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"The law is progressive and expansive, adapting itself to the new relations and interests which are constantly springing up in the progress of society. But this progress must be by analogy to what is already settled."

Chief Justice Greene, in 1 R.I. 356.

CITE BY TITLE AND SECTION

Thus

21 C.J.S. Courts § 17

CORPUS JURIS SECUNDUM

**A COMPLETE RESTATEMENT OF THE ENTIRE
AMERICAN LAW**

**AS DEVELOPED BY
ALL REPORTED CASES**

By
WILLIAM MACK, LL. D.
Editor-in-Chief
Corpus Juris and Cyclopedia of Law and Procedure
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EXPLANATION

THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

Corpus Juris Secundum is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

Corpus Juris Secundum is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

Corpus Juris Secundum represents the combined product of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS

TABLE OF ABBREVIATIONS

REPORTS AND TEXTBOOKS

A	A	Am.L.Reg.	American Law Register
Abb.	Atlantic Reporter	Am.L.Reg.N.S.	American Law Register New Series
Abb.Adm.	Abbott (U.S.)	Am.Law Reg.(O.S.)	American Law Register Old Series
Abb.App.Dec.	Abbott's Admiralty (U.S.)	Am.L.Rev.	American Law Review
Abb.Dec.	Abbott's Appeals Decisions (N.Y.)	Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Abb.N.Cas.	Abbott's Decisions (N.Y.)	Am.Law Inst.	American Law Institute, Restatement of the Law
Abb.Pr.	Abbott's New Cases (N.Y.)	Am.Negl.Cas.	American Negligence Cases
Abb.Pr.N.S.	Abbott's Practice (N.Y.)	Am.Negl.R.	American Negligence Reports
A'Beck.Res.	Abbott's Practice New Series (N.Y.)	A.M.&O.	Armstrong, Macartney & Ogle (Ir.)
Judgm.	A'Beckett's Reserved Judgments (Vict.)	Am.Prob.	American Probate
[1917]A.C.	[1917] Appeal Cases (Can.)	Am.Prob.N.S.	American Probate New Series
[1918]A.C.	Law Reports [1918] Appeal Cases (Eng.)	Am.Pr.	American Practice
Acton	Acton (Eng.)	Am.R.	American Reports
Adams	Adams Reports (N.H.)	Am.R.&Corp.	American Railroad & Corporation
Add.	Addison (Pa.)	Am.R.Rep.	American Railway Reports
Add.Eccl.	Addams' Ecclesiastical (Eng.)	Am.S.R.	American State Reports
A.&E.	Adolphus & Ellis (Eng.)	Am.St.R.D.	American Street Railway Decisions
A.&E.Enc.L.	American & English Encyclopædia of Law	And.	Anderson (Eng.)
A.&E.Enc.L.&Pr.	American & English Encyclopædia of Law & Practice	Andr.	Andrews (Eng.)
Aik.	Aikens (Vt.)	Ann.Cas.	American & English Annotated Cases
A.K.Marsh.	A. K. Marshall (Ky.)	Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Ala.	Alabama	Anstr.	Anstruther (Eng.)
Ala.App.	Alabama Appellate Court	Anth.N.P.	Anthon's Nisi Prius (N.Y.)
Alaska	Alaska	App.D.C.	Appeal Cases (D.C.)
Alb.L.J.	Albany Law Journal	App.Cas.	Law Reports Appeal Cases (Eng.)
A.L.C.	American Leading Cases	App.Div.	Appellate Division (N.Y.)
Alc.&N.	Alcott & Napier (Eng.)	Ariz.	Arizona
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)	Ark.	Arkansas
Aleyn	Aleyn (Eng.)	Ark.Just.	Arkley's Justiciary (Sc.)
Alison Pr.	Alison's Practice (Sc.)	Arn.	Arnold (Eng.)
Allen	Allen (Mass.)	Arn.&H.	Arnold & Hodges (Eng.)
Allen (N.B.)	Allen, New Brunswick	Ashm.	Ashmead (Pa.)
Alta.L.	Alberta Law	Aspin.	Aspinall's Maritime Cases (Eng.)
A.L.R.	American Law Reports	Atk.	Atkyn (Eng.)
Am.Bankr.	American Bankruptcy (U.S.)	Austr.C.L.R.	Commonwealth Law Reports, Australia
Ambl.	Ambler (Eng.)	Austr.Jur.	Australian Jurist
A.M.C.	American Maritime Cases	Austr.L.T.	Australian Law Times
Am.Corp.Cas.	American Corporation Cases		
Am.Cr.	American Criminal		
Am.D.	American Decisions		
Am.&E.Corp.Cas.	American & English Corporation Cases		
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series		
Am.&Eng.Ency. Law	American and English Encyclopedia of Law		
Am.&E.Eq.D.	American & English Decisions in Equity		
Am.&Eng.Pat. Cas.	American and English Patent Cases		
Am.&Eng.R.R. Cas.	American and English Railroad Cases		
Am.Electr.Cas.	American Electrical Cases		
Am.&E.R.Cas.	American & English Railroad Cases		
Am.&E.R.Cas.N.S.	American & English Railroad Cases New Series		
Am.J.Int.L.	American Journal of International Law		
Am.L.J.	American Law Journal (Pa.)		
Am.L.J.N.S.	American Law Journal New Series (Pa.)		
Am.L.Rec.	American Law Record (Ohio)		
C.J.S.			
		Bacon Abr.	Bacon's Abridgment (Eng.)
		Bail.Eq.	Bailey's Equity (S.C.)
		Bailey	Bailey's Law (S.C.)
		B.&Ad.	Barnewall & Adolphus (Eng.)
		B.&Ald.	Barnewall & Alderson (Eng.)
		Baldw.	Baldwin (U.S.)
		Balf.Pr.	Balfour's Practice (Sc.)
		Ball&B.	Ball & Beatty (Ir.)
		Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
		Bann.	Bannister (Eng.)
		Bann.&A.	Banning & Arden (U.S.)
		Barb.	Barbour (N.Y.)
		Barb.Ch.	Barbour's Chancery (N.Y.)
		B.&Arn.	Barron & Arnold (Eng.)
		Barn.	Barnardiston King's Bench (Eng.)
		Barn.Ch.	Barnardiston Chancery (Eng.)
		Barnes	Barnes' Practice Cases (Eng.)
		Barnes Notes	Barnes' Notes (Eng.)
		Batty	Batty (Ir.)
		B.&Aust.	Barron & Austin (Eng.)
		Baxt.	Baxter (Tenn.)
		Bay	Bay (S.C.)
		B.&B.	Broderip & Bingham (Eng.)
		B.C.	British Columbia

Civ.Proc.Rep. Civil Procedure Reports (N.Y.)
C.J. Corpus Juris
C.J.Ann. Corpus Juris Annotations
C.J.S. Corpus Juris Secundum
C.&K. Carrington & Kirwan (Eng.)
C.&L. Connor & Lawson (Ir.)
Cl.App. Clark's Appeal Cases (Eng.)
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Clarke Ch. Clarke's Chancery (N.Y.)
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Clev.L.Rep. Cleveland Law Reporter (Oh.)
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Cock.&Rowe Cockburn & Rowe's Election Cases
Code Rep. Code Reporter (N.Y.)
Code Rep.N.S. Code Reports New Series (N.Y.)
Coff.Prob. Coffey's Probate (Cal.)
Co.Inst. Coke's Institutes
Coke Coke (Eng.)
Col.Cas. Coleman's Cases (N.Y.)
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Coldw. Coldwell (Tenn.)
Coll. Collyer (Eng.)
Col.L.Rep. Colorado Law Reporter
Col.Law Review Columbia Law Review
Coll.&E.Bank. Collier and Eaton's American Bankruptcy Reports
Colles Colles' Cases in Parliament (Eng.)
Colo. Colorado
Colo.App. Colorado Appeals
Colq. Colquit
Coltm. Coltman (Eng.)
Comb. Comberbach (Eng.)
Com.Cas. Commercial Cases (Eng.)
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Comptr.Treas. Comptroller Treasury Decisions
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Crawf.&D. Crawford & Dix (Ir.)
Crawf.&D.Abr. Crawford & Dix's Abridged Cases (Ir.)
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Cr.L.Mag. Criminal Law Magazine
Cr.&Ph. Craig & Phillips (Eng.)
C.Rob. Christopher Robinson's Admiralty (Eng.)
Cro.Car. Croke Charles (Eng.)
Cro.Eliz. Croke Elizabeth (Eng.)
Cro.Jac. Croke's Reports tempore James (Jacobus) (Eng.)
Crompt.&J. Crompton & Jervis (Eng.)
Cromp.&M. Crompton & Meeson (Eng.)
Crosw.Pat.Cas. Croswell's Collection of Patent Cases (U.S.)
Cr.&Ph. Craig & Phillips (Eng.)
Ct.Cl. Court of Claims (U.S.)
Ct.Cust.&Pat. App. Court of Customs and Patent Appeals
Cunn. Cunningham (Eng.)
Curt. Curtis (U.S.)
Curt.Eccl. Curteis Ecclesiastical (Eng.)
Cush. Cushing (Mass.)
Cust.A. United States Customs Appeals
Cyc. Cyclopaedia of Law & Procedure
Cyc.Ann. Cyclopaedia of Law & Procedure Annotations
Dak. Dakota
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Houston's Criminal Cases (Del.)
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Howell's Nisi Prius (Mich.)
Howard's Practice (N.Y.)
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Law Reports [1891] Irish
Irish Chancery
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Irish Ecclesiastical Reports
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Irish Law Reports for year 1894
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Sir Thomas Jones' English King's Bench Reports
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Jones & Spencer (N.Y.)
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La.	Louisiana
La.App.	Louisiana Court of Appeals
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Lab.	Labatt's District Court (Cal.)
Lack.Jur.	Lackawanna Jurist (Pa.)
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Lack.Leg.Rec.	Lackawanna Legal Record (Pa.)
Lalor	Lalor's Supplement to Hill & Denio (N.Y.)
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Land Dec.	Land Decisions (U.S.)
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Lehigh Co.L.J.	Lehigh County Law Journal (Pa.)
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Leigh & C.	Leigh & Cave's English Crown Cases
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Law Times Reports New Series
 (Eng.)
 Lushington's Admiralty (Eng.)
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 Luzerne Legal Observer (Pa.)
 Luzerne Legal Register (Pa.)
 Lyndwood's Provinciales

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Manning & Ryland (Eng.)
Manning & Ryland's Magistrates' Cases (Eng.)
Manning & Scott (Eng.)
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Missouri Appeals Reporter
Modern (Eng.)
Modern Cases at Law and Equity (Eng.)
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Montagu's English Bankruptcy Reports
Montreal Law Reports (Can.)
Montagu & Ayrton (Eng.)
Montagu & Bligh (Eng.)
Montagu & Chitty (Eng.)
Montagu, Deacon & De Gex (Eng.)
Montgomery County Law Reporter (Pa.)
Montagu & McArthur (Eng.)
Montreal Condensed Reports
Montreal Legal News
Montreal Law Reports Queen's Bench
Montreal Law Reports Superior Court
Moody's Crown Cases (Eng.)
Moore's Common Pleas (Eng.)
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Moore's King's Bench (Eng.)
Moore's Privy Council Old Series (Eng.)
Moore's Privy Council New Series (Eng.)
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National Bankruptcy Register (U.S.)
National Corporation Reporter
National Law Reporter
New Brunswick
New Benloe (Eng.)
New Brunswick Equity
North Carolina
N. Chipman (Vt.)
North Carolina Conference
North Carolina Term Reports
North Dakota
North Eastern Reporter
North Eastern Reporter Second Series
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Nebraska Unofficial
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Nelson's Abridgment of the Common Law

Prob.Rep.
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Queen's Bench (Adolphus & Ellis New Series) (Eng.)
Law Reports [1891] Queen's Bench (Eng.)
Law Reports Queen's Bench Division (Eng.)
Queensland Justice of the Peace
Queensland Law
Queensland Law Journal
Quebec Law
Quebec Practice
Quebec Official Reports Queen's Bench
Quebec Revised Judicial
Quebec Official Reports Superior Court
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Revue Critique (Can.)
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Scottish Law Reporter
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Scotch Court of Session Cases
Supreme Court Reporter (U.S.)
South Dakota
South Eastern Reporter
Searle & Smith (Eng.)
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Southern Reporter
Solicitor's Journal (Eng.)
Speers (S.C.)
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 United States Statutes at Large
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 Stewart's Reports (N.S.)
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 Susquehanna Legal Chronicle (Pa.)
 South Western Reporter
 South Western Reporter Second Series
 Swabey's Admiralty (Eng.)
 Swabey & Tristram (Eng.)
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CORPUS JURIS

SECUNDUM

VOLUME TWENTY-ONE

COURTS

This Title includes the judicial department of government; nature and scope of judicial power in general; establishment, organization, and conduct of business of courts; ministerial officers attached to them; jurisdiction and procedure peculiar to particular courts; and concurrent and conflicting jurisdiction and comity between courts.

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I. DEFINITIONS, DISTINCTIONS, AND GENERAL PROVISIONS

§ 1. Court Generally

Broadly speaking a court is a judicial tribunal engaged in the administration of justice, although the precise meaning of the term in any particular connection will vary with the context in which it is employed.

While the meaning of the term "court" will vary with the context in which it is used,¹ generally speaking a court is a body in the government to which the public administration of justice is delegated,² being a tribunal officially assembled under

authority of law, at the appropriate time and place, for the administration of justice,³ through which the state enforces its sovereign rights and powers,⁴ and consisting in its jurisdiction and functions and not its title or name,⁵ although in cases where the character of a court as created is inconclusive the legislative label or name given it may be a determining factor in ascertaining its character.⁶ A court has also been defined as a place where justice is judicially administered.⁷ Other

1. Conn.—*Alcorn v. Fellows*, 127 A. 911, 102 Conn. 22.

In popular speech "the term 'court' is unfortunately used . . . in a rather loose manner with different meanings depending upon the particular sense in which it is employed."—*Commonwealth v. Shawell*, 191 A. 17, 19, 325 Pa. 497.

2. Conn.—*Alcorn v. Fellows*, 127 A. 911, 102 Conn. 22.

Or.—*Hertzen v. Hertzen*, 208 P. 580, 104 Or. 423.

15 C.J. p 715 notes 1, 2.

Similar definitions

(1) "A judicial assembly."—*State v. Woodson*, 61 S.W. 252, 161 Mo. 444, 453.

(2) "A tribunal established for the public administration of justice."—*Alabama's Freight Co. v. Hunt*, 242 P. 658, 29 Ariz. 419.

(3) "A tribunal established to administer justice."—*State v. Le Blond*, 140 N.E. 510, 108 Ohio St. 126—15 C.J. p 716 note 8.

(4) "An official assembly legally met together for the transaction of judicial business; a judge or judges sitting for the hearing or trial of causes."

U.S.—*The Mary*, D.C.Wash., 233 F. 121, 123.

Ind.—*Shoultz v. McPheeters*, 79 Ind. 373, 376.

Ohio.—*State v. Fabin*, 4 Ohio N.P., N.S., 238, 292.

"Tribunal" may include a court.—*Cosson v. Bradshaw*, 141 N.W. 1062, 160 Iowa 296, Ann.Cas.1915D 157—64 C.J. p 1308 note 38.

All courts as parts of judicial department

All courts of commonwealth held to be parts of judicial department and may be viewed as one.—*Duffy v. Colonial Trust Co.*, 135 A. 204, 287 Pa. 348, 49 A.L.R. 406, certiorari denied 47 S.Ct. 570, 273 U.S. 765, 71 L.Ed. 880.

Not guardians of public

Courts created by constitution are not guardians of the public, but are impartial tribunals created for administration of justice in trial of causes between natural and artificial

persons and associations authorized by law to invoke jurisdiction according to rules and principles, according to course of common law.—*Ex parte Wilkey*, 172 So. 111, 233 Ala. 375.

3. Pa.—In re *McCormick's Contested Election*, 126 A. 568, 281 Pa. 281.—In re *Carter's Estate*, 99 A. 58, 254 Pa. 518.

Similar definitions

(1) "A tribunal organized according to law and sitting at fixed times and places for the administration of justice."—*People v. Haverstraw*, 45 N.E. 884, 151 N.Y. 75, 84, reversing 30 N.Y.S. 325, 80 Hun 385.

(2) "A tribunal empowered to hear and determine issues between parties, on pleadings either oral or written, and on evidence to be adduced under well defined and established rules, according to settled principles of law."—*State v. Columbia*, 17 S.C. 80, 82.

(3) "That part of the state government vested with the judicial power necessary to the administration of justice, and whose duty it is to apply the law to controversies brought before it."—*Bradley v. Bloomfield*, 89 A. 1009, 85 N.J.Law 506, 507.

(4) "The presence of a sufficient number of the members of a body in the government, to which the public administration of justice is delegated, regularly convened in an authorized place, at an appointed time, engaged in the full and regular performance of its duties."

U.S.—*The Mary*, D.C.Wash., 233 F. 121, 123.

Conn.—*Alcorn v. Fellows*, 127 A. 911, 102 Conn. 22.

15 C.J. p 716 note 4.

(5) "An organized body, with defined powers, meeting at certain times and places, for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers, namely, attorneys and counsel to present and manage the business, clerks to record and attest its acts and decisions, and ministerial officers to execute its com-

mands and to secure order in its proceedings."—*Bosworth v. Marshall*, 176 S.W. 348, 349, 165 Ky. 32—15 C. J. p 716 note 5.

(6) "An incorporeal, political being, composed of one or more judges, who sit at fixed times and places, attended by proper officers, pursuant to lawful authority, for the administration of justice."—*State v. Le Blond*, 140 N.E. 510, 108 Ohio St. 126—15 C.J. p 716 note 12.

A judicial tribunal is a court.—*State v. New Haven etc. Co.*, 43 Conn. 351—34 C.J. p 1185 note 76.

4. Fla.—*Lipscomb v. Kaloroukas*, 133 So. 107, 101 Fla. 1137—*Lipscomb v. Gialourakis*, 133 So. 104, 101 Fla. 1130.

5. Cal.—*Robertson v. Langford*, 273 P. 150, 95 Cal.App. 414—*Ex parte Hall*, 283 P. 295, 88 Cal.App. 212. Mich.—*Kates v. Reading*, 235 N.W. 881, 254 Mich. 158.

N.J.—*Johnson v. State*, 37 A. 949, 59 N.J.Law 535.

6. Wis.—*State ex rel. Schneider v. Midland Investment & Finance Corporation*, 262 N.W. 711, 219 Wis. 161.

7. Cal.—*Finkle v. Superior Court of California in and for San Bernardino County*, 234 P. 432, 71 Cal. App. 97.

Conn.—*Alcorn v. Fellows*, 127 A. 911, 102 Conn. 22.

Okl.—*Ex parte Owens*, 295 P. 415, 49 Okl.Cr. 445.

Pa.—*Commonwealth v. Shawell*, 191 A. 17, 325 Pa. 497—*Summers v. Kramer*, 114 A. 525, 271 Pa. 189. 15 C.J. p 715 note 3.

Criticism of definition

(1) The definition given in the text requires to have added "and the presence of the necessary officers—the judge or judges."—*The Mary*, D.C.Wash., 233 F. 121, 123—15 C.J. p 715 note 3 [b].

(2) To perform the functions of court, the presence of the officers constituting the court is necessary, and the officers must be present at the time and place appointed by law.—*Ex parte Massengale*, Okl.Cr., 93 P.2d 41.

definitions embodying the same ideas in different phraseology are to be found in the cases.⁸ The singular "court" may be construed as including the plural "courts."⁹

Elements and constituent parts. Time, place, and an authorized officer are essential constituents of the organization of a court; that is to say, in order to constitute a court a duly authorized officer must be present at the time and place appointed by law.¹⁰ In every court there must be at least three constituent parts: the actor, reus, and iudex; the actor, or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it; and the iudex, or judicial power

which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to be done, to ascertain and by its officers to apply the remedy.¹¹

"Judge" and "court" as convertible terms. The words "judge" and "court" are frequently used as convertible terms,¹² but they are not strictly synonymous,¹³ and a judge alone does not necessarily constitute a court,¹⁴ and has been described as merely an officer or member of the court,¹⁵ for, while the judge is an indispensable part,¹⁶ he is only a part¹⁷ of the court.

"Term" and "session." The word "term" has been construed as meaning a court,¹⁸ although there

8. U.S.—Bland v. Kennamer, C.C.A. Okl., 6 F.2d 180—Janvrin v. Smith, D.C.Mass., 13 F.Cas.No.7,220, 1 Sprague 18.

Cal.—Finkle v. Superior Court of California in and for San Bernardino County, 234 P. 432, 71 Cal. App. 97.

Fla.—Baruch v. Gihlin, 164 So. 831, 122 Fla. 59.

Ky.—Commonwealth ex rel. Ward v. Harrington, 98 S.W.2d 53, 266 Ky. 41.

Ohio.—Palmer v. State, 18 Ohio N.P.N.S., 609—Mendelson v. Miller, 11 Ohio N.P.N.S., 586.

Wis.—State v. Cannon, 240 N.W. 441, 206 Wis. 374.

15 C.J. p 716 note 13.

9. Iowa.—Shaw v. McHenry, 2 N.W. 1096, 52 Iowa 182, 186.

10. Ky.—Thompson v. Commonwealth, 99 S.W.2d 705, 266 Ky. 529—Mills v. Commonwealth, 42 S.W.2d 505, 240 Ky. 359—Goodloe's Ex'r v. Goodloe, 270 S.W. 790, 208 Ky. 189—Stevens v. Young, 202 S.W. 481, 180 Ky. 154.

15 C.J. p 718 note 41.

Time of assemblage

An assemblage of the proper officers of a court at the proper place, but at a time not authorized by law, does not constitute a "court," and any judicial proceedings then had, which under the law can be had only in term time, are null and void.—Ex parte Massengale, Okl.Cr., 93 P. 2d 41.

11. Ark.—Clayton v. Berry, 27 Ark. 129.

15 C.J. p 718 note 40.

12. U.S.—In re United States, Ohio, 24 S.Ct. 629, 194 U.S. 194, 196, 48 L.Ed. 931—Guthrie Nat. Bank v. Guthrie, Okl., 19 S.Ct. 513, 173 U.S. 528, 535, 48 L.Ed. 796.

Cal.—Newby v. Bacon, 208 P. 1005, 58 Cal.App. 337.

Conn.—Alcorn v. Fellows, 127 A. 911, 102 Conn. 22.

Kan.—State v. Anderson, 217 P. 327, 114 Kan. 297.

N.J.—Guild v. Meyer, 46 A. 202, 59 N.J.Eq. 390.

15 C.J. p 717 note 35.

Any presiding judge may constitute the "court" as the term is used in statutory provisions, and it has been said that the word "court" as thus used should not be restricted to the particular judge who tried the case.—People v. Gilbert, 198 N.W. 971, 227 Mich. 538.

Circuit court

Single judge constitutes a "circuit court" under Florida law.—Meyer v. Nator Holding Co., 136 So. 636, 102 Fla. 689.

When exercising judicial functions

"The word 'court' is frequently used as meaning the judge when he is exercising any judicial powers conferred on him by law."—Gray v. Bank of Moundville, 107 So. 804, 805, 214 Ala. 260.

Factors considered in determining legislative meaning

The words "judge" and "court" being often, even in statutes, used indiscriminately and interchangeably, in determining which is meant, not only the word used, but the power conferred and the duty to be performed, in the light of the purpose of the act, must be considered.—Bradford v. Richardson, 97 S.E. 58, 61, 111 S.C. 205.

13. U.S.—Todd v. U. S., Ala., 15 S.Ct. 889, 158 U.S. 278, 39 L.Ed. 982—U. S. v. Gee Lee, Wash., 50 F. 271, 1 C.C.A. 516—U. S. v. Clark, C.C.Mass., 25 F.Cas.No.14,804, 1 Gall. 497.

Fla.—Lamb v. Harrison, 108 So. 671, 674, 91 Fla. 927, citing *Corpus Juris*.

N.Y.—Aiken v. Aiken, 160 N.Y.S. 876, 96 Misc. 561.

Ohio.—State v. Le Blond, 140 N.E. 510, 108 Ohio St. 126.

Pa.—Moritz v. Luzerne County, 129 A. 85, 283 Pa. 349.

15 C.J. p 718 note 35.

Judge in vacation as not "court"

While the word "court" may

sometimes be understood as meaning "judge," where there is nothing in the context of a statute to indicate that the lawmakers used the word "court" in other than its technical sense, such term will not be construed to include a judge in vacation.

Ark.—Gibson v. Lower Running Water Drainage Dist., 191 S.W. 908, 127 Ark. 165.

Mo.—State ex rel. McDonald v. Lollis, 33 S.W.2d 98, 376 Mo. 614—United States Bank of St. Louis v. Pritchard, App., 70 S.W.2d 929.

Committing magistrate has been held not a "court" within the meaning of such term as used in a constitutional provision. State v. Ferguson, 201 N.W. 652, 45 S.D. 346.

14. N.Y.—People v. Barrett, 9 N.Y.S. 321, 56 Hun 571, 18 N.Y.Cr. 230, 24 App. Div. 130, 1 N.Y.Cr. 13, affirmed 24 N.E. 1005, 121 N.Y. 678.

15 C.J. p 718 note 37.

15. Ind.—In re McCormick's Contested Election, 129 A. 264, 241 Pa. 281.

Presides over tribunal

"The court is a tribunal organized for the purpose of administering justice, while the judge is the officer who presides over that tribunal."—State v. Le Blond, 140 N.E. 510, 108 Ohio St. 126.

16. Mo.—State v. Woodson, 61 S.W. 252, 161 Mo. 441.

15 C.J. p 718 note 38.

"A judge and jurisdiction are . . . the necessary legal prerequisites to constitute a court, and stripped of them it would be a nonentity."—State v. Sullivan, 116 So. 255, 262, 95 Fla. 191.

17. Ill.—Moline v. Chicago, B. & Q. R. Co., 104 N.E. 201, 263 Ill. 32.

15 C.J. p 718 note 39.

18. Va.—Ex parte Santee, 2 Va. Cas. 363.

63 C.J. p 721 note 45.

is authority to the contrary;¹⁹ and the word "court" is sometimes used in the sense of term or session of court,²⁰ but cannot always be read in such sense.²¹

Particular persons or bodies as "courts." The term "court" may include a judge and a jury,²² although it has been held that the jury is not an essential part of the court,²³ and may include a judge and a clerk,²⁴ although as between judge and clerk the word "court" will ordinarily be construed as referring exclusively to the former,²⁵ the "clerk" not being the "court," as shown in Clerks of Court § 1; and the term "court" may include a tribunal presided over by a police judge,²⁶ or by a justice or justices of the peace;²⁷ a board to try election

contests;²⁸ the mayor of a city;²⁹ a city council;³⁰ a town clerk;³¹ or a court-martial.³² However, the term has been held not to include a master commissioner,³³ appraisers appointed under eminent domain statutes,³⁴ department of registration and education,³⁵ draft board,³⁶ levee district commissioners of appraisement,³⁷ real estate commissioner,³⁸ securities commission,³⁹ United States commissioner,⁴⁰ an officer,⁴¹ a referee in bankruptcy proceedings, as shown in Bankruptcy § 268, a commission appointed by the court,⁴² a public service commission,⁴³ the interstate commerce commission as shown in Commerce § 141, a commission to investigate the claims of subjects of a foreign nation pursuant to a treaty,⁴⁴ a board of equalization

19. Neb.—Parrott v. Walcott, 106 N.W. 607, 75 Neb. 530.

62 C.J. p 721 note 45 [c].

20. Wis.—Oshoga v. State, 3 Pinn. 56.

15 C.J. p 718 note 42.

That presiding judge has other judges sitting with him during a session does not prevent the tribunal from constituting a court.—Rubin v. State, 216 N.W. 513, 194 Wis. 207.—State v. Circuit Court of Milwaukee County, Branch No. 1, 214 N.W. 396, 193 Wis. 132.

21. Ind.—Michigan Cent. R. Co. v. Northern Indiana R. Co., 3 Ind. 239.

22. U.S.—The Mary, D.C.Wash., 233 F. 121.

Idaho.—State v. Ramirez, 208 P. 279, 34 Idaho 623, 29 A.L.R. 297.

Ill.—Road Dist. No. 4 v. Frailey, 145 N.E. 195, 313 Ill. 568.

N.D.—State v. Kirsch, 268 N.W. 473, 476, 66 N.D. 626, citing *Corpus Juris*—Peterson v. Fargo-Moorhead St. Ry. Co., 164 N.W. 42, 37 N.D. 440.

Tex.—Houston Belt & Terminal Ry. Co. v. Lynch, Com.App., 221 S.W. 959.

15 C.J. p 717 note 14.

Although "court" sometimes refers to the judge in contradistinction to the jury, when the term is loosely used in common parlance, strictly speaking "in common-law actions the court consists, for the determination of a controversy, of a judge and a jury."—*Filbin Corporation v. U. S.*, D.C.S.C., 265 F. 354, 359.

23. Nev.—State v. Ceja, 2 P.2d 124, 53 Nev. 272.

Competency of court to act without jury

Court is fully organized and competent to transact business without presence of jury.—*People v. Fisher*, 172 N.E. 722, 340 Ill. 250.

24. U.S.—The Mary, D.C.Wash., 233 F. 121.

15 C.J. p 717 note 15.

21 C.J.S.—2

"Hold over" clerk

Parish district judge was not warranted in refusing to transact official business on ground that court was not legally constituted merely because elected clerk had failed to give bond and his resignation had been accepted, since clerk was entitled to discharge duties of office until election and qualification of his successor.—*State v. Hargis*, 154 So. 628, 179 La. 623.

25. U.S.—*McDonald v. Harding*, C.C. A.Alaska, 57 F.2d 119.

N.C.—*Cannon v. Briggs*, 94 S.E. 519, 174 N.C. 740.

26. Cal.—*Boys, etc., Aid Soc. v. Reis*, 12 P. 796, 71 Cal. 627.

27. Conn.—*Wooley v. Williams*, 136 A. 583, 105 Conn. 671.

N.M.—*State v. Lazarovich*, 200 P. 422, 27 N.M. 282.

Or.—*Webster v. Boyer*, 159 P. 1166, 81 Or. 485, Ann.Cas.1918D 988.

Wash.—*State v. Willey*, 12 P.2d 393, 168 Wash. 340.

15 C.J. p 717 note 17.

Anomalous status

A tribunal of a justice of the peace is a court in the general sense of the term, but "it is not a court in the constitutional and statutory sense of that term" under provisions of Connecticut law.—*Alcorn v. Fellows*, 127 A. 911, 914, 102 Conn. 22.

28. Ky.—*Pratt v. Breckinridge*, 65 S.W. 136, 66 S.W. 405, 112 Ky. 1, 23 Ky.L. 1356.

29. Kan.—*Malone v. Murphy*, 2 Kan. 250.

30. N.J.—*Bradley v. Bloomfield*, 89 A. 1009, 85 N.J.Law 506.

31. Ind.—*Baltimore, etc., R. Co. v. Whiting*, 68 N.E. 266, 161 Ind. 228.

32. N.Y.—*People v. Van Allen*, 55 N. Y. 31.

15 C.J. p 717 note 22.

33. Ind.—*Shultz v. McPheeters*, 79 Ind. 373.

15 C.J. p 717 note 24.

34. Neb.—*In re Appraisement of Omaha Gas Plant*, 169 N.W. 725, 103 Neb. 782.

Although called a "court of condemnation," a board of appraisers appointed under eminent domain statutes, such as statutes providing for appropriation of public utilities, is not a court in the true sense of that term.—*In re Appraisement of Omaha Gas Plant*, supra.

35. Ill.—*Schireson v. Walsh*, 187 N. E. 921, 354 Ill. 40.

36. U.S.—*U. S. v. Stephens*, D.C.Del., 245 F. 956.

37. Tex.—*Glenn v. Dallas County Bois D'Arc Island Levee Dist.*, Civ. App., 282 S.W. 339.

38. Cal.—*Lemen v. Edmunson*, 262 P. 735, 202 Cal. 760.

39. Utah.—*In re Deseret Mortuary Co.*, 3 P.2d 267, 78 Utah 393.

40. U.S.—*In re Pacific Telephone & Telegraph Co.*, D.C.Cal., 38 F.2d 833.

66 C.J. p 2 note 16.

41. Ohio.—*State v. Fabin*, 4 Ohio N.P., N.S., 283.

42. Conn.—*Norwich Gas & Electric Co. v. Norwich*, 57 A. 746, 76 Conn. 565.

15 C.J. p 717 note 26.

43. U.S.—*Central Vermont R. Co. v. Redmond*, C.C.Vt., 189 F. 683.

Idaho.—*Natatorium v. Erb*, 200 P. 348, 34 Idaho 209.

La.—*State ex rel. Milling v. Louisiana Public Service Commission*, 98 So. 175, 179, 154 La. 752.

Pa.—*Commonwealth v. Benn*, 131 A. 253, 284 Pa. 421.

Tenn.—*In re Cumberland Power Co.*, 249 S.W. 818, 147 Tenn. 504.

51 C.J. p 34 note 70.

44. U.S.—*U. S. v. Ferreira*, Fla., 13 How. 40, 14 L.Ed. 42.

of taxes,⁴⁵ a board of revenue,⁴⁶ a compensation board operating under workmen's compensation acts,⁴⁷ or a board of irrigation,⁴⁸ the view being that the word "court" implies a permanent organization for the administration of justice.⁴⁹ The court of pardons is not a court in the judicial sense of the term,⁵⁰ but belongs to the executive department of the state, as shown in the C.J.S. title Pardons § 3, also 46 C.J. p 1185 note 46. The status of county boards as courts is considered in Counties § 83.

Miscellaneous phrases. "Competent court,"⁵¹

"competent tribunal,"⁵² "court above" and "court below,"⁵³ "court and judges thereof,"⁵⁴ "court having charge of liquidation,"⁵⁵ "court having jurisdiction,"⁵⁶ "court in banc" or "court in bank,"⁵⁷ "court of cassation,"⁵⁸ "court of record of the state,"⁵⁹ "court of the district,"⁶⁰ "courts in the city,"⁶¹ "courts of each county,"⁶² "courts of enemy's country" and "courts of plaintiff's country,"⁶³ "courts of the state,"⁶⁴ "courts of the United States,"⁶⁵ "court trying the cause,"⁶⁶ "full court,"⁶⁷ "moot court,"⁶⁸ "neutral courts,"⁶⁹ and "open court."⁷⁰

45. U.S.—Interstate Commerce Comm. v. U. S., App.D.C., 32 S.Ct. 556, 224 U.S. 474, 56 L.Ed. 849.

Ky.—Albin Co. v. Louisville, 79 S.W. 274, 117 Ky. 895, 25 Ky.L. 2055.

46. Ala.—Mobile County v. Maddox, 70 So. 259, 195 Ala. 336.

47. Ariz.—Alabam's Freight Co. v. Hunt, 242 P. 658, 29 Ariz. 419.

Cal.—Hart v. Industrial Acc. Commission of California, 235 P. 748, 71 Cal.App. 542.

Mass.—Ahmed's Case, 179 N.E. 684, 278 Mass. 180, 79 A.L.R. 669.

N.C.—Heavner v. Town of Lincoln, 162 S.E. 909, 202 N.C. 400.

Tex.—Texas Employers' Ins. Ass'n v. Sewell, Civ.App., 32 S.W.2d 262—U. S. Casualty Co. v. Hampton, Civ. App., 293 S.W. 260.

71 C.J. p 919 notes 46-48.

48. Neb.—Crawford Co. v. Hathaway, 85 N.W. 308, 61 Neb. 317.

15 C.J. p 717 note 33.

49. Mich.—Streeter v. Paton, 7 Mich. 341.

15 C.J. p 717 note 34.

50. N.J.—In re Court of Pardons, 129 A. 624, 97 N.J.Eq. 555.

51. N.Y.—Landers v. Staten Island R. Co., 53 N.Y. 450, 456.

12 C.J. p 235 note 12.

"Court of competent jurisdiction" is defined *infra* § 22.

52. N.Y.—People v. Liscomb, 3 Hun 760, reversed on other grounds 60 N.Y. 559, 19 Am.R. 211.

Pa.—In re Williamson, 26 Pa. 9, 67 Am.D. 374.

12 C.J. 236 note 33.

53. In appellate practice, the "court above" is the one to which a cause is removed for review, whether by appeal, writ of error, or certiorari, and the "court below" is the one from which a case is removed.—Black L.D. See generally Courts § 3.

54. A statutory phrase, the well settled construction of which signifies the court when in session, and also the judges acting in vacation.—Thompson v. State, 108 P. 398, 400, 25 Okl. 741.

55. Ill.—People ex rel. Barrett v.

West Side Trust & Savings Bank of Chicago, 1 N.E.2d 81, 86, 362 Ill. 607.

56. U.S.—U. S. v. Black, C.C.A.Okl., 247 F. 942, 947.

57. Defined

(1) A meeting of all the judges of a court, usually for the purpose of hearing arguments on demurrers, points reserved, motions for new trial, etc., as distinguished from sessions of the same court presided over by a single judge or justice.—Black L.D.

(2) The term is also used to refer to a majority of the members constituting a quorum of state supreme courts and acting as such.—Mountain States Telephone & Telegraph Co. v. People, 190 P. 513, 517, 68 Colo. 487.

(3) The term may also be used as referring to the supreme court composed of its justices and the circuit judges, called into consultation and sitting as members of the supreme court.—Duncan v. Record Pub. Co., 148 S.E. 31, 72, 145 S.C. 196.

"Sitting in banc" is a meeting of all the judges as distinguished from the sitting of a single judge.—In re Hanover Tp. School Directors, 137 A. 811, 813, 290 Pa. 95.

58. See Cassation 14 C.J.S. p 24 note 50.

59. U.S.—Alliance Trust Co. v. Hall, D.C.Idaho, 11 F.Supp. 668, 671.

Wis.—State v. Pierce, 209 N.W. 693, 695, 191 Wis. 1.

Courts of record and courts not of record generally see *infra* § 5.

60. Inapplicable to state courts under particular circumstances.—Prieto v. U. S. Shipping Board Emergency Fleet Corporation, 193 N.Y.S. 342, 117 Misc. 708.

61. Inapplicable to state supreme court

In a particular connection, it has been held that the phrase has no application to the state supreme court, although holding sessions within New York City.—People v. Badamo, 173 N.Y.S. 872, 105 Misc. 516.

62. Mont.—Ex parte Sheehan, 49 P. 2d 438, 441, 100 Mont. 244.

63. See the C.J.S. title War § 18, also 67 C.J. p 361 note 36-p 365 note 68.

64. U.S.—Orlando Candy Co. v. New Hampshire Fire Ins. Co. of Manchester, D.C.Fla., 51 F.2d 392, 394 —Alliance Trust Co. v. Hall, D.C. Idaho, 11 F.Supp. 668, 671.

65. U.S.—In re Film and Pictorial Representation of Dempsey-Tunney Fight, D.C.Ga., 22 F.2d 837, 839—Sand Springs Home v. Title Guarantee & Trust Co., C.C.A.Okl., 16 F.2d 917, 919—Brown v. Magruder, D.C.Md., 25 F.Supp. 161, 166—General Inv. Co. v. Lake Shore & M. S. Ry. Co., C.C.A.Ohio, 269 F. 235, 237.

See generally the C.J.S. title Federal Courts.

66. N.M.—New Mexico State Highway Department v. Bible, 34 P. 2d 295, 299, 38 N.M. 372.

67. Defined

A session of a court, which is attended by all the judges or justices composing it.—Black L.D.

68. Defined

A court held for the arguing of moot cases or questions.—Black L.D.

69. See the C.J.S. title War § 18, also 67 C.J. p 365 notes 69-71.

70. U.S.—U. S. v. Ginsberg, Mo., 37 S.Ct. 422, 423, 243 U.S. 472, 61 L. Ed. 853—Louis Werner Stave Co. v. Marden, Orth & Hastings Co., C.C.A.N.Y., 280 F. 601, 603.

N.Y.—Rudd v. Hazard, 194 N.E. 764, 765, 266 N.Y. 302.

S.C.—Salinas v. Aultman, 27 S.E. 933, 934, 50 S.C. 558.

46 C.J. p 1109 note 87.

The phrase may signify

(1) Court in session, organized for the transaction of judicial business, and presence of the parties and their attorneys.—Gomez v. Ullbarri, 169 P. 301, 302, 23 N.M. 501.

(2) A court formally opened and engaged in the transaction of judicial affairs, to which all persons who conduct themselves in an or-

§ 2. Courts of General and Courts of Special Jurisdiction

Courts of general jurisdiction are those competent to decide their own jurisdiction and to take cognizance of all causes, civil and criminal, of a particular nature, while courts of special jurisdiction are those incompetent to decide their own jurisdiction and taking cognizance only of a few specified matters.

Courts of general jurisdiction are courts which take cognizance of all causes, civil or criminal, of a particular nature,⁷¹ or courts whose judgment is conclusive until modified or reversed on direct attack, and who are competent to decide on their own jurisdiction.⁷² Courts of limited or special jurisdiction are those which can take cognizance of a few specified matters only;⁷³ those which have only a special jurisdiction for a particular purpose, or are clothed with special powers for the performance of specified duties, beyond which they have no authority of any kind.⁷⁴ Courts of original and general jurisdiction are competent by their constitution to decide upon their own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the jurisdictional facts and evidence upon which it is rendered; their records import absolute verity, and cannot be impugned by averment or proof to the contrary, and there can be no judicial inspection behind the judgment save by appellate power; whereas on the other hand courts of special and limited jurisdiction are so con-

stituted that their judgments may be looked through for the facts and evidence necessary to sustain them, their decisions do not furnish evidence of themselves to show jurisdiction and its lawful exercise, and every requisite for either must appear upon the face of their proceedings or they are nullities.⁷⁵ The distinction between courts of general and courts of limited jurisdiction is to be found largely in the laws which establish them,⁷⁶ and the line of demarcation is not always definite.⁷⁷ When a court of general jurisdiction proceeds under a special statute it becomes a court of limited jurisdiction for the purpose of such proceeding.⁷⁸ The question whether a court is of general or inferior jurisdiction is, however, to be determined by the nature of the jurisdiction conferred, and not by the territorial limits within which it is to be exercised.⁷⁹

§ 3. Courts of Original and Courts of Appellate Jurisdiction

Courts of original jurisdiction are those wherein a cause arises, whereas courts of appellate jurisdiction are those wherein it is reviewed.

Courts of original jurisdiction are those in which an action has its first source or existence, and which do not take jurisdiction of it by appeal.⁸⁰ Courts of appellate jurisdiction are those which review causes removed by appeal or error from another court.⁸¹

derly manner are admitted.—*Suesemilch v. Suesemilch*, 48 Ill.App. 573, 574.

(3) The court in public session, as distinguished from one or more of its judges exercising judicial functions in chambers.—*Conover v. Bird*, 28 A. 428, 429, 56 N.J.Law 228—46 C.J. p 1109 note 87 [b] (3).

(4) "The time when the court can properly exercise functions."—*Ex parte Branch*, 63 Ala. 383, 387.

71. *Miss.*—*Daniels v. Jordan*, 134 So. 903, 904, 161 *Miss.* 78, citing *Corpus Juris*.
15 C.J. p 718 note 44.

County courts

(1) County courts are courts of general jurisdiction.

Ill.—*People ex rel. Lange v. Old Portage Park Dist.*, 190 N.E. 664, 666, 356 Ill. 340.

Miss.—*Daniels v. Jordan*, 134 So. 903, 161 *Miss.* 78.
15 C.J. p 718 note 44 [f].

(2) The holding that in probate matters the county court is a "court of general and superior jurisdiction" simply means that its record imports absolute verity, and cannot be col-

laterally attacked.—*Cole v. Marvin*, 193 P. 828, 831, 98 Or. 175.

Statutory court

Specially created statutory court is not "court of general jurisdiction."—*Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co.*, 167 A. 636, 109 Pa.Super. 571.

"Superior court" held one of general jurisdiction.—*Clark v. Clark*, 172 N.E. 124, 202 Ind. 104—15 C.J. p 718 note 44 [i], [j].

72. *Idaho.*—*Short v. Thompson*, 55 P.2d 163, 166, 56 *Idaho* 361—*Clark v. Rossier*, 78 P. 353, 10 *Idaho* 348, 3 *Ann.Cas.* 231.

73. *Mo.*—*State v. Daniels*, 66 Mo. 192.
15 C.J. p 719 note 45.

Municipal court is one of limited jurisdiction.—*Linschitz v. C. A. Neuberger Co.*, *Wis.*, 283 N.W. 811—*Jones v. State*, 247 N.W. 445, 211 *Wis.* 9.

74. *N.J.*—*Den v. Hammel*, 18 N.J. Law 73.
15 C.J. p 719 note 46.

75. *U.S.*—*Grignon v. Astor*, *Wis.*, 2 *How.* 319, 11 *L.Ed.* 283.

Wis.—*Linschitz v. C. A. Neuberger Co.*, 283 N.W. 811, 814.
15 C.J. p 719 note 47.

76. *Alaska.*—*Sylvester v. Willson*, 2 *Alaska* 325.

77. *Ga.*—*Tucker v. Harris*, 13 *Ga.* 1, 7, 58 *Am.D.* 488.

Tex.—*Withers v. Patterson*, 27 *Tex.* 491, 86 *Am.D.* 643.
15 C.J. p 719 note 49.

78. *Fla.*—*State ex rel. Landis v. Simmons*, 140 *So.* 187, 104 *Fla.* 487.

Okl.—*Osage Oil & Refining Co. v. Interstate Pipe Co.*, 253 P. 66, 124 *Okl.* 7.

79. *Wis.*—*State v. La Crosse County Ct. Judge*, 11 *Wis.* 50.

80. *Me.*—*Abbott v. Knowlton*, 31 *Me.* 77, 79.

15 C.J. p 720 note 51.

81. *Mich.*—*In re Consolidated Freight Co.*, 251 N.W. 431, 434, 265 *Mich.* 340, citing *Corpus Juris*.
15 C.J. p 720 note 52.

Supreme court is court of record, wherein acts and proceedings are enrolled for perpetual memorial, and such courts "speak only through their records."—*Naro v. State*, 101 *So.* 666, 667, 212 *Ala.* 5.

§ 4. Courts of Law and Courts of Equity

Broadly speaking, a court of law is any tribunal duly administering the laws of the land, although in a narrower sense it is a tribunal proceeding according to the common law in contradistinction to a court of equity, which latter is a tribunal proceeding according to the precepts of chancery and sometimes called a "court of conscience."

In the broad sense of the term, a court of law is any duly constituted tribunal administering the laws of the state or nation.⁸² In a narrower sense courts of law are those which administer justice according to the principles and forms of the common law,⁸³ while courts of equity are those which administer justice according to the rules and principles of equity.⁸⁴

Court of conscience is a name frequently applied to the courts of equity or of chancery, not as a name but as a description.⁸⁵

§ 5. Courts of Record and Courts Not of Record

Broadly speaking, a court of record is one keeping a written account of its proceedings which imports verity, or which is so denominated by the statute of its creation.

A court of record has been defined as a court where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony,⁸⁶ and which has power to fine and imprison

for contempt of its authority;⁸⁷ a court that is bound to keep a record of its proceedings, and that may fine or imprison;⁸⁸ a court whose proceedings are enrolled for a perpetual memorial and testimony, which rolls are called the records of the court, and are of such high and super-eminent authority that their truth is not to be called in question;⁸⁹ a judicial, organized tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it,⁹⁰ and proceeding according to the course of the common law;⁹¹ and a court having a seal,⁹² although the presence or absence of a seal is not necessarily conclusive of the character of a court as one of record.⁹³ Courts may be designated by statute as courts of record, as will more fully appear from an examination of the statutes and of the decisions referred to *infra* this note,⁹⁴ and it has been said that a test entitled to considerable weight in determining whether or not a court is one of record is whether the legislature creating the court has or has not declared it to be a court of record.⁹⁵ The phrase "court of record," as employed in state statutes, has been construed as restricted to state or federal courts within the state in question.⁹⁶

Courts not of record include inferior local courts,⁹⁷ or inferior courts lacking the power to fine or imprison for contempt,⁹⁸ or those of inferior dig-

82. Black L.D.

83. Anderson L.D.
15 C.J. p 720 note 53.

84. Bouvier L.D.
15 C.J. p 720 note 54.

85. Md.—Harper v. Clayton, 35 A. 1083, 1085, 84 Md. 346, 57 Am.S.R. 407, 35 L.R.A. 211.
15 C.J. p 687 note 68.

86. Ohio.—State v. Allen, 159 N.E. 591, 117 Ohio St. 470.
15 C.J. p 720 notes 55, 56.

Classification

Courts of record have been classified as supreme, superior, and inferior.—Heininger v. Davis, 117 N.E. 229, 231, 96 Ohio St. 205—15 C.J. p 720 note 55 [d].

County court is a "court of record."

Mo.—Johnson v. Underwood, 24 S.W. 2d 133, 140, 324 Mo. 578.

N.Y.—Sternberg v. Bergman, 250 N.Y.S. 134, 138, 140 Misc. 569.

87. N.M.—Bucher v. Thompson, 32 P. 498, 7 N.M. 115, 118.
15 C.J. p 720 note 57.

Definition criticized

Ohio.—State v. Allen, 159 N.E. 591, 117 Ohio St. 470.

88. Pa.—Commonwealth v. Sutton, 193 A. 250, 252, 327 Pa. 337, quoting *Corpus Juris*.
15 C.J. p 720 note 58.

89. N.Y.—Hutkoff v. Demorest, 8 N.E. 899, 10 N.E. 535, 103 N.Y. 377.

Pa.—Commonwealth v. Sutton, 193 A. 250, 252, 327 Pa. 337, quoting *Corpus Juris*.

One of the tests applied in determining whether or not a tribunal is a court of record is "whether or not the record of the court imports absolute verity."—State v. Allen, 159 N.E. 591, 592, 117 Ohio St. 470.

90. Pa.—Commonwealth v. Sutton, 193 A. 250, 252, 327 Pa. 337, quoting *Corpus Juris*.
15 C.J. p 720 note 60.

91. Pa.—Commonwealth v. Sutton, *supra*.
15 C.J. p 721 note 61.

92. Pa.—Commonwealth v. Sutton, *supra*, quoting *Corpus Juris*.
15 C.J. p 721 note 62.

93. Cal.—Ex p. Thistleton, 52 Cal. 220.
15 C.J. p 721 note 62 [a].

94. Mass.—Ex p. Gladhill, 8 Metc. 168.

Minn.—Davis v. Hudson, 11 N.W. 136, 29 Minn. 27.

Pa.—Commonwealth v. Sutton, 193 A. 250, 252, 327 Pa. 337, quoting *Corpus Juris*.
15 C.J. p 721 note 63.

Family court is a court of record in view of statutory provisions giving it the powers of such.—Commonwealth v. Sutton, 193 A. 250, 327 Pa. 337.

95. Ohio.—State v. Allen, 159 N.E. 591, 117 Ohio St. 470.

96. Mo.—In re Thompson's Estate, 97 S.W.2d 93, 339 Mo. 410.

97. N.Y.—Andrews v. Andrews, 1 N.Y.S.2d 760, 166 Misc. 297—Employers Liability Assur. Corporation v. Fisher, 13 N.Y.S.2d 962.

Mayor's court has been held not "court of record."—Pettiford v. Village of Yellow Springs, 176 N.E. 587, 588, 38 Ohio App. 310.

Municipal courts have been held not to be courts of record.—State v. Board of Com'rs of Douglas County, 189 N.W. 639, 641, 169 N.D. 25—15 C.J. p 721 note 65 [b] (3).

98. Ohio.—Heininger v. Davis, 117 N.E. 229, 231, 96 Ohio St. 205.

"The distinction between inferior courts of record and inferior courts not of record seems to be that the one has authority to fine and imprison for contempt, and the other has no such power."—Heininger v. Davis, *supra*.

nity, which have no power to fine or to imprison, and in which the proceedings are not enrolled or recorded;⁹⁹ and all courts which do not come within the definition of a court of record are courts not of record.¹

Distinguished from "office". A court of record is essentially not an "office," but an institution, entity, or agency within itself.²

Court of record having a clerk or prothonotary. A statutory phrase meaning a court having a clerk or prothonotary as distinguished from a court in which the justice is the recording officer.³

§ 6. Civil and Criminal Courts

Civil courts are those determining controversies between private persons, and criminal courts those adjudicating offenses alleged to have been committed against the state.

Civil courts are those which are authorized by the common law, or by the constitution or statute, to decide upon civil actions, and on disputes between persons in their private capacity—whether such matters relate to the persons of the parties, or to their personal or real property.⁴ Criminal courts are those established for the repression and punishment of crimes.⁵ Owing to the distribution of the jurisdiction into civil and criminal cases, the courts having jurisdiction of criminal cases were designated as "criminal courts" and those having jurisdiction of civil cases became known as "civil courts."⁶ The word "criminal" is used in this connection to describe the court, rather than to designate it by its supposed name, the word having reference to the character of the business—that is, criminal business—to be transacted in the court.⁷

§ 7. Superior and Inferior Courts

Broadly speaking, superior courts are those exercise-

ing both original and supervisory jurisdiction, and inferior courts are those with very limited jurisdiction subject to review by higher tribunals.

A superior court is a court with controlling authority over some other court or courts, and with certain original jurisdiction of its own.⁸ Inferior courts are those which are subordinate to other courts or which are of a very limited jurisdiction;⁹ those which are of very restricted jurisdiction and whose judgments and decrees can be reviewed by the higher tribunals.¹⁰ According to the technical meaning of the term, inferior courts are those the judgments of which, standing alone, are mere nullities, and whose proceedings, in order to give them validity, must show their jurisdiction.¹¹ A court of limited jurisdiction is not necessarily an inferior court in a technical sense.¹²

§ 8. Supreme Courts

Supreme courts are ordinarily those possessing the highest and controlling jurisdiction, although in some states they are courts of supervisory jurisdiction but not of final resort.

Supreme courts are those which possess the highest and controlling jurisdiction; also, in some states, a court of higher jurisdiction than the superior courts, although not the court of final resort.¹³ Supreme court of the United States is considered in the C.J.S. title Federal Courts §§ 191–281, also in 25 C.J. p 858 note 67–p 961 note 24.

§ 9. Local Courts

A local court is one having jurisdiction of causes arising within a limited area, such as a town or borough.

Local courts are those which have jurisdiction of causes occurring in certain places only, usually the limits of a town or borough.¹⁴

99. Burrill L.D., citing 3 Stephen Comm. p 384.

1. 4 Bouvier Inst. p 68, No. 2524. 15 C.J. p 721 note 65.

Public service commission is not a court of record.—Commonwealth v. Benn, 131 A. 253, 256, 284 Pa. 421.

2. Colo.—Dixon v. People, 127 P. 930, 53 Colo. 527.

N.Y.—Ledwith v. Rosalsky, 186 N.E. 688, 244 N.Y. 406, reversing 216 N.Y.S. 411, 217 App.Div. 749, motion denied 157 N.E. 858, 245 N.Y. 563.

3. U.S.—Ex p. Cragg, C.C.Mass., 6 F.Cas.No.3,380, 2 Curt. 98.

4. N.C.—Carpenter v. Hanes, 83 S.E. 577, 167 N.C. 551. Philippine.—U. S. v. Arceo, 6 Philippine 29.

15 C.J. p 721 note 66.

5. 4 Bouvier Inst. p 71, No. 2531.

"Criminal court" is one where criminal cases are tried and determined, not one where civil cases are tried, or persons charged with criminal offenses are held for action by proper authority.—Hobart v. First Criminal Judicial Dist. of Court of Bergen County, 160 A. 674, 675, 10 N.J.Misc. 723.

6. Mo.—State v. Nast, 108 S.W. 563, 209 Mo. 708, 722.

7. Ill.—Petty v. People, 8 N.E. 304, 118 Ill. 148, 156.

8. Anderson L.D. 15 C.J. p 721 note 68.

9. Hawaii.—Matter of Atcherly, 19 Hawaii 535.

15 C.J. p 721 note 69.

10. N.M.—State v. Medler, 142 P. 376, 19 N.M. 252.

15 C.J. p 722 note 70.

11. Ala.—Nugent v. State, 18 Ala. 521.

15 C.J. p 722 note 71.

Necessity of jurisdiction appearing of record see infra § 105.

"Used in a narrow and technical sense, the words 'inferior courts' mean courts of a special and limited jurisdiction, which are created on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction."—Cole v. Marvin, 193 P. 828, 830, 98 Or. 175.

12. Mo.—In re Davison, 73 S.W. 373, 100 Mo.App. 263.

15 C.J. p 722 note 72.

13. Bouvier L.D.

15 C.J. p 722 note 73.

14. Bouvier L.D.

15 C.J. p 722 note 74.

§ 10. Provisional Courts

Provisional courts are those established in conquered territory by military authority for temporary use.

Provisional courts are tribunals temporarily established by military authority in conquered countries.¹⁵ The establishment of provisional courts is considered in the C.J.S. title War § 39, also 67 C.J. p 423 note 15; and courts established by military government as provisional federal courts are discussed in the C.J.S. title Federal Courts § 320, also 25 C.J. p 986 notes 96, 97.

§ 11. Particular Courts

Various particular courts, American and English, are enumerated and defined in this section.

Admiralty court is a court having jurisdiction of causes arising under the rules of admiralty law,¹⁶ and such courts are discussed in §§ 3, 4 of the title Admiralty.

Circuit court. In many of the states this is the name of the court of general original jurisdiction, clothed with power to try by judge and by jury the issues of fact in ordinary actions, but subject to a review of its determinations in the supreme court of the state or other appellate tribunal.¹⁷ They have been called common-law courts.¹⁸

County court. The name is used in many of the states to designate the ordinary courts of record having jurisdiction for trials at nisi prius.¹⁹ As defined with reference to its jurisdiction, the term may mean a court presided over by the county judge alone,²⁰ the quorum court presided over by the county judge or county chairman,²¹ and, under particular circumstances, the municipal court in spite of its name.²² The nature and scope of the juris-

diction of county courts in particular states is considered infra §§ 249-297.

Court for the trial of impeachments or *Court of impeachment.* A general phrase designating a tribunal empowered to try any officer of government or other person brought to its bar by the process of impeachment.²³

Court of appeals is an appellate tribunal which is often the court of last resort.²⁴ Courts of appeals are an integral part of the state government, to which part of the administration of justice is delegated, and are corporate entities or organized bodies existing only in contemplation of law.²⁵ Circuit courts of appeal are discussed in the C.J.S. title Federal Courts §§ 282-301, also 25 C.J. p 961 note 25-p 973 note 73.

Court of common pleas, sometimes called merely "common pleas," is a tribunal of original and general jurisdiction for the trial of issues of fact and law according to the principles of the common law, a court having jurisdiction generally of civil actions;²⁶ a distinctive court which has jurisdiction of common-law pleas and several things not belonging to nor within the jurisdiction of other courts;²⁷ and the tribunal has been referred to as the "general fountain of justice" available for the protection of the common-law or statutory rights of the citizen where no other provision is made for their redress.²⁸

Court of error. An expression applied in some of the United States to the court of last resort in the state; and in its most general sense denotes any court having power to review the decisions of lower courts on appeal, error, certiorari, or other process.²⁹

Police court is a local court.—People v. Boice, 118 N.Y.S. 500, 63 Misc. 357.

15. U.S.—Mechanics' & Traders' Bank v. Union Bank, La., 22 Wall. 276, 22 L.Ed. 871.
15 C.J. p 722 note 75.

16. Black L.D.

Maritime court is a court exercising jurisdiction in maritime causes; one which possesses the powers and jurisdiction of a court of admiralty.—Black L.D.

17. Abbott L.D.

Their jurisdiction extends over several counties or districts, and terms are held in the various counties or districts to which their jurisdiction extends.—Black L.D., citing 1 Kent Comm. pp 301-303.

18. Or.—Montesano Lumber & Mfg. Co. v. Portland Iron Works, 152 P. 244, 78 Or. 53.

19. Black L.D.

"Their powers generally comprise ordinary civil jurisdiction, also the charge and care of persons and estates coming within legal guardianship, a limited criminal jurisdiction, appellate jurisdiction over justices of the peace, etc."—Black L.D.

20. Ky.—Bowling Green & Madisonville R. Co. v. Warren County Ct., 10 Bush 711, 717.

21. Tenn.—Sheffy v. Mitchell, 215 S. W. 403, 142 Tenn. 48.

22. Cal.—Hart Bros. Co. v. Los Angeles County, Super., 82 P.2d 221.

23. Black L.D.

See also the C.J.S. title Officers § 63, and 46 C.J. p 1001 note 84-p 1003 note 20.

Court of impeachment

(1) A court empowered to try

charges of misconduct on the part of public officers, in proceedings instituted for their removal from office.—Rapalje & L.L.D.

(2) "A court for the trial of government official."—English L.D.

24. Black L.D.

25. Ohio.—Barner v. Barner, 19 Ohio App. 458.

26. R.I.—State v. Bacon, 61 A. 653, 27 R.I. 252.
12 C.J. p 205 notes 2-4.

27. Pa.—Dallett v. Keltus, 7 Phila. 627.
12 C.J. p 205 note 2.

28. S.C.—Moore v. Barry, 9 S.E. 589, 30 S.C. 530, 4 L.R.A. 294—
In re Geiger v. Drafts, 17 S.C. 155.

29. Black L.D.

Court of inquiry is a term which has been applied to a justice of the peace, who, acting under statutory authority, may summon and examine witnesses in relation to an offense which he has good cause to believe has been committed.³⁰ Military courts of inquiry are discussed in the title Army and Navy §§ 48-50, and in the C.J.S. title Militia § 24, also 40 C.J. p 697 notes 52-59.

Court of last resort. A court from which there is no appeal,³¹ or in which the decision is final and controlling between the parties.³²

Court of nisi prius or *Nisi prius court.* The term "court of nisi prius" is frequently used as a general designation of any court exercising general, original jurisdiction in civil cases, being used interchangeably with "trial-court."³³ "Nisi prius court" has been defined as a court held for the trial of issues of fact, before a jury and a single presiding judge, and is familiarly used to denote the forum, whatever its statutory name, in which the cause was tried to a jury as distinguished from the appellate court.³⁴

Court of oyer and terminer. The name "court of oyer and terminer" is generally used (sometimes, with additions) as the title, or part of the title, of a state court of criminal jurisdiction, or of the criminal branch of a court of general jurisdiction, being commonly applied to such courts as may try felonies, or the higher grades of crime.³⁵

"Courts of special sessions" is a generic term applicable to those courts which have no stated terms and are not continuous, but which are organized and exist only for the trial of each particular case, and

become *functus officio* when the judgment is rendered therein.³⁶

District courts are inferior courts established in some states with a jurisdiction for the most part similar to that of county courts.³⁷ Federal district courts are considered in the C.J.S. title Federal Courts §§ 302-311, also 25 C.J. p 973 note 76-p 980 note 9.

Ecclesiastical courts, as such, seem never to have existed in the United States,³⁸ and are defined infra this section under the heading relative to English courts. The term, however, as shown infra note 61, is sometimes applied to courts exercising probate jurisdiction.

Municipal or city courts; mayor's court. Municipal courts are courts with statutory jurisdiction in criminal or civil cases, or both, usually limited not only in amount, but by the requirement that suits can be instituted only against residents, and crimes prosecuted only where committed within the municipality,³⁹ and their territorial authority is confined to the city or community in which they are erected.⁴⁰ A city court is one whose jurisdiction is coextensive with a city,⁴¹ and the terms "city court" and "municipal court" are substantially synonymous.⁴² It has been said that city courts may be inferior courts of law and equity,⁴³ also that they are "inferior courts of record."⁴⁴ The term has been limited to courts from which there is a prescribed mode of appeal.⁴⁵ A mayor's court is a court established in some cities, in which the mayor sits with the powers of a police judge or committing magistrate with respect to offenses committed with-

30. Tex.—Brown v. State, 118 S.W. 139, 55 Tex.Cr. 572.

31. English L.D.

32. U.S.—Arcless Contact Co. v. General Electric Co., C.C.A.N.Y., 87 F.2d 340.

33. Black L.D.

In Pennsylvania the term belonged as a legal title only to a court which formerly existed in the city and county of Philadelphia, and which was presided over by one of the judges of the supreme court of Pennsylvania, and later abolished.—Black L.D.

34. Black L.D.

35. Black L.D.
15 C.J. p 690 note 40.

36. N.Y.—People v. Kraft, 242 N.Y. S. 348, 351, 229 App.Div. 281.

Similar to police courts

"The term is equivalent to police courts. They derive their jurisdiction and power to act in any given case from the statute creating them.

. . . Undoubtedly they were patterned after English courts of 'Sessions of the Peace' and 'Courts of Petty Sessions.' Historically they were known originally as courts of special sessions of the peace. They were held generally by a justice of the peace who acted as a court, not as a magistrate.—People v. Kraft, supra.

The court of special sessions held by a city magistrate is a "Court of Special Sessions of the City of New York."—People ex rel. Dembinsky v. Fox, 168 N.Y.S. 1008, 1013, 182 App. Div. 642.

"Sessions of the peace" is a term which was used both as the name of a court of record held before two or more justices of the peace for the execution of the authority given them by their commission and certain acts of parliament, and also to designate a sitting of justices for the execution of those purposes which are confided to them by their com-

mission and by several acts of parliament.—People v. Powell, 14 Abb. Fr., N.Y., 91, 93—57 C.J. p 288 notes 38, 39.

37. Black L.D.

38. N.M.—Hodges v. Hodges, 159 P. 1007, 22 N.M. 192.

19 C.J. p 24 note 11.

39. Bouvier L.D.

40. Black L.D.

42 C.J. p 1414 note 39.

41. Standard D.

11 C.J. p 791 note 63.

42. Ill.—Miller v. People, 82 N.E. 521, 230 Ill. 65.

11 C.J. p 791 note 62.

43. Ala.—Perkins v. Corbin, 45 Ala. 103, 118, 6 Am.R. 698.

44. Ill.—Wolf v. Hope, 70 N.E. 1082, 210 Ill. 50.

11 C.J. p 791 note 65.

45. Ga.—Georgia, etc., R. Co. v. Sasser, 60 S.E. 997, 130 Ga. 394.

11 C.J. p 791 note 66.

in the city, and sometimes with civil jurisdiction in small causes, or other special statutory powers.⁴⁶ The status and jurisdiction of such courts in particular states are considered infra §§ 249-297.

Police, recorder's and magistrate's courts. A police court, with which a "recorder's court" is ordinarily synonymous,⁴⁷ is a court for the trial of offenders brought up on charges preferred by the police;⁴⁸ an inferior court exercising a limited jurisdiction over offenses of a criminal character,⁴⁹ and perhaps also a limited civil jurisdiction.⁵⁰ "Magistrate's court" is a local court in some United States cities for the trial of small causes.⁵¹

Probate, surrogate's and similar courts. A "court of probate" or "probate court" has been defined as a court having jurisdiction over the probate of

wills, the grant of administration, and the supervision of the management and settlement of the estates of decedents, including the collection of assets, the allowance of claims, and the distribution of the estate,⁵² or more simply as a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills.⁵³ Such tribunals have also been termed "courts of ordinary,"⁵⁴ "orphans' courts,"⁵⁵ "prerogative courts,"⁵⁶ "register's courts,"⁵⁷ and "surrogate's courts."⁵⁸ Probate courts, surrogate's courts, orphans' courts, courts of ordinary, and similar courts of probate jurisdiction, are judicial tribunals,⁵⁹ and under the practice prevailing in different jurisdictions have been variously called constitutional,⁶⁰ ecclesiastical,⁶¹ or statutory⁶² courts, or courts of law⁶³ or equity,⁶⁴ or independent tri-

46. Black L.D.

47. Cal.—Colton v. San Bernardino County Super. Ct., 257 P. 909, 84 Cal.App. 303.

53 C.J. p 600 note 93.

48. Cal.—Ex parte Baxter, 86 P. 998, 999, 3 Cal.App. 716.

49. Anderson L.D.

49 C.J. p 1071 note 32.

50. Anderson L.D.

49 C.J. p 1071 note 33.

51. English L.D.

Magistrate's courts in particular places

(1) A local court in the city of Philadelphia, Pa., possessing the criminal jurisdiction of a police court and civil jurisdiction in actions involving not more than one hundred dollars.—Black L.D.

(2) Courts in the state of South Carolina, having exclusive jurisdiction in matters of contract of and under twenty dollars.—Black L.D.

52. Black L.D.

53. U.S.—Robinson v. Fair, Cal., 9 S.Ct. 30, 128 U.S. 53, 86, 32 L.Ed. 415.

54. Court of ordinary

In some of the United States, for example, Georgia, the name given to the probate or surrogate's court, or the court having the usual jurisdiction in respect to the proving of wills and the administration of decedents' estates.—Black L.D., citing Veach v. Rice, Ga., 9 S.Ct. 730, 131 U.S. 293, 33 L.Ed. 163.

"The words "court of ordinary" and "ordinary" are often used interchangeably, but it is the act which determines whether the ordinary is proceeding as a court or in a ministerial capacity."—Morse v. Caldwell, 191 S.E. 479, 487, 55 Ga.App. 804—Trust Co. of Georgia v. Smith, 188 S.E. 469, 54 Ga.App. 518.

55. Black L.D.

U.S.—Robinson v. Fair, Cal., 9 S.Ct. 30, 128 U.S. 53, 32 L.Ed. 415.

15 C.J. p 689 note 38.

56. "Prerogative court" is a term sometimes used to denote a distinct tribunal for the establishment of wills and the administration of the estates of men dying either with or without wills.

U.S.—Robinson v. Fair, Cal., 9 S.Ct. 30, 128 U.S. 53, 32 L.Ed. 415.

Mich.—Grand Rapids L. & D. R. Co. v. Chesebro, 42 N.W. 66, 68, 74 Mich. 466.

57. Register's court

(1) A court in the commonwealth of Pennsylvania which had jurisdiction in matters of probate.—Black L.D.

(2) These courts were subsequently abolished, and their powers and jurisdiction were conferred on the orphans' court.—Robinson's Estate, 11 Phila., Pa., 37.

58. Black L.D.

U.S.—Robinson v. Fair, Cal., 9 S.Ct. 30, 35, 128 U.S. 53, 32 L.Ed. 415.

60 C.J. p 1184 note 30.

Private court of state

A surrogate's court is not a public court where principles of *jus gentium* are supreme, but a private court of the state proceeding generally in rem according only to the laws of the state.—In re Green's Estate, 164 N.Y.S. 1063, 99 Misc. 582, affirmed 165 N.Y.S. 1088, 179 App. Div. 890.

59. Kan.—In re Gassaway, 79 P. 113, 70 Kan. 695.

N.J.—Mellor v. Kaighn, 99 A. 207, 39 N.J.Law 543.

Or.—Staedtman v. Miner, 155 P. 708, 33 Or. 348.

15 C.J. p 1008 note 30.

As "court"

The probate court of Cook county, Ill., is a "court" within the mean-

ing universally accorded that term.—U. S. v. Paisley, D.C.Ill., 26 F. Supp. 237.

In Michigan

(1) In view of Const. art 7 § 13, the probate court is a "judicial agency."—Freeman v. Hulbert, 203 N.W. 158, 230 Mich. 455.

(2) "Under our constitutional system, that court itself is, for most purposes, at least, a prerogative, and not a judicial, court."—Grand Rapids, L. & D. R. Co. v. Chesebro, 42 N.W. 66, 68, 74 Mich. 466.

60. U.S.—Hamburg Bank v. Ouachita Nat. Bank in Monroe, C.C.A.Ark., 78 F.2d 100, and certiorari denied Ouachita Nat. Bank v. Hamburg Bank, 56 S.Ct. 382, 206 U.S. 655, 80 L.Ed. 467.

Idaho.—Short v. Thompson, 55 P.2d 163, 56 Idaho 361.

Mich.—In re McLouth's Estate, 274 N.W. 759, 281 Mich. 191—Michigan Trust Co. v. McNamara, 132 N.W. 1078, 167 Mich. 406.

N.Y.—In re Wellington's Estate, 289 N.Y.S. 1005, 160 Misc. 383, denying modification 276 N.Y.S. 946, 154 Misc. 271.

61. N.J.—In re Merrill, 102 A. 400, 88 N.J.L. 261.

49 C.J. p 1332 note 55.

62. N.Y.—In re Hoyt, 170 N.Y.S. 846, 103 Misc. 614.

63. Ill.—In re Jogminas' Estate, 246 Ill.App. 518, 520.

"The probate court of Cook county is not a court of equity but a court of law and therefore legal rather than equitable rules must be applied."—In re Jogminas' Estate, supra.

64. N.Y.—In re Dell's Estate, 276 N.Y.S. 960, 154 Misc. 216.

Pa.—Kretzer v. Murry, 147 A. 102, 297 Pa. 451.

Courts of equity

"Probate courts" are not "courts

bunals of original jurisdiction⁶⁵ neither strictly courts of law nor courts of equity, although more nearly akin to the latter than to the former.⁶⁶ The status of such tribunals as courts of record, and the scope and extent of their jurisdiction, are discussed infra § 298.

The term "probate court" has been held substantially synonymous with "probate judge."⁶⁷

Other particular courts. Bankruptcy court,⁶⁸ commerce court,⁶⁹ commercial court,⁷⁰ constitutional court,⁷¹ consular court,⁷² court for correction of errors,⁷³ court for correction of errors at law,⁷⁴ courts-martial,⁷⁵ court merchant,⁷⁶ court of arbitra-

tion,⁷⁷ court of arbitration of the chamber of commerce,⁷⁸ court of assistants,⁷⁹ court of chancery,⁸⁰ court of claims,⁸¹ court of conciliation,⁸² court of conscience,⁸³ court of county commissioners,⁸⁴ court of customs appeals,⁸⁵ court of errors and appeals,⁸⁶ court of first instance,⁸⁷ court of general quarter sessions of the peace,⁸⁸ court of general sessions,⁸⁹ court of law,⁹⁰ court of magistrates and freeholders,⁹¹ court of oyer and terminer and general jail delivery,⁹² court of oyer and terminer, general jail delivery and quarter sessions of the peace, in and for the city and county of Philadelphia,⁹³ court of private land claims,⁹⁴ court of quarter sessions of the peace,⁹⁵ and other particular courts are court of

of law" according to ordinary use of term, since they derive their origin and jurisdiction from a source distinct from common law, and they exercise no functions peculiar to that system.—In re Quinney's Estate, 283 N.W. 599, 287 Mich. 329.

65. N.C.—Graham v. Floyd, 197 S.E. 873, 214 N.C. 77—Hardy v. Turnage, 168 S.E. 823, 204 N.C. 538.

66. N.J.—Bugbee v. Van Cleve, 134 A. 646, 99 N.J.Eq. 825, 100 N.J. Eq. 263.

49 C.J. p 1332 notes 55, 56.

67. Kan.—White Sewing Mach. Co. v. Walt, 24 Kan. 136, 139.

Mich.—Freeman v. Judge Wayne Probate Ct., 203 N.W. 158, 230 Mich. 455.

S.C.—Bradford v. Richardson, 97 S. E. 58, 111 S.C. 205.

68. See Bankruptcy §§ 19–30.

69. See Commerce § 148 d (3), also 25 C.J. p 980 notes 10, 11.

70. See 15 C.J.S. p 576 note 3.

71. See 16 C.J.S. p 1 note 65.

72. **Consular courts** are courts held by the consuls of one country within the territory of another under authority given by treaty; and the character and scope of their jurisdiction is discussed in Ambassadors and Consuls § 18.

73. Defined

The style of a court having jurisdiction for review, by appeal or writ of error.—Black L.D.—15 C.J. p 685 note 4.

74. Defined

At common law, a court that has such jurisdiction as a writ of error can confer upon it.—State v. Bailey, 1 S.C. 1, 5.

75. See Army & Navy §§ 51–69, and the C.J.S. title Militia § 25, also 40 C.J. p 697 note 60–p 704 note 32.

76. A court in the colony of Georgia, which was recognized as existing by the state constitution of 1777, and was continued in existence by the constitution of 1789, subject to regulation by the general assembly.

—De Lamar v. Dollar, 57 S.E. 85, 128 Ga. 57—15 C.J. p 686 note 30.

77. Defined

A tribunal created by statute to hear controversies between labor organizations and their employers.—Edwards v. Cheyenne, 114 P. 677, 122 P. 900, 19 Wyo. 110—15 C.J. p 686 note 39.

78. Defined

A court of arbitrators, created for the convenience of merchants in the city of New York, by act of the legislature of New York, which decides disputes between members of the chamber of commerce and outside merchants who voluntarily submit themselves to the jurisdiction of the court.—Black L.D.

79. "A court in Massachusetts organized in 1630, consisting of the governor, deputy governor, and assistants. It exercised the whole power both legislative and judicial of the colony and an extensive chancery jurisdiction as well."—Black L.D.

80. See supra § 4, also 14 C.J.S. p 394 note 36.

81. See the C.J.S. title Federal Courts §§ 327–354, also 25 C.J. p 988 note 56–p 1007 note 31.

82. Defined

A court which proposes terms of adjustment, so as to avoid litigation.—Kashefsky v. Futernick, 276 N. Y.S. 253, 153 Misc. 733.

83. See supra § 4.

84. Defined

In Alabama a court of record, composed of the judge of probate, as principal judge, and four commissioners, who are elected at the times prescribed by law, and hold office for four years.—Black L.D.

Commissioners' courts and the like as county administrative bodies are defined and discussed in Counties § 74 et seq.

The court of county revenue of Franklin county corresponds to the courts of county commissioners, or boards of revenue in other counties.

—Franklin County v. Richardson, 79 So. 384, 202 Ala. 46.

85. See the C.J.S. title Customs Duties § 182, also 17 C.J. p 657 notes 23–25.

Court of customs and patent appeals see the C.J.S. titles Customs Duties §§ 182–198, and Patents §§ 136–141.

86. Defined

The court of last resort in the state of New Jersey; formerly the same title was given to the highest court of appeal in New York.—Black L.D.

87. Defined

A court of primary jurisdiction.—Black L.D.

In the Philippine Islands see the C.J.S. title Federal Courts § 317, also 25 C.J. p 983 text and notes 58–61.

88. In New Jersey, a court of criminal jurisdiction.—Black L.D.

89. A court of general original jurisdiction in criminal cases in some states.—Black L.D.

90. See supra § 4.

91. In South Carolina formerly a court established for the trial of slaves and free persons of color for criminal offenses.—Black L.D.

92. In Pennsylvania a court of criminal jurisdiction; held at the same time with the court of quarter sessions, as a general rule, and by the same judges.—Black L.D.—15 C.J. p 690, notes 41, 42.

93. A court of record of general criminal jurisdiction in and for the city and county of Philadelphia, in the state of Pennsylvania.—Black L.D.

94. See the C.J.S. title Public Lands § 307, also 50 C.J. p 1240 note 5–p 1241 note 28.

95. In Pennsylvania a court of criminal jurisdiction, having power to try misdemeanors, and exercising certain functions of an administrative nature.—Black L.D.—15 C.J. p 690 note 62.

review,⁹⁶ court of sessions,⁹⁷ courts of territories and outlying possessions,⁹⁸ delinquency courts,⁹⁹ examining court,¹ fiscal court,² hustings court,³ juvenile court,⁴ parish court,⁵ prize court,⁶ quarterly courts,⁷ and United States court for China.⁸

Particular English courts. County court,⁹ county sessions,¹⁰ court-baron,¹¹ court christian,¹² court for consideration of crown cases reserved,¹³ court for divorce and matrimonial causes,¹⁴ court for relief of insolvent debtors,¹⁵ court-leet,¹⁶ court-leet of the county or sheriff's tourn,¹⁷ court of ancient demesne,¹⁸ court of archdeacon or archdeacon's court,¹⁹ court of arches or arches court,²⁰ court of assise and nisi prius,²¹ court of attachments,²² court of audience,²³ court of augmentation,²⁴ court of

berghmote,²⁵ court of brotherhood and guestling, court of chivalry,²⁷ court of Cinque Ports,²⁸ court of commissioners of sewers,²⁹ court of common bench,³⁰ court of common pleas,³¹ court of conscience,³² court of consistory or consistory court, court of construction,³⁴ court of convocation, court of criminal appeal,³⁶ court for crown cases reserved,³⁷ court of delegates,³⁸ court of error, court of exchequer,⁴⁰ court of exchequer chamber, court of faculties,⁴² court of general quarter sessions of the peace,⁴³ court of great sessions, Wales,⁴⁴ court of green cloth,⁴⁵ court of high commission,⁴⁶ court of honor,⁴⁷ court of hustings, court of inquiry,⁴⁹ court of justice seat,⁵⁰ court of justiciary or justiciary court,⁵¹ court of king

96. Defined

A court whose principal function is passing upon final decisions of other courts.—English L.D.

97. A court of criminal jurisdiction existing in some of the states.—Black L.D.

98. See the C.J.S. title Federal Courts §§ 312-319, also 25 C.J. p 980 note 15—p 985 note 91.

District of Columbia courts are considered in the C.J.S. title Federal Courts §§ 323-326, also 25 C.J. p 986 note 98—p 988 note 55.

99. See the C.J.S. title Militia § 24, also 40 C.J. p 704 notes 33, 34.

1. Defined

A term applied to a magistrate when sitting for the purpose of inquiring into a criminal accusation against any person.—Brown v. State, 118 S.W. 139, 55 Tex.Cr. 572—23 C.J. p 179 note 71.

2. See the title Counties § 74.

In Kentucky, a court of special and limited jurisdiction having no power to appropriate the money of the county except as authorized by law.—Mitchell v. Henry County, 100 S.W. 220, 221, 124 Ky. 833—26 C.J. p 592 note 7.

3. A local court in some parts of Virginia.—Black L.D.

4. See the C.J.S. title Infants § 6, also 31 C.J. p 989 note 70—p 990 note 89.

5. In Louisiana, the name of a court established in each parish, and corresponding to the county courts or common pleas courts in the other states.—Black L.D.

6. See the C.J.S. title War § 31, also 15 C.J. p 686 notes 36, 37, and 67 C.J. p 407 note 9—p 408 note 31.

7. A system of courts in Kentucky possessing a limited original jurisdiction in civil cases and appellate jurisdiction from justices of the peace.—Black L.D.—51 C.J. p 118 note 66.

8. See the C.J.S. title Federal Courts §§ 321-322, also 25 C.J. p 985 notes 92-95.

9. Black L.D.

15 C.J. p 673 note 59.

10. Black L.D.

15 C.J. p 675 note 13.

11. Burrill L.D.

15 C.J. p 680 note 18.

In the province of New York the old manors had their courts-baron and courts-leet.—Burrill L.D.

12. Black L.D.

15 C.J. p 680 note 20.

13. Black L.D.

15 C.J. p 685 note 3.

14. Black L.D.

15 C.J. p 685 note 6.

15. Black L.D.

15 C.J. p 685 note 7.

16. Black L.D.

15 C.J. p 686 note 28.

17. Black L.D.

57 C.J. p 1143 notes 10-15.

18. Black L.D.

15 C.J. p 686 note 33.

19. See 6 C.J.S. p 294 note 34.

20. See 6 C.J.S. p 294 note 36.

21. See Assise or Assize 6 C.J.S. p 1435 note 19.

22. Black L.D.

15 C.J. p 687 note 45.

23. Black L.D.

15 C.J. p 687 note 46.

See also Audience Court 7 C.J.S. p 1274 note 16.

24. Black L.D.

7 C.J.S. p 1287 note 33.

25. English L.D.

15 C.J. p 687 note 49.

26. Black L.D.

12 C.J.S. p 373 note 34.

27. Bouvier L.D.—Burrill L.D.

14 C.J.S. p 1112 note 37.

28. Black L.D.

15 C.J. p 687 notes 56, 57.

29. Black L.D.

15 C.J. p 687 note 60.

30. Black L.D.

15 C.J.S. p 590 note 53.

31. Black L.D.

15 C.J. p 687 notes 62, 63.

32. Black L.D.

See also 15 C.J.S. p 977 notes 30, 31.

33. Black L.D.

15 C.J.S. p 990 note 76.

34. See 16 C.J.S. p 1514 note 62.

35. Black L.D.

18 C.J.S. p 125 note 19.

36. Black L.D.

37. Del.—State v. Williams, 18

949, 950, 14 Del. 508.

17 C.J. p 346 note 18 [a].

38. Black L.D.

15 C.J. p 688 note 76.

39. Black L.D.

15 C.J. p 688 notes 79-81.

40. Black L.D.

15 C.J. p 688 notes 84, 85.

41. Black L.D.

15 C.J. p 688 note 86.

42. Black L.D.

15 C.J. p 688 notes 87-89.

43. Black L.D.

15 C.J. p 688 note 2.

44. Black L.D.

15 C.J. p 688 note 4.

45. English L.D.

15 C.J. p 688 note 5.

46. Black L.D.

15 C.J. p 689 note 7.

47. Black L.D.

48. Black L.D.

15 C.J. p 689 note 8.

49. Black L.D.

15 C.J. p 689 notes 13-14.

50. Black L.D.

15 C.J. p 689 note 15.

51. Black L.D.

15 C.J. p 689 note 16.

bench,⁵² court of lodemanage,⁵³ court of marches,⁵⁴ court of marshalsea,⁵⁵ court of orphans or orphans' court,⁵⁶ court of oyer and terminer,⁵⁷ court of palace at Westminster,⁵⁸ court of passage,⁵⁹ court of peculiars,⁶⁰ court of piedpoudre, piepoudre, pipowder, pie powder, py-powder, etc.,⁶¹ court of pleas,⁶² court of policies of assurance,⁶³ court of principality of Wales,⁶⁴ court of probate,⁶⁵ court of regards,⁶⁶ court of requests,⁶⁷ court of review,⁶⁸ court of session,⁶⁹ court of shepway,⁷⁰ court of St. Martin le Grand,⁷¹ court of stannaries,⁷² court of star chamber,⁷³ court of the steward and marshal,⁷⁴ court of summary jurisdiction,⁷⁵ court of survey,⁷⁶ court of sweinmote, swainmote, or swain-gemote,⁷⁷ court of teind or teind court,⁷⁸ court of the chief justice in Eyre,⁷⁹ court of the clerk of the mar-

ket,⁸⁰ court of the coroner,⁸¹ court of the counties palatine,⁸² court of the duchy of Lancaster,⁸³ court of the earl marshal,⁸⁴ court of the lord high admiral,⁸⁵ court of the lord high steward,⁸⁶ court of the lord high steward of the universities,⁸⁷ court of the official principal,⁸⁸ court of the steward of the king's household,⁸⁹ court of the universities,⁹⁰ court of Trailbaston,⁹¹ court of wards and liveries,⁹² courts of the forest,⁹³ courts of the franchises,⁹⁴ courts of Westminster Hall,⁹⁵ court spiritual,⁹⁶ crown court,⁹⁷ customary court-baron,⁹⁸ diocesan courts,⁹⁹ ecclesiastical court,¹ forty-days-court,² freeholder's court-baron,³ general sessions or court of general sessions,⁴ his majesty's court of appeal,⁵ hundred court,⁶ instance court,⁷ lady court,⁸ last court,⁹ lawless court,¹⁰ mayor's court of

52. Black L.D.
15 C.J. p 689 notes 17, 18.
53. Black L.D.
15 C.J. p 689 note 23.
54. English L.D.
15 C.J. p 689 note 27.
55. Black L.D.
15 C.J. p 689 notes 28-31.
56. Black L.D.
15 C.J. p 689 note 37.
57. Black L.D.
15 C.J. p 690 note 39.
58. Black L.D.
15 C.J. p 690 note 44.
59. Black L.D.
15 C.J. p 690 note 45.
60. Black L.D.
15 C.J. p 690 note 46.
61. Black L.D.—Burrill L.D.—Jacob L.D.
15 C.J. p 690 notes 47-49.
62. Black L.D.
15 C.J. p 690 note 50.
63. Black L.D.
15 C.J. p 690 note 51.
64. Black L.D.
15 C.J. p 690 note 52.
65. Black L.D.
15 C.J. p 690 note 55.
66. Black L.D.
15 C.J. p 690 note 65.
67. Black L.D.
15 C.J. p 690 note 66.
68. Rapalje & L.L.D.
15 C.J. p 691 notes 68, 69.
69. Black L.D.
15 C.J. p 691 note 70.
70. Black L.D.
15 C.J. p 691 note 72.
71. English L.D.
15 C.J. p 691 note 78.
72. Black L.D.
15 C.J. p 691 note 74.
73. Black L.D.
15 C.J. p 691 note 75.

74. Black L.D.
15 C.J. p 691 note 76.
75. Eng.—Boulter v. Kent, 1897, A. C. 556, 563.
15 C.J. p 691 note 79.
76. Black L.D.
15 C.J. p 691 note 80.
77. Black L.D.
15 C.J. p 691 note 81.
78. English L.D.
15 C.J. p 691 note 82.
79. Black L.D.
15 C.J. p 687 note 53.
80. Black L.D.
15 C.J. p 687 note 59.
81. Black L.D.
15 C.J. p 688 notes 72, 73.
82. Black L.D.
15 C.J. p 688 note 74.
83. Black L.D.
15 C.J. p 688 note 77.
84. Black L.D.
85. Black L.D.
86. Black L.D.
15 C.J. p 689 note 24.
87. Black L.D.
15 C.J. p 689 note 25.
88. Black L.D.
89. Black L.D.
15 C.J. p 691 note 77.
90. Black L.D.
15 C.J. p 691 notes 84, 85.
91. English L.D.
"Justices of trail-baston were justices appointed by King Edward I, during his absence in the Scotch and French wars, about the year 1305. They were so styled, says Hollingshed, for trailing or drawing the staff of justice. Their office was to make inquisition, throughout the kingdom, of all officers and others, touching extortion, bribery, and such like grievances, of intruders into other men's lands, barrators, robbers,

breakers of the peace, and divers other offenders."—Black L.D.

92. Black L.D.
15 C.J. p 691 notes 86, 87.
93. Black L.D.
15 C.J. p 688 notes 94-98.
94. Black L.D.
15 C.J. p 688 note 99.
95. Black L.D.
15 C.J. p 691 note 83.
96. Black L.D.
15 C.J. p 1185 note 1.
97. Black L.D.
17 C.J. p 387 note 51.
98. Burrill L.D.
15 C.J. p 680 note 18 [b].
99. Black L.D.
1. Ala.—Goodman v. Winter, 64 Ala 410, 426, 38 Am.R. 13.
Ga.—Equitable Life Assurance Society v. Paterson, 41 Ga. 338, 364, Am.R. 535.
Ind.—Short v. Stotts, 50 Ind. 29, 35 19 C.J. p 1009 note 49.
2. Bouvier L.D.
26 C.J. p 1001 note 10.
3. Black L.D.
15 C.J. p 680 note 18 [c].
4. N.Y.—People v. Powell, 14 Abt Pr. 91, 93, quoting Bacon Abr. 57 C.J. p 288 note 55 [a].
5. Black L.D.
15 C.J. p 686 note 34.
6. Black L.D.
7. Black L.D.
32 C.J. p 940 notes 39, 40.
8. Black L.D.
35 C.J. p 932 note 27.
9. Black L.D.
10. Black L.D.
36 C.J. p 970 note 69.

London,¹¹ prerogative court,¹² quarter sessions,¹³ sheriff's court,¹⁴ and special sessions or court of special sessions.¹⁵

§ 12. Exercise of Power a Judicial Act

The exercise of power by a court in accordance with the customary formalities attending its proceedings is judicial in character irrespective of the original nature of the power.

Where power is conferred on a court of justice to be exercised by it as a court, in the manner and with the formalities used in its ordinary proceedings, the action of such court is to be regarded as judicial, irrespective of the original nature of the power.¹⁶ The exercise of judicial power vested by a constitution in the courts named therein has been said to refer to such power and authority as is necessary to the hearing and determination of a matter at law or in equity, and not such procedural acts or orders as may be authorized by a statute in the conduct of the case.¹⁷

§ 13. Seal of Court

Ordinarily, a court of record has a seal. Under constitutional provision the seal of a probate court may serve as the seal of the county court.

While a seal is not necessary to a court of record, the term "court of record" implies that the court has a seal.¹⁸ A constitutional provision that, until otherwise provided, the seal of the probate

court shall be the seal of the county court makes the seal of the probate court, in the absence of legislation, the official seal of the county court.¹⁹

§ 14. Expenses and Support of Court

Subject to statutory and constitutional restrictions, a court has inherent power to incur such expenses as may be requisite to the proper performance of its duties.

Courts have inherent power to incur and order paid all expenses necessary for the holding of court and the discharge of the duties thereof,²⁰ and subject to constitutional or statutory provisions may apply public funds for their use.²¹ In the absence of some statutory provision in reference thereto, it is for the court alone to determine what expenditures are necessary to carry on the business of the court;²² but if there is a statute in reference thereto the power of the court is controlled thereby.²³ It is within the power of the state to require a given locality to provide funds for the support of courts created for such locality.²⁴ A constitutional provision that the courts shall be open to every person, and speedy and certain remedy afforded for every wrong, does not mean that the courts shall remain open after the funds provided for their expenses have been exhausted, but is to be construed in connection with a further provision that no municipal corporation shall be allowed to become indebted for any purpose to an amount exceeding the income and revenue provided for the year.²⁵

II. JURISDICTION

A. DEFINITIONS AND DISTINCTIONS

§ 15. Jurisdiction Generally

- a. Definition and nature generally
- b. Lack of jurisdiction generally
- c. Distinctions, including distinction between jurisdiction and venue

a. Definition and Nature Generally

The jurisdiction of a court is in a broad sense its power to hear and determine controversies, and in a more restricted sense its power to adjudicate a particular case.

11. Black L.D.
12. Del.—Van Dyke v. Johns, 1 Del. Ch. 93, 111, 12 Am.D. 76.
- N.J.—In re Dittman, 101 A. 66, 67, 87 N.J.Eq. 297—In re Coursen, 4 N. J.Eq. 408, 413.
13. Australia.—Russell v. Bates, 40 Austr.C.L.R. 209.
- 51 C.J. p 118 note 69 [a].
14. Black L.D.
- 57 C.J. p 1143 notes 3-5.
15. N.Y.—People v. Powell, 14 Abb. Pr. 81, 93.
- 57 C.J. p 288 note 56 [a].
16. N.Y.—In re Cooper, 22 N.Y. 67, 11 Abb.Pr. 301, 20 How.Pr. 1.
- 15 C.J. p 723 note 77.

Deciding question of fact

Power vested in a subordinate body to determine a question of fact is a

"judicial power."—Shells v. Flynn, 299 N.Y.S. 64, 164 Misc. 302, affirmed 300 N.Y.S. 536, 252 App.Div. 238, affirmed 11 N.E.2d 1, 275 N.Y. 446.

Opening, holding, and adjournment of court are the exercise of judicial powers to be performed by the court.—Ex parte Massengale, Okl.Cr., 93 P.2d 41.

17. Mo.—State ex rel. Phillips v. Barton, 254 S.W. 85, 300 Mo. 76.

18. Tex.—Houston Oil Co. v. Kimball, 122 S.W. 533, 124 S.W. 85, 103 Tex. 94, affirming, Civ.App., 114 S. W. 662.

19. Okl.—Stewart v. State, 105 P. 374, 3 Okl.Cr. 618.

20. Penn.—Edwards v. Prutzman, 165 A. 255, quoting Corpus Juris, 15 C.J. p 900 note 97.

21. Cal.—Millholen v. Riley, 293 P. 69, 211 Cal. 29.

N.J.—In re New Jersey State Bar Ass'n, 162 A. 99, 111 N.J.Eq. 234, reversed on other grounds 164 A. 1, 112 N.J.Eq. 236.

22. Mo.—State v. Smith, 5 Mo.App. 427.

Pa.—Edwards v. Prutzman, 165 A. 255, quoting Corpus Juris.

23. Pa.—Edwards v. Prutzman, supra.

15 C.J. p 900 note 99.

24. Cal.—Fleming v. Hance, 94 P. 620, 153 Cal. 162.

15 C.J. p 901 note 1.

25. Okl.—State v. Stanfield, 126 P. 239, 34 Okl. 524.

While there are many definitions²⁶ of the term, as shown *infra* this section, in a broad and general sense jurisdiction is judicial power,²⁷ and fundamentally the term means the power or capacity given by law to a court or other body or officer to hear and determine certain controversies.²⁸ The jurisdiction of the courts is in reality a power inherent in the state which is conferred on the courts either directly by the people through their constitution or indirectly through the legislature by laws duly en-

acted.²⁹ It has been briefly defined as the authority to hear and determine causes or controversies,³⁰ the power and authority conferred on a court by the constitution and laws to hear and determine causes between parties and to carry its judgments into effect;³¹ the power constitutionally conferred on a judge or magistrate to determine causes according to law and to carry the sentence into execution;³² or in a more limited sense as the power

26. Iowa.—Incorporated Town of Carpenter v. Joint Drainage Dist. No. 6, 197 N.W. 656, 658, 198 Iowa 182, modified on other grounds on rehearing 199 N.W. 265, 198 Iowa 182.

"That there are classifications in jurisdiction as well known and understood as are the classifications of nouns, verbs, and adverbs, or the classifications of trusts and corporations."—State v. Sullivan, Fla., 116 So. 255, 259.

27. Wis.—Harrigan v. Gilchrist, 99 N.W. 909, 933, 121 Wis. 127.

28. Utah.—Atwood v. Cox, 55 P.2d 377, 380.

Derivation of word

The word "jurisdiction" is derived from the Latin "juris dicto," "I speak by the law."—Atwood v. Cox, *supra*—15 C.J. p 723 note 78 [a].

"In its application to courts, jurisdiction is the authority to hear and determine controversies concerning certain subjects."—Ashlock v. Ashlock, 195 N.E. 657, 659, 360 Ill. 115.

Vague use of term

U.S.—Watson v. Jones, Ky., 13 Wall. 679, 732, 20 L.Ed. 666.
15 C.J. p 723 note 78 [c].

29. Ind.—Pease v. State, 129 N.E. 337, 74 Ind.App. 572.

30. U.S.—Showalter v. Hampton, C. C.A.Okl., 26 F.2d 777—In re Ostlund Mfg. Co., D.C.Or., 19 F.Supp. 836—Hartford Life Ins. Co. v. Johnson, C.C.A.Mo., 268 F. 30—In re Havens, N.Y., 255 F. 478, 166 C. C.A. 554.

Ala.—Bynum v. Brewer, 114 So. 577, 217 Ala. 52.

Cal.—Pacific States Savings & Loan Co. v. Superior Court in and for Alameda County, 19 P.2d 977, 217 Cal. 517—Ex parte Wood, App., 93 P.2d 1058—People v. Superior Court in and for San Bernardino County, 285 P. 871, 124 Cal.App. 276—Archer v. Superior Court of California, in and for City and County of San Francisco, 254 P. 939, 81 Cal.App. 742—Warren v. Ellis, 179 P. 544, 39 Cal.App. 542.
Fla.—Sheldon v. Powell, 128 So. 258, 99 Fla. 782—State v. Sullivan, 116 So. 255, 95 Fla. 191—Lovett v. Lov-

ett, 112 So. 768, 775, citing *Corpus Juris*.

Ill.—Woodward v. Ruel, 188 N.E. 911, 355 Ill. 163—Wilson Bros. v. Haeger, 179 N.E. 140, 347 Ill. 140, reversing 261 Ill.App. 568—City Ry. Co. v. Chicago & W. I. R. Co., 163 N.E. 852, 331 Ill. 551—People v. Brewer, 160 N.E. 76, 328 Ill. 472—People v. Lee, 143 N.E. 196, 311 Ill. 552, error dismissed Lee v. People of State of Illinois ex rel. Emmerson, 46 S. Ct. 23, 269 U.S. 593, 70 L.Ed. 429—People v. Ford, 124 N.E. 549, 289 Ill. 550—Lyon & Healy v. Piano, Organ & Musical Instrument Workers' International Union, 124 N.E. 443, 289 Ill. 176.

Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 190, 278 Ky. 695, quoting *Corpus Juris*.
Mich.—Ward v. Hunter Machinery Co., 248 N.W. 864, 263 Mich. 445.

Mo.—State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, App., 113 S. W.2d 1034.

Neb.—State v. Knudtsen, 236 N.W. 696, 121 Neb. 270—Smiley v. Sampson, 1 Neb. 56.

N.Y.—Cooper v. Davis, 248 N.Y.S. 227, 231 App.Div. 527.

Ohio.—State v. Metzger, 10 Ohio N. P.N.S., 97.

Okl.—Ex parte Waldoek, 286 P. 765, 142 Okl. 258, dismissed Waldoek v. Newell, 51 S.Ct. 100, 282 U.S. 906, 75 L.Ed. 797—Carille v. National Oil & Development Co., 201 P. 377, 83 Okl. 217—Welch v. Focht, 171 P. 730, 87 Okl. 275, L.R.A.1918D 1163.

Or.—Harney Valley Irr. Dist. v. Bolton, 221 P. 171, 109 Or. 486—Sprague v. City of Astoria, 204 P. 956, 106 Or. 253—Ralston v. Bennett, 183 P. 766, 93 Or. 519.

Pa.—Massachusetts Bonding & Insurance Co. v. Johnston & Harder, 199 A. 216, 330 Pa. 336.

Tex.—Morrow v. Corbin, 62 S.W.2d 641, 645, 122 Tex. 553, citing *Corpus Juris*—Stewart v. Moore, Com. App., 291 S.W. 886—Southern Casualty Co. v. Fulkerson, Civ.App., 30 S.W.2d 911, reversed on other grounds, Com.App., 45 S.W.2d 152—Neill v. Johnson, Civ.App., 234 S.W. 147.

Utah.—Atwood v. Cox, 55 P.2d 377, 380, citing *Corpus Juris*.

Wash.—State v. Superior Court of King County, 172 P. 257, 101 Wash. 81, 4 A.L.R. 572.

15 C.J. p 723 note 79, p 724 notes 82, 91.

It is *coram iudice* whenever a case is presented which brings the power to hear and determine a cause into action.—State v. Knudtsen, 236 N.W. 696, 121 Neb. 270—15 C.J. p 723 note 79 [d].

Inherent power

"By jurisdiction is meant the inherent power to hear and determine the case."—Nash v. Harman, 139 S. E. 273, 274, 148 Va. 610.

Jurisdiction can never depend on merits of case brought before the court, but depends on its right to hear and decide it at all.

N.J.—Dixon v. Russell, 73 A. 51, 78 N.J.Law 296, reversed on other grounds 76 A. 982, 79 N.J.Law 490.
N.D.—Hanson v. North Dakota Workmen's C. Bureau, 248 N.W. 680, 63 N.D. 79.

Without assignment of case for trial Court's jurisdiction may exist although no cases are assigned to it for trial.—State v. Sullivan, 116 So. 255, 95 Fla. 191.

31. Ind.—Indianapolis v. Hawkins, 103 N.E. 10, 180 Ind. 382.

Iowa.—Western Grocer Co. v. Glenn, 286 N.W. 441—Dickson Fruit Co. v. District Court of Sac County, 213 N.W. 803, 203 Iowa 1028—Franklin v. Bonner, 207 N.W. 778, 201 Iowa 516.

Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 190, 278 Ky. 695, quoting *Corpus Juris*.
Tex.—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—Berkman v. Levy, Civ.App., 129 S.W.2d 397, error dismissed, judgment correct—Haney v. Temple Trust Co., Civ.App., 55 S.W.2d 891, error dismissed, followed in 59 S.W.2d 1117, 59 S.W. 2d 1118, two cases, and 59 S.W.2d 1119.

15 C.J. p 725 note 93.

32. Ohio.—Mahoning Valley R. Co. v. Santoro, 112 N.E. 190, 93 Ohio St. 53, 56.

Tenn.—Swift v. Memphis Cold Stor-

to adjudicate a particular case or controversy,³³ and jurisdiction of a court in a particular case includes not alone the power to hear the cause but likewise the power to render the particular judgment entered.³⁴ Jurisdiction includes the power by a court to determine whether it has the authority to hear and determine the controversy presented,³⁵ and the right to decide whether that state of facts exists which confers jurisdiction, as well as all other matters which arise in the case legitimately before the court.³⁶ The term imports the power and authority to declare the law,³⁷ to expound or to apply the

laws excluding the idea of power to make the laws,³⁸ to hear and determine issues of law and of fact,³⁹ the power to hear, determine, and pronounce judgment on the issues before the court,⁴⁰ and the power to inquire into the facts, to apply the law, and to pronounce the judgment.⁴¹

Other definitions found in the decisions are: The power of binding decision possessed by a judicial or quasi-judicial tribunal;⁴² the authority by which judicial officers take cognizance of and decide causes;⁴³ the power of a court or a judge to entertain

age Warehouse Co., 158 S.W. 480, 128 Tenn. 82, 100.

Tex.—Morrow v. Corbin, 62 S.W. 2d 641, 122 Tex. 553.

15 C.J. p 725 note 94.

32. Ill.—People v. Brewer, 160 N.E. 76, 228 Ill. 472.

Mont.—Reed v. Woodmen of the World, 22 P.2d 819, 94 Mont. 374. N.J.—Ex parte Hall, 118 A. 847, 94 N.J.Eq. 108.

Tex.—Mitchell v. San Antonio Public Service Co., Com.App., 35 S.W.2d 140, reversing, Civ.App., 15 S.W.2d 694—Stewart v. Moore, Com.App., 291 S.W. 886—Ex parte McKenzie, 29 S.W.2d 771, 115 Tex. Cr. 315.

15 C.J. p 725 note 88.

As applied to certain controversy, jurisdiction is the right to hear and determine that controversy.—Ashlock v. Ashlock, 195 N.E. 657, 660, 360 Ill. 115.

General and particular senses of term

Word "jurisdiction" is sometimes used in general sense, in which it signifies abstract right of tribunal to exercise its power in causes of certain class, and is sometimes used in a particular sense, in which it relates to right of tribunal to exercise its power with respect to particular matter, general jurisdiction being conferred by the constitution or statutes, and particular jurisdiction by filing of complaint and issuance of summons.—Pease v. State, 129 N.E. 337, 74 Ind.App. 572.

34. Ill.—Thayer v. Village of Downers Grove, 16 N.E.2d 717, 369 Ill. 334—People ex rel. Sokoll v. Municipal Court of Chicago, 194 N.E. 242, 359 Ill. 102, affirming 276 Ill. App. 102—People ex rel. Weed v. Whipp, 186 N.E. 135, 352 Ill. 525—People v. Circuit Court of Washington County, 179 N.E. 441, 347 Ill. 34—People v. Siman, 119 N.E. 940, 284 Ill. 28.

Mo.—American Constitution Fire Assur. Co. v. O'Malley, 113 S.W.2d 795, 342 Mo. 139.

Mont.—Crawford v. Pierse, 185 P. 315, 56 Mont. 371.

Vt.—State v. Barnett, 3 A.2d 521.

Wyo.—Padlock Ranch v. Washakie Needles Irr. Dist., 61 P.2d 410, 50 Wyo. 253, denying rehearing 60 P.2d 819, 50 Wyo. 253—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

Power to render judgment as decisive

To determine jurisdiction the question is whether on the case before the court the action is judicial or extrajudicial, with or without the authority of law to render a judgment or decree on the rights of the litigant parties, and, if the law confers the power to render a judgment or decree, then the court has jurisdiction.—In re Green's Estate, 196 P. 128, 80 Okl. 256.

Enforcement of judgment

(1) "Jurisdiction" includes not only the power to hear and determine the cause but to enter and enforce a judgment.—Williams v. Hankins, 225 P. 243, 75 Colo. 136.

(2) Jurisdiction is the power to hear, determine, and enforce the conclusions reached.—Sanford v. Roberts, 236 S.W. 571, 193 Ky. 377.

(3) Jurisdiction is power to hear and determine, including power to issue process to enforce judgment or decree.—Bynum v. Brewer, 114 So. 577, 217 Ala. 52.

(4) Power of court to enforce its judgment as constituting or not constituting a necessary element of jurisdiction is considered in detail infra § 35.

35. U.S.—In re National Labor Relations Board, 58 S.Ct. 1001, 304 U. S. 486, 82 L.Ed. 1482.

36. Ill.—People ex rel. Carlstrom v. Shurtleff, 189 N.E. 291, 355 Ill. 210.

Tex.—Missouri, etc., R. Co. v. Jones, Com.App., 24 S.W.2d 366, citing Corpus Juris—Lone Star Gas Co. v. Birdwell, Civ.App., 74 S.W.2d 294, 296, citing Corpus Juris.

15 C.J. p 725 note 90.

37. U.S.—In re McMurray, D.C.Iowa, 8 F.Supp. 449.

Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 190,

278 Ky. 695, quoting Corpus Juris.

15 C.J. p 725 note 96—35 C.J. p 426 note 20, p 427 note 21.

38. S.C.—Glenn v. York County, 6 S.C. 412, 441.

15 C.J. p 726 note 7.

Limited to redress afforded by law

Courts do not make the law and they can only redress the wrongs of citizens where the remedy or the redress is provided by law.—Houston & North Texas Motor Freight Lines v. Local Union No. 886 of International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, D.C.Okla., 24 F. Supp. 619.

39. U.S.—Schlosser v. Welsh, D.C.S.D., 5 F.Supp. 993.

Cal.—Hayward v. Superior Court in and for Los Angeles County, 20 P. 2d 348, 130 Cal.App. 607.

Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 190, 278 Ky. 695, quoting Corpus Juris. N.D.—Rasmussen v. Schmalenberger, 235 N.W. 496, 60 N.D. 527.

Or.—In re McCormick, 143 P. 915, 144 P. 425, 72 Or. 608.

Tex.—Morrow v. Corbin, 62 S.W.2d 641, 645, 122 Tex. 553, citing Corpus Juris—Stewart v. Moore, Civ. App., 291 S.W. 886.

40. N.C.—Williams v. Williams, 125 S.E. 482, 188 N.C. 728.

15 C.J. p 725 note 87.

41. N.Y.—Benedict v. Clarke, 123 N. Y.S. 964, 139 App.Div. 342.

15 C.J. p 725 note 3.

42. Iowa.—Incorporated Town of Carpenter v. Joint Drainage Dist. No. 6, 197 N.W. 656, 658, 198 Iowa 182, modified in other respects 199 N.W. 265, 198 Iowa 182.

43. Ohio.—Mahoning Valley R. Co. v. Santoro, 112 N.E. 190, 93 Ohio St. 53.

Okla.—Board of Trustees of Firemen's Relief and Pension Fund of City of Marietta v. Brooks, 67 P.2d 4, 179 Okl. 600.

Tex.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—Stewart v. Moore, Civ.App., 291 S.W. 886.

15 C.J. p 724 note 81.

an action, petition, or other proceeding;⁴⁴ the power vested by law in a tribunal to hear and determine causes properly coming before it;⁴⁵ the power, lawfully conferred, to deal with the subject involved in the action;⁴⁶ the power to hear and determine the subject matter in controversy;⁴⁷ the right to adjudicate concerning the subject matter in a given case;⁴⁸ the power to hear and determine the subject matter in controversy between parties to the suit;⁴⁹ the power to adjudicate a case on the merits and dispose of it as justice may require;⁵⁰ the power to decide a case either way, as the merits may require;⁵¹ the power conferred by law to determine causes concerning certain subjects, and between parties legally before the court, by process and notice, actual or constructive;⁵² the authority to judge or to declare the law between parties brought into court;⁵³ the right of a court or a judge to pronounce a sentence of the law on a case

or issue before him, acquired through due process of law;⁵⁴ the authority to perform any judicial function;⁵⁵ the right of administering justice through the laws;⁵⁶ the legal right by which judges exercise their authority;⁵⁷ and the authority or power which a man hath to do justice in causes of complaint brought before him.⁵⁸

While the term "jurisdiction" may be and ordinarily is employed as relating to the forum, court, or judge that may hear a cause,⁵⁹ it may also be employed as having reference to and meaning the district or geographical limits within which the judgments or orders of a court can be enforced or executed.⁶⁰

"Common-law jurisdiction," is a phrase employed as referring to jurisdiction to hear and determine causes which were cognizable by the courts of law, under what is known as the common law of Eng-

44. Ohio.—Mahoning Valley R. Co. v. Santoro, 112 N.E. 190, 93 Ohio St. 53—Willis v. Street, 30 Ohio N.P., N.S., 579.

15 C.J. p 725 note 88.

Test of "jurisdiction" is whether court had power to enter on inquiry.—Berkman v. Levy, Tex.Civ.App., 129 S.W.2d 397, error dismissed, judgment correct.

45. Ill.—Saylor v. Duel, 86 N.E. 119, 236 Ill. 429, 19 L.R.A., N.S., 377.

Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 190, 278 Ky. 695, quoting *Corpus Juris*.

46. Alaska.—Lynch v. Collings, 7 Alaska 84.

47. U.S.—Delaware & Hudson Co. v. U. S., D.C.N.Y., 295 F. 558, affirmed 45 S.Ct. 153, 266 U.S. 438, 69 L.Ed. 369—Hartford Life Ins. Co. v. Johnson, C.C.A.Mo., 268 F. 30.

Ill.—Wilmette State Bank v. City of Des Plaines, 181 N.E. 696, 349 Ill. 106—People v. Brewer, 160 N.E. 76, 328 Ill. 472—Carroll, Schendorf & Boenicke v. Hastings, 269 Ill.App. 564—Davis v. Alton, etc., R. Co., 180 Ill.App. 1.

Okl.—In re Harkness' Estate, 204 P. 911, 83 Okl. 107, 42 A.L.R. 399—Dickson v. Lowe, 163 P. 523, 65 Okl. 64.

48. U.S.—Nixon Chemical Products Co. v. Leekie, N.J., 39 F.2d 318, certiorari denied Robb v. Nixon Chemical Products Co., 51 S.Ct. 22, 282 U.S. 841, 75 L.Ed. 747.

Cal.—Harrington v. Superior Court in and for Placer County, 228 P. 15, 194 Cal. 185—Donner v. Superior Court within and for Los Angeles County, 255 P. 272, 82 Cal. App. 165.

Ind.—Freestone v. State, 176 N.E. 877, 98 Ind.App. 623.

Mo.—United Cemeteries Co. v. Strother, 119 S.W.2d 762, 342 Mo. 1155—Dusenberg v. Rudolph, 30 S.W. 2d 94, 325 Mo. 881—Davis v. Morgan Foundry Co., 28 S.W.2d 231, 224 Mo.App. 162.

Ohio.—State ex rel. Hath v. Moloney, 186 N.E. 362, 126 Ohio St. 526.

Pa.—Mintz v. Mintz, 83 Pa.Super. 85.

Tex.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—Texas Employers' Ins. Ass'n v. Evans, 298 S.W. 516, 117 Tex. 113, answers conformed to, Civ.App., 2 S.W.2d 566—Ex parte Armstrong, 8 S.W.2d 674, 110 Tex.Cr. 362.

Wash.—Alberta Lumber Co. v. Pioneer Lumber Co., 244 P. 250, 138 Wash. 132.

15 C.J. p 725 note 85.

49. U.S.—Olson v. Hoffman, D.C.Ill., 4 F.2d 263—Hartford Life Ins. Co. v. Johnson, C.C.A.Mo., 268 F. 30.

Ill.—People v. Blocklinger, 176 N.E. 749, 344 Ill. 447.

N.D.—Christenson v. Grandy, 180 N. W. 18, 46 N.D. 418.

Okl.—Fehr v. Black Petroleum Corporation, 229 P. 1048, 103 Okl. 241—In re Green's Estate, 196 P. 128, 80 Okl. 256—National Surety Co. v. S. H. Hanson Builders' Supply Co., 165 P. 1136, 64 Okl. 59.

Tex.—Farmers' Nat. Bank of Stephenville v. Daggett, Com.App., 2 S.W.2d 834, affirming Daggett v. Farmers' Nat. Bank, Civ.App., 259 S.W. 198.

15 C.J. p 725 note 84, p 726 note 6.

50. U.S.—The Resolute, Or., 18 S. Ct. 112, 168 U.S. 437.

Hawaii.—Kim Poo Kum v. Sugiyama, 33 Hawaii 545.

Va.—Shelton v. Sydnor, 102 S.E. 83, 126 Va. 625.

51. U.S.—Erickson v. U. S., Wash., 44 S.Ct. 310, 264 U.S. 246, 68 L. Ed. 661.

52. Ind.—Robertson v. State, 10 N. E. 582, 109 Ind. 78, 82.

15 C.J. p 725 note 92.

53. Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 190, 278 Ky. 695, quoting *Corpus Juris*.

La.—See Swift & Co. v. Villemeur, 131 So. 855, 856, citing *Corpus Juris*.

15 C.J. p 725 note 2.

54. Pa.—Mintz v. Mintz, 83 Pa.Super. 85.

Vt.—State v. Wakefield, 15 A. 181, 60 Vt. 618—Perry v. Morse, 57 Vt. 509.

55. Or.—In re McCormick, 143 P. 915, 144 P. 425, 72 Or. 608.

15 C.J. p 725 note 95.

56. W.Va.—Johnston v. Hunter, 40 S.E. 448, 50 W.Va. 52.

15 C.J. p 725 note 99.

57. Ind.—Curless v. Watson, 102 N.E. 497, 180 Ind. 86, 91, denying transfer 100 N.E. 576, 54 Ind.App. 110.

58. Fla.—Bucky v. Willard, 16 Fla. 330.

35 C.J. p 426 note 19.

59. Ohio.—Mahoning Valley R. Co. v. Santoro, 112 N.E. 190, 93 Ohio St. 53.

60. Tex.—Sullivan v. Weshoff, Civ. App., 38 S.W.2d 604, 606, citing *Corpus Juris*.

15 C.J. p 726 note 8.

"Jurisdiction" and "venue" distinguished see *infra* this section subdivision c.

"Foreign jurisdiction" is any jurisdiction foreign to that of the forum.—Black L.D.

land;⁶¹ jurisdiction as appertained to the common law of England, as administered through her courts;⁶² the power of the court to hear and determine cases according to the rules of common law.⁶³ The term as applied to courts is used to distinguish these courts from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law.⁶⁴

Jurisdiction of a particular court is that portion of the judicial power which it has been authorized to exercise by the constitution or statutes.⁶⁵

Jurisdiction over the people. A statute giving certain courts "full jurisdiction and power in and over the people" of a certain territory gives jurisdiction over property within such territory as well as over persons residing therein.⁶⁶

Consultive jurisdiction. Where one court aids another by giving an opinion on a matter which the latter has under consideration, the court which gives the opinion is said to exercise a consultive jurisdiction.⁶⁷

Jurisdiction in rem and in personam. Jurisdiction is of two kinds, jurisdiction of the person or jurisdiction in personam, and jurisdiction of the thing or jurisdiction in rem.⁶⁸ Jurisdiction of the person is the power of a court to render a personal judgment, or to subject the parties in a particular case to the decisions and rulings made by it in such case,⁶⁹ and is obtained by appearance or by serving the proper process in the manner required by law on persons or parties subject to be sued in a particular action.⁷⁰ Actions in rem and in personam are discussed in Actions § 1.

Summary jurisdiction is the jurisdiction of a court to give a judgment or make an order itself forthwith.⁷¹

The term "*venue jurisdiction*" means the power of the particular court to function,⁷² and raises the question of the judicial power of such particular court to determine the cause before it.⁷³ The distinction between "venue" and "jurisdiction" is discussed infra in subdivision c of this section.

"*Judicial power*", which is defined in this work under the word "Judicial," also in 34 C.J. p 1183 note 39-p 1184 note 55, cannot exist without jurisdiction, and must of necessity be exercised within the scope of jurisdiction and not beyond it.⁷⁴

"*Plenary power*," as the term is used in defining the jurisdiction of a court, means full, entire, complete and absolute power.⁷⁵

What law governs. The law of the forum determines the jurisdiction of a court.⁷⁶

b. Lack of Jurisdiction Generally

Strictly speaking, lack of jurisdiction means lack of judicial power to act in the premises, although lack of jurisdiction has been loosely used to convey the idea of error in rendering a decision, and also that of forbearance from the exercise of jurisdiction.

Lack of jurisdiction, it has been said, may consist in lack of judicial power to act at all in a given situation or with reference to a certain subject matter, or may denote want of jurisdiction of the subject matter of the action in a particular instance where prescribed conditions precedent to the exercise of judicial power have not been complied with.⁷⁷ In cases where the idea intended to be conveyed is that the exercise of judicial power would

61. Me.—Dean, Petitioner, 22 A. 385, 83 Me. 489, 496, 13 L.R.A. 229.

12 C.J. p 203 note 28—15 C.J. p 720 note 53 [b] (2), p 731 note 56 [b].

62. Cal.—In re Conner, 39 Cal. 98, 99, 100, 2 Am.R. 427.
12 C.J. p 203 note 29.

63. Utah.—Kenyon v. Kenyon, 24 P. 829, 3 Utah 431, 434.

15 C.J. p 720 note 53 [b] (1).

64. U.S.—Levin v. U. S., Mo., 128 F. 326, 332, 63 C.C.A. 476.

"Common-law jurisdiction" as used in a statute relating to naturalization see the title Aliens § 134.

65. Tex.—Morrow v. Corbin, 62 S.W. 2d 641, 122 Tex. 553.

66. S.C.—Rushton v. Woodham, 46 S.E. 943, 68 S.C. 110.

67. Bouvier L.D.

68. Tex.—H. H. Watson Co. v. Cobb Grain Co., Com.App., 292 S.W. 174,

reversing Cobb Grain Co. v. H. H. Watson Co., Civ.App., 290 S.W. 812.

69. Iowa.—Collins v. Powell, 277 N.W. 477, 224 Iowa 1015.

15 C.J. p 786 note 53.

70. Iowa.—Collins v. Powell, 277 N.W. 477, 481, quoting *Corpus Juris*.

Wyo.—Grieve v. Huber, 266 P. 128, 130, citing *Corpus Juris*.

15 C.J. p 786 note 53.

Jurisdiction of subject matter distinguished

"Jurisdiction of subject-matter" relates to the judicial power of the court to determine the cause, and "jurisdiction of the person" of defendant relates to whether defendant is properly before the court and subject to its jurisdiction.—Monarch Anthracite Mining Co. v. Coffin, C.C.A. Pa., 102 F.2d 337.

71. Black L.D.

72. U.S.—Brand v. Pennsylvania R. Co., D.C.Pa., 22 F.Supp. 569.

73. U.S.—Monarch Anthracite Mining Co. v. Coffin, C.C.A.Pa., 102 F.2d 337.

74. Ohio.—Ex parte Steinmetz, 172 N.E. 623, 35 Ohio App. 491.

Exercise of judicial power in civil cases

Judicial power, in civil matters, is exercised according to course of common law.—Ex parte Steinmetz, 172 N.E. 623, 35 Ohio App. 491.

75. Ohio.—Madigan v. Dollar Building & Loan Co., 4 N.E.2d 68, 52 Ohio App. 553.

76. N.Y.—Mertz v. Mertz, 3 N.E.2d 597, 271 N.Y. 466, affirming 235 N.Y.S. 590, 247 App.Div. 713, affirming 284 N.Y.S. 83, 153 Misc. 55.

77. Wis.—State v. Williams, 245 N.W. 663, 209 Wis. 511—Seyfert v. Seyfert, 229 N.W. 636, 201 Wis. 223.

be erroneous, there is sometimes said to be a "want of jurisdiction,"⁷⁸ although, strictly speaking, "want of jurisdiction" refers to want of power rather than to the erroneous exercise thereof.⁷⁹ The court's forbearance from exercising its power is sometimes called "lack of jurisdiction."⁸⁰

c. Distinctions, Including Distinction between Jurisdiction and Venue

"Jurisdiction" has been distinguished from "judgment," "merits," and other terms. "Jurisdiction" is distinguished from "venue" in that the latter refers to the place of trial and the former to the power to hear the trial or case.

Jurisdiction is a subject which relates to the power of the court and not to the rights of the parties as between themselves,⁸¹ and has been distinguished from "judgment" or "decision";⁸² and "jurisdiction" has been distinguished from "merits" in that the former means the power to entertain the suit, consider the merits, and render binding judgment, whereas the latter means the various elements entering into plaintiff's right to the relief sought.⁸³ Jurisdiction is distinguished from procedure in that "jurisdiction" relates to the court or forum that may hear and determine a controversy and "procedure" relates to the form or manner of conducting the suit.⁸⁴

Distinguished from "venue." The distinction between "jurisdiction" and "venue" has been plainly

established⁸⁵ and has frequently been recognized.⁸⁶ Jurisdiction connotes the power to decide a case on the merits, while venue connotes locality, the place where the suit should be heard.⁸⁷ The word "venue," unless it is given jurisdictional effect by localizing the action, relates only to the place where or the territory within which either party may require the case to be tried, and unless it is a localized action, the question of jurisdiction of subject matter is not involved.⁸⁸ "Venue" as a matter of procedure does not arise until an action is started.⁸⁹ The mere existence of general rules of venue, whether in common law or statutory form, does not, of itself, affect the right of the court to hear and determine foreign causes.⁹⁰

§ 16. General and Limited or Special Jurisdiction

General jurisdiction extends to all controversies, and special or limited jurisdiction is confined to particular controversies or is such as must be exercised under statutory limitations.

General jurisdiction is such as extends to all controversies which may be brought before a court within the legal bounds of rights and remedies.⁹¹ Limited or special jurisdiction, on the other hand, is jurisdiction which is confined to particular causes,⁹² or which can be exercised only under the limitations and circumstances prescribed by the statute.⁹³

78. Wis.—Harrigan v. Gilchrist, 99 N.W. 909, 934, 121 Wis. 127.

79. Wis.—Harrigan v. Gilchrist, *supra*.

80. U.S.—Amey v. Colebrook Guaranty Sav. Bank, C.C.A.Vt., 92 F. 2d 62, certiorari denied 58 S.Ct. 271, 302 U.S. 750, 82 L.Ed. 580.

81. Cal.—Hogan v. Horsfall, 266 P. 1002, 91 Cal.App. 37, followed in 266 P. 1005, 91 Cal.App. 797.

N.D.—Hanson v. North Dakota Workmen's C. Bureau, 248 N.W. 680, 63 N.D. 79.

15 C.J. p 726 note 9.

82. Tex.—Gossett v. Hensley, Civ. App., 94 S.W.2d 903.

15 C.J. p 723 note 78 [b].

83. U.S.—General Inv. Co. v. New York Cent. R. Co., Ohio, 46 S.Ct. 496, 497, 271 U.S. 228, 70 L.Ed. 920—Dyer v. Stauffer, C.C.A.Ohio, 19 F.2d 922, certiorari denied 48 S.Ct. 114, 275 U.S. 551, 72 L.Ed. 421.

"There may be jurisdiction and yet an absence of merits"

U.S.—General Inv. Co. v. New York Cent. R. Co., Ohio, 46 S.Ct. 496, 497, 271 U.S. 228, 70 L.Ed. 920.

21 C.J.S.—3

Distinguished from plaintiff's right to prevail

The jurisdiction of a court to entertain a cause, and the right of plaintiff therein ultimately to prevail, are essentially different questions, the former being determined by an inspection of the record, and the latter resulting from the facts established by proof.—Stidham v. Brooks, Del., 5 A.2d 522.

84. Ohio.—Mahoning Valley R. Co. v. Santoro, 112 N.E. 190, 93 Ohio St. 53.

85. Mass.—Paige v. Sinclair, 130 N. E. 177, 237 Mass. 482.

86. Pa.—Malessa v. Pennsylvania R. Co., 22 Pa.Dist. 1087, 41 Pa. Co. 315.

Wash.—National Ass'n of Creditors v. Brown, 264 P. 1005, 147 Wash. 1. 67 C.J. p 11 note 16.

87. U.S.—Toulmin v. James Mfg. Co., D.C.N.Y., 27 F.Supp. 512.

Ky.—Britton v. Davis, 108 S.W.2d 665, 268 Ky. 7.

Miss.—Grenada Bank v. Petty, 164 So. 316, 317, 174 Miss. 415, quoting *Corpus Juris*.

Mont.—Stanton Trust & Savings Bank v. Johnson, 65 P.2d 1188, 104 Mont. 235.

N.C.—Shaffer v. Bank, 160 S.E. 481, 201 N.C. 415.

Utah.—Floor v. Mitchell, 41 P.2d 281, 86 Utah 203.

67 C.J. p 12 note 17.

88. Ky.—Cushing v. Doudistal, 129 S.W.2d 527, 278 Ky. 779.

89. Minn.—State ex rel. Helmes v. District Court of Ramsey County, 287 N.W. 875.

90. Minn.—Little v. Chicago, etc., R. Co., 67 N.W. 846, 65 Minn. 48, 60 Am.S.R. 421, 33 L.R.A. 423.

67 C.J. p 12 note 21.

91. Pa.—Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co., 167 A. 636, 638, 109 Pa.Super. 571, quoting *Corpus Juris*.

15 C.J. p 726 note 11.

92. Pa.—Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co., *supra*.

15 C.J. p 726 note 12.

93. Pa.—Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co., *supra*.

15 C.J. p 726 note 13.

A court exercising special statutory jurisdiction is governed by the same rules as courts of limited jurisdiction.⁹⁴

§ 17. Original and Appellate Jurisdiction

Original jurisdiction is that of a court to proceed in the first instance, and appellate jurisdiction comprises the power of a superior court to review and revise the final judgment of an inferior tribunal.

Original jurisdiction is jurisdiction conferred on, or inherent in, a court in the first instance.⁹⁵ Appellate jurisdiction is the power and authority conferred on a superior court to rehear and determine causes which have been tried in inferior courts;⁹⁶ the cognizance which a superior court takes of a case removed to it, by appeal or writ of error, from the decision of an inferior court;⁹⁷ or the review by a superior court of the final judgment or order of some inferior court.⁹⁸ While it is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted and does not create that cause,⁹⁹ yet such jurisdiction once established not only includes the power to reverse the judgment, but also to control and direct the subsequent action of the subordinate court,¹ as well as to issue all writs and process in aid of such jurisdiction.²

§ 18. Exclusive and Concurrent or Coördinate Jurisdiction

Exclusive jurisdiction is sole jurisdiction and concurrent jurisdiction is that shared with another tribunal.

Exclusive jurisdiction is jurisdiction confined to a particular tribunal or grade of courts³ and possessed by it to the exclusion of all others,⁴ or jurisdiction possessed by a particular court to the ex-

clusion not of all other courts but merely to the exclusion of other courts of the same grade;⁵ that jurisdiction which gives to one tribunal sole power to try the cause.⁶

Concurrent or coördinate jurisdiction is that jurisdiction exercised by different courts at the same time over the same subject matter and within the same territory, and wherein litigants may in the first instance resort to either court indifferently,⁷ that of several different tribunals, each authorized to deal with the same subject matter,⁸ and when a proceeding in respect of a certain subject matter can be brought in any one of several different courts, they are said to have concurrent jurisdiction.⁹ The term is usually applied to two or more courts,¹⁰ and concurrent jurisdiction may be briefly defined as "equal jurisdiction" or "same jurisdiction."¹¹

§ 19. Criminal and Civil Jurisdiction

Criminal jurisdiction is the power to take cognizance of a criminal offense and to impose sentence following a lawful trial. Civil jurisdiction is that which exists when the matter is not of a criminal nature.

The terms "civil" and "criminal" when used in reference to jurisdiction or judicial proceedings generally refer to the nature and form of the remedy, and the cause of action or occasion for instituting the proceedings.¹² Criminal jurisdiction is that which exists for the punishment of crimes,¹³ and has been defined as the power and authority constitutionally conferred on a court, judge, or magistrate to take cognizance of an offense and to pronounce the judgment or sentence provided by law, after a trial in the manner sanctioned by law as proper and sufficient;¹⁴ and its nature and scope

94. Ill.—Hook v. Wright, 160 N.E. 579, 329 Ill. 299.

95. Anderson L.D. 15 C.J. p 727 note 16.

96. Tex.—Waters-Pierce Oil Co. v. State, 106 S.W. 326, 107 Tex. 1—Brownsville v. Basse, 43 Tex. 440, 449.

3 C.J. p 356 note 70—15 C.J. p 727 note 17.

97. Cal.—Maxson v. Madera County Super.Ct., 57 P. 379, 124 Cal. 468. 15 C.J. p 727 note 18.

98. S.C.—Ex p. Evans, 52 S.E. 419, 72 S.C. 547.

3 C.J. p 356 note 70—15 C.J. p 727 note 19.

99. Kan.—Auditor v. Atchison, etc., R. Co., 6 Kan. 500, 505, 7 Am.R. 575.

15 C.J. p 727 note 20.

1. Cal.—Maxson v. Madera County Super. Ct., 57 P. 379, 124 Cal. 468. 15 C.J. p 727 note 21.

2. Mont.—Finlen v. Heinze, 69 P. 829, 70 P. 517, 27 Mont. 107.

15 C.J. p 727 note 22.

3. Anderson L.D. 15 C.J. p 728 note 23.

4. Ark.—Watson v. Henderson, 135 S.W. 461, 98 Ark. 63. Philippine.—Barrameda v. Moir, 25 Philippine 44.

5. Me.—State v. Jones, 73 Me. 280. N.Y.—People v. Fuchs, 152 N.Y.S. 445, 166 App.Div. 811—People v. Wenk, 127 N.Y.S. 702, 71 Misc. 868.

6. Okl.—Ex parte Wade, 100 P. 35, 38, 2 Okl.Cr. 100.

Pa.—Commonwealth v. Superintendent of House of Correction, 64 Pa. Super. 613.

7. Ill.—Hercules Iron Works v. Elgin, etc., R. Co., 30 N.E. 1050, 141 Ill. 491, 498.

15 C.J. p 728 note 24.

8. Okl.—Oklahoma Fire Ins. Co. v. Philip, 111 P. 334, 27 Okl. 234, 235.

12 C.J. p 395 note 32.

9. Okl.—Ex parte Wade, 100 P. 35, 38, 2 Okl.Cr. 100.

10. Wis.—J. S. Keator Lumber Co. v. St. Croix Boom Corp., 38 N.W. 529, 72 Wis. 62, 95, 7 Am.S.R. 837. 12 C.J. p 396 note 33.

11. Ky.—Allen v. Moore, 191 S.W. 93, 173 Ky. 394.

"Concurrent jurisdiction means joint and equal jurisdiction."—Eastern Maine General Hospital v. Harrison, 193 A. 246, 248, 135 Me. 190.

12. N.Y.—Landers v. Staten Island R. Co., 53 N.Y. 450, 14 Abb.Pr.N.S. 346, reversing 13 Abb.Pr.N.S. 338.

13. Bouvier L.D.

14. Nev.—Eureka County Bank v. Heas Corpus Cases, 126 P. 655, 129 P. 308, 35 Nev. 80.

16 C.J. p 147 note 4.

are discussed in the C.J.S. title Criminal Law § 107, also in 16 C.J. p 147 notes 5-9. Civil jurisdiction is that which exists when the subject matter is not of a criminal nature.¹⁵

§ 20. Territorial Jurisdiction

Territorial jurisdiction is the power of a court with reference to the territory within which it is to be exercised.

Territorial jurisdiction has been defined as the power of the tribunal considered with reference to the territory within which it is to be exercised.¹⁶ connotes power over property and persons within the territory, and has been distinguished from jurisdiction over the subject matter.¹⁷ The territorial jurisdiction of a court is a matter of substance and not of form, a limitation which is fundamental and not merely theoretical.¹⁸ The jurisdiction of the state within its own territory is susceptible of no limitation not imposed by itself.¹⁹

§ 21. Complete Jurisdiction

Complete jurisdiction connotes both the power to hear and determine and the power to enforce the judgment rendered. To be complete the jurisdiction should extend to the subject matter; in actions in personam it must extend to the person; in proceedings in rem it must extend to the res in contest.

Complete jurisdiction includes not only the power to hear and determine, but the power to enforce the determination,²⁰ as the judgment or decree is the end for which jurisdiction is exercised, and it is only through the judgment and its execution that

the power of the court is made efficacious and its jurisdiction complete.²¹ To render the jurisdiction of a court complete, it must have jurisdiction over the subject matter,²² and in actions in personam over the person,²³ or in proceedings in rem over the res or matter in contest.²⁴

§ 22. Competent Jurisdiction

"Competent jurisdiction" may mean abstract authority to hear and determine cases involving a certain subject matter or jurisdiction over the person and cause. A court of competent jurisdiction is one having power at the time of acting to do the particular act.

The term "competent jurisdiction" is susceptible of two meanings; it may signify that the court must acquire and exercise jurisdiction competent to grant an application, through and by reason of a strict conformity to the requirements of a statute, or it may signify jurisdiction over the subject matter, a sort of authority in the abstract, to hear and determine a case.²⁵ In its usual signification, however, the term embraces the person as well as the cause.²⁶

A court of competent jurisdiction is one having power and authority of law at the time of acting to do the particular act;²⁷ one that has jurisdiction both of the person and of the subject matter;²⁸ one provided for in the constitution or created by the legislature and which has jurisdiction of the subject matter and of the person;²⁹ the court which has power or authority conferred on it by law to hear and determine a particular application,

15. Bouvier L.D.
15 C.J. p 728 note 28.

16. Bouvier L.D.
15 C.J. p 728 note 29.

17. N.Y.—American Historical Soc. v. Glenn, 227 N.Y.S. 174, 179, 131 Misc. 291.

Power over all property and persons
"The concept of territorial jurisdiction imports power of the court over all the property within its confines, and over all its residents, and over nonresidents while sojourning in its territory."—American Historical Soc. v. Glenn, *supra*.

18. N.Y.—Salzman v. Attrean, 254 N.Y.S. 288, 142 Misc. 245.

19. U.S.—Watts v. Unione Austriaca di Navigazione, D.C.N.Y., 224 F. 188.

20. U.S.—In re Potell, D.C.N.Y., 53 F.2d 877, 880, citing *Corpus Juris*.
La.—State v. North American Land, etc., Co., 31 So. 172, 106 La. 621, 87 Am.S.R. 309.

21. U.S.—Central Nat. Bank v. Stevens, N.Y., 18 S.Ct. 403, 169 U.S. 432,

42 L.Ed. 807—Riggs v. Johnson Co., Iowa, 6 Wall. 166.
15 C.J. p 728 note 32.

Process subsequent to judgment as essential

"Process subsequent to judgment is as essential to jurisdiction as process antecedent, else the judicial power would be incomplete, and entirely inadequate to the purposes for which it was conferred."—Central Nat. Bank v. Stevens, N.Y., 18 S.Ct. 403, 415, 169 U.S. 432, 42 L.Ed. 807—Riggs v. Johnson, Iowa, 6 Wall. 166.

22. U.S.—Ex parte Craig, C.C.A.N.Y., 282 F. 133, reversing, D.C., 274 F. 177, in which certiorari is denied Craig v. McCarthy, 42 S.Ct. 272, 268 U.S. 604, 617, 66 L.Ed. 793, certiorari granted Craig v. Hecht, 43 S.Ct. 90, 260 U.S. 714, 67 L.Ed. 477, and affirmed 44 S.Ct. 103, 263 U.S. 255, 68 L.Ed. 293.
15 C.J. p 728 note 33.

23. U.S.—Ex parte Craig, *supra*.
15 C.J. p 728 note 34.

24. U.S.—Cooper v. Reynolds, Tenn., 10 Wall. 308, 19 L.Ed. 931—Grignon v. Astor, Wis., 2 How. 319, 11 L.Ed. 283.

25. Tex.—Lubbock Oil Refining Co. v. Bourn, Civ.App., 96 S.W.2d 569, 571, quoting *Corpus Juris*.
12 C.J. p 236 notes 24-26.

26. Tex.—Lubbock Oil Refining Co. v. Bourn, *supra*.
12 C.J. p 236 note 27—15 C.J. p 728 note 36.

27. Okl.—Ex parte Davis, Cr.App. 91 P.2d 799, 807—Ex parte Plaistridge, 173 P. 646, 68 Okl. 256.
Tex.—Lubbock Oil Refining Co. v. Bourn, Civ.App., 96 S.W.2d 569, 571, quoting *Corpus Juris*.
12 C.J. p 236 note 28-29—15 C.J. p 729 note 37.

"Court of competent jurisdiction without the United States" means a court having jurisdiction according to the laws of any civilized country.—In re Neidecker, C.C.A.N.Y., 82 F.2d 263, 295.

28. Ga.—Robinson v. Attapulugus Clay Co., 189 S.E. 555, 55 Ga.App. 141—English v. Central of Ga. Ry. Co., 66 S.E. 969, 7 Ga.App. 263.

29. Kan.—In re Norton, 68 P. 639, 64 Kan. 842, 849, 91 Am.S.R. 255.

and whose jurisdiction it is proper to invoke in that instance;³⁰ any court which is subject to the legislation of the commonwealth.³¹

The term "competent court" is defined supra § 1.

§ 23. Jurisdiction of the Subject-Matter

Jurisdiction of the subject matter is the power to hear and determine the case and the question involved.

Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong;³² the power to deal with the general subject involved in

the action;³³ and means not simply jurisdiction of the particular case then occupying the attention of the court but jurisdiction of the class of cases to which the particular case belongs,³⁴ the authority to hear and determine both the class of actions to which the action before the court belongs and the particular question which it assumes to determine.³⁵ "Jurisdiction over the subject-matter" means the nature of the cause of action and relief sought, and such jurisdiction is conferred by the sovereign authority which organizes the court and is to be sought for in the general nature of the court's pow-

30. Neb.—Hubermann v. Evans, 65 N.W. 1045, 46 Neb. 784.

31. Mass.—Reynolds v. Enterprise Transp. Co., 85 N.E. 110, 198 Mass. 590.

12 C.J. p 286 note 31.

32. U.S.—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A. Wyo., 74 F.2d 827—Noxon Chemical Products Co. v. Leckie, C.C.A. N.J., 39 F.2d 318, certiorari denied Robb v. Noxon Chemical Products Co., 51 S.Ct. 22, 283 U.S. 841, 75 L.Ed. 747—Ex parte Craig, C.C.A. N.Y., 282 F. 138, reversing 274 F. 177, certiorari denied Craig v. McCarthy, 42 S.Ct. 272, 258 U.S. 604, 617, 66 L.Ed. 793, certiorari granted, Craig v. Hecht, 43 S.Ct. 90, 260 U.S. 714, 67 L.Ed. 477, and affirmed 44 S.Ct. 103, 263 U.S. 255, 68 L.Ed. 293.

Fla.—Cobb v. State ex rel. Hornickel, 187 So. 151, 134 Fla. 315—Curtis v. Albritton, 132 So. 677, 101 Fla. 853—Crill v. State Road Department, 117 So. 795, 96 Fla. 110.

Ga.—Pal Theatre, Inc. v. Tarver, App., 5 S.E.2d 277, 279.

Ill.—Brown v. Jacobs, 12 N.E.2d 10, 367 Ill. 545—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 300, 365 Ill. 588, citing *Corpus Juris*—Ashlock v. Ashlock, 195 N.E. 657, 360 Ill. 115—Finlen v. Skelly, 141 N.E. 388, 310 Ill. 170—Taylor Coal Co. v. Industrial Commission, 134 N.E. 169, 301 Ill. 381—Pocahontas Mining Co. v. Industrial Commission, 134 N.E. 160, 301 Ill. 462—People v. Ford, 124 N.E. 549, 289 Ill. 550—Oakman v. Small, 118 N.E. 775, 282 Ill. 360—Foreman Bros. Banking Co. v. Kelly—Atkinson Const. Co., 218 Ill.App. 356.

Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467—Waugh v. Board of Com'rs of Montgomery County, 115 N.E. 356, 64 Ind.App. 123.

Iowa—Collins v. Powell, 277 N.W. 477, 481, 224 Iowa 1015, quoting *Corpus Juris*.

Ky.—Sanford v. Roberts, 236 S.W. 571, 193 Ky. 377.

Mich.—Joy v. Two-Bit Corporation, 283 N.W. 45, 287 Mich. 244.

Mo.—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 842, 850, 322 Mo. 654, quoting *Corpus Juris*—State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, App., 113 S.W.2d 1034.

Neb.—Brandeen v. Lau, 201 N.W. 665, 113 Neb. 34.

N.Y.—Nowinski v. La Monte, 5 N.Y. S.2d 894, 168 Misc. 558—Cooper v. Davis, 248 N.Y.S. 227, 231 App.Div. 527.

Okl.—Glacken v. Andrew, 169 P. 1096, 69 Okl. 61.

Or.—Duncan Lumber Co. v. Willapa Lumber Co., 183 P. 476, 93 Or. 386, denying rehearing 182 P. 172, 93 Or. 386.

Pa.—Welser v. Ealer, 176 A. 429, 317 Pa. 182.

Tex.—Honea v. Graham, Civ.App., 66 S.W.2d 802, 804, quoting *Corpus Juris*.

15 C.J. p 734 note 93.

"When it is said that a court has jurisdiction of the subject-matter of any given cause, if these words are to be given their full meaning, they imply, generally speaking: (1) That the court has jurisdictional power to adjudicate the class of cases to which such case belongs; and (2) that its jurisdiction has been invoked in the particular case by lawfully bringing before it the necessary parties to the controversy; (3) the controversy itself by pleading of some sort sufficient to that end; and (4) when the cause is one in rem, the court must have judicial power or control over the res, the thing which is the subject of the controversy."—Lovett v. Lovett, 112 So. 768, 776, 93 Fla. 611.

Power to deal with abstract question

Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. U.S.—Feltz v. St. Louis, etc., R. Co., Ark., 60 F. 316, 8 C.C.A. 635.

Fla.—Lovett v. Lovett, 112 So. 768, 775.

Ga.—Melton v. Jenkins, 178 S.E. 754, 50 Ga.App. 613.

N.Y.—Field v. Chronik, 179 N.Y.S. 891, 190 App.Div. 501.

33. U.S.—Parker Bros. v. Fagan, C. C.A.Fla., 68 F.2d 616, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490.

Colo.—State Board of Dental Examiners v. Savelle, 8 P.2d 693, 90 Colo. 177, 82 A.L.R. 1176, followed in State Board of Dental Examiners v. Heitler, 8 P.2d 695, 90 Colo. 191, and appeal dismissed Savelle v. State Board of Dental Examiners of State of Colorado, 53 S.Ct. 5, 287 U.S. 562, 77 L.Ed. 496.

Fla.—Quigley v. Cremin, 113 So. 892, 94 Fla. 104, modifying 109 So. 312—Malone v. Meres, 109 So. 677, 91 Fla. 709.

Ga.—Pal Theatre, Inc. v. Tarver, App., 5 S.E.2d 277, 279.

Mo.—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W.2d 842, 850, 322 Mo. 654, quoting *Corpus Juris*.

N.Y.—Mulligan v. Bond & Mortgage Guarantee Co., 184 N.Y.S. 429, 193 App.Div. 741.

Or.—Dippold v. Cathlamet Timber Co., 193 P. 909, 98 Or. 183.

Tex.—Honea v. Graham, Civ.App., 66 S.W.2d 802, 804, quoting *Corpus Juris*.

15 C.J. p 735 note 94.

34. U.S.—Schodde v. U. S., C.C.A. Idaho, 69 F.2d 866.

Ga.—Georgia Power Co. v. Friar, 47 Ga.App. 675, 171 S.E. 210, 214, citing *Corpus Juris*.

Ill.—People ex rel. Barrett v. Shurtleff, 187 N.E. 271, 353 Ill. 248.

Ind.—Person v. Republic Casualty Co., 160 N.E. 43, 200 Ind. 350.

Mo.—Ballew Lumber & Hardware Co. v. Missouri Pac. Ry. Co., 232 S.W. 1015, 288 Mo. 473.

Tex.—Honea v. Graham, Civ.App., 66 S.W.2d 802, 804, quoting *Corpus Juris*.

15 C.J. p 729 note 39.

35. Wash.—Alberta Lumber Co. v. Pioneer Lumber Co., 244 P. 250, 138 Wash. 132.

ers or in the authority especially conferred on the court.³⁶ In order for a court to have "jurisdiction of the subject-matter," the particular issue determined must be properly brought before it in the particular proceeding for determination.³⁷

Elements of jurisdiction of subject matter are considered *infra* § 37 et seq.

Distinctions. Jurisdiction of the subject matter has been distinguished from jurisdiction of the person,³⁸ and from an appellate court's duty to hear and determine the cause.³⁹

§ 24. Jurisdictional Facts

The jurisdictional facts are those conditioning the power of the court to decide the issues of a case.

Jurisdictional facts are those which condition the power of the courts to decide some of the issues in the case, like the nature of the subject matter and the service of process,⁴⁰ and the power to grant relief has been called part of the jurisdictional facts.⁴¹

36. Va.—Wilson v. State Highway Commissioner, 4 S.E.2d 746.

Source of jurisdiction

(1) Jurisdiction of the subject matter is acquired by the act creating the court, since "subject-matter" means the nature of the cause of action, and of the relief sought.—*Motfatt v. Cassimus*, 190 So. 299, reversing 190 So. 297, 28 Ala.App. 582.

(2) "Subject-matter" of which a court has jurisdiction relates to right of the court to try and dispose of particular character of case either criminal or civil, and measure of such jurisdiction emanates from constitution, or from statute enacted pursuant to authority conferred by constitution.—*Cushing v. Doudistal*, 129 S.W.2d 527, 278 Ky. 779.

37. Ky.—Helton v. Hubbs, 129 S.W.2d 116, 278 Ky. 621.

38. U.S.—Monarch Anthracite Mining Co. v. Coffin, C.C.A.Pa., 102 F.2d 337.

Distinction stated

(1) "Jurisdiction of subject-matter" relates to the judicial power of the court to determine the cause, and "jurisdiction of the person" of defendant relates to whether defendant is properly before the court and subject to its jurisdiction.—*Monarch Anthracite Mining Co. v. Coffin*, *supra*.

(2) Component elements required to confer jurisdiction on a court consists of "jurisdiction of the per-

son," and "jurisdiction of the subject matter"; the former refers to bringing person to be affected by judgment before court so as to give him an opportunity to be heard, while the latter pertains to right of the court, under the laws of the sovereignty where it sits, to adjudicate the particular character of case, or issue.—*Swartz v. Caudill*, 130 S.W.2d 80, 279 Ky. 206.

39. Mo.—McClain v. Kansas City Bridge Co., 88 S.W.2d 1019, 338 Mo. 7, reversing, App., 83 S.W.2d 182.

Litigant's statutory right of appeal as raising different question

A court's "jurisdiction of the subject-matter" of an action means the nature of the cause of action or the relief sought or the power to entertain the suit and should not be confused with statutory right of a litigant to appeal, the presence and exercise of which results in the appellate court's duty to hear and determine the cause.—*McClain v. Kansas City Bridge Co.*, *supra*.

40. U.S.—In re Belle Fourche First Nat. Bank, 152 F. 64, 81 C.C.A. 260, 11 Ann.Cas. 355.

41. Tex.—Stokes v. Tumulty, Civ. App., 74 S.W.2d 417, affirmed *Tumulty v. Stokes*, 92 S.W.2d 1017, 127 Tex. 155.

42. Philippine.—Forbes v. Chuoco Tiaco, 16 Philippine 534, 600.

43. Ala.—Carter v. Mitchell, 142 So. 514, 517, 225 Ala. 287—*Broom v. Douglass*, 57 So. 860, 175 Ala. 268,

§ 25. Excess of Jurisdiction

Excess of jurisdiction is the state of being outside the limits of jurisdiction and is distinguished from complete lack of jurisdiction in that the act, although unauthorized with respect to the particular case, is still within the general power of the court.

Excess of jurisdiction may be defined as the state of being beyond or outside the limits of jurisdiction,⁴² and, as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized, and therefore void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in that particular case are wanting, and hence the judicial power is not in fact lawfully invoked.⁴³ Although a court may have jurisdiction of the subject matter and the parties, its act or order may, nevertheless, be in excess of its jurisdiction, as being something which it has no power to do;⁴⁴ and it has been said that any act of a court in violation of statutory prohibition may be considered to be in excess of jurisdiction.⁴⁵

44 L.R.A.N.S., 164, Ann.Cas.1914C 1155.

Cal.—In re Martin's Estate, 88 P.2d 755, 757, 31 Cal.App.2d 680, quoting *Corpus Juris*.

Fla.—Malone v. Meres, 109 So. 677, 684, 690, citing *Corpus Juris*.
Idaho.—Baldwin v. Anderson, 8 P. 2d 461, 463, citing *Corpus Juris*.

N.Y.—Dodge v. Supreme Court, State of New York, 291 N.Y.S. 527, 536, citing *Corpus Juris*.

N.D.—Hanson v. North Dakota Workmen's C. Bureau, 248 N.W. 680, 63 N.D. 79.

S.C.—Beckwith v. McAlister, 162 S. E. 623, 165 S.C. 1.

Lack of jurisdiction see *supra* § 15 b.

Absence of facts warranting action after inquiry

When jurisdiction to inquire and act depends on existence of certain facts, absence of proof of such facts limits power to that of inquiry only, and, if action is attempted, it is in excess of jurisdiction.—*King v. Superior Court in and for San Diego County*, 56 P.2d 268, 12 Cal.App.2d 501.

44. Utah.—Stockyards Nat. Bank of South Omaha v. Bragg, 245 P. 966, 67 Utah 60—*Andrus v. Blazzard*, 63 P. 888, 23 Utah 233, 54 L.R.A. 354.

45. Cal.—Kohn v. Superior Court in and for City and County of San Francisco, 55 P.2d 1186, 12 Cal. App.2d 459.

appears in §§ 120-139, flows from constitutional and statutory provisions, and from the common law so far as not repugnant to the federal and state constitutions and laws;⁶⁰ and courts can neither assume jurisdiction which is not conferred on them,⁶¹ nor decline, as appears in § 90 *infra*, that which is conferred, unless they are invested with discretion. Jurisdiction may depend on the existence of one of two or more alternative facts or conditions;⁶² and where certain facts must exist as a necessary prerequisite to the jurisdiction of a court, they must exist at or before the time when the court assumes jurisdiction.⁶³ Whenever the attention of the court is called to the absence of a jurisdictional fact, it may, and should, refuse to exceed its powers.⁶⁴ Delay in instituting an action for a period greater than that prescribed by a statute of limitations will not deprive a court of jurisdiction.⁶⁵

§ 29. Enlargement of Jurisdiction by Intendment

While, as a general rule, jurisdiction may be conferred on a court by necessary implication, as well as by express grant, special jurisdictional acts cannot be enlarged by implication or intendment beyond the express letter of the grant.

While it has been said that jurisdiction cannot be assumed by implication,⁶⁶ other courts have recognized that jurisdiction may be conferred on a court by necessary implication as effectually as by express terms.⁶⁷ However, special jurisdictional acts cannot be enlarged by implication or intendment beyond the express letter of the grant.⁶⁸ The name applied to a court will not of itself increase its jurisdiction.⁶⁹

§ 30. Limitation of Jurisdiction

Jurisdiction cannot be limited by the parties to a controversy, or by restrictions deriving their validity from a source outside the state or nation.

While the jurisdiction of state courts is subject

Stablemen, and Helpers of America, D.C.Okla., 24 F.Supp. 619.
15 C.J. p 730 note 54.

Jurisdiction by consent see *infra* § 85.

60. Mo.—State v. Anderson, App., 101 S.W.2d 530, 533, citing *Corpus Juris*.

Tex.—Stewart v. Moore, Com.App., 291 S.W. 886.

Utah.—Larson v. Salt Lake City, 97 P. 483, 34 Utah 318, 27 L.R.A., N.S., 462.

Wyo.—Urbach v. Urbach, 73 P.2d 953, 52 Wyo. 207, 113 A.L.R. 889.
15 C.J. p 731 note 56.

61. Cal.—Mannix v. Superior Court in and for Sacramento County, 24 P.2d 507, 133 Cal.App. 740.

N.Y.—People ex rel. Sandnes v. Sheriff of Kings County, 299 N.Y.S. 9, 164 Misc. 355.

Pa.—Arrott v. Allegheny County, 194 A. 910, 328 Pa. 293.

Tex.—Stewart v. Moore, Com.App., 291 S.W. 886.

Va.—Long v. Long, 144 S.E. 447, 151 Va. 156.

Wash.—Prince v. Saginaw Logging Co., 84 P.2d 397, 403, 197 Wash. 4, quoting *Corpus Juris*.

Wyo.—State ex rel. Leazenby v. True, 184 P. 229, 231, 26 Wyo. 314, citing *Corpus Juris*.

15 C.J. p 731 note 57.
Power of court to determine its own jurisdiction and effect of its decision see §§ 113, 115 *infra*.

62. Cal.—In re Paulsen's Estate, 178 P. 143, 179 Cal. 528.

Minn.—Strom v. Lindstrom, 275 N.W. 833, 834, 201 Minn. 226, quoting *Corpus Juris*.

Or.—Dippold v. Cathlamet Timber Co., 193 P. 909, 98 Or. 183.

15 C.J. p 732 note 66.

63. Cal.—In re Paulsen's Estate, 178 P. 143, 179 Cal. 528.

Del.—Stidham v. Brooks, 5 A.2d 522.

Minn.—Strom v. Lindstrom, 275 N.W. 833, 834, 201 Minn. 226, quoting *Corpus Juris*.

15 C.J. p 732 note 67.

64. Iowa.—In re Watters' Estate, 208 N.W. 281, 201 Iowa 884.

Ky.—Johnson v. Harvey, 88 S.W.2d 42, 49, 261 Ky. 522, quoting *Corpus Juris*.

Minn.—Strom v. Lindstrom, 275 N.W. 833, 834, 201 Minn. 226, quoting *Corpus Juris*.

15 C.J. p 732 note 68.

Right and duty of court to act of its own motion see § 114 *infra*.

65. N.J.—Rutherford Nat. Bank v. McKenzie, 1 A.2d 12, 120 N.J.Law 594.

66. Pa.—Arrott v. Allegheny County, 194 A. 910, 328 Pa. 293.

67. Cal.—In re Cate, App., 273 P. 617, supplementing opinions 270 P. 968 and 271 P. 356, which denied rehearing 270 P. 968.

Ind.—Partlow v. State, 144 N.E. 661, 195 Ind. 164.

Tex.—Ex parte Hughes, 129 S.W.2d 270—Spence v. Fenchler, 180 S.W. 597, 107 Tex. 443, reversing, Civ. App., 151 S.W. 1094.

Inherent powers of courts see § 31 *infra*.

Territorial jurisdiction held not enlarged by statute creating commissioner of motor vehicles the agent of nonresident owners and drivers of

automobiles for acceptance of process in civil suits, there being nothing in the statute to show clearly that such enlargement was intended.—MacPhail v. Nassau, 184 A. 633, 14 N.J.Misc. 292.

68. U.S.—Delaware Tribe of Indians v. U. S., 84 Ct.Cl. 535.

Cal.—People v. Superior Court in and for San Bernardino County, 285 P. 871, 104 Cal.App. 276.

Ill.—Central Illinois Public Service Co. v. Industrial Commission, 127 N.E. 80, 293 Ill. 62.

Mo.—American Asphalt Roof Corporation v. Marler, App., 56 S.W.2d 844.

N.J.—Di Meglio v. Slonk Const. Co., 5 A.2d 691, 122 N.J.Law 379, affirming 2 A.2d 470, 121 N.J.Law 366—Clea v. Moore, 195 A. 530, 119 N.J. Law 215.

N.Y.—City Real Estate Co. v. Realty Const. Corporation, 3 N.Y.S.2d 312, 167 Misc. 379.

Tex.—Baker v. Chisholm, 3 Tex. 157, 15 C.J. p 732 note 69.

"Legislative acts, giving courts special and extraordinary jurisdiction and powers, are usually strictly construed."—In re Downes' Estate, Del.Orph., 193 A. 561, 563.

Jurisdiction of special proceedings is limited by terms of statute under which proceeding is authorized.—Woods-Drury, Inc., v. Superior Court in and for City and County of San Francisco, 63 P.2d 1184, 18 Cal. App.2d 340.

69. Wis.—State v. Sande, 238 N.W. 504, 205 Wis. 495.

Effect of change of name of court generally see § 138 *infra*.

to express or implied limitations of federal law,⁷⁰ it has been broadly stated that, within territorial limits, the jurisdiction of the courts of each state or nation is limited only by constitution or treaty⁷¹ and is not subject to restrictions deriving their validity from an external source.⁷² Jurisdiction cannot be limited by the parties to a controversy,⁷³ and the name applied to a court will not of itself limit its jurisdiction.⁷⁴

The power of the legislature to limit the jurisdiction of courts, and the exercise thereof, is discussed in §§ 122-139 infra.

§ 31. Inherent Powers of Courts

Courts, at least those of general jurisdiction, possess

certain inherent powers and certain implied powers in addition to those expressly conferred on them.

Courts,⁷⁵ at least those of general jurisdiction,⁷⁶ possess certain inherent powers, and certain powers which may be said to be implied from a general grant of jurisdiction,⁷⁷ in addition to those expressly conferred on them. The inherent powers of courts are derived from the laws to which the courts owe their existence,⁷⁸ and do not exist without express or implied grant.⁷⁹ It is a just inference that an alleged power of the court which has lain dormant during the whole period of English jurisprudence and which no court in America has ever attempted to exercise until within a very recent period never in fact had any existence.⁸⁰

The scope and extent of the inherent, implied, or

70. Okl.—*In re Harkness' Estate*, 204 P. 911, 83 Okl. 107, 42 A.L.R. 399.

71. N.Y.—*Hutchison v. Ross*, 187 N. E. 65, 262 N.Y. 381, 89 A.L.R. 1007, affirming *Ross v. Ross*, 253 N.Y.S. 871, 233 App.Div. 626, which reversed 243 N.Y.S. 418, 137 Misc. 795, affirmed *Hutchison v. Ross*, 253 N.Y.S. 889, 233 App.Div. 516, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023, affirmed *Ross v. Ross*, 243 N.Y.S. 418, 137 Misc. 795.

"In this state, there is certainly no limitation on the power of the courts to settle and decree the rights of litigants, save as prohibited by the fundamental law."—*Matheson v. McCormac*, 195 S.E. 122, 125, 186 S.C. 93.

72. U.S.—*Watts v. Unione Austriaca di Navigazione*, D.C.N.Y., 224 F. 188.

73. Cal.—*Mannix v. Superior Court in and for Sacramento County*, 24 P.2d 507, 133 Cal.App. 740—*In re Stuhldreher's Estate*, 239 P. 859, 74 Cal.App. 226.

Or.—*State v. Tazwell*, 266 P. 238, 125 Or. 528, 59 A.L.R. 1436, motion denied 270 P. 486, 126 Or. 585.

74. Wis.—*State v. Sande*, 238 N.W. 504, 205 Wis. 495.

Effect of change of court's name generally see § 133 infra.

75. Ariz.—*State v. Superior Court of Maricopa County*, 5 P.2d 192, 39 Ariz. 242.

Fla.—*State ex rel. Davis v. City of Avon Park*, 158 So. 159, 117 Fla. 556, 98 A.L.R. 230, modifying 151 So. 701, 117 Fla. 556, denying rehearing *State ex rel. Attorney General v. City of Avon Park*, 149 So. 409, 108 Fla. 641—*Keen v. State*, 103 So. 399, 89 Fla. 113.

Ind.—*Parlow v. State*, 144 N.E. 661, 195 Ind. 164.

Ky.—*Capps v. Gore*, 21 S.W.2d 266, 231 Ky. 185.

Mo.—*In re Richards*, 63 S.W.2d 672, 333 Mo. 907—*State v. Ryan*, 38 S.W.2d 717, 327 Mo. 728, citing *Corpus Juris*.

N.Y.—*In re Association of Bar of the City of New York*, 227 N.Y.S. 1, 222 App.Div. 580.

Ohio.—*Hale v. State*, 45 N.E. 199, 55 Ohio St. 210, 36 L.R.A. 254—*In re Whallon*, 26 Ohio Cir.Ct. N.S., 167. Tex.—*Burttschell v. Sheppard*, 69 S.W.2d 402, 403, 123 Tex. 113, quoting *Corpus Juris*.

Wis.—*State v. Cannon*, 226 N.W. 385, 199 Wis. 401—*Rubin v. State*, 216 N.W. 513, 194 Wis. 207.

Inherent powers defined

(1) Inherent powers are such powers as are necessary to the ordinary and efficient exercise of jurisdiction. Ariz.—*State v. Superior Court of Maricopa County*, 5 P.2d 192, 39 Ariz. 242.

Ohio.—*Hale v. State*, 45 N.E. 199, 55 Ohio St. 210, 36 L.R.A. 254.

(2) The inherent powers of courts are those which are essential to the existence, dignity, and functions of the courts.

Neb.—*In re Integration of Nebraska State Bar Association*, 275 N.W. 265, 133 Neb. 283, 114 A.L.R. 151.

Okl.—*In re Integration of State Bar of Oklahoma*, 95 P.2d 113, 185 Okl. 505.

(3) The inherent powers of courts are those which are essential to their existence and to the due administration of justice.—*Fuller v. State*, 57 So. 806, 57 So. 6, 100 Miss. 811, 39 L.R.A.N.S., 242, Ann.Cas.1914A 98.

Power to determine who are proper parties and who have such interest in subject of action as entitles them to litigate is inherent.—*In re Cook's Will*, 217 N.Y.S. 176, 217 App. Div. 342, affirmed 154 N.E. 823, 244 N.Y. 63, 55 A.L.R. 806, answering cer-

tified questions 217 N.Y.S. 907, 217 App.Div. 804.

Right of court to function efficiently is inherent.

Cal.—*In re Cate*, App., 273 P. 617, supplementing opinion 270 P. 968, and 271 P. 356, which denied rehearing 270 P. 968.

Mich.—*People v. Brown*, 212 N.W. 968, 238 Mich. 298.

Disposal of case

"Court has inherent power to compel a disposition of the case."—*Sulzer v. Fontheim*, 10 N.Y.S.2d 527, 528, 170 Misc. 552.

76. Ind.—*Hitt v. Carr*, 130 N.E. 1, 77 Ind.App. 488.

77. Cal.—*In re Cate*, App., 273 P. 617, supplementing opinions 270 P. 968, and 271 P. 356, which denied rehearing 270 P. 968.

Tex.—*Ex parte Hughes*, 129 S.W.2d 270—*Burttschell v. Sheppard*, 69 S.W.2d 402, 403, 123 Tex. 113, quoting *Corpus Juris*.

15 C.J. p 732 note 71.

Enlarging jurisdiction by implication see § 29 supra.

78. Cal.—*In re Cate*, App., 273 P. 617, supplementing opinions 270 P. 968 and 271 P. 356, which denied rehearing 270 P. 968.

Interference with rights

Courts have little or no right to interfere with men's freedom of will, when not violating law or others' rights.—*Buchhalter v. Myers*, 276 P. 972, 85 Colo. 419.

79. Tex.—*Ex parte Hughes*, 129 S.W.2d 270—*Burttschell v. Sheppard*, 69 S.W.2d 402, 403, 123 Tex. 113, quoting *Corpus Juris*.

15 C.J. p 732 note 72.

80. N.Y.—*McQuigan v. Delaware, etc., R. Co.*, 29 N.E. 235, 129 N.Y. 50, 26 Am.S.R. 507, 14 L.R.A. 460, 21 N.Y.Civ.Proc. 396.

15 C.J. p 732 note 75.

incidental powers of courts is discussed in §§ 86-88 infra.

§ 32. Partial Jurisdiction

The invalidity of part of the proceedings of a court because of want of jurisdiction will not destroy the entire proceedings.

Proceedings of a court may be valid in part and void as to the residue, as where its action in some part is within its jurisdictional powers, while in other parts its action is without jurisdiction.⁸¹

§ 33. Effect of Pleadings

While jurisdiction will not attach without proper pleadings, jurisdiction will attach if the pleadings contain sufficient matter to challenge the court's attention and to authorize it to deliberate and act.

Before the power to hear and determine a cause attaches, the parties must be brought before the tribunal by proper pleading according to the practice and the law of each particular state,⁸² but jurisdiction cannot be conferred by averments in the pleadings where none is conferred by law.⁸³ Jurisdiction does not depend on the sufficiency of the pleadings as such,⁸⁴ or the character of the defense which may exist or may be set up on behalf of defendant;⁸⁵ and if the pleadings contain sufficient matter to challenge the attention of the court, and such a case is thereby presented as to authorize the court to deliberate and act, this is sufficient for the purpose of conferring jurisdiction.⁸⁶ Thus, if a complaint sets forth a case belonging to the general class over which the authority of the court extends, the fact that it fails to state a cause of action does not affect the jurisdiction of the court.⁸⁷ However,

81. Me.—State v. Parent, 172 A. 442, 445, 132 Me. 433, quoting *Corpus Juris*.

N.D.—Hanson v. North Dakota Workmen's C. Bureau, 248 N.W. 680, 687, 63 N.D. 79, citing *Corpus Juris*.

15 C.J. p 733 note 76.

Jurisdiction as to part of demand see § 117 infra.

82. U.S.—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652, reversing, D.C., 14 F.Supp. 459, certiorari denied Guaranty Trust Co. of New York v. Thompson, 58 S.Ct. 121, 302 U.S. 735, 82 L.Ed. 568.

Ill.—People v. Brewer, 160 N.E. 76, 328 Ill. 472.

Utah.—Atwood v. Cox, 55 P.2d 377, 88 Utah 437.

Wis.—Nehring v. Niemierowicz, 276 N.W. 325, 327, 226 Wis. 285, citing *Corpus Juris*.

Wyo.—State v. District Court of Eighth Judicial Dist. in and for Natrona County, 238 P. 545, 33 Wyo. 281.

15 C.J. p 733 note 77.

Jurisdictional facts

"Where the jurisdiction of a court depends upon the existence of facts, it has no power to proceed or act upon a pleading which does not substantially set forth such facts."—Charleston v. Littlepage, 80 S.E. 131, 132, 73 W.Va. 156, 51 L.R.A., N.S., 358.

83. Ill.—People ex rel. Courtney v. Prystalski, 192 N.E. 908, 358 Ill. 198.

15 C.J. p 733 note 78.

"Jurisdiction of a tribunal does not depend upon facts actually alleged, but upon the authority to determine the existence or nonexistence of such facts, and to render judgment according to such determination."—People ex rel. Kerner v. Circuit Court of Will County, 17 N.E.2d 46, 47, 369 Ill. 438—Borman v. Bor-

man, 5 N.E.2d 225, 364 Ill. 601, transferred to 9 N.E.2d 667, 391 Ill.App. 135—People ex rel. Courtney v. Sullivan, 1 N.E.2d 206, 363 Ill. 34—People ex rel. Courtney v. Prystalski, supra—People v. Superior Court, 84 N.E. 875, 284 Ill. 186, 14 Ann.Cas. 753.

Waiver of tort and suing in assumpsit cannot confer jurisdiction on court which did not originally possess it.—Mann v. Kendall, 47 N. C. 192.

84. U.S.—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652, reversing, D.C., 14 F.Supp. 459, certiorari denied Guaranty Trust Company of New York v. Thompson, 58 S.Ct. 121, 302 U.S. 735, 82 L.Ed. 568—Montgomery v. Equitable Life Assur. Soc. of U. S., C.C.A. Ill., 83 F.2d 758.

Ill.—People v. Brewer, 160 N.E. 76, 328 Ill. 472—Foreman Bros. Banking Co. v. Kelly-Atkinson Const. Co., 218 Ill.App. 356.

Mo.—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W. 2d 842, 322 Mo. 654.

Neb.—Taylor v. Coots, 48 N.W. 964, 32 Neb. 30, 39 Am.S.R. 428—Trumble v. Williams, 24 N.W. 716, 18 Neb. 144.

15 C.J. p 733 note 79, p 735 note 98. "The sufficiency of the complaint or document filed to invoke . . .

[the court's] jurisdiction is one to be determined by . . . [the court] upon the hearing, and does not affect . . . [its] jurisdiction to pass thereon."—Athearn v. Nicol, 200 P. 942, 945, 187 Cal. 88.

Defects curable by amendment

The mere fact that a complaint was in some respects defective would not of itself deprive the court of jurisdiction, if it stated, although imperfectly, a cause of action the subject matter of which was within

the jurisdiction of the court and if the defects therein were capable of being cured by amendment. *Mansure v. Cunningham*, 222 P. 678, 64 Cal. App. 536.

85. Neb.—In re Nilson's Estate, 253 N.W. 675, 678, 126 Neb. 541, 15 C.J. p 734 note 81.

Defense enforceable in another court
Jurisdiction cannot be defeated by defendant's pleading a defense which can only be enforced in another forum. *Thordagill v. Federal Land Bank of Houston*, Tex. Civ. App. 268, W.2d 348, error dismissed 15 C.J. p 734 note 81 [b].

86. U.S.—Thompson v. Terminal Shares, C.C.A.Mo., 89 F.2d 652, reversing, D.C., 14 F.Supp. 459, certiorari denied Guaranty Trust Co. of New York v. Thompson, 58 S.Ct. 121, 302 U.S. 735, 82 L.Ed. 568.

Neb.—In re Nilson's Estate, 253 N.W. 675, 678, 126 Neb. 541, citing *Corpus Juris*.

15 C.J. p 733 note 80.

"Where the law gives the power to entertain a cause, and the pleadings state facts sufficient to show that such a cause is intended or attempted to be brought before the court, the court has jurisdiction."—Atwood v. Cox, 55 P.2d 377, 381, 88 Utah 437.

87. U.S.—Olson v. Hoffman, D.C. Ill., 4 F.2d 263.

Ill.—People ex rel. Courtney v. Prystalski, 192 N.E. 908, 358 Ill. 198—Foreman Bros. Banking Co. v. Kelly-Atkinson Const. Co., 218 Ill.App. 356.

Ia.—Main Cleaners & Dyers v. Columbia Super Cleaners, 2 A.2d 750, 322 Pa. 71.

Utah.—Atwood v. Cox, 55 P.2d 377, 88 Utah 437.

15 C.J. p 733 note 79.

er, where the pleadings show on their face that the court has no jurisdiction of the subject matter,⁸⁸ or that the claim set forth is plainly without color of merit,⁸⁹ or the pleadings are such that it is impossible to ascertain whether the jurisdiction of the court has been invoked,⁹⁰ the court has no jurisdiction to proceed further than to decide to refuse to take cognizance.

§ 34. Effect of Decision as to Jurisdiction

A court cannot extend its statutory or constitutional powers by judicial fiat.

A court cannot extend its statutory or constitutional powers by judicial fiat,⁹¹ although, as appears in §§ 112-115, *infra*, subject to same qualifications every court has power to determine its own jurisdiction, and its decision with respect thereto is ordinarily not subject to collateral attack.

C. ELEMENTS OF JURISDICTION

1. IN GENERAL

§ 35. In General

- a. Elements of jurisdiction
- b. Jurisdiction of subject matter
- c. Contentions originating in unlawful transactions
- d. Power to enforce determination

a. Elements of Jurisdiction

The essential elements of jurisdiction may be stated to be that the court have cognizance of the class of cases to which the one to be adjudged belongs; that the proper parties are present; and that the point decided is in substance and effect within the issue. In personal actions

there must be jurisdiction both of the subject matter and of the person.

The three essential elements of jurisdiction are (1) The court must have cognizance of the class of cases to which the one to be adjudged belongs; the proper parties must be present; (3) the point decided must be, in substance and effect, within the issue.⁹²

The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought,⁹³ and the primary essential nature of the suit, and not its incidents.

88. Utah.—Atwood v. Cox, 55 P.2d 377, 88 Utah 437.

89. U.S.—Binderup v. Pathé Exch., Neb., 44 S.Ct. 96, 263 U.S. 291, 68 L.Ed. 308, reversing, C.C.A., 280 F. 301, certiorari denied 43 S.Ct. 88, 260 U.S. 725, 67 L.Ed. 483.—Mitchell Woodbury Corporation v. Albert Pick-Barth Co., C.C.A.Mass., 36 F.2d 974, reversed on other grounds, C.C.A., 41 F.2d 148.

90. Utah.—Atwood v. Cox, 55 P.2d 377, 88 Utah 437.

91. U.S.—Stoll v. Gottlieb, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, reversing Gottlieb v. Crowe, 12 N.E.2d 881, 368 Ill. 88, reversing 7 N.E.2d 469, 289 Ill.App. 595, certiorari granted Stoll v. Gottlieb, 58 S.Ct. 1038, 304 U.S. 554, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437.

Ill.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

92. U.S.—Noxon Chemical Products Co. v. Leckie, C.C.A.N.J., 39 F.2d 318, quoting *Corpus Juris*, and certiorari denied Robb v. Noxon Chemical Products Co., 51 S.Ct. 22, 282 U.S. 841, 75 L.Ed. 747.

Conn.—Artman v. Artman, 149 A.246, 111 Conn. 124.—New Haven Sand Blast Co. v. Dreisbach, 133 A. 99, 104 Conn. 322.

Fla.—Lovett v. Lovett, 112 So. 768, 93 Fla. 611.

Kan.—Harder v. Johnson, 76 P.2d 763, 764, 147 Kan. 440, quoting *Corpus Juris*.

Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 190, 278 Ky. 685, quoting *Corpus Juris*—Stewart v. Model Coal Co., 288 S.W. 696, 216 Ky. 742.

Mo.—Kristanik v. Chevrolet Motor Co., 70 S.W.2d 890, 894, 335 Mo. 60, quoting *Corpus Juris*—Davis v. Morgan Foundry Co., 23 S.W.2d 231, 224 Mo.App. 162.

N.J.—Thomas v. Flanagan, 134 A.298, 99 N.J.Eq. 717.

N.M.—State v. Patten, 69 P.2d 931, 41 N.M. 395.

N.C.—White v. Vaca Land & Lumber Co., 154 S.E. 620, 199 N.C. 410.

Pa.—Mintz v. Mintz, 83 Pa.Super. 85. Tex.—Stewart v. Moore, Com.App., 291 S.W. 886.

Utah.—Rolando v. District Court of Salt Lake County, 271 P. 225, 72 Utah 459.

15 C.J. p 734 note 85.

"Jurisdiction" includes jurisdiction of subject matter, of the person, and to render the particular judgment which was given.—Wall v. Superior Court of Yavapai County, Ariz., 89 P.2d 624.

Jurisdiction is divided into jurisdiction of the subject matter, jurisdiction of the particular cause, involving questions of venue, and jurisdiction

of the parties involving questions of process or its service. J. E. Petty & Co. v. Dock Contor Co., D.C.Pa., 283 F. 388, affirm C.C.A., 283 F. 341.

Elements of "active jurisdiction"

The essential requisites of "active jurisdiction" are potential jurisdiction, territorial jurisdiction, active jurisdiction of the subject matter where the proceeding is in rem, of the proper parties where the proceeding is personal, and existence of other facts demanded by the written or statute law.—Farant Corporation v. Francis, 122 S.E. 138 Va. 417.

Presence of issuable facts is essential to invoke, as well as to sustain judicial action.—State ex rel. Arson v. Daues, 287 S.W. 603, quas certiorari Anderson v. Wells, 27 W. 238, 220 Mo.App. 19.

93. U.S.—National Clay Product Co. v. Heath Unit Tile Co., C Iowa, 40 F.2d 617.

Del.—Stidham v. Brooks, 5 A.2d Ky.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 278 Ky. 695, quoting *Corpus Juris*—Mo.—State ex inf. Marr v. Allen S.W. 454, 455, 316 Mo. 754, qu *Corpus Juris*.

15 C.J. p 734 note 92.

character, determines the jurisdiction of the court relative to it.⁹⁴

Real parties and a real subject matter are essential to jurisdiction,⁹⁵ but the lack of necessary or proper parties is not necessarily jurisdictional.⁹⁶ The right of a plaintiff to maintain a suit, while frequently treated as going to the question of jurisdiction, has been said to go in reality to the right of plaintiff to relief rather than to the jurisdiction of the court to afford it.⁹⁷

While, as stated *infra* § 43, the presence of the res or property within the territorial limits of the sovereignty under which the court acts may confer jurisdiction in rem on the court, in personal actions jurisdiction both of the subject matter and of the person or party whose rights are to be affected are essential,⁹⁸ and a state court can acquire no jurisdiction where neither the person nor any property of defendant can be found within the state.⁹⁹ If a court having jurisdiction of the subject matter acquires jurisdiction of the person it has the right and power to hear and determine the particular case;¹ but unless jurisdiction of the subject matter and of the person exist it is the duty of the

court to decline to do more than ascertain and declare that it has no power to examine or to decide the merits of the case.² Where, by the statute law of a state, a right of action has become fixed, or a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court having jurisdiction over the subject matter and the parties.³ While a court may have general jurisdiction of the subject matter of a class of actions, it does not necessarily follow that it may hear and determine a particular case submitted for its consideration.⁴

b. Jurisdiction of Subject Matter

Jurisdiction of the subject matter is essential to the determination of every case. The court acquires such jurisdiction by the act of its creation, and it is not dependent on the existence of a good cause of action in the particular case, the sufficiency of the bill or complaint, the validity of the demand or the right to the relief requested, the regularity of the proceedings, or the correctness of the decision.

Jurisdiction of the subject matter is defined *supra* § 23 as the power to hear and determine cases of the general class to which the proceedings in question belong, and, as used in the constitutions and statutes, the word "jurisdiction" means juris-

94. Tex.—*Pierce v. Foreign Mission Board of Southern Baptist Convention*, Com.App., 235 S.W. 552, reversing, Civ.App., 218 S.W. 140.

95. Ala.—*Milbra v. Sloss-Sheffield Steel, etc., Co.*, 62 So. 176, 182 Ala. 622, 46 L.R.A.N.S., 274.

96. U.S.—*Lecouturier v. Ickelheimer*, D.C.N.Y., 205 F. 682.

13 C.J. p 734 note 91.

97. U.S.—*Carolina Power & Light Co. v. South Carolina Public Service Authority*, C.C.A.S.C., 94 F.2d 520, affirming, D.C., 20 F.Supp. 864, certiorari denied 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541, *South Carolina Power Co. v. South Carolina Public Service Authority*, 58 S.Ct. 1048, 304 U.S. 578, 82 L.Ed. 1541, and *South Carolina Electric & Gas Co. v. South Carolina Public Service Authority*, 58 S.Ct. 1049, 304 U.S. 578, 82 L.Ed. 1541.

98. U.S.—*Smith Separator Corporation v. Dillon*, C.C.A.Okla., 98 F.2d 521—*Hurley v. Wells-Newton Nat. Corporation*, D.C.Conn., 49 F.2d 914—*Noxon Chemical Products Co. v. Leckie*, C.C.A.N.J., 39 F.2d 318, 319, quoting *Corpus Juris*, and certiorari denied Robb v. Noxon Chemical Products Co., 51 S.Ct. 22, 282 U.S. 841, 75 L.Ed. 747—*Ex parte Craig*, C.C.A.N.Y., 282 F. 138, reversing 274 F. 177, in which certiorari is denied, *Craig v. McCarthy*, 42 S.Ct. 272, 258 U.S. 604, 617, 66 L.Ed. 793. Certiorari granted *Craig v. Hecht*,

43 S.Ct. 90, 260 U.S. 714, 67 L.Ed. 477, and affirmed 44 S.Ct. 103, 263 U.S. 255, 68 L.Ed. 293.

Ala.—*Moffatt v. Cassimus*, 190 So. 297, 38 Ala.App. 582, reversed on other grounds, Sup., 190 So. 299.

Ariz.—*Hewins v. Weller*, 36 P.2d 799, 44 Ariz. 309.

Colo.—*State Board of Dental Examiners v. Saville*, 8 P.2d 693, 90 Colo. 177, 82 A.L.R. 1176, followed in *State Board of Dental Examiners v. Heitler*, 8 P.2d 698, 90 Colo. 191, and appeal dismissed *Saville v. State Board of Dental Examiners of State of Colorado*, 53 S.Ct. 5, 287 U.S. 562, 77 L.Ed. 496.

Ga.—*Robinson v. Attapulgus Clay Co.*, 189 S.E. 555, 55 Ga.App. 141.

Hawaii.—*Kim Poo Kum v. Sugiyama*, 33 Hawaii 545.

Ill.—*Finlen v. Skelly*, 141 N.E. 388, 310 Ill. 170—*Rabbit v. Frank C. Weber & Co.*, 130 N.E. 787, 297 Ill. 491—*Oakman v. Small*, 118 N.E. 775, 282 Ill. 360.

Ind.—*De Lange v. Cones*, 19 N.E.2d 850.

Iowa.—*Kalde v. Kalde*, 222 N.W. 351, 207 Iowa 121.

N.Y.—*Cooper v. Davis*, 248 N.Y.S. 227, 231 App.Div. 527.

Or.—*In re Wells' Estate*, 289 P. 511, 133 Or. 155.

Pa.—*Eldredge v. Eldredge*, 194 A. 306, 128 Pa.Super. 284—*Brobst v. Allentown Housing Authority*, 18 Lehigh L.J. 157.

S.C.—*Knight v. Fidelity & Casualty Co. of New York*, 192 S.E. 358, 181 S.C. 362—*Hodges v. Lake Summit Co.*, 152 S.E. 658, 155 S.C. 436.

Tenn.—*Brown v. Brown*, 296 S.W. 356, 155 Tenn. 530.

15 C.J. p 734 note 86.

99. S.C.—*Emanuel v. Ferrie*, 41 S.E. 20, 63 S.C. 101.

15 C.J. p 787 note 31.

Place of transaction not controlling

Not where transaction occurs, but where parties thereto are, or, sometimes, where their property is, decides jurisdiction to determine civil character of transaction.—*Turner v. Turner*, 157 A. 532, 85 N.H. 249.

1. Ill.—*Wilson Bros. v. Hauge*, 179 N.E. 459, 347 Ill. 140, reversing 261 Ill.App. 568.

2. U.S.—*Noxon Chemical Products Co. v. Leckie*, C.C.A.N.J., 39 F.2d 318, 319, certiorari denied Robb v. Noxon Chemical Products Co., 51 S.Ct. 22, 282 U.S. 841, 75 L.Ed. 747. 15 C.J. p 734 note 87.

Where lack of jurisdiction in a court is patent, the proceedings stop.—*Appeal of Kelley*, 1 A.2d 183, 136 Me. 7.

3. U.S.—*International Nav. Co. v. Lindstrom*, N.Y., 123 F. 475, 60 C.C.A. 649, reversing, C.C., 117 F. 170, and certiorari denied 24 S.Ct. 652, 193 U.S. 669, 48 L.Ed. 840.

4. Mo.—*Ballow Lumber & Hardware Co. v. Missouri Pac. Ry. Co.*, 233 S.W. 1015, 288 Mo. 473.

diction as to subject matter only,⁵ unless an exception arises by reason of its employment in a broader sense.⁶ Thus a court has jurisdiction of the subject matter when it has the right to try the kind of proceeding, whether it be an action or suit;⁷ when it has jurisdiction of the person and the cause is the kind of cause triable in such court;⁸ when the matter is one over which the court's general power extends, and such power is regularly called into action by the application or act of the parties concerned.⁹

Jurisdiction of the subject matter is essential in every case.¹⁰ Such jurisdiction the court acquires by the act of its creation, and possesses inherently by its constitution;¹¹ and it is not dependent on the existence of a good cause of action in plaintiff in a cause pending before the court;¹² nor upon the sufficiency of the bill or complaint,¹³ the validity of the demand set forth in the complaint, or plaintiff's right to the relief demanded,¹⁴ the regularity of the proceedings,¹⁵ or the correctness of the decision rendered.¹⁶

5. Fla.—Malone v. Meres, 109 So. 677, 686, 91 Fla. 709, quoting *Corpus Juris*.

Tex.—Honea v. Graham, Civ.App., 66 S.W.2d 802, 804, quoting *Corpus Juris*.

15 C.J. p 735 note 95.

6. Fla.—Malone v. Meres, 109 So. 677, 686, 91 Fla. 709, quoting *Corpus Juris*.

Tex.—Honea v. Graham, Civ.App., 66 S.W.2d 802, 804, quoting *Corpus Juris*.

15 C.J. p 735 note 96.

7. U.S.—Sander v. Johnston, C.C.A. Cal., 11 F.2d 509.

Iowa.—Reinsurance Life Co. of America v. Houser, 227 N.W. 116, 208 Iowa 1226.

Mo.—Davis v. Morgan Foundry Co., 23 S.W.2d 231, 224 Mo.App. 162.

Or.—Smith v. Oregon Scenic Trips Co., 209 P. 486, 105 Or. 222—McCann v. Oregon Scenic Trips Co., 209 P. 483, 105 Or. 213.

Utah.—Kramer v. Pixton, 268 P. 1029, 72 Utah 1.

Authorized extent of powers

Jurisdiction of the subject matter, in a court of record, is to be tested by the authorized extent of the powers of the court in respect of the cause of action before it.—In re Warner's Estate, Neb., 288 N.W. 39.

8. Okl.—Board of Trustees of Firemen's Relief and Pension Fund of City of Marietta v. Brooks, 67 P. 2d 4, 179 Okl. 600.

Pa.—Grime v. Department of Public Instruction, 188 A. 337, 324 Pa. 371.

9. Utah.—Upper Blue Bench Irr. Dist. v. Continental Nat. Bank & Trust Co., 72 P.2d 1048, 93 Utah 325.

Wyo.—Padlock Ranch v. Washakie Needles Irr. Dist., 61 P.2d 410, 50 Wyo. 253, denying rehearing 60 P. 2d 819, 50 Wyo. 253.

In determining whether a court had jurisdiction of the subject matter, it must be ascertained whether the court, under the laws of the sovereignty of its creation, was given the right to pass on the particular class of case involved, and whether that particular class of case had

been brought before it for determination.—Covington Trust Co. of Covington v. Owens, 129 S.W.2d 186, 278 Ky. 695.

10. Cal.—Ferryboatmen's Union of California v. Southern Pac. Co., App., 38 P.2d 425.

N.Y.—Norton v. Southern Ry. Co., 246 N.Y.S. 676, 138 Misc. 784.

Or.—Duncan Lumber Co. v. Willapa Lumber Co., 183 P. 476, 93 Or. 386, denying rehearing 182 P. 172, 93 Or. 386.

Wash.—In re Elvigen's Estate, 71 P. 2d 672, 191 Wash. 614.

11. Fla.—Malone v. Meres, 109 So. 677, 686, 91 Fla. 709, quoting *Corpus Juris*.

Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 300, 365 Ill. 588, citing *Corpus Juris*—People v. Brewer, 160 N.E. 76, 328 Ill. 473.

Mo.—First Nat. Bank & Trust Co. of King City v. Bowman, 15 S.W. 2d 842, 850, 322 Mo. 654, quoting *Corpus Juris*.

15 C.J. p 735 note 97.

Basis

The jurisdiction of a court over the subject matter of an action depends upon the authority granted to it by the constitution and laws of the sovereignty.—Henderson County v. Smyth, 5 S.E.2d 186, 216 N.C. 421.

12. Colo.—Board of Com'rs of El Paso County v. City of Colorado Springs, 180 P. 301, 66 Colo. 111.

Fla.—Quigley v. Cremin, 113 So. 892, 94 Fla. 104, modifying 109 So. 312.

—Malone v. Meres, 109 So. 677, 91 Fla. 709—Foreman Bros. Banking Co. v. Kelly-Atkinson Const. Co., 218 Ill.App. 356.

Or.—Dippold v. Cathlamet Timber Co., 193 P. 909, 98 Or. 183.

13. Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 300, 365 Ill. 588, citing *Corpus Juris*—People v. Brewer, 160 N.E. 76, 328 Ill. 472—Finlen v. Skelly, 141 N.E. 388, 392, 310 Ill. 170, citing *Corpus Juris*.

Iowa.—Lawrence v. Stanton, 237 N. W. 512, 513, 212 Iowa 949, citing *Corpus Juris*.

Mo.—Tucker v. Burford, 88 S.W.2d 144, 145, 337 Mo. 1073, citing *Corpus Juris*.

Tex.—Ward County Irr. Dist. No. 1

v. Western Union Telegraph Co., Civ.App., 254 S.W. 1114.

15 C.J. p 735 note 98.

Pleadings as basis of right to assume jurisdiction see supra, § 33.

14. U.S.—Parker Bros. v. Fagan, C. C.A.Fla., 68 F.2d 616, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490.

Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 300, 365 Ill. 588, citing *Corpus Juris*.

Pa.—Main Cleaners & Dyers v. Columbia Super Cleaners, 2 A.2d 750, 332 Pa. 71—In re Heffernan, 184 A. 286, 287, 121 Pa. 544, quoting *Corpus Juris*.

Utah.—Atwood v. Cox, 55 P.2d 377, 88 Utah 437.

15 C.J. p 735 note 99.

Frivolous claim insufficient

Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous, or in other words plainly without color of merit.—Binderup v. Pathé Exch., Neb., 44 S.Ct. 96, 263 U.S. 291, 68 L. Ed. 308, reversing, C.C.A., 280 F. 301, in which certiorari is denied 43 S.Ct. 88, 260 U.S. 725, 67 L.Ed. 483.

15. Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 300, 365 Ill. 588, citing *Corpus Juris*—Finlen v. Skelly, 141 N.E. 388, 392, 310 Ill. 170, citing *Corpus Juris*.

Pa.—In re Heffernan, 184 A. 286, 287, 121 Pa. 544, quoting *Corpus Juris*.

R.I.—Kelley v. City Council of City of Cranston, 1 A.2d 185.

15 C.J. p 735 note 1.

16. U.S.—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A. Wyo., 74 F.2d 827.

Ga.—Kaiser v. Kaiser, 173 S.E. 688, 178 Ga. 355.

Ill.—Knaus v. Chicago Title & Trust Co., 7 N.E.2d 298, 300, 365 Ill. 588, citing *Corpus Juris*—Finlen v. Skelly, 141 N.E. 388, 392, 310 Ill. 170, citing *Corpus Juris*.

N.Y.—Mulligan v. Bond & Mortgage Guarantees Co., 184 N.Y.S. 429, 193 App.Div. 741.

Pa.—In re Heffernan, 184 A. 286, 287, 121 Pa. 544, quoting *Corpus Juris*.

15 C.J. p 735 note 2.

A party has the legal right to bring his action in any court which has jurisdiction of the subject matter and can obtain jurisdiction of the parties.¹⁷

The subject matter of a suit, when reference is made to questions of jurisdiction, means the nature of the cause of action, and the relief sought.¹⁸

Breadth of cause of action. A cause of action may, within the court's subjects of jurisdiction, be as broad as parties make it by pleadings, argument, or evidence admitted without objection; but beyond that the court's determination is coram non iudice.¹⁹

Where a complaint sets up several different causes of action, of some of which the court has jurisdiction and of others not, the case may be tried as to those of which the court has jurisdiction,²⁰ although no judgment can be rendered upon the cause of action which is outside the jurisdiction of the court.²¹

c. Contentions Originating in Unlawful Transactions

Jurisdiction of an action is not affected by the fact that the wrongdoer was acting without authority of law.

While it has been said that courts of justice will not assume jurisdiction of contentions originating in unlawful purposes or transactions,²² jurisdiction of an action will not be affected by the fact that the wrongdoer was acting without authority of law.²³

d. Power to Enforce Determination

Power to enforce its determination is not essential to the jurisdiction of the court.

While some definitions of jurisdiction as discussed supra § 15 include or have included the power

to enforce the judgment of decree, it is not as a rule regarded as essential that the court possess the power of execution or be able to carry into effect the relief granted in the determination of the litigation in order that it may have jurisdiction.²⁴ It is proper for a court to decline to exercise jurisdiction intended to be complete, where it has no power to enforce its determination,²⁵ and, as stated infra § 43, in actions in rem, where the property is outside the limits of the court's control and its process cannot reach the locus in quo, the court has no jurisdiction.

§ 36. Advisory Opinions

In the absence of constitutional or statutory provisions authorizing them courts have no jurisdiction to render advisory opinions.

In the American colonies, the rendition of advisory opinions was occasionally practiced; but an attempt made at the framing of the federal constitution to incorporate therein a provision perpetuating the practice was unsuccessful, and although no contrary provision was adopted, nor even the distributive clause which appears in so many state constitutions, advisory opinions have never been given under the federal system. A refusal by the judges of the supreme court to comply with a request by President Washington for a construction of the treaty with France appears to have settled the point for that jurisdiction. In the states the familiar constitutional clause which requires the separation of governmental powers has been held impliedly to prohibit the rendition of advisory opinions, and the attitude of the judiciary has generally been unfavorable to the practice.²⁶ Where advisory power is not given by the organic law it cannot be conferred by the legislature.²⁷

The test of jurisdiction is whether the tribunal had the power to enter on the inquiry, and not whether its methods were regular, its findings right, or its conclusions in accordance with the law.—*Malone v. Meres*, 109 So. 677, 686, 91 Fla. 709, quoting *Corpus Juris*—15 C.J. p. 735 note 2 [a].

17. Ind.—*State v. Killigrew*, 174 N. E. 808, 809, quoting *Corpus Juris*. 15 C.J. p. 736 note 3.

18. Fla.—*State ex rel. Washburn v. Hutchins*, 135 So. 298, 101 Fla. 773. N.D.—*Patterson Land Co. v. Lynn*, 175 N.W. 211, 44 N.D. 251, denying motion to vacate decision 147 N.W. 256, 27 N.D. 391.

The matter in dispute

The "subject-matter of a suit" refers to the cause, the object or thing in dispute, and, when applied to an action where conflicting claims

to really are in issue, it is synonymous with the real property itself.—*Patterson Land Co. v. Lynn*, supra.

19. Wis.—*Cowie v. Strohmeyer*, 136 N.W. 956, 137 N.W. 778, 150 Wis. 401.

20. Tex.—*Capital Oil & Gas Co. v. Casey*, Civ.App. 299 S.W. 466, 468, citing *Corpus Juris*. 15 C.J. p. 736 note 5.

21. Tex.—*Capital Oil & Gas Co. v. Casey*, supra, citing *Corpus Juris*. 15 C.J. p. 736 note 6.

22. La.—*Fabacher v. Bryant*, 15 So. 181, 46 La. Ann. 320.

23. U.S.—*Baltimore & O. R. Co. v. Meyers*, Ind. 62 F. 367, 10 C.C.A. 485.

15 C.J. p. 736 note 49.

24. U.S.—*Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, C.C.A. N.Y., 43 F.2d 705, certiorari denied

51 S.Ct. 181, 232 U.S. 896, 75 L.Ed. 789.

Conn.—*Morrill v. Morrill*, 77 A. 1, 43 Conn. 479.

However, it has been said that the question of jurisdiction has as its primary, theoretical basis of solution power of tribunal to enforce its judgment or decree, either in personam or in rem.—In re *DeBaun's Will*, 293 N.Y.S. 836, 162 Misc. 111.

25. La.—*State v. North American Land, etc., Co.*, 31 So. 172, 106 La. 621, 37 Am.St.R. 309.

26. Tex.—*Morrow v. Corbin*, 62 S.W.2d 641, 646, 122 Tex. 553, quoting *Corpus Juris*.

Advisory opinions:

Of appellate courts of particular states see infra §§ 314-485.

Under constitutional provisions see *Constitutional Law* § 150.

27. Tex.—*Wright v. San Jacinto*

2. JURISDICTION OF SUBJECT-MATTER OR CAUSE OF ACTION

§ 37. Place Where Cause of Action Accrues

Other elements being present, the place where the cause of action accrues may determine jurisdiction.

Other elements being present, jurisdiction may be determined by the place where an injury is received,²⁸ whether the injury be to the person,²⁹ or to real³⁰ or personal³¹ property. The courts of a state where a contract was to be performed and the breach occurred have jurisdiction of an action on the contract,³² although the contract was made in another state;³³ but it is also held that the courts of the place where the contract is made may have jurisdiction of an action thereon.³⁴ A cause of action on an implied obligation arises where the matters from which the obligation is implied occur.³⁵

If the remedy is purely statutory it is applicable only to cases where the circumstances that warrant it have occurred within the jurisdiction of the state,³⁶ and if neither the person nor the subject matter is within the jurisdiction of the court it has no power over them.³⁷ These rules are not how-

ever exclusive in a general sense, for, if there is something to which the jurisdiction can attach, the court will take cognizance of the action even though other matters are involved which of themselves are without the limitation of the court's power, between which and the question of jurisdiction of defendant or of the property or subject matter there may be, and frequently is, a distinction.³⁸

§ 38. Local and Transitory Actions in General

Where the cause of action is necessarily local the territorial jurisdiction is exclusive; but transitory actions may be brought in any state regardless of where the cause of action arose, provided, of course, that other necessary conditions for the court to act are fulfilled.

Where a cause of action is necessarily local the territorial jurisdiction will be exclusive.³⁹ The characteristic feature of a transitory action is that the right of action follows the person of defendant.⁴⁰ Transitory actions are not confined to any particular state;⁴¹ and hence, where a cause of ac-

Trust Co., 62 S.W.2d 652, 122 Tex. 582—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553.

There can be no devolution of power on the state courts to render advisory opinions, instructing or directing former state officers whether they are or are not legally deposed, or giving confirmation to the assumed authority of new commissioners.—City of New York v. McAneny, 190 N.Y.S. 87, 115 Misc. 433.

28. S.C.—Knight v. Fidelity & Casualty Co. of New York, 192 S.E. 558, 184 S.C. 362.
15 C.J. p 736 note 9.

29. Okl.—Chicago, etc., R. Co. v. McIntire, 119 P. 1008, 29 Okl. 797.
15 C.J. p 736 note 10.

30. U.S.—Potomac Milling & Ice Co. v. Baltimore & O. R. Co., D.C.Md., 217 F. 665.
15 C.J. p 736 note 11.

Injury in state from cause outside the state

Where a locomotive at or near the Kansas-Oklahoma state line sets fire to property in Oklahoma, the cause of action arises in Oklahoma; and it is immaterial whether the engine was in Kansas, or on the state line, or in Oklahoma, when the escaping sparks from the engine set fire to the property.—Otey v. Midland Valley R. Co., 197 P. 203, 108 Kan. 755.
Action as local or transitory see *infra* § 47.

31. Va.—Chesapeake, etc., R. Co. v.

American Exch. Bank, 23 S.E. 935, 92 Va. 495, 44 L.R.A. 449.
15 C.J. p 736 note 12.

32. La.—French v. Artistic Furniture Co., 139 So. 307, 173 La. 982.
15 C.J. p 736 note 13.

Account against foreign debtor

Where a commission merchant doing business in one state sued his correspondent, living in another state, for a balance of account, the cause of action was regarded as accruing in the state in which the merchant did business.—Coolidge v. Poor, 15 Mass. 427.

Action on note

Cause of action for default on Maine city's notes payable in Massachusetts arose in Massachusetts, as regards jurisdiction of action against city.—National Shawmut Bank of Boston v. City of Waterville, Me., 189 N.E. 92, 285 Mass. 252.

Delay of freight

Causes of action against corporation for damages for delay of freight deliverable within state arose within state.—Hewitt v. Canadian Pac. Ry. Co., 207 N.Y.S. 797, 124 Misc. 186, affirmed 207 N.Y.S. 851.

33. U.S.—U. S. Graphite Co. v. Pacific Graphite Co., C.C.Mich., 68 F. 442.
15 C.J. p 736 note 14.

34. Tex.—Western Union Tel. Co. v. Clark, 38 S.W. 225, 14 Tex.Civ. App. 563.
15 C.J. p 736 note 15.

Injury to passenger

U.S.—Chatters v. Louisville & N.

R. Co., D.C.La., 17 F.2d 305, affirmed, C.C.A., Louisville & N. R. Co. v. Chatters, 26 F.2d 403, certiorari granted Chatters v. Louisville & N. R. Co., 49 S.Ct. 26, 278 U.S. 590, 73 L.Ed. 523, reversed on other grounds, 49 S.Ct. 329, 279 U.S. 320, 73 L.Ed. 711.

35. Ind.—Runkle v. Pullin, 97 N.E. 956, 49 Ind.App. 619.

36. Miss.—Nations v. Alvis, 13 Miss. 338.

37. Mo.—State v. Barnett, 149 S.W. 311, 245 Mo. 99.
15 C.J. p 737 note 18.

38. Mich.—Detroit Lumber Co. v. The Petrel, 117 N.W. 80, 153 Mich. 528.
15 C.J. p 737 note 19.

Action against corporation

The corporation court of a city has jurisdiction of actions against a corporation whose principal office is within the corporate limits of the city without reference to where the cause of action arose.—Builders' Supply Co. of Hopewell v. Piedmont Lumber Co., 94 S.E. 933, 122 Va. 225.

39. N.M.—Fire Assoc. v. Patton, 107 P. 679, 15 N.M. 304, 27 L.R.A., N.S., 420.
15 C.J. p 737 note 21.

40. Tenn.—Brown v. Brown, 296 S.W. 356, 155 Tenn. 530.

41. U.S.—Barrow S. S. Co. v. Kane, N.Y., 18 S.Ct. 526, 170 U.S. 100, 42 L.Ed. 964.

15 C.J. p 737 note 22.

tion is transitory in its nature, the courts of a state may assume jurisdiction thereof, although it may be based on an act done in another state⁴² or country.⁴³ Accordingly, a right of action which has accrued in one state will be enforced in the courts of another, unless prohibited by law, or unless it is against morals or natural justice, or unless it is against the general interests of the citizens of that state.⁴⁴ An act of omission which gives rise to no cause of action in the jurisdiction where it occurred cannot be the basis of an action in another state.⁴⁵ Relief will be granted only to such extent as the right asserted is not violative of the public policy of the state whose jurisdiction is invoked.⁴⁶

§ 39. Character of Actions as Local or Transitory in General

Where a cause of action can arise in one place only, the action is local; otherwise it is transitory.

Where a cause of action can arise in one place only, the action is local;⁴⁷ but if the cause of action is one which might arise anywhere the action is transitory.⁴⁸

The principal question involved determines the nature of an action as transitory or otherwise.⁴⁹

The lex fori governs in determining whether an action is local or transitory,⁵⁰ and hence where a cause of action arising in another state is deemed to be transitory in the state where an action thereon is brought, such action may be maintained, although the cause of action would be deemed local in the state where it arose.⁵¹

§ 40. Personal Actions in General

In general, personal actions are transitory.

As a general rule, personal actions are transitory and may be entertained wherever jurisdiction of the parties can be maintained.⁵²

§ 41. Actions on Contract

As a general rule, actions on contracts are transitory and may be brought wherever jurisdiction of the parties can be obtained.

An action on contract is as a general rule transitory,⁵³ and may be entertained wherever jurisdic-

42. U.S.—Mausser v. Union Pac. R. Co., D.C.Cal., 243 F. 274.

Ala.—Hall v. Milligan, 128 So. 438, 221 Ala. 233, 69 A.L.R. 618—Weaver v. Alabama Great Southern R. Co., 76 So. 364, 200 Ala. 432.

Conn.—Hartford Accident & Indemnity Co. v. Bernblum, 191 A. 542, 122 Conn. 583.

Ind.—Dodgem Corporation v. D. D. Murphy Shows, 183 N.E. 699, 96 Ind.App. 325, rehearing denied 185 N.E. 169, 96 Ind.App. 325.

Me.—Foss v. Richards, 139 A. 313, 126 Me. 419.

Mo.—Harbis v. Cudahy Packing Co., 241 S.W. 960, 211 Mo.App. 188, transferred, Sup., 223 S.W. 578, and certiorari quashed State ex rel. Harbis v. Trimble, 238 S.W. 809, 292 Mo. 323.

N.H.—Emery v. Hovey, 153 A. 322, 84 N.H. 499.

N.Y.—Baltimore Mail S. S. Co. v. Fawcett, 199 N.E. 628, 269 N.Y. 379, 104 A.L.R. 1068, conformed to 287 N.Y.S. 159, 247 App.Div. 739, certiorari denied Madsen v. Baltimore Mail S. S. Co., 56 S.Ct. 939, 298 U.S. 675, 80 L.Ed. 1396.

Vt.—Brown v. Perry, 156 A. 910, 104 Vt. 66.

15 C.J. p 737 note 23.

Actions under laws of other states or countries see *infra* §§ 70-72.

43. U.S.—Barrow SS. Co. v. Kane, N.Y., 18 S.Ct. 526, 170 U.S. 100, 42 L.Ed. 964.

15 C.J. p 738 note 24.

44. U.S.—Theokistou v. Panama R. Co., C.C.A.Canal Zone, 6 F.2d 116, certiorari denied Panama R. Co.

v. Theokistou, 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

N.C.—Ingle v. Cassady, 181 S.E. 562, 208 N.C. 497.

15 C.J. p 738 note 25.

45. U.S.—Smith v. Condry, D.C., 1 How. 28, 11 L.Ed. 35.

15 C.J. p 738 note 28.

46. N.Y.—Hutchinson v. Ward, 85 N.E. 390, 192 N.Y. 375, 127 Am.S.R. 909, reversing 103 N.Y.S. 1129, 118 App.Div. 910.

47. Idaho.—Taylor v. Sommers Bros. Match Co., 204 P. 472, 35 Idaho 30, 42 A.L.R. 189.

15 C.J. p 738 note 31.

Contempt proceeding

Idaho.—Greene v. Edgington, 214 P. 751, 37 Idaho 1.

Overflow of canal

An action for injuries to barges from the overflow of a canal is local, not transitory.—Moyer v. Chesapeake & Delaware Canal Co., 13 Phila., Pa., 400, 35 Leg.Int. 144.

48. Idaho.—Taylor v. Sommers Bros. Match Co., 204 P. 472, 35 Idaho 30, 42 A.L.R. 189.

15 C.J. p 738 note 32.

49. D.C.—Columbia Nat. Sand Dredging Co. v. Morton, 28 App. D.C. 288, 7 L.R.A.N.S., 114, 8 Ann. Cas. 511.

Action on administrator's bond

The "subject of an action" against surety on bond of administrator was the liability of the administrator and was located in a North Carolina county in which the administration proceedings had been instituted as

respects statutory necessity that case be tried in county in which subject or some part thereof is situated and wholly within the jurisdiction of the courts of North Carolina so that South Carolina court had no jurisdiction.—Knight v. Fidelity & Casualty Co. of New York, 192 S.E. 558, 184 S.C. 362.

50. U.S.—Potomac Milling & Ice Co. v. Baltimore & O. R. Co., 14 C.M.D., 217 F. 665.

La.—Holmes v. Barclay, 4 La. Ann. 63.

51. La.—Holmes v. Barclay, *supra*.

Statutory provisions as to venue

That Louisiana statute giving an injured person a right of direct action against insurer under liability policy also provided that such action could be brought in parish where injury occurred or insured had his domicile did not render statute local.—Burkett v. Globe Indemnity Co., 181 So. 316, 182 Miss. 423.

52. N.H.—McBee v. Portland & R. R. Co., 52 N.H. 430, 13 Am. R. 72.

15 C.J. p 738 note 36.

Suit to enforce express trust is a "transitory action" in personam, and can be brought anywhere that jurisdiction may be had of parties.—Townsend v. Rosenbaum, 60 F.2d 251, 187 Wash. 372.

53. Ala.—De Kalb County v. McClain, 78 So. 961, 201 Ala. 565.

Ark.—American Ry. Express Co. v. H. Rouw Co., 294 S.W. 401, 173 Ark. 810.

tion of the parties can be obtained,⁵⁴ regardless of where the contract was made⁵⁵ or where it was to be performed.⁵⁶

§ 42. Actions for Tort

Actions for tort are as a rule transitory, and may be brought in any jurisdiction, unless contrary to public policy.

An action for tort is as a rule transitory,⁵⁷ and may be entertained wherever jurisdiction of the

parties can be obtained,⁵⁸ unless public policy forbids,⁵⁹ although the act or omission complained of occurred in another state⁶⁰ or country⁶¹ whose laws are dissimilar to the laws of the forum,⁶² notwithstanding plaintiff might also have sued in the state or country where the act or omission complained of occurred.⁶³

Jurisdiction may thus be entertained of an action to recover for personal injury,⁶⁴ for wrongfully

Me.—In re Neely's Estate, 1 A.2d 772, 136 Me. 79.

N.Y.—Clark Plastering Co. v. Seaboard Surety Co., 182 N.E. 71, 259 N.Y. 424, 85 A.L.R. 845, reversing 257 N.Y.S. 375, 235 App.Div. 444, and dismissing appeal 257 N.Y.S. 469, 235 App.Div. 449, reversing 260 N.Y.S. 463, 237 App.Div. 274, motion denied 260 N.Y.S. 973, 237 App.Div. 807—Cotnareanu v. Woods, 278 N.Y.S. 589, 155 Misc. 95.

15 C.J. p 739 note 38.

54. N.Y.—Shlosberg v. New York Life Ins., 216 N.Y.S. 215, 217 App. Div. 67, affirmed 155 N.E. 749, 244 N.Y. 482, and 155 N.E. 913, 244 N.Y. 593, answering certified questions 216 N.Y.S. 917, 217 App.Div. 742—Franklin Soc. for Home Bldg. and Sav. v. Weseman, 293 N.Y.S. 909, 162 Misc. 109.

Tex.—Southern Surety Co. v. Illinois Powder Mfg. Co., Civ.App., 81 S.W.2d 314.

Utah.—Steed v. Harvey, 54 P. 1011, 18 Utah 367, 72 Am.S.R. 789.

15 C.J. p 739 note 39.

Particular actions within rule

(1) Action by doctor to recover from employer's insurer for services rendered employee, based on settlement with employee.—Employers' Casualty Co. v. Ponton, Tex.Civ.App., 41 S.W.2d 147.

(2) Action on conditional sales contract.—Floor v. Mitchell, 41 P.2d 281, 86 Utah 203.

(3) Action on open account for goods sold and delivered.—Shiatte v. Singer Mfg. Co., 125 A. 429, 81 N.H. 294.

(4) Action on public contractor's bond.—First Nat. Bank v. Caples, C.C.A.Tex., 17 F.2d 87.

(5) Actions on insurance policies. Ill.—Illinois Life Ins. Co. v. Prentiss, 175 N.E. 554, 277 Ill. 383.

Mo.—Howard Undertaking Co. v. Fidelity Life Ass'n, App., 59 S.W.2d 746, rehearing denied 60 S.W.2d 1018.

(6) Suit for rent due on premises in Texas brought by landlord not seeking lien for rent.—Upton v. Robinson, 17 S.W.2d 305, 179 Ark. 600.

(7) Payee of note, is entitled to bring action for balance due thereon

against resident makers, although note was secured by trust deed on land in another state, notwithstanding courts of state are without jurisdiction to entertain suit involving title to land located in another state or to order sale of such land.—Fidelity-Bankers Trust Co. v. Little, 181 S.E. 913, 173 S.C. 133.

(8) That trustees of corporation sued for debt had no property or assets of corporation did not deprive court of jurisdiction of subject matter.—Ghina v. Barker, 254 P. 174, 78 Mont. 357.

State statute prohibiting deficiency judgment in action to foreclose mortgage securing bond, limiting time for suit on bond after foreclosure, authorizing redemption of property after entry of deficiency judgment in such suit and requiring lis pendens notice before commencing suit, held not to preclude action on bond outside state; such action being transitory.—Hackensack Trust Co. v. Voigt, C.C.A.N.Y., 75 F.2d 270.

55. Mich.—Miller v. Hilto, 155 N.W. 574, 189 Mich. 635.

15 C.J. p 739 note 40.

56. Okl.—Hays v. King, 143 P. 1142, 44 Okl. 180.

15 C.J. p 739 note 41.

57. U.S.—Chase v. Ormsby, C.C.A. Pa., 65 F.2d 521, reversing, D.C., 3 F.Supp. 680, certiorari granted Ormsby v. Chase, 54 S.Ct. 52, 290 U.S. 609, 78 L.Ed. 533, reversed on other grounds 54 S.Ct. 211, 290 U.S. 387, 78 L.Ed. 378, 92 A.L.R. 1499—Mann v. Pacific Atlantic S. Co., D.C.N.Y., 10 F.Supp. 527.

Del.—Skillman v. Conner, Super., 193 A. 563.

La.—Natalbany Lumber Co. v. McGraw, 178 So. 377, 188 La. 863, followed in Daniels v. McGraw, 178 So. 380, 188 La. 874.

Mass.—Pinson v. Potter, 10 N.E.2d 136.

N.Y.—Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223, 32 A.L.R. 1, reversing 176 N.Y.S. 901, 188 App. Div. 975—Domres v. Storms, 260 N.Y.S. 335, 236 App.Div. 630, reargument and motion denied 261 N.Y.S. 1037, 238 App.Div. 765—Consumers' Lumber Co. v. Lincoln, 233 N.Y.S. 530, 225 App.Div. 484—

Ferguson v. Harder, 252 N.Y.S. 783, 141 Misc. 466.

15 C.J. p 739 note 44.

58. U.S.—Mann v. Pacific Atlantic S. Co., D.C.N.Y., 10 F.Supp. 527. Cal.—Loranger v. Nadeau, 10 P.2d 63, 215 Cal. 362, 84 A.L.R. 1264.

La.—Natalbany Lumber Co. v. McGraw, 178 So. 377, 188 La. 863, followed in Daniels v. McGraw, 178 So. 380, 188 La. 874.

N.Y.—Gregonis v. Philadelphia & Reading Coal & Iron Co., 139 N.E. 223, 235 N.Y. 152, 32 A.L.R. 1, reversing 176 N.Y.S. 901, 188 App. Div. 975—Ferguson v. Harder, 252 N.Y.S. 783, 141 Misc. 466.

Tenn.—Brown v. Hagan, 14 Tenn. App. 251.

15 C.J. p 739 note 45.

Tort actions against foreign corporations

General jurisdiction of state courts extends to transitory actions against foreign corporations where subject of action is tort committed outside of state, if plaintiffs are residents of state at time action is commenced, unless unreasonable burden is placed on interstate or foreign commerce.—Rozenblitt v. Polish Trans-Atlantic Shipping Co., 293 N.Y.S. 79, 162 Misc. 251.

59. Conn.—Kranke v. American Fabrics Co., 151 A. 312, 112 Conn. 58.

60. Conn.—Kranke v. American Fabrics Co., supra.

15 C.J. p 740 note 46.

61. Tex.—Mendiola v. Gonzales, Civ. App., 185 S.W. 389.

15 C.J. p 740 note 47.

62. Tex.—Morgan's Louisiana, etc., R., etc., Co. v. Street, 122 S.W. 270, 57 Tex.Civ.App. 194.

63. U.S.—Evey v. Mexican Cent. R. Co., Tex., 81 F. 294, 26 C.C.A. 407, 38 L.R.A. 887.

15 C.J. p 740 note 49.

Actions under laws of other states or countries see infra §§ 70-72.

64. U.S.—Ormsby v. Chase, Pa., 54 S.Ct. 211, 290 U.S. 387, 78 L.Ed. 378, 92 A.L.R. 1499, reversing, C.C.A., 65 F.2d 521, reversing, D.C., 3 F.Supp. 680, certiorari granted Ormsby v. Chase, 54 S.Ct. 52, 290 U.S. 609, 78 L.Ed. 533—Atchison, T. & S. F. Ry. Co. v. Weeks, D.C.

causing death,⁶⁵ for assault and battery,⁶⁶ for wrongful arrest and imprisonment,⁶⁷ for malicious prosecution,⁶⁸ for slander⁶⁹ or libel,⁷⁰ for fraud or deceit,⁷¹ for unfair competition,⁷² for negligence resulting in the derailment of a train,⁷³ or for failure to deliver a telegram.⁷⁴

Such jurisdiction rests merely upon comity and may be declined under proper circumstances.⁷⁵

If there is no right of action in the state where the injury occurred, there can be no recovery therefor in another state, although such a recovery would be warranted if the act or omission had occurred in the state of the forum.⁷⁶

Where a river or stream forms the boundary between two states, the courts of either state have

concurrent jurisdiction over an action for personal injuries occurring on the stream.⁷⁷

§ 43. Jurisdiction of the Res or Property

Jurisdiction over the res or property is the power of the court over the thing before it without regard to the persons who may be interested in it. Where the res is present within its territorial jurisdiction the court may adjudicate with regard to it, and may determine the obligations of a nonresident; but the court has no jurisdiction of an action in rem where the property in controversy lies without the territorial limits of its jurisdiction.

Jurisdiction over the res or property is the power of a court over the thing before it, without regard to the persons who may be interested therein,⁷⁸ and the presence of the res within the territorial dominion of the sovereign power under authority of which the court acts may confer such jurisdiction.⁷⁹

Tex., 248 F. 970, reversed on other grounds 254 F. 513, 186 C.C.A. 71, in which certiorari is denied Weeks v. Atchison, T. & S. F. R. Co., 39 S.Ct. 259, 249 U.S. 602, 63 L.Ed. 797.

Ark.—Yockey v. St. Louis-San Francisco Ry. Co., 37 S.W.2d 694, 183 Ark. 601.

Cal.—Roberts v. Dunsmuir, 16 P. 782, 75 Cal. 203—Hudson v. Von Hamm, 259 P. 374, 85 Cal.App. 323.

Conn.—Fine v. Wencke, 169 A. 58, 117 Conn. 683—Orr v. Ahern, 139 A. 691, 107 Conn. 174.

Ill.—Opp v. Pryor, 128 N.E. 580, 294 Ill. 533—Swanson v. Moline, R. I. & E. Traction Co., 204 Ill.App. 144.

La.—Williams v. Pope Mfg. Co., 27 So. 851, 52 La.Ann. 1417, 78 Am. S.R. 390, 50 L.R.A. 816.

Mass.—Keegan v. Director General of Railroads, 137 N.E. 341, 243 Mass. 96.

Neb.—Herrmann v. Franklin Ice Cream Co., 208 N.W. 141, 114 Neb. 468.

N.Y.—Mertz v. Mertz, 3 N.E.2d 597, 271 N.Y. 466, 108 A.L.R. 1120, affirming 285 N.Y.S. 590, 247 App. Div. 713, affirming 284 N.Y.S. 83, 158 Misc. 85—Gainer v. Donner, 251 N.Y.S. 713, 140 Misc. 841.

Tex.—Atchison, T. & S. F. Ry. Co. v. Stevens, Civ.App., 192 S.W. 304, affirmed 206 S.W. 921, 109 Tex. 262.

W.Va.—Poling v. Poling, 179 S.E. 604, 116 W.Va. 187.

Wis.—Bourestom v. Bourestom, 285 N.W. 426—Elgartner v. Illinois Steel Co., 68 N.W. 664, 94 Wis. 70, 59 Am.S.R. 359, 34 L.R.A. 503. 15 C.J. p 740 note 50.

Railroad companies

(1) A railroad may be sued for injuries to an employee or a passenger in a state other than that in which the accident occurred.

U.S.—Nance v. Richmond & D. R. Co., C.C.N.C., 33 F. 429.

N.J.—Martin v. Lehigh Valley R. Co., 176 A. 665, 114 N.J.Law 243.

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Smitha, 232 S.W. 494, 111 Tex. 285, affirming, Civ. App., 190 S.W. 237.

15 C.J. p 740 note 50 [b].

(2) An action for injuries to a railway switchman, occurring on the land belonging to the United States, is transitory and enforceable in the state courts.—Schaff v. Ellison, Tex. Civ.App., 255 S.W. 680, petition dismissed Sumner Sollitt Co. v. Ellison, 45 S.Ct. 10, 266 U.S. 638, 69 L.Ed. 482.

65. Ala.—Folkes v. Central of Georgia Ry. Co., 80 So. 458, 202 Ala. 376.

Ky.—Henry Bickel Co. v. Wright's Adm'x, 202 S.W. 672, 180 Ky. 181.

Mich.—Petrusha v. Korinek, 213 N. W. 188, 237 Mich. 583.

Minn.—Peterson v. Chicago, B. & Q. Ry. Co., 244 N.W. 823, 187 Minn. 228.

N.Y.—Jensen v. United Air Lines Transport Corporation, 8 N.Y.S.2d 374, 255 App.Div. 811.

Pa.—Roberts v. Freihofer Baking Co., 129 A. 574, 283 Pa. 573. 15 C.J. p 741 note 51.

66. Tex.—Parker v. Mather, Civ. App., 59 S.W.2d 961, error refused. 15 C.J. p 741 note 52.

67. N.H.—Henry v. Sergeant, 13 N. H. 321, 40 Am.D. 146.

N.Y.—Tupper v. Morin, 12 N.Y.S. 310, 25 Abb.N.Cas. 398.

68. Tex.—Missouri, etc., R. Co. v. Craddock, Civ.App., 174 S.W. 965.

69. N.Y.—Hull v. Vreeland, 42 Barb. 543, 18 Abb.Pr. 182. 15 C.J. p 741 note 55.

70. Wis.—Morse v. Modern Woodmen of America, 184 N.W. 829, 166 Wis. 194, Ann.Cas.1918D 480. 15 C.J. p 741 note 56.

71. Me.—Foss v. Richards, 139 A. 313, 126 Me. 419.

N.Y.—Ayew v. Willard Hawes & Co., 295 N.Y.S. 49, 250 App.Div. 598, motion granted 296 N.Y.S. 994, 251 App.Div. 705, affirmed 12 N.E.2d 796, 278 N.Y. 634. 15 C.J. p 741 note 57.

72. N.Y.—Morris v. Altstedter, 156 N.Y.S. 1103, 93 Misc. 329. 15 C.J. p 741 note 58.

73. Tex.—Southern Pac. Co. v. Blake, 128 S.W. 668, 61 Tex.Civ. App. 396.

74. Conn.—Penobscot Fish Co. v. Western Union Tel. Co., 98 A. 341, 91 Conn. 35.

15 C.J. p 741 note 60.

75. Mich.—Great Western R. Co. v. Miller, 19 Mich. 305. 15 C.J. p 741 note 61.

76. Mass.—Davis v. New York, etc., R. Co., 9 N.E. 815, 143 Mass. 301, 58 Am.R. 138.

15 C.J. p 741 note 62.

77. Minn.—Opsahl v. Judd, 14 N.W. 575, 30 Minn. 126.

Mo.—Sanders v. St. Louis, etc., Anchor Line, 10 S.W. 595, 97 Mo. 26, 3 L.R.A. 390.

78. U.S.—In re Antigo Screen Door Co., Wis., 123 F. 249, 59 C.C.A. 248.

15 C.J. p 794 note 30.

79. U.S.—Curry v. McCanness, 59 S. Ct. 900, reversing Nashville Trust Co. v. Stokes, Tenn., 118 S.W.2d 228.

Cal.—Guillos v. Parkinson, 263 P. 635, 204 Cal. 441.

D.C.—Stern v. Drew, 235 F. 925, 52 App.D.C. 191.

Ga.—Sweat v. Arline, 197 S.E. 893, 186 Ga. 460—Sirmans v. Powell, 192 S.E. 823, 184 Ga. 693.

Ind.—Joyce v. Bocquin, 150 N.E. 816, 84 Ind.App. 188.

La.—First Nat. Bank v. Lagrone, 117 So. 741, 166 La. 626—Martel Syn-

dicare v. Block, 98 So. 400, 154 La. 869.
 Minn.—First Trust Co. of St. Paul v. Matheson, 246 N.W. 1, 187 Minn. 468, 87 A.L.R. 478.
 N.Y.—McKinnell v. Payne, 189 N.Y. S. 7, 197 App.Div. 340.
 Okl.—Whitehead v. Cox, 218 P. 867, 95 Okl. 198.
 S.D.—Berge v. Yellow Mfg. Acceptance Corporation, 232 N.W. 45, 57 S.D. 306.
 15 C.J. p 794 note 81.

Assets of dissolved foreign corporation

N.Y.—Moscow Fire Ins. Co. of Moscow, Russia, v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 8 N.Y.S.2d 652, 253 App.Div. 644.

Trust property in jurisdiction

Fla.—Reiner v. Fidelity Union Trust Co., 8 A.2d 175, 126 N.J.Eq. 78.
 Wis.—Laughlin v. Wells Bldg. Co., 171 N.W. 755, 169 Wis. 50.

Debts and choses in action

(1) As regards jurisdiction of state courts, the situs of a chose in action is ordinarily at the residence of the creditor or holder thereof.—Title Ins. & Trust Co. v. Northwestern Long-Distance Telephone Co., 173 P. 251, 88 Or. 666.

(2) A debt, which is a mere forced relation between parties, is incapable of location or actual situs.—Redzina v. Provident Inst. for Savings in Jersey City, 125 A. 133, 96 N.J.Eq. 346, affirming 121 A. 519, 1 N.J.Misc. 334.

(3) Debts being intangible have no strictly legal situs, although for most purposes they are given situs of creditor.—Parker, Peebles & Knox v. National Fire Ins. Co., 150 A. 313, 111 Conn. 383, 69 A.L.R. 599.

(4) For purposes of ownership, creditor's domicile is determination of situs of "debt," which is legal relation between two parties, while for purposes of collection, debt is always ambulatory and accompanies person of debtor.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

(5) A debt owed by the United States has no locality at the seat of the government, and a state court in the state of the creditor's domicile has jurisdiction to determine conflicting claims to the fund between creditors of the government's creditor.—Phillips v. Noel Const. Co., 266 F. 603, 49 App.D.C. 379, certiorari denied 41 S.Ct. 7, 254 U.S. 631, 65 L.Ed. 447.

(6) Action of foreign testamentary trustee in lending money to resident executors of foreign decedent created debt due to trustee from executors

having situs in state.—Braman v. Braman, 258 N.Y.S. 181, 236 App.Div. 164.

(7) Debt does not have situs in state, and drafts do not give jurisdiction so that decree respecting debt would bind nonresident, where debtors and creditor were nonresidents and transaction took place and debt was payable without state.—Larson v. Dubuque Fire & Marine Ins. Co., 213 N.W. 140, 238 Mich. 366.

(8) Respecting suit by Kentucky administrator against Texas debtors to recover general bank deposit and notes representing proceeds of sale of Texas land, such choses in action are located in Texas, not Kentucky.—Robinson v. First Nat. Bank, C.C.A.Tex., 55 F.2d 209, affirming, D.C., 45 F.2d 613.

(9) While an open account owed by a resident debtor to a nonresident creditor is property of the creditor situated within the state over which the state courts can acquire jurisdiction, where banks within the state had issued certificates of deposit, negotiable in form and not charged against any particular fund, but payable only from their general assets, which were owned by nonresident banks and held by the owners outside of the state, the courts of the state could not acquire jurisdiction over the debts represented by such certificates of deposit.—Bank of Jasper v. First Nat. Bank of Rome, Ga., 42 S.Ct. 202, 258 U.S. 112, 66 L. Ed. 490, affirming, C.C.A.Fla., First Nat. Bank of Rome, Ga., v. First Nat. Bank of Jasper, Fla., 264 F. 83, 88, in which certiorari is granted Bank of Jasper v. First Nat. Bank of Rome, Ga., 41 S.Ct. 7, 254 U.S. 622, 65 L.Ed. 443.

(10) Nonnegotiable notes, sent by the owner to another state for a temporary purpose, are not property in that state which gave a court there jurisdiction to seize and sell them in an action in rem, on substituted service.—Selgmann v. Millis, C.C.A.Iowa, 25 F.2d 807.

Stock in corporations

(1) The ownership of stock in a corporation can be settled by the courts in the state in which the corporation was organized.

Colo.—Clark v. O'Donnell, 187 P. 534, 68 Colo. 279.
 N.J.—Griswold v. Kelly-Springfield Tire Co., 120 A. 324, 94 N.J.Eq. 308.

Or.—State ex rel. Methodist Old People's Home v. Crawford, 80 P.2d 873, 159 Or. 377.

Tex.—B. & A. Drilling Co. v. Norton, Civ.App., 20 S.W.2d 413, reversed on other grounds Norton v. B. & A. Drilling Co., Com.App., 34 S.W.2d 1095.

(2) Situs of stocks owned by Illinois corporation, pledged to nonresident banks, accompanied by delivery of certificates is not in Illinois, as regards court's jurisdiction.—Guaranty Trust Co. of New York v. Pentress, C.C.A.Ill., 61 F.2d 329, reversing, D.C., Cherry v. Insull Utility Investments, 58 F.2d 1022.

(3) Courts of one state cannot impound, sell, transfer, or in any way incumber corporate stock of foreign corporation.—B. & A. Drilling Co. v. Norton, 20 S.W.2d 413, reversed on other grounds Norton v. B. & A. Drilling Co., Com.App., 34 S.W.2d 1095.

(4) Jurisdiction obtained over corporation by federal district court did not give it jurisdiction to adjudicate rights of legatees of such corporation's capital stock owned by testator and distributed to them by state probate court.—Asher v. Bone, C.C.A.Idaho, 100 F.2d 315.

(5) Stock of a Washington corporation had a situs in Washington, but also had a situs in Idaho, where owners of stock resided in Idaho and adverse claimants of the stock appeared voluntarily in Idaho court and litigated their claims, as regards jurisdiction of court.—Treinies v. Sunshine Mining Co., C.C.A.Idaho, 99 F.2d 651, affirming Sunshine Mining Co. v. Treinies, D.C., 19 F.Supp. 587, certiorari granted Treinies v. Sunshine Mining Co., 59 S.Ct. 439.

(6) Under R.C.1915 § 1986, declaring situs of corporate stock, and Rev.Codes 1915 §§ 3850, 3856, which authorizes substituted service, nonresident owners of stock in domestic corporation may be brought constructively before state court in suit to restrain it from voting such stock, and court has jurisdiction to enter such injunction on proper showing.—Bouree v. Trust Français des Actions de la Franco-Wyoming Oil Co., 127 A. 56, 14 Del.Ch. 332.

(7) New York court had jurisdiction to transfer to New York executors stock certificates in New York of Missouri corporation maintaining transfer office in New York.—Lohman v. Kansas City Southern Ry. Co., 83 S.W.2d 117, 326 Mo. 863.

(8) Presumption exists that certificate evidencing shares of corporate stock followed its owner, and was beyond power of court, where owner was nonresident of state.—Iron City Sav. Bank v. Isaacsen, 164 S.E. 520, 158 Va. 609.
 15 C.J. p 794 note 31 [h].

Under Kentucky declaratory judgment act, circuit court and court of appeals on appeal may adjudicate rights of parties concerning real estate within jurisdiction.—Savin v. Delaney, 16 S.W.2d 1039, 229 Ky. 226.

So where a nonresident has property within the jurisdiction the tribunals of a state may inquire into the nature and extent of his obligations, and in connection therewith may control the disposition of such property or may appropriate it to satisfy the claims of citizens of the state.⁸⁰ While in a proper case a state court may render a judgment in personam and control the acts of the parties regarding property outside the jurisdiction of the state,⁸¹ if a nonresident over whom the court has not otherwise obtained jurisdiction has no property in the state its courts cannot adjudicate his liability to citizens of the state.⁸² In an action in rem, jurisdiction of the court over the property, as the subject matter of the suit, attaches at the institution of the suit.⁸³

A court has no jurisdiction of rights or actions in rem where the property in controversy lies without the limits of the court's control and its process can-

not reach the locus in quo;⁸⁴ and neither jurisdiction nor custody of specific property can be conferred on a court or acquired by it by the commencement of a suit which contains no notice, either in the pleadings or other proceedings therein, of any purpose to affect such property.⁸⁵

Whether an action affecting property in another jurisdiction shall be entertained by the courts of a different state having jurisdiction is to be determined according to the law of the latter state.⁸⁶

The fact that the property was improperly brought within the jurisdiction will not prevent the attaching of jurisdiction.⁸⁷

The courts may not entertain, except by consent, an action directed against property of a foreign government, which is in its possession and is destined for its public use, except where proceedings for the enforcement of a lien against such property

80. Del.—*Shore v. Union Drug Co.*, 159 A. 371.

Ga.—*Pendley v. Tumlin*, 184 S.E. 283, 181 Ga. 808.

Ind.—*Joyce v. Bocquin*, 150 N.E. 816, 84 Ind.App. 188.

La.—*Corell v. Evangeline Parish School Board*, 107 So. 783, 160 La. 1011—*Villey v. Wall*, 97 So. 409, 154 La. 221.

Mich.—*Stewart v. Eaton*, 283 N.W. 651, 287 Mich. 466, 120 A.L.R. 1354.

Neb.—*Salyers Auto Co. v. De Vore*, 217 N.W. 94, 116 Neb. 317, 56 A.L.R. 594.

N.Y.—*Zuhke v. Prudential Life Ins. Co. of America*, 279 N.Y.S. 833, 244 App.Div. 549—*Rich v. St. John*, 199 N.Y.S. 149, 205 App.Div. 24—*Cotnareanu v. Woods*, 278 N.Y.S. 589, 155 Misc. 95—*Jacobs v. Central Vermont Ry. Co.*, 228 N.Y.S. 705, 132 Misc. 144, affirmed *Gaboury v. Central Vermont R. Co.*, 231 N.Y.S. 630, 225 App.Div. 145, reversed on other grounds 165 N.E. 275, 250 N.Y. 233.

S.C.—*Ex parte Roddey*, 172 S.E. 866, 171 S.C. 489, 92 A.L.R. 1430.

Tex.—*Erwin v. Holliday*, 112 S.W.2d 177, 131 Tex. 69, affirming *Holliday v. Erwin*, Civ.App., 85 S.W.2d 355—*American Soda Fountain Co. v. Hairston Drug Co.*, Civ.App., 52 S.W.2d 764.

W.Va.—*Patton v. Eicher*, 102 S.E. 124, 85 W.Va. 465.

15 C.J. p 795 note 34.

Application of maxim, "Mobilia sequuntur personam"

The maxim "mobilia sequuntur personam" is only juristic formula, which cannot destroy fact of physical presence of personal property in another jurisdiction than that of

owner's domicile. It is restricted to field within which state, wherein such property is found, chooses to apply other laws than its own. Thus an owner authorizing removal of personalty from his domicile or acquiring such property elsewhere must be deemed to know that it becomes subject to laws of jurisdiction to which removed and that appeal may be made to courts thereof to determine conflicting rights in property. The physical presence in state of documents in which intangible personal property is merged gives state jurisdiction over them except for imposition of property tax, although owner resides in another state.—*Hutchison v. Ross*, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, affirming *Ross v. Ross*, 253 N.Y.S. 871, 233 App.Div. 626, which reversed 243 N.Y.S. 418, 137 Misc. 795, affirmed *Hutchison v. Ross*, 253 N.Y.S. 889, 233 App.Div. 516. Reargument denied 183 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

31. Cal.—*Guilloy v. Parkinson*, 268 P. 635, 204 Cal. 441.

Kan.—*Illinois Life Ins. Co. v. Young*, 235 P. 104, 118 Kan. 308, certiorari denied *Young v. Stillwell*, 46 S.Ct. 21, 269 U.S. 560, 70 L.Ed. 412.

Powers of courts of equity see the C.J.S. title Equity § 81, also 21 C.J. p 150 note 61—p 153 note 93, and 15 C.J. p 744 notes 87, 88.

82. Mich.—*Larson v. Dubuque Fire & Marine Ins. Co.*, 213 N.W. 140, 238 Mich. 366.

Neb.—*Salyers Auto Co. v. De Vore*, 217 N.W. 94, 116 Neb. 317, 56 A.L.R. 594.

83. Tex.—*Moore v. McLennan County*, Civ.App., 275 S.W. 478.

84. U.S.—*U. S. v. Mack*, N.Y., 55 S.Ct. 813, 295 U.S. 480, 79 L.Ed. 1559, reversing, C.C.A., 73 F.2d 265, which affirmed, D.C., 8 F.Supp. 839, certiorari granted 55 S.Ct. 546, 294 U.S. 704, 79 L.Ed. 1239, and followed in *U. S. v. E. & S. Motor Transportation Co.*, C.C.A. N.Y., 73 F.2d 267, which reversed, D.C., 8 F.Supp. 844.

Fla.—*Georgia Casualty Co. v. O'Donnell*, 147 So. 267, 109 Fla. 290.

N.Y.—*Westchester Mortg. Co. v. Grand Rapids & I. R. Co.*, 154 N.E. 70, 246 N.Y. 191, modifying 219 N.Y.S. 695, 219 App.Div. 733, which modified 213 N.Y.S. 593, 126 Misc. 534, reargument denied 159 N.E. 643, 246 N.Y. 540—*McNaughton v. Broach*, 260 N.Y.S. 100, 226 App. Div. 448.

15 C.J. p 795 note 35.

A mechanic's lien on land cannot be enforced outside of the state under whose laws the lien exists, and where the property is situated.—*Burton-Lingo Co. v. Patton*, N.M., 107 P. 679, 15 N.M. 304.

Replevin

Where plaintiff's evidence disclosed that property sought to be replevied was outside state when action was instituted, court had no jurisdiction, although pleadings were silent upon question of venue and defendant answered to merits.—*Martindale v. Scott*, 158 P. 923, 86 Or. 618.

85. U.S.—*Lang v. Choctaw, D. & G. R. Co.*, Ark., 189 F. 355, 87 C.C.A. 307.

86. Mass.—*National Shawmut Bank of Boston v. City of Waterville*, Me., 189 N.E. 92, 285 Mass. 252.

87. U.S.—*The Bee*, D.C.Me., 3 F.Cas. No.1,219, 1 Ware 336.

15 C.J. p 795 note 37.

may be had without disturbing the possession of the government.⁸⁸

§ 44. Actions Relating to Personal Property

Actions relating to personal property are as a rule transitory.

Actions relating to personal property are as a rule transitory,⁸⁹ and hence a court may assume jurisdiction of an action for injury to,⁹⁰ or conversion of,⁹¹ personal property, notwithstanding the act or omission out of which the cause of action arose occurred in another state.

In order to maintain an action of tort founded upon an injury to personal property, and not upon a breach of contract, it is held that the act which caused the injury must at least be actionable under or punishable by the law of the place where it was done.⁹²

Motor vehicles being personal property jurisdiction over them attaches in the territorial limits wherein they are found.⁹³

§ 45. Actions Relating to Land

Actions relating to land are as a general rule local actions. Thus, as stated *infra* § 46, actions or suits for the recovery of possession or the determination of title are local, as are also action for trespass or injury to land, as discussed *infra* § 47, unless the action is in the nature of trover; and actions on contracts involving land, while generally transitory, as shown *infra* § 48, if based on privacy of estate must be brought in the state where the land lies.

§ 46. — Recovery of Possession or Determination of Title

Actions for the recovery of the possession of land, or to determine the title to land, are local and must be brought in the place where the land lies.

All actions to recover possession of land, as actions in rem, are essentially local to the state in which the land lies,⁹⁴ and the same is true where the object of the suit is not ostensibly to obtain possession of, but to determine directly the question of title to, foreign land,⁹⁵ whether the proceeding is

88. U.S.—The Johnson Lighterage Co. No. 24, D.C.N.J., 231 F. 365.

89. Tex.—Southwestern Portland Cement Co. v. Kezer, Civ.App., 174 S. W. 661.

Action to enforce innkeeper's liability for loss of baggage is transitory.—Fant v. Arlington Hotel Co., 280 S.W. 20, 170 Ark. 440.

Action for money stolen in Pullman car

A passenger's action for money stolen from his suit case while riding in a Pullman car is transitory, and maintainable wherever a court may be found having jurisdiction of the parties and the subject-matter.—Pullman Co. v. Uribe, Tex.Civ.App., 225 S.W. 189.

90. U.S.—McKenna v. Fisk, D.C., 1 How. 211, 11 L.Ed. 117.

Ark.—American Ry. Express Co. v. H. Rouw Co., 294 S.W. 416, 174 Ark. 6.

Mo.—Burrell Collins Brokerage Co. v. New York Cent. R. Co., App., 219 S.W. 105.

N.C.—MacGovern & Co. v. Atlantic Coast Line R. Co., 104 S.E. 534, 180 N.C. 219.

Or.—Anderson v. Columbia Contract Co., 184 P. 240, 94 Or. 171, 7 A.L.R. 653, rehearing denied 185 P. 231, 94 Or. 171, 7 A.L.R. 653.

Pa.—Moyer v. Canal Co., 12 Phila. 400.

15 C.J. p 741 note 65.

91. U.S.—The Lydia, C.C.A.N.Y., 1 F.2d 18, certiorari denied Lydia S. Co. v. Hugh D. MacKenzie Co., 45 S.Ct. 97, 286 U.S. 616, 69 L.Ed.

470, and National Surety Co. v. Hugh D. MacKenzie Co., 45 S.Ct. 97, 286 U.S. 616, 69 L.Ed. 470.

Or.—Montessano Lumber & Mfg. Co. v. Portland Iron Works, 186 P. 438, 94 Or. 677.

Tex.—Kelvin Lumber & Supply Co. v. Copper State Mining Co., Civ. App., 232 S.W. 858, dismissed for want of jurisdiction.

15 C.J. p 741 note 66.

92. U.S.—The China v. Walsh, N.Y., 7 Wall. 53, 19 L.Ed. 67.

15 C.J. p 742 note 67.

93. D.C.—Stern v. Drew, 285 F. 925, 52 App.D.C. 191.

94. Conn.—Gaul v. Baker, 143 A. 51, 108 Conn. 178.

Ga.—Waters v. Donaldson, 191 S.E. 429, 184 Ga. 450.

Ill.—Oakman v. Small, 118 N.E. 775, 283 Ill. 360.

Kan.—Caldwell v. Newton, 183 P. 163, 99 Kan. 846.

Mich.—Henkel v. Henkel, 276 N.W. 522, 282 Mich. 473.

N.Y.—Provident Sav. Bank & Trust Co. v. Steinmetz, 200 N.E. 669, 270 N.Y. 129, affirming 280 N.Y.S. 778, 244 App.Div. 779.

Tex.—Griner v. Trevino, Civ.App., 207 S.W. 947.

15 C.J. p 742 note 68.

Land lying in several jurisdictions

Circuit court of county wherein three of approximately four hundred and forty acres of land in dispute were situated has jurisdiction.—Jacobs v. Stoner, 7 S.W.2d 698, 319 Mo. 1093.

In a proceeding to compel appropriation of land in another state, the action is based on the right of possession, and whether the action is local must be determined by the laws of the former state; and in view of Ohio Const. art 13 § 5, providing that no right of way shall be appropriated for use of a corporation until full compensation be first made, where a life tenant sold a lot to a railroad company which was succeeded by defendants, and at the death of the life tenant, remaindermen had their choice of an action in ejectment, or an action to compel appropriation, the choice of the latter action would not change the cause from a local to a transitory one, the rights under both actions being based on the remainderman's right of possession.—Eighme v. Indiana, B. & W. R. Co., 249 S.W. 717, 213 Mo.App. 342.

Ownership of liens on land

The ownership, as between parties to the action, of liens created by mortgage on land within the state, is a matter of proper determination by the courts of the state.—Davison v. Circuit Court of Kingsbury County, in Ninth Judicial Circuit, 173 N.W. 737, 42 S.D. 254.

95. U.S.—Weaver v. Atlas Oil Co., D.C.La., 31 F.2d 484.

Cal.—Taylor v. Taylor, 218 P. 756, 192 Cal. 71, 51 A.L.R. 1074—Getty v. Getty, 20 P.2d 82, 130 Cal.App. 519—Redwood Inv. Co. of Stithon, Ky., v. Exley, 221 F. 973, 64 Cal.App. 455.

at law or in equity.⁹⁶

§ 47. — Trespass or Injury

Actions for trespass or injury to land are generally regarded as local. However, an action in the nature of trover is transitory, and under some statutes actions may be brought for injuries to land outside the jurisdiction.

It is usually considered that actions for trespass or injury to real estate are local in their character and must be brought in the state where the land is located;⁹⁷ and a court of another state cannot entertain such an action, even though all the persons concerned are within the jurisdiction,⁹⁸ and it is certain that defendant cannot be reached by the courts of the state in which the trespass was committed.⁹⁹ Furthermore, plaintiff cannot, by including injuries to personalty from the same wrongful act, confer jurisdiction on a court of a state other than the one where the land is located.¹ However, where the action is in the nature of trover, although

the facts alleged may be sufficient to constitute a cause of action for injury to real estate, the courts of one state may take jurisdiction of such an action where the wrongful act was done in another state;² and accordingly jurisdiction may be entertained of an action for the value of sand removed from land and converted,³ or for trees or timber cut and carried away,⁴ although the wrongful act was committed in another state. There is also authority for the view that an action will lie in one state for any injury to land situated in another state,⁵ it being considered that such an action is purely personal in its nature, the reparation being purely personal, and the relief sought being a recovery of damages.⁶

Act in one state causing damage in another. Where the act is committed in one state but it causes damage and injury to real property in another, the action is generally considered to be transitory and not local as between the states.⁷

The law of the forum governs in determining

Ill.—Carter v. Carter, 119 N.E. 268, 283 Ill. 324.

Iowa.—Ross v. Lawrence, 186 N.W. 455, 193 Iowa 47—Matson v. Matson, 173 N.W. 127, 186 Iowa 607.

Me.—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 110 A. 429, 119 Me. 213.

Mo.—Wass v. Hammontree, 77 S.W. 2d 1006—Crawford v. Amusement Syndicate Co., 37 S.W.2d 581.

N.Y.—In re Osborn's Estate, 270 N.Y.S. 616, 151 Misc. 52.

Ohio.—Smith v. McKelvey, 162 N.E. 722, 28 Ohio App. 361.

Or.—Crocket v. Howland, 24 P.2d 327, 144 Or. 223.

Tenn.—Cory v. Olmstead, 290 S.W. 31, 154 Tenn. 513.

Tex.—Youree v. Pires, Civ.App., 5 S.W.2d 178, error refused.

Va.—American Bonding Co. of Baltimore, Md., v. American Surety Co. of New York, 103 S.E. 599, 127 Va. 209.

Wash.—Daniel v. Daniel, 181 P. 215, 106 Wash. 659.

15 C.J. p 742 note 69.

96. U.S.—Northern Indiana R. Co. v. Michigan Cent. R. Co., Mich., 15 How. 233, 14 L.Ed. 674. 15 C.J. p 742 note 70.

97. U.S.—Shell Petroleum Corporation v. Moore, C.C.A.Tex., 46 F.2d 959.

Cal.—Ophir Silver Mining Co. v. Superior Court of City and County of San Francisco, 82 P. 70, 147 Cal. 467.

Me.—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 110 A. 429, 119 Me. 213.

N.J.—Van Ommen v. Hogeman, 126 A. 468, 100 N.J.Law 224.

Or.—Dippold v. Cathlamet Timber Co., 193 P. 909, 98 Or. 183. 15 C.J. p 743 note 71.

Where dispute concerns title to land

Transitory actions will not be entertained to recover money damages as for the conversion of personalty, where the dispute at bottom is one concerning title to land, but the parties will be relegated to courts, with jurisdiction to try title to the land as a local action; and the courts of Massachusetts have no jurisdiction of actions between Maine corporations operating mines in Arizona and having a usual place of business in Massachusetts to recover a debt for money expended in Massachusetts for defendant company's proportion of expense for pumping water from its mine, the actions being founded on Ariz.Civ.Code 1913 pars 4047, 4048, in view of paragraph 4051, and being inherently local.—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 128 N.E. 4, 236 Mass. 185.

Damages for negligently starting fire

A complaint that defendant negligently caused, permitted, and suffered fires about its plant and negligently permitted them to escape to and destroy plaintiffs' timber growing on their homestead entry resulting in damage, states a local cause of action, and must be tried in the state where homestead is situated.—Taylor v. Sommers Bros. Match Co., 204 P. 472, 35 Idaho 30, 42 A.L.R. 189.

98. Neb.—Kroll v. Chicago, etc., R. Co., 152 N.W. 548, 549, 98 Neb. 322, 324. 15 C.J. p 743 note 72.

99. U.S.—Livingston v. Jefferson,

C.C.Va., 15 F.Cas.No.8,411, 1 Brock. 203, 4 Hughes 606.

1. Idaho.—Taylor v. Sommers Bros. Match Co., 201 P. 472, 35 Idaho 30, 42 A.L.R. 189.

Me.—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 110 A. 429, 119 Me. 213.

N.J.—Van Ommen v. Hogeman, 126 A. 468, 100 N.J.Law 224.

2. U.S.—Compania Transcontinental de Petroleo, S. A., v. Mexican Gulf Oil Co., (C.C.A.N.Y., 292 F. 846, affirming, D.C., Mexican Gulf Oil Co. v. Compania Transcontinental de Petroleo, 281 F. 148).

Me.—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 110 A. 429, 119 Me. 213.

Tex.—Copper State Mining Co. v. Kelvin Lumber & Supply Co., Com. App., 227 S.W. 938, reversing Kelvin Lumber & Supply Co. v. Copper State Mining Co., Civ.App., 203 S.W. 608.

15 C.J. p 743 note 74.

3. Kan.—McGonigle v. Atchison, 7 P. 550, 33 Kan. 726.

4. Ga.—Lanlie v. Gragg Lumber Co., 193 S.E. 763, 184 Ga. 794, 113 A.L.R. 932.

15 C.J. p 743 note 76.

5. Minn.—Little v. Chicago, etc., R. Co., 67 N.W. 846, 65 Minn. 48, 60 Am.S.R. 421, 33 L.R.A. 423.

15 C.J. p 743 note 77.

6. Minn.—Little v. Chicago, etc., R. Co., supra.

7. Vt.—Vermont Valley R. R. v. Connecticut River Power Co. of New Hampshire, 133 A. 367, 99 Vt. 397.

15 C.J. p 744 note 79.

whether an action for trespass on land in one state can be brought in another state.⁸

Statutes sometimes permit the maintenance of an action within the state for injuries to real property outside the state,⁹ but such a statute is not retroactive.¹⁰

§ 48. — Contract Actions

Actions for breach of contract respecting land are transitory, unless the contract action is based on privity of estate.

An action to recover pecuniary damages for the breach of a contract respecting lands lying abroad is transitory, if the relation between the parties is

that of privity of contract;¹¹ but an action in contract, based on privity of estate, cannot be entertained in a state other than that in which the land lies,¹² even though the parties litigant are inhabitants of the state of the forum.¹³

§ 49. — Suits in Equity

The jurisdiction of the subject matter or cause of action in suits in equity relating to land is considered in the title Equity § 58, also 21 C.J. p 146 note 99—p 147 note 2, and the power of equity to act in personam, although its act affects land outside its territorial jurisdiction, in the C.J.S. title Equity § 81, also 21 C.J. p 150 note 61—p 153 note 93, and 15 C.J. p 744 notes 87, 88.

3. AMOUNT IN CONTROVERSY

§ 50. Courts of Limited or Inferior Jurisdiction in General

Constitutional or statutory provisions in force in many jurisdictions which limit the jurisdiction of courts of inferior jurisdiction by the amount in controversy must be complied with.

In general, the amount or value of the matter in controversy is an essential element in the determi-

nation of the jurisdiction of courts,¹⁴ and the jurisdiction of courts of inferior jurisdiction is very generally limited, under the constitutional or statutory provisions in force in the various jurisdictions, by the amount in controversy, such courts usually being prevented from entertaining actions in which the amount involved exceeds,¹⁵ or is below,¹⁶ a specified amount, or are limited in their jurisdiction

8. U.S.—Potomac Milling & Ice Co. v. Baltimore & O. R. Co., D.C. Md., 217 F. 665—Peyton v. Desmond, Minn., 129 F. 1, 63 C.C.A. 651.

9. U.S.—Mexican Gulf Oil Co. v. Compania Transcontinental De Petroleo, S. A., D.C.N.Y., 281 F. 148, affirmed, C.C.A., Compania Transcontinental de Petroleo, S. A., v. Mexican Gulf Oil Co., 292 F. 846. N.Y.—Stark v. Howe Sound Co., 266 N.Y.S. 368, 148 Misc. 686, affirmed 269 N.Y.S. 936, 241 App.Div. 637, amended 271 N.Y.S. 1097, 242 App. Div. 668.

15 C.J. p 744 note 81.

10. N.Y.—Jacobus v. Colgate, 111 N.E. 837, 217 N.Y. 235, reversing 150 N.Y.S. 1056, 165 App.Div. 227.

11. Cal.—Platner v. Vincent, 202 P. 655, 187 Cal. 443.

15 C.J. p 744 note 83.

12. Me.—Elghme v. Indiana, B. & W. R. Co., 249 S.W. 717, 213 Mo.App. 342.

15 C.J. p 744 note 84.

Assignee of grantee

The original grantee under a deed executed in California, conveying land situated in Washington, may recover for breaches of covenants of title and quiet enjoyment, irrespective of whether such covenants run with the land, although the laws of Washington declare such covenants to be express and hence substantially

part of the deed but an assignee or grantee of such original grantee, in the absence of a contract that such covenant should inure to his benefit, cannot recover for a breach occurring while he holds the title, unless the covenant runs with the land, there being no privity of contract, but only of estate, between him and the original grantor.—Platner v. Vincent, 202 P. 655, 187 Cal. 443.

13. Mass.—Clark v. Scudder, 6 Gray 122.

15 C.J. p 744 note 85.

14. Tex.—Booth v. Texas Employers' Ins. Ass'n, Com.App., 123 S.W. 2d 322, reversing Texas Employers Ins. Ass'n v. Booth, Civ.App., 113 S.W.2d 231.

15. Cal.—Architectural Tile Co. v. Superior Court in and for Los Angeles County, 291 P. 586, 108 Cal.App. 369.

Idaho.—Freston A. Blair Co. v. Rose, 51 P.2d 209, 58 Idaho 114.

Ind.—Capitol Amusement Co. v. Washington & New Jersey Realty Co., 164 N.E. 715, 90 Ind.App. 389.

Iowa.—Great Western Ins. Co. v. Saunders, 274 N.W. 28, 223 Iowa 926.

N.J.—Standard Accident Ins. Co. of Detroit, Mich. v. Lloyd, 157 A. 657, 10 N.J.Misc. 28.

N.Y.—McConnell v. Williams S. S. Co., 256 N.Y.S. 858, 143 Misc. 426, reversing City Ct., 254 N.Y.S. 597,

142 Misc. 269—Kaplan v. Antonelli, 230 N.Y.S. 321, 132 Misc. 572.

Ohio.—Soul v. Lockhart, 164 N.E. 419, 119 Ohio St. 393.

Pa.—Cuberka v. Pennsylvania Slovak Roman and Greek Catholic Union of U. S. of America, 193 A. 328, 126 Pa.Super. 605—Baker v. Carter, 157 A. 211, 103 Pa.Super. 344—Love v. Tioga Trust Co., 68 Pa. Super. 447—Wilson v. Pullman Co., 65 Pa.Super. 499—Lerner v. Felderman, 64 Pa.Super. 287.

Tex.—Specialty Service Corporation v. Armstrong, Civ.App., 296 S.W. 958—Simms Oil Co. v. Hall, Civ. App., 281 S.W. 286—Cavitt v. Beall Hardware & Implement Co., Civ. App., 204 S.W. 798, reversed on other grounds Brown v. Fleming, Com.App., 212 S.W. 483.

15 C.J. p 745 note 91.

Interpleader

Tex.—Vassiliades v. Theophiles, Civ. App., 115 S.W.2d 1220, error dismissed.

Consolidation of actions see Actions § 109 b (2).

Justices of peace

Amount in controversy as an element of jurisdiction of court of justice of the peace see the C.J.S. title Justices of the Peace §§ 33-35, also 35 C.J. p 512 note 99—p 526 note 78.

16. Ill.—Seney v. Knight, 126 N.E. 761, 292 Ill. 206, affirming In re Seney, 213 Ill.App. 382.

to actions in which the amounts involved are between specified amounts.¹⁷ Where the jurisdiction of an inferior court is made by statute to depend on a specified amount, the jurisdiction does not attach to any case in which the right involved cannot be calculated in money.¹⁸ A court of limited jurisdiction has no power to entertain a cause of action which is not within its jurisdiction;¹⁹ and where a court of limited jurisdiction entertains a cause of action appearing on its face to be not within its jurisdiction, the entry of a judgment for an amount within the jurisdiction of the court does not give the court jurisdiction of the cause, when there is no relinquishment of a part of the cause of action so as to bring it bona fide within the jurisdiction of the court.²⁰

These limitations placed on the jurisdiction of inferior courts are not on the theory that they are incapable of dealing with larger sums.²¹ If the power of the court depends on the amount claimed in the complaint, jurisdiction, once it exists, is not lost because more than the specified sum may be involved; and the inferior or local court, having once obtained jurisdiction, may dispose of the entire dispute between the parties unless prohibited by constitution or statute.²² On the other hand, if the jurisdiction of the court is limited by the amount for which judgment can be rendered, it cannot by interpleading other parties defendant, who are making adverse claims, obtain jurisdiction to render an

affirmative judgment going beyond the plaintiff's claim, and for more than the amount of the jurisdiction of the court in original actions; but the fact that the court made an order of interpleader beyond its powers will be immaterial if the judgment rendered is within its powers.²³

Where the jurisdiction of a court is expressly prescribed and limited by the constitution with respect to the amount in controversy, the legislature cannot confer jurisdiction of an amount in excess thereof.²⁴

Transfer of causes. Under some statutes a transfer of causes from a court not having jurisdiction up to the amount demanded to a court having such jurisdiction is authorized.²⁵

§ 51. Courts of Superior Jurisdiction in General

Under constitutional or statutory provisions in force in various jurisdictions, superior courts of general jurisdiction are limited in their jurisdiction to cases involving amounts in excess of a specified amount.

In a number of states, the policy is to force litigants whose disputes involve only comparatively trifling amounts to resort to the inferior courts, and the superior courts of general jurisdiction are, in pursuance of this policy, deprived of original jurisdiction of actions of certain classes where the amount involved is less than a specified sum.²⁶ In order to warrant the dismissal of an action because

17. Tex.—Ripple v. McCoury, Civ. App., 29 S.W.2d 436.

18. Miss.—Welch v. Bryant, 128 So. 734, 157 Miss. 559.

19. N.Y.—McConnell v. Williams S. S. Co., 267 N.Y.S. 554, 239 App. Div. 393, modifying 262 N.Y.S. 574, 146 Misc. 512, and motion denied 193 N.E. 297, 265 N.Y. 513, affirmed 193 N.E. 386, 265 N.Y. 594.

Pa.—Horafeus v. Mangos, 98 Pa. Super. 447.

Tex.—Ferguson v. Ferguson, Civ. App., 98 S.W.2d 513, error dismissed.

Of arbitration award

Court has no jurisdiction to construe arbitration award, or to make it the judgment of the court, where an inspection of the award itself shows that the amount involved exceeds the jurisdiction of the court.—Ferguson v. Ferguson, *supra*.

Case should be dismissed

Bill for injunction, filed in municipal court of Philadelphia, involving amount in excess of the court's jurisdiction should be dismissed, or with the consent of the court of common pleas, transferred to that court.—Pennington v. Conway & Ash, 92 Pa.Super. 149.

20. Fla.—Seaboard Air Line R. Co. v. Ray, 42 So. 714, 52 Fla. 634.

Pa.—Reily v. Shafer, 70 Pa.Super. 289.

Reduction of amount as conferring jurisdiction see *infra* § 68.

21. N.Y.—Byrne v. Padden, 162 N.E. 20, 248 N.Y. 243, reversing 223 N.Y.S. 596, 221 App.Div. 764, appeal granted 224 N.Y.S. 943, 222 App. Div. 866.

22. N.Y.—Byrne v. Padden, 162 N.E. 20, 248 N.Y. 243, reversing 223 N.Y.S. 596, 221 App.Div. 764, appeal granted 224 N.Y.S. 943, 222 App. Div. 866.

23. N.Y.—Basile v. Basile, 197 N.Y.S. 668, 120 Misc. 63.

24. N.Y.—Tappin v. Maclean, 192 N.Y.S. 196, 117 Misc. 757, 15 C.J. p 746 note 93.

25. N.Y.—Margies v. Clyde SS. Co., 150 N.Y.S. 4, 165 App.Div. 33, 15 C.J. p 746 note 94.

26. Ariz.—Mosher v. Bellas, 264 P. 468, 33 Ariz. 147.

Ark.—McCuen v. Grand Lodge, I. O. O. F., 240 S.W. 19, 152 Ark. 613.

Cal.—Hopkins v. Anderson, 31 P.2d 560, 218 Cal. 62—Consolidated Adjustment Co. of California v. Su-

perior Court of Sonoma County, 207 P. 552, 149 Cal. 32—Rapaport v. Forer, 66 P.2d 1242, 20 Cal.App. 2d 271—Norager v. Mountain States Life Ins. Co., 51 P.2d 443, 10 Cal.App.2d 188—Lesser v. Pomin, 39 P.2d 451, 3 Cal.App.2d 117—Clark v. Bauer, 26 P.2d 729, 155 Cal. App. 65—Stevens v. Superior Court in and for Los Angeles County, 293 P. 620, 109 Cal.App. 522—Architectural Tile Co. v. Superior Court in and for Los Angeles County, 291 P. 586, 108 Cal.App. 369—Massachusetts Bonding & Ins. Co. v. San Francisco-Oakland Terminal Rys., 178 P. 974, 39 Cal. App. 388—Stephens v. Weyl-Zuckerman & Co., 167 P. 171, 34 Cal. App. 210.

Fla.—Bailey v. Clendenon, 172 So. 94, 127 Fla. 10—State ex rel. City of West Palm Beach v. Chillingworth, 129 So. 816, 100 Fla. 483.

Ky.—Union Light, Heat & Power Co. v. Mulligan, 197 S.W. 1081, 177 Ky. 662.

Mo.—Wade v. Markham, App., 106 S.W.2d 939.

N.C.—Rebuck v. Short, 144 S.E. 515, 196 N.C. 61.

R.I.—Mack Motor Truck Co. v. Dorsey, 119 A. 756, 45 R.I. 65.

the amount involved is insufficient to give the court jurisdiction, the facts made to appear of record should create a legal certainty as to such insufficiency.²⁷ Where the amount involved in a contract is such as to give jurisdiction, the court does not lose jurisdiction because the contract is found to be void;²⁸ and where the court has jurisdiction of the principal sum, it may settle the claims of all parties to such sum, although such claims are too small to be the subjects of independent actions in such court.²⁹ Where the jurisdiction of a court is dependent on the fact that the matter in dispute exceeds in value a specified amount, jurisdiction does not attach to any case in which the right involved cannot be calculated in money.³⁰ A case cannot be transferred from the equity side of a court to the law side of the court where the amount involved is not within the jurisdiction of the court.³¹

Action by state or county. It has been held that general statutes as to courts of record restricting the jurisdiction as to the amount in controversy do not bind the state, unless expressly mentioned therein, and that a suit may be brought by the state for a sum less than the statute specifies as necessary to confer jurisdiction,³² but a county has been held not entitled to sue in a particular court for less than the jurisdictional amount.³³

Change of jurisdictional amount. Jurisdiction which has once attached will not be divested by a subsequent statute increasing the minimum amount which must be involved in order to give the court jurisdiction,³⁴ especially where the statutes contain express saving clauses with respect to pending actions or actions on causes of actions which had previously accrued;³⁵ nor will a statute operate to give a court jurisdiction over pending actions which were, when commenced, beyond its jurisdiction.³⁶

On appeal from inferior court. Where an appeal lies from an inferior court to a superior court, where the case is tried de novo, the jurisdiction of the superior court on such appeal is the same as the jurisdiction of the inferior court,³⁷ and if the result of a trial in the superior court shows the real amount in controversy to be an amount which, although within its own jurisdiction, is beyond the jurisdiction of the inferior court in which the action was commenced, the action should be dismissed for want of jurisdiction in the inferior court.³⁸

§ 52. Jurisdiction Independent of Amount in Controversy

Under constitutional and statutory provisions in the different jurisdictions particular and designated courts may have jurisdiction of specified classes of cases irrespective of the amount in controversy.

Tex.—Faith v. Newman, Civ.App., 4 S.W.2d 193—Austin v. Guaranty State Bank of Fullbright, Civ.App., 232 S.W. 262—Dillion v. Dillion, Civ.App., 274 S.W. 217—Hughes v. Hughes, Civ.App., 264 S.W. 579—Beverly v. Roberts, Civ.App., 215 S.W. 975—Kynard v. Security Nat. Bank, Civ.App., 207 S.W. 133, reversed on other grounds Security Nat. Bank v. Kynard, Com.App., 228 S.W. 123—Jones v. Dodd, Civ. App., 192 S.W. 1134.
15 C.J. p 746 note 96.

Affecting right to remove cause to federal court see the C.J.S. title Removal of Causes §§ 28-44, also 54 C.J. p 224 note 45-p 230 note 31.
The question of the amount in controversy as affecting the right of review is discussed in Appeal and Error §§ 53-90.

Amount in controversy as determining jurisdiction of federal district courts see the C.J.S. title Federal Courts § 310, also 25 C.J. p 976 note 28-p 980 note 7.

Original jurisdiction of the supreme court of the United States not dependent on the amount in controversy see the C.J.S. title Federal Courts § 197, also 25 C.J. p 861 note 7.

27. U.S.—Wetmore v. Rymer, Tenn.,

18 S.Ct. 292, 169 U.S. 115, 42 L.Ed. 682.
15 C.J. p 748 note 99.

Insufficiency not shown

Where plaintiff had paid three thousand dollars for privilege of cutting timber, and under contract was entitled to possession of land for that purpose, district court had jurisdiction of suit to enjoin interference with such activities.—Kajfes v. Ellis, 101 So 393, 156 La. 993.

28. Ark.—Stevenson v. Christle, 42 S.W. 418, 64 Ark. 72.

29. Tex.—Robinson v. Chamberlain, 68 S.W. 209, 29 Tex.Civ.App. 170.
15 C.J. p 748 note 1.

Creditor's bill

The superior court, taking charge of the entire property of a debtor, under its general jurisdiction, by means of a creditor's bill, has power to collect and dispose of all the assets, and to determine liens and priorities, and to apply the funds accordingly, irrespective of the amount of any claim, and even though the amount of a particular claim is less than the amount required to confer jurisdiction on the court in other instances.—Fulp & Linville v. Kernersville Light & Power Co., 72 S.E. 867, 157 N.C. 157.

30. U.S.—Kurtz v. Moffitt, Cal., 6 S. Ct. 148, 115 U.S. 487, 29 L.Ed.

458—Oregon R. & Nav. Co. v. Shell, C.C.Wash., 125 F. 979, affirmed 143 F. 1004.

31. Fla.—Bailey v. Clendenon, 172 So. 94, 127 Fla. 10.

32. N.C.—State v. Garland, 29 N.C. 48.

33. Ala.—Camp v. Marion County, 8 So. 786, 91 Ala. 240.

34. U.S.—Taylor v. Midland Valley R. Co., D.C.Okl., 197 F. 323.
15 C.J. p 748 note 5.

35. U.S.—Cady v. Barnes, D.C.Ohio, 208 F. 359.
15 C.J. p 748 note 6.

36. Cal.—Taylor v. Datig, 11 P.2d 98, 123 Cal.App. 782.

37. Miss.—Askew v. Askew, 49 Miss. 301.

Okl.—Terwilleger v. Bull, 9 P.2d 45, 155 Okl. 294.

Cross action

Cross action for amount within jurisdiction of inferior court, but not within jurisdiction of superior court, cannot, for the first time, be filed in superior court.—Racugno v. Hanovia Chemical & Manufacturing Co., Tex.Civ.App., 110 S.W.2d 249.

38. Ark.—Harnwell v. Hollenberg Music Co., 13 S.W.2d 297, 178 Ark. 98.

Miss.—Askew v. Askew, 49 Miss. 301.

The amount in controversy does not always govern with respect to jurisdiction, for in certain classes of cases constitutional or statutory provisions in the various states have conferred jurisdiction on particular designated courts regardless of the amount in controversy, the test of jurisdiction being found in the nature of the case made by the complaint and the relief sought,³⁹ and in such a case a court of general jurisdiction has power to dispose of the matter, even though the amount in-

volved or the ultimate recovery is trifling.⁴⁰ No general rule can be laid down for the determination of the question as to whether the jurisdictional limit applies to a particular proceeding, but each case must be determined for itself in view of the constitutional or statutory provisions with respect to the jurisdiction conferred.⁴¹ So, on the construction of such provisions must depend the jurisdiction of actions on contracts,⁴² or tort actions,⁴³ or suits concerning real property,⁴⁴ of summary

39. Ind.—Capitol Amusement Co. v. Washington & New Jersey Realty Co., 164 N.E. 715, 90 Ind.App. 389. Md.—Havre de Grace Banking & Trust Co. v. Mitchell, 199 A. 843, 175 Md. 68.

15 C.J. p 749 note 11.

To compel issuance of execution

Where validity of claim supporting judgment in justice's court was not controverted, district court had jurisdiction to entertain suit to compel justice to issue execution thereon, regardless of the amount of the claim involved.—Richburg v. Baldwin, Tex.Civ.App., 89 S.W.2d 851, error dismissed.

Attachments on judgments

In attachments on judgments by way of execution jurisdictional limit has no application.—Havre de Grace Banking & Trust Co. v. Mitchell, 199 A. 843, 175 Md. 68.

Forcible detainer action

That purchase price in land contract which vendor had forfeited for purchaser's default exceeded municipal court's jurisdiction did not defeat jurisdiction of vendor's forcible detainer action against purchaser, since no money judgment, except costs, was contemplated.—State v. Miller, 183 N.E. 41, 48 Ohio App. 173.

40. Tex.—Missouri, etc., R. Co. v. Bacon, Civ.App., 80 S.W. 573.

41. Ill.—People v. Woodside, 72 Ill. 407.

15 C.J. p 749 note 14.

Residence of parties

In action commenced in circuit court for amount less than fifty dollars certified copy of ex parte affidavit filed in office of secretary of state reciting that one of defendants was resident of another county and that one of defendants was resident of another state was insufficient to prove that defendants were nonresidents of county so as to confer jurisdiction on court, under statute conferring jurisdiction regardless of amount where parties reside elsewhere.—Wade v. Markham, Mo.App., 106 S.W.2d 939.

42. Ill.—Holmes v. Straus, 119 N. E. 708, 283 Ill. 621, modifying 204 Ill.App. 305.

15 C.J. p 750 note 15.

Guaranty contract

Jurisdictional limitation held to apply to action on guaranty contract.—Capitol Amusement Co. v. Washington & New Jersey Realty Co., 164 N.E. 715, 90 Ind.App. 389.

Specialties

(1) In an action on a replevin bond the jurisdiction of the municipal court of Chicago extends to cases in which the amount claimed exceeds one thousand dollars.—Strassheim v. Barnes, 212 Ill.App. 299.

(2) Under the municipal court code, there is no limitation as to amount in an action in the municipal court on the bond of a marshal of the city of New York.—Allen v. Wolkof, 169 N.Y.S. 382, 182 App.Div. 634, reversing 168 N.Y.S. 336, 102 Misc. 122.

43. Cal.—Rapaport v. Forer, 66 P.2d 1242, 20 Cal.App.2d 271.

Statute relating to monied demand

(1) A statute providing that, if suit be brought on any monied demand and plaintiff recovers an amount below the court's jurisdiction, the judgment must be set aside and the suit dismissed does not apply to actions in tort.—Louisville & N. R. Co. v. Watson, 94 So. 551, 208 Ala. 319—King v. Farmer, 34 Ala. 416.

(2) Such a statute does not apply to an action against a constable and the surety on his bond for wrongful removal of property as it is an action ex delicto.—Matlock v. Johnson, 88 So. 182, 17 Ala.App. 669.

Damages from conspiracy

Action for damages arising from conspiracy grounded in fraud is an action in law, and to such an action a jurisdictional minimum has been held applicable.—Rapaport v. Forer, 66 P.2d 1242, 20 Cal.App.2d 271.

Trespass or conversion not shown

Deputy sheriff's inadvertent seizure of articles worth less than one hundred dollars, with other property taken from his lawful possession by owner, who had mingled therewith property not levied on and subsequently accepted return of latter, was held not trespass or conversion, of which district court had jurisdic-

tion.—Leach v. Stone, Tex.Civ.App., 264 S.W. 620, affirmed, Civ.App., 276 S.W. 903.

44. R.I.—Clarke v. Rice, 23 A. 301, 15 R.E. 132.
15 C.J. p 750 note 16.

Failure to contest title immaterial

Jurisdiction on ground that title to land is involved, although the amount in controversy is below the jurisdictional limit, cannot be ousted by defendant conceding plaintiff's title, since the question as to title would always remain, although no contest was made thereon.—Johnson v. Simmons, 290 F. 331, 53 App. D.C. 356.

Possession an element of title

Petition alleging that defendant was interfering with plaintiff's right of possession of land sufficiently showed jurisdiction in the district court, since "title" to lands is the means whereby the owner has possession, and "possession" means the actual control of the property and is prima facie evidence of and one of the elements of title.—Stewart v. Patterson, Tex.Civ.App., 204 S.W. 768, error refused.

Court held to have jurisdiction

The municipal court has jurisdiction to issue a writ of restitution for the possession of premises, because of the termination of the tenancy by nonpayment of the rent, even though the rent was more than one thousand dollars per annum.—Sechrist v. Bryant, 286 F. 458, 52 App.D.C. 286.

Condemnation proceedings

(1) The county court of Cook County has general jurisdiction to pass on questions involved in a condemnation proceeding by the city of Chicago without regard to the amount involved and may enter orders providing for disposition of proceeds of the condemnation judgment without limit as to amount.—City of Chicago v. Goebel, 21 N.E.2d 844, 301 Ill.App. 73.

(2) The county court of Cook County had jurisdiction of a proceeding to establish and enforce a statutory attorney's lien for seven thousand dollars on the proceeds of a judgment of condemnation entered by the court in favor of the city

proceedings for the possession of real property,⁴⁵ of proceedings in reference to estates of deceased and incompetent persons and probate matters generally,⁴⁶ of bastardy proceedings,⁴⁷ of proceedings for the enforcement of liens and mortgages,⁴⁸ of suits for statutory penalties,⁴⁹ of actions in replevin,⁵⁰ of proceedings for the trial of the right of property,⁵¹ of possessory actions,⁵² of tax proceedings,⁵³

and of equitable proceedings in general.⁵⁴ In some jurisdictions, the amount for which judgment is demanded is not determinative of the court's jurisdiction where it is called on to grant equitable relief;⁵⁵ but if plaintiff fails to show a proper case for the equitable action of the court, the amount for which judgment is demanded must be within the jurisdictional limits of the court in order to give it

of Chicago.—*City of Chicago v. Goebel*, *supra*.

45. N.Y.—*Byrne v. Padden*, 182 N. E. 20, 248 N.Y. 243, reversing 223 N.Y.S. 596, 221 App.Div. 764, appeal granted 224 N.Y.S. 943, 222 App.Div. 866.

Rent

(1) City court whose jurisdiction in actions on contract is limited to those where the sum claimed does not exceed one thousand dollars has jurisdiction in summary disposition proceedings to render judgment for any amount of rent due.—*Byrne v. Padden*, *supra*.

(2) Municipal court, in summary proceeding, has no jurisdiction to render judgment for landlord for rent in excess of one thousand dollars.—*Madison Estates v. Rainess*, 225 N.Y.S. 662, 131 Misc. 45.

(3) However, a mere demand for judgment exceeding one thousand dollars for rent in summary proceeding does not deprive municipal court of jurisdiction.—*Madison Estates v. Rainess*, *supra*.

46. Colo.—*Wyman v. Felker*, 33 P. 157, 18 Colo. 382.
15 C.J. p 750 note 17.

47. Ill.—*People v. Suhling*, 231 Ill. App. 256.

Effect of allegation of damages

Under some statutes, in bastardy proceedings, the allegation of damages does not affect the jurisdiction.—*Cooper v. State*, 128 P. 115, 36 Okl. 189.

48. Tex.—*Buckholts State Bank v. Harris*, Civ.App., 194 S.W. 961.
15 C.J. p 750 note 18.

Effect of jurisdiction in justice's court

The fact that a justice of the peace may have a certain jurisdiction in such cases involving a particular amount does not deprive the higher court of its jurisdiction.—*Faville v. Hadcock*, 80 N.Y.S. 23, 39 Misc. 397.

Attachment

In action on note for less than jurisdictional amount, an attachment obtained and levied on land was held, under statute, to give the court jurisdiction.—*Hutton v. Rogers*, 121 S.W. 698, 134 Ky. 840.

Mechanic's Lien

Under the statute, the question of jurisdiction in an action to enforce

a mechanic's lien is dependent on the amount of the debt to be collected, and not on the fact that plaintiff seeks the enforcement of a lien.—*Phillips-Burtoiff Manufg Co. v. Campbell*, 25 S.W. 961, 93 Tenn. 469.

Vendor's Lien

(1) In suit to recover on a note and to foreclose a vendor's lien retained as security therefor, the district court has jurisdiction without reference to the amount involved.—*Buckholts State Bank v. Harris*, Tex.Civ.App., 194 S.W. 961.

(2) The district court has jurisdiction of an action on a vendor's lien note, although it is subject to the bar of limitations, and for less than five hundred dollars, since the right to enforce the lien is not cut off until the bar is pleaded.—*Burton v. Archinard*, Tex.Civ.App., 49 S.W. 634.

Liens on land

(1) The district court has jurisdiction of suits for the enforcement of liens on land, independent of the amount in controversy.—*Ablowich v. Greenville Nat. Bank*, 67 S.W. 381, 95 Tex. 429.—*Ward County Irr. Dist. No. 1 v. Western Union Telegraph Co.*, Tex.Civ.App., 254 S.W. 1114.

(2) The district court acquiring jurisdiction of a suit to foreclose a mechanic's lien on real estate may retain jurisdiction and may render a personal judgment for less than five hundred dollars.—*Tenison v. Hagendorn*, Tex.Civ.App., 155 S.W. 690.

49. Tex.—*State v. Eggerman*, 16 S. W. 1067, 81 Tex. 569.
15 C.J. p 750 note 19.

50. Md.—*Blimline v. Cohen*, 8 Md. 147.

Mass.—*Walker v. Cooke*, 40 N.E. 185, 163 Mass. 401.

51. Ill.—*Dickes v. Magill Weinsheimer Co.*, 228 Ill.App. 62.

52. Ind.—*Capitol Amusement Co. v. Washington & New Jersey Realty Co.*, 164 N.E. 715, 90 Ind.App. 389.

Damages for holding over

Statute conferring jurisdiction on municipal court of possessory actions between landlord and tenant, irrespective of the value of the property sought to be recovered, was held to carry with it the granting of jurisdiction for the recovery of

damages for holding over unlimited in amount.—*Capitol Amusement Co. v. Washington & New Jersey Realty Co.*, *supra*.

53. Tex.—*City of Breckenridge v. Pierce*, Civ.App., 251 S.W. 316.
15 C.J. p 750 note 21.

To restrain collection of taxes

Petition to restrain collection of taxes on real estate, on the ground that petitioners' property had been assessed erroneously.—*City of Breckenridge v. Pierce*, *supra*.

To review equalization proceeding

The district court has jurisdiction of a direct proceeding to review the action of the commissioner's court, sitting as a board of equalization, in raising the valuation of plaintiff's property, regardless of the amount sought to be recovered.—*Ward County v. Wentz*, Tex.Civ.App., 69 S.W.2d 571.

54. Ark.—*Uptmoor v. Young*, 22 S. W. 169, 57 Ark. 528.
15 C.J. p 750 note 22.

Specific performance

A petition alleging defendant's refusal to carry out their agreement to sell corporate stock, that corporation's stock had no market value, could not be obtained otherwise and would have future value far beyond its present value, and that plaintiff had no adequate legal remedy and was entitled to specific performance, was sufficient to invoke equitable relief, so as to bring cause within district court's jurisdiction, even if allegations did not fix amount in controversy at sum within such court's pecuniary jurisdiction.—*Berkman v. Levy*, Tex.Civ. App., 129 S.W.2d 397, error dismissed, judgment correct.

55. Cal.—*Merrill v. Hare*, 34 P.2d 194, 139 Cal.App. 462.

Alimony

The superior court has jurisdiction of a suit to establish in this state a foreign judgment for alimony, for the purpose of enforcing it as a continuing judgment for payment of alimony, regardless of the amount of the accrued alimony at the time of judgment.—*Straus v. Straus*, 41 P.2d 218, 4 Cal.App.2d 461, modifying on other grounds and rehearing denied 42 P.2d 378, 4 Cal.App.2d 461.—*Creager v. Superior Court of Santa Clara County*, 14 P.2d 552, 126 Cal. App. 280.

jurisdiction of the case.⁵⁶ In proceedings in which the main object is the enforcement of a right which cannot be measured in dollars and cents, the jurisdiction of a court of such matter is not dependent on the amount involved, even though the recovery of a specified amount is sought as an incident to the main object of the action;⁵⁷ but where such proceedings have as their main object the enforcement of a right which can be measured in dollars and cents, statutory provisions limiting the jurisdiction of the court according to the amount in controversy apply.⁵⁸ Limitations on the ordinary jurisdiction of a court based on the amount in controversy do not apply so as to restrict a court in the use of statutory and other recognized means of enforcing its jurisdiction by the amount or value involved.⁵⁹

§ 53. Real Amount Governs

Ordinarily, for jurisdictional purposes, the amount actually in dispute between the parties controls, where this differs from the amount alleged.

In some jurisdictions, a plaintiff may bring a case actually involving an amount below the jurisdictional minimum of the court by making a large demand in his pleadings.⁶⁰ This, however, is not the general rule, and, although the jurisdiction is ordinarily determined by the amount claimed, see *infra* § 55, or by the alleged value of the property in dispute, see *infra* § 57, by the weight of authority this is not necessarily conclusive;⁶¹ and the court may investigate in order to determine the real amount,⁶² or even act on its own knowledge of the real amount in controversy acquired on a former trial,⁶³ or the obvious smallness of the amount really involved;⁶⁴

56. Cal.—Merrill v. Hare, 34 P.2d 194, 139 Cal.App. 462.

57. Tex.—Jasper County Lumber Co. v. Biscamp, Civ.App., 77 S.W.2d 571—Smith v. Kidd, Civ.App., 228 S.W. 348, error refused—Cleaver v. Duke, Civ.App., 58 S.W. 145.

Injunction

(1) Where the right which is sought to be enforced through the restraining and mandatory injunction of the court is one that may not be measured in dollars and cents, the district court has jurisdiction, even though the damages already sustained, which are less than the jurisdictional amount of the court, are sought as an incident to the main purpose of the suit.—Smith v. Kidd, Tex.Civ.App., 228 S.W. 348, error refused.

(2) Amount in controversy is not controlling where controlling purpose of suit, as disclosed by pleadings, is to obtain injunctive relief abating or preventing threatened irreparable damage, for which law affords no adequate remedy, and suit for damages is merely incidental.—Jasper County Lumber Co. v. Biscamp, Tex.Civ.App., 77 S.W.2d 571.

Mandamus

(1) District court would have no jurisdiction to determine controversy involving two hundred and eighty dollars, but it has jurisdiction of suit incidentally involving such sum if only the issuance of a mandamus is directly involved.—Kimmins v. Estes, Tex.Civ.App., 80 S.W.2d 387.

(2) Where, in mandamus to compel a county auditor to sign a warrant, petitioner did not seek any judgment as to the amount or validity of his claim, the amount thereof did not affect the district court's jurisdiction of the cause.—Anderson v. Ashe, 90 S.W. 372, 99 Tex. 447.

Setting aside conveyances

Dismissal by superior court for want of jurisdiction of action involving \$125.03, the purpose of which is to obtain equitable relief against two defendants as partners and to have certain conveyances set aside as fraudulent, was held error.—Armstrong Grocery Co. v. Banks, 116 S.E. 173, 185 N.C. 149.

Specific performance

The county court has no jurisdiction of a suit for specific performance of a contract, although the damages alleged for its breach, if permitted, are within the amount of which that court has jurisdiction.—Mebane Cotton Breeding Ass'n v. Sides, Tex.Civ.App., 259 S.W. 279—Mebane Cotton Breeding Ass'n v. Sides, Tex.Civ.App., 257 S.W. 302.

58. Tex.—Jasper County Lumber Co. v. Biscamp, Civ.App., 77 S.W.2d 571—Day v. Mercer, Civ.App., 175 S.W. 764.

Injunction

(1) The county court has no authority to issue an injunction to restrain the execution of a judgment of a justice for less than two hundred dollars, when the whole amount in controversy is less than two hundred dollars.—Phillips v. Sanders, Tex.Civ.App., 80 S.W. 567.

(2) Statutes authorizing issuance of injunction writs necessary to the enforcement of the county court's jurisdiction and providing that writs of injunction in a suit to enjoin the execution of a judgment shall be returned to the court where such suit is pending, or such judgment was rendered, do not give the county court jurisdiction of an original suit to enjoin the seizure and sale of property of an alleged value, not within the jurisdiction of the county court, to satisfy a final judgment, there being no suit pending to which

the proceeding is ancillary.—Blanket State Bank of Blanket v. Redwine, Tex.Civ.App., 77 S.W.2d 558.

Mandamus

A court has no power to issue a mandamus to enforce its jurisdiction where the amount claimed, and in regard to which the mandamus was issued, is less than that necessary to be in controversy to confer jurisdiction.—Goree v. Dupree, 1 Tex.A. Civ.Cas. § 825.

59. Tex.—Isbell v. Kenyon-Warner Dredging Co., 261 S.W. 762, 113 Tex. 528.

Sequestration proceeding

In sequestration proceeding in which replevy bond was executed, county court had jurisdiction to render judgment on bond for amount in excess of one thousand dollars.—Isbell v. Kenyon-Warner Dredging Co., *supra*.

60. Conn.—Grether v. Klock, 39 Conn. 133.

61. Cal.—Demartini v. Marini, 187 P. 985, 45 Cal.App. 418.

Colo.—McKnight v. McKnight, 111 P. 583, 49 Colo. 60.

15 C.J. p 750 note 24.

Certificate alleging value

Certificate that case does not involve more than two thousand five hundred dollars, required to be filed as condition precedent to action in municipal court, is not conclusive.—Pennington v. Conway & Ash, 92 Pa.Super. 149.

62. La.—State v. Judge of Third Judicial District, 17 So. 479, 47 La. Ann. 1022.

15 C.J. p 750 note 25.

63. Conn.—Cantoni v. Betts, 39 A. 604, 70 Conn. 386.

64. U.S.—Kebart v. Arkin, 1'a., 232 F. 454, 146 C.C.A. 448.

15 C.J. p 751 note 27.

and wherever the real amount actually in controversy is made to appear, this is the controlling criterion of jurisdiction, even though it may be different from the amount demanded in the complaint or otherwise alleged in the pleadings.⁶⁵ Where there is no uncertainty as to the amount which may be recovered, merely claiming an increased amount will not confer jurisdiction.⁶⁶ An allegation of damages not recoverable must be disregarded.⁶⁷ The real amount, as shown by the evidence produced at the trial, governs on a question of jurisdiction when the allegations are in conflict with it,⁶⁸ and the amount shown by the record and the pleadings, taken as a whole, when these disclose the real sum in dispute, is determinative of the question of jurisdiction.⁶⁹ The mere fact that the cause of action arises out of a demand whose total sum exceeds the jurisdictional limit will not prevent the attaching of that jurisdiction, provided the real amount due in the particular case is alone claimed and such amount is

within the jurisdiction.⁷⁰ In distress proceedings, the jurisdiction of a court, acquired on the basis of bona fide allegations, made at the institution of the proceedings, as to the value of the property seized, is not defeated when it subsequently turns out that the value of the property seized exceeds the jurisdiction of the court.⁷¹ However, under statutes which limit the jurisdiction of specified courts in actions to recover a chattel to chattels of a stated value, with or without damages for the taking or detention thereof, in an action to recover a chattel of an alleged value within the jurisdiction of the court, the court will be divested of jurisdiction if, after trial, the value of the chattel proves to be greater than such stated value, but otherwise, it retains jurisdiction, even if the damages for the detention be greater than that amount.⁷² Where, in a replevin action brought in a court of inferior jurisdiction, the value of the property involved and the damages incurred by the defendant exceeds the

65. Cal.—Consolidated Adjustment Co. of California v. Superior Court of Sonoma County, 207 P. 552, 189 Cal. 92.

Colo.—McKnight v. McKnight, 111 P. 583, 49 Colo. 60.

Fla.—Director General of Railroads v. Wilford, 88 So. 256, 81 Fla. 430.

Pa.—Pennington v. Conway & Ash, 92 Pa.Super. 149.

15 C.J. p 751 note 28; p 764 note 37.

Replevin

Actual and not claimed value of chattel in replevin determines municipal court's jurisdiction.—Goodovitch v. Reiss, 220 N.Y.S. 42, 129 Misc. 152, citing Dennis v. Crittenden, 42 N.Y. 542, as authority for the statement that under the former practice in the court, jurisdiction in replevin was acquired if the affidavit of plaintiff claimed the value of the chattel to be an amount within the court's jurisdiction.

66. Miss.—Griffin v. McDaniel, 63 Miss. 121.

15 C.J. p 752 note 29.

67. U.S.—Vance v. W. A. Vandercook Co., S.Ct. 18 S.Ct. 645, 170 U.S. 468, 42 L.Ed. 1111, affirming in part and reversing in part, C.C., 80 F. 786.

15 C.J. p 752 note 30.

68. Colo.—McKnight v. McKnight, 111 P. 583, 49 Colo. 60.

Pa.—Horafeus v. Mangos, 98 Pa. Super. 447.

15 C.J. p 752 note 31.

Ad damnum prima facie evidence

Under the Massachusetts practice the ad damnum in the declaration is prima facie evidence of the amount in controversy, but is subject to be

controlled by evidence as to the amount actually in controversy, and does not estop plaintiff from showing the true facts as to the amount of the claim.—Burmon & Bolonsky v. Luckenbach S. S. Co., D.C.Mass., 39 F.2d 619.

69. Cal.—California Cured Fruit Assoc. v. Ainsworth, 66 P. 586, 134 Cal. 461.

15 C.J. p 752 note 32.

Unmatured installments

Insurer's refusal to pay monthly disability benefits as they accrued did not give insured right to sue for the full coverage as for total and permanent disability, and hence county court at law did not have jurisdiction of insured's cause of action at time when only four installments totaling less than two hundred dollars had matured.—Metropolitan Life Ins. Co. v. Evans, Tex. Civ.App., 96 S.W.2d 152.

Amount involved held sufficient

Liability of insurer under disability clause of group policy dates from time when insurer by letter to insured denied its liability under policy, and hence, three installments amounting to more than fifty dollars having become due between that date and date of instituting suit, amount involved was within jurisdiction of circuit court.—Young v. Metropolitan Life Ins. Co., 84 S.W.2d 1065, 229 Mo.App. 823, certiorari quashed State ex rel. Metropolitan Life Ins. Co. v. Allen, 100 S.W.2d 487.

Liquidated damages as controlling

In an action for breach of a contract for exchange of real property, the sum of one dollar named as consideration for the contract will

not be held to be liquidated damages ousting circuit court's jurisdiction, where damages were easily ascertainable.—Ben Cheeseman Realty Co. v. Thompson, 112 So. 151, 216 Ala. 9.

70. Colo.—Nelson v. Meyer, 180 P. 86, 66 Colo. 164.

15 C.J. p 753 note 33.

Liability of stockholders

In separate action to enforce the liability of an individual stockholder, the amount in demand would be amount claimed to be due from him, as distinguished from the aggregate amount sought to be recovered from all the stockholders together.—Friede v. Jennings, 184 A. 369, 121 Conn. 220.

Action to cancel mortgages by owner of small interest

In a suit by an alleged owner of one three hundred and twenty-fifth of certain real property, consisting of waterworks and their appurtenances, to cancel and avoid mortgages thereon for four hundred and seventy-five thousand dollars, and to declare his interest in the property free from the liens of such mortgages, the sum or value in dispute is the value of the one three hundred and twenty-fifth of the property, which complainant claims to own and seeks to relieve from the lien of the encumbrances.—Cowell v. City Water Supply Co., Iowa, 121 F. 53, 57 C.C.A. 393, reversing, C.C., 96 F. 769.

71. Tex.—Boyd v. Mara, Civ.App., 284 S.W. 703.

72. N.Y.—Rubenstein v. Frank De Rosa Co., 213 N.Y.S. 40, 126 Misc. 314.

jurisdiction of that court, the defendant therein may litigate his claim for damages sustained from the wrongful taking and the conversion of the property in another court whose jurisdiction includes the amount involved.⁷³

Incidental rights not considered. The limitation as to amount refers to the sum in dispute and not to the value of rights which are mere incidents.⁷⁴ The fact that a contract itself may be incidentally involved in the suit, does not fix the jurisdiction in accordance with the amount of the contract if the only matter really in dispute is a different sum;⁷⁵ but in an action to recover payments made on a contract in which an adjudication of the validity of the contract is involved, the amount of the contract and not the specific sum sued for is the amount in controversy.⁷⁶

§ 54. How Amount Ascertained or Fixed

a. In general

b. Time as of which jurisdiction determined

73. Okl.—Terwilliger v. Bull, 9 P. 3d 45, 155 Okl. 294.

74. U.S.—Oregon R. & Nav. Co. v. Shell, C.C.Wash., 125 F. 979—New York Silk Mfg. Co. v. Paterson Second Nat. Bank, C.C.N.J., 10 F. 204.

Collateral effect immaterial

As regards jurisdictional amount, the collateral effect of the judgment of a court is not the test of the court's jurisdiction.—Huey v. Prudential Ins. Co. of America, D.C.Ala., 23 F.Supp. 708.

75. La.—Reimann Const. Co. v. Heinz, 137 So. 355, 17 La.App. 687.

Amount of contract held not involved

In an action to recover four hundred dollars earnest money paid by plaintiffs on a contract for the purchase of land for the sum of four thousand dollars, on the ground of failure of defendant vendors to give good title, a plea that the amount in controversy and subject matter of the suit were beyond the jurisdiction of the county court, predicated on allegations of the petition that if the title had been good plaintiffs would have paid the balance of the purchase money and taken the land, and were still willing to do so, was without merit.—Davis v. Fant, Tex. Civ.App., 98 S.W. 193.

76. Tex.—Gossett v. Manley, Civ. App., 43 S.W.2d 622, error refused.

77. Cal.—San Jose Pacific Building & Loan Ass'n v. Corum, 37 P.2d 866, 2 Cal.App.2d 276.

Fla.—Knudsen v. Green, 156 So. 240, 116 Fla. 47—Wilkie v. Roberts, 109 So. 225, 91 Fla. 1064—A. Mortellaro & Co. v. Atlantic Coast Line R. Co., 107 So. 528, 91 Fla. 230—Hutchinson v. Courtney, 98 So. 582, 86 Fla. 556.

Tex.—Threadgill v. Federal Land Bank of Houston, Civ.App., 26 S.W.2d 345, error dismissed.

Ambiguity as to amount

Where the parties go to trial on an issue within the jurisdiction of the court, the fact that the allegations of the complaint taken in conjunction with the prayer for judgment created some ambiguity and uncertainty as to whether the amount due was within the jurisdiction of the court will not deprive the court of jurisdiction.—Sunset Lumber Co. v. Dunlap, 163 P. 338, 32 Cal.App. 492.

Amount held sufficient

District court had jurisdiction of suit to determine owner of mineral lease rental of four hundred eighty dollars and four rental payments for like amounts to fall due on same date of four succeeding years under ordinary drill or pay lease.—Mineral Investing Corporation v. Bishop Cattle Co., 78 S.W.2d 174, 124 Tex. 387, affirming, Civ.App., 49 S.W.2d 532.

78. Tex.—Losano v. Torres, Civ. App., 234 S.W. 151.

79. Tex.—Goodall v. Dean, Civ.App., 236 S.W. 111—Losano v. Torres, Civ.App., 234 S.W. 151.

Conversion and damages therefor

Under a petition alleging the conversion of two horses worth one

a. In General

The amount or value of the matter actually in dispute between the parties is the amount in controversy for the purpose of determining the jurisdiction of the court, and varies according to the nature of the case and the relief demanded.

In general, the amount actually put in controversy determines the jurisdiction of the court;⁷⁷ that which a party in good faith seeks to obtain determines the amount in controversy;⁷⁸ and, except where statutes require the amount to be determined on specified items in certain cases, see *infra* § 57, all the relief demanded must be considered in order to determine the amount in controversy for jurisdictional purposes.⁷⁹ The matter in dispute from which the amount in controversy is to be determined for jurisdictional purposes varies according to the nature of the case and the relief demanded. It may be the debt or damages claimed, as in a case on a money demand or sounding in damages, see *infra* § 55; the value of property or of the possession thereof in cases involving the title or the right thereto, considered *infra* § 57; the value of a right

hundred fifty dollars each, under the pretense of a judgment and execution against plaintiff, that plaintiff's credit was affected thereby in the sum of nine hundred fifty dollars, and that for the unlawful deprivation of the use of the horses and the expenses he lost forty five dollars, and praying for exemplary and actual damages, the amount in controversy is one thousand two hundred and ninety five dollars.—Parlin & Orendorff Implement Co. v. Clements, 117 S.W. 495, 54 Tex.Civ.App. 356.

Triple damages

The amount in controversy includes the amount of triple damages claimed in an action for unlawful detainer for the unlawful detention.—Wells Fargo Bank & Union Trust Co. v. Broad, 39 P.2d 241, 3 Cal.App. 2d 45.

Continuing account

Action for total amount of freight charges on various shipments was within jurisdiction of lower court, although no individual shipment was large enough.—New York N. H. & H. R. Co. v. Salter, 134 A. 230, 104 Conn. 728.

Unlawful discrimination between shippers

Suit for unlawful discrimination between shippers amounting to two dollars and fifty cents per car was within jurisdiction of circuit court, where total damages sought exceeded one hundred dollars.—Missouri Pac. Ry. Co. v. Kirten Gravel Co., 44 S.W. 2d 674, 184 Ark. 1024.

claimed;⁸⁰ the value of the right to be protected, or the extent of the injury to be prevented, as in injunction suits;⁸¹ the diminished value of the property directly affected by the relief prayed;⁸² the value of the object sought, or of the erection to be abated, as in a suit to abate or enjoin a nuisance;⁸³ the value of property and rights which will be affected, if the relief prayed for is granted, rather than the value of complainant's interest;⁸⁴ the balance due, as in an action to recover the price of property sold;⁸⁵ the amount paid by the surety, and not the balance still due on the note, in an action by a surety on a note for reimbursement;⁸⁶ the amount of the salary of an office the title to which is in dispute;⁸⁷ the face value of a life insurance policy, in a suit to set aside a forfeiture thereof;⁸⁸ the amount of the judgment, in a suit to restrain a levy under a writ of execution;⁸⁹ or in an action to cancel contracts to purchase property and to recover amounts paid thereon, the amount sought to be recovered together with the balance due on the contracts is the amount in controversy.⁹⁰

In a garnishment proceeding, neither the total amount owed by the debtor nor the value of the property of the debtor in the hands of the garnishee constitutes the amount in controversy where the debt sought to be collected in the garnishment proceeding is less than either.⁹¹ In a suit to enjoin the enforcement of a judgment of another court, the amount of any damage sought by plaintiff cannot be considered in determining the amount in controversy for jurisdictional purposes.⁹²

Replevin. In replevin, if the writ is issued as a means of trying the title to property, the value of the article replevied is the matter in dispute, see *infra* § 57; but if the replevin is of property distrained for rent, the amount for which avowry is made is the real matter in dispute,⁹³ and damages claimed are not to be considered in determining the court's jurisdiction.⁹⁴

Tax cases. In an action to enjoin the collection or enforcement of a tax or assessment, the amount of the tax or assessment is the amount of the con-

80. U.S.—Lanning v. Osborne, C.C. Cal., 79 F. 657.
15 C.J. p 753 note 39.

To file compensation claim

In a suit by an employee to cancel a settlement for workmen's compensation so as to leave him free to file his claim for compensation before the Industrial Accident Board, the amount involved is the difference between the amount he was entitled to under the compensation law and what he had received under the alleged fraudulent settlement.—*Maryland Casualty Co. v. Meyer*, Tex.Civ. App., 41 S.W.2d 291, 293, citing *Corpus Juris*.

In suit for partnership accounting, the amount in controversy cannot exceed the aggregate of the amounts claimed by each partner to be due him from the other. The court held that it was not convinced that reason would justify the general application of the rule that in an action for a partnership accounting the whole of the common property constitutes the amount in controversy, which rule was laid down without particular examination of the question in the case of *Rogers v. Lawton*, C.C.Wis., 162 F. 203.—*Mull v. Parrott Bros. Co.*, D.C.Idaho, 218 F. 713.

81. Pa.—*Horwitz v. Wohlmuth*, 66 Pa.Super. 321.
Tex.—*Haynes v. Priddy*, Civ.App., 27 S.W.2d 827.
15 C.J. p 753 note 40.

Promise not to engage in business

In a suit to enjoin defendant from engaging in business in a specified area in accordance with his agree-

ment on the sale of his business to plaintiff, the amount in controversy is the value of the promise not to engage in business in the territory described and not the value of the entire property sold.—*Horwitz v. Wohlmuth*, 66 Pa.Super. 321.

82. Pa.—*Pennington v. Conway & Ash*, 92 Pa.Super. 149.

To restrain construction

On a bill in equity to restrain the erection and maintenance of a building or other structure, the value of the matter in controversy is the difference between the value of the property with the building on it and its value without the building and deprived of the right to build and maintain it.—*Pennington v. Conway & Ash*, *supra*.

83. U.S.—*Mississippi, etc., R. Co. v. Ward*, Iowa, 2 Black 485, 17 L.Ed. 311.
15 C.J. p 754 note 41.

84. U.S.—*Larabee v. Dolley*, C.C. Kan., 175 F. 865, reversed on other grounds *Dolly v. Abilene Nat. Bank*, 179 F. 461, 102 C.C.A. 607, 32 L.R.A.N.S., 1085, affirmed *As-saria State Bank v. Dolley*, 31 S. Ct. 189, 219 U.S. 121, 55 L.Ed. 123.
15 C.J. p 754 note 45.

85. Cal.—*Whims v. Marco*, 31 P.2d 475, 137 Cal.App. 750.

Right to elect different remedy immaterial

In action for balance of purchase price of corporate stock under contract which enabled the purchasers to relieve themselves of liability by paying the seller a stated sum on

receipt of notice of the seller's perfection of title the amount in controversy is the balance of the purchase price of the stock where the purchasers never exercised their right to relieve themselves of liability by making the required payment.—*Whims v. Marco*, *supra*.

86. Tex.—*Self v. Thompson*, Civ. App., 35 S.W.2d 245.

87. Tex.—*State v. De Gress*, 11 S.W. 1029, 72 Tex. 242.
15 C.J. p 754 note 46.

88. Tex.—*First Texas Prudential Ins. Co. v. Ryan*, Civ.App., 48 S.W.2d 750, affirmed 82 S.W.2d 635, 125 Tex. 377.

89. Tex.—*Dr. L. D. Le Gear Medicine Co. v. Hairston*, Civ.App., 62 S.W.2d 885.

90. Tex.—*Burcum v. Gaston*, Civ. App., 196 S.W. 257.

91. Tex.—*White v. Sibley*, Civ.App., 59 S.W.2d 266, error dismissed.

92. Tex.—*Phillips v. Sanders*, Civ. App., 80 S.W. 567—Consolidated Advertising Corporation of California v. Gibson, Civ.App., 74 S.W.2d 710.

93. U.S.—*Peyton v. Robertson*, D.C., 9 Wheat. 527, 6 L.Ed. 151.

Contra

It has been held that in proceedings to recover goods wrongfully seized for rent the amount of plaintiff's damages, rather than the amount of rent, controls.—*Hirst v. Moss*, 3 Phila., Pa., 457.

94. U.S.—*Peyton v. Robertson*, D.C., 9 Wheat. 527, 6 L.Ed. 151.

trover;⁹⁵ unless a contractual right of exemption is alleged to be violated, in which case the value of the right of exemption sought to be protected, and not of the individual tax or assessment claimed to be violative thereof, measures the jurisdiction.⁹⁶ Where the attack is directed at the tax itself rather than the liability of the complaining party, the test of jurisdiction is the amount of the total tax, and not the amount for which the individual taxpayer may be liable⁹⁷ or may have paid.⁹⁸ In license tax cases, the value of the right to conduct complainant's business free from the tax is the jurisdictional amount.⁹⁹

Protest fees. It has been held that in an action on a protested bill of exchange, where plaintiff is entitled to recover protest fees in addition to interest and costs, such fees may be considered in making up the jurisdictional amount,¹ but this has also been denied.²

An interest in a judgment to which plaintiff's counsel is entitled as a fee is a part of the judgment for the purpose of determining the amount in controversy in a suit to set aside an assignment thereof.³

On a motion to set aside an execution, the jurisdiction of the court as to the amount involved is regulated by the face of the execution.⁴

Recitals in an agreed statement of facts may amount to a concession that the value of a right in question is sufficient to give jurisdiction.⁵

b. Time as of Which Jurisdiction Determined

The amount in controversy at the time of the institution of the suit determines the jurisdiction of the court.

The jurisdiction of a court is determined by the amount in controversy at the time when the court is first called on to exercise jurisdiction, which in a trial court is the amount claimed at the time when the suit is instituted.⁶ So, where the action is commenced for an amount within the jurisdiction of the court, jurisdiction is not affected by a delay in the trial resulting in damages or interest accruing to an extent making the entire amount exceed the jurisdictional amount,⁷ even though an amendment of the petition, which originally demanded a sum within the jurisdiction of the court, so as to include such interest, makes it state a claim beyond the jurisdictional limit.⁸ Conversely, damages suffered after the commencement of a suit cannot serve as a basis for the court's jurisdiction as respects the amount involved.⁹ In an action to recover installments due under a contract, installments not due cannot be considered in determining the jurisdictional amount.¹⁰

95. U.S.—*Eachus v. Hartwell*, C.C. Cal., 112 F. 564.
15 C.J. p 754 note 48.

96. U.S.—*Berryman v. Board of Trustees of Whitman College*, Wash., 32 S.Ct. 147, 222 U.S. 334, 56 L.Ed. 225, reversing, C.C. Board of Trustees of Whitman College v. Berryman, 156 F. 112.
15 C.J. p 754 note 49.

97. La.—*Fontenot v. Young*, 54 So. 408, 128 La. 20.
15 C.J. p 754 note 50.

98. Ky.—*Commonwealth v. Scott*, 65 S.W. 596, 112 Ky. 252, 23 Ky.L. 1488, 55 L.R.A. 597.

99. U.S.—*Humes v. City of Little Rock*, C.C.Ark., 138 F. 929.
15 C.J. p 754 note 52.

1. U.S.—*Dallyn v. Brady*, D.C.Pa., 205 F. 480.
Ark.—*Modern Laundry v. Dilley*, 163 S.W. 1197, 111 Ark. 350.

2. U.S.—*Baker v. Howell*, C.C.Neb., 44 F. 113.

3. U.S.—*Lee Line Steamers v. Robinson*, Tenn., 232 F. 417, 146 C.C.A. 411.

4. Mo.—*Force v. Van Patton*, 50 S. W. 906, 149 Mo. 446.

5. U.S.—*Scott v. Donald*, S.C., 17 S. Ct. 262, 165 U.S. 107, 41 L.Ed. 648, modifying, C.C., *Donald v. Scott*, 67 F. 854.

6. Cal.—*Ross v. McDougal*, 87 P.2d 709, 31 Cal.App.2d 114—*Wells Fargo Bank & Union Trust Co. v. Broad*, 39 P.2d 241, 3 Cal.App.2d 45.

Ill.—*Commercial Credit Trust v. Land*, 251 Ill.App. 469.

Miss.—*Catchot v. Russell*, 134 So. 140, 160 Miss. 330, 77 A.L.R. 988—*Continental Casualty Co. v. Crook*, 128 So. 574, 578, 157 Miss. 518, 72 A.L.R. 186, quoting *Corpus Juris*. N.Y.—*Tappin v. Maclean*, 192 N.Y.S. 196, 198, 117 Misc. 757, citing *Corpus Juris*.

Tex.—*W. R. Case & Sons Cutlery Co. v. Canode*, Civ.App., 205 S.W. 350. Vt.—*Shepherd v. Beede*, 24 Vt. 40.

15 C.J. p 773 note 7.
Reduction of amount claimed see *infra* § 68.

7. N.Y.—*Tappin v. Maclean*, 192 N. Y.S. 196, 117 Misc. 757.

Tex.—*Ft. Worth & D. C. Ry. Co. v. Underwood*, 99 S.W. 92, 100 Tex. 284, 123 Am.S.R. 806—*Stump v. F. A. Officer & Co.*, Civ.App., 250 S. W. 308.

15 C.J. p 774 note 8.

Necessity for rule

This is a wise and necessary rule; otherwise by the accrual of interest during the pendency of the action, especially in courts with congested calendars where much time

must elapse before a trial can be had, the amount in controversy could easily outgrow the jurisdiction of the court, and the litigants would find further efforts barred from this court by limitation of jurisdiction and from other tribunals by limitation of time.—*Tappin v. Maclean*, 192 N.Y.S. 196, 117 Misc. 757.

8. Tex.—*Ft. Worth & D. C. Ry. Co. v. Underwood*, 99 S.W. 92, 100 Tex. 284, 123 Am.S.R. 806—*Simms Oil Co. v. Hall*, Civ.App., 281 S.W. 286—*Stump v. F. A. Officer & Co.*, Civ. App., 250 S.W. 308.

15 C.J. p 774 note 9.

9. La.—*Nick v. Bensberg*, 48 So. 986, 123 La. 351.

10. Tex.—*Jones v. Dodd*, Civ.App., 192 S.W. 1134.

Insurance contract

Action at law arising in city of Oakland for monthly insurance benefits in amount under one thousand dollars was within exclusive jurisdiction of justice court, although complaint alleged that defendant had declared policy expired and plaintiff prayed that policy be declared in full force.—*Norager v. Mountain States Life Ins. Co.*, 51 P.2d 443, 10 Cal.App.2d 188.

Teaching contract

On school board's breach of teaching contract for period of eight

§ 55. — Amount Claimed in General

In general, in actions in which the relief sought is a sum of money the amount claimed in good faith by the plaintiff, and not the amount of the recovery, determines the amount in controversy.

In general, in an action in which the relief sought is a sum of money, as in an action on a money demand or sounding in damages, the amount claimed

in good faith by plaintiff,¹¹ the same being well pleaded,¹² determines the amount in controversy for the purpose of determining the court's jurisdiction; and this ordinarily constitutes the amount for which, in the aspect of the case most favorable to plaintiff, judgment could be rendered on the facts set out.¹³ This amount is determined without reference to any defense or plea set up by defendant,¹⁴

months, teacher suing at the end of seven months could recover only the contract wage for the seven months.—*Jones v. Dodd*, Tex.Civ.App., 193 S. W. 1134.

11. U.S.—*Kunkel v. Brown*, Md., 99 F. 593, 39 C.C.A. 665.

Ala.—*Sheldon v. Lyon*, 104 So. 576, 20 Ala.App. 628.

Ark.—*Merchants' Bank of Vanderhoort v. Affholter*, 215 S.W. 648, 140 Ark. 480.

Cal.—*Todhunter v. Smith*, 28 P.2d 916, 219 Cal. 690—*Consolidated Adjustment Co. of California v. Superior Court of Sonoma County*, 207 P. 552, 189 Cal. 92—*Ross v. McDougal*, 87 P.2d 709, 31 Cal.App. 2d 114—*Wells Fargo Bank & Union Trust Co. v. Broad*, 39 P.2d 241, 3 Cal.App.2d 45—*Harris v. Seidell*, 36 P.2d 1104, 1 Cal.App.2d 410—*Warfield v. Basso*, 216 P. 48, 62 Cal. App. 47—*Hall v. Cline*, 188 P. 295, 45 Cal.App. 616.

Colo.—*Nelson v. Meyer*, 180 P. 86, 66 Colo. 164.

Conn.—*Atlantic Refining Co. v. Schoen*, 170 A. 478, 118 Conn. 26.

Fla.—*Knudsen v. Green*, 156 So. 240, 116 Fla. 47—*Wilkie v. Roberts*, 109 So. 225, 91 Fla. 1064—*A. Mortellaro & Co. v. Atlantic Coast Line R. Co.*, 107 So. 528, 91 Fla. 230—*Hutchinson v. Courtney*, 98 So. 532, 86 Fla. 556—*Director General of Railroads v. Wilford*, 88 So. 256, 81 Fla. 430.

Ga.—*Pacific Mut. Life Ins. Co. v. Barfield*, 194 S.E. 258, 57 Ga.App. 43—*Bowen v. Hendricks*, 107 S.E. 617, 27 Ga.App. 235.

Ky.—*Trustees of Graded Free Colored Common Schools of City of Mayfield v. Trustees of Graded Free White Common Schools of City of Mayfield*, 203 S.W. 520, 180 Ky. 574, rehearing denied Board of Trustees of Graded Free Colored Common School of Mayfield v. Board of Trustees of Graded White Common School of Mayfield, 204 S. W. 86, 181 Ky. 303.

La.—*Givens v. Yazoo & M. V. R. Co.*, 137 So. 66, 173 La. 372—*Reimann Const. Co. v. Heinz*, 137 So. 355, 17 La.App. 687.

Mich.—*Zimmerman v. Miller*, 173 N. W. 364, 206 Mich. 599.

Mo.—*Sutherland v. Metropolitan Life Ins. Co.*, App., 99 S.W.2d 111.

N.Y.—*Byrne v. Padden*, 162 N.E. 20, 248 N.Y. 248, reversing 223 N.Y.S.

596, 221 App.Div. 764, appeal granted 224 N.Y.S. 943, 222 App.Div. 866—*McConnell v. Williams S. S. Co.*, 256 N.Y.S. 858, 143 Misc. 428, reversing City Ct., 254 N.Y.S. 597, 142 Misc. 269—*Spetler v. Jogel Realty Co.*, 231 N.Y.S. 517, 224 App. Div. 612—*Central Park-West 84th Street Corporation v. Cusack*, 224 N.Y.S. 414, 130 Misc. 770.

N.C.—*Chamberlain v. Home Sec. Life Ins. Co.*, 175 S.E. 86, 206 N.C. 622—*Lamson Co. v. Morehead*, 154 S.E. 50, 199 N.C. 164—*Petree v. Savage*, 88 S.E. 725, 171 N.C. 437—*Riddle v. Bridgewater Milling Co.*, 64 S.E. 782, 150 N.C. 689—*Boyd v. Roanoke R. & Lumber Co.*, 43 S.E. 631, 132 N.C. 184—*Knight v. Taylor*, 42 S.E. 537, 131 N.C. 84, 85—*Noville v. Dew*, 94 N.C. 42—*Allen v. Jackson*, 86 N.C. 321.

Pa.—*Porter v. Zeuger Milk Co.*, 7 A. 2d 77, 136 Pa.Super. 48—*Baker v. Carter*, 157 A. 211, 103 Pa.Super. 344.

R.I.—*Henry W. Cooke Co. v. Sheldon*, 164 A. 327, 53 R.I. 101.

S.C.—*Dupre v. Gilland*, 152 S.E. 878, 156 S.C. 109.

S.D.—*Elde v. Gilbert*, 163 N.W. 678, 39 S.D. 81.

Tenn.—*Crooms v. Reichman*, 8 Tenn. Civ.App. 86.

Tex.—*Johnson v. Universal Life & Accident Ins. Co.*, 94 S.W.2d 1145, 127 Tex. 435—*Clonts v. Johnson*, 294 S.W. 844, 116 Tex. 489—*Dwyer v. Bassett & Bassett*, 63 Tex. 274—*Linn Motor Co. v. Sabine Development Co.*, Civ.App., 127 S.W.2d 502—*Press v. Davis*, Civ.App., 118 S.W.2d 982, 996, error granted, citing *Corpus Juris*—*Cornell v. Swisher County*, Civ.App., 78 S.W.2d 1072—*Spencer v. Davis*, Civ.App., 293 S.W. 443—*C. R. Garner & Co. v. Riley*, Civ.App., 238 S.W. 953—*Smith v. Nesbitt*, Civ.App., 235 S. W. 1104, conforming to certified questions 230 S.W. 976, 111 Tex. 186—*W. R. Case & Sons Cutlery Co. v. Canode*, Civ.App., 205 S.W. 350—*City of Brownsville v. Fernandez*, Civ.App., 202 S.W. 112.

Utah.—*Gibson v. Equitable Life Assur. Soc. of U. S.*, 36 P.2d 105, 84 Utah 452—*Hardy v. Meadows*, 264 P. 968, 71 Utah 255.

Va.—*J. A. Heilser & Bro. v. Merchants' Cold Storage & Ice Mfg. Co.*, 123 S.E. 505, 139 Va. 114.

15 C.J. p 755 note 59.

Prima facie

In a proceeding for a writ of mandamus, the amount stated in the petition as the amount sued for is prima facie the amount involved.—*State ex rel. Douglas v. Tune*, Mo. App., 191 S.W. 1078.

For unliquidated damages

Amount of demand, where honestly made, determines amount in controversy in suit for unliquidated damages.—*Travis & Son v. F. A. Hulett & Son*, 141 So. 349, 163 Miss. 221.

Amount held insufficient

In action against trustees of religious society in their individual and representative capacity to foreclose an assessment lien, where amount in controversy as against trustees in their personal capacity was less than five hundred dollars and no supporting lien was pleaded against them in their personal capacity, district court did not have jurisdiction of action against trustees in their personal capacity.—*Uvalde Rock Asphalt Co. v. Lacy*, Tex.Civ.App., 181 S.W.2d 698.

12. Tex.—*Smith v. Nesbitt*, Civ.App., 235 S.W. 1104, conforming to certified questions 230 S.W. 976, 111 Tex. 186.

13. La.—*Johnson v. National Casualty Co.*, 4 La.App. 574, 575, citing *Corpus Juris*.

N.C.—*Lenoir Realty, etc., Co. v. Corpening*, 61 S.E. 528, 147 N.C. 613.

14. S.C.—*Dupre v. Gilland*, 152 S.E. 878, 156 S.C. 109—*Corley v. Evans*, 48 S.E. 459, 69 S.C. 520.

Demurrer to part of claim

Where the amount sued for is within the jurisdiction of the court, jurisdiction is not lost by the sustaining of a demurrer to all of the petition except a part which sets forth a claim less in amount than the jurisdiction of the court.—*Trustees of Graded Free Colored Common Schools of City of Mayfield v. Trustees of Graded Free White Common Schools of Mayfield*, 203 S.W. 520, 180 Ky. 574, rehearing denied Board of Trustees of Graded Free Colored Common School of Mayfield v. Board of Trustees of Graded White Common School of Mayfield, 204 S.W. 86, 181 Ky. 303.

and is not determined by the proof adduced during the trial of the case,¹⁵ or by the amount of the recovery;¹⁶ and even the fact that plaintiff made a mistake as to the amount due, and voluntarily admitted on the trial that an amount below the jurisdiction of the court was actually due, will not deprive the court of jurisdiction acquired under an original bona fide claim.¹⁷ If the amount claimed is such as to bring the case within the jurisdiction of the court, such jurisdiction is not defeated by the fact that the actual recovery is less than the jurisdictional amount;¹⁸ unless, as appears *infra* § 54, it appears that the original demand was fictitious or fraudulent; and except in jurisdictions in which, under the statutes in force therein, it is required in

actions *ex contractu*,¹⁹ but not in tort actions,²⁰ that in a suit for a moneyed demand for an amount within the jurisdiction of the court, if the judgment rendered is below the jurisdiction of the court, the judgment must be set aside and the cause dismissed,²¹ unless the amount was reduced by set-off successfully pleaded,²² or unless the plaintiff makes the required affidavit stating a sufficient cause why the jurisdictional amount was not recovered.²³

In a trial by the court without a jury, the fact that the court ignored all of the claims except one, which was for an amount below its minimum jurisdiction does not affect its jurisdiction of the case.²⁴

15. Ark.—Manufacturers' Furniture Co. v. Cantrell, 290 S.W. 353, 172 Ark. 642.

Cal.—Turley v. Roberts, 277 P. 878, 99 Cal.App. 71.

Tex.—Clonts v. Johnson, 294 S.W. 844, 116 Tex. 489—Rascoe v. Myre, Civ.App., 202 S.W. 780—Burcum v. Gaston, Civ.App., 196 S.W. 257.

Vt.—Barnard v. Leonard, 100 A. 876, 91 Vt. 369.

16. U.S.—Kunkel v. Brown, Md., 99 F. 593, 39 C.C.A. 665.

Ala.—Sheldon v. Lyon, 104 So. 576, 20 Ala.App. 628.

Cal.—Ross v. McDougal, App., 87 P. 2d 709—Wells Fargo Bank & Union Trust Co. v. Broad, 39 P.2d 241, 3 Cal.App.2d 45—San Jose Pacific Building & Loan Ass'n v. Corum, 37 P.2d 866, 2 Cal.App.2d 276—Harris v. Seidell, 36 P.2d 1104, 1 Cal.App.2d 410—Hall v. Cline, 188 P. 295, 45 Cal.App. 616.

Fla.—Knudsen v. Green, 156 So. 240, 116 Fla. 47—Wilkie v. Roberts, 109 So. 225, 91 Fla. 1064—A. Mortellaro & Co. v. Atlantic Coast Line R. Co., 107 So. 528, 91 Fla. 280—Hutchinson v. Courtney, 98 So. 582, 86 Fla. 556—Seaboard Air Line Ry. v. Ray, 42 So. 714, 52 Fla. 634.

Mo.—Sutherland v. Metropolitan Life Ins. Co., App., 99 S.W.2d 111.

N.C.—Brown v. Taylor, 93 S.E. 982, 174 N.C. 428, L.R.A.1918B 293.

R.I.—Henry W. Cooke Co. v. Sheldon, 164 A. 327, 53 R.I. 101—Edwards v. Hopkins, 5 R.I. 138.

S.D.—Eide v. Gilbert, 163 N.W. 678, 39 S.D. 81.

Tex.—Dwyer v. Bassett & Bassett, 63 Tex. 274—Campsey v. Brumley, Com.App., 55 S.W.2d 810—Holman v. Ward, Com.App., 288 S.W. 148, affirming, Civ.App., 279 S.W. 310—Home Ins. Co. v. Bennett, Civ.App., 9 S.W.2d 432—Losano v. Torres, Civ.App., 234 S.W. 151—City of Forney v. Mounser, Civ.App., 210 S.W. 240.

Utah.—Gibson v. Equitable Life Assur. Soc. of U. S., 36 P.2d 105,

84 Utah 452—Hardy v. Meadows, 264 P. 968, 71 Utah 255.

Judgment below jurisdictional amount permitted

Court may render judgment for less than jurisdictional amount.—Manufacturers' Furniture Co. v. Cantrell, 290 S.W. 353, 172 Ark. 642.

Judgment on undertaking to stay execution

Under statutes authorizing court to render judgment on stay of execution which specify no limitation as to the penal amount of the undertaking, the court may render judgment thereon for an amount in excess of the jurisdictional amount for which cases may be brought.—Bailey v. Allan E. Walker, Inc., 2 F.2d 123, 55 App.D.C. 74.

17. Cal.—Rodley v. Curry, 52 P. 999, 120 Cal. 541.

18. Ark.—Merchants' Bank of Vandervoort v. Affholter, 215 S.W. 648, 140 Ark. 480.

Cal.—Ross v. McDougal, App., 87 P. 2d 709—Bank of America Nat. Trust & Savings Ass'n v. Ames, 63 P.2d 1208, 18 Cal.App.2d 311—Harris v. Seidell, 36 P.2d 1104, 1 Cal. App.2d 410.

Fla.—Hutchinson v. Courtney, 98 So. 582, 86 Fla. 556.

Ga.—Bowen v. Hendricks, 107 S.E. 617, 27 Ga.App. 235.

Mich.—Zimmerman v. Miller, 173 N. W. 364, 206 Mich. 599.

Tenn.—Crooms v. Reichman, 8 Tenn. Civ.A. 86.

Tex.—C. R. Garner & Co. v. Riley, Civ.App., 238 S.W. 953.

15 C.J. p 756 note 61.

Recovery against different defendants

Where complaint sought recovery from several stockholders for amounts within jurisdictional limits of trial court, fact that ultimate judgment was entered against one or more of several stockholders for an amount below such jurisdictional limit did not deprive trial court of

Jurisdiction.—Bank of America Nat. Trust & Savings Ass'n v. Cryer, 58 P.2d 643, 6 Cal.2d 485.

19. Ala.—Louisville & N. R. Co. v. Watson, 94 So. 551, 208 Ala. 319—Woodward Iron Co. v. Keller, 74 So. 933, 199 Ala. 432—Smith v. Allen, 37 So. 933, 142 Ala. 148—First Nat. Bank of Gadsden v. Pinson, 17 So. 182, 105 Ala. 588.

20. Ala.—Louisville & N. R. Co. v. Watson, 94 So. 551, 208 Ala. 319—Woodward Iron Co. v. Keller, 74 So. 933, 199 Ala. 432—Sharpe v. Barney, 21 So. 490, 114 Ala. 381.

21. Ala.—Woodward Iron Co. v. Keller, 74 So. 933, 199 Ala. 432—Smith v. Allen, 37 So. 933, 142 Ala. 148—First Nat. Bank of Gadsden v. Pinson, 17 So. 182, 105 Ala. 588—T. L. Farrow Mercantile Co. v. Jeffers, 80 So. 135, 16 Ala.App. 561.

22. Ala.—Woodward Iron Co. v. Keller, 74 So. 933, 199 Ala. 432.

23. Ala.—Woodward Iron Co. v. Keller, *supra*—T. L. Farrow Mercantile Co. v. Jeffers, 80 So. 135, 16 Ala.App. 561.

Sufficiency of affidavit

(1) The affidavit must state that the amount sued for is actually due.—First Nat. Bank of Gadsden v. Pinson, 17 So. 182, 105 Ala. 588.

(2) Plaintiff's affidavit stating "belief" of affiant that recovery should have been for a greater amount, was insufficient and not in compliance with Code 1907 § 5355.—Alabama Great Southern R. Co. v. Lawler, 104 So. 412, 218 Ala. 119.

Conclusiveness of affidavit

Where plaintiff recovers an amount below the jurisdiction of the court, the filing of an affidavit that an amount within the jurisdiction was due and would have been recovered but for failure of proof is conclusive, and prevents a dismissal of the action.—Bullock v. Mason, 69 So. 86, 194 Ala. 662.

24. Tex.—Fowler v. Small, Civ.App., 244 S.W. 1098.

§ 56. — Fictitious or Fraudulent Claims

A fictitious or fraudulent demand of an amount greater than the facts warrant will not confer jurisdiction; but it is presumed that the plaintiff acted in good faith and a mere failure to prove his claim will not show fraud so as to defeat the court's jurisdiction.

In order for the amount demanded in the pleading to confer jurisdiction, the demand must be made in good faith and not for the purpose of conferring jurisdiction.²⁵ If a fictitious or fraudulent demand of an amount greater than the facts warrant is made, it cannot avail to confer jurisdiction;²⁶ and where it appears that the amount claimed in the complaint was laid at an excessive sum in order fraudulently to confer jurisdiction the action should be dismissed.²⁷ However, the fact that certain items of damage were alleged for the fraudulent purpose of giving jurisdiction to the court will not defeat its jurisdiction if the other items alleged in the petition are sufficient in amount to sustain it.²⁸ A presumption exists that plaintiff acted in good faith with respect to the amount of his claim,²⁹ and the mere fact that he fails to establish every cause of action set forth in his complaint, or to recover the full amount claimed, is not of itself sufficient

to show that his demand was fictitious or fraudulent so as to defeat the jurisdiction of the court.³⁰ What constitutes a colorable enlargement of a demand, where the law gives no fixed rule, depends on the facts of the particular case.³¹

Mode of raising objection. In some jurisdictions, fraud on the jurisdiction of the court, where it does not appear on the face of the pleadings, cannot be raised by exception;³² but in order to raise that question it must be specially pleaded and an issue thereon tried³³ and submitted, under proper instructions, to the jury.³⁴ In other jurisdictions, it has been held that the question of whether the demand of plaintiff for damages was colorable and exaggerated for the purpose of conferring jurisdiction on the court is one for the court to decide;³⁵ and that if it is proper to submit it to a jury at all, the submission should be as to the facts bearing on the enlargement and separate from the merits.³⁶

Placing parties in statu quo on dismissal. In a proper case the court, on dismissing an action because of a misstatement as to the amount in con-

25. N.C.—Petree v. Savage, 88 S.E. 725, 171 N.C. 437.

26. Ga.—Bowen v. Hendricks, 107 S.E. 617, 27 Ga.App. 235.

Tex.—Clonts v. Johnson, 294 S.W. 844, 116 Tex. 489—Booth v. Texas Employers' Ins. Ass'n, Com.App., 123 S.W.2d 322, reversing Texas Employers Ins. Ass'n v. Booth, Civ. App., 113 S.W.2d 231—Jenkins v. Parks, Com.App., 49 S.W.2d 714, reversing Parks v. Jenkins, Civ.App., 41 S.W.2d 507—Worth Finance Co. v. Charlie Hillard Motor Co., Civ. App., 131 S.W.2d 416—Stone v. Bare, Civ.App., 198 S.W. 1102.

15 C.J. p 758 note 70.

Bad faith held not shown

Vt.—Reed v. Whitham, 181 A. 129, 107 Vt. 482.

Objections to jurisdictional amount as ground for abatement generally see Abatement and Revival, § 12.

27. Tex.—Jenkins v. Parks, Com. App., 49 S.W.2d 714, reversing Parks v. Jenkins, Civ.App., 41 S.W. 2d 507—Stone v. Bare, Civ.App., 198 S.W. 1102.

From plaintiff's evidence

Where it appears on the trial, from the testimony of plaintiff and his witnesses, that the amount claimed in the complaint was laid beyond his reasonable expectation of recovery, the action should be dismissed.—Holden v. Utah, etc., Mach. Co., C.C. Utah, 82 F. 209, error dismissed 97

F. 983, 38 C.C.A. 692—Maxwell v. Atchison, etc., R. Co., C.C.Mich., 34 F. 286.

28. Tex.—C. R. Garner & Co. v. Riley, Civ.App., 238 S.W. 953.

29. Tex.—McNamara v. Russ Mfg. Co., Civ.App., 57 S.W.2d 953. 15 C.J. p 758 note 71.

30. Ark.—Merchants' Bank of Vandervoort v. Amholter, 215 S.W. 648, 140 Ark. 480. 15 C.J. p 758 note 72.

Mistake as to measure of damages

The claim by a buyer who had paid in advance for the goods that he was entitled to recover from the seller for a shortage in the goods the highest market value, and not merely the contract price, was sufficiently meritorious to sustain the jurisdiction of the court, notwithstanding the insufficiency of the amount if he were allowed only the contract price.—C. R. Garner & Co. v. Riley, Tex.Civ.App., 238 S.W. 953.

Intent to evade limitations on jurisdiction is not sufficiently shown by the mere fact that plaintiff testified that an account for a sum under the jurisdictional limit was correct.

Miss.—Potts v. Hines, 57 Miss. 735. Tex.—Johnson v. Borden, Civ.App., 25 S.W. 1131.

31. U.S.—Hayward v. Nordberg Mfg. Co., Mich., 85 F. 4, 29 C.C.A. 438.

32. Tex.—Mansfield Mill & Elevator

Co. v. Nichols, Civ.App., 265 S.W. 746.

33. Tex.—Dwyer v. Bassett & Bassett, 63 Tex. 274—Nahm v. J. R. Fleming & Co., Civ.App., 116 S.W.2d 1174—McNamara v. Russ Mfg. Co., Civ.App., 57 S.W.2d 953—Fowler v. Small, Civ.App., 244 S.W. 1096—Smith v. Nesbitt, Civ. App., 235 S.W. 1104, conforming to certified questions 230 S.W. 976, 111 Tex. 186—Moon Automobile Co. v. Avery, Civ.App., 219 S.W. 511.

To establish plea

(1) To establish plea that plaintiff laid his damages excessively so as to confer jurisdiction, evidence must show not only that property was of value less than jurisdictional amount, but that value laid was for fraudulent purpose of conferring jurisdiction.—Stone v. Bare, Tex.Civ.App., 198 S.W. 1102.

(2) Allegations that specified items were claimed solely for the purpose of conferring jurisdiction and not in good faith are not sufficient, but the party must prove that allegation.—McKnight v. Washington Nat. Ins. Co., Tex.Civ.App., 131 S.W.2d 1072.

34. Tex.—Dwyer v. Bassett & Bassett, 63 Tex. 274. 15 C.J. p 759 note 75.

35. U.S.—Mexican Cent. R. Co. v. Glover, Tex., 107 F. 356, 46 C.C.A. 334.

36. U.S.—Mexican Cent. R. Co. v. Glover, supra.

trovery, may make such order as is necessary to place the parties in statu quo.³⁷

§ 57. — Value of Property

In an action in which property or its possession is the matter in dispute, the value of such property or its possession is the amount in controversy.

Where the litigation involves property, or the title thereto, or some question necessarily affecting its enjoyment and possession, it is the value of the property itself rather than the amount of the claim of the contending parties which fixes the amount in controversy for the purpose of jurisdiction;³⁸ and the amount of a mortgage or lien covering the prop-

erty cannot be used as a basis to determine jurisdiction or oust jurisdiction.³⁹ Under this rule, it has been held that the value of the property involved determines jurisdiction in actions to try the rights of property;⁴⁰ in ejectment;⁴¹ in actions to quiet title;⁴² in an action to remove a cloud from the title to land,⁴³ as a suit instituted for the purpose of protecting complainant's land from a lien asserted against it;⁴⁴ in bills to redeem mortgaged premises;⁴⁵ in a suit to prevent a threatened injury to the freehold;⁴⁶ in a suit to prevent the creation of an obligation which will have to be paid by taxation;⁴⁷ in a suit to prevent the execution of a judgment;⁴⁸ and value of property involved deter-

37. Tex.—Texas Land, etc., Co. v. Sanders, Civ.App., 113 S.W. 558.

38. U.S.—Peterson v. Suero, C.C.A. N.C., 93 F.2d 878, 882, citing *Corpus Juris*.

Tex.—Cavitt v. Beall Hardware & Implement Co., Civ.App., 204 S.W. 798, reversed on other grounds Brown v. Fleming, Com.App., 212 S.W. 483.

15 C.J. p 760 note 99.

Effect of subsequent finding as to value

The court need not vacate a former order overruling a plea in abatement, when, on the trial, the jury finds the value of the property involved to be an amount in excess of the court's jurisdiction; and defendant is not entitled to urge the objection, since the issue has already been tried and determined against him.—Vilbig v. Faison, Tex. Civ.App., 296 S.W. 669.

Water rights

In a suit concerning water rights, the thing in controversy is the right to the use of the water, and where that exceeded in value two thousand dollars, exclusive of interest and costs, a circuit court of the United States had jurisdiction.—Morris v. Bean, C.C.Mont., 146 F. 423, affirmed Bean v. Morris, 159 F. 651, 86 C.C.A. 519, affirmed 31 S.Ct. 703, 221 U.S. 485, 55 L.Ed. 821.

39. Okl.—One Hudson Super-Six Automobile, Model J, No. 4197, Engine No. 39527, v. State, 187 P. 806, 77 Okl. 130.

40. Okl.—One Hudson Super-Six Automobile, Model J, No. 4197, Engine No. 39527 v. State, supra.

Sequestered property

The jurisdiction of the district court of suits for the trial of the rights of property levied on by virtue of a writ of sequestration is dependent on the value of the property levied on.—Vaughn v. Porter, Tex. Civ.App., 44 S.W.2d 1009.

Officer's valuation

(1) In the absence of any claim

for damages or allegations of fraud, the officer's valuation fixes the jurisdiction of the court to which oath and bond of claimant to sequestered property shall be returned.—Vaughn v. Porter, supra—15 C.J. p 761 note 3 [a] (1).

(2) Where the return did not show the value of property levied on, which plaintiff was claiming, but the sheriff made an indorsement on the replevy bond given by plaintiff, stating that he assessed the value of the property at two hundred twenty-two dollars and fifty cents, and it was agreed that such was its value, court properly overruled a motion to dismiss, on the ground that the value of the property in controversy was less than two hundred dollars.—Watson v. Schultz, Tex.Civ.App., 208 S.W. 953.

(3) The provision requiring the levying officer to return the writ to the district court and giving that court jurisdiction to try the claim, if the property is valued by the levying officer at any amount in excess of five hundred dollars, applies where the property is claimed by a person who is not a party to the writ, and not where he is the party alleged by plaintiff to be in possession of the property, in which case the valuation alleged by plaintiff determines the jurisdiction of the court.—Automobile Underwriters of America v. Brooks, Tex.Civ.App., 228 S.W. 367.

41. U.S.—Peterson v. Suero, C.C.A.N.C., 93 F.2d 878, 882, citing *Corpus Juris*.

15 C.J. p 761 note 2.

42. Colo.—Greene v. Gibson, 127 P. 239, 53 Colo. 346.

15 C.J. p 762 note 5.

43. Mich.—Wight v. Roethlisberger, 74 N.W. 474, 116 Mich. 241.

Contra

A suit to remove a cloud on title to land will not be dismissed because the value of the land exceeds the court's jurisdiction where there was no allegation in the complaint as to

the value of the land or defendant's interest therein, and defendant's answer and cross complaint showed that his only interest was a lien for less than the jurisdictional amount.—Borman v. Apter, 110 A. 453, 95 Conn. 66.

44. Mich.—Matteson v. Matteson, 93 N.W. 1079, 132 Mich. 516.

Sale for assessment

In an action to enjoin the sale of real estate in satisfaction of an assessment, the value of the land and not the alleged amount due on the assessment determines the court's jurisdiction.—Fuller v. City of Grand Rapids, 40 Mich. 395.

45. Conn.—Scripture v. Johnson, 3 Conn. 211—Wheat v. Griffin, 4 Day 419.

46. Mich.—Huyck v. Bailey, 55 N.W. 1002, 100 Mich. 223.

47. Mich.—Dodge v. Van Buren Circuit Judge, 76 N.W. 315, 118 Mich. 189.

Amount of taxes immaterial

The question of jurisdictional amount in suit to enjoin delivery of municipal bonds which, if delivered, will have to be paid by taxation, depends, not on the amount of taxes plaintiff will have to pay, but on the value of his property subject to taxation.—Dodge v. Van Buren Cir. Judge, supra.

48. Mich.—Willeke v. Duross, 107 N.W. 907, 144 Mich. 243, 115 Am.S.R. 394.

To set aside judgment

In a suit to set aside a judgment under which execution was levied on real estate, the court has jurisdiction where the value of the land is sufficient, although the amount of the judgment is insufficient.—Willeke v. Duross, supra.

To enjoin execution on homestead

Where a homestead is seized, and the seizure is enjoined, the value of the homestead is the amount in dispute, and not the amount of the judgment sought to be executed; and

mines jurisdiction in replevin,⁴⁹ where the writ is issued as a means of trying the title to the property;⁵⁰ and in actions for conversion.⁵¹ Also, where property, title to which is claimed by a third person, is seized under a court order, the value of the property tests the jurisdiction of the court, and where it exceeds the jurisdiction of the seizure court, claimant must go into the court having jurisdiction according to amount.⁵²

Property indirectly involved. Where property is only indirectly involved, its value will not be considered in determining the jurisdiction of the court.⁵³ Thus, in an action to recover rent, the title to the premises is a collateral matter, although proof thereof may be required, and jurisdiction is fixed by the amount of rent demanded;⁵⁴ and in an action to compel the refunding of part of a tax exacted under an excessive assessment, the refund claimed, and not the value of the property on which the tax was levied, governs in determining the jurisdiction of the court.⁵⁵

Value of possession. Where the issue in a case is not the ownership of property, but the right of possession thereof, it is the value of the right of

possession, and not the value of the property, which determines the question of jurisdiction of the court.⁵⁶ Thus, in a replevin action in which the controversy is over the right to possession, the title to the property involved not being in dispute, plaintiff seeking damages for unlawful detention and defendants claiming a lien on the property, the value of the property is not a part of the amount in controversy.⁵⁷ In an action to determine merely the right of possession of realty, the value of the right of possession alone determines the amount involved,⁵⁸ with such actual damages as the complaint shows plaintiff entitled to recover.⁵⁹ Under some statutes, in proceedings to eject a tenant, the amount of the monthly or yearly rental determines the jurisdiction of the courts.⁶⁰

To set aside conveyances or transfers as fraudulent. It has been held that, in actions to set aside conveyances or transfers as fraudulent, the amount in controversy for jurisdictional purposes is the value of the property transferred;⁶¹ but there is also authority for the view that in a judgment creditor's suit jurisdiction is determined by the amount claimed by the creditor rather than by the value of the

the injunction suit must be filed in a court other than that of the seizure, if the latter court has not jurisdiction.—*Speyrer v. Miller*, 32 So. 524, 108 La. 204, 61 L.R.A. 781.

49. Mass.—*Carroll v. Berger*, 150 N. E. 870, 255 Mass. 132.

Miss.—*Fenn v. Harrington*, 54 Miss. 733.

N.J.—*King v. Scala*, 165 A. 426, 110 N.J.Law 321.

N.Y.—*Scharfman v. May-Claire Costume Co.*, 232 N.Y.S. 516, 133 Misc. 482—*Kessler v. Zucker*, 202 N.Y.S. 770.

Okl.—*One Hudson Super-Six Automobile, Model J, No. 4197, Engine No. 39527 v. State*, 187 P. 806, 77 Okl. 130.

R.I.—*Mack Motor Truck Co. v. Dorsey*, 119 A. 756, 45 R.I. 65. 15 C.J. p 761 note 3.

Value held in excess of court's jurisdiction

Finding that piano sought to be replevied had value under three hundred dollars, bringing suit within municipal court's jurisdiction, was not supported by evidence.—*Harnwell v. Hollenberg Music Co.*, 13 S. W.2d 297, 178 Ark. 98.

Money damage demanded

(1) The jurisdiction of the city court of the city of New York in actions of replevin is not circumscribed by the amount of money damage demanded in the complaint, but is based on the value of the chattels sought to be recovered.—*Scharfman*

v. May-Claire Costume Co., 232 N.Y. S. 516, 133 Misc. 482.

(2) In replevin, the jurisdiction of the court depends on the value of the property involved, and a demand for damages for the unlawful detention of the goods will not affect the jurisdiction, even though the total judgment, for the value of the goods and for damages for their unlawful detention, is an amount in excess of the jurisdictional limit of the court.—*Goldstein v. Miami Wrecking & Salvage Co.*, 137 So. 283, 103 Fla. 149.

50. U.S.—*Peyton v. Robertson*, D. C., 9 Wheat. 527, 6 L.Ed. 451.

51. Tex.—*Lone Star Finance Corporation v. Davis*, Civ.App., 77 S.W. 2d 711—*Cox v. Overton*, Civ.App., 240 S.W. 642.

52. La.—*Woodard v. Johnson*, 152 So. 65, 178 La. 501—*Speyrer v. Miller*, 32 So. 524, 108 La. 204, 61 L.R.A. 781.

53. La.—*Lhote v. Methodist Episcopal Church Extension Soc.*, 39 So. 502, 115 La. 487.

Mo.—*McKinney v. T. L. Wright Lumber Co.*, 90 S.W. 726, 192 Mo. 22.

54. U.S.—*Battle v. Atkinson*, Ark., 24 S.Ct. 845, 191 U.S. 559, 48 L. Ed. 302, affirming, C.C., 115 F. 384. Tex.—*Kalteyer v. Wipff*, Civ.App., 65 S.W. 207.

55. Colo.—*Foster v. Hart Cons. Min. Co.*, 122 P. 54, 52 Colo. 429.

56. La.—*Richardson v. Caloavello*, 3 La.App. 535.

Use and occupation

The value of the possession determines the jurisdiction of a suit for the recovery of money for the use and occupation of property.—*Richardson v. Caloavello*, 3 La.App. 535.

57. Pa.—*Ladner v. Forman*, 163 A. 359, 107 Pa.Super. 245.

58. S.C.—*American Oil Co. v. Cox*, 189 S.E. 660, 662, 182 S.C. 419, citing *Corpus Juris*.

15 C.J. p 762 note 9.

Analogy to bond required

The federal court in Arkansas, in an action of unlawful detainer, by analogy to the requirements of *Sandels & H. Dig. c 70 § 3449*, requiring as a preliminary to the issuance of a writ of possession a bond in double the amount of two years' rent will, in determining the value of possession as affecting its jurisdiction, regard the amount in controversy as a sum double the amount of the rent of the premises detained for two years.—*Battle v. Atkinson*, C.C.Ark., 115 F. 384, affirmed 24 S.Ct. 845, 191 U.S. 559, 48 L.Ed. 302.

59. U.S.—*Battle v. Atkinson*, C.C. Ark., 115 F. 384, affirmed 24 S.Ct. 845, 191 U.S. 559, 48 L.Ed. 302.

60. La.—*Dreyfus v. Process Oil, etc.*, Co., 72 So. 805, 104 La. 50.

61. La.—*Cusachs v. Dugue*, 36 So. 960, 113 La. 261. 15 C.J. p 762 note 10.

property held by the debtor's alleged fraudulent assignee.⁶²

Actions to have title papers declared mortgages. In a proceeding to have title papers to personalty declared chattel mortgages, the amount of the debts secured by the mortgages, and not the value of the property covered thereby, determines the amount in controversy.⁶³

Actions to enforce liens. As a general rule, in actions to enforce liens the amount in controversy for jurisdictional purposes is determined by the amount demanded.⁶⁴ In Texas, in an action to enforce a lien on personal property the matter in controversy is not only the debt, but also the property covered by the lien,⁶⁵ and, dependant on whichever

er is the greater in the particular case,⁶⁶ the amount in controversy, for the purpose of determining the jurisdiction of the court, is either the value of the property on which the lien is sought to be enforced,⁶⁷ or the amount of the debt sought to be collected,⁶⁸ except in cases where the lien is fixed by statute, and is limited in its operation to only so much of the property as is necessary to satisfy the judgment, in which case, the court's jurisdiction is determined by the amount of the debt and not the value of the property on which the lien exists.⁶⁹ The rule does not apply to cases in which the creation of the lien is dependent on the filing of the suit and the subsequent levy of a writ.⁷⁰ However, it has been held, that where the amount of the debt is within the jurisdiction of the court, but the value

62. U.S.—Alkire Grocery Co. v. Richesin, C.C.Ark., 91 F. 79.

63. Okl.—Lyons v. Martin, 20 P. 2d 1039, 163 Okl. 91.

64. Mich.—Matteson v. Matteson, 93 N.W. 1079, 132 Mich. 516. 15 C.J. p 762 note 13.

Entire indebtedness

In an action by a holder of a part of an issue of bonds to foreclose the mortgage given to secure the whole issue for default in the payment of interest, the amount in controversy is not only the unpaid interest, but the amount of plaintiff's bonds.—Lowenthal v. Georgia Coast, etc., R. Co., D.C.Ga., 233 F. 1010.

65. Tex.—Cleckler v. American Motors Finance Co., Civ.App., 24 S.W. 2d 514—Williams v. Givins, Civ. App., 11 S.W.2d 224—Davis v. First Nat. Bank of El Paso, Civ.App., 248 S.W. 119.

66. Tex.—Bishop & Babcock Sales Co. v. Haley, Civ.App., 115 S.W. 2d 772—Peters v. Hubb Diggs Co., Civ.App., 35 S.W.2d 449, error dismissed—Cleckler v. American Motors Finance Co., Civ.App., 24 S.W. 2d 514, error refused—Lunsford v. Pearce, Civ.App., 19 S.W.2d 71—Williams v. Givins, Civ.App., 11 S.W.2d 224—Whatley v. Gust, Civ. App., 294 S.W. 245—Allnutt v. Compton, Civ.App., 294 S.W. 244—Bush v. Campbell, Civ.App., 201 S.W. 1055—Marshall v. G. A. Stowers Furniture Co., Civ.App., 167 S.W. 280—Cantrell v. Cawyer, Civ. App., 162 S.W. 919.

67. Tex.—Childress Oil Co. v. Wood, 230 S.W. 143, 111 Tex. 165—Cotulla v. Goggan, 13 S.W. 742, 77 Tex. 32—Campsey v. Brumley, Com.App., 55 S.W.2d 810—Jenkins v. Parks, Com.App., 49 S.W.2d 714, reversing Parks v. Jenkins, Civ.App., 41 S.W.2d 507—Bishop & Babcock Sales Co. v. Haley, Civ.App., 115 S.W.2d 772—Jones v. National Cash Register Co., Civ.App., 52 S.W.2d

1083, error dismissed—Cleckler v. American Motors Finance Co., Civ. App., 24 S.W.2d 514—McIntyre v. Oliver Motor Co., Civ.App., 20 S.W. 2d 241, error dismissed—Lunsford v. Pearce, Civ.App., 19 S.W.2d 71—Williams v. Givins, Civ.App., 11 S.W.2d 224—Whatley v. Gust, Civ. App., 294 S.W. 245—Blackwell v. Guaranty State Bank of Keller, Civ.App., 260 S.W. 895—Wilkerson v. Huddleston, Civ.App., 258 S.W. 884—McKee v. Le Fors, Civ.App., 253 S.W. 598—Davis v. First Nat. Bank of El Paso, Civ.App., 248 S.W. 119—Kiechler v. Kelm, Civ.App., 246 S.W. 1079—Graham Fuel Oil Co. v. Young County Oil Syndicate, Civ.App., 242 S.W. 1114—Hodgkinson v. Hartwell, Civ.App., 226 S.W. 457—People's Ice Co. v. Phariss, Civ.App., 203 S.W. 66—Jackson v. Sere, Civ.App., 198 S.W. 604—Lusk v. Hardin, Civ.App., 176 S.W. 787—Stricklin v. Arrington & Carter, Civ.App., 141 S.W. 189. 15 C.J. p 762 note 14.

Alleged value

The alleged value of the property on which a lien is sought to be foreclosed determines the jurisdiction of the court.—Williams v. Greer, Tex. Civ.App., 122 S.W.2d 247—Houston Harbor Sales Co. v. Levand, Civ. App., 206 S.W. 379.

Liens to which rule applied

(1) Chattel mortgage.—Welder v. First State Bank of Skidmore, Tex. Civ.App., 37 S.W.2d 848—Peters v. Hubb Diggs Co., Tex.Civ.App., 35 S.W.2d 449, error dismissed—Leonard v. Burton, Civ.App., 11 S.W.2d 688—Huff v. McDonald, Tex.Civ.App., 239 S.W. 365—Koontz v. Savely, Tex.Civ. App., 233 S.W. 540, dismissed for want of jurisdiction—Tant v. Baldwin Piano Co., Tex.Civ.App., 217 S.W. 239—Bush v. Campbell, Tex.Civ. App., 201 S.W. 1055—Jackson v. Sere, Tex.Civ.App., 198 S.W. 604.

(2) Laborer's lien.—Allnutt v. Compton, Tex.Civ.App., 294 S.W. 244—R. O. Kipp Co. v. Anglin, Tex.Civ. App., 270 S.W. 893—Ferrell-Michael Abstract & Title Co. v. McCormac, Tex.Civ.App., 184 S.W. 1081, affirmed, Com.App., 215 S.W. 559.

68. Tex.—Bush v. Campbell, Civ. App., 201 S.W. 1055—Marshall v. G. A. Stowers Furniture Co., Civ. App., 167 S.W. 280—Walker Mercantile Co. v. J. R. Raney Co., Civ. App., 154 S.W. 317.

69. Tex.—R. O. Kipp Co. v. Anglin, Civ.App., 270 S.W. 893—Wilkerson v. Huddleston, Civ.App., 258 S.W. 884—Texas, etc., R. Co. v. Allen, 1 Tex.Civ.Cas. § 568.

Liens to which rule applicable

(1) Landlord's statutory lien.—R. O. Kipp Co. v. Anglin, Tex.Civ.App., 270 S.W. 893—Wilkerson v. Huddleston, Tex.Civ.App., 258 S.W. 884—Mandre v. Wilkinson, Tex.Civ.App., 136 S.W. 1152—Ingraham v. Rich, Tex.Civ.App., 138 S.W. 549—Irwin v. Bexar County, 63 S.W. 550, 26 Tex. Civ.App. 526—Dazey v. Pennington, 31 S.W. 312, 16 Tex.Civ.App. 326—Lawson v. Lynch, 29 S.W. 1128, 9 Tex.Civ.App. 582.

(2) The rule is not applicable to laborer's liens.—R. O. Kipp Co. v. Anglin, Tex.Civ.App., 270 S.W. 893, criticising the decision in Allen v. Glover, 65 S.W. 379, 27 Tex.Civ.App. 483, relating to a laborer's lien, on the ground that it is based on the mistaken assumption that the statute providing for the laborer's lien contains a restriction similar to that stated in the text.

70. Tex.—Graham Fuel Oil Co. v. Young County Oil Syndicate, Civ. App., 242 S.W. 1114.

Attachment

Value of property does not determine amount in controversy in action in which the lien is created by an attachment issued after, or at the time of, the filing of the suit.—Graham

of the property covered by the lien is beyond its jurisdiction, the court may retain the cause for trial of the issue as to the alleged debt and receive a verdict and render judgment thereon, but it cannot foreclose the lien.⁷¹

Cancellation of notes and mortgages. In a suit to cancel a note and chattel mortgage given to secure its payment the amount in controversy as respects the jurisdiction of the court is either the amount of the note or the value of the property covered by the chattel mortgage, depending on which is the greater in amount.⁷² However, in a suit to cancel notes secured by chattel mortgages, or, in the alternative, for judgment for a stated amount for conversion of a part of the security, if it appears that such security was not accepted in payment of the notes, the amount of the notes sought to be canceled or the amount for which judgment for conversion of the security is demanded is the amount in controversy and not the value of the property covered by the mortgages securing the notes.⁷³

Value of property and damages. In some jurisdictions, in actions for the recovery of property and damages for its detention, the value of the property and the damages claimed may be added in determining the jurisdictional amount.⁷⁴ In other jurisdictions, if either the demand or the value of the property involved does not exceed a stated amount, a specified court has jurisdiction.⁷⁵ In still other jurisdictions, jurisdiction in such actions depends exclusively on the value of the chattels regardless of the damages.⁷⁶ Where, however, damages for the detention of property are not allowable in an action of trover, jurisdiction of such an action depends on the value of the property regardless of the damages claimed.⁷⁷

Actions by stockholders. It appears to be well established that where a stockholder sues in the right of the corporation, the amount in controversy, for jurisdictional purposes, is the value of the right of the corporation which it is sought to protect and not the value of the complainant's interest therein.⁷⁸ So, also, where a suit is brought by the owners of landholders' shares in a cemetery, on behalf of themselves and all other owners of such shares similarly situated, to protect the interests of the land of the corporation as against a proposed sale, the aggregate interest of the whole class constitutes the matter in dispute,⁷⁹ and in a suit by a stockholder on behalf of himself and other stockholders to secure the distribution of a fund belonging to a dissolved corporation, the entire fund is the amount in controversy for jurisdictional purposes.⁸⁰ It has also been held that in a suit by a member of a non-stock corporation to restrain alleged illegal and ultra vires acts by its governing body, the amount involved, for jurisdictional purposes, is the value of the rights of the corporation sought to be protected.⁸¹ On the other hand, where a stockholder sues in his own right, asserting rights adverse to the corporation, the value of his stock and not the value of the corporate assets, governs.⁸²

Applications for receivership. Although it has been held that in an action by a stockholder of a corporation for the appointment of a receiver and the winding up of the corporation, the amount in controversy for jurisdictional purposes is the value of plaintiff's stock,⁸³ there is also authority for the view that in a suit for a receivership and the distribution of assets the value of the entire assets to be seized, rather than plaintiff's interest in them is the amount in controversy.⁸⁴ It has also been held that, on an application by creditors of a cor-

Fuel Oil Co. v. Young County Oil Syndicate, *supra*.

71. Tex.—Jecker v. Phytides, 65 S. W. 1129, 27 Tex.Civ.App. 410.

72. Tex.—Bishop & Babcock Sales Co. v. Haley, Civ.App., 115 S.W. 2d 772.

73. Tex.—Cleckler v. American Motors Finance Co., Civ.App., 24 S. W.2d 514, error refused.

74. Idaho.—Preston A. Blair Co. v. Rose, 51 P.2d 209, 56 Idaho 114. 15 C.J. p 763 note 17.

75. Fla.—Goldstein v. Miami Wrecking & Salvage Co., 137 So. 283, 103 Fla. 149.

76. N.Y.—Barnard v. Devine, 68 N. Y.S. 859, 34 Misc. 182.

R.I.—McKittrick v. Bates, 132 A. 610, 47 R.I. 240.

Power to adjudge damages

Under statute authorizing plaintiff in replevin to recover his reasonable damages for the taking and detention of the goods and chattels, the district court can give plaintiff full judgment for the value of the property and damages, even though the damages exceed the amount of its jurisdiction.—Mack Motor Truck Co. v. Dorsey, 119 A. 756, 45 R.I. 65.

77. U.S.—Vance v. U. A. Vandercook Co., S.C., 18 S.Ct. 645, 170 U.S. 468, 42 L.Ed. 1111.

S.C.—Loeb v. Mann, 18 S.E. 1, 39 S.C. 465.

78. U.S.—Larabee v. Dolley, C.C. Kan., 175 F. 365, reversed on other grounds Dolley v. Abilene Nat. Bank, 179 F. 461, 102 C.C.A. 607, 32 L.R.A., N.S., 1065, affirmed As-

saria State Bank v. Dolley, 31 S. Ct. 189, 219 U.S. 121, 55 L.Ed. 123. 15 C.J. p 763 note 20.

79. U.S.—Carpenter v. Knollwood Cemetery, D.C.Mass., 198 F. 297.

80. U.S.—Kent v. Honsinger, C.C.N.Y., 167 F. 619.

81. U.S.—McKee v. Chantauqua Assembly, C.C.N.Y., 124 F. 808, affirmed 130 F. 536, 65 C.C.A. 8.

82. U.S.—Ryan v. Seaboard, etc., R. Co., C.C.Va., 89 F. 397. 15 C.J. p 763 note 24.

83. U.S.—Robinson v. West Virginia Loan Co., C.C.W.Va., 90 F. 770. 15 C.J. p 763 note 25.

84. Pa.—Horafeus v. Mangos, 98 Pa. Super. 447. 15 C.J. p 763 note 26.

poration for a receiver, the amount in controversy for jurisdictional purposes is the amount of the assets of the corporation and not the claims of the creditors.⁸⁵

A bill to compel a corporation to transfer corporate stock and to pay the difference between the market value of the stock on the day that transfer was demanded and its highest market value between that day and the day of judgment, alleging that the corporation refused to transfer the stock, which was subject to an inheritance tax under state law, until a waiver or consent to the transfer from the state was produced, has been held not within the jurisdiction of a federal court, where the amount of the tax was less than the minimum jurisdictional amount, although the market value of the stock greatly exceeded that amount.⁸⁶

§ 58. — Interest

In general, accrued interest may be added to the principal of a claim in the determination of the amount in controversy, unless the law fixes the jurisdiction at a certain amount exclusive of interest.

Where the law does not expressly exclude interest in making up the jurisdictional amount, interest due upon the amount involved at the time the action was brought may be added to determine the amount in controversy for jurisdictional purposes;⁸⁷ but interest which might be allowed for the time elapsing between the bringing of the action and

the judgment is too speculative and indefinite to be so considered,⁸⁸ and, as appears supra § 54 b, cannot, under the rule requiring jurisdiction to be determined as of the time when the suit is instituted, be considered. So accrued interest may be added to a claim to bring it within the jurisdiction of a court,⁸⁹ except that where a statute gives the court jurisdiction only in cases where the demand, exclusive of interest, amounts to a certain sum, the addition of interest to a debt originally beneath the jurisdiction of the court, cannot of course confer jurisdiction thereon.⁹⁰ Also a court cannot take cognizance of an action where interest is demanded and such interest raises the amount sought to be recovered above the jurisdiction of the court, although without interest the demand would be within its jurisdiction,⁹¹ unless the law fixes the jurisdiction of the court at a certain amount exclusive of interest.⁹² In some jurisdictions statutory and constitutional provisions limiting the jurisdiction of specified courts to stated amounts, exclusive of interest, are construed as applying only to interest *eo nomine*, that is, interest in its own name, which the statutes make provision for or the party binds himself by contract to pay, so that when interest is sought, which is expressly authorized by statute or which flows from and is incident to the written contract sued on, it will not be considered as a part of the amount in controversy in determining the jurisdiction of the court;⁹³ but where interest is

85. U.S.—Jones v. Mutual Fidelity Co., C.C.Del., 123 F. 506.

86. U.S.—Jessup v. Chicago, etc., R. Co., C.C.N.Y., 188 F. 931.

87. Conn.—Atlantic Refining Co. v. Schoen, 170 A. 478, 118 Conn. 26.

88. Conn.—Atlantic Refining Co. v. Schoen, 170 A. 478, 118 Conn. 26.

N.Y.—Tappin v. Maclean, 192 N.Y.S. 196, 117 Misc. 757.

89. Fla.—Barber v. Smith, 190 So. 438—Jonas v. Prows, 89 So. 424, 82 Fla. 131, citing *Corpus Juris*.

Miss.—Cachot v. Russell, 134 So. 140, 160 Miss. 330, 77 A.L.R. 988.

Tex.—Sims v. Sinton State Bank of Sinton, Civ.App., 238 S.W. 316.

15 C.J. p 765 note 42.

90. Tex.—North Texas Building & Loan Ass'n v. Samson, Civ.App., 84 S.W.2d 571, error dismissed—Allen v. Wright, Civ.App., 291 S.W. 644, 645, quoting *Corpus Juris*—Davis v. Rush, Civ.App., 288 S.W. 504—Escue v. Hartley, Civ.App., 202 S. W. 159.

15 C.J. p 764 note 41.

Stipulation to regard interest as principal

A stipulation to regard interest as principal is unavailing to render it a part of the amount in controversy

when it is excluded by statute.—Allen v. Wright, Tex.Civ.App., 291 S. W. 644, 645, quoting *Corpus Juris*—15 C.J. p 764 note 41 [b].

Identifiable interest

If the interest can be identified from any part of the record, it will be excluded from the computation of the amount in controversy.—Allen v. Wright, supra, quoting *Corpus Juris*—15 C.J. p 764 note 41 [a].

Simple and compound interest excluded

Jurisdictional amount in controversy is determined by excluding all interest, whether simple or compound.—Allen v. Wright, Tex.Civ. App., 291 S.W. 644.

91. Ala.—Sheldon v. Lyon, 104 So. 576, 20 Ala.App. 623.

Cal.—Hargett v. Gulf Ins. Co. of Dallas, Tex., 55 P.2d 1258, 12 Cal. App.2d 449.

N.J.—Besser v. Krasny, 176 A. 146, 114 N.J.Law 146, reversing 172 A. 533, 113 N.J.Law 81.

N.Y.—Mansson v. Nostrand, 170 N. Y.S. 285, 183 App.Div. 371.

Tex.—Clark v. El Paso County Water Improvement Dist. No. 1, Civ. App., 298 S.W. 967—Simms Oil Co. v. Hall, Civ.App., 281 S.W. 286

—Bell v. C. J. Gerlach & Bro., Civ. App., 205 S.W. 470.

15 C.J. p 765 note 43.

What constitutes interest

Demands falling within statute defining interest must be excluded in determining jurisdiction of municipal court.—Hargett v. Gulf Ins. Co. of Dallas, Tex., 55 P.2d 1258, 12 Cal. App.2d 449.

92. La.—Decklar v. Frankenberger, 30 La. Ann. 410.

Miss.—Cachot v. Russell, 134 So. 140, 160 Miss. 330, 77 A.L.R. 988.

N.Y.—O'Farrell v. Martin, 292 N.Y. S. 581, 161 Misc. 353.

Okla.—St. Louis & S. F. R. Co. v. Ladd, 178 P. 125, 72 Okl. 55.

Pa.—Graboyes v. Kapner, 181 A. 385, 120 Pa. Super. 4.

Tex.—Oppenheim v. Hood, Civ.App., 33 S.W.2d 265—Bunker Printing Products Corporation v. McCall, Civ.App., 8 S.W.2d 719—Dillon v. Dillon, Civ.App., 274 S.W. 217—Nueces Hotel Co. v. Ring, Civ. App., 217 S.W. 255, dismissed for want of jurisdiction.

15 C.J. p 766 note 44.

93. Tex.—McDaniel v. National Steam Laundry Co., 244 S.W. 135, 112

Tex. 54—Binge v. Gulf Coast Or-

not recoverable *eo nomine*, but is sued for as damages or compensation, and is merely taken as a standard by which to measure the damages to be recovered, it is considered in determining the amount in controversy for jurisdictional purposes.⁹⁴

It must appear that interest is claimed, otherwise it will not be considered in determining the amount in controversy;⁹⁵ but the failure to expressly and specifically claim interest will not prevent its consideration where the *ad damnum* and the proceedings are consistent with such a claim.⁹⁶

§ 59. — Attorney's Fees

In general attorney's fees claimed as a part of the specific demand sued for are considered in determining the amount in controversy, but if they are allowable only as costs they are not ordinarily so considered.

Where attorney's fees are claimed as part of the damages recoverable, or, on the basis of an express promise contained in the instrument sued on or an express statutory provision authorizing their recovery, are claimed as a part of the specific demand sued for, such fees are properly considered in determining the amount in controversy for jurisdictional purposes.⁹⁷ It has even been held that at-

chards Co., Civ.App., 93 S.W.2d 813, error dismissed—City of Abilene v. American Surety Co., Civ. App., 73 S.W.2d 616—Stump v. F. A. Officer & Co., Civ.App., 250 S. W. 308—Sims v. Sinton State Bank of Sinton, Civ.App., 238 S.W. 316—Bell v. C. J. Gerlach & Bro., Civ.App., 205 S.W. 470—Ewalt v. Holmes, Civ.App., 165 S.W. 39.

Action on written contract

Where suit is brought on written contract, interest provided for by statute is excluded in determining court's jurisdiction. — Wonderful Workers of World Benev. Ass'n v. Bookman, Tex.Civ.App., 29 S.W.2d 890.

Interest held *eo nomine*

(1) Interest on amount due under written contract of employment.—Carter Grocer Co. v. Day, Tex.Civ. App., 144 S.W. 385.

(2) Interest on claim for unpaid check.—Sewell v. Statler, Tex.Civ. App., 15 S.W.2d 144.

(3) Interest on unpaid rent sued for, due under written rental contract.—Bunker Printing Products Corporation v. McCall, Tex.Civ.App., 8 S.W.2d 719.

(4) Interest prayed for in action for amount provided in contract to be paid as liquidated damages in case of its breach.—Escue v. Hartley, Tex.Civ.App., 202 S.W. 159.

(5) Statutory interest on amount due on stock subscription contract, no specified rate having been agreed on.—Nueces Hotel Co. v. Ring, Tex. Civ.App., 217 S.W. 255, dismissed for want of jurisdiction.

(6) Statutory interest on open account.—Oppenheim v. Hood, Tex.Civ. App., 33 S.W.2d 265, error refused.

(7) Where terms of due date to pay debt due under written contract are ascertainable, interest in suit on contract is not recoverable as damages, and is not to be computed in determining amount in controversy.—Davis v. Rush, Tex.Civ.App., 288 S.W. 504.

94. Tex.—McDaniel v. National Steam Laundry Co., 244 S.W. 135,

112 Tex. 54—Binge v. Gulf Coast Orchards Co., Civ.App., 93 S.W.2d 813, error dismissed—Wood v. Young, Civ.App., 11 S.W.2d 369—Clark v. El Paso County Water Improvement Dist. No. 1, Civ.App., 296 S.W. 967—Simms Oil Co. v. Hall, Civ.App., 281 S.W. 286—Stallings v. Williams, Civ.App., 235 S. W. 636—Bell v. C. J. Gerlach & Bro., Civ.App., 205 S.W. 470—Waller v. Gray, 94 S.W. 1098, 43 Tex. Civ.App. 405.

15 C.J. p 764 note 41 [d], p 766 note 44 [a].

Interest held proper to consider

(1) Interest allowed by statute against guardian failing to invest funds.—Holman v. Ward, Tex.Com. App., 288 S.W. 148, affirming, Civ. App., 279 S.W. 310.

(2) Interest as damages for conversion or wrongful detention of money.—City of Abilene v. American Surety Co., Tex.Civ.App., 73 S.W.2d 616.

(3) Interest asked for in suit against sheriff for conversion of money.—Sanders v. Waghalter, Tex. Civ.App., 192 S.W. 1083.

(4) Interest asked for in a suit to recover earnest money paid on an optional purchase of realty.—Moser v. Tucker, Tex.Civ.App., 195 S.W. 259.

(5) Interest for detention of amount of draft deposited with defendant bank for collection and converted by bank.—Sims v. Sinton State Bank of Sinton, Tex.Civ.App., 238 S.W. 316.

(6) Interest on damages claimed for a breach of contract.—Stump v. F. A. Officer & Co., Tex.Civ.App., 250 S.W. 308.

95. S.C.—Evans v. Hollman, 4 S.C. L. 150.

15 C.J. p 766 note 45.

96. Fla.—Barber v. Smith, 190 So. 438.

97. Cal.—Taylor v. Datig, 11 P.2d 98, 123 Cal.App.Supp. 782.

Fla.—State v. Barrs, 99 So. 668, 670, 87 Fla. 168, citing *Corpus Juris*.
La.—Foundation Finance Co. v. Rob-

bins, App., 144 So. 293, 295, quoting *Corpus Juris*.

Miss.—Catchot v. Russell, 134 So. 140, 160 Miss. 380, 77 A.L.R. 988.
Tex.—McKnight v. Washington Nat. Ins. Co., Civ.App., 131 S.W.2d 1072—East Texas Title Co. v. Parchman, Civ.App., 116 S.W.2d 497, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Post, Civ.App., 220 S.W. 129—Planters' Oil Co. v. Hill Printing & Stationery Co., Civ.App., 208 S.W. 192.

15 C.J. p 767 note 47.

Ownership of fees

Where there is a contractual obligation to pay attorney's fees, the right to claim those fees, in the event of the happening of the contingency upon which they are made to depend, belongs to the person in whose favor the main obligation runs and not to his attorney, and thus such fees actually become a part of the claim, and, in the absence of statute prohibiting it, are to be taken into account in determining jurisdiction.—Foundation Finance Co. v. Robbins, La.App., 144 So. 293.

Fees not a penalty

Where an agreement contains a stipulation for the payment of attorney's fees, those fees are to be considered as representing a part of the damage which noncompliance by the obligor will inflict upon the obligee and not as a penalty upon the obligor. The moving consideration for the inclusion of the said stipulation is not punishment of the obligor for his failure to comply with his agreement, but rather repayment to the obligee of any loss he may sustain.—Foundation Finance Co. v. Robbins, *supra*.

As special damages

Attorney's fees provided in note sued on are special damages.—Taylor v. Datig, 11 P.2d 98, 123 Cal.App. Supp. 782.

Attorney's fees allowed

(1) Attorney's fees allowed by statute in action to recover on life insurance policy.—Johnson v. Universal Life & Accident Ins. Co., 94 S.W.2d 1145, 127 Tex. 425—National

torney's fees expressly stipulated for in a note are a part of the amount in controversy in a suit on such note, even though the stipulation is void under a statute,⁹⁸ although this has been denied.⁹⁹ A claim for attorney's fees not provided for in the contract and not recoverable under the statute cannot be added to the amount in controversy so as to give the district court jurisdiction,¹ and in an action for damages a claim for attorney's fees which are not allowable by law in such actions cannot be added to the amount in controversy so as to give the court jurisdiction;² nor, where the statute gives the right to collect attorney's fees as a penalty for failing to pay a legal demand, can such amount be considered in determining the jurisdiction of the case.³

Where attorney's fees are not demanded, although expressly stipulated for in the instrument sued on, they are not included in the amount in controversy.⁴

In a suit to cancel notes, instituted before their maturity, attorney's fees, although expressly stipulated for, are not included as a part of the amount in controversy.⁵

Attorney's fees allowed as costs. In general attorney's fees which are allowable only as costs are not to be taken into consideration in determining the amount in controversy for jurisdictional pur-

poses;⁶ but, under a statute which allows attorney's fees as a part of the general recovery sought so that they enter into and become a part of the amount sued for, attorney's fees are taken into consideration in determining the jurisdiction of the court, even though the statute authorizing their recovery also provides that they shall be taxed as part of the costs.⁷

§ 60. — Costs

In general, costs, including protest fees, do not constitute a part of the amount in controversy for jurisdictional purposes; but where they are included in a judgment which is the subject of another and independent suit they are a part of the amount in controversy.

Costs are an incident to a judicial proceeding, and not a part of the recovery claimed, in such sense as to be considered in determining the amount in controversy as bearing on the jurisdiction of the court.⁸ However, costs included in a judgment which is made the subject of another and independent suit constitute a part of the amount in controversy in the latter suit.⁹

Protest fees are taxable costs, in an action in a federal court on a promissory note or bill of exchange, and cannot be considered as part of the amount in controversy for jurisdictional purposes.¹⁰

Life Ins. Co. of U. S. A. v. Mouton, Civ.App., 242 S.W. 782, certified questions answered National Life Ins. Co. of U. S. of America, of Chicago, v. Mouton, 252 S.W. 1040, 113 Tex. 224.

(2) Attorney's fees provided in note sued on. Cal.—Taylor v. Datig, 11 P.2d 98, 128 Cal.App.Supp. 782.

La.—Foundation Finance Co. v. Robbins, App., 144 So. 293. Tex.—East Texas Title Co. v. Parchman, Civ.App., 116 S.W.2d 497, error dismissed.

(3) Statutory attorney's fees.—Davis v. Fore, Civ.App., 250 S.W. 783.

98. Ga.—Rimes v. Williams, 25 S.E. 685, 99 Ga. 281. S.D.—Warder, etc., Co. v. Raymond, 64 N.W. 525, 7 S.D. 451.

99. N.C.—Exchange Bank v. Apalachian Land Co., 38 S.E. 813, 128 N.C. 193.

1. Okl.—St. Paul F., etc., Ins. Co. v. Peck, 130 P. 805, 37 Okl. 85.

2. Cal.—Massachusetts Bonding & Ins. Co. v. San Francisco-Oakland Terminal Rys., 178 P. 974, 39 Cal. App. 388.

3. Mo.—Pike v. Farmers' Mut. Fire & Lightning Ins. Co. of Polk County, 251 S.W. 115, 215 Mo.App. 303

—Knight v. Quincy, O. & K. C. R. Co., 96 S.W. 716, 120 Mo.App. 311.

4. Ga.—Pickett v. Smith, 23 S.E. 669, 95 Ga. 757. 15 C.J. p 767 note 51.

5. Tex.—Hildebrand v. Walter A. Wood Mowing, etc., Mach. Co., 27 S.W. 826, 3 Tex.Civ.App. 132. 15 C.J. p 767 note 52.

6. Fla.—Director General of Railroads v. Wilford, 88 So. 256, 81 Fla. 430.

Mo.—Wade v. Markham, App., 106 S.W.2d 939. 15 C.J. p 767 note 53.

7. Tex.—Johnson v. Universal Life & Accident Ins. Co., 94 S.W.2d 1145, 127 Tex. 435, disapproving Provident Life & Accident Ins. Co. v. Adams, Civ.App., 55 S.W.2d 1077 —National Life & Accident Ins. Co. v. Halpin, Civ.App., 99 S.W.2d 997 —Johnson v. Universal Life & Accident Ins. Co., Civ.App., 96 S.W.2d 674.

Contra cases

It has been held in a number of decisions in the lower courts that such fees are not a part of the amount in controversy.—Watchtower Mut. Life Ins. Co. v. Davis, Tex. Civ.App., 99 S.W.2d 693—First Texas Prudential Ins. Co. v. Pipes, Tex.Civ. App., 56 S.W.2d 203, error dismissed

—Provident Life & Accident Ins. Co. v. Adams, Tex.Civ.App., 55 S.W.2d 1077.

8. Fla.—Director General of Railroads v. Wilford, 88 So. 256, 81 Fla. 430. 15 C.J. p 767 note 54.

Items covered

(1) When a statute limits the jurisdiction of the state court to a stated amount, exclusive of costs, the "costs" referred to are those items that are by statute denominated as costs, or that are allowed by statute to be recovered as costs.—State v. Harris, 99 So. 664, 87 Fla. 168.

(2) Where the statute limits the jurisdictional value of matters that may be litigated in a court of record to a sum stated, exclusive of interest and costs, the "costs" referred to are those fees and charges that are ordinarily allowed in such actions and such other items as are legally and specifically made by statute a part of the costs that may be recovered as such in a case.—State v. Harris, supra.

9. Kan.—McClelland v. Cragun, 38 P. 776, 54 Kan. 599. 15 C.J. p 767 note 55.

10. U.S.—Baker v. Howell, C.C.Neb., 44 F. 113.

§ 61. — Demand of Exemplary or Special Damages

In determining the amount in controversy for jurisdictional purposes, exemplary or punitive damages should be included where they are claimed in a tort action, but not where claimed in a contract action. The authorities are in conflict as to whether double damages or other statutory allowances should be considered.

Where exemplary or punitive damages are claimed in an action of tort, such damages should be included in determining the jurisdictional amount,¹¹ provided such damages are properly pleaded,¹² and unless the facts pleaded are on their face insufficient to sustain a claim for such damages.¹³ However, it has been held that such damages are excluded from the determination in contract actions,¹⁴ but there is authority to the contrary.¹⁵ Double damages or other statutory allowances of extra damages, according to some authorities, should be excluded in computing the jurisdictional amount as indicated by the real amount in controversy;¹⁶ but a contrary view has also been asserted.¹⁷

§ 62. — Actions on Bonds

In an action on a penal bond there is a conflict of authority as to whether it is the amount of the damages claimed or the penalty of the bond which determines the amount in controversy for jurisdictional purposes, which conflict may be reconciled on the basis that it is the obligation of the obligor, or the obligor's liability under the bond, as measured by the penalty therein

which controls; and, according to the facts of the particular case, this may be the amount claimed or the penalty of the bond.

It has been held that in an action on a penal bond it is the amount of the damages claimed, and not the penalty of the bond, which determines jurisdiction, the damages being the real amount in controversy and the penalty being regarded as in the nature of collateral security for the debt;¹⁸ but there is also authority for the view that the penalty of the bond is the amount in controversy for the purpose of determining jurisdiction.¹⁹ This apparent conflict may be reconciled by a distinction, which the cases do not always make clear, based on the nature of the bond and the judgment which must be entered in the action, and it is believed that the correct rule may be stated as follows: It is not the amount of any individual claim nor the aggregate of all claims, but it is the obligation of the obligor, or the obligor's liability under the bond, as measured by the penalty therein;²⁰ and the amount of damages sought to be recovered controls where a judgment recovered for that amount, although different from the penalty of the bond, determines the entire liability of the obligors;²¹ but the amount named as the penalty of the bond controls where the nature of the bond is such, or the practice with relation to such actions requires, that judgment must be entered for the full penalty of the bond²² to be discharged on payment of the damages²³ or

Recovery of cost of pretest in actions on bills and notes generally see Bills and Notes § 724.

11. Miss.—Adams-Newell Lumber Co. v. Jones, 139 So. 315, 162 Miss. 517.

Tex.—Nahm v. J. R. Fleming & Co., Civ.App., 116 S.W.2d 1174—Fowler v. Small, Civ.App., 244 S.W. 1096—Gulf, C. & S. F. Ry. Co. v. Gordon, Civ.App., 218 S.W. 74.

15 C.J. p 767 note 53.

12. Tex.—Peterson v. Thomas, Civ. App., 24 S.W. 1124—Hudson v. Norwood, 35 S.W. 1075, 13 Tex. Civ.App. 662.

13. Tex.—Peterson v. Thomas, Civ. App., 24 S.W. 1124.

14. Tex.—Peterson v. Thomas, supra.

15. N.C.—Chamberlain v. Home Sec. Life Ins. Co., 175 S.E. 86, 206 N.C. 622.

16. Mo.—Grau v. St. Louis, etc., R. Co., 54 Mo. 240.

15 C.J. p 767 note 62.

17. Fla.—Seaboard Air Line Ry. v. Maxey, 60 So. 353, 64 Fla. 487.

15 C.J. p 768 note 63.

18. Miss.—Continental Casualty Co. v. Crook, 128 So. 574, 157 Miss. 518, 72 A.L.R. 186.

Tex.—American Surety Co. of New York v. Foust, Com.App., 272 S.W. 445, 447, quoting *Corpus Juris*, and reversing Foust v. Bibb, 258 S.W. 921—Spikes v. West Texas Supply Co., Civ.App., 42 S.W.2d 452, 453, quoting *Corpus Juris*.

15 C.J. p 768 note 65.

Amount due from breach

In an action on a penal bond the amount in controversy is neither the demand nor the amount of the bond, but the amount equitably due by reason of the breach.—Cabot v. McMaster, C.C.Ill., 61 F. 129, appeal dismissed 65 F. 533, 13 C.C.A. 39.

19. Mo.—St. Louis v. Fox, 15 Mo. 71.

15 C.J. p 768 note 66.

20. Tex.—American Surety Co. of New York v. Foust, Com.App., 272 S.W. 445, reversing Foust v. Bibb, Civ.App., 258 S.W. 921—Employers' Casualty Co. v. Rockwall County, Civ.App., 300 S.W. 148, modified on other grounds 35 S.W.2d 690, 120 Tex. 441, reformed on other grounds 38 S.W.2d 1098, 120 Tex. 441.

21. Tex.—American Surety Co. of New York v. Foust, Com.App., 272 S.W. 445, 447, quoting *Corpus Juris*, and reversing Foust v. Bibb,

258 S.W. 921—Means v. Floyd West & Co., Civ.App., 74 S.W.2d 518, 519, citing *Corpus Juris*—Spikes v. West Texas Supply Co., Civ.App., 42 S.W.2d 452, 453, quoting *Corpus Juris*.

15 C.J. p 768 note 67.

22. Tex.—American Surety Co. of New York v. Foust, Com.App., 272 S.W. 445, 447, quoting *Corpus Juris*, and reversing Foust v. Bibb, Civ.App., 258 S.W. 921—Spikes v. West Texas Supply Co., Civ.App., 42 S.W.2d 452, 453, quoting *Corpus Juris*.

15 C.J. p 768 note 68.

Materialman's action on contractor's bond

Penalty of surety bond determines jurisdiction in action by materialman on contractor's bond.—Employers' Casualty Co. v. Rockwall County, 35 S.W.2d 690, 120 Tex. 441, modifying, Civ.App., 300 S.W. 148, and reformed on other grounds 38 S.W.2d 1098, 120 Tex. 441.

23. Tex.—American Surety Co. of New York v. Foust, Com.App., 272 S.W. 445, 447, quoting *Corpus Juris*, and reversing Foust v. Bibb, Civ. App., 258 S.W. 921—Spikes v. West Texas Supply Co., Civ.App.,

to stand as security for further breaches, the remedy therefor being by scire facias.²⁴

In an action on a forthcoming bond the amount in controversy is the amount of plaintiff's claim against the property, and not the value of the property.²⁵

§ 63. — Joinder of Demands or Causes of Action

The amounts involved in causes of action which cannot properly be joined in one action cannot be aggregated for the purpose of determining the court's jurisdiction; but where such causes of action can properly be joined and they concern and affect all the parties litigant it is held in some jurisdictions that they can, and in other jurisdictions that they cannot, be so aggregated.

In order that two or more claims may be united to make the jurisdictional amount, they must belong to a class that under the statute will permit them to be properly joined in one suit, and not such as should be made the subject of independent suits;²⁶ and where two or more causes of action are improperly united in one suit the amounts involved in the different causes cannot be added together so as to make an amount in controversy sufficient to confer jurisdiction on the court in which the suit is

brought,²⁷ either by improperly joining demands or causes of action each of which is below the jurisdictional amount,²⁸ or by joining a demand or cause of action below the jurisdiction of the court with a demand or cause of action of which the court has jurisdiction.²⁹

In so far as causes of action which may properly be joined are concerned, and which concern all the parties litigant, there is, however, a lack of harmony on the question of whether or not their various amounts should be aggregated in order to determine the amount in controversy for jurisdictional purposes. In some jurisdictions the amount of each separate demand or cause of action and not the aggregate of various causes which may be joined in one action determines the jurisdictional amount;³⁰ so that where the claims are substantive and are not in their nature joint or composite and do not arise out of the same transaction, circumstances, or occurrences, and are not consequent upon a continuous course of dealing as evidenced by an open account or a continuing contract, and are in no way related, but represent distinct and wholly independent demands,³¹ whether ex contractu or ex delicto,³² they cannot be aggregated to confer jurisdiction.

42 S.W.2d 452, 453, quoting *Corpus Juris*.
15 C.J. p 768 note 69.

24. Mich.—Probate Judge v. Dean, 18 N.W. 118, 52 Mich. 387.

Tex.—American Surety Co. of New York v. Foust, Com.App., 272 S.W. 445, 447, quoting *Corpus Juris*, and reversing Foust v. Bibb, 258 S.W. 921—Spikes v. West Texas Supply Co., Civ.App., 42 S.W.2d 452, 453, quoting *Corpus Juris*.

25. La.—State v. Court of Appeals, 17 So. 290, 47 La. Ann. 740.

Miss.—Biddle v. Paine, 21 So. 250, 74 Miss. 494.

26. Mo.—State ex rel. Adler v. Douglas, 95 S.W.2d 1179, 339 Mo. 187—Barnes v. Metropolitan St. Ry. Co., 95 S.W. 971, 119 Mo.App. 303.

27. Mo.—Barnes v. Metropolitan St. Ry. Co., supra.

Tex.—Horton Mfg. Co. v. Hardy Light Co., Civ.App., 294 S.W. 320. 15 C.J. p 770 note 81 [h].

Dismissal

Jurisdiction cannot be conferred by improper joinder of causes of action and when such joinder and want of jurisdiction are apparent on the face of the petition the demand improperly joined should be dismissed by the court of its own action.—Horton Mfg. Co. v. Hardy Light Co., supra.

28. Mo.—State ex rel. Adler v.

Douglas, 95 S.W.2d 1179, 339 Mo. 187.

29. Mo.—State ex rel. Adler v. Douglas, supra.

30. Ark.—Hively v. Jones, 13 S.W.2d 612, 178 Ark. 1127—Clage v. Road Improvement Dist. No. 3 of Newton County, 240 S.W. 427, 153 Ark. 321—Schaap v. State Nat. Bank, 208 S.W. 309, 137 Ark. 251—Winer v. Bank of Blytheville, 117 S.W. 232, 89 Ark. 435, 131 Am.S.R. 102.

Assigned claims

Claims of miners against their employer for coal mined are separate causes of action, and when no single claim exceeds one hundred dollars, they cannot be grouped together by a common assignee so as to bring the amount within the jurisdictional limits of the circuit court.—Paris Mercantile Co. v. Hunter, 86 S.W. 808, 74 Ark. 615.

Notes of a series

In a suit on notes, each given for parts of the same obligation, the separate demand on each note, and not the aggregate amount, determines the jurisdiction of the court.—Schneider v. Fairmon, 194 S.W. 251, 128 Ark. 425—American Soda Fountain Co. v. Battle & Waddle, 107 S.W. 672, 85 Ark. 213, motion for modification of opinion denied 108 S.W. 508, 85 Ark. 213—Brooks v. Hornberger, 94 S.W. 708, 78 Ark. 595.

Open account and notes under contract

In an action on an open account and on nine notes given for installments, on sale of a set of law reports, each note and the open account constitute the basis of a separate cause of action.—Edward Thompson Co. v. Henson, 219 S.W. 27, 142 Ark. 504.

Items of damage under single cause of action

In an action for damages for the breach of a single contract for the sale of several carloads of fruit, the amount in controversy is the aggregate of the damages demanded, and separate items specified for damages on each of the cars do not constitute separate causes of action each of which must be within the jurisdiction of the court.—Coyne Bros. v. Fenzel, 195 S.W. 391, 129 Ark. 163.

31. Fla.—State ex rel. City of West Palm Beach v. Chillingworth, 129 So. 816, 100 Fla. 489.

Claims which cannot be aggregated

(1) Promissory notes given for wholly unrelated and separate items of indebtedness.—Burkhart v. Gowin, 98 So. 140, 86 Fla. 376.

(2) Live stock killed at different times.—Director General of Railroads v. Wilford, 58 So. 256, 81 Fla. 430.

32. Fla.—Burkhart v. Gowin, 98 So. 140, 86 Fla. 376.

tion. Thus, in such jurisdictions, the jurisdictional amount cannot be made up by joining two or more separate demands or causes of action each of which is below the jurisdictional amount;³³ nor can a demand or cause of action of an amount below the jurisdiction of a court be brought within its jurisdiction by joining it in an action on a demand for which the court has jurisdiction.³⁴ Also an inferior court has jurisdiction of an action on several demands, each within the jurisdictional amount, although the total of the demands exceeds the jurisdiction of the court.³⁵

On the other hand, in other jurisdictions it is held that the amount in controversy for the purpose of determining the court's jurisdiction is the aggregate amount of all of the causes of action properly joined,³⁶ which concern and affect all the parties to the

litigation,³⁷ and which are capable of the same character of relief,³⁸ except that actions ex contractu cannot be joined with actions ex delicto,³⁹ and notwithstanding some or all of the claims have been assigned to plaintiff⁴⁰ for collection only,⁴¹ although as to the latter some courts hold that such claims cannot be aggregated for the purpose of making up the jurisdictional amount.⁴² If two or more causes of actions involving the same parties are joined in one action the court will have jurisdiction of a cause below its jurisdictional minimum if one or more of the causes in the action is for an amount within its jurisdiction,⁴³ or if the cause for an amount below the jurisdictional minimum is properly joined with a cause which, although not for the recovery of a pecuniary amount, is within the jurisdiction of the court.⁴⁴

33. Ark.—S. A. Robertson & Co. v. Lewis Rich Const. Co., 237 S.W. 95, 151 Ark. 557.
15 C.J. p 768 note 73.

Several executions

The remedy for failure to return several executions is several and exclusive, and they cannot be consolidated to give the court jurisdiction if otherwise the court would have no right to take cognizance of the case.—Partlow v. Lawson, 2 B.Mon., Ky., 46.

34. Ark.—Skillern v. Baker, 100 S. W. 764, 82 Ark. 86, 118 Am.S.R. 52, 12 Ann.Cas. 243.
15 C.J. p 768 note 72.

Jurisdiction of small claim not shown

In section hand's action against railroad, foreman, and supervisor for damages for wrongful discharge, circuit court was held without jurisdiction to entertain cause as to foreman and supervisor to recover ten dollars paid to supervisor pursuant to his statement that plaintiff would thereupon be restored to his job, since, for jurisdictional purposes, such ten dollars could not be added to seven hundred and fifty dollars sought as damages.—Clark v. Cincinnati, N. O. & T. P. Ry. Co., 79 S.W. 2d 704, 258 Ky. 197.

35. Ark.—Schaap v. State Nat. Bank, 203 S.W. 309, 137 Ark. 251.
Conn.—Johnson v. Cooke, 84 A. 97, 85 Conn. 679, Ann.Cas.1913C, 275.
15 C.J. p 769 note 76.

36. U.S.—Firestone Tire & Rubber Co. v. Brent, D.C.N.Y., 2 F.Supp. 425.

Ala.—Wood v. Traders' Securities Co., 130 So. 398, 221 Ala. 629—Wood & Pritchard v. McClure, 96 So. 577, 209 Ala. 523.

Cal.—Hammell v. Superior Court in and for Los Angeles County, 17 P.2d 101, 217 Cal. 5—Forster v.

Carouse, 299 P. 741, 114 Cal.App. 303.

N.Y.—Marcus v. Bader, 282 N.Y.S. 503, 156 Misc. 730.

N.C.—Brown v. Taylor, 93 S.E. 982, 174 N.C. 423, L.R.A.1918B 293—Martin v. Goode, 16 S.E. 232, 111 N.C. 288, 32 Am.S.R. 799.

Ohio.—Shidler v. Piedmont Land Co., 198 N.E. 60, 50 Ohio App. 256.

Tex.—Myers v. Flewellen, Civ.App., 47 S.W.2d 657.

15 C.J. p 770 note 81.

Claims which can be aggregated

Amount of note in suit, which was given on balancing of open account, and amount omitted in striking balance for which note was given.—Warner v. Gohlman, Lester & Co., 293 S.W. 890, 117 Tex. 145, answering certified questions, Civ.App., 8 S.W. 2d 1049.

Simultaneous cancellation of several insurance policies

Complaint, in action against insurance company for damages, alleging that defendant simultaneously canceled three policies on plaintiff's life, issued at different dates and for different amounts, constituted single cause of action for purpose of determining whether amount prayed for was within superior court's jurisdiction.—Chamberlain v. Home Sec. Life Ins. Co., 175 S.E. 86, 206 N.C. 622.

37. Cal.—Emery v. Pacific Employers Ins. Co., 67 P.2d 1046, 8 Cal.2d 663—Hammell v. Superior Court in and for Los Angeles County, 17 P.2d 101, 217 Cal. 5—Frost v. Mighetto, 71 P.2d 932, 22 Cal.App. 2d 612.

38. Ariz.—Mosher v. Bellas, 264 P. 468, 33 Ariz. 147—Nichols v. McClure, 201 P. 95, 23 Ariz. 27—Miami Copper Co. v. State, 149 P. 758, 17 Ariz. 179, Ann.Cas.1916E 494.

39. Ariz.—Mosher v. Bellas, 264 P.

468, 33 Ariz. 147—Miami Copper Co. v. State, 149 P. 758, 17 Ariz. 179.

40. Cal.—Calloway v. Oro Mining Co., 89 P. 1070, 5 Cal.App. 191.

Mass.—Gilman v. American Producers' Controlling Co., 62 N.E. 267, 180 Mass. 319.

Tex.—Tomerlin v. Mittendorf, Civ. App., 286 S.W. 477.

15 C.J. p 770 notes 85, 87.

41. Cal.—Emery v. Pacific Employers Ins. Co., 67 P.2d 1046, 8 Cal. 2d 663—Hammell v. Superior Court in and for Los Angeles County, 17 P.2d 101, 217 Cal. 5.

Tex.—Adkins v. Smithfield Unit of Texas Honey Ball Ass'n, Civ.App., 1 S.W.2d 725, error dismissed.

Character of ownership immaterial

Jurisdiction of superior court is not dependent on character of plaintiff's ownership of chose in action, it being sufficient if plaintiff has capacity to sue, and aggregate amount demanded is within jurisdiction.—Hammell v. Superior Court in and for Los Angeles County, 17 P.2d 101, 217 Cal. 5.

42. U.S.—Woodside v. Beckham, Iowa, 30 S.Ct. 367, 216 U.S. 117, 54 L.Ed. 408, affirming, C.C., 142 F. 617.

15 C.J. p 769 note 75 [a].

43. Mich.—First Nat. Bank v. Engel, 222 N.W. 148, 245 Mich. 185.

Assigned causes may be joined.—Trinidad Bean & Elevator Co. v. Superior Court of Los Angeles County, 17 P.2d 153, 128 Cal.App. 355.

44. Tex.—Bland v. City of Hearne, Civ.App., 95 S.W.2d 979.

Injunction

Action to recover excess charges for electricity of an amount below the jurisdiction of the court and to enjoin future overcharges and discontinuance of service for failure to pay overcharges should not be dismissed where the court is the only

If, however, the suit is primarily one to establish a money claim and writs of injunction and mandamus prayed for are merely incidental thereto, the amount of the claim must determine the jurisdiction of the court.⁴⁵

Joint or composite causes of action. If the demands from their nature or character are joint or composite, or are in some way related to each other, or arise out of the same transaction, circumstance, or occurrence, they may be aggregated to confer jurisdiction.⁴⁶ Thus a person who honestly possesses a demand which was made up at one time of several items, each of which is below the minimum jurisdiction of the court in which he sues, is not precluded from prosecuting his claim in such court, when its sum total is of sufficient amount to enable the court to entertain it.⁴⁷

Joinder of causes of action on notes not due. Where action is brought by a creditor, in good

faith, on several notes, some of which are not yet due, because of intended fraud on the part of the debtor, and all of the notes aggregate the requisite jurisdictional amount, the court has jurisdiction, although the amount of the notes which are past due is less than the jurisdictional amount.⁴⁸

Separate counts. Where there are several counts in one declaration, each setting up different items for which judgment is claimed, jurisdiction depends on the aggregate amount claimed in the different counts;⁴⁹ but they cannot be so aggregated where the several counts are resorted to merely to state the same cause of action in various ways.⁵⁰

Claim for statutory penalty. In an action for a claim and for a statutory penalty authorized to be collected in connection therewith, the two items may be added together to determine the amount in controversy for jurisdictional purposes.⁵¹

one having jurisdiction to grant a writ of injunction.—*Bland v. City of Hearne*, supra.

Jurisdiction not shown

(1) Action for amount below minimum jurisdiction of the court and for mandamus to secure its payment will be dismissed where another court which has jurisdiction of the amount sued for also has power to issue writs of mandamus in cases involving amounts within its jurisdiction.—*Texas Employers' Ins. Ass'n v. Bryan*, Tex.Civ.App., 198 S. W. 342, error refused.

(2) Action against administrator on claims aggregating less than jurisdictional amount was not brought within superior's court's jurisdiction by prayer for injunctive relief, where complaint merely alleged on information and belief that plaintiff, in case of distribution, would be unable to receive payment and was without legal remedy.—*Merrill v. Hare*, 34 P. 2d 194, 139 Cal.App. 462.

45. Tex.—*Jones v. Dodd*, Civ.App., 192 S.W. 1134.

46. Ark.—*Hively v. Jones*, 13 S. W.2d 612, 178 Ark. 1127.
Fla.—*State ex rel. City of West Palm Beach v. Chillingworth*, 129 So. 816, 100 Fla. 489—*Burkhart v. Gowin*, 98 So. 140, 86 Fla. 376, 15 C.J. p 771 note 89.

Prevailing view

"This seems to be the prevailing view throughout the country."—*State ex rel. City of West Palm Beach v. Chillingworth*, 129 So. 816, 817, 818, 100 Fla. 489.

"Demand" construed

The word "demand," as used in the organic limitations as to jurisdiction, means the amount of a claim that may properly be and is duly put in

controversy by the plaintiff. The "demand" referred to in Const. art 5 § 18, is single, and does not authorize the joinder of distinct, substantive causes of action to confer jurisdiction.—*Burkhart v. Gowin*, 98 So. 140, 86 Fla. 376.

Claims which can be aggregated

(1) Interest coupons on municipal refunding bonds of like tenor and effect, owned by plaintiffs suing city jointly.—*State ex rel. City of West Palm Beach v. Chillingworth*, 129 So. 816, 100 Fla. 489.

(2) Successive obligations to pay rent or other items growing out of a contract or lease of land.—*Livingston v. L'Engle*, 8 So. 728, 27 Fla. 502.

(3) Claims for several head of live stock killed in the same railroad accident.—*Georgia, F. & A. Ry. Co. v. Andrews*, 54 So. 461, 61 Fla. 246, 15 C.J. p 771 note 90 [a].

Items of account

Where an action was brought to recover an alleged amount due for board of employees of defendant railroad company under a contract between plaintiff and the company, and orders given by such employees on the company were only offered as evidence to establish the different items of the account, which exceeded one hundred dollars in amount, the circuit court had jurisdiction although none of the orders was for an amount greater than one hundred dollars.—*St. Louis, etc., R. Co. v. James*, 95 S.W. 804, 78 Ark. 490, 8 Ann.Cas. 611.

47. Fla.—*Georgia, F. & A. Ry. Co. v. Andrews*, 54 So. 461, 61 Fla. 246, 15 C.J. p 771 note 90.

48. U.S.—*Schunk v. Moline, Milburn*

& Stoddard Co., Neb., 13 S.Ct. 416, 147 U.S. 500, 37 L.Ed. 255, following *Upton v. McLaughlin*, Wyo., 105 U.S. 640, 26 L.Ed. 1197, and *Gaines v. Fuentes*, La., 92 U.S. 10, 23 L.Ed. 524, and distinguishing *Bowman v. Chicago & N. W. R. Co.*, Ill., 6 S.Ct. 192, 115 U.S. 611, 29 L.Ed. 502.

49. Ga.—*Waterman v. Gilson*, 42 S.E. 95, 115 Ga. 773, 15 C.J. p 770 note 82.

50. Ala.—*Broyles v. Loveman, Joseph & Loeb*, 156 So. 843, 229 Ala. 292.

N.J.—*Phillips v. Foster*, 132 A. 327, 4 N.J.Misc. 248.

N.Y.—*Rubenstein v. Frank De Rosa Co.*, 213 N.Y.S. 40, 126 Misc. 314, 15 C.J. p 770 notes 83, 84.

Summary proceedings

(1) A plaintiff in summary proceedings may insert in his petition several counts on the same cause of action, and it is no objection that the aggregate amount claimed by all such counts exceeds the jurisdiction of the court, provided no single count does so.

N.J.—*Phillips v. Foster*, 132 A. 327, 328, 4 N.J.Misc. 248, quoting *Corpus Juris*.

S.C.—*Lee v. Foot*, 18 S.C.L. 112.

(2) But if evidence is given of a debt beyond the jurisdiction of the court, plaintiff must fail.—*Lee v. Foot*, supra.

51. Ark.—*Hunt v. Northern Const. Co.*, 196 S.W. 116, 129 Ark. 321.

Penalty for delay in settling claim

(1) In an action for damages for injury to freight and for a statutory penalty for delay in settling the claim the aggregate of the two items is the jurisdictional amount.—*Mobile, etc., R. Co. v. Greenwald*, 61

§ 64. — Joinder of Parties

In actions by or against several parties whose claims or liabilities are joint, the total claims or liabilities determine the jurisdictional amount in controversy; but where the interests of the plaintiffs are several their claims are not aggregated to determine the amount in controversy, nor, it is generally held, can the several liabilities of different defendants be so aggregated.

In an action by several parties who sue jointly for the recovery of money or property, claiming under one common right or undivided interest, even though their claims are separable as between themselves, the aggregate sum of their several claims determines the amount in controversy for jurisdictional purposes;⁵² and in some jurisdictions the same is true where several plaintiffs sue the same defendant or defendants in one action to recover for individual injuries arising out of the same occurrence.⁵³ Also the total liability of two or more persons who are jointly and not severally liable in one and the same suit is the amount in controversy

for jurisdictional purposes.⁵⁴ However, it is only where there is a common or general interest in the subject matter of the controversy or the relief sought of which the court has jurisdiction that it may exercise jurisdiction over separate claims of different parties, each of which is for an amount less than that required to give jurisdiction.⁵⁵ Where several controversies between several litigants, which are legally distinct, are included all in one cause or suit or connected together for trial and each considered separately, the mere joining of them does not destroy the jurisdiction of the court in the event the two distinct and separate sums sued for by separate litigants would, when combined, exceed in amount the jurisdiction of the court.⁵⁶ The distinct and separate claims of several plaintiffs, whose individual causes of action are properly joined in one action, cannot be aggregated for the purpose of determining the jurisdictional amount;⁵⁷ nor can the several liabilities of different defend-

So. 426, 104 Miss. 417, L.R.A.1917B 924.

(2) In an action for wages and for a statutory penalty for failure to pay them the penalty may be added to the wages due in determining the court's jurisdiction.—*Hunt v. Northern Const. Co.*, 196 S.W. 116, 129 Ark. 321—*St. Louis, I. M. & S. Ry. Co.*, 110 S.W. 222, 86 Ark. 147.

Penalty for cutting trees

In an action to recover actual damages for cutting trees and a statutory penalty therefor, both together constitute one cause of action and may be stated in one count.—*Fleming v. Dunigan Cooperaage Co.*, 109 So. 851, 144 Miss. 769.

52. Cal.—*Frost v. Mighetto*, 71 P. 2d 932, 934, 22 Cal.App.2d 612, quoting *Corpus Juris*.

Fla.—*State ex rel. City of West Palm Beach v. Chillingworth*, 129 So. 816, 818, 100 Fla. 489, citing *Corpus Juris*.

15 C.J. p 771 note 91.

Damages constituting community property

Husband and wife being jointly interested in total amount recovered in their action for damages suffered in collision between automobiles to extent that such amount belongs to community and its members equally, whether recovery be in their names jointly or individually, sum of amounts sought to be recovered by each determines superior court's jurisdiction.—*Frost v. Mighetto*, 71 P. 2d 932, 22 Cal.App.2d 612.

Suit based on single bond

Aggregate sued for in suit on guardian's bond, and not amounts due each minor, should be considered in determining whether court had jurisdiction.—*Holman v. Ward*, Tex.

Civ.App., 279 S.W. 310, affirmed, Com. App., 288 S.W. 148.

To set aside fraudulent conveyance

That creditors' claim was less than two hundred dollars does not preclude him from becoming party plaintiff in creditors' suit in equity, to establish claims, and set aside mortgage from one defendant to other as fraudulent.—*Robinson v. Williams*, 126 S.E. 621, 189 N.C. 256.

53. N.Y.—*Spetler v. Jogel Realty Co.*, 231 N.Y.S. 517, 224 App.Div. 612.

Tex.—*Myers v. Flewellen*, Civ.App., 47 S.W.2d 657.

Automobile accident

(1) Where several plaintiffs bring one action to recover for injuries to their respective persons arising out of the same automobile accident the amount in controversy is the aggregate of the sums claimed as damages.—*Myers v. Flewellen*, Tex.Civ. App., 47 S.W.2d 657.

(2) In suit brought by father as next friend for injuries sustained by his two minor daughters in automobile collision, aggregate of sums claimed governed jurisdiction of court.—*Magnolia Petroleum Co. v. Wheeler*, Tex.Civ.App., 132 S.W.2d 456, error dismissed, judgment correct.

54. Tex.—*Cotter v. Parks*, 16 S.W. 307, 80 Tex. 539.

15 C.J. p 772 note 93.

Action for contribution

In an action by an obligor on a bond against his coobligors for contribution, the jurisdiction of the court is to be determined by the amount claimed from all the defendants, and not by the share shown to be due from each.—*Jarvis v. Matson*, Tex.Civ.App., 94 S.W. 1079—*Ja-*

lufka v. Matejek, 55 S.W. 395, 22 Tex.Civ.App. 384.

Actions against connecting carriers

Where a petition in an action against connecting carriers for damages to a shipment of live stock alleged that defendants were partners, and the aggregate injuries pleaded were sufficient in amount to bring the case within the jurisdiction of the county court, each carrier being liable under such allegation for all the damages recovered against either, the fact that the damages stated against one of the roads was less than the jurisdictional amount did not deprive such court of jurisdiction.—*International, etc., R. Co. v. Lucas*, 84 S.W. 1082, 37 Tex.Civ.App. 404.

55. Ky.—*Batman v. Louisville Gas & Electric Co.*, 220 S.W. 318, 187 Ky. 659.

56. Tex.—*Fridh v. Giberson & Kampff*, Civ.App., 21 S.W.2d 563, error dismissed.

57. U.S.—*Auer v. Lombard*, Mass., 72 F. 209, 19 C.C.A. 72.

Cal.—*Emery v. Pacific Employers Ins. Co.*, 67 P.2d 1046, 8 Cal.2d 663—*Hammell v. Superior Court in and for Los Angeles County*, 17 P. 2d 101, 217 Cal. 5—*Winrod v. Wolters*, 74 P. 1037, 141 Cal. 399—*Frost v. Mighetto*, 71 P.2d 932, 22 Cal. App.2d 612—*Colla v. Carmichael U-Drive Autos*, 294 P. 378, 111 Cal.App. 784.

Fla.—*State ex rel. City of West Palm Beach v. Chillingworth*, 129 So. 816, 818, 100 Fla. 489, citing *Corpus Juris*.

Miss.—*R. H. Green Wholesale Co. v. Hall*, 185 So. 807.

N.Y.—*Merten v. Queen Rental Corporation*, 271 N.Y.S. 271, 241 App.Div.

ants whose individual liabilities on different causes of action are litigated in one action be so aggregated,⁵⁸ except that in some jurisdictions the aggregate amount of several causes of action brought by one plaintiff against different defendants is the amount in controversy for jurisdictional purposes.⁵⁹ So, in actions to enforce separate lien claims of different lien claimants, it is the several amount of each claim, and not the aggregate sum of all in one suit, which determines jurisdiction,⁶⁰ although it has been held that in a petition by several lien holders attacking the appraisal and sale under

a mortgage foreclosure the aggregate of the claims determines the jurisdictional amount.⁶¹ In some jurisdictions, in an action by several plaintiffs having separate and distinct demands, the jurisdiction of the court over each plaintiff's claim depends on the amount of such claim, independent of the amount involved in the other claims;⁶² and, where a several judgment is sought against several defendants in a single action, jurisdiction as to any one defendant is determined by the amount of the judgment claimed against him.⁶³ In other jurisdictions, the jurisdictional amount in controversy in actions

831, overruling *Dilworth v. Yellow Taxi Corporation*, 221 N.Y.S. 813, 220 App.Div. 772, reversing 216 N.Y.S. 513, 127 Misc. 543, on the authority of which *Weis v. Richartz*, 224 N.Y.S. 416, 130 Misc. 583, held that where the aggregate amount of separate causes of action of several plaintiffs exceeded the jurisdiction of the court, the complaint should be dismissed for lack of jurisdiction.—*Murtagh v. Keystone Transp. Co.*, 269 N.Y.S. 903, 150 Misc. 686—*Plunkett v. Bain*, 259 N.Y.S. 918, 144 Misc. 928—*Agostinacci v. Brooklyn City R. Co.*, 254 N.Y.S. 485, 141 Misc. 908—*Sirop v. Bernard Greenwood Co.*, 236 N.Y.S. 588, 134 Misc. 836, affirmed 239 N.Y.S. 856, 228 App. Div. 799—*Dobrikin v. Union Ry. Co.*, 225 N.Y.S. 376, 130 Misc. 796, motion granted 166 N.E. 324, 250 N.Y. 561.

Tex.—McConnell v. Frost, Civ.App., 45 S.W.2d 777, error refused. 15 C.J. p 772 note 92.

Constitutional provision controlling Jurisdictional question of whether separate demands could be joined to make up amount sufficient to confer jurisdiction on circuit court was controlled by constitution and statutory device or rule of practice could not be invoked to avoid constitution.—*R. H. Green Wholesale Co. v. Hall*, Miss., 185 So. 807.

Amount stated in summons immaterial

Where causes of action are separated and each plaintiff seeks damages on each cause of action in a sum not exceeding the jurisdictional limit of the municipal court, court has jurisdiction notwithstanding the body of the summons contains a demand for judgment in an amount in excess of the jurisdictional limit.—*Nowinski v. La Monte*, 5 N.Y.S.2d 894, 168 Misc. 586.

Action by husband and wife

Under a statute which, although providing that rights of action by husband and wife to recover damages for injury to the wife should be redressed in one suit brought in the names of the husband and

wife, kept separate the independent causes of action and provided for the rendition of separate verdicts and the entry of separate judgments, a court has jurisdiction over such an action where the amount claimed by each plaintiff is within the court's jurisdictional limit, although the total amount claimed by both exceeds such limit.—*Fries v. Wiser*, 62 Pa.Super. 218.

Debts due to persons severally cannot be joined in one bill in equity.—*Chapman v. Banker, etc.*, Pub. Co., 128 Mass. 478.

Interveners' claims

Where amount sued for in suit on contractor's bond was within county court's jurisdiction, jurisdiction was not lost because interveners propounded claims totaling sum exceeding jurisdiction.—*Continental Casualty Co. v. Crook*, 128 So. 574, 157 Miss. 518, 72 A.L.R. 186.

58. U.S.—*Peterson v. Suero*, C.C.A. N.C., 93 F.2d 878.

Cal.—*Emery v. Pacific Employers Ins. Co.*, 67 P.2d 1046, 8 Cal.2d 663—*Hammell v. Superior Court in and for Los Angeles County*, 17 P.2d 101, 217 Cal. 5—*Myers v. Sierra Valley Stock & Agricultural Ass'n*, 55 P. 689, 123 Cal. 669—*Frost v. Mighetto*, 71 P.2d 932, 23 Cal.App.2d 613—*Heavilin v. Westchester Fire Ins. Co. of New York*, 56 P.2d 252, 12 Cal.App.2d 695.

N.Y.—*Farkas v. Metz*, 289 N.Y.S. 214, 160 Misc. 9.

15 C.J. p 772 note 94.

Joint and several liabilities

A cause of action on which two or more defendants are liable jointly cannot be joined with a cause of action on which one of the defendants is liable severally and their aggregate amount used as the amount in controversy for jurisdictional purposes.—*Wilson v. Broadlick*, 169 N. E. 347, 91 Ind.App. 713—*Wilson v. Broadlick*, 169 N.E. 346, 91 Ind.App. 470.

59. N.Y.—*Fader v. Silverman*, 267 N.Y.S. 782, 149 Misc. 590.

60. Cal.—*Miller v. Carlisle*, 59 P. 785, 127 Cal. 327, reversed on other

grounds in banc 59 P. 1112, 127 Cal. 331.

Colo.—*Keystone Min. Co. v. Gallagher*, 5 Colo. 23.

61. La.—*Amato v. Hermann*, 17 So. 505, 47 La. Ann. 967.

62. Miss.—*R. H. Green Wholesale Co. v. Hall*, 185 So. 807. *Tex.—Pettus v. Weyel*, Civ.App., 225 S.W. 191, error refused.

Action by husband and wife for wife's injuries

(1) It has been held in an action brought by a husband and wife for injuries to the wife in which the husband adds claims in his own right, that where a bill of particulars shows that the damage sustained by the husband and for which he set up a claim in separate counts was below the jurisdiction of the court a demurrer to such counts should be sustained.—*Walker v. Smith*, 161 So. 551, 119 Fla. 430.

(2) On the other hand, in such an action the court has been held to have jurisdiction of the husband's claim where he set up two counts for damages for an amount less than the minimum jurisdictional amount cognizable by the court, and two counts for damages for an amount within the jurisdiction of the court, where it could not be determined under which count verdict in favor of husband for less than jurisdictional amount was rendered.—*Miami Jockey Club v. Alken*, 163 So. 51, 126 Fla. 544.

63. U.S.—*Wisconsin Cent. R. Co. v. Phenix Ins. Co.*, C.C.Wis., 123 F. 989.

Conn.—*Friede v. Jennings*, 184 A. 369, 121 Conn. 220.

In suit against several stockholders of insolvent bank to enforce statutory liability which was separate and distinct as to each stockholder.—*Friede v. Jennings*, 184 A. 369, 121 Conn. 220.

Conversion and foreclosure

In an action against one defendant to foreclose a chattel mortgage and against another defendant for conversion of a part of the mortgaged property in which the allege-

to enforce the separate claims of several plaintiffs is the highest claim of the various plaintiffs;⁶⁴ and the court has jurisdiction of joinable causes of action in favor of different plaintiffs, or against different defendants, where the largest claim is for an amount within the jurisdiction of the court, even though others of the claims are for an amount below the jurisdictional minimum of the court.⁶⁵ Also, on interpleader involving an amount within the jurisdiction of the court, a claim by one defendant against another for an amount below the jurisdictional minimum of the court may be adjudicated.⁶⁶

tions for conversion are laid upon a distinct count, the failure of plaintiff to show jurisdiction in the court of the cause for foreclosure by his failure to allege the value of the property does not deprive the court of jurisdiction of the cause for conversion, the amount sued for on conversion being within the court's jurisdiction.—*Knowles v. Gilmer State Bank*, Tex.Civ.App., 298 S.W. 625.

Where one cause transferred

Where, in a suit to foreclose a chattel mortgage and collect a note, plaintiffs alleged that third parties had converted a part of the mortgaged property, valued at two hundred and twenty-five dollars, and on plea of privilege the cause as to conversion was transferred to the county court of another county, plaintiffs' failure to allege the value of the mortgaged property in the original suit did not oust the county court of jurisdiction, where the balance of plaintiffs' debt was less than maximum jurisdictional amount.—*Fussell & Irvin v. M. Kangerga & Bro.*, Tex.Civ.App., 254 S.W. 159.

64. N.Y.—*Merten v. Queon Rental Corporation*, 271 N.Y.S. 271, 241 App.Div. 831—*Murtagh v. Keystone Transp. Co.*, 269 N.Y.S. 903, 150 Misc. 686—*Plunkett v. Bain*, 259 N.Y.S. 918, 144 Misc. 928—*Agostinacci v. Brooklyn City R. Co.*, 254 N.Y.S. 485, 141 Misc. 908—*Sirov v. Bernard Greenwood Co.*, 236 N.Y.S. 588, 134 Misc. 836, affirmed 239 N.Y.S. 856, 228 App.Div. 799—*Doebrikin v. Union Ry. Co.*, 225 N.Y.S. 376, 130 Misc. 796, motion granted 166 N.E. 324, 250 N.Y. 561.

If some of the claims exceed the jurisdictional amount this is sufficient, although the claims of others are below the limit.—*Stanwood v. Wishard*, 134 F. 959.

65. Cal.—*Emery v. Pacific Employers Ins. Co.*, 67 P.2d 1046, 8 Cal.2d 663—*O'Donnell v. Market Street Ry. Co.*, 86 P.2d 1077, 30 Cal.App. 2d 630—*Scott v. Allen*, 41 P.2d 371, 4 Cal.App.2d 621.

Constitutional and statutory provisions conferring jurisdiction on the inferior courts of demands below certain amounts do not forbid determination of said demands in the superior court where they are connected with larger claims or with a type of demand solely within the jurisdiction of the superior court.—*Kane v. Mendenhall*, 56 P.2d 498, 5 Cal.2d 749.

Action against stockholders

(1) Where a suit to enforce the unpaid subscriptions of corporate stock was brought by corporate creditors whose claims were large enough to give the court jurisdiction, the court had jurisdiction of the claims of other creditors whose claims were not large enough to give the court jurisdiction in the first instance, for the fund the creditors sought to subject was a trust fund held by the stockholder for the benefit of the creditors, having the right to subject it to the payment of their debts and to join in the same suit for that purpose.—*Williams v. Chamberlain*, 94 S.W. 29, 123 Ky. 150, 29 Ky.L. 606.

(2) It has been held that the stockholders being liable severally for corporation's debts, test of municipal court's jurisdiction is amount demanded from each stockholder, not sum of all demands in action.—*Southwestern Portland Cement Co. v. Cochrane*, 300 P. 445, 114 Cal.App. Supp. 778.

(3) Also it has been held in actions against stockholders for a corporate debt that, although the aggregate amount sought to be recovered from all exceeds the sum required to give jurisdiction, the court cannot take jurisdiction as to those against whom the claims do not amount to a sum sufficient for that purpose.

U.S.—*Conway v. Owensboro Sav. Bank & Trust Co.*, C.C.Ky., 185 F. 950.

Cal.—*Derby v. Stevens*, 30 P. 820, 64 Cal. 287—*Evans v. Bailey*, 6 P. 424—*Johnson v. Hinkel*, 154 P. 487, 29 Cal.App. 78.

Creditor's suit

Where one complainant in a credi-

tor's suit in a federal court has recovered a judgment against defendant exceeding two thousand dollars in amount, other creditors holding judgments for smaller amounts may unite with him as complainants, or may intervene.—*Huff v. Bidwell*, Ga., 151 F. 563, 81 C.C.A. 43, affirming, C.C., 103 F. 362—*Stanwood v. Wishard*, C.C.Iowa, 134 F. 959.

Where the main controversy is within the jurisdiction of the court, it has been held permissible to bring in as defendants parties who are necessary to a complete determination of the controversy, although the amount involved with respect to such parties is beneath the jurisdiction of the court;⁶⁷ and it has been held that where a court has jurisdiction of an action it may permit one asserting a lien against defendant's property to become a party, although the amount of the lien is less than the minimum jurisdiction of the court.⁶⁸ A court which has jurisdiction of suits started therein is compe-

tor's suit in a federal court has recovered a judgment against defendant exceeding two thousand dollars in amount, other creditors holding judgments for smaller amounts may unite with him as complainants, or may intervene.—*Huff v. Bidwell*, Ga., 151 F. 563, 81 C.C.A. 43, affirming, C.C., 103 F. 362—*Stanwood v. Wishard*, C.C.Iowa, 134 F. 959.

66. Tex.—*Threadgill v. Federal Land Bank of Houston*, Civ.App., 26 S.W.2d 345, error dismissed.

67. Fla.—*State ex rel. Whyte v. Gray*, 156 So. 493, 116 Fla. 510. 15 C.J. p 772 note 95.

Joining persons secondarily liable

(1) Effect of statute authorizing maker and any one secondarily liable on note to be joined and sued in same action is to confer on court having jurisdiction of amount put in controversy by plaintiff against principal debtor concomitant jurisdiction over guarantors, indorsers, or sureties who may be liable for all or any part of principal debt sued for.—*State ex rel. Whyte v. Gray*, 156 So. 493, 116 Fla. 510.

(2) Principal and surety on real estate broker's bond could be sued jointly in superior court, where recovery within jurisdictional amount was sought against principal, although recovery against surety was limited by bond to amount below jurisdictional minimum of court.—*Kaufman v. Pacific Indemnity Co.*, 56 P.2d 504, 5 Cal.2d 761—*Kane v. Mendenhall*, 56 P.2d 498, 5 Cal.2d 749.

(3) County court at law has jurisdiction of demand against guarantor of two hundred dollar note in suit on that and three hundred dollar note.—*Sheffield v. J. I. Case Threshing Mach. Co.*, Tex.Civ.App., 298 S.W. 183.

(4) For earlier cases on this point see 15 C.J. p 772 notes 93 [c], 95 [c].

68. Tex.—*Ferrell-Michael Abstract, etc., Co. v. McCormac*, Civ.App., 184 S.W. 1081, affirmed, Com.App., 215 S.W. 559.

tent to pass upon the priority of conflicting claims asserted by adverse parties to a fund from which satisfaction of the amount sued for is sought, notwithstanding such claims are sums in excess of the court's jurisdiction.⁶⁹

In an action by several taxpayers whose burdens as taxpayers may be increased by the doing of such act, to enjoin the threatened unauthorized act of an official, it is the value of the right sought to be protected from invasion by the doing of the unlawful act threatened, and not the interest of each separate complainant, as measured by the amount its burden of taxation will be increased, that determines the amount in controversy for jurisdictional purposes.⁷⁰

In a suit against a number of defendants to quiet title to a tract of land alleged to be of the jurisdictional value, in order to sustain the jurisdiction of the court it must appear from the bill that all the defendants have a privity of interest, derived from a common source of title, or that the separate claim of each defendant is of the jurisdictional amount, since, where the defendants claim separately, the suit is severable, and the requisite amount must be involved in each separate controversy.⁷¹

Where an action is brought in an inferior court against several defendants jointly, and the amount claimed from one of them is in excess of the jurisdiction of the court, the court is without jurisdiction as to the entire case.⁷²

Where one sues on behalf of himself and others. Where one sues on behalf of himself and all others similarly situated who may join in the proceedings, the amount in controversy has been held to be the aggregate value of the interests of those who have joined in the suit, and not the value of the interests

of the entire class;⁷³ but there is also authority for the view that under such circumstances the aggregate interest of the whole class constitutes the amount in controversy.⁷⁴ A statute providing that if a question involves a common or general interest of many persons, or, if the parties be numerous and it is impracticable to bring all before the court, one or more may sue for the benefit of all, does not confer jurisdiction irrespective of the amount in controversy, but only permits one or more of the proper parties to an action to sue or defend for all in the cases specified where the court has jurisdiction;⁷⁵ and the mere fact that separate claims of different parties, for money arise under a common title and involve the same questions of law and fact is not sufficient, where each claim is for an amount below the minimum jurisdictional requirement of the court, to confer jurisdiction so as to permit one party to sue or defend for all therein.⁷⁶ However, in an action by a party for himself and all other persons similarly situated to recover a tax or assessment illegally levied and collected the taxes or assessments illegally collected constitute a trust fund which is the subject matter of the suit, so that the amount in controversy for jurisdictional purposes is not merely the amount plaintiff is entitled to recover, but the aggregate interest of the whole class for whom suit is brought, that is, the total fund illegally collected,⁷⁷ and the same rule applies in an action by several policemen on behalf of a large number to recover pay for a period when they were illegally suspended.⁷⁸

§ 65. — Splitting Demands or Causes of Action

A cause of action which is single and indivisible in its nature cannot be split into a number of small claims which would be within the jurisdiction of a court whose

69. Tex.—*Dodson v. Montes*, Civ. App., 276 S.W. 749.

70. U.S.—*Larabee v. Dolley*, C.C. Kan., 175 F. 365, reversed on other grounds 179 F. 461, 102 C.C.A. 607, 32 L.R.A.N.S., 1065, affirmed 31 S.Ct. 189, 219 U.S. 121, 55 L.Ed. 123.

71. U.S.—*Cooper v. Preston*, C.C. Cal., 105 F. 403—*Stemmler v. McNeill*, C.C.N.C., 102 F. 660.

72. Tex.—*Herrington v. Gulf, etc.*, R. Co., Civ.App., 142 S.W. 983.

73. U.S.—*Risley v. Utica*, C.C.N.Y., 168 F. 737—*Cowell v. City Water Supply Co.*, Iowa, 121 F. 53, 57 C.C.A. 393, reversing, C.C., 96 F. 769.

74. U.S.—*Carpenter v. Knollwood Cemetery*, D.C.Mass., 198 F. 297.

Creditors' claims

Where an action to enforce the execution of an express trust is brought by a creditor in behalf of himself and other creditors the aggregate amount of all the creditors' claims is the amount in controversy.—*Gonceller v. Foret*, 4 Minn. 13.

75. Ky.—*Batman v. Louisville Gas & Electric Co.*, 220 S.W. 318, 187 Ky. 659.

76. Ky.—*Batman v. Louisville Gas & Electric Co.*, supra.

To recover overcharges from a public utility

An action by a consumer of gas against a gas company, to recover overcharges under a franchise on behalf of himself and all others similarly situated, is not within the jurisdiction of the circuit court,

where the only relief asked is separate judgments for money for plaintiff and those for whom he sues, and each claim is for less than the amount required to give jurisdiction.—*Batman v. Louisville Gas & Electric Co.*, supra.

Right of utility to require deposit

Persons from whom gas company exacted deposit as condition of service had no common interest in question of company's right to do so.—*Union Light, Heat & Power Co. v. Mulligan*, 197 S.W. 1081, 177 Ky. 662.

77. Ky.—*Commonwealth v. Scott*, 65 S.W. 596, 112 Ky. 252, 23 Ky.L. 1488, 55 L.R.A. 597—*McCann v. Louisville*, 62 S.W. 446, 23 Ky.L. 558.

78. Ky.—*Gorley v. Louisville*, 65 S.W. 844, 104 Ky. 372, 23 Ky.L. 1782.

jurisdiction does not extend to the entire claim; but where a claim has been split by the parties into several small claims, or they arise from separate transactions, a court whose jurisdiction extends only to the small claims may take jurisdiction of them.

Where a claim is in its character one and indivisible, jurisdiction cannot be conferred by splitting it up into smaller claims, each within a certain court's cognizance, while the claim as a unit is in excess thereof.⁷⁹ A claim may, however, be split by the consent of the parties into several claims so as to authorize several suits thereon in a court whose jurisdiction would not extend to the entire claim.⁸⁰

Where separate claims arise from separate transactions, distinct actions thereon may be brought in a court whose jurisdiction would not extend to a single action for the aggregate amount of such claims,⁸¹ even though the several claims were included in a single open account and a single action might have been brought thereon for the aggregate amount,⁸² unless the creditor has so dealt with the account as to show that he elected to make it but a single indebtedness.⁸³

Severance of claim from lien. A person suing on

a claim secured by a lien may sever the claim from the lien, and sue only on the claim in a court whose jurisdiction extends to the claim in suit, but not to a foreclosure of the lien.⁸⁴

§ 66. Effect of Set-Off or Counterclaim

- a. With respect to plaintiff's action
- b. Jurisdiction as to set-off or counterclaim

a. With Respect to Plaintiff's Action

A set-off, counterclaim, or other cross action cannot increase or reduce the amount involved so as to oust the court of jurisdiction of the plaintiff's claim; but it may confer jurisdiction where the plaintiff's claim is insufficient, although it will not operate to reduce a plaintiff's claim which is in excess of the court's jurisdiction to an amount within its jurisdiction.

Where plaintiff sues in a court of general jurisdiction, defendant cannot oust the jurisdiction of the court by asserting a set-off or counterclaim, even though it be established, which is sufficient to reduce plaintiff's recovery below the minimum jurisdictional amount.⁸⁵ However, a counterclaim, plea in reconviction, or cross action for a sufficient amount,⁸⁶ or a cross complaint which, because of

79. Fla.—Burkhart v. Gowin, 98 So. 140, 86 Fla. 376.

La.—Kearney v. Fenerty, 171 So. 57, 58, 185 La. 862, citing *Corpus Juris*.

15 C.J. p 773 note 2.

Case seemingly contra.

An exception to the first city court's jurisdiction on the ground that plaintiff divided his claim to give jurisdiction was held properly overruled, where the amount demanded was within the court's jurisdiction, seemingly on the basis that it did not appear otherwise than that plaintiff had remitted the excess of his claim above the court's jurisdiction, and, even if it was as defendant alleged, the supervisory jurisdiction of the supreme court and not that of the courts of appeal should have been invoked.—Gitz & Geier v. Carroll, 121 So. 779, 9 La. App. 631.

Notes of series

Cause of action for indebtedness payable in installments, represented by notes, which became single matured obligation at same time because of acceleration agreement, could not be divided into two suits in order to confer jurisdiction on court.—Kearney v. Fenerty, 171 So. 57, 185 La. 862.

Rent

Plaintiff may not, for the purpose of conferring jurisdiction on an inferior court, bring separate actions for rent due on the same premises for different months.—Cornella v.

V. Booraem's Estate v. Lubow, 1 A.2d 35, 120 N.J.Law 575.

Single account for separate buildings

Materialman charging materials furnished for four separate buildings to contractor in one account could not treat claims as to each building as separate indebtedness so as to be able to bring separate suits, for alleged balances, within jurisdiction of city court.—Bargain Lumber Yard v. Carbo, La.App., 142 So. 346.

Cause of action held not split

Tex.—Keen & Woolf Oil Co. v. Fulenwider, Civ.App., 284 S.W. 322.

Reduction of amount as conferring jurisdiction on court of inferior jurisdiction see *infra* § 68.

80. Ala.—Herrin v. Buckelew, 37 Ala. 585.

15 C.J. p 773 note 3.

81. Mich.—Phelps v. Abbott, 74 N. W. 1010, 116 Mich. 624.

N.J.—Femia v. City of Bayonne, 166 A. 922, 11 N.J.Misc. 553, affirmed 170 A. 56, 112 N.J.Law 89, 90.

15 C.J. p 773 note 4.

Separate claims shown

Evidence established that employment to testify before commissioners, and subsequent request to testify before court on appeal, were separate employments bringing claim for each within court's jurisdiction.—Faherty v. Branegan, 169 A. 654, 112 N.J.Law 134—Branegan v. Hilton, 160 A. 577, 10 N.J.Misc. 729.

82. Mich.—Phelps v. Abbott, 74 N. W. 1010, 116 Mich. 624.

15 C.J. p 773 note 5.

83. Ga.—Floyd v. Cox, 72 Ga. 147, 15 C.J. p 773 note 6.

84. Tex.—Carter v. Gray, Civ.App., 52 S.W.2d 91, error dismissed 81 S.W.2d 647, 125 Tex. 219.

85. U.S.—Pickham v. Wheeler-Bliss Mfg. Co., Ill., 77 F. 663, 23 C.C.A. 391, affirming, C.C., 69 F. 419, and certiorari denied 18 S.Ct. 945, 168 U.S. 708, 42 L.Ed. 1211.

15 C.J. p 774 note 11.

Erroneous statement of credit by plaintiff

If plaintiff, suing in court for conversion of automobile valued at amount within the jurisdiction of the court, attempted to acknowledge credit and misstated amount, jurisdiction would not be defeated if allegations showed amount of demand to be within jurisdiction.—Lone Star Finance Corporation v. Davis, Tex. Civ.App., 77 S.W.2d 711.

86. Ohio.—General Motors Acceptance Corp. v. Sharp, 32 Ohio N.P., N.S., 481, 485, citing *Corpus Juris*. Tex.—McConnell v. Frost, Civ.App., 45 S.W.2d 777, error refused—Baldwin v. Drew, Civ.App., 195 S.W. 636, reversed on other grounds, Com.App., 244 S.W. 987.

15 C.J. p 774 note 12.

To try counterclaim

In an action for an amount below the minimum jurisdiction of the court wherein defendant filed a coun-

the nature of the claim, is within the jurisdiction of the court,⁸⁷ may confer jurisdiction where plaintiff's claim is insufficient for the purpose; although there is also authority for the view that where plaintiff's bill in an action involving specific property failed to show the value of the property, a plea in reconvention claiming damages in an amount within the court's jurisdiction would not confer jurisdiction.⁸⁸ If plaintiff sues in a court of limited jurisdiction, the amount of a set-off, counterclaim, or cross action asserted by defendant cannot be added to plaintiff's claim to oust the jurisdiction of the court, but each will be considered separately;⁸⁹ nor will the assertion of a set-off or counterclaim in excess of the jurisdiction of the court oust the jurisdiction with respect to the claim asserted in the complaint, that being within the jurisdiction.⁹⁰ Where the action is originally brought for an amount beyond the jurisdiction of the court, jurisdiction cannot be conferred by the assertion of a set-off or counterclaim, even though successful, sufficient in amount to reduce the original claim to a

sum within the jurisdictional limit;⁹¹ but under a statute which confers jurisdiction where the debt, balance, or other matter in dispute does not exceed a stated amount, a court has jurisdiction if an admitted counterclaim reduces the amount originally claimed by plaintiff to an amount within its jurisdictional limits.⁹²

b. Jurisdiction as to Set-Off or Counterclaim

In general a court which has jurisdiction of the plaintiff's claim has jurisdiction of an offset, although it is below the court's minimum jurisdiction; but it does not have jurisdiction of an offset or cross demand which exceeds its maximum jurisdiction.

Although there is authority to the contrary,⁹³ the general rule is that where the cause of action set up by the complaint in a court is such as to give the court jurisdiction, it has also jurisdiction to adjudicate with respect to a set-off, counterclaim, or cross complaint asserted by defendant, although the amount thereof is not sufficient to give the court jurisdiction in an independent action thereon;⁹⁴ but

terclaim for an amount within the jurisdiction of the court, the court has jurisdiction to try the counterclaim.—*Moline Plow Co. v. Adair*, 183 P. 499, 76 Okl. 4.

87. Cal.—*Brix v. People's Mut. Life Ins. Co.*, 41 P.2d 537, 2 Cal.2d 446.—*Coggins v. Superior Court in and for City and County of San Francisco*, 16 P.2d 148, 127 Cal.App. 412.

Sounding in equity

Where case stated in complaint is not within jurisdiction of superior court, but defendant sets up cross complaint sounding in equity, and hence within jurisdiction of superior court, such court has jurisdiction of both causes of action.—*Emery v. Pacific Employers Ins. Co.*, 67 P.2d 1046, 8 Cal.2d 663.

88. Tex.—*De Witt County v. Wischkemper*, 67 S.W. 882, 95 Tex. 435.

89. S.C.—*Dupre v. Gilland*, 152 S. E. 878, 875, 156 S.C. 109, quoting *Corpus Juris*.

Tex.—*Fridh v. Giberson & Kempff*, Civ.App., 21 S.W.2d 563, error dismissed.

15 C.J. p 774 note 14.

90. Colo.—*Nelson v. Meyer*, 180 P. 86, 66 Colo. 164.

Ill.—*Whitsett v. Chicago Washed Coal Co.*, 199 Ill.App. 522.

N.Y.—*U. S. Fidelity & Guaranty Co. v. McGuire & Co.*, 298 N.Y.S. 455, 164 Misc. 120.

Ohio.—*Braun v. Pociety*, 18 Ohio App. 370.

S.C.—*Dupre v. Gilland*, 152 S.E. 873, 875, 156 S.C. 109, quoting *Corpus Juris*.

Tex.—*Kittrell v. Conanico*, Civ.App., 56 S.W.2d 272.—*Fridh v. Giberson*

& Kempff, Civ.App., 21 S.W.2d 563, error dismissed.
15 C.J. p 774 note 15.

Counterclaim failing to state cause of action

That defendant asked for judgment in his favor in excess of the court's jurisdiction in counterclaim did not operate to oust the court of jurisdiction to determine plaintiff's cause of action for less than that amount, where counterclaim failed to state cause of action for recovery of any amount.—*Jefferson Gardens v. Terzan*, 257 N.W. 154, 216 Wis. 230.

Effect of amendment

Where court acquired jurisdiction of the parties and over the separate causes of action in the complaint and defendant's counterclaims as first interposed, an amendment to a counterclaim increasing the amount involved to an excess of the statutory limit of the civil court's jurisdiction could not affect its jurisdiction to proceed with the matter still properly before it.—*Sells v. Elmergreen*, 198 N.W. 267, 183 Wis. 532.

91. Pa.—*Peter v. Schlosser*, 81 Pa. 439.

15 C.J. p 774 note 16.

Offset asserted by plaintiff

County court is without jurisdiction of claim for one thousand eight hundred twenty-nine dollars and thirty-two cents for pipe borrowed which admits plaintiff's indebtedness of one thousand one hundred seventy-six dollars and one cent for other borrowed pipe.—*Pennant Oil & Gas Co. v. Lightfoot*, Tex.Com. App., 292 S.W. 517, reversing, Civ. App., 286 S.W. 249.

92. N.J.—*Besser v. Krasny*, 176 A. 146, 114 N.J.Law 146, reversing 172 A. 523, 113 N.J.Law 81.

Balance within jurisdictional amount
A district court is not deprived of jurisdiction where there are mutual demands exceeding the jurisdictional amount, if the balance in dispute is less than three hundred dollars.—*Bowler v. Osborne*, 70 A. 119, 75 N.J. Law 903, reversing 69 A. 697, 74 N. J.Law 216.

93. La.—*Feahney v. New Orleans R.*, etc., 4 La.A. (Orleans) 277.—*Labarthe v. Blazzel*, 2 La.A. (Orleans) 367.

94. Cal.—*Kling v. Kimball Pump Co.*, 32 P.2d 659, 138 Cal.App. 470. Tex.—*Baker v. Black*, Civ.App., 83 S.W.2d 811, modified on other grounds *Black v. Baker*, 111 S.W. 2d 706, 130 Tex. 454.—*White v. Hill*, Civ.App., 243 S.W. 529.—*City of Dallas v. Rutledge*, Civ.App., 258 S.W. 534.—*Gammack v. Prather*, Civ.App., 71 S.W. 351.
15 C.J. p 774 note 17.

Affirmative relief

(1) Plaintiff's cause of action for foreclosure of a mortgage for a small debt being within the jurisdiction of the superior court, defendant might have affirmative relief on a counterclaim to an amount not jurisdictional.—*Singer Sewing Mach. Co. v. Burger*, 107 S.E. 11, 181 N.C. 241.

(2) Defendant may recover upon claims arising out of transaction on which complaint is based, although amount claimed is less than jurisdictional amount of court.—*Emery v. Pacific Employers Ins. Co.*

the court does not have jurisdiction of a cross action for an amount below its minimum jurisdictional limits by one defendant against another defendant who asks no relief against the cross complainant.⁹⁵ In some jurisdictions certain courts which have acquired jurisdiction of an action have power to try and render judgment on any counterclaim, even though the judgment demanded against plaintiff is in excess of the jurisdiction of the court;⁹⁶ and the court having secured jurisdiction of the action by reason of the amount sued for in plaintiff's complaint has jurisdiction of other or further and additional claims set up in plaintiff's reply to offset a counterclaim set up in defendant's answer, even though such claims when added to the amount orig-

inally sued for total an amount in excess of the court's jurisdiction.⁹⁷ In other jurisdictions in an action on a claim for an amount within its jurisdiction the court has jurisdiction of a set-off or counterclaim for an amount in excess of its jurisdiction, but does not have power to render a judgment in excess of its maximum jurisdictional limitations.⁹⁸ By the weight of authority, however, in an action on a claim for an amount within its jurisdiction, a court does not have jurisdiction of a cross demand which exceeds its maximum jurisdiction;⁹⁹ and such cross demand cannot be reduced to an amount within the jurisdiction of the court by crediting plaintiff's claim thereon;¹ but, as appears *infra* § 68, defendant may waive a portion of

67 P.2d 1046, 8 Cal.2d 663—Sullivan v. California Realty Co., 75 P. 767, 142 Cal. 201—Moore v. Groftholdt, 103 P. 149, 10 Cal.App. 714.

(3) For earlier cases on this point see 15 C.J. p 774 note 17 [a].

Cross action between defendants

In a suit for mandatory injunction to abate a nuisance, the court, having acquired jurisdiction to abate the nuisance, has jurisdiction of a cross action by one defendant against another to recover expenses in an amount below the jurisdiction of the court, which he incurred in abating the nuisance.—Bartholomew v. Shipe, Tex.Com.App., 251 S.W. 1031, reversing Shipe v. Bartholomew, Civ. App., 239 S.W. 1020.

95. Tex.—City of Dallas v. Rutledge, Civ.App., 258 S.W. 534.

Jurisdiction determined independent of main action

Jurisdiction of a cause of action between codefendants, which is not dependent on or connected with the subject matter of the main action, is determined by the amount involved in the cause of action between said codefendants alone, without any aid from the jurisdiction conferred by the amount involved in the main action.—Morgan v. Davis, Tex.Civ. App., 292 S.W. 610.

96. N.Y.—Byrne v. Padden, 162 N.E. 20, 248 N.Y. 243—Brink's Exp. Co. v. Burns, 245 N.Y.S. 649, 230 App. Div. 559.

Summary proceedings

(1) The rule has been applied in summary proceedings.—Atlas v. Moritz, 216 N.Y.S. 490, 217 App.Div. 38—Metropolitan Life Ins. Co. v. Shapiro, 294 N.Y.S. 265, 162 Misc. 223, reversed on other grounds 296 N.Y.S. 563, 163 Misc. 76—Silverman-Mendelson, Inc., v. Malco Trading Corporation, 255 N.Y.S. 552, 142 Misc. 636—Broadway & Ninety-Fourth St. v. C. & L. Lunch Co., 190 N.Y.S. 563, 116 Misc. 440, reversed on other grounds 196 N.Y.S. 549, 119 Misc. 486.

(2) However, it has been held to the contrary in summary proceedings by landlord against tenant.—Peerless Candy Co. v. Halbreich, 211 N.Y.S. 676, 125 Misc. 889, affirmed 213 N.Y. S. 49, 125 Misc. 889.

97. N.Y.—Giglotti v. Hawkins, 221 N.Y.S. 733, 129 Misc. 180.

98. Ohio.—Oglesby Granite Quarries v. Schott Monument Co., 6 N.E.2d 766, 54 Ohio App. 196.

In Illinois, in an action of the fourth class brought in the municipal court of Chicago, the court has jurisdiction of a set-off or counterclaim irrespective of the amount involved, but cannot render judgment thereon for an amount in excess of the jurisdictional limit in fourth-class cases.—Holmes v. Straus, 119 N.E. 708, 233 Ill. 621, modifying 204 Ill.App. 305.

99. Ark.—Jones v. Blythe, 210 S.W. 348, 138 Ark. 81—Kilgore Lumber Co. v. Thomas & Hammonds, 128 S.W. 62, 95 Ark. 43.

Colo.—Nelson v. Meyer, 180 P. 86, 66 Colo. 164.

Ill.—Whitsett v. Chicago Washed Coal Co., 199 Ill.App. 522.

Pa.—Eacker v. Remov, 69 Pa.Super. 138.

S.C.—Dupre v. Gilland, 152 S.E. 873, 875, 156 S.C. 109, quoting *Corpus Juris*.

S.D.—Bestak v. Bennett, 184 N.W. 359, 44 S.D. 486.

Tex.—Lewis v. Fowler, Civ.App., 128 S.W.2d 107—Turner v. Larson, Civ. App., 72 S.W.2d 397, error dismissed—Brook Mays & Co. v. Osborne, Civ.App., 70 S.W.2d 755—Commercial Inv. Trust v. Smart, Civ.App., 69 S.W.2d 805—Fridh v. Giberson & Kempff, Civ.App., 21 S.W.2d 563, error dismissed—French v. Meyer & Kiser, Civ.App., 277 S.W. 1114, reversed on other grounds Meyer & Kiser v. French, Com.App., 288 S.W. 405—Commercial Credit Co. v. Moore, Civ.App., 270 S.W. 582—Armstrong v. Clay-

ton, Civ.App., 255 S.W. 1015—Nichols v. Ellis, Civ.App., 246 S.W. 713. Utah.—Hardy v. Meadows, 264 P. 963, 71 Utah 255.

15 C.J. p 775 note 19—57 C.J. p 375 note 41.

Remission of excess prerequisite to jurisdiction

(1) Defendant may not even use a demand exceeding the court's jurisdiction to extinguish plaintiff's claim without expressly remitting the amount in excess of jurisdiction.—Blankenship v. McDaniel, 261 S.W. 316, 164 Ark. 186.

(2) Where defendant's set-off was for amount beyond district court's jurisdiction and excess was not waived, set-off was properly stricken.—Platt v. Montclair Feed & Fuel Co., 157 A. 553, 9 N.J.Misc. 1319.

Dismissal

Court having no jurisdiction of cross-action because it was for sum in excess of jurisdiction could only dismiss it.—Mumme v. Spies, Tex. Civ.App., 15 S.W.2d 137.

Compensation

The courts have no jurisdiction of a demand in compensation in excess of their jurisdiction.—Koerner & Co. v. Francingues, 3 La.App. 220.

Reconvention

The courts have no jurisdiction of a claim in reconvention in excess of their maximum jurisdiction.—Arctic Pure Ice Co. v. Rathe, 3 La.App. 14—Kaufman v. Mahen, 2 La.App. 354.

Amount held not in excess of jurisdiction

Cross action for fraud in sale of machinery held to declare on damages in amount not exceeding jurisdiction of county court.—Shepherd Laundries Co. v. Griffin, Tex.Civ.App., 285 S.W. 683.

1. Ark.—Jones v. Blythe, 210 S.W. 348, 138 Ark. 81.

Tex.—Manly v. Citizens Nat. Bank in Abilene, Civ.App., 110 S.W.2d 993—Turner v. Larson, Civ.App., 72 S.

his demand so as to bring it within the jurisdiction of the court; and in certain jurisdictions if the cross demand is for an amount in excess of the court's jurisdiction the court may deal with it to the extent of plaintiff's claim, although it cannot give affirmative relief.² If the facts alleged in a defendant's cross action, the court having jurisdiction of plaintiff's suit, be such as to show no cause of action as to such a part of the whole sum sued for as to reduce it to an amount for which the court has jurisdiction, the cross action will not be dismissed, and it is immaterial in such case that the total sum may exceed the maximum jurisdictional amount.³

In some jurisdictions if a defendant has a liquidated counterclaim or defensive action against a plaintiff for a sum in excess of the jurisdiction of the court he may file it in the court along with an affidavit of good faith and the entire case will be transferred to another court whose jurisdiction extends to the amount involved.⁴

Plaintiff's claim as part of amount in defendant's cross action. In the determination of the amount involved in defendant's counterclaim or cross action, the amount of a debt sued on by plaintiff which defendant asks to be canceled,⁵ as where he pleads payment thereof,⁶ should be considered; but if he does not seek a cancellation of such debt the

amount thereof cannot be added to the amount defendant seeks to recover in his cross action in the determination of the amount involved in such cross action for jurisdictional purposes.⁷

§ 67. Effect of Plea in Bar

In an action on notes a plea of payment by delivery of goods, whose value exceeded the maximum jurisdiction of the court, does not seek to have the court adjudicate a claim beyond its jurisdiction, where defendant does not seek any recovery from plaintiff.

Where, in an action on certain notes, defendant pleaded, in bar of plaintiff's right to recover, the delivery of certain goods under a contract with plaintiff, but did not seek to recover any amount on such contract, the fact that the value of the goods so delivered exceeded the amount as to which the court had jurisdiction did not defeat the jurisdiction of the court to determine the question whether such agreement had been made and the goods delivered thereunder.⁸

§ 68. Reduction of Amount

- a. As defeating jurisdiction of court
- b. As conferring jurisdiction on court of inferior or limited jurisdiction

a. As Defeating Jurisdiction of Court

In general, if an action is originally brought for an amount within the jurisdiction of the court a reduction

W.2d 397, error dismissed—Nichols v. Ellis, Civ.App., 246 S.W. 713.

15 C.J. p 775 note 20—57 C.J. p 375 note 43.

2. N.C.—Armour Fertilizer Works v. Aiken, 95 S.E. 657, 175 N.C. 398—Stacey Cheese Co. v. Pipkin, 71 S.E. 442, 155 N.C. 394, 37 L.R.A., N.S., 606.

Pa.—Standard Engineering & Const. Co. v. Smyser-Royer Co., 68 Pa. Super. 437.

3. Tex.—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W. 2d 399, error dismissed.

4. N.J.—Eder v. Hudson County Circuit Court, 140 A. 883, 104 N.J. Law 260.

Proof required for transfer

The term "due proof," in a statute providing that the case shall not be transferred unless the judge of the court to which it is intended to transfer the case shall, upon due proof, make an order that he finds there is reasonable cause to believe the set-off, counterclaim, or other defensive action, is founded on fact and has a reasonable chance of success on the trial, relates to proof of the existence of such facts and circumstances from which the judge can determine whether or not there is

reasonable cause to believe that the counterclaim is founded on fact, and does not require defendant to state anything more than the facts on which he relies for a recovery.—Eder v. Hudson County Circuit Court, supra.

Claim held unliquidated

In action for wages by discharged employee, counterclaim for damages because of plaintiff's incompetence held unliquidated.—Tigler v. Fabrics Finishing Corporation, 150 A. 223, 8 N.J.Misc. 303.

5. Tex.—Lewis v. Fowler, Civ.App., 128 S.W.2d 107—Brook Mays & Co. v. Osborne, Civ.App., 70 S.W.2d 755—Commercial Inv. Trust v. Smart, Civ.App., 69 S.W.2d 805—Commercial Credit Co. v. Moore, Civ.App., 270 S.W. 532—Billings v. Southern Supply Co., Civ.App., 194 S.W. 1170.

6. Tex.—Commercial Inv. Trust v. Smart, 69 S.W.2d 35, 123 Tex. 130—Commercial Inv. Trust v. Smart, Civ.App., 69 S.W.2d 805.

Early cases

(1) However, in an earlier case it was held, in an action on a note for an amount within the jurisdiction of the court in which defendant alleged payment and asked for an amount within the jurisdiction of the

court as damages for wrongful attachment, that the amounts pleaded in payment should not have been added to the amount asked as damages in determining the amount involved in defendant's cross action.—Knoohuizen v. Nicholl, Tex.Civ.App. 257 S.W. 972.

(2) Also it was held in a case upholding the validity of the decision in Knoohuizen v. Nicholl, supra, that in an action to foreclose a mortgage on a truck in which defendant pleaded that the debt was paid and asked cancellation of the note and mortgage and for possession of property in the possession of the sheriff by virtue of a writ of sequestration issued in the case, but did not ask for judgment against plaintiff either for the amount of the note or for the sums which he had paid, that the amount of the note and the truck were not a part of the amount in controversy as respects the court's jurisdiction of defendant's cross action.—Commercial Credit Co. v. Moore, Tex.Civ.App., 283 S.W. 508.

7. Tex.—Eastern Seed & Grain Co. v. Weldon, Civ.App., 61 S.W.2d 536.

8. Tex.—Eule v. Dorn, 92 S.W. 328, 41 Tex.Civ.App. 520.

of the amount involved below the jurisdiction of the court will not deprive it of jurisdiction, unless, in some jurisdictions, the reduction is due to a failure to allege a cause of action as to the items stricken; but the fact that before the action was commenced the claim was within the court's jurisdiction will not confer jurisdiction if, at the time the action was commenced, the amount had been reduced by credits or otherwise below the jurisdiction.

It is usually held that, where an action is originally brought for an amount which is within the jurisdiction of the court, jurisdiction is not defeated by a reduction of the amount involved to an extent which makes it less than the jurisdictional amount,⁹ in the absence of plea and proof that fraudulent allegations were made to confer jurisdiction, considered *supra* § 56. The fact that the amount originally due was within the jurisdiction of a superior court does not authorize such court to exercise jurisdiction, where before the action is commenced such amount has been reduced, by credits or otherwise, to a sum beneath the jurisdiction of the court;¹⁰ but in some jurisdictions this rule

is subject to the exception that in an action on a book account or a note the debit side of the plaintiff's book,¹¹ or the face amount of the note,¹² is the amount in controversy for jurisdictional purposes, regardless of the balance due because of payments or credits on the account or note, unless, in the case of a book account, the account has been balanced and closed by agreement of the parties, in which case the balance is the amount in controversy.¹³

Effect of disclaimers in suit to quiet title. Where disclaimers filed by some of a number of defendants in a suit to quiet title are not directed to any particular subdivision of the tract of land described in the bill, but are of any right, title, or interest in any part of such tract, they do not reduce the value of the matter in dispute, which remains, as between the complainant and the remaining defendants, the value of the land involved.¹⁴

Effect of tender. A tender of an amount less

9. Cal.—*Rosenkranz v. Bentley*, 31 P.2d 782, 220 Cal. 529.

Tex.—*Majors v. Turner*, Civ.App., 280 S.W. 844.

15 C.J. p 775 note 23.

Payment from proceeds of prior foreclosure

Chattel mortgage given to secure payment of two notes, the larger of which was already secured by a deed of trust on real property, and providing for foreclosure upon default in payment of either was primary obligation as to each note, so that court had jurisdiction of action to foreclose, which was not lost because larger note was discharged from proceeds of foreclosure sale under deed of trust securing it and amount of smaller note was below jurisdictional amount.—*Rosenkranz v. Bentley*, 31 P.2d 782, 220 Cal. 529.

Reduction on trial

Jurisdiction will not be lost by the fact that the amount is reduced on the trial.—*Nations v. Lindley*, Tex. Civ.App., 275 S.W. 163.

Remittitur after judgment

The county court having jurisdiction of a claim for two hundred dollars for property and twenty dollars attorney's fees, to which plaintiff was entitled it was not robbed of such jurisdiction by a remittitur of the attorney's fees after judgment for plaintiff.—*Davis v. Fore*, Tex. Civ. App., 250 S.W. 783.

Defensive pleadings

Court in which suit is filed in good faith has jurisdiction, although amount claimed in petition could be reduced by defensive pleadings.—*City of Fort Worth v. Zane-Cetti*, Tex. Com. App., 29 S.W.2d 958, revers-

ing *Zane-Cetti v. City of Fort Worth*, Civ.App., 21 S.W.2d 355.

Statute of limitations

(1) Where the statute of limitations is interposed successfully as to a part of the demand, jurisdiction will be retained, although the amount is thus reduced below that of which the court could originally take jurisdiction.

Cal.—*Bank of America Nat. Trust & Savings Ass'n v. Ames*, 63 P.2d 1208, 18 Cal.App.2d 311.

Tex.—*City of Fort Worth v. Zane-Cetti*, Com.App., 29 S.W.2d 958, reversing *Zane-Cetti v. City of Fort Worth*, Civ.App., 21 S.W.2d 355—*Smith v. Nesbitt*, Civ.App., 235 S.W. 1104, conforming answers to certified questions 230 S.W. 976, 111 Tex. 186.

15 C.J. p 775 note 23 [d].

(2) The reason is that the complaint states a cause of action, even though the cause, or a part thereof, is barred by the statute of limitations, for the bar of the statute is a matter of defense and recovery may be had on the complaint unless the plea of the bar is raised.—*Bank of America Nat. Trust & Savings Ass'n v. Ames*, *supra*.

(3) However, it has been held that if it appears from the petition that certain items are barred by the statute of limitations, and if an exception to such part of the petition is sustained on that ground and the amount in controversy thereby reduced below the minimum jurisdiction of the court, an exception to the jurisdiction of the court should be sustained and the suit dismissed.—*Low v. Dowbarn*, 26 Tex. 507—

Browning v. El Paso Lumber Co., Tex. Civ.App., 140 S.W. 386.

10. Cal.—*Morgan v. Somervell*, 65 P.2d 820, 19 Cal.App.2d 434.

Miss.—*Martin v. Harden*, 52 Miss. 694.

15 C.J. p 776 note 25.

Application of deductions held erroneous

In suit on note on which partial payments had been made, court erroneously declined jurisdiction because deduction of aggregate of all payments from face of note left remainder of less than jurisdictional minimum of court, whereas application of partial payments first to interest due and then to principal would have resulted in sum within court's jurisdiction.—*J. I. Case Co. v. Laubhan*, Tex. Civ.App., 64 S.W.2d 1079.

Deduction not proper

In action to recover published freight charges, shipper was held not entitled to deduction of switching charges paid from transportation charge in determining jurisdiction of court below, since, under statute, such charges are separate from those required to be filed with interstate commerce commission.—*United Hay Co. v. St. Louis, B. & M. Ry. Co.*, Tex. Civ.App., 74 S.W.2d 766.

11. Vt.—*A. H. Berry Shoe Co. v. Deschenes*, 35 A. 335, 68 Vt. 387—*Willard v. Collamer*, 34 Vt. 594—*Reed v. Talford*, 10 Vt. 568.

12. Vt.—*Bank of Middlebury v. Tucker*, 7 Vt. 144.

13. Vt.—*Willard v. Collamer*, 34 Vt. 594.

14. U.S.—*Cooper v. Preston*, C.C. Cal., 105 F. 403.

than that for which the action is brought cannot operate to reduce the amount in controversy to the difference between the amount sued for and the amount tendered.¹⁵

b. As Conferring Jurisdiction on Court of Inferior or Limited Jurisdiction

In general, although there is some authority to the contrary, a party may confer jurisdiction on a court whose jurisdiction does not extend to the full amount of his claim by waiving or remitting the excess thereof.

Although there is some authority which holds that a party cannot remit a portion of his claim and thereby bring it within the jurisdiction of a court whose maximum jurisdiction is below the amount of the entire claim,¹⁶ by the weight of authority one who desires to sue in a court whose jurisdiction does not extend to the full amount of his claim may confer jurisdiction upon such court by waiving or remitting a portion of his claim, so

that what remains is within the jurisdiction of the court.¹⁷ Thus a plaintiff may remit his claim for interest due and demandable,¹⁸ or recoverable as an element of damages,¹⁹ and by suing only for the amount of his claim without interest bring the case within the jurisdiction of a court whose jurisdiction would not extend to the amount of his claim with interest. However, in some jurisdictions this rule is qualified, the rule being that if a demand admits of segregation of the amount sought to be remitted, a plaintiff may validly abandon in its entirety a severable portion of his claim, and jurisdiction will be tested by the amount of the remaining claim;²⁰ but plaintiff cannot, by the remission of an arbitrary part of his claim,²¹ as by waiving a portion of any severable item sued on,²² or by arbitrarily reducing the value of property or services which are the subject matter of the suit,²³ bring his action within the jurisdiction of an inferior court. So, where an amount within the ju-

15. Tex.—Bourn v. Gray, Tex.Civ. App., 144 S.W. 356.

16. Pa.—Moore v. White, 11 Wkly. N.C. 206.

S.C.—Simpson v. M'Million, 10 S.C.L. 192—Ramsay v. The Court of Wardens, 2 S.C.L. 180.

Purpose of credit

Whether a credit indorsed on a note was on account of a payment actually made, or voluntary and intended to bring the case within the summary jurisdiction of the circuit court, is a question for its determination.—Taylor v. Purvis, 19 S.C.L. 373.

Amount of rent due

Under constitutional provision limiting the jurisdiction of the city court in New Orleans in suits by landlords for possession of leased premises to cases where "the monthly or yearly rent, or the rent for the unexpired term of the lease, does not exceed" one hundred dollars, if the amount due exceeds that sum, but plaintiff does not sue for all that is due, the city court is without jurisdiction.—Runkel v. Auto Repair & Garage Co., 86 So. 483, 147 La. 1030.

17. Ga.—Pacific Mut. Life Ins. Co. v. Barfield, 194 S.E. 258, 57 Ga. App. 43.

Ill.—Dahlgren v. Israel, 204 Ill.App. 340.

N.J.—Besser v. Krasny, 172 A. 533, 113 N.J.Law 81, reversed on other grounds 176 A. 146, 114 N.J.Law 146.

N.Y.—Frenchi v. New York City Ry. Co., 92 N.Y.S. 771, 46 Misc. 612.

Ohio.—State ex rel. Talaba v. Moreland, 5 N.E.2d 159, 132 Ohio St. 71.

15 C.J. p 776 note 80.

Justices of the peace see the C.J.S. title Justices of the Peace § 35, also 35 C.J. p 524 note 47—p 526 note 78.

Payment a credit on reduced amount

In action for services and supplies furnished, plaintiff by suing in district court waived any excess of his claim over five hundred dollars and hence payment on claim was a credit on five hundred dollars.—Smith v. Spaeth, 128 A. 582, 3 N.J. Misc. 395.

Under statute

Under a statute which authorizes a party to waive all of his claim over three hundred dollars, in an action in a court whose maximum jurisdiction is five hundred dollars a plaintiff cannot give the court jurisdiction by waiving all of his claim over five hundred dollars, but, if he waives any of his claim, must waive all of it over three hundred dollars.—Mooney v. Woolhouse, 72 A. 53, 77 N.J.Law 325.

18. N.J.—Mau v. Vulcan Building & Loan Ass'n, 165 A. 888, 11 N.J. Misc. 352.

N.Y.—Gigliotti v. Jacksina, 201 N.Y. S. 241, 206 App.Div. 368.

Ohio.—State ex rel. Talaba v. Moreland, 5 N.E.2d 159, 132 Ohio St. 71.

Pa.—Simon v. Irwin, 96 Pa.Super. 298.

15 C.J. p 777 note 32.

19. Ill.—Wright v. Smith, 76 Ill. 216. Tex.—Ft. Worth, etc., R. Co. v. Mathews, 191 S.W. 559, 108 Tex. 228.

20. Tex.—Fort Worth & R. G. Ry. Co. v. Mathews, 191 S.W. 559, 108 Tex. 228—Maryland Casualty Co. v. Overstreet, Com.App., 61 S.W.2d 810, reversing, Civ.App., 42 S.W.

2d 160—Williams v. Trinity Gravel Co., Civ.App., 297 S.W. 878—Commercial Credit Co. v. Moore, Civ.App., 388 S.W. 508—Burke v. Adoue, 22 S.W. 824, 3 Tex.Civ.App. 494, rehearing denied 23 S.W. 91, 3 Tex.Civ.App. 494.

21. Tex.—Maryland Casualty Co. v. Overstreet, Com.App., 61 S.W.2d 810, reversing, Civ.App., 42 S.W.2d 160.

Part of a fixed sum

A portion of the amount demanded cannot be remitted to bring the amount within the jurisdiction, where the amount demanded is a fixed sum.—Chicago, etc., R. Co. v. Gladish, Tex.Civ.App., 175 S.W. 863.

22. Tex.—Bankers' Health & Accident Co. v. Kimbro, Civ.App., 62 S.W.2d 262—Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co., Civ.App., 6 S.W.2d 418—Williams v. Trinity Gravel Co., Civ. App., 297 S.W. 878—Burke v. Adoue, 22 S.W. 824, 3 Tex.Civ.App. 494, rehearing denied 23 S.W. 91, 3 Tex.Civ.App. 494.

23. Tex.—Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co., Civ.App., 6 S.W.2d 418—Williams v. Trinity Gravel Co., Civ.App., 297 S.W. 878—Taylor v. Buzan, Civ.App., 241 S.W. 1084.

In foreclosure proceedings

In an action to foreclose a mortgage in which plaintiff failed to allege the value of the property, if the value of the property is in excess of the court's jurisdiction plaintiff cannot in good faith amend his petition by alleging a value of the property such as to bring the case within the jurisdiction of the court.—Glasscock v. Sinks, Tex.Civ.App., 185 S.W. 405.

jurisdiction of an inferior court in which the action is brought is claimed, jurisdiction is not affected by proof showing that plaintiff would be entitled to recover an amount in excess of the jurisdiction, although judgment cannot of course be entered for such an amount,²⁴ the rule applying with especial force where the claim sued on is unliquidated, whether the action is on contract or tort,²⁵ for the reason that in such a case there is no other test or measure which can be applied.²⁶

A court is not deprived of jurisdiction because the claim sued on was originally of an amount in excess of its jurisdiction, if it has been reduced by payments or credits to an amount within the jurisdiction.²⁷ Where the value of property involved in an action in an inferior court is not alleged, and the evidence shows a value in excess of the jurisdiction of the court, plaintiff cannot amend so as to bring the case within the jurisdiction.²⁸

Demand in pleadings in excess of jurisdiction. In some jurisdictions, where plaintiff in his complaint demands a sum beyond the jurisdiction of the court, no jurisdiction exists, and the case cannot be brought within the jurisdiction by a waiver on the part of plaintiff of a part of his demand,²⁹ or by a remission of interest claimed, where the principal debt is within the jurisdictional limit.³⁰ In other jurisdictions, where plaintiff in his original complaint demands a sum in excess of the jurisdiction of the court, a remission of a part of the claim so as to bring it within the jurisdiction of the court may be made during the pendency of the action;³¹ and, as appears *infra* § 69, to accomplish this re-

sult a party may amend his pleadings by reducing the amount claimed. In New York, as appears *infra* § 69, where at the time of the commencement of the suit by the service of summons it appears that the amount demanded is in excess of the jurisdictional limitation of the court, as where the amount appears in a complaint served with the summons, or in the summons by a statement therein of the amount sued for or a reference therein to the demand to be made in the complaint, the court has no jurisdiction; and the case cannot be brought within the jurisdiction of the court by a waiver by plaintiff of a part of his demand, as by a remission of interest claimed, where the principal debt is within the jurisdictional limit;³² and if plaintiff is successful, he is not entitled to remit the excess over the jurisdictional amount and have judgment for what remains.³³

Admission of part of indebtedness. The fact that on the trial the defendant admits a portion of the debt sued for, leaving in controversy a balance less than the jurisdictional minimum of the court, does not deprive the court of jurisdiction.³⁴

Set-off or counterclaim. A set-off or counterclaim may be brought within the jurisdiction of the court by a waiver or remission of the excess over the jurisdictional limit,³⁵ subject in those jurisdictions where the rule applies, see *supra* this section note 20, to the proviso that the remission must be of a severable portion of the claim.³⁶ In New Jersey a distinction is drawn between set-off and recoupment. A defendant asserting a set-off in excess of the jurisdiction of the court may, under the

24. Ga.—Wilhelms v. Noble Bros. & Co., 36 Ga. 599—Pacific Mut. Life Ins. Co. v. Barfield, 194 S.E. 258, 57 Ga.App. 43.

N.C.—Knight v. Taylor, 42 S.E. 537, 131 N.C. 84.

S.C.—Coldthwaite v. Dent, 3 McCord 296.

Tex.—New Fenfield Townsite Co. v. King, Civ.App., 204 S.W. 788—Coleman v. Bell, Civ.App., 50 S.W. 155.

Not a fraud on the court

A cross action placing the value of property for whose destruction recovery is sought at an amount within the jurisdiction of the court is not a fraud on the court, where it was fixed in good faith by the defendant's counsel, although the real value of the property was in excess of the court's jurisdiction.—San Jacinto Rice Co. v. Ulrich, Tex. Civ.App., 214 S.W. 777.

25. Ga.—Pacific Mut. Life Ins. Co. v. Barfield, 194 S.E. 258, 57 Ga.App. 43.

Tex.—Commercial Credit Co. v. Moore, Civ.App., 288 S.W. 508—New Fenfield Townsite Co. v. King, Civ.App., 204 S.W. 788.

15 C.J. p 757 note 65.

Claim held unliquidated

A suit for monthly disability benefits under insurance policy was a suit for unliquidated amount.—Pacific Mut. Life Ins. Co. v. Barfield, 194 S.E. 258, 57 Ga.App. 43.

26. U.S.—Wiley v. Sinkler, S.C., 21 S.Ct. 17, 179 U.S. 58, 45 L.Ed. 84.

27. Cal.—Morgan v. Somervell, 65 P.2d 820, 19 Cal.App.2d 434. 15 C.J. p 777 note 84.

28. Tex.—Glasscock v. Sinks, Civ. App., 185 S.W. 405.

29. S.D.—Egan v. Rounds, 216 N.W. 878, 52 S.D. 139. 15 C.J. p 777 note 37.

30. S.C.—St. Amand v. Gerry, 11 S.C.L. 487.

31. Ohio.—State ex rel. Talaba v. Moreland, 5 N.E.2d 159, 132 Ohio St. 71.

At or before judgment

Plaintiff may either before or at time of rendition of judgment remit excess of his demand over and above the sum for which the court is authorized to render judgment, so as to bring the case within the court's jurisdiction.—Moffatt v. Cassimus, Ala., 190 So. 299, reversing 190 So. 297, 28 Ala.App. 582.

32. N.Y.—Smith v. Dunn, 92 N.Y.S. 300, 46 Misc. 475.

33. N.Y.—Smith v. Dunn, *supra*.

34. La.—Abney v. Whitted, 28 La. Ann. 818.

35. Ark.—Blankenship v. McDaniel, 261 S.W. 316, 164 Ark. 186—Jones v. Blythe, 210 S.W. 343, 138 Ark. 81—Kilgore Lumber Co. v. Thomas & Hammonds, 128 S.W. 62, 95 Ark. 43.

15 C.J. p 777 note 43—57 C.J. p 375 note 44.

36. Tex.—Maryland Casualty Co. v. Overstreet, Com.App., 61 S.W.2d 810, reversing, Civ.App., 42 S.W.2d 160.

statute, confer jurisdiction by waiving the excess;³⁷ but, there being no statutory provision for such a waiver in case of a demand in recoupment or counterclaim, it is held that the assertion of such a demand exceeding the jurisdiction of the court deprives it of jurisdiction notwithstanding a waiver of the excess.³⁸ However, as appears *infra* § 69 note 15, the recoupment or counterclaim may be amended so as to give the court jurisdiction.

Verdict or judgment in excess of jurisdiction. In some jurisdictions, in case a verdict is rendered for an amount beyond the jurisdiction of the court, the excess may be remitted and judgment entered for the jurisdictional amount,³⁹ or the court may, of its own motion, remit the excess or presume the excess to be remitted.⁴⁰ There is, however, authority for the view that, where the amount actually recovered is beyond the jurisdiction of the court, jurisdiction is lost;⁴¹ and it has been held that a statute permitting a party to remit the excess, if "the amount found due exceeds the sum for which the court is authorized to enter judgment," does not apply to a case where the amount demanded in the summons and complaint was beyond the jurisdic-

tion of the court in the first instance.⁴² Plaintiff cannot, by remitting a portion of the judgment rendered, confer jurisdiction of an action in which the pleadings claim an amount in excess of the jurisdictional limit.⁴³

Judgment in excess of amount claimed. Under a statute giving a court jurisdiction where the sum claimed did not exceed a certain amount, it has been held that, where plaintiff claimed only that amount, jurisdiction is not affected by the judgment's being for more, but the excess may be waived.⁴⁴

§ 69. Pleading and Proof

In general the amount in controversy is determined from the allegations of the pleadings, and they must allege an amount within the jurisdiction of the court.

Ordinarily the pleadings determine the amount in controversy, and therefore, the jurisdiction of the particular action asserted,⁴⁵ unless, as appears *supra* § 56, it is shown that such amount was alleged fraudulently for the purpose of giving the court jurisdiction; and this is ordinarily determined by the amount alleged in the complaint, declaration, or petition,⁴⁶ regardless of the truth of the allega-

37. N.J.—Ward v. Hauck, 93 A. 533, 87 N.J.Law 198.
15 C.J. p 778 note 44.

38. N.J.—Rosenkranz v. Wolf, 93 A. 584, 87 N.J.Law 211—Ward v. Hauck, 93 A. 533, 87 N.J.Law 198—Lester v. Karasik, 170 A. 842, 12 N.J.Misc. 195.

39. Neb.—Adams v. Nebraska Sav., etc., Bank, 76 N.W. 421, 56 Neb. 121.

15 C.J. p 778 note 46.

40. N.C.—Porter v. Grimsley, 4 S. E. 529, 98 N.C. 550.
15 C.J. p 778 note 47.

41. Or.—Ferguson v. Byers, 67 P. 1115, 69 P. 32, 40 Or. 468.
15 C.J. p 778 note 48.

42. N.Y.—Warden v. Goldman, 145 N.Y.S. 989, 84 Misc. 87—Smith v. Dunn, 92 N.Y.S. 300, 46 Misc. 475.

43. Tex.—Wilson v. Yates, Civ.App., 120 S.W.2d 639.

Remittitur after judgment

Where remittitur was not entered prior to judgment for three hundred twenty-five dollars in city court of Shreveport, agreement among counsel afterward that court should enter another judgment for amount within court's jurisdiction did not cure lack of jurisdiction nor validate judgment.—Peyton v. Noble, La.App., 152 So. 812.

44. N.Y.—Globe v. Rauch, 46 N.Y.S. 889, 21 Misc. 48, 26 N.Y.Civ.Proc. 359.

Waiver of interest

Where claim on note with interest

was within county court's jurisdiction when suit was instituted, but subsequent judgment exceeded amount because of interest which accrued pending the trial, plaintiff may waive right to interest accruing after institution of suit, and court may reduce judgment to within limitation.—Simon v. Irwin, 96 Pa.Super. 298.

45. U.S.—Kunkel v. Brown, 99 F. 593, 39 C.C.A. 665.
Ga.—Bowen v. Hendricks, 107 S.E. 617, 27 Ga.App. 235.

Tex.—Clonts v. Johnson, 294 S.W. 844, 116 Tex. 489—Beauchamp v. Parrish, Civ.App., 148 S.W. 333.

46. Cal.—Turley v. Roberts, 277 P. 878, 99 Cal.App. 71.

N.Y.—City Trust Co. v. Anthony Ricci Realty Co., 241 N.Y.S. 481, 137 Misc. 128.

Tex.—Brown v. Peters, 94 S.W.2d 129, 127 Tex. 300, affirming Peters v. Brown, Civ.App., 58 S.W.2d 1063—Isbell v. Kenyon-Warner Dredging Co., 261 S.W. 762, 113 Tex. 528—Campsey v. Brumley, Com.App., 55 S.W.2d 810—Jenkins v. Parks, Com.App., 49 S.W.2d 714, reversing Parks v. Jenkins, Civ.App., 41 S.W.2d 507—Worth Finance Co. v. Charlie Hillard Motor Co., Civ. App., 131 S.W.2d 416—Berkman v. Levy, Civ.App., 129 S.W.2d 397, error dismissed, judgment corrected—Graddy v. Le Bus, Civ.App., 127 S.W.2d 332—Brown v. Ricks, Civ. App., 120 S.W.2d 850—Parsons v. John Deere Plow Co., Civ.App., 113 S.W.2d 970—Lubbock Oil Refining

Co. v. Bourn, Civ.App., 96 S.W.2d 569—McNamara v. Russ Mfg. Co., Civ.App., 57 S.W.2d 953—Threadgill v. Federal Land Bank of Houston, Civ.App., 26 S.W.2d 345, error dismissed—Washington v. Ravel, Civ.App., 14 S.W.2d 367—Crowell v. Mickolaseh, Civ.App., 297 S.W. 214—Nations v. Lindley, Civ.App., 275 S.W. 163—Mansfield Mill & Elevator Co. v. Nichols, Civ.App., 265 S.W. 746—Moon Automobile Co. v. Avery, Civ.App., 219 S.W. 511—San Antonio Drug Co. v. Red Cross Pharmacy, Civ.App., 199 S.W. 324—Jackson v. Sere, Civ.App., 198 S.W. 604—Burcum v. Gaston, Civ. App., 196 S.W. 257.

When determined on complaint only

Amount in controversy must be determined on plaintiff's petition alone, in absence of plea in abatement, ruling on general demurrer, plea that plaintiff's allegations were fraudulently made to confer jurisdiction, or objection to evidence of value.—Pennant Oil & Gas Co. v. Lightfoot, Tex. Civ.App., 286 S.W. 249, reversed on other grounds, Com.App., 292 S.W. 517.

Variance between complaint and bill of particulars

When the complaint is in writing, it is the complaint, and not the bill of particulars, which determines the jurisdiction; and so the demand of the complaint will not be enlarged by a bill of particulars containing a statement of damages amounting to a sum in excess of the sum demanded in the complaint.—French v.

tions;⁴⁷ and the question of jurisdiction is concluded by its averments in so far as they state facts in relation to the thing in controversy, unless it otherwise appears that a plaintiff in framing his petition has improperly sought to give jurisdiction where it does not properly belong.⁴⁸

Although, under some statutes, an allegation of the amount in dispute is not jurisdictional,⁴⁹ and plaintiff's pleadings are not subject to demurrer because they do not show that the amount in dispute is within the jurisdiction of the court,⁵⁰ in general,

unless the court has jurisdiction because of the nature of the subject matter,⁵¹ the complaint, declaration, or petition must affirmatively⁵² show that the amount involved is within the jurisdiction of the court in which the action is brought,⁵³ which petition or complaint must be in writing and filed;⁵⁴ and a failure to allege this jurisdictional fact cannot be cured by proof,⁵⁵ nor supplied from the trial court's finding in its judgment.⁵⁶ There is, however, authority for the view that the amount need not be set forth in the complaint, declaration, or petition,⁵⁷ but may be set forth in a summons or in the

New York City Ry. Co., 92 N.Y.S. 771, 46 Misc. 612.

Complaint construed

A complaint in the county court, demanding judgment for a certain amount against "each and both of the defendants," was not defective as demanding three times the amount designated, which would be beyond the jurisdiction of the county court, since from a fair construction of the allegation the amount mentioned was the one requested.—Curran v. Arp, 125 N.Y.S. 758, 141 App.Div. 38.

47. Tex.—Clonts v. Johnson, 294 S. W. 844, 116 Tex. 489—Booth v. Texas Employers' Ins. Ass'n, Com. App., 123 S.W.2d 322, reversing Texas Employers Ins. Ass'n v. Booth, Civ.App., 113 S.W.2d 231—Berkman v. Levy, Civ.App., 129 S.W.2d 397, error dismissed. Judgment corrected.

48. Tex.—Brown v. Peters, 94 S.W. 2d 129, 127 Tex. 300, affirming Peters v. Brown, Civ.App., 58 S.W.2d 1063—Dwyer v. Bassett & Bassett, 63 Tex. 274—Booth v. Texas Employers' Ins. Ass'n, Com.App., 123 S.W.2d 322, reversing Texas Employers Ins. Ass'n v. Booth, Civ. App., 113 S.W.2d 231—Berkman v. Levy, Civ.App., 129 S.W.2d 397, error dismissed, judgment correct.

49. Mich.—McBride v. Jacob, 167 N. W. 1007, 201 Mich. 525—Brandt v. Luce, 142 N.W. 1117, 177 Mich. 184—Brassington v. Waldron, 107 N.W. 100, 143 Mich. 364.

Formal averment unnecessary

The amount in controversy, where jurisdiction depends on it, need not be stated by formal averment, provided jurisdiction in that regard is inferable from other facts pleaded.—Abbott v. Gregory, 39 Mich. 68—Palmer v. Rich, 12 Mich. 414.

Book account

Under a statute which provides that in an action on a book account the matter in demand shall be the debtor side of plaintiff's book, and which prescribes the writ, but does not require an allegation of the jurisdictional fact, the writ need not affirmatively show the jurisdiction of

the court.—A. H. Berry Shoe Co. v. Deschenes, 35 A. 335, 68 Vt. 387.

50. Mich.—Brassington v. Waldron, 107 N.W. 100, 143 Mich. 364.

Defendant's remedy

(1) If the amount in dispute is not within the court's jurisdiction, defendant's remedy is not to demur, but to raise the jurisdictional question by plea or answer.—Brassington v. Waldron, supra.

(2) However, he may insist on the objection at the hearing where it appears, either by pleadings or proof, that the value in controversy is not within the jurisdictional amount.—Brandt v. Luce, 142 N.W. 1117, 177 Mich. 184—Brassington v. Waldron, supra.

Pleadings held sufficient

(1) An allegation in a taxpayer's suit that complainant's interest in the matters involved exceeded the jurisdictional amount was sufficient to show jurisdictional interest to withstand a demurrer.—Brandt v. Luce, 142 N.W. 1117, 177 Mich. 184.

(2) A bill alleging that the amount owing, by complainant on a judgment was one hundred dollars over and above any and all claims or liens which any person claimed to have against such judgment "as far as complainant was advised" is a sufficient statement of the amount involved.—Robinson v. Kunkleman, 75 N.W. 451, 117 Mich. 193.

51. Tex.—Stewart v. Patterson, Civ. App., 204 S.W. 768, error refused.

52. Colo.—Greene v. Gibson, 127 P. 239, 53 Colo. 346.

Tex.—Brown v. Peters, 94 S.W.2d 129, 127 Tex. 300, affirming Peters v. Brown, Civ.App., 58 S.W.2d 1063—Campsey v. Brumley, Com.App., 55 S.W.2d 810—Booher v. Brown, Civ.App., 87 S.W.2d 330—Abilene & S. Ry. Co. v. Bagwell, Civ.App., 70 S.W.2d 480, error dismissed—Lunsford v. Pearce, Civ.App., 19 S.W. 2d 71—Williams v. Givins, Civ. App., 11 S.W.2d 224—Williams v. Tyler, Civ.App., 258 S.W. 886—Tant v. Baldwin Piano Co., Civ.App., 217 S.W. 239.

Form of averment

The jurisdictional averments need not be in any prescribed form, and averments which are equivalent to an allegation that the amount in controversy, or the value of the property involved, does not exceed the jurisdictional amount, may be used.—Greene v. Gibson, 127 P. 239, 53 Colo. 346.

County court

(1) In the county court plaintiff's petition must affirmatively show jurisdiction.—Parsons v. John Deere Plow Co., Tex.Civ.App., 113 S.W.2d 970—Thompson v. Dalley, Tex.Civ. App., 95 S.W.2d 1007.

(2) A county court had no jurisdiction to grant an injunction restraining the opening of a county road through petitioner's land, where the petition contained no allegation as to the value of the subject of the controversy.—Dewitt County v. Wischkemper, 67 S.W. 882, 95 Tex. 435.

53. Tex.—Brown v. Peters, 94 S.W. 2d 129, 127 Tex. 300, affirming Peters v. Brown, Civ.App., 58 S.W. 2d 1063—Press v. Davis, Civ.App., 118 S.W.2d 982, error granted—Whittle Music Co. v. Lammons, Civ.App., 93 S.W.2d 233. 15 C.J. p 759 note 80.

Nominal damages

Allegations of actual damages are necessary to confer jurisdiction to award nominal damages only on a court whose minimum jurisdiction is above such amount.—Press v. Davis, Tex.Civ.App., 118 S.W.2d 982, error granted.

54. Tex.—D. V. Brooks Co. v. Vera, Civ.App., 58 S.W.2d 1061, affirmed Vera v. D. V. Brooks Co., 94 S.W.2d 132, 127 Tex. 306.

55. Ark.—Modern Laundry v. Dilley, 163 S.W. 1197, 111 Ark. 350. Tex.—Lunsford v. Pearce, Civ.App., 19 S.W.2d 71.

56. Tex.—Brown v. Peters, 94 S.W. 2d 129, 127 Tex. 300, affirming Peters v. Brown, Civ.App., 58 S.W.2d 1063.

57. U.S.—Robinson v. Suburban

writ,⁵⁸ or in interrogatories filed in a garnishment proceeding;⁵⁹ that it is sufficient if the amount appears from the pleadings as a whole;⁶⁰ and that, if the entire record shows that the jurisdictional amount is involved, this is sufficient.⁶¹ In New York, where at the time of the commencement of the suit by the service of summons it appears that the amount demanded is in excess of the jurisdictional limitation of the court, as where the amount appears in a complaint served with the summons, or in the summons by a statement therein of the amount sued for or a reference therein to the demand to be made in the complaint, the court acquires no jurisdiction of the case;⁶² but, where the summons is served first and indicates no stated amount of claim, or states an amount within the jurisdiction of the court, the court acquires jurisdiction, and it is not deprived thereof because plain-

tiff thereafter serves a complaint demanding an amount in excess of the court's jurisdiction.⁶³

In some jurisdictions the jurisdiction of specified courts, so far as it depends on the amount or value of the thing in question, is to be decided solely by the ad damnum set forth in the writ.⁶⁴ In other jurisdictions the amount in controversy is determined from the petition, declaration, or complaint taken as a whole,⁶⁵ and constitutes the amount demanded up to which proof can be made for the purposes of recovery.⁶⁶ Ordinarily the amount claimed in the prayer or ad damnum clause of the petition, declaration, or complaint determines the amount in controversy,⁶⁷ but such amount is not necessarily conclusive;⁶⁸ and, where necessary to determine the court having jurisdiction, the court may scrutinize the allegations of the complaint,⁶⁹ some ju-

Brick Co., W.Va., 127 F. 804, 62 C. C.A. 484.

15 C.J. p 759 note 82.

58. N.Y.—Nowinski v. La Monte, 5 N.Y.S.2d 894, 168 Misc. 586.

15 C.J. p 759 note 83.

Interpretation

(1) The court must interpret the fact of the summons by what appears on the indorsement.—Nowinski v. La Monte, *supra*.

(2) Where, in a suit by several plaintiffs, they fail separately to state the amount sued for, the court has interpreted the summons as if it demanded judgment in separate amounts for the different plaintiffs for the amount for which judgment was demanded on the face of the summons.—Nowinski v. La Monte, *supra*.

Municipal court

(1) Test of jurisdiction of municipal court of New York City is amount fixed in summons.—Gunner v. E. R. Squibb & Sons, 269 N.Y.S. 661, 150 Misc. 83.

(2) This is true, even though the damages as itemized in an amended complaint aggregate an amount in excess of the jurisdiction of the municipal court.—Gunner v. E. R. Squibb & Sons, *supra*.

59. Ark.—More v. Woodruff, 5 Ark. 214.

60. Tex.—Blackwell v. Guaranty State Bank of Keller, Civ.App., 260 S.W. 895.

15 C.J. p 759 note 85.

Variation in statement

In purchaser's action for damages for deficiency in acreage, petition fixing damages at six hundred forty-five dollars, although shortage pleaded elsewhere amounted to only three hundred fifteen dollars, was held sufficient.—Reid v. Byrd, Tex.Civ.App., 34 S.W.2d 305.

Statement of amount held sufficient

Petition which alleged property depreciated in value from one thousand two hundred dollars to three hundred dollars as result of removal of trees therefrom claimed nine hundred dollars damages, and district court had jurisdiction.—Gulf States Utilities Co. v. Madeley, Tex.Civ.App., 36 S.W. 2d 256, error dismissed.

61. U.S.—Robinson v. Suburban Brick Co., W.Va., 127 F. 804, 62 C.C.A. 484.

62. N.Y.—Fader v. Silverman, 267 N.Y.S. 782, 149 Misc. 590—Gigliotti v. Hawkins, 221 N.Y.S. 733, 129 Misc. 180—Smith v. Dunn, 92 N.Y. S. 300, 46 Misc. 475.

Reference to complaint

In an action for money only, where summons, served with or without complaint, states amount for which judgment will be taken on default, by words "for relief demanded in complaint," and the complaint, when served, demands judgment for an amount in excess of the court's jurisdiction, the summons demands judgment for the same amount, and service does not confer jurisdiction on county court.—Mansson v. Nostrand, 170 N.Y.S. 285, 183 App.Div. 371.

63. N.Y.—Ussop v. American West African Line, 269 N.Y.S. 654, 151 Misc. 12—Connelly v. Oceanic Steam Nav. Co., 257 N.Y.S. 735, 144 Misc. 2—Rubenstein v. Frank De Rosa Co., 213 N.Y.S. 40, 126 Misc. 314.

64. Me.—Smith v. Hunt, 40 A. 695, 91 Me. 572.

Mass.—Massasoit-Pocasset Nat. Bank v. Borden, 117 N.E. 911, 228 Mass. 581—Ashuelot Bank v. Pearson, 14 Gray 521.

65. Cal.—Hammell v. Superior Court in and for Los Angeles County, 17

P.2d 101, 217 Cal. 5—San Jose Pacific Building & Loan Ass'n v. Corum, 37 P.2d 866, 2 Cal.App.2d 276.

Tex.—Kolb v. Gerson, Civ.App., 215 S.W. 987, dismissed for want of jurisdiction.

66. Fla.—Seaboard Air Line Ry. v. Ray, 42 So. 714, 52 Fla. 634.

Highest amount recoverable

In determining jurisdiction of county court, "amount in controversy" means full amount which could be recovered under allegations of plaintiffs' pleading.—Abilen & S. Ry. Co. v. Bagwell, Tex.Civ.App., 70 S.W. 2d 480, error dismissed.

67. Cal.—Heavilin v. Westchester Fire Ins. Co. of New York, 56 P. 2d 252, 12 Cal.App.2d 695—Harrison v. Superior Court in and for City and County of San Francisco, 39 P.2d 825, 2 Cal.App.2d 469—Wells Fargo Bank & Union Trust Co. v. Broad, 39 P.2d 241, 3 Cal. App.2d 45—Harris v. Scidell, 36 P. 2d 1104, 1 Cal.App.2d 410—Sturgeon v. Security First Nat. Bank, 33 P.2d 874, 139 Cal.App. 197.

Conn.—Grether v. Klock, 39 Conn. 133.

68. Cal.—Consolidated Adjustment Co. of California v. Superior Court of Sonoma County, 207 P. 552, 189 Cal. 92—Demartini v. Marini, 187 P. 985, 45 Cal.App. 418.

R.I.—Edwards v. Hopkins, 5 R.I. 138.

Tex.—Gulf, C. & S. F. Ry. Co. v. Hamrick, Civ.App., 231 S.W. 166.

69. Cal.—Consolidated Adjustment Co. of California v. Superior Court of Sonoma County, 207 P. 552, 189 Cal. 92—Heavilin v. Westchester Fire Ins. Co. of New York, 56 P. 2d 252, 12 Cal.App.2d 695—Lessor v. Pomin, 39 P.2d 451, 3 Cal.App. 2d 117—San Jose Pacific Building

risdictions holding that in testing the jurisdiction of a court the amount in controversy is determined by the allegations in the body of the petition, and not in the prayer for relief.⁷⁰ Where the cause of action alleged in the body of the complaint is one

for which the law fixes a definite and specific recovery, the amount for which judgment is demanded does not control where it is different from the amount shown in the body of the complaint;⁷¹ but in a suit for damages where the amount recoverable

& Loan Ass'n v. Corum, 37 P.2d 866, 2 Cal.App.2d 276—Merrill v. Hare, 34 P.2d 194, 139 Cal.App. 462—Trinidad Bean & Elevator Co. v. Superior Court of Los Angeles County, 17 P.2d 153, 128 Cal.App. 355—Demartini v. Marini, 187 P. 985, 45 Cal.App. 418.

Colo.—Sams Automatic Car-Coupler Co. v. League, 54 P. 642, 25 Colo. 129.

Ind.—Williamson v. Brandenburg, 32 N.E. 834, 133 Ind. 594.

La.—Purpera v. Fidelity & Deposit Co. of Maryland, App., 189 So. 639. N.Y.—Giglotti v. Hawkins, 221 N.Y. S. 733, 129 Misc. 180.

R.I.—Edwards v. Hopkins, 5 R.I. 138. Vt.—Thompson v. Colony, 6 Vt. 91.

Ad damnum clause insufficient

The jurisdictional statement in the complaint, and not the ad damnum clause, must be looked to to ascertain the court's jurisdiction.—Bloomer v. Jones, 125 P. 541, 22 Colo.App. 404.

Jurisdictional averment controls ad damnum clause

Where in replevin plaintiff alleged that the value of the property sued for was one thousand dollars and demanded a judgment for two thousand five hundred dollars, but also alleged that the amount in controversy for which relief was sought did not exceed two thousand dollars, such allegation controlled the ad damnum clause of the complaint, and, therefore, alleged a cause of action within the court's jurisdiction, so that defendant was not prejudiced by a subsequent amendment on appeal, still further reducing the ad damnum clause to seven hundred dollars.—Dunkle v. French, 116 P. 1039, 51 Colo. 170.

Erroneous classification

(1) Where the amount claimed is such as to give the court jurisdiction of a contract, but not of a tort action, it will have jurisdiction, if the allegations of fact in the complaint are sufficient to support an action for implied breach of contract, even though the complaint designates the action as one in tort.—Thomason v. Chicago Motor Coach Co., 1 N.E.2d 729, 284 Ill.App. 593.

(2) As respects jurisdiction of county court, damages for pain and suffering were recoverable as natural consequences of plaintiff's injuries, notwithstanding such damages were designated in plaintiff's petition as exemplary damages.—Wilson v. Yates, Tex.Civ.App., 120 S.W.2d 639.

Variation in statement

(1) Allegations as to plaintiff's inability to ascertain amount of business transacted by defendants and praying accounting are not sufficient to confer jurisdiction on superior court, amount allegedly due being elsewhere stated as definite sum.—Stevens v. Superior Court in and for Los Angeles County, 293 P. 620, 109 Cal.App. 522.

(2) Where the petition on its face showed that plaintiff, a broker, was not entitled to recover more than five hundred dollars for the owner's breach of a contract of sale, an allegation that a greater sum was a reasonable compensation cannot confer jurisdiction on the district court to hear the case.—Martin v. Jeffries, Tex.Civ.App., 153 S.W. 658.

Jurisdiction shown

Superior court was held not without jurisdiction of unlawful detainer proceeding on ground that record affirmatively showed lack of evidence as to monthly rental value of rental estate, where complaint alleged property to be worth one hundred twenty-three thousand dollars and rental value thereof one thousand five hundred dollars per month and asked for three thousand dollars damages.—San Jose Pacific Building & Loan Ass'n v. Corum, 37 P.2d 866, 2 Cal.App.2d 276.

Specific statement of sums sued for unnecessary

Complaint is not demurrable on jurisdictional grounds for failure to make specific statement of sums sued for, where, by any computation as to elements comprising total, amount prayed exceeded superior court's jurisdictional minimum.—McCune v. Harris, 50 P.2d 837, 9 Cal.App.2d 719.

70. S.C.—Williams v. Workman, 101 S.E. 833, 113 S.C. 487.

Tex.—Wilson v. Yates, Civ.App., 120 S.W.2d 639—Bankers' Health & Accident Co. v. Kimbro, Civ.App., 62 S.W.2d 262—Maryland Casualty Co. v. Overstreet, Civ.App., 42 S.W.2d 160, reversing on other grounds, Com.App., 61 S.W.2d 810—Upham Gas Co. v. Veasey, Civ.App., 28 S.W.2d 233—Taylor v. Buzan, Civ.App., 241 S.W. 1084—Gulf, C. & S. F. Ry. Co. v. Hamrick, Civ.App., 231 S.W. 166.

71. R.I.—Edwards v. Hopkins, 5 R.I. 138.

Tex.—Maryland Casualty Co. v. Overstreet, Com.App., 61 S.W.2d 810, reversing, Civ.App., 42 S.W.2d 160.

Where items specified

The amount in controversy is not the amount prayed for, nor the amount stated generally in the petition, where the items going to make up the total value or damages are specifically stated and the aggregate sum thereof differs from the amount prayed for or stated generally. The total of the items specifically set out comprises the amount in controversy in case of such conflict.—Wilson v. Yates, Tex.Civ.App., 120 S.W.2d 639—Abilene & S. Ry. Co. v. Bagwell, Tex.Civ.App., 70 S.W.2d 480, error dismissed—Davis v. Rush, Tex.Civ.App., 288 S.W. 504—Simms Oil Co. v. Hall, Tex.Civ.App., 281 S.W. 286—Taylor v. Buzan, Tex.Civ.App., 241 S.W. 1084—Gulf, C. & S. F. Ry. Co. v. Hamrick, Tex.Civ.App., 231 S.W. 166.

Mistake as to amount or value of item

(1) Miscalculation by pleader or by court cannot alter plain allegations of facts relied on for recovery, in determining whether suit is for amount larger than amount over which court has jurisdiction.—Wilson v. Yates, Tex.Civ.App., 120 S.W.2d 639.

(2) A petition which states generally that the amount involved is nine hundred fifty dollars and twenty-five cents, and which sets forth a detailed list of the items of property destroyed, aggregating nine hundred fifty dollars and twenty-five cents, while one item shows on its face a mistake either in the number of tons or the price per ton or the total value, will be construed as stating a cause of action within the court's jurisdiction on the theory that the mistake is in the number of tons.—Fort Worth & D. C. Ry. Co. v. Dy-sart, Tex.Civ.App., 136 S.W. 1117.

(3) In personal injury action in county court where plaintiff alleged that at time of accident she was earning ten dollars per week and would be out of employment for twelve months, court could not compute loss of earnings for twelve-month period as four hundred eighty dollars, notwithstanding allegation in plaintiff's petition that damages for loss of earnings amounted to four hundred eighty dollars.—Wilson v. Yates, supra.

is not definitely fixed by law or otherwise alleged, for jurisdictional purposes, the sum prayed for constitutes the amount in controversy.⁷² The amount demanded in the prayer for judgment or ad damnum clause does not determine the jurisdiction of the court when the real demand or value of the property involved otherwise clearly appears and the ad damnum is in excess of the real demand;⁷³ if it appears from the pleadings that plaintiff cannot recover the amount claimed, the amount claimed is the highest sum which plaintiff on the face of the pleadings appears to be entitled to recover.⁷⁴ If the cause of action stated is for an amount less than the jurisdictional limits of the court, it will not have jurisdiction, even though judgment is demanded for an amount within its jurisdiction;⁷⁵ but, where the cause of action alleged in the body of the complaint is for an amount within the jurisdiction of the court, the court has jurisdiction, even though the prayer for judgment is for an amount in excess of the court's jurisdiction.⁷⁶ On the other hand, if the cause of action set forth in the body of the petition, declaration, or complaint is for an amount in excess of the court's jurisdiction and the prayer for judgment is for a less amount, which is within the jurisdiction of the court, in some juris-

dictions the prayer operates as a waiver of the excess and the court has jurisdiction;⁷⁷ but in other jurisdictions, if the cause of action shown by the complaint is beyond the jurisdiction of the court, jurisdiction cannot be entertained by reason of the fact that the judgment demanded is for an amount within the jurisdiction of the court.⁷⁸

Value of property. In general the value alleged in the petition or complaint determines the value of the property involved for jurisdictional purposes,⁷⁹ and not the evidence of such value;⁸⁰ and, subject to the rule that the real amount actually in controversy controls the jurisdiction, considered *supra* § 53, if the allegation of amount is honestly made, it determines the jurisdiction of the court, even though the jury value the property at an amount not within the jurisdiction of the court.⁸¹ However, it has been held that, under the practice in some jurisdictions, where an allegation in the complaint as to the value of the property involved, putting it within the jurisdiction of the court, is denied in the answer, there must, in order to support a judgment in favor of plaintiff, be a special finding that the value of the property is such as to bring the case within the jurisdiction of the court.⁸²

72. R.I.—*Edwards v. Hopkins*, 5 R. I. 138.

Tex.—*Maryland Casualty Co. v. Overstreet*, Com.App., 61 S.W.2d 810, reversing, Civ.App., 42 S.W.2d 160.

73. Fla.—*A. Mortellaro & Co. v. Atlantic Coast Line R. Co.*, 107 So. 528, 91 Fla. 230—*Director General of Railroads v. Wilford*, 88 So. 256, 81 Fla. 430—*Seaboard Air Line Ry. v. Maxey*, 60 So. 353, 64 Fla. 487. Ind.—*Williamson v. Brandenburg*, 32 N.E. 834, 133 Ind. 594.

Iowa.—*Thompson v. Jackson*, 61 N. W. 1004, 93 Iowa 376, 27 L.R.A. 92.

N.Y.—*Giglotti v. Hawkins*, 221 N.Y. S. 733, 129 Misc. 180.

74. Cal.—*Consolidated Adjustment Co. of California v. Superior Court of Sonoma County*, 207 P. 552, 189 Cal. 92.

Conn.—*Atlantic Refining Co. v. Schoen*, 170 A. 478, 118 Conn. 26—*Hannon v. Bramley*, 32 A. 336, 65 Conn. 193—*Grether v. Klock*, 39 Conn. 133.

Ind.—*Collins v. Shaw*, 8 Ind. 516.

Bill of particulars

If plaintiff has filed a bill of particulars as part of the record, and it thereby appears that recovery cannot be had for an amount within the jurisdiction of the court, then a want of jurisdiction appears of record.—*Grether v. Klock*, 39 Conn. 133.

Dismissal

Action will be dismissed for want

of jurisdiction where the petition, although seeking to recover an amount within the jurisdiction of the court, on its face discloses that a recovery cannot be had for an amount within the jurisdiction of the court.—*Youngblood v. Independent Order of Puritans*, Tex.Civ.App., 197 S.W. 1116.

75. Cal.—*Lesser v. Pomin*, 39 P.2d 451, 3 Cal.App.2d 117.

Rent

Where total amount which plaintiff could recover under facts alleged in action for rent was less than the jurisdictional amount, the court was without jurisdiction.—*Lesser v. Pomin*, *supra*.

76. N.Y.—*Giglotti v. Hawkins*, 221 N.Y.S. 733, 129 Misc. 180.

Tex.—*Davis v. Rush*, Civ.App., 288 S.W. 504.

77. Colo.—*Litchfield v. Daniels*, 1 Colo. 268.

Iowa.—*McVey v. Johnson*, 39 N.W. 249, 75 Iowa 165.

Mass.—*Hapgood v. Doherty*, 8 Gray 373.

Minn.—*Wagner v. Nagel*, 23 N.W. 308, 33 Minn. 348.

N.Y.—*Giglotti v. Hawkins*, 221 N.Y.S. 733, 129 Misc. 180.

Okl.—*Oliver v. White*, 176 P. 946, 74 Okl. 60.

15 C.J. p 759 note 87.

78. Tex.—*Abilene & S. Ry. Co. v. Bagwell*, Civ.App., 70 S.W.2d 480, error dismissed—*Simms Oil Co. v.*

Hall, Civ.App., 281 S.W. 286—*Gulf, C. & S. F. Ry. Co. v. Hamrick*, Civ. App., 231 S.W. 166—*Rose v. Riddle*, 3 Tex.App.Civ.Cas. § 298.

15 C.J. p 759 note 88.

79. Tex.—*Lunsford v. Pearce*, Civ. App., 19 S.W.2d 71.

15 C.J. p 764 note 35.

Judgment need not recite value

It is not necessary for the judgment to recite the value of the mortgaged chattels and so it is immaterial that such a recital was not supported by evidence.—*Sparkman v. First State Bank of Handley*, Tex. Civ.App., 246 S.W. 724, conforming to answers to certified questions 244 S. W. 127, 113 Tex. 33.

Foreclosure of lien

The alleged value of the property on which a lien is sought to be foreclosed determines the jurisdiction of the court.—*Williams v. Greer*, Tex. Civ.App., 123 S.W.2d 247.

Affidavit of bail

Pecuniary jurisdiction in trover suit is not determinable by averments in affidavit for bail.—*Dorsey v. Cotton States Fertilizer Co.*, 167 S.E. 924, 46 Ga.App. 485.

80. Tex.—*Lunsford v. Pearce*, Civ. App., 19 S.W.2d 71—*Hunter v. Marlin Nat. Bank*, Civ.App., 195 S.W. 882.

81. Miss.—*Fenn v. Harrington*, 54 Miss. 733.

82. U.S.—*Greene v. Tacoma*, C.C.

In actions where the value of the property involved determines the amount in controversy, the petition or complaint must allege such value in order to confer jurisdiction;⁸³ but it has been stated that it is the practice in the courts of the United

States in actions where the demand is not money, and the nature of the action does not require the value of the property in controversy to be stated, to allow the value to be proved at the trial.⁸⁴ In jurisdictions in which in suits to foreclose liens on

Wash., 53 F. 562, following *Roberts v. Lewis*, 12 S.Ct. 781, 144 U. S. 653, 36 L.Ed. 579, in effect overruling *Clarion First Nat. Bank v. Hamor*, 49 F. 45, 1 C.C.A. 153, stating practice in Washington.

83. Colo.—*Greene v. Gibson*, 127 P. 239, 53 Colo. 346—*Bloomer v. Jones*, 125 P. 541, 22 Colo.App. 404. Tex.—*Allnutt v. Compton*, Civ.App., 294 S.W. 244—*Campbell v. Horton*, Civ.App., 261 S.W. 833, modified on other grounds on motion for rehearing 263 S.W. 630—*Graham v. Omar Gasoline Co.*, Civ. App., 253 S.W. 896.
15 C.J. p 764 note 30.

Sufficiency of pleadings

(1) A court whose jurisdiction is limited in actions to recover possession of chattels to chattels not exceeding one thousand dollars in value did not have jurisdiction of an action in which the complaint alleged the chattels to be worth "upwards of \$1,000."—*Kessler v. Zucker*, 202 N. Y.S. 770.

(2) A petition for an injunction and a receiver which states that the suit is for the recovery of sixteen thousand six hundred dollars worth of property from the possession of certain named parties, and seeks to place it in the hands of others for their management and control, or to distribute it among the owners thereof, and alleges that the daily increase in the value of the property is one hundred twenty-five dollars, is sufficient to show that the amount in controversy is within the jurisdiction of the district court.—*Woodward v. Smith*, Tex.Civ.App., 253 S. W. 847.

(3) Petition in trover alleging value of property sued for as ninety dollars with yearly value of ten dollars was held not demurrable as showing that amount involved exceeded hundred dollar jurisdiction of monthly term of Dublin city court, where no claim for hire was alleged.—*Dorsey v. Cotton States Fertilizer Co.*, 167 S.E. 924, 46 Ga.App. 485.

(4) Early cases on this point see 15 C.J. p 764 note 30 [b].

Form of plea

Where a petition alleges the taking of plaintiff's timber worth an amount within the county court's jurisdiction and a mingling of it with defendant's timber and seeks a recovery of the title and possession of the whole, but does not allege the value of defendant's timber with

which it was mingled, an exception to the petition on the ground that it affirmatively shows that the amount in controversy exceeds the jurisdiction of the court should not be sustained, but one on the ground that the value of all the timber was not shown should be sustained.—*Houston Oil Co. of Texas v. Davis*, Tex.Civ. App., 154 S.W. 337.

Appointment of receiver

(1) A petition for the dissolution of a firm and the appointment of a receiver, which contains no allegation of the value of the business or of plaintiff's interest therein, falls to show value sufficient to confer jurisdiction on the district court.—*Childs v. Brown*, Tex.Civ.App., 151 S.W. 1154.

(2) District court was held without jurisdiction to appoint receiver of corporation where petition did not allege amount of incorporation, number of shares of capital stock, or value thereof, value of property and assets of such corporation, or value of petitioner's interest or probable interest therein by which amount in controversy could be ascertained.—*Lubbock Oil Refining Co. v. Bourn*, Tex.Civ.App., 96 S.W.2d 569.

Corporate stock

(1) A petition for mandamus to compel a corporation to issue stock must contain an allegation of the value of the stock, and an allegation of the number of shares and their face value is not sufficient to show jurisdiction of a district court to determine the issue.—*Motex Oil Corporation v. Taylor*, Tex.Civ.App., 233 S.W. 520.

(2) A petition, alleging that plaintiff tendered into court six hundred sixty-six dollars and sixty-six cents as par value of corporation stock sought to be recovered, alleged that the minimum amount in controversy was six hundred sixty-six dollars and sixty-six cents.—*Berkman v. Levy*, Tex.Civ.App., 129 S.W.2d 397, error dismissed, judgment correct.

(3) Earlier cases on this point see 15 C.J. p 763 note 30 [c].

Injunction

(1) In an action to enjoin trespasses on real estate pending a suit to try title thereto, the county judge had no jurisdiction to grant a temporary injunction where the petition did not allege the value of the subject matter of the suit.—*Johnson v. Clemmons*, Tex.Civ.App., 158 S.W. 797.

(2) County court had jurisdiction of amount of claim for recovery of one hundred forty-seven dollars and ninety cents, but had no jurisdiction to issue temporary injunction to restrain shipment of cotton on which plaintiff claimed lien, where plaintiff failed to allege value of cotton.—*Booher v. Brown*, Tex.Civ.App., 87 S.W.2d 330.

(3) An action to recover two hundred seventy-six dollars and ninety cents actual damages for seller's breach of covenant not to carry on competitive business of printing or publishing a newspaper for period of five years and for injunctive relief was not within jurisdiction of county court but within jurisdiction of district court, where petition did not state value of covenant which it was sought to protect by injunctive relief.—*Price v. Miller*, Tex.Civ.App., 112 S.W.2d 761, error dismissed.

(4) County court was without jurisdiction of application to enjoin execution against trucks without alleging their value.—*Salamy v. Bruce*, Tex.Civ.App., 21 S.W.2d 380.

Mortgaged property claimed by third person

Where petition seeking foreclosure of chattel mortgage alleged that a third person set up some claim to the property, the value of the property, and not the debt due from mortgagor to mortgagee, was the amount in controversy, and, if such value was not alleged, the petition did not affirmatively show jurisdiction as to the third person.—*People's Ice Co. v. Phariss*, Tex.Civ.App., 203 S.W. 66.

To compel delivery of property

A petition for mandamus to compel an officer to accept a replevy bond and deliver property to the principal therein which did not show that the property was within the jurisdictional value of the court was insufficient.—*Keasler Lumber Co. v. Clark*, Tex.Civ.App., 151 S.W. 845.

To enforce contract

To confer jurisdiction on the county court to enforce a contract whereby defendant, in consideration of a grant of the oil in certain land, agreed to give plaintiff a portion of the oil to be produced, the value of such oil must be alleged to be within the jurisdiction of the court.—*Staley & Barnsdall v. Derden*, 121 S.W. 1136, 57 Tex.Civ.App. 142.

84. U.S.—*Beard v. Federy*, Cal., 3 Wall. 478, 18 L.Ed. 88.

personal property the value of the property on which the lien is sought to be enforced or the sum sued for, whichever is the greater, determines the jurisdiction of the court, see *supra* § 57, the petition, in order to confer jurisdiction on a court

whose jurisdiction is limited by a maximum limitation on the amount in controversy, must allege the amount sued for,⁸⁵ and the value of the property on which foreclosure of the lien is sought⁸⁶ at the

85. *Tex.*—*Lunsford v. Pearce*, Civ. App., 19 S.W.2d 71—*Whatley v. Gust*, Civ.App., 294 S.W. 245—*Walker Mercantile Co. v. J. R. Raney Co.*, Civ.App., 154 S.W. 317.

86. *Tex.*—*Campsey v. Brumley*, Com. App., 55 S.W.2d 810—*Jenkins v. Parks*, Com.App., 49 S.W.2d 714, reversing *Parks v. Jenkins*, Civ. App., 41 S.W.2d 507—*Matthews v. Webb*, Civ.App., 129 S.W.2d 1161—*Moore v. First State Bank of Livingston*, Civ.App., 127 S.W.2d 536—*Graddy v. Le Bus*, Civ.App., 127 S.W.2d 332—*Brown v. Ricks*, Civ. App., 120 S.W.2d 850—*Bishop & Babcock Sales Co. v. Haley*, Civ. App., 115 S.W.2d 772—*Parsons v. John Deere Plow Co.*, Civ.App., 113 S.W.2d 970—*Thompson v. Dalley*, Civ.App., 95 S.W.2d 1007—*Durham v. Simpson*, Civ.App., 77 S.W.2d 295—*Foster v. First Nat. Bank*, Civ.App., 70 S.W.2d 764—*D. V. Brooks Co. v. Kinney-Shotts Inv. Co.*, Civ.App., 58 S.W.2d 1062, affirmed *Kinney-Shotts Inv. Co. v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 307—*D. V. Brooks Co. v. Vera*, Civ.App., 58 S.W.2d 1061, affirmed *Vera v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 306—*Agricultural Bond & Credit Co. v. Alderson*, Civ.App., 57 S.W.2d 595—*Michot v. Rizer*, Civ.App., 46 S.W.2d 1111—*Leifeste v. Stokes*, Civ. App., 45 S.W.2d 1006—*Fuqua v. Mapes*, Civ.App., 40 S.W.2d 847, affirmed, Com.App., 57 S.W.2d 97—*Welder v. First State Bank of Skidmore*, Civ.App., 37 S.W.2d 848—*Richardson v. Renfro Hardware Co.*, Civ.App., 33 S.W.2d 466—*Harris v. Gregory*, Civ.App., 23 S.W.2d 748—*McIntyre v. Oliver Motor Co.*, Civ.App., 20 S.W.2d 241, error dismissed—*Lunsford v. Pearce*, Civ. App., 19 S.W.2d 71—*Williams v. Givins*, Civ.App., 11 S.W.2d 224—*Doan v. Star Hardware & Furniture Co.*, Civ.App., 296 S.W. 639—*Whatley v. Gust*, Civ.App., 294 S.W. 245—*Winerich Motor Sales Co. v. Gombert*, Civ.App., 293 S.W. 1113—*Jaco v. W. A. Nash Co.*, Civ. App., 289 S.W. 1089—*McMillan v. First Nat. Bank of Rule*, Civ.App., 269 S.W. 112—*Johnson v. American Oil Pump & Tank Co.*, Civ.App., 268 S.W. 1055—*Wilkerson v. Huddleston*, Civ.App., 258 S.W. 884—*Butts v. Hudgins*, Civ.App., 255 S.W. 762—*McKee v. Le Fors*, Civ.App., 253 S.W. 598—*Smart v. Bank of Logansport, La.*, Civ.App., 249 S.W. 521—*Davis v. First Nat. Bank of El Paso*, Civ.App., 248 S.W. 119—

Nichols v. Ellis, Civ.App., 246 S.W. 713—*Henderson v. Glezen*, Civ. App., 240 S.W. 666—*Huff v. McDonald*, Civ.App., 239 S.W. 365—*Tant v. Baldwin Piano Co.*, Civ. App., 217 S.W. 239—*People's Ice Co. v. Phariss*, Civ.App., 203 S.W. 66, stating that the case of *Cantrell v. Cawyer*, Civ.App., 162 S.W. 920, holds to the contrary, and also stating that all the courts of civil appeals hold that it is necessary to allege the value of the property on which foreclosure is sought—*Watts v. Stewart*, Civ.App., 301 S.W. 1061—*Hunter v. Marlin Nat. Bank*, Civ.App., 195 S.W. 882—*Glasscock v. Sinks*, Civ.App., 185 S.W. 406—*Wilson v. Ford*, Civ.App., 159 S.W. 73—*Walker Mercantile Co. v. J. R. Raney Co.*, Civ.App., 154 S.W. 317—*Mangum v. Buffalo Pitts Co.*, Civ.App., 131 S.W. 1196.

Demurrer

Petition in chattel mortgage foreclosure suit, not alleging value of automobile, was held demurrable.—*Peters v. Brown*, Civ.App., 58 S.W.2d 1063, affirmed *Brown v. Peters*, 94 S.W.2d 129, 127 Tex. 300—*D. V. Brooks Co. v. Vera*, Civ.App., 58 S.W.2d 1061, affirmed *Vera v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 306.

Limitation to amount of claim

The county court is without jurisdiction in a suit on a money demand for an amount within the jurisdiction of the court and for foreclosure of a lien on cotton, where the petition failed to allege the value of the cotton, although the prayer for execution was limited to so much thereof as was necessary to satisfy the lien.—*Booher v. Brown*, Tex.Civ. App., 87 S.W.2d 330.

Sufficiency of allegations

(1) Allegation that consideration for note wholly failed was sufficient to show that property on which seller sought foreclosure did not exceed court's jurisdiction.—*Jones v. National Cash Register Co.*, Tex.Civ. App., 52 S.W.2d 1083, error dismissed.

(2) A statement of the purchase price of the property is not a sufficient allegation of its value.—*Ollouqui v. Duran*, 92 S.W.2d 436, 127 Tex. 156, setting aside, Civ.App., 60 S.W.2d 808.

(3) A contra case in a lower court held that a statement of the purchase price in the seller's petition was sufficient to show value of property.—*Jones v. National Cash Register Co.*, *supra*.

(4) Where the price agreed on by the parties for the property, if treated as the value, was an amount within the jurisdiction of the court, and this price was alleged, and the evidence received without objection fixed the value of the chattels at an amount within the jurisdiction of the court, the court had jurisdiction to render judgment for the debt and for foreclosure of the mortgage, although the petition failed to allege the value of the property.—*Edwards v. Mayes*, Tex.Civ.App., 136 S.W. 510.

(5) An allegation that both parties agreed to a sale of the car for four hundred fifty dollars and that plaintiff was damaged in the sum of three hundred dollars is insufficient to show the value of the automobile.—*Hodgkinson v. Hartwell*, Tex.Civ. App., 226 S.W. 457.

Allegation in mortgage set out

Petition alleging nonpayment of note and execution of chattel mortgage, set out, warranting that property was of reasonable value of one thousand dollars, sufficiently alleged value of property.—*Fuqua v. Mapes*, Tex.Com.App., 57 S.W.2d 97, affirming, Civ.App., 40 S.W.2d 847.

Affidavit of sequestration insufficient

(1) Allegations of value of mortgaged chattels set forth in affidavit of sequestration could not be imported into petition for foreclosure since allegation of value must be in the petition itself.—*Brown v. Peters*, 94 S.W.2d 129, 127 Tex. 300, affirming *Peters v. Brown*, Civ.App., 58 S.W.2d 1063, in effect overruling *Dubois v. Walters*, Tex.Civ.App., 289 S.W. 751, which the opinion stated conflicted with the case affirmed—*Moore v. First State Bank of Livingston*, Tex.Civ.App., 127 S.W.2d 536—*D. V. Brooks Co. v. Vera*, Civ.App., 58 S.W.2d 1061, affirmed *Vera v. D. V. Brooks Co.*, 94 S.W.2d 132, 127 Tex. 306—*Kiechler v. Klein*, Tex.Civ. App., 246 S.W. 1079.

(2) Affidavit filed during progress of suit for purpose of procuring issuance of writ of sequestration to impound property involved in suit is not a "pleading" or part of "pleadings" as respects jurisdiction of county court of chattel mortgage foreclosure suit, wherein petition did not allege value of mortgaged property.—*Brown v. Peters*, 94 S.W.2d 129, 127 Tex. 300, affirming *Peters v. Brown*, Civ.App., 58 S.W.2d 1063.

Existence of lien

An amended petition in the county court, which alleges that since the

time of the filing of the suit;⁸⁷ and the fact that the sum sued for is within the jurisdiction of the court will not be sufficient to confer jurisdiction without an allegation showing that the value of the property covered by the lien is not in excess of the jurisdictional amount of the court.⁸⁸ If, however, suit to enforce the lien is brought in a court which, as to the amount in controversy, has no maximum limit on its jurisdiction, the value of the property covered by the lien need not be alleged if the amount sued for is within the jurisdiction of the court.⁸⁹ It has been held that plaintiff's failure to allege the value of the property involved may be cured by an allegation of value in defendant's pleadings,⁹⁰ but that proof of value is not sufficient;⁹¹ and that the failure to allege the value of the property does not defeat the jurisdiction of the court to render a personal judgment where it does not foreclose the lien and exercises no jurisdiction over the mortgaged property.⁹²

In some jurisdictions in an action in claim and delivery the complaint need not allege the value of the property sought to be recovered, but it is sufficient if the complaint alleges damages in a sum within the jurisdiction of the court.⁹³ In general the amount alleged in the petition, declaration, or complaint as to the value of the property replevined

governs for jurisdictional purposes.⁹⁴ However, in some jurisdictions in a replevin proceeding the affidavit fixes the value of the property sought to be recovered for jurisdictional purposes.⁹⁵ In still other jurisdictions, in a replevin suit in which the value of the property is not stated, if the jury bring in a verdict fixing the value of the property at a sum not within the jurisdiction of the court, such valuation ousts the jurisdiction of the court, in the absence of a showing that plaintiff had reason to believe, or did actually believe, the valuation to be within the court's jurisdiction.⁹⁶

Failure to state cause of action. If the petition on its face shows that plaintiff is not entitled to recover under the law an amount within the jurisdiction of the court, the court has no jurisdiction of the cause.⁹⁷ So where the petition fails to state a cause of action as to a claim made, the amount thereof cannot be considered in determining the amount in controversy;⁹⁸ and, even though the amount claimed in the petition is sufficient to give the court jurisdiction of the case, if the facts alleged are such as to show no cause of action as to such part of the whole sum sued for as to reduce it below the amount for which the court has jurisdiction, the suit should be dismissed;⁹⁹ but a mere insufficiency of the petition to state a cause of ac-

institution of the action defendant has paid off a seventy-five dollar note secured by a chattel mortgage, renders the allegations in the original petition as to the execution of such note and mortgage ineffective to show the existence of a lien sufficient to confer jurisdiction on the court.—Thompson v. Perryman, Tex.Civ.App., 141 S.W. 184.

87. Tex.—Peters v. Hubb Diggs Co., Civ.App., 35 S.W.2d 449, error dismissed.

Sufficiency of allegation

Allegation that mortgage was executed on binder of the value of one hundred dollars and two tractors of the value of one hundred fifty dollars each was held intended to allege the value at the time of the filing of the suit and not at the time of the execution of the mortgage.—Peters v. Hubb Diggs Co., supra.

88. Tex.—Michot v. Rizer, Civ.App., 46 S.W.2d 1111—Stephens v. Collins Piano Co., Civ.App., 28 S.W.2d 255—Williams v. Givins, Civ.App., 11 S.W.2d 224—McKee v. Le Fors, Civ.App., 253 S.W. 598—Walker Mercantile Co. v. J. R. Raney Co., Civ.App., 154 S.W. 317.

89. Tex.—Walker Mercantile Co. v. J. R. Raney Co., Civ.App., 154 S.W. 317.

90. Tex.—Jones v. National Cash Register Co., Civ.App., 52 S.W.2d

1083, error dismissed—Stephens v. Collins Piano Co., Civ.App., 28 S.W.2d 255.

91. Tex.—Johnson v. American Oil Pump & Tank Co., Civ.App., 268 S.W. 1055.

92. Tex.—Fuqua v. Mapes, Civ.App., 40 S.W.2d 847, affirmed on the ground that the petition contained a sufficient allegation of the value of the property, Com.App., 57 S.W.2d 97.

93. Nev.—Johnson v. Johnson, 27 P.2d 532, 55 Nev. 109.

94. Ind.—Markin v. Jornigan, 3 Ind. 548.

15 C.J. p 764 note 38.

95. Fla.—Goldstein v. Miami Wrecking & Salvage Co., 137 So. 283, 103 Fla. 149.

96. Miss.—Stephen v. Eiseman, 54 Miss. 535.

97. Tex.—City of Fort Worth v. Zane-Cetti, Civ.App., 29 S.W.2d 958, reversing Zane-Cetti v. City of Fort Worth, Civ.App., 21 S.W.2d 355.

Nominal damages

Petition asking for compensatory damages, but stating, as a matter of law, a cause of action for only nominal damages does not state cause within jurisdiction of court not having jurisdiction of such nominal

sum.—Spencer v. Davis, Tex.Civ.App., 298 S.W. 443.

98. Cal.—Larson v. Du Bain, 27 P.2d 393, 135 Cal.App. 433.

La.—Claverie v. Lorenz, 1 La.App. 606.

N.C.—Williams v. Williams, 125 S.E. 482, 188 N.C. 728.

Tex.—North Texas Building & Loan Ass'n v. Samson, Civ.App., 84 S.W.2d 571, error dismissed—Askey v. Oliver Chilled Plow Works, Civ.App., 57 S.W.2d 210, error dismissed—Tyler v. Coker, Civ.App., 124 S.W. 729.

99. N.C.—Williams v. Williams, 125 S.E. 482, 188 N.C. 728.

Tex.—Carswell v. Habberzettie, 86 S.W. 738, 99 Tex. 1, 122 Am.S.R. 597—Western Union Telegraph Co. v. Arnold, 79 S.W. 8, 97 Tex. 365, affirming 77 S.W. 249, 33 Tex.Civ.App. 306, and stating that the decisions of the court upon the question are conflicting, and the opposite position is sustained by the opinion in Tidball v. Elchoff, 17 S.W. 263, 66 Tex. 58—Rowell v. Western Union Tel. Co., 12 S.W. 534, 75 Tex. 26—Low v. Dowbarn, 26 Tex. 507—Tindle v. Elms, Civ.App., 108 S.W.2d 437—Crowe v. North American Accident Ins. Co., Civ.App., 96 S.W.2d 670, error dismissed—Lone Star Finance Corporation v. Davis, Civ.App., 77 S.

tion will not show a want of jurisdiction, it being necessary for the pleadings to show that no cause of action for such items can be stated consistent with the facts alleged.¹

Allegations by defendant. An allegation in the answer that the amount in controversy is less than the amount necessary to confer jurisdiction cannot avail to defeat jurisdiction where the amount claimed in the complaint is within the jurisdiction of the court,² and where the complaint or petition fails to allege the amount in controversy in an application for a receivership, allegations of the value of the subject matter of the litigation, made in a mo-

tion to discharge the receiver, will not validate the insufficiency of the petition.³ A plea of payment of one of several notes sued on does not of itself lessen the amount in controversy as fixed by the petition or complaint,⁴ nor does a denial of indebtedness reduce the amount in controversy.⁵

Construction of pleadings. Subject to the rule that the pleadings must positively show jurisdiction and that it is not sufficient for the petition merely to show that the court may have jurisdiction,⁶ the pleadings will be construed liberally in favor of the court's jurisdiction.⁷ A court of limited jurisdiction is without jurisdiction where the amount de-

W.2d 711—Robert & St. John Motor Co. v. Bumpass, Civ.App., 65 S.W.2d 399, error dismissed—Askey v. Oliver Chilled Plow Works, Civ. App., 57 S.W.2d 210, error dismissed—Smith v. Nesbitt, Civ.App., 235 S.W. 1104, conforming to certified questions 230 S.W. 976, 111 Tex. 186—Texas & P. Ry. Co. v. Butler, Civ.App., 86 S.W. 800—Gaddis v. Western Union Tel. Co., 77 S.W. 37, 33 Tex.Civ.App. 391.

On sustaining demurrer

If the sustaining of demurrer to petition reduces sum sought to be recovered to an amount below jurisdiction of court, the suit should be dismissed.—Wood County v. Cate, 12 S.W. 536, 75 Tex. 219—Tindle v. Elms, Tex.Civ.App., 108 S.W.2d 437—15 C.J. p 776 note 24 [a].

Sustaining exceptions to part of claims

Where exceptions to items alleged in the petition are sustained and the amount in controversy thereafter remaining is less than the minimum amount within the jurisdiction of the court, the petition should be dismissed.—Haddock v. Taylor, 11 S.W. 1093, 74 Tex. 216—Grief v. Texas Cent. R. Co., Tex.Civ.App., 163 S.W. 345—Browning v. El Paso Lumber Co., Tex.Civ.App., 140 S.W. 386—Barrett v. Wentz, Tex.Civ.App., 138 S.W. 428—Kopperl v. Western Union Telegraph Co., Tex.Civ.App., 85 S.W. 1018.

Items held not unrecoverable

County court had jurisdiction of action for breach of warranty that bull was breeder, where it was alleged that bull bought for one hundred ninety-five dollars was valueless and that plaintiffs lost calf crop of value of three hundred twenty-five dollars, since amount in controversy was more than two hundred dollars.—Farmer v. Kay Bros., Tex.Civ.App., 73 S.W.2d 546, error dismissed.

Insufficiency of count

Where a complaint contains a count not stating a cause of action and the remaining counts demand sums aggregating less than the minimum

to which the jurisdiction of the court extends, the action cannot be entertained.—Reeg v. McArthur, 119 P. 105, 17 Cal.App. 203.

1. Tex.—Hearn v. Ralph Sollitt & Sons Const. Co., Civ.App., 93 S.W. 2d 551—Lone Star Finance Corporation v. Davis, Civ.App., 77 S.W. 2d 711.

2. Or.—Corbell v. Childers, 21 P. 670, 17 Or. 528.
Tex.—Nations v. Lindley, Civ.App., 275 S.W. 163.
15 C.J. p 760 note 92.

3. Tex.—Lubbock Oil Refining Co. v. Bourn, Civ.App., 96 S.W.2d 569.

4. Tex.—Brunson v. Dawson State Bank, Civ.App., 175 S.W. 438.

5. Cal.—Sunset Lumber Co. v. Dunlap, 163 P. 338, 32 Cal.App. 492.

6. Tex.—Abilene & S. Ry. Co. v. Bagwell, Civ.App., 70 S.W.2d 480, error dismissed stating that the cases of Cantrell v. Cawyer, Civ. App., 162 S.W. 919, Robbins v. Winters, Civ.App., 203 S.W. 149, Pittman & Harrison v. Boatenhamer, Civ.App., 210 S.W. 972, Houston Oil Co. v. Davis, Civ.App., 154 S.W. 387, Magnolia Cotton Oil Co. v. Martin, Civ.App., 201 S.W. 190, which were decided under the theory that a county court has jurisdiction if there are allegations to show that it may have, and there are no allegations showing affirmatively that it has not, should be regarded as overruled by the opinion in Campsey v. Brumley, Com. App., 55 S.W.2d 810—Williams v. Givins, Civ.App., 11 S.W.2d 224.

7. N.C.—Armfield Co. v. Saleeby, 100 S.E. 611, 178 N.C. 298—Mitchem v. Pasour, 92 S.E. 322, 173 N.C. 487.
Tex.—Williams v. Kelley, Civ.App., 77 S.W.2d 263—Pittman & Harrison Co. v. Boatenhamer, Civ.App., 210 S.W. 972, dismissed for want of jurisdiction—Magnolia Cotton Oil Co. v. Martin, Civ.App., 201 S.W. 190—Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank, Civ.App., 192 S.W. 1098.

"The rule is that, after indulging all intendments in favor of the pleading, unless it then plainly appears from the allegations that the court is without jurisdiction of the amount, it should retain jurisdiction."—Maryland Casualty Co. v. Hipp, Tex.Civ. App., 22 S.W.2d 147, 149—Knoohuizen v. Nicholl, Tex.Civ.App., 257 S.W. 972, 974.

Every reasonable intendment will be indulged in favor of the petition.—Pecos, etc., R. Co. v. Rayzor, 172 S.W. 1103, 106 Tex. 544—Worth Finance Co. v. Charlie Hillard Motor Co., Tex.Civ.App., 131 S.W.2d 416—Peters v. Hubb Diggs Co., Tex.Civ. App., 35 S.W.2d 449, error dismissed.

Interest

(1) Where petition is doubtful as to when interest sought is to begin, it will be construed to begin when the judgment was rendered, where, if it began before such time, the court would not have had jurisdiction on account of amount involved.—Magnolia Cotton Oil Co. v. Martin, Tex.Civ.App., 201 S.W. 190.

(2) In action in the county court on a policy of fire insurance, where petition asked for judgment for one thousand dollars, amount of policy, and further general and special relief, it will not be construed as asking for interest or any amount in excess of one thousand dollars.—Merchants' Reciprocal Underwriters of Dallas v. First Nat. Bank, Tex. Civ.App., 192 S.W. 1098.

(3) In action in county court for breach of implied warranty of seeds, a complaint alleging that if the seed had been as represented plaintiff would have produced five tons of broomcorn on his land, worth two hundred dollars a ton over and above all expenses of raising and harvesting, was not bad as in excess of jurisdiction of the county court, plaintiff not asking for judgment in excess of one thousand dollars and not asking for interest in any form.—Pittman & Harrison Co. v. Boatenhamer, Tex.Civ.App., 210 S.W. 972, dismissed for want of jurisdiction.

manded is indefinite and such that it is not necessarily within the court's jurisdiction.⁸ In an action on a note in a court not having jurisdiction of suits to foreclose liens on land, the mere statement in the pleadings of the existence of a lien on land securing the note, does not deprive the court of jurisdiction, the petition not seeking a foreclosure of the lien.⁹

Amendment of pleadings. In some jurisdictions, pleadings which do not show an amount in controversy within the jurisdiction of the court may not be amended so as to demand a jurisdictional amount,¹⁰ as by an amendment reducing the amount claimed.¹¹ In other jurisdictions, if the pleadings

show an amount in controversy not within the jurisdiction of the court, they cannot be amended so as to confer jurisdiction.¹² In still other jurisdictions if the action was brought in good faith to recover an amount within the jurisdiction of the court, the court has jurisdiction to allow an amendment so as to show what was the sum originally claimed;¹³ but an amendment is not proper for the purpose of conferring jurisdiction on the court.¹⁴ By the weight of authority, however, a petition which fails to show that the amount involved is within the jurisdiction of the court may be amended to show a jurisdictional amount in controversy¹⁵ by increasing¹⁶ or reducing¹⁷ the amount claimed

Variation between counts

Where, in one count of petition, plaintiff sued for one hundred fifty dollars as the value of a house, and in another count alleged house to be worth two hundred fifty dollars, and sued for that amount in conversion, the petition, on its face, did not show that less than two hundred dollars was involved, and was sufficient to give jurisdiction to county court.—Robbins v. Winters, Tex.Civ. App., 203 S.W. 149.

8. N.Y.—Gerken v. Gerken, 199 N.Y. S. 169.

Failure to demand definite amount

In an action for breach of an employment contract in which plaintiff failed to demand a definite amount, the complaint was construed as seeking to recover damages only up to the jurisdictional amount for which the municipal court could render judgments.—Ker v. Stern, 175 N.Y.S. 475, 107 Misc. 4.

9. Tex.—Carter v. Gray, Civ.App., 52 S.W.2d 91, error dismissed 81 S.W.2d 647, 125 Tex. 219.

10. N.H.—Holt v. Molony, 2 N.H. 322.

11. Ala.—Davis v. Jerrell, 149 So. 720, 25 Ala.App. 524.

Amendment to amendment

After an amendment to the complaint which ousts the jurisdiction of the court by increasing the amount claimed to an amount in excess of the court's jurisdiction, plaintiff cannot subsequently amend his complaint again by reducing the amount claimed to an amount within the jurisdictional limits of the court.—Egan v. Rounds, 216 N.W. 878, 52 S.D. 139.

12. N.Y.—Byrne v. Padden, 162 N. E. 20, 248 N.Y. 243, reversing 223 N.Y.S. 596, 221 App.Div. 764, appeal granted 224 N.Y.S. 943, 222 App.Div. 866—McConnell v. Williams S. S. Co., 267 N.Y.S. 554, 239 App.Div. 393, modifying 262 N.Y.S. 574, 146 Misc. 512, and motion de-

nied 193 N.E. 297, 265 N.Y. 513, affirmed 193 N.E. 336, 265 N.Y. 594. Vt.—Sanders v. Pierce, 35 A. 377, 68 Vt. 468.

Tort action

Where the declaration in an action of trespass vi et armis contains no statement of the damages claimed, except a statement in the ad damnum of an amount less than the jurisdictional amount of the court, although such statement be a clerical error, the court could not confer jurisdiction on itself by amendment of the declaration.—Sanders v. Pierce, supra.

13. N.C.—Boyd v. Roanoke R. & Lumber Co., 43 S.E. 631, 132 N.C. 184.

14. N.C.—Boyd v. Roanoke R. & Lumber Co., supra.

15. Colo.—Southwestern Land Co. v. Hickory Jackson Ditch Co., 33 P. 275, 18 Colo. 489.

La.—Glass v. Stewart, 133 So. 787, 16 La.App. 387.

Tex.—Wood County v. Cate, 12 S.W. 535, 75 Tex. 215—Mansfield Mill & Elevator Co. v. Nichols, Civ.App., 265 S.W. 746.

Wis.—McNab v. Noonan, 28 Wis. 434.

Recoupment or counterclaim

A recoupment or counterclaim may be amended so as to give the court jurisdiction.—Ward v. Hauck, 93 A. 533, 87 N.J.Law 198—Lester v. Karasik, 170 A. 842, 12 N.J.Misc. 195.

Foreclosure cases

The rule applies to a petition to foreclose a lien on personal property.—Lelfeste v. Stokes, Tex.Civ. App., 45 S.W.2d 1006—McIntyre v. Oliver Motor Co., Tex.Civ.App., 20 S.W.2d 241, error dismissed.

Partition proceeding

A bill in equity to partition land lying in two counties may be amended to show that the larger part in value is situated in the county in which the action is brought in a state in which such an allegation is

a jurisdictional averment.—Nevin v. Catanach, 107 A. 856, 264 Pa. 523.

16. Fla.—Barber v. Smith, 190 So. 438.

Ga.—American Liberty Fire Ins. Co. v. McGlothlin, 140 S.E. 354, 165 Ga. 173.

Tex.—McDannell & Co. v. Cherry, 64 Tex. 177—Mecca Fire Ins. Co. v. Blohopolo, Civ.App., 141 S.W. 358—Watson v. Mirike, 61 S.W. 538, 25 Tex.Civ.App. 527.

15 C.J. p 759 note 90.

Contra

In an early case in a lower court, it was held that the petition, in an action for an amount less than that of which the court has jurisdiction, cannot be amended by an allegation adding to such an amount so as to bring it within the jurisdiction of the court.—Gleaton v. Cothran, 84 S.E. 486, 16 Ga.App. 35.

Items stricken and added

Where items are stricken out of a complaint and others added by amendment the jurisdiction will be determined by the amount of those not stricken out and of those so added.—Missouri, K. & T. R. Co. v. Kolbe, 65 S.W. 34, 95 Tex. 76.

Omission of ad damnum

The omission of an ad damnum clause may be supplied by amendment.

Me.—McLellan v. Crofton, 6 Me. 307. Vt.—Lamphere v. Cowen, 42 Vt. 180.

17. Ind.—Dick v. Niles, 17 Ind. 239. La.—Johnson v. National Casualty Co., 4 La.App. 574.

Mass.—Hall v. Hall, 86 N.E. 363, 200 Mass. 194.

N.J.—Harris v. Roth, 143 A. 557, 6 N.J.Misc. 1006.

Ohio.—State ex rel. Talaba v. Moreland, 5 N.E.2d 159, 132 Ohio St. 71.

Pa.—Shlifer v. Bergdoll, 69 Pa.Super. 86.

Tex.—Williams v. Trinity Gravel Co., Civ.App., 297 S.W. 878.

Time allowed

Amendment may be made even

or involved, or by permitting the withdrawal of one or more counts sued on.¹⁸ However, in jurisdictions which authorize the remission, for the purpose of conferring jurisdiction, of only the whole of a severable portion of a claim, an amendment reducing the value of services sued for, merely for the purpose of conferring jurisdiction, is not allowed;¹⁹ but where the amount claimed is unliquidated, and the pleader by inadvertence or mistake fixes his damages at a sum in excess of the jurisdiction of the court, he may by amendment filed in good faith retain the jurisdiction by reducing his demand to a jurisdictional amount,²⁰ so that an amendment which does not arbitrarily reduce the demand, but rather shows that plaintiff never did have, nor believed he had, a claim in excess of the jurisdictional amount is proper.²¹ It is proper for the court to refuse to allow an amendment increasing the amount claimed, where it is clearly an attempt to bring the case within the jurisdiction of the court without regard to the substantiality of the claim.²² In New York, as appears *supra* notes 62, 63 of this section, where at the time of the com-

mencement of the suit by the service of summons it appears that the amount demanded is in excess of the jurisdictional limitation of the court, as where the amount appears in a complaint served with the summons, or in the summons by a statement therein of the amount sued for or a reference therein to the demand to be made in the complaint, the court has no jurisdiction; and the case cannot be brought within the jurisdiction of the court by an amendment reducing the amount demanded in the complaint to an amount within the court's jurisdiction;²³ but where the summons is served without any complaint, and contains no statement of the amount sued for, the court has acquired jurisdiction, and may thereafter amend the complaint, if it demands judgment for more than the amount within the jurisdiction of the court.²⁴ If the amount involved is such as to give an inferior court jurisdiction, but insufficient to give jurisdiction to the tribunal in which the action is brought, plaintiff has no right to amend his complaint by adding a cause of action over which the court does have jurisdiction.²⁵

after close of testimony and entry of decree nisi.—*Porter v. Zeuger Milk Co.*, 7 A.2d 77, 136 Pa.Super. 48.

Failure to waive in original complaint immaterial

Failure of original demand to contain waiver of excess immaterial, after amendment of demand to include waiver of damages over jurisdictional amount.—*Harris v. Roth*, 143 A. 557, 6 N.J.Misc. 1006.

Amendment of amended petition

Where a petition claiming interest, which did not raise the total amount beyond the jurisdictional limit, was amended at a time when additional interest had accrued so as to raise the total amount above the maximum jurisdiction, the excess of interest may be waived and jurisdiction thus restored.—*San Antonio, etc., R. Co. v. Barnett*, 66 S.W. 474, 27 Tex.Civ.App. 498.

Contra dictum

It has been stated in a case in which such was not the fact that, if at the time the original petition was filed the total amount sued for, including the interest, had exceeded the jurisdiction of the court, the amendments thereafter filed, seeking to recover less than the jurisdictional amount, would have been unavailing.—*Rotan Grocery Co. v. Missouri, etc., R. Co.*, Tex.Civ.App., 142 S.W. 623.

18. N.C.—*Baer v. McCall*, 193 S.E. 406, 212 N.C. 339.

19. Tex.—*Taylor v. Buzan*, Civ.App., 241 S.W. 1084.

20. Tex.—*Houston E. & W. T. Ry. Co. v. Southern Pine Lumber Co.*, Civ.App., 6 S.W.2d 418—*Commercial Credit Co. v. Moore*, Civ.App., 288 S.W. 508.

21. Tex.—*D. V. Brooks Co. v. Kinney-Shotts Inv. Co.*, Civ.App., 58 S.W.2d 1062, affirmed *Kinney-Shotts Inv. Co. v. D. V. Brooks Co.*, Com. App., 94 S.W.2d 132, 127 Tex. 307.

22. Cal.—*Philpott v. Superior Court in and for Los Angeles County*, 36 P.2d 635, 1 Cal.2d 512, 95 A.L.R. 990.

23. N.Y.—*McIntyre v. Carriere*, 17 Hun 64—*McConnell v. Williams S. S. Co.*, 267 N.Y.S. 554, 239 App.Div. 393, modifying 262 N.Y.S. 574, 146 Misc. 512, and motion denied 193 N.E. 297, 265 N.Y. 513, affirmed 193 N.E. 336, 265 N.Y. 594—*Gigliotti v. Jacksina*, 201 N.Y.S. 241, 206 App.Div. 368—*Halpern v. Langrock Bros. Co.*, 155 N.Y.S. 167, 169 App. Div. 464—*National Surety Co. v. Rosenberg*, 142 N.Y.S. 1043, 158 App.Div. 896—*Heffron v. Jennings*, 73 N.Y.S. 410, 66 App.Div. 443—*Fader v. Silverman*, 267 N.Y.S. 782, 149 Misc. 590—*Dobrikin v. Union Ry. Co.*, 225 N.Y.S. 376, 130 Misc. 796, motion granted 166 N.E. 324, 250 N.Y. 561—*Central Park-West 84th St. Corporation v. Cusack*, 224 N.Y.S. 414, 130 Misc. 770—*Gigliotti v. Hawkins*, 221 N.Y.S. 733, 129 Misc. 180—*Libow v. Lauer*, 210 N.Y.S. 618, 125 Misc. 259.

Reference in summons to complaint
Where the summons, served with or without a complaint, although it

does not state the amount for which judgment will be taken in the event of default, states, "for the relief demanded in the complaint," and the complaint, whether served with the summons or thereafter, demands judgment for an amount in excess of the jurisdiction of the court, the court does not have jurisdiction, and the defect cannot be cured by amendment.—*Manasson v. Nostrand*, 170 N.Y.S. 285, 183 App.Div. 371.

24. N.Y.—*Van Clief v. Van Vechten*, 29 N.E. 1017, 130 N.Y. 571, reversing 8 N.Y.S. 760, 55 Hun 467—*McIntyre v. Carriere*, 17 Hun 64—*Gigliotti v. Jacksina*, 201 N.Y.S. 241, 206 App.Div. 368—*National Surety Co. v. Rosenberg*, 142 N.Y.S. 1043, 158 App.Div. 896—*Connolly v. Oceanic Steam Nav. Co.*, 257 N.Y.S. 735, 144 Misc. 2—*Jennings v. Plwinski*, 241 N.Y.S. 349, 136 Misc. 447—*Dobrikin v. Union Ry. Co.*, 225 N.Y.S. 376, 130 Misc. 796, motion granted 166 N.E. 324, 250 N.Y. 561—*Rubenstein v. Frank De Rosa Co.*, 213 N.Y.S. 40, 126 Misc. 314—*Owen v. Brown*, 139 N.Y.S. 451, 78 Misc. 273.

After judgment

After judgment for plaintiff for amount within court's jurisdiction the court will deem complaint amended to demand amount within its jurisdiction.—*Ussop v. American West African Line*, 269 N.Y.S. 654, 151 Misc. 12.

25. Cal.—*A. Hamburger & Sons v. Kice*, 18 P.2d 115, 129 Cal.App. 63.

In some jurisdictions, in an action in which the amount claimed is within the jurisdiction of the court, the allowance of an amendment increasing the amount claimed to an amount in excess of the court's jurisdiction will not oust the court of jurisdiction of the case, but the amendment will be treated as surplusage, or regarded as a nullity.²⁶ In other jurisdictions, the jurisdiction of the court will be tested by the allegations of the original petition, when the amended petition does not set up a new cause of action,²⁷ and by the amended petition when it does set up a new cause of action.²⁸ If the original pleadings allege an amount within the jurisdiction of the court, an amendment claiming damages which have accrued during the pendency of the action, thereby increasing the amount claimed to an amount in excess of the court's jurisdiction, will not oust the court of jurisdiction of the case;²⁹ nor will an amendment reducing the amount claimed to less than the jurisdictional amount deprive the court of jurisdiction;³⁰ but a supplemental petition which increases the original demand to an amount in excess of the jurisdiction of the court deprives the court of jurisdiction;³¹ and, as appears *supra* this section note 99, if the amount claimed is reduced to a sum below the jurisdiction of the court by rulings on demurrers addressed to the petition, the court will be deprived of jurisdiction. In still other jurisdictions, an amendment increasing the amount for which recovery is asked to an amount in excess of the jurisdiction of the court ousts the court of jurisdiction,³² and on an amendment to a complaint not stating a cause of action so as to show a cause of action for an amount below the jurisdiction of the court, a motion to dismiss on the ground that the court has

no jurisdiction should be granted.³³

A plaintiff may amend his bill of particulars so as to make it conform to his declaration with respect to the amount demanded.³⁴

Mode of objecting to jurisdiction. To raise the question of the jurisdiction of the court where the amount in controversy appears on the face of the pleadings and is for an amount within the court's jurisdiction, that question should be made to appear by proper defensive pleading.³⁵ As appears in the title *Abatement and Revival*, § 16 a (2), the real amount involved in an action may be put in issue by a plea to the jurisdiction, although the apparent amount as shown by the pleading or record is within the jurisdictional limit; and where the claim asserted is on its face sufficient to bring the case within the jurisdiction of the court, the issue as to the bona fides of such claim must be raised by a plea to the jurisdiction. On the other hand, a general demurrer is sufficient to challenge the jurisdiction of the court on the ground that the pleadings show an amount in controversy not within the jurisdiction of the court.³⁶ In an action in the United States district court, defendant has been denied leave to plead separately to the jurisdiction on the ground that the amount involved is less than the jurisdictional amount and that plaintiff's claim is fictitious, without prejudice to his right to plead to the merits and to assert any counterclaim.³⁷

Burden of proof. The burden of proof rests on the party bringing the action to show that the court in which it is filed has jurisdiction of it;³⁸ but where the complaint shows jurisdiction and a dismissal is sought for lack of jurisdiction, the burden of proof that the amount in controversy is not

26. Conn.—Avery v. Ginsburg, 102 A. 589, 92 Conn. 208.

N.Y.—Siedel v. Muehlenbrink, 220 N.Y.S. 621, 220 App.Div. 69.

27. Tex.—Sellers v. Spiller, Civ. App., 64 S.W.2d 1049—Stump v. F. A. Officer & Co., Civ.App., 250 S. W. 308.

28. Tex.—State v. Tyler County State Bank, Civ.App., 261 S.W. 414, reversed on other grounds, Com. App., 277 S.W. 625, 42 A.L.R. 1347.

29. Tex.—Ft. Worth & D. C. Ry. Co. v. Underwood, 99 S.W. 92, 100 Tex. 284, 123 Am.S.R. 806—Fort Worth & D. C. Ry. Co. v. Dysart, Civ.App., 136 S.W. 1117—Ft. Worth & D. C. Ry. Co. v. Underwood, Civ. App., 98 S.W. 453—San Antonio & A. P. Ry. Co. v. Barnett, 66 S.W. 474, 27 Tex.Civ.App. 498.

Addition of new cause

The filing of an amended petition which, if stating a new cause of ac-

tion, retains the cause of action stated in the original petition, does not deprive court of jurisdiction over old suit.—Isbell v. Kenyon-Warner Dredging Co., 261 S.W. 762, 113 Tex. 528.

30. Tex.—Williams v. Kelley, Civ. App., 77 S.W.2d 263—Sellers v. Spiller, Civ.App., 64 S.W.2d 1049—Holman v. Ward, Civ.App., 279 S.W. 310, affirmed, Com.App., 288 S.W. 148—Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin, Civ.App., 135 S.W. 1088.

31. Tex.—Stallings v. Williams, Civ. App., 235 S.W. 636.

32. La.—Peyton v. Noble, App., 152 So. 812.
S.D.—Egan v. Rounds, 216 N.W. 878, 52 S.D. 139.

Effect of ouster

Where seizure was made when Shreveport city court had jurisdiction, and forthcoming bond was giv-

en at that time, immediately on court's loss of jurisdiction because of amendment of petition increasing amount of claim, seizure became invalid and bondsmen were released.—Peyton v. Noble, La.App., 152 So. 812.

33. Cal.—Smith v. Chin Chew, 254 P. 599, 81 Cal.App. 704.

34. Conn.—Grether v. Klock, 39 Conn. 133.

35. Tex.—Blackwell v. Guaranty State Bank of Keller, Civ.App., 260 S.W. 895.

36. Tex.—Brook Mays & Co. v. Osborne, Civ.App., 70 S.W.2d 755.

37. U.S.—American Sheet, etc., Co. v. Winzeler, D.C.Ohio, 227 F. 321. 15 C.J. p 760 note 97.

38. Tex.—Beal v. Texas Indemnity Ins. Co., Com.App., 55 S.W.2d 801, reversing Texas Indemnity Co. v. Beal, Civ.App., 35 S.W.2d 1054.

within the jurisdiction of the court rests on defendant.³⁹

Workmen's compensation cases. In suits to set aside a final ruling and decision of a workmen's compensation board for injuries to an employee, decisions holding that, for the purpose of determining the proper court in which the suit must be brought, the amount in controversy is the amount claimed before the board, not the amount awarded, and may be shown by direct allegations in the petition that the amount claimed by the employee before the board was a sum within the jurisdiction of the court,⁴⁰ or is the maximum amount of compensation allowed by the provisions of the Workmen's Compensation Act for the injury suffered, and may be shown by an allegation containing the claim filed, in which it is shown that it was of such a nature that the average weekly wage, when multiplied by the maximum time for which compensation may be allowed, would produce an amount within the jurisdiction of the court,⁴¹ have been disapproved and overruled.⁴² In suits to set aside the awards of such boards, the identity of the injury received by the employee for which he made claim before the board with the injury shown by his petition in court, rather than the amount of the claim as made before the board, is the controlling

factor in determining the jurisdiction of the court;⁴³ and where the identity of the injury is established, the test of the court's jurisdiction of the suit with respect to the amount in controversy is to be determined by the allegations of fact in the petition.⁴⁴ In suits filed by insurers to set aside awards of such boards, the amount in controversy is the amount of the award made by the board when the claim filed with the board does not show the amount claimed, in dollars and cents or by a statement of facts from which the amount can definitely be determined;⁴⁵ and when the claim filed with the board does show the amount claimed, in dollars and cents or by a statement of facts from which the amount can definitely be determined, and the award of the board equals or exceeds in amount the amount shown by the claim, the amount of the award is the amount in controversy,⁴⁶ but if the award of the board is less in amount than that of the claim, the amount shown by the claim is the amount in controversy.⁴⁷ In suits filed by an injured employee to set aside a final ruling and decision of the board, it is not necessary, as a predicate of jurisdiction of the court in which such suit may be filed, that the claim filed with the board state, and the pleadings, show the amount claimed before the board by the employee or facts from which such amount can be definitely determined;⁴⁸ and the question of the

39. U.S.—*Butters v. Carney*, C.C. Nev., 127 F. 622.
15 C.J. p 760 note 98.

Measure of claim held not evidently improper

In buyer's action for breach of warranty, the court cannot hold that it is evident from plaintiff's affidavit, stating that he arrived at his loss by deducting the amount for which he was able to dispose of the merchandise from the amount he paid defendant therefor, that in fixing his damages he adopted a wrong and purely arbitrary measure, and therefore had not shown his claim to be in excess of a lower court's jurisdiction.—*Pasquinnelli v. Southern Macaroni Mfg. Co.*, 116 A. 372, 272 Pa. 468.

Slight evidence as to value held sufficient to support jurisdiction

In replevin for six thousand five hundred dollar note, where there was some evidence that the note was without value, it cannot be said that the municipal court had no jurisdiction because aggregate value was over one thousand dollars.—*The Public Bank of New York City v. Rosendorf*, 166 N.Y.S. 734.

40. Tex.—*Beal v. Texas Indemnity Ins. Co.*, Com.App., 55 S.W.2d 801, reversing *Texas Indemnity Co. v. Beal*, Civ.App., 35 S.W.2d 1054—*Traders & General Ins. Co. v.*

Crouch, Civ.App., 113 S.W.2d 650, error dismissed.

Allegations held sufficient

(1) Petition alleging claimant's average weekly wage, that he was seventy-five per cent permanently disabled, and that he filed claim with board was sufficient to bring suit within district court's jurisdiction, although not directly alleging amount involved before board.—*Welch v. U. S. Fidelity & Guaranty Co.*, Tex.Civ.App., 54 S.W.2d 1041, error dismissed.

(2) Where claim filed with industrial accident board stated that injury sustained was sprained back, and that claimant's wages were two hundred and fifty dollars per month, and allegations of petition in suit to set aside board's award denying compensation identified the cause of action with the claim filed before the board, the court had jurisdiction.—*Texas Indemnity Ins. Co. v. Williamson*, Tex.Civ.App., 109 S.W.2d 322, error dismissed.

41. Tex.—*Beal v. Texas Indemnity Ins. Co.*, Com.App., 55 S.W.2d 801, reversing *Texas Indemnity Co. v. Beal*, Civ.App., 35 S.W.2d 1054—*Ettna Casualty & Surety Co. v. Ware*, Civ.App., 113 S.W.2d 981—*Traders & General Ins. Co. v. Crouch*, Civ.App., 113 S.W.2d 650, error dismissed—*American Em-*

ployers' Ins. Co. v. Scott, Civ.App., 33 S.W.2d 845, error refused—*Texas Employers' Ins. Ass'n v. Nuna-maker*, Civ.App., 267 S.W. 749.

42. Tex.—*Booth v. Texas Employers' Ins. Ass'n*, Com.App., 123 S.W.2d 322, reversing *Texas Employers Ins. Ass'n v. Booth*, Civ.App., 113 S.W.2d 231.

43. Tex.—*Texas Employers' Ins. Ass'n v. Wright*, 97 S.W.2d 171, 128 Tex. 242, reversing, Civ.App., 56 S.W.2d 926—*Booth v. Texas Employers' Ins. Ass'n*, Com.App., 123 S.W.2d 322, reversing *Texas Employers Ins. Ass'n v. Booth*, Civ.App., 113 S.W.2d 231—*Southern Underwriters v. Stubblefield*, Civ.App., 130 S.W.2d 385.

44. Tex.—*Booth v. Texas Employers' Ins. Ass'n*, Com.App., 123 S.W.2d 322, reversing *Texas Employers Ins. Ass'n v. Booth*, Civ.App., 113 S.W.2d 231.

45. Tex.—*Booth v. Texas Employers' Ins. Ass'n*, supra.

46. Tex.—*Booth v. Texas Employers' Ins. Ass'n*, supra.

47. Tex.—*Booth v. Texas Employers' Ins. Ass'n*, supra.

48. Tex.—*Robinson v. Commercial Standard Ins. Co.*, Com.App., 123 S.W.2d 337, reversing *Commercial Standard Ins. Co. v. Robinson*, Civ.App., 31 S.W.2d 1147—*Federal Un-*

jurisdiction of the court in such case is determined by the amount in controversy in the suit in accordance with the allegations of fact in the petition,⁴⁹ provided it is not made to appear that the averments were fraudulently made. In no case is the amount in controversy determined by the maximum amount

of compensation which the law authorizes for the character of injury for which claim is filed,⁵⁰ nor by the amount of the claim filed with the board; and this is true whether the claim filed with the board shows or does not show the amount of the claim.⁵¹

4. ACTIONS UNDER LAWS OF OTHER STATES OR COUNTRIES

§ 70. In General

- a. Recognition of foreign law in general
- b. Extent of, and limitations on, recognition

a. Recognition of Foreign Law in General

Subject to some qualifications, the courts, on the

ground, as the rule is ordinarily stated, of comity, assume jurisdiction of transitory actions arising under the laws of other states or of foreign countries, although such laws have in themselves no extraterritorial effect.

Notwithstanding the laws of a state have of themselves no extraterritorial force or effect,⁵² the courts of one state will, within limitations discussed

derwriters Exchange v. Cost, Com. App., 123 S.W.2d 332, affirming, Civ.App., 115 S.W.2d 706—*Ætna Casualty & Surety Co. v. Ware*, Com.App., 123 S.W.2d 332, affirming, Civ.App., 113 S.W.2d 981—*Booth v. Texas Employers' Ins. Ass'n*, Com.App., 123 S.W.2d 322, reversing *Texas Employers' Ins. Ass'n v. Booth*, Civ.App., 113 S.W.2d 231—*Southern Underwriters v. Stubblefield*, Civ.App., 130 S.W.2d 385—*Traders & General Ins. Co. v. Belcher*, Civ.App., 126 S.W.2d 35, error refused.

Essential jurisdictional connection

The amount of the claim before the board is immaterial on the issue of jurisdiction of the court selected to review the award, the only essential jurisdictional connection between the claim for compensation before the board and the suit to set aside the award being the identity of the injury of which complaint is made.—*Texas Employers' Ins. Ass'n v. Wright*, 97 S.W.2d 171, 128 Tex. 242, reversing, Civ.App., 56 S.W.2d 926—*Booth v. Texas Employers' Ins. Ass'n*, Com.App., 123 S.W.2d 332, reversing *Texas Employers' Ins. Ass'n v. Booth*, Civ.App., 113 S.W.2d 231.

49. *Tex.—Booth v. Texas Employers' Ins. Ass'n*, supra—*Southern Underwriters v. Stubblefield*, Civ. App., 130 S.W.2d 385.

Computation of jurisdictional amount

(1) Computation may be based on the maximum claimed for an alleged injury.—*Texas Employers' Ins. Ass'n v. Whiteside*, Tex.Civ.App., 77 S.W.2d 767.

(2) Amount claimed for medical expenses constitutes part of the jurisdictional amount involved.—*Texas Employers' Ins. Ass'n v. Whiteside*, supra.

For injury to minor child

Even if action of parents to set aside an award of the industrial acci-

dent board denying compensation for daughter's death was one for compensation or earnings of minor child belonging to parents, where the most they could have recovered for accrued and unpaid compensation prior to daughter's death under pleadings was only three hundred and fifty dollars, district court did not have jurisdiction.—*Swain v. Standard Accident Ins. Co.*, 109 S.W.2d 750, 130 Tex. 277, affirming, Civ.App., 81 S.W.2d 258.

50. *Tex.—Booth v. Texas Employers' Ins. Ass'n*, Com.App., 123 S.W.2d 322, reversing *Texas Employers' Ins. Ass'n v. Booth*, Civ.App., 113 S.W.2d 231—*Morris v. Maryland Casualty Co.*, Civ.App., 130 S.W.2d 1080.

51. *Tex.—Booth v. Texas Employers' Ins. Ass'n*, Com.App., 123 S.W.2d 322, reversing *Texas Employers' Ins. Ass'n v. Booth*, Civ.App., 113 S.W.2d 231—*Federal Underwriters Exchange v. Riggsby*, Civ.App., 130 S.W.2d 1105, error dismissed, judgment correct.

52. *U.S.—U. S. Shipping Board Emergency Fleet Corporation v. Greenwald*, C.C.A.N.Y., 16 F.2d 948—*Palmetto Fire Ins. Co. v. Beha*, D.C.N.Y., 13 F.2d 500—*Theoktistou v. Panama R. Co.*, C.C.A.Canal Zone, 6 F.2d 116, certiorari denied *Panama R. Co. v. Theoktistou*, 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416—*Panko v. Endicott Johnson Corporation*, D.C.N.Y., 24 F.Supp. 678.

Ala.—Caine v. St. Louis & S. F. R. Co., 95 So. 876, 209 Ala. 181, 32 A.L.R. 793.

Cal.—Quong Ham Wah Co. v. Industrial Acc. Commission of California, 192 P. 1021, 184 Cal. 26, 12 A.L.R. 1190, error dismissed 41 S.Ct. 373, 255 U.S. 445, 65 L.Ed. 723—*Wolf v. Gall*, 163 P. 346, 32 Cal. App. 286, rehearing denied 163 P. 350, 32 Cal.App. 286.

D.C.—Atkinson v. Atkinson, 82 F.2d 847, 65 App.D.C. 241.

Fla.—Hartford Accident & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 100 Fla. 748.

Ga.—Clark v. Baker, 196 S.E. 750.

Iowa.—Henriksen v. Crandic Stages, 246 N.W. 913, 216 Iowa 643—*Rastede v. Chicago, St. P., M. & O. Ry. Co.*, 212 N.W. 751, 203 Iowa 430.

La.—Citizens' Bank of Waynesboro, Ga., v. Hibernia Bank & Trust Co., 140 So. 705, 19 La.App. 461.

Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

Mass.—Armstrong v. Boston & M. R. R., 177 N.E. 665, 276 Mass. 418, 80 A.L.R. 1408, certiorari granted *Boston & M. R. R. v. Armstrong*, 52 S.Ct. 44, 284 U.S. 609, 76 L.Ed. 521, and affirmed 52 S.Ct. 336, 285 U.S. 334, 76 L.Ed. 729—*Corkum v. Clark*, 161 N.E. 912, 263 Mass. 378. *Mich.—Henkel v. Henkel*, 276 N.W. 522, 282 Mich. 473—*Walton School of Commerce v. Stroud*, 226 N.W. 883, 248 Mich. 85.

Miss.—Dickerson v. Western Union Telegraph Co., 74 So. 779, 114 Miss. 115.

Mo.—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662—*State ex rel. Freeling v. National City Bank of Kansas City*, 274 S.W. 945, 220 Mo. App. 474, transferred *State of Oklahoma ex rel. Freeling v. National City Bank of Kansas City*, Sup., 267 S.W. 118—*Jerome P. Parker-Harris Co. v. Stephens*, 224 S.W. 1036, 205 Mo.App. 373.

Mont.—Mieyr v. Federal Surety Co. of Davenport, Iowa, 34 P.2d 982, 97 Mont. 503, certiorari granted *Clark v. Willard*, 55 S.Ct. 113, 293 U.S. 546, 79 L.Ed. 650, affirmed 55 S.Ct. 356, 294 U.S. 211, 79 L.Ed. 865, 98 A.L.R. 347.

N.H.—Gray v. Gray, 174 A. 508, 87 N.H. 82, 94 A.L.R. 1404.

N.J.—Bolmer v. Edsall, 106 A. 646, 90 N.J.Eq. 299—*Rybasack v. Travel-*

in subdivision b of this section and in §§ 71, 72 following, assume jurisdiction of transitory causes of action which arise under the laws of another state,⁵³ whether they are founded on the statutes of such states⁵⁴ or on the common law as recognized

ers Ins. Co., 190 A. 308, 15 N.J. Misc. 266.
 N.Y.—Mertz v. Mertz, 3 N.E.2d 597, 271 N.Y. 466, affirming 285 N.Y.S. 590, 247 App.Div. 713, affirming 284 N.Y.S. 83, 158 Misc. 85—Moscow Fire Ins. Co. of Moscow, Russia, v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App. Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644—Hood v. Guaranty Trust Co. of New York, 274 N.Y.S. 65, 153 Misc. 298, reversed on other grounds 278 N.Y.S. 294, 243 App.Div. 470, affirmed 200 N.E. 55, 270 N.Y. 17—In re Killough's Estate, 265 N.Y.S. 301, 148 Misc. 73—Travelers' Ins. Co. v. Central R. Co. of New Jersey, 258 N.Y.S. 35, 143 Misc. 589—Commonwealth of Pennsylvania, for Use of Beals, v. Beans, 249 N.Y.S. 232, 139 Misc. 785.
 N.C.—Howard v. Howard, 158 S.E. 101, 201 N.C. 574.
 Or.—Deardorf v. Idaho Nat. Harvester Co., 177 P. 33, 90 Or. 425.
 R.I.—Farrell v. Employers' Liability Assur. Corporation, 168 A. 911, 54 R.I. 18.
 Tex.—Phillips v. Perue, 229 S.W. 849, 111 Tex. 112—Compania Bancaria y de Inversiones, S. A., v. Border Nat. Bank, Civ.App., 265 S.W. 599 —Western Union Telegraph Co. v. Epley, Civ.App., 218 S.W. 528.
 Utah.—U. S. Bond & Finance Corporation v. National Building & Loan Ass'n of America, 17 P.2d 238, 80 Utah 62, denying rehearing 12 P.2d 758, 80 Utah 62.
 Va.—C. I. T. Corporation v. Guy, 195 S.E. 659.
 Wis.—State v. Sorenson, 260 N.W. 662, 218 Wis. 295—Bernard v. Jennings, 244 N.W. 589, 209 Wis. 116 —Ford, Bacon & Davis v. Terminal Warehouse Co., 240 N.W. 796, 207 Wis. 467, 81 A.L.R. 1127—E. L. Husting Co. v. Coca-Cola Co., 216 N.W. 833, 194 Wis. 311.
 15 C.J. p 778 note 52.

Legislation is presumptively territorial only, and confined to limits over which law-making power has jurisdiction.—E. C. Warner Co. v. W. B. Foshay Co., C.C.A.Minn., 57 F.2d 656, certiorari denied 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292.

Necessity of physical presence in state

No state can create personal obligations against persons who are not physically present within its boundaries, residents there, nor bound to it by allegiance, except in case of acts done in the state by an agent.

—Siegmann v. Meyer, C.C.A.N.Y., 100 F.2d 367.

Public policy of a state has no extraterritorial operation in respect of nonresidents.—Pennsylvania Co. for Insurance on Lives and Granting Annuities v. United Railways of Havana & Regla Warehouses, D.C. Me., 26 F.Supp. 379.

Statutory liens

A landlord's lien created by state statute has no extraterritorial force.—Chicago Title & Trust Co. v. Fox Theatres Corporation, C.C.A.N.Y., 105 F.2d 147.

53. U.S.—James-Dickinson Farm Mortg. Co. v. Harry, Ill., 47 S.Ct. 308, 273 U.S. 119, 71 L.Ed. 569—Siegmann v. Meyer, C.C.A.N.Y., 100 F.2d 367—Mosby v. Manhattan Oil Co., C.C.A.Mo., 52 F.2d 364, 77 A.L.R. 1099, certiorari denied Manhattan Oil Co. v. Mosby, 52 S.Ct. 131, 284 U.S. 677, 76 L.Ed. 572.

Cal.—Loranger v. Nadeau, 10 P.2d 63, 215 Cal. 362, 84 A.L.R. 1264.

Conn.—Slattery v. Hartford-Connecticut Trust Co., 161 A. 79, 115 Conn. 163—Reilly v. Antonio Pepe Co., 143 A. 568, 108 Conn. 436—Commonwealth Fuel Co. v. McNeil, 130 A. 794, 103 Conn. 390.

Del.—Skillman v. Conner, Super., 193 A. 563.

Ga.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.

Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

Minn.—Boright v. Chicago, R. I. & P. R. Co., 230 N.W. 457, 180 Minn. 52.

Mo.—Burg v. Knox, 67 S.W.2d 96, 334 Mo. 329, transferred, App., 54 S.W.2d 797—Austin v. Hough, App., 10 S.W.2d 655.

N.H.—Gray v. Gray, 174 A. 508, 87 N.H. 82, 94 A.L.R. 1404.

N.J.—Masci v. Young, 162 A. 623, 109 N.J.Law 453, 83 A.L.R. 869, affirming 157 A. 82, 9 N.J.Misc. 1137, and affirmed Young v. Masci, 53 S.Ct. 599, 289 U.S. 253, 77 L.Ed. 1158, 88 A.L.R. 170.

N.Y.—Silverman v. Rappaport, 300 N.Y.S. 76, 165 Misc. 543—Ferguson v. Harder, 252 N.Y.S. 783, 141 Misc. 466.

N.C.—Wise v. Hollowell, 171 S.E. 82, 205 N.C. 286.

15 C.J. p 737 note 23, p 738 note 25. General rules of comity see *infra* § 545.

Defendant's right to special verdict as of right, if sued in the state under the laws of which the cause of action arose, is no objection to the maintenance of the action in another

state where defendant has the same right.—Missouri, etc., R. Co. v. Kellerman, 87 S.W. 401, 39 Tex.Civ. App. 274.

Enforceability in other states not a bar

The mere fact that an action might have been brought in some other states does not mean that it could not have been brought in the forum.—Van Denburgh v. Tungsten Reef Mines Co., 63 P.2d 647, 48 Ariz. 540.

Plaintiff may select the forum in which his claim to relief shall be heard.—Roseman v. Fidelity & Deposit Co. of Maryland, 277 N.Y.S. 471, 154 Misc. 320.

Provisional remedies

A sutor can avail himself of the provisional remedies appropriate to the action in the state where the suit is brought.—Van Horn v. Kittitas County, 59 N.Y.S. 853, 28 Misc. 333, affirmed 61 N.Y.S. 1150, 46 App. Div. 623.

54. U.S.—U. S. Shipping Board Emergency Fleet Corporation v. Greenwald, C.C.A.N.Y., 16 F.2d 948. Ala.—Caine v. St. Louis & S. F. R. Co., 95 So. 876, 209 Ala. 181, 32 A.L.R. 793.

Fla.—Hartford Acc. & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 8, 100 Fla. 748, citing *Corpus Juris*.

Iowa.—Enfield v. Butler, 264 N.W. 546, 221 Iowa 615.

Mass.—New York Trust Co. v. Brewster, 134 N.E. 616, 241 Mass. 155 —Golder v. Golder, 126 N.J. 382, 235 Mass. 76, 16 A.L.R. 429.

Minn.—Chubbuck v. Holloway, 234 N.W. 314, 182 Minn. 225, reversed on other grounds Chubbuck v. Minneapolis, St. P. & S. S. M. Ry. Co., 234 N.W. 868, 182 Minn. 225.

Miss.—Burkett v. Globe Indemnity Co., 181 So. 316, 182 Miss. 423.

Mo.—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662—Maurizi v. Western Coal & Mining Co., 11 S.W.2d 268, 321 Mo. 378.

N.Y.—Mertz v. Mertz, 3 N.E.2d 597, 271 N.Y. 466, affirming 285 N.Y.S. 590, 247 App.Div. 713, affirming 284 N.Y.S. 83, 158 Misc. 85—Wilkoff v. Hirschel, 249 N.Y.S. 690, 232 App.Div. 193, affirmed and certified questions answered 179 N.E. 249, 258 N.Y. 28—Bicknell v. Hood, 6 N.Y.S.2d 449, 168 Misc. 727.

Okl.—McCoubrey v. Pure Oil Co., 66 P.2d 57, 60, 179 Okl. 344, quoting *Corpus Juris*.

Vt.—Wellman v. Mead, 107 A. 396, 93 Vt. 323.

Va.—C. I. T. Corporation v. Guy, 195 S.E. 659.

15 C.J. p 778 note 53.

and enforced therein.⁵⁵ Laws of a foreign country also may in some cases be enforced.⁵⁶ The general principle herein involved is applicable to a right of action given by the law of another state or country for a tort committed therein⁵⁷ or on a contract which is implied in part or in whole under its laws,⁵⁸ and to many other causes of action which are treated specifically in other titles of this work.

Jurisdiction to hear and determine actions arising under foreign laws is not affected by the ultimate question of whether plaintiff will be found entitled to recover.⁵⁹

The enforcement by the courts of a state of causes of action arising under the laws of another state or of a foreign nation is ordinarily stated or recognized to be on the basis of comity,⁶⁰ although according to some authorities rights arising under a foreign law are enforced because the rule requiring such enforcement is a part of the law of the forum,⁶¹ and for a general discussion of the existence and limitations of the doctrine of comity reference is made to Conflict of Laws § 3.

In any event, the recognition of an obligation which arises under the law of another state or country is not regarded as giving the law of such state or country an extraterritorial application or effect.⁶²

b. Extent of, and Limitations on, Recognition

- (1) In general
- (2) Positive law of forum as limitation
- (3) Public policy of forum as limitation
- (4) Matters of procedure and remedies as limitations
- (5) Restrictions imposed by foreign law

(1) In General

The circumstances in, and extent to, which causes of action arising under foreign laws will be enforced is determinable by the sovereignty in which enforcement is sought. Plaintiff must plead and prove the foreign law under which he claims, and that he had a cause of action thereunder in the state having such law.

Except as determined by the full faith and credit requirement of the federal constitution, discussed in the C.J.S. title States § 9, the circumstances in,

55. Mass.—*Golder v. Golder*, 126 N. E. 382, 235 Mass. 76, 16 A.L.R. 429. N.Y.—*Commonwealth of Pennsylvania, for use of Beals, v. Beans*, 249 N.Y.S. 232, 139 Misc. 785. 15 C.J. p. 779 note 54.

56. U.S.—*Evey v. Mexican Cent. R. Co.*, Tex., 81 F. 294, 26 C.C.A. 407, 38 L.R.A. 387.

Iowa.—*Bradbury v. Chicago, etc., R. Co.*, 128 N.W. 1, 149 Iowa 51, 59, 40 L.R.A., N.S., 684.

15 C.J. p. 738 note 24, p. 779 note 57.

57. U.S.—*Theoktistou v. Panama R. Co.*, C.C.A. Canal Zone, 6 F.2d 116, certiorari denied *Panama R. Co. v. Theoktistou*, 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416—*Lauria v. E. I. Du Pont De Nemours & Co.*, D.C. N.Y., 241 F. 687.

Ill.—*Wintersteen v. National Cooper- age & Woodenware Co.*, 197 N.E. 578, 361 Ill. 95.

Kan.—*Pool v. Day*, 40 P.2d 396, 141 Kan. 195.

Minn.—*Chubbuck v. Holloway*, 234 N. W. 314, 182 Minn. 225, reversed on other grounds *Chubbuck v. Minneapolis, St. P. & S. M. Ry. Co.*, 234 N.W. 868, 182 Minn. 225.

Miss.—*Burkett v. Globe Indemnity Co.*, 181 So. 316, 182 Miss. 423.

N.Y.—*Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 224 N. Y. 99, reversing 159 N.Y.S. 282, 172 App.Div. 227, reversing 156 N. Y.S. 7, 92 Misc. 475—*Herzog v. Stern*, 265 N.Y.S. 72, 148 Misc. 25, reversed on other grounds 267 N. Y.S. 968, 240 App.Div. 881, reversed on other grounds 191 N.E. 23, 264 N.Y. 379, certiorari denied 55 S.Ct.

112, 293 U.S. 597, 79 L.Ed. 690—*Lewis v. Johnson*, 233 N.Y.S. 543, 133 Misc. 777.

Okl.—*Miller v. Tennis*, 282 P. 345, 140 Okl. 185.

Pa.—*Personal Finance Co. of New York v. General Finance Co.*, 3 A. 2d 174, 133 Pa.Super. 582. 15 C.J. p. 779 note 58.

58. Ark.—*Upson v. Robison*, 17 S.W. 2d 305, 179 Ark. 600.

La.—*Citizens' Bank of Waynesboro, Ga., v. Hibernia Bank & Trust Co.*, 140 So. 705, 19 La.App. 461.

Action for rent from tenant holding over

Ark.—*Upson v. Robison*, 17 S.W.2d 305, 179 Ark. 600.

Action on statutory bond

Fla.—*Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 130 So. 7, 100 Fla. 748.

N.Y.—*Clark Plastering Co. v. Seaboard Surety Co.*, 182 N.E. 71, 259 N.Y. 424, 85 A.L.R. 845, reversing 257 N.Y.S. 375, 235 App.Div. 444, and dismissing appeal 257 N.Y.S. 469, 235 App.Div. 449, reversing 260 N.Y.S. 468, 237 App.Div. 274, motion denied 260 N.Y.S. 973, 237 App. Div. 807.

59. Pa.—*Squire v. Fridenberg*, 191 A. 631, 126 Pa.Super. 508.

60. Ga.—*Clark v. Baker*, 196 S.E. 750, 186 Ga. 65.

Ill.—*Union Bridge & Construction Co. v. Industrial Commission*, 122 N.E. 609, 287 Ill. 396—*Stix, Baer & Fuller Co. v. Woesthaus Motor Co.*, 1 N.E.2d 796, 284 Ill.App. 301. N.Y.—*Moscow Fire Ins. Co. of Mos-*

cow, Russia, v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644—*Hood v. Guaranty Trust Co. of New York*, 274 N.Y.S. 65, 153 Misc. 298, reversed on other grounds 278 N.Y.S. 294, 243 App.Div. 470, affirmed 200 N.E. 55, 270 N.Y. 17—*Roseman v. Fidelity & Deposit Co. of Maryland*, 262 N.Y.S. 491, 146 Misc. 532, modified on other grounds 265 N.Y.S. 557, 148 Misc. 132—*In re Honeyman, Sur.*, 192 N. Y.S. 910, 117 Misc. 653, affirmed 193 N.Y.S. 936, 202 App.Div. 728. S.D.—*Knittle v. Ellenbusch*, 159 N.W. 893, 38 S.D. 22.

Tex.—*Hicks v. Sias*, Civ.App., 102 S. W.2d 460, error refused.

Wyo.—*Union Securities Co. v. Adams*, 236 P. 513, 33 Wyo. 45, 50 A.L.R. 23.

General rules of comity see *infra* § 545.

61. U.S.—*Siegmann v. Meyer*, C.C.A. N.Y., 100 F.2d 367.

Me.—*Pringle v. Gibson*, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

N.H.—*Gray v. Gray*, 174 A. 508, 87 N.H. 82, 94 A.L.R. 1404.

62. U.S.—*Bradford Electric Light Co. v. Clapper*, N.H., 52 S.Ct. 571, 286 U.S. 145, 76 L.Ed. 1026, 82 A. L.R. 696, reversing, C.C.A., 51 F. 2d 992, appeal dismissed and certiorari granted 52 S.Ct. 118, 284 U. S. 221, 76 L.Ed. 254.

and extent to, which causes of action arising under the laws of other states or countries will be enforced are determinable by the particular sovereignty in which enforcement is sought.⁶³ Where the action sought to be enforced arose under a foreign statute, all provisions of the statute relating to rights and remedies will be considered by the court of the forum in determining whether it has jurisdiction of the action.⁶⁴

Pleading and proof. The statute of the state where the cause of action accrued should be set out in the declaration or complaint,⁶⁵ and plaintiff must be prepared to show the law of the state under which he claims the right asserted by him,⁶⁶ and that he had a cause of action which the courts of the state in which such cause of action accrued, under their view of the law at the time of such accrual, would have enforced.⁶⁷

(2) Positive Law of Forum as Limitation

The courts of a state will not enforce laws of another state or country which are repugnant to its own laws, or, under some authorities, which are not similar in character and purpose.

The courts of a state will not enforce laws of another state or country which are repugnant to its own laws.⁶⁸ Under some authorities, the statute on which a foreign cause of action is based must be similar in character and purpose to a statute of the forum to warrant assumption of the action,⁶⁹ but other authorities hold that dissimilarity between the law of a state or country where the cause of action arose and the law of the forum will not prevent enforcement of the cause of action unless the dissimilarity is so great as to amount to conflict or repugnancy.⁷⁰ The fact that the forum does not give a similar right has been held not to constitute such a dissimilarity,⁷¹ although there is authority

63. Fla.—Hartford Accident & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 8, 100 Fla. 748, citing *Corpus Juris*.

Ga.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.

Ill.—Wall v. Chesapeake & O. Ry. Co., 125 N.E. 20, 290 Ill. 227, reversing 210 Ill.App. 136, error dismissed 41 S.Ct. 402, 256 U.S. 125, 65 L.Ed. 856—Stix, Baer & Fuller Co. v. Woesthaus Motor Co., 1 N.E. 2d 796, 284 Ill.App. 301.

Mo.—State ex rel. Weaver v. Missouri Workmen's Compensation Commission, 95 S.W.2d 641.

N.J.—Polykronos v. Polykronos, 8 A.2d 265, 17 N.J.Misc. 250.

N.Y.—Mertz v. Mertz, 3 N.E.2d 597, 271 N.Y. 466, affirming 285 N.Y.S. 590, 247 App.Div. 713, affirming 284 N.Y.S. 83, 158 Misc. 85—Moscow Fire Ins. Co. of Moscow, Russia, v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App. Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644—Adams v. Dick, 170 N.Y.S. 17, 103 Misc. 259.

Tex.—Johnson v. Employers Liability Assur. Corporation, Civ.App., 99 S.W.2d 979, error refused. 15 C.J. p 780 note 65.

Public policy of United States

The extent to which foreign law will be enforced by the courts of a state is determined by the public policy of the state, not that of the United States.—Moscow Fire Ins. Co. of Moscow, Russia, v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644.

64. N.Y.—Consolidated Copper Mines Corporation v. Nevada Consolidat-

ed Copper Co., 215 N.Y.S. 265, 127 Misc. 71.

65. Ala.—Kahl v. Memphis, etc., R. Co., 10 So. 661, 95 Ala. 337. 15 C.J. p 781 note 82.

66. N.Y.—Debevoise v. New York, etc., R. Co., 98 N.Y. 377, 50 Am. R. 683. 15 C.J. p 781 note 83.

67. Mo.—Farrar v. St. Louis, etc., R. Co., 130 S.W. 373, 149 Mo.App. 183.

68. Cal.—Alaska Packers' Ass'n v. Industrial Accident Commission of California, 34 P.2d 716, 1 Cal.2d 250, affirmed 55 S.Ct. 518, 294 U.S. 532, 79 L.Ed. 1044—Hudson v. Von Hamm, 259 P. 374, 85 Cal. App. 323.

Conn.—Reilly v. Antonio Pepe Co., 143 A. 568, 108 Conn. 436.

Ga.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65—Ulman, Magill & Jordan Woolen Co. v. Magill, 117 S.E. 657, 155 Ga. 555, answers to certified questions conformed to 113 S.E. 499, 30 Ga.App. 335—Shore Acres Properties v. Morgan, 160 S.E. 705, 44 Ga.App. 128.

Ill.—Wall v. Chesapeake & O. Ry. Co., 125 N.E. 20, 290 Ill. 227, reversing 210 Ill.App. 136, error dismissed 41 S.Ct. 402, 256 U.S. 125, 65 L.Ed. 856.

Iowa.—Strong v. Chicago, etc., R. Co., 129 N.W. 321, 150 Iowa 1.

Kan.—Pool v. Day, 40 P.2d 396, 141 Kan. 195.

Ky.—Cooper's Adm'r v. Lebus' Adm'r, 90 S.W.2d 83, 262 Ky. 245.

Mich.—Mt. Ida School for Girls v. Rood, 235 N.W. 227, 253 Mich. 482, 74 A.L.R. 1325.

Mo.—Austin v. Hough, App., 10 S.W. 2d 655.

N.J.—Polykronos v. Polykronos, 8 A.2d 265, 17 N.J.Misc. 250.

Va.—C. I. T. Corporation v. Guy, 195 S.E. 659, 170 Va. 16.

15 C.J. p 738 note 25, p 778 note 53, p 780 note 68.

69. Iowa.—Morris v. Chicago, etc., R. Co., 23 N.W. 143, 65 Iowa 727, 54 Am.R. 39.

Md.—Davis v. Ruzicka, 183 A. 569, 170 Md. 112, certiorari denied 58 S.Ct. 943, 298 U.S. 671, 80 L.Ed. 1394.

Tex.—El Paso & Juarez Traction Co. v. Carruth, Com.App., 255 S.W. 159, reversing El Paso Electric Ry. Co. v. Carruth, Civ.App., 208 S.W. 984—Missouri, K. & T. R. Co. v. Kellerman, 87 S.W. 401, 39 Tex.Civ. App. 274.

"Though the *lex fori* and *lex loci* . . . may in some features be different, yet if both give the right of action for the wrong complained of, and the redress given the injured party by the *lex loci* . . . is such as obtains and may be enforced in the *lex fori*, the difference in other features of the law of the respective jurisdictions do not constitute an insuperable barrier to the jurisdiction of the forum."—Southern Pac. Co. v. Allen, 106 S.W. 441, 444, 48 Tex.Civ.App. 68.

70. N.Y.—Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 224 N.Y. 99, reversing 159 N.Y.S. 282, 172 App.Div. 227, reversing 156 N.Y.S. 7, 92 Misc. 475—Wikoff v. Hirschel, 249 N.Y.S. 690, 232 App. Div. 193, affirmed and certified questions answered 179 N.E. 249, 258 N.Y. 28—Taynton v. Vollmer, 271 N.Y.S. 128, 151 Misc. 214, reversed on other grounds 275 N.Y. S. 284, 242 App.Div. 854. 15 C.J. p 780 note 71.

71. N.Y.—Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 224

to the contrary.⁷²

(3) Public Policy of Forum as Limitation

Courts will not assume jurisdiction of actions arising under foreign laws where enforcement thereof would be against the public policy of the forum, or, in other words against good morals, natural justice, or the general interests of the people of the forum; a mere difference between the *lex loci* and *lex forum* does not render enforcement of the *lex loci* opposed to public policy.

The courts of a state will not assume jurisdiction of actions arising under the laws of another state or country where enforcement thereof would be against the public policy of the jurisdiction in which the action is brought,⁷³ or, in other words, against good morals, natural justice, or the general interests of the people of the forum,⁷⁴ in which case only it is a basis for refusal to assume jurisdiction.

N.Y. 99, reversing 159 N.Y.S. 282, 172 App.Div. 227, reversing 156 N.Y.S. 7, 92 Misc. 475—Domreg v. Storms, 260 N.Y.S. 335, 236 App. Div. 630, reargument and motion denied 261 N.Y.S. 1037, 238 App. Div. 765—Wilkoff v. Hirschel, 249 N.Y.S. 690, 232 App.Div. 193, affirmed and certified questions answered 179 N.E. 249, 258 N.Y. 28—Taynton v. Vollmer, 271 N.Y.S. 128, 151 Misc. 214, reversed on other grounds 275 N.Y.S. 284, 242 App. Div. 854.

72. Mo.—Rositzky v. Rositzky, 46 S.W.2d 591, 329 Mo. 662.
15 C.J. p 778 note 52 [a].

73. U.S.—Mosby v. Manhattan Oil Co., C.C.A.Mo., 52 F.2d 364, 77 A.L.R. 1099, certiorari denied Manhattan Oil Co. v. Mosby, 52 S.Ct. 131, 284 U.S. 677, 76 L.Ed. 572—U.S. v. Bank of New York & Trust Co., D.C.N.Y., 10 F.Supp. 269, affirmed, C.C.A., 77 F.2d 866, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393, affirmed 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, and affirmed, C.C.A., U.S. v. President and Directors of Manhattan, 77 F.2d 881—Lauria v. E. I. Du Pont De Nemours & Co., D.C.N.Y., 241 F. 637.

Ala.—Caine v. St. Louis & S. F. R. Co., 95 So. 876, 209 Ala. 181, 32 A.L.R. 793.

Colo.—Commercial Credit Co. v. Higbee, 20 P.2d 543, 92 Colo. 346.

Conn.—Reilly v. Antonio Pepe Co., 143 A. 568, 108 Conn. 436.

Fla.—Hartford Accident & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 8, 100 Fla. 748, citing *Corpus Juris*.

Ga.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.

Iowa.—Enfield v. Butler, 264 N.W. 546, 221 Iowa 615—Farmers' & Merchants' Nat. Bank of Fort Worth, Tex., v. Anderson, 250 N.W. 214, 216 Iowa 988.

Kan.—Pool v. Day, 40 P.2d 396, 141 Kan. 195.

Ky.—Cooper's Adm'r v. Lebus' Adm'r's, 90 S.W.2d 33, 262 Ky. 245—Johnson v. Sauerman Bros., 49 S.W.2d 331, 243 Ky. 587.

Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

Mass.—New York Trust Co. v. Brewster, 134 N.E. 616, 241 Mass. 155

—Golder v. Golder, 126 N.E. 382, 235 Mass. 76, 16 A.L.R. 429.

Mich.—Eskovitz v. Berger, 268 N.W. 883, 276 Mich. 536—Mt. Ida School for Girls v. Rood, 235 N.W. 227, 253 Mich. 482, 74 A.L.R. 1325.

Minn.—Chubbuck v. Holloway, 234 N.W. 314, 182 Minn. 225, reversed on other grounds Chubbuck v. Minneapolis, St. P. & S. S. M. Ry. Co., 234 N.W. 868, 182 Minn. 225.

Mo.—Austin v. Hough, App., 10 S.W.2d 655—Jerome P. Parker-Harris Co. v. Stephens, 224 S.W. 1036, 205 Mo.App. 373.

N.J.—Mascl v. Young, 162 A. 623, 109 N.J.Law 453, 83 A.L.R. 869, affirming 157 A. 82, 9 N.J.Misc. 1137, and affirmed Young v. Mascl, 53 S.Ct. 599, 289 U.S. 253, 77 L.Ed. 1158, 88 A.L.R. 170—Polykronos v. Polykronos, 8 A.2d 265, 17 N.J. Misc. 250.

N.M.—Wooley v. Shell Petroleum Corporation, 45 P.2d 927, 39 N.M. 256.

N.Y.—Herzog v. Stern, 191 N.E. 23, 264 N.Y. 379, reversing 267 N.Y.S. 968, 240 App.Div. 881, reversing 265 N.Y.S. 72, 148 Misc. 25, and certiorari denied 55 S.Ct. 112, 293 U.S. 597, 79 L.Ed. 690—Vladikavkazsky Ry. Co. v. New York Trust Co., 189 N.E. 456, 263 N.Y. 369, affirming 264 N.Y.S. 669, 238 App. Div. 531, and reargument denied 191 N.E. 581, 264 N.Y. 595—Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 224 N.Y. 99, reversing 159 N.Y.S. 282, 172 App.Div. 227, reversing 156 N.Y.S. 7, 92 Misc. 475—Hutchinson v. Ward, 85 N.E. 390, 192 N.Y. 375, 127 Am.S.R. 909, reversing 103 N.Y.S. 1129, 118 App.Div. 910—Wilkoff v. Hirschel, 249 N.Y.S. 690, 232 App.Div. 193, affirmed and certified questions answered 179 N.E. 249, 258 N.Y. 28—Bicknell v. Hood, 6 N.Y.S.2d 449, 168 Misc. 727—Silverman v. Rapaport, 300 N.Y.S. 76, 165 Misc. 543—Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 641, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644.

(2) Action affecting the internal management of the affairs of the state in which the cause arose.—Roseman v. Fidelity & Deposit Co. of Maryland, 262 N.Y.S. 491, 146 Misc. 532, modified on other grounds 265 N.Y.S. 557, 148 Misc. 132.

Enforcement in federal courts see the C.J.S. title Federal Courts § 25; also 15 C.J. p 780 note 70.

74. U.S.—Theokistou v. Panama R. Co., C.C.A.Canal Zone, 6 F.2d 116, certiorari denied Panama R. Co. v. Theokistou, 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

Cal.—Loranger v. Nadeau, 10 P.2d 63, 215 Cal. 362, 84 A.L.R. 1264.

—Ferguson v. Harder, 252 N.Y.S. 783, 141 Misc. 466—People, on Complaint of Kay v. Kay, 252 N.Y.S. 518, 141 Misc. 574—Clough v. Gardiner, 182 N.Y.S. 803, 111 Misc. 244, affirmed 184 N.Y.S. 914, 194 App. Div. 923.

N.C.—Wise v. Hollowell, 171 S.E. 82, 205 N.C. 286.

Okl.—Miller v. Tennis, 282 P. 345, 140 Okl. 185.

Pa.—Personal Finance Co. of New York v. General Finance Co., 3 A.2d 174, 133 Pa.Super. 582—In re Bundy's Estate, 21 Erie Co. 238.

Tex.—Johnson v. Employers Liability Assur. Corporation, Civ.App., 99 S.W.2d 979, error refused.

Vt.—Wellman v. Mead, 107 A. 396, 93 Vt. 322.

Va.—C. I. T. Corporation v. Guy, 195 S.E. 659, 170 Va. 16.

Wyo.—Union Securities Co. v. Adams, 286 P. 513, 33 Wyo. 45, 50 A.L.R. 23.

15 C.J. p 780 note 69.

Particular actions against public policy

(1) Action to enforce laws of foreign government confiscating property located in the forum.

U.S.—U. S. v. Belmont, C.C.A.N.Y., 85 F.2d 542, certiorari granted 57 S.Ct. 313, 299 U.S. 587, 81 L.Ed. 396, motion denied 57 S.Ct. 505, 300 U.S. 641, 81 L.Ed. 856, reversed on other grounds 57 S.Ct. 758, 301 U.S. 324, 81 L.Ed. 1134.

N.Y.—Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 641, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644.

(2) Action affecting the internal management of the affairs of the state in which the cause arose.—Roseman v. Fidelity & Deposit Co. of Maryland, 262 N.Y.S. 491, 146 Misc. 532, modified on other grounds 265 N.Y.S. 557, 148 Misc. 132.

Enforcement in federal courts see the C.J.S. title Federal Courts § 25; also 15 C.J. p 780 note 70.

74. U.S.—Theokistou v. Panama R. Co., C.C.A.Canal Zone, 6 F.2d 116, certiorari denied Panama R. Co. v. Theokistou, 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

Cal.—Loranger v. Nadeau, 10 P.2d 63, 215 Cal. 362, 84 A.L.R. 1264.

tion.⁷⁵ It does not mean merely sound or good policy.⁷⁶ Such policy is to be found in the constitution, statutes, and judicial decisions of the state.⁷⁷ The mere fact that a right of action given by the law of another state or country differs from that given by the forum, or that the forum does not give a similar right or remedy, does not render its enforcement opposed to public policy;⁷⁸ if the *lex fori* and the *lex loci delicti* are of the same character or concur in holding that an act is the subject of legal redress, assumption of jurisdiction is strongly, if not, conclusively shown not to be against the public policy of the state where the action is brought.⁷⁹

(4) Matters of Procedure and Remedies as Limitations

The courts of a state will not assume jurisdiction of an action under the laws of another jurisdiction when the judicial procedure of the forum is inadequate to do complete or substantial justice; nor can they enforce special statutory remedies provided by other jurisdictions.

The courts of a state will not take jurisdiction of an action arising under the laws of another jurisdiction when the judicial procedure of the forum is inadequate to do complete or substantial justice in the case.⁸⁰ So special statutory remedies for the invasion of a recognized right, which is protected

- Colo.—Commercial Credit Co. v. Higbee, 20 P.2d 543, 92 Colo. 346.
- Conn.—Slattery v. Hartford-Connecticut Trust Co., 161 A. 79, 115 Conn. 163.
- Fla.—Hartford Accident & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 8, 100 Fla. 748, citing *Corpus Juris*.
- Ill.—Wall v. Chesapeake & O. Ry. Co., 125 N.E. 20, 290 Ill. 227, reversing 210 Ill.App. 136, error dismissed 41 S.Ct. 402, 256 U.S. 125, 65 L.Ed. 856.
- Kan.—Pool v. Day, 40 P.2d 396, 141 Kan. 195.
- Ky.—Johnson v. Sauerman Bros., 39 S.W.2d 331, 243 Ky. 587.
- Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.
- Mo.—Jerome P. Parker-Harris Co. v. Stephens, 224 S.W. 1036, 205 Mo. App. 373.
- N.Y.—Moscow Fire Ins. Co. of Moscow, Russia, v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644.
- Okl.—Miller v. Tennis, 282 P. 345, 140 Okl. 185.
- Va.—C. I. T. Corporation v. Guy, 195 S.E. 659, 170 Va. 16.
- Wyo.—Union Securities Co. v. Adams, 236 P. 513, 33 Wyo. 45, 50 A.L.R. 23.
- 15 C.J. p 778 note 53.
75. U.S.—Curtis v. Campbell, C.C.A. Pa., 76 F.2d 84, certiorari denied 55 S.Ct. 649, 295 U.S. 737, 79 L.Ed. 1685—Mosby v. Manhattan Oil Co., C.C.A.Mo., 52 F.2d 364, 77 A.L.R. 1099, certiorari denied Manhattan Oil Co. v. Mosby, 52 S.Ct. 131, 284 U.S. 677, 76 L.Ed. 572—Lauria v. E. I. Du Pont De Nemours & Co., D.C.N.Y., 241 F. 687.
- Conn.—Broderick v. McGuire, 174 A. 314, 119 Conn. 83, 94 A.L.R. 890.
- Del.—Skillman v. Conner, Super., 193 A. 563.
- Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.
- N.Y.—Shannon v. Irving Trust Co., 9 N.E.2d 792, 275 N.Y. 95, affirming 285 N.Y.S. 478, 246 App.Div. 280.
- S.C.—Rauton v. Pullman Co., 191 S.E. 416, 183 S.C. 495.
- Tenn.—Brown v. Hagan, 14 Tenn. App. 251.
- Vt.—Brown v. Perry, 156 A. 910, 104 Vt. 66.
- 15 C.J. p 738 note 25.
76. Minn.—Chubbuck v. Holloway, 234 N.W. 314, 182 Minn. 225, reversed on other grounds Chubbuck v. Minneapolis, St. P. & S. S. M. Ry. Co., 234 N.W. 868, 182 Minn. 225.
77. Del.—Skillman v. Conner, Super., 193 A. 563.
- Ill.—Ralsor v. Chicago, etc., R. Co., 117 Ill.App. 488, affirmed 74 N.E. 69, 215 Ill. 47, 106 Am.S.R. 153, 2 Ann.Cas. 802.
- Minn.—Chubbuck v. Holloway, 234 N.W. 314, 182 Minn. 225, reversed on other grounds Chubbuck v. Minneapolis, St. P. & S. S. M. Ry. Co., 234 N.W. 868, 182 Minn. 225.
- N.M.—Wooley v. Shell Petroleum Corporation, 45 P.2d 927, 39 N.M. 256.
- N.Y.—Taynton v. Vollmer, 271 N.Y.S. 128, 151 Misc. 214, reversed on other grounds 275 N.Y.S. 384, 242 App.Div. 854.
78. U.S.—Curtis v. Campbell, C.C.A. Pa., 76 F.2d 84, certiorari denied 55 S.Ct. 649, 295 U.S. 737, 79 L.Ed. 1685—Mosby v. Manhattan Oil Co., C.C.A.Mo., 52 F.2d 364, 77 A.L.R. 1099, certiorari denied Manhattan Oil Co. v. Mosby, 52 S.Ct. 131, 284 U.S. 677, 76 L.Ed. 572—Lauria v. E. I. Du Pont De Nemours & Co., D.C.N.Y., 241 F. 687.
- Conn.—Broderick v. McGuire, 174 A. 314, 119 Conn. 83, 94 A.L.R. 890—Reilly v. Antonio Pepe Co., 143 A. 568, 108 Conn. 436.
- Del.—Skillman v. Conner, Super., 193 A. 563.
- Ind.—Henning v. Hill, 141 N.E. 66, 80 Ind.App. 363.
- Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.
- Mass.—Walsh v. New York & N. E. R. Co., 36 N.E. 584, 160 Mass. 571, 39 Am.S.R. 514.
- Minn.—Chubbuck v. Holloway, 234 N.W. 314, 182 Minn. 225, reversed on other grounds Chubbuck v. Minneapolis, St. P. & S. S. M. Ry. Co., 234 N.W. 868, 182 Minn. 225.
- Mo.—Burg v. Knox, 67 S.W.2d 96, 334 Mo. 329, transferred, App., 54 S.W.2d 797.
- N.Y.—Commonwealth of Pennsylvania, for use of Reals v. Beans, 249 N.Y.S. 232, 139 Misc. 785.
- N.C.—Howard v. Howard, 158 S.E. 101, 201 N.C. 574.
- Okl.—Miller v. Tennis, 282 P. 345, 140 Okl. 185.
- S.C.—Rauton v. Pullman Co., 191 S.E. 416, 183 S.C. 495.
- Tenn.—Brown v. Hagan, 14 Tenn. App. 251.
- Vt.—Brown v. Perry, 156 A. 910, 104 Vt. 66.
79. Mass.—New York Trust Co. v. Brewster, 134 N.E. 616, 241 Mass. 155.
- Tex.—Southern Pac. R. Co. v. Allen, 106 S.W. 441, 48 Tex.Civ.App. 66.
80. U.S.—Lauria v. E. I. Du Pont De Nemours & Co., D.C.N.Y., 241 F. 687.
- Cal.—Loranger v. Nadeau, 10 P.2d 63, 215 Cal. 362, 84 A.L.R. 1264.
- Fla.—Hartford Accident & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 8, 100 Fla. 748, citing *Corpus Juris*.
- Mass.—New York Trust Co. v. Brewster, 134 N.E. 616, 241 Mass. 155.
- Minn.—Chubbuck v. Holloway, 234 N.W. 314, 182 Minn. 225, reversed on other grounds Chubbuck v. Minneapolis, St. P. & S. S. M. Ry. Co., 234 N.W. 868, 182 Minn. 225.
- Miss.—Burkett v. Globe Indemnity Co., 181 So. 316, 182 Miss. 423.
- N.J.—Masci v. Young, 162 A. 623, 109 N.J.Law 453, 83 A.L.R. 869, affirming 157 A. 82, 9 N.J.Misc. 1137, and affirmed Young v. Masci, 53 S.Ct. 599, 289 U.S. 253, 77 L.Ed. 1158, 88 A.L.R. 170.
- N.Y.—Wilkoff v. Hirschel, 249 N.Y.S. 690, 232 App.Div. 193, affirmed and

elsewhere in other ways, cannot be enforced by the courts of another state.⁸¹ However, the mere fact that the remedy available in the forum is not as complete as that in the state where the wrong occurred has been held not to justify a refusal to take jurisdiction.⁸²

(5) Restrictions Imposed by Foreign Law

Although there is contrary authority, the weight of authority seems to be that an action arising under the laws of one state will be entertained in another state only on the terms permitted by such laws. There is authority both affirming and denying that a statute permitting an action only in the state in which it arose will be enforced in other states. Courts of other states need not recognize legislation intended to operate only locally.

While compliance with statutory requirements imposed by the state under whose laws the cause of action arose has been held not a prerequisite to enforcement of the action in another state,⁸³ however, the mere fact that statutes of the state in which the cause of action arose provide for suspension of execution for a limited time does not preclude adjudication of the action in other states;⁸⁴ and the fact that the state in which the cause of action arose will not enforce against its own residents like causes of action arising in other states has been held immaterial as regards whether

other states will enforce the action against their residents.⁸⁵

Statutory limitation of place for bringing action.

It has been held that a statute creating a right of action may impose the condition that an action thereon shall be brought in the courts of the state and not elsewhere,⁸⁶ and that such a provision will preclude an action on such right of action in any other state.⁸⁷ However, the weight of authority is that the legislature of a state cannot deny to one having a transitory cause of action originating in that state under one of its statutes the right to appeal to the courts of another state for the enforcement thereof.⁸⁸

Local causes of action. Courts of other states are not required to recognize a statute intended by the enacting legislature to be only local in its operation.⁸⁹

§ 71. Penal Laws

Courts will not enforce penal laws of other states or countries. This rule has been held applicable to penalties imposed for the benefit of private individuals, but according to another view applies only to penalties by or on behalf of the state or a subdivision thereof as a punishment for violation of public or criminal law.

It is a well established general rule that the courts

certified questions answered 179 N. E. 249, 258 N.Y. 28.
15 C.J. p 780 note 67.

81. U.S.—Esteves v. Lykes Bros. S. S. Co., C.C.A.Tex., 74 F.2d 364, certiorari denied Lykes Bros. S. S. Co. v. Esteves, 55 S.Ct. 830, 295 U. S. 751, 79 L.Ed. 1695.

Ill.—Smith v. Kastor, 195 Ill.App. 458, followed in Buell v. Kastor, 195 Ill.App. 464.

Miss.—McArthur v. Maryland Casualty Co., 186 So. 305, 120 A.L.R. 846.

N.Y.—Hartford Accident & Indemnity Co. v. Chartrand, 204 N.Y.S. 791, 209 App.Div. 352, reversed on other grounds 145 N.E. 274, 239 N.Y. 36—Consolidated Copper Mines Corporation v. Nevada Consolidated Copper Co., 215 N.Y.S. 265, 127 Misc. 71.

Tenn.—U. S. Gypsum Co. v. American Surety Co., 34 Tenn.App. 367—Livingston v. U. S. Fire Ins. Co., 7 Tenn.App. 230.
15 C.J. p 781 note 75.

Arbitration

Ohio.—Shafer v. Metro-Goldwyn-Mayer Distributing Corporation, 172 N.E. 689, 36 Ohio App. 31.

82. Iowa.—Armbruster v. Chicago, R. I. & P. R. Co., 147 N.W. 337, 166 Iowa 155.

83. U.S.—El Paso & N. E. R. Co. v. Gutierrez, 34 S.Ct. 21, 215 U.S. 87,

54 L.Ed. 106, affirming 117 S.W. 426, 102 Tex. 378.

Cal.—Ryan v. North Alaska Salmon Co., 95 P. 862, 153 Cal. 438.
N.Y.—Apfelberg v. Lax, 174 N.E. 759, 255 N.Y. 377, reversing 245 N.Y.S. 729, 230 App.Div. 865.

Absence of cause of action in lex loci see *infra* § 545.

Action in equity

Where the lex loci provides only for an action in equity on a particular type of cause of action, only a suit in equity, not an action at law, may be maintained thereon in the forum.—Farrell v. Employers' Liability Assur. Corporation, 168 A. 911, 54 R.I. 18.

Notice and demand

Where a statute requires notice and demand, a court of another state cannot allow a recovery thereunder without a showing of compliance with such requirements.—El Paso & N. E. R. Co. v. Gutierrez, 30 S.Ct. 21, 215 U.S. 87, 54 L.Ed. 106, affirming 117 S.W. 426, 102 Tex. 378.

Contra Apfelberg v. Lax, 174 N. E. 759, 255 N.Y. 377, reversing 245 N.Y.S. 729, 230 App.Div. 865.

84. Mass.—New York Trust Co. v. Brewster, 134 N.E. 616, 241 Mass. 155.

85. Conn.—Broderick v. McGuire, 174 A. 314, 119 Conn. 83, 94 A.L.R. 890.

86. Mo.—Lessenden v. Missouri Pac. R. Co., 142 S.W. 332, 238 Mo. 247.

15 C.J. p 781 note 77.
87. U.S.—Coyne v. Southern Pacific Co., C.C.Utah, 155 F. 683.
15 C.J. p 781 note 78.

88. Ga.—Slaton v. Hall, 158 S.E. 747, 172 Ga. 675, appeal dismissed Clemmons v. Hall, 52 S.Ct. 5, 284 U.S. 691, 76 L.Ed. 583.

Minn.—State v. District Court, Hennepin County, 168 N.W. 589, 140 Minn. 494, 1 A.L.R. 145.
15 C.J. p 781 note 79.

Nonresident

A state cannot compel a nonresident to bring suit only within its courts for personal injuries suffered in the state.—Atchison, T. & S. F. R. Co. v. Mills, 116 S.W. 852, 53 Tex. Civ.App. 359—Atchison, T. & S. F. R. Co. v. Sowers, Tex.Civ.App., 99 S.W. 190.

Solicitation of business in another state

Courts will not decline to entertain action of transitory nature arising in a foreign state, brought by citizen of such state, merely because statute of foreign state prohibits solicitation of business of prosecuting such actions without state.—Hovel v. Minneapolis & St. L. Ry. Co., 206 N.W. 710, 165 Minn. 449.

89. Va.—C. I. T. Corporation v. Guy, 195 S.E. 659, 170 Va. 16.

of one state will not enforce the penal laws of another state,⁹⁰ or of a foreign country.⁹¹ In some cases, this rule has been considered applicable to penalties imposed for the benefit of individuals whose private rights have been infringed.⁹² However, a number of cases hold that the rule applies only to statutes imposing penalties recoverable by or on behalf of the state or some political subdivision thereof, as a punishment for some violation of public or criminal law,⁹³ and that the mere fact that a statute was passed as a penal one or as a police regulation does not necessarily preclude the enforcement in another state of a purely private right conferred thereby.⁹⁴

How character of statute determined. It has

been considered that it is for the courts of the forum to determine whether a statute is penal in its nature so as to prevent its enforcement in a foreign jurisdiction, or whether it merely provides for the enforcement of private statutory rights of a transitory nature.⁹⁵ On the other hand, it has also been held that, where the supreme court of a state has decided that a liability imposed by a statute of such state is a penal liability, such liability will not be enforced in another state.⁹⁶

§ 72. Revenue Laws

Ordinarily, a state court will not enforce the revenue laws of another state or country.

90. U.S.—James-Dickinson Farm Mortg. Co. v. Harry, 47 S.Ct. 308, 273 U.S. 119, 71 L.Ed. 569—The Vestris, D.C.N.Y., 53 F.2d 847—Lauria v. E. I. Du Pont de Nemours & Co., D.C.N.Y., 241 F. 687. Conn.—Reilly v. Antonio Pepe Co., 143 A. 568, 108 Conn. 436. Ga.—Sherman & Sons Co. v. Bitting, 105 S.E. 848, 26 Ga.App. 299. Ill.—Grinestaff v. New York Central R. R., 253 Ill.App. 589. Mass.—E. S. Parks Shellac Co. v. Harris, 129 N.E. 617, 237 Mass. 312. N.J.—People of State of New York v. Coe Mfg. Co., 172 A. 198, 112 N.J.Law 536, affirming 162 A. 872, 10 N.J.Misc. 1161, and certiorari denied Coe Mfg. Co. v. People of State of New York, 55 S.Ct. 89, 293 U.S. 576, 79 L.Ed. 674—Masci v. Young, 162 A. 623, 109 N.J.Law 453, 83 A.L.R. 869, affirming 157 A. 82, 9 N.J.Misc. 1137, and affirmed Young v. Masci, 53 S.Ct. 599, 289 U.S. 253, 77 L.Ed. 1158, 83 A.L.R. 170—Kennedy v. Leary, 51 A. 475, 67 N.J.Law 435. N.Y.—In re Cohen's Will, 298 N.Y.S. 368, 164 Misc. 98, affirmed 2 N.Y.S. 2d 764, 254 App.Div. 571, affirmed 16 N.E.2d 111, 278 N.Y. 584—Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644—Ferguson v. Harder, 252 N.Y.S. 783, 141 Misc. 466—In re Engel's Estate, 250 N.Y.S. 648, 140 Misc. 276. N.C.—Rodwell v. Camel City Coach Co., 171 S.E. 100, 205 N.C. 292. Pa.—Nesbit v. Clark, 116 A. 404, 272 Pa. 161, 25 A.L.R. 1406, certiorari denied 42 S.Ct. 273, 258 U.S. 621, 66 L.Ed. 795—North American Provision Co. v. Millar, 85 Pa. Super. 265. Tenn.—Livingston v. U. S. Fire Ins. Co., 7 Tenn.App. 230.

- Vt.—Brown v. Perry, 156 A. 910, 104 Vt. 66—Wellman v. Mead, 107 A. 396, 93 Vt. 322. W.Va.—Stevens v. Brown, 20 W. Va. 450. 15 C.J. p 781 note 86.

91. N.Y.—Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co., 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644. 15 C.J. p 781 note 86.

92. N.Y.—Consolidated Copper Mines Corporation v. Nevada Consolidated Copper Co., 215 N.Y.S. 265, 127 Misc. 71.

- Tex.—Clay v. Atchison, T. & S. F. Ry. Co., Civ.App., 201 S.W. 1072, affirmed, Com.App., 228 S.W. 907. 15 C.J. p 782 note 89.

Particular penalties

- (1) Punitive damages for willful and wanton injuries.—Grinestaff v. New York Central R. R., 253 Ill. App. 589.

- (2) Penalty against insurance companies unsuccessful on the trial and appeal of actions on policies.—Livingston v. U. S. Fire Ins. Co., 7 Tenn. App. 230.

93. U.S.—Abercrombie v. United Light & Power Co., D.C.Md., 7 F. Supp. 530.

- Ga.—Sherman & Sons Co. v. Bitting, 105 S.E. 848, 26 Ga.App. 299.

- Mo.—Coryell v. Atchison, T. & S. F. Ry. Co., 201 S.W. 77, 273 Mo. 361.

- N.Y.—Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 224 N.Y. 99, reversing 159 N.Y.S. 282, 172 App.Div. 227, reversing 156 N.Y.S. 7, 92 Misc. 475. 15 C.J. p 782 note 90.

- Meaning in private international law as test.—Roseman v. Fidelity & Deposit Co. of Maryland, 265 N.Y.S. 557, 148 Misc. 132, modifying 262 N.Y.S. 491, 146 Misc. 532.

94. U.S.—Abercrombie v. United Light & Power Co., D.C.Md., 7 F. Supp. 530.

- Ga.—Sherman & Sons Co. v. Bitting, 105 S.E. 848, 26 Ga.App. 299.

- Ill.—See Craig v. Yazoo & M. V. Ry. Co., 209 Ill.App. 599.

- Mo.—Coryell v. Atchison, T. & S. F. Ry. Co., 201 S.W. 77, 273 Mo. 361.

- 15 C.J. p 782 note 91.

"[The] question whether a statute of one state which in some aspects may be called penal is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."—Wellman v. Mead, 107 A. 396, 93 Vt. 322—15 C.J. p 782 note 91.

Punitive damages

A statute is not a penal statute, so as not to be entitled to enforcement by the courts of another state, merely because it awards punitive damages as the measure of the liability of the wrongdoer.—James-Dickinson Farm Mortg. Co. v. Harry, Ill., 47 S.Ct. 308, 273 U.S. 119, 71 L. Ed. 569—15 C.J. p 782 note 91 [c].

Action to recover rent from a tenant holding over is not penal in its nature so as to prevent the courts of other estates from assuming jurisdiction thereof.—Upson v. Robison, 17 S.W.2d 305, 179 Ark. 600.

95. N.H.—Hill v. Boston, etc., R. Co., 89 A. 482, 77 N.H. 151, Ann. Cas.1914C 714.

- N.Y.—Loucks v. Standard Oil Co., 156 N.Y.S. 7, 92 Misc. 475, reversed on other grounds 159 N.Y.S. 282, 172 App.Div. 227.

96. Pa.—Commercial Nat. Bank v. Kirk, 71 A. 1085, 222 Pa. 567, 128 Am.S.R. 823.

- 15 C.J. p 783 note 97.

As a general rule, a state court will not enforce the revenue laws of another state or country.⁹⁷ Thus, it has been considered that an action cannot be maintained in one state for a tax imposed under the law of another state.⁹⁸ However, it has been

held that a court of probate will not refuse to direct a just and equitable administration of an estate within its jurisdiction merely because such direction will result in the enforcement of revenue laws of another state.⁹⁹

5. JURISDICTION OF THE PERSON

§ 73. In General

Generally speaking, jurisdiction of the parties is essential to a court's power to determine a legal controversy and jurisdiction of the person is absolutely necessary in personal actions. Such jurisdiction is obtainable only as to persons subject to the territorial jurisdiction of the court and, conversely, may attach as to all such persons.

Jurisdiction of the parties is in general essential to the power of a court to determine a legal controversy,¹ and, in actions affecting purely personal rights, jurisdiction of the person is absolutely necessary.² Jurisdiction of the person may be acquired by a court of the state only in respect of a person at the time subject to the jurisdiction of the state courts;³ such jurisdiction is dependent, broadly speaking, on the person's presence within the state,⁴ and is not conferred merely by

the fact that the court has jurisdiction of his property.⁵ Conversely, civil and criminal jurisdiction will attach to all persons found within the state, whether their residence be permanent or temporary.⁶ In some circumstances, lack of jurisdiction of the person may be asserted only by the person over whom such jurisdiction may be lacking.⁷

Joint and several defendants. Where an action is brought against persons over whom the court has no jurisdiction, the fact that another person over whom the court has jurisdiction but against whom no cause of action is alleged is joined as a defendant will not confer jurisdiction over the other defendants;⁸ and, where the cause of action against each of several defendants is separate and distinct, the acquisition of jurisdiction over one defendant does not give the court jurisdiction over another.⁹

97. U.S.—*Moore v. Mitchell*, C.C.A. N.Y., 30 F.2d 600, affirming, D.C., 28 F.2d 997, and certiorari granted 49 S.Ct. 513, 279 U.S. 834, 73 L.Ed. 982, affirmed 50 S.Ct. 175, 281 U.S. 18, 74 L.Ed. 673.

N.Y.—*Beadall v. Moore*, 191 N.Y.S. 826, 199 App.Div. 531—*Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co.*, 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644.

15 C.J. p 783 note 99.

As against property in the forum.

N.Y.—*In re Spitzer's Estate*, 9 N.Y.S. 2d 868, 170 Misc. 160.

98. U.S.—*Moore v. Mitchell*, C.C.A. N.Y., 30 F.2d 600, affirming, D.C., 28 F.2d 997, certiorari granted 49 S.Ct. 513, 279 U.S. 834, 73 L.Ed. 982, affirmed 50 S.Ct. 175, 281 U.S. 18, 74 L.Ed. 673.

N.Y.—*In re Gotthelf's Will*, 273 N.Y.S. 247, 152 Misc. 309—*Maryland v. Turner*, 132 N.Y.S. 173, 75 Misc. 9.

99. N.Y.—*State of Colorado v. Harbeck*, 179 N.Y.S. 510, 189 App.Div. 865; reversing 175 N.Y.S. 685, 106 Misc. 319—*Matter of Hollins*, 139 N.Y.S. 713, 79 Misc. 200.

1. Cal.—*Inga v. Blum*, 25 P.2d 473, 134 Cal.App. 398.

Hawaii.—*Kim Poo Kum v. Sugiyama*, 33 Hawaii 545.

Release of debt

A court may compel a release from, and an assignment of, an action of a creditor only if the court has before it both the debtor and creditor.—*Redzina v. Provident Inst. for Savings in Jersey City*, 125 A. 138, 96 N.J.Eq. 346, affirming 121 A. 519, 1 N.J.Misc. 334.

2. U.S.—*Noxon Chemical Products Co. v. Leckie*, C.C.A.N.J., 39 F.2d 318, certiorari denied *Robb v. Noxon Chemical Products Co.*, 51 S.Ct. 22, 282 U.S. 84, 75 L.Ed. 747.

Ark.—*Gainsburg v. Dodge*, 101 S.W. 2d 178, 193 Ark. 473.

Or.—*In re Wells' Estate*, 289 P. 511, 133 Or. 155.

Pa.—*In re Dench's Estate*, 17 Pa. Dist. & Co. 696, 14 Erie Co. 93.

15 C.J. p 734 note 86.

3. Iowa.—*Jones v. Illinois Cent. R. Co.*, 175 N.W. 316, 188 Iowa 850.

4. U.S.—*Hutchinson v. Chase & Gilbert*, C.C.A.N.Y., 45 F.2d 139.

"Jurisdiction of person" defined see supra § 15.

5. N.Y.—*Robinson v. Robinson*, 3 N.Y.S.2d 882, 254 App.Div. 696, affirmed 17 N.E.2d 448, 279 N.Y. 582, answering questions certified 4 N.Y.S.2d 1017, 254 App.Div. 763.

Pa.—*Atlantic Seaboard Natural Gas Co. v. Whitten*, 173 A. 305, 315 Pa. 529, 93 A.L.R. 615.

6. Ga.—*Hines v. Moore*, 148 S.E. 162, 168 Ga. 451.

La.—*Wall v. Graham*, 133 So. 511, 16 La.App. 141.

N.Y.—*Webster v. Columbian Nat. Life Ins. Co.*, 116 N.Y.S. 404, 131 App.Div. 837, affirmed 89 N.E. 1114, 196 N.Y. 523.

15 C.J. p 787 note 55.

Conduct within the state, as distinguished from mere residence or domicile, whether temporary or permanent, may be a statutory ground for jurisdiction.—*Horvath v. Brettschneider*, 227 N.Y.S. 109, 131 Misc. 618.

Residents may resort to courts as of right to enforce obligations against persons over whom the courts can obtain jurisdiction.—*Universal Adjustment Corporation v. Midland Bank, Limited, of London, England*, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407—*Cressey v. Erie R. Co.*, 180 N.E. 160, 278 Mass. 284.

Allegation of jurisdiction held sufficient

Ga.—*Piedmont Cotton Mills v. James*, 200 S.E. 457, 59 Ga.App. 239.

Miss.—*J. J. Newman Lumber Co. v. Scipp*, 91 So. 11, 128 Miss. 322.

7. N.Y.—*Ernst v. Elmira Municipal Impr. Co.*, 54 N.Y.S. 116, 24 Misc. 583.

8. Tex.—*Weekes v. Sunset Brick, etc., Co.*, 56 S.W. 243, 23 Tex.Civ. App. 556.

15 C.J. p 787 note 58.

9. U.S.—*Wright v. Ankeny*, D.C. Wash., 217 F. 988.

15 C.J. p 787 note 59.

On the other hand, lack of jurisdiction over one co-defendant may not defeat jurisdiction over the other codefendant.¹⁰

§ 74. Nonresidents

Residence within the territorial jurisdiction of the court is not, in the absence of statute, essential to personal jurisdiction. However, a court cannot compel nonresident officers of a foreign corporation to obey decrees respecting the management thereof, nor make orders affecting substantial rights of a foreign corporation not a party.

In the absence of statute, it is not of itself sufficient to defeat the jurisdiction of a state court that a party to an action is a resident of another state,¹¹ and even inferior courts in a state may have jurisdiction of a cause of action, although both parties may not reside within the territorial limits of such court's particular jurisdiction.¹² However, the courts of one state cannot compel the officers of a

foreign corporation residing in another state to obey their decrees respecting the management of the affairs of the corporation,¹³ and, a fortiori, a court cannot make an order affecting the substantial rights of a foreign corporation in an action to which it is not a party.¹⁴ Of course, a court cannot acquire jurisdiction of nonresidents by unauthorized acts of its officers.¹⁵

§ 75. — Actions by Nonresidents

In the absence of a legal restraint, courts will assume jurisdiction of actions by nonresidents; although, by statute, he by bringing an action may become amenable to an action on a cause of action available as a set-off or counterclaim.

In the absence of some legal restraint,¹⁶ courts will assume jurisdiction of actions by nonresidents to enable them to assert their rights;¹⁷ and considerations of convenience have been held to be im-

10. U.S.—*Denver & R. G. W. R. Co. v. Terte*, Mo., 52 S.Ct. 152, 284 U.S. 284, 76 L.Ed. 295.

11. La.—*Wall v. Graham*, 138 So. 511, 16 La.App. 141.

Minn.—*Boright v. Chicago, R. I. & P. R. Co.*, 230 N.W. 457, 180 Minn. 52.

15 C.J. p 787 note 60.

Nonresident testator

The fact that the will of a nonresident testator is involved will not defeat the jurisdiction.—*Farmers' L. & T. Co. v. Ferris*, 73 N.Y.S. 475, 67 App.Div. 1—15 C.J. p 788 note 64.

Who are residents or nonresidents

(1) To constitute a person a nonresident within the meaning of statutes relating to the acquisition of jurisdiction, he must have a fixed abode outside the state, although it need not necessarily be permanent nor the animus revertendi abandoned.—*Appleton v. Southern Trust Co.*, 51 S.W.2d 447, 244 Ky. 453.

(2) Where there is no bodily presence, and no permanent place of abode and no domicile, within the state, there is no residence.—*Rawstorne v. Maguire*, 192 N.E. 294, 265 N.Y. 204, affirming 269 N.Y.S. 39, 240 App.Div. 1.

(3) Other holdings.—*Natalbany Lumber Co. v. McGraw*, 178 So. 377, 188 La. 863, followed in *Daniels v. McGraw*, 178 So. 380, 188 La. 874. 15 C.J. p 787 note 60 [a].

12. La.—*Dixon v. Futch*, App., 166 S. Ct. 205.

15 C.J. p 788 note 81.

"Residence" and "domicile" as synonymous in respect of the jurisdiction of an inferior court.—*In re Oxlas' Estate*, Mo.App., 29 S.W.2d 240.

13. Tex.—*Royal Fraternal Union v. Lunday*, 113 S.W. 185, 51 Tex.Civ. App. 637.

15 C.J. p 788 note 62.

14. Kan.—*State v. International Harvester Co.*, 106 P. 1053, 81 Kan. 610.

15. N.Y.—*Amusement Securities Corporation v. Academy Pictures Distributing Corporation*, 295 N.Y.S. 436, 251 App.Div. 227, modifying in part 294 N.Y.S. 279, 163 Misc. 608, affirmed 294 N.Y.S. 305, 250 App.Div. 710 and 294 N.Y.S. 306, 250 App.Div. 710, motion denied 295 N.Y.S. 472, 250 App.Div. 749, affirmed 13 N.E.2d 471, 277 N.Y. 557, reargument denied 14 N.E.2d 383, 277 N.Y. 672.

16. Ohio.—*Loftus v. Pennsylvania R. Co.*, 16 Ohio App. 371, affirmed 140 N.E. 94, 107 Ohio St. 352, error dismissed 45 S.Ct. 97, 266 U.S. 639, 69 L.Ed. 483.

Statute held valid excluding from the jurisdiction of the state court all causes for injuries or death occurring without the state unless claimant be a resident of the state.—*Loftus v. Pennsylvania R. Co.*, 140 N.E. 94, 107 Ohio St. 352, affirming 16 Ohio App. 371, and error dismissed 45 S.Ct. 97, 266 U.S. 639, 69 L.Ed. 483, followed in *Reeves v. Louisville & N. R. Co.*, 181 N.E. 885, 124 Ohio St. 657, dismissed 52 S.Ct. 314, 285 U.S. 524, 76 L.Ed. 322.

17. Conn.—*Place v. Lyon, Kirby* 404. Ill.—*Wintersteen v. National Cooperation & Woodenware Co.*, 197 N.E. 578, 361 Ill. 95.

Ind.—*Dodgem Corporation v. D. D. Murphy Shows*, 183 N.E. 699, 96 Ind.App. 325, rehearing denied 185 N.E. 169, 96 Ind.App. 325.

Minn.—*Boright v. Chicago, R. I. & P. R. Co.*, 230 N.W. 457, 180 Minn. 52.

Mo.—*State v. Grimm*, 143 S.W. 483, 239 Mo. 135, 180.

Neb.—*Herrmann v. Franklin Ice Cream Co.*, 208 N.W. 141, 114 Neb. 468.

N.Y.—*Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N.Y. 152, 139 N.E. 223, 32 A.L.R. 1, reversing 176 N.Y.S. 901, 188 App. Div. 975—*Denkman v. Denkman*, 8 N.Y.S.2d 238, 255 App.Div. 496—*Consumers' Lumber Co. v. Lincoln*, 233 N.Y.S. 530, 235 App.Div. 484—*Moscow Fire Ins. Co. of Moscow, Russia v. Bank of New York & Trust Co.*, 294 N.Y.S. 648, 161 Misc. 903, affirmed 1 N.Y.S.2d 640, 253 App.Div. 710, and 1 N.Y.S.2d 641, 253 App.Div. 710, affirmed 3 N.Y.S.2d 653, 253 App.Div. 644—*Holzer v. Deutsche Reichsbahn Gesellschaft*, 290 N.Y.S. 181, 159 Misc. 830—*People's Trust Co. of Binghamton v. Goodell*, 236 N.Y.S. 549, 134 Misc. 692.

N.C.—*MacGovern & Co. v. Atlantic Coast Line R. Co.*, 104 S.E. 534, 180 N.C. 219.

Ohio.—*Zizelman v. Union Trust Co.*, 157 N.E. 903, 25 Ohio App. 165.

15 C.J. p 788 note 66.

Action on joint liability

Although prevented by statute from maintaining an action against a certain person alone, a nonresident has been held entitled to maintain the action against such person and another on a joint liability where the action was maintainable against the other.—*Baltimore & O. R. Co. v. Ballie*, 148 N.E. 233, 112 Ohio St. 567.

Bill of discovery

Mo.—*Ex parte Dillon*, 29 S.W.2d 236, 225 Mo.App. 280.

Comity as basis of rule

Tex.—*Coss v. Coss*, Civ.App., 207 S.W. 127.

material.¹⁸ However, it is sometimes provided by statute that, if a nonresident sues in a court of the state, he becomes liable to be sued in the courts of such state, notwithstanding his nonresidence, on any cause of action which might have been available as a set-off or counterclaim in his action.¹⁹

§ 76. — Actions against Nonresidents

State courts may entertain an action against a nonresident on acquiring jurisdiction of his person by service of process on him within the court's territorial jurisdiction or within the state, or by his voluntary submission to its jurisdiction, or, in the absence thereof, in some circumstances, to the extent of his property situated in the state, but not otherwise.

State courts cannot take jurisdiction of actions against nonresidents who own no property within the state, have not been personally served with proc-

ess therein,²⁰ and have not voluntarily submitted to the jurisdiction of its courts;²¹ but, while jurisdiction of personal actions cannot be acquired against nonresidents who have not been personally served with process within the state,²² or voluntarily submitted to the court's jurisdiction,²³ a court may entertain an action against a nonresident on acquiring jurisdiction of his person²⁴ by service of process on him within the territorial jurisdiction of the court or within the state,²⁵ or by his voluntary submission to its jurisdiction.²⁶ The fact that a nonresident is the owner of property situated within the state does not give the state courts jurisdiction over his person,²⁷ but they may have jurisdiction in some circumstances of actions against a nonresident to the extent of such property.²⁸ A nonresident over whose person jurisdic-

18. U.S.—Doyle v. Northern Pac. Ry. Co., D.C.Minn., 55 F.2d 708.

19. U.S.—Rice v. Sharpleigh Hardware Co., C.C.Tenn., 85 F. 559.

Mass.—Aldrich v. Blatchford, 56 N.E. 700, 175 Mass. 369.

15 C.J. p 788 note 67.

20. Ala.—Ford Motor Co. v. Hall Auto Co., 147 So. 603, 226 Ala. 385.

Ill.—See Mead v. Mead, 205 Ill.App. 327.

La.—Superior Oil Co. v. Baltar, 160 So. 626, 181 La. 908—Charles B. Nelsen & Co. v. Rodriguez, 133 So. 347, 172 La. 14—Krotz Springs Oil & Mineral Water Co. v. Shirk, 116 So. 488, 165 La. 1005—Klotz v. Tru-Fruit Distributors, App., 173 So. 592.

Mich.—Larson v. Dubuque Fire & Marine Ins. Co., 213 N.W. 140, 238 Mich. 366.

Ohio.—Schaeffer v. Alva West & Co., 4 N.E.2d 720, 53 Ohio App. 270.

15 C.J. p 789 note 71.

Appointment of curator, in Louisiana

In Louisiana, it has been held that a plaintiff cannot bring a nonresident before the courts by causing a curator to be appointed to represent the nonresident.—Superior Oil Co. v. Baltar, 160 So. 626, 181 La. 908.

Contra Krotz Springs Oil & Mineral Water Co. v. Shirk, 116 So. 488, 165 La. 1005.

21. Mass.—Pond v. Simpson, 146 N.E. 864, 251 Mass. 325.

N.Y.—McNaughton v. Broach, 260 N.Y.S. 100, 236 App.Div. 448.

22. Ga.—Gordy v. Levison & Co., 122 S.E. 234, 157 Ga. 670.

La.—Klotz v. Tru-Fruit Distributors, App., 173 So. 592.

Miss.—Delta Insurance & Realty Agency v. Fourth Nat. Bank, 102 So. 846, 137 Miss. 855.

N.H.—Nottingham v. Newmarket Mfg. Co., 151 A. 709, 84 N.H. 419.

N.J.—Papp v. Metropolitan Life Ins. Co., 164 A. 873, 113 N.J.Eq. 522.

N.Y.—Rawstorne v. Maguire, 192 N.E. 294, 265 N.Y. 204, affirming 269 N.Y.S. 39, 240 App.Div. 1.

Ohio.—Schaeffer v. Alva West & Co., 4 N.E.2d 720, 53 Ohio App. 270.

Service by publication is insufficient to give jurisdiction of the person.

Md.—Grote v. Rogers, 149 A. 547, 158 Md. 685, followed in 149 A. 551, 158 Md. 695.

Wis.—Riley v. State Bank of De Pere, 269 N.W. 722, 223 Wis. 16.

23. N.Y.—Schwinger v. Hickok, 53 N.Y. 280.

15 C.J. p 789 note 71 [a].

24. Ala.—St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co., 138 So. 834, 224 Ala. 152.

Cal.—Hudson v. Von Hamm, 259 P. 374, 85 Cal.App. 323.

Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

Nonresident of county

A county court may acquire jurisdiction over the person of a defendant resident of another county.—Gardner v. Condon, 190 N.Y.S. 756, 117 Misc. 97.

Alien receiver appointed under the laws of a foreign country held within court's jurisdiction.—Mitchell v. Banco de Londres y Mexico, 183 N.Y.S. 446, 192 App.Div. 720.

Allegation of complaint that defendant is a nonresident does not warrant inference or conclusion that a court of general jurisdiction has no jurisdiction of defendant's person.—Williams v. Simon, 122 S.E. 772, 128 S.C. 315.

25. Ga.—Hines v. Moore, 148 S.E. 162, 168 Ga. 451—McDaniel v. Alford, 97 S.E. 673, 143 Ga. 609.

Ill.—Hes v. Heidenreich, 201 Ill.App. 619.

Md.—Hieston v. National City Bank

of Chicago, 104 A. 281, 132 Md. 389—McSherry v. McSherry, 77 A. 653, 113 Md. 395, 140 Am.S.R. 428.

Mass.—Durfée v. Durfee, 200 N.E. 395.

N.H.—Shiatte v. Singer Mfg. Co., 125 A. 429, 81 N.H. 294.

N.Y.—Richards v. Wright, 248 N.Y.S. 298, 299, 139 Misc. 316, quoting *Corpus Juris*.

S.C.—Williams v. Simon, 122 S.E. 772, 128 S.C. 315.

Va.—Bank of Bristol v. Ashworth, 94 S.E. 469, 122 Va. 170.

15 C.J. p 789 note 76.

26. Ill.—Hes v. Heidenreich, 201 Ill. App. 619.

Md.—McSherry v. McSherry, 77 A. 653, 113 Md. 395, 140 Am.S.R. 428.

N.Y.—Sudbury v. Ambi Verwaltung Kommanditgesellschaft Auf Aktien, 210 N.Y.S. 164, 213 App.Div. 98.

Ohio.—Schaeffer v. Alva West & Co., 4 N.E.2d 720, 53 Ohio App. 270.

Executors and trustees of a deceased nonresident who had voluntarily submitted to the jurisdiction of the court.—Gould v. Gould, 207 N.Y.S. 4, 211 App.Div. 78, affirming 203 N.Y.S. 399, 122 Misc. 152.

27. Me.—McVicker v. Beedy, 31 Me. 314, 50 Am.D. 666.

N.C.—Everitt v. Austin, 86 S.E. 523, 169 N.C. 622.

15 C.J. p 789 note 75 [f].

28. Mich.—Larson v. Dubuque Fire & Marine Ins. Co., 213 N.W. 140, 238 Mich. 366.

Neb.—Salyers Auto Co. v. De Vore, 217 N.W. 94, 116 Neb. 317, 56 A.L.R. 594.

Ohio.—St. John v. Parsons, 7 N.E.2d 1013, 54 Ohio App. 420.

Wash.—State v. Superior Court of State of Washington, King County, 197 P. 321, 115 Wash. 359.

15 C.J. p 789 note 75.

Jurisdiction of res generally see *supra* § 43.

tion has been acquired is in court for every purpose connected with the suit, and is charged with notice of any action the court may take pending the same;²⁹ and having acquired jurisdiction, the court will retain it for the purpose of administering justice to resident citizens, and will not send them to foreign jurisdictions to seek redress.³⁰

Persons doing business within the jurisdiction are, under some statutes, deemed residents for the purpose of being sued.³¹

Nonresidents jointly liable. A court may assume jurisdiction over an action against a nonresident over whose person it has acquired jurisdiction, although it has not acquired jurisdiction over the person of a nonresident jointly liable with him.³²

Statutory limitations on inferior courts. The jurisdiction of inferior courts is sometimes limited by statute to actions brought against persons who are residents within the territorial jurisdiction of the court.³³ So by statute, jurisdiction of actions against nonresidents may require personal service on the nonresident within the territorial jurisdiction of the court at the time the action is commenced.³⁴

§ 77. — Actions between Nonresidents

- a. In general
- b. Between nonresident and foreign corporation
- c. Between foreign corporations

a. In General

The courts of a state may in their sound discretion assume jurisdiction of actions between nonresidents or foreigners. Under some authorities, the doctrine of *forum non conveniens* is to be applied cautiously, and this is true generally in respect of actions growing out of commercial transactions or contracts; but there is a contrary view in respect of causes of action in tort arising outside the state.

The courts of a state will in many instances assume jurisdiction of actions between nonresidents, either where the subject matter of the controversy is in reference to rights in or to property situated within the state, or where the cause of action, although it accrued in another state, is transitory in its nature and the parties are personally within the jurisdiction of the court;³⁵ so state courts will in many instances assume jurisdiction of actions between foreigners where defendant can be found within the state and process there personally served

Mode of acquiring jurisdiction of res generally see *infra* § 84.

Nonresident stockholders of a corporation in receivership in a court of the state are within the jurisdiction of such court as regards their claims against the corporation.—*In re Receivership of Cotton Queen Oil Co.*, 78 So. 130, 143 La. 1.

Necessity of seizure

(1) Seizure of the property is necessary to such jurisdiction. Idaho.—*Welch v. Morris*, 291 P. 1048, 49 Idaho 781.

La.—*Levy v. Collins*, 38 So. 966, 115 La. 204—*Gele v. Cotonio*, 3 La.A. (Orleans) 165.

Miss.—*Aldridge v. First Nat. Bank*, 144 So. 469, 165 Miss. 1.

(2) Thus, seizure of realty is necessary to jurisdiction of an action against a nonresident for breach of a contract to sell the realty.—*Aldridge v. First Nat. Bank*, *supra*.

Service by publication may be sufficient service in such circumstances.—*St. John v. Parsons*, 7 N.E. 2d 1013, 54 Ohio App. 420—15 C.J. p 789 note 75 [c].

Pleading

It is not necessary to allege, in an action brought in the district court against a nonresident, that defendant may be found in the county where the action is brought, or that he has property in the county where the action is brought, if in fact he has property in such county.—*Whitehead v. Cox*, 218 P. 867, 95 Okl. 198.

29. Md.—*McSherry v. McSherry*, 77 A. 653, 113 Md. 395, 140 Am.S.R. 428.

30. Ga.—*Callaway v. Jones*, 19 Ga. 277.

31. N.Y.—*Routenberg v. Schweitzer*, 58 N.E. 880, 165 N.Y. 175, reversing 63 N.Y.S. 746, 50 App.Div. 218.

32. N.Y.—*Bates v. Reynolds*, 20 N. Y.Super. 685.

33. N.Y.—*Kortvellyessy v. Manhattan Cooperage Co.*, 147 N.Y.S. 586, 162 App.Div. 285.

15 C.J. p 790 note 85.

Equitable actions

Ga.—*Holmes v. Holmes*, 113 S.E. 81, 153 Ga. 790.

Proof of residence

(1) Under some statutes, proof that defendant resides in the judicial township of suit is jurisdictional, but it is not required that the fact of such residence shall appear in the complaint or judgment or any records in the case.—*Bogmuda v. Young*, 207 P. 915, 58 Cal.App. 19.

(2) Under other statutes, on the other hand, the judgment of such a court has been held not void for lack of jurisdiction because the residence of defendant does not appear.—*Dodge Mfg. Co. v. Nassau Show Case Co.*, 61 N.Y.S. 111, 44 App.Div. 603.

34. Tenn.—*Hamilton Nat. Bank v. Watkins*, 110 S.W.2d 811, 172 Tenn. 83.

Transitory actions

Statute providing that a transitory right of action "follows person of defendant" means that court has no jurisdiction of transitory action commenced prior to personal service on defendant within the county.—*Hamilton Nat. Bank v. Watkins*, *supra*.

35. U.S.—*Atchison, T. & S. F. Ry. Co. v. Wells*, C.C.A.Tex., 285 F. 369, certiorari granted 43 S.Ct. 519, 261 U.S. 612, 67 L.Ed. 826, reversed on other grounds 44 S.Ct. 469, 265 U.S. 101, 68 L.Ed. 938.

Ala.—*Jefferson Island Salt Co. v. El J. Longyear Co.*, 98 So. 119, 210 Ala. 352.

Cal.—*Hudson v. Von Hamm*, 259 P. 374, 85 Cal.App. 323.

Conn.—*Hartford Accident & Indemnity Co. v. Bernblum*, 191 A. 542, 122 Conn. 583—*Fine v. Wencke*, 169 A. 58, 117 Conn. 683.

Fla.—*Hagen v. Viney*, 169 So. 391, 124 Fla. 747.

Ga.—*McDaniel v. Alford*, 97 S.E. 678, 148 Ga. 609.

La.—*Stewart v. Litchenberg*, 86 So. 734, 148 La. 195.

Me.—*Foss v. Richards*, 139 A. 313, 126 Me. 419.

Miss.—*Pullman Palace Car Co. v. Lawrence*, 22 So. 53, 74 Miss. 782.

N.H.—*Shiatte v. Singer Mfg. Co.*, 125 A. 429, 81 N.H. 294.

Pa.—*New York Central R. Co. v. Marz*, 13 Pa.Dist. & Co. 29.

15 C.J. p 790 note 89.

on him.³⁶ However, in the absence of statute,³⁷ courts are not obliged to assume such jurisdiction, but are to exercise a sound discretion in the matter,³⁸ to be governed by broad considerations of the relationship between states or nations,³⁹ of convenience,⁴⁰ and of justice.⁴¹ Nevertheless, some authorities take the view that the doctrine of forum non conveniens is to be applied with caution,⁴² and,

in accordance with this view, courts do not ordinarily refuse to entertain actions between nonresidents on a cause of action growing out of a commercial transaction or contract,⁴³ unless special reasons are shown why they should not do so,⁴⁴ even where the contract was made or to be performed outside the state.⁴⁵ So courts sometimes assume jurisdiction of actions in tort, whether the

36. Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407. Pa.—New York Central R. Co. v. Marz, 13 Pa.Dist. & Co. 29. 15 C.J. p 791 note 90.

37. Ohio.—Mattone v. Argentina, 175 N.E. 603, 128 Ohio St. 393. Tex.—Allen v. Bass, Civ.App., 47 S. W.2d 426, error refused. 15 C.J. p 816 note 45 [d].

38. Fla.—Hagen v. Viney, 169 So. 391, 124 Fla. 747.

Mass.—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

N.Y.—De Flammercourt v. Ascer, 3 N.Y.S.2d 461, 167 Misc. 473—Gainer v. Donner, 251 N.Y.S. 713, 140 Misc. 841—Gardner v. Thomas, 14 Johns. 134, 7 Am.D. 445.

15 C.J. p 790 note 88, p 816 note 45.

Comity as basis for assumption of jurisdiction.—Foss v. Richards, 139 A. 313, 126 Me. 419.

Statute held not to confer unequalled right on nonresidents to have the courts of the state entertain their transitory actions against other nonresidents, even though personal service is had in the state.—Stewart v. Litchenberg, 86 So. 734, 148 La. 195.

Refusal to assume held proper. Me.—Foss v. Richards, 139 A. 313, 126 Me. 419.

39. Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

Friendliness and desire to do justice. Court, in determining whether to entertain jurisdiction of an action between nonresidents, will recognize state of friendliness and reciprocal desire to do justice existing between nations and between the several states.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, supra.

40. Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, supra.

Convenience of parties

Mass.—Universal Adjustment Corpo-

ration v. Midland Bank, Limited, of London, England, supra.

N.H.—Jackson & Sons v. Lumbermen's Mut. Casualty Co., 168 A. 895, 86 N.H. 341.

Other matters of convenience

In determining whether it should retain jurisdiction of foreign cause of action between nonresident litigants, court may consider fact that local courts are overcrowded and that if action is entertained, other similar litigation may be invited, all to delay of citizen litigants and to great expense of commonwealth.

Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

N.H.—Jackson & Sons v. Lumbermen's Mut. Casualty Co., 168 A. 895, 86 N.H. 341.

41. Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

Preferability of trial elsewhere

Where in a broad sense the ends of justice strongly indicate that a controversy between nonresidents may be more suitably tried in another forum, the local court will ordinarily decline jurisdiction and relegate the parties to relief in such forum.

La.—Stewart v. Litchenberg, 86 So. 734, 148 La. 195.

Mass.—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

N.H.—Jackson & Sons v. Lumbermen's Mut. Casualty Co., 168 A. 895, 86 N.H. 341.

N.J.—Sielcken v. Sorenson, 161 A. 47, 111 N.J.Eq. 44.

Ohio.—Wilson v. Humboldt, 13 Ohio N.P.N.S., 222.

Good faith

The right of a nonresident to maintain an action against another nonresident is subject to the condition that the action shall have been brought in the courts of the state in good faith.—Fine v. Wencke, 169 A. 58, 117 Conn. 683.

Comity does not require assumption of jurisdiction of a foreign cause of action between nonresidents

where justice cannot be afforded by the local court.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

42. Mass.—Pinson v. Potter, 10 N.E. 2d 136—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

Defendants held not entitled to dismissal on the ground that the court was forum non conveniens.—Merinos Viesca y Compania v. Pan American Petroleum & Transport Co., D.C.N.Y., 49 F.2d 852.

43. Mich.—Cofrode v. Wayne County Circuit Judge, 44 N.W. 623, 79 Mich. 332, 7 L.R.A. 511.

N.Y.—Reeve v. Cromwell, 237 N.Y.S. 20, 227 App.Div. 32.

15 C.J. p 790 note 89 [a], [d].

Partnership relations

Wash.—Gerson v. Sussman, 30 P.2d 379, 176 Wash. 564.

44. N.Y.—Stagg v. British Controlled Oilfields, 192 N.Y.S. 596, 117 Misc. 474.

Hardship on the nonresident, if compelled to go elsewhere for relief, may justify assumption of jurisdiction, and it is not essential that, if the court refused to assume jurisdiction, the nonresident would go without a remedy.—Stagg v. British Controlled Oilfields, supra.

45. N.Y.—Holzer v. Deutsche Reichsbahn-Gesellschaft, 14 N.E.2d 798, 277 N.Y. 474, modifying 299 N.Y.S. 748, 252 App.Div. 729, granting motion 296 N.Y.S. 1006, 251 App.Div. 711, appeal dismissed 11 N.E.2d 739, 275 N.Y. 539, answering questions certified 300 N.Y.S. 714, 252 App.Div. 841—De Flammercourt v. Ascer, 3 N.Y.S.2d 461, 167 Misc. 473—Spiegel May Stern Co. v. Male, 270 N.Y.S. 490, 150 Misc. 398—Hunter v. Hosmer, 254 N.Y.S. 635, 142 Misc. 382—McMahon v. National City Bank of New York, 254 N.Y.S. 279, 142 Misc. 268—Reeve v. Cromwell, 237 N.Y.S. 20, 227 App.Div. 32—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 168.

15 C.J. p 792 note 2.

cause of action arose within⁴⁶ or outside⁴⁷ the state, but, in at least one jurisdiction, the courts will, as a matter of public policy, ordinarily refuse to retain jurisdiction of and to determine an action for tort between nonresidents on a cause of action arising outside of the state,⁴⁸ unless special reasons are shown to exist which make the assumption and retention of jurisdiction necessary or proper.⁴⁹ It has been said not to be the policy of the courts to grant to an alien extraordinary relief by injunction or a receivership against another alien.⁵⁰

b. Between Nonresident and Foreign Corporation

Courts generally have power to assume jurisdiction of actions by nonresidents against foreign corporations

on causes of action arising either within or outside the state, although the exercise of, or refusal to exercise, jurisdiction in particular instances has been held to be a matter for the court's sound discretion, at least where the cause of action arose outside the state.

Either under express authority of statute or merely in the absence of statutory restrictions, courts are generally held to possess power to assume jurisdiction of actions by nonresidents against foreign corporations.⁵¹ This is true, especially, where the cause of action arose within the state,⁵² but it is generally held also, although there is some authority to the contrary,⁵³ that state courts may assume jurisdiction of actions on transitory causes of action arising outside the state,⁵⁴ where the corporation is doing or authorized to do business,⁵⁵ or

48. N.Y.—Malak v. Upton, 3 N.Y. S.2d 248, 166 Misc. 817—Hunter v. Hosmer, 254 N.Y.S. 835, 142 Misc. 882.

Wis.—Bourestom v. Bourestom, 285 N.W. 426.

Jurisdiction not assumed

N.Y.—Gainer v. Donner, 251 N.Y.S. 713, 140 Misc. 841.

Affidavit as to convenience of witnesses held insufficient.—Gainer v. Donner, supra.

47. Pa.—Knight v. West Jersey R. Co., 108 Pa. 250, 56 Am.R. 200.

Tex.—Southern Pac. Co. v. Allen, 106 S.W. 441, 48 Tex.Civ.App. 66.

48. N.Y.—Rodger v. Bliss, 223 N.Y.S. 401, 130 Misc. 168.

15 C.J. p 792 note 99.

Court of other states held without jurisdiction

In an action between residents on a cause of action for a tort committed in the state, it has been held by the courts of the state that the courts of other states were without jurisdiction.—Natalbany Lumber Co. v. McGraw, 178 So. 377, 188 La. 863, followed in Daniels v. McGraw, 178 So. 380, 188 La. 874.

49. N.Y.—Hunter v. Hosmer, 254 N.Y.S. 835, 836, 142 Misc. 382, quoting **Corpus Juris**—Gainer v. Donner, 251 N.Y.S. 713, 715, 140 Misc. 841, quoting **Corpus Juris**—Banco De La Lacuna v. Escobar, 237 N.Y.S. 267, 135 Misc. 165—Johnson v. Dalton, 1 Cow. 543, 13 Am.D. 564—Gardner v. Thomas, 14 Johns. 134, 7 Am.D. 445.

15 C.J. p 792 note 1.

Assumption or retention held not warranted

N.H.—Jackson & Sons v. Lumbermen's Mut. Casualty Co., 168 A. 895, 86 N.H. 341.

N.Y.—Larive v. Prince Line, 230 N.Y.S. 217, 224 App.Div. 764—Schwencke v. Central R.R. of New Jersey, 200 N.Y.S. 774.

15 C.J. p 792 note 1 [a].

50. Ga.—Reynolds, etc., Mortg. Co. v. Martin, 42 S.E. 796, 116 Ga. 495.

15 C.J. p 791 note 91.

51. N.Y.—Simons v. Inecto, Inc., 275 N.Y.S. 501, 242 App.Div. 275—Jacobsen v. U. S. Shipping Board Emergency Fleet Corporation, 217 N.Y.S. 856, 128 Misc. 138.

15 C.J. p 791 note 95.

Action by nonresident creditor for accounting

Mass.—Kling v. McTarnahan, 178 N.E. 831, 277 Mass. 386.

Assignee of nonresident

(1) May maintain an action against a foreign corporation.—Application of Hamburg-American Line, 238 N.Y.S. 331, 135 Misc. 715, affirmed in re Hamburg-American Line, 239 N.Y.S. 914, 228 App.Div. 802.

(2) However, his right in such respect has been held to be no greater than that of his assignor, even though he himself is a resident.—Jacobson v. Baltimore & O. R. Co., 291 N.Y.S. 628, 161 Misc. 268.

52. N.Y.—Hodgens v. Columbia Trust Co., 171 N.Y.S. 235, 103 Misc. 415, reversed on other grounds 173 N.Y.S. 304, 185 App.Div. 555.

15 C.J. p 791 note 96.

Proof

Where the action is for loss of goods shipped for delivery in the state, proof of failure of delivery in the state is sufficient, and the actual place of loss need not be shown.—Jacobson v. Baltimore & O. R. Co., 291 N.Y.S. 628, 161 Misc. 268.

Cause of action held to arise in state N.Y.—Hodgens v. Columbia Trust Co., 171 N.Y.S. 235, 103 Misc. 415, reversed on other grounds 173 N.Y.S. 304, 185 App.Div. 555.

15 C.J. p 791 note 96 [d].

53. Mich.—Gober v. Federal Life Ins. Co., 237 N.W. 32, 255 Mich. 20.

Action arising out of business in state

The courts of a state cannot acquire jurisdiction over an action by a nonresident against a foreign corporation doing business in the state, unless the action arises out of the business so done.—Fry v. Denver, etc., R. Co., D.C.Cal., 226 F. 893.

54. U.S.—Denver, etc., R. Co. v. Roller, Cal., 100 F. 733, 41 C.C.A. 22, 49 L.R.A. 77.

15 C.J. p 792 note 97.

Action on contract

Mo.—State v. Grimm, 239 Mo. 135, 143 S.W. 483.

Wis.—State v. Belden, 236 N.W. 542, 205 Wis. 158.

Venue statute held not restrictive

A venue statute providing that actions against foreign corporations may be maintained by a nonresident when the cause of action shall have arisen or the subject of the action be situated within the state does not preclude a nonresident from maintaining against a foreign corporation a transitory cause of action arising out of the state.—Ledford v. Western Union Telegraph Co., 101 S.E. 533, 179 N.C. 63.

55. Ind.—Dodgem Corporation v. D. D. Murphy Shows, 183 N.E. 699, 96 Ind.App. 325, rehearing denied 185 N.E. 169, 96 Ind.App. 325.

La.—French v. Artistic Furniture Co., 139 So. 307, 173 La. 982—Buscher v. Southern Ry. Co., 4 La. App. 653.

N.C.—Ledford v. Western Union Telegraph Co., 101 S.E. 533, 179 N.C. 63.

Va.—Morgan v. Pennsylvania R. Co., 138 S.E. 566, 148 Va. 272.

Wis.—State v. Fowler, 220 N.W. 534, 196 Wis. 451, followed in 220 N.W. 538, 196 Wis. 463.

Action for personal injuries

Ill.—Taylor v. Southern Ry. Co., 259 Ill.App. 271, reversed on other grounds 182 N.E. 805, 350 Ill. 139.

owns substantial property,⁵⁶ within the state. So, at least where a statute so provides, courts may assume jurisdiction of a nonresident's action against a foreign corporation for the breach of a contract made within the state.⁵⁷ However, in the absence of a statute to the contrary,⁵⁸ whether a court will

in a particular instance exercise or refuse to exercise its jurisdiction of actions by nonresidents against foreign corporations has been held to be a matter for the sound discretion of the court,⁵⁹ at least where the cause of action arose outside the state.⁶⁰

Mo.—Bright v. Wheelock, 20 S.W.2d 684, 323 Mo. 840, 66 A.L.R. 263.
N.J.—Metcuskie v. Philadelphia & R. Ry. Co., 116 A. 170, 97 N.J.Law 100.

Designation of agent for service of process does not dispense with the requirement that the corporation be doing business in the state.—*Delatour & Marmouget v. Southern Ry. Co.*, 4 La.App. 658.

In New York

(1) Under a statute authorizing nonresidents to maintain actions against foreign corporations doing business in the state, the courts may in a proper case assume jurisdiction of such actions whether the cause of action arose within or without the state.—*Murnan v. Wabash Ry. Co.*, 158 N.E. 508, 246 N.Y. 244, 54 A.L.R. 1522, reversing 221 N.Y.S. 322, 220 App.Div. 218, affirmed 226 N.Y.S. 393, 222 App.Div. 833—*Cohen v. Delaware, L. & W. R. Co.*, 269 N.Y.S. 667, 150 Misc. 450—*Randle v. Inecto, Inc.*, 226 N.Y.S. 686, 131 Misc. 261—*Jacobsen v. U. S. Shipping Board Emergency Fleet Corporation*, 217 N.Y.S. 856, 128 Misc. 138.

(2) Conversely, there are cases holding that the court may or must refuse jurisdiction where the corporation is not doing business in the state at the time the action is commenced.—*Gaboury v. Central Vermont Ry. Co.*, 231 N.Y.S. 630, 225 App.Div. 145, affirming *Jacobs v. Central Vermont Ry. Co.*, 228 N.Y.S. 705, 132 Misc. 144, and reversed on other grounds *Gaboury v. Central Vermont Ry. Co.*, 165 N.E. 275, 250 N.Y. 233—*Richter v. Chicago, R. I. & P. Ry. Co.*, 205 N.Y.S. 128, 123 Misc. 234—*Davis v. Julius Kessler & Co.*, 194 N.Y.S. 9, 118 Misc. 292.

(3) However, the fact that the statute provides that jurisdiction of such actions may be assumed only where the foreign corporation is doing business in the state has been held not to preclude assumption of such jurisdiction in special circumstances after the corporation has ceased to do business in the state.—*Simons v. Inecto, Inc.*, 275 N.Y.S. 501, 242 App.Div. 275.

(4) The statute is not retroactive.—*Fairclough v. Southern Pac. Co.*, 157 N.Y.S. 862, 171 App.Div. 496—*Morrison v. Baltimore, etc., R. Co.*, 164 N.Y.S. 258.

(5) Thus, it does not confer on the court jurisdiction of an action previously commenced.—*Fairclough*

v. Southern Pac. Co., 157 N.Y.S. 862, 171 App.Div. 496, reversing 155 N.Y. S. 899.

(6) Under a statute providing that a nonresident may maintain an action against a foreign corporation only on a cause of action arising in the state, or in certain other circumstances, the courts have been held without jurisdiction of actions arising outside the state and not otherwise coming within the terms of the statute.—*Fairclough v. Southern Pac. R. Co.*, supra—15 C.J. p 791 note 96 [b], [c], [e], p 792 note 97 [b].

(7) So, apart from statute, the courts have been held without jurisdiction over an action brought by a nonresident against a foreign corporation on a cause of action arising outside the state.—*Klunck v. Pennsylvania R. Co.*, 133 N.Y.S. 207, 148 App.Div. 788.

56. Wis.—*In re Inland Steel Co.*, 182 N.W. 917, 174 Wis. 140.

More office supplies held insufficient property within the meaning of the requirement stated in the text.—*In re Inland Steel Co.*, supra.

57. N.Y.—*N. V. Tonerde Maatschappij Voor Montaan-Chemie v. Great Lakes Coal & Coke Co.*, 276 N.Y.S. 395, 243 App.Div. 640.

58. Mo.—*State v. Grimm*, 143 S.W. 483, 239 Mo. 135.
15 C.J. p 792 note 97 [a].

Considerations not warranting refusal

(1) The fact that plaintiff will not be injured seriously by a refusal.—*State v. Grimm*, 143 S.W. 483, 239 Mo. 135.

(2) The fact that assumption of jurisdiction will result in considerable expense to the corporation or the state, or both.—*Bright v. Wheelock*, 20 S.W.2d 684, 323 Mo. 840, 66 A.L.R. 263.

59. N.Y.—*Simons v. Inecto, Inc.*, 275 N.Y.S. 501, 242 App.Div. 275.

Appointment of receiver

A court will decline to assume jurisdiction of an action by a nonresident for the appointment of a receiver of a foreign corporation's property pending the filing of an action in another state to have the corporation declared insolvent.—*Fehr v. Black Petroleum Corporation*, 229 P. 1048, 103 Okl. 241.

60. N.Y.—*Murnan v. Wabash Ry. Co.*, 158 N.E. 508, 246 N.Y. 244, 54

A.L.R. 1522, reversing 221 N.Y.S. 332, 220 App.Div. 218, affirmed 226 N.Y.S. 393, 222 App.Div. 833—*Gaboury v. Central Vermont Ry. Co.*, 231 N.Y.S. 630, 225 App.Div. 145, affirming *Jacobs v. Central Vermont Ry. Co.*, 228 N.Y.S. 705, 132 Misc. 144, and reversed on other grounds *Gaboury v. Central Vermont Ry. Co.*, 165 N.E. 275, 250 N.Y. 233—*Randle v. Inecto, Inc.*, 226 N.Y.S. 686, 131 Misc. 261.

Under New York statute

(1) Providing that a nonresident may maintain an action against a foreign corporation in certain circumstances, the courts have been held not precluded from refusing, in their discretion, to entertain such an action, at least where the cause of action arose outside the state.—*Waisikoski v. Philadelphia & Reading Coal & Iron Co.*, 127 N.E. 923, 228 N.Y. 581, affirming 159 N.Y.S. 906, 173 App.Div. 538, and 165 N.Y.S. 1117, 178 App.Div. 932—*Waisikoski v. Philadelphia & Reading Coal & Iron Co.*, 159 N.Y.S. 906, 173 App.Div. 538—*Jacobsen v. U. S. Shipping Board Emergency Fleet Corporation*, 217 N.Y.S. 856, 128 Misc. 138—*Richter v. Chicago, R. I. & P. Ry. Co.*, 205 N.Y.S. 128, 123 Misc. 234—*Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 165 N.Y.S. 910, 178 App. Div. 662.

(2) However, in at least one case, such statute has been held to prevent the court from refusing in its discretion to assume jurisdiction of an action by a nonresident against a foreign corporation doing business in the state to recover damages for a breach of contract.—*Crane, Hayes & Co. v. New York, N. H. & H. R. Co.*, 225 N.Y.S. 775, 131 Misc. 71.

Under Federal Employers' Liability Act, a state court is not precluded from exercising discretion as to whether it will assume or refuse to assume jurisdiction of an action arising under the act in another state.—*Murnan v. Wabash Ry. Co.*, 158 N.E. 508, 246 N.Y. 244, 54 A.L.R. 1522, reversing 221 N.Y.S. 322, 220 App.Div. 218, affirmed 226 N.Y.S. 393, 222 App.Div. 833.

Inconvenience of obtaining witnesses from without state is no ground for dismissing action by foreign corporation against foreign corporation doing business within state.—*Crane, Hayes & Co. v. New York, N. H. & H. R. Co.*, 225 N.Y.S. 775, 131 Misc. 71.

Action by foreign corporation against nonresident. A state court has been held to have jurisdiction of an action by a foreign corporation against a nonresident natural person, although the cause of action did not arise in, or out of business conducted in, the state.⁶¹

c. Between Foreign Corporations

A state court may assume jurisdiction of actions between foreign corporations on causes of action arising within the state, or, under some statutes, or in some jurisdictions, in the absence of statutory restrictions, on transitory causes of action arising outside the state, although the exercise of, or refusal to exercise, its jurisdiction in particular instances has been held to be a matter for the court's sound discretion, at least where the cause of action arose outside the state.

Subject to statutory limitations, a state court may entertain jurisdiction of an action between foreign corporations on a cause of action arising within the

state.⁶² Likewise, under some statutes, or, in some jurisdictions, in the absence of statutory restrictions, courts may assume jurisdiction of actions on transitory causes of action arising outside the state,⁶³ where defendant corporation is doing business in the state,⁶⁴ but there is other authority holding that jurisdiction cannot be assumed if the cause of action is unrelated to business transacted in the state by defendant.⁶⁵ So, a state court has been held to have power to entertain jurisdiction of actions on contracts made in the state.⁶⁶ However, in the absence of a statute to other effect, whether a court will exercise or refuse to exercise its jurisdiction in particular instances has been held to be a matter for the sound discretion of the court, at least where the cause of action arose outside the state,⁶⁷ to be governed by broad considerations of convenience, justice, and public policy.⁶⁸ Where

Assumption of jurisdiction held warranted

N.Y.—Carrington v. Panama Mail S. S. Co., 251 N.Y.S. 803, 233 App. Div. 855, reversing on reargument 247 N.Y.S. 674, 232 App. Div. 695, and affirming 241 N.Y.S. 847, 136 Misc. 850—Randle v. Inecto, Inc., 226 N.Y.S. 686, 131 Misc. 261—Buonanno v. Southern Pac. Co., 205 N.Y.S. 791, 121 Misc. 99—Richter v. Chicago, R. I. & P. Ry. Co., 205 N.Y.S. 128, 123 Misc. 234.

Assumption of jurisdiction held not warranted

N.Y.—Simons v. Inecto, Inc., 275 N.Y.S. 501, 242 App. Div. 275.

Demurrer to answer held improperly sustained where the answer gave notice that the corporation would show facts inducing the court to decline jurisdiction because of alienage.—Bagdon v. Philadelphia & Reading Coal & Iron Co., 165 N.Y.S. 910, 178 App. Div. 662.

61. La.—General Motors Acceptance Corporation v. Ford, 150 So. 18, 177 La. 1062.

Jurisdiction of city court

Under a statute to that effect, a particular city court has been held to have jurisdiction of action by foreign corporation against resident of county who has been served in city, but has no place of business or residence there.—Spiegel May Stern Co. v. Male, 270 N.Y.S. 490, 150 Misc. 398.

62. N.Y.—Wrightsville Hardware Co. v. Assets Realization Co., 144 N.Y.S. 991, 159 App. Div. 849. 15 C.J. p 791 note 94 [b].

63. Ill.—National Can Co. v. Weirton Steel Co., 145 N.E. 389, 314 Ill. 280—Frank Simpson Fruit Co. v. Atchison, etc., R. Co., 92 N.E. 524, 245 Ill. 596, reversing 152 Ill. App. 235.

Wash.—Oregon Mortg. Co. v. Hart-

ford Fire Ins. Co., 210 P. 385, 122 Wash. 183.

Wis.—State v. Belden, 236 N.W. 542, 205 Wis. 158.

Action on contract

Ill.—National Can Co. v. Weirton Steel Co., 145 N.E. 389, 314 Ill. 280.

Wash.—Oregon Mortg. Co. v. Hartford Fire Ins. Co., 210 P. 385, 122 Wash. 183.

Wis.—State v. Belden, 236 N.W. 542, 205 Wis. 158.

64. N.Y.—N. V. Brood en Beschuifabriek v. Aluminum Co. of America, 239 N.Y.S. 702, 136 Misc. 349, reversed on other grounds N. V. Brood en Beschuifabriek V/H John Simons v. Aluminum Co. of America, 248 N.Y.S. 460, 231 App. Div. 693—Bisbee Linseed Co. v. Fireman's Fund Ins. Co., 220 N.Y.S. 309, 128 Misc. 851—Commonwealth Mortgage Co. v. Le Roy Sargent & Co., 172 N.Y.S. 594, 104 Misc. 558.

Action on contract

N.Y.—N. V. Brood en Beschuifabriek v. Aluminum Co. of America, 239 N.Y.S. 702, 136 Misc. 349, reversed on other grounds N. V. Brood en Beschuifabriek V/H John Simons v. Aluminum Co. of America, 248 N.Y.S. 460, 231 App. Div. 693—Bisbee Linseed Co. v. Fireman's Fund Ins. Co., 220 N.Y.S. 309, 128 Misc. 851.

Action in tort

N.Y.—Commonwealth Mortgage Co. v. Le Roy Sargent & Co., 172 N.Y.S. 594, 104 Misc. 558.

65. Ga.—Louisiana State Rice Milling Co. v. Mente & Co., 159 S. E. 497, 173 Ga. 1—Erlanger Cotton Mills Co. v. O'Neill Bros., 167 S.E. 715, 46 Ga. App. 329.

Action on contract neither made nor performable in the state.—National Coal Co. v. Cincinnati Gas

Coke, etc., Co., 131 N.W. 580, 168 Mich. 195.

66. N.Y.—New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co., 50 N.Y.S. 1093, 28 App. Div. 411.

15 C.J. p 791 note 94 [c].

67. Mass.—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 236 Mass. 556, 93 A.L.R. 1124—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 134 N.E. 281, 233 Mass. 522.

Action by resident assignee of foreign corporation against another foreign corporation on foreign cause of action may be maintained only as matter of comity.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N. E. 152, 281 Mass. 303, 87 A.L.R. 1407. *Refusal held not violative of treaty.* Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, supra.

68. Ind.—Dodgem Corporation v. D. D. Murphy Shows, 153 N.E. 699, 96 Ind. App. 325, rehearing denied 185 N.E. 169, 96 Ind. App. 325.

Mass.—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 236 Mass. 556, 93 A.L.R. 1124.

Pendency of action in other state where defendant has sufficient property to satisfy a judgment against it is not sufficient to require the court to decline jurisdiction.—State v. Wickham, Wis., 198 N.W. 594.

Assumption held proper

Mass.—Trojan Engineering Corporation v. Green Mountain Power Corporation, 200 N.E. 117—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 236 Mass. 556, 93 A.L.R. 1124.

Wis.—State v. Fowler, 220 N.W. 534, 196 Wis. 451, followed in 220 N.W. 538, 196 Wis. 463.

the circumstances in which actions between foreign corporations may be maintained are specified by statute, the power of courts to take jurisdiction in other circumstances is excluded.⁶⁹

§ 78. — Joinder of Residents as Defendants

In the absence of statute, a court may assume jurisdiction of an action on a joint obligation if one obligor resides within its territorial jurisdiction, although another resides outside it, but cannot, in the absence of statute, acquire jurisdiction of the nonresident's person. Jurisdiction of a nonresident cannot be acquired by improper joinder of a resident, or may be wanting in event of discontinuance or dismissal of the action as to, or judgment in favor of, the resident. The joinder of a resident will not confer jurisdiction of the person of a nonresident of the state.

While, in the absence of a statute,⁷⁰ a court may assume jurisdiction of an action on a joint obligation where one of the obligors resides within the court's territorial jurisdiction, although the other resides outside thereof,⁷¹ the jurisdiction of a strictly local court ordinarily cannot be extended to persons outside of its territorial jurisdiction by the mere circumstance that one or more of the persons who are jointly liable happen to reside or to be within the jurisdiction.⁷² Under some statutes, however, if an action against several defendants is

brought in a court whose territorial jurisdiction does not extend throughout the entire state, the fact that one or more of defendants reside within the territorial limits of its jurisdiction authorizes the court to take jurisdiction over other defendants who reside elsewhere in the state,⁷³ the process of the court under such circumstances running outside of the territorial limits of its jurisdiction,⁷⁴ although service on defendant residing within the territorial jurisdiction of the court is frequently made a prerequisite to valid service on a joint defendant outside of such jurisdiction.⁷⁵ However, it has been held, under constitutional limitations, that the legislature cannot extend the territorial jurisdiction of a municipal court by providing for the service of original process on a nonresident outside of the corporate limits of the municipality, where a joint defendant residing in the city has been served with process therein.⁷⁶

Jurisdiction as against a nonresident cannot be acquired by an improper joinder, as a defendant, of one residing within the jurisdiction,⁷⁷ but in order to give such jurisdiction defendant who resides in, or is served with process in, the county where the action is brought, must have a real and substantial interest in the subject of the action, adverse to plaintiff;⁷⁸ and if no cause of action is set

Refusal to assume held proper

Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 128 N.E. 4, 236 Mass. 185—Arizona Commercial Mining Co. v. Iron Cap Copper Co., 124 N.E. 281, 233 Mass. 522.

69. S.C.—Blue Ridge Power Co. v. Southern Ry. Co., 115 S.E. 306, 122 S.C. 222.
15 C.J. p 791 note 93.

Cause of action arising within state

Under a statute authorizing such an action where the cause of action arose within the state, the right of action must be local with reference to the state.—Anglo-American Provision Co. v. Davis Provision Co., 62 N.E. 587, 169 N.Y. 506, 88 Am.S.R. 608, affirming 63 N.Y.S. 987, 50 App.Div. 273, and affirmed 24 S.Ct. 92, 191 U.S. 373, 48 L.Ed. 225—15 C.J. p 791 note 94.

Statute held to preclude assumption

(1) Where the cause of action did not arise, nor relate to a contract made or property situated, in the state, and defendant corporation was not doing business in the state.—Swift & Co. v. Karlina, 157 N.E. 861, 245 N.Y. 570, affirming 220 N.Y.S. 933, 219 App.Div. 821—McCauley v. Georgia Railroad Bank, 203 N.Y.S.

550, 122 Misc. 632, affirmed 205 N.Y. S. 935, 209 App.Div. 886—Joseph M. Baker Co. v. Southern Express Co., 199 N.Y.S. 543.

(2) Where the cause of action did not arise, or the subject of the action was not situated, in the state.—Blue Ridge Power Co. v. Southern Ry. Co., 115 S.E. 306, 122 S.C. 222.

Action by resident assignee

(1) However, where the action is one which may be maintained by a resident, the fact that the resident is the assignee of a foreign corporation precluded from maintaining the action does not preclude him from maintaining it.—Ball v. Nippon Yusen (Kabushiki Kaisha), 253 N.Y.S. 260, 142 Misc. 201, affirmed 256 N.Y.S. 298, 143 Misc. 243, following Brown v. Canadian Pac. Ry. Co., 256 N.Y.S. 294, 143 Misc. 239—McCauley v. Georgia Railroad Bank, 203 N.Y. S. 550, 122 Misc. 632, affirmed 205 N.Y.S. 935, 209 App.Div. 886.

(2) It is sufficient that the assignee is a bona fide resident; that the assignment was without consideration and for the sole purpose of bringing the action is immaterial.—McCauley v. Georgia Railroad Bank, *supra*.

70. N.Y.—Kortvellyessy v. Manhattan Cooperage Co., 147 N.Y.S. 586, 162 App.Div. 285.

71. Ga.—Jolly v. Chattahoochee Fer-

tilizer Co., 110 S.E. 639, 28 Ga. App. 194.

72. N.Y.—Hoag v. Lamont, 60 N.Y. 96, 16 Abb.Pr.N.S. 369, modifying 16 Abb.Pr.N.S. 91.

73. Ark.—Wernimont v. State, 142 S.W. 194, 101 Ark. 210, Ann.Cas. 1913D 1156.

Ky.—Basye v. Brown, 78 Ky. 553, 15 C.J. p 793 note 6.

74. Ark.—Wernimont v. State, 142 S.W. 194, 101 Ark. 210, Ann.Cas. 1913D 1156.

15 C.J. p 793 note 7.

75. Mich.—Allison v. Kinne, 62 N. W. 152, 104 Mich. 141.

15 C.J. p 793 note 8.

76. Ill.—Wilcox v. Conklin, 99 N.E. 669, 255 Ill. 604.

77. Tex.—Pool v. Pickett, 8 Tex. 122.

15 C.J. p 793 note 10.

Where there is no joint liability, jurisdiction of nonresident defendant cannot be conferred by the joinder as defendant of a resident over whom the court has jurisdiction.

Ga.—Carter v. Briggs, 94 S.E. 70, 21 Ga.App. 176.

Mo.—Harris v. McQuay, App., 300 S.W. 305.

15 C.J. p 793 note 10 [a].

78. Ohio.—Fisher v. Murdock, 1 Handy, 544, 546, 12 Ohio Dec. (Reprint) 280.

15 C.J. p 793 note 11.

forth against defendant served within the jurisdiction, judgment cannot be rendered against defendant served outside of the jurisdiction.⁷⁹ It has been held that before a judgment can be rendered against defendant served with process outside of the territorial jurisdiction of the court, some disposition should be made of the action as to defendant served within the jurisdiction;⁸⁰ and, while jurisdiction with respect to nonresident defendants is not lost by reason of the fact that the verdict is in favor of defendants who reside within the territorial limits of the jurisdiction,⁸¹ there is authority for the view that where the action is dismissed as to resident defendant, the court has no jurisdiction to render judgment by default against nonresident defendant,⁸² or that where, before trial, a nolle prosequi is entered as to resident defendant, this is ground for abatement as to nonresident defendant.⁸³ It is sometimes provided by statute that no judgment can be rendered against defendant served outside of the jurisdiction where the action is discontinued or dismissed as to defendants served within the jurisdiction, or where judgment is rendered in their favor, unless defendant served outside of the jurisdiction has appeared and failed to object.⁸⁴

Residents and nonresidents of state as joint defendants. Although a state court would not have jurisdiction of an action, if all the defendants were

nonresidents of the state, the fact that one or more of several defendants are residents may authorize it to take jurisdiction of the action although the other defendants are nonresidents.⁸⁵ In order for this rule to apply, resident defendant must have a real interest in the matter in controversy,⁸⁶ but jurisdiction may be acquired although the rights of nonresident defendant are wholly distinct from those of resident defendant.⁸⁷ Where a court is given jurisdiction of actions between nonresidents, or between nonresidents and citizens, such jurisdiction extends to an action by a nonresident against several joint defendants, some of whom are citizens, and others of whom are nonresidents.⁸⁸ However, the joinder of a resident as a defendant cannot confer jurisdiction over nonresident defendants who are not personally served, and do not appear, so as to empower the court to enter a personal judgment against them.⁸⁹

§ 79. Political Corporations

A county or parish may be sued in any court of proper or competent jurisdiction within its territorial limits.

The political corporation known as the county or parish exists everywhere throughout its territorial limits and may, therefore, be sued in any court of proper or competent jurisdiction within such territorial limits.⁹⁰

79. Ky.—Fernel v. Speer, 3 Metc. 459.

Mo.—Haseltine v. Messmore, 82 S.W. 115, 184 Mo. 298.

80. Ky.—Fernel v. Speer, 3 Metc. 459.

81. Tenn.—Rich v. Rayle, 2 Humphr. 404.

82. Ill.—Herkimer v. Sharp, 5 Ill. App. 620.

83. Tenn.—Yancey v. Marriott, 1 Sneed 28.

15 C.J. p 793 note 15.

84. Ky.—Fernel v. Speer, 3 Metc. 459.

15 C.J. p 793 note 18.

85. N.Y.—Consumers' Lumber Co. v. Lincoln, 233 N.Y.S. 530, 225 App. Div. 484.

15 C.J. p 794 note 21.

Action to cancel contract and enjoin performance

Ala.—City of Albany v. Spragins, 93 So. 803, 208 Ala. 122.

Action ex delicto

In an action ex delicto against several defendants, some of whom

were nonresidents of the state, the court was held to have jurisdiction as to those who resided within the territorial limits of its jurisdiction, although defendants were sued as partners.—Weidman v. Sibley, 44 N.Y.S. 1057, 16 App.Div. 616.

86. N.Y.—Consumers' Lumber Co. v. Lincoln, 233 N.Y.S. 530, 225 App. Div. 484.

Tenn.—Jackson v. Tiernan, 10 Yerg. 172.

87. Tenn.—Jackson v. Tiernan, supra.

88. Ky.—Turner v. O'Bannon, 2 J.J. Marsh. 186.

89. Ga.—Reynolds, etc., Mortg. Co. v. Martin, 42 S.E. 796, 116 Ga. 495.

15 C.J. p 790 note 83.

Partnership doing business in state

A partner neither domiciled nor served in state cannot be personally and individually brought into court in an action properly brought in the state against the partnership, since partnership is entity separate and apart from its members.—Klotz v.

Tru-Fruit Distributors, La.App., 173 So. 592.

Nonresident foreign corporation, not doing business within the state or otherwise submitting to the jurisdiction of its courts, cannot be personally brought into its courts although joined in an action with a resident over whom the court has jurisdiction.

La.—Lowery v. Zorn, App., 157 So. 826.

Miss.—First Nat. Bank v. Mississippi Cottonseed Products Co., 157 So. 349, 171 Miss. 282.

90. La.—State v. Dupre, 14 So. 907, 46 La. Ann. 117.—State v. Judge First Justice's Ct., 6 So. 653, 41 La. Ann. 403.

15 C.J. p 794 note 26.

Jurisdiction and venue generally in actions by or against:

Counties see Counties § 326.

Municipal corporations see the C. J. S. title Municipal Corporations §§ 2202, 2203, also 15 C.J. p 794 note 27; 44 C.J. p 1470 note 33—p 1472 note 64.

D. MODE OF ACQUIRING JURISDICTION

§ 80. In General

Methods recognized or prescribed by law must be followed for the court to obtain jurisdiction.

It is a general rule that every state may, within its constitutional authority, prescribe the manner in which its courts shall acquire jurisdiction;⁹¹ and if a new jurisdiction is created by statute without its form of proceeding being prescribed, such jurisdiction may pursue its own forms and regulations if not inconsistent with the laws of the land.⁹² In any case, due modes of procedure must be pursued in order that the court may obtain jurisdiction,⁹³ and where the mode of acquiring jurisdiction is prescribed by statute compliance therewith is essential or the proceedings will be a nullity,⁹⁴ although a failure to conform to the statute literally may be deemed to be an unimportant variation not affecting the jurisdiction of the court.⁹⁵ On the other hand, if jurisdiction is acquired in the manner prescribed

by the statute it cannot be questioned within the state.⁹⁶

As a general rule, jurisdiction must be fairly acquired,⁹⁷ and if a thing must be done in order to attach jurisdiction, it must be lawfully done.⁹⁸

Conditional jurisdiction. In some states, a conditional jurisdiction is sometimes acquired upon the granting of a provisional remedy,⁹⁹ which jurisdiction, as appears in § 93 infra, is subject to be divested by failure to do certain acts within a specified time.

§ 81. Court Cannot Act Sua Sponte

A court cannot of its own motion assume jurisdiction.

A court cannot of its own motion assume jurisdiction in a particular matter; it is necessary that some person should in some legal way invoke its action.¹ However, it is not always required that

91. Ind.—*De Lange v. Cones*, 19 N. E.2d 850, 852, citing *Corpus Juris*.
Tex.—*San Antonio & A. P. Ry. Co. v. Blair*, 196 S.W. 502, 1153, 108 Tex. 434, denying error, Civ.App., 184 S.W. 566, followed in *Gatz v. City of Kerrville*, 43 S.W.2d 91, 121 Tex. 92—*Campbell v. Wilson*, 6 Tex. 379—*Stewart v. Moore*, Com. App., 291 S.W. 886.

Mode by which nonresidents may invoke jurisdiction
W.Va.—*Titus v. Titus*, 174 S.E. 874, 875, 115 W.Va. 229, citing *Corpus Juris*.

92. Ga.—*Pilotage Com'rs v. Low*, R.M.Chart. 298.

Wash.—*State v. Superior Court for Yakima County*, 185 P. 628, 108 Wash. 636.

93. Del.—*Stidham v. Brooks*, 5 A.2d 522.

Fla.—*Lovett v. Lovett*, 112 So. 768, 93 Fla. 611.

N.Y.—*In re Grube's Will*, 295 N.Y.S. 238, 162 Misc. 578.

Utah.—*Utah Liquor Control Commission v. Wooras*, 93 P.2d 465.

Wyo.—*State v. District Court of Eighth Judicial Dist. in and for Natrona County*, 233 P. 545, 33 Wyo. 281.

However, it has been held that the admitted jurisdiction of a court over the parties and subject matter is not affected by the mode in which the case is presented.—*Anderson v. Anderson*, 170 N.E. 212, 338 Ill. 309.

Separate from trial procedure

The procedure necessary to confer jurisdiction is altogether separate and distinct from that to be observed in the trial.—*Southern Cas-*

ualty Co. v. Fulkerson, Tex.Civ.App., 30 S.W.2d 911, reversed on other grounds, Com.App., 45 S.W.2d 152.

Parties and subject matter must be brought before court in manner giving it power to act.—*Lovett v. Lovett*, 112 So. 768, 93 Fla. 611.

No action commenced

Court's jurisdiction could not be invoked by service of order to show cause, where no action had been commenced.—*In re Citizens' State Bank of Gillett*, 241 N.W. 339, 207 Wis. 434.

Void nunc pro tunc order cannot restore jurisdiction lost by lapse of time.—*Jedele v. Washtenaw Circuit Judge*, 212 N.W. 89, 237 Mich. 520.

94. Ill.—*Hoeamer v. Village of Elmwood Park*, 198 N.E. 345, 361 Ill. 422, 102 A.L.R. 196—*People v. Blocklinger*, 176 N.E. 749, 344 Ill. 447—*People v. Brewer*, 160 N.E. 76, 328 Ill. 472.

Minn.—*Strom v. Lindstrom*, 275 N. W. 833, 835, 201 Minn. 226, quoting *Corpus Juris*.

Mo.—*Riggs v. Moise*, 128 S.W.2d 632.

N.Y.—*Gates v. State*, 28 N.E. 373, 128 N.Y. 221—*People v. De Renns*, 2 N.Y.S.2d 694, 166 Misc. 582—*Pacilio v. Scarpatti*, 300 N.Y.S. 473, 165 Misc. 586.

Utah.—*Askwith v. Ellis*, 38 P.2d 757, 759, 85 Utah 103, citing *Corpus Juris*.

Wis.—*State v. Zimmerman*, 231 N.W. 590, 202 Wis. 69.

15 C.J. p 797 note 51.

Manner of invoking jurisdiction

If a court cannot try question except under particular conditions, or

unless approached in a particular manner, jurisdiction is withheld unless such conditions exist or the court is approached in the manner provided.

Del.—*Stidham v. Brooks*, 5 A.2d 522.
Vt.—*Holden v. Campbell*, 144 A. 455, 101 Vt. 474.

95. N.Y.—*Stewart v. Transcontinental Car Forwarding Co. of Akron, Ohio*, 7 N.Y.S.2d 926, 169 Misc. 427.

96. Tex.—*Campbell v. Wilson*, 6 Tex. 379.

97. Mo.—*Nations v. New York Times*, App., 57 S.W.2d 713.

98. U.S.—*The Underwriter*, D.C. Conn., 6 F.2d 937, reversed on other grounds, C.C.A., 13 F.2d 433, and affirmed *Maul v. U. S.*, 47 S. Ct. 735.

99. N.Y.—*Schram v. Keane*, 18 N. E.2d 136, 279 N.Y. 227, 119 A.L.R. 1216, affirming 6 N.Y.S.2d 157, 254 App.Div. 828—*Bennet v. Bird*, 261 N.Y.S. 540, 237 App.Div. 542, reargument denied 262 N.Y.S. 907, 238 App.Div. 786—*City of New York v. Staten Island Midland Ry. Co.*, 181 N.Y.S. 124, 110 Misc. 695.

15 C.J. p 825 note 83.

1. Fla.—*Coffrin v. Sayles*, 175 So. 236, 128 Fla. 622—*Lovett v. Lovett*, 112 So. 768, 775, 93 Fla. 611, citing *Corpus Juris*.

Ill.—*People v. Brewer*, 160 N.E. 76, 328 Ill. 472.

Ind.—*De Lange v. Cones*, 19 N.E.2d 850, 852, citing *Corpus Juris*.

Miss.—*Love v. Mississippi Cotton Seed Products Co.*, 137 So. 739.

Mo.—*Riggs v. Moise*, 128 S.W.2d

the jurisdiction of the court be invoked by formal pleadings.²

§ 82. Jurisdiction of the Action; Pleadings

While jurisdiction is acquired by the filing of pleadings presenting a cause within the court's potential jurisdiction regardless of the sufficiency of the pleadings in other respects, the court may refuse to take jurisdiction where it appears or is shown that false statements are made for the purpose of conferring jurisdiction.

As is stated in *Corpus Juris*, jurisdiction of a particular action is acquired by the filing of pleadings which show the case to be within the general class of cases which the court has jurisdiction to hear and determine,³ and a petition or complaint which shows this is sufficient to give jurisdiction, although it is defective in other respects.⁴ On the other hand, the mere form of pleading cannot give to a court jurisdiction of a subject otherwise foreign to its jurisdiction.⁵

Fraudulent statement of cause of action. If plaintiff falsely states facts, either as constituting his cause of action or with regard to the amount

in controversy, for the purpose of conferring jurisdiction, and this manifestly appears to the court, it is said that it is the duty of the court to interfere *ex mero motu* and to prevent a fraud on its jurisdiction,⁶ although, if the fact of an intentional fraud is not apparent, it is held that the matter must be specially pleaded,⁷ before answer to the merits is made,⁸ and the question on the plea is one to be submitted to the jury.⁹

§ 83. Jurisdiction of the Parties

- a. Plaintiff
- b. Defendant

a. Plaintiff

The court acquires jurisdiction over plaintiff in an action when he invokes its power or action.

The court acquires jurisdiction of plaintiff in an action when he voluntarily comes into court and invokes the exercise of its powers and its assistance to compel defendant to render him his rights under the law;¹⁰ and it has been held that there is a suit

632—Owens v. McCleary, App., 273 S.W. 145.

Tex.—Grand Lodge, Colored K. P. v. Kidd, Civ.App., 10 S.W.2d 420.

Utah.—State v. Telford, 72 P.2d 626, 93 Utah 228.

Wis.—State v. Zimmerman, 231 N.W. 590, 202 Wis. 69.

Wyo.—State v. Underwood, 86 P.2d 707, 718, citing *Corpus Juris*.
15 C.J. p 797 note 53.

2. Ind.—De Lange v. Cones, 19 N.E. 2d 850.

Wyo.—State v. Underwood, 86 P.2d 707.

3. Ariz.—McCulloch v. Western Land & Cattle Co., 231 P. 618, 27 Ariz. 154.

Fla.—State ex rel. Associated Utilities Corporation v. Chillingworth, 181 So. 346, 132 Fla. 587—Lovett v. Lovett, 112 So. 768, 93 Fla. 611.

Ill.—People v. Brewer, 160 N.E. 76, 328 Ill. 472—Vincent v. McElvain, 136 N.E. 502, 304 Ill. 160—Martin v. Heymann, 251 Ill.App. 89.

Iowa.—Denman v. Sawyer, 232 N.W. 819, 211 Iowa 56.

Mo.—Noll v. Alexander, App., 282 S.W. 739.

Mont.—Reed v. Woodmen of the World, 22 P.2d 819, 94 Mont. 374.

N.J.—Robb v. Shore Bus Transp. Co., 159 A. 527, 10 N.J.Misc. 458.

N.M.—Cooper v. Otero, 29 P.2d 341, 88 N.M. 164.

Tenn.—Long v. Garrison, 1 Tenn. App. 211.

Tex.—Permian Oil Co. v. Smith, 73 S.W.2d 490—Barrier v. Lowery, 13 S.W.2d 688, 118 Tex. 227, denying rehearing 11 S.W.2d 298, 118 Tex.

227—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—Ellis v. Houston & T. C. Ry. Co., Civ.App., 203 S.W. 172, error refused.

Utah.—In re Rogers' Estate, 284 P. 992, 75 Utah 290.

Wyo.—State v. Underwood, 86 P.2d 707, 718, citing *Corpus Juris*—Padlock Ranch v. Washakie Needles Irr. Dist., 61 P.2d 410, 50 Wyo. 253, denying rehearing 60 P.2d 819, 50 Wyo. 253.
15 C.J. p 797 note 54.

Facts stated by plaintiff

Whether the court has jurisdiction of the subject of the action depends, not on the facts as they actually exist, but on the facts as stated by the plaintiff.—Owen v. Brown, 139 N.Y.S. 451, 78 Misc. 273.

Jurisdiction is dependent on primary purpose of suit

Md.—Carey v. Jackson, 169 A. 922, 165 Md. 472.

Necessity of written pleadings

(1) On the principle that jurisdiction must be invoked according to proper procedure, it has been held that a party must file a complaint, petition, or application, and not simply state his complaint orally.—State v. Telford, 72 P.2d 626, 93 Utah 228.

(2) It has been said, however, that "the power of a court . . . to pronounce judgment, when proceeding according to the course of the common law, does not necessarily depend upon the existence or the filing of written pleadings by the parties."—Johnson v. Miller, 50 Ill. App. 60, 70.

4. Ariz.—Long v. Stratton, 72 P.2d 939, 50 Ariz. 427.

Fla.—Lovett v. Lovett, 112 So. 768, 93 Fla. 611.

Ill.—People v. Brewer, 160 N.E. 76, 328 Ill. 472.

N.M.—Cooper v. Otero, 29 P.2d 341, 349, 38 N.M. 164, quoting *Corpus Juris*.

Tex.—Permian Oil Co. v. Smith, 73 S.W.2d 490, 501, quoting *Corpus Juris*.

Vt.—International Paper Co. v. Bellows Falls Canal Co., 100 A. 684, 91 Vt. 350.

15 C.J. p 797 note 55.

5. D.C.—In re Standard Oil Co., 39 App.D.C. 491.

6. Mich.—Fix v. Sissung, 47 N.W. 340, 83 Mich. 561, 21 Am.S.R. 616.

15 C.J. p 797 note 57.

Fictitious or fraudulent claims as to amount in controversy generally see *supra* § 56.

7. Tex.—Ellis v. Houston & T. C. Ry. Co., Civ.App., 203 S.W. 172, error refused.

15 C.J. p 798 note 58.

8. Tex.—Price v. Garvin, Civ.App. 69 S.W. 985.

9. Tex.—Roper v. Brady, 16 S.W. 434, 80 Tex. 588.
15 C.J. p 798 note 59.

10. Ark.—Federal Land Bank of St. Louis v. Gladish, 2 S.W.2d 696, 176 Ark. 267—Purnell v. Nichol, 292 S.W. 686, 173 Ark. 496.

Ill.—Wilson Bros. v. Haegge, 179 N.E. 459, 347 Ill. 140, reversing 261 Ill. App. 568—Vincent v. McElvain, 136 N.E. 502, 304 Ill. 160.

pending for the purpose of giving the court jurisdiction of the parties and the subject matter, where all the parties appear as plaintiffs as well as when they appear as parties plaintiff and defendant.¹¹ However, where an unauthorized person brings an action in the name of another who has not consented thereto, the court does not acquire jurisdiction of plaintiff.¹²

b. Defendant

- (1) In general
- (2) Sending process out of jurisdiction

(1) In General

Generally jurisdiction over defendant may and must be acquired, in the absence of his voluntary submission

thereto, by proper and fairly obtained service of process, actual or constructive, regardless of the sufficiency of the proof or return thereof, and jurisdiction acquired without personal service, as by seizure of property, confers no power to render personal judgment against defendant.

To authorize a court to proceed, it must acquire jurisdiction over defendant in some mode authorized by law, by service or other means,¹³ and, as appears in the C.J.S. title Judgments § 19, also 33 C.J. p 1074 note 43—p 1075 note 59, a judgment rendered without acquiring such jurisdiction is a nullity. So the rule prevails that, in the absence of defendant's voluntary submission to the jurisdiction of the court, service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or the property,¹⁴

Mo.—State ex rel. Angold v. Utz, App., 236 S.W. 386, 387, quoting *Corpus Juris*.

N.J.—Robb v. Shore Bus Transp. Co., 159 A. 527, 10 N.J.Misc. 458.

N.D.—Cofman v. Ousterhouse, 168 N. W. 826, 40 N.D. 390, 18 A.L.R. 219.

Okl.—Humphreys v. Smith, 197 P. 155, 81 Okl. 104.

Pa.—Delco Ice Mfg. Co. v. Frick Co., 178 A. 135, 139, 318 Pa. 337, citing *Corpus Juris*.

15 C.J. p 798 note 60.

"Where one puts in motion the process of a court or seeks to use the procedure of the court for the purpose of obtaining a benefit for himself, jurisdiction is conferred over him so far as the defendant in the proceeding or the court is concerned."—Delco Ice Mfg. Co. v. Frick Co., supra.

Nonresident instituting suit

(1) Generally.—Gordy v. Levison & Co., 122 S.E. 234, 157 Ga. 670—15 C.J. p 798 note 60 [b].

(2) Nonresident remote grantee, suing for breach of warranty, submitted himself to jurisdiction of courts, and original grantor could then sue in same county to reform deed for mistake.—Wachovia Bank & Trust Co. v. Jones, 144 S.E. 256, 166 Ga. 747.

Plaintiff always in court

A plaintiff, although not actually present in person or by attorney, is always in court as affects court's jurisdiction to rule on motions, demurrers, etc.—Christ v. Jovanoff, 152 N. E. 2, 84 Ind.App. 676, denying rehearing 151 N.E. 26, 84 Ind.App. 676.

11. Tex.—Blogge v. Shaw, Civ.App., 41 S.W. 756.

12. Okl.—Southern Pine Lumber Co. v. Ward, 85 P. 459, 18 Okl. 131.

13. Ala.—Ex parte Gunter, 86 So. 146, 17 Ala.App. 313.

Fla.—Harris v. City of Sarasota, 181 So. 366, 132 Fla. 568.

La.—Krotz Springs Oil & Mineral Water Co. v. Shirk, 116 So. 483, 165 La. 1005—Hodges v. Lyon, 98 So. 49, 154 La. 638.

Mo.—State v. Rutledge, 56 S.W.2d 28, 37, 331 Mo. 1015, citing *Corpus Juris*—State ex rel. Angold v. Utz, 236 S.W. 386.

Mont.—Reed v. Woodmen of the World, 22 P.2d 819, 94 Mont. 374.

Nev.—Electrical Products Corporation v. Second Judicial Dist. Court, in and for Washoe County, 23 P. 2d 501, 55 Nev. 8.

N.D.—Taylor v. Oulie, 212 N.W. 931, 55 N.D. 253.

Or.—Duncan Lumber Co. v. Willapa Lumber Co., 183 P. 476, 93 Or. 386, denying rehearing 182 P. 172, 93 Or. 386.

Tex.—Maryland Casualty Co. v. Jones, Civ.App., 73 S.W.2d 668, affirmed 104 S.W.2d 847, 129 Tex. 392.

15 C.J. p 798 note 64.

Notice to parties concerned

It is a general rule that courts will not adjudicate matters involving conflicting rights until all parties directly concerned have been actually or constructively notified.—Ackerman v. Union & New Haven Trust Co., 100 A. 22, 91 Conn. 500.

Principal and nominal defendants

Where the court lacks personal jurisdiction of the principal defendants the fact that the court has jurisdiction of a merely nominal party defendant does not give the court jurisdiction of the case.—Reynolds, etc., Mortg. Co. v. Martin, 42 S.E. 796, 116 Ga. 495.

14. U.S.—Robertson v. Railroad Labor Board, Ill., 45 S.Ct. 621, 268 U. S. 619, 69 L.Ed. 1119, reversing, D.C., Railroad Labor Board v. Robertson, 3 F.2d 488—Monarch Anthracite Mining Co. v. Coffin, C.C. A.Pa., 102 F.2d 337—Andis v. Schick Dry Shaver, C.C.A.Wis., 94

F.2d 271—Brogdex Co. v. Food Machinery Co., C.C.A.Del., 92 F.2d 787, reversing, D.C., 16 F.Supp. 228

—Noxon Chemical Products Co. v. Leckie, C.C.A.N.J., 39 F.2d 318, certiorari denied Robb v. Noxon Chemical Products Co., 51 S.Ct. 22, 282 U.S. 841, 75 L.Ed. 747—U. S. v. Mahon, D.C.N.Y., 42 F.2d 571.

Ala.—Ex parte Gunter, 86 So. 146, 17 Ala.App. 313.

Del.—Skinner v. Educational Pictures Securities Corporation, 129 A. 857, 14 Del.Ch. 417.

Fla.—Harris v. City of Sarasota, 181 So. 366, 132 Fla. 568—Lovett v. Lovett, 112 So. 768, 93 Fla. 611.

Iowa.—Dewell v. Suddick, 232 N.W. 118, 211 Iowa 1352—Franklin v. Bonner, 207 N.W. 778, 201 Iowa 516.

Mo.—State v. Rutledge, 56 S.W.2d 28, 37, 331 Mo. 1015, citing *Corpus Juris*—Kellogg v. Moore, 196 S.W. 15, 271 Mo. 189.

Mont.—Holt v. Sather, 264 P. 108, 81 Mont. 442.

N.J.—Brainard v. New York, O. & W. Ry. Co., 150 A. 681, 8 N.J.Misc. 322.

N.Y.—Hodgens v. Columbia Trust Co., 173 N.Y.S. 304, 185 App.Div. 555, reversing 171 N.Y.S. 235, 103 Misc. 415—Stewart v. Transcontinental Car Forwarding Co. of Akron, Ohio, 7 N.Y.S.2d 926, 169 Misc. 427—In re Clark's Will, 3 N.Y.S. 2d 364, 166 Misc. 909.

N.C.—Hatch v. Alamance Ry. Co., 112 S.E. 529, 183 N.C. 617.

Or.—State ex rel. Methodist Old People's Home v. Crawford, 80 P.2d 873, 159 Or. 377—Walters v. Dock Commission of City of Portland, 270 P. 778, 126 Or. 437, denying motion 266 P. 634, 126 Or. 437—Duncan Lumber Co. v. Willapa Lumber Co., 183 P. 476, 93 Or. 386, denying rehearing 182 P. 172, 93 Or. 386.

S.C.—Miller v. White, 174 S.E. 17, 172 S.C. 333.

and the statutory mode of service or of giving notice must be followed,¹⁵ including requirements as to time.¹⁶ Conversely, where a defendant has properly been served with process, the court has jurisdiction of his person.¹⁷ Also, as is stated in § 85 c infra, the court may acquire such jurisdiction by reason of defendant's voluntary submission thereto, but it is held that a person's knowledge of the existence of an action does not supply the want of compliance with the statutory or legal requirements as to service,¹⁸ and that a person's mere presence in court does not give jurisdiction to enter a judgment against him when he was not brought there by any legal means.¹⁹

Constructive service. Where such service is authorized, jurisdiction may be acquired by construc-

tive service as well as by personal service.²⁰ So, as against a defendant within the state who conceals himself so as to avoid service of process, substituted service may be authorized and is sufficient.²¹

Service obtained by fraud or improper means. It is well established as a general rule that in a civil case a court will not take jurisdiction based on a service of process on a defendant who was brought within the reach of its process wrongfully or fraudulently, or by deceit or any other improper device,²² provided, of course, the wrong or deceit is chargeable to plaintiff.²³ This rule is based not on a lack of jurisdiction but on the view that it is improper for a court to exercise a jurisdiction so obtained.²⁴

Return and proof of service. While it is usually

Tenn.—Dickson v. Simpson, 113 S.W. 2d 1190, 172 Tenn. 680, 116 A.L.R. 380.

Tex.—Walker v. Koger, Civ.App., 99 S.W.2d 1034, error dismissed—Lipscomb v. McCart, Civ.App., 295 S.W. 245.

Wyo.—Padlock Ranch v. Washakie Needles Irr. Dist., 61 P.2d 410, 50 Wyo. 253, denying rehearing 60 P. 2d 819, 50 Wyo. 253.

15 C.J. p 787 note 56, p 798 note 65. General appearance as conferring jurisdiction see Appearances § 17.

Necessity of service of process generally see C.J.S. title Process § 2, also 50 C.J. p 446 note 80—p 447 note 22.

Method of notification

Jurisdiction cannot be exercised unless method of notification is employed which is reasonably calculated to give knowledge of attempted exercise of jurisdiction and opportunity to be heard.—Mazzoleni v. Transamerica Corporation, 169 A. 127, 313 Pa. 317.

Erroneous ruling

Where court had not acquired jurisdiction over a foreign corporation by service of process on appearance, it could acquire none by making an erroneous ruling denying motion to dismiss made on special appearance.—State v. Second Judicial Dist. Court in and for Washoe County, 226 P. 1106, 48 Nev. 53.

15. Mont.—Holt v. Sather, 264 P. 108, 81 Mont. 442.

N.C.—Hatch v. Alamance Ry. Co., 112 S.E. 529, 183 N.C. 617.

S.C.—Dyar v. Georgia Power Co., 176 S.E. 711, 173 S.C. 527.

W.Va.—Pettry v. Shinn, 196 S.E. 385, 386, citing *Corpus Juris*.

15 C.J. p 799 note 66.

16. N.J.—Matlock v. Layman, 3 N.J. Law 993—Karr v. Karr, 19 N.J. Eq. 427.

N.Y.—Sills v. Gaffney, 93 N.Y.S. 541, 47 Misc. 366.

17. U.S.—Southwark Foundry & Machine Co. v. Franz Foundry & Machine Co., C.C.A.Ohio, 48 F.2d 714—In re Anton, D.C.Minn., 11 F.Supp. 345.

Ala.—Parker v. Central of Georgia Ry. Co., 170 So. 333, 233 Ala. 149.

Ariz.—McCulloch v. Western Land & Cattle Co., 231 P. 618, 27 Ariz. 154.

Minn.—Sievart v. Selvig, 222 N.W. 281, 175 Minn. 597.

Miss.—Aldridge v. First Nat. Bank, 144 So. 469, 165 Miss. 1.

Mo.—H. & M. Finance Co. v. Brandt, App., 86 S.W.2d 196, followed in H. & M. Finance Co. v. Reinkemeyer, 86 S.W.2d 200—Noll v. Alexander, App., 282 S.W. 739—State ex rel. Angold v. Utz, App., 236 S.W. 386, 387, quoting *Corpus Juris*.

N.J.—Doan v. Collins-Doan Co., 194 A. 254, 122 N.J.Eq. 399—Ex parte Hall, 118 A. 347, 94 N.J.Eq. 108. Utah—Floor v. Mitchell, 41 P.2d 281, 86 Utah 203.

Wyo.—Grieve v. Huber, 266 P. 123, 799, 38 Wyo. 223, citing *Corpus Juris*.

15 C.J. p 799 note 68.

18. Okl.—Kennedy v. State, 58 P.2d 139, 144, 177 Okl. 79, citing *Corpus Juris*.

15 C.J. p 799 note 69.

19. Ky.—Jones v. Kenny, Hard. 96. N.Y.—Wheelock v. Lee, 74 N.Y. 495, 5 Abb.N.Cas. 72, reversing 54 How. Pr. 402—Wheelock v. Lee, 64 N.Y. 242, reversing 15 Abb.Pr.N.S., 24.

20. Fla.—Harris v. City of Sarasota, 181 So. 366, 132 Fla. 568.

Mont.—Holt v. Sather, 264 P. 108, 81 Mont. 442.

21. Cal.—Ware v. Robinson, 9 Cal. 107.

22. U.S.—Wyman v. Newhouse, C.

C.A.N.Y., 93 F.2d 313, 115 A.L.R. 460, certiorari denied 58 S.Ct. 831, 303 U.S. 664, 83 L.Ed. 1122.

Iowa.—Van Donselaar v. Jones, 192 N.W. 22, 195 Iowa 1081.

Miss.—Nicholson v. Gulf, Mobile & Northern R. Co., 172 So. 306, 308, quoting *Corpus Juris*.

Mo.—Bowman v. Neblett, App., 24 S.W.2d 697.

15 C.J. p 800 note 86.

Contrary rule in criminal cases see the C.J.S. title Criminal Law § 146, also 16 C.J. p 175 notes 67-72. Jurisdiction of property fraudulently induced to be brought within jurisdiction see infra § 84.

Corpus Juris cited

(1) In support of analogous rule as to jurisdiction of res obtained by improper or wrongful means.—Seagate Tire & Rubber Co. v. Mosely, 18 P.2d 276, 277, 161 Okl. 256.

(2) In support of rule that a person not a material defendant may not be joined as such for the fraudulent purpose of giving the court jurisdiction of action properly triable in another county.—Daniel v. Livingstone, Miss., 150 So. 662, 664—Trollo v. Nichols, 133 So. 207, 208, 160 Miss. 611.

Person forcibly brought within territorial limits

Cal.—Ex parte Edwards, 278 P. 910, 99 Cal.App. 541.

However, it has been broadly said that "a person is subject to the jurisdiction, even if he was brought there by wrong."—United Dictionary Co. v. G. & C. Merriam Co., Ill., 28 S.Ct. 390, 291, 208 U.S. 260, 52 L.Ed. 473.

23. Iowa.—Gregory v. Howell, 91 N.W. 778, 118 Iowa 26.

N.J.—Steiger v. Bonn, 3 N.J.L.J. 370.

24. Miss.—Nicholson v. Gulf, Mobile & Northern R. Co., 172 So. 306, 308, quoting *Corpus Juris*.

15 C.J. p 801 note 88.

the fact of service and not the proof thereof²⁵ or the sufficiency of the return²⁶ which gives a court jurisdiction, it is otherwise where the statute makes proof of service a condition precedent to the jurisdiction which it specially confers.²⁷

A seizure of property of a defendant may, under the rules stated in § 84 *infra*, give jurisdiction of the cause, although there has been no personal service on defendant; but such jurisdiction extends only to the ascertainment of the obligation and the subjection of the property seized thereto and not to the rendition of any personal judgment against defendant.²⁸

(2) Sending Process Out of Jurisdiction

Service of process out of the territorial jurisdiction of a court confers no jurisdiction to render personal judgment against the party so served except where it is

otherwise specially and lawfully provided by statute or where there is a lawful waiver or consent to such service.

Service of process out of the territorial jurisdiction of the court from which it issues, at common law, is a nullity,²⁹ for the process of a court ordinarily has no force outside of its jurisdiction,³⁰ and the sovereignty of the state itself does not embrace authority to control the manner of executing process to the extent of making lawful any service against a person without the jurisdiction of the court as a basis for a personal judgment.³¹ This rule generally applies to state,³² to county,³³ and to district³⁴ courts, and also to inferior courts of municipalities.³⁵ However, where it is specially and lawfully provided by statute, a court of limited territorial jurisdiction may be authorized to send its process to other territories within the state,³⁶

25. N.Y.—*Lambert v. Lambert*, 1 N. E.2d 833, 270 N.Y. 422, reversing 278 N.Y.S. 580, 244 App.Div. 78.

26. Wyo.—*Stockmen's Nat. Bank of Casper v. Calloway Shops*, 285 P. 146, 41 Wyo. 232.

15 C.J. p 799 note 74.

Necessity of return generally see the C.J.S. title Process § 90, also 50 C.J. p 562 notes 92-97.

27. N.J.—*Matlock v. Layman*, 3 N.J. Law 993.

N.Y.—*Stone v. Miller*, 62 Barb. 430.

Wis.—*State v. Cary*, 112 N.W. 428, 132 Wis. 501.

28. Del.—*Skinner v. Educational Pictures Securities Corporation*, 129 A. 857, 14 Del.Ch. 417.

Miss.—*Aldridge v. First Nat. Bank*, 144 So. 469, 165 Miss. 1.

N.Y.—*Hodgens v. Columbia Trust Co.*, 171 N.Y.S. 235, 103 Misc. 415, reversed on other grounds 173 N.Y. S. 304, 185 App.Div. 555.

N.C.—*Stevens v. Cecil*, 199 S.E. 161, 214 N.C. 217.

Tenn.—*Dickson v. Simpson*, 113 S.W. 2d 1190, 172 Tenn. 680, 116 A.L.R. 380.

15 C.J. p 799 note 73.

29. U.S.—*Heath v. Santa Lucia Co.*, S. A., D.C.N.Y., 3 F.2d 326.

Cal.—*Frey & Horgan Corporation v. Superior Court in and for City and County of San Francisco*, 55 P.2d 203, 5 Cal.2d 401, certiorari denied *Frey & Horgan Corporation v. Superior Court of State of California*, 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.

Del.—*Webb Packing Co. v. Harmon, Super.*, 193 A. 596.

S.D.—*K. & S. Sales Co. v. Sorenson*, 239 N.W. 185, 59 S.D. 239, citing *Corpus Juris*.

15 C.J. p 799 note 76.

Place to which process may issue generally see the C.J.S. title Proc-

ess § 8, also 50 C.J. p 450 note 90- p 451 note 12.

30. Fla.—*Phillips v. State*, 77 So. 665, 75 Fla. 93.

N.J.—*Ex parte Hall*, 118 A. 347, 94 N.J.Eq. 108.

15 C.J. p 799 note 77-50 C.J. p 450 notes 91, 92.

31. Cal.—*Frey & Horgan Corporation v. Superior Court in and for City and County of San Francisco*, 55 P.2d 203, 5 Cal.2d 401, certiorari denied *Frey & Horgan Corporation v. Superior Court of State of California*, 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.

Ga.—*Peeples v. Mullins*, 168 S.E. 785, 176 Ga. 743—*Irons v. American Nat. Bank*, 165 S.E. 738, 175 Ga. 552, followed in *Irons v. American Nat. Bank*, 165 S.E. 741, 175 Ga. 552—*Gordy v. Levison & Co.*, 122 S.E. 234, 157 Ga. 670—*Ford v. Southern Ry. Co.*, 125 S.E. 479, 33 Ga.App. 24.

Md.—*Grote v. Rogers*, 149 A. 547, 158 Md. 685, followed in 149 A. 551, 158 Md. 695.

Neb.—*Salysers Auto Co. v. De Vore*, 217 N.W. 94, 116 Neb. 317, 56 A.L.R. 594.

N.J.—*Redzina v. Provident Inst. for Savings in Jersey City*, 125 A. 133, 96 N.J.Eq. 346, affirming 121 A. 519, 1 N.J.Misc. 334—*Ex parte Hall*, 118 A. 347, 94 N.J.Eq. 108.

Pa.—*Huntington v. Supreme Commandery, United Order of the Golden Cross of the World*, 104 A. 498, 261 Pa. 168.

Tex.—*Hicks v. Sias, Civ.App.*, 102 S. W.2d 460, error refused.

Wis.—*State ex rel. Ledin v. Davison*, 256 N.W. 718, 216 Wis. 216, 96 A. L.R. 589.

15 C.J. p 800 note 78-50 C.J. p 450 notes 93, 94.

Suit to cancel receipt for fraud and duress is suit in personam which

is not maintainable against nonresidents served only by notice out of state; and fact that lessee asked and was granted decree which defined his rights in land after cancellation of receipt did not change nature of proceeding to suit in rem or quasi in rem, so as to authorize maintenance of suit—*Holliday v. Erwin, Tex.Civ.App.*, 85 S.W.2d 355, affirmed *Erwin v. Holliday*, 112 S.W. 2d 177, 131 Tex. 69.

32. Cal.—*Frey & Horgan Corporation v. Superior Court in and for City and County of San Francisco*, 55 P.2d 203, 5 Cal.2d 401, certiorari denied *Frey & Horgan Corporation v. Superior Court of State of California*, 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.

Ga.—*Ford v. Southern Ry. Co.*, 125 S.E. 479, 33 Ga.App. 24.

Mo.—*Wagoner v. Wagoner*, 229 S.W. 1064, 287 Mo. 567.

Pa.—*Shipley Massingham Co. v. Mutual Drug Co.*, 198 A. 639, 329 Pa. 559.

Wis.—*State ex rel. Ledin v. Davison*, 256 N.W. 718, 216 Wis. 216, 96 A. L.R. 589.

15 C.J. p 800 note 79.

33. Del.—*Discount & Credit Corporation v. Ehrlich*, 187 A. 591, 7 W. W.Harr. 561.

S.D.—*K. & S. Sales Co. v. Sorenson*, 239 N.W. 185, 59 S.D. 239, quoting *Corpus Juris*.

15 C.J. p 800 note 80.

34. U.S.—*Robertson v. Railroad Labor Board, Ill.*, 45 S.Ct. 621, 268 U. S. 619, 69 L.Ed. 1119, reversing, *D. C., Railroad Labor Board v. Robertson*, 3 F.2d 488.

15 C.J. p 800 note 81.

35. S.D.—*K. & S. Sales Co. v. Sorenson*, 239 N.W. 185, 59 S.D. 239, quoting *Corpus Juris*.

15 C.J. p 800 note 82.

Suit to cancel receipt for fraud and duress is suit in personam which

36. Neb.—*Nebraska Mut. Hall Ins.*

and extraterritorial service may confer jurisdiction where the party so served lawfully consents thereto,³⁷ or waives his right to object.³⁸

§ 84. Jurisdiction of the Res

Jurisdiction of the res is generally obtained by a fairly effected seizure of the property under legal process, with constructive service of process on the persons whose rights therein are affected, but in some proceedings constructive seizure, or the mere situs of the property within the territory, may be sufficient to confer jurisdiction.

As a general rule, jurisdiction of the res or property is obtained by a seizure under legal process of the court whereby it is held to abide such order as the court may make,³⁹ and with respect to the persons whose rights in the property are to be affected jurisdiction may be obtained by constructive service of process,⁴⁰ it not being necessary that they should be brought within the reach of the process of the court,⁴¹ or should receive actual notice.⁴² The mere fact that property is within the jurisdiction of

the court is not sufficient to justify an action in personam against defendant where he cannot be served with process; the property itself must be brought before the court.⁴³

With respect to proceedings in rem and quasi in rem, the basis of the jurisdiction is the seizure of the property on which the judgment is to operate, and such jurisdiction cannot be acquired except by a lawful seizure,⁴⁴ unless the action or proceeding is of such a character that the mere situs of the property to be affected within the territorial jurisdiction of the court is sufficient to confer jurisdiction,⁴⁵ as, for instance, in administration proceedings or condemnation proceedings.⁴⁶ Accordingly such jurisdiction cannot be acquired where there is no property of defendant within the state over which the court can exercise its authority.⁴⁷

Constructive seizures. While the general rule with regard to jurisdiction in rem requires the ac-

Co. v. Meyers, 92 N.W. 572, 66 Neb. 657.

15 C.J. p 800 note 83.

37. Cal.—Frey & Horgan Corporation v. Superior Court in and for City and County of San Francisco, 55 P.2d 203, 5 Cal.2d 401, certiorari denied Frey & Horgan Corporation v. Superior Court of State of California, 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.

38. Ky.—Cowan v. Montgomery, 7 J. J. Marsh. 299.

39. Ariz.—McCulloch v. Western Land & Cattle Co., 231 P. 618, 27 Ariz. 154.

Fla.—Harris v. City of Sarasota, 181 So. 366, 132 Fla. 568.

Ga.—Coral Gables Corporation v. Hamilton, 147 S.E. 494, 168 Ga. 182. Miss.—Aldridge v. First Nat. Bank, 144 So. 469, 165 Miss. 1.

Neb.—In re Nilson's Estate, 253 N.W. 675, 678, 126 Neb. 541, citing *Corpus Juris*.

N.C.—Stevens v. Cecil, 199 S.E. 161, 214 N.C. 217.

Tenn.—State v. Collier, 23 S.W.2d 897, 160 Tenn. 403.

Tex.—Pantaze v. Fox-Head Spring Beverage Co., Civ.App., 23 S.W.2d 514, affirmed 37 S.W.2d 724, 120 Tex. 270.

15 C.J. p 801 note 92.

Service of legal and valid writ is essential to jurisdiction over res.—Lunger v. Page, 2 A.2d 606, 16 N.J. Misc. 529.

Nonresidence of parties

Court has jurisdiction where property is attached, unless complaint shows that, because of nonresidence of parties, no cause of action upon which the court has authority to pass

judgment is presented.—Artman v. Artman, 149 A. 246, 111 Conn. 124.

40. Fla.—Harris v. City of Sarasota, 181 So. 366, 132 Fla. 568.

N.C.—Orange County v. Jenkins, 156 S.E. 774, 200 N.C. 202, followed in 156 S.E. 777, 200 N.C. 798.

Tenn.—Dickson v. Simpson, 113 S.W. 2d 1190, 172 Tenn. 680, 116 A.L.R. 380.

15 C.J. p 801 note 93.

41. Tenn.—Dickson v. Simpson, supra.

15 C.J. p 802 note 94.

42. Ga.—Coral Gables Corporation v. Hamilton, 147 S.E. 494, 168 Ga. 182.

15 C.J. p 802 note 95.

Jurisdiction to administer decedent's estate is acquired on filing of proper petition regardless of notice to interested parties.—In re Barlow's Estate, 188 N.W. 282, 152 Minn. 249.

43. Ala.—Tigrett v. Taylor, 60 So. 858, 180 Ala. 296.

Del.—Skinner v. Educational Pictures Securities Corporation, 129 A. 857, 14 Del.Ch. 417.

Wyo.—Fremont Consolidated Oil Co. v. Anderson, 12 P.2d 369, 370, 44 Wyo. 313, quoting *Corpus Juris*.

15 C.J. p 802 note 96.

44. Fla.—Harris v. City of Sarasota, 181 So. 366, 132 Fla. 568.

N.C.—Stevens v. Cecil, 199 S.E. 161, 214 N.C. 217.

Tenn.—Potter v. Foster, 64 S.W.2d 520, 523, 16 Tenn.App. 336, quoting *Corpus Juris*.

15 C.J. p 802 note 97.

"It is essential in these cases that the seizure shall be had at the commencement of the proceedings and opportunity shall be afforded the owner thereof to be heard."—Dickson

v. Simpson, 113 S.W.2d 1190, 1192, 172 Tenn. 680, 116 A.L.R. 380.

Corpus Juris quoted but held inapplicable to party's contention.—Perry v. Edmonds, Nev., 84 P.2d 711, 712.

45. Miss.—Brown v. Levee Commrs., 50 Miss. 468.

Tenn.—Potter v. Foster, 64 S.W.2d 520, 523, 16 Tenn.App. 336, quoting *Corpus Juris*.

Proceedings to enforce lien

In proceedings in rem to enforce lien on property, it is not necessary to acquire jurisdiction by attachment or actual seizure of property.

—Orange County v. Jenkins, 156 S.E. 774, 200 N.C. 202, followed in 156 S.E. 777, 200 N.C. 798.

46. Miss.—Brown v. Levee Commrs., 50 Miss. 468.

Jurisdiction of:

Administration proceedings generally see the C.J.S. title Executors and Administrators § 20, also 23 C.J. p 1012 note 61—p 1018 note 10.

Condemnation proceedings generally see the C.J.S. title Eminent Domain § 232, also 20 C.J. p 914 note 47—p 917 note 75.

47. N.Y.—Hodgens v. Columbia Trust Co., 173 N.Y.S. 304, 185 App.Div. 555, reversing 171 N.Y.S. 235, 108 Misc. 415.

Absence of indebtedness

Where jurisdiction was sought to be acquired against nonresident by attachment and garnishment, and answers of garnishees showed no indebtedness, jurisdiction was not acquired even in rem.—E. H. Emery & Co. v. Wabash R. Co., 166 N.W. 600, 183 Iowa 687.

tual seizure and possession of the res by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing, and in effect subject it to such dominion.⁴⁸

Seizure by improper means. A court will not take jurisdiction based on a seizure of property where the presence of the property within the territorial limits of the court's jurisdiction was obtained by fraudulent or improper means, as by trickery or deceit.⁴⁹

§ 85. Jurisdiction by Consent

- a. In general
- b. Limitations of rule
- c. Jurisdiction of the person

a. In General

If the court has not jurisdiction of the cause of action or subject matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement, or conduct of the parties.

It is not within the power of litigants to invest a court with any jurisdiction or power not conferred on it by law,⁵⁰ and, accordingly, it is well es-

48. Ariz.—McCulloch v. Western Land & Cattle Co., 231 P. 618, 27 Ariz. 154.

Constructive seizure under writ of attachment see Attachment § 223 d. Jurisdiction of debt or property garnished see the C.J.S. title Garnishment § 124, also 28 C.J. p 193 note 59-p 201 note 27.

49. Ala.—Sessoms Grocery Co. v. International Sugar Feed Co., 66 So. 479, 138 Ala. 232.

Iowa.—Van Donselaar v. Jones, 192 N.W. 22, 195 Iowa 1081.

Mo.—Nations v. New York Times, App., 57 S.W.2d 713.

Okl.—Oklahoma Industrial Finance Corporation v. Wallace, 69 P.2d 362, 180 Okl. 363.

Fraudulent service generally see supra § 83.

50. U.S.—In re Bishop's Estate, Hawaii, 250 F. 145, 162 C.C.A. 281.

Ala.—Ex parte Phillips, 165 So. 80, 231 Ala. 364—Waldman v. Georgia Casualty Co., 141 So. 705, 225 Ala. 61—Franklin v. Georgia Casualty Co., 141 So. 702, 225 Ala. 58—Ex parte State ex rel. Smith, 87 So. 594, 205 Ala. 11—Moffatt v. Cassimus, 190 So. 297, 28 Ala.App. 582, reversed on other grounds, Sup., 190 So. 299.

Cal.—Emery v. Pacific Employers Ins. Co., 67 P.2d 1046, 8 Cal.2d 663—Mines v. Superior Court in and for Los Angeles County, 16 P.2d 782, 216 Cal. 776—Adolph M. Schwartz, Inc. v. Burnett Pharmacy, 295 P. 508, 509, 112 Cal.App. 781, citing *Corpus Juris*—Mannix v. Superior Court in and for Sacramento County, 24 P.2d 507, 133 Cal.App. 740—Gillespie v. Andrews, 248 P. 715, 78 Cal.App. 595—In re Stuhldreher's Estate, 239 P. 859, 74 Cal.App. 226—Badgalupi v. Badgalupi, 238 P. 93, 72 Cal.App. 654—Harrington v. Superior Court in and for Placer County, 228 P. 15, 194 Cal. 185—Taylor v. Taylor, 218 P. 756, 192 Cal. 71, 51 A.L.R. 1074.

Colo.—Isham v. People, 262 P. 89, 82 Colo. 550.

Ga.—Parker v. Travelers' Ins. Co.,

163 S.E. 159, 161, 174 Ga. 525, quoting *Corpus Juris*—Thompson v. Allen, 128 S.E. 773, 160 Ga. 535.

Ill.—Martin v. Bankers' Life Co., 193 N.E. 197, 358 Ill. 338—Keplinger v. Lord, 192 N.E. 549, 357 Ill. 571.

Ind.—Bishop v. International Sugar Feed Co., 162 N.E. 71, 87 Ind.App. 294.

Iowa.—Franklin v. Bonner, 207 N.W. 778, 201 Iowa 516.

La.—Foundation Finance Co. v. Robins, App., 144 So. 293—Bank of Winnfield v. Melton, App., 142 So. 300.

Mass.—Board of Assessors of City of Boston v. Suffolk Law School, 4 N.E.2d 342.

Mich.—City of Detroit v. Public Utilities Commission, 286 N.W. 368, 288 Mich. 267—Henkel v. Henkel, 276 N.W. 522, 282 Mich. 473—Strandt v. Strandt, 270 N.W. 709, 278 Mich. 354—Twork v. Munising Paper Co., 266 N.W. 311, 275 Mich. 174—Straus v. Barbee, 247 N.W. 125, 262 Mich. 113.

Miss.—Welch v. Bryant, 128 So. 734, 157 Miss. 559.

Mo.—United Cemeteries Co. v. Strother, 119 S.W.2d 762, 342 Mo. 1155—Consolidated School Dist. No. 2 of Clinton County, v. Gower Bank of Gower, 53 S.W.2d 280, transferred In re Liquidation of Gower Bank, App., 55 S.W.2d 713—Little River Drainage Dist. v. Houck, 222 S.W. 384, 282 Mo. 458—Simplex Paper Corporation v. Standard Corrugated Box Co., 97 S.W.2d 862, 231 Mo.App. 764, transferred, Sup., 76 S.W.2d 1075—Phillips v. Alford, App., 90 S.W.2d 1060, 1070, citing *Corpus Juris*.

Neb.—State ex rel. Wright v. Barney, 276 N.W. 676, 133 Neb. 676.

Nev.—Sweeney v. Sweeney, 179 P. 638, 42 Nev. 431.

N.J.—Myslewitz v. Sullivan, 181 A. 57, 102 N.J.Law 61—Benton & Holden v. Central R. Co. of New Jersey, 194 A. 805, 122 N.J.Eq. 309, affirmed Benton & Holden v. Central R. Co. of New Jersey, 196 A. 352, 123 N.J.Eq. 163.

N.Y.—In re Hoff, 297 N.Y.S. 39, 251

App.Div. 862, reargument denied and motion granted 298 N.Y.S. 1006, 252 App.Div. 751, affirmed Hoff v. Hoff, 12 N.E.2d 580, 276 N.Y. 569—City of Oswego v. Montcalm Dock Co., 283 N.Y.S. 121, 245 App.Div. 555—In re Martin's Will, 281 N.Y.S. 163, 245 App.Div. 120, reversed on other grounds 199 N.E. 491, 269 N.Y. 805—Jacobs v. Steinbrink, 273 N.Y.S. 498, 242 App.Div. 197—Cooper v. Davis, 248 N.Y.S. 227, 229, 231 App.Div. 527, quoting *Corpus Juris*—In re Heinze's Estate, 165 N.Y.S. 1017, 179 App.Div. 453.

N.C.—Saunderson v. Saunderson, 141 S.E. 572, 195 N.C. 169.

N.D.—In re LePage's Trust, 269 N.W. 53, 58, 67 N.D. 15, citing *Corpus Juris*.

Ohio.—Gatton v. Gatton, 179, N.E. 745, 41 Ohio App. 397.

Or.—State v. Tazwell, 266 P. 238, 125 Or. 528, 59 A.L.R. 1436, motion denied 270 P. 486, 126 Or. 585—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 816, 107 Or. 561, citing *Corpus Juris*.

Pa.—Wolfe v. Lewisburg Trust & Safe Deposit Co., 158 A. 567, 305 Pa. 583, 81 A.L.R. 660—Bluestone v. De Roy, 148 A. 110, 111, 208 Pa. 267, quoting *Corpus Juris*—Commonwealth v. Mathieu, 163 A. 109, 107 Pa.Super. 261.

R.I.—Bowden v. Ide, 138 A. 190, 48 R.I. 441.

Tex.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—Nevitt v. Wilson, 285 S.W. 1079, 1084, 116 Tex. 29, 48 A.L.R. 355, citing *Corpus Juris*—Perkins v. U. S. Fidelity & Guaranty Co., Com.App., 299 S.W. 213, 217, citing *Corpus Juris*, and reversing U. S. Fidelity & Guaranty Co. v. Perkins Civ.App., 293 S.W. 675—H. H. Watson Co. v. Cobb Grain Co., Com.App., 292 S.W. 174, reversing Cobb Grain Co. v. H. H. Watson Co., Civ.App., 290 S.W. 842—Hall v. Wilbarger County, Civ.App., 37 S.W.2d 1041, 1046, citing *Corpus Juris*—Bull Dog Auto Fire Ins. Ass'n v. Brown, Civ.App., 287 S.W. 76.

Utah.—Hardy v. Meadows, 264 P. 968, 71 Utah 255.

published as a general rule that, where the court has not jurisdiction of the cause of action or subject matter involved in a particular case, such jurisdic-

tion cannot be conferred by consent, agreement, or other conduct of the parties.⁵¹ So, also, if the court cannot try the question except under partic-

Vt.—*F. S. Fuller & Co. v. Morrison*, 169 A. 9, 106 Vt. 22.

Va.—*Golderos v. Golderos*, 194 S.E. 706, 708, 169 Va. 496, quoting *Corpus Juris*—*Commonwealth v. P. Lorillard Co.*, 105 S.E. 683, 129 Va. 74—*Shelton v. Sydnor*, 102 S.E. 83, 126 Va. 625—*Thacker v. Hubbard & Appleby*, 94 S.E. 929, 122 Va. 379. 15 C.J. p. 802 note 6.

Rule applied in particular courts:

Appellate courts see *Appeal and Error* § 43.

Courts Martial see *Army and Navy* § 54 a.

Criminal Courts see the C.J.S. title *Criminal Law* § 147, also 16 C.J. p. 176 notes 82–86.

Federal Courts see the C.J.S. title *Federal Courts* § 83, also 25 C.J. p. 781 note 27–p. 782 note 40.

Justices of the Peace see the C.J.S. title *Justices of the Peace* § 48, also 35 C.J. p. 546 notes 93–4.

51. U.S.—*Goldstone v. Payne*, C.C.A. N.Y., 94 F.2d 855, certiorari denied 58 S.Ct. 1057, 304 U.S. 585, 82 L.Ed. 1547—*In re Palisades-on-the-Desplains*, C.C.A.Ill., 89 F.2d 214—*U. S. v. Kiles*, C.C.A.Mo., 70 F.2d 880—*In re Gray's Estate*, C.C.A.Ind., 66 F.2d 367—*Gatch, Tennant & Co. v. Mobile & O. R. Co.*, D.C.Ala., 59 F.2d 217—*Woods Bros. Const. Co. v. Yankton County*, S. D., C.C.A. S.D., 54 F.2d 304, 81 A.L.R. 300—*Bailey v. Texas Co.*, C.C.A.N.Y., 47 F.2d 153—*In re Morgan Drug Co.*, D.C.N.Y., 37 F.2d 419—*Davidson v. Rafferty*, D.C.N.Y., 34 F.2d 700, affirmed, C.C.A., 39 F.2d 1022—*McLaughlin v. Western Union Telegraph Co.*, D.C.La., 7 F.2d 177—*In re Ostlund Mfg. Co.*, D.C.Or., 19 F. Supp. 336—*Dennison v. Payne*, C. C.A.N.Y., 293 F. 333—*Henry Kaelin & Son v. U. S.*, D.C.N.Y., 290 F. 242—*Panama R. Co. v. Johnson*, C. C.N.Y., 289 F. 964, affirmed 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748—*Primos Chemical Co. v. Fulton Steel Corporation*, D.C.N.Y., 254 F. 454—*Spencer v. Patey*, N.Y., 243 F. 555, 156 C.C.A. 253.

Ala.—*Wood & Pritchard v. McClure*, 96 So. 577, 209 Ala. 523—*Hines v. Hines*, 84 So. 712, 203 Ala. 633—*Spears v. State*, 160 So. 727, 26 Ala. App. 376.

Ark.—*Missouri Pac. R. Co. v. Henry*, 66 S.W.2d 636, 138 Ark. 530—*Axley v. Hammock*, 50 S.W.2d 608, 135 Ark. 939—*McLain v. Brewington*, 211 S.W. 174, 138 Ark. 157.

Cal.—*Amos v. Superior Court of California*, in and for San Diego County, 239 P. 817, 196 Cal. 677—*Employers' Liability Assur. Corporation v. Industrial Acc. Commission*, 203 P. 95, 187 Cal. 615—*Marin Mu-*

nicipal Water Dist. v. North Coast Water Co., 173 P. 473, 178 Cal. 324

—*Frowley v. Superior Court of Modoc County*, 110 P. 817, 158 Cal. 220—*Kegley v. Kegley*, 60 P.2d 482, 16 Cal.App.2d 216—*Adolph M. Schwartz, Inc., v. Burnett Pharmacy*, 295 P. 508, 509, 112 Cal.App. 781, citing *Corpus Juris*—*Cook v. Winklefleck*, 59 P.2d 463, 16 Cal. App.2d Supp. 759.

Colo.—*U. S. Fidelity & Guaranty Co. v. Industrial Commission*, 61 P.2d 1033, 99 Colo. 280—*Saunders v. Norton*, 58 P.2d 482, 98 Colo. 537—*Williams v. Hankins*, 225 P. 243, 75 Colo. 136.

Conn.—*McDonald v. Hugo*, 105 A. 709, 93 Conn. 360.

Del.—*Omnium De Participations Industries De Luxe, S. A., v. Spoturno, Super.*, 196 A. 194.

D.C.—*Woodmen of the World Life Ins. Ass'n v. Federal Communications Commission*, 99 F.2d 122, 69 App.D.C. 87—*U. S. ex rel. Abilene & S. Ry. Co. v. Interstate Commerce Commission*, 8 F.2d 901, 56 App.D.C. 40, certiorari denied 46 S.Ct. 351, 270 U.S. 650, 70 L.Ed. 781.

Fla.—*Spitzer v. Branning*, 184 So. 770—*State ex rel. Landis v. Simmons*, 140 So. 187, 104 Fla. 487—*Carolina Portland Cement Co. v. Baumgartner*, 128 So. 241, 99 Fla. 987—*Lovett v. Lovett*, 112 So. 768, 93 Fla. 611.

Ga.—*Jones v. Jones*, 184 S.E. 271, 181 Ga. 747—*Crews v. Folds*, 127 S.E. 281, 160 Ga. 23—*Robinson v. Atapulgus Clay Co.*, 189 S.E. 555, 55 Ga.App. 141—*Griffin v. Nix*, 125 S. E. 732, 33 Ga.App. 136—*Brannon v. Price*, 115 S.E. 151, 29 Ga.App. 333.

Hawaii.—*Kim Poo Kum v. Sugiyama*, 33 Hawaii 545—*Wong Kwai Tong v. Choy Yin*, 31 Hawaii 603.

Idaho.—*Poage v. Co-operative Pub. Co.*, 66 P.2d 1119, 57 Idaho 561, 110 A.L.R. 1322—*First Nat. Bank v. Collins*, 9 P.2d 802, 51 Idaho 689.

Ill.—*Dunavan v. Industrial Commission*, 189 N.E. 283, 355 Ill. 444—*People v. Brautigan*, 142 N.E. 208, 310 Ill. 472—*Gunsul v. American Surety Co. of New York*, 139 N. E. 620, 308 Ill. 312, affirming 225 Ill.App. 76—*Pocahontas Mining Co. v. Industrial Commission*, 134 N. E. 160, 301 Ill. 462—*Town of Kingston v. Anderson*, 133 N.E. 347, 300 Ill. 577—*Rabbitt v. Frank C. Weber & Co.*, 130 N.E. 787, 297 Ill. 491—*Oakman v. Small*, 118 N.E. 775, 282 Ill. 360—*King v. Snow*, 266 Ill. App. 462—*Phelps v. Columbia Phonograph Broadcasting System*, 255 Ill.App. 294—*Askins v. Hott*,

188 Ill.App. 235. See *People v. Rigdon*, 204 Ill.App. 309.

Ind.—*Nation v. Green*, 116 N.E. 840, 65 Ind.App. 136, transferred 123 N. E. 163, 188 Ind. 697.

Iowa.—*Johnson v. Purcell*, 282 N.W. 741, 225 Iowa 1265.

Ky.—*Thompson v. Commonwealth*, 99 S.W.2d 705, 266 Ky. 529—*Tackett v. Tackett*, 265 S.W. 336, 204 Ky. 831.

Me.—*Consolidated Rendering Co. v. McManus*, 5 A.2d 923—*Charles Cushman Co. v. Mackesy*, 200 A. 505, 135 Me. 490, 118 A.L.R. 148—*Appeal of Chaplin*, 160 A. 27, 131 Me. 187—*Hoadley v. Wheelwright*, 156 A. 692, 130 Me. 395.

Mass.—*Harvey v. Fiduciary Trust Co.*, 13 N.E.2d 299—*Bergeron v. Bergeron*, 192 N.E. 86, 287 Mass. 524—*Connolly v. Phipps*, 186 N.E. 646, 282 Mass. 584—*Warner v. City of Taunton*, 148 N.E. 377, 253 Mass. 116—*Attorney General v. Pelletier*, 134 N.E. 407, 240 Mass. 264—*Attorney General v. Tufts*, 131 N.E. 573, 239 Mass. 458, 17 A.L.R. 274—*Paige v. Sinclair*, 130 N.E. 177, 237 Mass. 482—*Eaton v. Eaton*, 124 N.E. 37, 233 Mass. 351, 5 A.L.R. 1426.

Mich.—*In re Fraser's Estate*, 285 N. W. 1, 288 Mich. 392—*Goldberg v. Trustees of Elmwood Cemetery*, 275 N.W. 663, 281 Mich. 647—*Orloff v. Morehead Mfg. Co.*, 262 N.W. 736, 273 Mich. 62—*Wieser v. Richter*, 225 N.W. 542, 247 Mich. 52.

Mo.—*United Cemeteries Co. v. Strother*, 119 S.W.2d 762, 342 Mo. 1155—*Robinson v. Field*, 117 S.W.2d 308, 342 Mo. 778—*Bash v. Truman*, 75 S.W.2d 840, 335 Mo. 1077—*State ex rel. Consolidated School Dist. No. 2 v. Ingram*, 298 S.W. 37, 317 Mo. 1141—*Jones v. Sanderson*, 229 S.W. 1087, 287 Mo. 176—*City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co.*, 212 S.W. 887.

Mont.—*Stanton Trust & Savings Bank v. Johnson*, 65 P.2d 1188, 104 Mont. 235—*Reed v. Woodmen of the World*, 22 P.2d 819, 94 Mont. 374.

Nev.—*Jasper v. Jewkes*, 254 P. 698, 50 Nev. 153.

N.H.—*Jackson & Sons v. Lumbermen's Mut. Casualty Co.*, 168 A. 895, 86 N.H. 341—*Labonte v. City of Berlin*, 154 A. 89, 85 N.H. 89—*Burleigh v. Wong Sung Leon*, 139 A. 184, 83 N.H. 115.

N.J.—*Kaufman v. Smathers*, 166 A. 453, 111 N.J.Law 52, reversing *Kaufman v. Smather*, 160 A. 500, 10 N.J.Misc. 671—*Maresh v. O'Regan*, 194 A. 156, 122 N.J.Eq. 388—*Moresh v. O'Regan*, 192 A. 831, 122 N.J.Eq. 388, reversing 187 A. 619, 120 N.J.

ular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or unless the court is approached

in the manner provided, and consent will not avail to change the provisions of the law in this regard.⁵²

Eq. 524—Ex parte Hall, 118 A. 347, 94 N.J.Eq. 108—Stanford v. Stanford, 101 A. 388, 87 N.J.Eq. 475—F. W. Woolworth & Co. v. Zimmerman, 179 A. 474, 13 N.J.Misc. 505.
N.Y.—Patrone v. M. P. Howlett, Inc., 143 N.E. 232, 237 N.Y. 394, affirming 201 N.Y.S. 930, 207 App.Div. 856, and motion denied 143 N.E. 731, 237 N.Y. 534—Newham v. Chile Exploration Co., 133 N.E. 120, 232 N.Y. 37, 25 A.L.R. 1018, reversing 187 N.Y.S. 31, 195 App.Div. 291, and reargument denied 138 N.E. 437, 234 N.Y. 537—Lewin v. Abrams, 3 N.Y.S.2d 729, 253 App.Div. 669, appeal denied 6 N.Y.S.2d 442, 254 App.Div. 701, appeal dismissed 16 N.E.2d 850, 278 N.Y. 702—Application of Senitha, 299 N.Y.S. 407, 252 App.Div. 804—People ex rel. Battista v. Christian, 229 N.Y.S. 644, 224 App.Div. 243, reversing 64 N.Y.S. 142, 131 Misc. 411, and reversed on other grounds 164 N. E. 111, 249 N.Y. 314, 61 A.L.R. 793—Christensen v. Morse Dry Dock & Repair Co., 214 N.Y.S. 732, 216 App.Div. 274, appeal dismissed 154 N.E. 616, 243 N.Y. 587—In re Matthewson's Will, 206 N.Y.S. 734, 210 App.Div. 572—City of Rochester v. Rochester Gas & Electric Corporation, 190 N.Y.S. 229, 198 App.Div. 973—Newham v. Chile Exploration Co., 187 N.Y.S. 31, 195 App.Div. 291, reversed on other grounds 133 N.E. 120, 232 N.Y. 37—Dworkowitz v. Harlem River Towboat Line, 183 N.Y.S. 458, 192 App.Div. 855—Stoddard v. Stoddard, 175 N.Y.S. 636, 187 App.Div. 258, affirmed 124 N.E. 91, 227 N.Y. 13—Jamaica Sav. Bank v. Risian Realty Corporation, 300 N. Y.S. 553, 165 Misc. 372—In re Grube's Will, 295 N.Y.S. 238, 162 Misc. 578—Borenstein v. Borenstein, 270 N.Y.S. 688, 151 Misc. 160, affirmed 274 N.Y.S. 1011, 242 App. Div. 761, motion denied 196 N.E. 572, 267 N.Y. 547, and affirmed 3 N.E.2d 844, 272 N.Y. 407—Norman S. Riesenfeld, Inc. v. R. W. Realty Co., 217 N.Y.S. 306, 127 Misc. 630—Davis v. Rochester Can Co., 207 N.Y.S. 33, 124 Misc. 123, reversed on other grounds 221 N.Y.S. 666, 220 App.Div. 487—Carey v. International Brotherhood of Paper Makers, 206 N.Y.S. 73, 123 Misc. 680—Knill v. Knill, 195 N.Y.S. 398, 119 Misc. 186—Gardner v. Condon, 190 N.Y.S. 756, 117 Misc. 97.
N.C.—Dees v. Apple, 178 S.E. 557, 207 N.C. 763—Thompson's Dependents v. Johnson Funeral Home, 172 S.E. 500, 205 N.C. 801.
N.D.—Hanson v. North Dakota Workmen's C. Bureau, 248 N.W. 680, 687, 63 N.D. 79, citing *Corpus Juris*.

Ohio.—Newland v. Industrial Commission of Ohio, 19 N.E.2d 780, 60 Ohio App. 104—Degenhart v. Harford, 18 N.E.2d 990, 59 Ohio App. 552—Crook v. Baltimore & O. R. Co., 167 N.E. 899, 32 Ohio App. 263—Baughman v. Bounds, 29 Ohio N.P., N.S., 544—Weis v. Mann, 26 Ohio N.P., N.S., 552.
Pa.—In re Dick's Estate, 116 A. 549, 273 Pa. 69—In re Report of Auditors of Susquehanna County, 187 A. 78, 123 Pa.Super. 195—In re Warner's Estate, 24 Pa.Dist. & Co. 177, 51 Montg.Co. 84—Divine v. Skrotzky, 3 Pa.Dist. & Co. 717—Frey v. Long, 3 Pa.Dist. & Co. 121—Commonwealth v. Bobarsky, 5 Pa.Dist. & Co. 213—Wanamaker v. Beamesderfer, 3 Pa.Dist. & Co. 699, 701, citing *Corpus Juris*—Commonwealth v. Rudy, 3 Pa.Dist. & Co. 383, 384, citing *Corpus Juris*—In re Elwood's Estate, 28 Pa.Dist. 972, 48 Pa.Co. 358, 67 Pittsb.Leg.J. 840—In re Greek Catholic Union of Russian Brotherhoods of U. S. A., 5 Schuylkill Reg. 370.
S.C.—Lillard v. Searson, 170 S.E. 449, 170 S.C. 304—Sanders v. Atlantic Coast Line R. Co., 103 S.E. 564, 114 S.C. 164.
S.D.—O'Neal v. Diamond A. Cattle Co., 260 N.W. 836—Fergen v. Lonie, 213 N.W. 720, 51 S.D. 315.
Tenn.—James v. Kennedy, 129 S.W.2d 215, 174 Tenn. 591—Jordan v. Jordan, 239 S.W. 423, 145 Tenn. 378—Cockrell v. Cockrell, 83 S.W.2d 281, 19 Tenn.App. 71—Reynolds v. Hamilton, 77 S.W.2d 986, 18 Tenn.App. 380.
Tex.—Campsey v. Brumley, Com. App., 55 S.W.2d 810—Willbarger County v. Hall, Com.App., 55 S.W. 2d 797, 798, citing *Corpus Juris*—Cooper v. U. S. Fidelity & Guaranty Co., Com.App., 29 S.W.2d 971, affirming U. S. Fidelity & Guaranty Co. v. Cooper, Civ.App., 14 S.W. 2d 342, and rehearing denied Cooper v. U. S. Fidelity & Guaranty Co., Com.App., 33 S.W.2d 189—Pierce v. Foreign Mission Board of Southern Baptist Convention, Com. App., 235 S.W. 552, reversing, Civ. App., 218 S.W. 140—Neal v. Beck Funeral Home, Civ.App., 131 S.W. 2d 778, error dismissed—Fidelity & Casualty Co. of New York v. Milligan, Civ.App., 115 S.W.2d 464, error refused—Hardy v. City of Throckmorton, Civ.App., 62 S.W.2d 1104—Harris v. Gregory, Civ.App., 23 S.W.2d 748—U. S. Fidelity & Guaranty Co. v. Perkins, Civ.App., 293 S.W. 675, 676, citing *Corpus Juris*, reversed on other grounds Perkins v. U. S. Fidelity & Guaranty Co., Com.App., 299 S.W. 213—Interna-

tional-Great Northern R. Co. v. Smith, Civ.App., 269 S.W. 886—Burcum v. Gaston, Civ.App., 196 S. W. 257.
Utah.—Devlin v. District Court of Weber County, 178 P. 73, 53 Utah 208.
Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—Miner v. Shanasy, 102 A. 480, 92 Vt. 110.
Va.—Buchanan v. Buchanan, 197 S.E. 426, 170 Va. 458, 116 A.L.R. 688.
Wis.—In re George's Estate, 274 N. W. 294, 225 Wis. 251, vacating mandate 270 N.W. 538, 225 Wis. 251.
Wyo.—Church v. Quiner, 224 P. 1073, 31 Wyo. 222—North Laramie Land Co. v. Hoffman, 184 P. 226, 26 Wyo. 327, rehearing granted 195 P. 988, 27 Wyo. 271.
15 C.J. p 804 note 7, p 806 note 34—47 C.J. p 363 note 59.
Jurisdiction not conferred by general appearance see *Appearances* § 16.
Waiver or estoppel to question jurisdiction see *infra* §§ 107–111.
"Subject-matter", over which jurisdiction cannot be conferred by consent, has reference, not to the res or property involved in the litigation nor to a particular case, but to the class of cases, the purported subject of the litigation, and the nature of the action and of the relief sought.—Appeal of McLain, 176 N. W. 817, 189 Iowa 264.
Stating cause of action
Jurisdiction of the subject matter of an action cannot be conferred by stipulation admitting jurisdiction, without making a statement of facts sufficient within themselves to constitute a cause of action.—Lewis v. Shaw, 246 P. 86, 77 Cal.App. 99.
Where court lacks potential jurisdiction over subject matter of suit, no action or agreement of parties can confer jurisdiction.—Maul v. Williams, Tex.Com.App., 69 S.W.2d 1107, reversing In re Volgt's Estate, Civ.App., 46 S.W.2d 467, motion granted Maul v. Williams, 78 S.W. 2d 164, 124 Tex. 408.
Facts shown in stipulation
Stipulation that the court had jurisdiction will not avail, where other facts stipulated necessarily show that the court was without jurisdiction.—People v. Meloche, 152 N.W. 918, 186 Mich. 536.
52. U.S.—Duke v. State Life Ins. Co., D.C.Tex., 4 F.Supp. 138.
Ala.—Wood & Pritchard v. McClure, 96 So. 577, 209 Ala. 523.
Cal.—Moran v. Superior Court in and for Sacramento County, App., 94 P

Particular applications of rule. In accordance with the foregoing rules, numerous instances have arisen in which jurisdiction to entertain particular remedies or to determine particular controversies has been held not to be conferred by consent.⁵³ So, the rule as to consent has been applied to cases

wherein jurisdiction is dependent on the amount involved in the controversy;⁵⁴ to actions improperly brought in a court having jurisdiction only within certain territorial limits;⁵⁵ to cases in which jurisdiction was conferred on courts other than those in which the remedy was sought;⁵⁶ to an attempt

2d 1015, 1018, quoting *Corpus Juris*, and reversed on other grounds 96 P.2d 193—*Bekins Van & Storage Co. v. State*, 28 P.2d 61, 135 Cal. App. 738.

Conn.—*D'Andrea v. Rende*, 195 A. 741, 123 Conn. 377—*Mardil v. A. H. Merriman & Sons*, 163 A. 411, 115 Conn. 678—*Walsh v. A. Waldron & Sons*, 153 A. 298, 112 Conn. 578, 78 A.L.R. 1301.

Del.—*Stidham v. Brooks*, 5 A.2d 522. Ill.—*Allen v. Illinois Mineral Co.*, 20 N.E.2d 898, 299 Ill.App. 537.

Iowa.—*Appeal of McLain*, 176 N.W. 817, 189 Iowa 264.

N.J.—*Kuestner v. Boscarell*, 136 A. 506, 5 N.J. 303.

N.Y.—*Cooper v. Davis*, 248 N.Y.S. 227, 229, 231 App.Div. 527, quoting *Corpus Juris*.

Or.—*Western Land & Irrigation Co. v. Humfeld*, 247 P. 143, 118 Or. 416. Wis.—*Welhouse v. Industrial Commission of Wisconsin*, 252 N.W. 717, 214 Wis. 163.

15 C.J. p 806 note 8.

Failure to move in proper time

Jurisdiction which has been lost because of failure of party to act within the time within which statute permits jurisdiction to be exercised cannot be restored by stipulation.—*Donner v. Superior Court within and for Los Angeles County*, 255 P. 272, 82 Cal.App. 165.

53. Cal.—*In re Thurnell's Estate*, App., 19 P.2d 14.

Ky.—*Sanford v. Roberts*, 236 S.W. 571, 193 Ky. 377.

Mo.—*In re Buckles*, 53 S.W.2d 1055, 331 Mo. 405.

N.Y.—*Stoddard v. Stoddard*, 175 N.Y. S. 636, 187 App.Div. 258, affirmed 124 N.E. 91, 227 N.Y. 13—*Tauszig v. Kantor*, 188 N.Y.S. 92, 115 Misc. 366.

Jurisdiction held not conferred

(1) To try a suit in equity not presenting a proper case for equitable interference.

Ill.—*Litzelman v. Town of Fox*, 1 N.E.2d 915, 285 Ill.App. 7.

Me.—*North v. Harris*, 138 A. 564, 126 Me. 371.

Mich.—*Halkes v. Douglas & Lomason Co.*, 255 N.W. 343, 267 Mich. 600.

N.H.—*Manchester Dairy System v. Hayward*, 132 A. 12, 82 N.H. 193.

15 C.J. p 806 note 29.

(2) To entertain action for settlement of trustee's accounts.

N.J.—*In re Struble's Estate*, 101 A. 177, 87 N.J.Eq. 311.

N.Y.—*In re Ungrich*, 190 N.Y.S. 187,

115 Misc. 762—*In re Hoyt*, 170 N.Y.S. 846, 103 Misc. 614.

(3) To entertain summary proceedings to dispossess a tenant. N.J.—*Handelman v. Harris*, 107 A. 34, 93 N.J.Law 66.

N.Y.—*Kleinsteinst v. Gonsky*, 118 N.Y. S. 949, 134 App.Div. 266—*Lawyers' Title & Guaranty Co. v. Tausig*, 268 N.Y.S. 815, 149 Misc. 594.

(4) To pass on qualification of member of state legislature.—*Reif v. Barrett*, 188 N.E. 889, 355 Ill. 104.

(5) To determine question of adverse possession in proceeding to define validity of an encumbrance.—*New England Home for Deaf Mutes v. Leader Filling Stations Corporation*, 177 N.E. 97, 276 Mass. 153.

(6) To render final judgment on mere petition for certiorari.—*Rogers v. Brown*, 181 A. 667, 134 Me. 88.

(7) To grant writ of prohibition.—*People v. Hinkle*, 227 P. 861, 130 Wash. 419.

(8) To change the record after adjournment of the term in which the final decree was rendered.—*Owen v. Owen*, 162 S.E. 46, 157 Va. 580.

(9) Other instances see 15 C.J. p 806 notes 21, 23, 24, 27, 28, 32.

Rule is especially applicable in divorce actions

La.—*Hockaday v. Hockaday*, 161 So. 164, 182 La. 88.

N.C.—*Lewellyn v. Lewellyn*, 166 S.E. 737, 203 N.C. 575.

Probate or surrogate's court generally

Ark.—*Hendricks v. Henson*, 92 S.W. 2d 867, 192 Ark. 544.

Cal.—*In re Thurnell's Estate*, App., 19 P.2d 14—*Fuller v. Nelle*, 55 P. 2d 1248, 12 Cal.App.2d 576.

Mich.—*Exo v. Detroit Automobile Inter-Insurance Exchange*, 244 N. W. 241, 259 Mich. 578.

Minn.—*State ex rel. Larson v. Probate Court of Hennepin County*, 283 N.W. 545, 204 Minn. 5.

N.J.—*In re Struble's Estate*, 101 A. 177, 87 N.J.Eq. 311.

N.Y.—*In re Mondshain's Estate*, 174 N.Y.S. 599, 186 App.Div. 523—*Application of Goodchild*, 290 N.Y.S. 683, 160 Misc. 738—*In re Von Deilen's Will*, 278 N.Y.S. 689, 154 Misc. 877—*In re Welton's Estate*, 253 N.Y.S. 128, 141 Misc. 674—*In re Crosby's Estate*, 242 N.Y.S. 207, 136 Misc. 688—*In re Grossman's Estate*, 236 N.Y.S. 630, 134 Misc. 724, reversed on ground that proceeding was discovery proceed-

ing under stipulation 251 N.Y.S. 670, 233 App.Div. 887—*In re Morris*, 235 N.Y.S. 461, 134 Misc. 374—*In re Brennan's Estate*, 231 N.Y.S. 462, 129 Misc. 283—*In re Penos's Estate*, 221 N.Y.S. 205, 128 Misc. 718—*In re Connell's Estate*, 207 N.Y.S. 259, 123 Misc. 955—*In re Dick's Will*, 191 N.Y.S. 762, 117 Misc. 635—*In re Lyon's Estate*, 190 N.Y.S. 483, 116 Misc. 640—*In re Ungrich*, 190 N.Y.S. 187, 115 Misc. 762—*In re Kingsley's Estate*, 181 N.Y.S. 496, 111 Misc. 528. Or.—*Skyles v. Kincaid*, 264 P. 432, 124 Or. 443.

15 C.J. p 806 note 26.

54. Ill.—*Malina v. Oplatka*, 136 N.E. 666, 304 Ill. 381.

La.—*Rockefeller v. Eggleston*, App., 177 So. 124—*Carlock v. Kusin*, App., 167 So. 459—*Succession of Ducre*, 139 So. 665, 19 La.App. 574.

Mo.—*State ex rel. Adler v. Douglas*, 95 S.W.2d 1179, 339 Mo. 187—*Cunningham v. Cunningham*, 30 S.W. 2d 63, 325 Mo. 1161.

N.J.—*Novograd v. Kayne's*, 199 A. 59, 16 N.J.Misc. 283.

N.Y.—*Nowinski v. La Monte*, 5 N.Y.S.2d 894, 168 Misc. 586—*City Trust Co. v. Anthony Ricci Realty Co.*, 241 N.Y.S. 481, 137 Misc. 128. Utah.—*Hardy v. Meadows*, 264 P. 968, 71 Utah 255.

15 C.J. p 806 note 9.

55. Ark.—*King v. Harris*, 203 S.W. 847, 134 Ark. 337.

Mass.—*Holt v. Holt*, 149 N.E. 40, 253 Mass. 411.

Miss.—*Dullion v. Folkes*, 120 So. 437, 153 Miss. 91.

N.Y.—*Cooper v. Davis*, 248 N.Y.S. 227, 231 App.Div. 527.

Local action brought in a county other than that in which the property lay.

Ky.—*Shadoin v. Sellars*, 4 S.W.2d 717, 223 Ky. 751.

La.—*Mitcham v. Mitcham*, 173 So. 132, 186 La. 641, transferred, App. 160 So. 145.

Tenn.—*McHenry v. Wallen*, 2 Yerg. 441.

56. Cal.—*Norton v. Baranov*, 50 P. 2d 67, 4 Cal.2d 443—*Shipp v. Superior Court in and for San Bernardino County*, 289 P. 825, 203 Cal. 671—*Tennesen v. Prudential Ins. Co. of America*, 47 P.2d 1066, 8 Cal.App. 160.

Mo.—*American Asphalt Roof Corporation v. Marler*, App., 56 S.W.2d 844.

to invest a court with jurisdiction over matters cognizable in another state;⁵⁷ to an attempt to confer original jurisdiction of a particular matter on a court invested by law with appellate jurisdiction only;⁵⁸ and to attempts to extend jurisdiction so as to have matters not properly within the cognizance of a court settled in proceedings before it.⁵⁹ So, also, consent cannot cure jurisdictional defects resulting from the determination of matters by a person, judge, or tribunal not qualified or empowered to preside or to perform judicial acts,⁶⁰ as by a court not legally in session because convened or sitting at the wrong time⁶¹ or place.⁶²

b. Limitations of Rule

The rule that jurisdiction cannot be conferred by consent is sometimes held inapplicable, as where a statute authorizes such consent or where jurisdiction is reacquired by consent after divestiture, and generally if the court has jurisdiction of the subject matter, its exercise in a particular case may be conferred by consent.

The general rule, stated in subdivision a of this section, that jurisdiction cannot be conferred by consent has in particular circumstances been held inapplicable, as in the case of certain orders not involving the exercise of power of the court,⁶³ or, in the case of an exercise of jurisdiction in an unauthorized manner.⁶⁴ Also, in some cases, a court may exercise jurisdiction acquiesced in by the par-

Tenn.—Petition of Southern Lumber & Mfg. Co., 210 S.W. 639, 141 Tenn. 325.

Tex.—Texas Pipe Line Co. v. Ennis, 93 S.W.2d 148, 127 Tex. 470, reversing and dismissing for want of jurisdiction, Civ.App., 57 S.W.2d 178—Doan v. Star Hardware & Furniture Co., Civ.App., 296 S.W. 639.

15 C.J. p 806 note 15.

Interference with orders or decrees of another court having jurisdiction of cause.

La.—Putnam & Norman v. Conner, 80 So. 285, 144 La. 231.

Me.—Consolidated Rendering Co. v. McManus, 5 A.2d 923.

57. Mass.—Harvey v. Fiduciary Trust Co., 13 N.E.2d 299.

Particular matters

(1) To partition real estate located in an another state.—Bowden v. Ide, 138 A. 190, 48 R.I. 441.

(2) Application for an accounting and discharge of a guardian appointed in another state.—Anderson v. Story, 73 N.W. 735, 53 Neb. 259.

(3) Application for original probate of a foreign will.—In re Chadwick, 82 A. 918, 20 N.J.Eq. 168, affirmed 85 A. 266, 80 N.J.Eq. 471.

58. Ky.—Mississippi Cent. R. Co. v. Davis, 8 Ky.Op. 524.

Mo.—State ex rel. Farmers' Exchange Bank of Gallatin, Daviess County, v. Beals, App., 55 S.W.2d 1005.

S.C.—Moore v. Moore, 197 S.E. 507, 187 S.C. 144.

Tex.—Neal v. Beck Funeral Home, Civ.App., 131 S.W.2d 778, error dismissed.

15 C.J. p 806 note 14.

59. Hawaii.—Wong Kwai Tong v. Choy Yin, 31 Hawaii 603.

Minn.—In re Pearson's Estate, 192 N.W. 937, 155 Minn. 122.

N.Y.—Application of Senitha, 299 N.Y.S. 407, 252 App.Div. 304—Meyro-

witz v. Wattel, 267 N.Y.S. 591, 149 Misc. 862.

15 C.J. p 806 note 20.

Renderition of extrajudicial judgment
N.J.—Cottrell v. Thompson, 15 N.J. Law 344.

Questions not properly before court

(1) Generally.

Mo.—Dahlberg v. Fisse, 40 S.W.2d 606, 328 Mo. 213.

R.I.—In re Rathbun, 110 A. 649, 48 R.I. 173.

(2) To have motion heard on oral demurrer.—New Haven Sand Blast Co. v. Dreisbach, 133 A. 99, 104 Conn. 322.

(3) To determine moot questions or abstract propositions of law.—U. S. v. Roberts & Oake, D.C.Ill., 1 F.Supp. 797, affirmed, C.C.A., 65 F.2d 630—Panama R. Co. v. Johnson, C.C.A.N.Y., 289 F. 964, affirmed 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748.

60. Cal.—Norwood v. Kenfield, 84 Cal. 329.

Ga.—Little v. McCalla, 93 S.E. 37, 20 Ga.App. 324.

Ky.—Philpot v. Commonwealth, 42 S.W.2d 317, 240 Ky. 289.

Mo.—State ex rel. Allen v. Trimble, 297 S.W. 378, 317 Mo. 751, quashing record Allen v. Best, 279 S.W. 728, 220 Mo.App. 1041.

Statutory disqualification of judge to sit or take part in decision in certain specified cases.—Watson v. Payne, 111 A. 462, 94 Vt. 299.

61. Ark.—Red Bud Realty Co. v. South, 224 S.W. 964.

Ky.—Thompson v. Commonwealth, 99 S.W.2d 705, 266 Ky. 529.

15 C.J. p 806 note 18.

Exercise of powers during vacation
Ala.—Crabtree v. Miller, 155 So. 529, 229 Ala. 193.

Miss.—Mississippi State Highway Department v. Haines, 139 So. 168, 162 Miss. 216.

Va.—Owen v. Owen, 162 S.E. 46, 157 Va. 580.

Expiration of judge's authority to act

Ark.—Kory v. Dodge, 298 S.W. 505, 174 Ark. 1156.

62. Ark.—Red Bud Realty Co. v. South, 224 S.W. 964, 145 Ark. 604. 15 C.J. p 806 note 19.

Court sitting in wrong county

N.C.—Reid v. Reid, 155 S.E. 719, 199 N.C. 740.

Tex.—Isbill v. Stovall, Civ.App., 92 S.W.2d 1067.

63. Sale of real estate

An order for the sale of real estate entered in a court which had no authority to make it, but reciting that it was made by the consent of the parties, has been held to be good in support of the sale on the grounds that the sale was not made by virtue of any power exercised by the court, but exclusively by the authority of the agreement of the parties, and that the principle that consent could not confer jurisdiction of the subject matter had no application.—International Trust Co. v. Keokuk Electric St. R., etc., Co., 57 N.W. 712, 90 Iowa 90.

64. As bar to relief in another state

Where consent to the exercise of judicial power, in a manner not authorized by statute, is relied on as a bar to equitable relief demanded in another state, it should be made to appear clearly that the res of the equity so demanded was within the contemplation of the consenting parties, and was considered by the court when it acted on their consent. Such consent, and the action of the court based thereon, should not be extended by construction so as to defeat a clear equity of either consenting party in the courts of another state; but, on the other hand, a technical rule of construction should not be applied to such a consent where this would defeat a clear equity.—Bodie v. Bates, 146 N.W. 1002, 95 Neb. 757, L.R.A.1915E 421.

ties where the proofs do not clearly indicate a want of jurisdiction.⁶⁵

Statute authorizing consent. The general rule that consent cannot confer jurisdiction may be obviated by some provision of local law,⁶⁶ as where jurisdiction is restricted to a certain amount, but the parties are specially permitted to agree to extend the jurisdiction to a larger amount,⁶⁷ or where a statute permits a court to entertain jurisdiction of a suit properly triable in another county if the parties fail to raise the defect by demurrer or answer.⁶⁸ Even in such cases it is considered that the necessary consent must be given in the manner prescribed by law,⁶⁹ although it is held that, if the consent was actually given, the judgment is valid even though no record was made of the fact.⁷⁰

Consent to exercise of existing jurisdiction in particular case. Where the court has jurisdiction of the subject matter, jurisdiction over the particular action may be conferred by consent,⁷¹ as by a

party's act in invoking or submitting to the jurisdiction of the court;⁷² and where jurisdiction has attached and the cause of action or subject matter is legally and properly within the power and cognizance of the court, it may proceed on consent or stipulation with reference to the matters before it.⁷³ In such case, the parties cannot later complain or withdraw the consent thus given.⁷⁴

The principle as to consent has been held to be applicable only to the question of general jurisdiction to adjudicate as to the subject matter and not to the question whether the particular facts of the case bring it within that conceded jurisdiction.⁷⁵ It has also been asserted that the rule that jurisdiction cannot be conferred by consent does not cover cases where the agreement of the parties is in effect only waiving the ordinary process by which the power of the court is invoked,⁷⁶ especially so where the court has general jurisdiction over the subject matter and has proceeded to final judgment without objection taken.⁷⁷ So, parties who consent that an

65. Where jurisdictional facts are properly alleged and thus properly appear on the record, and the parties proceed to trial on the pleadings which go to the merits, and particularly, when the jurisdictional facts are not subsequently put in issue by defendant or seriously denied, the case will not ordinarily be dismissed for want of jurisdiction, where the proofs do not create a legal certainty that it is not within the jurisdiction.—William H. Perry Co. v. Klossers Aktie Bolag, R.I., 152 F. 967, 82 C.C.A. 321.

66. Ind.—Pittsburgh, C. C. & St. L. Ry. Co. v. Home Ins. Co. of New York, App., 125 N.E. 427.
15 C.J. p 806 note 36.

67. Iowa.—Schlismann v. Webber, 21 N.W. 209, 65 Iowa 114.

68. Ind.—Pittsburgh, C. C. & St. L. Ry. Co. v. Home Ins. Co. of New York, App., 125 N.E. 427.

69. Mo.—Ladd v. Forsee, 68 S.W. 331, 163 Mo. 506.

70. Iowa.—Schlismann v. Webber, 21 N.W. 209, 65 Iowa 114, distinguishing Bridges v. Arnold, 37 Iowa 221.

71. Ark.—Purnell v. Nichol, 292 S. W. 686, 173 Ark. 496.
Iowa.—Appeal of McLain, 176 N.W. 817, 189 Iowa 264.

Mo.—Phillips v. Alford, App., 90 S.W. 2d 1060, 1070, citing Corpus Juris.
Pa.—Ganster v. Ganster, 5 Pa. Dist. & Co. 503.

Tex.—Lloyds Casualty Co. of New York v. Lem, Civ.App., 62 S.W.2d 497, error dismissed.
15 C.J. p 807 note 43.

Where court has potential jurisdiction over the subject matter of

the suit, its right or power to exercise it may be shown by an agreed statement entered into by the parties.—Maul v. Williams, Com.App., 69 S.W.2d 1107, reversing In re Voigt's Estate, Civ.App., 46 S.W.2d 467, motion granted Maul v. Williams, 78 S.W.2d 164, 124 Tex. 408.

Partition proceedings

In the absence of want of jurisdiction over the subject matter, a partition cannot be avoided because of some proceeding to which a party had the right to object, which he failed to exercise.—Elder v. McClaskey, Ohio, 70 F. 529, 17 C.C.A. 251—47 C.J. p 363 note 60.

Consent held not shown

Minn.—Canty v. Bockenstedt, 212 N. W. 905, 170 Minn. 383.

Tex.—Perkins v. U. S. Fidelity & Guaranty Co., Com.App., 299 S.W. 213, reversing U. S. Fidelity & Guaranty Co. v. Perkins, Civ.App., 293 S.W. 675.

72. Ala.—Ex parte Pruitt, 92 So. 426, 207 Ala. 261.

Ark.—Jamison v. Henderson, 71 S.W. 2d 696, 189 Ark. 204.

Cal.—Cloverdale Union High School Dist. of Sonoma County v. Peters, 264 P. 273, 88 Cal.App. 731.

Iowa.—Educational Film Exchanges of Iowa v. Hansen, 266 N.W. 487, 221 Iowa 1153.

La.—Lafourche Ice & Shrimp Co. v. Gilbeau, App., 185 So. 310.

Mo.—Winning v. Brown, 100 S.W.2d 303, 340 Mo. 178.

Ohio.—Kennedy v. Latchaw, 126 N.E. 314, 100 Ohio St. 431.

S.D.—Pendergast v. Muns, 238 N.W. 344, 59 S.D. 135.

Tex.—National Debenture Corporation v. Adams, Civ.App., 115 S.W.2d

757—Wright v. Lynskey, Civ.App., 285 S.W. 655.

Va.—Hinton v. Norfolk & W. Ry. Co., 120 S.E. 135, 137 Va. 605.

Wash.—In re Quick's Estate, 297 P. 198, 161 Wash. 537.

73. Ala.—Ray v. Hilman, 157 So. 676, 229 Ala. 424—Ex parte Pruitt, 92 So. 426, 207 Ala. 261.

Ark.—Purnell v. Nichol, 292 S.W. 686, 173 Ark. 496.

D.C.—Harrison v. Washington Loan & Trust Co., 49 App.D.C. 17, 258 F. 273.

N.H.—Burleigh v. Wong Sung Leon, 139 A. 184, 83 N.H. 115.

N.Y.—Hill v. Hill, 207 N.Y.S. 705, 124 Misc. 102.

Tex.—Texas Employers' Ins. Ass'n v. Ezell, Com.App., 14 S.W.2d 1018, reversing Ezell v. Texas Employers' Ins. Ass'n, Civ.App., 5 S.W.2d 594, and rehearing denied Texas Employers' Ins. Ass'n v. Ezell, 16 S.W.2d 523.

15 C.J. p 807 note 44.

74. Ohio.—Barner v. Barner, 19 Ohio App. 458.

Hearing before judges of another district

Ohio.—Barner v. Barner, supra.

75. Mo.—Hadley v. Bernero, 78 S.W. 64, 103 Mo.App. 549.

Porto Rico.—Bayron v. Garcia, 17 Porto Rico 512.

Wis.—Wanzer v. Howland, 10 Wis. 8.

76. Pa.—In re Report of Auditors of Susquehanna County, 187 A. 78, 123 Pa.Super. 195.

15 C.J. p 807 note 46.

77. Pa.—In re Spring St., 3 A. 581, 112 Pa. 258.

Tex.—Kruegel v. Daniels, 109 S.W. 1108, 50 Tex.Civ.App. 215.

order of court be made have been held to be obligated thereby, even though the court had no power to make such order.⁷⁸ It is also held that where jurisdiction depends on the facts pleaded, the parties may stipulate as to the existence of such facts.⁷⁹

Reacquisition of jurisdiction after divestiture. In some circumstances, a court may, as a result of consent of the parties to proceed with the action, reacquire jurisdiction previously lost by it.⁸⁰ So, where the court once had jurisdiction, although the power may have been executed so that without consent of the parties it could not change its judgment or decree, the jurisdiction may be restored by consent.⁸¹

Where the court has jurisdiction of the subject matter without regard to any agreement between the parties, its jurisdiction is not dependent on their consent and is not affected thereby,⁸² even though

such agreement is illegal.⁸³

c. Jurisdiction of the Person

In the absence of contrary statute, a court having jurisdiction of the subject matter may, as a general rule, acquire jurisdiction over the persons of the parties by their consent.

It is well established, as a general rule, that where the court has jurisdiction of the subject matter or cause of action, jurisdiction over the persons of the parties may be conferred by consent,⁸⁴ as where defendant has voluntarily submitted to the jurisdiction of the court.⁸⁵ Accordingly, express or implied consent of the parties to the jurisdiction of the court may operate to cure defects of jurisdiction arising from irregularities in the commencement of the proceedings, defective process, or even the absence of process.⁸⁶ Further, it has been held

78. S.C.—Chalmers v. Turnipseed, 21 S.C. 126.

15 C.J. p 807 note 48.

79. Mo.—Mott v. Kansas City, App., 60 S.W.2d 736.

Tex.—Texas Employers' Ins. Ass'n v. Wright, Com.App., 4 S.W.2d 31, modifying, Civ.App., 297 S.W. 764, and motion denied, Com.App., 7 S.W.2d 72—Ocean Accident & Guarantee Corporation v. McCall, Civ.App., 25 S.W.2d 653, reversed on other grounds, Com.App., 45 S.W.2d 178, modified on other grounds 46 S.W.2d 290.

80. Failure to set date for trial within time limited by statute resulting in loss of jurisdiction may be cured by agreement of parties to proceed.—Berliner v. M. Zimmermann Co., 104 N.Y.S. 407, 54 Misc. 246.

After change of venue, the jurisdiction of the court in which the action was originally brought may be restored by consent.—Taylor v. Atlantic, etc., R. Co., 68 Mo. 397.

81. Ala.—Byrd v. McDaniel, 26 Ala. 582.

15 C.J. p 808 note 53.

82. Fla.—Yulee v. Canova, 11 Fla. 9. N.Y.—Hill v. Hill, 207 N.Y.S. 705, 124 Misc. 102.

Vt.—Town of Duxbury v. Town of Williamstown, 145 A. 872, 102 Vt. 94.

83. Or.—Oregon Growers' Co-op. Ass'n v. Lentz, 212 P. 811, 107 Or. 561.

84. U.S.—Dennison v. Payne, C.C.A. N.Y., 293 F. 333—Henry Kaelin & Son v. U. S., D.C.N.Y., 290 F. 242—Primos Chemical Co. v. Fulton Steel Corporation, D.C.N.Y., 254 F. 454.

Ala.—Hines v. Hines, 84 So. 712, 203 Ala. 633.

Ark.—Axley v. Hammock, 50 S.W.2d 608, 185 Ark. 939—Purnell v. Nich-

ol, 292 S.W. 686, 689, 173 Ark. 496, quoting *Corpus Juris*.

Cal.—Northington v. Industrial Accident Commission, 72 P.2d 909, 23 Cal.App.2d 255.

Fla.—State ex rel. Associated Utilities Corporation v. Chillingworth, 181 So. 346, 132 Fla. 587.

Ga.—Jones v. Jones, 184 S.E. 271, 181 Ga. 747—Crews v. Folds, 127 S.E. 281, 160 Ga. 22—Robinson v. Attapulugus Clay Co., 189 S.E. 555, 55 Ga.App. 141—Oliver v. Rutland, 172 S.E. 660, 48 Ga.App. 326.

Ill.—Rabbitt v. Frank C. Webber & Co., 130 N.E. 787, 297 Ill. 491—Alexander Lumber Co. v. Kellerman, 271 Ill.App. 571, affirmed 192 N.E. 913, 353 Ill. 207.

Iowa.—Dewell v. Suddick, 232 N.W. 118, 211 Iowa 1352—Franklin v. Bonner, 207 N.W. 778, 201 Iowa 516.

Mo.—Robinson v. Field, 117 S.W.2d 308, 342 Mo. 778.

N.H.—Jackson & Sons v. Lumbermen's Mut. Casualty Co., 168 A. 895, 86 N.H. 341.

N.J.—Lunger v. Page, 2 A.2d 606, 16 N.J.Misc. 529—Kuestner v. Boscarell, 136 A. 506, 5 N.J.Misc. 303.

N.Y.—Cooper v. Davis, 248 N.Y.S. 227, 231 App.Div. 527—Newham v. Chile Exploration Co., 187 N.Y.S. 31, 195 App.Div. 291, reversed on other grounds 133 N.E. 120, 232 N.Y. 37—Praete v. Adams, 8 N.Y. S.2d 235, 169 Misc. 776—Gardner v. Condon, 190 N.Y.S. 756, 117 Misc. 97—Klein v. Director General of Railroads, 180 N.Y.S. 618.

Pa.—In re Report of Auditors of Susquehanna County, 187 A. 78, 123 Pa.Super. 195—Divine v. Skrotsky, 8 Pa.Dist. & Co. 717—Frey v. Long, 8 Pa.Dist. & Co. 121.

S.C.—Lillard v. Seanson, 170 S.E. 449, 170 S.C. 304—Walker v. Harris, 170 S.E. 270, 170 S.C. 242—San-

ders v. Atlantic Coast Line R. Co., 103 S.E. 564, 114 S.C. 164.

Tex.—U. S. Fidelity & Guaranty Co. v. Perkins, Civ.App., 293 S.W. 675, 676, citing *Corpus Juris*, reversed on other grounds Perkins v. U. S. Fidelity & Guaranty Co., Com.App., 299 S.W. 213.

Va.—Shelton v. Sydnor, 102 S.E. 83, 126 Va. 625.

15 C.J. p 808 note 57.

Consent not shown

(1) Generally.—Lashbrook v. Copenhagen, 259 P. 191, 70 Utah 163.

(2) Transaction of business within state by nonresident does not imply consent to be bound by process of state court.—Clesas v. Hurley Mach. Co., 157 A. 426, 52 R.I. 69.

(3) Pleading to merits of petition did not constitute consent to jurisdiction of court where petition did not disclose plaintiff's status as foreign corporation and defendant on this fact being made to appear, moved to dismiss for want of jurisdiction.—Erlanger Cotton Mills Co. v. O'Neill Bros., 167 S.E. 715, 46 Ga. App. 329.

85. U.S.—Hewes v. Gay, D.C.Conn., 11 F.2d 165.

Ga.—Oliver v. Rutland, 172 S.E. 660, 48 Ga.App. 326.

Okl.—Kennedy v. State, 58 P.2d 139, 177 Okl. 79.

Wyo.—Continental Oil Co. v. American Co-op. Ass'n, 228 P. 503, 31 Wyo. 433.

General appearance as submission to jurisdiction see Appearances § 17.

Nonresident by invoking jurisdiction of court in state for any purpose, such as attacking void judgment, submits himself to jurisdiction of court for all purposes.—Collins v. McCook, 136 So. 204, 17 La.App. 415.

86. U.S.—De Dood v. Pullman Co., C.C.A.N.Y., 57 F.2d 171, affirming, D.C., 53 F.2d 95.

that the court may exercise jurisdiction over a party submitting thereto even though it has no jurisdiction of the subject matter, where under statute it has power over the case to permit amendment of pleadings or to order transfer to another court.⁸⁷ On the other hand, consent cannot give a court jurisdiction over a person not a resident within its territorial jurisdiction where a statute operates to make the defect one of subject matter.⁸⁸ Also, a party cannot consent to jurisdiction over his person so as to prejudice the rights of third persons.⁸⁹

Time of consent. While it has been intimated that the consent conferring jurisdiction may be given either before or after action has been brought,⁹⁰ the execution of a consent and waiver prior to the institution of a proceeding has been held not to confer jurisdiction over the party executing such consent and waiver;⁹¹ and a provision in a lease that the venue of a suit on such lease shall be in a certain county has been held not to give to the court of that county jurisdiction of a nonresident of the state.⁹²

E. SCOPE AND EXTENT OF JURISDICTION

§ 86. In General

Courts cannot transcend the powers granted to them by law. Generally they have power to control their own proceedings, and to perform any act which a judge may perform, unless his power to act is made exclusive.

A court cannot transcend the powers granted to it by law,⁹³ although it may have jurisdiction of the parties and the subject matter in an action,⁹⁴ and it can exercise its powers only in judicial proceed-

ings.⁹⁵ A court has been broadly said to have authority to control all persons and things within its own territorial limits,⁹⁶ but when an asserted power is inconsistent with an established right the power must be denied.⁹⁷

A court has inherent power to maintain its jurisdiction and render it effective in behalf of litigants.⁹⁸ Generally speaking, courts have the pow-

Cal.—Harrington v. Superior Court, in and for Placer County, 228 P. 15, 194 Cal. 185.

Mo.—Ellis v. Starr Piano Co., 49 S. W.2d 1078, 226 Mo.App. 1209.

N.J.—Ex parte Hall, 118 A. 347, 94 N.J.Eq. 108.

S.C.—Lillard v. Searson, 170 S.E. 449, 170 S.C. 304.

Tex.—Harris v. Gregory, Civ.App., 23 S.W.2d 748.

15 C.J. p 809 note 59.

Written waiver of service of process will confer jurisdiction over party.—Walker v. Koger, Tex.Civ.App., 99 S.W.2d 1034, error dismissed.—Maryland Casualty Co. v. Jones, Tex. Civ.App., 73 S.W.2d 668, affirmed 104 S.W.2d 847, 129 Tex. 392.

87. Wis.—Dring v. Mainwaring, 169 N.W. 301, 168 Wis. 139.

88. La.—Nelson v. Employers' Casualty Co., App., 141 So. 619, recalling 134 So. 782.

N.Y.—Cooper v. Davis, 248 N.Y.S. 227, 231 App.Div. 527.

15 C.J. p 809 note 58.

Consent of foreign corporation to jurisdiction of court in suit against it by nonresident plaintiff is ineffective where statute expressly denies jurisdiction to court unless foreign corporation does business in state.—Davis v. Julius Kessler & Co., 194 N.Y.S. 9, 118 Misc. 292.

89. Ga.—Raney v. McRae, 14 Ga. 589, 60 Am.D. 660.

15 C.J. p 809 note 63.

90. U.S.—Withers v. Starace, D.C. N.Y., 22 F.Supp. 773.

Arbitration agreement

Provision for arbitration and that contract would be governed by law of California was in effect an agreement to submit to jurisdiction of California, rendering defendant amenable to extraterritorial service of process of court enforcing arbitration.—Frey & Horgan Corporation v. Superior Court in and for City and County of San Francisco, 55 P. 2d 203, 5 Cal.2d 401, certiorari denied Frey & Horgan Corporation v. Superior Court of State of California, 56 S.Ct. 955, 298 U.S. 684, 80 L.Ed. 1404.

91. N.Y.—Matter of Graham, 79 N. Y.S. 573, 39 Misc. 226, 12 N.Y. Ann. Cas. 157.

Waiver of notice in divorce suit which in effect is an agreement for a collusive divorce is void as against public policy and confers no jurisdiction over the person.—State ex rel. Robbins v. Glideon, 77 S.W.2d 647, 228 Mo.App. 1023.

92. Tex.—York v. State, 11 S.W. 869, 73 Tex. 651, affirmed 11 S.Ct. 9, 137 U.S. 15, 34 L.Ed. 604.

93. U.S.—Reid v. U. S., N.Y., 29 S. Ct. 171, 211 U.S. 529, 53 L.Ed. 313.

Cal.—People v. O'Donnell, 174 P. 102, 37 Cal.App. 192.

Fla.—State ex rel. Dillman v. Tedder, 166 So. 590, 123 Fla. 188.

Ga.—Rogers v. Rogers, 137 S.E. 633, 183 Ga. 131.

Iowa.—Mally v. Mally, 31 Iowa 60.

Ohio.—Cummins v. Kinsinger, 29

Ohio N.P., N.S., 34.

Va.—Buchanan v. Buchanan, 197 S. E. 426, 170 Va. 458, 116 A.L.R. 688, 15 C.J. p 810 note 67.

Enlargement of jurisdiction by intertendment see supra § 29.

Law as source of jurisdiction see supra § 28.

Approval of acts

"It is a general rule that, unless prohibited by some statutory provision, the court may approve an act which it might have authorized or directed to be done, and with the same effect."—Robinson v. Irwin, 214 N.W. 696, 698, 204 Iowa 98.

Power to punish

"The civil side of the courts have no power to punish excepting for contempt."—Andrews v. Andrews, 2 N.Y.S.2d 575, 580, 166 Misc. 385.

94. Ohio.—Russell v. Fourth Nat. Bank, 131 N.E. 726, 102 Ohio St. 248.

95. Ky.—Janin v. Logan, 273 S.W. 531, 209 Ky. 811.

96. U.S.—The Salvore, C.C.A.N.Y., 36 F.2d 712, reversing, D.C., Petition of Navigazione Libera Triestina, S. A., 33 F.2d 967.

Territorial limits see infra § 91.

97. Ala.—Ex parte Alabama Marble Co., 113 So. 240, 216 Ala. 272.

98. Minn.—In re Slimmer's Estate, 169 N.W. 536, 538, 141 Minn. 131, certiorari denied Lipman v. Slimmer, 39 S.Ct. 492.

"When a litigant disobeys a proper order, or commits a fraud on the court or the opposing party, the result of which is that the jurisdiction of the court is ineffectual, he may be

er to control their own proceedings,⁹⁹ at least during the term of court,¹ or so long as they are pending.²

Jurisdiction of a cause includes the power to define the right sought to be protected,³ and the power to render any rightful judgment in the cause;⁴ and jurisdiction given by statute over certain proceedings in a specified matter may be exercised even though the enforcement of the entire remedy is not necessary for the protection of plaintiff's legal rights.⁵

The limitation of jurisdiction is discussed in § 30 supra.

Exercise of judge's power by court. In the exercise of judicial power a court may ordinarily perform any act the power to perform which has been

conferred upon a judge;⁶ but where exclusive jurisdiction to act is conferred upon the judge, as distinguished from the court, the court cannot act in the premises.⁷ The nature and extent of the powers of judges is discussed in the C.J.S. title Judges §§ 40-56, also 33 C.J. p 959 note 65-p 974 note 25.

§ 87. Over Entire Controversy

Jurisdiction carries with it power to determine every issue or question properly arising in the case, to do all things with reference thereto authorized by law, and to grant full relief.

It is the policy of the courts to determine the entire controversy between litigants.⁸ Accordingly, jurisdiction carries with it the power to hear and determine every issue or question properly arising in the case,⁹ to do any and all things with reference

subjected to proper coercive measures. What ought to be done depends upon the particular circumstances."—In re Slimmer's Estate, supra.

99. Mont.—Union Bank & Trust Co. of Helena v. State Bank of Townsend, 62 P.2d 677, 103 Mont. 260. N.Y.—In re City of Buffalo, 78 N.Y. 362—In re Gould, 8 N.Y.S.2d 714, 255 App.Div. 433—Decatur Contracting Co. v. Edward S. Murphy Bldg. Co., 2 N.Y.S.2d 970, 166 Misc. 614.

Power of court to:

Amend and correct its records see infra § 231.

Make rules of practice and procedure see infra § 170.

Correction of irregularities

Where jurisdiction has been previously obtained, subsequent irregularities may be corrected by court.—Wolford v. Copelon, 273 N.Y.S. 186, 242 App.Div. 91.

1. Va.—Clendenning v. Conrad, 21 S.E. 818, 91 Va. 410.

W.Va.—Hansford v. Tate, 56 S.E. 372, 61 W.Va. 207.

2. N.Y.—La Salle Extension University v. Parella, 294 N.Y.S. 146, 162 Misc. 220.

Final disposition of cause as exhausting court's jurisdiction see infra § 94.

3. Cal.—Truck Owners & Shippers v. Superior Court of San Diego County, 228 P. 19, 194 Cal. 146.

4. Okl.—Board of Trustees of Firemen's Relief and Pension Fund of City of Marietta v. Brooks, 67 P. 2d 4, 179 Okl. 600—Crutcher v. Block, 81 P. 895, 19 Okl. 246, 14 Ann.Cas. 1029.

5. Ga.—Seaboard Air-Line R. Co. v. Burns, 86 S.E. 270, 17 Ga.App. 1. N.Y.—Kenny v. Goehagan, 9 N.Y.Civ. Proc. 378.

15 C.J. p 810 note 73.

6. Cal.—Newman's Estate, 16 P. 887, 75 Cal. 213, 7 Am.S.R. 146.

S.D.—King v. McClurg, 63 N.W. 219, 7 S.D. 67.

15 C.J. p 815 note 23.

7. N.Y.—Heishon v. Knickerbocker L. Ins. Co., 77 N.Y. 278.

15 C.J. p 815 note 24.

8. Iowa.—Hoskins v. Hotel Randolph Co., 211 N.W. 423, 203 Iowa 1152, 65 A.L.R. 1125, certiorari denied Otis Elevator Co. v. Hoskins, 48 S.Ct. 122, 275 U.S. 566, 72 L. Ed. 429.

Tex.—Cleveland v. Ward, 285 S.W. 1063, 1070, 116 Tex. 1, citing *Corpus Juris*.

15 C.J. p 810 note 80.

9. U.S.—Peck v. Jenness, N.H., 7 How. 612, 12 L.Ed. 841—Mudd v. Perry, C.C.A.Okl., 25 F.2d 85.

Ala.—Effe v. Pioneer Lumber Co., 185 So. 759, 237 Ala. 92—Cobbs v. Norville, 151 So. 576, 227 Ala. 621.

Ark.—Strauss v. Missouri State Life Ins. Co., 66 S.W.2d 299, 188 Ark. 286.

Cal.—Brix v. People's Mut. Life Ins. Co., 41 P.2d 537, 2 Cal.2d 446—Pacific States Savings & Loan Co. v. Superior Court in and for Alameda County, 19 P.2d 977, 217 Cal. 517—United Security Bank & Trust Co. v. Superior Court of California in and for Orange County, 270 P. 184, 205 Cal. 167.

Fla.—Malone v. Meres, 109 So. 677, 91 Fla. 709.

Ky.—Goodenough v. Kentucky Purchasing Co., 45 S.W.2d 451, 241 Ky. 744.

Pa.—Thompson v. Fitzgerald, 198 A. 58, 329 Pa. 497, certiorari granted Princess Lida of Thurn and Taxis v. Fitzgerald, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed Princess Lida of Thurn and Taxis v. Thompson, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285.

S.C.—St. Clair v. St. Clair, 178 S.E. 493, 175 S.C. 83.

Tex.—Conn v. Campbell, 24 S.W.2d 813, 119 Tex. 82—Cleveland v. Ward, 285 S.W. 1063, 1070, 116 Tex. 1, citing *Corpus Juris*—Cavers v. Sioux Oil & Refining Co., Com. App., 39 S.W.2d 862, reversing, Civ. App., 23 S.W.2d 421, and rehearing denied, Com.App., 43 S.W.2d 578—Supreme Forest Woodmen Circle v. City of Belton, Civ.App., 66 S.W.2d 439, error refused—Threadgill v. Federal Land Bank of Houston, Civ.App., 26 S.W.2d 345, error dismissed—Bean v. Holmes, Civ. App., 236 S.W. 120, error refused.

Utah.—Herzog v. Bramel, 23 P.2d 345, 82 Utah 216.

15 C.J. p 810 notes 79, 80.

Power:
Of court first acquiring jurisdiction to dispose of entire controversy where actions brought in different courts see infra §§ 492, 529, 548.
To determine ancillary or incidental matters see infra § 88.
"As a general proposition, a court must necessarily have power to hear and determine all questions of law which are necessary to an ultimate decision of the issues involved."—In re Stinger's Estate, 201 P. 693, 698, 61 Mont. 173.

Matters arising by amendments to the petition are included.—Zane-Cetti v. City of Fort Worth, Tex.Civ.App., 21 S.W.2d 355, reversed on other grounds City of Ft. Worth v. Zane-Cetti, Com.App., 29 S.W.2d 958.

Issues outside pleadings
(1) Issues not presented by the pleadings are not within the actual jurisdiction of the court.—Rockwood & Co. v. Parrott & Co., 41 P.2d 1081, 49 Or. 611.

(2) On service of summons, court did not acquire jurisdiction of defendant for any demand not plead-

thereto authorized by law,¹⁰ and to grant full and complete relief.¹¹ Thus a court acquiring jurisdiction of property may determine all questions relative to the title, possession, and control thereof.¹²

§ 88. Ancillary and Incidental Jurisdiction

A grant of jurisdiction implies the necessary and usual incidental powers essential to effectuate it, and every regularly constituted court has power to do all things reasonably necessary for the administration of justice within the scope of its jurisdiction, and for the enforcement of its judgments and mandates, even though the court may thus be called upon to decide matters

which would not be within its cognizance as original causes of action.

While a court may be expressly granted the incidental powers necessary to effectuate its jurisdiction,¹³ a grant of jurisdiction, in the absence of prohibitive legislation,¹⁴ implies the necessary and usual incidental powers essential to effectuate it,¹⁵ and, subject to existing laws and constitutional provisions,¹⁶ every regularly constituted court has power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction,¹⁷ and for the enforcement of its

ed.—Christ v. Jovanoff, 151 N.E. 26, 84 Ind.App. 676, rehearing denied 152 N.E. 2, 84 Ind.App. 676.

Giving effect to "all rights"

Under a statute requiring that all rights, both legal and equitable, be given effect, and that the court apply legal and equitable remedies, "such as the nature of the case may allow or require," the court's power to give effect to all rights is restricted to instances when the nature of the case may allow or require it.—Rogers v. Rogers, 187 S.E. 633, 634, 183 Ga. 131.

10. Tex.—Conn v. Campbell, 24 S.W.2d 813, 119 Tex. 82—Cleveland v. Ward, 285 S.W. 1063, 1069, 116 Tex. 1, citing *Corpus Juris*—Cavers v. Sioux Oil & Refining Co., Com. App., 39 S.W.2d 862, reversing, Civ. App., 23 S.W.2d 421, and rehearing denied, Com.App., 43 S.W.2d 578—National Debenture Corporation v. Adams, Civ.App., 115 S.W.2d 757.

11. Tex.—Moyers v. Carter, Civ. App., 61 S.W.2d 1027, error refused. 15 C.J. p 811 note 88. Retention of jurisdiction by equity to afford full relief see the C.J.S. title Equity § 67, also 21 C.J. p 134 note 5-p 137 note 23.

12. U.S.—Murphy v. John Hoffman Co., N.Y., 29 S.Ct. 154, 211 U.S. 562, 53 L.Ed. 327.

Okl.—Darrrough v. Claremore First Nat. Bank, 156 P. 191, 56 Okl. 647. 15 C.J. p 811 note 89.

Suit brought by improper party

Rule that court acquiring jurisdiction of property will do everything necessary fully to administer it is inapplicable where court never acquired jurisdiction of property in suit for accounting for profits from alleged partnership business and realty, inasmuch as suit was improperly brought by deceased partner's heirs instead of personal representative.—Stewart v. Wall, C.C.A.N.C., 87 F.2d 598, certiorari denied 58 S.Ct. 26, 302 U.S. 634, 82 L.Ed. 528, rehearing denied 58 S.Ct. 135, 302 U.S. 775, 82 L.Ed. 600.

13. Fla.—Hazen v. Smith, 135 So. 813, 101 Fla. 767. Idaho.—Maloney v. Zipf, 237 P. 632, 41 Idaho 30.

Mont.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 272 P. 525, 83 Mont. 400—In re McLure's Estate, 220 P. 527, 68 Mont. 556—State v. Second Judicial Dist. Court in and for Silver Bow County, 168 P. 522, 54 Mont. 172.

15 C.J. p 810 note 83.

Express power to issue writs necessary to the complete exercise of jurisdiction implies the power to make appropriate orders to precede the issuance of such writs.—Hazen v. Smith, 135 So. 813, 101 Fla. 767.

14. U.S.—Ex parte U. S., C.C.A.Wis., 101 F.2d 870, certiorari granted U. S. v. Stone, 59 S.Ct. 1044.

15. U.S.—Ex parte U. S., supra. La.—In re Receivership of Baldwin Lumber Co., 147 So. 31, 32, 176 La. 909, quoting *Corpus Juris*—Frank v. Currie, App., 172 So. 843. Mont.—In re Stinger's Estate, 201 P. 693, 61 Mont. 173.

N.Y.—Marcus v. Aufses, 94 N.Y.S. 397.

Ohio.—In re Whallon, 26 Ohio Cir. Ct., N.S., 187.

Pa.—Commonwealth v. Lawrence, 47 Dauph.Co. 376.

Tex.—Ex parte Hughes, 129 S.W.2d 270—City of Dallas v. Wright, 36 S.W.2d 973, 975, 120 Tex. 190, 77 A.L.R. 709, citing *Corpus Juris*—Ware v. Barfield, Civ.App., 54 S.W.2d 1105, 1107, citing *Corpus Juris*.

15 C.J. p 810 note 84.

Statutory grants of power as implying incidental powers generally see the C.J.S. title Statutes § 327, also 59 C.J. p 973 note 97.

Courts "possess . . . incidental or implied powers, which, while not indispensably necessary, are directly appropriate, convenient, and suitable to the execution of their granted powers."—Clark v. Austin, 101 S.W.2d 977, 988, 340 Mo. 467, citing *Corpus Juris*.

Power to issue process

Where there is power in a court

to hear and determine a case, there is also power to issue proper process to enforce its orders.—Commonwealth v. New York Cent. & H. R. Co., 92 N.E. 766, 206 Mass. 417, 19 Ann.Cas. 529.

The power to annul its own judgment is included in the powers necessarily and usually incident to a court's jurisdiction.—Frank v. Currie, La.App., 172 So. 843.

16. Fla.—State ex rel. Davis v. City of Avon Park, 158 So. 159, 117 Fla. 556, 48 A.L.R. 230, modifying 151 So. 701, 117 Fla. 556, denying rehearing State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641.

17. Fla.—Keen v. State, 103 So. 399, 89 Fla. 113.

Kan.—Allen v. Burke, 53 P.2d 894, 896, 143 Kan. 257, quoting *Corpus Juris*—Beacon Pub. Co. v. Burke, 53 P.2d 888, 890, 143 Kan. 248, quoting *Corpus Juris*.

La.—In re Receivership of Baldwin Lumber Co., 147 So. 31, 32, 176 La. 909, quoting *Corpus Juris*.

Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

Mo.—Trautz v. Lemp, 46 S.W.2d 135, 329 Mo. 580.

Neb.—Wassung v. Wassung, 286 N.W. 340, 136 Neb. 440.

N.Y.—In re Association of Bar of the City of New York, 227 N.Y.S. 1, 222 App.Div. 580—Lawrence v. Cowperthwait, 269 N.Y.S. 486, 150 Misc. 326.

Tex.—City of Dallas v. Wright, 36 S.W.2d 973, 975, 120 Tex. 190, 77 A.L.R. 709, citing *Corpus Juris*—Ware v. Barfield, Civ.App., 54 S.W.2d 1105, 1107, citing *Corpus Juris*.

Wyo.—Ex parte Moore, 8 P.2d 818, 44 Wyo. 92.

15 C.J. p 811 note 85.

"Jurisdiction attaching, the court's powers 'as a necessary incident to their general jurisdiction, to make such orders in relation to the cases pending before them as are necessary to the progress of the cases and the dispatch of business,' fol-

judgments and mandates.¹⁸ So demands, matters, or questions ancillary or incidental to, or growing out of, the main action, and coming within the above principles, may be taken cognizance of by the court and determined, since such jurisdiction is in aid of its authority over the principal matter,¹⁹ even though the court may thus be called on to consider and decide matters which, as original causes of ac-

low."—*Burleigh v. Wong Sung Leon*, 139 A. 184, 186, 83 N.H. 115.

Self-preservation

(1) A court's right of self-preservation is inherent.—*Capps v. Gore*, 21 S.W.2d 266, 231 Ky. 266.

(2) "Every . . . constitutional court has the inherent power in this State to exert all necessary and appropriate power to function free from destructive and pernicious acts;" whether they have the right to exert inherent power depends on the facts of the particular case.—*In re New Jersey State Bar Ass'n*, 162 A. 99, 101, 111 N.J.Eq. 234, reversed on other grounds 164 A. 1, 112 N.J.Eq. 236.

Power to preserve subject of suit

(1) A trial court has a broad discretion in the exercise of its power to protect the subject matter of suits coming within its jurisdiction.—*Bankers' Life & Loan Ass'n v. Cremona*, Tex.Civ.App., 68 S.W.2d 762; 15 C.J. p 811 note 85 [a].

(2) The county district court having exclusive jurisdiction of a suit and potential jurisdiction of all other matters alleged in petition, necessary writs issued by it to protect subject matter involved were not void.—*Ex parte Lee*, 93 S.W.2d 720, 127 Tex. 256.

(3) A court may entertain a petition to restrain a foreign corporation over which it has jurisdiction from doing anything to prevent a receiver from acting in matters which pertain to the subject matter of the suit before it, such as taking possession of property.—*Chesapeake, etc., R. Co. v. Swayze*, 47 A. 28, 60 N.J. Eq. 417.

Power to redress own wrong

(1) A court, having by its own erroneous act occasioned a wrong, possesses inherent and summary jurisdiction to afford redress.—*Masser v. London Operating Co.*, 145 So. 72, 106 Fla. 474.

(2) Setting aside acts without jurisdiction see *infra* § 119.

Alleged excess of authority

A court "has the inherent right to take cognizance of and pass on questions involving an alleged unreasonable and unlawful exercise of authority in a case pending before it and under its general control."—*Barnard v. Judge Grand Rapids Super. Ct.*, 158 N.W. 202, 204, 191 Mich. 567.
18. Ala.—*Grooms v. Brown-Marx Co.*, 184 So. 698, 236 Ala. 655.
Ind.—*New York, C. & St. L. R. Co. v. Perdue*, 187 N.E. 349, 97 Ind. App. 517.

Kan.—*Allen v. Burke*, 53 P.2d 894, 896, 143 Kan. 257, quoting *Corpus Juris*—*Beacon Pub. Co. v. Burke*, 53 P.2d 888, 890, 143 Kan. 248, quoting *Corpus Juris*.

La.—*In re Receivership of Baldwin Lumber Co.*, 147 So. 31, 32, 176 La. 909, quoting *Corpus Juris*.

Mont.—*State v. Second Judicial Dist. Court in and for Silver Bow County*, 168 P. 522, 54 Mont. 172.

Ohio.—*In re Whallon*, 26 Ohio Cir. Ct., N.S., 167.

Tex.—*City of Dallas v. Wright*, 36 S.W.2d 973, 975, 120 Tex. 190, 77 A.L.R. 709, citing *Corpus Juris*—*Yount-Lee Oil Co. v. Federal Crude Oil Co.*, Civ.App., 92 S.W.2d 493, certiorari denied *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 57 S.Ct. 16, 299 U.S. 554, 81 L.Ed. 408; *Ware v. Barfield*, Civ.App., 54 S.W.2d 1105.

15 C.J. p 811 note 86—34 C.J. p 737 note 83—p 738 note 85.

Enforcement of judgments generally see the C.J.S. title Judgments § 585, also 34 C.J. p 737 note 83—p 738 note 88.

Powers preliminary to final adjudication

(1) A court has inherent power to make interlocutory orders necessary to protect its jurisdiction and effectuate its decree.—*Boynton v. Moffat Tunnel Improvement Dist.*, C.C.A. Colo., 57 F.2d 772, certiorari denied *Moffat Tunnel Improvement Dist. v. Boynton*, 53 S.Ct. 20, 287 U.S. 620, 77 L.Ed. 538.

(2) Ordinarily courts can proceed to enforce a plaintiff's rights only after a trial on the merits, their power preliminary to the final adjudication being limited to the preservation of the subject matter, the maintenance of the status, and issuance of extraordinary writs such as attachment, for the purpose of securing an effective adjudication and enforcement of the rights of the parties after such adjudication.—*Colby v. Osgood*, Tex.Civ.App., 230 S.W. 459.

Requiring security

(1) The district court has the inherent power in all cases to require such a bond as will adequately protect the interest of the parties, and secure enforcement of and obedience to any order which it has the inherent power to make.—*Logan v. Hopkins*, 205 P. 1095, 85 Okl. 278.

(2) "The power of courts of record to require security from persons subject to their order where there are interests demanding its protection is an inherent one, essential to

the due administration of right and justice which the Constitution has placed beyond the possibility of legislative interference."—*Petition of American Banking & Trust Co.*, 4 Pa.Dist. 757, 17 Pa.Co. 274, 275, 43 Pa.L.J. 213, 37 Wkly.N.C. 297.

Proceedings ancillary to the judgment may be entertained.

Ala.—*International Moving Picture & Film Co. v. Smith*, 99 So. 303, 211 Ala. 3.

Ohio.—*In re Whallon*, 26 Ohio Cir.Ct., N.S., 167.

15 C.J. p 812 note 92.

If the proceedings be not specially pointed out, any suitable procedure may be adopted which appears most conformable to the spirit of the law.—*Smith v. Clyne*, 97 P. 40, 15 Idaho 254.

19. Iowa.—*Hoskins v. Hotel Randolph Co.*, 211 N.W. 423, 203 Iowa 1152, 65 A.L.R. 1125, certiorari denied *Otis Elevator Co. v. Hoskins*, 48 S.Ct. 122, 275 U.S. 566, 72 L.Ed. 429.

Kan.—*Allen v. Burke*, 53 P. 894, 896, 143 Kan. 257, quoting *Corpus Juris*—*Beacon Pub. Co. v. Burke*, 53 P. 2d 888, 890, 143 Kan. 248, quoting *Corpus Juris*.

15 C.J. p 811 note 90.

Power to determine entire controversy see *supra* § 87.

Matters held incidental or ancillary

(1) Intervention proceedings.
Ark.—*Board of Directors of St. Francis Levee Dist. v. Raney*, 76 S.W.2d 311, 190 Ark. 75.

Miss.—*Shoemaker v. Federal Credit Co.*, 191 So. 62, followed in 191 So. 64.

(2) The power to render judgment involves the power to take the preliminary steps.—*Commonwealth v. Simpson*, 2 Grant, Pa., 438.

(3) Other matters see 15 C.J. p 811 note 90 [a] (2)–(22), (24)–(29).

Matters held not incidental or ancillary

(1) "Ordinarily, the law does not enable the court in which is pending a suit within its jurisdiction to take cognizance in dependent manner of cause of action which is not before him."—*Western Powder Mfg. Co. v. Interstate Coal Co.*, D.C.Ill., 5 F.Supp. 619, 621.

(2) A power to reform a mortgage is not incidental to the power to foreclose.—*Thomas v. Harmon*, 25 N.E. 257, 122 N.Y. 84, affirming 11 N.Y. St. 79, 46 Hun 75, 27 N.Y.Wkly.Dig. 316.

tion, would not be within its cognizance.²⁰ When parties are once rightfully in court, the court has jurisdiction over them, and that jurisdiction continues, without further notice, as long as any steps can be rightfully taken in the cause.²¹

However, these principles do not justify the assumption of equitable jurisdiction by a court which is not endowed with it.²² If a court has no jurisdiction of the principal question, it has none of its consequences and incidents;²³ and lack of jurisdiction to grant the principal relief sought is not cured by jurisdiction to grant the incidental relief sought.²⁴

The ancillary or incidental jurisdiction of probate and like courts, and of appellate courts, is considered *infra* in §§ 304 and 313 respectively.

Character of jurisdiction. The jurisdiction of a court over the incidents of a litigation is of the same character as that over the principal subject matter,²⁵ and, where the jurisdiction of the subject

matter is exclusive, jurisdiction over the incidents is also exclusive.²⁶

Control of process and procedure. Every court has inherent power to control, and prevent abuse of, its orders or processes²⁷ and its procedure.²⁸

Control of officers. Courts have inherent power to supervise,²⁹ and to correct the errors or abuses of,³⁰ their officers and subordinates.

Power to investigate. While it has been held that in the absence of statutory authorization a court has no power to order an investigation to be made out of court for the purpose of discovering facts regarding matters pending before the court,³¹ it has been recognized that courts have inherent power to investigate charges of acts having a direct tendency to obstruct or prevent the administration of justice,³² or charges of misconduct on the part of their officers.³³

Preservation of order. Every court, while en-

20. Tex.—Bartholomew v. Shipe, Com.App., 251 S.W. 1031, reversing Shipe v. Bartholomew, Civ.App., 239 S.W. 1020—McConnell v. Frost, Civ.App., 45 S.W.2d 777, error refused.

15 C.J. p 812 note 91.

Cross complaint or counterclaim

(1) Where a court has jurisdiction of an original suit, a cross complaint or counterclaim is treated as ancillary, and the court will entertain the ancillary suit even though it could not have entertained it as an independent suit; but when jurisdiction is lacking over the primary suit, the defect cannot be cured by a counterclaim of which the court also lacks jurisdiction.—Goldstone v. Payne, C. C.A.N.Y., 94 F.2d 855. Certiorari denied 58 S.Ct. 1057, 30 U.S. 585, 82 L. Ed. 1547.

(2) Jurisdiction of set-off or counterclaim for less than jurisdictional amount see *supra* § 66.

Intervention proceedings may be maintained as ancillary under jurisdiction already subsisting, even though the court would be without jurisdiction to entertain an independent suit brought by the intervenor. U.S.—Rouse v. Letcher, Kan., 15 S. Ct. 266, 156 U.S. 47, 39 L.Ed. 341. Ark.—Board of Directors of St. Francis Levee Dist. v. Raney, 76 S.W.2d 311, 190 Ark. 75.

Miss.—Shoemaker v. Federal Credit Co., 191 So. 62, followed in 191 So. 64.

15 C.J. p 812 note 91 [a].

Power to grant ancillary injunction

A court which is without original jurisdiction of suits for injunctions

may, in an original action in quo warranto to determine the right of rival courts of supervisors to exercise official functions, grant an ancillary injunction to protect those having the *prima facie* right from interference by other claimants during the pendency of such action.—State v. Cuyahoga County, 71 N.E. 717, 70 Ohio St. 841.

21. Ind.—Burnside v. Ennis, 43 Ind. 411.

15 C.J. p 811 note 87.
Jurisdiction as continuing until final disposition of cause see *infra* § 94.

22. N.Y.—Marcus v. Aufses, 94 N.Y.S. 397.

23. La.—Gay v. Eaton, 27 La. Ann. 166.

N.Y.—Matter of Ferguson, 9 Johns. 239.

24. Iowa.—Mally v. Mally, 31 Iowa 60.

25. N.Y.—Bartlett v. Spicer, 75 N.Y. 528, affirming 12 Hun 398—Marcus v. Aufses, 94 N.Y.S. 397.

"A complete change in the character of an action, converting it from a legal into an equitable one, cannot be regarded as a mere incident."—Marcus v. Aufses, 94 N.Y.S. 397, 399.

26. N.Y.—Bartlett v. Spicer, 75 N.Y. 528, affirming 12 Hun 398.

Enjoining proceedings in another court see *infra* § 498.

"The court of this state having jurisdiction of the case to which another action is ancillary, has exclusive jurisdiction of the ancillary proceeding."—Fielder v. Parker, Tex. Civ.App., 119 S.W.2d 1089, 1093.

27. Ala.—Eidson v. McDaniel, 114 So. 204, 216 Ala. 610.

Colo.—West v. Duncan, 210 P. 699, 72 Colo. 253.

Fla.—Jax Ice & Cold Storage Co. v. South Florida Farms Co., 109 So. 212, 91 Fla. 593, 48 A.L.R. 957, followed in Central Farmers' Trust Co. v. Davis, 132 So. 695, 101 Fla. 832.

Kan.—Patterson v. Imperial Window Glass Co., 137 P. 955, 91 Kan. 201. 15 C.J. p 813 note 98.

28. Fla.—State ex rel. Dillman v. Tedder, 166 So. 590, 123 Fla. 188—Ray v. Williams, 46 So. 158, 55 Fla. 723.

29. Ala.—Eidson v. McDaniel, 114 So. 204, 216 Ala. 610.

30. Colo.—West v. Duncan, 210 P. 699, 72 Colo. 253.

N.Y.—People v. Jakira, 198 N.Y.S. 306, 118 Misc. 303.

31. Md.—Tsaracklis v. Characklis, 3 A.2d 725.

Or.—Bestel v. Bestel, 53 P.2d 525, 153 Or. 100.

32. N.J.—In re New Jersey State Bar Ass'n, 162 A. 99, 111 N.J.Eq. 234, reversed on other grounds 164 A. 1, 112 N.J.Eq. 236.

Investigation of "ambulance chasing" held within jurisdiction of court.—State v. Circuit Court of Milwaukee County, Branch No. 1, 214 N.W. 396, 193 Wis. 132.

33. Ky.—Capps v. Gore, 21 S.W.2d 266, 231 Ky. 185.

N.J.—Petition of New Jersey State Bar Ass'n, 166 A. 316, 112 N.J.Eq. 606, reversed on other grounds In re New Jersey State Bar Ass'n, 168 A. 794, 114 N.J.Eq. 261.

gaged in the discharge of its lawful functions, has the authority to preserve order, decency, and silence | in its presence,³⁴ and may apprehend and punish an offender who interferes with its proceedings.³⁵

F. EXERCISE OF JURISDICTION

§ 89. Mode of Exercise in General

In the absence of special statutory directions as to the mode of exercise of jurisdiction, it may be exercised according to the rules of common law, or in the mode prescribed by the court, exercising sound discretion or conforming to the spirit of the constitution or code. The attainment of justice is the courts' fundamental aim.

The jurisdiction of a court must be exercised in the mode prescribed by the law of the land.³⁶ The legislature has the power to regulate the manner or to fix the conditions under which the jurisdiction may be exercised,³⁷ even though the constitution gives a court exclusive jurisdiction in certain cases.³⁸

The protective features of statutes expressly prescribing the mode in which jurisdiction may be exercised must be substantially complied with;³⁹ but in the absence of special statutory directions as to the mode of exercise, jurisdiction may be exercised according to the rules of the common law,⁴⁰ or informally,⁴¹ or in the mode prescribed by the court, exercising sound discretion,⁴² or conforming to the spirit of the constitution or code.⁴³

The making of rules of practice and procedure is discussed in §§ 170-180 infra.

The attainment of justice is the fundamental aim of the courts;⁴⁴ in the absence of statutory inhibition, they may take such steps, regarding matters properly before them, as will promote the administration of justice,⁴⁵ and in exercising jurisdiction they should not permit irrelevant and immaterial matters to obstruct, delay, or defeat its administration.⁴⁶

Statutory jurisdiction. Special statutory jurisdiction can be exercised only as the statute directs.⁴⁷ However, unless a contrary intention clearly appears in the statute conferring jurisdiction, where jurisdiction over a new subject is conferred on a court of general jurisdiction the jurisdiction conferred is to be exercised by it as such a court, with the powers incident to its general jurisdiction so far as applicable to the new subject, and not as a tribunal of inferior jurisdiction created by statute, or by its justices as commissioners appointed by the

34. Ala.—Ex parte Birmingham, 33 So. 13, 184 Ala. 609, 59 L.R.A. 572. 15 C.J. p 813 note 99.

35. Cal.—People v. Turner, 1 Cal. 152.

Ind.—Redman v. State, 28 Ind. 205. Power to punish for contempt as being inherent see Contempt § 43.

36. Del.—Stidham v. Brooks, 5 A.2d 522.

Ohio.—Cummins v. Kinsinger, 29 Ohio N.P., N.S., 34.

Observance of statutes

"The duty of the courts is to observe statutory provisions. It does not lie with them to arbitrarily disobey them."—Dodd v. State, 201 S.W. 1014, 1018, 83 Tex.Cr. 160.

"Arbitrary power does not abide with the courts of Oklahoma."—Rose v. Arnold, 82 P.2d 293, 183 Okl. 286.—Lattimore v. Vernor, 288 P. 463, 142 Okl. 105.

What constitutes exercise of jurisdiction

(1) "The court exercises its jurisdiction by deciding all questions of law and determining all issues of fact which the pleadings and evidence present for its determination, and by granting or denying in whole or in part proper and appropriate relief."—Board of Trustees of Firemen's Relief and Pension Fund of City of Marietta v. Brooks, 67 P.2d 4, 6, 179 Okl. 600.

(2) Jurisdiction and exercise of jurisdiction distinguished see supra § 26.

37. Ind.—De Lange v. Cones, 19 N. E.2d 850.

Tex.—Campbell v. Wilson, 6 Tex. 379.—Stewart v. Moore, Com.App., 291 S.W. 886.

38. Wash.—Daniel v. Daniel, 198 P. 728, 116 Wash. 82. 15 C.J. p 815 note 19.

39. Miss.—Prudential Ins. Co. v. Gleason, 187 So. 229.

40. Miss.—Prudential Ins. Co. v. Gleason, supra.

Neb.—State v. Knudtsen, 236 N.W. 696, 121 Neb. 270.—Smiley v. Sampson, 1 Neb. 56.

41. Neb.—State v. Knudtsen, 236 N.W. 696, 121 Neb. 270.—Smiley v. Sampson, 1 Neb. 56.

42. Wash.—State v. Superior Court for Yakima County, 185 P. 628, 108 Wash. 636.

43. Idaho.—Maloney v. Zipf, 237 P. 632, 41 Idaho 30.

Wash.—Daniel v. Daniel, 198 P. 728, 116 Wash. 82.

44. Va.—American-LaFrance & Foamite Industries v. Arlington County, 192 S.E. 758, 763, 169 Va. 1.

Liberal construction

"We must liberally construe each law, each ground of logic and reason, to attain . . . [justice]."—

American-LaFrance & Foamite Industries v. Arlington County, supra. "Legal justice"

"It is not the function of a court to do justice but to do legal justice."—Sir R. Ropner & Co. v. Emmons Coal Mining Corporation, D.C. Pa., 17 F.2d 386, 388, affirmed, D.C., 31 F.2d 948 (first case), and, C.C.A., Emmons Coal Mining Corp. v. Sir R. Ropner & Co., 31 F.2d 948 (second case), certiorari denied 50 S.Ct. 31, 280 U.S. 577, 74 L.Ed. 628.

45. Pa.—Appeal of City of Erie, 147 A. 58, 297 Pa. 260.

46. Tex.—Matthews v. Looney, Civ. App., 100 S.W.2d 1061, reversed on other grounds, Com.App., 123 S.W.2d 871.

47. Ohio.—Cummins v. Kinsinger, 29 Ohio N.P., N.S., 34. 15 C.J. p 815 note 20.

Authority given by private act

If authority is given in a particular case by a private legislative act, the court will not deviate from the letter thereof, or make orders founded partly on such express specific authority and partly on its original jurisdiction.—Williamson v. Ball, N.Y., 8 How. 566, 12 L.Ed. 1200.—Williamson v. New York Irish Presb. Cong., N.Y., 8 How. 565, 12 L.Ed. 1200.—Williamson v. Berry, N.Y., 8 How. 495, 12 L.Ed. 1170.

legislature;⁴⁸ and a statute authorizing the exercise of a power upon certain conditions in a statutory proceeding does not operate as a general limitation on the exercise of such power granted by another statute or under common-law principles.⁴⁹

§ 90. Discretion of Court

As a general rule, the courts must exercise, in matters properly before them, the jurisdiction conferred upon them; but jurisdiction may be refused where there are good reasons against assuming it, as where reasons of public policy are opposed, or the court is not in a position to do complete justice.

As a general rule, the courts must exercise, in matters properly before them, the jurisdiction which has been conferred upon them.⁵⁰ However, jurisdiction need not necessarily be exercised in all cases where the right to exercise it exists.⁵¹

Where it is within the discretion of a particular court whether it will take jurisdiction of a cause, the question is one of fact to be determined by such court,⁵² and jurisdiction may be assumed or retained when no valid reason for refusing it is shown,⁵³ especially where there are also good rea-

sons for its assumption or retention.⁵⁴ On the other hand, jurisdiction may be refused in the absence of sufficient reasons for assuming it.⁵⁵ A court which is not in a condition or position to do complete justice in the case may and should decline to entertain jurisdiction.⁵⁶ Jurisdiction may also be refused where there are reasons of public policy against entertaining the action;⁵⁷ where the assumption of jurisdiction would result in aiding a fraud;⁵⁸ where, as appears in § 77 supra, the action is between nonresidents, or where it is between a resident, subrogated to the rights of a nonresident, and a nonresident;⁵⁹ where the matter arises in another state whose courts have ample power to deal therewith;⁶⁰ where the suit is against a foreign corporation or its stockholders,⁶¹ or in favor of such stockholders;⁶² where there is an objection to the jurisdiction in a cause before a supreme court by stipulation, although the court might otherwise proceed;⁶³ where it is foreseen with certainty that the petitioner will not be aided;⁶⁴ or where the same questions are before another tribunal, and the court's decision of these questions would be nugatory,⁶⁵ although the fact that the same questions of

48. U.S.—Mudd v. Perry, C.C.A.Okl., 25 F.2d 85, 87, citing *Corpus Juris*.

N.M.—In re Sheley's Estate, 298 P. 942, 946, 35 N.M. 358, quoting *Corpus Juris*.

N.Y.—In re Canal St., etc., 12 N.Y. 406.

49. Wyo.—Urbach v. Urbach, 73 P. 2d 953, 52 Wyo. 207, 113 A.L.R. 889.

50. U.S.—*Ætna Casualty & Surety Co. v. Quarles*, C.C.A.S.C., 92 F.2d 321—Southern California Telephone Co. v. Hopkins, C.C.A., Cal., 13 F.2d 814, certiorari granted Hopkins v. Southern California Tel. Co., 47 S.Ct. 242, 273 U.S. 685, 71 L.Ed. 839, affirmed 48 S.Ct. 180, 275 U.S. 393, 72 L.Ed. 329.

Ind.—State v. Killigrew, 174 N.E. 808, 202 Ind. 397, 74 A.L.R. 631.

Tex.—Stewart v. Moore, Com.App., 291 S.W. 886.

15 C.J. p 731 note 57, p 816 note 31.

"Courts are primarily established to decide the disputes of all suitors over whom they have jurisdiction, and some reason must be shown for their abdication."—*The Falco*, C.C.A. N.Y., 20 F.2d 362, 364, affirming, D.C., 15 F.2d 604.

"The appropriate and proper function of courts is to hear causes that the citizen of the State may see proper to institute, and there are but few cases in which they can exercise a discretion to refuse to hear them."—*State ex rel. Landis v. S. H. Kress & Co.*, 155 So. 823, 828, 115 Fla. 189.

Doubtful questions of law must be resolved by the courts, and not referred to the legislature.—*Breedlove v. Turner*, 9 Mart., La., 353.

Powers delegated by statute to the courts should not be considered discretionary unless such intention clearly appears in the statute.—*People v. De Renna*, 2 N.Y.S.2d 694, 166 Misc. 582.

51. Ariz.—*Van Denburgh v. Tungsten Reef Mines Co.*, 63 P.2d 647, 48 Ariz. 540.

Cal.—*Keck v. Superior Court in and for Los Angeles County*, 293 P. 128, 109 Cal.App. 251.

Mo.—*Ex parte Gounis*, 268 S.W. 988, 304 Mo. 428.

52. N.H.—*Driscoll v. Portsmouth, etc., R. Co.*, 51 A. 898, 71 N.H. 619.

53. Mass.—*Bethlehem Fabricators v. H. D. Watts Co.*, 190 N.E. 828, 288 Mass. 556, 93 A.L.R. 1124.

15 C.J. p 816 note 33.

54. Ky.—*Schaffer v. Coorsen*, 10 Ky. L. 634.

15 C.J. p 816 note 34.

55. N.Y.—*Dickinson v. Powers*, 125 N.Y.S. 949, 140 App.Div. 105.

15 C.J. p 816 note 41.

56. N.H.—*Jackson & Sons v. Lumbermen's Mut. Casualty Co.*, 168 A. 895, 86 N.H. 341.

N.Y.—In re *Collins' Estate*, 284 N.Y.S. 692, 157 Misc. 790—*People v. Blackman*, 1 Den. 632.

15 C.J. p 816 note 40.

57. Wis.—*Chicago, M., St. P. & P. Ry. Co. v. Wolf*, 226 N.W. 297, 199

Wis. 278—*State v. Gehrz*, 194 N.W. 418, 181 Wis. 238.

15 C.J. p 816 note 43.

58. Ala.—*Sessoms Grocery Co. v. International Sugar Feed Co.*, 66 So. 479, 188 Ala. 232.

Wis.—*Chicago, M., St. P. & P. Ry. Co. v. Wolf*, 226 N.W. 297, 199 Wis. 278.

59. U.S.—*U. S. Merchants' & Shippers' Ins. Co. v. A/S Den Norske Afrika Og Australie Line*, C.C.A. N.Y., 65 F.2d 392, affirming, D.C., *The Tricolor*, 1 F.Supp. 934.

60. N.Y.—*Alger v. Alger*, 31 Hun 471—*Delaware, etc., R. Co. v. New York, etc., R. Co.*, 33 N.Y.S. 1081, 12 Misc. 230.

61. Mass.—*Post v. Toledo, etc., R. Co.*, 11 N.E. 540, 144 Mass. 341, 59 Am.R. 86.

15 C.J. p 817 note 46.

62. Mass.—*Kimball v. St. Louis, etc., R. Co.*, 31 N.E. 697, 157 Mass. 7, 34 Am.S.R. 250.

63. Minn.—*Rathbun v. Moody*, 4 Minn. 364.

64. Right to driver's license

Superior court, although having jurisdiction to try automobile driver's right to license, was not required to hear case, where evidence before commissioner compelled conclusion that driver was incompetent.—*Keck v. Superior Court in and for Los Angeles County*, 293 P. 128, 109 Cal. App. 251.

65. U.S.—*New York & N. E. R. Co. v. Woodruff*, C.C.Conn., 42 F. 468.

law have arisen in a case pending in the supreme court of the United States will not cause a state court to decline to act or to delay its decision of a similar case until the supreme court has made its decision.⁶⁶ A court should not refrain from exercising its power merely because of fear that the power may be misused in other instances,⁶⁷ or because it is not foreseen with certainty that the outcome will help plaintiff.⁶⁸

Convenience has been said not to be a consideration in any case when the performance of a mandatory judicial function is involved;⁶⁹ and the principle of *forum non conveniens* is to be applied with caution.⁷⁰ The mere fact that the convenience of the parties will best be served by relegating them to another tribunal does not preclude assumption or retention of jurisdiction;⁷¹ and it has been held that a court cannot refuse jurisdiction because rights might be more conveniently and completely determined in another forum;⁷² but a law court may refuse to exercise its equitable powers where relief

in equity would be more convenient and effectual.⁷³

Discretion not arbitrary. It has been declared that when a court is given discretion in the exercise of a power, a judicial, and not an arbitrary or even a moral, discretion is implied.⁷⁴

Nonjudicial authority. A court may refuse to exercise nonjudicial authority, such as to appoint a health commissioner, conferred upon it by statute.⁷⁵

§ 91. Territorial Limits

Courts of a state are restricted in the exercise of their authority to the limits of the state; and a court created within and for a particular territory within the state is limited in its jurisdiction to such territory.

Courts derive their authority from the sovereign power of the state, and are restricted in its exercise to the circumscribed limits of the state,⁷⁶ and beyond such limits their writs and processes, or attempts to exercise authority generally, are without force.⁷⁷ In the absence of a constitutional or stat-

Proceedings before industrial commissioner

County court will refuse jurisdiction in action to recover prevailing rate of wage under state contract, where finding of industrial commissioner as to prevailing rate was annulled by appellate division and rehearing ordered.—*Rainville v. Kell*, 266 N.Y.S. 867, 148 Misc. 795.

66. Pa.—*Windolph v. Adams Express Co.*, 48 Pa.Super. 304. 15 C.J. p 915 note 83.

67. N.Y.—*Bergelt v. Roberts*, 258 N.Y.S. 905, 144 Misc. 832, affirmed 258 N.Y.S. 1086 (1st case), 236 App. Div. 777, motion denied 258 N.Y.S. 1086 (2nd case), 236 App.Div. 794.

68. U.S.—*Geneva Furniture Mfg. Co. v. S. Karpen & Bros.*, Ill., 238 U.S. 254, 35 S.Ct. 788, 59 L.Ed. 1295.—In re Great Lakes Transit Corporation, C.C.A.Ohio, 63 F.2d 849, affirming, D.C., 53 F.2d 1022.

69. N.Y.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214.

70. Mass.—*Pinson v. Potter*, 10 N.E.2d 136.—*Lydia E. Pinkham Medicine Co. v. Gove*, 9 N.E.2d 573.

71. N.Y.—*McMahon v. National City Bank of New York*, 254 N.Y.S. 279, 142 Misc. 268.

72. Vt.—*Kimball v. Neal*, 44 Vt. 567.

73. Del.—*Industrial Trust Co. v. Miller*, 170 A. 923, 5 W.W.Harr. 554.

74. Ariz.—*Redewill v. Superior Court of Maricopa County*, 29 P. 2d 475, 478, 43 Ariz. 68.

Test of discretion

"One of the principal tests, if not the vital one, of that discretion, is

the purpose for which the power was conferred."—*Redewill v. Superior Court of Maricopa County*, supra.

75. Ohio.—In re Health Comrs., 6 Ohio Dec. (Reprint) 1174, 11 Am. L.Rec. 651.

76. U.S.—*Rosso v. Freeman*, D.C. Mass., 30 F.2d 826.

Cal.—*Rex, Inc. v. Superior Court in and for Los Angeles County*, App., 93 P.2d 182, followed in *Haskell v. Superior Court in and for Los Angeles County*, App., 93 P.2d 183 and *Lauder v. Superior Court in and for Los Angeles County*, App., 93 P.2d 183.

Conn.—*Frick v. Hartford Life Ins. Co.*, 119 A. 229, 98 Conn. 251.

Del.—*Webb Packing Co. v. Harmon*, Super., 193 A. 596.

Ga.—*Peeples v. Mullins*, 168 S.E. 785, 176 Ga. 743.—*Irons v. American Nat. Bank*, 165 S.E. 741, 175 Ga. 558.—*Irons v. American Nat. Bank*, 165 S.E. 738, 175 Ga. 552.—*Ford v. Southern Ry. Co.*, 125 S.E. 479, 33 Ga.App. 24.

Ill.—*Oakman v. Small*, 118 N.E. 775, 282 Ill. 360.

Md.—*Reliance Life Ins. Co. of Pittsburgh, Pa. v. Bennington*, 121 A. 369, 142 Md. 390.—*Expressmen's Mut. Ben. Ass'n v. Hurlock*, 46 A. 957, 91 Md. 595.

Mich.—*Stewart v. Eaton*, 283 N.W. 651, 287 Mich. 466, 120 A.L.R. 1354.

Mo.—*Wagoner v. Wagoner*, 229 S.W. 1064, 287 Mo. 567.

N.Y.—*Gilbert v. Burnstine*, 174 N.E. 706, 255 N.Y. 348, 73 A.L.R. 1453, reversing 241 N.Y.S. 54, 229 App. Div. 170, which affirmed 237 N.Y.S. 171, 135 Misc. 305.—*Hodgens v. Columbia Trust Co.*, 171 N.Y.S. 235,

103 Misc. 415, reversed on other grounds 173 N.Y.S. 304, 185 App. Div. 555.

Okla.—*Stuart v. Mayberry*, 231 P. 491, 105 Okl. 13.

Pa.—*Giampalo v. Taylor*, 6 A.2d 499, 335 Pa. 121.

S.C.—*Scheper v. Scheper*, 118 S.E. 178, 125 S.C. 89.

Tenn.—*Dickson v. Simpson*, 113 S.W. 2d 1190, 172 Tenn. 680, 116 A.L.R. 380.

Tex.—*Hicks v. Sias*, Civ.App., 102 S.W.2d 460, error refused.

15 C.J. p 817 note 50.

Reason for rule

"To allow a state extraterritorial jurisdiction would be to take from the jurisdiction of a sovereign sister state and the states are equal—each is sovereign, save for the reserved powers of the United States under the Constitution."—In re C. A. Taylor Logging & Lumber Co., D.C. Wash., 28 F.2d 526, 529.

A court cannot decree the abatement of a nuisance entirely outside of the limits of the state, although it has acquired jurisdiction of the person of defendant.—*Columbia River Packers' Assoc. v. McGowan*, Wash., 219 F. 365, 134 C.C.A. 461, affirmed 38 S.Ct. 129, 245 U.S. 352, 62 L.Ed. 342.

77. Fla.—*Phillips v. State*, 77 So. 665, 75 Fla. 93.

Mich.—*Stewart v. Eaton*, 283 N.W. 651, 287 Mich. 466, 120 A.L.R. 1354.

Okla.—*Stuart v. Mayberry*, 231 P. 491, 105 Okl. 13.

Pa.—*Giampalo v. Taylor*, 6 A.2d 499, 335 Pa. 121.

Tenn.—*Dickson v. Simpson*, 113 S.W. 2d 1190, 172 Tenn. 680, 116 A.L.R. 380.

utory provision for extraterritorial jurisdiction,⁷⁸ a court created within and for a particular territory within the state is limited in its jurisdiction to such territory.⁷⁹

Courts cannot by their judgments or mandates affect property outside their territorial jurisdiction;⁸⁰ but a person whose domicile is within the court's jurisdiction may bring suit to recover the proceeds of foreign land;⁸¹ and where an assignee having proceeds of land both within and without the state is within the jurisdiction of the court, it may direct a distribution of the foreign fund.⁸²

The effect, if any, of original process outside the territorial jurisdiction of the court is considered in § 83 supra, and the jurisdiction of probate and like courts over property outside their territorial jurisdiction in § 303 infra. The territorial limits within which courts of equity may exercise their jurisdiction, and their powers over property outside their territorial jurisdiction, including, among other

things, their jurisdiction of suits to compel, cancel, or reform a conveyance, or to enforce or rescind a sales contract, covering land outside their territorial jurisdiction, are considered in the C.J.S. title Equity §§ 79-83, also 15 C.J. p 818 note 71-p 820 note 2, p 820 note 7-p 821 note 22, and 21 C.J. p 149 note 44-p 153 note 93.

Effect of matters of venue. Statutes relating to venue, which has been distinguished from jurisdiction supra § 15, serve merely to fix the proper place of trial within the state of a cause of action there arising, and do not affect the jurisdiction of the court.⁸³

Where the circuit court of a judicial circuit, and not that of the county, is made the constitutional entity, the assumption of jurisdiction by the circuit court of one county of a cause whose proper venue is in another county of the same circuit is an irregularity, but not without jurisdiction.⁸⁴

Effect of comity

(1) A court having the parties before it has jurisdiction to enter a judgment which may be enforced on the grounds of comity in any other jurisdiction, even though the court lacks the power to enforce the judgment extraterritorially.—*Frick v. Hartford Life Ins. Co.*, 119 A. 228, 98 Conn. 251.

(2) General rules of comity see infra § 545.

78. *Ariz.—Funk v. Fillman*, 36 P.2d 574, 44 *Ariz.* 283.

Cal.—People v. Denault, 253 P. 151, 81 *Cal.App.* 1.

Particular provisions

(1) The legislature under the power conferred upon it by the constitution to add to the jurisdiction of the courts may modify the common-law rule that no court can have its process executed beyond its territorial jurisdiction.—*Virginia-Carolina Chemical Corporation v. Smith*, 164 So. 717, 121 Fla. 720—*Beard v. Viser*, 97 So. 718, 86 Fla. 265.

(2) Local courts may have authority vested in them to issue final process beyond the limits of their original jurisdiction to aid in enforcing their judgments.—*Covill v. Phy*, 26 Ill. 432—*People v. Barr*, 22 Ill. 241.

(3) Under a statute authorizing district courts "to establish water conservation districts which may be entirely within or partly within and partly without the judicial district in which said court is located," a district court has jurisdiction to create a conservation district extend-

ing into another judicial district.—*People ex rel. Rogers v. Letford*, 79 P.2d 274, 102 Colo. 234.

79. *Ariz.—Funk v. Fillman*, 36 P.2d 574, 44 *Ariz.* 283.

Cal.—People v. Denault, 253 P. 151, 81 *Cal.App.* 1.

Del.—Disceunt & Credit Corporation v. Ehrlich, 187 A. 591, 7 *W.W. Harr.* 561.

Fla.—Phillips v. State, 77 So. 665, 75 Fla. 93.

Mass.—Holt v. Holt, 149 N.E. 40, 253 *Mass.* 411.

Mo.—State v. Buckner, 234 S.W. 651, 291 *Mo.* 320—*State ex rel. Gardner v. Hall*, 221 S.W. 708, 282 *Mo.* 425.

Utah.—Mathison v. Poultry & Stock Minerals Mining Co., 38 P.2d 741, 85 *Utah* 74.

Va.—Jordan v. Town of South Boston, 122 S.E. 265, 138 *Va.* 838.

W.Va.—Click v. Click, 127 S.E. 194, 98 *W.Va.* 419.

15 C.J. p 817 note 51.

Common pleas "courts" of Ohio "are not migratory and cannot be moved about the state," while common pleas "judges" are migratory and can be so moved.—*State of Ohio ex rel. Stahl v. Webster*, 30 Ohio N.P., N.S., 435, 438.

Rights over portion of Gulf of Mexico

Circuit court of Taylor county, Florida, held to have jurisdiction to enforce sovereign rights of state over portion of Gulf of Mexico within boundaries of such county.—*Lipscomb v. Kaloroukas*, 133 So. 107, 101 Fla. 1137—*Lipscomb v. Gialourakis*, 133 So. 104, 101 Fla. 1130.

80. *Ill.—Oakman v. Small*, 118 N.E. 775, 282 Ill. 360.

Or.—Title Ins. & Trust Co. v. Northwestern Long-Distance Telephone Co., 173 P. 251, 88 *Or.* 666.

Tenn.—Dickson v. Simpson, 113 S.W. 2d 1190, 172 *Tenn.* 630, 116 A.L.R. 380.

Utah.—Mathison v. Poultry & Stock Minerals Mining Co., 38 P.2d 741, 85 *Utah* 74.

Jurisdiction of the res or property as element of jurisdiction see supra § 43.

"The Legislature of one state has no power to confer jurisdiction over property situated in another state."—*De Tray v. Hardgrove, Tex. Com. App.*, 52 S.W.2d 239, 240, affirming *Hardgrove v. De Tray, Civ. App.*, 34 S.W.2d 379.

Enforcement of lien

A court with limited powers cannot enforce a lien on property not within the territorial limits of its jurisdiction.—*Fisher v. Murdock*, 1 *Handy* 544, 12 *Ohio Dec.* (Reprint) 280.

81. *La.—Edwards v. Ballard*, 14 *La. Ann.* 362.

Pa.—Kessler v. Kessler, 3 *Pa. Co.* 522.

82. *Pa.—Moss' Estate*, 21 A. 206, 138 *Pa.* 646.

83. *N.Y.—Railroad Co-op. Building & Loan Ass'n v. Cocks*, 290 N.Y.S. 611, 248 *App. Div.* 905—*Railroad Federal Savings & Loan Ass'n v. Rosemont Holding Corporation*, 290 N.Y.S. 609, 248 *App. Div.* 909. 67 C.J. p 12 notes 18-20.

84. *S.D.—Lytle v. Smith*, 211 N.W. 450, 50 *S.D.* 637.

G. LOSS OR DIVESTITURE OF JURISDICTION

§ 92. In General

Jurisdiction of a court when once conferred may be taken away only by express words, or by necessary implication from the terms, of the statute relied on to withdraw jurisdiction.

Where jurisdiction is conferred in all cases, some special or particular law is necessary to exclude it in any particular case.⁸⁵ While jurisdiction may be divested by a repeal of the statute which conferred jurisdiction,⁸⁶ in general jurisdiction once conferred is taken away only by express negative words or by irresistible implication from the terms of the statute;⁸⁷ but legislation conferring exclusive jurisdiction in certain cases on one court will by implication oust the jurisdiction of another court, which theretofore had concurrent jurisdiction in such cases.⁸⁸

Questions as to proceedings after decision that no jurisdiction exists are considered *infra* § 118, and as to reacquisition of jurisdiction by consent of parties after divestiture *supra* § 85. Questions as to the loss or divestiture of jurisdiction of federal courts are considered in the C.J.S. title Federal Courts § 26, also 25 C.J. p 717 note 7—p 718 note 21; of justices of the peace in civil proceedings, in the C.J.S. title Justices of the Peace § 43, also 35 C. J. p 538 note 89—p 541 note 40; and of courts in criminal prosecutions, in the C.J.S. title Criminal

Law §§ 165–172, also 16 C.J. p 181 note 71—p 183 note 94.

Defective pleading. Where the court has jurisdiction of the subject matter and parties, its jurisdiction is not defeated because the declaration or bill is insufficient.⁸⁹ Questions as to the effect of pleadings in respect of the right to assume jurisdiction are considered *supra* § 33.

Agreement or consent. Parties may not by consent deprive a court of jurisdiction which is conferred on it by statute.⁹⁰ A contractual provision for submission to the jurisdiction of foreign courts does not necessarily prevent an action in the court of the state having jurisdiction of the parties and the subject matter.⁹¹

Limitation as to time. Jurisdiction conferred for a limited period of time will not continue in force after the expiration of such period,⁹² nor will any power exist thereafter to review or modify a judgment pronounced prior thereto.⁹³

§ 93. Events Happening after Jurisdiction Acquired

In general jurisdiction once acquired is not lost or divested by subsequent events.

As a general rule, jurisdiction once acquired is not defeated by subsequent events,⁹⁴ even though they

85. Mass.—Commonwealth v. White, 8 Pick. 453—Boone v. Poindexter, 20 Miss. 640.

86. Mo.—Davidson v. Schmidt, 124 S.W. 552, 146 Mo.App. 358.

87. Ala.—Gould v. Hayes, 19 Ala. 438.
15 C.J. p 822 note 63.

Trusts

Act of June 26, 1931, P.L. p 1384, which extended the jurisdiction of orphan's court to matters affecting trustees of trusts, inter vivos did not take away jurisdiction of courts of common pleas in that regard.—In re Breyer's Estate, 19 Pa.Dist. & Co. 255.

88. D.C.—Gassenheimer v. District of Columbia, 6 App. 108.

89. Ill.—Marabia v. Mary Thompson Hospital of Chicago for Women and Children, 140 N.E. 836, 309 Ill. 147, reversing 224 Ill.App. 367.
Vt.—International Paper Co. v. Belkows Falls Canal Co., 100 A. 684, 91 Vt. 850.

90. Mich.—Goldberg v. Trustees of Elmwood Cemetery, 275 N.W. 663, 281 Mich. 647.

91. N.Y.—Engel v. Shubert Theatri-

cal Co., 151 N.Y.S. 593, 166 App. Div. 394.

Contract made in state

In an action against a foreign corporation on breach of a contract between the parties reciting that while it was signed in the city of New York it should be considered and held to be a contract duly executed in England, on motion to vacate a summons, it was held that Code Civ. Proc. § 1780 subd 1, applied and that the New York supreme court had jurisdiction, the contract being one made in New York; the court should not permit the parties to deprive it of jurisdiction.—Stagg v. British Controlled Oilfields, 192 N.Y.S. 596, 117 Misc. 474.

Action not within provision of contract

N.Y.—Kent v. Universal Film Mfg. Co., 193 N.Y.S. 838, 200 App.Div. 539.

92. Tex.—Texas Mexican R. Co. v. Jarvis, 15 S.W. 1089, 80 Tex. 456.

93. Tex.—Texas Mexican R. Co. v. Jarvis, *supra*.

94. U.S.—Highway Const. Co. v. McClelland, C.C.A.Mo., 15 F.2d 187, denying rehearing 14 F.2d 406, and certiorari denied McClelland v.

Highway Const. Co., 47 S.Ct. 570, 293 U.S. 765, 71 L.Ed. 881.

Ala.—Wright v. Price, 147 So. 675, 676, 226 Ala. 468, citing *Corpus Juris*—Lassiter v. Wilson, 93 So. 593, 207 Ala. 669, citing *Corpus Juris*.

D.C.—O'Connor v. Rhodes, 79 F.2d 146, 65 App.D.C. 21, certiorari granted 56 S.Ct. 249, 296 U.S. 568, 80 L.Ed. 401 and U. S. Shipping Board Merchant Fleet Corporation v. Rhodes, 56 S.Ct. 249, 296 U.S. 568, 80 L.Ed. 401, affirmed 56 S.Ct. 517, 297 U.S. 883, 80 L.Ed. 733.

Mo.—Rouse v. Bank of Darlington, 41 S.W.2d 159, 161, citing *Corpus Juris*—Mann v. Bank of Greenfield, 20 S.W.2d 502, 506, 323 Mo. 1000, citing *Corpus Juris*.

Mont.—In re East Bench Irr. Dist., 224 P. 859, 70 Mont. 186.

N.J.—Goodman v. Goodman, 194 A. 866, 15 N.J.Misc. 716, citing *Corpus Juris*.

N.Y.—Hodgens v. Columbia Trust Co., 171 N.Y.S. 285, 103 Misc. 415, reversed on other grounds 173 N. Y.S. 304, 185 App.Div. 555.

Okl.—Pine v. Superior Court of Seminole County, 39 P.2d 530, 532, 172 Okl. 70, citing *Corpus Juris*.

Pa.—Dunmore School Directors' Re-

are of such a character as would have prevented jurisdiction from attaching in the first instance.⁹⁵ So, where jurisdiction of the person or of the res has once attached, it is not defeated by a removal of the person or the res beyond the jurisdiction of the court.⁹⁶ In order, however, that the rule that jurisdiction continues notwithstanding the subsequent event is such as would have prevented the acquisition

of jurisdiction in the first instance may apply, there must be an action pending over which the jurisdiction of the court has actually vested;⁹⁷ and, although a court has assumed jurisdiction of a case, it may be shown that the facts existing at the time that jurisdiction was assumed were such that the case was not within the jurisdiction of the court, and under such circumstances it is of course improper for the

removal, 3 Pa.Dist. & Co. 58, 60, quoting *Corpus Juris*.

Tex.—Cleveland v. Ward, 285 S.W. 1063, 1070, 116 Tex. 1, citing *Corpus Juris*—Isbell v. Kenyon-Warner Dredging Co., 261 S.W. 762, 113 Tex. 538—Boyd v. Mara, Civ.App., 284 S.W. 703, 704, citing *Corpus Juris*.

Wyo.—Padlock Ranch, Inc. v. Washakie Needles Irr. Dist., 61 P.2d 410, 412, 50 Wyo. 253, citing *Corpus Juris*.

15 C.J. p 823 note 67.

Jurisdiction not divested by

(1) Stipulation for taking testimony before any judge and in any county, within judicial district.—Gotsch v. Schoenjahn, 207 N.W. 567, 201 Iowa 1317.

(2) Attempted withdrawal of petition and claim to estate in administration proceeding, without notice or approval of court and without withdrawal of appearance.—O'Connor v. Stanley, C.C.A.Neb., 54 F.2d 20.

(3) Fact that good defense could have been presented.—Hidden v. Edwards, 285 S.W. 462, 313 Mo. 642.

(4) Filing cross complaint alleging cause of action not within jurisdiction.—Johnson v. Greenen, 188 N. E. 796, 98 Ind.App. 612.

(5) Fact that attorney general was erroneously made a party.—Wemme v. First Church of Christ, Scientist, of Portland, 237 P. 674, 115 Or. 281.

(6) Failure of plaintiff to establish all that he claimed.—Silverman v. Greenberg, Cal., 83 P.2d 293.

(7) Giving false testimony on material matter.—In re Hannerkam's Estate, 77 P.2d 814, 51 Ariz. 447.

(8) Failure of party to disclose an important fact.—In re Hannerkam's Estate, supra.

New action on same cause

Court, in absence of final disposition of pending cause, has jurisdiction over defendant therein, notwithstanding new suit has been filed based on same cause of action.—Whitaker v. Wright, 129 So. 889, 100 Fla. 282.

Suit to cancel mortgage

The foreclosure of a mortgage does not divest jurisdiction of an action to cancel the mortgage.—Morrisson v. Chambers, 108 So. 666, 212

Ala. 574—Fair v. Cummings, 72 So. 389, 197 Ala. 389.

Failure of public officer to comply with duty

City solicitor's failure to discharge his duties regarding illegal expenditures by board of education, resulting in adverse judgment, did not destroy court's jurisdiction.—Lynch v. Board of Education of City School Dist. of City of Lakewood, 156 N.E. 188, 116 Ohio St. 361.

Payment

Alleged payment of note declared on in plaintiff's complaint did not deprive court of jurisdiction of the action and of defendants' complaint in set-off, where such payment did not include plaintiff's costs already accrued.—George A. Fernald & Co. v. Manley, 138 A. 247, 99 Vt. 421.

Transfer of property involved in suit

Wife made defendant in suit to impress trust on property transferred to her in fraud of husband's creditors was not entitled to transfer funds to attorney as fees so as to defeat court's jurisdiction over the property.—Schmitt v. Lamb, C.C.A. Miss., 48 F.2d 533, reversing, D.C., 43 F.2d 770, and certiorari granted Lamb v. Schmitt, 52 S.Ct. 43, 284 U. S. 609, 76 L.Ed. 521, affirmed 52 S.Ct. 317, 285 U.S. 222, 76 L.Ed. 720.

Lapse of time or delay

(1) While a court will not permit a case to lie dormant indefinitely, with the consent of everybody, and then allow it to be used by one party against the objection of the other as a basis for exercising power that would not otherwise exist, mere unexplained inaction for a year and a half does not ipso facto destroy the power of the court to proceed when both parties consent, and, where, after the court had decided to appoint a receiver for a street railroad company, a plan was agreed to by the parties for the operation of the property under direction of the court, which was in effect a substitute for the receivership, which plan was carried out for a number of years, the court did not during such time lose jurisdiction of the case.—City of Toledo v. Toledo Rys. & Light Co., Ohio, 259 F. 450, 170 C.C.A. 426.

(2) Mere passage of time was not sufficient to deprive court of juris-

diction over subject matter of its original decree granting perpetual injunction.—U. S. v. Aluminum Co. of America, D.C.Pa., 19 F.Supp. 374. Effect of transfer of cause from one state court to another see infra §§ 517-520.

95. Ala.—Wright v. Price, 147 So. 675, 676, 226 Ala. 468, citing *Corpus Juris*—Lassiter v. Wilson, 93 So. 598, 207 Ala. 669, citing *Corpus Juris*.

Pa.—Dunmore School Directors' Removal, 3 Pa.Dist. & Co. 58, 60, quoting *Corpus Juris*.

Tex.—Boyd v. Mara, Civ.App., 284 S. W. 703, 704, citing *Corpus Juris*.

15 C.J. p 824 note 68.

Appointment as consul

Jurisdiction of state court properly acquired was not divested by subsequent appointment of defendant as vice consul of a foreign country, notwithstanding U.S.Judicial Code § 256, 28 U.S.C.A. § 371, vests in federal courts exclusive jurisdiction of actions against vice consuls.—Earle v. De Besa, 293 P. 885, 109 Cal.App. 619—15 C.J. p 824 note 68 [e].

96. Cal.—Marts v. Marts, 59 P.2d 170, 176, 15 Cal.App.2d 224, quoting *Corpus Juris*.

La.—Wheeler v. Wheeler, 167 So. 191, 193, 184 La. 689, citing *Corpus Juris*—Lukianoff v. Lukianoff, 116 So. 890, 891, 166 La. 219, citing *Corpus Juris*.

N.J.—Goodman v. Goodman, 194 A. 866, 15 N.J.Misc. 716.

N.Y.—Hodgens v. Columbia Trust Co., 171 N.Y.S. 235, 103 Misc. 415, reversed on other grounds 173 N.Y. S. 304, 185 App.Div. 555.

15 C.J. p 823 note 67 [a] (39), p 824 note 69.

Plaintiff's departure from state

Jurisdiction of district court was not lost by plaintiff's departure from state.—Bolich v. Robinson, 184 N.W. 218, 106 Neb. 449.

Leaving state and making no defense

Mechanic's lien defendant cannot destroy court's jurisdiction, which had attached to him, by leaving state and instructing his attorney to make no further defense.—Cruz v. Texas Glass & Paint Co., Tex.Civ.App., 199 S.W. 819, error refused.

97. U.S.—Thaxter v. Hatch, C.C. Ill., 23 F.Cas.No.13,866, 6 McLean 68.

court to proceed further.⁹⁸ While it has been stated broadly that jurisdiction once acquired by a statement in good faith of a cause of action within the jurisdiction of the court is not lost by the subsequent elimination of allegations of the complaint, which were essential to the existence of jurisdiction, by pleading, as in the case of an answer or demurrer, or by failure of proof, or in any other way,⁹⁹ there is authority for the view that plaintiff, after jurisdiction has attached, may so change his pleading voluntarily that the court will no longer have jurisdiction on the face of the pleading.¹

The general rule that jurisdiction is not defeated by subsequent events has been applied or recognized in respect of an agreement between the parties,² the nonexistence of a lien,³ amendments of pleadings,⁴ errors or irregularities in the exercise of jurisdiction,⁵ and adjournments and continuances.⁶ Questions as to the dependence of jurisdiction on cor-

rectness of determination are considered supra §§ 27, 35.

Where a suit is voluntarily settled before judgment, the court does not wholly lose jurisdiction, so that no disposition of the case can be made, but should enter judgment dismissing both complaint and counterclaim.⁷ The court is not deprived of jurisdiction to proceed with the cause by virtue of an agreement between the parties for dismissal if defendant should make certain payments, where defendant fails to comply with the condition as to payments.⁸

A statute which expressly withdraws the power to do an act after the expiration of a fixed period has been regarded as mandatory so as to prevent the exercise of jurisdiction in that regard after such period has passed.⁹ Under some statutes the jurisdiction of some courts over certain types of actions is taken away where the population of the county decreases to less than a specified number.¹⁰

98. N.H.—Pickering v. Pickering, 21 N.H. 537.

99. N.C.—Shankle v. Ingram, 45 S.E. 578, 133 N.C. 254.

1. U.S.—Highway Const. Co. v. McClelland, C.C.A.Mo., 15 F.2d 187, denying rehearing 14 F.2d 406, and certiorari denied McClelland v. Highway Const. Co., 47 S.Ct. 570, 273 U.S. 765, 71 L.Ed. 881.

2. Mo.—McClain v. Kansas City Bridge Co., App., 83 S.W.2d 132, 135, citing *Corpus Juris*, and appeal dismissed 88 S.W.2d 1019, 338 Mo. 7.

15 C.J. p 823 note 67 [a].

3. Tex.—Sellers v. Spiller, Civ.App., 64 S.W.2d 1049.

Jurisdiction of personal action

(1) In action to recover money judgment and to foreclose lien, jurisdiction is not necessarily lost by showing or adjudication that lien does not exist.—*Southwest Inv. Co. v. Terry*, Tex.Civ.App., 42 S.W.2d 1051, error refused—15 C.J. p 824 note 68 [b] (2).

(2) Jurisdiction of district court shown by petition for debt and to foreclose lien on land attached in absence of pleading or proof that allegations of lien were fraudulently made to confer jurisdiction, and was not defeated by defense that property was a homestead, which, if sustained, would defeat lien.—*Massie v. City of Fort Worth*, Tex.Civ.App., 262 S.W. 837.

(3) Where court acquired jurisdiction by reason of the existence of a lien when the suit was commenced, the expiration of the lien during the pendency of the suit did not divest the court of jurisdiction so as to

prevent the rendition of a personal judgment.—*Darrow v. Morgan*, 65 N.Y. 333.

4. Iowa.—Walton v. Mandeville, Dowling & Co., 5 N.W. 776. 15 C.J. p 823 note 67 [a] (3)–(5).

5. Cal.—Ex parte Selowsky, 208 P. 99, 189 Cal. 331.

Ga.—*New York Life Ins. Co. v. Gilmore*, 157 S.E. 188, 171 Ga. 894, reversing 149 S.E. 799, 40 Ga.App. 431, and conformed to 159 S.E. 288, 43 Ga.App. 442.

Ill.—See *Donovan v. National Life Ins. Co. of United States of America*, 203 Ill.App. 219.

Kan.—*Cahill-Swift Mfg. Co. v. Hayes*, 157 P. 1169, 98 Kan. 269. 15 C.J. p 823 note 67 [a] (15)–(19).

Impaneling or drawing jury

Illegality or error respecting drawing or impaneling of jury is not jurisdictional, but at most error in the exercise of jurisdiction, and does not deprive court of jurisdiction.—*Livesey v. Stock*, 281 P. 70, 208 Cal. 315.—*Amos v. Superior Court of California*, in and for San Diego County, 239 P. 317, 196 Cal. 677.

Proof

Error or irregularity in respect of proof, or failure to hear proof, does not deprive court of jurisdiction.—*Stephenson v. Kirtley*, W.Va., 46 S.Ct. 50, 269 U.S. 163, 70 L.Ed. 213.

Procedure

When, by statute, a matter is referred to court having general jurisdiction, legislative intent to deprive court of jurisdiction because of failure to act in particular way ought to be very clear from language used.—*State v. Town of Hessville*, 132 N.E. 588, 191 Ind. 251, denying rehearing 131 N.E. 46, 191 Ind. 251.

6. N.Y.—*Douglas v. Collins*, 273 N.Y.S. 663, 152 Misc. 839, reversed on other grounds 276 N.Y.S. 87, 243 App.Div. 546, affirmed 196 N.E. 577, 267 N.Y. 557.

15 C.J. p 823 note 67 [a] (7)–(10).

Repeated continuances create no presumption that the court lost jurisdiction.—*Cahill Swift Mfg. Co. v. Hayes*, 157 P. 1169, 98 Kan. 269, denying rehearing 156 P. 735, 97 Kan. 740.

7. Wis.—*Dr. Shoop Family Medicine Co. v. Schowalter*, 98 N.W. 940, 120 Wis. 663.

8. Repossession of property by defendant

The rule stated in the text was applied where plaintiff sued for the balance of the purchase price of an automobile and claimed a purchase-money lien, and, pursuant to the agreement between the parties, the automobile was redelivered to defendant by the sheriff who had taken possession under a writ of seizure.—*Walker v. Robinson*, 112 So. 867, 147 Miss. 67.

9. Cal.—*Donner v. Superior Court within and for Los Angeles County*, 255 P. 272, 82 Cal.App. 165.

10. Saving clause

The provision in Code § 2119, that jurisdiction once having been acquired shall not thereafter be affected by any question of population, does not refer to the general jurisdiction of the court involved but to particular actions where the population should decrease below the specified number while such actions were pending.—*Kimball Independent Consol. School Dist. No. 2 v. Willow Lake School Dist.*, 209 N.W. 650, 50 S.D. 279.

Questions as to loss, divestiture, or defeat of jurisdiction dependent on the amount involved, by reason of proof, or amendment of pleadings, as to amount of claim are considered *supra* §§ 54-69.

Delay, adjournments, and continuances in inferior courts. An inferior court may lose jurisdiction by failure to render judgment within the time limited therefor by statute,¹¹ or by an unauthorized adjournment.¹² Under the practice in some jurisdictions, however, jurisdiction is not lost by an adjournment to a time beyond the period fixed by a statutory limitation where the adjournment is granted on the application of defendant, or with the consent of the parties; nor is jurisdiction lost by an adjournment, otherwise valid, where it is necessitated by the fact that the court is actually engaged in the trial of another case; nor is it lost where the case is duly continued indefinitely by agreement of the parties and is tried on a day fixed by the court pursuant to such agreement.¹³

Division of county or change of county lines. Where suit is properly commenced in one county,

the subsequent division of that county or a change of county lines will not necessarily divest the jurisdiction.¹⁴

Death of party. Whether jurisdiction is divested or not by the death of a party depends primarily on the nature of the action and the governing statute and also on the nature of the jurisdiction with which the court is invested.¹⁵ The court does not necessarily lose jurisdiction by the death of some of the petitioners,¹⁶ and a statute may authorize continuation of the action,¹⁷ as by the substitution of a representative of the decedent.¹⁸

Questions as to the abatement or survival of actions on the death of parties are considered in detail in the C.J.S. title Abatement and Revival §§ 114-186.

Conditional jurisdiction. A conditional jurisdiction is sometimes acquired by the granting of a provisional remedy as shown *supra* § 80, which jurisdiction is subject to be divested by failure to do certain acts within a specified time.¹⁹

11. N.Y.—Shaffer v. Vandewater, 137 N.Y.S. 857, 78 Misc. 133—Lebowitz v. Herman, 108 N.Y.S. 566. 15 C.J. p 824 note 74.

Stipulation extending time

(1) A justice of the municipal court of the city of New York did not lose jurisdiction by failing to comply with the requirement of the Consolidation Act, L.1882 c 410 § 1384, that he shall render judgment within eight days from submission of the case to him, where counsel by written stipulation had extended the time.—Mayer v. Friedman, 60 N.Y.S. 969, 44 App.Div. 518.

(2) But it was held that, where on Febr. 8, 1899, the time within which a municipal court justice should decide a pending cause was extended to Nov. 24, 1899, and he made no order as required by the Consolidation Act § 1372, and failed to decide the same, the municipal court lost jurisdiction of the case on the expiration of the time as extended, and hence another justice had no power to hear the same.—Lamura v. Haggerty, 62 N.Y.S. 1084, 30 Misc. 745.

12. N.Y.—Berliner v. M. Zimmerman Co., 104 N.Y.S. 407, 54 Misc. 245.

15 C.J. p 825 note 75.

Definite adjournment

In the district courts there must be a definite adjournment or the court loses jurisdiction, except that, after hearing, the court may reserve its decision, which amounts to its judgment, for a reasonable time.—

Morley v. McDonald, 118 A. 582, 98 N.J.Law 275.

Want of due adjournment

Under L.1921 c 244 § 24, unless case pending before municipal court of Fond du Lac County regulated thereby is adjourned to an hour, day, and place certain, and due entries made thereof, court loses jurisdiction, and where court closed its docket and adjourned without adjourning case it lost jurisdiction.—Sippel v. Fond du Lac County, 200 N. W. 459, 184 Wis. 607.

13. Neb.—Wagner v. Union Stockyards Co. of Omaha, 186 N.W. 996, 107 Neb. 769.

14. U.S.—U. S. v. Dawson, Ark., 15 How. 467, 14 L.Ed. 775.

15 C.J. p 825 note 77.

15. Mo.—Newman v. Weinstein, 75 S.W.2d 871, 872, 230 Mo.App. 794, quoting *Corpus Juris*.

15 C.J. p 825 note 78.

Several defendants

Resident defendant's death, leaving nonresident sole defendant, before second trial of tort action did not deprive court of county of decedent's residence of jurisdiction, in view of provision of Code 1932 § 422 that, if there be more than one defendant, the action may be tried "in any county in which one or more of the defendants . . . resides at the time of the commencement of the action."—Halsey v. Minnesota-South Carolina Land & Timber Co., 166 S. E. 626, 168 S.C. 18.

Several defendants

Where a court of equity, by reason of the residence of one of several

codefendants living in different counties, has obtained jurisdiction, such jurisdiction is not lost by the death of the resident defendant.—Lofton v. Collins, 43 S.E. 708, 117 Ga. 434, 61 L.R.A. 150.

16. N.H.—State v. Wilkins, 29 A. 693, 67 N.H. 164.

17. Vt.—Ashley v. Harrington, 1 D. Chlpm. 348.

18. Ind.—Lawson v. Newcomb, 12 Ind. 439.

15 C.J. p 825 note 81.

Insolvent estate

Where before the administrator appeared or made default, the probate estate of decedent defendant was adjudged insolvent by the probate judge, the common pleas did not thereafter have jurisdiction to determine the merits of the action, nor to order any disposition of it except its discontinuance.—Parker v. Badger, 26 N.H. 466.

Nonresidence of personal representative of party

Where a party dies after the jurisdiction of the court has attached, and his personal representative is substituted, the jurisdiction of the court is not affected by the nonresidence of the personal representative. U.S.—Clarke v. Mathewson, R.I., 12 Pet. 164, 9 L.Ed. 1041.

N.J.—Upton v. New Jersey Southern R. Co., 25 N.J.Eq. 372.

19. N.Y.—Bennett v. Bird, 261 N.Y. S. 540, 237 App.Div. 542, reargument denied 262 N.Y.S. 907, 238 App.Div. 786.

15 C.J. p 825 note 83.

§ 94. Final Disposition of Cause

In general, a court retains jurisdiction of a cause until final disposition, but jurisdiction ceases with rendition of final judgment or decree except as to certain matters.

A court, having obtained jurisdiction, retains it

until the final disposition of the cause;²⁰ but after final judgment or decree has been rendered and the parties dismissed, in general, the jurisdiction of the court is exhausted, and it cannot take any further proceedings in the case,²¹ at least where the judgment term has ended,²² except with respect to the

Attachment

N.Y.—Schram v. Keane, 18 N.E.2d 136, 279 N.Y. 227, 119 A.L.R. 1216, affirming 6 N.Y.S.2d 157, 254 App. Div. 828.

15 C.J. p 825 note 83.

Temporary injunction

N.Y.—City of New York v. Staten Island Midland Ry. Co., 181 N.Y.S. 124, 110 Misc. 695.

20. U.S.—Woodbury v. Andrew Jergens Co., C.C.A.N.Y., 69 F.2d 49. Ala.—Ex parte Burch, 184 So. 694, 236 Ala. 662.

D.C.—Davis v. Davis, 57 F.2d 414, 61 App.D.C. 48.

Fla.—State v. Sarasota County, 159 So. 797, 118 Fla. 629—Davidson v. Stringer, 147 So. 228, 229, 109 Fla. 238, citing *Corpus Juris*—Whitaker v. Wright, 129 So. 889, 100 Fla. 282.

Mont.—In re East Bench Irr. Dist., 224 P. 859, 70 Mont. 186.

N.Y.—Douglas v. Collins, 273 N.Y.S. 663, 666, 152 Misc. 839, citing *Corpus Juris* and reversed on other grounds 276 N.Y.S. 87, 243 App.Div. 546, affirmed 196 N.E. 577, 267 N.Y. 557.

Tex.—State v. Epperson, 42 S.W.2d 228, 121 Tex. 80—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—Cavers v. Sioux Oil & Refining Co., Com.App., 39 S.W.2d 862, reversing, Civ.App., 23 S.W.2d 421, and rehearing denied, Com.App., 43 S.W.2d 578—U. S. Fidelity & Guaranty Co. v. Davis, Civ.App., 212 S.W. 239.

15 C.J. p 825 note 84.

Cause is "pending" until it reaches final determination either in court of original jurisdiction or in appellate court, as regards question of court's jurisdiction.—People v. District Court of Second Judicial Dist. in and for City and County of Denver, 299 P. 1, 89 Colo. 78, followed in People v. District Court of Second Judicial Dist. in and for City and County of Denver, 299 P. 5, 89 Colo. 88.

Determination of all issues

The jurisdiction of a court over subject matter and parties, once fully attached in a cause, continues until all issues both of fact and of law have been finally determined.

U.S.—In re 431 Oakdale Ave. Bldg. Corporation, D.C.Ill., 28 F.Supp. 63.

Tex.—Gulf, C. & S. F. Ry. Co. v. Muse, 207 S.W. 897, 109 Tex. 352, 4 A.L.R. 613.

Dismissal of resident defendant

It was held, under the statute involved, that dismissal of suit against the only resident defendant did not divest jurisdiction in respect of defendants residing in a county other than that in which the action was brought.—Read v. Renaud, 14 Miss. 79.

Entry of judgment

(1) Where a tribunal has jurisdiction over parties and subject matter, the jurisdiction continues until final judgment shall have been entered.—Kennedy v. Industrial Accident Commission of California, 195 P. 267, 50 Cal.App. 184.

(2) Ordinarily, trial court has full control over trial of cause up to time of entry of judgment, and after judgment where motion for new trial is timely made, and even later under some circumstances and within limited time.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.

(3) When the district court acquires jurisdiction of an action, it retains it for the purpose of the entry of any judgment that may be proper under the pleadings and the evidence.—Bolich v. Robinson, 184 N.W. 218, 106 Neb. 449.

Finality of order

Where order for distribution in partition proceeding, properly construed, was final only in so far as it concerned master in chancery who made the report which the order approved, court did not lose jurisdiction to enter subsequent orders.—Masters v. Masters, 249 Ill.App. 259.

Where judge has jurisdiction to hear a matter and the matter is heard before him, he entertains jurisdiction until his decision is rendered.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, S.C., 1 S.E.2d 797.

21. Fla.—Davidson v. Stringer, 147 So. 228, 229, 109 Fla. 238, citing *Corpus Juris*.

Ill.—Stangle v. Muscaio, 8 N.E.2d 721, 290 Ill.App. 607.

Mont.—State v. Carey, 238 P. 597, 74 Mont. 39—State ex rel. Hatton v. District Court, 176 P. 608, 55 Mont. 324.

N.Y.—Matter of Ungrich, 94 N.E. 999, 201 N.Y. 415—Public Operating Corporation v. Weingart, 7 N.Y.S.2d 827, 255 App.Div. 443.

Ohio.—Long & Allstatter Co. v. Willis, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed Willis v. Long

& Allstatter Co., 2 N.E.2d 600, 131 Ohio St. 287.

15 C.J. p 825 note 85.

Dismissal with prejudice

In suit to cancel deed, declare trust in personality and for money judgment, trial court was without jurisdiction to exercise jurisdiction over land by granting injunctive relief on defendants' application after entry of judgment dismissing action as to land, with prejudice, following which defendants' tenant abandoned premises and plaintiffs took possession.—Thompson v. Thompson, 86 P.2d 286, 184 Okl. 208.

Resident defendants

(1) Under the practice in some jurisdictions, jurisdiction over defendant not resident of county in which action was brought, and summoned out of county, is lost after rendition of judgment in favor of local defendant.—Ramey v. Weddington, 105 S.W.2d 824, 268 Ky. 675—University of Louisville v. Metcalfe, 287 S.W. 945, 216 Ky. 339, 49 A.L.R. 375.

(2) A like rule applies where the action is dismissed as to resident defendants.—Dees' Adm'r v. Dees' Ex'r, 61 S.W.2d 301, 249 Ky. 650.

Order for incorporation of municipality

Circuit court for a certain county, having jurisdiction of a proceeding looking to the incorporation of a village, could not, after entry of an order of incorporation, entertain a proceeding to determine, on an order to show cause, the right of the assessor of another county to levy an assessment for income taxes against residents of said village.—In re Village of Chenequa, 222 N.W. 794, 197 Wis. 591.

22. Ky.—Reed v. Hatcher, 1 Bibb 346.

Mo.—Ætna Ins. Co. v. O'Malley, 118 S.W.2d 3, 342 Mo. 800—Burton v. Chicago & A. R. Co., 204 S.W. 501, 275 Mo. 185, reversing, App., 175 S.W. 110.

15 C.J. p 825 note 85.

Adjournment sine die

Where a trial judge adjourns court sine die, he loses jurisdiction of case finally determined during that term except under special circumstances.—Burns v. Babb, 3 S.E.2d 247, 190 S.C. 508—Bagerton v. Atlantic Coast Line R. Co., 178 S.E. 844, 175 S.C. 209.

entry of the judgment or decree,²³ or, in a proper case, its enforcement,²⁴ correction,²⁵ or vacation.²⁶

The rendition of an erroneous judgment which has been vacated after the ascertainment of errors does not deprive the court of jurisdiction to render a proper judgment.²⁷

§ 95. Repeal or Amendment of Statute

Jurisdiction over pending cases may be ousted by the valid repeal of the statute on which jurisdiction wholly depends.

While, according to some cases, a court is not necessarily deprived of jurisdiction of pending actions, by the enactment of a statutory provision which gives exclusive jurisdiction of actions of the type involved to another court, even in the absence of a saving clause,²⁸ it has been held or recognized

that jurisdiction over pending causes will be ousted by the valid repeal of the statute on which it wholly depends,²⁹ unless the repealing act contains a clause saving pending actions from the operation of the repeal³⁰ or a substantial reenactment of the provisions under which the action was brought.³¹ This rule does not apply, however, to exclusively constitutional courts,³² and an invalid statute which attempts to oust the jurisdiction of a court over pending actions is ineffective.³³

It has been held that, where a court originally obtains and exercises jurisdiction, jurisdiction will not be overturned and impaired by any legislative enactment unless express prohibitory words are used,³⁴ and that jurisdiction duly acquired under an existing statute is not taken away by a subsequent statute prescribing a different method of commencing an action.³⁵

Bringing forward and restoring to docket

Where a valid and final judgment has been entered and the parties are out of court, the court may not, at a subsequent term, bring the action forward nor restore it to the docket, especially where the rights of third persons are involved.—*Davis v. Cass*, 142 A. 377, 127 Me. 167.

Courts of equity

Circuit courts, in exercise of equity jurisdiction, have no terms in the sense that their jurisdiction is lost, except as to final decrees, as provided in Code 1928 § 6670.—*Ex parte King*, 162 So. 275, 230 Ala. 529.

Jurisdiction over case distinguished from jurisdiction over records

In a case in which was involved the question as to the authority to have entered on the minutes an order made at a former term which was inadvertently, or otherwise, omitted, it was recognized that the court may lose jurisdiction of the case to which a record refers, although not losing jurisdiction of its records.—*Hannon v. Henson*, Tex.Civ. App., 7 S.W.2d 613, affirmed, Com. App., 15 S.W.2d 579.

23. Mont.—*State v. Carey*, 238 P. 597, 74 Mont. 39.—*State ex rel. Hatton v. District Court*, 176 P. 608, 55 Mont. 324.

Entry of decree or judgment in general see the C.J.S. titles Equity §§ 552, 593, also 21 C.J. p 650 note 84—p 653 note 28, and Judgments §§ 106-121, also 34 C.J. p 52 note 38—p 82 note 15.

24. Ala.—*Ex parte Burch*, 184 So. 694, 236 Ala. 662.

Fla.—*Davidson v. Stringer*, 147 So. 228, 229, 109 Fla. 238, citing *Corpus Juris*.

Mont.—*State v. Carey*, 238 P. 597, 74 Mont. 39.—*State ex rel. Hatton v.*

District Court, 176 P. 608, 55 Mont. 324.

N.Y.—*Matter of Ungrich*, 94 N.E. 999, 201 N.Y. 415.—*Public Operating Corporation v. Weingart*, 7 N.Y.S.2d 827, 255 App.Div. 443.

15 C.J. p 812 note 92, p 825 note 86.

Jurisdiction of property, once acquired by a court, continues until the court's judgment or decree is finally complied with.—*Mayer v. Lable*, C.C.A.Mass., 291 F. 564.

25. Fla.—*Davidson v. Stringer*, 147 So. 228, 229, 109 Fla. 238, citing *Corpus Juris*.

N.Y.—*Matter of Ungrich*, 94 N.E. 999, 201 N.Y. 415.—*Kamp v. Kamp*, 59 N.Y. 212, reversing 37 N.Y.Super. 241.—*Public Operating Corporation v. Weingart*, 7 N.Y.S.2d 827, 255 App.Div. 443.

Amendment and correction of decree or judgment in general see the C.J.S. titles Equity §§ 622-667, also 21 C.J. p 701 note 52—p 782 note 70, and Judgments §§ 236-264, also 34 C.J. p 228 note 80—p 252 note 70.

26. Fla.—*Davidson v. Stringer*, 147 So. 228, 229, 109 Fla. 238, citing *Corpus Juris*.

N.Y.—*Matter of Ungrich*, 94 N.E. 999, 201 N.Y. 415.—*Public Operating Corporation v. Weingart*, 7 N.Y.S.2d 827, 255 App.Div. 443.

Vacation of decree or judgment in general see the C.J.S. titles Equity §§ 622-667, also 21 C.J. p 701 note 52—p 782 note 70, and Judgments §§ 265-310, also 34 C.J. p 252 note 72—p 390 note 53.

27. Cal.—*Kent v. Williams*, 79 P. 527, 146 Cal. 3.

28. Cal.—*Wheaton v. Superior Court in and for Los Angeles County*, 292 P. 499, 198 Cal.App. 702.—*Architectural Title Co. v. Superior Court in and for Los Angeles County*, 291 P. 586, 198 Cal.App. 369.

29. Colo.—*Remington v. Smith*, 1 Colo. 53.

Ind.—*Zintsmaster v. Aiken*, 88 N.E. 509, 90 N.E. 82, 173 Ind. 269.

15 C.J. p 825 note 90.

Even though judgment has been rendered, a divestiture of jurisdiction before the judgment is signed deprives the court of authority to sign it.—*Hoyle v. New Orleans City R. Co.*, 23 La. Ann. 502.

30. Ind.—*Hunt v. Jennings*, 5 Blatchf. 195, 33 Am.D. 465.

15 C.J. p 825 note 90, p 826 note 91.

Saving clause in general statute

It has been held that a saving clause as to pending actions, contained in a general statute, must be read into a statute repealing a prior statutory provision conferring jurisdiction of certain actions on a particular court, so that the court retained jurisdiction of an action which was commenced intermediate the date of enactment of the repealing statute and the date said statute was to become operative and which was pending on the latter date.—*Kelley v. State*, 114 N.E. 255, 94 Ohio St. 331.

Action begun on day statute passed

If there is a saving clause, an action begun on the day the act was approved will be discontinued only on proof that it was begun at a later hour than that at which the act was approved.—*Kennedy v. Palmer*, 6 Gray, Mass., 316.

31. Tex.—*McMullen v. Guest*, 6 Tex. 275.

32. La.—*Knight v. Knight*, 12 La. Ann. 59.

33. Ariz.—*Puterbaugh v. Gila County*, 46 P.2d 1064, 45 Ariz. 557.

34. Mo.—*State v. St. Louis County Ct.*, 38 Mo. 402.

35. Wash.—*Seattle v. O'Connell*, 48 P. 412, 16 Wash. 625.

H. PRESUMPTIONS AS TO JURISDICTION

§ 96. Courts of General Jurisdiction

- a. In general
- b. Presumptions as affected by territorial limits of jurisdiction
- c. Exercise of special statutory powers
- d. Conclusiveness of presumption

a. In General

It is generally presumed, unless the contrary appears, as by the record, that a court of general jurisdiction has jurisdiction of a cause, that all the facts necessary in order for it to render a particular judgment existed and were duly found, and that every step necessary to give it jurisdiction was taken.

36. Mont.—Bury v. Bury, 223 P. 502, 69 Mont. 570.
N.C.—Downing v. White, 188 S.E. 815, 211 N.C. 40.

Court of record

(1) "It is presumed that . . . [the] jurisdiction [of a court of record] was properly acquired."—People ex rel. Kammerer v. Brophy, 7 N.Y. S.2d 34, 255 App.Div. 821, affirmed 20 N.E.2d 1006—People ex rel. Price v. Hayes, 136 N.Y.S. 854, 858, 151 App.Div. 561.

(2) Generally, court of record is presumed to have all the incidents pertaining thereto at common law, including the power to entertain a motion for a new trial, except as expressly denied by act creating court.—Malinowski v. Moss, 220 N.W. 197, 196 Wis. 292.

Jurisdiction to enter judgment

There is a presumption that a court in entering a judgment had jurisdiction to do so.—Jotter v. Charles B. Marvin Inv. Co., 189 P. 22, 67 Colo. 555.

Discretion to hear and rule

"The performance of a judicial act necessarily implies a court with both jurisdiction and discretion to hear and rule."—Graham v. Floyd, 197 S.E. 873, 877, 214 N.C. 77—Hardy v. Turnage, 168 S.E. 823, 826, 204 N.C. 538.

Proceedings to organize school district

Jurisdiction of court in proceedings to organize school district will be presumed until properly challenged.—In re Common School Dist. in Highmore Independent School Dist. of Highmore, Hyde County, 222 N.W. 690, 54 S.D. 146.

In doubtful cases all intendments of plaintiff's pleading will be construed in favor of court's jurisdiction.—Worth Finance Co. v. Charlie Hillard Motor Co., Tex.Civ.App., 131 S.W.2d 416—Williams v. Kelley, Tex.Civ.App., 77 S.W.2d 263.

It has been stated, without reference to the nature of the jurisdiction of the court involved, that a prima facie presumption of jurisdiction arises from the exercise of it,³⁶ that jurisdiction over the subject matter and parties has been rightfully acquired and exercised,³⁷ and that the burden is on the party asserting want of jurisdiction to show such want.³⁸

More particularly, the presumption is that a court of general jurisdiction has jurisdiction of a cause, or has acted within its jurisdiction, unless the contrary is made to appear,³⁹ and every presumption

37. U.S.—Durrant v. United States, 50 Ct.Cl. 1.

Tex.—Guerra v. City Nat. Bank of Corpus Christi, Civ.App., 26 S.W.2d 354, 355, error refused.

38. Mont.—Bury v. Bury, 223 P. 502, 69 Mont. 570.
N.C.—Downing v. White, 188 S.E. 815, 211 N.C. 40.

39. Idaho—Kettenbach v. Walker, 186 P. 912, 32 Idaho 544—Pedersen v. Moore, 184 P. 475, 32 Idaho 420.
Ill.—Bartunek v. Lastovken, 183 N.E. 333, 350 Ill. 380.

Iowa.—Marsh v. Hanna, 259 N.W. 225, 219 Iowa 682.

Mo.—Gill v. Sovereign Camp, W. O. W., 236 S.W. 1073—Davidson v. Schmidt, 164 S.W. 577, 258 Mo. 18—Harbstreet v. Shipman, App., 122 S.W.2d 395—O'Donnell v. New York Life Ins. Co., App., 251 S.W. 82—Kirkman v. Stevenson, 238 S.W. 543, 210 Mo.App. 380—Fox-Miller Grain Co. v. Stephens, App., 217 S.W. 994.

N.Y.—Consumers' Lumber Co. v. Lincoln, 233 N.Y.S. 530, 225 App.Div. 484—Lang v. Dreyer, 9 N.Y.S.2d 970, 170 Misc. 207.

Or.—Murphy v. Bjellik, 170 P. 723, 87 Or. 329, denying rehearing 169 P. 520, 87 Or. 329.

Wash.—State v. Lindsey, 272 P. 72, 150 Wash. 121—Holland v. Silver Basin Mining Co., 193 P. 500, 113 Wash. 63.

15 C.J. p 827 note 17.

Presumptions as to jurisdiction:

In collateral attack on judgment see the C.J.S. title Judgments § 425, also 34 C.J. p 537 note 72—p 546 note 18.

Of federal courts see the C.J.S. title Federal Courts § 8, also 25 C.J. p 692 note 65—p 693 note 67.

"There is a presumption of legality attaching to the acts of a court of general jurisdiction."—In re Dugan, 76 P.2d 961, 962, 158 Or. 439.

Transferred case

Under statutes providing that judgments of district courts could trans-

fer cases from one court to another and that any judge could try any case pending in another district court, there was held to be a presumption that a case was properly before the district court to which it was transferred, where the judgment recited that all parties appeared and announced ready for trial.—De Zavala v. Scanlan, Tex.Com.App., 65 S.W.2d 489, reversing Scanlan v. De Zavala, Civ.App., 42 S.W.2d 849.

Suit enjoining enforcement of default judgment

There was held to be a presumption that suit to enjoin enforcement of default judgment regularly became subject to trial in district court other than where rendered, notwithstanding the provisions of a statute requiring that writs of injunction to stay an execution on a judgment should be tried in the court where the judgment was rendered, such statute being qualified by other statutes regulating the distribution and trial of cases in these courts.—Rasmussen v. Grimes, Tex.Com.App., 24 S.W.2d 346, affirming, Civ.App., 13 S.W.2d 959.

Invitation to hold court

The presumption includes the further presumption that a district judge from one district who holds court or disposes of judicial business in another district has acted on proper invitation under constitutional and statutory provisions permitting him to hold court in any county on the request of a judge thereof or the governor.—Kettenbach v. Walker, 186 P. 912, 32 Idaho 544.

California municipal court; superior court

(1) Municipal courts of California are to be regarded as courts of superior or general jurisdiction for the purpose of applying the presumption of jurisdiction.—Adolph M. Schwartz, Inc. v. Burnett Pharmacy, 295 P. 508, 112 Cal.App.Supp. 781.

(2) "The superior court [of California] as a court of general juris-

not inconsistent with the record is to be indulged in favor of such jurisdiction,⁴⁰ at least when the allegations of the petition show jurisdiction.⁴¹ So, it is well established that, where a court of general jurisdiction has exercised its powers, it will be presumed, unless the contrary appears, as by the record, that it had jurisdiction both of the subject matter of the action and of the parties,⁴² for, as the first duty of all courts is to keep strictly within the limits of their jurisdiction, any affirmative act on the part of a court implies that it has jurisdiction so to act,⁴³ and that it has ascertained that it had such jurisdiction.⁴⁴ Conversely, no presumption against

jurisdiction should be indulged,⁴⁵ nor should anything be presumed to be outside of the jurisdiction of a court of general jurisdiction.⁴⁶

Accordingly, unless the contrary appears from the record, it will be presumed, with respect to a court of general jurisdiction, that all the facts necessary to give the court jurisdiction to render the particular judgment existed⁴⁷ and were duly found,⁴⁸ that the court has determined every matter on which its jurisdiction depends,⁴⁹ and that every step necessary to give it jurisdiction has been taken.⁵⁰ So, unless the contrary appears, it will be

diction is presumed to have jurisdiction over a particular cause."—*Peterson v. Donelley*, 91 P.2d 123, 125, 33 Cal.App.2d 133.

(3) It is presumed to have jurisdiction of unlawful detainer action brought under statute by purchaser at trustee's sale, notwithstanding damages alleged amounted to but one thousand dollars, that rental value of premises was not alleged, and that by statute a justice's court would have jurisdiction if rental value was one hundred dollars or less.—*Cheney v. Trauzettel*, 69 P.2d 832, 9 Cal.2d 158.

(4) From the time of service of summons or the equivalent thereof, a presumption arose that jurisdiction of the superior court of California would continue until a final judgment was entered.—*Merner Lumber Co. v. Silvey*, Cal.App., 84 P.2d 1062.

40. Cal.—*Security-First Nat. Bank v. Board of Sup'rs of Riverside County*, 26 P.2d 862, 135 Cal.App. 208.

Ill.—*Little v. Blue Goose Motor Coach Co.*, 244 Ill.App. 427.

N.M.—*State v. Patten*, 69 P.2d 931, 41 N.M. 395.

R.I.—*Colagiovanni v. District Court of Sixth Judicial Dist.*, 133 A. 1, 47 R.I. 323.

15 C.J. p 827 note 17.

Upon appeal from the denial of a motion for a new trial, it was held, as differing from the case of a collateral attack upon a judgment, that no presumptions are indulged in favor of court's jurisdiction over plaintiff to render judgment on defendants' cross-actions.—*Cornelius v. Early*, Civ.App., 24 S.W.2d 757, affirmed *Early v. Cornelius*, 39 S.W.2d 6, 120 Tex. 335.

41. Tex.—*Fowler v. Small*, Civ.App., 244 S.W. 1096.

42. Ill.—*Eddy v. Dodson*, 242 Ill. App. 508.

Ind.—*Grantham Realty Corporation v. Bowers*, App., 18 N.E.2d 929.

Ky.—*Pinnacle Motor Co. v. Simpson*, 287 S.W. 566, 216 Ky. 184.

Mo.—*Crabtree v. Aetna Life Ins. Co.*, 111 S.W.2d 103, 341 Mo. 1173—*Owens v. McCleary*, 273 S.W. 145, 147, citing *Corpus Juris*—*St. Charles Sav. Bank v. Thompson & Gray Quarry Co.*, 210 S.W. 868.

S.C.—*Ex parte Hart*, 195 S.E. 253, 186 S.C. 125.

W.Va.—*Slater v. Melton*, 193 S.E. 185, 119 W.Va. 259.

15 C.J. p 827 note 17, p 831 note 28.

Lapse of time

Presumption acquires greater force after lapse of time.—*Wilcox v. Cannon*, 1 Coldw., Tenn., 369.

Admission of lack of jurisdiction

Jurisdiction will not be presumed, in a collateral proceeding, where there was in such proceeding a direct admission that jurisdiction did not exist.—*Doe v. Anderson*, 5 Ind. 33.

Notice of term not presumed

Although, in absence of any showing to contrary in record, existence of all matters necessary to confer jurisdiction will be presumed, where record showed that suit for divorce was filed and tried on opening day of special term, no presumption that statutory five-day notice of term was given to litigants would obtain.—*State ex rel. Robbins v. Gideon*, 77 S.W.2d 647, 228 Mo.App. 1023.

43. S.C.—*Ex parte Hart*, 195 S.E. 253, 186 S.C. 125.

"A prima facie presumption of rightful jurisdiction arises from the fact that a court of general jurisdiction has acted in the matter."—*Graham v. Floyd*, 197 S.E. 873, 877, 214 N.C. 77—*State v. Adams*, 195 S. E. 822, 823, 213 N.C. 243.

44. Miss.—*Broom v. Board of Sup'rs of Jefferson Davis County*, 158 So. 344, 345, 171 Miss. 586, citing *Corpus Juris*.

Nev.—*Gamble v. Hanchett*, 133 P. 938, 35 Nev. 819, denying rehearing 126 P. 111, 34 Nev. 351.

45. U.S.—*Biggs v. Blue*, C.C.Ohio, 3 F.Cas.No.1,403, 5 McLean 148, 106—*Rowan v. Lamb*, 4 Greene 468.

46. Mo.—*St. Charles Sav. Bank v. Thompson & Gray Quarry Co.*, 210 S.W. 868—*Davidson v. Schmidt*, 164 S.W. 577, 256 Mo. 18—*Harbstreet v. Shipman*, App., 122 S.W.2d 395—*Gill v. Sovereign Camp*, W. O. W., App., 236 S.W. 1073.

15 C.J. p 829 note 20.

47. Ga.—*Stanley v. Metts*, 149 S.E. 786, 169 Ga. 101.

Miss.—*Hall v. Franklin County*, 185 So. 591—*Pettibone v. Wells*, 179 So. 336, 181 Miss. 425—*Martin v. Board of Sup'rs of Winston County*, 178 So. 315, 181 Miss. 363.

Presumption as to residence

The presumption of jurisdiction of the person may be extended as to embrace the intentment that a party resided in a particular place. Cal.—*Barrett v. Carney*, 33 Cal. 530. Iowa.—*Doran v. Davis*, 43 Iowa 86.

48. Ala.—*Blount County Bank v. Barnes*, 118 So. 460, 462, 218 Ala. 230, citing *Corpus Juris*.

15 C.J. p 829 note 21.

49. U.S.—*Badger Dome Oil Co. v. Hallam*, C.C.A.Minn., 99 F.2d 293.

50. Ala.—*Blount County Bank v. Barnes*, 118 So. 460, 462, 218 Ala. 230, citing *Corpus Juris*.

Cal.—*Security-First Nat. Bank v. Board of Sup'rs of Riverside County*, 26 P.2d 862, 135 Cal.App. 208.

Ga.—*Davis v. Melton*, 181 S.E. 300, 51 Ga.App. 685.

Ind.—*Indianapolis Northern Traction Co. v. Long*, 127 N.E. 565, 73 Ind. App. 390.

R.I.—*Colagiovanni v. District Court of Sixth Judicial Dist.*, 133 A. 1, 2, 47 R.I. 323, citing *Corpus Juris*.

Tenn.—*Brewer v. Griggs*, 10 Tenn. App. 378.

15 C.J. p 829 note 22.

Application throughout proceedings

The rule applies to the various stages of the proceedings from institution to completion as well as to judgments or decrees.—*Voorhees v. Jackson*, Ohio, 10 Pet., U.S., 449, 9 L.Ed. 490.

presumed that the cause of action had accrued when suit was brought,⁵¹ that there was due service of process or notice, or appearance by the parties,⁵² and that an appearance by an attorney was authorized.⁵³ The presumption of jurisdiction exists, even though the record is silent on a matter necessary to jurisdiction.⁵⁴

b. Presumptions as Affected by Territorial Limits of Jurisdiction

Presumptions have been indulged that a corporation's residence and the location of land which was the subject of a suit were within the territorial limits of the court's jurisdiction.

A presumption has been indulged that a defendant corporation resided in the county in which suit

was started, where residence there was necessary to the court's jurisdiction;⁵⁵ so also, it has been presumed that land which was the subject of a suit was situated within the territorial limits of the jurisdiction of the court.⁵⁶

c. Exercise of Special Statutory Powers

There is no presumption of the jurisdiction of a court of general jurisdiction where it exercises special statutory powers in a special statutory manner or not according to the course of the common law.

Some authorities have applied the presumption of jurisdiction of courts of general jurisdiction in cases where such courts have exercised special statutory powers,⁵⁷ and it seems well established that the presumption arises where they exercise such spe-

Administrator's notice of appointment

The sufficiency of administrator's notice of his appointment, if essential to jurisdiction, may be presumed.—*Bassett v. South*, 158 N.E. 229, 87 Ind.App. 136, denying rehearing 156 N.E. 410, 87 Ind.App. 136.

51. Ill.—*Austin v. Austin*, 43 Ill. App. 488.
15 C.J. p 829 note 23.

52. Ind.—*Grantham Realty Corporation v. Bowers*, App., 18 N.E.2d 929—*Indianapolis Northern Traction Co. v. Long*, 127 N.E. 565, 73 Ind.App. 390.

Mo.—*Kirkman v. Stevenson*, 238 S.W. 543, 210 Mo.App. 380.

Ohio.—*Hamilton v. Stewart*, 5 Ohio N.P., N.S., 553.

R.I.—*Colagiovanni v. District Court of Sixth Judicial Dist.*, 133 A. 1, 2, 47 R.I. 323, citing *Corpus Juris*.
15 C.J. p 829 note 24.

Actual or constructive service

Presumption is the same whether service is actual or constructive.—*McHatton v. Rhodes*, 76 P. 1036, 143 Cal. 275, 101 Am.S.R. 125.

Defendant "duly served;" substituted service

(1) Where a judgment roll recites that "legal process . . . was duly served upon all . . . persons who had . . . any interest in said property who were in this state," and that other persons were served by publication, and where service by publication on defendant would not have warranted judgment against him, the recital that defendant was "duly served" means that he was "personally served," since he admittedly had an interest in the property and will be presumed to have been within the state; and such judgment is binding upon him, although naming him as "Kinney" instead of "Kenney."—*Bank of Com-*

merce & Trust Co. v. Kenney, 165 P. 8, 9, 175 Cal. 59.

(2) Where a court of general jurisdiction is authorized to bring in, by substituted service, nonresident defendants interested in property within its jurisdiction, but is not required to put proof of service in the record, it will be presumed, where the court has ordered such service, that it was made as ordered, although no evidence thereof appears of record.—*Applegate v. Lexington & Carter County Min. Co., Ky.*, 6 S.Ct. 742, 117 U.S. 255, 270, 29 L.Ed. 892.

Proof of want of service sought

Upon appeal in a suit to quiet title to land purchased by plaintiff at sheriff's sale in a partition action, the appellate court in examining the judgment in the partition action will not look for proof of personal service upon defendant in such action, but for want of such service.—*Bank of Commerce & Trust Co. v. Kenney*, 165 P. 8, 175 Cal. 59.

Notice of motion to increase ad damnum

Record of district court, reciting giving of leave to increase ad damnum on hearing of motion, carries with it presumption that notice of motion was given, so as to bestow jurisdiction.—*Colagiovanni v. District Court of Sixth Judicial Dist.*, 133 A. 1, 47 R.I. 323.

Notice of proceedings to enter judgment *nunc pro tunc* is presumed to have been given.—*Indianapolis Northern Traction Co. v. Long*, 127 N.E. 565, 73 Ind.App. 390.

53. N.J.—*Lafetra v. Beveridge*, 1 A. 2d 68, 124 N.J.Eq. 184.
15 C.J. p 830 note 25.

Presumption of authority of attorney see *Attorney and Client* § 73.

54. Ala.—*Blount County Bank v. Barnes*, 118 So. 460, 462, 218 Ala. 230, citing *Corpus Juris*.

Idaho.—*Pedersen v. Moore*, 184 P. 475, 32 Idaho 420.

Ill.—*Eddy v. Dodson*, 242 Ill.App. 508.

Mo.—*Gill v. Sovereign Camp, W. O. W.*, 236 S.W. 1073—*Hall v. Thurman*, App., 86 S.W.2d 1069—*Kirkman v. Stevenson*, 238 S.W. 543, 210 Mo.App. 380.

Tenn.—*Brewer v. Griggs*, 10 Tenn. App. 378.

15 C.J. p 830 note 27.

Necessity of jurisdiction's appearing of record see *infra* § 104.

Record recitals as to jurisdiction see *infra* § 101.

55. Mo.—*St. Charles Sav. Bank v. Thompson & Gray Quarry Co.*, 210 S.W. 868.

Presumption not overcome

The presumption was held not overcome by a return of service by a sheriff of a different locality which stated that defendant's president was served at defendant's business office, where the recital as to defendant's office was surplusage.—*St. Charles Sav. Bank v. Thompson & Gray Quarry Co., Mo.*, 210 S.W. 868.

Representation by agent in county

Where, at the time of the issuance of a benefit certificate sued on, a defendant association had a camp located in a particular county, and where plaintiff furnished papers concerning the death of insured to the clerk of the camp in that county, it could be inferred that the association had agents transacting business in such county, so as to give the circuit court of such county jurisdiction under the governing statute.—*Gill v. Sovereign Camp, W. O. W., Mo.App.*, 236 S.W. 1073.

56. U.S.—*Foster v. Givens, Ky.*, 67 F. 684, 14 C.C.A. 625.

15 C.J. p 830 note 27 [a].

57. Colo.—*Van Wagenen v. Carpenter*, 61 P. 698, 27 Colo. 444.

15 C.J. p 831 note 32.

cial statutory powers by the usual common-law and chancery proceedings and practice;⁵⁸ likewise it arises where such courts enforce statutory causes of action of which they have cognizance in the exercise of their general jurisdiction over the subject matter of such actions, rather than in the exercise of the special jurisdiction conferred on them by statute.⁵⁹

On the other hand, it is very generally considered that there is no presumption of jurisdiction where a court of general jurisdiction exercises, in a special statutory manner, or otherwise than according to the course of the common law, special statutory powers not belonging to it as such court, and not within its ordinary jurisdiction,⁶⁰ since, under such circumstances, the court stands, with respect to the

special power exercised, on the same footing with courts of limited and inferior jurisdiction.⁶¹

d. Conclusiveness of Presumption

The presumption of the jurisdiction of a court of general jurisdiction is rebuttable; under most authorities it may be overcome only by recitals in the record affirmatively showing lack of jurisdiction.

The presumption in favor of the jurisdiction of a court of general jurisdiction, discussed in § 96 a supra, is not conclusive, but may be rebutted.⁶² The burden is on the party claiming want of jurisdiction to show such want;⁶³ and while there are authorities holding that lack of jurisdiction, at least over the subject matter,⁶⁴ may be shown by evidence dehors the record,⁶⁵ according to the weight of authority the presumption in favor of the juris-

58. Tenn.—Magevney v. Karsch, 65 S.W.2d 562, 167 Tenn. 32, 92 A.L.R. 343.

15 C.J. p 831 note 33.

59. Mo.—Charley v. Kelley, 25 S.W. 571, 120 Mo. 134.

15 C.J. p 831 note 34.

60. Ala.—Hurt v. Knox, 126 So. 110, 220 Ala. 448.

Ark.—Grand Lodge, A. O. U. W., v. Adair, 32 S.W.2d 430, 182 Ark. 684—Wallace v. Hill, 205 S.W. 699, 135 Ark. 353.

Ill.—People ex rel. Lange v. Old Portage Park Dist., 190 N.E. 664, 356 Ill. 340. See Broadway Bank of St. Louis, Mo., v. McGee Creek Levee & Drainage Dist., 204 Ill. App. 592.

Mo.—Crabtree v. Aetna Life Ins. Co., 111 S.W.2d 103, 108, 341 Mo. 1173, quoting *Corpus Juris*.

Or.—Murphy v. Bjellk, 170 P. 723, 87 Or. 329, denying rehearing 169 P. 520, 87 Or. 329.

Pa.—Re Pine Hill Road, 6 Pa. Dist. & Co. 441, 443, quoting *Corpus Juris*.

S.C.—Ex parte Hart, 195 S.E. 253, 256, 186 S.C. 125, citing *Corpus Juris*.

Tex.—Mingus v. Wadley, 285 S.W. 1084, 1089, 115 Tex. 551, quoting *Corpus Juris*—Stallings v. Federal Underwriters Exchange, Civ.App., 108 S.W.2d 449.

15 C.J. p 831 note 35.

Action for divorce

Idaho.—Platts v. Platts, 215 P. 464, 37 Idaho 149.

Nev.—Danforth v. Danforth, 166 P. 927, 40 Nev. 435.

Va.—Blankenship v. Blankenship, 100 S.E. 538, 125 Va. 595.

Bankrupt's application for order cancelling judgment

N.Y.—Buffalo Sav. Bank v. Tuott, 260 N.Y.S. 249, 236 App.Div. 556.

Proceeding to annex territory to park district

Ill.—People ex rel. Lange v. Old

Portage Park Dist., 190 N.E. 664, 356 Ill. 340.

Proceedings under paupers act

Ill.—Brown v. Van Keuren, 172 N.E. 1, 340 Ill. 118.

Suit based on workmen's compensation proceeding

U.S.—Maryland Casualty Co. v. Gerlaske, C.C.A. Tex., 68 F.2d 497.

Tex.—Mingus v. Wadley, 285 S.W. 1084, 115 Tex. 551.

Awarding writ of possession; execution sale

Although the superior court has general jurisdiction, it exercises a jurisdiction which is special, limited, and summary and not according to the course of common law when acting under a statute empowering it to award a writ of possession to a purchaser at an execution sale; hence, nothing is to be taken by intendment in favor of its jurisdiction in such a case.—Stidham v. Brooks, Del., 5 A.2d 522.

Procedure for confession of judgment

This rule is not applicable to a statute merely regulating the mode of procedure in receiving the confession of a judgment.—Bush v. Hanson, 70 Ill. 480.

61. Idaho.—Platts v. Platts, 215 P. 464, 37 Idaho 149.

Ill.—Brown v. Van Keuren, 172 N.E. 1, 340 Ill. 118—Keal v. Rhydderck, 148 N.E. 53, 317 Ill. 231. See Broadway Bank of St. Louis, Mo., v. McGee Creek Levee & Drainage Dist., 204 Ill. App. 592.

Mo.—Crabtree v. Aetna Life Ins. Co., 111 S.W.2d 103, 108, 341 Mo. 1173, quoting *Corpus Juris*.

Tex.—Mingus v. Wadley, 285 S.W. 1084, 1089, 115 Tex. 551, quoting *Corpus Juris*.

15 C.J. p 827 note 17 [f], p 832 note 36.

Basis for rule

The question whether a superior

court acting under a special authority or jurisdiction conferred upon it by statute is to be regarded as one of limited and inferior jurisdiction "is probably a question of authority more than of reason, for it is doubtful if there is any principle of reason or justice which decides either way."—Cooper v. Sunderland, 3 Iowa 114, 127, 66 Am.D. 52.

62. Iowa.—Blain v. Dean, 142 N.W. 418, 160 Iowa 708.

N.Y.—People v. Liscomb, 60 N.Y. 559, 19 Am.R. 211, reversing 3 Hun 760, 6 Thomps. & C. 258.

Presumptions as to jurisdiction in collateral attack on judgments see the C.J.S. title Judgments § 425, also 34 C.J. p 537 note 72—p 546 note 18.

63. Ind.—Fitch v. Gundrum, 122 N.E. 428, 69 Ind.App. 572.

"Clear and explicit" proof

"The proof required to overcome the presumption that exists in favor of the jurisdiction of a court of general jurisdiction must be clear and explicit."—Egan v. Giragosian, 245 N.Y.S. 69, 71, 137 Misc. 830.

If an allegation of a jurisdictional fact is denied, the burden of ousting the court of jurisdiction by proof is upon the party seeking such ouster.—Empire Ranch, etc., Co., 135 P. 127, 24 Colo.App. 464.

Acts or omissions affecting the validity of the proceedings must be affirmatively shown.—Johnson v. Victoria Chief Copper Min., etc., Co., 112 N.Y.S. 346, 60 Misc. 468, affirmed 114 N.Y.S. 1132, 129 App.Div. 910—14 C.J. p 832 note 43.

64. Idaho.—Williams v. Sherman, 212 P. 971, 975, 36 Idaho 494, citing *Corpus Juris*.

15 C.J. p 832 note 42.

65. N.Y.—Ferguson v. Crawford, 70 N.Y. 253, 26 Am.R. 589.

15 C.J. p 832 note 42.

diction of superior courts may be overcome only by recitals in the record showing affirmatively that the court was without jurisdiction.⁶⁶

§ 97. Courts of Inferior, Limited, or Special Jurisdiction

No presumption exists in favor of the jurisdiction of courts, or other tribunals, of inferior, limited, or special jurisdiction; but once jurisdiction is established the regularity of their proceedings and the validity of subsequent proceedings are presumed.

No presumption exists in favor of the jurisdiction of courts of inferior, limited, or special jurisdiction,⁶⁷ or in favor of the jurisdiction of inferior magistrates or tribunals exercising judicial functions,⁶⁸ and jurisdiction in such cases must affirmatively appear,⁶⁹ and the facts conferring jurisdic-

tion affirmatively found to exist;⁷⁰ however, it is within the constitutional power of the legislature to change this rule.⁷¹ So the mere exercise of jurisdiction by such courts does not raise a presumption of the existence of the requisite jurisdictional facts,⁷² and one who relies on a decision or order of such a court, or who claims any right or benefit under its proceedings, must affirmatively show its jurisdiction by alleging and proving it;⁷³ and this rule applies to jurisdiction both of the person and of the subject matter.⁷⁴ Where, however, jurisdiction is once established, and these courts have not transcended their powers, the validity of subsequent proceedings will be presumed until the contrary is shown,⁷⁵ and the same presumptions of regularity will attend the proceedings as apply to the acts of courts of general jurisdiction.⁷⁶ Thus one

66. Idaho.—Williams v. Sherman, 212 P. 971, 36 Idaho 494, 15 C.J. p 832 note 41.

67. Ill.—People v. Miller, 171 N.E. 672, 339 Ill. 573.

Miss.—Jackson Equipment & Service Co. v. Dunlop, 160 So. 734, 177 Miss. 752—Broom v. Board of Sup'rs of Jefferson Davis County, 158 So. 344, 171 Miss. 586.

Neb.—Gloor v. Torczon, 187 N.W. 887, 108 Neb. 402—Kuker v. Bein-dorff, 88 N.W. 190, 63 Neb. 91.

Nev.—State v. Justice Court of Reno Tp., Washoe County, 233 P. 40, 48 Nev. 425.

N.Y.—Patrzykowski v. Mursten, 294 N.Y.S. 62, 250 App.Div. 355—Buffalo Sav. Bank v. Tuott, 260 N.Y.S. 249, 236 App.Div. 556—Klatzko v. Golodetz, 184 N.Y.S. 367, 193 App. Div. 854—Lang v. Dreyer, 9 N.Y.S. 2d 970, 170 Misc. 207.

Ohio.—State ex rel. Sparks v. Weber, 192 N.E. 386, 48 Ohio App. 60.

Tenn.—Brewer v. Griggs, 10 Tenn. App. 378, 395, quoting *Corpus Juris*.

Vt.—Barber v. Chase, 143 A. 302, 101 Vt. 343.

15 C.J. p 833 note 44.
County court of limited, but not inferior, jurisdiction see *infra* § 99.

Where the privilege of suing the state is granted, with conditions, the jurisdiction is limited and special and no presumption will be entertained in support of it.—Ross v. State, 173 N.Y.S. 656, 186 App.Div. 156, affirming 175 N.Y.S. 304, 103 Misc. 196.

68. N.Y.—People ex rel. Hayes v. Waldo, 105 N.E. 961, 212 N.Y. 156 —People ex rel. Liberty v. Cooke, 177 N.Y.S. 116, 188 App.Div. 351.

City council sitting as a board of equalization.—Rickard v. Council of City of Santa Barbara, 192 P. 726, 49 Cal.App. 58.

School district

Tex.—Geffert v. Yorktown Independent School Dist., Com.App., 290 S. W. 1083, reversing, Civ.App., 285 S.W. 345.

County commissioners

Ohio.—State ex rel. Bolsinger v. Swing, 6 N.E.2d 999, 54 Ohio App. 251.

69. Nev.—Court of Reno Tp., Washoe County, 233 P. 40, 48 Nev. 425.

N.Y.—People ex rel. Tweed v. Liscomb, 60 N.Y. 559, 19 Am.R. 211, 11 Alb.L.J. 396—Lang v. Dreyer, 9 N.Y.S.2d 970, 170 Misc. 207.

Ohio.—State ex rel. Bolsinger v. Swing, 6 N.E.2d 999, 54 Ohio App. 251.

Tex.—Geffert v. Yorktown Independent School Dist., Com.App., 290 S. W. 1083, reversing, Civ.App., 285 S.W. 345.

W.Va.—Slater v. Melton, 193 S.E. 185, 119 W.Va. 259.

Entries and decisions

No presumption exists in favor of entries and decisions of court of limited jurisdiction unless record affirmatively shows that the court had jurisdiction to make them.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 323.

70. Miss.—Pettibone v. Wells, 179 So. 336, 181 Miss. 425—Martin v. Board of Sup'rs of Winston County, 178 So. 315, 181 Miss. 363.

N.Y.—Ross v. State, 173 N.Y.S. 656, 186 App.Div. 156, affirming 175 N.Y.S. 304, 103 Misc. 196.

Ohio.—State ex rel. Bolsinger v. Swing, 6 N.E.2d 999, 54 Ohio App. 251.

71. W.Va.—Slater v. Melton, 193 S.E. 185, 119 W.Va. 259.
15 C.J. p 833 note 44 [b].

Municipal court of Boston held subject to statute applicable to district courts generally, providing that same presumption as would be made

in favor of proceedings of other courts of superior and general jurisdiction shall obtain.—Long v. George, 195 N.E. 377, 290 Mass. 316.

72. Tex.—Mingus v. Wadley, 285 S. W. 1084, 1089, 115 Tex. 551, quoting *Corpus Juris*—Geffert v. Yorktown Independent School Dist., Com.App., 290 S.W. 1083, 1085, quoting *Corpus Juris*, and reversing, Civ.App., 285 S.W. 345.
15 C.J. p 833 note 44.

73. Tex.—Mingus v. Wadley, 285 S. W. 1084, 1089, 115 Tex. 551, quoting *Corpus Juris*—Geffert v. Yorktown Independent School Dist., Com.App., 290 S.W. 1083, 1085, quoting *Corpus Juris*, and reversing, Civ.App., 285 S.W. 345.

Va.—Forbes v. State Council, Junior Order United American Mechanics of Virginia, 60 S.E. 81, 107 Va. 853.

15 C.J. p 834 note 45.

74. Tex.—Mingus v. Wadley, 285 S. W. 1084, 1089, 115 Tex. 551, quoting *Corpus Juris*.
15 C.J. p 834 notes 44–46.

75. Kan.—Cahill Swift Mfg. Co. v. Hayes, 157 P. 1169, 98 Kan. 269.
15 C.J. p 834 note 47.

76. Ill.—Smith v. Herdlicka, 154 N.E. 414, 323 Ill. 585.
Ind.—Ward v. Board of Com'rs of Lake County, 157 N.E. 721, 199 Ind. 467.

The maxim, "*Omnia praesumuntur rite esse acta*," applies

Kan.—Cahill Swift Mfg. Co. v. Hayes, 157 P. 1169, 98 Kan. 269.

Pa.—Fowler v. Jenkins, 28 Pa. 176.

Where a board of supervisors has found a jurisdictional fact in support of a judgment, the judgment is entitled to the same force and effect with respect to such fact as the judgment of a court of general jurisdiction.—Pettibone v. Wells, 179 So. 336, 181 Miss. 425—Martin v.

who relies on a loss of jurisdiction to invalidate a judgment must affirmatively show such loss.⁷⁷

§ 98. Probate and Similar Courts

There is a presumption of the jurisdiction of probate and similar courts when they possess the attributes of courts of general jurisdiction, but not when they are held to have a special and limited jurisdiction.

The rules as to the presumptions in favor of the jurisdiction of courts of general jurisdiction, as set out in § 96 supra, apply to courts of probate, and those with like powers, where they are regarded as courts of general jurisdiction or as possessing the attributes thereof, or when they are adjudicating the class of questions over which they have general jurisdiction.⁷⁸ These presumptions may be applied even though the courts in question have not exclusive jurisdiction,⁷⁹ or have a limited, but not a special or inferior, jurisdiction,⁸⁰ or have powers which are limited to certain specified subjects.⁸¹

On the other hand, the rule against the presumption of jurisdiction in courts of inferior, limited, or special jurisdiction, as set out in § 97 supra, is ap-

plicable to probate and similar courts where their jurisdiction is held to be a special and limited one, not according to the common law,⁸² particularly when they exercise powers in special matters constituting exceptions to their general authority.⁸³

So the presumption of jurisdiction has been indulged with respect to a court by which a guardian was appointed,⁸⁴ but not, in another case, where the court was held to be, in such matters, one of special and limited jurisdiction.⁸⁵

§ 99. County Courts

There is a presumption of the jurisdiction of county courts where their jurisdiction is general or they are adjudicating classes of questions as to which they have general jurisdiction.

The presumption in favor of the jurisdiction of courts of general jurisdiction, as discussed in § 96, supra, applies to county courts where their jurisdiction is general,⁸⁶ or where they are courts of limited, but not of inferior, jurisdiction, adjudicating particular classes of questions as to which they have general jurisdiction;⁸⁷ and where jurisdiction

Board of Sup'rs of Winston County, 178 So. 315, 181 Miss. 363.

77. N.Y.—Bowman v. Seaman, 137 N.Y.S. 568, 152 App.Div. 690, reargument and appeal to court of appeals denied 137 N.Y.S. 1112, 152 App. 937.

78. Ariz.—Varnes v. White, 12 P. 2d 870, 40 Ariz. 427.

Ill.—Illinois Merchants' Trust Co. v. Turner, 173 N.E. 52, 341 Ill. 101.

Kan.—Denton v. Miller, 203 P. 693, 110 Kan. 292.

Mo.—Ussery v. Haynes, 127 S.W.2d 410.

Neb.—Foote v. Chittenden, 184 N.W. 167, 106 Neb. 704.

Ohio.—Hamilton v. Stewart, 5 Ohio N.P., N.S., 553.

Tex.—Hannon v. Henson, Com.App., 15 S.W.2d 579, affirming, Civ.App., 7 S.W.2d 613.

15 C.J. p 834 note 51—34 C.J. p 545 note 15.

Burden of showing want of jurisdiction in a probate court is on the party claiming such want, and this burden requires clear and convincing proof.—Collins v. Maude, 77 P. 945, 144 Cal. 289.

Regularity of proceedings

(1) "The probate court is a court of general jurisdiction, and its proceedings are presumed to be regular unless shown otherwise."—Marsh v. Hanna, 259 N.W. 225, 226, 219 Iowa 682.

(2) "When the [probate] court [administering an estate] has once obtained jurisdiction of the res, all presumptions and intendments are to

be taken in favor of the regularity and validity of its proceedings."—In re Upton's Estate, 92 P.2d 210, 212, 199 Wash. 447, 123 A.L.R. 1220—State ex rel. Lauridsen v. Superior Court for King County, 37 P.2d 209, 213, 179 Wash. 198, 95 A.L.R. 819.

Adoption proceedings

Jurisdiction will be presumed in favor of the judgment of a probate court in adoption proceedings where these proceedings are held to be in accordance with the usual practice of courts of record.—Magevney v. Karsch, 65 S.W.2d 562, 167 Tenn. 32, 92 A.L.R. 343.

79. Ala.—Acklen v. Goodman, 77 Ala. 521.

Wash.—Magee v. Big Bend Land Co., 99 P. 16, 51 Wash. 406.

80. Ill.—Salomon v. Wincox, 104 Ill. App. 277.

Mo.—Crohn v. Modern Woodmen, 129 S.W. 1069, 145 Mo.App. 158.

N.J.—Hess v. Cole, 23 N.J.Law 116.

81. Minn.—Davis v. Hudson, 11 N. W. 136, 29 Minn. 27.

Mo.—Viehmann v. Viehmann, 250 S. W. 565, 298 Mo. 356.

82. Vt.—Probate Court for District of Fair Haven v. Indemnity Ins. Co. of North America, 171 A. 336, 106 Vt. 207—Barber v. Chase, 143 A. 302, 101 Vt. 343.

15 C.J. p 835 note 56—34 C.J. p 546 note 17.

83. Ala.—Rucker v. Tennessee Coal, etc., Co., 58 So. 465, 176 Ala. 456.

15 C.J. p 835 note 57—34 C.J. p 546 note 18.

84. Iowa.—Marsh v. Hanna, 259 N. W. 225, 219 Iowa 682.

Okl.—Powers v. Brown, 252 P. 27, 122 Okl. 40.

28 C.J. p 1070 note 93.

85. Vt.—Holden v. Scanlin, 30 Vt. 177.

86. Ill.—Moats v. Moore, 199 Ill. App. 270.

15 C.J. p 835 note 59.

In an action on a note and to foreclose a mortgage on personalty, brought in a county court, it was held, with respect to the allegation of the value of the mortgaged property, that "every presumption must be indulged in favor of the jurisdiction of the court."—Olloqui v. Duran, Civ.App., 60 S.W.2d 808, 809, set aside, on other grounds 92 S.W. 2d 436, 127 Tex. 156.

Regularity of proceedings

The county court of Lincoln county is a court of record, and the usual presumption in favor of regularity of proceedings is applicable thereto.—State ex rel. Leverance v. Frey, Wis., 286 N.W. 705.

87. U.S.—Montgomery v. Equitable Life Assur. Soc. of U. S., C.C.A.Ill., 83 F.2d 758.

Ill.—People v. Miller, 171 N.E. 672, 339 Ill. 573—Hoit v. Snodgrass, 146 N.E. 562, 315 Ill. 548—Little v. Blue Goose Motor Coach Co., 244 Ill.App. 427.

15 C.J. p 835 note 60.

"Where a county court possesses general jurisdiction of a given class of subject-matters, the possession of

of the subject matter has been acquired by such a court it is presumed to continue.⁸⁸ However, where a county court is regarded as an inferior court, acting under special statutory directions and not according to the course of the common law, no inferences in favor of its jurisdiction may be indulged.⁸⁹

§ 100. Courts of Another State

It is presumed, unless the contrary appears, that courts of record, or of general jurisdiction, of another state had the authority which they exercised; but no presumption of jurisdiction obtains when such courts have acted in matters as to which their jurisdiction is held a limited one.

In the absence of evidence to the contrary, it is presumed that courts of record, or of general juris-

diction, of another state had the authority which they assumed to exercise in particular cases,⁹⁰ and the presumption must be overcome by clear and convincing⁹¹ proof;⁹² but such presumption is not conclusive and does not preclude a collateral inquiry into the question whether or not jurisdiction actually existed.⁹³

The presumptions generally applicable to courts of general jurisdiction do not apply where the foreign court is acting in a matter as to which it is considered a court of limited jurisdiction;⁹⁴ and it is not necessarily to be presumed, in the absence of any showing to that effect, that a court of another state is a court of general jurisdiction whose jurisdiction is to be presumed.⁹⁵

I. RECORD RECITALS AS TO JURISDICTION

§ 101. Courts of General Jurisdiction

Jurisdictional facts expressly found by a superior

court of general jurisdiction, or otherwise appearing of record, are conclusively established, unless irreconcilable with other parts of the record or, under some authorities,

jurisdiction assumed to be exercised in a particular case falling within that class is, in a collateral proceeding, presumed. All matters necessary to give the court jurisdiction, upon which the record is silent, are presumed.—*Foot v. Chittenden*, 184 N.W. 167, 168, 106 Neb. 704.

"The county court is a court of general probate jurisdiction, and it should not be held to have acted in excess of its jurisdiction, unless it clearly appears that it entered a decree not authorized by law."—*Hunter v. Wittier*, 250 P. 793, 794, 120 Okl. 103.

Alleging cause of action within jurisdiction

As to matters over which a county court has general jurisdiction, if petition shows facts sufficient to show cause of action within such jurisdiction, and facts on face of record do not establish lack of jurisdiction, all presumptions are made in favor of power of court to act.—*Brandeen v. Lou*, 201 N.W. 665, 113 Neb. 34. Appointment of guardian see *supra* § 98.

Insanity proceedings

It will be presumed that a county court having general jurisdiction in insanity proceedings had jurisdiction both of the person and of the subject matter therein.—*Moats v. Moore*, 199 Ill.App. 270.

Missouri county courts

While early cases in Missouri held that the facts necessary to show jurisdiction of county courts must appear from their records, these cases were expressly overruled by *Johnson v. Beazley*, 65 Mo. 250, 27 Am.R. 276, and the principle announced that as to matters exclusively within their

jurisdiction the same presumptions are to be indulged in favor of their proceedings, judgments and orders as are indulged with respect to a court of general jurisdiction.—*Ussery v. Haynes*, Mo., 127 S.W.2d 410.

88. Iowa.—*Davenport Mut. Sav. Fund, etc.; Assoc. v. Schmidt*, 15 Iowa 213.

89. Mo.—*Evans v. Andres*, 42 S.W. 2d 32, 226 Mo.App. 63.

Adoption proceedings

Ill.—*Keal v. Rhydderck*, 148 N.E. 53, 317 Ill. 231—*Kennedy v. Borah*, 80 N.E. 767, 226 Ill. 243.

90. Ill.—*Eddy v. Dodson*, 242 Ill. App. 508—*Blakeslee v. Blakeslee*, 213 Ill.App. 168.

Mass.—*Robinson v. Freeman*, 128 N.E. 718, 236 Mass. 446.

Okla.—*Fidelity & Deposit Co. of Maryland v. Clanton*, 28 P.2d 566, 167 Okl. 106.

W.Va.—*Citizens' Nat. Bank of Port Allegany, Pa., v. Consolidated Glass Co.*, 97 S.E. 689, 83 W.Va. 1.

15 C.J. p 835 note 62—28 C.J. p 1070 note 93 [a]—34 C.J. p 1140 note 62.

Impeachment of judgments of courts of sister states for want of jurisdiction see the C.J.S. title Judgments § 893, also 34 C.J. p 1138 note 56—p 1151 note 64.

Jurisdiction to determine remedy

A court of another state having jurisdiction of the subject matter and the parties is presumed to have jurisdiction to determine the remedy.—*Rubin v. Dale*, 288 P. 223, 156 Wash. 676.

Service by publication

Presumption in favor of jurisdiction is the same where service made

by publication as where it was personal.—*In re Wiechers' Estate*, 250 P. 397, 199 Cal. 523, certiorari denied *Wiechers v. Wiechers*, 47 S.Ct. 476, 273 U.S. 762, 71 L.Ed. 879.

Lack of jurisdiction in similar courts

The presumption will be indulged even though similar courts of the state in which the question is raised have no such authority as that exercised by the court of the other state.—*Council Bluffs Sav. Bank v. Griswold*, 70 N.W. 376, 50 Neb. 753.

91. Cal.—*In re Wiechers' Estate*, 250 P. 397, 199 Cal. 523, certiorari denied *Wiechers v. Wiechers*, 47 S.Ct. 476, 273 U.S. 762, 71 L.Ed. 879.

92. W.Va.—*Citizens' Nat. Bank of Port Allegany, Pa., v. Consolidated Glass Co.*, 97 S.E. 689, 83 W.Va. 1.

93. W.Va.—*Citizens' Nat. Bank of Port Allegany, Pa., v. Consolidated Glass Co.*, *supra*.

15 C.J. p 836 note 63—34 C.J. p 1142 note 72.

94. Idaho.—*Platts v. Platts*, 215 P. 464, 37 Idaho 149.

Special proceeding in Mexican court

Proceeding under Mexican laws to obtain title to vacant land is special proceeding, and no jurisdictional presumptions with respect thereto may be entertained, but proof must show jurisdiction.—*Willis v. First Real Estate & Investment Co., C.C.A.Tex.*, 68 F.2d 671, certiorari denied 54 S.Ct. 631, 292 U.S. 626, rehearing denied 54 S.Ct. 713, 292 U.S. 604, 78 L.Ed. 1467.

95. N.Y.—*Benedict v. Clarke*, 123 N.Y.S. 964, 139 App.Div. 242.

15 C.J. p 836 note 64.

with evidence aliunde; conversely, where it appears from the record that the court was without jurisdiction, no presumption in favor of jurisdiction can be indulged.

Jurisdictional facts expressly found by a superior court of general jurisdiction, or otherwise appearing of record, and relating to matter within the general scope of the courts' powers, are conclusively established thereby, and cannot be questioned in a collateral proceeding,⁹⁶ even though all facts essential to jurisdiction are not disclosed by the record,⁹⁷ unless the recitals as to jurisdiction are irreconcilable with the other facts disclosed by the record, in which case the record impeaches itself,⁹⁸ or, under some authorities, unless impeached by evidence aliunde.⁹⁹

Conversely, where it appears from the record that the court was without jurisdiction, no presumption in favor of jurisdiction can be indulged, and the action of the court is void.¹ When the record states the evidence or makes an averment showing a want of jurisdiction, it will not be presumed in support of the judgment that there was other or different evidence respecting the fact, or that the fact was otherwise than averred,² and if the record on

the whole shows that what was done to acquire jurisdiction was insufficient, it will not be presumed that some other thing, not shown by the record, which would confer jurisdiction was done,³ the whole record being taken together for this purpose.⁴ Court records generally are considered in §§ 225-237 *infra*; the effect given to record recitals of jurisdiction upon appeal is considered in Appeal and Error § 1536 c, the effect given to recitals of jurisdiction in judgments on collateral attack generally in the C.J.S. title Judgments § 426, also 34 C.J. p 547 note 19-p 552 note 43, and the verity and conclusiveness of the judgment record in the C.J.S. title Judgments § 132, also 34 C.J. p 95 note 22-p 96 note 32.

If a court has exercised special powers, and its judgment or decree recites a compliance with the statute, it will conclusively be presumed that the court acted on sufficient evidence of the facts recited,⁵ and a general recital in the judgment or decree that the statutory requirements have been fulfilled is sufficient, although the facts are not set out in the record;⁶ but if the facts are set out in the record,

96. U.S.—Shields v. Shields, D.C. Mo., 26 F.Supp. 211.

Ill.—People v. Miller, 171 N.E. 672, 339 Ill. 573.

Okla.—Ex parte Massengale, Cr., 93 P.2d 41.

15 C.J. p 837 note 67.

97. Ark.—Fidelity Mortg. Co. v. Evans, 270 S.W. 624, 168 Ark. 459.

Neb.—In re Ramp's Estate, 201 N.W. 676, 113 Neb. 3.

Or.—In re Lyon's Guardianship, 265 P. 1087, 128 Or. 94.

Tex.—Hardy v. Beatty, 19 S.W. 778, 84 Tex. 562—Carroll v. McLeod, Com.App., 130 S.W.2d 277, affirming McLeod v. Carroll, Civ.App., 109 S.W.2d 316—Hannon v. Henson, Com.App., 15 S.W.2d 579.

Va.—Shelton v. Sydnor, 102 S.E. 83, 126 Va. 625.

15 C.J. p 838 note 68.

98. Ill.—People ex rel. Carlstrom v. Shurtleff, 189 N.E. 291, 355 Ill. 210.

Wyo.—State v. Underwood, 86 P.2d 707, 719, citing Corpus Juris.

15 C.J. p 838 note 69.

99. Iowa.—Shehan v. Stuart, 90 N.W. 614, 117 Iowa 207.

N.Y.—Ferguson v. Crawford, 70 N.Y. 253, 86 N.Y. 609.

34 C.J. p 547 note 21, p 550 note 35. "Perhaps," if shown aliunde.

State v. Underwood, Wyo., 86 P.2d 707, 719.

Federal court's record recitals on the subject of jurisdiction may be controverted by extrinsic evidence.

Mo.—Stuart v. Dickinson, 235 S.W. 446, 290 Mo. 516.

Tex.—Batjer v. Roberts, Civ.App., 148 S.W. 841.

1. Cal.—Adolph M. Schwartz, Inc. v. Burnett Pharmacy, 295 P. 508, 112 Cal.App. 781.

Ga.—Campbell v. Atlanta Coach Co., 200 S.E. 203, 58 Ga.App. 824, transferred 196 S.E. 769, 185 Ga. 77.

15 C.J. p 838 note 70.

"The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent."—Galpin v. Page, Cal., 18 Wall. 350, 366, 21 L. Ed. 959.

"A fact apparent from the mandatory record, showing that fundamental law was disregarded in the establishment of the judgment, will render it null and void for all purposes."—Stockyards Nat. Bank v. Bragg, 245 P. 966, 973, 67 Utah 60.

Service on wrong corporation, as shown by writ in record, held fatal to garnishee judgment.—American Discount Corporation v. Gerrard, 286 P. 666, 156 Wash. 276.

2. Ill.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

15 C.J. p 838 note 71—34 C.J. p 551 note 39.

Effect of statute as to recitals

"It is . . . urged . . . that, because of our statute . . . orders or decrees made by a court or judge in probate proceedings need

not recite the existence of facts or the performance of acts upon which the jurisdiction of the court may depend . . . here the facts and purpose upon and for which the mortgage was authorized are recited and contained in the order, and what if anything showing such purpose was there lacking was affirmatively brought into the case by the plaintiff's pleadings, and by its stipulation of facts put in evidence by it . . . Thus, whatever presumption of jurisdictional facts may be indulged from a naked order containing merely the matters ordered and adjudged is on the record itself dissipated."—Stockyards Nat. Bank v. Bragg, 245 P. 966, 973, 67 Utah 60.

3. Ill.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

15 C.J. p 839 note 72—34 C.J. p 551 note 40.

Omission in return of substituted service in another county of facts showing existence of any condition required by statute to authorize such service held ground for reversal.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

4. Or.—Laughlin v. Hughes, 89 P.2d 568.

15 C.J. p 839 note 73—34 C.J. p 551 note 41.

5. Ill.—Reedy v. Camfield, 42 N.E. 833, 159 Ill. 254.

15 C.J. p 839 note 76.

6. Ark.—McLain v. Duncan, 20 S.W. 597, 57 Ark. 49.

and it appears therefrom that the statute has not been complied with, the recital of the judgment or decree will not avail.⁷

Service by publication. If the judgment or decree recites the fact of publication, although the record shows nothing further with respect thereto, it is generally held that such recital will raise at least a prima facie presumption that the statutory requirements of service by publication were complied with.⁸

§ 102. Courts of Limited or Special Jurisdiction

The recital of jurisdictional facts in the record of a court of limited or special jurisdiction is conclusive, unless want of jurisdiction appears on the face of the proceedings, and unless jurisdiction depends on a collateral fact which can be decided without going into the merits of the case, in which case the recital may be questioned collaterally and disproved.

Where the record of a court of limited or special jurisdiction declares the ascertainment of the ju-

risdictional facts, which appears to be made in the exercise of its authority,⁹ it is, as a general rule, conclusive,¹⁰ unless the want of jurisdiction is apparent on the face of the record or proceedings.¹¹ This is true at least where the question of jurisdiction is involved in the question which is the gist of the suit, so that it cannot be decided without going into the merits of the case;¹² on the other hand, where jurisdiction depends upon some collateral fact which can be decided without going into the case on its merits, the recital thereof, although constituting prima facie evidence of jurisdiction,¹³ may be questioned collaterally and disproved.¹⁴

A clerical error in the recital of jurisdictional facts is not fatal.¹⁵

§ 103. Courts of Another State

Record recitals as to jurisdiction as affecting judgments of courts of another state are considered in the C.J.S. title Judgments §§ 893, 896, also 34 C.J. p 1138 note 56—p 1151 note 64, p 1154 notes 82–85.

J. NECESSITY OF JURISDICTION'S APPEARING OF RECORD

§ 104. Courts of General Jurisdiction

It is generally not necessary that the record of a court of general jurisdiction show the existence of jurisdiction; but, in order for this rule to apply, it should appear from the record that the cause of action comes within the class of cases embraced within the general or ordinary jurisdiction of the court, and the rule does not apply where a statute confers special authority upon

such a court, not to be exercised according to the course of the common law.

Since, as appears in § 96 supra, it is presumed that a court of general jurisdiction has the authority which it has assumed to exercise in a particular case, it is not necessary as a general rule, that the record of the proceedings of such court should af-

7. Ark.—State v. Wilson, 27 S.W.2d 106, 181 Ark. 683.

Ill.—People v. Brewer, 160 N.E. 76, 328 Ill. 472.

15 C.J. p 839 note 78.

8. U.S.—Virginia & West Virginia Coal Co. v. Charles, D.C.Va., 251 F. 83, affirmed 254 F. 379, 165 C.C.A. 599, error allowed 255 F. 992, 167 C.C.A. 671, error dismissed 40 S.Ct. 345, 252 U.S. 569, 64 L.Ed. 720.

Ark.—Matthews v. Williamson, 220 S.W. 58, 143 Ark. 281.

W.Va.—Williams v. Monico, 132 S.E. 652, 101 W.Va. 304.

15 C.J. p 839 note 75—34 C.J. p 542 note 99.

9. Ill.—Vyverberg v. Vyverberg, 142 N.E. 191, 310 Ill. 599.

10. Ala.—Miller v. Thompson, 96 So. 481, 209 Ala. 469.

Miss.—Martin v. Board of Sup'rs of Winston County, 178 So. 315, 181 Miss. 363.

15 C.J. p 839 note 79—34 C.J. p 553 note 51.

Courts of limited or inferior juris-

diction generally see *infra* §§ 244–248.

General jurisdiction and limited or special jurisdiction distinguished see *supra* § 16.

11. Ind.—Waugh v. Board of Com'rs of Montgomery County, 115 N.E. 356, 64 Ind.App. 123.

15 C.J. p 840 note 80—34 C.J. p 554 note 52.

If record reveals foreign corporation as defendant, default judgment will be vacated where court lacks any jurisdiction over foreign corporations.—Wachtel v. Diamond State Engineering Corp., 213 N.Y.S. 77, 215 App.Div. 15.

Jurisdiction of the person is not acquired where the record shows that notice was not given as required by law.—Keal v. Rhydderck, 148 N.E. 53, 317 Ill. 231.

12. Ala.—Ex parte Griffith, 95 So. 551, 209 Ala. 158.

15 C.J. p 840 note 81.

13. Ala.—Miller v. Thompson, 96 So. 481, 209 Ala. 469—Ex parte Griffith, 95 So. 551, 209 Ala. 158.

14. Ala.—Grayson v. Schwab, 179 So. 377, 235 Ala. 398—Ex parte Griffith, 95 So. 551, 552, 209 Ala. 158.

15 C.J. p 840 note 82.

"The general line of distinction seems to be that, where the fact recited by the decree is necessary to the court's jurisdiction of the thing or of the person—usually a matter of record, dehors the decree itself—without which the court cannot proceed to a hearing, the recital in the decree is only prima facie evidence of fact thus recited, and its verity may be impeached by evidence dehors the record; but, where jurisdiction has fully attached by the mere filing of a proper petition, as in proceedings in rem, or where the nature of the proceeding requires the court to ascertain a preliminary fact essential to its valid action, the recital of a finding of the necessary fact, if uncontradicted by a primary record in the proceeding, is conclusive on collateral attack."—Ex parte Griffith, *supra*.

15. Ala.—Mayfield v. Tuscaloosa County, 41 So. 932, 148 Ala. 548.

firmatively show the existence of jurisdiction.¹⁶ However, it is required, for the application of this rule, that it appear from the record that the particular cause of action comes within the class of cases embraced within the general or ordinary jurisdiction of the court;¹⁷ and it has been required that the record show jurisdiction over the res,¹⁸ over the person of a nonresident,¹⁹ or over foreign corporations,²⁰ or conformity to the requirements of

substituted service²¹ or of service by publication,²² or jurisdiction to render judgment by default,²³ although according to other authority the doctrine that the facts, or proof thereof, upon which jurisdiction depends need not be shown upon the face of the record applies equally to cases of default;²⁴ and an explanation of the exercise of authority by a particular judge may be required.²⁵ It has also been held that where a direct attack is made on the

16. Cal.—Adolph M. Schwartz, Inc., v. Burnett Pharmacy, 295 P. 508, 112 Cal.App. 781.

Ill.—People v. Miller, 171 N.E. 672, 339 Ill. 573.

Miss.—Martin v. Board of Sup'rs of Winston County, 178 So. 315, 181 Miss. 363—Broom v. Board of Sup'rs of Jefferson Davis County, 158 So. 344, 171 Miss. 586.

R.I.—Cologiovanni v. District Court of Sixth Judicial District, 133 A. 1, 47 R.I. 323.

Wash.—In re Dingman, 188 P. 755, 110 Wash. 513—Taylor v. Huntington, 75 P. 1104, 34 Wash. 455.

Fla.—Contra Walker v. Carver, 112 So. 45, 93 Fla. 337.

W.Va.—Dixon v. Hesper Coal & Coke Co., 130 S.E. 663, 100 W.Va. 422.

15 C.J. p 841 note 86.

Every necessary step taken need not appear affirmatively of record. Ind.—Indianapolis Northern Traction Co. v. Long, 127 N.E. 565, 73 Ind. App. 390.

Tenn.—Brewer v. Griggs, 10 Tenn. App. 378.

Jurisdiction of parties need not be affirmatively shown, due service of process or appearance being assumed, unless the contrary appears of record.—Indianapolis Northern Traction Co. v. Long, 127 N.E. 565, 73 Ind.App. 390.

Facts showing venue need not affirmatively appear on the face of the record proper of a court of general jurisdiction.—State ex rel. and to Use of Western Valve Co. v. John Gill & Sons Co., Mo.App., 220 S.W. 978.

Pleadings

(1) Jurisdictional facts need not be pleaded when suit is brought in a court of general jurisdiction.

Cal.—Cheney v. Trauzettel, 69 P.2d 832, 9 Cal.2d 158—Kiku Saito v. Policy Holders' Life Ins. Ass'n, 22 P.2d 724, 132 Cal.App. 412, followed in Todome Arao v. Policy Holders' Life Ins. Ass'n, 22 P.2d 726, 132 Cal.App. 785.

Mo.—Yates v. Casteel, 49 S.W.2d 68, 329 Mo. 1101—St. Charles Sav. Bank v. Thompson & Gray Quarry Co., 210 S.W. 868—Rubber Tire Supply Co. v. American Utilities Co., App., 279 S.W. 751.

(2) Effect of pleadings on right to assume jurisdiction see supra § 33.

Where a court, although of limited jurisdiction, is not an inferior court in the technical sense of the term, a judgment rendered in a suit before it is not a nullity which may be disregarded on collateral attack, although the jurisdiction of the court does not appear by the record.—Ruckman v. Cowell, 1 N.Y. 505, 7 N.Y.Leg.Obs. 7.

17. Ark.—Ex parte Tipton, 185 S.W. 798, 128 Ark. 389.

Neb.—In re Ramp's Estate, 201 N.W. 676, 113 Neb. 3.

Porto Rico.—Bonnie Fruit Co. v. Davila, 7 Porto Rico 430.

"Where the general powers of the court are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions . . . the facts essential to the exercise of the special jurisdiction must appear . . . upon the record."—Galpin v. Page, Cal., 18 Wall. 350, 371, 21 L.Ed. 959.

"While it is not necessary that the record of the proceedings of . . . [a] court [of general jurisdiction] should affirmatively show the existence of jurisdiction, Ex parte Pearson, 60 S.E. 706, 79 S.C. 302, there are exceptions to the rule. 15 C.J., Courts, § 159. Thus where the general powers of the court are exercised over a class of subjects not within its ordinary jurisdiction, upon the performance of prescribed statutory conditions, no such presumption of jurisdiction will attend the judgment of the court."—Ex parte Hart, 195 S.E. 253, 256, 186 S.C. 125.

Jurisdiction of cause of action is determined in first instance by pleading initiating proceeding.—Ex parte Williams, 177 A. 85, 117 N.J.Eq. 517.

"Jurisdiction of the subject matter of the litigation must affirmatively appear on the face of the record; that is, the record must show affirmatively that the case is one of a class of which the court rendering the judgment was given cognizance."—Shelton v. Sydnor, 102 S.E. 83, 85, 126 Va. 625.

Jurisdiction of the person will be presumed if jurisdiction of the subject matter appears.—Galpin v. Page, Cal., 18 Wall. 350, 21 L.Ed. 959.

18. The "domestic" character of a vessel must be affirmatively shown

in proceedings to sustain a judgment in a state court based upon a materialman's lien, the case being otherwise not cognizable by a state tribunal, but in admiralty.—The Montauk v. Walker, 47 Ill. 335.

Stock in a foreign corporation must be affirmatively shown by the record to be within the court's jurisdiction before the court may proceed to take action to bring it within its control; and where it appears that the shares in question are held by a nonresident who has not appeared or been served, the court has no jurisdiction.—Iron City Sav. Bank v. Isaacsen, 164 S.E. 520, 158 Va. 609.

Jurisdiction of the res generally see supra § 84.

19. Mo.—Crabtree v. Aetna Life Ins. Co., 111 S.W.2d 103, 109, 341 Mo. 1173, citing *Corpus Juris*.

15 C.J. p 841 note 94—34 C.J. p 537 note 70, p 541 note 97.

20. U.S.—Walker v. Ritter-Burns Lumber Co., D.C.Ky., 10 F.Supp. 804.

Wash.—American Discount Corporation v. Gerrard, 286 P. 666, 156 Wash. 276.

21. Ill.—Werner v. W. H. Shons Co., 173 N.E. 486, 341 Ill. 478.

Mo.—Crabtree v. Aetna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173.

22. Or.—Laughlin v. Hughes, 89 P. 2d 568.

15 C.J. p 841 note 96—34 C.J. p 549 note 32.

23. Tex.—Friend v. Thomas, Civ. App., 187 S.W. 986—Lazarus v. Barrett, 23 S.W. 822, 5 Tex.Civ. App. 5.

Wash.—American Discount Corporation v. Gerrard, 286 P. 666, 156 Wash. 276.

24. Ill.—People v. Miller, 171 N.E. 672, 339 Ill. 573.

25. **Hearing before chancellor of other circuit**

Where the chancellor of a circuit other than that in which a bill is brought presides on the hearing of an application for an injunction at chambers, the ground for the exercise of such authority should appear by the record.—Sharman v. Thomas-ton, 67 Ga. 246.

Absence of resident judge and the fact that no other judge, regular or

jurisdiction, and there is no proof of facts on which jurisdiction rests, the intendment in favor of jurisdiction must be supported by the record.²⁶ Where a statute gives a nonresident the right to sue in the state courts only when defendant is a citizen, the record must show this jurisdictional fact.²⁷

The necessity, on appeal, of showing by the record matters essential to the jurisdiction of the appellate and lower courts is considered in Appeal and Error §§ 680-690 and §§ 691-692, respectively.

Exercise of special powers. Where a statute confers upon a court of general jurisdiction special authority not belonging to it as such court, and not to be exercised according to the course of the common law, sufficient matter must appear of record or on the face of the proceedings to show the case to be within such special jurisdiction, the court being regarded in this respect as one of limited or special

jurisdiction.²⁸

Summary proceedings. As a rule everything necessary to give the court jurisdiction in summary proceedings should appear on the face of the record.²⁹

§ 105. Courts of Inferior, Limited, or Special Jurisdiction

It is usually necessary that the record of a court of inferior, limited, or special jurisdiction affirmatively show that the court had jurisdiction.

There being, as appears in § 97 supra, no presumption in favor of the jurisdiction of a court or tribunal of inferior, limited, or special jurisdiction, it is usually necessary, unless otherwise provided by statute,³⁰ in order to sustain the proceedings of such a court, that the record affirmatively show that the court had jurisdiction;³¹ this is held, by some au-

special, was presiding in the circuit at the time required to be affirmatively shown in order that orders of a judge of a different circuit be sustained.—*Ex parte Hart*, 195 S.E. 253, 186 S.C. 125.

26. Ill.—*Jackson v. Rickard*, 19 Ill. App. 507.

Wis.—*Heminway v. Reynolds*, 74 N. W. 350, 98 Wis. 501.

27. Ky.—*Lexington Mfg. Co. v. Dorr*, 2 Litt. 256.

28. U.S.—*McLellan v. Automobile Ins. Co. of Hartford, Conn.*, C.C.A. Ariz., 80 F.2d 344, 346, citing *Corpus Juris*.

Ark.—*Walker v. McMillen*, 61 S.W.2d 455, 187 Ark. 586—*Grand Lodge, A. O. U. W., v. Adair*, 32 S.W.2d 430, 182 Ark. 634—*Monks v. Duffie*, 259 S.W. 735, 163 Ark. 118.

Idaho.—*Union Central Life Ins. Co. v. Albrethsen*, 294 P. 342, 50 Idaho 196—*Wright v. Atwood*, 195 P. 625, 33 Idaho 455.

Ill.—*Village of Waynesville v. Pennsylvania R. Co.*, 188 N.E. 482, 354 Ill. 318—*Fico v. Industrial Commission*, 186 N.E. 605, 353 Ill. 74—*Brown v. Van Keuren*, 172 N.E. 1, 340 Ill. 118—*People v. Miller*, 171 N.E. 672, 339 Ill. 573—*City of Chicago v. Hitt*, 166 N.E. 517, 334 Ill. 619—*People v. Brewer*, 160 N.E. 76, 328 Ill. 472—*Keal v. Rhydderck*, 148 N.E. 53, 317 Ill. 231—*Vyverberg v. Vyverberg*, 142 N.E. 191, 310 Ill. 599—*People ex rel. Com'rs of North Fork Outlet Drainage Dist. v. Schwartz*, 244 Ill.App. 137.

Mo.—*State ex rel. Case v. Seehorn*, 223 S.W. 664, 283 Mo. 508—*State ex rel. and to Use of Western Valve Co. v. John Gill & Sons Co.*, App., 220 S.W. 978.

Or.—*Murphy v. Bjellik*, 170 P. 723, 87 Or. 329, denying rehearing 169 P. 520, 87 Or. 329.

Tex.—*Mingus v. Wadley*, 285 S.W. 1084, 115 Tex. 551—*Texas Employers' Ins. Ass'n v. Nelson*, Civ.App., 292 S.W. 651, 653, citing *Corpus Juris*.

Wis.—*State v. Cary*, 112 N.W. 428, 132 Wis. 501.

Wyo.—*Kelsey v. Carroll*, 138 P. 867, 22 Wyo. 85.

15 C.J. p 842 note 99—34 C.J. p 543 note 5.

Divorce proceedings are statutory and jurisdiction must affirmatively appear from record.—*Anthony v. Anthony*, 128 So. 440, 221 Ala. 221—*Phillips v. Ashworth*, 124 So. 519, 220 Ala. 237.

Proceeding relating to overdue taxes Ark.—*Wallace v. Hill*, 205 S.W. 699, 135 Ark. 353.

Service of interrogatories

Ala.—*Tennessee Valley Bank v. Clifton*, 121 So. 548, 219 Ala. 181.

Proper notice to defendant as shown by record is jurisdictional in court exercising limited powers.—*Phillips v. Ashworth*, 124 So. 519, 220 Ala. 237.

Ministerial act

"When the act [of a court of general jurisdiction] under . . . [special powers conferred by statute] is ministerial only and not judicial, its decision must be regarded as that of a court of limited and special jurisdiction, and in such cases all of the facts essential to the exercise of the special jurisdiction must appear upon the face of the record."—*State v. Wilson*, 27 S.W.2d 106, 109, 181 Ark. 683—34 C.J. p 543 note 7.

29. Idaho.—*Union Central Life Ins. Co. v. Albrethsen*, 294 P. 342, 50 Idaho 196—*Wright v. Atwood*, 195 P. 625, 33 Idaho 455.

Contra *Adolph M. Schwartz, Inc.*

v. Burnett Pharmacy, 295 P. 508, 112 Cal.App. 781.

15 C.J. p 842 note 1—34 C.J. p 543 note 5 [a].

30. Ill.—*People v. Miller*, 171 N.E. 672, 339 Ill. 573.

Tenn.—*Brewer v. Griggs*, 10 Tenn. App. 378, 395, quoting *Corpus Juris*.

15 C.J. p 843 note 4.

Location of property

In an action where statute makes jurisdiction dependent on location of property involved, a failure of records to show location of property within jurisdiction of the court is fatal.—*Hauser v. Burge*, Mo.App., 121 S.W.2d 314.

31. Ala.—*Grayson v. Schwab*, 179 So. 377, 235 Ala. 398—*Miller v. Thompson*, 96 So. 481, 209 Ala. 469—*Ex parte Griffith*, 95 So. 551, 209 Ala. 158—*Bowden v. State*, 97 So. 467, 19 Ala.App. 377.

Ark.—*State v. Wilson*, 27 S.W.2d 106, 181 Ark. 683.

Fla.—*State ex rel. Everette v. Pette-way*, 179 So. 666, 131 Fla. 516.

Ill.—*People v. Miller*, 171 N.E. 672, 339 Ill. 573.

La.—*State ex rel. Clayton v. Jones*, 188 So. 737, 192 La. 671.

Miss.—*Hall v. Franklin County*, 185 So. 591—*Pettibone v. Wells*, 179 So. 336, 181 Miss. 425—*Martin v. Board of Sup'rs of Winston County*, 178 So. 315, 181 Miss. 363—*Jackson Equipment & Service Co. v. Dunlop*, 160 So. 734, 177 Miss. 752—*Broom v. Board of Sup'rs of Jefferson Davis County*, 158 So. 344, 171 Miss. 586—*Dulion v. Folkes*, 120 So. 437, 153 Miss. 91.

Mo.—*State ex inf. Barrett v. Imhoff*, 238 S.W. 122, 291 Mo. 603—*State on Inf. of Killman v. Colbert*, 201 S.W. 52, 273 Mo. 198—*Ramsey v. Huck*, 184 S.W. 966, 267 Mo. 333—

thorities, to apply both to subject matter and parties,³² but there is also authority for the view that the rule is limited to the jurisdiction of the subject matter, and that, when this jurisdiction has once vested, the rules which govern its exercise as to the person are generally the same as those applicable to courts of general jurisdiction.³³

The jurisdictional facts required to appear of record are the ultimate, rather than the evidentiary, facts,³⁴ and they need not appear in any particular form or language,³⁵ or part of the record.³⁶

In some cases it is held that, if the jurisdictional facts actually existed, a failure of the record to recite or to establish such facts may be supplied by proof aliunde;³⁷ but in other cases this is denied.³⁸

The necessity, on appeal, of showing by the rec-

ord matters essential to the jurisdiction of the appellate and lower courts is considered in Appeal and Error §§ 680-690 and §§ 691-692, respectively.

Jurisdiction over special statutory proceedings exercised in derogation of, or not according to, the course of the common law must appear.³⁹

§ 106. Courts of Probate

Records of probate courts must show the existence of jurisdiction where they are regarded as courts of limited, inferior, or special jurisdiction, but not where they are regarded as courts of general jurisdiction.

In so far as probate courts, or courts exercising probate jurisdiction, are regarded as having general jurisdiction, their records need not show affirmatively the existence of facts on which the exercise of their jurisdiction depends.⁴⁰ Where, however,

Ex parte McLaughlin, App., 105 S. W.2d 1020—St. Louis County v. Menke, App., 95 S.W.2d 818.
N.Y.—Patszykowski v. Mursten, 294 N.Y.S. 62, 250 App.Div. 355—Wachtel v. Diamond State Engineering Corporation, 213 N.Y.S. 77, 215 App.Div. 15—Fairbanks v. 95 Pondfield Road Corporation, 11 N.Y.S.2d 995, 171 Misc. 698.

Or.—Cole v. Marvin, 193 P. 828, 98 Or. 175.
Tenn.—Brewer v. Griggs, 10 Tenn. App. 378, 395, quoting *Corpus Juris*.

Tex.—Mingus v. Wadley, 285 S.W. 1084, 1089, 115 Tex. 551, citing *Corpus Juris*.

Va.—Farant Inv. Corporation v. Francis, 122 S.E. 141, 138 Va. 417.
Wis.—Linschitz v. C. A. Neuberger Co., 283 N.W. 811—Jones v. State, 247 N.W. 445, 211 Wis. 9—In re Anson's Estate, 188 N.W. 479, 177 Wis. 441.

15 C.J. p 842 note 3—34 C.J. p 544 note 8.

Jurisdiction of justices of peace to be shown by record see the C.J.S. title Justices of the Peace § 50, also 35 C.J. p 548 note 27—p 551 note 46.

Every fact essential to jurisdiction must appear.

Cal.—Adolph M. Schwartz, Inc., v. Burnett Pharmacy, 295 P. 508, 112 Cal.App. 781.

Miss.—Broom v. Board of Sup'rs., 158 So. 344, 171 Miss. 586.

Mo.—State ex rel. Kelly v. Trimble, 247 S.W. 187, 297 Mo. 104, opinion explained, 247 S.W. 1009, 297 Mo. 104.

Neb.—Gloor v. Torczon, 187 N.W. 387, 108 Neb. 402.

Or.—Kerns v. Union County, 261 P. 76, 123 Or. 103.

Regularity of proceedings of court not of record is not presumed, and the facts showing jurisdiction must appear in the record.—Kansas City v.

Jones Store Co., 28 S.W.2d 1008, 325 Mo. 226, certiorari denied Jones Store Co. v. Kansas City, Mo., 51 S.Ct. 78, 282 U.S. 873, 75 L.Ed. 771.

Collateral attack

The general rule that silence of the record of a tribunal of inferior jurisdiction on a jurisdictional point is fatal applies in cases of collateral attack to those jurisdictional facts only which the law directs the tribunal to enter upon the record.—Hager v. Wilson, 186 P. 974, 106 Kan. 127—Gehlenberg v. Hartley, 165 P. 286, 100 Kan. 487.

Where exclusive jurisdiction was conferred on county courts as to reapportionment of counties into judicial districts, it was held that the jurisdiction of a county court need not affirmatively appear from the record in each cause of such nature.—Wilson v. Dean, 197 S.W. 547, 177 Ky. 97.

32. Mo.—State ex rel. Kelly v. Trimble, 247 S.W. 187, 297 Mo. 104, opinion explained 247 S.W. 1009, 297 Mo. 104—Schell v. Leland, 45 Mo. 289.

33. Miss.—Cason v. Cason, 31 Miss. 578.

Particular class of persons as subject matter

"The rule announced in the case of Cason v. Cason, 31 Miss. 578 . . . cannot be invoked here, for the reason that the subject-matter composes a class of persons whose disabilities are sought to be removed, and no others."—Dullion v. Folkes, 120 So. 437, 441, 153 Miss. 91.

34. Ark.—Trice v. Crittenden County, 7 Ark. 159.

Miss.—Pettibone v. Wells, 179 So. 336, 181 Miss. 425.

35. Miss.—Pettibone v. Wells, supra.

15 C.J. p 843 note 9.

"The language in which such recitals are made need not be such as a skillful lawyer would use."—Martin v. Board of Supervisors of Winston County, 178 So. 315, 320, 181 Miss. 363.

36. Ill.—Galena, etc., R. Co. v. Pound, 22 Ill. 399.

Averments in complaint

(1) "The County Court being a court of limited jurisdiction, the complaint must contain averments of the necessary jurisdictional facts."—Wachtel v. Diamond State Engineering Corporation, 213 N.Y.S. 77, 78, 215 App.Div. 15.

(2) Effect of pleadings on right to assume jurisdiction see supra § 33.

37. N.Y.—Van Deusen v. Sweet, 51 N.Y. 378.

15 C.J. p 843 note 11.

38. Ind.—Smith v. Clausmeier, 35 N. E. 904, 136 Ind. 105, 43 Am.S.R. 311—Nicholson v. Stephens, 47 Ind. 185.

39. Fla.—State v. City of Miami, 152 So. 6, 113 Fla. 280.

Pa.—Pine Hill Road, 6 Pa.Dist. & Co. 441, 443, quoting *Corpus Juris*.

15 C.J. p 843 note 5.
So as to courts of general jurisdiction see supra § 104.

40. Ga.—Campbell v. Atlanta Coach Co., 200 S.E. 203, 53 Ga.App. 824, transferred 196 S.E. 769, 185 Ga. 77—Davis v. Melton, 181 S.E. 300, 51 Ga.App. 685.

Ill.—Illinois Merchants' Trust Co. v. Turner, 173 N.E. 52, 341 Ill. 101.

Mont.—Thelen v. Vogel, 281 P. 753, 86 Mont. 33.

Neb.—In re Ramp's Estate, 201 N. W. 676, 113 Neb. 3—Brandeen v. Lau, 201 N.W. 665, 113 Neb. 34.

Or.—In re Lyon's Guardianship, 266 P. 1087, 128 Or. 94.

Tex.—Hannon v. Henson, Com.App., 15 S.W.2d 579.

15 C.J. p 843 note 14.

such courts are regarded as courts of limited, inferior, or special jurisdiction,⁴¹ or where they exercise special statutory powers,⁴² their jurisdiction must appear by the record. Where the facts essen-

tial to jurisdiction are expressly required to be set forth, there must be a sufficient showing that jurisdiction has been acquired as claimed.⁴³

K. OBJECTIONS TO JURISDICTION, ESTOPPEL, AND WAIVER

§ 107. Grounds for Questioning Jurisdiction

The essential elements, the absence of which may afford grounds of objection to the jurisdiction of a court, have already been discussed in §§ 27-106.

Objections to jurisdiction as to which there may be an estoppel or a waiver are treated infra §§ 108-111.

Jurisdiction and powers of courts of probate jurisdiction generally see infra § 298.

In Utah, "while the requisite jurisdictional facts need not be recited in the order or judgment, yet, to properly invest the court with jurisdiction of the subject-matter, they must somewhere be made to appear in the mandatory record of the court, the record that describes the matter for the court's adjudication and determination and is the foundation of the judgment or sequestrating order, the record which resists all objections on collateral attack."—*Stockyards Nat. Bank of South Omaha v. Bragg*, 245 P. 966, 973, 67 Utah 60.

41. Fla.—*State v. Petteway*, 179 So. 666, 131 Fla. 516.
Md.—*Talbot Packing Corporation v. Wheatley*, 190 A. 833, 172 Md. 365.
Tenn.—*Brewer v. Griggs*, 10 Tenn. App. 378.
Wis.—*In re Anson's Estate*, 188 N.W. 479, 177 Wis. 441.
15 C.J. p 844 note 15.

42. Ala.—*Miller v. Thompson*, 96 So. 481, 209 Ala. 469.
Ark.—*Monks v. Duffie*, 259 S.W. 735, 163 Ark. 118.
Tex.—*Cline v. Niblo*, 8 S.W.2d 633, 117 Tex. 474, 66 A.L.R. 916.
15 C.J. p 844 note 16.

43. U.S.—*Hershberger v. Blewett*, C. Wash., 55 F. 170.

44. Ala.—*Ray v. Hilman*, 157 So. 676, 229 Ala. 424.
Cal.—*Kegley v. Kegley*, 60 P.2d 482, 16 Cal.App.2d 216—*Young v. City of Los Angeles*, 260 P. 798, 800, 86 Cal.App. 13, quoting *Corpus Juris*.

Colo.—*Stocks v. Industrial Commission of Colorado*, 174 P. 588, 589, 65 Colo. 20, citing *Corpus Juris*.
Ga.—*Parker v. Travellers' Ins. Co.*, 163 S.E. 159, 161, 174 Ga. 525, quoting *Corpus Juris*.

21 C.J.S.—11

§ 108. Estoppel to Deny Jurisdiction

Jurisdiction of the subject matter cannot be conferred by estoppel; but one who invokes or consents to a court's jurisdiction is estopped to question it on any ground other than that the court lacks jurisdiction of the subject matter.

Jurisdiction of the subject matter cannot be conferred upon a court by, or be based on, the estoppel of a party to deny that it exists.⁴⁴ As to other objections to jurisdiction, there may be an estoppel,⁴⁵

Ill.—*Mills v. People's Gaslight & Coke Co.*, 158 N.E. 814, 327 Ill. 508.

Iowa.—*Latta v. Utterback*, 211 N.W. 503, 202 Iowa 1116.

Mich.—*In re Rogers*, 220 N.W. 808, 243 Mich. 517.

Mo.—*United Cemeteries Co. v. Strother*, 119 S.W.2d 762, 342 Mo. 1155—*In re Buckles*, 53 S.W.2d 1055, 1057, 331 Mo. 405, quoting *Corpus Juris*.

N.H.—*Labonte v. City of Berlin*, 154 A. 89, 85 N.H. 89.

Pa.—*Harrison v. Harrison*, 163 A. 62, 107 Pa.Super. 161.

Tenn.—*Cory v. Olmstead*, 290 S.W. 31, 154 Tenn. 513.

Tex.—*Perkins v. U. S. Fidelity & Guaranty Co.*, Com.App., 299 S.W. 213, reversing U. S. Fidelity & Guaranty Co. v. Perkins, Civ.App., 293 S.W. 675—*Fidelity & Casualty Co. of New York v. Millican*, Civ. App., 115 S.W.2d 464, error refused—*Burcum v. Gaston*, Civ.App., 196 S.W. 257.

Utah.—*State v. Telford*, 72 P.2d 626, 93 Utah 228.

15 C.J. p 809 note 65, p 845 note 19.
Jurisdiction by consent see supra § 85.

Estoppel is no more effective than consent to confer jurisdiction.—*James v. Kennedy*, 129 S.W.2d 215, 174 Tenn. 591.

No estoppel as to prerequisite fact
"A party is not estopped from denying the existence of a fact which the law requires to appear in the case as a prerequisite . . . in order to give the district court jurisdiction over the subject-matter."—*Stacks v. Industrial Commission of Colorado*, 174 P. 588, 589, 65 Colo. 20.

A plaintiff is not estopped to assert that the court to which he has resorted has no jurisdiction.—*Freer v. Davis*, 43 S.E. 164, 52 W.Va. 1, 94 Am.S.R. 895, 59 L.R.A. 556.

Property in custody of another court

A mortgagee who has instituted foreclosure proceedings in a state court is not estopped to question the jurisdiction of the federal court thereafter to appoint a receiver of the property, even though he accepts redemption money raised from the sale of the receiver's certificates.—*York v. Acadia Land Co.*, D.C.La., 58 F.2d 1042.

45. Ga.—*Sligh v. Whitley*, 153 S.E. 237, 41 Ga.App. 428.

Mo.—*Smith v. Gaskill*, App., 272 S.W. 1087.

Tex.—*Aetna Life Ins. Co. v. Harris*, Civ.App., 83 S.W.2d 1087.
15 C.J. p 846 note 24.

Matrimonial domicile

A party may be estopped to deny that the matrimonial domicile was within the court's jurisdiction.

Kan.—*Kirby v. Kirby*, 55 P.2d 356, 143 Kan. 430.

N.Y.—*Melchers v. Bertolido*, 192 N.Y. S. 781, 118 Misc. 196.

Okl.—*Dale v. Carson*, 283 P. 1017, 141 Okl. 105—*Carson v. Carson*, 283 P. 1015, 141 Okl. 106.

Tex.—*Prendergast v. Prendergast*, Civ.App., 122 S.W.2d 710.

Power to stay action

A party who obtains an order in equity staying the trial of a law action is estopped to question the jurisdiction of equity to issue the order.—*Smith Engineering Co. v. Pray*, C.C.A., 61 F.2d 687, affirming 58 F.2d 926, and certiorari denied 53 S.Ct. 594, 289 U.S. 733, 77 L.Ed. 1482.

Formal order transferring case

Where cause was pending in one district court and, without formal order transferring cause, parties appeared before another district court of same county and announced ready for trial and proceeded to trial without objection, it could not thereafter be urged that court hearing cause was without jurisdiction.—*Allen v. Farm & Home Savings & Loan Ass'n*

as in the case of objections to the manner in which, or the steps by which, the court obtained jurisdiction,⁴⁶ or to the venue.⁴⁷

Where the court has general jurisdiction of the subject matter, a party may be estopped to question its jurisdiction of the particular case.⁴⁸ A par-

ty may be estopped to invoke the jurisdiction of another court.⁴⁹

What constitutes estoppel. Save where the court is completely without jurisdiction of the subject matter, a party will be estopped to question the court's jurisdiction if he invokes it,⁵⁰ as by instituting an action⁵¹ or filing a counterclaim or bring-

of Missouri, Tex.Civ.App., 58 S.W.2d 886, error refused.

Law or equity action

(1) Defendant not demurring to complaint, or objecting to taking of testimony in action for money received, could not claim after judgment, on showing of pleadings, verdict, and judgment only, that case was an equity action and therefore beyond court's jurisdiction.—Harry H. Culver & Co. v. Superior Court in and for Los Angeles County, 19 P.2d 43, 129 Cal.App. 589.

(2) Where the subject matter is such that it only requires some equitable element to bring the suit within the jurisdiction of a court of equity, defendant may by his action estop himself to object to jurisdiction on the ground that there was an adequate remedy at law.—Darst v. Kirk, 82 N.E. 862, 230 Ill. 521, affirming 132 Ill.App. 203—15 C.J. p 845 note 20 [f].

Control of guardian

One appointed guardian by a court is estopped to deny the authority of the court to control him in the disbursement of the ward's property.—Dudding v. Pitman, 280 P. 801, 138 Okl. 222.

46. Colo.—Industrial Commission of Colorado v. Employers' Liability Assur. Corporation, 241 P. 729, 78 Colo. 287.

N.D.—Allen v. Bohner, 208 N.W. 234, 54 N.D. 14.

Tex.—Eldridge v. Eldridge, Civ.App., 259 S.W. 209.

Utah.—State v. Telford, 72 P.2d 626, 93 Utah 228.

Wyo.—Neiderjohn v. Thompson, 264 P. 699, 38 Wyo. 28.

47. Ind.—Willard v. Loucks, 175 N.E. 256, 97 Ind.App. 131.

Neb.—McCall v. Hamilton County Farmers Telephone Ass'n, 280 N.W. 254, 135 Neb. 70.

Ohio.—Beck v. Beck, 187 N.E. 366, 45 Ohio App. 507.

15 C.J. p 846 note 27 [il].

48. Ariz.—Blair v. Blair, 62 P.2d 1321, 48 Ariz. 501.

Cal.—Young v. City of Los Angeles, 260 P. 798, 800, 86 Cal.App. 13, quoting *Corpus Juris*.

15 C.J. p 845 note 21.

49. Ohio.—Beck v. Beck, 192 N.E. 791, 48 Ohio App. 105.

Submission to court's jurisdiction

Defendant, by petitioning to vacate divorce decree and praying for leave

to answer therein, submitted to court's jurisdiction and was estopped from invoking jurisdiction of another court, notwithstanding action in other court was commenced prior to filing of petition to vacate.—Beck v. Beck, 192 N.E. 791, 48 Ohio App. 105.

50. U.S.—U. S. v. Edwards, C.C.A. Neb., 23 F.2d 477, 480, quoting *Corpus Juris*.

Ark.—Rader v. Payne, 68 S.W.2d 457, 188 Ark. 899.

Colo.—Graham v. Francis, 265 P. 690, 83 Colo. 346.

Mich.—In re Farber, 245 N.W. 793, 260 Mich. 652.

Neb.—In re Nilson's Estate, 253 N.W. 675, 126 Neb. 541—Geiss v. Trinity Lutheran Church Congregation, 230 N.W. 658, 119 Neb. 745.

N.M.—Golden v. Golden, 68 P.2d 928, 41 N.M. 356.

Or.—In re Prince's Estate, 246 P. 713, 118 Or. 210.

S.D.—In re Barnes' Estate, 235 N.W. 701, 58 S.D. 295.

Tex.—Etna Life Ins. Co. v. Harris, Civ.App., 83 S.W.2d 1087.

Utah.—J. B. Colt Co. v. District Court of Fifth Judicial Dist. in and for Millard County, 269 P. 1017, 72 Utah 281.

Wash.—In re Stoops' Estate, 203 P. 22, 118 Wash. 153.

Wyo.—Board of Com'rs of Natrona County v. Casper Nat. Bank, 96 P. 2d 564, 569, quoting *Corpus Juris*.

15 C.J. p 845 note 21, p 846 note 27 [il].

Adjudication by estoppel as last resort

"A determination of jurisdiction by reason of estoppel is . . . a most unsatisfactory and frequently hazardous basis of adjudication, which should be attained only as a final resort for the purpose of promoting the ends of justice."—In re Auditors' Estate, 287 N.Y.S. 873, 877, 159 Misc. 402.

Invoking as attorney in fact in behalf of principal

Ill.—Robinson v. Miller, 148 N.E. 819, 317 Ill. 501, modifying 232 Ill.App. 625.

Conduct which invokes jurisdiction

(1) Filing affirmative equitable defense.—Smith Engineering Co. v. Pray, C.C.A., 61 F.2d 687, affirming 58 F.2d 926, and certiorari denied 53 S.Ct. 594, 289 U.S. 733, 77 L.Ed. 1482.

(2) Voluntarily intervening.

U.S.—Miller v. Pyrites Co., C.C.A. Md., 71 F.2d 804, certiorari denied 55 S.Ct. 121, 293 U.S. 604, 75 L.Ed. 696, rehearing denied 55 S.Ct. 208, 293 U.S. 632, 79 L.Ed. 717, certiorari denied Merrell v. Pyrites Co., 55 S.Ct. 121, 293 U.S. 604, 79 L.Ed. 696, rehearing denied 55 S.Ct. 208, 293 U.S. 632, 79 L.Ed. 717—Henry L. Doherty & Co. v. Toledo Rys. & Light Co., D.C. Ohio, 254 F. 597.

Mo.—Carson Nat. Bank of Auburn, Neb., v. American Nat. Bank of St. Joseph, 34 S.W.2d 143, 225 Mo.App. 948.

Wyo.—Neiderjohn v. Thompson, 264 P. 699, 38 Wyo. 28.

15 C.J. p 845 note 21 [d].

(3) Filing petition to vacate judgment.—Beck v. Beck, 187 N.E. 366, 45 Ohio App. 507.

(4) A party who appeals to the district court from a judgment of a justice of the peace and demands a new trial in the district court cannot deny the jurisdiction of the district court on the ground that the justice of the peace had no jurisdiction.—City of Enderlin v. Pontiac Tp., Cass County, 242 N.W. 117, 62 N.D. 105—Allen v. Bohner, 208 N.W. 234, 54 N.D. 14.

51. Ariz.—Blair v. Blair, 62 P.2d 1321, 1324, 48 Ariz. 501, citing *Corpus Juris*.

Ark.—Chamber of Commerce of Hot Springs v. Barton, 112 S.W.2d 619, 195 Ark. 274.

Colo.—Fields v. Kincaid, 184 P. 832, 67 Colo. 20.

Ga.—Manry v. Farmers' Bank of Forsyth, 170 S.E. 30, 177 Ga. 37—Sligh v. Whitley, 153 S.E. 237, 41 Ga.App. 428.

Ill.—Hopkins v. Gifford, 141 N.E. 178, 309 Ill. 363—Meldahl v. West, 117 N.E. 593, 280 Ill. 421.

Kan.—Kirby v. Kirby, 55 P.2d 356, 143 Kan. 430—McCleery v. McCleery Lumber Co., 283 P. 647, 129 Kan. 520.

Miss.—Security Finance Co. v. Tindall, 118 So. 606, 151 Miss. 516.

Mo.—School Dist. No. 46 v. Stewartsville School Dist., App., 110 S.W. 2d 399.

Mont.—Hall v. Hall, 226 P. 469, 70 Mont. 460.

N.Y.—Melchers v. Bertolido, 192 N.Y. S. 781, 118 Misc. 196.

Okla.—Dale v. Carson, 283 P. 1017, 141 Okl. 105—Carson v. Carson, 283 P. 1015, 141 Okl. 106.

ing a cross action,⁵² or if he requests or consents that a particular court take jurisdiction,⁵³ or accepts benefits resulting from the court's exercise of jurisdiction.⁵⁴

A party will not be permitted to deny the existence of jurisdictional elements which he previously alleged or asserted.⁵⁵

Estoppel of third person. An estoppel to question jurisdiction has been held operative against a devisee and legatee⁵⁶ and grantee⁵⁷ of the person estopped, but not against an attacking creditor.⁵⁸

§ 109. Waiver of Objections

A want of jurisdiction of the subject matter cannot be waived; but where a court has general jurisdiction of the subject matter a lack of jurisdiction of the particular case may be waived, as may other objections to jurisdiction, such as lack of jurisdiction of the person. An objection, if it can be waived, is waived, among other methods, by invoking, or submitting to, the court's jurisdiction.

An absolute want of jurisdiction of the subject matter or cause of action cannot be waived, and such jurisdiction cannot be conferred by waiver.⁵⁹ Accordingly a lack of jurisdiction of the subject

Pa.—Bell v. Bell, 135 A. 219, 287 Pa. 269.

Tex.—Texas Employers' Ins. Ass'n v. Ezell, Com.App., 14 S.W.2d 1018, reversing Ezell v. Texas Employers' Ins. Ass'n, Civ.App., 5 S.W.2d 594 and rehearing denied Texas Employers' Ins. Ass'n v. Ezell, Com.App., 16 S.W.2d 523—Eldridge v. Eldridge, Civ.App., 259 S.W. 209.

52. Ark.—Federal Land Bank of St. Louis v. Gladish, 2 S.W.2d 696, 178 Ark. 267.

Mich.—Champion v. Grand Rapids, G. H. & M. R. Co., 108 N.W. 1078, 145 Mich. 676.

Mo.—Robinson v. Field, 117 S.W.2d 308, 342 Mo. 778—Winning v. Brown, 100 S.W.2d 303, 340 Mo. 178.

Neb.—Geiss v. Trinity Lutheran Church Congregation, 230 N.W. 658, 119 Neb. 745.

Ohio.—State ex rel. Brickell v. Roach, 170 N.E. 866, 122 Ohio St. 117.

Tex.—Prendergast v. Prendergast, Civ.App., 122 S.W.2d 710—Citizens' Nat. Bank of Waco v. Billingsley, Civ.App., 300 S.W. 648.
15 C.J. p 845 note 21 [c].

53. Ind.—Willard v. Loucks, 175 N. E. 266, 97 Ind.App. 131.

Mo.—Smith v. Gaskill, App., 272 S. W. 1087.

Neb.—McCall v. Hamilton County Farmers Telephone Ass'n, 280 N. W. 254, 135 Neb. 70.

Tex.—Allen v. Farm & Home Savings & Loan Ass'n of Missouri, Civ. App., 58 S.W.2d 866, error refused—Richardson v. McCloskey, Civ. App., 261 S.W. 801, reversed on other grounds, Com.App., 276 S.W. 680.

Utah.—State v. Telford, 72 P.2d 626, 98 Utah 228.

15 C.J. p 845 note 21, p 846 note 27 [u].

Requesting directed verdict.

A defendant who requested the court to exercise jurisdiction by asking for a directed verdict in his favor is not in a position to assert that the court did not have jurisdiction.—Moseley v. Victory Life Ins. Co., 45 S.W.2d 119, 226 Mo.App. 566.

Mistake as to amount involved

An error of defendants in computing plaintiffs' compensation too high did not estop defendants from questioning the jurisdiction of the court because of the amount involved, where plaintiffs had not been prejudiced by the error.—Board of Sup'rs of Lamar County v. Warden & Barrett, 75 So. 382, 115 Miss. 311.

54. Cal.—Young v. City of Los Angeles, 260 P. 798, 86 Cal.App. 13.

Colo.—Fields v. Kincaid, 184 P. 832, 87 Colo. 20.

Mont.—Hall v. Hall, 226 P. 469, 70 Mont. 460.

N.M.—Golden v. Golden, 68 P.2d 928, 41 N.M. 356.

55. Ala.—Ray v. Hillman, 157 So. 676, 229 Ala. 424.

Kan.—Kirby v. Kirby, 55 P.2d 356, 143 Kan. 430.

N.Y.—Brown v. Snell, 57 N.Y. 286.

Okl.—Stafford v. Williams, 70 P.2d 97, 180 Okl. 441—Dale v. Carson, 283 P. 1017, 141 Okl. 105—Carson v. Carson, 283 P. 1015, 141 Okl. 106.

Pa.—Bell v. Bell, 135 A. 219, 287 Pa. 269.

Tenn.—Gouge v. McInturf, 92 S.W. 2d 198, 170 Tenn. 72, modifying 90 S.W.2d 753, 169 Tenn. 678.

Tex.—Schoonmaker v. Clardy, Civ. App., 218 S.W. 1112, reversed on other grounds, Com.App., 244 S.W. 124.

Law or equity action

Party invoking equity jurisdiction on an alleged state of facts which gives the court jurisdiction will not be permitted to assert inconsistent theory which would deprive the court of jurisdiction.—Hamilton v. Watson, 112 So. 115, 215 Ala. 550.

Service of judgment

A defendant is estopped from questioning the jurisdiction of the court to punish him for contempt for failing to file an account as directed by a judgment, on the ground that he had never been served with the judgment, where he instituted an action in the same court to enjoin the enforcement of the judgment and included a copy thereof in his plead-

ings.—Underhill v. Schenck, 199 N.Y. S. 611, 205 App.Div. 182.

56. Colo.—In re Schmidt's Will, 273 P. 21, 85 Colo. 28.

57. N.Y.—Melchers v. Bertolido, 192 N.Y.S. 781, 118 Misc. 196.

58. Ky.—Marcum v. Addison Branch Land Co., 95 S.W.2d 32, 264 Ky. 541.

59. U.S.—City of Gainesville v. Brown-Crummer Inv. Co., Tex., 48 S.Ct. 454, 277 U.S. 54, 72 L.Ed. 781, reversing, C.C.A., 20 F.2d 497, certiorari granted 48 S.Ct. 85, 275 U.S. 516, 72 L.Ed. 402, conformed to, C.C.A., 31 F.2d 1009, certiorari denied 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622—Athan v. Hartford Fire Ins. Co., C.C.A.N.Y., 73 F.2d 66—U. S. v. Kiles, C.C.A.Mo., 70 F.2d 380—Ogden Levee Dist. v. Kansas City Southern Ry. Co., C. C.A.Ark., 39 F.2d 884—Panama R. Co. v. Johnson, C.C.A.N.Y., 289 F. 964, affirmed 44 S.Ct. 301, 264 U.S. 375, 68 L.Ed. 748—McLaughlin v. Western Union Telegraph Co., D. C.La., 7 F.2d 177.

Ariz.—In re Baxter's Estate, 194 P. 333, 22 Ariz. 91.

Cal.—Amos v. Superior Court of California in and for San Diego County, 239 P. 317, 196 Cal. 677—Marin Municipal Water Dist. v. North Coast Water Co., 173 P. 473, 178 Cal. 324—Lewis v. Superior Court in and for San Bernardino County, 69 P.2d 220, 21 Cal.App. 2d 340—Adolph M. Schwartz, Inc. v. Burnett Pharmacy, 295 P. 508, 112 Cal.App. 781—Young v. City of Los Angeles, 260 P. 798, 86 Cal. App. 13.

Colo.—U. S. Fidelity & Guaranty Co. v. Industrial Commission, 61 P.2d 1033, 99 Colo. 280—Saunders v. Norton, 58 P.2d 482, 98 Colo. 537.

Conn.—Marcell v. A. H. Merriman & Sons, 163 A. 411, 115 Conn. 678—Walsh v. A. Waldron & Sons, 153 A. 298, 112 Conn. 579, 78 A.L.R. 1301.

D.C.—U. S. ex rel. Tungsten Reef Mines Co. v. Ickes, 84 F.2d 257, 66 App.D.C. 3.

Fla.—Spitzer v. Branning, 190 So. 516.

- Ga.—Thomas v. Calhoun Nat. Bank, 121 S.E. 808, 157 Ga. 475—Griffin v. Nix, 125 S.E. 732, 33 Ga.App. 136.
- Idaho.—Poage v. Co-operative Pub. Co., 66 P.2d 1119, 57 Idaho 561, 110 A.L.R. 1322.
- Ill.—People, *oy* Kerner v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229—Welton v. Hamilton, 176 N.E. 333, 344 Ill. 82—Kelly v. Brown, 141 N.E. 743, 310 Ill. 319—Taylor Coal Co. v. Industrial Commission, 134 N.E. 169, 301 Ill. 381—Pocahontas Mining Co. v. Industrial Commission, 134 N.E. 160, 301 Ill. 462—Wilson v. Josephson, 244 Ill.App. 366.
- Kan.—Richards v. State, 186 P. 1025, 106 Kan. 105.
- Ky.—Thompson v. Commonwealth, 99 S.W.2d 705, 266 Ky. 529—Tackett v. Tackett, 265 S.W. 336, 204 Ky. 831.
- La.—Mann v. Mann, 129 So. 543, 170 La. 953.
- Me.—Charles Cushman Co. v. Mackesy, 200 A. 505, 135 Me. 490, 118 A.L.R. 148—Pinkham v. Jennings, 122 A. 873, 123 Me. 343.
- Mass.—Board of Assessors of City of Boston v. Suffolk Law School, 4 N.E.2d 342—Holt v. Holt, 149 N.E. 40, 253 Mass. 411—Attorney General v. Tufts, 131 N.E. 573, 239 Mass. 453, 17 A.L.R. 274—Eaton v. Eaton, 124 N.E. 37, 233 Mass. 351, 5 A.L.R. 1426.
- Mich.—In re Fraser's Estate, 285 N.W. 1, 238 Mich. 392—In re Rogers, 220 N.W. 808, 243 Mich. 517—Carpenter v. Dennison, 175 N.W. 419, 208 Mich. 441.
- Miss.—Myrick v. Mansell, 185 So. 581.
- Mo.—United Cemeteries Co. v. Strother, 119 S.W.2d 762, 342 Mo. 1155—Callahan v. Huhlman, 98 S.W.2d 704, 339 Mo. 634—In re Buckles, 53 S.W.2d 1055, 1057, 331 Mo. 405, quoting *Corpus Juris*—Mississippi County v. Byrd, 4 S.W.2d 810, 319 Mo. 697—State ex rel. Allen v. Trimble, 297 S.W. 378, 317 Mo. 751, quashing record Allen v. Best, 279 S.W. 728, 220 Mo.App. 1041—State ex rel. Kelly v. Trimble, 247 S.W. 187, 297 Mo. 104, opinion explained 247 S.W. 1009, 297 Mo. 104—Meierhoffer v. Hansell, 243 S.W. 131, 294 Mo. 195—City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co., 212 S.W. 887—State ex rel. Newell v. Cave, 199 S.W. 1014, 272 Mo. 653, error dismissed Cave v. State of Missouri ex rel. Newell, 38 S.Ct. 334, 246 U.S. 650, 62 L.Ed. 921—Hauser v. Burge, App., 121 S.W.2d 314—State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, App., 113 S.W.2d 1034—Phillips v. Alford, App., 90 S.W.2d 1080—State ex rel. Sharp v. Knight, 26 S.W.2d 1011, 224 Mo. App. 761—Roberts v. Meek, 296 S.W. 193, 221 Mo.App. 974.
- Mont.—Stanton Trust & Savings Bank v. Johnson, 65 P.2d 1188, 104 Mont. 235.
- N.J.—Kaufman v. Smathers, 166 A. 453, 111 N.J.Law 52, reversing Kaufman v. Smather, 160 A. 500, 10 N.J.Misc. 671—Lazorchak v. Demarest, 157 A. 137, 108 N.J.Law 198, affirming 151 A. 381, 8 N.J. Misc. 623—Handelman v. Harris, 107 A. 34, 93 N.J.Law 66—Moresch v. O'Regan, 192 A. 831, 122 N.J.Eq. 388, reversing 187 A. 619, 120 N.J.Eq. 524, dissenting opinion 194 A. 156, 122 N.J.Eq. 388—Fidelity Union Trust Co. v. Ackerman, 191 A. 813, 121 N.J.Eq. 497, modified on other grounds, 199 A. 379, 123 N.J.Eq. 556—F. W. Woolworth & Co. v. Zimmerman, 179 A. 474, 13 N.J.Misc. 505.
- N.Y.—Newham v. Chile Exploration Co., 133 N.E. 120, 232 N.Y. 37, reversing 187 N.Y.S. 31, 195 App. Div. 291, and reargument denied 138 N.E. 437, 234 N.Y. 537—Cooper v. Davis, 248 N.Y.S. 227, 231 App.Div. 527—Auto Dealers' Discount Corporation v. Santoro, 11 N.Y.S.2d 10, 170 Misc. 635—Jamaica Sav. Bank v. Risian Realty Corporation, 300 N.Y.S. 553, 165 Misc. 372—In re Grube's Estate, 295 N.Y.S. 238, 162 Misc. 578—People ex rel. Hotel Astor v. Sexton, 287 N.Y.S. 746, 159 Misc. 280, affirmed 10 N.Y.S.2d 232—In re Von Deilen's Will, 278 N.Y.S. 689, 154 Misc. 877—City Trust Co. v. Anthony Ricci Realty Co., 241 N.Y.S. 481, 137 Misc. 128.
- N.C.—Miller v. Roberts, 193 S.E. 286, 212 N.C. 126—Dees v. Apple, 178 S.E. 557, 207 N.C. 763—Reid v. Reid, 155 S.E. 719, 199 N.C. 740.
- Ohio.—Degenhart v. Harford, 18 N.E. 2d 990, 59 Ohio App. 552—Dayton Morris Plan Bank v. Graham, 191 N.E. 817, 47 Ohio App. 310—Johnson v. Toledo & O. C. Ry. Co., 5 Ohio N.P., N.S., 347.
- Okl.—McNee v. Hart, 246 P. 373, 117 Okl. 220.
- Or.—Duncan Lumber Co. v. Willapa Lumber Co., 183 P. 476, 93 Or. 386, denying rehearing 182 P. 172, 93 Or. 386.
- Pa.—In re Greek Catholic Union of Russian Brotherhoods of U. S. A., 5 Schuylkill Reg. 370.
- R.I.—David v. David, 132 A. 879, 47 R.I. 304.
- S.C.—Rosamond v. Lucas-Kidd Motor Co., 189 S.E. 641, 182 S.C. 331—Hodges v. Lake Summit Co., 152 S.E. 653, 155 S.C. 436.
- Tenn.—Jordan v. Jordan, 239 S.W. 423, 145 Tenn. 378—Petition of Southern Lumber & Mfg. Co., 210 S.W. 639, 141 Tenn. 325—Reynolds v. Hamilton, 77 S.W.2d 986, 18 Tenn.App. 380.
- Tex.—Wilbarger County v. Hall, Com.App., 55 S.W.2d 797, affirming Hall v. Wilbarger County, Civ.App., 37 S.W.2d 1041—Pittman v. City of Wichita Falls, Civ.App., 117 S.W.2d 491—Roberson v. Keck, Civ.App., 108 S.W.2d 840, error refused—Burcum v. Gaston, Civ.App., 196 S.W. 257.
- Utah.—Hardy v. Meadows, 264 P. 963, 71 Utah 255.
- Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—F. S. Fuller & Co. v. Morrison, 169 A. 9, 106 Vt. 22.
- Va.—Commonwealth v. P. Lorillard Co., 105 S.E. 683, 129 Va. 74—Shelton v. Sydnor, 102 S.E. 83, 126 Va. 625.
- Wis.—State v. Flynn, 193 N.W. 651, 180 Wis. 556.
- 15 C.J. p 804 note 7, p 844 note 18. Appearance see Appearances § 16. Jurisdiction by consent see *supra* § 85.
- Waiver of objection to federal court jurisdiction see the C.J.S. title Federal Courts § 83, also 25 C.J. p 781 note 27—p 782 note 40.
- Waiver is no more effective than consent to confer jurisdiction.**—James v. Kennedy, 129 S.W.2d 215, 174 Tenn. 591.
- Partial waiver and partial enforcement of jurisdiction are not permitted.**—Lonergan v. American Railway Express Co., 144 N.E. 756, 250 Mass. 30.
- "Silence cannot confer jurisdiction of a subject-matter."**—Harry H. Culver & Co. v. Superior Court in and for Los Angeles County, 19 P.2d 43, 44, 129 Cal.App. 589.
- Objection to submission of controversy as not authorized by statute cannot be waived.**—Beresford Independent School Dist. v. Fletcher, S. D., 287 N.W. 497.
- Local actions**
- Courts cannot by waiver acquire jurisdiction of actions that are purely local and should have been brought elsewhere.—Taylor v. Sommers Bros. Match Co., 204 P. 472, 35 Idaho 30, 42 A.L.R. 189.
- Search warrant**
- Want of jurisdiction to issue search warrant cannot be waived.—Latta v. Utterback, 211 N.W. 503, 202 Iowa 1116.
- Workmen's compensation; admiralty**
- However, with respect to a contention that an employer had waived his right to question the jurisdiction of a state industrial board to award workmen's compensation on the ground that the matter was subject to admiralty jurisdiction, it was said, "Jurisdiction . . . may be waived . . . and when such waiver has once been made it is final."—Haglund v. Morse Dry Dock & Repair Co., 7 N.Y.S.2d 465, 466, 255 App.Div. 895, followed in Agne v. Morse Dry Dock & Repair Co., 7 N.Y.S.2d 467, 255 App.Div. 897.

matter is not waived by answer,⁶⁰ general demurrer,⁶¹ failing to demur,⁶² failing to object to, or otherwise raise the question of, jurisdiction,⁶³ going to trial on the merits,⁶⁴ moving for a new trial,⁶⁵ appealing,⁶⁶ or partially complying with the judgment.⁶⁷ Moreover, the objection that the

court completely lacks jurisdiction of the subject matter may be raised in any manner.⁶⁸

On the other hand, objections to the venue,⁶⁹ the procedure,⁷⁰ including the procedure by which the court acquired jurisdiction of the particular case,⁷¹ or the remedy pursued⁷² may be waived,

60. Idaho.—Stanger v. Hunter, 291 P. 1060, 49 Idaho 723.

N.C.—Cohoon v. State, 160 S.E. 183, 201 N.C. 312—Finley v. Finley, 158 S.E. 549, 201 N.C. 1—Tallassee Power Co. v. Peacock, 150 S.E. 510, 197 N.C. 735.

15 C.J. p 844 note 18 [a] (8), (10). Effect of appearance see Appearances § 16.

61. Ky.—Rice v. Kelly, 10 S.W.2d 1112, 226 Ky. 347.
Tenn.—Harr v. Booher, 244 S.W. 493, 146 Tenn. 694.

62. Okl.—Blake v. Metz, 276 P. 765, 136 Okl. 150—Blake v. Metz, 276 P. 762, 136 Okl. 146.

15 C.J. p 844 note 18 [a] (3).

63. U.S.—Panama R. Co. v. Johnson, C.C.A.N.Y., 289 F. 964, affirmed 44 S.Ct. 391, 264 U.S. 375, 68 L.Ed. 748.

Ill.—Wilton v. Hamilton, 176 N.E. 333, 344 Ill. 82—Oakman v. Small, 118 N.E. 775, 282 Ill. 360.

Mo.—Phillips v. Alford, App., 90 S.W.2d 1060.

N.Y.—City Trust Co. v. Anthony Ricci Realty Co., 241 N.Y.S. 481, 137 Misc. 128.

N.C.—Miller v. Roberts, 193 S.E. 286, 212 N.C. 126.

Tex.—Neal v. Beck Funeral Home, Civ.App., 131 S.W.2d 778, error dismissed.

15 C.J. p 844 note 18 [a] (4)–(7).

Failure to file formal plea in abatement

Va.—Wilson v. State Highway Commissioner, 4 S.E.2d 746.

Failure to plead objection to jurisdiction does not prevent the question from being raised at the time that the lack of jurisdiction becomes apparent.

Ill.—Allen v. Illinois Mineral Co., 20 N.E.2d 898, 299 Ill.App. 537.

N.C.—Miller v. Roberts, 193 S.E. 286, 212 N.C. 126.

Wash.—Harvey v. Admiral Oriental Line, 286 P. 66, 156 Wash. 1.

Exceptions failing to contain a specific statement of the objection do not waive it.

Me.—Hutchins v. Hutchins, 4 A.2d 679—Charles Cushman Co. v. Mackesy, 200 A. 505, 135 Me. 490, 118 A.L.R. 148.

Mo.—Callahan v. Huhlman, 98 S.W.2d 704, 339 Mo. 634.

64. U.S.—Carriere & Son v. U. S., C. Mich., 163 F. 1009.

Ky.—Thompson v. Commonwealth, 99 S.W.2d 705, 266 Ky. 529.

65. Okl.—Blake v. Metz, 276 P. 765, 136 Okl. 150—Blake v. Metz, 276 P. 762, 136 Okl. 146.

66. Neb.—Albin v. Consolidated School Dist. No. 14 of Richardson County, 184 N.W. 141, 106 Neb. 719.

67. Ga.—Jones v. Jones, 184 S.E. 271, 181 Ga. 747.

68. U.S.—Phoenix Mut. Life Ins. Co. of Hartford, Conn., v. Lafferty, D. C.Iowa, 16 F.Supp. 740, affirmed, C. C.A., Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 91 F.2d 141, certiorari denied 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Cramer v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied Coburn v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Coburn v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied Cramer v. Aetna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied Coburn v. Aetna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602.

Ind.—Pittsburgh, C. & St. L. Ry. Co. v. Ireton, 126 N.E. 431, 73 Ind. App. 449.

S.C.—Williamson v. Richards, 155 S.E. 890, 158 S.C. 534.

Va.—Thacker v. Hubbard & Appleby, 94 S.E. 929, 122 Va. 379.

W.Va.—Charlotten v. Gordon, 200 S.E. 740.

69. U.S.—In re Miller's Dresses, D. C.Tex., 1 F.Supp. 378.

Ga.—Collier v. Forman, 124 S.E. 710, 158 Ga. 768.

Ind.—State ex rel. Allman v. Superior Court for Grant County, 19 N.E.2d 467.

Minn.—In re Marttinen's Estate, 214 N.W. 469, 171 Minn. 475.

Okl.—Freeman v. Bryant, 184 P. 76, 76 Okl. 51.

Tenn.—Chambers v. Sanford & Treadway, 289 S.W. 553, 154 Tenn. 134. 15 C.J. p 846 note 23.

Waiver of objection to venue generally see the C.J.S. title Venue §§ 75–78, also 67 C.J. p 91 note 32–p 94 note 80.

70. Conn.—Lusas v. St. Patrick's Roman Catholic Church Corporation of Waterbury, 193 A. 204, 123 Conn. 166, 111 A.L.R. 763.

Ky.—Borderland Coal Co. v. Burchett, 237 S.W. 663, 193 Ky. 602.

Mont.—State v. Keaster, 266 P. 387, 82 Mont. 126.

N.Y.—In re Smith, 278 N.Y.S. 467, 244 App.Div. 733.

15 C.J. p 845 note 20 [a] (1).

71. Cal.—Young v. City of Los Angeles, 260 P. 798, 86 Cal.App. 13.

Ill.—People, by Kerner, v. United Medical Service, 200 N.E. 157, 362 Ill. 442, 103 A.L.R. 1229—Wilson Bros. v. Haeger, 179 N.E. 459, 347 Ill. 140, reversing 261 Ill.App. 568—Taylor Coal Co. v. Industrial Commission, 134 N.E. 169, 301 Ill. 381.

Iowa.—Appeal of McLain, 176 N.W. 817, 189 Iowa 264.

15 C.J. p 845 note 20 [b], p 846 note 22.[a].

72. Pa.—Commonwealth v. Camp, 102 A. 205, 258 Pa. 548.

Wyo.—Board of Com'rs of Natrona County v. Casper Nat. Bank, 96 P.2d 564, 569, quoting *Corpus Juris*. 15 C.J. p 846 note 22.

Law or equity action

(1) An objection to equity jurisdiction on the ground that an adequate remedy is available at law may be waived.—Pedro v. Vey, 46 P.2d 582, 150 Or. 415.

(2) "Where a court has general jurisdiction of civil actions at law and also of all equity causes, and the subject-matter of a suit or action and the relief sought are within the jurisdiction of the court . . . the question whether the relief sought should be by an action at law or by a suit in equity does not ordinarily involve the power of the court to determine the matter, but it is rather a matter of procedure, at least, where the right to a jury trial is not unlawfully denied."—Harvey v. City of St. Petersburg, Fla., 189 So. 861, 864, certiorari denied 60 S.Ct. 131—Malone v. Meres, 109 So. 677, 682, 91 Fla. 709.

Answer in ancillary proceeding

In an ancillary and summary proceeding in a probate court to discover property or compel an accounting, the respondent does not, by interposing an answer, waive his objection to the jurisdiction of the court to try the question of title to the property sought.—In re Rey's Estate, 88 P.2d 718, 31 Cal.App.2d 648—Koerber v. Superior Court in and for City and County of San Francisco, 206 P. 496, 57 Cal.App. 31.

as may a lack of jurisdiction of the person.⁷³

Where the court has general jurisdiction of the subject matter, a lack of jurisdiction of the particular case, as dependent upon the existence of particular facts, may be waived.⁷⁴

What constitutes waiver. Objections to lack of

jurisdiction of the person, and other objections to jurisdiction not based on the contention that there is an absolute want of jurisdiction of the subject matter, are waived by invoking the court's jurisdiction, as by a cross bill or counterclaim,⁷⁵ consent, or voluntary submission, to jurisdiction, or conduct amounting to a general appearance,⁷⁶ or

73. Colo.—Sarchet v. Phillips, 78 P. 2d 1096, 102 Colo. 318.
- Fla.—State ex rel. Associated Utilities Corporation v. Chillingworth, 181 So. 346, 132 Fla. 587.
- Ga.—Harper v. Allen, 154 S.E. 651, 41 Ga.App. 736—Georgia Creosoting Co. v. Moody, 154 S.E. 294, 41 Ga.App. 701, transferred 150 S.E. 153, 169 Ga. 322.
- Idaho.—Williams v. Sherman, 212 P. 971, 36 Idaho 494.
- Ill.—Kelly v. Brown, 141 N.E. 743, 310 Ill. 313—Phelps v. Columbia Phonograph Broadcasting System, 255 Ill.App. 294.
- Ky.—Thompson v. Commonwealth, 99 S.W.2d 705, 266 Ky. 529.
- La.—Klotz v. Tru-Fruit Distributors, App., 173 So. 592—Gravet v. Gonsoulin, 120 So. 643, 10 La.App. 553, denying rehearing 119 So. 785, 10 La.App. 553.
- Mont.—State v. Keaster, 266 P. 387, 82 Mont. 126.
- N.Y.—Cooper v. Davis, 248 N.Y.S. 227, 231 App.Div. 527—Auto Dealers Discount Corporation v. Santoro, 11 N.Y.S.2d 10, 170 Misc. 635.
- Ohio.—Dayton Morris Plan Bank v. Graham, 191 N.E. 817, 47 Ohio App. 310—Johnson v. Toledo & O. C. Ry. Co., 5 Ohio N.P.N.S., 347.
- Pa.—Carroll v. Hannon, 3 Pa.Dist. & Co. 15.
- S.C.—Rosamond v. Lucas-Kidd Motor Co., 189 S.E. 641, 182 S.C. 331.
- W.Va.—Morris v. Calhoun, 195 S.E. 341.
- 15 C.J. p 809 note 59, p 846 note 24. Jurisdiction of person by consent see *supra* § 85.
- Mode of acquiring jurisdiction.**
- (1) Defendant may waive any irregularities in mode by which his person is subjected to jurisdiction of court.—Daley v. Dennis, 242 N.Y.S. 408, 137 Misc. 1—15 C.J. p 846 note 24 [a].
- (2) A failure to bring the parties into court by proper process may be waived either by direct or implied waiver.—Moffatt v. Cassimus, 190 So. 297, 28 Ala.App. 582, reversed on other grounds, Sup., 190 So. 299.
- (3) Waiver of objections to process see the C.J.S. title Process § 113, also 50 C.J. p 596 note 59—p 598 note 97.
- Foreign government's immunity** from suit may be waived.—Dexter & Carpenter v. Kunglig Jarnvagstyrelsen, C.C.A.N.Y., 48 F.2d 705, certiorari denied 51 S.Ct. 181, 282 U.S. 896, 75 L.Ed. 789.
- Nonexistence of party**
- (1) Where plaintiff died prior to service of summons, the court never obtained jurisdiction of the action and defendant could not waive the objection by answering or failing to raise the jurisdictional question.—Lawson v. L. R. Mack, Inc., 282 N.Y.S. 982, 246 App.Div. 622.
- (2) Where unincorporated association sued as a corporation files plea denying its corporate existence, which is sustained, its failure to object to amendment of process and pleadings treating it as a fraternal benefit society under statute does not amount to such submission to court's jurisdiction as will sustain judgment against it, unless proof shows it to be a society within such statute.—Simpson v. Grand International Brotherhood of Locomotive Engineers, 98 S.E. 580, 83 W.Va. 355, certiorari denied 39 S.Ct. 494, 250 U.S. 644, 63 L.Ed. 1186.
74. U.S.—U. S. v. Ellison, C.C.A.W. Va., 74 F.2d 864, 869, citing *Corpus Juris*—U. S. v. Kiles, C.C.A.Mo., 70 F.2d 880—U. S. v. Edwards, C.C.A. Neb., 23 F.2d 477, 480, quoting *Corpus Juris*.
- Ariz.—Smith v. City of Nogales, 211 P. 589, 593, 24 Ariz. 546, quoting *Corpus Juris*.
- Cal.—Young v. City of Los Angeles, 260 P. 798, 800, 86 Cal.App. 13, quoting *Corpus Juris*.
- Colo.—Drummond v. Christensen, 275 P. 906, 85 Colo. 284.
- Ill.—Taylor Coal Co. v. Industrial Commission, 134 N.E. 169, 391 Ill. 381.
- Ind.—Jefferson Park Realty Corporation v. Kelley Glover & Vale, 12 N.E.2d 977, 105 Ind.App. 813—Stoll v. Rich, 165 N.E. 67, 88 Ind.App. 639.
- Wyo.—Board of Com'rs of Natrona County v. Casper Nat. Bank, 96 P.2d 564, 569, quoting *Corpus Juris*.
- 15 C.J. p 845 note 20.
- Well-considered case**
- N.M.—Albuquerque & Cerrillos Coal Co. v. Lermuseaux, 187 P. 560, 25 N.M. 686.
- Jurisdictional amount**
- Where jurisdiction is dependent on the amount of the claim or the value of the property involved, an objection to jurisdiction on such ground is waived by a motion to dismiss, or an answer on the merits to, a complaint which contains the proper allegations.
- U.S.—Lambert v. Yellowley, C.C.A.N.Y., 4 F.2d 915, reversing, D.C., 291 F. 640, and affirmed 47 S.Ct. 210, 272 U.S. 581, 71 L.Ed. 422, 49 A. L.R. 575.
- Tex.—Karbach v. International Harvester Co. of America, Civ.App., 61 S.W.2d 864—American Citizens' Labor & Protective Institution v. Brandy, Civ.App., 2 S.W.2d 977, error dismissed.
- Proceedings pending in another court**
- "The parties do not here raise the question of the jurisdiction of the district court to entertain this action while the probate proceedings are still pending in the county court. Inasmuch as the district court has general jurisdiction of the subject-matter of this action, that question will be considered waived. 15 C.J. 844 et seq."—Stevens v. Rogers, 68 P.2d 321, 823, 180 Okl. 305.
75. Ark.—Du Fresno v. Paul, 221 S. W. 485, 144 Ark. 87.
- Colo.—Drummond v. Christensen, 275 P. 906, 85 Colo. 284.
- 15 C.J. p 846 note 25, p 846 note 27 [r], [s].
76. Ala.—Cooper v. Lake Wood Co., 75 So. 307, 199 Ala. 633—Gager v. Doe, 29 Ala. 341.
- Kan.—Makemson v. Edwards, 166 P. 508, 101 Kan. 269.
- La.—Gravet v. Gonsoulin, 120 So. 643, 10 La.App. 553, denying rehearing 119 So. 785, 10 La.App. 553.
- Ohio.—Barner v. Barner, 19 Ohio App. 458.
- Pa.—Larkin v. City of Scranton, 29 A. 910, 162 Pa. 289, 35 Wkly.N.C. 42—Carroll v. Hannon, 3 Pa.Dist. & Co. 15.
- S.C.—State v. Maes, 120 S.E. 576, 127 S.C. 397—Dawkins v. Chester County, 115 S.E. 62, 122 S.C. 8.
- Vt.—Town of Duxbury v. Town of Williamstown, 145 A. 872, 102 Vt. 94.
- 15 C.J. p 808 note 57, p 846 note 27. Jurisdiction by consent see *supra* § 85.
- Waiver by general appearance see *Appearances* § 17.
- What constitutes appearance generally see *Appearances* §§ 12, 13.
- Filing demurrer** asserting that petition alleged no cause of action.—Sweat v. Atlantic Coast Line R. Co.,

objecting to the jurisdiction of the subject matter,⁷⁷ failing to raise the question of jurisdiction⁷⁸ in the proper manner,⁷⁹ seeking relief on a ground additional to, or other than, want of jurisdiction,⁸⁰ appealing,⁸¹ or by any other conduct indicating an intention to abandon or forego the objection.⁸²

On the other hand, the objection is not waived where the question is raised in the proper manner,⁸³ even though the motion or plea is based on incorrect grounds;⁸⁴ and various particular acts have

been held not to waive the objection to jurisdiction.⁸⁵

§ 110. — Delay in Raising Objection

An objection that the court lacks jurisdiction of the subject matter may be made at any time; an objection to jurisdiction on any other ground is waived if not made at the first opportunity or seasonably.

An absolute want of jurisdiction over the subject matter or cause of action may be taken advantage of at any stage of the proceedings,⁸⁶ even aft-

C.C.A.Ga., 81 F.2d 492—15 C.J. p 848 note 32 [e].

Filing answer on merits

Ga.—Berry v. Watkins, 123 S.E. 102, 158 Ga. 304.

Or.—Cole v. Canadian Bank of Commerce, 239 P. 98, 115 Or. 456. 15 C.J. p 846 note 27 [f].

77. Neb.—Brainard v. Butler, 109 N. W. 766, 77 Neb. 515.

15 C.J. p 846 note 27 [x].

78. Okl.—Fernow v. Fernow, 247 P. 106, 114 Okl. 298.

15 C.J. p 846 note 21 [a], [b], p 846 note 27 [q].

79. Ky.—Louisville, etc., R. Co. v. Stewart, 173 S.W. 757, 163 Ky. 164. Tenn.—Scholze v. Scholze, 2 Tenn. App. 80.

Va.—Blanchard v. Twin City Market, 160 S.E. 310, 157 Va. 13.

Statutory method of raising question of trial court's jurisdiction must be pursued.—Appeal of Solar Electric Co., 138 A. 914, 290 Pa. 372.

An answer cannot present the question of jurisdiction of the person, since it would waive such question.—Aerofil Burner Co. v. Littleford, D.C.N.Y., 15 F.2d 256.

80. Cal.—Adolph M. Schwartz, Inc., v. Burnett Pharmacy, 295 P. 508, 112 Cal.App. 781.

Ga.—Forrester v. Forrester, 118 S.E. 373, 155 Ga. 722, 29 A.L.R. 1363.

La.—Martel Syndicate v. Block, 98 So. 400, 154 La. 869—Zeller v. Louisiana Cypress Lumber Co., 121 So. 670, 9 La.App. 609.

Okl.—Knebel v. Rennie, 209 P. 414, 87 Okl. 136.

15 C.J. p 847 note 29.

Change of special appearance into general appearance see Appearances § 1 c (2) (c).

Demurrer held limited to objections to jurisdiction

Ga.—Irons v. American Nat. Bank, 165 S.E. 738, 175 Ga. 552, followed in 165 S.E. 741, 175 Ga. 558.

81. D.C.—Harding v. Westcott, 45 App.D.C. 533.

15 C.J. p 846 note 27 [hh].

Appeal from accident board award
However, it has been held that a defendant, by appealing to a court to set aside the award of an indus-

trial accident board, did not waive its right to object to the court's jurisdiction, where no other court was open to it under the compensation act.—Perkins v. U. S. Fidelity & Guaranty Co., Tex.Com.App., 299 S. W. 213, reversing U. S. Fidelity & Guaranty Co. v. Perkins, Civ.App., 293 S.W. 675.

82. U.S.—Frontera Transportation Co. v. Abaunza, C.C.A.La., 271 F. 199.

15 C.J. p 846 note 27.

83. Miss.—First Nat. Bank v. Mississippi Cottonseed Products Co., 157 So. 349, 171 Miss. 282.

Mo.—Lentz v. Evens & Howard Fire Brick Co., 11 S.W.2d 1070, 223 Mo. App. 1017.

15 C.J. p 847 note 28.

Effect of special appearance see Appearances § 22-24.

Pleas to jurisdiction see Abatement and Revival § 8-16.

84. Mo.—State ex rel. Rakowsky v. Bates, App., 286 S.W. 420.

85. **Calling for bill of particulars**
Ala.—Oates v. Clendenard, 6 So. 359, 87 Ala. 734.

Ark.—Watkins v. Brown, 5 Ark. 197.

Acknowledgment and waiver of service after removing from county of suit held not waiver of jurisdiction over person.—Bolton v. Keys, 144 S.E. 406, 38 Ga.App. 573.

The appearance of counsel for the purpose of pleading to the jurisdiction of the court, and entry of their names on docket with the word "answer," is not such pleading to the merits as admits jurisdiction.—Cox v. Potts, 67 Ga. 521.

Garnishment proceeding; ambiguous record

The waiver of an objection to a garnishment proceeding that the debt is the subject of another litigation will not be inferred from an ambiguous record, but must clearly appear.—Lowenstein v. Levy, Tenn., 212 F. 383, 129 C.C.A. 59.

Other acts see 15 C.J. p 847 note 28.

86. U.S.—Matson Nav. Co. v. U. S. Ct.Cl., 52 S.Ct. 162, 284 U.S. 352, 76 L.Ed. 336, affirming 72 Ct.Cl. 210, certiorari granted 52 S.Ct. 11, 284 U.S. 600, 76 L.Ed. 515—City of Gainesville v. Brown-Crummer Inv.

Co., Tex., 48 S.Ct. 454, 277 U.S. 54, 72 L.Ed. 781, reversing, C.C.A., 20 F.2d 497, certiorari granted 48 S.Ct. 85, 275 U.S. 516, 72 L.Ed. 402, conformed to, C.C.A., 31 F.2d 1009, certiorari denied 50 S.Ct. 27, 280 U.S. 569, 74 L.Ed. 622—U. S. v. Bertelsen & Petersen Engineering Co., C.C.A.Mass., 95 F.2d 867, affirming, D.C., Bertelsen & Petersen Engineering Co. v. U. S., 14 F. Supp. 868, affirmed U. S. v. Bertelsen & Petersen Engineering Co., C.C.A., 98 F.2d 132, certiorari granted U. S. v. Bertelsen & Petersen Engineering Co., 59 S.Ct. 229, affirmed U. S. v. Bertelsen & Petersen Engineering Co., 59 S.Ct. 541—Gatch, Tennant & Co. v. Mobile & O. R. Co., D.C.Ala., 59 F.2d 217—Plymouth County Trust Co. v. MacDonald, C.C.A.Mass., 53 F.2d 827, reversing, D.C., In re Craig, Reed & Emerson, 46 F.2d 811, and certiorari granted MacDonald v. Plymouth County Trust Co., 52 S.Ct. 407, 285 U.S. 533, 76 L.Ed. 928, reversed on other grounds MacDonald v. Plymouth County Trust Co., 52 S.Ct. 505, 286 U.S. 263, 76 L.Ed. 1093, conformed to, C.C.A., Plymouth County Trust Co. v. MacDonald, 60 F.2d 94—Weinstein v. Black Diamond S. S. Corporation, C.C.A.N.Y., 40 F.2d 590, certiorari denied 51 S.Ct. 486, 283 U.S. 837, 75 L.Ed. 1448—Phalen v. U. S., C.C.A.N.Y., 32 F.2d 687—Benedict v. Seiberling, D.C.Ohio, 17 F. 2d 841—Southwestern Lumber Co. of New Jersey v. Kerr, D.C.Tex., 11 F.Supp. 253, affirmed, C.C.A., Kerr v. Southwestern Lumber Co. of New Jersey, 78 F.2d 348, certiorari denied 56 S.Ct. 130, 296 U. S. 611, 80 L.Ed. 433—Central Iron & Steel Co. v. U. S., Ct.Cl., 6 F. Supp. 115, vacating 4 F.Supp. 113, and certiorari denied 55 S.Ct. 75, 293 U.S. 563, 79 L.Ed. 663—The Washington, D.C.N.Y., 296 F. 158. Cal.—In re McConnell's Estate, 78 P. 2d 1043, 26 Cal.App.2d 102—Lewis v. Superior Court in and for San Bernardino County, 69 P.2d 220, 21 Cal.App.2d 340. D.C.—Laughlin v. Cummings, 105 F. 2d 71, 70 App.D.C. 192—Wilbur v. Burley Irr. Dist., 58 F.2d 871, 61 App.D.C. 145.

er judgment.⁸⁷

An objection to jurisdiction based on any ground | other than lack of jurisdiction of the subject matter, such as lack of jurisdiction of the person or ir-

Ill.—*People v. Securities Discount Corporation*, 198 N.E. 681, 361 Ill. 551, affirming 279 Ill.App. 70—*People v. Brautigan*, 142 N.E. 208, 310 Ill. 472—*Town of Kingston v. Anderson*, 133 N.E. 347, 300 Ill. 577—*Allen v. Illinois Mineral Co.*, 20 N.E.2d 898, 299 Ill.App. 537—*People ex rel. Rusch v. Schwartz*, 1 N.E.2d 760, 284 Ill.App. 645—*People ex rel. Rusch v. Schwartz*, 1 N.E.2d 757, 284 Ill.App. 38—*Phelps v. Columbia Phonograph Broadcasting System*, 255 Ill.App. 294—*Sims v. City of Moline*, 222 Ill.App. 530.

Ind.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Iretton*, 126 N.E. 431, 73 Ind. App. 449.

Iowa.—*Johnson v. Purcell*, 282 N.W. 741, 225 Iowa 1265.

Ky.—*Farmers' Nat. Bank of Somerset v. Board of Sup'rs of Pulaski County*, 8 S.W.2d 401, 225 Ky. 246.

Me.—*Hutchins v. Hutchins*, 4 A.2d 679.

Mass.—*Board of Assessors of City of Boston v. Suffolk Law School*, 4 N.E.2d 342—*Moll v. Town of Wakefield*, 175 N.E. 81, 274 Mass. 505—*Loneragan v. American Railway Express Co.*, 144 N.E. 756, 250 Mass. 30.

Miss.—*Waits v. Black Bayou Drainage Dist.*, 185 So. 577.

Mo.—*United Cemeteries Co. v. Strother*, 119 S.W.2d 762, 342 Mo. 1155—*Callahan v. Huhman*, 98 S.W.2d 704, 339 Mo. 634—*State ex rel. Compagnie Générale Transatlantique v. Falkenhainer*, 274 S.W. 758, 309 Mo. 224—*McClain v. Kansas City Bridge Co., App.*, 83 S.W.2d 132, reversed on other grounds, 88 S.W.2d 1019, 338 Mo. 7—*Woods v. Moffitt*, 88 S.W.2d 525, 225 Mo. App. 801—*McKenna v. Wittman, App.*, 25 S.W.2d 541—*Dahlin v. Missouri Commission for Blind, App.*, 262 S.W. 420.

Neb.—*In re Hansen's Estate*, 221 N.W. 694, 117 Neb. 551.

N.H.—*Jackson & Sons v. Lumbermen's Mut. Casualty Co.*, 168 A. 895, 86 N.H. 341.

N.J.—*Lonsdale v. Pompeo*, 181 A. 51, 119 N.J.Eq. 14—*Jersey City Welding & Machine Works v. Hudson County White Co.*, 174 A. 516, 116 N.J.Eq. 548.

N.M.—*Albuquerque & Cerrillos Coal Co. v. Lermuseaux*, 137 P. 560, 25 N.M. 686.

N.Y.—*McConnell v. Williams S. S. Co.*, 267 N.Y.S. 554, 239 App.Div. 393, modifying 262 N.Y.S. 574, 146 Misc. 512, and motion denied 193 N.E. 297, 265 N.Y. 513, affirmed 193 N.E. 336, 265 N.Y. 594—*Glickman v. Kirtland*, 264 N.Y.S. 470, 142 Misc. 313.

N.C.—*Henderson County v. Smyth*, 5 S.E.2d 136, 216 N.C. 421—*Miller v. Roberts*, 193 S.E. 286, 212 N.C. 126.

Ohio.—*State ex rel. Handley v. McCall*, 19 N.E.2d 158, 135 Ohio St. 63.

Okl.—*Wright v. Kemper*, 279 P. 346, 137 Okl. 259.

Pa.—*Commonwealth v. Mathieu*, 163 A. 109, 107 Pa.Super. 261—*Frey v. Long*, 8 Pa.Dist. & Co. 121—*Divine v. Skrotzky*, 8 Pa.Dist. & Co. 717—*Commonwealth v. Rudy*, 3 Pa. Dist. & Co. 383.

R.I.—*David v. David*, 132 A. 879, 47 R.I. 304.

S.C.—*Williamson v. Richards*, 155 S.E. 890, 158 S.C. 534.

Tenn.—*Chambers v. Sanford & Treadway*, 289 S.W. 533, 154 Tenn. 134—*Petition of Southern Lumber & Mfg. Co.*, 210 S.W. 639, 141 Tenn. 325—*Reynolds v. Hamilton*, 77 S.W.2d 986, 18 Tenn.App. 380.

Tex.—*U. S. Fidelity & Guaranty Co. v. Perkins, Civ.App.*, 293 S.W. 675, reversed on other grounds *Perkins v. U. S. Fidelity & Guaranty Co., Com.App.*, 299 S.W. 213—*Stewart v. Patterson, Civ.App.*, 204 S.W. 768, error refused.

Vt.—*Smith v. White's Estate*, 188 A. 901, 108 Vt. 473—*F. S. Fuller & Co. v. Morrison*, 169 A. 9, 106 Vt. 22—*Miner v. Shanasy*, 102 A. 480, 92 Vt. 110.

15 C.J. p 847 note 31.

Court's power to raise question of jurisdiction of its own motion see infra § 114.

Raising question for first time on appeal see *Appeal and Error* § 258 b.

Laches is no defense when a court assumes jurisdiction it does not have, since lack of jurisdiction over the subject matter may be pleaded at any time.—*In re Crisswell's Estate*, 86 Pa.L.J. 615.

After removal to federal court

Objections as to the jurisdiction of a state court over the subject matter may be taken advantage of at any time in a federal court after removal thereto.—*Philadelphia & R. Ry. Co. v. Sherman, N.Y.*, 230 F. 814, 145 C.C.A. 124.

Appeal from interlocutory order

"It is true that, if a court takes cognizance of a matter whereof it has none, an objection may be raised in the proper mode at any stage of the proceeding; but it does not follow that it may be raised by an appeal from an interlocutory order" otherwise not appealable.—*In re Wilhelmia Drainage Dist.*, 216 S.W. 530, 531, 280 Mo. 1.

Contempt petition not under oath

Mo.—*Charles Cushman Co. v. Macke-*

sy, 200 A. 505, 135 Me. 490, 118 A.L.R. 148.

Expiration of time to plead

Defendant whose time to plead to action has expired may nevertheless move to dismiss action for want of jurisdiction of the subject matter.—*Thacker v. Hubbard & Appleby*, 94 S.E. 929, 122 Va. 379.

Failure to give notice of appeal in required time

Tex.—*Roberson v. Keck, Civ.App.*, 108 S.W.2d 840, error granted.

Motion for deficiency judgment

If statute requiring motion for deficiency judgment to be made within a certain time after sale is jurisdictional, the objection that the application was made too late may be raised at any time.—*Jamaica Sav. Bank v. Risian Realty Corporation*, 300 N.Y.S. 553, 165 Misc. 372.

Want apparent on face of pleadings or record

Ga.—*Geer v. Cowart*, 62 S.E. 1054, 5 Ga.App. 251.

Me.—*Miller v. Weisman*, 130 A. 504, 125 Me. 4—*Pinkham v. Jennings*, 122 A. 873, 123 Me. 343.

87. Mo.—*Riggs v. Moise*, 128 S.W.2d 632—*United Cemeteries Co. v. Strother*, 119 S.W.2d 762, 342 Mo. 1155—*State ex rel. Kelly v. Trimble*, 247 S.W. 187, 297 Mo. 104, opinion explained 247 S.W. 1009, 297 Mo. 104.

N.Y.—*City Trust Co. v. Anthony Ricci Realty Co.*, 241 N.Y.S. 481, 137 Misc. 128.

Construction favoring jurisdiction

"Defendant went to trial on the merits, raising no jurisdictional question until after judgment against it. Under such circumstances, the court will not strain to so construe the cause of action as to divest itself of jurisdiction."—*Ussop v. American West African Line*, 269 N.Y.S. 654, 656, 151 Misc. 12.

"Final disposition"

(1) "The question of jurisdiction . . . may be raised at any time before final disposition of the cause."—*Stuckey v. City of Tulsa*, 238 P. 837, 113 Okl. 45.

(2) "An objection [to the jurisdiction] can be made at any time before the case is finally disposed of on appeal."—*Gill v. Physicians' and Surgeons' Bldg.*, 138 A. 674, 676, 153 Md. 394.

Proceeding to enforce order or judgment

"The lack of jurisdiction over the subject-matter may be raised in any proceeding to enforce the order made or judgment entered."—*General Motors Acceptance Corporation v. Eilar*, 220 N.W. 766, 767, 243 Mich. 603.

regularity in the method by which jurisdiction of the particular case was obtained, is usually waived by failure to raise the objection at the first opportunity, or in due or seasonable time,⁸⁸ or within the time prescribed by statute.⁸⁹

§ 111. — Proceeding after Objection Overruled

The objection that there is no jurisdiction of the subject matter is not waived by proceeding with the case on the merits after the objection is overruled; and the same is true, according to most authorities, as to other objections to jurisdiction, provided no affirmative relief, not necessary to a defense, is requested.

The objection that there is an absolute lack of jurisdiction of the subject matter is not waived by

proceeding on the merits after the objection is overruled,⁹⁰ or by failing to take a preliminary appeal.⁹¹

Where the objection to jurisdiction is one other than that the court lacks jurisdiction of the subject matter, the objecting party is held, by some authorities, to waive his objection to jurisdiction by proceeding with the case on the merits after his objection has been overruled,⁹² unless the trial court compels submission of the merits to the jury, conditional upon the jury's finding for plaintiff upon the jurisdictional question;⁹³ the majority view, however, is that the objecting party does not waive the objection, after it is overruled, by proceeding with his case,⁹⁴ or by moving for a new trial on the

88. Ark.—Purnell v. Nichol, 292 S. W. 686, 689, 173 Ark. 496, quoting *Corpus Juris*.

Cal.—Young v. City of Los Angeles, 260 P. 798, 86 Cal.App. 13.

Ill.—People v. Securities Discount Corporation, 198 N.E. 681, 361 Ill. 551, affirming 279 Ill.App. 70.

Mont.—Reed v. Woodmen of the World, 22 P.2d 819, 94 Mont. 374.

N.M.—Albuquerque & Cerrillos Coal Co. v. Lermuseaux, 187 P. 560, 25 N.M. 686.

N.Y.—Hardenbrook v. Combs, 290 N. Y.S. 290, 160 Misc. 548.

Ohio.—McClees v. Grand International Brotherhood of Locomotive Engineers, 18 N.E.2d 812, 59 Ohio App. 477.

Pa.—Randig v. O'Hara, 187 A. 78, 83, 123 Pa.Super. 195, quoting *Corpus Juris*—In re Gaitley's Adoption, 154 A. 368, 303 Pa. 200.

15 C.J. p 809 note 59, p 845 note 20, p 848 note 32.

Jurisdictional amount

A plea to the jurisdiction, on the ground that the amount demanded has been fraudulently stated in the petition in order to confer jurisdiction, must be filed before answering to the merits.—American Citizens' Labor & Protective Institution v. Bandy, Tex.Civ.App., 2 S.W.2d 977, error dismissed.

Nonexistent party

(1) "A judgment upon the merits rendered against a person who is not subject to the jurisdiction of the court, and, indeed, not in existence, is futile. . . . [Such] objection to the jurisdiction of the court may be raised at any time."—MacAffer v. Boston & M. R. R., 197 N.E. 328, 329, 268 N.Y. 400, affirming 278 N.Y.S. 679, 242 App.Div. 140.

(2) An objection to the jurisdiction of the court on the ground that plaintiff is not, as represented in the complaint, a legal corporate entity "may be entertained at any stage of the case."—Commercial & Savings

Bank of Lake City v. Ward, 143 S. E. 546, 548, 146 S.C. 77.

Objection comes too late when made

(1) After judgment.—Borderland Coal Co. v. Burchett, 237 S.W. 663, 193 Ky. 602.

(2) By defendant more than four months after his general appearance by general demurrer and two and one-half months after decree on the demurrer.—Kyser v. American Surety Co. of New York, 105 So. 689, 213 Ala. 614.

(3) After verdict and judgment against the objecting party on the merits.—King v. Snow, 266 Ill.App. 462.

(4) Other cases see 15 C.J. p 848 note 32 [a].

Where extrinsic evidence is necessary to show the absence of jurisdiction, the better practice requires that the question should be raised before the trial is ended.—Ripkey v. Binns, 175 S.W. 206, 264 Mo. 505.

69. Ark.—Fidelity Mut. Life Ins. Co. v. Price, 20 S.W.2d 874, 180 Ark. 214.

Pa.—Appeal of Solar Electric Co., 138 A. 914, 290 Pa. 372.

90. Colo.—Saunders v. Norton, 58 P. 2d 482, 98 Colo. 537—Spaulding v. Porter, 31 P.2d 711, 94 Colo. 496.

Mich.—Carpenter v. Dennison, 175 N. W. 419, 208 Mich. 441.

15 C.J. p 844 note 18 [a] (10), (15).

Failure to renew at close of trial

An objection made at the opening of the trial is not waived by failure to renew it at the close of the trial.—Herald Square Cloak, etc., Co. v. Rocca, 96 N.Y.S. 189, 48 Misc. 650.

Preservation of exception

However, it has been held that "the question of jurisdiction may be raised once, but when the issue has been decided adversely to a party he cannot continue to raise it, in different stages of the trial. His remedy is to preserve his exception in the first instance, and his failure to do

so forecloses the right to again raise it."—Dunlap & Dunlap v. Zimmerman, 199 S.E. 296, 299, 188 S.C. 322.

91. Mich.—Carpenter v. Dennison, 175 N.W. 419, 208 Mich. 441.

Pa.—Commonwealth v. Mathieu, 163 A. 109, 107 Pa.Super. 261.

92. Or.—Sweeney v. Jackson County, 178 P. 865, 93 Or. 96, rehearing denied 182 P. 380, 93 Or. 96.

Pa.—Specktor v. Hanover Fire Ins. Co. of New York, 145 A. 430, 295 Pa. 390, appeal dismissed and certiorari denied Hanover Fire Ins. Co. of New York v. Spector, 50 S. Ct. 161, 280 U.S. 534, 74 L.Ed. 598.

15 C.J. p 850 note 38.

Effect of general appearance after adverse ruling on special appearance to challenge jurisdiction see Appearances § 21.

Proceeding with cause after objection to process is overruled see the C.J.S. title Process § 113, also 50 C. J. 598 notes 94–97.

Failure to appeal from preliminary determination of jurisdiction waives jurisdiction as to person.—Wettenengel v. Robinson, 136 A. 673, 288 Pa. 362.

93. U.S.—Kever v. Philadelphia & R. Coal & Iron Co., D.C.N.Y., 234 F. 814.

94. Ark.—American Workmen Ins. Co. v. Ervin, 110 S.W.2d 487, 194 Ark. 1149.

Conn.—Whitford v. Lee, 117 A. 554, 97 Conn. 554.

Ky.—Bankers' Nat. Life Ins. Co. v. Stone, 72 S.W.2d 49, 254 Ky. 682

—Brumleve v. Cronan, 197 S.W. 498, 176 Ky. 818.

N.D.—Ellingson v. Northwestern Jobbers' Credit Bureau, 227 N.W. 360, 58 N.D. 754.

Ohio.—Johnson v. Toledo & O. C. Ry. Co., 5 Ohio N.P., N.S., 347.

Okl.—Allen v. Ramsey, 41 P.2d 658, 170 Okl. 430, 97 A.L.R. 1259—

merits,⁹⁵ provided proper exception is taken to the adverse ruling,⁹⁶ no affirmative relief, not necessary to a defense, is requested, as by a cross action

or counterclaim,⁹⁷ and there is no conduct implying an abandonment of the objection.⁹⁸

L. DETERMINATION OF JURISDICTIONAL QUESTIONS

§ 112. In General

The question of jurisdiction will be determined without regard to hardship or the merits of the case, and, in general, so as to sustain the court's jurisdiction where possible. It is to be determined in the first instance from the pleadings, being primarily a question for the court, although disputed questions of fact are for the jury. One who seeks action by a court has the burden of demonstrating its jurisdiction to grant the relief sought.

It is not usual to defeat the jurisdiction of any court, in civil actions, by rigid construction, where the matter is fairly doubtful, and jurisdiction may fairly be retained;⁹⁹ but it has been said that superior courts will rule strictly with regard to matters of jurisdiction of inferior courts for the purpose of keeping the latter tribunals strictly within the limits of their jurisdiction.¹ In determining the

Braden v. Williams, 222 P. 948, 101 Okl. 11.
15 C.J. p 847 note 28 [1], p 850 note 37.

So in arbitration proceeding

N.Y.—Finsilver, Still & Moss v. Goldberg, Maas & Co., 171 N.E. 579, 253 N.Y. 382, 69 A.L.R. 809, reversing 237 N.Y.S. 110, 227 App.Div. 90, and modifying *In re Goldberg, Maas & Co.*, 237 N.Y.S. 119, 227 App.Div. 790.

Resisting motion to discharge attachment

Mont.—Helena Adjustment Co. v. Predovich, 37 P.2d 651, 98 Mont. 162.

95. Ky.—Bankers' Nat. Life Ins. Co. v. Stone, 72 S.W.2d 49, 254 Ky. 682.
La.—Snyder v. Davison, 131 So. 84, 15 La.App. 695, affirming 129 So. 185, 15 La.App. 695, and affirmed Snyder v. Davison, 134 So. 89, 172 La. 274.

96. Ky.—Louisville, etc., R. Co. v. Cooper, 13 Ky.L. 496.
Tex.—Ft. Worth, etc., R. Co. v. Harlan, Civ.App., 62 S.W. 971.

97. U.S.—Federal Coal Co. v. Liberty Coal & Coke Co., C.C.A.Ky., 23 F.2d 674.

Ark.—Federal Land Bank of St. Louis v. Gladish, 2 S.W.2d 696, 176 Ark. 267.

Kan.—Clark v. West, 206 P. 317, 111 Kan. 83.

Okl.—Allen v. Ramsey, 41 P.2d 658, 170 Okl. 430, 97 A.L.R. 1259—Wright v. Kemper, 279 P. 346, 137 Okl. 259—El Jardin Immigration Co. v. Hudson, 236 P. 386, 110 Okl. 147.

Reason for rule

"Defendant did not merely defend against plaintiff's claim. He also asserted an affirmative cause of action against plaintiff and asked for an affirmative judgment against him. . . . By doing so he voluntarily invoked the power of the court in his own behalf, and thereby gave the court jurisdiction over him."—Morehart v. Furley, 182 N.W. 723, 724, 141 Minn. 56.

Motion to make more definite

Filing a demurrer to the petition and moving to make it more definite is not a request for affirmative relief such as will waive defendant's objection to jurisdiction over his person.—Commonwealth Cotton Oil Co. v. Hudson, 161 P. 535, 62 Okl. 23.

In an election contest, where defendant appeared specially and objected to the jurisdiction of the court over his person, his request for additional time in which to plead, his motion to dismiss on the ground that plaintiff was not a proper party, his request for stay of execution until final judgment, and his answer by way of cross petition and counter contest, held not to invoke the jurisdiction of the court in matters unnecessary to his defense so as to result in a waiver of his objection.—Braden v. Williams, 222 P. 948, 101 Okl. 11.

98. Ky.—Brumleve v. Cronan, 197 S.W. 498, 176 Ky. 818.

Answer not mentioning plea to jurisdiction

(1) Objection to jurisdiction, if raised by motion to quash, held waived by filing of answer to merits consisting only of general denial.—Joe Dan Market v. Wentz, 13 S.W.2d 641, 321 Mo. 943, transferred 20 S.W.2d 567, 223 Mo.App. 772.

(2) Where defendant's motion to dismiss, in the nature of a plea to the jurisdiction, was overruled, and he then appeared generally for the purpose of taking change of venue, which was granted, and thereafter filed an answer without reference to the plea to the jurisdiction, defendant waived the jurisdictional question, notwithstanding his having excepted to the overruling of a motion to dismiss.—Cotton Lumber Co. v. La Crosse Lumber Co., 204 S.W. 957, 200 Mo.App. 7.

99. Tex.—Fuqua v. Mapes, Com. App., 57 S.W.2d 97, affirming, Civ. App., 40 S.W.2d 847.

Vt.—Stanley v. Barker, 25 Vt. 507. Presumptions as to jurisdiction see supra §§ 96–100.

Contract or tort

When an action can be fairly treated as based either on contract or on tort, a court, to support jurisdiction, will sustain the election made by plaintiff.—Roeback v. Short, 144 S.E. 515, 196 N.C. 61—Mitchem v. Pasour, 92 S.E. 322, 173 N.C. 487.

Imperfect evidence of jurisdictional facts

"If the facts necessary to confer jurisdiction did exist, jurisdiction was acquired, however imperfect the evidence of those facts before the court." — Minneapolis Threshing Mach. Co. v. Ashauer, 126 N.W. 118, 115, 142 Wis. 646.

Misdescription of defendants' capacity

On motion to dismiss a complaint for want of jurisdiction of defendants, sued "as executors and trustees," where action cannot be maintained against them in their capacity as executors, it was held that the erroneous description of the capacity in which they are being sued may be disregarded where the complaint shows that they have been sued as trustees, rather than as executors.—Everhart v. Provident Life & Trust Co. of Philadelphia, 195 N.Y.S. 388, 118 Misc. 852.

Action against state

When the jurisdiction of a court is questioned on the ground that the action is really against the state, the court will look behind the nominal parties to the record to ascertain the real parties to the controversy, dismissing the action if it is really against the state, and retaining jurisdiction if it is not.—Salem Flouring Mills Co. v. Lord, 69 P. 1033, 70 P. 832, 42 Or. 82.

1. Kan.—State v. Horn, 9 P. 208, 34 Kan. 556. Limitations on jurisdiction of inferior courts generally see *infra* §§ 244–248.

question of jurisdiction, considerations of hardship,² or of the merits of the case,³ can play no part, nor is the convenience of the litigants or witnesses controlling.⁴ Jurisdiction is to be determined as of the time the suit was commenced.⁵

The court, in determining whether it has jurisdiction at common law, may inquire whether a statutory remedy exists;⁶ but the existence of a remedy in another state cannot be shown to defeat jurisdiction.⁷

Pleadings. The question of jurisdiction is to be

determined in the first instance from the pleadings,⁸ the allegations of which must be assumed to be true.⁹ The fact that the cause of action, as pleaded, is within the court's jurisdiction, or that the pleadings allege all of the requisite jurisdictional facts, is not conclusive as to the court's jurisdiction.¹⁰

Where it appears from the face of the complaint that the court lacks jurisdiction of the subject matter, the defect cannot be cured by the evidence or the verdict.¹¹ Omission¹² or error¹³ in the allega-

2. U.S.—Goldstone v. Payne, C.C.A. N.Y., 94 F.2d 855, certiorari denied 58 S.Ct. 1057, 304 U.S. 585, 82 L.Ed. 1547.

3. U.S.—Davidson v. Rafferty, D.C. N.Y., 34 F.2d 700, affirmed, C.C.A., 39 F.2d 1022.
15 C.J. p 734 note 81, p 851 note 61.

Desire to dispose of controversy on merits cannot justify ignoring jurisdictional limitations.—Martin v. Barth, C.C.A.Ind., 25 F.2d 95.

4. N.Y.—Parker v. Krauss Co., 284 N.Y.S. 478, 157 Misc. 667, affirmed 292 N.Y. 955, 249 App.Div. 718.

5. U.S.—Minneapolis & St. L. R. Co. v. Peoria & P. U. Ry. Co., Iowa, 46 S.Ct. 402, 270 U.S. 580, 70 L. Ed. 743—Fisher Flouring Mills Co. v. Vierhus, C.C.A.Wash., 78 F.2d 889.

N.Y.—Davidsburgh v. Knickerbocker L. Ins. Co., 90 N.Y. 526.

Curing defective attachment

Where attachment proceedings are defective, so that the court did not acquire jurisdiction of the property attached, nothing can be done after the filing of an objection to the jurisdiction to change or affect the issue pending its disposition by the court.—Pugh v. Flannery, 92 So. 699, 151 La. 1063.

6. Pa.—Fisher v. Kreebel, 1 Leg. Chron. 113.

7. Tex.—Sorkin v. Houston, etc., R. Co., Civ.App., 53 S.W. 608.
15 C.J. p 851 note 67.

8. Ark.—Merchants Bank of Vandervoort v. Affholter, 215 S.W. 648, 140 Ark. 480.

Cal.—Holbrook v. Phelan, 6 P.2d 356, 357, 121 Cal.App.Supp., 781.

La.—O'Brien v. Delta Air Corporation, 178 So. 489, 188 La. 911.

Mich.—Fox v. Martin, 283 N.W. 9, 287 Mich. 147.

Or.—Watts v. Gerking, 228 P. 135, 111 Or. 641, 34 A.L.R. 1489—Dippold v. Cathlamet Timber Co., 193 P. 909, 98 Or. 183.

Tex.—Karbach v. International Harvester Co. of America, Civ.App., 61 S.W.2d 864—Bankers' Mortg. Co. of Topeka, Kan. v. Rogers, Civ.App., 61 S.W.2d 593, followed in Bank-

ers' Mortg. Co. of Topeka, Kan. v. Chambers, 61 S.W.2d 597 and Bankers' Mortg. Co. of Topeka, Kan. v. Johnson, 61 S.W.2d 597.
15 C.J. p 850 note 51.

Source of, and right to assume jurisdiction as affected by pleadings see *supra* § 33.

"The pleadings of all parties could be looked to for the purpose of determining whether or not the court had jurisdiction of the case."—Texas Reciprocal Ins. Ass'n v. Leger, 97 S.W.2d 677, 678, 128 Tex. 319, reversing, Civ.App., 92 S.W.2d 482.

Whether cause of action arose within state

(1) The allegations of the initial pleading determine whether a cause of action arose within the state.

Ind.—Lake Shore, etc., R. Co. v. Clough, 104 N.E. 975, 105 N.E. 905, 182 Ind. 178.

N.Y.—Delaware, etc., R. Co. v. New York, etc., R. Co., 33 N.Y.S. 1081, 12 Misc. 230.

(2) Such allegations are exclusive of affidavits on the point.—Delaware, etc., R. Co. v. New York, etc., R. Co., 33 N.Y.S. 1081, 12 Misc. 230.

Jurisdiction of subject-matter, however, has been held "not determined by the pleadings nor by the way the case is tried by either party."—McClain v. Kansas City Bridge Co., App., 83 S.W.2d 132, 134, reversed on other grounds 88 S.W.2d 1019, 338 Mo. 7.

Equity jurisdiction

Where a court of equity has jurisdiction of parties and subject matter, the fact that the pleadings fail to show a right to equitable relief does not render the court's decree, granting such relief, void.—Malone v. Meres, 109 So. 677, 91 Fla. 709.

9. U.S.—Goodman v. Lane, C.C.A. Mo., 48 F.2d 32.

Mass.—Malden Trust Co. v. Brooks, 177 N.E. 629, 276 Mass. 464, 80 A.L.R. 1028.

Pa.—Gengenbach v. Willow Grove Park Co., 124 A. 425, 280 Pa. 278.

Whether action is local or transitory is a jurisdictional question which may not be established by a

simple allegation in the petition, but is for the court's determination, under the facts pleaded.—Elghme v. Indiana, B. & W. R. Co., 249 S.W. 717, 213 Mo.App. 342.

10. La.—Turner v. Item Co., 6 La. App. 270.

N.Y.—City of Albany v. Town of Coeymans, 2 N.Y.S.2d 735, 253 App. Div. 436.

Pa.—Hickey v. Philadelphia Electric Co., 184 A. 553, 122 Pa.Super. 213.

Tex.—Treacarr v. City of Galveston, Civ.App., 28 S.W.2d 887, error refused—Treacarr v. City of Galveston, Civ.App., 28 S.W.2d 276, error dismissed.

"In adjudicating questions of jurisdiction, courts are not bound by the allegations of the plaintiff's petition. The rule is that, in the trial of a case, if at any time during its progress it becomes apparent that the court has no authority under the law to adjudicate the issues presented, it becomes the duty of the court to dismiss it."—Galley v. Hedrick, Tex.Civ.App., 127 S.W.2d 978, 980.

Affidavit of value furnished to an officer executing a writ of replevin is not conclusive in determining jurisdiction; and where the proof shows that the value of the property replevied exceeds the court's jurisdictional limits, the action should be dismissed.—King v. Scala, 165 A. 426, 110 N.J.Law 321.

11. Or.—Dippold v. Cathlamet Timber Co., 193 P. 909, 98 Or. 183.

On demurrer ore tenus, raising the question only as to whether the court was without jurisdiction on the face of the complaint, the evidence offered by plaintiff cannot be considered.—Roebuck v. Short, 144 S.E. 515, 196 N.C. 61.

12. Mo.—Darby v. Weber Implement Co., 208 S.W. 116, 203 Mo. App. 200.

13. Minn.—Horn v. Ne-Gon-Ah-E-Quaince, 192 N.W. 363, 155 Minn. 77, certiorari denied Ne-Gon-Ah-E-Quaince v. Horn, 44 S.Ct. 6, 263 U.S. 701, 68 L.Ed. 514—State v. Probate Court, 153 N.W. 520, 130 Minn. 269.

tions with respect to venue may be cured by the evidence. Objections to jurisdiction not appearing on the face of the complaint cannot be raised by a motion to dismiss the proceeding for lack of jurisdiction, being matter of defense;¹⁴ they may be set up by way of answer, special plea, or affidavit of defense, or in any other appropriate manner.¹⁵ Allegations which are sufficient to confer jurisdiction if made in good faith can only be attacked by a special plea setting up lack of good faith.¹⁶

Burden of proof. Any person seeking the affirmative action of a court has the burden of demonstrating its jurisdiction to grant the relief sought.¹⁷ An objection to jurisdiction over the person, either on account of irregularity of service of summons or because the action was brought in the wrong county, must be supported by the evidence when the record does not show facts going to support the objection,¹⁸ unless the facts are admitted;¹⁹ but it has been held that, where defendant appears specially to challenge the court's jurisdiction over his

person, the burden of proof is on plaintiff.²⁰ A defendant pleading against a court's jurisdiction that plaintiff is not a bona fide resident or citizen of the state has the burden of proof on such issue;²¹ and a defendant attacking the jurisdiction of another court, a former proceeding in which is the basis of the action, has the burden of proving that, as he claims, plaintiff was not within the jurisdictional limits of such court.²²

Trial of issue; question for court or jury. Jurisdiction has broadly been said to be a question for the court,²³ and not for the jury,²⁴ its determination resting in the sound judicial discretion of the court.²⁵ A question of jurisdiction not resting on contested facts is one of law;²⁶ but a disputed question of fact must be determined as such a question,²⁷ and where jurisdiction is dependent on questions of fact, the jury may, subject to the direction of the court as to matters of law, affirm or deny jurisdiction by a general verdict.²⁸ Jurisdictional

14. N.Y.—*Berlinger v. Berlinger*, 298 N.Y.S. 965, 164 Misc. 413.

15. N.Y.—*Consumers' Lumber Co. v. Lincoln*, 233 N.Y.S. 530, 225 App. Div. 434—*Berlinger v. Berringer*, 298 N.Y.S. 965, 164 Misc. 413.

Ohio.—*Coverson v. Carpenta*, 163 N.E. 718, 29 Ohio App. 482.

Pa.—*Gengenbach v. Willow Grove Park Co.*, 124 A. 425, 280 Pa. 278.

Jurisdiction over nonresident codefendant

Where petition on its face showed that all defendants were rightfully joined, and service was made on some of them in county where suit was brought, and on nonresident defendant in county of his residence, question of court's jurisdiction over nonresident must be raised by answer.—*Coverson v. Carpenta*, 163 N.E. 718, 29 Ohio App. 482.

16. Ark.—*Merchants' Bank of Vandervoort v. Affholter*, 215 S.W. 648, 140 Ark. 480.

Tex.—*Karbach v. International Harvester Co. of America*, Civ.App., 61 S.W.2d 864.

Plea challenging good faith held properly overruled

Tex.—*McCusker v. Field*, Civ.App., 76 S.W.2d 816.

17. N.Y.—*In re Brady's Estate*, 264 N.Y.S. 449, 147 Misc. 613.

Location of land

Plaintiffs seeking to quiet and determine title to land alleged to be situated in county where action was brought had burden to prove that land was situated therein, where defendants alleged otherwise, and dismissal was proper where plaintiffs

did not sustain burden.—*Warner v. Howard*, 98 S.W.2d 613, 339 Mo. 923.

18. U.S.—*McCauley v. McCauley*, D. C.Pa., 202 F. 280.

Neb.—*Martin v. Fraternal Life Assoc.*, 114 N.W. 159, 80 Neb. 224. Tex.—*Houston Oil Co. v. Davis*, Civ. App., 154 S.W. 337.

19. U.S.—*McCauley v. McCauley*, D. C.Pa., 202 F. 280.

20. Iowa.—*Pendy v. Cole*, 233 N.W. 47, 211 Iowa 199—*Jermaine v. Graf*, 283 N.W. 428, 225 Iowa 1063.

21. N.Y.—*Persick v. Philadelphia & Reading Coal & Iron Co.*, 169 N.Y.S. 288, 182 App.Div. 291.

22. N.Y.—*Sullivan v. Curtayne*, 285 N.Y.S. 587, 247 App.Div. 756.

23. Ga.—*Thompson v. State*, 170 S.E. 328, 47 Ga.App. 229.

Ky.—*Robinson v. Paxton*, 276 S.W. 500, 502, 210 Ky. 575, citing *Corpus Juris*.

Mo.—*Gill v. Sovereign Camp, W. O. W.*, 236 S.W. 1073, 209 Mo.App. 63.

Okl.—*Dolese Bros. v. Tollett*, 19 P. 2d 570, 162 Okl. 158.

Pa.—*Gearing v. Gearing*, 7 Pa. Dist. & Co. 747, 750, quoting *Corpus Juris*, and affirmed 90 Pa.Super. 192.

15 C.J. p 851 note 59.

Power of court to determine its own jurisdiction see *infra* § 113.

24. Ky.—*Robinson v. Paxton*, 276 S.W. 500, 502, 210 Ky. 575, citing *Corpus Juris*.

Mo.—*Gill v. Sovereign Camp, W. O. W.*, 236 S.W. 1073, 209 Mo.App. 63.

So as to subject matter

Okl.—*Dolese Bros. v. Tollett*, 19 P. 2d 570, 162 Okl. 158.

25. Ind.—*Pittsburgh, etc., R. Co. v. Peck*, 88 N.E. 627, 44 Ind.App. 62, transferred 87 N.E. 644, 172 Ind. 19.

15 C.J. p 851 note 62.

26. Mo.—*State ex rel. Kaiser v. Miller*, 289 S.W. 898, 316 Mo. 372.

Pa.—*Gearing v. Gearing*, 7 Pa. Dist. & Co. 747, affirmed 90 Pa.Super. 192.

Effect of evidence in support of, and in opposition to, an objection to jurisdiction, where there is no conflict in the evidence, is for the court.—*Tomson v. Iowa State Traveling Men's Assoc.*, 129 N.W. 529, 88 Neb. 399.

27. N.Y.—*Woiclanowicz v. Philadelphia & Reading Coal & Iron Co.*, 133 N.E. 579, 232 N.Y. 256, reversing 172 N.Y.S. 926, 186 App.Div. 906, amendment of remittitur denied 134 N.E. 586, 232 N.Y. 596—*Persick v. Philadelphia & Reading Coal & Iron Co.*, 169 N.Y.S. 288, 182 App.Div. 291.

Evidence of jurisdictional amount

Evidence was held to justify finding that plaintiff, suing city under agreements for hire of truck, worked under two separate employments, thereby bringing amount due under each within jurisdiction of district court.—*Femia v. City of Bayonne*, 170 A. 56, 112 N.J.Law 89, 90, affirming 166 A. 922, 11 N.J.Misc. 553.

28. Pa.—*Gearing v. Gearing*, 7 Pa. Dist. & Co. 747, 750, affirmed 90 Pa.Super. 192, and quoting *Corpus Juris*.

15 C.J. p 851 note 60.

facts put in issue by the pleadings must be proved.²⁹

Where there is a conflict between the parties as to the existence of a jurisdictional fact, the court should not decide the question on affidavits,³⁰ even with the consent of the parties;³¹ in such case the dispute should be determined by the taking of evidence,³² either at a hearing on that issue³³ or at the trial of the case.³⁴

Under a Pennsylvania statute, providing that where the question of jurisdiction is raised in the court of first instance it shall be preliminarily determined by the court on the pleadings or with depositions, the procedure set forth must be followed

strictly when a litigant wishes to raise solely a jurisdictional question.³⁵ Such statute cannot be availed of for any purpose except the disposition of questions of jurisdiction without a trial on the merits, and was not intended to furnish a short cut to a determination of the issues raised by the pleadings³⁶ or otherwise;³⁷ and in a proceeding based on the statute, no other matters are open to inquiry than jurisdiction over defendant's person and over the cause of action.³⁸

Effect of prior rulings. The question of jurisdiction of the subject matter is not closed by the fact that there have been in the same case prior rulings of the same judge, or of another judge, sustaining the jurisdiction.³⁹

29. U.S.—U. S. v. Wilson, C.C.A. Kan., 78 F.2d 465.

30. N.Y.—Goodovitch v. Reiss, 220 N.Y.S. 42, 129 Misc. 152.

Ohio.—Robinson v. Harrison, 9 Ohio S. & C.P. 701, 7 Ohio N.P. 273.

Forum inconvenient

However, on application to a court to decline jurisdiction of an action between a resident plaintiff, treated for purposes of jurisdiction as a nonresident, and a nonresident defendant, on the ground that the forum is an inconvenient one, the court may consider the question on affidavits or on testimony given by witnesses, or both.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1407.

31. Ohio.—Robinson v. Harrison, 9 Ohio S. & C. P. 701, 7 Ohio N.P. 703.

32. N.Y.—Woicjanowicz v. Philadelphia & Reading Coal & Iron Co., 133 N.E. 579, 232 N.Y. 256, reversing 172 N.Y.S. 926, 186 App.Div. 906, amendment of remittitur denied 134 N.E. 586, 232 N.Y. 596.—Goodovitch v. Reiss, 220 N.Y.S. 42, 129 Misc. 152.

Domicile

Where an averment as to domicile is supported by evidence on behalf of plaintiff, defendant is entitled to introduce evidence in contradiction thereof.—Stephenson v. Broadwell, 26 La. Ann. 387.

33. Ohio.—Robinson v. Harrison, 9 Ohio S. & C.P. 701, 7 Ohio N.P. 703.

Preliminary jury trial may be had, if necessary, to determine the controlling facts.—Gengenbach v. Willow Grove Park Co., 124 A. 425, 280 Pa. 273.

Preliminary motion for injunction

However, a question as to the jurisdiction of the court to proceed in an action cannot be determined on a preliminary motion for an injunction to restrain plaintiff from further

proceedings.—Johnson v. Victoria Chief Copper Min., etc., Co., 112 N.Y.S. 346, 60 Misc. 468, affirmed 114 N.Y.S. 1132, 129 App.Div. 910.

34. N.Y.—Consumers' Lumber Co. v. Lincoln, 233 N.Y.S. 530, 225 App. Div. 484.—Johnson v. Victoria Chief Copper Min., etc., Co., 112 N.Y.S. 346, 60 Misc. 468, affirmed 114 N.Y.S. 1132, 129 App.Div. 910. 15 C.J. p. 850 note 50.

35. Pa.—Brummer v. Linker, 196 A. 834, 329 Pa. 192.—Welser v. Ealer, 176 A. 429, 317 Pa. 182.—Wettengel v. Robinson, 136 A. 673, 288 Pa. 362.

Commission, as distinguished from oral examination by depositions, is required for taking of testimony of nonresident witnesses.—Chicago Coliseum Club v. Dempsey, 8 Pa. Dist. & Co. 420.

Motion to dissolve injunction as petition

Where motion to dissolve preliminary injunction, on the ground that the court lacked jurisdiction was discharged and no appeal taken from order, discharge of rule granted on subsequent petition raising preliminarily question of jurisdiction of court over defendant's person on ground prior motion was equivalent to petition, was held error.—Wanamaker v. Wanamaker, 172 A. 846, 315 Pa. 229.

36. Pa.—Colflesh v. Provident Trust Co. of Philadelphia, 176 A. 433, 317 Pa. 46.—In re Hurst, 176 A. 427, 317 Pa. 217.—Staryeu v. Midouhas, 149 A. 600, 299 Pa. 352.—Lackawanna County v. James, 145 A. 817, 296 Pa. 225.—Appeals of Kasnevich, 189 A. 679, 124 Pa. Super. 582.—First Nat. Bank, to Use of Willson v. Getty, 179 A. 764, 118 Pa. Super. 326.

37. Pa.—Rutherford Water Co. v. City of Harrisburg, 146 A. 113, 297 Pa. 33.

38. Pa.—Welser v. Ealer, 176 A. 429, 317 Pa. 182.—Koontz v. Messer,

172 A. 457, 314 Pa. 434.—Skelton v. Lower Merion Tp., 148 A. 846, 298 Pa. 471.—Appeals of Kasnevich, 189 A. 679, 124 Pa. Super. 582.—First Nat. Bank, to Use of Willson, v. Getty, 179 A. 764, 118 Pa. Super. 326.

Right to recover

"Whether or not a plaintiff has averred sufficient facts in his statement of claim to entitle him to recover is not a matter open for consideration under the statute."—Skelton v. Lower Merion Tp., 148 A. 846, 298 Pa. 471.

Defenses to claim cannot be considered.—Koontz v. Messer, 172 A. 457, 314 Pa. 434.

Form of action, as whether plaintiff may proceed in equity instead of at law, is not a question to which the statute applies.—Rutherford Water Co. v. City of Harrisburg, 146 A. 113, 297 Pa. 33.

Whether claimant can file mechanic's lien cannot be decided.—Staryeu v. Midouhas, 149 A. 600, 299 Pa. 352.

Questions of propriety of introducing certain evidence do not affect court's jurisdiction, and will not be considered.—In re Hurst, 176 A. 427, 317 Pa. 217.

Improper service of process

(1) "One of the main purposes of the . . . [statute] was to permit the question of want of jurisdiction over the defendant, arising from an alleged illegal service of process, to be raised and decided in limine."—Kolesar v. Slovak Evangelical Union, Augsburg Confession of America, 186 A. 302, 304, 122 Pa. Super. 318.

(2) Statute was held applicable in wife's maintenance suit against husband not served with process pursuant to statute.—Hughes v. Hughes, 158 A. 874, 306 Pa. 75.

39. U.S.—Sheldon v. Wabash R. Co., C.C. Ill., 105 F. 785.

Refusal to reconsider decision

Where no appeal was taken from the trial court's decision that it had

§ 113. Power of Court to Determine Its Own Jurisdiction

Every court has the power and duty to determine whether or not it has jurisdiction of a cause presented to it for determination. However, a court cannot pass on its own existence as a court.

jurisdiction, and thereafter a long trial was had, the trial court would not reconsider the question of jurisdiction before rendering judgment.—Heald v. Marden, Orth & Hastings Co., 172 N.Y.S. 25, affirmed 182 N.Y.S. 928.

40. U.S.—Davidson v. Rafferty, D.C. N.Y., 34 F.2d 700, affirmed, C.C.A., 39 F.2d 1022—In re Seger Bros. Co., D.C.Mich., 243 F. 459, reversed on other grounds Lawhead v. Monroe Bldg. Co., 252 F. 758, 164 C.C.A. 598, certiorari denied Monroe Bldg. Co. v. Lawhead, 39 S.Ct. 67, 248 U.S. 581, 63 L.Ed. 431.

Fla.—State ex rel. B. F. Goodrich Co. v. Trammell, 192 So. 175, 177, quoting *Corpus Juris*.

Ind.—State v. Superior Court of Marion County, 177 N.E. 322, 202 Ind. 589.

Ill.—Fico v. Industrial Commission, 186 N.E. 605, 353 Ill. 74.

Ky.—Deakins v. Childers, 242 S.W. 9, 195 Ky. 208.

Mass.—Carroll v. Berger, 150 N.E. 870, 225 Mass. 132.

N.Y.—Consumers' Lumber Co. v. Lincoln, 233 N.Y.S. 530, 225 App. Div. 484.

N.C.—Jones v. Standard Oil Co. of New Jersey, 162 S.E. 741, 202 N.C. 328.

Okl.—McDonald v. Renz, 88 P.2d 336, 184 Okl. 485—Adair v. Montgomery, 176 P. 911, 74 Okl. 21.

Pa.—In re Keyser's Estate, 193 A. 125, 129, 329 Pa. 514, citing *Corpus Juris*.

Wyo.—Fox Park Timber Co. v. Baker, 84 P.2d 736, 742, 53 Wyo. 467, 120 A.L.R. 1020, citing *Corpus Juris*.

15 C.J. p 851 note 69.

Determination of jurisdiction of appellate court see Appeal and Error § 45.

After judgment

A court may determine the question of jurisdiction at any time in the proceedings of the cause, either before or after judgment.—Williams v. Sherman, 212 P. 971, 36 Idaho 494.

After cause has been removed from a state to a federal court, it is for the latter court alone to determine questions with respect to its jurisdiction.—Illius v. New York, etc., R. Co., 13 N.Y. 597, followed in Fargo v. McVicker, 55 Barb. 437, 38 How.Pr. 21.

As between courts

(1) "As between courts, neither of which has corrective power over the

other, one cannot bind the other on a question of jurisdiction."—Subers v. Hirschensohn, 127 S.E. 825, 827, 33 Ga.App. 752, citing *Corpus Juris*.

(2) Where the question of jurisdiction as between two courts, in each of which an action involving the same transaction has been instituted, depends on a question of fact, the proper court to decide the issue of jurisdiction is the one in which the pleadings raise the question.—Russell v. Taylor, 49 S.W.2d 733, 121 Tex. 450.

Assumption of authority to proceed in a cause does not confer jurisdiction where it does not exist.—Brougham v. Oceanic Steam Nav. Co., N.Y., 205 F. 857, 126 C.C.A. 321.

41. U.S.—Stoll v. Gottlieb, Ill., 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, reversing Gottlieb v. Crowe, 12 N.E.2d 831, 368 Ill. 88, reversing 7 N.E.2d 469, 289 Ill.App. 595, certiorari granted Stoll v. Gottlieb, 58 S.Ct. 1038, 304 U.S. 554, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437—Moore v. Pate, C.C.A.Mass., 39 F.2d 616, certiorari denied 51 S.Ct. 30, 282 U.S. 553, 75 L.Ed. 755.

Ark.—Fruitt v. International Order of Twelve, Knights and Daughters of Tabor, 250 S.W. 331, 158 Ark. 437.

Fla.—State ex rel. B. F. Goodrich Co. v. Trammell, 192 So. 175, 177, quoting *Corpus Juris*—Curtis v. Albritton, 132 So. 677, 101 Fla. 853.

Ind.—Baltimore, etc., R. Co. v. Freeze, 82 N.E. 761, 169 Ind. 370—Wagh v. Board of Com'rs of Montgomery County, 115 N.E. 356, 64 Ind.App. 123.

Miss.—Broom v. Board of Sup'rs of Jefferson Davis County, 158 So. 344, 171 Miss. 586—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604.

Wyo.—Fox Park Timber Co. v. Baker, 84 P.2d 736, 742, 53 Wyo. 467, 120 A.L.R. 1020, citing *Corpus Juris*.

Status of would-be litigant

(1) The question of the status of any would-be litigant in the surrogate's court must be determined as a preliminary matter, and the authority to make such determination is inherent in the general grant of jurisdiction to the court.—In re Grube's Will, 7 N.Y.S.2d 194, 169 Misc. 170.

(2) Where no specifically defined person is granted the right to insti-

Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction,⁴⁰ both as to parties and as to subject matter,⁴¹ and to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction.⁴² The court

tute proceeding over which the statute has given court jurisdiction, the court can inquire into the interest of the person seeking its institution and into the matter which he sets forth as his right so to do before it directs that the parties representing the opposing interests be brought into court and required to answer.—State v. Superior Court for Yakima County, 185 P. 628, 108 Wash. 636.

42. U.S.—Stoll v. Gottlieb, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, reversing Gottlieb v. Crowe, 12 N.E.2d 831, 368 Ill. 88, reversing 7 N.E.2d 469, 289 Ill.App. 595, certiorari granted Stoll v. Gottlieb, 58 S.Ct. 1038, 304 U.S. 554, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437—Texas & P. Ry. Co. v. Gulf, C. & S. F. Ry. Co., Tex., 46 S.Ct. 263, 270 U.S. 266, 70 L.Ed. 578, reversing, C.C.A., Gulf, C. & S. F. Ry. Co. v. Texas & P. Ry. Co., 4 F.2d 904 which reversed, D.C., Lancaster v. Gulf, C. & S. F. Ry. Co., 298 F. 488, transferred Gulf, C. & S. F. Ry. Co. v. Texas & P. Ry. Co., 45 S.Ct. 128, 266 U.S. 583, 69 L.Ed. 455—Rice v. Baltimore & O. R. Co., C.C.A.Ohio, 42 F.2d 387—In re Seger Bros. Co., D.C. Mich., 243 F. 459, reversed on other grounds Lawhead v. Monroe Bldg. Co., 252 F. 758, 164 C.C.A. 598, certiorari denied Monroe Bldg. Co. v. Lawhead, 39 S.Ct. 67, 248 U.S. 581, 63 L.Ed. 431.

Colo.—Isham v. Miller, 252 P. 353, 80 Colo. 380.

Idaho.—Pfirman v. Probate Court of Shoshone County, 64 P.2d 849, 57 Idaho 304.

Ill.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

La.—Jefferson v. Gamm, 90 So. 682, 150 La. 372—Elster v. Picou, 81 So. 710, 144 La. 1052.

N.J.—Femia v. City of Bayonne, 170 A. 56, 112 N.J.Law 89, 90, affirming 166 A. 922, 11 N.J.Misc. 553.

N.Y.—Morris v. Morris, 289 N.Y.S. 686, 160 Misc. 59.

N.C.—Miller v. Roberts, 193 S.E. 286, 212 N.C. 126—Young v. Mayland Mica Co., 193 S.E. 285, 212 N.C. 243.

Ohio.—Busse & Borgmann Co. v. Upchurch, 21 N.E.2d 349, 60 Ohio App. 349—Industrial Commission of Ohio v. Frazier, 7 N.E.2d 815, 54 Ohio App. 401—Long & Allstatter Co. v. Willis, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed Willis

necessarily decides that it has jurisdiction by proceeding in the cause.⁴³

When at any time or in any manner it is represented to the court that it has not jurisdiction, the court should examine the grounds of its jurisdiction before proceeding further, the question of jurisdiction being always open for determination.⁴⁴ The court may receive testimony on a preliminary question to determine its jurisdiction,⁴⁵ and is not bound to dismiss the suit on a mere allegation of lack of jurisdiction, but may inquire into the correctness of the averment.⁴⁶

A court cannot pass on its own existence as a

court,⁴⁷ or entertain a motion to set aside its judgment on the ground that the law creating the court is unconstitutional, so that the court is a nullity.⁴⁸

§ 114. Right and Duty of Court to Act of Its Own Motion

A court has the right and duty to raise the question of its jurisdiction, of its own motion. If, at any time the court finds that it lacks jurisdiction, it should take appropriate action, irrespective of the parties' wishes.

A court is bound to take notice of the limits of its authority,⁴⁹ and it is its right and duty to make a preliminary⁵⁰ examination of its jurisdiction to entertain the cause, of its own motion, even though

v. Long & Allstatter Co., 2 N.E.2d 600, 131 Ohio St. 287.

"It is the legitimate exercise of judicial powers of any court to determine its own jurisdiction where the question arises on contested facts."—Mahon v. Fletcher's Estate, Mo.App., 245 S.W. 372, 374.

Residence of defendant

Colo.—Badger v. Badger, 196 P. 861, 69 Colo. 564.

43. U.S.—Stoll v. Gottlieb, Ill., 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, reversing Gottlieb v. Crowe, 12 N.E.2d 881, 368 Ill. 88, reversing 7 N.E.2d 469, 289 Ill.App. 595, certiorari granted Stoll v. Gottlieb, 58 S.Ct. 1038, 304 U.S. 554, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437.

Fla.—State ex rel. B. F. Goodrich Co. v. Trammell, 192 So. 175, 177, quoting *Corpus Juris*—Curtis v. Albritton, 132 So. 677, 681, 101 Fla. 853, citing *Corpus Juris*.

Ga.—Long v. S. A. Lynch Enterprise Finance Corporation, 146 S.E. 513, 39 Ga.App. 221.

Mass.—Bar Ass'n of City of Boston v. Casey, 116 N.E. 541, 227 Mass. 46.

Miss.—Drummond v. State, 185 So. 207, 209, citing *Corpus Juris*.

N.Y.—In re Beattie's Estate, 221 N.Y.S. 726, 129 Misc. 241, affirmed Matter of Beattie, 225 N.Y.S. 792, 222 App.Div. 729, appeal dismissed 162 N.E. 525, 248 N.Y. 561.

15 C.J. p 851 note 71.

Presumption as to jurisdiction from exercise thereof see supra §§ 96–100.

Issuance of process implies a ruling in favor of jurisdiction.—Manier v. Trumbo, C.C.Ky., 30 F.Cas.No.18, 309—15 C.J. p 850 note 46.

44. Conn.—Marcl v. A. H. Merri-man & Sons, 153 A. 411, 115 Conn. 678.

Fla.—Speight v. Horne, 133 So. 574, 101 Fla. 101, followed in 133 So. 577, 101 Fla. 109, and rehearing denied 135 So. 528, 101 Fla. 108—State ex rel. Lane Drug Stores v. Simpson, 166 So. 227, 122 Fla. 582,

affirmed 166 So. 262, 122 Fla. 670, followed in State ex rel. Lane Drug Stores v. Carswell, 166 So. 249, 122 Fla. 639, rehearing denied 166 So. 574, 122 Fla. 700, rehearing denied State ex rel. Lane Drug Stores v. Simpson, 166 So. 574, 122 Fla. 700, certiorari denied Simpson v. State of Florida ex rel. Lane Drug Stores, 57 S.Ct. 15, 299 U.S. 543, 81 L.Ed. 399.

Me.—Perry v. Griefen, 59 A. 601, 99 Me. 420.

Mass.—Shannon v. Shepard Mfg. Co., 119 N.E. 763, 230 Mass. 224.

Mich.—Warner v. Noble, 282 N.W. 855, 286 Mich. 654—Cohen v. Home Life Ins. Co., 263 N.W. 857, 860, 273 Mich. 469, citing *Corpus Juris*.

Mo.—Dahlin v. Missouri Commission for the Blind, App., 282 S.W. 420. N.C.—Patrick-Mosteller Co. v. James R. Baker & Co., 105 S.E. 271, 180 N.C. 588.

S.C.—Williamson v. Richards, 155 S.E. 890, 153 S.C. 534.

Vt.—Town of Barton v. Town of Sutton, 106 A. 583, 93 Vt. 102.

15 C.J. p 850 note 43.

Representation by amicus curiae see *Americus Curiae* § 3 a.

Specifying ground for decision

Where jurisdiction is attacked on several grounds, the court in determining that it lacks jurisdiction need not specify on which ground the decision rests.—Irons v. American Nat. Bank, 165 S.E. 738, 175 Ga. 552, followed in 165 S.E. 741, 175 Ga. 558.

Successive motions questioning the jurisdiction are not ordinarily entertained.—Grosch v. Central Van-nina, 7 Porto Rico Fed. 101.

45. Pa.—In re Keyser's Estate, 198 A. 125, 329 Pa. 514.

15 C.J. p 852 note 73.

46. U.S.—Wylie Permanent Camping Co. v. Lynch, W.Va., 195 F. 386, 115 C.C.A. 288, certiorari denied 32 S.Ct. 839, 225 U.S. 707, 56 L.Ed. 1266. La.—State v. Voorhies, 34 La. Ann. 1142.

47. N.C.—State v. Hall, 55 S.E. 806, 142 N.C. 710.

48. N.C.—Virginia-Carolina Chemical Co. v. Turner, 130 S.E. 154, 190 N.C. 123.

Consideration of question by appellate court

The constitutional question is not properly presented by appeal from the denial of such motion to a court whose jurisdiction is derivative in appeals from the court in which the motion is made.—Virginia-Carolina Chemical Co. v. Turner, supra.

49. U.S.—Reid v. U. S., N.Y., 29 S.Ct. 171, 211 U.S. 529, 53 L.Ed. 313—Mara v. U. S., D.C.N.Y., 54 F. 2d 397.

Fla.—West 132 Feet v. City of Orlando, 86 So. 197, 199, 80 Fla. 233, reversing 91 So. 369, 80 Fla. 229, citing *Corpus Juris*.

Me.—Hutchins v. Hutchins, 4 A.2d 679, quoting *Corpus Juris*.

Mich.—In re Fraser's Estate, 285 N.W. 1, 288 Mich. 392, citing *Corpus Juris*—Warner v. Noble, 282 N.W. 855, 858, 286 Mich. 654, citing *Corpus Juris*.

Miss.—Mississippi State Highway Department v. Haines, 139 So. 168, 162 Miss. 216.

Neb.—Stewart v. Herten, 249 N.W. 552, 553, 125 Neb. 210, quoting *Corpus Juris*.

50. Cal.—Fitzpatrick v. Sonoma County, 276 P. 113, 97 Cal.App. 588—Dillon v. Dillon, 187 P. 27, 45 Cal.App. 191.

Idaho.—Pfirman v. Probate Court of Shoshone County, 64 P.2d 849, 57 Idaho 304.

La.—Elster v. Picou, 81 So. 710, 144 La. 1052.

Miss.—Broom v. Board of Sup'rs of Jefferson Davis County, 158 So. 344, 171 Miss. 586—Brotherhood of Railroad Trainmen v. Agnew, 155 So. 205, 170 Miss. 604.

Mo.—Ussery v. Haynes, 127 S.W.2d 410—Bushnell v. Mississippi & Fox River Drainage Dist. of Clark County, 102 S.W.2d 871, 340 Mo. 811, transferred 111 S.W.2d 946—State ex rel. Otto ex rel. Sales v. Hyde, 296 S.W. 775, 317 Mo. 714.

the question is not raised by the pleadings or is not suggested by counsel.⁵¹ If the court finds at any stage of the proceedings⁵² that it is without juris-

diction, it is its duty to take proper notice of the defect by staying the proceedings, dismissing, or other appropriate action.⁵³

Ohio.—Ryan v. Kroger Grocery & Baking Co., 11 N.E.2d 204, 56 Ohio App. 469.

51. U.S.—Weinstein v. Black Diamond S. S. Corporation, C.C.A.N.Y., 40 F.2d 590, certiorari denied 51 S.Ct. 486, 283 U.S. 837, 75 L.Ed. 1448.

Ala.—Moffatt v. Cassimus, 190 So. 297, 28 Ala.App. 582, reversed on other grounds 190 So. 299.

Ind.—Fenstermacher v. Indianapolis Times Pub. Co., 1 N.E.2d 655, 102 Ind.App. 189.

La.—Scott v. Howell, 148 So. 6, 177 La. 137—State ex rel. Palfrey v. Sims, App., 150 So. 428, affirmed 152 So. 395—Foundation Finance Co. v. Robbins, App., 144 So. 293—Smith v. Shehee, App., 143 So. 339, conforming to answers 143 So. 338, 175 La. 394, and amended on other grounds, App., 144 So. 750—Royal Route Co. v. Whittington & Nicholson Const. Co., 5 La.App. 504—State ex rel. Fourroux v. Board of Directors of Public Schools of Jefferson Parish, 3 La.App. 2.

Mass.—Lord v. Cummings, 22 N.E. 2d 26—Moll v. Town of Wakefield, 175 N.E. 81, 274 Mass. 505—Warner v. City of Taunton, 148 N.E. 377, 253 Mass. 116—Loneragan v. American Railway Express Co., 144 N.E. 756, 250 Mass. 30—Attorney General v. Pelletier, 134 N.E. 407, 240 Mass. 264—Eustace v. Dickey, 132 N.E. 852, 240 Mass. 93—Attorney General v. Tufts, 131 N.E. 573, 239 Mass. 458, 17 A.L.R. 274—Eaton v. Eaton, 124 N.E. 37, 233 Mass. 351, 5 A.L.R. 1426—Shannon v. Shepard Mfg. Co., 119 N.E. 768, 230 Mass. 224—Bar Ass'n of City of Boston v. Casey, 116 N.E. 541, 227 Mass. 46.

Mich.—Halkes v. Douglas & Lomason Co., 255 N.W. 343, 267 Mich. 600.

Miss.—Mississippi State Highway Department v. Haines, 139 So. 168, 162 Miss. 216.

Mo.—State ex rel. Consolidated School Dist. No. 2 v. Ingram, 298 S.W. 37, 317 Mo. 1141—State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, App., 118 S.W.2d 1034—Dahlin v. Missouri Commission for the Blind, App., 262 S.W. 420.

N.Y.—In re Martin's Will, 281 N.Y.S. 163, 245 App.Div. 120, reversed on other grounds 199 N.E. 491, 269 N.Y. 305.

N.C.—Miller v. Roberts, 193 S.E. 286, 212 N.C. 126.

Ohio.—Barnes v. Fifth-Third Union Trust Co., 15 N.E.2d 651, 58 Ohio App. 27.

Okl.—Sheridan Oil Co. v. Superior Court of Creek County, 82 P.2d 832,

183 Okl. 372—Rorem v. Bodine, 62 P.2d 630, 178 Okl. 235—McNee v. Hart, 246 P. 373, 117 Okl. 220—Fehr v. Black Petroleum Corporation, 229 P. 1048, 103 Okl. 241.

Or.—In re Scappoose Drainage Dist., 239 P. 193, 115 Or. 541, denying petition 237 P. 1117, 115 Or. 541, modifying 237 P. 684, 115 Or. 541. S.C.—Williamson v. Richards, 155 S.E. 890, 158 S.C. 534.

Tenn.—Ward v. Lovell, 113 S.W.2d 759, 21 Tenn.App. 560—Reynolds v. Hamilton, App., 77 S.W.2d 986.

Vt.—Town of Barton v. Town of Sutton, 106 A. 583, 93 Vt. 102.

Wash.—State v. Superior Court of Clarke County, 177 P. 679, 105 Wash. 187.

15 C.J. p 852 note 77.

Equity Jurisdiction

Where, however, the court has jurisdiction of the subject matter and the parties, and, there being no objection to the procedure, the power to render a judgment in the premises is undoubted, the court will not itself raise the question of equity jurisdiction.—Courtney v. Neimeyer, 51 N.W. 234, 33 Neb. 796.

52. U.S.—In re Nossman, D.C.Kan., 22 F.Supp. 645.

D.C.—Laughlin v. Cummings, 105 F. 2d 71, 70 App.D.C. 192.

Idaho.—Williams v. Sherman, 212 P. 971, 36 Idaho 494.

Ill.—Village of Glencoe v. Industrial Commission, 188 N.E. 329, 354 Ill. 190.

Mass.—Shannon v. Shepard Mfg. Co., 119 N.E. 768, 230 Mass. 224.

Mich.—In re Fraser's Estate, 285 N.W. 1, 288 Mich. 392, citing *Corpus Juris*.

Minn.—In re Huntsinger, 153 N.W. 1095, 130 Minn. 538, denying rehearing 153 N.W. 869, 130 Minn. 474.

Miss.—Waits v. Black Bayou Drainage Dist., 185 So. 577.

Mo.—State of Oklahoma ex rel. Freeling v. National City Bank of Kansas City, Mo., 267 S.W. 118, transferred State ex rel. Freeling v. National City Bank of Kansas City, 274 S.W. 945, 220 Mo.App. 474.

Neb.—Stewart v. Herten, 249 N.W. 552, 553, 125 Neb. 210, quoting *Corpus Juris*.

N.Y.—Shea v. Export S. S. Corporation, 170 N.E. 477, 253 N.Y. 17, reversing 233 N.Y.S. 893, 226 App. Div. 696.

N.C.—Henderson County v. Smyth, 5 S.E.2d 136, 216 N.C. 421.

Or.—McCargar v. Moore, 171 P. 587, 88 Or. 682.

R.I.—David v. David, 132 A. 879, 47 R.I. 304.

Tex.—Galley v. Hedrick, Civ.App., 127 S.W.2d 978—Treacchar v. City of Galveston, Civ.App., 28 S.W.2d 276, error dismissed.

Vt.—In re Carleton, 187 A. 423, 108 Vt. 312—Miner v. Shanasy, 102 A. 480, 92 Vt. 110.

Va.—Long v. Long, 144 S.E. 447, 151 Va. 156.

W.Va.—Croft Land Co. v. Royal Block Coal Co., 105 S.E. 799, 87 W.Va. 570.

53. U.S.—City and County of Dallas Levee Imp. Dist. ex rel. Simond v. Allen, D.C.Tex., 17 F.Supp. 777, affirmed, C.C.A., City and County of Dallas Levee Imp. Dist. ex rel. Simond v. Industrial Properties Corporation, 89 F.2d 731, and City and County of Dallas Levee Imp. Dist. ex rel. Simond v. Allen, 89 F.2d 735.

Conn.—Marcell v. A. H. Merriman & Sons, 163 A. 411, 115 Conn. 678.

Ill.—Martin v. Bankers' Life Co., 193 N.E. 197, 358 Ill. 388—Keplinger v. Lord, 192 N.E. 549, 357 Ill. 571.

Ind.—Fenstermacher v. Indianapolis Times Pub. Co., 1 N.E.2d 655, 102 Ind.App. 189.

Ky.—Johnson v. Harvey, 88 S.W.2d 42, 261 Ky. 522.

Me.—Hutchins v. Hutchins, 4 A.2d 679, quoting *Corpus Juris*—Darling Automobile Co. v. Hall, 197 A. 558, 559, 135 Me. 382, citing *Corpus Juris*.

Mich.—In re Fraser's Estate, 285 N.W. 1, 288 Mich. 392, citing *Corpus Juris*.

Minn.—Strom v. Lindstrom, 275 N.W. 833, 201 Minn. 226.

Neb.—Stewart v. Herten, 249 N.W. 552, 553, 125 Neb. 210, quoting *Corpus Juris*.

N.J.—Wilson v. Willson, 181 A. 257, 264, 14 N.J.Misc. 33, citing *Corpus Juris*.

N.Y.—Patrone v. M. P. Howlett, Inc., 143 N.E. 232, 237 N.Y. 394, affirming 201 N.Y.S. 930, 207 App.Div. 356, and motion denied 143 N.E. 731, 237 N.Y. 534.

N.C.—Henderson County v. Smyth, 5 S.E.2d 136, 216 N.C. 421.

S.D.—O'Neal v. Diamond A Cattle Co., 260 N.W. 836.

Va.—Moore v. Norfolk & W. Ry. Co., 98 S.E. 635, 124 Va. 628.

W.Va.—Croft Land Co. v. Royal Block Coal Co., 105 S.E. 799, 15 C.J. p 852 note 77.

"Rule is inflexible and without exception."—Morris v. Gilmer, Ala., 9 S.Ct. 289, 292, 129 U.S. 315, 32 L.Ed. 690.

These rules apply irrespective of the wishes of the parties, or either of them.⁵⁴

Where a party mistakes his remedy, as by improperly proceeding by mandamus or quo warranto, the court may, of its own motion, consider the propriety of the proceeding.⁵⁵

§ 115. Effect of Decision

A court's decision as to its jurisdiction has the same effect and conclusiveness as its decision on any other matter within its jurisdiction; but a court cannot, by an erroneous decision on a question of law, add to, or divest itself of, its jurisdiction.

Since, as appears in § 113 supra, a court has pow-

er to decide as to its own jurisdiction in any particular case, it follows that its decision as to its jurisdiction will have the same effect and conclusiveness as would its decision on any other matter within its jurisdiction;⁵⁶ and where the jurisdiction of a court depends on a fact which it is required to ascertain, its judgment determining that such fact does or does not exist is conclusive on the question of jurisdiction, until set aside or reversed by direct proceedings, and cannot be attacked collaterally.⁵⁷ Where the question of jurisdiction is one of law, a court cannot by an erroneous decision acquire jurisdiction which it has not, or divest itself of jurisdiction which it has.⁵⁸

A. PROCEEDINGS AND ACTS WITHOUT JURISDICTION

§ 116. In General

The acts and proceedings of a court which is without jurisdiction in the particular case, or is acting in excess of its jurisdiction, are void.

Where a court is without jurisdiction in the particular case, its acts and proceedings can be of no force or validity, and are a mere nullity and void,

54. U.S.—*In re American Bond & Mortgage Co.*, C.C.A.III, 61 F.2d 875, certiorari granted *Royal Indemnity Co. v. American Bond & Mortgage Co.*, 53 S.Ct. 400, 288 U.S. 596, 77 L.Ed. 973, affirmed 53 S.Ct. 551, 289 U.S. 165, 77 L.Ed. 1100—*Handley-Mack Co. v. Godchaux Sugar Co.*, C.C.A.Tenn., 2 F.2d 435—*In re Fox West Coast Theatres*, D.C.Cal., 25 F.Supp. 250, affirmed, C.C.A., 88 F.2d 212, certiorari denied *Tally v. Fox Film Corporation*, 57 S.Ct. 944, 301 U.S. 710, 81 L.Ed. 1363, rehearing denied 58 S.Ct. 7, 302 U.S. 772, 82 L.Ed. 598.

Mich.—*Halkes v. Douglas & Lomason Co.*, 255 N.W. 343, 267 Mich. 600.

Mo.—*McClain v. Kansas City Bridge Co.*, App., 83 S.W.2d 132.

N.J.—*Uppercu Cadillac Corporation v. 536 Broad St. Corporation*, 151 A. 394, 106 N.J.Eq. 529.

Utah—*Hardy v. Meadows*, 264 P. 968, 71 Utah 255.

55. La.—*State ex rel. Palfrey v. Sims*, App., 150 So. 428, affirmed 152 So. 395.

15 C.J. p 852 note 79.

56. Ala.—*Carter v. Mitchell*, 142 So. 514, 518, 225 Ala. 287, citing *Corpus Juris*.

Fla.—*State ex rel. B. F. Goodrich Co. v. Trammell*, 192 So. 175, 177, quoting *Corpus Juris*—*Newport v. Culbreath*, 162 So. 340, 120 Fla. 152—*Calet v. Chestnut*, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212.

15 C.J. p 734 note 82, p 852 note 82. Attack on judgment precluded by court's decision as to its jurisdiction see the C.J.S. title Judgments § 427, also 34 C.J. p 552 note 44—p 554 note 52.

21 C.J.S.—12

Collateral attack; facts not in record

(1) "The jurisdiction [of a court] cannot be the subject of a collateral attack."—*Russell v. U. S.*, C.C.A. Minn., 86 F.2d 389, 392.

(2) Court whose judgment is attacked is the only court authorized to try issue respecting jurisdiction determinable from facts not affirmatively appearing on record.—*Crane v. Kelly*, Tex.Civ.App., 39 S.W.2d 138.

57. U.S.—*Stoll v. Gottlieb*, 59 S.Ct. 134, 305 U.S. 165, 83 L.Ed. 104, reversing *Gottlieb v. Crowe*, 12 N.E.2d 881, 368 Ill. 88, reversing 7 N.E.2d 469, 289 Ill.App. 595, certiorari granted *Stoll v. Gottlieb*, 58 S.Ct. 1038, 304 U.S. 554, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437—*Lambert v. Central Bank of Oakland*, C.C.A.Cal., 85 F.2d 954, certiorari denied 57 S.Ct. 436, 300 U.S. 658, 81 L.Ed. 867—*Rice v. Baltimore & O. R. Co.*, C.C.A.Ohio, 42 F.2d 387. Ala.—*Carter v. Mitchell*, 142 So. 514, 518, 225 Ala. 287, citing *Corpus Juris*.

Cal.—*Ex parte Tassey*, 253 P. 948, 81 Cal.App. 287.

Fla.—*State ex rel. B. F. Goodrich Co. v. Trammell*, 192 So. 175, 177, quoting *Corpus Juris*.

Ohio.—*Barnes v. Fifth-Third Union Trust Co.*, 15 N.E.2d 651, 58 Ohio App. 27.

Pa.—*Askew v. S. C. Loveland Co.*, 9 Pa.Dist. & Co. 635.

15 C.J. p 853 note 83.

Remedy for erroneous decision is by appeal or writ of error.

U.S.—*Toy Toy v. Hopkins*, Wash., 29 S.Ct. 416, 212 U.S. 542, 53 L.Ed. 644.

Ark.—*Jones v. Coffin*, 131 S.W. 873, 96 Ark. 332.

Mere conclusion by a court that it had jurisdiction is insufficient where the record does not show, and the court did not find, the jurisdictional facts.

Ill.—*Eddy v. Eddy*, 134 N.E. 801, 302 Ill. 446.

N.Y.—*Sibley v. Waffle*, 16 N.Y. 180.

58. Cal.—*Cook v. Winklesfleek*, 59 P. 2d 463, 16 Cal.App.2d, Supp., 759.

Fla.—*State ex rel. B. F. Goodrich Co. v. Trammell*, 192 So. 175, 177, quoting *Corpus Juris*.

Ill.—*Barry v. Knight*, 15 N.E.2d 999, 296 Ill.App. 277.

Mo.—*McClain v. Kansas City Bridge Co.*, App., 83 S.W.2d 132—*State ex rel. Macon Creamery Co. v. Mix*, 7 S.W.2d 290, 222 Mo.App. 426.

Ohio.—*State ex rel. Bechtel v. McCabe*, 20 N.E.2d 381, 60 Ohio App. 233.

15 C.J. p 734 note 83, p 853 note 84.

"A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. . . . An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter."—*Stoll v. Gottlieb*, 59 S.Ct. 134, 137, 305 U.S. 165, 83 L.Ed. 104, reversing *Gottlieb v. Crowe*, 12 N.E.2d 881, 368 Ill. 88, reversing 7 N.E.2d 469, 289 Ill.App. 595, certiorari granted *Stoll v. Gottlieb*, 58 S.Ct. 1038, 304 U.S. 554, 82 L.Ed. 1523, rehearing denied 59 S.Ct. 250, 305 U.S. 675, 83 L.Ed. 437.

not voidable,⁵⁹ even prior to reversal,⁶⁰ whether the lack of jurisdiction appears on the face of the record or by proof outside of it;⁶¹ likewise, a court's acts in excess of its jurisdiction are void, even if it has jurisdiction of the subject matter of the action and of the parties,⁶² as where a court of special or limited jurisdiction exceeds its powers.⁶³ If jurisdiction did not exist at the time when action was taken, a subsequent enlargement of the jurisdiction of the court to an extent which would authorize what was done cannot cure the defect or

render the action previously taken valid;⁶⁴ but it has been held that if after a cause has been dismissed for want of jurisdiction the court acquires jurisdiction of the subject matter, a reinstatement of the case by consent vests the court with full jurisdiction.⁶⁵

Amendment conferring jurisdiction. Where a court is without jurisdiction, it has no power to allow an amendment which would confer jurisdiction, since that in itself would be an exercise of jurisdiction.⁶⁶

59. U.S.—*Vallely v. Northern Fire & Marine Ins. Co.*, 41 S.Ct. 116, 254 U.S. 348, 65 L.Ed. 297—*Brogdex Co. v. Food Machinery Co.*, C.C.A.Del., 92 F.2d 787, reversing, D.C., 16 F. Supp. 228—*Manning v. Ketcham*, C.C.A.Ky., 58 F.2d 948—*Great Lakes Dredge & Dock Co. v. Brown*, D.C.Ill., 47 F.2d 265—*Northern Pacific S. S. Co. v. Industrial Accident Commission*, D.C. Cal., 23 F.2d 109.
- Ala.—*Carter v. Mitchell*, 142 So. 514, 518, 225 Ala. 287, citing *Corpus Juris*—*Yauger v. Taylor*, 118 So. 271, 218 Ala. 235—*In re 500 Sacks of Feed and 165 Sacks of Feed*, 87 So. 348, 205 Ala. 315.
- Cal.—*Standard Pipe & Supply Co. v. Superior Court*, 51 P.2d 910, 9 Cal. App.2d 769—*OH Well Supply Co. v. Superior Court in and for Los Angeles County*, 51 P.2d 908, 9 Cal. App.2d 624.
- Ga.—*Williams v. Mann*, 3 S.E.2d 557, 188 Ga. 212—*Deans v. Deans*, 137 S.E. 829, 830, 164 Ga. 162, citing *Corpus Juris*.
- Idaho.—*Union Central Life Ins. Co. v. Albrethsen*, 294 P. 842, 50 Idaho 196.
- Ill.—*Gill v. Lynch*, 10 N.E.2d 812, 367 Ill. 203—*People ex rel. Carlstrom v. Shurtleff*, 189 N.E. 291, 355 Ill. 210—*Hawkins v. Hawkins*, 183 N.E. 9, 350 Ill. 227—*McGarry v. Village of Wilmette*, 135 N.E. 96, 303 Ill. 147—*Litzelman v. Town of Fox*, 1 N.E.2d 915, 285 Ill.App. 7.
- Ind.—*Nation v. Green*, 116 N.E. 846, 65 Ind.App. 136.
- Iowa.—*Collins v. Powell*, 277 N.W. 477, 224 Iowa 1015.
- Mass.—*Humphrey v. Employers' Liability Assur. Corp.*, 115 N.E. 253, 226 Mass. 143.
- Mo.—*American Constitution Fire Assur. Co. v. O'Malley*, 113 S.W.2d 795, 342 Mo. 139—*Bash v. Truman*, 75 S.W.2d 840, 335 Mo. 1077—*In re Buckles*, 53 S.W.2d 1055, 331 Mo. 405—*State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission*, App., 113 S.W.2d 1034.
- Or.—*State ex rel. Hall v. Hall*, 55 P.2d 1102, 153 Or. 127.
- Pa.—*Commonwealth v. Hall*, 140 A. 626, 291 Pa. 341, 58 A.L.R. 1023, affirming 91 Pa.Super. 485.
- S.C.—*Ex parte Hart*, 195 S.E. 253, 186 S.C. 125.
- Tex.—*Cleveland v. Ward*, 285 S.W. 1063, 116 Tex. 1—*San Lorenzo Title & Improvement Co. v. City Mortg. Co.*, Civ.App., 48 S.W.2d 310, affirmed 73 S.W.2d 513, 124 Tex. 513, followed in *San Lorenzo Title & Improvement Co. v. Clardy*, 73 S.W.2d 516, 124 Tex. 31, and *San Lorenzo Title & Improvement Co. v. Caples*, 73 S.W.2d 516, 124 Tex. 33—*Dean v. Fuller*, Civ.App., 290 S.W. 829.
- Wis.—*State v. Williams*, 245 N.W. 683, 209 Wis. 541—*Seyfert v. Seyfert*, 229 N.W. 636, 201 Wis. 223.
- 15 C.J. p 853 notes 85, 86.
- Summary relief**
When court acts without jurisdiction, party aggrieved is entitled to direct and summary relief.—*Brookley v. Ives*, 278 N.Y.S. 147, 243 App. Div. 487.
- Court's action as arbitration**
Where the probate court in a final decree and an order allowing a final account assumes to determine matters over which it has no jurisdiction, its action cannot be given effect as a common-law arbitration.—*In re Pearson's Estate*, 192 N.W. 937, 155 Minn. 122.
- Exercise of power reserved for other tribunal is usurpation.**—*Henderson County v. Smyth*, 5 S.E.2d 136, 216 N.C. 421.
- Abolition of court**
Any action by inferior court on day of approval of act abolishing such court was without legal effect.—*Beck v. Johnson*, 179 So. 225, 235 Ala. 323.
60. U.S.—*Vallely v. Northern Fire & Marine Ins. Co.*, 41 S.Ct. 116, 254 U.S. 348, 65 L.Ed. 297.
- Review unnecessary**
Proceedings in tribunal without jurisdiction are void, and aggrieved party need not seek review, but at any stage may treat them as null and defend against trespass by their use.—*North Pacific S. S. Co. v. Industrial Accident Commission*, D.C. Cal., 23 F.2d 109.
61. Tex.—*Olton State Bank v. Howell*, Civ.App., 105 S.W.2d 287.
62. U.S.—*Quereau v. Lehigh Valley R. Co.*, D.C.N.Y., 251 F. 986.
- Ill.—*Thayer v. Village of Downers Grove*, 16 N.E.2d 717, 369 Ill. 334—*People ex rel. Weed v. Whipp*, 189 N.E. 135, 352 Ill. 525—*People v. Circuit Court of Washington County*, 179 N.E. 441, 347 Ill. 34—*People v. Siman*, 119 N.E. 940, 284 Ill. 28.
- Mo.—*Aetna Ins. Co. v. O'Malley*, 118 S.W.2d 3, 342 Mo. 800.
- Ohio.—*Cummins v. Kinsinger*, 29 Ohio N.P.N.S. 34.
- Tex.—*Farmers' Nat. Bank of Stephenville v. Daggett*, Com.App., 2 S.W.2d 834, affirming *Daggett v. Farmers' Nat. Bank*, Civ.App., 259 S.W. 198.
- Wash.—*In re Elvigen's Estate*, 71 P. 2d 672, 191 Wash. 614.
- Excess of jurisdiction defined see supra § 25.
- Compliance with conditions precedent**
"Where prescribed condition precedent to the exercise of judicial power has not been complied with," but the power to deal with the subject generally exists, "action is erroneous, but not void."—*State v. Williams*, 245 N.W. 663, 665, 209 Wis. 541—*Seyfert v. Seyfert*, 229 N.W. 636, 639, 201 Wis. 223.
63. Vt.—*Barber v. Chase*, 143 A. 302, 101 Vt. 343.
- 15 C.J. p 854 notes 89, 90.
- Where jurisdiction of court is statutory**, statute must be strictly complied with, or proceedings thereunder will be void.—*Woodward v. Ruel*, 188 N.E. 911, 355 Ill. 163.
64. Ala.—*Henderson v. Hall*, 32 So. 840, 134 Ala. 455, 63 L.R.A. 678.
- 15 C.J. p 853 note 87.
65. Mo.—*Tippack v. Briant*, 63 Mo. 580.
66. U.S.—*Willing v. Provident Trust Co.*, D.C.Pa., 21 F.Supp. 237.
- N.Y.—*Nowinski v. La Monte*, 5 N.Y. S.2d 894, 168 Misc. 586.
- 15 C.J. p 854 note 91.
- Statute permitting curing of technical defects or insufficiencies can-**

Where a statute conferring jurisdiction is held unconstitutional, such decision will have no retroactive effect on proceedings regularly had under the law as it existed before such decision.⁶⁷

Duty to refrain from acting. Where, although the trial court had jurisdiction to act, it was its duty not to do so, out of deference to some other branch of the government, the wrong in acting so approaches jurisdictional error that it may be attacked at any time while the order or judgment could be so attacked for judicial error.⁶⁸

§ 117. Jurisdiction as to Part of Demand

A court may proceed as to the part of a demand which is within its jurisdiction, but cannot indirectly adjudicate the part not within it.

Where a court has jurisdiction as to part of a demand, although another part is not within its jurisdiction, it may proceed as to the part within its jurisdiction,⁶⁹ and an award will be void only as to the excess.⁷⁰ However, a court cannot, by rendering a judgment covering an entire transaction, indirectly adjudicate that part of it of which it has determined it has no jurisdiction.⁷¹

not be used to cure jurisdictional defects.—*Northwest Engineering Co. v. Rappl*, 230 N.Y.S. 177, 133 Misc. 497.

67. S.C.—*Thomas v. Poole*, 19 S.C. 323—*Herndon v. Moore*, 18 S.C. 339.

68. Wis.—*State v. Duluth St. R. Co.*, 142 N.W. 184, 153 Wis. 650.

69. N.Y.—*Kaplan v. Antonelli*, 230 N.Y.S. 321, 132 Misc. 572.
15 C.J. p 854 note 94.

Partial jurisdiction generally see *supra* § 32.

Foreclosure and money judgment

Where an action is brought to foreclose a lien and for a money judgment, the court may determine the action for a money judgment, even though it lacks jurisdiction of the action in so far as it seeks foreclosure.—*Kaplan v. Antonelli*, 230 N.Y.S. 321, 132 Misc. 572.

70. N.Y.—*American Ins. Co. v. Fisk*, 1 Paige 90.

71. U.S.—*Olympia Shipping Corporation v. U. S.*, C.C.A.N.Y., 11 F.2d 600.

Accounting; charter hire

After determining that it was without jurisdiction of claim for charter hire, a court cannot indirectly adjudicate such claim by awarding judgment, in an action for an accounting, for a balance due over and above the charter hire.—*Olympia Shipping Corporation v. U. S.*, C.C.A.N.Y., 11 F.2d 600.

72. U.S.—*In re Greenlie-Hallday Co.*, C.C.A.N.Y., 57 F.2d 173.

Cal.—*In re Palmieri's Estate*, 8 P.2d 152, 120 Cal.App. 698.
15 C.J. p 854 note 96.

73. U.S.—*Elliott v. De Soto Crude Oil Purchasing Corporation, D.C. La.*, 20 F.Supp. 743.

Cal.—*In re Palmieri's Estate*, 8 P.2d 152, 153, 120 Cal.App. 698, quoting *Corpus Juris*.

Ill.—*Hawkins v. Hawkins*, 183 N.E. 9, 350 Ill. 227.

Ky.—*Howard v. Kentucky, etc., Mut. Ins. Co.*, 13 B.Mon. 282.

Or.—*Dippold v. Cathlamet Timber Co.*, 193 P. 909, 98 Or. 183.

Tex.—*Lone Star Finance Corporation v. Davis*, Civ.App., 77 S.W.2d 711.

Comment on issues by a court dismissing an action for lack of jurisdiction "is declaratory purely, and no more."—*In re Braver*, D.C.Mich., 51 F.2d 123, 125, affirmed, C.C.A., *Detroit Trust Co. v. Dunitz*, 59 F.2d 905.

Land outside court's jurisdiction

In an action to determine the title to land, a decision that the land lay outside the county in which suit was brought marks the limit of the jurisdiction of the court, and its judgment that plaintiff had no title to the land must be reversed.—*Alluvial Realty Co. v. Himmelberger-Har-*

§ 118. Proceedings Subsequent to Decision That No Jurisdiction Exists

A court which has determined that it has no jurisdiction should not proceed further except to dismiss.

Upon determining that it has no jurisdiction, the court not only may,⁷² but should,⁷³ refuse to proceed further and determine other objections or issues or the rights of the parties; and a judgment of dismissal for want of jurisdiction or without prejudice should be entered,⁷⁴ after which the court has no authority to proceed.⁷⁵

§ 119. Setting Aside Acts without Jurisdiction

A court which has erroneously exercised jurisdiction has power to correct resulting wrongs, at least while it has custody of the subject of controversy and the parties are before it.

Where a court has erroneously exercised jurisdiction which it did not possess, it has power to correct any wrong which may have resulted from such improper action by undoing what was done,⁷⁶ as by

risson Lumber Co., 229 S.W. 757, 287 Mo. 299.

74. Cal.—*In re Palmieri's Estate*, 8 P.2d 152, 153, 120 Cal.App. 698, quoting *Corpus Juris*.

Ill.—*People ex rel. Carlstrom v. Shurtleff*, 189 N.E. 291, 355 Ill. 210.

General judgment for defendant is erroneous under such circumstances because in form rendering the merits of the case res judicata.—*Maxwell v. Federal Gold, etc., Co., Minn.*, 155 F. 110, 83 C.C.A. 570.

75. Cal.—*In re Palmieri's Estate*, 8 P.2d 152, 153, 120 Cal.App. 698, quoting *Corpus Juris*.

La.—*Franek v. Brewster*, 76 So. 187, 141 La. 1031—*Lavergne v. Roussel*, 72 So. 453, 139 La. 915.
15 C.J. p 854 note 99.

76. Mont.—*Doggett v. Johnson*, 257 P. 267, 268, 79 Mont. 499, citing *Corpus Juris*.

15 C.J. p 854 note 1.

Protecting impounded funds

Court was required to protect impounded funds which it had in its custody and to see that it reached the rightful custodian thereof, notwithstanding that it was accumulated without authority of law in a cause over which the court did not have jurisdiction.—*American Constitution Fire Assur. Co. v. O'Malley*, 113 S.W.2d 795, 342 Mo. 139.

setting aside any ruling, order, or judgment made by it,⁷⁷ at least so long as the subject of the controversy is in its custody and the parties are before it.⁷⁸

III. CREATION, CONSTITUTION, AND OFFICERS OF COURTS

A. CREATION, ORGANIZATION, ABOLITION, REORGANIZATION, CONSOLIDATION, AND TRANSFER OF JURISDICTION OF COURTS

§ 120. Source of Power

The constitution is the ultimate source of the judicial power of courts.

The constitution, as the dispenser of the sovereign power of a state, is the ultimate source of the judicial power of courts.⁷⁹ To it all courts owe their existence⁸⁰ and jurisdiction.⁸¹ Unless a court's authority emanates from the supreme power of the state, the court itself is an absolute nullity, and all its proceedings are utterly void.⁸² No person can, in the absence of authority at law, create a court⁸³ and preside over the same as judge;⁸⁴ nor can any judge hold a court which is unconstitutional in its organization.⁸⁵ Of course, the power of a state to determine the limits of jurisdiction of its courts is subject to restrictions imposed by the

federal constitution,⁸⁶ but a provision of the federal constitution defining the extent of judicial power is inapplicable to the judicial power of state courts.⁸⁷

§ 121. Constitutional and Legislative Power

Unless such power is conferred on it by the constitution, the legislature has no power to confer or withdraw jurisdiction or judicial power, and a court's jurisdiction is regulated by the constitution or by statutes enacted pursuant thereto.

Since, as discussed in the preceding section, the ultimate source of the judicial power of courts is the constitution, it follows and is almost universally recognized that, unless such power is conferred on it by the constitution, the legislature has no power to confer or withdraw jurisdiction or judicial power,⁸⁸ or to create or abolish courts,⁸⁹ although there

77. U.S.—*Caruthers v. R. K. O. Radio Pictures*, D.C.N.Y., 20 F.Supp. 906.

Ill.—*Litzelman v. Town of Fox*, 1 N.E.2d 915, 285 Ill.App. 7.

78. U.S.—*U. S. v. Morgan*, Mo., 59 S.Ct. 795, 307 U.S. 183, 83 L.Ed. 1211, reversing, D.C., *Morgan v. U. S.*, 24 F.Supp. 214, conforming to mandate 58 S.Ct. 999, 305 U.S. 1, 82 L.Ed. 1129, denying rehearing 58 S.Ct. 773, 304 U.S. 1, 82 L.Ed. 1129, reversing, D.C., 23 F.Supp. 380—*Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.*, Ark., 39 S.Ct. 237, 249 U.S. 184, 63 L.Ed. 517—*Northwestern Fuel Co. v. Brock*, Iowa, 11 S.Ct. 523, 139 U.S. 216, 35 L.Ed. 151.

Mont.—*Doggett v. Johnson*, 257 P. 267, 268, 79 Mont. 499, citing *Corpus Juris*.

79. Cal.—*In re Hart's Estate*, App., 70 P.2d 539, affirmed 77 P.2d 1082, 11 Cal.2d 89.

Ill.—*People v. Fisher*, 172 N.E. 722, 340 Ill. 250.

Md.—*Day v. State*, 159 A. 602, 162 Md. 221.

Mich.—*Washington-Detroit Theater Co. v. Moore*, 229 N.W. 618, 249 Mich. 673, 68 A.L.R. 105.

Okl.—*City of Sapulpa v. Land*, 223 P. 640, 101 Okl. 22, 35 A.L.R. 872.

Wash.—*Blanchard v. Golden Age Brewing Co.*, 63 P.2d 397, 188 Wash. 396.

Wis.—*John F. Jelke Co. v. Hill*, 242 N.W. 576, 208 Wis. 650, 12 C.J. p. 816 note 1.

80. Wis.—*John F. Jelke Co. v. Hill*, supra.

15 C.J. p. 854 note 4.

81. Cal.—*McCaughna v. Bilhorn*, 52 P.2d 1025, 10 Cal.App.2d 674.

Del.—*Wilmington Trust Co. v. Baldwin, Super.*, 195 A. 287.

N.Y.—*Zambrotto v. Jannette*, 290 N.Y.S. 338, 160 Misc. 558.

Wis.—*John F. Jelke Co. v. Hill*, 242 N.W. 576, 208 Wis. 650.

15 C.J. p. 731 note 59.

82. Wis.—*John F. Jelke Co. v. Hill*, supra.

15 C.J. p. 854 note 4.

83. La.—*Mechanics' etc., Bank v. Union Bank*, 25 La. Ann. 387, affirmed 22 Wall. 276, 22 L.Ed. 871.

Mo.—*State v. Boone County Ct.*, 50 Mo. 317, 11 Am.R. 415.

15 C.J. p. 854 note 5.

84. Mo.—*State v. Boone County Ct.*, supra.

15 C.J. p. 854 note 6.

85. Pa.—*Commonwealth v. Swank*, 79 Pa. 154.

15 C.J. p. 854 note 7.

86. U.S.—*McKnett v. St. Louis & S. F. Ry. Co.*, 54 S.Ct. 690, 292 U.S. 230, 78 L.Ed. 1227, reversing 149 So. 822, 227 Ala. 349, certiorari granted 54 S.Ct. 210, 290 U.S. 621, 78 L.Ed. 542, motion denied 54 S.Ct. 439, and rehearing denied 54 S.Ct. 855, 292 U.S. 613, 78 L.Ed. 1472.

Equal protection respecting appeals. The equal protection clause of the federal constitution does not require

states to adopt unifying method of appeals insuring uniformity of decisions.—*State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 50 S.Ct. 228, 281 U.S. 74, 74 L.Ed. 710, 66 A.L.R. 1460, affirming *State ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 166 N.E. 407, 120 Ohio St. 464.

87. Mo.—*Randolph v. Fricke*, 35 S.W.2d 912, 327 Mo. 130, certiorari denied 51 S.Ct. 365, 283 U.S. 832, 75 L.Ed. 1445.

88. Cal.—*In re Hart's Estate*, App., 70 P.2d 539, affirmed 77 P.2d 1082, 11 Cal.2d 89.

Ill.—*People v. Fisher*, 172 N.E. 722, 340 Ill. 250.

N.C.—*Lacy v. State*, 141 S.E. 886, 195 N.C. 284.

Wis.—*John F. Jelke Co. v. Hill*, 242 N.W. 576, 208 Wis. 650, 12 C.J. p. 816 note 1.

Power to construe laws

State income tax act determining amount of tax by laws of United States was held, not to be unconstitutional as depriving courts of state of power of construing own laws.—*Featherstone v. Norman*, 153 S.E. 58, 170 Ga. 370, 70 A.L.R. 449, followed in *Meikleham v. Norman*, 153 S.E. 71, 170 Ga. 398.

89. Ill.—*People v. Fisher*, 172 N.E. 722, 340 Ill. 250.

N.C.—*Lacy v. State*, 141 S.E. 886, 195 N.C. 284.

12 C.J. p. 816 note 1.

is authority holding that the legislature has such power unless inhibited by the constitution.⁹⁰ This is the fundamental rule governing legislative power with respect to courts, and applies alike to courts created directly by constitutional provision, hereinafter considered in § 122, and to courts created by the legislature pursuant to delegated power, considered in § 126 *infra*. The jurisdiction of a tribunal is regulated by the constitution or by statutes enacted pursuant thereto.⁹¹ Accordingly, no tribunal with the attributes of a court, other than those named in a state constitution, can ordinarily be established without an act of the legislature.⁹²

On the admission of a new state into the Union congress has power to vest in the state courts, as successors to the territorial courts, jurisdiction over the continued prosecution of criminal cases not of a federal character, the state consenting,⁹³ or it may transfer jurisdiction with respect to crimes against the United States from the territorial to the federal courts.⁹⁴ With respect to civil actions, it has been held that on the admission of a state into the federal Union, the state district court became the successor of the territorial district court as to

all actions no longer pending, and the judgments of such territorial district court passed under the jurisdiction of the state district court.⁹⁵

Apart from the various rules considered elsewhere in §§ 121-133, reference is made in the note to cases in which the courts have had under consideration the construction and effect of constitutional and statutory provisions, and the validity of various statutory provisions, with respect to particular courts.⁹⁶

§ 122. — General and Specific Rules

Except in so far as authorized by the constitution, the legislature cannot abolish, divide, reorganize, or consolidate constitutional courts, nor alter or diminish the essentials of the jurisdiction, functions, or judicial powers conferred on such courts.

Some constitutions establish a number of designated courts, vest them with judicial power, and apportion jurisdiction among them.⁹⁷ Such constitutional grants, except as they may reserve some of the judicial power and delegate its distribution or apportionment, dispose of the whole of such power residing in the sovereignty, leaving none at the disposal of the legislature;⁹⁸ and the courts so estab-

90. Fla.—*State v. Branning*, 95 So. 237, 85 Fla. 61.

"In the absence of constitutional provision, the power of the Legislature to create courts is absolute and without restriction. The provisions of the State Constitution, instead of conferring and enlarging the power of the Legislature with respect to the creation of courts, are limitations of that right in the strict sense of that term."—*State ex rel. Best v. Gibbons*, 278 N.W. 578, 579, 202 Minn. 421.

91. Ariz.—*State v. Superior Court of Maricopa County*, 5 P.2d 192, 39 Ariz. 242.

Ind.—*State ex rel. Robertson v. Circuit Court of Lake County*, 17 N.E. 2d 805.

Iowa.—*Incorporated Town of Carpenter v. Joint Drainage Dist. No. 6*, 197 N.W. 656, 198 Iowa 182, modified 199 N.W. 265, 198 Iowa 182.

Kan.—*Citizens Building & Loan Ass'n v. Knox*, 74 P.2d 161, 146 Kan. 734.

Mo.—*State ex rel. Allen v. Trimble*, 297 S.W. 378, 317 Mo. 751, quashing record *Allen v. Best*, 279 S.W. 728, 220 Mo.App. 1041—*State v. Anderson*, App., 101 S.W.2d 530, 533, citing *Corpus Juris*.

Okl.—*City of Sapulpa v. Land*, 223 P. 640, 101 Okl. 22, 35 A.L.R. 872.

Tex.—*Stewart v. Moore*, Com.App., 291 S.W. 886—*Ex parte Armstrong*, 8 S.W.2d 674, 110 Tex.Cr. 362.

Va.—*Barnes v. American Fertilizer Co.*, 130 S.E. 902, 144 Va. 692.

Wash.—*Prince v. Saginaw Logging Co.*, 84 P.2d 397, 403, 197 Wash. 4, quoting *Corpus Juris*.

Wis.—*State v. Sande*, 238 N.W. 504, 205 Wis. 495.

15 C.J. p 730 note 55.

Power of municipalities

(1) City cannot visit appellate powers on courts without legislative authority.—*Ex parte Boalt*, 260 P. 1004, 123 Or. 1—*City of La Grande v. Municipal Court of City of La Grande*, 251 P. 308, 120 Or. 109.

(2) Neither can it, without constitutional or legislative authority, divest court of powers conferred by legislative enactment.—*Ex parte Boalt*, *supra*.

(3) A city charter cannot control the jurisdiction of courts as against provisions of the state code.—*People v. District Court of Second Judicial Dist. in and for City and County of Denver*, 242 P. 997, 78 Colo. 526.

(4) Municipal legislative bodies, operating under a freeholders' charter in the state, are without power to confer jurisdiction on the district courts of the state.—*City of Sapulpa v. Land*, 223 P. 640, 101 Okl. 22, 35 A.L.R. 872.

(5) Municipal courts generally see *infra* § 131.

Court cannot confer power on inferior courts.—*Defiance Mach. Works v. Gill*, 175 N.W. 940, 170 Wis. 477.

92. Ohio.—*Coyne v. State*, 153 N.E. 876, 22 Ohio App. 462.

Power of municipalities to establish courts see *infra* § 131.

93. Okl.—*Ex parte Buchanen*, 94 P. 943, 20 Okl. 831—*Ex parte Bailey*, 94 P. 553, 20 Okl. 497—*Higgins v. Brown*, 94 P. 703, 20 Okl. 355.

94. U.S.—*Pickett v. U. S.*, Okl., 30 S.Ct. 285, 216 U.S. 456, 54 L.Ed. 566.

95. N.D.—*Merchants' Nat. Bank v. Brathwaite*, 75 N.W. 244, 7 N.D. 358, 66 Am.S.R. 653.

96. U.S.—*Farmers' Livestock Commission Co. v. U. S.*, D.C.Ill., 54 F.2d 375.

Conn.—*Connecticut Light & Power Co. v. Town of Southbury*, 111 A. 360, 95 Conn. 88.

N.J.—*In re Hunt*, 191 A. 437, 15 N.J. Misc. 331.

Pa.—*Guido v. Nagle*, 8 Pa.Dist. & Co. 119.

15 C.J. p 855 note 13.

97. Mass.—*Commonwealth v. Leach*, 141 N.E. 301, 246 Mass. 464.

N.C.—*Lacy v. State*, 141 S.E. 886, 195 N.C. 284.

98. Cal.—*Standard Oil Co. v. State Board of Equalization*, 59 P.2d 119, 6 Cal.2d 557—*Department of Public Works v. Superior Court*, 239 P. 1076, 197 Cal. 215—*In re Hart's Estate*, App., 70 P.2d 539, affirmed 77 P.2d 1082, 11 Cal.2d 89.

Ind.—*State v. Noble*, 21 N.E. 244, 118 Ind. 350, 10 Am.S.R. 143, 4 L.R.A. 101.

Md.—*Quenstedt v. Wilson*, 194 A. 354, 173 Md. 11—*Humphreys v. Walls*,

lished constitute a coordinate and independent judicial department of the government.⁹⁹ Hence, the universally recognized rule that, except in so far as it is authorized to do so by the constitution, the leg-

islature cannot abolish, reorganize, divide, or consolidate constitutional courts, nor alter, destroy, increase, or diminish the essentials of the jurisdiction, functions, or judicial powers so conferred on them,¹

181 A. 735, 169 Md. 292—Day v. State, 159 A. 602, 162 Md. 221.
Mich.—Washington-Detroit Theater Co. v. Moore, 229 N.W. 618, 249 Mich. 673, 68 A.L.R. 105.
Miss.—State v. Speakes, 109 So. 129, 144 Miss. 125.
Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

Subsequent distribution by constitution

Although a state constitution delegated power to the legislature to ordain and establish certain courts, such power was taken away by the adoption of a subsequent constitution setting up a system of judicial tribunals and vesting in them all the judicial power of the state.—State ex rel. Barrett v. May, 235 S.W. 124, 290 Mo. 302.

99. Ala.—Perkins v. Corbin, 45 Ala. 103, 6 Am.R. 698.

Fla.—State ex rel. Powell v. Leon County, 182 So. 639.

L. Ariz.—Crandall v. Town of Saford, 56 P.2d 560, 47 Ariz. 402.

Ark.—Dickinson v. Mingea, 88 S.W. 2d 807, 191 Ark. 946—Wilson v. Lucas, 47 S.W.2d 8, 185 Ark. 183—Hart v. Wimberly, 296 S.W. 39, 173 Ark. 1083—Ft. Smith Light & Traction Co. v. Bourland, 254 S.W. 481, 160 Ark. 1, affirmed 45 S.Ct. 249, 267 U.S. 330, 67 L.Ed. 631, rehearing denied and opinion amended 45 S.Ct. 51, 268 U.S. 676, 69 L.Ed. 631—Marvel v. State, 193 S.W. 259, 127 Ark. 595, 5 A.L.R. 1458.

Cal.—Standard Oil Co. of California v. State Board of Equalization, 59 P.2d 119, 6 Cal.2d 557—Vidal v. Backs, 21 P.2d 952, 218 Cal. 99, 86 A.L.R. 1134—Lemen v. Edmunson, 262 P. 735, 202 Cal. 760—Sacramento & San Joaquin Drainage Dist. v. Superior Court in and for Colusa County, 238 P. 687, 196 Cal. 414—Ex parte Brambini, 218 P. 569, 192 Cal. 19, error dismissed Brambini v. U. S., 45 S.Ct. 461, 267 U.S. 584, 69 L.Ed. 799—McClintock v. Abel, 68 P.2d 273, 21 Cal.App.2d 11—Griffin v. City of Los Angeles, 26 P.2d 655, 134 Cal.App. 763—People v. Barbera, 248 P. 304, 78 Cal.App. 277—People v. City of Redley, 226 P. 408, 66 Cal.App. 409—Coulthirst v. Southern Pac. R. Co., 193 P. 796, 49 Cal.App. 525—Yolo Water & Power Co. v. Superior Court in and for Lake County, 185 P. 195, 43 Cal.App. 332.

Colo.—Greeley Transp. Co. v. People, 245 P. 720, 79 Colo. 307—In re Brown's Estate, 176 P. 477, 65 Colo. 341.

Fla.—State ex rel. Powell v. Leon County, 182 So. 639—State ex rel. Payson v. Chillingworth, 165 So. 264, 267, 122 Fla. 339, citing *Corpus Juris*—State ex rel. Buckwalter v. City of Lakeland, 150 So. 508, 512, 112 Fla. 200, 90 A.L.R. 704, citing *Corpus Juris*, and followed in State ex rel. Sovereign Camp, W. O. W., v. Halifax Hospital Dist., 150 So. 517, and Overstreet v. State ex rel. Carpenter, 155 So. 926, 115 Fla. 151—Spafford v. Brevard County, 110 So. 451, 92 Fla. 617—Harry E. Prettyman Inc., v. Florida Real Estate Commission, 109 So. 442, 92 Fla. 515.

Ga.—American Mills Co. v. Doyal, 163 S.E. 603, 174 Ga. 631, transferred 167 S.E. 312, 46 Ga.App. 236—Hines v. Etheridge, 162 S.E. 113, 173 Ga. 870—Empire Inv. Co. v. Hutchings, 144 S.E. 209, 166 Ga. 749.

Idaho.—Neil v. Public Utilities Commission of Idaho, 178 P. 271, 32 Idaho 44.

Ill.—Shippert v. Shippert, 20 N.E.2d 597, 371 Ill. 267—White v. City of Ottawa, 149 N.E. 521, 318 Ill. 463, affirming 230 Ill.App. 493—Stephens v. Chicago, B. & Q. R. Co., 135 N.E. 68, 303 Ill. 49, reversing 217 Ill. App. 1—Kurzwaski v. Kurzwaski, 5 N.E.2d 597, 288 Ill.App. 118—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

Ky.—In re Constitutionalality of House Bill No. 222, 90 S.W.2d 692, 262 Ky. 437, 103 A.L.R. 1085—Hoblitzel v. Jenkins, 263 S.W. 764, 204 Ky. 122.

La.—Perez v. Cognevich, 100 So. 444, 156 La. 331—Meunier v. Bernich, App., 170 So. 567.

Me.—Mailman v. Record Foundry & Machine Co., 106 A. 606, 118 Me. 172.

Mich.—In re Brant's Estate, 256 N. W. 855, 269 Mich. 201—In re Consolidated Freight Co., 251 N.W. 431, 265 Mich. 340.

Minn.—In re Gilroy's Estates, 258 N.W. 584, 193 Minn. 349—State v. Probate Court of Goodhue County, 210 N.W. 40, 168 Minn. 147—Lading v. City of Duluth, 190 N.W. 981, 153 Minn. 464.

Miss.—Rockett v. Finley, 184 So. 78—Prentiss v. Turner, 155 So. 214, 170 Miss. 496.

Mo.—Ward v. Public Service Commission, 108 S.W.2d 136, 341 Mo. 227—State ex rel. Wabash Ry. Co. v. Shain, 106 S.W.2d 898, 341 Mo. 19, granting peremptory mandamus State ex rel. Pitcairn v. Public Service Commission of Missouri, App., 100 S.W.2d 636, transferred,

Sup., 92 S.W.2d 881, certiorari quashed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902, cause reinstated State ex rel. Pitcairn v. Public Service Commission, 110 S.W.2d 367, 232 Mo.App. 609, mandate conformed to 110 S.W.2d 367, 232 Mo.App. 609—State ex rel. Orschelm Bros. Truck Lines v. Public Service Commission, 92 S.W.2d 882, 338 Mo. 572, transferred State ex rel. Orschelm Bros. Truck Lines v. Public Service Commission of Missouri, App., 98 S.W.2d 126, peremptory mandamus granted State ex rel. Orschelm Bros. Truck Lines v. Shain, 106 S.W.2d 901—State ex rel. Pitcairn v. Public Service Commission, 92 S.W.2d 881, transferred State ex rel. Pitcairn v. Public Service Commission of Missouri, App., 100 S.W.2d 636, peremptory mandamus granted State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 901, certiorari quashed 106 S.W.2d 902—Junior v. Junior, 84 S.W.2d 909—State ex rel. Allen v. Trimble, 10 S.W.2d 519, 321 Mo. 230—Clark v. Reardon, App., 104 S.W.2d 407.

Neb.—State ex rel. Wright v. Barney, 276 N.W. 676, 133 Neb. 676—State v. Nebraska State Bank of Bloomfield, 247 N.W. 31, 124 Neb. 449—Burnham v. Bennison, 236 N. W. 745, 121 Neb. 291.

N.J.—In re Herbert's Estate, 192 A. 39, 121 N.J.Eq. 564—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504—In re Walker's Estate, 123 A. 423, 95 N. J.Eq. 619—Randal v. Hillside Pleasure Park Co., 107 A. 587, 90 N.J.Eq. 604—Hedden v. Hand, 107 A. 285, 90 N.J.Eq. 583, 5 A.L.R. 1463.

N.Y.—In re Malloy's Estate, 17 N. E.2d 108, 278 N.Y. 429, affirming 1 N.Y.S.2d 184, 253 App.Div. 30—Decker v. Canzoneri, 9 N.Y.S.2d 210, 256 App.Div. 68—Marvis v. Marvis, 215 N.Y.S. 43, 216 App.Div. 291, reversing 209 N.Y.S. 579, 125 Misc. 309—Gutttag v. Shatzkin, 186 N.Y.S. 47, 194 App.Div. 509, reversing 185 N.Y.S. 71, 113 Misc. 362, and reversed on other grounds 130 N.E. 929, 230 N.Y. 647—In re Levy, 182 N.Y.S. 792, 192 App.Div. 550, affirmed 129 N.E. 939, 229 N.Y. 637—Johnson v. Lasser, 289 N.Y.S. 16, 159 Misc. 346—Bischoff v. Schnepf, 249 N.Y.S. 49, 139 Misc. 293—Osterhoudt v. Horowitz, 240 N.Y.S. 683, 135 Misc. 744.

N.C.—Hendrix v. High Point, T. & D. Ry. Co., 163 S.E. 752, 202 N.C. 579—Jones v. Standard Oil Co. of

nor abrogate or abridge their inherent powers or functions.² In other words, the legislature cannot

New Jersey, 162 S.E. 741, 202 N.C. 328.

N.D.—Becker County Sand & Gravel Co. v. Wosick, 245 N.W. 454, 62 N.D. 740.

Ohio.—Neff v. McKelvey, 15 N.E.2d 770, 134 Ohio St. 47—Foraker v. Township of Perry Rural School Dist. Board of Education, 199 N.E. 74, 130 Ohio St. 243, affirming Davis v. Watts, 3 N.E.2d 923, 52 Ohio App. 474—Ireland v. Cheney, 196 N.E. 267, 129 Ohio St. 527—State v. Common Pleas Court of Meigs County, 179 N.E. 415, 124 Ohio St. 493—Tuck v. Chapple, 151 N.E. 48, 114 Ohio St. 155—State v. Wallace, 140 N.E. 305, 107 Ohio St. 557—Craig v. Welply, 136 N.E. 143, 104 Ohio St. 312—Haas v. Mutual Life Ins. Co. of New York, 115 N.E. 1020, 95 Ohio St. 137—Daily v. Dowty, 3 N.E.2d 430, 52 Ohio App. 84—In re Stroman's Estate, 17 Ohio App. 108.

Okl.—Chickasha Cotton Oil Co. v. Grady County, 58 P.2d 590, 594, 177 Okl. 240, quoting *Corpus Juris*—McIntosh v. Dill, 205 P. 917, 86 Okl. 1, error dismissed 43 S.Ct. 12, 260 U.S. 694, 67 L.Ed. 467, and certiorari denied 43 S.Ct. 12, 260 U.S. 721, 67 L.Ed. 480.

Pa.—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599.

R.I.—Gorham v. Robinson, 186 A. 832, 57 R.I. 1.

S.C.—Ansel v. Means, 172 S.E. 434, 171 S.C. 432—Strickland v. Seaboard Air Line Ry. Co., 98 S.E. 853, 112 S.C. 67.

S.D.—Camp Crook Independent School Dist. No. 1 v. Shevling, 270 N.W. 518, 65 S.D. 14—Chicago, M., St. P. & P. R. Co. v. Board of Railroad Com'rs of South Dakota, 266 N.W. 660, 64 S.D. 297—Warren v. Brown, 234 N.W. 38, 57 S.D. 528—Winner Milling Co. v. Chicago & N. W. Ry. Co., 181 N.W. 195, 43 S.D. 574.

Tenn.—In re Cumberland Power Co., 249 S.W. 818, 147 Tenn. 504—Clements v. Roberts, 231 S.W. 902, 144 Tenn. 152, denying rehearing 230 S.W. 30, 144 Tenn. 129.

Tex.—Aucutt v. Aucutt, 62 S.W.2d 77, 122 Tex. 518, 89 A.L.R. 1198—Reasonover v. Reasonover, 58 S.W. 2d 817, 122 Tex. 512, answering certified questions, Civ.App., 59 S.W.2d 887—Love v. Wilcox, 28 S.W. 2d 515, 119 Tex. 256, 70 A.L.R. 1484—State v. Gillette's Estate, Com.App., 10 S.W.2d 984, reversing Gillette's Estate v. State, Civ.App., 286 S.W. 261—Whittenberg v. Craven, Com.App., 258 S.W. 152, reversing Ex parte Grimes, Civ.App., 216 S.W. 251—Moyers v. Carter, Civ.App., 61 S.W.2d 1027, error refused—Jones v. Soch, Civ.

App., 277 S.W. 171—Ex parte Richmond, 14 S.W.2d 851, 111 Tex.Cr. 446.

Va.—Etna Ins. Co. v. Commonwealth ex rel. State Corporation Commission, 169 S.E. 859, 160 Va. 698.

Wash.—Blanchard v. Golden Age Brewing Co., 63 P.2d 397, 188 Wash. 396.

Wis.—In re Price, 210 N.W. 844, 191 Wis. 17.

12 C.J. p 816 note 2—15 C.J. p 731 note 61, p 858 notes 57, 58.

Constitutional court defined

(1) "A constitutional court is one which is named or described and expressly protected by the Constitution . . . or is one which is recognized by name or definite description in the Constitution but is given no express protection."—Gorham v. Robinson, 186 A. 832, 850, 57 R.I. 1.

(2) However, it has been held that a court named in a constitution but vested with no jurisdiction is not a "constitutional court."—Bradford v. Richardson, 97 S.E. 58, 111 S.C. 205.

(3) The fact that the power to establish a particular court is vested by the constitution in the legislature does not support a contention that such court is not "provided for," that is, created and established, by the constitution.

Colo.—People v. Rucker, 5 Colo. 455. Neb.—State ex rel. Hunter v. Maguire, 285 N.W. 921, 923, citing *Corpus Juris*.

Territorial jurisdiction

(1) Where the constitution fixes the territorial jurisdiction of particular courts, the legislature cannot extend such jurisdiction beyond the constitutional limitations.—Wilmington Trust Co. v. Baldwin, Del. Super., 195 A. 287—15 C.J. p 731 note 61 [f], p 862 note 8.

(2) Nor can the legislature do this even with respect to actions brought for the benefit of the state itself.—State v. Royal Consol. Mining Co., 202 P. 133, 187 Cal. 343.

Jurisdiction at common law

Legislature cannot confer jurisdiction on supreme court and courts of civil appeals beyond limits of original and appellate power as comprehended by common law, except as common law has been abrogated or modified directly or by necessary implication by constitution itself.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553.

Abrogating concurrent jurisdiction

Where the constitution gives two courts concurrent jurisdiction of a particular matter, the legislature cannot make the jurisdiction of one of such courts exclusive.—State v. Jones, 137 P. 544, 15 Ariz. 215.

Statutes held invalid or unauthorized by particular provisions

Fla.—State ex rel. Buckwalter v. City of Lakeland, 150 So. 508, 112 Fla. 200, 90 A.L.R. 704, followed in State ex rel. Sovereign Camp, W. O. W. v. Halifax Hospital Dist., 150 So. 517, and Overstreet v. State ex rel. Carpenter, 155 So. 926, 115 Fla. 151.

Ill.—People v. Lattimore, 199 N.E. 275, 362 Ill. 206.

N.J.—Lyons v. City of Bayonne, 130 A. 14, 101 N.J.Law 455.

N.Y.—Sliossberg v. New York Life Ins. Co., 216 N.Y.S. 215, 217 App. Div. 67, affirmed 155 N.E. 749, 244 N.Y. 482, and 155 N.E. 913, 244 N.Y. 599, answering certified questions 216 N.Y.S. 917, 217 App.Div. 742—Heyman v. Osterweis, 185 N.Y.S. 311, 113 Misc. 282.

S.D.—Warren v. Brown, 234 N.W. 38, 57 S.D. 528.

Tex.—Reasonover v. Reasonover, 58 S.W.2d 817, 122 Tex. 512, answering certified questions, Civ.App., 59 S.W.2d 887.

15 C.J. p 855 note 13.

Statutes held valid

Ala.—State v. Knighton, 108 So. 85, 21 Ala.App. 330.

Fla.—Milton v. City of Marianna, 144 So. 400, 107 Fla. 251.

Ga.—Dillon v. Continental Trust Co., 175 S.E. 652, 179 Ga. 198.

Kan.—State v. Howat, 198 P. 686, 109 Kan. 376, 25 A.L.R. 1210, error dismissed Howat v. State of Kansas, 42 S.Ct. 277, 258 U.S. 181, 66 L.Ed. 550—State v. Howat, 191 P. 585, 107 Kan. 423.

Mass.—Horton v. Attorney General, 169 N.E. 552, 269 Mass. 503.

Nev.—In re Walker River Irr. Dist., 195 P. 327, 44 Nev. 321—Steamboat Canal Co. v. Garson, 185 P. 801, 43 Nev. 298, rehearing denied 185 P. 1119, 43 Nev. 298.

N.Y.—In re Westchester Title & Trust Co., 198 N.E. 19, 268 N.Y. 432, motion denied 199 N.E. 691, 269 N.Y. 602—Seglin Const. Co. v. State, 293 N.Y.S. 205, 249 App.Div. 476, amended 295 N.Y.S. 753, 250 App.Div. 818.

N.C.—Thompson v. Dillingham, 112 S.E. 321, 183 N.C. 566.

N.D.—Talcott v. Bailey, 208 N.W. 549, 54 N.D. 19—State v. First State Bank of Jud, 202 N.W. 391, 52 N.D. 231—Klein v. Hutton, 191 N.W. 485, 49 N.D. 248.

15 C.J. p 855 note 13.

2. Cal.—In re Cate, App., 273 P. 617, supplementing 271 P. 356, denying rehearing 270 P. 963.

Miss.—Ex parte Marshall, 147 So. 791, 804, 165 Miss. 523, citing *Corpus Juris*.

Mo.—Clark v. Reardon, 104 S.W.2d 407, 231 Mo.App. 668.

take from courts power which it does not give.³ Thus, the legislature cannot destroy jurisdiction by depriving a party of the right to appeal to the courts for redress of a legal wrong,⁴ nor can it authorize a court to divest itself of constitutionally imposed exclusive jurisdiction.⁵ However, a change of the substantive law by the legislature, which increases or decreases the subject matter on which the jurisdiction of the courts operates, is not an unconstitutional interference with such jurisdiction.⁶

On the other hand, to the extent that the constitution allows or does not prohibit, the legislature may legislate with respect to constitutional courts;⁷ and thus, depending on the particular constitutional provisions involved, may increase,⁸ diminish, or change their jurisdiction,⁹ confer on them any additional jurisdiction that it deems advisable,⁹ may extend their jurisdiction in harmony with their character and general jurisdiction, without infringing on the inherent or constitutional powers of any other court,¹⁰ or may abridge their jurisdiction

N.J.—Cohen v. Cohen, 188 A. 244, 121 N.J.Eq. 299—Smith v. Washington Casualty Ins. Co., 159 A. 510, 110 N.J.Eq. 122—Ex parte Hague, 144 A. 546, 104 N.J.Eq. 31, affirmed 145 A. 618, 104 N.J.Eq. 369—In re Walker's Estate, 123 A. 423, 95 N.J.Eq. 619—Mackie v. Cain, 114 A. 549, 92 N.J.Eq. 631.

Pa.—In re Investigation by June 1938 Dauphin County Grand Jury, 46 Dauph.Co. 54.

Tex.—State v. Gillette's Estate, Com. App., 10 S.W.2d 984, reversing Gillette's Estate v. State, Civ.App., 286 S.W. 261.

12 C.J. p 817 note 3.

Imposing duties on justices

It is beyond the power of the legislature to impose a service on the justices of the supreme court which would seriously impair the efficient discharge of the constitutional duties of the court and of its justices.—In re House Bill No. 537 of Thirty-Eighth Legislature, 256 S.W. 573, 113 Tex. 367.

Power to enforce rules

Legislature could not take from supreme court power to enforce rule made by it pursuant to inherent power.—Epstein v. State, 128 N.E. 353, 190 Ind. 693, denying rehearing 127 N.E. 441, 190 Ind. 693.

Control of court records

A statute relating to records on appeal was void because it was encroachment on judicial function inherent in courts of last resort.—Davis v. State, 128 N.E. 354, 189 Ind. 464.

3. Cal.—In re Cate, App., 273 P. 617, supplementing 271 P. 356, denying rehearing 270 P. 968.

4. Cal.—Selby v. Oakdale Irr. Dist., 35 P.2d 125, 140 Cal.App. 171.

12 C.J. p 818 note 13.

5. Colo.—In re Brown's Estate, 176 P. 477, 65 Colo. 341.

N.Y.—Alexander v. Bennett, 60 N.Y. 204.

Court itself cannot relinquish that jurisdiction.—Alexander v. Bennett, 60 N.Y. 204.

6. Wis.—American Furniture Co. v. I. B. of T. C. and H. of A., Chauffeurs, Teamsters and Helpers Gen-

eral Local No. 200 of Milwaukee, 268 N.W. 250, 222 Wis. 338, 106 A.L.R. 335.

7. Okl.—Chickasha Cotton Oil Co. v. Grady County, 58 P.2d 590, 594, 177 Okl. 240, quoting *Corpus Juris*.

Pa.—Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania, 178 A. 291, 318 Pa. 401, affirming 174 A. 11, 114 Pa.Super. 7.

15 C.J. p 731 note 60—p 859 note 71.

In Porto Rico, legislature had authority to abolish a district court vested with judicial authority by the first Organic Act and establish another in its place.—Diaz Cintron v. People of Puerto Rico, C.C.A.Porto Rico, 24 F.2d 957.

8. N.M.—First Nat. Bank v. Dunbar, 258 P. 817, 32 N.M. 419.

Ohio.—Geiger v. Geiger, 160 N.E. 28, 117 Ohio St. 451, affirming 159 N.E. 350, 25 Ohio App. 461.

Tex.—Kubish v. State, 84 S.W.2d 480, 128 Tex.Cr. 666.

9. Ill.—People v. White, 166 N.E. 100, 334 Ill. 465, 64 A.L.R. 1006.

10. Ark.—Rodgers v. Carson Lake Road Imp. Dist. No. 6, 85 S.W.2d 716, 191 Ark. 112—Wilson v. Magnolia Petroleum Co., 26 S.W.2d 92, 181 Ark. 391—Bowman Engineering Co. v. Arkansas & Missouri Highway Dist., 235 S.W. 399, 151 Ark. 47.

Del.—Wilmington Trust Co. v. Baldwin, Super., 195 A. 287.

Fla.—Cormack v. Coleman, 161 So. 844, 120 Fla. 1—Harry E. Prettyman, Inc., v. Florida Real Estate Commission, 109 So. 442, 92 Fla. 515.

Miss.—Bacot v. Board of Sup'rs of Hinds County, 86 So. 765, 124 Miss. 231.

Mont.—State v. Wiles, 41 P.2d 8, 98 Mont. 577.

Neb.—State ex rel. Wright v. Barney, 276 N.W. 676, 133 Neb. 676.

N.J.—State v. Knight, 115 A. 569, 96 N.J.Law 461, 19 A.L.R. 733—In re Herbert's Estate, 192 A. 39, 121 N.J.Eq. 564—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504—Randal v. Hillside Pleasure Park Co., 107 A. 587, 90 N.J.Eq. 604—Hedden v.

Hand, 107 A. 285, 90 N.J.Eq. 583, 5 A.L.R. 1463.

N.M.—First Nat. Bank v. Dunbar, 258 P. 817, 32 N.M. 419.

N.Y.—La Rocca v. La Rocca, 259 N.Y.S. 569, 144 Misc. 737—People ex rel. Lemon v. Caparbo, 238 N.Y.S. 197, 135 Misc. 151, modified on other grounds People ex rel. Lemon v. Elmore, 245 N.Y.S. 95, 230 App. Div. 543, affirmed 177 N.E. 14, 256 N.Y. 489, 75 A.L.R. 1292.

Okl.—Key v. City of Ardmore, 234 P. 793, 30 Okl.Cr. 8—El Reno Wholesale Grocery Co. v. Taylor, 209 P. 749, 87 Okl. 140.

S.D.—Warren v. Brown, 234 N.W. 88, 57 S.D. 528.

W.Va.—Locke v. Raleigh County Court, 161 S.E. 6, 111 W.Va. 156—State v. England, 103 S.E. 400, 86 W.Va. 508.

12 C.J. p 817 note 6—15 C.J. p 731 note 61 [e].

Enlargement of equity jurisdiction held proper

Ark.—Arkansas Cotton Growers' Co-op. Ass'n v. Brown, 270 S.W. 946, 168 Ark. 504, supplemental opinion, 270 S.W. 1119, 168 Ark. 504.

N.Y.—People ex rel. Lemon v. Caparbo, 238 N.Y.S. 197, 135 Misc. 151, modified on other grounds People ex rel. Lemon v. Elmore, 245 N.Y.S. 95, 230 App.Div. 543, affirmed 177 N.E. 14, 256 N.Y. 489, 75 A.L.R. 1292.

Pa.—Commonwealth v. Dietz, 132 A. 572, 285 Pa. 511, followed in Commonwealth v. Artz, 132 A. 575, 285 Pa. 521.

Restriction imposed by court itself on the exercise of its inherent equity jurisdiction may be removed by legislature.—Hawkins v. Rellim Inv. Co., 110 So. 350, 92 Fla. 784.

Particular constitutional provisions construed

(1) A provision continuing the jurisdiction of a court as fixed by prior constitutions "unless otherwise provided," permits the legislature to add to such jurisdiction in any appropriate and germane particular.—Wilmington Trust Co. v. Baldwin, Del.Super., 195 A. 287.

(2) The legislature has power, under a constitutional provision con-

without infringing on their inherent powers.¹¹ Similarly, it has been held that the legislature may regulate to some extent the quantity of the business of a court by reasonably contracting or enlarging the limits of the exercise of its jurisdiction,¹² or may, pursuant to authority granted by the constitution, enact a statute which incidentally results in the elimination of a constitutional court.¹³ Further, to the extent that the legislature properly confers additional jurisdiction on a constitutional court, it may withdraw such jurisdiction.¹⁴

Conferring concurrent jurisdiction. The legislature may confer on a court jurisdiction concurrent with that of another court, where such act is a legitimate exercise of the power conferred on the

legislature, having regard also to such jurisdiction as may be conferred on the latter court by the constitution of the state.¹⁵ Thus, the mere grant of jurisdiction by the constitution to certain courts will not prevent the legislature from conferring concurrent jurisdiction on subordinate¹⁶ or higher¹⁷ courts, and this may be done under the provisions of the several state constitutions, where the jurisdiction granted by the constitution is not exclusive.¹⁸ However, concurrent jurisdiction with a constitutional court cannot be conferred on another tribunal where the purpose of such grant is to deprive the constitutional court of its general jurisdiction,¹⁹ or its effect is to impair the court's jurisdiction over matters exclusively within its province.²⁰ A constitutional provision that the legisla-

fering certain jurisdiction on designated courts "subject to such changes as may be made by law," to add to, take from, or otherwise change the jurisdiction so conferred.—*Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania*, 178 A. 291, 318 Pa. 401, affirming 174 A. 11, 114 Pa.Super. 7.

(3) A provision giving a court certain powers "and all the other jurisdiction and powers vested by the laws" of the state, is prospective in character, and does not confine such court's powers to those vested at the time the constitution was promulgated.—*Woods v. Spoturno*, 183 A. 319, 7 W.W.Harr., Del., 295, reversed on other grounds *Spoturno v. Woods*, 192 A. 689, 8 W.W.Harr. 378.

(4) A constitutional provision conferring on a court certain appellate and original jurisdiction and "such other and further jurisdiction as may be conferred upon it by law," permits the legislature to confer original jurisdiction on such court in all matters of general public interest directly affecting the state's sovereign rights and powers.—*In re State Treasury Note Indebtedness*, 90 F.2d 19, 185 Okl. 10.

(5) A provision that a particular court "shall have both chancery and common-law jurisdiction, and such other jurisdiction as the Legislature may provide," gives the legislature power to enlarge, but not to limit, the general jurisdiction so conferred.—*State ex rel. Wright v. Barney*, 276 N.W. 676, 133 Neb. 676.

(6) A constitutional provision providing for the establishment of a particular court was held to confer no jurisdiction on it, but simply to give it the capacity to receive jurisdiction from the legislature.—*Cummins v. Kinsinger*, 29 Ohio N.P., N.S., 34.

11. Ill.—*Brown v. Kienstra*, 169 N.E. 736, 237 Ill. 641.

Mo.—*State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 92 S.W.2d 882, 338 Mo. 572, transferred *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission of Missouri*, App., 98 S.W.2d 126, peremptory mandamus granted *State ex rel. Orscheln Bros. Truck Lines v. Shain*, Sup., 106 S.W.2d 901.

N.Y.—*Charles W. Sommer & Bro. v. Albert Lorsch & Co.*, 172 N.E. 271, 254 N.Y. 146, denying appeal 241 N.Y.S. 772, 228 App.Div. 810.

Pa.—*Lipoff v. United Food Workers Industrial Union, Local No. 107*, Pa., 33 Dist. & Co. 599.

Tex.—*Seale v. McCallum*, 287 S.W. 45, 116 Tex. 662.

12 C.J. p 817 notes 7, 9.

12. Colo.—*People v. Scott*, 120 P. 126, 52 Colo. 59.

15 C.J. p 857 note 35.

13. Ga.—*Hines v. Etheridge*, 162 S. E. 113, 173 Ga. 870.

14. Fla.—*State v. Circuit Court for Eleventh Judicial Circuit*, 135 So. 866, 102 Fla. 112, modified on other grounds 135 So. 870, 102 Fla. 122.

Tex.—*Texas Farm Bureau Cotton Ass'n v. Lennox*, Civ.App., 296 S. W. 325, followed in *Parker v. Shields*, Civ.App., 296 S.W. 329.

15. Ala.—*Morris v. McElroy*, 122 So. 606, 23 Ala.App. 96, certiorari denied 122 So. 608, 219 Ala. 369.

15 C.J. p 1130 note 16.

16. U.S.—*Börs v. Preston*, N.Y., 4 S. Ct. 407, 111 U.S. 252, 28 L.Ed. 419.

17. Tex.—*Gulf, W. T. & P. Ry. Co. v. Fromme*, 84 S.W. 1054, 98 Tex. 459—*Stavely v. Stavely*, Civ.App., 94 S.W.2d 545, error dismissed.

18. Ala.—*Martin v. State*, 97 So. 57, 210 Ala. 44—*Ex parte Pruitt*, 92 So. 426, 207 Ala. 261—*James v. State*, 107 So. 727, 21 Ala.App. 295.

Ill.—*State v. Milauskas*, 149 N.E. 294, 318 Ill. 198—*State v. Aiello*,

147 N.E. 916, 317 Ill. 159—*Myers v. People*, 67 Ill. 503.

Miss.—*Ex parte Tucker*, 143 So. 700, 164 Miss. 20.

N.Y.—*In re Malloy's Estate*, 17 N.E. 2d 108, 278 N.Y. 429, affirming 1 N. Y.S.2d 184, 253 App.Div. 30.

Okl.—*Buchanan v. State*, 236 P. 903, 30 Okl.Cr. 362.

S.C.—*Strickland v. Seaboard Air Line Ry. Co.*, 98 S.E. 853, 112 S.C. 67.

Tex.—*Love v. Wilcox*, 28 S.W.2d 515, 119 Tex. 256, 70 A.L.R. 1484.

W.Va.—*Locke v. Raleigh County Court*, 161 S.E. 6, 111 W.Va. 156.

15 C.J. p 732 note 64, p 1180 note 17.

Nonexercise of permissive power

Coordinate authority with a constitutional court respecting a particular matter incidental to its general jurisdiction may be conferred on another tribunal, where the constitutional court deliberately refrains from exercising its permissive power, and where it may, if it sees fit at any time, exercise it.—*Schmidt v. Chamberlain of City of New York*, 272 N.Y.S. 889, 242 App.Div. 692, reversed on other grounds 194 N.E. 685, 266 N.Y. 225, motion denied 195 N.E. 126, 266 N.Y. 403.

Grant of general jurisdiction

Statutory court may be made one of general jurisdiction as to matters prescribed in the statute.—*Blount County Bank v. Barnes*, 118 So. 460, 218 Ala. 230.

19. N.Y.—*Flynn v. New Jersey Cent. R. Co.*, 37 N.E. 514, 142 N.Y. 439. 15 C.J. p 732 note 65.

20. Ark.—*Bonds v. Wilson*, 284 S.W. 24, 171 Ark. 328.

Ind.—*In re Petition to Transfer Appeals*, 174 N.E. 812, 202 Ind. 365.

La.—*Succession of Dyer*, 166 So. 68, 184 La. 251.

N.J.—*In re Walker's Estate*, 123 A. 423, 95 N.J.Eq. 619.

N.C.—*Hendrix v. High Point, T. & D. Ry. Co.*, 163 S.E. 752, 202 N.C. 579.

ture may establish courts inferior to a named constitutional court, with a limited jurisdiction, does not authorize the legislature to establish a court with a jurisdiction concurrent with that of the constitutional court.²¹ Courts of law may be invested with jurisdiction concurrent with courts of equity,²² although they cannot exercise equitable jurisdiction in cases where complete justice can be done only by a court possessing full equity powers.²³

Conflicting and concurrent jurisdiction of courts generally is considered *infra* § 486 et seq.

Conferring judicial powers on other than courts. Unless the constitution otherwise provides, judicial power is to be vested exclusively in the courts,²⁴ and the legislature has no authority to confer such power on any person or class of persons other than the courts²⁵ or judicial officers²⁶ provided for in the constitution. Obviously, however, statutes which confer on nonjudicial persons or bodies functions

which are not judicial, are not unconstitutional on this ground.²⁷

Distinction between law and equity courts. A distinction between the jurisdiction of courts of law and of equity made by the constitution must be observed by the legislature;²⁸ but where it is provided by the constitution that the legislature shall, as far as practicable, abolish distinctions between law and equity proceedings, the fact that a certain proceeding was formerly within the jurisdiction of a court of equity furnishes no reason for holding that the legislature may not properly confer jurisdiction of a similar proceeding on a court of law,²⁹ and such an extension of the jurisdiction of law courts has been held valid in the absence of any constitutional prohibition.³⁰

Regulation. The legislature always has power, within constitutional limitations, to regulate the exercise of jurisdiction conferred by the constitution,³¹ as by prescribing new conditions under

N.D.—Becker County Sand & Gravel Co. v. Wosick, 245 N.W. 454, 62 N.D. 740.

Tex.—State v. Gillette's Estate, Com. App., 10 S.W.2d 984, reversing Gillette's Estate v. State, Civ.App., 286 S.W. 261—Whittenberg v. Craven, Com.App., 258 S.W. 152, reversing *Ex parte* Grimes, Civ.App., 216 S.W. 251.

12 C.J. p 817 note 4—15 C.J. p 1130 note 18.

Coextensive territorial jurisdiction

General jurisdiction territorially coextensive with that of the supreme court cannot be conferred on other tribunals.—Decker v. Canzoneri, 9 N.Y.S.2d 210, 256 App.Div. 68.

21. Wis.—State v. La Crosse County Ct. Judge, 11 Wis. 50.

22. Ill.—Watson v. Reissig, 24 Ill. 281, 76 Am.D. 746.

Iowa.—Covert v. Sebern, 35 N.W. 636, 73 Iowa 564.
15 C.J. p 1131 note 20.

23. Ill.—Watson v. Reissig, 24 Ill. 281, 76 Am.D. 746.

N.J.—Ely v. Crane, 37 N.J.Eq. 157, reversed on other grounds 37 N.J.Eq. 564.

24. Cal.—In re Hart's Estate, App., 70 P.2d 539, affirmed 77 P.2d 1082, 11 Cal.2d 89.

Md.—Day v. State, 159 A. 602, 162 Md. 221.

Conferring judicial powers as encroachment on judiciary generally see Constitutional Law § 110.

25. Cal.—In re Hart's Estate, App., 70 P.2d 539, affirmed 77 P.2d 1082, 11 Cal.2d 89.

Md.—Day v. State, 159 A. 602, 162 Md. 221.

N.D.—Becker County Sand & Gravel

Co. v. Wosick, 245 N.W. 454, 62 N.D. 740.

Pa.—In re American Banking & Trust Co., 4 Pa.Dist. 757.

Conferring judicial powers on judges instead of on courts see the C.J.S. title Judges § 41, also 12 C.J. p 818 notes 20–24.

On litigants

A statute providing that the mere filing of an affidavit charging bias and prejudice is sufficient to disqualify a judge without any hearing or determination of the truth or falsity of the affidavit, is unconstitutional as vesting judicial power to that extent in the litigants.—Diehl v. Crump, 179 P. 4, 72 Okl. 108, 5 A.L.R. 1272.

In Alaska, the act of the territorial legislature attempting to impose jurisdiction on the commissioner and ex officio probate judge to hear the petition for the annexation of territory to a municipal corporation and render judgment thereon contravenes the provisions of the Organic Act of Alaska and amendments thereto separating the governmental powers, and is, therefore, unconstitutional and void.—In re Annexation to Fairbanks, 6 Alaska 439.

26. Md.—Day v. State, 159 A. 602, 162 Md. 221.

President of city commission

A provision of a municipal charter that the president of the city commissioners may perform such judicial functions as are, by the constitution, conferred on mayors is valid.—Ide v. State, 116 N.E. 450, 95 Ohio St. 224.

27. Idaho.—In re Edwards, 266 P. 665, 45 Idaho 876.

Kan.—State v. French, 286 P. 204, 130 Kan. 464.

Ky.—Perkins v. Lucas, 246 S.W. 150, 197 Ky. 1.

12 C.J. p 816 note 96.

Duties attached to judicial office, but which are ministerial and mandatory, may be imposed on court clerks.—Cole v. Richmond, 100 So. 419, 156 La. 262.

28. N.J.—Estate of Gilbert Smith v. Cohen, 196 A. 361, 123 N.J.Eq. 418.

12 C.J. p 817 note 10.

Statutes held not to violate distinction

Fla.—South Florida Trust Co. v. Miami Coliseum Corporation, 133 So. 334, 101 Fla. 1351.

N.J.—State Board of Milk Control v. Newark Milk Co., 179 A. 116, 118 N.J.Eq. 504.

29. Mich.—Kalamazoo County Cir. Judge, 59 N.W. 644, 101 Mich. 406.

30. W.Va.—Tomlinson v. Cunningham, 144 S.E. 570, 106 W.Va. 1—Fisher v. Sommerville, 98 S.E. 67, 83 W.Va. 160.

31. Ark.—Dickinson v. Mingea, 88 S.W.2d 807, 191 Ark. 946—Adams v. State, 240 S.W. 5, 153 Ark. 202—Marvel v. State, 193 S.W. 259, 127 Ark. 595, 5 A.L.R. 1458.

Cal.—Sacramento & San Joaquin Drainage Dist. v. Superior Court in and for Colusa County, 238 P. 687, 196 Cal. 414—Couldthirst v. Southern Pac. R. Co., 193 P. 796, 49 Cal.App. 525.

Minn.—In re Gilroy's Estates, 258 N.W. 584, 193 Minn. 349—State v. Probate Court of Goodhue County, 210 N.W. 40, 168 Minn. 147.

which that jurisdiction may be exercised,³² or by changing the form of proceedings and remedies and limiting their use to certain tribunals,³³ designating parties who may³⁴ or may not³⁵ invoke the established jurisdiction of the court over certain matters, provided such regulation or restriction does not defeat or materially impair constitutional jurisdiction or functions;³⁶ and the legislature may, of course, do so where the constitution expressly so provides.³⁷ So, too, the legislature may pass laws in aid of the courts' inherent powers.³⁸

Special statutory proceedings. Where the legislature creates special statutory proceedings involving rights previously unknown to law and equity and providing remedies therefor, the legislature may confer jurisdiction thereof on any court to the

exclusion of others,³⁹ provided the statute furnishes adequate protection of the rights of persons concerned;⁴⁰ but it cannot, in so doing, take away the constitutionally protected jurisdiction of other courts in so far as it is applicable to the controversy involved.⁴¹ An attempt by the legislature, in an act which continues in force statutes giving a right of action, to prohibit the court from hearing particular suits under such statutes, is an unconstitutional invasion of the court's jurisdiction.⁴²

Legislation proposed by initiative petition. Where the constitution and amendments thereto so provide, no measure that relates to the powers of courts may be proposed by initiative petition, but the mere fact that an incidental result of a general law covering a subject not connected with courts is that the work

N.Y.—Gutttag v. Shatzkin, 186 N.Y. S. 47, 194 App.Div. 509, reversing 185 N.Y.S. 71, 113 Misc. 862, and reversed on other grounds 130 N.E. 929, 230 N.Y. 647—In re Michaelson, 296 N.Y.S. 119, 162 Misc. 847.
Ohio.—Neff v. McKelvey, 15 N.E.2d 770, 134 Ohio St. 47—Craig v. Welply, 136 N.E. 143, 104 Ohio St. 312—State v. Belonski, 153 N.E. 160, 20 Ohio App. 141.
Tex.—Aucutt v. Aucutt, 62 S.W.2d 77, 122 Tex. 518, 89 A.L.R. 1198—Porch v. Rooney, Civ.App., 275 S.W. 494.
Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.
12 C.J. p 817 note 5.

Statute regulating practice to be followed before court is called to determine certain matters is held valid.—Egan v. Broderick, 179 N.E. 757, 258 N.Y. 334, reversing In re Egan, 251 N.Y.S. 880, 233 App.Div. 834, and followed in In re Bank of U. S., 185 N.E. 775, 261 N.Y. 645, affirming 257 N.Y.S. 1033, 236 App. Div. 672, and 259 N.Y.S. 970, 236 App. Div. 826.

32. Ark.—Marvel v. State, 193 S.W. 259, 127 Ark. 595, 5 A.L.R. 1458.
Cal.—Ex parte Alpine, 265 P. 947, 203 Cal. 731, 58 A.L.R. 1500.
Iowa.—State v. Howard, 241 N.W. 682, 214 Iowa 60.

33. N.Y.—Rae v. New York, 39 N.Y. Super. 192, appeal dismissed 62 N. Y. 631.

General law applicable to all courts affecting the mode of obtaining a remedy cannot be construed into an infringement of the constitutional jurisdiction or power of courts.—Rae v. New York, supra.

34. Fla.—State ex rel. Jacksonville Gas Co. v. Lewis, 170 So. 306, 125 Fla. 816.

35. Cal.—Yolo Water & Power Co. v. Superior Court in and for Lake County, 185 P. 195, 43 Cal.App. 332.

36. Cal.—Millholen v. Riley, 293 P.

69, 211 Cal. 29—Brydonjack v. State Bar of California, 281 P. 1018, 208 Cal. 439, 66 A.L.R. 1507.
Fla.—South Florida Trust Co. v. Miami Coliseum Corporation, 133 So. 334, 101 Fla. 1351.
Wis.—John F. Jelke Co. v. Hill, 242 N.W. 576, 208 Wis. 650.

"Mere procedure by which jurisdiction is to be exercised may be prescribed by the Legislature, unless, indeed, such regulations should be found substantially to impair the constitutional powers of the Courts or practically defeat their exercise."—Ex parte Harker, 49 Cal. 465, 467.

Statutes held valid

Cal.—In re Barreiro's Estate, 13 P. 2d 1017, 125 Cal.App. 153—In re Barnett's Estate, 275 P. 453, 97 Cal.App. 138.

Del.—Spoturno v. Woods, 192 A. 689, 8 W. W.Harr. 378, reversing Woods v. Spoturno, 183 A. 319, 7 W.W. Harr. 295.

37. Ky.—Federal Land Bank of Louisville v. Crombie, 80 S.W.2d 39, 40, 258 Ky. 383, quoting *Corpus Juris*.

N.Y.—Slosberg v. New York Life Ins. Co., 216 N.Y.S. 215, 217 App. Div. 67, affirmed 155 N.E. 749, 244 N.Y. 482, and 155 N.E. 913, 244 N. Y. 599, answering certified questions 216 N.Y.S. 917, 217 App.Div. 742.

Ohio.—Daily v. Dowty, 3 N.E.2d 430, 52 Ohio App. 84.

Creation of agency to aid court

Legislature has plenary power to constitute a new medium or agency for official action within existing supreme court as an aid thereto.—In re Starr, 280 N.Y.S. 753, 245 App. Div. 5.

38. La.—Meunier v. Bernich, App., 170 So. 567.

R.I.—Creditors' Service Corporation v. Cummings, 190 A. 2, 57 R.I. 291.

39. Mass.—Ashley v. Wait, 116 N.E.

961, 228 Mass. 63, 8 A.L.R. 1463, error dismissed 40 S.Ct. 53, 250 U.S. 652, 63 L.Ed. 1190.

Ill.—Ashlock v. Ashlock, 195 N.E. 657, 360 Ill. 115—Illinois Life Ins. Co. v. City of Chicago, 244 Ill.App. 185.

Mo.—Ward v. Public Service Commission, 108 S.W.2d 136.

N.Y.—Nox v. U. S. Shipping Board Emergency Fleet Corporation, 193 N.Y.S. 340.

N.C.—Manning v. Rama Rural Community of Mecklenburg County, 109 S.E. 576, 182 N.C. 861.

Tex.—Alpha Petroleum Co. v. Terrell, 59 S.W.2d 364, 122 Tex. 257, affirming, Civ.App., 54 S.W.2d 821, amended Alpha Petroleum Co. v. Terrell, 59 S.W.2d 372, 122 Tex. 257, and followed in Alpha Petroleum Co. v. Walker, 59 S.W.2d 373, 122 Tex. 246.

New offense

Whether the legislature shall confide the power and confer the jurisdiction of dealing with offenders against a law enacted under the police power to a city magistrate, a police justice, or a county court is a matter in the legislative discretion.—Katz v. Eldredge, 118 A. 242, 96 N.J. Law 382, reversed on other grounds 117 A. 841, 97 N.J. Law 123, 98 N. J. Law 125.

Rights under administrative proceeding

N.Y.—Masters v. Eclectic Life Ins. Co., 213 N.Y.S. 669, 215 App.Div. 424—In re Atlantic Ins. Co., 232 N.Y.S. 489, 133 Misc. 464.

40. Ill.—White v. City of Ottawa, 149 N.E. 521, 318 Ill. 463, affirming 230 Ill.App. 493.

41. Pa.—Grime v. Department of Public Instruction, 188 A. 337, 324 Pa. 371.

42. Ariz.—Puterbaugh v. Gila County, 46 P.2d 1064, 45 Ariz. 557.

of a court or courts may be affected does not bring it within such a prohibition.⁴³

§ 123. — General and Specific Constitutional Provisions

Effect will be given to specific constitutional provisions respecting the creation, abolition, organization, and jurisdiction of courts.

In addition to vesting judicial power in certain courts, and delegating authority to create and control the jurisdiction of courts, already considered in § 122, state constitutions frequently contain other provisions affecting courts, the effect of such provisions, as has been shown by cases construing or applying them, being variously to divide a state into judicial circuits, districts, etc.,⁴⁴ or to provide that this shall be done;⁴⁵ to divide counties;⁴⁶ to abolish an entire judiciary system created and established under a prior constitution;⁴⁷ to abolish particular courts, divest and transfer their jurisdiction, or substitute other courts in their place;⁴⁸ to create one court as the successor of another, giving it jurisdiction over all causes and proceedings pending in the abolished court;⁴⁹ to provide that causes shall be transferred or that jurisdiction over the same shall be vested in other courts or tribunals;⁵⁰ to continue certain courts and their jurisdiction⁵¹

until the legislature shall act;⁵² to reorganize the judiciary and divest them of jurisdiction⁵³ except over specified causes;⁵⁴ to limit or specify the number of judges in counties or other judicial divisions;⁵⁵ to provide for uniformity in organization, proceedings, practice, and jurisdiction in certain courts;⁵⁶ to specify expressly the limitation of jurisdiction in designated courts;⁵⁷ to make specific provision covering the organization of courts, the extent and number of judicial districts, the election of judges, terms of courts, and place of holding the same until otherwise provided by law, and provide for officers thereof;⁵⁸ and to restrict legislative power respecting courts by designating the manner, mode, and time of its exercise, or by otherwise placing limitations thereon as to population, elections, extent of territory or districts, etc.⁵⁹

§ 124. — Exclusive Constitutional Provisions

The legislature cannot interfere with jurisdiction which is conferred on a court by exclusive constitutional provisions.

The judicial power or jurisdiction conferred on certain courts by some constitutional provisions is exclusive⁶⁰ in the sense that the grant thereof precludes the legislature from creating any other

43. Mass.—Horton v. Attorney General, 169 N.E. 552, 269 Mass. 503.

44. Ark.—State v. Martin, 30 S.W. 421, 60 Ark. 343, 28 L.R.A. 153. Tex.—Lytle v. Halff, 12 S.W. 610, 75 Tex. 128.

45. Ind.—Stocking v. State, 7 Ind. 326.

46. Ill.—Goforth v. Adams, 11 Ill. 52.

47. La.—State v. Duffel, 32 La. Ann. 649.

48. Del.—Wilmington Trust Co. v. Baldwin, Super., 195 A. 287. 15 C.J. p 857 note 44.

Burden of proving abolition

If it is claimed that a court is abolished by the constitution, the burden is on the party asserting the point to satisfy the court either from the express language of the constitution or by necessary implication from such language that the court in question was abolished, and where there is nothing in the constitution or reasonably to be intended therefrom showing such fact, the claim will not be sustained.

Del.—Forbes v. State, Super., 41 A. 1102.

La.—State v. Walsh, 32 La. Ann. 1234.

49. Cal.—Learned v. Castle, 7 P. 34, 67 Cal. 41.

15 C.J. p 857 note 45.

50. Ga.—Foster v. Daniels, 39 Ga. 39.

15 C.J. p 857 note 46.

51. Miss.—Marble v. Whaley, 35 Miss. 527.

15 C.J. p 857 note 47.

52. Del.—Wilmington Trust Co. v. Baldwin, Super., 195 A. 287.

Mo.—Edwards v. Newton County, 73 Mo. 636.

Pa.—Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania, 178 A. 291, 318 Pa. 401, affirming 174 A. 11, 114 Pa. Super. 7.

53. Md.—Orrick v. Boehm, 49 Md. 72.

W. Va.—Fowler v. Thompson, 22 W. Va. 106.

54. Va.—Fowler v. Thompson, supra.

55. Ark.—State v. Martin, 30 S.W. 421, 60 Ark. 343, 28 L.R.A. 153.

15 C.J. p 858 note 51.

56. Colo.—Parker v. People, 21 P. 1120, 13 Colo. 155, 4 L.R.A. 803.

15 C.J. p 858 note 52.

Provision self-executing

Where the intent of a constitutional provision is to abrogate special legislation and to establish uniformity in the powers, proceedings, and practice of all courts of the same class or grade, the provision is self-executing and operates as an abrogation of existing special legis-

lation in conflict therewith, since a provision designed to remove an existing mischief will never be construed as dependent for its efficacy and operation on legislative will. Ill.—People v. Rumsey, 64 Ill. 44.

Courts of "same class or grade"

Under a provision requiring that organization, jurisdiction, and powers of all courts of same class or grade shall be uniform, words "class" and "grade" are synonymous, and are to be given their ordinary, and not a technical, meaning.—Commonwealth ex rel. Margiotti v. Sutton, 193 A. 250, 327 Pa. 337.

Enlarging jurisdiction of one of class

Statute requiring judge of superior court to designate an existing court as a juvenile court of county was violative of constitutional provision for uniformity of courts of the same grade.—Wages v. Morgan, 162 S.E. 380, 174 Ga. 158.

57. Wis.—Bookhout v. State, 28 N. W. 179, 66 Wis. 415.

58. Tex.—St. Louis Southwestern R. Co. v. Hall, 85 S.W. 786, 98 Tex. 480—Lytle v. Halff, 12 S.W. 610, 75 Tex. 128.

59. Pa.—Commonwealth v. Heck, 95 A. 929, 251 Pa. 39.

15 C.J. p 858 note 55.

60. Tex.—Dean v. Fuller, Civ. App., 290 S.W. 829.

15 C.J. p 858 note 56.

courts,⁶¹ or from conferring any additional jurisdiction on such courts,⁶² or from conferring all or a part of such courts' jurisdiction on other courts.⁶³ Thus, unless the constitution provides for other courts,⁶⁴ the specification therein of courts which may exercise judicial power operates as a limitation of the legislature's power to create other courts.⁶⁵ A constitutional restriction, however, as to the creation of new and enlarged circuits will not be implied from a limitation as to changes in the boundaries of circuits, the general rule which is applicable being that if no technical words are employed in a constitution it admits of no interpretation other than that which the common understanding places on it.⁶⁶

§ 125. — Power of Congress as to State Courts

Although congress has no power to create or regulate

state courts, it may authorize state courts to enforce a cause of action created by federal act; but congress cannot require that state courts take cognizance of such actions.

Strictly speaking, congress cannot confer judicial power⁶⁷ or impose a judicial duty⁶⁸ on state courts, nor create,⁶⁹ define,⁷⁰ or enlarge⁷¹ their jurisdiction, nor regulate nor control their modes of procedure⁷² or the remedies available therein under state statutes.⁷³ Nevertheless, when acting within its constitutional powers, congress may control and regulate the power of the several states to provide for the determination of controversies in their courts,⁷⁴ but it may not restrict such power except in conformity to the judiciary sections of the federal constitution.⁷⁵ Congress may authorize state courts to enforce a cause of action created by a federal act,⁷⁶ where the jurisdiction of the state courts,

61. Ky.—Hoblitzel v. Jenkins, 263 S. W. 764, 204 Ky. 122—Rieser v. Ward, 236 S.W. 255, 193 Ky. 368.

62. Ky.—Rieser v. Ward, *supra*.

63. Minn.—Lading v. City of Duluth, 190 N.W. 981, 153 Minn. 464. N.Y.—Decker v. Canzoneri, 9 N.Y.S. 2d 210, 256 App.Div. 68. 15 C.J. p 858 note 56.

Litigable claims

Under a constitutional provision securing to the supreme court "general jurisdiction in law and equity," the test and measure of its jurisdiction of a given claim or right is whether it is litigable. If it is litigable, it cannot be withdrawn from the court's jurisdiction; if it is not litigable, it may be sent elsewhere for decision.—*People ex rel. Crane v. Hahlo*, 127 N.E. 402, 228 N.Y. 309, reversing 178 N.Y.S. 910, 189 App. Div. 900, and answering certified questions 179 N.Y.S. 943, and amendment granted 129 N.E. 916, 229 N.Y. 565, affirmed *Crane v. Hahlo*, 42 S. Ct. 214, 258 U.S. 142, 66 L.Ed. 514.

Partial exclusiveness

A constitutional provision that a particular court should have certain designated powers and "such other jurisdiction . . . as is or may be prescribed by law" has been held not to vest exclusive jurisdiction in such court as to matters not designated.—*Locke v. Raleigh County Court*, 161 S.E. 6, 111 W.Va. 156.

Power "to conform" constitutional court's jurisdiction

A constitutional provision authorizing the legislature to establish courts other than those therein provided for and to conform the jurisdiction of other courts to courts so established does not authorize the legislature to take away certain jurisdiction given to a court by the

constitution.—*Reasonover v. Reasonover*, 58 S.W.2d 817, 122 Tex. 512, answering certified questions, Civ.App., 59 S.W.2d 887—*State v. Gillette's Estate*, Tex.Com.App., 10 S.W.2d 984, reversing *Gillette's Estate v. State*, Civ.App., 286 S.W. 261.

64. Pa.—*Gerlach v. Moore*, 90 A. 399, 243 Pa. 603. 15 C.J. p 858 note 62.

65. Md.—*Quenstedt v. Wilson*, 194 A. 354, 173 Md. 11—*Humphreys v. Walls*, 181 A. 735, 169 Md. 292—*Day v. State*, 159 A. 602, 162 Md. 221. 15 C.J. p 858 note 61.

66. Ill.—*People v. Wall*, 83 Ill. 75. 15 C.J. p 858 note 60.

67. U.S.—*Ex parte Crandall*, D.C. Ind., 52 F.2d 650, affirmed, C.C.A., 53 F.2d 969, certiorari denied *Crandall v. Habbe*, 52 S.Ct. 312, 285 U. S. 540, 76 L.Ed. 933.

Mo.—*Ex parte Gounis*, 263 S.W. 988, 304 Mo. 428. 15 C.J. p 859 note 67.

68. Conn.—*In re Fordiani*, 120 A. 338, 98 Conn. 435.

69. Ind.—*McConnell v. Thomson*, 8 N.E.2d 986, 213 Ind. 16, 113 A.L.R. 1429, rehearing denied 11 N.E.2d 183, 213 Ind. 16, 113 A.L.R. 1429.

70. Ind.—*McConnell v. Thomson*, *supra*.

71. U.S.—*Ex parte Crandall*, D.C. Ind., 52 F.2d 650, affirmed, C.C.A., 53 F.2d 969, certiorari denied *Crandall v. Habbe*, 52 S.Ct. 312, 285 U. S. 540, 76 L.Ed. 933.

Ohio.—*U. S. v. Campbell*, Tapp. 61.

72. Ga.—*Central of Georgia Ry. Co. v. Jones*, 108 S.E. 618, 152 Ga. 92, answer to certified questions conformed to 110 S.E. 914, 28 Ga.App. 258, certiorari denied 43 S.Ct. 92, 260 U.S. 729, 67 L.Ed. 485.

Mo.—*Ex parte Gounis*, 263 S.W. 988, 304 Mo. 428.

73. N.Y.—*Ruddy v. Morse Dry Dock & Repair Co.*, 176 N.Y.S. 731, 107 Misc. 199.

74. U.S.—*U. S. Nat. Bank of Omaha, Neb. v. Pamp*, C.C.A.Neb., 77 F.2d 9, 99 A.L.R. 1370.

75. U.S.—*Healy v. Ratta*, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., *Ratta v. Healy*, 1 F. Supp. 669, appeal dismissed *Healy v. Ratta*, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459.

Consolidation of state and national banks

Act of congress providing for consolidation of state banks and trust companies with national banks, when construed as leaving trust company functions under supervision of state banking authorities after trust company's merger, was not unwarranted interference with procedure in state courts.—*Adams v. Atlantic Nat. Bank of Jacksonville*, 155 So. 648, 115 Fla. 399.

Employers' Liability

In enacting the Federal Employers' Liability Act, congress did not, and could not, restrict jurisdiction of state court.—*Ex parte Crandall*, D.C. Ind., 52 F.2d 650, affirmed, C.C.A., 53 F.2d 969, certiorari denied *Crandall v. Habbe*, 52 S.Ct. 312, 285 U.S. 540, 76 L.Ed. 933.

76. Conn.—*Hoxie v. New York, N. H. & H. R. Co.*, 73 A. 754, 82 Conn. 352, 17 Ann.Cas. 324.

Ind.—*McConnell v. Thomson*, 8 N.E. 2d 986, 113 A.L.R. 1429, rehearing denied 11 N.E.2d 183, 113 A.L.R. 1429.

Rule criticized

"It was urged . . . that, al-

under the local law, is adequate to the occasion;⁷⁷ and when congress does so, it adopts the prevailing rules of procedure in the state.⁷⁸ The mere fact, however, that congress declares that state courts shall have concurrent jurisdiction of a particular cause of action, does not require that they shall take cognizance of such actions,⁷⁹ nor does it exempt a citizen of any state from the equitable jurisdiction of its courts to restrain the bringing of such an action in another state.⁸⁰ Congress cannot appoint a judge to a state court, much less create a state court and appoint a judge to administer it.⁸¹ The power of congress to confer judicial power on state courts, apart from the duty of such courts to accept or exercise the power thus conferred, is grounded on the theory that the provisions of the federal constitution vesting judicial power as to certain classes of cases in designated courts of the United States, did not prohibit congress from vesting judicial power as to other cases in other courts or magistrates, where the exercise of such power is an appropriate means by which to use the powers granted to the legislative department of the government.⁸²

though Congress could not confer jurisdiction on a State so as to compel its exercise, yet it would be legitimate if the Court was willing to accept it. This is to me a solecism. A court is a creature of the Constitution and laws under which it exists. To exercise any power not derived from such Constitution and laws would necessarily be a usurpation. It sounds curious to say, 'Congress has no authority to give this power to the Court, yet the Court exercises this power by virtue of the authority of Congress.'—Ex p. Knowles, 5 Cal. 300, 301.

77. U.S.—Ex parte Crandall, D.C. Ind., 52 F.2d 650, affirmed, C.C.A., 53 F.2d 969, certiorari denied Crandall v. Habbe, 52 S.Ct. 312, 285 U.S. 540, 76 L.Ed. 933.

78. Ga.—Central of Georgia Ry. Co. v. Jones, 108 S.E. 618, 152 Ga. 92, answer to certified questions conformed to 110 S.E. 914, 28 Ga. App. 258, certiorari denied 43 S.Ct. 92, 260 U.S. 729, 67 L.Ed. 485.

79. U.S.—Ex parte Crandall, C.C. A.Ind., 53 F.2d 969, affirming, D.C., 52 F.2d 650, and certiorari denied Crandall v. Habbe, 52 S.Ct. 312, 285 U.S. 540, 76 L.Ed. 933.

Conn.—Hoxie v. New York, N. H. & H. R. Co., 73 A. 754, 82 Conn. 352, 17 Ann.Cas. 324.

Mo.—Ex parte Gounis, 263 S.W. 988, 304 Mo. 428.

It will not be presumed that congress would, if it could, require the state courts to enforce rights created by the federal law enforceable only

by following procedure not permitted by the state law and opposed to the public policy which that law declares.—Hoxie v. New York, N. H. & H. R. Co., 73 A. 754, 82 Conn. 352, 17 Ann.Cas. 324.

80. U.S.—Ex parte Crandall, C.C.A. Ind., 53 F.2d 969, affirming, D.C., 52 F.2d 650, and certiorari denied Crandall v. Habbe, 52 S.Ct. 312, 285 U.S. 540, 76 L.Ed. 933.

Ind.—McConnell v. Thomson, 8 N.E. 2d 986, 113 A.L.R. 1429, rehearing denied 11 N.E.2d 183, 113 A.L.R. 1429.

81. La.—Mechanics', etc., Bank v. Union Bank, 25 La. Ann. 387, affirmed 22 Wall. 276, 22 L.Ed. 871.

82. U.S.—Levin v. U. S., Mo., 128 F. 826, 63 C.C.A. 476.

Okl.—State v. Huser, 184 P. 113, 76 Okl. 130.

83. Cal.—Ex parte Jacobson, 60 P. 2d 1001, 16 Cal.App.2d 497.

La.—State ex rel. Saragusa v. Ott, 81 So. 435, 144 La. 948.

Mass.—Commonwealth v. Leach, 141 N.E. 301, 246 Mass. 464.

Mo.—State ex rel. Barrett v. May, 235 S.W. 124, 290 Mo. 302.

Okl.—Diehl v. Crump, 179 P. 4, 72 Okl. 108, 5 A.L.R. 1272.

S.C.—Bradford v. Richardson, 97 S. E. 53, 111 S.C. 205.

Tenn.—State ex rel. Ward v. Murrell, 90 S.W.2d 945, 169 Tenn. 688.

15 C.J. p 732 note 62, p 859 note 73, p 861 note 3.

Limitation in subsequent constitution

A limitation upon the power of the

§ 126. Power Delegated to Legislature and Exercise Thereof

Particular matters with regard to power delegated by the constitution to the legislature to create, abolish, and regulate the jurisdiction of courts will be discussed in detail in the sections immediately following. Consult Pocket Parts for later cases.

§ 127. — Governing Principles

The legislature in exercising delegated authority with respect to the existence or jurisdiction of courts must act in conformity with the constitution granting such power.

The basic limitation on the exercise by the legislature of any power delegated to it to legislate with respect to the existence or jurisdiction of courts is that it must act in conformity with the organic law granting or delegating the power; in other words, it may not, while exercising the power respecting courts conferred by some provisions of the constitution, violate any other provisions thereof.⁸³ This principle runs through all the decisions and governs statutes relating to inferior courts in

legislature to create certain designated courts does not apply to a court created by it under a prior constitution containing no such limitation.—Failing v. Grounds, 145 N.Y.S. 427, 160 App.Div. 71.

Enacting clause

In an act providing merely for the reorganization or rearrangement of a constitutional court, the enacting clause need not be in literal compliance with the constitution, where the substance of the required enacting words remains, there being a distinction between mandatory and directory provisions as applied to organic law.—State v. Harris, 17 So. 129, 47 La. Ann. 336.

Designation of court

Where the legislature is empowered to establish as many courts of a certain class within specified limits as the public interest may require, an act establishing a court of the same class as provided is constitutional, even though it omits its specific name or denomination.—State v. Anderson, 29 La. Ann. 774.

Conferring jurisdiction "by general law"

Constitutional provision giving certain courts "such other jurisdiction as may be provided for by general law" is complied with by any law, general in its nature, providing other jurisdiction for such courts, and does not limit the giving of further jurisdiction to such courts to a single general law.—People ex rel. Rusch v. Ladwig, 7 N.E.2d 313, 365 Ill. 574.

general,⁸⁴ to courts of equity or chancery in general,⁸⁵ to the creation of courts of either exclusive⁸⁶ or concurrent⁸⁷ jurisdiction, to statutes providing or failing to provide for judges,⁸⁸ and, more particularly, to statutes relating to various of the matters considered *infra* in §§ 129-138. Accordingly, the legislature's exercise of delegated power with respect to courts is subject to a constitutional provision against partial, discriminatory, and capricious laws,⁸⁹ or against special laws,⁹⁰ or requiring courts of the same grade or class to be uniform,⁹¹ although, of course, uniformity is not essential where the constitution does not require it.⁹² In the exercise of such power, the legislature may not violate the rule, already discussed in § 122, against infringing upon or divesting the jurisdiction of constitutional courts,⁹³ as by taking the jurisdiction from one court and vesting it in another,⁹⁴ or by converting local courts into courts of general jurisdiction.⁹⁵ Further, the legislature cannot confer upon a statutory court powers prohibited⁹⁶ or not authorized⁹⁷ by the constitution, or reserved exclusively to other courts,⁹⁸ or which it could not confer on courts already existing;⁹⁹ nor may it, in prescribing the scope of a statutory court's jurisdiction, disturb a constitutional court's prerogatives.¹

§ 128. — Authority Conferred in General

The terms of the grant of authority determine the authority conferred on the legislature with respect to the existence and jurisdiction of courts. The legislature usually has power to create courts in addition to those specified in the constitution, and to abolish courts it has thus created.

The authority conferred on the legislature with respect to the existence or jurisdiction of courts depends, of course, on the provisions of the particular constitution in question. The legislatures of the several states may be broadly said to have the power, if the particular constitution grants it or does not withhold it, and subject always to the limitations considered in the preceding section, to confer or impose additional authority on courts;² to limit jurisdiction or provide that it shall be exclusive;³ to confer extraterritorial jurisdiction on local courts;⁴ and to confer upon courts jurisdiction of certain suits against nonresidents.⁵

Under the various state constitutions the legislature is generally empowered to create certain courts in addition, and usually subordinate, to those established by the constitution,⁶ even though additional

84. Cal.—*Ex parte Jacobson*, 60 P.2d 1001, 16 Cal.App.2d 407.
15 C.J. p 860 note 74.

85. N.J.—*Estate of Gilbert Smith v. Cohen*, 196 A. 361, 128 N.J.Eq. 419.

12 C.J. p 817 note 10, 15 C.J. p 860 note 78.

Observing distinction between law and equity courts see *supra* § 122.

86. Ohio.—*State v. Archibald*, 38 N.E. 314, 52 Ohio St. 1.

15 C.J. p 860 note 82.

Power of legislature to create courts generally see *infra* § 128.

87. N.C.—*Rhine v. Lipscombe*, 29 S.E. 57, 122 N.C. 650.

15 C.J. p 860 note 83.

Power to confer concurrent jurisdiction generally see *supra* § 122.

88. Tex.—*Carter v. Missouri, etc., R. Co.*, 157 S.W. 1169, 106 Tex. 137.
15 C.J. p 860 note 87.

89. Tenn.—*Gouge v. McInturff*, 90 S.W.2d 763, 169 Tenn. 678, modified on other grounds 92 S.W.2d 198, 170 Tenn. 72.

90. Okl.—*Levine v. Allen*, 221 P. 771, 96 Okl. 252.

Statute establishing orphans' court for a particular county held not invalid as special legislation.—*Commonwealth v. Wehr*, 17 Pa.Dist. & Co. 689.

91. Pa.—*Commonwealth ex rel. Margiotti v. Sutton*, 193 A. 250, 327 Pa. 337.

92. Conn.—*Cinque v. Boyd*, 121 A. 678, 99 Conn. 70.

93. Ga.—*Empire Inv. Co. v. Hutchings*, 144 S.E. 209, 166 Ga. 749.
N.M.—*State v. Eychaner*, 73 P.2d 805, 41 N.M. 677, followed in 73 P.2d 809, 41 N.M. 683.
15 C.J. p 862 note 12.

94. N.J.—*Conger v. Convery*, 20 A. 166, 52 N.J.Law 417.
15 C.J. p 862 note 11.

95. N.Y.—*Landers v. Staten Island R. Co.*, 53 N.Y. 450, 13 Abb.Pr.N.S. 338.

96. N.Y.—*Zambrotto v. Jannette*, 290 N.Y.S. 338, 160 Misc. 558.

97. N.Y.—*Walsh v. Walsh*, 263 N.Y.S. 517, 146 Misc. 604.

98. Ala.—*James v. State*, 107 So. 727, 21 Ala. 295.

Cal.—*Ex parte Luna*, 257 P. 76, 201 Cal. 405.

N.Y.—*Zambrotto v. Jannette*, 290 N.Y.S. 338, 160 Misc. 558.

99. Vt.—*Sabre v. Rutland R. Co.*, 85 A. 693, 86 Vt. 347, Ann.Cas.1915C 1269.

1. N.J.—*Eder v. Hudson County Circuit Court*, 140 A. 883, 104 N.J. Law 260.

2. Alaska.—*Territory v. House No. 24*, 7 Alaska 611.

Ky.—*Campbell County v. City of Newport*, 193 S.W. 1, 174 Ky. 712, L.R.A.1917D 791.

N.Y.—*People ex rel. Lemon v. Elmore*, 177 N.E. 14, 256 N.Y. 489, 75 A.L.R. 1292, affirming 245 N.Y.S. 95, 230 App.Div. 543, which modified *People ex rel. Lemon v. Caparbo*, 238 N.Y.S. 197, 135 Misc. 151—*Lorich v. State*, 184 N.Y.S. 818, 113 Misc. 409.

15 C.J. p 861 note 4—12 C.J. p 809 note 92.

3. Mass.—*Ashley v. Wait*, 116 N.E. 961, 228 Mass. 63, 8 A.L.R. 1463, error dismissed 40 S.Ct. 53, 250 U.S. 652, 63 L.Ed. 1190.

Ohio.—*Geiger v. Geiger*, 160 N.E. 28, 117 Ohio St. 451, affirming 159 N.E. 350, 25 Ohio App. 461.

15 C.J. p 862 note 5.

4. Wis.—*State v. McArthur*, 13 Wis. 383.

15 C.J. p 862 note 6.

5. Mich.—*Elliott v. Farwell*, 6 N.W. 234, 44 Mich. 186.

N.Y.—*Lehigh, etc., R. Co. v. American Bonding, etc., Co.*, 83 N.Y.S. 191, 40 Misc. 698.

6. Ala.—*James v. State*, 107 So. 727, 21 Ala. 295—*Conner v. State*, 104 So. 554, 20 Ala.App. 613.

Ark.—*Buzbee v. Hutton*, 52 S.W.2d 647, 186 Ark. 184.

Fla.—*Western Casualty & Surety Co. v. Rotter*, 191 So. 78—*State v. Sullivan*, 116 So. 255, 95 Fla. 191.

Ga.—*Board of Education of Long County v. Board of Education of Liberty County*, 159 S.E. 712, 173 Ga. 208.

courts are not specified in the constitution,⁷ and, as a necessary incident of such power,⁸ to confer and define their jurisdiction.⁹ By the same token, the legislature has the power to increase, diminish, modify, alter, or withdraw the jurisdiction of such stat-

utory courts,¹⁰ to prescribe how their jurisdiction shall be exercised,¹¹ or otherwise to legislate concerning them.¹² The legislature, having power in the first instance to create such courts, has power to limit their existence,¹³ or to abolish them¹⁴ and

Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Hoffman, 162 N.E. 403, 200 Ind. 178, denying petition and error
Pittsburg, C. C. & S. L. R. Co. v. Hoffman, 155 N.E. 622, 87 Ind. App. 619.

Iowa.—In re Cloud, 250 N.W. 160, 217 Iowa 3.

Mass.—In re Opinion of the Justices, 171 N.E. 237, 271 Mass. 575.

Mich.—City of Detroit v. Dingeman, 206 N.W. 582, 233 Mich. 356.

Miss.—Ex parte Tucker, 143 So. 700, 164 Miss. 20—State v. Speakes, 109 So. 129, 144 Miss. 125.

Ohio.—State v. Davis, 165 N.E. 298, 119 Ohio St. 596—State v. Le Blond, 140 N.E. 491, 108 Ohio St. 41—State v. Ritchie, 119 N.E. 124, 97 Ohio St. 41—Underwood v. Isham, 22 N.E.2d 468, 61 Ohio App. 129, appeal dismissed 20 N.E.2d 719, 135 Ohio St. 320.

Okl.—Sheridan Oil Co. v. Superior Court of Creek County, 82 P.2d 832, 183 Okl. 372—Levine v. Allen, 221 P. 771, 96 Okl. 252—Buchanan v. State, 236 P. 903, 30 Okl. Cr. 362.

Pa.—Commonwealth ex rel. Margiotti v. Sutton, 193 A. 250, 327 Pa. 337.

S.C.—Glymph v. Smith, 170 S.E. 813, 170 S.C. 486.

Tenn.—State ex rel. v. Link, 111 S.W. 2d 1024, 172 Tenn. 258—State ex rel. Ward v. Murrell, 90 S.W.2d 945, 169 Tenn. 688.

Tex.—Tucker v. Tucker, Civ.App., 255 S.W. 641, reversed on other grounds Turner v. Tucker, 258 S.W. 149, 113 Tex. 434—Cockrell v. State, 211 S.W. 939, 85 Tex.Cr. 326.

15 C.J. p 857 note 29, p 859 note 71, p 861 notes 92, 95—12 C.J. p 816 note 93.

Legislative power with respect to particular statutory courts see infra §§ 129-133.

"Statutory courts" defined

All state courts created by legislature and not named or described by constitution are "legislative" or "statutory courts."—Gorham v. Robinson, R.I., 136 A. 832.

7. Miss.—Lindsley v. Coahoma County, 11 So. 336, 69 Miss. 815. 15 C.J. p 861 note 96.

8. Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.

Ohio.—State v. Davis, 165 N.E. 298, 119 Ohio St. 596—Underwood v. Isham, 22 N.E.2d 468, 61 Ohio App. 129, appeal dismissed 20 N.E. 2d 719, 135 Ohio St. 320.

Tenn.—Spurgeon v. Worley, 90 S.W. 2d 948, 169 Tenn. 697.

9. Cal.—Ex parte Luna, 257 P. 76, 201 Cal. 405.

Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.

La.—State ex rel. Saragusa v. Ott, 81 So. 435, 144 La. 948.

Mich.—City of Detroit v. Dingeman, 206 N.W. 582, 233 Mich. 356.

Minn.—State ex rel. Best v. Gibbons, 278 N.W. 578, 202 Minn. 421.

N.J.—Eder v. Hudson County Circuit Court, 140 A. 883, 104 N.J.Law 260—MacPhail v. Nassau, 184 A. 633, 14 N.J.Misc. 292.

N.Y.—In re Grenier, 1 N.Y.S.2d 235, 165 Misc. 784.

Okl.—Buchanan v. State, 236 P. 903, 30 Okl.Cr. 362.

S.C.—Bradford v. Richardson, 97 S.E. 58, 111 S.C. 205.

Tenn.—Spurgeon v. Worley, 90 S.W. 2d 948, 169 Tenn. 697—State ex rel. Ward v. Murrell, 90 S.W.2d 945, 169 Tenn. 688—Gouge v. McInturf, 90 S.W.2d 753, 169 Tenn. 678, modified on other grounds 92 S.W.2d 198, 170 Tenn. 72.

Tex.—Ex parte Davis, 211 S.W. 456, 85 Tex.Cr. 218.

15 C.J. p 859 note 71, p 861 note 92.

Limitation on jurisdiction grantable
Under a constitutional provision authorizing the legislature generally to create inferior courts with jurisdiction not exceeding that of county courts, and specially authorizing the creation of a particular court, with such jurisdiction as may be necessary for the protection of delinquent minors, etc., the general provision does not enlarge the powers granted by the special provision, and jurisdiction of the particular court must be limited to that specified.—People v. Hopkins, 208 N.Y.S. 653, 208 App.Div. 438, appeal dismissed 147 N.E. 207, 239 N.Y. 589.

10. Ind.—Klipsch v. Indiana Alcoholic Beverage Commission, 21 N.E.2d 701.

Mass.—In re Opinion of the Justices, 171 N.E. 237, 271 Mass. 575—Commonwealth v. Rowe, 153 N.E. 537, 257 Mass. 172, 48 A.L.R. 762—Commonwealth v. Leach, 141 N.E. 301, 246 Mass. 464.

N.J.—State v. Knight, 115 A. 569, 96 N.J.Law 461, 19 A.L.R. 733—MacPhail v. Nassau, 184 A. 633, 14 N.J.Misc. 292—In re Kellner's Estate, 165 A. 585, 11 N.J.Misc. 201.

N.Y.—People ex rel. H. D. H. Realty Corporation v. Murphy, 186 N.Y.S. 33, 194 App.Div. 530, reversing 184 N.Y.S. 868, 113 Misc. 253, and af-

firmed 180 N.E. 932, 230 N.Y. 654—People v. Hevern, 215 N.Y.S. 412, 127 Misc. 141.

Ohio.—State v. Le Blond, 140 N.E. 491, 108 Ohio St. 41.

Okl.—McIntosh v. Dill, 205 P. 917, 86 Okl. 1, error dismissed 43 S.Ct. 12, 200 U.S. 694, 67 L.Ed. 467, and certiorari denied 43 S.Ct. 12, 260 U.S. 721, 67 L.Ed. 480.

Tenn.—Moore v. Love, 107 S.W.2d 982, 171 Tenn. 682.

Withdrawal of inherent attributes
When the legislature establishes a court pursuant to constitutional authority, so long as the court continues as such, the legislature cannot take from it an essential attribute of judicial tribunals.

N.H.—In re Opinion of the Justices, 166 A. 640, 86 N.H. 597.

Ohio.—In re Whallon, 26 Ohio Ch. Ct.N.S., 167.

Additional territorial jurisdiction
Constitution authorizing conferring additional jurisdiction on statutory courts as to amount or subject matter did not deny power of conferring additional territorial jurisdiction; hence, the territorial jurisdiction of justices of peace, notaries, and ex officio justices could be enlarged.—Collier v. Duffell, 141 S.E. 194, 165 Ga. 421.

11. Fla.—Western Casualty & Surety Co. v. Rotter, 191 So. 73.

N.J.—Eder v. Hudson County Circuit Court, 140 A. 883, 104 N.J.Law 260.

Jurisdiction carved from constitutional court
Portion of constitutional jurisdiction of circuit courts cannot be conferred upon inferior courts with statutory restrictions as to process which, in effect, deny jurisdiction to inferior courts in cases taken from circuit court's jurisdiction.—State ex rel. Vetter v. McCall, 145 So. 841, 107 Fla. 564.

12. Ohio.—State v. Davis, 165 N.E. 292, 119 Ohio St. 596.

15 C.J. p 859 note 71.

13. Tex.—Bray v. State, 276 S.W. 244, 101 Tex.Cr. 346—Walker v. State, 267 S.W. 988, 93 Tex.Cr. 663.

15 C.J. p 857 note 31.

14. Fla.—State ex rel. Landis v. Dickenson, 138 So. 376, 103 Fla. 907.

Mass.—In re Opinion of the Justices, 171 N.E. 237, 271 Mass. 575—Commonwealth v. Leach, 141 N.E. 301, 246 Mass. 464.

Mo.—Randol v. Kline's, Inc., 13 S.W.2d 500, 322 Mo. 746.

to transfer their jurisdiction to other courts,¹⁵ although such transfer of jurisdiction has been held not to be required.¹⁶ The legislature may create a tribunal without clothing any court with appellate jurisdiction over its decisions.¹⁷ In general, the grant of power to create courts, whether general or specific, includes by necessary implication the grant of such authority as is essential to effectuate the purposes intended.¹⁸

§ 129. — Courts of Appellate Jurisdiction

In the absence of constitutional authorization, appellate jurisdiction granted by the constitution cannot be altered by the legislature, but, to the extent permitted by the constitution, the legislature may control the jurisdiction of appellate courts.

In the absence of constitutional authorization, either express or necessarily implied, appellate jurisdiction granted by the constitution cannot be altered,¹⁹ limited,²⁰ enlarged,²¹ or withdrawn or

N.C.—Queen v. Board of Com'rs of Haywood County, 138 S.E. 310, 193 N.C. 821.

Ohio.—State v. Le Blond, 140 N.E. 491, 108 Ohio St. 41.

R.I.—Gorham v. Robinson, 186 A. 832.

S.C.—Ansel v. Means, 172 S.E. 434, 171 S.C. 432.

15 C.J. p 857 note 30, p 861 notes 99, 1.

Popular vote required

Where constitution provided that establishment of county court should be submitted to county electors before legislature could establish county court, legislature could not abolish existing county court without submission to county electors.—Ansel v. Means, 172 S.E. 434, 171 S.C. 432.

15. Mass.—In re Opinion of the Justices, 171 N.E. 237, 271 Mass. 575.—Commonwealth v. Leach, 141 N.E. 301, 246 Mass. 464.

Mo.—Randol v. Kline's, Inc., 18 S.W. 2d 500, 322 Mo. 746.

Tenn.—Spurgeon v. Worley, 90 S.W. 2d 948, 169 Tenn. 697—Gouge v. McInturf, 90 S.W.2d 753, 169 Tenn. 678, modified on other grounds 92 S.W.2d 198, 170 Tenn. 72.

15 C.J. p 861 note 1.

16. Ala.—Lee v. Elba Drug Co., 58 So. 58, 3 Ala.App. 570.

17. Pa.—Rhoads v. Philadelphia, 2 Phila. 149.

18. Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.

Ohio.—Underwood v. Isham, 22 N.E. 2d 468, 61 Ohio App. 129, appeal dismissed 20 N.E.2d 719, 135 Ohio St. 320.

15 C.J. p 859 note 72.

19. Cal.—Lemen v. Edmunson, 262 P. 735, 202 Cal. 760.

Fla.—Brinson v. Tharin, 127 So. 313, 99 Fla. 696.

Ohio.—State v. Smith, 20 N.E.2d 718, 135 Ohio St. 292—Ireland v. Cheney, 196 N.E. 267, 129 Ohio St. 527—Karpanty v. Karpanty, 177 N.E. 521, 39 Ohio App. 194.

Statutes need not be examined in order to determine jurisdiction of court whose jurisdiction is fully prescribed by the constitution.—City of Zanesville v. Wilson, 1 N.E.2d 638, 51 Ohio App. 438, affirming Wilson v.

City of Zanesville, 199 N.E. 187, 130 Ohio St. 286.

Reclassification of causes

Legislature has no authority to affect jurisdiction of supreme court through reclassification of the subject of causes of action over which the supreme court was vested with jurisdiction by the constitution.—Junior v. Junior, Mo., 84 S.W.2d 909.

20. Cal.—Millsap v. Alderson, 219 P. 469, 63 Cal.App. 518.

Colo.—In re Brown's Estate, 176 P. 477, 65 Colo. 341.

Fla.—Brinson v. Tharin, 127 So. 313, 99 Fla. 696.

Me.—Mailman v. Record Foundry & Machine Co., 106 A. 606, 118 Me. 172.

Mich.—In re Brant's Estate, 256 N.W. 855, 269 Mich. 201.

Mo.—State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission, 92 S.W.2d 882, 338 Mo. 572, transferred State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission of Missouri, App., 98 S.W.2d 126, peremptory mandamus granted State ex rel. Orscheln Bros. Truck Lines v. Shain, Sup., 106 S.W.2d 901—State ex rel. Trimble, 10 S.W.2d 519, 321 Mo. 230.

Ohio.—State v. Smith, 20 N.E.2d 718, 135 Ohio St. 292—Hoffman v. Knollman, 20 N.E.2d 221, 135 Ohio St. 170—Eastman v. State, 1 N.E.2d 140, 131 Ohio St. 1, appeal dismissed 57 S.Ct. 21, 299 U.S. 505, 81 L.Ed. 374—Werner v. Rowley, 193 N.E. 623, 129 Ohio St. 15—American Casualty Co. v. Howell, 180 N.E. 544, 125 Ohio St. 62—State v. Common Pleas Court of Meigs County, 179 N.E. 415, 124 Ohio St. 493—Commonwealth Oil Co. v. Turk, 160 N.E. 856, 118 Ohio St. 273—State v. Wallace, 140 N.E. 305, 107 Ohio St. 557—Tinker v. Sauer, 136 N.E. 854, 105 Ohio St. 135—Complete Bldg. Show Co. v. Albertson, 121 N.E. 817, 99 Ohio St. 11—Haas v. Mutual Life Ins. Co. of New York, 115 N.E. 1020, 95 Ohio St. 137—Karpanty v. Karpanty, 177 N.E. 521, 39 Ohio App. 194.

Wash.—North Bend Stage Line v. Department of Public Works, 16 P.2d 206, 170 Wash. 217.

15 C.J. p 862 note 17.

Authorizing summary proceeding

A statute authorizing summary proceeding to collect taxes so as to expedite collection of taxes is not unconstitutional as limiting jurisdiction of appellate courts, notwithstanding no provision is made for a devolutive appeal.—State v. Standard Oil Co. of Louisiana, 178 So. 601, 138 La. 978.

Certiorari

The legislature cannot curtail or impair the power of a constitutional appellate court to review proceedings of inferior tribunals on certiorari.

Fla.—Great American Ins. Co. of New York v. Peters, 141 So. 322, 105 Fla. 380—Palmer v. Johnson, 121 So. 466, 97 Fla. 479.

Ga.—Empire Inv. Co. v. Hutchings, 144 S.E. 209, 166 Ga. 749.

21. Ark.—State v. Jones, 22 Ark. 331.

Cal.—Millsap v. Alderson, 219 P. 469, 63 Cal.App. 518.

Colo.—In re Brown's Estate, 176 P. 477, 65 Colo. 341.

Fla.—In re Florida Conference Ass'n of Seventh Day Adventists, 175 So. 715, 128 Fla. 677—Medlin-Pea-cock Buick Co. v. Broward, 135 So. 156, 101 Fla. 600—Brinson v. Tharin, 127 So. 313, 99 Fla. 696—Atlantic Coast Line R. Co. v. Florida Fine Fruit Co., 112 So. 66, 93 Fla. 161, affirmed 113 So. 334, 93 Fla. 161, 171—American Ry. Express Co. v. Weatherford, 98 So. 820, 86 Fla. 626.

Mo.—State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission, 92 S.W.2d 882, 338 Mo. 572, transferred State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission of Missouri, App., 98 S.W.2d 126, peremptory mandamus granted State ex rel. Orscheln Bros. Truck Lines v. Shain, Sup., 106 S.W.2d 901—State ex rel. Gehrs v. Public Service Commission of Missouri, 90 S.W.2d 394, transferred, App., 100 S.W.2d 636.

Ohio.—State v. Smith, 20 N.E.2d 718, 135 Ohio St. 292—Hoffman v. Knollman, 20 N.E.2d 221, 135 Ohio St. 170—Werner v. Rowley, 193 N.E. 623, 129 Ohio St. 15—Warner v. Mutual Bldg. & Inv. Co., 190 N.E. 143, 128 Ohio St. 37—State v. Common Pleas Court of Meigs County, 179 N.E. 415, 124 Ohio St.

abridged²² by the legislature. Accordingly, where under the constitution a court's jurisdiction is exclusively appellate, the legislature cannot confer on it original jurisdiction,²³ or jurisdiction to review directly decisions of state boards or commissions,²⁴

or, generally, jurisdiction not properly belonging to a court of appeals;²⁵ nor can it so alter or restrict the jurisdiction of an appellate court as to change its character as such.²⁶ Further the legislature cannot confer upon a court appellate jurisdiction with-

493—Commonwealth Oil Co. v. Turk, 160 N.E. 856, 118 Ohio St. 273—In re Hawke, 140 N.E. 583, 107 Ohio St. 341—State v. Wallace, 140 N.E. 305, 107 Ohio St. 557—Tinker v. Sauer, 136 N.E. 854, 105 Ohio St. 135—Complete Bldg. Show Co. v. Albertson, 121 N.E. 817, 99 Ohio St. 11—Daily v. Dowty, 3 N.E.2d 430, 52 Ohio App. 84—Whiting v. Bertram, 199 N.E. 367, 51 Ohio App. 40—Levenson v. Wolfson, 182 N.E. 111, 42 Ohio App. 318—In re Stroman's Estate, 17 Ohio App. 108.

Tenn.—In re Cumberland Power Co., 249 S.W. 818, 147 Tenn. 504.

Wash.—North Bend Stage Line v. Department of Public Works, 16 P. 2d 206, 170 Wash. 217.

Right of appeal to court of appeals cannot be enlarged, although it may be restricted.—Charles W. Sommer & Bro. v. Albert Lorsch & Co., 172 N.E. 271, 254 N.Y. 146, denying appeal 241 N.Y.S. 772, 228 App.Div. 810.

Hearing "de novo"

An act providing for an "appeal" from the determination of an administrative board to a constitutional court where the matter will be heard "de novo" is not invalid as extending the appellate jurisdiction of the court as fixed in the constitution since on hearing "de novo" court hears matter as court of original and not appellate jurisdiction.—Collier & Wallis v. Astor, 70 P.2d 171, 9 Cal.2d 202.

Territorial jurisdiction

The legislature cannot, without changing its territorial jurisdiction, give an appellate court jurisdiction of a cause arising outside of such jurisdiction.—State v. Nixon, 134 S.W. 538, 232 Mo. 496, followed in State v. Nolte, 134 S.W. 542, 233 Mo. 451—State v. Nixon, 133 S.W. 336, 232 Mo. 98, followed in State v. Nixon, Mo., 133 S.W. 340.

Jurisdiction cannot be enlarged by

(1) Designating additional courts from which appellate court may entertain writs of error.—Boswell v. Roberts, 122 S.E. 216, 157 Ga. 585, answer to certified questions conformed to 122 S.E. 651, 32 Ga.App. 85—Inman Grocery Co. v. Williams, 118 S.E. 718, 155 Ga. 900—Taylor v. Stovall, 118 S.E. 715, 155 Ga. 894.

(2) Permitting retrial of facts by appellate court through correction of a finding.—Dexter Yarn Co. v. American Fabrics Co., 129 A. 527, 102 Conn. 529.

22. Cal.—McClintock v. Abel, App. 68 P.2d 273.

Fla.—In re Florida Conference Ass'n of Seventh Day Adventists, 175 So. 715, 128 Fla. 677.

Mo.—Vall v. Dinning, 44 Mo. 210.

Ohio.—Karpanty v. Karpanty, 177 N.E. 521, 39 Ohio App. 194.

Tenn.—In re Cumberland Power Co., 249 S.W. 818, 147 Tenn. 504.

Wash.—North Bend Stage Line v. Department of Public Works, 16 P.2d 206, 170 Wash. 217.

15 C.J. p. 862 note 16.

Statutes held valid

(1) A statute forbidding the circuit court to try one convicted of a misdemeanor in the municipal court, where a change of venue had been improperly denied there, is not invalid as interfering with the superintending control and appellate jurisdiction of the circuit court, since an appellate court never has jurisdiction greater than that of the court appealed from.—Green v. State, 243 S.W. 950, 155 Ark. 45.

(2) Other statutes.

Cal.—People v. Jackson, 212 P. 4, 190 Cal. 257.

Fla.—State ex rel. Richardson v. Ferrell, 177 So. 181.

Legislature cannot abridge power to

(1) Determine charges to remove lower court judge.—Schieffelin v. Goldsmith, 237 N.Y.S. 248, 227 App. Div. 246, reversed on other grounds 170 N.E. 905, 253 N.Y. 243, 68 A.L.R. 1376.

(2) Review questions of jurisdiction.—City of Elkhart v. Minser, Ind., 5 N.E.2d 501.

(3) Review proceedings of inferior tribunals by certiorari.

Ga.—Aspironal Laboratories v. Mallinckrodt Chemical Works, 179 S.E. 709, 180 Ga. 544.

Pa.—Appeal of Geary, 175 A. 544, 316 Pa. 342.

(4) Exercise "supervisory control" over inferior courts by circuit court.

—State v. Superior Court of Dane County, 175 N.W. 927, 170 Wis. 885.

Appellate jurisdiction cannot be abridged by

(1) Creation of new remedy if the right involved is essentially one within the court's jurisdiction.—In re Sutter-Butte By-Pass Assessment No. 6 of Sacramento & San Joaquin Drainage Dist., 213 P. 974, 190 Cal. 532.

(2) Conferring on supreme court jurisdiction directly to review decisions of the trial court without re-

view by intermediate court.

N.M.—State v. Eychaner, 73 P.2d 805, 41 N.M. 677, followed in 73 P. 2d 809, 41 N.M. 683.

Ohio.—Eastman v. State, 1 N.E.2d 140, 131 Ohio St. 1, appeal dismissed 57 S.Ct. 21, 299 U.S. 505, 81 L.Ed. 374.

(3) Conferring legislative power upon appellate court.—Ætna Ins. Co. v. Commonwealth ex rel. State Corporation Commission, 169 S.E. 859, 160 Va. 698.

23. Fla.—State ex rel. Fulton v.

Ives, 167 So. 394, 128 Fla. 401.

Mo.—Vall v. Dinning, 44 Mo. 210.

Ohio.—State v. Common Pleas Court of Meigs County, 179 N.E. 415, 124 Ohio St. 483.

Inherent original jurisdiction

Statute relating to duties of an appellate court in dealing with professional conduct of attorneys held not invalid as in contravention of constitutional provision conferring on such court appellate jurisdiction only, since the jurisdiction of the court as to such matter is inherent.—In re Sparks, 101 S.W.2d 194, 267 Ky. 93.

Authorizing rendition of advisory

opinions by justices of appellate court is equivalent to grant of original jurisdiction to such court.—In re Constitutionality of House Bill No. 222, 90 S.W.2d 692, 262 Ky. 437, 103 A.L.R. 1085.

24. Ky.—Hoblitzel v. Jenkins, 263

S.W. 764, 204 Ky. 122.

S.D.—Winner Milling Co. v. Chicago

& N. W. Ry. Co., 181 N.W. 195, 43

S.D. 574.

Tenn.—In re Cumberland Power Co.,

249 S.W. 818, 147 Tenn. 504.

25. Miss.—Robertson v. Southern

Bitulithic Co., 92 So. 580, 129 Miss. 453.

Extent of "proper jurisdiction"

Under a constitutional provision that the jurisdiction of a particular court shall be such as properly belongs to a court of appeals, the only jurisdiction which the legislature can confer upon it is to review and revise the judicial action of an inferior tribunal, and such incidental jurisdiction of a quasi-original character as is necessary to preserve its dignity and decorum, and to give full and complete operation to its appellate powers.—Robertson v. Southern Bitulithic Co., 92 So. 580, 129 Miss. 453.

26. Iowa.—Wine v. Jones, 163 N.W. 318, 183 Iowa 1166, modifying opin-

held by the constitution.²⁷ Nevertheless, mere regulation of the exercise of constitutionally vested appellate jurisdiction does not ordinarily come within such prohibitions.²⁸

On the other hand, to the extent that the constitution permits, or does not prohibit, the legislature may create courts of appellate jurisdiction²⁹ or may control the jurisdiction of established appellate courts,³⁰ it may change such jurisdiction,³¹ or regulate,³² limit,³³ or enlarge³⁴ it, provided the enlargement is harmonious with the court's inherent characteristics.³⁵ Accordingly, statutes have been upheld prescribing the mode of taking appeals,³⁶ limiting the right of appeal to cases involving a stated amount,³⁷ limiting the right to certiorari³⁸ or

the powers of an appellate court to a review of questions of law,³⁹ making the decision of another court final,⁴⁰ or diminishing the field in which the decision of an intermediate appellate court is final.⁴¹ So too it has been held within the power of the legislature to grant an appellate court authority to review the evidence in equity cases,⁴² or in other cases not involving the right to trial by jury,⁴³ and even in criminal cases;⁴⁴ to confer upon it the right to hear appeals in special cases;⁴⁵ or to review its own decrees;⁴⁶ or to confer concurrent appellate jurisdiction on other courts.⁴⁷ Under appropriate constitutional provisions, the legislature may confer upon appellate courts original jurisdiction with respect to certain matters.⁴⁸ Where the

ion on rehearing 162 N.W. 196, 183 Iowa 1166.

Burdensome original jurisdiction

The primary purpose of the constitution being to create an appellate court as a court of final resort, the legislature could not so burden it with original jurisdiction as to destroy its primary function as an appellate court.—*El Reno Wholesale Grocery Co. v. Taylor*, 209 P. 749, 87 Okl. 140.

27. Cal.—*McClintock v. Abel*, 68 P. 2d 273, 21 Cal.App.2d 11.

28. Ohio.—*American Casualty Co. v. Howell*, 180 N.E. 544, 125 Ohio St. 62—*Commonwealth Oil Co. v. Turk*, 160 N.E. 856, 118 Ohio St. 273—*Tinker v. Sauer*, 136 N.E. 854, 105 Ohio St. 135—*Daily v. Dowty*, 3 N. E.2d 430, 52 Ohio App. 84.

29. Fla.—*Western Casualty & Surety Co. v. Rotter*, 191 So. 78.

30. Ill.—*Brown v. Kienstra*, 169 N. E. 786, 337 Ill. 641—*McGinnis v. McGinnis*, 124 N.E. 562, 289 Ill. 608, dismissing error 211 Ill.App. 240.

15 C.J. p 862 note 20.

31. Tex.—*San Antonio & A. P. Ry. Co. v. Blair*, 196 S.W. 502, 1153, 108 Tex. 434, denying error, Civ. App., 184 S.W. 566—*Kubish v. State*, 84 S.W.2d 480, 128 Tex.Cr. 666.

Wis.—*State v. Superior Court of Dane County*, 175 N.W. 927, 170 Wis. 385.

15 C.J. p 862 note 25.

32. Ark.—*State v. Jones*, 22 Ark. 331.

N.M.—*First Nat. Bank v. Dunbar*, 258 P. 817, 32 N.M. 419.

Tex.—*De Silva v. State*, 267 S.W. 271, 98 Tex.Cr. 499.

33. Ark.—*State v. Jones*, 22 Ark. 331.

La.—*Perez v. Cognevich*, 100 So. 444, 156 La. 331.

N.M.—*First Nat. Bank v. Dunbar*, 258 P. 817, 32 N.M. 419.

Tex.—*Farmers State Bank of New Boston v. Bowie County*, 95 S.W. 2d 1304, 127 Tex. 641—*Seale v. McCallum*, 287 S.W. 45, 116 Tex. 662—*San Antonio & A. P. Ry. Co. v. Blair*, 196 S.W. 502, 1153, 108 Tex. 434, denying error, Civ.App., 184 S.W. 566—*Parker v. Shields*, Civ.App., 296 S.W. 329—*Texas Farm Bureau Cotton Ass'n v. Lennox*, Civ.App., 296 S.W. 325—*Kubish v. State*, 84 S.W.2d 480, 128 Tex.Cr. 666—*De Silva v. State*, 267 S.W. 271, 98 Tex.Cr. 499.

Right of appeal to particular court, as conferred by constitution, may be restricted but not enlarged.—*Charles W. Sommer & Bro. v. Albert Lorsch & Co.*, 172 N.E. 271, 254 N.Y. 146, denying appeal 241 N.Y.S. 772, 228 App.Div. 810.

34. La.—*Perez v. Cognevich*, 100 So. 444, 156 La. 331.

Tex.—*Love v. Wilcox*, 28 S.W.2d 515, 119 Tex. 256, 70 A.L.R. 1484—*San Antonio & A. P. Ry. Co. v. Blair*, 196 S.W. 502, 1153, 108 Tex. 434, denying writ of error, Civ.App., 184 S.W. 566—*Kubish v. State*, 84 S.W. 2d 480, 128 Tex.Cr. 666.

35. N.J.—*State v. Knight*, 115 A. 569, 96 N.J.Law 461, 19 A.L.R. 733—*Harris v. Vanderveer*, 21 N.J.Eq. 424.

36. Cal.—*Haight v. Gay*, 8 Cal. 297, 68 Am.D. 323.

Delegation to court

The legislature has power to give to the courts of civil appeals the authority of determining when an appeal from their judgments shall lie.—*San Antonio & A. P. Ry. Co. v. Blair*, 196 S.W. 502, 1153, 108 Tex. 434, denying writ of error, Civ.App., 184 S.W. 566.

37. Minn.—*Tierney v. Dodge*, 9 Minn. 166.

15 C.J. p 862 note 21.

38. W.Va.—*Wilson v. West Virginia Cent., etc., R. Co.*, 18 S.E. 577, 38 W.Va. 212.

15 C.J. p 862 note 22.

39. Ill.—*Chicago, etc., R. Co. v. Fisher*, 31 N.E. 406, 141 Ill. 614. Tenn.—*McElwee v. McElwee*, 37 S. W. 560, 97 Tenn. 649.

40. Ala.—*Troxell v. Moody*, 75 So. 961, 200 Ala. 203.

Ill.—*Brown v. Kienstra*, 169 N.E. 736, 237 Ill. 641.

Tex.—*Seale v. McCallum*, 287 S.W. 45, 116 Tex. 662.

15 C.J. p 862 note 31—12 C.J. p 817 note 9 [b].

41. Tex.—*Jones v. Jones*, 1 Tex.A. Civ.Cas. § 200.

42. N.Y.—*Bonnette v. Molly*, 102 N. E. 559, 209 N.Y. 167.

43. Ark.—*Ft. Smith Light & Traction Co. v. Bourland*, 254 S.W. 481, 160 Ark. 1, affirmed 45 S.Ct. 249, 267 U.S. 330, 67 L.Ed. 631, rehearing denied and opinion amended 45 S.Ct. 51, 268 U.S. 676, 69 L.Ed. 631.

44. N.J.—*State v. Knight*, 115 A. 569, 96 N.J.Law 461, 19 A.L.R. 733.

45. Md.—*State v. Northern Cent. R. Co.*, 18 Md. 193.

46. Ohio.—*Longworth v. Sturges*, 41 Ohio St. 690.

47. Ill.—*Burns v. Henderson*, 20 Ill. 264.

48. S.D.—*Warren v. Brown*, 234 N. W. 38, 57 S.D. 528.

Tex.—*Love v. Wilcox*, 28 S.W.2d 515, 119 Tex. 256, 70 A.L.R. 1484.

Matters affecting sovereign rights

(1) In matters of general public interest, which directly affect the sovereign rights and powers of the state, the legislature has power, to confer original jurisdiction upon the supreme court.—*In re State Treasury Note Indebtedness*, Okl., 90 P.2d 19—*El Reno Wholesale Grocery Co. v. Taylor*, 209 P. 749, 87 Okl. 140.

(2) So the legislature may confer upon a court, whose jurisdiction is otherwise exclusively appellate, original jurisdiction over suits against the state, where the constitution empowers the legislature to direct in

legislature has full power to fix the jurisdiction of a court designated in the constitution it may confer upon it authority to entertain appeals from administrative boards exercising some judicial functions.⁴⁹

The constitutionally established rank or position of an appellate court in the hierarchy of a judicial system cannot be disturbed by the legislature.⁵⁰ Thus a court which is placed by the constitution at the head of the judicial system of a state, there being no appeal from its judgments to any other state tribunal, cannot be deprived of its rank as the highest and ultimate judicial power of the state,⁵¹ as by a transfer of its jurisdiction to another court created by the legislature in any manner so as to make its decisions and opinions final.⁵² This rule, however, does not prevent the legislature from conferring upon intermediate appellate courts jurisdiction over appeals which otherwise would lie to the higher court, provided such intermediate courts are subordinate to the higher court, and their decisions subject to review by it;⁵³ and the legislature can confer such jurisdiction upon courts newly created by it.⁵⁴ Furthermore, to the extent that the constitution permits and the appellate jurisdiction of the supreme court or other superior court of the state is not exclusive, the legislature may invest inferior appellate courts with final jurisdiction as to

limited classes of cases.⁵⁵

The rule that the power of the legislature to enact laws respecting the existence or jurisdiction of courts may be exercised only in conformity with constitutional provisions, *supra* § 127, applies with equal force to appellate courts and their jurisdiction.⁵⁶ The validity of statutes dealing with the jurisdiction of appellate courts is generally determined by the nature of the court, the character of the jurisdiction involved, and the effect of the statutes upon the constitutional powers of other courts, in the light of constitutional and statutory intent.⁵⁷ The jurisdiction of an appellate court cannot be taken away except by express terms⁵⁸ or irresistible implication.⁵⁹

§ 130. — County and Probate Courts

Legislative power with respect to county and probate courts depends on constitutional provisions and may be exercised only in conformity therewith.

The power of the legislature with respect to county and probate courts may, in accordance with the general principle stated *supra* in § 127, be exercised only in conformity with constitutional provisions.⁶⁰ Subject to these limitations, the legislature may, to the extent that it is permitted so to do by the constitution, confer jurisdiction on constitutional coun-

* what courts such suits may be brought.—*Mullen v. Dwight*, 173 N. W. 645, 42 S.D. 171.

49. Ohio.—*Stanton v. State Tax Commission*, 151 N.E. 760, 114 Ohio St. 558.

50. N.C.—*Jones v. Standard Oil Co. of New Jersey*, 162 S.E. 741, 202 N.C. 328.

Superior court

General assembly cannot establish another court of jurisdiction equal to that of superior court on plan different from that provided by constitution.—*Jones v. Standard Oil Co. of New Jersey*, 162 S.E. 741, 202 N.C. 328.

51. Ind.—*In re Petition to Transfer Appeals*, 174 N.E. 812, 202 Ind. 365. 15 C.J. p 859 note 64, p 862 note 14 [a].

52. N.J.—*In re Roebbling's Estate*, 108 A. 359, 91 N.J.Eq. 72, dismissing appeal 104 A. 295, 89 N.J. Eq. 163. 15 C.J. p 859 note 64—12 C.J. p 818 note 14.

53. N.J.—*Inhabitants of City of Plainfield v. O'Driscoll*, 184 A. 799, 14 N.J.Misc. 343.

15 C.J. p 859 note 64—12 C.J. p 818 note 15.

The jurisdiction given to a justice of the supreme court to enforce rights under a civil service act was not invalid, where such grant in no way interfered with the right of the supreme court to review the entire case by certiorari, but simply added an additional step in the progress of the proceeding toward the supreme court.—*Edwards v. Petry*, 101 A. 195, 90 N.J.Law 670.

54. Ind.—*Pittsburgh, C. C. & St. L. R. Co. v. Hoffman*, 162 N.E. 403, 200 Ind. 178, denying petition and error *Pittsburgh, C. C. & S. L. R. Co. v. Hoffman*, 155 N.E. 622, 87 Ind.App. 619. 15 C.J. p 859 note 64.

55. Ind.—*Bobruk v. State*, 181 N.E. 157, 203 Ind. 516, dismissing petition 167 N.E. 548, 90 Ind.App. 97—*Bobruk v. State*, 181 N.E. 157, 203 Ind. 516, dismissing petition 168 N.E. 192, 90 Ind.App. 503, followed *Georgades v. State*, 168 N.E. 194, 90 Ind.App. 713—*Miskovich v. State*, 181 N.E. 157, dismissing petition 168 N.E. 715, 90 Ind.App. 677—*In re Petition to Transfer Appeals*, 174 N.E. 812, 202 Ind. 365. N.C.—*Jones v. Standard Oil Co. of New Jersey*, 162 S.E. 741, 202 N.C. 328.

15 C.J. p 859 note 64—12 C.J. p 818 note 16.

56. N.C.—*State v. Wilmington, etc., R. Co.*, 29 S.E. 334, 122 N.C. 877—*State v. Ray*, 29 S.E. 61, 122 N.C. 1097.

15 C.J. p 860 note 86.

57. Colo.—*People v. Scott*, 120 P. 126, 52 Colo. 59.

15 C.J. p 862 note 15.

58. N.J.—*State v. Falkinburge*, 15 N.J.Law 320.

15 C.J. p 863 note 38.

59. Pa.—*Overseers of Poor v. Smith*, 2 Serg. & R. 363.

60. Mo.—*Barrett v. May*, 235 S.W. 124, 290 Mo. 302.

Or.—*Jacobson v. Holt*, 255 P. 901, 121 Or. 462.

15 C.J. p 860 note 75.

Such legislation subject to requirement

(1) That courts of the same grade or rank be uniform.

Ky.—*Beauchamp v. Silk*, 120 S.W.2d 765, 275 Ky. 91—*Lynn v. Bullock*, 225 S.W. 733, 189 Ky. 604.

Pa.—*Commonwealth ex rel. Margiotti v. Sutton*, 193 A. 250, 327 Pa. 337.

(2) That statutes embrace but one subject.—*Pitts v. Berry*, 75 So. 630, 16 Ala.App. 82.

ty courts⁶¹ as to any matters that it sees fit,⁶² including concurrent jurisdiction with another constitutional court.⁶³ Likewise, to the extent that it is authorized to do so, the legislature may diminish or change the jurisdiction of county courts.⁶⁴ On the other hand, except in so far as the constitution permits, the legislature cannot trench upon, lessen, limit, or withdraw the constitutionally conferred jurisdiction of a county court,⁶⁵ although it may regulate the exercise thereof.⁶⁶ It cannot create another court and give it any of the exclusive jurisdiction of such county court,⁶⁷ or give an inferior court jurisdiction greater than that of the county court.⁶⁸

61. Ill.—*People ex rel. Rusch v. Ladwig*, 7 N.E.2d 313, 365 Ill. 574.

Ohio.—*State v. Le Blond*, 140 N.E. 491, 108 Ohio St. 41.

Tex.—*Heyn v. Massachusetts Bonding & Insurance Co.*, Civ.App., 110 S.W.2d 261.

62. Ill.—*Bowers v. Glos*, 179 N.E. 80, 346 Ill. 623—*People v. White*, 166 N.E. 100, 334 Ill. 465, 64 A.L.R. 1006.

63. Ill.—*State v. Aiello*, 147 N.E. 916, 317 Ill. 159.

In Texas

(1) Legislature has power to give county court jurisdiction of civil cases concurrent with justice of the peace courts of county.—*Commercial Inv. Trust v. Smart*, 69 S.W.2d 35, 123 Tex. 180—*Campsey v. Brumley*, Com.App., 55 S.W.2d 810—*Stavely v. Stavely*, Civ.App., 94 S.W.2d 545, error dismissed.

(2) However, it has been held that it has no power to confer upon the county court concurrent jurisdiction with the district court, except where it does so in the process of "conforming" the jurisdiction of constitutional courts to that of a newly created statutory court.—*Whittenberg v. Craven*, Tex.Com.App., 258 S.W. 152, reversing *Ex parte Grimes*, Civ.App., 216 S.W. 251.

64. Or.—*Jacobson v. Holt*, 255 P. 901, 121 Or. 462.

Tenn.—*State v. Knox County*, 54 S.W. 2d 973, 165 Tenn. 319.

Tex.—*Brand v. Hood*, Civ.App., 85 S.W.2d 347, error dismissed. 15 C.J. p 863 note 44.

65. Cal.—*Sacramento & San Joaquin Drainage Dist. v. Superior Court in and for Colusa County*, 238 P. 687, 196 Cal. 414.

Ill.—*Kurzawski v. Kurzawski*, 5 N.E. 2d 597, 288 Ill.App. 118.

66. Cal.—*Sacramento & San Joaquin Drainage Dist. v. Superior Court in and for Colusa County*, 238 P. 687, 196 Cal. 414.

Land in two counties

A statute giving exclusive jurisdic-

tion to superior court of county containing largest area of land included within drainage district to determine validity of assessment or bond issue, held not violative of the constitutional provision requiring all actions affecting real estate to be brought in county in which land is situated and not invalid as trenching on constitutional jurisdiction of superior courts.—*Sacramento & San Joaquin Drainage Dist. v. Superior Court in and for Colusa County*, *supra*.

67. Tex.—*State v. Gillette's Estate*, Com.App., 10 S.W.2d 984, reversing *Gillette's Estate v. State*, Civ.App., 286 S.W. 261.

68. N.Y.—*Buoneto v. Buoneto*, 16 N. E.2d 284, 278 N.Y. 284, reversing 4 N.Y.S.2d 196, 254 App.Div. 75, 688.

Greater territorial jurisdiction permitted

The prohibition against granting a local court jurisdiction greater than that of the county court refers to jurisdiction of the subject matter and not to territorial jurisdiction; it intends that inferior courts shall not have greater powers, importance, and dignity than county courts.—*Buoneto v. Buoneto*, *supra*.

69. Ala.—*Johnson v. State*, 113 So. 480, 22 Ala.App. 160—*Hails v. State*, 75 So. 724, 16 Ala.App. 132. N.C.—*State v. Boyd*, 95 S.E. 161, 175 N.C. 791.

Ohio.—*State v. Ritchie*, 119 N.E. 124, 97 Ohio St. 41.

Okl.—*Herndon v. Anderson*, 25 P.2d 326, 165 Okl. 104—*Williams v. State*, 199 P. 400, 19 Okl.Cr. 307.

Delegation of authority

(1) Statutory provision authorizing county commissioners to establish general county court by resolution held not void as an unauthorized delegation of legislative power, since the commissioners were not authorized to grant judicial powers, but simply to find certain facts.—*Meador v. Thomas*, 170 S.E. 110, 205 N.C. 142.

Within constitutional limitations, the legislature may create county courts⁶⁹ and confer jurisdiction upon them.⁷⁰ It may limit or change their jurisdiction when proper provision is made for pending causes,⁷¹ or may abolish such courts entirely.⁷² While, in the absence of constitutional sanction, county courts cannot be created with a jurisdiction coextensive within the county with that of a constitutional circuit court,⁷³ a court may be established with exclusive jurisdiction in specified matters, and as to such matters it will supersede another court, where it is evident that it was intended that there should not be concurrent jurisdiction between the two courts in the same county.⁷⁴ So

(2) Under a statute creating county courts but providing that the governor shall determine and declare by proclamation the counties in which they shall exist, the governor's proclamation does not bring any such court into existence until the date stated in the statute, and until a judge of such court is nominated or elected, governor's proclamation regarding county court is subject to contest regarding facts therein declared.—*Hill v. State*, 128 So. 878, 157 Miss. 648.

(3) Under a statute so providing, a city court for a county may be established upon the recommendation of the grand jury.—*Rogers v. Citizens' Bank of Douglas*, 101 S.E. 674, 149 Ga. 568.

(4) General statute authorizing establishment of city court for county held not repealed by subsequent statutes creating such courts, where such subsequent statutes were repealed.—*Rogers v. Citizens' Bank of Douglas*, *supra*.

Creation of court for part of county held valid.—*Glymph v. Smith*, 170 S.E. 913, 170 S.C. 486.

70. Ala.—*Hails v. State*, 75 So. 724, 16 Ala. App. 132.

71. Ind.—*Citizens' St. R. Co. v. Haugh*, 41 N.E. 533, 142 Ind. 254.

72. N.C.—*Queen v. Board of Com'rs of Haywood County*, 138 S.E. 310, 193 N.C. 821.

Pending appeal as to validity of creating act

The legislature had the right to abolish a county court, by enactment of statute withdrawing such county from operation and effect of statute under which the court was organized, pending appeal in action involving its validity.—*Coffey v. Rader*, 110 S. E. 106, 182 N.C. 639.

73. Wis.—*State v. La Crosse County Ct. Judge*, 11 Wis. 50.

74. Ala.—*Holman v. State*, 39 So. 640, 144 Ala. 95. 15 C.J. p 863 note 40.

more than one judicial district in a county may be created, and two district courts may be authorized to sit at one place, the county seat, where the constitution does not show an intention to forbid this.⁷⁵ Statutes relating to county courts and not violative of any of the aforementioned restrictions have been held valid.⁷⁶

Probate courts. Unless sanctioned by the constitution, the legislature cannot enlarge,⁷⁷ take away,⁷⁸ limit, or curtail⁷⁹ the constitutionally conferred jurisdiction of probate courts or probate jurisdiction of courts otherwise designated, although it may regulate the exercise thereof.⁸⁰ Probate courts, cannot contrary to the organic law, be invested with jurisdiction in chancery and at common law.⁸¹ On the other hand, to the extent that the constitution permits, the legislature may control⁸² or extend⁸³ such jurisdiction or the jurisdiction of such courts. So

the legislature may confer upon another court any part of a constitutional probate court's jurisdiction which is not exclusive.⁸⁴ It has been held that the legislature may confer equity jurisdiction upon a probate court.⁸⁵

§ 131. — Municipal and Police Courts

- a. In general
- b. Powers of municipalities

a. In General

The provisions of the several state constitutions determine the power of the legislature to affect the existence or jurisdiction of municipal and police courts.

In general, any legislation affecting municipal or police courts must conform to constitutional provisions⁸⁶ and the law of the land.⁸⁷ Thus the legislature cannot give a municipal or police court ex-

75. Tex.—Lytle v. Halff, 12 S.W. 610, 75 Tex. 128—Kruegel v. Cockrell, Civ.App., 151 S.W. 352.

76. Ala.—Johnson v. State, 113 So. 480, 22 Ala.App. 160.

Ark.—Ex parte King, 217 S.W. 465, 141 Ark. 213.

Colo.—Kingdom of Yugo-Slavia v. Jovanovich, 69 P.2d 311, 100 Colo. 406.

Ill.—Bowers v. Glos, 179 N.E. 80, 346 Ill. 623.

N.Y.—Broadway & Ninety-Fourth St. v. C. & L. Lunch Co., 190 N.Y.S. 563, 116 Misc. 440.

77. Ill.—In re Bishop's Estate, 18 N.E.2d 218, 370 Ill. 173—Howard v. Swift, 190 N.E. 102, 356 Ill. 80—First State Bank of Steger v. Chicago Title & Trust Co., 134 N.E. 46, 302 Ill. 77.

Power to sell property to pay legacies

Where legacies were a charge on realty belonging to estate, and personality was insufficient to pay them, sale of the realty to pay legacies was a "probate matter" and was an incident to the "settlement of the estate" within constitutional provision defining jurisdiction of probate court; hence a statute relating to such sale was not invalid as enlarging the court's jurisdiction.—In re Bishop's Estate, 18 N.E.2d 218, 370 Ill. 173.

78. Colo.—In re Brown's Estate, 176 P. 477, 65 Colo. 341.

Tex.—Moyers v. Carter, Civ.App., 61 S.W.2d 1027, error refused.

79. Minn.—In re Gilroy's Estates, 258 N.W. 584, 193 Minn. 349—State v. Probate Court of Goodhue County, 210 N.W. 40, 168 Minn. 147.

Administrator ad litem

A statute providing that upon the death of a party to an action the court before which the action is pending may appoint a special ad-

ministrator in whose name the action shall be revived does not infringe upon the probate court's general jurisdiction of the administration of estates.—Wade v. Bridges, 24 Ark. 569.

80. Minn.—In re Gilroy's Estates, 258 N.W. 584, 193 Minn. 349—State v. Probate Court of Goodhue County, 210 N.W. 40, 168 Minn. 147.

81. U.S.—Perris v. Higley, Utah, 20 Wall. 375, 22 L.Ed. 383.

15 C.J. p 863 note 49.

82. Kan.—Citizens Building & Loan Ass'n v. Knox, 74 P.2d 161, 146 Kan. 734.

Minn.—State ex rel. Pearson v. Probate Court of Ramsey County, 287 N.W. 297, 205 Minn. 545.

N.M.—First Nat. Bank v. Dunbar, 258 P. 817, 32 N.M. 419.

Or.—Jacobson v. Holt, 255 P. 901, 121 Or. 462.

Legislature may grant jurisdiction

(1) Of proceedings in aid of execution.—Young v. Ledrick, 14 Kan. 92.

(2) To grant divorces.—Geiger v. Geiger, 160 N.E. 28, 117 Ohio St. 451, affirming 159 N.E. 350, 25 Ohio App. 461.

15 C.J. p 863 note 47.

83. Ohio.—Geiger v. Geiger, supra.

15 C.J. p 863 note 46.

84. Minn.—In re Peterson's Estate, 268 N.W. 707, 198 Minn. 45.

15 C.J. p 863 note 41.

85. Ohio.—Madigan v. Dollar Building & Loan Co., 4 N.E.2d 68, 52 Ohio App. 553.

86. N.Y.—Osterhoudt v. Horowitz, 240 N.Y.S. 683, 135 Misc. 744.

15 C.J. p 860 notes 76, 77.

"Police court" defined

A police court is an inferior court exercising a limited jurisdiction over offenses of a criminal nature, and

perhaps also a limited civil jurisdiction; it is a court for the trial of offenders brought up on charges preferred by the police.—In re Baxter, 86 P. 998, 3 Cal.App. 716—49 C.J. p 1071 notes 32—34.

Right to elect judges

A statute creating a court and limiting the election of the judge thereof to electors of the city in which the court is to sit, while excluding electors of the territory outside of the city, but within the court's jurisdiction, is unconstitutional.

Neb.—State ex rel. Wright v. Brown, 267 N.W. 466, 131 Neb. 239.

Wis.—State v. Sande, 238 N.W. 504, 205 Wis. 495.

Uniformity

(1) Where the constitution requires uniformity among city courts, such uniformity must be brought about and preserved.—Frantz v. Fleitz, 85 Ill. 362—15 C.J. p 863 note 57.

(2) Where such uniformity would be destroyed by the creation of a city court it cannot be created.—People v. Rodenberg, 98 N.E. 764, 254 Ill. 386.

Magistrates' court

The legislature may not create one court of three magistrates having civil jurisdiction over the entire city of Philadelphia to the exclusion of the remaining twenty-five magistrates in violation of the constitutional provision for a basic structure of subordinate tribunals to be located throughout the city; nor may it subject the exercise of jurisdiction by the city magistrates of Philadelphia to the visitatorial power of the common pleas courts.—Rutenberg v. City of Philadelphia, 196 A. 78, 329 Pa. 26.

87. Tenn.—Spurgeon v. Worley, 90 S.W.2d 948, 169 Tenn. 697.

clusive jurisdiction over matters of which, under the constitution, it has or may at most have only concurrent jurisdiction with another court.⁸⁸

To the extent authorized by the constitution, the legislature has power to establish city or municipal courts⁸⁹ and police courts,⁹⁰ and to fix their jurisdiction,⁹¹ even where it involves the carving of the necessary jurisdiction out of other courts.⁹² Depending upon the applicable constitutional provisions it has been variously held that the legislature may⁹³ or may not⁹⁴ give such courts extraterritorial jurisdiction, may give them jurisdiction less extensive than the city limits,⁹⁵ may give them ju-

risdiction to enforce purely municipal ordinances⁹⁶ only,⁹⁷ or may give them jurisdiction in cases arising under the state laws⁹⁸ concurrently with other courts.⁹⁹ A city court authorized, but not created, by the constitution may be abolished by the legislature,¹ but the legislature may be without power to repeal a city charter establishing a city court.² Various other statutes relating to city, municipal, police, or magistrates' courts have been held valid as against divers contentions,³ such as that they abolished or limited the jurisdiction of justices of the peace,⁴ gave such a court greater jurisdiction than allowed by the constitution,⁵ or created a new inferior local court.⁶

88. Cal.—Hopkins v. Anderson, 21 P.2d 560, 218 Cal. 62.
N.Y.—People ex rel. Folk v. McNulty, 9 N.Y.S.2d 380, 256 App.Div. 82, reversing 8 N.Y.S.2d 306, affirmed 18 N.E.2d 854, 279 N.Y. 563.

89. Ala.—McGehee v. State, 74 So. 374, 199 Ala. 287.
Kan.—State v. Smith, 285 P. 542, 130 Kan. 228.

La.—Berry v. Bass, 102 So. 76, 157 La. 81.

Ohio.—Ellis v. Urner, 180 N.E. 661, 41 Ohio App. 183, affirmed 181 N.E. 22, 125 Ohio St. 246.

Okl.—Herndon v. Excise Board of Garfield County, 295 P. 223, 147 Okl. 126—Buchanan v. State, 237 P. 624, 31 Okl.Cr. 94—Buchanan v. State, 236 P. 903, 30 Okl.Cr. 362.
15 C.J. p 863 note 50.

In place of justice's court

(1) Where the constitution so provides, the legislature may establish a city court only in place of a justice's court thereby abolished.—City of Gretna v. Bailey, 75 So. 491, 141 La. 625, Ann.Cas.1918E 566.

(2) In view of such a provision, the creation of a city court and abolition of a justice's court during the term of a justice of the peace is valid.—State v. Miller, 113 So. 814, 164 La. 192—State v. Miller, 113 So. 813, 164 La. 191—State v. Gooch, 113 So. 812, 164 La. 186.

(3) Where the constitution so provides a municipal court may be substituted for justices of the peace within the territorial limits of the court; the phrase "within such district," as used in such a constitutional provision, means that the territorial limits of the municipal court so substituted must be coextensive with the district for which it is substituted.—State ex rel. Wright v. Brown, 267 N.W. 466, 131 Neb. 289.

Establishment in town

A city court is not a constitutional city court where established in a town, and it is not made such a court by a subsequent act chartering the

town as a city but not referring to the court.—Neill v. State, 136 S.E. 470, 36 Ga.App. 292.

90. Miss.—Hughes v. State, 29 So. 786, 79 Miss. 77.
15 C.J. p 863 note 51.

91. La.—State ex rel. Saragusa v. Ott, 81 So. 435, 144 La. 948.
Pa.—Ladner v. Forman, 163 A. 359, 107 Pa.Super. 245.

Criminal jurisdiction

(1) In creating a city court, there is nothing which prevents the legislature from fixing its jurisdiction in criminal cases, except that it may not be given power to try felonies.—State ex rel. Saragusa v. Ott, 81 So. 435, 144 La. 948.

(2) The legislature exceeded its constitutional power in giving municipal and police courts and trial justices in their respective counties concurrent jurisdiction with the supreme and superior courts over all prosecutions for violation of a statute punishing driving automobiles on highways while drunk by maximum sentence of "not more than one year," since prosecutions for infamous crimes must be by indictment.—State v. Vashon, 123 A. 511, 123 Me. 412.

92. N.C.—Albertson v. Albertson, 178 S.E. 352, 207 N.C. 547.
15 C.J. p 863 note 52.

93. Cal.—Ex parte Luna, 257 P. 76, 201 Cal. 405.
Contra People v. Denault, 253 P. 151, 81 Cal.App. 1.
Ga.—Collier v. Duffell, 141 S.E. 194, 165 Ga. 421.

Method of changing venue from justices' courts outside the city to a municipal court may be prescribed by the statute creating such court, despite a general statute governing change of venue.—Brickell v. Guaranty Loan & Trust Co., 93 S.W.2d 656, 192 Ark. 652.

94. Ky.—Rieser v. Ward, 236 S.W. 255, 193 Ky. 368.

95. Ala.—McGehee v. State, 74 So. 374, 199 Ala. 287.

96. La.—Berry v. Bass, 102 So. 76, 157 La. 81.

97. La.—City of New Orleans v. Riisse, 113 So. 879, 164 La. 369.

98. Tenn.—Moore v. State, 19 S.W. 2d 233, 159 Tenn. 468.

99. Miss.—Hughes v. State, 29 So. 786, 79 Miss. 77.
15 C.J. p 863 note 55.

In Texas

(1) It has been held that the legislature may create a corporation court and give it, within the city limits, concurrent jurisdiction with the justice of the peace in criminal matters over state offenses.—Ex parte Hart, 56 S.W. 341, 41 Tex.Cr. 581.

(2) In an earlier case, however, the same court had held otherwise.—Ex parte Coombs, 44 S.W. 854, 38 Tex. Cr. 648, 653.
15 C.J. p 863 notes 53, 56.

1. Ala.—State v. Gunter, 54 So. 283, 170 Ala. 165.

Ohio.—State v. Le Blond, 140 N.E. 491, 108 Ohio St. 41.

Va.—Nehr v. Peterson, 174 S.E. 225, 162 Va. 99.

2. Iowa.—Hetherington v. Bissell, 10 Iowa 145.

3. Kan.—State v. Smith, 285 P. 542, 130 Kan. 228.

N.Y.—People ex rel. Steckler v. Warden of City Prison, 182 N.E. 73, 259 N.Y. 430, affirming 254 N.Y.S. 1021, 235 App.Div. 604—City of New York v. Kaiser, 210 N.Y.S. 598.

Pa.—Rutensberg v. City of Philadelphia, 196 A. 73, 329 Pa. 26.

4. Cal.—Robertson v. Langford, 273 P. 150, 95 Cal.App. 414.

Kan.—State v. Smith, 285 P. 542, 130 Kan. 228.

5. N.Y.—Broadway & Ninety-Fourth St. v. C. & L. Lunch Co., 190 N.Y. S. 563, 116 Misc. 440.

6. N.Y.—In re Levy, 182 N.Y.S. 792, 192 App.Div. 555, affirmed 129 N.E. 939, 229 N.Y. 637.

b. Powers of Municipalities

Municipalities have only such power with respect to the establishment or disestablishment of municipal or police courts as is conferred upon them by constitutional provision or delegated to them by statute.

Since the establishment, and administration of courts of justice is a governmental function of the state rather than a local or municipal function,⁷ a municipality has no power, in the absence of authorization, to create a municipal or police court⁸ or to define the authority of such courts and their procedure.⁹ However, to the extent that the necessary constitutional and statutory authority exists, a municipality may create or bring into operation a city, municipal, or police court,¹⁰ by or under a resolution or ordinance,¹¹ or a charter or amendment thereof,¹² or by a popular election.¹³ A municipality may be authorized to regulate the exercise of

jurisdiction conferred on a city court by the constitution.¹⁴

While a statute which, without constitutional authorization, delegates to municipalities the legislative power of creating municipal courts, is invalid,¹⁵ statutes authorizing municipalities under certain circumstances to bring into operation municipal or city courts whose organization and jurisdiction are prescribed by the statute have been held not to constitute an unauthorized delegation of legislative power, but rather a delegation only of the power to determine facts which bring the court into being;¹⁶ hence the delegation of such power does not embrace the power to abolish a court thus created,¹⁷ unless there is also a delegation of power to determine facts upon which its disestablishment may be based.¹⁸ Authority conferred upon a municipality to create municipal or police courts may be exercised only within the limits of such authority.¹⁹

7. N.Y.—*In re Siracusa*, 212 N.Y.S. 400, 125 Misc. 882.
15 C.J. p. 854 note 3.

Local self-government

The fact that the constitution confers on municipalities sovereign right to locally govern themselves, does not abridge state's sovereignty over municipalities with respect to its courts.—*State v. Davis*, 165 N.E. 298, 119 Ohio St. 596.

8. Alaska.—*In re Bruno Munro*, 1 Alaska 279.
N.M.—*Stout v. City of Clovis*, 16 P.2d 936, 37 N.M. 80.

Ohio.—*State ex rel. Stanley v. Bernon*, 187 N.E. 733, 127 Ohio St. 204.—*State v. Hutsinpillar*, 147 N.E. 647, 112 Ohio St. 468.—*Coyne v. State*, 153 N.E. 876, 22 Ohio App. 462.

9. N.Y.—*In re Siracusa*, 212 N.Y.S. 400, 125 Misc. 882.

Home rule

The constitutional and statutory provisions for home rule do not give a city power to define authority and procedure of its courts.—*In re Siracusa*, 212 N.Y.S. 400, 125 Misc. 882.

10. Ill.—*People ex rel. Soble v. Gill*, 193 N.E. 192, 353 Ill. 261.
Mo.—*Ex p. Kiburg*, 10 Mo.App. 442.

11. Cal.—*Bancroft Whitney Co. v. Payne*, 241 P. 551, 197 Cal. 551.
Colo.—*People v. Pickens*, 12 P.2d 349, 91 Colo. 109.

Kan.—*Brown v. Arkansas City*, 11 P.2d 607, 135 Kan. 453.—*State v. Hettinger*, 5 P.2d 862, 134 Kan. 405.

Wis.—*State v. Outagamie County Board*, 185 N.W. 184, 175 Wis. 253.

Effect of city's fiscal affairs

That creation of city court under ordinance may disarrange city's fis-

cal affairs as contemplated by current annual budget held not to invalidate ordinance.—*State v. Hettinger*, 5 P.2d 862, 134 Kan. 405.

Authority dependent on census returns

(1) Census bulletin officially issued was official notice of city's population within statute authorizing city courts in cities having over twenty-five thousand population, although bulletin contained statement that it was subject to correction.—*Herndon v. Excise Board of Garfield County*, 295 P. 223, 147 Okl. 126.

(2) Ordinance establishing municipal court in city having actual population exceeding that required, but under latest preceding United States census, less than that required, was void.—*City of Blytheville v. Ray*, 1 S.W.2d 548, 175 Ark. 1089.

Election by city commissioners

Where the charter so provides, the election of a municipal judge by the city commissioners brings the municipal court into existence.—*Peek v. Matthews*, 95 So. 234, 85 Fla. 54.

12. Cal.—*Wallace v. Payne*, 241 P. 879, 197 Cal. 539.—*Robertson v. Langford*, 273 P. 150, 95 Cal.App. 414.

13. Iowa.—*State v. Birdsall*, 169 N.W. 453, 186 Iowa 129.

Time of declaring result

Resolution of board of city commissioners of city, one year after election on the creation of municipal court, that question had carried, held not to determine that question had carried, the board at that time having no authority to sit as canvassing board to determine or declare result of prior election.—*Hurley v. Coursey*, 265 N.W. 4, 64 S.D. 131.

14. Md.—*City of Baltimore v. Blocher & Schaff*, 132 A. 160, 149 Md. 648, affirmed *Blocher & Schaff v. City of Baltimore*, 48 S.Ct. 33, 275 U.S. 490, 72 L.Ed. 389.—*Goldman v. Crowther*, 128 A. 50, 147 Md. 282, 38 A.L.R. 1455.

Exclusive right of appeals

Under a constitutional provision giving a city court exclusive jurisdiction of appeals under ordinances, the city may provide for such appeal from a particular ordinance, without authorizing any appeal from such city court.—*Tighe v. Osborne*, 133 A. 465, 150 Md. 452, 46 A.L.R. 80.

15. Utah.—*State v. Barker*, 167 P. 262, 50 Utah 139.

16. Kan.—*Brown v. Arkansas City*, 11 P.2d 607, 135 Kan. 453.—*State v. Hettinger*, 5 P.2d 862, 134 Kan. 405.—*State v. Smith*, 285 P. 542, 130 Kan. 228.

Wis.—*State v. Outagamie County Board*, 185 N.W. 184, 175 Wis. 253.

17. Kan.—*Brown v. Arkansas City*, 11 P.2d 607, 135 Kan. 453.

18. Wis.—*State v. Outagamie County Board*, 185 N.W. 184, 175 Wis. 253.

Court established by election may be abandoned by the same method.—*People v. Tolsted*, 183 N.E. 644, 351 Ill. 23.

19. N.Y.—*People v. Paris*, 168 N.Y. S. 836, 181 App.Div. 499, 36 N.Y.Cr. 221.

Infringement on legislative power

A constitutional provision authorizing a city to create police courts does not authorize the city to trench in any way upon the legislative power to create and maintain city justice's courts.—*Chambers v. Waterbury*, 18 P.2d 957, 129 Cal.App. 511.

§ 132. — Criminal Courts

Under appropriate constitutional provisions the legislature may create criminal courts and abolish courts so created.

Under appropriate constitutional provisions, the legislature may create a criminal court²⁰ and confer upon it criminal jurisdiction²¹ and limited civil jurisdiction as well,²² and may provide for the incidents necessary to its jurisdiction.²³ A criminal court so established by the legislature may be abolished by it.²⁴ Statutes creating courts of criminal jurisdiction have been held valid as against various contentions,²⁵ such as that they violated rules relating to classification²⁶ or that they created new courts in contravention of the constitution.²⁷

Legislative power with respect to the jurisdiction of criminal courts is considered in the C.J.S. title Criminal Law §§ 114–118, also 16 C.J. p 149 note 36–p 151 note 56.

§ 133. — Special and Temporary Courts and Commissions

a. In general

b. As grant or defeat of judicial power

a. In General

Legislative power with respect to special and temporary courts and commissions is determined by constitutional provisions.

Legislative power with respect to special and temporary courts²⁸ or tribunals,²⁹ or commissions,³⁰ may be exercised only in conformity with constitutional provisions. Thus, while a legislature has been held authorized to establish emergency courts with such jurisdiction as it deems best,³¹ it has also been held that special courts cannot be created for the trial of rights and obligations of particular parties.³² A constitutional provision for the appointment of judges pro tempore of particular courts does not authorize the creation of courts pro tempore in which such appointees shall sit.³³ It has been held that the legislature may abolish special courts,³⁴ and may transfer their jurisdiction³⁵ and the powers appertaining to them³⁶ to commissioners. It has also been considered that jurisdiction ends and a special court is dissolved at the ending of each separate case which it is constituted to try.³⁷

b. As Grant or Defeat of Judicial Power

While a legislature cannot ordinarily confer purely judicial power upon a body other than a court authorized

20. Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.

Tex.—Cunningham v. City of Corpus Christi, Civ.App., 260 S.W. 266—Pool v. State, Cr., 57 S.W.2d 1118—Allen v. State, 54 S.W.2d 810, 122 Tex.Cr. 186.

Evidence held not to disprove establishment

Testimony by the ordinary that he did not perform acts required by statute for establishment of criminal court did not sustain burden of proving court was not legally established, where a de facto officer might have performed the necessary acts while the ordinary was illegally deprived of his office.—Jordan v. State, 159 S.E. 235, 172 Ga. 857.

21. Tex.—Cunningham v. City of Corpus Christi, Civ.App., 260 S.W. 266—Pool v. State, Cr., 57 S.W.2d 1118—Allen v. State, 54 S.W.2d 810, 122 Tex.Cr. 186.
16 C.J. p 149 note 36.

22. Tex.—Cunningham v. City of Corpus Christi, Civ.App., 260 S.W. 266—Pool v. State, Cr., 57 S.W.2d 1118—Allen v. State, 54 S.W.2d 810, 122 Tex.Cr. 186.

Delegation of power to county commissioners to confer such jurisdiction held void.—Durham Provision Co. v. Daves, 128 S.E. 593, 190 N.C. 7.

23. Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.

24. Mo.—Randol v. Kline's Inc., 18 S.W.2d 500, 322 Mo. 746.

25. Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.

26. Fla.—State v. Sullivan, supra.
Population being a reasonable method of classification, the legislature by general law may create court of crimes in counties having a stated population.—State v. Sullivan, supra.

27. Mo.—State ex rel. Matacia v. Buckner, 254 S.W. 179, 300 Mo. 359.

28. Kan.—State v. Howat, 191 P. 585, 107 Kan. 423.
15 C.J. p 860 note 79, p 864 note 61.

Committee of justices

A statute authorizing the justices of the supreme court to designate a committee of justices of the courts of civil appeals to pass upon petitions to the supreme court for writs of error, is constitutional; such a statute does not disable or unduly interfere with the functioning of the court from which the committee members are appointed.—San Antonio & A. P. Ry. Co. v. Blair, 196 S.W. 502, 1153, 108 Tex. 434, denying error, Civ.App., 184 S.W. 566.

29. Ky.—Pratt v. Breckinridge, 65 S. W. 186, 66 S.W. 405, 112 Ky. 1, 23 Ky.L. 1356, 1858.

15 C.J. p 860 note 80.

Equivalent to "inferior court"

A circuit judge and municipal election commissioners sitting as a special tribunal to review a primary election exercise judicial functions and constitute an "inferior court" within constitutional provision authorizing the establishment of inferior courts.—Hayes v. Abney, Miss., 188 So. 533.

30. Wis.—Forest County v. Langlade County, 45 N.W. 598, 76 Wis. 605.

15 C.J. p 860 note 81, p 864 note 61.

31. Tex.—Carter v. Missouri, etc., R. Co., 157 S.W. 1169, 106 Tex. 137.

15 C.J. p 864 note 61 [a], [b].

32. Tenn.—State Bank v. Cooper, 2 Yerg. 599, 24 Am.D. 517.

33. Cal.—Fay v. District Court of Appeal, Second Appellate Dist., Division 2, 254 P. 896, 200 Cal. 522.

34. N.C.—State v. Smith, 65 N.C. 369.

Pa.—In re Pennsylvania Hall, 5 Pa. 204.

35. Mass.—Opinion of Justices, 8 Gray 20—Dearborn v. Ames, 8 Gray 1.

36. Ky.—Dotson v. Fitzpatrick, 66 S. W. 403, 23 Ky.L. 2042.

37. Miss.—Warren v. African Baptist Church, 50 Miss. 223.

by the constitution to receive such power, it may confer upon statutory tribunals mixed administrative and quasi-judicial functions.

Although the legislature cannot ordinarily confer purely judicial power upon a body or tribunal other than a court authorized by the constitution to receive such power,³⁸ it may confer upon a statutory tribunal or commission mixed administrative and quasi-judicial functions properly within the sphere of the legislative power.³⁹ Thus legislation authorizing the supreme court to appoint commissioners to assist the court in the performance of its duties is not an exercise of judicial power by the legislature, and is valid, since such legislation confers no judicial powers on such commissioners;⁴⁰ and it has been held that the legislature may create such a tribunal by direct legislation and appointment,⁴¹ although there is authority to the contrary.⁴² Other tribunals which have been held not to constitute courts or to possess judicial powers so as to come within constitutional inhibitions against creating new courts or conferring judicial powers other than as prescribed include courts of claims,⁴³ boards of appraisers,⁴⁴ a board of control for charitable institutions,⁴⁵ and a board of commissioners of a state bar.⁴⁶

Workmen's compensation acts. By the great weight of authority, the creation by workmen's compensation acts of boards or commissions having authority to pass on claims for injuries, find facts, and make awards does not constitute an unwarranted delegation of judicial powers or the unwarranted creation of a judicial tribunal or court.⁴⁷

These decisions are based on the various grounds that such boards or commissions are merely administrative agencies, although exercising quasi judicial powers,⁴⁸ that they do not have the final authority to decide and to render enforceable judgments,⁴⁹ or that, under the compensation acts allowing an election as to whether their provisions shall come into operation, they are in effect or analogous to boards of arbitration by agreement;⁵⁰ and the ease of reaching a decision under such acts has been urged in sustaining them.⁵¹

As against the contention that they deprived the courts of their jurisdiction, not only have elective compensation acts been held not invalid,⁵² but, under a constitutional provision authorizing the legislature to provide for the settlement by arbitration, by a board or by the courts, of disputes involving the liability of employers, even a compulsory act vesting exclusive jurisdiction in a commission, in certain circumstances, has been sustained.⁵³

§ 134. Effect of Exercise of Power in General

The effect of an exercise of the power to create, abolish, reorganize, consolidate, or transfer the jurisdiction of a court depends on the intent expressed in the constitutional or statutory provision exercising such power.

A proper and lawful exercise of delegated legislative authority, or the direct exercise of constitutional power, will operate to abolish a court or not, according to the intent expressed or lawfully to be implied within the principles heretofore stated. This intent governs in determining the effect of the

38. Fla.—*D'Alemberte v. State*, 47 So. 489, 56 Fla. 162.

39. N.J.—*Erie R. Co. v. Board of Public Utility Com'rs*, 98 A. 13, 89 N.J.Law 57, affirmed 103 A. 1052, 90 N.J.Law 672, 673, which is affirmed 41 S.Ct. 169, 254 U.S. 394, 65 L.Ed. 322.

"Every administrative body, if it is to function at all, must have some power and jurisdiction to determine for itself whether or not it may proceed in a given case, and this we think may be done without usurping the functions of the courts, so long as it does not act arbitrarily nor in excess of the express powers conferred by legislative enactment."—*Utah Fuel Co. v. Industrial Commission*, 194 P. 122, 124, 57 Utah 246.

40. Cal.—*People v. Hayne*, 23 P. 1, 83 Cal. 111, 17 Am.S.R. 211.

12 C.J. p 818 note 26.

41. Tex.—*Jackson v. State*, 280 S.W. 202, 103 Tex.Cr. 318, certiorari denied 46 S.Ct. 474, 271 U.S. 661, 70 L.Ed. 1138.

12 C.J. p 818 note 27.

42. Ind.—*State v. Noble*, 21 N.E. 244, 118 Ind. 350, 10 Am.S.R. 143, 4 L.R.A. 101.

43. S.C.—*Ex p. Childs*, 12 S.C. 111.

44. Neb.—*In re Appraisement of Omaha Gas Plant*, 169 N.W. 725, 102 Neb. 782.

45. Ky.—*Willis v. Scott*, 142 S.W. 1012, 146 Ky. 547.

46. Idaho.—*In re Edwards*, 266 P. 665, 45 Idaho 676.

47. Ky.—*Greene v. Caldwell*, 186 S.W. 648, 170 Ky. 571.

12 C.J. p 816 note 97—71 C.J. p 290 note 5.

48. Ky.—*Greene v. Caldwell*, supra, 71 C.J. p 291 note 6.

"It [the industrial commission] is an administrative body or arm of the government which in the course of its administration of a law is empowered to ascertain some questions of fact and apply the existing law thereto, and in so doing acts quasi-judicially, but it is not thereby vest-

ed with judicial power in the constitutional sense."—*Borgnis v. Falk Co.*, 133 N.W. 209, 219, 147 Wis. 327, 37 L.R.A., N.S., 489.

49. Mich.—*Mackin v. Detroit-Timkin Axle Co.*, 153 N.W. 49, 187 Mich. 8.

71 C.J. p 291 note 7.

50. Ill.—*Deibelkis v. Link-Belt Co.*, 104 N.E. 211, 261 Ill. 454, Ann.Cas. 1915A 241.

71 C.J. p 291 note 8.

51. Ill.—*Grand Trunk Western Ry. Co. v. Industrial Commission*, 125 N.E. 748, 291 Ill. 167.

71 C.J. p 291 note 9.

52. Iowa.—*Hunter v. Colfax Cons. Coal Co.*, 154 N.W. 1037, 1062, 1064, 157 N.W. 145, 175 Iowa 245, L.R.A. 1917D 15, Ann.Cas. 1917E 803.

Wis.—*Borgnis v. Falk Co.*, 133 N.W. 209, 147 Wis. 327, 37 L.R.A., N.S., 489.

71 C.J. p 292 note 17.

53. Cal.—*Dominguez v. Pendola*, 188 P. 1025, 46 Cal.App. 220.

adoption of a new constitution; of the creation, alteration, and reorganization of new districts, circuits, or other judicial subdivisions; of the detaching, attaching, annexation, and consolidation of districts and the transfer of jurisdiction in general; and each law must be interpreted and applied accordingly.⁵⁴ The usual rules as to the construction of statutes apply to statutes of this character.⁵⁵ Such a statute should be construed as a whole,⁵⁶ and statutes of this character in *pari materia* should be read together as one law.⁵⁷ Statutes conferring additional power on courts should be liberally construed,⁵⁸ and any doubt that exists as to whether

jurisdiction of a court arises under a new statute ordinarily should be resolved in favor of jurisdiction;⁵⁹ but it has been held that a grant of jurisdiction to an inferior court, which jurisdiction formerly resided in the court to which appeals from the inferior court may be taken, must be strictly construed.⁶⁰ An express statutory exclusion of certain cases is not affected by a subsequent enactment which merely indicates an inclusion thereof.⁶¹

On the other hand, unless the intent to do so is apparent,⁶² the jurisdiction of a court is rarely deemed to be taken away by implication.⁶³ A limi-

54. Ariz.—*Sanders v. Sanders*, 79 P. 2d 523.

Ind.—*Gibson v. State*, 188 N.E. 803, 99 Ind.App. 106.

Ohio.—*State v. Cahill*, 171 N.E. 595, 122 Ohio St. 354.

Vt.—*Westinghouse Electric Mfg. Co. v. Barre & Montpelier Traction & Power Co.*, 123 A. 201, 97 Vt. 306. 15 C.J. p 864 note 68.

Restoration of jurisdiction

Where under the state constitution a court is vested with original jurisdiction over certain proceedings, of which it cannot be deprived except by direct legislation, on repeal of a statute vesting such jurisdiction in another court, the jurisdiction of the original court is restored.—*Stapleton v. Commonwealth*, 3 S.W. 793 —*Anderson v. Commonwealth*, 3 S.W. 127.

Provision for transfer

A statute providing that a court in which a particular action is brought should, under certain circumstances, transfer it to the county in which it should properly be tried does not impair or destroy the constitutional jurisdiction of the original court to hear and determine such action.—*Lloyds Casualty Co. of New York v. Lem*, Tex.Civ.App., 62 S.W.2d 497, error dismissed.

Special court in excepted locality

As opposed to the statutory intent, a general statute organizing certain courts throughout the state will not apply to a particular locality excepted in the statute, where a special provision continues the existence of similar courts in the excepted locality.—*People v. New York Gen. Sess.*, 15 Abb.Pr., N.Y., 59.

Consolidation

A constitutional amendment authorizing the legislature to consolidate chancery and probate courts does not, *ipso facto*, consolidate chancery and probate courts, nor does it abolish probate courts.—*Lewis v. Smith*, Ark., 129 S.W.2d 229.

55. Ala.—*State v. Torbert*, 77 So. 37, 200 Ala. 663.

Cal.—*Hopkins v. Anderson*, 21 P.2d 560, 218 Cal. 62.

15 C.J. p 856 note 22.

Jurisdiction

Where the words of a statute creating a court are descriptive of the character of its jurisdiction and powers rather than of the territorial extent of the jurisdiction, and the intent to create a court of limited, inferior, and consequently constitutional jurisdiction is clear from the whole act, the court will be held to have such constitutional jurisdiction.—*Brandon v. Avery*, 22 N.Y. 459, followed in *People v. Terry*, 14 N.E. 815, 108 N.Y. 1.

Statutes construed to have

(1) Established court.—*Kaufman v. Smather*, 160 A. 500, 10 N.J.Misc. 671, reversed on other grounds *Kaufman v. Smathers*, 166 A. 453, 111 N.J.Law 52.

(2) Abolished court.

Ala.—*Robertson v. State*, 104 So. 561, 20 Ala.App. 514.

N.C.—*Coffey v. Rader*, 110 S.E. 106, 182 N.C. 689.

(3) Repealed former acts.—*State v. Torbert*, 77 So. 37, 200 Ala. 663.

Statute construed

(1) As not establishing court.—*Scottish Union & National Ins. Co. v. Baker*, 84 So. 480, 17 Ala.App. 188, certiorari denied *Ex parte Baker*, 84 So. 924, 203 Ala. 696.

(2) As not enlarging court's territorial jurisdiction.—*Mohr v. Sonnet*, 8 A.2d 109, 17 N.J.Misc. 226.

(3) As not replacing court.—*Scottish Union & National Ins. Co. v. Baker*, *supra*.

(4) As not merging court with another.—*Halls v. State*, 75 So. 724, 16 Ala.App. 132.

(5) As not abolishing court.—*Watts v. State*, 109 So. 762, 215 Ala. 95, denying certiorari 109 So. 762, 21 Ala.App. 516—*Taylor v. State*, 105 So. 915, 21 Ala.App. 157.

56. Tex.—*Acree v. State*, Civ.App., 47 S.W.2d 907, error dismissed.

57. Kan.—*Hall's Pet.*, 17 P. 649, 38 Kan. 670.

58. Cal.—*Gallagher v. Campodonico*, 5 P.2d 486, 121 Cal.App., Supp., 765.

N.Y.—*Millhauser v. Schwach*, 273 N.Y.S. 944, 152 Misc. 546.

59. Cal.—*Gallagher v. Campodonico*, 5 P.2d 486, 121 Cal.App., Supp., 765.

60. Cal.—*People v. Denault*, 253 P. 151, 81 Cal.App. 1.

61. U.S.—*Ludington v. U. S.*, 15 Ct. Cl. 453.

62. Jurisdiction arising from implication

Where equity jurisdiction was not conferred by statute but arose because there was no other adequate remedy, an amendment conferring sole jurisdiction on another court abolishes, by implication, the equity jurisdiction theretofore entertained.—*White v. City of Ottawa*, 149 N.E. 521, 318 Ill. 463, affirming 230 Ill. App. 493.

63. U.S.—*Cook v. Alaska S. S. Co.*, D.C.Wash., 8 F.2d 207.

Cal.—*Hopkins v. Anderson*, 21 P.2d 560, 218 Cal. 62.

Ind.—*Gibson v. State*, 188 N.E. 803, 99 Ind.App. 106.

N.Y.—*People ex rel. Paris v. Agent and Warden of State Prison, Comstock*, N.Y., 192 N.Y.S. 692, 118 Misc. 44, 39 N.Y.Cr. 421, reversed on other grounds *People ex rel. Paris v. Hunt*, 194 N.Y.S. 699, 201 App.Div. 573, 39 N.Y.Cr. 493.

15 C.J. p 856 note 22 [a], p 864 note 71.

Act must plainly evidence intent that legislative abolition of the court shall follow.—*State ex rel. Landis v. Dickinson*, 138 So. 376, 103 Fla. 907.

Equity powers

(1) Creation of probate courts did not take away equity powers of circuit court not expressly conferred on probate court.—*Primeau v. Primeau*, 297 S.W. 382, 317 Mo. 828.

(2) Under a constitution providing that until the General Assembly shall establish courts of chancery the circuit courts shall have jurisdiction in matters of equity, exercise of the power of the legislature in establishing separate chancery

tation of jurisdiction will not be held to result from the terms of a statute unless such limitation is expressed, or unless it arises from a necessary implication.⁶⁴ The giving of additional jurisdiction to other courts has been held not to take general jurisdiction thereof away from a constitutional court of general jurisdiction,⁶⁵ but it has also been held that a statute conferring special jurisdiction on another court deprives a court of general jurisdiction of its jurisdiction over such subject matter.⁶⁶ Where a court is created to exercise the jurisdiction of other courts, it assumes the same characteristics as respects to whether it exercises essentially state or county functions.⁶⁷ Where the establishment or disestablishment of courts of inferior jurisdiction by special legislation rests in the discretion of the legislature, such legislation will not be reviewed by the courts.⁶⁸

With respect to time. The time when an exercise of the power to create, abolish, consolidate, or transfer of the jurisdiction of a court shall go into effect depends on the intent expressed in the constitutional or statutory provision in question;⁶⁹ and where the time therefor is fixed by the constitution, it is incompetent for the legislature to fix some other time.⁷⁰ The effect generally of specifying a time certain in the law creating, continuing, or abolish-

ing a court is to fix a period governing the jurisdiction of the new, the continued, or the old court;⁷¹ but where a court is established and the time of holding the first term specified, the court comes into existence for the purpose of filing papers, although the time for holding the term has not yet arrived.⁷² Where a constitution abolishes a court "from" a day certain, that day is excluded and a judgment of such court rendered on such day is valid.⁷³ Where the statute is silent as to the time of expiration of a court, it remains in existence to superintend the execution of a judgment in a habeas corpus case, and there is still a tribunal to be reached by certiorari.⁷⁴ Where a statute abolished an old court and created a new one to come into existence at a time fixed in the future, but before such time arrived a new constitution was adopted which continued the old court in existence until after the time fixed by statute for its going out of existence, it was held that the statute never went into effect and the new court created thereby never came into existence.⁷⁵

A statute cannot operate retroactively so as lawfully to create and establish a court from a date anterior to the adoption of the enactment.⁷⁶

Creation or continuation. Whether a new court is created or an established court continued depends on the intent expressed in, or lawfully implied from,

courts swept away the circuit courts' jurisdiction in matters exclusively cognizable in courts of equity.—*Monette Road Improvement Dist. of Dudley, Ark.*, 222 S.W. 59.

Where jurisdiction cannot be taken away directly, it cannot, of course, be taken away indirectly or by implication.—*State v. Superior Court of Dane County*, 175 N.W. 927, 170 Wis. 385.

64. U.S.—*U. S. v. Samperyac*, Terr. of Ark., 27 F.Cas.No.16,216a, Hempst. 118, affirmed 7 Pet. 222, 8 L.Ed. 665.

Affirmative description of cases in which jurisdiction may be exercised implies a negative on the exercise of such power in other cases.

U.S.—*In re Heath*, D.C., 12 S.Ct. 615, 144 U.S. 92, 36 L.Ed. 358.

Cal.—*People v. O'Donnell*, 174 P. 102, 37 Cal.App. 192.

Mich.—*Luyk v. Hertel*, 219 N.W. 721, 242 Mich. 445.

65. N.Y.—*In re Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 429, affirming 1 N.Y.S.2d 184, 253 App.Div. 30.—*Klein v. City of New York*, 255 N.Y.S. 696, 234 App.Div. 455.

Refusal to act

Court of general jurisdiction, however, may refuse to act as to matters over which an inferior court has been given jurisdiction.—*Schley v.*

Donlin, 225 N.Y.S. 453, 131 Misc. 208.

66. Tex.—*Wilson v. Donna Irr. Dist. No. 1, Hidalgo County*, Civ.App., 8 S.W.2d 187, error refused.

67. Tenn.—*Hancock v. Davidson County*, 104 S.W.2d 824, 171 Tenn. 420.

68. Mo.—*State v. Pinger*, 50 Mo. 486.

69. Ohio.—*State v. Corbett*, 148 N.E. 357, 113 Ohio St. 23.

Continued existence contemplated

A court is not divested of all jurisdiction immediately after the date of a constitutional amendment by which it is abolished, where it is the evident intent thereof that such tribunal should remain in existence with jurisdiction over specified subjects until a certain subsequent date.—*Brandon v. Bingaman*, 39 Miss. 505—15 C.J. p 865 note 75.

Existing courts

Where a statute is evidently intended to govern as to certain courts then existing, it will be so construed, even though the enactment is, by its terms, not to take effect until a stated time in the future.—*Milner v. Chicago, etc., R. Co.*, 42 N.W. 567, 77 Iowa 755.

Jurisdiction held continued

(1) Until such time as is specified for the judge of the new court to

enter on his duties.—*Gillis v. Barnett*, 38 Cal. 393—15 C.J. p 865 note 77.

(2) Until the time specified for the organization of the new court which succeeds the old court.—*Addams' Pet.*, 26 S.W. 182, 16 Ky.L. 45.

(3) Until the expiration of the terms of judges may govern the time of a change respecting the court becoming effective.—*Lafayette F. Ins. Co. v. Remmers*, 29 La. Ann. 419.

15 C.J. p 865 note 79.

70. Ohio.—*State v. Corbett*, 148 N.E. 357, 113 Ohio St. 23.

71. Ill.—*McAllister v. Ball*, 24 Ill. 149.

Mich.—*Richards v. Morton*, 18 Mich. 255.

N.C.—*Lash v. Thomas*, 86 N.C. 313.

72. Tex.—*Johnson v. State*, 153 S.W. 849, 69 Tex.Cr. 123.

73. Ga.—*Strickland v. Griffin*, 70 Ga. 541.

74. Ga.—*Livingston v. Livingston*, 24 Ga. 379.

75. Mo.—*Ex parte Snyder*, 64 Mo. 58.

76. Ga.—*Murray v. State*, 37 S.E. 111, 112 Ga. 7.

N.Y.—*Matter of Littmann*, 150 N.Y.S. 607, 88 Misc. 403.

the constitutional or statutory provision in question.⁷⁷ Even though the jurisdiction is somewhat different, a court may nevertheless be a continuation of an established court.⁷⁸ The mere addition of certain duties to those of the members of a court already existing is not a creation of a new court,⁷⁹ nor is a new court created by merely dividing the territorial jurisdiction of an established court, where no provision of the constitution imposes any limitation on the legislative power with respect to making such division or appointing a place in each division for holding the court.⁸⁰

77. Addition of new judge

(1) A new judge may be added by statute to an existing court without thereby creating a new court or constituting a legislative attempt to make the judges of an existing court judges of a new court.—*Ex parte Lloyd*, 20 P. 872, 78 Cal. 421.

(2) Where it is evident from the language of a new constitution that a new tribunal was not created, even though an additional judge was added, and that such court was not to be continued as before until the general assembly should elect an additional associate justice, it will be so construed.—*Middleton v. Taber*, 24 S.E. 282, 46 S.C. 337—*Land Mortg. Inv.*, etc., Co. v. *Faulkner*, 23 S.E. 516, 24 S.E. 288, 45 S.C. 503.

New courts not created

(1) Generally.

Ark.—*Ex parte King*, 217 S.W. 465, 141 Ark. 213.

Fla.—*State ex rel. Davis v. Rose*, 122 So. 225, 97 Fla. 710.

N.Y.—*City of New York v. Kaiser*, 210 N.Y.S. 598, 125 Misc. 637.

(2) A new court is not created within a constitutional prohibition by a charter provision wherein certain courts are "continued, consolidated, and reorganized under the name of 'The Municipal Court,'" etc., but such charter merely continues and reorganizes existing courts.—*Worthington v. London Guarantee*, etc., Co., 58 N.E. 102, 164 N.Y. 81, 31 N.Y.Civ.Proc. 274, reversing 62 N.Y. S. 591, 47 App.Div. 609—15 C.J. p 868 note 27.

(3) Court of limited and special jurisdiction is not created by conferring jurisdiction on department thereof.—*Ex parte Converse*, 198 P. 229, 45 Nev. 93.

78. Wis.—*State v. Scholl*, 167 N.W. 830, 167 Wis. 504.
15 C.J. p 868 note 26.

Court held not extinguished by combination with another court.—

Lewis v. Smith, Ark., 129 S.W.2d 229.

Ohio.—*State v. Cahill*, 171 N.E. 595, 122 Ohio St. 354.

79. Tex.—*San Antonio & A. P. Ry. Co. v. Blair*, 196 S.W. 1153, 108 Tex. 434—*San Antonio & A. P. Ry. Co. v. Blair*, 196 S.W. 502, 108 Tex. 434, denying error, Civ.App., 184 S.W. 566.

80. Ala.—*Lowery v. State*, 15 So. 641, 103 Ala. 50.

81. Mo.—*State ex rel. Allen v. Trimble*, 10 S.W.2d 519, 321 Mo. 230.

15 C.J. p 861 note 98.

82. Ala.—*McDaniel v. Youngblood*, 77 So. 674, 201 Ala. 260—*Ex parte City Bank & Trust Co.*, 76 So. 372, 200 Ala. 440.

Fla.—*Segel v. Staiber*, 144 So. 875, 106 Fla. 946—*State ex rel. Landis v. Dickenson*, 138 So. 376, 103 Fla. 907.

Ga.—*Wash v. Kennedy*, 99 S.E. 158, 23 Ga.App. 618.

15 C.J. p 865 note 82, p 861 note 97.

Actions considered pending

(1) Proceedings for the establishment and maintenance of a drainage district instituted in the chancery court of the county.—*Box v. Straight Bayou Drainage Dist.*, 84 So. 3, 121 Miss. 850.

(2) Other actions see 15 C.J. p 865 note 82 [b].

Causes which are transferred

(1) Where a court sitting in equity awarded the custody of a child to one of two rival claimants "until the further order of the court."—*McDaniel v. Youngblood*, 77 So. 674, 201 Ala. 260.

(2) Other causes see 15 C.J. p 865 note 82 [a].

Fulfillment of conditions

An act creating a new county and providing for a transfer to the courts of such county of actions pending in the courts of the old county, where the property in con-

§ 135. Transfer of Causes of Action and Jurisdiction

If such is the intent of the law, causes of action may and will be transferred from the original to the new or superseding court. The new court has such powers and jurisdiction as is vested in it by law.

In the absence of constitutional restriction,⁸¹ causes of action may and will be transferred where they come within the terms of a constitution or statute providing therefor.⁸² Indeed, unless a contrary intent is expressed in the constitutional or statutory provision,⁸³ causes pending in abolished courts have been held to be transferred by operation of law to the new courts;⁸⁴ without the necessity for any certificate⁸⁵ or order transferring them.⁸⁶ A trans-

troverly is situated in the new county, does not divest the jurisdiction of the courts of the old county until the conditions of transfer are fulfilled.—*Sanford v. Ainsa*, 33 S.Ct. 704, 228 U.S. 705, 57 L.Ed. 1033, affirming 114 P. 560, 13 Ariz. 287.

Matters included

A motion in the case is included when jurisdiction is legally transferred.

Ala.—*Kavanaugh v. State Bank*, 21 Ala. 564.

Cal.—*Chipman v. Bowman*, 14 Cal. 157.

Validity of statute

A statute transferring certain cases from one court to another does not violate a constitutional provision vesting in the court the power to change the venue.—*Armstrong v. Emmet*, 41 S.W. 87, 16 Tex.Civ.App. 242.

83. Motion for transfer

Where a statute so requires, a motion for a transfer must be filed before the case is set for trial.—*State v. Oklahoma County Super. Ct.*, 136 P. 424, 40 Okl. 120.

Jurisdiction to issue process

Where a suit was pending in one court at the time of the enactment of a law organizing a new court which would have jurisdiction of the case, the jurisdiction of the old court over the action, to issue process therein, was held to be continued until an order was made therein transferring the case to the new court.—*Stone v. Martin*, 1 Tex.A.Civ. Cas. § 87.

84. Ala.—*Thompson v. Johnson*, 78 So. 91, 201 Ala. 315—*McDaniel v. Youngblood*, 77 So. 674, 201 Ala. 260.

15 C.J. p 865 note 83.

85. Fla.—*Easterlin v. State*, 31 So. 350, 43 Fla. 365.

86. N.Y.—*People v. Hoch*, 44 N.E. 976, 150 N.Y. 291.
15 C.J. p 865 note 85.

fer of the authority of one court to another will not revoke the authority given to a committee by the first court.⁸⁷

Appeals. While the abolition of an inferior court may abridge the appellate jurisdiction theretofore possessed by another court over its judgments,⁸⁸ it does not have such effect as to cases pending on appeal at the time of abolition.⁸⁹ Where a new appellate district is created, or where there has been a redistricting of existing appellate districts, pending appeals will be transferred to the appellate court having jurisdiction thereof when a statute⁹⁰ or valid order of the supreme court⁹¹ so provides; but in the absence of such a statute or order, appeals which have been perfected prior to the effective date of the statute will not be transferred to the court having jurisdiction under the new statute.⁹² Where a statute provided that all

causes pending in the court when the act took effect should be transferred to another court and be triable there, a cause originally tried in the former court, which, when the act took effect, was awaiting determination on appeal, was, when the appeal was dismissed, within the jurisdiction of the latter court.⁹³

Authority of new or superseding court. The authority or jurisdiction of the new or superseding court depends, of course, on that vested in it by the constitutional or statutory provision in question.⁹⁴ Accordingly, it may be vested with the powers and jurisdiction formerly resting in the old or superseded court,⁹⁵ as well as the jurisdiction formerly possessed by itself, if it was already an existing court.⁹⁶ If such is the intent of the law, the new court will obtain and may proceed to exercise jurisdiction over causes lawfully transferred to it.⁹⁷

87. Mass.—Brown v. Somerset County, 11 Mass. 221.

88. Fla.—Ferlita v. Figarota, 145 So. 605, 106 Fla. 578.

89. Fla.—Ferlita v. Figarota, supra—Whitlock v. American Central Ins. Co. of St. Louis, 144 So. 412, 107 Fla. 13.

90. Tex.—Keator v. Whittaker, 143 S.W. 607, 104 Tex. 628.

91. Tex.—Kennedy v. Wheeler, Civ. App., 256 S.W. 315.

92. Tex.—Fry v. Barron, 299 S.W. 230, 117 Tex. 170.
15 C.J. p 866 note 91.

93. Mo.—Sperling v. Stubblefield, 79 S.W. 1172, 105 Mo.App. 429.

94. **No extension of jurisdiction**
A statute authorizing the transfer of suits from one circuit court to another, and giving the latter jurisdiction "to hear causes so transferred in like manner as if the same had been originally brought in said court," does not extend the jurisdiction of such court.—Coles v. First Baptist Church, 35 A. 907, 59 N.J.Law 311.

95. **Abolition of distinction between law and equity**

Under constitutional provisions abolishing distinctions between actions at law and suits in equity, and providing that actions at law and suits in equity should be transferred to courts having jurisdiction thereof, superior courts became successors of courts of equity, with jurisdiction and equitable powers of courts of equity, unless restrained by statute.—Reynolds v. Reynolds, 182 S.E. 341, 208 N.C. 578.

Statute not repealed

A statute vesting exclusive jurisdiction over certain suits in a particular court is not repealed by a statute abolishing such court and

vesting its jurisdiction in another, as such a statute does not relate merely to the establishment of such court.—State of North Dakota ex rel. Lemke v. Chicago & N. W. Ry. Co., N.D., 42 S.Ct. 170, 257 U.S. 485, 66 L.Ed. 329.

96. Or.—In re Norman's Estate, 78 P.2d 346, 159 Or. 197.

97. Ala.—Denson v. Stanley, 84 So. 770, 17 Ala.App. 198, certiorari granted and reversed on other grounds Ex parte Stanley, 84 So. 773, 203 Ala. 408.

Fla.—State ex rel. Landis v. Dickenson, 138 So. 376, 103 Fla. 907.

Ga.—Wash v. Kennedy, 99 S.E. 158, 23 Ga.App. 618.

Miss.—Davis v. Watson, 54 Miss. 679.

N.Y.—Hertzberg v. Hertzberg, 296 N.Y.S. 169, 251 App.Div. 278, modifying 289 N.Y.S. 708, 159 Misc. 644.

15 C.J. p 866 note 93.

New or superseding court may

(1) Amend records relating to the judicial action of the superseded court.—Forsyth County v. Blackburn, 68 N.C. 406.

(2) Appoint a receiver.—Wegman v. Childs, 41 N.Y. 159, reversing 44 Barb. 403.

(3) Entertain supplementary proceedings.—Wegman v. Childs, supra.

(4) Hear an excuse submitted for a delay in filing the statement of facts on appeal after the transfer of the record from the superseded court.—Keator v. Whittaker, 143 S.W. 607, 104 Tex. 628.

(5) Hold the remainder of a term which was in session when the statute took effect.—Commonwealth v. Skiffington, 14 Gray, Mass., 381.

(6) Modify, set aside, or vacate its decrees and orders.

Ga.—Wash v. Kennedy, 99 S.E. 158, 23 Ga.App. 618.

N.Y.—Sherman v. Felt, 2 N.Y. 186, 3 How.Pr. 425.

Ohio.—Graft v. Graft, 6 Ohio App. 260.

(7) Proceed to comply with former court's mandate, filed before its abolition.—Segel v. Staiber, 144 So. 875, 106 Fla. 946.

(8) Set aside former submission in chancery court and have resubmission, or render decision on original submission.—Thompson v. Johnson, 78 So. 91, 201 Ala. 315.

(9) Try de novo a transferred cause.

La.—State v. Mathews, 33 La. Ann. 103.

N.D.—Tubbs v. Sather, 158 N.W. 276, 84 N.D. 284.

(10) Other matters see 15 C.J. p 866 note 93 [a].

In pending proceedings

(1) A constitutional provision that a city court "shall have and exercise the equity jurisdiction previously vested in the respective County Courts from which such cases are so transferred, but not otherwise" vested the city court with equity jurisdiction only in cases pending in the county court and transferred to it.—People ex rel. Clark v. Adel, 220 N.Y.S. 696, 129 Misc. 82.

(2) Annual examinations of incompetents' accounts and inventories are not matters "pending" in county court, and jurisdiction did not pass to the city court.—People ex rel. Clark v. Adel, 220 N.Y.S. 696, 129 Misc. 82.

Removal from county

A statute providing for transfer on organization of new county, of suits pending in county or city courts of old county to superior court of new county, was inapplicable to suit filed in city court of old county against defendant who had

On the other hand, the new or superseding court will not, as a general rule, review the judgments and decrees rendered in the original court for alleged error committed prior to the organization of the new court.⁹⁸ It has been held that, where an appeal is lost by reason of the abolition of a court and the transfer of its business, the new court cannot set aside a verdict and grant a new trial;⁹⁹ and that, where an action was not pending in a court at the time of the taking effect of a constitutional provision abolishing such court and vesting another court with jurisdiction of all actions and proceedings pending therein, the superseding court had no power to order exceptions taken in the former court to be heard in the first instance by the superseding court.¹ A statute conferring jurisdiction has been held not to operate to give jurisdiction over causes of action arising before the passage of the act.²

Authority of old or superseded court. In the absence of a clearly expressed intention, a statute depriving a court of jurisdiction does not operate retrospectively to suspend pending proceedings,³ and if the statute is not imperative in requiring the transfer of all causes, the original court may continue to exercise jurisdiction over an action commenced therein.⁴ On the other hand, a court may

not entertain proceedings over which its jurisdiction has been terminated,⁵ and where the jurisdiction of the old or superseded court has been completely terminated, pending cases should be transferred to the new court.⁶ Where the court is not abolished but is deprived of jurisdiction over certain matters, the power to enforce the decrees already entered continues in the original court,⁷ and the mere fact that the power of a court to deal with certain questions has been terminated does not deprive it of jurisdiction to set aside a former erroneous decree as to such matters.⁸ A division of a county or a judicial district will not oust jurisdiction which has already attached,⁹ unless express prohibitory words are used in the statute,¹⁰ or where there is a saving clause;¹¹ and a judge who has tried a cause may make and file a decision after the county is attached to another district, even though he is not a judge thereof.¹²

Practice, procedure, process, and defenses. If a court under a new constitution is a continuation of an established one, and no change is made in the practice or procedure therein, the former laws regulating the practice of the old courts will be in force;¹³ and where the constitution provides for a transfer of causes to the superseding court to be proceeded with as though the old courts had not

moved from such county after institution of suit but before organization of new county, notwithstanding return of such defendant after creation of new county, and the suit was not transferable either at time of creation of new county or at time of his return. In any event, the right to transfer of suit was waived by trial of case twice in original county without objection of either party.—*Subers v. Hirschensohn*, 127 S.E. 825, 33 Ga.App. 752.

Statutory tribunal to entertain jurisdiction of the subject matter is the court invested with such jurisdiction at the time the proceedings are had.—*Taylor v. Dew*, 184 So. 184, 236 Ala. 624.

98. Ga.—*Saunders v. Smith*, 3 Ga. 121.

15 C.J. p 810 note 75.

99. N.H.—*Cummings v. White Mountains R. Co.*, 43 N.H. 114.

1. N.Y.—*Fifth Ave. Bank v. Forty-Second St., etc., R. Co.*, 40 N.Y.S. 219, 6 App.Div. 567.

15 C.J. p 867 note 4.

2. Mo.—*Mott Store Co. v. St. Louis, etc., R. Co.*, 158 S.W. 108, 173 Mo. App. 189.

3. Cal.—*Hopkins v. Anderson*, 21 P. 2d 560, 218 Cal. 82.

Mo.—*Mott Store Co. v. St. Louis, etc., R. Co.*, 158 S.W. 108, 173 Mo. App. 189.

Appointment of receiver

Circumstances of the case may justify the chancellor of the abolished court in appointing a receiver to hold and preserve property.—*In re Colvin*, 3 Md.Ch. 278.

4. Cal.—*Hopkins v. Anderson*, 21 P. 2d 560, 218 Cal. 82.

Ohio.—*Smedley v. State*, 115 N.E. 1022, 95 Ohio St. 141.

15 C.J. p 867 note 9.

Retroactive curative statute

Although under an amendment to the constitution transferring all actions and proceedings pending in certain county courts on Jan. 1, 1927 to the city court, a judgment signed by the county court judge Dec. 30, 1926, was improperly entered in the county clerk's office on Feb. 3, 1927, such entry became effective under a subsequent statute legalizing and confirming validity of entries of all judgments in such actions in county clerk's offices since Jan. 1, 1927.—*Parsons v. Benann Holding Corporation*, 221 N.Y.S. 522, 129 Misc. 680.

5. U.S.—*Henrietta First Moon v. Starling White Tail, Okl.*, 48 S. Ct. 246, 270 U.S. 243, 70 L.Ed. 565.—*U. S. v. Johnson*, D.C.Wash., 53 F.2d 267.

Fla.—*State ex rel. Whyte v. Gray*, 156 So. 493, 116 Fla. 510.

Abolished or superseded court cannot

(1) Sign a bill of exceptions.—*Reed v. Worland*, 64 Ind. 216.

(2) Try actions.—*State v. Lackey*, 2 Ind. 285—15 C.J. p 867 note 6.

(3) Overrule exceptions so as to bind the new court.—*Parker v. Shropshire*, 26 La. Ann. 37.

(4) Remove an administrator and appoint his successor.—*Linge v. Alaska Treadwell Co.*, 3 Alaska 9.

6. Ind.—*Warner v. State*, 181 N.E. 45, 92 Ind.App. 220.

Power to enter order

A court whose jurisdiction is superseded may order the transfer of causes pending at the time of such supersession.—*Sharpleigh v. Cooper*, 1 Tex.A.Civ.Cas. § 55.

7. Ohio.—*In re Whallon*, 26 Ohio Cir.Ct., N.S., 167.

8. U.S.—*Ya-koot-sa v. U. S.*, C.C.A. Or., 262 F. 398.

9. Miss.—*Box v. Straight Bayou Drainage Dist.*, 84 So. 3, 121 Miss. 850.

15 C.J. p 867 note 11.

10. Mo.—*State v. St. Louis County Ct.*, 38 Mo. 402.

11. Mass.—*Drury v. Midland R. Co.*, 127 Mass. 571.

12. Minn.—*Darelius v. Davis*, 77 N. W. 214, 74 Minn. 845.

13. N.Y.—*Onderdonk v. Mott*, 34 Barb. 106.

15 C.J. p 867 note 16.

been abolished, the legislature has the right to provide for and regulate the modes of procedure therein, and to prescribe what proceedings in regard thereto should be taken by the court and the parties in the specified cases.¹⁴ The mode of procedure of an abolished court, however, is not transferred to another court which has an established mode of procedure of its own, merely because cases in the abolished court are transferred;¹⁵ and the law of the court to which a suit is transferred, under a statute providing for such removal, regulates the practice.¹⁶ A writ cannot be issued from a court not in existence, as where the statute appointing the court has not taken effect,¹⁷ although process may be regular notwithstanding the fact that on the day of its issuance no judges were commissioned.¹⁸ The filing of the record in the appellate court where the case is pending has been held to be proper, notwithstanding that prior to such filing a new appellate court having jurisdiction had

been created by statute.¹⁹ As to defenses, it is a general rule that such as were available in the old court may be relied on in the new where a cause of action has been lawfully transferred.²⁰

§ 136. Judicial Departments, Circuits, and Districts

Where authorized to do so, the legislature may create, change, or increase or decrease the number of judicial circuits or districts, but in exercising such power the legislature must be governed by constitutional requirements.

The state constitutions usually divide the state into judicial departments, circuits, or districts,²¹ or give to the legislature the power to make such a division.²² Where the constitution expressly or by necessary implication so permits, the legislature may change judicial districts or circuits,²³ may detach and attach counties and districts,²⁴ and increase²⁵ or diminish²⁶ the number thereof from time to time

14. Ind.—Hollingsworth v. State, 12 N.E. 490, 111 Ind. 289.

15 C.J. p 867 note 17.

15. Ind.—Ellison v. State, 24 N.E. 739, 125 Ind. 492.

16. U.S.—Alexandria Canal Co. v. Swann, D.C., 5 How. 83, 12 L.Ed. 60.

Appeals

A statute relating to appeals from an order granting or refusing a new trial, and applicable to the new court to which probate matters are transferred by the constitution, governs instead of the statute which related to probate appeals in the old court.—In re Davis, 27 P. 342, 11 Mont. 1—15 C.J. p 867 note 20.

17. Ill.—Coleen v. Figgins, 1 Ill. 19, 15 C.J. p 868 note 22.

18. Pa.—Evans v. Webb, 4 Pa.L.J. 318.

19. Tex.—Kennedy v. Wheeler, Civ. App., 256 S.W. 315.

20. U.S.—Alexandria Canal Co. v. Swann, D.C., 5 How. 83, 12 L.Ed. 60.

21. Mont.—State v. Cooney, 225 P. 1007, 70 Mont. 355, 15 C.J. p 868 note 31.

22. S.C.—State v. Cooler, 98 S.E. 845, 112 S.C. 95—State v. Manups, 92 S.E. 1053, 107 S.C. 345.

15 C.J. p 868 note 32, p 860 note 89, p 861 note 94.

Judicial district defined

(1) By "judicial district" is meant a political and convenient arrangement for electing district court judges and designating their territorial jurisdiction. — Consolidated Flour Mills Co. v. Muegge, 260 P. 745, 127 Okl. 295, reversed on other grounds 49 S.Ct. 17, 278 U.S. 559, 73 L.Ed. 505.

(2) Other definitions see 34 C.J. p 1182 notes 2, 3.

23. Ala.—Ex parte Johnson, 84 So. 803, 203 Ala. 579.

Pa.—Commonwealth v. Wehr, 17 Pa. Dist. & Co. 689.

Tex.—Chambers v. Baldwin, Com. App., 282 S.W. 793, reversing, Civ. App., 274 S.W. 1011—Porch v. Rooney, Civ.App., 275 S.W. 494.

Wyo.—Brown v. Clark, 34 P.2d 17, 47 Wyo. 216.

15 C.J. p 868 note 33, p 861 note 93, p 860 note 89.

Effect of change

(1) Under some laws district courts exist as district courts of a particular county, and not as district courts of a particular judicial district; and where by a statute a county is detached from one judicial district and attached to another, the terms of court are not changed by law.—Consolidated Flour Mills Co. v. Muegge, 260 P. 745, 127 Okl. 295, reversed on other grounds 49 S.Ct. 17, 278 U.S. 559, 73 L.Ed. 505—Ex parte Worley, 66 P.2d 107, 60 Okl.Cr. 384.

(2) It has also been held that the placing of the court in a new judicial district does not affect pending cases.—Paddy v. State, 49 S.W.2d 745, 120 Tex.Cr. 565.

(3) Accordingly, the transfer by law of a county from one judicial circuit to another does not affect the validity of judgments obtained in the county or proceedings thereon.—Sendoya v. Chattanooga Brewing Co., 74 So. 801, 73 Fla. 648.

Entire state one district

Statute held not to have made entire state one judicial district in which any and all circuit judges might be said to sit regularly in any and all circuits.—Lamb v. Board of

Auditors of Wayne County, 209 N.W. 195, 235 Mich. 95.

Municipal court

Under Kansas City Charter, art 4 §§ 8, 10, common council had right, not only to fix boundary line of divisions of municipal court in ordinance creating them, but to change them from time to time, even during term for which judge had been elected and was serving.—State ex rel. Russell v. Gardner, 265 S.W. 986, 218 Mo.App. 217.

Power not restricted

(1) Provision of constitution that judges may or shall hold court for each other does not restrict power of legislature to change boundaries of districts.—Brown v. Clark, 34 P.2d 17, 47 Wyo. 216.

(2) Other provisions not restricting power see 15 C.J. p 868 note 33 [a].

Statute construed and held to reorganize judicial districts, and not to abolish districts.—State v. Manry, 16 S.W.2d 809, 118 Tex. 449.

24. Okl.—Ex parte Worley, 66 P.2d 107, 60 Okl.Cr. 384, 15 C.J. p 861 note 91.

25. Ind.—State ex rel. Wadsworth v. Wright, 5 N.E.2d 504, 211 Ind. 41.

La.—State ex rel. Garland v. Guilory, 166 So. 94, 184 La. 329, 15 C.J. p 868 note 34, p 861 note 90, p 861 note 2.

26. Fla.—State ex rel. Landis v. Bird, 163 So. 248, 120 Fla. 780, 15 C.J. p 861 note 90.

Construction of amendment

Constitutional amendment relating to reapportionment and reduction of judicial circuits and circuit judges did not work any changes in circuit

as may be deemed necessary and proper. On the other hand, in the absence of constitutional authorization, the legislature has no power either to create or abolish judicial circuits as established or permitted to be established under the constitution.²⁷

In exercising the power to create or change ju-

dicial districts, the legislature must, of course, be governed by constitutional requirements,²⁸ such as to population,²⁹ equality of population,³⁰ territory,³¹ and number³² of districts, contiguity of counties in the same district,³³ and compactness of geographical form of districts,³⁴ and the business involved in

courts system, except such as might be necessarily implied for accomplishment of reapportionment and reduction, and did not repeal or amend constitutional provisions relating to judiciary.—State ex rel. Landis v. Thompson, 163 So. 270, 120 Fla. 860.

Holding of election

A constitutional provision that "Nor shall the boundary of any judicial district in a county be changed, unless, at an election held for that purpose, two-thirds of those voting assent thereto" is inapplicable to the abolition of a line and a merger of districts. Statute held to authorize submission to voters of question whether line between judicial districts should be abolished.—Mulliner v. Bouldin, 131 So. 364, 159 Miss. 212.

Provision "until otherwise provided by law," as used in constitution respecting judicial districts, authorizes legislature to reduce number of judicial districts.—Brown v. Clark, 34 P.2d 17, 47 Wyo. 216.

Reapportionment

Under a constitutional provision requiring reapportionment and reduction of judicial circuits, judicial circuits which are unchanged remain in existence without being continued.—State ex rel. Landis v. Bird, 163 So. 248, 120 Fla. 780.

Statute held not to abolish judicial district.—Sibley v. Continental Supply Co., Tex.Civ.App., 290 S.W. 769, error denied 292 S.W. 155, 116 Tex. 403.

27. Fla.—State ex rel. Landis v. Thompson, 163 So. 270, 120 Fla. 860.

Pa.—Commonwealth v. Gamble, 62 Pa. 343, 1 Am.R. 422.

Reason for rule

Legislature enacting laws concerning circuit courts and circuit judges of general jurisdiction acts solely as agency of people under delegated authority which must be found in constitution, and not under its general power to legislate.—State ex rel. Landis v. Thompson, 163 So. 270, 120 Fla. 860.

28. Fla.—State ex rel. Landis v. Thompson, *supra*.

Nev.—State ex rel. Wichman v. Gerbig, 24 P.2d 313, 55 Nev. 46.

Tex.—Reasonover v. Reasonover, 58 S.W.2d 817, 122 Tex. 512, answering certified questions, Civ.App., 59 S.W.2d 887.

Constitutional qualifications held applicable to creation of additional districts, and not applicable solely to first division of state by legislature.—Willis v. Jonson, 121 S.W.2d 904, 275 Ky. 538.

Mere surplusage in act which violates constitutional requirements may be disregarded.—State ex rel. Landis v. Thompson, 163 So. 270, 120 Fla. 860.

Constitutional provisions in pari materia should be read together in determining limitations on legislature's power over judicial districts.—Howard v. Ferguson, 180 S.E. 529, 116 W.Va. 362.

Statutes held not violative of requirement

(1) That right of appeal be preserved.—Bonner v. Jackson, 251 S.W. 1, 158 Ark. 526.

(2) That legislature pass a "suitable law" for reduction of number of circuits.—State ex rel. Landis v. Thompson, 163 So. 270, 120 Fla. 860.

29. Ky.—Willis v. Jonson, 130 S.W. 2d 828, 279 Ky. 416—Willis v. Jonson, 121 S.W.2d 904, 275 Ky. 538—Nolan v. Jones, 284 S.W. 1054, 215 Ky. 288.

15 C.J. p 869 note 35.

30. Ill.—People v. Rose, 67 N.E. 746, 203 Ill. 46.

31. Ky.—Willis v. Jonson, 121 S.W. 2d 904, 275 Ky. 538—Fields v. Nickell, 58 S.W.2d 912, 248 Ky. 526.

15 C.J. p 869 note 37.

Accessibility and convenience

Under constitutional provision concerning the creation of judicial districts, the elements of accessibility and convenience were a primary consideration of framers of constitution in providing that due regard should be given the territory affected.—Willis v. Jonson, 130 S.W.2d 828, 279 Ky. 416.

District divided by rivers

As regards constitutionality of act creating new judicial district, the general assembly failed to act with due regard to territory involved as required by constitution, where the new judicial district created by legislature was located on both sides of rivers which traversed its territory from end to end, and which could not be crossed during times of high water because there were no bridges, and new district was much larger than any of the old districts, and

was almost twice as large as the other districts involved after the creation of the new district.—Willis v. Jonson, 121 S.W.2d 904, 275 Ky. 538.

Single county as district

(1) Where the constitution so permits, a county of a certain population may alone constitute a judicial circuit or district.

Ala.—State v. Black, 74 So. 387, 199 Ala. 321.

S.C.—State v. Cooler, 98 S.E. 845, 112 S.C. 95—State v. Mappus, 92 S.E. 1053, 107 S.C. 345.

(2) Where the constitutional provision also requires that a city of a certain population be in the county, it refers to a city having that number of bona fide residents within its corporate limits.—Nolan v. Jones, 284 S.W. 1054, 215 Ky. 288.

Division of county

(1) Some constitutions contemplate no such thing as a judicial circuit to be composed of a mere subdivision of a county; a county as a whole being the minimum territorial limit of a circuit, and then only when having a certain population and property valuation.—In re Opinions of the Justices, 117 So. 50, 217 Ala. 602.

(2) It has also been held that a portion of a county, not constituting either a city or village, cannot be severed for local judicial purposes from the rest, leaving it a unit for all other purposes of civil government.—People ex rel. Townsend v. Porter, 90 N.Y. 68—People v. Boice, 118 N.Y.S. 500, 63 Misc. 357.

(3) On the other hand, in the absence of constitutional restriction, the legislature may divide a county into judicial districts, and define the power and jurisdiction of the courts therein situated.

Ark.—Williams v. Montgomery, 17 S.W.2d 875, 179 Ark. 611—Cowger v. Ellison, 299 S.W. 1031, 175 Ark. 478.

Tex.—Kruegel v. Daniels, 109 S.W. 1108, 50 Tex.Civ.App. 215.

32. Ky.—Brown v. Moss, 105 S.W. 139, 126 Ky. 833, 31 Ky.L. 1288. 15 C.J. p 869 note 38.

33. Ill.—People v. Rose, 67 N.E. 746, 203 Ill. 46. 15 C.J. p 860 note 39 [c].

34. Ill.—People v. Rose, *supra*.

the districts.³⁵ So, also, where the constitution permits this power to be exercised at certain times only, such limitation is binding.³⁶ Where a discretion is delegated to the legislature in these respects, if it acts within the constitutional restrictions on the exercise of such power,³⁷ its exercise will not be reviewed by the courts unless it appears that there was a gross abuse of discretion.³⁸

The division of a single county attached to an existing judicial district into two counties will, unless otherwise provided, leave both counties within the same district.³⁹ Where the statute so provides, the courts of one district will not have jurisdiction over matters arising in, or persons residing in, other districts, even though both districts are wholly in one county.⁴⁰

35. Ky.—*Willis v. Jonson*, 130 S.W. 2d 828, 279 Ky. 416.—*Willis v. Jonson*, 121 S.W.2d 904, 275 Ky. 538.

36. Pa.—*Noecker v. Woods*, 102 A. 507, 259 Pa. 160.

W.Va.—*Howard v. Ferguson*, 180 S.E. 529, 116 W.Va. 362.

15 C.J. p 869 note 42, p 860 note 89 [a], p 861 note 91 [a].

Times at which power may be exercised

(1) First session after enumeration.—*Fields v. Nickell*, 58 S.W.2d 912, 248 Ky. 526.

(2) Expiration of elective term of circuit judges, where county is transferred from one district to another.—*Howard v. Ferguson*, 180 S.E. 529, 116 W.Va. 362.

37. Ky.—*Willis v. Jonson*, 121 S.W. 2d 904, 275 Ky. 538.

Conditions as a whole must be considered by the legislature, having due regard for the several factors set forth by the constitution.—*Willis v. Jonson*, 130 S.W.2d 828, 279 Ky. 416.

38. Ark.—*Bonner v. Jackson*, 251 S.W. 1, 158 Ark. 526.

15 C.J. p 869 note 41, p 860 note 89 [b].

Authority of court

In suit attacking validity of statute creating a new judicial district, the authority of the courts was to determine whether there was any evidence to support legislative conclusion that a new district was necessary or to show that legislature had due regard for the factual conditions viewed as a whole; the courts cannot treat the factors of territory, business, and population separately.—*Willis v. Jonson*, 130 S.W.2d 828, 279 Ky. 416.

Presumption in favor of act

In suit challenging validity of statute creating a new judicial district, the determination of the legislature would be presumed to have

been supported by facts known to it, unless facts judicially known or proved precluded such possibility.—*Willis v. Jonson*, 130 S.W.2d 828, 279 Ky. 416.

39. Mich.—*People v. Maynard*, 15 Mich. 463.

40. Ark.—*Cowger v. Ellison*, 299 S.W. 1031, 175 Ark. 478.

41. La.—*Piazza v. McDermott*, 101 So. 269, 156 La. 930.

Mo.—*Title Guaranty & Surety Co. v. Drennon*, App., 208 S.W. 474. 15 C.J. p 869 note 45.

42. Ala.—*McCreless v. Tennessee Valley Bank*, 94 So. 722, 208 Ala. 414.—*Hardeman v. State*, 99 So. 53, 19 Ala.App. 563.

Ga.—*McCall v. State*, 103 S.E. 428, 150 Ga. 81.—*Fountain v. State*, 101 S.E. 294, 149 Ga. 519, reversing 98 S.E. 178, 23 Ga.App. 113, opinion conformed to 101 S.E. 712, 24 Ga. App. 558.

Ind.—*State v. Greenwald*, 116 N.E. 296, 186 Ind. 321. 15 C.J. p 869 note 46.

Jurisdiction over particular proceedings

(1) A constitutional provision which confers jurisdiction over certain matters on the superior courts does not confer on each of such courts concurrent jurisdiction of such matters coextensive with the state so as to prevent the legislature from designating particular proceedings which shall be exclusively within the jurisdiction of one of such courts.—*Elberta Oil Co. v. Superior Court of California in and for Kings County*, 239 P. 415, 74 Cal.App. 114.

(2) Thus, a constitutional provision conferring jurisdiction in all matters of probate on the superior court does not mean that the superior courts in the state have concurrent jurisdiction in every particular probate matter, but the legislature has the right to prescribe which

§ 137. Divisions and Parts of Courts

A court which is divided into divisions or departments remains a unit notwithstanding; actions brought in any of the departments are in effect in the same court, and decisions and judgments therein are rendered by the same tribunal. The department to which a case is assigned has exclusive jurisdiction of it unless or until the case is transferred or reassigned to another department.

It frequently happens that a court is divided into a number of different departments, parts, or divisions,⁴¹ and the legislature has power so to regulate the business of a court in the absence of any constitutional prohibition,⁴² but the creation of divisions by a court in contravention of constitutional or statutory provisions is invalid.⁴³ Cases are assigned to the various divisions or departments as provided by statute or rule of court,⁴⁴ and a litigant

court shall exercise jurisdiction of the particular estate.—*Duncan v. Fresno County Super. Ct.*, 84 P. 767, 149 Cal. 98, 117 Am.S.R. 119.

Alabama statute not repealed by amendment

Local Acts 1919 p 12, amending Acts 1909 p 14, which provided for a branch of the circuit court of Marshall county at Albertville does not repeal it, and the court still remains as a branch of the circuit court of Marshall county, and the old court is not abolished.—*Lang v. State*, 89 So. 164, 18 Ala.App. 88, certiorari denied 89 So. 166, 206 Ala. 58.—*Kuykendall v. State*, 87 So. 878, 17 Ala.App. 582, certiorari denied 87 So. 882, 205 Ala. 218.

43. Cal.—*Fay v. District Court of Appeal, Second Appellate Dist.*, Division 2, 254 P. 896, 200 Cal. 522. Fla.—*City of Coral Gables v. Blount*, 178 So. 554, 131 Fla. 36.

44. Fla.—*State ex rel. Palmer v. Atkinson*, 156 So. 726, 116 Fla. 366, 96 A.L.R. 539.

La.—*Merrick v. Southern Publishing Co.*, 75 So. 74, 141 La. 342.

Mo.—*State ex rel. MacNish v. Landwehr*, 60 S.W.2d 4.—*State ex rel. Clinton Const. Co. v. Johnson*, 273 S.W. 928.—*Meierhoffer v. Hansell*, 243 S.W. 131, 294 Mo. 195.—*For-Miller Grain Co. v. Stephens*, App., 217 S.W. 994.

N.Y.—*Ford v. Clarke*, 197 N.Y.S. 424, 204 App.Div. 5, affirmed 142 N.E. 302, 236 N.Y. 606.

Necessity for assignment

In accordance with statute or rule of court, a division has no authority to hear a case until it has been assigned to it.—*Hallinan v. Superior Court in and for City and County of San Francisco*, 81 P.2d 254, 27 Cal. App.2d 433.

Mo.—*Meierhoffer v. Hansell*, 243 S.W. 131, 294 Mo. 195.

has no inherent right to have a case tried by a particular division or judge.⁴⁵ Cases of a particular nature should be assigned to the department designated by statute or rule of court for that type of case,⁴⁶ but jurisdiction is not dependent on a proper assignment and an irregularity in an assignment presents no question of jurisdiction in the ordinary sense of the term,⁴⁷ and the irregularity is waived or cured by the absence of a timely objection thereto.⁴⁸ An assignment of the first of several identical suits will carry all the others to the same division of the court.⁴⁹ In the absence of any rules of court, after business had been distributed among

different departments by an order of court concurred in by all the judges, the order should be held binding until revoked or modified by the same authority.⁵⁰

The court remains a unit notwithstanding such a division;⁵¹ and where the constitution vests the power in the court and not in departments, which are merely for convenience, the judges hold but one and the same court whether sitting separately or together.⁵² Actions brought in any of such departments are in effect in the same court, and decisions and judgments therein are rendered by the same tribunal,⁵³ although where a case is assigned or al-

45. La.—Robertson v. Cambon, 146 So. 738, 176 La. 753.

Mo.—Dawson v. Scott, 49 S.W.2d 87. Mont.—State ex rel. Clark v. Bailey, 44 P.2d 740, 99 Mont. 484.

Practice not commended

The practice of attempting to maneuver a cause before a particular judge is not commended.—Hilton v. Mack, 15 N.Y.S.2d 187, 257 App.Div. 709.

46. Or.—Leonard v. Ekwall, 264 P. 463, 124 Or. 351.

Jury cases

A rule of court requiring all jury cases when at issue to be transferred to a certain division means that the case shall be transferred when it is ready for trial on the merits and until then the other divisions are to retain jurisdiction.—Plaza Amusement Co. v. Frank Rubenstein & Co., 111 So. 702, 163 La. 272.—Briggs v. Aiken, 93 So. 917, 152 La. 607.

Probate matters

Or.—Leonard v. Ekwall, 264 P. 463, 124 Or. 351.

47. Ark.—Blackstad Mercantile Co. v. Bond, 148 S.W. 262, 104 Ark. 45. Cal.—White v. San Francisco Super. Ct., 42 P. 480, 110 Cal. 60.—People v. Barbera, 248 P. 304, 78 Cal.App. 277.

La.—Byrnes v. Byrnes, 38 So. 991, 115 La. 275.—Succession of Murray, 6 La.A., Orleans, 283.

Mo.—State ex rel. MacNish v. Landwehr, 60 S.W.2d 4.

N.Y.—Dairy Sealed, v. Ten Eyck, 288 N.Y.S. 641, 159 Misc. 716, reversed on other grounds 289 N.Y.S. 85, 248 App.Div. 352, followed in Sunshine Farms v. Ten Eyck, 289 N.Y. S. 89, 248 App.Div. 814, and Sheehy v. Ten Eyck, 289 N.Y.S. 89, 248 App.Div. 814.

Designation of division for particular type of case

The fact that a certain division is designated to handle a particular type of case does not deprive the other divisions of jurisdiction if cases of that type are allotted to

them.—State ex rel. MacNish v. Landwehr, Mo., 60 S.W.2d 4.

48. La.—State ex rel. Marchand v. Judge of Division A, Civil Dist. Court, 10 So. 768, 44 La.Ann. 190.—James v. Meyer, 8 So. 575, 43 La. Ann. 38.—Succession of Murray, 6 La.A., Orleans, 283.

Mo.—Fox-Miller Grain Co. v. Stephens, App., 217 S.W. 994.

49. La.—State v. Judges Civil Dist. Ct., 18 So. 632, 47 La.Ann. 1601.

Proceedings previously pending

Under rule of court, cases growing out of other suits or proceedings previously pending or involving a common fund shall follow the assignment of the original suit or go to the division first acquiring jurisdiction of the fund.—Merrick v. Southern Publishing Co., 75 So. 74, 141 La. 342.

Assignment on subsequent appeal

A cause which has previously been in the appellate court is on a subsequent appeal assigned to that branch which decided it on prior review; but, if through inadvertence it is assigned to another branch, the assignment is, with the consent of that branch, vacated.—Tarallo v. L. W. Hubbell Fertilizer Co., 209 Ill. App. 500.

50. Mont.—State v. Donlan, 80 P. 244, 32 Mont. 256.

51. Ariz.—Faires v. Frohmiller, 67 P.2d 470, 472, 49 Ariz. 366, quoting *Corpus Juris*—Peterson v. Speakman, 66 P.2d 1023, 49 Ariz. 342.—Gordon v. Reeves, 267 S.W. 133, 166 Ark. 601.

Cal.—Tubby v. Tubby, 260 P. 294, 202 Cal. 272.

Kan.—Combs v. Combs, 162 P. 273, 99 Kan. 626.

La.—Robertson v. Cambon, 146 So. 738, 176 La. 753.

Mich.—Petition of Board of Education of City of Detroit, 214 N.W. 239, 239 Mich. 46.

Mo.—State ex rel. MacNish v. Landwehr, 60 S.W.2d 4.—In re McFarland, 12 S.W.2d 523, 223 Mo.App.

826—Case v. Smith, 257 S.W. 148, 215 Mo.App. 621.

Wash.—State ex rel. Onstine v. Bartlett, 230 P. 636, 131 Wash. 546, quoting *Corpus Juris*.
15 C.J. p. 869 note 47.

Suit against foreign corporation

Suit may be maintained against foreign corporation in any circuit court of any county in which it does business by agent, regardless of number of branch courts, in absence of any restriction as to branch courts fixed by law.—Ex parte Kemp, 168 So. 147, 232 Ala. 434.

52. Cal.—White v. San Francisco Super. Ct., 42 P. 480, 110 Cal. 60.—People v. Barbera, 248 P. 304, 78 Cal.App. 277.

Iowa.—Dunkelbarger v. Myers, 233 N.W. 744, 211 Iowa 512.

Mont.—State v. Great Northern Utilities Co., 284 P. 772, 86 Mont. 442.

Each department constitutes court

Each department of superior court constitutes court.—Union Bank & Trust Co. of Los Angeles v. Los Angeles County, 38 P.2d 442, 2 Cal.App. 2d 600.

Judicial functions not denied

Since the district court is a court of general jurisdiction, the mere division of judicial duties by agreement of the judges does not in itself deny judicial functions to any judge of that court.—Foley v. Utterback, 195 N.W. 721, 196 Iowa 956.

Laws governing department

Department of circuit court known as department of domestic relations is governed by general laws governing other departments of the circuit court when exercising the jurisdiction common to all circuit courts.—Hallett ex rel. State v. Hallett, 55 P.2d 1143, 153 Or. 63.

53. Ariz.—Peterson v. Speakman, 66 P.2d 1023, 49 Ariz. 342.

Cal.—Davis v. Conant, 51 P.2d 151, 10 Cal.App.2d 73.—City of Long Beach v. Wright, 25 P.2d 541, 134 Cal.App. 366.

Fla.—State ex rel. Brooks v. Free-land, 138 So. 27, 103 Fla. 663.

lotted to a particular department or division, such department or division has exclusive jurisdiction thereof,⁵⁴ unless or until the case is transferred or reassigned to another department or division,⁵⁵ exercises all the powers of the court which it represents,⁵⁶ and has jurisdiction to decide all the issues

which properly come before it.⁵⁷ A separate and distinct action,⁵⁸ or a proceeding to enforce the judgment obtained,⁵⁹ may properly be heard in another department. The proceedings in the various branches of a court must be separate and independent in so far as the trial of causes is concerned,⁶⁰

Kan.—*Wolcott v. Stewart*, 239 P. 765, 119 Kan. 407.

La.—*State v. McPherson*, 138 So. 663, 173 La. 773.

N.Y.—Public Service Commission, First Dist. v. Brooklyn Heights R. Co., 172 N.Y.S. 790, 105 Misc. 254, P.U.R.1919B 258.

Or.—*Hertzen v. Hertzen*, 208 P. 580, 104 Or. 423.

15 C.J. p 869 note 49.

Construction of statute as directory

Statute providing that injunction to restrain state officers from performing duty shall be granted only by supreme court at term sitting in department in which officer or board is located, or duty is required to be performed, although mandatory in form, must be construed as directory, otherwise it would be unconstitutional as restraint on chancery jurisdiction of some justices of supreme court, while conferring it on others.—*Dairy Sealed v. Ten Eyck*, 288 N.Y.S. 641, 159 Misc. 716, reversed on other grounds 289 N.Y.S. 85, 248 App.Div. 352, followed in *Sunshine Farms v. Ten Eyck*, 289 N.Y.S. 89, 248 App.Div. 814 and *Sheehy v. Ten Eyck*, 289 N.Y.S. 89, 248 App.Div. 814.

54. Fla.—*City of Coral Gables v. Blount*, 178 So. 554, 131 Fla. 36.

Iowa.—*Dunkelbarger v. Myers*, 233 N.W. 744, 745, 211 Iowa 512, citing *Corpus Juris*.

Ky.—*Hatzell v. Dover*, 270 S.W. 723, 208 Ky. 149.

La.—*State ex rel. Scanlan v. City of Hammond*, 165 So. 314, 184 La. 13.

Mo.—*State ex rel. Hayes v. Ellison*, 191 S.W. 49—*May Hosiery Mills v. Hirsch*, App., 274 S.W. 387—*Hirsch v. Hirsch*, App., 273 S.W. 151—*Case v. Smith*, 257 S.W. 148, 215 Mo.App. 621.

Mont.—*Lutey Bros. v. Jackson*, 179 P. 459, 55 Mont. 556.
15 C.J. p 869 note 50.

Setting aside continuance granted by another judge

A judge to whom a case is regularly assigned for trial has authority in the exercise of his discretion to set aside a continuance granted by another judge and reset the case for trial.—*Morris v. McElroy*, 122 So. 608, 219 Ala. 369, denying certiorari 122 So. 606, 23 Ala.App. 96.

Jurisdiction not properly acquired

(1) Where a division has never properly acquired jurisdiction over a cause, further proceedings in the

cause may be commenced in another division.—*Riggs v. Moise*, Mo., 128 S.W.2d 632.

(2) Thus, where a testamentary trustee made application to resign without giving notice to beneficiaries whose consent was not obtained, division of court to which application was submitted had no jurisdiction, the resignation was a nullity, and the appointment of a successor was void, so that another division of the court, to which, after trustee's death, a subsequent petition was assigned, had jurisdiction to appoint a succeeding trustee.—*Riggs v. Moise*, supra.

Request for trial by another judge

(1) Where a cause was assigned to a division of the circuit court, the request of the judge of that division that a judge of another division hear the cause was held valid and not in violation of the general rule that the division to which a case is assigned has exclusive jurisdiction.—*Hargadine-McKittrick Dry Goods Co. v. Garesche*, Mo., 227 S.W. 824.

(2) The authority for the request of one circuit judge that another judge of the same court sit for him being shown, the reason therefor need not be stated in the request.—*Hargadine-McKittrick Dry Goods Co. v. Garesche*, supra.

Appointment of receivers

Court having acquired jurisdiction over insolvent corporation's property, and appointed receivers, coordinate branch of same court cannot take property out of receiver's hands and place it in possession of others.—*Scranton Button Co. v. Neonlite Corporation of America*, 149 A. 369, 106 N.J.Eq. 708.

Change of venue

Under Rev.St.1919 § 1371, relating to change of venue in St. Louis circuit courts, each division of circuit court of such city is to be treated as if it were separate and complete court.—*State ex rel. Paramount Progressive Order of Moose v. Miller*, 273 S.W. 122, 216 Mo.App. 692.

55. Mo.—*Haehl v. Wabash R. Co.*, 24 S.W. 737, 119 Mo. 325—*Title Guaranty & Surety Co. v. Drennon*, App., 208 S.W. 474.

Questions arising pending reassignment

If party to action, which has been regularly assigned to department of

superior court, is of opinion that some question in connection with action should be presented to judge presiding over another department, application should be made for reassignment of action, and, until such reassignment be ordered, in absence of an emergency, questions concerning action should be presented to judge before whom action is pending or to presiding judge himself.—*State ex rel. Hillman v. Superior Court for King County*, 47 P.2d 8, 132 Wash. 372.

56. Fla.—*United American Ins. Co. v. Oak*, 166 So. 547, 123 Fla. 159.

Mo.—*State ex rel. MacNish v. Landwehr*, 60 S.W.2d 4.

Mont.—*Rowan v. Gazette Printing Co.*, 220 P. 1104, 69 Mont. 170.

15 C.J. p 869 note 52.

Dismissal of writ of error

One of two circuit judges in Hillsborough county was held authorized to dismiss writ of error to civil court of record.—*State ex rel. Meriden Creamery Co. v. Robles*, 150 So. 247, 111 Fla. 276.

Order affirming judgment

Judge of division of circuit court to which appeal from justice's judgment was assigned had jurisdiction to enter order affirming judgment for want of notice of appeal and to enter nunc pro tunc order thereon.—*Thomas v. Brotherhood of Railway and Steamship Clerks*, Mo.App., 72 S.W.2d 502.

57. Mo.—*State ex rel. Clinton Const. Co. v. Johnson*, 272 S.W. 928—*Thomas v. Brotherhood of Railway and Steamship Clerks*, App., 72 S.W.2d 502.

Mont.—*State v. Great Northern Utilities Co.*, 284 P. 772, 86 Mont. 442.
15 C.J. p 870 note 53.

58. Cal.—*Nickel v. State*, 175 P. 641, 179 Cal. 126.

La.—*State ex rel. Fazio v. Triolo*, 101 So. 211, 156 La. 824—*Firemen's Ins. Co. v. Hava*, 78 So. 486, 143 La. 254.

59. Mo.—*Graber v. Ft. Dearborn Casualty Underwriters of Chicago*, Ill., App., 35 S.W.2d 933—*Graff v. Continental Auto Ins. Underwriters*, Springfield, Ill., 35 S.W.2d 926, 225 Mo.App. 85.

60. D.C.—*Re Gompers*, 40 App.D.C. 293.

Ill.—*People v. Matson*, 22 N.E. 456, 129 Ill. 591.

and a grant is exclusive in accordance with its terms where it confers authority to sit in banc for a specified purpose, and for no other purpose whatever.⁶¹ The intent of the constitution will determine the power of judges to sit together or separately to hold court in each branch, and in accordance with such intent only one judge may participate in the proceedings in a given case.⁶² A judge of one branch or department may hear and determine a cause pending in another department, or make orders in connection therewith, where a necessity therefor arises,⁶³ even though one branch is civil and the other criminal.⁶⁴

A case originally assigned to one division or department may be transferred to another,⁶⁵ without notice,⁶⁶ unless notice is required by statute,⁶⁷ but such transfer does not affect previous orders in the

case made in the department to which it then belonged,⁶⁸ nor is the jurisdiction of one department affected by the fact that preliminary orders were made in another department.⁶⁹ The transfer of a case from one division to another is not a transfer of jurisdiction from one court to another.⁷⁰ In accordance with statutory provisions or rules of court, the transfer may be by a judge on his own motion,⁷¹ or it may be by agreement of the judges.⁷² The division or judge to whom a case is transferred or reassigned alone has jurisdiction of the case thereafter,⁷³ except as to matters which have been taken under advisement prior to transfer,⁷⁴ and may render judgment.⁷⁵

Courts may be separate and distinct, although the same judge presides over both of them,⁷⁶ and where

61. Colo.—*People v. Arapahoe County Dist. Ct.*, 24 P. 260, 14 Colo. 396.

62. Ill.—*Wayland v. City of Chicago*, 15 N.E.2d 516, 369 Ill. 43—*Courson v. Browning*, 78 Ill. 208—*Hall v. Hamilton*, 74 Ill. 437—*Jones v. Albee*, 70 Ill. 34.

63. Fla.—*United American Ins. Co. v. Oak*, 166 So. 547, 123 Fla. 159—*State ex rel. Brooks v. Freeland*, 138 So. 27, 103 Fla. 663.

Mo.—*State ex rel. Clinton Const. Co. v. Johnson*, 272 S.W. 928—*Hargadine-McKittick Dry Goods Co. v. Garesche*, 227 S.W. 824.

15 C.J. p 870 note 61.

Court continued by special judge

Division of circuit court which was opened by one of regular judges thereof pursuant to agreement with other regular judge and which was continued by regularly elected special judge after judge who had opened court became unable to continue was held properly constituted.—*Chapman & Dewey Lumber Co. v. Andrews*, 91 S.W.2d 1026, 192 Ark. 291.

64. Ky.—*Mengel v. Jackson*, 22 S.W. 854, 94 Ky. 472, 15 Ky.L. 283.

Mo.—*State v. Allen*, 138 S.W. 339, 235 Mo. 298.

15 C.J. p 870 note 62.

65. Cal.—*Ransome-Crummey Co. v. Wood*, 180 P. 951, 40 Cal.App. 355. La.—*Robertson v. Cambon*, 146 So. 738, 176 La. 753—*Lifsey v. Jackson*, 146 So. 8, 176 La. 410.

Mich.—*In re Altenfeld's Estate*, 249 N.W. 466, 264 Mich. 183—*Petition of Board of Education of City of Detroit*, 214 N.W. 239, 239 Mich. 46.

Mo.—*Dawson v. Scott*, 49 S.W.2d 87—*State ex rel. Clinton Const. Co. v. Johnson*, 272 S.W. 928—*State ex rel. Hayes v. Ellison*, 191 S.W. 49—*State ex rel. Paramount Progressive Order of Moose v. Miller*, 273 S.W. 122, 216 Mo.App. 692—*Ti-*

tle Guaranty & Surety Co. v. Drennon, App., 208 S.W. 474.

15 C.J. p 870 note 57.

Wrong division

A case is properly reassigned if it has been sent to the wrong division by mistake.—*Neevel v. McDermind*, 278 S.W. 818, 220 Mo.App. 812.

Transfer because of local prejudice

To justify a transfer from one department to another because of local prejudice against defendant, if such right exists, the affidavit asserting that a fair trial cannot be had must comply with the statute governing applications for change of venue on these grounds.—*People v. Grace*, 262 P. 56, 37 Cal.App. 629.

Justices equally divided

Where justices in a department of the appellate division of the supreme court qualified to sit are equally divided and unable to render a decision in an appeal, the appeal will be transferred to another department of the appellate division, to be there heard and determined, pursuant to Code Civ.Proc. § 231.—*In re De Cant's Estate*, 190 N.Y.S. 57, 198 App. Div. 966.

66. Cal.—*Ransome-Crummey Co. v. Wood*, 180 P. 951, 40 Cal.App. 355.

Trial notice

The statutory notice essential where a party brings an issue to trial is not required.—*Tubby v. Tubby*, 260 P. 294, 202 Cal. 272—*City of Los Angeles v. Morris*, 241 P. 409, 74 Cal.App. 473.

67. Colo.—*Petition of Chamberlin*, 180 P. 748, 66 Colo. 249.

68. Cal.—*People v. Carantan*, 105 P. 768, 11 Cal.App. 561.

69. Wash.—*In re Newcomb*, 105 P. 1042, 56 Wash. 395.

70. Cal.—*Tubby v. Tubby*, 260 P.

294, 202 Cal. 272—*Cocke v. MacLeod*, 258 P. 980, 85 Cal.App. 63.

Mo.—*State ex rel. Clinton Const. Co. v. Johnson*, 272 S.W. 928.

71. Colo.—*Smaldone v. People*, 81 P. 2d 385, 102 Colo. 500.

Revocation of order of transfer

Where the judge of a civil division transfers a cause to a criminal division, the judge or his successor may revoke the order of transfer at any time before the approving order made by the judge to whom transferred is entered of record, in view of District Court Rules, rule 8a, requiring entry on record of the order of transfer.—*Petition of Chamberlin*, 180 P. 748, 66 Colo. 249.

72. Mo.—*Cole v. Norton*, App., 251 S.W. 723.

73. Mo.—*Cole v. Norton*, supra—*Dorton v. Kansas City Rys. Co.*, 224 S.W. 30, 204 Mo.App. 262.

74. Mo.—*State ex rel. Burleigh v. Miller*, 266 S.W. 985.

Order for inspection

Under rules and customs of the court, a circuit judge, who heard argument on application for right to inspect books and papers of corporation, and took matter under advisement before assignment to other division, could make order for inspection subsequent to assignment.—*State ex rel. Burleigh v. Miller*, supra.

75. Neb.—*Western Newspaper Union v. Dee*, 187 N.W. 919, 108 Neb. 303.

76. Ky.—*Farmers' Bank v. Collins*, 13 Bush 138. 15 C.J. p 870 note 63.

Merger of police court with recorder's court was held to create a court with dual functions as distinct in purpose as formerly.—*Moline v. Murphy*, 213 N.W. 204, 238 Mich. 78.

courts have no authority or control over the clerks, dockets, or records, of other courts they are separate and distinct bodies.⁷⁷

§ 138. Change in Name of Court

A change of the name of a court does not change the court where the clear constitutional purpose is to the contrary, nor does it affect past or pending proceedings.

Courts may be continued under another name;⁷⁸ and a change of the name of a court does not change the court, where the clear constitutional pur-

pose is to the contrary,⁷⁹ nor has it any effect on either past or pending proceedings therein.⁸⁰

§ 139. Judges

A court cannot exist without a judge, and the power to create a court embraces the power to create the office of judge thereof.

A court cannot be established until it has a judge, and unless the things required by the constitution for the existence of a court concur the court cannot exist.⁸¹ The power to create a court ordinarily implies the power to create the office of judge thereof and to confer jurisdiction.⁸²

B. MINISTERIAL OFFICERS, ATTENDANTS, AND ASSISTANTS

§ 140. In General

- a. Appointment and supervision in general
- b. Bond
- c. Tenure and abolition of office
- d. Duties
- e. Compensation

a. Appointment and Supervision in General

Ministerial officers may be provided for the courts and such officers are subject to their supervision.

The legislative authority may provide for court officers with power to perform ministerial duties nec-

essary in the administration of the law;⁸³ and the power to appoint such officers, within such limitations as are prescribed by statute, may be expressly or impliedly delegated to the courts.⁸⁴ In addition, in the absence of contrary legislation courts have inherent power to provide themselves with appropriate instruments required for the performance of their duties, including authority to appoint persons to aid the court in the performance of special administrative or judicial duties.⁸⁵ The exercise of such jurisdiction depends on the sound discretion of the trial judge,⁸⁶ and, it has been held, there can be no agent of a court unless there is an appointment by, or subjection to the discretion of, the court;⁸⁷

77. Md.—Goldsmith v. Kilbourn, 46 Md. 289.

78. Ill.—People v. Aurora, 78 Ill. 218.

15 C.J. p 868 note 25.

79. Ohio.—Mahoning Valley R. Co. v. Santoro, 112 N.E. 190, 93 Ohio St. 53.

80. N.Y.—Peace v. Wilson, 79 N.E. 329, 186 N.Y. 403, affirming 96 N.Y. S. 1139, 110 App.Div. 887.

15 C.J. p 870 note 66.

81. Ill.—People v. Opel, 58 N.E. 996, 188 Ill. 194.

Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.

82. Fla.—State v. Sullivan, supra.

83. R.I.—Gorham v. Robinson, 186 A. 832, 57 R.I. 1.

15 C.J. p 871 note 76.

Court stenographers see the C.J.S. title Stenographers §§ 1-12, also 60 C.J. p 21 note 1-p 29 note 34, and p 30 notes 51, 52.

Deputies and assistants of:

Clerks of Courts see Clerks of Courts §§ 83-92.

Sheriffs and constables see the C.J.S. title Sheriffs and Constables §§ 21-34, also 57 C.J. p 761 notes 58-p 774 note 89.

United States Marshals see the C.J.S. title United States Marshals § 4, also 66 C.J. p 14 note 26-p 15 note 52.

Official reporters see the C.J.S. title Reports §§ 9-13, also 54 C.J. p 682 note 98-p 683 note 43.

An examiner who takes depositions is a sworn officer of the court.—In re Gilbert, 118 S.W.2d 535, 274 Ky. 187.

Prohibition agents have been held not court officers.—U. S. v. Goodhues, D.C.Md., 53 F.2d 696.

Creation by ordinance

Ordinance held so indefinite as to be ineffective to create more than one office of warrant officer.—Holcombe v. Grota, 102 S.W.2d 1041, 129 Tex. 100, 110 A.L.R. 234, reversing Grota v. Holcombe, Civ.App., 97 S.W. 2d 301.

84. Fla.—Blitch v. Buchanan, 131 So. 151, 100 Fla. 1202, affirmed, 132 So. 474, 100 Fla. 1242.

Miss.—Newsom v. Federal Land Bank of New Orleans, 185 So. 595.

Approval of appointments

The appointment of certain court officials by the judge is invalid where such appointments are not approved by the budget director as required by law, since the requirement of such

approval is a reasonable restriction on the power of selection and appointment, and even judicial officers may not ignore reasonable budgetary restrictions.—Daly v. McGoldrick, 20 N.E.2d 545, 280 N.Y. 210, affirming 8 N.Y.S.2d 495, 255 App.Div. 594.

85. U.S.—In re Peterson, N.Y., 40 S.Ct. 543, 253 U.S. 300, 64 L.Ed. 917.

Fla.—Blitch v. Buchanan, 131 So. 151, 100 Fla. 1202, affirmed 132 So. 474, 100 Fla. 1242.

Appointment as affecting right to judicial hearings

That courts may appoint such ministerial officers as auditors, investigators, and examiners to aid them does not affect the parties' rights to judicial hearings, inasmuch as the reports of investigators and examiners are for the benefit of all parties and the makers thereof may be cross-examined.—In re Utilities Power & Light Corporation, C.C.A.Ill., 90 F.2d 798.

86. U.S.—In re Utilities Power & Light Corporation, supra.

87. U.S.—Acken v. New York Title & Mortgage Co., D.C.N.Y., 9 F.Supp. 521.

but such ministerial officers are in nowise necessary to the existence of a court.⁸⁸

As a general rule the conduct of the court's ministerial officers and others connected with its judicial proceedings is always subject to the control and discipline of the court.⁸⁹ Thus the court may give summary relief against its officers,⁹⁰ as, for example, by requiring them to return money, books, papers, or other property to a person from whom it was unlawfully taken, or which the officers have no equitable right to retain,⁹¹ even though the officer's term may already have expired.⁹² Furthermore, the court may call on its officers to make correct and proper return of process.⁹³ However, an appellate court has been held to be without power to coerce the officers of lower courts in the performance of duties owed to such lower courts and not to the appellate court.⁹⁴

b. Bond

Statutes requiring a court officer to give bond must be substantially complied with.

Where required by statute, a court officer must give a legally sufficient bond, conditioned for the faithful performance of his duties, and approved by the proper administrative body.⁹⁵ Such body, however, is bound to approve the bond if it contains proper sureties, is drawn in proper form, and furnishes sufficient security;⁹⁶ immaterial variances or omissions from the precise statutory form are not sufficient to render it invalid or ineffective.⁹⁷

c. Tenure and Abolition of Office

The term of office of a court officer ceases on the repeal of the law authorizing his appointment and on the abolition of the court, but it survives the resignation of the judge.

If the law under which the appointment of a court officer was made is repealed, the appointment ceases;⁹⁸ and where, by legislative action, the court is abolished, the terms of its officers are thereby ended.⁹⁹ One not validly appointed to a position as court officer is not entitled to contest a purported abolition of such office.¹

The resignation of a judge does not arrest ministerial proceedings of subordinate court officers, and such officers may continue to perform their legal duties until a successor is appointed.²

d. Duties

Ministerial court officers ordinarily must attend personally to their duties, and should be disinterested as between litigants.

Although there may be a substitution of officers,³ ministerial court officers are generally required to give personal attention to the duties of their offices;⁴ and, as between litigants, they should maintain a disinterested attitude.⁵

e. Compensation

The compensation of ministerial officers of a court may be regulated by statute.

Where the legislature has the power to create a particular court, it possesses the power to provide who shall pay the employees and the amount to be paid.⁶ Where so provided by statute, the sole pow-

88. Porto Rico.—Ex parte Plata, 22 Porto Rico 175.
15 C.J. p 871 note 85.

89. U.S.—King of Spain v. Oliver, Pa., 14 F.Cas.No.7,814, 2 Wash.C.C. 429.

Pa.—Montgomery County Bar Ass'n v. Rinalducci, 197 A. 924, 329 Pa. 296.

R.I.—Superior Glass Co. v. District Court of Sixth Judicial Dist., 135 A. 50, 48 R.I. 4.

Statute declaratory of common law
State statute empowering courts to control conduct of ministerial officers and others connected with judicial proceedings merely states common-law rule.—Rison v. Postal Telegraph-Cable Co., D.C.Cal., 28 F.2d 738.

Limitation of power as to evidence
The supervisory jurisdiction of the federal district court over its officers in advance of prosecution will not support an order adjudging that the United States may not use certain evidence in any criminal proceeding where the only question is the ad-

missibility of the evidence.—Eastus v. Bradshaw, C.C.A.Tex., 94 F.2d 788, certiorari denied Bradshaw v. Eastus, 58 S.Ct. 1045, 304 U.S. 576, 82 L.Ed. 1539.

90. U.S.—U. S. v. Gowen, C.C.A.N.Y., 40 F.2d 593, certiorari granted Go-Bart Importing Co. v. U. S., 50 S. Ct. 466, 281 U.S. 719, 74 L.Ed. 1138, reversed on other grounds 51 S.Ct. 153, 282 U.S. 344, 75 L.Ed. 374.

91. U.S.—U. S. v. Maresca, D.C.N.Y., 266 F. 713.

Ill.—Citizens State Bank v. Goebel, 10 N.E.2d 828, 292 Ill.App. 95.

92. Ill.—Citizens State Bank v. Goebel, supra.

93. Pa.—Commonwealth v. Green, 1 Ashm. 289.

94. Miss.—Ocean Springs Bank v. Frederick, 110 So. 366, 145 Miss. 558.

95. Minn.—State ex rel. Bozicevich v. City of Eveleth, 260 N.W. 223, 194 Minn. 44.

96. Minn.—State ex rel. Bozicevich

v. City of Eveleth, 260 N.W. 223, 194 Minn. 44.

97. Minn.—State ex rel. Bozicevich v. City of Eveleth, 265 N.W. 30, 196 Minn. 307.

98. Ill.—People v. Rumsey, 64 Ill. 44.

99. N.J.—Rutgers v. New Brunswick, 42 N.J.Law 51.

1. N.Y.—Daly v. McGoldrick, 20 N. E.2d 545, 280 N.Y. 210, affirming 8 N.Y.S.2d 495, 255 App.Div. 594—Staudt v. McGoldrick, 8 N.Y.S.2d 495, 255 App.Div. 594, affirmed People ex rel. Staudt v. McGoldrick, 21 N.E.2d 191, 280 N.Y. 675.

2. La.—Maskell v. Horner, 10 La. Ann. 641.

3. Mo.—State v. Griffith, 63 Mo. 545.

4. N.Y.—Rowland v. Mayor, 83 N.Y. 372.

15 C.J. p 871 note 78.

5. Ala.—Victor Adding Mach. Co. v. Long, 104 So. 679, 20 Ala.App. 633.

6. Ohio.—Ellis v. Urner, 180 N.E. 661, 41 Ohio App. 183, affirmed 181 N.E. 22, 125 Ohio St. 246.

er to fix the compensation of particular court officers and employees is vested in the judge;⁷ such power is not subject to veto or to any general right of visitation;⁸ and once the compensation is fixed by the judge, it becomes the duty of the proper administrative body to provide funds for the payment thereof.⁹

One wrongfully dismissed from his position as a court officer is entitled to recover the salary for such office.¹⁰

§ 141. Interpreters

- a. Appointment in general
- b. Qualifications
- c. Compensation
- d. Removal

a. Appointment in General

Courts may appoint interpreters in proper cases; and in some jurisdictions they are regarded as court officers.

Where so provided by statute, an interpreter may be appointed for designated courts or purposes;¹¹ and even in the absence of express authority it is the right and duty of courts to employ and swear

interpreters of foreign languages in cases where the necessity therefor arises.¹²

Status. While it has been stated that an interpreter is more than a mere witness and is, in a sense, an officer of the court,¹³ it has also been held that he is not a court officer, but is merely an attendant.¹⁴

b. Qualifications

An interpreter must be qualified, competent and, whenever possible, should be disinterested; and whether a person sufficiently meets the requirements is determined by the court.

An interpreter must be qualified and competent to perform the duty assumed,¹⁵ and, whenever possible, he should be entirely disinterested.¹⁶

The question of whether a particular person is sufficiently qualified, competent, or disinterested to act as interpreter is, generally speaking, a matter within the discretion of the trial court,¹⁷ and in the absence of abuse the exercise of such discretion ordinarily will not be reviewed.¹⁸

While it has been held that, under a statute providing for the calling of an interpreter in certain

7. N.Y.—*People ex rel. Wingate v. Taylor*, 1 N.Y.S.2d 233, 166 Misc. 13, affirmed 4 N.Y.S.2d 52, 254 App. Div. 749, affirmed *Wingate v. McGoldrick*, 18 N.E.2d 143, 279 N.Y. 246.

8. N.Y.—*People ex rel. Wingate v. Taylor*, supra.

9. N.Y.—*Wingate v. McGoldrick*, 18 N.E.2d 143, 279 N.Y. 246, affirming *People ex rel. Wingate v. Taylor*, 4 N.Y.S.2d 52, 254 App. Div. 749, affirming 1 N.Y.S.2d 233, 166 Misc. 13.

10. Tex.—*Grota v. Holcombe*, Civ. App., 97 S.W.2d 301, reversed on other grounds *Holcombe v. Grota*, 102 S.W.2d 1041, 129 Tex. 100, 110 A.L.R. 234.

11. Cal.—*People v. Holtzclaw*, 243 P. 894, 76 Cal.App. 168—*People v. Walker*, 231 P. 572, 69 Cal.App. 475. Pa.—*Moritz v. Luzerne County*, 129 A. 85, 283 Pa. 349. 15 C.J. p 871 note 86.

12. Cal.—*People v. Holtzclaw*, 243 P. 894, 76 Cal.App. 168—*People v. Walker*, 231 P. 572, 69 Cal.App. 475. N.C.—*Wise v. Short*, 107 S.E. 134, 136, 181 N.C. 320, quoting *Corpus Juris*.

Appointment of interpreter in:

Civil trials see the C.J.S. title Trial § 42, also 64 C.J. p 71 notes 22-23.

Criminal trials see the C.J.S. title Criminal Law § 965, also 16 C.J. p 808 note 41-p 809 note 50.

13. Iowa.—*Paucher v. Enterprise Coal Mining Co.*, 168 N.W. 86, 183 Iowa 1076.

Witness for purpose of interpreting testimony see the C.J.S. title Witnesses § 326, also 70 C.J. p 493 note 59.

14. N.Y.—*Rosenthal v. New York*, 6 Daly 167. 15 C.J. p 871 note 86 [a].

15. N.C.—*Wise v. Short*, 107 S.E. 134, 136, 181 N.C. 320, quoting *Corpus Juris*. 15 C.J. p 871 note 88-70 C.J. p 493 note 67.

Inability to read English does not render an interpreter incompetent where he is able to speak English and the language of the witness.—*Central of Georgia R. Co. v. Joseph*, 28 So. 35, 125 Ala. 813.

Where no regular interpreter has been appointed any qualified person may act in that capacity.—*Farar v. Warfield*, 8 Mart. N.S., La., 695.

16. Ind.—*Bielich v. State*, 126 N.E. 220, 189 Ind. 127. Miss.—*Morse v. Phillips*, 128 So. 336, 157 Miss. 452. 70 C.J. p 494 note 71.

Jurors

(1) "Jurors cannot be allowed to intervene as interpreters of witnesses . . . [since] whatever goes to the jury must go to all through the same medium."—*Lendberg v. Brotherton Iron Min. Co.*, 42 N.W. 675, 677, 75 Mich. 84.

(2) A juror may, however, with defendant's consent, act as an interpreter.—*People v. Thiede*, 39 P. 837, 11 Utah 241, affirmed 16 S.Ct. 62, 159 U.S. 510, 40 L.Ed. 237.

17. Fla.—*Kelly v. State*, 118 So. 1, 96 Fla. 348. Miss.—*Morse v. Phillips*, 128 So. 336, 157 Miss. 452. Ohio.—*Andy v. State*, 2 Ohio App. 103. R.I.—*State v. Deslovers*, 100 A. 64, 40 R.I. 89. Vt.—*Collette v. Edgerton*, 175 A. 227, 107 Vt. 6. 16 C.J. p 809 note 45-70 C.J. p 493 note 66, p 494 notes 70, 74.

18. Ill.—*People v. Rardin*, 99 N.E. 59, 255 Ill. 9. Ohio.—*Andy v. State*, 2 Ohio App. 103. R.I.—*State v. Deslovers*, 100 A. 64, 40 R.I. 89.

Discretion held abused

Where plaintiff was able to express himself completely in matters of detail only through translations by his daughter, a public school teacher, rejecting her as interpreter was error.—*Morse v. Phillips*, 128 So. 336, 157 Miss. 452.

Discretion held not abused

Appointment as interpreter for plaintiff, of his attractive daughter, instead of his brother or wife.—*Renick v. Hays*, 256 S.W. 26, 201 Ky. 192.

cases, he need not necessarily be unbiased,¹⁹ the selection of an interested person as an interpreter is at least improper,²⁰ and may constitute fatal error.²¹

It is not in every case, however, that an interested person must be rejected.²² For example, an interested person may be accepted where no other person is available who can adequately interpret for the witness.²³ Furthermore, an interpreter has been held not to be disqualified or rendered incompetent merely because he is interested in the outcome of the particular suit or prosecution;²⁴ or because he is related to a party or a witness in the proceeding;²⁵ or has had friendly relations with the parties;²⁶ or because he has been subpoenaed as a witness,²⁷ has listened to the testimony of other witnesses in the case,²⁸ or has, himself, testified or will testify;²⁹ or because, in a criminal case, he is a member of the police force.³⁰

Examination or inquiry as to competency as translator. While, as is stated above in this subdivision of this section, the question of the qualification and competency of an interpreter is a matter within the discretion of the court, and, as is noted in the C.J.S. title Criminal Law § 965, also 16 C.J. p 809 note 48 and in the C.J.S. title Witnesses § 326, also 70 C.J. p 495 note 81, the accuracy of an interpreter's translation is ultimately a question of fact for the jury, nevertheless, the qualifications of an interpreter as a translator are subject to a proper inquiry.³¹ Thus his competency may be attacked

by direct or cross examination, or by independent testimony,³² and when attacked it may be reestablished by further examination or by independent evidence.³³ An interpreter may not, however, prove his competency as a translator merely by his own affidavit,³⁴ or by the opinion of a witness familiar with the foreign language;³⁵ and the court may properly refuse to permit an interpreter to demonstrate his skill by carrying on a conversation with various witnesses in a foreign tongue.³⁶

Time for determining. The competency of an interpreter should be determined prior to the time when he enters on the discharge of his duties.³⁷

c. Compensation

An interpreter, properly appointed and qualified, is entitled to such compensation as is fixed by law.

Where the compensation of an interpreter is regulated by statute, he is entitled to receive only the amount fixed,³⁸ and the court cannot make an additional allowance.³⁹

An interpreter who has not been properly appointed to, or who has not qualified for, the position is not entitled to receive the statutory compensation.⁴⁰ Furthermore, an interpreter cannot recover salary when he was so far unqualified as to be chargeable with fraud in accepting the office.⁴¹

A county may not be held liable for an interpreter's fees unless his services were rendered in the prosecution or defense of a criminal case or in a civil case to which the county was a party.⁴²

19. Tex.—Tores v. State, Cr., 63 S. W. 880.

70 C.J. p 494 note 73.

20. Iowa.—Paucher v. Enterprise Coal Mining Co., 168 N.W. 86, 183 Iowa 1076.

Tex.—Nader v. State, 219 S.W. 474, 86 Tex.Cr. 424.

Vt.—Collette v. Edgerton, 175 A. 227, 107 Vt. 6.

Arresting officer

Ind.—Bielich v. State, 126 N.E. 220, 189 Ind. 127.

21. Mo.—State v. Chyo Chiagk, 4 S. W. 704, 92 Mo. 395.

70 C.J. p 494 note 72.

22. Miss.—Morse v. Phillips, 128 So. 336, 157 Miss. 452.

23. Miss.—Morse v. Phillips, supra.

24. Iowa.—Paucher v. Enterprise Coal Mining Co., 168 N.W. 86, 183 Iowa 1076.

70 C.J. p 494 note 75.

Complaining witness in trial for assault.—Sellers v. State, 134 S.W. 348, 61 Tex.Cr. 140.

Prosecuting attorney

Tex.—Tores v. State, Cr., 63 S.W. 880.

25. Miss.—Morse v. Phillips, 128 So. 336, 157 Miss. 452.

Ohio.—Andy v. State, 2 Ohio App. 103.

Okl.—Claycomb v. State, 211 P. 429, 22 Okl.Cr. 315.

Vt.—Collette v. Edgerton, 175 A. 227, 107 Vt. 6.

70 C.J. p 494 note 76.

26. Okl.—Claycomb v. State, 211 P. 429, 22 Okl.Cr. 315.

27. Wash.—State v. Michel, 54 P. 995, 20 Wash. 162.

70 C.J. p 494 note 77.

28. Tex.—Trevino v. State, 204 S. W. 996, 83 Tex.Cr. 562.

70 C.J. p 494 note 78.

29. Miss.—Morse v. Phillips, 128 So. 336, 157 Miss. 452.

70 C.J. p 494 note 79.

30. Ill.—People v. Murphy, 114 N.E. 609, 276 Ill. 304.

31. Kan.—Missouri, K. & T. R. Co. v. Bagley, 56 P. 759, 60 Kan. 424.

70 C.J. p 495 note 82.

32. Okl.—Claycomb v. State, 211 P. 429, 22 Okl.Cr. 315.

70 C.J. p 495 note 83.

33. Cal.—People v. Ong Git, 137 P. 283, 23 Cal.App. 148.

70 C.J. p 495 note 84.

34. Kan.—Missouri, K. & T. R. Co. v. Bagley, 56 P. 759, 60 Kan. 424.

70 C.J. p 495 note 85.

35. Kan.—Missouri, K. & T. R. Co. v. Bagley, supra.

70 C.J. p 495 note 86.

36. Cal.—People v. Ong Git, 137 P. 283, 23 Cal.App. 148.

70 C.J. p 495 note 87.

37. Mo.—State v. Chyo Chiagk, 4 S. W. 704, 92 Mo. 395.

38. U.S.—U. S. v. Mitchell, 3 S.Ct. 151, 109 U.S. 146, 27 L.Ed. 887.

N.Y.—Rosenthal v. New York, 6 Daly 167.

15 C.J. p 871 note 90 [a].

39. Porto Rico.—In re Official Ct. Interpreter, 4 Porto Rico Fed. 301.

40. Pa.—Moritz v. Luzerne County, 129 A. 85, 283 Pa. 349.

41. N.Y.—Conroy v. New York, 6 Daly 490, affirmed 67 N.Y. 610.

42. Ariz.—Cochise County v. Michelena, 140 P. 63, 15 Ariz. 477.

d. Removal

Under statutory regulations an interpreter may be removed.

An interpreter may be removed pursuant to statutory regulations.⁴³

§ 142. Court Attendants and Assistants

- a. In general
- b. Eligibility
- c. Appointment and qualification
- d. Tenure and removal
- e. Authority, duties, and liability
- f. Compensation

a. In General

Court attendants are essential to the administration of business of a court, but they are regarded ordinarily as employees rather than as officers.

Court attendants are a necessary adjunct to the due and orderly administration of the business of a court.⁴⁴

Status. Court attendants have, in general, and for various purposes, been held not to be officers,⁴⁵ county officers,⁴⁶ public officers,⁴⁷ or constitutional

officers,⁴⁸ but are ordinarily considered to be mere employees,⁴⁹ or attachés;⁵⁰ although in the federal courts certain attendants have been held to be officers of the court.⁵¹

Whether a particular county employee attending court has the status of a "court attendant" within the meaning of a statute providing for such an official, depends, it has been held, on his appointment and the nature of the duties for which he has been appointed;⁵² and where the evidence as to his status is conflicting the question is properly submitted to the jury.⁵³

b. Eligibility

Court attendants and assistants must possess the qualifications required by law.

To be eligible for appointment as a court attendant or assistant, the applicant or appointee must possess the qualifications required by statute.⁵⁴ For instance, the applicant must comply with statutes requiring court attendants to be residents of the municipality or local subdivision within which their functions are to be exercised.⁵⁵

In the absence of constitutional restrictions, it is

43. Statute enacted after appointment

Where an interpreter was appointed to the Brooklyn Police Courts under L.1875 c 623 authorizing appointment by the common council and removal "for cause," he was nevertheless removable under a later statute, L.1910 c 659, providing for removal by the board of magistrates "after an opportunity of making an explanation."—*People v. Kemper*, 129 N.Y.S. 460, 144 App.Div. 339.

44. N.Y.—*In re Flaherty*, 171 N.Y.S. 624, 184 App.Div. 428, reversed on other grounds *Flaherty v. Craig*, 123 N.E. 157, 226 N.Y. 76.

45. Court constables
Ohio.—*State v. Zangerle*, 151 N.E. 769, 115 Ohio St. 32.
Status of constables see the C.J.S. title *Sheriffs and Constables* § 3, also 57 C.J. p 731 note 17.

46. Marshal
Ga.—*Strickland v. Houston*, 161 S.E. 262, 173 Ga. 615.

Secretary to judge is not a "county officer, deputy or employee," as regards constitutionality of a statute, relating to the secretary's appointment and salary.—*Chitwood v. Hicks*, Cal.App., 19 P.2d 70, 71.

47. Court crier
Pa.—*Werkman v. Westmoreland County*, 194 A. 344, 128 Pa.Super. 297.

Tipstaff

Pa.—*Schwarz v. City of Philadelphia*, 4 A.2d 573, 134 Pa.Super. 544.

48. Bailiffs and criers

U.S.—*U. S. v. McCabe, R. I.*, 129 F. 708, 64 C.C.A. 236, affirming, C.C., 122 F. 653—*Kelly v. U. S.*, 41 Ct. Cl. 246.

49. Court crier

Pa.—*Werkman v. Westmoreland County*, 194 A. 344, 128 Pa.Super. 297.

Tipstaff

Pa.—*Schwarz v. City of Philadelphia*, 4 A.2d 573, 134 Pa.Super. 544.

50. Court crier

Pa.—*Werkman v. Westmoreland County*, 194 A. 344, 128 Pa.Super. 297.

Secretary to judge

Cal.—*Chitwood v. Hicks*, App., 19 P. 2d 70.

51. Bailiffs and criers

U.S.—*U. S. v. McCabe, R.I.*, 129 F. 708, 64 C.C.A. 236, affirming, C.C., 122 F. 653—*Kelly v. U. S.*, 41 Ct. Cl. 246.

52. N.J.—*Sawyer v. Camden County*, 4 A.2d 76, 122 N.J.Law 119.
Designation on the pay roll does not determine whether employee is a court attendant.—*Sawyer v. Camden County*, 4 A.2d 76, 122 N.J.Law 119.

Possession of badge

N.J.—*Sawyer v. Camden County*, supra.

53. N.J.—*Sawyer v. Camden County*, supra.

54. Confidential attendant to judge

Confidential clerk of supreme court justice held not entitled to be certified as eligible for appointment as court attendant under civil service law providing for certification of "confidential attendant" to a justice.—*In re McKenzie*, 291 N.Y.S. 485, 249 App.Div. 672.

55. N.Y.—*People v. McGuire*, 125 N. Y.S. 90, 68 Misc. 516.

15 C.J. p 872 note 8.

Validity of statute

The provision of New York charter that designated court attendant shall reside in borough in which district for which he was appointed is situated would be unconstitutional if construed as requiring appointive power to disregard standing of persons on single eligible list to conform to residence requirement.—*Marcellus v. Kern*, 10 N.Y.S.2d 73, 170 Misc. 281.

As condition for continuance in office

The requirement of the New York charter that designated court attendant shall reside in borough in which district for which he was appointed is situated is not condition of eligibility for examination but condition and qualification for continuance in office after appointment since one cannot become an "employee" until he has been appointed.—*Marcellus v. Kern*, supra.

within the power of the legislature to place particular court officials and attendants in the unclassified service outside of the eligibility provisions of the civil service laws.⁵⁶ However, where applicable, civil service statutes and rules respecting the appointment of court attendants and employees must be given effect.⁵⁷

c. Appointment and Qualification

Unless deprived of the power by statute, courts ordinarily may appoint the necessary attendants and assistants. In the absence of statute, an attendant need not give bond.

Where authorized by statute, courts may appoint court attendants or assistants.⁵⁸ Such statutes have been held valid,⁵⁹ and preclude the appointment of court attendants by other officials.⁶⁰ However, where no particular form of appointment is pre-

scribed by the statute, the court may accept an appointment made by another official.⁶¹

Apart from statute, a court of general jurisdiction, of record, or of last resort, possesses the inherent power to provide the necessary attendants and assistants as a means of conducting its business with reasonable despatch, or to provide for assistants charged with the care of its rooms or other like functions, and the court itself may determine the necessity.⁶² An inferior court cannot, however, make an appointment contrary to statutory intent.⁶³

Where a statute vests the appointive power in an official other than the judge, such enactment controls.⁶⁴ However, under particular statutory regulations the court may have the power to recommend a person for the appointment,⁶⁵ or may de-

56. Ohio.—*Ellis v. Urner*, 181 N.E. 22, 125 Ohio St. 246, affirming 180 N.E. 661, 41 Ohio App. 183.

57. Municipal court attendants

(1) Civil service rules applicable to municipalities are not controlling in the appointment of deputy bailiffs of a municipal court.—*McGann v. People*, 81 N.E. 847, 228 Ill. 203.

(2) Employees of New York City municipal court are subject to jurisdiction of municipal civil service commission rather than that of state civil service commission.—*Gluck v. Rice*, 265 N.Y.S. 3, 147 Misc. 327, reversed 267 N.Y.S. 986, 240 App.Div. 928, reversed 191 N.E. 862, 285 N.Y. 132.

(3) President justice of municipal court is not authorized to designate persons not on civil service list as clerks to individual justices.—*Ordway v. Leary*, 232 N.Y.S. 182, 225 App.Div. 47.

(4) Position of municipal court officer is not under civil service, but it is subject to soldiers' and sailors' preference law.—*State ex rel. Bozicevich v. City of Eveleth*, 260 N.W. 223, 194 Minn. 44.

58. Colo.—*Board of Com'rs of Routt County v. Morning*, 210 P. 326, 72 Colo. 200.

Ga.—*MacNeill v. Steele*, 199 S.E. 99, 186 Ga. 792.

N.Y.—*Flaherty v. Craig*, 123 N.E. 157, 226 N.Y. 76, reversing *In re Flaherty*, 171 N.Y.S. 624, 184 App. Div. 428.

Ohio.—*State v. Zangerle*, 151 N.E. 769, 115 Ohio St. 32.

15 C.J. p 871 note 95.

Exercise of power not mandatory

N.Y.—*Tonkin v. Leary*, 255 N.Y.S. 216, 234 App.Div. 448, affirmed 182 N.E. 158, 259 N.Y. 510.

Pa.—*Werkman v. Westmoreland County*, 194 A. 344, 128 Pa.Super. 297.

Appointment by nonresident justice

Under a statute providing that the justice or justices of a particular court residing in two certain counties, respectively, may appoint one attendant in the court in each of those counties, respectively, where no judge lived in one of the counties, the appointment by the judges residing in the other county of the court attendant for the first county is legal.—*In re Mott*, 190 N.Y.S. 180.

Number of appointments may be one or more, under a statute providing for appointment of sergeants at arms for district court.—*Hopkins v. City of Passaic*, 163 A. 238, 10 N. J.Misc. 1261.

Repeal

(1) Statute held not impliedly repealed by later statute giving mayor control over administrative and executive departments.—*State ex rel. Bailey v. Webb, Ind.*, 21 N.E.2d 421.

(2) Where prior to the passage of an act vesting the power of appointing court attendants in the comptroller of the city of New York, the various courts had power of appointment by statute, the power remains in the court if the subsequent act is held unconstitutional.—*Brennan v. New York*, 62 N.Y. 365.

Creation of office

(1) Statute authorizing appointment of secretary of court does not create office.—*Noel v. Lewis*, 170 P. 857, 35 Cal.App. 658.

(2) Appointment to position as janitor, under another name, does not create a new office.—*Sullivan v. New York*, 53 N.Y. 652, 47 How.Pr. 491.

59. Ky.—*Shaw v. Fox*, 55 S.W.2d 11, 246 Ky. 342.

60. Pa.—*In re Court Officers*, 3 Pa. Dist. 198.

15 C.J. p 871 note 95 [b].

61. N.Y.—*Brennan v. New York*, 62 N.Y. 365.

62. Cal.—*Millholen v. Riley*, 293 P. 69, 211 Cal. 29.

Ind.—*Dunn v. State*, 184 N.E. 535, 204 Ind. 390.

N.Y.—*In re Flaherty*, 171 N.Y.S. 624, 184 App.Div. 428, reversed on other grounds *Flaherty v. Craig*, 123 N.E. 157, 226 N.Y. 76.

N.Y.—*Werkman v. Westmoreland County*, 194 A. 344, 128 Pa.Super. 297.—*In re Surcharge of County Commissioners*, 12 Pa.Dist. & Co. 471, 477, quoting *Corpus Juris*.
15 C.J. p 872 note 96.

Effect of statute providing for attendance of sheriff and deputies

Wis.—*Stevenson v. Milwaukee County*, 121 N.W. 654, 140 Wis. 14, 17 Ann.Cas. 901.

15 C.J. p 872 note 96 [a].

Appointment of greater number than statute specifies

U.S.—*U. S. v. Swift, Mass.*, 139 F. 225, 71 C.C.A. 351, affirming, *C.C., Swift v. U. S.*, 128 F. 763.

15 C.J. p 872 note 96 [b].

63. N.Y.—*Huff v. Knapp*, 5 N.Y. Super. 299, affirming 5 N.Y. 65.
15 C.J. p 872 note 97.

64. Minn.—*State ex rel. Bozicevich v. City of Eveleth*, 260 N.W. 223, 194 Minn. 44.

N.J.—*Sawyer v. Camden County*, 4 A.2d 76, 122 N.J.Law 119—*Courter v. Butler*, 103 A. 411, 91 N.J.Law 683.

N.Y.—*Connery v. Sewell*, 213 N.Y.S. 602, 126 Misc. 418.

15 C.J. p 872 note 98.

65. Necessity of repeated recommendations

Judges authorized to recommend court attendants for appointment by county officer need not recommend names to each incoming officer, but the latter must continue the attendants' names on pay roll until attend-

termine the number of attendants,⁶⁶ or may require the appointment of as many as are necessary.⁶⁷ Moreover, a court may appoint attendants when a peculiar emergency demands, or where the agency vested by law with the power of appointment neglects or refuses to perform its duty;⁶⁸ although the right to appoint under such circumstances is only coextensive with the necessity and ceases with it.⁶⁹

The exercise of an appointing power is not subject to the control, dictation, or approval of a local administrative body or official, in the absence of a statute imposing such regulation;⁷⁰ and where the power of appointment has been lawfully exercised the court may not be compelled by mandamus to appoint another to the same office.⁷¹

Qualification. In the absence of statutory requirement, a court attendant need not give bond to the appointing official.⁷²

d. Tenure and Removal

Unless otherwise regulated by statute, the power to remove a court attendant is lodged with the appointing authority.

In the absence of statutory regulations, the power to remove a court attendant follows and abides with the power of appointment.⁷³ Thus, where the power of appointment is exercised by the court, it has the power of removal.⁷⁴

Where statutes prescribe the body or official who

may remove court attendants, such statutes control.⁷⁵ However, a power of removal may not be implied from a mere limited power of appointment to fill vacancies.⁷⁶ Civil service laws providing for the removal of court attendants and assistants must be given effect.⁷⁷

Where required by statute, an attendant is entitled to a hearing before removal.⁷⁸

Term of office. Where the term of office of a court attendant is regulated by statutory provisions, such regulations control.⁷⁹

Where an attendant is appointed pursuant to statutory authorization, and the statute is repealed by a subsequent enactment, the appointment of new attendants under the later act terminates the services of the attendant, although the subsequent appointments are not made to the full number authorized.⁸⁰ However, the transfer by legislative action of the appointing power to another body or official does not remove the attendant where the body or official fails to make new appointments.⁸¹

e. Authority, Duties, and Liability

The duties of a court attendant are those pertaining to the character of the office and which are prescribed by law. An attendant may be civilly liable for his wrongful acts or omissions.

As a general rule the duties of court assistants and attendants are those which appertain to the

ant is removed.—*Hansmann v. Thomas*, 234 N.Y.S. 581, 134 Misc. 75.

68. *Ariz.*—*Merrill v. Phelps*, 84 P. 2d 74, 52 *Ariz.* 526.

Ill.—*People ex rel. Snow v. City of Chicago*, 244 Ill.App. 66.

N.Y.—*Hansmann v. Thomas*, 234 N.Y.S. 581, 134 Misc. 75.

67. *Ariz.*—*Merrill v. Phelps*, 84 P.2d 74, 52 *Ariz.* 526.

68. *Idaho.*—*State v. Leavitt*, 260 P. 164, 44 *Idaho* 739.

Ohio.—*Mayhew v. Hamilton County*, 1 *Disn.* 186, 12 *Ohio Dec.*, Reprint, 565.

15 C.J. p 872 note 99.

69. *Ohio.*—*Mayhew v. Hamilton County*, 1 *Disn.* 186, 12 *Ohio Dec.*, Reprint, 565.

70. *Minn.*—*State ex rel. Bozicevich v. City of Eveleth*, 260 N.W. 223, 194 *Minn.* 44.

N.Y.—*In re Flaherty*, 171 N.Y.S. 624, 184 App.Div. 428, reversed on other grounds *Flaherty v. Craig*, 123 N.E. 157, 226 N.Y. 76.

71. N.Y.—*People v. Wendell*, 10 N.Y.S. 587, 67 *Hun* 382.

15 C.J. p 872 note 2.

72. N.Y.—*Hansmann v. Thomas*, 234 N.Y.S. 581, 134 Misc. 75.

73. *Wis.*—*In re Janitor Supreme Ct.*, 35 *Wis.* 410.

15 C.J. p 872 note 10.

74. *Ohio.*—*State ex rel. Hess v. City of Akron*, 10 N.E.2d 1, 56 *Ohio App.* 28, affirmed 7 N.E.2d 411, 132 *Ohio St.* 305.

Pa.—*Werkman v. Westmoreland County*, 194 A. 344, 128 Pa.Super. 297.

Wis.—*In re Janitor Supreme Ct.*, 35 *Wis.* 410.

15 C.J. p 872 note 10.

75. Ill.—*Belmont v. City of Chicago*, 198 Ill.App. 25.

N.Y.—*Hansmann v. Thomas*, 234 N.Y.S. 581, 134 Misc. 75—*Connery v. Sewell*, 213 N.Y.S. 602, 126 Misc. 418—*In re Mott*, 190 N.Y.S. 180.

76. N.J.—*Courter v. Butler*, 103 A. 411, 91 N.J.Law 683.

77. N.J.—*Courter v. Butler*, supra.

Appeal to commission

Civil service commission has jurisdiction to hear appeal of sergeant at arms from order of district judge dismissing sergeant at arms from his position, as well as to change the penalty imposed from dismissal to suspension.—*Varbalow v. Civil Service Commission*, 192 A. 88, 15 N.J. Misc. 444.

78. *Minn.*—*State ex rel. Bozicevich v. City of Eveleth*, 260 N.W. 223, 194 *Minn.* 44.

79. Effect of resignation of judge

Where a statute providing that particular court attendants should hold office during pleasure of judges appointing them was ambiguous as to whether appointment was for a term at pleasure of incumbent at time of appointment, or for a term at the pleasure of the court as the appointing power, the latter interpretation was adopted.—*Varbalow v. Civil Service Commission*, 192 A. 88, 15 N.J. Misc. 444.

Indefinite term

Where under a statute attendants are to be removed by the sheriff with the consent of the judges, they have an indefinite tenure dependent on the will of the judges.—*Hansmann v. Thomas*, 234 N.Y.S. 581, 134 Misc. 75.

80. N.Y.—*Holley v. New York*, 59 N.Y. 166.

Notice to an incumbent of his removal is unnecessary.—*Holley v. New York*, supra.

81. N.Y.—*Blunt v. New York*, 60 *How.Pr.* 482.

character of the office itself, and the necessity upon which rests their appointment, and such as are specifically provided by law,⁸² although it has been held that the duties of an attendant may be founded on ancient practice sanctioned by laws impliedly recognizing the same.⁸³

Attendants and assistants must act in accordance with the judge's direction,⁸⁴ regardless of the instructions of any other person.⁸⁵

Liability. A court attendant may be held accountable in a civil suit for damages resulting from negligence in the performance of his legal duties;⁸⁶ and a suit may be brought against a former attend-

ant in his individual capacity after he has gone out of office.⁸⁷

f. Compensation

The compensation of court attendants is regulated by statute, by the court, or by other officials or bodies; and the amount fixed may not be changed contrary to statute. Acceptance of an amount less than the statutory allowance does not, in some states, foreclose recovery of the full compensation.

The right to, and the amount of, compensation of court attendants and assistants may be fixed by statute,⁸⁸ or it may be determinable by the court in the exercise of its inherent⁸⁹ or statutory⁹⁰ jurisdiction,

82. N.Y.—In re Flaherty, 171 N.Y.S. 624, 184 App.Div. 428, reversed on other grounds Flaherty v. Craig, 123 N.E. 157, 226 N.Y. 76, 15 C.J. p 873 note 14.

Bailiffs and criers of federal courts are required to attend, without special designation, on any day to which the court is specifically adjourned, and they are bound to take notice of the orders of the court and be ready to discharge their duties if required.—U. S. v. McCabe, R.L. 129 F. 708, 64 C.C.A. 236, affirming, C.C., 122 F. 653—Kelly v. U. S., 41 Ct.Cl. 246.

Deputy marshal of municipal court held charged at all times with performance of duty as peace officer.—Los Angeles County v. Industrial Accident Commission of California, 11 P.2d 434, 123 Cal.App. 12.

The duties of the court crier and tipstaff are to open court, and to keep the court room, judges' room, law library, and jury rooms clean, heated, lighted, etc.—In re Court Officers, 3 Pa.Dist. 136.

83. N.J.—Cox v. Passaic County C. Pl. Ct., 45 N.J.Law 328, 15 C.J. p 873 note 15.

Sheriff

At common law the sheriff was required to summon two constables to serve as attendants on sessions of court, and who were required to be constables in order that they might have the power requisite to preserve order in the court and to enforce the mandates of the court.—Hansmann v. Thomas, 234 N.Y.S. 531, 134 Misc. 75.

84. Ariz.—Merrill v. Phelps, 84 P. 2d 74, 52 Ariz. 526.

Ohio.—State v. Zangerle, 151 N.E. 769, 115 Ohio St. 32.

Assistance to other officers

Judges could require deputy court attendants to assist sheriff or other county officer.—Hansmann v. Thomas, 234 N.Y.S. 531, 134 Misc. 75.

85. Ariz.—Merrill v. Phelps, 84 P.2d 74, 52 Ariz. 526.

Sergeant at arms

(1) Sergeant at arms held not gail-

ty of negligence or default in returning to debtor property levied on but claimed exempt.—Charlton v. Mitchell, 2 A.2d 367, 121 N.J.Law 285.

(2) A sergeant at arms of a district court has been held not subject to the statutory liability for failure to perform the duties prescribed by the District Court Act respecting executions out of said court delivered to him which was imposed on constables for such failure.—Nixon v. Fithian, 33 A. 698, 61 N.J.Law 4.

87. Summons held sufficient

Ill.—King v. Snow, 266 Ill.App. 462.

88. Ga.—MacNeill v. Steele, 199 S. E. 99, 186 Ga. 792.

Iowa.—Heller v. Montgomery County, 176 N.W. 966, 188 Iowa 981.

N.J.—Lally v. Allgair, 6 A.2d 183, 122 N.J.Law 499.

N.Y.—People ex rel. Martin v. Hyman, 210 N.Y.S. 30, 213 App.Div. 519—Shevlin v. La Guardia, 2 N.Y.S.2d 597, 166 Misc. 473, modified on other grounds, 5 N.Y.S.2d 556, 254 App.Div. 922, affirmed 18 N.E.2d 43, 279 N.Y. 649—Nadal v. City of New York, 269 N.Y.S. 379, 150 Misc. 400.

Pa.—Werkman v. Westmoreland County, 194 A. 344, 128 Pa.Super. 297—Bettig v. Berks County, 26 Pa.Dist. 972.

15 C.J. p 873 note 18.

Validity of statute

Statute held valid as not in violation of constitutional provision relating to civil service.—Ellis v. Urner, 181 N.E. 22, 125 Ohio St. 246, affirming 180 N.E. 661, 41 Ohio App. 183.

Repeal of statute

(1) After the repeal of the statute providing for fees, such fees are not allowable.—Hart v. New Orleans, 24 La.Ann. 290.

(2) In view of provision of General Appropriation Bill of 1939 that where salary of state officer or employee has not been changed by any act out of legislature of 1939, the appropriation for salaries respect-

ing such officer or employee shall control salary to be paid, the act fixing compensation of marshal of supreme court at three thousand dollars per annum was suspended during life of appropriation bill.—State ex rel. Williams v. Lee, Fla., 191 So. 697.

89. Cal.—Millholen v. Riley, 293 P. 69, 211 Cal. 29.

Ind.—Dunn v. State, 184 N.E. 535, 204 Ind. 390.

Pa.—Schwarz v. City of Philadelphia, 4 A.2d 573, 134 Pa.Super. 544.

S.D.—White v. Hughes County, 67 N.W. 855, 9 S.D. 12.

15 C.J. p 873 note 19.

An appointee of a court not of record cannot recover compensation.—Huff v. Knapp, 5 N.Y.Super. 299, affirmed 5 N.Y. 65.

Power to appoint see supra subdivision c of this section.

90. Ill.—People ex rel. Snow v. City of Chicago, 244 Ill.App. 66.

N.Y.—Flaherty v. Craig, 123 N.E. 157, 226 N.Y. 76, reversing In re Flaherty, 171 N.Y.S. 624, 184 App. Div. 428.

Ohio.—State v. Thomas, 172 N.E. 397, 35 Ohio App. 250.

Limitation on exercise of power

The power of courts to fix salaries of their employees and assistants in administration of justice must be exercised not only with due regard to rates of pay for similar positions in other courts within city, but also with sympathetic appraisal of financial condition of city which pays the salaries.—Rosenthal v. McGoldrick, 5 N.Y.S.2d 531, 167 Misc. 673, reversed on other grounds 6 N.Y.S.2d 360, 254 App.Div. 859, affirmed 18 N.E.2d 315, 279 N.Y. 688, reargument denied 19 N.E.2d 660, 280 N.Y. 11.

Exclusion of county board's authority

Where the power to fix compensation is vested in the judge, such power may not be exercised by the county board.—State v. Thomas, 172 N.E. 397, 35 Ohio App. 250.

or by other public officers or bodies in the exercise of authority vested in them.⁹¹

A statute fixing the compensation of particular court attendants should be limited to such employees as are clearly included within its provisions;⁹² and where the compensation is fixed by statute a court attendant, whether de facto or de jure, coming within its terms, is entitled to recover at least the minimum amount specified therein.⁹³ However, where the right to compensation is dependent on statute, an attendant is not entitled to receive compensation not provided for by the statute, or to receive more than the amount fixed or determined by the statute;⁹⁴ and services required of him for which he is not specifically paid must be considered compensated for by the payment received for other services.⁹⁵

A court attendant whose appointment was unlawful has been held not entitled to recover compensa-

tion for his attendance;⁹⁶ but a de facto court attendant may recover compensation for his services,⁹⁷ and an attendant whose appointment was otherwise lawful is not barred from recovering compensation because of the fact that, prior to his appointment, the full number of officers and attendants allowed to the court had been appointed.⁹⁸

While under a statute so providing a court attendant is not entitled to receive compensation for services not actually rendered,⁹⁹ it has been held that, not only may an attendant wrongfully suspended from, and subsequently reinstated in, his position recover his compensation for the period of the suspension,¹ but that, where the compensation is an incident of his office, it is not subject to set-off for sums earned in other employment during such period.² Furthermore, the right to compensation of a court attendant, such as a bailiff or crier, has been held not to depend on the necessity of his

Necessity of approval by board

Where so provided by statute, the court's determination of the compensation of its assistants may be subject to the approval of the county board.—*Board of Com'rs of Routt County v. Morning*, 210 P. 326, 72 Colo. 200.

Necessity of notice to comptroller

An attendant of the supreme court may compel the comptroller to pay his salary at the increased rate fixed by resolution of court, although the comptroller was not personally notified of the increase, and the justices' notice of their resolution given to the board of estimate and apportionment was sufficient.—*In re Flaherty*, 171 N.Y.S. 624, 184 App.Div. 428, reversed on other grounds *Flaherty v. Craig*, 123 N.E. 157, 226 N.Y. 76.

Duty to determine amount due

Where it is the duty of the judges of a court to approve the warrants or vouchers of its officers, they must determine for themselves what is lawfully due to such officers and approve warrants accordingly.—*In re Reilly*, 2 McG., La. 89.

91. N.Y.—*People v. New York Bd. of Estimate, etc.*, 131 N.Y.S. 604, 146 App.Div. 515, affirming 131 N.Y.S. 294, 72 Misc. 456.
15 C.J. p 873 note 20.

When rate of compensation effective

A rate of compensation, when fixed, relates back to, and takes effect from, the beginning of the fiscal period for which such rate is established, rather than from the date on which the rate is actually fixed.—*People ex rel. Pollastrini v. Whealan*, 187 N.E. 491, 353 Ill. 500, reversing 269 Ill.App. 281.

92. "Chief court attendant" held not "attendant" within the meaning of

a statute fixing and equalizing the compensation of "attendants" of a particular court.—*Gannon v. McGoldrick*, 7 N.Y.S.2d 11, 12, 169 Misc. 107, affirmed 7 N.Y.S.2d 13, 255 App.Div. 755.

Classification on pay roll

That employees are classified on the pay roll as "court attendants" does not alone establish their right to compensation as such, under a statute fixing the compensation of such "attendants," while the fact that they had previously not claimed the benefit of a prior statute fixing a smaller salary for such attendants is an indication that they did not consider themselves to be such "court attendants."—*Sawyer v. Camden County*, 4 A.2d 76, 122 N.J.Law 119.

93. Failure of city to fix salary

That salary was not fixed by city is no defense to action for unpaid salaries at minimum statutory rate.—*Hopkins v. City of Passaic*, 163 A. 238, 10 N.J.Misc. 1261.

94. Ala.—*Jefferson County v. Capanes*, 179 So. 637, 235 Ala. 449.
N.J.—*Lewis v. Hoboken*, 42 N.J.Law 377.

Okl.—*McIntosh County v. Whitaker*, 158 P. 1136, 59 Okl. 232.

Statutory authority to be shown

(1) One who claims "fees for services must be able to put his finger on some statute expressly allowing the fees he claims, and, if he is unable to do so, he is not entitled to the fees."—*State v. Police Comrs. Bd.*, 82 S.W. 960, 962, 108 Mo. App. 98.

(2) "The joy of serving rather than money, or . . . the smallest instead of the largest sum of money allowable, is to be preferred as compensation for a named duty unless money, in the one event, or the larg-

est amount, in the other, is provided for in terms or by implications of undeniable cogency."—*Duclos v. Harris County, Tex.Com.App.*, 298 S.W. 417, 418, affirming *Civ.App.*, 291 S.W. 611.

Occupancy of two positions

(1) A person filling two positions, such as crier and messenger, whose duties are compatible and distinct in character, is entitled to compensation for both.—*Preston v. U. S., D.C. Mo.*, 37 F. 417.

(2) A person holding two positions, such as bailiff and deputy marshal, whose duties are the same, is not entitled to pay as bailiff for attendance on the court on the same days on which he also attended court, and earned a fee, as deputy marshal.—*Swift v. U. S., C.C.Mass.*, 128 F. 763, affirmed *U. S. v. Swift*, 139 F. 225, 71 C.C.A. 351.

95. Ind.—*Randolph County v. Henry County*, 61 N.E. 612, 27 Ind.App. 378.

15 C.J. p 873 note 22.

96. N.Y.—*Day v. New York*, 66 N.Y. 592, reversing 6 Hun 92—*People v. Columbia County*, 4 Cow. 146.

97. N.Y.—*Thompson v. New York*, 30 N.Y.Super. 543.

Failure to file bond is no defense to action for unpaid salary for services thereafter rendered by de facto attendant.—*Hopkins v. City of Passaic*, 163 A. 238, 10 N.J.Misc. 1261.

98. N.Y.—*People v. Green*, 45 How. Pr. 150.

99. Ky.—*Threlkeld v. Livingston County Fiscal Ct.*, 80 S.W. 1095, 118 Ky. 330, 26 Ky.L. 211.

1. N.Y.—*Nadal v. City of New York*, 269 N.Y.S. 379, 150 Misc. 400.

2. N.Y.—*Nadal v. City of New York*, supra.

services but his attendance at the proper time is all that is required.³

Mileage or traveling expenses are sometimes allowed to court attendants by statute,⁴ and a county board has no power to reduce or cancel the allowance fixed, or to make a binding contract eliminating such fees.⁵

Change of compensation. Where an attendant is appointed, and is removable at will, by the court, the court may increase or diminish his compensation at will.⁶ Where the court is authorized by statute to fix the compensation subject to approval by a board, the board may not reduce the compensation once it is fixed and approved.⁷

Where the statute so provides, the compensation of an attendant, when once fixed, may not be changed for a given year.⁸ Furthermore, where the minimum compensation for attendants is fixed by statute, it may not be reduced by the court⁹ or by

a local administrative body,¹⁰ unless a reduction is authorized by the statute.¹¹ A statute authorizing a reduction of the compensation of certain court attendants does not affect the compensation of court attendants specifically exempted from the operation of the statute.¹²

Acceptance of less than legal compensation. According to some authorities the acceptance of an amount less than the statutory allowance does not preclude a court attendant from recovering the amount of compensation fixed by statute,¹³ at least in the absence of a binding agreement,¹⁴ or in the face of an acceptance under protest.¹⁵

On the other hand, it has also been held that the acceptance of a lesser amount estops an attendant from claiming the statutory allowance where he has failed to protest,¹⁶ or where he has agreed to accept the lesser sum,¹⁷ particularly where, although the agreement might not be binding, it has been fully performed.¹⁸

3. U.S.—U. S. v. McCabe, R.I., 129 F. 708, 64 C.C.A. 236, affirming, C.C., 122 F. 653—Kelly v. U. S., 41 Ct.Cl. 246.

15 C.J. p 873 note 24.

4. N.Y.—Becker v. Phipps, 153 N. Y.S. 486, 89 Misc. 176.

15 C.J. p 874 note 32.

5. N.Y.—Becker v. Phipps, 153 N.Y. S. 486, 89 Misc. 176.

6. Pa.—Schwarz v. City of Philadelphia, 4 A.2d 573, 134 Pa.Super. 544.

7. Colo.—Board of Com'rs of Routt County v. Morning, 210 P. 326, 72 Colo. 200.

8. Ill.—People ex rel. Pollastrini v. Whealan, 187 N.E. 491, 353 Ill. 500, reversing 269 Ill.App. 281.

N.Y.—Flaherty v. Craig, 123 N.E. 157, 226 N.Y. 76, reversing In re Flaherty, 171 N.Y.S. 624, 184 App.Div. 428.

Applicability of statute

L.1869 c 875 § 7, and L.1870 c 382 § 3, prohibiting supervisors from increasing the salaries of those then in office or their successors, except as provided by law, had no application where the salary of a court crier was fixed at a figure in excess of what he had theretofore been receiving as an ordinary officer of the court, since the crier's salary had not previously been established.—People v. Havemeyer, 47 How.Pr. N.Y., 59.

9. N.Y.—Shevlin v. La Guardia, 2 N.Y.S.2d 597, 166 Misc. 473, modified on other grounds 5 N.Y.S.2d 556, 254 App.Div. 922, affirmed 18 N.E.2d 43, 279 N.Y. 649.

Pa.—Werkman v. Westmoreland County, 194 A. 344, 128 Pa.Super. 297—Bettig v. Berks County, 26 Pa.Dist. 972.

10. N.Y.—Shevlin v. La Guardia, 2 N.Y.S.2d 597, 166 Misc. 473, modified on other grounds 5 N.Y.S.2d 556, 254 App.Div. 922, affirmed 18 N.E.2d 43, 279 N.Y. 649.

11. Repeal of statute

Statute held not repealed or modified by subsequent statute relating to compensation of different class of court attendants.—MacNeill v. Steele, 199 S.E. 99, 186 Ga. 792.

12. N.Y.—Shevlin v. La Guardia, 2 N.Y.S.2d 597, 166 Misc. 473, modified on other grounds 5 N.Y.S.2d 556, 254 App.Div. 922, affirmed 18 N.E.2d 43, 279 N.Y. 649.

13. Ga.—MacNeill v. Steele, 199 S. E. 99, 101, 186 Ga. 792.

Public policy

"An agreement by a public officer to accept less than the fees or salary allowed him by law is contrary to public policy and void. . . . The compensation . . . is an incident of his office, and he is entitled to it, not by force of any contract, but because the law attaches it to the office."—MacNeill v. Steele, supra.

14. Pa.—Bettig v. Berks County, 26 Pa.Dist. 972.

15. Pa.—Bettig v. Berks County, supra.

Effect of charter regulation

The provision of Greater New York Charter § 149, that an officer's receipt in full payment upon the pay roll shall be deemed an accord and satisfaction has no application to the salary of a supreme court attendant, fixed by the court as a county charge, which the comptroller has no power to dispute.—In re Flaherty, 171 N.Y.S. 624, 184 App.Div. 428, reversed on other grounds Flaherty

v. Craig, 123 N.E. 157, 226 N.Y. 76.

16. Public policy

Waiver by court attendant of part of his statutory salary was not contrary to public policy, especially where he had accepted less than statutory salary on fifty-six successive occasions over period of two years and four months in full payment.—State ex rel. Hess v. City of Akron, 7 N.E.2d 411, 132 Ohio St. 305, affirming 10 N.E.2d 1, 56 Ohio App. 28.

17. Public policy

(1) "The public policy which prevents a public officer from agreeing to accept less than the compensation attached by law to his office . . . does not apply to a mere employee or attaché who may be appointed or discharged at will."—Werkman v. Westmoreland County, 194 A. 344, 346, 128 Pa.Super. 297.

(2) "An arrangement by which a municipal court attendant accepted less than his statutory salary did not violate public policy in view of provision making term of office dependent on pleasure of the appointing judges.—State ex rel. Hess v. City of Akron, 10 N.E.2d 1, 56 Ohio App. 28, affirmed 7 N.E.2d 411, 132 Ohio St. 305.

Consideration for agreement

The mutual promises of court attendants to accept less than the statutory salary was a "consideration" for the transaction; but even if there had been no consideration originally a change of position by the city paying the compensation in reliance on the promises would supply the "consideration" necessary to the validity of the agreement.—State ex rel. Hess v. City of Akron, supra.

18. Ohio.—State ex rel. Hess v. City of Akron, supra.

§ 143. Probation Officers

- a. In general
- b. Appointment
- c. Duties and authority
- d. Compensation
- e. Tenure, removal, and retirement

a. In General

A probation officer is a local court assistant or officer, and, in some jurisdictions, is a county officer. A federal district probation officer's jurisdiction is limited to his own district.

A probation officer is a court assistant¹⁹ or officer,²⁰ who exercises judicial functions.²¹ Furthermore, he is regarded as a minor local officer.²² He is also a county officer in some states,²³ but not in others.²⁴

Jurisdiction. A federal probation officer, appointed for a particular district, has no jurisdiction to act in another district.²⁵

b. Appointment

Unless otherwise provided for by statutory or constitutional regulations, a probation officer, ordinarily is appointed by the court.

The appointment of a probation officer has been held to be a judicial function,²⁶ which may not be delegated to another official or body, such as a county board.²⁷ Hence, the appointment of a probation

officer, usually under statutory authority, is ordinarily made by the court.²⁸ The delegation of such power to the court is proper.²⁹

Pursuant to constitutional authorization, the appointment may be made by the governor;³⁰ and, where so required by statute, an appointment must have the consent and approval of the county board,³¹ although the board's power therein does not extend to determining whether a necessity exists for such appointment.³²

Character and qualifications. The determination of the character and qualifications of a proposed appointee usually is a matter within the discretion of the appointing court;³³ but, under a statute requiring the consent and approval of the county board to an appointment, it is the office of such body to determine whether the proposed appointee is a person fit for the position.³⁴

c. Duties and Authority

The authority and duties of a probation officer are determined by statute or by the court. He has no general power of arrest.

The duties and authority of a probation officer are such as may be conferred on him by statute³⁵ or by the court appointing him.³⁶ It is his duty generally to assist the court;³⁷ to furnish to it such information as it may require,³⁸ and to make such

19. Cal.—Nicholl v. Koster, 108 P. 302, 157 Cal. 416.
21 C.J. p 1000 note 92.

20. Ill.—People ex rel. Callahan v. Whealan, 190 N.E. 698, 356 Ill. 328—People v. Chicago, B. & Q. R. Co., 112 N.E. 278, 273 Ill. 110.
31 C.J. p 1000 note 93.

21. Ill.—Witter v. Cook County, 100 N.E. 148, 256 Ill. 616.

22. Cal.—Nicholl v. Koster, 108 P. 302, 157 Cal. 416.

Probation officers as relating to infants see the C.J.S. title Infants § 17, also 31 C.J. p 1000 note 87 et seq.

Employee

Officer held not "employee" of court within meaning of statute determining court fees, although appointed by judge of court.—Funk v. Lamneck, 30 Ohio N.P.N.S., 174.

23. Cal.—Nicholl v. City and County of San Francisco, 257 P. 501, 201 Cal. 470.

Mo.—Hasting v. Jasper County, 282 S.W. 700, 314 Mo. 144.

Wash.—State ex rel. Richardson v. Clark County, 56 P.2d 1023, 1024, 186 Wash. 79.

15 C.J. p 483 note 34.

24. Ill.—People ex rel. Callahan v.

Whealan, 190 N.E. 698, 356 Ill. 328.
15 C.J. p 483 note 35.

25. U.S.—Kelly v. U. S. ex rel. Frad, C.C.A.N.Y., 89 F.2d 866, certiorari granted Frad v. Kelly, 57 S.Ct. 946, 301 U.S. 681, 81 L.Ed. 1339, affirmed 58 S.Ct. 188, 302 U.S. 312, 82 L.Ed. 282.

26. Ill.—Witter v. Cook County, 100 N.E. 148, 256 Ill. 616.

Mass.—Catheron v. Suffolk County, 116 N.E. 885, 227 Mass. 598.

27. Ill.—Witter v. Cook County, 100 N.E. 148, 256 Ill. 616.
Delegation of judicial powers see Constitutional Law § 166.

28. Ill.—People ex rel. Callahan v. Whealan, 190 N.E. 698, 356 Ill. 328.

Mass.—Avery v. Norfolk County, 181 N.E. 707, 279 Mass. 598—McCourt v. City of Boston, 149 N.E. 601, 254 Mass. 100.

31 C.J. p 1000 note 6.

Appointment held valid

Mass.—Catheron v. Suffolk County, 116 N.E. 885, 227 Mass. 598.

29. Cal.—Nicholl v. Koster, 108 P. 302, 157 Cal. 416.

W.Va.—State v. Monongalia County Ct., 96 S.E. 966, 82 W.Va. 564.

Judicial encroachment on executive see Constitutional Law § 156.

30. Fla.—Hillsborough County v. Savage, 58 So. 835, 63 Fla. 337.

31. Okl.—Seminole County v. State, 120 P. 913, 31 Okl. 196.

32. Okl.—Seminole County v. State, supra.

31 C.J. p 1000 note 10.

33. Mass.—McCourt v. City of Boston, 149 N.E. 601, 254 Mass. 100.

34. Okl.—Seminole County v. State, 120 P. 913, 31 Okl. 196.

31 C.J. p 1000 note 10.

35. Ill.—People v. Chicago, B. & Q. R. Co., 112 N.E. 278, 273 Ill. 110.

15 C.J. p 483 note 35 [a].

Duties and authority of probation officers as relating to infants, see the C.J.S. title Infants § 17, also 31 C.J. p 1000 notes 88, 89, 95, 98, 99.

36. Ill.—People v. Chicago, B. & Q. R. Co., supra.

Pa.—In re Juvenile Ct., 17 Pa. Dist. 207.

37. Ill.—People v. Chicago, B. & Q. R. Co., 112 N.E. 278, 273 Ill. 110.

31 C.J. p 1000 note 96.

38. Cal.—Nicholl v. Koster, 108 P. 302, 157 Cal. 416.

31 C.J. p 1000 note 98.

investigations as may be necessary.³⁹

A probation officer has authority to make arrests only when such power is incidental or necessary to the performance of his duties.⁴⁰

d. Compensation

The compensation of probation officers ordinarily is fixed and paid according to statutory regulations.

Pursuant to statutory regulations the compensation of a probation officer is determined by the court,⁴¹ subject to the concurrence of the county board or equivalent municipal body,⁴² and is paid by the county.⁴³ Where the officer's salary has been fixed by the court within the limit set by statute, and has been approved by the county board, the board cannot thereafter reduce the salary,⁴⁴ at least during the period for which an appropriation has been made therefor.⁴⁵

The fixing of the compensation of a probation officer has, however, been held not to be a judicial function;⁴⁶ and, in some jurisdictions, the county board is empowered to fix the compensation;⁴⁷ but where the legislature is required by the constitution to fix the compensation of officers it may not

delegate to a county board the power to fix the compensation of probation officers.⁴⁸

e. Tenure, Removal, and Retirement

Where a probation officer serves at the pleasure of the court he may be summarily removed. To secure retirement benefits statutory regulations must be complied with.

Where so provided by statute, the tenure of a probation officer is at the pleasure of the court.⁴⁹ Under such statutes the officer may be removed at will by the court without the preferment of charges or an opportunity to be heard.⁵⁰ Where the officers are appointed by the court, subject to removal in its discretion, the county board has no power to reduce the number of such officers.⁵¹

Where the manner of removal is regulated by statute, such statutes are to be complied with.⁵²

Retirement; benefits. On retirement a probation officer may, under statutes so providing, be entitled to retirement benefits.⁵³ Where, under such statutes, he has an option as to the manner in which such benefits are to be paid, he must exercise such option in proper form and time;⁵⁴ and, on his failure to do so, benefits are payable in the manner

39. Ill.—Witter v. Cook County, 100 N.E. 148, 256 Ill. 616.

31 C.J. p 1000 note 97.

40. W.Va.—State v. Monongalia County Ct., 96 S.E. 966, 82 W.Va. 564.

41. Mass.—Avery v. Norfolk County, 181 N.E. 707, 279 Mass. 598—Catheron v. Suffolk County, 116 N.E. 885, 227 Mass. 598.

Mo.—Hastings v. Jasper County, 282 S.W. 700, 314 Mo. 144.

Compensation held lawfully fixed Mass.—McCourt v. City of Boston, 149 N.E. 601, 254 Mass. 100.

42. Ill.—People ex rel. Callahan v. Whealan, 190 N.E. 698, 356 Ill. 328.

Subsequent disapproval by city council of probation officer's salary does not affect his right thereto.—McCourt v. City of Boston, 149 N.E. 601, 254 Mass. 100.

Salary of subsequent appointees

(1) Establishment of salary for all probation officers appointed under statute providing therefor fixed salary for each appointee, and separate action as to salary in subsequent appointments was unnecessary.—McCourt v. City of Boston, supra.

(2) Where a salary is fixed for a particular appointee, rather than for any incumbent of the office, the fact that subsequent temporary appointees are paid at the same rate is not a binding recognition of such fixed salary for the office itself, since, to be construable as fixing a salary

for the office rather than for an appointee, the county board's order must be clear; hence, when the board approves the salary of a subsequent permanent appointee for a lower amount than previously paid the incumbent, such appointee is entitled only to such lower amount.—Avery v. Norfolk County, 181 N.E. 707, 279 Mass. 598.

43. Cal.—Nicholl v. Koster, 108 P. 302, 157 Cal. 416.

Ill.—People ex rel. Callahan v. Whealan, 190 N.E. 698, 356 Ill. 328.

Mass.—Avery v. Norfolk County, 181 N.E. 707, 279 Mass. 598—McCourt v. City of Boston, 149 N.E. 601, 254 Mass. 100.

Mo.—Hastings v. Jasper County, 282 S.W. 700, 314 Mo. 144.

44. Ill.—People ex rel. Callahan v. Whealan, 190 N.E. 698, 356 Ill. 328.

45. Ill.—People ex rel. Callahan v. Whealan, supra.

46. La.—State v. East Baton Rouge Police Jury, 55 So. 572, 128 La. 911.

47. La.—State v. East Baton Rouge Police Jury, supra.

48. Fla.—State v. Hillsborough County, 87 So. 917, 81 Fla. 271—Hillsborough County v. Savage, 58 So. 335, 63 Fla. 337.

49. Pa.—In re Juvenile Court, 17 Pa. Dist. 207.

Deputy probation officer

Under Inferior Criminal Courts Act § 96, providing for the removal of "chief probation officer or any pro-

bation officer," a deputy chief probation officer of city magistrate's court of the city of New York may be removed at pleasure of the appointing power, the omission to specifically include deputy chief probation officers not indicating legislative intent to omit them or to design that method of their removal is under Greater New York Charter § 1543.—McKay v. McAdoo, 178 N.Y.S. 207, 108 Misc. 201.

50. Mo.—State ex rel. Mincke v. Sartorius, 95 S.W.2d 873, 231 Mo. App. 807.

51. Ill.—People ex rel. Callahan v. Whealan, 190 N.E. 698, 356 Ill. 328.

52. Opportunity to make explanation

A probation officer in domestic relations court of city of New York was only entitled to an opportunity of making an explanation after due notice upon written charges, and, where there had been a full compliance with such conditions, determination of presiding justice of domestic relations court dismissing probation officer was required to be confirmed.—O'Kelly v. Hill, 15 N.Y. S.2d 16, 257 App.Div. 631.

53. N.Y.—Marcus v. New York City Employees' Retirement System, 285 N.Y.S. 903, 247 App.Div. 111.

54. N.Y.—Marcus v. New York City Employees' Retirement System, supra.

and amount prescribed by statutory regulations.⁵⁵ retirement under the terms of retirement laws in-
 A probation officer is not subject to compulsory applicable to his office.⁵⁶

C. DE FACTO AND UNAUTHORIZED OR ILLEGAL COURTS AND TRIBUNALS

§ 144. In General

If authorized by law, a court defectively organized or irregularly called is a *de facto* court and its acts are valid.

Where the organization or calling of a court is authorized by law, a court organized or called thereunder is at least a *de facto* court, although it is defectively organized or irregularly called.⁵⁷

While it has been held that, where a court has been established by an act of the legislature apparently valid, and has gone into operation under such act, it is to be regarded as a court *de facto*,⁵⁸ it has also been held that orders and decrees made by a person purporting to act as judge of a court organized under an unconstitutional statute are void.⁵⁹

If there is no law authorizing a certain court to be held, and a judge assumes to create a court and preside over it, the tribunal so created and all its proceedings will be void.⁶⁰

§ 145. Courts of De Facto Government

- a. In general
- b. Confederate courts

a. In General

Courts acting under *de facto* political authority have

jurisdiction; a judgment of a foreign court in territory in *de facto* possession of a foreign government may validly affect private rights.

Courts acting under authority of the *de facto* rulers of a county for the time being have the jurisdiction of legitimate courts,⁶¹ and a judgment of a court of a foreign country, sitting in territory not yet surrendered by such foreign government, it being *de facto* in possession, is valid as to the rights of private persons affected thereby.⁶²

b. Confederate Courts

The national court of the Confederate States was a nullity, but acts of the state courts in the Confederacy have been held valid to the same extent as acts of foreign courts.

A national court organized under authority of the government of the Confederate States of America was a nullity and could exercise no rightful jurisdiction;⁶³ but it is well established as a general rule that the acts, decrees, and judgments of the courts of the states which formed part of the Confederacy, during the war, were valid and binding so far as they related merely to private rights and did not impair, or tend to impair, the supremacy of the national authority or the just rights of citizens under the federal constitution,⁶⁴ although their judgments

55. N.Y.—*Marcus v. New York City Employees' Retirement System*, supra.

56. Cal.—*Nicholl v. City and County of San Francisco*, 257 P. 501, 201 Cal. 470.

57. Minn.—*State v. Bailey*, 118 N.W. 876, 106 Minn. 138, 130 Am.S.R. 592, 19 L.R.A.N.S., 775, 16 Ann. Cas. 338.

N.Y.—*People ex rel. Horowitz v. Hanley*, 176 N.Y.S. 392, 106 Misc. 625, 37 N.Y.Cr. 430.

Or.—*Ex parte Worley*, 66 P.2d 107, 60 Okl.Cr. 384.

15 C.J. p 874 note 36.

Court held out of term

A court held on, following an adjournment to, a day beyond the commencement of the term of another court of the same circuit was a court *de facto* and its proceedings were valid in a criminal, as well as in a civil, case.—*Brewer v. State*, 6 Lea, Tenn., 188.

58. Minn.—*Burt v. Winona & St. P. R. Co.*, 18 N.W. 285, 289, 31 Minn. 472.

Authorities reviewed

Mich.—*Gildemeister v. Lindsay*, 180 N.W. 638, 212 Mich. 299.

59. Tex.—*State v. Gillette's Estate*, Com.App., 10 S.W.2d 984, reversing *Gillette's Estate v. State*, Civ.App., 286 S.W. 261.

Reason for rule is that there can be no officer, either *de jure* or *de facto*, unless there is an office to fill.—*State v. Gillette's Estate*, supra.

60. Kan.—*In re Davis*, 61 P. 809, 62 Kan. 281.

15 C.J. p 874 note 38.
 Power to create courts in general see supra § 120.

61. Pa.—*Bank of North America v. McCall*, 4 Binn. 371.
 15 C.J. p 874 note 39.

62. U.S.—*Keene v. McDonough, La.*, 8 Pet. 308, 8 L.Ed. 955.

A decree of a Mexican tribunal as to the ownership of lands in disputed territory, made subsequent to the declaration of ownership by Texas, but while such territory was claimed and controlled by Mexico, has been held valid.—*Trevino v. Fernandez*, 13 Tex. 630.

63. U.S.—*Hickman v. Jones*, Ala., 9 Wall. 197, 19 L.Ed. 551.

Validity of acts done under secession governments see the C.J.S. title States § 13, also 59 C.J. p 42 note 32 et seq.

64. U.S.—*Johnson v. Atlantic, G. & W. I. Transit Co., Fla.*, 15 S.Ct. 520, 156 U.S. 618, 39 L.Ed. 556.
 15 C.J. p 874 note 42.

Theory underlying validity

The Confederate States "in most, if not in all, instances, merely transferred the existing State organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights remained. . . . These laws . . . were the fundamental principles for which civil society is organized . . . and must be respected in their administration under whatever temporary dominant authority they may be exercised. It . . . [was] only when in the use of these powers substantial aid and comfort was given or intended to be given to the rebellion . . . that their acts . . . [were] void."

stand on no higher ground than acts and judgments of a foreign court, and can be impeached in the same manner.⁶⁵

It has been held, however, that the acts of such courts are void,⁶⁶ and in some states, by constitutional provision adopted during the Civil War, they were expressly declared void.⁶⁷

§ 146. Collateral Impeachment

The legality of the existence of a *de facto* court may be questioned only in a direct proceeding.

The legality of the existence of a *de facto* court and its right to exercise its functions may not be inquired into collaterally, but only in a direct proceeding at the instance of the state;⁶⁸ neither may the question of the legal existence of a trial court be raised by appeal.⁶⁹

IV. TERMS AND SESSIONS

§ 147. Definitions and Distinctions

A term of court is the period of time prescribed for holding court, while a session of court is the time during a term in which the court actually sits for the transaction of judicial business. A term is regular when it is held at a time and place fixed by law; and it is special when it is called by a judge or other authorized official, in his discretion, and is convened or held at a time fixed by him. An appearance term is one to which process is returnable; and a jury term is one at which a jury may be had.

A term of court is the time prescribed for holding court for the administration of judicial duties; a definite and fixed period, prescribed by law for the administration of judicial duties, within which the business of the term should be transacted.⁷⁰ It signifies that period of time between the first day of a term as fixed by law and the adjournment to the next court in course.⁷¹ It is the time prescribed for

holding court, and not the time during which the court actually sits and is engaged in transacting business, which constitutes the term,⁷² and for many purposes, as for instance, the suing out and return of process,⁷³ or the filing of declarations,⁷⁴ a time appointed by law for the holding of a court is a term, although the court does not actually convene.⁷⁵ A term of court is distinguishable from "vacation,"⁷⁶ although it has been held that the space of time during which a court holds a session for the purpose of hearing and deciding any matters in vacation is a term of court for such purpose.⁷⁷

Appearance term is ordinarily the first term after legal service of process has been made,⁷⁸ or the term to which process is made returnable;⁷⁹ but as used in a statute relating to trials *de novo* in the

Sprott v. U. S., 20 Wall., U.S., 459, 464, 22 L. Ed. 371.

65. Ala.—Bibb v. Avery, 45 Ala. 691. 15 C.J. p 874 note 43.

66. W. Va.—Snider v. Snider, 3 W. Va. 200.

67. Ark.—Cowser v. State, 27 Ark. 444.

15 C.J. p 874 note 45.

68. Or.—Morgan v. State, Cr., 90 P. 2d 683, 685, quoting *Corpus Juris*. 15 C.J. p 875 note 46.

69. Mo.—State ex rel. General Motors Acceptance Corporation v. Brown, 48 S.W.2d 857, 858, 330 Mo. 220, quoting *Corpus Juris*—Gardner v. Springfield Gas & Electric Co., 135 S.W. 1023, 154 Mo. App. 666.

70. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 368, quoting *Corpus Juris*, and denying certiorari 128 So. 901, 23 Ala. App. 354.

Ill.—People v. Wilson, 190 N.E. 270, 273, 356 Ill. 256, quoting *Corpus Juris*.

15 C.J. p 875 notes 48, 49.

Other definitions

Ky.—Wood Oil Co. v. Commonwealth, 244 S.W. 429, 196 Ky. 196.

Miss.—Walton v. State, 112 So. 790, 147 Miss. 851.

Tex.—Emerson v. Missouri, K. & T. Ry. Co. of Texas, 82 S.W. 1060, 37 Tex. Civ. App. 110, 111.

Wis.—Hutchinson v. Lord, 1 Wis. 286, 314, 60 Am. D. 381.

15 C.J. p 875 note 49 [a]—62 C.J. p 721 notes 41, 52, 53.

71. Mo.—Trower v. Mudd, App., 242 S.W. 993.

Duration of terms see *infra* § 151.

72. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 368, quoting *Corpus Juris*, and denying certiorari 128 So. 901, 23 Ala. App. 354.

Miss.—Williams v. State, 126 So. 40, 42, 156 Miss. 346, quoting *Corpus Juris*.

15 C.J. p 875 note 50.

73. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 368, quoting *Corpus Juris*, and denying certiorari 128 So. 901, 23 Ala. App. 354.

Miss.—Williams v. State, 126 So. 40, 42, 156 Miss. 346, quoting *Corpus Juris*.

15 C.J. p 875 note 51.

74. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 368, quoting *Corpus Juris*, and de-

nying certiorari 128 So. 901, 23 Ala. App. 354.

Ill.—Downey v. Smith, 13 Ill. 671.

Miss.—Williams v. State, 126 So. 40, 42, 156 Miss. 346, quoting *Corpus Juris*.

75. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 368, quoting *Corpus Juris*, and denying certiorari 128 So. 901, 23 Ala. App. 354.

Ill.—Downey v. Smith, 13 Ill. 671.

Miss.—Williams v. State, 126 So. 40, 42, 156 Miss. 346, quoting *Corpus Juris*.

76. Mo.—Himmelberger - Harrison Lumber Co. v. Keener, 117 S.W. 42, 217 Mo. 522.

62 C.J. p 722 note 54.

"Vacation" is correlative of "term" Va.—Brown v. Hume, 16 Gratt. 456, 57 Va. 456.

What constitutes vacation see *infra* § 167.

77. Fla.—Lanier v. Shayne, 95 So. 617, 85 Fla. 212.

78. Iowa.—Vinsant v. Vinsant, 47 Iowa 594.

79. Miss.—Thornton v. Fitzhugh, 18 Miss. 438.

15 C.J. p 875 note 55.

supreme court the expression has been held to mean the term when it first becomes apparent that an issue of fact is to be determined.⁸⁰

General term is an expression sometimes used to indicate a sitting of the court in banc⁸¹ or the occasion when the court may exercise jurisdiction extending to the whole of a subject.⁸²

Jury term. A term may be a jury term in contemplation of law, although it is not so in point of fact, as where the legislature has designated it as one of the annual terms for the county and has provided a jury therefor and, although the judge has by order dispensed with a jury for the term, the dispensation is not absolute and a jury may still be had by affirmative order of the court.⁸³

Spring term. A term is a spring term of a certain year where it is specifically so described by statute, even though, in pursuance of a statutory requirement that it begin a designated number of Mondays before the first Monday of March, it commences in December of the preceding year.⁸⁴

A *session* of court is the time during a term in which the court sits for the transaction of business.⁸⁵ A court is not in session until the judge arrives and opens court,⁸⁶ but it is in session when

the judge, attended by the court officials and the parties and their counsel and witnesses, proceeds with the dispatch of judicial business.⁸⁷ A statutory definition of "session" as part of a term of court, including all calls or sittings during any term, is substantially the same as the common understanding of its meaning by the courts without the aid of a statute.⁸⁸ Although the words "term" and "session" are sometimes used as synonymous, or nearly so,⁸⁹ there is a clear distinction between their meanings, which is sometimes important.⁹⁰

Sitting of a court may mean a session for the day,⁹¹ or the word may be used in such a way that it will be regarded as signifying a term.⁹²

Regular, special, and adjourned terms or sessions. Terms of court are very generally classified into regular terms and special terms⁹³ or regular, adjourned, and special terms.⁹⁴ So also, under the practice of some states, court sessions are regular, special or called, and adjourned.⁹⁵ A regular term of court is one held at a time and place fixed once and for all.⁹⁶ A special term is one called by the judge in his discretion, in pursuance of power granted by statute, and is convened or held at a time fixed, not by law, but by the order of the court or judge calling it;⁹⁷ it is separate and distinct from

80. Iowa.—Vinsant v. Vinsant, 47 Iowa 594.

81. Mo.—State v. Eggers, 54 S.W. 498, 152 Mo. 485.

Use to indicate number of judges who shall sit

Ind.—Klipsch v. Indiana Alcoholic Beverage Commission, 21 N.E.2d 701.

82. N.Y.—Gracie v. Freeland, 1 N.Y. 228.

83. W.Va.—Ex parte Anderson, 94 S.E. 31, 81 W.Va. 171.

84. N.C.—State v. Harden, 98 S.E. 782, 177 N.C. 580.

85. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 368, quoting *Corpus Juris*, and denying certiorari 128 So. 901, 23 Ala.App. 354.

Ky.—Wood Oil Co. v. Commonwealth, 244 S.W. 429, 196 Ky. 196. 15 C.J. p 875 note 57.

86. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 365, quoting *Corpus Juris*, and denying certiorari 128 So. 901, 23 Ala.App. 354.

Ga.—Perdue v. State, 67 S.E. 810, 134 Ga. 300.

87. Wis.—Bloomer v. Bloomer, 221 N.W. 734, 197 Wis. 140.

88. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 221 Ala. 368, denying certiorari 128 So. 901, 23 Ala.App. 354.

89. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 368, quoting *Corpus Juris*, and denying certiorari 128 So. 901, 23 Ala.App. 354.

La.—Deal v. Sovereign Camp, W. O. W., App., 161 So. 621.

15 C.J. p 875 note 59—62 C.J. p 721 notes 42 [a], 46, 47, 50.

90. Ala.—Carpenter v. City of Birmingham, 128 So. 899, 900, 221 Ala. 368, quoting *Corpus Juris*, and denying certiorari 128 So. 901, 23 Ala.App. 354.

15 C.J. p 875 note 60.

Distinction stated

There is a wide distinction between the legal significance of a "term" of court and a "session" of court. The former is the legally prescribed time for the actual holding of sessions of court within that time, and each occasion of such holding is a "session," and there may be as many or more of them as there are days allotted to the term.—Hinkle v. Rose, 26 S.W.2d 541, 233 Ky. 606.

91. Md.—Costigin v. Bond, 3 A. 285, 65 Md. 122.

92. Mass.—Anonymous, 5 Mass. 197. Or.—Gird v. State, 1 Or. 308.

15 C.J. p 875 note 62—62 C.J. p 721 notes 48, 49.

93. Ark.—Honea v. Federal Land Bank of St. Louis, 61 S.W.2d 436, 438, 187 Ark. 619, quoting *Corpus Juris*.

Ill.—People v. Wilson, 190 N.E. 270, 356 Ill. 256.

Kan.—Kingsley v. Bagby, 41 P. 991, 2 Kan.App. 23.

94. Ala.—Martin v. State, 113 So. 452, 22 Ala.App. 191, conforming to answers to certified questions 113 So. 602 (second case), 22 Ala.App. 154, which denied motion 113 So. 602 (first case), 216 Ala. 160.

95. Ark.—Magnolia Petroleum Co. v. Saunders, 94 S.W.2d 703, 192 Ark. 783.

96. Ark.—Honea v. Federal Land Bank of St. Louis, 61 S.W.2d 436, 438, 187 Ark. 619, quoting *Corpus Juris*.

Ill.—People v. Wilson, 190 N.E. 270, 356 Ill. 256.

15 C.J. p 875 note 65.

Beginning

Regular terms are those beginning at certain dates fixed by law, or by the judge in conformity with authority of law.—Glebe v. State, 183 N.W. 295, 106 Neb. 251.

Particular terms held regular terms N.C.—State v. Wood, 95 S.E. 1050, 175 N.C. 809.

W.Va.—State v. Thompson, 130 S.E. 456, 100 W.Va. 253.

97. Ill.—People v. Wilson, 190 N.E. 270, 356 Ill. 256.

Neb.—Glebe v. State, 183 N.W. 295, 106 Neb. 251.

the regular term⁹⁸ and not a continuation thereof after adjournment.⁹⁹ A special term may¹ or may not² be called or appointed for a particular purpose. A special term is distinguished from the regular or general terms only in the date or time that it is convened or held,³ unless the expression has some other local significance.⁴ When a statute speaks of terms of court, the terms constituted by law, and not special terms, are meant,⁵ unless the statute by appropriate language expressly includes special terms in such designation or such conclusion is clearly apparent by implication.⁶

§ 148. Necessity for Terms and for Observing Terms Fixed

In some states there are no terms of court, the courts being always open for the transaction of business; and in other states this is true as to some courts or for certain purposes. Terms, however, are necessary when required by constitutional or valid statutory provision; and, when the time and place of holding a term or session of court have been properly fixed and appointed, persons having business at such term or session are bound to take notice thereof.

It has been considered that fixed times and places for holding court are necessary for the successful administration of justice, since otherwise all

those interested in the proceedings of the courts might be kept in attendance upon an uncertainty.⁷ Unquestionably, a constitutional requirement of a certain number of terms each year is mandatory and it is beyond the power of a judge to pretermitt one of such terms.⁸ In some jurisdictions, however, the courts are always open for the transaction of business, except on nonjudicial days, and consequently there are no terms of court properly so called, during which the court may sit to hear and determine causes, but only a division of the year into sessions to facilitate the orderly arrangement and dispatch of business.⁹ So also, under the statutes of some states, there are terms for courts of law only, and a court of chancery or, as to equitable proceedings, a court possessing both legal and equitable jurisdiction, is required to be always open for the transaction of business.¹⁰ In some states, a probate or surrogate's court, or, as to its probate jurisdiction, a county court, is always open and its proceedings are continuous, there being no stated terms;¹¹ but, where so required by statute, the judicial business of a probate court must be conducted in regular monthly terms.¹² By statute, a court may have terms for certain purposes and be always open for other purposes;¹³ and by rule of court, authorized

Particular term held special term
Miss.—Perkins v. State, 114 So. 392, 148 Miss. 608.

98. Ala.—Martin v. State, 113 So. 452, 22 Ala.App. 191, conforming to answers to certified questions 113 So. 602 (second case), 22 Ala.App. 154, which denied motion 113 So. 602 (first case), 216 Ala. 160.

Ark.—Honea v. Federal Land Bank of St. Louis, 61 S.W.2d 436, 438, 187 Ark. 619, quoting *Corpus Juris*.
15 C.J. p 876 note 67.

99. Ark.—Honea v. Federal Land Bank of St. Louis, *supra*, quoting *Corpus Juris*.

15 C.J. p 876 note 68, p 892 note 84 [a].

1. Ark.—Honea v. Federal Land Bank of St. Louis, *supra*, quoting *Corpus Juris*.

Ill.—People v. Wilson, 190 N.E. 270, 356 Ill. 256.

15 C.J. p 875 note 66.

2. Ill.—People v. Wilson, *supra*.

3. Fla.—Ex p. Daly, 63 So. 834, 66 Fla. 345.

4. Ark.—Honea v. Federal Land Bank of St. Louis, 61 S.W.2d 436, 438, 187 Ark. 619, quoting *Corpus Juris*.

15 C.J. p 876 note 70.

5. Ark.—Honea v. Federal Land Bank of St. Louis, *supra*, quoting *Corpus Juris*.

Ill.—People v. Wilson, 190 N.E. 270, 356 Ill. 256.

Neb.—Glebe v. State, 183 N.W. 295, 106 Neb. 251.

Tex.—Ex parte Cole, 101 S.W. 249, 250, 51 Tex.Cr. 166.

W.Va.—Stafford v. Mingo County Court, 51 S.E. 2, 58 W.Va. 88.

15 C.J. p 876 note 71.

Statutes requiring trial of criminal case at next succeeding term after demand see the C.J.S. title Criminal Law § 467, also 16 C.J. p 441 note 18.

6. Ill.—People v. Wilson, 190 N.E. 270, 356 Ill. 256.

Trial of fact issues in criminal actions

It has been held that a statutory provision requiring issues of fact in criminal actions to be tried at a "regular term" did not intend to discriminate between a regular term and a special or called term at which a jury was convened.—State v. Boucher, 78 N.W. 988, 8 N.D. 277.

7. Iowa.—Grable v. State, 2 Greene 559.

15 C.J. p 876 note 73.

"Under our scheme of government it is absolutely necessary to have fixed terms of court."—Williams v. State, 126 So. 40, 42, 156 Miss. 346.

8. Miss.—Ivey v. State, 119 So. 507, 154 Miss. 60.

9. La.—Union Motor Co. v. Williams, 8 La.App. 391.

N.D.—Bank of Inkster v. Christenson, 194 N.W. 702, 49 N.D. 1047.

Philippine.—Arnedo v. Llorente & Llongson, 18 Philippine 257.

Wash.—Gordon v. Hillman, 173 P. 22, 102 Wash. 411, denying petition State v. Smith, 167 P. 91, 98 Wash. 100, modified on other grounds 169 P. 468, 98 Wash. 100.

15 C.J. p 876 note 74.

10. Ala.—Ex parte Campbell, 157 So. 675, 229 Ala. 422—Ex parte Favors, 145 So. 146, 225 Ala. 675—Ex parte Howard, 142 So. 403, 225 Ala. 106.

Ark.—Vaughan v. Screeton, 39 S.W. 2d 299, 183 Ark. 816.

N.J.—Ex parte Stegman, 163 A. 422, 112 N.J.Eq. 72.

11. N.Y.—Western v. Romaine, 1 Bradf.Surr. 37.

Okl.—Wheeler v. Bigheart, 43 P.2d 1028, 172 Okl. 262—Southern Surety Co. v. Chambers, 180 P. 711, 72 Okl. 307.

12. Kan.—Gaston v. Collins, 72 P.2d 84, 146 Kan. 449.

13. Ark.—Miller v. Tatum, 279 S.W. 1002, 170 Ark. 152—Wilmot Road Improvement Dist. v. De Yampert, 251 S.W. 880, 159 Ark. 298.

Term, or lack thereof, for purpose of motion for new trial see the C.J.S. title New Trial § 124, also 46 C.J. p 293 notes 95, 96.

No terms except for jury trials

N.M.—Fullen v. Fullen, 153 P. 294, 21 N.M. 212.

by the constitution and not conflicting with any statute, the court may be open all of the year for the trial of particular classes of cases.¹⁴

Where the time and place of holding a term or session of court have been properly fixed and appointed, it is the duty of parties having business at such term or session to take notice thereof, or to suffer the penalty, whatever that may happen to be, of their ignorance.¹⁵ So also, where the legislature has provided a number of regular terms without specifying that criminal cases only shall be tried at one or more of such terms, but the court has power to provide by order that only criminal cases shall be heard at certain regular terms, and it has made such an order as to a particular term, the entry of a default judgment in a civil action during that term is unauthorized.¹⁶

§ 149. First Day of Term and Relation of Proceedings Thereto

By a legal fiction, a term of court is deemed to consist of but one day and that is the first day, or day designated for the commencement, thereof. Where the operation of the fiction would work injustice or be inconsistent with a requirement that a certain thing be done on a particular day during the term, it will not prevail as against a showing of the true time when a step or proceeding was taken during the term.

The first day of the term is the day designated for the commencement thereof,¹⁷ whether the judge attends or not,¹⁸ where, as shown *infra* §§ 150 a, 155, such nonattendance does not preclude the holding of a legal term, or cause a lapse of the term, and even though the court is adjourned to another day.¹⁹

For all general purposes, in the absence of a statute to the contrary, a term of court, of however many days it in fact consists, is deemed to consist of but one day;²⁰ and that is the day on which it

is first held, all of the proceedings during the term, with a few exceptions, having relation back to that day and being regarded as contemporaneous,²¹ and all succeeding days of the term being in contemplation of law only a continuation and part of the first, whether the court is adjourned from day to day or for a longer time.²² This doctrine is, however, only a legal fiction, and, although adopted for purposes of general justice and convenience, is subject to the rule which universally prevails in regard to all other fictions, that where it is requisite to show that the fact which by the fiction is supposed to exist is inconsistent with the truth, the real fact may be shown, and the fiction will not prevail against it. In accordance with this rule, the true time when any legal proceedings took place in term may be shown, when justice requires it.²³ For some purposes, such as where a day in term is designated, as the time when certain things are to be done, the term is divisible, and particular days thereof will be regarded,²⁴ or the court may inquire as to the day or the hour if it becomes important,²⁵ although never when the result of so doing will cause injustice.²⁶ In some states the fiction does not obtain,²⁷ or a departure therefrom is shown by statutes which manifestly contemplate different days of a term of court.²⁸

§ 150. Time for Holding Terms

- a. In general
- b. Control, fixation, or change

a. In General

A term held at any other time than that fixed therefor is illegal and the proceedings had thereat are void.

A term must be held at the time fixed therefor and at no other time,²⁹ unless it has been lawfully postponed, as to which see *infra* § 152. A term held

14. La.—Hoyle's Succ., 33 So. 625, 109 La. 623.

15. Ala.—Doty v. Pope, 101 So. 883, 213 Ala. 4.

Iowa.—State v. Powers, 164 N.W. 856, 181 Iowa 452.

15 C.J. p 876 note 76.

This is especially true as to plaintiff in a case, he having invoked the jurisdiction of the court and set its machinery in motion.—Berry v. Sims, 112 S.W.2d 25, 195 Ark. 326.

16. Ky.—Thacker v. Thacker, 75 S.W.2d 3, 255 Ky. 523.

17. Kan.—Bush v. Doy, 1 Kan. 86. S.C.—McKellar v. Parker, 7 S.E. 295, 29 S.C. 237.

18. Kan.—Bush v. Doy, 1 Kan. 86.

19. S.C.—McKellar v. Parker, 7 S.E. 295, 29 S.C. 237.

20. Ill.—Hutchinson v. Hutchinson, 95 N.E. 143, 250 Ill. 170—Wilson v. Hilligoss, 278 Ill.App. 564.

15 C.J. p 876 note 82.

21. Ill.—Hutchinson v. Hutchinson, 95 N.E. 143, 250 Ill. 170.

15 C.J. p 877 note 83.

Judgment see the C.J.S. title Judgments § 113, also 34 C.J. p 70 note 27.

22. Cal.—People v. Beatty, 14 Cal. 566.

15 C.J. p 877 note 84.

23. Cal.—People v. Beatty, *supra*. Conn.—Leavenworth v. Marshall, 19 Conn. 1.

15 C.J. p 877 note 85.

24. Ill.—Brown v. Leet, 26 N.E. 639, 136 Ill. 203.

15 C.J. p 877 note 86.

25. Cal.—People v. Beatty, 14 Cal. 566.

26. Ill.—Chicago, B. & Q. R. Co. v. Chamberlain, 84 Ill. 333.

Ohio.—May v. State, 14 Ohio 461, 45 Am.D. 548.

15 C.J. p 877 note 88.

27. Mo.—Cole v. Parker-Washington Co., 207 S.W. 749, 766, 276 Mo. 220.

28. Ark.—State v. Canal Const. Co., 203 S.W. 704, 134 Ark. 447.

29. Ala.—Polytinsky v. Johnston, 99 So. 839, 842, 211 Ala. 99, citing *Corpus Juris*.

Ky.—Thompson v. Commonwealth, 99 S.W.2d 705, 707, 266 Ky. 529, citing *Corpus Juris*.

15 C.J. p 877 note 89.

at any time other than that fixed therefor is illegal and the proceedings had thereat are void;³⁰ but it has been held that, although a court may convene before the time designated, a judgment rendered or an order made on a day subsequent to that fixed for the rightful convening of the court may be valid.³¹

Interval between terms. A statutory provision that a certain period shall intervene between the terms of a court must be complied with.³²

Term in one county at time fixed for term in another. Where the terms of a court are fixed by statute and there is but one judge, a term held in one county or part of the district during the time fixed by law for holding a term in another county or part of the district is illegal, and the proceedings thereat will not be sustained.³³

Where day fixed is holiday. If the day fixed for opening the term is a legal holiday the court may be opened on the succeeding day.³⁴

*Where no time is prescribed for holding a regular term or session, the justices, or a justice, as the case may be, may hold it at pleasure.*³⁵

Where judge fails to appear. The failure of the judge to appear on the day appointed for the commencement of a term of court will prevent the convening of a legal court,³⁶ unless the statute provides for the convening of the court on a later day under such circumstances,³⁷ or makes other provi-

sion for such emergencies,³⁸ and the statute is complied with,³⁹ although, as stated supra § 147, there may nevertheless be a term of the court for certain purposes.

b. Control, Fixation, or Change

Subject to constitutional limitations, the legislature may regulate and control terms of court and fix or change the times at which they are to be held, or it may delegate this power to courts, judges, or other boards or officers. An order made in the exercise of delegated power should appear in the record and any requirements as to the manner of making it or giving notice thereof must be complied with. Legal difficulties and impossibilities may make it necessary to defer the operation of a statute changing terms until an existing term is concluded and a county has for the year the number of legal terms to which it is entitled under a constitutional provision.

Within certain limits and reasonable bounds, the legislature may regulate and control the terms of courts;⁴⁰ but, to insure the survival and independence of the judiciary, the power is necessarily subject to limitations.⁴¹ It is within the power of the legislature to fix the times at which the regular terms of courts are to be held,⁴² subject, of course, to such constitutional requirements and limitations as may exist;⁴³ but this power may be delegated to the courts or judges thereof, or commissioners appointed for that purpose,⁴⁴ or to the governor of the state;⁴⁵ and when the legislature has so delegated its power, and days and places have been designated by those authorized to designate them, those days

30. Ala.—Ex parte State ex rel. Smith, 88 So. 899, 205 Ala. 677. Ky.—Thompson v. Commonwealth, 99 S.W.2d 706, 707, 266 Ky. 529, citing *Corpus Juris*.

Miss.—Steverson v. McLeod Lumber Co., 81 So. 788, 120 Miss. 65. 15 C.J. p 878 notes 91, 92. Proceedings at term held after legal change of time see infra § 150 b.

31. Ala.—Garlick v. Dunn, 42 Ala. 404. Ark.—Shumard v. Phillips, 13 S.W. 510, 53 Ark. 37.

32. Ala.—Manning v. Kohn, 44 Ala. 343. La.—State v. Brodden, 16 So. 874, 47 La. Ann. 375. 15 C.J. p 880 note 11.

33. Miss.—Walton v. State, 112 So. 790, 794, 147 Miss. 851, quoting *Corpus Juris*. 15 C.J. p 881 note 26.

34. U.S.—Gordon v. Randle, D.C., 23 S.Ct. 635, 189 U.S. 417, 47 L.Ed. 875. 15 C.J. p 878 note 96.

35. Ark.—Dunn v. State, 2 Ark. 229, 35 Am.D. 54.

36. Miss.—Steverson v. McLeod

Lumber Co., 81 So. 788, 120 Miss. 65. 15 C.J. p 878 note 98.

Corpus Juris is cited as stating the common-law rule which, however, is said to have been largely, if not entirely, abrogated as to fixed regular terms, although not as to special terms, by custom which has ripened into law.—Hinkle v. Rose, 26 S.W.2d 541, 233 Ky. 606.

37. Kan.—Bush v. Doy, 1 Kan. '86. N.C.—McNeill v. McDuffie, 25 S.E. 871, 119 N.C. 336.

Statute authorizing holding of court at any time Ark.—Gordon v. Reeves, 267 S.W. 133, 166 Ark. 601.

38. Ala.—Peel v. State, 39 So. 251, 144 Ala. 125.

39. Miss.—Steverson v. McLeod Lumber Co., 81 So. 788, 120 Miss. 65.

40. Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382. Tex.—Citizens State Bank of Frost v. Miller, Civ.App., 115 S.W.2d 1183.

Only constitutional restriction, in some states, upon the power of the legislature to regulate terms of court is that a term must be held in each

county during the year.—Gordon v. Reeves, 267 S.W. 133, 166 Ark. 601.

41. Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382.

42. Miss.—Williams v. State, 126 So. 40, 156 Miss. 346.

Okl.—State ex rel. Jones v. Presson, 77 P.2d 38, 39, 182 Okl. 147, citing *Corpus Juris*. 15 C.J. p 878 note 3.

Time of holding court may be prescribed by the legislature.—Sanders v. McClintock, 300 S.W. 408, 175 Ark. 633—Miller v. Tatum, 279 S.W. 1002, 170 Ark. 152.

Statutes limited to particular courts The statutes providing for terms of district court are not applicable to county courts.—Citizens State Bank of Frost v. Miller, Tex.Civ.App., 115 S.W.2d 1183.

43. Fla.—Mack v. Carter, 183 So. 478, 133 Fla. 313.

Miss.—Walton v. State, 112 So. 790, 147 Miss. 851. 15 C.J. p 879 note 4.

44. Okl.—State ex rel. Jones v. Presson, 77 P.2d 38, 39, 182 Okl. 147, citing *Corpus Juris*. 15 C.J. p 879 note 5.

45. N.Y.—People v. Shea, 41 N.E. 505, 147 N.Y. 78.

and places become the regular terms of court as much as if they had been expressly so enacted by statute.⁴⁶ Under some constitutions and statutes the county commissioners' court may fix the times of holding the terms of a county court and provide for more terms than the minimum number required by the constitution.⁴⁷

Where the terms of court are fixed by a judge, an order by him fixing the terms should appear affirmatively in the record;⁴⁸ and where certain essentials are prescribed by statute in connection with the making or publication of the order they should be complied with.⁴⁹ Where the terms of court are fixed by statute and a trial was had during a regular term, as shown by the transcript of record, at which term the officers required by law to hold the same were present and officiating, the fact that in the statement of the organization of the court there is a recital that the time for the regular jury term was by order of the presiding judge does not affect the regularity of the term.⁵⁰

Change. In the absence of constitutional prohibition, and subject to constitutional limitations, the legislature may change the terms of a court,⁵¹ repeal a statute fixing terms,⁵² or, where it has delegated authority to a court or judge to fix terms, withdraw the authority or supersede the order of the court or judge.⁵³ The power to change terms is sometimes delegated by statute to the courts⁵⁴

or to the judges thereof,⁵⁵ or authority to fix terms delegated to a court or judge is deemed to be a continuing power not exhausted by the first user thereof,⁵⁶ and an order fixing terms is considered not to be a judgment in the sense ordinarily meant, but to be more in the nature of a rule over which the court has continuous control.⁵⁷ However, where, although a court or judge is authorized to fix terms of court, there is a constitutional or statutory prohibition of a change, in the terms so fixed, either generally,⁵⁸ or for a limited period,⁵⁹ or except in a specified manner,⁶⁰ it will be accorded effect.

Where the judge has power to change terms, notice that he has ordered a changed term must precede the term, although it need not precede the order.⁶¹ It has been held that where a defendant is notified to appear at the next term, and such term is changed to a later month, he should appear without further notice.⁶²

An act which merely changes the time of holding a certain court does not abolish such court⁶³ or effect a discontinuance of business therein pending,⁶⁴ and a court which has convened prior to the passage of such an act is not prevented from concluding its term or session.⁶⁵ Neither can such a change be allowed to operate so as to deprive a county of the number of terms in a year to which it is entitled under the constitution.⁶⁶ However, where a law

46. Pa.—In re McCandless Tp. Road, 1 A. 594, 110 Pa. 605.
15 C.J. p 880 note 7.

47. Tex.—Brazos River Gas Co. v. McGarr, Civ.App., 113 S.W.2d 643.—Employers' Casualty Co. v. Smith, Civ.App., 284 S.W. 991.—Farrow v. Star Ins. Co. of America, Civ.App., 273 S.W. 318.

48. Colo.—Clelland v. People, 4 Colo. 244.

49. Tex.—Jowell v. Coffee, Civ.App., 132 S.W. 886.
15 C.J. p 880 note 10.

50. Ala.—Vice v. State, 144 So. 837, 25 Ala.App. 278.

51. Mo.—Rhodes v. Bell, 130 S.W. 466, 230 Mo. 138.
15 C.J. p 880 note 12.

In construing statute changing court terms and fixing them at conflicting times, words may be substituted to effectuate clear legislative intent.—Meek v. Stone, 9 S.W.2d 1099, 225 Ky. 749.

52. Express repeal abolishes terms provided for by repealed statute.—U. S. v. Todar, C.C.A.Ind., 41 F.2d 146.

Implied repeal of statutes fixing the time may result from later en-

actments.—Montgomery Tract. Co. v. Knabe, 48 So. 501, 158 Ala. 458—15 C.J. p 878 note 3 [b].

Statute repealed as to particular county
Miss.—Walton v. State, 112 So. 790, 147 Miss. 851.

Statutes held not repealed

(1) Generally.—Weaver v. Turner, 87 So. 641, 125 Miss. 250.

(2) As to particular county.—Riley v. State, 96 So. 599, 209 Ala. 505.

53. Okl.—State ex rel. Jones v. Presson, 77 P.2d 38, 182 Okl. 147.

54. Mo.—Overton v. Johnson, 17 Mo. 442.

Tex.—Frickie v. State, 51 S.W. 394, 40 Tex.Cr. 626.

55. Va.—Jackson v. Commonwealth, 13 Gratt. 795, 54 Va. 795.
15 C.J. p 880 note 15.

56. Neb.—Candy v. State, 1 N.W. 454, 8 Neb. 482.

Okl.—State ex rel. Jones v. Presson, 77 P.2d 38, 182 Okl. 147.

57. Okl.—State ex rel. Jones v. Presson, supra.

58. Order fixing terms cannot be revoked, even within the time allowed

for fixing such terms.—State v. Bristol, 55 P. 107, 21 Mont. 578.

59. Order for change commencing after limited period is not void because made within that period.—Frickie v. State, 51 S.W. 394, 40 Tex. Cr. 626.

60. La.—State v. Chambers, 11 So. 944, 45 La. Ann. 36.

61. La.—State v. Dillard, 35 La. Ann. 1049.

62. Iowa.—Peoria M. & F. Ins. Co. v. Dickerson, 28 Iowa 274.

63. Mass.—Commonwealth v. Holbrook, 5 N.E. 168, 140 Mass. 440.
15 C.J. p 880 note 21.

64. Mo.—Freeman v. Thompson, 53 Mo. 183.
15 C.J. p 880 note 22.

65. Okl.—Mayer v. Marks, 217 P. 183, 91 Okl. 207.
15 C.J. p 880 note 23.

Statute so providing in effect is not unconstitutional.—Hughes v. State, 204 S.W. 640, 83 Tex.Cr. 550.

66. Tex.—Texas Mexican Ry. Co. v. Driscoll, Civ.App., 238 S.W. 346—Edgar v. State, 255 S.W. 748, 96 Tex.Cr. 1.

15 C.J. p 880 note 24.

which changes the term of a court has gone into effect, and in ignorance thereof the term is held as provided by the former law, all judgments and proceedings are without warrant of law and void.⁶⁷ It is sufficient if a term is held at the time prescribed by a particular law where other laws do not change the time or purport to do so but are ineffective.⁶⁸ A term of court is properly held under a prior law where the emergency clause of an act changing the term is invalid and the act does not become effective until so long after its passage as to be too late to affect the term under the old law.⁶⁹ Where a statute changing a term of court does not become effective until after the date fixed for the beginning of the new term, the term cannot be held for the remainder of the period, the reason being that there is not, and cannot be, any legal commencement or beginning of the term, either by fiat of the law or by the presence of a duly qualified judge to preside over it.⁷⁰

§ 151. Duration of Terms

a. In general

b. Computation of time

a. In General

Unless terminated sooner by adjournment *sine die*, a term of court continues until its expiration by operation of law; and such expiration occurs on the date fixed for the termination of the term, where such a date has been fixed by statute or authorized order or, if no such date has been fixed, it occurs on the date fixed by law for the commencement of the next term of court at the same place or, according to some authorities, the commencement of a term of court in another county in the same judicial district. A special term may be longer than, and does not necessarily terminate on the commencement of, a regular term.

A term of court continues until it is finally adjourned or expires by operation of law.⁷¹ The time for the expiration of a term of court by operation of law may be a definite date⁷² fixed by statute,⁷³ or by an order made under constitutional or statutory authority,⁷⁴ for its termination.

Where the time of beginning but not of ending a term is fixed, the term, when it has been duly begun, will continue, and may for all general purposes be considered as in session, until it is adjourned *sine die* or, in the absence of a previous adjournment *sine die*, until the time fixed by law for the beginning of the next succeeding term;⁷⁵ and, in such case, after the term of a court has been opened, the questions how long it shall remain open, to what

67. Ill.—Robinson v. Ferguson, 73 Ill. 538.

68. Mo.—Heather v. City of Palmyra, 276 S.W. 872, 311 Mo. 32.

69. Ky.—Kilbourn v. Commonwealth, 298 S.W. 1086, 221 Ky. 487—McIntyre v. Commonwealth, 297 S.W. 931, 221 Ky. 16—Deaton v. Commonwealth, 295 S.W. 167, 220 Ky. 343.

70. Ky.—Hinkle v. Rose, 26 S.W.2d 541, 233 Ky. 606.

71. Ga.—Luke v. Luke, 123 S.E. 716, 158 Ga. 103—Thompson v. State, 199 S.E. 787, 58 Ga.App. 679.

Okl.—Southwestern Surety Ins. Co. v. Douglas, 198 P. 334, 81 Okl. 232.

Or.—State v. Ryan, 234 P. 811, 114 Or. 91.

Tex.—Clayton v. Jobe, Civ.App., 71 S.W.2d 911, error refused. 15 C.J. p 881 note 27.

72. Dicta

(1) It is said that, at common law, a term of court can continue no longer than a legally prescribed time for that purpose and that in most, if not all, jurisdictions in America a regular term of court has a designated day for its termination.—Hinkle v. Rose, 26 S.W.2d 541, 233 Ky. 606.

(2) "We must look beyond this particular case, and declare the law as applicable to all terms of court; they must have a definite time of beginning, and, as far as possible,

some definite time for ending; terms cannot continue indefinitely without business, to be revived in the discretion of a judge."—Reynolds v. Crosey, 150 N.E. 303, 306, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App. Div. 683.

(3) It is also said that, in very early times, the whole year was one continual term.—Wood Oil Co. v. Commonwealth, 244 S.W. 429, 196 Ky. 196.

73. Conn.—Whitford v. Lee, 117 A. 554, 97 Conn. 554.

Four weeks from actual beginning of term

Ga.—Willard v. Stone, 95 S.E. 994, 22 Ga.App. 335.

74. Tex.—Ex parte Swindle, 111 S.W.2d 271, 133 Tex.Cr. 416—Ex parte Jones, 111 S.W.2d 267, 133 Tex.Cr. 402.

Presumption as to time of termination

Where an order fixes the duration of a term, it will be presumed, in the absence of a showing to the contrary, that the term came to an end at the time indicated by such order.—Richter v. Koopman, 31 So. 32, 131 Ala. 399.

Intent of statute directing judges to fix terms

A statute directing district judges to fix terms of court has been held not intended to control them in the length of time during which they

should actually hold court in the different parishes, but to designate in advance certain periods as "terms of court," with a view of furnishing the basis to public officials for fixing dates for drawing juries, or of doing other acts necessary to be done a certain number of days before sessions of court.—State v. De Raillion, 26 So. 648, 51 La.Ann. 788.

75. Iowa.—Comes v. Comes, 178 N.W. 403, 404, 190 Iowa 547, citing **Corpus Juris**—Jones v. McClaughry, 151 N.W. 210, 169 Iowa 281. Miss.—Walton v. State, 112 So. 790, 147 Miss. 851.

N.M.—Henderson v. Dreyfus, 191 P. 455, 26 N.M. 541.

N.D.—State v. Shortridge, 211 N.W. 336, 339, 54 N.D. 779, citing **Corpus Juris**.

Okl.—Hensley v. State, 3 P.2d 211, 53 Okl.Cr. 22—Wise v. State, 246 P. 656, 34 Okl.Cr. 234—Ex parte Haley, 214 P. 1090, 23 Okl.Cr. 339. Or.—Oxman v. Baker County, 234 P. 799, 115 Or. 436.

Tex.—Ex parte Miller, 211 S.W. 451, 85 Tex.Cr. 283.

15 C.J. p 881 note 36.

After term has been adjourned to court in course, it does not continue until the time fixed by law for the commencement of the next term; if it did so continue, there would never be a time which was not term time.—Unbehahn v. Fader, 149 N.E. 773, 319 Ill. 250.

day it shall be adjourned, and whether and how often it shall remain open for incidental business after the regular business of the term has been concluded are matters which rest in the discretion of the judge,⁷⁶ the general rule being that the term should or may be continued until all the business before the court is disposed of.⁷⁷ So also, according to a number of authorities, mostly early ones, where the term of a court for each county in the district begins on a specified day, the duration of a term is ended by the arrival of the day fixed for the beginning of a term in another county;⁷⁸ but it has also been held that the commencement of a term of court in one county does not automatically terminate a term in another county, even though the counties are in the same judicial district and the same judge is elected to preside over the court in both counties,⁷⁹ or at least it does not do so where there is a statute authorizing sessions of the same court to be held in different counties at the same time,⁸⁰ or authorizing the adjournment or postponement of a term in session beyond the time fixed for holding court in another county,⁸¹ or providing that regular terms or adjourned terms of court in two or more counties in the same judicial district shall proceed until adjournment sine die.⁸² Unless finally adjourned at an earlier date, a term of a federal court expires automatically at the time fixed by law for the convening of the next term at that place,⁸³ but not at the time court is convened or a term begins at another place in the same district,⁸⁴ or at the

time a term begins in another district in the same state.⁸⁵

Designation of a new term does not of itself, in the absence of a statute so providing, terminate a term theretofore established.⁸⁶

Absence of the judge does not work a termination of a term of court after it has been legally commenced,⁸⁷ unless he has left the bench for the term⁸⁸ so as to effect an actual adjournment sine die, as shown *infra* § 152.

Death of the regular judge does not end the term where his successor qualifies on the same day,⁸⁹ and a fortiori the death of such judge during a term held by a special judge previously selected does not end such term.⁹⁰

Special or extraordinary terms. Where a special term is not limited by law to any specified number of days, proceedings thereat will not be invalid because it continues in session for a longer period than the regular term of the court is limited to;⁹¹ neither are proceedings at a special term invalidated by a continuance of the term beyond the time fixed for a regular term.⁹² However, where an order for a special term does not fix any date for adjournment and it does not appear clearly therefrom that it is intended to overlap the regular term, it will terminate by operation of law when the time for convening the regular term arrives.⁹³ Also an extraordinary term, like all other terms, must come to an end some time.⁹⁴

76. N.D.—*State v. Shortridge*, 211 N. W. 336, 54 N.D. 779.
15 C.J. p 882 note 37.

77. N.Y.—*Defazio v. Oneida County Court*, 250 N.Y.S. 703, 140 Misc. 487, affirmed *Alfano v. Oneida County Court*, 258 N.Y.S. 1080, 236 App.Div. 822, *Frank v. Oneida County Court*, 258 N.Y.S. 1084, 236 App.Div. 822, *Lisandrelli v. Oneida County Court*, 258 N.Y.S. 1084, 236 App.Div. 822, *Pugliese v. Oneida County Court*, 258 N.Y.S. 1085, 236 App.Div. 822, and *De Fazio v. Oneida County Court*, 258 N.Y.S. 1085, 236 App.Div. 822.

Tex.—*Ex parte Miller*, 211 S.W. 451, 85 Tex.Cr. 263.
15 C.J. p 882 note 38.

78. Ark.—*House v. McGehee*, 65 S. W.2d 21, 188 Ark. 277.
15 C.J. p 882 note 39.

79. Iowa.—*Jones v. McClaughry*, 151 N.W. 210, 169 Iowa 281.
Or.—*Oxman v. Baker County*, 234 P. 799, 115 Or. 426.
15 C.J. p 882 note 39 [b], [c], [f].

80. U.S.—*Memorandum, C.C.D.C.*, 16 F.Cas.No.9,408, 1 Cranch C.C. 114.

W.Va.—*Cumberland First Nat. Bank v. Parsons*, 32 S.E. 271, 45 W.Va. 688.

81. Ind.—*Sutherland v. State*, 49 N.E. 947, 150 Ind. 154.
15 C.J. p 882 note 41.

82. Okl.—*Boaz v. Martin*, 225 P. 516, 101 Okl. 243.

83. U.S.—*Saunders v. Commissioner of Internal Revenue, C.C.A.*, 101 F. 2d 407, affirming *Lewis v. U. S.*, D. C.Colo., 17 F.Supp. 543—*U. S. v. Rasmussen, C.C.A.Okl.*, 95 F.2d 842—*U. S. v. Todar, C.C.A.Ind.*, 41 F. 2d 146—*Petition of Thames Towboat Co., D.C.Conn.*, 23 F.2d 493.
15 C.J. p 883 note 49.

84. U.S.—*U. S. v. Rasmussen, C.C.A. Okl.*, 95 F.2d 842—*East Tennessee Iron & Coal Co. v. Wiggins, Tenn.*, 68 F. 446, 15 C.C.A. 510.

85. U.S.—*U. S. v. Louisville & N. R. Co., D.C.Ky.*, 177 F. 780.

86. N.Y.—*People v. Warden*, 102 N. Y.S. 374, 117 App.Div. 154, affirmed 80 N.E. 1118, 188 N.Y. 549.

87. Ky.—*Wood Oil Co. v. Commonwealth*, 244 S.W. 429, 196 Ky. 196.
15 C.J. p 883 note 45.

88. N.C.—*Dunn v. Taylor*, 121 S.E. 659, 187 N.C. 385—*Cogburn v. Hen-son*, 103 S.E. 377, 179 N.C. 631.

89. W.Va.—*Franklin v. Vandervoort*, 40 S.E. 374, 50 W.Va. 412.

Continuous existence of court

Death of judge does not interrupt continuous existence of court.—*Case v. Fox*, 7 P.2d 267, 138 Or. 453.

90. Tex.—*Glover v. Albrecht, Civ. App.*, 173 S.W. 504—*McKenzie v. State*, 12 S.W.2d 578, 111 Tex.Cr. 299, denying motion 11 S.W.2d 172.

91. Miss.—*Dees v. State*, 28 So. 849, 78 Miss. 250.

Tex.—*Trabue v. Ash, Civ.App.*, 200 S.W. 415.

92. U.S.—*Borrego v. Cunningham, N.M.*, 17 S.Ct. 182, 164 U.S. 612, 41 L.Ed. 572.

15 C.J. p 883 note 53.

93. Tex.—*Norwood v. State*, 120 S. W.2d 806, 135 Tex.Cr. 406.

94. N.Y.—*Reynolds v. Cropsey*, 150 N.E. 303, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App.Div. 683.

b. Computation of Time

The decisions are not in harmony as to whether Sunday is to be included in a term of court as the last day thereof or whether, where a term is to continue until a certain day, that day is to be included.

Under a provision that a term of court shall continue until a certain day, it cannot continue beyond that day;⁹⁵ and it has been held that it does not include that day;⁹⁶ but it has also been held to include the day named when it is the last day of the week or month.⁹⁷ It has variously been held that, where a term is to continue for one or more weeks, the last Sunday is⁹⁸ or is not⁹⁹ to be included; that the day designated for the expiration of the term is not to be counted where it is Sunday;¹ that where there is no adjournment sine die and the termination of the term is not fixed by statute, it ends at the close of the last business day preceding the commencement of the next term, that is, on Saturday where the next term commences on Monday;² that the term may include Sunday for the purpose of receiving a verdict on that day, although a term begins in another county of the district on the next day;³ and that the court may continue in session up to the latest hour which permits the judge to attend the next regular term,⁴ but should adjourn the term before the time limited for its expiration if it becomes necessary to do so for the purpose of traveling to another town in order to begin a term there on the day appointed by law.⁵

§ 152. Extension or Adjournment of Terms

- a. Authority and duty
- b. Requisites and sufficiency
- c. Operation and effect

a. Authority and Duty

Frequently statutes are deemed to measure the power of a judge to extend a term or postpone the commencement thereof by adjournment or otherwise; and occasionally recognition is accorded the inherent power of a court or judge in these matters. The power of a sheriff or clerk of court to adjourn court from day to day or to the next term is only such as is conferred on him by statute or an order of the judge authorized by statute.

A court or judge may extend a term under an applicable statute conferring authority to do so,⁶ such as a statute permitting this to be done when necessary for the transaction of the business of the court,⁷ for the disposition of pending litigation,⁸ or for the purpose of concluding a pending trial;⁹ and under court rule, or otherwise, than under a statute expressly conferring authority, it is sometimes held that a term, although ended for other business, may be extended or continued for the purposes of a particular case,¹⁰ such as for the purpose of passing on and deciding applications for a new trial¹¹ or of settling and signing a bill of exceptions,¹² or it may be deemed continued for the purpose of deciding cases and matters finally sub-

95. Conn.—Whitford v. Lee, 117 A. 554, 97 Conn. 554.

96. Neb.—Ryan v. State Bank, 7 N. W. 276, 10 Neb. 524.

97. Ala.—Montgomery Tract. Co. v. Knabe, 48 So. 501, 158 Ala. 453, overruling Johnson v. State, 37 So. 421, 141 Ala. 7, 109 Am.S.R. 17.

98. N.C.—Taylor v. Ervin, 25 S.E. 875, 119 N.C. 274.

S.C.—State v. Gregory, 120 S.E. 499, 127 S.C. 87.

99. Ala.—Nabors v. State, 6 Ala. 200.

15 C.J. p 881 note 32.

1. Tex.—Camden Fire Ins. Co. v. Hill, Com.App., 276 S.W. 887, reversing, Civ.App., 264 S.W. 123.

2. Okl.—City of Duncan v. Abrams, 48 P.2d 720, 171 Okl. 619.

3. Ky.—Franklin v. Commonwealth, 48 S.W. 986, 105 Ky. 237, 20 Ky.L. 1137.

4. Va.—Hill v. Commonwealth, 2 Gratt. 594, 43 Va. 594.

5. Ill.—Archer v. Ross, 3 Ill. 303.

6. D.C.—Young v. Hesse, 30 F.2d 986, 58 App.D.C. 362.

S.C.—State v. Bigham, 131 S.E. 603, 133 S.C. 491.

Tex.—Alexander v. State, 204 S.W. 644, 84 Tex.Cr. 75.

Statute applies to special terms
Miss.—Watson v. State, 146 So. 122, 166 Miss. 194.

7. Ky.—Happy Coal Co. v. Brashear, 92 S.W.2d 23, 263 Ky. 257.
Miss.—Perry v. State, 122 So. 744, 154 Miss. 459.

8. Tex.—Hamilton v. Empire Gas & Fuel Co., Com.App., 110 S.W.2d 561, affirming, Civ.App., 85 S.W.2d 280 —Bell & Graddy v. O'Brien, Civ. App., 113 S.W.2d 560.

9. N.C.—State v. Harris, 107 S.E. 466, 181 N.C. 600—State v. Wood, 95 S.E. 1050, 175 N.C. 309.

Tex.—E. H. Stafford Mfg. Co. v. Wichita School Supply Co., 23 S.W.2d 695, 113 Tex. 650—Texas Employers' Ins. Ass'n v. Lane, Civ. App., 124 S.W.2d 893, error dismissed, judgment correct—Brooks v. Morgan, Civ.App., 121 S.W.2d 398, error refused—Lamb v. Isley, Civ.App., 114 S.W.2d 673, rehearing denied 115 S.W.2d 1036—Morse v. Hoover, Civ.App., 165 S.W.2d 682—Valley Theatres v. Fairbairn, Civ.App., 21 S.W.2d 1080, error refused.

Statute was not repealed by another statute authorizing the extension of a term for the disposition of pending litigation.—Hamilton v. Empire Gas & Fuel Co., Tex.Com.App., 110 S.W.2d 561, affirming, Civ.App., 85 S.W.2d 280—Clayton v. Jobe, Tex. Civ.App., 71 S.W.2d 911, error refused.

Statute should be liberally construed
Tex.—Wichita Falls Traction Co. v. Cook, 60 S.W.2d 764, 122 Tex. 446.

Trial court has discretion in matter of extending term.—Goldstone v. State, 25 S.W.2d 852, 114 Tex.Cr. 442.

Refusal to grant extension of term to enable defendant to procure evidence in support of unsworn supplemental motion for new trial was not error.—King v. State, 269 S.W. 1042, 99 Tex.Cr. 425.

10. N.Y.—Schultze v. Huttlinger, 135 N.Y.S. 70, 150 App.Div. 489.
15 C.J. p 881 note 28.

11. U.S.—Little v. Cox & Carpenter, C.C.A.Miss., 66 F.2d 84, certiorari denied 54 S.Ct. 102, 290 U.S. 678, 78 L.Ed. 585.

12. U.S.—Gordon v. Randle, D.C., 23 S.Ct. 635, 189 U.S. 417, 47 L.Ed. 875.

Ala.—Blake v. Harlan, 75 Ala. 205.
D.C.—Howard v. Maryland International Trust Co., 32 App. 3.

mitted to it during its regular and formal sittings.¹³ Indeed, it is held that, although the judge has not adjourned the term a certain number of days prior to the next regular term, as required by statute, the court is nevertheless open and may proceed as in term time,¹⁴ the statute being merely directory and not taking away from the presiding judge the inherent power to continue a term to meet the exigencies of the public business.¹⁵

The terms of a court may in some cases be extended by adjournment.¹⁶ A court, or at least a court of general jurisdiction, has inherent, and sometimes statutory, authority to adjourn a term from day to day or to a specified day to complete the business properly before it.¹⁷ Also, in keeping with statutory provisions, a term may be adjourned at the commencement thereof.¹⁸ A judge may have express¹⁹ or implied²⁰ power in certain situations, and subject to such restrictions as are imposed, to postpone the commencement of a term and put off the holding of court to another time, such as power, for good and sufficient reason, to direct a ministerial officer, previous to the day for the opening of the term, to postpone the term when

the day for opening it arrives²¹ or authority, when the completion of a trial would proceed beyond the day fixed for the next term, to adjourn the latter term so that there may be sufficient time to complete such trial.²²

Of course, the power of a judge under a statute to adjourn or extend a term does not exceed that given by the statute and may not be exercised in cases or situations not within the statute.²³ Under a statute providing, as to particular courts or proceedings, such as chancery courts or criminal proceedings, that the court shall remain open until its next regular term, a court may and should take only a recess and not adjourn.²⁴ A term cannot be adjourned, extended, or revived after its expiration,²⁵ or after the expiration of a prior extension,²⁶ or where the court is not in session;²⁷ and there can be no adjourned term of a regular term which is illegal, because held at a time not authorized by law, so that all proceedings thereat, including the order of adjournment, are void.²⁸ Also a term should be extended only in cases of necessity and not for the convenience of the trial judge²⁹ or for the purpose of attending to future, as

13. N.Y.—*Sawanac Land & Timber Co. v. Roberts*, 125 N.E. 102, 227 N.Y. 188, reversing 176 N.Y.S. 920, 188 App.Div. 921.

14. Ga.—*Luke v. Luke*, 124 S.E. 556, 32 Ga.App. 738.

15. Ga.—*Horkan v. Beasley*, 75 S.E. 341, 11 Ga.App. 273.

16. Mo.—*Nickey v. Leader*, 138 S. W. 18, 235 Mo. 30, 15 C.J. p. 885 note 89.

17. N.Y.—*In re Cedar*, 269 N.Y.S. 733, 240 App.Div. 182, reversing 264 N.Y.S. 103, 147 Misc. 569, and affirmed *Cedar v. Judges of Court of General Sessions*, New York County, 193 N.E. 414, 265 N.Y. 620.

W.Va.—*State v. Roane County Court*, 135 S.E. 174, 102 W.Va. 327.

Adjournment from week to week

(1) Where the statute does not designate the length of the term, the judge may adjourn from week to week.—*Hays v. State*, 84 S.E. 497, 16 Ga.App. 20.

(2) Where the statute does not require the court to sit for two weeks, trial judge is vested with discretion to adjourn court from week to week, or hold adjourned term at date fixed beyond second week.—*Peacock v. State*, 186 S.E. 882, 53 Ga. App. 599.

Adjournment of session to subsequent day of term see *infra* § 163.

18. Miss.—*Ivey v. State*, 119 So. 507, 154 Miss. 60.

19. Ind.—*Porter v. State*, 2 Ind. 435.

20. Ind.—*Porter v. State*, *supra*.
Va.—*Mann v. Mercer County Ct.*, 52 S.E. 776, 58 W.Va. 651, 15 C.J. p. 886 note 94.

21. N.C.—*State v. Wood*, 95 S.E. 1050, 175 N.C. 809, 15 C.J. p. 886 note 96.

22. Iowa.—*State v. Stevens*, 25 N. W. 777, 67 Iowa 557.

Va.—*Cluverius v. Commonwealth*, 81 Va. 787.

23. Ga.—*Walker v. O'Connor*, 97 S.E. 276, 23 Ga.App. 22.

Tex.—*Wichita Falls Traction Co. v. Cook*, 60 S.W.2d 764, 122 Tex. 446.—*Hamilton v. Empire Gas & Fuel Co.*, Com.App., 110 S.W.2d 561, affirming Civ.App., 85 S.W.2d 280.—*Morse v. Hoover*, Civ.App., 105 S.W.2d 682.—*Blair v. Farmer*, Civ. App., 77 S.W.2d 703.—*Jefferson v. Williams*, Civ.App., 286 S.W. 614.

Exhaustion of power by single exercise

The power granted by statute to a judge or chancellor who fails to attend at any term of his court to authorize the clerk or sheriff to adjourn the court to a later day is exhausted when once exercised, and, should the judge or chancellor fail to attend the adjourned term on the day appointed, the term cannot be adjourned on his order to a later day.—*Williams v. Simon*, 99 So. 433, 135 Miss. 562.

Limited to county court

A statute providing that, when regularly convened, the county court

may be adjourned to such time as the judge may deem proper, provided it shall not conflict with the term of the court provided for at any other place in the county, is not intended as a grant of power to prolong the term, but merely commits to the discretion of the court the power to adjourn the session at the county seat from time to time as business may require.—*Ex parte Haley*, 214 P. 1090, 23 Okl.Cr. 339.—*Tucker v. State*, 139 P. 998, 10 Okl.Cr. 565.

24. Ark.—*Thomas v. State*, 116 S. W.2d 358, 196 Ark. 123.—*Vaughan v. Screeton*, 39 S.W.2d 299, 183 Ark. 816.

25. U.S.—*Bertino v. Marion Steam Shovel Co.*, D.C.Mo., 10 F.Supp. 354, mandamus granted *Marion Steam Shovel Co. v. Reeves*, C.C.A., 76 F.2d 462.

Where prior orders of extension are invalid

Tex.—*Hamilton v. Empire Gas & Fuel Co.*, Com.App., 116 S.W.2d 561, affirming, Civ.App., 85 S.W.2d 280.

26. Tex.—*Bernstein v. Hibbs*, Civ. App., 20 S.W.2d 838, error dismissed.

27. Ark.—*Light v. Self*, 211 S.W. 369, 214 S.W. 746, 138 Ark. 221. Miss.—*Perry v. State*, 122 So. 744, 154 Miss. 459.

28. Ala.—*Ex parte State ex rel. Smith*, 88 So. 899, 205 Ala. 677.

29. Tex.—*Cory v. Richardson*, Civ. App., 191 S.W. 568.

distinguished from unfinished, business.³⁰ A motion for a further extension of the term for purposes of a case may be denied without prejudice to renew where the judge is not satisfied that an appeal has been taken in good faith and the extension, if it becomes necessary, can be granted at a later time.³¹

Extension beyond commencement of subsequent term. The power of the trial court to extend a term into a subsequent term for the disposition of unfinished business is entirely statutory.³² Under some statutes the term may be so extended for the purpose of carrying a pending case to its conclusion;³³ but, when prohibited or not authorized by statute, a term cannot be extended by adjournment or otherwise beyond the commencement of another term of the same character in the same county or judicial district, so as to overlap or conflict with the latter term,³⁴ although, both under statutory authority³⁵ and in the absence of some positive law to the contrary,³⁶ a court may adjourn a term in one county over an intervening term in another county.

Authority of particular judges. A supernumerary judge holding a regular term in the absence of the regular judge has power, according to the construction accorded pertinent statutes, to order an adjourned term.³⁷ Under the statutes of some

states an extension of a term for the disposition of pending litigation may be made by the regular judge of the district regardless of whether court is being held by him or by another judge,³⁸ but an extension for the purpose of concluding a pending trial may be made by, and only by, the judge presiding at the trial, whether he be a regular, special, or visiting judge.³⁹ The power of a judge of a city court may or may not be so limited by the particular statute creating the court that he may not⁴⁰ or may⁴¹ have authority to adjourn or recess the term to a date beyond a certain period. The signing of a general order extending a term may be within an exception in a statute dealing with the disqualification of judicial officers.⁴²

Power of clerk or sheriff. In the absence of an applicable statute conferring authority, a clerk of court, although ordered or directed by the judge to do so, is without power to adjourn a term either finally⁴³ or to a future day.⁴⁴ Where a statute so permits, the sheriff, in the absence of the judge, may adjourn court from day to day⁴⁵ under a written order from the judge;⁴⁶ but under some statutes, on the inability of the judge to attend the regular term, the sheriff has power to adjourn the court only until the next term, and not from day to day.⁴⁷ Under a statute providing that, if the judge does not appear on the fourth day of the term, the sher-

30. W.Va.—State v. Roane County Court, 135 S.E. 174, 102 W.Va. 327.

31. U.S.—U. S. v. Strewl, D.C.N.Y., 28 F.Supp. 87.

32. Tenn.—Puryear v. State, 125 S.W.2d 138.

33. Tenn.—Puryear v. State, supra.

34. Ark.—Central Coal & Coke Co. v. Graham, 196 S.W. 940, 129 Ark. 550.

Ky.—Thompson v. Commonwealth, 99 S.W.2d 705, 266 Ky. 529—Smith v. Commonwealth, 15 S.W.2d 458, 228 Ky. 710—Daniel v. Commonwealth, 13 S.W.2d 790, 227 Ky. 604.

N.Y.—Hanbury v. Metropolitan Securities Co., 213 N.Y.S. 555, 215 App.Div. 225, motion granted 171 N.E. 767, 253 N.Y. 527.

S.C.—State v. Henderson, 134 S.E. 364, 136 S.C. 363—Haughton v. Order of United Commercial Travelers of America, 93 S.E. 393, 108 S.C. 73.

Tex.—Hamilton v. Empire Gas & Fuel Co., 85 S.W.2d 280, 282, quoting Corpus Juris, and affirmed, Com.App., 110 S.W.2d 561.

15 C.J. p 885 note 91.

Where terms are not of same character, the case is not within the reason for the rule and, therefore, not within the rule.—State ex rel.

Chick v. Davis, 201 S.W. 529, 273 Mo. 660—15 C.J. p 885 note 91 [a]. Conflicting terms generally see infra § 154.

35. W.Va.—Rockhold v. Cabot, 95 S.E. 804, 81 W.Va. 697.

36. Okl.—Phillips v. State, 225 P. 180, 27 Okl.Cr. 108. 15 C.J. p 885 note 90.

Adjournment over term at another place in county

Where the statute provides that the county court shall hold terms at different places within the county other than the county seat, an adjournment of the regular term of court at the county seat may be had to a day later than an intervening term provided for by law at some other place in the county.—Ex parte Haley, 214 P. 1090, 23 Okl.Cr. 339.

37. Ala.—Whatley v. State, 39 So. 1014, 144 Ala. 68.

38. Tex.—Hamilton v. Empire Gas & Fuel Co., Com.App., 110 S.W.2d 561, affirming, Civ.App., 85 S.W.2d 280.

39. Tex.—Hamilton v. Empire Gas & Fuel Co., supra—Bell & Graddy v. O'Brien, Civ.App., 113 S.W.2d 560—Johnson v. Bussey, Civ.App., 95 S.W.2d 990, error refused—Clay-

ton v. Jobe, Civ.App., 71 S.W.2d 911, error refused—Texas Mut. Life Ins. Ass'n v. Laster, Civ.App., 69 S.W.2d 496—McKenzie v. State, 12 S.W.2d 578, 111 Tex.Cr. 299, denying motion 11 S.W.2d 172.

Special judge appointed from the bar may extend term to complete trial of case properly before him.—Hall v. Eversole's Adm'r, 64 S.W.2d 891, 251 Ky. 296.

40. Ga.—Medders v. Lewis, 123 S.E. 605, 158 Ga. 417, conformed to 124 S.E. 80, 32 Ga.App. 613.

41. Ga.—Peacock v. State, 186 S.E. 882, 53 Ga.App. 599.

42. U.S.—Grant v. Pilgrim, C.C.A. Alaska, 95 F.2d 562.

43. Wis.—State v. McBain, 78 N.W. 602, 102 Wis. 431.

44. Ky.—Stevens v. Young, 202 S.W. 481, 180 Ky. 154.

45. Until fourth day of term, where judge fails to appear on first day N.C.—State v. Davis, 98 S.E. 785, 177 N.C. 573—State v. Harden, 98 S.E. 782, 177 N.C. 580.

46. La.—State v. Reed, 21 So. 732, 49 La. Ann. 704.

47. Mo.—Grant City v. Simmons, 151 S.W. 137, 167 Mo.App. 183.

iff shall adjourn court until the next regular term, the sheriff, of course, need not make such adjournment where the judge appears and opens court on the fourth day.⁴⁸

Rescinding adjournment. It has been held that, where a district judge, through a misapprehension that all litigants desired an adjournment of the term, adjourned the same, and a litigant was injured thereby, it was the judge's duty to rescind his action and thus relieve such litigant from the injury, provided he could do so without wronging some other innocent person.⁴⁹

b. Requisites and Sufficiency

There may be a final adjournment without an order; and under some statutes a term may be extended for

a limited purpose without an order; but, to effect a continuance, extension, or temporary adjournment which will keep the term alive, there must be a compliance with any applicable statutory requirements.

In making either a temporary or final adjournment there may be, and in making a continuance, extension, or temporary adjournment for the purpose of keeping the term alive there must be, a compliance with any applicable statutes requiring a written⁵⁰ order,⁵¹ an entry on the minutes or records,⁵² and notice by publication or otherwise.⁵³ It is not necessary for a court to assign reasons for an adjournment and the holding of an adjourned term,⁵⁴ unless the statute forbids an adjournment except for certain specified reasons, in which case the order of adjournment must show the existence of one of such reasons.⁵⁵ Under a statute which,

48. Tex.—Moore v. State, 218 S.W. 1059, 87 Tex.Cr. 24.

49. La.—Colonial Homes Realty, etc., Co. v. Sample, 66 So. 794, 136 La. 212.

50. Iowa.—State v. Holmes, 9 N.W. 894, 56 Iowa 588, 41 Am.R. 121. 15 C.J. p 884 note 74.

Failure of order to direct officer, such as sheriff, marshal, or clerk, to adjourn court may not be fatal. U.S.—Weichen v. U. S., C.C.A.III., 262 F. 941.

Miss.—Mississippi & S. V. R. Co. v. Brown, 132 So. 556, 160 Miss. 123.

51. Ark.—Magnolia Petroleum Co. v. Saunders, 94 S.W.2d 703, 192 Ark. 783.

Self-impeaching order

An order of adjournment shown by the records to have been made at a time to which the court was adjourned, and when the judge was not present, and therefore not to be authorized by statute, impeaches itself and is void.—Cook v. Penrod, 85 S.W. 676, 111 Mo.App. 128.

Order held not erroneous

Tex.—Fierro v. State, 121 S.W.2d 597, 135 Tex.Cr. 483.

Orders held sufficient to extend term of court until bill of exceptions was signed.—Morrissey v. U. S., C.C.A.Cal., 67 F.2d 267, rehearing denied 70 F.2d 729, certiorari denied 58 S.Ct. 77, 293 U.S. 566, 79 L.Ed. 666.

Particular orders construed

N.Y.—Shoff v. Taylor, 295 N.Y.S. 484, 162 Misc. 681.

Tex.—Hamilton v. Empire Gas & Fuel Co., Com.App., 110 S.W.2d 561, affirming Civ.App., 85 S.W.2d 280—Morse v. Hoover, Civ.App., 105 S.W.2d 682.

15 C.J. p 885 note 79 [a].

52. Miss.—Perry v. State, 122 So. 744, 164 Miss. 459.

N.Y.—Reynolds v. Cropsey, 150 N.E.

303, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App.Div. 683—Defazio v. Oneida County Court, 250 N.Y.S. 703, 140 Misc. 487, affirmed Alfano v. Oneida County Court, 258 N.Y.S. 1080, 236 App. Div. 822, Frank v. Oneida County Court, 258 N.Y.S. 1084, 236 App. Div. 822, Lisandrelli v. Oneida County Court, 258 N.Y.S. 1084, 236 App. Div. 822, Fuglise v. Oneida County Court, 258 N.Y.S. 1085, 236 App. Div. 822, and DeFazio v. Oneida County Court, 258 N.Y.S. 1085, 236 App. Div. 822. 15 C.J. p 884 note 75.

Timely signature of minutes by judge is necessary to extend term.—Watson v. State, 146 So. 122, 166 Miss. 134.

Entry constituting final adjournment

Where the records of a district court recite under a certain date that court convened as per adjournment and continued in session during the day, "when it adjourned," the entry constitutes a final adjournment of the term, notwithstanding a subsequent entry at a later date of an order adjourning the term sine die.—Marengo Sav. Bank v. Byington, 112 N.W. 192, 135 Iowa 151.

Nunc pro tunc entry

(1) The order may be entered nunc pro tunc.

Ind.—Green v. White, 18 Ind. 817. Mo.—State v. Bush, 118 S.W. 670, 136 Mo.App. 608.

(2) Even a nunc pro tunc order correcting a prior adjourning order as to the date to which adjournment was made may save an adjourned term held on the corrected date; but it is otherwise where the correction produces a conflict with other orders and such orders may not be regarded as clerical misprisions, it appearing from the records of the court that adjourned sessions were to be held between the original and

corrected dates, and, from undisputed testimony, that they were actually held.—Magnolia Petroleum Co. v. Saunders, 94 S.W.2d 703, 192 Ark. 783.

(3) The order being an administrative, rather than a judicial, one, the rule is less strict and rigid as to the quantum and quality of evidence required to establish that the order, was made, as a condition precedent to the nunc pro tunc entry thereof, than in the cases of judgments or judicial orders.—Happy Coal Co. v. Brashear, 92 S.W.2d 22, 263 Ky. 257.

Filing

Where the statute requires only an order entered on the minutes and does not require that the order be filed or that it be put in writing, except through an entry in the minutes, the entry in the minutes constitutes the original order and if there is a separate writing evidencing the order it will be considered merely as a memorandum and it does not matter when, if at all, it is filed.—J. C. Dielman Co. v. Peaslee-Gaulbert Co., Tex.Civ.App., 23 S.W.2d 757.

53. N.H.—State v. Moore, 40 A. 702, 69 N.H. 102.

15 C.J. p 884 note 76.

Entry in minutes as notice

The notice which the public, and especially litigants, should have of the days on which courts are to sit and terms are to be held is fully accomplished by compliance with a statute providing for adjournment of a term from day to day, or to a specified day, by an entry in the minutes.—Reynolds v. Cropsey, 150 N.E. 303, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App.Div. 683.

54. Ind.—Cass v. Krimbill, 39 Ind. 357.

55. Ga.—Martin v. Scott, 44 S.E. 974, 118 Ga. 149.

15 C.J. p 884 note 66.

in some respects, makes an adjourned term a separate and distinct term, rather than a part of the original term, it has been held necessary, for the purpose of allowing a continuance of the term to be treated as an adjourned term, that the order of adjournment recite that the court is about to adjourn without having transacted its business and that the adjournment is taken to an adjourned term or employ language of similar import clearly showing an intention on the part of the court to create an adjourned term on reconvening.⁵⁶

There may be a final adjournment or adjournment sine die of the term, as distinguished from a temporary adjournment from day to day or to a day certain or other proceeding continuing or extending the term, even though the judge makes only an oral order and does not sign the minutes or record book containing the entry of adjournment.⁵⁷ Indeed, there may be an adjournment sine die without any order. Where the judge leaves the bench for the term there is an actual adjournment sine die,⁵⁸ although, as a matter of orderly procedure, the judge, when he leaves the bench for the term, should cause due notice of the final adjournment to be given by the crier.⁵⁹ Also the court stands adjourned after the expiration of the period prescribed by statute for the term where, prior to such expiration, the presiding judge discharged the jury, left the bench, ceased to hold court, and passed no order continuing court in session after the expiration of the statutory period.⁶⁰ However, the mere absence of the judge for several successive days during the term does not adjourn the term.⁶¹ Also merely excusing the petit jurors until a future date does not adjourn the term of court in the absence of an order of court to that effect.⁶² According to some authorities, there is no adjournment sine die where there is an adjournment subject to call⁶³ or an announcement by the court, after completion of pending business, "this is all for this time," without fix-

ing a time for reconvening;⁶⁴ but, according to other authorities, as shown *infra* in subdivision c of this section, an adjournment for an indefinite time is equivalent to an adjournment sine die in so far as ending the term is concerned; and there are authorities, some of which construe or give effect to statutes, indicating that an adjournment or extension of a term other than to a fixed date or for a definitely fixed period is not authorized or justified.⁶⁵

Under a particular statute, no particular procedure may be necessary to bring about an exercise of the power of the presiding judge to extend a term in order to conclude a pending trial, it being proper for the judge to act on his own motion;⁶⁶ and where, under one statute, an order entered on the minutes is not necessary to extend a term, the fact that the extension is unnecessarily evidenced by an order entered on the minutes does not destroy the power existing without the order nor bring the extension within another statute authorizing an extension on different grounds and requiring an order.⁶⁷ Where, by virtue of statute, an order in term time setting a hearing in vacation is not necessary to give the judge jurisdiction to hear a demurrer to a motion to set aside a judgment, an agreement of the parties in term time for the hearing of the demurrer in vacation has the effect of extending the term for the purpose of the hearing.⁶⁸ While a term of court may be extended or prolonged by a standing rule,⁶⁹ a rule of court providing that appellant shall have a specified number of days from the day of allowance of appeal to file his bill of exceptions does not extend the judgment term.⁷⁰

The personal presence of the judge in the court room is not necessary to validate an adjournment announced by the sheriff, recorded by the clerk, and made pursuant to an order of court.⁷¹

56. W.Va.—*Rockhold v. Cabot*, 95 S. E. 804, 81 W.Va. 697.

57. Ark.—*Fernwood Mining Co. v. Pluna*, 205 S.W. 822, 136 Ark. 107. Ga.—*Worthington v. State*, 67 S.E. 805, 134 Ga. 281.

Iowa.—*State v. Harper*, 258 N.W. 886, 220 Iowa 515.

58. N.C.—*May v. National F. Ins. Co.*, 90 S.E. 890, 172 N.C. 795. 15 C.J. p 883 note 54.

59. N.C.—*DeLafield v. Lewis Mercer Constr. Co.*, 20 S.E. 167, 115 N.C. 21—*Foley v. Blank*, 92 N.C. 476. 15 C.J. p 884 note 55.

60. Ga.—*Gilley v. Gilley*, 163 S.E. 241, 44 Ga.App. 818.

61. Tex.—*Creed v. State*, 155 S.W. 240, 69 Tex.Cr. 464. 15 C.J. p 884 note 58.

62. N.M.—*State v. Kille*, 218 P. 347, 29 N.M. 55.

63. Kan.—*State v. Langmade*, 163 P. 847, 101 Kan. 814.

64. Okl.—*Hensley v. State*, 3 P.2d 211, 53 Okl.Cr. 22.

65. N.Y.—*Reynolds v. Cropsey*, 150 N.E. 303, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App.Div. 683. Tex.—*Hamilton v. Empire Gas & Fuel Co., Com.App.*, 110 S.W.2d 561, affirming, Civ.App., 85 S.W.2d 280. 15 C.J. p 885 notes 77, 78.

66. Tex.—*Texas Employers' Ins. Ass'n v. Lane*, Civ.App., 124 S.W. 2d 893, error dismissed, judgment correct.

67. Tex.—*Alexander v. State*, 204 S. W. 644, 84 Tex.Cr. 75.

68. Ga.—*Revels v. Kilgo*, 121 S.E. 209, 157 Ga. 39.

69. U.S.—*Bertino v. Marion Steam Shovel Co., D.C.Mo.*, 10 F.Supp. 354, mandamus granted, C.C.A., *Marion Steam Shovel Co. v. Reeves*, 76 F. 2d 462.

70. U.S.—*Bertino v. Marion Steam Shovel Co.*, *supra*.

71. Kan.—*Mulcahy v. City of Moine*, 171 P. 597, 101 Kan. 532, 102 Kan. 531.

c. Operation and Effect

- (1) In general
- (2) Adjourned or extended term

(1) In General

A term is ended by a final adjournment, on adjournment sine die or for an indefinite time, or an adjournment to the day fixed for the commencement of the next regular term, but not by an adjournment to a subsequent day in the same term, nor by a recess, provided it is not too long.

Notwithstanding some authority to the contrary in respect of an adjournment subject to call⁷² and a failure to adjourn to a specific time,⁷³ the rule adopted in some decisions is that a term is ended when it is adjourned finally or sine die or is continued or adjourned without fixing a time to reconvene, there being no difference in this connection between the words "continued" and "adjourned" and there being no magic in the words "sine die," the same result following, as in the case of a formal adjournment sine die, when there is a continuance or adjournment for an indefinite time or subject to the call of the judge or further order of the court.⁷⁴ Also an adjournment to the day fixed for the beginning of the next regular term puts an end to the current term.⁷⁵ On the other hand, an adjournment to a subsequent day in the term does not end the term or deprive the judges of control of the proceedings.⁷⁶ Furthermore, the declaration of a recess by the judge does not terminate the term,⁷⁷ although other courts of the circuit are held in the meantime⁷⁸ by the same judge.⁷⁹ However, a re-

cess of a term of court indicates only a temporary suspension of proceedings with the understanding and expectation that, after a brief suspension, proceedings will be resumed;⁸⁰ and the court cannot, by taking a recess, keep the term alive for a long time to the end that the court may be reconvened for the purpose of taking up new business.⁸¹

The adjournment of a special term has no effect on the regular term.⁸²

Final adjournment of court for the term as legal discharge of jury see the C.J.S. titles Grand Juries § 33, also 28 C.J. p 796 notes 71, 72, and Juries § 206, also 35 C.J. p 309 note 36.

(2) Adjourned or Extended Term

- (a) Nature and duration
- (b) Scope and validity of proceedings thereat

(a) Nature and Duration

A proper and legal adjourned or extended term is not a new, distinct, and independent term, but rather is a part of the term adjourned or extended. Except in the case of an extension until the conclusion of a pending trial, it may continue so long as necessary for the transaction of business or, in some instances, until the commencement of the next term.

While there is authority for the view that an adjourned term is a distinct and separate term,⁸³ a legally adjourned term of court is not, it has generally been determined, a distinct, independent term, but is rather regarded as a continuance or part of the same term.⁸⁴ So also a proper extension of a

72. Kan.—State v. Langmade, 168 P. 847, 101 Kan. 814.

Okl.—Boaz v. Martin, 225 P. 516, 101 Okl. 243—Southwestern Surety Ins. Co. v. Douglas, 198 P. 334, 81 Okl. 232.

73. Ky.—Wood Oil Co. v. Commonwealth, 244 S.W. 429, 432, 196 Ky. 196, quoting *Corpus Juris*. 15 C.J. p 884 note 57.

74. Ga.—Myers v. Brooks, 102 S.E. 369, 24 Ga.App. 793. Me.—Ingraham v. Berlawsky, 147 A. 227, 128 Me. 307.

N.Y.—Reynolds v. Cropsey, 150 N.E. 303, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App.Div. 683. 15 C.J. p 884 note 63, p 885 note 83.

Corpus Juris is cited in a case where, however, it is held that the rule does not apply to the situation, the regular judge having corrected an error made by another judge, temporarily presiding during the trial of three cases, in announcing an adjournment sine die.—Southern Pac. Co. v. Jones, 202 P. 1095, 59 Utah 253.

After final adjournment of the term the court or judge is power-

less to make any further valid orders in a cause in which a bill of exceptions was due at that term, save to cause proper entries nunc pro tunc to be made.—State v. Brannon, 110 S.W. 695, 212 Mo. 173.

75. Mo.—State v. Todd, 72 Mo. 288.

76. Ky.—Wood Oil Co. v. Commonwealth, 244 S.W. 429, 432, 196 Ky. 196, quoting *Corpus Juris*. Miss.—Perry v. State, 122 So. 744, 154 Miss. 459.

Mo.—Tucker v. Burford, App., 95 S.W.2d 866.

N.D.—State v. Shortridge, 211 N.W. 336, 54 N.D. 779.

W.Va.—Rockhold v. Cabot, 95 S.E. 804, 81 W.Va. 697.

15 C.J. p 884 note 56, p 885 note 85.

Term is kept alive by a proper adjournment from day to day or to a specified future day.—Reynolds v. Cropsey, 150 N.E. 303, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App.Div. 683.

77. Ky.—Wood Oil Co. v. Commonwealth, 244 S.W. 429, 432, 196 Ky. 196, quoting *Corpus Juris*.

15 C.J. p 884 note 59.

78. Ga.—King v. Sears, 18 S.E. 830, 91 Ga. 577.

79. Iowa.—Jones v. McClaughry, 151 N.W. 210, 169 Iowa 281.

80. N.Y.—Reynolds v. Cropsey, 150 N.E. 303, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App.Div. 683.

81. N.Y.—Reynolds v. Cropsey, supra.

82. Mo.—State v. Riddle, 78 S.W. 606, 179 Mo. 287—Cook v. Penrod, 85 S.W. 676, 111 Mo.App. 128.

83. Tenn.—State v. Mayo, 8 S.W.2d 477, 157 Tenn. 339. 15 C.J. p 886 note 3.

Purported adjourned term was held to be a separate and distinct term, it not being within statutes authorizing adjourned and extended terms, and, if lawful, it must have been a special term.—Beard v. McLain, 78 So. 184, 117 Miss. 316.

84. Ala.—Martin v. State, 113 So. 452, 22 Ala.App. 191, conforming to answers to certified questions 113 So. 602 (second case), 22 Ala.App. 154, which denied motion 113 So. 602 (first case), 216 Ala. 160.

term, whether regular or special, is not a new term, but instead is a prolongation and part of the term extended.⁸⁵

Commencement and termination. Where a term is adjourned or postponed at the beginning thereof, the return day thereof is also adjourned,⁸⁶ and the first day of actual session is the first day of the regular jury term.⁸⁷ An adjourned term may remain in session so long as may be necessary to transact its business.⁸⁸ Where a county court at a regular term makes an order adjourning the court to chambers, the adjourned term is in full force until the actual convening of the next term of court.⁸⁹ Also, where a term is extended until the time prescribed by law for the commencement of another term for the same county, it ends at the appointed time.⁹⁰

A term extended until the conclusion of a pending trial continues until, but not beyond, the time when all judicial acts appertaining to the trial, which have been duly invoked and are required by law to be done during the term in which the trial is had, have been done and due entry has been made of all such judicial acts as are required by law to be entered in the court record.⁹¹ This time may be the date of the entry of an order overruling a motion for new trial or rehearing⁹² or when judgment is entered and an appeal is perfected,⁹³ but not where the jury is discharged because of its inability to reach a verdict, where there remains anything proper to be done in respect of the final disposition of the case,⁹⁴ nor where a bill of excep-

tions or statement of facts is considered and approved, where, although such consideration and approval involve a judicial act appertaining to the trial of the case, the law does not require the bill or statement to be prepared and filed during the term at which the trial is had.⁹⁵

(b) Scope and Validity of Proceedings Thereat

As to business which, under the statutes and orders of court not inconsistent therewith, may be considered and disposed of at an adjourned or extended term, the court possesses and can exercise the same power, authority, and jurisdiction as at the original term; and its proceedings are valid if the adjourned or extended term is valid and is held at an authorized time.

Where an extended or continued term of court is invalid, as where the extension or continuance is unauthorized or is not made in a proper manner or at a proper time, all proceedings thereat are void.⁹⁶ Furthermore, where an extended term is held at an unauthorized time, the court is without jurisdiction and all its proceedings are void.⁹⁷ Conversely, where the adjournment, postponement, or extension is authorized and regularly made and, in pursuance thereof, a regularly constituted court is convened at the proper time, all acts done and proceedings taken at the adjourned, postponed, or extended term are valid.⁹⁸ Where adjourned terms are authorized by statute, it will be presumed, if nothing to the contrary appears, that the term to which a cause was adjourned was regularly held, and the cause regularly brought to trial thereat.⁹⁹

Pa.—Fisher v. Fisher, 74 Pa.Super. 538.

W.Va.—State v. Roane County Court, 135 S.E. 174, 102 W.Va. 327. 15 C.J. p 883 note 42, p 886 note 1.

Adjourned term is not special term, at least where it is convened pursuant to adjournment of a regular term.—State v. Taylor, 51 S.W.2d 1003, 330 Mo. 1036—15 C.J. p 886 note 1 [d], [e].

85. Ky.—Sloan v. Commonwealth, 277 S.W. 488, 211 Ky. 318. Miss.—Watson v. State, 146 So. 122, 166 Miss. 194.

Extension of regular term is not special term, but is simply part of regular term.—Perry v. State, 122 So. 744, 154 Miss. 459.

Day set for hearing of motion for new trial

Where motion for new trial is filed within trial term and order sets hearing thereof on a named day in vacation, that day is in legal contemplation a continuance of the term.—Perry v. Gammage, 99 S.E. 141, 23 Ga.App. 583.

86. Fla.—Wilson v. Lott, 5 Fla. 302.

87. La.—State v. Pate, 5 So. 21, 40 La.Ann. 748.

88. Ga.—Murray v. State, 17 S.E. 99, 91 Ga. 136.

89. N.Y.—Matter of Wood, 95 N.Y.S. 260, 107 App.Div. 514, 99 N.Y.S. 871, 111 App.Div. 781.

90. Or.—State v. Ryan, 234 P. 811, 114 Or. 91.

91. Tex.—Stephenson v. Nichols, Com.App., 286 S.W. 197, affirming, Civ.App., 272 S.W. 220.

92. Tex.—Stephenson v. Nichols, supra—Drane v. Humble Oil & Refining Co., Civ.App., 4 S.W.2d 241, error refused—Edwards v. Edwards, Civ.App., 288 S.W. 634, reversed in part on other grounds and affirmed in part, Com.App., 295 S.W. 581.

93. Tex.—Knight v. State, 267 S.W. 983, 99 Tex.Cr. 15.

94. Tex.—Edwards v. Edwards, Civ. App., 288 S.W. 634, reversed in part on other grounds and affirmed in part, Com.App., 295 S.W. 581.

95. Tex.—Stephenson v. Nichols, Com.App., 286 S.W. 197, affirming, Civ.App., 272 S.W. 220.

96. Conn.—Whitford v. Lee, 117 A. 554, 556, 97 Conn. 554, quoting *Corpus Juris*.

Ky.—Ritchie v. Commonwealth, 17 S. W.2d 738, 229 Ky. 654.

Miss.—Watson v. State, 146 So. 122, 166 Miss. 194.

Tex.—Wichita Falls Traction Co. v. Cook, 60 S.W.2d 764, 122 Tex. 446—Citizens State Bank of Frost v. Miller, Civ.App., 115 S.W.2d 1183—Morse v. Hoover, Civ.App., 105 S. W.2d 682.

15 C.J. p 886 note 5.

97. Ky.—Thompson v. Commonwealth, 99 S.W.2d 705, 266 Ky. 529—Smith v. Commonwealth, 15 S. W.2d 458, 228 Ky. 710—Daniel v. Commonwealth, 13 S.W.2d 790, 227 Ky. 604.

98. Miss.—Perry v. State, 122 So. 744, 154 Miss. 459.

N.C.—State v. Harden, 98 S.E. 782, 177 N.C. 580.

Pa.—Fisher v. Fisher, 74 Pa.Super. 538.

15 C.J. p 883 note 42.

99. Mich.—People v. McGarry, 99 N.W. 147, 136 Mich. 316.

15 C.J. p 886 note 4.

The court possesses the same power during an extended term as during the original term;¹ and it can exercise all the authority and jurisdiction at an adjourned term which it could exercise at the regular term.² The business which may be considered and disposed of at an adjourned or extended term depends on the statutes and orders of court not inconsistent therewith,³ but not on an order enlarging or limiting power fixed by statute.⁴ New actions may be brought⁵ and, with the consent of the parties, may be tried⁶ at an adjourned term.

Whether the same panel of petit jurors may be retained for the adjourned part of a term is considered in the C.J.S. title Juries § 206, also 35 C.J. p 309 notes 40, 41, p 310 note 45. As to the competency of the same grand jury to serve see the C.J. S. title Grand Juries § 33, also 28 C.J. p 796 note 74.

§ 153. Continuance of Proceedings beyond Term

Ordinarily, business unfinished at the end of a term goes over to the next term; but in some instances, under statute or otherwise, the court retains jurisdiction and may continue in session, if necessary, beyond the term for the purpose of completing business which was commenced, and as to which the action of the court or judge was invoked, during the term.

Ordinarily, business which is unfinished at the end of a term goes over to the next term,⁷ all caus-

es not tried or otherwise disposed of being continued as of course or by operation of law to the next term, as noted in Continuances § 12. It has been stated generally that there is an inherent power in courts to finish at a succeeding term business commenced at a previous term.⁸ However, an unfinished trial cannot be taken up at the next term where left off at the prior term and be proceeded with from that point.⁹

In some instances, under statute or otherwise, a court is deemed to retain jurisdiction and to have power to continue in session, if need be, beyond the term for the purpose of completing and disposing of business which has been commenced, and as to which the action of the court or judge, as the case may be, has been invoked during the term,¹⁰ such as for the purpose of concluding a trial in progress at the time fixed for the expiration of the term,¹¹ rendering a final decree in an equitable case which has been heard,¹² hearing and determining a motion for new trial,¹³ or making an order necessary to enforce a decree.¹⁴

§ 154. Simultaneous or Conflicting Terms

There cannot be two terms of the same kind of the same court at the same time and place and presided over by the same judge; but the decisions are not in harmony as to the validity of simultaneous terms of the same court in different counties in the same district or circuit, whether presided over by the same judge or by different judges.

1. Tex.—Gulf, C. & S. F. Ry. Co. v. Muse, 207 S.W. 897, 109 Tex. 352, 4 A.L.R. 613—Scoggins v. Lee, Civ. App., 92 S.W.2d 1116, modified on other grounds Republic Production Co. v. Lee, Com.App., 121 S.W.2d 973.

2. Ala.—Ashford v. McKee, 62 So. 879, 183 Ala. 620.

15 C.J. p 886 note 2.

3. Ga.—Henrich v. Whittaker, 114 S. E. 640, 154 Ga. 579.

Ky.—Sloan v. Commonwealth, 277 S.W. 488, 211 Ky. 318.

N.Y.—People ex rel. Sherman v. Adjourned Special Term of Orange County, 200 N.Y.S. 880, 206 App. Div. 799.

Tex.—Bell & Graddy v. O'Brien, Civ. App., 113 S.W.2d 560—Morse v. Hoover, Civ.App., 105 S.W.2d 682.

4. Miss.—Brown v. State, 161 So. 465, 173 Miss. 542, overruling suggestion of error 158 So. 339, and certiorari granted Brown v. State of Mississippi, 56 S.Ct. 128, 296 U. S. 559, 80 L.Ed. 394, reversed on other grounds 56 S.Ct. 461, 297 U.S. 278, 80 L.Ed. 682, conformed to Brown v. State, 167 So. 82.

5. Conn.—Hawley v. Parrott, 10 Conn. 486.

15 C.J. p 886 note 93.

6. Ind.—Hyatt v. Hyatt, 33 Ind. 309.

7. U.S.—Walker v. Moser, Neb., 117 F. 230, 54 C.C.A. 262.

Kan.—State v. Crilly, 77 P. 701, 69 Kan. 802.

8. U.S.—Rachmil v. U. S., C.C.A. N.Y., 288 F. 782, certiorari denied 43 S.Ct. 700, 262 U.S. 751, 67 L.Ed. 1215.

D.C.—Pratt v. U. S., 102 F.2d 275, 70 App.D.C. 7.

9. Mo.—Neal v. Kansas City Rys. Co., 204 S.W. 563, 199 Mo.App. 493. Necessity of complete retrial after continuance of partially tried case to next term see Continuances § 102.

10. U.S.—In re Bills of Exceptions, C.C.A., 37 F.2d 849.

Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382.

15 C.J. p 887 note 8.

Provision of new federal rules of civil procedure that the expiration of a term of court shall not affect or limit in any way the period of time provided for the doing of any act or the taking of any proceeding or the power of the court to do any act or take any proceeding in any civil action which has been pending before it, has rendered anachronistic the technical niceties pertaining to terms

of court as to both law and equity.—Sprague v. Ticonic Nat. Bank, Me., 59 S.Ct. 777, reversing, C.C.A., 99 F.2d 583, certiorari granted 59 S.Ct. 463.

11. U.S.—Kalmanson v. U. S., C.C.A. N.Y., 282 F. 619.

Ind.—Clevenger v. Kern, 197 N.E. 731, 100 Ind.App. 581.

Miss.—Pittman v. State, 113 So. 348, 147 Miss. 593.

Pa.—Shenker v. Harr, 2 A.2d 298, 332 Pa. 382.

15 C.J. p 887 note 7.

12. U.S.—Davis v. Virginia R. & Power Co., Va., 229 F. 633, 144 C.C.A. 43, certiorari denied 36 S.Ct. 723, 241 U.S. 672, 60 L.Ed. 123.

13. Fla.—Adams v. Wolf, 137 So. 705, 103 Fla. 547.

Division of term

Where the first half of a term is for civil business and the last half for criminal business, a motion for a new trial in a civil case tried during the first half of the term may be heard during the last half of the term, the division being one merely for convenience.—Mann's Mercantile Co. v. Smith, 64 So. 929, 107 Miss. 16.

14. D.C.—Dutton v. Parish, 34 App. D.C. 393.

15 C.J. p 887 note 10.

Ordinarily there cannot be two terms of the same court at the same time, in the same place,¹⁵ and presided over by the same judge;¹⁶ and it has also been held that there cannot be two regular terms of a circuit court in session in two counties of the same circuit at the same time,¹⁷ although there is authority for the view that courts of the same kind may sit at the same time in different counties in the same circuit or district.¹⁸ It has been held that, where a judge is required by law to hold court in two counties at the same time he may in his discretion hold court in either county,¹⁹ and that, by means of an adjournment or recess so that actual sessions do not conflict, two terms, in different counties of the same district, presided over by the same judge, may be open at the same time;²⁰ but the latter proposition has been denied,²¹ and an act requiring a judge to hold court in two districts at the same time has been held void.²²

Simultaneous terms of different courts may be held in the same county;²³ where a court has two or more branches, different judges may sit in different branches at the same time;²⁴ terms of federal courts in different districts of the same state may be held simultaneously;²⁵ where there are sufficient judges, simultaneous sessions of the same court may be held, as shown *infra* § 162, or a regular and a special term may be held simultaneously at the same place or at different places in the same district, as stated *infra* § 156; and where a speci-

fied time, whether that time should be in vacation or during a term, has been appointed for the hearing in chambers of a motion for a new trial, the jurisdiction of the trial judge to pass on the motion at the appointed time is not ousted by the opening of a regular term of a county in the circuit by another judge.²⁶

§ 155. Lapse of Term

The lapse of a term prevents any subsequent proceedings at that term, all causes being continued to the next term by operation of law. After the term has been opened, the failure of the judge to attend on an adjourned day does not cause the term to lapse; and the common-law rule that the failure of the judge to attend and open court on the day fixed for the beginning of the term results in a lapse of the term has, to some extent, been obviated by statutes permitting the selection of a temporary judge to take the place of the absent judge or providing, on the nonappearance of the judge, for adjournments by a ministerial officer or by operation of law for a limited period during which court may be convened.

A failure to open court on the day fixed for the beginning of a term results, at common law, in a lapse or loss of the whole term, so far at least as the holding of court is concerned;²⁷ but where no particular hour for the convening of the court is fixed, the judges may lawfully meet and open court at any time before the close of the day, and the term does not lapse because they fail to appear before noon.²⁸ The inconvenience resulting from the common-law rule has led to a very general enact-

15. Ga.—Butler v. State, 37 S.E. 124, 112 Ga. 76.

16. C.J. p 887 note 18.

16. Miss.—Walton v. State, 112 So. 790, 147 Miss. 851.

17. Ind.—Batten v. State, 80 Ind. 394.

15 C.J. p 887 note 14.

18. N.C.—State v. Wood, 95 S.E. 1050, 175 N.C. 809.

15 C.J. p 887 note 15.

19. Fla.—Brock v. Gale, 14 Fla. 523, 14 Am.R. 356.

Mont.—Carland v. Custer County, 6 P. 24, 5 Mont. 579.

20. Ark.—Thomas v. State, 116 S.W. 2d 358, 196 Ark. 123.

15 C.J. p 888 note 18.

Conflict

Two courts in the same circuit presided over by one judge cannot legally be held on same day; even if it were physically possible for the judge to reach both places on the same day, it cannot legally be done, because the law does not take account of different parts of a day in fixing the time for holding court. Also, a statute providing that the court shall continue in session from day to day until the business is

disposed of does not authorize court to stand open from day to day so as to conflict with holding court in another county in same circuit.—Central Coal & Coke Co. v. Graham, 196 S.W. 940, 129 Ark. 550.

Corpus Juris is cited in a case where, however, there was no order recessing or adjourning the court first opened, but the judge, after opening court, impaneling and instructing the grand jury, calling the civil docket, and setting cases for trial, went to another county, held court there for one and a half days, adjourned the term finally and returned to the first county in time to receive the indictment in question, and it was held that the term of court in the first county and the indictment were valid.—Crausby v. State, 26 S.W.2d 246, 115 Tex.Cr. 441.

21. Ark.—McVay v. State, 150 S.W. 125, 104 Ark. 629.

Okl.—In re Patswald, 50 P. 139, 5 Okl. 789.

22. Ark.—Ex parte Jones, 4 S.W. 639, 49 Ark. 110.

23. Ill.—Wadhams v. Hotchkiss, 80 Ill. 437.

Ind.—Swalls v. Coverdill, 21 Ind. 271.

24. W.Va.—Cumberland First Nat Bank v. Parsons, 32 S.E. 271, 45 W. Va. 688.

15 C.J. p 887 note 16.

25. U.S.—U. S. v. Louisville & N. R. Co., D.C.Ky., 177 F. 780.

26. Ga.—Kirkland v. Ferris, 95 S.E. 971, 148 Ga. 84.

27. Ky.—Hinkle v. Rose, 26 S.W. 2d 541, 542, 233 Ky. 606, quoting *Corpus Juris*—Stevens v. Young, 202 S.W. 481, 180 Ky. 154.

15 C.J. p 888 note 28.

Abrogation of rule by custom

Notwithstanding common-law rule, the opinion has been expressed that custom, which has ripened into law, has largely, if not entirely, abrogated the rule as it relates and applies to fixed regular terms, although the reason for the abrogation does not apply to a special term called for a particular purpose at a particular time.—Hinkle v. Rose, 26 S.W.2d 541, 233 Ky. 606.

28. Cal.—People v. Sanchez, 24 Cal. 17.

ment of statutes preventing a lapse of the term, by permitting some ministerial officer, during a limited period, to adjourn sessions until the judge shall appear, or by giving the mere nonappearance of the judge the effect of an adjournment from day to day for a limited time, within which the court may be convened;²⁹ but even under these statutes, and adjournments made under the authority thereof, a term may lapse where the judge does not appear and court is not opened before the expiration of the statutory period for making adjournments³⁰ or on the day to which an adjournment has been taken.³¹ In some states the attorneys in attendance may prevent the lapse of the term by the selection of one of their number to take the place of the absent judge,³² and such a situation has also been cared for by statutes permitting county officials to appoint a temporary judge where the regular judge does not appear.³³ Whatever statutory provision that may obtain in the particular state, the course designated thereby must be followed or the term will lapse where the judge fails to attend at the time fixed for the commencement of the term.³⁴

Where there is no law requiring the observance of any particular ceremony in opening, the court must be regarded as open by operation of law, so as to prevent the lapse of the term, whenever, on the day appointed, the judge, attended by the proper officers, is present at the place designated, even though, because of unfinished business in another court, the judge may not be able to proceed immediately with the business of the court just opened.³⁵

After a term has once been opened the failure of the judge to attend on a day to which it is adjourned does not have the effect of causing the term to lapse,³⁶ since, as stated supra § 151, it continues until it is adjourned sine die or expires by law; but there is some authority for the view that, where

the court adjourns from one day to another given day, a failure to meet on the day to which the court is adjourned will result in a lapse of the remainder of the term, unless there exists some statute which prevents such lapse.³⁷ The setting aside of a first venire and ordering the drawing of a second does not cause a term to lapse where the court remains in session.³⁸

Effect of lapse. Where a term lapses all causes properly triable thereat, whether civil or criminal, stand continued by operation of law,³⁹ and any subsequent proceedings at such term are void.⁴⁰

§ 156. Special or Extraordinary Term

Special terms of court are frequently held to be valid and legal, especially as against objections to the time of the calling or holding thereof.

Where the authority to call a special term existed, it will be presumed, in the absence of any showing to the contrary, that such term was regularly called and held.⁴¹ The rules governing the convening of regular terms of court are but the work of the legislature which may be changed by a subsequent legislature; and none of the provisions of general laws relating to the convening of courts generally can avail where they are in necessary conflict with a later statute governing the calling of special terms and providing for the repeal of all laws inconsistent therewith.⁴² The organization of the court at a special term is not void because no jury was summoned where, owing to the exhaustion of the jury box, no jury could be summoned by the clerk before the court convened.⁴³

There is no necessity for calling a special term where the court is required by constitutional provision to be in session continuously for ten months of the year and the case in question is tried during such a session.⁴⁴

29. S.D.—State v. Sonnenschein, 156 N.W. 906, 37 S.D. 139.
15 C.J. p 888 note 25.

30. Ala.—Forbus v. State, 48 So. 592, 158 Ala. 41.
15 C.J. p 888 note 26.

31. Miss.—Williams v. Simon, 99 So. 433, 135 Miss. 562.

32. W.Va.—Franklin v. Vandervort, 40 S.E. 374, 50 W.Va. 412.
15 C.J. p 889 note 27.

33. Ind.—Jones v. State, 11 Ind. 357—Case v. State, 5 Ind. 1.

34. Ky.—Stevens v. Young, 202 S.W. 481, 180 Ky. 154.
Okl.—Ex parte Massengale, Cr., 93 P.2d 41.

35. S.C.—Miller v. George, 9 S.E. 659, 30 S.C. 526.
15 C.J. p 889 note 29.

36. Ky.—Hinkle v. Rose, 26 S.W. 541, 542, 233 Ky. 606, citing *Corpus Juris*.

15 C.J. p 889 note 30.

Lack of written order of adjournment will not cause the term to lapse when the judge is absent on the day to which the court was adjourned.—Schofield v. Horse Springs Cattle Co., C.C.Mont., 65 F. 433.

37. Ind.—Loesnitz v. Seelinger, 25 N.E. 1037, 26 N.E. 887, 127 Ind. 422.

Failure of adjourned session see *infra* § 163.

38. La.—State v. Vance, 31 La. Ann. 398.

39. Neb.—Pitman v. Heumeier, 115 N.W. 1083, 81 Neb. 338.
15 C.J. p 889 note 34.

Continuance by operation of law generally see Continuances § 12.

40. Ky.—Stevens v. Young, 202 S.W. 481, 180 Ky. 154.

Okl.—Ex parte Massengale, Cr., 93 P.2d 41.
15 C.J. p 889 note 35.

41. Ky.—Phillips v. Robinson, 9 S.W.2d 995, 997, 225 Ky. 682, quoting *Corpus Juris*.
15 C.J. p 893 note 95.

42. Tex.—Hickox v. State, 253 S.W. 823, 95 Tex. Cr. 173.

43. Miss.—Mackie v. State, 103 So. 379, 138 Miss. 740.

44. La.—State v. Sisemore, 92 So. 274, 151 La. 675.

Time for calling and holding. Special terms of court are generally considered valid as against objections directed to the time of the calling or holding thereof, it being variously held that: An order for a special term may be made in vacation;⁴⁵ a statute requiring the supreme court justices, on or before December 1, in every second year, to appoint special terms, is merely directory as to date;⁴⁶ statutory provisions for procuring jurors in advance of a term of court, compliance with which requires action at least fifteen days in advance of the term, do not by implication forbid the calling of a special term to be held within less than fifteen days from the date of the order, where there is another statutory method for procuring jurors;⁴⁷ a statute, although mandatory as to the calling of a special term of court in a certain situation, as noted *infra* § 157, does not deprive the judge of discretion in determining the particular date on which the special term is to be held;⁴⁸ a special term of court may be valid although it is not held within ten days after the call therefor, as required by statute, where there is no showing of prejudice to accused in a criminal case tried at the term and the statute, construed with reference to its purpose to protect persons accused of certain crimes from mob violence, may be regarded as directory;⁴⁹ a special term is not necessarily unauthorized or invalid because it is organized during the period covered by a regular term;⁵⁰ a term of court convened by the judge after the adjournment of the regular term, but within the time during which the regular term might have continued, may be a special term, and not the regular term reopened in an unauthorized manner;⁵¹ general or regular and special or extraordinary terms of the same courts may be held at the same time and place where the statutes permit it and there are sufficient

judges;⁵² a special term of court may lawfully be held while a regular term is in session at another place in the same district, where there are two judges, each having authority to hold court in such district;⁵³ a special term may be held during a recess of the regular term;⁵⁴ a judge may hold a regular term in one county and meanwhile hold a special term in another county,⁵⁵ as by transacting business at the special term during a recess or temporary adjournment of the session in the other county;⁵⁶ and an order, made at a regular term, that a special term be held in the week following that fixed for the regular term in another county, is not illegal.⁵⁷ However, it has also been held that a judge who is required by law to hold court in a certain county has no authority to appoint a special term to commence in another county at the same time.⁵⁸ Furthermore, where the legislature has provided, for a certain time and place, a regular term exclusively for civil business and at which a grand jury is not to be impaneled, a judge cannot repeal the statute nor abolish the statutory term by calling a term of court for the same time and place and naming it a special term.⁵⁹

The duration of a special term is considered above in § 151 a.

§ 157. — Authority to Appoint or Hold

Under statutory authority, a special term may be called by a judge or, in some states, by the governor, in his discretion. What particular judges may call or hold special terms depends on the laws of the state in question.

The legislature has power to appoint special terms of courts,⁶⁰ subject, of course, to constitutional requirements;⁶¹ but this power may be delegated⁶² to judges without violation of constitutional provi-

45. Ga.—Bloodworth v. State, 127 S. E. 453, 160 Ga. 197.

Tex.—Ex parte Boyd, 96 S.W. 1079, 50 Tex.Cr. 309.

46. N.Y.—People v. Youngs, 45 N.E. 460, 151 N.Y. 210.

47. Fla.—Peoples v. State, 35 So. 223, 46 Fla. 101, 4 Ann.Cas. 870.

48. Ark.—Cain v. Robertson, 271 S. W. 336, 168 Ark. 751.

49. Ark.—Harris v. State, 276 S.W. 361, 169 Ark. 627.

50. Ala.—Mullins v. State, 130 So. 527, 24 Ala.App. 78, certiorari denied 130 So. 530, 222 Ala. 9.

Adjournment

Where the day named for a special term conflicts with that for a regular term and adjournment of the special term is taken to a succeeding day, an indictment found at such term is legal.—State v. Clark, 30 Iowa 168.

51. Tex.—Mayhew v. State, 155 S. W. 191, 69 Tex.Cr. 187.

52. Ala.—Young v. State, 54 So. 166, 170 Ala. 71.

15 C.J. p 892 note 82.

53. Fla.—Reynolds v. Horne, 102 So. 158, 88 Fla. 308.

Ky.—Crenshaw v. Commonwealth, 12 S.W.2d 336, 227 Ky. 223.

15 C.J. p 892 note 83.

54. Ga.—Worthington v. State, 67 S.E. 805, 134 Ga. 261.

15 C.J. p 892 note 84.

55. Tex.—White v. State, Cr., 128 S.W.2d 51.

56. Tex.—Brown v. State, 51 S.W.2d 616, 121 Tex.Cr. 528—Wilson v. State, 223 S.W. 217, 87 Tex.Cr. 538.

57. Fla.—Peoples v. State, 35 So. 223, 46 Fla. 100, 4 Ann.Cas. 870.

58. Ill.—Archer v. Ross, 3 Ill. 303.

59. Miss.—Williams v. State, 126 So. 40, 156 Miss. 346, explaining Perkins v. State, 114 So. 392, 148 Miss. 608.

60. Ark.—Bell v. State, 130 S.W. 186, 120 Ark. 530.

Vt.—State v. Alfred, 88 A. 534, 87 Vt. 157.

Wis.—State v. Bardon, 79 N.W. 226, 103 Wis. 297.

61. Tex.—Ex parte Collins, 185 S.W. 580, 79 Tex.Cr. 436.

15 C.J. p 889 note 38.

Unless forbidden by the constitution, the legislature has power to provide for special terms of court and the appointment of special judges to preside over special and general terms.—State v. Davis, 70 S.E. 417, 88 S.C. 204.

62. Vt.—State v. Alfred, 88 A. 534, 87 Vt. 157.

15 C.J. p 889 note 39.

sions⁶³ and, as a general rule, is delegated to them and they are given authority to call or hold special terms of their courts.⁶⁴ In a particular state, however, there may be no legal authority for the holding of a special term of a county court,⁶⁵ the terms, other than the minimum number prescribed by the constitution, which the commissioners' court is held to have exclusive power to fix,⁶⁶ being deemed to be regular, and not special, terms.⁶⁷ Also the statutory power of a judge to extend a term does not authorize the calling of a new term,⁶⁸ nor does the authority of a court to continue its sessions from day to day until its business is transacted embrace the holding of a special term.⁶⁹

An order calling a special term is not necessarily unauthorized because the judge making it is disqualified to act in a case to be disposed of at the special term.⁷⁰ A special judge may provide for a special term;⁷¹ and under the laws of some states, which vest him with all the powers of a regular judge, he may call a special term for the trial of the cases he is designated to try;⁷² but the laws of other states vest authority to call special terms primarily⁷³ or exclusively⁷⁴ in the regular resident judge. While a judge need not be within the county at the time of calling a special term pursuant to statutory authority,⁷⁵ nevertheless where he is elect-

ed to serve within a given district, he is without power to call a term of court in another district unless he is called in and designated to sit as a trial judge in such other district.⁷⁶ In some states the justices of the supreme court have exclusive power to call special terms of lower courts,⁷⁷ or the chief justice of the supreme court has power in this respect concurrent with that of a judge of the lower court⁷⁸ or when the latter judge declines to act.⁷⁹

Except in a few situations where, by statute, there is a mandatory duty to call a special term,⁸⁰ the judge vested with authority to call a special term may be guided by his own opinion as to the necessity or propriety of the term and, in his discretion, may call or refuse to call it.⁸¹ Indeed, one view is that the call may be made or refused at the will or pleasure of the trial judge;⁸² but another view is that the power is not absolute.⁸³

Persons accused of crime are not entitled to be heard on the advisability or necessity of calling a special term of court for the trial of criminal cases.⁸⁴

The governor of the State has, in some states, statutory authority to appoint or call special or extraordinary terms of courts.⁸⁵ Where this power is granted it is for the governor alone to decide as to

63. S.C.—State v. Gossett, 108 S.E. 290, 117 S.C. 76, 16 A.L.R. 1299. 15 C.J. p 891 notes 42-44.

64. Fla.—Reynolds v. Horne, 102 So. 158, 88 Fla. 308.

Ga.—Bloodworth v. State, 127 S. E. 458, 160 Ga. 197—Brinson v. Tennessee Chemical Co., 123 S.E. 731, 32 Ga.App. 456.

Tex.—Brown v. State, 51 S.W.2d 616, 121 Tex.Cr. 528—Enix v. State, 299 S.W. 430, 108 Tex.Cr. 106—Minor v. State, 299 S.W. 422, 108 Tex. Cr. 1.

15 C.J. p 889 note 40.

With or without request of county commissioners

Under the statutes of a state, a judge may, on the request or application of the county commissioners, call a special term for the transaction of general business and, on his own motion, may call one for the trial of criminal prosecutions.—Brown v. State, 2 N.W. 378, 9 Neb. 157.

65. Tex.—Mosaic Templars of America v. Gaines, Civ.App., 265 S.W. 721.

66. Tex.—Ex parte Collins, 185 S. W. 580, 79 Tex.Cr. 436. 15 C.J. p 891 note 56.

67. Tex.—Mosaic Templars of America v. Gaines, Civ.App., 265 S.W. 721—Ex parte Cole, 101 S.W. 249, 51 Tex. Cr. 168.

68. Tex.—Bernstein v. Hibbs, Civ. App., 20 S.W.2d 838, error dismissed.

69. Tenn.—Cannon v. McAdams, 7 Heisk. 376.

70. Ga.—Bloodworth v. State, 127 S.E. 458, 160 Ga. 197.

71. Ky.—Sowers v. Commonwealth, 248 S.W. 187, 197 Ky. 834.

N.C.—State v. Montague, 130 S.E. 888, 190 N.C. 841.

Tex.—McKenzie v. State, 12 S.W.2d 578, 111 Tex.Cr. 299, denying second motion 11 S.W.2d 172.

72. Ky.—Hall v. Eversole's Adm'r, 64 S.W.2d 891, 251 Ky. 296—Commonwealth v. Carnes, 98 S.W. 1045, 124 Ky. 340, 30 Ky.L. 506.

Under statute in force at one time, special judge appointed and commissioned to hold a designated regular term had no power while so acting to call a special term of court.—Tye v. Tinsley, 263 S.W. 743, 204 Ky. 219.

73. Fla.—State ex rel. Skipper v. Bird, 127 So. 331, 99 Fla. 673.

74. Tex.—McAllen v. Raphael, Civ. App., 96 S.W. 760.

75. Vt.—State v. Alfred, 88 A. 534, 87 Vt. 157.

76. N.D.—State v. Garrison, 276 N. W. 693, 68 N.D. 71.

77. Or.—Hanley v. Medford, 108 P. 188, 56 Or. 171.

78. S.C.—State v. Gossett, 108 S.E. 290, 117 S.C. 76, 16 A.L.R. 1299.

79. Ky.—Lee v. Commonwealth, 298 S.W. 1083, 221 Ky. 420.

80. Ark.—Cain v. Robertson, 271 S. W. 336, 168 Ark. 751.

Ky.—Lee v. Commonwealth, 298 S.W. 1083, 221 Ky. 420.

81. Fla.—State ex rel. Skipper v. Bird, 127 So. 331, 99 Fla. 673.

Tex.—Perry v. Walston, Civ.App., 96 S.W.2d 834.

15 C.J. p 890 note 41.

82. U.S.—Downer v. Dunaway, C.C. A.Ga., 53 F.2d 586, conformed to, D.C., 1 F.Supp. 1001.

83. S.C.—State v. Gossett, 108 S.E. 290, 117 S.C. 76, 16 A.L.R. 1299.

84. Vt.—State v. Alfred, 88 A. 534, 87 Vt. 157.

85. N.Y.—People ex rel. Folk v. McNulty, 9 N.Y.S.2d 380, 256 App. Div. 82, reversing 8 N.Y.S.2d 306, affirmed 18 N.E.2d 854, 279 N.Y. 563—People ex rel. Saranac Land & Timber Co. v. Extraordinary Special and Trial Term of Supreme Court, 166 N.Y.S. 132, 177 App. Div. 378, affirmed 116 N.E. 384, 220 N.Y. 487.

N.C.—State v. Baxter, 179 S.E. 450, 208 N.C. 90.

15 C.J. p 891 note 50.

the necessity for such a term,⁸⁶ and his discretion in the matter cannot be reviewed.⁸⁷ A statute not vesting the governor with any discretion, but making it a mandatory duty on his part, on the mere application of the solicitor, to call an extra term is unconstitutional.⁸⁸

§ 158. — Order Appointing

Statutory requirements as to the contents and entry of an order appointing or calling a special term should be complied with; and all facts essential to the jurisdiction of the court at such term must exist and appear; but where jurisdiction exists, certain defects or misrecitals may not be fatal. The order may be revoked or set aside, or it may be amended at a proper time, although not after a case has been tried, so as to give jurisdiction thereof.

Where the statute prescribes what an order appointing a special term shall contain, there must be a compliance with such requirements,⁸⁹ and the order should recite every fact required by the statute as a condition to the calling of such term.⁹⁰ Where the statute prescribes no set form to be used by a judge in appointing a special term, any form will be sufficient which clearly indicates the purpose,⁹¹ and an order of a judge calling a special term is not invalid because it designates the term as adjourned instead of special,⁹² or recites that the authority therefor is derived from the constitution instead of from a statute,⁹³ or fails to fix an adjourning date or specify the length of the term.⁹⁴ The fact that the order fixing a special term states that it is for

the purpose of resuming business under the regular term does not change the character of such term as a special one.⁹⁵ The order need not recite that a special term is necessary, as the order is of itself an affirmation of this fact,⁹⁶ nor need it contain an affirmative recital that the holding of the special term will not interfere with any other court to be held by the same judge.⁹⁷ Where a person accused of crime has been properly tried and condemned, it is immaterial whether the order calling the special term at which he was tried was signed by the judge.⁹⁸

An order by the governor assigning a judge to hold a special term of court need not specify any particular case to be tried;⁹⁹ nor does a misnomer of a person upon whom an alleged crime had been committed invalidate the order.¹ An order of the governor, pursuant to his statutory authority, for a special term of a court of general sessions is not rendered nugatory by the fact that it needlessly confines the term to the disposition of all the cases on the criminal docket.²

Two orders made a few days apart, the second to supplement the first, calling a special term of court for the same day, are to be treated as one.³

Amendment. A defective order, calling a special term to try criminal cases, cannot be amended nunc pro tunc after the trial of a case so as to give the court jurisdiction over that case;⁴ but it can be properly amended the same day it is made.⁵

86. N.Y.—*People v. Extraordinary Spec., etc., Term Supreme Ct.*, 116 N.E. 384, 220 N.Y. 487—*People ex rel. Luciano v. Murphy*, 290 N.Y. S. 1011, 160 Misc. 573, affirmed 292 N.Y.S. 844, 249 App.Div. 879.

87. N.Y.—*People v. Extraordinary Spec., Term Supreme Ct.*, 116 N.E. 384, 220 N.Y. 487.

88. S.C.—*State v. Gossett*, 108 S.E. 290, 117 S.C. 76, 16 A.L.R. 1299.

89. Ky.—*Rooney v. Commonwealth*, 249 S.W. 763, 198 Ky. 515. 15 C.J. p 891 note 63.

Giving style of each case to be tried
(1) Where a statute mandatorily requires an order calling a special term to give the style of each case to be tried at such term, an order ostensibly extending a regular term cannot be upheld as in fact calling a special term where it does not comply with this requirement.—*Daniel v. Commonwealth*, 18 S.W.2d 790, 227 Ky. 604.

(2) However, where the original order for the first special term fully complies with the requirement, an order for a second special term sufficiently complies with the statute by stating that the term is called to

finish the trial of the cases set for trial at the first term.—*Davidson v. Commonwealth*, 15 S.W.2d 431, 228 Ky. 565.

90. Ark.—*Reece v. State*, 176 S.W. 165, 118 Ark. 310.

Orders held sufficient

Ark.—*Morrow v. State*, 284 S.W. 721, 171 Ark. 1188—*Bettis v. State*, 261 S.W. 46, 164 Ark. 17.

15 C.J. p 891 note 64 [a].

91. W.Va.—*State v. Hoke*, 84 S.E. 1054, 76 W.Va. 36.

15 C.J. p 891 note 65.

92. Fla.—*Peoples v. State*, 35 So. 223, 46 Fla. 101, 4 Ann.Cas. 370.

Designation coupled with formal adjournment

The mere fact that the judge in form adjourns a regular term to a future day, covering and beyond the period during which a regular term should be, and is, held in another county in the circuit, and designates the term to be held as an adjourned term does not prevent the future term from being in law an extra or special term.—*Reynolds v. Horne*, 102 So. 153, 83 Fla. 303.

93. Neb.—*Brown v. State*, 2 N.W. 378, 9 Neb. 157.

94. Tex.—*Ramirez v. Sanchez*, Civ. App., 97 S.W.2d 1034—*Norwood v. State*, 120 S.W.2d 806, 135 Tex.Cr. 406.

Under former statute, the rule was otherwise.—*Jowell v. Coffey*, 132 S.W. 886, 62 Tex.Civ.App. 487.

95. Tex.—*Mayhew v. State*, 155 S.W. 191, 69 Tex.Cr. 187.

96. Ky.—*Graham v. Commonwealth*, 175 S.W. 981, 164 Ky. 317. 15 C.J. p 892 note 69.

97. Ark.—*Sease v. State*, 244 S.W. 450, 155 Ark. 130.

98. Ky.—*Bales v. Commonwealth*, 11 S.W. 470, 11 Ky.L. 297.

99. Fla.—*Ex parte Daly*, 63 So. 834, 66 Fla. 345.

1. Fla.—*Ex parte Daly*, supra.

2. S.C.—*State v. Gallman*, 60 S.E. 632, 79 S.C. 223.

3. Ark.—*Pool v. State*, 180 S.W. 339, 121 Ark. 17.

4. Ark.—*Reece v. State*, 176 S.W. 165, 118 Ark. 310.

5. Ark.—*Harris v. State*, 276 S.W. 361, 169 Ark. 627.

Setting aside or revocation. An order for the calling of a special term may be revoked by the court making the same, and a different time appointed for the holding of such term.⁶ When one judge succeeds another who during his incumbency ordered a special jury term, the new judge may set aside the order.⁷

Entry. Where the statute requires the order calling or appointing a special term to be entered on the records of the court, such entry must be made,⁸ although it has been held that where every element of jurisdiction of the court at a special term, as to subject matter, parties, time, and place, is present, and the judge has performed every duty imposed on him, the mere fact that the clerk failed to enter on the minutes of the court the order calling the special term does not oust jurisdiction.⁹ Every fact essential to give the court jurisdiction at a special term must appear on the record of the order therefor;¹⁰ but where the important and necessary jurisdictional fact that the term convened is a special term sufficiently appears, an erroneous recital that the date on which the term is convened is the time fixed by law for holding court is not fatal;¹¹ and where the order, including the signature of the judge, is copied in full on the records of the court, the jurisdiction of the court vests and is not defeated by the subsequent act of the clerk in erasing the name of the judge from the record.¹² Where the order, although entered of record as of the last day of the regular term, was in fact made after the expiration of such term and as direct an attack on the order as the circumstances will permit is made, parol evidence is admissible to show the truth regarding the entry of the order.¹³

§ 159. — Notice

Notice of a special term, otherwise than by the filing or entry of the order calling it, is not necessary unless required by an applicable statute which is not construed to be merely directory.

In the absence of a statutory requirement, it is not necessary to give any notice of a special term other than the filing or entry of the order calling the term,¹⁴ such filing or entry being sufficient,¹⁵ and all parties being bound to take notice thereof.¹⁶ Indeed, in some states statutes requiring notice by advertisement, posting at the courthouse door, or other designated mode, are deemed to be merely directory and not mandatory;¹⁷ but in other states compliance with such a statutory requirement is considered essential to the validity of the term and the proceedings thereat.¹⁸ Even in the latter states a substantial compliance may be held sufficient and a technical defect or lack of strict or exact compliance may be regarded as an irregularity merely and not a jurisdictional defect.¹⁹ It will be presumed that proper notice was given.²⁰

Under some statutes, publication in a newspaper, although necessary under some circumstances, may be dispensed with where the special term is appointed in an adjourning order;²¹ and under other statutes, which make the entry of an order on the records of the court at its next preceding regular term and the posting of a notice, signed by the judge, at the courthouse door alternative methods of calling a special term, a notice so posted is alone sufficient as a call,²² but is not necessary where a special term is called by an order duly made and entered at a regular term.²³

6. Ill.—*Brown v. People*, 9 Ill. 439.

7. La.—*State v. Hingle*, 20 So. 886; 48 La. Ann. 1542.

8. Ark.—*Bell v. State*, 180 S.W. 186, 120 Ark. 530.
15 C.J. p 892 note 78.

Statute held complied with
Ark.—*Clark v. State*, 276 S.W. 849, 169 Ark. 717.

9. La.—*State v. Davis*, 97 So. 449, 154 La. 295.

Miss.—*Durr v. State*, 168 So. 65, 175 Miss. 797—*Ex parte Neil*, 43 So. 615, 90 Miss. 518.

10. Ark.—*Reece v. State*, 176 S.W. 165, 118 Ark. 310.
15 C.J. p 892 note 80.

11. Miss.—*Durr v. State*, 168 So. 65, 175 Miss. 797.

12. Ark.—*Cooper v. State*, 224 S.W. 726, 145 Ark. 403.

13. Ky.—*Rooney v. Commonwealth*, 249 S.W. 763, 198 Ky. 515.

14. Tex.—*Hartman v. Byrd*, Civ. App., 47 S.W.2d 659, 661, citing *Corpus Juris*—*Newton v. State*, 247 S.W. 281, 93 Tex. Cr. 314.

15 C.J. p 893 note 88.

15. Vt.—*State v. Alfred*, 88 A. 534, 87 Vt. 157.

16. Vt.—*State v. Alfred*, supra. Duty of parties to take notice of terms and sessions generally see supra § 148.

17. N.C.—*State v. Boykin*, 191 S.E. 18, 211 N.C. 407.
15 C.J. p 893 notes 92–94.

18. N.Y.—*McIntyre v. Sawyer*, 166 N.Y.S. 631, 179 App. Div. 535.
15 C.J. p 893 note 91.

Statute held complied with
Ark.—*Clark v. State*, 276 S.W. 849, 169 Ark. 717.

Where no special term is called, but instead an adjourned term is held, it is not necessary to give the

statutory notice of a special term.—*State v. Taylor*, 51 S.W.2d 1003, 330 Mo. 1036.

19. N.Y.—*People ex rel. Childs v. Extraordinary Trial Term of Supreme Court*, 127 N.E. 486, 228 N.Y. 463, reversing 171 N.Y.S. 922, 184 App. Div. 829.

15 C.J. p 893 note 91 [d].

20. Ky.—*Philips v. Robinson*, 9 S.W.2d 995, 997, 225 Ky. 682, quoting *Corpus Juris*.

15 C.J. p 893 note 96.

21. Tenn.—*Lieberman, Loveman & Cohn v. Knight*, 283 S.W. 450, 153 Tenn. 268.

22. Ky.—*Crenshaw v. Commonwealth*, 12 S.W.2d 336, 227 Ky. 223—*Philips v. Robinson*, 9 S.W.2d 995, 225 Ky. 682—*Frey v. Commonwealth*, 184 S.W. 899, 169 Ky. 534.

23. Ky.—*Bates v. Commonwealth*, 225 S.W. 1086, 189 Ky. 727.

§ 160. — Jurisdiction and Authority

Provided the term is authorized and is legally called and held, the court has the same jurisdiction and authority at a special or extraordinary term as at a regular term, unless there is a statutory limitation or an effective limitation in the order calling the term.

A judge is without jurisdiction to try cases at a special term where the order calling the term is invalid because not complying with statutory requirements.²⁴ Where a special term is unauthorized all proceedings thereat are void,²⁵ and the same is true where the facts essential to authorize the holding of a special term do not exist.²⁶ However, the convening of an extraordinary term under authority of law does not exclude the exercise of jurisdiction at other terms;²⁷ and even though an order calling a special term of court for the trial of a case is invalid, the case is properly tried where, after service of a sufficient notice of trial, it is tried on a day of the regular term of the proper court.²⁸ A plea to the jurisdiction of the court at a special term is properly overruled where the term has been duly called and the judge holds a valid commission.²⁹ Also it may sufficiently appear that a special term is a de facto, if not a de jure, term, so that all things done thereat are valid and binding, especially as to a person pleading guilty.³⁰

Subject to the provisions of pertinent statutes³¹ and the order or notice calling the term,³² a court at a valid special or extraordinary term has the

same jurisdiction and authority as it possesses at a regular term.³³ Sometimes a statement in the order or proclamation calling or appointing a special term of the purpose thereof or the particular business for which the court will convene is deemed not to affect the power of the court or judge, the statement being regarded merely as matter of inducement and as not conferring or limiting jurisdiction or enlarging or diminishing the rights of litigants.³⁴

A special or extraordinary term is governed by the same procedure as at a regular term and must be conducted in accordance with the rules governing all other terms.³⁵

Particular matters which may be done at a special term include the disposition of a docketed case,³⁶ the removal of a cause to another county,³⁷ and the making of an order for the publication of notice of the result of a local option election.³⁸ So it has been decided that at a special term suits may be commenced and determined;³⁹ and, while it is otherwise under a statute prohibiting the hearing of any new civil suit at a special term,⁴⁰ such a prohibitory statute does not apply to nor preclude the hearing of a statutory election contest.⁴¹ A case which, although filed as an ordinary action, has been treated as an equity action may be tried at a special term called for the trial of equity cases.⁴² Criminal cases,⁴³ including indictments returned at that term,⁴⁴ may be tried at a special term unless, it

24. Ky.—Rooney v. Commonwealth, 249 S.W. 763, 198 Ky. 515.

25. Miss.—Williams v. State, 126 So. 40, 42, 156 Miss. 346, quoting *Corpus Juris*.

15 C.J. p 891 note 47.

26. Ark.—Dunn v. State, 2 Ark. 229, 35 Am.D. 54.

27. N.Y.—People ex rel. Sherman v. Adjourned Special Term of Orange County, 200 N.Y.S. 880, 206 App. Div. 799.

28. S.D.—State v. Denis, 167 N.W. 151, 40 S.D. 219.

29. N.C.—State v. Davis, 164 S.E. 737, 203 N.C. 13, 35, certiorari denied Davis v. State of North Carolina, 53 S.Ct. 95, 287 U.S. 649, 77 L.Ed. 561.

30. U.S.—Dean v. U. S., C.C.A.Okl., 33 F.2d 68.

31. Ky.—New York Beverage Co. v. Horvath, 272 S.W. 878, 209 Ky. 343—Sowers v. Commonwealth, 248 S.W. 187, 197 Ky. 834.

N.Y.—People ex rel. Folk v. McNulty, 18 N.E.2d 854, 279 N.Y. 563, affirming 9 N.Y.S.2d 380, 256 App. Div. 82, reversing 8 N.Y.S.2d 306. Tex.—Perry v. Walston, Civ.App., 96

S.W.2d 834—Minor v. State, 299 S.W. 422, 108 Tex.Cr. 1.

Wis.—Dells Paper & Pulp Co. v. Willow River Lumber Co., 173 N.W. 317, 170 Wis. 19.

32. Ill.—People v. Wilson, 190 N.E. 270, 356 Ill. 256.

15 C.J. p 894 notes 6, 7.

33. N.Y.—People ex rel. Luciano v. Murphy, 290 N.Y.S. 1011, 160 Misc. 573, affirmed 292 N.Y.S. 844, 249 App.Div. 879.

Tex.—Hartman v. Byrd, Civ.App., 47 S.W.2d 659, 661, citing *Corpus Juris*—Guerra v. Guerra, Civ.App., 213 S.W. 360, 364, citing *Corpus Juris*—Stephens v. State, 245 S.W. 687, 93 Tex.Cr. 164—Ex parte Holland, 238 S.W. 654, 91 Tex.Cr. 339.

15 C.J. p 891 note 53, p 893 note 97.

34. N.Y.—Saranac Land & Timber Co. v. Roberts, 125 N.E. 102, 227 N.Y. 188, reversing 176 N.Y.S. 920, 188 App.Div. 921.

15 C.J. p 891 notes 54, 55, p 894 note 5.

35. N.Y.—Reynolds v. Cropsey, 150 N.E. 303, 241 N.Y. 389, reversing 212 N.Y.S. 280, 215 App.Div. 683.

Tex.—Stephens v. State, 245 S.W. 687, 93 Tex.Cr. 164—Ex parte Hol-

land, 238 S.W. 654, 91 Tex.Cr. 339.

36. Tex.—Ruby v. Martin, Civ.App., 44 S.W.2d 824, error refused.

37. N.C.—Sparkman v. Daughtry, 35 N.C. 168.

Tex.—Mayhew v. State, 155 S.W. 191, 69 Tex.Cr. 187.

38. Mo.—State v. Fulton, App., 184 S.W. 938.

39. Ill.—Darby v. McConnel, 13 Ill. 352.

15 C.J. p 893 note 98.

40. Tex.—Ruby v. Martin, Civ.App., 44 S.W.2d 824.

41. Tex.—Perry v. Walston, Civ. App., 96 S.W.2d 834.

42. Ky.—Belcher v. Adkins, 132 S.W.2d 52, 279 Ky. 680.

43. Ark.—Norrid v. State, 68 S.W. 2d 528, 188 Ark. 32.

N.Y.—People ex rel. Folk v. McNulty, 9 N.Y.S.2d 380, 256 App.Div. 82, reversing 8 N.Y.S.2d 306, affirmed 18 N.E.2d 854, 279 N.Y. 563.

44. Tex.—Newton v. State, 247 S.W. 281, 93 Tex.Cr. 314.

An order reciting that important business is pending, and that it is to the interest of the county that a

is held, the special term was ordered "for the trial of causes upon the civil docket."⁴⁵ The power of the court to summon and impanel a grand jury for a special term is considered in the C.J.S. title Grand Juries § 4, also 15 C.J. p 894 note 1, and 28 C.J. p 765 notes 33-35. There is authority for the view that at a special term called for the disposal of unfinished business of a regular term only such causes are triable as could have been tried at the preceding regular term;⁴⁶ but, in accordance with this view, a case is triable where it was triable at the preceding regular term⁴⁷ and a decree pro confesso may be taken where it could have been taken at a preceding regular term.⁴⁸ Under a statute providing that at a special term of court any cause ready for hearing may, with the consent of the parties, be heard, the court cannot at such a term, without such consent, hear a demurrer to a bill and dissolve an injunction.⁴⁹ In some jurisdictions an act authorized to be done by a judge at chambers may be performed by the court at special term.⁵⁰

§ 161. Sessions of Court

To function judicially, a court must be lawfully in session.

Courts can exercise judicial functions only when lawfully in session.⁵¹ A statute providing that district courts shall be at all times in session and open at any place in the district where the judge may be,

for the purpose of hearing and determining motions, rendering final decrees in equity, etc., is valid.⁵²

§ 162. — Time for

The pertinent and divergent laws of the different states have given rise to a variety of holdings, but not many rules of universal application, respecting the time for sessions of courts.

While the sittings or sessions of a court shall be held at the times prescribed or authorized by law,⁵³ the governing law may vary in different states, or in the same state at different times, and sometimes is quite broad as to the authority conferred thereby.⁵⁴ Sometimes the hours of convening court and the length of the sessions are regarded as matters necessarily in the discretion of the trial judge.⁵⁵ However, it is improper for the trial judge to limit sessions to such short periods, such as ten minutes each, as to prevent the prompt dispatch of judicial business and prolong a particular trial for a period of more than two months and compel counsel, litigants, and witnesses to attend court on a great many different days.⁵⁶

Holding of night sessions of court is a matter resting in the discretion of the trial judge, and a court of review will not interfere unless it clearly appears that there has been an abuse of the judge's power and that injustice has been done.⁵⁷ Suffi-

special term be held for the trial of the same, and ordering the drawing of a grand jury, contemplates the trial at such special term of any indictment which may be returned.—Perry v. State, 30 S.E. 903, 102 Ga. 385.

45. Tenn.—Brown v. Newby, 6 Yerg. 395.

46. Miss.—Hatto v. Brooks, 33 Miss. 575.

15 C.J. p 894 note 6.

47. Miss.—Williams Bros. v. Bank of Blue Mountain, 95 So. 843, 132 Miss. 178.

48. Miss.—Williams Bros. v. Bank of Blue Mountain, *supra*.

49. Va.—Fowler v. Mosher, 7 S.E. 542, 85 Va. 421.

50. Minn.—Whallon v. Bancroft, 4 Minn. 109.

51. Mo.—State ex rel. Chick v. Davis, 201 S.W. 529, 273 Mo. 660.

52. N.M.—U. S. v. Gwyn, 42 P. 167, 4 N.M. 635.

53. Ark.—Red Bud Realty Co. v. South, 224 S.W. 984, 145 Ark. 604—State v. Canal Const. Co., 203 S.W. 704, 134 Ark. 447.

Cal.—Hamblin v. Superior Court of Los Angeles County, 233 P. 337, 339, 195 Cal. 364, 43 A.L.R. 1509, citing *Corpus Juris*.

Mass.—Commonwealth v. Handren, 153 N.E. 894, 261 Mass. 294. 15 C.J. p 894 note 9.

Holding sessions at pleasure of judges is not within their power.—Magnolia Petroleum Co. v. Saunders, 94 S.W.2d 703, 192 Ark. 783.

54. Authorized rules

Under a statute providing that courts shall be held at certain hours in every judicial day, or so often as the board of justices of the court may direct, rules enacted by such board as to the frequency and hours of sessions of court have the force of law.—Matter of Bolte, 90 N.Y.S. 499, 97 App.Div. 551—15 C.J. p 894 note 10.

Change of law during session

Where a session is held at a time and place designated by law, the fact that during the session an act is passed which fixes a different time for holding the court does not affect the jurisdiction of the court to continue its session, there being no provision in that regard.

Okl.—Collins v. State, 114 P. 1127, 5 Okl.Cr. 254.

S.C.—Shelton v. Maybin, 4 S.C. 541.

Directory statute

The statutory requirement concerning time of sitting of the court of common pleas to determine elec-

tion controversies must be construed as directory and not mandatory.—In re General Election in City and County of Philadelphia, on November 8, 1938, 2 A.2d 301, 332 Pa. 457.

In Louisiana

(1) Under the laws of Louisiana the fixing of dates for the holding of sessions in each parish, in a district composed of more than one parish, does not affect the authority or duty of the judge to sit at any time in any of the parishes of his district when the public interests may require it.—State v. Kane, 136 So. 80, 173 La. 36—15 C.J. p 876 note 77, p 894 note 11.

(2) Notwithstanding other provisions as to sessions, effect may be given, in a proper case, to a constitutional provision expressly authorizing the judge to try misdemeanors at any time.—State v. Hincey, 56 So. 620, 129 La. 636.

55. Okl.—Muskogee Sand & Gravel Co. v. Hulbert, 9 P.2d 419, 156 Okl. 112.

56. N.Y.—Fishman v. Wagenheim, 299 N.Y.S. 909, 252 App.Div. 485.

57. Ill.—Boon v. Moline Plow Co., 81 Ill. 293.

Okl.—Muskogee Sand & Gravel Co.

cient notice of a night session is given by an announcement thereof in open court.⁵⁸

Shortening or prolonging sessions. Where the duration of sessions is fixed by constitution or statute, the court has no power to shorten them,⁵⁹ although it may prolong or extend them.⁶⁰

Continuous sessions. The expression "continuous sessions during ten months of the year," as used in a constitutional requirement, means that courts shall be opened for the trial of cases, and that the judges shall fix cases for trial and try them during that period, provided there are cases to try.⁶¹ Sometimes sessions of courts are regarded as continuous, although terms and vacations are specified by rules of court.⁶² Under an organic act relating to territorial courts and providing that "the first six days of every term of said court, or so much thereof as may be necessary, shall be appropriated to the trial of causes arising under said constitution and law," such a court is convened for federal and territorial business, and is in session for both purposes from the beginning of its term until it finally adjourns for the term.⁶³ A court will be presumed or regarded as having been in continuous session between specified dates in a term where the term had not lapsed by expiration of law and there is no showing of any order of adjournment sine die, or

to a day certain, or otherwise.⁶⁴

Simultaneous sessions. Where a court has more than one judge, simultaneous sessions may sometimes, under constitutional or statutory authority, be held by the different judges.⁶⁵ Under such authority there may be at the same time as many sessions in a single county as there are judges therein, including not only resident judges but also judges assigned to the county and those acting pro tempore.⁶⁶ Even in the absence of statutory authority, it has been considered that the holding of simultaneous sessions, while an irregularity, does not render the proceedings at one of such sessions void as to a party who actually participated in a trial thereat.⁶⁷ Indeed, there would be little or no advantage in having two or more judges if simultaneous sessions could not be held.⁶⁸

Special or extra sessions. Under the laws of some states there may be special sessions;⁶⁹ but the statute of another state regarding extra sessions was impliedly repealed by a constitutional amendment.⁷⁰ When notice that the court will convene in special session is deemed necessary to serve the purposes of justice and to avoid entrapping the unwary, the court may cause such notice to be given; but it need not give notice to a plaintiff.⁷¹

Probate courts. It has been held that a judge of

v. Hulbert, 9 P.2d 419, 156 Okl. 112.

Pa.—Commonwealth v. Prophet, 160 A. 597, 307 Pa. 122.

Wash.—McQuary v. Penketh, 76 P.2d 1024, 194 Wash. 57.

Two A.M. of judicial day of superior court is not impossible, or unlawful, or unreasonable hour for hearing on petition for adoption, as fixed in order for publication of notice to child's father.—In re Soderberg, 226 P. 210, 26 Ariz. 404.

58. Ill.—Boon v. Moline Plow Co., 81 Ill. 293.

59. La.—Colonial Homes Realty & Inv. Co. v. Sample, 66 So. 788, 136 La. 195.

15 C.J. p 895 note 44.

60. La.—State v. Page, 136 So. 609, 173 La. 279.—Colonial Homes Realty & Inv. Co. v. Sample, 66 So. 788, 136 La. 195.

61. La.—Colonial Homes Realty & Inv. Co. v. Sample, supra.

62. Porto Rico.—Calzada v. Cruz, 18 Porto Rico 477.

63. Okl.—Peters v. U. S., 37 P. 1081, 2 Okl. 138, 143.

64. Ark.—Fultz v. State, 121 S.W. 2d 111, 196 Ark. 1161.

65. Wash.—Hindman v. Boyd, 64 P. 609, 42 Wash. 17.

66. Cal.—Athearn v. Nicol, 200 P. 942, 187 Cal. 86.
15 C.J. p 894 note 18.

67. Kan.—Mohon v. Harkreader, 18 Kan. 383.

68. La.—State v. Page, 136 So. 609, 173 La. 279.

69. In Alabama

(1) Under statutes requiring the courts to be open for the transaction of business during two specified periods covering practically the entire year and also requiring causes on the dockets for trial to be called peremptorily at the time fixed by law and at such other times as may be fixed by order, the time for transaction of business of court within the statutory limits is left with the circuit judges, and order of circuit judge, calling term of circuit court to be opened for disposition of pending cases, is authorized.—Jennett v. State, 168 So. 224, 27 Ala.App. 174.

(2) Only limitation on power of judge of circuit court to appoint time for holding of court other than times fixed by law, if any, is that it must be held within time designated by statute.—Carson v. Sleigh, 78 So. 229, 201 Ala. 373.

(3) The court may call a special jury session; and even if a provision in the order should be read as

limiting the cases triable to those at issue on the date of the order, the limitation is not binding on, and may be disregarded by, the court.—Caldwell v. State, 84 So. 272, 203 Ala. 412.

(4) While an entry should be made on the minutes of the court whenever a special session for the trial of any cause or causes is ordered, the jurisdiction of the court does not depend on such an order being entered on the minutes, as, under the statute, the court is in session practically the entire year.—Doty v. Pope, 101 So. 883, 213 Ala. 4.

(5) It was immaterial that the judge ordering a special session during the regular term was the junior judge of the circuit where he was the presiding judge at the time the order was made.—Medders v. State, 99 So. 776, 19 Ala.App. 628.

In Louisiana, rules of court do not affect discretion of judge to convene his court in special session when the public business can, in his opinion, be best served thereby.—State v. Holmes, 161 So. 182, 182 La. 142.

70. Cal.—People v. Ferguson, 12 P. 2d 158, 124 Cal.App. 221, rehearing denied 12 P.2d 960, 124 Cal. App. 221.

71. Ark.—Berry v. Sims, 112 S.W. 2d 25, 195 Ark. 326.

probate has no power to hold a court for the hearing of a particular case at any time or place other than those fixed by law, and any decree passed at a session so held is void;⁷² but there is also authority for the view that a constitutional provision that probate courts shall be held at times and places fixed by law does not deprive them of jurisdiction over proceedings at other times.⁷³

§ 163. — Adjournment

A recess or adjournment may be taken from one day to another in the same term on compliance with such statutory requirements, if any, as are applicable. After adjournment, the court may reconvene and transact business either on the day on which the adjournment is made or on the day to which it is taken, but there is a conflict of authority as to whether it may do so on any other day.

The sessions or sittings of a court during the term are as a general rule within the control of the court, and it may adjourn its session from day to day or for a longer period,⁷⁴ provided the adjournment is to a day which is not beyond the time to which the term can legally continue.⁷⁵ Furthermore a court may be recessed from one day to another of the same term.⁷⁶ Indeed, an adjournment from one day to another is a mere recess in the sessions of the court.⁷⁷ While a court may on the opening day of a term, adjourn to a fixed day later in the term,⁷⁸ it cannot take a recess until after it is organized for the term.⁷⁹ Recess or temporary adjournment of pending trial see the C.J.S. title Trial § 45, also 64 C.J. p 84 note 83-p 85 note 97.

Retention or discharge of jury. A jury may be retained without the court remaining in session continually from day to day,⁸⁰ and the retaining of the

impaneled jury after adjournment does not amount to an attempt to keep the court in session and to continue its proceedings during the period of adjournment.⁸¹ The final discharge of the jury for the term terminates the sittings of the term, it is held, although no formal adjournment is had until the next ensuing term begins, and special sittings are held after the discharge of the jury.⁸² Even under the most liberal construction, it is said, the session or sitting of the court is over, as to a particular case, when, after the final discharge of the jurors, the judge signs an order overruling a motion for a new trial and delivers the papers in the case to counsel, to be returned to the clerk.⁸³

Order, entry, and notice. Under some statutes an order of adjournment is necessary to the validity of an adjourned session.⁸⁴ The date of an adjourned session may be fixed by oral order in open court,⁸⁵ and, while it is the duty of the clerk to make a note of such an order, his failure to do so is not fatal to the validity of the adjourned session,⁸⁶ and the order may be entered on the minutes nunc pro tunc at any time.⁸⁷ However, where an adjournment has not been to a day certain, the error cannot be cured by a subsequent antedated order fixing the day of the adjourned session, and a nunc pro tunc entry thereof.⁸⁸

While the court may not act to entrap the unwary at adjourned sessions and may cause notice to be given where it is deemed necessary to serve the purposes of justice, no one need apprise a plaintiff of the fact that the court will convene at an adjourned session; having invoked the jurisdiction of the court, he must take notice of its adjournments.⁸⁹

72. Me.—White v. Riggs, 27 Me. 114.

73. N.H.—Kimball v. Fisk, 39 N.H. 110, 75 Am.D. 213.

74. Ky.—Howard v. Farmer, 104 S. W.2d 957, 268 Ky. 303.

W.Va.—Rockhold v. Cabot, 95 S.E. 804, 81 W.Va. 697.
15 C.J. p 894 note 20.

75. W.Va.—Rockhold v. Cabot, supra—Mann v. Mercer County Ct., 52 S.E. 776, 58 W.Va. 651.

Inapplicable statutory limitation of time

An adjournment for a longer period than that specified in a statute providing that if the judge of the court is absent for more than a designated time his court shall be adjourned until the next regular term is not prohibited by such statute, which is applicable only to those cases where the judge is absent without regular adjournment.—Redwine v. State, 15 Ind. 293—Seymour v. State, 15 Ind. 288.

76. Ky.—Howard v. Farmer, 104 S. W.2d 957, 268 Ky. 303.

Miss.—Perry v. State, 122 So. 744, 154 Miss. 459.

77. Cal.—McGarvey v. Southern Pac. Milling Co., 43 P.2d 354, 5 Cal. App.2d 604.

Miss.—Perry v. State, 122 So. 744, 154 Miss. 459.

78. Ark.—State v. Canal Const. Co., 203 S.W. 704, 134 Ark. 447.

79. Ala.—Forbus v. State, 48 So. 592, 158 Ala. 41.

80. Ark.—McVay v. State, 150 S.W. 125, 104 Ark. 629.

81. Ark.—McVay v. State, supra.

82. Md.—Livers v. Ardinger, 44 A. 1042, 90 Md. 36.

83. Md.—Hays v. Philadelphia, etc., R. Co., 58 A. 439, 99 Md. 413.

84. Ark.—Magnolia Petroleum Co. v. Saunders, 94 S.W.2d 703, 192 Ark. 732.

85. Ga.—Buchanan v. State, 45 S.E. 607, 118 Ga. 751—Cribb v. State, 45 S.E. 396, 118 Ga. 316.

86. Ga.—Buchanan v. State, 45 S.E. 607, 118 Ga. 751—Cribb v. State, 45 S.E. 396, 118 Ga. 316.

Absence of statutory requirement

Where the statute under which a court of general jurisdiction proceeds in a certain matter in vacation does not require that in case of adjournment there shall be a written order entered on the record showing the adjournment, the jurisdiction of the court does not depend on the formal entry of such an order.—Lake County Schools v. Griffith, 105 N.E. 760, 263 Ill. 550, Ann.Cas.1914D 1136.

87. La.—State v. Thompson, 46 So. 1013, 121 La. 1051.

88. Mo.—Stovall v. Emerson, 20 Mo.App. 322.

89. Ark.—Berry v. Sims, 112 S.W.2d 25, 195 Ark. 326.

A statute requiring the posting of notice on the door of the courthouse where court is adjourned by the sheriff in the absence of the judge is not applicable where the judge opens court and then orders an adjournment, and no notice of such adjournment need be posted.⁹⁰

Effect; subsequent transaction of business. An adjournment which is a mere recess in the sessions of the court, such as an adjournment to the next day, carries all calendar matters with it.⁹¹ Also it is undisputed that a court may reconvene for the transaction of business on the same day on which it has adjourned.⁹² However, there is a divergence of authority as to whether, after an adjournment, the court may reconvene, transact business, or exercise any functions on any day other than the one on which the adjournment is made and the one to which it is taken; it has been both affirmed⁹³ and denied⁹⁴ that the court can revoke an order adjourning court to a subsequent day of the term, and reconvene before the time first fixed. Also it has been held that, although the court has adjourned to a day certain, it may convene before that day if no one is prejudiced thereby;⁹⁵ but, according to other authorities, after the expiration of the day on which an adjournment is made the functions of the court cease until the day fixed for reconvening and it cannot reconvene and transact business in the

interim,⁹⁶ unless there is an applicable statute permitting it to do so on giving notice and the record of reconvening shows affirmatively a compliance with the provisions of the statute.⁹⁷ Furthermore, it has been held that where the judge is unable to hold a session on the day fixed by the order of adjournment, a session held on a subsequent date within the term is valid;⁹⁸ but it has also been held that the adjourned session will necessarily fail unless the place of the absent judge can be temporarily supplied, or the session itself adjourned in some way,⁹⁹ and that, in the absence of an order adjourning court from the adjourned day to a later day, a subsequent session is unauthorized.¹

§ 164. Place for Holding Terms and Sessions

A court may be held only within the territorial limits of its jurisdiction and at a place designated by, or under authority of, law. Proceedings at an unauthorized place are generally held to be void; but sometimes they are regarded as unassailable collaterally and as being merely voidable on direct attack by a party who has not acquiesced therein or otherwise waived objection thereto.

Constitutional and valid statutory provisions designating the place for holding court or terms or sessions thereof will be accorded effect, they being mandatory and exclusive of other places;² and where the place is so fixed the court cannot lawfully be held at any other place.³ Proceedings at an unauthorized place are usually held to be void,⁴ un-

90. Ill.—Bressler v. People, 8 N.E. 62, 117 Ill. 422.

91. Cal.—McGarvey v. Southern Pac. Milling Co., 43 P.2d 354, 5 Cal.App.2d 604.

92. Ark.—Ex parte Baldwin, 176 S. W. 680, 118 Ark. 416.

Ind.—Bowen v. Stewart, 26 N.E. 168, 28 N.E. 73, 128 Ind. 507.

Adjournment to next day

The adjournment of the court from one day to the next for rest and refreshment does not suspend the functions of the court altogether.—Barrett v. State, 1 Wis. 175.

93. Neb.—Green v. Morse, 77 N.W. 925, 57 Neb. 391, 73 Am.S.R. 518.

Writing "vacated" across the entry on the record of an order of adjournment amounts to a setting aside of such order.—Cole County v. Dallmeyer, 13 S.W. 687, 101 Mo. 57, 66.

94. Mo.—Methudy v. Methudy, App., 238 S.W. 562.

95. Hawaii.—Matter of Ct., 3 Hawaii Fed. 402.

96. Ark.—State v. Canal Const. Co., 203 S.W. 704, 134 Ark. 447.

97. Statute inapplicable

A statute requiring notice of reconvening of court on other than an adjourned day is inapplicable where there is no showing that the court

has adjourned.—Fultz v. State, 121 S.W.2d 111, 196 Ark. 1161.

98. Okl.—St. Louis & S. F. R. Co. v. James, 128 P. 279, 36 Okl. 196. 15 C.J. p 895 note 38.

99. Ark.—Streett v. Reynolds, 38 S. W. 150, 63 Ark. 1.—Butler v. Williams, 2 S.W. 430, 48 Ark. 227.

1. Ark.—Magnolia Petroleum Co. v. Saunders, 94 S.W.2d 703, 192 Ark. 783.

Lapse of remainder of term by failure to meet on adjourned day see supra § 155.

2. Cal.—Ex parte Brady, 224 P. 252, 65 Cal.App. 345.

Tex.—Isbill v. Stovall, Civ.App., 92 S.W.2d 1067.

15 C.J. p 895 note 46.

Particular statute held directory

The statutory requirement concerning place of sitting of the court of common pleas to determine election controversies must be construed as directory and not mandatory.—In re General Election in City and County of Philadelphia on November 8, 1938, 2 A.2d 301, 332 Pa. 457.

3. Ala.—Polytinsky v. Johnston, 99 So. 839, 842, 211 Ala. 99, citing Corpus Juris.

Ark.—Red Bud Realty Co. v. South, 224 S.W. 964, 145 Ark. 604.

Cal.—Hamblin v. Superior Court of Los Angeles County, 238 P. 337, 339, 195 Cal. 364, 43 A.L.R. 1509, citing Corpus Juris—Ex parte Brady, 224 P. 252, 65 Cal.App. 345.

Ill.—Patchen v. Patchen, 4 N.E.2d 94, 364 Ill. 178.—McCune v. Reynolds, 123 N.E. 217, 288 Ill. 188.

Mass.—Commonwealth v. Handren, 158 N.E. 894, 261 Mass. 294.

Tex.—Isbill v. Stovall, Civ.App., 92 S.W.2d 1067, 1072, citing Corpus Juris.

15 C.J. p 896 note 47.

Court cannot assume vagrant character and hold its sessions at places other than those provided by law.—State v. Canal Const. Co., 203 S.W. 704, 134 Ark. 447.

Place fixed by statute or authorized court rules

Courts can only exercise their jurisdiction at place fixed by statute or rules of court authorized by statute.—Rouff v. Boyd, Tex.Civ.App., 16 S.W.2d 403.

4. Ga.—Bankers' Health & Life Ins. Co. v. James, 164 S.E. 684, 45 Ga. App. 346.

Okl.—Atchison, T. & S. F. Ry. Co. v. Long, 251 P. 486, 490, 122 Okl. 86, citing Corpus Juris.

Tex.—Isbill v. Stovall, Civ.App., 92 S.W.2d 1067.

15 C.J. p 896 note 48.

less, as is permissible in some,⁵ although not otherwise,⁶ jurisdictions, the parties consent to the holding of a session in a place other than that appointed. It has been held, however, that under such circumstances the proceedings are not void, the court being a de facto one,⁷ or that the proceedings are not absolutely void so as to be vulnerable to collateral attack,⁸ especially where the only thing done by the court at an unauthorized place is the hearing of testimony, the remainder of the proceedings being taken at the proper place.⁹

When not prohibited by constitutional provision, the legislature may prescribe¹⁰ and change¹¹ the place for holding courts. In the exercise of its plenary authority over Porto Rico, congress might, it is said, even provide that all judicial proceedings should be held in the United States instead of on the Island.¹²

In some cases the power to designate the place for holding court has been conferred upon the judge;¹³ but, to be effective, such designation must be formally made and filed as required by statute.¹⁴ Where no place for the holding of a session is prescribed by statute or otherwise, it may be held, at the discretion of the judge or judges authorized to hold it, anywhere within his or their territorial jurisdiction.¹⁵

State. It has been held that the court does not exceed its jurisdiction when it takes a view of premises in another state.¹⁶

County. Under the constitution and statutes of a state, a court of one county may be without ju-

risdiction to try a suit and render judgment while sitting in another county;¹⁷ a judge may be without authority, except by consent, to hear a cause, or to make any order substantially affecting the rights of the parties, outside the county in which the action is pending;¹⁸ and, a fortiori, an action, the venue of which is exclusively in one county, is not required to be tried in another county.¹⁹ However, the taking of a view and the hearing of the testimony of some witnesses in another county has been considered an irregularity which cannot be urged as a ground for reversal by a party who, personally and through counsel, acquiesced and actively participated therein.²⁰ While an order overruling a motion for a new trial and granting time in which to prepare and file a bill of exceptions is void where it is made in, and by a court of, a county and circuit other than the one in which the judgment was made and entered and the case is not within a statutory exception allowing, in a stated situation, the presentation of a motion for new trial to the judge of the district in which the verdict or decision was rendered, wherever he may be found,²¹ the argument of a motion for a new trial at a place outside the county in which the case was tried, but in the same judicial district, will not invalidate an order for a new trial duly made and entered in the county in which the action was tried.²²

District. A special term of a federal court called to dispose of a motion to remand a case to a state court must be held in the district in which the cause is pending;²³ but matters which may properly be heard in chambers may be heard outside the district.²⁴ In a district court of inferior jurisdiction,

Judgments see the C.J.S. title Judgments § 16, also 33 C.J. p 1066 notes 73, 79, p 1067 note 80.

5. Minn.—Bell v. Jarvis, 107 N.W. 547, 98 Minn. 109, 8 Ann.Cas. 938. 15 C.J. p 896 note 49.

6. Ga.—Bankers' Health & Life Ins. Co. v. James, 164 S.E. 684, 45 Ga. App. 346.

7. Mo.—Bouldin v. Ewart, 63 Mo. 330, 335.

15 C.J. p 896 note 50.

8. Ill.—Patchen v. Patchen, 4 N.E. 2d 94, 364 Ill. 178.

9. Cal.—Hamblin v. Superior Court of Los Angeles County, 233 P. 337, 195 Cal. 364, 43 A.L.R. 1509.

10. Ark.—Sanders v. McClintock, 300 S.W. 408, 175 Ark. 633—Miller v. Tatum, 279 S.W. 1002, 170 Ark. 152.

11. Miss.—Hinton v. Perry County, 36 So. 565, 84 Miss. 536.

12. U.S.—Rivera v. Lawton, C.C.A. Porto Rico, 35 F.2d 823.

13. Mich.—McCall v. Calhoun Cir. Judge, 109 N.W. 601, 146 Mich. 319.

15 C.J. p 896 note 51.

14. N.Y.—People ex rel. Jimerson v. Freiberg, 243 N.Y.S. 590, 137 Misc. 314.

15. Vt.—Bates v. Sabin, 24 A. 1013, 64 Vt. 511.

15 C.J. p 896 note 52.

16. N.H.—Carpenter v. Carpenter, 101 A. 628, 78 N.H. 440, L.R.A. 1917F 974.

17. Tex.—Isbill v. Stovall, Civ.App. 92 S.W.2d 1067.

18. N.C.—Jeffreys v. Jeffreys, 197 S.E. 8, 213 N.C. 531—Brown v. Mitchell, 176 S.E. 258, 207 N.C. 132.

Void legislation

When in conflict with a constitutional provision, an initiated measure providing that a judge may hear a cause and render judgment in a county other than the one in which the cause is pending is void.—Bill-

ingsley v. Gulf, C. & S. F. Ry. Co., 253 P. 103, 122 Okl. 181—Missouri-

Kansas-Texas Ry. Co. v. Long, 251 P. 495, 122 Okl. 86—St. Louis-San Francisco R. Co. v. Long, 251 P. 494, 122 Okl. 94—St. Louis-San Francisco Ry. Co. v. Deweese, 251 P. 494, 122 Okl. 94—Killey v. St. Louis-San Francisco Ry. Co., 251 P. 493, 122 Okl. 102—Atchison, T. & S. F. Ry. Co. v. Long, 251 P. 486, 122 Okl. 86.

19. Ky.—Messamore v. Webb, 295 S.W. 1038, 220 Ky. 755.

20. Cal.—Union Oil Co. of California v. Reconstruction Oil Co., 66 P. 2d 1215, 20 Cal.App.2d 170.

21. Ark.—Sinclair Refining Co. v. Burkholder, 97 S.W.2d 925, 193 Ark. 62.

22. Kan.—Mathias v. Cook, 45 P. 56, 57 Kan. 16.

23. U.S.—Henry v. West, D.C. Miss., 49 F.2d 813.

24. U.S.—Edina Life Ins. Co. of Hartford, Conn., v. Wilson, C.C.A. S.C., 84 F.2d 330.

a mere trial, without a transfer of the record of the cause and without the rendition of judgment, at a place in the county other than where the action is brought before a judge having jurisdiction coextensive with the county, may not be legally objectionable.²⁵

Adjournment or transfer to another place. A court may be without power or authority to adjourn from an authorized place to another place,²⁶ such as another county.²⁷ However by proceeding with the trial without objection after adjournment to another place, a party waives an objection that the trial is concluded at a place where no term of court has been appointed to be held.²⁸ Also, the transfer of a cause from one place or session to another may be authorized by statute.²⁹ Where a statute provided for the adjournment of the term of a court to another place in the county on publishing notice thereof for three weeks in a newspaper, and an amendatory statute provided that the court might adjourn to another place in the county for one or more days whenever the public good would be promoted thereby, it was held that notice by publication was unnecessary as to parties having actual and seasonable notice of the adjournment.³⁰ The failure of the record to state the place to which a case is adjourned does not necessarily cause loss of jurisdiction.³¹

25. N.J.—Epps v. Bowen, 191 A. 110, 118 N.J.Law 50.

26. U.S.—U. S. v. Cornell, C.C.R.I., 25 F.Cas.No.14,868, 2 Mason 91. 15 C.J. p 898 note 47 [a]. Adjournment to home of witness see infra § 166.

27. Mass.—Commonwealth v. Handren, 158 N.E. 894, 261 Mass. 294.

Chambers in another county

A judge has no authority to adjourn the trial to his chambers in another county; and, where the trial is partially had in the latter county, the error is not cured by adjourning the proceedings back to the county in which the trial was started for further trial and decision.—Gould v. Bennett, 49 How.Pr., N.Y., 57.

28. N.Y.—McLear v. Balmat, 223 N.Y.S. 76, 129 Misc. 805, reversed on other grounds 230 N.Y.S. 259, 224 App.Div. 306, modified on other grounds 231 N.Y.S. 581, 224 App.Div. 366.

29. Va.—Lillienfeld v. Commonwealth, 23 S.E. 832, 92 Va. 818.

30. N.H.—State v. Moore, 40 A. 702, 69 N.H. 102.

Corpus Juris was cited by the court in its discussion of an analo-

gous question.—State v. McClurg, 300 P. 898, 902, 50 Idaho 762.

31. Wis.—State v. Wright, 50 N.W. 894, 80 Wis. 648.

32. Ala.—Merchants Nat. Bank v. McNaron, 55 So. 242, 172 Ala. 469. 15 C.J. p 897 note 58.

33. N.J.—Palmer v. Webster, 186 A. 49, 14 N.J.Misc. 502.

Okl.—Ex parte Owens, 295 P. 415, 416, 49 Okl.Cr. 445, citing *Corpus Juris*.

15 C.J. p 897 note 59.

34. Ga.—Bankers' Health & Life Ins. Co. v. James, 164 S.E. 684, 45 Ga.App. 346.

Tex.—Isbill v. Stovall, Civ.App., 92 S.W.2d 1067.

15 C.J. p 897 note 60.

35. Ala.—Polytinsky v. Johnston, 99 So. 839, 211 Ala. 99.

Ark.—Bonner v. Jackson, 251 S.W. 1, 158 Ark. 526.

15 C.J. p 897 note 61.

Revocation of order for change

As a corollary of the power conferred by a statute, which permits the judges, in their discretion, to direct that the court be held or continued at another place in the county but does not purport to authorize the parties to demand that the place

§ 165. — Seat of Government or County Seat

The highest court ordinarily is held at the seat of government. Other courts may and should be held at the county seat unless the holding thereof elsewhere is authorized by legislation not contravening constitutional provisions.

Ordinarily the supreme or other highest court in a state is held at the seat of government,³² and such courts as county, district, and circuit courts are generally and properly held at the county seat.³³ A constitutional or statutory provision that a court shall be held at the county seat is mandatory and the court cannot be held elsewhere;³⁴ but it is within the power of the legislative department to authorize the holding of court at a place other than the county seat,³⁵ unless, of course, this would violate some constitutional provision.³⁶

§ 166. — Courthouses and Courtrooms

a. Definition

b. Use, designation, suitability, and control

a. Definition

A courthouse is a building in which courts are held.

The term "courthouse" is used to designate the building where courts are held, and where the people attending such courts are supposed to congregate.³⁷

of trial be changed, there must exist power to revoke an order for a change.—Barber v. Palo Verde Mut. Water Co., 246 P. 1044, 198 Cal. 649.

Statute requiring court to divide its time between the county seat and a city of the third class is applicable only where the city of the third class is entirely within the borders of the county.—Reed v. Rose, 222 S.W. 112, 188 Ky. 411.

32. Fla.—Mack v. Carter, 183 So. 478, 133 Fla. 813.

Okl.—Billingsley v. Gulf. C. & S. F. Ry. Co., 253 P. 103, 122 Okl. 181—Missouri-Kansas-Texas Ry. Co. v. Long, 251 P. 495, 122 Okl. 86—St. Louis-San Francisco Ry. Co. v. Long, 251 P. 494, 122 Okl. 94—St. Louis-San Francisco Ry. Co. v. Deweese, 251 P. 494, 122 Okl. 94—Killey v. St. Louis-San Francisco Ry. Co., 251 P. 493, 122 Okl. 102—Atchison, T. & S. F. Ry. Co. v. Long, 251 P. 486, 490, 122 Okl. 86, citing *Corpus Juris*.

Tex.—Turner v. Tucker, 258 S.W. 149, 113 Tex. 434, reversing Tucker v. Tucker, Civ.App., 255 S.W. 641. 15 C.J. p 898 note 62.

37. Mo.—Hambricht v. Brockman, 59 Mo. 52, 57.

b. Use, Designation, Suitability, and Control

While a court may be and ordinarily is held in a room in the courthouse, it may be held elsewhere. While other bodies or officers are charged with the duty of providing suitable buildings or rooms for the holding of courts, the court or judge may pass on the suitability of the quarters furnished and exercise control over the courthouse to the extent necessary to secure suitable rooms for, and to prevent interference with, the discharge of public business.

Terms and sessions of courts are ordinarily held at the courthouse,³⁸ and it is proper that they be held there³⁹ in a suitable room therein;⁴⁰ and it is improper to take up a case and render judgment in a room adjoining the court room without notice to a party's attorney who is in the courtroom waiting for the case to be called.⁴¹ However, it is not in all cases essential to the validity of a court's proceedings that the court be held in the house or room where its sessions are usually held;⁴² it may properly be held elsewhere where there is a reason for the change,⁴³ as where the courthouse is undergoing repairs or is otherwise unfit for occupancy,⁴⁴ or it has been destroyed by fire or otherwise,⁴⁵ especially where there is statutory authority for a change on account of some such reason.⁴⁶ Where a session of court is required to be held at a county seat where there is no courthouse, the court may meet in any suitable place within the county seat.⁴⁷

It has been held both proper⁴⁸ and improper⁴⁹ to adjourn court from the regular courtroom to a hotel, residence, or other place on account of the illness or physical incapacity of a party, witness, juror, or judge. At any rate, it is not error to refuse to take the jury to the home of a witness.⁵⁰

From the beginning of the American occupation of Porto Rico, congress has, at least by necessary implication, approved of the use of the Santo Domingo Barracks by the Porto Rican courts.⁵¹

Duty to provide. As a general rule, by statutes which are not unconstitutional,⁵² the duty is imposed on cities or counties where courts are held to provide suitable buildings or rooms for that purpose,⁵³ and the court is sometimes given power, by statute, in case suitable rooms are not provided, to direct the sheriff to provide them.⁵⁴ Where a statute creates the office of courthouse commissioners and imposes on them the duty of constructing and maintaining a courthouse, the offices of such commissioners continue even after the building is completed and paid for, until the legislature otherwise provides.⁵⁵

A United States court which derives its right to the use and occupancy of rooms in a federal building directly from an act of congress providing for

Tenn.—Johnson City Buick Co. v. Johnson, 54 S.W.2d 946, 165 Tenn. 349, citing *Corpus Juris*.

Other definitions

(1) "The building occupied and appropriated according to law for the holding of the courts."—Harris v. State, 18 So. 387, 388, 72 Miss. 960, 33 L.R.A. 85.

(2) "The building at the county seat in which the courts are held, the records kept, and the officers of the county maintain their offices and perform their functions."—Harris v. Elder, Tex.Civ.App., 49 S.W.2d 973, 978.

15 C.J. p 685 notes 14-19.

As related to number of county courthouses

"If courts are held at but one place in a county, the courthouse of that county is the building in which such courts are held. If courts are held in two places in a county, in a broad sense, both buildings in which courts are held are courthouses of that county."—Johnson City Buick Co. v. Johnson, 54 S.W.2d 946, 165 Tenn. 349.

38. Wis.—Tourville v. S. D. Seavey Co., 102 N.W. 352, 124 Wis. 56. 15 C.J. p 898 note 63.

39. Ala.—Kilgore v. State, 95 So. 906, 19 Ala.App. 181.

40. Ill.—Greene v. Bjorseth, 183 N. E. 464, 350 Ill. 469.

Wis.—Bloomer v. Bloomer, 221 N.W. 734, 197 Wis. 140.

41. Ky.—Taylor v. Combs, 28 S.W.2d 545, 232 Ky. 338.

42. Cal.—People v. Pompa, 221 P. 198, 192 Cal. 412.

Tex.—McKenzie v. State, 12 S.W.2d 578, 111 Tex.Cr. 299, denying motion 11 S.W.2d 172.

15 C.J. p 898 note 64.

Transaction of civil business in criminal court building

Ill.—Patchen v. Patchen, 4 N.E.2d 94, 364 Ill. 178—Rutan v. Lagonda Nat. Bank, 72 Ill.App. 35.

43. Iowa.—State v. Richards, 102 N. W. 439, 126 Iowa 497.

15 C.J. p 898 note 65.

44. Conn.—Costa v. Reed, 155 A. 417, 113 Conn. 377.

15 C.J. p 899 note 66.

45. Ark.—Lee v. State, 19 S.W. 16, 56 Ark. 4.

15 C.J. p 899 note 67.

46. Idaho.—State v. McClurg, 300 P. 898, 50 Idaho 782.

Wis.—Cody v. Cody, 74 N.W. 217, 98 Wis. 445.

47. Ark.—Hudspeth v. State, 18 S. W. 183, 55 Ark. 323.

Fla.—Beville v. State, 55 So. 854, 61 Fla. 8.

48. La.—State v. Goodwin, 179 So. 591, 189 La. 443.

15 C.J. p 898 note 65 [a].

49. Ark.—Mell v. State, 202 S.W. 33, 133 Ark. 197, L.R.A.1918D 480.

Iowa.—Funk v. Carroll County, 64 N.W. 768, 96 Iowa 158.

50. Ky.—Warner v. Commonwealth, 43 S.W.2d 524, 241 Ky. 118.

La.—State v. Joiner, 112 So. 503, 163 La. 609.

51. U.S.—Rivera v. Lawton, C.C.A. Porto Rico, 35 F.2d 823.

52. Ind.—Elkhart County v. Albright, 81 N.E. 578, 168 Ind. 564.

Ohio.—State v. Davis, 165 N.E. 298, 119 Ohio St. 596.

53. Ind.—Elkhart County v. Albright, 81 N.E. 578, 168 Ind. 564.

15 C.J. p 899 note 70.

Statute applicable to municipal courts in a particular state is one requiring commissioners to house municipal courts in the courthouse, and charge rental therefor, and not one requiring them to furnish suitable rooms for the accommodation of the "several courts of record."—State v. Board of Com'rs of Douglas County, 189 N.W. 639, 109 Neb. 35.

54. Cal.—Falconer v. Hughes, 96 P. 19, 8 Cal.App. 56.

15 C.J. p 899 note 71.

55. Ky.—Streine v. Campbell Court-house Dist. Comrs., 149 S.W. 928, 149 Ky. 641.

"permanent accommodations" cannot be dispossessed by the treasury department of the United States from the occupancy of such rooms as have been permanently appropriated for its use.⁵⁶

Decision as to designation and suitability of quarters. It is for the court to judge as to the suitability of the quarters and other equipment furnished to it.⁵⁷ It has been held that quarters which county supervisors propose to furnish for a circuit court are neither suitable, adequate, nor convenient, where there is no jury room therein, and the county supervisors may be enjoined from moving the court into such quarters.⁵⁸ Under a statute providing that where there is no courthouse in the county, or it is undergoing repairs or is unfit for use, the board of supervisors shall designate some other suitable building in which the courts of the county may be held, the court must be held at the courthouse or the place designated by the proper authorities,⁵⁹ and it is the first duty of a judge, when called on to hold a term of court in a place rather than the regular courthouse, to decide whether such place has been lawfully designated,⁶⁰ but his decision that it has been so designated is final and not open to collateral attack in cases thereafter before the court.⁶¹

Control of courthouse and vicinity. A judge has inherent authority to control over the courthouse and courtrooms to the extent of preventing any interference with the discharge of the public business and of securing a suitable, convenient, and comfortable place for the transaction of such business.⁶² Indeed, according to some authorities, if, and so far as, necessary to prevent noise and disturbance in the courtroom, a court or judge may even barricade a street or stop traffic thereon.⁶³

Where a county board has charge of a courthouse as real estate simply, the courthouse as such being in the custody of the sheriff and subject to the court's direction, the county board has no power to dictate to the courts what court rooms they shall respectively occupy.⁶⁴ However, where the control of the location of courthouses is vested in the county commissioners, a circuit court of a state has no power to change the location of a courthouse.⁶⁵ The commissioners of a courthouse district, under their power to maintain the courthouse, have power to erect a fireproof vault in which to keep records of real estate transfers required to be kept at the courthouse.⁶⁶

§ 167. Vacations and Proceedings Therein

Under the construction of some statutes, as well as at common law, vacation is limited to the period between terms; but, as used in other statutes, it includes a recess extending over one or more judicial days. The transaction of judicial business in vacation is not permissible unless authorized by constitutional or valid statutory provisions; and, except where it is provided otherwise by constitution or statute, such business cannot be transacted then even though the parties consent.

At common law "vacation" means the period between the end of one term and the beginning of another,⁶⁷ and not intervals of time between the actual sessions or meetings of the court during the term, such as those resulting from temporary recesses or adjournments.⁶⁸ Whether the common-law meaning should be given to the word "vacation" as used in a particular statute depends on the subject matter, scope and purpose of the law and the sense in which the word was used by the framers of the law.⁶⁹ Some statutes are deemed to use the word in its common-law sense and not as signifying the intervals of time between the actual sessions of the court during the term;⁷⁰ but other stat-

56. U.S.—In re Lyman, D.C.N.Y., 55 F. 29.

57. Philippine.—Tarlac v. Gale, 26 Philippine 338.

58. Wis.—In re Court Room & Officers of Fifth Branch Cir. Ct., 134 N.W. 490, 148 Wis. 109, Ann.Cas. 1913B 98.

59. Miss.—Jones v. State, 107 So. 8, 141 Miss. 894.

60. Miss.—Brookhaven Lumber & Mfg. Co. v. Adams, 97 So. 484, 132 Miss. 689.

61. Miss.—Jones v. State, 152 So. 479, 168 Miss. 702—Brookhaven Lumber & Mfg. Co. v. Adams, 97 So. 484, 132 Miss. 689.

62. Pa.—Sturdevant v. Luzerne County, 13 Pa.Dist. 72.

Va.—Bedford County v. Wingfield, 27 Gratt. 329, 68 Va. 329.

Use of elevators

Where the county commissioners refuse to permit the use of an elevator in a courthouse, which is the principal means of reaching the courtrooms, the court may, on refusal of the one in charge of the elevator to run it, direct the sheriff to take charge of and run the same. —Vigo County v. Stout, 35 N.E. 683, 136 Ind. 53, 22 L.R.A. 398.

63. Ala.—Ex parte Birmingham, 83 So. 18, 134 Ala. 609, 59 L.R.A. 572. La.—New Orleans v. Bell, 14 La.Ann. 214.

64. Ill.—Dahnke v. People, 48 N.E. 187, 168 Ill. 102, 39 L.R.A. 197, affirming 57 Ill.App. 619.

65. Ind.—Benton County v. Thompson, 7 Ind. 265.

66. Ky.—Streine v. Campbell Courthouse Dist. Comrs., 149 S.W. 928, 149 Ky. 641.

67. Mo.—Trower v. Mudd, App., 242 S.W. 993.

Or.—Peterson v. Beals, 201 P. 727, 102 Or. 245.

S.D.—State v. Denis, 167 N.W. 151, 40 S.D. 219.

15 C.J. p 899 note 83—66 C.J. p 394 notes 13-20.

When court finally adjourns there is a vacation.—In re Murphy, 50 A. 817, 73 Vt. 115.

68. Ky.—Henderson v. Kentucky Peerless Distilling Co., 170 S.W. 210, 161 Ky. 1.

Mo.—Trower v. Mudd, App., 242 S.W. 993.

Neb.—Wallace v. Clements, 248 N.W. 58, 124 Neb. 671.

69. Mo.—Trower v. Mudd, App., 242 S.W. 993.

70. Mo.—Trower v. Mudd, supra.

utes are considered to use the word as including any recess during the term caused by an adjournment over one or more judicial days or days on which court might legally have been held, this being a broad and liberal sense in which the word is sometimes employed in practice.⁷¹ It has also been held that there is a vacation where, although the court is kept open for the purpose of hearing matters *ex parte*, and no order of final adjournment is made, the court ceases to meet in the court room from day to day and no parties can be compelled to appear;⁷² but there is authority for the view that where the practice obtains of entering no order of *sine die* adjournment at the close of the actual session of the court for a stated term, and the court is left open so that further sitting may be taken up as a part of that term, at any time when the business of the court requires it, there is no technical vacation, although the court is not in actual session.⁷³ A hearing on an application for the appointment of a receiver is deemed to have been before the court and not before the judge in vacation, where the petition was entitled at a particular term which did not terminate until after the conclusion of the trial.⁷⁴

It has been said that "vacation" and "chambers" may be used interchangeably.⁷⁵

The general rule is that all judicial business should be transacted by a court in term time,⁷⁶ and that such, and only such, business may be transacted in vacation as is specially authorized by constitutional or valid statutory provisions.⁷⁷ A court without jurisdiction to act in vacation cannot acquire it by agreement of the parties unless it is so provided by law;⁷⁸ and under a statute allowing judicial business, or certain kinds thereof, to be transacted in vacation with the consent of the parties, it is necessary and sufficient that the business in question be within the statute and that the parties consent to the transaction thereof in vacation.⁷⁹ The foregoing rules are applicable to such matters in vacation as the trial of civil causes generally, see the C.J.S. title Trial § 30, also 64 C.J. p 60 notes 35-39, a criminal conviction,⁸⁰ the trial of a prosecution for a misdemeanor,⁸¹ the rendition of decisions and judgments in cases heard and submitted during term time,⁸² the making of an order releasing sureties on a bond,⁸³ and the disposition of a pe-

71. Ill.—Unbehahn v. Fader, 149 N. E. 773, 319 Ill. 250—Coe v. Hallam, 50 N.E. 1072, 173 Ill. 461—Konkling v. Ridgely, 1 N.E. 261, 112 Ill. 36, 54 Am.R. 204.
S.D.—State v. Denis, 167 N.W. 151, 40 S.D. 219.
66 C.J. p 395 notes 25-30, 32-34.

72. Ind.—Northern Indiana R. Co. v. Michigan Cent. R. Co., 2 Ind. 670.

73. U.S.—Harrison v. German-American F. Ins. Co., C.C.Iowa, 90 F. 758.
15 C.J. p 899 note 87.

74. Iowa.—M. H. McCarthy Co. v. Dubuque District Court, 208 N.W. 505, 201 Iowa 912.

75. Ga.—Chapin v. Chattoga Oil Mill Co., 96 S.E. 579, 580, 22 Ga. App. 446.

76. La.—Teacle v. Hughes, 83 So. 457, 146 La. 195.

N.Y.—Jacobs v. Steinbrink, 278 N.Y. S. 498, 242 App.Div. 197.

Tex.—Citizens State Bank of Frost v. Miller, Civ.App., 115 S.W.2d 1183, 1184, citing *Corpus Juris*—Texas Electric & Ice Co. v. City of Vernon, Civ.App., 254 S.W. 503, 504, citing *Corpus Juris*.
15 C.J. p 399 note 88.

77. La.—Laenger v. Dendinger, 86 So. 733, 148 La. 190.

Miss.—State Highway Commission v. Day, 180 So. 794, 181 Miss. 708—Mississippi State Highway Department v. Haines, 139 So. 168, 162 Miss. 216.

Pa.—In re Storer's Estate, 28 Pa. Dist. 215.

Tex.—Citizens State Bank of Frost v. Miller, Civ.App., 115 S.W.2d 1183, 1184, citing *Corpus Juris*—Texas Electric & Ice Co. v. City of Vernon, Civ.App., 254 S.W. 503, 504, citing *Corpus Juris*.
15 C.J. p 900 note 90.

"Vacation" imports absence of power
Tex.—Accousi v. G. A. Stowers Furniture Co., Civ.App., 83 S.W. 1104.
66 C.J. p 395 note 23.

78. Colo.—Francis v. Wells, 4 Colo. 274.

79. Me.—Hutchins v. Inhabitants of Penobscot, 113 A. 618, 120 Me. 281.
Miss.—Hurst v. Gulf States Creosoting Co., 141 So. 346, 163 Miss. 512—Bowman v. Empson, 138 So. 341, 162 Miss. 13—Morris v. Trussell, 109 So. 854, 144 Miss. 343—J. J. Newman Lumber Co. v. Pace, 102 So. 570, 137 Miss. 504—Yazoo & M. V. R. Co. v. Lawler, 94 So. 219, 130 Miss. 421.

Tex.—White v. State, Civ.App., 122 S.W.2d 714—Isbill v. Stovall, Civ. App., 92 S.W.2d 1067.

Consent of contesting parties is sufficient and jurisdiction in vacation is not wanting because of lack of consent of defaulting defendants.—Woods v. Lanier, Tex.Civ.App., 66 S.W.2d 360.

Lack of objection

Where no objection was filed to trial of case in vacation, and parties did try it, it must be held that trial was by consent of parties.—

Glenn v. Milam, 263 S.W. 900, 114 Tex. 160.

Estoppel

Defendants in injunction suit are estopped from insisting that court had no jurisdiction to hear case on merits in vacation, where they filed affidavits and verified pleading praying that matter be finally determined in vacation.—Cowan v. Capps, Tex. Civ.App., 278 S.W. 283, reversed on other grounds Capps v. Cowan, Com. App., 286 S.W. 161.

80. Tex.—Ex parte Bills, 111 S.W. 2d 269, 133 Tex.Cr. 388—Ex parte Jones, 111 S.W.2d 267, 133 Tex. Cr. 402.

81. La.—State v. Windham, 125 So. 618, 169 La. 563—State v. Hincey, 56 So. 620, 129 La. 636.

82. Ark.—Morrow v. Scroggins, 70 S.W.2d 551, 188 Ark. 1088.
15 C.J. p 900 notes 92, 93.

Necessity of submission

Where the statute provides that, with the consent of parties, actions may be taken under advisement by the judges, decided and entered of record in vacation or at the next term, a ruling or decree made in vacation is without jurisdiction unless by consent of the parties, or otherwise, the case has been submitted to the judge to be considered and determined during vacation.—Marengo Sav. Bank v. Byington, 112 N.W. 192, 135 Iowa 151.

83. Ark.—Diffie v. Anderson, 208 S. W. 428, 137 Ark. 151.

tition to set aside a decree for divorce and alimony and grant a new trial.⁸⁴ Actions may be instituted at any time, whether during the session or in vacation of the court;⁸⁵ and during the summer recess, when the court is hearing only matters of emergency, it may hear a matter which qualifies as one of emergency.⁸⁶

The power of a judge at chambers or in vacation is considered in the C.J.S. title Judges § 48, also in 33 C.J. p 964 note 65-p 969 note 14. For a discussion of the rendition and entry in vacation of judgments generally see the C.J.S. title Judgments §§ 16, 114, also 33 C.J. p 1067 note 88-p 1070 note 95, and 34 C.J. p 66 note 82-p 67 note 93, judgments by confession see the C.J.S. title Judgments §§ 154, 166, also 34 C.J. p 111 notes 93-95, p 125 note 74-p 126 note 87, and judgments by default see the C.J.S. title Judgments § 207, also 34 C.J. p 183 note 46-p 184 note 50.

§ 168. Designation or Assignment of Judges

The courts lean toward upholding the validity and sufficiency of an order assigning a judge to sit in another court or to hold court in another county or circuit; but, nevertheless, in order that the judge may have authority and jurisdiction in the court, county, or circuit to which he is assigned, the judicial or executive officer making the assignment must have authority to make it, or, at least, the assigned judge must be a judge, ex officio or otherwise, of the court to which he is assigned, or have general jurisdiction and authority to sit in any county or circuit.

An order by the governor, chief justice, or other designated officer or officers assigning a judge to sit

in another court or to hold court in another county, district, or department, on account of the disqualification of the regular resident judge, the congestion of the calendar, or other adequate cause, is valid and sufficient to confer jurisdiction where it is authorized by a constitutional provision, valid statutory provision, or authorized rule of court⁸⁷ and there is a substantial compliance with procedural requirements.⁸⁸ To the end that it may be held valid and sufficient to confer jurisdiction, the order of assignment will be liberally construed and presumptions indulged in its favor⁸⁹ whenever there appears therein any basis by which the scope and extent of the authority of the assigned judge can be determined;⁹⁰ and it will not be held ineffective because of mere irregularity in procedure,⁹¹ especially noncompliance with a directory statute⁹² or an administrative rule of court.⁹³ However, an order of assignment is insufficient in itself to confer jurisdiction where the chief justice or other officer making it is without power to do so;⁹⁴ and in such case, or where there is no assignment whatever, a judge of one court who is not a judge, ex officio or otherwise, of another court until he is assigned thereto under authority conferred by rules of court, cannot perform judicial acts in the latter court or hold a term thereof.⁹⁵ Also an order may be insufficient because of uncertainty as to the duration of the assignment;⁹⁶ but where a judge is regularly assigned a pertinent statute, properly construed, may be of aid in determining what term or terms may be held by him.⁹⁷ To be valid, statutes relating to the assignment or detailing of judges to cer-

84. Miss.—Dulaney v. Dulaney, 178 So. 814, 181 Miss. 36.

85. Va.—Davis v. McCall, 113 S.E. 835, 133 Va. 487.

86. Ill.—Kimball v. Ryan, 283 Ill. App. 456.

87. Ala.—Walker v. State, 85 So. 787, 204 Ala. 474.

Cal.—Edler v. Hollopeter, 6 P.2d 245, 214 Cal. 427—Gialdini v. Russell, 25 P.2d 845, 134 Cal.App. 524—People v. Ferguson, 12 P.2d 158, 124 Cal.App. 221, hearing denied 12 P. 2d 960, 124 Cal.App. 221—Lindsay Strathmore Irr. Dist. v. Superior Court in and for Tulare County, 9 P.2d 579, 121 Cal.App. 606.

88. Ill.—People v. Davis, 192 N.E. 210, 357 Ill. 396.

De facto jurisdiction

The executive orders of governor, assigning judge of criminal court of record of one county to preside at the criminal court of record of another county, which were made in substantial compliance with the statutory authority as to the terms of assignment, conferred at least de

facto jurisdiction on the assigned judge, and his acts thereunder were valid unless duly annulled by a court of competent jurisdiction.—State ex rel. Dato v. Himes, 184 So. 244, 134 Fla. 675, rehearing denied 184 So. 648.

89. Fla.—State ex rel. Dato v. Himes, supra.

90. Fla.—McCall v. Adams, 156 So. 524, 116 Fla. 558.

91. Ohio.—State v. Marsh, 168 N.E. 478, 121 Ohio St. 321, 169 N.E. 564, 121 Ohio St. 477.

92. Mich.—Alpena Nat. Bank v. Hoey, 274 N.W. 808, 281 Mich. 307.

93. Ill.—People v. Davis, 192 N.E. 210, 357 Ill. 396.

94. Ill.—People v. Sullivan, 20 N.E. 2d 567, 371 Ill. 264.

Lack of power under circumstances

(1) The senior circuit judge was without power to designate a judge to sit in the place of a district judge who did not present the senior circuit judge with a certificate of disquali-

cation, but filed a certified copy of an order entered by him denying the petition asking that he recuse himself from hearing certain causes.—In re Wingert, D.C.Md., 22 F.Supp. 483.

(2) After presiding judge had designated qualified judge of his district to hold term of court within county of such district, governor was without authority to designate outside judge to preside thereat where regular and properly designated judge was competent to act and there was no accumulation of business before court which would cause delay of trial.—State ex rel. Decker v. Montague, 262 N.W. 684, 195 Minn. 278.

95. Ill.—People v. Sullivan, 20 N.E. 2d 567, 371 Ill. 264—People v. Feinberg, 181 N.E. 437, 348 Ill. 549, overruling Greene v. People, 55 N.E. 341, 182 Ill. 278.

96. Fla.—McCall v. Adams, 156 So. 524, 116 Fla. 558.

97. N.C.—West v. F. W. Woolworth Co., 198 S.E. 659, 214 N.C. 214.

tain courts, or to the judges or judicial officers who may preside over such courts and sit for the trial of causes therein, must, of course, not contravene constitutional provisions.⁹⁸

Where a judge has general authority and jurisdiction to hold court in any county or circuit in the state, at least on assignment, and he accepts an assignment, he has full authority to act, regardless of whether or not he could have been compelled to accept it.⁹⁹

While statutes providing for the assignment of causes in a circuit by the local presiding judge ought to be followed,¹ they are merely directory and have

no relation to jurisdiction.²

§ 169. Attendance of Sheriff or Other Officer

A sheriff should be in attendance at the sessions of court held in his county; but he may do so by deputy.

While it is one of the usual duties of the sheriff to attend in person or by deputy at the sessions of court held in his county,³ his presence is not necessary to the organization or continuance of the court,⁴ and attendance by a duly qualified deputy is sufficient.⁵ He has no power to originate motions or present questions, in the names of the parties to a suit, for the action of the court.⁶

V. RULES OF PRACTICE AND PROCEDURE

§ 170. Power to Make Rules

- a. Power of legislature
- b. Power of courts

a. Power of Legislature

The legislature, subject to the constitution, may establish rules of procedure for the courts, and where

it enacts a positive rule, the court has no discretion. Where the legislature fails to prescribe methods of procedure, the parties are relegated to the former practice of the court.

It is within the power of the legislature, subject to such provisions as may be incorporated in the constitution, to establish the procedure by which courts shall exercise their jurisdiction,⁷ and where

88. Cal.—*Edler v. Holloper*, 6 P. 2d 245, 214 Cal. 427.

Pa.—*Petition of Park*, 196 A. 495, 329 Pa. 60.

The legislature cannot authorize the justices of the peace of a county to sit with the county judge in matters other than those authorized by the constitution.—*Worthen v. Badgett*, 32 Ark. 496.

Permissible legislation

(1) The legislature is competent to provide that each of the several judges in a district shall sit separately to try causes and exercise all the powers which he might exercise if sole judge thereof.—*Jordan v. People*, 36 P. 218, 19 Colo. 417.

(2) It may provide that particular causes may be tried before one or more judges of any court.—*Ashley v. Wait*, 116 N.E. 961, 228 Mass. 63, 8 A.L.R. 1463, error dismissed 40 S.Ct. 53, 250 U.S. 652, 63 L.Ed. 1190.

(3) If there is a constitutional delegation of power to the legislature to create inferior courts it may authorize any judicial officer to preside over them ex officio, even though judges of inferior courts are required to be elected by the people.

Ala.—*Balkum v. State*, 40 Ala. 671. N.J.—*Engeman v. State*, 23 A. 676, 54 N.J.Law 247.

(4) Statute empowering governor to assign judge of circuit court to hold regular or special term of criminal court of record, civil court of record, or court of crimes, or to try any case or cases pending in the jurisdiction thereof, in event of

absence or disqualification of regular judge, is not violative of any constitutional provision.—*Cormack v. Coleman*, 161 So. 844, 120 Fla. 1.

99. Mich.—*People v. Phelps*, 245 N. W. 565, 261 Mich. 45.

N.Y.—*People ex rel. Newton v. Special Term*, Part 1, Supreme Court, New York County, 184 N.Y.S. 193, 193 App.Div. 463, 38 N.Y.Cr. 537.

1. Mich.—*People v. Phelps*, 245 N. W. 565, 261 Mich. 45.

Where particular judge will not or cannot sit in the circuit, or at least not within a reasonable time, as where he, as visiting judge, heard the main case but at the time of contempt proceedings is occupied in his own circuit, the presiding judge should assign the hearing to some judge who is sitting in the circuit.—*MacLean v. Harp*, 251 N.W. 358, 265 Mich. 172.

2. Mich.—*People v. Phelps*, 245 N. W. 565, 261 Mich. 45.

3. Ill.—*La Salle County v. Milligan*, 32 N.E. 196, 143 Ill. 321. 57 C.J. p 781 note 29.

Provision that constable shall attend sittings of a district court refers to attendance on the court when sitting for the performance of its judicial functions.—*Lewis v. Hoboken*, 42 N.J.Law 377.

4. Ga.—*McGuffie v. State*, 17 Ga. 497.

5. Ga.—*McGuffie v. State*, supra.

6. Fla.—*Rhodes v. Moseley*, 6 Fla. 12.

7. Ala.—*Porter v. State*, 174 So. 315, 234 Ala. 226, denying certiorari 174 So. 318, 27 Ala. App. 441—*Porter v. State*, 174 So. 311, 312, 234 Ala. 11, citing *Corpus Juris*, answer to certified question conformed to 174 So. 313, 27 Ala.App. 441—*Glenn v. State*, 174 So. 315, 317, 27 Ala.App. 433, citing *Corpus Juris*.

Fla.—*Keen v. State*, 103 So. 399, 89 Fla. 113.

Kan.—*Kansas Wheat Growers' Ass'n v. Schulte*, 216 P. 311, 316, 113 Kan. 678, quoting *Corpus Juris*.

Ky.—*Federal Land Bank of Louisville, Ky. v. Crombie*, 80 S.W.2d 39, 258 Ky. 383.

Ohio.—*Purcell v. Riverside*, 18 Ohio Cir.Ct. 790, 10 Ohio Cir.Dec. 648.

Wis.—*Spoo v. State*, 262 N.W. 696, 219 Wis. 285.

15 C.J. p 901 note 9.

Legislature has supreme authority with respect to court rules, except in so far as any legislative rules may unreasonably limit or hamper courts in performance of constitutional duties, or violate provisions of constitution prohibiting exercise by one governmental department of another's powers.—*De Camp v. Central Arizona Light & Power Co.*, 57 P.2d 311, 47 Ariz. 517.

General rules of practice applicable to circuit courts prevail in Jefferson county.—*Garaca v. Lusco*, 169 So. 12, 232 Ala. 573.

Operation and effect of statute

Code of criminal procedure is not to be deemed to have limited the

a positive rule of practice is established by statute, the courts have no discretion in the matter.⁸ Where the legislature fails to act in prescribing methods of procedure, parties are relegated to the former practice of the court.⁹

b. Power of Courts

- (1) In general
- (2) Regulation of practice in another court

(1) In General

Subject to the requirement of reasonableness and the provisions of the constitution and statutes, courts have inherent power to make their own rules of practice and procedure.

A rule of court has been held to mean uniformity, regulation in practice alike to all suitors, established and fixed, as much as a statute itself, and known to all litigants and attorneys;¹⁰ also an order generally made by a court having competent jurisdic-

tion;¹¹ an order made by a court between the parties to a cause before it, or touching the discharge of duty by those engaged in the conduct of its proceedings, either as permanent officers of the court or as serving therein in some temporary capacity.¹² The term may include commands to lower courts or court officials, to do ministerial acts;¹³ and, as sometimes used, the term has been held to be intended for the word "judgment."¹⁴ In the federal judicial code the term has reference to a standing rule having the force of law.¹⁵ As used in this Title, the term is confined to rules of practice and procedure established by courts to facilitate the conduct of their business, and which are applicable alike to all cases and all litigants or their counsel.

While courts are very generally authorized by statute to make their own rules for the regulation of their practice and the conduct of their business, a court has, even in the absence of any statutory provision or regulation in reference thereto, inherent power to make such rules,¹⁶ subject to limita-

power of the courts, in practice or procedure, beyond the scope of its provisions.—*People ex rel. Weeks v. Platt*, 159 N.Y.S. 920, 173 App.Div. 451.

8. *Ala.*—*Porter v. State*, 174 So. 315, 234 Ala. 226, denying certiorari 174 So. 313, 27 Ala.App. 441—*Porter v. State*, 174 So. 311, 312, 234 Ala. 11, citing *Corpus Juris*, answer to certified question conformed to 174 So. 313, 27 Ala.App. 441—*Glenn v. State*, 174 So. 315, 317, 27 Ala.App. 433, citing *Corpus Juris*.

Kan.—*Kansas Wheat Growers' Ass'n v. Schulte*, 216 P. 311, 316, 113 Kan. 678, quoting *Corpus Juris*.

Ky.—*Federal Land Bank of Louisville, Ky., v. Crombie*, 80 S.W.2d 39, 258 Ky. 383.

15 C.J. p 901 note 10.

9. *N.Y.*—*Matter of Van Houten*, 46 N.Y.S. 190, 18 App.Div. 301, 47 N.Y.S. 689, 21 App.Div. 266, affirming 49 N.E. 1103, 154 N.Y. 773.

10. *U.S.*—*Spangler v. Atchison, T. & S. F. R. Co., C.C.Mo.*, 42 F. 305, 306.

54 C.J. p 1109 note 13.

11. *Neb.*—*Bouvier, L.D.*, quoting *Barney v. State*, 68 N.W. 636, 49 Neb. 515, 522.

12. *S.C.*—*Goodlett v. Charles*, 14 Rich. 46, 49.

13. *Mo.*—*Carter v. Louisiana Purchase Exposition Co.*, 102 S.W. 6, 124 Mo.App. 530, 538.

14. *Ind.*—*Jacobs v. Moffatt*, 3 Blackf. 395, 398.

15. *N.C.*—*Dills v. Champion Fiber Co.*, 94 S.E. 694, 695, 175 N.C. 49.

16. *U.S.*—*Woodbury v. Andrew Jer-*

gens Co., C.C.A.N.Y., 61 F.2d 736, certiorari denied *Berenson v. Woodbury*, 53 S.Ct. 659, 239 U.S. 740, 77 L.Ed. 1487.

Ala.—*Porter v. State*, 174 So. 315, 234 Ala. 226, denying certiorari 174 So. 313, 27 Ala.App. 441—*Porter v. State*, 174 So. 311, 312, 234 Ala. 11, citing *Corpus Juris*, answer to certified question conformed to 174 So. 313, 27 Ala.App. 441—*Williams v. Wright*, 169 So. 871, 233 Ala. 42—*Glenn v. State, App.*, 174 So. 315, 317, citing *Corpus Juris*.

Ariz.—*De Camp v. Central Arizona Light & Power Co.*, 57 P.2d 311, 312, 47 Ariz. 517, citing *Corpus Juris*—*Brown v. Haymore*, 32 P.2d 1027, 48 Ariz. 466.

Cal.—*Ex parte Garner*, 177 P. 162, 179 Cal. 409—*Scott v. Larson*, 255 P. 248, 82 Cal.App. 46—*Johnson v. Superior Court of San Bernardino County*, 250 P. 686, 79 Cal.App. 650.

Colo.—*Kolkman v. People*, 300 P. 575, 89 Colo. 8.

Del.—*Wilmington Trust Co. v. Baldwin, Super.*, 195 A. 287.

Fla.—*Humphries v. Hester & Stinson Lumber Co.*, 141 So. 749, 103 Fla. 1079, denying rehearing *Humphries v. Hester*, 139 So. 147, 103 Fla. 1079—*Keen v. State*, 103 So. 399, 89 Fla. 113.

Ill.—*Gyure v. Sloan Valve Co.*, 11 N.E.2d 963, 387 Ill. 489—*People v. Feinberg*, 181 N.E. 437, 348 Ill. 549—*Stepanian v. Asadourian*, 1 N.E.2d 753, 283 Ill.App. 495—*Lo-cander v. Joliet & Eastern Traction Co.*, 225 Ill.App. 143.

Ind.—*Epstein v. State*, 128 N.E. 353, 190 Ind. 693, denying rehearing 127 N.E. 441, 190 Ind. 693.

Ky.—*Burton v. Mayer*, 118 S.W.2d 547, 274 Ky. 263.

Mich.—*Jones v. Eastern Michigan Motorbuses*, 233 N.W. 710, 287 Mich. 619—*People v. Brown*, 212 N.W. 968, 238 Mich. 298.

Mo.—*State ex rel. Garvey v. Buckner*, 272 S.W. 940, 308 Mo. 390—*State ex rel. Kansas City Light & Power Co. v. Trimble*, 237 S.W. 1021, 291 Mo. 532—*Pelletier v. Heart of America Hospital Ass'n*, 2 S.W.2d 805—*Taylor v. Heart of America Hospital Ass'n*, 2 S.W.2d 804, 222 Mo.App. 17.

Neb.—*Uerling v. State*, 250 N.W. 243, 246, 125 Neb. 374, citing *Corpus Juris*.

N.Y.—*Farrell v. Malcom*, 236 N.Y.S. 704, 135 Misc. 101.

Pa.—*Gregory v. Davis*, 177 A. 331, 117 Pa.Super. 1—*In re Laverelle's Estate*, 101 Pa.Super. 448—*Landis's Estate*, 3 Pa.Dist. & Co. 575.

Tex.—*Glenn v. McCarty*, 110 S.W.2d 1148, 130 Tex. 641, denying rehearing 107 S.W.2d 363, 130 Tex. 641, dismissing application 103 S.W.2d 1098.

Utah.—*Baker v. Department of Registration*, 3 P.2d 1082, 78 Utah 424—*Standard Coal Co. v. Stewart*, 269 P. 1014, 72 Utah 272.

Wis.—*Spoo v. State*, 262 N.W. 696, 219 Wis. 285.

Wyo.—*Harvey v. Stanolind Oil & Gas Co.*, 86 P.2d 735, denying rehearing 84 P.2d 755—*Delfelder v. Farmers' State Bank of Riverton*, 270 P. 1081, 38 Wyo. 481, denying rehearing 269 P. 413, 38 Wyo. 481. 15 C.J. p 901 note 12.

Municipal court judges have power to adopt rules of practice touching proceedings for recovery of personal

tions based on reasonableness and conformity to constitutional and statutory provisions.¹⁷ A court cannot make and enforce rules which are arbitrary,¹⁸ or unreasonable,¹⁹ or uncertain in their operation,²⁰ which deprive a party of his legal rights,²¹ or which are inconsistent with, or contra-

property in addition to those prescribed by legislature.—*Universal Credit Co. v. Antonsen*, 22 N.E.2d 790, 301 Ill.App. 334, transferred 19 N.E. 2d 866, 370 Ill. 509.

In absence of court of appeal rule, relating to procedure to be followed in event of death of appellant, rule of supreme court on such subject will be followed.—*Smith v. Cowgill*, La. App., 189 So. 485.

Where constitution confers jurisdiction on courts, it carries with it, as a necessary incident, the power to adopt such rules as will render the constitutional grant effective. Cal.—*Byers v. Smith*, 47 P.2d 705, 4 Cal.2d 203.

Ky.—*Burton v. Mayer*, 118 S.W.2d 547, 274 Ky. 263.

General Code supplements any inherent power of the courts of appeals to make and publish uniform rules of practice for all the districts.—*Anderson v. Industrial Commission of Ohio*, 19 N.E.2d 509, 135 Ohio St. 77.

Court having full constitutional jurisdiction is not entirely dependent on statute respecting procedure.—*Neely v. Craig*, 139 So. 835, 162 Miss. 712.

Chancellor may make rules for proper conduct of court of chancery.—*In re New Jersey State Bar Ass'n*, 168 A. 794, 114 N.J.Eq. 261, reversing *Petition of New Jersey State Bar Ass'n*, 166 A. 316, 112 N.J.Eq. 606.

Supreme court cannot interfere with rules governing trial courts unless rules clearly disregard vested rights.—*Okerlund v. Robinson*, 281 P. 200, 74 Utah 602—*Campbell v. Union Sav. & Inv. Co.*, 226 P. 190, 63 Utah 366.

Following English common law

At common law, superior courts of England had power to regulate procedure by rules, and that practice, as modified from time to time, was followed in this country prior to the adoption of constitutions and statutes on the subject.—*People v. Callopy*, 192 N.E. 634, 358 Ill. 11.

Statute authorizing courts to adopt procedure applies alike to all cases of statutory jurisdiction, whether original or appellate.—*Baker v. Department of Registration*, 3 P.2d 1082, 78 Utah 424.

Federal decisions recognize right of state courts to prescribe their own practice in all classes of cases involving federal enactments.—*Breen v. Iowa Cent. Ry. Co.*, 168 N.W. 901, 184 Iowa 1200, certiorari denied *Iowa Cent. R. Co. v. Breen*, 39 S.Ct. 288, 249 U.S. 604, 68 L.Ed. 793.

In absence of statute

(1) Court may define and limit general rules, but they have no independent lawmaking power.—*Moore v. U. S. Fidelity & Guaranty Co.*, 9 P.2d 562, 122 Cal.App. 205.

(2) Under Code Civ.Proc. § 187, providing that when jurisdiction by the constitution or statutes is conferred on a court, and the course of proceeding is not specifically pointed out, any suitable mode of proceeding may be adopted which may appear most conformable to the spirit of the code, if a law as written provides none, it is permissible to adopt any suitable procedure which will achieve the desired result, provided there is some constitutional or statutory jurisdiction to make the section applicable.—*Traffic Truck Sales Co. of California v. Justice's Court of Red Bluff Tp., Tehama County*, 220 P. 306, 192 Cal. 377.

17. Ala.—*Brown v. McKnight*, 114 So. 40, 216 Ala. 660.

Ariz.—*De Camp v. Central Arizona Light & Power Co.*, 57 P.2d 311, 47 Ariz. 517.

Cal.—*People v. Walker*, 244 P. 94, 76 Cal.App. 192.

Fla.—*Petition of Jacksonville Bar Ass'n*, 169 So. 674, 125 Fla. 175.

Ga.—*Brown v. Hutcheson*, 146 S.E. 27, 167 Ga. 451, reversing 144 S.E. 147, 38 Ga.App. 453, conformed to 146 S.E. 329, 39 Ga.App. 99.

Ill.—*People v. Jennings*, 144 N.E. 316, 312 Ill. 606—*Wilson v. Gill*, 279 Ill.App. 487.

Ind.—*Barber v. State*, 149 N.E. 896, 197 Ind. 88.

Iowa.—*Workman v. District Court, Delaware County*, 269 N.W. 27, 222 Iowa 364.

Ky.—*Warfield Natural Gas Co. v. Allen*, 33 S.W.2d 34, 236 Ky. 358.

Minn.—*Jovaag v. O'Donnell*, 249 N. W. 676, 189 Minn. 315.

Mo.—*State ex rel. Brockman Mfg. Co. v. Miller*, 241 S.W. 920—*State ex rel. Gerst Bros. Mfg. Co. v. Ossing*, 7 S.W.2d 428, 222 Mo.App. 448—*State ex rel. Paramount Progressive Order of Moose v. Miller*, 273 S.W. 122, 216 Mo.App. 692.

Mont.—*In re Unification of Montana Bar Ass'n*, 87 P.2d 172, 107 Mont. 559.

Neb.—*Uerling v. State*, 250 N.W. 243, 246, 125 Neb. 374, citing *Corpus Juris*.

N.Y.—*Crocker-Wheeler Co. v. Gene-see Recreation Co.*, 167 N.Y.S. 141, 101 Misc. 440.

Ohio.—*Meyer v. Brinsky*, 195 N.E. 702, 129 Ohio St. 371.

Pa.—*Blessing v. Philadelphia Rapid Transit Co.*, 138 A. 573, 325 Pa. 12—*Smith v. Ellwood City Ice Co.*,

166 A. 560, 311 Pa. 147—*Carroll v. Quaker City Cabs*, 162 A. 258, 308 Pa. 345—*Equipment Corporation of America v. Primos Vanadium Co.*, 132 A. 360, 285 Pa. 432.

Tenn.—*Stepp v. Stepp*, 11 Tenn.App. 578.

Wash.—*State v. Superior Court for King County*, 267 P. 770, 148 Wash. 1.

W.Va.—*Hall v. O'Brien*, 124 S.E. 507, 97 W.Va. 77—*Kemble v. Wiltison*, 114 S.E. 369, 92 W.Va. 32—*Star Piano Co. v. Burgner*, 109 S.E. 491, 89 W.Va. 475—*Teter v. George*, 103 S.E. 275, 86 W.Va. 454.

Wyo.—*Harvey v. Stanolind Oil & Gas Co.*, 86 P.2d 735, denying rehearing 84 P.2d 755.

15 C.J. p 902 note 13.

Probate courts have power to make reasonable rules of procedure.—*State ex rel. Ray v. Veneman*, 200 N.E. 216, 209 Ind. 575.

18. Mo.—*State ex rel. Caldwell v. Cockrell*, 217 S.W. 524, 529, 280 Mo. 269, citing *Corpus Juris*.

Or.—*Ptack v. Strong*, 257 P. 19, 121 Or. 688.

15 C.J. p 902 note 13.

19. Ala.—*Jefferson County Burial Society v. Cotton*, 133 So. 256, 222 Ala. 578.

Ind.—*State ex rel. Ray v. Veneman*, 200 N.E. 216, 209 Ind. 575.

Mo.—*State ex rel. Caldwell v. Cockrell*, 217 S.W. 524, 529, 280 Mo. 269, citing *Corpus Juris*.

Neb.—*Uerling v. State*, 250 N.W. 243, 125 Neb. 374.

Ohio.—*Meyer v. Brinsky*, 195 N.E. 702, 129 Ohio St. 371.

Or.—*Ptack v. Strong*, 257 P. 19, 121 Or. 688.

Pa.—*Carroll v. Quaker City Cabs*, 162 A. 258, 308 Pa. 345—*Weinstock v. City of Philadelphia*, 17 Pa.Dist. & Co. 411.

W.Va.—*Hall v. O'Brien*, 124 S.E. 507, 97 W.Va. 77—*Kemble v. Wiltison*, 114 S.E. 369, 92 W.Va. 32.

15 C.J. p 902 note 13; p 903 note 15.

20. La.—*Dorfer v. City of Natchitoches*, App., 160 So. 307.

Court rules should be plain and unequivocal, and their requirements should be clear and their meaning derived from wording of rule, without necessity of resort to jurisprudence.—*Dorfer v. City of Natchitoches*, supra.

21. Cal.—*Helbush v. Helbush*, 290 P. 18, 209 Cal. 758.

Colo.—*Drennen v. Johnson*, 176 P. 479, 65 Colo. 381.

Del.—*Wilmington Trust Co. v. Baldwin*, Super., 195 A. 287.

Ill.—*Diversey Liquidating Corpora-*

vene any constitutional or statutory provision²² or principles of general law.²³

Court rules are subservient to statutes, and in case of conflict the statute, if constitutional, pre-

vails;²⁴ but a statute authorizing the chancellor to make rules of procedure as to parties and pleadings in chancery suits will prevail over inconsistent provisions in a prior statute.²⁵ A rule authorized by

tion v. Neunkirchen, 19 N.E.2d 363, 370 Ill. 523, 120 A.L.R. 1395.

Mich.—Shannon v. Cross, 222 N.W. 168, 245 Mich. 220.

Mo.—State ex rel. Caldwell v. Cockrell, 217 S.W. 524, 529, 280 Mo. 269, citing *Corpus Juris*—State ex rel. Paramount Progressive Order of Moose v. Miller, 273 S.W. 122, 216 Mo.App. 692.

Neb.—Uerling v. State, 250 N.W. 243, 125 Neb. 374.

Tex.—Galveston, H. & S. A. Ry. Co. v. Stewart & Threadgill, Com.App., 257 S.W. 526, affirming Stewart & Threadgill v. El Paso & S. W. Co., Civ.App., 207 S.W. 594.

Wash.—State v. Pavelich, 279 P. 1102, 153 Wash. 379.

W.Va.—Hall v. O'Brien, 124 S.E. 507, 97 W.Va. 77—Kemble v. Wiltison, 114 S.E. 369, 92 W.Va. 32, 15 C.J. p 902 note 13.

22. U.S.—Alaska Packers Ass'n v. Pillsbury, Cal., 57 S.Ct. 682, 301 U.S. 174, 81 L.Ed. 988, reversing, C.C. A., Pillsbury v. Alaska Packers Ass'n, 85 F.2d 758 and 78 F.2d 587, certiorari granted to both cases Alaska Packers Ass'n v. Pillsbury, 57 S.Ct. 322, 299 U.S. 538, 81 L.Ed. 396—Standish v. Gold Creek Mining Co., C.C.A.Mont., 92 F.2d 662, certiorari denied Gold Creek Mining Co. v. Standish, 58 S.Ct. 476, 302 U.S. 765, 82 L.Ed. 594—Tibbens v. Clayton, D.C.Okla., 288 F. 393, affirmed Clayton v. Tibbens, C.C.A., 298 F. 18.

Ala.—Nichols v. Dill, 132 So. 900, 222 Ala. 455.

Ark.—Clarkson v. State, 264 S.W. 975, 165 Ark. 459.

Cal.—Butterfield v. Butterfield, 34 P.2d 145, 1 Cal.2d 227—Helbush v. Helbush, 290 P. 18, 209 Cal. 758—In re Steehler's Estate, 239 P. 718, 197 Cal. 67, correcting error 233 P. 972, 195 Cal. 386—Wigman v. Superior Court of California, in and for Los Angeles County, 239 P. 427, 74 Cal.App. 132.

Colo.—Drennen v. Johnson, 176 P. 479, 65 Colo. 381.

Fla.—State ex rel. Fisher v. Rowe, 148 So. 588, 110 Fla. 141—Keen v. State, 103 So. 399, 89 Fla. 113.

Ga.—Brown v. Hutcheson, 146 S.E. 27, 167 Ga. 451, reversing 144 S.E. 147, 38 Ga.App. 453, conformed to 146 S.E. 329, 39 Ga.App. 99—Dixon v. Evans, 193 S.E. 470, 56 Ga.App. 583.

Ill.—Diversey Liquidating Corporation v. Neunkirchen, 19 N.E.2d 363, 370 Ill. 523, 120 A.L.R. 1395—Cohen v. Bendix, 17 N.E.2d 12, 369 Ill. 507—Wayland v. City of Chi-

cago, 15 N.E.2d 516, 369 Ill. 43—Danoff v. Larson, 15 N.E.2d 290, 368 Ill. 519—People v. Davis, 192 N.E. 210, 337 Ill. 396—People v. Feinberg, 181 N.E. 437, 348 Ill. 549—Wilson v. Gill, 279 Ill.App. 487—Matthiessen v. Duntley, 225 Ill. App. 249—People v. Campbell, 204 Ill.App. 226.

Ind.—State ex rel. Weaver v. Weir, 4 N.E.2d 542, 210 Ind. 601—State ex rel. Ray v. Veneman, 200 N.E. 216, 209 Ind. 575—Graves v. State, 178 N.E. 233, 203 Ind. 1.

Iowa.—Tate v. Delll, 269 N.W. 871, 222 Iowa 635.

Ky.—Federal Land Bank of Louisville v. Crombie, 80 S.W.2d 39, 258 Ky. 383—Hall v. Eversole's Adm'r, 64 S.W.2d 891, 251 Ky. 296—Dorman v. Wheeler, 51 S.W. 2d 941, 244 Ky. 628.

Mo.—National Refrigerator Co. v. Southwest Missouri Light Co., 231 S.W. 930, 283 Mo. 290—State ex rel. Caldwell v. Cockrell, 217 S.W. 524, 529, 280 Mo. 269, citing *Corpus Juris*—State ex rel. Paramount Progressive Order of Moose v. Miller, 273 S.W. 122, 216 Mo.App. 692—Tyon v. Wabash Ry. Co., 232 S.W. 786, 207 Mo.App. 322.

N.Y.—Lambert v. Lambert, 1 N.E. 2d 833, 270 N.Y. 422, reversing 278 N.Y.S. 580, 244 App.Div. 78—Broome County Farmers' Fire Relief Ass'n v. New York State Electric & Gas Corporation, 268 N.Y.S. 131, 239 App.Div. 304, affirmed 191 N.E. 591, 264 N.Y. 614—Pistell, Deans & Co. v. Wood, 250 N.Y.S. 92, 232 App.Div. 411—Cohen v. Smith, 294 N.Y.S. 470, 162 Misc. 192—Cohen v. Paprecki, 286 N.Y.S. 26, 158 Misc. 465.

Ohio.—Meyer v. Brinsky, 195 N.E. 702, 129 Ohio St. 371—Busher v. Macek, 190 N.E. 200, 127 Ohio St. 554, affirming State ex rel. Macek v. Busher, 187 N.E. 874, 46 Ohio St. 148—Cleveland Ry. Co. v. Halliday, 188 N.E. 1, 127 Ohio St. 278—Brodbeck v. Talley, 26 Ohio Cir. Ct., N.E., 334.

Or.—Hart v. State Industrial Accident Commission, 38 P.2d 698, 148 Or. 692—Bank of Beaverton v. Godwin, 264 P. 356, 124 Or. 166—Ptack v. Strong, 257 P. 19, 121 Or. 688—Schnitzer v. Stein, 189 P. 984, 96 Or. 343—In re Pittick's Estate, 202 P. 216, 102 Or. 159.

Pa.—Rutenberg v. City of Philadelphia, 196 A. 73, 329 Pa. 26—School Dist. of Haverford Tp., to Use of Tedesco, v. Herzog, 171 A. 455, 314 Pa. 161—Carroll v. Quaker City Cabs, 162 A. 258, 308 Pa. 345—

Equipment Corporation of America v. Primos Vanadium Co., 132 A. 360, 285 Pa. 432—Nawocki v. Skaziak, 88 Pa.Super. 100—Griffin v. Dath, 17 Pa.Dist. & Co. 181, 22 Del.Co. 257—Mandeville v. Mandeville, 11 Pa.Dist. & Co. 181—Bowne v. Bowne, 9 Pa.Dist. & Co. 652.

Tenn.—World Granite Co. v. Morris Bros., 222 S.W. 527, 142 Tenn. 665.

Tex.—Durham v. Scrivener, Com. App., 270 S.W. 161, affirming, Civ. App., 259 S.W. 606—Duval County Ranch Co. v. Drought, Civ.App., 260 S.W. 298—Sessions v. State, 197 S.W. 718, 81 Tex.Cr. 424.

Va.—Virginia Home for Incurables v. Coleman, 178 S.E. 908, 154 Va. 280. W.Va.—Rusinko v. Shipman, 162 S. E. 316, 111 W.Va. 402.

Wyo.—Boner v. Fall River County Bank, 168 P. 726, 25 Wyo. 260.

15 C.J. p 902 note 13; p 903 note 18.

23. U.S.—Patterson v. Winn, Ga., 5 Pet. 233, 8 L.Ed. 108.

Mich.—Shannon v. Cross, 222 N.W. 168, 245 Mich. 220.

Wash.—State v. Pavelich, 279 P. 1102, 153 Wash. 379.

15 C.J. p 903 note 19.

24. Ala.—Nichols v. Dill, 132 So. 900, 222 Ala. 455.

Ariz.—De Camp v. Central Arizona Light & Power Co., 57 P.2d 311, 47 Ariz. 517.

Cal.—McMahon v. Hamilton, 260 P. 793, 202 Cal. 319.

Fla.—Petition of Jacksonville Bar Ass'n, 169 So. 674, 125 Fla. 175.

Ga.—Brown v. Hutcheson, 146 S.E. 27, 167 Ga. 451, reversing 144 S.E. 147, 38 Ga.App. 453, conformed to 146 S.E. 329, 39 Ga.App. 99—Dixon v. Evans, 193 S.E. 470, 56 Ga.App. 583.

Mo.—State ex rel. Paramount Progressive Order of Moose v. Miller, 273 S.W. 122, 216 Mo.App. 692.

N.Y.—Lieberman v. Van Denburg, 6 N.Y.S.2d 428, 168 Misc. 155—Juskowitz v. Stern, 283 N.Y.S. 955, 158 Misc. 28—Leroy Arnold, Inc. v. Mackey, 222 N.Y.S. 225, 129 Misc. 643.

Or.—Hart v. State Industrial Accident Commission, 38 P.2d 698, 148 Or. 692.

Pa.—Steele v. Mifflinburg Borough, 6 Pa.Dist. & Co. 129.

Tex.—Glenn v. McCarty, 110 S.W. 2d 1148, 130 Tex. 641, denying rehearing 107 S.W.2d 363, 130 Tex. 641, dismissing application 103 S.W.2d 1098.

15 C.J. p 903 note 18 [e].

25. N.J.—Weinberger v. Goldstein, 132 A. 659, 99 N.J.Eq. 1, affirmed 137 A. 920, 101 N.J.Eq. 310.

the constitution is valid although it conflicts with a statute.²⁶ A rule of court made to carry out a statute cannot broaden the statute.²⁷ although, on the other hand, it has been held that the mere fact that a rule goes beyond the provisions of a statute does not make it inconsistent therewith.²⁸

Purpose of rules. Court rules of practice are adopted to facilitate the business of the court and to promote the orderly and expeditious administration of justice²⁹ and for the benefit of the parties as well as for the benefit of the court.³⁰ Rules which promote the speedy determination of the rights of litigants, provided they are such as will protect the rights of persons and property, must be given judicial sanction in preference to rules based purely on technical distinctions, the effect of which is only to hinder and delay the courts in the administration of justice.³¹

Uniformity. A rule of court respecting attorneys must apply uniformly to all attorneys appearing in court, irrespective of their place of residence in the state.³² So, a rule relating to jury trials should apply in all counties of the state, and a special rule applicable only in one county is beyond the power of the court.³³ A constitutional provision that the

judges of the superior court shall, from time to time establish rules for the government of such courts, has been construed as intended to insure uniform rules of minute procedure, and not as a grant of power to make broad and general rules.³⁴

Special rules for particular cases may sometimes, under statutory authority, be made when justice so requires,³⁵ although the effect may be to exempt such cases from the operation of the ordinary rules of court.³⁶ However, it has been held that courts have not inherent power to extend an existing practice to meet a particular situation or to create a new procedure without legislation.³⁷

(2) Regulation of Practice in Another Court

The higher courts, if authorized by the constitution or statutes, may make binding rules of procedure for the inferior courts. The inferior courts may make rules of their own with respect to matters for which the higher court has not provided. A trial court cannot make rules to govern procedure in an appellate court. Rules adopted by an appellate court for its own practice have no application to the practice in lower courts. The rules of a court in one county are not binding on the corresponding court in another county.

In the absence of some authority under either the constitution or a statute, an appellate court has no

28. La.—Brott v. New Orleans Land Co., 101 So. 150, 156 La. 807.

27. Me.—Nissen v. Flaherty, 105 A. 127, 117 Me. 535.

26. Cal.—Butterfield v. Butterfield, 34 P.2d 145, 1 Cal.2d 227.

25. Ala.—Freeland v. State, 182 So. 414, 28 Ala.App. 268—Williams v. State, 175 So. 697, 27 Ala.App. 525.

Del.—South Atlantic S. S. Co. of Delaware v. Munkacsy, 137 A. 600, 7 W.W.Harr. 580, certiorari denied 57 S.Ct. 233, 299 U.S. 607, 81 L.Ed. 448—Pendergast v. Fostoria Oil Co., 108 A. 737, 12 Del.Ch. 143.

Fla.—Phillips v. Lindsay, 136 So. 666, 102 Fla. 935—Lake Mabel Development Corporation v. Bird, 129 So. 105, 99 Fla. 259, denying rehearing 126 So. 356, 99 Fla. 253—Demos v. Walker, 126 So. 305, 99 Fla. 302. Idaho.—Evans v. Humphrey, 1 P.2d 626, 51 Idaho 63.

Ill.—Strickland v. Washington Bldg. Corporation, 4 N.E.2d 973, 287 Ill. App. 340—Bender v. Alton R. Co., 1 N.E.2d 108, 284 Ill.App. 419.

Iowa.—Smith v. Middle States Utilities Co. of Delaware, 275 N.W. 153, 224 Iowa 151.

Kan.—Crumley v. Weiner, 94 P.2d 807, 150 Kan. 427.

Miss.—Rockett v. Finley, 184 So. 78, 183 Miss. 308.

Mo.—Evans v. Hilliard, App., 112 S. W.2d 886.

N.J.—Ash v. Cohn, 3 A.2d 130, 121 N.J.Law 412.

Or.—Pacific Finance Corporation v. Ellithorpe, 280 P. 658, 134 Or. 601.

Tex.—Texas Employers' Ins. Ass'n v. Evans, 208 S.W. 516, 117 Tex. 113, answer conformed to, Civ.App., 2 S.W.2d 566.

Wash.—Elsom v. Tefft, 268 P. 177, 143 Wash. 195, appeal dismissed Tefft v. Grant, 49 S.Ct. 479, 279 U.S. 824, 73 L.Ed. 977.

Primary purpose of court rules is to dispatch business of court in such a manner as to obviate unreasonable delays.—United Taxi Co. v. Dilworth, Ind.App., 20 N.E.2d 699.

Rules not furthering justice should not be established.—Kehres v. Stuempfle, 136 A. 794, 288 Pa. 534.

Rule as to filing affidavit of defense was made to promote justice by preventing so far as possible fictitious defenses.—Bulow v. Jenkins, 68 F.2d 783, 63 App.D.C. 38.

30. Mo.—Parker v. Massachusetts Bonding & Ins. Co., App., 123 S.W. 2d 570.

31. Wis.—City of Milwaukee v. Johnson, 213 N.W. 335, 192 Wis. 585.

32. Ohio.—Meyer v. Brinsky, 195 N.E. 702, 129 Ohio St. 371.

33. Ohio.—Cleveland Ry. Co. v. Halliday, 188 N.E. 1, 127 Ohio St. 278, following Bushner v. Macek, 190 N. E. 200, 127 Ohio St. 554, affirming State ex rel. Macek v. Bushner, 187 N.E. 874, 46 Ohio App. 148.

34. Wash.—State v. Superior Court for King County, 267 P. 770, 148 Wash. 1.

35. N.H.—Moses v. Craig, 95 A. 148, 77 N.H. 586.

Adoption in limine

Since no rules are prescribed under the amendatory Act of May 26, 1937, P.L. p 895, 12 Pub.St. § 393, regulating the procedure in a proceeding for an account thereunder it is necessary for the courts of common pleas to make rules, and if no rules have been adopted, then they may be adopted in limine for the purpose of the particular case.—De-laney v. Campton, La., 5 Schuykill Reg. 366.

In absence of rules of practice generally each particular court may adopt fair and proper rule to regulate conduct of cause at bar.—Farrell v. Malcom, 286 N.Y.S. 704, 135 Misc. 101.

36. N.H.—Deming v. Foster, 42 N. H. 165.

37. Conn.—Ackerman v. Union, etc., Trust Co., 100 A. 22, 91 Conn. 500.

Miss.—Lewis v. State, 125 So. 419, 421, 155 Miss. 810.

"We have no dispensing power, and can assume none, to bend those essential rules to fit the exigencies of a particular case, else there would soon be no rules and no orderly enforcement of the law."—Lewis v. State, supra.

power to make rules which are binding on an inferior court as to practice and proceedings in the latter;³⁸ but such power may be conferred by constitutional provisions or by statutes not contravening the constitution.³⁹ The power of "superintending control" over inferior courts conferred by the constitution on the appellate court has been held to include the power to promulgate rules of practice for the inferior courts,⁴⁰ and rules so prescribed are held to be promulgated under the inherent power of the court,⁴¹ and have all the binding force of a statute, as stated *infra* § 176. Such a provision abrogates the inherent common-law power of such inferior courts to make rules of practice,⁴² of a permanent and general nature, and convenient merely but not necessary to the administration of law by such inferior courts,⁴³ at least to the extent to which such matters are regulated by rules established by the higher courts,⁴⁴ although it is considered that, notwithstanding such provisions, the lower courts

retain the power to adopt rules of their own with respect to matters for which the higher court has failed to provide.⁴⁵ Sometimes the rules of an inferior court are subject to the approval of a higher court.⁴⁶ Rules adopted by a supreme court for its own practice have no application to the practice and procedure in the lower courts.⁴⁷

A trial court has no power to make rules to govern procedure in a court of appeal.⁴⁸

Coördinate courts in different counties. The rules of a court in one county are not binding on the corresponding court in another county.⁴⁹

§ 171. Constitutional and Statutory Provisions

The intent of the legislature governs in construing a statute authorizing a court to adopt rules of procedure.

As before stated, the power of the legislature to

38. Minn.—Smith v. Valentine, 19 Minn. 452.

15 C.J. p 904 note 24.

39. Ariz.—Brown v. Haymore, 32 P. 2d 1027, 43 Ariz. 466.

Colo.—Ernst v. Lamb, 213 P. 994, 73 Colo. 132.

Fla.—Wilhelm v. South Indian River Co., 124 So. 729, 98 Fla. 970.

Ill.—People v. Cowdrey, 196 N.E. 838, 360 Ill. 633, reversing 278 Ill.App. 65—People v. Callopy, 192 N.E. 634, 358 Ill. 11—Stepanian v. Asadourian, 1 N.E.2d 753, 283 Ill.App. 495.

Mich.—Jones v. Eastern Michigan Motorbuses, 283 N.W. 710, 287 Mich. 619.

Neb.—Nichols v. State, 191 N.W. 333, 109 Neb. 335.

Wash.—White v. Million, 27 P.2d 320, 175 Wash. 189.

Wis.—In re Constitutionality of Section 251.18, Wisconsin Statutes, 236 N.W. 717.

15 C.J. p 904 note 25.

Extent of statutory authority

Rev.L.1910 § 5347 authorizing supreme court justices to make and revise rules and make amendments required to carry into effect provisions of the code and to make further rules as they may deem proper, limits the authority to make rules for inferior courts when such courts are in the exercise of judicial functions, and courts are in determination of matters to which an appeal may be taken or to which writs of certiorari or other like writs may lie.—Haddock v. Johnson, 194 P. 1077, 80 Okl. 250.

Statutes held constitutional

(1) Statute authorizing supreme court to make rules for other courts is not unconstitutional because taking effect on happening of subse-

quent event.—State v. Superior Court for King County, 267 P. 770, 148 Wash. 1.

(2) Statute authorizing supreme court to make rules governing pleading, practice, and procedure in all courts was not unconstitutional because of provision that statute shall not abridge right of legislature to enact or repeal statutes or rules relating to pleading, practice, and procedure.—In re Constitutionality of Section 251.18, Wisconsin Statutes, Wis., 236 N.W. 717.

40. Colo.—Kolkman v. People, 300 P. 575, 89 Colo. 8.

N.M.—State v. Roy, 60 P.2d 646, 40 N.M. 397.

41. N.M.—State v. Roy, *supra*.

42. N.Y.—Cohen v. Smith, 294 N.Y. S. 470, 162 Misc. 192.

15 C.J. p 904 note 27.

Nisi prius court has no authority to adopt rules in conflict with positive provisions of rules of practice and procedure adopted by supreme court, which apply uniformly, so far as applicable, to practice in *nisi prius* courts of record in state, except in municipal court of Chicago, and supersede local rules.—Winning v. Winning, 7 N.E.2d 750, 366 Ill. 57.

43. Fla.—Petition of Jacksonville Bar Ass'n, 169 So. 674, 125 Fla. 175—Wilhelm v. South Indian River Co., 124 So. 729, 98 Fla. 970—State v. Call, 22 So. 748, 89 Fla. 504.

44. Mich.—Detroit, G. R. & W. R. Co. v. Eaton Circuit Judge, 87 N.W. 641, 128 Mich. 495.

15 C.J. p 904 note 28.

45. Kan.—Jones v. Menefee, 28 Kan. 436.

15 C.J. p 904 note 29.

In New York appellate division of the supreme court in each department is empowered by Gen.Pract. Rules, rule 83 to make such further rules as may seem to be necessary.—Francis v. Watkins, 76 N.Y.S. 106, 72 App.Div. 15.

46. Mass.—Harding v. Brown, 117 N.E. 638, 227 Mass. 77.

Mich.—Kegel v. Schrenkheisen, 37 Mich. 174.

15 C.J. p 904 note 30.

Proceedings in land court

Generally under rule of land court, approved by supreme judicial court, proceedings before the land court are governed by rules of superior court so far as applicable.—U. S. Fidelity & Guaranty Co. v. English Const. Co., Mass., 20 N.E. 2d 939.

Effect of failure to submit

Failure of court of probate to submit, for approval of supreme judicial court, a rule prescribing form and mode of service on parent of notice of guardianship proceedings, as required by statute, did not do away with probate court's authority to require notice.—Harding v. Brown, 117 N.E. 638, 227 Mass. 77.

47. Miss.—Yazoo, etc., R. Co. v. Kirk, 58 So. 710, 834, 102 Miss. 41, 42 L.R.A., N.S., 1172, Ann.Cas. 1914C 968.

48. Cal.—Taylor v. De Vaughn, 266 P. 963, 91 Cal.App. 324.

D.C.—Doyne v. Werner, 48 App.D.C. 254.

Pa.—Dando v. Brobst, 177 A. 831, 318 Pa. 325.

49. Hawaii.—Territory v. Kapiolani, 20 Hawaii 548.

Pa.—Clayton v. Estate, 1 Chest.Co. 21.

establish the procedure to be followed by the courts, see supra § 170 a, and the power of courts to make rules for the conduct of their business, see supra § 170 b, are subject to the provisions of the constitution and statutes. Rules of court may be amended, repealed, or abolished by statute where the legislature has power to regulate the practice and procedure in courts, as stated infra § 179; but a rule of practice enacted by statute cannot, as stated infra § 176, be superseded by a rule of court.

In construing a statute conferring on a court the power to adopt rules of procedure, the general principle that the intent of the legislature must govern will be applied.⁵⁰

§ 172. Matters Subject to Regulation

- a. In general
- b. Jurisdiction and remedies
- c. Process

50. Okl.—Haddock v. Johnson, 194 P. 1077, 80 Okl. 250.

51. Wyo.—Harvey v. Stanolind Oil & Gas Co., 86 P.2d 735. 15 C.J. p 905 note 36.

52. Cal.—Ex parte Garner, 177 P. 162, 179 Cal. 409.

Wyo.—Harvey v. Stanolind Oil & Gas Co., 86 P.2d 735.

Where the statute is so uncertain that two interpretations thereof are possible, leading to quite different results, the practical effect is the same as if there were an entire absence of statutory regulation, and the court may prescribe appropriate rules of procedure.—Harvey v. Stanolind Oil & Gas Co., supra.

53. Mich.—Van Benschoten v. Fales, 85 N.W. 476, 126 Mich. 176.

54. U.S.—Mahr v. Upion Pac. R. Co., C.C.Wash., 140 F. 921, affirmed 170 F. 699, 96 C.C.A. 19.

55. Md.—Laurel Canning Co. v. Baltimore, etc., R. Co., 81 A. 126, 115 Md. 638.

Tex.—Duval County Ranch Co. v. Drought, Civ.App., 260 S.W. 298.

15 C.J. p 905 notes 41, 42.

While appellate division is reluctant to interfere with the control of the calendar of the justices of the trial and special terms, yet it will do so where their action is based on a misconception of rules established by the appellate division.—Lazarowitz v. Wolf Co., 180 N.Y.S. 699, 191 App.Div. 90.

Striking cause from calendar

Part of municipal court rule providing that, where party fails to comply with demand for bill of particulars, adverse party may make motion to strike cause from trial calendar, and that such motion shall be granted with costs, is in-

- d. Appeal and error
- e. Discretion of court

a. In General

The principle that courts may prescribe reasonable rules, not contravening the constitution or statutes, nor affecting substantive law, has been applied to rules regulating various matters of practice and procedure.

Only such matters as are not regulated by general or special laws in reference to practice and procedure,⁵¹ or which are inadequately provided for by such laws,⁵² may be regulated by a rule of court. Among matters which, subject to this principle and to the rules as to reasonableness and conformity to constitutional and statutory provisions, as set forth supra § 170 a, may be regulated by court rules are: Issuance of attachment;⁵³ notices of appearance;⁵⁴ calendars and dockets;⁵⁵ the publication of legal notices or trial lists;⁵⁶ application or petition for certiorari;⁵⁷ parties;⁵⁸ the necessity of plead-

valid as seeking to regulate matters specifically covered by rules of appellate division, and as contravening provision of municipal court code, providing that in matters of bills of particulars, procedure in municipal court code should be that prescribed in Civil Practice Act and rules adopted.—Cohen v. Smith, 294 N.Y.S. 470, 162 Misc. 192.

Rule of trial court cannot repeal statute or render nugatory its requirement for a call of the docket on appearance day or as soon thereafter as may be practicable.—Duval County Ranch Co. v. Drought, Tex. Civ.App., 260 S.W. 298.

56. Pa.—McGreevy v. Kulp, 17 A. 541, 126 Pa. 97.—Venango County v. Durban, 3 Grant 66. 15 C.J. p 905 note 43.

57. Cal.—Lavore v. Industrial Accident Commission, 84 P.2d 176, 29 Cal.App. 255.

Rules held valid

(1) The court rule requiring that an application for writ of certiorari to review an award of the industrial accident commission shall be accompanied by proof of service of a copy thereof on the commission and requiring application to state material evidence if application is based on want of evidence to support commission's conclusion does not conflict with constitutional provision that all decisions of the commission shall be subject to a review by the appellate courts.—Lavore v. Industrial Accident Commission, supra.

(2) In view of Civ.Code 1910 § 6140, in considering question of grant of petition for certiorari, and, if granted in disposing of case, supreme court will only consider questions raised in petition, rule of

supreme court as to petitions not being in conflict with Const. art 6 § 2 par 5.—Mitchell v. Owen, 127 S.E. 122, 159 Ga. 690, reversing 121 S.E. 699, 31 Ga.App. 649.

58. Ill.—Collateral Finance Co. v. Braud, 18 N.E.2d 392, 298 Ill.App. 130.

Rule held valid

The rule authorizing a partnership to sue or be sued in the partnership name is not one of substantive law but rather a matter of practice to be defined by the local authority, which the judges of the municipal court of Chicago are authorized to regulate by rules.—Collateral Finance Co. v. Braud, supra.

Rule held invalid

Civ.Pract.Act § 192, providing that new parties may be added, substituted, or dropped at any stage of cause, as needs of justice may require, cannot be limited by court rule.—U. S. Trust Co. of New York v. Greiner, 209 N.Y.S. 105, 124 Misc. 458, affirmed 212 N.Y.S. 931, 215 App.Div. 659.

Scire facias to bring in additional parties

(1) Where act which regulated joining of additional defendants by scire facias did not limit time for issuance of writ, matter was properly regulated by rules of common pleas court, provided limitation was reasonable.—Blessing v. Philadelphia Rapid Transit Co., 188 A. 578, 325 Pa. 12.—Megargee v. City of Philadelphia, 16 Pa.Dist. & Co. 588.

(2) Rule of court of common pleas requiring scire facias to bring in additional defendants to issue within thirty days of service of statement of claim was not abridgment of right conferred by scire

ings;⁵⁹ the form and sufficiency of pleadings;⁶⁰ of briefs;⁶¹ or of stipulations or agreements;⁶² presenting or filing pleadings, motions, or exceptions, and time therefor;⁶³ affidavits of merits or defense;⁶⁴ notice of counterclaims;⁶⁵ the manner of

making issues;⁶⁶ the effect of failure to deny averments in pleadings;⁶⁷ notice of motions;⁶⁸ change of venue, time of application, and proceedings therefor;⁶⁹ and matters which may be regulated by rules

facias act.—*Carroll v. Quaker City Cabs*, 162 A. 258, 303 Pa. 345.

(3) But such rule when unreasonable may be held invalid.—*Carroll v. Quaker City Cabs*, supra—*Weinstock v. City of Philadelphia*, 17 Pa. Dist. & Co. 411.

59. Ill.—*Weil v. Federal L. Ins. Co.*, 106 N.E. 246, 264 Ill. 425, Ann.Cas.1915D 944, affirming 182 Ill.App. 322.

60. Ill.—*City of Chicago v. Willoughby*, 128 N.E. 497, 294 Ill. 327—*American Credit Indemnity Co. of New York v. Yamer*, 170 Ill.App. 350.

15 C.J. p 905 note 46.

Rule held valid

Mun.C. Rules, rule 15, of Chicago, requiring the nature of a defense to be specified, does not conflict with the statutes of the state, because the Municipal Court Act provides that rules of pleading may be changed in actions in such court.—*Matthiessen v. Duntley*, 225 Ill.App. 249.

Demurrers

Under Code Civ.Proc. § 421, providing that code rules govern sufficiency of pleadings, it is inferentially intended by § 431, providing that demurrer must specify grounds thereof or be disregarded, that if demurrer does specify grounds authorized by § 430, defendant is entitled to have a ruling on the merits, and Super.C. Rules, rule 10 par 8, requiring notation of authorities on demurrer, but containing no penalties for refusal, could not override the statute so as to permit the court to refuse to pass on the demurrer by reason of the omission of the notation.—*Wigman v. Superior Court of California*, in and for Los Angeles County, 239 P. 427, 74 Cal.App. 132.

Striking out sham pleading

Practice Act giving court power to strike out sham pleading automatically gave life to rule authorizing commissioner of supreme court to strike out counterclaim as sham.—*Yale Electric Corporation v. Morrissey*, 148 A. 721, 106 N.J.Law 471.

61. Ind.—*Shoecraft v. Cain*, 23 Ind. 169.

62. Nev.—*Haley v. Eureka County Bank*, 22 P. 1098, 20 Nev. 410. 15 C.J. p 905 note 47.

63. Ky.—*Coombs Land Co. v. Lanier*, 300 S.W. 328, 222 Ky. 139. Mass.—*Crawford v. Roloson*, 160 N. E. 308, 262 Mass. 527.

Pa.—*Murta v. Reilly*, 118 A. 563, 274 Pa. 534—*Sork v. Trevor Dunham, Inc.*, 14 Pa. Dist. & Co. 526. W.Va.—*Teter v. George*, 103 S.E. 275, 86 W.Va. 454.

15 C.J. p 905 notes 48, 69.

Pleadings

(1) Rules of probate courts that day of appearance shall be return day of citation, unless court shall otherwise order, and, if respondent shall not appear and file answer, plea, or demurrer within fourteen days thereafter, petition shall be taken for confessed, and that respondent may, at any time before petition is taken for confessed, demur, plead, or answer to petition, which rules were authorized by statute, are valid.—*In re McNulty's Estate*, 195 N.E. 735, 290 Mass. 597.

(2) Rule of court authorizing judgment of non pros. unless declaration or statement when necessary is filed within three months after return day of writ is valid.—*Smith v. Ellwood City Ice Co.*, 166 A. 560, 311 Pa. 147.

(3) Court rule requiring a special plea, notice, or counterclaim to be filed not later than the fifth day before that on which any case is set for trial, except as otherwise provided by law, and making failure to file it on or before such day a bar on principle of waiver, is valid.—*Teter v. George*, 103 S.E. 275, 86 W. Va. 454.

(4) Court rule, limiting court's discretion in granting extensions of time for filing pleadings, is invalid because conflicting with statute.—*Bank of Beaverton v. Godwin*, 264 P. 356, 124 Or. 186.

(5) Municipal court rule providing that, where bill of particulars has not been served within ten days after demand, ex parte order of preclusion may be obtained, is void as in contravention of Municipal court code.—*Cohen v. Paprocki*, 286 N.Y.S. 26, 158 Misc. 465.

Motions

The right of one adversely affected by a verdict to move to set it aside at the same term at which it is returned, or any time before judgment is rendered thereon, should it not be rendered at the same term at which returned, may not be abridged or taken away by a rule of court denying the right to make such motion after two days from the return of the verdict, it not appearing that such abridgment of the right in any way facilitates the administration of the law.—

Kemble v. Wiltison, 114 S.E. 369, 92 W.Va. 32.

Exceptions

(1) Time and manner of excepting to rulings in counsel's absence are proper subjects for regulation by land court rule.—*Crawford v. Roloson*, 160 N.E. 303, 262 Mass. 527.

(2) In absence of express constitutional or legislative authority, supreme court of appeals has no power, by court rule, to supersede statutory provisions as to time for tendering and signing bills or certificates of exception and as to notice to opposite party.—*Virginia Home For Incurables v. Coleman*, 178 S.E. 908, 164 Va. 230.

(3) The requirement that exceptions be saved at the time of the rulings complained of cannot be satisfied or obviated by a rule or custom of the trial court purporting to dispense with the necessity of timely saving exceptions to adverse rulings.—*Tyon v. Wabash Ry. Co.*, 232 S.W. 786, 207 Mo.App. 322.

(4) Trial court's rule requiring counsel, when excepting, to specify wherein charge is defective, was held unreasonable, and hence invalid.—*Jefferson County Burial Soc. v. Cotton*, 133 So. 256, 223 Ala. 578.

64. Pa.—*Hogg v. Charlton*, 25 Pa. 200.

15 C.J. p 905 note 49.

65. Pa.—*American Structural Steel Co. v. Annex Hotel Co.*, 75 A. 669, 226 Pa. 461.

66. D.C.—*King v. Curtin*, 31 App. 23.

67. Pa.—*Blair v. Ford China Co.*, 26 Pa.Super. 374—*Easton Power Co. v. Sterlingworth R. Supply Co.*, 22 Pa.Super. 538.

68. S.D.—*Smith v. Hawley*, 78 N.W. 355, 11 S.D. 399.

69. Ind.—*State ex rel. Weaver v. Weir*, 4 N.E.2d 542, 210 Ind. 601—*State ex rel. Ray v. Veneman*, 200 N.E. 216, 209 Ind. 575.

15 C.J. p 905 note 56.

Court rules cannot limit, abrogate, or obstruct statutory right to change of venue.—*State ex rel. Weaver v. Weir*, 4 N.E.2d 542, 210 Ind. 601.

Rules held invalid

(1) As applied to affidavit for change of venue because of local prejudice and adversary's undue influence over citizens of county, court rule is invalid in so far as requiring that affidavit for change of venue, filed within five days before date for

include change⁷⁰ and interchange⁷¹ of judges; assignment and transfer of cases;⁷² rights of persons accused of crime;⁷³ recognizances for appearance by persons accused of crime and seeking a change of venue;⁷⁴ continuances;⁷⁵ dismissal or

discontinuance of actions;⁷⁶ making objections in writing;⁷⁷ depositions;⁷⁸ submission of civil causes on abstracts of record;⁷⁹ time,⁸⁰ place,⁸¹ and notice⁸² of trial or hearing; juries and jury trials;⁸³

trial, must show source of information, in view of constitutional prohibition against local or special laws providing for change of venue.—*State ex rel. Weaver v. Weir*, supra.

(2) Probate court rule providing that no change of venue shall be granted until issues in cause are closed is void as in conflict with statute making it mandatory on probate court to grant change of venue on proper motion and affidavit.—*State ex rel. Ray v. Veneman*, 200 N. E. 216, 209 Ind. 575.

(3) The right to obtain change of venue being conferred both by *Crawford & M.Dig.* § 3087 et seq. and Const. art 2 § 10, court rule requiring accused to file application for change on day preceding trial was beyond court's power.—*Clarkson v. State*, 264 S.W. 975, 165 Ark. 459.

70. Ind.—*Barber v. State*, 149 N.E. 896, 197 Ind. 88.

Time of motion

(1) Motion for change of judge cannot be rejected for failure to file in time, when reason for asking change was not known in time to comply with the rule.—*Barber v. State*, supra.

(2) Applicant for change of judges, whose motion is not presented in time, need not set out in his affidavit, to court's satisfaction, facts showing that motion was made as soon as reasonably possible after discovery of cause for asking change.—*Barber v. State*, supra.

71. Mo.—*Hargadine-McKittrick Dry Goods Co. v. Garesche*, 227 S.W. 824.

Request for interchange

The provision of Const. art 6 § 29, given legislative sanction by Rev.St. 1919 § 2440, authorizing a circuit judge to request a judge of another circuit to hold court for him, does not apply to judges of the same circuit court who, under §§ 2619, 2634, may make rules governing procedure, and a rule that judges "may interchange with each other or act for each other on request" is valid.—*Hargadine-McKittrick Dry Goods Co. v. Garesche*, supra.

72. Mo.—*State ex rel. Paramount Progressive Order of Moose v. Miller*, 273 S.W. 122, 216 Mo.App. 692.

Limitation of power

Circuit court of St. Louis has power to make rules regulating assignments and transfers of cases, which are merely to facilitate work of court and properly to apportion cases

between judges, but such court may not make or enforce rule narrowing or abridging any rights given litigants by statute law, in view of Rev. St. 1919 § 1356, permitting transfer of cases by stipulation of parties.—*State ex rel. Paramount Progressive Order of Moose v. Miller*, supra.

73. N.M.—*State v. Bogart*, 62 P.2d 1149, 41 N.M. 1.

Particular rights

Court rule cannot impair accused's right to fair trial, to remain silent and require state to prove guilt, to compulsory process for witnesses, to confront witnesses, and to counsel.—*State v. Pavelich*, 279 P. 1102, 153 Wash. 379.

Indictment or information

(1) Supreme court has power to make rules prescribing forms of indictment and information.—*State v. Bogart*, 62 P.2d 1149, 41 N.M. 1, followed in *State v. Wallace*, 62 P.2d 1150, 41 N.M. 3, and *State v. Joyce*, 62 P.2d 1150, 41 N.M. 4.

(2) Trial court rule making it unnecessary to allege venue in indictment or information was held not void as in conflict with constitutional provision that accused shall have a speedy public trial by impartial jury of county or district in which offense is alleged to have been committed.—*State v. Bogart*, supra.

74. Iowa.—*State v. Ensley*, 10 Iowa 149.

75. Ky.—*Conrad Schopp Fruit Co. v. Bondurant*, 121 S.W. 482, 134 Ky. 568.

Custom of municipal court to continue cases from term to term, when deemed by court advisable, was held reasonable.—*Smith v. Tallman*, 175 A. 857, 87 N.H. 176.

76. Ill.—*Ptacek v. Coleman*, 5 N.E. 2d 467, 364 Ill. 618, affirming 279 Ill.App. 639.

Iowa.—*Workman v. District Court, Delaware County*, 269 N.W. 27, 222 Iowa 364.

Mass.—*Cheney v. Boston & M. R. Co.*, 141 N.E. 502, 246 Mass. 502. Mich.—*Pear v. Graham*, 241 N.W. 865, 258 Mich. 161.

Pa.—*Lamb v. Greenhouse*, 59 Pa. Super. 329.

77. Me.—*Maberry v. Morse*, 43 Me. 176.

78. Wash.—*State v. Superior Court for King County*, 267 P. 770, 148 Wash. 1.

Rule held valid

Court rule permitting taking testimony of witness by deposition

when he is party to action or an officer, agent, etc., of party does not invade realm of substantive law.—*State v. Superior Court for King County*, supra.

Rule held invalid

Court rule requiring that deposition, when completed, be read to witness and subscribed by him, is void as imposing requirements additional to statutory requirements for depositions.—*Broome County Farmers' Fire Relief Ass'n v. New York State Electric & Gas Corporation*, 263 N. Y.S. 131, 239 App.Div. 304, affirmed 191 N.E. 591, 264 N.Y. 614.

79. Fla.—*Smith v. Guckenheimer*, 27 So. 900, 42 Fla. 1.

80. Ala.—*Rochell v. City of Florence*, 182 So. 50, 236 Ala. 313.

Ky.—*Hall v. Eversole's Adm'r*, 64 S. W.2d 891, 251 Ky. 296.

Pa.—*In re Road in Hampton Tp.*, 72 Pa.Super. 484.

W.Va.—*Hall v. O'Brien*, 124 S.E. 507, 97 W.Va. 77.

15 C.J. p 906 note 63.

81. Ala.—*Rochell v. City of Florence*, 182 So. 50, 236 Ala. 313.

Division of court in which suit triable

Order or rule of supreme court requiring all civil jury cases in district court for parish of Orleans to be tried in particular division of that court entered under authority of Const. 1921 art 7 §§ 12, 80, is valid, notwithstanding its conflict with Code Pract. art 608, requiring cases to annul judgments to be heard before division entering judgment, and, where jury trial in such case was granted, cause should at once have been transferred to division specified.—*Brott v. New Orleans Land Co.*, 101 So. 150, 156 La. 807.

82. Cal.—*Hayden v. Los Angeles County Super. Ct.*, 133 P. 26, 22 Cal.App. 23.

83. Ala.—*Smith v. Louisville & N. R. Co.*, 123 So. 57, 219 Ala. 676. 15 C.J. p 906 note 64.

Right to, and demand for, jury

(1) Chancellors possess inherent power to make reasonable rules with reference to demanding of jury trials and presenting issues therefor in the chancery courts; and a rule which requires "that application for a jury must be made within the first three days of the trial term" is reasonable or a rule requiring the jury to be demanded on or before the second day of the term is reasonable.—*Stepp v. Stepp*, 11 Tenn.App. 578.

instructions;⁸⁴ and time for presenting special instructions⁸⁵ or interrogatories⁸⁶ to the jury; findings and conclusions of law and requests therefor;⁸⁷ arguments of counsel;⁸⁸ exceptions to audi-

tors' reports;⁸⁹ affidavits to accompany exceptions to an account;⁹⁰ applications for rehearing;⁹¹ judgments or decrees generally and by default;⁹²

(2) Chancery court could not deprive a defendant who has demanded a jury trial in his answer of the right to such trial given him by statute, although defendant had not complied with rule of court requiring defendant to demand a jury by a motion in court after joinder of issue, such statute being mandatory, and such rule of court being in conflict therewith.—*World Granite Co. v. Morris Bros.*, 222 S.W. 527, 142 Tenn. 665.

(3) Circuit court rule requiring defendant in criminal case to make request, five days before trial, for a jury is repugnant to state laws.—*Graves v. State*, 178 N.E. 233, 203 Ind. 1.

(4) Trial court rule that failure to demand jury of more than six in original demand for jury constitutes waiver of jury of twelve is invalid because in conflict with valid general law.—*Cleveland Ry. Co. v. Halliday*, 188 N.E. 1, 127 Ohio St. 278, following *Busher v. Macek*, 190 N.E. 200, 127 Ohio St. 554, affirming *State ex rel. Macek v. Busher*, 187 N.E. 874, 46 Ohio App. 148.

List for struck jury

Court may adopt rule, or, in absence of rule, presiding judge may make general order for guidance of clerk in furnishing list for struck jury.—*Smith v. Louisville & N. R. Co.*, 123 So. 57, 219 Ala. 676.

Peremptory challenges

No warrant exists for a rule requiring peremptory challenges to be made by writing the juror's name on a slip of paper and passing it up to the trial judge, no record thereof being made.—*People v. Lytle*, 167 P. 552, 34 Cal.App. 360.

84. Ill.—*People v. Jennings*, 144 N. E. 316, 312 Ill. 606.

Rules held valid

(1) Where there was no legislative rule on the subject, supreme court had power to provide by rule that in criminal cases court should instruct jury in accordance with section of Civil Practice Act.—*People v. Callopy*, 192 N.E. 634, 358 Ill. 11.

(2) Circuit court rule providing that exceptions to giving and refusing of instructions will be considered as waived, unless expressly saved to each ruling at the time, does not violate Rev.St.1919 § 1459.—*Elchwedel v. Metropolitan Life Ins. Co.*, 270 S.W. 415, 216 Mo.App. 452.

(3) Court rule abrogating statute requiring court to instruct that no inference of guilt shall arise from accused's failure to testify does not

invade the realm of substantive law, and is valid.—*State v. Pavelich*, 279 P. 1102, 153 Wash. 379.

Rules held invalid

(1) Rule of practice enacted by legislature providing that written charges moved for by either party must be given or refused in terms in which they are written by judge, who must write "given" or "refused" on charge and sign his name thereto, could not be changed by rule of circuit court.—*Porter v. State*, 174 So. 311, 234 Ala. 11, answer to certified question conformed to 174 So. 313, 27 Ala.App. 441, followed in 174 So. 315, 234 Ala. 226, denying certiorari 174 So. 313, 27 Ala.App. 441.

(2) The statute requiring judges to write out their charges and read them to jury, when requested to do so, is mandatory, and failure to comply with such request was error requiring new trial, even though court rule provided that judge was not required to reduce charge to writing, since rule is in conflict with statutes, and in such cases statutes must prevail.—*Dixon v. Evans*, 193 S.E. 470, 56 Ga.App. 583.

(3) A rule limiting instructions to a given number is unreasonable.—*Chicago City R. Co. v. Sandusky*, 64 N.E. 990, 198 Ill. 400.

85. Ill.—*Locander v. Joliet & Eastern Traction Co.*, 225 Ill.App. 143, 15 C.J. p 906 note 65.

Rules held invalid

(1) District court rule requiring that plaintiff ask special instructions when closing evidence is invalid.—*Mulford v. Bamberger Electric R. Co.*, 287 P. 929, 76 Utah 186.

(2) Nisi prius court cannot fix any particular time during progress of trial at which written charges moved for by either party must be presented to judge for his consideration, but judge must consider such charges when presented, and must mark charges "given" or "refused," as required by statute, some time prior to retirement of jury to consider case.—*Porter v. State*, 174 So. 311, 234 Ala. 11, answer to certified question conformed to 174 So. 313, 27 Ala.App. 441, followed in 174 So. 315, 234 Ala. 226, denying certiorari 174 So. 313, 27 Ala.App. 441.

86. Ind.—*Ollam v. Shaw*, 27 Ind. 388.

87. Kan.—*Schuler v. Collins*, 65 P. 662, 63 Kan. 372.

Requests for findings

A rule of court that a request for special findings of fact must be made at the opening of the trial is

reasonable.—*Clark Inv. Co. v. Cunningham*, 197 P. 212, 108 Kan. 703—*Schuler v. Collins*, 65 P. 662, 63 Kan. 372.

Rule held invalid

A court rule depriving a litigant of the right to have the trial court file his findings of fact and conclusions of law given by statute, is unconstitutional.—*Galveston, H. & S. A. Ry. Co. v. Stewart & Threadgill*, Tex.Com.App., 257 S.W. 526, affirming *Stewart & Threadgill v. El Paso & S. W. Co.*, Civ.App., 207 S.W. 594.

88. Neb.—*Schmidt v. Boyle*, 74 N. W. 964, 54 Neb. 387.
15 C.J. p 906 note 67.

Objections to arguments

District court rule permitting objections to closing arguments to be taken at close thereof, where such arguments are reported, was not objectionable as unreasonably affecting work of supreme court on appeal.—*Jovaag v. O'Donnell*, 249 N.W. 676, 189 Minn. 315.

89. Pa.—*In re Mylin*, 7 Watts 64.

90. Pa.—*Peck's Appeal*, 11 Wkly.N. C. 31.

91. La.—*Brooks v. Dolard*, McG. 279.

N.Y.—*Burch v. Newberry*, 3 How.Pr. 271, 1 Code Rep. 41.

92. Ill.—*City of Chicago v. Willoughby*, 128 N.E. 497, 294 Ill. 327.

Mass.—*Kaufman v. Buckley*, 188 N. E. 607, 285 Mass. 83.

15 C.J. p 905 note 52, p 906 note 73.

Rules held valid

(1) Rule requiring presentation of motion, orders, or judgments to opposing counsel before clerk's entry is reasonable.—*Coombs Land Co. v. Lanier*, 300 S.W. 328, 222 Ky. 139.

(2) Superior court rule requiring lapse of ten days before final judgment, where demurrer is sustained, was held valid.—*Kaufman v. Buckley*, 188 N.E. 607, 285 Mass. 83.

Rules held invalid

(1) Circuit court rule requiring notice to adverse party of motion was held invalid as applying to motions for default judgment because conflicting with statute.—*Dorman v. Wheeler*, 51 S.W.2d 941, 244 Ky. 628.

(2) Where defendant's motions to set aside default and judgment were duly filed in accordance with statute, order striking motion for failure to comply with court rule requiring party to note in motion docket number of case was properly annulled, since court rules could not nullify

motions for new trial⁹³ and errors to be considered on such motions;⁹⁴ issuance of *capias ad satisfaciendum*;⁹⁵ stays of execution;⁹⁶ the examination of debtors in supplementary proceedings;⁹⁷ records to

be kept by the clerk;⁹⁸ the time within which cases shall be noted for settlement;⁹⁹ fees and costs,¹ including motions to require security for costs;² procedure in divorce suits,³ procedure in ejectment

statute.—*Tate v. Dell*, 269 N.W. 371, 222 Iowa 635.

(3) Court order prohibiting judgment on amicable actions in ejectment, without rule to show cause, is invalid as contrary to statute.—*Equipment Corporation of America v. Primos Vanadium Co.*, 132 A. 360, 285 Pa. 432.

(4) The municipal court of Philadelphia may not by rule of court authorize the entry of judgment by default, for want of a sufficient affidavit of defense, in actions of trespass.—*Smith v. Wertheimer*, 76 Pa. Super. 210.

In Alabama a circuit court rule allowing submissions for decree on demurrer without notice was held void as inconsistent with chancery practice rule.—*Stuckey v. Murphy*, 138 So. 289, 224 Ala. 8.—*Spear v. Virginia-Carolina Chemical Corporation*, 136 So. 805, 223 Ala. 448.

93. Mass.—*Vengrow v. Grimes*, 174 N.E. 505, 274 Mass. 278.

Rule held valid

Court rule requiring facts to be set forth and verified in motion for new trial for newly discovered evidence was held valid.—*Vengrow v. Grimes*, supra.

Time for motion

Rule of municipal court of Chicago providing that if motion for new trial is not made orally immediately after verdict in presence of the parties, it should be made in writing within five days after entry of verdict, does not affect validity of statute giving municipal court power to modify every final judgment, order or decree during same term, within thirty days, and hence municipal court of Chicago had right to grant written motion to vacate judgment and grant new trial, although motion was made twenty-five days after entry of judgment.—*Locke v. Feinberg*, 111 App., 28 N.E.2d 400.

94. Tenn.—*Jacks v. Williams-Robinson Lumber Co.*, 140 S.W. 1066, 125 Tenn. 123.

95. Ill.—*Wilson v. Gill*, 279 Ill.App. 487.

Rule held valid

Municipal court rule, providing that a *capias ad satisfaciendum* shall not be issued by the clerk of court without a special order of court, is a rule of practice, is not inconsistent with the constitution or with any statute in relation to substantive law, provides merely that the application for the writ shall be made in the first instance to the court rather

than to the clerk, is reasonable and proper, and is binding both on the clerk and on a judgment creditor seeking the writ.—*Wilson v. Gill*, supra.

96. Mich.—*Ismond v. Scougale*, 78 N.W. 546, 119 Mich. 501.

97. U.S.—*Walker v. Monad Engineering Co.*, N.Y., 196 F. 206, 116 C.C.A. 38.

98. Colo.—*Crump v. People*, 2 Colo. 316.

99. Kan.—*Jones v. Menefee*, 28 Kan. 436.

1. Ill.—*Huber v. Van Schaack-Mutual*, 13 N.E.2d 179, 368 Ill. 142. Mich.—*Behr v. Baker*, 241 N.W. 229, 257 Mich. 487.

15 C.J. p 907 note 80.

Rules held valid

(1) Under statute vesting in the chancellor for the court of chancery and in majority of other state judges for the supreme court and other courts, "full power and authority" to make regulations for the payment of costs, the word "costs" was used in a broad and comprehensive sense, and statute was intended to grant an extensive authority with respect to the payment of costs and to making of rules with respect to payment of expense of matters customarily essential to appeals.—*Peyton v. William C. Peyton Corporation*, Del., 8 A.2d 89.

(2) The Chicago municipal court has the power to adopt a rule providing that, if plaintiff has paid a six dollar jury fee and has consented to a trial by six jurors, a defendant desiring case to be tried by jury of twelve must pay an additional six dollar jury fee.—*Huber v. Van Schaack-Mutual*, 13 N.E.2d 179, 368 Ill. 142.

(3) Court rule under which premium paid for bond to stay proceedings pending appeal was taxable as costs is valid.—*Behr v. Baker*, 241 N.W. 229, 257 Mich. 487.

Rules held invalid

(1) Under St.1921 p 1520 § 17 subd 5, providing that no undertaking shall be required from, or costs charged against, state comptroller in inheritance tax proceedings, where judgment of reversal in inheritance tax case made no provision for costs, clerk's remittitur providing that appellants, taxpayers, recover costs of appeal was error, Sup.Ct.Rules, rule 23 not controlling as against statute, and on proper motion remittitur will be recalled and such provision stricken.—In re *Steehler's Estate*, 239 P.

718, correcting remittitur 233 P. 972, 195 Cal. 386.

(2) A county court rule providing that a separate appearance fee shall be paid by every property owner objecting to the sale of property on application for judgment by the county collector for delinquent general taxes is contrary to Hurd Rev.St. 1912 § 33 c 53.—*People v. Campbell*, 204 Ill.App. 226.

(3) Circuit court rule requiring payment in advance for docketing appeal from justice was held unauthorized.—*Rusinko v. Shipman*, 162 S.E. 316, 111 W.Va. 402.

(4) Assuming that, under Lord L. § 916, the circuit court, in the absence of statute, can by rule require the payment of the jury fee four days before the cause is called to be set for trial under penalty of losing the right to a jury trial, such a rule violates Lord L. § 1117, as amended by L.1915 p 91, requiring the clerk to collect such fee at the time the action, suit, or proceeding comes on for trial by jury, especially as the amendment eliminated a provision for payment two or four days before the case was called.—*Schnitzer v. Stein*, 189 P. 984, 96 Or. 343.

2. Ind.—*Fancoast v. Travelers Ins. Co.*, 79 Ind. 172.

3. Mass.—*Diggs v. Diggs*, 196 N.E. 858, 291 Mass. 399.

Rules held valid

(1) Probate court rule that on filing of statement of objection within six months after entry of decree nisi in divorce case no decree absolute shall be entered because of mere efflux of time without some judicial disposition of objections is a valid rule, preventing decree nisi from becoming decree absolute by lapse of time, notwithstanding longer period than six months has elapsed after statement of objections has been filed until objections have been disposed of.—*Diggs v. Diggs*, supra.

(2) Superior court had authority to establish Divorce Rules, rule 6, providing that before six months from granting of decree of divorce nisi libelee or other interested party may file statement of objections to absolute decree, and that such decree shall not become absolute until such objections have been disposed of, and rule has force of law.—*Feldman v. Feldman*, 119 N.E. 681, 230 Mass. 330.

(3) A rule of court providing that in divorce cases "when the respondent is not within the county, but is within the state, the sheriff shall

suits,⁴ and in actions of replevin,⁵ and various other matters of practice and procedure.⁶

Evidence. While rules of court as to the admission and recognition of evidence, not involving questions of substantive law, have been held valid,⁷ rules which attempt to control the rights of parties in the matter of evidence admissible under the general principles of law are invalid.⁸

deputize the sheriff of the county where the respondent may be found to make the service, and shall return that the respondent cannot be found within this county, and that he deputized the sheriff of such other county to make the service; and shall attach thereto the affidavit of the officer making the service", is a reasonable and proper rule and one which the court has power to make by virtue of Divorce Law of May 2, 1929 § 66.—*Knowles v. Knowles*, 5 Schuykill Reg. 242.

(4) Rule for ex parte hearing where respondent has been duly served and fails to file answer within prescribed time is valid.—*Smith v. Smith*, 16 Pa. Dist. & Co. 414, 29 Schuykill Leg. Rec. 191.

4. N.J.—*Guardian Life Ins. Co. of America v. Rita Realty Co.*, 5 A.2d 45, 17 N.J. Misc. 87.

5. Pa.—*Russ Soda Fountain Co. v. Victor Pastry Shoppe*, 190 A. 376, 125 Pa. Super. 452.

Rules held valid

(1) Court rule relating to procedure in actions of replevin, where defendant claims lien or has distrained property for rent, is authorized by statute.—*Ricci v. Felino*, 173 A. 825, 113 Pa. Super. 259.

(2) Rule of court relative to asserting claim of lien on replevied property in affidavit of defense is not consistent with law regulating replevin.—*Katz v. Wagoner*, 92 Pa. Super. 363.

Contempt of court

(1) The statute giving municipal court judges power to adopt rules regulating practice in such court in addition to statutory provisions prescribing practice therein authorized their adoption of rule that failure of defendant in replevin to deliver replevied property to court bailiff should be deemed contempt of court.—*Universal Credit Co. v. Antonsen*, 22 N.E.2d 790, 301 Ill. App. 334, transferred 19 N.E.2d 366, 370 Ill. 509.

(2) The Chicago municipal court rule, that failure of defendant in replevin to deliver replevied property to court bailiff shall be deemed contempt of court, is not rule of substantive law, but purely practice rule within statute empowering municipal court judges to adopt practice rules.—*Universal Credit Co. v. Antonsen*, supra.

(3) Such rule is not invalid as in conflict with Replevin Act.—*Universal Credit Co. v. Antonsen*, supra.

(4) Nor is it invalid as in conflict with general laws of state, as it is in addition thereto.—*Universal Credit Co. v. Antonsen*, supra.

(5) The judge of Chicago municipal court could reasonably deem rule adopted by the judges, that failure of defendant in replevin to deliver concealed property described in writ to court bailiff, should be deemed contempt of court necessary and expedient for proper administration of justice within statute authorizing such judges to adopt practice rules deemed necessary or expedient for such purpose, as such rule gives remedy in addition to those provided by statute to discourage concealment of property and disobedience of court's commands.—*Universal Credit Co. v. Antonsen*, supra.

6. Ill.—*Wilson v. Gill*, 279 Ill. App. 487.

La.—*Capital City Auto Co. v. Folse*, 92 So. 300, 151 La. 689.

Mass.—*Wilson v. Checker Taxi Co.*, 161 N.E. 803, 263 Mass. 425.

Minn.—*Jovaag v. O'Donnell*, 249 N. W. 676, 189 Minn. 315.

15 C.J. p 907 note 81.

Agreements between attorney and client

(1) Court rule requiring agreement between attorneys or parties touching suit to be in writing or made in open court and entered of record is valid.—*Billington v. National Standard Life Ins. Co.*, Tex. Civ. App., 68 S.W.2d 239.

(2) Court rule, in effect inhibiting making contingent fee contracts between attorneys and clients, and thus depriving party of substantive right to contract, was held invalid.—*Shannon v. Cross*, 222 N.W. 168, 245 Mich. 220.

District in which suit must be brought

(1) Power given by Municipal Court Code § 8, to the justices of that court to adopt rules, does not authorize one requiring actions for rent to be brought in the district in which the premises are located, this contravening § 17, requiring an action to be brought in a district in which a party resides.—*People ex*

b. Jurisdiction and Remedies

Court rules which enlarge or diminish the constitutional or statutory jurisdiction of a court, or which purport to give new remedies or to extend or curtail existing ones, are invalid.

The jurisdiction of a court as conferred by the constitution or statute cannot be enlarged or diminished by a rule of court,⁹ such as a rule dispensing

rel. *Nassoit v. Young*, 186 N.Y.S. 334, 195 App. Div. 513.

(2) Municipal Court Code § 17 subd 5, providing that nothing in that section, as to the division of the court in which actions must be brought, shall prevent the justices designating a part of the court where special classes of actions shall be brought, authorizes only the establishment of parts of the court in each district for such purpose, and not a rule requiring a certain class of cases to be brought in a district other than required by the section.—*People ex. rel. Nassoit v. Young*, supra.

Motion for directed verdict

Super. Ct. Rules, 1923, rule 44, requiring motion for directed verdict to be separate matter, dissociated from requests for instructions, is proper requirement, and within power of court to adopt, under Gen. L. c 213 § 3.—*Carp v. Kaplan*, 146 N.E. 779, 251 Mass. 225.

Reporting argument of counsel

Provision of district court rule requiring party requesting reporting, as distinguished from transcribing, of counsel's argument, to pay reporter therefor, was held invalid.—*Jovaag v. O'Donnell*, 249 N.W. 676, 189 Minn. 315.

Report of master in equity

Superior court rule requiring master to append to his report summaries of evidence necessary to enable court to determine whether evidence was sufficient in law to support findings is valid exercise of power to regulate procedure and practice in equity confirmed in superior court, binds parties, master, and court, and is to be made effective in all its parts according to their true meaning and intent.—*Morin v. Clark*, Mass., 6 N.E.2d 830.

7. Me.—*Sellers v. Carpenter*, 27 Me. 497.

Md.—*Gist v. Drakely*, 2 Gill 330, 41 Am. Dec. 426.

15 C.J. p 906 note 61.

8. Wash.—*State v. Pavelich*, 279 P. 1102, 153 Wash. 379.

15 C.J. p 906 note 61 [c]—[e].

9. U.S.—*Standish v. Gold Creek Mining Co.*, C.C.A. Mont., 92 F.2d 662, certiorari denied *Gold Creek Mining Co. v. Standish*, 58 S.Ct. 476, 302 U.S. 765, 82 L.Ed. 594—*U. S. v. National City Bank of New*

with process, or otherwise conflicting with fundamental rights in reference thereto, see *infra* § 172 c; nor can powers designed to be exercised by the court be transferred to any other body in this manner.¹⁰

The rule-making power of a supreme court does not extend to a modification or limitation of the jurisdiction of any other court as fixed by law,¹¹ nor can a supreme court prescribe rules of procedure which will preclude any court from exercising judicial functions in a matter in which jurisdiction is properly invoked.¹²

Remedies. Rules of practice and procedure adopted under a practice act are strictly limited to carrying legislation into effect and cannot give new remedies or extend or curtail existing ones.¹³

c. Process

Court rules regulating process are valid only when

York, C.C.A.N.Y., 83 F.2d 236, 106 A.L.R. 1235, affirming, D.C., State of Russia v. Bankers Trust Co., 4 F.Supp. 417, certiorari denied U. S. v. National City Bank of New York, 57 S.Ct. 25, 299 U.S. 563, 81 L.Ed. 414.

Cal.—Helbush v. Helbush, 290 P. 18, 209 Cal. 758.

Ill.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

La.—Bell v. O'Rourke, 11 La. 124.

Mich.—Ray Jewelry Co. v. Darling, 231 N.W. 101, 251 Mich. 157.

Okl.—Oklahoma Pipe Line Co. v. State Industrial Commission, 293 P. 180.

Va.—Virginia Home for Incurables v. Coleman, 178 S.E. 908, 912, 164 Va. 230, quoting *Corpus Juris*.

15 C.J. p 907 note 82.

Substituting general for limited jurisdiction

That a court of limited jurisdiction may exercise its discretion in use of rules of practice of court of general jurisdiction does not substitute, nor authorize court to substitute, general jurisdiction for limited jurisdiction specified by statute.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

Retrial of facts

Jurisdiction of supreme court cannot be enlarged to permit retrial of facts by it.—Dexter Yarn Co. v. American Fabrics Co., 129 A. 527, 102 Conn. 529.

10. Md.—Mitchell v. Mitchell, 1 Gill 66.

11. Ariz.—Collins v. Superior Court in and for Maricopa County, 62 P. 2d 131, 48 Ariz. 381.

Tex.—Brown v. Hooks, 299 S.W. 228, 117 Tex. 155.

12. Tex.—State v. Scranton Independent County Line School Dist., Com.App., 285 S.W. 601, affirming

Scranton Independent School Dist. v. State, Civ.App., 277 S.W. 435.

13. Conn.—Ackerman v. Union & New Haven Trust Co., 100 A. 22, 91 Conn. 500.

Mich.—Jones v. Eastern Michigan Motorbuses, 283 N.W. 710, 724, 287 Mich. 619, quoting *Corpus Juris*.

14. Utah.—In re Evans, 130 P. 217, 42 Utah 282, reversing 62 P. 913, 22 Utah 366, 53 L.R.A. 952, 83 Am.S.R. 794.

15. Ill.—Cohen v. Bendix, 17 N.E.2d 12, 369 Ill. 507.—Danoff v. Larson, 15 N.E.2d 290, 368 Ill. 519.

N.Y.—Juskowitz v. Stern, 283 N.Y.S. 955, 158 Misc. 28.

Regulating fundamental rights

Notice or process of some kind is a fundamental right and is jurisdictional in nature and not a mere matter of practice to be regulated by a rule of a court which does not have common-law jurisdiction.—Wilmington Trust Co. v. Baldwin, Del. Super., 195 A. 287.

Rule held valid

Where a statute provides that a nonresident defendant in a chancery suit may be served with the subpoena by publication thereof in a newspaper within the state, and by posting it at the courthouse door, the court may further provide by rule that, where the residence of defendant is stated, either in the bill, or in the affidavits to obtain publication, the register shall inclose to him by mail within forty days from the time of making the order a copy of the order posted up at the courthouse. Such a rule is valid and will be enforced.—Butler v. Butler, 11 Ala. 668.

Rules held invalid

(1) Since the acts necessary to give jurisdiction as specified by stat-

they do not contravene the statutes nor affect fundamental or substantive rights.

Courts of general and superior jurisdiction have inherent power to control and recall their process,¹⁴ and may make rules governing the issuance and service thereof, not contravening statutory regulations nor affecting principles of substantive law.¹⁵

d. Appeal and Error

Reasonable rules of court regulating practice and procedure with respect to appeal or error are valid if not in contravention of the constitution or statutes.

Subject to the principle that rules of court must not contravene constitutional or statutory provisions nor regulate substantive rights, courts may, especially where the legislature has provided no mode of procedure, adopt reasonable rules of practice with respect to appeals and writs of error,¹⁶ such as the time within which the proceeding for review must

ute cannot be added to, or limited by, a rule of court, compliance with Code Civ.Proc. § 413, in mailing summons to a defendant whose residence is known, will not be affected by failure to observe a rule of court requiring such mailed documents to be registered.—Klokke Inv. Co. v. Superior Court in and for Los Angeles County, 179 P. 728, 39 Cal.App. 717.

(2) Adoption of district court rule eliminating personal service on respondents in irrigation company's proceeding for change in point of diversion was beyond court's jurisdiction.—San Luis Valley Irrigating Dist. v. Centennial Irrigating Ditch Co., 272 P. 9, 84 Colo. 502.

(3) A municipal court rule that such court may direct service of summons in such manner as it deems proper in case of officer's inability to make due service thereof is void as authorizing each judge of such court to make whatever orders he sees fit in each case in violation of act authorizing majority of judges to make rules.—Danoff v. Larson, 15 N.E.2d 290, 368 Ill. 519.

(4) A rule providing that an application to the court to raise any jurisdictional question shall be deemed an appearance, and no further process shall be necessary to bring the party into court, is invalid. Jurisdiction over a person can never be acquired, unless by a method which the law specifically provides, or by consent of the party himself. If the legal method has not been employed and the party expressly refuses his consent, an assumption of jurisdiction by the court will be purely arbitrary.—Huff v. Shepard, 58 Mo. 242.

16. Ark.—Harrison v. Tradee, 27 Ark. 59.

Cal.—Silva v. Co-Operative Dairy-men's League, 42 P.2d 370, 5 Cal.

be taken or exceptions be presented,¹⁷ and such | as the time within which the notice of appeal

App.2d 294—Johnson v. Superior Court of San Bernardino County, 250 P. 686, 79 Cal.App. 650.

Ill.—People, for Use of Tindall v. London & Lancashire Indemnity Co. of America, 14 N.E.2d 289, 294 Ill.App. 619.

Mich.—Attorney General v. Lane, 243 N.W. 6, 259 Mich. 283, certiorari denied Lane v. Voorhies, 53 S.Ct. 115, 237 U.S. 654, 77 L.Ed. 565.

Pa.—Rutenberg v. City of Philadelphia, 196 A. 73, 329 Pa. 26.

Tex.—Glenn v. McCarty, 110 S.W.2d 1148, 130 Tex. 641, denying rehearing 107 S.W.2d 363, 130 Tex. 641, dismissing application 103 S.W.2d 1098—Stillman v. Hirsch, 99 S.W.2d 270, 128 Tex. 359, affirming, Civ.App., 84 S.W.2d 501—The Praetorians v. Redmon, Civ.App., 93 S.W.2d 607, reversed on other grounds, Com.App., 123 S.W.2d 644.

15 C.J. p 907 note 77.

Prerequisites to writ of error to intermediate court

The statutes governing applications for writs of error do not manifest intent to furnish a complete standard for such applications nor to override supreme court rule requiring motion for rehearing to be filed in court of civil appeals as a prerequisite thereto.—Glenn v. McCarty, 110 S.W.2d 1148, 130 Tex. 641, denying rehearing 107 S.W.2d 363, 130 Tex. 641, dismissing application 103 S.W.2d 1098.

Appeal from department of registration

In absence of statute regulating procedure on appeal from order of director of department of registration revoking license of physician and surgeon, supreme court has authority and duty to define procedure.—Baker v. Department of Registration, 3 P.2d 1082, 78 Utah 424.

Land court rule

(1) Rule that no statement other than that in bill of exceptions, that party excepts to ruling, need be filed, was held not invalid as contrary to superior court rule.—Crawford v. Roloson, 160 N.E. 303, 262 Mass. 527.

(2) Land court rule that no other statement of exception to ruling in counsel's absence than that in bill of exceptions need be filed was reasonable.—Crawford v. Roloson, *supra*.

Supersedeas bonds

A rule of the supreme court, although not requiring every supersedeas bond to be conditioned on payment of condemnation money, does not violate Const. art. 4 § 27, requiring that supersedeas bonds give sufficient security for payment of condemnation money or to abide decree.—Ownbey v. Morgan, Del., 105

A. 838, 7 Boyce, 297, affirming Morgan v. Ownbey, 100 A. 411, 6 Boyce, 379.

Presentation of grounds of review

District court rule, precluding review of sufficiency of evidence, unless request for ruling with specifications of grounds be filed, was within court's power.—Holton v. American Pastry Products Corporation, 174 N.E. 663, 274 Mass. 268.

Exceptions and notice of filing

(1) Circuit court rule, by which all exceptions to adverse rulings from the court are considered saved as a matter of course, the exception to be noted by the reporter transcribing the testimony and to be inserted in the bill of exceptions, is not violative of Rev.St.1919 § 1459, providing that, whenever either party shall except to the opinion of court, and shall write the exception and pray the court to allow and sign it, the court shall sign the bill, if true.—State ex rel. Brockman Mfg. Co. v. Miller, Mo., 241 S.W. 920.

(2) Rule of superior court requiring notice in writing to adverse party of filing of exceptions is within power of court under Rev.Laws c 158 § 3 c 173 § 106; and such rule and practice of dismissal of exceptions for want of compliance therewith does not violate constitutional rights of party whose exceptions are dismissed.—Day v. McClellan, 128 N. E. 412, 236 Mass. 330.

Settling record

Where record cannot be settled in any of the manners provided by Laws 1913 c 178, no court except the supreme court can prescribe any special rule or direction for the settling of the record for the purpose of a new trial or an appeal under § 6 of such act.—Kremer v. Public Drug Co., 168 N.W. 57, 40 S.D. 524.

Presenting report of proceedings at trial

The rules of the supreme court and the court of appeal effective Aug. 1, 1938, providing that report of proceedings at trial shall be presented within fifty days from day notice of appeal is filed instead of within fifty days as was formerly provided, were applicable in action in which notice of appeal was filed Aug. 29, 1938, notwithstanding amendment of rules had not been published in official bound volume of opinions of supreme court, where amendment to rules had been published several times in legal publications of general circulation among lawyers prior to date when notice of appeal was filed.—Stribling v. Grace, Ill.App., 22 N.E.2d 719.

Trial de novo

Court rule requiring litigant on appeal to try case on transcript of

evidence, supplemented by oral evidence, does not accord litigant constitutional right to trial de novo.—Dehmer v. Campbell, 180 N.E. 267, 124 Ohio St. 634.

Prohibiting reversal for technical error

Rule prohibiting reversals for technical errors, and requiring appellant to show prejudice from erroneous rulings, when construed so as not to apply to fundamental errors, is constitutional.—Golden v. Odiorne, 249 S.W. 822, 112 Tex. 544.

Contravention of statute

(1) A circuit court rule that no party who fails to have proceedings reported shall be entitled to have a bill of exceptions filed by court could not change or vary terms of general statutes as to bills of exceptions.—Steiner Bros. v. Slifkin, 186 So. 156, 237 Ala. 226.

(2) Court rule requiring mandamus petition to compel certification of bill of exceptions to be filed within twenty days after refusal to certify is in conflict with statute.—Brown v. Hutcheson, 146 S.E. 27, 167 Ga. 451, reversing 144 S.E. 147, 38 Ga.App. 453, conformed to 146 S.E. 329, 39 Ga.App. 99.

(3) Court rule 101a (159 S.W. xi), if it intended to prevent review of record because there was no motion for a new trial, would be inconsistent with legislative enactment, and hence beyond the power of the Supreme Court, the procedure for criminal appeals being prescribed by statute.—Sessions v. State, 197 S. W. 718, 81 Tex.Cr. 424.

17. Cal.—Johnson v. Superior Court of San Bernardino County, 250 P. 686, 79 Cal.App. 650.

Colo.—Ernst v. Lamb, 213 P. 994, 73 Colo. 132.

Md.—Swann v. State, 138 A. 329, 153 Md. 700.

Mass.—Russell v. Foley, 179 N.E. 619, 278 Mass. 145—Herbert v. G. E. Lothrop Theatres Co., 173 N. E. 539, 273 Mass. 462—Brown v. Grow, 144 N.E. 403, 249 Mass. 495.

Wash.—Nudd v. Fuller, 273 P. 200, 150 Wash. 389.

Wyo.—Snider v. Rhodes, 79 P.2d 481.

Contravention of statute

(1) Rules excluding Sundays and holidays in calculating time provided apply only where the statute is silent, and cannot enlarge the ten days fixed by the statute within which to apply for a writ of error.—Covey v. Williamson, 286 F. 459, 52 App.D.C. 289.

(2) Part of circuit court rule requiring bill of exceptions to be presented within ten days after entry of judgment must yield to statute

be given;¹⁸ the form, contents, and time of filing or docketing the transcript or record;¹⁹ the time of filing briefs;²⁰ the form and nature of briefs and arguments;²¹ or the mode of raising points and presenting questions for review.²²

However, any rule of court which deprives a party of his constitutional or statutory right to prosecute an appeal or a writ of error,²³ or which confers a right of appeal in a case where it does not exist at common law or by statute,²⁴ is invalid. Where a statute regulating the procedure on appeal

is so uncertain that two interpretations leading to different results are possible, the supreme court is authorized to correct the situation by a rule.²⁵

e. Discretion of Court

A rule which prevents the exercise of a court's discretion is invalid.

Where, according to statute or common law, a certain matter is left to the discretion of the court, a rule which prevents the exercise of such discretion is invalid and cannot be enforced.²⁶

permitting tender of bill of exceptions within sixty days after entry.—*Hart v. State Industrial Accident Commission*, 38 P.2d 698, 148 Or. 692.

(3) The supreme court's promulgation of rule, reducing time for taking appeal in civil actions from ninety days to thirty days after entry of judgment appealed from, did not abrogate statutory provision for appeal by state department of public service within twenty days after entry of judgment in superior court in any action of review.—*State ex rel. Department of Public Service v. Northern Pac. Ry. Co.*, Wash., 94 P. 2d 502.

18. Ill.—*Johnson v. Cook County*, 13 N.E.2d 169, 368 Ill. 160, reversing 8 N.E.2d 220, 290 Ill.App. 602.

19. Del.—*Ownbey v. Morgan*, 105 A. 838, 7 Boyce 297, affirming *Morgan v. Ownbey*, 100 A. 411, 6 Boyce 379. Ky.—*Tuttle v. Commonwealth*, 77 S. W.2d 351, 257 Ky. 60.

N.C.—*Pruitt v. Wood*, 156 S.E. 126, 199 N.C. 788.—*Pentuff v. Park*, 143 S.E. 139, 195 N.C. 609.—*Stone v. Ledbetter*, 133 S.E. 162, 191 N.C. 777.—*State v. Farmer*, 124 S.E. 582, 188 N.C. 243.

Or.—*In re Purdin's Estate*, 240 P. 890.

15 C.J. p 907 note 79.

Rule held valid

The supreme court rule requiring that record on appeal be filed in clerk's office within sixty days after filing thereof in district court clerk's office merely interprets and applies statute, requiring latter clerk to transmit record to supreme court clerk if district court grants no new trial within twenty days after filing of specifications of error, and is authorized by statute providing that supreme court may prescribe rules of practice therefor not inconsistent with state constitution or laws.—*Snider v. Rhodes*, Wyo., 79 P.2d 481.

Contravention of statute

(1) Appeals in quo warranto proceedings are governed by statute, which supersedes court rule requiring that transcript be filed within twenty days after appeal is perfected.—*Orndorff v. State ex rel. McGill*,

Tex.Civ.App., 108 S.W.2d 206, error refused.

(2) Comp.St.1910 § 5122, providing no proceeding to reverse, etc., judgment or final order shall be commenced, unless within one year is statute of limitations, and supreme court's power cannot, by rule or otherwise, change time fixed.—*Boner v. Fall River County Bank*, 168 P. 726, 25 Wyo. 260.

20. Ohio.—*Anderson v. Industrial Commission of Ohio*, 19 N.E.2d 509, 135 Ohio St. 77.

Wyo.—*Harvey v. Stanolind Oil & Gas Co.*, 86 P.2d 735, denying rehearing 84 P.2d 755.

Rules held valid

(1) A rule of the court of appeals requiring briefs to be filed in error proceedings within a reasonable time is a valid exercise of the power conferred on that court.—*Anderson v. Industrial Commission of Ohio*, 19 N.E.2d 509, 135 Ohio St. 77.—*Adams v. Hollow Rock Min. & Transp. Co.*, 140 N.E. 624, 108 Ohio St. 352.

(2) The rule of the supreme court that in workmen's compensation cases brief shall be filed within fifteen days after filing petition in error or record on appeal was not invalid as inconsistent with statute providing that record on appeal from compensation award must be filed within seventy days from date of decision and that fifteen days shall be allowed thereafter for filing brief, in view of fact that legislature had met no less than three times since promulgation of rule without altering language of statute and at one session specifically reenacted language of statute.—*Harvey v. Stanolind Oil & Gas Co.*, Wyo., 84 P.2d 755, rehearing denied 86 P.2d 735.

21. Iowa.—*Siesseger v. Puth*, 234 N. W. 540, 211 Iowa 775.

Points and propositions

Court rule 53, 128 N.W. xi, requiring a statement of the error to be followed by points and propositions, is not in conflict with Code Suppl. 1913 § 4136, providing that no assignment of error shall be required.—*Wine v. Jones*, 168 N.W. 318, 183 Iowa 1166, modifying opin-

ion on rehearing 162 N.W. 196, 183 Iowa 1166.

22. Idaho.—*Morton Realty Co. v. Big Bend Irr. & Min. Co.*, 218 P. 433, 37 Idaho 311.

N.C.—*Baker v. Clayton*, 164 S.E. 233, 202 N.C. 741.—*In re Beard's Will*, 163 S.E. 748, 202 N.C. 661.

S.C.—*Brown v. Piedmont Mfg. Co.*, 96 S.E. 138, 109 S.C. 343.

Rule held reasonable

The requirement of supreme court rule that errors relied on be placed in statement of case was not arbitrary or unreasonable.—*Gyure v. Sloan Valve Co.*, 11 N.E.2d 963, 367 Ill. 489.

23. Colo.—*Drennen v. Johnson*, 176 P. 479, 65 Colo. 381.

Mich.—*Jones v. Eastern Michigan Motorbuses*, 283 N.W. 710, 287 Mich. 619.

Rules held invalid

(1) The writ of error provided for in constitution cannot be abolished by supreme court by exercise of its rule making power nor by legislative enactment.—*Jones v. Eastern Michigan Motorbuses*, supra.

(2) District court rule, to same effect as Rev.St.1908 § 2528, requiring payment of docketing fee on appeal from county court to district court, could not authorize the remitting of a transcript actually docketed without the payment of the fee, since the right of appeal is statutory, and no rule of court can deprive a party of that right.—*Drennen v. Johnson*, 176 P. 479, 65 Colo. 381.

24. Fla.—*Bellamy v. Bellamy*, 4 Fla. 242.

25. Wyo.—*Harvey v. Stanolind Oil & Gas Co.*, 86 P.2d 735, denying rehearing 84 P.2d 755.

26. Pa.—*South Pittsburgh Water Co. v. Winterberger*, 75 Pa.Super. 150.

15 C.J. p 907 note 85.

Amendments

The county court of Allegheny County is a court of record with all the common-law powers of such a court to allow amendments, and it cannot, by adoption of a general rule, divest itself of the duty to exercise a discretion with which it is by

§ 173. Method of Adoption

- a. In general
- b. Adoption by convention of judges

a. In General

It is usually held that court rules must be promulgated formally and be in writing and adopted of record; but rules resting in parol and established by long practice have been upheld.

It has been laid down that rules of court must be definitely stated, and promulgated formally,²⁷ at least rules framed to guide and govern litigants,²⁸ and should not be in force until after reasonable publicity and notice thereof.²⁹ So it is very generally held that the general rules of practice enacted by the courts must be embodied in writing and adopted of record.³⁰ Nevertheless rules resting in parol and established by a long course of practice have been upheld,³¹ especially in the federal courts, as stated in the C.J.S. title Federal Courts § 96, also

law invested.—*South Pittsburgh Water Co. v. Winterberger*, supra.

27. Ill.—*Illinois Cent. R. Co. v. Haskins*, 2 N.E. 654, 115 Ill. 300. 15 C.J. p 907 note 86.

Sufficiency of promulgation

While customarily court rules are published in current bar dockets or otherwise, such publication or promulgation is not essential to the enforcement of the rule, which is adopted in open court and which is spread of record on the order book of the court.—*State ex rel. Thompson v. Barce*, 10 N.E.2d 612, 212 Ind. 595.

Printing and filing copies

In order that rules may be given the necessary publicity, it is frequently provided that they shall be printed and that copies be filed in the office of the clerk.—*In re Maxwell*, 14 N.Y.S. 658—15 C.J. p 908 note 92.

28. Mo.—*State ex rel. Garvey v. Buckner*, 272 S.W. 940, 942, 308 Mo. 390, citing *Corpus Juris*.

Nature of rules distinguished

Formal promulgation should precede effective date of court rules framed to guide and govern litigants, but there is no such requirement in case of rules to aid court in apportionment and dispatch of its business.—*State ex rel. Garvey v. Buckner*, supra.

29. Ill.—*Illinois Cent. R. Co. v. Haskins*, 2 N.E. 654, 115 Ill. 300. 15 C.J. p 908 note 87.

30. N.J.—*Lyczak v. Margulies*, 151 A. 64, 8 N.J.Misc. 549, affirmed, 162 A. 590, 190 N.J.Law 352. 15 C.J. p 908 note 90.

Must be recorded

(1) Rules of courts of record cannot rest in parol, but must be placed on court's records.

Ala.—*Naro v. State*, 101 So. 666, 212 Ala. 5.

Ill.—*Calbreath v. Beckwith*, 260 Ill. App. 7.

(2) Custom or practice cannot become rule of court, because a rule of court is not valid unless spread on the records of the court.—*Calbreath v. Beckwith*, supra.

31. U.S.—*U. S. v. French*, C.C.A. Iowa, 95 F.2d 922, certiorari denied 59 S.Ct. 80, 305 U.S. 620, 83 L.Ed. 396.

Mich.—*City of Detroit v. Judge of Recorder's Court*, 237 N.W. 40, 255 Mich. 44, citing *Corpus Juris*.

Mo.—*State ex rel. Gerst Bros. Mfg. Co. v. Ossing*, 7 S.W.2d 428, 222 Mo.App. 448.

N.H.—*Smith v. Tallman*, 175 A. 857, 87 N.H. 176.

Utah.—*Patton v. Evans*, 69 P.2d 969, 970, 92 Utah 524, 112 A.L.R. 589.

"It is a fact well known to bench and bar that trial courts have certain rules of procedure which are not specified in the statute or the canons of the common law, and which may not even be spread upon the record of the court. Yet, they are well understood and observed by both lawyers and judge. For instance, the court has a certain hour for convening and adjourning court each day; a certain hour of the day, or day of the week or term, for calling and hearing the motion docket; the number of times a case will be called before parties are required to make a definite announcement, and the like." —*Maloney v. Hunt*, 29 Mo.App. 379, 382.

25 C.J. p 827 note 20. So, when necessary, the court may supplement rules previously formulated and printed, by declaring a new rule from the bench to meet a particular situation.³²

Where a rule requiring the filing of a demand for a jury trial had not been enforced, publication of notice that it would be strictly enforced after a specified date corrected the previous delinquency in its enforcement.³³

Failure of court to enact rule as required by mandatory statute does not deprive a litigant complying with the statute of the benefit of the rule.³⁴

b. Adoption by Convention of Judges

In some jurisdictions rules of practice may be adopted by a convention of judges.

In some jurisdictions the judges of the superior courts are authorized to meet in convention at stated periods for the purpose of adopting uniform rules.³⁵ The powers of such a convention are lim-

A long-established practice uniformly followed, especially in federal courts, has the same force and effect as a rule of court where the practice relates to a matter inherent in the case itself or to the mechanics or the form or mode of process and not to a question of judicial courtesy or judicial administration by court of its calendar.—*Patton v. Evans*, 69 P.2d 969, 92 Utah 524, 112 A.L.R. 589.

Custom declared by judge

Special justice of municipal court is competent to know and declare custom of his own court, and custom so declared is practical equivalent of rule which court has power to make.—*Smith v. Tallman*, 175 A. 857, 87 N.H. 176.

32. Pa.—*Landis Estate*, 3 Pa.Dist. & Co. 575.

33. Mich.—*Basmajian v. City of Detroit*, 240 N.W. 87, 256 Mich. 539.

34. Pa.—*In re Shugars' Estate*, 167 A. 567, 312 Pa. 472.

Notice to creditors of decedent's estate

Statute requiring orphans' courts to provide, by general rule, for giving of actual notice to creditor of estate, who gave written notice of claim to executor or administrator is mandatory, and failure of court to enact rule did not deprive creditor complying with statute of benefits thereof.—*In re Shugars' Estate*, supra.

35. Ga.—*Jones v. Boykin*, 196 S.E. 900, 185 Ga. 606.

15 C.J. p 908 note 93.

Powers conferred

(1) The authority of judges of superior courts to sit in convention and as a convention of judges to estab-

ited to making such rules, in addition to those prescribed by statute, as are necessary,³⁶ which rules must be in harmony with the provisions of the statute,³⁷ in accordance with the principle stated supra § 170 b (1), and the convention is not authorized to alter, modify, or annul any rule of practice established by statute.³⁸

§ 174. Adoption by State of Federal Rules

Under some statutes the rules of practice obtaining in United States equity courts are adopted as rules of practice in the state court; but a federal equity rule conflicting with a local statute must yield thereto.

Under the statutes in some jurisdictions rules of practice in equity courts of the United States are made rules of practice in the state court when exercising equity jurisdiction,³⁹ and such statutes must be construed to apply to all rules and amendments thereof adopted by the supreme court whether before or after their enactment.⁴⁰ In matters not covered by rules, the practice follows that of the high court of chancery in England;⁴¹ but the practice of English chancery courts is inapplicable where a federal rule of practice or a local rule or statute prescribes a different procedure.⁴² A federal equity rule, if in conflict with a local statute governing chancery practice, must yield to the extent of the conflict.⁴³

lish uniform rules of practice is no greater than authority conferred by statute authorizing convention.—*Jones v. Boykin*, supra.

(2) The general assembly had power to rescind and annul any action which the general assembly might have previously authorized convention of superior court judges to take, since the convention was a creature of statute with authority no greater than was conferred by statute.—*Jones v. Boykin*, supra.

(3) The fact that at time of adoption of constitution, enumerating powers of the superior courts, and providing that they should have such other powers as were conferred on them by law, a statute was in force authorizing judges of superior courts in convention to prescribe rules of practice, did not confer constitutional power on a convention of superior court judges as distinguished from powers of superior courts, but, even if it did confer power on the convention, it only conferred power contained in statute to make rules of practice.—*Jones v. Boykin*, supra.

(4) The passage of a rule of practice by judges of superior courts in convention was not the exercise of a "judicial power" within constitution—

al provision that judicial powers of state should be vested in courts.—*Moyers v. State*, 197 S.E. 846, 186 Ga. 446, 116 A.L.R. 981, mandate conformed to 198 S.E. 283, 58 Ga.App. 237.

36. N.Y.—*Gormerly v. McGlynn*, 84 N.Y. 284—*Hecker v. Sexton*, 43 Hun 640.

37. N.Y.—*Gormerly v. McGlynn*, 84 N.Y. 284.

38. N.Y.—*Gormerly v. McGlynn*, supra—*Conderman v. Conderman*, 44 Hun 181.

39. Fla.—*Rorick v. Stilwell*, 133 So. 609, 101 Fla. 4.

40. Fla.—*Kahn v. Weinlander*, 22 So. 653, 39 Fla. 210.

41. Fla.—*Rorick v. Stilwell*, 133 So. 609, 101 Fla. 4—*Long v. Anderson*, 37 So. 216, 48 Fla. 279, 5 Ann.Cas. 846.

42. Fla.—*Earle v. Detroit & Security Trust Co.*, 138 So. 65, 103 Fla. 618.

Distinction exists between "practice" prevailing in courts of chancery and "rules of practice."—*Earle v. Detroit & Security Trust Co.*, supra.

43. Fla.—*Earle v. Detroit & Security Trust Co.*, supra.

§ 175. General Nature of Rules

Rules of practice should be general, and be so framed as to promote justice.

Rules of practice must be general,⁴⁴ and should be framed with a view to insuring, so far as possible, just results in all cases, and minimizing the danger of injustice being done to parties in any case.⁴⁵ They should facilitate getting at the real facts in an orderly manner, and should promote, and not impede, the administration of justice.⁴⁶

§ 176. Operation and Effect of Rules

- a. In general
- b. Knowledge of rules
- c. Prospective or retrospective operation

a. In General

Court rules cannot make valid anything which is void in law, nor supersede, change, or interfere with the operation of statutory or other law; but authorized rules have the force of law, are binding on the court and litigants, and must ordinarily be enforced by the court. The rules governing proceedings in a case are those of the court in which the case is pending. In case of conflict between a general and a local rule the former prevails.

A rule of court cannot operate so as to render valid anything which is void in law,⁴⁷ nor can it supersede, nullify, or change statutory or other law,⁴⁸ nor can a rule of court operate so as to

44. Ind.—*Shoner v. Pennsylvania R. Co.*, 28 N.E. 616, 29 N.E. 775, 130 Ind. 170.

45. Ind.—*Shoner v. Pennsylvania R. Co.*, supra.

46. Cal.—*Baxter v. Boston-Pacific Oil Co.*, 253 P. 185, 81 Cal.App. 187. Ill.—*Farmer v. Fowler*, 123 N.E. 550, 288 Ill. 494.

47. U.S.—*Grant v. Auburn Nat. Bank*, D.C.N.Y., 232 F. 201. Miss.—*Pickett v. Pickett*, 2 Miss. 267.

48. Cal.—*Henry v. Willett*, 212 P. 698, 60 Cal.App. 244.

III.—*Matthiessen v. Duntley*, 225 Ill. App. 249.

Ind.—*State ex rel. Weaver v. Weir*, 4 N.E.2d 542, 210 Ind. 601.

Iowa.—*Tate v. Delli*, 269 N.W. 871, 222 Iowa 635.

La.—*Hemler v. United Gas Public Service Co.*, 143 So. 265, 175 La. 285.

Mo.—*State v. Rollinger*, 256 S.W. 460, transferred, App., 267 S.W. 17.—*National Refrigerator Co. v. Southwest Missouri Light Co.*, 231 S.W. 930, 288 Mo. 290.

N.Y.—*Threat v. City of New York*, 288 N.Y.S. 976, 159 Misc. 868.—*Friedman v. Friedman*, 204 N.Y.S. 550, 122 Misc. 700.

Ohio.—*Long & Allstatter Co. v. Wil-*

interfere with the operation of such law.⁴⁹ Where, however, a court is authorized to establish rules, such rules, when not repugnant to or in conflict with the organic laws, have all the force of law,⁵⁰ and must be complied with,⁵¹ unless compliance is waived in accordance with the rules stated *infra* §

- His, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed *Willis v. Long & Allstatter Co.*, 2 N.E.2d 600, 131 Ohio St. 287.
- Or.—In re *Pittick's Estate*, 202 P. 216, 102 Or. 159—*Schnitzer v. Stein*, 189 P. 984, 96 Or. 343.
- Pa.—*Nawocki v. Skaziak*, 88 Pa.Super. 100.
- Tex.—*Durham v. Scrivener*, Com. App., 270 S.W. 161, affirming, Civ. App., 259 S.W. 606—*Duval County Ranch Co. v. Drought*, Civ.App., 260 S.W. 298.
- Va.—*Virginia Home for Incurables v. Coleman*, 178 S.E. 908, 164 Va. 230.
- 15 C.J. p 909 note 5.
Validity of particular rules see *supra* § 172.
49. Cal.—*Henry v. Willett*, 212 P. 698, 60 Cal.App. 244.
- Ind.—State ex rel. *Weaver v. Weir*, 4 N.E.2d 542, 210 Ind. 601.
- 15 C.J. p 909 note 6.
50. U.S.—*Weil v. Neary*, N.Y., 49 S. Ct. 144, 278 U.S. 160, 73 L.Ed. 243, reversing, C.C.A., 22 F.2d 893, certiorari granted 48 S.Ct. 338, 276 U.S. 613, 72 L.Ed. 732—In re *G. W. Giannini, Inc.*, C.C.A.N.Y., 90 F.2d 445, 111 A.L.R. 1492, affirming, D.C., 14 F.Supp. 1005—*Wainer v. U. S.*, C.C.A.Ill., 87 F.2d 77, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—*Twist v. Prairie Oil & Gas Co.*, C.C.A.Okl., 27 F.2d 470, vacated per stipulation 28 F.2d 1021—*U. S. v. Minkus*, 16 Ct.Cust.App. 263.
- Ariz.—*Daniel v. Telford*, 75 P.2d 373, 51 Ariz. 197—*De Camp v. Central Arizona Light & Power Co.*, 57 P. 2d 311, 47 Ariz. 517—*Kinman v. Grousky*, 49 P.2d 624, 46 Ariz. 191—*Day v. Board of Regents of University of Arizona*, 36 P.2d 262, 44 Ariz. 277—*De Mille v. State*, 33 P. 2d 280, 43 Ariz. 551, followed in *McCormack v. State*, 33 P.2d 282, 43 Ariz. 555—*Gillespie Land & Irrigation Co. v. Hamilton*, 18 P.2d 1111, 41 Ariz. 432—*Taltis v. Colachis*, 274 P. 776, 35 Ariz. 78.
- Cal.—*Helbush v. Helbush*, 290 P. 18, 209 Cal. 758—*Silva v. Co-Operative Dairymen's League*, 42 P.2d 370, 5 Cal.App.2d 294—*People v. Walker*, 244 P. 94, 76 Cal.App. 192.
- D.C.—*Nealon v. Davis*, 18 F.2d 175, 57 App.D.C. 133.
- Fla.—*Keen v. State*, 103 So. 399, 89 Fla. 113.
- Ill.—*Gyure v. Sloan Valve Co.*, 11 N. E.2d 963, 367 Ill. 489—*People v. Callopy*, 192 N.E. 634, 358 Ill. 11—*People v. Andrus*, 132 N.E. 225, 299 Ill. 50, reversing 219 Ill.App. 205—*Feldott v. Featherstone*, 125 N.E. 361, 290 Ill. 485—*Lewis v. Renfro*, 9 N.E.2d 652, 291 Ill.App. 396—*Bender v. Alton R. Co.*, 1 N.E.2d 108, 284 Ill.App. 419—*Swiercz v. Nalepka*, 259 Ill.App. 262.
- Ind.—State ex rel. *Ray v. Veneman*, 200 N.E. 216, 209 Ind. 575—*Indiana State Sanatorium of Rockville v. McMahon*, App., 23 N.E.2d 288—*Thompson v. Cleveland, C., C. & St. L. Ry. Co.*, App., 11 N.E.2d 81—*Lindeman v. Lindeman*, 8 N.E.2d 1004, 103 Ind.App. 494—*Bohannon & Morrison v. Stutz Motor Car Co.*, 7 N.E.2d 510, 103 Ind.App. 552—*Rooker v. John Hancock Mut. Life Ins. Co.*, 184 N.E. 306, 98 Ind.App. 478.
- Ky.—*Warfield Natural Gas Co. v. Allen*, 33 S.W.2d 34, 236 Ky. 358—*Kammerer v. Brown*, 27 S.W.2d 959, 234 Ky. 199.
- Me.—*Hutchins v. Hutchins*, 4 A.2d 679—*Hill v. Finmore*, 172 A. 826, 132 Me. 459—*Cunningham v. Long*, 135 A. 198, 125 Me. 494.
- Mass.—*Kaufman v. Buckley*, 188 N. E. 607, 285 Mass. 83.
- Mo.—*Robinson v. Sussman*, App., 253 S.W. 186.
- Mont.—*Roush v. District Court of Eighth Judicial Dist. for Cascade County*, 53 P.2d 96, 101 Mont. 166—*State v. Kacar*, 240 P. 365, 74 Mont. 269.
- Nev.—*Sullivan v. Nevada Industrial Commission*, 14 P.2d 262, 54 Nev. 301—*Whitman v. Moran*, 13 P.2d 1107, 54 Nev. 276—*State v. Second Judicial Dist. Court in and for Washoe County*, 233 P. 843, 48 Nev. 459—*Golden v. McKim*, 204 P. 602, 45 Nev. 350.
- N.M.—*State v. Faircloth*, 277 P. 30, 34 N.M. 61—*State v. City of Albuquerque*, 262 P. 225, 33 N.M. 184.
- N.Y.—*Lambert v. Lambert*, 1 N.E.2d 833, 270 N.Y. 422, reversing 278 N. Y.S. 580, 244 App.Div. 78—*Sachs v. Blum*, 272 N.Y.S. 334, 241 App.Div. 384—*Lyons v. Burtis*, 284 N.Y.S. 106, 157 Misc. 325.
- Okl.—*Charley v. Britton-Johnson Oil Co.*, 263 P. 1096, 129 Okl. 153—*Renfrow v. Ittleson*, 236 P. 585, 110 Okl. 109—*Carlile v. National Oil & Development Co.*, 201 P. 377, 83 Okl. 217—*Winona Oil Co. v. Barnes*, 200 P. 981, 83 Okl. 248.
- Or.—*Hart v. State Industrial Accident Commission*, 38 P.2d 698, 148 Or. 692—*McAuliffe v. McAuliffe*, 298 P. 239, 136 Or. 168—*Bank of Beaverton v. Godwin*, 264 P. 356, 124 Or. 166—*Oxman v. Baker County*, 236 P. 1040, 115 Or. 436.
- Pa.—*R. Baur & Son v. Wilkes-Barre Light Co.*, 102 A. 430, 259 Pa. 117—*Russ Soda Fountain Co. v. Victor Pastry Shoppe*, 190 A. 376, 125 Pa. Super. 452—*Strizak v. Danacko*, 11 Pa.Dist. & Co. 150—*J. B. Colt Co. v. Shirk*, 3 Pa.Dist. & Co. 56—*Philadelphia & Reading Coal & Iron Co. v. Tremont Tp. School Dist.*, 5 Schuylkill Reg. 259.
- S.C.—*State v. Atterberry*, 124 S.E. 648, 651, 129 S.C. 464, citing *Corpus Juris*.
- S.D.—*Hovland v. Cook*, 257 N.W. 43, 63 S.D. 118.
- W.Va.—*Altmeyer v. Fassig*, 171 S.E. 529, 114 W.Va. 266—*Hall v. O'Brien*, 124 S.E. 507, 97 W.Va. 77—*Star Piano Co. v. Burgner*, 109 S. E. 491, 89 W.Va. 475.
- Wyo.—*Sayre v. Roberts*, 84 P.2d 718, 15 C.J. p 909 note 7, p 910 note 25.
- Equity rules prepared by supreme court pursuant to statute have force of statute.**—*Colflesh v. Provident Trust Co. of Philadelphia*, 176 A. 433, 317 Pa. 46—*Wanamaker v. Wanamaker*, 172 A. 846, 315 Pa. 229—*R. Baur & Son v. Wilkes-Barre Light Co.*, 102 A. 430, 259 Pa. 117—*Mintzer v. Turnbach*, 172 A. 162, 113 Pa.Super. 113—*C. P. Matthews & Son, Inc. v. Lewis*, 2 Pa.Dist. & Co. 566.
- Rules as to appellate practice have the effect of statutes.**—*Wood v. Mesmer*, 178 P. 314, 39 Cal.App. 108.
- Procedural regulations not affecting substantive rights, directly or indirectly, generally govern from the time such rules become effective.**—*Boysell Co. v. Colonial Coverlet Co.*, D.C.Tenn., 29 F.Supp. 122.
51. Ala.—*Freeland v. State*, 182 So. 414, 28 Ala.App. 268.
- Ariz.—*Daniel v. Telford*, 75 P.2d 373, 51 Ariz. 197—*Ferguson v. Goff*, 50 P.2d 20, 46 Ariz. 260—*Kinman v. Grousky*, 49 P.2d 624, 46 Ariz. 191.
- D.C.—*Doyne v. Werner*, 48 App.D.C. 254.
- Fla.—*Phillips v. Lindsay*, 136 So. 666, 102 Fla. 935—*Lake Mabel Development Corporation v. Bird*, 129 So. 105, 99 Fla. 259, denying rehearing 126 So. 356, 99 Fla. 253.
- Idaho.—*Harsin v. Pioneer Irr. Dist.*, 263 P. 988, 45 Idaho 369.
- Ind.—*Jones v. Moise*, 8 N.E.2d 99, 104 Ind.App. 390.
- Iowa.—*Harroun v. Schultz*, 284 N.W. 450.
- Ky.—*Shipp v. Bradley*, 275 S.W. 1, 210 Ky. 51.
- Mass.—*Kaufman v. Buckley*, 188 N.E. 607, 285 Mass. 83.
- Mo.—*Evans v. Hilliard*, App., 112 S. W.2d 886—*Girvin v. Metropolitan Life Ins. Co.*, App., 84 S.W.2d 644—*State ex rel. Gerst Bros. Mfg. Co. v. Ossing*, 7 S.W.2d 428, 222 Mo. App. 448—*Pelletier v. Heart of America Hospital Ass'n*, App., 2 S. W.2d 805—*Taylor v. Heart of America Hospital Ass'n*, 2 S.W.2d

178 b, or a reasonable excuse is given for noncompliance.⁵² Rules prescribed by an appellate court for inferior courts have a like effect.⁵³ Even general disregard of a particular rule by consent, acquiescence, or waiver will not excuse such disregard in a particular case where the adverse party insists on his rights under the rule,⁵⁴ although it has been held that noncompliance with a rule made merely

for the convenience of the clerk cannot be taken advantage of by the opposite party where his rights have not been affected thereby.⁵⁵

General rules of practice, it has been held, apply only to practice in courts of record.⁵⁶

Rules of court properly adopted are binding on the court and its officers as well as on the parties and their counsel,⁵⁷ and ordinarily it is the duty of

804, 222 Mo.App. 17—State ex rel. Paramount Progressive Order of Moose v. Miller, 273 S.W. 122, 216 Mo.App. 692.

Nev.—American Sodium Co. v. Shelley, 267 P. 497, 51 Nev. 26, denying rehearing 264 P. 980, 50 Nev. 416.

N.J.—Ash v. Cohn, 3 A.2d 130, 121 N.J.Law 412.

N.C.—Pruitt v. Wood, 156 S.E. 126, 199 N.C. 788—Pentuff v. Park, 143 S.E. 139, 195 N.C. 609—Covington v. Hanes Hosiery Mills Co., 142 S.E. 705, 195 N.C. 478—Waller v. Dudley, 137 S.E. 149, 193 N.C. 354—Cox v. Kinston Carolina R. & Lumber Co., 98 S.E. 704, 177 N.C. 227.

Okl.—Cosden Oil & Gas Co. v. Hendrickson, 221 P. 86, 96 Okl. 206.

Or.—Diller v. Riverview Dairy, 238 P. 401, 133 Or. 442.

Pa.—R. Baur & Son v. Wilkes-Barre Light Co., 102 A. 430, 259 Pa. 117—J. B. Colt Co. v. Shirk, 3 Pa.Dist. & Co. 56—C. P. Matthews & Son, Inc. v. Lewis, 2 Pa.Dist. & Co. 568. S.C.—State v. Atterberry, 124 S.E. 648, 651, 129 S.C. 464, citing *Corpus Juris*.

Utah.—Okerlund v. Robinson, 281 P. 200, 74 Utah 602—Standard Coal Co. v. Stewart, 269 P. 1014, 72 Utah 272.

15 C.J. p 909 note 8, p 910 note 25.

Time of filing briefs on appeal

Rules of court requiring briefs on appeal to be filed within the time specified confer rights which may be enforced by litigants.—Borgmeyer v. Solomon, 178 P. 544, 39 Cal.App. 106.

Substantial compliance

(1) While courts and all others charged with duty of enforcing law as it is declared should be ever ready to do so, and not to permit immaterial technicalities to obstruct or defeat original public purposes, declared rules of procedure should be substantially followed.—Shipp v. Bradley, 275 S.W. 1, 210 Ky. 51.

(2) Rules of Oklahoma supreme court governing procedure in sale of oil lease on minor's lands must be substantially followed.—Twist v. Prairie Oil & Gas Co., C.C.A.Okl., 27 F.2d 470, vacated per stipulation 28 F.2d 1021.

(3) Assignee of oil lease on minor's lands in disregard of court rule

was not entitled to prevail on theory of vested rights under established rule of property.—Twist v. Prairie Oil & Gas Co., supra.

(4) An appellant will not be entitled to a reversal of judgment without at least a substantial observance of court rules.—Poff v. McKillip, Ind. App., 18 N.E.2d 963.

Litigants and their counsel should make a reasonable, diligent, and good-faith effort to comply with rules of court.—United Taxi Co. v. Dilworth, Ind.App., 20 N.E.2d 699.

Effect of noncompliance

(1) When the court has made a rule applicable to a particular matter, and provided what penalty shall be inflicted for noncompliance therewith, it cannot inflict any penalty for violation of the rule except as stated.—State ex rel. Kansas City Light & Power Co. v. Trimble, 237 S.W. 1021, 291 Mo. 532.

(2) Willful or negligent disobedience of rules of appellate procedure may cause supreme court to refuse to consider transcript or brief, or parts of either.—State v. Kacar, 240 P. 365, 74 Mont. 269.

(3) The willful disregard by the trial court of rules 25 and 27, governing trial courts of record, which were established under L.1919 c 163, and are therefore the laws of the state, binding on the courts, and which have demonstrated their value, is misconduct resulting in a mistrial of the action.—Presho State Bank v. Northwestern Milling Co., 185 N.W. 370, 45 S.D. 58, 23 A.L.R. 48, rehearing denied 186 N.W. 560, 45 S.D. 147.

52. Cal.—Borgmeyer v. Solomon, 178 P. 544, 39 Cal.App. 106.

Del.—Pendergast v. Fostoria Oil Co., 108 A. 737, 12 Del.Ch. 143.

Ignorance of rule as excuse see infra § 176 b.

Power of court to suspend or relax rules see infra § 178 a.

When noncompliance does not preclude relief

Where plaintiff seeking to invalidate tax sale showed noncompliance with statute requiring county treasurer's report to court and confirmation thereof, plaintiff's failure to comply with county court's rules by filing briefs after filing exceptions to chancellor's finding and conclusions

should not preclude relief.—Gregory v. Davis, 177 A. 331, 117 Pa.Super. 1.

53. Ariz.—Day v. Board of Regents of University of Arizona, 36 P.2d 262, 44 Ariz. 277—Brown v. Haymore, 32 P.2d 1027, 43 Ariz. 466—Gillespie Land & Irrigation Co. v. Hamilton, 18 P.2d 1111, 41 Ariz. 422.

Neb.—Sorenson v. Grand Island Clinic, 228 N.W. 601, 119 Neb. 280.

N.J.—In re Ahrend, 132 A. 758, 99 N.J.Eq. 328, dismissing appeal In re Ahrend's Estate, 130 A. 219, 3 N.J.Misc. 746.

Okl.—Charley v. Britton-Johnson Oil Co., 263 P. 1096, 129 Okl. 153.

15 C.J. p 904 note 26, p 909 note 7 [a].

Supreme court rule binding intermediate appellate court

Supreme Court Rules, rule 31, regarding appeals from interlocutory orders, is binding on the appellate courts and is a part of rules referred to in statute authorizing Supreme Court to regulate procedure for review.—People, for Use of Tindall, v. London & Lancashire Indemnity Co. of America, 14 N.E.2d 289, 294 Ill. App. 619.

Rule construing statute, enacted by supreme court, is binding on the court of civil appeals.—Marvin v. Kennison Bros., Tex.Civ.App., 230 S.W. 831.

54. Mich.—Hill v. Webber, 15 N.W. 52, 50 Mich. 142.

55. N.J.—Kennedy v. Kennedy, 18 N.J.Law 51.

56. N.Y.—Employers Liability Assur. Corporation v. Fisher, 13 N.Y. S.2d 902.

57. D.C.—Clawans v. Whiteford, 55 F.2d 1037, 60 App.D.C. 412, certiorari denied 53 S.Ct. 10, 287 U.S. 605, 77 L.Ed. 526, followed in Clawans v. Carrick, 55 F.2d 1038, 60 App.D.C. 413, certiorari denied 53 S.Ct. 10, 287 U.S. 605, 77 L.Ed. 526. Fla.—National Trucking Co. v. Gill, 182 So. 220, 132 Fla. 844—Esch v. Forster, 127 So. 336, 99 Fla. 717—Bryan v. State, 114 So. 773, 94 Fla. 909.

Ill.—People v. Femberg, 181 N.E. 437, 348 Ill. 549—North Ave. Building & Loan Ass'n v. Huber, 121 N.E. 721, 286 Ill. 375, reversing 208 Ill. App. 271—Lewis v. Renfro, 9 N.E.

the court to enforce them,⁵⁸ unless the circumstances are such as to warrant and permit their suspension or modification in the particular case, as discussed *infra* § 178 a, or unless they have been abrogated or amended by the court or by statute, in accordance with the principles stated *infra* § 179. However, although fixed rules of procedure cannot be disregarded, they should be so administered as to promote, rather than hinder, trials on their merits, if this can be done without violence to the rules.⁵⁹ In some jurisdictions it has been said to be the policy of the supreme court to be liberal in the application of its rules until the bench and bar have

had a reasonable time to become familiar therewith.⁶⁰ Parties and attorneys are justified in presuming that the rules of court will be enforced, and are not chargeable with negligence in relying upon this presumption and acting accordingly.⁶¹ The method of enforcement rests in the discretion of the court if the rule itself does not provide a method or penalty.⁶²

There is a distinction, however, between mandatory and directory rules; a mandatory rule which limits the power of the court as well as the parties must be complied with, and acts not complying therewith are void;⁶³ but where a rule is merely

2d 652, 291 Ill.App. 396—Bender v. Alton R. Co., 1 N.E.2d 108, 284 Ill. App. 419.

Ind.—Earl v. State, 151 N.E. 3, 197 Ind. 703—Epstein v. State, 128 N.E. 353, 190 Ind. 693, denying rehearing 127 N.E. 441, 190 Ind. 693—Indiana State Sanatorium of Rockville v. McMahon, App., 23 N.E.2d 288—Poff v. McKilip, App., 18 N.E.2d 963—Thompson v. Cleveland, C. & St. L. Ry. Co., App., 11 N.E.2d 81—Martin v. Petgen, 11 N.E.2d 59, 104 Ind.App. 308—Miller v. Miller, 10 N.E.2d 746, 104 Ind. App. 298—Lindeman v. Lindeman, 8 N.E.2d 1004, 103 Ind.App. 494—Jones v. Moise, 8 N.E.2d 99, 104 Ind.App. 390—Breuninger v. Weck, 7 N.E.2d 517, 103 Ind.App. 305—Bannon & Morrison v. Stutz Motor Car Co., 7 N.E.2d 510, 103 Ind.App. 552—Rooker v. John Hancock Mut. Life Ins. Co., 184 N.E. 306, 98 Ind. App. 478—Loeser v. Goldberg, 182 N.E. 462, 95 Ind.App. 52.

La.—Interdiction of Wenger, 85 So. 62, 147 La. 422—Levy v. Michon, 77 So. 644, 142 La. 825.

Me.—Hill v. Finmore, 172 A. 826, 132 Me. 459—Massachusetts Bonding & Insurance Co. v. Pettapiece, 165 A. 375, 132 Me. 44.

Md.—Carey v. Safe Deposit & Trust Co. of Baltimore, 178 A. 242, 168 Md. 501.

Mass.—In re McNulty's Estate, 195 N.E. 735, 290 Mass. 597—Petition of Flynn, 163 N.E. 900, 265 Mass. 310—Feldman v. Feldman, 119 N.E. 681, 230 Mass. 330.

Mont.—State v. District Court of Ninth Judicial Dist. in and for Gallatin County, 233 P. 126, 72 Mont. 245.

Neb.—Sorensen v. Grand Island Clinic, 228 N.W. 601, 119 Neb. 280.

Okl.—Charley v. Britton-Johnson Oil Co., 263 P. 1096, 129 Okl. 153—Carlile v. National Oil & Development Co., 201 P. 377, 83 Okl. 217—Winona Oil Co. v. Barnes, 200 P. 981, 83 Okl. 248.

Or.—Sitton v. Goodwin, 248 P. 163, 119 Or. 74, rehearing denied 249 P. 362, 119 Or. 354.

Pa.—Jones v. Motor Sales Co. of Johnstown, 185 A. 809, 322 Pa. 492—J. B. Colt Co. v. Shirk, 3 Pa. Dist. & Co. 56.

15 C.J. p 909 note 11.

Supreme court is bound by rules which it prescribes.—Mann v. Etchells, 182 So. 198, 132 Fla. 409—Syndicate Properties v. Hotel Floridian Co., 114 So. 441, 94 Fla. 899.

Rules as to master's report are binding on court, master, and parties.—Morin v. Clark, Mass., 6 N.E.2d 830.

Rule as construing statute

Rule of court declaring what litigant must do to comply with statute is "construction of such statute" and binding on court.—Walker v. Fireman's Fund Ins. Co., 257 P. 701, 122 Or. 179.

58. Mo.—Myers v. Union Electric Light & Power Co., App., 125 S.W. 2d 950—Pruett v. Milgram Food Stores, App., 112 S.W.2d 371.

Nev.—City of Fallon v. Churchill County Bank Mortg. Corporation, 49 P.2d 358, 57 Nev. 1.

Okl.—Carlile v. National Oil & Development Co., 201 P. 377, 83 Okl. 217—Winona Oil Co. v. Barnes, 200 P. 981, 83 Okl. 248.

Pa.—Gregory v. Davis, 177 A. 331, 117 Pa. Super. 1.

S.D.—Hovland v. Cook, 257 N.W. 43, 63 S.D. 118.

Utah.—Okerlund v. Robinson, 281 P. 200, 74 Utah 602.

Va.—Omohundro v. Palmer, 164 S.E. 541, 158 Va. 693.

15 C.J. p 910 note 12.

59. Ala.—Roberson v. Roberson, 169 So. 292, 232 Ala. 647.

60. Tex.—Glenn v. McCarty, 110 S.W.2d 1148, 130 Tex. 641, denying rehearing 107 S.W.2d 363, 130 Tex. 641, dismissing application, Civ. App., 103 S.W.2d 1098.

Administration of supreme court rules should not deprive a litigant of a review for infractions attributable to advocate's pardonable devotion to client's cause, which presents no real difficulty to opposing counsel or the

court and are of no real consequence in determination of the issues presented.—Flint v. Loew's St. Louis Realty & Amusement Corporation, Mo., 126 S.W.2d 193.

61. Iowa.—National Loan & Investment Co. v. Bleasdale, 141 N.W. 456, 159 Iowa 529.

15 C.J. p 910 note 14.

62. Ill.—Chicago City Bank & Trust Co. v. Kaplan, 281 Ill.App. 97.

63. Or.—Pacific Finance Corporation v. Ellithorpe, 280 P. 658, 134 Or. 601—Darling-Singer Lumber Co. v. Oriental Nav. Co., 259 P. 420, 127 Or. 655.

15 C.J. p 910 note 25.

Rules held mandatory

(1) Rules of practice governing appeals in supreme court, enacted by the court pursuant to constitutional authority, are mandatory, and must be uniformly enforced.—State v. Moore, 187 S.E. 586, 210 N.C. 459—Baker v. Clayton, 164 S.E. 233, 202 N.C. 741—In re Beard's Will, 163 S.E. 748, 202 N.C. 661—Pruitt v. Wood, 156 S.E. 126, 199 N.C. 788—Pentuff v. Park, 143 S.E. 139, 195 N.C. 609—Covington v. Hanes Hosiery Mills Co., 142 S.E. 705, 195 N.C. 478—Womble v. Moncure Mill & Gin Co., 140 S.E. 230, 194 N.C. 577—Waller v. Dudley, 137 S.E. 149, 193 N.C. 354—Stone v. Ledbetter, 133 S.E. 162, 191 N.C. 777—State v. Farmer, 124 S.E. 562, 188 N.C. 243—Cooper v. Board of Com'rs of Franklin County, 113 S.E. 569, 184 N.C. 615.

(2) Such rules cannot be abrogated or disregarded by the trial judge, see *infra* § 178.

(3) Nor can the parties or counsel consent to their abrogation, see *infra* § 178 b.

(4) Nor can they be disregarded or set at naught by legislative act.—State v. Moore, 187 S.E. 586, 210 N.C. 459—Pruitt v. Wood, 156 S.E. 126, 199 N.C. 788—Pentuff v. Park, 143 S.E. 139, 195 N.C. 609—Covington v. Hanes Hosiery Mills Co., 142 S.E. 705, 195 N.C. 478—State v. Crowder, 122 S.E. 222, 195 N.C. 335—Womble v.

directory it does not render the doing of a prescribed act at a different time or in a different manner void.⁶⁴

Failure to follow the procedure laid down by a court rule does not necessarily deprive the court of jurisdiction.⁶⁵

Rules established by the judge of a court for the regulation of the proceedings in such court become the rules of the court,⁶⁶ and remain so until abrogated or superseded by the judge who established them,⁶⁷ or his successor in office.⁶⁸ It has been held, however, that rules promulgated by judges for the apportionment of business are binding only on the judges and not on the court or on the successors of the judges.⁶⁹

What rules govern. The rules governing the proceedings in a case are the rules of the court in which the case is pending at the time the proceedings were taken.⁷⁰ Where, prior to the adoption

of rules regulating appellate procedure, final judgment had been entered on a pending action, but an appeal was not taken until after the date on which the rules were to become effective, the procedure on the appeal was governed by the rules so adopted.⁷¹ In case of a conflict between a general rule and a local rule, the general rule prevails.⁷²

b. Knowledge of Rules

Parties and their counsel are bound to take notice of court rules, and ignorance thereof ordinarily is no excuse for noncompliance therewith.

Attorneys practicing before a court,⁷³ regardless of whether they reside in the same county or not,⁷⁴ and the parties to actions therein⁷⁵ are bound to take notice of the duly-adopted and promulgated rule of such court, and ignorance of a rule ordinarily is no excuse for noncompliance therewith; but special circumstances may excuse ignorance of a rule.⁷⁶

Moncure Mill & Gin Co., 140 S.E. 230, 194 N.C. 577—*Cooper v. Board of Com'rs of Franklin County*, 113 S.E. 569, 184 N.C. 615.

(5) The Kansas City court of appeals rule which requires appellant or plaintiff in error to furnish abstract with complete index at end thereof specifically identifying exhibits has force and effect of legislative enactment, and must be enforced.—*Pruett v. Milgram Food Stores, Mo. App.*, 112 S.W.2d 371.

(6) Municipal Court Rules, rule 9, providing causes placed on reserve calendar "may be restored to trial calendar on three days' notice on consent of the parties, for a day to be fixed by the court," having been approved by the appellate division of the supreme court, has the force of law, and "may" must be construed "must," the rule being imperative.—*Rossmann v. Serventi*, 177 N.Y.S. 855.

(7) Where a court rule provides that a rule for a more specific statement of claim or a rule to strike off a statement shall not be entertained unless applied for within fifteen days after service of the statement, such court rule is mandatory and must be followed.—*Trocasso v. Lauter Co.*, 26 North.Co., Pa., 251.

(8) Court rules requiring notice to an antagonist must be strictly enforced.—*Pacific Finance Corporation v. Ellithorpe*, 280 P. 658, 134 Or. 601.

64. Or.—*Darling-Singer Lumber Co. v. Oriental Nav. Co.*, 259 P. 420, 127 Or. 655.

Noncompliance with directory rules will not be penalized where no possible harm could result.—*Pacific Finance Corporation v. Ellithorpe*, 280 P. 658, 134 Or. 601.

After court acquires jurisdiction, most rules of procedure are directory, and slight variation, where no harm has resulted, will not be penalized.—*Pacific Finance Corporation v. Ellithorpe*, supra.

Rule held directory

Rule that any party may, within thirty days after entry of final judgment, tender a bill of exceptions is merely directory.—*Darling-Singer Lumber Co. v. Oriental Nav. Co.*, 259 P. 420, 127 Or. 655.

65. N.Y.—*In re Benedict*, 147 N.E. 59, 239 N.Y. 440, reversing 203 N.Y.S. 919, 208 App.Div. 823.

The test is, if the act, required to be done by uniform superior court rule but omitted, must be performed prior to or simultaneous with act validity of which is involved, failure to perform omitted act renders act done void.—*Gillespie Land & Irrigation Co. v. Hamilton*, 18 P.2d 1111, 41 Ariz. 432.

66. La.—*Berthelot v. Hotard*, 42 So. 90, 117 La. 524.

Mass.—*Gardner v. Butler*, 78 N.E. 885, 193 Mass. 96.

67. La.—*Berthelot v. Hotard*, 42 So. 90, 117 La. 524.

68. La.—*Berthelot v. Hotard*, supra.

69. Mont.—*State v. State First Judicial Dist. Ct.*, 141 P. 151, 49 Mont. 158.

70. Ind.—*Hood v. Baker, App.*, 75 N.E. 608, transferred 76 N.E. 243, 165 Ind. 562.

Abstract of record on appeal

Where an appeal was improperly taken to a court of intermediate appeals, and was therefore transferred to the court of last resort, and the abstract of the record and brief for appellant were prepared after the

cause reached the latter court, the rules of the latter were held to govern as to the contents of the abstract of record.—*Jenkins v. Shannon County*, 125 S.W. 1100, 226 Mo. 137.

71. N.M.—*State v. Faircloth*, 277 P. 30, 34 N.M. 61.

72. Pa.—*Strizak v. Danacko*, 11 Pa. Dist. & Co. 150.

73. Vt.—*Davis v. Dunn*, 93 A. 81, 90 Vt. 253.

74. Ariz.—*Daniel v. Telford*, 75 P.2d 373, 51 Ariz. 197—*Faltis v. Colachis*, 274 P. 776, 35 Ariz. 78.

Mont.—*State v. Kacar*, 240 P. 365, 74 Mont. 269.

15 C.J. p 908 note 2.

Changes in rules

Attorneys are chargeable with notice of changes in rules of court of appeals.—*Lutz v. State*, 172 A. 354, 167 Md. 12.

Ignorance does not excuse infraction of rules pertaining to appellate procedure, since only reasonable requirements are prescribed, and with these every lawyer who practices before supreme court should be conversant.—*State v. Kacar*, 240 P. 365, 74 Mont. 269.

Attorneys should familiarize themselves with rules and comply with the requirements.—*Freeland v. State*, 182 So. 414, 28 Ala.App. 268.

74. Ariz.—*Daniel v. Telford*, 75 P.2d 373, 51 Ariz. 197—*Faltis v. Colachis*, 274 P. 776, 35 Ariz. 78.

75. U.S.—*In re Sherbondy, Cust. & Pat.App.*, 35 F.2d 71.

15 C.J. p 908 note 3.

76. Pa.—*Sterling v. Ritchey*, 17 Serg. & R. 263.

Ignorance excused

In a case where a circuit court system was restored after having

c. Prospective or Retrospective Operation

Court rules ordinarily operate prospectively only, and should not be made retrospective.

While the general rule is that rules of court must be held to operate prospectively only,⁷⁷ a rule may be made to operate on actions pending at the time of its adoption by manifesting such intent;⁷⁸ and it has also been held that a rule which relates only to procedure and in no way affects rights of the parties is applicable to future procedure in pending litigation,⁷⁹ although such a rule does not enlarge the effect of pleadings filed prior to their enactment.⁸⁰ On the other hand, it has been held that rules of court should not be retrospective in their terms.⁸¹

§ 177. Construction

a. Power to construe

b. Rules of construction

been out of use for a number of years, it was held that, although the old rules of practice in that court were also restored, the ignorance of an attorney regarding the necessity of an affidavit of defense might be excused under the circumstances, where he offered to furnish the required affidavit as soon as he learned of the rule.—*Sterling v. Ritchey*, supra.

77. Ill.—*Rose v. Meyer*, 18 N.E.2d 184, 370 Ill. 166.

Mo.—*State ex rel. Duckett v. Bender*, 239 S.W. 833.

Neb.—*Heinemann v. Wilson*, 271 N.W. 346, 132 Neb. 159.

Pa.—*Kapp v. Henry*, 29 Pa. Dist. 119.

Tex.—*Sampson v. Gandy*, Civ.App., 116 S.W.2d 767.

15 C.J. p 910 note 20.

Right to jury trial

Supreme court rule requiring party desiring jury trial on appeal from justice of peace to make written demand therefor could not be considered by appellate court in determining right to jury trial in case appealed from justice of peace, where case had been tried before supreme court rule became effective.—*North American Provision Co. v. Kinman*, 6 N.E.2d 235, 288 Ill.App. 414.

Procedure on appeal

Where supreme court rule relating to the record on appeal was amended after judgment was entered in trial court and notice of appeal was filed, the procedure on appeal must be determined according to the rule in effect at the time judgment was entered in the trial court.—*Rose v. Meyer*, 18 N.E.2d 184, 370 Ill. 166.

Effect of amendment of rule

(1) Where application for writ of error was filed and case was submit-

ted before amendment of rule omitting requirement that application state that the particular decision or ruling sought to be reviewed was assigned as error in motion for rehearing in court of civil appeals, sufficiency of application must be determined according to rule before amendment.—*Robinson v. Commercial Standard Ins. Co.*, Tex.Com.App., 123 S.W.2d 337, reversing *Commercial Standard Ins. Co. v. Robinson*, Civ. App., 91 S.W.2d 1147.

(2) Where application for writ of error was filed prior to amendment deleting from rule portion thereof requiring that application for writ state that the particular decision or ruling sought to be reviewed was assigned as error in the motion for rehearing in court of civil appeals, application omitting such statement was improvidently granted and application was subject to dismissal.—*Texas Employers Ins. Ass'n v. McNorton*, Tex.Com.App., 122 S.W.2d 1043, dismissing error, Civ.App., 92 S.W.2d 562.

78. Ind.—*Coffin v. McClure*, 23 Ind. 356.

Pa.—*Chain v. Hart*, 40 Pa. 374.

79. Pa.—*Schumacher v. Ploplis*, 87 Pa.Super. 265—*Laukhuff's Estate*, 39 Pa.Super. 117.

80. Pa.—*Schumacher v. Ploplis*, 87 Pa.Super. 265.

81. N.C.—*Rawlings v. Neal*, 29 S.E. 93, 122 N.C. 173.

15 C.J. p 910 note 23.

82. Mo.—*State v. Ellison*, 184 S.W. 963, 267 Mo. 321.

Pa.—*Dellacasse v. Floyd*, 2 A.2d 860, 332 Pa. 218—*Richter v. City of Scranton*, 184 A. 252, 321 Pa. 430—*School Dist. of Haverford Tp., to Use of Tedesco, v. Herzog*, 171 A.

a. Power to Construe

The construction of court rules is for the court which enunciates them, and its conclusion will not ordinarily be revised in the absence of a clear abuse of power or manifest error.

The construction of court rules is for the court which enunciates them,⁸² and while it has been held that such construction is not final, but is subject to revision by an appellate court,⁸³ the general rule is that a court's construction of its own rules will not be interfered with by a higher court⁸⁴ in the absence of a clear abuse of power or manifest and material error,⁸⁵ such as a construction which violates the plain terms of the rule or of some organic or statutory law.⁸⁶

b. Rules of Construction

Court rules, especially those which are for the convenience of the court, should be liberally construed, although a strict construction will be given to rules intended for the protection of the rights of the parties.

455, 314 Pa. 161—*Smith v. Ellwood City Ice Co.*, 166 A. 560, 311 Pa. 147—*Commonwealth v. Morgan*, 124 A. 339, 280 Pa. 67—*East Pittsburgh Building & Loan Ass'n v. Teets*, 186 A. 166, 123 Pa.Super. 117—*Mittin Bros. v. Bass*, 84 Pa.Super. 298.

W.Va.—*Teter v. George*, 103 S.E. 275, 86 W.Va. 454.

Power to prescribe and enforce rules includes the power to interpret and apply them.—*Citizens' Nat. Bank v. Dixon*, 117 S.E. 685, 94 W.Va. 21.

Trial court has wide power to construe its own rules.—*McFadden v. Pennzoil Co.*, 191 A. 584, 326 Pa. 277.

Court of appeals can construe its own rules, which construction is a judicial determination of the matter.—*State ex rel. Wallace State Bank v. Trimble*, 272 S.W. 72, 308 Mo. 278.

83. Mass.—*Rathbone v. Rathbone*, 4 Pick. 89.

15 C.J. p 911 note 35.

84. W.Va.—*Teter v. George*, 103 S.E. 275, 86 W.Va. 454.

15 C.J. p 911 note 33.

Court of appeals' interpretation of its rules as to filing assignments of error, etc., is final and not reviewable by supreme court.—*Osborne v. Tennessee Electric Power Co.*, 12 S.W.2d 947, 158 Tenn. 278.

85. Pa.—*Richter v. City of Scranton*, 184 A. 252, 321 Pa. 430—*East Pittsburgh Building & Loan Ass'n v. Teets*, 186 A. 166, 123 Pa.Super. 117—*Mittin Bros. v. Bass*, 84 Pa.Super. 298—*Megargee v. City of Philadelphia*, 16 Pa. Dist. & Co. 588.

15 C.J. p 911 note 34.

86. Pa.—*Brennan's Estate*, 65 Pa. 16. W.Va.—*Star Piano Co. v. Burgner*, 109 S.E. 491, 89 W.Va. 475.

Rules should be construed in harmony with statutes relating to the same matter, and different rules as to particular practice should be construed together.

Rules which are enacted by virtue of constitutional or statutory authority, and which are mandatory in their terms, should be construed in the same manner as statutes,⁸⁷ because they have the force and operation of a statute, as stated *supra* § 176 a. Strict interpretation will be given to provisions that are aimed to protect the rights of the parties;⁸⁸ but provisions intended only for the convenience of, and aid to, the court should be liberally construed.⁸⁹ A rule having reference to the public good should not receive a strict or narrow construction;⁹⁰ and it has been held with reference to court rules generally that they should not be construed too strictly or literally,⁹¹ but should be liberally and reasonably construed so as to promote rather than defeat justice.⁹² They will not, however, be construed so as to favor a negligent, and penalize a diligent, party.⁹³ Rules of court apply to all persons, cases, and representatives of cli-

ents alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties, or their counsel.⁹⁴

In determining whether a rule made pursuant to constitutional and statutory authority is mandatory or directory, the court will apply the same rules of construction that are applicable to constitutions and statutes.⁹⁵ A rule will be construed as directory merely, where another construction would work a denial of practice.⁹⁶

Court rules must also be construed with due regard to the reason on which they rest, and so as to promote the objects which their framers had in view in adopting them,⁹⁷ and so as not to interfere with fundamental rights.⁹⁸

A rule of court, not limited by its terms to actions at law, must also be applied to actions in equity,⁹⁹ and even though a rule does not in terms relate to criminal cases, it may be adopted in such cases by analogy when applicable.¹

67. Cal.—*Helbush v. Helbush*, 290 P. 18, 209 Cal. 758.
Fla.—*Syndicate Properties v. Hotel Floridian Co.*, 114 So. 441, 94 Fla. 899.

15 C.J. p 910 note 25.

88. Mo.—*Clark v. Meriwether*, App., 123 S.W.2d 603.

Rule penalizing violation

Court rule, violation of which results in dismissal of appeal, is highly penal and should be strictly construed.—*Dorfer v. City of Natchitoches*, La.App., 160 So. 807.

69. Mo.—*Clark v. Meriwether*, App., 123 S.W.2d 603.

15 C.J. p 911 note 27.

Rules to further efficient dispatch of business will not be applied harshly or in highly technical manner, test being whether the purpose of rule is substantially effectuated.—*Myers v. Union Electric Light & Power Co.*, Mo.App., 125 S.W.2d 950.

Rules governing procedural matters

(1) Rules governing procedural matters should be liberally construed.—*Mauldin Drilling Co. v. Weyman*, Tex.Civ.App., 3 S.W.2d 585, error dismissed.

(2) Court rules respecting procedure on appeal are to be liberally construed and applied.—*T. J. Perry & Son v. Harrison*, 135 So. 409, 24 Ala.App. 356.

90. U.S.—*City and County of Denver v. Stenger*, C.C.A.Colo., 295 F. 809.

91. Ill.—*People v. Davis*, 192 N.E. 210, 357 Ill. 396—*People ex rel. Wilmette State Bank v. Village of Wilmette*, 13 N.E.2d 990, 294 Ill. App. 362.

N.Y.—*Broome County Farmers' Fire Relief Ass'n v. New York State Electric & Gas Corporation*, 268 N.Y.S. 131, 239 App.Div. 304, affirmed 191 N.E. 591, 264 N.Y. 614.

92. Mo.—*Harbison v. Chicago*, R. I. & P. Ry. Co., 37 S.W.2d 609, 327 Mo. 440, 79 A.L.R. 1.

Mont.—*State v. District Court of Fourteenth Judicial Dist. in and for Wheatland County*, 284 P. 125, 86 Mont. 358.

N.J.—*Baldwin Lumber Co. v. Local No. 560, International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America*, 109 A. 147, 91 N.J.Eq. 240.

N.M.—*Jaritas Live Stock Co. v. Spriggs*, 74 P.2d 722, 42 N.M. 14.

N.Y.—*Broome County Farmers' Fire Relief Ass'n v. New York State Electric & Gas Corporation*, 268 N.Y.S. 131, 239 App.Div. 304, affirmed 191 N.E. 591, 264 N.Y. 614.

Rules will be construed to aid litigants, rather than to be test of skill between respective attorneys.—*Pacific Finance Corporation v. Ellithorpe*, 280 P. 658, 134 Or. 601.

Rules of appellate procedure

(1) Appellate court must construe its rules liberally so that causes on appeal may be determined on merits and disposition thereof so made, rather than on questions of procedure.—*Martin v. Petgen*, 11 N.E.2d 59, 104 Ind.App. 308—*Jones v. Moise*, 8 N.E.2d 99, 104 Ind.App. 390.

(2) The supreme court rules are not intended to create a trap for the unwary, but merely to facilitate review of cases in such court.—*Home Ins. Co., N. Y., v. Fidelity-Phenix*

Fire Ins. Co., 279 N.W. 425, 225 Iowa 36.

93. N.C.—*Hamby v. Callahan Const. Co.*, 128 S.E. 146, 189 S.C. 747.

94. Mo.—*Kolokas v. Missouri Pac. R. Co.*, 122 S.W. 1082, 223 Mo. 455—*Harding v. Bedoll*, 100 S.W. 638, 202 Mo. 625.

95. Okl.—*Carlile v. National Oil & Development Co.*, 201 P. 377, 83 Okl. 217.

96. Mo.—*State ex rel. Currier v. Falkenhainer*, 223 S.W. 100, 283 Mo. 203.

97. U.S.—*Maison Dorin Société Anonyme v. Arnold*, C.C.A.N.Y., 16 F.2d 977, certiorari denied 47 S.Ct. 571, 273 U.S. 766, 767, 71 L.Ed. 881. Ariz.—*Collins v. Superior Court in and for Maricopa County*, 62 P.2d 131, 48 Ariz. 381—*De Camp v. Central Arizona Light & Power Co.*, 57 P.2d 311, 47 Ariz. 517.

Ind.—*Smallwood v. Barskin*, 194 N.E. 147, 208 Ind. 267.

N.Y.—*In re Argus Co.*, 34 N.E. 388, 138 N.Y. 557—*In re Moore*, 15 N.E. 369, 108 N.Y. 280.

Intent of formulators of rules and evil to be remedied by rule must be considered—*Chiricahua Ranches Co. v. State*, 39 P.2d 640, 44 Ariz. 559.

98. Ga.—*Ransone v. Christian*, 56 Ga. 351.

Pa.—*Freeman's Estate*, 7 Pa.Dist. & Co. 59—*Gaston v. Tsagrinos*, 7 Pa. Dist. & Co. 23.

99. Wis.—*Rosecky v. Tomaszewski*, 274 N.W. 259, 225 Wis. 438.

1. Mass.—*Commonwealth v. Hassan*, 126 N.E. 287, 235 Mass. 26.

The reenactment of a rule of court must be held to have been made with intention to adopt the construction already placed on the language.²

Construction with reference to statutes. Court rules should, if possible, be construed in the light of and in harmony with statutes relating to the same matter,³ and in view of constitutional or statutory limitations on the power of the court,⁴ and should not be so construed as to subordinate the statute to the rule.⁵ A special rule adopting the

provisions of a repealed statute will be given the mandatory character which the statute had previously received.⁶

Construing rules together. Rules relating to the same matters should be construed together so as to avoid a conflict.⁷

Particular rules construed. Cases in which particular rules of practice and procedure have been construed are set out in the note.⁸ Under a rule of

2. Mich.—Preston Nat. Bank v. Wayne Cir. Judge, 100 N.W. 393, 137 Mich. 152.

3. Ariz.—De Camp v. Central Arizona Light & Power Co., 57 P.2d 311, 47 Ariz. 517.

Fla.—Bryan v. State, 114 So. 773, 94 Fla. 909—Seaboard Air Line Ry. Co. v. Hess, 74 So. 500, 73 Fla. 494. Mich.—Woodliff v. Baker, 272 N.W. 705, 279 Mich. 356.

Presumption is that rule was made to follow law.—Paulson v. Shearer, 8 Alaska 465.

Repealed statute

Provisions of court rule following substantially language theretofore used in repealed law are to be interpreted in same manner.—People v. Malone, 2 P.2d 332, 213 Cal. 406.

Where supreme court in preparing rule adopted language of a statute which had not been construed, court will construe statute and give rule same construction.—Hess & Skinner Engineering Co. v. Turney, 203 S.W. 593, 109 Tex. 208, answers to certified questions conformed to, Civ.App., 207 S.W. 171, and modified on other grounds 216 S.W. 621, 110 Tex. 148.

Service of summons

Court rule permitting service of summons by registered mail must be read in light of statute which does not permit personal service of original process on resident outside borders of state.—Woodliff v. Baker, 272 N.W. 705, 279 Mich. 356.

Default procedure

Court rule relative to default procedure should be construed with reference to applicable statutes.—State ex rel. Fisher v. Rowe, 148 So. 588, 110 Fla. 141—Holder Turpentine Co. v. M. C. Kiser Co., 67 So. 85, 68 Fla. 312.

4. Tex.—Golden v. Odiome, 249 S.W. 822, 112 Tex. 544.

5. Fla.—Seaboard Air Line Ry. Co. v. Hess, 74 So. 500, 73 Fla. 494.

6. N.M.—State v. City of Albuquerque, 262 P. 225, 33 N.M. 184.

7. Ill.—Aurora Nat. Ban. v. Funk, 16 N.E.2d 442, 296 Ill.App. 437.

Or.—State v. Director, 231 P. 191, 113 Or. 74, reversing 227 P. 298, 113 Or. 74.

Pa.—McKeown v. Rosenthal, 97 Pa. Super. 271.

Rules held not in conflict

Rule requiring pleadings and other papers presented to court of chancery to be marked filed and forwarded to clerk was not in conflict with rule requiring solicitor to pay filing fees before clerk shall file paper.—In re S——, 169 A. 679, 115 N.J. Eq. 186.

Divisions of circuit court

(1) Rules adopted by circuit judges of a circuit court dividing court into divisions and providing that, when judge is absent or assigned for trial work, he shall give such his exclusive time, did not affect constitutional jurisdiction of each circuit judge in judicial circuit.—City of Coral Gables v. Blount, 178 So. 554, 131 Fla. 36.

(2) Although the circuit court of a city may be separated into many divisions, it is nevertheless one court, and where parties stipulated in the supreme court for reversal of a circuit court ruling the remanding mandate thereon went to the circuit court and not to a division thereof, and Circuit Court Rules, rule 4 subd S, that a mandate shall go to the division which tried the case and from which it was appealed is only a procedural rule facilitating its disposition.—Hargadine-McKittrick Dry Goods Co. v. Garesche, Mo., 227 S. W. 824.

Indorsement of garnishee summons

Rule of Chicago municipal court requiring indorsement on copy of garnishee summons, left with garnishee, of defendant's business, business address, and residence address, but not providing that failure to comply therewith should be jurisdictional or require quashing of the summons or discharge of the garnishee or even requiring that return of the summons show compliance with such rule, did not of itself require granting of a motion to quash summons for noncompliance.—Chicago City Bank & Trust Co. v. Kaplan, 281 Ill.App. 97.

Pleadings

A rule of court providing that in all actions not specifically provided for by the Practice Act of 1915, 12

P.S. § 382 et seq, the pleadings shall conform to the requirements thereof as nearly as possible, means only that the pleadings shall conform to such requirement as those relating to conciseness, numbered paragraphs each containing but one material allegation, pleading evidence or conclusions of law, attaching copies of writings relied on, proper form of denials, verification, etc., and is not intended to provide what the pleadings shall consist of or what the practice shall be.—Carlisle Deposit Bank & Trust Co. v. Hoffer, 35 Pa. Dist. & Co. 157.

Taking depositions

Supreme court rule relating to taking of depositions, although same as statute, is intended to make definite and simplify practice, and is not to be presumed to limit statutes relating to same subject matter, but is to be considered supplementary.—American Fruit Growers v. Calvert, 56 P. 2d 1307, 186 Wash. 29, rehearing denied and modified on other grounds 59 P.2d 747, 186 Wash. 29.

Inspection of books, papers, or documents

Rule authorizing chancellor to direct inspection of "any books, papers or documents" does not authorize party to pry into records of stranger.—McCarter v. Farmers' Loan & Trust Co., 147 A. 785, 105 N.J.Eq. 322.

Service of papers

A circuit court rule requiring copies of papers filed in a cause to be served on attorney of adverse party whenever such party had appeared by attorney did not apply to orders entered pursuant to oral motions or oral applications.—State ex rel. Kaser v. Leonard, Or., 94 P.2d 1113.

Modes of review

Supreme court rule providing for review by notice of appeal, designated an "appeal", did not destroy former writs in terming them appeals.—Attorney General v. Lane, 243 N.W. 6, 259 Mich. 283, certiorari denied Lane v. Voorhies, 53 S.Ct. 115, 287 U.S. 654, 77 L.Ed. 565.

Notice of appeal

Court rule which provided for service and filing of notice of appeal in criminal cases within five days after entry of order appealed from

a state supreme court, making "rules" governing comments by district judges on evidence those in force in the United States district courts, the word "rules" was held to mean the practice, procedure, custom, method, and/or system prevailing in such federal courts.⁹

§ 178. Suspension or Modification in Particular Cases

- a. Power of court
- b. Consent, stipulation, or waiver by parties or counsel

a. Power of Court

While some authorities hold that a court has no power to suspend or modify its rules in a particular case, others hold that a court may exercise such power when justice so requires. When the rule is not mandatory,

required dismissal of state's appeal from an order vacating order of forfeiture of cash bail where notice of appeal was not given within specified time, as against contention that order was an adjudication of civil character and that rule relating to appeals in civil cases was applicable.—*State v. Knizek*, 72 P.2d 310, 192 Wash. 34.

Time of filing briefs

Dauphin County Court Rules, rule No. 58A, relating to the time of filing briefs applies both to cases where there has been an oral argument, and to those where the matter has been submitted on briefs.—*Weiser v. Michlovitz*, 46 Dauph.Co., Pa., 385.

Supreme Court rules regarding submission of causes apply to case presented to supreme court, on rule to show cause, since court rules apply to any cause unless they are relaxed or dispensed with by supreme court.—*Ash v. Cohn*, 3 A.2d 130, 121 N.J.Law 412.

9. Colo.—*Kolkman v. People*, 300 P. 575, 89 Colo. 8.

10. D.C.—*Nealon v. Davis*, 18 F.2d 175, 57 App.D.C. 133.

Ind.—*Poff v. McKilip*, App., 18 N.E.2d 963.

Me.—*Hill v. Finnemore*, 172 A. 826, 132 Me. 459.

Md.—*Carey v. Safe Deposit & Trust Co. of Baltimore*, 178 A. 242, 168 Md. 501.

Mo.—*Pelletier v. Heart of America Hospital Ass'n*, App., 2 S.W.2d 805 —*Taylor v. Heart of America Hospital Ass'n*, 2 S.W.2d 804, 222 Mo. App. 17.

N.C.—*Hamby v. Callahan Const. Co.*, 128 S.E. 146, 189 N.C. 747.

Or.—*Bratt v. State Industrial Accident Commission*, 236 P. 478, 114 Or. 644.

Wash.—*State v. Currie*, 94 P.2d 754, 15 C.J. p 912 note 38.

Courts of review will not vary the application of the rule to suit the contingencies of the particular case.—*Rubottom v. Crane Co.*, 23 N.E.2d 354, 302 Ill.App. 58.

Discretion reserved

Under statute district judges may suspend or set aside their rules at their discretion.—*Succession of Troclair*, 1 La.App. 209.

11. Del.—*Garland v. Independent Oil & Gas Co.*, 156 A. 263, 18 Del.Ch. 115—*Kuratle v. Pyle*, 107 A. 788, 12 Del.Ch. 112, affirmed *Pyle v. Kuratle*, 110 A. 659, 12 Del.Ch. 372.

Fla.—*Demos v. Walker*, 126 So. 305, 99 Fla. 302.

Ky.—*Warfield Natural Gas Co. v. Allen*, 33 S.W.2d 34, 236 Ky. 358.

Miss.—*Dogan v. Cooley*, 185 So. 783.

Mont.—*State v. Kacar*, 240 P. 365, 74 Mont. 269.

Neb.—*Uerling v. State*, 250 N.W. 243, 246, 125 Neb. 374, citing *Corpus Juris*.

N.H.—*Flannagan v. Prosper Shevell & Son*, 135 A. 24, 82 N.H. 403.

N.J.—*Ash v. Cohn*, 3 A.2d 130, 121 N.J.Law 412—*Lambert v. Trenton & Mercer County Traction Co.*, 135 A. 270, 103 N.J.Law 23, affirmed 139 A. 718, 104 N.J.Law 175—*In re Boury's Estate*, 3 A.2d 137, 124 N.J.Eq. 608—*Federal Title & Mortgage Guaranty Co. v. Lowenstein*, 166 A. 538, 113 N.J.Eq. 200—*Paper & Textile Machinery Co. v. Newlin*, 137 A. 314, 101 N.J.Eq. 115—*Schubert v. District Court of Third Judicial Dist. of Bergen County*, 159 A. 615, 10 N.J.Misc. 414—*Great American Indemnity Co. v. Gronowicz*, 142 A. 897, 6 N.J.Misc. 821, followed in *Dumphy v. Weiner*, 143 A. 922, 7 N.J.Misc. 13.

N.Y.—*Broom County Farmers' Fire Relief Ass'n v. New York State Electric & Gas Corporation*, 268 N.Y.S. 131, 239 App.Div. 304, affirmed 191 N.E. 591, 264 N.Y. 614.

but is merely directory and for the convenience of the court, it may be disregarded by the court. Ordinarily, a court cannot abrogate or suspend rules prescribed for it by a higher court, nor can rules made by a lower court be suspended by a higher court. Rules adopted by the court as such cannot be disregarded by a single judge.

There are numerous cases which declare that rules of court should be adhered to both by parties litigant and the court, in all cases which fall within them, as long as they remain in force, and that the court has no power in a particular case, where no discretion is reserved, to suspend or to modify any rule which it has made.¹⁰ On the other hand, there is abundant authority in support of the view that rules of court are but a means to accomplish the ends of justice, and that the court has the power to modify, suspend, or rescind its own rules whenever justice requires it,¹¹ at least where no party

Pa.—*McFadden v. Pennzoil Co.*, 191 A. 584, 326 Pa. 277—*Commonwealth v. Wilcox*, 178 A. 653, 316 Pa. 129 —*Kehres v. Stuenkel*, 136 A. 794, 288 Pa. 534—*Commonwealth v. Boyle*, 165 A. 521, 108 Pa.Super. 598 —*Gorman v. Sullivan*, 84 Pa.Super. 161—*Haytock v. Nickel*, 19 Pa.Dist. & Co. 671—*Megargee v. City of Philadelphia*, 16 Pa.Dist. & Co. 588, 590, citing *Corpus Juris*—*Tausig v. Fishman*, 29 Pa.Dist. 1171—*Coats v. Miffin*, 29 Pa.Dist. 1009—*Kressly Estate, Inc., v. Hendricks*, 26 North.Co. 70.

Tex.—*Stevenson v. Wilson*, Civ.App., 130 S.W.2d 317, error refused.

15 C.J. p 912 note 39.

"Courts are reluctant to give effect to rules of procedure which seem harsh and unfair and which prevent a litigant from having his claim adjudicated upon its merits."—*Stapp v. Andrews*, 113 S.W.2d 749, 750, 172 Tenn. 610.

Rules of practice are for purpose of aiding in speedy determination of causes, while the courts are established for the higher purpose of the administration of practice, and, where the strict enforcement of the letter of a rule would tend to prevent or jeopardize the administration of justice, the rule must yield to the higher purpose, and be relaxed by the court.—*Vilsack v. General Commercial Securities Corporation*, 143 So. 250, 106 Fla. 296—*Baker-Lewis Const. Co. v. Midyette*, 141 So. 534, 105 Fla. 502—*Edwards v. Knight*, 139 So. 582, 104 Fla. 16, adhered to 143 So. 441, 104 Fla. 16—*O'Gara v. Hancock*, 79 So. 167, 76 Fla. 1.

Trial court has wide power to determine whether rules are to be rigidly enforced, or even to suspend rules when its action does not prejudice party seeking to invoke rules—*McFadden v. Pennzoil Co.*, 191 A. 584, 326 Pa. 277.

is prejudiced thereby;¹² and even if, under some circumstances, a declaration may be stricken for failure to comply with a rule of court, it should not be when it would work manifest injustice.¹³ This conflict of authority is, however, more apparent than real, for while the cases do not always bring out the distinction clearly, the general tendency appears to be toward an opinion that the power of a court to modify or suspend its rules in particular cases depends largely on the character of the rule,

the principle being that rules which are merely directory, or which are prescribed solely for the governance of attorneys and the convenience of the court, may be dispensed with when the ends of justice so require, but rules which are mandatory must never be dispensed with in an arbitrary manner in cases where it will operate to the prejudice of the parties, or tend to unsettle the established practice of the court.¹⁴

Deference for a valid act of the general assembly, clearly requires that the court of appeals exert its own power to make the act effective, even though in doing so the court contravenes a rule of practice generally accepted as binding.—*Burton v. Mayer*, 118 S.W.2d 547, 274 Ky. 263.

Vice chancellor may relax or dispense with rules of practice after he has acquired jurisdiction; but where strict adherence thereto would work surprise or injustice he cannot dispense with rule for purpose of acquiring jurisdiction.—*Scranton But- ton Co. v. Neonlite Corporation of America*, 149 A. 369, 105 N.J.Eq. 708.

Discretion of court

(1) The summary and equitable jurisdiction of a court of law so to control its own process and proceedings as not to produce hardship is a matter of grace or discretion, and not of right, where the proceedings have been regular, and is characterized by the imposition of terms on the party to whom concession is made.—*Ownbey v. Morgan*, 41 S.Ct. 433, 256 U.S. 94, 65 L.Ed. 337, 17 A.L.R. 873, affirming 105 A. 838, 7 Boyce, Del., 297.

(2) The district court of appeal will not in all cases enforce its rules but will retain discretion in exacting compliance.—*In re Paterson's Estate*, Cal.App., 76 P.2d 138.

(3) Whether court will deviate from court rules fixing law day is matter of discretion.—*Elsom v. Tefft*, 268 P. 177, 148 Wash. 195, appeal dismissed *Tefft v. Grant*, 49 S.Ct. 479, 279 U.S. 324, 73 L.Ed. 977.

On rare occasions, and in the interest of justice, rule of supreme court that in special proceedings only questions of law will be considered may be waived by court.—*State ex rel. Helena Allied Printing Council v. Mitchell*, 74 P.2d 417, 105 Mont. 326.

When rule not waived by court

While the court may, upon a proper showing, waive the requirements of its own rules, it will not waive the requirement of Rules of Court, rule 27, which provides that "in no case will the Court receive written, without oral, argument," in a case of importance involving an indictment charging violation of the Pennsylvania

General Food Law.—*Commonwealth v. Richards*, 29 Berks Co.L.J., Pa., 319.

Burden of showing waiver by court is on one asserting waiver.—*Esch v. Forster*, 127 So. 336, 99 Fla. 717.

In Illinois it has been held that:

(1) Court rules may be disregarded by judges for good cause and where no material harm is done to accused.—*People v. Davis*, 192 N.E. 210, 357 Ill. 396.

(2) Court rules not violating constitution or statute are binding on judges, court officers, and litigants, unless in particular case judge for good cause may disregard them.—*People v. Feinberg*, 181 N.E. 437, 348 Ill. 549.

(3) A court of review will not vary the application or interpretation of the rules regarding taking of an appeal to suit the contingencies of a particular case.—*Lewis v. Renfro*, 9 N.E.2d 652, 291 Ill.App. 396.—*Bender v. Alton R. Co.*, 1 N.E.2d 108, 284 Ill.App. 419.

In Iowa it has been held that:

(1) Supreme court may, under some circumstances, waive its own rules.—*Farmers' State Sav. Bank of Promise City v. Miles*, 221 N.W. 449, 206 Iowa 776.

(2) But it cannot do so where the matter sought to be obviated is statutory, and where the rules with respect to the subject merely conform to the statute.—*Arends v. Frerichs*, 186 N.W. 457, 192 Iowa 1313, dismissing petition 184 N.W. 650, 192 Iowa 285.

In Texas

(1) The court of civil appeals has the right to enforce its rules within such limitation as justice may require.—*Rowntree v. Peck Furniture Co.*, Com.App., 248 S.W. 26.

(2) But it has also been held that, while a reviewing court is loath to deprive litigant of complete opportunity to present every proposition deemed by him important to his rights, it is bound by rules of procedure, and may not suspend them.—*Roesser v. Coffey*, Tex.Civ.App., 98 S.W.2d 275.

12. N.J.—*Standard Embossing Plate*

Mfg. Co. v. American Salpa Corporation, 166 A. 542, 113 N.J.Eq. 246.

13. D.C.—*Danzansky v. Zimballist*, 105 F.2d 457, 70 App.D.C. 234.

14. Okl.—*Holbert v. Patrick*, 176 P. 903, 74 Okl. 290.

Wash.—*Elsom v. Tefft*, 268 P. 177, 148 Wash. 195, appeal dismissed *Tefft v. Grant*, 49 S.Ct. 479, 279 U.S. 324, 73 L.Ed. 977.

15 C.J. p. 913 note 41.

Place where motions should be made

The rules that have been adopted by the supreme court prescribing the motions and applications that are to be made to the different parts of the court were not intended to embrace motions or applications in criminal actions.—*People ex rel. Newton v. Special Term*, Part 1, Supreme Court New York County, 184 N.Y.S. 193, 193 App.Div. 463.

Character of rules distinguished

(1) "There is, of course, a wide difference in the character of the various rules of courts. Some are intended merely to produce regularity and order in court proceedings. Rules of appellate courts as to the form of briefs, etc., such rules may well be placed as directory only. There is another class, such as the one under consideration, which stands as notice to all litigants that the court will not act until a certain time, or until certain prior steps are taken. To disregard such rules would be the very opposite of the promotion of justice."—*Holbert v. Patrick*, 176 P. 903, 904, 74 Okl. 290.

(2) Accordingly, it has been held that, where rule of district court provides that demurrer and motions shall only be heard on certain days, the court, without agreement of counsel, cannot disregard the rule and hear a demurrer prior to day it would regularly come on for hearing.—*Holbert v. Patrick*, supra.

(3) On the other hand, it has been held that where district court adopts rule requiring journal entry of judgment to be signed by counsel for both plaintiff and defendant enforcement of rule is discretionary.—*McAleer v. Waddell-O'Brien Motor Co.*, 231 P. 480, 105 Okl. 35.

Even though mandatory, a rule authorizing judgment for failure to

When the rules of a court are prescribed by a higher court under a statute, discussed supra § 170 b (2), the court for which such rules are prescribed has no authority to modify, abrogate, or suspend the same;¹⁵ but where a rule prescribed by a court of last resort to regulate proceedings in an intermediate appellate court in effect precludes the latter court from exercising judicial functions in a matter in which its jurisdiction is properly invoked, the rule may be disregarded on sufficient excuse, within

the discretion of the intermediate court.¹⁶ On the other hand, where a lower court has the power to make its own rules, they cannot be suspended by a higher court in a particular case,¹⁷ except in the manner provided by such rules.¹⁸

Leave of court. A litigant desiring the relaxation of a court rule may be required to obtain leave of court,¹⁹ and the application will be refused unless strong reasons are presented in its favor.²⁰

serve notice of appeal from a magistrate's court will not be enforced where appellee's attorney had actual notice of the appeal and entered a general appearance.—*Konheim v. Pomeroy's, Inc.*, 22 Pa.Dist. & Co. 129.

Mandatory rule affecting substantial rights

(1) Such a rule cannot be waived by court.—*U. S. v. Minkus*, 16 Ct. Cust.App. 263.

(2) A rule of court that in divorce proceedings, after testimony has been taken, the case shall be placed upon the argument list, is mandatory; the rule affects the respondent's rights and, until abrogated, is in force and cannot be disregarded by the court.—*Fisher v. Fisher*, 74 Pa. Super. 538.

Rules not essential for protection of substantial rights of litigants must give way to rules not impeding justice.—*City of Milwaukee v. Johnson*, 213 N.W. 335, 192 Wis. 585.

Deprivation of rights

Where court in rendering default judgment disregards court rules, depriving party of trial, judgment is erroneous.—*Ramsey v. Holland*, 172 N.E. 411, 35 Ohio App. 199.

Equity rules

(1) Equity rules are the rules of all the courts, to be enforced as of course in all of them, and not relaxed or disregarded as matter of mere indulgence or convenience.—*Philadelphia & Reading Coal & Iron Co. v. Tremont Tp. School Dist.*, 5 Schuylkill Reg., Pa., 259.

(2) Court cannot expedite unduly a proceeding in violation of equity rules.—*Mintzer v. Turnbach*, 172 A. 162, 113 Pa.Super. 113.

Important question involved

Where question raised by appeal was one theretofore not decided in the state, and respondents had not been misled nor prejudiced by appellants' alleged noncompliance with rules nor appellate court inconvenienced thereby, appeal was considered on its merits rather than dismissed for such noncompliance.—*In re Paterson's Estate*, Cal.App., 76 P. 2d 138.

Time for filing pleadings

Valid court rule, made in particular case, fixing time within which

pleadings must be filed, is not obligatory on court, but may be enforced where enforcement does not deny defendant reasonable opportunity to exercise legal rights.—*Uerling v. State*, 250 N.W. 243, 125 Neb. 374.

Time for filing transcript

Supreme court rule limiting time for filing transcript was held not of character requiring its suspension or waiver to promote justice.—*Sullivan v. Nevada Industrial Commission*, 14 P.2d 262, 54 Nev. 301.

Suspension as precedent

A suspension of rules in one case should not operate as a precedent in another case.—*Tucker v. State*, 150 S. W. 190, 67 Tex.Cr. 510.

Mandamus will not lie to compel a court to dispense with the requirements of its rules in a particular case.—*Alexander v. State*, 14 Lea, Tenn., 88.

15. S.D.—*Presho State Bank v. Northwestern Milling Co.*, 186 N.W. 560, 45 S.D. 147, denying rehearing 185 N.W. 370, 45 S.D. 58, 23 A.L.R. 48.

Va.—*Omohundro v. Palmer*, 164 S.E. 541, 158 Va. 693.

15 C.J. p 914 note 47.

Supreme court rules relating to appeals cannot be disregarded by trial judge.—*State v. Moore*, 187 S.E. 586, 210 N.C. 459—*Pruitt v. Wood*, 156 S. E. 126, 199 N.C. 783—*Pentuff v. Park*, 143 S.E. 139, 195 N.C. 609—*Covington v. Hanes Hosiery Mills Co.*, 142 S.E. 705, 195 N.C. 478—*State v. Crowder*, 142 S.E. 222, 195 N.C. 335—*Womble v. Moncure Mill & Gin Co.*, 140 S.E. 230, 194 N.C. 577—*Waller v. Dudley*, 137 S.E. 149, 193 N.C. 354—*Stone v. Ledbetter*, 133 S.E. 162, 191 N.C. 777.

Appellate court cannot change rule announced by the supreme court.—*Girvin v. Metropolitan Life Ins. Co.*, Mo.App., 84 S.W.2d 644.

Statute providing for liberal construction of practice act does not contemplate disregard of rules established by supreme court for orderly and convenient procedure in prosecution of appeals.—*Cullinan v. Cullinan*, 1 N.E.2d 921, 285 Ill.App. 272.

Probate procedure of county courts

Rule of supreme court relating to

procedure of county courts in probate matters, cannot be dispensed with to suit the circumstances in any particular case.—*Carlile v. National Oil & Development Co.*, 201 P. 377, 83 Okl. 217—*Winona Oil Co. v. Barnes*, 200 P. 981, 83 Okl. 248.

Willful disregard of such rules is reversible error.—*Weibel v. Gardner*, 187 N.W. 629, 45 S.D. 349, 23 A.L.R. 50.

16. Tex.—*State v. Scranton Independent County Line School Dist.*, Com.App., 285 S.W. 601, affirming *Scranton Independent School Dist. v. State*, Civ.App., 277 S.W. 435.

Time for filing transcript

Rule 7, prescribed by supreme court to regulate proceedings in courts of civil appeals, requiring transcript in quo warranto proceedings to be filed within twenty days after appeal is perfected, may be disregarded upon sufficient excuse within discretion of court of appeals.—*State v. Scranton Independent County Line School Dist.*, supra.

17. Wis.—*Baker v. State*, 54 N.W. 1003, 84 Wis. 584.

18. Ariz.—*Collins v. Superior Court in and for Maricopa County*, 62 P. 2d 131, 48 Ariz. 381.

Supreme court cannot on appeal make exceptions to uniform rules of superior court where rules have been violated, in absence of provision by lower court for waiver of rules in manner set forth in rules.—*Collins v. Superior Court in and for Maricopa County*, supra.

Rule relating to entry of final order and judgment is mandatory rather than discretionary and must be followed by superior courts and supreme court unless suspended or modified in manner set forth by court rules.—*Collins v. Superior Court in and for Maricopa County*, supra.

19. N.J.—*Ash v. Cohn*, 3 A.2d 130, 121 N.J.Law 412.

Record not complying with supreme court rules as to submission of cause, and which was not filed with leave of court could not be considered.—*Ash v. Cohn*, supra.

20. Ala.—*Williams v. State*, 175 So. 697, 27 Ala.App. 525.

15 C.J. p 913 note 42.

The action of a court in refusing to suspend one of its rules will not be reviewed on appeal, unless the rule in question and the circumstances alleged to justify its suspension are set out in the bill of exceptions.²¹

*Rules adopted by a whole body of judges, or a majority of them, should be observed and enforced by single judges.*²²

b. Consent, Stipulation, or Waiver by Parties or Counsel

Although it has been held that court rules cannot be abrogated by agreement of the parties or their counsel, there is authority to the effect that a party or his counsel may consent to the suspension of a rule, or may waive the benefit thereof.

Where rules are prescribed by a court, no unqualified right exists in parties to stipulate for the abrogation of the same,²³ and it has been held that court rules cannot be abrogated by agreement of the parties or their counsel,²⁴ and that mandatory rules for trial courts, promulgated under the express direction of the legislature cannot be waived by a party, even with the consent of the court.²⁵ On the other hand it has been held that, where a

party who is entitled to insist on the observance of a rule consents to its suspension,²⁶ or waives the benefit thereof, either expressly or by his conduct,²⁷ its requirements may be dispensed with, although it is otherwise where the rule is made for the benefit of the public or the protection of the court, and not for the benefit of litigants.²⁸ In any event a mandatory rule cannot be waived by a litigant if the waiver affects a substantial right.²⁹

§ 179. Amendment, Repeal, or Abolition

- a. By courts
- b. By statute

a. By Courts

A court may, by formal action, amend or abolish its rules. Amendments of such rules ordinarily operate prospectively only, although it has been held that if an amendment relates only to foreclosure it may affect pending actions.

When rules of court are once duly adopted, they remain in force until changed or abrogated,³⁰ but the power to make rules, discussed supra § 170 b, includes the power to amend them.³¹ The amendment, however, must be made in the prescribed

Where any default is made by a litigant he must, in order to obtain leave from the court, not only show an excuse for his default, but also a meritorious case.—*In re Boury's Estate*, 3 A.2d 137, 124 N.J.Eq. 608.

21. Ill.—*Illinois Cent. R. Co. v. Haskins*, 2 N.E. 654, 115 Ill. 300.

22. Colo.—*Halter v. Wade*, 273 P. 1042, 85 Colo. 121.

La.—*Levy v. Michon Bros.*, 77 So. 644, 142 La. 825.

15 C.J. p 914 note 49.

Individual judges have no power to dispense with court rules lawfully adopted by court.—*Kaufman v. Buckley*, 188 N.E. 607, 285 Mass. 83—*Carp v. Kaplan*, 146 N.E. 779, 251 Mass. 225—*Everett-Morgan Co. v. Boyajian Pharmacy*, 139 N.E. 170, 244 Mass. 460.

23. Cal.—*Reynolds v. Lawrence*, 15 Cal. 359.

15 C.J. p 914 note 50.

24. Mo.—*Dean v. State Social Security Commission of Missouri*, App., 123 S.W.2d 573.

15 C.J. p 914 note 52.

Rule as to form and manner of submitting requested instructions cannot be abrogated by agreement of counsel to waive requirements.—*Diller v. Riverview Dairy*, 238 P. 401, 133 Or. 442.

Supreme court rules governing appeals cannot be disregarded by consent of litigants or counsel.—*State v. Moore*, 137 S.E. 536, 210 N.C. 459—

Pruitt v. Wood, 156 S.E. 126, 199 N.C. 738—*Pentuff v. Park*, 143 S.E. 139, 155 N.C. 609—*Covington v. Hanes Hosiery Mills Co.*, 142 S.E. 705, 195 N.C. 478—*State v. Crowder*, 142 S.E. 222, 195 N.C. 335—*Womble v. Moncure Mill & Gin Co.*, 140 S.E. 230, 194 N.C. 577—*Waller v. Dudley*, 137 S.E. 149, 193 N.C. 354—*Stone v. Ledbetter*, 133 S.E. 162, 191 N.C. 777—*Hardy v. Heath*, 124 S.E. 564, 188 N.C. 271—*State v. Farmer*, 124 S.E. 562, 188 N.C. 243.

25. S.D.—*Presho State Bank v. Northwestern Milling Co.*, 186 N.W. 560, 45 S.D. 147, denying rehearing 185 N.W. 370, 45 S.D. 53, 23 A.L.R. 48.

26. Me.—*Dwinell v. Larrabee*, 38 Me. 464.

Md.—*Gist v. Drakely*, 2 Gill 330, 41 Am.D. 426.

27. U.S.—*Concrete Mixing & Conveying Co. v. Great Western Power Co. of California*, D.C.Cal., 46 F.2d 331, appeal dismissed, C.C.A., 48 F.2d 1072.

Ariz.—*Collins v. Superior Court in and for Maricopa County*, 62 P.2d 131, 48 Ariz. 381—*Day v. Board of Regents of University of Arizona*, 36 P.2d 262, 44 Ariz. 277.

S.D.—*State v. Krogh*, 198 N.W. 559, 47 S.D. 314.

Failure to object

Where defendant made no objection to plaintiff's arguing that demurrer should not be sustained on ground

that complaint did not state facts sufficient to bring case within declaratory judgments act, although plaintiff did not file statement of point as required by court rule, trial court could pass on point.—*Day v. Board of Regents of University of Arizona*, 36 P.2d 262, 44 Ariz. 277.

Burden of proof is on party asserting waiver of rule governing procedure in court matters.—*Phillips v. Lindsay*, 136 So. 666, 102 Fla. 935.

28. Ariz.—*Collins v. Superior Court in and for Maricopa County*, 62 P.2d 131, 48 Ariz. 381.

Rule relating to entry of judgment is primarily for protection of court and not for protection of litigants, and hence may not be waived by parties.—*Collins v. Superior Court in and for Maricopa County*, supra.

29. U.S.—*U. S. v. Minkus*, 16 Ct. Cust.App. 263.

30. La.—*Schwing v. Dunlap*, 49 So. 134, 123 La. 485—*Berthelot v. Hottard*, 42 So. 90, 117 La. 524.

31. La.—*State v. Turner*, 152 So. 567, 178 La. 927.

Tex.—*In re Orders in Chambers*, 226 S.W. 1075.

Wash.—*State v. Currie*, 94 P.2d 754, 15 C.J. p 914 note 55.

Rule modified

Rule dealing with exceptions to findings is modified by amendment to rule relating to requests.—*Ioska Tribe of Red Men v. Great Council of Red Men*, 98 Pa.Super. 390.

manner,³² and it has been held that a court cannot abolish or modify its rules in vacation,³³ or by orders resting in parol.³⁴ Amendments to rules operate prospectively,³⁵ and their effect is in general the same as that of amendments to statutes;³⁶ but it has been held that an amendment of rules relating only to procedure generally affects pending actions.³⁷

A change in rules does not abrogate a preëxisting practice which was not dependent on written rules.³⁸ Such practice, although established by long-continued usage, should not be departed from suddenly, without notice, and to the injury of litigants.³⁹ Neither can a formally-adopted written rule of procedure be nullified by a custom.⁴⁰ A rule of court is not repealed or modified by a subsequent rule which makes no mention of the matter to which the previous rule relates, and which is not inconsistent with the previous rule.⁴¹

Where part of a rule remains unchanged, it is considered as having continued in force from the time of its original establishment,⁴² and the new or changed portion is considered as having become operative only at the time of its adoption.⁴³

b. By Statute

A rule of court may be amended or repealed by statute.

Where the authority exists in the legislature to regulate the practice and procedure in courts, the rules of a court may be amended, rescinded, or repealed by statute.⁴⁴ A rule of court is rendered inoperative by the enactment of a statute inconsistent therewith,⁴⁵ and when a statute is repealed all rules of court which derive their validity therefrom are rendered inoperative.⁴⁶ The enactment of a statute authorizing the court to make certain rules does not abolish the common-law power of said court to adopt rules, and rules previously adopted remain in force until new rules are made under the statute.⁴⁷ A mere change in the number of judges assigned to hold a court,⁴⁸ or in the number of a judicial district, otherwise left unchanged,⁴⁹ does not abrogate rules previously existing in such court of district.

§ 180. Record and Evidence of Rules

The court records are the only competent evidence of the existence of a rule of court, and such existence will not be presumed. The nonexistence of a particular rule must be shown by the testimony of the clerk of the court.

The records of the court are the only competent evidence of the existence of a rule of court,⁵⁰ and

32. La.—*State v. Turner*, 152 So. 567, 178 La. 927.

Publication

Order of district judges changing vacation period was ineffective, where order was not published in official journal of each parish of district at least three times, as required by mandatory statute.—*State v. Turner*, supra.

Necessity of order from bench in open court

Supreme court may make an order amending the rules, without announcing the order from the bench in open court.—*In re Orders in Chambers*, Tex., 226 S.W. 1075.

33. Ill.—*Treishel v. McGill*, 28 Ill. App. 68.

34. Iowa.—*Burlington, etc., R. Co. v. Marchand*, 5 Iowa 468.

35. N.C.—*Rawlings v. Neal*, 29 S.E. 93, 122 N.C. 173.

36. N.Y.—*In re Warde*, 48 N.E. 513, 154 N.Y. 342.

37. U.S.—*United Wall Paper Factories v. Hodges*, C.C.A.Conn., 70 F.2d 243, affirming, D.C., *In re Hodges*, 4 F.Supp. 804.

38. N.Y.—*Miller v. Stettiner*, 22 How.Pr. 518.

39. Mich.—*City of Detroit v. Judge of Recorder's Court*, 237 N.W. 40, 255 Mich. 44.

40. U.S.—*U. S. v. French*, C.C.A. Iowa, 95 F.2d 922, certiorari denied 59 S.Ct. 80, 305 U.S. 620, 83 L.Ed. 396.

41. Wash.—*Nicktovich v. Olympic Motor Transit Co.*, 289 P. 337, 148 Wash. 410.

Filing abstract of record

Rule requiring appellant to serve and file abstract of record held not changed or affected by subsequent rules.—*Nicktovich v. Olympic Motor Transit Co.*, supra.

42. N.Y.—*In re Warde*, 48 N.E. 513, 154 N.Y. 342.

43. N.Y.—*In re Warde*, supra.

44. Ala.—*Williams v. Knight*, 169 So. 871, 233 Ala. 42.

Neb.—*Sorensen v. Grand Island Clinic*, 228 N.W. 601, 119 Neb. 280. 15 C.J. p 914 note 63.

Striking cause from calendar

Municipal court rule dealing with right to strike cause from trial calendar on failure to comply with demand for bill of particulars was rescinded by enactment of section of civil practice act giving appellate division power to regulate practice pertaining to bills of particulars and by statute providing that procedure for obtaining bill of particulars should be that prescribed in civil practice act and rules adopted pursuant thereto, and hence granting of motion to

strike action from calendar under municipal court rule after such statutes had become effective was error.—*I. & B. Upholstering Co. v. Kresel*, 300 N.Y.S. 549, 252 App.Div. 577.

Effect of repeal

Rule of chancery practice repealed by civil practice act was inapplicable in suit in which taking of evidence did not begin before Jan. 1, 1934.—*Strickland v. Washington Bldg. Corporation*, 4 N.E.2d 973, 287 Ill.App. 340.

Rules not repealed

Act regulating trial, introduction of evidence and objections and exceptions did not repeal practice rules requiring that probable injury appear.—*Morgan Hill Paving Co. v. Pratt City Sav. Bank*, 127 So. 500, 220 Ala. 683, followed in 127 So. 502, 220 Ala. 686.

45. N.M.—*Texas, S. F. & N. R. Co. v. Saxton*, 6 P. 206, 3 N.M. 282. 15 C.J. p 914 note 64.

46. Minn.—*Jordan v. White*, 20 Minn. 91.

47. Iowa.—*Shane v. McNeill*, 41 N. W. 166, 76 Iowa 459.

48. W.Va.—*Sterling Organ Co. v. House*, 25 W.Va. 64.

49. Iowa.—*Shane v. McNeill*, 41 N. W. 166, 76 Iowa 459.

50. Ill.—*Harris v. Nelson*, 162 N.E. 333, 331 Ill. 225.

cannot be shown by affidavit;⁵¹ nor will its existence be presumed.⁵² The nonexistence of a particular rule must be proved by the testimony of the clerk of the court,⁵³ and an affidavit of counsel that there is no rule relating to a particular matter does not establish the nonexistence of such rule.⁵⁴ Un-

der a rule of the supreme court that such rules as may be adopted by the courts shall be published in a volume next succeeding their adoption, the official publication of the rules is not confined to an official bound volume of the opinion of the supreme court.⁵⁵

VI. RULES OF ADJUDICATION, DECISIONS, AND OPINIONS

A. MODE AND PRINCIPLES OF ADJUDICATION

§ 181. In General

- a. Definitions
- b. General rules

a. Definitions

The term "decision" means, strictly speaking the judgment in a case; but it has been variously applied to orders, reports of opinions, findings of fact, and conclusions of law, and other judicial determinations. An "opinion" is distinguished from a "decision" as being a statement of the reasons for the judgment. A "ruling" is a settlement or exposition of law without necessarily the force of a judgment or order.

A "decision" or "judicial decision" means, strictly speaking, the last act of the court,⁵⁶ or, in other words, the judgment⁵⁷ or conclusion.⁵⁸ It may be

a final judgment,⁵⁹ or an adjudication other than a final one;⁶⁰ it may be of intermediate matters, or of questions finally disposing of the case.⁶¹ It may apply with equal force to actions and special proceedings,⁶² or to a mere judicial determination.⁶³ Further, the term "decision" or "judicial decision" has been applied to, or held to mean, orders,⁶⁴ such as an order in a summary proceeding,⁶⁵ the reports or accounts of the opinions or judicial determinations of the courts,⁶⁶ the result when any issue or issues under the pleadings are tried, submitted, and decided by the court,⁶⁷ the resolution of the principles which determine a controversy,⁶⁸ an adjudication of a question submitted to the court,⁶⁹ and the

W.Va.—Smith v. Wallace, 182 S.E. 538, 116 W.Va. 546, citing *Corpus Juris*.

15 C.J. p 914 note 69.

51. Ill.—Calbreath v. Beckwith, 260 Ill.App. 7.

52. Mont.—State ex rel. Eden v. Schneider, 57 P.2d 783, 102 Mont. 286.

53. Ill.—Hughes v. Humphreys, 102 Ill.App. 194.

54. Ill.—Hughes v. Humphreys, *supra*.

55. Ill.—Stribbling v. Grace, App., 22 N.E.2d 719.

56. Ohio.—Buckeye Pipe Line Co. v. Fee, 57 N.E. 446, 62 Ohio St. 543, 78 Am.S.R. 743.

57. Miss.—Robertson v. Mississippi Valley Co., 81 So. 799, 120 Miss. 159.

N.Y.—Deming v. Post, 1 Code Rep. 121.

Tex.—Halbert v. Alford, 16 S.W. 814, 18 C.J. p 27 note 96.

"Judgment" defined see the C.J.S. title Judgments § 1, also 33 C.J. p 1047 note 1—p 1051 note 18.

Reversal included in decision.—Keller v. Summers, 171 S.W. 336, 262 Mo. 324—18 C.J. p 27 note 96 [b].

Oral judgment

(1) "Decision" has been applied to an oral judgment.—Takekawa v. Hole, 149 P. 593, 170 Cal. 328.

(2) However, it has been declared that "the decision or judgment is

necessarily in writing."—Teillard v. Green, 7 Porto Rico Fed. 328, 331.

58. Idaho.—Stark v. McLaughlin, 261 P. 244, 45 Idaho 112.

59. N.Y.—Deming v. Post, 1 Code Rep. 121.

18 C.J. p 27 note 96.

60. Iowa.—Weiser v. Day, 41 N.W. 476, 77 Iowa 25.

18 C.J. p 28 note 98.

61. Iowa.—Weiser v. Day, *supra*.

Action by court of last resort not necessary

"Judicial decision," as used in an agreement, was held to mean a decision by a competent tribunal on the subject, and not necessarily one by a court of last resort.—Wadsworth v. Green, 3 N.Y.Super. 78.

62. N.Y.—Peo. v. Barker, 46 N.E. 875, 152 N.Y. 417.

Probate of will

"A register . . . is a judge, and the admission of a will to probate [by him] is a judicial decision."—In re Kern's Estate, 61 A. 573, 575, 212 Pa. 57—Holliday v. Ward, 19 Pa. 485, 489, 57 Am.D. 671.

63. La.—State v. Judges Orleans Parish Civ. Dist. Ct., 34 La.Ann. 1114.

N.Y.—Deming v. Post, 1 Code Rep. 121.

Determinations, orders, findings, and entries having the force and effect of a judgment may be included.—Corning v. Ryan, 3 Colo. 525.

64. Kan.—Dobson v. Holmes, 112 P. 131, 83 Kan. 476.

N.Y.—Peo. v. Barker, 46 N.E. 875, 152 N.Y. 417.

Tex.—Halbert v. Alford, 16 S.W. 814.

An order taken by default is not a judicial decision, "for a decision implies the hearing of both parties."—Thompson v. Erie R. Co., 9 Abb.Pr., N.S., N.Y., 233, 238.

Inclusion in judgment roll

"The decision, which is, in effect, . . . an 'order' for judgment, is both an 'order' and a 'paper' involving the essential merits, and one which necessarily not only 'affects' the judgment, but actually determines the judgment to be entered," so as to require inclusion in the judgment roll.—Garr v. Spaulding, 51 N.W. 867, 868, 2 N.D. 414.

65. Porto Rico.—Porto Rico Leaf Tobacco Co. v. Aldrey, 13 Porto Rico 228.

18 C.J. p 28 note 2.

66. N.Y.—Deming v. Post, 1 Code Rep. 121.

Tex.—Halbert v. Alford, 16 S.W. 814, 18 C.J. p 28 note 9.

67. Minn.—Ashton v. Thompson, 9 N.W. 876, 28 Minn. 330.

18 C.J. p 28 note 11.

68. Ohio.—Buckeye Pipe Line Co. v. Fee, 57 N.E. 446, 447, 62 Ohio St. 543, 78 Am.S.R. 743, quoting Abbott L. D.

69. Iowa.—Weiser v. Day, 41 N.W. 476, 77 Iowa 25.

result of the deliberations of a tribunal.⁷⁰

Although a decision has been said to be the announcement by the court of its judgment, as distinct from the findings,⁷¹ other cases have applied the term "decision" to the findings of fact and conclusions of law of the court,⁷² and also simply to its conclusions,⁷³ findings,⁷⁴ or special findings,⁷⁵ of fact. When used in the latter sense, it is to be distinguished from judgment, as indicated in the C. J.S. title Judgments § 4, also 33 C.J. p 1052 note 33 —p 1053 note 40.

Judicial decision has been further said to be the declaration of what the law is, and not what it shall hereafter be,⁷⁶ and the application by a court of competent jurisdiction of the law to a state of facts proved or admitted to be true, and a declaration of the consequences which follow.⁷⁷

Questions as to what constitutes a decision which is reviewable are discussed in Appeal and Error §§ 46-166.

A decision upon the merits has been said to be a decision upon the justice of the cause, and not upon technical grounds only, the real or substantial

grounds of the action in distinction from technical or collateral matter.⁷⁸

A final decision is one decisive of the cause.⁷⁹

Opinion. Although the terms "decision" and "opinion" have sometimes been considered to have, or treated as having, the same meaning,⁸⁰ they are generally to be distinguished,⁸¹ in that the decision of the court is its judgment, while the opinion is a statement of the reasons on which the judgment rests.⁸²

"*Ruling*" has been defined as a settlement or decision of a point of law arising from the trial of a case, without necessarily the force and solemnity of a judgment or order.⁸³ "Rulings" have been held to mean expositions of the law or the legal reasons on which courts rested their judgment on questions presented or issues raised.⁸⁴

b. General Rules

In rendering decisions, courts must apply the governing principles of law, regardless of special inconveniences, extraneous influences, or the agreement of the parties as to the applicable principles, and must avoid absurd or patently unjust results.

70. Ohio.—Buckeye Pipe Line Co. v. Fee, 57 N.E. 446, 447, 62 Ohio St. 543, 78 Am.S.R. 743, quoting Abbott L. D.

Wyo.—Mulhern v. Union Pac. R. Co., 2 Wyo. 465, 472.

71. Nev.—Linville v. Scheeline, 93 P. 455, 30 Nev. 106.

72. N.D.—De Lendrecie v. Peck, 48 N.W. 342, 1 N.D. 422.
18 C.J. p 29 notes 17, 19-22.

73. Okl.—Muskogee v. Irvin, 145 P. 415, 45 Okl. 118—Shawnee First State Bank v. Oklahoma Nat. Bank, 118 P. 574, 29 Okl. 411.

74. Ind.—Weston v. Johnson, 48 Ind. 1.

Okl.—Muskogee v. Irvin, 145 P. 415, 45 Okl. 118.
18 C.J. p 29 note 26.

75. Ind.—Major v. Miller, 75 N.E. 159, 165 Ind. 275.

Okl.—Muskogee v. Irvin, 145 P. 415, 45 Okl. 118.

76. S.C.—Thomson v. Gaillard, 37 S.C.L. 418, 45 Am.D. 778.

77. Miss.—Le Blanc v. Illinois Cent. R. Co., 19 So. 211, 73 Miss. 463.

78. Wyo.—Mulhern v. Union Pac. R. Co., 2 Wyo. 465.
18 C.J. p 29 note 32.

79. U.S.—In re Coe, N.H., 49 F. 481, 1 C.C.A. 326.
18 C.J. p 29 note 33.

"A final decision . . . is one which finally disposes of all the rights of the parties, and upon which

final judgment can be entered."—Ashton v. Thompson, 9 N.W. 876, 877, 28 Minn. 330.

Other cases defining or using term "final decision" or "final decisions" see 25 C.J. p 1130 note 65.

80. Ind.—Pierce v. State, 10 N.E. 302, 109 Ind. 535.

N.Y.—Deming v. Post, 1 Code Rep. 121.
46 C.J. p 1118 note 16 [a].

81. U.S.—Rogers v. Hill, N.Y., 53 S. Ct. 731, 289 U.S. 582, 77 L.Ed. 1385, reversing, C.C.A., 62 F.2d 1079, which followed, C.C.A.N.Y., 60 F.2d 109, and certiorari granted 53 S.Ct. 593, 289 U.S. 716, 77 L.Ed. 1469.

Cal.—Houston v. Williams, 13 Cal. 24, 73 Am.D. 565.
18 C.J. p 28 note 4 [a].

"Until the opinion is adopted by the court it is not its product. When it is so adopted it becomes the decision of the court."—Edwards v. Bell, Mo., 123 S.W.2d 83, 85, denying hearing 103 S.W.2d 315.

82. U.S.—Rogers v. Hill, N.Y., 53 S. Ct. 731, 289 U.S. 582, 77 L.Ed. 1385, reversing, C.C.A., 62 F.2d 1079, which followed, C.C.A.N.Y., 60 F.2d 109, and certiorari granted 53 S.Ct. 593, 289 U.S. 716, 77 L.Ed. 1469.

Miss.—Robertson v. Mississippi Valley Co., 81 So. 799, 120 Miss. 159.
W.Va.—Robertson v. Vandergrift, 193 S.E. 62, 119 W.Va. 219.
18 C.J. p 28 note 4 [a].

Contra Keller v. Summers, 171 S.W. 336, 262 Mo. 324.

"Opinion" defined generally see infra § 217a.

Findings embraced in decision

"An opinion contains the views of the judge in relation to a given subject; a decision embraces the findings of the court, upon which a decree or judgment may be entered."—Matter of Winslow, 34 N.Y.S. 637, 638, 12 Misc. 254.

"Argument" distinguished

S.C.—Gaillard v. Trenholm, 39 S.C.L. 356.

18 C.J. p 28 note 4 [b].

83. Mont.—State v. O'Brien, 43 P. 1091, 44 P. 399, 13 Mont. 1.
54 C.J. p 1110 note 52.

Application to questions of law only
"Ruling" has been held applicable to decisions upon questions of law only, and not to findings on matters of fact.

Mass.—Paine v. Newton St. R. Co., 77 N.E. 1026, 192 Mass. 90.

S.C.—Anderson v. O'Donnell, 7 S.E. 523, 29 S.C. 355, 13 Am.S.R. 728, 1 L.R.A. 632.

Refusal of a judge to do a ministerial act was held not a "ruling" or "decision."—Cruse v. McQueen, Tex.Civ.App., 25 S.W. 711.

"Determination" distinguished

N.Y.—People v. Second Dist. Public Serv. Commn., 163 N.Y.S. 59, 181 App.Div. 147.

84. Mo.—Kellers v. Summers, 171 S.W. 336, 262 Mo. 324.

The business of a court is confined to giving decisions in causes properly before it.⁸⁵ In rendering their decisions, courts must look beyond the particular case to the governing principle and apply it to the facts,⁸⁶ regardless of temporary or special inconveniences⁸⁷ or extraneous influences;⁸⁸ but courts do not seek to fit cases into an abstract formula,⁸⁹ and should not subordinate a rule of conduct of a whole people, long prevailing and acted on in their dealings, to mere consistency of legal principles,⁹⁰ or permit an absurd or patently unjust result to be reached.⁹¹

Effect of decision on right to appeal. Ordinarily a court cannot allow its decisions to be influenced by the consideration that a decision one way instead of another may cut off a party from an appeal;⁹² and a fortiori, where the system of judicature contemplates that a court of intermediate appeal shall be the ultimate tribunal in cases of a certain char-

acter, such a court will not render a pro forma decision merely for the purpose of advancing such a case to another forum.⁹³ However, where two cases in a court of last resort appeared to be in irreconcilable conflict as to the right to maintain a bill, a demurrer to such bill was sustained so that a speedy determination of the right might be obtained.⁹⁴

Agreement of parties. A court will not be bound by an agreement of the parties with respect to the principles on which a cause is to be determined.⁹⁵

Legal and equitable principles. In administering justice according to fixed rules of law and procedure, courts should be aided, where proper and necessary, by established and governing principles relating to equity jurisprudence.⁹⁶ A statute may permit courts to apply both legal and equitable remedies in determining actions;⁹⁷ but a statutory pro-

85. N.Y.—*Davis v. Seaward*, 146 N. Y.S. 981, 85 Misc. 210.

15 C.J. p 915 note 72.

In determining scientific questions, courts do not sit as scientists, but as weighers of evidence.—*General Electric Co. v. P. R. Mallory & Co.*, C.C. A.N.Y., 298 F. 579, affirming, D.C., 294 F. 562, and *General Electric Co. v. Save Electric Corporation*, 294 F. 567. *Certiorari denied Save Electric Corporation v. General Electric Co.*, 45 S.Ct. 94, 266 U.S. 609, 69 L.Ed. 466.

86. Cal.—*In re Kline's Estate*, 32 P. 2d 677, 138 Cal.App. 514.

N.Y.—*In re Hennessy's Estate*, 278 N.Y.S. 700, 155 Misc. 53.

S.C.—*Spillers v. Griffin*, 95 S.E. 133, 109 S.C. 78, L.R.A.1918D 1193.

Tenn.—*Philadelphia Life Ins. Co. v. Daugherty*, App. 132 S.W.2d 224.

"A judge when deciding a judicial question must do three things: (a) Find the facts; (b) find the governing law; and (c) apply that law to the facts."—*Dean v. State*, 162 So. 155, 159, 173 Miss. 254, overruling suggestion of error 160 So. 584, 173 Miss. 254.

Doubts to be dispelled

Courts must endeavor not to entertain doubts if they can be dispelled.—*Pabst v. Roxana Petroleum Co.*, D.C.Tex., 30 F.2d 953.

Notion of public policy

"In formulating a rule individual notion of public policy may be given effect only where the court finds that its notion of public policy is so generally held and so obviously sound that it is in fact part of the law of the state."—*Mertz v. Mertz*, 3 N. E.2d 597, 599, 271 N.Y. 468, affirming 285 N.Y.S. 590, 247 App.Div. 713, affirming 284 N.Y.S. 83, 153 Misc. 85.

87. Ariz.—*Western Land & Cattle Co. v. National Bank of Arizona* at Phoenix, 239 P. 299, 29 Ariz. 51, denying motion for rehearing 238 P. 725, 28 Ariz. 270.

Mich.—*Detroit v. Detroit, etc.*, Plank Road Co., 5 N.W. 275, 43 Mich. 140.

S.C.—*Thomson v. Gaillard*, 37 S.C.L. 418, 45 Am.D. 778.

Utah.—*Salt Lake City v. Sutter*, 216 P. 234, 61 Utah 533.

General laws of business, established to promote commercial intercourse, are framed on the assumption that men will act honestly, and such laws should not be interfered with because in exceptional instances a wrong may be possible.—*Mason v. A. E. Nelson Cotton Co.*, 62 S.E. 625, 148 N.C. 492, 128 Am.S.R. 635, 18 L.R.A.N.S., 1221.

Claim of economic unreasonableness of statute

Where the economic policy of the state has been constitutionally declared in legislation, courts will protect rights thereunder against those who reject such legislation as economically unreasonable.—*McKay v. Retail Automobile Salesmen's Local Union No. 1067*, Cal.App., 89 P. 2d 426, rehearing denied 90 P.2d 113.

88. N.J.—*In re Megill*, 169 A. 501, 114 N.J.Eq. 604.

Tex.—*Barker v. State*, 2 S.W.2d 851, 109 Tex.Cr. 67.

"The determination of . . . facts should be uninfluenced by bias, prejudice or sympathies."—*In re Stolen*, 216 N.W. 127, 128, 193 Wis. 602, 55 A.L.R. 1355, affirming 214 N.W. 379, 193 Wis. 602, 55 A.L.R. 1355.

Equities of case may not be considered to exclusion of law.—*Erick-*

son v. Carlberg Co., 223 N.W. 195, 54 S.D. 296.

89. Tenn.—*Philadelphia Life Ins. Co. v. Daugherty*, App. 132 S.W. 2d 224.

90. N.Y.—*Glennan v. Rochester Trust, etc., Co.*, 102 N.E. 537, 209 N.Y. 12, 52 L.R.A.N.S., 302, Ann. Cas.1915A 441.

15 C.J. p 915 note 77.

91. Ky.—*Louisville & N. R. Co. v. Burnam*, 284 S.W. 391, 214 Ky. 736—*Elkhorn & B. V. Ry. Co. v. Martin*, 241 S.W. 344, 195 Ky. 20.

"It is the first and primary duty of the courts to see that substantial justice is done."—*Goodspeed Co. v. Great Western Power Co. of California*, 91 P.2d 623, 636, 33 Cal.App. 2d 245, rehearing denied 92 P.2d 410, 33 Cal.App.2d 245.

92. Ga.—*Lord v. Cannon*, 75 Ga. 300, 309.

15 C.J. p 915 note 73.

93. N.Y.—*Sias v. Rochester R. Co.*, 46 N.Y.S. 532, 18 App.Div. 506, appeal dismissed 54 N.E. 1094, 159 N. Y. 567.

94. U.S.—*Graver v. Faurot*, C.C. Ill., 64 F. 241, reversed on other grounds 76 F. 257, 22 C.C.A. 156.

95. N.C.—*Fagan v. Jacocks*, 15 N. C. 263, 264.

15 C.J. p 915 note 84.

Admissions of counsel as to law

"This court is not bound by admissions or statements of counsel as to the interpretation of statutes or as to any phase of the law."—*Cawley v. Pershing County*, 268 P. 44, 51 Nev. 36, denying rehearing 264 P. 696, 50 Nev. 411.

96. Cal.—*In re Kline's Estate*, 32 P. 2d 677, 138 Cal.App. 514.

97. Conn.—*Ludington v. Merrill*, 71 A. 504, 81 Conn. 400.

vision permitting the rendition of such judgment as substantial justice shall require means substantial legal justice determined by fixed rules and positive statutes, and not the abstract, varying notions of equity entertained by each individual.⁹⁸

Absence of precedent. In determining a question without the guidance of precedent in the same state, a court must adopt the rule which agrees with the habits and customs of the people, and which will in the majority of cases be conducive to a settlement of disputes according to right.⁹⁹ The absence of reported judgments and decisions sustaining an alleged liability, or a particular procedure, raises a strong presumption or is persuasive, that no such liability or procedure is recognized.¹ However, it has been declared that the courts are not bound to find legislative authority or the authority of the other cases stating the same facts before they can declare the law in a new aggregation of facts.²

§ 182. Questions to Be Decided

A court will decide only the questions necessary for determining the particular case presented, and will pass on a question not raised by the parties if determinative of the case.

As a general rule, a court will decide only such questions as are necessary for a determination of the case presented for its consideration, and will

not render decisions in advance of such presentation,³ particularly when entering upon a new field of law in the construction of a statute,⁴ or, as appears in Constitutional Law § 94, when considering constitutional questions. Courts deal with cases upon the basis of the facts disclosed, and never with nonexistent and assumed circumstances.⁵

A court will pass upon a question not raised by the parties if it is fundamental and determinative of the case;⁶ but in an original proceeding in mandamus it was held that the court would not examine or rule on propositions not controverted in respondent's brief.⁷

§ 183. Number of Judges Necessary to Adjudication

- a. In general
- b. Death, disqualification, retirement, or absence of a judge

a. In General

As a general rule, a majority of a court constitutes a quorum; but authority to hold court may be vested in one or all of the judges or a prescribed number. A judgment by fewer judges than the number required is a nullity or voidable.

As a general rule, unless constitutional or statutory provisions prescribe otherwise, a majority of a court constitutes a quorum sufficient for the trans-

98. Cal.—*Stevens v. Ross*, 1 Cal. 94. Neb.—*Shold v. Van Treeck*, 117 N.W. 118, 82 Neb. 99. 15 C.J. p 916 note 88.

99. N.C.—*Wicker v. Jones*, 74 S. E. 801, 159 N.C. 102, 40 L.R.A., N.S., 69, Ann.Cas.1914B 1083.

Determination by reason and justice Judges may resort to their own reasoning processes and demands of justice, where authorities are conflicting and there is no direct authority in state.—*Ward Baking Co. v. Trizzino*, 161 N.E. 557, 27 Ohio App. 475.

1. U.S.—*Western Union Tel. Co. v. Schriver*, Iowa, 141 F. 538, 72 C. C.A. 596, 4 L.R.A., N.S., 678.

Cal.—*Bank of Italy Nat. Trust & Savings Ass'n v. Bentley*, 20 P.2d 940, 945, 217 Cal. 644, citing *Corpus Juris*.

Me.—*Simpson v. Simpson*, 109 A. 254, 119 Me. 14.

2. S.C.—*Spillers v. Griffin*, 95 S.E. 133, 109 S.C. 78, L.R.A.1918D 1193.

3. Idaho.—*Garrity v. Board of Com'rs of Owyhee County*, 34 P.2d 949, 54 Idaho 342, followed in *State Ins. Fund v. Board of Com'rs of Owyhee County*, 34 P.2d 956, 54 Idaho 359.

Kan.—*National Sav. Life Ins. Co. v. Hobbs*, 286 P. 294, 130 Kan. 313,

denying rehearing 284 P. 397, 129 Kan. 663.

La.—*Horrell v. Gulf & Valley Cotton Oil Co.*, 131 So. 709, 15 La.App. 603.

Pa.—*Public Defence Ass'n v. Allegheny County*, 6 Pa.Dist. & Co. 182.—*In re Archambault's Estate*, 29 Pa.Dist. 77.

15 C.J. p 915 note 80.

Actions for determination of abstract questions see *Actions* § 17. Declaratory judgment actions see *Actions* § 18.

Fictitious or collusive actions see *Actions* § 19.

Reasons for rule

(1) "This rule has a tendency to exclude obiter, it points the distinction between a legal treatise on a general head of the law, and a judicial opinion on a concrete case, and it saves trouble to those judges who come after us and are called to decide the question as vital and turning in some appeal."—*West v. Spencer*, 141 S.W. 586, 588, 238 Mo. 65.

(2) "When a court decides a question not before it, its decision may and very probably will affect the rights of parties who have never had their day in court. . . . Long experience has demonstrated that questions which affect the rights of citizens should not be determined

upon hypothetical and supposititious cases."—*United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board*, 279 N.W. 37, 42, 227 Wis. 569.

4. Wis.—*United Shoe Workers of America, Local 132, v. Wisconsin Labor Relations Board*, supra.

"The concrete case and its actual circumstances and effects are apt to throw much light upon the question and suggest considerations wholly unthought of when viewing the matter abstractly in advance of any actual experience."—*Borgnis v. Falk Co.*, 133 N.W. 209, 221, 147 Wis. 327, 37 L.R.A., N.S., 489.

5. U.S.—*Associated Press v. National Labor Relations Board*, N.Y., 57 S.Ct. 650, 301 U.S. 103, 81 L.Ed. 953, affirming, C.C.A., *National Labor Relations Board v. Associated Press*, 85 F.2d 56, certiorari granted *Associated Press v. National Labor Relations Board*, 57 S.Ct. 110, 299 U.S. 532, 81 L.Ed. 392.

6. Pa.—*Chester City v. Bostwick*, 16 Pa.Dist. & Co. 29, 21 Del.Co. 296, 45 York Leg.Rec. 170. Jurisdiction see *supra* § 114.

7. Mo.—*State v. St. Louis*, 145 S.W. 801, 241 Mo. 231.

Uncontroverted statements in briefs see *Appeal and Error* §§ 1344, 1345.

action of its business;⁸ but authority to hold court and transact business may be vested in a single judge;⁹ or it may be permitted¹⁰ or required,¹¹ generally or with respect to particular matters, that all the judges be present, or that action be taken by the court en banc;¹² and the full bench may be re-

8. Colo.—*Mountain States Telephone & Telegraph Co. v. People*, 190 P. 513, 68 Colo. 487.

Fla.—*Western Casualty & Surety Co. v. Rotter*, 191 So. 78.

Pa.—*Commonwealth v. Shawell*, 191 A. 17, 325 Pa. 497—*Roberts v. Washington Trust Co.*, 187 A. 386, 323 Pa. 442.

15 C.J. p 964 note 54, 59 [a].

Necessity of full court to overrule unanimous decision see *infra* § 189.

Number of federal judges necessary to hear application for injunction against enforcement of state statute on ground of unconstitutionality see the C.J.S. title *Injunctions* § 169, also 32 C.J. p 290 notes 31–39.

"It is fundamental that a majority of the judges of a reviewing court may hold court in the absence of the rest, provided there is no constitutional or statutory inhibition."—*Neff v. McKelvey*, 15 N.E.2d 770, 771, 134 Ohio St. 47.

Majority of entire court

Under a constitutional provision that an appellate court "shall consist of the Chancellor, the justices of the Supreme Court, and six judges, or a major part of them," a majority of all the members is required for a constitutional quorum; in such case, if a majority of the court is disqualified, an appeal cannot be heard until changes in the court permit assembling of such quorum.—*In re Hudson County*, 144 A. 169, 106 N.J. Law, 62, denying motion *In re Freeholders of Hudson County*, 143 A. 536, 105 N.J. Law 57.

Quorum of a division

A statute providing that a court "shall sit in divisions of three judges each, but two judges shall constitute a quorum of a division" is constitutional; and a decision by a division, or a majority thereof, is a decision of the court.—*Joseph v. State*, 96 S.E. 223, 148 Ga. 166, affirming 94 S.E. 626, 21 Ga.App. 496.

A judge ill at home may join with one of his colleagues in making effective majority by signing papers at his home.—*Reap's Case*, 8 Pa. Dist. & Co. 155.

Where two constitute a quorum, and they are divided in opinion, a valid final judgment cannot be rendered.—*Deglow v. Kruse*, 49 N.E. 477, 57 Ohio St. 434.

9. Ala.—*Edwards v. Louisville & N. R. Co.*, 80 So. 847, 202 Ala. 463.

Pa.—*Commonwealth v. Shawell*, 191 A. 17, 325 Pa. 497—*First Nat. Bank v. American Bangor Slate Co.*, 19

Pa. Dist. 649, 12 North. Co. 134, affirmed 77 A. 1100, 229 Pa. 27. 15 C.J. p 964 note 55.

A single judge may become an agent of the court for a particular purpose, and his official acts as such agent will be considered the acts of the court itself.—*In re First Congressional Dist. Election*, 144 A. 735, 295 Pa. 1.—*Commonwealth v. Kenahan*, 12 Pa. Dist. & Co. 585.

Approval of settlement of suit.—*In re Commissioner of Banks*, 144 N.E. 73, 249 Mass. 144.

Decision in contest of homestead exemption in an equity case.—*Kimball v. Cunningham Hardware Co.*, 78 So. 787, 201 Ala. 409.

Order that appeal not act as stay R.I.—*Public Utilities Commission v. Rhode Island Co.*, 107 A. 871, 42 R. I. 379.

Right to set aside verdict

"A single justice in a court of common-law jurisdiction had and has the inherent right to set aside a verdict in an action tried before him."—*Simpson v. Simpson*, 109 A. 254, 255, 119 Me. 14.

Writ of error

Circuit court on writ of error to review judgment may be composed of one circuit judge.—*Meyer v. Nator Holding Co.*, 136 So. 636, 102 Fla. 689.

Hearing of exceptions

Nonresident judge who tried a case should sit as member of court in banc to hear exceptions, but should not alone compose such court, unless absolutely necessary.—*Stone v. New Schiller Building & Loan Ass'n*, 142 A. 293, 293 Pa. 161.

Examination by "court" in confession of murder

Statute providing that if person is convicted by confession, for murder, the "court" shall examine witnesses, determine the degree of the crime, and give sentence accordingly held to authorize single judge to pronounce sentence; and where president judge heard testimony alone, decided upon death penalty, and prepared opinion to that effect, that he subsequently asked other judges to read his opinion and check his conclusions, and that they noted their concurrence, and sat when court imposed sentence was held not improper where other judges took no part in decision itself.—*Commonwealth v. Shawell*, 191 A. 17, 325 Pa. 497.

10. Cal.—*Atheam v. Nicol*, 200 P. 942, 187 Cal. 86.

11. Ohio.—*Union v. United Battery*

Service Co., 171 N.E. 608, 35 Ohio App. 68.

15 C.J. p 964 note 56.

A motion before the supreme court for a new trial for newly discovered evidence is for the full court.—*Smith v. Moore*, 63 S.E. 735, 150 N. C. 158, 62 S.E. 892, 149 N.C. 185.

Authority to decide either way required

Where, to reverse a judgment on the weight of evidence, the unanimous consent of the court is required, the court may not, when composed of less than the full bench, hear and determine such assignment, since jurisdiction may be exercised only by a court having authority to decide either way; and an appellant urging such ground is entitled to a determination by a court composed of all the judges, notwithstanding a statute permitting a lesser number to form a quorum or to render an order, judgment, or decree.—*Neff v. McKelvey*, 15 N.E.2d 770, 134 Ohio St. 47.

Georgia supreme court

"It is an unvarying rule of this [supreme] court that all cases shall be decided by the entire court, consisting of six judges, unless one or more of them shall be absent for providential or other like causes."—*Lester v. State*, 118 S.E. 674, 675, 155 Ga. 382.

12. Colo.—*Scott v. Shook*, 249 P. 259, 80 Colo. 40, 47 A.L.R. 1108.

Mo.—*State ex rel. Talbott v. Shain*, 66 S.W.2d 826, 334 Mo. 617.

Pa.—*Sterrett v. MacLean*, 143 A. 189, 293 Pa. 557.—*In re Surcharge of County Commissioners*, 12 Pa. Dist. & Co. 471.

S.C.—*Sturgess v. Atlantic Coast Line R. Co.*, 60 S.E. 939, 61 S.E. 261, 80 S.C. 167.

Hearing on exceptions; application for new trial

(1) In passing on exceptions, a nonresident judge who tried a case should sit as a member of the court in banc, where resident judges are disqualified, but should not alone compose such court unless absolutely necessary.—*Stone v. New Schiller Building & Loan Ass'n*, 142 A. 293, 293 Pa. 161.—*Carney v. Penn Oil Co.*, 137 A. 799, 289 Pa. 588.

(2) Where court consists of more than one judge, exceptions must be heard by other members of tribunal, if possible, and final disposition accompanied by written opinion from court in banc when circumstances require.—*Kicenko v. Petruska*, 102 A. 286, 259 Pa. 1.

(3) Where bench consists of two members, both must sit in banc to

quired for a decision on constitutional questions.¹³

In the absence of express law or long continued usage requiring a specified number of judges, any number determined by necessity or convenience are competent to hold court.¹⁴ Where a constitution or statute specifies that a particular number of judges shall constitute a quorum, litigants are not entitled of right to a hearing by a greater number.¹⁵ In the absence of the quorum or number required by law to hold court, a judgment rendered by the remaining judges will be regarded as a nullity,¹⁶ or as voidable,¹⁷ since in such case there is no authority to render a judgment.

*The record should show that the requisite number of judges were present.*¹⁸

b. Death, Disqualification, Retirement, or Absence of a Judge

The death, disqualification, retirement, or absence

of a judge will not ordinarily prevent the other members of the court from transacting its business, if the required number of judges remains, despite provisions for designating judges to replace those incapacitated.

As a general rule, and in the absence of constitutional or statutory provisions to the contrary, the death, disqualification, retirement, or absence of a judge will not deprive the other judges of authority to hold court and exercise all its functions, provided the number of judges legally required for the transaction of business remains.¹⁹ This rule is not changed by provisions for the designation of judges to take the place of others who may be incapacitated;²⁰ but such provisions will permit a quorum to be made up where it would otherwise be lacking.²¹

The fact that disqualifications were unknown until after the rendition of a decision does not necessarily require a rehearing;²² and, a fortiori, rehear-

consider applications for new trial and judgment non obstante veredicto.—*Zimmerman v. Pennsylvania R. Co.*, 142 A. 220, 293 Pa. 264.

Expression of scope of decisions

"Court in banc . . . alone has the power to speak authoritatively concerning the scope and effect of its own decisions."—*State ex rel. Talbott v. Shain*, 66 S.W.2d 826, 827, 334 Mo. 617.

Conviction of murder by confession

Court en banc was not required to decide a case of person convicted of murder by confession.—*Commonwealth v. Shawell*, 191 A. 17, 325 Pa. 497.

Number of judges for court en banc

(1) Where court is acting in banc, as many of the judges thereof as may be available ought to sit.—*In re Bright's Contested Election*, 141 A. 254, 292 Pa. 389.—*In re McCormick's Contested Election*, 126 A. 568, 281 Pa. 281.

(2) But a majority is sufficient to constitute a "quorum."—*Mountain States Telephone & Telegraph Co. v. People*, 190 P. 518, 68 Colo. 487.

(3) And, since a court en banc is properly constituted if a majority of available judges take part, the absence of the trial judge from the argument of a motion for a new trial does not prevent the court from acting on such motion when composed of two other judges who constitute a majority.—*Frank v. Bayuk*, 185 A. 705, 322 Pa. 282.

(4) Three judges of municipal court of Philadelphia, which is composed of ten members, may properly sit in banc.—*Stein v. Kessler*, 92 Pa.Super. 859.

(5) When supreme court of Mississippi, consisting of six members,

is sitting in banc, at least four of its judges must be present.—*Dean v. State*, 162 So. 155, 173 Miss. 254, overruling suggestion of error 160 So. 584, 173 Miss. 254.

13. Colo.—*Scott v. Shook*, 249 P. 259, 80 Colo. 40, 47 A.L.R. 1108.—*Murray v. Board of Com'rs of Washington County*, 185 P. 262, 67 Colo. 14.

S.C.—*Sturgess v. Atlantic Coast Line R. Co.*, 60 S.E. 939, 61 S.E. 261, 80 S.C. 167.

14. N.J.—*Gray v. Bastedo*, 46 N.J. Law 453.

"In any county in Ohio, where more than one judge of the court of common pleas holds office, the 'court of common pleas' of such county may be constituted by one or more of the common pleas judges holding office in that county, and the judges so holding office have unlimited discretion to determine the number of judges who shall preside over any session of such court."—*State v. Darby*, 144 N.E. 611, 109 Ohio St. 632.—*State v. Le Blond*, 140 N.E. 510, 108 Ohio St. 126, certiorari denied and error dismissed *State of Ohio v. Le Blond*, 44 S.Ct. 134, 263 U.S. 679, 714, 68 L.Ed. 503.

15. Ga.—*Fountain v. State*, 101 S.E. 294, 149 Ga. 519, reversing 98 S.E. 178, 23 Ga.App. 113, conformed to 101 S.E. 712, 24 Ga.App. 553.

Md.—*Ewell v. Kefauver*, 129 A. 369, 148 Md. 316.

16. Pa.—*Sterrett v. MacLean*, 143 A. 189, 293 Pa. 557.—*In re Surcharge of County Commissioners*, 12 Pa.Dist. & Co. 471.

15 C.J. p 964 note 58.

Excessive number

Where a court was required by statute to be held by a justice of the supreme court without an asso-

ciate, and the court was in fact held by a justice of the supreme court with two justices of the sessions, the decision was void.—*People v. Bork*, 96 N.Y. 188.

17. Fla.—*Western Casualty & Surety Co. v. Rotter*, 191 So. 78.

18. N.C.—*State v. King*, 27 N.C. 203.

19. Ga.—*Gibbs v. Milk Control Board of Georgia*, 196 S.E. 791, 185 Ga. 844.—*Eatonton Oil & Auto Co. v. Greene County*, 185 S.E. 296, 53 Ga.App. 145, conforming to certified question 181 S.E. 758, 181 Ga. 47.

La.—*State v. Neu*, 157 So. 105, 180 La. 545.

15 C.J. p 965 note 63.

Disqualification as including death

Under a statute authorizing one judge of a court to try a cause when the others were disqualified, a single judge could act after the death of an associate judge who sat in the trial of the case.—*Platt v. Shields*, 119 A. 520, 96 Vt. 257.

20. Cal.—*Dolley v. Ragon*, 243 P. 893, 76 Cal.App. 140.

Ga.—*Johnson v. Walls*, 194 S.E. 380, 185 Ga. 177.

21. Wyo.—*Phelan v. Cheyenne Brick Co.*, 189 P. 1103, 26 Wyo. 493, denying rehearing 188 P. 354, 26 Wyo. 493.

15 C.J. p 965 note 64.

Where resident judges are disqualified, a nonresident judge who tried a case should sit as a member of the court in banc in passing on exceptions, but should not alone compose such court unless absolutely necessary.—*Stone v. New Schiller Building & Loan Ass'n*, 142 A. 293, 293 Pa. 161.

22. Ga.—*Gibbs v. Milk Control*

ing will be denied where the party seeking it knew of a judge's inability to sit and did not object to a hearing before the others.²³

The presence of all the judges of an appellate court²⁴ or of the United States court of claims²⁵ is not required when a case is submitted on oral argument; and a judge who has not heard the argument of a cause is competent to sit with the others who heard it, for the purpose of constituting a court,²⁶ and may, unless prohibited by statute from so doing,²⁷ participate in the decision.²⁸

§ 184. Number of Judges Concurring in Opinion

a. In general

b. Where court equally divided

Board of Georgia, 196 S.E. 791, 185 Ga. 844.

Where case was submitted without argument, movants for rehearing could not demand decision by full bench after rendition of decision revealing that one judge was disqualified.—*Eaton Oil & Auto Co. v. Greene County*, 185 S.E. 296, 53 Ga.App. 145, conforming to certified question 181 S.E. 758, 181 Ga. 47.

23. Wyo.—*Stanton v. Chicago, B. & Q. R. Co.*, 167 P. 709, 25 Wyo. 138, denying rehearing 165 P. 993, 25 Wyo. 138.

24. Tex.—*Love v. Gamer*, Civ.App., 64 S.W.2d 393, error dismissed.

25. U.S.—*Standard Oil Co. (Indiana) v. U. S.*, Ct.Cl., 7 F.Supp. 301, overruling motion 5 F.Supp. 976, certiorari denied 55 S.Ct. 116, 293 U.S. 599, 79 L.Ed. 692.

26. N.Y.—*Corning v. Slosson*, 16 N. Y. 294.

15 C.J. p 965 note 61.

27. N.Y.—*Corning v. Slosson*, supra.

28. La.—*In re New Orleans Improvement & Banking Co.*, 4 La. Ann. 478.

Court rule that cause shall be deemed submitted, on records and briefs, to any member of the court not present at the oral argument does not require submission of case to all the justices, but merely permits absent justice to take part in decision if he so desires.—*Hunt v. Ward*, 259 N.W. 12, 193 Minn. 168, denying rehearing 258 N.W. 145, 193 Minn. 168.

29. Cal.—*Dolley v. Ragon*, 243 P. 893, 76 Cal.App. 140.

15 C.J. p 965 note 66.

Effect of concurrence of judges on case as precedent see *infra* § 189.

Reversal as against weight of evidence

(1) Under a constitutional provi-

sion that a reversal as against the weight of evidence must be unanimous, a reversal upon such ground concurred in by less than the full court is erroneous.—*Porter v. Lerch*, 193 N.E. 766, 129 Ohio St. 47.—*Brittain v. Industrial Commission of Ohio*, 115 N.E. 110, 95 Ohio St. 391.—*Fink v. State*, 178 N.E. 700, 40 Ohio App. 431.

(2) And a reversal upon the ground that there is not "sufficient evidence" must also be unanimous, since the words "weight of evidence" are equivalent to "sufficient evidence."—*Brittain v. Industrial Commission of Ohio*, supra.

(3) But the determination of a motion for directed verdict involves only consideration of uncontroverted evidence, and unanimous action thereon is not required.—*Buell v. New York Cent. R. Co.*, 150 N.E. 422, 114 Ohio St. 40.

(4) Nor is unanimous action required where there is no evidence in support of findings and judgment of lower court.—*Kern v. Contract Carriage Co.*, 9 N.E.2d 869, 55 Ohio App. 481.

For reversal of unanimous decision, concurrence of all the judges held required.—*Bainbridge Citizens' Bank v. Fort*, 83 S.E. 235, 142 Ga. 611.

30. N.D.—*State ex rel. Mason v. Baker*, 288 N.W. 202.—*Wilson v. City of Fargo*, 186 N.W. 263, 48 N.D. 447.—*Daly v. Berry*, 178 N.W. 104, 45 N.D. 287.

Ohio.—*Shook v. Mahoning Valley Sanitary Dist.*, 166 N.E. 415, 120 Ohio St. 449, appeal dismissed *Gottlieb v. Mahoning Valley Sanitary Dist.*, 50 S.Ct. 333, 281 U.S. 770, 74 L.Ed. 1177.—*State ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 166 N.E. 407, 120 Ohio St. 464, affirmed *State of Ohio ex rel. Bryant v.*

a. In General

Except where constitutional or statutory provisions require the concurrence of a designated number of judges for adjudication, the concurrence of a majority of the judges sitting is necessary and sufficient.

Constitutional or statutory provisions requiring that a designated number of judges shall concur in an opinion in order that there may be a valid and binding adjudication by the court,²⁹ or in order that a statute be declared unconstitutional,³⁰ must, of course, be complied with. The general rule, however, unless the law provides otherwise, is that a concurrence of a majority of the judges sitting is necessary³¹ and that a concurrence of a majority

Akron Metropolitan Park Dist. for Summit County, 50 S.Ct. 228, 281 U.S. 74, 74 L.Ed. 710, 66 A.L.R. 460.—*State v. Zangerle*, 159 N.E. 564, 117 Ohio St. 507.—*City of East Cleveland v. Board of Education of City School Dist. of East Cleveland*, 148 N.E. 350, 112 Ohio St. 607.—*State v. Smith*, 133 N.E. 480, 102 Ohio St. 673.—*State v. Smith*, 133 N.E. 457, 102 Ohio St. 591.—*Barker v. City of Akron*, 121 N.E. 646, 98 Ohio St. 446.

Majority of court held insufficient where fewer than the required number of judges.—*State ex rel. Sathre v. Board of University and School Lands of North Dakota*, 262 N.W. 60, 65 N.D. 687.

Federal constitution not violated

Provision of a state constitution that all but one of judges of state supreme court must concur to hold law unconstitutional held not violative of federal constitution.—*State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 50 S.Ct. 228, 281 U.S. 74, 74 L.Ed. 710, 66 A.L.R. 1460, affirming *State ex rel. Bryant v. Akron Metropolitan Park Dist. for Summit County*, 166 N.E. 407, 120 Ohio St. 464.

Municipal "ordinance" held not "law" within constitutional provision requiring concurrence of at least all but one of judges of supreme court to declare law unconstitutional.—*Village of Brewster v. Hill*, 191 N.E. 366, 128 Ohio St. 354, denying motion 190 N.E. 766, 128 Ohio St. 343.—*Meyers v. Copelan*, 160 N.E. 855, 117 Ohio St. 622.—*Fullwood v. City of Canton*, 158 N.E. 171, 116 Ohio St. 732, error dismissed 48 S.Ct. 31, 275 U.S. 484, 72 L.Ed. 886.

31. Miss.—*Dean v. State*, 162 So. 155, 173 Miss. 254, overruling suggestion of error 160 So. 534, 173 Miss. 254.

of the judges sitting is sufficient,³² although those concurring are not a majority of all the judges of the court.³³

Where the necessary number have concurred in an opinion, the decision rendered is the decision of the court,³⁴ at least on the points as to which the required number have concurred,³⁵ although not on points as to which fewer have concurred.³⁶ A change in the personnel will not warrant a reopening of the controversy unless the court itself orders a reargument.³⁷

The calling in of additional judges may be au-

thorized where the court is divided,³⁸ with the additional requirement, under some decisions, that two of the justices so desire³⁹ or that the question be a constitutional one.⁴⁰

b. Where Court Equally Divided

In the absence of a statute having a different effect, full relief cannot be granted by an equally divided court, and the subject matter with which such court is dealing remains *in statu quo*.

Where, upon the question whether relief should be granted or refused, the judges constituting the court are equally divided in opinion, full relief cannot be granted,⁴¹ and the subject matter with which

Ohio.—City of Cincinnati v. Alcorn, 171 N.E. 330, 122 Ohio St. 294.

Pa.—Stein v. Kessler, 92 Pa.Super. 359—In re Surcharge of County Commissioners, 12 Pa.Dist. & Co. 471—Reap's Case, 8 Pa.Dist. & Co. 155.

Vt.—Leonard v. Wilcox, 142 A. 762, 101 Vt. 195.

15 C.J. p 966 note 67.

Assent to entry of judgment

Where only two judges of a court of three are present at the court when a decision is made, a judgment in the case from which one of the two dissents is not made effective by his assent to the entry thereof; nor is such judgment made effective by the fact that another judge who was present at the hearing but absent at the time of decision previously indicated his conclusion by a statement in writing.—In re Kings County El. R. Co., 78 N.Y. 383, reversing 18 Hun 378.

32. Cal.—Athearn v. Nicol, 200 P. 942, 945, 187 Cal. 86, citing *Corpus Juris*.

Fla.—F. L. Stitt & Co. v. Powell, 114 So. 375, 94 Fla. 550.

N.Y.—Parrott v. Knickerbocker Ice Co., 8 Abb.Pr.N.S. 234, 38 How. Pr. 508.

15 C.J. p 966 note 67.

Judgment entered by unanimous concurrence may be modified by majority concurrence.—City of Cincinnati v. Alcorn, 171 N.E. 330, 122 Ohio St. 294.

Lay judges; questions of fact or law

The associate lay judges constituting a majority of court of common pleas of Columbia County may decide a case heard before the three judges against the opinion and dissent of the president judge, where it depends upon questions of fact, but cannot overrule him on a question of law.—Petition of Murray, 105 A. 61, 262 Pa. 188.

33. Colo.—Mountain States Telephone & Telegraph Co. v. People, 190 P. 513, 68 Colo. 487.

Fla.—Carver v. State, 138 So. 893, 101 Fla. 1432, denying second re-

hearing 134 So. 62, 101 Fla. 1421, reversed 136 So. 605, 101 Fla. 1431.

15 C.J. p 966 note 68.

34. Miss.—Bowles v. Wood, 44 So. 169, 90 Miss. 742.

Decision of two lay judges, a majority, filed after contrary decision of president judge, but on same day, held decision of court.—Petition of Murray, 105 A. 61, 262 Pa. 188.

Dissent or absence not noted

Where no dissent or absence of a judge is noted, a decision will be regarded as one by the whole court.—Vincennes Nat. Bank v. Cockrum, 64 Ind. 229—15 C.J. p 966 note 74.

Decree "by the court"

Where less than a majority of the members of a court hear a cause, a decree "by the court" has been held to be improper.—Ebling v. Schuylkill Haven, 91 A. 360, 244 Pa. 505.

35. Ohio.—Meyers v. Copelan, 160 N.E. 855, 117 Ohio St. 632—Fullwood v. City of Canton, 158 N.E. 171, 116 Ohio St. 732, error dismissed 48 S.Ct. 31, 275 U.S. 484, 72 L.Ed. 386.

36. Cal.—Scott v. Times-Mirror Co., 184 P. 672, 181 Cal. 345, 12 A.L.R. 1007.

37. Mich.—McCutcheon v. Homer, 5 N.W. 668, 43 Mich. 483, 38 Am.R. 212.

38. La.—Colvin v. Johnston, 29 So. 274, 104 La. 655.

Mo.—Edwards v. Bell, 123 S.W.2d 83, denying hearing 103 S.W.2d 315.

39. S.C.—Florence v. Brown, 26 S.E. 880, 27 S.E. 273, 49 S.C. 332.

Where neither contingency occurs, the circuit judges will not be called in merely because the supreme court is divided, and the parties desire an authoritative determination of the question involved.—Florence v. Brown, *supra*.

40. S.C.—Carolina, etc., R. Co. v. McCown, 66 S.E. 1—Florence v. Brown, 26 S.E. 880, 27 S.E. 273, 49 S.C. 332.

41. Fla.—Olds v. Alvord, 191 So. 434, modifying 188 So. 711, 133 Fla. 221, 345, rehearing granted 188 So.

652, 136 Fla. 549, certiorari denied Alvord v. Town of Belleair, 60 S. Ct. 141.

Pa.—In re First Congressional Dist. Election, 144 A. 735, 295 Pa. 1—Summers v. Kramer, 114 A. 525, 527, 271 Pa. 189, citing *Corpus Juris*.

15 C.J. p 966 note 78.

Decision by divided court as precedent see *infra* § 189.

Equal division of appellate court see Appeal and Error, § 1844 b.

Demurrer overruled

Fla.—State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641, rehearing denied State ex rel. Davis v. City of Avon Park, 151 So. 701, 117 Fla. 556, modified on other grounds 153 So. 159, 117 Fla. 565, 98 A.L.R. 230—15 C.J. p 966 note 78 [a] (1).

Petition for disbarment dismissed.—In re Franklin, Miss., 138 So. 307.

Mandamus

(1) An original mandamus was refused where the sitting members of the court could not agree on the award or refusal of the writ.

Fla.—State ex rel. Farris v. Simpson, 155 So. 831, 115 Fla. 577.

W.Va.—State v. Damron, 104 S.E. 490, 87 W.Va. 189.

(2) Peremptory mandamus should be denied where court is equally divided in opinion and there is no prospect of immediate change in personnel.—Tippett v. Williams, 127 So. 305, 99 Fla. 627.

Effect on pendency of suit

Where, on a hearing on the merits in an equity case, the members of the court were equally divided on the question whether the bill should be dismissed, it was held that no judgment could be entered, that the cause remained pending, and that receivers who had been appointed to hold the property during the pendency of the suit would remain in possession.—Northern R. Co. v. Concord R. Co., 50 N.H. 166.

An absent chancellor's opinion will not be taken into consideration for the purpose of showing a division in

the court is dealing must remain in statu quo,⁴² although relief may be granted in so far as a majority deems the relief sought appropriate.⁴³ So, as a general rule, neither member of a tribunal consisting of two members can, over the dissent of the other, perform an affirmative act changing an existing condition,⁴⁴ even where the court is composed of a president and one associate judge;⁴⁵ however, the senior judge of a court may be given, by statute, the power to decide a case, although his associ-

ate, sitting with him, fails to agree.⁴⁶

§ 185. Text Books as Authorities

Textbooks are secondary authority, their value depending on the authors' care and ability in examining cases and drawing conclusions therefrom.

Textbooks are at best only secondary authority, and their value depends on the care with which their authors examine the cases cited and their ability to draw correct conclusions therefrom.⁴⁷

B. PREVIOUS DECISIONS AS CONTROLLING OR AS PRECEDENTS

1. IN GENERAL

§ 186. In General

- a. Decisions as precedents in general
- b. Extending scope of decisions
- c. Decision without full argument of point
- d. Points decided without discussion in opinion
- e. Common-law and civil law precedents
- f. Single decisions

a. Decisions as Precedents in General

A "precedent" has been defined as a decision considered as authority for a similar case afterward arising on a similar question of law; but a precedent, sufficient to protect rights and which must be followed in similar cases, usually requires a series of decisions declaratory of common-law or equitable principles.

A "precedent," within the rule, stated *infra* § 187, requiring an established precedent to be followed in similar cases, has been defined as an adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterward arising on a similar question of law.⁴⁸ However, to establish a precedent sufficiently authoritative to protect rights acquired during its continuance, it is usually required, in case of decisions declaratory of the common law or of general equitable principles, that there be a series of decisions.⁴⁹

In the absence of a decision by a court whose judgment is authoritative on a court trying a case, a judge must exercise his best judgment on legal questions submitted to him in accordance with his

the court.—*Johnson v. Lewis*, 18 S.C. Eq. 390.

42. Pa.—In re First Congressional Dist. Election, 144 A. 735, 295 Pa. 1.

43. Fla.—State ex rel. Landis v. Circuit Court for Eleventh Judicial Circuit, 135 So. 870, 102 Fla. 122, modifying 135 So. 870, 102 Fla. 112.

44. Pa.—*Slattery v. Aetna Life Ins. Co.*, 172 A. 316, 112 Pa.Super. 607. Reason for rule

"It takes a majority of the whole body to do this, and one is not a majority of two."—In re First Congressional Dist. Election, 144 A. 735, 295 Pa. 1.

45. Ind.—*Irons v. Hussey*, 3 Ind. 158.

Pa.—*Summers v. Kramer*, 114 A. 525, 527, 271 Pa. 189, citing *Corpus Juris*.

Ruling by one judge excluding other

An entry of a judgment by one of two judges over the other's protest does not constitute a judgment, since what is ordered and adjudged by the court, not merely what is en-

tered, constitutes the judgment; and a judgment so entered by the president judge of a court over the protest of the associate judge is not binding, even though a prior ruling by the former excluding the latter from the hearing remained unreversed.—*Summers v. Kramer*, 114 A. 525, 271 Pa. 189.

46. Minn.—*Darelius v. Davis*, 77 N.W. 214, 74 Minn. 345—*State Bank v. Hahn*, 59 N.W. 315, 57 Minn. 361.

47. Tex.—*Southwestern Tel., etc., Co. v. Long*, Civ.App., 183 S.W. 421.

"When a text-book statement comes before us here on appeal, it becomes our imperative duty, as the court of last resort, to carefully re-examine that text, and in the light of our own jurisprudence to lay it alongside the yardstick of sound, practical judicial reason, and thereupon to determine and say whether, in our independent opinion, the said text measures out as a correct, exact, and full statement of our law."—*Knox v. State*, 135 So. 206, 207, 160 Miss. 494.

48. Black L. D. It is a general maxim that, when

a point of law has been settled by a decision, it forms a precedent which is not to be departed from.—*Rorick v. Chancey*, 178 So. 112, 116, 130 Fla. 442—*McGregor v. Provident Trust Co. of Philadelphia*, 162 So. 323, 119 Fla. 718.

An antecedent case is a prerequisite to a precedent.—*Heine v. New York Life Ins. Co.*, C.C.A.Or., 50 F. 2d 382, affirming, D.C., 45 F.2d 426.

Decisions in state courts as authority in federal courts see the C.J.S. title Federal Courts §§ 170-190, also 25 C.J. p 831 note 67—p 858 note 68.

Previous decisions as precedents in construction of wills see the C.J.S. title Wills § 605, also 69 C.J. p 80 notes 3-5.

49. La.—*Miami Corporation v. State*, 173 So. 315, 186 La. 784, certiorari denied *Miami Corporation v. State of Louisiana*, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541.

N.C.—*Williamson v. Rabon*, 98 S.E. 830, 177 N.C. 302. 15 C.J. p 916 note 90.

Single decision as precedent see *infra* subdivision f of this section.

own views, although other courts have reached a contrary conclusion.⁵⁰ A claim set up by cross bill in equity is governed by decisions as to a similar demand at law.⁵¹ A decision rendered by an unconstitutional tribunal has no value as a precedent.⁵²

Declarations as to public policy or future rulings.

In the absence of statute, a judicial declaration of public policy is equal in force and effect to a statute, and should be followed by the court.⁵³ A decision of the appellate court, declaring that the giving of a certain instruction, which has several times been criticized by that court, will in the future be ground for a reversal is not applicable to a case previously tried, and does not constitute ground for reversal of such case on an appeal subsequently heard.⁵⁴

"Unofficial" opinions. It has been considered that the opinions of the commissioners of the supreme court designated as "unofficial" have no value as precedent or authority in the sense in which the doctrine of stare decisis is applied,⁵⁵ even though the conclusion reached is approved and the recommendation adopted.⁵⁶

Unreported decisions. The fact that a decision is not reported does not impair its effect as to questions distinctly raised and decided,⁵⁷ but there is authority to the contrary.⁵⁸ An unreported decision affirming an erroneous decision without an opinion will not be followed under the rule of stare decisis.⁵⁹

b. Extending Scope of Decisions

In applying the rule of stare decisis the courts are generally not required to extend the scope of the previous decisions.

In applying the rule of stare decisis, it is not incumbent on the court to extend the scope of previous decisions on constitutional questions,⁶⁰ especially where it is convinced that error in principle might supervene.⁶¹ Neither will a doubtful doctrine be extended by resort to analogy.⁶² So, also, although a court adopts a rule established by a line of decisions on a given question, it does not necessarily follow that it must carry such rule to its logical results where the parties occupy different relations to the subject matter and to each other.⁶³

Implication from former decision. It has been held that the rule of stare decisis cannot be extend-

50. U.S.—U. S. v. United Shoe Machinery Co., D.C.Mo., 264 F. 138, motion granted United Shoe Machinery Co. v. U. S., 41 S.Ct. 9, and appeal dismissed U. S. v. United Shoe Mach. Corporation, 41 S.Ct. 217, 254 U.S. 666, 65 L.Ed. 465, affirmed United Shoe Machinery Corporation v. U. S., 42 S.Ct. 363, 258 U.S. 451, 66 L.Ed. 708, rehearing denied 42 S.Ct. 585, 259 U.S. 575, 66 L.Ed. 1071.

Mass.—Glaser v. Congregation Kehilath Israel, 161 N.E. 619, 263 Mass. 435.

Definition of a word or phrase by the trial court is entitled to great weight until a different definition is established by a court decision or at least by proof.—Slocovich v. Orient Mut. Ins. Co., 14 N.E. 802, 108 N.Y. 56—De Long v. Massachusetts Fire & Marine Ins. Co., 262 N.Y.S. 165, 238 App.Div. 760, reversing 266 N.Y.S. 300, 142 Misc. 654.

Stare decisis does not relieve a judge of responsibility in a case when no decision has been rendered by a court of last resort or when no conclusive reason is given for the decision reached.—People v. Williams, 147 N.Y.S. 1036, 85 Misc. 553, affirmed 148 N.Y.S. 1136, 164 App.Div. 900.

51. Tenn.—Campbell v. Lewisburg & N. R. Co., 26 S.W.2d 141, 160 Tenn. 477—Mengel Box Co. v. Ferguson, 137 S.W. 101, 124 Tenn. 433.

52. Ky.—Smith v. Overstreet's Adm'r, 81 S.W.2d 571, 258 Ky. 781.

53. Colo.—Moore v. Chalmers-Galloway Live Stock Co., 10 P.2d 950, 90 Colo. 548—Oliver v. Wilder, 149 P. 275, 27 Colo.App. 337.

54. Cal.—People v. Ryan, 92 P. 853, 152 Cal. 364.
15 C.J. p 943 note 6.

55. Neb.—Burkamp v. Roberts Sanitary Dairy, 219 N.W. 805, 117 Neb. 60—Flint v. Chaloupka, 99 N.W. 825, 72 Neb. 34, 117 Am.S.R. 771.
15 C.J. p 943 note 4.

Rulings of legislative and executive departments and special tribunals generally see *infra* § 208.

56. Neb.—Hoagland v. Stewart, 98 N.W. 428, 100 N.W. 133, 71 Neb. 102.

15 C.J. p 943 note 5.

57. N.Y.—Goodwin v. Massachusetts Mut. L. Ins. Co., 73 N.Y. 480.
15 C.J. p 954 note 85.

Not officially reported

The fact that a decision is not ordered reported in the official reports does not detract from its binding force.—MacDonald v. MacDonald, 102 P. 927, 155 Cal. 665—In re Little's Estate, 72 P.2d 213, 23 Cal.App.2d 40.

58. Ohio.—Thompson v. Denton, 116 N.E. 452, 95 Ohio St. 333.

"The usual and most forceful reason advanced against regarding unreported cases as judicial authority is that it is not possible always to ascertain the exact legal proposition in-

volved and decided. It is urged and with good reason, in such cases, that where several errors have been assigned, and the court does not state the point on which the decision rests, the uncertainty is such as to destroy the case as commanding authority."—Thompson v. Denton, 116 N.E. 452, 95 Ohio St. 333.

59. Tenn.—Kobbe v. Harriman Land Co., 201 S.W. 762, 139 Tenn. 251.

60. U.S.—Pollock v. Farmers' L. & T. Co., N.Y., 15 S.Ct. 673, 157 U.S. 429, 30 L.Ed. 759.

Mo.—Rourke v. Holmes St. R. Co., 166 S.W. 272, 257 Mo. 555.

Nature and scope of decisions as precedent see *infra* §§ 209-216.

61. U.S.—Pollock v. Farmers' L. & T. Co., N.Y., 15 S.Ct. 693, 157 U.S. 429, 30 L.Ed. 759.

62. N.Y.—Judson v. Gray, 11 N.Y. 408.

63. Tex.—Thompson v. Amarillo First State Bank, Civ.App., 189 S. W. 116.

Property outside and inside state

Where United States supreme court has held that real estate outside the state, although equitably converted, could not, under Const.U.S.Amendm. 14, be considered in fixing inheritance tax, state court may refuse to follow logic of such decision as to property within the state.—Commonwealth v. Presbyterian Hospital in Philadelphia, 134 A. 427, 287 Pa. 49.

ed to implications from what was decided in a former case,⁶⁴ but it has also been held that effect must be given to the implications contained in the decision of a higher court,⁶⁵ and that the premises implicit in a holding are as authoritative as the holding itself.⁶⁶ The court will indulge the presumption that a rule previously announced, and unchanged by the legislature, continues and expresses the policy of the state,⁶⁷ unless and until it is expressly, or by necessary implication, overruled.⁶⁸

c. Decision without Full Argument of Point

A decision is, generally, not a precedent as to a point which was not sufficiently argued and presented to the court, although if the point was an essential one the fact that it was duly presented and considered may be presumed. An affirmance without an opinion is not an approval of the opinion of the lower court; and an affirmance by consent of parties creates no binding precedent.

If a point is essential to the decision rendered, it will be presumed that it was duly considered, and that all that could be urged for or against it was presented to the court;⁶⁹ but, if it appears from the report of the case that it was not taken or inquired into at all, there is no ground for this presumption,

and the authority of the case is proportionately weakened.⁷⁰ Where it is the settled practice of a court that a judgment will not be reversed for errors not argued in the briefs of counsel, a decision affirming a judgment does not become a precedent as to any question not argued or expressly presented to the court, and left unnoticed in the opinion, although it might have been raised, and, if raised, have been decisive of the case,⁷¹ and even though a question may not have been fully argued, yet it cannot be said that the decision thereon is obiter dictum, where the question was directly involved in the issues and the mind of the court was directly drawn to, and distinctly expressed on, the subject.⁷² Neither can an inferior court decide adversely to a decision of a court of last resort and send the case up to that court again on the ground that, in the former decision of the court of last resort, certain points were not sufficiently argued or noticed by the justice delivering the opinion there.⁷³ It has been held that a decision entered pro forma, without argument or consideration and solely to hasten the determination of the question by the court of appeals, will not be regarded as binding.⁷⁴

An affirmance without an opinion is an approval

64. Ariz.—City of Bisbee v. Cochise County, 78 P.2d 982, 52 Ariz. 1, denying rehearing 72 P.2d 439, 50 Ariz. 360.

Ky.—Rex Coal Co. v. Campbell, 281 S.W. 1039, 1041, 213 Ky. 636, citing *Corpus Juris*.

Mo.—Broadwater v. Wabash R. Co., 110 S.W. 1084, 212 Mo. 437. 15 C.J. p 940 note 74.

Inferential holdings

The court is not bound by its previous inferential holdings made, in other cases, without discussion in briefs or opinion, in affirming judgment.—Petley v. City of Tacoma, 221 P. 579, 127 Wash. 459.

65. N.Y.—Matter of Meyer, 131 N.Y. S. 27, 72 Misc. 566.

Appealability

Case appealed and decided on merits is impliedly held appealable.—Smith v. Turner, Civ.App., 13 S.W.2d 152, reversed on other grounds Turner v. Smith, 61 S.W.2d 792, 122 Tex. 338, followed in Douglas Oil Co. v. State, 61 S.W.2d 804, 122 Tex. 369.

Jurisdiction

Opinion of supreme court determining application for habeas corpus on merits determines by implication presence of jurisdictional element that judgment was in civil case.—Ex parte Green, 295 S.W. 910, 116 Tex. 515.

66. U.S.—Murray v. Roberts, C.C.A. N.Y., 103 F.2d 889.

67. Mont.—State v. Madison State

Bank of Virginia City, 218 P. 652, 68 Mont. 342.

Tex.—Mills v. Warnock, Civ.App., 284 S.W. 676, reversed on other grounds Warnock v. Mills, Com.App., 291 S. W. 850.

68. Tex.—Mills v. Warnock, supra. To overrule former precedents and to establish a principle not before recognized, an opinion should express such principle in plain and explicit terms; mere implication is insufficient.—New Amsterdam Casualty Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa., 194 N.E. 745, 266 N. Y. 254, affirming 271 N.Y.S. 953, 241 App.Div. 813, affirming 273 N.Y.S. 647, 151 Misc. 894.

An appellate court's failure to refer to an important decision of that court concerning the law applicable to the subject matter of litigation will not be construed as an intent to overrule such law sub silentio.—In re Hilliard's Will, 299 N.Y.S. 788, 164 Misc. 677, affirmed In re Myers, 5 N.Y.S.2d 92, 254 App.Div. 879, reargument denied In re Hilliard's Estate, 7 N.Y.S.2d 114, 255 App.Div. 781.

69. N.Y.—Molony v. Dows, 54 Barb. 32, 8 Abb.Pr. 316, 48 How.Pr. 363.

70. Ky.—Rex Coal Co. v. Campbell, 281 S.W. 1039, 1041, 213 Ky. 636, citing *Corpus Juris*.

N.Y.—John J. Creem Co. v. City of New York, 177 N.Y.S. 229, 188 App. Div. 169.—Molony v. Dows, 54 Barb. 32, 8 Abb.Pr. 316, 48 How.Pr. 363. 15 C.J. p 942 note 87.

71. Ill.—In re Dunning, 213 Ill.App. 602.

Neb.—Larson v. Pender First Nat. Bank, 92 N.W. 729, 66 Neb. 595.

Or.—State v. Archerd, 24 P.2d 5, 9, 144 Or. 309, citing *Corpus Juris*, and appeal dismissed 54 S.Ct. 372, 290 U.S. 604, 78 L.Ed. 530, rehearing denied 54 S.Ct. 453, 291 U.S. 645.

Error not assigned

An affirmance of a judgment of a lower court is not an approval of the ruling of such court on the trial court's instructions, where the application for a writ of error contained no assignment challenging the instruction.—Southland Greyhound Lines v. Cotten, 91 S.W.2d 326, 126 Tex. 596, reversing, Civ.App., 55 S. W.2d 1066.

"Little weight as a precedent is to be attached to decisions upon questions which may have been involved, but which were not presented to or considered by the court."—Eyers Woolen Co. v. Town of Gilsum, 146 A. 511, 521, 84 N.H. 1, 64 A.L.R. 1196.—Wyatt v. State Board of Equalization, 70 A. 387, 392, 74 N.H. 552.

72. Md.—Michael v. Morey, 26 Md. 239, 90 Am.D. 106.

Dicta generally see *infra* § 190.

73. N.Y.—New York etc., R. Co. v. Schuyler, 8 Abb.Pr. 239.

74. N.Y.—Matter of McGinness, 35 N.Y.S. 820, 13 Misc. 714.

only of the point decided or result reached by the court below, and not of the opinion and the conclusions of law of the lower court, so as to establish a precedent for future action.⁷⁵

Where a judgment is affirmed by consent of the parties, the court is not committed on the question where it arises again in a subsequent action, nor is it bound by the adjudication then made, although the parties to the prior action may be bound.⁷⁶

d. Points Decided without Discussion in Opinion

An omission, in an opinion, to discuss the points decided generally does not limit the controlling effect of its decree, subsequent in point of time.

An omission in an opinion of a court of last resort does not operate as a limitation on the scope

of its decree, which was subsequent in point of time, and might embrace matters not discussed or referred to in the opinion, the decree being controlling.⁷⁷ Where, however, although a decision might have been reached easily by the application of a specific principle of law, the court went to some length to decide the question on another ground, the decision is negative authority against such a principle.⁷⁸ The authority of a decision of the supreme court of the United States upholding a rule of a court is not lessened by the former court's failure to give the grounds for its decision,⁷⁹ and it is a well recognized rule that, where such court passes on a case, the question of jurisdiction has been considered and determined, although not expressly stated in the opinion.⁸⁰ So, also, where there has been a long series of uniform decisions assuming the same prin-

76. Mo.—O'Hara v. Lamb Const. Co., 206 S.W. 253, 200 Mo.App. 292.

N.Y.—Commissioner of Public Welfare v. Jackson, 193 N.E. 262, 265 N.Y. 440, denying reargument 193 N.E. 275, 265 N.Y. 469, affirming Commissioner of Public Welfare of City of New York, on Complaint of Jackson, v. Jackson, 269 N.Y.S. 197, 240 App.Div. 142—Adrico Realty Corporation v. City of New York, 164 N.E. 732, 250 N.Y. 29, 64 A.L.R. 1, reversing 224 N.Y.S. 742, 222 App.Div. 655—People ex rel. Palmer v. Travis, 119 N.E. 437, 223 N.Y. 150, reversing 167 N.Y.S. 467, 180 App.Div. 25—Dall v. Time, Inc., 300 N.Y.S. 680, 252 App.Div. 636, affirmed 16 N.E.2d 297, 278 N.Y. 635, reargument denied 17 N.E.2d 138, 278 N.Y. 718—Goetz v. Goetz, 216 N.Y.S. 434, 217 App.Div. 31—Erie R. Co. v. International Ry. Co., 204 N.Y.S. 771, 775, 209 App.Div. 380, citing *Corpus Juris* and affirmed 147 N.E. 211, 239 N.Y. 598—Vierfels v. New York, O. & W. Ry. Co., 169 N.Y.S. 497, 182 App.Div. 92—Williamson & Adams v. State, 13 N.Y.S.2d 736, 171 Misc. 763—Levine v. Behn, 8 N.Y.S.2d 58, 169 Misc. 601, affirmed 12 N.Y.S.2d 190, 257 App.Div. 156—In re Eckenroth's Will, 4 N.Y.S.2d 582, 167 Misc. 632—Broschart v. City of New York, 3 N.Y.S.2d 18, 166 Misc. 515, affirmed 7 N.Y.S.2d 646, 255 App.Div. 776—In re Hilliard's Will, 299 N.Y.S. 788, 164 Misc. 677, affirmed in re Myers, 5 N.Y.S.2d 92, 254 App. Div. 879, reargument denied in re Hilliard's Estate, 7 N.Y.S.2d 111, 255 App.Div. 781—In re Avchin's Estate, 285 N.Y.S. 762, 158 Misc. 338—In re Kaufman's Estate, 285 N.Y.S. 347, 158 Misc. 102—In re Shanaburgh's Estate, 277 N.Y.S. 689, 154 Misc. 559—In re Brush's Estate, 277 N.Y.S. 559, 154 Misc. 480, affirmed in re Brush, 287 N.Y.S. 151, 247 App.Div. 760—Haggerty

v. City of New York, 276 N.Y.S. 722, 153 Misc. 841, reversed on other grounds 196 N.E. 45, 267 N.Y. 252, reargument denied 198 N.E. 534, 268 N.Y. 639—Lehrer v. Nusbaum, 233 N.Y.S. 340, 133 Misc. 710—People ex rel. Metropolitan Trust Co. of City of New York v. Travis, 176 N.Y.S. 765, 107 Misc. 377, affirmed 180 N.Y.S. 659, 191 App.Div. 129—Matter of Bassett, 146 N.Y.S. 842, 84 Misc. 656.

A *per curiam* affirmation of a decree on appeal reciting: "We find no error in the disposition of this case in the circuit court, and the judgment is therefore affirmed," means only that the decree on the facts proved in the record is correct, and nothing else is affirmed.—John Deere Plow Co. v. Anderson, Ga., 174 F. 815, 98 C.C.A. 523.

Adoption of the opinion of the trial court as the opinion of the appellate court, does not lead to the conclusion that the appellate court intended to bind itself by every quotation found therein.—Powers v. Smith, 61 S.E. 222, 80 S.C. 110.

76. N.Y.—McGillis v. McGillis, 49 N.E. 145, 154 N.Y. 532, modifying 42 N.Y.S. 921, 11 App.Div. 359. 15 C.J. p 942 note 94.

77. U.S.—Steel & Tubes v. Clayton Mark & Co., D.C.Del., 21 F.Supp. 326.

Tenn.—Richardson v. Marshall County, 45 S.W. 440, 100 Tenn. 346.

Tex.—U. S. Fidelity & Guaranty Co. v. Nettles, Com.App., 35 S.W.2d 1045, reversing, Civ.App., 21 S.W. 2d 31.

Wash.—Petley v. City of Tacoma, 221 P. 579, 127 Wash. 479.

A *per curiam* opinion, written where the court is all of one mind, and where questions presented are controlled by previous decisions or do not require elaboration, is binding

as a precedent.—Bigham v. Foor, 158 S.E. 548, 201 N.C. 14—Mote v. White Lake Lumber Co., 135 S.E. 294, 192 N.C. 460—Hyder v. Board of Road Trustees for Henderson County, 130 S.E. 497, 190 N.C. 663.

Interdependence of franchises

Where the only formal issue decided was whether the transit commission had power to raise the five-cent fare on the subway and on the through service of the elevated, but the interdependence of the franchises was the sole justification for the conclusion reached, the decision was conclusive that the franchises were interdependent.—Murray v. Roberts, C.C.A.N.Y., 103 F.2d 839.

Taxability of proceeds of insurance

Supreme court's prior opinion holding that proceeds of life policies were not subject to estate transfer tax was held to constitute a precedent in a subsequent case in determining taxability, under same statute, of policies with like provisions, although the court in the prior case did not allude to the specific provisions now claimed to be pertinent, especially where the briefs in the prior case clearly brought to court's attention all the provisions invoked in the subsequent case.—Bingham v. U. S., Mass., 56 S.Ct. 180, 296 U.S. 211, 80 L.Ed. 160, reversing, C.C.A., U. S. v. Bingham, 76 F.2d 573, reversing, D.C., Bingham v. U. S., 7 F.Supp. 907, certiorari granted 56 S.Ct. 92, 296 U.S. 564, 80 L.Ed. 398.

78. N.Y.—Foote v. People, 56 N.Y. 321, reversing 2 Thomps. & C. 216, and followed in Roland v. People, 56 N.Y. 648.

79. U.S.—Fidelity, etc., Co. v. U. S., 23 S.Ct. 120, 187 U.S. 315, 47 L.Ed. 194, affirming 20 App.D.C. 376. 15 C.J. p 942 note 97.

80. U.S.—Gallagher v. Clark, D.C. Iowa, 5 F.Supp. 547.

ciple and reaching the same conclusion on facts which are alike and in which a certain point is involved, the fact that the point was not raised in any of these cases by counsel or stated by the court is support for the view that the point has no foundation.⁸¹

e. Common-Law and Civil Law Precedents

Common-law precedents, ordinarily, are not available in civil law cases, and likewise civil law precedents generally cannot be followed in common-law cases.

Common-law decisions ordinarily are not available as precedents in states and in respect of matters governed by the civil law.⁸² On the other hand, decisions based on the civil law ordinarily cannot be followed as governing authority in a state where the common law, as modified by constitutional and statutory provisions, judicial decisions, and the conditions and wants of the people, is in force.⁸³ However, precedents from the civil law have been held binding on a court of probate in the absence of precedents from the common law.⁸⁴

f. Single Decisions

A single decision, although not necessarily binding as

a precedent, may be applied as such where it is not in conflict with previous decisions, is not erroneous, and has generally been acquiesced in and acted on.

The rule of stare decisis is frequently applied to a principle which has been enunciated in but a single decision,⁸⁵ which is so definite in its terms and so generally acquiesced in and acted on that it has come to be recognized as the accepted rule on a given question;⁸⁶ and this rule is particularly applicable to a decision by a court of last resort, construing a statute,⁸⁷ since, as stated *infra* § 214, such construction constitutes a part of the statute. A previous opinion deciding contentions identical in facts, law, and application with those in the instant case should be followed on the principle of stare decisis.⁸⁸

A single decision, however, is not necessarily binding, under the rule of stare decisis,⁸⁹ especially where it has not been cited for many years;⁹⁰ and this rule will not be applied where the decision is in conflict with prior decisions, is not supported by reason or authority, or is clearly erroneous,⁹¹ or will interfere with important public or private rights.⁹² For a number of reasons a single decision

81. Ill.—Rhoads v. Chicago, etc., R. Co., 81 N.E. 371, 227 Ill. 328, 11 L.R.A.N.S., 623, 10 Ann.Cas. 111, 15 C.J. p 942 note 98.

82. La.—Ciaccio v. Carbajal, 83 So. 73, 145 La. 869.

The civil law, as to the rights of landlord and tenant, being essentially different from the common law, the decisions of courts administering the common law can throw but little light on questions involving such rights, arising under the law and to be determined by the courts of Louisiana.—Ciaccio v. Carbajal, *supra*.

83. Okl.—Chicago, etc., R. Co. v. Groves, 93 P. 755, 20 Okl. 101, 22 L.R.A.N.S., 802.

84. N.Y.—Matter of Martin, 144 N.Y.S. 174, 82 Misc. 574—In re Swartz's Will, 139 N.Y.S. 1105, 79 Misc. 388.

85. U.S.—Wilson v. Ward Lumber Co., C.C.Mo., 67 F. 674, appeal dismissed 84 F. 1023, 28 C.C.A. 689.

Ill.—People v. Taylor, 174 N.E. 59, 342 Ill. 88.

15 C.J. p 953 note 79.

86. U.S.—Wilson v. Ward Lumber Co., C.C.Mo., 67 F. 674, appeal dismissed 84 F. 1023, 28 C.C.A. 689.

Mo.—Dunklin County v. Chouteau, 25 S.W. 553, 120 Mo. 578.

N.C.—Williamson v. Rabon, 98 S.E. 830, 177 N.C. 302.

S.C.—James v. James, 1 S.E.2d 494, 189 S.C. 414.

15 C.J. p 953 note 79.

87. Ariz.—Inspiration Consol. Cop-

per Co. v. Conwell, 190 P. 88, 21 Ariz. 480.

Ind.—Dailey v. Pugh, 131 N.E. 836, 83 Ind.App. 431.

La.—Levy v. Hitsche, 4 So. 472, 40 La. Ann. 500.

Mo.—Handlin v. Morgan County, 57 Mo. 114.

N.C.—Williamson v. Rabon, 98 S.E. 830, 177 N.C. 302.

88. U.S.—Grand Rapids & I. R. Co. v. Blanchard, C.C.A.Mich., 38 F.2d 470.

Where two cases are consolidated in the trial court, and the records on the two appeals are substantially the same, a decision of the supreme court on questions presented on one of the appeals will be regarded as a ruling precedent for determining similar questions presented on the other appeal.—Sinkers-Davis Co. v. Indianapolis, 94 N.E. 886, 177 Ind. 417.

89. U.S.—O. D. Jennings & Co. v. Maestri, D.C.La., 22 F.Supp. 980, affirmed, C.C.A., 97 F.2d 679.

La.—Miami Corporation v. State, 173 So. 315, 186 La. 784, certiorari denied Miami Corporation v. State of Louisiana, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541—Rosenblath v. Sanders, 91 So. 252, 150 La. 882—State ex rel. Boykin v. Hope Producing Co., App., 167 So. 506—Dorsey v. Metropolitan Life Ins. Co., App., 145 So. 304—Cusachs v. Columbia Nat. Fire Ins. Co., 6 La.App. 15, 15 C.J. p 954 note 80.

More than one decision is required to settle jurisprudence on any given

point or question of law.—Miami Corporation v. State, 173 So. 315, 186 La. 784, certiorari denied Miami Corporation v. State of Louisiana, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541.

Single decision inadvisably made should be overruled, especially when no rule of property is involved.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 188 N.C. 30.

90. Iowa.—Ford v. Dilley, 156 N.W. 513, 174 Iowa 248.

91. Mo.—Young v. Downey, 51 S.W. 751, 150 Mo. 317.

15 C.J. p 954 note 80 [a]—[c].

Single decision can never serve as a basis for stare decisis where it is opposed to previous decisions, especially where such previous decisions are overruled without being referred to.—Miami Corporation v. State, 173 So. 315, 186 La. 784, certiorari denied Miami Corporation v. State of Louisiana, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541.

Overruling decision

A court which is presented with a single decision believed to have been inadvisably made must overrule the decision where the court entertains a different opinion on the question presented.—Miami Corporation v. State, *supra*.

92. Utah.—Kimball v. Grantsville City, 57 P. 1, 19 Utah 368, 45 L.R.A. 628.

15 C.J. p 954 note 80 [d].

will not have the same compelling force as an authoritative precedent which would attach to a series of decisions in which the same principle was asserted.⁹³ A case simply establishing a point, without in any way interfering with or contradicting any previous case, will have more weight than one which is in conflict with previous decisions or dicta.⁹⁴

§ 187. The Stare Decisis Rule

Under the stare decisis rule, a principle of law which

has become settled by a series of decisions generally is binding on the courts and should be followed in similar cases. This rule is based on expediency and public policy, and, although generally it should be strictly adhered to by the courts, it is not universally applicable.

As stated in *Corpus Juris*, which has been cited and quoted with approval, it is a well established general rule that, where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed, in similar cases,⁹⁵ or, as otherwise expressed, the principle so settled forms a precedent for the guidance of the

Reexamination of question involved

Where a question involving important public or private rights extending through all coming time has been passed on on a single occasion, and the decision can in no just sense be said to have been acquiesced in, it is not only the right but the duty of the courts, when properly called on, to reexamine the questions involved and again subject them to judicial scrutiny.—*Commonwealth ex rel. Margiotti v. Lawrence*, 193 A. 46, 326 Pa. 526—15 C.J. p 954 note 83.

93. Utah.—*Kimball v. Grantsville City*, 57 P. 1, 19 Utah 368, 45 L.R. A. 626.
15 C.J. p 954 note 82.

94. Mo.—*Young v. Downey*, 51 S.W. 751, 150 Mo. 317.
15 C.J. p 954 note 84.

95. U.S.—*In re Boggs-Rice Co., C.C. A.Va.*, 66 F.2d 855, reversing in part, D.C., 4 F.Supp. 431, affirmed in part, C.C.A., 66 F.2d 859.

Ala.—*Galloway Coal Co. v. Stanford*, 109 So. 377, 215 Ala. 79.

Ark.—*Newton v. Alzheimer*, 280 S.W. 641, 170 Ark. 366.

Cal.—*Knoke v. Swan*, 42 P.2d 1019, 2 Cal.2d 630, 97 A.L.R. 841—*People v. O'Connor*, 263 P. 866, 88 Cal.App. 568.

Del.—*Wilson v. Bethlehem Steel Co., Super.*, 7 A.2d 906.

Fla.—*Beach v. Kirk*, 189 So. 263—*State ex rel. Beggs v. Fabisinski*, 172 So. 685, 126 Fla. 684.

Idaho.—*Helgeson v. Powell*, 34 P.2d 957, 968, 54 Idaho 667, citing *Corpus Juris*.

Ill.—*Neff v. George*, 4 N.E.2d 388, 364 Ill. 306—*Gridley v. Wood*, 175 N.E. 396, 343 Ill. 228.

Iowa.—*In re Sterner's Estate*, 278 N. W. 216, 224 Iowa 617.

Ky.—*Northern Assur. Co. v. Griffin*, 33 S.W.2d 7, 236 Ky. 296—*Hoskins v. Hoskins*, 20 S.W.2d 1029, 231 Ky. 5—*Fidelity-Phoenix Fire Ins. Co. v. Hyden*, 10 S.W.2d 829, 226 Ky. 246—*Home Ins. Co. of New York v. Smither*, 251 S.W. 169, 199 Ky. 344.

La.—*Peltier v. Thibodaux*, 144 So. 903, 175 La. 1026—*Inman v. Silver*

Fleet of Memphis, App., 175 So. 436, rehearing denied 176 So. 657. Md.—*Griffith v. Benzinger*, 125 A. 512, 144 Md. 575.

Mass.—*Bergson v. H. P. Hood & Sons*, 15 N.E.2d 196, 116 A.L.R. 951. Mich.—*People v. Kambout*, 198 N.W. 831, 227 Mich. 172.

Minn.—*Melin v. Aronson*, 285 N.W. 830—*Johnston v. Tourangeau*, 259 N.W. 187, 193 Minn. 635.

Miss.—*Dunn v. Learned*, 188 So. 911.

Mo.—*Adair v. General American Life Ins. Co., App.*, 124 S.W.2d 657—*Calvert v. Hull*, App., 251 S.W. 414.

Mont.—*Continental Supply Co. v. Abell*, 24 P.2d 133, 139, 95 Mont. 148, quoting *Corpus Juris*—*Anderson v. Sunburst Oil & Refining Co.*, 296 P. 1108, 89 Mont. 175—*State v. Board of Com'rs of Cascade County*, 296 P. 1, 21, 89 Mont. 37, quoting *Corpus Juris*.

Neb.—*Patterson v. Kerr*, 254 N.W. 704, 127 Neb. 73.

Nev.—*In re MacDonnell's Estate*, 53 P.2d 625, 626, 56 Nev. 346, citing *Corpus Juris*, and rehearing granted 55 P.2d 834, 56 Nev. 504, affirmed 57 P.2d 695, 56 Nev. 504.

N.H.—*Smith v. Twin State Gas & Electric Co.*, 144 A. 57, 83 N.H. 439, 61 A.L.R. 1015, rehearing denied 144 A. 783, 83 N.H. 439, 61 A.L.R. 1015.

N.J.—*State v. Herbert*, 105 A. 796, 92 N.J.Law 341—*Beck v. Essex Sales Co.*, 139 A. 396, 5 N.J.Misc. 1071—*Van Clirk v. Hackensack Water Co.*, 126 A. 634, 2 N.J.Misc. 1140.

N.Y.—*Sternlieb v. Normandie Nat. Securities Corporation*, 188 N.E. 726, 263 N.Y. 245, 90 A.L.R. 1437, affirming 264 N.Y.S. 806, 238 App. Div. 349—*Lamont v. Travelers Ins. Co.*, 5 N.Y.S.2d 295, 254 App.Div. 511—*In re Herle's Estate*, 300 N. Y.S. 103, 165 Misc. 46—*Application of Gilchrist*, 224 N.Y.S. 210, 130 Misc. 456—*Quinby v. Public Service Commission of State of New York*, Second Dist., 169 N.Y.S. 976, 102 Misc. 857, affirmed 169 N.Y.S. 1109, 183 App.Div. 914, reversing 119 N. E. 433, 223 N.Y. 244, 3 A.L.R. 685, reargument denied 124 N.E. 790, 227 N.Y. 601.

N.C.—*State v. Dixon*, 1 S.E.2d 521,

215 N.C. 161—*Sidney Spitzer & Co. v. Commissioners of Franklin County*, 123 S.E. 636, 188 N.C. 30—*Williamson v. Rabon*, 98 S.E. 830, 177 N.C. 302—*Hill v. Atlantic & N. C. R. Co.*, 55 S.E. 854, 866, 143 N.C. 539, 9 L.R.A., N.S., 606.

Okl.—*Webb v. Semans*, 235 P. 1074, 110 Okl. 72.

Pa.—*Heisler v. Thomas Colliery Co.*, 118 A. 394, 274 Pa. 448, 24 A.L.R. 1215, affirmed 43 S.Ct. 83, 260 U.S. 245, 67 L.Ed. 237—*DeWitt v. Gardner*, 28 Pa.Dist. 920.

S.C.—*James v. James*, 1 S.E.2d 494, 189 S.C. 414.

S.D.—*Printup v. Kenner*, 180 N.W. 512, 43 S.D. 473.

Tex.—*Benavides v. Garcia*, Com. App., 290 S.W. 739, affirming, Civ. App., 283 S.W. 611—*Cockrell v. Work*, Civ.App., 94 S.W.2d 784.

Va.—*Crafts v. Broadway Nat. Bank of Richmond*, 128 S.E. 364, 142 Va. 702.

Wash.—*State v. Crockett*, 290 P. 873, 158 Wash. 152—*Mattingley v. Oregon-Washington R. & Nav. Co.*, 280 P. 46, 153 Wash. 514.

Wis.—*Village of West Salem v. Industrial Commission of Wisconsin*, 174 N.W. 453, 170 Wis. 151.

15 C.J. p 916 note 90.

"Perhaps the most fundamental characteristic of Anglo Saxon law as distinguished from other systems of jurisprudence is its deference to the principle of stare decisis which may be defined as the obligation of courts to adhere to the results of decided cases and to refrain from disturbing general principles which have been established by judicial determination."—*In re Herle's Estate*, 300 N. Y.S. 103, 109, 165 Misc. 46.

"Decided cases should be regarded as weighty authority, at least within the courts which decide them."—*State v. Dixon*, 1 S.E.2d 521, 524, 215 N.C. 161.

One should not be cut off, under this rule, until his rights are fully adjudicated.—*Reflectolyte Co. v. Luminous Unit Co., C.C.A.Mo.*, 20 F.2d 607.

Criticism of stare decisis rule
Tex.—*Shelton v. Jackson*, 49 S.W. 415, 20 Tex.Civ.App. 443.

courts in similar cases.⁹⁶ Under this rule courts are bound to follow the common law as it has been judicially declared in previously adjudicated cases,⁹⁷ and rules of substantive law should be reasonably interpreted and administered.⁹⁸

This rule, which has been stated, *infra* § 193, to be merely an application of the doctrine of estoppel to court decisions, and which is usually known and referred to as the rule of stare decisis, is founded largely on considerations of expediency and sound principles of public policy, to preserve the harmony

and stability of the law,⁹⁹ and to make as steadfast as possible judicially declared principles affecting the rights of property;¹ it being indispensable to the due administration of justice, especially by a court of last resort, that a question once deliberately examined and decided should be considered as settled and closed to further argument.²

It is a salutary rule, entitled to great weight, and ordinarily should be strictly adhered to by the courts,³ especially where a different ruling would

96. U.S.—The Madrid, C.C.La., 40 F. 677.

Fla.—Rorick v. Chancey, 178 So. 112, 130 Fla. 442.
Me.—Derosby v. Mathieu, 2 A.2d 170, 136 Me. 91.

N.Y.—Ford v. Grand Union Co., 270 N.Y.S. 162, 240 App.Div. 294.

"Commonly called the 'doctrine of precedents' "

N.C.—Hill v. Atlantic & N. C. R. Co., 55 S.E. 854, 866, 143 N.C. 539, 9 L.R.A., N.S., 606.

Stated in its general and simplest terms, the doctrine of stare decisis expresses the policy of the courts to stand by precedents and not to disturb settled points.—Neff v. George, 4 N.E.2d 388, 364 Ill. 306.

Precedents which cannot be distinguished should be followed until modified or overruled.—New York Life Ins. Co. v. Ross, C.C.A.Tenn., 30 F.2d 80, certiorari denied 49 S. Ct. 348, 279 U.S. 852, 73 L.Ed. 995. Necessity for similarity of facts see *infra* § 210.

97. Fla.—Layne v. Tribune Co., 146 So. 234, 108 Fla. 177, 86 A.L.R. 466.
Mo.—Musser v. Musser, 221 S.W. 46, 281 Mo. 649.

No right to revise

Courts have no inherent right to revise settled rules of common law to suit their own ideas of wherein law should be modernized by amendments which would overturn long standing precedents.—Layne v. Tribune Co., 146 So. 234, 108 Fla. 177, 86 A.L.R. 466.

98. Mo.—Harbison v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 609, 327 Mo. 440, 79 A.L.R. 1.—Ray County Sav. Bank v. Hutton, 123 S.W. 47, 224 Mo. 42.

99. Ga.—City Council of Augusta v. Bowers, 187 S.E. 264, 268, 54 Ga. App. 115, citing *Corpus Juris*.

Idaho.—McCornick & Co., Bankers, v. Gem State Oil & Products Co., 222 P. 286, 38 Idaho 470, 34 A.L.R. 387.

Ill.—Prall v. Burckhardt, 132 N.E. 280, 289, 299 Ill. 19, quoting *Corpus Juris*.

Ky.—Liberty Nat. Bank & Trust Co. v. Loomis, 121 S.W.2d 947, 275 Ky. 445.

Mich.—Loud v. General Builders' Supply Co., 228 N.W. 715, 249 Mich. 331.

Mont.—Continental Supply Co. v. Abell, 24 P.2d 133, 139, 95 Mont. 148, quoting *Corpus Juris*.

N.H.—Smith v. Twin State Gas & Electric Co., 144 A. 57, 61, 83 N. H. 439, 61 A.L.R. 1015, rehearing denied 144 A. 783, 83 N.H. 439, 61 A.L.R. 1015.

Or.—Noonan v. City of Portland, 83 P.2d 808.

Tex.—Benavides v. Garcia, Com. App., 290 S.W. 739, affirming, Civ. App., 283 S.W. 611.

Va.—Kelly v. Trehy, 112 S.E. 757, 133 Va. 160.

15 C.J. p 918 note 91.

"It finds its support in the sound principle that, when courts have announced, for the guidance and government of individuals and the public, certain controlling principles of law, they ought not after the principles have been promulgated and after these constructions have been published, to withdraw or overrule them."—State ex rel. La Prade v. Cox, 30 P.2d 825, 828, 43 Ariz. 174.

"The doctrine of stare decisis is a part of our judicial system, and it rests upon the principle that the law by which men are governed should be fixed, definite, and known, and that, when it is declared by a court of competent jurisdiction authorized to construe it, such declaration, in the absence of palpable mistake or error, is itself evidence of the law until it is changed by competent authority."—Griffith v. Benzinger, 125 A. 512, 520, 144 Md. 575.

Public policy of the state, if not found in the constitution or statutes of the state, may be established by judicial decision.—Shannon v. Irving Trust Co., 9 N.E.2d 792, 275 N.Y. 95, affirming 285 N.Y.S. 478, 246 App. Div. 280.

Recent case

Fact that prior case was quite recent would not render the doctrine of stare decisis inapplicable on ground that the case could be disregarded without serious disturbance to the body of the law.—State v. Dixon, 1 S.E.2d 521, 215 N.C. 161.

1. Ky.—Liberty Nat. Bank & Trust Co. v. Loomis, 121 S.W.2d 947, 275 Ky. 445.

Decisions constituting rules of property see *infra* § 216.

Rules of evidence

The doctrine of stare decisis cannot apply to a mere rule of evidence in which no one has a vested right.—Williams v. Kidd, 151 P. 1, 170 Cal. 631, Ann.Cas.1916E 708.

2. Ariz.—State ex rel. La Prade v. Cox, 30 P.2d 825, 43 Ariz. 174.

Ill.—Prall v. Burckhardt, 132 N.E. 280, 289, 299 Ill. 19, quoting *Corpus Juris*.

Mont.—Continental Supply Co. v. Abell, 24 P.2d 133, 139, 95 Mont. 148, quoting *Corpus Juris*—State ex rel. Kain v. Fischl, 20 P.2d 1057, 94 Mont. 92.

15 C.J. p 918 note 92.

3. U.S.—The Madrid, C.C.La., 40 F. 677.

Ariz.—State ex rel. La Prade v. Cox, 30 P.2d 825, 43 Ariz. 174.

Fla.—McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323, 119 Fla. 718.

Ky.—Hubley's Guardian Ad Litem v. Wolfe, 82 S.W.2d 830, 259 Ky. 574, 101 A.L.R. 1359.—Stoll Oil Refining Co. v. State Tax Commission, 296 S.W. 351, 221 Ky. 229.

La.—Miami Corporation v. State, 173 So. 315, 186 La. 784, certiorari denied Miami Corporation v. State of Louisiana, 58 S.Ct. 19, 302 U.S. 700, 32 L.Ed. 541.

Nev.—In re MacDonnell's Estate, 53 P.2d 625, 56 Nev. 348, rehearing granted 55 P.2d 834, 56 Nev. 504, affirmed 57 P.2d 695, 56 Nev. 504.
N.Y.—Hoyt v. Martense, 16 N.Y. 231, reversing 8 How.Pr. 196.

N.C.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 138 N.C. 30.—Hill v. Atlantic & N. C. R. Co., 55 S.E. 854, 866, 143 N.C. 539, 9 L.R.A., N.S., 606.

Tex.—Lyle v. State, 193 S.W. 680, 80 Tex.Cr. 606.

Va.—Kelly v. Trehy, 112 S.E. 757, 133 Va. 160.

Wash.—Bowman v. Union High School Dist. No. 1, Kitsap County, 22 P.2d 931, 173 Wash. 299.—Mat-

work injustice to some of the litigants.⁴ The courts are slow to interfere with the principle announced by the decision, and it may be upheld, even though they would decide otherwise were the question a new one,⁵ or equitable considerations might suggest a different result,⁶ and although it has been erroneously applied in a particular case.⁷ In determining a case the court is not concerned with what the law ought to be, but its sole function is to declare what the law, applicable to the facts of the case, is.⁸ A fortiori courts will not depart from an established rule of law to meet a particular case of supposed hardship.⁹

The rule of stare decisis is peculiarly applicable to a trial court.¹⁰

It applies with greater force in the case of private affairs, where contractual and property rights have grown up in reliance on the original decision, but it is nevertheless of importance in questions where

the rights of the public, as a whole, are concerned.¹¹

Not universally applicable. The stare decisis rule is not universally applicable to all situations without exception, and has more or less force, according to the nature of the question decided;¹² and the rule will not be applied to the extent of perpetuating error, as stated infra § 193, or where there is some other good reason for departing therefrom.¹³ Furthermore, the rule is applicable only where the rule of law does not conflict with pertinent constitutional or statutory provisions to the contrary,¹⁴ or with decisions in which such provisions have been called to the attention of the court.¹⁵

§ 188. Distinction between Stare Decisis and Res Judicata

Res judicata and stare decisis are distinguishable in that the former may relate to both law and facts whereas

son v. Kennecott Mines Co., 175 P. 181, 103 Wash. 499, modifying 171 P. 1040, 101 Wash. 12—State ex rel. Atkinson v. Ross, 86 P. 575, 43 Wash. 290.

W.Va.—Lyon v. Grasselli Chemical Co., 146 S.E. 57, 106 W.Va. 518.

Adherence to precedent should be the rule and not exception, particularly by nisi prius tribunals.—Application of Gilchrist, 224 N.Y.S. 210, 130 Misc. 456.

4. W.Va.—Lyon v. Grasselli Chemical Co., 146 S.E. 57, 106 W.Va. 518.

5. Ill.—Frall v. Burckhardt, 132 N.E. 280, 289, 299 Ill. 19, quoting *Corpus Juris*.

Ind.—Teeters v. City Nat. Bank of Auburn, 14 N.E.2d 1004, 118 A.L.R. 383.

Mont.—State v. Board of Com'rs of Cascade County, 296 P. 1, 89 Mont. 87.

N.Y.—People v. Westchester County Nat. Bank of Peekskill, 132 N.E. 241, 231 N.Y. 465, 15 A.L.R. 1344, reversing 138 N.Y.S. 944—Application of Gilchrist, 224 N.Y.S. 210, 130 Misc. 456.

Okl.—Webb v. Semans, 235 P. 1074, 110 Okl. 72—Jackson v. Twin State Oil Co., 218 P. 324, 95 Okl. 96—Nixon v. Harter, 208 P. 804, 87 Okl. 21—Nixon v. Good, 208 P. 803, 87 Okl. 19—Inman v. Sherill, 116 P. 426, 29 Okl. 100.

15 C.J. p 918 note 93.

"Ruling precedents of long standing involving such important matters as negotiable instruments, and the rights and liabilities of the parties contracting under or in respect thereto, touch many transactions of great importance among men, and courts ought to be reluctant to disturb them."—Teeters v. City Nat.

Bank of Auburn, Ind., 14 N.E.2d 1004, 1006, 118 A.L.R. 383.

6. Mich.—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14.

7. Miss.—National Surety Co. v. Miller, 124 So. 251, 155 Miss. 115.

8. Mo.—Kansas City v. Public Service Commission of Missouri, 210 S.W. 381, 276 Mo. 539, error dismissed 40 S.Ct. 54, 250 U.S. 652, 63 L.Ed. 1190—Calvert v. Hull, App., 251 S.W. 414.

9. Ark.—Foster v. Pollack Co., 291 S.W. 989, 173 Ark. 48.

Fla.—Beach v. Kirk, 189 So. 263.

Mich.—Loud v. General Builders' Supply Co., 228 N.W. 715, 249 Mich. 331.

Tex.—City of Munday v. Shaw, Civ. App., 100 S.W.2d 765, error dismissed—Adams v. State, 24 S.W. 2d 48, 114 Tex.Cr. 494.

Va.—Poff v. Poff, 104 S.E. 719, 128 Va. 62.

15 C.J. p 919 note 95.

Human and moral aspects of case must give way to established rules of law when the two conflict.—In re Meyer's Estate, 249 N.Y.S. 451, 140 Misc. 1.

10. N.Y.—A. Victor & Co. v. Sleininger, 4 N.Y.S.2d 597, 167 Misc. 719, affirmed 9 N.Y.S.2d 323, 255 App.Div. 678, reargument denied 11 N.Y.S.2d 548—Driggs v. Rockwell, 11 Wend. 504.

11. Ariz.—State ex rel. La Prade v. Cox, 30 P.2d 825, 43 Ariz. 174.

Governmental affairs

The doctrine of "stare decisis" attaches great weight to decisions which have invited those who administer governmental affairs to depend on them as correct expositions of the law, and which likewise in-

cline those who deal with governmental bodies to determine their demands and course of action on the decisions already announced.—Noonan v. City of Portland, Or., 88 P.2d 808.

Decisions affecting taxation are particularly within the application of stare decisis, since stability of interpretation is signally desirable in matters relating to taxation.—Welch v. Robinson, 97 N.E. 893, 211 Mass. 178.

Decisions constituting rules of property generally see infra § 216.

12. Ill.—Neff v. George, 4 N.E.2d 388, 364 Ill. 206.

Va.—Whitaker & Fowle v. Lane, 104 S.E. 252, 128 Va. 317, 11 A.L.R. 1157.

Wash.—Bowman v. Union High School Dist. No. 1, Kitsap County, 22 P.2d 991, 173 Wash. 299.

13. Miss.—Dunn v. Learned, 188 So. 911.

Matters subsequent to decision affecting force as precedent see infra § 191.

14. Ill.—Neff v. George, 4 N.E.2d 388, 364 Ill. 206.

Mont.—Snider v. Carmichael, 53 P. 2d 1004, 102 Mont. 387—Vande Veegaete v. Vande Veegaete, 243 P. 1082, 75 Mont. 52.

N.Y.—Shannon v. Irving Trust Co., 9 N.E.2d 792, 275 N.Y. 95, affirming 285 N.Y.S. 478, 246 App.Div. 280.

Okl.—Protest of Kansas City Southern Ry. Co., 11 P.2d 500, 157 Okl. 246.

S.D.—Shriver-Johnson Co. v. Hargraves, 223 N.W. 315, 54 S.D. 367, affirming 220 N.W. 148, 53 S.D. 86.

15. S.D.—Shriver-Johnson Co. v. Hargraves, supra.

the latter relates to legal principles only; and also in that the former binds parties and privies, whereas the latter governs a decision on the same question between strangers to the record.

A statement often met with in discussions of the law of *res judicata* is, in effect, that the judgment operates between parties and privies as a conclusive adjudication of all questions, both of law and of fact, determined by the court;¹⁶ and this is undoubtedly true of "estoppel by judgment," as explained in the C.J.S. title Judgments § 593, also 34 C.J. p 745 note 83—p 746 note 87, where the former adjudication is not void, no matter how erroneous or irregular it may be.¹⁷ Where, however, the former adjudication, invoked as a bar or estoppel, is a decision on a point of law, as, for example, the construction or constitutionality of a statute, the law of *res judicata* trenches on that of precedent or *stare decisis*;¹⁸ and, although both doctrines have in view the final termination of controversial questions of fact and of law,¹⁹ they are distinct and rest on entirely different grounds.²⁰ *Res judicata* relates to the conclusiveness of prior judicial findings or adjudications, whereas *stare decisis* relates to the binding effect of the legal principles involved;²¹ and *res judicata* binds parties and

privies, whereas *stare decisis* governs the decision of the same question in the same way in an action between strangers to the record.²²

Some authorities have held that the law of *res judicata* applies to decisions on points of law, as well where the estoppel is by verdict as where it is by judgment;²³ but on the other hand, the law of *stare decisis* and not that of *res judicata* has been held to apply to findings on questions of law, where the estoppel is by verdict.²⁴

§ 189. Concurrence of Judges

- a. In general
- b. Several opinions delivered
- c. Decisions by divided court
- d. Unanimous decisions

a. In General

A decision concurred in as to the result only, by a majority of the court, is not within the rule of *stare decisis*, although it is entitled to consideration as to the views of the judge writing the opinion. A general concurrence in an opinion is a concurrence in all points discussed in the opinion, unless the concurrence shows that it is on a particular ground only.

Where a majority of the court concur merely in

16. U.S.—*Boston v. McGovern*, C.C. A.Mass., 292 F. 705.
34 C.J. p 746 note 88.

As conversely stated a judgment is conclusive on the parties thereto only in respect of the grounds covered by it, and the law and facts necessary to uphold it.—*Woodgate v. Fleet*, 44 N.Y. 1—34 C.J. p 746 note 88 [a].

Res judicata in general see the C.J. S. title Judgments § 592, also 34 C.J. p 743 note 10—p 744 note 78.

17. Ky.—*Cain v. Union Cent. L. Ins. Co.*, 93 S.W. 622, 123 Ky. 59, 29 Ky. L. 475, 124 Am.S.R. 313.

34 C.J. p 747 note 90.

Void and voidable judgments as *res judicata* see the C.J.S. title Judgments §§ 615–619, also 34 C.J. p 768 note 7—p 769 note 17.

18. N.Y.—*In re Laudy*, 55 N.E. 914, 161 N.Y. 429.

34 C.J. p 747 note 91.

19. Neb.—*Scott v. Scotts Bluff County*, 183 N.W. 573, 106 Neb. 355.

20. Ky.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380.

La.—*State v. American Sugar Refining Co.*, 32 So. 965, 108 La. 603—*Carpenter v. Metropolitan Life Ins. Co.*, App. 167 So. 223.

N.J.—*Street v. Smith*, 135 A. 352, 5 N.J.Misc. 5.

N.Y.—*Byk v. Enright*, 203 N.Y.S. 296,

reversed on other grounds 204 N. Y.S. 897, 209 App.Div. 823.

15 C.J. p 919 note 97—34 C.J. p 747 note 92.

"Law of the case" distinguished see infra § 195.

21. N.Y.—*Bridenbaker v. Kissell*, 227 N.Y.S. 384, 131 Misc. 534, affirmed 234 N.Y.S. 751, 226 App. Div. 850.

Pa.—*State Hospital for Criminal Insane v. Consolidated Water Supply Co.*, 110 A. 281, 267 Pa. 29.

15 C.J. p 919 note 99—34 C.J. p 747 note 92 [a] (2) (3) (5) (6).

Other statements of distinction

"*Res judicata*" constitutes a plea in bar, founded on a specific judgment determinative of a specific controversy, whereas *stare decisis* is merely a rule of precedent.—*U. S. v. Certain Bottles of Lee's "Save the Baby"*, D.C.Conn., 37 F.2d 137.

"When *res adjudicata* is applicable, every essential fact, proved or unproved, as well as the ultimate fact found, must be treated as established, when pertinent for consideration in a later suit between the same parties; whereas *stare decisis* simply declares that, for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially the same."—*Heisler v. Thomas Colliery Co.*, 118 A. 394, 395, 274 Pa. 448, 24 A.L.R. 1215, affirmed 43 S. Ct. 83, 260 U.S. 245, 67 L.Ed. 237.

22. U.S.—*Utilities Production Cor-*

poration v. *Carter Oil Co.*, C.C.A. Okl., 72 F.2d 655, affirming, D.C., 2 F.Supp. 81.

Fla.—*McGregor v. Provident Trust Co. of Philadelphia*, 162 So. 323, 119 Fla. 718.

La.—*Rauschkolb v. Di Matteo*, 181 So. 555, 190 La. 7.

Pa.—*State Hospital for Criminal Insane v. Consolidated Water Supply Co.*, 110 A. 281, 267 Pa. 29.

W.Va.—*Marguerite Coal Co. v. Meadow River Lumber Co.*, 127 S. E. 644, 98 W.Va. 698.

Wis.—*Village of West Salem v. Industrial Commission of Wisconsin*, 174 N.W. 453, 170 Wis. 151.

Party not served in action

Corporation officer who was not served in action wherein judgment was rendered which was *res judicata* as to officers' freedom from liability under agreement signed by officers on ground that signatures were made solely in their capacity as officers is protected under doctrine of *stare decisis*, if not under doctrine of *res judicata*.—*Crossley v. Briscoe*, 189 A. 381, 382, 117 N.J.Law 474, citing *Corpus Juris*.

23. U.S.—*Southern Minnesota R. Extension Co. v. St. Paul & S. C. R. Co.*, Minn., 55 F. 690, 5 C.C.A. 249.

34 C.J. p 748 note 96.

24. Okl.—*Oklahoma R. Co. v. Severns Pav. Co.*, 170 P. 216, 67 Okl. 206; 10 A.L.R. 157.

34 C.J. p 748 note 98.

he result, the principles enunciated in the opinion cannot be considered as within the rule of stare decisis,²⁵ although they are entitled to consideration as the views of the judge writing the opinion.²⁶ A decision rendered on a summary application to a single member of the court, although concurred in by the other members of the court, is not binding as a precedent for the guidance of the court, although it may be looked to for its persuasive effect.²⁷ Where, however, judges in the minority on one question concur in an opinion of one of the majority on another question, the principles as established therein with relation to the latter question may be considered as the settled law of the court.²⁸

A general concurrence in an opinion delivered by one member of the court indicates that the concurring judges agreed with him on all the points discussed in his opinion,²⁹ unless it appears that the concurrence was on a particular ground.³⁰

b. Several Opinions Delivered

Concurrence in several opinions, all arriving at the same general result, establishes a precedent only where

the decision shows an agreement by a majority of the court on the particular question or questions constituting the ground of the decision.

Where a court consists of several judges, two or more of whom deliver opinions, and all arrive at the same general result in the cause, but for different reasons, and the rest of the judges give a silent vote of concurrence with them, in a decision for the one party or the other, then, as it does not appear that a majority of the court agreed as to any one question in particular as the ground of the decision, the case cannot be considered as authority on any of the questions which arise in the cause.³¹ Where, however, several questions arise in the cause and the opinions delivered agree in regard to all of them, and the other members of the court give a silent vote of concurrence, then all the questions will be deemed to have been determined by a majority of the court, and the case will be regarded and respected as an authoritative adjudication of all such questions.³² The views expressed in a separate concurring opinion of an individual judge are those of the court and a controlling authority, only where a majority of the court concur therein.³³

25. U.S.—*Off v. U. S.*, D.C. Ill., 35 F. 2d 222.

Idaho.—*Codd v. McGoldrick Lumber Co.*, 279 P. 298, 48 Idaho 1, 87 A.L.R. 580.

Mo.—*State v. White*, 126 S.W.2d 234—*Heald v. Aetna Life Ins. Co. of Hartford, Conn.*, 104 S.W.2d 379, 340 Mo. 1143, affirming, App., 90 S.W.2d 797—*State ex rel. Dengel v. Hartmann*, 96 S.W.2d 329, 339 Mo. 200—*State ex rel. St. Louis-San Francisco Ry. Co. v. Haid*, 37 S.W.2d 437, 327 Mo. 217, quashing error *Seldel v. St. Louis-San Francisco Ry. Co.*, App., 18 S.W.2d 126—*Coleman v. Haworth*, 8 S.W.2d 931, 320 Mo. 852—*Viquesney v. Kansas City*, 266 S.W. 700, 305 Mo. 488—*State v. Gochenour*, 225 S.W. 690—*In re Williams*, App., 113 S.W.2d 353, opinion quashed *State ex rel. Clark v. Shain*, Sup., 122 S.W.2d 882—*Rodier v. Kline's Inc.*, 47 S.W.2d 230, 226 Mo.App. 474—*O'Hara v. Lamb Const. Co.*, 206 S.W. 253, 200 Mo.App. 292.

Mont.—*Franz v. Listug*, 74 P.2d 1133, 105 Mont. 499.

S.C.—*Moseley v. American Nat. Ins. Co.*, 166 S.E. 94, 167 S.C. 112.

Wash.—*Green v. City of Seattle*, 261 P. 643, 146 Wash. 27.
15 C.J. p 938 note 39.

Statements in the opinion are merely the personal views of the writer of the opinion, and not the opinion of the court, where a majority of the judges concur only in the result.—*Off v. U. S.*, D.C. Ill., 35 F.2d 222.

Number of concurring judges necessary to render decision see supra § 184.

26. U.S.—*T. D. Downing & Co. v. U. S.*, 16 Ct.Cust.App. 293.

Mo.—*Heald v. Aetna Life Ins. Co. of Hartford, Conn.*, 104 S.W.2d 379, 340 Mo. 1143, affirming, App., 90 S.W.2d 797.

S.C.—*State v. Goodwin*, 62 S.E. 1100, 81 S.C. 419.

27. Ky.—*Raley v. County Board of Education of Woodford County*, 5 S.W.2d 484, 224 Ky. 50—*Dark Tobacco Growers' Co-op. Ass'n v. Garth*, 291 S.W. 367, 218 Ky. 391—*Lewis v. Mosely*, 286 S.W. 793, 215 Ky. 573—*Gray v. R. J. Reynolds Tobacco Co.*, 252 S.W. 134, 200 Ky. 47.

28. U.S.—*Boyle v. Zacharie, Md.*, 6 Pet. 348, 8 L.Ed. 423.

Concurrence as to applicable point
Where opinion of the court in cited case stated as material a detail which rendered the decision distinguishable from case at bar, but majority of the court concurred in the judgment on an express ground which was applicable to the case at bar, without referring to the detail relied on by writer of the opinion, the cited case is decisive.—*Rosenbaum v. City and County of Denver*, 81 P.2d 760, 102 Colo. 530.

29. N.Y.—*Kortright v. Cady*, 21 N.Y. 343, 78 Am.D. 145—*Barnes v. Ontario Bank*, 19 N.Y. 152—*Curtis v. Leavitt*, 15 N.Y. 9.

30. Mo.—*State ex rel. and to Use of*

Missouri Poultry & Game Co. v. Nolte, App., 217 S.W. 541.

N.Y.—*Kortright v. Cady*, 21 N.Y. 343, 78 Am.D. 145.

31. Mo.—*State ex rel. Columbia Nat. Bank of Kansas City v. Davis*, 284 S.W. 464, 314 Mo. 373—*State ex rel. and to Use of Missouri Poultry & Game Co. v. Nolte*, App., 217 S.W. 541.

N.Y.—*James v. Patten*, 6 N.Y. 9, 55 Am.D. 376, reversing 8 Barb. 344.

32. N.Y.—*Oakley v. Aspinwall*, 13 N.Y. 500—*James v. Patten*, 6 N.Y. 9, 55 Am.D. 376, reversing 8 Barb. 344.

33. Ala.—*State v. Goldstein*, 93 So. 308, 207 Ala. 569, 18 Ala.App. 587. Colo.—*London Guarantee & Accident Co. v. McCoy*, 45 P.2d 900, 97 Colo. 13.

Mo.—*Anderson v. Sutton*, 293 S.W. 770, 316 Mo. 1058—*Kirk v. Kansas City*, App., 128 S.W.2d 1128.

S.C.—*Bailey v. U. S. Fidelity & Guaranty Co.*, 193 S.E. 638, 185 S.C. 169.

"The intention of a decision is to be found in the majority opinion of the court, rather than in the separate views of one of the members of the court expressed in a concurring opinion."—*Loustalot v. New Orleans City Park Improvement Ass'n*, La. App., 164 So. 183, 186.

Where majority concur

Views expressed in separate concurring opinions are the views of court of last resort so as to render decision controlling where it appears that the majority of the court con-

c. Decisions by Divided Court

A decision affirmed merely by reason of an equal division of the appellate court is not binding as a precedent; but a deliberate decision of the court of last resort, although by a divided court, must be considered as *stare decisis* on the questions involved.

A prior case, decided by a closely divided court, is authority only for its own facts.³⁴ Where the judgment of a lower court is affirmed by operation of law, by reason of an equal division of opinion in the appellate court, the judgment, while binding in the particular case as fully as a decision rendered

by a unanimous court, is not binding as a precedent, and, when the same question arises in a subsequent case between other parties, it is treated as an open one and the former decision is not to be invoked as *stare decisis*;³⁵ but there is authority to the contrary.³⁶ Even though the court was not equally divided, it seems to be generally considered that the principles established by a decision rendered by a majority of the judges sitting will be more readily reconsidered than if there had been unanimous concurrence in the prior decision.³⁷

curring in them.—*City of Detroit v. Public Utilities Commission*, 286 N. W. 368, 288 Mich. 267.

34. U.S.—*U. S. v. Kennesaw Mountain Battlefield Ass'n*, C.C.A.Ga., 99 F.2d 830, certiorari denied *Kennesaw Mountain Battlefield Ass'n v. U. S.*, 59 S.Ct. 587, 306 Mo. 646, 83 L.Ed. 1045.

35. Colo.—*People v. Stapleton*, 247 P. 1062, 79 Colo. 629.

Fla.—*State ex rel. Landis v. Williams*, 151 So. 284, 112 Fla. 734—*Dale v. Jennings*, 107 So. 175, 90 Fla. 234.

Iowa.—*First Nat. Bank v. Frank*, 212 N.W. 705, 203 Iowa 364.

Mass.—*Howes Bros. Co. v. Massachusetts Unemployment Compensation Commission*, 5 N.E.2d 720, certiorari denied 57 S.Ct. 434, 300 U.S. 657, 81 L.Ed. 867.

Mich.—*Kangas v. New York Life Ins. Co.*, 198 N.W. 867, 223 Mich. 238.

N.C.—*Howard v. Queen City Coach Co.*, 4 S.E.2d 616—*Toxey v. Meggs*, 4 S.E.2d 513—*Durham v. Sovereign Camp, W. O. W.*, 2 S.E.2d 10—*Outlaw v. City of Asheville*, 1 S.E.2d 559—*Sawyer v. Cox*, 199 S.E. 379, 214 N.C. 839, rehearing denied 1 S.E.2d 562, 215 N.C. 241—*Edge v. North State Felspar Corporation*, 198 S.E. 644, 214 N.C. 818—*Piedmont Fire Ins. Co. v. Stinson*, 197 S.E. 751, 214 N.C. 98—*Powell v. Veasey*, 197 S.E. 622, 214 N.C. 25—*Fraday v. Carolina Mountain Power Corporation*, 196 S.E. 817, 213 N.C. 803—*Wells v. Jefferson Standard Life Ins. Co.*, 196 S.E. 326, 213 N.C. 801, rehearing denied 199 S.E. 291, 214 N.C. 351—*Mills v. Jones*, 196 S.E. 308, 213 N.C. 802—*Collins v. Security Mut. Life Ins. Co.*, 195 S.E. 793, 213 N.C. 800—*Braswell v. Town of Wilson*, 193 S.E. 20, 212 N.C. 833—*Cole v. Atlantic Coast Line R. Co.*, 191 S.E. 353, 211 N.C. 591—*Virginia Trust Co. v. Merrick*, 191 S.E. 5, 211 N.C. 739—*Allen v. Mutual Life Ins. Co.*, 190 S.E. 735, 211 N.C. 736—*Ferrell v. Metropolitan Life Ins. Co.*, 187 S.E. 575, 210 N.C. 831—*Gott v. Prudential Ins. Co. of America*, 187 S.E. 572, 210 N.C. 832—*Brown v. Equitable Life Assur. Soc. of*

U. S., 185 S.E. 429, 210 N.C. 825—*Holderfield v. Pou*, 183 S.E. 373, 209 N.C. 844—*State v. Swan*, 183 S.E. 285, 209 N.C. 836—*Sessoms v. Atlantic Coast Line R. Co.*, 182 S.E. 112, 208 N.C. 844—*Hayes v. City of Hickory*, 182 S.E. 111, 208 N.C. 845—*Joyner v. St. Paul Fire & Marine Ins. Co.*, 182 S.E. 111, 208 N.C. 848—*Martin v. Southern Ry. Co.*, 181 S.E. 745, 208 N.C. 843—*Beam v. News Pub. Co.*, 181 S.E. 326, 208 N.C. 837—*Smith v. Powell*, 181 S.E. 325, 208 N.C. 837—*Sondey v. Yates*, 181 S.E. 326, 208 N.C. 836—*Seay v. Sentinel Life Ins. Co.*, 179 S.E. 888, 208 N.C. 832—*First Nat. Bank & Trust Co. v. Hood, ex rel. Central Bank & Trust Co.*, 177 S.E. 16, 207 N.C. 862—*Alonzo v. Claverie*, 170 S.E. 648, 205 N.C. 832—*Federal Land Bank of Columbia v. Maney*, 170 S.E. 629, 205 N.C. 834—*Garrison v. Southern Ry. Co.*, 164 S.E. 115, 202 N.C. 851—*Nebel v. Nebel*, 161 S.E. 223, 201 N.C. 840—*Wilmington Cape Fear Corporation v. Cape Fear Hotel Co.*, 160 S.E. 757, 201 N.C. 834—*Hunter Mfg. & Commission Co. v. Leak Mfg. Co.*, 159 S.E. 411, 201 N.C. 823—*Durham v. Lloyd*, 157 S.E. 136, 200 N.C. 803—*Parsons v. Board of Education of Ashe County*, 156 S.E. 244, 200 N.C. 88—*Parsons v. Board of Education of Watauga County*, 156 S.E. 244, 200 N.C. 795—*Town of Tarboro v. Johnson*, 146 S.E. 803, 196 N.C. 824—*Gooch v. Western Union Telegraph Co.*, 146 S.E. 803, 196 N.C. 823—*Julian v. City of Winston-Salem*, 140 S.E. 83, 194 N.C. 807—*Lawrence v. Fidelity Bank*, 137 S.E. 427, 193 N.C. 841—*Raynor v. Jefferson Standard Life Ins. Co.*, 137 S.E. 137, 193 N.C. 835—*Poe v. Durham Public Service Co.*, 135 S.E. 321, 192 N.C. 819—*Town of Hillsboro v. Merchants' & Farmers' Bank*, 132 S.E. 657, 191 N.C. 823—*McCarter v. Atlanta & C. Air Line Ry. Co.*, 123 S.E. 88, 187 N.C. 863—*Jenkins v. Suncrest Lumber Co.*, 123 S.E. 82, 187 N.C. 864.

Pa.—*Commonwealth v. Reid*, 108 A. 829, 265 Pa. 328—*City of New Castle v. Berger's Heirs*, 74 Pa. Super. 548.

S.C.—*Snipes v. Davis*, 127 S.E. 447, 131 S.C. 293—*Florence v. Berry*, 40 S.E. 871, 62 S.C. 469.
15 C.J. p 938 note 47.

Such an affirmance does not settle principles of law, so as to make judgment an authority for determination of other issues.—*Williams v. New York P. & N. R. Co.*, C.C.A. Va., 11 F.2d 363, 45 A.L.R. 437.

Federal question

Decision of highest state court, affirmed by equal division of federal supreme court, is of no authority on federal questions involved.—*Gulf States Paper Corporation v. Carmichael*, D.C.Ala., 17 F.Supp. 225, injunction modified *Carmichael v. Gulf States Paper Corporation*, 57 S.Ct. 674, 300 U.S. 644, 81 L.Ed. 358, reversed on other grounds 57 S.Ct. 968, 301 U.S. 495, 81 L.Ed. 1245, 109 A.L.R. 1327—*Southern Coal & Coke Co. v. Carmichael*, D.C.Ala., 17 F.Supp. 225, injunction modified *Carmichael v. Southern Coal & Coke Co.*, 57 S.Ct. 674, 300 U.S. 644, 81 L.Ed. 358, reversed on other grounds 57 S.Ct. 868, 301 U.S. 495, 81 L.Ed. 1245, 109 A.L.R. 1327.

Disposition of case where court equally divided see *supra* § 184.

Equal division of appellate court as constituting affirmance in general see *Appeal and Error* § 184 b.

36. Miss.—*Brock v. Adler*, 177 So. 523, 180 Miss. 118, decree entered 178 So. 593, 180 Miss. 126—*Jefferson Standard Life Ins. Co. v. Ham*, 173 So. 672, 178 Miss. 838—*Robertson v. Mississippi Valley Co.*, 81 So. 799, 120 Miss. 159.

On appeal by a revenue agent in his proceeding to back-assess and subject to taxation by a city the capital stock of a corporation, a decision of the supreme court rendered in a like proceeding between the same parties involving the same questions, which decision was an affirmance only on account of a divided court, is a judicial precedent, and should be followed unless and until overruled.—*Robertson v. Mississippi Valley Co.*, *supra*.

37. Ala.—*Hand v. Stapleton*, 39 So. 651, 145 Ala. 118.
15 C.J. p 938 note 48.

Nevertheless as stated in *Corpus Juris*, which has been quoted and cited with approval, a deliberate decision of the highest court of a state, although pronounced by a divided court, must be considered as *stare decisis* on the questions involved,³⁸ unless and until it is overruled or reversed, as explained *infra* § 197; and the same rule has been applied to a decision by a court of intermediate appeal.³⁹ Indeed it has been said that a dissenting opinion strengthens the authority of a case, within the jurisdiction where its decisions are binding as precedents, by reason of the fact that it shows that the case has been thoroughly considered,⁴⁰ although in other states, where the decision is merely persuasive, as explained *infra* §§ 204, 205, it weakens the force of the decision.⁴¹

Ordinarily, only an opinion which is concurred in

by at least a majority of the court of last resort constitutes a precedent;⁴² if fewer than the majority concur there is no ruling opinion except as to the disposition of the case.⁴³ That some of the members of the court are not present or do not participate therein does not affect the force of a majority opinion as a precedent.⁴⁴

d. Unanimous Decisions

A unanimous decision is a precedent which must be followed in subsequent similar cases; and, under statutes, such a decision, unless reversed or overruled, prevails over a later unanimous decision, and also over a decision by fewer than all the judges.

The unanimous decision of a court on a question of law is a precedent which must be followed in subsequent cases in which the same question is raised on the same state of facts,⁴⁵ regardless of

38. Colo.—*Murray v. Newmyer*, 182 P. 888, 889, 66 Colo. 459, quoting *Corpus Juris*.

Fla.—*Hysler v. State*, 181 So. 350, 132 Fla. 200.

Ga.—*Western & A. R. R. v. Michael*, 160 S.E. 93, 43 Ga.App. 703, conforming to answers to certified questions 158 S.E. 426, 172 Ga. 561.

Iowa.—*State v. Grattan*, 256 N.W. 273, 218 Iowa 889.

Mich.—*People v. McMurphy*, 228 N.W. 723, 249 Mich. 147.

Miss.—*Hughes v. Gully*, 153 So. 528, 170 Miss. 425—*Chenault v. State*, 122 So. 98, 154 Miss. 21.

Mo.—*State ex rel. Hopkins v. Daues*, 6 S.W.2d 893, 319 Mo. 733, quashing opinion *Hopkins v. American Car & Foundry Co.*, App., 295 S.W. 841 and followed in *State ex rel. Barber v. Daues*, 6 S.W.2d 898, 319 Mo. 743, conformed to, *Barber v. American Car & Foundry Co.*, App., 14 S.W.2d 478—*Liebing v. Mutual Life Ins. Co. of New York*, 207 S.W. 230, 276 Mo. 118.

N.Y.—*B. N. Exton & Co. v. Home Fire & Marine Ins. Co.*, 225 N.Y.S. 714, 222 App.Div. 237, affirmed 164 N.E. 43, 249 N.Y. 253, 61 A.L.R. 718.

Ohio.—*Michaelson v. City of Cincinnati*, 27 Ohio N.P.N.S., 100—*State ex rel. Crabbe v. Crawford*, 26 Ohio N.P.N.S., 519.

Or.—*Runnells v. Lefel*, 207 P. 867, 871, 105 Or. 346, quoting *Corpus Juris*.

S.C.—*Williamson v. Richards*, 155 S.E. 890, 158 S.C. 534—*Tate v. Lenhard*, 96 S.E. 720, 110 S.C. 569—*American Mortg. Co. v. Woodward*, 65 S.E. 739, 83 S.C. 521.

W.Va.—*Simmers v. Star Coal & Coke Co.*, 167 S.E. 737, 738, 113 W.Va. 309, citing *Corpus Juris*.

15 C.J. p 938 note 49.

"A five to four decision of an appellate court has the same binding

force and effect as if it had been adopted by a unanimous membership."—*State v. Grattan*, 256 N.W. 273, 218 Iowa 889.

39. N.Y.—*Matter of Yonkers*, 147 N.Y.S. 195, 162 App.Div. 153. 15 C.J. p 938 note 50.

40. S.C.—*Matthews v. Clark*, 89 S.E. 471, 105 S.C. 13, 19.

15 C.J. p 938 note 51.

41. S.C.—*Matthews v. Clark*, *supra*.

A divided court and a strong dissenting opinion materially weaken a case as an authority.—*Scibilla v. City of Philadelphia*, 124 A. 273, 279 Pa. 549, 32 A.L.R. 981.

42. Cal.—*Atkinson v. Golden Gate Tile Co.*, 131 P. 107, 21 Cal.App. 168.

Ga.—*Moss v. Myers*, 76 S.E. 768, 12 Ga.App. 63.

La.—*State v. Hayes*, 110 So. 486, 162 La. 310.

Mo.—*State ex rel. St. Louis-San Francisco Ry. Co. v. Haid*, 37 S.W.2d 437, 327 Mo. 217, quashing error *Seidel v. St. Louis-San Francisco Ry. Co.*, App., 18 S.W.2d 126—*State ex rel. Hopkins v. Daues*, 6 S.W.2d 893, 319 Mo. 733, quashing opinion *Hopkins v. American Car & Foundry Co.*, App., 295 S.W. 841, and followed in *State ex rel. Barber v. Daues*, 6 S.W.2d 898, 319 Mo. 743, conformed to, *Barber v. American Car & Foundry Co.*, App., 14 S.W.2d 478—*Poague v. Mallory*, App., 235 S.W. 491.

Okl.—*Commerce Trust Co., Kansas City, Mo. v. Morris*, 11 P.2d 183, 157 Okl. 127—*Bank of Picher v. Morris*, 11 P.2d 178, 157 Okl. 122.

S.D.—*Thomas v. City of Ft. Pierre*, 241 N.W. 327, 59 S.D. 519.

Vt.—*Labor v. Carpenter*, 148 A. 867, 102 Vt. 418, followed in *Sheltra v. Carpenter*, 148 A. 869, 102 Vt. 423.

United States supreme court

The opinion concurred in by the majority of the justices of the Unit-

ed States supreme court establishes the law, although four of the justices dissent therefrom.—*Sudden & Christenson v. Industrial Accident Commission*, 188 P. 803, 182 Cal. 437.

View expressed *arguendo* in one justice's opinion in which only one other justice concurred, whereas two justices dissented and the fifth justice filed specially concurring opinion, not concurring in such view, had not the sanction of a majority of the court so as to be binding as precedent.—*Crocker v. Johnston*, 95 P.2d 214, 43 N.M. 469.

43. Mich.—*Groening v. McCambridge*, 275 N.W. 795, 282 Mich. 135.

Mo.—*Coates & Hopkins Realty Co. v. Kansas City Terminal Ry. Co.*, 43 S.W.2d 817, 328 Mo. 1118—*Gary Realty Co. v. Swinney*, 17 S.W.2d 505, 322 Mo. 450—*State v. Frost*, 289 S.W. 895—*Poague v. Mallory*, App., 235 S.W. 491.

44. Okl.—*Commerce Trust Co., Kansas City, Mo. v. Morris*, 11 P.2d 183, 157 Okl. 127—*Bank of Picher v. Morris*, 11 P.2d 178, 157 Okl. 122.

Where one of the justices is disqualified, so that only seven participated in a decision concurred in by a majority of the seven, the decision is *stare decisis*.—*Dolph v. Norton*, 123 N.W. 13, 158 Mich. 417.

45. U.S.—*Southern Ry. Co. v. City of Greenwood*, D.C.S.C., 40 F.2d 679.

Ga.—*Golden v. National Life & Accident Ins. Co.*, 5 S.E.2d 198, answers to certified questions conformed to, App., 6 S.E.2d 112—*West v. Trotzier*, 196 S.E. 902, 185 Ga. 794—*Pierce Trading Co. v. City of Blackshear*, 186 S.E. 721, 182 Ga. 649—*Corley v. City of Atlanta*, 182 S.E. 177, 181 Ga. 381—*Hallman v. Atlanta Child's Home*, 130 S.E. 814, 161 Ga. 247—*Kenemer v. State*, 113 S.E. 551, 154 Ga. 139—

the individual opinions of the present members of the court,⁴⁶ unless and until it has been reversed or overruled by a like unanimous decision;⁴⁷ and under some statutes such a decision cannot be overruled or materially modified except by a like unanimous concurrence.⁴⁸ Under some statutes, unless a decision of the highest court is unanimous, it is not binding as authority on the court.⁴⁹ It has been held, however, that a statute providing that unanimous decisions by a full court shall never be reversed, overruled, or changed, but shall have the same effect as if they had been enacted in terms by the legislature, can operate prospectively only, so that decisions rendered prior to the enactment of such statute have the force of statutes not from the time when they were made, but only from the time of the enactment of the statute.⁵⁰

In view of a statute that a unanimous decision can be reversed or overruled only by a like decision, in case of conflict, a unanimous decision, which has not been so reversed or overruled, takes precedence as authority over a later unanimous decision,⁵¹ and

particularly over a later decision not concurred in by all the justices.⁵² In case of a conflict between a decision rendered by all the judges constituting a court and another decision rendered by the court when less than all the judges were sitting, the decision rendered by all the judges will prevail.⁵³

§ 190. Dicta

- a. In general
- b. Adjudication on point within issues
- c. Judicial dicta
- d. Dicta as rule of law

a. In General

Dictum is an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof. It is entitled to consideration as being persuasive, but, as a general rule, is not binding as authority or precedent within the rule of stare decisis.

A dictum is an opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication;⁵⁴ an opinion ex-

Killingsworth v. Killingsworth, 97 S.E. 539, 148 Ga. 590.
15 C.J. p 939 note 54.

46. Ga.—Kennemer v. State, 113 S. E. 551, 154 Ga. 139.

47. Ga.—Kennemer v. State, *supra*—Killingsworth v. Killingsworth, 97 S.E. 539, 148 Ga. 590.

48. Ga.—Gillmore v. Mutual Ben. Life Ins. Co., 175 S.E. 681, 179 Ga. 267.

15 C.J. p 939 note 55.

49. Ga.—Wofford Oil Co. v. Town of Willacoochee, 191 S.E. 128, 184 Ga. 275—City of Atlanta v. Southern Broadcasting Co., 190 S.E. 594, 184 Ga. 9—Southern Ry. Co. v. Wright, 114 S.E. 359, 154 Ga. 334—Merritt v. State, 110 S.E. 160, 152 Ga. 405—Wilcox v. State Highway Board, 149 S.E. 432, 40 Ga. App. 241, conforming to State Highway Board v. Wilcox, 149 S. E. 182, 168 Ga. 883, reversing Wilcox v. State Highway Board, 144 S.E. 214, 38 Ga.App. 378—Yellow Cab Co. v. General Lumber Co., 134 S.E. 190, 35 Ga.App. 620.

50. Ga.—Bond v. Munro, 28 Ga. 597.

51. Ga.—Neely v. Sheppard, 198 S. E. 452, 185 Ga. 771—Mullis v. McCook, 194 S.E. 171, 185 Ga. 171—Brooks v. State, 188 S.E. 711, 183 Ga. 466, 108 A.L.R. 752, answers conformed to 189 S.E. 852, 55 Ga. App. 227—Tucker v. Wimpey, 116 S.E. 315, 155 Ga. 118—Josey v. State, 96 S.E. 1041, 148 Ga. 468—Allen v. Montgomery, 105 S.E. 33, 25 Ga.App. 817.

N.C.—Keasler v. Mutual Life Ins. Co. of New York, 99 S.E. 97, 177 N.C. 394.

Conflicting decisions generally see *infra* § 192.

52. Ga.—Scarborough v. Houston, 175 S.E. 491, 179 Ga. 194—Basil v. State, 97 S.E. 259, 22 Ga.App. 765.

53. Ga.—Warner v. Strickland, 87 S.E. 667, 144 Ga. 547.

54. U.S.—Hogan v. Hill, D.C.Pa., 9 F.Supp. 975, affirmed, C.C.A., 78 F.2d 1017.

Cal.—Harris v. Industrial Accident Commission of California, 268 P. 902, 204 Cal. 432.

Ky.—Flinn v. Blakeman, 71 S.W.2d 961, 254 Ky. 416.

Me.—Glidden v. Rines, 128 A. 4, 124 Me. 286.

Miss.—Deer Island Fish & Oyster Co. v. First Nat. Bank, 146 So. 116, 166 Miss. 162.

Mo.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W. 2d 876, 336 Mo. 406—State v. Marshall, 34 S.W.2d 29, 326 Mo. 1141.

N.Y.—In re Browning's Will, 294 N. Y.S. 530, 162 Misc. 244.

Ohio.—Dow Drug Co. v. Nieman, 13 N.E.2d 130, 57 Ohio App. 190.

Pa.—In re Shelley, 2 A.2d 809, 815, 332 Pa. 358, quoting *Corpus Juris*—Commonwealth v. Reid, 108 A. 329, 265 Pa. 328—In re Bell's Estate, 31 Pa.Dist. & Co. 670.

Philippine.—Kuenzle v. Villaneuva, 41 Philippine 611.

Utah.—Parkinson v. State Bank of Millard County, 35 P.2d 814, 84 Utah, 278, 94 A.L.R. 1112.

Va.—American Nat. Ins. Co. v. Branch, 191 S.E. 668, 168 Va. 478. Wis.—Gelosi v. State, 255 N.W. 893, 215 Wis. 649.

15 C.J. p 950 note 53.

In every case what is actually de-

cided is the law applicable to the particular facts; all other legal conclusions therein are but obiter dicta.—Hill v. Hout, 141 A. 159, 160, 292 Pa. 339.

Similar definitions

(1) "An expression of opinion by the court or judge on a collateral question not directly involved."—Crescent Ring Co. v. Travelers' Indemnity Co., 132 A. 106, 107, 102 N.J.Law 85.

(2) A legal conclusion stated in opinion but not applicable to particular facts of case.—In re Schuetz' Estate, 172 A. 865, 315 Pa. 105, remitted to 174 A. 832, 114 Pa.Super. 602.

(3) A ruling suggested by a court to be applied to a supposed statement of facts not involved in the case at bar.—Union Pac. R. Co. v. Hanna, 214 P. 550, 73 Colo. 162.

(4) A decision on a question which court is without jurisdiction to consider.—Barton v. Montex Corporation, Tex.Civ.App., 295 S.W. 950.

(5) "That part of an opinion which does not express any final conclusion on any legal question presented by the case for determination or any conclusion on any principle of law which it is necessary to determine as basis for final conclusion on one or more questions to be decided by the court."—Beaver County v. Home Indemnity Co., 52 P.2d 435, 444, 88 Utah 1.

In old English law, a dictum was an arbitrament, or the award of arbitrators.—Black L.D.

In French law a dictum is the report of a judgment made by one

pressed by a judge on a point not necessarily arising | not responsive to any issue and not necessary to the
in the case;⁵⁵ a statement or holding in an opinion | decision of the case;⁵⁶ an opinion expressed on a

of the judges who has given it.—
Black L.D.

55. U.S.—Union Tank Line v. Wright, 39 S.Ct. 276, 249 U.S. 275, 63 L.Ed. 602, reversing Union Tank Line Co. v. Wright, 91 S.E. 680, 146 Ga. 487—New York & Queens Gas Co. v. Newton, D.C.N.Y., 269 F. 277, affirmed Newton v. New York & Queens Gas Co., 42 S.Ct. 268, 253 U.S. 178, 66 L.Ed. 549.

Cal.—Griffin v. Payne, 24 P.2d 370, 133 Cal.App. 363, followed in Drake, Riley & Thomas v. Mann, 24 P.2d 375, 133 Cal.App. 789.

Idaho.—Long v. State Ins. Fund, 90 P.2d 973.

Ill.—McAdams v. McAdams, 267 Ill. App. 124.

La.—State v. Simpson, 102 So. 810, 157 La. 614—Reiner v. Maryland Casualty Co., App., 185 So. 93.

Mass.—U. S. Leather Co. v. City of Lynn, 199 N.E. 313.

Miss.—Harrington v. Yazoo & M. V. R. Co., 111 So. 444, 145 Miss. 887.

Mo.—Hannibal Trust Co. v. Elzea, 286 S.W. 371, 315 Mo. 485—Gillilan v. Gillilan, 212 S.W. 348, 278 Mo. 99—O'Hara v. Lamb Const. Co., 206 S.W. 253, 200 Mo.App. 292.

Neb.—City of Lincoln v. Steffensmeyer, 279 N.W. 272, 134 Neb. 613, 119 A.L.R. 914.

N.Y.—Shlosberg v. New York Life Ins. Co., 216 N.Y.S. 215, 217 App. Div. 67, affirmed 155 N.E. 749, 244 N.Y. 482, and 155 N.E. 913, 244 N.Y. 539, answering certified questions 216 N.Y.S. 917, 217 App.Div. 742.

N.C.—Suskin v. Hodges, 4 S.E.2d 891, 216 N.C. 333.

Pa.—In re Lippincott's Estate, 3 A. 2d 363, 333 Pa. 48.

R.I.—Rice v. Board of Aldermen of City of Woonsocket, 112 A. 175, 43 R.I. 305, reargument denied 112 A. 523.

Tex.—Youngs v. Youngs, Civ.App., 16 S.W.2d 426, affirmed, Com. App., 26 S.W.2d 191—United North & South Oil Co. v. Meredith, Civ. App., 258 S.W. 560, affirmed, Com. App., 272 S.W. 124.

Utah.—Lagoon Jockey Club v. Davis County, 270 P. 543, 72 Utah 405.
15 C.J. p 950 note 54.

Dogmatic negative to a question not squarely involved and squarely presented would only be dictum.—State v. Crosby Bros. Mercantile Co., 176 P. 670, 103 Kan. 896, denying rehearing 176 P. 321, 103 Kan. 733.

56. U.S.—Icyclear, Inc., v. District Court of U. S. for Southern District of California, Central Division, C.C.A.Cal., 98 F.2d 625—Sovereign Camp, W. O. W., v. Gillespie, C.C.A.Ark., 87 F.2d 944, cer-

tiorari denied Gillespie v. Sovereign Camp, W. O. W., 57 S.Ct. 925, 301 U.S. 698, 81 L.Ed. 1353—Yell County, Ark. v. Gillespie, C.C.A.Ark., 87 F.2d 944, certiorari denied Gillespie v. Yell County, Ark., 57 S.Ct. 925, 301 U.S. 698, 81 L.Ed. 1353—The Pacific Maru, D.C.Ga., 8 F.2d 166—Kevan v. John Hancock Mut. Life Ins. Co., D.C.Mo., 3 F.Supp. 238—Associated Commercial Co. v. U. S., 24 Ct.Cust. & Pat. App. 402—U. S. v. American Sponge & Chamolis Co., 16 Ct.Cust. App. 61.

Ala.—Roquemore v. Sovereign Camp, W. O. W., 146 So. 619, 226 Ala. 279—People's Bank v. Barrett, 121 So. 910, 219 Ala. 253.

Ariz.—Granow v. Adler, 206 P. 590, 24 Ariz. 53.

Ark.—Connor v. Blackwood, 2 S.W. 2d 44, 176 Ark. 139.

Cal.—Hills v. Superior Court in and for Los Angeles County, 279 P. 805, 207 Cal. 666, 65 A.L.R. 266—Melvin v. Carl, 276 P. 574, 206 Cal. 772—Marsden v. Collins, 72 P. 2d 247, 23 Cal.App.2d 148—Lossman v. City of Stockton, 44 P.2d 397, 6 Cal.App.2d 324.

Colo.—Wheeler v. Wilkin, 58 P.2d 1223, 98 Colo. 568.

D.C.—Robertson v. U. S. ex rel. Baldwin Co., 287 F. 942, 52 App.D.C. 368, reversed on other grounds U. S. ex rel. Baldwin Co. v. Robertson, 44 S.Ct. 508, 265 U.S. 168, 63 L.Ed. 962.

Ill.—People v. Callopy, 192 N.E. 634, 358 Ill. 11—People v. Lowenstein, 130 N.E. 733, 297 Ill. 395.

Ind.—Smith v. Smith, 142 N.E. 128, 81 Ind.App. 566.

Iowa.—Bates v. Nichols, 274 N.W. 32, 223 Iowa 878—International Harvester Co. of America v. Chicago, M. & St. P. Ry. Co., 172 N.W. 471, 186 Iowa 86.

Kan.—Putnam v. City of Salina, 22 P.2d 957, 137 Kan. 731, denying motion 17 P.2d 827, 136 Kan. 637.

Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380—Superior Oil Corporation v. Alcorn, 47 S.W.2d 973, 242 Ky. 814—Utterback's Adm'r v. Quick, 19 S.W.2d 980, 230 Ky. 333—Insurance Co. of North America v. Cheatham, 299 S.W. 545, 221 Ky. 668—Murphy v. Commonwealth, 298 S.W. 671, 221 Ky. 217.

Mich.—Attorney General v. Montgomery, 267 N.W. 550, 555, 275 Mich. 504—Robinson v. Gordon Oil Co., 253 N.W. 218, 266 Mich. 65.

Mo.—State v. Sheeler, 7 S.W.2d 340, 320 Mo. 173—State ex rel. Globe-Democrat Pub. Co. v. Gehner, 294 S.W. 1017, 316 Mo. 694—Rauch v. Metz, 212 S.W. 353—Lipp v. Lipp,

App., 117 S.W.2d 364—State ex rel. Kennedy v. Harris, 69 S.W.2d 307, 312, 228 Mo.App. 469—Wolford v. Scarbrough, 21 S.W.2d 777, 234 Mo. App. 137.

Neb.—Sedlacek v. Welpton Lumber Co., 197 N.W. 618, 619, 111 Neb. 677—State v. Marsh, 187 N.W. 84, 107 Neb. 637.

Nev.—Dellamonica v. Lyon County Bank Mortg. Corporation, 78 P.2d 89, 58 Nev. 307.

N.Y.—People v. Cashdollar, 176 N.Y. S. 443, 188 App.Div. 9, 37 N.Y.Cr. 524—Marcus v. Day, 248 N.Y.S. 649, 139 Misc. 283.

Ohio.—Dow Drug Co. v. Nieman, 13 N.E.2d 130, 57 Ohio App. 190.

Or.—McCredie v. Commercial Casualty Ins. Co., 20 P.2d 332, 142 Or. 229, 91 A.L.R. 557.

Pa.—In re Cassell's Estate, 6 A.2d 60, 334 Pa. 381, reversing 3 A.2d 194, 133 Pa.Super. 512—In re Warden's Estate, 25 Pa.Dist. 1000, 43 Pa.Co. 333, 4 Westmoreland Co.L.J. 138.

S.D.—Shriver-Johnson Co. v. Hargraves, 223 N.W. 315, 54 S.D. 367, affirming 220 N.W. 148, 53 S.D. 86—Highrock v. Gavin, 179 N.W. 12, 43 S.D. 315.

Tex.—Wells v. Lumbermen's Reciprocal Ass'n, Com.App., 6 S.W.2d 346, reversing Lumbermen's Reciprocal Ass'n v. Wells, Civ.App., 1 S.W.2d 945—Texas Power & Light Co. v. Brownwood Public Service Co., Civ.App., 37 S.W.2d 557—United North & South Oil Co. v. Meredith, Civ.App., 258 S.W. 550, affirmed, Com.App., 272 S.W. 124.

Utah.—Utah Fuel Co. v. Industrial Commission of Utah, 273 P. 306, 73 Utah 199.

Wis.—Stevens v. Jacobs, 276 N.W. 638, 226 Wis. 198, denying rehearing 275 N.W. 555, 226 Wis. 198—State ex rel. Ekern v. Dammann, 254 N.W. 759, 215 Wis. 394—Vanderwerker v. City of Superior, 192 N.W. 60, 179 Wis. 638.

15 C.J. p 950 note 55.

"It is a well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but obiter dicta, and lack the force of an adjudication."—People v. Case, 190 N.W. 289, 290, 220 Mich. 379, 27 A.L.R. 686.

Academic question

The question of burden of proof to show negligence of carrier avoiding limitation of liability clause in bill of lading becomes purely academic, where the court goes fully into the facts and finds that there had been negligence.—E. Borneman & Co. v.

point in which the judicial mind is not directed to the precise question necessary to be determined to fix the rights of the parties;⁵⁷ or an opinion of a judge which does not embody the resolution or determination of the court, and made without argument, or full consideration of the point, not the professed deliberate determination of the judge him-

self.⁵⁸ The term "dictum" is generally used as an abbreviation of "obiter dictum" which means a remark or opinion uttered by the way.⁵⁹

Such an expression or opinion, as a general rule, is not binding as authority or precedent within the stare decisis rule,⁶⁰ even on courts inferior to the

New Orleans, M. & C. R. Co., 81 So. 882, 145 La. 150.

Right to maintain action

A statement in an opinion that an original action might be maintained for a certain purpose may be disregarded as pure dictum where no right to maintain such an action was involved, and the question was not before the court directly or indirectly.—Board of Com'rs of Boone County v. Adler, 133 N.E. 602, 77 Ind.App. 296.

Weight of evidence

On reversal of a directed verdict for defendant, no expression of opinion on the weight of the evidence is called for, and a statement in the opinion that the testimony of disinterested witnesses was convincing that plaintiff was mistaken in his testimony is obiter dictum.—Kosnicki v. Pere Marquette Ry. Co., 186 N.W. 493, 217 Mich. 245, affirming 184 N.W. 454, 217 Mich. 245.

57. Neb.—City of Lincoln v. Steffensmeyer, 279 N.W. 272, 134 Neb. 613, 119 A.L.R. 914.

58. Miss.—State v. Tingle, 60 So. 728, 103 Miss. 672.

N.Y.—In re Herle's Estate, 300 N.Y. S. 103, 165 Misc. 46.
15 C.J. p 950 note 56.

59. Miss.—Deer Island Fish & Oyster Co. v. First Nat. Bank, 146 So. 116, 166 Miss. 162—State v. Tingle, 60 So. 728, 739; 103 Miss. 672.

Pa.—Commonwealth v. Paine, 56 A. 317, 207 Pa. 45.

60. U.S.—KVOS, Inc. v. Associated Press, Wash., 57 S.Ct. 197, 299 U.S. 269, 81 L.Ed. 183, reversing, C.C.A., Associated Press v. KVOS, 80 F.2d 575, reversing, D.C., 9 F.Supp. 279, certiorari granted KVOS, Inc. v. Associated Press, 56 S.Ct. 938, 298 U.S. 650, 80 L.Ed. 1379—Williams v. U. S., 53 S.Ct. 751, 289 U.S. 553, 77 L.Ed. 1372—In re Dodge, C.C. A.N.Y., 86 F.2d 259—U. S. v. Sakharan Ganesh Pandit, C.C.A.Cal., 15 F.2d 285, certiorari denied 47 S.Ct. 473, 273 U.S. 759, 71 L.Ed. 878—The Pacific Maru, D.C.Ga., 8 F.2d 166—Theokistou v. Panama R. Co., C.C.A.Canal Zone, 6 F.2d 116, certiorari denied Panama R. Co. v. Theokistou, 46 S.Ct. 25, 269 U.S. 569, 70 L.Ed. 416.

Ala.—Roquemore v. Sovereign Camp, W. O. W., 146 So. 619, 226 Ala. 279.—Folkes v. Central of Georgia Ry. Co., 80 So. 458, 202 Ala. 376.

Ark.—Connor v. Blackwood, 2 S.W.2d 44, 176 Ark. 139—Scruggs v. State, 198 S.W. 694, 131 Ark. 320.

Cal.—San Diego County v. Hammond, 59 P.2d 478, 6 Cal.2d 709, 105 A.L.R. 1155—Laguna Land & Water Co. v. Greenwood, 268 P. 699, 92 Cal.App. 570—Brown v. Brown, 256 P. 595, 83 Cal.App. 74.

Colo.—Union Pac. R. Co. v. Hanna, 214 P. 550, 73 Colo. 162.

Fla.—Ex parte Livingston, 156 So. 612, 116 Fla. 640.

Ga.—Lacey v. State, 163 S.E. 292, 44 Ga.App. 79—Mobley v. Macon Nat. Bank, 155 S.E. 778, 42 Ga.App. 267, affirmed 162 S.E. 708, 174 Ga. 286, 82 A.L.R. 560.

Ill.—Atchison, T. & S. F. Ry. Co. v. Commerce Commission, 167 N.E. 831, 335 Ill. 624.

Ind.—State v. Kaufman, 117 N.E. 643, 186 Ind. 602—Claridge v. Phelps, App., 11 N.E.2d 503.

Iowa.—State ex rel. Mitchell v. National Life Ins. Co. of U. S., 275 N.W. 26, 223 Iowa 1301—State v. Webster County, 227 N.W. 595, 209 Iowa 143—Brady v. Welsh, 204 N.W. 235, 200 Iowa 44, 40 A.L.R. 603.

Ky.—Stone v. City of Providence, 34 S.W.2d 244, 236 Ky. 775—Trimble v. Kentucky River Coal Corporation, 31 S.W.2d 367, 235 Ky. 301—Utterback's Adm'r v. Quick, 19 S.W.2d 980, 230 Ky. 333—Murphy v. Commonwealth, 298 S.W. 671, 221 Ky. 217—Greene v. National Surety Co., 217 S.W. 117, 186 Ky. 353.

La.—State v. Todd, 136 So. 76, 173 La. 23—Moulin v. Monteleone, 115 So. 447, 165 La. 169—O'Shee v. Chaudoir, 104 So. 59, 158 La. 321.

Mass.—U. S. Leather Co. v. City of Lynn, 199 N.E. 313—Erickson v. Ames, 163 N.E. 70, 264 Mass. 436. Mich.—Whitehead & Kales Co. v. Taan, 208 N.W. 148, 233 Mich. 597. Miss.—Aetna Ins. Co. v. Commander, 153 So. 877, 169 Miss. 847—Harrington v. Yazoo & M. V. R. Co., 111 So. 444, 145 Miss. 887.

Mo.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406—State ex rel. Globe-Democrat Pub. Co. v. Gehner, 294 S.W. 1017, 316 Mo. 694—Lipp v. Lipp, App., 117 S.W.2d 364—Platte Valley Drainage Dist. of Worth County v. National Surety Co., 295 S.W. 1083, 221 Mo.App. 898—O'Hara v. Lamb Const. Co., 206 S.W. 253, 200 Mo.App. 292.

Mont.—Manley v. Harer, 264 P. 937, 82 Mont. 30—State v. District

Court of Fourteenth Judicial Dist. in and for Broadwater County, 260 P. 134, 80 Mont. 228—State v. Madison State Bank of Virginia City, 218 P. 652, 68 Mont. 342.

Nev.—Dellamonica v. Lyon County Bank Mortg. Corporation, 78 P.2d 89, 58 Nev. 307.

N.J.—Thomas v. National Bank of New Jersey, 198 A. 539, 541, 16 N.J.Misc. 271, quoting *Corpus Juris*.

N.Y.—Yonkers Fur Dressing Co. v. Royal Ins. Co., 160 N.E. 778, 247 N.Y. 435, reversing 224 N.Y.S. 941, 222 App.Div. 688—Campbell v. New York Evening Post, 218 N.Y.S. 446, 219 App.Div. 169, reversed on other grounds 157 N.E. 153, 245 N.Y. 320, 52 A.L.R. 1432—Silosberg v. New York Life Ins. Co., 216 N.Y.S. 215, 217 App.Div. 67, affirmed 155 N.E. 749, 244 N.Y. 482 and 155 N.E. 913, 244 N.Y. 599, answering certified questions 216 N.Y.S. 917, 217 App.Div. 742—In re Martin's Estate, 12 N.Y.S.2d 316, 170 Misc. 813—In re Herle's Estate, 300 N.Y.S. 103, 165 Misc. 46—People v. Anonymous, 292 N.Y.S. 282, 161 Misc. 379—Marcus v. Day, 248 N.Y.S. 649, 139 Misc. 233—In re Green's Estate, 178 N.Y.S. 353, 109 Misc. 112, reversed on other grounds 182 N.Y.S. 190, 192 App. Div. 112.

Or.—McCredie v. Commercial Casualty Ins. Co., 20 P.2d 232, 142 Or. 229, 91 A.L.R. 557.

Pa.—In re Cassell's Estate, 6 A.2d 60, 334 Pa. 381, reversing 3 A.2d 194, 133 Pa.Super. 512—In re Shelley, 2 A.2d 809, 815, 332 Pa. 358, quoting *Corpus Juris*—Orlosky v. Haskell, 155 A. 112, 304 Pa. 57—Commonwealth v. Snyder, 144 A. 748, 294 Pa. 555—In re Warden's Estate, 25 Pa.Dist. 1000, 43 Pa.Co. 333, 4 Westmoreland Co.L.J. 138. Philippine.—Kuenzle v. Villaneuva, 41 Philippine 611.

R.I.—Rice v. Board of Aldermen of City of Woonsocket, 112 A. 175, 43 R.I. 305, reargument denied 112 A. 523.

S.D.—Schmidt v. Gunsalus, 209 N.W. 341, 50 S.D. 261—Highrock v. Gavlin, 179 N.W. 12, 43 S.D. 315.

Tenn.—Bank of Delrose v. Mansfield, 4 Tenn.App. 488.

Tex.—Ball v. Davis, 18 S.W.2d 1063, 118 Tex. 534, affirming in part and reversing in part, Civ.App., 3 S.W.2d 829—Thomas v. Creager, Civ. App., 107 S.W.2d 705, error dismissed—Travelers' Ins. Co. v. Lan-

court from which such expression emanated,⁶¹ no matter how often it may be repeated.⁶² This general rule is particularly applicable where there are prior decisions to the contrary of the statement regarded as dictum;⁶³ where the statement is declared, on a rehearing, to be dictum;⁶⁴ where the dictum is on a question which the court expressly states that it does not decide;⁶⁵ or where it is contrary to statute and would produce an inequitable result.⁶⁶ It has also been held that a dictum is not

the "law of the case,"⁶⁷ nor res judicata.⁶⁸

A general expression or discussion in the court's opinion is to be taken in connection with the case in which it is used, as explained *infra* § 222, and, in accordance with the foregoing general rule if such expression or discussion goes beyond the case in which it is used, it is dicta binding on no one, and is not controlling in a subsequent case in which the same question is presented for decision.⁶⁹ A state-

caster, Civ.App., 71 S.W.2d 318, error dismissed—Barton v. Montex Corporation, Civ.App., 295 S.W. 950.—Bukowski v. Williams, Civ.App., 198 S.W. 843—Belote v. State, 59 S.W.2d 161, 123 Tex.Cr. 468.

Utah.—Spring Canyon Coal Co. v. Industrial Commission of Utah, 277 P. 206, 74 Utah 103—Salt Lake City v. Sutter, 218 P. 234, 61 Utah 533.

Va.—Morison v. Dominion Nat. Bank of Bristol, 1 S.E.2d 292—American Nat. Ins. Co. v. Branch, 191 S.E. 668, 168 Va. 478—Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, affirming Chesapeake & O. R. Co. v. Martin, 143 S.E. 629, 154 Va. 1, and certiorari granted 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732, reversed on other grounds 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983.

Wis.—State ex rel. Ekern v. Dammann, 254 N.W. 759, 215 Wis. 394. Wyo.—State v. Morris, 283 P. 406, 41 Wyo. 128.

15 C.J. p 950 note 59.

"The recognition of judicial declarations as being 'obiter dicta' in special instances is a part of the doctrine of 'stare decisis.'"—Parsons v. Federal Realty Corporation, 143 So. 912, 920, 105 Fla. 105, 88 A.L.R. 275.

Reason for rule

"In view of the fact that the duty of the court is to construe the law as it exists, in cases brought within its jurisdiction . . . it would be unfair to the judge as well as to future litigants to give permanent and controlling effect to casual statements outside the scope of the real inquiry."—Rauch v. Metz, Mo., 212 S.W. 353, 357.

Construction of a statute, by the court, if unnecessary to the decision of any question then presented, may be disregarded.

Ky.—W. B. Samuels & Co. v. Nelson County, 264 S.W. 1098, 204 Ky. 490. Tex.—Garner v. Lemar, Civ.App., 38 S.W.2d 161, reversed on other grounds Lemar v. Garner, 50 S.W.2d 769, 121 Tex. 502.

Opinion on an issue not specifically called to court's attention is no authority thereon.—Bank of Seneca v. Morrison, 204 S.W. 1119, 200 Mo. App. 169.

Stare decisis rule see *supra* § 187.

61. U.S.—Arthur C. Harvey Co. v. Malley, C.C.A.Mass., 61 F.2d 365, denying motion 60 F.2d 97, affirming, D.C., 52 F.2d 885, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, affirmed 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461.

Mo.—City of Mountain View v. Farmers' Telephone Exch. Co., 243 S.W. 153, 294 Mo. 623, affirming, App., 224 S.W. 155.

Tex.—Travelers' Ins. Co. v. Lancaster, Civ.App., 71 S.W.2d 318, error dismissed.

15 C.J. p 952 note 60.

62. Ky.—W. B. Samuels & Co. v. Nelson County, 264 S.W. 1098, 204 Ky. 490.

N.Y.—In re Gedney, 142 N.Y.S. 157. 63. Ariz.—Donahue v. Babbitt, 227 P. 995, 26 Ariz. 542.

Cal.—Peis v. Mohr, 14 P.2d 878, 126 Cal.App. 300.

Right to jury trial

Appellate court's opinion as to extent of right to trial by jury in case wherein lower court ruled that application for jury trial came too late, and no question was raised as to such right or binding effect of verdict, is not authoritative as to binding effect of verdict in equity case, as against prior decisions to contrary.—Donahue v. Babbitt, 227 P. 995, 26 Ariz. 542.

64. Ind.—City of Indianapolis v. Dillon, 6 N.E.2d 966, 212 Ind. 172.

65. Ind.—Brehm v. Hennings, 123 N.E. 821, 70 Ind.App. 625.

Miss.—Weisinger v. McGehee, 184 So. 148, 160 Miss. 424.

66. U.S.—Arthur C. Harvey Co. v. Malley, C.C.A.Mass., 61 F.2d 365, denying motion 60 F.2d 97, affirming, D.C., 52 F.2d 885, certiorari granted 53 S.Ct. 314, 287 U.S. 596, 77 L.Ed. 519, affirmed 53 S.Ct. 426, 288 U.S. 415, 77 L.Ed. 866, motion denied 53 S.Ct. 656, 289 U.S. 704, 77 L.Ed. 1461.

Cal.—Wood v. Roach, 14 P.2d 170, 25 Cal.App. 631.

A statute, the language of which is plain, should be followed instead of contrary dictum.—Dow Drug Co. v. Nieman, 13 N.E.2d 130, 57 Ohio App. 130.

67. Ind.—Wheeler v. City of Indianapolis, 185 N.E. 125, 205 Ind. 88. Va.—Morison v. Dominion Nat. Bank of Bristol, 1 S.E.2d 292.

A dictum of the reviewing court is not the "law of the case" on a subsequent appeal nor are statements which, although not obiter in a strict sense, are closely allied thereto, such as statements casually made as to other portions of case not under consideration.—Morison v. Dominion Nat. Bank of Bristol, *supra*. Previous decision as law of case in general see *infra* § 195.

68. N.Y.—In re Zimmerman's Will, 172 N.Y.S. 80, 104 Misc. 516.

Proper parties

Dictum in an accounting proceeding as to the proper parties to such a proceeding is not res judicata as to parties in probate proceedings in an action that is strictly a probate proceeding.—In re Zimmerman's Will, *supra*.

Res judicata in general see the C.J.S. title Judgments § 592, also 34 C.J. p 743 note 70—p 745 note 82.

69. U.S.—Wright v. U. S., 58 S.Ct. 395, 302 U.S. 583, 82 L.Ed. 439—People of Puerto Rico v. Shell Co., Porto Rico, 58 S.Ct. 167, 302 U.S. 253, 82 L.Ed. 235, reversing, C.C.A., 86 F.2d 577, certiorari granted 57 S.Ct. 931, 301 U.S. 675, 81 L.Ed. 1336—Osaka Shosen Kaisha Line v. U. S., Tex., 57 S.Ct. 356, 300 U.S. 98, 81 L.Ed. 532, affirming, C.C.A., The Santos Maru, 84 F.2d 482, certiorari granted Osaka Shosen Kaisha Line v. U. S., 57 S.Ct. 30, 299 U.S. 526, 81 L.Ed. 387—Baltimore & Carolina Line v. Redman, N.Y., 55 S.Ct. 890, 295 U.S. 654, 79 L.Ed. 1636, modifying, C.C.A., Redman v. Baltimore & Carolina Line, 70 F.2d 635, certiorari granted Baltimore & Carolina Line v. Redman, 55 S.Ct. 89, 293 U.S. 541, 79 L.Ed. 646, certiorari denied Redman v. Baltimore & Carolina Line, 55 S.Ct. 98, 293 U.S. 577, 79 L.Ed. 674—Humphrey's Ex'r v. U. S., 55 S.Ct. 869, 295 U.S. 602, 79 L.Ed. 1611—Pacific S. S. Co. v. Peterson, 49 S.Ct. 75, 278 U.S. 136, 73 L.Ed. 220, affirming Peterson v. Pacific S. S. Co., 261 P. 115, 145 Wash. 460, certiorari granted Pacific S. S. Co. v. Peterson, 48 S.Ct.

ment, not necessary to the decision, made by a lower court is not binding on a higher appellate court, which merely affirms the judgment rendered, vouchsafes no opinion of its own, and gives no approval of the opinion in the lower court.⁷⁰

Reasoning, arguments, references, illustrations, and analogies. In accordance with the general rule, statements in the opinion which constitute merely the reasoning, arguments, references, illustrations, and analogies are generally not precedents,⁷¹ for

while the opinion announces the decision of the court, it does not follow that each member has arrived at his conclusion by the same reasoning or bases it on the same principles.⁷² However, it has been held that the reasoning of the court which furnishes the entire basis for the conclusion reached cannot be regarded as obiter dictum.⁷³

Entitled to consideration. An obiter dictum statement or expression, however, is not to be wholly disregarded.⁷⁴ It is entitled to respectful consid-

321, 276 U.S. 612, 72 L.Ed. 731—Weyerhaeuser v. Hoyt, Minn., 31 S.Ct. 300, 219 U.S. 380, 55 L.Ed. 258—Cohens v. Virginia, 6 Wheat. U.S. 264, 399, 5 L.Ed. 257—Metropolitan Casualty Ins. Co. of New York v. Colthurst, C.C.A.Cal., 36 F.2d 559, certiorari denied Colthurst v. Metropolitan Casualty Ins. Co. of New York, 50 S.Ct. 351, 281 U.S. 746, 74 L.Ed. 1158—American Surety Co. v. U. S., La., 239 F. 680, 152 C.C.A. 514.

Ala.—State ex rel. Wilkinson v. Murphy, 186 So. 487, 237 Ala. 332, 121 A.L.R. 283—Henderson v. Garner, 75 So. 387, 200 Ala. 59.

Cal.—Hallinan v. Superior Court in and for Kings County, 240 P. 788, 74 Cal.App. 420.

Fla.—Pell v. State, 122 So. 110, 97 Fla. 650.

Idaho.—Bashore v. Adolf, 238 P. 534, 41 Idaho 84, 41 A.L.R. 932.

Ill.—People v. Barber, 124 N.E. 594, 289 Ill. 556.

Ind.—Pierce v. Blair, 149 N.E. 560, 196 Ind. 710—City of Terre Haute v. Burns, App., 117 N.E. 519, denying rehearing 116 N.E. 604.

Mont.—Martien v. Porter, 219 P. 817, 68 Mont. 450.

N.Y.—In re Owens' Estate, 172 N.Y.S. 442, 184 App.Div. 702—Spring v. Fidelity Mut. Life Ins. Co., 170 N.Y.S. 253, 183 App.Div. 134—Smith v. Pacific Improvement Co., 172 N.Y.S. 65, 104 Misc. 481.

Pa.—Scaife v. McKee, 148 A. 37, 298 Pa. 33, appeal dismissed Scaife v. Scaife, 50 S.Ct. 459, 281 U.S. 771, 74 L.Ed. 1177, and McKee v. Scaife, 50 S.Ct. 459, 281 U.S. 771, 74 L.Ed. 1178—Levin v. Fourth St. Nat. Bank, 121 A. 105, 277 Pa. 350—In re Frick's Estate, 121 A. 35, 277 Pa. 242, reversed on other grounds Frick v. Commonwealth of Pennsylvania, 45 S.Ct. 603, 268 U.S. 473, 69 L.Ed. 1058.

Tenn.—State ex rel. Lea v. Brown, 64 S.W.2d 841, 166 Tenn. 669, 91 A.L.R. 1246, certiorari denied State of Tennessee ex rel. Lea v. Brown, 54 S.Ct. 717, 292 U.S. 638, 78 L.Ed. 1491—Prudential Ins. Co. of America v. Davis, 78 S.W.2d 358, 18 Tenn.App. 413.

Tex.—Duckworth v. Thompson, Civ.

App., 22 S.W.2d 528, affirmed, Com. App., 37 S.W.2d 731.

Va.—Morison v. Dominion Nat. Bank of Bristol, 1 S.E.2d 292—Virginia Ry. & Power Co. v. Dressler, 111 S.E. 243, 132 Va. 342, 22 A.L.R. 301.

Wis.—Wisconsin Telephone Co. v. Public Service Commission, 287 N.W. 122, rehearing denied 287 N.W. 593.

Incidental remarks of court on question not before it are not to be taken as precedents.—Parker v. Plympton, 273 P. 1030, 85 Colo. 87.

70. N.Y.—Buehler v. Board of Sup'rs of Rensselaer County, 183 N.E. 384, 260 N.Y. 268, affirming 259 N.Y.S. 512, 236 App.Div. 747, and followed in O'Brien v. Board of Sup'rs of Rensselaer County, 184 N.E. 113, 260 N.Y. 608, which affirmed 259 N.Y.S. 511, 236 App. Div. 748, and followed in Stowe v. Board of Sup'rs of Rensselaer County, 184 N.E. 136, 260 N.Y. 662, reversing 259 N.Y.S. 503, 236 App.Div. 212.

71. U.S.—Kansas City Life Ins. Co. v. Cox, C.C.A.Tenn., 104 F.2d 321.

Idaho.—Washington County Irr. Dist. v. Talboy, 43 P.2d 943, 55 Idaho 382.

Ill.—Shank v. Modern Woodmen of America, 213 Ill.App. 506.

Ind.—Wheeler v. City of Indianapolis, 185 N.E. 125, 205 Ind. 86.

Ky.—Mackey v. Commonwealth, 74 S.W.2d 915, 255 Ky. 466.

Mass.—Allen v. Commissioner of Corporations and Taxation, 172 N.E. 643, 272 Mass. 502, 70 A.L.R. 1299.

Mich.—People v. Baritz, 180 N.W. 423, 212 Mich. 580, 12 A.L.R. 520.

Mo.—Kinnerk v. Smith, 41 S.W.2d 381, 328 Mo. 513.

N.J.—Crescent Ring Co. v. Travelers' Indemnity Co., 132 A. 106, 102 N.J.Law 85.

Ohio.—Dow Drug Co. v. Nieman, 13 N.E.2d 130, 57 Ohio App. 190.

Pa.—In re Bell's Estate, 31 Pa.Dist. & Co. 670.

Tenn.—Hertzka v. Ellison, 8 Tenn. App. 667.

Tex.—Patterson v. State, 221 S.W. 596, 87 Tex.Cr. 95.

Utah.—Utah Fuel Co. v. Industrial

Commission of Utah, 273 P. 306, 73 Utah 199.

15 C.J. p 952 note 62.

"An opinion is authority only in so far as the ratio decidendi is necessary for a decision of the precise issue involved in the case."—Frost-Johnson Lumber Co. v. Salling's Heirs, 91 So. 207, 242, 150 La. 756.

More definitions of words, especially when used argumentatively, do not amount to the laying down of a definite and distinct ruling principle.—Castleman v. Canal Bank & Trust Co., 156 So. 648, 171 Miss. 291.

References in preliminary statement are not part of opinion, and cannot be accepted as precedents.—Henderson v. City of Wilmington, 132 S.E. 25, 191 N.C. 269.

Statements in a United States supreme court opinion which adopts reasoning of the lower court that is unnecessary to the decision are dicta not binding on the supreme court nor on the federal district court, especially where the supreme court has subsequently changed its views on a fundamental constitutional question involved in the case.—Committee for Industrial Organization v. Hague, D.C.N.J., 25 F.Supp. 127, modified, C.C.A., Hague v. Committee for Industrial Organization, 101 F.2d 774, certiorari granted 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1023, modified 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 423.

72. Tenn.—Louisville & N. R. Co. v. Davidson County Ct., 1 Sneed 637, 62 Am.D. 424.

15 C.J. p 952 note 63.

73. U.S.—Eisner v. Macomber, N.Y., 40 S.Ct. 189, 252 U.S. 189, 64 L.Ed. 521, 9 A.L.R. 1570.

74. Cal.—San Joaquin, etc., Canal etc., Co. v. Stanislaus County, 99 P. 365, 155 Cal. 21.

15 C.J. p 950 note 58 [a].

"An opinion is not to be disregarded wholly because it is obiter dictum. The real criticism goes to those portions of an opinion which assume to determine matters outside the issues, and hence not fully discussed and considered."—In re Wever's Estate, 55 P.2d 279, 280, 12 Cal.App.2d 237.

eration as expressing the view of the judge by whom it was uttered, and has a persuasive force, as being the expression of a man learned in the law,⁷⁵ and may be followed if sufficiently persuasive.⁷⁶ It has been held that a dictum should be afforded controlling weight if it is the only reported statement of the law applicable to the particular facts presented;⁷⁷ and that a dictum of a court of last resort should be regarded as tantamount to a decision, and binding, in the absence of a contrary decision of that court.⁷⁸

A clause in an official syllabus not contained in the opinion but evidently injected into the syllabus

by inadvertence may be regarded as obiter dictum;⁷⁹ and, where the syllabus of a decision states the law of the case, obiter therein must be so recognized,⁸⁰ although it has been held that dictum carried into the syllabus shows the court's intention to declare it law.⁸¹

b. Adjudication on Point within Issues

An adjudication on any point within the issues of the case is not dictum; and inferior tribunals are bound by the conclusions of courts of last resort.

An adjudication on any point within the issues presented by the case cannot be considered a dictum;⁸² and this rule applies as to all pertinent ques-

75. U.S.—Osaka Shosen Kaisha Line v. U. S., Tex., 57 S.Ct. 356, 300 U. S. 98, 81 L.Ed. 533, affirming, C. C.A., The Santos Maru, 84 F.2d 482, certiorari granted Osaka Shosen Kaisha Line v. U. S., 57 S.Ct. 30, 299 U.S. 596, 81 L.Ed. 387—Williams v. U. S., 53 S.Ct. 751, 289 U. S. 553, 77 L.Ed. 1372—Committee for Industrial Organization v. Hague, D.C.N.J., 25 F.Supp. 127, modified on other grounds, C.C.A., Hague v. Committee for Industrial Organization, 101 F.2d 774, certiorari granted 59 S.Ct. 486, 306 U.S. 624, 83 L.Ed. 1028, modified 59 S.Ct. 954, 307 U.S. 496, 83 L.Ed. 423.

Cal.—Brown v. Brown, 256 P. 595, 83 Cal.App. 74.

Ky.—District Board of Tuberculosis Sanatorium Trustees for Fayette County v. City of Lexington, 12 S. W.2d 348, 227 Ky. 7.

Mass.—Erickson v. Ames, 163 N.E. 70, 264 Mass. 436.

Mich.—Whitehead & Kales Co. v. Taan, 208 N.W. 148, 233 Mich. 597.

Mo.—State ex rel. Dunlap v. Higbee, 43 S.W.2d 825, 328 Mo. 1066—Gillilan v. Gillilan, 212 S.W. 348, 278 Mo. 99.

Mont.—State v. District Court of Fourteenth Judicial Dist. in and for Broadwater County, 260 P. 134, 80 Mont. 228.

N.J.—Thomas v. National Bank of New Jersey, 198 A. 539, 541, 16 N. J.Misc. 271, quoting *Corpus Juris*.

N.Y.—Standard Chemicals & Metals Corporation v. Waugh Chemical Corporation, 185 N.Y.S. 207, 194 App.Div. 254, reversed on other grounds 181 N.E. 566, 231 N.Y. 51, 14 A.L.R. 1054—City of Rochester v. Ailing, 10 N.Y.S.2d 373, 170 Misc. 477.

Ohio.—Suburban Ice Mfg. & Cold Storage Co. v. Mulvihill, 153 N.E. 204, 21 Ohio App. 438.

Pa.—In re Shelley, 2 A.2d 809, 815, 332 Pa. 358, quoting *Corpus Juris*.

Tex.—Patterson v. State, 221 S.W. 596, 87 Tex.Cr. 95.

15 C.J. p 950 note 58.

Dicta may be entitled to great consideration because of the high stand-

ing of the judge uttering them.—Hill v. Houtp, 141 A. 159, 292 Pa. 339.

Construction of statute

A prior decision placing a construction on a statute is persuasive only where a construction was not necessary to a decision of the matter involved.—New York Life Ins. Co. v. Kennedy, D.C.Fla., 253 F. 287.

Decisions containing only dicta are not entitled to same weight as decisions wherein the particular question is discussed and considered.—Bahls v. Welfare Loan Soc. of La Fayette, D.C.Ind., 17 F.2d 379.

76. U.S.—Humphrey's Ex'r v. U. S., 55 S.Ct. 869, 295 U.S. 602, 79 L.Ed. 1611.

Dicta of United States supreme court should be very persuasive.—

Fouts v. Maryland Casualty Co., C. C.A.N.C., 30 F.2d 357, reversing, D.C., Maryland Casualty Co. v. Foutz, 27 F.2d 423, and certiorari denied Maryland Casualty Co. v. Fouts, 49 S.Ct. 348, 279 U.S. 852, 73 L.Ed. 995.

77. N.Y.—Karameros v. Luther, 2 N.Y.S.2d 508, 166 Misc. 376.

78. N.J.—Kutschinski v. Thompson, 138 A. 569, 101 N.J.Eq. 649.

Obiter dicta of the highest court of another state is some evidence of the law of such state, and in the absence of conflicting evidence warrants a finding that the law is as stated.—Meuer v. Chicago, M. & St. P. R. Co., 75 N.W. 823, 11 S.D. 94, 74 Am.S.R. 774.

79. Neb.—Wilson v. Ulysses Tp., 101 N.W. 986, 72 Neb. 807, 9 Ann. Cas. 1153.

80. Ohio.—Williamson Heater Co. v. Radich, 190 N.E. 403, 128 Ohio St. 124.

81. Ohio.—Ward v. Swartz, 158 N.E. 318, 25 Ohio App. 175.

82. U.S.—Vall v. U. S., C.C.A.Mass., 94 F.2d 687, certiorari granted 58 S.Ct. 760, 303 U.S. 632, 82 L.Ed. 1092—Fouts v. Maryland Casualty Co., C.C.A.N.C., 30 F.2d 357, reversing, D.C., Maryland Casualty Co. v. Foutz, 27 F.2d 423, and certiorari

denied Maryland Casualty Co. v. Fouts, 49 S.Ct. 348, 279 U.S. 852, 73 L.Ed. 995—Weedin v. Tayokichi Yamada, C.C.A.Wash., 4 F.2d 455, reversing, D.C., Ex parte Tayohichi Yamada, 300 F. 248.

Cal.—Coombs v. Getz, 18 P.2d 939, 217 Cal. 320—People v. Scott, 178 P. 298, 39 Cal.App. 128.

Idaho.—Burns v. Lukens, 269 P. 596, 46 Idaho 603.

Iowa.—Perfection Tire & Rubber Co. v. Kellogg-Mackay Equipment Co., 187 N.W. 32, 194 Iowa 523.

Ky.—Board of Education of Louisville v. Board of Education for Jefferson County, 97 S.W.2d 11, 265 Ky. 447.

Miss.—Menken v. Frank, 58 Miss. 283.

Mo.—Sutton v. Anderson, 31 S.W.2d 1026, 1033, 326 Mo. 304, citing *Corpus Juris*.

Pa.—In re Groome's Estate, 35 Pa. Dist. & Co. 535, 537, quoting *Corpus Juris*.

Tex.—Daniel v. Cook, Civ.App., 70 S. W.2d 1024—Livingston Oil Corporation v. Waggoner, Civ.App., 273 S.W. 903—Allen v. Berkmiel, Civ. App., 216 S.W. 647.

Wis.—State v. Carchidi, 204 N.W. 473, 187 Wis. 438—School Dist. No. 4, Village of Shorewood, v. First Wisconsin Co., 203 N.W. 939, 137 Wis. 150—Chase v. American Cartage Co., 186 N.W. 598, 176 Wis. 235. 15 C.J. p 952 note 65.

"In so far as an opinion announces principles as a basis for the decision, it is in no sense dictum."—Taylor v. Taylor, 40 S.W.2d 393, 395, 162 Tenn. 482.

Court's holding in distinguishing a case on the authority of which one of the parties was insisting on a result different from that reached in the opinion is a part of the actual decision, and not merely obiter dictum.—State ex rel. McNulty v. Ellison, 210 S.W. 381, 278 Mo. 42.

Disposal of law and fact

The decision of a case on the law is not obiter dicta, although the case is also disposed of as a matter of

tions, although only incidentally involved, which are presented and decided in the regular course of the consideration of the case, and lead up to the final conclusion,⁸³ and to any statement in the opinion as to a matter on which the decision is predicated.⁸⁴ Accordingly, a point expressly decided does not lose its value as a precedent because the disposition of the case is⁸⁵ or might have been⁸⁶ made on some other ground, or even though, by reason of other points in the case, the result reached might have been the same if the court had held, on the particular point, otherwise than it did.⁸⁷ A decision on

which the case could have turned is not regarded as obiter dictum merely because, owing to the disposal of that contention, it was necessary to consider another question,⁸⁸ nor can an additional reason for a decision, brought forward after the case has been disposed of on one ground, be regarded as dicta.⁸⁹ So, also, where a case presents two or more points, any one of which is sufficient to determine the ultimate issue, but the court actually decides all such points, the case is an authoritative precedent as to every point decided, and none of such points can be regarded as having merely the status of a dictum,⁹⁰

fact.—*Utah Fuel Co. v. Industrial Commission of Utah*, 273 P. 306, 73 Utah 199.

The decision of a point made in argument is not an adjudication of the question involved unless by the pleadings it is or should have been made an issue.—*State v. Des Moines City R. Co.*, 140 N.W. 437, 159 Iowa 257.

Decision without full argument not necessarily dictum see supra § 186 c.

83. U.S.—*Northern Pac. Ry. Co. v. Baker*, D.C.Wash., 3 F.Supp. 1.

Mich.—*City of Detroit v. Public Utilities Commission*, 286 N.W. 368, 288 Mich. 267.

N.J.—*Mayor, etc., of City of Paterson v. East Jersey Water Co.*, 70 A. 472, 74 N.J.Eq. 49.

N.Y.—*Secklir v. Penney*, 266 N.Y.S. 327, 148 Misc. 807, affirmed 280 N. Y.S. 1009, 244 App.Div. 830.

Ohio.—*State ex rel. Sweeney v. Mitchell*, 187 N.E. 739, 46 Ohio App. 59, affirmed 191 N.E. 98, 128 Ohio St. 266.

Wis.—*Wisconsin Power & Light Co. v. City of Beloit*, 254 N.W. 119, 215 Wis. 439, followed in 254 N.W. 126, 215 Wis. 454—*Chase v. American Cartage Co.*, 186 N.W. 598, 176 Wis. 235.

Wyo.—*Miller v. Amorette*, 181 P. 420, 26 Wyo. 170, followed in *Miller v. Palmer*, 181 P. 427, 26 Wyo. 191. 15 C.J. p 952 note 65 [b].

Construction of pertinent constitutional or statutory provision

Ark.—*McAdams v. Henley*, 273 S.W. 355, 169 Ark. 97, 41 A.L.R. 629.

N.J.—*Sharp v. Borough of Vineland*, 190 A. 44, 117 N.J.Law 598, affirming 183 A. 911, 14 N.J.Misc. 256, affirmed 194 A. 260, 118 N.J.Law 567.

Tex.—*Austin Mill & Grain Co. v. Brown County Water Improvement Dist. No. 1*, Civ.App., 128 S.W.2d 829, error granted.

Wash.—*State v. Nikolich*, 241 P. 664, 137 Wash. 62.

Principle announced to meet contention of party

N.C.—*Kirby v. Boyette*, 24 S.E. 18, 118 N.C. 244.

84. Fla.—*Therrell v. Reilly*, 151 So. 305, 111 Fla. 805.

N.Y.—*Brennan v. Berry*, 222 N.Y.S. 355, 129 Misc. 671, affirmed 222 N. Y.S. 775, 220 App.Div. 833.

Tex.—*E. L. Martin, Inc. v. Kyser*, Civ.App., 104 S.W.2d 592, error dismissed.

Responsive statements

Statements in opinion, responsive to question put and treated by court as decisive, are not dicta, but authority.—*State v. Bank of Commerce*, 203 S.W. 824, 133 Ark. 498, L.R.A.1918F 538.

Statement referring to contingency

In opinion construing a deed as giving grantee defeasible fee, which on his death without heir would pass to heirs of grantor's deceased son, reference to such heirs as of blood of "first purchaser" is not dictum, where contingency on which statement is based is referred to by "altogether probable," showing it to be a material part of opinion.—*Stevens v. Wooten*, 130 S.E. 13, 190 N.C. 378.

85. U.S.—*Wagner v. Corn Products Refining Co.*, D.C.N.J., 28 F.2d 617. Mo.—*In re Moody's Estate*, 83 S.W.2d 141, 229 Mo.App. 625.

Neb.—*Sawyer v. Sovereign Camp*, W. O. W., 201 N.W. 652, 112 Neb. 821. 15 C.J. p 952 note 66.

Subordinate proposition

A proposition assumed or decided by the court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the court, is as effectually passed on and settled in that court as the very matter directly decided.—*Johnson v. Seattle Electric Co.*, 81 P. 705, 39 Wash. 211—15 C.J. p 952 note 66 [c].

86. U.S.—*Weedin v. Tayokichi Yamada*, C.C.A.Wash., 4 F.2d 455, reversing, D.C., *Ex parte Tayokichi Yamada*, 300 F. 248—*Watson v. St. Louis, I. M. & S. Ry. Co.*, C.C.Ark., 169 F. 942, affirmed 32 S.Ct. 533, 223 U.S. 745, 56 L.Ed. 639.

Cal.—*People v. Reid*, 232 P. 457, 195 Cal. 249, 36 A.L.R. 1435.

Fla.—*Parsons v. Federal Realty Cor-*

poration, 143 So. 912, 105 Fla. 105, 88 A.L.R. 275.

Ky.—*Swiss Oil Corporation v. Shanks*, 270 S.W. 478, 208 Ky. 64, affirmed 47 S.Ct. 393, 273 U.S. 407, 71 L.Ed. 709.

Mo.—*Farish Co. v. Brown-Evans Mfg. Co.*, 230 S.W. 365, 207 Mo.App. 78.

N.M.—*Baca v. Chavez*, 252 P. 987, 33 N.M. 210.

87. N.Y.—*Smith v. Scholtz*, 68 N.Y. 41.

88. Ark.—*Galloway v. Darby*, 151 S. W. 1014, 105 Ark. 558, 44 L.R.A., N.S., 782, Ann.Cas.1914D 712.

89. Ky.—*Swiss Oil Corporation v. Shanks*, 270 S.W. 478, 208 Ky. 64, affirmed 47 S.Ct. 393, 273 U.S. 407, 71 L.Ed. 709.

90. U.S.—*U. S. v. Title Insurance & Trust Co.*, Cal., 44 S.Ct. 621, 265 U. S. 472, 68 L.Ed. 1110, affirming, C. C.A., 288 F. 821—*Van Dyke v. Parker*, C.C.A.Ariz., 83 F.2d 35—*Curreri v. Vice*, C.C.A.Cal., 77 F.2d 130, certiorari denied 56 S.Ct. 170, 296 U.S. 638, 80 L.Ed. 454—*Alco-Zander Co. v. Amalgamated Clothing Workers of America*, D.C.Pa., 35 F.2d 202—*Williams v. Arlington Hotel Co.*, D.C.Ark., 15 F.2d 412, reversed on other grounds, C.C.A., 22 F.2d 669.

Cal.—*Coombes v. Getz*, 18 P.2d 939, 217 Cal. 320—*East Bay Municipal Utility Dist. v. Kieffer*, 279 P. 178, 99 Cal.App. 240, denying rehearing 273 P. 476, 99 Cal.App. 240—*Williams v. Southern Pac. Co.*, 202 P. 356, 54 Cal.App. 571, certiorari denied 42 S.Ct. 315, 253 U.S. 622, 66 L.Ed. 796.

Fla.—*Parsons v. Federal Realty Corporation*, 143 So. 912, 105 Fla. 105, 88 A.L.R. 275.

Ind.—*Vandalia R. Co. v. Schnull*, 122 N.E. 225, 188 Ind. 87, reversed on other grounds 41 S.Ct. 324, 255 U. S. 113, 65 L.Ed. 539, conformed to 130 N.E. 885, 190 Ind. 698.

Iowa.—*Galvin v. Citizens' Bank of Pleasantville*, 250 N.W. 729, 217 Iowa 494—*Waddell v. Board of Directors of Aurelia Consolidated Independent School Dist.*, 175 N.W. 65, 190 Iowa 400.

and one point should not be denied authority merely because another point was more dwelt on and more fully argued and considered;⁹¹ nor does a decision on one proposition make statements of the court regarding other propositions dicta.⁹² However, expressions of opinion as to the construction of a statute, if such expressions are not necessary for the rendering of the decision in question, do not constitute judicial determinations of the true construction of the statute.⁹³

Inferior tribunals bound. Inferior tribunals are bound by the conclusions of the court of last resort, and cannot treat them as dicta on the theory that the questions determined were not properly raised by the record and were not necessary to the determination of the case;⁹⁴ and, in the absence of decisions to the contrary, dicta of a court of last resort, or other higher court, should be considered by inferior courts on the same matter.⁹⁵ It has

been held that an inferior court is controlled, in deciding a particular question, by the dictum of a court of last resort, as to what decision it would make if the question came before it.⁹⁶

c. Judicial Dicta

An expression of opinion on a point involved in a case, argued by counsel and deliberately passed on by the court, although not essential to the disposition of the case, if dictum, is a judicial dictum.

As stated in *Corpus Juris*, which has been quoted and cited with approval, an expression of opinion on a point involved in a case, argued by counsel and deliberately passed on by the court, although not essential to the disposition of the case, if a dictum, should be considered a judicial dictum as distinguished from a mere obiter dictum, which is an expression originating alone with the judge writing the opinion, as an argument or illustration.⁹⁷ A fortiori, an expression which might otherwise be

Ky.—*Swiss Oil Corporation v. Shanks*, 270 S.W. 478, 208 Ky. 64, affirmed 47 S.Ct. 398, 273 U.S. 407, 71 L.Ed. 709.

Or.—*Lovejoy v. City of Portland*, 188 P. 207, 95 Or. 459.

Tex.—*Stanolind Oil & Gas Co. v. Edgar*, Civ.App., 98 S.W.2d 222, error dismissed—*Casparis v. Fidelity Union Casualty Co.*, Civ.App., 65 S.W.2d 404, error refused—*Park v. South Bend Chilled Plow Co.*, Civ. App., 199 S.W. 843, error refused.

Utah.—*Jones v. Mutual Creamery Co.*, 17 P.2d 256, 81 Utah 223, 85 A.L.R. 908—*Utah Fuel Co. v. Industrial Commission of Utah*, 273 P. 306, 73 Utah 199.

Wis.—*Chase v. American Cartage Co.*, 186 N.W. 598, 176 Wis. 235, 15 C.J. p 953 note 69.

Where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court, and each is of equal validity.—*Gilbert v. Stockton Port Dist.*, 60 P.2d 847, 849, 7 Cal.2d 384—*Bank of Italy Nat. Trust & Savings Ass'n v. Bentley*, 20 P.2d 940, 942, 217 Cal. 644, certiorari denied 54 S.Ct. 74, 290 U.S. 659, 78 L.Ed. 571—*Pugh v. Moxley*, 128 P. 1037, 164 Cal. 374.

91. U.S.—*Richmond Screw Anchor Co. v. U. S.*, 48 S.Ct. 194, 275 U.S. 331, 72 L.Ed. 303, reversing 61 Ct. Cl. 397.

92. Iowa.—*Galvin v. Citizens' Bank of Pleasantville*, 250 N.W. 729, 217 Iowa 494.

93. N.Y.—*Marion v. Weiser*, 196 N.Y.S. 386, 119 Misc. 412.

Constitutionality

Expressions of opinion as to the construction of statutes in decisions passing on their constitutionality do not constitute judicial determinations of the true construction of the statute where there was no holding that the statute would be constitutional if given one construction and unconstitutional if given another, especially where the holding was that the statute was constitutional even if construed as claimed.—*Marion v. Weiser*, supra.

94. Mo.—*Gibson v. Chouteau*, 7 Mo. App. 1, affirmed 76 Mo. 38. Ohio.—*Strauss v. Jacobs*, 10 Ohio S. & C.P. 132.

Federal courts

(1) An expression of the views of the supreme court setting forth the mature and unanimous opinion of the members of the court on a question of law involved in the case at bar should be followed, and should not be rejected by an inferior court as dictum.—*Cameron v. U. S.*, Ariz., 250 F. 943, 163 C.C.A. 193, affirmed 40 S.Ct. 410, 252 U.S. 450, 64 L.Ed. 659—*Daniels v. Wagner*, C.C.A.Or., 205 F. 235.

(2) The circuit court of appeals would hesitate to disregard a holding of the supreme court because a certain point was not raised by unsuccessful party before the supreme court.—*Bank Line v. U. S.*, C.C.A.N.Y., 96 F.2d 52.

(3) A decision of the supreme court on a question assigned as error and fully briefed, although no exception was taken in the lower court, may be treated by a district court as establishing the law as against an objection that it was obiter dictum.—*U. S. v. Carlson*, D.C.Minn., 17 F. 2d 628.

95. N.Y.—*Gimbel Bros. v. White*, 10/

N.Y.S.2d 666, 256 App.Div. 439—*People v. Cascia*, 181 N.Y.S. 855, 191 App.Div. 376.

Federal courts

A district court in determining the constitutionality of a statute may be bound by doctrine of stare decisis as evidenced by decisions of United States supreme court and the circuit court of appeals, and, where either court has not passed on point in controversy, district court may consider pertinent obiter dicta in their opinions.—*Acme, Inc. v. Besson*, D.C.N.J., 10 F.Supp. 1.

96. Ala.—*Johnston v. Mobile Hotel Co.*, 167 So. 595, 27 Ala.App. 145, certiorari denied 167 So. 596, 232 Ala. 175—*Bozeman v. State*, 145 So. 165, 25 Ala.App. 281—*Gulf States Steel Co. v. Houston Furniture Co.*, 110 So. 476, 21 Ala.App. 580, certiorari denied 110 So. 478, 215 Ala. 306.

97. Iowa.—*Perfection Tire & Rubber Co. v. Kellogg-Mackay Equipment Co.*, 187 N.W. 32, 194 Iowa 523.

Miss.—*State v. McDonald*, 145 So. 508, 512, 164 Miss. 405, citing *Corpus Juris*.

Mont.—*State ex rel. Blume v. State Board of Education of Montana*, 34 P.2d 515, 97 Mont. 371.

N.J.—*Crescent Ring Co. v. Travelers' Indemnity Co.*, 132 A. 106, 102 N.J.Law 85.

N.Y.—*Chance v. Guaranty Trust Co. of New York*, 298 N.Y.S. 17, 22, 164 Misc. 346, quoting *Corpus Juris*, and affirmed 297 N.Y.S. 293, 251 App.Div. 855.

Pa.—*In re Bell's Estate*, 31 Pa.Dist. & Co. 670.

Tenn.—*Taylor v. Taylor*, 40 S.W.2d 393, 162 Tenn. 482.

Utah.—*Utah Fuel Co. v. Industrial*

regarded as dictum becomes an authoritative statement when it is expressly declared by the court to be announced as a guide for future conduct.⁹⁸ A statement of a rule of practice, by an appellate court, for the guidance of the courts of first instance and of the bar is not obiter dictum,⁹⁹ and this also applies to statements disclosing the logic which induced the court to lay down a rule, and which were intended to enunciate general principles to be regarded as settled.¹ It has been held, however, that the court has no power to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it;² and that the fact that a higher court has condemned a certain practice is no authority for reversing a case by an intermediate court for such practice, unless and until the higher court has reversed a cause for that reason.³

A judicial dictum is entitled to much weight, and should be followed unless found to be erroneous.⁴

d. Dicta as Rule of Law

Dicta frequently repeated and approved may acquire thereby strength and importance as precedents.

Dicta, while not binding in themselves, may become finally a part of the recognized law of the land. It is within the power of a higher appellate court to make precedents where there are none to the contrary, and to this end it may adopt obiter rulings which appear to it to be legally sound.⁵ Even though dicta have not the merit of having regarded legal principles accurately, yet, having by frequent repetition and approval obtained a familiar place in the current decisions, they may ultimately be clothed with the same, or substantially the same, strength and importance attached to precedents,⁶

Commission of Utah, 273 P. 306, 73 Utah 199.

Wis.—Chase v. American Cartage Co., 186 N.W. 598, 176 Wis. 235. 15 C.J. p 953 note 70.

Construction of statute

When a court of last resort carefully reviews specific provisions of a statute and declares its interpretation thereof, such construction is judicial dictum and not mere obiter dictum and it is the duty of a court of first instance to follow such construction to the fullest extent, even though not strictly necessary to the decision of the case in which it was laid down by the appellate court.—In re Bell's Estate, 31 Pa.Dist. & Co. 670.

Dicta held not judicial

Court's expressions as to applicability of statute to domestic insurance companies cannot be treated as judicial interpretations of statute where only foreign companies were involved in case decided.—Bowers v. Missouri Mut. Ass'n, 62 S.W.2d 1058, 333 Mo. 492, affirming, App., 52 S.W. 2d 599.

98. Cal.—In re Turner's Estate, 196 P. 807, 51 Cal.App. 317, certiorari denied *Herrick v. Basletta*, 42 S. Ct. 185, 257 U.S. 658, 66 L.Ed. 421. N.Y.—Chance v. Guaranty Trust Co. of New York, 298 N.Y.S. 17, 23, 164 Misc. 346, quoting *Corpus Juris*, and affirmed 297 N.Y.S. 293, 251 App.Div. 855.—Matter of Fanoni, 152 N.Y.S. 218, 88 Misc. 442, affirmed 153 N.Y.S. 1114, 169 App. Div. 958, affirmed 110 N.E. 1040, 216 N.Y. 640.

Tenn.—Brummitt Tire Co. v. Sinclair Refining Co., 75 S.W.2d 1022, 1030, 18 Tenn.App. 270, quoting *Corpus Juris*.

Wis.—Chase v. American Cartage Co., 186 N.W. 598, 176 Wis. 235.

Ruling as to communication with foreman of jury

An opinion, after mature consideration, that the probable effect of the trial court's misconduct in communicating with the foreman only during the jury's deliberation, in violation of statute, is of such public concern that lack of a fair trial will be conclusively presumed and no evidence to the contrary be heard on a motion for a new trial, is binding, even if technically dicta, in view of the court's statement that the question is so important as to make a ruling appropriate, although unnecessary.—Parker v. Bailey, Tex. Com.App., 15 S.W.2d 1033.

99. U.S.—Exporters of Manufacturers' Products v. Butterworth-Judson Corporation, D.C.N.Y., 265 F. 907.

N.Y.—Chance v. Guaranty Trust Co. of New York, 298 N.Y.S. 17, 164 Misc. 346, affirmed 297 N.Y.S. 293, 251 App.Div. 855.

"When dealing with questions of practice, as distinguished from questions of substantive law, appellate courts not infrequently take the opportunity of stating a rule for the guidance of the courts of first instance and of the bar."—Exporters of Manufacturers' Products v. Butterworth-Judson Corporation, D.C.N.Y., 265 F. 907, 908.

1. Del.—Du Pont v. Peyton, 136 A. 149, 15 Del.Ch. 255.

N.M.—In re Lewis' Will, 71 P.2d 1032, 41 N.M. 522.

2. Ill.—National Jockey Club v. Illinois Racing Commission, 5 N.E. 2d 224, 364 Ill. 630.

Iowa.—State v. Webster County, 227 N.W. 595, 209 Iowa 143.

Miss.—Trahan v. State Highway Commission, 151 So. 178, 169 Miss. 732.

3. Mo.—Emmert v. Electric Park Amusement Co., App., 193 S.W. 909.

4. Miss.—State v. McDonald, 145 So. 508, 164 Miss. 405.

Mont.—State ex rel. Blume v. State Board of Education of Montana, 34 P.2d 515, 97 Mont. 371.

Pa.—In re Bell's Estate, 31 Pa.Dist. & Co. 670.

Tenn.—Taylor v. Taylor, 40 S.W.2d 393, 162 Tenn. 482.

Tex.—Parker v. Bailey, Com.App., 15 S.W.2d 1033.

Wis.—Sprague v. Northern Pac. Ry. Co., 100 N.W. 842, 122 Wis. 509, 106 Am.S.R. 997.

15 C.J. p 953 note 70 [b].

An opinion on a question of law in determining controverted rights of persons or property may have weight as a precedent for future decisions.—National Jockey Club v. Illinois Racing Commission, 5 N.E. 2d 224, 364 Ill. 630.

Judicial dictum is entitled to much greater weight than dictum, and should not be lightly disregarded.—Crescent Ring Co. v. Travelers' Indemnity Co., 132 A. 106, 102 N.J. Law 85.

5. Ga.—Willson v. Swords, 95 S.E. 1013, 22 Ga.App. 233.

6. U.S.—U. S. v. Guaranty Trust Co. of New York, C.C.A.Minn., 33 F.2d 533, certiorari granted 50 S. Ct. 40, 280 U.S. 546, 74 L.Ed. 605, and affirmed 50 S.Ct. 212, 280 U. S. 478, 74 L.Ed. 556.

N.J.—McHugh v. Spotts, 3 A.2d 141, 121 N.J.Law 447.

Tex.—Martin v. Federal Life Ins. Co., Civ.App., 116 S.W.2d 912.

Wis.—Milwaukee Automobile Ins. Co., Limited, Mutual, v. Felten, 281 N.W. 637, 229 Wis. 29.

15 C.J. p 953 note 73.

especially where the dicta are the construction of a statute which has remained substantially the same;⁷ and it has been held that, when a construction of statutes involves a question of practice only, and has been for a number of years followed by the trial courts and indirectly approved several times on appeal, it will be followed until changed by law.⁸ So, where there is an accepted dictum of the law which has long formed the basis of contracts, and on the faith of which rights have vested, the courts will decline to overrule it.⁹ Such dicta, however, should not be permitted to overcome a long line of authorities to the contrary, unless such action is urgently impelled by highly persuasive reasons not previously considered.¹⁰

The opinion of the highest court of another state on a certain issue, although dictum, is competent evidence of the law of that state with relation to such issue.¹¹

§ 191. Matters Subsequent to Decision Affecting Force as Precedent

A decision's force as a precedent may be affected by a subsequent change in the law, a cessation of the reason for the decision, as by a change in conditions, and by other matters arising subsequent to the decision.

A rule of law established by a court of last resort, as a precedent, ordinarily cannot be changed

or affected except by a controlling decision of such court.¹² In the absence of such a controlling decision, the force of a decision as a precedent under the stare decisis rule is not affected by the fact that certain justices subsequently withdraw their acquiescence in the decision¹³ or by the fact that the decision has been vigorously criticized by text writers as being out of harmony with the decisions of other states,¹⁴ or that it has not been followed generally by the legal profession and by trial judges.¹⁵

Changes in law. Where the law on a particular subject is radically changed or superseded by statute, decisions under the old law become of little value as authority.¹⁶ When, however, a statutory provision introduces no new principle, but is merely affirmative of the common law, decisions of the common law are applicable as precedents after the enactment of the statute.¹⁷ A statutory provision which is necessarily considered in a decision denying an appeal and reargument of a former decision does not destroy the effect of the former decision.¹⁸ A decision based on a statute subsequently repealed, but in substance restored by the initiative measure, does not lose its force by reason of the repeal.¹⁹

Cessation of reason for former decision. The courts may properly refuse to follow precedents where the reasons on which such precedents were

"Dicta cited with approval in a case in which the question is involved, cease to be dicta."—Binford v. Carline, 8 Tenn.App. 364, 368.

Obiter dicta as to a fundamental right in the case, sound in principle, and unanimously adopted by an appellate court, will be adhered to unless and until a contrary rule is announced by a higher court.—Southern Ry. Co. v. City of Greenwood, D.C.S.C., 40 F.2d 679.

Dicta recognizing absolute character of privileged publication in a judicial proceeding, which has also been recognized in other cases, has some persuasive, if not authoritative, force.—Donnell v. Linforth, 52 P.2d 937, 11 Cal.App.2d 25.

Dicta must be right, in order to be valuable.—Buchner v. Chicago, M. & N.W. R. Co., 19 N.W. 56, 60 Wis. 264. Decisions constituting rules of property see supra § 216.

7. U.S.—Republic Creosoting Co. v. Boldt Const. Co., C.C.A.Ohio, 38 F.2d 739.

N.J.—McHugh v. Spotts, 3 A.2d 141, 121 N.J.Law 447.

United States supreme court's construction of a statute, although obiter dicta, and its repeated affirmation by the same court, also

dicta, must be taken as giving to it the weight of a settled conclusion of law, that is, a construction of the statute which is binding on a district court.—Arrigo v. Commonwealth Casualty Co., D.C.Md., 41 F.2d 817.

Validity of statute

That the validity and binding force of a statute have been long acquiesced in and recognized by dicta in judicial decisions furnishes an almost irresistible reason for not overturning it.—Ex parte Garner, 177 P. 162, 179 Cal. 409.

8. Neb.—Mosher v. Huwaldt, 126 N.W. 143, 86 Neb. 686.

9. N.C.—Kirby v. Boyette, 24 S.E. 18, 118 N.C. 244.

10. Cal.—Feis v. Mohr, 14 P.2d 878, 126 Cal.App. 300.

11. Mass.—Haven v. Haven, 64 N.E. 410, 181 Mass. 573.

12. N.Y.—B. N. Exton & Co. v. Home Fire & Marine Ins. Co., 225 N.Y.S. 714, 222 App.Div. 237, affirmed 164 N.E. 43, 249 N.Y. 258, 61 A.L.R. 718.

13. Wis.—Wisconsin Power & Light Co. v. City of Beloit, 254 N.W. 119, 215 Wis. 439, followed in 254 N.W. 126, 215 Wis. 454.

14. Tex.—Bennett v. Gulf, C. & S. F. R. Co., Civ.App., 159 S.W. 132.

15. Okl.—McDougal v. McKay, 142 P. 987, 43 Okl. 251.

Evidence as to rule

It has been held proper to exclude, as incompetent and immaterial, the testimony of lawyers that the rule laid down by the United States circuit court of appeals in a certain case has not been followed generally by the legal profession and by trial judges.—McDougal v. McKay, supra.

Not accepted in other jurisdictions

Rule of law established by court decisions of state and founded in sound reason cannot be changed by court because perhaps not accepted in other jurisdictions.—Bastedo v. Frailey, 162 A. 621, 109 N.J.Law 390, 87 A.L.R. 587.

16. Fla.—Dowling v. Nicholson, 135 So. 238, 101 Fla. 672.

15 C.J. p 954 note 86.

17. Ill.—Wren v. Dooley, 97 Ill.App. 88.

15 C.J. p 954 note 87.

18. N.Y.—Hudson-Harlem Valley Title & Mortgage Co. v. White, 10 N.Y.S.2d 846, 256 App.Div. 393, affirming 8 N.Y.S.2d 599.

19. Cal.—Rogers v. Springfield Fire & Marine Ins. Co., 268 P. 679, 92 Cal.App. 537.

based no longer exist,²⁰ as where they are based on differences and distinctions which have been destroyed by a later judicial decision or by statute.²¹ However, the application of old principles to new conditions or changed facts does not offend the rule of stare decisis,²² although prior decisions need not be followed where it cannot be done consistently with the traditional policy of the courts to adapt the law to the economic and social needs of the times.²³ A rule of law, which has its origin in the decisions of the court, may be changed by the courts in the light of experience, and should be changed when the justice of the cause resulting from changed conditions so requires,²⁴ unless the rule has become fixed by constitutional or statutory provision.²⁵

Subsequent judicial observations on decision. It has been stated that in the consideration of the doc-

trine of stare decisis the interpretation is to be broader than that generally given to decisions, or rather the effect of prior decisions is more comprehensive and wider reaching,²⁶ and not only are actual decisions followed, but it is even claimed that any subsequent allegation as to what is determined in any case is to be respected, so that not only the particular case but any subsequent interpretation or explanation of its meaning is to be regarded as coming within the doctrine and final.²⁷ A decision rendered in obedience to a ruling of the supreme court of the United States, as then understood, is not conclusive where such court subsequently places a contrary construction on its former holding.²⁸

Lapse of time. A deliberate decision does not lose its authority as a precedent by lapse of time alone, and it is not necessary for the court to reiterate the doctrine from time to time to keep it in

20. Ky.—Wermeling v. Wermeling, 5 S.W.2d 893, 224 Ky. 107.

Mo.—State v. Lee, 259 S.W. 798, 303 Mo. 246—Kling v. Kansas City, 61 S.W.2d 411, 227 Mo.App. 1248.

N.J.—State v. Herbert, 105 A. 796, 92 N.J.Law 341.

Va.—Whitaker & Fowle v. Lane, 104 S.E. 252, 128 Va. 817, 11 A.L.R. 1157.

15 C.J. p 954 note 88.

Abandonment of doctrine

A doctrine established by decisions should not be abandoned, unless reason therefor has ceased.—State, for Use of Strepay, v. Cohen, 172 A. 274, 166 Md. 682, 94 A.L.R. 427.

21. N.Y.—Swift & Co. v. Bankers Trust Co., 19 N.E.2d 992, 280 N.Y. 135, affirming 3 N.Y.S.2d 923, 254 App.Div. 666.

22. Colo.—Colby v. Board of Adjustment, 255 P. 443, 81 Colo. 344.

N.J.—State v. Herbert, 105 A. 796, 92 N.J.Law 341.

Degree of authority of former decision depends on its agreement with the spirit of the times or judgment of subsequent tribunals on its correctness as a statement of existing law.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 188 N.C. 30.

23. U.S.—Swetland v. Curtiss Airports Corporation, C.C.A.Ohio., 55 F.2d 201, modifying, D.C., 41 F.2d 929.

N.Y.—Aero-Bocker Corporation v. Axelrod, 241 N.Y.S. 158, 136 Misc. 521.

Va.—Whitaker & Fowle v. Lane, 104 S.E. 252, 128 Va. 817, 11 A.L.R. 1157.

Wis.—City of Milwaukee v. Milwaukee Electric Ry. & Light Co., 180 N.W. 389, 173 Wis. 400, 13 A.L.R.

802, modified 181 N.W. 321, 173 Wis. 400.

Where constitutional or fundamental rights are not threatened, the stare decisis rule does not require the court to cling to outworn technicalities and theories in a criminal case.—People v. Palmisano, 229 N.Y. S. 462, 132 Misc. 244.

24. U.S.—Ex parte U. S., C.C.A. Wis., 101 F.2d 870, certiorari granted U. S. v. Stone, 59 S.Ct. 1044, 307 U.S. 620, 83 L.Ed. 1499.

Fla.—Evans v. Green, 180 So. 753, 132 Fla. 469—Layne v. Tribune Co., 146 So. 234, 108 Fla. 177, 86 A.L.R. 466.

Iowa.—Montanick v. McMillin, 280 N.W. 608, 616, 225 Iowa 442.

Or.—In re Hood River, 227 P. 1065, 114 Or. 112, error dismissed Pacific Power & Light Co. v. Bayer, 47 S.Ct. 245, 273 U.S. 647, 71 L.Ed. 821.

S.C.—Ezell v. Ritholz, 198 S.E. 419, 188 S.C. 39.

"That the common law has within itself the quality and capacity for growth and of adaptation to new conditions, has been one of its most admirable features. The law has the inherent capacity to meet the requirements of the new and various experiences which arise out of the development of the country."—Montanick v. McMillin, supra.

It is the duty of the courts "to remodel and reapply the ancient rules so as to fit them to modern conditions, where there has arisen and become involved, new factors of life and business arising from the complexities of a mechanized era of human progress."—Layne v. Tribune Co., 146 So. 234, 237, 108 Fla. 177, 86 A.L.R. 466.

As repeal or amendment of rule Declaration of a common-law rule

which changes a former statement of it in effect repeals or amends the rule as formerly stated, but in legal theory it is a statement of the rule in force that renders the former statement of it erroneous.—Niemi v. Boston & M. R. R., 173 A. 361, 87 N.H. 1, affirming 175 A. 245, 87 N. H. 1.

Financial panic does not warrant setting aside of established rules of law relating to judicial sales to meet an alleged emergency, since public policy and interests of debtors require stability in judicial sales, which should not be disturbed in absence of fraud, mistake, or violation of duty by officer making sale, or by purchaser.—Chicago Title & Trust Co. v. Robin, 198 N.E. 4, 361 Ill. 261, reversing 278 Ill.App. 20, and followed in Chicago Title & Trust Co. v. Bamburg, 198 N.E. 10, 361 Ill. 291, reversing 278 Ill.App. 1.

25. Iowa.—Montanick v. McMillin, 280 N.W. 608, 225 Iowa 442.

26. Ala.—Matheson v. Hearin, 29 Ala. 210.

27. Ala.—Matheson v. Hearin, supra.

Mo.—Kling v. Kansas City, 61 S.W. 2d 411, 227 Mo.App. 1248.

Judgment of an intermediate appellate court, construing a statute, is to be interpreted in the light of the decision of a higher appellate court, affirming it, but putting a different construction on the statute.—People v. Shoemaker, 239 N.Y.S. 71, 228 App. Div. 314, reversing 236 N.Y.S. 70, 134 Misc. 542.

28. Tenn.—Union, etc., Bank v. Memphis, 46 S.W. 557, 101 Tenn. 154.

Wash.—Union Oil Co. of California v. State, 216 P. 22, 125 Wash. 327.

force,²⁹ but it has been said to be a significant factor in determining the weight of a decision that, in a long period of years from the date of its rendition, it has never been referred to in the jurisdiction where it was rendered.³⁰ On the other hand, it is considered that an additional reason for refusing to change a rule established by a decision of courts is found in the fact that it has been adhered to for many years;³¹ and a decision, repeatedly followed and not questioned will not be construed as altered by later cases, although they contain implications at variance therewith.³²

Change of organization of court. Where a court is abolished or reorganized and succeeded by a new court which is in fact a continuation of the former court, the decisions of such former court are generally followed in the application of the principle of stare decisis, except where such decisions are manifestly erroneous.³³ A fortiori a change in the personnel of a court affords no ground for reopening a question which it has once authoritatively settled.³⁴

Effect of appeal. The fact that an appeal has been taken from the court of last resort of a state to the supreme court of the United States does not release the state courts from the obligation of following such decision, as it remains the law until it is reversed;³⁵ and a decision of the supreme court of the United States putting its affirmance of the decree of the state appellate court on a ground different from that taken by the state court in its opinion does not affect the binding authority of the decision of the state court as a judicial precedent on the ques-

tion covered.³⁶ It has been held not improper for the court of civil appeals of a state to cite a decision of that court as a precedent, although a writ of error on such decision is pending and undetermined in the state supreme court;³⁷ but, on the other hand, it has been held that an opinion of an intermediate appellate court cannot be relied on as authority, where the case has been transferred to a higher court for a further hearing.³⁸ The refusal of a writ of error by a court of last resort cannot override a subsequent express decision of the same question in an opinion of such court.³⁹

Effect of grant of rehearing. A decision in which a rehearing is granted is not authority, where, before any hearing or further decision is rendered in banc, the proceeding is dismissed on motion.⁴⁰ It has also been held that even pending an application for a rehearing, a case cannot be relied on or cited as authority, as such an application suspends the judgment;⁴¹ and also that as the authority of an opinion is nullified by the granting of a petition for a rehearing, such opinion is not an authority with respect to questions decided therein,⁴² even though they were not referred to or discussed in the second opinion on the rehearing.⁴³ On the other hand, it has been considered that, where a rehearing is granted on one ground but denied on the other, the decision as to the latter is binding as a precedent.⁴⁴

§ 192. Conflicting Decisions

In case of a conflict in the decisions of a court, the latest decision is generally regarded as controlling, as

29. N.Y.—New York Cent. Trust Co. v. Falck, 164 N.Y.S. 473, 177 App.Div. 501.

30. Iowa.—Ford v. Dilley, 156 N.W. 513, 174 Iowa 243.

N.C.—Williamson v. Rabon, 98 S.E. 830, 177 N.C. 302.

31. Me.—State v. Rudman, 136 A. 817, 126 Me. 177.

Wis.—In re Kootz' Will, 280 N.W. 672, 228 Wis. 306—Campbell v. Mickelson, 279 N.W. 73, 227 Wis. 429.

15 C.J. p 955 note 95.

More than a year

Where law laid down by decision construing public contractor's bond executed under a statute has been in force and effect for more than a year, during which time many similar bonds have been written, the case has become stare decisis.—Multnomah County v. United States Fidelity & Guaranty Co., 180 P. 104, 92 Or. 146.

32. Ga.—Yarbrough v. Stuckey, 147

S.E. 160, 39 Ga.App. 265, followed in 147 S.E. 163, 39 Ga.App. 271.

33. Okl.—State v. Chaney, 102 P. 133, 23 Okl. 788.
15 C.J. p 955 note 96.

34. Iowa.—State v. Grattan, 256 N.W. 273, 218 Iowa 389.
15 C.J. p 955 note 97.

35. N.Y.—Rochester, etc., R. Co. v. Clarke Nat. Bank, 60 Barb. 234.

36. N.J.—Paterson v. East Jersey Water Co., 70 A. 472, 74 N.J.Eq. 49, affirmed 78 A. 1134, 77 N.J.Eq. 588.

37. Tex.—Southwestern States Portland Cement Co. v. Riser, Civ.App., 137 S.W. 1188.

38. Cal.—Rex, Inc. v. Superior Court in and for Los Angeles County, App., 93 P.2d 182, followed in Haskell v. Superior Court in and for Los Angeles County, App., 93 P.2d 183 and Lauder v. Superior Court in and for Los Angeles County, App., 93 P.2d 183—Aungst v. Central California Traction Co., 1 P.2d 56, 115 Cal.App. 113.

39. Tex.—Shropshire v. Commerce Farm Credit Co., 30 S.W.2d 282, 120 Tex. 400, 84 A.L.R. 1269, reversing, Civ.App., 266 S.W. 612, and rehearing denied 39 S.W.2d 11, 120 Tex. 400, 84 A.L.R. 1269, certiorari denied Commerce Farm Credit Co. v. Shropshire, 52 S.Ct. 130, 284 U.S. 675, 76 L.Ed. 571.

40. Cal.—Ex parte Whitley, 77 P. 879, 144 Cal. 167, 1 Ann.Cas. 13.
La.—New Orleans Securities Co. v. City of New Orleans, 139 So. 635, 173 La. 1097.

Miss.—State v. Jones, 64 So. 241, 106 Miss. 522.

41. Utah.—Karren v. Bair, 225 P. 1094, 63 Utah 344.

42. Ind.—Barr v. Sumner, 107 N.E. 675, 109 N.E. 193, 183 Ind. 402.

43. Cal.—Federoff v. Birks Bros., 242 P. 885, 75 Cal.App. 345.
Ind.—Barr v. Sumner, 107 N.E. 675, 109 N.E. 193, 183 Ind. 402.

44. N.C.—Mayo v. Washington, 29 S.E. 343, 122 N.C. 5, 40 L.R.A. 163.

against prior decisions and should be followed in determining the same question.

According to some decisions, where conflicting decisions have already been made by inadvertence or otherwise, and the position of the court is therefore uncertain, the rule of stare decisis does not apply,⁴⁵ and in such event, it has been held that it is the duty of the court to follow the decision which it conceives is based on the sounder reasoning.⁴⁶ By the weight of authority, however, it is generally considered that in case of a conflict the last expression of the court is controlling as against prior opinions.⁴⁷ In case of a conflict between decisions on a contract relation and decisions in ex delicto cases, arising out of such relation, in a case of the latter character the decisions in such cases should be followed.⁴⁸

Under some statutory provisions, unless an earlier decision has been overruled or materially modified, in the manner provided by statute, it is superior in

authority to later decisions to the contrary and should be given first consideration in determining a question.⁴⁹ If a question has been decided expressly in an earlier case which has never been modified or questioned, the mere fact that the reasoning of the few later cases involving somewhat similar but really different questions seems to indicate a change of view affords no justification for a departure from the rule laid down in the earlier decision.⁵⁰ An earlier decision which harmonizes with the great weight of authority must prevail, and that part of a later decision which is not in harmony with the weight of authority both in the federal and state courts must be overruled.⁵¹

In inferior courts. So far as inferior courts are concerned, it is their duty to follow the latest decision of the court of last resort, or higher appellate court, regardless of whether or not it is in harmony with earlier decisions of that court.⁵² This rule applies where a later decision of a coordinate

45. La.—Dorsey v. Metropolitan Life Ins. Co., App., 145 So. 304. 15 C.J. p 955 note 9.

Stare decisis cannot be construed as giving a vested right when there are conflicting decisions, but can be sustained only when the decisions are uniform and consistent.—Patterson v. McCormick, 99 S.E. 401, 405, 177 N.C. 448, quoting *Corpus Juris*. Conflict between decision by full court and decision by less than full court see *supra* § 189.

46. Ky.—Meade v. Commonwealth, 282 S.W. 781, 214 Ky. 88. S.C.—Daugherty v. Northwestern R. Co., 75 S.E. 553, 92 S.C. 361.

47. Ark.—State ex rel. Attorney General v. Irby, 81 S.W.2d 419, 190 Ark. 786, certiorari denied Irby v. State of Arkansas ex rel. Attorney General, 56 S.Ct. 136, 296 U.S. 616, 80 L.Ed. 437.

Cal.—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App.2d 55—Kenney v. Antioch Live Oak School Dist., 63 P.2d 1143, 18 Cal.App.2d 226.

Colo.—Parker v. Plympton, 273 P. 1030, 85 Colo. 87—Baker v. Sockwell, 251 P. 543, 80 Colo. 309.

La.—Weaver Bros. Realty Corporation v. Voight, App., 191 So. 580.

Md.—Rice v. Blitmore Apartments Co., 119 A. 364, 141 Md. 507.

Mo.—State ex rel. Dunham v. Ellison, 213 S.W. 459, 278 Mo. 649, reversing Griggs v. Dunham, App., 204 S.W. 573—Martin v. St. Joseph, 117 S.W. 94, 136 Mo.App. 316.

Ohio.—Hornsbey v. State, 163 N.E. 923, 29 Ohio App. 495—City of Youngstown v. Arnold, 15 Ohio App. 112.

Or.—Libby v. Southern Pac. Co., 219 P. 604, 109 Or. 449, rehearing denied 220 P. 1017, 109 Or. 449.

Pa.—Raub Supply Co. v. National Casualty Co., 47 Dauph.Co. 446. S.C.—Bruner v. Automobile Ins. Co. of Hartford, Conn., 164 S.E. 134, 165 S.C. 421.

Earlier case regarded as overruled In so far as any inconsistency existed between two cases, older case was required to be considered as having been overruled by the later, as respects question of controlling precedent.—Puget Mill Co. v. Kerry, 49 P.2d 57, 183 Wash. 542, 100 A.L.R. 1220.

On a federal question

State court must recognize and follow most recent United States supreme court decision on a federal question, although it conflicts with previous decisions.—Fidelity & Guaranty Fire Corporation v. Leser, 193 A. 164, 172 Md. 652.

Decisions held not conflicting

U.S.—U. S. Fidelity & Guaranty Co. v. Henry Waterhouse Trust Co., C. C.A.Hawaii, 11 F.2d 497.

Mo.—Fitzgerald v. Colorado Life Co., App., 116 S.W.2d 242.

Tex.—Davies v. Texas Employers' Ins. Ass'n, Com.App., 16 S.W.2d 524, reversing Texas Employers' Ins. Ass'n v. Davies, Civ.App., 6 S.W.2d 792, and motion overruled Davies v. Texas Employers' Ins. Ass'n, Com.App., 29 S.W.2d 987.

48. La.—Marquez v. Le Blanc, App., 143 So. 108.

49. Ga.—Jewel Tea Co. v. City of Cartersville, 196 S.E. 712, 185 Ga. 799—Corley v. City of Atlanta, 182 S.E. 177, 181 Ga. 381—Huley v. Huley, 114 S.E. 184, 154 Ga. 321—Howell v. Nance, 112 S.E. 294, 28 Ga.App. 575—Maryon v. City of Atlanta, 99 S.E. 316, 23 Ga.App. 716, conforming to answers to cer-

tified questions 99 S.E. 116, 149 Ga. 35—Horton-Hughes Furniture Co. v. Broad Street Hotel Co., 95 S. E. 373, 22 Ga.App. 89.

In California, where a decision of the supreme court in banc was overruled by a decision in department, and there was no petition for rehearing, so that the case was not called to the attention of the full bench, and no rule of property was involved, the supreme court in banc could adhere to its former decision.—Robison v. Mitchell, 114 P. 984, 159 Cal. 581.

50. U.S.—Sheldon v. Metro-Goldwyn Pictures Corporation, D.C.N.Y., 26 F.Supp. 134.

Md.—Pittman v. Home Owners' Loan Corporation of Washington, D.C., 2 A.2d 689, 175 Md. 512, certiorari granted 59 S.Ct. 787, 306 U.S. 628, 83 L.Ed. 1031, affirmed 60 S.Ct. 15. N.Y.—Rowland v. New York, 44 N. Y.Super. 559, affirmed 83 N.Y. 372. N.C.—Williamson v. Rabon, 98 S.E. 880, 177 N.C. 302.

51. Me.—State v. Vashon, 123 A. 511, 123 Me. 412.

52. U.S.—R. J. Reynolds Tobacco Co. v. Robertson, C.C.A.N.C., 80 F. 2d 966, certiorari denied 56 S.Ct. 596, 297 U.S. 719, 80 L.Ed. 1004—Jellison v. Krell Piano Co., D.C. Ky., 246 F. 509.

Ala.—Fox v. State, 87 So. 621, 17 Ala.App. 559, certiorari denied 87 So. 623, 205 Ala. 74—Sloss-Sheffield Steel & Iron Co. v. Dean, 34 So. 419, 17 Ala.App. 253.

Cal.—Outer Harbor Dock & Wharf Co. v. City of Los Angeles, 193 P. 137, 49 Cal.App. 120.

Ill.—Waxenberg v. Brown, 20 N.E.2d 150, 299 Ill.App. 225—McMillan v. Betz, 224 Ill.App. 117.

appellate court is affirmed by the court of last resort.⁵³ So, also, where pending a rehearing in a court of intermediate appeals the court of last resort decides the question otherwise than was decided by the court of intermediate appeals, it is the duty of the latter court on the rehearing to follow the decision of the highest court and overrule its own decision,⁵⁴ and if, in the interval between a first and second appeal to an intermediate court, the court of last resort rules on the question involved, such ruling should be followed on the second appeal.⁵⁵ Where, however, the inferior court has rendered a final decree settling the rights of the parties in accordance with the latest decision of the court of last resort, and its judgment has been af-

firmed by that court, the matter will not be reopened merely because the court of last resort has changed its ruling on the principle in a subsequent decision.⁵⁶

§ 193. Rule Not Applied to Perpetuate Error

Previous decisions should not be followed to the extent that grievous wrong may result; and, accordingly, the courts ordinarily will not adhere to a rule or principle established by previous decisions which they are convinced is erroneous.

The rule of stare decisis is not so imperative or inflexible as to preclude a departure therefrom in any case,⁵⁷ but its application must be determined

Ind.—State ex rel. Department of Financial Institutions of Indiana v. Sonntag, 195 N.E. 601, 101 Ind. App. 557.

Ky.—Smith v. Overstreet's Adm'r, 81 S.W.2d 571, 258 Ky. 781.

La.—Spiro v. Corpora, App., 174 So. 145—Samuel Stamping & Enameling Co. v. Monroe Furniture Co., App., 171 So. 463, amended and rehearing refused 172 So. 217.

Mo.—State ex rel. City of St. Louis v. Hall, 75 S.W.2d 578, 335 Mo. 1097—State ex rel. Barber v. Daues, 6 S.W.2d 898, conformed to Barber v. American Car & Foundry Co., App., 14 S.W.2d 478—State ex rel. Hopkins v. Daues, 6 S.W.2d 898, 319 Mo. 733, quashing opinion Hopkins v. American Car & Foundry Co., App., 295 S.W. 841—State ex rel. Hausgen v. Allen, 250 S.W. 905, 298 Mo. 448, quashing certiorari Hausgen v. Elsberry Drainage Dist., App., 245 S.W. 401—Campbell v. Terminal R. Ass'n of St. Louis, App., 126 S.W.2d 915—Langan v. U. S. Life Ins. Co., App., 121 S.W.2d 268, transferred, Sup., 114 S.W.2d 984—Tate v. Farmers' Exchange Bank of Chula, App., 87 S.W.2d 992—Central State Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 30 S.W.2d 774, 224 Mo.App. 573, reversed on other grounds Central States Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 66 S.W.2d 550, 334 Mo. 580—Faubion v. Kansas City Public Service Co., App., 22 S.W.2d 897—State Farmers' Mut. Tornado Ins. Co. v. Cantley, 6 S.W.2d 970, 222 Mo.App. 839—State ex rel. Concrete & Steel Const. Co. v. Southern Surety Co., 294 S.W. 123, 221 Mo.App. 67—Aranson v. Maryland Casualty Co., 280 S.W. 724, 222 Mo.App. 490—State ex rel. Zeppenfeld v. Calhoun, 279 S.W. 188, 219 Mo.App. 482—Rhodes v. Missouri Pac. R. Co., 255 S.W. 1084, 213 Mo.App. 515—Carroll v. Missouri Pac. Ry. Co., App., 229 S.W. 234—Bragg v. Kirksville Pack-

ing Co., 226 S.W. 1012, 205 Mo.App. 600—Mergenthaler Linotype Co. v. Hays, App., 202 S.W. 300, conforming to State ex rel. Hays v. Robertson, 196 S.W. 1132, 271 Mo. 475, which quashes Mergenthaler Linotype Co. v. Hays, 181 S.W. 1183, and error dismissed Mergenthaler Linotype Co. v. Davis, 40 S.Ct. 133, 257 U.S. 256, 64 L.Ed. 255—Willis v. Kansas City Terminal Ry. Co., App., 199 S.W. 736.

N.J.—Solazoo v. Carol, 185 A. 510, 14 N.J.Misc. 435—Makohon v. Millers Nat. Ins. Co., 171 A. 513, 515, 12 N.J.Misc. 282, citing *Corpus Juris*. N.Y.—Gottesman v. Goldberg, 266 N.Y.S. 676, 149 Misc. 50.

Ohio.—Mutual Life Ins. Co. of Baltimore v. Connell, 183 N.E. 286, 43 Ohio App. 415.

Tex.—Galveston, H. & S. A. Ry. Co. v. McCrorey, Com.App., 23 S.W.2d 691, reversing, Civ.App., 10 S.W.2d 1021—Sproles Motor Freight Lines v. Juge, Civ.App., 123 S.W.2d 919, error dismissed, judgment correct—Press v. Davis, Civ.App., 113 S.W.2d 982, error granted—Parker v. Mather, Civ.App., 59 S.W.2d 961, error refused—Federal Surety Co. v. Blackwood, Civ.App., 46 S.W.2d 1062—Southern Travelers' Ass'n v. Cole, Civ.App., 45 S.W.2d 675—Tanton v. State Nat. Bank of El Paso, 43 S.W.2d 957, affirmed 79 S.W.2d 838, 125 Tex. 16, 97 A.L.R. 1093—Southwest Contract Purchase Corporation v. McGee, Civ. App., 296 S.W. 912, affirmed 36 S.W.2d 978, 120 Tex. 240.

15 C.J. p 956 note 13.

But court of civil appeals has been held free to decide point according to weight of authority and better reasoning, where supreme court decisions involving same point were conflicting.—Shropshire v. Commerce Farm Credit Co., Civ.App., 266 S.W. 612, reversed on other grounds, Com.App., 280 S.W. 181, reversed on other grounds 30 S.W.2d 282, 120 Tex. 400, 84 A.L.R. 1269, rehearing denied 39 S.W.2d 11, 120 Tex. 400, 84

A.L.R. 1269, certiorari denied 52 S.Ct. 130, 284 U.S. 675, 76 L.Ed. 571.

Before giving an instruction based on a former decision of the highest court, the trial court should ascertain whether it has stood the test of criticism in later decisions of such court.—State v. Brannon, 137 S.E. 649, 103 W.Va. 427.

Rights accruing while overruled decision in force

Under a constitutional provision to the effect that the last previous ruling of the supreme court on any question of law or equity is controlling on the inferior courts, an inferior court must follow the latest decision of the court of last resort even in dealing with rights which accrued while the overruled decision was still in force.—Sedalia v. Gold, 81 Mo.App. 32.

53. Tex.—Federal Mortg. Co. v. Hawkins, 111 S.W.2d 1062, 131 Tex. 56, reversing, Civ.App., 95 S.W.2d 744.

Judgment reversed

A judgment of the court of civil appeals would be reversed by the supreme court and judgment rendered for the plaintiff in error, where a judgment of another court of civil appeals reaching an opposite conclusion in a case in which controlling facts were identical had been affirmed by the supreme court.—Federal Mortg. Co. v. Hawkins, *supra*.

54. N.Y.—Walsh v. Hanan, 87 N.Y.S. 930, 93 App.Div. 580, 66 N.Y.S. 1066, 55 App.Div. 92.

55. Mo.—Thompson v. Irwin, 76 Mo., App. 418.

56. Mo.—Harburg v. Arnold, 87 Mo. App. 326.

N.C.—State v. Bell, 49 S.E. 163, 136 N.C. 674.

57. Ky.—Louisville & N. R. Co. v. Hutton, 295 S.W. 175, 220 Ky. 277, 53 A.L.R. 1328.

Mich.—Morley v. University of Detroit, 256 N.W. 861, 871, 269 Mich. 216, citing *Corpus Juris*.

in each case by the discretion of the court,⁵⁸ and previous decisions should not be followed to the extent that error may be perpetuated and grievous wrong be the result.⁵⁹ Accordingly, unless a doctrine or principle has become so well established

that it may fairly be considered to have become a rule of property, as explained *infra* § 216, the courts will not adhere to it, although established by previous decisions, if they are convinced that it is erroneous,⁶⁰ even though it may have been reas-

N.C.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 637, 188 N.C. 30, citing *Corpus Juris*.

Pa.—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599.

15 C.J. p 956 note 17.

"The doctrine of stare decisis is not one to be either rigidly applied or blindly followed. So used the doctrine would nullify that basic principle of the common law which permits it to grow and develop to meet new and changing social conditions and would soon render the law inelastic, archaic and useless to serve the needs of a dynamic community."—Amoskeag Trust Co. v. Trustees of Dartmouth College, 200 A. 786, 788, 89 N.H. 471, 117 A.L.R. 1186.

"Though the determination of the question of law involved in . . . litigation may dictate a similar conclusion in litigation between other parties where similar questions are involved, yet such parties may still challenge the correctness of the original decision and the court may refuse to follow it."—Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation, 9 N.E.2d 20, 26, 274 N.Y. 388, modifying 290 N.Y.S. 129, 248 App. Div. 719, affirming 286 N.Y.S. 522, 158 Misc. 689, remittitur amended 10 N.E.2d 589, 274 N.Y. 636.

58. N.H.—Amoskeag Trust Co. v. Trustees of Dartmouth College, 200 A. 786, 89 N.H. 471, 117 A.L.R. 1186.

15 C.J. p 957 note 18.

Announcement of error

As between the line of decisions of the court which the court believes to announce the law correctly and another line of decisions which appear to arrive at erroneous conclusions, it is court's duty to announce the error when its attention is called thereto, and to affirm its views of what the law really is.—Middleton v. State, 217 S.W. 1046, 86 Tex.Cr. 307.

59. Ill.—Prall v. Burckhardt, 132 N.E. 280, 299 Ill. 19, 18 A.L.R. 992.

La.—State v. Brown, 109 So. 394, 161 La. 704.

Mich.—Hilt v. Weber, 233 N.W. 159, 252 Mich. 198, 71 A.L.R. 1238.

Miss.—Mitchell v. State, 176 So. 743, 745, citing *Corpus Juris*—Brewer v. Browning, 76 So. 519, 115 Miss. 358, L.R.A.1918F 1185, Ann.Cas. 1918B 1013, overruling suggestion of error 76 So. 267, 115 Miss. 358,

L.R.A.1918F 1185, Ann.Cas.1918B 1013.

Mo.—St. Louis Poster Advertising Co. v. City of St. Louis, 195 S.W. 717, affirmed 39 S.Ct. 274, 249 U.S. 269, 63 L.Ed. 599.

N.C.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 637, 188 N.C. 30, citing *Corpus Juris*—Patterson v. McCormick, 99 S.E. 401, 405, 177 N.C. 448, citing *Corpus Juris*.

Wash.—State v. Savidge, 258 P. 1, 144 Wash. 302—Schramm v. Steele, 166 P. 634, 97 Wash. 309.

15 C.J. p 957 note 19.

Immunity to embezzler

The rule of stare decisis, of limited application in cases involving penal statutes, should not be applied to afford an embezzler of private funds immunity from prosecution on repayment of such funds to his employer.—State v. Matthews, 226 S.W. 203, 143 Tenn. 463, 13 A.L.R. 314.

60. U.S.—Candler v. Rose, C.C.A. Ga., 80 F.2d 407, followed in Citizens & Southern Nat. Bank v. Rose, 80 F.2d 410—Raphael v. U.S., 23 C.C.P.A. (Customs) 253.

Ariz.—Byers v. Comer, 70 P.2d 330, 50 Ariz. 134, modifying 68 P.2d 671, 50 Ariz. 8—State ex rel. La Prade v. Cox, 30 P.2d 825, 43 Ariz. 174.

Cal.—San Pedro, L. A. & S. L. R. Co. v. City of Los Angeles, 179 P. 390.

Del.—Lynch v. Hill, Ch., 6 A.2d 614—Biddle v. Board of Trustees of New Castle County Workhouse, 138 A. 631, 3 W.W.Harr. 425.

Fla.—Brogan v. Ferguson, 133 So. 317, 101 Fla. 1311.

Ill.—Neff v. George, 4 N.E.2d 388, 364 Ill. 306—Prall v. Burckhardt, 132 N.E. 280, 299 Ill. 19, 18 A.L.R. 992—Spiegel's House Furnishing Co. v. Industrial Commission, 123 N.E. 606, 283 Ill. 422, 6 A.L.R. 540.

Ind.—In re Todd, 193 N.E. 865, 208 Ind. 168.

Ky.—Burlew v. Fidelity & Casualty Co. of New York, 122 S.W.2d 990, 276 Ky. 132, 121 A.L.R. 751—Liberty Nat. Bank & Trust Co. v. Loomis, 121 S.W.2d 947, 275 Ky. 445—Stoll Oil Refining Co. v. State Tax Commission, 296 S.W. 351, 221 Ky. 29—Louisville & N. R. Co. v. Hutton, 295 S.W. 175, 220 Ky. 277, 53 A.L.R. 1328.

Mich.—Hilt v. Weber, 233 N.W. 159, 252 Mich. 198, 71 A.L.R. 1238.

Mo.—State ex rel. May Department Stores Co. v. Haid, 38 S.W.2d 44, 327 Mo. 567.

Mont.—In re Murphy's Estate, 43 P. 2d 233, 99 Mont. 114.

N.H.—Amoskeag Trust Co. v. Trustees of Dartmouth College, 200 A. 786, 788, 89 N.H. 471, 117 A.L.R. 1186—Smith v. Twin State Gas & Electric Co., 144 A. 57, 83 N.H. 439, 61 A.L.R. 1015, rehearing denied 144 A. 783, 83 N.H. 439, 61 A.L.R. 1015.

N.Y.—Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation, 9 N.E.2d 20, 274 N.Y. 388, modifying 290 N.Y.S. 129, 248 App.Div. 719, affirming 286 N.Y.S. 522, 158 Misc. 689, remittitur amended 10 N.E.2d 589, 274 N.Y. 636—Cameron v. Ellis Const. Co., 169 N.E. 622, 252 N.Y. 394, reversing 232 N.Y.S. 710, 225 App.Div. 838, motion denied 168 N.E. 420, 251 N.Y.S. 542, remittitur amended 171 N.E. 782, 253 N.Y. 559, followed in Gullifer v. Chr. Hansen's Laboratory, 247 N.Y.S. 885, 232 App.Div. 713, Artnink v. Caffisch, 247 N.Y.S. 887, 232 App.Div. 713, Copeland v. Foundation Co., 177 N.E. 143, 256 N.Y. 563, reversing 245 N.Y.S. 912, 231 App.Div. 781, and Zeltoski v. Osborne Drilling Corporation, 191 N.E. 532, 264 N.Y. 496, reversing 267 N.Y.S. 855, 239 App. Div. 235—People ex rel. Rice v. Graves, 273 N.Y.S. 582, 242 App. Div. 128, affirmed 270 N.Y. 498, 200 N.E. 288, certiorari denied 56 S.Ct. 953, 298 U.S. 683, 80 L.Ed. 1403.

Or.—Noonan v. City of Portland, 88 P.2d 808—State v. Hecker, 221 P. 808, 109 Or. 520.

Pa.—Schuldt v. Reading Trust Co., 113 A. 545, 270 Pa. 360.

S.D.—Brekke v. Crew, 178 N.W. 146, 43 S.D. 106.

Tenn.—Foster v. Roberts, 219 S.W. 729, 142 Tenn. 350, 9 A.L.R. 431.

15 C.J. p 957 note 20.

"An appellate court is not bound or estopped by its erroneous decision of a question of law, when that question is again presented by those who were not parties to the suit in which the erroneous judgment was rendered."—Hawkeye Commercial Men's Ass'n v. Christy, C.C.A.Iowa, 294 F. 203, 212.

Matter of practice

While the court is reluctant to interfere with former decisions, where they have not become a rule of property, and pertain merely to a question of practice, the supreme court will not hesitate to adopt the proper practice and set aside the erroneous decisions.—Cain v. Miller, 191 N.W. 704, 109 Neb. 441, 30 A.L.R. 125

serted and acquiesced in for a number of years,⁶¹ especially if the former decisions are injurious or unjust in their operation.⁶²

An established rule or principle will not be departed from, however, except in case of grave necessity, when cogent reasons or considerations of

justice or public interests, relative to plain principles of the law, require such departure,⁶³ and on the fullest conviction that the law has been settled wrongly,⁶⁴ and that less injury will result from overruling than from following the earlier decisions.⁶⁵ Where the occasion requires the review of

—Penhansky v. Drake Realty Const. Co., 150 N.W. 265, 109 Neb. 120.

61. Ill.—Neff v. George, 4 N.E.2d 388, 364 Ill. 306.

Mo.—State v. Swarens, 241 S.W. 934, 294 Mo. 139.

62. Ill.—Neff v. George, 4 N.E.2d 388, 364 Ill. 306.

Nev.—Steeves v. Second Judicial District Court in and for Washoe County, 94 P.2d 1093.

63. U.S.—The Madrid, C.C.La., 40 F. 677, 679—McCarthy v. Palmer, D. C.N.Y., 29 F.Supp. 585.

Ala.—Tallapoosa County v. Elmore County, 161 So. 500, 501, 230 Ala. 440—Galloway Coal Co. v. Stanford, 109 So. 377, 215 Ala. 79.

Ariz.—State ex rel. La Prade v. Cox, 30 P.2d 825, 43 Ariz. 174—Ellsworth v. Struckmeyer, 232 P. 56, 27 Ariz. 484—Fairfield v. Foster, 214 P. 319, 25 Ariz. 146.

Del.—Wilson v. Bethlehem Steel Co., Super., 7 A.2d 906—Lynch v. Hill, Ch., 6 A.2d 614.

Fla.—McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323, 119 Fla. 713.

Ill.—Neff v. George, 4 N.E.2d 388, 364 Ill. 306.

Iowa.—Goodman v. Henry L. Doherty & Co., 255 N.W. 667, affirmed Henry L. Doherty & Co. v. Goodman, 55 S.Ct. 553, 294 U.S. 623, 79 L.Ed. 1097.

Ky.—Norfolk & W. Ry. Co. v. Harmon, 129 S.W.2d 994, 279 Ky. 9—Liberty Nat. Bank & Trust Co. v. Loomis, 121 S.W.2d 947, 275 Ky. 445—Northern Assur. Co. v. Griffin, 33 S.W.2d 7, 236 Ky. 296—Fidelity-Phoenix Fire Ins. Co. v. Hyden, 10 S.W.2d 829, 226 Ky. 246—Stafford v. Johnson, 222 S.W. 929, 188 Ky. 576—Moody v. Barker, 222 S.W. 89, 188 Ky. 401.

Miss.—New York Life Ins. Co. v. Boling, 169 So. 882, 177 Miss. 172, 111 A.L.R. 967, appeal dismissed New York Life Ins. Co. v. Alexander, 57 S.Ct. 506, 300 U.S. 637, 81 L.Ed. 854, rehearing denied 57 S. Ct. 667, 300 U.S. 638, 81 L.Ed. 889.

Neb.—Patterson v. Kerr, 254 N.W. 704, 127 Neb. 73.

Nev.—Steeves v. Second Judicial District Court in and for Washoe County, 94 P.2d 1093—Maitia v. Allied Land & Live Stock Co., 248 P. 893, 49 Nev. 451.

N.J.—Ramsey v. Hutchinson, 187 A. 650, 117 N.J.Law 222, reversing 181 A. 52, 13 N.J.Misc. 729—Jersey City v. Blum, 127 A. 217, 101 N.

J.Law 210, 220—Jersey City v. Blum, 127 A. 214, 101 N.J.Law 93—State v. Herbert, 105 A. 796, 92 N.J.Law 341.

N.Y.—Schindler v. Royal Ins. Co., 179 N.E. 711, 258 N.Y. 310, affirming 250 N.Y.S. 805, 233 App. Div. 765—Hoyt v. Martense, 16 N. Y. 231, reversing 8 How.Pr. 196.

Or.—Nealam v. Ring, 184 P. 275, 98 Or. 490.

S.D.—Rex Tp. v. Bailey Tp., 223 N. W. 200, 54 S.D. 307—Brekke v. Crew, 178 N.W. 146, 43 S.D. 106.

Tex.—Benavides v. Garcia, Com.App., 290 S.W. 739, affirming, Civ.App., 283 S.W. 611—Gearheart v. State, 197 S.W. 187, 81 Tex.Cr. 540—Lyle v. State, 193 S.W. 680, 80 Tex.Cr. 606.

Wash.—Bowman v. Union High School Dist. No. 1, Kitsap County, 22 P.2d 991, 173 Wash. 299. 15 C.J. p 959 note 22.

Adverse consequence in administration of law is not sufficient reason for abandonment of sound rule, to enforcement of which suitors are entitled.

U.S.—Tait v. Western Maryland R. Co., Md., 53 S.Ct. 706, 289 U.S. 620, 77 L.Ed. 1405, affirming, D.C., Western Maryland R. Co. v. Tait, 53 F.2d 211, certiorari granted Tait v. Western Maryland R. Co., 53 S.Ct. 660, 289 U.S. 718, 77 L.Ed. 1470. N.J.—State v. Herbert, 105 A. 796, 92 N.J.Law 341.

Clerical misprision

Errors in an opinion amounting to mere clerical misprision and not affecting the result reached do not destroy effect of decision as a precedent.—Davis v. Davis' Estate, 185 P. 559, 56 Mont. 500.

Jury errors

Although the doctrine of stare decisis is applicable to judicial decisions which may be viewed as judicial errors, it does not hold as to jury errors.—Gross Coal Co. v. City of Milwaukee, 175 N.W. 793, 170 Wis. 467.

Merely to restore the harmony and symmetry of the law is not a sufficient reason to overthrow a doctrine which has, through a series of decisions, come to be regarded universally as fixed and settled. In such case the court may, however, with propriety circumscribe the anomalous doctrine within as narrow limits as possible.—Judson v. Gray, 11 N.Y. 408.

Wholly illogical former opinion, entirely unsupported by reason, may be corrected and overruled.—Stoll Oil Refining Co. v. State Tax Commission, 296 S.W. 351, 221 Ky. 29.

64. Ala.—Tallapoosa County v. Elmore County, 161 So. 500, 230 Ala. 440—Galloway Coal Co. v. Stanford, 109 So. 377, 215 Ala. 79.

Ariz.—State ex rel. La Prade v. Cox, 30 P.2d 825, 43 Ariz. 174.

Del.—Wilson v. Bethlehem Steel Co., Super., 7 A.2d 906.

Ky.—Hubley's Guardian Ad Litem v. Wolfe, 82 S.W.2d 830, 259 Ky. 574, 101 A.L.R. 1359—Kentucky Utilities Co. v. Farmers' Co-op. Stock Yards Co., 54 S.W.2d 364, 246 Ky. 40—Home Ins. Co. of New York v. Smither, 251 S.W. 169, 199 Ky. 344.

Mich.—Dolby v. Dillman, 278 N.W. 694, 283 Mich. 609, 117 A.L.R. 538.

15 C.J. p 959 note 23.

A mere doubt as to the correctness of former decisions is not sufficient ground for overruling them.—State v. Silvers, 47 N.W. 772, 82 Iowa 714—15 C.J. p 959 note 23 [a].

Rule of court

The promulgation of a general rule by the court is a decision that the power to make such rule exists, and in a case arising under the rule, before reversing its decision sustaining it, it should appear very clearly to the court that the rule was authorized neither by law nor by the inherent powers of the court of chancery.—In re Du Pont, 68 A. 399, 8 Del.Ch. 442.

Rulings on the admissibility of documents as evidence ought to be followed, unless they are manifestly wrong, in which case they may and should be changed.—Spiegel's House Furnishing Co. v. Industrial Commission, 123 N.E. 606, 288 Ill. 422, 6 A.L.R. 540.

65. Ark.—Brickhouse v. Hill, 268 S. W. 865, 167 Ark. 513.

Cal.—Santa Cruz Portland Cement Co. v. Santa Clara County, 217 P. 520, 191 Cal. 578.

Ill.—Prall v. Burckhardt, 132 N.E. 280, 299 Ill. 19, 13 A.L.R. 992.

Ky.—Kentucky Utilities Co. v. Farmers' Co-op. Stock Yards Co., 54 S.W.2d 364, 246 Ky. 40.

Mich.—Dolby v. Dillman, 278 N.W. 694, 283 Mich. 609, 117 A.L.R. 538—Hilt v. Weber, 233 N.W. 159, 252 Mich. 198, 71 A.L.R. 1238.

a rule of law not so well settled by authority as to preclude such examination, a state court of last resort will review it.⁶⁶

Power and duty to overrule or change precedent.

In the absence of constitutional restrictions, a court generally, has power, and it is its duty, to overrule or modify its former decisions which in its opinion are erroneous or wrongful,⁶⁷ although there has been no legislative change in the law as originally construed,⁶⁸ unless a rule of property or statutory or constitutional construction is involved.⁶⁹ However, if a rule of law, well established by decisions, is erroneous, it is not to be lightly set aside by the

courts, but the matter of abandoning it or having it changed should be addressed to the legislature and not to the court,⁷⁰ unless the error is one which cannot be cured by the legislature.⁷¹

Decisions contrary to constitution or statute. The doctrine of stare decisis cannot be invoked to sustain, as authority, a decision which is in conflict with the provisions of the state constitution;⁷² or a decision which is in conflict with a previous statutory enactment to which the decision makes no reference, and which is made without reviewing or construing the statute,⁷³ and in such a case the stat-

Nev.—*Steeves v. Second Judicial District Court in and for Washoe County*, 94 P.2d 1093.

Tex.—*Dalton v. Allen*, 215 S.W. 439, 110 Tex. 68, conformed to, Civ. App., 218 S.W. 73.

15 C.J. p 959 note 24.

Stare decisis prevents changes only when it is better to suffer an error to persist than it is to undergo the hardships which would result from its correction.—*Amoskeag Trust Co. v. Trustees of Dartmouth College*, 200 A. 786, 788, 89 N.H. 471, 117 A.L.R. 1186.

Construction of insurance policy

To justify a departure from an authoritative and long-standing construction of an insurance policy previous to its delivery and acceptance, it ought to be perfectly clear not only that the construction was wrong, but also that the evils of the established principle will be more injurious to the community than can possibly result from a change of the rule.—*Home Ins. Co. of New York v. Smither*, 251 S.W. 169, 199 Ky. 344.

66. N.Y.—*Matthews v. Coe*, 49 N.Y. 57, reversing 56 Barb. 430.—*Leavitt v. Blatchford*, 17 N.Y. 521, affirming 17 Barb. 309.

67. Ark.—*Gregg v. Road Improvement Dist. No. 2 of Jackson County*, 277 S.W. 515, 169 Ark. 671.

Iowa.—*Montanick v. McMillin*, 280 N.W. 608, 225 Iowa 442.

Ky.—*Louisville & N. R. Co. v. Hutton*, 295 S.W. 175, 220 Ky. 277, 53 A.L.R. 1328.

Tex.—*Long v. Martin*, Civ.App., 260 S.W. 327, error dismissed, Sup., 273 S.W. 1115.

Utah.—*Salt Lake City v. Industrial Commission*, 74 P.2d 657, 93 Utah 510.

Wis.—*Schwanke v. Garlit*, 263 N.W. 176, 219 Wis. 176.—*Reiter v. Grober*, 181 N.W. 739, 173 Wis. 493, 18 A.L.R. 362.

15 C.J. p 957 note 20 [b], [c], [i].

Constitutional provisions held not restrictions

(1) Constitutional provisions, vesting the judicial power of the state in

the supreme court and such other courts as are provided for by the constitution, and also providing that the supreme court shall have such jurisdiction as properly belongs to a court of appeals, place no restriction on the power of the supreme court to overrule or change decisions which in its opinion are erroneous or wrongful.—*Brewer v. Browning*, 76 So. 519, 115 Miss. 358, L.R.A.1918F 1185, Ann.Cas.1918B 1013, overruling suggestion of error 76 So. 267, 115 Miss. 358, L.R.A.1918F 1185, Ann.Cas.1918B 1013.

(2) Constitutional provision that common law in force at time constitution was adopted should continue to be law of state does not preclude court from repudiating former holding that law of joint tenancies in personal property governed savings account or bank certificate payable to two persons or survivor and holding law of contracts applicable where at time Constitution was adopted there was no common law applicable to such cases.—*Schwanke v. Garlit*, 263 N.W. 176, 219 Wis. 367.

Implied repeals of decisions are not favored.—*Parker v. Bailey*, Tex. Com.App., 15 S.W.2d 1033.

Extent of change

Where a change becomes unavoidable because of a different opinion arrived at, it should extend no further than actually necessary.—*Bayou Terre-aux Boeufs Drain Dist. v. Baker*, 50 So. 16, 124 La. 216.

68. Iowa.—*Montanick v. McMillin*, 280 N.W. 608, 225 Iowa 442.

69. Ky.—*Louisville & N. R. Co. v. Hutton*, 295 S.W. 175, 220 Ky. 277, 53 A.L.R. 1328.

Tenn.—*Foster v. Roberts*, 219 S.W. 729, 142 Tenn. 350, 9 A.L.R. 431.

15 C.J. p 957 note 20 [g].

Construction of:

Constitutional provision see *infra* § 215.

Statute see *infra* § 214.

Rule of property see *infra* § 216.

70. Cal.—*Luning Mineral Products Co. v. East Bay Water Co.*, 232 P. 721, 70 Cal.App. 94.

Colo.—*London Guarantee & Accident Co. v. McCoy*, 45 P.2d 900.—*Aetna Life Ins. Co. v. Industrial Commission of Colorado*, 254 P. 995, 81 Colo. 233.

La.—*Taylor v. Allen*, 91 So. 635, 151 La. 82.

Mont.—*Jonosky v. Northern Pac. Ry. Co.*, 187 P. 1014, 57 Mont. 63.

N.Y.—*Schindler v. Royal Ins. Co.*, 179 N.E. 711, 258 N.Y. 310, 80 A.L.R. 1142, affirming 250 N.Y.S. 805, 233 App.Div. 765.

Pa.—*In re Bickley's Estate*, 113 A. 68, 270 Pa. 101.

Remedy is with legislature

(1) To change judicial rule of liability, without fault, for loss of public funds received by an officer cannot be changed.—*Bird v. McGoldrick*, 14 N.E.2d 805, 277 N.Y. 492, 116 A.L.R. 1059, reversing *Bird v. Taylor*, 2 N.Y.S.2d 790, 253 App.Div. 873.

(2) To change rule of decision applicable to contracts in restraint of trade.—*Parish v. Schwartz*, 176 N.E. 757, 344 Ill. 563, 78 A.L.R. 1032, affirming 252 Ill.App. 591.

Doctrine of contributory negligence must be enforced by courts without amendment until repealed by appropriate legislative enactment.—*Johnston v. Tourangeau*, 259 N.W. 187, 193 Minn. 635.

71. Pa.—*Commonwealth v. Sunbury Converting Works*, 134 A. 438, 286 Pa. 545, 48 A.L.R. 992.

Erroneous decision based on fourteenth amendment of federal constitution

Pa.—*Commonwealth v. Sunbury Converting Works*, *supra*.

72. Tex.—*Storrie v. Cortes*, 38 S.W. 154, 90 Tex. 283, 35 L.R.A. 666.

15 C.J. p 957 note 20 [f].

73. Ga.—*Central of Georgia Railway Co. v. Jones*, 110 S.E. 914, 28 Ga.App. 258, conforming to answer to certified questions 108 S.E. 618, 152 Ga. 92, certiorari denied *Jones v. Central of Georgia Ry. Co.*, 43 S.Ct. 92, 260 U.S. 729, 67 L.Ed. 485.

Mo.—*Heller v. Lutz*, 164 S.W. 123, 254 Mo. 704, L.R.A.1915B 191.

ute should be followed rather than the decision.⁷⁴

Similarity to estoppel. It has been considered that the rule of stare decisis, stated in simple form and considered with relation to its effect on private affairs, is really nothing more than the application of the doctrine of estoppel to court decisions,⁷⁵ and accordingly, giving the doctrine what might be called a personal application, it cannot be relied on by a party who has not in good faith been deceived by the decision under which he claims to have acted;⁷⁶ and when it appears that a party was not misled to his prejudice by a reliance on a decision that the court rendering such decision has subsequently concluded was erroneous, the court will not feel estopped to overrule it by reason of the insistence of the party claiming to have acted under it that such overruling would overturn contracts and engagements which he had entered into on the faith of such decision.⁷⁷

N.Y.—Keeler v. Templeton, 298 N.Y. S. 193, 164 Misc. 113, motion denied 300 N.Y.S. 868, 165 Misc. 392.
N.C.—Patterson v. McCormick, 99 S. E. 401, 405, 177 N.C. 448, quoting *Corpus Juris*.
Or.—Nadstanek v. Trask, 281 P. 840, 130 Or. 669, 67 A.L.R. 599.
15 C.J. p 956 note 17 [c].
74. Colo.—Lambert v. People, 241 P. 538, 78 Colo. 313.
Idaho.—First Nat. Bank v. Doschades, 279 P. 416, 47 Idaho 661, 65 A.L.R. 900.
75. Ariz.—State ex rel. La Prade v. Cox, 30 P.2d 825, 43 Ariz. 174.
Ky.—Hubley's Guardian Ad Litem v. Wolfe, 82 S.W.2d 830, 259 Ky. 574, 101 A.L.R. 1359—Oliver Co. v. Louisville Realty Co., 161 S.W. 570, 156 Ky. 628, 51 L.R.A.N.S., 293, Ann.Cas.1915C 565.
Mich.—St. Helen Shooting Club v. Carter, 227 N.W. 746, 747, 248 Mich. 376, citing *Corpus Juris*.
76. Ill.—Neff v. George, 4 N.E.2d 383, 364 Ill. 306.
Ky.—Oliver Co. v. Louisville Realty Co., 161 S.W. 570, 156 Ky. 628, 51 L.R.A.N.S., 293, Ann.Cas.1915C 565.
77. Ky.—Oliver Co. v. Louisville Realty Co., supra.
78. U.S.—Fleming v. Fleming, Iowa, 44 S.Ct. 246, 264 U.S. 29, 68 L.Ed. 547—Jackson v. Harris, C.C.A.Okla., 43 F.2d 513, 516, citing *Corpus Juris*.
Ariz.—O'Malley v. Sims, 75 P.2d 50, 51 Ariz. 155, 115 A.L.R. 634.
Cal.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of California, 283 P. 775, 209 Cal. 460, affirmed

51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128.
Fla.—State ex rel. Seville Holding Co. v. Draughon, 173 So. 353, 127 Fla. 528, 111 A.L.R. 234.
Ill.—Duke v. Olson, 240 Ill.App. 198.
Kan.—Pearson v. Orent, 191 P. 286, 107 Kan. 305, overruling motion for rehearing 189 P. 160, 106 Kan. 610.
Ky.—Great Atlantic & Pacific Tea Co. v. Scanlon, 100 S.W.2d 223, 266 Ky. 785—Landers v. Tracy, 188 S.W. 763, 171 Ky. 657.
La.—Norton v. Crescent City Ice Mfg. Co., 150 So. 855, 173 La. 135, annulling, App., 146 So. 753, rehearing denied 147 So. 385 (first case).
Mich.—Donohue v. Russell, 249 N.W. 830, 831, 264 Mich. 217, quoting *Corpus Juris*.
Minn.—Hoven v. McCarthy Bros. Co., 204 N.W. 29, 163 Minn. 339.
Mo.—Klocke v. Klocke, 208 S.W. 825, 276 Mo. 572.
Nev.—Steeves v. Second Judicial District Court in and for Washoe County, 94 P.2d 1093, 1096, citing *Corpus Juris*.
N.J.—Ross v. Board of Chosen Freeholders of Hudson County, 102 A. 397, 90 N.J.Law 522.
N.Y.—People ex rel. Rice v. Graves, 273 N.Y.S. 582, 588, 242 App.Div. 123, citing *Corpus Juris*, and affirmed 200 N.E. 288, 270 N.Y. 948, certiorari denied 56 S.Ct. 953, 298 U.S. 683, 80 L.Ed. 1403—Lawrence-Cedarhurst Bank v. Ruth, 294 N.Y. S. 810, 162 Misc. 82—Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation, 286 N.Y.S. 522, 158 Misc. 689, affirmed 290 N.Y.S. 129, 248 App.Div. 719, modified on oth-

er grounds 9 N.E.2d 20, 274 N.Y. 388, remittitur amended 10 N.E.2d 589, 274 N.Y. 636.
N.C.—Wilkinson v. Wallace, 134 S.E. 401, 192 N.C. 156—Williamson v. Rabon, 98 S.E. 830, 177 N.C. 302.
15 C.J. p 960 note 29.

An overruled decision "does not become bad law; it never was the law and . . . is regarded as if it never had existed and the reconsidered or new decision is regarded as the law from the beginning. Consequently it is obvious that an overruling decision operates retroactively."—Lawrence-Cedarhurst Bank v. Ruth, 294 N.Y.S. 810, 815, 162 Misc. 82.

"An overruling decision does not change law, but impeaches the overruled decision as evidence of law."—People ex rel. Rice v. Graves, 273 N.Y.S. 582, 587, 242 App.Div. 123, affirmed 200 N.E. 288, 270 N.Y. 948, certiorari denied 56 S.Ct. 953, 298 U.S. 683, 80 L.Ed. 1403.

Transfer of stock as subject to taxation

A decision of the supreme court of the United States overruling a former decision and determining that a testamentary transfer of stock is subject to taxation in the state of the owner's domicile rather than in state of the domicile of the corporation which issued the stock is controlling as to taxes which accrued or were paid before date of latter decision as well as to taxes which state has attempted to levy and collect subsequent to that date.—O'Malley v. Sims, 75 P.2d 50, 51 Ariz. 155, 115 A.L.R. 634.

§ 194. Effect of Reversal or Overruling of Earlier Decisions

- a. In general
- b. Exception to general rule

a. In General

The overruling of a decision generally is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision. The overruled decision as a precedent is thereby destroyed, but it remains the law of the particular case in which it was rendered.

As a general rule, the effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective, as well as prospective, and makes the law at the time of the overruled decision as it is declared to be in the last decision;⁷⁸ and in accordance with the rule stated infra § 214, that a judicial construction of a statute relates back and constitutes a part of the statute, a decision reversing or overruling a prior decision as to the construction of a statute is generally retrospective in its operation and relates back to the enactment of

the statute,⁷⁹ or to the date of the overruled decision.⁸⁰ The distinction has been made that if the overruled decision is one dealing with procedural or adjective law the effect of the subsequent overruling decision is prospective only;⁸¹ but if the overruled decision is one dealing with substantive law the effect of the subsequent overruling decision is retroactive.⁸² In any event, a court of final decision may expressly define and declare the effect of

a decision overruling a former decision, as to whether or not it shall be retroactive, or operate prospectively only,⁸³ and may, by a saving clause in the overruling decision, preserve all rights accrued under the previous decision.⁸⁴

The overruling decision destroys the effect of the overruled decision as a precedent,⁸⁵ and a decision which is based wholly on another decision, which is overruled, is also overruled.⁸⁶

79. U.S.—Fleming v. Fleming, Iowa, 44 S.Ct. 246, 264 U.S. 29, 68 L.Ed. 547.

Fla.—State ex rel. Gillespie v. Bay County, 151 So. 10, 112 Fla. 687.

Ind.—Byrum v. Henderson, 51 N.E. 94, 151 Ind. 102.

Okl.—Coats v. Riley, 7 P.2d 644, 154 Okl. 291.

15 C.J. p 960 note 29 [d].

Tax on income

(1) A decision of the federal supreme court overruling its earlier decision that income from patent royalties was not taxable by the states has been held retrospective, even though a taxpayer is compelled to pay interest at the usual legal rate for taxes withheld prior to the overruling decision; and if the tax commission has refrained from assessing certain income because of the supreme court's decision, it is not precluded from levying an assessment within the time limited subsequent to the overruling of such decision.—Laabs v. Wisconsin Tax Commission, 261 N.W. 404, 218 Wis. 414.

(2) Where, pursuant to United States supreme court decision that state could not tax income from copyrights, state tax commission did not assess tax upon income from copyrights, after supreme court reversed itself, tax commission was entitled to collect income tax upon revenue from copyright for years during which prior decision was thought to be the law.—People ex rel. Rice v. Graves, 273 N.Y.S. 582, 242 App.Div. 128, affirmed 200 N.E. 288, 270 N.Y. 498, certiorari denied 56 S.Ct. 953, 298 U.S. 683, 80 L.Ed. 1403.

80. N.Y.—People ex rel. Rice v. Graves, supra.

81. Mo.—Barker v. St. Louis County, 104 S.W.2d 371, 340 Mo. 986—Koebel v. Tieman Coal & Material Co., 85 S.W.2d 519, 337 Mo. 561—Newberry v. City of St. Louis, App., 109 S.W.2d 876.

Affecting property rights

Changes in judicial interpretation of statute respecting procedure affecting property rights should not be given retroactive effect.—Continental Supply Co. v. Abell, 24 P.2d 133, 95 Mont. 148.

Limitation of action

Effect of decision overruling prior

decision and holding unconstitutional, statute imposing twenty day limitation for claim for compensation for taking of property for county road would be prospective and not retroactive, as dealing with matter of "procedural law."—Barker v. St. Louis County, 104 S.W.2d 371, 340 Mo. 986.

In Oklahoma the rule that court's decision construing statute operates prospectively only is inapplicable to decision construing statute affecting procedure or legal remedy; and therefore a subsequent decision holding that governmental approval and acknowledgment of will of full-blood Indian is not element of due execution and attestation, contrary to former holding, constitutes decision affecting procedure and remedy, and therefore has retroactive effect.—Coats v. Riley, 7 P.2d 644, 154 Okl. 291.

82. Mo.—Barker v. St. Louis County, 104 S.W.2d 371, 340 Mo. 986—Koebel v. Tieman Coal & Material Co., 85 S.W.2d 519, 337 Mo. 561.

Burden of proof

Where, in an action for injuries, the instruction is based on a former incorrect rule as to burden required of plaintiff, the correct rule adopted by court after cause was tried is retroactive and applicable to that cause, since rule as to burden of proof is matter of substantive law.—Koebel v. Tieman Coal & Material Co., supra.

83. Mo.—Barker v. St. Louis County, 104 S.W.2d 371, 340 Mo. 986—Koebel v. Tieman Coal & Material Co., 85 S.W.2d 519, 337 Mo. 561.

Federal supreme court

Whether decision of federal supreme court overruling one of its earlier decisions is retrospective is for such court's determination.—Laabs v. Wisconsin Tax Commission, 261 N.W. 404, 218 Wis. 414.

84. Ky.—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380.

Saving rights as to bonds issued

Ky.—Ebert v. Board of Education of School Dist. of City of Newport, 126 S.W.2d 1111, 277 Ky. 633—Payne v. City of Covington, 123 S.W.2d 1045, 276 Ky. 380.

85. Ala.—Poole v. Griffith, 112 So. 447, 216 Ala. 120.

Iowa.—Grimes Sav. Bank of Grimes v. McHarg, 199 N.W. 365, 197 Iowa 1393.

N.Y.—People, on Complaint of Dillon, v. Schroederman, 232 N.Y.S. 302, 133 Misc. 557—In re East River Park in Borough of Queens, City of New York, 203 N.Y.S. 151, 122 Misc. 109, reversed on other grounds 205 N.Y.S. 247, 209 App. Div. 662, and affirmed 147 N.E. 179, 239 N.Y. 524.

Constitutional rights cannot be based on the error of prior decisions.—Dunbar v. City of New York, 40 S.Ct. 250, 251 U.S. 516, 64 L.Ed. 384, affirming 119 N.E. 1039, 223 N.Y. 597, which affirms 164 N.Y.S. 519, 177 App. Div. 647.

Construction of will

The fact that a will was drawn and testator died after decision had been made by the supreme court announcing a rule of interpretation applicable thereto, and before the rendition of another decision assumed to be in conflict therewith, is not a sufficient reason for following the rule first announced rather than the later one. If the second decision is regarded as overruling the first, the accepted theory is that the first was wrong, not that a change had taken place in the law; and the first decision, being erroneous, is of no effect, unless in a situation having a bearing on testator's actual intention.—Pearson v. Orcutt, 191 P. 286, 107 Kan. 305, overruling motion for rehearing 189 P. 160, 106 Kan. 610.

Suit against state

Contractor seeking to sue state highway commission in chancery court to recover balance allegedly due for construction work done on state highways under contract with such commission could not complain because supreme court overruled its former decision, even though that decision permitted plaintiff to maintain its suit similar to present one, since no one has vested right to sue state or its agencies.—Arkansas State Highway Commission v. Nelson Bros., 87 S.W.2d 394, 191 Ark. 629.

86. Ark.—Federal Land Bank of St. Louis v. State Highway Commission, 108 S.W.2d 1077, 194 Ark. 616. La.—State v. Southern Cotton Oil Co., 113 So. 825, 164 La. 225.

A decision by one department of a court, which was vacated by an order directing a hearing by the court in banc, at which hearing a different conclusion was reached, is not binding as an authority.⁸⁷

Reliance on an erroneous decision which is afterward reversed gives no right of action;⁸⁸ and moreover, a reversal does not establish a dissenting opinion of the reversed case as the law of the case,⁸⁹ and will not restore to a litigant a right which he has, in the meantime, forfeited.⁹⁰ If a decision of a court is reversed by an appellate court and its decision is reversed by the court of last resort on such terms as to leave the question of jurisdiction in the first court doubtful, such question will not be thereby decided.⁹¹

Partial overruling or reversal. The overruling or reversal of one proposition of a decision does not argue unsoundness therein as to other separate and distinct propositions declared thereby.⁹² However, a ruling subsequently reversed in part cannot sup-

port a ruling in another court and case, made before the reversal,⁹³ but if the later ruling involves different facts and reasons it need not be reversed.⁹⁴

Overruled decision as law of case. The overruled decision remains the law of the case with respect to the particular case in which it was rendered;⁹⁵ it remains, as between the parties in the earlier litigation, a conclusive determination of questions of law and fact there litigated.⁹⁶

Criminal or penal case. The general rule as to an overruling decision being retrospective has been held to apply to the overruling of a decision in a criminal case.⁹⁷ However, with respect to the construction of criminal statutes, it has been considered that the overruling or reversal of a decision does not relate back to the date of the earlier decision for the reason that such relation back would give the statute an ex post facto operation;⁹⁸ and that one who places reliance on an unequivocal decision

Miss.—Columbian Mut. Life Ins. Co. v. Jones, 133 So. 149, 160 Miss. 41.

37. Cal.—Gray v. Cotton, 134 P. 1145, 166 Cal. 130.

38. Minn.—Courtright v. City of Detroit, 183 N.W. 346, 149 Minn. 295.

Dammum absque injuria

Where highest judicial tribunal enjoins violation of statute, and a defendant is thus coerced into compliance, and no conditions are imposed on those in whose favor the decree operates as a prerequisite to obtain its benefits, damage to defendant is damnum absque injuria, although injunction is afterwards dissolved.—Minneapolis, St. P. & S. S. M. Ry. Co. v. Washburn Lignite Coal Co., 168 N.W. 684, 40 N.D. 69, 12 A.L.R. 744, error dismissed 41 S.Ct. 140, 254 U.S. 370, 65 L.Ed. 310.

69. U.S.—U. S. ex rel. Murphy v. McCandless, D.C.Pa., 40 F.2d 643, reversed on other grounds, C.C.A., McCandless v. U. S. ex rel. Murphy, 47 F.2d 1072—U. S. ex rel. Petersen v. Commissioner of Immigration, D.C.N.Y., 1 F.Supp. 735.

90. U.S.—In re Jayrose Millinery Co., D.C.N.Y., 19 F.Supp. 1013, modified on other grounds, C.C.A., 93 F.2d 471.

91. N.Y.—In re Henderson, 53 N.Y. S. 957, 33 App.Div. 545.

92. Va.—Pennington v. Gillaspie, 61 S.E. 416, 63 W.Va. 541.

Reversal read in light of return

The supreme court's reversal of judgment dismissing corporation's complaint must be read solely in light of return indicating that lower court's decision was based on one ground that corporation could not appear personally in action before

such court, although supreme court assigned other reasons than that corporation could so appear in memorandum of reversal.—A. Victor & Co. v. Sleining, 4 N.Y.S.2d 597, 167 Misc. 719, affirmed 9 N.Y.S.2d 323, 255 App.Div. 673, reargument denied 11 N.Y.S.2d 548.

93. U.S.—In re Cresap, C.C.A.Ill., 99 F.2d 722.

94. U.S.—In re Cresap, supra.

95. Ind.—Hunter v. Cleveland, C., C. & St. L. Ry. Co., 174 N.E. 287, 202 Ind. 328.

Ky.—Thompson v. Louisville Banking Co., 55 S.W. 1080, 21 Ky.L. 1611. Mich.—Donohue v. Russell, 249 N.W. 830, 831, 264 Mich. 217, quoting **Corpus Juris**.

Okl.—Gillespie v. Wilson, 221 P. 82, 101 Okl. 62.

15 C.J. p 961 note 32.

The proceedings taken and had under the overruled opinion in the case in which it was handed down are not in any way affected by the overruling decision.—Commonwealth v. Fidelity & Columbia Trust Co., 215 S.W. 42, 185 Ky. 300.

Previous decision in same case as law of the case generally see *infra* § 195.

96. Cal.—Outer Harbor Dock & Wharf Co. v. City of Los Angeles, 193 P. 137, 49 Cal.App. 120.

N.Y.—Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation, 9 N.E. 2d 20, 274 N.Y. 388, modifying 290 N.Y.S. 129, 248 App.Div. 719, affirming 286 N.Y.S. 522, 158 Misc. 689, remittitur amended 10 N.E.2d 589, 274 N.Y. 636.

A decree or judgment which has never been reversed or set aside is

still the law of the case, notwithstanding a different rule of construction is subsequently applied to the statute involved in the matter.—Frantz v. City of Philadelphia, 3 A. 2d 917, 333 Pa. 220.

97. Miss.—Gross v. State, 100 So. 177, 135 Miss. 624.

Mo.—State v. Akers, 242 S.W. 660, 15 C.J. p 960 notes 29, 30 [1].

Common law

Where court of last resort of a state held that certain act did not constitute a crime under the common law, and later overruled the case so holding, and held that such act did constitute a crime under the common law, the common law on the subject stands as if the first case had never been decided.—Gross v. State, 100 So. 177, 135 Miss. 624.

The decision of an inferior court cannot be relied on to justify the commission of an act alleged to be a crime, where a court of last resort subsequently makes a contrary holding.—State v. Striggles, 210 N.W. 137, 202 Iowa 1318, 49 A.L.R. 1270.

98. Miss.—State v. Longino, 67 So. 902, 109 Miss. 125, Ann.Cas.1916E 371.

Trial according to construction of overruled decision

Where a defendant was indicted for a crime under a statute under the provisions of which, as construed by a decision of the supreme court, he was not guilty of the crime with which he was charged at the time of the commission of the acts charged against him as constituting such crime, and later, by a decision of the supreme court, the former decision was overruled, defendant was entitled to be tried accord-

holding a statute unconstitutional is not liable to a penalty for a violation of such statute notwithstanding it is later declared to be constitutional.⁹⁹

Mode of overruling. A decision may be overruled directly¹ or it may be overruled impliedly,² as by a refusal to apply it.³ Where, however, the court decides a case one way, a later decision in a different case involving the same legal propositions and decided another way will not affect the first decision.⁴

b. Exception to General Rule

An overruling decision cannot operate retrospectively so as to impair the obligations of contracts entered into,

or injuriously affect vested rights acquired, in reliance on the overruled decision.

The foregoing general rule as to an overruling decision having a retroactive effect is subject to the well-settled exception that the construction of the law, as given by the overruling decision, may work prospectively but will not be permitted to retroact so as to impair the obligations of contracts entered into, or injuriously affect vested rights acquired, in reliance on the earlier decision,⁵ as where contracts are made or rights acquired in reliance on the construction of a constitutional provision or statute by an earlier decision, which construction is afterward changed by an overruling decision,⁶ and

ing to the construction put upon the statute by the overruled decision.—*Odum v. State*, 95 So. 253, 132 Miss. 3, overruling suggestion of error 94 So. 233, 130 Miss. 643.

99. Fla.—*State ex rel. Williams v. Whitman*, 156 So. 705, 116 Fla. 196, 95 A.L.R. 1416.
15 C.J. p 960 note 30 [J].

Practicing dentistry without license
Fla.—*State ex rel. Williams v. Whitman*, 156 So. 705, 116 Fla. 196, 95 A.L.R. 1416.

1. Wyo.—*Investors' Guaranty Corporation v. Thomson*, 225 P. 590, 31 Wyo. 264, 32 A.L.R. 1071.

2. U.S.—*Hill v. Carter*, C.C.A.Hawaii, 47 F.2d 869, certiorari denied 52 S.Ct. 10, 284 U.S. 625, 76 L.Ed. 532.

D.C.—*Prall v. Prall*, 15 F.2d 735, 56 App.D.C. 336, granting in part motion 13 F.2d 305, 56 App.D.C. 333.

General expressions in a later opinion must be considered in the connection in which they are used, in determining whether a former decision has been impliedly overruled, in whole or in part.—*Hill v. Carter*, C.C.A.Hawaii, 47 F.2d 869, certiorari denied 52 S.Ct. 10, 284 U.S. 625, 76 L.Ed. 532.

Decisions not overruled

Mo.—*Myron Green Cafeterias Co. v. Kansas City, Mo.*, 240 S.W. 132, 293 Mo. 519.

Tex.—*Mills v. Warnock*, Civ.App., 284 S.W. 676, reversed on other grounds *Warnock v. Mills*, Com.App., 291 S.W. 850.

3. Wyo.—*Investors' Guaranty Corporation v. Thomson*, 225 P. 590, 31 Wyo. 264, 32 A.L.R. 1071.

4. Ind.—*Putman v. Murden*, 184 N.E. 796, 97 Ind.App. 313.

Judgment not modified

Judgment enjoining highway commission from executing contract where notice to bidders took specified form would not be modified by same judge's decision in subsequent case ordering commission to pay es-

timates due on similar contract let on similar notice.—*Putman v. Murden*, 184 N.E. 796, 97 Ind.App. 313.

5. U.S.—*Jackson v. Harris*, C.C.A. Okl., 43 F.2d 513, 516, citing *Corpus Juris*—*Reppel v. Board of Liquidation*, D.C.La., 11 F.Supp. 799.

Ala.—*Cooper v. Hawkins*, 176 So. 329, 234 Ala. 636.
Ariz.—*O'Malley v. Sims*, 75 P.2d 50, 51 Ariz. 155, 115 A.L.R. 634.

Ky.—*World Fire & Marine Ins. Co. v. Tapp*, 130 S.W.2d 848, 279 Ky. 423—*Great Atlantic & Pacific Tea Co. v. Scanlon*, 100 S.W.2d 223, 266 Ky. 785.

La.—*Norton v. Crescent City Ice Mfg. Co.*, 150 So. 855, 178 La. 135, annulling, App., 146 So. 753, rehearing denied 147 So. 385—*Gayoso Co. v. Arkansas Natural Gas Corporation*, 145 So. 677, 176 La. 333.

Mich.—*Donohue v. Russell*, 249 N.W. 330, 331, 264 Mich. 217, quoting *Corpus Juris*.

Minn.—*Hoven v. McCarthy Bros. Co.*, 204 N.W. 29, 163 Minn. 339.

Miss.—*Bank of Philadelphia v. Posey*, 95 So. 134, 130 Miss. 825, reversing 92 So. 840, 130 Miss. 530.

N.Y.—*People ex rel. Rice v. Graves*, 273 N.Y.S. 582, 588, 242 App.Div. 128, citing *Corpus Juris*, and affirmed 200 N.E. 288, 270 N.Y. 948, certiorari denied 56 S.Ct. 953, 298 U.S. 683, 80 L.Ed. 1403.

S.C.—*State v. West*, 136 S.E. 736, 138 S.C. 421.

15 C.J. p 960 note 30.

State or municipal obligations

"An early decision of the highest court of a state validating state or municipal obligations becomes important when a later decision holds the obligations invalid because of initial defects in their issue or a change in the law. In such cases the later decision is held to operate prospectively only and the validity of the obligations accepted or purchased on the faith of the earlier decision is upheld."—*Reppel v. Board of Liquidation*, D.C.La., 11 F.Supp. 799, 803—15 C.J. p 960 note 30 [d].

Refusal to allow entry of decree

The refusal of the supreme court to allow the trial court to enter a final decree of divorce against the will of a petitioner, after a decision that the petitioner was entitled to a divorce, will not affect final decrees of divorce in other divorce suits entered against the will of a petitioner, since such decrees are founded on error, and not on lack of jurisdiction.—*McLaughlin v. McLaughlin*, 117 A. 649, 44 R.I. 429.

On a claim for damages ex delicto, there can be no vested right until judgment is rendered, and until so rendered court decisions can operate retrospectively.—*Norton v. Crescent City Ice Mfg. Co.*, 150 So. 855, 178 La. 135, annulling 146 So. 753, rehearing denied 147 So. 385 (first case).

"A person who is not a party or privy in the action can not acquire a vested right in an erroneous decision made therein."—*Crigler v. Shepler*, 101 P. 619, 79 Kan. 334, 342, 23 L.R.A.N.S., 500.

6. U.S.—*U. S. v. Standard Oil Co. of California*, D.C.Cal., 20 F.Supp. 427.
Ariz.—*O'Malley v. Sims*, 75 P.2d 50, 51 Ariz. 155, 115 A.L.R. 634.

Cal.—*Emery v. Reed*, 4 P. 200, 65 Cal. 351.

Fla.—*State v. Greer*, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.

Ind.—*Center School Tp. v. State*, 49 N.E. 961, 150 Ind. 168.

Minn.—*Hoven v. McCarthy Bros. Co.*, 204 N.W. 29, 163 Minn. 339.

Mo.—*State ex rel. May Department Stores Co. v. Haid*, 38 S.W.2d 44, 327 Mo. 567—*Klocke v. Klocke*, 208 S.W. 825, 276 Mo. 572—*Eberle v. Koplar*, App., 85 S.W.2d 919.

Mont.—*Continental Supply Co. v. Abell*, 24 P.2d 133, 95 Mont. 148—

Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.

N.Y.—*People ex rel. Rice v. Graves*, 273 N.Y.S. 582, 588, 242 App.Div. 128, affirmed 200 N.E. 288, 270 N.Y. 948, certiorari denied 56 S.Ct. 953,

this rule has been held to apply to the construction of taxation statutes.⁷ This exception, however, generally applies only where reliance was placed on a decision of a court of last resort, and not on a decision of an inferior court.⁸ In order to obtain the benefit of this exception, it is not necessary for the person who acquired a vested right in accordance with the prior decision to prove that he relied thereon in acquiring such right, for reliance thereon will be presumed.⁹

§ 195. Previous Decisions in Same Case as Law of the Case

- a. Definition, nature, and distinctions
- b. General rule; limitations
- c. Particular applications of rule

298 U.S. 683, 80 L.Ed. 1403—Charles H. Dauchey Co. v. Farney, 173 N.Y.S. 530, 105 Misc. 470.
N.C.—Wilkinson v. Wallace, 134 S.E. 401, 192 N.C. 156—Patterson v. McCormick, 99 S.E. 401, 177 N.C. 448.
Okl.—Coats v. Riley, 7 P.2d 644, 154 Okl. 291—Sarber v. Marland Oil Co. of Oklahoma, 296 P. 473, 147 Okl. 257—Harness v. Myers, 288 P. 285, 143 Okl. 147—Bagby v. Martin, 247 P. 404, 118 Okl. 244.
Wis.—Nickoll v. Racine Cloak & Suit Co., 216 N.W. 502, 504, 194 Wis. 298, citing *Corpus Juris*.
15 C.J. p 960 note 30.

Bonds

(1) Where municipal bonds have been sold, the rights of the parties are to be determined according to the statute as it had been judicially construed, when the bonds were placed on the market, because a change in the decision would be equivalent to a change in the law itself, and giving such change a retroactive effect would impair the obligation of the contract of sale.—*Douglass v. Pike County, Mo.*, 101 U.S. 677, 25 L.Ed. 968.

(2) A purchaser of bonds issued under a statute previously declared to be constitutional by the highest court of the state will be protected in an action to recover the amount paid for the bonds where a subsequent decision overruled the prior case and declared the statute to be unconstitutional.—*State v. Greer*, 102 So. 739, 88 Fla. 249, 37 A.L.R. 1298.

Liability of corporate directors

Corporate directors, when debt of corporation was contracted, have right to rely upon prior decisions of supreme court respecting their statutory liability.—*Continental Supply Co. v. Abell*, 24 P.2d 133, 95 Mont. 148.

Failure to index record of deed as not affecting efficacy

N.C.—*Wilkinson v. Wallace*, 134 S.E.

401, 192 N.C. 156—*S. R. Fowle & Son v. O'Ham*, 96 S.E. 639, 176 N.C. 12.

Recharting course in construction

The principle that a litigant must not be prejudiced because courts have recharted judicial course in construction of statute does not apply where court adheres to construction given statute before its amendment simply because court's attention was not called to different wording of statute after amendment.—*Fidelity Trust Co. of Houston v. Highland Farms Corporation*, Tex.Civ.App., 109 S.W.2d 1014, error dismissed.

Rule held inapplicable

A public service corporation, which was granted a franchise and entered into a contract with a city when, under the state constitution, as then construed, the city was without power to construct competing works, but which, constitutional provision was subsequently construed to grant such power, has no standing, after its franchise and contract have expired by limitation, to invoke the rule that one acquiring rights under one construction of the state law may not be deprived of them by a subsequent different construction.—*Elizabeth City Water & Power Co. v. Elizabeth City, C.C.A.N.C.*, 298 F. 70—*Hill v. Elizabeth City, C.C.A.N.C.*, 298 F. 67, affirming, D.C., 291 F. 194.

7. U.S.—*Mercantile Nat. Bank of Cleveland v. Lander, C.C.Ohio*, 109 F. 21, affirming 118 F. 785, 55 C.A. 523.

15 C.J. p 960 note 30 [e]—[g].

8. Ill.—*Chicago Theological Seminary v. People*, 59 N.E. 977, 189 Ill. 489, affirmed 23 S.Ct. 386, 188 U.S. 662, 47 L.Ed. 641.

N.Y.—*Muller Dairies v. Baldwin*, 274 N.Y.S. 975, 242 App.Div. 296.
15 C.J. p 960 note 30 [c].

9. Miss.—*Bank of Philadelphia v.*

a. Definition, Nature, and Distinctions

"Law of the case" is the controlling legal rule of decision, as established by a previous decision, between the same parties in the same case. It is a rule of practice, and generally is distinguishable from *res judicata* and *stare decisis*.

"Law of the case" has been defined as the opinion delivered on a former appeal.¹⁰ More specifically, it means that whatever is once irrevocably established as the controlling legal rule of decision between the same parties in the same case continues to be the law of the case, whether correct on general principles or not, so long as the facts on which such decision was predicated continue to be the facts of the case before the court.¹¹

Nature. The doctrine of the law of the case is

Posey, 95 So. 134, 130 Miss. 825, reversing 92 So. 840, 130 Miss. 530.
Mont.—*Continental Supply Co. v. Abell*, 24 P.2d 133, 95 Mont. 148.

10. Ky.—*Hocker v. Louisville, etc., R. Co.*, 96 S.W. 526, 527, 29 Ky.L. 842.

36 C.J. p 965 note 33.

11. Fla.—*U. S. Gypsum Co. v. Columbia Casualty Co.*, 169 So. 532, 124 Fla. 633.

Ga.—*Hutchings v. Roquemore*, 150 S.E. 571, 40 Ga.App. 566.

Ill.—*Harris v. Chicago House-Wrecking Co.*, 145 N.E. 666, 314 Ill. 500, reversing 226 Ill.App. 230.

Ky.—*Anderson v. Daugherty*, 207 S.W. 474, 182 Ky. 800.

Mass.—*Woodward v. Snow*, 124 N.E. 35, 233 Mass. 267, 5 A.L.R. 1381.

Vt.—*In re Taylor's Estate*, 2 A.2d 317, 110 Vt. 80.

Similar definition

The law of the case is a phrase which is used to give expression to the rule that the final judgment of the highest court on a question of law establishes the rights of the parties to that controversy, and is a final determination thereof which estops the parties afterwards from questioning its correctness.

Cal.—*Atchison, T. & S. F. Ry. Co. v. Railroad Commission of California*, 288 P. 775, 209 Cal. 460, affirmed 51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128—*Klauber v. San Diego Street Car Co.*, 32 P. 876, 98 Cal. 105.

Neb.—*In re Wecker's Estate*, 243 N.W. 642, 123 Neb. 504.

Decisions of highest court

"The doctrine of the 'law of the case' applies only to decisions of the highest court on the particular issue under consideration."—*Atchison, T. & S. F. Ry. Co. v. Railroad Commission of California*, 288 P. 775, 779, 309 Cal. 460, affirmed 51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128.

a rule of practice and not a principle of substantive law.¹² It expresses the practice of the courts generally to refuse to reopen what has been previously decided in the same case,¹³ and is binding on every tribunal dealing with the case except one clothed with power to overrule and finally declare the law to be otherwise.¹⁴ It is founded on public policy, in the interests of orderly judicial procedure,¹⁵ and is of special significance as applied to questions of law as distinguished from decisions on questions of fact.¹⁶

Distinguished from res judicata and stare decisis. The law of the case, *res judicata*, and *stare decisis* belong to the same family in that they have in view the termination of controverted questions of fact and law.¹⁷ The law of the case, however, is distinct from *res judicata*,¹⁸ in that the law of the case does not have the finality of the doctrine of *res*

judicata,¹⁹ and applies only to the one case, whereas *res judicata* forecloses parties or privies in one case by what has been done in another case,²⁰ although in its essence it is nothing more than a special and limited application of the doctrine of *res judicata* or former adjudication,²¹ and what is known as the "law of the case," that is, the effect and conclusiveness of a former decision in the subsequent proceedings in the same case, has been generally put upon the ground of *res judicata*.²²

"The law of the case" has also been held to be distinct from "*stare decisis*" in that it is founded on different considerations;²³ but the law of *stare decisis* and not that of *res judicata* has been held to apply to findings on questions of law, where the doctrine invoked is that of the law of the case, and the former decision did not have the requisites of a final judgment.²⁴

12. Minn.—*Sands v. American Ry. Express Co.*, 198 N.W. 402, 159 Minn. 25.

Vt.—*Perkins v. Vermont Hydro-Electric Corporation*, 177 A. 631, 106 Vt. 367.

13. U.S.—*Messinger v. Anderson*, Ohio, 32 S.Ct. 739, 225 U.S. 436, 56 L.Ed. 1152—*Lewith v. Irving Trust Co.*, C.C.A.N.Y., 67 F.2d 855—*Page v. Arkansas Natural Gas Corporation*, C.C.A.Ark., 53 F.2d 27, certiorari granted 52 S.Ct. 407, 285 U.S. 532, 76 L.Ed. 927 and affirmed 52 S.Ct. 507, 286 U.S. 269, 76 L.Ed. 1096.

D.C.—*Davis v. Davis*, 96 F.2d 512, 68 App.D.C. 240, certiorari granted 58 S.Ct. 944, 304 U.S. 552, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 3, 305 U.S. 32, 83 L.Ed. 26, 118 A.L.R. 1518, motion denied 59 S.Ct. 773.

Hawaii.—*In re Ryan*, 81 Hawaii 547.

Kan.—*Fleming v. Campbell*, 83 P.2d 708, 148 Kan. 516.

Mo.—*State v. Randazzo*, 300 S.W. 755, 318 Mo. 761.

Ohio.—*Trustees of Cincinnati Southern Ry. Co. v. McWilliams*, 18 Ohio App. 225—*Russell v. Fourth Nat. Bank*, 31 Ohio C.A. 193.

14. Mass.—*Lunn & Sweet Co. v. Wolfman*, 167 N.E. 641, 268 Mass. 345.
Neb.—*In re Wecker's Estate*, 243 N.W. 642, 123 Neb. 504.

15. U.S.—*Turner v. Kirkwood*, C.C.A. Okl., 62 F.2d 256, certiorari denied 53 S.Ct. 522, 289 U.S. 724, 77 L.Ed. 1474—*Toy Nat. Bank of Sioux City, Iowa, v. Smith*, D.C.Iowa, 8 F.Supp. 638, reversed on other grounds, C.C.A., *Hammerstrom v. Toy Nat. Bank*, 81 F.2d 628, certiorari denied *Toy Nat. Bank v. Hammerstrom*,

57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402 and *Iowa Joint Stock Land Bank v. Hammerstrom*, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402, and *Live Stock Nat. Bank v. Hammerstrom*, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402—*U. S. v. Davis*, D.C.N.Y., 3 F.Supp. 97.

Pa.—*In re Reamer's Estate*, 200 A. 35, 331 Pa. 117, 119 A.L.R. 589.

16. Fla.—*U. S. Gypsum Co. v. Columbia Casualty Co.*, 169 So. 532, 535, 124 Fla. 633.

17. Fla.—*U. S. Gypsum Co. v. Columbia Casualty Co.*, supra.

Neb.—*Scott v. Scotts Bluff County*, 183 N.W. 573, 106 Neb. 355.

Vt.—*Perkins v. Vermont Hydro-Electric Corporation*, 177 A. 631, 106 Vt. 367.

Relation of law of the case to *res judicata* and *stare decisis* as applied to decision of appellate court on subsequent appeal see *Appeal and Error* § 1822.

"The law of the case, like the principle of *stare decisis*, is a rule of comity or convenience."—*Walker v. Gerll*, 12 N.Y.S.2d 942, 944, 257 App. Div. 249, vacated 14 N.Y.S.2d 278.

18. U.S.—*Southern R. Co. v. Clift*, Ind., 43 S.Ct. 126, 260 U.S. 316, 67 L.Ed. 283.

34 C.J. p 747 note 92 [a].

19. N.Y.—*Walker v. Gerll*, 12 N.Y.S.2d 942, 257 App.Div. 249, vacated 14 N.Y.S.2d 278.

Pa.—*In re Reamer's Estate*, 200 A. 35, 331 Pa. 117, 119 A.L.R. 589.

20. U.S.—*U. S. v. Davis*, D.C.N.Y., 3 F.Supp. 97.

21. Fla.—*U. S. Gypsum Co. v. Columbia Casualty Co.*, 169 So. 532, 124 Fla. 633.

22. Cal.—*Petition v. Reader*, App., 39 P.2d 654.

Ga.—*Williams Realty & Loan Co. v. Simmons*, 3 S.E.2d 580, 188 Ga. 184—*Simmons v. Williams Realty & Loan Co.*, 194 S.E. 356, 185 Ga. 154.
Ky.—*Dixon v. Riddle*, 38 S.W.2d 715, 238 Ky. 722.

Mass.—*Hanson v. Hanson*, 154 N.E. 525, 258 Mass. 45.

Mich.—*Darling v. Abbott*, 191 N.W. 20, 221 Mich. 449.

Mo.—*State v. Lando*, 300 S.W. 767—*State v. Randazzo*, 300 S.W. 755, 318 Mo. 761.

Neb.—*In re Wecker's Estate*, 243 N.W. 642, 644, 123 Neb. 504.

N.H.—*Venus Shoe Corporation v. Hanover Shoe Store*, 189 A. 352, 88 N.H. 478.

Pa.—*In re Gould's Estate*, 113 A. 552, 270 Pa. 535.

34 C.J. p 748 note 97.

23. Ky.—*Payne v. City of Covington*, 123 S.W.2d 1045, 276 Ky. 380.

Mo.—*Denny v. Guyton*, 57 S.W.2d 415.

Neb.—*In re Wecker's Estate*, 243 N.W. 642, 644, 123 Neb. 504.

Stare decisis as distinguished from law of the case is applicable to a subsequent judicial determination of the same questions of law between parties not bound as parties or privies on the record of the earlier case in which the decision was made.—*McGregor v. Provident Trust Co. of Philadelphia*, 162 So. 323, 119 Fla. 718.

Where parties are different, although question is same, a case is governed by rule of *stare decisis*, and doctrine of law of case has no application.—*Steinman v. Clinchfield Coal Corp.*, 93 S.E. 684, 121 Va. 611.

24. Mass.—*Lunn & Sweet Co. v. Wolfman*, 167 N.E. 641, 268 Mass. 345.

34 C.J. p 748 note 98.

b. General Rule; Limitations

As a general rule, a decision by the court on a point in a case becomes the law of the case unless or until it is reversed or modified by a higher court. This rule, however, is subject to the power of the court, in a proper case, to disregard or correct its former decision; and in any event the rule applies only to a prior decision which is a binding adjudication on substantially the same facts and issues.

As stated in *Corpus Juris*, which has been quoted and cited with approval, as a general rule, where a court has considered and determined a point in a case, its conclusion thereon becomes the law of that case,²⁵ unless or until reversed or modified by an appellate court,²⁶ subject, of course, to the general authority of courts to vacate or set aside their

25. U.S.—In re G. W. Giannini, Inc., C.C.A.N.Y., 90 F.2d 445, 111 A.L.R. 1492, affirming, D.C., 14 F.Supp. 1005—Mortgage Loan Co. v. Livingston, C.C.A.Mo., 66 F.2d 636, certiorari denied Livingston v. Mortgage Loan Co., 54 S.Ct. 121, 290 U.S. 885, 78 L.Ed. 590—Salvatore & Emanuele Fili v. 13,986 Bales of Cork Shavings, D.C.N.Y., 28 F.2d 447—Pacific Telephone & Telegraph Co. v. Star Pub. Co., D.C.Wash., 2 F.2d 151—Southwell v. Robertson, D.C.Pa., 27 F.Supp. 944—Buck v. Trilanon Co., D.C.Wash., 26 F.Supp. 96—Empire Trust Co. v. Hoey, D.C.N.Y., 22 F.Supp. 386, reversed on other grounds, C.C.A., 103 F.2d 430—Todd v. Russell, D.C.N.Y., 20 F.Supp. 936, affirmed, C.C.A., 104 F.2d 169—Patterson v. Anderson, D.C.N.Y., 20 F.Supp. 799—The Claremont, D.C.N.Y., 20 F.Supp. 163—Dixon v. Gage, D.C.S.C., 18 F.Supp. 895, reversed on other grounds, C.C.A., Leonard v. Gage, 94 F.2d 19, certiorari denied Gage v. Leonard, 58 S.Ct. 752, 303 U.S. 653, 32 L.Ed. 1113—The Doris Kellogg, D.C.N.Y., 18 F.Supp. 159, affirmed, C.C.A., In re Kellogg S. S. Corporation, 94 F.2d 1015—Toy Nat. Bank of Sioux City, Iowa, v. Smith, D.C.Ill., 8 F.Supp. 638, 640, quoting *Corpus Juris*, and reversed on other grounds, C.C.A., Hammerstrom v. Toy Nat. Bank, 81 F.2d 628, certiorari denied Toy Nat. Bank v. Hammerstrom, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402 and Iowa Joint Stock Land Bank v. Hammerstrom, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402, and Live Stock Nat. Bank v. Hammerstrom, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402—U. S. Paper Exports Ass'n v. Bowers, D.C.N.Y., 6 F.Supp. 735, modified on other grounds, C.C.A., 80 F.2d 82—In re Realty Associates Securities Corporation, D.C.N.Y., 6 F.Supp. 549, modified on other grounds, C.C.A., 74 F.2d 61, certiorari granted Realty Associates Securities Corporation v. O'Connor, 55 S.Ct. 508, 294 U.S. 701, 79 L.Ed. 1237, reversed 55 S.Ct. 663, 295 U.S. 295, 79 L.Ed. 1446—Green v. Southern Timber Co., D.C.Ga., 291 F. 582.
- Ark.—City of Magnolia v. Davies, 64 S.W.2d 85, 188 Ark. 19—Newton v. Althemer, 280 S.W. 641, 170 Ark. 366.
- Cal.—Merron v. Title Guarantee & Trust Co., 80 P.2d 740, 27 Cal.App. 2d 119—Pittler v. Bank of America Nat. Trust & Savings Ass'n, 58 P. 2d 981, 15 Cal.App.2d 5.
- Fla.—Andrew v. Hecker, 182 So. 251, 132 Fla. 759—Banning v. Brown, 79 So. 721, 76 Fla. 94.
- Ga.—West v. Trotzler, 196 S.E. 902, 185 Ga. 794—Simmons v. Williams Realty & Loan Co., 194 S.E. 356, 185 Ga. 154—Ellis v. First Nat. Bank, 186 S.E. 813, 182 Ga. 641—Southern Cotton Oil Co. v. Raines, 155 S.E. 484, 171 Ga. 154—Wester v. Cairo Banking Co., 140 S.E. 359, 165 Ga. 185.
- Idaho.—Read v. La Shonse, 261 P. 773, 45 Idaho 299.
- Ill.—People ex rel. Bowen v. Hughes, 18 N.E.2d 453, 370 Ill. 255—People ex rel. Parker v. Whealan, 18 N.E. 2d 234, 370 Ill. 243—Wilson v. Fisher, 17 N.E.2d 216, 369 Ill. 538—Chicago Title & Trust Co. v. Cohen, 1 N.E.2d 717, 284 Ill.App. 181. See People v. Brod, 197 Ill.App. 358.
- Ind.—Hunter v. Cleveland, C. C. & St. L. Ry. Co., 174 N.E. 287, 202 Ind. 328.
- Iowa.—State ex rel. Havner v. Associated Packing Co., 249 N.W. 761, 231 Iowa 1344, 90 A.L.R. 1339—Manchester v. Loomis, 195 N.W. 958, 197 Iowa 1049, amended 198 N.W. 102, 197 Iowa 1049.
- Ky.—Blackberry, Kentucky & West Virginia Coal & Coke Co. v. Kentland Coal & Coke Co., 8 S.W.2d 425, 225 Ky. 346.
- La.—Keegan v. Board of Com'rs of Port of New Orleans, 98 So. 50, 154 La. 639.
- Me.—Bean v. Ingraham, 148 A. 681, 128 Me. 462.
- Md.—Dickey v. Dickey, 141 A. 387, 154 Md. 675, 58 A.L.R. 634.
- Mass.—Bucholz v. Green Bros. Co., 195 N.E. 318, 290 Mass. 356—Hanson v. Hanson, 154 N.E. 525, 258 Mass. 45—Woodward v. Snow, 124 N.E. 35, 233 Mass. 267, 5 A.L.R. 1381.
- Minn.—In re Judicial Ditch No. 9 of Nobles County, 188 N.W. 321, 152 Minn. 544.
- Mo.—Keltner v. Harris, App., 204 S. W. 561.
- Neb.—Scott v. Scotts Bluff County, 183 N.W. 573, 106 Neb. 355.
- N.H.—Venus Shoe Corporation v. Hanover Shoe Store, 189 A. 352, 88 N.H. 478.
- N.J.—Baker v. Kennerup, 140 A. 681, 102 N.J.Eq. 367.
- N.Y.—Jenkins v. 313—321 W. 37th Street Corporation, 12 N.Y.S.2d 739, 257 App.Div. 228—Maylayne Corporation v. Markantonis, 262 N.Y.S. 285, 237 App.Div. 601, reargument denied and motion granted 262 N.Y.S. 884, 238 App.Div. 784, and reversed on other grounds 186 N.E. 862, 262 N.Y. 354—In re Eastern Boulevard in Borough of the Bronx, City of New York, 243 N.Y.S. 57, 230 App.Div. 52—Gasper v. Wales, 219 N.Y.S. 719, 219 App.Div. 614—Title Guarantee & Trust Co. v. Hofheimer, 10 N.Y.S.2d 1008, 170 Misc. 691—Henry v. New York Post, 5 N.Y.S.2d 716, 168 Misc. 247, affirmed 8 N.Y.S.2d 1023, 255 App. Div. 973.
- Okl.—O'Neil Engineering Co. v. City of Lehigh, 182 P. 659, 75 Okl. 227.
- Or.—Levine v. Levine, 252 P. 972, 121 Or. 44.
- Porto Rico.—Semidey v. Central Aguirre, 7 Porto Rico Fed. 572.
- S.C.—Matheson v. McCormac, 196 S. E. 883, 187 S.C. 260—Georgian Co. v. Britton, 139 S.E. 217, 141 S.C. 136—Bowling v. Mangum, 115 S.E. 212, 122 S.C. 179.
- Tenn.—Central Bank & Trust Co. v. Cohn, 264 S.W. 641, 150 Tenn. 375.
- Tex.—State Life Ins. Co. of Indiana v. Nolen, Civ.App. 36 S.W.2d 767, 768, citing *Corpus Juris*.
- Vt.—In re Taylor's Estate, 2 A.2d 317, 110 Vt. 80.
- Wash.—Belcher v. Tacoma Eastern R. Co., 201 P. 750, 117 Wash. 512.
- Wis.—Fred Miller Brewing Co. v. Knebel, 171 N.W. 69, 168 Wis. 587, 15 C.J. p 961 note 36.
- A judgment rendered at a prior term of court, to which exception is not timely taken, fixes the law of the case, and concludes the parties on all questions necessarily involved in the decision of the points previously raised.—City of Atlanta v. Gore, 169 S.E. 776, 47 Ga.App. 70.
- Denial of motion to open judgment**
- Where defendant's original motion to open a judgment for excusable neglect was denied by the trial court and the judgment affirmed, such decision is the law of the case, and is conclusive against a second motion to open the judgment on the ground of the same excusable neglect.—Sharpe v. Huggins, 102 S.E. 788, 114 S.C. 40.
26. U.S.—Pacific Telephone & Telegraph Co. v. Star Pub. Co. D.C. Wash., 2 F.2d 151—Toy Nat. Bank of Sioux City, Iowa, v. Smith, D.C. Ill., 8 F.Supp. 638, 640, quoting *Corpus Juris*, and reversed on other grounds, C.C.A., Hammerstrom

judgments, as explained in the C.J.S. title Judgments § 265, also 34 C.J. p 252 note 72-p 255 note 80. Such a decision, as the law of the case, is binding on the courts,²⁷ as well as on the parties,²⁸ and even though the decision was erroneous it cannot be availed of by the litigant prejudicially affected in a subsequent trial of the same cause.²⁹ A question of law once decided ordinarily will not be reconsidered in the same case except on a motion for a rehearing.³⁰

This doctrine is most generally applied to decisions of an appellate court, and will be found treated in Appeal and Error § 1821, with regard to such

decisions being the law of the case on subsequent appeals, and § 1964, with regard to such decisions being the law of the case in the lower court, and in the C.J.S. title Criminal Law § 1840, also 17 C.J. p 207 note 68-p 208 note 73, with regard to such decisions being the law of the case in criminal cases.

Limitations of rule. The general rule, however, is not inflexible.³¹ It does not constitute a limitation on the power of the court,³² which may disregard or correct a prior decision or ruling which was plainly wrong,³³ or where the application of

v. Toy Nat. Bank, 81 F.2d 628, certiorari denied Toy Nat. Bank v. Hammerstrom, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402 and Iowa Joint Stock Land Bank v. Hammerstrom, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402, and Live Stock Nat. Bank v. Hammerstrom, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402.

Ala.—Indian Refining Co. v. Van Valkenburg, 93 So. 895, 208 Ala. 62.

Ga.—West v. Trotzier, 196 S.E. 902, 185 Ga. 794—New England Mut. Life Ins. Co. v. Childs, 194 S.E. 561, 185 Ga. 198.

Mass.—Woodward v. Snow, 124 N.E. 35, 233 Mass. 267, 5 A.L.R. 1381.

N.Y.—Henry v. New York Post, 5 N.Y.S.2d 716, 168 Misc. 247, affirmed 8 N.Y.S.2d 1022, 255 App.Div. 973—In re Moran's Will, 241 N.Y.S. 648, 136 Misc. 615.

Okl.—O'Neil Engineering Co. v. City of Lehigh, 182 P. 659, 75 Okl. 227. 15 C.J. p 962 note 37.

An appealable decision, not appealed from, is the law of the case, whether right or wrong.

Mass.—Bartlett v. Slater, 97 N.E. 991, 211 Mass. 334.

N.Y.—Novara v. Wyoming County, 259 N.Y.S. 932, 144 Misc. 920—Pirojnikoff v. National City Bank of New York, 233 N.Y.S. 219, 133 Misc. 536.

27. U.S.—U. S., for Use and Benefit of Johnson, v. Morley Const. Co., D.C.N.Y., 17 F.Supp. 378, modified on other grounds, C.C.A., U. S. ex rel. Johnson v. Morley Const. Co., 98 F.2d 781, certiorari denied Maryland Casualty Co. v. U. S., for Use and Benefit of Harrington, 59 S.Ct. 244.

Ga.—Hamrick v. Stewart, 114 S.E. 723, 29 Ga.App. 220.

N.Y.—Chase Nat. Bank of City of New York v. Carver, 2 N.Y.S.2d 329, 166 Misc. 708.

Or.—Levine v. Levine, 252 P. 972, 121 Or. 44.

Tex.—Grogan-Cochran Lumber Co. v. McWhorter, Civ.App., 15 S.W.2d

126, error refused—McHenry v. Bankers' Trust Co., Civ.App., 206 S.W. 560, error dismissed 41 S.Ct. 321, 255 U.S. 559, 85 L.Ed. 785.

Wash.—Moore v. Sacajawea Lumber & Shingle Co., 256 P. 331, 144 Wash. 38.

28. U.S.—Union Electric Light & Power Co. v. Snyder Estate Co., D.C.Mo., 15 F.Supp. 379.

Ga.—Roles v. Edwards, 176 S.E. 106, 49 Ga.App. 527—Hamrick v. Stewart, 114 S.E. 723, 29 Ga.App. 220.

Neb.—In re Wecker's Estate, 243 N.W. 642, 645, 123 Neb. 504.

Or.—Levine v. Levine, 252 P. 972, 121 Or. 44.

15 C.J. p 962 note 37 [a].

Waiver

A defendant who had the opportunity to present the insufficiency of affidavit for attachment on his first motion to dissolve attachment is foreclosed to do so on appeal from order denying his second motion to dissolve attachment, although leave to renew the original motion was granted by the court in overruling it; not having availed himself of the privilege extended, but having appealed from the first order, he thereby waived the privilege.—American Surety Co. of New York v. Kartowitz, 195 P. 99, 59 Mont. 1.

29. Okl.—O'Neil Engineering Co. v. City of Lehigh, 182 P. 659, 75 Okl. 227.

30. N.H.—Peppin v. Boston & M. R. R., 185 A. 153, 88 N.H. 145—Cotton v. Stevens, 115 A. 618, 80 N.H. 175—Tucker v. Lowe, 107 A. 641, 79 N.H. 259—Topore v. Boston & M. R. R., 106 A. 498, 79 N.H. 169—Olney v. Boston & M. R. R., 59 A. 387, 73 N.H. 85.

31. Pa.—In re Reamer's Estate, 200 A. 35, 331 Pa. 117, 119 A.L.R. 589.

32. U.S.—Messinger v. Anderson, Ohio, 32 S.Ct. 739, 225 U.S. 436, 56 L.Ed. 1152.

D.C.—Davis v. Davis, 96 F.2d 512, 68 App.D.C. 240, certiorari granted 58 S.Ct. 944, 304 U.S. 552, 82 L.Ed.

1523, reversed on other grounds 59 S.Ct. 3, 305 U.S. 32, 83 L.Ed. 26, 118 A.L.R. 1518, motion denied 59 S.Ct. 773.

Hawaii.—In re Ryan, 31 Hawaii 547. Kan.—Fleming v. Campbell, 83 P.2d 708, 148 Kan. 516.

Minn.—Sands v. American Ry. Express Co., 198 N.W. 402, 159 Minn. 25.

33. U.S.—Cherry v. Howell, C.C.A.N.Y., 66 F.2d 713.

Cal.—City of Los Angeles v. Oliver, 283 P. 298, 102 Cal.App. 299.

Colo.—Lugon v. Crosier, 240 P. 462, 78 Colo. 141.

D.C.—Davis v. Davis, 96 F.2d 512, 68 App.D.C. 240, certiorari granted 58 S.Ct. 944, 304 U.S. 552, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 3, 305 U.S. 32, 83 L.Ed. 26, 118 A.L.R. 1518, motion denied 59 S.Ct. 773.

La.—Register v. Harrell, 60 So. 638, 131 La. 983.

Mont.—Boyle v. Chicago, M. & St. P. Ry. Co., 199 P. 283, 60 Mont. 453.

Neb.—Tady v. Warta, 196 N.W. 901, 111 Neb. 521.

Ohio.—Trustees of Cincinnati Southern Ry. Co. v. McWilliams, 18 Ohio App. 225.

Vt.—Perkins v. Vermont Hydro-Electric Corporation, 177 A. 631, 106 Vt. 367.

Court making erroneous ruling, or order is not prevented from afterward rendering correct judgment, and party in whose favor error was committed cannot successfully urge reversal of correct final judgment on ground it was contrary to erroneous order previously made.—Union Realty Co. of Greensburg v. Older, 185 N.E. 522, 97 Ind.App. 412.

The power of the trial judge to revise his earlier rulings is not affected by the rule that the question whether the evidence sustains the verdict or conclusion is properly raised by exceptions to the grants or denials of nonsuits or directed verdicts.—Bennett v. Larose, 136 A. 254, 82 N.H. 443.

the law of the case rule would work a manifest injustice.³⁴

In any event, the former decision or ruling is binding, under the doctrine of the law of the case, only where it is a binding adjudication,³⁵ and therefore it does not apply to a statement or expression by the court which does not constitute such an adjudication,³⁶ and an expression of an opinion *en* *tenu* by one of the judges of a court after judgment

is pronounced does not affect the law of the case.³⁷

Furthermore, the former holding or decision is binding only to the extent of the precise question passed upon;³⁸ and is confined to the application of a legal principle to the same, or substantially the same, state of facts,³⁹ and is not binding as to facts or issues not adjudicated or involved in the former decision or ruling.⁴⁰ Moreover, it is binding only in subsequent proceedings in the same case involving

34. D.C.—*Davis v. Davis*, 96 F.2d 512, 68 App.D.C. 240, certiorari granted 58 S.Ct. 944, 304 U.S. 552, 82 L.Ed. 1523, reversed on other grounds 59 S.Ct. 3, 305 U.S. 32, 83 L.Ed. 26, 118 A.L.R. 1518, motion denied 59 S.Ct. 773.

Pa.—*In re Reamer's Estate*, 200 A. 35, 331 Pa. 117, 119 A.L.R. 539.

Conclusions on affidavits

The conclusions of a judge on the facts, as presented in affidavits on which is based an order granting an injunction *pendente lite*, are not necessarily binding on the trial judge, who hears the evidence from the witnesses, as it is best for all parties that a trial be had and the facts be so determined and found.—*Burgess Bros. Co. v. Stewart*, 185 N.Y.S. 85, 194 App.Div. 913, affirming 184 N.Y.S. 199, 112 Misc. 347.

In absence of constitutional or statutory inhibition, trial judge retains jurisdiction to change rulings made during term, if, in his discretion, change is necessary to do justice.—*Handy v. Olney Oil & Refining Co.*, Tex.Civ.App., 68 S.W.2d 313, error refused.

35. Ky.—*Kudelle v. Vizzard Inv. Co.*, 240 S.W. 54, 194 Ky. 604.

N.Y.—*International Ry. Co. v. Jagard*, 197 N.Y.S. 384, 204 App.Div. 67.

Pa.—*Skelton v. Lower Merion Tp.*, 178 A. 337, 318 Pa. 356.

36. U.S.—*Potts v. Village of Haverstraw*, C.C.A.N.Y., 93 F.2d 506.

Ga.—*Wilson v. State*, 160 S.E. 319, 173 Ga. 275.

Iowa.—*Crawford v. Emerson Const. Co.*, 269 N.W. 384, 222 Iowa 378.

Mo.—*Brinkerhoff-Paris Trust & Savings Co. v. Hill*, 42 S.W.2d 23, 328 Mo. 886, conforming to 50 S.Ct. 451, 281 U.S. 673, 74 L.Ed. 1107, which reversed 19 S.W.2d 748, 323 Mo. 138, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 648/revoked 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608, and certiorari granted 50 S.Ct. 152, 280 U.S. 550, 74 L.Ed. 608.

Mont.—*Outlook Farmers' Elevator Co. v. American Surety Co. of New York*, 223 P. 905, 908, 70 Mont. 8, citing *Corpus Juris*.

R.I.—*Everett J. Horton & Co. v. Grinnell*, 199 A. 315.

A suggestion by a trial judge as to the validity of a stipulation of facts between the parties is not binding on the judge before whom the case comes up.—*Brown v. Pechman*, 33 S.E. 732, 55 S.C. 555.

Statements made during the course of the trial by the trial court are not binding on the court, and the judgment controls over any expression of opinion to the contrary made by trial judge during course of trial.—*Curry v. Crull*, 116 S.W.2d 125, 342 Mo. 553.

Statement of judge at interlocutory hearing on temporary injunction that lease was not ambiguous was not judgment establishing law of case and controlling on demurrer.—*White v. Cook*, 156 S.E. 657, 171 Ga. 663.

37. S.C.—*Steele v. Charlotte, etc., R. Co.*, 14 S.C. 324.

38. U.S.—*Miller v. Commissioner of Internal Revenue*, C.C.A., 103 F.2d 58.

N.Y.—*In re Pinkney*, 202 N.Y.S. 818, 208 App.Div. 181, affirmed *In re Pinkney's Estate*, 144 N.E. 909, 238 N.Y. 602.—*In re Witkind's Estate*, 4 N.Y.S.2d 933, 167 Misc. 885, 15 C.J. p 962 note 39.

Correctness of overruling challenge to juror is not to be judged by another ruling in same case.—*State v. Vigil*, 266 P. 920, 33 N.M. 365.

39. U.S.—*U. S. v. Davis*, D.C.N.Y., 3 F.Supp. 97.

Me.—*Bean v. Ingraham*, 148 A. 681, 128 Me. 462.

40. U.S.—*German v. Universal Oil Products Co.*, C.C.A.Mo., 77 F.2d 70, affirming, D.C., *Universal Oil Products Co. v. Standard Oil Co. of Indiana*, 6 F.Supp. 37.—*Roos v. Texas Co.*, C.C.A.Tex., 68 F.2d 321, certiorari denied *Texas Co. v. Roos*, 54 S.Ct. 859, 292 U.S. 649, 78 L.Ed. 1499.—*Cherry v. Howell*, C.C.A.N.Y., 66 F.2d 713.—*The Snug Harbor*, D.C.N.Y., 53 F.2d 407.—*Burton v. Roos*, D.C.Tex., 20 F.Supp. 75, affirmed, C.C.A., *Texas Co. v. Roos*, 93 F.2d 380.—*Kennedy v. Boston-Continental Nat. Bank*, D.C.Mass., 11 F.Supp. 611, vacated, C.C.A., 84 F.2d 592, certiorari granted 57 S.Ct. 115, 299 U.S. 533, 81 L.Ed. 392, certiorari dismissed 57 S.Ct. 667, 300 U.S. 684, 81 L.Ed. 887.—*Metro-*

Goldwyn-Mayer Distributing Corporation v. Bijou Theatre Co. of Holyoke, D.C.Mass., 3 F.Supp. 66.—*Federal Trade Commission v. Smith*, D.C.N.Y., 1 F.Supp. 247.

Ariz.—*Dickason v. Sturdavan*, 72 P. 2d 584, 50 Ariz. 382.

Ark.—*Parrish v. Parrish*, 86 S.W.2d 557, 191 Ark. 443.

Ga.—*Rabun Mineral & Development Co. v. Heyward*, 155 S.E. 324, 171 Ga. 322.—*Southern Cotton Oil Co. v. Shields*, 98 S.E. 408, 23 Ga.App. 476.

Iowa.—*Andrew v. American Sav. Bank of Carroll*, 255 N.W. 871, 218 Iowa 489.—*McLarand v. Daut*, 168 N.W. 401.

Ky.—*Nuetzel v. State Tax Commission*, 265 S.W. 606, 205 Ky. 124.

Mich.—*Thomas v. Banks*, 195 N.W. 94, 224 Mich. 488.

N.Y.—*O'Leary v. Grant*, 8 N.Y.S.2d 196, 255 App.Div. 517.—*Amusement Securities Corporation v. Academy Pictures Distributing Corporation*, 295 N.Y.S. 436, 251 App.Div. 227, modifying in part 294 N.Y.S. 279, 162 Misc. 608, affirmed 294 N.Y.S. 305, 250 App.Div. 710 and 294 N.Y.S. 306, 250 App.Div. 710, motions denied 295 N.Y.S. 472, 250 App.Div. 749, affirmed 13 N.E.2d 471, 277 N.Y. 557, reargument denied 14 N.E. 2d 383, 277 N.Y. 672.—*Flynn v. Colonial Discount Co.*, 269 N.Y.S. 394, 149 Misc. 607.

Pa.—*In re Reamer's Estate*, 200 A. 35, 331 Pa. 117, 119 A.L.R. 539.

Tex.—*Nash v. McCallum*, Civ.App., 74 S.W.2d 1046.

Wash.—*Kirwin v. Hall*, 14 P.2d 62, 169 Wash. 501.

Wyo.—*Farmers' State Bank of Riverton v. Johnson*, 253 P. 858, 36 Wyo. 191.

15 C.J. p 962 note 39.

If the facts are substantially changed by an appropriate judicial procedure, the doctrine of the law of the case is not to be enforced.—*U. S. v. Davis*, D.C.N.Y., 3 F.Supp. 97.

Distribution of estate

A ruling of law by an orphans court in dealing with the distributor of a portion of an estate is not binding upon a subsequent adjudication relating to another portion of the estate; and, although error committed with regard to one fund

the same parties and subject matter,⁴¹ and not as against parties who had no notice or opportunity to be heard at the time the decision was rendered.⁴²

Final or interlocutory order. The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right.⁴³ It has been held that the law of the case as made by an interlocutory decision or order remains the same except in so far as the facts are changed by evidence on the final hearing;⁴⁴ but ordinarily an interlocutory order which merely decides some point or mat-

ter essential to the progress of the cause, collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits.⁴⁵

State and federal courts. The doctrine of the law of the case in its customary sense does not run from state to federal jurisdiction or vice versa;⁴⁶ but it has been held that a federal decree, which has become final by affirmance by the supreme court of the United States, becomes the fixed

in the distribution of an estate may be irremediable as to it, they do not impose upon the court the necessity of persisting in the same errors in the disposition of a subsequent fund.—*In re Reamer's Estate*, 200 A. 35, 331 Pa. 117, 119 A.L.R. 589.

41. U.S.—Fidelity & Deposit Co. of Maryland v. Port of Seattle, C.C.A. Wash., 106 F.2d 777, 781, citing *Corpus Juris*, and reversing Port of Seattle v. Fidelity & Deposit Co. of Maryland, 24 F.Supp. 434—U. S. v. Davis, D.C.N.Y., 3 F.Supp. 97.

Ark.—Western Union Telegraph Co. v. Byrd, 122 S.W.2d 569.

Cal.—State v. Savings Union Bank & Trust Co., 199 P. 26, 186 Cal. 294. S.C.—Matheson v. McCormac, 196 S. E. 883, 187 S.C. 260—Bowling v. Mangum, 115 S.E. 212, 122 S.C. 179. Tex.—Brinkman v. Rick, Civ.App., 19 S.W.2d 808, error refused.

Va.—Steinman v. Clinchfield Coal Corp., 93 S.E. 684, 121 Va. 611.

42. N.Y.—Levy v. Paramount Public Corporation, 266 N.Y.S. 271, 149 Misc. 129, affirmed 269 N.Y.S. 997, 241 App.Div. 711, affirmed 193 N.E. 418, 265 N.Y. 629.

Va.—Motley v. H. Vicello & Bro., 111 S.E. 295, 132 Va. 281.

43. U.S.—Triborough Chemical Corporation v. Doran, D.C.N.Y., 39 F. 2d 479—U. S. v. Columbus Marine Corporation, D.C.N.Y., 8 F.2d 315. N.Y.—Sears, Roebuck & Co. v. 9 Avenue-31 Street Corporation, 9 N.E. 2d 20, 274 N.Y. 388, modifying 290 N.Y.S. 129, 248 App.Div. 719, affirming 286 N.Y.S. 522, 158 Misc. 689, remittitur amended 10 N.E.2d 589, 274 N.Y. 636—Durand v. Lipman, 1 N.Y.S.2d 468, 165 Misc. 615.

A decision denying a motion for temporary injunction on ground that a labor dispute was not involved established the "law of the case."—*Wohl v. Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters*, 14 N.Y.S.2d 198.

Denying motion of attorney to withdraw

Decision of judge denying motion of attorneys to withdraw was the "law of the case" so far as relieving

the attorneys of their duty to defendants for whom they had appeared.—*Martin v. United Standard Oil Fund of America*, D.C.N.Y., 26 F. Supp. 974.

Determination on application to set aside service of summons became law of case on motion for judgment on pleadings.—*People v. Afa Finance Corporation*, 245 N.Y.S. 267, 138 Misc. 32.

Order that case stand for trial on calendar 1 on cause of action for nuisance and on no other cause of action was law of case where no appeal was taken therefrom.—*Oates v. City of Easley*, 188 S.E. 504, 182 S.C. 91.

44. U.S.—Société Vinicole De Champagne v. Mumm Champagne & Importation Co., D.C.N.Y., 13 F.Supp. 575—U. S. v. Davis, D.C.N.Y., 3 F. Supp. 97.

Ga.—Clements v. Fletcher, 118 S.E. 201, 155 Ga. 802.

45. U.S.—Jones Bros. Co. v. Underkoffler, D.C.Pa., 24 F.Supp. 393.

Iowa.—Baehne v. Independent School Dist. of Manly, 207 N.W. 755, 201 Iowa 625.

Ky.—Bolen v. Standard-Elkhorn Coal Co., 275 S.W. 372, 210 Ky. 43—Smith v. Ruth, 209 S.W. 850, 183 Ky. 566.

La.—Labourdette v. Doullut & Williams Shipbuilding Co., 100 So. 547, 156 La. 412.

N.Y.—*In re Witkind's Estate*, 4 N.Y. S.2d 933, 167 Misc. 885—*Williams Ice Cream Co. v. Chase Nat. Bank*, 199 N.Y.S. 314, 120 Misc. 301, reversed on other grounds 205 N.Y.S. 446, 210 App.Div. 179.

N.C.—Bland v. Faulkner, 139 S.E. 835, 194 N.C. 427.

Okl.—Ft. Dearborn Trust & Savings Bank v. Skelly Oil Co., 293 P. 557, 145 Okl. 179.

Pa.—Sultan v. Stoer, 6 A.2d 809, 335 Pa. 403.

S.C.—Lucius v. Du Bose, 103 S.E. 759, 114 S.C. 375.

Tex.—City of Seymour v. Montgomery, Civ.App., 209 S.W. 237.

Va.—Motley v. H. Vicello & Bro., 111 S.E. 295, 132 Va. 281.

Wis.—*Holzinger v. Prudential Ins. Co. of America*, 269 N.W. 306, 222 Wis. 456.

As affected by failure to appeal

The provision of Jud.Code § 129, as amended, 28 U.S.C.A. § 227, that an appeal may be taken to the circuit court of appeals from an interlocutory order or decree granting an injunction, and that such an appeal must be taken within thirty days from the entry of such order or decree, did not divest the district court of jurisdiction to reconsider questions passed on by an interlocutory decree before entering a final order, notwithstanding defendants took no appeal, since failure to exercise option of taking preliminary appeal in no way affected right to have district court reconsider the interlocutory decree before entering a final decree, or the right to appeal from the final decree.—*Jones Bros. Co. v. Underkoffler*, D.C.Pa., 24 F.Supp. 393.

Building made at preliminary hearing could be corrected at the final trial on the merits.—*Allen v. Nickerson*, Mass., 199 N.E. 482.

Rulings on practice motions are not determinative of the major issue in the controversy.—*In re Witkind's Estate*, 4 N.Y.S.2d 933, 167 Misc. 885.

In a suit to restrain the enforcement of a municipal ordinance imposing a license tax on certain dealers in trading stamps, a ruling granting an injunction pendente lite is not a final decision so as to constitute res judicata on the question of the validity of the ordinance on a hearing on the merits.—*Sperry & Hutchinson Co. v. Tacoma*, D.C. Wash., 199 F. 853.

46. U.S.—Fidelity & Deposit Co. of Maryland v. Port of Seattle, C.C.A. Wash., 106 F.2d 777, 781, citing *Corpus Juris*—*Interstate Realty & Investment Co. of Louisiana v. Bibb County, Ga.*, C.C.A.Ga., 293 F. 721—*Harrison v. Foley, Mo.*, 206 F. 57, 124 C.C.A. 191, certiorari denied 34 S.Ct. 321, 231 U.S. 750, 58 L.Ed. 466.

Va.—Steinman v. Clinchfield Coal Corp., 93 S.E. 684, 121 Va. 611. 15 C.J. § 963 note 51.

law of the case, and any further proceeding in the matter must be in conformity therewith.⁴⁷

Manner of invoking rule. A former decision, as the law of the case, may be invoked by an oral motion based on an inspection of the record, without further pleading.⁴⁸

c. Particular Applications of Rule

The doctrine of the law of the case has been applied to many particular questions, and to many and various situations.

The doctrine of the law of the case has been applied to decisions with respect to: The jurisdic-

tion of the court⁴⁹ and venue;⁵⁰ the construction and validity of a written instrument;⁵¹ the statute of limitations;⁵² and the admissibility⁵³ and weight and sufficiency⁵⁴ of the evidence. It has been held not to apply to a decision of a state supreme court involving the construction of the federal constitution or a federal statute.⁵⁵

Rulings on pleadings in general. In accordance with the foregoing general rule, stated in subdivision b of this section, a decision or ruling on a question of pleading generally becomes binding as the law of the case on such question,⁵⁶ except where

47. Cal.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of California, 288 P. 775, 209 Cal. 460, affirmed 51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128.

S.D.—Drainage Ditch No. 1 and 2 v. Chicago, M. & St. P. Ry. Co., 231 N.W. 531, 57 S.D. 182, affirmed 236 N.W. 372, 58 S.D. 414.

Determination of supreme court becomes law of case on transfer to circuit court of appeals.—Street v. Shipowners' Ass'n of Pacific Coast, C.C.A.Cal., 299 F. 5.

48. Conn.—Rents v. Eckert, 49 A. 203, 74 Conn. 11.

Ga.—Ellis v. First Nat. Bank, 186 S. E. 813, 182 Ga. 641.

49. U.S.—National Park Bank v. McKibben & Co., D.C.Ga., 43 F.2d 254—Boyle v. Chicago, R. I. & P. Ry. Co., C.C.A.Mo., 42 F.2d 633—Molesphini v. Bruno, D.C.N.Y., 26 F. Supp. 595—Callaway v. Bohler, D. C.Ga., 291 F. 243, affirmed Bohler v. Callaway, 45 S.Ct. 431, 267 U.S. 479, 69 L.Ed. 745.

Wash.—City of Camas v. Kiggins, 206 P. 951, 120 Wash. 40.

50. Mo.—State v. Lando, 300 S.W. 787.

Wash.—City of Camas v. Kiggins, 206 P. 951, 120 Wash. 40.

51. N.Y.—In re Moran's Will, 241 N. Y.S. 648, 136 Misc. 615.

Pa.—In re Gould's Estate, 113 A. 552, 270 Pa. 535.

Indorsement on insurance policy as admission or estoppel

Vt.—Kimball v. New York Life Ins. Co., 126 A. 553, 98 Vt. 192.

The construction of a will adopted by an auditing judge in the distribution of the estate becomes "the law in the case" and res judicata on subsequent distributions arising from the same fund, or particular part of the fund affected, especially when the fund is turned over to trustees for the purposes of the will as construed by the auditing judge.—In re Gould's Estate, 113 A. 552, 270 Pa. 535.

52. Mich.—Kibbey v. L. O. Gordon

Mfg. Co., 245 N.W. 512, 260 Mich. 531.

N.Y.—Van der Stegen v. Neuss, Hesselein & Co., 276 N.Y.S. 624, 243 App. Div. 122, affirmed 200 N.E. 577, 270 N.Y. 55, 105 A.L.R. 605.

N.C.—Moore v. Harkins, 97 S.E. 824, 177 N.C. 113.

Effect of amendment

The statute of limitations, being matter of defense, to be pleaded and proved, may be so interposed, notwithstanding permission, over objection of the bar of limitations, to amend complaint to bring the cause of action within a statute.—Kinney v. New York, Cent. & H. R. R. Co., 166 N.Y.S. 868, reversed on other grounds 171 N.Y.S. 1090, 185 App. Div. 903.

53. Ky.—Johnston v. Benjamin, 292 S.W. 801, 219 Ky. 169.

Mo.—State v. Randazzo, 300 S.W. 755, 318 Mo. 761—State v. Windsor, App., 289 S.W. 663.

S.C.—Henderson v. Rice, 158 S.E. 258, 160 S.C. 307.

Tex.—Hennegan v. Nona Mills Co., Civ.App., 195 S.W. 664, error refused.

Utah.—State v. Bohn, 248 P. 119, 67 Utah 362.

Exclusion before opportunity to cross-examine as not law of case.—U. S. Fidelity & Guaranty Co. v. Dunn, N.H., 7 A.2d 246.

54. N.C.—Price v. Life & Casualty Ins. Co. of Tennessee, 160 S.E. 367, 201 N.C. 376—Mewborn v. Smith, 157 S.E. 795, 200 N.C. 532—Price v. Life & Casualty Ins. Co. of Tennessee, 157 S.E. 132, 200 N.C. 427—Godfrey v. Queen City Coach Co., 156 S.E. 139, 200 N.C. 41.

Tex.—Hennegan v. Nona Mills Co., Civ.App., 195 S.W. 664, error refused.

Change as to sufficiency

The trial court has a right to change its mind as to the sufficiency of the evidence for the jury in ruling on motion for a new trial, even though it had previously ruled the other way.—Snyder v. Guthrie, 187

N.W. 953, 193 Iowa 624, 24 A.L.R. 950.

Probative force of letter

Where letter, allegedly written on day that written trust agreement was made, was admitted over objection, and motion to strike out was denied, and court's attention was directed to claim that trust agreement was integrated in writing as matter of law, admission of letter does not preclude the court from subsequently finding that letter could not be given probative force.—Robertson v. Schoonmaker, 285 N.Y.S. 204, 158 Misc. 627.

Where the evidence on a second trial is different from that produced at the former trial, this may justify a departure from the rulings at the former trial or on a former appeal, as to questions with regard to which the evidence must govern.—U. S. v. Davis, D.C.N.Y., 3 F.Supp. 97—15 C. J. p 963 note 42.

55. Cal.—Atchison, T. & S. F. Ry. Co. v. Railroad Commission of California, 288 P. 775, 209 Cal. 460, affirmed 51 S.Ct. 553, 283 U.S. 380, 75 L.Ed. 1128.

Miss.—Louisville & N. R. Co. v. State, 65 So. 381, 107 Miss. 597.

56. U.S.—Potts v. Village of Haverstraw, C.C.A.N.Y., 93 F.2d 506—Alfred Metal Stamping Co. v. Standard Electric Equipment Corporation, D.C.N.Y., 57 F.2d 296—Galban Lobo & Co., S. A., v. U. S., D.C.N.Y. 14 F.2d 435, reversed on other grounds, C.C.A., 18 F.2d 221—U. S., for Use and Benefit of Johnson, v. Morley Const. Co., D.C.N.Y., 17 F.Supp. 378, modified on other grounds, C.C.A., U. S. ex rel. Johnson v. Morley Const. Co., 98 F.2d 781, certiorari denied Maryland Casualty Co. v. U. S., for Use and Benefit of Harrington, 59 S.Ct. 244. Colo.—London Guarantee & Accident Co. v. Officer, 242 P. 989, 78 Colo. 441.

Ga.—Williams Realty & Loan Co. v. Simmons, 3 S.E.2d 580, 188 Ga. 184—New England Mut. Life Ins. Co. v. Childs, 194 S.E. 561, 185 Ga. 198—Marks v. Steinberg, 190 S.E. 808,

it involves different facts or conditions.⁵⁷ An amendment to a pleading does not open it to new rulings on identical questions previously adjudicated in the same case.⁵⁸ An adjudication of matters in issue on a plea in abatement has been held not to be the law of the case as to such matters on the trial of the principal cause on the merits,⁵⁹ but there is authority to the contrary.⁶⁰

Ruling on demurrer. A ruling on demurrer or exception is not, as a rule, regarded as binding on the court in the subsequent course of the litigation,⁶¹ and, as explained in the C.J.S. title Pleading § 268, also 49 C.J. p 453 note 41-p 454 note 69, the court may at any time before final judgment reconsider its ruling and make other appropriate orders or decisions. This rule is particularly applicable

55 Ga.App. 561—Hamrick v. Stewart, 114 S.E. 723, 29 Ga.App. 220. Iowa—Arthaud v. Griffin, 235 N.W. 66, 212 Iowa 646.

Ky.—Horn's Adm'r v. Prudential Ins. Co. of America, 65 S.W.2d 1017, 252 Ky. 137.

Mass.—Bucholz v. Green Bros. Co., 195 N.E. 318, 290 Mass. 350.

N.Y.—Endurance Holding Corporation v. Kramer Surgical Stores, 238 N.Y.S. 377, 227 App.Div. 582—Citizens' Trust Co. of Utica v. R. Prescott & Son, 223 N.Y.S. 191, 221 App.Div. 426—Citizens' Trust Co. of Utica v. R. Prescott & Son, 223 N.Y.S. 184, 221 App.Div. 420—Rollins v. Carib Syndicate, 14 N.Y.S. 2d 930, 172 Misc. 648, affirmed 15 N.Y.S.2d 974, 258 App.Div. 816—Sterling Bag Co. v. Taylor, 7 N.Y. S.2d 45, 169 Misc. 5, affirmed Sterling Bag Co. v. City of New York, 11 N.Y.S.2d 297, 256 App.Div. 645—Breuchaud v. Bank of New York & Trust Co., 283 N.Y.S. 812, 157 Misc. 375—Kidder v. Hesselman, 196 N.Y.S. 837, 119 Misc. 410—Burg v. Travelers Indemnity Co., 9 N.Y. S.2d 284.

S.C.—Yancey v. Southern Wholesale Lumber Co., 123 S.E. 767, 129 S. C. 48.

Va.—Winston v. Winston, 130 S.E. 784, 144 Va. 848.

Bill of particulars

On motion for further bill of particulars, court cannot base refusal on sufficiency of pleading, which would virtually set aside previous order, unappealed from, requiring a bill of certain particulars.—Grolnick v. Mutual Life Ins. Co. of New York, 178 N.Y.S. 176.

Quantum meruit not precluded by demurrer for breach of contract

That sustaining of demurrer to cause of action for breach of employment contract established as law of case that contract was too indefinite and uncertain to be enforced did not preclude recovery on second cause of action for services rendered thereunder on quantum meruit, and court erred in excluding evidence of value of such services.—Siebert v. Smith, 239 P. 396, 49 Nev. 120, rehearing denied 244 P. 1012, 49 Nev. 310.

Remedy

(1) Where, on motion for judgment on pleadings, it was decided that complaint stated equitable cause

of action, such determination is law of case, and objections thereafter that plaintiff had adequate remedy at law were unavailing.—Rawll v. Baker-Vawter Co., 167 N.Y.S. 931, reversed on other grounds 176 N.Y.S. 189, 187 App.Div. 330.

(2) Where ruling of supreme court transferring case to the court of appeals fixed law of case as action on contract, demurrer to petition for misjoinder of actions on contract and tort was properly overruled.—McKenzie Trust Co. v. Bullard, 132 S.E. 125, 35 Ga.App. 19, transferred 127 S.E. 277, 159 Ga. 884.

57. N.Y.—Bovin v. Galitzka, 226 N.Y.S. 364, 131 Misc. 482, reversed on other grounds 227 N.Y.S. 775, 223 App.Div. 737, motion denied 164 N.E. 565, and reversed 165 N.E. 273, 250 N.Y. 228.

S.C.—Jordan v. State Highway Department, 3 S.E.2d 201, 190 S.C. 397.

Rulings on motion to strike held not law of case

U.S.—Sourino v. U. S., C.C.A.Ga., 86 F.2d 309, certiorari denied 57 S. Ct. 491, 300 U.S. 661, 81 L.Ed. 869—Schafran v. Mt. Vernon-Woodberry Mills, C.C.A.N.J., 70 F.2d 963, 94 A.L.R. 543.

N.J.—Gery v. Gery, 166 A. 108, 113 N.J.Eq. 59.

N.Y.—Howell v. Garrett & Co., 218 N.Y.S. 301, 218 App.Div. 322.

58. Ga.—General Tire & Rubber Co. v. Brown Tire Co., 168 S.E. 75, 46 Ga.App. 548—Southern Ry. Co. v. Smallwood, 99 S.E. 539, 23 Ga.App. 810.

15 C.J. p 961 note 36 [b].

59. Mo.—Sessinghaus v. Knoche, 118 S.W. 104, 137 Mo.App. 323.

Tenn.—Illinois Cent. R. Co. v. Miles, 130 S.W.2d 111, 174 Tenn. 676.

60. U.S.—Merchants Ins. Co. v. Lillgeomont, Inc., C.C.A.Ga., 84 F.2d 685.

Mass.—Second Nat. Bank v. Leary, 187 N.E. 611, 284 Mass. 321.

61. U.S.—Richmond Trust Co. v. Charlotte County, D.C.Fla., 300 F. 121, reversed on other grounds, C.C.A., 12 F.2d 62—A. Magnus Sons Co. v. Orey, C.C.A.Or., 287 F. 1—Terminal Warehouse Co. v. Pennsylvania R. Co., D.C.Pa., 7 F.Supp. 484, reversed on other grounds, C.

C.A., Pennsylvania R. Co. v. Terminal Warehouse Co., 78 F.2d 591, certiorari granted Terminal Warehouse Co. v. Pennsylvania R. Co., 56 S.Ct. 137, 296 U.S. 560, 80 L.Ed. 395, affirmed 56 S.Ct. 546, 297 U.S. 500, 80 L.Ed. 827.

Cal.—Yolo Water & Power Co. v. Superior Court, 183 P. 453, 181 Cal. 33.

Fla.—Adams v. Elliott, 174 So. 731, 128 Fla. 79.

Ga.—Woodland Hills Co. v. Lawton, 142 S.E. 208, 37 Ga.App. 742.

Hawaii.—In re Ryan, 31 Hawaii 547, 551, citing *Corpus Juris*.

Iowa.—McCord v. Page County, 184 N.W. 625, 192 Iowa 357.

N.Y.—De Witt v. McNamee, 249 N.Y. S. 31, 232 App.Div. 88.

Ohio.—Scholey v. Winder, 10 Ohio N.P.N.S., 642, affirmed 83 Ohio St. 204.

Wash.—Sprague v. Adams, 247 P. 960, 189 Wash. 510, 47 A.L.R. 529.

Wis.—U. S. Fidelity & Guaranty Co. v. Pullen, 283 N.W. 462.

15 C.J. p 963 note 44.

Receipt of evidence

Overruling exception to petition on ground of "no cause of action," does not render court without right to entertain and sustain objection to receipt of evidence based on same ground as was the exception.—Labourdette v. Doullut & Williams Shipbuilding Co., 100 So. 547, 156 La. 412.

Overruling demurrer and denying nonsuit

Where plaintiff specially demurred to defense pleaded in answer, final judgment overruling special demurrer and denying nonsuit and entering judgment for plaintiff did not adjudicate as law of case that defense was good, since judgment was to be considered as merely overruling special demurrer because it was not filed until trial term, when it was too late.—Stembridge v. Family Finance Co., 175 S.E. 663, 49 Ga.App. 353.

Vacation of order

Where order overruling general demurrer was vacated at same term, subsequent judgment sustaining demurrer when case was regularly heard was not erroneous on ground that judge was without authority to render it.—Kerr v. Kerr, 189 S.E. 20, 183 Ga. 578.

where the ruling is erroneous⁶² or grants leave to amend,⁶³ or where the parties, after such ruling, plead over and go to final hearing on the law and the facts.⁶⁴ An appellate court's decision on a proposition ruled on by the lower court on a demurrer may present a cogent reason for disturbing the lower court's order;⁶⁵ but a mere difference in the interpretation of the import and weight to be given a subsequent decision by an appellate court should not require an annulment of the previous order.⁶⁶

A ruling on demurrer, however, may be regarded as the law of the case, as against another objection based on the same grounds as was the demurrer.⁶⁷ If, after the ruling on demurrer, the

complaint is amended, and the only question presented thereby was decided adversely on demurrer to the original complaint, the previous decision should be followed;⁶⁸ but if the amended complaint materially differs from the original pleading the previous ruling is not the law of the case, and the amended pleading is again open to demurrer,⁶⁹ especially where the court in overruling a general demurrer expressly gives defendant the right to renew demurrers on the filing of an amendment.⁷⁰

A decision on demurrer which has the effect of finally settling the rights of the parties is binding as the law of the case;⁷¹ and in some states it is held that a ruling sustaining or overruling a demurrer, unless appealed from or excepted to, constitutes

62. Cal.—De la Beckwith v. Colusa County Super. Ct., 80 P. 717, 146 Cal. 496.

Ky.—Hardin v. Johnson, 248 S.W. 544, 198 Ky. 187.

Mont.—Boyle v. Chicago, M. & St. P. Ry. Co., 199 P. 233, 60 Mont. 453.

As dependent on belief in correctness

If the court is of the opinion that the former demurrer was correctly decided, it is proper to treat it as the law of the case. If it is of a contrary opinion, it is not required so to treat it, but should determine it in accordance with its view of the law.—Fitzgerald v. Merard Holding Co., 138 A. 483, 106 Conn. 475, 54 A. L.R. 361.

63. Fla.—Adams v. Elliott, 174 So. 731, 128 Fla. 79.

Ga.—Woodland Hills Co. v. Lawton, 142 S.E. 208, 37 Ga.App. 742.

64. D.C.—Marks v. Frigidaire Sales Corporation, 54 F.2d 974, 60 App. D.C. 359, certiorari denied Frigidaire Sales Corporation v. Marks, 52 S.Ct. 394, 285 U.S. 544, 76 L.Ed. 936.

Kan.—Dey v. Knights and Ladies of Security, 213 P. 1066, 113 Kan. 86.

N.Y.—Campbell v. Poland Spring Co., 187 N.Y.S. 643, 196 App.Div. 331, affirmed 135 N.E. 394, 233 N.Y. 506—Roth v. Gotthold, 153 N.Y.S. 187, 90 Misc. 363—Burg v. Travelers Indemnity Co., 9 N.Y.S.2d 284—Melnick v. Borden, 185 N.Y.S. 305.

15 C.J. p 963 note 44 [e].

65. U.S.—Toy Nat. Bank of Sioux City, Iowa, v. Smith, D.C.Iowa, 8 F.Supp. 638, reversed on other grounds C.C.A., Hammerstrom v. Toy Nat. Bank, 81 F.2d 628, certiorari denied Toy Nat. Bank v. Hammerstrom, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402 and Iowa Joint Stock Land Bank v. Hammerstrom, 57 S.Ct. 9, and 299 U.S. 546, 81 L.Ed. 402, and Live Stock Nat. Bank v. Hammerstrom, 57 S.Ct. 9, 299 U.S. 546, 81 L.Ed. 402.

66. U.S.—Toy Nat. Bank of Sioux City, Iowa, v. Smith, supra.

67. Okl.—Deering v. Meyers, 116 P. 793, 29 Okl. 232.

A motion to strike is properly denied where it is based on the same grounds as were assigned by a demurrer which was overruled.

Okl.—Deering v. Meyers, supra.
Wis.—Madison Trust Co. v. Helleckson, 257 N.W. 691, 216 Wis. 443, 96 A.L.R. 992.

68. U.S.—Meeker v. Lehigh Valley R. Co., C.C.N.Y., 175 F. 320, reversed on other grounds 183 F. 548, 106 C.C.A. 94.

Ga.—Lederle v. City of Atlanta, 138 S.E. 910, 164 Ga. 440—Dekle v. Metropolitan Life Ins. Co., 174 S. E. 741, 49 Ga.App. 193—Watson v. Atlanta Gas Light Co., 167 S.E. 718, 46 Ga.App. 326—Hall v. Massachusetts Protective Ass'n, 128 S.E. 218, 34 Ga.App. 39—Hewlett v. Almand, 115 S.E. 501, 29 Ga.App. 392.

N.H.—Hedding v. Gallagher, 47 A. 614, 70 N.H. 631.

Same rule applied to answer

Alaska.—Buckley v. Verhonic, 3 Alaska 425.

Ga.—Hammock v. Kemp, 97 S.E. 852, 148 Ga. 672.

Amendment not curing defect

If an amended petition does not cure its defect, in compliance with an order sustaining a demurrer to the original petition and granting time for amendment, it should be disallowed since the previous adjudication sustaining the demurrer became the law of the case.—Brown v. S. H. Kress & Co., 159 S.E. 893, 43 Ga.App. 778—Calhoun Oil & Fertilizer Co. v. Western & A. R. R., 133 S.E. 348, 35 Ga.App. 436—Atlantic Refining Co. v. Pearson, 120 S.E. 652, 31 Ga.App. 281—Marbut v. Southern Ry. Co., 95 S.E. 1021, 22 Ga.App. 330.

69. U.S.—Post v. Pearson, Dak., 2 S.Ct. 799, 108 U.S. 418, 27 L.Ed.

774—Huyler's v. Ritz-Carlton Restaurant & Hotel Co. of Atlantic City, D.C.Del., 9 F.2d 143.

Conn.—Fitzgerald v. Merard Holding Co., 138 A. 483, 106 Conn. 475, 54 A.L.R. 361.

Ga.—Tingle v. Maddox, 198 S.E. 722, 186 Ga. 757—Lederle v. City of Atlanta, 138 S.E. 910, 164 Ga. 440—General Tire & Rubber Co. v. Brown Tire Co., 168 S.E. 75, 46 Ga.App. 548—Watson v. Atlanta Gas Light Co., 167 S.E. 718, 46 Ga.App. 326—Woodside Hills Co. v. Lawton, 142 S.E. 208, 37 Ga.App. 742—Central of Georgia Ry. Co. v. Jones, 110 S.E. 914, 28 Ga.App. 258, conforming to answer to certified questions 108 S.E. 613, 152 Ga. 92, certiorari denied Jones v. Central of Georgia Ry. Co., 43 S. Ct. 92, 260 U.S. 729, 67 L.Ed. 485—Central of Georgia R. Co. v. Waldo, 65 S.E. 1698, 6 Ga.App. 840.

Iowa.—Schultz v. Consolidated Independent School Dist. of Treynor, 204 N.W. 281, 200 Iowa 293—Marshall Ice Co. v. La Plant, 111 N.W. 1016, 136 Iowa 621, 12 L.R.A.N.S. 1073.

Kan.—Parks v. Monroe, 161 P. 638, 99 Kan. 368.

Nev.—Edwards v. Jones, 246 P. 688, 49 Nev. 342.

Wis.—U. S. Fidelity & Guaranty Co. v. Pullen, 283 N.W. 462.

15 C.J. p 963 note 44 [c].

Issues raised by new pleadings

Judgment rendered on demurrer is as conclusive as to material facts confessed by it as though put in issue and established by verdict, but not as to other issues raised by a new pleading after the decision.—Wapello State Sav. Bank v. Colton, 122 N.W. 149, 143 Iowa 359.

70. Ga.—Tingle v. Maddox, 198 S. E. 722, 186 Ga. 757.

71. Mass.—Massachusetts Gasoline & Oil Co. v. Go Gas Co., 166 N.E. 563, 267 Mass. 122, certiorari denied 50 S.Ct. 86, 280 U.S. 604, 74 L.Ed. 648.

the law of the case as to the matters thereby decided,⁷² and, in case of the overruling of a demurrer to the complaint, is conclusive of plaintiff's right to a verdict, if he proves his case substantially as laid.⁷³

Ruling on motion to dismiss, or nonsuit. A ruling on a motion to dismiss has been held to be the

law of the case as to matters thereby adjudicated.⁷⁴ Where, however, the question of dismissal arises on an amended complaint which presents a different situation the court is not bound to follow the previous ruling, although the same question is involved.⁷⁵ An earlier ruling on a motion to dismiss for want of jurisdiction does not become the law of the case.⁷⁶ It has been held that questions de-

72. Ala.—Indian Refining Co. v. Van Valkenburg, 93 So. 895, 208 Ala. 62.

Conn.—Kelly v. City of Waterbury, 114 A. 530, 96 Conn. 494.

Ga.—Kent v. Citizens Mut. Inv. Ass'n, 196 S.E. 770, 186 Ga. 91—Taylor v. Wilmot, 178 S.E. 739, 180 Ga. 408—Prescott v. Ellis, 174 S.E. 525, 178 Ga. 822—Massachusetts Bonding & Insurance Co. v. Floyd County, 173 S.E. 720, 178 Ga. 595—Plunkett's School for Boys v. City of Thomasville, 173 S.E. 656, 178 Ga. 625—Bean v. Barron, 168 S.E. 259, 176 Ga. 285—Strickland v. Household Finance Corporation, 157 S.E. 635, 172 Ga. 279—Gandy v. Overton, 156 S.E. 189, 171 Ga. 552—Pierpont Mfg. Co. v. City of Savannah, 112 S.E. 462, 153 Ga. 455—Davis v. Berry Schools, 1 S.E.2d 602, 59 Ga.App. 549, transferred 199 S.E. 808, 187 Ga. 131—Dameron v. Liberty Nat. Life Ins. Co., 192 S.E. 446, 56 Ga. App. 257—Roles v. Edwards, 176 S.E. 106, 49 Ga.App. 527—Gaines v. Merlin, 176 S.E. 48, 49 Ga.App. 511—City of Atlanta v. Gore, 169 S.E. 776, 47 Ga.App. 70—Watson v. Atlanta Gas Light Co., 167 S.E. 718, 46 Ga.App. 326—Higgins v. Atlanta Gas Light Co., 166 S.E. 456, 46 Ga.App. 49—Hammontree v. Southern Ry. Co., 165 S.E. 813, 45 Ga.App. 728—Brown v. S. H. Kress & Co., 159 S.E. 893, 43 Ga. App. 778—Hendricks v. Strahley, 149 S.E. 70, 40 Ga.App. 119—Clarke v. Roosevelt Memorial Ass'n, 146 S.E. 522, 37 Ga.App. 312—Ponsell v. Citizens' & Southern Bank, 133 S.E. 351, 35 Ga.App. 460—Calhoun Oil & Fertilizer Co. v. Western & A. R. R., 133 S.E. 348, 35 Ga.App. 436—Hall v. Massachusetts Protective Ass'n, 128 S.E. 218, 34 Ga. App. 39—Walker v. City of Cairo, 121 S.E. 138, 31 Ga.App. 307—J. R. Watkins Co. v. Harrison, 120 S.E. 432, 31 Ga.App. 270—Bennett v. Simmons, 118 S.E. 493, 30 Ga. App. 529—Garmany v. Henson, 117 S.E. 107, 30 Ga.App. 100—Crane v. Smith, 97 S.E. 80, 22 Ga.App. 679.

S.C.—First Carolinas Joint Stock Land Bank of Columbia v. Stuckey, 169 S.E. 843, 170 S.C. 86—Brasington v. Williams, 141 S.E. 375, 143 S.C. 223—Walker v. McDonald, 126 S.E. 646, 130 S.C. 513.

49 C.J. p 453 note 41.

As warranting direction of verdict
Ga.—Davis v. Berry Schools, 1 S.E. 2d 602, 59 Ga.App. 549, transferred 199 S.E. 808, 187 Ga. 131.

An oral motion to dismiss is not available as a means of questioning the sufficiency of a petition where an unreversed decision that the petition, as against demurrer, sets forth a cause of action.—Daniel v. Powell, 165 S.E. 173, 45 Ga.App. 473.

Instrument inadmissible

Where demurrer to paragraph of answer setting up written instrument was sustained and allegations as to instrument were stricken and no exception was taken, instrument was inadmissible in evidence.—Prescott v. Ellis, 174 S.E. 525, 178 Ga. 822.

Refusal of an appeal from the action
of the trial court in overruling the demurrer of two defendants to the bill, settled the question adversely to defendants' claim, and became the law of the case, and cannot be again brought in question.—Crowder v. Crowder, 99 S.E. 746, 125 Va. 80.

73. Ga.—Phinizy v. Phinizy, 114 S.E. 185, 154 Ga. 193—Pierpont Mfg. Co. v. City of Savannah, 112 S.E. 462, 153 Ga. 455—Roles v. Edwards, 176 S.E. 106, 49 Ga. App. 527—Daniel v. Powell, 165 S.E. 173, 45 Ga.App. 473—Bibb Mfg. Co. v. Bashinski, 149 S.E. 82, 40 Ga.App. 172—White County Bank v. Clermont State Bank, 140 S.E. 767, 37 Ga.App. 268—Howard v. Citizens' & Southern Bank, 122 S.E. 717, 32 Ga.App. 22.

Conclusive as to complaint stating cause of action

N.C.—Tallassee Power Co. v. Peacock, 150 S.E. 510, 197 N.C. 735.

Overruling general demurrer to answer on first trial, ruling not being excepted to, while conclusive on law necessarily involved, was not adjudication that defendant was absolutely entitled to a verdict, provided it proved its defense as laid.—Southern Ry. Co. v. Easley Cotton Mills, 129 S.E. 19, 34 Ga.App. 192.

74. U.S.—Potts v. Village of Haverstraw, C.C.A.N.Y., 93 F.2d 506—C. I. T. Corporation v. Sanderson, D.C.Idaho, 49 F.2d 937—Weagant v. Bowers, D.C.N.Y., 49 F.2d 934, reversed on other grounds, C.C.A., 57 F.2d 679—Commercial Union of

America v. Anglo-South American Bank, C.C.A.N.Y., 10 F.2d 937—Piest v. Tide Water Oil Co., D.C. N.Y., 27 F.Supp. 1021—Ashwander v. Tennessee Valley Authority, D. C.Ala., 9 F.Supp. 965, reversed on other grounds, C.C.A., Tennessee Valley Authority v. Ashwander, 78 F.2d 578, certiorari granted 56 S. Ct. 145 (two cases), 296 U.S. 562, 80 L.Ed. 396, affirmed 56 S.Ct. 466, 297 U.S. 288, 80 L.Ed. 688, rehearing denied 56 S.Ct. 588 (two cases), 297 U.S. 728, 80 L.Ed. 1011, conformed to, D.C., 14 F.Supp. 11—Presidio Mining Co. v. Overton, C. C.A.Cal., 261 F. 933, affirmed 270 F. 388, and certiorari denied Martin v. Presidio Mining Co., 41 S.Ct. 535, 256 U.S. 694, 65 L.Ed. 1175.

Mass.—United Drug Co. v. Cordley & Hayes, 132 N.E. 56, 239 Mass. 334.

Mich.—Darling v. Abbott, 191 N.W. 20, 221 Mich. 449.

N.Y.—Schickler v. Penrod Co., 227 N.Y.S. 331, 222 App.Div. 627—Barber v. Rowe, 193 N.Y.S. 157, 200 App. Div. 290—Sterling Bag Co. v. Taylor, 7 N.Y.S.2d 45, 169 Misc. 5, affirmed Sterling Bag Co. v. City of New York, 11 N.Y.S.2d 297, 256 App.Div. 645—Henry v. New York Post, 5 N.Y.S.2d 716, 168 Misc. 247, affirmed 8 N.Y.S.2d 1022, 255 App. Div. 973—Sterling Bag Co. v. City of New York, 4 N.Y.S.2d 521, 168 Misc. 179—Holzer v. Deutsche Reichsbahn Gesellschaft, 289 N.Y. S. 943, 160 Misc. 597—Burg v. Travelers Indemnity Co., 9 N.Y. S.2d 284.

A plea to the jurisdiction should not be entertained on a particular ground after a motion to dismiss, based on the same ground, has been overruled.—Martin v. Chicago, etc., Electric R. Co., 77 N.E. 86, 220 Ill. 97.

75. U.S.—Cherry v. Howell, C.C.A. N.Y., 66 F.2d 713.

N.Y.—Irving Trust Co. v. Reikes, 240 N.Y.S. 232, 228 App.Div. 510.

76. U.S.—Blossfeld v. Pacific Tank & Pipe Co., D.C.Cal., 15 F.2d 889, 890.

Reason for rule

"It would be not only an extraordinary but a useless thing to permit the trial of a case which, on the allegations of the complaint, must be dismissed for want of jurisdiction at

cided on a motion to dismiss an appeal become the law of the case,⁷⁷ but that an improper ruling on such a motion does not preclude a disposition of the case on proper grounds on a hearing on the merits.⁷⁸

A ruling on a nonsuit generally does not become the law of the case until the cause passes beyond the court's control;⁷⁹ but it has been held that the denial of a codefendant's motions for a nonsuit and for a directed verdict becomes the law of the case that the evidence warrants a finding against him.⁸⁰

Decision in companion case. A decision in one case is controlling as the law of the case, or at least as authority, in a companion case involving the same subject matter, and in which the points of de-

cision and facts are the same,⁸¹ including a subsequent suit on the same cause of action, for the same relief whether it is independent of or ancillary to the original action.⁸² Where two cases are jointly tried as companion cases, and are appealed on separate records but involving the same questions on appeal, the decision in one case is conclusive as to the other case,⁸³ unless the ruling is wrong and no property rights have been acquired on the faith of the ruling.⁸⁴

Different judges. The ruling of one judge ordinarily becomes the law of the case in that court;⁸⁵ and one judge of a court should not ordinarily review or disturb the rulings of another judge of the same or a coordinate court in the same case,⁸⁶ un-

the close of the plaintiff's case; which, if not then dismissed, must be dismissed on the court's own motion . . . at any time before entry of a final decree at which the lack of jurisdiction was suggested; and which, on appeal, would be dismissed, rather than reviewed, because of lack of jurisdiction in the trial court."—*Blossfeld v. Pacific Tank & Pipe Co.*, *supra*.

Limitations of action

The denial of a motion to dismiss for want of jurisdiction on the ground that limitations had run was not such an adjudication against the defense of limitations as prevented defendant from pleading the statute as an affirmative defense.—*Gardner v. Beck*, 183 N.W. 962, 195 Iowa 62.

77. Cal.—*Morris Plan Co. of Orange County v. Kahen*, 26 P.2d 855, 135 Cal.App. 395—*Simons v. Porterfield*, 193 P. 172, 49 Cal.App. 296.

78. Mo.—*Star Bottling Co. v. Louisiana Purchase Exposition Co.*, 144 S.W. 776, 240 Mo. 634.

79. S.C.—*Brown v. Walker Lumber Co.*, 122 S.E. 670, 128 S.C. 161.

80. N.Y.—*Dee v. Spencer*, 251 N.Y.S. 311, 233 App.Div. 217, followed in 251 N.Y.S. 864, 233 App.Div. 894.

81. U.S.—*Miller v. Travelers Ins. Co. of Hartford, Conn.*, C.C.A. III, 80 F.2d 503, certiorari denied 56 S.Ct. 682, 298 U.S. 660, 80 L.Ed. 1385.

Ala.—*Williams v. State*, 171 So. 390, 27 Ala.App. 292—*American Equitable Assur. Co. of New York v. Bailey*, 147 So. 446, 25 Ala.App. 303, certiorari denied 147 So. 448, 226 Ala. 393.

Colo.—*Schwalb v. Riel*, 282 P. 876, 86 Colo. 429.

Fla.—*State ex rel. Chalmers v. Sholtz*, 163 So. 926, 121 Fla. 514.

Ga.—*Sheffield v. Tabb*, 173 S.E. 124, 178 Ga. 255.

Ill.—*Prudential Ins. Co. of America v. Richman*, 11 N.E.2d 132, 292 Ill.

App. 637, transferred 4 N.E.2d 76, 364 Ill. 234.

Ky.—*Marks' Adm'r v. Commonwealth*, 124 S.W.2d 762, 276 Ky. 514.

Mo.—*City of St. Louis v. Pope*, 126 S.W.2d 1215.

Tex.—*Sederholm v. City of Port Arthur, Civ.App.*, 3 S.W.2d 925, affirmed *Lyner v. La Coste*, Com. App., 13 S.W.2d 685 and *Lyner v. Keith*, Com.App., 13 S.W.2d 687—*Conner v. State*, 111 S.W.2d 266, 133 Tex.Cr. 390—*Brown v. State*, 91 S.W.2d 739, 129 Tex.Cr. 625.

A prior decision on the same facts is an authority, and not to be ignored, even though the parties to the instant case were not parties in the original case, and are therefore not bound by the decision.

U.S.—*Utilities Production Corporation v. Carter Oil Co.*, C.C.A. Okl., 72 F.2d 655, affirming, D.C., 2 F. Supp. 81.

N.Y.—*Benedict v. Lunn*, 155 N.E. 677, 244 N.Y. 373, reversing *in re Benedict*, 209 N.Y.S. 794, 214 App.Div. 741.

To prevent contradiction in judgments concerning the same matter and to avoid confusion, judgment in suit by municipalities to enjoin execution of contract for dismantling street railway, on the ground that it should be operated, although at a loss, till expiration of its franchises, should be the same as that rendered in suit to foreclose mortgage on the property.—*Southern Traction Co. v. Warren County*, 215 S.W. 283, 185 Ky. 499.

82. U.S.—*Becker Steel Co. of America v. Cummings*, C.C.A. N.Y., 95 F. 2d 319, certiorari denied 59 S.Ct. 64, 305 U.S. 604, 83 L.Ed. 384.

Changing nature of suit

Determination, on defendant foreign corporation's plea to jurisdiction, that defendant was doing business in Massachusetts and had appointed agent there, was conclusive

of such matters, after plaintiff by amendment, changed suit in equity to action at law.—*Reynolds v. Missouri, K. & T. Ry. Co.*, 117 N.E. 913, 223 Mass. 584.

83. Ala.—*Fidelity & Casualty Co. of New York v. Raborn*, 173 So. 895, 27 Ala.App. 458.

Ky.—*Krayenbuhl v. House*, 107 S.W. 2d 328, 269 Ky. 511.

Tex.—*Dossett v. Missouri State Life Ins. Co.*, Com.App., 277 S.W. 620, reversing *Missouri State Life Ins. Co. v. Dossett*, Civ.App., 265 S.W. 254, and rehearing denied *Dossett v. Missouri State Life Ins. Co.*, 284 S.W. 949.

84. Cal.—*San Pedro, L. A. & S. L. R. Co. v. City of Los Angeles*, 179 P. 390.

85. U.S.—*Aachen & Munich Fire Ins. Co. v. Guaranty Trust Co. of New York*, D.C.N.Y., 24 F.2d 466, reversed on other grounds, C.C.A., 27 F.2d 674, and certiorari denied *Guaranty Trust Co. of New York v. Aachen & Munich Fire Ins. Co.*, 49 S.Ct. 83, 278 U.S. 648, 73 L.Ed. 560—*Farmers' Loan & Trust Co. v. Miller*, D.C.N.Y., 298 F. 758, reversed on other grounds, C.C.A., *Farmers' Loan & Trust Co. v. Hicks*, 9 F.2d 848.

86. U.S.—*U. S. ex rel. Hughes v. Gault*, D.C.Iowa, 13 F.2d 225—*Commercial Union of America v. Anglo-South American Bank*, C.C. A.N.Y., 10 F.2d 937—*The Material Service, D.C.Ill.*, 11 F.Supp. 1006, affirmed, C.C.A., *Leathem Smith-Putman Navigation Co. v. Osby*, 79 F.2d 280, certiorari denied 56 S.Ct. 370, 296 U.S. 653, 80 L.Ed. 465—*U. S. v. Davis*, D.C.N.Y., 3 F.Supp. 37—*Kings County Lighting Co. v. Nixon*, D.C.N.Y., 268 F. 143, affirmed *Newton v. Kings County Lighting Co.*, 42 S.Ct. 268, 258 U.S. 180, 66 L.Ed. 550.

Hawaii.—*In re Ryan*, 31 Hawaii 547, 551, quoting *Corpus Juris*.

less the right to do so is reserved or is given by rule or by statute.⁸⁷ However, although the judge before whom the later proceedings are had may adopt the ruling or decision of his predecessor in the

case,⁸⁸ he is not absolutely bound to follow the rulings of the judge before whom the earlier proceedings were had,⁸⁹ especially where the first judge was without jurisdiction.⁹⁰

2. COURTS BY WHICH PRIOR ADJUDICATION MADE

§ 196. Same Court

A court is bound by its previous determinations, including those of its different divisions or departments.

Although a state court of last resort has power,

in a proper case, to overrule its prior opinions,⁹¹ the rule of stare decisis is frequently invoked where a question is presented which has been previously determined in the same court, in which case it applies with full force,⁹² even though the question is

Ill.—Harris v. Chicago House-Wrecking Co., 145 N.E. 666, 314 Ill. 500, reversing 226 Ill.App. 220.

Mass.—Second Nat. Bank v. Leary, 187 N.E. 611, 284 Mass. 321—United Drug Co. v. Cordley & Hayes, 132 N.E. 56, 239 Mass. 334.

N.Y.—Henlun Holding Corporation v. Eas Bros. Holding Corporation, 239 N.Y.S. 259, 228 App.Div. 102—Endurance Holding Corporation v. Kramer Surgical Stores, 238 N.Y.S. 377, 227 App.Div. 582—Mutual Thread Co. v. Oriental Textiles, 176 N.Y.S. 313, 188 App.Div. 104—Western Manufacturing & Oil Co. v. American Spirits Mfg. Co., 175 N.Y.S. 345, 187 App.Div. 230.

N.C.—Tallassee Power Co. v. Peacock, 150 S.E. 510, 197 N.C. 735.

Porto Rico.—Semidey v. Central Aguirre, 7 Porto Rico Fed. 572.

R.I.—Rhode Island Co. v. Superior Court, 104 A. 634, 42 R.I. 5.

S.C.—Georgian Co. v. Britton, 139 S.E. 217, 141 S.C. 136.

15 C.J. p 961 note 36 [g], [h], p 963 note 49.

An order reinstating a cause is not reviewable by another judge after more than five years, however erroneous at the time, in the absence of a writ of error, appeal, or certiorari; and if such order is subsequently dismissed again for want of prosecution, and again properly reinstated, by an order not questioned by appeal or otherwise, it cannot be collaterally attacked by defendant by objection to further consideration of case when called for trial before another judge.—Harris v. Chicago House-Wrecking Co., 145 N.E. 666, 314 Ill. 500, reversing 226 Ill.App. 220.

A judgment should not be vacated or nullified by a different justice sitting in same branch of court, even if such judgment was one vacating or nullifying action of still another justice sitting in same branch of court.—Public Service Commission, First Dist., v. Brooklyn Borough Gas Co., 175 N.Y.S. 28, 106 Misc. 549, affirmed 176 N.Y.S. 918, 188 App.Div. 935.

An order appointing receivers, made in a suit within the jurisdiction

of the court, and in the exercise of judicial discretion, may not be vacated by another judge sitting in the same court, as having been impropiously made.—Hardy v. North Butte Mining Co., C.C.A.Mont., 22 F.2d 62, reversing, D.C., 20 F.2d 967.

Motion for injunction pendente lite, made without leave following service of amended complaint, should be denied, where another justice had denied similar application.—Wingfoot Concessionaire v. Sunnyside Outdoor Recreation Center, 253 N.Y.S. 779, 233 App.Div. 540.

87. S.C.—Georgian Co. v. Britton, 139 S.E. 217, 141 S.C. 136.

88. U.S.—American Central Life Ins. Co. v. American Trust Co., C.C.A.Tenn., 5 F.2d 71, affirming, D.C., American Trust Co. v. American Central Life Ins. Co., 5 F.2d 69, certiorari denied American Central Life Ins. Co. v. American Trust Co., 46 S.Ct. 20, 269 U.S. 559, 70 L.Ed. 411.

89. Conn.—Santoro v. Kleinberger, 163 A. 107, 115 Conn. 631—Pettee v. Hartford-Connecticut Trust Co., 136 A. 111, 105 Conn. 595.

Hawaii.—In re Ryan, 31 Hawaii 547, 551, quoting *Corpus Juris*.

Ind.—State ex rel. Williams Coal Co. v. Duncan, 6 N.E.2d 342, 211 Ind. 203—Hamilton v. State, 190 N.E. 870, 207 Ind. 97.

Mo.—Rolle v. Lofton, App., 230 S.W. 330.

N.Y.—De Witt v. McNamee, 249 N.Y.S. 31, 232 App.Div. 88—Anna McNally, Inc., v. Chapin, 189 N.Y.S. 441, 197 App.Div. 792.

N.C.—Bland v. Faulkner, 139 S.E. 835, 194 N.C. 427.

Or.—In re Brizzolari's Estate, 275 P. 17, 129 Or. 307.

15 C.J. p 963 note 50.

An order striking allegations from the complaint does not preclude a subsequent order by another judge in the same court permitting the filing of an amended complaint containing such allegations.—Rice v. Van Why, 111 P. 599, 49 Colo. 7.

A ruling of one judge on demurrer, however, is not conclusive on another judge of same court who after-

ward tries the case, but errors in such ruling may be corrected at a subsequent term.—Follmer v. State, 142 N.W. 908, 94 Neb. 217, Ann.Cas. 1914D 151.

Discretion

In passing on the question when again presented, the successor does not review the ruling of the original judge, but must exercise his discretion as though the matter were presented for the first time.—State ex rel. Williams Coal Co. v. Duncan, 6 N.E.2d 342, 211 Ind. 203.

90. U.S.—German v. Universal Oil Products Co., C.C.A.Mo., 77 F.2d 70, affirming, D.C., Universal Oil Products Co. v. Standard Oil Co. of Indiana, 6 F.Supp. 37.

91. Tex.—Federal Royalty Co. v. State, 98 S.W.2d 993, 128 Tex. 324, reversing Douglas Oil Co. v. State, Civ.App., 81 S.W.2d 1064.

No requirement of consistency

State courts are not required to be consistent in their decisions.—Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, Tex., 59 S.Ct. 420, 306 U.S. 103, 83 L.Ed. 515, affirming, C.C.A., 95 F.2d 671, remanding cause, D.C., City Nat. Bank of Wichita Falls, Tex. v. Wichita Royalty Co., 18 F.Supp. 795, rehearing denied, C.C.A., Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 97 F.2d 249, certiorari granted 59 S.Ct. 101, 305 U.S. 587, 83 L.Ed. 371.

Reconsideration not precluded by rule

In view of grave doubts as to the propriety of the treatment, in prior decisions, of foreign law as an ordinary question of fact, rule of stare decisis does not preclude reconsideration of question.—Saloshin v. Houle, 155 A. 47, 85 N.H. 126.

92. U.S.—Sterrett v. Second Nat. Bank of Cincinnati, Ohio, 39 S.Ct. 27, 248 U.S. 73, 63 L.Ed. 135, affirming 246 F. 753, 159 C.C.A. 55, 3 A.L.R. 256, certiorari granted 38 S.Ct. 345, 246 U.S. 688, 62 L.Ed. 930—Old Colony R. Co. v. New York, N. H. & H. R. Co., C.C.A. Conn., 98 F.2d 670. Certiorari denied Palmer v. Palmer, 59 S.Ct. 361, 305 U.S. 660, 83 L.Ed. 428, re-

determined differently in other states;⁹³ and an opinion of one judge is ordinarily held binding on another judge in the same court,⁹⁴ or in the same department of the court,⁹⁵ although it is contrary to a decision in another state.⁹⁶ It has even been held that the decision of a trial court is not subject to review before another judge of the same court

when the point ruled on is presented in a subsequent stage of the same case.⁹⁷ Nevertheless it has been held that in a court presided over by a single judge the judge presiding is not bound to follow the decisions of a predecessor in office.⁹⁸

Divisions or departments. It has been held that, where a court sits in two or more divisions or de-

versed in part on other grounds 59 S.Ct. 647, 305 U.S. 573, 82 L.Ed. 364—*Papani v. U. S.*, C.C.A.Cal., 84 F.2d 160—*Harris Trust & Savings Bank v. Chicago Rys. Co.*, C.C.A. Ill., 56 F.2d 942, certiorari denied *Babcock v. Chicago Rys. Co.*, 53 S.Ct. 16, 287 U.S. 614, 77 L.Ed. 533—*U. S. v. Simonetti*, D.C.N.Y., 44 F.2d 553—*Barker Painting Co. v. Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America*, C.C.A.N.J., 34 F.2d 3, affirming, D.C., 12 F.2d 945, and certiorari granted 50 S.Ct. 88, 280 U.S. 550, 74 L.Ed. 608, affirmed 50 S.Ct. 356, 281 U.S. 462, 74 L.Ed. 867—*Brown v. Empire Brass Mfg. Co.*, D.C.Ohio, 33 F.2d 548—*Koppers Connecticut Coke Co. v. James McWilliams Blue Line*, D.C. N.Y., 18 F.Supp. 992, affirmed, C.C.A., 89 F.2d 865, certiorari denied *James McWilliams Blue Line v. Koppers Connecticut Coke Co.*, 58 S.Ct. 25, 362 U.S. 706, 82 L.Ed. 545—*City of Omaha v. Omaha Electric Light & Power Co.*, Neb., 255 F. 801, 167 C.C.A. 129, certiorari denied 39 S.Ct. 491, 250 U.S. 640, 63 L.Ed. 1184.

Ala.—*East v. Karter*, 144 So. 26, 225 Ala. 556.

Colo.—*Walker v. People*, 285 P. 1104, 87 Colo. 178—*City Council of City and County of Denver v. United Negroes Protective Ass'n*, 230 P. 598, 76 Colo. 86.

Conn.—*Appeal of Silberman*, 134 A. 773, 105 Conn. 192, affirmed in part and reversed in part on other grounds *Blodgett v. Silberman*, 48 S.Ct. 410, 277 U.S. 1, 72 L.Ed. 749.

Del.—*Hackett v. Bethlehem Steel Co.*, 165 A. 832, 5 W.W.Harr. 317—*Ajax Rubber Co. v. Gam*, 151 A. 831, 4 W.W.Harr. 264.

Fla.—*Brogan v. Ferguson*, 133 So. 317, 101 Fla. 1311.

Ill.—*People ex rel. Urch v. Ryan*, 187 N.E. 431, 353 Ill. 437—*People v. Taylor*, 174 N.E. 59, 342 Ill. 88.

Ind.—*Union Hospital v. S. P. Brown & Co.*, 11 N.E.2d 520, 104 Ind.App. 430—*Dalley v. Pugh*, 131 N.E. 836, 83 Ind.App. 431.

Iowa.—*In re Sterner's Estate*, 278 N.W. 216, 224 Iowa 817—*Bechtel v. District Court of Worth County*, 245 N.W. 249, 215 Iowa 295—*Federal Surety Co. v. France*, 238 N.W. 460, 212 Iowa 1403—*In re Caylor's Estate*, 227 N.W. 103, 203 Iowa 1208.

Ky.—*Board of Com'rs of City of Middlesboro v. Kentucky Utilities Co.*, 101 S.W.2d 414, 267 Ky. 99.

Mass.—*Brown v. Palmer Clay Products Co.*, 195 N.E. 122, 290 Mass. 103, certiorari granted *Palmer Clay Products Co. v. Brown*, 56 S.Ct. 98, 296 U.S. 556, 80 L.Ed. 392, affirmed 56 S.Ct. 450, 297 U.S. 227, 80 L.Ed. 655—*Whitley's Case*, 147 N.E. 576, 252 Mass. 211.

Mich.—*Reichert v. Farmers' & Workingmen's Savings Bank*, 242 N.W. 239, 241, 257 Mich. 500, citing *Coxpus Juris*.

Mo.—*State ex rel. Kansas City University of Physicians and Surgeons v. North*, 294 S.W. 1012, 316 Mo. 1050—*Mayes v. Mayes*, App., 104 S.W.2d 1019, reversed on other grounds 116 S.W.2d 1, 342 Mo. 401.

N.J.—*Hornsby v. Board of Aldermen of City of Perth Amboy*, 123 A. 360, 89 N.J.Law 277—*Losick v. Binda*, 130 A. 537, 102 N.J.Law 157, affirming 128 A. 619, 3 N.J. Misc. 422—*Browne v. Hagen*, 100 A. 857, 90 N.J.Law 423, reversed on other grounds 104 A. 207, 91 N.J. Law 544—*Philadelphia & Camden Ferry Co. v. Johnson*, 121 A. 900, 94 N.J.Eq. 296—*Clement v. Creveling*, 88 A. 189, 82 N.J.Eq. 27, reversed on other grounds 91 A. 89, 83 N.J.Eq. 318.

N.Y.—*A. Victor & Co. v. Sleining*, 4 N.Y.S.2d 597, 167 Misc. 719, affirmed 9 N.Y.S.2d 323, 255 App.Div. 678, reargument denied 11 N.Y.S.2d 548—*Baerlein v. Winter*, 170 N.Y. S. 399, 103 Misc. 506.

N.C.—*Sidney Spitzer & Co. v. Commissioners of Franklin County*, 123 S.E. 636, 188 N.C. 30.

Ohio.—*State ex rel. Gullbert v. Kilgour*, 8 Ohio N.P.N.S., 617.

Okl.—*Houts v. Stevenson*, 229 P. 424, 103 Okl. 58.

Or.—*In re Winters' Estate*, 80 P.2d 714, 159 Or. 637—*Bump v. Union High School Dist. No. 3*, 24 P.2d 880, 144 Or. 390—*Basche-Sage Hardware Co. v. De Wolfe*, 231 P. 135, 113 Or. 246.

S.C.—*Williamson v. Richards*, 155 S.E. 890, 158 S.C. 534.

Tex.—*Sovereign Camp, W. O. W. v. Jackson*, Civ.App., 264 S.W. 289.

Utah.—*Stokey v. Green*, 178 P. 586, 53 Utah 311.

Wash.—*McGinn v. North Coast Stevedoring Co.*, 270 P. 113, 149 Wash. 1—*State v. Superior Court*

for Clark County, 266 P. 134, 147 Wash. 294—*Godefroy v. Reilly*, 262 P. 639, 146 Wash. 257.

15 C.J. p 919 note 1, p 923 note 29 [d].

After denial of review

Appellate court is bound by decision rendered by it in case where review was denied by court of last resort.

Cal.—*Masonic Mines Ass'n v. Superior Court in and for Alameda County*, 28 P.2d 691, 136 Cal.App. 298.

Tex.—*Bailey v. Shell Petroleum Corporation*, Civ.App., 95 S.W.2d 982, error refused.

A referee's opinion, when approved by the chancellor as a whole, possesses the force of a judicial precedent in the chancery court.—*Martindale v. Bowers Beach Corporation*, 118 A. 299, 13 Del.Ch. 283.

93. Iowa.—*Bates v. Nichols*, 274 N.W. 82, 223 Iowa 878.

Md.—*Gillespie v. State*, 127 A. 727, 147 Md. 45.

S.C.—*Deery v. Jefferson Standard Life Ins. Co.*, 176 S.E. 876.

94. U.S.—*U. S. v. Hirschhorn*, D.C. N.Y., 21 F.2d 758—*American Scantic Line v. U. S.*, D.C.N.Y., 27 F. Supp. 271—*Mayer v. Marcus Mayer Co.*, D.C.Pa., 25 F.Supp. 58—*Holmberg v. Anchell*, D.C.N.Y., 24 F. Supp. 594—*Brusselback v. Cago Corporation*, D.C.N.Y., 24 F.Supp. 524—*Wells Fargo & Co. v. Cuneo*, D.C.N.Y., 241 F. 727.

In ancillary suit in nature of interpleader, it was judge's duty, on motion to dismiss, to follow decision of other judge of same court in original suit respecting propriety of such remedy, although not res judicata.—*Marine Midland Trust Co. of New York v. Irving Trust Co.*, D.C.N.Y., 56 F.2d 385, appeal dismissed, C.C.A., *Marine Midland Trust Co. of New York v. Eybro Corporation*, 58 F.2d 165.

95. N.Y.—*Head v. Smith*, 44 How. Fr. 476.

96. N.Y.—*Head v. Smith*, supra.

97. U.S.—*Wakelee v. Davis*, C.C.N.Y., 44 F. 532, affirmed 15 S.Ct. 555, 156 U.S. 680, 39 L.Ed. 578.

4 C.J. p 1104 note 36.

98. N.Y.—*Matter of Watson*, 148 N.Y.S. 902, 86 Misc. 538, affirmed 150 N.Y.S. 776, 165 App.Div. 252.

15 C.J. p 920 note 4.

partments, a decision by one of such divisions or departments should be followed by another,⁹⁹ and while there are to be found in the reports numerous instances where such divisions or departments have rendered conflicting decisions, this has probably been due to a feeling that such divisions or departments were in the same situation as coordinate courts, one of which, as shown *infra* § 200, is not bound by the decision of another.

§ 197. Courts of Last Resort

Decisions of courts of last resort should be followed by inferior courts until reversed or overruled.

Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness, until they have been reversed or overruled,¹ and this rule, as applied to inferior

99. *Miss.—Jefferson Standard Life Ins. Co. v. Dorsey*, 173 So. 672, 178 Miss. 838.

15 C.J. p 920 note 5.

1. U.S.—*California Water Service Co. v. City of Redding*, Cal., 58 S. Ct. 865, 304 U.S. 252, 32 L.Ed. 1323, affirming, D.C., 22 F.Supp. 641—*Miguel v. McCarl*, 54 S.Ct. 465, 291 U.S. 442, 78 L.Ed. 901, modifying *McCarl v. Miguel*, 66 F.2d 564, 62 App.D.C. 259, certiorari granted *Miguel v. McCarl*, 54 S.Ct. 102, 290 U.S. 618, 78 L.Ed. 540—*Valli v. U. S.*, C.C.A.Mass., 94 F.2d 687, certiorari granted 58 S.Ct. 760, 303 U.S. 632, 82 L.Ed. 1092—*Sumney v. Southern Ry. Co.*, C.C.A.N.C., 89 F.2d 437—*Kattelman v. Madden*, C.C.A.Mo., 88 F.2d 858—*Pink v. Fidelity & Deposit Co. of Maryland*, C.C.A.N.Y., 88 F.2d 630, affirming, D.C., 15 F.Supp. 715, certiorari granted *Fidelity & Deposit Co. of Maryland v. Pink*, 57 S.Ct. 939, 301 U.S. 678, 81 L.Ed. 1338, reversed on other grounds 58 S.Ct. 162, 302 U.S. 224, 82 L.Ed. 213, rehearing denied 58 S.Ct. 407, 302 U.S. 780, 82 L.Ed. 603—*Brinkley v. Hassig*, C.C.A.Kan., 83 F.2d 351—*Paddock v. U. S.*, C.C.A.Ariz., 79 F.2d 872—*Arizona Wholesale Grocery Co. v. Southern Pac. Co.*, C.C.A.Ariz., 68 F.2d 601—*Hood v. Brownlee*, C.C.A.N.C., 62 F.2d 675—*Laubenhelmer v. Factor*, C.C.A.Ill., 61 F.2d 626, certiorari granted *Factor v. Laubenhelmer*, 53 S.Ct. 523, 289 U.S. 713, 77 L.Ed. 1467, affirmed 54 S.Ct. 191, 290 U.S. 276, 78 L.Ed. 315—*The Princess Sophia*, C.C.A.Wash., 61 F.2d 339, certiorari denied *Brace v. Canadian Pac. Co.*, 53 S.Ct. 396, 288 U.S. 604, 77 L.Ed. 980—*The Czechoslovakia*, C.C.A.Ia., 58 F.2d 746—*Carlo v. Delaware, L. & W. R. Co.*, C.C.A.N.Y., 54 F.2d 475—*First Trust Co. of Omaha v. Allen*, D.C.Neb., 51 F.2d 1069, affirmed, C.C.A., 60 F.2d 812, certiorari denied *Doolittle v. Allen*, 53 S.Ct. 315, 287 U.S. 671, 77 L.Ed. 578—*Town of Clayton v. Colorado & S. Ry. Co.*, C.C.A.N.M., 51 F.2d 977, 82 A.L.R. 417—*J. Chr. G. Hupfel Co. v. Anderson*, D.C.N.Y., 51 F.2d 115, affirmed, C.C.A., 55 F.2d 1080, certiorari denied 52 S.Ct. 504, 286 U.S. 551, 76 L.Ed. 1286—*Pacific Gas & Electric Co. v. U. S.*, C.C.A.Cal., 45 F.2d 708, cer-

tiorari denied 51 S.Ct. 654, 283 U.S. 862, 75 L.Ed. 1467, and *U. S. v. Pacific Gas & Electric Co.*, 51 S.Ct. 654, 283 U.S. 861, 76 L.Ed. 467—*In re McCown*, D.C.Pa., 31 F.2d 334, affirmed, C.C.A., Middleton v. Fidelity-Philadelphia Trust Co., 35 F.2d 851, followed in, C.C.A., Middleton v. Dussoulas, 35 F.2d 857—*La Flower v. Merrill*, D.C.Cal., 28 F.2d 734—*Ruddock v. Bloedel Donovan Lumber Mills*, C.C.A.Wash., 28 F.2d 684—*U. S. v. Dworkin*, D.C.Mass., 25 F.2d 738—*Travelers Mut. Casualty Co. of Des Moines v. Skeer*, D.C.Mo., 24 F.Supp. 805—*Idaho Farms Co. v. North Side Canal Co.*, D.C.Idaho, 24 F.Supp. 189—*Western Maryland Ry. Co. v. U. S.*, D.C.Md., 23 F.Supp. 554—*Harwood v. McMurtry*, D.C.Ky., 22 F.Supp. 572—*In re Lindsay-Strathmore Irr. Dist.*, D.C.Cal., 21 F.Supp. 129, motion denied *U. S. v. Bekins*, 58 S.Ct. 647, and *Lindsay-Strathmore Irr. Dist. v. Bekins*, 58 S.Ct. 649, reversed on other grounds *U. S. v. Bekins*, 58 S.Ct. 811, 304 U.S. 27, 83 L.Ed. 1137, rehearing denied 58 S.Ct. 1043, 304 U.S. 589, 82 L.Ed. 1549 and *Lindsay-Strathmore Irr. Dist. v. Bekins*, 58 S.Ct. 1044, 304 U.S. 589, 82 L.Ed. 1549—*U. S. v. Fuller*, D.C.Idaho, 20 F.Supp. 339—*Miller v. Vincennes Steel Corporation*, D.C.Miss., 20 F.Supp. 553, modified on other grounds, C.C.A., Vincennes Steel Corporation v. Miller, 94 F.2d 347—*In re Samuel Kades, Inc.*, D.C.Pa., 18 F.Supp. 455—*U. S. ex rel. Guest v. Perkins*, D.C.D.C., 17 F.Supp. 177—*In re Lehrenkrauss*, D.C.N.Y., 14 F.Supp. 682—*Gregg v. U. S.*, Ct.Cl., 13 F.Supp. 147—*Ballard v. Helburn*, D.C.Ky., 9 F.Supp. 812, affirmed, C.C.A., Helburn v. Ballard, 85 F.2d 613—*Mooney v. Holohan*, D.C.Cal., 7 F.Supp. 385, appeal denied, C.C.A., *In re Mooney*, 72 F.2d 503—*In re Missouri Pac. Ry. Co.*, D.C.Mo., 7 F.Supp. 1, certiorari granted *U. S. v. Bankers' Trust Co.*, 55 S.Ct. 145 (two cases), 293 U.S. 548, 79 L.Ed. 652, affirmed 55 S.Ct. 407, 294 U.S. 240, 79 L.Ed. 885, 95 A.L.R. 1352—*McNary v. Guaranty Trust Co. of New York*, D.C.Ohio, 6 F.Supp. 616—*Lawrence v. Travelers' Ins. Co.*, D.C.Pa., 6 F.Supp. 428—*U. S. v. Suburban Motor Service*

Corporation, D.C.Ill., 5 F.Supp. 798—*New Jersey Zinc Co. v. Singmaster*, D.C.N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied *Singmaster v. New Jersey Zinc Co.*, 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685—*Baker v. Glenn*, D.C.Ky., 2 F.Supp. 880—*Folding Furniture Works v. Industrial Commission of Wisconsin*, D.C.Wis., 300 F.991—*Yohyowan v. Luce*, D.C.Wash., 291 F.425—*Title Guarantee & Trust Co. v. Edwards*, D.C.N.Y., 290 F.617, error dismissed 44 S.Ct. 4, 263 U.S. 672, 68 L.Ed. 499—*Ex parte Mason*, D.C.N.Y., 256 F.384—*Jellison v. Krell Piano Co.*, D.C.Ky., 246 F.509—*U. S. v. North American Mercantile Co.*, 17 C.C.P.A. 378 (Customs).

Ala.—Moffatt v. Cassimus, 190 So. 297, 28 Ala.App. 582—*Huston v. State*, 186 So. 183, 28 Ala.App. 421—*American Discount Co. v. Ramsey*, 184 So. 820, 28 Ala.App. 382—*Lackey v. Thomas*, 184 So. 262, 28 Ala.App. 302, certiorari denied *Ex parte Thomas*, 184 So. 264, 236 Ala. 602—*Crow v. State*, 183 So. 397, 28 Ala.App. 319—*Morgan v. State*, 182 So. 466, 28 Ala.App. 241, certiorari denied 182 So. 468, 236 Ala. 381—*Norris v. Neely*, 180 So. 124, 28 Ala.App. 171—*Atkins v. State*, 169 So. 330, 27 Ala.App. 212—*Southern Ry. Co. v. Webb*, 168 So. 227, 27 Ala.App. 173—*Southern Ry. Co. v. McCants*, 163 So. 363, 26 Ala.App. 442, certiorari denied 163 So. 365, 231 Ala. 22—*Lee v. State*, 150 So. 167, 25 Ala.App. 488, conforming to answer 150 So. 164, 227 Ala. 2, certiorari denied 150 So. 169, 227 Ala. 334—*Birmingham Electric Co. v. Hereford*, 149 So. 862, 25 Ala.App. 465, certiorari denied 149 So. 863, 227 Ala. 321—*Aetna Life Ins. Co. v. Copeland*, 147 So. 206, 25 Ala.App. 383—*Curry v. State*, 146 So. 81, 25 Ala.App. 317—*Pelham v. State*, 134 So. 888, 24 Ala.App. 330, certiorari denied 134 So. 890, 223 Ala. 155—*Lee v. State*, 132 So. 61, 24 Ala.App. 168—*City of Mobile v. Lartigue*, 127 So. 257, 23 Ala.App. 479—*Irwin v. State*, 124 So. 408, 23 Ala.App. 284, certiorari denied 124 So. 410, 220 Ala. 160—*Burns v. State*, 117 So. 616, 22 Ala.App. 501, followed in *Harris v. State*, 117 So. 616, 22

- Ala.App. 501—State v. Burchfield, 117 So. 485, 22 Ala.App. 502, conforming to answer to certified question 117 So. 483, 218 Ala. 8—Hargrove v. State, 111 So. 587, 22 Ala.App. 67—Birmingham Electric Co. v. Praytor, 111 So. 895, 22 Ala.App. 45—Bates v. Louisville & N. R. Co., 106 So. 394, 21 Ala.App. 176, certiorari denied Ex parte Bates, 106 So. 395, 214 Ala. 77—Farmers' & Merchants' Bank of Samson v. American Ry. Express Co., 106 So. 195, 21 Ala.App. 133, certiorari granted Ex parte American Ry. Express Co., 106 So. 197, 213 Ala. 151—Priester v. Western Union Telegraph Co., 102 So. 372, 20 Ala.App. 388, reversed on other grounds Ex parte Priester, 102 So. 376, 212 Ala. 271—Alabama Fuel & Iron Co. v. Courson, 101 So. 638, 20 Ala.App. 312, reversed on other grounds Ex parte Alabama Fuel & Iron Co., 101 So. 642, 212 Ala. 1—Miller v. State, 95 So. 915, 19 Ala.App. 137, certiorari denied Ex parte Miller, 95 So. 922, 209 Ala. 700—Durdin v. State, 93 So. 342, 18 Ala.App. 498, certiorari denied Ex parte Durdin, 93 So. 922, 208 Ala. 697.
- Cal.—Agricultural Prorate Co. of California v. Superior Court in and for Sonoma County, 88 P.2d 253, 31 Cal.App.2d 518—Westberg v. Willde, App. 85 P.2d 507—National Automobile Ins. Co. v. Industrial Accident Commission, App. 84 P.2d 201—Crescent City v. Moran, 77 P.2d 281, 25 Cal.App.2d 183—Los Angeles County v. Leach, 59 P.2d 1045, 15 Cal.App.2d 721—Krasnow v. Superior Court in and for Sacramento County, 59 P.2d 442, 15 Cal.App.2d 141—In re Maguire's Estate, 58 P.2d 209, 14 Cal.App.2d 388—People v. MacMullen, 24 P.2d 794, 134 Cal.App. 81—Butler v. Wyman, 18 P.2d 354, 128 Cal.App. 736—Capron v. West, 300 P. 149, 114 Cal.App. 633—Blair v. Williams, 261 P. 539, 86 Cal.App. 676—Alkus v. Davies, 260 P. 894, 86 Cal.App. 355—Reardon v. Spring Valley Water Co., 228 P. 406, 68 Cal.App. 13—State v. San Francisco Savings & Loan Soc., 225 P. 309, 66 Cal.App. 53—Winter v. DeShields, 189 P. 703, 46 Cal.App. 574—Colusa & H. R. Co. v. Glenn, 169 P. 423, 35 Cal.App. 205.
- Colo.—Home Ins. Co. of New York v. Taylor, 32 P.2d 183, 94 Colo. 446—Hickman-Lumbeck Grocery Co. v. Hager, 227 P. 829, 75 Colo. 554—Broadhead v. Farmers' State Bank of Sedgwick, 211 P. 376, 72 Colo. 430.
- Del.—Wilmington Trust Co. v. Baldwin, Super., 195 A. 287.
- D.C.—Curtis v. Welker, 296 F. 1019, 54 App.D.C. 272—Brown v. Helvering, 97 F.2d 189, 68 App.D.C. 332.
- Fla.—State ex rel. Seville Holding Co. v. Draughon, 173 So. 353, 127 Fla. 528, 111 A.L.R. 234.
- Ga.—Morris v. Morris, 199 S.E. 840, 58 Ga.App. 707—Battle v. State, 198 S.E. 719, 58 Ga.App. 395—Rogers v. Carmichael, 198 S.E. 318, 58 Ga.App. 343, certiorari dismissed 200 S.E. 800, 187 Ga. 432—Ben-nett v. State, 189 S.E. 676, 55 Ga.App. 194—Turner v. Plottel, 166 S.E. 31, 45 Ga.App. 621—Western & A. R. R. v. Michael, 160 S.E. 93, 43 Ga.App. 703, conforming to answers to certified questions 158 S.E. 426, 172 Ga. 561—Burnette v. Johnson, 144 S.E. 36, 38 Ga.App. 396—Porter Fertilizer Co. v. Brewer, 136 S.E. 477, 36 Ga.App. 329—Stansall v. Columbian Nat. Life Ins. Co., 109 S.E. 297, 27 Ga.App. 537—Grier v. State, 97 S.E. 883, 23 Ga.App. 230—Lee v. Central of Georgia Ry. Co., 94 S.E. 888, 21 Ga.App. 558, affirmed 40 S.Ct. 254, 252 U.S. 109, 64 L.Ed. 482—Hammond v. Director General of Railroads, 101 S.E. 588, 24 Ga.App. 635—Davis v. Hall, 93 S.E. 25, 20 Ga.App. 398.
- Ill.—People v. Baldwin, 174 N.E. 51, 341 Ill. 604—Hibbard, Spencer, Bartlett & Co. v. City of Chicago, 19 N.E.2d 625, 299 Ill.App. 614—Kerner v. Thompson, 13 N.E.2d 110, 293 Ill.App. 454, certiorari denied Thompson v. Kerner, 59 S.Ct. 102, 305 U.S. 635, 83 L.Ed. 408—People v. Baldwin, 6 N.E.2d 904, 289 Ill.App. 126—Pfeffer v. Farmers' State Bank of Schaumburg, 263 Ill. App. 360—Taylor v. Southern Ry. Co., 259 Ill.App. 271, reversed on other grounds 350 Ill. 139, 132 N.E. 805—People v. Elbert, 217 Ill.App. 394—Boston Store of Chicago v. Retail Clerks' International Protective Ass'n, Local 226, 216 Ill.App. 428—Palmer v. Union Elevated R. Co., 215 Ill.App. 91—Barretta v. Chicago Rys. Co., 214 Ill.App. 455—Page v. W. F. Hallam & Co., 212 Ill.App. 428. See Zurasky v. Handycap Co., 210 Ill.App. 254—See Thomas v. Wells Fargo & Co., 208 Ill.App. 381—See People v. Schlick, 200 Ill.App. 605.
- Ind.—State v. Superior Court of Marion County, 177 N.E. 322, 202 Ind. 589—In re Petition to Transfer Appeals, 174 N.E. 812, 202 Ind. 365, denying transfer Busch v. State, 167 N.E. 144, 92 Ind.App. 122, denying rehearing 165 N.E. 560, 92 Ind.App. 122—Board of Com'rs of Lake County v. Woodward, 194 N.E. 735, 101 Ind.App. 142—Shaw v. Union Trust Co. of Indianapolis, 137 N.E. 895, 79 Ind.App. 277, transferred 136 N.E. 571, 192 Ind. 410—National Express Co. v. Moore, 135 N.E. 264, 78 Ind.App. 696.
- Iowa.—State v. Striggles, 210 N.W. 137, 202 Iowa 1318, 49 A.L.R. 1270.
- Ky.—Commonwealth v. Crumbaugh, 197 S.W. 401, 176 Ky. 720.
- La.—Vaccaro v. Favrot, 128 So. 284, 170 La. 483, affirming 125 So. 296, 13 La.App. 120—Granier v. Bourgeois, App. 189 So. 474, denying rehearing 188 So. 423—Succession of Lasseigne, App. 181 So. 879—State ex rel. Boykin v. Hope Producing Co., App. 167 So. 506—Smith v. Metropolitan Life Ins. Co., App. 155 So. 789, recalling 152 So. 369—Norton v. Crescent City Ice Mfg. Co., App. 146 So. 758, rehearing denied 147 So. 385, and annulled on other grounds 150 So. 859, 178 La. 150 (second case)—Giroir v. Celotex Co., 119 So. 777, 10 La.App. 141—Leopold v. Ninth Senatorial Dist. Democratic Executive Committee, 8 La.App. 232.
- Miss.—Brock v. Adler, 177 So. 523, 180 Miss. 118, decree entered 178 So. 593, 180 Miss. 126—White v. Williams, 132 So. 573, 159 Miss. 732, 76 A.L.R. 757.
- Mo.—State ex rel. Fourcade v. Shain, 119 S.W.2d 788, 342 Mo. 1190, quashing opinion Fourcade v. Kansas City, App. 107 S.W.2d 953—State ex rel. Gatewood v. Trimble, 62 S.W.2d 756, 333 Mo. 207, quashing certiorari Citizens' Sec. Bank of Englewood v. Gatewood, App. 36 S.W.2d 426—State ex rel. Mac-lay v. Cox, 10 S.W.2d 940, 320 Mo. 1218, quashing certiorari Mac-lay v. Missouri Pac. Ry. Co., App. 299 S.W. 626—State ex rel. National Ammonia Co. v. Daues, 10 S.W.2d 931, 320 Mo. 1234, quashing certiorari Turley v. National Ammonia Co., App. 299 S.W. 53—State v. Richardson, 292 S.W. 61, 316 Mo. 1014—Stoneham v. Davis, 280 S.W. 45, certiorari granted Mellon v. Stoneham, 46 S.Ct. 632, 271 U.S. 657, 70 L.Ed. 1136, certiorari dismissed 47 S.Ct. 333, 273 U.S. 776, 71 L.Ed. 887—State ex rel. Kranke v. Calhoun, 232 S.W. 1033, affirming 227 S.W. 1080, 206 Mo.App. 208—Breit v. Bowland, App. 127 S.W.2d 71—Van Houten v. Kansas City Public Service Co., App. 122 S.W.2d 868—Harrington v. Harrington, App. 121 S.W.2d 291—Milby v. Murphy, App. 121 S.W.2d 169—St. Paul & Kansas City Short Line R. Co. v. U. S. Fidelity & Guaranty Co., 105 S.W.2d 14, 231 Mo.App. 613—Kling v. Kansas City, 61 S.W.2d 411, 227 Mo.App. 1248—Vroom v. Thompson, 55 S.W.2d 1024, 227 Mo.App. 531—Ferris v. Missouri Pac. R. Co., 48 S.W.2d 138, 226 Mo.App. 951—Bagby v. Kirby, 35 S.W.2d 54, 225 Mo.App. 1190—Gauck v. Advance Finance Co., App. 17 S.W.2d 576—Lewellen v. Lewellen, 13 S.W.2d 565, 223 Mo.App. 262—Hopkins v. American Car & Foundry Co., 11 S.W.2d 65, 222 Mo.App. 801—Klusman v. Harper, 298 S.W. 121, 221 Mo.App. 1110—

- Little v. St. Louis-San Francisco Ry. Co., App., 297 S.W. 980—Mock v. American Ry. Express Co., App., 296 S.W. 855—Orlando v. Brown, App., 296 S.W. 245—Lutgen v. Missouri Pac. R. Co., App., 294 S.W. 444—Flenner v. Southwest Missouri R. Co., 290 S.W. 78, 221 Mo. App. 160—Hildreth v. Hudloe, App., 282 S.W. 747—Anderson v. Nagel, 259 S.W. 858, 214 Mo.App. 134—State v. Caldwell, App., 245 S.W. 626—Robison v. Floesch Const. Co., App., 242 S.W. 421—Esstman v. United Rys. Co. of St. Louis, App., 220 S.W. 508—Sethman v. Union Depot Bridge & Terminal R. Co., 218 S.W. 879, 203 Mo.App. 381—Cook v. Smith, 204 S.W. 919, 200 Mo.App. 218.
- N.J.—Ex parte Connellan, 8 A.2d 345, 123 N.J.Law 229—Fidelity Union Trust Co. v. Martin, 192 A. 74, 118 N.J.Law 277, affirmed 197 A. 40 (two cases) 119 N.J.Law 425 and 197 A. 41, 119 N.J.Law 426—O'Brien v. Board of Public Utility Com'rs, 105 A. 132, 92 N.J.Law 44, affirmed 106 A. 414, 92 N.J.Law 587—Gordon v. Gordon, 103 A. 31, 88 N.J.Eq. 436, affirmed 105 A. 242, 89 N.J.Eq. 535—Pitsch v. Hopper, 194 A. 147, 15 N.J.Misc. 662—J. J. Hockenjos Co. v. Lurie, 173 A. 913, 12 N.J.Misc. 645—Makohon v. Millers Nat. Ins. Co., 171 A. 513, 12 N.J.Misc. 282.
- N.Y.—Quality Motors of Rochester v. (American) Lumbermen's Mut. Casualty Co. of Illinois, 9 N.Y.S.2d 108, 256 App.Div. 892, affirmed 21 N.E.2d 527, 280 N.Y. 771—Becker v. Faber, 4 N.Y.S.2d 765, 254 App. Div. 772, reversed on other grounds 19 N.E.2d 997, 280 N.Y. 146, 121 A.L.R. 1010, reargument denied Becker v. Inteman, 21 N.E.2d 216, 280 N.Y. 730—Fordham Manor Reformed Church v. Walsh, 216 N.Y.S. 260, 217 App.Div. 177, reversed on other grounds People ex rel. Fordham Manor Reformed Church v. Walsh, 155 N.E. 575, 244 N.Y. 280—Titus v. Booker, 215 N.Y.S. 488, 216 App. Div. 608, affirmed 155 N.E. 727, 244 N.Y. 421—People v. Cascia, 181 N.Y.S. 855, 191 App.Div. 376—Petty v. Petty, 175 N.Y.S. 30, 186 App. Div. 738, affirmed Petty v. Langan, 125 N.E. 924, 227 N.Y. 621—Montrose v. Baggett, 146 N.Y.S. 649, 161 App.Div. 494—In re Van Ripper's Will, 11 N.Y.S.2d 975, 171 Misc. 178—National Variety Artists v. Mosconi, 9 N.Y.S.2d 498, 169 Misc. 982—Carbone v. Carbone, 2 N.Y.S.2d 869, 166 Misc. 924—Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845—In re Brown-ing's Estate, 1 N.Y.S.2d 67, 165 Misc. 675, affirmed In re Brown-ing's Will, 7 N.Y.S.2d 486, 255 App. Div. 764, appeal granted In re Brown-ing's Estate, 7 N.Y.S.2d 1007, 255 App.Div. 846, affirmed 20 N.E.2d 25—In re Hilliard's Will, 299 N.Y.S. 788, 164 Misc. 677, affirmed In re Myers, 5 N.Y.S.2d 92, 254 App. Div. 879, reargument denied In re Hilliard's Estate, 7 N.Y.S.2d 111, 255 App.Div. 781—Blaustein v. Pan American Petroleum & Transport Co., 297 N.Y.S. 539, 163 Misc. 749, affirmed 296 N.Y.S. 996, 251 App. Div. 704—Trapp v. Seaboard Surety Co., 292 N.Y.S. 260, 161 Misc. 428—Candee Smith & Howland Co. v. Bendish Contracting Co., 265 N.Y.S. 737, 148 Misc. 262—Goldsmith v. Outdoor Advertising Co., 264 N.Y.S. 189, 147 Misc. 536—Shelter v. Grobsmith, 257 N.Y.S. 353, 143 Misc. 380—People v. Freiman, 230 N.Y.S. 614, 132 Misc. 554—Interborough Rapid Transit Co. v. Green, 227 N.Y.S. 258, 131 Misc. 682—Application of Gilchrist, 224 N.Y.S. 210, 130 Misc. 456—Seagram-Distillers Corporation v. Sey-opp Corporation, 2 N.Y.S.2d 550.
- N.C.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 188 N.C. 30.
- Ohio.—State ex rel. Erman v. Gilman, 185 N.E. 808, 44 Ohio App. 339, error dismissed 186 N.E. 4, 126 Ohio St. 379—Rodgers v. Miller, 182 N.E. 654, 43 Ohio App. 198—Lighty v. Board of Education of Crane Tp., Rural School Dist. of Paulding County, 171 N.E. 846, 35 Ohio App. 81—University Club Co. v. McBride, 158 N.E. 9, 25 Ohio App. 380—Ballard v. Ballard, 26 Ohio Cir. Ct.N.S., 490—City of Newark v. Board of Education, 28 Ohio N.P., N.S., 297.
- Pa.—Commonwealth v. Provident Trust Co. of Philadelphia, 180 A. 16, 319 Pa. 385, followed in 180 A. 20, 319 Pa. 395, 180 A. 21, first case, 319 Pa. 395, and 180 A. 21, second case, 319 Pa. 396—Lemon v. Campbell, 7 A.2d 643, 136 Pa. Super. 370—In re Curtis' Estate, 3 A.2d 980, 134 Pa.Super. 364, affirmed, Sup., 6 A.2d 283—Baier v. Glen Alden Coal Co., 200 A. 190, 131 Pa.Super. 309, affirmed 3 A.2d 349, 332 Pa. 561—Sherman v. Welsh, 87 Pa.Super. 282—Idell v. Day, 79 Pa.Super. 215—Lipoff v. United Food Workers Industrial Union, Local No. 107, 33 Pa.Dist. & Co. 599.
- S.D.—Kapaun v. Federal Land Bank of Omaha, 269 N.W. 564, 64 S.D. 635, followed in Gilmore v. Federal Land Bank of Omaha, 269 N.W. 566, 64 S.D. 639, and Johnson v. Federal Land Bank of Omaha, 269 N.W. 567, 64 S.D. 640.
- Tenn.—Knox County v. Lemarr, 97 S.W.2d 659, 20 Tenn.App. 258—Securities Inv. Co. v. White, 91 S.W.2d 581, 19 Tenn.App. 540—Texas Co. v. Ingraham, 64 S.W.2d 208, 16 Tenn.App. 267.
- Tex.—Federal Royalty Co. v. State, 98 S.W.2d 993, 128 Tex. 324, revers-ing Douglas Oil Co. v. State, Civ. App., 81 S.W.2d 1064—Galveston, H. & S. A. Ry. Co. v. McCrorey, Com.App., 23 S.W.2d 691, reversing, Civ.App., 10 S.W.2d 1021—First Nat. Bank of Willsboro v. First Nat. Bank of Quitman, Tex., Com. App., 299 S.W. 856, affirming First Nat. Bank of Quitman, Tex., v. Wood County, Civ.App., 294 S.W. 324—Benavides v. Garcia, Com. App., 290 S.W. 739, affirming, Civ. App., 283 S.W. 611—Texas & P. Ry. Co. v. Reeves, Com.App., 256 S.W. 902, affirming, Civ.App., 202 S.W. 814—Richardson v. Bird Bros., Civ. App., 126 S.W.2d 1078—Ball v. Gulf States Utilities Co., Civ.App., 123 S.W.2d 937, error dismissed—O'Brien v. Smith, Civ.App., 118 S.W.2d 474, error granted—Standard Sav. ings & Loan Ass'n v. Miller, Civ. App., 114 S.W.2d 1201—Alexander v. Byrd, Civ.App., 114 S.W.2d 915, error refused—Washington Nat. Ins. Co. v. Guadalupana Funeral Home, Civ.App., 109 S.W.2d 1002—Stark v. American Nat. Bank of Beaumont, Civ.App., 100 S.W.2d 208, error refused—Casparis v. Fidelity Union Casualty Co., Civ.App., 65 S.W.2d 404, error refused—Greenfield v. Chas. K. Horton, Inc., Civ.App., 64 S.W.2d 369—Park Presbyterian Church of Italy v. Wm. Cameron & Co., Civ.App., 38 S.W.2d 901, reversed on other grounds, Com.App., 58 S.W.2d 63—Lumbermen's Reciprocal Ass'n v. Hull, Civ.App., 23 S.W.2d 842, error dismissed—Crawford v. Coleman Hotel Co., Civ.App., 16 S.W.2d 307, error refused—Porter v. State, Civ.App., 15 S.W.2d 191—Smith v. Thornhill, Civ.App., 12 S.W.2d 625, affirmed, Com.App., 25 S.W.2d 597, reversed on other grounds 34 S.W.2d 803—Gulf Refining Co. v. City of Dallas, Civ.App., 10 S.W.2d 151, error dismissed—Maryland Casualty Co. v. Long, Civ.App., 9 S.W.2d 458, error dismissed—Texas Pacific Coal & Oil Co. v. Stuard, Civ.App., 7 S.W.2d 878, error refused—Austin v. Pool, Civ.App., 299 S.W. 935—Nalle v. Eaves, Civ.App., 298 S.W. 447, reversed on other grounds, Com.App., 5 S.W.2d 500—Weeks v. De Young, Civ.App., 290 S.W. 852—Texas & N. O. R. Co. v. Smith, Civ.App., 285 S.W. 913—Houston E. & W. T. R. Co. v. Kopinitzsch, Civ. App., 282 S.W. 884—National Live Stock Commission Co. v. Goff, Civ. App., 280 S.W. 856—Consolidated Underwriters v. Breedlove, Civ. App., 273 S.W. 325, conforming to answer to certified questions, Com. App., 265 S.W. 128—Holloway v. Miller, Civ.App., 272 S.W. 562—Hunter v. Hale, Civ.App., 233 S.W. 1005, dismissed for want of juris-diction—Western Union Telegraph Co. v. Chihuahua Exchange, Civ. App., 206 S.W. 364—Park v. South

state courts, is not affected by the fact that the decision of the state court of last resort is contrary to the rule established by authority outside of the state.² The decisions of the court of last resort, however, are not binding in a case which may be differentiated,³ as by the presence of an express statutory provision not considered in the prior rulings.⁴

Where there are divisions of the court of last resort, a decision of the court in banc is controlling on appellate courts, inferior courts and divisions of the court,⁵ and such a decision controls and must be followed notwithstanding a contrary decision on the same question by a division,⁶ even though the divisional opinion is the later one;⁷ in the absence

of an authoritative ruling by the court in banc, however, inferior courts are bound to follow the latest divisional opinion;⁸ and a specific ruling in a later divisional opinion, rather than the general language of an opinion of the court in banc, will be followed.⁹

Where justices of the lower court are called to sit in the court of last resort, their decision is the decision of the court in which they are sitting, and is entitled to the same consideration as if promulgated by a like number of regularly elected judges of such court.¹⁰

A decision of commissioners of appeal, when adopted by the court of last resort, is to be followed in the same way as a decision of the court.¹¹

Bend Chilled Plow Co., Civ.App., 199 S.W. 843, error refused.

Va.—Crafts v. Broadway Nat. Bank of Richmond, 128 S.E. 364, 142 Va. 702.

Wash.—Godefroy v. Reilly, 262 P. 639, 146 Wash. 257.

15 C.J. p 920 note 8.

Time of decision

(1) Supreme court decisions, which were rendered after trial in other actions arising out of automobile accident, but were declaratory of existing law applicable when accident occurred, were controlling on appeal in such other actions.—*Stone v. City and County of San Francisco, 80 P. 2d 175, 27 Cal.App.2d 34.*

(2) On appeal from judgment on verdict for plaintiff in action on life insurance policies containing age adjustment clauses, court of appeals must apply rule, stated by supreme court in case decided after instant case was tried and briefed and argued on appeal, that misrepresentation statute did not nullify such clauses, though such decision changed rule prevailing when case at bar was tried, as such rule deals with substantive law.—*Aronson v. Hercules Life Ins. Co., Mo.App., 131 S.W. 2d 852.*

Answer to certified question

The duty to follow a decision of the supreme court exists where the supreme court answers certified questions as well as in cases on appeal by writs of certiorari.—*Perry v. U. S., 37 Ct.Cl. 182, certiorari denied 59 S.Ct. 85, 305 U.S. 624, 83 L.Ed. 399.*

Approved decision of another court

Decision of court of another state expressly approved by Texas supreme court must be accepted as rule governing inferior Texas courts in like cases.—*Brinker v. First Nat. Bank, Tex.Com.App., 37 S.W.2d 136, reversing, Civ.App., 16 S.W.2d 965.*

Law announced in syllabus

Inferior court is bound by law an-

nounced by supreme court in syllabus.—*Wick v. Youngstown Sheet & Tube Co., 188 N.E. 514, 46 Ohio App. 253, error dismissed 189 N.E. 4, 127 Ohio St. 379.*

2. Cal.—*People v. Lesser, 11 P.2d 668, 123 Cal.App. 489.*

Ill.—*See Armster v. Metropolitan Life Ins. Co., 207 Ill.App. 514.*

Mo.—*Seewald v. Gentry, 286 S.W. 445, 220 Mo.App. 367—Ebert v. Emerson Electric Mfg. Co., App., 264 S.W. 453.*

N.J.—*In re Hollander's Estate, 195 A. 805, 128 N.J.Eq. 52—Tenez Const. Corporation v. Garner, 133 A. 396, 4 N.J.Misc. 485.*

N.Y.—*Robert Gair Co. v. Travelers' Ins. Co. of Hartford, Conn., 180 N. Y.S. 163, 109 Misc. 499.*

Ohio.—*Erle R. Co. v. Kohler, 26 Ohio Cir.Ct., N.S., 337.*

15 C.J. p 922 note 9.

3. U.S.—*Terry v. New York Life Ins. Co., C.C.A.Mo., 104 F.2d 498.*

Ala.—*Law v. Gulf States Steel Co., 175 So. 322, 27 Ala.App. 484, certiorari denied 175 So. 326, 234 Ala. 352.*

Rule of stare decisis as affected by scope and nature of former decisions see *infra* §§ 209–216.

4. U.S.—*Asher v. U. S., D.C.Cal., 28 F.Supp. 893.*

5. Mo.—*Poe v. Illinois Cent. R. Co., 99 S.W.2d 82, 339 Mo. 1025—State ex rel. Barber v. Daues, 6 S.W.2d 898, conformed to Barber v. American Car & Foundry Co., App., 14 S.W.2d 478—State ex rel. Hopkins v. Daues, 6 S.W.2d 893, 319 Mo. 733, quashing opinion Hopkins v. American Car & Foundry Co., App., 295 S.W. 841—State ex rel. North Kansas City Development Co. v. Ellison, 222 S.W. 783, 282 Mo. 660, quashing record Roy v. North Kansas City Development Co., App., 209 S.W. 990, affirmed 226 S.W. 965—In re Flynn's Estate, App., 95 S.W.2d 1208, transferred from 92 S.W.2d 671, 338 Mo. 522, certiorari*

quashed, *State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, 340 Mo. 965—Vogt v. United Rys. Co. of St. Louis, App., 226 S.W. 75, record quashed on other grounds State ex rel. Vogt v. Reynolds, 244 S.W. 929, 295 Mo. 375.*

6. Mo.—*Hinds v. Chicago, B. & Q. R. Co., App., 85 S.W.2d 165.*

7. Mo.—*State ex rel. Woodmansee v. Ridge, 123 S.W.2d 20—State v. Humphries, 119 S.W.2d 401—State ex rel. United Rys. Co. of St. Louis v. Reynolds, 213 S.W. 782, 278 Mo. 554, certiorari quashing record Lamphe v. United Rys. Co. of St. Louis, App., 202 S.W. 438—In re Flynn's Estate, App., 95 S.W.2d 1208, transferred from 92 S.W.2d 671, 338 Mo. 522, certiorari quashed State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, 340 Mo. 965—Cremier v. May, 8 S.W.2d 110, 223 Mo.App. 57—State ex rel. Concrete & Steel Const. Co. v. Southern Surety Co., 294 S.W. 123, 221 Mo. App. 67.*

8. Mo.—*State ex rel. Barber v. Daues, 6 S.W.2d 898, conformed to Barber v. American Car & Foundry Co., App., 14 S.W.2d 478—State ex rel. Hopkins v. Daues, 6 S.W.2d 893, quashing opinion Hopkins v. American Car & Foundry Co., App., 295 S.W. 841.*

9. Mo.—*State ex rel. Concrete & Steel Const. Co. v. Southern Surety Co., 294 S.W. 123, 221 Mo.App. 67.*

10. N.D.—*Youmans v. Hanna, 161 N.W. 797, 35 N.D. 479, Ann.Cas. 1917E 263, denying motion 160 N. W. 705, 35 N.D. 479, Ann.Cas.1917E 263, and rehearing denied 171 N. W. 835, 43 N.D. 536.*

11. Tex.—*Sheppard v. Musser, 92 S. W.2d 219, 127 Tex. 193, modifying, Civ.App., 89 S.W.2d 222, appeal dismissed Musser v. Sheppard, 57 S.Ct. 121, 299 U.S. 513, 81 L.Ed. 379—National Bank of Commerce*

The fact that a court has held a doctrine different from that subsequently asserted by the court of last resort does not affect its obligation to follow the latter ruling.¹²

§ 198. Other Appellate Courts

Decisions of intermediate appellate courts will be followed under the stare decisis rule until reversed or overruled; and where there are several coördinate courts decisions of each control the inferior courts in its department or division. Ordinarily granting or refusing of certiorari or a writ of error is not a binding decision by the higher court within the rule.

Although the doctrine of stare decisis does not apply with full force prior thereto,¹³ the decision of an intermediate appellate court is the law of the

state or jurisdiction until such decision is reversed or overruled by the court of last resort,¹⁴ and the duty of a lower court to follow such decision is not affected by the fact that it is contrary to the decisions of the court of last resort of a sister state on the same question,¹⁵ but a decision of an appellate court, not of last resort, which is not in accord with the decisions of the court of last resort, is not authoritative.¹⁶

Where there are several appellate courts or divisions with coördinate jurisdiction, an inferior court in one division or district should follow the decisions of the appellate court of another division or district as to a matter which has not been passed upon by its own appellate court;¹⁷ but in case

v. Williams, 84 S.W.2d 691, 125 Tex. 619, reversing Williams v. National Bank of Commerce, Civ. App., 62 S.W.2d 1108—Wooters v. Hollingsworth, 58 Tex. 371—Traders & General Ins. Co. v. Snow, Civ.App., 114 S.W.2d 682, error dismissed—Firquin v. Money, Civ. App., 67 S.W.2d 892—Pate v. Security Union Ins. Co., Civ.App., 54 S.W.2d 355—Le Sage v. Maxie, Civ.App., 286 S.W. 612—Austin v. Bain, Civ.App., 283 S.W. 638.

Effect of unapproved opinions of Texas commission of appeals see infra § 198.

12. U.S.—F. S. Lewis & Co. v. U. S., C.C.A. Ill., 102 F.2d 177.

Mo.—Aronson v. Hercules Life Ins. Co., App., 131 S.W.2d 852.

N.Y.—Skrocki v. Greene, 274 N.Y.S. 1, 242 App.Div. 226.

Tex.—Dallas Joint Stock Land Bank v. Rawlins, Civ.App., 129 S.W.2d 485.

15 C.J. p 922 note 12.

13. U.S.—Posados v. Warner, Barnes & Co., Philippine Islands, 49 S.Ct. 333, 279 U.S. 340, 73 L.Ed. 729.

Okl.—Jackson v. Carroll, 207 P. 735, 86 Okl. 230.

Pa.—In re Brolosky's Estate, 153 A. 739, 302 Pa. 439.

14. Ala.—People's Auto Co. v. State, 121 So. 907, 23 Ala.App. 7, certiorari denied 121 So. 908, 219 Ala. 280—Brewer v. State, 121 So. 689, 23 Ala.App. 116.

Ind.—Mechanics & Traders Ins. Co. v. Mini, 4 N.E.2d 567, 104 Ind.App. 60—Dailey v. Pugh, 131 N.E. 836, 83 Ind.App. 431.

N.J.—Byrnes v. Boulevard Com'rs of Hudson County, 197 A. 667, 16 N.J. Misc. 141, affirmed 3 A.2d 456, 121 N.J.Law 497—Loper v. City of Bridgeton, 128 A. 616, 3 N.J.Misc. 439.

N.Y.—Montrose v. Baggott, 146 N.Y. S. 649, 161 App.Div. 494—Krohe v. Goldman, 4 N.Y.S.2d 851, 167 Misc. 930—In re Smith's Estate, 3 N.Y.

S.2d 503, 167 Misc. 95—Benwitt v. Investors' Syndicate, 268 N.Y.S. 163; 149 Misc. 635—Candee Smith & Howland Co. v. Bendish Contracting Co., 265 N.Y.S. 737, 148 Misc. 262—George F. Fish Farms v. State, 237 N.Y.S. 383, 135 Misc. 188—Hammond v. Antwerp Light & Power Co., 230 N.Y.S. 621, 132 Misc. 786—Myers v. State, 187 N.Y.S. 911, 115 Misc. 678—Empire State Railroad Corporation v. State, 184 N.Y.S. 234, 113 Misc. 238—In re Denham's Estate, 175 N.Y. S. 726, 107 Misc. 71, modifying 174 N.Y.S. 833—In re Grandview Ave. in City of New York, 165 N.Y.S. 238.

15 C.J. p 922 note 13.

Federal district court

Decision of United States district court immediately superior to referee's court is binding upon referee in bankruptcy.—In re Welch, D.C.N. D., 8 F.Supp. 838.

In Illinois

(1) Since the amendment of L.1877 p 69 § 17, by L.1935 p 696 § 41, Smith-Hurd St.Annot.1935 c 37, an opinion of the appellate court is binding authority, not only upon said court, but upon all inferior courts in the state.—Hughes v. Medendorp, 13 N.E.2d 1015, 294 Ill.App. 424.

(2) Prior to such amendment it was considered doubtful whether the doctrine of stare decisis could be applied to an opinion of the appellate courts, in view of the statute which provided that the opinion of such courts should not be binding authority in any cause or proceeding, other than that in which it was filed.—People ex rel. Nelson v. Sherrard State Bank, 253 Ill.App. 168. See Hart v. Oregon Short Line R. Co., 207 Ill.App. 290.

Texas commission of appeals

(1) It has been held that the law as laid down in opinions of commission of appeals not expressly approved by the supreme court should

be followed by the court of civil appeals and lower courts.—National Bank of Commerce v. Williams, 84 S.W.2d 691, 125 Tex. 619, reversing Williams v. National Bank of Commerce, Civ.App., 62 S.W.2d 1108—U. S. Fidelity & Guaranty Co. v. Summers, Tex.Civ.App., 262 S.W. 247.

(2) But, citing the statute, it has been held that such an unapproved opinion is not authoritative as precedent.—Galbraith-Foxworth Lumber Co. v. Gerneth, Tex.Civ.App., 66 S.W. 2d 471, error dismissed—Millers' Indemnity Underwriters v. Hughes, Tex.Civ.App., 256 S.W. 334.

(3) And it has been held that an opinion of the commission of appeals is not authoritative, where supreme court adopts only the judgment recommended.—Hager v. Stakes, 294 S.W. 335, 116 Tex. 453—Stephens County v. Mid-Kansas Oil & Gas Co., 254 S.W. 290, 113 Tex. 160, 29 A.L.R. 566—McKenzie v. Withers, 206 S.W. 503, 109 Tex. 255.

(4) In adopting a judgment recommended by the commission, however, the supreme court must necessarily approve all holdings necessary to that judgment, although it adopted the judgment only.—United North & South Oil Co. v. Meredith, Tex.Civ. App., 258 S.W. 550, affirmed, Com. App., 272 S.W. 124.

15. N.Y.—Baerlein v. Winter, 170 N.Y.S. 399, 103 Misc. 506—Head v. Smith, 44 How.Pr. 476.

16. N.H.—Stevens v. City of Manchester, 127 A. 873, 81 N.H. 369. Tex.—Francis v. Thomas, 108 S.W. 2d 257, 129 Tex. 579, affirming Thomas v. Francis, Civ.App., 76 S.W.2d 575—Beckham v. Scott, Civ. App., 142 S.W. 80.

17. N.Y.—In re Harned's Will, 247 N.Y.S. 212, 138 Misc. 546, affirmed 254 N.Y.S. 939, 234 App.Div. 796—Baerlein v. Winter, 170 N.Y.S. 399, 103 Misc. 506—Hamlin v. Bender, 155 N.Y.S. 963, 92 Misc. 16, affirm-

there is a conflict between the decisions of such courts or divisions an inferior court should follow the decisions of its own appellate court.¹⁸ In case there is a conflict between the decisions of several appellate courts or divisions and the question has not been determined in another division, an inferior

court of the latter division is free to follow whichever view of the other divisions seems more correct.¹⁹ In the federal courts a decision of the circuit court of appeals is binding on the district courts in its circuit for the propositions which it decides²⁰ although in other circuit courts of appeal

ed 159 N.Y.S. 1117, 173 App.Div. 958, 996.

In Ohio, however, the determination of a court of appeals of one county does not bind the court of common pleas of another county.—*King Powder Co. v. Thrasher*, 20 Ohio N.P., N.S., 401.

Effect of decision of one coordinate court in another see *infra* § 200.

18. N.Y.—*Rojzenblitt v. Polish Transatlantic Shipping Co.*, 293 N.Y.S. 79, 162 Misc. 251—*Brown v. John Hancock Mut. Life Ins. Co. of Boston, Mass.*, 260 N.Y.S. 154, 145 Misc. 642—*Sherman Sylvester Scheuer Bldg. Corporation v. Krull*, 255 N.Y.S. 97, 142 Misc. 189—*Maher v. Orange & Rockland Electric Co.*, 252 N.Y.S. 459, 141 Misc. 573—In re *Greim's Estate*, 183 N.Y.S. 149.

15 C.J. p 922 note 17.

19. N.Y.—*Shannon v. Metropolitan Life Ins. Co.*, 263 N.Y.S. 170, 146 Misc. 903.

20. U.S.—*E. Edelmann & Co. v. Triple-A Specialty Co.*, C.C.A.Ill., 88 F.2d 852, certiorari denied 57 S.Ct. 673, 300 U.S. 680, 81 L.Ed. 884—*The M. M. O'Brien*, D.C.N.Y., 60 F.2d 976—*The Philip J. Kenny*, D.C.N.J., 57 F.2d 337—*Cleaves v. Peterboro Basket Co.*, D.C.N.H., 54 F.2d 101—*First Trust Co. of Omaha v. Allen*, D.C.Neb., 51 F.2d 1069, affirmed, C.C.A., 60 F.2d 812, certiorari denied *Doolittle v. Allen*, 53 S.Ct. 315, 287 U.S. 671, 77 L.Ed. 578—*Mobley v. J. A. Fischer Co.*, D.C.Pa., 49 F.2d 920—*Palmer v. Bender*, D.C.La., 49 F.2d 316, affirmed, C.C.A., 57 F.2d 32, certiorari granted 53 S.Ct. 79, 287 U.S. 586, 77 L.Ed. 512, affirmed 53 S.Ct. 225, 287 U.S. 551, 77 L.Ed. 489—*Western Electric Co. v. Wallerstein*, D.C.N.Y., 48 F.2d 268—*D. L. Flack & Son v. West Virginia Coal Co.*, D.C.N.Y., 46 F.2d 177, affirmed, C.C.A., 50 F.2d 1075—In re *King*, D.C.W.Va., 46 F.2d 112—*Hartford & New York Transp. Co. v. Rogers & Hubbard Co.*, D.C.Conn., 40 F.2d 954, affirmed, C.C.A., 47 F.2d 189, certiorari denied *Rogers & Hubbard v. Hartford & New York Transp. Co.*, 51 S.Ct. 483, 283 U.S. 835, 75 L.Ed. 1446—*Lektophone Corporation v. Miller Bros. Co.*, D.C.Del., 37 F.2d 580, reversed on other grounds 51 S.Ct. 93, 282 U.S. 168, 75 L.Ed. 274, amended 51 S.Ct. 173—*Sugarland Industries v. Bass*, D.C.Tex., 36 F.2d 375, reversed on

other grounds, C.C.A., *Bass v. Sugarland Industries*, 50 F.2d 65—In re *Ruane*, D.C.N.Y., 35 F.2d 187—*U. S. v. Goldman*, D.C.Conn., 28 F.2d 424—In re *United Realty & Homebuilders' Corporation*, D.C.Md., 27 F.2d 138—*U. S. ex rel. Hughes v. Gault*, D.C.Iowa, 13 F.2d 225—In re *Grossberg*, D.C.Fla., 11 F.2d 329—*McNeely v. Town of Vidalia*, D.C.La., 6 F.2d 21, modifying and making injunction permanent 6 F.2d 19, and affirmed *Town of Vidalia v. McNeely*, 47 S.Ct. 758, 274 U.S. 676, 71 L.Ed. 1292—*Morgan v. Tennessee Valley Authority*, D.C.Tenn., 28 F.Supp. 732—*U. S. v. La Vine*, D.C.Md., 28 F.Supp. 113—*U. S. v. Aluminum Co. of America*, D.C.N.Y., 26 F.Supp. 711—*U. S. v. Eighty Acres of Land in Williamson County*, D.C.Ill., 26 F.Supp. 315—*Sheldon v. Metro-Goldwyn Pictures Corporation*, D.C.N.Y., 26 F.Supp. 134—*Bank of New York & Trust Co. v. U. S.*, D.C.N.Y., 25 F.Supp. 314—*Cookson v. Louis Marx & Co.*, D.C.N.Y., 23 F.Supp. 615—In re *James Butler Grocery Co.*, D.C.N.Y., 22 F.Supp. 995—*O. D. Jennings & Co. v. Maestri*, D.C.La., 22 F.Supp. 980, affirmed, C.C.A., 97 F.2d 679—*Diatel v. Gleason*, D.C.N.Y., 22 F.Supp. 355—In re *Davis*, D.C.Ill., 22 F.Supp. 2—*English v. Bitgood*, D.C.Conn., 21 F.Supp. 641—*Baker v. U. S.*, D.C.Mass., 21 F.Supp. 577—*Forrest v. Southern Ry. Co.*, D.C.S.C., 20 F.Supp. 851—*Helmbright v. John A. Gebelein, Inc.*, D.C.Md., 19 F.Supp. 621—*Koppers Connecticut Coke Co. v. James McWilliams Blue Line*, D.C.N.Y., 18 F.Supp. 992, affirmed, C.C.A., 89 F.2d 865, certiorari denied *James McWilliams Blue Line v. Koppers Connecticut Coke Co.*, 58 S.Ct. 25, 302 U.S. 706, 82 L.Ed. 545—*U. S. ex rel. Amato v. Commissioner of Immigration, Ellis Island, New York Harbor*, D.C.N.Y., 18 F.Supp. 480—*Murphy v. Dunklin County*, D.C.Mo., 17 F.Supp. 128—*Campbell v. Lago Petroleum Corporation*, D.C.N.Y., 16 F.Supp. 980—*Remington Rand v. Lind*, D.C.N.Y., 16 F.Supp. 666—*U. S. v. Hartford Accident & Indemnity Co.*, D.C.Md., 15 F.Supp. 791—In re *Lehrenkrauss*, D.C.N.Y., 14 F.Supp. 682—In re *Ruckman*, D.C.Ill., 13 F.Supp. 992—In re *Cheney Bros.*, D.C.Conn., 12 F.Supp. 605—*G. B. R. Smith Milling Co. v. Thomas*, D.C.Tex., 11 F.Supp. 833—*Neild Mfg. Corporation v. Hassett*, D.C.Mass., 11 F.Supp. 642—In

re *Consolidation Coal Co.*, D.C.Md., 11 F.Supp. 594, appeal dismissed, C.C.A., *Doersam v. Consolidation Coal Co.*, 79 F.2d 989—*McNary v. Guaranty Trust Co. of New York*, D.C.Ohio, 6 F.Supp. 616—*Lawrence v. Travelers' Ins. Co.*, D.C.Pa., 6 F.Supp. 428—*Irving Trust Co. v. Manufacturers' Trust Co.*, D.C.N.Y., 6 F.Supp. 185—*Motor Improvements v. A. C. Spark Plug Co.*, D.C.Mich., 5 F.Supp. 712, reversed on other grounds, C.C.A., 80 F.2d 385, certiorari denied *A. C. Spark Plug Co. v. Motor Improvements*, 56 S.Ct. 939, 298 U.S. 671, 80 L.Ed. 1394—In re *Sollars*, D.C.Wash., 5 F.Supp. 483—*Mills Novelty Co. v. Bolan*, D.C.N.Y., 3 F.Supp. 968, affirmed, C.C.A., *Mills Novelty Co. v. O'Ryan*, 68 F.2d 1009, certiorari granted *O'Ryan v. Mills Novelty Co.*, 54 S.Ct. 629, 292 U.S. 615, 73 L.Ed. 1474, reversed on other grounds 54 S.Ct. 779, 292 U.S. 609, 78 L.Ed. 1469—*Bausch & Lomb Optical Co. v. Wahlgren*, D.C.Ill., 1 F.Supp. 799, affirmed, C.C.A., *Wahlgren v. Bausch & Lomb Optical Co.*, 63 F.2d 660, certiorari denied 54 S.Ct. 774, 292 U.S. 639, 78 L.Ed. 1491, rehearing denied 54 S.Ct. 862, 292 U.S. 615, 78 L.Ed. 1491—*U. S. v. McGovern*, D.C.N.Y., 1 F.Supp. 568, affirmed, C.C.A., 60 F.2d 880, certiorari denied *McGovern v. U. S.*, 53 S.Ct. 96, 287 U.S. 650, 77 L.Ed. 561—*Radio Corporation of America v. Radio Engineering Laboratories*, D.C.N.Y., 1 F.Supp. 65, reversed on other grounds, C.C.A., 66 F.2d 768, certiorari granted 54 S.Ct. 373, 290 U.S. 624, 78 L.Ed. 544, reversed on other grounds 54 S.Ct. 752, 293 U.S. 1, 78 L.Ed. 1453, amended and rehearing denied 55 S.Ct. 66, 293 U.S. 522, 79 L.Ed. 634, amended 55 S.Ct. 928, 293 U.S. 1, 79 L.Ed. 163—*Prudential Ins. Co. of America v. Herold*, D.C.N.J., 247 F. 681—*Jellison v. Krell Piano Co.*, D.C.Ky., 246 F. 509—*U. S. v. River Spinning Co.*, D.C.R.I., 243 F. 759, affirmed 250 F. 586, 162 C.C.A. 602—*Mark Seong v. U. S.*, N.Y., 242 F. 496, 155 C.C.A. 272, modifying, D.C., *Ex parte Chin Him*, 227 F. 131.

In the tenth circuit, which was formerly a part of the eighth circuit, decisions of eighth circuit court of appeals are binding on district court in absence of applicable decisions by tenth circuit court of appeals.—*Thompson v. St. Louis-San Francisco Ry. Co.*, D.C.Okl., 5 F.Supp. 785—In

there are decisions to the contrary.²¹ While a district court is not absolutely bound by decisions of the circuit court of appeals for another circuit,²² such decisions are highly persuasive²³ and the court will follow them where its own circuit court of appeals has not decided the matter,²⁴ unless there are exceptional reasons for refusing.²⁵ The decisions of the circuit court of appeals in one circuit have been held not binding on territorial courts situated in another circuit.²⁶

The mere granting of a writ of error by the court of last resort, on a ground questioning the correctness of a decision by a court of intermediate appeal, is not a judicial decision of the question by the higher court,²⁷ and where there is no final ruling on the question by the higher court the decision of the intermediate court is not thereby overruled.²⁸

Although there is authority to the contrary in some jurisdictions,²⁹ the refusal of the court of last

re Meyers, D.C.Okla., 1 F.Supp. 673, reversed on other grounds, C.C.A., Barber v. Spurrier Lumber Co., 64 F.2d 5.

Certiorari granted

The decision of the circuit court of appeals will be followed by district judge in that circuit, notwithstanding certiorari has been granted to review such decree.—In re Simon Weltman & Co., D.C.N.Y., 2 F.2d 759.

Decision erroneous as to law

Decision of circuit court of appeals is binding on district court in that circuit even if erroneous as to law.—Elliott v. Wheelock, D.C.Mo., 34 F.2d 213.

21. U.S.—In re Ruane, D.C.N.Y., 35 F.2d 187—In re Grossberg, D.C.Fla., 11 F.2d 329.

22. U.S.—Pepsin Syrup Co. v. Schwaner, D.C.Ill., 35 F.2d 197—Bassick Mfg. Co. v. Ready Auto Supply Co., D.C.N.Y., 22 F.2d 331—Christianssand Shipping Co. v. Marshall, D.C.Pa., 22 F.2d 192, reversed on other grounds, C.C.A., 31 F.2d 686—Wolff v. Stewart & Co., D.C.Md., 21 F.Supp. 135—King v. U. S., D.C.Md., 10 F.Supp. 206, affirmed, C.C.A., 79 F.2d 453—In re Jones, D.C.Mo., 10 F.Supp. 165—U. S. Nat. Bank of La Grande v. Pole, D.C.Or., 2 F.Supp. 153—Continental Securities Co. v. Interborough Rapid Transit Co., C.C.N.Y., 165 F. 945.

Refusal to follow decision

Decision of circuit court of appeals was not binding authority on district court of another circuit, the circuit court of appeals of which had declined to follow such decision.—In re Upham's Income Tax, D.C.N.Y., 18 F.Supp. 737.

23. U.S.—Pepsin Syrup Co. v. Schwaner, D.C.Ill., 35 F.2d 197—Bassick Mfg. Co. v. Ready Auto Supply Co., D.C.N.Y., 22 F.2d 331—Wolff v. Stewart & Co., D.C.Md., 21 F.Supp. 135—U. S. Nat. Bank of La Grande v. Pole, D.C.Or., 2 F.Supp. 153.

24. U.S.—U. S. v. Flannery, C.C.A.Md., 106 F.2d 315, affirming, D.C., Flannery v. U. S., 25 F.Supp. 677—The Bleakley No. 76, D.C.N.Y., 56 F.2d 1037—Topas v. National

Shawmut Bank, D.C.Mass., 53 F.2d 1020, reversed on other grounds, C.C.A., National Shawmut Bank of Boston v. Topas, 60 F.2d 467, certiorari denied Topas v. National Shawmut Bank of Boston, 53 S.Ct. 292, 287 U.S. 668, 77 L.Ed. 576—Metro-Goldwyn-Mayer Distributing Corporation v. Bijou Theatre Co., D.C.Mass., 50 F.2d 908, set aside on other grounds, C.C.A., 59 F.2d 70—Pepsin Syrup Co. v. Schwaner, D.C.Ill., 35 F.2d 197—New York Life Ins. Co. v. Ruhlin, D.C.Pa., 25 F.Supp. 65, conforming to mandate Ruhlin v. New York Life Ins. Co., 58 S.Ct. 860, 304 U.S. 202, 32 L.Ed. 1290, vacating, C.C.A., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U.S. 681, 32 L.Ed. 526—Pitzer Transfer Corporation v. Norfolk & W. Ry. Co., D.C.Md., 10 F.Supp. 436—King v. U. S., D.C.Md., 10 F.Supp. 206, affirmed, C.C.A., 79 F.2d 453—In re Jones, D.C.Mo., 10 F.Supp. 165—Vacuum Cleaner Co. v. Thompson Mfg. Co., D.C.Iowa, 258 F. 239, appeal dismissed, C.C.A., Thompson Mfg. Co. v. Vacuum Cleaner Co., 272 F. 1023—In re Gibney Tire & Rubber Co., D.C.Pa., 241 F. 879. 15 C.J. p 922 note 18.

Party enjoined from suit

In power companies' suit to enjoin construction of Tennessee Valley Authority dams, federal district court in Tennessee refused to give consideration to alleged competition of Authority with company enjoined from participating in the suit by federal district court in Georgia whose decree was affirmed by circuit court of appeals.—Tennessee Electric Power Co. v. Tennessee Valley Authority, D.C.Tenn., 21 F.Supp. 947, appeal dismissed in part 59 S.Ct. 54, 305 U.S. 663, 83 L.Ed. 430, appeal dismissed 59 S.Ct. 154, 305 U.S. 665, 83 L.Ed. 431, affirmed 59 S.Ct. 366, 306 U.S. 118, 83 L.Ed. 543.

25. U.S.—King v. U. S., D.C.Md., 10 F.Supp. 206, affirmed C.C.A., 79 F.2d 453—New Amsterdam Casualty Co. v. Iowa State Bank, C.C.A.Iowa, 277 F. 713, certiorari denied Iowa State Bank v. New Amsterdam Casualty Co., 42 S.Ct. 381, 258 U.S. 624, 66 L.Ed. 797—Bright v. State of Arkansas, Ark., 249 F. 950,

162 C.C.A. 148—In re Baird, D.C.Pa., 154 F. 215.

26. Tex.—Western Union Tel. Co. v. Sloss, 100 S.W. 354, 45 Tex.Civ.App. 153.

27. Pa.—Kraemer v. Guarantee Trust & Safe Deposit Co., 33 A. 1047, 173 Pa. 416.

Tex.—Riggins v. Waco, 90 S.W. 657, 40 Tex.Civ.App. 569, error denied 93 S.W. 426, 100 Tex. 32.

28. Tex.—Riggins v. Waco, supra.

29. In Louisiana

(1) A refusal to review a judgment of one of the courts of appeal, even on the ground that the judgment is considered correct, is an affirmation of only the judgment itself, and is not to be considered an affirmation of all that is said in the opinion on which the judgment is founded.—Rhodes v. Chrysanthou, 186 So. 333, 191 La. 774.

(2) It has been held, however, that, on denial by the supreme court of a writ of review of a decision of an appellate court, it will be concluded that there was no error in the opinion and ruling, and the points decided must be considered as finally settled.—Union Homestead Assoc. v. Casting, 8 La.App., Orleans, 349.

(3) While the supreme court's refusal of a writ of review does not generally make the case a supreme court "decision," where the only question involved is one of law concerning the interpretation of a legislative act, the refusal of a writ signifies the court's approval of the case.—Kroncke v. Caddo Parish School Board, App., 183 So. 86.

(4) So by refusing writ of review, supreme court approved findings of court of appeal.—Smith v. Shehee, App., 143 So. 339, conforming to answers 143 So. 338, 175 La. 334, and amended, App., 144 So. 750.

(5) And where supreme court refused writ in a case where court of appeal based its decision strictly upon rule expressed in the case, court of appeal would assume that supreme court approved such rule.—Barr v. Fidelity & Casualty Co. of New York, App., 188 So. 521.

(6) However, the supreme court did not approve ruling overruling

resort to review a decision of a court of intermediate appeal by certiorari or writ of error or review is not ordinarily regarded as an affirmance of such de-

cision which raises it to the dignity of final authority.³⁰ Nevertheless the appellate court's decision in

plea where another reason was assigned for refusing writ.—*White v. Louisiana Western Ry. Co.*, 140 So. 486, 174 La. 308, affirming 135 So. 255, 18 La.App. 544.

(7) And the supreme court's refusal to exercise supervisory jurisdiction in case where complainant has yet remedy by appeal does not establish jurisprudence.—*Griffon v. Villia*, 120 So. 50, 167 La. 632.

In Texas

(1) The rule that refusal of a writ by the supreme court manifests its approval of the decision of the intermediate appellate court has been applied in several cases.—*Casualty Reciprocal Exchange v. Dawson*, 107 S.W.2d 994, 130 Tex. 362, dismissing error, Civ.App., 81 S.W.2d 284—*Hamilton v. Empire Gas & Fuel Co.*, Com. App., 110 S.W.2d 561, affirming, Civ. App., 85 S.W.2d 280—*Payne v. Harris*, Com.App., 241 S.W. 1008, reversing, Civ.App., 228 S.W. 350—*State v. Selby Oil & Gas Co.*, Civ. App., 130 S.W.2d 423, error granted—*Stanolind Oil & Gas Co. v. Edgar*, Civ.App., 98 S.W.2d 222, error dismissed—*Culver v. State*, Civ.App., 85 S.W.2d 997, error refused—*The Maccahees v. Marshall*, Civ.App., 11 S.W.2d 523, affirmed Com.App., 27 S.W.2d 535—*Orndorff v. El Paso County*, Civ.App., 295 S.W. 219, certiorari denied 48 S.Ct. 339, 276 U.S. 633, 72 L.Ed. 742, and followed in *Orndorff v. El Paso County*, Civ.App., 295 S.W. 222—*Urban v. Bagby*, Civ.App., 286 S.W. 519, affirmed, Com.App., 291 S.W. 537—*Binford v. Harris County*, Civ.App., 261 S.W. 535—*Ingram v. Fred*, Civ.App., 243 S.W. 598—*Milner v. Gatlin*, Civ.App., 211 S.W. 617, reversed on other grounds, Com. App., 261 S.W. 1003—*Gray v. Eleazer*, 94 S.W. 911, 43 Tex.Civ.App. 417.

(2) In another case it has been said that the decision as to which application for writ of error was dismissed was well worth following.—*Scott v. Gardner*, Civ.App., 106 S.W. 2d 1109, error dismissed.

(3) However, a contrary conclusion has been reached under the law in force at the time a particular writ was refused.—*Conley v. Abrams*, Civ.App., 7 S.W.2d 674, error refused.

(4) And it has been said that the supreme court's dismissal of application for writ of error indicates that the supreme court approves the result reached by the court of civil appeals but not the reasons assigned.—*Moore v. Gordon*, Civ.App., 122 S.W.2d 239, error dismissed.

(5) It has also been held that the supreme court's refusal of writs of error in cases decided by courts of

civil appeals did not make those decisions binding on another court of civil appeals.—*Texas Farm Mortgage Co. v. Rowley*, Civ.App., 98 S.W.2d 854, error granted.

(6) Thus refusal of application for writ of error was held not to constitute approval by supreme court of holding of court of civil appeals on particular question, where such holding was not questioned in application, and where refusal antedated statute contemplating refusal where judgment is correct, and where legal principles declared in opinion of court of civil appeals are correctly determined.—*City of San Angelo v. Deutsch*, 91 S.W.2d 308, 126 Tex. 532, reversing *Deutsch v. City of San Angelo*, Civ.App., 73 S.W.2d 125.

(7) It seems that where a judgment of the court of civil appeals was correct under the proper construction of a statute, a writ of error by the supreme court was properly denied, and such denial did not necessarily approve other holdings by the lower court.—*American Indemnity Co. v. City of Austin*, 246 S.W. 1019, 112 Tex. 239, reversing, Civ. App., 211 S.W. 812.

30. U.S.—*Guaranty Trust Co. of New York v. Henwood*, C.C.A.Mo., 98 F.2d 160, certiorari granted 59 S.Ct. 146, 305 U.S. 588, 83 L.Ed. 372, affirmed 59 S.Ct. 847, 307 U.S. 247, 83 L.Ed. 1266—*In re F. & W. Grand 5-10-25 Cent Stores*, C.C.A.N.Y., 69 F.2d 807—*Sunshine Mining Co. v. Treinies*, D.C.Idaho, 19 F.Supp. 587, affirmed, C.C.A., Treinies v. Sunshine Mining Co., 99 F.2d 651, certiorari granted 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029.

Ala.—*O'Brien v. State*, App., 191 So. 389, reversed on other grounds, Sup., 191 So. 391.

Cal.—*Seney v. Pickwick Stages, Northern Division*, 274 P. 536, 206 Cal. 389—*Bohn v. Bohn*, 129 P. 981, 164 Cal. 532—*People v. Davis*, 81 P. 718, 147 Cal. 346—*People v. Brunwin*, 37 P.2d 1072, 2 Cal.App. 2d 287—*McMillan v. Greer*, 259 P. 995, 85 Cal.App. 558—*People v. Whitaker*, 228 P. 376, 68 Cal.App. 7. *Contra Bridges v. Tefft*, 200 P. 71, 53 Cal.App. 117.

Ga.—*Seaboard Air Line Ry. v. Brooks*, 107 S.E. 878, 151 Ga. 625, answers to certified questions conformed to 108 S.E. 166, 27 Ga.App. 274, and certiorari denied *Brooks v. Air Line Co.*, 43 S.Ct. 12, 260 U.S. 724, 67 L.Ed. 482.

N.Y.—*Marchant v. Mead-Morrison Mfg. Co.*, 169 N.E. 386, 252 N.Y. 284, modifying and affirming 235 N.Y.S. 370, 226 App.Div. 397, and

reargument denied 171 N.E. 770, 253 N.Y. 534, appeal dismissed *Mead-Morrison Mfg. Co. v. Marchant*, 51 S.Ct. 104, 282 U.S. 808, 75 L.Ed. 725—*West 158th Street Garage Corporation v. State*, 10 N.Y.S.2d 990, 256 App.Div. 401, reversing 6 N.Y.S.2d 462, 168 Misc. 822, reargument denied 12 N.Y.S.2d 759.

Ohio.—*Kern v. Contract Cartage Co.*, 9 N.E.2d 869, 55 Ohio App. 481.

Pa.—*Dougherty v. Proctor & Schwartz*, 176 A. 439, 317 Pa. 363—*Kraemer v. Guarantee Trust & Safe Deposit Co.*, 33 A. 1047, 173 Pa. 416.

Tenn.—*Bryan v. Aetna Life Ins. Co.*, 130 S.W.2d 85, 174 Tenn. 602.

Reason for rule

Many petitions for certiorari are denied because statutory prerequisites to their consideration are overlooked by counsel, and, moreover, the higher court does not feel itself required in every instance to file a memorandum upon denial of the writ, although it only concurs in the result reached by the inferior court.—*Lingner v. Lingner*, 56 S.W. 2d 749, 185 Tenn. 525.

In Illinois

(1) The denial of certiorari by the supreme court is not equivalent to a holding that the question of law necessarily involved has been decided properly by the appellate court.—*People ex rel. Wilmette State Bank v. Village of Wilmette*, 13 N.E.2d 990, 294 Ill.App. 362.

(2) It is merely approval of conclusion reached by appellate court or an affirmance of judgment, and is not necessarily approval of reasons given in opinion of appellate court for its judgment, as respects whether such denial is binding authoritatively upon appellate courts.—*Marks v. Pope*, 7 N.E.2d 481, 289 Ill.App. 558, reversed on other grounds 19 N.E. 2d 616, 370 Ill. 597.

(3) Hence opinion of appellate court and denial of certiorari by supreme court in case presenting involved situation calling for many statements of law in appellate court's opinion are not binding authorities in another case involving similar facts presented to another appellate court.—*Marks v. Pope*, supra—*People v. Grant*, 208 Ill.App. 235, affirmed 119 N.E. 344, 283 Ill. 391.

(4) It has been held, however, that denial of the writ must be regarded as sustaining the views expressed by the appellate court.—*Overland Motor Co. v. Tennant*, 195 Ill.App. 6.

such case, even though not controlling, must be considered as highly persuasive.³¹

§ 199. Higher Courts of Original Jurisdiction

Although there is some contrary authority courts of limited original jurisdiction ordinarily follow decisions of courts of general original jurisdiction.

Where, as is usually the case, there are, in the same state, courts of general original jurisdiction and also inferior courts of limited jurisdiction, it is clear that the latter courts, in accordance with the principles which have been stated supra §§ 187, 197, 198, should follow the decisions of the higher courts, although it has been held in New York that a coun-

ty court is not obliged to follow a decision of the supreme court in another department.³²

§ 200. Coördinate Courts

Decisions of coördinate courts, while not binding, will ordinarily be followed unless clearly erroneous.

While a court is not always bound, under the principle of stare decisis, to follow the decisions of another court whose authority is coördinate,³³ such decisions are very persuasive,³⁴ and it is well established as a general rule that a court will adhere to a principle, not clearly erroneous, which is laid down by another court of coördinate jurisdiction, until the rule is settled otherwise by the decision

(5) And every question involved having been adjudicated, in prior suits between same parties, or predecessors, by judgments of appellate court, to review one of which certiorari was sought and denied, judgments were decisive of present controversy under doctrine of stare decisis.—*Gridley v. Wood*, 175 N.E. 396, 343 Ill. 223.

(6) By denying a writ of certiorari, the supreme court does not review the judgment of the appellate court, but declines to do so, which does not make the judgment of the latter court final, but leaves its finality undisturbed.—*People v. Grant*, supra.

Creation of inference

Ordinarily, the refusal of United States supreme court to grant certiorari to review decision of lower court creates no inference regarding correctness of lower court's decision, but where supreme court granted certiorari in case wherein lower court determined that orders extending time for settlement of bill of exceptions were required to be made part of bill of exceptions but refused certiorari in case in which lower court recognized validity of bill of exceptions, notwithstanding orders extending time for its settlement were not made part of the bill, an inference was created which strengthened the conclusion of the circuit court of appeals that orders extending time for settlement of bill of exceptions were not necessary to be made a part thereof.—*Gluck v. U. S.*, C.C.A.Ill., 93 F.2d 953.

Refusal by state and federal courts

A decision of district court of appeal is not controlling in another proceeding before the state supreme court although the state supreme court denied petition for hearing and United States supreme court denied state attorney general's petition for writ of certiorari in former case.—*Western Lithograph Co. v. State Board of Equalization*, 78 P.2d 731, 11 Cal.2d 156, 117 A.L.R. 338.

31. Cal.—*People v. Rowland*, 65 P. 2d 1333, 19 Cal.App.2d 540.

Pa.—*Dougherty v. Proctor & Schwartz*, 176 A. 439, 317 Pa. 363.

32. N.Y.—*Nichols v. Fanning*, 45 N. Y.S. 409, 20 Misc. 73.

33. U.S.—*Sweet v. Commissioner of Internal Revenue*, C.C.A., 102 F.2d 103, certiorari denied 59 S.Ct. 829, 307 U.S. 627, 83 L.Ed. 1510.—*Sherman & Son v. Corin*, C.C.A.Mass., 73 F.2d 468.—*Arlac Dry Stencil Corporation v. A. B. Dick Co.*, C.C.A.Pa., 46 F.2d 899.—*Haberle Crystal Springs Brewing Co. v. Clarke*, C.C.A.N.Y., 30 F.2d 219, reversing, D.C., 20 F.2d 540, and certiorari granted *Clarke v. Haberle Crystal Springs Brewing Co.*, 49 S.Ct. 419, 279 U.S. 332, 73 L.Ed. 981, reversed on other grounds *Clarke v. Haberle Crystal Springs Brewing Co.*, 50 S.Ct. 155, 280 U.S. 384, 74 L.Ed. 498, followed in *J. Chr. G. Hupfel Co. v. Anderson*, C.C.A., 55 F.2d 1080, affirming, D.C., 51 F.2d 115, and certiorari denied 52 S.Ct. 504, 286 U.S. 551, 76 L.Ed. 1286.—*Bassick Mfg. Co. v. Ready Auto Supply Co.*, D.C.N.Y., 22 F.2d 331.—*Bahls v. Welfare Loan Soc. of La Fayette*, D.C.Ind., 17 F.2d 379.—*Ball v. Chapman*, C.C.A.Ill., 1 F.2d 895.—*Chesapeake & O. R. Co. v. U. S.*, D.C.Va., 1 F.Supp. 350.—*National Cash Register Co. v. Remington Arms Co.*, D.C.Del., 283 F. 196, affirmed, C.C.A., 286 F. 367.

Cal.—*Smith v. Hume*, 74 P.2d 566, 29 Cal.App.2d Supp. 747.—*People v. Brunwin*, 37 P.2d 1072, 2 Cal. App.2d 287.

Ill.—*People v. Grant*, 208 Ill.App. 235, affirmed 119 N.E. 344, 283 Ill. 391.

La.—*Thornton v. Central Surety & Insurance Corporation*, App., 191 So. 179.

N.Y.—*In re Van Riper's Will*, 11 N. Y.S.2d 975, 171 Misc. 178.—*In re Hodgson's Estate*, 11 N.Y.S.2d 384, 170 Misc. 897.—*People v. McGuinness*, 6 N.Y.S.2d 593, 168 Misc. 349

—*In re Phillip's Will*, 6 N.Y.S.2d 108, 168 Misc. 549.—*People v. Kearns*, 5 N.Y.S.2d 590, 168 Misc. 264.—*In re Herle's Estate*, 300 N.Y. S. 103, 165 Misc. 46.—*In re Draske's Will*, 290 N.Y.S. 581, 160 Misc. 587.—*People ex rel. Battista v. Christian*, 227 N.Y.S. 142, 131 Misc. 411, reversed on other grounds 229 N. Y.S. 644, 224 App.Div. 243, reversed on other grounds 164 N.E. 111, 249 N.Y. 314, 61 A.L.R. 793.

Ohio.—*Doe v. Roe*, 6 N.E.2d 593, 54 Ohio App. 145.

15 C.J. p 923 note 29.

Subsequent ruling

Where judge in one division of district had entered orders in cause prior to ruling of judge in another division of same district in another cause involving same question, first judge was not required, either on account of comity or otherwise, to follow views expressed in such ruling.—*Chester C. Fosgate Co. v. Kirkland*, D.C.Fla., 19 F.Supp. 152.

Decision not subsequently followed

Where an early decision by a district judge of the same district has not been followed in a later case in the same circuit, it is not binding on the district court.—*Griffin White Shoe Co. v. O'Connor & Goldberg*, D. C.N.Y., 277 F. 1012.

34. U.S.—*Arlac Dry Stencil Corporation v. A. B. Dick Co.*, C.C.A.Pa., 46 F.2d 899.—*Bassick Mfg. Co. v. Ready Auto Supply Co.*, D.C.N.Y., 22 F.2d 331.—*Chesapeake & O. R. Co. v. U. S.*, D.C.Va., 1 F.Supp. 350. N.Y.—*In re Cruikshank's Estate*, 8 N.Y.S.2d 279, 168 Misc. 514.

"This court is loath to rehear issues previously decided by a court of coordinate jurisdiction, whose decree has been affirmed by the court of review."—*Textile Mach. Works v. Eous Hirsch Textile Machines*, D.C. N.Y., 13 F.Supp. 476, 482, reversed on other grounds, C.C.A., 87 F.2d 702, certiorari granted 57 S.Ct. 944, 301 U.S. 680, 81 L.Ed. 1339, affirmed 58 S.Ct. 291, 302 U.S. 490, 82 L.Ed. 382.

of a higher court.³⁵ The federal courts consider this rule to be especially applicable in cases involving patents³⁶ and trade-marks.³⁷ The rule is, however, merely one of comity, not requiring a court to abdicate its own individual judgment and applicable only where the court is in doubt as to the soundness of its views, for the purpose of establishing uniformity of rulings and avoiding confusion;³⁸ and the rule has been held not to be applicable to motions for injunctions, where error may be fol-

lowed by irremediable mischief.³⁹

§ 201. Inferior Courts

The decisions of inferior courts are not generally binding on the higher courts, but they are given some consideration and, particularly in cases involving construction of statutes, may be followed if long acquiesced in.

The decisions of inferior courts are not, as a rule, binding on the higher courts,⁴⁰ even as establish-

35. U.S.—First Trust Co. of Omaha v. Allen, D.C.Neb., 51 F.2d 1069, affirmed, C.C.A., 60 F.2d 812, certiorari denied Doolittle v. Allen, 53 S.Ct. 315, 237 U.S. 671, 77 L.Ed. 578—Caferio & Menacaci v. Navigazione Libera Triestina, S. A., D.C. N.Y., 50 F.2d 199—Claude Neon Lights v. E. Machlett & Son, D.C. N.Y., 31 F.2d 983—Delaware, L. & W. R. Co. v. Bowers, D.C.N.Y., 28 F.2d 33—U. S. ex rel. Hughes v. Gault, D.C.Iowa, 13 F.2d 225.

Cal.—Smith v. Hume, 74 P.2d 566, 29 Cal.App.2d Supp. 747—Skaggs v. Taylor, 247 P. 218, 77 Cal.App. 519.

Mo.—Mayes v. Mayes, App., 104 S. W.2d 1019, reversed on other grounds 116 S.W.2d 1, 342 Mo. 401.

N.Y.—Corporation of Frederick Scholes v. Theodore Ficke Warehouses, 198 N.Y.S. 47, 204 App. Div. 329—People ex rel. H. D. H. Realty Corporation v. Murphy, 186 N.Y.S. 38, 194 App.Div. 530, reversing 184 N.Y.S. 888, 113 Misc. 253, and affirmed 130 N.E. 932, 230 N.Y. 654.

N.C.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 188 N.C. 30.

Ohio.—Stearns v. Hibben Dry Goods Co., 11 Ohio Cir.Ct.N.S., 553.

Tex.—Culver v. State, Civ.App., 85 S.W.2d 997, error refused—Sovereign Camp, W. O. W., v. Jackson, Civ.App., 264 S.W. 289—Wootton v. Jones, Civ.App., 204 S.W. 237, affirmed Jones v. Wootton, Com. App., 228 S.W. 142.

15 C.J. p 923 note 30.

A federal circuit court of appeals should follow the decision of a circuit court of appeals in another circuit.—U. S. v. Flannery, C.C.A.Md., 106 F.2d 315, affirming, D.C., Flannery v. U. S., 25 F.Supp. 677—U. S. v. Blosser, C.C.A.Mo., 104 F.2d 119—Sweet v. Commissioner of Internal Revenue, C.C.A., 102 F.2d 103, certiorari denied 59 S.Ct. 829, 307 U.S. 627, 83 L.Ed. 1510—Guaranty Trust Co. of New York v. Henwood, C.C.A.Mo., 98 F.2d 160, certiorari granted 59 S.Ct. 146, 305 U.S. 588, 83 L.Ed. 372, affirmed 59 S.Ct. 847, 307 U.S. 247, 83 L.Ed. 1266—Industrial Trust Co. v. Broderick, C.C.A.R.I., 94 F.2d 927, affirming, D.C., 19 F.Supp. 961,

certiorari denied 58 S.Ct. 1040, 304 U.S. 572, 82 L.Ed. 1536—McDonald v. U. S., C.C.A.Minn., 89 F.2d 128, certiorari denied 57 S.Ct. 925, 301 U.S. 697, 81 L.Ed. 1352, rehearing denied 58 S.Ct. 4, 302 U.S. 773, 82 L.Ed. 599—Hennepin County v. M. W. Savage Factories, C.C.A.Minn., 83 F.2d 453, certiorari denied M. W. Savage Factories v. Hennepin County, Minn., 57 S.Ct. 16, 299 U.S. 555, 81 L.Ed. 408—Sherman & Son v. Corin, C.C.A.Mass., 73 F.2d 468—Gottlieb v. White, C.C.A.Mass., 69 F.2d 792, affirming, D.C., 1 F.Supp. 905, and certiorari denied 54 S.Ct. 867, 292 U.S. 557, 78 L.Ed. 1505—Parfumerie Roger & Gallet v. M. C. M. Co., C. C.A.N.Y., 24 F.2d 698—Ball v. Chapman, C.C.A.Ill., 1 F.2d 895—15 C.J. p 923 note 30 [a].

Court of appeals for District of Columbia should not depart from clear path already taken by federal courts except for most cogent reasons.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

36. U.S.—Emerson Electric Mfg. Co. v. Emerson Radio & Phonograph Corporation, D.C.N.Y., 24 F.Supp. 481—Keystone Type Foundry v. Fastpress Co., D.C.N.Y., 263 F. 99, reversed on other grounds, C.C.A., 272 F. 242.

15 C.J. p 924 note 31.

37. U.S.—California Packing Corporation v. Sun-Maid Raisin Growers of California, D.C.Cal., 7 F. Supp. 497, reversed on other grounds, C.C.A., 81 F.2d 674, certiorari denied Sun-Maid Raisin Growers of California v. California Packing Corporation, 56 S.Ct. 833, 298 U.S. 668, 80 L.Ed. 1891—Hercules Powder Co. v. Newton, D.C. N.Y., 254 F. 906, following Gold v. Newton, 254 F. 824, 166 C.C.A. 270, certiorari denied 39 S.Ct. 290, 249 U.S. 608, 63 L.Ed. 799, and affirmed, C.C.A., Hercules Powder Co. v. Newton, 266 F. 169.

38. U.S.—Bakelite Corporation v. National Aniline & Chemical Co., C. C.A.N.Y., 88 F.2d 176—U. S. v. Hirschhorn, D.C.N.Y., 21 F.2d 758. Tex.—Miller v. Branch, Civ.App., 233 S.W. 1032.

15 C.J. p 924 note 32.

39. U.S.—Many v. Sizer, C.C.Mass.,

16 F.Cas.No. 9,057, 1 Fish.Pat.Cas. 31.

40. U.S.—McIlhenny Co. v. Gaidry, La., 253 F. 613, 165 C.C.A. 239. Cal.—Western Lithograph Co. v. State Board of Equalization, 78 P.2d 731, 11 Cal.2d 156, 117 A.L.R. 838—Ferguson v. Koch, 268 P. 342, 204 Cal. 342, 58 A.L.R. 1176.

Del.—Ownbey v. Morgan, 105 A. 838, 7 Boyce 297, affirming Morgan v. Ownbey, 100 A. 411, 6 Boyce 379. Ga.—Neely v. Sheppard, 196 S.E. 453, 185 Ga. 771.

Ill.—Giesecke v. Cullerton, 117 N.E. 777, 280 Ill. 510, reversing 203 Ill. App. 287.

N.J.—Dorman v. West Jersey Title & Guaranty Co., 105 A. 195, 92 N.J. Law 487.

N.Y.—Banca Nazionale Di Credito v. Equitable Trust Co. of New York, 224 N.Y.S. 617, 221 App.Div. 555—People ex rel. Battista v. Christian, 227 N.Y.S. 142, 131 Misc. 411, reversed on other grounds 229 N.Y.S. 644, 224 App.Div. 243, reversed on other grounds 164 N.E. 111, 249 N. Y. 314, 61 A.L.R. 793—Byk v. Enright, 203 N.Y.S. 296, reversed on other grounds 204 N.Y.S. 897, 209 App.Div. 823.

Okl.—Protest of Downing, 23 P.2d 173, 164 Okl. 181.

Pa.—In re Umble's Estate, 186 A. 75, 232 Pa. 170—In re Broilasky's Estate, 153 A. 739, 302 Pa. 439—Breining v. Smith, 110 A. 285, 267 Pa. 207—State Hospital for Criminal Insane v. Consolidated Water Supply Co., 110 A. 281, 267 Pa. 29. Tenn.—Walkup v. Covington, 114 S. W.2d 45, 173 Tenn. 7.

Tex.—National Bank of Commerce v. Williams, 84 S.W.2d 691, 125 Tex. 619, reversing Williams v. National Bank of Commerce, Civ.App., 62 S.W.2d 1108—Hargrave v. Texas & P. Ry. Co., Com.App., 12 S.W.2d 1009, affirming Texas & P. Ry. Co. v. Hargrave, Civ.App., 1 S.W.2d 740—Federal Surety Co. v. Blackwood, Civ.App., 46 S.W.2d 1062.

Wash.—Northern Pac. Ry. Co. v. Snohomish County, 172 P. 878, 101 Wash. 686.

15 C.J. p 924 note 34.

Failure to follow previous ruling
Decision of court of appeals is not binding on supreme court in deter-

ing the law of the case,⁴¹ although it has been considered that an appellate court will give great weight to the opinions of a lower court upon questions affecting its own practice and jurisdiction,⁴² and may consider the decision of such a court on other matters in the absence of any authoritative precedent.⁴³ Accordingly, a principle announced in an inferior court, unchallenged for a long period of time should not be overthrown by a decision of a higher court except for cogent and important reasons.⁴⁴ Due consideration will be given to the construction of statutes by inferior courts,⁴⁵ and such construction will generally be upheld if long acquiesced in,⁴⁶ especially where the adoption of a different rule would cause great mischief;⁴⁷ but the rule does not go to the extent of binding the court to a construction put upon the language by inferior courts where the language involved is clear and unequivocal.⁴⁸ A decision by the federal district court of another state as to the construction of a statute of such state would be followed by the federal circuit court;⁴⁹ and the United States supreme court in construing a statute of the District of Columbia

has said that the fact that it had been construed in a great number of cases in the District in accordance with the views of the federal supreme court was important not only as a confirmation of its view but as a reason for taking such view if the court had felt more doubt than it did.⁵⁰ It has been held however, that a circuit court of appeals may examine and dispose of a question in a patent case according to its own convictions, regardless of the decisions of district courts of another circuit.⁵¹

§ 202. Civil and Criminal Courts

Where civil and criminal courts are separate, decisions of one on matters exclusively within its jurisdiction are binding on the other.

Where there are in the same state distinct courts of last resort in civil and in criminal cases, the decisions of the civil courts as to matters exclusively within their jurisdiction are binding on the criminal courts,⁵² and the civil courts are in turn bound by the decisions of the criminal courts with respect to matters of criminal law;⁵³ but the criminal courts

mining whether court of appeals has failed to follow previous ruling of supreme court.—State ex rel. Harri-man v. Reynolds, 200 S.W. 296, 273 Mo. 131, quashing certiorari Harri-man v. Sayman, 193 S.W. 1001, 197 Mo.App. 208.

41. U.S.—Trapp v. Metropolitan Life Ins. Co., C.C.A.Mo., 70 F.2d 976, affirmed 72 F.2d 374, certiorari denied Metropolitan Life Ins. Co. v. Trapp, 55 S.Ct. 112, 293 U.S. 596, 79 L.Ed. 690.

Previous decisions in same case as law of case see supra § 195.

42. Cal.—People v. District Court of Appeal, 222 P. 353, 193 Cal. 19. 15 C.J. p 924 note 35.

Decisions as to matters of form and practice generally see infra § 213.

43. N.Y.—Byk v. Enright, 203 N.Y. S. 296, reversed on other grounds 204 N.Y.S. 897, 209 App.Div. 823. Pa.—State Hospital for Criminal In-sane v. Consolidated Water Supply Co., 110 A. 281, 267 Pa. 29.

Tex.—National Bank of Commerce v. Williams, 84 S.W.2d 691, 125 Tex. 619, reversing Williams v. National Bank of Commerce, Civ.App., 62 S. W.2d 1108.

15 C.J. p 924 note 36.

44. N.J.—Ramsey v. Hutchinson, 187 A. 650, 117 N.J.Law 222, reversing 181 A. 52, 13 N.J.Misc. 729 —Public Service Ry. Co. v. Matteucci, 143 A. 221, 105 N.J.Law 114, reversing 140 A. 442, 6 N.J. Misc. 34.

45. Colo.—Wilson v. People, 99 P. 335, 44 Colo. 608—Gibson v. People, 99 P. 333, 44 Colo. 600.

In Indiana

(1) Supreme court will consider construction of statute by inferior or intermediate courts where words therein are of doubtful import.—Citizens' Trust & Savings Bank of South Bend v. Fletcher American Co., 192 N.E. 451, 207 Ind. 328, 99 A.L.R. 1476, denying rehearing 190 N.E. 868, 207 Ind. 328, 99 A.L.R. 1474.

(2) Supreme court is bound by construction given to workmen's compensation act by appellate court.—Grant Coal Mining Co. v. Coleman, 179 N.E. 778, 204 Ind. 122.

In Missouri court of appeals' decision construing new statutes will not be disturbed, in absence of conflicting decisions of supreme court.—State ex rel. Holman v. Trimble, 293 S.W. 98, 316 Mo. 1041, quashing certiorari State ex rel. Bell v. Holman, 293 S.W. 98, 222 Mo.App. 531—State ex rel. Ball & Neal v. Holman, 293 S. W. 98—State ex rel. Dreps & Sons v. Holman, 293 S.W. 98, and State ex rel. Holmes v. Holman, 293 S.W. 98. Construction of statutes generally see infra § 214.

46. U.S.—State of Missouri v. Ross, Mo., 57 S.Ct. 60, 299 U.S. 72, 81 L.Ed. 46, affirming, C.C.A., 80 F. 2d 329, certiorari granted 56 S.Ct. 669, 297 U.S. 702, 80 L.Ed. 991—U. S. v. Ryan, Mont., 52 S.Ct. 65, 284 U.S. 167, 76 L.Ed. 224, reversing, C.C.A., Ryan v. U. S., 44 F.2d 951, certiorari granted U. S. v. Ryan, 51 S.Ct. 649, 283 U.S. 816, 75 L.Ed. 1432, and followed in In re Anderson, 44 F.2d 953, reversed on other

grounds U. S. v. Anderson, 52 S.Ct. 125, 284 U.S. 584, 76 L.Ed. 505.

Ga.—Johnson v. State, 115 S.E. 642, 154 Ga. 806, answers to certified questions conformed to 116 S.E. 226, 29 Ga.App. 659.

Or.—State v. Stevenson, 193 P. 1030, 98 Or. 285.

59 C.J. p 1036 note 37.

47. N.Y.—Van Loon v. Lyon, 4 Daly 149, reversed on other grounds 61 N.Y. 22.

48. Ind.—Citizens' Trust & Savings Bank of South Bend v. Fletcher American Co., 192 N.E. 451, 207 Ind. 328, 99 A.L.R. 1476, denying rehearing 190 N.E. 868, 207 Ind. 328, 99 A.L.R. 1474.

49. U.S.—White v. The Cynthia, C.C. N.Y., 29 F.Cas.No.17,546a.

50. U.S.—District of Columbia v. Lynchburg Inv. Corp., D.C., 35 S. Ct. 477, 236 U.S. 692, 59 L.Ed. 792. Weight given by federal courts to construction of territorial statutes by territorial court see the C.J.S. title Federal Courts § 171, also 25 C.J. p 838 note 88.

51. U.S.—Curtis v. Overman Wheel Co., Conn., 58 F. 784, 7 C.C.A. 493 —Wanamaker v. Enterprise Mfg. Co., Pa., 53 F. 791, 3 C.C.A. 672—National Cash-Register Co. v. American Cash-Register Co., Pa., 53 F. 367, 3 C.C.A. 559.

52. Okl.—State v. Coyle, 122 P. 243, 7 Okl.Cr. 50.

Tex.—Bishop v. State, 167 S.W. 363, 74 Tex. 214.

15 C.J. p 924 note 41.

53. Okl.—Ex parte Barnett, 69 P.2d

satisfied of the soundness of the reasoning by which they are supported,⁵⁹ and as shown in the C.J.S. title Statutes §§ 371-373, also 15 C.J. p 926 notes 50, 51, 59 C.J. p 1068 note 68-p 1072 note 23, where one state has adopted a statute of another state, which has been construed by the courts of the latter state, such decisions should be accorded very considerable weight when the question of the construction of the statute arises in the state where it has been so adopted, although it would seem that the courts are not bound to accept such construction. On questions of the constitutionality of the statute, moreover, decisions of the courts of the state from which the statute was adopted are not binding on those of the adopting state,⁶⁰ whether holding the statute constitutional⁶¹ or unconstitutional.⁶² Modern adjudications of foreign courts proceeding in rem, unlike adjudications in personam, are an unusual authority everywhere in courts of like character.⁶³

Federal questions. A court of one state is not bound by adjudications in other states on questions arising under the federal constitution and laws.⁶⁴ It has been held, however, that, since the adoption of the fourteenth amendment to the United States constitution, the federal supreme court has become the final arbiter of whether a state in the exercise of its police power has violated the constitutional guaranty, thus making the various state courts courts of concurrent jurisdiction, and so the decisions of the courts of one state on such questions

are not to be regarded in another as those of a foreign tribunal, but as those of a court of equal authority.⁶⁵

Matters of practice. The value of precedents from other states in matters of practice depends so much upon the identity of statutes, the similarity of the courts, and the methods of procedure, that without proof thereof little weight can be accorded to them.⁶⁶ A court is not controlled by principles of practice established in other jurisdictions, unless they are consonant with other rules of its own procedure.⁶⁷

Questions of public policy. In determining what is and what is not against public policy, the common law and the decisions of other states may be resorted to as in determining any other rule of substantive law.⁶⁸

Workmen's compensation acts. On account of the large number and variety of state statutes dealing with workmen's compensation,⁶⁹ it has been held that, in construing a compensation statute, the decisions of courts of other states are persuasive and of value only to the extent to which the reasoning therein appears sound,⁷⁰ and applicable to the specific provisions of the law being construed,⁷¹ and decisions made in other jurisdictions have been held to have very little weight where the wording of the acts to which they relate, on the question under consideration, is very different from that of the act of the forum.⁷² Further, the construction placed on

from the realty.—*Sewell v. Sewell*, 1 N.E.2d 492, 363 Ill. 166.

Writ dismissed by supreme court

Foreign judgment is regarded with added respect, where federal supreme court dismissed writ of error.—*Chorosh v. Woodbury*, 240 N.Y.S. 157, 135 Misc. 910.

Acts widely adopted

In construing an act such as the Negotiable Instruments Law or Uniform Sales Act, widely adopted by the different states for the purpose of securing uniformity, great weight will be given to the harmonious decisions of the courts of other states. *Ariz.—Arnett v. Clack*, 198 P. 127, 22 Ariz. 409.

Neb.—Peter v. Finzer, 217 N.W. 612, 116 Neb. 380, 65 A.L.R. 1419.

N.Y.—Kasnowitz v. Manufacturers Trust Co., 13 N.Y.S.2d 211, 171 Misc. 545.

Vt.—Etna Chemical Co. v. Spaulding & Kimball Co., 126 A. 532, 98 Vt. 51.

15 C.J. p 926 note 50 [a].

In construing decision by court of another state relative to inheritance between adoptive parents and adopted children, it will be presumed that

in not discussing a statute of that state relative to rights and duties of adoptive parents, the court concluded that such statute was inapplicable.—*McKinney v. Minkler*, Tex. Civ.App., 102 S.W.2d 273.

59. *Mont.—Rutherford v. City of Great Falls*, 86 P.2d 656, 107 Mont. 512.

Ohio.—Hicks v. Hicks, 4 Ohio N.P., N.S., 25.

Utah.—Wood v. Cowan, 250 P. 979, 68 Utah 388.

15 C.J. p 926 note 49.

Construction of statute

Supreme court may follow precedent from another state in construing its own state's statute only if approved as proper construction thereof.—*Ballard-Hassett Co. v. City of Des Moines*, 224 N.W. 793, 207 Iowa 1351.

60. *Minn.—State v. Brooks*, 232 N. W. 331, 181 Minn. 262.

61. *Ala.—Federal Automobile Ins. Ass'n v. Abrams*, 117 So. 85, 217 Ala. 539.

62. *Minn.—State v. Brooks*, 232 N. W. 331, 181 Minn. 262.

63. *N.Y.—In re Zimmerman's Will*, 172 N.Y.S. 80, 104 Misc. 516.

64. *N.Y.—In re Wittmann's Estate*, 182 N.Y.S. 535, 112 Misc. 168.

Tex.—Western Union Telegraph Co. v. Brown, Civ.App., 202 S.W. 1049. 15 C.J. p 926 note 47.

65. *N.Y.—People v. Kane*, 139 N.Y. S. 350, 79 Misc. 140.

Decisions of coordinate courts generally see supra § 200.

66. *N.Y.—People v. Goodrich*, 149 N. Y.S. 406.

67. *Wyo.—Hall Oil Co. v. Barquin*, 237 P. 255, 33 Wyo. 92.

68. *Mo.—State v. Bowman*, 170 S.W. 700, 184 Mo.App. 549.

69. *Md.—Sea Gull Specialty Co. v. Snyder*, 134 A. 133, 151 Md. 78.

70. *Md.—Cambridge Mfg. Co. v. Johnson*, 153 A. 283, 160 Md. 248—*Sea Gull Specialty Co. v. Snyder*, 134 A. 133, 151 Md. 78.

71. *Md.—Cambridge Mfg. Co. v. Johnson*, 153 A. 283, 160 Md. 248.

72. *Ill.—Uphoff v. Industrial Board of Illinois*, 111 N.E. 128, 271 Ill. 312.

the legislation by the courts has been said to be so diverse that little applicable authority is found in other jurisdictions.⁷³ Accordingly, while many cases from other jurisdictions are helpful in arriving at a proper construction of the act of the forum,⁷⁴ the wide differences in the phraseology of the acts on which the decisions are based require great care in considering many of the opinions.⁷⁵

Territorial courts. Decisions of the courts of a territory, although perhaps not binding on the courts of a state subsequently formed out of the territory, are at least persuasive.⁷⁶

Contracts generally. In determining the validity of a contract made and to be performed in another state, the decisions of that state should, it has been held, be followed,⁷⁷ although there is also authority for the view that the state in which the action is brought will adhere to its own decision relating to similar contracts, regardless of the decisions of the other state, no law of that state being pleaded or proved.⁷⁸ Decisions of inferior courts of that state as to the measure of damages for breach of the contract are not binding.⁷⁹

Transitory common-law actions. In actions for injuries occurring in other states, there is a conflict of authority. So, although there is authority

to the contrary,⁸⁰ it has been held that the interpretation of the common law by the court of the state where the injury occurred will govern,⁸¹ but the court in which the action is brought is at liberty to differ from the judgment of the foreign court as to the application of the law to the facts.⁸²

Decisions of the highest court of a state formed out of a territory are not declaratory of the common law as it existed in the territory where federal courts possessed revisory control over the judgments of the supreme court of the territory.⁸³

Law merchant. There is conflict as to whether decisions of sister states as to the law merchant must be followed, where the law of that state is the controlling law. In some jurisdictions the courts have held that, where the law to be applied is the general commercial law or law merchant, it must be sought for, not in the decisions of local tribunals, but in the general doctrines of commercial jurisprudence; that, while following the decisions of the courts of final resort of the other state in the construction of its statutes, the courts of the state where the case is tried will be governed by their own precedents in expounding the general common law applicable to commercial transactions.⁸⁴ On the other hand, it is held in other jurisdictions that

73. Okl.—Harris v. Oklahoma Natural Gas Co., 216 P. 116, 91 Okl. 39.

74. Del.—Widdoes v. Laub, 129 A. 344, 33 Del. 4.

Vt.—Jacobs v. Holden Leonard Co., 4 A.2d 843.

Persuasive but not binding

S.C.—Spearman v. F. S. Royster Guano Co., 199 S.E. 530, 188 S.C. 393.

75. Del.—Widdoes v. Laub, 129 A. 344, 33 Del. 4.

76. Wash.—Bickford v. Eschbach, 9 P.2d 376, 167 Wash. 357.

History, customs, and local laws

Generally, great weight must be given to decision by highest court of territory as to latter's history and customs and construction of its local laws.—In re Gabaldon's Estate, 34 P.2d 672, 38 N.M. 392, 94 A.L.R. 980.

Weight given by federal courts to construction of territorial statutes by territorial court see the C.J.S. title Federal Courts § 171, also 25 C.J. p 838 note 88.

77. Ala.—Stevens v. Hopson, 110 So. 147, 215 Ala. 261.

Del.—Mackenzie Oil Co. v. Omar Oil & Gas Co., 154 A. 883, 4 W.W.Harr. 435, affirmed Phoenix Oil Co. v. Mackenzie Oil Co., 154 A. 894, 4 W.W.Harr. 460.

Ill.—See Ward v. Gartside, 197 Ill. App. 314.

Miss.—Fleming v. Grimes, 107 So. 420, 142 Miss. 522, 45 A.L.R. 618.

N.M.—Wooley v. Shell Petroleum Corporation, 45 P.2d 927, 39 N.M. 256.

15 C.J. p 926 note 52.

Partition proceedings

In an action against a purchaser at a partition sale under proceedings had in a court of another state, for failure to pay the purchase price, the decisions of that state must govern.—Runyan v. Richardson, 247 S.W. 59, 156 Ark. 536.

In construing Missouri contract, a decision of a court of appeals of Missouri which construed an identical contract must be treated as establishing law, validity of contract, and right to enforce it in Arkansas.—J. R. Watkins Medical Co. v. Johnson, 196 S.W. 465, 129 Ark. 384.

78. Ga.—Akers v. Jefferson County Sav. Bank, 48 S.E. 424, 120 Ga. 1066—Thomas v. Shepherd, 156 S. E. 724, 42 Ga.App. 558—Motors Mortg. Corporation v. Purchase-Money Note Co., 143 S.E. 459, 38 Ga.App. 222.

79. N.Y.—Seaver v. Lindsay Light Co., 135 N.E. 329, 233 N.Y. 273, reversing 187 N.Y.S. 622, 196 App. Div. 397, which reversed 182 N.Y. S. 30, 111 Misc. 553 and reargu-

ment denied 135 N.E. 953, 233 N. Y. 646.

80. Ga.—Slaton v. Hall, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, reversing Hall v. Slaton, 144 S.E. 827, 38 Ga.App. 619, and conformed to 149 S.E. 306, 40 Ga.App. 288, overruling Atlanta & C. Air Line Ry. Co., 68 Ga. 384—Hopkins v. Sipe, 199 S. E. 246, 58 Ga.App. 511—Aetna Life Ins. Co. v. Evans, 192 S.E. 483, 56 Ga.App. 336—Bolton v. Bluestein, 191 S.E. 388, 55 Ga.App. 782.

81. Mo.—Lee v. Missouri Pac. R. Co., 92 S.W. 614, 195 Mo. 400—Gabriel v. St. Louis etc., R. Co., 115 S. W. 3, 135 Mo.App. 222.
15 C.J. p 926 note 55.

82. Mo.—Lee v. Missouri Pac. R. Co., 92 S.W. 614, 195 Mo. 400.

83. Tex.—Lamb v. Hardy, 211 S.W. 445, 109 Tex. 414, affirming Hardy v. Lamb, Civ.App., 152 S.W. 650.

84. Ga.—Pattillo v. Alexander, 30 S. E. 644, 105 Ga. 482.

Iowa.—Michigan Nat. Bank v. Green, 33 Iowa 140—Franklin v. Twogood, 25 Iowa 520, 96 Am.D. 73.

Me.—Roads v. Webb, 40 A. 128, 91 Me. 406, 64 Am.S.R. 246.

N.Y.—St. Nicholas Bank v. State Nat. Bank, 27 N.E. 849, 128 N.Y. 26, 13 L.R.A. 241.

8 C.J. p 86 notes 86, 87—15 C.J. p 925 note 46 [e].

one state cannot determine what the law merchant of another state or country is, but is bound by the decisions of that state.⁸⁵

In an action on a judgment rendered without service of process, in a sister state, the courts of the state in which the action is tried are bound by the interpretation placed on the common law by the courts of the state in which the judgment was rendered with regard to the validity of the procedure to sustain the judgment.⁸⁶

b. Construction of Constitution and Statutes of Other States

In construing or applying provisions of the constitu-

tion or statutes of another state, a court should usually follow the decisions of the courts of that state; and while it has power to declare such provisions unconstitutional, this power should be exercised only when necessary and in case the invalidity clearly appears.

It is the right and the duty of the courts to construe the law on which a litigant relies, even though it be the law of another state;⁸⁷ and in a proper case the courts of one state may be called on to construe the constitution of another state.⁸⁸ Where a question as to the construction or effect of the constitution or statutes of a state arises in the courts of another state, such courts should follow the decisions of the court of last resort of the state whose constitutional or statutory provisions are involved.⁸⁹

85. Conn.—*Roe v. Jerome*, 18 Conn. 138.

Ind.—*Midland Steel Co. v. Citizens' Nat. Bank*, 72 N.E. 290, 34 Ind. App. 107.

Kan.—*Sykes v. Citizens' Nat. Bank*, 98 P. 206, 78 Kan. 688, 19 L.R.A. N.S., 665.

N.H.—*Limerick Nat. Bank v. Howard*, 51 A. 641, 71 N.H. 18, 93 Am. S.R. 489.

8 C.J. p 87 notes 92, 93.

In Texas

(1) The rule of the text has been recognized.—*Lamb v. Hardy*, 211 S. W. 445, 109 Tex. 414, affirming *Hardy v. Lamb*, Civ.App., 152 S.W. 650.

(2) But there is authority holding that, in an action involving a note transferred in Missouri, a rule of law, not based on any statute, when contrary to the law of the forum and the weight of authority, is not binding on the domestic courts.—*Springfield Third Nat. Bank v. National Bank of Commerce*, Civ.App., 139 S.W. 665.

Inapplicable decision

In Massachusetts suit to enforce note given on Florida land contract, Florida decision in an action of contract, holding that there must be tender of deed before suit was inapplicable; hence trial judge did not err in following Massachusetts law, no different Florida rule being shown.—*Coral Gables v. Granara*, 189 N.E. 604, 285 Mass. 565.

86. Neb.—*Whittier v. Riley*, 178 N. W. 762, 104 Neb. 805.

Conclusiveness of foreign judgments and enforcement in other states see the C.J.S. title Judgments §§ 891-892 also 34 C.J. p 1132 note 3 et seq.

87. La.—*Succession of Marinoni*, 148 So. 888, 177 La. 592.

88. U.S.—*Smithsonian Inst. v. St. John*, N.Y., 29 S.Ct. 601, 214 U.S. 19, 53 L.Ed. 892.

89. U.S.—*Good v. Derr*, C.C.A.Wis., 46 F.2d 411, certiorari denied 51 S. Ct. 495, 283 U.S. 849, 75 L.Ed. 1457

—*Hayes Wheel Co. v. American Distributing Co.*, Mich., 257 F. 881, 169 C.C.A. 31, reversing, D.C., *American Distributing Co. v. Hayes Wheel Co.*, 250 F. 109, and certiorari denied 40 S.Ct. 13, 250 U.S. 672, 63 L.Ed. 1200.

Ark.—*Magnolia Petroleum Co. v. Turner*, 65 S.W.2d 1, 188 Ark. 177—*Shaver v. Nash*, 29 S.W.2d 298, 181 Ark. 1112, 73 A.L.R. 961—*Peppers v. Pennsylvania Door & Sash Co.*, 285 S.W. 5, 171 Ark. 521—*Guardian Life Ins. Co. v. Dixon*, 240 S. W. 25, 152 Ark. 597.

Cal.—*People v. Goddard*, 258 P. 447, 84 Cal.App. 382—*Interstate Lumber Co. v. Tweedy*, 82 P.2d 208, 28 Cal.App.2d 208, followed in *Emery Consolidated Mining Co. v. Tweedy*, 82 P.2d 209, 28 Cal.App.2d 767—*McManus v. Red Salmon Canning Co.*, 173 P. 1112, 37 Cal.App. 133.

Colo.—*U. S. Fidelity & Guaranty Co. v. Industrial Commission*, 61 P.2d 1033, 99 Colo. 280.

Ga.—*Slaton v. Hall*, 158 S.E. 747, 172 Ga. 675, appeal dismissed *Clemmons v. Hall*, 52 S.Ct. 5, 284 U.S. 691, 76 L.Ed. 583—*Slaton v. Hall*, 148 S.E. 741, 168 Ga. 710, 73 A.L.R. 891, reversing *Hall v. Slaton*, 144 S.E. 827, 38 Ga.App. 619, and conformed to 149 S.E. 306, 40 Ga.App. 288.

Ill.—*Montana Wheat Land Co. v. Northern Pac. Ry. Co.*, 139 N.E. 876, 308 Ill. 620, affirming *Montana Wheat Land Co. v. Danaher*, 225 Ill.App. 364—*Hartilep Transit Co., for Use of Snow, v. Central Mut. Ins. Co. of Chicago*, 5 N.E.2d 879, 288 Ill.App. 140.

Ind.—*Clark v. Southern Ry. Co.*, 119 N.E. 539, 69 Ind.App. 697.

Iowa.—*Kingery v. Donnell*, 268 N.W. 617, 222 Iowa 241.

Mass.—*Hopkins v. Flower*, 152 N.E. 635, 256 Mass. 367.

Mich.—*Palchi v. Robbins*, 262 N.W. 381, 272 Mich. 411, followed in *Frigo v. Robbins*, 262 N.W. 385, 272 Mich. 423.

Minn.—*Burkhardt v. Northern States*

Power Co., 231 N.W. 239, 180 Minn. 560.

Miss.—*McArthur v. Maryland Casualty Co.*, 186 So. 305, 120 A.L.R. 846.

Mo.—*Rositzky v. Rositzky*, 46 S.W. 2d 591, 329 Mo. 662—*Ramey v. Missouri Pac. R. Co.*, 21 S.W.2d 873, 323 Mo. 662, certiorari denied *Missouri Pac. R. Co. v. Ramey*, 50 S.Ct. 163, 280 U.S. 614, 74 L.Ed. 655

—*Mosely v. Empire Gas & Fuel Co.*, 281 S.W. 762, 313 Mo. 225, 45 A.L.R. 1223—*Hiatt v. St. Louis-San Francisco Ry. Co.*, 271 S.W. 806, 308 Mo. 77—*Atkinson v. Metropolitan Life Ins. Co.*, App., 131 S.W.2d 918—*Stevens v. Walker*, App., 125 S.W.2d 920—*Sisk v. Chicago, B. & Q. R. Co.*, App., 67 S.W. 2d 830—*Lugar v. Missouri Pac. R. Co.*, 283 S.W. 738, 321 Mo.App. 679.

Mont.—*In re Hauge's Estate*, 9 P.2d 1065, 92 Mont. 36—*Swift & Co. v. Weston*, 289 P. 1035, 88 Mont. 40.

N.Y.—*Schwertfeger v. Scandinavian-American Line*, 123 N.E. 888, 226 N.Y. 696, affirming 174 N.Y.S. 147, 186 App.Div. 89—*In re Southern Surety Co. of New York*, 9 N.Y.S. 2d 567, 256 App.Div. 237—*Maxwell v. Thompson*, 186 N.Y.S. 208, 195 App.Div. 616, motion denied 132 N.E. 881, 231 N.Y. 542, and affirmed 134 N.E. 596, 232 N.Y. 619—*Larendon v. Ocean S. S. Co. of Savannah*, 170 N.Y.S. 830, 183 App. Div. 559—*In re Cohen's Estate*, 269 N.Y.S. 235, 149 Misc. 765—*Los Angeles Inv. Securities Corporation v. Joslyn*, 12 N.Y.S.2d 370.

Tenn.—*Nashville, C. & St. L. Ry. v. Paris*, 60 S.W.2d 425, 166 Tenn. 238.

Tex.—*Criteser, v. Gaffey*, Com.App., 222 S.W. 193, affirming *Gaffey v. Criteser*, Civ.App., 195 S.W. 1166—*Clay v. Atchison, T. & S. F. Ry. Co.*, Civ.App., 201 S.W. 1072, affirmed, Com.App., 228 S.W. 907.

Va.—*Norman v. Baldwin*, 148 S.E. 831, 152 Va. 800.

Wash.—*Scherer v. Alaska Shamrock Marble Co.*, 56 P.2d 684, 185 Wash. 614.

even though they would be inclined to place a different, or even an opposite, construction upon a similar provision if it appeared in the constitution or statutes of their own state.⁹⁰ This rule rests upon comity alone,⁹¹ and the duty of recognizing such decisions is not imposed by the full faith and credit clause of the federal constitution,⁹² nor will the rule be applied where the decisions of the state of enactment are in conflict with those of the United States supreme court.⁹³ So a court is not bound to follow such a construction of a statute by another court as would make it violative of the federal constitution.⁹⁴ Furthermore, a court need not apply the doctrine of comity where the highest court of the other state has given different constructions to the statute at different times, and rights may have been acquired under the former construction.⁹⁵ The same degree of recognition will not ordinarily be accorded to decisions of the inferior courts of another state as to the construction and effect of the constitutional and statutory provisions of such state,⁹⁶ although such decisions have been followed;⁹⁷ and it has been said that a state court will look upon as new, and decide for itself, questions which concern the citizens of the state, although such questions grow out of the constitutional or

statutory provisions of a sister state, where there is a conflict between the federal and the state tribunals as to the proper construction of such provisions.⁹⁸

Where a statute has not been construed by the courts of the state in which it was enacted, a court of another state in which a question with respect to the effect of such statute arises may place its own construction thereon,⁹⁹ and does not, by so doing, deny to the statute full faith and credit, in violation of the federal constitution.¹ Such a construction is no authority as a precedent, however, in the courts of the state in which the statute was enacted.²

The mode of procedure to be followed to obtain relief under a statute of another state is governed by the laws of the state where such relief is sought, and the courts of such state will not, in this respect, be governed by the adjudications of the courts of the state where the statute is in force.³

In determining whether a statute is penal, so as to deny jurisdiction to the courts of another state, in which an action thereon is brought, such courts are not bound by the construction placed on the statute by the courts of the state which enacted it, but this

Wyo.—*Miller v. Palmer*, 181 P. 427, 26 Wyo. 191.—*Miller v. Amoretti*, 181 P. 420, 26 Wyo. 170.

15 C.J. p 927 note 58—59 C.J. p 946 note 64, p 1037 note 50.

Construction of:

Constitutions generally see *infra* § 215.

Statutes generally see *infra* § 214.

Duty of federal courts to follow construction of state constitution or statute by state courts see the C.J. S. title Federal Courts § 171, also 25 C.J. p 832 note 72.

90. Tex.—*St. Louis, etc., R. Co. v. Conrad*, Civ.App., 99 S.W. 209, 210. 15 C.J. p 928 note 59.

91. Pa.—*Nesbit v. Clark*, 116 A. 404, 272 Pa. 162, 25 A.L.R. 1406, certiorari denied 42 S.Ct. 273, 258 U.S. 621, 66 L.Ed. 795.

15 C.J. p 928 note 60—59 C.J. p 946 note 67.

92. Mo.—*Esmar v. Haeussler*, App., 115 S.W.2d 54, transferred 106 S.W. 2d 412, 341 Mo. 33.

Pa.—*Nesbit v. Clark*, 116 A. 404, 272 Pa. 161, 25 A.L.R. 1406, certiorari denied 42 S.Ct. 273, 258 U.S. 621, 66 L.Ed. 795.

15 C.J. p 928 note 61—59 C.J. p 946 note 67.

93. U.S.—*Pease v. Peck*, Mich., 18 How. 595, 15 L.Ed. 518.

La.—*Davis v. Robertson*, 11 La. Ann. 752.

94. Mo.—*Oxford v. St. Louis-San*

Francisco Ry. Co., 52 S.W.2d 983, 331 Mo. 53.

95. Pa.—*Nesbit v. Clark*, 116 A. 404, 272 Pa. 161, 25 A.L.R. 1406, certiorari denied 42 S.Ct. 273, 258 U.S. 621, 66 L.Ed. 795.

96. Md.—*Commonwealth of Pennsylvania v. Fidelity & Deposit Co. of Maryland*, 121 A. 920, 143 Md. 29.—*Peter v. Peter*, 110 A. 211, 136 Md. 187.

15 C.J. p 928 note 62.

97. Miss.—*McArthur v. Maryland Casualty Co.*, 186 So. 305, 120 A.L.R. 846.

Persuasiveness of decisions

Decisions of lower courts, while not compelling on courts of other states, are persuasive.—*Smith v. Smith*, 9 N.Y.S.2d 188, 255 App.Div. 652.

98. La.—*Cotton v. Brien*, 6 Rob. 115.

15 C.J. p 928 note 63.

99. U.S.—*Illinois Western Life Indemn. Co. v. Rupp*, 35 S.Ct. 37, 235 U.S. 261, 59 L.Ed. 220, affirming 144 S.W. 743, 147 Ky. 489.

La.—*Polmer v. Polmer*, App., 181 So. 200.

Mass.—*Harvard Trust Co. v. Commissioner of Corporations and Taxation*, 187 N.E. 596, 284 Mass. 225.

Miss.—*McArthur v. Maryland Casualty Co.*, 186 So. 305, 120 A.L.R. 846.

Tex.—*McKinney v. Minkler*, Civ.App., 102 S.W.2d 273, 279, citing *Corpus Juris*.

59 C.J. p 946 note 70.

Local construction of similar statute in force in state in which the question arises will be followed.

Ark.—*Norris v. Dunn*, 43 S.W.2d 77, 184 Ark. 511.

Mo.—*Handlin v. Burchett*, 192 S.W. 1016, 270 Mo. 114.

N.Y.—*Keeler v. Templeton*, 300 N.Y. S. 868, 165 Misc. 392, denying motion 298 N.Y.S. 193, 164 Misc. 113.

Ohio.—*Cushman Motor Delivery Co. v. Smith*, 1 N.E.2d 628, 51 Ohio App. 421.

Tex.—*Mitchell v. San Antonio Public Service Co.*, Com.App., 35 S.W.2d 140, reversing, Civ.App., 15 S.W.2d 694.

Anticipating construction

The court must construe a statute of another state as the courts of that state would construe it.—*Fogle v. Equitable Life Assur. Soc. of U. S.*, Mo.App., 123 S.W.2d 595.

1. U.S.—*Illinois Western Life Indemn. Co. v. Rupp*, 35 S.Ct. 37, 235 U.S. 261, 59 L.Ed. 220, affirming 144 S.W. 743, 147 Ky. 489.

2. N.Y.—*Commercial Inv. Trust v. Bskew*, 212 N.Y.S. 718, 126 Misc. 114.

3. Mass.—*Clark v. Knowles*, 72 N.E. 352, 187 Mass. 35, 105 Am.S.R. 376, 2 Ann.Cas. 26.

is to be determined by the court in which the action is brought.⁴

Constitutionality. A state court, in a proper case, may declare provisions in the constitution of a sister state to be in conflict with the federal constitution and consequently void.⁵ So the courts of one state may declare unconstitutional a statute of another state on the ground of its contravening the constitution of the state enacting it,⁶ or the federal constitution,⁷ even where the courts of the state enacting the statute have not passed on it;⁸ but this power will be exercised only where the invalidity of the statute in question clearly appears,⁹ and not if the question involved is in any way capable of being decided without passing on the validity of the law.¹⁰ Neither will the power be exercised where

a well-considered decision of the court of the state enacting the statute has held it constitutional.¹¹

§ 205. Decisions of United States Courts as Precedents in State Courts

In cases not involving federal questions, as where state constitutions and statutes are to be construed, state courts are not required to follow federal court decisions although they may be persuasive; but generally territorial courts should follow decisions of the federal courts.

In cases not arising upon the construction of the constitution and laws of the federal government, but in which the state courts have full jurisdiction and their judgments are final, such courts will adhere to and follow their own decisions and are not bound by those of the federal courts,¹² although

4. Ga.—Southern R. Co. v. Decker, 62 S.E. 678, 5 Ga.App. 21.
- Tenn.—Whitlow v. Nashville, etc., R. Co., 84 S.W. 618, 114 Tenn. 344, 68 L.R.A. 503.
5. Pa.—Stoddard v. Smith, 5 Binn. 355.
6. Mass.—Woodward v. Central Vermont R. Co., 62 N.E. 1051, 180 Mass. 599.
- 12 C.J. p 698 note 54.
7. Mass.—Woodward v. Central Vermont R. Co., supra—Shoe, etc., Nat. Bank v. Wood, 8 N.E. 753, 142 Mass. 563—Simonds v. Simonds, 103 Mass. 572, 4 Am.R. 576.
- Pa.—Stoddard v. Smith, 5 Binn. 355.
8. Mass.—Woodward v. Central Vermont R. Co., 62 N.E. 1051, 180 Mass. 599.
- 12 C.J. p 698 note 55.
9. La.—Hyde v. Planters' Bank, 8 Rob. 416—Illinois Bank v. Sloo, 16 La. 539, 35 Am.D. 223.
- Pa.—McDowell v. Lindsay, 63 A. 130, 213 Pa. 591.
- 12 C.J. p 698 note 55 [a].
10. La.—Shelden v. Miller, 9 La. Ann. 187.
11. Utah.—Bozo v. Central Coal & Coke Co., 193 P. 1111, 57 Utah 243—Bozo v. Central Coal & Coke Co., 180 P. 432, 54 Utah 289.
12. U.S.—Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, Tex., 59 S.Ct. 420, 306 U.S. 103, 83 L.Ed. 515, affirming, C.C.A., 95 F. 2d 671, remanding cause, D.C., City Nat. Bank of Wichita Falls, Tex. v. Wichita Royalty Co., 18 F.Supp. 795, rehearing denied, C.C.A., Wichita Royalty Co. v. City Nat. Bank of Wichita Falls, 97 F.2d 249, certiorari granted 59 S.Ct. 101, 305 U.S. 587, 83 L.Ed. 371.
- Ala.—Shertzer v. Williams, 168 So. 573, 232 Ala. 558—Kraas v. American Bakeries Co., 164 So. 565, 231 Ala. 278—Elmore County v. Tal-

- lapoosa County, 128 So. 158, 221 Ala. 182.
- Ariz.—Mason Dry Goods Co. v. Ackel, 243 P. 606, 30 Ariz. 7.
- Ark.—Merchants' Nat. Bank of Ft. Smith v. Taylor, 25 S.W.2d 1048, 181 Ark. 356.
- Cal.—Western Oil & Refining Co. v. Venago Oil Corporation, 24 P.2d 971, 218 Cal. 733, 88 A.L.R. 1271, followed in 24 P.2d 977, 218 Cal. 784—Bank of Italy Nat. Trust & Savings Ass'n v. Bentley, 20 P.2d 940, 943, 217 Cal. 644, citing *Corpus Juris*—Chambers v. Mumford, 201 P. 588, 187 Cal. 228, 42 A.L.R. 342—Bank of California v. McCoy, 72 P.2d 923, 23 Cal.App.2d 192.
- Del.—State ex rel. Green v. Collison, 197 A. 836, reversed on other grounds Collison v. State ex rel. Green, 2 A.2d 97, 119 A.L.R. 1422.
- Fla.—Rorick v. Chancey, 178 So. 112, 130 Fla. 442.
- Ga.—Georgia R. & Banking Co. v. Stanley, 145 S.E. 530, 38 Ga.App. 773.
- Ill.—State Public Utilities Commission v. City of Quincy, 125 N.E. 374, 290 Ill. 360.
- Iowa.—Iowa Title & Loan Co. v. Clark Bros., 224 N.W. 774, 209 Iowa 169.
- Ky.—Coleman v. Reamer's Ex'r, 36 S.W.2d 22, 237 Ky. 603—Big Sandy & K. R. Ry. Co. v. Blair, 6 S.W.2d 453, 224 Ky. 367.
- La.—State v. Miller, 126 So. 422, 169 La. 914.
- Minn.—State ex rel. Dunlap v. Utecht, 287 N.W. 229, 232, citing *Corpus Juris*.
- N.J.—Cassatt v. First Nat. Bank, 156 A. 278, 9 N.J.Misc. 848.
- N.Y.—People ex rel. Mosbacher v. Graves, 5 N.Y.S.2d 553, 254 App. Div. 438, affirmed 19 N.E.2d 89, 279 N.Y. 793—Marsich v. Eastman Kodak Co., 279 N.Y.S. 140, 244 App. Div. 295, affirmed 200 N.E. 27, 269 N.Y. 621—People ex rel. Rice v.

- Graves, 273 N.Y.S. 582, 242 App. Div. 128, affirmed 200 N.E. 288, 270 N.Y. 498, certiorari denied 56 S.Ct. 953, 298 U.S. 683, 80 L.Ed. 1403—In re Bemis' Will, 205 N.Y.S. 367, 368, 123 Misc. 255, citing *Corpus Juris*.
- Ohio.—East Ohio Gas Co. v. City of Cleveland, 140 N.E. 410, 106 Ohio St. 489, reversing City of Cleveland v. East Ohio Gas Co., 15 Ohio App. 117.
- Pa.—Central Lithograph Co. v. Eastmor Chocolate Co., 175 A. 697, 316 Pa. 300—In re Harkness' Estate, 129 A. 458, 283 Pa. 464, certiorari denied Hanna v. Pennsylvania for Insurance of Lives and Granting Annuities, 46 S.Ct. 104, 269 U.S. 579, 70 L.Ed. 422—Harkness's Estate, 5 Pa.Dist. & Co. 351, affirmed 129 A. 458, 283 Pa. 464.
- S.C.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457—Santee River Cypress Lumber Co. v. Query, 167 S.E. 22, 168 S.C. 112—Key v. Carolina & N. W. Ry. Co., 147 S.E. 625, 150 S.C. 29, followed in Holladay v. Atlantic Coast Line R. Co., 147 S.E. 927, 150 S.C. 234—State v. George, 111 S.E. 880, 119 S.C. 120.
- Tex.—Harrison v. Barngrover, Civ. App., 72 S.W.2d 971, error refused, certiorari denied 55 S.Ct. 639, 294 U.S. 731, 79 L.Ed. 1260—Bell v. Baker, Civ.App., 249 S.W. 246, reversed on other grounds, Com.App., 260 S.W. 158.
- Wis.—General Accident Fire & Life Assur. Corporation v. Industrial Commission, 271 N.W. 385, 223 Wis. 635.
- 15 C.J. p 928 note 69.
- Federal decisions held not binding as to**
(1) Administrative practice and procedure under federal acts.—Chairs v. Stollenwerck, 168 So. 589, 232 Ala. 546.

such decisions are persuasive;¹³ and the decisions | of a state court of last resort upon a question as to

(2) Admissibility of evidence generally.—Kraettli v. North Coast Transp. Co., 6 P.2d 609, 166 Wash. 186, 80 A.L.R. 1520.

(3) Common law of state.—McGinn v. North Coast Stevedoring Co., 270 P. 113, 149 Wash. 1.

(4) Effect to be given judgment of court of foreign country and enforcement of private rights acquired thereunder.—Johnston v. Compagnie Générale Transatlantique, 152 N.E. 121, 242 N.Y. 381, 46 A.L.R. 435, reversing 210 N.Y.S. 868, 214 App.Div. 775, which affirmed 206 N.Y.S. 413, 123 Misc. 806, reargument denied 154 N.E. 597, 243 N.Y. 541.

(5) Extent of police power.—Fowler v. Obler, 7 S.W.2d 219, 224 Ky. 742.

(6) Holdings arising under statutes in other states.—Ballinger v. Wagaraw Bldg. Supply Co., 200 A. 744, 16 N.J.Misc. 375.

(7) Interpretation of decisions of state supreme court.

Ark.—Fidelity & Casualty Co. of New York v. State, for Use of Columbia County, 126 S.W.2d 293, 197 Ark. 1027.

Ky.—Combs v. Fields, 278 S.W. 137, 211 Ky. 842.

(8) Liability of railroad engaged in interstate commerce for damages sustained by person not one of its employees in collision at crossing.—Texas & P. R. Co. v. Gillette, 83 S.W.2d 307, 125 Tex. 563, reversing, Civ.App., 50 S.W.2d 901—Galveston, H. & S. A. Ry. Co. v. Wells, 50 S.W.2d 247, 121 Tex. 310, affirming, Civ.App., 15 S.W.2d 46—Greathouse v. Fort Worth & D. C. Ry. Co., Tex. Com.App., 65 S.W.2d 762, reversing, Civ.App., Fort Worth & D. C. Ry. Co. v. Greathouse, 41 S.W.2d 418—Rio Grande, E. P. & S. F. R. Co. v. Dupree, Tex.Com.App., 55 S.W.2d 522, affirming, Civ.App., 35 S.W.2d 809.

(9) Matters of practice.—State v. Searing, 207 P. 5, 120 Wash. 117.

(10) Pleadings in actions involving carriers' liability respecting interstate shipments.—St. Louis-San Francisco Ry. Co., v. Glow Electric Co., 172 N.E. 426, 35 Ohio App. 291.

(11) Public policy.—Lemnos Broad Silk Works v. Spiegelberg, 217 N.Y. S. 595, 127 Misc. 855.

(12) Right of one charged with illegally carrying a concealed revolver to have it returned.—People v. Esposito, 194 N.Y.S. 326, 118 Misc. 867.

(13) Sufficiency of evidence to sustain finding of negligence.—Pierce Oil Corporation v. Taylor, 227 S.W. 420, 147 Ark. 100.

(14) Validity of agreement made in time of war to procure contracts from United States government for

furnishing army equipment.—Beck v. Bauman, 175 N.Y.S. 831, 187 App.Div. 774, reversing 173 N.Y.S. 772, 105 Misc. 584.

(15) Whether certain class of persons are "passengers" on train.—Shaddock v. Chicago, M., St. P. & P. R. Co., 252 N.W. 772, 218 Iowa 281.
Admissibility of evidence illegally obtained

(1) Decisions of the United States supreme court regarding admissibility of evidence illegally obtained do not bind state courts.

Conn.—State v. Reynolds, 125 A. 636, 101 Conn. 224.

Ga.—Kennemer v. State, 113 S.E. 551, 154 Ga. 139.

Mass.—Commonwealth v. Wilkins, 138 N.E. 11, 243 Mass. 356.

Minn.—State v. Hesse, 191 N.W. 267, 154 Minn. 89.

Miss.—Little v. State, 159 So. 103, 171 Miss. 818.

Nev.—Terrano v. State, 91 P.2d 67.

N.Y.—People v. Defore, 150 N.E. 585, 242 N.Y. 13, affirming 211 N.Y.S. 134, 213 App.Div. 643, certiorari denied Defore v. People of State of New York, 46 S.Ct. 353, 270 U.S. 657, 70 L.Ed. 784—People v. Defore, 211 N.Y.S. 134, 213 App.Div. 643, affirmed 150 N.E. 585, 242 N.Y. 13, certiorari denied Defore v. People, 46 S.Ct. 353, 270 U.S. 657, 70 L.Ed. 784—People v. McDonald, 165 N.Y.S. 41, 177 App.Div. 806—People v. La Combe, 9 N.Y.S.2d 877, 170 Misc. 669—People v. Richer, 217 N.Y.S. 303, 127 Misc. 410—People v. Esposito, 194 N.Y.S. 326, 118 Misc. 867—People v. Wicka, 192 N.Y.S. 633, 117 Misc. 364—In re Holcomb, 192 N.Y.S. 407, 117 Misc. 356, affirmed 194 N.Y.S. 944, 202 App.Div. 784.

Okl.—Gore v. State, 218 P. 545, 24 Okl.Cr. 394.

Or.—State v. McDaniel, 231 P. 965, 115 Or. 187, affirmed 237 P. 373, 115 Or. 187.

S.D.—City of Sioux Falls v. Walser, 137 N.W. 821, 45 S.D. 417, error dismissed Walser v. City of Sioux Falls, 44 S.Ct. 35, 263 U.S. 678, 68 L.Ed. 502.

Vt.—State v. Pilon, 163 A. 571, 105 Vt. 55.

(2) But it is held in some cases that where state and federal constitutional provisions are in effect the same the practice established by the United States supreme court should be adopted and followed by the courts of the state.—State v. Laundry, 204 P. 953, 103 Or. 443, rehearing denied 206 P. 290, 103 Or. 443.

(3) The state supreme court having adopted the practice as declared by the supreme court of the United States, "for the same reasons which

recommended it to that court," adopted those reasons as disclosed by the cited decisions of that court.—State v. McDaniel, 231 P. 965, 115 Or. 187, affirmed on rehearing 237 P. 373, 115 Or. 187.

Same controversy

Decision of United States circuit court of appeals made in same controversy is entitled to respect but does not bind state supreme court unless operating by way of estoppel.—Lewis v. Braun, 191 N.E. 56, 356 Ill. 467.

Decisions of state courts as authority in federal courts see the C.J.S. title Federal Courts §§ 165-190, also 25 C.J. p 828 note 28 et seq.

13. Ala.—State v. Pullman-Standard Car Mfg. Co., 179 So. 541, 235 Ala. 493, 117 A.L.R. 498.

Ark.—Dickinson v. Mingea, 88 S.W. 2d 807, 191 Ark. 946—Merchants' Nat. Bank of Ft. Smith v. Taylor, 25 S.W.2d 1048, 181 Ark. 356—State v. Ciesna, 270 S.W. 963, 168 Ark. 565.

Cal.—Bank of Italy Nat. Trust & Savings Ass'n v. Bentley, 20 P.2d 940, 943, 217 Cal. 644, citing Corpus Juris—Morrow v. Coast Land Co., 84 P.2d 301, 29 Cal.App.2d 92—Smith v. Hume, 74 P.2d 566, 29 Cal.App.2d Supp. 747—People v. Herbert's of Los Angeles, Inc., 39 P.2d 829, 3 Cal.App.2d 482.

Fla.—Miami Home Milk Producers Ass'n v. Milk Control Board, 169 So. 541, 124 Fla. 797—Virginia-Carolina Chemical Corporation v. Smith, 164 So. 717, 121 Fla. 720—Parsons v. Federal Realty Corporation, 143 So. 912, 105 Fla. 105, 88 A.L.R. 275—Yale Inv. Co. v. Williams, 141 So. 308, 105 Fla. 414.

Ga.—Bohannon v. Duncan, 196 S.E. 897, 135 Ga. 849—McCallum v. Twiggs County Bank, 158 S.E. 302, 172 Ga. 591, 74 A.L.R. 932, reversing Twiggs County Bank v. McCallum, 147 S.E. 129, 39 Ga.App. 306, and conformed to 159 S.E. 309, 43 Ga.App. 442.

Ill.—Illinois Cent. R. Co. v. Illinois Commerce Commission, 173 N.E. 804, 342 Ill. 11—Blair v. Linn, 274 Ill.App. 23—Cahill v. Plumbers', Gas and Steam Fitters', and Helpers' Local 93, 238 Ill.App. 123.

Ky.—Craig v. E. H. Taylor, Jr., & Sons, 232 S.W. 395, 192 Ky. 36—Louisville & N. R. Co. v. Board of Drainage Com'rs of Daviess County, 209 S.W. 15, 183 Ky. 282.

Md.—Hitzelberger v. State, 197 A. 605, 174 Md. 152.

Mass.—Susser v. Cambria Chocolate Co., 13 N.E.2d 609.

Mich.—People v. Victor, 283 N.W. 666, 287 Mich. 506.

which its judgment is final will be adhered to and followed by the lower courts of that state, even though it is in conflict with a decision of the supreme court of the United States.¹⁴ Accordingly the state courts are free to decide for themselves all questions of the construction of state constitutions and statutes.¹⁵ An exception to this rule has been made, however, where the federal supreme court

- Mont.—State v. Kahn, 182 P. 107, 56 Mont. 108.
- N.J.—Robt. H. Ingersoll & Bro. v. Hahne & Co., 101 A. 1030, 88 N.J. Eq. 222.
- N.M.—Henderson v. Dreyfus, 191 P. 442, 26 N.M. 541.
- N.Y.—People ex rel. Mosbacher v. Graves, 5 N.Y.S.2d 553, 254 App. Div. 433, affirmed 19 N.E.2d 89, 279 N.Y. 793—Jewett v. Commonwealth Bond Corporation, 271 N.Y.S. 522, 241 App.Div. 131, reversing Bank of Manhattan Trust Co. v. Ehlida Corporation, 265 N.Y.S. 115, 147 Misc. 374, motion granted 196 N.E. 576, 267 N.Y. 554—In re Van Wagenen's Estate, 11 N.Y.S.2d 327, 170 Misc. 820.
- S.C.—In re Hearing Before Joint Legislative Committee of House and Senate Created by Joint Resolution No. 622, 196 S.E. 164, 187 S.C. 1, 118 A.L.R. 591—Johnson v. Atlantic Coast Line R. Co., 140 S.E. 443, 142 S.C. 125.
- 15 C.J. p 929 note 70.
- On questions of first impression, state supreme court will follow the rulings of the United States supreme court.**—Post Printing & Publishing Co. v. City & County of Denver, 189 P. 32, 68 Colo. 50.
- Statute modeled after federal act**
- (1) Although construction placed upon similar provision of federal statutes was not binding upon state court in construing state statute, decisions of the federal court were justly entitled to weight, where statute had been borrowed from or modeled after federal statute after construction thereof by federal court.—State v. Flenner, 181 So. 786, 236 Ala. 228—U. S. Fidelity & Guaranty Co. v. Benson Hardware Co., 132 So. 622, 222 Ala. 429.
- Ark.—Dicken v. Missouri Pac. R. Co., 69 S.W.2d 277, 188 Ark. 1035.
- Ill.—Des Plaines Lumber & Coal Co. v. Chicago, B. & Q. R. Co., 249 Ill. App. 383—People v. Fifty Cases of Eggs, 198 Ill.App. 319. See People v. Fourteen Cases of Eggs, 198 Ill. App. 324.
- Md.—Allender v. Ghingher, 183 A. 610, 170 Md. 156.
- N.Y.—In re Mancuso's Estate, 10 N.Y.S.2d 459, 170 Misc. 298—New York State Labor Relations Board v. Interborough News Co., 10 N.Y.S.2d 396, 170 Misc. 347—Broderick v. Aaron, 272 N.Y.S. 219, 151 Misc. 516, affirmed 277 N.Y.S. 499, 243 App.Div. 594, affirmed 198 N.E. 11, 268 N.Y. 411, reargument denied 198 N.E. 547, 268 N.Y. 655.
- Ohio.—McNary v. State, 191 N.E. 733, 128 Ohio St. 497.
- Tenn.—New River Lumber Co. v. Tennessee Ry. Co., 238 S.W. 867, 145 Tenn. 266—Oman v. Tennessee Cent. Ry. Co., 7 Tenn.App. 141.
- (2) Statute in substance adopted from federal equity rule should be construed in accordance with federal decisions interpreting rule when not conflicting with local laws.—Tilton v. Horton, 137 So. 801, 103 Fla. 497, rehearing denied 139 So. 142, 103 Fla. 497.
- Laws prohibiting seditious conduct**
- In construing statutes making it unlawful to discourage enlistment in the armed forces of United States or of the state, the state court would look to the decisions of the federal courts for the rules governing in such cases since it is really the federal government which is challenged by seditious conduct.—State v. Townley, 168 N.W. 591, 140 Minn. 413.
14. Cal.—Scott v. Austin, 209 P. 251, 58 Cal.App. 643.
- Ill.—Gourley v. Chicago & E. I. R. Co., 14 N.E.2d 842, 295 Ill.App. 160—Stevens-Davis Co. v. Mather & Co., 230 Ill.App. 45.
- Mo.—Messer v. Gentry, 280 S.W. 1014, 220 Mo.App. 1294.
- N.J.—Singac Trust Co. v. Soschin, 164 A. 869, 11 N.J.Misc. 37.
- N.Y.—Bourjois Sales Corporation v. Dorfman, 7 N.E.2d 30, 273 N.Y. 167, 110 A.L.R. 1411—People ex rel. Hirschberg v. Seeger, 166 N.Y.S. 913, 179 App.Div. 792, affirming 165 N.Y.S. 32, 100 Misc. 51, appeal dismissed 119 N.E. 1069, 223 N.Y. 659.
- Ohio.—Northwestern Nat. Ins. Co. v. Ferstman, 181 N.E. 499, 42 Ohio App. 55.
- Pa.—Rohrer v. Milk Control Board, 184 A. 133, 121 Pa.Super. 281.
- Tex.—Nevill v. Gulf. C. & S. F. Ry. Co., Com.App., 244 S.W. 980, reversing, Civ.App., 187 S.W. 388 and reversed on other grounds, Com. App., 252 S.W. 483—Atchison, T. & S. F. Ry. Co. v. Ayres, Civ.App., 192 S.W. 310, reversed on other grounds 206 S.W. 922, 109 Tex. 270—Atchison, T. & S. F. Ry. Co. v. Stevens, Civ.App., 192 S.W. 304, affirmed 206 S.W. 921, 109 Tex. 262.
- 15 C.J. p 929 note 71.
- Decisions of other courts**
- Where there is conflict between the decisions of the federal court and of the state appellate courts in cases not involving federal or constitutional questions, courts of original jurisdiction in state, with due deference to the federal courts, must follow the authorities of the state courts in preference to those of the federal courts.—Grauer v. Equitable Life Assur. Soc. of U. S., 3 N.Y.S.2d 564, 167 Misc. 30.
15. U.S.—Union Pac. R. Co. v. Board of Com'rs of Weld County, Colo., 38 S.Ct. 510, 247 U.S. 282, 62 L.Ed. 1110, reversing 222 F. 651, 138 C.C.A. 175, which denies rehearing of 217 F. 540, 133 C.C.A. 392.
- Ala.—Shertzer v. Williams, 168 So. 573, 232 Ala. 553.
- Ariz.—Menderson v. City of Phoenix, 76 P.2d 321, 51 Ariz. 280—Morton v. Pacific Const. Co., 283 P. 281, 36 Ariz. 97—Kingsbury v. State, 232 P. 887, 27 Ariz. 289, reversed on other grounds 235 P. 140, 28 Ariz. 86.
- Cal.—City of Oakland v. Buteau, 179 P. 170, 180 Cal. 83—McCord v. Martin, 191 P. 89, 47 Cal.App. 717.
- Colo.—Industrial Commission v. Northwestern Mut. Life Ins. Co., 88 P.2d 560, 103 Colo. 550—Updike v. People, 18 P.2d 472, 92 Colo. 125—Board of Com'rs of Boulder County v. Union Pac. R. Co., 299 P. 1055, 89 Colo. 110.
- Ga.—Seaboard Air Line Ry. Co. v. Sarman, 144 S.E. 810, 38 Ga.App. 637.
- Ill.—Joseph T. Ryerson & Son v. Peden, 135 N.E. 423, 303 Ill. 171, 24 A.L.R. 1273—Gourley v. Chicago & E. I. R. Co., 14 N.E.2d 842, 295 Ill. App. 160.
- Iowa.—Krueger v. Municipal Court of Sioux City, 275 N.W. 122, 223 Iowa 1363—Stajcar v. Dickinson, 169 N.W. 756, 185 Iowa 49.
- Mass.—Susser v. Cambria Chocolate Co., 13 N.E.2d 609—Commonwealth v. Nichols, 153 N.E. 787, 257 Mass. 289.
- Mich.—People v. Victor, 283 N.W. 666, 287 Mich. 506—Detroit Trust Co. v. Detroit City Service Co., 247 N.W. 76, 262 Mich. 14.
- Minn.—Reed v. Bjornson, 253 N.W. 102, 191 Minn. 254, followed in Thompson-Parker Holding Co. v. Bjornson, 253 N.W. 110, 191 Minn. 271.
- Miss.—Tatum v. Wheelless, 178 So. 95, 180 Miss. 800—Wilson Banking Co. Liquidating Corporation v. Colvard, 161 So. 123, 172 Miss. 804.
- Mo.—Scales v. National Life & Accident Ins. Co., 213 S.W. 8, reversing, App., 186 S.W. 948.
- Neb.—State v. Farmers' State Bank of Polk, 237 N.W. 857, 121 Neb. 532, 82 A.L.R. 7.
- N.H.—Tirrell v. Johnston, 171 A. 641, 86 N.H. 530, affirmed 55 S.Ct. 238, 293 U.S. 533, 79 L.Ed. 641.

has decided that it is necessary to construe a state statute in a certain way to prevent its being violative of the federal constitution;¹⁶ and where the question presented is as to the construction or violation of a provision of the state constitution which is similar to a provision of the federal constitution,

and the same question has been decided by the federal supreme court with respect to the federal constitution, the federal decision is strongly persuasive as authority,¹⁷ and is generally acquiesced in by the state courts,¹⁸ although it is not absolutely bind-

N.J.—First Nat. Bank v. Bianchi & Smith, 150 A. 774, 106 N.J.Eq. 333.

N.Y.—New York Rapid Transit Corporation v. City of New York, 9 N.E.2d 858, 275 N.Y. 258, reversing 296 N.Y.S. 1012, 251 App.Div. 710, followed in Brooklyn & Queens Transit Corporation v. City of New York, 11 N.E.2d 293, 275 N.Y. 454, affirming 296 N.Y.S. 1006, 251 App.Div. 710, answering question certified 11 N.E.2d 293, 275 N.Y. 454, affirmed New York Rapid Transit Corporation v. City of New York, 58 S.Ct. 721, 303 U.S. 573, 82 L.Ed. 1024, rehearing denied 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548, and Brooklyn & Queens Transit Corporation v. City of New York, 58 S.Ct. 939, 304 U.S. 588, 82 L.Ed. 1548—People ex rel. Weber & Hellbroner v. Graves, 291 N.Y.S. 354, 249 App.Div. 49—Thorburn v. Gates, 171 N.Y.S. 568, 184 App.Div. 443, affirming 171 N.Y.S. 193, 103 Misc. 292—Stalban v. Friedman, 11 N.Y.S.2d 343, 171 Misc. 106—Darweger v. Staats, 275 N.Y.S. 394, 153 Misc. 522, affirmed 278 N.Y.S. 87, 243 App.Div. 380, appeal granted 278 N.Y.S. 94, 243 App.Div. 825, affirmed 196 N.E. 61, 267 N.Y. 290, followed in People v. Greenbaum, 280 N.Y.S. 771, 244 App.Div. 778—People v. Willi, 179 N.Y.S. 542, 109 Misc. 79, affirmed 184 N.Y.S. 943, 194 App.Div. 946—Levett v. Draper, 174 N.Y.S. 721, 106 Misc. 497.

N.C.—Champion Fibre Co. v. Cozad, 112 S.E. 810, 183 N.C. 600.

Pa.—In re Markle's Estate, 166 A. 884, 311 Pa. 472—Commonwealth v. Kooper, 7 Pa.Dist. & Co. 673.

S.C.—Santee River Cypress Lumber Co. v. Query, 167 S.E. 22, 168 S.C. 112.

S.D.—State v. Risty, 213 N.W. 952, 51 S.D. 336.

Tex.—Houston Belt & Terminal Ry. Co. v. Clark, Civ.App., 122 S.W.2d 356, error granted—American Fidelity & Casualty Co. v. Newman, Civ.App., 60 S.W.2d 482, mandamus granted American Fidelity & Casualty Co. v. McClendon, Com. App., 81 S.W.2d 493, and set aside on other grounds, Civ.App., American Fidelity & Casualty Co. v. Newman, 83 S.W.2d 710—Danciger Oil & Refining Co. v. Railroad Commission of Texas, Civ.App., 49 S.W.2d 837, reversed on other grounds Danciger Oil & Refining Co. of Texas v. Railroad Commis-

sion of Texas, 56 S.W.2d 1075, 122 Tex. 243.

Wash.—In re Killien's Estate, 35 P. 2d 11, 178 Wash. 335—State v. Searing, 207 P. 5, 120 Wash. 117.

Wis.—In re Ogden's Estate, 244 N.W. 571, 209 Wis. 162.
15 C.J. p 929 note 72.

What constitutes common law of state, in light of which state statutes are to be interpreted, is to be determined by state court decisions.—Marsich v. Eastman Kodak Co., 279 N.Y.S. 140, 244 App.Div. 295, affirmed 200 N.E. 27, 269 N.Y. 621.

Federal statutes not considered N.Y.—Marsich v. Eastman Kodak Co., 279 N.Y.S. 140, 244 App.Div. 295, affirmed 200 N.E. 27, 269 N.Y. 621.

Doing business within state

(1) State courts may independently decide whether foreign corporation is doing business within state within statutes imposing license tax on foreign corporations doing business within state subject to limitation that state courts cannot cross path of interstate commerce or breach constitutional rights.—American Sec. Credit Co. v. Empire Properties Corporation, 276 N.Y.S. 970, 154 Misc. 191.

(2) Binding effect of federal decisions as to what constitutes interstate commerce see *infra* § 206.

(3) Binding effect of federal decisions on issue whether foreign corporation is doing business within state for purpose of service of process see *infra* § 206.

Delegation of legislative functions

Whether a state statute unlawfully delegates legislative functions to a person or to a commission is primarily for the state courts.—State v. McMasters, 283 N.W. 767, 204 Minn. 438.

Duty of critical examination

A state supreme court which is faced with the final construction of a provision of its own constitution must examine critically the reasoning of any case which by analogy might aid in such construction, regardless of the high standing of the court in which such other decision is rendered.—Du Pont v. Green, 195 A. 273, 114 A.L.R. 1184.

Law partly contravening federal constitution

After portions of a state law have been declared by federal courts to violate the federal constitution, the inquiry as to whether the remaining

portions which do not violate the federal constitution are sufficient in themselves, so that it cannot be said that the entire act falls, ordinarily presents no federal question.—Stark v. McLaughlin, 261 P. 244, 45 Idaho 112.

16. Ind.—Richey v. Cleveland, etc., R. Co., 93 N.E. 1022, 47 Ind.App. 123.

17. Ark.—Mitchell v. Hopper, 241 S. W. 10, 153 Ark. 515.

Fla.—Dudley v. Harrison, McCready & Co., 173 So. 820, 127 Fla. 687, rehearing denied 174 So. 729, 128 Fla. 338.

Ind.—Midwestern Petroleum Corporation v. State Board of Tax Com'rs. 187 N.E. 882, 206 Ind. 688, rehearing denied 191 N.E. 153, 206 Ind. 688.

Md.—Goldsmith v. Mead Johnson & Co., 7 A.2d 176.

N.H.—H. P. Welch Co. v. State, 199 A. 886, 120 A.L.R. 282, affirmed H. P. Welch Co. v. State of New Hampshire, 59 S.Ct. 438.

N.Y.—People v. Reiss, 8 N.Y.S.2d 209, 255 App.Div. 509, affirmed 20 N.E.2d 8, 280 N.Y. 539—People v. Willi, 179 N.Y.S. 542, 109 Misc. 79, affirmed 184 N.Y.S. 943.

Okl.—Gore v. State, 218 P. 545, 24 Okl.Cr. 394.

Wash.—Herr v. Schwager, 258 P. 1039, 145 Wash. 101.

Cogent reasons must exist before a state court in construing a provision of state constitution will depart from the construction placed by United States supreme court on a similar provision in federal constitution.—Gabielli v. Knickerbocker, Cal., 82 P.2d 391, appeal dismissed 59 S.Ct. 786.

18. Ind.—Sperry & Hutchinson Co. v. State, 122 N.E. 584, 188 Ind. 173.

Ky.—Brent v. Commonwealth, 240 S. W. 45, 194 Ky. 504.

N.Y.—In re Weiden's Estate, 188 N. E. 270, 263 N.Y. 107, reversing 265 N.Y.S. 1001, 240 App.Div. 716, amending 265 N.Y.S. 1000, 239 App. Div. 852, which affirmed 262 N.Y.S. 437, 146 Misc. 381—In re Lande's Estate, 271 N.Y.S. 530, 241 App. Div. 138, reversing 266 N.Y.S. 879, 149 Misc. 203.

15 C.J. p 930 note 74.

Duty of court of last resort

(1) Where decision of federal court, construing the federal constitution, apparently necessitates changes in what has been treated as settled law concerning the constitu-

ing.¹⁹ The view has also been taken that in order to insure consistency of decisions upon questions of law which have general application to the several states, such as questions of commercial law, the decisions of the supreme court of the United States should be followed as a common standard, even with regard to cases of which the state court has final jurisdiction, as the decisions of the federal court will be more readily followed by common consent than would the decisions of a court of any particular state;²⁰ although this principle will not be carried to the extent of requiring a departure from previous decisions of the state court,²¹ or applied where the court is of the opinion that the weight of better reasoning is decidedly in favor of the opposite holding.²² A state court will adopt the construction that a federal court made of its own order.²³

Territorial courts should follow the decisions of the federal supreme court,²⁴ unless some statute applicable to the territory evinces a legislative intent to establish a different rule;²⁵ and it has been held that, where causes are pending in territorial courts at the time when the territory is admitted to statehood, the decisions of the federal supreme court should govern in subsequent determinations of such causes by the courts.²⁶ However, the territorial courts may follow a rule of damages contrary to a rule sustained by decisions of the United States supreme court where the territorial rule was adopted prior to the allowance of appeals to a federal court upon other than federal questions.²⁷ The decisions of a circuit court of appeals, which is the

tionality of a given application of a state statute, the state supreme court and not any subordinate state court should announce such changes, unless no reasonable distinction between the particular case presented, and the federal court's decision can be made.—*Birkhofer v. Krumm*, 81 P.2d 609, 27 Cal.App.2d 513, certiorari denied *Krumm v. Birkhofer*, 59 S.Ct. 249.

(2) So an intermediate appellate court is without jurisdiction to grant writ of habeas corpus to prisoner even though language of decision of supreme court of United States required it, where to grant writ would overrule decisions of state supreme court, since any departure from established legal doctrine declared by state supreme court must have its origin in such court.—*Ex parte Mooney*, 45 P.2d 388, 6 Cal.App.2d 730.

19. *Ariz.*—*Turley v. State*, 59 P.2d 312, 48 *Ariz.* 61.

Cal.—*Gabrielli v. Knickerbocker*, 82 P.2d 391, appeal dismissed 59 S.Ct. 736.—*People v. Mayen*, 205 P. 435, 188 *Cal.* 237, 24 *A.L.R.* 1383.

Ga.—*Kenemer v. State*, 113 S.E. 551, 154 *Ga.* 139.

Ind.—*Midwestern Petroleum Corporation v. State Board of Tax Comm'rs*, 187 N.E. 882, 206 *Ind.* 688, rehearing denied 191 N.E. 153, 206 *Ind.* 688.—*Sperry & Hutchinson Co. v. State*, 122 N.E. 584, 188 *Ind.* 173.

Iowa.—*Des Moines Joint Stock Land Bank of Des Moines v. Nordholm*, 253 N.W. 701, 217 *Iowa* 1319.

Mass.—*Commonwealth v. Wilkins*, 138 N.E. 11, 243 *Mass.* 356.—*In re Opinion of the Justices*, 115 N.E. 978, 226 *Mass.* 613.

Minn.—*State v. Pluth*, 195 N.W. 789, 157 *Minn.* 145.

Miss.—*Wilson Banking Co. Liquidating Corporation v. Colvard*, 161 So. 123, 172 *Miss.* 804.—*Masonite Cor-*

poration v. Lochridge, 141 So. 758, 163 *Miss.* 364, overruling suggestion of error 140 So. 223, 163 *Miss.* 364.

Neb.—*First Trust Co. of Lincoln v. Smith*, 277 N.W. 762, 134 *Neb.* 84.—*Billings v. State*, 191 N.W. 721, 109 *Neb.* 596.

Nev.—*Terrano v. State*, 91 P.2d 67.—*State v. Chin Gim*, 224 P. 798, 47 *Nev.* 421.

N.Y.—*People v. Defore*, 211 N.Y.S. 134, 213 App.Div. 643, affirmed 150 N.E. 585, 242 N.Y. 13, certiorari denied *Defore v. People* 46 S.Ct. 353, 270 U.S. 657, 70 L.Ed. 784.—*People v. Richer*, 217 N.Y.S. 303, 127 *Misc.* 410.—*People v. Willi*, 179 N.Y.S. 542, 109 *Misc.* 79, affirmed 134 N.Y.S. 943, 194 App.Div. 946.

Okl.—*Gore v. State*, 218 P. 545, 24 *Okl.Cr.* 394.

S.D.—*City of Sioux Falls v. Walser*, 187 N.W. 821, 45 S.D. 417, error dismissed *Walser v. City of Sioux Falls*, 44 S.Ct. 35, 263 U.S. 678, 68 L.Ed. 502.

Utah.—*State v. Alme*, 220 P. 704, 62 *Utah* 476, 32 *A.L.R.* 375.

Vt.—*State v. Pilon*, 163 A. 571, 105 *Vt.* 55.

Va.—*Hall v. Commonwealth*, 121 S.E. 154, 138 *Va.* 727.

Wash.—*Herr v. Schwager*, 258 P. 1039, 145 *Wash.* 101.

15 C.J. p 929 note 72.

20. *Tex.*—*Tillman County Bank of Granfield, Okl., v. Behringer*, Civ. App., 241 S.W. 1092, reversed on other grounds 257 S.W. 206, 113 *Tex.* 415.

15 C.J. p 930 note 75.

In receivership proceedings it is desirable that there should be uniformity of decisions in the state and federal courts.—*In re Edgewood Park Junior College*, 192 A. 561, 123 *Conn.* 74.—*Napier v. People's Stores Co.*, 120 A. 295, 98 *Conn.* 414, 33 *A.L.R.* 499.

Anti-injunction act

Where state statute prohibiting granting of injunctions in cases involving labor disputes is substantially the same as the Clayton Act, courts in interpreting statute follow decisions interpreting the Clayton Act.—*Swing v. American Federation of Labor*, 18 N.E.2d 258, 298 *Ill.App.* 63.

Tax matters

A United States supreme court decision construing amendments to federal estate tax law was controlling in construing similar amendments to similar state law relating to estate taxation, in view of pronouncement of court of appeals that uniformity of administration between federal and state tax statutes which legislature had endeavored to bring about should be maintained.—*In re Anderson's Estate*, 13 N.Y.S.2d 504, 171 *Misc.* 795.

21. *N.Y.*—*Mynard v. Syracuse, etc., R. Co.* 7 *Hun* 399, approved on this point but reversed on other grounds 71 N.Y. 180, 27 *Am.R.* 28.

22. *Tex.*—*Tillman County Bank of Granfield, Okl., v. Behringer*, 257 S.W. 206, 113 *Tex.* 415, 36 *A.L.R.* 1302, reversing *Tillman County Bank of Granfield v. Behringer*, Civ.App., 241 S.W. 1090.

23. *Neb.*—*Stewart v. Wabash Ry. Co.*, 182 N.W. 496, 105 *Neb.* 812.

24. *Alaska.*—*Qualley v. Aitken*, 4 *Alaska* 291.

15 C.J. p 930 note 77.

25. *Utah.*—*People v. Ritchie*, 42 P. 209, 12 *Utah* 180.

15 C.J. p 930 note 78.

26. *Okl.*—*Missouri, etc., R. Co. v. Walker*, 113 P. 907, 27 *Okl.* 849.

15 C.J. p 930 note 79.

27. *Hawaii.*—*Lau Yin v. Pang Lum Mow*, 28 *Hawaii* 476.

appellate court of a territory, are of course the law of the territory on the points decided.²⁸

Actions between same parties for same cause of action. A decision of the United States circuit court of appeals, on reversing a judgment for plaintiff and remanding the case for a new trial, does not govern the disposition of a new action brought by plaintiff in the state courts after suffering a non-suit in the federal court.²⁹

§ 206. — Decisions on Federal Questions;

Decisions of the United States supreme court on federal questions are absolutely binding on state courts; but decisions of lower federal courts are generally held not binding.

Where a question is federal in its nature, the decisions of the supreme court of the United States are absolutely binding on the various state courts and must be followed,³⁰ regardless of the views of

28. Tex.—*Western Union Tel. Co. v. White*, Civ.App., 162 S.W. 905.

29. Ill.—*Spring Valley Coal Co. v. Patting*, 71 N.E. 371, 210 Ill. 342, affirming 112 Ill.App. 4.
15 C.J. p 930 note 81.

30. Ala.—*State v. Firemen's Fund Ins. Co.*, 134 So. 853, 223 Ala. 134, 77 A.L.R. 1486—*Howard v. Davis*, 95 So. 354, 209 Ala. 113—*Whitby v. Southern Ry. Co.*, 93 So. 392, 207 Ala. 490.

Ariz.—*Southern Pac. R. Co. of Mexico v. Gonzalez*, 61 P.2d 377, 46 Ariz. 260, 106 A.L.R. 1012—*Western Union Telegraph Co. v. Griffin*, 18 P.2d 653, 41 Ariz. 387.

Cal.—*People v. Yahne*, 235 P. 50, 195 Cal. 683—*Miller & Lux v. Board of Sup'rs of Madera County*, 208 P. 304, 189 Cal. 254—*Moon v. Martin*, 197 P. 77, 185 Cal. 361.

Colo.—*Allen v. Bailey*, 14 P.2d 1087, 91 Colo. 260—*Boettcher v. Auslander*, 232 P. 683, 76 Colo. 399—*City and County of Denver v. Mountain States Telephone & Telegraph Co.*, 184 P. 604, 67 Colo. 225, error dismissed *Mountain States Telephone & Telegraph Co. v. City and County of Denver*, 40 S.Ct. 219, 251 U.S. 545, 64 L.Ed. 407.

Ga.—*Bugg v. Consolidated Grocery Co.*, 118 S.E. 56, 155 Ga. 550, reversing *Consolidated Grocery Co. v. Bugg*, 113 S.E. 60, 28 Ga.App. 809, and conformed to 118 S.E. 704, 30 Ga.App. 642.

Ill.—*Town of Cheney's Grove v. Van Scoyoc*, 191 N.E. 289, 387 Ill. 52.

Ind.—*Sperry & Hutchinson Co. v. State*, 122 N.E. 584, 188 Ind. 173—*Harmon v. Bolley*, 120 N.E. 33, 187 Ind. 511, 2 A.L.R. 609—*Cleveland C. C. & St. L. Ry. Co. v. Belange*, 135 N.E. 367, 78 Ind.App. 36.

Iowa.—*Elk River Coal & Lumber Co. v. Funk*, 271 N.W. 204, 222 Iowa 1222, 110 A.L.R. 1415—*American Asphalt Roof Corporation v. Shankland*, 219 N.W. 28, 205 Iowa 862, 60 A.L.R. 986—*Stier v. Iowa State Traveling Men's Ass'n*, 201 N.W. 328, 199 Iowa 118, 59 A.L.R. 1384—*Payne v. Knapp*, 193 N.W. 62, 197 Iowa 737—*Klotz v. Western Union Telegraph Co.*, 175 N.W. 825, 187 Iowa 1355.

Ky.—*Zahn's Ex'r v. State Tax Commission*, 47 S.W.2d 925, 243 Ky. 187.

La.—*State v. Tri-State Transit Co. of Louisiana*, 155 So. 233, 179 La. 811.

Me.—*Continental Paper Bag Co. v. Maine Cent. R. Co.*, 99 A. 259, 115 Me. 449.

Md.—*Fidelity & Guaranty Fire Corporation v. Leser*, 193 A. 164, 172 Md. 652.

Mass.—*Proctor v. Dillon*, 129 N.E. 265, 235 Mass. 538.

Mich.—*Grand Rapids Showcase Co. v. Postal Telegraph-Cable Co.*, 183 N.W. 731, 215 Mich. 30—*Winget v. Grand Trunk Western Ry. Co.*, 177 N.W. 273, 210 Mich. 100, certiorari denied *Grand Trunk Western Ry. Co. v. Winget*, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447.

Mo.—*Ople v. Weinbunner*, 226 S.W. 256, 285 Mo. 365, certiorari denied 41 S.Ct. 535, 256 U.S. 695, 65 L.Ed. 1175—*Liebing v. Mutual Life Ins. Co. of New York*, 207 S.W. 230, 276 Mo. 118.

Mont.—*Montana Manganese Co. v. Ringeling*, 211 P. 333, 65 Mont. 249.

Neb.—*Drainage Dist. No. 2 of Dakota County v. O'Neill*, 191 N.W. 685, 109 Neb. 552—*Dunning v. Western Union Telegraph Co.*, 187 N.W. 890, 108 Neb. 422.

Nev.—*Hostettler v. Harris*, 197 P. 697, 45 Nev. 43.

N.H.—*Crugley v. Grand Trunk Ry. Co.*, 108 A. 293, 79 N.H. 276.

N.Y.—*U. S. v. Inter-Ocean Oil Co.*, 204 N.Y.S. 136, 122 Misc. 368—*Ruddy v. Morse Dry Dock & Repair Co.*, 176 N.Y.S. 731, 107 Misc. 199.

N.C.—*Soles v. Atlantic Coast Line R. Co.*, 114 S.E. 305, 184 N.C. 283—*Smith-Courtney Co. v. Board of Road Com'rs of Hertford County*, 108 S.E. 443, 182 N.C. 149—*State v. Southern Express Co.*, 91 S.E. 706, 173 N.C. 753.

N.D.—*Federal Land Bank of St. Paul v. De Rochford*, 287 N.W. 522.

Okl.—*Lowe v. Dickson*, 260 P. 25, 127 Okl. 127.

Or.—*State v. Hurlburt*, 182 P. 169, 93 Or. 34—*State v. Hyde*, 169 P. 757, 88 Or. 1, Ann.Cas.1918E 688, rehearing denied 171 P. 582, 88 Or. 1, Ann.Cas.1918E 688.

Pa.—*City of Duquesne v. Fincke*, 112 A. 130, 269 Pa. 112—*Lipoff v. United Food Workers Industrial Un-*

ion, Local No. 107, 33 Pa.Dist. & Co. 599.

R.I.—*Jenckes Spinning Co. v. New York, N. H. & H. R. Co.*, 129 A. 815, 47 R.I. 72.

Tex.—*Scaling v. Williams*, Civ.App., 284 S.W. 310—*Spencer v. Burk*, Civ.App., 217 S.W. 1110, error refused—*Baker v. Grace*, 213 S.W. 299, error refused—*Karr v. State*, 54 S.W.2d 92, 122 Tex.Cr. 88—*Ex parte Gilmore*, 228 S.W. 199, 88 Tex.Cr. 529.

Va.—*McGuire v. Atlantic Coast Line R. Co.*, 118 S.E. 225, 136 Va. 382.

Wash.—*Northern Pac. Ry. Co. v. Longmire*, 176 P. 150, 104 Wash. 121.

Wis.—*State v. Emery*, 189 N.W. 564, 178 Wis. 147.

15 C.J. p 931 note 82.

Acts of federal agencies

(1) Where acts of federal agencies are involved, state courts are governed by rules and decisions of federal tribunals.

La.—*Davis v. Ferguson*, 136 So. 293, 173 La. 132, avoiding 132 So. 289, 17 La.App. 149.

Mass.—*Keegan v. Director General of Railroads*, 137 N.E. 341, 243 Mass. 96.

Mich.—*Groesbeck v. Michigan State Telephone Co.*, 172 N.W. 799, 206 Mich. 372.

(2) So the decision by the supreme court of the United States that a railroad corporation is not liable for injuries occasioned by the operation of the railroad by the director general under federal control finally settles that question.—*Schaff v. Mason*, 235 S.W. 520, 111 Tex. 388, modifying, Civ.App., 222 S.W. 288.

Dissolution of injunction

The assessment of damages on dissolution of injunction involves a federal question, and decisions of federal courts are controlling in state court, where injunction dissolved was issued out of a federal court.—*National Bank of Commerce in St. Louis v. Maryland Casualty Co.*, 270 S.W. 691, 307 Mo. 417.

Injunction bond

(1) Where injunction bond was taken by a federal court in a proceeding pending therein, its interpretation and construction, including the scope of the obligations imposed,

the latter courts, and even though such decisions are inconsistent with prior decisions of the state courts.³¹ So the decisions of the federal court are

binding as to the construction of the federal constitution,³² and are also binding as to the validity

must be governed by the federal law applicable to the subject.—U. S. Fidelity & Guaranty Co. v. Travelers' Ins. Mach. Co., 224 S.W. 496, 188 Ky. 841, certiorari denied 41 S.Ct. 216, 254 U.S. 653, 65 L.Ed. 459, and error dismissed 41 S.Ct. 375, 255 U.S. 563, 65 L.Ed. 787.

(2) In an action on such a bond, the rule established by decisions of the United States supreme court as to measure of liability must, when applicable, be followed by the state court.

Ala.—National Surety Co. v. O'Connell, 81 So. 146, 16 Ala.App. 654, certiorari denied 81 So. 660, 202 Ala. 684.

Mo.—Local Union No. 66 of United Leather Workers' International Union v. Herkert & Meisel Trunk Co., 5 S.W.2d 671, 222 Mo.App. 383.

15 C.J. p 931 note 82 [a].

Public survey

In questions involving the public survey the decisions of the supreme court of the United States are binding on all other courts.—Minnie v. Rose, 238 S.W. 782, 152 Ark. 527.

Public utility rates

Decisions of federal courts are controlling as to how and when accrued depreciation may be accounted for in fixing rates of public utilities.—State ex rel. City of St. Louis v. Public Service Commission of Missouri, 47 S.W.2d 192, 329 Mo. 918.

Status of property for succession tax purposes

Ariz.—O'Malley v. Sims, 75 P.2d 50, 51 Ariz. 155, 115 A.L.R. 634.

Ark.—Gates v. Bank of Commerce & Trust Co., 47 S.W.2d 806, 185 Ark. 502.

Conn.—Appeal of Silberman, 134 A. 778, 105 Conn. 192, affirmed in part and reversed in part on other grounds Blodgett v. Silberman, 48 S.Ct. 410, 277 U.S. 1, 72 L.Ed. 749.

Ky.—Havemeyer v. Coleman, 47 S.W. 2d 1060, 243 Ky. 194.

Validity of search warrant

In determining whether a federal search warrant under which a federal agent made a search was valid, the federal law furnishes the test, but the method of making that test is not governed by the federal practice.—Walters v. Commonwealth, 250 S.W. 839, 199 Ky. 182.

31. U.S.—Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 453, 283 U.S. 209, 75 L.Ed. 983, reversing 143 S. E. 629, 154 Va. 1, and Chesapeake & O. Ry. Co. v. Martin & Porter, 152 S.E. 335, 154 Va. 1, and certiorari granted Chesapeake & O. Ry. Co. v. Martin, 51 S.Ct. 23, 282 U.S. 819, 75 L.Ed. 732.

Ala.—State for Use of Wadsworth v. Southern Surety Co., 127 So. 805, 221 Ala. 113, 70 A.L.R. 296—Charlton v. Alabama Great Southern R. Co., 89 So. 710, 206 Ala. 341.

Ark.—Lester v. Thomas, 295 S.W. 717, 174 Ark. 351, certiorari denied Thomas v. Lester, 48 S.Ct. 140, 275 U.S. 567, 72 L.Ed. 430.

N.Y.—Bourjois Sales Corporation v. Dorfman, 7 N.E.2d 30, 273 N.Y. 167, 110 A.L.R. 1411.

Tex.—Cleburne Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 221 S.W. 270, reversing, Civ.App., 184 S.W. 1070.

15 C.J. p 932 note 83.

32. U.S.—State of South Carolina v. Bailey, 53 S.Ct. 667, 289 U.S. 412, 77 L.Ed. 1292, reversing Ex parte Bailey, 166 S.E. 165, 203 N.C. 382, certiorari granted State of South Carolina v. Bailey, 53 S.Ct. 525, 289 U.S. 714, 77 L.Ed. 1468.

Ala.—Cheairs v. Stollenwerck, 168 So. 589, 232 Ala. 546.

Ariz.—State v. Jay J. Garfield Bldg. Co., 3 P.2d 983, 39 Ariz. 45, followed in State v. Perry, 3 P.2d 987, 39 Ariz. 55.

Colo.—Porter v. Hammitt, 241 P. 543, 78 Colo. 320—City and County of Denver v. Mountain States Telephone & Telegraph Co., 184 P. 604, 67 Colo. 225.

Conn.—State v. Palko, 191 A. 320, 122 Conn. 529, 113 A.L.R. 628, affirmed Palko v. State of Connecticut, 58 S.Ct. 149, 302 U.S. 319, 82 L.Ed. 288.

Fla.—House v. State, 177 So. 705, 130 Fla. 400—Miami Home Milk Producers Ass'n v. Milk Control Board, 169 So. 541, 124 Fla. 797.

Ind.—Storen v. J. D. Adams Mfg. Co., 7 N.E.2d 941, 212 Ind. 343, modified on other grounds J. D. Adams Mfg. Co. v. Storen, 58 S.Ct. 913, 304 U.S. 307, 82 L.Ed. 1365, 117 A.L.R. 429, mandate conformed to Storen v. J. D. Adams Mfg. Co., 15 N.E.2d 1016.

Iowa.—Tolerton & Warfield Co. v. Iowa State Board of Assessment and Review, 270 N.W. 427, 222 Iowa 908—In re Smith's Estate, 228 N.W. 638, 209 Iowa 685.

Ky.—Becker v. Crabbs's Trustee in Bankruptcy, 21 S.W.2d 438, 231 Ky. 354.

Mass.—Lowell Co-op. Bank v. Co-operative Central Bank, 191 N.E. 921, 287 Mass. 338—Commonwealth v. Daniel O'Connell's Sons, 183 N.E. 839, 281 Mass. 402.

Mich.—People v. Victor, 283 N.W. 666, 287 Mich. 506—Smart v. Florida East Coast Ry. Co., 215 N.W. 390, 240 Mich. 542.

Neb.—First Trust Co. of Lincoln v. Smith, 277 N.W. 762, 134 Neb. 84.

N.J.—John Simmons Co. v. Sloan, 142 A. 15, 104 N.J.Law 612.

N.M.—Silva v. Crombie & Co., 44 P. 2d 719, 39 N.M. 240—Henderson v. Dreyfus, 191 P. 442, 26 N.M. 541.

N.Y.—People ex rel. Tipaldo v. Morehead, 200 N.E. 799, 270 N.Y. 233, reversing 282 N.Y.S. 576, 156 Misc. 522, certiorari granted Morehead v. People of State of New York ex rel. Tipaldo, 56 S.Ct. 670, 297 U.S. 702, 80 L.Ed. 991, affirmed 56 S.Ct. 918, 298 U.S. 587, 80 L.Ed. 1347, 103 A.L.R. 1445, rehearing denied 57 S.Ct. 4, 299 U.S. 619, 81 L.Ed. 456—Kings County Lighting Co. v. Newton, 195 N.Y.S. 147, 202 App. Div. 473—Associated Industries of New York State v. Department of Labor, 286 N.Y.S. 459, 158 Misc. 350, reversed on other grounds Associated Industries of New York State v. Department of Labor of New York, 2 N.E.2d 22, 271 N.Y. 1, 106 A.L.R. 1519, affirmed Associated Industries of New York State v. Department of Labor of State of New York, 57 S.Ct. 122, 299 U.S. 515, 81 L.Ed. 380, rehearing denied 57 S.Ct. 926, 301 U.S. 714, 81 L.Ed. 1365.

Ohio.—Iron City Produce Co. v. American Ry. Express Co., 153 N. E. 316, 22 Ohio App. 165.

Okl.—Ex parte Nowabbi, 61 P.2d 1139, 60 Okl.Cr. 111.

Or.—State v. Norton, 283 P. 12, 131 Or. 382.

S.C.—Hearon v. Calus, 183 S.E. 13, 178 S.C. 381.

Tenn.—Paine v. Fox, 112 S.W.2d 1, 172 Tenn. 290.

12 C.J. p 697 note 49—15 C.J. p 932 note 84.

Double taxation

Md.—Mayor and City Council of Baltimore v. Gibbs, 171 A. 37, 166 Md. 364, certiorari denied 55 S.Ct. 71, 293 U.S. 559, 79 L.Ed. 660.

Due process of law

Ala.—Gill v. More, 76 So. 453, 200 Ala. 511.

Ark.—Bone v. State, 129 S.W.2d 240.

Fla.—Miami Laundry Co. v. Florida Dry Cleaning & Laundry Board, 183 So. 759, 119 A.L.R. 956.

Ga.—Bohannon v. Duncan, 196 S.E. 897, 185 Ga. 840.

Idaho.—Hyatt v. Blackwell Lumber Co., 173 P. 1083, 31 Idaho 452, 1 A. L.R. 1663.

Ill.—Van Dyke v. Illinois Commercial Men's Ass'n, 193 N.E. 490, 358 Ill. 458—Northern Illinois Light & Traction Co. v. Illinois Commerce Commission, 134 N.E. 142, 302 Ill. 11—Fembleton v. Illinois Commercial Men's Ass'n, 124 N.E. 355, 289

vel non of state statutes³³ assailed as being in conflict with the federal constitution, and as to the

- Ill. 99, certiorari granted *Pemberton v. Illinois Commercial Men's Ass'n*, 40 S.Ct. 178, 251 U.S. 549, 64 L.Ed. 409, and dismissed 40 S.Ct. 483, 253 U.S. 499, 64 L.Ed. 1032.
- Ind.—Public Service Commission of *Indiana v. City of La Porte*, 193 N.E. 668, 207 Ind. 462.
- Ky.—*Wagers v. Sizemore*, 300 S.W. 918, 222 Ky. 306.
- Mich.—*Michigan Public Utilities Commission v. Michigan State Telephone Co.*, 200 N.W. 749, 228 Mich. 658.
- Minn.—*State ex rel. Dunlap v. Utech*, 287 N.W. 229.
- Nev.—*Menteberry v. Giacometto*, 267 P. 49, 51 Nev. 7.
- N.J.—*Ex parte Connellan*, 8 A.2d 345, 123 N.J.Law 229.
- N.Y.—*Central Sav. Bank in City of New York v. City of New York*, 19 N.E.2d 659, 280 N.Y. 9, 121 A.L.R. 615, amending 18 N.E.2d 151, 279 N.Y. 266, 121 A.L.R. 607, reversing 5 N.Y.S.2d 451, 254 App.Div. 502, certiorari denied *City of New York v. Central Sav. Bank in City of New York*, 59 S.Ct. 790, 306 U.S. 661, 83 L.Ed. 1058—*In re Lagergren's Estate*, 11 N.E.2d 722, 276 N.Y. 184, reversing *In re Lagergren's Estate Tax*, 298 N.Y.S. 345, 251 App.Div. 820—*Merchandise Reporting Co. v. L. Oransky & Sons*, 234 N.Y.S. 83, 133 Misc. 890.
- Vt.—*In re Hanrahan's Will*, 194 A. 471, 109 Vt. 108—*State v. Prouty*, 111 A. 559, 94 Vt. 359.
- Wis.—*General Accident Fire & Life Assur. Corporation v. Industrial Commission*, 271 N.W. 385, 223 Wis. 635.
- 15 C.J. p 932 note 84 [b], [c].
- Equal protection of the laws**
- N.C.—*Clark v. Maxwell*, 150 S.E. 190, 197 N.C. 604, affirmed 51 S.Ct. 211, 282 U.S. 811, 75 L.Ed. 726—*Great Atlantic & Pacific Tea Co. v. Doughton*, 144 S.E. 701, 196 N.C. 145.
- 15 C.J. p 932 note 84 [e].
- Full faith and credit clause**
- Conn.—*Broderick v. McGuire*, 174 A. 314, 119 Conn. 83, 94 A.L.R. 890.
- N.Y.—*Schenker v. Schenker*, 169 N.Y.S. 35, 181 App.Div. 621, affirmed 127 N.E. 921, 228 N.Y. 600—*In re Bennett's Estate*, 238 N.Y.S. 723, 135 Misc. 486.
- N.C.—*Hollingsworth v. Supreme Council of the Royal Arcanum*, 96 S.E. 81, 175 N.C. 615, Ann.Cas. 1918E 401.
- Vt.—*In re Hanrahan's Will*, 194 A. 471, 109 Vt. 108.
- 15 C.J. p 932 note 84 [a].
- Obligations of contract**
- Fla.—*Humphreys v. State*, 145 So. 858, 108 Fla. 92.
- N.Y.—*Tompkins County Trust Co. v. Herrick*, 13 N.Y.S.2d 825, 171 Misc. 929.
- Tenn.—*Lake County v. Morris*, 28 S.W.2d 351, 160 Tenn. 619.
- Wis.—*Pawlowski v. Eskofski*, 244 N.W. 611, 209 Wis. 189.
- Nineteenth Amendment**
- Me.—*State v. Gauthier*, 118 A. 380, 121 Me. 522, 26 A.L.R. 652.
- Mass.—*Commonwealth v. Nickerson*, 128 N.E. 273, 236 Mass. 281, 10 A.L.R. 1568.
- Matrimonial domicile**
- The decisions of the United States supreme court on the question of jurisdiction of the courts of the several states over the matrimonial domicile are final—*Wagoner v. Wagoner*, 229 S.W. 1064, 287 Mo. 567.
- Questions arising in other states**
- Under the rule of precedent or stare decisis, the state courts are as much bound to follow the decisions of the supreme court of the United States on a question arising under the federal constitution in cases which went up from other states as they are to follow a decision on writ of error to the state court—*Union Oil Co. of California v. State*, 216 P. 22, 125 Wash. 327—15 C.J. p 933 note 85 [a].
- Ratification of proposed amendment**
- (1) A state court's position that a state can act but once on a proposed amendment to federal constitution is subject to views of United States supreme court when expressed thereon—*Wise v. Chandler*, 108 S.W. 2d 1024, 270 Ky. 1.
- (2) Whether proposed amendment had been submitted by congress and ratified in accordance with provisions of federal constitution must be determined finally by United States supreme court—*In re Opinions of the Justices*, 172 S.E. 474, 204 N.C. 806.
- (3) The state court, in considering the question of whether an amendment to the United States constitution was validly adopted and ratified, will be controlled by the decisions of the United States supreme court—*Leser v. Garnett*, 114 A. 840, 139 Md. 46, affirmed 42 S.Ct. 217, 258 U.S. 130, 66 L.Ed. 505.
- Validity of judgment**
- The law of California, as construed by the supreme court of the United States, was controlling on supreme court of another state in determining validity of judgment in personam rendered by California court following service by publication of summons on defendant who resided in California at time action was instituted but who left state without having been served with summons—*Laughlin v. Hughes*, Or., 89 P.2d 568.
33. U.S.—*Missouri Pac. R. Co. v. Norwood*, D.C.Ark., 13 F.Supp. 24, affirmed 54 S.Ct. 227, 290 U.S. 600, 78 L.Ed. 527.
- Ala.—*National Linen Service Corporation v. State Tax Commission*, 186 So. 478, 237 Ala. 360—*Mutual Building & Loan Ass'n v. Moore*, 169 So. 1, 232 Ala. 488.
- Ariz.—*State v. Jay J. Garfield Bldg. Co.*, 3 P.2d 983, 39 Ariz. 45, followed in *State v. Perry*, 3 P.2d 987, 39 Ariz. 55.
- Ark.—*State v. Gray*, 96 S.W.2d 447, 192 Ark. 1045.
- Cal.—*Douglas Aircraft Co., Inc. v. Johnson*, 90 P.2d 572—*Ex parte Deane*, 67 P.2d 333, 8 Cal.2d 599—*Perkins Mfg. Co. v. Jordan*, 254 P. 551, 200 Cal. 687—*Ex parte Boynton*, 223 P. 972, 193 Cal. 782—*Ex parte Smith*, 223 P. 971, 193 Cal. 337—*State v. San Francisco Savings & Loan Soc.*, 225 P. 309, 66 Cal.App. 53.
- Colo.—*Lindsley v. Werner*, 283 P. 534, 86 Colo. 545.
- Ga.—*Slizer v. State*, 148 S.E. 385, 168 Ga. 566.
- Ill.—*Illinois Cent. R. Co. v. Emmer-son*, 132 N.E. 471, 299 Ill. 328.
- Kan.—*Court of Industrial Relations v. Charles Wolff Packing Co.*, 227 P. 249, 114 Kan. 487, modifying 219 P. 259, 114 Kan. 304, and reversed on other grounds *Chas. Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 45 S.Ct. 441, 267 U.S. 552, 69 L.Ed. 785.
- Ky.—*Bingham's Adm'r v. Commonwealth*, 251 S.W. 936, 199 Ky. 402.
- Md.—*State v. J. M. Seney Co.*, 107 A. 189, 134 Md. 437.
- Mass.—*In re Opinion of the Justices*, 171 N.E. 234, 271 Mass. 593, 68 A.L.R. 1265—*Liquid Carbonic Co. v. Commonwealth*, 121 N.E. 514, 232 Mass. 19, certiorari denied *Commonwealth of Massachusetts v. Liquid Carbonic Co.*, 39 S.Ct. 259, 249 U.S. 603, 63 L.Ed. 797.
- Mich.—*City of Grand Rapids v. Grand Trunk Ry. System*, 182 N.W. 424, 214 Mich. 1.
- Mo.—*Montgomery Ward & Co. v. Becker*, 69 S.W.2d 674, 334 Mo. 789, certiorari denied *Becker v. Montgomery Ward & Co.*, 55 S.Ct. 71, 293 U.S. 559, 79 L.Ed. 660.
- Neb.—*Bell v. Niemann*, 257 N.W. 69, 127 Neb. 762.
- Nev.—*In re Calvo*, 253 P. 671, 50 Nev. 125.
- N.H.—*H. P. Welch Co. v. State*, 199 A. 886, 89 N.H. 428, 120 A.L.R. 282, affirmed *H. P. Welch Co. v. State of New Hampshire*, 59 S.Ct. 438, 306 U.S. 79, 83 L.Ed. 500—*Tirrell v. Johnston*, 171 A. 641, 86 N.H. 530, affirmed 55 S.Ct. 238, 293 U.S. 533, 79 L.Ed. 641—*In re Opinion of the Justices*, 166 A. 640, 86 N.H. 597.

validity vel non of federal³⁴ statutes or municipal ordinances³⁵ assailed as being in conflict therewith; the construction and effect of federal statutes;³⁶ the construction and effect of treaties of

- N.Y.—Bronx Gas & Electric Co. v. Public Service Commission, First Dist., 180 N.Y.S. 38, 190 App.Div. 13, reversing 178 N.Y.S. 172, 108 Misc. 180—Abbye Employment Agency v. Robinson, 2 N.Y.S.2d 947, 166 Misc. 820.
- Or.—Hofer v. Carson, 203 P. 323, 102 Or. 546.
- Pa.—Carolene Products Co. v. Harter, 197 A. 627, 329 Pa. 49, 119 A.L.R. 235.
- Tenn.—Hoover Motor Express Co. v. Fort, 72 S.W.2d 1052, 167 Tenn. 628, appeal dismissed 55 S.Ct. 149, 293 U.S. 529, 79 L.Ed. 638.
- Utah—Minneapolis Steel & Machinery Co. v. Crockett, 263 P. 926, 71 Utah 211—Badger v. Crockett, 259 P. 921, 70 Utah 265.
- Va.—Trust Co. of Norfolk v. Commonwealth, 145 S.E. 326, 151 Va. 883, affirming 141 S.E. 825, 151 Va. 883, reversed on other grounds Safe Deposit & Trust Co. of Baltimore, Md. v. Commonwealth of Virginia, 50 S.Ct. 59, 280 U.S. 83, 74 L.Ed. 180, 67 A.L.R. 386.
- Wash.—Aberdeen Savings & Loan Ass'n v. Chase, 289 P. 536, 157 Wash. 351, 71 A.L.R. 232, followed in United Diversified Securities Corporation v. Chase, 289 P. 584, 157 Wash. 699, Washington Mut. Sav. Bank v. Chase, 289 P. 555, 157 Wash. 698 and in re Washington Mut. Sav. Bank, 289 P. 555, 157 Wash. 698, and rehearing denied Washington Mut. Savings Bank v. Chase, 290 P. 697, 157 Wash. 351, 71 A.L.R. 232—Great Northern Ry. Co. v. State, 267 P. 506, 147 Wash. 630—State v. Searing, 207 P. 5, 120 Wash. 117—State v. Warburton, 166 P. 615, 97 Wash. 242.
- Wis.—Newport Co. v. Wisconsin Tax Commission, 261 N.W. 884, 219 Wis. 293, 100 A.L.R. 1204, certiorari denied Wisconsin Tax Commission v. Newport Co., 56 S.Ct. 598, 297 U.S. 720, 80 L.Ed. 1004—Ed. Schuster & Co. v. Henry, 261 N.W. 20, certiorari denied Henry v. Wadhams Oil Co., 56 S.Ct. 148, 296 U.S. 625, 80 L.Ed. 444—Verhelst Const. Co. v. Galles, 235 N.W. 556, 204 Wis. 96—State v. Dammann, 224 N.W. 139, 198 Wis. 265—Northwestern Mut. Life Ins. Co. v. State, 207 N.W. 430, 189 Wis. 103, and 207 N.W. 434, 189 Wis. 114, reversed on other grounds 48 S.Ct. 55, 275 U.S. 136, 72 L.Ed. 202, and vacated 218 N.W. 98, 195 Wis. 190.
- Wyo.—Zancanelli v. Central Coal & Coke Co., 173 P. 981, 25 Wyo. 511, 15 C.J. p 933 note 85.
- Effect on federal functions**
Although state supreme court's decisions are controlling as to interpretation of state statute, federal supreme court will decide for itself effect of the statute as so construed on federal functions.—Tirrell v. Johnston, 171 A. 641, 86 N.H. 530, affirmed 55 S.Ct. 238, 293 U.S. 533, 79 L.Ed. 641.
34. Cal.—Ex parte Parr, 288 P. 852, 106 Cal.App. 95.
- Ky.—Coldiron v. Good Coal Co., 125 S.W.2d 757, 276 Ky. 833—Cravens v. Louisville & N. R. Co., 242 S.W. 628, 195 Ky. 257.
- R.I.—Carpenter v. Aquidneck Nat. Bank, 125 A. 358, 46 R.I. 152—Aquidneck Nat. Bank of Newport v. Jennings, 117 A. 743, 44 R.I. 435, 15 C.J. p 933 note 86.
35. Ga.—Glover v. City of Atlanta, 96 S.E. 562, 148 Ga. 285.
- Mo.—Wetterau v. Farmers' & Merchants' Trust Co., 226 S.W. 941, 285 Mo. 555.
- Tex.—Liberty Annex Corporation v. City of Dallas, Com.App., 289 S.W. 1067, affirmed City of Dallas v. Liberty Annex Corporation, Com.App., 295 S.W. 591.
- Va.—Irvine v. City of Clifton Forge, 97 S.E. 310, 124 Va. 781.
- Wash.—State v. Searing, 207 P. 5, 120 Wash. 117.
36. U.S.—State of South Carolina v. Bailey, 53 S.Ct. 667, 289 U.S. 412, 77 L.Ed. 1292, reversing Ex parte Bailey, 166 S.E. 165, 203 N.C. 362, certiorari granted State of South Carolina v. Bailey, 53 S.Ct. 525, 289 U.S. 714, 77 L.Ed. 1468—Baltimore & O. R. Co. v. Clark, C.C.A.Md., 59 F.2d 595, affirming in part and reversing in part, D.C., 56 F.2d 212—First Nat. Bank v. Buder, D.C. Mo., 8 F.2d 883, reversed on other grounds, C.C.A., Buder v. First Nat. Bank, 16 F.2d 990, certiorari denied First Nat. Bank v. Buder, 47 S.Ct. 588, 274 U.S. 743, 71 L.Ed. 1321—Williamson v. Columbia Gas & Electric Corporation, D.C.Del., 27 F.Supp. 198—U. S. v. Dewar, D.C. Nev., 18 F.Supp. 981.
- Ala.—Chairs v. Stollenwerck, 168 So. 589, 232 Ala. 546—Shertzer v. Williams, 168 So. 573, 232 Ala. 558—Hard v. State ex rel. Baker, 154 So. 77, 228 Ala. 517—Charlton v. Alabama Great Southern R. Co., 89 So. 710, 206 Ala. 341.
- Ariz.—Payne v. Woodson, 53 P.2d 1084, 47 Ariz. 113—Southern Pac. Co. v. Gastelum, 297 P. 875, 38 Ariz. 127.
- Cal.—Dougherty v. California Kettleman Oil Royalties, 69 P.2d 155, 9 Cal.2d 58—Hoogbruin v. Atchison, T. & S. F. Ry. Co., 2 P.2d 992, 213 Cal. 582—Ex parte McCready, 177 P. 459, 179 Cal. 514—First Nat. Bank v. Aldridge, 92 P.2d 674, 33 Cal.App.2d 485—Prichard v. Southern Pac. Co., 51 P.2d 426, 9 Cal.App. 2d 701.
- Cole.—Auslender v. Boettcher, 242 P. 672, 78 Colo. 427.
- Fla.—Miami Home Milk Producers Ass'n v. Milk Control Board, 169 So. 541, 124 Fla. 797.
- Ga.—Cooper v. National Bank of Savannah, 94 S.E. 611, 21 Ga.App. 356, certiorari granted Evans v. Same, 38 S.Ct. 423, 246 U.S. 670, 62 L.Ed. 931, and affirmed 40 S.Ct. 58, 251 U.S. 108, 64 L.Ed. 171.
- Ill.—Denney & Co. v. Oregon Short Line R. Co., 141 N.E. 704, 310 Ill. 305—Louisiana Lumber Co. v. Michigan Cent. R. Co., 230 Ill.App. 33.
- Iowa.—Johnston v. Chicago & N. W. Ry. Co., 225 N.W. 357, 208 Iowa 202.
- Kan.—Thomas v. Chicago, B. & Q. R. Co., 273 P. 451, 127 Kan. 326, 64 A.L.R. 322.
- Ky.—Lindon v. Morgan County Nat. Bank, 122 S.W.2d 126, 275 Ky. 556—Plumlee's Adm'x v. Citizen's Nat. Bank of Bowling Green, 111 S.W.2d 607, 271 Ky. 226—Frye's Adm'x v. Frye's Adm'x, 80 S.W.2d 584, 258 Ky. 554—Louisville & N. R. Co. v. Grant, 2 S.W.2d 1063, 223 Ky. 39—Davis v. Dye, 284 S.W. 1049, 215 Ky. 216.
- La.—Landis & Young v. Gossett & Winn, App., 169 So. 178.
- Md.—Acme-Evans Co. v. Baltimore & O. R. Co., 121 A. 571, 142 Md. 658.
- Mass.—New York Cent. & H. R. R. Co. v. York & Whitney Co., 119 N.E. 855, 230 Mass. 206, affirmed in part and reversed in part on other grounds 41 S.Ct. 509, 256 U.S. 406, 65 L.Ed. 1016.
- Mich.—Winget v. Grand Trunk Western Ry. Co., 177 N.W. 273, 210 Mich. 100, certiorari denied Grand Trunk Western Ry. Co. v. Winget, 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 447—J. F. French & Co. v. Pere Marquette Ry. Co., 171 N.W. 491, 204 Mich. 578, certiorari granted Pere Marquette R. Co. v. J. F. French & Co., 39 S.Ct. 494, 250 U.S. 637, 63 L.Ed. 1183, reversed on other grounds 41 S.Ct. 195, 254 U.S. 538, 65 L.Ed. 391.
- Minn.—Sands v. American Ry. Express Co., 198 N.W. 402, 159 Minn. 25.
- Miss.—Orleans Dredging Co. v. Frazie, 161 So. 699, 173 Miss. 882, certiorari denied Frazie v. Orleans Dredging Co., 56 S.Ct. 383, 296 U.S. 653, 80 L.Ed. 465.
- Mo.—Leftridge v. Western Union Telegraph Co., 210 S.W. 18, 277 Mo. 90—Wolcott & Lincoln v. Humphrey, App., 119 S.W.2d 1022.

the United States;³⁷ and matters relating to inter- | state commerce³⁸ or matters relating to, or per-

- Neb.—First Trust Co. of Lincoln v. Smith, 277 N.W. 762, 134 Neb. 84—Diller v. Chicago, B. & Q. R. Co., 229 N.W. 888, 119 Neb. 494—Hensley v. Chicago, St. P., M. & O. Ry. Co., 226 N.W. 421, 118 Neb. 690.
- N.H.—Gehlen v. Patterson, 141 A. 914, 915, 83 N.H. 328, citing *Corpus Juris*.
- N.J.—Rossi v. Pennsylvania R. Co., 178 A. 77, 115 N.J.Law 1, affirmed 187 A. 144, 117 N.J.Law 148—Cassatt v. First Nat. Bank, 168 A. 585, 111 N.J.Law 536, 89 A.L.R. 1302, certiorari denied 54 S.Ct. 377, 291 U.S. 660, 78 L.Ed. 1052—Dela-ware L. & W. R. Co. v. Henry Nuhs Co., 111 A. 223, 93 N.J.Law 309.
- N.Y.—Raiola v. Los Angeles First Nat. Trust & Savings Bank, 233 N.Y.S. 301, 133 Misc. 630.
- Ohio.—Flannery v. Cleveland, C. & St. L. Ry. Co., 26 Ohio Cir.Ct., N.S., 49.
- Or.—Compton v. Hammond Lumber Co., 55 P.2d 21, 153 Or. 546, reversed on other grounds and rehearing denied 58 P.2d 235, 153 Or. 546, certiorari denied Hammond Lumber Co. v. Compton, 57 S.Ct. 42, 299 U.S. 578, 81 L.Ed. 426, and mandate modified on other grounds Compton v. Hammond Lumber Co., 61 P.2d 1257, 154 Or. 650—Wychsel v. States S. S. Co., 296 P. 863, 135 Or. 475 certiorari denied States S. S. Co. v. Wychsel, 52 S.Ct. 11, 284 U.S. 625, 76 L.Ed. 533—Engfors v. Nelson S. S. Co., 280 P. 337, 131 Or. 108—Herrick v. Barzee, 190 P. 141, 96 Or. 357.
- Tex.—Southwestern Greyhound Lines v. Railroad Commission of Texas, 99 S.W.2d 263, 128 Tex. 560, 109 A.L.R. 1235, reversing Railroad Commission of Texas v. Southwestern Greyhound Lines, Civ. App., 92 S.W.2d 296—Winton v. Thompson, Civ.App., 123 S.W.2d 951, error refused—Kansas City, M. & O. Ry. Co. of Texas v. Harral, Civ.App., 199 S.W. 659, error refused.
- Va.—Richmond Fairfield Ry. Co. v. Llewellyn, 157 S.E. 809, 156 Va. 258, amended 162 S.E. 601, 156 Va. 258—Mellon v. Purse Bros., 138 S. E. 647, 148 Va. 262.
- Wash.—Arwine v. Alaska S. S. Co., 65 P.2d 695, 189 Wash. 437, 15 C.J. p 933 note 87.
- Resolution of congress and presidential proclamation**
- Tex.—Western Union Telegraph Co. v. Condit, Civ.App., 223 S.W. 234.
- 37. Mass.—Universal Adjustment Corporation v. Midland Bank, Limited, of London, England, 184 N.E. 152, 281 Mass. 303, 87 A.L.R. 1497.**
- Mich.—People v. Chosa, 233 N.W. 205, 252 Mich. 154.
- Minn.—Johnstown Land Co. v. Brainerd Brewing Co., 172 N.W. 211, 142 Minn. 291.
- 15 C.J. p 934 note 88.
38. Ala.—Clyde Mallory Lines v. State ex rel. State Docks Commission, 159 So. 53, 229 Ala. 624, affirmed Clyde Mallory Lines v. State of Alabama ex rel. State Docks Commission, 56 S.Ct. 194, 296 U.S. 261, 30 L.Ed. 215—Northern Alabama Ry. Co. v. Phillips, 126 So. 846, 220 Ala. 541.
- Ariz.—Weber Showcase & Fixture Co. v. Co-ed Shop, 56 P.2d 667, 47 Ariz. 415.
- Ark.—Railway Express Agency v. J. W. Myers Commission Co., 45 S. W.2d 14, 184 Ark. 1123—Friedrich v. Southwestern Transp. Co., 32 S. W.2d 613, 182 Ark. 733—St. Louis-San Francisco Ry. Co. v. Burford, 22 S.W.2d 378, 180 Ark. 562—Chicago, R. I. & P. Ry. Co. v. S. L. Robinson & Co., 298 S.W. 873, 175 Ark. 35—Hines v. Mason, 221 S.W. 861, 144 Ark. 11.
- Cal.—New York Cent. R. Co. v. Frank H. Buck Co., 41 P.2d 547, 2 Cal.2d 384.
- Conn.—New York, N.H. & H. R. Co. v. California Fruit Growers Exchange, 5 A.2d 353, 125 Conn. 241.
- Ill.—Steindl v. New York Cent. R. Co., 15 N.E.2d 899, 296 Ill.App. 70—Arakelian v. Southern Pac. Co., 220 Ill.App. 160—Mueller Grain Co. v. Lake Erie & W. R. Co., 213 Ill. App. 108.
- Ind.—Clark v. Southern Ry. Co., 119 N.E. 539, 69 Ind.App. 697.
- Iowa.—Dunnegan & Briggs v. Chicago, R. I. & P. R. Co., 211 N.W. 364, 202 Iowa 787.
- Ky.—Hollifield's Adm'x v. Louisville & N. R. Co., 16 S.W.2d 472, 229 Ky. 16.
- La.—State v. Premier Malt Sales Co., 136 So. 5, 172 La. 923—Erskine Williams Lumber Co. v. John I. Hay & Co., App., 160 So. 650.
- Mich.—Hankins v. Payne, 214 N.W. 99, 239 Mich. 155—Westerlin & Campbell Co. v. Detroit Milling Co., 206 N.W. 371, 233 Mich. 384.
- Miss.—Yazoo & M. V. R. Co. v. M. Levy & Sons, 106 So. 525, 141 Miss. 199.
- Mo.—Vaughn & Vaughn v. Quincy, O. & K. C. R. Co., App., 123 S.W. 2d 569—City of St. Charles v. Wash Ry. Co., App., 65 S.W.2d 655, modified on other grounds State ex rel. City of St. Charles v. Becker, 83 S.W.2d 583, 336 Mo. 1187.
- N.H.—Pennsylvania Rubber Co. v. Brown, 143 A. 703, 83 N.H. 336.
- N.J.—Delaware, L. & W. R. Co. v. Henry Nuhs Co., 111 A. 223, 93 N. J.Law 309.
- N.M.—Western Live Stock v. Bureau of Revenue, 65 P.2d 863, 41 N.M. 141—Evans v. Atchison, T. & S. F. Ry. Co., 20 P.2d 932, 37 N.M. 218.
- N.Y.—Barnet v. New York Cent. & H. R. R. Co., 118 N.E. 625, 222 N. Y. 195, reversing 153 N.Y.S. 374, 167 App.Div. 738—American Cotton Products Co. v. New York Cent. R. Co., 255 N.Y.S. 672, 142 Misc. 821—Feynman v. American Ry. Exp. Co., 234 N.Y.S. 727, 134 Misc. 223—Reznek v. Southern Pac. Co., 181 N.Y.S. 117, 111 Misc. 180—Heineman Bros. v. Erie R. Co., 172 N.Y.S. 111.
- Ohio.—Wilson v. Pennsylvania R. Co., 21 N.E.2d 865, 135 Ohio St. 560.
- Or.—Southern Pac. Co. v. Oregon Growers' Co-op. Ass'n, 272 P. 281, 127 Or. 364.
- Pa.—Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 200 A. 854, 322 Pa. 34, certiorari granted Milk Control Board of Commonwealth of Pennsylvania v. Eisenberg Farm Products, 59 S.Ct. 229, 305 U.S. 589, 83 L.Ed. 372, reversed on other grounds Milk Control Board of Pennsylvania Eisenberg Farm Products, 59 S.Ct. 528, 306 U.S. 346, 83 L.Ed. 752 rehearing denied Milk Control Board of Commonwealth of Pennsylvania v. Eisenberg Farm Products, 59 S.Ct. 773, 306 U.S. 669, 83 L.Ed. 1063—Canilli v. Pennsylvania R. Co., 7 A.2d 129, 135 Pa.Super. 510—Hartzfeld v. Bloom, 193 A. 386, 127 Pa. Super. 323.
- S.C.—Woodruff Oil & Fertilizer Co. v. Charleston & W. C. Ry. Co., 180 S.E. 793, 177 S.C. 98—Sweeney v. Southern Ry. Co., 163 S.E. 838, 165 S.C. 380.
- Tex.—Rio Grande & E. P. R. Co. v. T. A. Austin & Co., Com.App., 25 S.W.2d 306, reversing, Civ.App., 12 S.W.2d 1070—Clebume Peanut & Products Co. v. Missouri, K. & T. Ry. Co. of Texas, Com.App., 221 S.W. 270, reversing, Civ.App., 184 S.W. 1070—Fort Worth & Denver City Ry. Co. v. Motley, Civ.App., 87 S.W.2d 551, error dismissed—Pullman Co. v. Dudley, Civ.App., 77 S. W.2d 592.
- Wash.—Spokane International Ry. Co. v. State, 299 P. 362, 162 Wash. 395.
- 15 C.J. p 934 note 89.
- What constitutes common carrier**
- Tex.—Galveston, H. & S. A. Ry. Co. v. American Grocery Co., 36 S.W. 2d 985, 122 Tex. 1, affirming, Com. App., 25 S.W.2d 583, which reversed Galveston Wharf Co. v. American Grocery Co., Civ.App., 13 S.W.2d 983, certiorari granted Galveston Wharf Co. v. Galveston H. & S. A. Ry. Co., 52 S.Ct. 41, 284 U. S. 608, 76 L.Ed. 521, affirmed 52

- S.Ct. 342, 235 U.S. 127, 76 L.Ed. 659.
- What constitutes interstate commerce**
- U.S.—*Bay City v. Frazier*, C.C.A. Mich., 77 F.2d 570.
- Ark.—*Crawford v. Louisville Silo & Tank Co.*, 265 S.W. 355, 166 Ark. 88.
- Mass.—*Conlin Bus Lines v. Old Colony Coach Lines*, 185 N.E. 350, 282 Mass. 493.
- Mo.—*Ward v. Western Union Telegraph Co.*, 45 S.W.2d 263, 226 Mo. App. 752, affirming 22 S.W.2d 81, 224 Mo.App. 16, opinion quashed on other grounds State ex rel. Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773.
- S.D.—*Wyman, Partridge Holding Co. v. Lowe*, 272 N.W. 181, 65 S.D. 139—*Lawyers' Co-op. Pub. Co. v. Bauer*, 244 N.W. 327, 60 S.D. 259—*Dakota Photo Engraving Co. v. Woodland*, 241 N.W. 510, 59 S.D. 523, affirming 236 N.W. 471, 58 S.D. 441.
- Tenn.—*Lloyd Thomas Co. v. Grosvenor*, 233 S.W. 669, 144 Tenn. 347—*Peck-Williamson Heating & Ventilating Co. v. McKnight & Merz*, 205 S.W. 419, 140 Tenn. 563.
- Tex.—*Pope v. Kansas City, M. & O. Ry. Co. of Texas*, 207 S.W. 514, 109 Tex. 311, reversing *Kansas City, M. & O. Ry. Co. of Texas v. Pope*, Civ.App., 152 S.W. 185, and 153 S.W. 183—*Little v. Armstrong Mfg. Co.*, Civ.App., 58 S.W.2d 849, error refused.
- Utah.—*Advance-Rumely Thresher Co. v. Stohl*, 283 P. 731, 75 Utah 124.
- Va.—*Western Union Telegraph Co. v. Bowles*, 98 S.E. 645, 124 Va. 730.
- Wis.—*Pfadtler Co. v. Westphal*, 209 N.W. 700, 190 Wis. 486.
- 15 C.J. p 934 note 89 [a].
- Construction of Interstate Commerce Act**
- (1) The United States supreme court is the supreme authority in the construction of the Interstate Commerce Act.
- Ala.—*Herring v. Alabama Great Southern R. Co.*, 184 So. 180, 236 Ala. 618, certiorari denied 59 S.Ct. 583, 306 U.S. 644, 83 L.Ed. 1044—*Alabama Great Southern R. Co. v. Conner*, 151 So. 355, 227 Ala. 562, certiorari denied *Connor v. Alabama Great Southern R. Co.*, 54 S.Ct. 531, 291 U.S. 675, 78 L.Ed. 1063.
- Ark.—*Jonesboro, L. C. & E. R. Co. v. Maddy*, 248 S.W. 911, 157 Ark. 484, 28 A.L.R. 498—*Shannon v. Western Union Telegraph Co.*, 238 S.W. 59, 152 Ark. 358—*St. Louis, I. M. & S. Ry. Co. v. Wood*, 207 S.W. 32, 136 Ark. 585.
- Ill.—*S. Valentine & Co. v. Atchison, T. & S. F. Ry. Co.*, 220 Ill.App. 188—*Sparr v. Southern Pac. Co.*, 220 Ill.App. 172.
- Ind.—*American Ry. Express Co. v. Rhody*, 143 N.E. 640, 84 Ind.App. 383.
- Ky.—*American Oak Leather Co. v. Cleveland, C. C. & St. L. R. Co.*, 288 S.W. 347, 216 Ky. 611—*Cleveland, C. C. & St. L. Ry. Co. v. Young*, 195 S.W. 93, 175 Ky. 841.
- Md.—*Bronstein v. Payne*, 113 A. 648, 138 Md. 116.
- Minn.—*Outcault Advertising Co. v. Citizens' State Bank of Roseau*, 180 N.W. 705, 147 Minn. 449.
- Mo.—*National Refrigerator Co. v. Southwest Missouri Light Co.*, 231 S.W. 930, 288 Mo. 290—*Foster Lumber Co. v. Atchison, T. & S. F. Ry. Co.*, 194 S.W. 281, 270 Mo. 629, L.R.A.1918A 768.
- N.J.—*West Jersey & S. S. R. Co. v. Lake & Risley Co.*, 145 A. 336, 105 N.J.Law 314.
- N.Y.—*Barnet v. New York Cent. & H. R. R. Co.*, 118 N.E. 625, 222 N.Y. 195, reversing 153 N.Y.S. 374, 167 App.Div. 738—*Lefcort v. Railway Express Agency*, 278 N.Y.S. 238, 154 Misc. 630.
- Okl.—*St. Louis, I. M. & S. Ry. Co. v. Patterson*, 182 P. 701, 75 Okl. 204—*St. Louis, I. M. & S. Ry. Co. v. Bentley*, 176 P. 250, 71 Okl. 165—*Atchison, T. & S. F. Ry. Co. v. Cooper*, 175 P. 539, 71 Okl. 112.
- Tex.—*Shroyer v. Chicago, R. I. & G. Ry. Co.*, Com.App., 222 S.W. 1095, 111 Tex. 24, reversing *Chicago, R. I. & G. Ry. Co. v. Shroyer*, Civ. App., 197 S.W. 773, and modified on other grounds *Shroyer v. Chicago, R. I. & G. Ry. Co.*, 226 S.W. 140, 111 Tex. 24.
- Va.—*Williamson v. Seaboard Air Line Ry.*, 118 S.E. 255, 136 Va. 626, certiorari denied *Williamson v. Seaboard Air Line Ry. Co.*, 44 S.Ct. 37, 263 U.S. 710, 68 L.Ed. 518—*Martin v. Commonwealth*, 100 S.E. 836, 126 Va. 715.
- (2) However, decisions under that act are inapplicable in determining rights and liabilities of shipper and carrier not subject to the act.—*R. H. Macy & Co. v. Pennsylvania Transp. Co.*, 266 N.Y.S. 194, 148 Misc. 129, affirmed 266 N.Y.S. 198, 149 Misc. 460.
- Construction of Bills of Lading Act**
- Colo.—*Davis v. Fruita Mercantile Co.*, 220 P. 983, 74 Colo. 247.
- Ill.—*Morse-Hubbard Co. v. Michigan Cent. R. Co.*, 3 N.E.2d 93, 286 Ill. App. 163.
- Construction of contract or bill of lading**
- Ala.—*Tamsett v. Hines*, 91 So. 788, 207 Ala. 97, 22 A.L.R. 875.
- Ark.—*Lusk v. Long*, 192 S.W. 213, 127 Ark. 261.
- Cal.—*Crenshaw Bros. & Saffold v. Southern Pac. Co.*, 181 P. 252, 40 Cal.App. 603, amendment denied 183 P. 208, 42 Cal.App. 44, and certiorari denied 40 S.Ct. 14, 250 U.S. 669, 63 L.Ed. 1198.
- Ga.—*Central of Georgia Ry. Co. v. Owens*, 110 S.E. 339, 28 Ga.App. 140.
- Ill.—*Cohen v. Southern Ry. Co.*, 193 N.E. 480, 358 Ill. 532, affirming 273 Ill.App. 116—*Mark Owen & Co. v. Michigan Cent. R. Co.*, 125 N.E. 767, 291 Ill. 149, certiorari granted *Michigan Cent. R. Co. v. Mark Owen & Co.*, 40 S.Ct. 483, 253 U.S. 481, 64 L.Ed. 1023, and affirmed 41 S.Ct. 554, 256 U.S. 427, 65 L.Ed. 1032.
- Iowa.—*Midland Linseed Co. v. American Liquid Fireproofing Co.*, 166 N.W. 573, 183 Iowa 1046, error dismissed 41 S.Ct. 60, 254 U.S. 610, 65 L.Ed. 436.
- Ky.—*Baltimore & Ohio R. Co. v. Leach*, 191 S.W. 310, 173 Ky. 452, reversed on other grounds 39 S.Ct. 254, 249 U.S. 217, 63 L.Ed. 470.
- Mass.—*Fisk Rubber Co. of New York v. New York, N. H. & H. R. R.*, 132 N.E. 714, 240 Mass. 40.
- Mich.—*H. Ginsberg & Sons v. Wabash R. Co.*, 189 N.W. 1018, 219 Mich. 665, 28 A.L.R. 518, affirmed *Ginsberg v. Wabash R. Co.*, 193 N.W. 286, 222 Mich. 560.
- Miss.—*Illinois Cent. R. Co. v. Rogers & Hurdle*, 76 So. 686, 116 Miss. 99.
- Mo.—*Miller v. Quincy, O. & K. C. R. Co.*, 225 S.W. 116, 205 Mo.App. 463—*Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co.*, 213 S.W. 531, 201 Mo.App. 609—*McMickle v. Wabash Ry. Co.*, App., 209 S.W. 611.
- N.Y.—*Bond Stores v. Overland Package Freight Service*, 13 N.Y.S.2d 928, 171 Misc. 135.
- Pa.—*Concordia Silk Hosiery Co. v. Pennsylvania R. Co.*, 69 Pa.Super. 361.
- S.C.—*Molise v. Southern Ry. Co.*, 123 S.E. 790, 129 S.C. 162.
- Tex.—*Shroyer v. Chicago, R. I. & G. Ry. Co.*, 222 S.W. 1095, 111 Tex. 24, reversing *Chicago, R. I. & G. Ry. Co. v. Shroyer*, Civ.App., 197 S.W. 773, and modified on other grounds *Shroyer v. Chicago, R. I. & G. R. Co.*, 226 S.W. 140, 111 Tex. 24—*Houston E. & W. T. Ry. Co. v. Houston Packing Co.*, Civ.App., 203 S.W. 1140.
- Va.—*Chesapeake & O. Ry. Co. of Indiana v. National Bank of Commerce of Norfolk*, 95 S.E. 454, 122 Va. 471, certiorari denied 38 S.Ct. 582, 247 U.S. 519, 62 L.Ed. 1246.
- Wyo.—*Union Pac. R. Co. v. Pacific Market Co.*, 200 P. 108, 27 Wyo. 501, rehearing denied 206 P. 143, 28 Wyo. 461.
- 15 C.J. p 934 note 89 [d], [e].
- Validity of stipulation**
- Ky.—*Louisville & N. R. Co. v. George*, 129 S.W.2d 986, 279 Ky. 24.
- Mass.—*Metz Co. v. Boston & M. R. R.*, 116 N.E. 475, 227 Mass. 307.
- N.C.—*Bryan v. Louisville & N. R. Co.*, 93 S.E. 750, 174 N.C. 177.
- 15 C.J. p 934 note 89 [g].

taining to, extradition,³⁹ maritime law,⁴⁰ navigability of waters within a state,⁴¹ state boundary lines,⁴² state taxation of federal officials or instrumentalities,⁴³ federal taxes,⁴⁴ legal tender of the United States,⁴⁵ conflict of laws,⁴⁶ jurisdiction

Liability of carrier

Fla.—American Ry. Exp. Co. v. Feigenbush, 144 So. 320, 107 Fla. 145.
Ill.—Hartford Live Stock Ins. Co. v. Railway Express Agency, 274 Ill. App. 585.

Kan.—Mangelsdorf Seed Co. v. Missouri Pac. R. Co., 280 P. 896, 128 Kan. 729.

Miss.—A. Polk & Son v. New Orleans & N. E. R. Co., 185 So. 554.

Mo.—Crowell v. St. Louis-San Francisco Ry. Co., App., 11 S.W.2d 1055.
Neb.—Robidoux v. Chicago & N. W. R. Co., 204 N.W. 870, 113 Neb. 682, 41 A.L.R. 446.

N.Y.—Dodge, etc., Co. v. Pennsylvania R. Co., 162 N.Y.S. 549, 175 App. Div. 823.

Ohio.—St. Louis-San Francisco Ry. Co. v. Glow Electric Co., 172 N.E. 425, 35 Ohio App. 291.

Or.—Coos Bay Amusement Co. v. American Ry. Express Co., 277 P. 107, 129 Or. 216.

Tex.—Henderson v. Wells Fargo & Co. Express, Civ.App., 217 S.W. 962.

Release valuation clause in interstate bill

Iowa.—Taylor v. Chicago, R. I. & P. Ry. Co., 227 N.W. 407, 208 Iowa 1396.

Performance of contract

Mo.—Burton v. Wabash Ry. Co., 58 S.W.2d 443, 332 Mo. 268, affirming, App., 22 S.W.2d 201, and followed in Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bozworth v. Wabash Ry. Co., App., 21 S.W.2d 1110.

Regulation of intrastate rates

Mont.—State v. Northern Pac. Ry. Co., 205 P. 959, 62 Mont. 576.

Demurrage charges

Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.

Interstate telegraph company or telegram

Ala.—Ex parte Priester, 102 So. 376, 212 Ala. 271, reversing Priester v. Western Union Telegraph Co., 102 So. 372, 20 Ala.App. 388.

Colo.—Western Union Telegraph Co. v. Trinidad Bean & Elevator Co., 267 P. 1068, 84 Colo. 93—Ryan v. Colorado Postal Telegraph Cable Co., 195 P. 645, 69 Colo. 542.

Mo.—Clerk v. Western Union Telegraph Co., 33 S.W.2d 982, 224 Mo. App. 1214—Williams v. Western Union Telegraph Co., 275 S.W. 570, 218 Mo.App. 364—Brewer v. Postal Telegraph Cable Co., 223 S.W. 949, 204 Mo.App. 275, certiorari denied 41 S.Ct. 15, 254 U.S. 647, 65 L. Ed. 455—Diffenderfer v. Western Union Telegraph Co., 200 S.W. 706, 199 Mo.App. 48.

Nev.—Postal Telegraph-Cable Co. v. Howe, 211 P. 358, 46 Nev. 239.

N.C.—Thos. G. Hardie & Co. v. Western Union Telegraph Co., 128 S.E. 500, 190 N.C. 45.

Pa.—Rixon v. Western Union Telegraph Co., 114 A. 367, 271 Pa. 67.

Tex.—Western Union Telegraph Co. v. Dick, Civ.App., 235 S.W. 287—Western Union Telegraph Co. v. King, Civ.App., 235 S.W. 286—Western Union Telegraph Co. v. Epley, Civ.App., 218 S.W. 528.

15 C.J. p 934 note 89 [I].

Pilotage

Mass.—Commonwealth v. Kemp, 150 N.E. 172, 254 Mass. 190.

39. Conn.—Taft v. Lord, 103 A. 644, 92 Conn. 539, L.R.A.1918E 545.

Ill.—People ex rel. Carr v. Murray, 192 N.E. 198, 357 Ill. 326, 94 A.L.R. 1487—People ex rel. La Rue v. Meyering, 191 N.E. 318, 357 Ill. 166—People v. Baldwin, 174 N.E. 51, 341 Ill. 604.

Mo.—Ex parte Ellis, 9 S.W.2d 544, 223 Mo.App. 125.

S.D.—Grogan v. Welch, 227 N.W. 74, 55 S.D. 613, 67 A.L.R. 1474.

Tenn.—State ex rel. Van Scoyoc v. State, 103 S.W.2d 26, 171 Tenn. 357.

Wash.—Ex parte Roberts, 56 P.2d 703, 186 Wash. 13.

Wis.—Ex parte Henke, 177 N.W. 880, 172 Wis. 36, 13 A.L.R. 409.

15 C.J. p 935 note 90.

40. Mass.—Ahern's Case, 142 N.E. 703, 247 Mass. 512.

N.Y.—Christensen v. Morse Dry Dock & Repair Co., 214 N.Y.S. 732, 216 App.Div. 274, appeal dismissed 154 N.E. 616, 243 N.Y. 587.

Or.—Martinson v. State Industrial Accident Commission, 60 P.2d 972, 154 Or. 423, certiorari denied 57 S.Ct. 435, 300 U.S. 659, 81 L.Ed. 868.

Va.—Johnson v. G. T. Elliott, Inc., 146 S.E. 298, 152 Va. 121.

Wash.—Novak v. Fishermen's Packing Corporation, 52 P.2d 336, 184 Wash. 526—Eclipse Mill Co. v. Department of Labor & Industries of Washington, 251 P. 130, 141 Wash. 172, affirmed Sultan Ry. & Timber Co. v. Department of Labor and Industries of State of Washington, 48 S.Ct. 505, 277 U.S. 135, 72 L.Ed. 820.

Admiralty rules

Common-law courts, when trying case cognizable in admiralty court, should ordinarily follow rules obtaining in admiralty.—Myrtle Point Transp. Co. v. Port of Coquille River, 168 P. 625, 86 Or. 311.

Contributory negligence

The rule of the United States su-

preme court that the common-law rule that contributory negligence bars recovery, and not the admiralty rule of comparative negligence, applies in cases prosecuted in state courts for maritime torts, should be followed until modified or limited by such court.—Maleeny v. Standard Shipbuilding Corporation, 142 N.E. 602, 237 N.Y. 250, reversing 200 N.Y. S. 933, 206 App.Div. 780.

Injuries on high seas

In determining validity of clauses limiting time for filing claim and bringing suit for injuries received by passenger on steamer on the high seas, the federal cases are controlling.—Hubbard v. Matson Nav. Co., Cal.App., 93 P.2d 846.

41. U.S.—U. S. v. State of Oregon, 55 S.Ct. 610, 295 U.S. 1, 79 L.Ed. 1267.

Iowa.—Shortell v. Des Moines Electric Co., 172 N.W. 649, 186 Iowa 469.

Pa.—Cleveland & P. R. Co. v. Pittsburgh Coal Co., 176 A. 7, 317 Pa. 395, certiorari denied 55 S.Ct. 655, 295 U.S. 743, 79 L.Ed. 1689.

42. Ark.—Kissell v. Stevens, 261 S.W. 299, 164 Ark. 195.

Miss.—Hill City Compress Co. v. West Kentucky Coal Co., 122 So. 747, 155 Miss. 55.

43. Ky.—Martin v. Kenesson, 119 S.W.2d 644, 274 Ky. 581.

Minn.—Geery v. Minnesota Tax Commission, 278 N.W. 594, 202 Minn. 366.

Mo.—State ex rel. and to Use of Baumann v. Bowles, 115 S.W.2d 805, 342 Mo. 357.

Utah.—Van Cott v. State Tax Commission of Utah, 79 P.2d 6, 95 Utah 43, certiorari granted State Tax Commission of Utah v. Van Cott, 59 S.Ct. 358, 305 U.S. 592, 83 L.Ed. 375, vacated 59 S.Ct. 605, 306 U.S. 511, 83 L.Ed. 950.

44. Ill.—U. S. Express Co. v. People, 62 N.E. 825, 195 Ill. 155.

Pa.—Biddle Hardware Co. v. Adams Express Co., 8 Pa.Dist. 43, 22 Pa.Co. 1.

Estate tax

N.H.—Amoskeag Trust Co. v. Trustees of Dartmouth College, 200 A. 786, 89 N.H. 471, 117 A.L.R. 1186.

Income tax

U.S.—Aldridge v. U. S., 64 Ct.Cl. 424.

45. Ill.—Black v. Lusk, 69 Ill. 70.

15 C.J. p 935 note 92.

46. Tex.—Metropolitan Life Ins. Co. v. Wann, 109 S.W.2d 470, 130 Tex. 400, 115 A.L.R. 1301, reversing, Civ.App., 81 S.W.2d 298.

of federal courts⁴⁷ and the effect of their judgments,⁴⁸ jurisdiction of offenses committed on Indian reservations,⁴⁹ removal of causes from state to federal courts,⁵⁰ liability of United States officers or agents and their sureties,⁵¹ patents,⁵² bankruptcy,⁵³ national banks,⁵⁴ and public lands or land

47. U.S.—Neuss, Hesslein & Co. v. Van der Stegen, C.C.A.China, 10 F. 2d 772, certiorari denied Van der Stegen v. Neuss Hesslein & Co., 46 S.Ct. 632, 271 U.S. 681, 70 U.S. 1149.
- Ark.—State v. St. Louis-San Francisco Ry. Co., 258 S.W. 609, 259 S.W. 415, 162 Ark. 443, certiorari denied State of Arkansas ex rel. Utley v. St. Louis-San Francisco Ry. Co., 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 402.
- Mass.—In re Wolf's Case, 189 N.E. 85, 285 Mass. 181.
- N.J.—Kennedy v. Coon, 106 A. 210, 91 N.J.Law 100, affirmed Coon v. Kennedy, 103 A. 207, 91 N.J.Law 598, error dismissed 39 S.Ct. 146, 248 U.S. 457, 63 L.Ed. 358.
- 15 C.J. p 935 note 93.
48. Ill.—Rock Island Nat. Bank v. Thompson, 50 N.E. 1089, 173 Ill. 593, 64 Am.S.R. 137, affirming 74 Ill.App. 54.
49. U.S.—Yohyowan v. Luce, D.C. Wash., 291 F. 425.
50. Whether cause is removable
- Ark.—Missouri Pac. R. Co. v. Tompkins, 247 S.W. 54, 157 Ark. 16.
- Ky.—Lee v. Chesapeake & O. Ry. Co., 256 S.W. 421, 201 Ky. 287.
- Mass.—Lawrence Trust Co. v. Chase Securities Corporation, 193 N.E. 905, 292 Mass. 481.
- Mich.—Dougherty v. Michigan Bell Telephone Co., 209 N.W. 200, 235 Mich. 416.
- N.C.—Van Dyke v. Prudential Ins. Co., 134 S.E. 460, 192 N.C. 206.
- 15 C.J. p 936 note 7.
- Consequence of appearance**
- Decisions of federal supreme court control as to consequences of appearance for purpose of securing removal.
- Miss.—McCoy v. Watson, 121 So. 116, 153 Miss. 416, suggestion of error denied 122 So. 368, 154 Miss. 307.
- Mo.—Electrolytic Chlorine Co. v. Wallace & Tiernan Co., 41 S.W.2d 1049, 238 Mo. 782, 78 A.L.R. 930.
- Contra
- Fla.—Rorick v. Chancey, 178 So. 112, 130 Fla. 442.
51. Cal.—Natoli v. Davis, 242 P. 895, 75 Cal.App. 309.
- Kan.—St. Paul Fire & Marine Ins. Co. v. Hines, 202 P. 582, 110 Kan. 4.
- Mass.—Genga v. New York, N. H. & H. R. Co., 137 N.E. 637, 243 Mass. 101.
- Tex.—McKee v. Brooks, 64 Tex. 255.
52. Ill.—Gillmore v. Sapp, 100 Ill. 297.
- Minn.—Dial Toaster Corporation v. Waters-Genter Co., 233 N.W. 870, 181 Minn. 606.
- N.C.—Maxwell v. Chemical Const. Co., 157 S.E. 606, 200 N.C. 500.
53. U.S.—Albert Pick & Co. v. Willson, C.C.A.Iowa, 19 F.2d 18.
- Ala.—Wofford Bond & Mortgage Co. v. Adams, 133 So. 254, 222 Ala. 527.
- Ark.—Lester v. Thomas, 295 S.W. 717, 174 Ark. 351, certiorari denied Thomas v. Lester, 48 S.Ct. 140, 275 U.S. 567, 72 L.Ed. 430.
- Colo.—People v. Ginsberg, 285 P. 758, 87 Colo. 115—Wilder v. Colorado Motor Finance Co., 244 P. 596, 79 Colo. 97.
- Ga.—Murray v. Miller, 121 S.E. 113, 157 Ga. 11—Covington v. Rosenbusch, 97 S.E. 78, 148 Ga. 459, answers to certified questions conformed to Covington v. Rosenbusch, 97 S.E. 462, 22 Ga.App. 799.
- Iowa.—Scovel v. Pierce, 226 N.W. 133, 208 Iowa 776.
- Ky.—Becker v. Crabb's Trustee in Bankruptcy, 21 S.W.2d 438, 231 Ky. 354.
- Minn.—Landy v. Martin, 258 N.W. 573, 193 Minn. 252.
- Neb.—Nebraska State Bank of Valparaiso v. Citizens' State Bank of Thedford, 240 N.W. 575, 122 Neb. 522.
- N.Y.—Cassedy v. Johnstown Bank, 286 N.Y.S. 202, 246 App.Div. 337—Brenen v. Dahlstrom Metallic Door Co., 178 N.Y.S. 846, 189 App. Div. 685, reversing 167 N.Y.S. 860—Brown v. Hoyt, 261 N.Y.S. 855, 145 Misc. 915—Schneck v. Lewis, 201 N.Y.S. 282, 121 Misc. 370, affirmed 206 N.Y.S. 958, 210 App.Div. 845—Sturm v. Chatham & Phenix Nat. Bank, 199 N.Y.S. 895, 121 Misc. 47.
- S.C.—Keenan v. Luther, 137 S.E. 144, 138 S.C. 539.
- Tenn.—Whaley v. King, 206 S.W. 31, 141 Tenn. 1.
- Tex.—Evans v. Whicker, Civ.App., 59 S.W.2d 420, reversed on other grounds 90 S.W.2d 554, 128 Tex. 621—Edrington v. Gee, Civ.App., 30 S.W.2d 860—Armstrong v. Neblett, Civ.App., 19 S.W.2d 362, affirmed Neblett v. Armstrong, Com. App., 26 S.W.2d 166, 75 A.L.R. 577.
- Wash.—Armour & Co. v. Becker, 9 P.2d 63, 167 Wash. 245.
- 15 C.J. p 935 note 97.
- Frazier-Lemke Act**
- Wis.—Kalb v. Luce, 279 N.W. 685, 228 Wis. 519, rehearing denied 280 N.W. 726, 228 Wis. 519, appeal dismissed 59 S.Ct. 107, 305 U.S. 566, 83 L.Ed. 356, followed in 285 N.W. 431, reversed on other grounds 60 S.Ct. 343.
54. U.S.—Gulley v. Wisdom, C.C.A. Miss., 69 F.2d 495—U. S. Fidelity & Guaranty Co. v. National Bank of America, D.C.Ind., 4 F.Supp. 569, modified on other grounds, C. C.A., National Bank of America v. U. S. Fidelity & Guaranty Co., 71 F.2d 618, certiorari granted Jennings v. U. S. Fidelity & Guaranty Co., 55 S.Ct. 112, 293 U.S. 543, 79 L.Ed. 648, reversed on other grounds 55 S.Ct. 394, 294 U.S. 216, 79 L.Ed. 869, 99 A.L.R. 1248.
- Ill.—C. E. Healey & Son v. Stewardson Nat. Bank, 1 N.E.2d 858, 285 Ill.App. 290.
- Ky.—Moss v. First Nat. Bank of Horse Cave's Receiver, 65 S.W.2d 88, 251 Ky. 390.
- N.J.—Klemm v. Labor Co-op. Nat. Bank of Paterson, 187 A. 640, 117 N.J.Law 284.
- N.Y.—Longley v. Coons, 280 N.Y.S. 17, 244 App.Div. 391, affirmed 198 N.E. 571, 268 N.Y. 712—O'Connor v. Bankers Trust Co., 289 N.Y.S. 252, 159 Misc. 920, affirmed 1 N.Y. S.2d 641, 253 App.Div. 714, motion granted 1 N.Y.S.2d 861, 253 App. Div. 797, affirmed O'Connor v. Bankers Trust Co., 16 N.E.2d 302, 278 N.Y. 649.
- N.C.—Board of Com'rs of Brunswick County v. Bank of Southport, 145 S.E. 227, 196 N.C. 198—Planters' Nat. Bank of Virginia v. Wysong & Miles Co., 99 S.E. 199, 177 N.C. 380, certiorari denied Wysong & Miles Co. v. Planters' Nat. Bank of Richmond, Va., 40 S.Ct. 13, 250 U.S. 666, 63 L.Ed. 1197, and error dismissed 40 S.Ct. 343, 251 U.S. 568, 64 L.Ed. 418, followed in Bank of North America v. Wysong & Miles Co., 99 S.E. 207, 177 N.C. 394, certiorari denied Wysong & Miles Co. v. Bank of North America, Philadelphia, Pa., 40 S.Ct. 13, 250 U.S. 666, 63 L.Ed. 1197, and error dismissed 40 S.Ct. 343, 251 U.S. 568, 64 L.Ed. 418.
- Or.—Giesey v. American Nat. Bank of Portland, 53 P.2d 20, 152 Or. 516, certiorari denied Giesey v. First Nat. Bank, 57 S.Ct. 10, 299 U.S. 547, 81 L.Ed. 402.
- Tex.—Wray v. Citizens' Nat. Bank of Dublin, Com.App., 288 S.W. 171, affirming, Civ.App., 282 S.W. 659—Wise v. Citizens Nat. Bank at Brownwood, Civ.App., 107 S.W.2d 715—Kosse Nat. Bank v. Darden, Civ.App., 36 S.W.2d 295.
- Wash.—Lloyd v. Fidelity Nat. Bank of Spokane, 13 P.2d 504, 169 Wash. 107.
- Wyo.—In re Riverton State Bank, 49 P.2d 637, 48 Wyo. 372, modifying 38 P.2d 603, 47 Wyo. 469.
- 15 C.J. p 935 note 98.

grants of the United States.⁵⁵ The state courts are also bound by such decisions with respect to naturalization and citizenship,⁵⁶ the location of mining claims,⁵⁷ former jeopardy in a capital case,⁵⁸ the power of a state to impose a tax on a foreign corporation measured by its capital stock as a condi-

tion of its right to do business in the state,⁵⁹ questions involving jurisdiction or the manner of acquiring jurisdiction over foreign corporations,⁶⁰ questions arising under the Federal Employers' Liability Act,⁶¹ or Federal Safety Appliance

Who is stockholder liable for bank's debts is not matter of procedure, but relates to substantive rights, as to which federal rule obtains, so that state scintilla rule does not prevail in determination of such question.—*Cheairs v. Stollenwerck*, 168 So. 589, 232 Ala. 546.

State tax on shares

Ala.—*Ward v. First Nat. Bank*, 142 So. 93, 225 Ala. 10.

Fla.—*Roberts v. American Nat. Bank of Pensacola*, 115 So. 261, 94 Fla. 427.

Iowa.—*Steele v. Madison County*, 200 N.W. 330, 198 Iowa 902.—*Des Moines Nat. Bank v. Fairweather*, 181 N.W. 459, 191 Iowa 1240, petition overruled 184 N.W. 313, 191 Iowa 1240, and affirmed 44 S.Ct. 23, 263 U.S. 103, 68 L.Ed. 191.—*Security Sav. Bank v. Board of Review of City of Waterloo*, 178 N.W. 562, 189 Iowa 463.

Minn.—*State v. First Nat. Bank*, 204 N.W. 874, 164 Minn. 235.

Wis.—*First Nat. Bank v. City of Hartford*, 203 N.W. 721, 187 Wis. 290, reversed on other grounds 47 S.Ct. 462, 273 U.S. 543, 71 L.Ed. 767, and vacated 214 N.W. 617, 193 Wis. 494.

55. U.S.—*U. S. v. State of Oregon*, 55 S.Ct. 610, 295 U.S. 1, 79 L.Ed. 1267.

Ala.—*Louisville & N. R. Co. v. Malchow*, 114 So. 53, 216 Ala. 656.

Colo.—*Denver & S. L. Ry. Co. v. Pacific Lumber Co.*, 278 P. 1022, 86 Colo. 86.

Fla.—*Seaboard Air Line Ry. Co. v. Board of Bond Trustees of Special Road and Bridge Dist. No. 1 of Alachua County*, 108 So. 689, 91 Fla. 612, 46 A.L.R. 870.

Ill.—*Daggett v. Wilkinson*, 178 N.E. 41, 345 Ill. 244.

Or.—*Luscher v. Reynolds*, 56 P.2d 1158, 153 Or. 625.

S.D.—*Casey v. Butte County*, 217 N.W. 508, 52 S.D. 334.

Wash.—*Thompson v. Savidge*, 188 P. 397, 110 Wash. 486.
15 C.J. p 935 note 99.

56. N.Y.—*People v. Newell*, 1 How. Pr., N.S., 8, affirmed 38 Hun 78.

57. Mont.—*Street v. Delta Min. Co.*, 112 P. 701, 42 Mont. 371.

58. Mont.—*State v. Keerl*, 85 P. 862, 33 Mont. 501.

59. Mont.—*J. I. Case Threshing Mach. Co. v. Stewart*, 199 P. 909, 60 Mont. 380.

60. Ariz.—*Wells Fargo & Co. of*

Mexico, S. A. v. McArthur Bros. Mercantile Co., 26 P.2d 1021, 42 Ariz. 405.

N.H.—*Campbell v. U. S. Radiator Corporation*, 167 A. 558, 86 N.H. 310.

N.Y.—*Kohn v. Wilkes-Barre Dry Goods Co.*, 246 N.Y.S. 425, 139 Misc. 116.

N.C.—*Langley v. Planters Tobacco Warehouse*, 1 S.E.2d 558, 215 N.C. 237.

S.C.—*McSwain v. Adams Grain, etc., Co.*, 76 S.E. 117, 93 S.C. 103, Ann. Cas.1914D 900.

Wis.—*Petition of Northfield Iron Co.*, 277 N.W. 168, 228 Wis. 487.

Suability

(1) Respecting suability of foreign corporation, federal authorities control on questions of due process, equal protection, and interstate commerce, and whether process was served on authorized agent.—*Ford Motor Co. v. Hall Auto Co.*, 147 So. 603, 226 Ala. 385.

(2) A like rule applies with respect to the question of whether corporation was doing business in state. Ala.—*Ford Motor Co. v. Hall Auto Co.*, 147 So. 603, 226 Ala. 385.

Iowa.—*Walter M. Toole Co. v. Distributors' Group*, 251 N.W. 689, 217 Iowa 422.

N.Y.—*Ray D. Lillibridge, Inc. v. Johnson Bronze Co.*, 222 N.Y.S. 130, 220 App.Div. 573, affirmed 161 N.E. 177, 247 N.Y. 548.—*Samuel Hoffman, Inc. v. Mode Shoppe*, 247 N.Y.S. 266, 138 Misc. 742.—*Scheinman v. Bonwit Teller & Co.*, 229 N.Y.S. 783, 132 Misc. 311.

S.C.—*Zeigler v. Puritan Mills*, 199 S.E. 420, 188 S.C. 367.

Tenn.—*Banks Grocery Co. v. Kelley-Clarke Co.*, 243 S.W. 879, 146 Tenn. 579.

(3) So whether foreign corporation served with process was present within state and service has been made on agent of representative capacity or exercising derivative authority within limits of state is a federal question on which the decisions of the supreme court of the United States are controlling.—*Dahl v. Collette*, 279 N.W. 561, 202 Minn. 544.

(4) Decisions of the United States supreme court as to the definition of an agent of a foreign corporation on whom process could be served are controlling in construing state's statute.—*Zeigler v. Puritan Mills*, supra.

61. U.S.—*Chesapeake & O. Ry. Co. v. Kuhn*, Ohio, 52 S.Ct. 45, 284 U.S. 44, 76 L.Ed. 157.—*Missouri Pac. R. Co. v. Aeby*, 48 S.Ct. 177, 275 U.S. 426, 72 L.Ed. 351, reversing *Aeby v. Missouri Pac. R. Co.*, 285 S.W. 965, 313 Mo. 492, certiorari granted *Missouri Pac. R. Co. v. Aeby*, 47 S.Ct. 108, 273 U.S. 679, 71 L.Ed. 836, mandate conformed to *Aeby v. Missouri Pac. R. Co.*, 6 S.W.2d 1115.

Ala.—*Louisville & N. R. Co. v. Grizzard*, 189 So. 203.—*Mobile & O. R. Co. v. Williams*, 129 So. 60, 221 Ala. 402.—*Bugg v. Sanders*, 121 So. 410, 219 Ala. 129.

Ariz.—*Southern Pac. Co. v. Gastelum*, 297 P. 875, 38 Ariz. 127.

Ark.—*De Queen & E. R. Co. v. Dye*, 58 S.W.2d 955, 187 Ark. 219.

Cal.—*Hoogbruin v. Atchison, T. & S. F. Ry. Co.*, 2 P.2d 992, 213 Cal. 582.—*Hines v. Industrial Accident Commission*, 193 P. 859, 184 Cal. 1, 14 A.L.R. 726, certiorari denied *Payne v. Industrial Accident Commission*, 41 S.Ct. 218, 254 U.S. 655, 65 L.Ed. 459.—*Weiland v. Southern Pac. Co.*, App., 93 P.2d 1023.—*King v. Schumacher*, App., 89 P.2d 466.—*Matthews v. Southern Pac. Co.*, 59 P.2d 220, 15 Cal.App.2d 36.—*Haskins v. Southern Pac. Co.*, 39 P.2d 895, 3 Cal.App.2d 177.—*Williams v. Southern Pac. Co.*, 202 P. 356, 54 Cal.App. 571, certiorari denied 42 S.Ct. 315, 258 U.S. 622, 66 L.Ed. 796.—*Werner v. Southern Pac. Co.*, 185 P. 1016, 44 Cal.App. 76.

Ill.—*Huff v. Illinois Cent. R. Co.*, 199 N.E. 116, 362 Ill. 95, affirmed 279 Ill.App. 323.—*Kusturin v. Chicago & A. R. Co.*, 122 N.E. 512, 287 Ill. 306, affirming 209 Ill.App. 55.—*Stott v. Thompson*, 14 N.E.2d 246, 294 Ill.App. 450, certiorari denied *Thompson v. Scott*, 59 S.Ct. 106, 305 U.S. 639, 83 L.Ed. 411.—*Chestnut v. Chicago, B. & Q. R. Co.*, 1 N.E.2d 811, 284 Ill.App. 317.—*Huff v. Illinois Cent. R. Co.*, 279 Ill.App. 323, affirmed 199 N.E. 116, 362 Ill. 95.—*Union Bank of Chicago v. Chicago & N. W. Ry. Co.*, 267 Ill.App. 554.—*Miller v. Miller*, 257 Ill.App. 287.—*Humphreys v. East St. Louis & Suburban Ry. Co.*, 253 Ill.App. 450.—*Genzel v. New York, C. & St. L. R. Co.*, 249 Ill.App. 164.—*Beck v. Baltimore & O. R. Co.*, 244 Ill. App. 441.—*Foreman Trust & Savings Bank v. Grand Trunk Western Ry. Co.*, 242 Ill.App. 428, certiorari denied 49 S.Ct. 252, 279 U.S. 839, 73 L.Ed. 935.—*Dunlavy v. Chi-*

- cago, B. & Q. R. Co., 200 Ill.App. 75.
- Ind.—Pennsylvania R. Co. v. Martin, 170 N.E. 554, 93 Ind.App. 258.
- Iowa.—Bennett v. Atchison, T. & S. F. Ry. Co., 183 N.W. 424, 191 Iowa 1333—Wright v. Interurban Ry. Co., 179 N.W. 877, 189 Iowa 1315, certiorari denied Wright v. Interurban R. Co., 41 S.Ct. 375, 255 U.S. 570, 65 L.Ed. 791.
- Kan.—McDougall v. Atchison, T. & S. F. Ry. Co., 186 P. 1028, 106 Kan. 135, certiorari denied 41 S.Ct. 6, 254 U.S. 629, 65 L.Ed. 446.
- Ky.—Louisville & N. R. Co. v. McCoy, 110 S.W.2d 433—Louisville & N. R. Co. v. Noble's Adm'x, 54 S.W.2d 636, 246 Ky. 86—Chesapeake & O. Ry. Co. v. Howard's Adm'x, 51 S.W.2d 461, 244 Ky. 838, certiorari denied Chesapeake & O. Ry. Co. v. Howard, 53 S.Ct. 315, 237 U.S. 670, 77 L.Ed. 578—Louisville & N. R. Co. v. Grant, 27 S.W.2d 980, 234 Ky. 276.
- La.—Harris v. Yazoo & M. V. R. Co., App., 183 So. 108—Snow v. Texas & P. Ry. Co., App., 166 So. 200.
- Mass.—Lynch v. New York, N. H. & H. R. R., 200 N.E. 877—Saunders v. Boston & M. R. R., 191 N.E. 381, 287 Mass. 56—Shipp v. Boston & M. R. R., 186 N.E. 653, 283 Mass. 266.
- Mich.—Howe v. Michigan Cent. R. Co., 211 N.W. 111, 236 Mich. 577, certiorari denied 47 S.Ct. 576, 274 U.S. 738, 71 L.Ed. 1317.
- Miss.—Favre v. Louisville & N. R. Co., 178 So. 327, 180 Miss. 843.
- Mo.—Harris v. Missouri Pac. R. Co., 114 S.W.2d 988, 342 Mo. 330, certiorari denied 59 S.Ct. 77, 305 U.S. 618, 83 L.Ed. 394—Drew v. Missouri Pac. R. Co., 100 S.W.2d 516, 340 Mo. 321—Williams v. St. Louis-San Francisco Ry. Co., 85 S.W.2d 624, 137 Mo. 667—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 835 Mo. 748—Milburn v. Chicago, M., St. P. & P. R. Co., 56 S.W.2d 80, 331 Mo. 1171—State ex rel. New York, C. & St. L. R. Co. v. Norton, 55 S.W.2d 272, 331 Mo. 764, 85 A.L.R. 345—Allen v. St. Louis-San Francisco Ry. Co., 53 S.W.2d 884, 331 Mo. 461—Moran v. Atchison, T. & S. F. Ry. Co., 48 S.W.2d 831, 330 Mo. 278, certiorari denied Atchison, T. & S. F. R. Co. v. Moran, 53 S.Ct. 21, 287 U.S. 621, 77 L.Ed. 539—Norton v. Wheelock, 23 S.W.2d 142, 323 Mo. 913, certiorari denied Wheelock v. Norton, 50 S.Ct. 355, 281 U.S. 752, 74 L.Ed. 1162—Hamilton v. St. Louis-San Francisco Ry. Co., 300 S.W. 787, 318 Mo. 123—Sweany v. Wabash Ry. Co., 80 S.W.2d 216, 229 Mo.App. 398—Voorhees v. Chicago, R. I. & P. Ry. Co., App., 7 S.W.2d 740.
- Mont.—Matti v. Chicago, M. & St. P. Ry. Co., 176 P. 154, 55 Mont. 280.
- Neb.—Sullivan v. Chicago & N. W. Ry. Co., 258 N.W. 38, 128 Neb. 92, certiorari denied 55 S.Ct. 831, 295 U.S. 749, 79 L.Ed. 1694—Lenz v. Union Pac. R. Co., 258 N.W. 33, 128 Neb. 99—Preble v. Union Stockyards Co. of Omaha, 193 N.W. 910, 110 Neb. 383—Morris v. Missouri Pac. R. Co., 187 N.W. 130, 107 Neb. 788.
- N.J.—Cvelich v. Erie R. Co., 199 A. 771, 120 N.J.Law 414, affirmed 4 A.2d 271, 122 N.J.Law 26.
- N.Y.—McMullen v. Pennsylvania R. Co., 275 N.Y.S. 592, 242 App.Div. 470, affirmed 196 N.E. 589, 267 N.Y. 580, certiorari denied 56 S.Ct. 123, 296 U.S. 607, 80 L.Ed. 431—Popadines v. Davis, 209 N.Y.S. 689, 213 App.Div. 9.
- N.C.—Battton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Battton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112—Vest v. Atlantic Coast Line R. Co., 179 S.E. 607, 208 N.C. 80—Wolfe v. Atlantic Coast Line R. Co., 155 S.E. 459, 199 N.C. 613—Pyatt v. Southern Ry. Co., 154 S.E. 847, 199 N.C. 397—Cole v. Seaboard Air Line Ry. Co., 154 S.E. 682, 199 N.C. 389, certiorari denied Seaboard Air Line Ry. Co. v. Cole, 51 S.Ct. 182, 282 U.S. 898, 75 L.Ed. 791—Austin v. Southern Ry. Co., 148 S.E. 446, 197 N.C. 319—Troxler v. Southern Ry. Co., 140 S.E. 20, 194 N.C. 446—Inge v. Seaboard Air Line Ry. Co., 185 S.E. 522, 192 N.C. 522, certiorari denied Seaboard Air Line R. Co. v. Inge, 47 S.Ct. 456, 273 U.S. 753, 71 L.Ed. 874.
- Ohio.—Bevan v. New York, C. & St. L. R. Co., 6 N.E.2d 982, 132 Ohio St. 245, certiorari denied 57 S.Ct. 924, 301 U.S. 695, 81 L.Ed. 1351—New York, C. & St. L. R. Co. v. Biermacher, 143 N.E. 570, 110 Ohio St. 173—Moore v. Industrial Commission of Ohio, 197 N.E. 403, 49 Ohio App. 386—Oman v. Baltimore & O. S. W. R. Co., 8 Ohio App. 161—Flannery v. Cleveland, C. C. & St. L. Ry. Co., 26 Ohio Cir.Ct., N.S., 49.
- Or.—Jackson v. United Rys. Co., 28 P.2d 836, 145 Or. 546—Christie v. Great Northern Ry. Co., 20 P.2d 377, 142 Or. 321—Adskim v. Oregon-Washington R. & Nav. Co., 276 P. 1094, 129 Or. 169—Ebbell v. Oregon-Washington R. & Nav. Co., 221 P. 1062, 110 Or. 665.
- Pa.—McCully v. Monongahela Ry. Co., 137 A. 623, 289 Pa. 393, certiorari denied 48 S.Ct. 37, 275 U.S. 542, 72 L.Ed. 416—Lindway v. Pennsylvania Co., 112 A. 40, 268 Pa. 491—Baltimore & O. R. Co. v. Barry, 87 Pa.L.J. 851.
- S.C.—Williamson v. Southern Ry. Co., 191 S.E. 79, 183 S.C. 312—Johnston v. Atlantic Coast Line R. Co., 190 S.E. 459, 183 S.C. 126—Terry v. Atlantic Coast Line R. Co., 186 S.E. 159, 181 S.C. 151—Lytle v. Southern Ry.—Carolina Division, 171 S.E. 42, 171 S.C. 221, 90 A.L.R. 915, certiorari denied Southern Ry.—Carolina Division v. Lytle, 54 S.Ct. 63, 290 U.S. 645, 78 L.Ed. 560—Southern Ry. Co. v. Moore, 155 S.E. 740, 158 S.C. 446, 73 A.L.R. 582, certiorari granted 51 S.Ct. 560, 233 U.S. 816, 75 L.Ed. 1432—Shiver v. Atlantic Coast Line R. Co., 152 S.E. 717, 155 S.C. 531.
- S.D.—Polluck v. Minneapolis & St. L. R. Co., 166 N.W. 641, 40 S.D. 186, certiorari denied 39 S.Ct. 6, 248 U.S. 558, 63 L.Ed. 421.
- Tenn.—Draper v. Louisville & N. R. Co., 66 S.W.2d 1003, 17 Tenn.App. 213.
- Tex.—Texas & N. O. R. Co. v. Warden, 78 S.W.2d 164, 125 Tex. 193, reversing, Civ.App., 49 S.W.2d 486—Saxon v. Atchison, T. & S. F. Ry. Co., Com.App., 36 S.W.2d 228, reversing Atchison, T. & S. F. Ry. Co. v. Saxon, Civ.App., 21 S.W.2d 686, and rehearing denied, Saxon v. Atchison, T. & S. F. Ry. Co., Com. App., 38 S.W.2d 775, certiorari granted Atchison, T. & S. F. Ry. Co. v. Saxon, 52 S.Ct. 30, 284 U.S. 604, 76 L.Ed. 513, reversed on other grounds 52 S.Ct. 229, 284 U.S. 458, 76 L.Ed. 397, conformed to Atchison, T. & S. F. Ry. Co., Com.App., 50 S.W.2d 1095—Texas & P. Ry. Co. v. Gibson, Com.App., 288 S.W. 823, affirming, Civ.App., 281 S.W. 652, and certiorari granted 47 S.Ct. 659, 274 U.S. 731, 71 L.Ed. 1326, certiorari denied 47 S.Ct. 763, 274 U.S. 748, 71 L.Ed. 1330, revoking certiorari 47 S.Ct. 659, 274 U.S. 731, 71 L.Ed. 1326—Smithers v. Fort Worth & D. C. Ry. Co., Com. App., 227 S.W. 764, affirming Fort Worth & D. C. Ry. Co. v. Smithers, Civ.App., 249 S.W. 286—Gulf, C. & S. F. R. Co. v. Spivey, Civ.App., 56 S.W.2d 655, certiorari denied Spivey v. Gulf, C. & S. F. R. Co., 54 S.Ct. 98, 290 U.S. 676, 78 L.Ed. 583—Texas & N. O. R. Co. v. Webster, Civ.App., 53 S.W.2d 656, affirmed 70 S.W.2d 394, 123 Tex. 197, certiorari denied 55 S.Ct. 93, 293 U.S. 580, 79 L.Ed. 677, rehearing denied 55 S.Ct. 138, 293 U.S. 630, 79 L.Ed. 716—Dawson v. Texas & P. Ry. Co., 45 S.W.2d 367, reversed on other grounds 70 S.W.2d 392, 123 Tex. 191, certiorari denied Texas & P. Ry. Co. v. Dawson, 55 S.Ct. 110, 293 U.S. 580, 79 L.Ed. 677—Fort Worth & D. C. Ry. Co. v. Griffith, Civ.App., 27 S.W.2d 351, error refused—Houston & T. C. R. Co. v. Robins, Civ.App., 23 S.W.2d 461, error refused—Missouri, K. & T. R. Co. v. Jordan, Civ.App., 2 S.W.2d 312—Rowe v. Colorado & S. R. Co., Civ.App., 205 S.W. 781, error refused—Ft. Worth & R. G. Ry. Co. v. Bird, Civ.App., 196 S.W. 597, reversed on other

- grounds *Bird v. Ft. Worth & R. G. R. Co.*, 207 S.W. 518, 109 Tex. 323.
- Utah.—*Eliswood v. Oregon Short Line R. Co.*, 28 P.2d 925, 82 Utah 285—*Miller v. Southern Pac. Co.*, 21 P.2d 865, 82 Utah 46, certiorari denied *Southern Pac. Co. v. Miller*, 54 S.Ct. 207, 290 U.S. 697, 78 L.Ed. 600—*Guiltron v. Oregon Short Line R. Co.*, 217 P. 971, 62 Utah 76.
- Va.—*Southern Ry. Co. v. Willmouth*, 153 S.E. 874, 154 Va. 582, certiorari denied *Willmouth v. Southern Ry. Corporation*, 51 S.Ct. 81, 282 U.S. 878, 75 L.Ed. 775.
- Wash.—*Schosboeck v. Chicago, M., St. P. & P. R. Co.*, 63 P.2d 477, 188 Wash. 672, modified on other grounds 71 P.2d 548, 191 Wash. 425.
- Wis.—*Lind v. Chicago, M., St. P. & P. Ry. Co.*, 256 N.W. 705, 216 Wis. 405—*Dretzka v. Chicago & N. W. Ry. Co.*, 256 N.W. 703, 216 Wis. 111.
- 15 C.J. p 936 note 5.
- Whether employee was engaged in interstate commerce**
- Ala.—*Louisville & N. R. Co. v. Pettis*, 89 So. 201, 206 Ala. 96.
- Ariz.—*Saxton v. El Paso & S. W. R. Co.*, 188 P. 257, 21 Ariz. 323.
- Cal.—*Southern Pac. Co. v. Industrial Acc. Commission*, 171 P. 1071, 178 Cal. 20, certiorari denied *Southern Pac. Co. v. Industrial Accident Commission of State of California* 38 S.Ct. 532, 247 U.S. 516, 62 L.Ed. 1244.
- Ill.—*Day v. Chicago & N. W. Ry. Co.*, 188 N.E. 540, 354 Ill. 469, affirming 269 Ill.App. 435—*Bartosik v. Chicago River & Indiana R. Co.*, 266 Ill.App. 28, certiorari denied 53 S.Ct. 401, 238 U.S. 609, 77 L.Ed. 983.
- Ky.—*Watson v. Louisville & N. R. Co.*, 45 S.W.2d 499, 242 Ky. 14.
- Mass.—*McCabe v. Boston Terminal Co.*, 22 N.E.2d 38, certiorari granted 60 S.Ct. 173.
- Mo.—*Clevinger v. St. Louis-San Francisco Ry. Co.*, 109 S.W.2d 369, 341 Mo. 797, certiorari denied 58 S.Ct. 366, 302 U.S. 760, 32 L.Ed. 588—*Stogsdill v. St. Louis-San Francisco Ry. Co.*, 85 S.W.2d 447, 337 Mo. 126—*McNatt v. Wabash Ry. Co.*, 74 S.W.2d 625, 335 Mo. 999—*Riley v. Wabash Ry. Co.*, 44 S.W.2d 136, 328 Mo. 910—*Berry v. St. Louis-San Francisco Ry. Co.*, 26 S.W.2d 988, 324 Mo. 775, certiorari denied *St. Louis-San Francisco Ry. Co. v. Berry*, 50 S.Ct. 464, 281 U.S. 765, 74 L.Ed. 1173.
- N.J.—*Herzog v. Hines*, 112 A. 815, 95 N.J.Law 98.
- N.Y.—*Hiser v. Davis*, 194 N.Y.S. 275, 201 App.Div. 213, affirmed 137 N.E. 586, 234 N.Y. 300.
- Or.—*Donaghy v. Oregon-Washington R. & Nav. Co.*, 288 P. 1003, 183 Or. 663, rehearing denied 291 P. 1017, 183 Or. 663.
- Pa.—*Mayers v. Union R. Co.*, 100 A. 967, 256 Pa. 474, certiorari denied 37 S.Ct. 483, 243 U.S. 656, 61 L.Ed. 949—*Backes v. Pennsylvania R. Co.*, 200 A. 181, 133 Pa.Super. 29—*Mason v. Reading Co.*, 195 A. 754, 129 Pa.Super. 289—*Brown v. Lehigh Valley R. Co.*, 184 A. 290, 121 Pa.Super. 380—*Elder v. Pennsylvania R. Co.*, 180 A. 183, 118 Pa. Super. 137—*Dunkell v. Pennsylvania R. Co.*, 163 A. 70, 106 Pa. Super. 356, certiorari denied 53 S.Ct. 527, 289 U.S. 727, 77 L.Ed. 1476.
- Tex.—*Texas & P. Ry. Co. v. Kelly*, Com.App., 51 S.W.2d 299, reversing, Civ.App., 35 S.W.2d 749, and certiorari denied *Kelly v. Texas & P. R. Co.*, 53 S.Ct. 90, 287 U.S. 644, 71 L.Ed. 557.
- Utah.—*Steward v. Industrial Commission of Utah*, 15 P.2d 334, 80 Utah 394—*Utah Rapid Transit Co. v. Industrial Commission of Utah*, 204 P. 87, 59 Utah 232—*Kuchemelster v. Los Angeles & S. L. R. Co.*, 172 P. 725, 52 Utah 116.
- Wash.—*Bennor v. Oregon-Washington R. & Nav. Co.*, 27 P.2d 1082, 175 Wash. 559.
- 15 C.J. p 936 note 5 [b].
- What constitutes negligence**
- Ark.—*Kansas City Southern Ry. Co. v. Larsen*, 114 S.W.2d 1081, 195 Ark. 808, certiorari denied 59 S.Ct. 82, 35 U.S. 621, 83 L.Ed. 397—*Kansas City Southern Ry. Co. v. Brock*, 98 S.W.2d 949, 193 Ark. 210—*Missouri Pac. R. Co. v. Montgomery*, 55 S.W.2d 68, 186 Ark. 537, certiorari denied 53 S.Ct. 690, 289 U.S. 747, 77 L.Ed. 1493—*Missouri Pac. R. Co. v. Remel*, 48 S.W.2d 548, 185 Ark. 598, certiorari denied 53 S.Ct. 85, 287 U.S. 634, 77 L.Ed. 550—*St. Louis-San Francisco Ry. Co. v. Fine*, 44 S.W.2d 340, 134 Ark. 940, certiorari denied 52 S.Ct. 502, 286 U.S. 552, 76 L.Ed. 1287—*St. Louis San-Francisco Ry. Co. v. Bishop*, 33 S.W.2d 382, 182 Ark. 763, certiorari denied 51 S.Ct. 647, 283 U.S. 854, 75 L.Ed. 1461—*St. Louis-San Francisco Ry. Co. v. Smith*, 19 S.W.2d 1102, 179 Ark. 1015—*Missouri Pac. R. Co. v. Skipper*, 298 S.W. 849, 174 Ark. 1083, certiorari denied 248 S.Ct. 322, 276 U.S. 629, 72 L.Ed. 740.
- Cal.—*Bobo v. Northwestern Pac. R. Co.*, 19 P.2d 10, 129 Cal.App. 273, certiorari granted *Northwestern Pac. R. Co. v. Bobo*, 54 S.Ct. 59, 290 U.S. 612, 78 L.Ed. 535, reversed on other grounds 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462.
- Ky.—*Cincinnati, N. O. & T. P. Ry. Co. v. Heinz*, 14 S.W.2d 138, 227 Ky. 816.
- Mo.—*Weaver v. Mobile & O. R. Co.*, 120 S.W.2d 1105—*Brimer v. Davis*, 245 S.W. 404, 211 Mo.App. 47.
- Neb.—*Diller v. Chicago, E. & Q. R. Co.*, 229 N.W. 888, 119 Neb. 494.
- N.H.—*Sweeney v. Boston & M. R. R.*, 174 A. 876, 87 N.H. 90, affirmed 175 A. 243, 87 N.H. 90, certiorari denied 55 S.Ct. 638, 294 U.S. 728, 79 L.Ed. 1258.
- N.C.—*Potter v. Atlantic Coast Line R. Co.*, 147 S.E. 698, 197 N.C. 17.
- Or.—*Makino v. Spokane, P. & S. Ry. Co.*, 63 P.2d 1082, 155 Or. 317.
- Pa.—*Fitzgerald v. Pennsylvania R. R.*, 184 A. 299, 121 Pa.Super. 461.
- Tex.—*Rio Grande, E. P. & S. F. R. Co. v. Dupree*, Com.App., 55 S.W.2d 522, affirming, Civ.App., 35 S.W.2d 809.
- Wis.—*Kalashian v. Hines*, 177 N.W. 602, 171 Wis. 429.
- Applicability of res ipsa doctrine**
- Cal.—*Connor v. Atchison, T. & S. F. Ry. Co.*, 207 P. 378, 189 Cal. 1, 22 A.L.R. 1462.
- Ky.—*Louisville & N. R. Co. v. Grant*, 2 S.W.2d 1063, 223 Ky. 39.
- Mo.—*Noce v. St. Louis-San Francisco Ry. Co.*, 85 S.W.2d 637, 337 Mo. 689.
- Party entitled to sue and nature of right**
- N.Y.—*McCarthy v. New York Cent. R. Co.*, 286 N.Y.S. 598, 247 App.Div. 50.
- Assumption of risk**
- Cal.—*Bobo v. Northwestern Pac. R. Co.*, 19 P.2d 10, 129 Cal.App. 273, certiorari granted *Northwestern Pac. R. Co. v. Bobo*, 54 S.Ct. 59, 290 U.S. 612, 78 L.Ed. 535, reversed on other grounds 54 S.Ct. 263, 290 U.S. 499, 78 L.Ed. 462.
- Ill.—*Burns v. Jackson*, 224 Ill.App. 519. See *Roberts v. Cleveland, C. & St. L. Ry. Co.*, 202 Ill.App. 480, affirmed 117 N.E. 97, 279 Ill. 493.
- Ky.—*Chesapeake & O. Ry. Co. v. Craig*, 17 S.W.2d 224, 229 Ky. 365.
- Mass.—*Hietala v. Boston & A. R. R.*, 3 N.E.2d 377, certiorari denied *Boston & Albany R. Co. v. Hietala*, 57 S.Ct. 116, 299 U.S. 589, 81 L.Ed. 424.
- Mo.—*Arnold v. Scandrett*, 131 S.W.2d 542—*Rowe v. Missouri-Kansas-Texas R. Co.*, 100 S.W.2d 480, 339 Mo. 1145, certiorari denied *Missouri-Kansas-Texas R. Co. v. Rowe*, 57 S.Ct. 671, 300 U.S. 680, 81 L.Ed. 884—*Williams v. Terminal R. Ass'n of St. Louis*, 98 S.W.2d 651, 339 Mo. 594, certiorari denied 57 S.Ct. 511, 300 U.S. 669, 81 L.Ed. 876—*Webber v. Terminal R. Ass'n of St. Louis*, 70 S.W.2d 863, 335 Mo. 11—*State ex rel. St. Louis-San Francisco Ry. Co. v. Cox*, 46 S.W.2d 849, 329 Mo. 292, quashing certiorari *Hankins v. St. Louis-San Francisco Ry. Co.*, App. 31 S.W.2d 596—*Pope v. Terminal R. Ass'n of St. Louis*, 254 S.W. 43—*Williams v. St. Joseph & G. I. Ry. Co.*, App., 112 S.W.2d 118—*Sweeney v. Terminal R. Ass'n of St. Louis*, App., 110 S.W.2d 852—*Webber v. Terminal Railroad Ass'n of St. Louis*, App., 20 S.W.2d 601.
- N.J.—*McGarry v. Central R. Co. of*

Act,⁶² questions affecting relations as a nation with foreign countries,⁶³ and such questions as whether a right claimed under the federal constitution is properly pleaded,⁶⁴ and whether an appeal to the United States supreme court operates as a super-sedeas.⁶⁵ Also, the decisions of the United States

supreme court furnish the ultimate authority for determining the law of a territory⁶⁶ or of the District of Columbia.⁶⁷

In the absence of controlling federal precedent a state court may determine federal questions by the exercise of its own judgment,⁶⁸ and, although state

New Jersey, 147 A. 472, 105 N.J. Law 590.

N.D.—DeMoss v. Great Northern Ry. Co., 272 N.W. 506, 67 N.D. 412.

Pa.—Reed v. Director General of Railroads, 110 A. 254, 267 Pa. 86, certiorari granted 41 S.Ct. 7, 254 U.S. 622, 65 L.Ed. 443, reversed on other grounds 42 S.Ct. 191, 258 U.S. 92, 66 L.Ed. 480.

Tex.—Texas & P. Ry. Co. v. Perkins, Com.App., 48 S.W.2d 249, reversing, Civ.App., 29 S.W.2d 835—Atchison, T. & S. F. Ry. Co. v. Francis, Civ.App., 227 S.W. 342, affirmed Francis v. Atchison, T. & S. F. Ry. Co., 253 S.W. 819, 113 Tex. 202, 30 A.L.R. 114.

Utah.—McAfee v. Ogden Union Ry. & Depot Co., 218 P. 98, 62 Utah 115.

Wash.—Stanke v. Spokane, C. D. & P. R. Co., 43 P.2d 961, 181 Wash. 472—Imbler v. Spokane, P. & S. Ry. Co., 2 P.2d 895, 164 Wash. 299—Cross v. Spokane, P. & S. Ry. Co., 291 P. 336, 158 Wash. 428, 71 A.L.R. 451, certiorari denied Spokane, P. & S. R. Co. v. Cross, 51 S.Ct. 345, 288 U.S. 321, 75 L.Ed. 1436.

W.Va.—Harness v. Baltimore & O. R. Co., 103 S.E. 866, 86 W.Va. 284.

Burden and quantum of proof

U.S.—Western & A. R. R. v. Hughes, 49 S.Ct. 231, 278 U.S. 496, 73 L.Ed. 473, affirming 142 S.E. 185, 37 Ga. App. 771, certiorari granted 49 S.Ct. 18, 278 U.S. 538, 73 L.Ed. 522.

Ala.—Louisville & N. R. Co. v. Hall, 135 So. 466, 223 Ala. 338, certiorari denied 52 S.Ct. 37, 284 U.S. 661, 76 L.Ed. 560.

Ga.—Louisville & N. R. Co. v. Rudder, 147 S.E. 795, 39 Ga.App. 513.

Okl.—Pryor v. Chicago, R. I. & P. Ry. Co., 39 P.2d 563, 170 Okl. 158.

W.Va.—Staton v. Virginian Ry. Co., 195 S.E. 601—Harness v. Baltimore & O. R. Co., 103 S.E. 866, 86 W.Va. 284.

Measure of damages

Ill.—Kennedy v. Ross, 213 Ill.App. 446.

Ky.—Louisville & N. R. Co. v. Noble's Adm'r, 28 S.W.2d 733, 234 Ky. 504—Chesapeake & O. Ry. Co. v. Maggard's Adm'r, 235 S.W. 736, 193 Ky. 259—Cincinnati, etc., R. Co. v. Nolan, 170 S.W. 650, 161 Ky. 205.

La.—Simmons v. Louisiana Ry. & Nav. Co., 90 So. 24, 149 La. 686—Jones v. Kansas City Southern Ry. Co., 73 So. 568, 143 La. 307.

Neb.—Sheehan v. Hines, 184 N.W. 934, 107 Neb. 36—Sweat v. Hines, 184 N.W. 927, 107 Neb. 1.

N.C.—Strunks v. Payne, 114 S.E. 840, 184 N.C. 582.

S.C.—Youngblood v. Southern Ry. Co., 149 S.E. 742, 152 S.C. 265, 77 A.L.R. 1419.

Tex.—Texas & P. Ry. Co. v. Perkins, Com.App., 48 S.W.2d 249, reversing, Civ.App., 29 S.W.2d 835.

Utah.—Klinge v. Southern Pac. Co., 57 P.2d 367, 89 Utah 284, 105 A.L.R. 204.

Excessiveness of verdict

Decided cases are merely advisory on question of excessiveness of verdict.—Sallee v. St. Louis-San Francisco Ry. Co., 12 S.W.2d 476, 321 Mo. 798.

Denial of certiorari

While the action of the federal supreme court in denying a petition for certiorari is not necessarily to be considered a controlling precedent, yet where that tribunal denied a writ of certiorari to review the judgment of a state court holding the federal Employer's Liability Act inapplicable, it must be inferred that the denial of the writ was a ruling to the effect that the act was not applicable.—Capps v. Atlantic Coast Line R. Co., 101 S.E. 216, 178 N.C. 558, certiorari denied 40 S.Ct. 345, 252 U.S. 580, 64 L.Ed. 726.

62. Cal.—Scott v. Industrial Accident Commission of California, 70 P.2d 940, 9 Cal.2d 315.

Ill.—Lavigne v. Chicago, M., St. P. & P. R. Co., 4 N.E.2d 785, 287 Ill. App. 253, 288, certiorari denied 58 S.Ct. 32, 302 U.S. 688, 82 L.Ed. 532—Davidson v. Peoria & P. U. Ry. Co., 203 Ill.App. 498.

Iowa.—Thornton v. Minneapolis & St. L. R. Co., 175 N.W. 71, 187 Iowa 1158.

Mo.—Meek v. New York, C. & St. L. R. Co., 88 S.W.2d 333, 337 Mo. 1188, certiorari denied New York, C. & St. L. R. Co. v. Meek, 56 S.Ct. 668, 297 U.S. 722, 80 L.Ed. 1006—Kimberling v. Wabash Ry. Co., 85 S.W.2d 736, 337 Mo. 702—Hardin v. Illinois Cent. R. Co., 70 S.W.2d 1075, 334 Mo. 1169, certiorari denied Illinois Cent. R. Co. v. Hardin, 55 S.Ct. 86, 293 U.S. 574, 79 L.Ed. 672—Hiatt v. Wabash Ry. Co., 69 S.W.2d 627, certiorari denied Wabash Ry. Co. v. Hiatt, 55 S.Ct. 72, 293 U.S. 560, 79 L.Ed. 661—Peters v. Wabash Ry. Co., 42 S.W.2d 588, 328 Mo. 924, certiorari denied 52 S.Ct. 209, 284 U.S. 686, 76 L.Ed.

580—Illinois State Trust Co. v. Missouri Pac. R. Co., 5 S.W.2d 368, certiorari denied 49 S.Ct. 25, 278 U.S. 623, 73 L.Ed. 544.

Ohio.—Scrable v. Cincinnati, N. O. & T. P. Ry. Co., 182 N.E. 528, 42 Ohio App. 473.

Whether plaintiff was employee

Ark.—St. Louis-San Francisco Ry. Co. v. Barron, 267 S.W. 582, 166 Ark. 641.

63. Alien Land Law

State court is warranted in adopting construction placed on Alien Land Law by supreme court of United States.—Porterfield v. Webb, 231 P. 554, 195 Cal. 71.

64. Miss.—Hill v. State, 42 So. 380, 89 Miss. 23.

65. Wash.—North Shore Boom, etc., Co. v. Nicomen Boom Co., 101 P. 48, 52 Wash. 564.

66. Tex.—Ralls v. Ralls, Civ.App., 256 S.W. 688.

67. Va.—Moore v. Potomac Sav. Bank of Washington, D.C., 169 S.E. 922, 160 Va. 597, 91 A.L.R. 1133.

68. Ala.—Beeland Wholesale Co. v. Kaufman, 174 So. 516, 234 Ala. 249.

Ark.—Sirman v. Sloss Realty Co., 129 S.W.2d 602.

Ga.—Seaboard Air Line Ry. v. Brooks, 107 S.E. 878, 151 Ga. 625, answers to certified questions conforming to 108 S.E. 166, 27 Ga.App. 274, certiorari denied Brooks v. Seaboard Air Line Co., 43 S.Ct. 12, 260 U.S. 724, 67 L.Ed. 482.

Mass.—Brown v. Palmer Clay Products Co., 195 N.E. 122, 290 Mass. 108, certiorari granted Palmer Clay Products Co. v. Brown, 56 S.Ct. 98, 296 U.S. 556, 80 L.Ed. 392, affirmed 56 S.Ct. 450, 297 U.S. 227, 80 L.Ed. 655.

Mo.—Williams v. Pryor, 200 S.W. 53, 272 Mo. 613, reversed on other grounds, App., 46 S.W.2d 241, certiorari granted Pryor v. Williams, 38 S.Ct. 332, 246 U.S. 660, 62 L.Ed. 926, reversed on other grounds. Pryor v. Williams, 41 S.Ct. 36, 254 U.S. 43, 65 L.Ed. 120—Hoyland Flour Mills Co. v. Missouri Pac. R. Co., 5 S.W.2d 125, 222 Mo.App. 599, certiorari denied Erie R. Co. v. Hoyland Flour Mills Co., 48 S.Ct. 433, 277 U.S. 586, 72 L.Ed. 1001.

N.H.—Tirrell v. Johnston, 171 A. 641, 86 N.H. 530, affirmed 55 S.Ct. 238, 293 U.S. 533, 79 L.Ed. 641.

15 C.J. p. 932 note 84 [J].

courts should not construe federal statutes in advance of decisions by the federal supreme court unless the facts of the particular case require it,⁶⁹ a construction of an act of congress by a state court of last resort is binding on the lower courts of the state.⁷⁰ The doctrine of stare decisis, so far as applicable to decisions of the state courts on federal questions, must yield, however, to the determination of such questions by the United States supreme court;⁷¹ but a decision of the United States supreme court affirming the decree of a state appellate court on a ground different from that taken by the state court in its opinion does not affect the binding authority of the decision of the state court as a judicial precedent on the questions covered.⁷²

With respect to what constitutes a federal question, the supreme court of the United States is the final authority.⁷³

On appeal to the supreme court of a state, a deci-

sion of the supreme court of the United States rendered since the decision of the trial court may be availed of as a conclusive authority that the decision of the trial court was erroneous.⁷⁴

Where there is a reconsideration of a question by the supreme court of the United States with a result adverse to its first judgment, such reconsideration does not affect existing judgments of state courts, or call for a modification or change of their records to meet the changed views and judgment of the supreme court.⁷⁵

Decisions of the lower federal courts on federal questions which have not been passed on by the supreme court of the United States should, according to some authorities, be followed by the state courts,⁷⁶ although it has also been considered that such decisions, while persuasive,⁷⁷ are not binding on the state courts,⁷⁸ and a conflict between deci-

Prior construction

Construction of an act of congress by a state court in a prior case must be accepted as sound by the court, in the absence of a contrary decision by the supreme court of the United States.—*Morse v. Stober*, 123 N.E. 780, 233 Mass. 223, 9 A.L.R. 78.

Finality of determination

State court's opinions, upholding validity of statute, are final, until overruled by federal supreme court in which the federal question is pending.—*Nuetzel v. Southern Bell Telephone & Telegraph Co.*, 295 S.W. 976, 220 Ky. 632.

69. Colo.—*Auslender v. Boettcher*, 242 P. 672, 78 Colo. 427.

70. Colo.—*Edwards v. Roberts*, 144 P. 856, 26 Colo.App. 538.

Tex.—*Western Union Telegraph Co. v. Kilgore*, Civ.App., 220 S.W. 593—*Western Union Telegraph Co. v. Southwick*, Civ.App., 214 S.W. 987, certiorari granted 40 S.Ct. 219, 251 U.S. 549, 64 L.Ed. 409, and reversed on other grounds 41 S.Ct. 446, 255 U.S. 565, 66 L.Ed. 788—*Citizens' Nat. Bank of Stamford v. Stevenson*, Civ.App., 211 S.W. 644, reversed on other grounds, Com. App., 231 S.W. 364—*Postal Telegraph-Cable Co. v. Prewitt*, Civ. App., 199 S.W. 316.

71. La.—*State v. Ardoin*, 24 So. 802, 51 La. Ann. 169, 72 Am.S.R. 454.

Law of case

In actions predicated on acts of congress, the rule of law of the case will not be applied if, since the former decision, the supreme court of the United States has expressed an opinion contrary to such decision.—*Goneau v. Minneapolis, St. P. & S. M. Ry. Co.*, 198 N.W. 403, 159

Minn. 41, certiorari granted *Minneapolis, St. P. & S. M. Ry. Co. v. Goneau*, 44 S.Ct. 638, 265 U.S. 579, 68 L.Ed. 1189, and affirmed 46 S.Ct. 129, 269 U.S. 406, 70 L.Ed. 335.

72. N.J.—*Paterson v. East Jersey Water Co.*, 70 A. 472, 74 N.J.Eq. 49, affirmed 78 A. 1134, 77 N.J.Eq. 588.

73. Cal.—*Gabrielli v. Knickerbocker*, 32 P.2d 391, 12 Cal.2d 85, appeal dismissed 59 S.Ct. 786, 306 U.S. 621, 33 L.Ed. 1026.

Mo.—*Beekman Lumber Co. v. Acme Harvester Co.*, 114 S.W. 1087, 215 Mo. 221.

Pa.—*Gasser v. Central R. Co. of New Jersey*, 171 A. 97, 112 Pa.Super. 420, certiorari denied *Central R. Co. of New Jersey v. Gasser*, 55 S.Ct. 75, 293 U.S. 555, 79 L.Ed. 664.

74. Cal.—*Southern Pac. R. Co. v. Lipman*, 83 P. 445, 148 Cal. 480.

75. N.Y.—*Miller v. Tyler*, 58 N.Y. 477.

76. Ala.—*Handy v. Goodyear Tire & Rubber Co.*, 160 So. 530, 230 Ala. 211.

Contra Louisville & N. R. Co. v. A. N. Chappell & Co., 109 So. 573, 21 Ala.App. 531, reversed on other grounds 109 So. 574, 215 Ala. 31. Va.—*Waller v. Eanes' Adm'r*, 157 S.E. 721, 156 Va. 339.

Wis.—*Stuart v. Farmers' Bank*, 117 N.W. 320, 137 Wis. 66, 16 Ann.Cas. 821.

In New York

(1) There is authority supporting the rule of the text.—*Sloane v. Martin*, 40 N.E. 217, 145 N.Y. 524, 45 Am.S.R. 630, 28 L.R.A. 347, affirming 28 N.Y.S. 332, 77 Hun 249—*Hudson-Oliver Motor Co. v. Vivian*, 189 N.Y.S. 734, 116 Misc. 104.

(2) But it has been said that the

authority of state appellate courts as to effect of joint congressional resolution on coupons appurtenant to a corporation's bonds would take precedence in state court over contrary rulings of federal courts in which certiorari was denied by the supreme court, since denial of certiorari by highest court does not determine merits of appeal.—*Zurich General Accident & Liability Ins. Co. v. Lackawanna Steel Co.*, 299 N.Y.S. 862, 164 Misc. 498.

(3) Where federal district court held state statute, providing for codes of fair competition under National Industrial Recovery Act as affecting intra-state commerce, constitutional, city court considered statute as not delegation or abdication of legislature's power or legislation by reference to act not incorporated therein, questions of constitutionality being for court of appellate jurisdiction.—*Friedman v. John Lowry, Inc.*, 277 N.Y.S. 248, 154 Misc. 328.

77. Ill.—*Kenna v. Calumet, H. & S. E. R. Co.*, 206 Ill.App. 17, affirmed 120 N.E. 259, 284 Ill. 301.

Iowa.—*Iowa Nat. Bank v. Stewart*, 232 N.W. 445, 214 Iowa 1229, certiorari granted *Iowa-Des Moines Nat. Bank v. Stewart*, 51 S.Ct. 353, 283 U.S. 813, 75 L.Ed. 1430, reversed on other grounds *Iowa-Des Moines Nat. Bank v. Bennett*, 52 S.Ct. 133, 284 U.S. 239, 76 L.Ed. 265, and reversed on rehearing on other grounds *Des Moines Savings Bank & Trust Co. v. Hunter*, 244 N.W. 309.

15 C.J. p 931 note 82 [d].

78. Ill.—*Kenna v. Calumet, H. & S. E. R. Co.*, 206 Ill.App. 17, affirmed 120 N.E. 259, 284 Ill. 301. Iowa.—*Iowa Nat. Bank v. Stewart*, 232 N.W. 445, 214 Iowa 1229, cer-

sions of the federal courts certainly leaves the state courts free to decide the question for themselves.⁷⁹

§ 207. Courts of Foreign Countries

Ordinarily decisions of courts of foreign countries, although entitled to consideration, are not binding as precedents, but they should be followed so far as they apply to their own laws and conditions; and English decisions antedating the American Revolution may be binding on questions of the common law.

In general, decisions of courts of a foreign country have no authority as precedents,⁸⁰ although they may be considered as guides to a correct determination;⁸¹ but, under the rules of international courtesy and comity, the courts of the United States must follow the interpretations of the tribunals of a foreign country so far as they apply to their own laws

and conditions.⁸² A single decision of an appellate court of a foreign country which runs contrary to the settled law elsewhere and which is not controlling as a precedent in the courts of that country will not be deemed authoritative here as to the law of that country.⁸³ However, in the absence of any foreign decision construing a foreign statute, it is the duty of the courts in the jurisdiction where the trial occurs to construe the statute according to the rules applicable to the construction of a domestic statute.⁸⁴

English courts. English decisions made subsequent to the period of our separation from the British empire, while they are not received as absolute authority in our courts,⁸⁵ may nevertheless be referred to, and are entitled to great respect;⁸⁶ but,

tiorari granted Iowa-Des Moines Nat. Bank v. Stewart, 51 S.Ct. 353, 233 U.S. 813, 75 L.Ed. 1430, reversed on other grounds Iowa-Des Moines Nat. Bank v. Bennett, 52 S.Ct. 133, 284 U.S. 239, 76 L.Ed. 265, and reversed on rehearing on other grounds Des Moines Savings Bank & Trust Co. v. Hunter, 244 N.W. 309.

Ky.—Walters v. Commonwealth, 250 S.W. 839, 199 Ky. 182.

Mass.—Brown v. Palmer Clay Products, 195 N.E. 122, 290 Mass. 108, certiorari granted Palmer Clay Products Co. v. Brown, 56 S.Ct. 98, 296 U.S. 556, 80 L.Ed. 392, affirmed 56 S.Ct. 450, 297 U.S. 227, 80 L.Ed. 655.

Mo.—State ex rel. and to Use of St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 42 A.L.R. 1232.

Okl.—Bruce v. Evertson, 68 P.2d 95, 97, 180 Okl. 111, citing *Corpus Juris*.

Wash.—Noble v. Dibble, 205 P. 1049, 119 Wash. 509.

15 C.J. p 931 note 82 [d], p 936 note 15.

79. Wis.—Ruck v. Chicago, etc., R. Co., 140 N.W. 1074, 153 Wis. 158—Stuart v. Farmers' Bank, 117 N.W. 820, 137 Wis. 66.

80. U.S.—Cordova v. Rizo, Porto Rico, 33 S.Ct. 350, 227 U.S. 375, 57 L.Ed. 556.

15 C.J. p 936 note 17.

81. U.S.—Badische Anilin & Soda Fabrik v. Kalle, C.C.N.Y., 94 F. 163, affirmed 104 F. 802, 44 C.C.A. 201.

15 C.J. p 936 note 18.

Marine insurance

The decisions of the courts of other countries and the opinions and

reasons of foreign writers on the subject are equally applicable in construing a contract of marine insurance with those of our own courts, for the contract is everywhere known and is substantially the same throughout the civilized world.—Dole v. New England Mut. Mar. Ins. Co., C.C.Mass., 7 F.Cas.No. 3,966, 2 Cliff. 394.

82. U.S.—U. S. v. Pillsbury Flour Mills Co., Cust & Pat.App., 96 F.2d 854, certiorari denied Pillsbury Flour Mills v. U. S., 58 S.Ct. 1056, 304 U.S. 532, 82 L.Ed. 1544.

La.—Cucullu v. Louisiana Ins. Co., 5 Mart.N.S., 464, 16 Am.D. 199.

Canadian statute

A decision by a Canadian court construing a Canadian statute has been held binding on an American court which is required to apply such statute.

U.S.—Shelton v. Canadian Northern R. Co., C.C.Minn., 189 F. 153.

N.Y.—Hyde v. Scott, 133 N.Y.S. 904, 75 Misc. 487.

83. U.S.—Yone Suzuki v. Central Argentine Ry., C.C.A.N.Y., 27 F. 2d 795, modifying, D.C., Yone Suzuki & Co. v. Central Argentine Ry., 19 F.2d 645, and certiorari denied Central Argentine Ry. v. Yone Suzuki, 49 S.Ct. 178, 278 U.S. 652, 78 L.Ed. 563.

84. Wash.—Ostrander v. Yokohama Specie Bank, 279 P. 585, 153 Wash. 427.

85. Ind.—State v. Dearth, 164 N.E. 489, 201 Ind. 1.

N.J.—Loudon v. Loudon, 168 A. 840, 844, 114 N.J.Eq. 242, citing *Corpus Juris*, and modified on other grounds 169 A. 335, 114 N.J.Eq. 212.

N.Y.—In re Cable's Will, 210 N.Y.S. 187, 213 App.Div. 512, affirming 206 N.Y.S. 501, 123 Misc. 394, and affirmed 152 N.E. 405, 242 N.Y. 510. 15 C.J. p 936 note 20.

86. N.J.—Loudon v. Loudon, 168 A. 840, 844, 114 N.J.Eq. 242, citing *Corpus Juris*, and modified on other grounds 169 A. 335, 114 N.J.Eq. 212.

15 C.J. p 936 note 21.

Admiralty decisions

The admiralty decisions of the higher English courts are given high consideration as precedents by the courts of the United States.—*Ætna Ins. Co. v. Houston Oil & Transport Co.*, C.C.A.Tex., 49 F.2d 121, certiorari denied *Houston Oil & Transport Co. v. Ætna Ins. Co.*, 52 S.Ct. 12, 284 U.S. 623, 75 L.Ed. 535—*New York & O. S. S. Co. v. Automobile Ins. Co. of Hartford, Conn.*, C.C.A.N.Y., 37 F. 2d 461, affirming, D.C., *New York & O. S. S. Co. v. Automobile Ins. Co.*, 32 F.2d 310—*Mellon v. Federal Ins. Co.*, D.C.N.Y., 14 F.2d 997—*The Governor Ames, Mass.*, 187 F. 40, 109 C.C.A. 94, certiorari denied 32 S.Ct. 525, 223 U.S. 725, 56 L.Ed. 631—15 C.J. p 936 note 21 [a].

In workmen's compensation cases English authorities are of value on questions of construction in cases of similarity between the English act and the statute under consideration.

Ill.—*Armour & Co. v. Industrial Board of Illinois*, 114 N.E. 173, 275 Ill. 328, affirming 197 Ill.App. 363.

Mich.—*Grand Rapids Lumber Co. v. Blair*, 157 N.W. 29, 190 Mich. 518.

Nev.—*Costley v. Nevada Industrial Insurance Commission*, 296 P. 1011, 53 Nev. 219.

In matters of commercial law our decisions should conform to the English decisions, in the absence of some rule of public policy which would forbid.—*The Turret Crown*, C.C.A.N.Y., 297 F. 766, reversing, D.C., 282 F. 354, and certiorari denied *Commonwealth Steamship Co. v. Patent Vulcanite Roofing Co.*, 44 S.Ct. 403, 264 U.S. 591, 68 L.Ed. 865.

where the common law has been adopted as a rule of decision in a state, the common-law rule of a case for the first time in such state will not be disregarded merely because the English judges have frequently regretted its adoption.⁸⁷ Although there is authority to the contrary,⁸⁸ an English decision rendered prior to 1776 has been considered binding as a precedent,⁸⁹ but it will not be followed so as to perpetuate error where it has been so modified by judicial decisions as not to be a part of the common law of the state.⁹⁰ English authorities cannot be considered on constitutional questions.⁹¹

In construing the duties of American executors of an English subject in distributing the estate in this country, the surrogate should recognize the decision of the English courts that property sent to Great Britain by the American executors may be there appropriated for any unpaid legacy due.⁹²

Hawaiian courts prior to annexation. As the organic act of Hawaii continued in force all laws of Hawaii not inconsistent with the constitution or laws of the United States, it has been considered

proper for the supreme court of the United States to adopt the construction of a Hawaiian statute given by the courts of that country prior to annexation;⁹³ and it has also been held proper for a state court to recognize a decree of divorce rendered by a court of the republic of Hawaii.⁹⁴

§ 208. Rulings of Legislative and Executive Departments and Special Tribunals

Rulings of governmental departments and special tribunals are ordinarily not binding on the courts, although such rulings may be followed when proper.

Decisions or rulings of any of the executive departments of government are not generally considered as binding on the courts,⁹⁵ although the courts may follow such rulings when proper.⁹⁶ So the decisions of the board of tax appeals⁹⁷ or an industrial accident commission⁹⁸ are not controlling, but a long line of decisions by governmental agencies is entitled to consideration.⁹⁹ Especial weight is to be given to the opinions of the interstate commerce commission in interpreting tariffs,¹ even though such opinions are not binding on the court;² and

87. Cal.—Johnson v. Fall, 6 Cal. 359, 65 Am.D. 518.

88. Cal.—Callet v. Alioto, 290 P. 438, 210 Cal. 65.

89. N.Y.—Matter of Swartz, 139 N. Y.S. 1105, 79 Misc. 388.

90. Wyo.—Investors' Guaranty Corporation v. Thomson, 225 P. 590, 31 Wyo. 264, 32 A.L.R. 1071.

91. Mich.—Grand Rapids Lumber Co. v. Blair, 157 N.W. 29, 190 Mich. 518.

N.Y.—Ives v. South Buffalo R. Co., 94 N.E. 431, 201 N.Y. 271, 296, 34 L.R.A.N.S., 162, Ann.Cas.1912B 156, 71 C.J. p 358 note 60.

92. N.Y.—Matter of Hollins, 139 N. Y.S. 713, 79 Misc. 200.

93. U.S.—Kealoha v. Castle, 28 S. Ct. 684, 210 U.S. 149, 52 L.Ed. 998, affirming 17 Hawaii 45.

94. Cal.—McGrew v. Mutual L. Ins. Co., 64 P. 103, 132 Cal. 85, 84 Am. S.R. 20, appeal dismissed 23 S.Ct. 375, 188 U.S. 291, 47 L.Ed. 480, 63 L.R.A. 33.

15 C.J. p 937 note 29.

95. U.S.—Chesapeake & O. R. Co. v. U. S., D.C.Va., 1 F.Supp. 350.

Colo.—Park Floral Co. v. Industrial Commission, 91 P.2d 492, 104 Colo. 350.

S.D.—State ex rel. South Dakota Game & Fish Commission v. O'Neill, 254 N.W. 265, 62 S.D. 522, 15 C.J. p 937 note 33.

Attorney general .

(1) Opinions of attorney general, while persuasive, are not binding on courts.—Jones v. Williams, 45 S.W.

2d 130, 121 Tex. 94, 79 A.L.R. 983—Smith v. Cathey, Tex.Civ.App., 226 S.W. 158.

(2) So the attorney general's written opinions are not controlling, but merely advisory, on appeal from conviction of crime.—Humphries v. State, 183 So. 685, 28 Ala.App. 307—Broadfoot v. State, 182 So. 411, 28 Ala.App. 280—Hill Grocery Co. v. State, 159 So. 269, 26 Ala.App. 302—Holcombe v. Mobile County, 155 So. 638, 26 Ala.App. 151, certiorari denied 155 So. 640, 229 Ala. 77.

(3) Construction of statutes by attorney general as precedent see the C.J.S. title Statutes § 359, also 59 C.J. p 1027 note 44 [b], p 1029 note 51 [a].

Public utility commission

Finding of supreme court of Ohio that adequate price for natural gas supplied to Ohio companies was same as price fixed by West Virginia public utility commission would not be disturbed, in absence of showing that supreme court held itself bound by determination of West Virginia commission or failed to exercise independent judgment on evidence before court.—Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio, 54 S.Ct. 763, 292 U.S. 398, 78 L. Ed. 1327, 91 A.L.R. 1403, reversing 187 N.E. 7, 127 Ohio St. 109, appeal dismissed 54 S.Ct. 559, 291 U.S. 651, 78 L.Ed. 1045, rehearing denied 54 S. Ct. 639, 292 U.S. 603, 78 L.Ed. 1465, remanded 193 N.E. 612, 129 Ohio St. 118.

Weight accorded executive construction of statutes see the C.J.S. title

Statutes § 359, also 59 C.J. p 1025 note 43—p 1033 note 94.

96. D.C.—Hoglund v. Lane, 44 App. D.C. 310.

Ky.—Young v. Trimble, 175 S.W. 366, 184 Ky. 177.

97. U.S.—Wood v. Rasquin, D.C.N. Y., 21 F.Supp. 211, affirmed, C.C.A., 97 F.2d 1023.

98. Cal.—City of Los Angeles v. Industrial Accident Commission of State of California, 47 P.2d 1096, 3 Cal.App.2d 580—Torrey v. Industrial Accident Commission of State of California, 22 P.2d 525, 132 Cal.App. 303.

99. U.S.—Wood v. Rasquin, D.C. N.Y., 21 F.Supp. 211, affirmed, C.C. A., 97 F.2d 1023.

1. U.S.—Atchison, T. & S. F. R. Co. v. Union Wire Rope Corporation, D.C.Mo., 1 F.Supp. 399, reversed on other grounds, C.C.A., Union Wire Rope Corporation v. Atchison, T. & S. F. Ry. Co., 66 F.2d 965, certiorari denied 54 S.Ct. 122, 290 U.S. 686, 78 L.Ed. 591.

Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.

Pa.—Baltimore & O. R. Co. v. Public Utility Commission, 4 A.2d 628, 135 Pa.Super. 20.

2. U.S.—Chesapeake & O. R. Co. v. U. S., D.C.Va., 1 F.Supp. 350.

Pa.—Baltimore & O. R. Co. v. Public Utility Commission, 4 A.2d 628, 135 Pa.Super. 20.

Construction of statute by interstate commerce commission as not binding on courts see the C.J.S. title Statutes § 359, also 59 C.J. p 1027 note 46 [c].

it has been held that state courts are bound by the commission's interpretation of bills of lading.³ In accordance with the rule stated supra § 203, decisions of military tribunals are of no binding authority except as to the particular cases decided by them.⁴ A similar conclusion has been reached as to the opinion of a commission of arbitration and award, where such tribunal can act only with the consent of the parties, and cannot render or enforce a judgment.⁵ Where, however, a trust is created for the benefit of those adhering to a particular

denomination, it has been decided that the determination of the proper ecclesiastical tribunals as to who are in subordination to that denomination will be accepted and followed by the courts.⁶ Awards made to others by agreement of creditors on receivership of a corporation have no weight as precedents and cannot serve as guides to real judicial allowances.⁷ That the construction put by the legislature on a constitutional provision, is entitled to great weight is shown in Constitutional Law § 33.

3. SCOPE AND NATURE OF FORMER DECISIONS

§ 209. In General

The authority of a former decision as a precedent must be limited to the points actually decided on the facts before the court.

The authority of a former decision as a precedent must be limited to the points actually decided on the facts before the court;⁸ and a former decision is

3. Me.—*Martin v. Canadian Pac. Ry. Co.*, 1 A.2d 224, 136 Me. 10.
4. Tex.—*Taylor v. Murphy*, 50 Tex. 291.
5. Tex.—*Henderson v. Beaton*, 52 Tex. 29.
6. Iowa. — *First Constitutional Presb. Church v. Congregational Soc.*, 23 Iowa 567.
7. U.S.—*Pennsylvania Co. for Insurances on Lives and Granting Annuities v. South Penn Collieries Co.*, D.C.Pa., 7 F.Supp. 583, affirmed, C.C.A., *Buchanan v. Penn. Anthracite Collieries Co.*, 84 F.2d 726.
8. U.S.—*Carroll v. Carroll, Md.*, 16 How. 275, 14 L.Ed. 936—*W-R Co. v. Sova*, C.C.A.Mich., 106 F.2d 478—*Mutual Benefit Health & Accident Ass'n v. Bowman*, C.C.A.Neb., 99 F.2d 856, conforming to mandate 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521, vacating, C.C.A., 96 F.2d 7, certiorari denied 59 S.Ct. 485, 306 U.S. 637, 83 L.Ed. 1038—*Philadelphia Nat. Bank v. Raff*, C.C.A.Ohio, 76 F.2d 843, affirming, D.C., 4 F.Supp. 230, and certiorari denied 56 S.Ct. 118, 296 U.S. 601, 80 L.Ed. 426—*Texas & P. Ry. Co. v. Louisiana Oil Refining Corporation*, C.C.A.La., 76 F.2d 465, affirming, D.C., *Louisiana Oil & Refining Corporation v. Texas & P. Ry. Co.*, 7 F.Supp. 1012, and certiorari denied *Texas & P. Ry. Co. v. Louisiana Oil Refining Corporation*, 55 S.Ct. 926, 295 U.S. 767, 79 L.Ed. 1708—*U. S. ex rel. Cunningham v. Mathues*, C.C.A.Pa., 50 F.2d 411, affirming, D.C., 33 F.2d 261 which reversed 26 F.2d 272, and which is vacated in *Mathues v. U. S. ex rel. Cunningham*, 51 S.Ct. 84, 282 U.S. 802, 75 L.Ed. 721—*Armstrong v. McAdams*, C.C.A.Ark., 46 F.2d 931—*Swetland v. Curtiss Airports Corporation*, D.C.Ohio, 41 F.2d 929, modified on other grounds, C.C.A., 55 F.2d 201, 33 A.L.R. 319—*Griffis v. U. S.*, 52 Ct.Cl. 170.
- Ark.—*Dickson v. Board of Directors of Long Prairie Levee Dist.*, 235 S. W. 45, 151 Ark. 22.
- Cal.—*Ex parte Brambini*, 218 P. 569, 192 Cal. 19, error dismissed *Brambini v. U. S.*, 45 S.Ct. 461, 267 U.S. 584, 69 L.Ed. 799.
- Fla.—*McGregor v. Provident Trust Co. of Philadelphia*, 162 So. 323, 119 Fla. 718.
- Ill.—*People ex rel. Schuler v. Chapman*, 19 N.E.2d 351, 370 Ill. 430—*Heaney v. Northeast Park Dist. of Evanston*, 195 N.E. 649, 360 Ill. 254—*White v. Seitz*, 174 N.E. 371, 342 Ill. 266, reversing 258 Ill. App. 318—*Mayer v. Erhardt*, 88 Ill. 452.
- Ind.—*Wrasman v. State*, 132 N.E. 673, 191 Ind. 399.
- Ky.—*Drury v. Franke*, 57 S.W.2d 969, 247 Ky. 753, 88 A.L.R. 917—*Trimble v. Kentucky River Coal Corporation*, 31 S.W.2d 367, 235 Ky. 301.
- La.—*Southern Amusement Co. v. City of Jennings*, 157 So. 720, 180 La. 800, conformed to, App., 157 So. 724, followed in *Southern Amusement Co. v. Funderburg*, 157 So. 725 and *Gayle v. Reid*, 157 So. 725—*Moulin v. Monteleone*, 115 So. 447, 165 La. 169—*Godchaux Co. v. Estopinal*, 83 So. 690, 146 La. 405.
- Me.—*Kilpinen's Case*, 175 A. 314, 133 Me. 133.
- Md.—*McGraw v. Merryman*, 104 A. 540, 133 Md. 247—*Alexander v. Worthington*, 5 Md. 471.
- Minn.—*Fletcher v. Scott*, 277 N.W. 270, 201 Minn. 609, 114 A.L.R. 762—*Barrett v. Smith*, 237 N.W. 15, 183 Minn. 431.
- Mo.—*State ex rel. Lashly v. Becker*, 235 S.W. 1017, 290 Mo. 560—*State ex rel. Diehlstadt Consol. School Dist. of Scott County v. Gwaltney*, App., 28 S.W.2d 678.
- Mont.—*Montana Horse Products Co. v. Great Northern Ry. Co.*, 7 P.2d 919, 91 Mont. 194.
- Neb.—*Enterprise Irr. Dist. v. Willis*, 284 N.W. 326, 135 Neb. 827—*Clark v. Hass*, 260 N.W. 792, 793, 129 Neb. 112, quoting *Corpus Juris*.
- Nev.—*Tardy v. Tarbell*, 16 P.2d 656, 54 Nev. 342—*Steptoe Live Stock Co. v. Gulley*, 295 P. 772, 53 Nev. 163.
- N.Y.—*Dougherty v. Equitable Life Assur. Soc. of U. S.*, 193 N.E. 897, 266 N.Y. 71, reversing 265 N.Y.S. 714, 238 App.Div. 696, affirmed in part and reversed in part on other grounds 259 N.Y.S. 146, 144 Misc. 363, reargument denied 195 N.E. 226, 266 N.Y. 615, and followed in *Goldberg-Rudkowsky v. Equitable Life Assur. Soc. of U. S.*, 195 N.E. 149, 266 N.Y. 451, reversing in part and affirming in part *Rudkowsky v. Equitable Life Assur. Soc. of U. S.*, 265 N.Y.S. 721, 238 App.Div. 704, which affirmed 261 N.Y.S. 23, 145 Misc. 765, reargument denied *Goldberg-Rudkowsky v. Equitable Life Assur. Soc. of U. S.*, 195 N.E. 226, 266 N.Y. 615, certiorari denied 56 S.Ct. 94, 296 U.S. 583, 80 L.Ed. 412, and followed in *Klochkov v. Petrogradski Mejdunarodni Commercheski Bank*, 195 N.E. 216, 266 N.Y. 596, affirming 263 N.Y.S. 433, 239 App.Div. 637, and reargument denied 195 N.E. 374, 266 N.Y. 667, and certiorari denied 56 S.Ct. 101, 296 U.S. 583, 80 L.Ed. 412—*Gwynne v. Board of Education of Union Free School Dist. No. 3*, 181 N.E. 353, 259 N.Y. 191, reversing 252 N.Y.S. 625, 234 App.Div. 629, and motion denied *Gwynne v. Board of Education of Union Free School Dist. No. 3 in Town of Huntington*, 182 N.E. 213, 259 N.Y. 634—*Rolfe v. Hewitt*, 125 N.E. 804, 227 N.Y. 486, reversing 170 N.Y.S. 1109, 184 App.Div. 920—*Rogers v. Graves*, 5 N.Y. S.2d 967, 254 App.Div. 467, reversed on other grounds 18 N.E.2d 626, 279

not a precedent on a point which was not raised or | ruled on,⁹ even though it lurked in the record,¹⁰ or

N.Y. 375—In re Opening and Extending Clarendon Road, Borough of Brooklyn, City of New York, 4 N.Y.S.2d 754, 254 App.Div. 268, appeal denied—Rodrigues v. Transmarine Corporation, 215 N.Y.S. 123, 216 App.Div. 337—People ex rel. Lehigh Valley Ry. Co. v. Harris, 6 N.Y.S.2d 794, 163 Misc. 685—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214—In re Herle's Estate, 300 N.Y.S. 103, 165 Misc. 46—Holzer v. Deutsche Reichsbahn Gesellschaft, 290 N.Y.S. 181, 159 Misc. 830.

N.C.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 686, 188 N.C. 30—Armour Fertilizer Works v. Simpson, 111 S.E. 341, 183 N.C. 251.

N.D.—Darling & Co. v. Burchard, 284 N.W. 856, 862, quoting *Corpus Juris*—Dennis v. Pease, 240 N.W. 611, 616, 61 N.D. 718, citing *Corpus Juris*.

Pa.—Hill & MacMilan v. Taylor, 155 A. 103, 304 Pa. 13, 75 A.L.R. 1022—In re Brolasky's Estate, 153 A. 739, 302 Pa. 439—Commonwealth v. Lazar, 157 A. 701, 103 Pa.Super. 417, appeal dismissed Lazar v. Commonwealth of Pennsylvania, 52 S.Ct. 639, 286 U.S. 532, 76 L. Ed. 1272.

Tenn.—Vanderbilt University v. Henderson, App., 127 S.W.2d 284.

Tex.—Panhandle & S. F. Ry. Co. v. Friend, Civ.App., 91 S.W.2d 922.

Utah.—State v. Salt Lake County, 85 P.2d 851, 96 Utah 464.

Wyo.—State v. Underwood, 86 P.2d 707—Bales v. Brome, 84 P.2d 714, 717, 53 Wyo. 370, quoting *Corpus Juris*.

15 C.J. p 939 note 53—49 C.J. p 1318 note 10 [a].

"The authority of a judicial opinion is limited to the judicial decision. It is what the court decides and not what the court says in so deciding which gives authority to the opinion."—Ferguson v. Johnson, Tex.Civ. App., 57 S.W.2d 372, 376, error dismissed.

Construction of opinions see *infra* § 222.

Dicta as authority see *supra* § 190.

Denial of writ of prohibition

(1) That the supreme court denied a writ of prohibition to restrain the circuit court from taking jurisdiction of a suit did not constitute a determination that the circuit court had jurisdiction to entertain the suit, the inference being that the writ was denied on the theory that since the question of jurisdiction should be determined on a writ of error to final judgment, extraordinary relief was unnecessary.—Consolidated Rubber Tire Co. v. Ferguson, N.Y., 183 F. 756, 106 C.C.A. 330.

(2) However, it has also been held

in a similar case that the denial of the writ, even though the majority of the court concurred in the result, only, constituted a decision that the circuit court had jurisdiction.—Laumeier v. Laumeier, 271 S.W. 481, 308 Mo. 201.

General approval of instructions is not a specific approval of instruction not criticized.—Graff v. United Railroads of San Francisco, 172 P. 603, 178 Cal. 171.

Record in previous trial as controlling

In determining whether an issue has been adjudicated, the court will be governed by the record in such previous trial, and not by the assumption by counsel on argument thereof that the issues therein embraced were the issues which are raised in the subsequent action.—Hart v. Chicago Chemical Nat. Bank, Miss., 27 So. 926.

Particular matters held not precedents

(1) Denial of petition for rehearing first calling attention to doctrine or point.—Great Northern Ry. Co. v. State, Wash., 93 P.2d 694.

(2) Dissenting opinion.—State v. Batson, 93 S.E. 135, 107 S.C. 460.

(3) A decision on appeal from a referee's decision has little force as an obligatory precedent on a point in the referee's decision, affirmance of which decision was necessarily involved in the appellate court's action, where all the parties failed to argue the point.—Chase Nat. Bank of City of New York v. Chicago Title & Trust Co., 279 N.Y.S. 327, 155 Misc. 61, affirmed 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

(4) Judgment of nonsuit is not stare decisis in a later action on the same cause of action.—Carey v. Hejke, 197 A. 652, 119 N.J.Law 594.

(5) Memorandum order by appellate court to the effect that it would not interfere with lower court's refusal to grant injunction pending appeal, and adding that it appeared that there was an adequate remedy at law, would not prevent the lower court, in a subsequent similar case, from granting temporary injunction on ground of inadequacy of remedy at law.—G. B. R. Smith Milling Co. v. Thomas, D.C.Tex., 11 F.Supp. 833.

(6) Mere recommendation settles no law.—Texas Employers' Ins. Ass'n v. Jimenez, Tex.Civ.App., 267 S.W. 752.

(7) Notations made on granting writs of error express only the tentative opinion of the court and have no authoritative value, al-

though they may be persuasive.—Ball v. Beaty, Tex.Civ.App., 223 S.W. 552.

9. U.S.—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 106 F.2d 375, certiorari denied 60 S.Ct. 294—Taft v. Commissioner of Internal Revenue, C.C.A., 92 F.2d 687, certiorari granted 58 S.Ct. 745, 303 U. S. 631, 82 L.Ed. 1091, affirmed 58 S.Ct. 891, 304 U.S. 351, 82 L.Ed. 1393, 116 A.L.R. 346—Arnhold & Co. v. U. S., 22 Cust. & Pat.App. 23. Ala.—Marbury Lumber Co. v. Jones, 91 So. 623, 206 Ala. 669, 23 A.L.R. 309.

Ark.—McLeod v. Shaver, 127 S.W.2d 258.

Colo.—People v. District Court of Second Judicial Dist. in and for City and County of Denver, 182 P. 5, 66 Colo. 438.

Iowa.—Ontjes v. McNider, 275 N.W. 328, 224 Iowa 115.

Ky.—Rex Coal Co. v. Campbell, 281 S.W. 1039, 1941, 213 Ky. 638, quoting *Corpus Juris*.

Mass.—Nash v. Lang, 167 N.E. 762, 268 Mass. 407—Glaser v. Congregation of Kehillath Israel, 161 N.E. 619, 263 Mass. 435—Cawley v. Northern Waste Co., 132 N.E. 365, 239 Mass. 540.

Minn.—State ex rel. Best v. Gibbons, 278 N.W. 578, 202 Minn. 421. Wash.—Continental Mut. Sav. Bank v. Elliott, 6 P.2d 638, 166 Wash. 283, 81 A.L.R. 1005.

Wis.—State v. Hackbarth, 279 N.W. 687, 228 Wis. 108—State v. Telgener, 227 N.W. 35, 199 Wis. 523—State ex rel. City of Sheboygan v. Board of Supervisors of Sheboygan County, 216 N.W. 143, 194 Wis. 456.

15 C.J. p 940 note 60—49 C.J. p 1318 note 10 [b].

10. U.S.—KVOS, Inc. v. Associated Press, Wash., 57 S.Ct. 197, 299 U. S. 269, 81 L.Ed. 183, reversing, C. C.A., Associated Press v. KVOS, 80 F.2d 575, reversing, D.C., 9 F. Supp. 279, certiorari granted KVOS, Inc. v. Associated Press, 56 S.Ct. 938, 298 U.S. 650, 80 L.Ed. 1379—Bingham v. U. S., Mass., 56 S.Ct. 180, 296 U.S. 211, 80 L.Ed. 160, reversing, C.C.A., U. S. v. Bingham, 76 F.2d 573, reversing, D.C., Bingham v. U. S., 7 F.Supp. 907, certiorari granted 56 S.Ct. 92, 296 U.S. 564, 80 L.Ed. 398—U. S. v. Mitchell, 46 S.Ct. 418, 271 U.S. 9, 70 L.Ed. 799, reversing Mitchell v. U. S., 60 Ct.Cl. 451—Webster v. Fall, Okl., 45 S.Ct. 148, 266 U.S. 507, 69 L.Ed. 411—New York Life Ins. Co. v. Gamer, C.C.A.Mont., 106 F.2d 375, certiorari denied 60 S.Ct. 294—Superintendent Five Civilized Tribes, for Sandy Fox, Creek No. 1263, v. Commissioner

was involved in the case and should have been decided.¹¹

It is commonly held that a decision is authoritative only on questions which it was necessary to decide,¹² and were involved,¹³ or in issue,¹⁴ in the case. However, inferior courts have been held bound by a decision on a question actually determined by an appellate court even though the decision thereof was not necessary for the determination of the case.¹⁵ While all propositions assumed by the court to be within the case, and all questions presented and considered and deliberately decided by the court leading up to the final conclusion, are as effectually passed upon as the ultimate questions solved, and a judgment is authority upon all points assumed to be within the issues which the record shows the court deliberately considered and decided in reaching it,¹⁶ and unless there are precedents of

the court necessarily leading to a different result, the court should follow previous repeated statements of a general principle applicable to the particular case, although it may not have been decided under circumstances involving the precise question,¹⁷ ordinarily a decision is not a precedent on matters assumed therein, but not decided.¹⁸ Thus it has been held that the exercise of jurisdiction by a court in similar cases, in which the question of jurisdiction was not raised, is not decisive in a case in which the question is directly presented,¹⁹ particularly where the court has determined in a subsequent case, in which the question was raised, that jurisdiction did not exist;²⁰ but it has also been held, on the ground that it is the duty of the court to determine whether it has jurisdiction even though that question is not raised, as appears in § 114 supra, that an exercise of jurisdiction constitutes a binding decision that it has jurisdiction.²¹

of Internal Revenue, C.C.A., 75 F. 2d 132, certiorari granted Superintendent Five Civilized Tribes v. Commissioner of Internal Revenue, 55 S.Ct. 650, 295 U.S. 723, 79 L.Ed. 1676, affirmed Superintendent of Five Civilized Tribes for Sandy Fox, Creek No. 1263 v. Commissioner of Internal Revenue, 55 S.Ct. 820, 295 U.S. 418, 79 L.Ed. 1517—Satterlee v. Harris, C.C.A. Okl., 60 F.2d 490.

Ill.—Heaney v. Northeast Park Dist. of Evanston, 195 N.E. 649, 360 Ill. 254.

Wash.—Anderson v. East Gate Temple Ass'n of Spokane, 64 P.2d 510, 139 Wash. 221.

11. Fla.—State v. Du Bose, 128 So. 4, 99 Fla. 812.

Ky.—Louisville & N. R. Co. v. Hut-ton, 295 S.W. 175, 220 Ky. 277, 53 A.L.R. 1328—Rex Coal Co. v. Campbell, 281 S.W. 1039, 1041, 213 Ky. 636, quoting *Corpus Juris*.

15 C.J. p 940 note 61.

12. U.S.—Mutual Benefit Health & Accident Ass'n v. Bowman, C.C.A. Neb., 99 F.2d 856, conforming to mandate 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521, vacating, C.C.A., 96 F.2d 7, certiorari denied 58 S.Ct. 435, 306 U.S. 637, 83 L.Ed. 1038.

Mont.—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.

Neb.—Enterprise Irr. Dist. v. Willis, 284 N.W. 326, 135 Neb. 827.

N.C.—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 188 N.C. 30.

Decision based on other ground

A decision is not authoritative on a point discussed where the judgment rested squarely on some other

ground.—M. H. B. Co. v. Desmond, 275 P. 733, 151 Wash. 344.

13. Colo.—Froid v. Knowles, 35 P. 2d 156, 95 Colo. 223—People v. Texas Co., 275 P. 896, 85 Colo. 289.

Decision of a higher court that a particular question was not involved in a case decided by a lower court destroys the value of the latter decision as a precedent upon such question.—Ex parte Conley, Tex.Civ. App., 75 S.W. 301.

14. U.S.—U. S. v. Lilly & Co., 14 Ct. Cust.App. 332.

Mont.—Sullivan v. Anselmo Mining Corporation, 268 P. 495, 82 Mont. 543—Pue v. Wheeler, 255 P. 1043, 78 Mont. 516.

"Decision of . . . court must be presumed to have been confined to issues before it."—Genard v. Hosmer, 139 N.E. 46, 48, 285 Mass. 259, 91 A.L.R. 543.

15. Mo.—Gibson v. Chouteau, 7 Mo. App. 1, affirmed 76 Mo. 33. 15 C.J. p 940 note 66.

16. Mich.—City of Detroit v. Public Utilities Commission, 286 N.W. 368, 379, 288 Mich. 267, quoting *Corpus Juris*.

Tex.—Stephens County v. Hefner, 16 S.W.2d 804, 118 Tex. 397—Casparis v. Fidelity Union Casualty Co., Civ.App., 65 S.W.2d 404, 406, citing *Corpus Juris*—Allen v. Berkmyer, Civ.App., 216 S.W. 647, 649, error refused, citing *Corpus Juris*.

15 C.J. p 940 note 62.

Decision deliberately made

The weight of a former decision is not lessened by the fact that the losing party had confessed error or that a different decision would have raised a grave constitutional question, where it is apparent that the decision was not affected by the con-

fession or the constitutional question.—U. S. v. Flannery, 45 S.Ct. 420, 268 U.S. 93, 69 L.Ed. 835, reversing Flannery v. U. S., 59 Ct.Cl. 719.

17. Iowa.—Frohardt v. Duff, 135 N. W. 609, 156 Iowa 144, 40 L.R.A., N.S., 242, Ann.Cas.1915B 254, modifying 132 N.W. 31.

"The court is bound by decisions which, while not deciding the precise point here in question, are in their logical implications of controlling significance."—Farmers' Loan & Trust Co. v. U. S., D.C.N.Y., 9 F.2d 688, 689.

18. U.S.—The Merauke, C.C.A.N.Y., 31 F.2d 974, reversing, D.C., 26 F. 2d 836.

Cal.—Donner v. Palmer, 31 Cal. 500.

Validity of stipulation

Decisions construing stipulation limiting carrier's liability to invoice value of goods lost, which assume, but do not decide, the validity of such stipulation, are not conclusive in a later case in which that question is raised.—The Merauke, supra.

19. N.J.—In re Roebing's Estate, 108 A. 359, 91 N.J.Eq. 72, dismissing appeal 104 A. 295, 89 N.J.Eq. 163.

15 C.J. p 939 note 59 [e].

Significant

Even though the decision is not a conclusive precedent, the fact that neither counsel nor court raised the question of jurisdiction is significant.—Norris v. Moody, 113 A. 24, 120 Me. 151.

20. Utah.—State v. Brown, 282 P. 785, 75 Utah 37.

21. La.—Smith v. Shehee, App., 143 So. 339, conforming to answers 143 So. 338, 175 La. 394, and amended on other grounds, App., 144 So. 750.

Matters improperly before court. A question actually determined becomes a binding precedent even though not properly raised.²² While there is authority to the contrary,²³ it has similarly been held that a decision on the merits constitutes an authoritative precedent even though the court lacked jurisdiction of the cause decided.²⁴

Time of rendering decision. A decision is not binding in other cases until it has been published or promulgated;²⁵ but a decision rendered after the trial of another action may be binding on the appeal of the latter action as declaratory of the law applicable to the case.²⁶

Where a decision considers and criticizes the former decisions in the state, it becomes *stare decisis* upon the point involved, and when the point arises again it is not necessary to examine *de novo* the authorities upon which such decision was based.²⁷

Concession of counsel. A consent decree cannot be considered a precedent in a later case;²⁸ nor can a mere concession of counsel be regarded as a judicial establishment of the point conceded.²⁹

Decision by court in particular capacity. While the rulings of a court of last resort in the exercise of its supervisory jurisdiction have no necessary application to a case involving the exercise of its appellate jurisdiction,³⁰ a decision in an action at law is binding in an equity action involving the same question.³¹

Necessity of written opinion. A prior decree may be binding in later cases even though it was rendered without written opinion.³²

§ 210. Necessity for Similarity of Facts

While the doctrine of *stare decisis* relates only to legal principles, the positive authority of a decision is coextensive only with the facts on which it is founded.

The doctrine of *stare decisis* relates only to legal principles;³³ accordingly judicial precedents are valuable only in so far as they state definite rules for guidance in future similar cases.³⁴

However, the rule of *stare decisis* has a limited application in determining whether settled legal principles are applicable to a particular fact situa-

Mass.—Eustace v. Dickey, 132 N.E. 852, 240 Mass. 33—Attorney General v. Tufts, 131 N.E. 573, 239 Mass. 458, 17 A.L.R. 274.

Miss.—Drummond v. State, 185 So. 207.

Mo.—State ex rel. Missouri Gravel Co. v. Missouri Workmen's Compensation Commission, App., 113 S.W.2d 1034.

Okl.—Sheridan Oil Co. v. Superior Court of Creek County, 82 P.2d 832, 183 Okl. 372.

22. Mo.—Gibson v. Chouteau, 7 Mo. App. 1, affirmed 76 Mo. 38.

Wrong remedy

A previous decision on the merits of a case is authoritative even though it was affirmed on appeal on the ground that the unsuccessful party had chosen the wrong remedy for review.—Browne v. Hagen, 100 A. 857, 90 N.J.Law 423, reversed on other grounds 104 A. 207, 91 N.J.Law 544.

23. Mo.—McManus v. Burrows, 230 S.W. 129, 206 Mo.App. 528.

24. Ga.—Long v. S. A. Lynch Enterprise Finance Corporation, 146 S.E. 513, 39 Ga.App. 221.

25. Mo.—Newberry v. City of St. Louis, App., 109 S.W.2d 876.

Pending motion for rehearing

An opinion handed down by the supreme court was not promulgated as the law of the state until motion for rehearing therein was overruled.—Newberry v. City of St. Louis, supra.

26. Cal.—Raynor v. City of Arcata, 77 P.2d 1054, 11 Cal.2d 113.

27. N.Y.—Ganson v. Tift, 71 N.Y. 48.

28. N.J.—Miller v. Bond & Mortgage Guaranty Co., 138 A. 678, 121 N.J.Eq. 197.

29. Miss.—Lusk v. Seal, 91 So. 386, 129 Miss. 228.

N.Y.—People v. Levine, 291 N.Y.S. 1001, 161 Misc. 336.

15 C.J. p 940 note 63.

30. La.—State v. Pool, 70 So. 107, 138 La. 228.

31. R.I.—Goggin v. Goggin, 195 A. 593.

However, it has been held upon review by appeal from a decree of a circuit judge at chambers, that the appellate court in considering the evidence is in nowise controlled by its former opinions affirming upon writ of error judgments in law actions at term involving the same issues of fact.—Lalakea v. Laupahoe Sugar Co., 33 Hawaii 745.

32. Tenn.—Burr v. White Oak Lumber Co., 258 S.W. 798, 149 Tenn. 191.

Necessity of written opinion generally see *infra* § 217.

33. Ark.—Gregg v. Road Improvement Dist., No. 2 of Jackson County, 277 S.W. 515, 169 Ark. 871.

Cal.—Clover v. Jackson, 253 P. 187, 81 Cal.App. 55.

Ind.—American Mut. Liability Ins. Co. of Boston v. Duesenberg, 16 N.E.2d 698, 117 A.L.R. 1297, denying rehearing 14 N.E.2d 919, 117 A.L.R. 1293.

Iowa.—Van De Walle v. Tama County, 201 N.W. 44, 198 Iowa 1330.

Miss.—Castleman v. Canal Bank & Trust Co., 156 So. 638, 650, 171 Miss. 291, citing *Corpus Juris*—National Surety Co. v. Miller, 124 So. 251, 155 Miss. 115.

Mo.—State v. Lee, 259 S.W. 798, 303 Mo. 246—Ex parte Dickinson, App., 132 S.W.2d 243.

N.Y.—Smith v. Russo Asiatic Bank, 290 N.Y.S. 471, 160 Misc. 417.

Tex.—Means v. Limpia Royalties, Civ.App., 115 S.W.2d 468, error dismissed.

15 C.J. p 942 note 82.

Under statute so providing where reasoning of court in deciding one case is directly applicable to another case, the rule laid down in former case should be followed in latter case.—Weyer v. Weyer, 182 P. 776, 40 Cal.App. 765.

34. Miss.—City of Greenville v. Laury, 159 So. 121, 172 Miss. 118.

Mo.—Coleman v. Hagey, 158 S.W. 829, 252 Mo. 102.

Neb.—Clark v. Hass, 260 N.W. 792, 793, 129 Neb. 112, quoting *Corpus Juris*.

N.Y.—Sandberg v. Margold Realty Corporation, 176 N.E. 175, 256 N. Y. 228, reversing Sanberg v. Margold Realty Corporation, 247 N.Y. S. 139, 231 App.Div. 241.

A decision, limited to particular facts, which established no rule of property or of practice for the guidance of the public generally upon which could arise, or have arisen, rights to be disturbed, was held not *stare decisis*.—Southwestern Presbyterian University v. City of Clarksville, 259 S.W. 550, 149 Tenn. 256.

tion;³⁵ and the positive authority of a decision is coextensive only with the facts on which it is founded,³⁶ and can apply only in subsequent cases in which the issues are similar.³⁷ Thus, while a de-

cision is binding in a later case where the issues and the facts are the same or substantially the same,³⁸ it is not conclusive in a later case where

35. Miss.—City of Greenville v. Laury, 159 So. 121, 172 Miss. 118.

"It is usually unsafe and hazardous to seek to classify adjudicated cases upon any complex question of law, and to extract from them rules of general application. So much of the reasoning in such cases is due to their diversities, that error is likely to creep into any generalization of them, and vitiate the results of an analysis that would ambitiously seek to reduce them to a system, and tempt the incautious inquirer to overlook the differences of fact that modify and control their application. It is, therefore, wiser in the main to investigate and decide each case upon its own peculiar state of facts, than by too general statements or deductions to incur the risk of being betrayed into too abstract reasoning."—Ashbury v. City of Norfolk, 147 S.E. 223, 227, 152 Va. 273—City of Richmond v. Long, 17 Gratt. 375, 376, 58 Va. 375, 376, 94 Am.D. 461.

36. U.S.—U. S. v. Brand, C.C.A.N.Y., 79 F.2d 605, certiorari denied Brand v. U. S., 56 S.Ct. 381, 298 U. S. 655, 80 L.Ed. 466—C. F. Medaris Co. v. Commissioner of Internal Revenue, C.C.A., 38 F.2d 812—Means v. U. S., C.C.A.N.Y., 6 F.2d 975.

Ala.—Watters v. First Nat. Bank, 171 So. 280, 233 Ala. 227—Walker v. Walker, 17 Ala. 396.

Cal.—Haverstick v. Southern Pac. Co., 37 P.2d 146, 1 Cal.App.2d 605—People v. Malowitz, 24 P.2d 177, 133 Cal.App. 250—River Farms Co. of California v. Superior Court in and for City and County of San Francisco, 21 P.2d 643, 645, 131 Cal.App. 365, citing *Corpus Juris*.

Conn.—Hartford-Connecticut Trust Co. v. Lawrence, 138 A. 159, 106 Conn. 178.

Idaho.—Eldridge v. Black Canyon Irr. Dist., 43 P.2d 1052, 55 Idaho 443.

Iowa.—Illinois Cent. Ry. Co. v. Waterloo, C. F. & N. Ry. Co., 173 N. W. 283, 186 Iowa 1207.

Ky.—Thacker v. Commonwealth, 16 S.W.2d 448, 228 Ky. 819, certiorari denied 50 S.Ct. 81, 280 U.S. 573, 74 L.Ed. 629—Crain v. Walker, 2 S.W.2d 654, 222 Ky. 823.

Md.—Williams v. State, 155 A. 339, 161 Md. 39.

Miss.—True-Hixon Lumber Co. v. Thorn, 158 So. 909, 912, 171 Miss. 733, citing *Corpus Juris*.

N.Y.—Sandberg v. Margold Realty Corporation, 176 N.E. 175, 256 N. Y. 228, reversing Sanberg v. Mar-

gold Realty Corporation, 247 N.Y. S. 139, 231 App.Div. 241.

N.D.—Dennis v. Pease, 240 N.W. 611, 616, 61 N.D. 713, citing *Corpus Juris*.

Ohio.—East Ohio Gas Co. v. City of Cleveland, 140 N.E. 410, 106 Ohio St. 489, reversing City of Cleveland v. East Ohio Gas Co., 15 Ohio App. 117.

Okl.—State v. Board of Com'rs of Le Flore County, 60 P.2d 788, 791, 177 Okl. 470, quoting *Corpus Juris*.

Pa.—Smith v. Philadelphia & R. Ry. Co., 135 A. 648, 288 Pa. 250—Sayre v. Textile Mach. Works, 195 A. 786, 129 Pa.Super. 520.

Tex.—McKenzie Const. Co. v. City of San Antonio, Civ.App., 50 S.W. 2d 349, error refused.

Va.—Virginia Electric & Power Co. v. Wynne, 141 S.E. 829, 149 Va. 382.

Wash.—Great Northern Ry. Co. v. Washington Electric Co., 86 P.2d 208, 197 Wash. 436.

15 C.J. p 941 note 79.

Same question of law

Since mere abstract questions of law cannot be made the subject of litigation, the determination of a question of law is not binding in a later case, between different parties, merely because the same question of law is involved.—People v. Curtice, 117 P. 357, 50 Colo. 503.

Rule applied to syllabi of opinion

Ohio.—City of Troy v. Schnell, 193 N.E. 732, 48 Ohio App. 325—Thomas v. City of Euclid, 182 N.E. 605, 43 Ohio App. 52.

37. U.S.—Schodde v. U. S., C.C.A. Idaho, 69 F.2d 866—Brown-Crummer Inv. Co. v. Town of North Miami, D.C.Fla., 11 F.Supp. 73—U. S. v. Kwong Lee Chong Co., 23 C.C.P.A., Customs, 327.

Fla.—Twyman v. Roell, 166 So. 215, 123 Fla. 2.

Ill.—People v. Kogen, 178 N.E. 414, 346 Ill. 307, certiorari denied Kogen v. People of State of Illinois ex rel. Harding, 52 S.Ct. 458, 235 U.S. 553, 76 L.Ed. 946—Gore v. National Association of Certified Public Accountants, 231 Ill.App. 38.

Mass.—Petition of Worcester County Nat. Bank of Worcester, 162 N. E. 217, 263 Mass. 444, modified on other grounds Ex parte Worcester County Nat. Bank of Worcester, 49 S.Ct. 363, 279 U.S. 347, 73 L.Ed. 733, 61 A.L.R. 98.

Mo.—Wolf v. Wuelling, App., 130 S. W.2d 671—Fitzgerald v. Colorado Life Co., App., 116 S.W.2d 242.

Ohio.—Voelkl v. Latin, 16 N.E.2d 519, 58 Ohio App. 245.

Okl.—State v. Board of Com'rs of Le Flore County, 60 P.2d 788, 791, 177 Okl. 470, quoting *Corpus Juris*. Pa.—Shambe v. Delaware & H. R. Co., 135 A. 755, 288 Pa. 240.

15 C.J. p 941 note 80.

"No decision can become binding under the rule of stare decisis, and thus be claimed to have established a rule of property, unless there was before the court, when it made such decision, the identical question before the court when the rule of stare decisis is relied upon."—Cook v. Evans, 185 N.W. 262, 264, 45 S.D. 31, modified on other grounds 186 N.W. 571, 45 S.D. 43.

Particular decisions considered

(1) Decisions in negligence cases are not necessarily conclusive in compensation cases.—Crawfordsville Shale Brick Co. v. Starbuck, 141 N. E. 7, 80 Ind.App. 649.

(2) Decisions as to rescission for fraud in procuring contracts are not controlling in an action to rescind a contract for default in performance.—Jones v. Peterson, 72 S.W.2d 76, 335 Mo. 242.

(3) On the question of sufficiency of instructions as to corroboration of testimony of a seduced female, former opinions, although valuable in their bearing on corroboration, were not controlling authority, where the question decided in such cases was not one relating to instructions.—Slaughter v. State, 218 S.W. 767, 36 Tex.Cr. 527.

(4) A declaration by equity, on disputed testimony or conflicting inferences, that a penal violation was proved by fair preponderance of evidence, could not be binding in a subsequent prosecution where guilt must be established beyond a reasonable doubt.—Reed v. Littleton, 9 N.E.2d 814, 275 N.Y. 150, affirming 292 N.Y.S. 363, 249 App.Div. 310, reversing 289 N.Y.S. 793, 159 Misc. 853.

(5) Decisions as to sufficiency of petition are not controlling, where exception is to award of nonsuit.—Fitzpatrick v. Seaboard Air Line Ry. Co., 160 S.E. 664, 43 Ga.App. 317.

38. U.S.—Supreme Lodge, Knights of Pythias, v. Smyth, N.Y., 33 S. Ct. 210, 245 U.S. 594, 62 L.Ed. 492, reversing Smyth v. Supreme Lodge, K. P., 220 F. 433, 137 C.C. A. 32—Burststein & Sussman v. U. S., 16 Ct.Cust.App. 232.

Ala.—Denson v. Realty Mortgage Co., 189 So. 768—Turner v. State, 178 So. 463, 28 Ala.App. 65—Lind-

the facts are different,³⁹ except where they present | an even stronger case than the facts in the former

- sey Lumber & Export Co. v. Faile, 139 So. 102, 24 Ala.App. 520, certiorari denied 139 So. 104, 224 Ala. 261.
- Ark.—Western Union Telegraph Co. v. Byrd, 122 S.W.2d 569.
- Cal.—People v. O'Connor, 263 P. 866, 88 Cal.App. 568.
- Ga.—McIntyre v. City of Vidalia, 185 S.E. 318, 182 Ga. 341—Peppers v. Travelers' Ins. Co., 173 S.E. 177, 48 Ga.App. 595.
- Idaho.—State v. Cameron, 94 P.2d 782.
- Ky.—Davis v. Cumberland County, 107 S.W.2d 237, 269 Ky. 271.
- Mass.—Malden Trust Co. v. Brooks, 197 N.E. 100, 291 Mass. 273.
- Mich.—Bonk v. Dibrizio, 275 N.W. 196, 281 Mich. 427—In re Allen's Estate, 216 N.W. 446, 240 Mich. 661.
- Minn.—Marschinke v. Egan Chevrolet, 279 N.W. 587, 202 Minn. 625.
- Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.
- Mo.—Crews v. Kansas City Public Service Co., 111 S.W.2d 54, 341 Mo. 1090—Brewster v. Bulow, 296 S.W. 372—McCarter v. Burger, App., 10 S.W.2d 348.
- Mont.—Anderson v. Sunburst Oil & Refining Co., 296 P. 1108, 89 Mont. 175.
- N.J.—Street v. Smith, 135 A. 352, 5 N.J.Misc. 5.
- N.Y.—Benedict v. Lunn, 155 N.E. 677, 244 N.Y. 373, reversing In re Benedict, 209 N.Y.S. 794, 214 App. Div. 741—Seitz Estates v. Medico Bros., 286 N.Y.S. 833, 247 App.Div. 71, affirmed 3 N.E.2d 884, 272 N.Y. 492.
- N.D.—Southall v. Quam, 277 N.W. 604, 68 N.D. 195—Southall v. Thompson, 277 N.W. 603, 68 N.D. 196.
- Ohio.—Powell v. Craig, 148 N.E. 607, 113 Ohio St. 245.
- Okl.—State ex rel. Murphy v. Johnson, 95 P.2d 99, 185 Okl. 651—Dill v. Rockwell, 220 P. 620, 94 Okl. 25.
- Pa.—Copeland v. Hurwitz, 93 Pa.Super. 355—Christy v. State Board of Medical Education, 46 Dauph.Co. 69.
- Tenn.—Hilton v. Anderson, 261 S.W. 984, 149 Tenn. 622.
- Tex.—Cockrell v. Work, Civ.App., 94 S.W.2d 784, error dismissed—Rhodes v. Austin, Civ.App., 299 S.W. 921—North River Ins. Co. v. Hipsher, Civ.App., 280 S.W. 328—Light Pub. Co. v. Keeran, Civ.App., 277 S.W. 759, reversed on other grounds, Com.App., 284 S.W. 917—McRae v. Japhet, Civ.App., 269 S.W. 829, reversed on other grounds Japhet v. McRae, Com.App., 276 S.W. 669.
- Va.—Spicer v. Hartford Fire Ins. Co. of Hartford, Conn., 199 S.E. 499, 171 Va. 428.
- 15 C.J. p 941 note 81 [b].
- Effect of facts not in opinion**
- The authority of a former decision, in which the facts considered in the opinion are the same as those in the case under review, cannot be undermined by alleged facts in the record of the former case which did not appear in the opinion and were not considered by the court.—The San Simeon, C.C.A.N.Y., 63 F.2d 798, affirming, D.C., 1 F.Supp. 506, and certiorari denied Pacific Atlantic S. S. Co. v. Mooremack Gulf Lines, 54 S.Ct. 61, 290 U.S. 643, 78 L.Ed. 558.
- Different position as to effect of facts**
- Rule applied in former suit involving same facts as present suit except that defendant took different position with regard to effect of facts should be adhered to even though present plaintiff was not party to former suit.—Candler v. Rose, C.C.A.Ga., 80 F.2d 407, followed in Citizens & Southern Nat. Bank v. Rose, C.C.A.Ga., 80 F.2d 410.
- Ruling on evidence**
- Where state's evidence was same on trials of two defendants, decision as to sufficiency of evidence on appeal by one held controlling as to that question on appeal by the other.—People v. Egan, 246 P. 337, 77 Cal. App. 279.
- Similar injuries from same cause**
- (1) Decision in wife's personal injury suit is authority for determination of same questions on appeal in husband's suit for loss of services.—Consolidated Coach Corporation v. Saunders, 25 S.W.2d 722, 233 Ky. 321.
- (2) A judgment is a controlling precedent as to the law in subsequent suit by person injured in the same accident, where the facts were similar in both cases.
- Mich.—Kalinowski v. Odlewany, 287 N.W. 344, 289 Mich. 684.
- N.Y.—Gray v. State, 189 N.Y.S. 572, 116 Misc. 760.
- (3) However, it has also been held that a former decision in an action by a third person for similar injuries from the same cause is not necessarily binding, since each case must stand or fall on its own record.—Wibaux Realty Co. v. Northern Pac. Ry. Co., 54 P.2d 1175, 101 Mont. 126.
- Factual difference not substantial**
- Mich.—Kalinowski v. Odlewany, 287 N.W. 344, 289 Mich. 684.
39. U.S.—First Trust Co. of Omaha v. Allen, D.C.Neb., 51 F.2d 1069, affirmed, C.C.A., 60 F.2d 812, certiorari denied, Doolittle v. Allen, 53 S.Ct. 315, 287 U.S. 671, 77 L.Ed. 578—Koppers Connecticut Coke Co. v. James McWilliams Blue Line, D.C.N.Y., 18 F.Supp. 992, affirmed, C.C.A., 89 F.2d 865, certiorari denied James McWilliams Blue Line v. Koppers Connecticut Coke Co., 58 S.Ct. 25, 302 U.S. 706, 82 L.Ed. 545.
- Ark.—Brotherhood of Locomotive Firemen and Enginemen v. Simmons, 79 S.W.2d 419, 190 Ark. 480—Beck v. Healea, 14 S.W.2d 1101, 179 Ark. 103.
- Cal.—People v. Malowitz, 24 P.2d 177, 133 Cal.App. 250—Sichterman v. R. H. Hollingshead Co., 4 P.2d 181, 117 Cal.App. 504.
- Ga.—Mitchell v. Owen, 127 S.E. 122, 159 Ga. 690, reversing 121 S.E. 699, 31 Ga.App. 649.
- Ill.—In re Healea's Estate, 254 Ill. App. 334.
- Ind.—Randolph v. State, 162 N.E. 656, 200 Ind. 210.
- Ky.—Dix v. Carmack, 117 S.W.2d 1036, 273 Ky. 844—Thacker v. Commonwealth, 16 S.W.2d 448, 228 Ky. 819, certiorari denied 50 S.Ct. 31, 280 U.S. 578, 74 L.Ed. 629—Crain v. Walker, 2 S.W.2d 654, 222 Ky. 828.
- Miss.—Texas Co. v. Jackson, 165 So. 546, 174 Miss. 737.
- Mo.—State v. Weatherby, 129 S.W. 2d 887—Zoll v. St. Louis County, 124 S.W.2d 1168—State ex rel. State Highway Commission v. Boone, App., 52 S.W.2d 186.
- N.Y.—In re Liberman, 18 N.E.2d 658, 279 N.Y. 458, affirming 2 N.Y.S.2d 1019, 253 App.Div. 884, affirming In re Liberman's Estate, 296 N.Y.S. 523, 163 Misc. 90, 105—Fox v. Allied Stores Corporation, 300 N.Y.S. 1254, 252 App.Div. 675—Application of Broderick, 252 N.Y.S. 68, 140 Misc. 861—City Bank Farmers Trust Co. v. Title Guarantee & Trust Co., 15 N.Y.S.2d 211.
- N.C.—Osmond Barringer Co. v. Standard Fire Ins. Co., 123 S.E. 305, 188 N.C. 117.
- Okl.—Coats v. Riley, 7 P.2d 644, 154 Okl. 291—Jackson v. Twin State Oil Co., 218 P. 324, 95 Okl. 96.
- Or.—Pacific Telephone & Telegraph Co. v. Wallace, 75 P.2d 942, 158 Or. 210—Giesy v. Aurora State Bank, 256 P. 763, 122 Or. 1, denying rehearing 255 P. 467, 122 Or. 1.
- Pa.—Commonwealth v. Shawell, 191 A. 17, 325 Pa. 497—Commonwealth v. Davis, 149 A. 176, 299 Pa. 276—Heisler v. Thomas Colliery Co., 118 A. 394, 274 Pa. 448, 24 A.L.R. 1215, affirmed 43 S.Ct. 83, 260 U.S. 245, 67 L.Ed. 237—McCarthy v. City of Pittsburgh, 193 A. 358, 127 Pa. Super. 399—Consentino v. Union Paving Co., 173 A. 470, 113 Pa. Super. 295.
- Tex.—Means v. Limpia Royalties, Civ.App., 115 S.W.2d 468, error dismissed—McKenzie Const. Co. v.

decision;⁴⁰ and it has been held that former decisions are ordinarily not controlling, but merely advisory, in a case which must be determined upon its own particular facts.⁴¹ The application of the doctrine of stare decisis to decisions on questions of fact is considered in § 212 infra.

§ 211. Advisory Opinions

Answers by justices to questions propounded by other departments of the government do not constitute an adjudication, and are not stare decisis, but merely advisory.

Where the justices of a court, pursuant to constitutional provisions, answer questions propounded to them by other departments of government such

as the legislative or executive, such answers are not an adjudication, but merely advisory, and not within the doctrine of stare decisis,⁴² even though the opinion was given after hearing argument on both sides.⁴³ However, in answering questions submitted to it, the court is bound by decisions rendered by it in the course of regular litigation, on matters respecting which it is the final authority.⁴⁴

§ 212. Decisions on Questions of Fact

Decisions on questions of fact are not ordinarily stare decisis, but may be advisory.

The doctrine of stare decisis does not ordinarily apply to decisions on questions of fact so as to render them binding in later cases,⁴⁵ although they may

City of San Antonio, Civ.App., 50 S.W.2d 349, error refused.
Utah.—Barlow v. Utah Light & Traction Co., 298 P. 386, 77 Utah 556.
Va.—Hancock v. Norfolk & W. Ry. Co., 141 S.E. 849, 149 Va. 829.
Wis.—Jackson v. Robert L. Reisinger & Co., 263 N.W. 641, 219 Wis. 535
& Co., 263 N.W. 641, 219 Wis. 535
—Indrebo v. Industrial Commission of Wisconsin, 243 N.W. 464, 209 Wis. 272.

Different taxes

Prior decisions as to the meaning or effect of particular taxes are not conclusive in determining similar questions with respect to other taxes.—People ex rel. New York Rapid Transit Corporation v. Loughman, 233 N.Y.S. 434, 226 App.Div. 149, affirmed 168 N.E. 430, 251 N.Y. 568—Newtown Creek Towing Co. v. Law, 199 N.Y.S. 866, 205 App.Div. 209, affirmed People ex rel. Newton Creek Towing Co. v. Law, 143 N.E. 749, 237 N.Y. 578.

Definitions

Decisions defining particular words under particular circumstances are not controlling in later cases in which the circumstances are different.—Arey v. George Associates, Mass., 12 N.E.2d 84.

40. Iowa.—State v. Carson, 170 N. W. 781, 185 Iowa 568.

Less probative weight

While stare decisis cannot rule, yet, if it be held upon stated facts that there is no seduction, that is authority whenever the facts, although they differ from those in the case relied on as an authority, have less probative weight than those present in the case cited.—State v. Carson, 170 N.W. 781, 185 Iowa 568.

41. U.S.—American Steel Foundries v. Tri-City Central Trades Council, Ill., 42 S.Ct. 72, 257 U.S. 184, 66 L. Ed. 189, 27 A.L.R. 360—Nalbantian v. U. S., C.C.A.Ill., 54 F.2d 63, 65, certiorari denied 52 S.Ct. 313, 285 U.S. 536, 76 L.Ed. 930—Chicago, M., St. P. & P. R. Co. v. Kane, C.C.A. Mont., 33 F.2d 866, certiorari de-

nied 50 S.Ct. 37, 280 U.S. 588, 74 L.Ed. 637.

Ala.—Martin Bldg. Co. v. Imperial Laundry Co., 124 So. 82, 220 Ala. 90.

Fla.—Stelle v. Dennis, 140 So. 194, 104 Fla. 384.

Ky.—Moran's Ex'r v. Moran, 59 S.W. 2d 7, 248 Ky. 554—Schenk v. Schenk, 41 S.W.2d 1102, 240 Ky. 237.

Md.—White v. Parks, 140 A. 70, 154 Md. 195.

Okl.—Brownell v. Moorehead, 165 P. 408, 65 Okl. 218.

Tex.—Texas Employers Ins. Ass'n v. Shifflette, Civ.App., 91 S.W.2d 787, error dismissed.

Va.—Haynes v. Bunting, 147 S.E. 211, 152 Va. 395—Neff v. Edwards, 139 S.E. 295, 148 Va. 628.

Wash.—Sterling Chain Theatres v. Central Labor Council of Seattle, 283 P. 1081, 155 Wash. 217.

Existence of negligence

Ark.—Smith v. McEachin, 57 S.W. 2d 1043, 186 Ark. 1132.

Pa.—Rocks v. Bender, 157 A. 705, 103 Pa.Super. 546.

S.C.—Funderburk v. Powell, 187 S.E. 742, 181 S.C. 412.

Construction of

(1) Trust instrument.—Mills v. Embrey, 186 S.E. 47, 166 Va. 383.

(2) Will.—Bergman v. Arnhold, 89 N.E. 1000, 242 Ill. 218.
15 C.J. p 942 notes 84, 85.

42. Del.—State ex rel. Satterthwaite v. Highfield, 152 A. 45, 4 W.W. Harr. 272.

Ind.—State v. McMahan, 142 N.E. 213, 194 Ind. 151.

Me.—Fellows v. Eastman, 136 A. 810, 126 Me. 147.

Mass.—Commonwealth v. Welosky, 177 N.E. 656, 276 Mass. 398, certiorari denied Welosky v. Commonwealth of Massachusetts, 52 S.Ct. 201, 284 U.S. 684, 76 L.Ed. 578—Building Inspector of Lowell v. Stoklosa, 145 N.E. 262, 250 Mass. 52—Loring v. Young, 132 N.E. 65, 239 Mass. 349—City of Boston v.

Treasurer and Receiver General, 130 N.E. 390, 237 Mass. 403, affirmed City of Boston v. Jackson, 43 S.Ct. 129, 260 U.S. 309, 67 L.Ed. 506, 821.

N.H.—In re Opinion of the Justices, 149 A. 321, 84 N.H. 557, 559—In re opinion of the Justices, 129 A. 117, 81 N.H. 566, 39 A.L.R. 1023.

R.I.—In re Opinion to the Governor, 178 A. 433, 55 R.I. 56—In re Opinion of the Justices, 154 A. 647, 51 R.I. 322.

15 C.J. p 943 notes 99, 2.

43. Mass.—Adams v. Bucklin, 7 Pick. 121.

44. Mass.—In re Opinion of the Justices, 115 N.E. 978, 226 Mass. 613.

45. U.S.—The Diamond Cement, C.C. A.Wash., 95 F.2d 738.

Ill.—Miller v. Chicago Rys. Co., 223 Ill.App. 122.

Iowa.—Sandell v. Des Moines City Ry. Co., 168 N.W. 226, 184 Iowa 525.

La.—Webster v. New York Life Ins. Co., 107 So. 599, 160 La. 854.

N.H.—Arlington Mills v. Town of Salem, 140 A. 163, 83 N.H. 148.

N.Y.—Smith v. Russo Asiatic Bank, 290 N.Y.S. 471, 160 Misc. 417.

15 C.J. p 943 note 8, p 969 note 17 [a].

"As the decision [of a question of fact] depends on the view of the tribunal of the weight of the evidence presented, the decision of other courts or of the same court upon the same state of facts cannot constitute a rule for the decision of the instant case, for facts cannot be found by rule."—Remick v. Merrill, 116 A. 344, 346, 80 N.H. 225.
Necessity for similarity of facts see supra § 210.

Rule applied to particular decisions as to:

(1) Infringement of copyright.—Park v. Warner Bros., D.C.N.Y., 8 F. Supp. 37.

(2) Mental capacity.—Doyle v. Schafer, 14 S.W.2d 413, 228 Ky. 83.

be advisory.⁴⁶ This is so even though the probative facts and testimony in the former decision were identical with those in the later case,⁴⁷ although it has also been held that a former decision on a question of fact may be binding where it is shown by competent evidence that the facts in the two cases are identical.⁴⁸

Damages; attorney's fees. Former decisions fixing damages, or determining the reasonableness of damages, in particular cases, are not controlling,⁴⁹ but may be advisory,⁵⁰ and should be consulted in order that there may be reasonable uniformity in

similar cases.⁵¹ The same is true of former decisions as to the propriety of attorney's fees in particular cases.⁵²

§ 213. Matters of Form and Practice

Decisions on matters of form and practice, except where they are erroneous, will ordinarily be followed, even though a contrary conclusion might be desirable.

On the ground that it is important for the proper and expeditious conduct of judicial business that the rules of practice be stable,⁵³ decisions on matters of form and practice will generally be followed,⁵⁴ particularly where the rules announced in

Boundaries

(1) The location of boundaries has been held a question of fact to which the doctrine of stare decisis does not apply, at least where it does not appear that the prior cases were based on the same facts.—*Richardson v. Schwoon*, 3 Tenn.App. 512—15 C.J. p 943 note 8 [a].

(2) However, a decision as to boundaries, even though regarded as not binding in later cases, will be followed where no good reason forbids.—*Birdseye v. Rogers*, Tex.Civ. App., 52 S.W. 985.

(3) And a decision establishing boundaries has been held binding in a later case involving the same land.—*Douglas Oil Co. v. State* (California Case), Tex.Civ.App., 70 S.W.2d 452.

46. La.—*Webster v. New York Life Ins. Co.*, 107 So. 599, 160 La. 854.

47. U.S.—*The Diamond Cement Co.*, C.A.Wash., 95 F.2d 738, 742.

Seaworthiness of vessel

"The inference from different factual situations leading to a finding of want of seaworthiness in the several cases cited do not, and in the nature of maritime employment cannot, create stare decisis. Even if, on the identical complicated probative facts and contradictory testimony in another case . . . another court found seaworthiness as an ultimate fact, it would not prevent us from weighing the evidence and making a contrary finding."—*The Diamond Cement*, supra.

48. Iowa.—*Sandell v. Des Moines City Ry. Co.*, 168 N.W. 226, 184 Iowa 525.

49. La.—*Pierce v. Leonard Truck Lines*, 138 So. 199, 18 La.App. 448. Me.—*Baston v. Thombs*, 143 A. 63, 127 Me. 278.

Mo.—*Cason v. Kansas City Terminal Ry. Co.*, 123 S.W.2d 133—*McNatt v. Wabash Ry. Co.*, 108 S.W.2d 33, 341 Mo. 516—*Harrison v. St. Louis-San Francisco Ry. Co.*, 99 S.W.2d 841, 339 Mo. 821—*Colwell v. St. Louis-San Francisco Ry. Co.*, 73 S.W.2d 222, 335 Mo. 494—*Byars v.*

St. Louis Public Service Co., 66 S.W.2d 894, 334 Mo. 278—*Kleinlein v. Foskin*, 13 S.W.2d 648, 321 Mo. 887—*McLean v. Eddy*, App., 83 S.W.2d 230—*Shaw v. East St. Louis Ry. Co.*, App., 55 S.W.2d 497—*Burton v. Wm. J. Brennan Grocer Co.*, App., 13 S.W.2d 567.

Tex.—*San Antonio Public Service Co. v. Mitchell*, Civ.App., 238 S.W. 265, error granted.

50. Mo.—*Cason v. Kansas City Terminal Ry. Co.*, Mo., 123 S.W.2d 133—*Colwell v. St. Louis-San Francisco Ry. Co.*, 73 S.W.2d 222, 335 Mo. 494—*Byars v. St. Louis Public Service Co.*, 66 S.W.2d 894, 334 Mo. 278—*Kleinlein v. Foskin*, 13 S.W.2d 648, 321 Mo. 887—*Shaw v. East St. Louis Ry. Co.*, App., 55 S.W.2d 497.

R.I.—*Cook v. Union Electric Supply Co.*, 133 A. 345.

Tex.—*Light Pub. Co. v. Keeran*, Civ. App., 277 S.W. 759, reversed on other grounds, Com.App., 284 S.W. 817.

Va.—*P. Lorillard Co. v. Clay*, 104 S.E. 384, 127 Va. 734.

Wash.—*Pearson v. Picht*, 52 P.2d 314, 184 Wash. 607.

51. Mo.—*McNatt v. Wabash Ry. Co.*, 108 S.W.2d 33, 341 Mo. 516—*O'Brien v. Rindskopf*, 70 S.W.2d 1085, 334 Mo. 1233.

52. Ky.—*Maynard v. Steele*, 47 S.W.2d 738, 242 Ky. 745.

N.Y.—*Prager v. New Jersey Fidelity & Plate Glass Ins. Co. of Newark*, N. J., 156 N.E. 76, 245 N.Y. 1, 52 A.L.R. 193, modifying 216 N.Y.S. 400, 217 App.Div. 630.

53. Ark.—*Washington Fire Ins. Co. v. Hogan*, 213 S.W. 7, 189 Ark. 130, 5 A.L.R. 1585.

Iowa.—*McKee v. National Travelers Casualty Ass'n*, 282 N.W. 291, 225 Iowa 1200.

N.D.—*Horton v. Wright, Barrett & Stilwell Co.*, 174 N.W. 67, 43 N.D. 114.

S.D.—*Grievies v. Danaher*, 243 N.W. 916, 60 S.D. 120.

54. U.S.—*Qualtop Beverages v. Mc-*

Campbell, C.C.A.N.Y., 31 F.2d 260, reversing, D.C., 22 F.2d 417.

Ala.—*Burns v. State*, 117 So. 616, 22 Ala.App. 501, followed in *Harris v. State*, 117 So. 617, 22 Ala.App. 502. Colo.—*Farmer v. People*, 7 P.2d 947, 90 Colo. 250.

Fla.—*Bancroft v. Allen*, 190 So. 885—*State ex rel. Beggs v. Fabisinski*, 172 So. 685, 126 Fla. 684.

Mo.—*State v. Baird*, 195 S.W. 1010, 271 Mo. 9—*Haight v. Stuart*, App., 31 S.W.2d 241—*Calkins v. Engle*, 300 S.W. 997, 221 Mo.App. 1173.

N.J.—*Jaskiewicz v. Salamander*, 131 A. 387, 3 N.J.Misc. 1247.

N.Y.—*Bernard v. Chase Nat. Bank of City of New York*, 253 N.Y.S. 336, 233 App.Div. 384.

Ohio.—*Ford v. Papcke*, 158 N.E. 558, 26 Ohio App. 225—*Lupico v. State*, 157 N.E. 576, 25 Ohio App. 37.

Or.—*State v. McDaniel*, 231 P. 965, 115 Or. 187, affirmed 237 P. 373, 115 Or. 187.

S.C.—*Barnes v. Leevy*, 100 S.E. 169, 112 S.C. 426.

Tex.—*Three States Telephone Co. v. Kirkwood*, Civ.App., 61 S.W.2d 568—*Texas & P. Ry. Co. v. Hargrave*, Civ.App., 1 S.W.2d 740, affirmed *Hargrave v. Texas & P. Ry. Co.*, Com.App., 12 S.W.2d 1009.

Utah.—*Sutton v. Otis Elevator Co.*, 249 P. 437, 68 Utah 85.

Va.—*Alexandria Water Co. v. City Council of Alexandria*, 177 S.E. 454, 163 Va. 512.

15 C.J. p 944 note 9.

"The rule of stare decisis is especially applicable to decisions on matters of procedure and practice."—*Horton v. Wright, Barrett & Stilwell Co.*, 174 N.W. 67, 43 N.D. 114.

In a criminal case the best way for trial court to accomplish just results for both defendant and people is to follow practice set forth in well-considered cases which have stood test of time.—*People v. Egan*, 275 N.Y.S. 697, 242 App.Div. 507.

Discretion as to new trial

On motions for new trial, the doctrine of stare decisis is applicable, and previous decisions must be followed, notwithstanding statute au-

such decisions have become well established,⁵⁵ even though were it not for such prior decisions a contrary conclusion might be reached.⁵⁶

However, courts will more freely change judicially established procedural rules than substantive rules,⁵⁷ and prior decisions as to matters of form and practice will not be followed where they are erroneous or where the rule announced hampers justice,⁵⁸ at least if the error in the former opinion can be corrected without substantial injury to litigants

by reason of reliance on the precedent so established.⁵⁹

§ 214. Construction of Statutes

The doctrine of stare decisis applies with full force to decisions construing statutes or ordinances, especially where the construction has been long acquiesced in, and decisions construing other statutes are authoritative if such statutes are nearly identical with the one under review.

The doctrine of stare decisis applies with full force to decisions construing statutes⁶⁰ or ordinance-

thorizing new trial gives the presiding justice discretionary power.—*Derosby v. Mathieu*, 2 A.2d 170, 136 Me. 91.

Absence of precedent

Court is not bound by precedent in determining sufficiency of indictment where there are no precedents.—*People v. Farson*, 155 N.E. 724, 244 N.Y. 413, affirming 218 N.Y.S. 41, 218 App. Div. 488.

Decisions limited to particular facts

(1) The doctrine of stare decisis does not apply to a decision which does not establish a general rule of practice, but is limited to particular facts.—*Southwestern Presbyterian University v. City of Clarksville*, 259 S.W. 550, 149 Tenn. 256.

(2) Thus the court's language in its opinion, as to whether a stipulation might be set aside on motion, used in view of a party's right to relief from a particular situation, is not binding as a precedent.—*Yonkers Fur Dressing Co. v. Royal Ins. Co.*, 160 N.E. 778, 247 N.Y. 435, reversing 224 N.Y.S. 941, 222 App. Div. 688.

55. Ind.—*Faulkner v. State*, 141 N.E. 514, 193 Ind. 663.

Iowa.—*McKee v. National Travelers Casualty Ass'n*, 282 N.W. 291, 225 Iowa 1200.

Neb.—*Patterson v. Kerr*, 254 N.W. 704, 127 Neb. 78—*Westbrook v. State*, 244 N.W. 403, 123 Neb. 817. N.Y.—*Meyers v. Credit Lyonnais*, 182 N.E. 61, 259 N.Y. 399, 83 A.L.R. 268, reversing 254 N.Y.S. 1052, 235 App. Div. 608, following *Garrison v. Newman*, 227 N.Y.S. 78, 222 App. Div. 498.

Change by legislative action

(1) If a change is desirable, such change should be made by legislative rather than by judicial action.—*T. W. Lind Co. v. Nu-Fastener Co.*, 108 A. 286, 43 R.I. 31.

(2) A firmly established and long-followed rule of procedure should not be departed from unless it is clear that statute invoked so requires.—*Willis & Turner v. Moore & Davis*, 271 S.W. 736, 151 Tenn. 582.

Apparently conflicting decisions in later cases involving somewhat similar questions were held not sufficient justification to overthrow decision

regarding criminal practice standing unchallenged for over 100 years.—*State v. Platt*, 151 S.E. 206, 154 S.C. 1.

Appeals

Long-settled uniform rule against single appeal from two independent separate appealable orders will not be changed, whether originally sound in theory or not.—*Grievous v. Dana-her*, 243 N.W. 916, 60 S.D. 120.

56. Neb.—*Patterson v. Kerr*, 254 N.W. 704, 127 Neb. 73.

N.Y.—*Bernard v. Chase Nat. Bank of City of New York*, 253 N.Y.S. 336, 233 App. Div. 384.

N.D.—*Horton v. Wright, Barrett & Stilwell Co.*, 174 N.W. 67, 43 N.D. 114.

15 C.J. p 944 note 10.

In Arkansas

(1) The rule stated in the text has been followed.—*Missouri Pacific Transp. Co. v. Sharp*, 108 S.W.2d 579, 194 Ark. 405—*Washington Fire Ins. Co. v. Hogan*, 213 S.W. 7, 139 Ark. 130, 5 A.L.R. 1585.

(2) And it has been held that the court has no right to alter or amend the general rules applicable to testing sufficiency of evidence to support a verdict, notwithstanding such rule may at times work a flagrant injustice, since the precedent is founded on fundamental law governing jury trials, the remedy lies within the lawmaking body, not within the court, and ample protection is given litigant by power inherent in trial court to set aside verdict of jury, where preponderance of evidence is contrary to it.—*Missouri Pacific Transp. Co. v. Sharp*, supra.

(3) However, it has also been held that decisions as to procedural matters are not as binding, under the stare decisis doctrine, as decisions on substantive matters, and that erroneous rules may be readily altered or abolished.—*Chapman & Dewey Lumber Co. v. Means*, 88 S.W.2d 829, 191 Ark. 1066.

(4) And this is especially true if such decisions are anomalous to modern law.—*Anheuser-Busch v. Manion*, 100 S.W.2d 672, 193 Ark. 405.

57. Pa.—*McCaffrey v. Schwartz*, 132 A. 810, 285 Pa. 561.

58. Kan.—*Weaver v. Gardner*, 14 Kan. 347.

N.Y.—*People v. Nixon*, 161 N.E. 463, 248 N.Y. 182.

Wis.—*Scharine v. Huebsch*, 234 N.W. 358, 203 Wis. 261.

Absence of opinion

That supreme court denied certiorari to review determination of court of appeals without filing written opinion or memorandum was held not to preclude investigation, in subsequent action, of question decided, involving mere matter of practice.—*Lingner v. Lingner*, 56 S.W.2d 749, 165 Tenn. 525.

An irregular proceeding, contrary to authority at the time, and never followed, does not create a precedent.—*Clark v. Boston Safe Deposit & Trust Co.*, 102 A. 289, 116 Me. 450, L.R.A.1918B 384.

59. Mont.—*Wetzstein v. Boston, etc., Cons. Copper, etc., Min. Co.*, 63 P. 1043, 25 Mont. 135.

15 C.J. p 944 note 12.

Right to rely

Parties and counsel are entitled to rely on previous decisions approving a particular practice.

Mont.—*State v. Simanton*, 49 P.2d 981, 100 Mont. 292.

Wash.—*Yarno v. Hedlund Box & Lumber Co.*, 225 P. 659, 129 Wash. 457, modified on other grounds 227 P. 518, 129 Wash. 457.

60. U.S.—*Federal Trade Commission v. F. A. Martocchio Co.*, C.C.A., 87 F.2d 561, certiorari denied *F. A. Martocchio Co. v. Federal Trade Commission*, 57 S.Ct. 794, 301 U.S. 691, 81 L.Ed. 1347—*Delaware & H. Co. v. Commissioner of Internal Revenue*, C.C.A., 65 F.2d 292, certiorari denied 54 S.Ct. 89, 290 U.S. 670, 78 L.Ed. 579—*Washburn Crosby Co. v. Nee*, D.C.Mo., 11 F.Supp. 822—*U. S. v. Appalachian Coals*, D. C.Va., 1 F.Supp. 339, reversed on other grounds *Appalachian Coals v. U. S.*, 53 S.Ct. 471, 288 U.S. 344, 77 L.Ed. 825—*U. S. v. River Spinning Co.*, D.C.R.I., 243 F. 759, affirmed 250 F. 586, 162 C.C.A. 602. Ala.—*City of Mobile v. Collins*, 130 So. 369, 24 Ala.App. 41, certiorari

es.⁶¹ In fact, when a statute has been judicially construed⁶² by the highest court having jurisdiction to pass on it⁶³ such construction is as much a part of the statute as if plainly written into it originally,

denied, Sup., 130 So. 374, 222 Ala. 32.

Ariz.—Van Denburgh v. Superior Court in and for Maricopa County, 36 P.2d 793, 44 Ariz. 306.

Ark.—O'Daniel v. Brunswick Balke Collender Co., 113 S.W.2d 717, 195 Ark. 669.

Cal.—Bellingham Bay Lumber Co. v. Hopkins, 163 P. 159, 34 Cal.App. 534.

Colo.—McGlone v. First Baptist Church of Denver, 50 P.2d 547, 97 Colo. 427—City of Boulder v. Plains Loan, Realty & Investment Co., 224 P. 233, 75 Colo. 86.

D.C.—Bardwell v. Petty, 286 F. 772, 52 App.D.C. 310.

Fla.—Halifax Drainage Dist. of Volusia County v. State, 185 So. 123, 134 Fla. 471.

Ga.—Little v. Walters, 150 S.E. 201, 40 Ga.App. 447.

Ill.—Melsha v. Johns-Manville Sales Corporation, 19 N.E.2d 753, 299 Ill. App. 157.

Ind.—Union Hospital v. S. P. Brown & Co., 11 N.E.2d 520, 104 Ind.App. 430—Dailey v. Pugh, 131 N.E. 836, 83 Ind.App. 431.

Iowa.—City of Cherokee v. Northwestern Bell Telephone Co., 202 N. W. 886, 199 Iowa 727.

Ky.—City of Mayfield v. Reed, 127 S.W.2d 847, 278 Ky. 5—Plumlee's Adm'r v. Citizen's Nat. Bank of Bowling Green, 111 S.W.2d 607, 271 Ky. 226—Stoll Oil Refining Co. v. State Tax Commission, 296 S. W. 351, 221 Ky. 29—Herdon v. Brawner, 203 S.W. 727, 180 Ky. 807.

La.—Danna v. Yazoo & M. V. R. Co., App., 154 So. 365—Heidecker v. Fidelity & Casualty Co. of New York, App., 153 So. 35—General Lumber & Supply Co. v. Hunter, 134 So. 759, 17 La.App. 71.

Md.—Shirk v. Soper, 124 A. 911, 144 Md. 269.

Mass.—Whitley's Case, 147 N.E. 576, 252 Mass. 211.

Miss.—State v. Wyoming Mfg. Co., 103 So. 11, 138 Miss. 249—Maris v. Lindsey, 87 So. 12, 124 Miss. 742—Village of Zama v. Ayers Separate School Dist., 82 So. 313, 120 Miss. 444.

Mo.—Milby v. Murphy, App., 121 S. W.2d 169—Bloomcamp v. Missouri Pac. R. Co., 236 S.W. 388, 208 Mo. App. 464—Gammon v. McDowell, 235 S.W. 461, 208 Mo.App. 616.

Mont.—Crutchfield v. Nash, 276 P. 938, 84 Mont. 556.

Neb.—Patterson v. Kerr, 254 N.W. 704, 706, 127 Neb. 73, quoting *Corpus Juris*.

N.J.—Commercial Casualty Ins. Co. v. State Board of Tax Appeals, 194 A. 390, 119 N.J.Law 94, affirmed

198 A. 872, 120 N.J.Law 186—Price v. Central R. of New Jersey, 123 A. 756, 99 N.J.Law 425—In re O'Mara's Estate, 151 A. 67, 106 N. J.Eq. 311, reversing 139 A. 167, 101 N.J.Eq. 713.

N.Y.—Carbone v. Carbone, 2 N.Y.S.2d 869, 166 Misc. 924—In re Schroeder's Will, 163 N.Y.S. 958, 98 Misc. 92—Clonick v. Gordon, 11 N.Y.S. 2d 703.

Okl.—Hinkle v. Kenny, 62 P.2d 621, 178 Okl. 210.

Or.—State v. Aetna Casualty & Surety Co., 265 P. 782, 125 Or. 194—State v. U. S. Fidelity & Guaranty Co., 265 P. 775, 125 Or. 13—Walker v. Fireman's Fund Ins. Co., 257 P. 701, 122 Or. 179.

S.D.—Kapaun v. Federal Land Bank of Omaha, 269 N.W. 564, 64 S.D. 635, followed in Gilmore v. Federal Land Bank of Omaha, 269 N.W. 566, 64 S.D. 639, and Johnson v. Federal Land Bank of Omaha, 269 N.W. 567, 64 S.D. 640.

Tex.—Thompson v. Kay, 77 S.W.2d 201, 124 Tex. 252, affirming Kay v. Thompson, Civ.App., 40 S.W.2d 884—Huey v. Warner, 77 S.W.2d 201, 124 Tex. 252, affirming Warner v. Huey, Civ.App., 29 S.W.2d 452—Massey v. Citizens' Nat. Bank of Weatherford, 77 S.W.2d 201, 124 Tex. 252, affirming Massey v. Citizens' Nat. Bank, Civ.App., 28 S. W.2d 257—Gill v. Baird, 77 S.W.2d 201, 124 Tex. 252, affirming, Civ. App., 32 S.W.2d 941—Wilson v. Underhill, Civ.App., 131 S.W.2d 19—Friberg v. Scurry, Civ.App., 33 S. W.2d 762—Park v. South Bend Chilled Plow Co., Civ.App., 199 S. W. 843, error refused.

Va.—Mellon v. Purse Bros., 138 S.E. 647, 148 Va. 262—Kelly v. Trehy, 112 S.E. 757, 133 Va. 160.

Wash.—Great Northern Ry. Co. v. State, 93 P.2d 694—Lawe v. Department of Labor and Industries, 66 P.2d 848, 189 Wash. 650.

Wis.—Dorner v. Doherty, 267 N.W. 46, 222 Wis. 101.

15 C.J. p 944 note 16.
Construction of statutes of other states see supra § 204.

Uniform Negotiable Instruments Law

(1) Since the prime purpose of the Uniform Negotiable Instruments Law was uniformity in decision, the courts in construing that act should readily yield to precedent.—Fidelity & Casualty Co. of New York v. Planenscheck, 227 N.W. 387, 200 Wis. 304, 71 A.L.R. 331.

(2) However, only decisions interpreting the uniform act are entitled to much weight as precedents.—Harris v. Esterbrook, 226 N.W. 751, 55 S.D. 538, 70 A.L.R. 241.

(3) And cases under the act are to be decided without reference to the authority of decisions prior to the act, since such a practice would tend to destroy the uniformity of the act and to cause confusion in the law of commercial paper instead of making it clear.—Austin, Nichols & Co. v. Gross, 120 A. 596, 98 Conn. 782.

Insolvency statutes

The doctrine of stare decisis has been applied to decisions construing insolvency statutes.—McAllister v. Samuel, 17 Pa. 114—32 C.J. p 818 note 8.

Mortgage in statutory form

Since legislature has by statute construed meaning of statutory form of mortgage and court of appeals has definitely settled any uncertainty relative thereto, court cannot construe instrument according to apparent intent of parties if in statutory form.—Leakey v. Schwing, 270 N. Y.S. 69, 150 Misc. 150.

Decision as to repeal

A decision as to whether a particular statutory provision had been repealed is conclusive.—Osborne's Guardian v. Chatham, 226 S.W. 101, 189 Ky. 754.

Hypothetical judgments

The contemporaneous compliance of some surrogates with the state comptroller's request to make hypothetical judgments based on contingencies, is not a contemporary construction of the law which will control another surrogate.—In re Sprigarn's Estate, 159 N.Y.S. 605, 96 Misc. 141, reversed on other grounds 162 N.Y.S. 695, 175 App.Div. 806—59 C.J. p 1036 note 39.

61. Ky.—City of Mayfield v. Reed, 127 S.W.2d 847, 278 Ky. 5.

62. Ark.—Merchants' Transfer & Warehouse Co. v. Gates, 21 S.W.2d 406, 180 Ark. 96.

Minn.—Zochrisson v. Redemption Gold Corporation, 274 N.W. 536, 200 Minn. 383.

Mo.—Ramey v. Missouri Pac. R. Co., 21 S.W.2d 873, 323 Mo. 662, certiorari denied Missouri Pac. R. Co. v. Ramey, 50 S.Ct. 162, 280 U.S. 614, 74 L.Ed. 655.

Mont.—Montana Horse Products Co. v. Great Northern Ry. Co., 7 P.2d 919, 91 Mont. 194.

N.Y.—In re Bommer's Estate, 288 N. Y.S. 419, 159 Misc. 511.

Tenn.—Miller v. Kennedy, 51 S.W.2d 1000, 164 Tenn. 470.

Wis.—State v. City of Milwaukee, 246 N.W. 447, 210 Wis. 336.

Construction by single prior decision see supra § 186 f.

63. U.S.—Gulf, C. & S. F. Ry. Co. v. Moser, 48 S.Ct. 49, 275 U.S. 133, 72

unless such construction will affect contract or property rights.⁶⁴ However, while such decisions should not be disturbed unless there are cogent reasons for holding that the former construction was erroneous,⁶⁵ the rule is not so absolutely fixed as to preclude the overruling of decisions which are plainly erroneous.⁶⁶

Effect of acquiescence. This rule is especially applicable where the construction placed on a statute by previous decisions has been long acquiesced in⁶⁷

by the legislature, by its continued use or failure to change the language of the statute so construed,⁶⁸ the power to change the law as interpreted being regarded, in such circumstances, as one to be exercised solely by the legislature.⁶⁹

Nature of previous consideration; similarity of questions. In order that a decision be a precedent on the construction of a statute, within the rule of stare decisis, not only must the statute have been considered therein,⁷⁰ but the construction of the

L.Ed. 200, reversing, Tex.Civ.App., 277 S.W. 722, set aside to conform to mandate of Federal Supreme Court, 4 S.W.2d 1118, and certiorari granted 46 S.Ct. 489, 271 U.S. 655, 70 L.Ed. 1135—U. S. v. Republic Steel Corporation, D.C.Ohio, 11 F. Supp. 117.

Ky.—Erpenbeck v. City of Covington, 69 S.W.2d 338, 253 Ky. 233—Coleman v. Greene, 40 S.W.2d 283, 239 Ky. 680—Coleman v. Inland Gas Corporation, 21 S.W.2d 1030, 231 Ky. 637.

Mo.—Eberle v. Koplar, App., 85 S.W.2d 919.

N.Y.—Skrocki v. Greene, 274 N.Y.S. 1, 242 App.Div. 226—Los Angeles Inv. Securities Corporation v. Joslyn, 12 N.Y.S.2d 370.

N.C.—Williamson v. Rabon, 98 S.E. 830, 177 N.C. 302.

Tex.—Lyle v. State, 193 S.W. 680, 80 Tex.Cr. 606.

59 C.J. p 1036 note 40.

64. Mo.—State v. Missouri Athletic Club, 170 S.W. 904, 261 Mo. 576, L.R.A.1915C 876.

59 C.J. p 1036 note 41.

65. D.C.—Tumulty v. District of Columbia, 102 F.2d 254, 69 App.D. C. 390.

La.—State v. Standard Oil Co. of Louisiana, 182 So. 531, 180 La. 338.

Mo.—State ex rel. Pickett v. Truman, 64 S.W.2d 105, 333 Mo. 1018—Williams v. Williams, 30 S.W.2d 69, 325 Mo. 963.

N.Y.—In re Schinas's Will, 14 N.E. 2d 58, 277 N.Y. 252, modifying 297 N.Y.S. 243, 252 App.Div. 82, reargument denied 16 N.E.2d 128, 278 N.Y. 624.

Tenn.—Humphries v. Manhattan Sav. Bank & Trust Co., 122 S.W.2d 446, 15 C.J. p 945 note 18.

Reasons warranting reexamination

The magnitude of the interests involved and the fact that the last decision was by a divided court are sufficient reasons for a reexamination of the question.—Hubbard v. Bibb Brokerage Co., 160 S.E. 639, 647, 44 Ga.App. 1, quoting *Corpus Juris*—15 C.J. p 945 note 20.

66. Miss.—State v. Wyoming Mfg. Co., 103 So. 11, 138 Miss. 249.

N.C.—Patterson v. McCormick, 99 S. E. 401, 405, 177 N.C. 448, quoting *Corpus Juris*.

Pa.—Qualp v. James Stewart Co., 109 A. 780, 266 Pa. 502—McAllister v. Samuel, 17 Pa. 114.

Tex.—Wilson v. Underhill, Civ.App., 131 S.W.2d 19.

15 C.J. p 945 note 19, p 957 note 20 [h].

Inconsistence with legal principles

A decision, applying a statute in a manner "so inconsistent with recognized fundamental principles of law as [to] negative a legislative intent" that the statute be so applied will not be followed.—Mayes v. Mayes, App., 104 S.W.2d 1019, 1023, reversed on other grounds 116 S.W.2d 1, 342 Mo. 401.

67. Cal.—In re O'Connell, 189 P. 700, 182 Cal. 786—In re Riccardi, 189 P. 694, 182 Cal. 675.

Neb.—Patterson v. Kerr, 254 N.W. 704, 708, 127 Neb. 73, quoting *Corpus Juris*.

N.J.—Plumstead v. Roxbury Tp., Morris County, 151 A. 489, 8 N.J. Misc. 717, affirmed Roxbury Tp. v. Plumstead, 156 A. 657, 108 N.J. Law 202.

15 C.J. p 945 note 17.

68. Cal.—Standard Varnish Works v. Industrial Accident Commission of California, 239 P. 1067, 197 Cal. 143—Rapfogel v. Klassen, 197 P. 795, 185 Cal. 524.

Idaho.—Ex parte Speer, 23 P.2d 239, 53 Idaho 293, 88 A.L.R. 1086.

Ind.—Dailey v. Pugh, 131 N.E. 836, 83 Ind.App. 431.

Iowa.—City of Cherokee v. Northwestern Bell Telephone Co., 202 N.W. 886, 199 Iowa 727.

Ky.—Coleman v. Greene, 40 S.W.2d 283, 239 Ky. 680.

Or.—Cook v. Leona Mills Lumber Co., 212 P. 785, 107 Or. 520.

Pa.—In re Opperman's Estate, 179 A. 735, 319 Pa. 466.

Wis.—State v. City of Milwaukee, 246 N.W. 447, 210 Wis. 336.

59 C.J. p 1037 notes 45-47.

Legislative adoption of judicial construction as effected by:

Amendment see the C.J.S. title Statutes § 384, also 59 C.J. p 1095 note 13-p 1096 note 17.

Reenactment see the C.J.S. title Statutes § 370, also 59 C.J. p 1061 note 35-p 1064 note 53.

Revision and codification see the C.J.S. title Statutes § 385, also 59 C.J. p 1102 notes 92-95.

As indication of approval by the people

Where the legislature has twice met and is in session a third time since a decision construing a statute, and no amendment of the statute has been made, it must be concluded that the law as so construed has the approval of the people, and, unless unconstitutional, must be followed.—Board of Medical Examiners of Utah v. Blair, 196 P. 221, 57 Utah 516.

Attempts to procure modification

Decision, adopting construction rendering statute valid, which was accepted for more than five years as conclusive adjudication on question, persons objecting to such construction having attempted without success to procure modification by legislature of effect of that decision, will not be overruled merely because construction of legislative meaning may be doubtful.—Swiss Oil Corporation v. Shanks, 270 S.W. 478, 208 Ky. 64, affirmed 47 S.Ct. 393, 273 U.S. 407, 71 L.Ed. 709.

69. Idaho.—Ex parte Speer, 23 P.2d 239, 53 Idaho 293, 88 A.L.R. 1086.

Pa.—In re Opperman's Estate, 179 A. 735, 319 Pa. 466.

Wis.—State v. City of Milwaukee, 246 N.W. 447, 210 Wis. 336.

70. Miss.—Ætna Ins. Co. v. Commander, 153 So. 877, 169 Miss. 847.

Statute not expressly mentioned

A statute will be deemed to have been construed by a decision, although not expressly referred to in the opinion, where the statute was cited in the briefs and in the motion for rehearing, and the construction of the statute was the controlling question in the case.—Second Nat. Bank v. McGehee, Tex.Civ. App., 241 S.W. 287.

Cases decided before enactment of statute are not authority on construction of the statute.

U.S.—North Philadelphia Trust Co. v. Smith, C.C.A.N.J., 13 F.2d 585

statute must have been directly involved in the case,⁷¹ and necessary to a decision of the issues.⁷² However, decisions construing statutory provisions are controlling in later cases even though the relief sought or the remedy pursued is different, where the question involved under the statute is the same;⁷³ and while they are generally not authoritative where the particular question,⁷⁴ or the particular portion of the statute,⁷⁵ involved in the later case was not considered in the prior decisions, or where the facts in the earlier cases and the instant case are different,⁷⁶ they are binding where, while not deciding the precise point in question, they are in their logical implications of controlling significance.⁷⁷

A doctrine of law or equity may be decisive of a question under a statute, although not announced in a case in the supreme court wherein the statute was up for consideration.⁷⁸

Construction of similar statutes or provisions. While decisions construing earlier or other statutes are authoritative where such statutes are identical or nearly identical in language or in principle with the one under review,⁷⁹ particularly where it appears that the legislative body knew of the prior decisions,⁸⁰ the doctrine of stare decisis cannot be invoked in favor of decisions on statutes which, while similar in some respects, are essentially different.⁸¹ Likewise a judicial interpretation of one

Cal.—*Harlie R. Norris Co. v. Lovett*, 12 P.2d 141, 123 Cal.App. 640.

Presumption

Where supreme court's attention was not directed to a statute until a rehearing petition on a motion to re-tax costs was filed, it will be assumed, in determining whether case is a precedent, that court did not consider statute in question.—*Jose v. Hunter*, 124 N.E. 65, 63 Ind.App. 298.

71. Ind.—*McDougal v. State*, 108 N. E. 524, 183 Ind. 168.
15 C.J. p 945 note 30.

72. Mo.—*State ex rel. Dean v. Daues*, 14 S.W.2d 990, 321 Mo. 1126, quashing, App., *Dean v. Dean*, 1 S. W.2d 236, and conformed to 15 S. W.2d 1116.

73. U.S.—*U. S. v. Atchison, T. & S. F. R. Co.*, Colo., 163 F. 517, 90 C. C.A. 327.
15 C.J. p 944 note 16 [b]—51 C.J. p 1036 note 12.

74. U.S.—*U. S. ex rel. Arant v. Lane*, D.C., 38 S.Ct. 94, 245 U.S. 166, 62 L.Ed. 223.

Validity of ordinance or resolution

The validity of an ordinance or resolution, under a statute, is not conclusively determined by a former decision in which its validity was merely assumed.

Mass.—*Cawley v. Northern Waste Co.*, 132 N.E. 365, 239 Mass. 540.

Mich.—*Tetro v. Wayne County*, 277 N.W. 856, 283 Mich. 131.

Different application of statute

In determining the procedure to be followed in the county civil court, which was created by a statute which provides among other things that its proceedings are to be governed by the statutes relating to justice of the peace courts, highly technical decisions construing the latter statutes are not binding, where they are contrary to the legislative intent, manifested in other parts of the civil court act, to simplify procedure.—*State v. Delaney*, 164 N.W. 825, 168 Wis. 141.

75. Cal.—*Oakland Paving Co. v.*

Whittell Realty Co., 195 P. 1058, 185 Cal. 113.

Ga.—*Davis v. Whitcomb*, 118 S.E. 488, 30 Ga.App. 497.

Kan.—*Honn v. Elliott*, 295 P. 719, 132 Kan. 454.

15 C.J. p 944 note 16 [c].

Change in statute

In determining whether rule of procedure was changed by statute, supreme court was not bound by its decisions in previous cases, continuing to apply the former rule after the change had allegedly become effective, where the question had not been presented and considered in such previous cases.—*Walker v. Money*, Tex., 120 S.W.2d 428, affirming, Civ.App., 93 S.W.2d 602.

76. Cal.—*People v. Malowitz*, 24 P. 2d 177, 133 Cal.App. 250.

Pa.—*Nesbit v. Clark*, 116 A. 404, 272 Pa. 161, 25 A.L.R. 1406, certiorari denied 42 S.Ct. 273, 258 U.S. 621, 66 L.Ed. 795.

Burden of proving similarity of facts

Where the interpretation of a statute in a prior case is relied on by a party to an action, it is not necessary for him to show that the same facts exist which existed in and governed the determination of that case, but the opposite party should prove, before he can ask for a reversal of that decision, that such facts do not exist in the case at bar.—*Wood v. New York*, 73 N.Y. 556.

77. U.S.—*Farmers' Loan & Trust Co. v. U. S.*, D.C.N.Y., 9 F.2d 638—*Oklahoma City v. Orthwein*, Okl., 258 F. 190, 169 C.C.A. 258.

Trespass on Indian's property

Opinion that Indian allottee is entitled to protection under state laws against trespass by white man is conclusive as to similar right of allottee's white lessee.—*Red Hawk v. Joines*, 278 P. 572, 129 Or. 620.

78. Mo.—*State v. Reynolds*, 175 S.W. 575, 265 Mo. 88.

79. U.S.—*Audiffren Refrigerating Mach. Co. v. General Electric Co.*, D.C.N.J., 245 F. 783.

Cal.—*People v. Sayre*, 70 P.2d 546, 26 Cal.App.2d Supp. 759.

Colo.—*Madrid v. City of Trinidad*, 230 P. 1006, 76 Colo. 294.

Md.—*Kushnick v. Lake Drive Building & Loan Ass'n*, 139 A. 446, 153 Md. 638.

Mo.—*State ex inf. Ewing, ex rel. Long v. Sheridan Consol. School Dist. No. 1*, 274 S.W. 1073, 310 Mo. 258.

N.Y.—*Cook v. Lehigh Valley R. Co.*, 181 N.Y.S. 217.

Or.—*Homan v. Hirsch*, 211 P. 795, 106 Or. 98.

Pa.—*Borough of Somerset v. Barber*, 167 A. 501, 103 Pa.Super. 20.

Tex.—*Tisdale v. F. Hannes & Co.*, Civ.App., 278 S.W. 324.

Utah.—*Wrathall v. Miller*, 169 P. 946, 51 Utah 218.

Wis.—*State v. Arnold*, 203 N.W. 373, 186 Wis. 609.

References to other provisions

The fact that a decision, construing a statutory provision very similar to the one under review, refers to other provisions of the former statute, which are not contained in the latter statute, would not deprive such decision of weight in construing the latter statute, where such references were purely incidental.—*People v. Sayre*, 70 P.2d 546, 26 Cal.App.2d Supp. 759.

80. Or.—*Homan v. Hirsch*, 211 P. 795, 106 Or. 98.

Wis.—*State v. Arnold*, 203 N.W. 373, 186 Wis. 609.

81. U.S.—*Carter Oil Co. v. Scott*, D. C.Okl., 12 F.2d 780, reversed on other grounds, C.C.A., *Knight v. Carter Oil Co.*, 23 F.2d 481.

Ga.—*Turner v. Sitton*, 127 S.E. 847, 160 Ga. 215.

Iowa.—*State v. Richardson*, 249 N. W. 211, 216 Iowa 809, affirming 240 N.W. 695—*State v. Marshall*, 211 N. W. 252, 202 Iowa 954—*Post v. Davis County*, 191 N.W. 129, 196 Iowa 183, rehearing overruled 194 N.W. 245, 196 Iowa 183.

N.Y.—*In re Assignment for Benefit of Creditors of New York's Little*

part of a section of a statute will be followed in interpreting another part to the extent that the substantive effect of the language of both parts is the same.⁸²

Decisions as to meanings of particular words. In determining the meaning and scope of particular words used in a statute, courts are bound not only by decisions under the statute,⁸³ but also by decisions defining the words with respect to the general subject,⁸⁴ unless a different meaning is unmistakably indicated.⁸⁵ However, a judicial definition of a term in one statute is not controlling as to the meaning of the same term in another statute which is materially different.⁸⁶

Effect of matters subsequent to decision. In construing statutes, the law most recently established prevails over conflicting law previously established,⁸⁷ and a prior construction of a statute is not binding after such statute, by being made part of another statute having a different application, be-

comes a restatement of a constitutional provision, to be guided by decisions, if any, as to such provision;⁸⁸ but it has been held that decisions construing a statute may be looked to even after the statute has been changed, in order to aid in determining related matters.⁸⁹ Where a decision construing a statute was influenced by another statute, the repeal of the latter statute will not affect the conclusiveness of the decision where there was no intention, by such repeal, to change the law.⁹⁰

§ 215. Construction of Constitutional Provisions; Constitutionality of Statutes

Ordinarily courts will not inquire into constitutional questions previously decided.

It is generally held that a court will not as a rule inquire into the construction of a constitutional provision or the constitutionality of a statute or ordinance where this question has been passed on in previous decisions⁹¹ by a court of last re-

Bohemia, 12 N.Y.S.2d 446, 171 Misc. 236—Onondaga Water Service Corporation v. Crown Mills, 230 N.Y. S. 691, 132 Misc. 848—In re Eckenroth's Will, 4 N.Y.S.2d 582, 167 Misc. 632.

N.D.—Federal Farm Mortgage Corporation v. Falk, 270 N.W. 885, 893, 67 N.D. 154, citing *Corpus Juris*.
S.D.—York Business College v. Kost, 221 N.W. 673, 53 S.D. 590, followed in Mahaffey v. Whitney, 221 N.W. 674, 53 S.D. 593.
15 C.J. p 945 note 27.

Construction of exemption statute

Decision construing exemption statute relating to taxability of business corporation was held not binding on court in construction of statute exempting income of estate distributable to charitable corporation.—Potter v. Bowers, C.C.A.N.Y., 89 F. 2d 687, reversing, D.C., 15 F.Supp. 724.

82. U.S.—Neirbo Co. v. Bethlehem Shipbuilding Corporation, C.C.A.N.Y., 103 F.2d 765, certiorari granted 59 S.Ct. 1037, 207 U.S. 619, 83 L.Ed. 1499, reversed on other grounds 80 S.Ct. 153.

Wash.—Schade v. Western Union Life Ins. Co., 215 P. 521, 125 Wash. 200.

83. U.S.—U. S. v. North American Mercantile Co., 17 C.C.P.A. 378—U. S. v. Ben Felsenthal & Co., 16 Ct.Cust.App. 15.
59 C.J. p 1036 note 42.

84. Mass.—Commonwealth v. Flynn, 188 N.E. 627, 285 Mass. 136, 92 A.L.R. 206.

59 C.J. p 1036 note 42.

85. Pa.—Qualp v. James Stewart Co., 109 A. 780, 266 Pa. 502.
59 C.J. p 1036 note 42.

86. Ark.—Drainage Dist. No. 9 of Miller County v. Merchants' & Planters' Bank, 2 S.W.2d 1079, 176 Ark. 474.

Mo.—Sawtell v. Stern Bros. & Co., 44 S.W.2d 264, 226 Mo.App. 485.

"Agricultural labor"

Decisions under the Workmen's Compensation Act as to meaning of "agricultural labor" are of no significance in determining meaning of term under Unemployment Compensation Act.—H. Duys & Co. v. Tone, 5 A.2d 23, 125 Conn. 300.

"Within the state"

Construction of words "within the state" as used in state taxing statute affecting business of carrier crossing state line, as meaning purely intra-state business is not to be applied always to similar state statutes, but they must be construed in accordance with legislative intent in enacting the particular statute.—Converse v. Northern Pac. Ry. Co., C.C.A.N.D., 2 F.2d 959.

87. N.Y.—People v. Propp, 15 N.Y. S.2d 83, 172 Misc. 314.

88. Md.—Ghingher v. Stockholders of Peoples Banking Co. of Smithsburg, 182 A. 558, 169 Md. 673, followed Ghingher v. Stockholders of Hagerstown Bank & Trust Co., 182 A. 566, 169 Md. 696, affirmed Stockholders of Peoples Banking Co. of Smithsburg, Md., v. Sterling, 57 S. Ct. 386, 300 U.S. 175, 81 L.Ed. 586.

89. Tex.—Ex parte Cole, 230 S.W. 175, 89 Tex.Cr. 185.

90. Kan.—City of Topeka v. Wasson, 168 P. 902, 101 Kan. 824.

91. U.S.—Cox v. Wood, Kan., 38 S. Ct. 421, 247 U.S. 3, 62 L.Ed. 947—Gibson v. Stiles, C.C.A.Tex., 90 F. 2d 998—Helmbright v. John A. Ge-

belein, Inc., D.C.Md., 19 F.Supp. 621—In re Cheney Bros., D.C. Conn., 12 F.Supp. 605—In re Jones, D.C.Mo., 10 F.Supp. 165.

Ala.—Scott v. Alabama State Bridge Corporation, 169 So. 273, 233 Ala. 12.

Conn.—Preveslin v. Derby & Ansonia Developing Co., 151 A. 518, 112 Conn. 129, 70 A.L.R. 1426.

Fla.—Economy Cash & Carry Laundry v. Florida Dry Cleaning and Laundry Board, 186 So. 422—State ex rel. Landis v. Ault, 176 So. 789, 129 Fla. 686.

Ill.—People v. Illinois Cent. R. Co., 142 N.E. 473, 311 Ill. 113—People v. Simmons, 132 N.E. 423, 299 Ill. 201.

Ind.—Borgman v. City of Fort Wayne, 18 N.E.2d 762.

Iowa.—First Trust Joint Stock Land Bank of Chicago v. Arp, 283 N.W. 441, 225 Iowa 1331, 120 A.L.R. 932—Metropolitan Life Ins. Co. of City of New York v. McDonald, 283 N.W. 445, 225 Iowa 1075—John Hancock Mut. Life Ins. Co. v. Eggland, 283 N.W. 444, 225 Iowa 1073.

Ky.—Jefferson County Fiscal Court v. Thomas, 130 S.W.2d 60, 279 Ky. 458—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739—Nuetzel v. Southern Bell Telephone & Telegraph Co., 295 S.W. 976, 220 Ky. 632.

Mo.—St. Louis Poster Advertising Co. v. City of St. Louis, 195 S.W. 717, affirmed 39 S.Ct. 274, 249 U.S. 269, 63 L.Ed. 599.

Neb.—Malin v. Housel, 181 N.W. 934, 105 Neb. 784.

N.J.—Maxwell v. Edwards, 99 A. 138, 89 N.J.Law 446, affirmed 101 A. 248, 90 N.J.Law 707, which is affirmed Maxwell v. Bugbee, 40 S.Ct.

sort,⁹² even though a different result might be desirable,⁹³ unless such previous decisions are manifestly erroneous,⁹⁴ and there are cogent reasons for

2, 250 U.S. 525, 63 L.Ed. 1124—Byrnes v. Boulevard Com'rs of Hudson County, 197 A. 667, 16 N.J. Misc. 141, affirmed 3 A.2d 456, 121 N.J.Law 497.

N.Y.—In re 1175 Evergreen Ave., Borough and County of Bronx, 1 N.E.2d 838, 270 N.Y. 436, affirming In re 1175 Evergreen Ave., City of New York, County of Bronx, 284 N.Y.S. 16, 158 Misc. 158, amendment of remittitur denied In re Mortgage Commission of State of New York, 3 N.E.2d 885—People, on Complaint of West, v. Princeton, Inc., 278 N.Y.S. 631, 154 Misc. 811.

Okl.—Ex parte Barnett, 69 P.2d 643, 180 Okl. 208, appeal dismissed Barnett v. Rogers, 58 S.Ct. 363, 302 U.S. 655, 82 L.Ed. 507, rehearing denied 58 S.Ct. 476, 302 U.S. 780, 82 L.Ed. 603—Ex parte Meek, 25 P.2d 54, 165 Okl. 80—Protest of Downing, 23 P.2d 173, 164 Okl. 181—State v. Sneed, 287 P. 1021, 143 Okl. 142—Ex parte Buchanan, 240 P. 699, 113 Okl. 194.

Or.—State v. Olcott, 187 P. 286, 94 Or. 633—Olcott v. Hoff, 181 P. 466, 92 Or. 462.

Pa.—Long v. Metzger, 152 A. 572, 301 Pa. 449, certiorari denied 51 S.Ct. 346, 283 U.S. 822, 75 L.Ed. 1437—Commonwealth v. Gardner, 147 A. 527, 297 Pa. 498, denying appeal 96 Pa.Super. 450—Commonwealth v. Hudson Coal Co., 134 A. 413, 287 Pa. 64, error dismissed Hudson Coal Co. v. Commonwealth of Pennsylvania, 48 S.Ct. 17, 275 U.S. 575, 72 L.Ed. 434.

Tenn.—Gill v. McKinney, 205 S.W. 416, 140 Tenn. 549.

Tex.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—State ex rel. Wilson v. Barber, Civ.App., 115 S.W.2d 1137.

Utah.—State v. Packer Corporation, 2 P.2d 114, affirmed Packer Corporation v. State of Utah, 52 S.Ct. 273, 285 U.S. 105, 76 L.Ed. 643, 79 A.L.R. 546—Utah Hotel Co. v. Public Utilities Commission of Utah, 204 P. 511, 59 Utah 389.

Wash.—State v. Natsuhara, 240 P. 557, 136 Wash. 437.

15 C.J. p 945 note 33—12 C.J. p 698 note 63.

Construction of constitution of another state by its courts see *supra* § 204.

Reason for rule

Principles of public policy demand that a fixed construction of constitutional law should not be unsettled, unless clearly erroneous.

Mont.—State ex rel. Kain v. Fischl, 20 P.2d 1057, 94 Mont. 92.

Tenn.—Humphries v. Manhattan Sav. Bank & Trust Co., 122 S.W.2d 446, 15 C.J. p 946 note 34.

Changing circumstances

(1) That times and conditions have changed affords no reason for holding unconstitutional an act which was once approved on judicial review and has stood unchallenged for nearly a third of a century since such decision was announced.—State v. Cranston, Idaho, 85 P.2d 682.

(2) However, since a police regulation, valid when made, may become, by reason of later events, arbitrary and confiscatory in operation, a former decision sustaining such a regulation does not preclude subsequent suit to test validity of assessments thereunder in light of later actual experience.

U.S.—Able State Bank v. Weaver, 51 S.Ct. 252, 282 U.S. 765, 75 L.Ed. 690, affirming 227 N.W. 922, 119 Neb. 153.

Neb.—Hubbell Bank v. Bryan, 245 N.W. 20, 124 Neb. 51, certiorari denied Bryan v. Hubbell Bank of Hubbell, Nebraska, 53 S.Ct. 785, 289 U.S. 753, 77 L.Ed. 1493.

(3) It has been held that a decision on a constitutional question need not be followed where the facts in the instant case are different from those in the former decision, particularly where the former decision was dictum and erroneous.—Prall v. Burckhardt, 132 N.E. 280, 299 Ill. 19, 13 A.L.R. 992.

Same parties; same ground

Court, having several times upheld the constitutionality of a statute, will not, where it is subsequently raised by the same parties on the same ground, further consider the matter, it being to the interest of the public that litigation have an end.—State ex rel. Buchanan County v. Imel, 219 S.W. 638, 280 Mo. 565—State ex rel. Buchanan County v. Imel, 219 S.W. 634, 280 Mo. 554.

92. U.S.—Keogh v. Neely, C.C.A.III, 50 F.2d 685, appeal dismissed and certiorari denied 52 S.Ct. 39, 284 U.S. 583, 76 L.Ed. 504—Cain v. U. S., C.C.A.Minn., 19 F.2d 472—Hooper v. U. S., C.C.A.Cal., 16 F.2d 368, certiorari denied 47 S.Ct. 587, 274 U.S. 743, 763, 71 L.Ed. 1321—Sofge v. Snook, C.C.A.Ga., 15 F.2d 561, certiorari denied 47 S.Ct. 344, 273 U.S. 745, 71 L.Ed. 370—Teter v. U. S., C.C.A.Ind., 12 F.2d 224, certiorari denied 47 S.Ct. 99, 273 U.S. 706, 71 L.Ed. 850—U. S. v. National Garment Co., D.C.Mo., 10 F.Supp. 104.

Ala.—Thornhill v. State, 189 So. 813, 28 Ala.App. 527, certiorari denied 189 So. 914, certiorari granted Thornhill v. State of Alabama, 60 S.Ct. 296.

Cal.—Miami Valley Coated Paper

Co. v. Pacific Nat. Bank, 57 P.2d 233, 13 Cal.App.2d 621—State v. San Francisco Savings & Loan Soc., 225 P. 309, 66 Cal.App. 53.

Ind.—Public Utilities Co. v. Reader, 122 N.E. 26, 71 Ind.App. 485.

Mo.—Lieber v. Hell, App., 32 S.W.2d 792.

N.Y.—In re Andrews' Estate, 232 N.Y.S. 202, 133 Misc. 369.

S.C.—Williamson v. Richards, 155 S.E. 890, 158 S.C. 534.

Higher court not bound by lower

The decision of an inferior court on a constitutional question is not binding on the supreme court.—Dennery v. State, 42 N.E. 929, 144 Ind. 503, 31 L.R.A. 726.

The rule of statutory construction. That when a statute has been construed by the highest court having jurisdiction to pass on it, such construction is as much a part of the statute as if plainly written into it originally, applies to the construction of constitutions.

N.Y.—Los Angeles Inv. Securities Corporation v. Joslyn, 12 N.Y.S.2d 370.

Tex.—Lyle v. State, Cr., 193 S.W. 680.

93. U.S.—In re Lindsay-Strathmore Irr. Dist., D.C.Cal., 21 F.Supp. 129, motion denied U. S. v. Bekins, 58 S.Ct. 647, and Lindsay-Strathmore Irr. Dist. v. Bekins, 58 S.Ct. 649, reversed on other grounds U. S. v. Bekins, 58 S.Ct. 811, 304 U.S. 27, 82 L.Ed. 1137, rehearing denied 58 S.Ct. 1043, 304 U.S. 589, 82 L.Ed. 1549, and Lindsay-Strathmore Irr. Dist. v. Bekins, 58 S.Ct. 1044, 304 U.S. 589, 82 L.Ed. 1549.

Ark.—Tindall v. Searan, 90 S.W.2d 476, 192 Ark. 173.

Ky.—Bankers Bond Co. v. Buckingham, 97 S.W.2d 596, 265 Ky. 712.

La.—State ex rel. Fernandez v. Feucht, App., 163 So. 761.

Tex.—Fearis v. Gafford, Civ.App., 204 S.W. 675—El Paso Sash & Door Co. v. Carraway, Civ.App., 186 S.W. 363, error dismissed 38 S.Ct. 222, 245 U.S. 643, 62 L.Ed. 528.

Wash.—State v. Showalter, 293 P. 1000, 159 Wash. 519, appeal dismissed State of Washington ex rel. Clithero v. Showalter, 52 S.Ct. 15, 284 U.S. 573, 76 L.Ed. 498.

94. Miss.—State v. Jones, 64 So. 241, 106 Miss. 522, suggestion of writ overruled 64 So. 469.

Mont.—State ex rel. Sparling v. Hitsman, 44 P.2d 747, 749, 99 Mont. 521, citing *Corpus Juris*—State ex rel. Kain v. Fischl, 20 P.2d 1057, 94 Mont. 92.

N.C.—Collie v. Franklin County, 59 S.E. 44, 145 N.C. 170.

overruling them;⁹⁵ and this is especially true where such decisions have been long relied on as authoritative,⁹⁶ or where such decisions have become rules of property, as shown *infra* § 216.

However, it has been stated in some early cases that the doctrine of stare decisis cannot control questions involving the construction and interpretation of the organic law at least where no rule of property is involved,⁹⁷ or at least that the doctrine does not apply with the same force to decisions on constitutional questions as to other decisions,⁹⁸ and while previous decisions will not be entirely disregarded and may, in case of doubt, control the views of the court, they will be considered merely as authorities tending to aid in arriving at a proper conclusion, and not as a rule to be followed without inquiry.⁹⁹

Questions not expressly considered. While prior

decisions in which the construction of a constitutional provision or the constitutionality of a statute was assumed, but not expressly raised or considered, are not ordinarily controlling,¹ at least if that question was not necessarily involved in the case,² it has been held that prior decisions vesting property rights under a statute are stare decisis as to the constitutionality of the statute, even though that question was not expressly considered.³ Also, it has been held that a statute will be assumed to have been held invalid, even though it was not mentioned in the opinion, where evidence of its invalidity was submitted to the court, and the result reached obviously gave no effect to the statute.⁴

Moreover, while it has been held that a previous decision upholding the constitutionality of a statute concludes all objections to its constitutionality, whether such objections were considered in the previous case or not,⁵ it is more commonly held that a

Pa.—*Luzerne County v. Morgan*, 107 A. 17, 263 Pa. 458.
Tex.—*Willis v. Owen*, 43 Tex. 41, 15 C.J. p 946 note 34.

Court's duty to maintain fundamental law forbids extension of erroneous decision on constitutional question under doctrine of stare decisis.

U.S.—*Pollock v. Farmers' Loan & Trust Co.*, N.Y., 15 S.Ct. 673, 157 U.S. 429, 39 L.Ed. 759.

Wash.—*State v. Savidge*, 253 P. 1, 144 Wash. 302.

95. Ind.—*Kassabaum v. Board of Finance of Town of Lakeville*, St. Joseph County, 20 N.E.2d 642, followed in *Kassabaum v. Board of Finance of Union Tp.*, St. Joseph County, 20 N.E.2d 646.

Md.—*Goldman v. Crowther*, 123 A. 50, 147 Md. 282, 38 A.L.R. 1455.

Okla.—*Phelps v. Childers*, 89 P.2d 732, 184 Okl. 421.

Tenn.—*Humphries v. Manhattan Sav. Bank & Trust Co.*, 122 S.W. 2d 446.

15 C.J. p 945 note 33 [d].

96. Ark.—*O'Daniel v. Brunswick Balke Collender Co.*, 113 S.W.2d 717, 195 Ark. 669—*Cummock v. Alexander*, 213 S.W. 767, 139 Ark. 158.

Cal.—*Bayley v. Garrison*, 214 P. 371, 190 Cal. 690.

Colo.—*Maryland Casualty Co. v. Industrial Commission*, 283 P. 548, 36 Colo. 553.

Fla.—*Atlantic Coast Line R. Co. v. Richardson*, 157 So. 17, 117 Fla. 10.

Neb.—*Taxpayers League of Wayne County v. Benthack*, 285 N.W. 577.

S.C.—*State v. Moorer*, 150 S.E. 269, 152 S.C. 455, appeal dismissed and certiorari denied *Johnson v. State Highway Commission of South*

Carolina, 50 S.Ct. 238, 281 U.S. 691, 74 L.Ed. 1120.

Wash.—*State v. Hurn*, 180 P. 400, 106 Wash. 362.

Change as involving untold hardship
Where provision of constitution limiting debt of municipalities had been construed in prior case, court would not adopt new meaning, especially where it was inevitable that untold hardship would follow an adoption of new meaning contended for.—*Duane v. City of Philadelphia*, 185 A. 401, 322 Pa. 33.

97. Ind.—*Jackson County v. State*, 58 N.E. 1037, 155 Ind. 604, 15 C.J. p 946 note 35.

98. Ind.—*In re Todd*, 193 N.E. 865, 208 Ind. 168.

Pa.—*Lipoff v. United Food Workers Industrial Union, Local No. 107*, 33 Pa.Dist. & Co. 599, 15 C.J. p 947 note 36.

Lower courts bound

The doctrine of stare decisis has no binding application to constitutional questions, and courts are always free to reexamine the reasons for decisions in that field of law when similar questions arise, but lower courts will be precluded from overruling a previous decision of the appellate court on such a question.—*Wilson v. School Dist. of Philadelphia*, 31 Pa.Dist. & Co. 177.

99. N.C.—*Elliott v. Gardner*, 166 S. E. 918, 203 N.C. 749, 15 C.J. p 947 note 37.

1. Ariz.—*Arizona State Bank v. Crystal Ice & Cold Storage Co.*, 224 P. 622, 26 Ariz. 205, modifying on rehearing 222 P. 407, 26 Ariz. 82.

Mass.—*Vigeant v. Postal Telegraph Cable Co.*, 157 N.E. 651, 280 Mass. 335, 53 A.L.R. 867.

N.J.—*Virtue v. Essex County*, 50 A. 360, 67 N.J.Law 139.

N.Y.—*College of City of New York v. Hylan*, 199 N.Y.S. 634, 120 Misc. 314, affirmed 199 N.Y.S. 804, 205 App.Div. 372, which is affirmed 142 N.E. 297, 236 N.Y. 594.

Wis.—*Scobie v. Wisconsin Tax Commission*, 275 N.W. 531, 225 Wis. 529.

Single prior decision construing statute

S.D.—*Gibbs v. Bergh*, 214 N.W. 338, 51 S.D. 432.

2. Ark.—*Ellison v. Oliver*, 227 S.W. 586, 588, 147 Ark. 252.

"The construction of a provision of the Constitution is a matter of too much public importance to be decided by the mere omission of the court to pass upon a question in a given action unless the decision of the case necessarily involves a construction of the provision of the Constitution in the respect named."—*Ellison v. Oliver*, *supra*.

3. Tex.—*Cockrell v. Work*, Civ.App., 17 S.W.2d 174, affirmed 61 S.W.2d 787, 122 Tex. 406.

15 C.J. p 949 note 45 [a].

Decisions constituting rules of property generally see *infra* § 216.

Reason for rule

"It must be presumed that the Supreme Court, before vesting property rights upon an act of the Legislature, first determines its constitutionality."—*Cockrell v. Work*, Civ. App., 17 S.W.2d 174, 176, affirmed 61 S.W.2d 787, 122 Tex. 406.

4. Ill.—*Smith v. Niemann*, 216 Ill. App. 179.

5. Va.—*Miller v. State Entomologist*, 135 S.E. 813, 146 Va. 175, 67 A.L.R. 197, affirmed *Miller v. Schoene*, 48 S.Ct. 246, 276 U.S. 272,

decision that a statute is constitutional does not preclude the court from subsequently declaring it unconstitutional in a case where it is attacked on grounds other than those presented in the former case.⁶

Similar enactments; amendments. While it has been held that a decision on the validity of a statute may be reconsidered where the constitutional inter-

pretation of another statute is affected by the previous decision,⁷ it has also been held that, where two enactments are substantially identical, a decision as to the validity of one is decisive of the validity of the other.⁸ However, decisions as to the constitutionality of a statute are not controlling as to the validity of a later statute or ordinance which is essentially different,⁹ even though the grounds of at-

72 L.Ed. 568—City of Portsmouth v. Weiss, 133 S.E. 781, 145 Va. 94, 15 C.J. p 945 note 33 [c].

"Since we had decided in previous cases that the legislation was valid . . . it was not necessary for the court to determine to which parts of the legislation the new challenge was properly directed or whether the constitutional questions properly raised were substantial. However raised and whether substantial or not, our answer was given in our previous opinions and decisions and it was immaterial in this court whether the answer had a wider scope than the questions properly presented."—Honeyman v. Hanan, 9 N.E.2d 970, 973, 275 N.Y. 382, affirming 285 N.Y.S. 527, 246 App.Div. 781, reargument denied 285 N.Y.S. 1084, 246 App.Div. 829, affirmed 3 N.E.2d 186, 271 N.Y. 564, remittitur amended 3 N.E.2d 473, 271 N.Y. 662, vacated 57 S.Ct. 350, 300 U.S. 14, 81 L.Ed. 476, remittitur amended 3 N.E.2d 618, 274 N.Y. 490, remittitur amended 11 N.E.2d 788, 275 N.Y. 625, appeal dismissed 58 S.Ct. 273, 302 U.S. 375, 82 L.Ed. 312.

Judicial notice of state of law

It will be presumed that the United States supreme court took judicial notice of the state of law existing at the time it rendered its decision upholding the validity of a statute, thereby foreclosing an objection based on the effect of another statute, where such objection was raised in a later case involving a similar statute under similar circumstances.—Schenley Products Co. v. Franklin Stores Co., 199 A. 402, 124 N.J.Eq. 100, reversing 192 A. 375, 122 N.J.Eq. 69.

6. U.S.—C. J. Tower & Sons v. U. S., Cust. & Pat.App., 71 F.2d 438. Ala.—Boyd v. State, 53 Ala. 601.

III.—Parks v. Libbey-Owens-Ford Glass Co., 195 N.E. 616, 360 Ill. 130—People v. Bruner, 175 N.E. 400, 343 Ill. 146.

La.—State ex rel. Curtis v. Ross, 81 So. 386, 144 La. 898.

Pa.—Wilson v. School Dist. of Philadelphia, 31 Pa.Dist. & Co. 177, modified on other grounds 195 A. 90, 328 Pa. 226, 113 A.L.R. 1401. 15 C.J. p 947 note 38.

Particular provisions

(1) A decision sustaining the constitutionality of a statute as a whole

is authoritative as to a particular provision of which the court, in its statement of the contents of the act, took note.—Haas v. Greenwald, 237 P. 38, 196 Cal. 236, 59 A.L.R. 1493, affirmed 48 S.Ct. 33, 275 U.S. 490, 72 L.Ed. 389.

(2) A decision as to constitutionality of statutory provision does not prevent consideration of constitutionality of another independent provision of same statute.—Tyler v. U. S., D.C.Md., 28 F.2d 887, reversed on other grounds, C.C.A., U. S. v. Tyler, 33 F.2d 724, certiorari granted Tyler v. U. S., 50 S.Ct. 81, 280 U.S. 548, 74 L.Ed. 607, and affirmed 50 S.Ct. 356, 281 U.S. 497, 74 L.Ed. 991, 69 A.L.R. 758, reversing, C.C.A., U. S. v. Provident Trust Co. of Pennsylvania, 35 F.2d 339, certiorari granted 50 S.Ct. 160, 280 U.S. 551, 74 L.Ed. 609, and followed in, C.C.A., Commissioner of Internal Revenue v. Girard Trust Co., 35 F.2d 343.

(3) Decision of the United States supreme court, if a holding that the Minimum Wage Law is violative of the federal constitution in so far as the act relates to adult women, does not constitute a holding that the act is unconstitutional as to minors, where court took pains to exclude from consideration the right of the legislature to fix a minimum wage for minors.—Stevenson v. St. Clair, 201 N.W. 629, 161 Minn. 444.

7. U.S.—West Coast Hotel Co. v. Parrish, 57 S.Ct. 578, 300 U.S. 379, 81 L.Ed. 703, 108 A.L.R. 1330, affirming Parrish v. West Coast Hotel Co., 55 P.2d 1033, 185 Wash. 581.

N.Y.—Abbye Employment Agency v. Robinson, 2 N.Y.S.2d 947, 166 Misc. 820.

"Stare decisis has no real place in constitutional law when the validity of another statute is under consideration."—Commonwealth ex rel. Margiotti v. Lawrence, 193 A. 46, 48, 326 Pa. 526—Heisler v. Thomas Colliery Co., 118 A. 394, 395, 274 Pa. 448.

3. Md.—Billig v. State, 145 A. 492, 157 Md. 185.

N.J.—Schenley Products Co. v. Franklin Stores Co., 199 A. 402, 124 N.J.Eq. 100, reversing 192 A. 375, 122 N.J.Eq. 69.

15 C.J. p 945 note 33 [c].

Determination of distinctions

Court of appeals will not attempt

to determine whether there are distinctions between present and former laws that would cause supreme court to change opinion as to validity.—Chastleton Corporation v. Sinclair, 290 F. 348, 53 App.D.C. 373, reversed on other grounds 44 S.Ct. 405, 264 U.S. 543, 68 L.Ed. 841.

Acceptance of finding of emergency by legislature

Federal supreme court having acquiesced in state legislature's finding of emergency producing wide-spread unemployment in opinion sustaining validity of state law, district court must accept a similar finding by congress in determining validity of federal law.—U. S. v. Suburban Motor Service Corporation, D.C.Ill., 5 F. Supp. 798.

Statute upheld by inference

Previous decisions upholding by inference the constitutionality of a statute are entitled to great weight in determining the validity of another statute which is almost identical with the first.—Cornell v. Harris, 59 P.2d 570, 15 Cal.App.2d 144, followed in 59 P.2d 575, 15 Cal. App.2d 763.

Effect of particular phrase

A decision as to the effect of a particular phrase on the constitutionality of a statute is controlling in a case involving an identical phrase in a similar statute.—Commonwealth v. Gardner, 147 A. 527, 297 Pa. 498, denying appeal 96 Pa.Super. 450.

9. U.S.—U. S. v. H. P. Hood & Sons, D.C.Mass., 26 F.Supp. 672—In re Consolidation Coal Co., D.C. Md., 11 F.Supp. 594, appeal dismissed, C.C.A., Doersam v. Consolidation Coal Co., 79 F.2d 939.

Fla.—Bentley-Gray Dry Goods Co. v. City of Tampa, 188 So. 758.

Ill.—People v. Thompson, 119 N.E. 41, 283 Ill. 87, L.R.A.1918D, 382.

Statutes of other jurisdictions

(1) In considering the validity, under the federal constitution, of a state statute substantially similar to a statute of another state, contrary decision as to statute of the other state by the United States supreme court is not necessarily controlling on state court if it can be fairly demonstrated that the statutes are not identical, or, for other reasons, should receive different interpretations.—Abbye Employment Agency v.

tack are the same.¹⁰ Although a decision that an act was constitutional is not conclusive of the validity of an amending act which made substantial changes in the original act,¹¹ a decision that a statute is valid on one ground of attack is conclusive on that question as to all purposes embodied in an amendatory act which merely broadened the purposes of the original act.¹² A decision construing a term in a constitution is controlling in construing the same term, used in a similar clause, in a later constitution.¹³

§ 216. Decisions Constituting Rules of Property

Subject to some exceptions, final decisions of courts of last resort which have become established rules of property will ordinarily be adhered to even when erroneous.

Where judicial decisions may be fairly presumed to have entered into the business transactions of a country, and have become established as rules of property, it is the duty of the court, on the principle of stare decisis, to adhere to such decisions without regard to how it might be inclined to decide if the question were new,¹⁴ and they should not be dis-

Robinson, 2 N.Y.S.2d 947, 166 Misc. 820.

(2) In determining the validity of condemnation proceedings under a federal statute, decisions dealing with such proceedings under state statutes are not controlling, since, the powers of the two sovereignties being different, what is a public use under one sovereign may not be a public use under the other.—U. S. v. Certain Lands in City of Louisville, Jefferson County, Ky., C.C.A.Ky., 78 F.2d 684, affirming, D.C., 9 F.Supp. 137, and certiorari granted U. S. v. Certain Lands in City of Louisville, 56 S.Ct. 154, 296 U.S. 567, 80 L.Ed. 400, affirmed 56 S.Ct. 594, 297 U.S. 726, 80 L.Ed. 1009.

New statute incorporating old

The constitutionality of a statute is not conclusively determined by a decision as to a prior statute which constitutes part of the statute under review, since the affinity of the parts is not the affinity of the whole.—R. C. Tway Coal Co. v. Glenn, D. C.Ky., 12 F.Supp. 570.

10. Mo.—State v. Missouri Pac. R. Co., 147 S.W. 118, 242 Mo. 339.

11. Pa.—Wilson v. School Dist. of Philadelphia, 81 Pa. Dist. & Co. 177, modified on other grounds 195 A. 90, 328 Pa. 225, 113 A.L.R. 1401.

12. Ky.—Jefferson County Fiscal Court v. Thomas, 130 S.W.2d 60, 279 Ky. 458.

13. La.—State v. Up-To-Date Shoe Repairing Co., 144 So. 714, 175 La. 917.

14. U.S.—U. S. v. Title Insurance & Trust Co., Cal., 44 S.Ct. 621, 265 U.S. 472, 68 L.Ed. 1110, affirming, C.C.A., 288 F. 821—Dunn v. Micoe, C.C.A.Okl., 106 F.2d 356, certiorari denied 60 S.Ct. 296, rehearing denied 60 S.Ct. 382—Johnson v. U. S., C.C.A.Okl., 64 F.2d 674, certiorari denied 54 S.Ct. 68, two cases, 290 U.S. 651, 78 L.Ed. 565—Knight v. Carter Oil Co., C.C.A. Okl., 23 F.2d 481, reversing Carter Oil Co. v. Scott, D.C., 12 F.2d 780—Del Galzo Distributing Corp. v. U. S., 24 Cust. & Pat.App. 64—

Arnhold & Co. v. U. S., 22 Cust. & Pat.App. 23.

Ark.—Hobbs v. Lenon, 87 S.W.2d 6, 191 Ark. 509—Burel v. Grand Lodge, I. O. O. F., 259 S.W. 369, 163 Ark. 131.

Cal.—Bock v. City of Oakland, 64 P. 2d 1098, 19 Cal.App.2d 115.

D.C.—Burgoon v. Lavezzo, 92 F.2d 726, 68 App.D.C. 20, 113 A.L.R. 944.

Fla.—Alta-Cliff Co. v. Spurway, 152 So. 721, 113 Fla. 633—State ex rel. Molter v. Johnson, 144 So. 299, 107 Fla. 47.

Idaho.—International Mortg. Bank v. Barghoorn, 248 P. 868, 43 Idaho 24.

Ill.—Neff v. George, 4 N.E.2d 388, 364 Ill. 306—Stevens Hotel Co. v. Art Institute of Chicago, 260 Ill.App. 555, transferred 173 N.E. 761, 342 Ill. 180.

Ky.—Hubley's Guardian Ad Litem v. Wolfe, 82 S.W.2d 830, 259 Ky. 574, 101 A.L.R. 1359—Commonwealth v. Kentucky Jockey Club, 38 S.W.2d 987, 238 Ky. 739—London Guarantee & Accident Co. v. Massman, 283 S.W. 1051, 214 Ky. 688—Moody v. Barker, 222 S.W. 89, 188 Ky. 401.

La.—Brock v. Pan American Petroleum Corporation, 173 So. 121, 186 La. 607—Taylor v. Allen, 91 So. 635, 151 La. 82.

Md.—Bishop v. Safe Deposit & Trust Co. of Baltimore, 185 A. 335, 170 Md. 615.

Mich.—Dolby v. Dillman, 278 N.W. 694, 283 Mich. 609, 117 A.L.R. 538—Hilt v. Weber, 233 N.W. 159, 252 Mich. 198, 71 A.L.R. 1238.

N.C.—Lowdermilk v. Butler, 109 S.E. 571, 182 N.C. 502.

Okl.—Farmers Nat. Bank of Cherokee v. De Fever, 61 P.2d 245, 177 Okl. 561—Stuart v. Gough, 237 P. 847, 111 Okl. 42—Lasiter v. Ferguson, 192 P. 197, 79 Okl. 200, certiorari denied 41 S.Ct. 148, 254 U. S. 651, 65 L.Ed. 457.

Or.—Wilhelm v. Wilhelm, 270 P. 516, 126 Or. 388.

Pa.—In re Knox' Estate, 195 A. 28, 328 Pa. 177, 113 A.L.R. 1185—Nice Ball Bearing Co. v. Mortgage

Building & Loan Ass'n, 166 A. 239, 310 Pa. 560.

S.D.—Erickson v. Horlyk, 205 N.W. 613, 48 S.D. 544.

Tenn.—Burr v. White Oak Lumber Co., 258 S.W. 798, 149 Tenn. 191.

Wash.—State v. Superior Court for Clark County, 266 P. 134, 147 Wash. 294—Foster v. Commissioners of Cowlitz County, 171 P. 539, 100 Wash. 502.

W.Va.—Marguerite Coal Co. v. Meadow River Lumber Co., 127 S.E. 644, 98 W.Va. 698.

Wis.—Wisconsin Power & Light Co. v. City of Beloit, 254 N.W. 119, 215 Wis. 439, followed in 254 N.W. 126, 215 Wis. 454—Nickoll v. Racine Cloak & Suit Co., 216 N.W. 502, 194 Wis. 298—Redhead v. Skidmore Land Credit Co., 215 N.W. 937, 194 Wis. 123—State v. Norsman, 169 N. W. 429, 168 Wis. 442—State v. Sutherland, 166 N.W. 14, 166 Wis. 511.

Wyo.—Application of Beaver Dam Ditch Co., 93 P.2d 934, 939, quoting *Corpus Juris*—Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne, 54 P.2d 906, 916, 49 Wyo. 333, citing *Corpus Juris*, and certiorari denied 57 S.Ct. 38, 299 U. S. 574, 81 L.Ed. 423. 15 C.J. p 947 note 41.

"Rule of property" defined

(1) A settled legal principle governing ownership and devolution of property.—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427, 455, citing *Corpus Juris*—54 C.J. p 1110 note 22.

(2) The decisions of the highest court of a state when they relate to and settle some principle of local law directly applicable to titles.—Edwards v. Davenport, C.C.Iowa, 20 F. 756, 4 McCrary 34.

(3) In the plural, those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto.—Bucher v. Cheshire R. Co., Mass., 8 S.Ct. 974, 125 U.S. 555, 31 L.Ed. 795—Kuhn v. Fairmont Coal Co., C.C. W.Va., 152 F. 1013.

turbed except for the most cogent reasons.¹⁵ The rule that such final decisions will ordinarily be adhered to even when they are erroneous applies to decisions relating to real property¹⁶ with particular

Fixed and relied on

(1) To constitute a rule of property, a judicial declaration should be fixed, long-continued, and relied on by persons acquiring property, so that its repudiation would amount to a denial of due process.—*U. S. v. Standard Oil Co. of California*, D.C. Cal., 20 F.Supp. 427, 458.

(2) A single decision does not establish a rule of property requiring it to be followed.—*Brekke v. Crew*, 178 N.W. 146, 43 S.D. 106.

Decisions of executive departments

The principle should not be extended to executive departments, except in the clearest instances of long and continued promulgation and reliance.—*U. S. v. Standard Oil Co. of California*, D.C. Cal., 20 F.Supp. 427, 458.

Rule applied to decisions relating to

(1) Construction and validity of contracts.

U.S.—*In re American Steel Supply Syndicate*, D.C. Mich., 256 F. 876.
Ky.—*Fidelity-Phoenix Fire Ins. Co. v. Hyden*, 10 S.W.2d 829, 226 Ky. 216.—*Home Ins. Co. of New York v. Smither*, 251 S.W. 169, 199 Ky. 344.

Tenn.—*Moore v. Life & Casualty Ins. Co.*, 40 S.W.2d 403, 162 Tenn. 682.

Wis.—*Ladwig v. National Guardian Life Ins. Co.*, 247 N.W. 312, 211 Wis. 56.

(2) Water rights.

Cal.—*City of San Diego v. Cuyamaca Water Co.*, 237 P. 475, 209 Cal. 105.

Idaho.—*Muir v. Allison*, 191 P. 206, 33 Idaho 146.

Mich.—*Pleasant Lake Hills Corporation v. Eppinger*, 209 N.W. 152, 235 Mich. 174.

Miss.—*State ex rel. Rice v. Stewart*, 185 So. 247, overruling suggestion of error 184 So. 44.

N.Y.—*Starke-Belknap v. New York Cent. R. Co.*, 188 N.Y.S. 820, 197 App.Div. 249.

Va.—*James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corporation*, 122 S.E. 344, 138 Va. 461.

Wyo.—*Application of Beaver Dam Ditch Co.*, 93 P.2d 934.—*Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 54 P.2d 906, 49 Wyo. 333, certiorari denied 57 S. Ct. 38, 299 U.S. 574, 81 L.Ed. 423. 15 C.J. p 947 note 41 [b].

(3) Priority of liens.

Colo.—*Fishel v. City and County of Denver*, 95 P.2d 1.

La.—*Gleissner v. Hughes*, 95 So. 529, 153 La. 133.

(4) Character of property, annexed to realty, as personality.—*Madfes v. Beverly Development Corporation*, 166 N.E. 787, 251 N.Y. 12, modifying 229 N.Y.S. 831, 224 App.Div. 671, and remittitur amended 168 N.E. 438, 251 N.Y. 589.

(5) Other matters.

U.S.—*General Electric Co. v. P. R. Mallory & Co.*, D.C.N.Y., 294 F. 562, affirmed, C.C.A., 298 F. 579, certiorari denied *Save Electric Corporation v. General Electric Co.*, 45 S.Ct. 94, 266 U.S. 609, 69 L. Ed. 466.

Fla.—*City of Kissimmee v. State ex rel. Ben Hur Life Ass'n*, 163 So. 473, 121 Fla. 151.

Ind.—*Lindley v. Seward*, 5 N.E.2d 998, 103 Ind.App. 600, rehearing denied 8 N.E.2d 119, 103 Ind.App. 600.

Pa.—*City of Erie v. Public Service Commission*, 123 A. 471, 278 Pa. 512.

Wis.—*Madler v. Kersten*, 175 N.W. 779, 170 Wis. 424.

15 C.J. p 947 note 41 [a].

15. U.S.—*U. S. v. Flannery*, 45 S. Ct. 420, 268 U.S. 98, 69 L.Ed. 865, reversing *Flannery v. U. S.*, 59 Ct.Cl. 719.

Cal.—*San Diego County v. Childs*, 17 P.2d 734, 217 Cal. 109.

D.C.—*Bullock v. Morehouse*, 19 F. 2d 705, 57 App.D.C. 231.

Ky.—*Bankers' Life Co. v. Green*, 76 S.W.2d 276, 256 Ky. 496.—*Evans v. Wheeler*, 270 S.W. 42, 208 Ky. 1. S.C.—*Schroeder v. O'Neill*, 184 S.E. 679, 179 S.C. 310.—*Elkin v. Southern Ry.*, 153 S.E. 337, 156 S.C. 390.

Wyo.—*Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 54 P.2d 906, 49 Wyo. 333, certiorari denied 57 S.Ct. 38, 299 U.S. 574, 81 L.Ed. 423.

"The doctrine [of stare decisis] will apply to prevent a disturbance of the previously declared principle, unless such previous declaration is wholly without reason to support it, and works clearly manifested injustice."—*Liberty Nat. Bank & Trust Co. v. Loomis*, 121 S.W.2d 947, 949, 275 Ky. 445.

16. U.S.—*Johnson v. U. S.*, C.C.A. Okl., 64 F.2d 674, certiorari denied 54 S.Ct. 68 (two cases), 290 U.S. 551, 78 L.Ed. 565.—*Weston v. Poland*, C.C.A. Okl., 48 F.2d 738.—*Knight v. Carter Oil Co.*, C.C.A. Okl., 23 F.2d 481, reversing, D.C., *Carter Oil Co. v. Scott*, 12 F.2d 780.

Ala.—*Lamar v. Lincoln Reserve Life Ins. Co.*, 131 So. 223, 222 Ala. 60.

Cal.—*Sorensen v. Hall*, 28 P.2d 667, 219 Cal. 680.

Hawaii.—*In re Austin*, 33 Hawaii 332.

Ind.—*Tolleston Club of Chicago v. Carson*, 123 N.E. 169, 188 Ind. 642.—*Dailey v. Pugh*, 131 N.E. 836, 83 Ind.App. 431.

Iowa.—*Rockafellow v. Gray*, 191 N.W. 107, 194 Iowa 1280.

Ky.—*Waggener v. Penn.*, 77 S.W.2d 427, 257 Ky. 124.—*Federal Gas, Oil & Coal Co. v. Harmon*, 71 S.W.2d 630, 254 Ky. 255.—*Evans v. Wheeler*, 270 S.W. 42, 208 Ky. 1.

Mass.—*Duncan v. New England Power Co.*, 145 N.E. 427, 250 Mass. 228.

Miss.—*Magee v. Morehead*, 123 So. 831, 154 Miss. 828.—*Edward Hines Yellow Pine Trustees v. State*, 98 So. 158, 134 Miss. 533, overruling suggestion of error 97 So. 552, 133 Miss. 334.—*K. C. Lumber Co. v. Moss*, 80 So. 638, 119 Miss. 185. N.M.—*Baca v. Chavez*, 252 P. 987, 32 N.M. 210.

Or.—*Wilhelm v. Wilhelm*, 270 P. 516, 126 Or. 388.

Pa.—*In re Lerch's Estate*, 159 A. 863, 309 Pa. 23.—*Reed v. Geddes*, 135 A. 232, 287 Pa. 274.

Tenn.—*Old Nat. Bank v. Swearingen*, 72 S.W.2d 545, 167 Tenn. 529.

15 C.J. p 949 note 49.

Matters assumed in previous decisions

Decisions which have assumed the validity of certain deeds, and have been relied on by the people and bar of the state, should not be held erroneous, unless there is no alternative, when to do so would result in disturbing many titles.—*Blackman v. Blackman*, 43 P.2d 1011, 45 Ariz. 374.

Rule applied to decisions relating to

(1) Whether a judgment may be enforced against a homestead.

Cal.—*In re Muntz's Estate*, 231 P. 371, 69 Cal.App. 404.

Colo.—*Sterling Nat. Bank of Sterling v. Francis*, 240 P. 945, 78 Colo. 204.

Tex.—*Tanton v. State Nat. Bank of El Paso*, 79 S.W.2d 833, 125 Tex. 16, 97 A.L.R. 1093, affirming, Civ. App., 43 S.W.2d 957.

15 C.J. p 947 note 41 [a] (31).

(2) Construction and validity of deeds.—*Majestic Coal Co. v. Anderson*, 82 So. 433, 203 Ala. 233.

(3) Validity of tax deeds.

Ark.—*Britt v. Harper*, 200 S.W. 787, 132 Ark. 193.

Cal.—*Carter v. Chevalier*, 230 P. 706, 100 Cal.App. 567.

Tenn.—*Burr v. White Oak Lumber Co.*, 253 S.W. 798, 149 Tenn. 191.

15 C.J. p 947 note 41 [a] (28).

(4) Validity of tax sales.—*Reese v. Thurston County*, 283 P. 170, 154 Wash. 617.

(5) Public property.—*Kavanaugh v. Baird*, 217 N.W. 2, 241 Mich. 240, reversed on other grounds 235 N.W. 871, 253 Mich. 631.

force.¹⁷

This rule applies only to final decisions¹⁸ of courts of last resort.¹⁹ Under this rule, if any change in the law is necessary it should be made by the legislature;²⁰ and the doctrine of rule of property has no operation as against subsequent legislation.²¹

While courts will not ordinarily adhere to previous decisions which are plainly erroneous, as appears in § 193 supra, they will be much more reluctant to depart from the law as declared in a prior

decision where the principles declared affect property rights and commercial transactions,²² and the doctrine of stare decisis obtains, even though the court may be of the belief that such decisions are founded on an erroneous principle and are not sound;²³ but the rule is not so absolutely fixed as to preclude the overruling of plainly erroneous decisions, where it is apparent that the beneficial results to be obtained by a departure from the rule will greatly exceed any disastrous effects likely to flow therefrom.²⁴

Constitutional questions; construction and oper-

(6) Other matters.

Iowa.—*Montgomery v. City of Des Moines*, 180 N.W. 723, 190 Iowa 705.

Mass.—*Erickson v. Ames*, 163 N.E. 70, 264 Mass. 436.

Mich.—*Van Wieren v. Macatawa Resort Co.*, 209 N.W. 825, 235 Mich. 606.

Tex.—*Bankers Life Co. v. Alderdice*, Civ.App., 92 S.W.2d 539, error dismissed.

15 C.J. p 947 note 41 [a].

17. U.S.—*U. S. v. Title Insurance & Trust Co.*, 44 S.Ct. 621, 265 U.S. 472, 68 L.Ed. 1110, affirming, C.C. A.Cal., 288 F. 821.

Fla.—*State ex rel. Molter v. Johnson*, 144 So. 299, 107 Fla. 47.

Okl.—*Stuart v. Gough*, 237 P. 847, 352, 111 Okl. 42, quoting *Corpus Juris*.

Or.—*Overland v. Jackson*, 275 P. 21, 128 Or. 455.

15 C.J. p 949 note 49.

Reason for rule

Stability is especially requisite in the law in regard to titles to real property. Titles may be dependent largely or wholly on previous decisions, and landed interests would be jeopardized by sudden or frequent changes in the interpretation or construction of legal principles.—*Stuart v. Gough*, 237 P. 847, 352, 111 Okl. 42, quoting *Corpus Juris*—15 C.J. p 949 notes 47, 49.

Absence of opinion

That a decree declaring a tax deed ineffectual to pass title was rendered without written opinion made it no less binding in subsequent cases as declarative of the law of the title to such realty, being necessarily relied on by every one examining the title thereto and purchasing any part thereof.—*Burr v. White Oak Lumber Co.*, 258 S.W. 798, 149 Tenn. 191.

18. Utah.—*Tintic Standard Mining Co. v. Utah County*, 15 P.2d 633, 80 Utah 491.

19. Pa.—*In re Brolasky's Estate*, 153 A. 739, 302 Pa. 439.

Inferior or intermediate courts

No such finality attaches to the decisions of the inferior or inter-

mediate courts that they can be considered as establishing a rule of property, however uniform their course of decisions or however long continued.—*Jackson v. Carroll*, 207 P. 735, 86 Okl. 230.

State court's decision on federal question is not final, and cannot constitute a rule of property, since state court is not the court of last resort on a federal question.—*Calhoun Gold Min. Co. v. Ajax Gold Min. Co.*, 59 P. 607, 27 Colo. 1, 83 Am.S.R. 17, 50 L.R.A. 209, affirmed 21 S.Ct. 835, 182 U.S. 499, 45 L.Ed. 1200—15 C.J. p 949 note 50 [b]. Decisions on federal questions generally see supra § 206.

20. Cal.—*Stewart v. Stewart*, 249 P. 197, 199 Cal. 318.

Ky.—*Hubley's Guardian Ad Litem v. Wolfe*, 82 S.W.2d 830, 259 Ky. 574, 101 A.L.R. 1359—*London Guarantee & Accident Co. v. Massman*, 283 S.W. 1051, 214 Ky. 688. La.—*Taylor v. Allen*, 91 So. 635, 151 La. 82—*G. P. Eberle & Co. v. Schmidt Osborne Storage & Transfer Co.*, 119 So. 442, 9 La.App. 378.

N.Y.—*Madfes v. Beverly Development Corporation*, 166 N.E. 787, 251 N.Y. 12, modifying 229 N.Y.S. 881, 224 App.Div. 671, and remittitur amended 168 N.E. 438, 251 N.Y. 589.

Or.—*Wilhelm v. Wilhelm*, 270 P. 516, 126 Or. 388.

Pa.—*Nice Ball Bearing Co. v. Mortgage Building & Loan Ass'n*, 166 A. 289, 310 Pa. 560—*Reed v. Geddes*, 135 A. 232, 287 Pa. 274.

Philippine.—*Kuenzle v. Villanueva*, 41 Philippine 611.

Wis.—*State v. Norsman*, 169 N.W. 429, 168 Wis. 442.

21. Miss.—*City of Jackson v. McPherson*, 138 So. 604, 162 Miss. 164.

22. Ky.—*Liberty Nat. Bank & Trust Co. v. Loomis*, 121 S.W.2d 947, 275 Ky. 445.

23. Ala.—*Herring v. Elliott*, 118 So. 391, 218 Ala. 203.

Ark.—*Hobbs v. Lenon*, 87 S.W.2d 6, 191 Ark. 509.

Iowa.—*Rockafellow v. Gray*, 191 N.W. 107, 194 Iowa 1280.

Miss.—*Edward Hines Yellow Pine Trustees v. State*, 98 So. 158, 134 Miss. 533, overruling suggestion of error 97 So. 552, 133 Miss. 334.

N.M.—*Baca v. Chavez*, 252 P. 987, 32 N.M. 210.

Tenn.—*Burr v. White Oak Lumber Co.*, 258 S.W. 798, 149 Tenn. 191.

15 C.J. p 948 note 42, p 959 note 21.

Reason for rule

When parties have acted on such decisions as settled law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable.

Okl.—*Stuart v. Gough*, 237 P. 847, 111 Okl. 42—*Lasiter v. Ferguson*, 192 P. 197, 79 Okl. 200, certiorari denied 41 S.Ct. 148, 254 U.S. 651, 65 L.Ed. 457.

Wyo.—*Application of Beaver Dam Ditch Co.*, 93 P.2d 934, 939, quoting *Corpus Juris*.

15 C.J. p 948 note 42.

In South Dakota

(1) The rule stated in the text has been followed.—*Printup v. Kenner*, 180 N.W. 512, 43 S.D. 473.

(2) The earlier case of *Brekke v. Crew*, 178 N.W. 146, 43 S.D. 106, overruling a prior decision, was distinguished on the ground that in that case the prior decision was not a rule of property.—*Printup v. Kenner*, supra.

24. Fla.—*State ex rel. Molter v. Johnson*, 144 So. 299, 107 Fla. 47.

Ill.—*Neff v. George*, 4 N.E.2d 388, 364 Ill. 306.

La.—*Miami Corporation v. State*, 173 So. 315, 186 La. 784, certiorari denied *Miami Corporation v. State of Louisiana*, 58 S.Ct. 19, 302 U.S. 700, 82 L.Ed. 541.

Mich.—*Dolby v. Dillman*, 278 N.W. 694, 283 Mich. 609, 117 A.L.R. 538. N.C.—*Lowdermilk v. Butler*, 109 S.E. 571, 182 N.C. 502.

Pa.—*City of Erie v. Public Service Commission*, 123 A. 471, 278 Pa. 512.

15 C.J. p 949 note 50.

ation of statutes. The doctrine of stare decisis, with respect to decisions which have become rules of property, includes decisions on questions of constitutional law,²⁵ or the construction and operation of statutes,²⁶ which have become established as rules of property.

Exceptions to rule. The application of the rule stated above is not without exceptions, and depends largely on the circumstances of the case under consideration,²⁷ and a rule of property is an equitable rule to be invoked only to protect honest investments made in reliance on decisions relating thereto.²⁸ Thus, while as a general rule the doctrine

has been applied to decisions relating to the law of descent²⁹ and the construction of wills,³⁰ it has been held that it cannot be invoked by persons claiming the right to inherit the property of a decedent, since no one can have a vested right of inheritance;³¹ nor does it apply to decisions rendered subsequent to the acquisition of alleged property rights, since they could not have been relied on as establishing a rule of property;³² nor can it be invoked to protect rights acquired as a result of a marriage, rather than under a contract.³³

The doctrine of rule of property cannot be applied to validate conveyances made in violation of

25. Ala.—Lamar v. Lincoln Reserve Life Ins. Co., 131 So. 223, 222 Ala. 60.

Ark.—Hobbs v. Lenon, 87 S.W.2d 6, 191 Ark. 509.

Cal.—Scott v. Austin, 209 P. 251, 58 Cal.App. 643.

Del.—Bringham v. O'Donnell, 124 A. 795, 14 Del.Ch. 225.

Ill.—W. F. Hallam & Co. v. Massey, 207 Ill.App. 417.

Mo.—Aufderheide v. Polar Wave Ice & Fuel Co., 4 S.W.2d 776, 319 Mo. 337—Regan v. Dickmann, 207 S.W. 792.

N.Y.—Halleran v. City of New York, 228 N.Y.S. 116, 132 Misc. 78.

N.D.—State v. State Board of Canvasers, 172 N.W. 80, 44 N.D. 126.

Wash.—State v. Gifford, 275 P. 74, 151 Wash. 43.

15 C.J. p 949 note 45.

Decisions assuming statutes to be constitutional see supra § 215.

26. U.S.—Dunn v. Micco, C.C.A.Okl., 106 F.2d 356, certiorari denied 60 S.Ct. 296, rehearing denied 60 S.Ct. 382—Weston v. Poland, C.C.A.Okl., 48 F.2d 738—Welch v. First Trust & Savings Bank of Pasadena, Cal., C.C.A.Okl., 15 F.2d 184—U. S. v. Standard Oil Co. of California, D.C.Cal., 20 F.Supp. 427.

Ala.—Tallapoosa County v. Elmore County, 161 So. 500, 230 Ala. 440—Herring v. Elliott, 118 So. 391, 218 Ala. 203.

Ariz.—Blackman v. Blackman, 43 P. 2d 1011, 45 Ariz. 374.

Ark.—Hobbs v. Lenon, 87 S.W.2d 6, 191 Ark. 509.

Cal.—Stewart v. Stewart, 249 P. 197, 199 Cal. 318—In re Beishaw's Estate, 212 P. 13, 190 Cal. 278.

Ind.—Dailey v. Pugh, 131 N.E. 836, 83 Ind.App. 431.

Ky.—Federal Gas, Oil & Coal Co. v. Harmon, 71 S.W.2d 630, 254 Ky. 255—Union Light, Heat & Power Co. v. City of Covington, 55 S.W. 2d 667, 246 Ky. 663—Evans v. Wheeler, 270 S.W. 42, 208 Ky. 1.

La.—Otwell v. Vaughan, 173 So. 527, 186 La. 911—Straus v. City of New Orleans, 118 So. 125, 166 La. 1035—

G. P. Eberle & Co. v. Schmidt Osborne Storage & Transfer Co., 119 So. 442, 9 La.App. 378.

Mo.—Chilton v. Hedges, 204 S.W. 900.

Mont.—Continental Supply Co. v. Abell, 24 P.2d 133, 95 Mont. 148.

Nev.—Davis v. Davis, 13 P.2d 1109, 54 Nev. 267.

Okl.—White v. Cheatham, 225 P. 533, 101 Okl. 264.

Or.—Cary v. Cary, 80 P.2d 886, 159 Or. 578, 121 A.L.R. 1371—Overland v. Jackson, 275 P. 21, 128 Or. 455.

Pa.—In re Lerch's Estate, 159 A. 868, 309 Pa. 23.

Philippine.—Kuenzle v. Villanueva, 41 Philippine 611.

Tex.—Cross v. Wilkinson, 234 S.W. 68, 111 Tex. 311, answering certified questions, Civ.App., 187 S.W. 345, and this judgment set aside 234 S.W. 1118.

Wash.—Tamblin v. Crowley, 168 P. 982, 99 Wash. 133.

15 C.J. p 949 note 46.

Construction contrary to intent of statute

(1) To make a line of decisions a rule of property they must be uniform and consistent, and not in conflict, within the plain expression of the statute, for the statute law, unless in conflict with some provision of the Constitution, is supreme.—Patterson v. McCormick, 99 S.E. 401, 177 N.C. 448.

(2) Doctrine of rule of property should not weigh with supreme court in abolition of precedent not sustainable in reason and in contravention of terms of statute relied on to support it, and which has wrought injustice in every instance of its subsequent application.—Klocke v. Klocke, 208 S.W. 825, 276 Mo. 572.

27. U.S.—Knight v. Carter Oil Co., C.C.A.Okl., 23 F.2d 481, reversing, D.C., Carter Oil Co. v. Scott, 12 F. 2d 780.

28. Okl.—Teague v. Smith, 204 P. 439, 85 Okl. 12.

Similarity of stare decisis to estoppel see supra § 193.

Duty to look up previously acquired interests

Title of purchaser at partition sale, who bought land relying on judgment setting aside for fraud judgment approving previous sale as announcing new rule of property, is bad as against vendee from purchaser at previous sale, who bought before such judgment was set aside, and was not party or privy to suit to set it aside, since purchaser at second sale was bound, in looking up the title which he sought to acquire, to find out whether a prior purchaser had acquired an interest before the rule was announced.—Abington v. Townsend, 197 S.W. 253, 271 Mo. 602.

29. U.S.—Dunn v. Micco, C.C.A.Okl., 106 F.2d 356, certiorari denied 60 S.Ct. 296, rehearing denied 60 S.Ct. 382.

Ala.—Herring v. Elliott, 118 So. 391, 218 Ala. 203.

N.M.—In re Lewis' Will, 71 P.2d 1032, 41 N.M. 522.

15 C.J. p 947 note 41 [a] (5).

30. Ill.—Lee v. Roberson, 130 N.E. 774, 297 Ill. 321.

Ky.—Waggener v. Penn, 77 S.W.2d 427, 257 Ky. 124.

15 C.J. p 947 note 41 [a] (4).

31. La.—Minor v. Young, 89 So. 757, 149 La. 583.

Okl.—Teague v. Smith, 204 P. 439, 442, 85 Okl. 12.

32. U.S.—Denker v. Mid-Continent Petroleum Corporation, C.C.A.Okl., 56 F.2d 725, 84 A.L.R. 756.

Ill.—Prall v. Burckhardt, 132 N.E. 280, 299 Ill. 19, 18 A.L.R. 992.

Ky.—May v. Chesapeake & O. Ry. Co., 212 S.W. 131, 184 Ky. 493.

Okl.—Sells v. Butts, 190 P. 863, 79 Okl. 36—Sells v. Mooney, 190 P. 863, 79 Okl. 35—Sells v. Mooney, 190 P. 861, 79 Okl. 34—McCray v. Miller, 186 P. 1089, 78 Okl. 16, denying rehearing 184 P. 781, 78 Okl. 16.

33. La.—Blunson v. Knighton, App., 140 So. 302.

governmental policy;³⁴ nor can the doctrine be applied to prevent the operation of the state's police power, since there can be no property rights which are not subject to that power.³⁵

C. OPINIONS

§ 217. Necessity

- a. Definitions and distinctions
- b. When required or permitted
- c. Advisory opinion

a. Definitions and Distinctions

As a judicial determination, an "opinion" is a statement by a court or judge of the reasons for the decision, and, in such sense, is distinguishable from "decree," "judgment," "mandate," and "order." A "judicial opinion" is one determining the issues before the court. An "extrajudicial opinion" is one given as to matters not in issue. A "per curiam opinion" is one given in a case in which the judges are agreed and fuller statement is not regarded as necessary.

In the sense of a determination by a court or judge, the term "opinion" has been variously defined as the conclusions of a judge on an issue before him;³⁶ an expression of the views of the court³⁷ or of the judge;³⁸ the announcement of

the reason or reasons for the conclusion the court has reached;³⁹ the reasons given by a court for its judgment;⁴⁰ the statement of reasons delivered by a judge or court for giving the judgment which is pronounced upon a case;⁴¹ the written statement by the court of its reasons for the conclusion reached from an examination of the law and of the facts in controversy;⁴² the statement by a judge or court of the decision reached with regard to a cause tried or agreed before them, expounding the law as applied to the case, and detailing the reasons upon which the judgment is based;⁴³ and what is said by the court as to its conclusion.⁴⁴ It is often merely an indication of what the decree should be, a kind of direction to the attorney or clerk how to draw a judgment.⁴⁵

The term "opinion" has been distinguished by the authorities from "decree,"⁴⁶ "judgment,"⁴⁷ "man-

34. Okl.—Sells v. Butts, 190 P. 863, 79 Okl. 36—Sells v. Mooney, 190 P. 853, 79 Okl. 35—Sells v. Mooney, 190 P. 861, 79 Okl. 34—Gannon v. Johnston, 140 P. 430, 40 Okl. 695.

Application of rule to alienation of Indian land see the C.J.S. title Indians § 54, also 31 C.J. p 516 note 5.

35. Ind.—Schmitt v. F. W. Cook Brewing Co., 120 N.E. 19, 187 Ind. 623, 3 A.L.R. 270.

36. N.J.—In re Beam, 117 A. 613, 93 N.J.Eq. 593.

Whether labeled "memorandum" or "conclusion" or "opinion," a memorandum merely stating the conclusions of a judge on an issue before him, and giving directions as to an order, judgment, or decree which may be entered, is an opinion.—In re Beam, supra.

37. Ky.—Chesapeake, etc., R. Co. v. Kelly, 171 S.W. 182, 183, 161 Ky. 660.

Similar definition

The informal expression of the views of the court.—In re Yorba, 167 P. 854, 856, 176 Cal. 166—Montecito Valley Water Co. v. City of Santa Barbara, 77 P. 1113, 1118, 144 Cal. 578.

38. Ind.—Craig v. Bennett, 62 N.E. 273, 274, 158 Ind. 8.

Similar statement

An expression of the reasons by which the judge reaches his conclusions.

Iowa.—Van Gorden v. Schuller, 185 N.W. 604, 606, 192 Iowa 853.

Md.—State v. Ramsburg, 43 Md. 325, 333.

Miss.—Robertson v. Mississippi Valley Co., 81 So. 799, 800, 120 Miss. 159.

39. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855, 858.

40. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., supra. Cal.—Houston v. Williams, 13 Cal. 24, 27, 73 Am.D. 565.

Miss.—Robertson v. Mississippi Valley Co., 81 So. 799, 800, 120 Miss. 159.

Neb.—Reams v. Clopine, 236 N.W. 158, 160, 121 Neb. 86.

Porto Rico.—Teillard v. Green, 7 Porto Rico Fed. 328, 331.

W.Va.—Robertson v. Vandergrift, 193 S.E. 62, 119 W.Va. 219.

Similar definition

A statement of the reasons on which the judgment rests.—Rogers v. Hill, N.Y., 53 S.Ct. 731, 734, 289 U.S. 582, 77 L.Ed. 1385, reversing, C.C.A., 62 F.2d 1079, which followed, C.C.A.N.Y., 60 F.2d 109, and certiorari granted 53 S.Ct. 593, 289 U.S. 716, 77 L.Ed. 1463.

41. Ind.—Craig v. Bennett, 62 N.E. 273, 274, 158 Ind. 9, quoting Bouvier L.D.

42. Or.—State v. Gray, 70 P. 904, 71 P. 978, 979, 42 Or. 261, 268.

43. Ind.—Craig v. Bennett, 62 N.E. 273, 274, 158 Ind. 9, quoting Black L.D.

44. Idaho.—Stark v. McLaughlin, 261 P. 244, 246, 45 Idaho 112.

45. Porto Rico.—Teillard v. Green, 7 Porto Rico Fed. 328, 331.

46. Iowa.—Van Gorden v. Schuller, 185 N.W. 604, 606, 192 Iowa 853. Md.—Phillips v. Pearson, 27 Md. 242, 253.

Decree follows the opinion

Md.—Phillips v. Pearson, supra.

47. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855, 858.

Md.—Martin v. Evans, 36 A. 258, 260, 85 Md. 8, 60 Am.S.R. 292, 36 L.R.A. 218—State v. Ramsburg, 43 Md. 325, 333.

Miss.—Robertson v. Mississippi Valley Co., 81 So. 799, 800, 120 Miss. 159.

Neb.—Reams v. Clopine, 236 N.W. 158, 160, 121 Neb. 86.

Okl.—Moroney v. Tannehill, 275 P. 938, 941, 90 Okl. 224. 15 C.J. p 970 note 21.

Distinctions

(1) "The opinion of the Judge is the expression of the reasons by which he reaches his conclusion; these may be consistent or contradictory, clear, or confused. The judgment or decree is the fiat or sentence of the law, determining the matter in controversy, in concise technical terms, which must be interpreted in their own proper sense." Md.—Martin v. Evans, 36 A. 258, 260, 85 Md. 8, 60 Am.S.R. 292, 36 L.R.A. 218—State v. Ramsburg, 43 Md. 325, 333.

Miss.—Robertson v. Mississippi Valley Co., 81 So. 799, 800, 120 Miss. 159.

date,"⁴⁸ and "order."⁴⁹ Likewise, as is pointed out in § 181 *supra*, while "decision" and "opinion" have been said to be without distinction, usually they are distinguishable.

"*Judicial opinion*" has been defined as one that is on the question before the court; the direct, solemn, and deliberate decision of the court upon the issues raised by the record and presented in the argument.⁵⁰ The phrase has been used in particular connections as synonymous with what has been adjudged or decreed.⁵¹

"*Extrajudicial opinion*" denotes an opinion given on a question that it was not necessary to decide in the case in which it was given, or on a point which was not then the point in question, or a proposition generally expressed, and which the case, or the circumstances of the case, did not call for, or an opinion on a point which was not the point argued

before the court, or upon which the court had pronounced its judgment, or an opinion not called for by the case, and which it was unnecessary to give.⁵²

"*Per curiam opinion*" is an opinion of the court in a case in which the judges are all of one mind, and which is so clear that it is not considered necessary to elaborate it by an extended discussion.⁵³

b. When Required or Permitted

Except as required by provisions of state constitutions or statutes, opinions need not be written by the court or judge, although the matter rests in the judicial discretion, as a result of which opinions will be written when necessary. In special instances oral opinions may be given, to be followed by written opinions.

It is frequently provided by constitution or statute that opinions of courts, especially those of appellate courts or courts of last resort, shall be in writing, which provisions should be complied with,⁵⁴

(2) "The court speaks by its judgments. . . . The opinion is only the reasoning of the court for its judgment."—Reams v. Clopine, 236 N.W. 158, 160, 121 Neb. 86.

Recording of an opinion in the book where judgments are recorded does not make it a judgment.—G. Amsinck & Co. v. Springfield Greer Co., C.C.A.Mo., 7 F.2d 855.

48. Distinction stated

A mandate is a judgment which makes the opinion effective.—Chesapeake, etc., R. Co. v. Kelly, 171 S.W. 182, 183, 161 Ky. 660.

49. Distinction

"The court speaks by its . . . orders. The opinion is only the reasoning of the court for its judgment."—Reams v. Clopine, 236 N.W. 158, 160, 121 Neb. 86.

50. Cal.—Warner v. The Uncle Sam, 9 Cal. 697, 732.

51. Md.—Hagthorp v. Hook, 1 Gill & J. 270, 311.

52. Cal.—Warner v. The Uncle Sam, 9 Cal. 697, 732.

53. Pa.—Clarke v. Western Assur. Co., 23 A. 248, 249, 146 Pa. 561.

In a dissenting opinion the same definition has been given.—Minor v. Pike, 93 P. 264, 77 Kan. 806.

54. U.S.—Monagas v. Central Eureka, C.C.A.Porto Rico, 56 F.2d 318.

Cal.—Clay v. Clay, 65 P.2d 1363, 19 Cal.App.2d 589.

Or.—Schmid v. Thorsen, 175 P. 74, 89 Or. 575, denying motion 170 P. 930, 89 Or. 575.

15 C.J. p 967 note 82.

Statutory requirements of opinions by appellate courts as unconstitutional encroachment by legislature on the judiciary see Constitutional Law § 128 e.

In Indiana

(1) While there was no requirement in the state constitution of 1816 that the supreme court give written opinions, such requirement existed by reason of Acts 1816 c 1 § 26.—Hunter v. Cleveland, C. C. & St. L. Ry. Co., 174 N.E. 287, 202 Ind. 328.

(2) Following the failure of such court to comply with this statutory requirement, a similar provision was incorporated in Const. 1851 art 7 § 5, which provision continues in subsequent constitutions.—State ex rel. Sluss v. Appellate Court of Indiana, 17 N.E.2d 324, 214 Ind. 686—Kryder v. State, 15 N.E.2d 386, 214 Ind. 419, appeal dismissed Kryder v. State of Indiana, 59 S.Ct. 154, 305 U.S. 570, 83 L.Ed. 359—Hunter v. Cleveland, C. C. & St. L. Ry. Co., *supra*—Trayser v. Indiana Asbury University, 39 Ind. 556—Willets v. Ridgeway, 9 Ind. 367—Hand v. Taylor, 4 Ind. 409.

(3) This provision was prospective only.—Hand v. Taylor, *supra*.

(4) Such provision did not control the appellate court.—Craig v. Bennett, 62 N.E. 273, 158 Ind. 9, denying appeal 60 N.E. 1124, 27 Ind.App. 704.

(5) Moreover, under Acts 1901 c 247 § 17, providing that in every case reversed by a division of the appellate court an opinion shall be given on the material questions therein in writing, etc., a substitute for Acts 1891 c 37 § 13, it was formerly held that a written opinion was not required where a judgment was affirmed.—Roetzel v. State, 172 N.E. 551, 96 Ind.App. 661, denying rehearing 171 N.E. 206, 96 Ind.App. 661—15 C.J. p 967 note 82 [b] (2).

(6) The present rule is that, in view of Acts 1901 c 247 § 15, providing that appeals to the appellate court shall be taken in the same manner and with the same effect and

subject to the same limitations as are now or hereafter may be provided in case of appeals to the supreme court, etc., coupled with Ind.Const. 1851 art 7 § 5, even in case of affirmation the appellate court must give a statement in writing of each question arising in the record of such case, as to which duty it is not relieved by Acts 1901 c 247 § 17.—State ex rel. Sluss v. Appellate Court of Indiana, 17 N.E.2d 324, 214 Ind. 686—Sluss v. Thermoid Rubber Co., 174 N.E. 291, 202 Ind. 338—Myers v. Newcomer, 174 N.E. 290, 202 Ind. 335, denying transfer, App., 172 N.E. 927—Hunter v. Cleveland, C. C. & St. L. Ry. Co., 174 N.E. 287, 202 Ind. 328.

(7) Acts 1901 c 247 § 15, reenacted as Burns St.Annot.1926 § 1351, has been held not unreasonable.—Hunter v. Cleveland, C. C. & St. L. Ry. Co., *supra*.

(8) However, the holding of Hunter v. Cleveland, C. C. & St. L. Ry. Co., *supra*, is limited to cases appealed to the appellate court, and such court is not required to give a written opinion or decision in an original action filed in that court.—J. S. Cruise Realty Co. v. Imfeld, 184 N.E. 407, 204 Ind. 419.

(9) In criminal cases particularly, an opinion must be given, in view of Burns St.Annot.1926 § 2397, providing that all opinions of the supreme court or the appellate court in criminal prosecutions must be given in writing, etc.—Burkus v. State, 174 N.E. 292, 202 Ind. 341.

In Oklahoma

(1) Const. art 7 § 5 requires the supreme court to render a written opinion in each case after said case has been finally submitted for decision.—In re Initiative Petition No.

but it has been held that such requirements are directory merely,⁵⁵ and should not be followed to such an extent as to swell the length of opinions unduly or so as to render ineffective provisions of a state constitution looking to a prompt determination of cases under submission.⁵⁶ In some jurisdictions appellate courts are required by the constitution to give the reason or reasons why they decline to exercise their supervisory jurisdiction.⁵⁷

Under some statutes written opinions by appellate courts are not required where the decision merely reaffirms previous decisions, or relates to questions of fact only, or when the case decided would, in their opinion, serve no useful purpose as a precedent.⁵⁸

In the absence of some positive requirement, it is not necessary that a court rendering a decision should in all cases give a written opinion,⁵⁹ or even

112, State Question No. 167, 7 P.2d 868, 154 Okl. 257.

(2) Necessity of opinion by court of criminal appeals see *infra* note 59.

In Texas

(1) Under Rev.Civ.St. arts 1873-1876, the courts of civil appeals are required to give opinions.—Tucker v. Higdon, Civ.App., 115 S.W.2d 973.

(2) However, they need not give opinions when the judgments are final and are affirmances.—Bankers Protective Life Ins. Co. v. Mazingo, Civ.App., 127 S.W.2d 525—Page v. Hart, Civ.App., 124 S.W.2d 399—Tucker v. Higdon, *supra*—Wrenn v. Reed, Civ.App., 98 S.W.2d 851—St. Louis, B. & M. Ry. Co. v. Blair, Civ. App., 44 S.W.2d 399—Godwin v. Banister, Civ.App., 242 S.W. 1098—Fink v. San Augustine Grocery Co., Civ. App., 167 S.W. 35—Roberts v. Arlington Realty Co., Civ.App., 128 S.W. 159—Wright v. Hooker, 118 S.W. 765, 55 Tex.Civ.App. 47—Needham v. Hickey, Civ.App., 61 S.W. 433.

(3) This is particularly true where no new questions of law are presented.—Jackson v. Postal Telegraph-Cable Co., Civ.App., 114 S.W. 2d 598.

(4) So, where court of civil appeals concluded that trial court was correct in holding that plaintiff motorist was not shown to have been guilty of contributory negligence that constituted proximate cause of collision, no written opinion was required of the court.—Roddy v. Herren, Civ.App., 125 S.W.2d 1057.

Suit against United States

Federal courts having jurisdiction of suits against the United States have a statutory duty of causing a written opinion to be filed.—P. H. & F. M. Roots Co. v. U. S., C.C.A.Ind., 17 F.2d 337.

55. W.Va.—State v. Smith, 193 S.E. 573, 119 W.Va. 347—Hall v. Bank of Virginia, 15 W.Va. 323—Renick v. Ludington, 15 W.Va. 323—Henry v. Davis, 13 W.Va. 230, 15 C.J. p 967 note 83.

In Indiana

(1) Const.1851 art 7 § 5, providing that the supreme court shall, upon the decision of every case, give a statement in writing of each question arising in the record of such

case and the decision of the court thereon, is merely directory, and should be construed so as to obviate its inconvenience and objectionable character, as far as conveniently can be done.—Trayser v. Indiana Asbury University, 39 Ind. 556—Willets v. Ridgeway, 9 Ind. 367.

(2) Such provision must be given reasonable interpretation, as well as practical application, so as not to require such court to exhaust every subject raised on appeal without regard to its importance in determination of cause.—State ex rel. Sluss v. Appellate Court of Indiana, 17 N.E.2d 824, 214 Ind. 686.

56. Mo.—Smarr v. Smarr, 6 S.W.2d 360, 319 Mo. 1153.

57. La.—Carrere v. City of New Orleans, 111 So. 393, 162 La. 981.

58. Ala.—Barley v. Wright, 171 So. 247, 233 Ala. 283—Farley v. Baldwin, 77 So. 723, 201 Ala. 197—Underwood v. Underwood, 77 So. 233, 200 Ala. 690—Hamilton v. State, App., 191 So. 402.

A judgment of conviction for violating prohibition law will be affirmed without further written opinion, where record appears regular and decision merely reaffirms previous decisions or relates to fact questions only.—Frederick v. State, 188 So. 272, 28 Ala.App. 494.

Intermediate court must follow policy of the court of last resort respecting statutory provision that justices and judges need not write opinions where their decisions merely reaffirm previous decisions or relate to fact questions only.—Frederick v. State, 188 So. 272, 28 Ala.App. 494.

59. Mich.—Public Welfare Commission v. Civil Service Commission, 286 N.W. 173, 174, 289 Mich. 101, citing *Corpus Juris*.

Miss.—Robertson v. Mississippi Valley Co., 81 So. 799, 120 Miss. 159. Neb.—Blodgett v. Cox, 203 N.W. 1007, 113 Neb. 463, 15 C.J. p 967 note 84.

Consent judgment

A case may be reversed in the court of last resort without opinion as to extent of error when appellee files confession of errors indorsed by appellant consenting that

order of reversal be entered.—Evans v. Green, Fla., 189 So. 232.

Interlocutory order

Where an appeal is taken from an interlocutory order overruling a general demurrer to a bill of complaint in an equity case and it appears to the court that the allegations of the bill sufficiently state an equity for appropriate relief, the interlocutory order appealed from may be affirmed by the court without discussing in an opinion the several contentions made on the appeal.—Weathers v. Tyler, 97 So. 311, 86 Fla. 181—Crosland v. Brickell, 97 So. 286, 86 Fla. 91.

Affirmance of judgment by divided court renders opinion by court impossible, so that it need not be delivered.—Rose v. Squires, 133 A. 488, 102 N.J.Law 449, affirming 128 A. 880, 101 N.J.Law 438—Light v. Light, 124 A. 448, 95 N.J.Eq. 779, equally divided court affirming 124 A. 359, 95 N.J.Eq. 779—15 C.J. p 967 note 84 [e].

Disagreement as to reason for decision

(1) Where majority of court cannot agree upon reasons for action taken, opinions by the several judges can serve no useful purpose.—State v. Beck, 239 N.W. 184, 59 S.D. 207.

(2) Thus, where majority of court agrees that judgment should be affirmed, but disagrees as to reason, judgment will be affirmed without opinion setting forth other reasons.—Thomas v. City of Ft. Pierre, 241 N.W. 327, 59 S.D. 519.

(3) So, where a majority of court believes that defendant did not receive fair and impartial trial guaranteed by constitution, but differs as to grounds, judgment will be reversed without opinions.—State v. Beck, *supra*.

Federal court

The writing of a considered opinion by district court on the facts in an equity case is supererogatory in view of necessity of formal findings of fact and conclusions of law.—Bassevi v. Edward O'Toole Co., D.C.N.Y., 26 F.Supp. 41.

In Ohio

(1) Court of appeals is not required by constitution or statute to

state the reasons for the conclusion reached.⁶⁰

Whether or not a written opinion shall be prepared and filed in a particular case is generally considered to rest in the discretion of the court,⁶¹ which will ordinarily prepare a written opinion

where this is deemed necessary,⁶² but not otherwise.⁶³ However, even though an opinion is not required by statute, one should be written where the case involves the application of an old principle, a restatement of which is necessary,⁶⁴ or where

write an opinion.—*Feeman v. State*, 1 N.E.2d 620, 131 Ohio St. 85.

(2) Gen.Code § 12248, providing that in case of reversal and remand the court of appeals shall state the error upon which the judgment of reversal was founded, does not refer to a written opinion.—*Feeman v. State*, supra.

(3) Affirmance of municipal court conviction by court of appeals without opinion held not error.—*Feeman v. State*, supra.

In Oklahoma, where a majority of the judges of the criminal court of appeals are unable to agree on legal questions involved on the application for a writ of habeas corpus, but agree that the petitioner is entitled to be released from custody, he will be discharged by memorandum opinion, especially when no good purpose would be served by a discussion of the questions raised.—*Ex parte Flowers*, 140 P. 914, 11 Okl.Cr. 381.

60. N.C.—*Bradsher v. Cheek*, 17 S. E. 533, 112 N.C. 338, 15 C.J. p 967 note 85.

Rulings

(1) A judge ordinarily cannot be compelled to state the reasons for any ruling given, or request for ruling refused.—*Williams v. Pittsfield Lime & Stone Co.*, 154 N.E. 572, 258 Mass. 65.

15 C.J. p 967 note 85 [a] (2).

(2) So he may properly refuse to give reasons for a ruling requiring an election between two counts.—*Williams v. Pittsfield Lime & Stone Co.*, supra.

61. N.C.—*Parker v. Webb*, 161 S.E. 730, 202 N.C. 818—*State v. Council*, 39 S.E. 814, 129 N.C. 511, 15 C.J. p 968 note 86.

In misdemeanor cases under some statutes whether written opinions shall be given is left to the discretion of the court.—*Casteel v. State*, 218 P. 1111, 25 Okl.Cr. 51—*Ostendorf v. State*, 128 P. 143, 8 Okl.Cr. 360—*Tucker v. State*, 124 P. 1134, 125 P. 1089, 7 Okl.Cr. 634.

Voluntary dismissal

(1) While a state constitution provision that the supreme court shall render a written opinion in each case after said case shall have been submitted for decision does not apply to a dismissal before final submission, nevertheless the court has discretion, as one of the terms it may impose as a condition precedent to granting leave to dismiss, to state

whatever facts it may deem necessary.—*In re Initiative Petition No. 112*, State Question No. 167, 7 P.2d 868, 154 Okl. 257.

(2) Imposition of terms by court generally as condition precedent to granting leave for voluntary dismissal see the C.J.S. title Dismissal and Nonsuit § 37, also 18 C.J. p 1168 note 86—p 1170 note 13.

62. Tenn.—*Beard v. Beard*, 14 S.W. 2d 745, 153 Tenn. 437, 15 C.J. p 968 note 87.

Federal court

(1) Necessity for federal court to enjoin enforcement of state law or action of state officials should be shown by an opinion of court.—*Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co.*, Ark., 47 S.Ct. 724, 274 U.S. 597, 71 L.Ed. 1224—*Lawrence v. St. Louis-San Francisco Ry. Co.*, Okl., 47 S.Ct. 730, 274 U.S. 538, 71 L.Ed. 1219.

(2) The reason is that the respect due to the state demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown.—*Lawrence v. St. Louis-San Francisco Ry. Co.*, supra.

(3) Federal court dismissing bill to set aside order requiring railroad to make switch connection with side track should render opinion setting forth reasons.—*Cleveland, C. C. & St. L. Ry. Co. v. U. S.*, Ill., 48 S.Ct. 189, 275 U.S. 404, 72 L.Ed. 838.

In sustaining new trial granted for law errors, reviewing court must declare law applicable.—*Hoooven Radiator Co. v. Little Motor Kar Co.*, Tex.Civ.App., 291 S.W. 313.

Certiorari

On petition for certiorari where the reviewing court has a divergence of opinion from that of the lower court, or merely concurs in the result reached without approving of the reasoning or authorities cited, it files a differentiating opinion.—*Beard v. Beard*, 14 S.W.2d 745, 153 Tenn. 437.

Statutes in some jurisdictions expressly so provide.—*Parker v. Webb*, 161 S.E. 730, 202 N.C. 818—*State v. Council*, 39 S.E. 814, 129 N.C. 511—*Bradsher v. Cheek*, 17 S.E. 533, 112 N.C. 338.

63. Miss.—*Union Indemnity Co. v. Shirley*, 150 So. 825, 170 Miss. 594, overruling suggestion of error 150 So. 224.

15 C.J. p 968 note 88.

Approval of lower court's opinion

(1) Written opinion by appellate court denying certiorari to review determination of intermediate appellate court is unnecessary, where the court of last resort concurs in reasoning of such intermediate court.—*Beard v. Beard*, 14 S.W.2d 745, 153 Tenn. 437.

(2) Where an appellate court approves opinion rendered by an intermediate appellate court, proper practice is merely to express approval of such opinion.—*McCombs v. Abrams*, Tex.Com.App., 48 S.W.2d 612, affirming, Civ.App., 28 S.W.2d 584—*Texas & Pacific Ry. Co. v. Baldwin*, Tex. Com.App., 44 S.W.2d 909.

Case valueless as precedent

Where case would be valueless as a precedent, no opinion will be written.—*Coppersmith v. Cook*, 144 S.E. 824, 196 N.C. 799.

Former decisions

Appellate court would not write opinion on question which was ruled against appellant by former decisions.—*Union Indemnity Co. v. Shirley*, 150 So. 825, 170 Miss. 594, overruling suggestion of error 150 So. 224.

Moot case

Where a case becomes moot pending application for supersedeas on appeal, no opinion is necessary.—*Portman v. Housel*, 226 P. 1117, 75 Colo. 506.

Points well settled

When points of law are well settled and discussion would be useless, decree will be affirmed without opinion.—*City of Miami Beach v. Poin-dexter*, 119 So. 136, 96 Fla. 811.

Rehearing

An appellate court adhering to original opinion does not, on rehearing, write opinions as to matters therein discussed.—*Austin Bros. v. Patton*, Tex.Com.App., 294 S.W. 537, denying motion 288 S.W. 182, which reversed, Civ.App., 245 S.W. 991, and which modified 290 S.W. 153.

To permit filing of suggestions of error

In a case not otherwise required by statute, a written opinion will not be given merely to enable counsel to file suggestions of error.—*Yazoo, etc., R. Co. v. James*, 67 So. 484, 108 Miss. 852, denying motion for written opinion 67 So. 464.

64. Miss.—*Yazoo, etc., R. Co. v. James*, supra.

the question involved is one of great public interest or importance or difficulty.⁶⁵

In some jurisdictions rules of court require commissioners of appeal to prepare such opinions as may be directed by the court.⁶⁶

Whether or not a trial court in admiralty may write an opinion is discussed in Admiralty § 147.

Oral opinion, followed by a written opinion, may be given, when special circumstances require a prompt decision.⁶⁷

A *per curiam opinion* is proper in a mandamus proceeding as to elections where time is too short to permit the promulgation of an opinion contemporaneously with entry of judgment awarding a peremptory writ, to be followed by a written opinion.⁶⁸

Findings of fact and opinion, when required, may be combined in a single document.⁶⁹

Where the civil law prevails, judgments and opinions are sometimes combined.⁷⁰

Number of opinions. Even though separate appeals have been taken, where a joint abstract and record has been filed, with appeals argued together, and separate briefs filed, only one opinion is required.⁷¹

c. Advisory Opinion

Advisory opinions will not be given by a court to a lower court after the latter has rendered judgment, nor will such opinions be given in order to influence future litigation.

A court will not give an advisory opinion to a lower court after the latter has rendered judgment;⁷² nor may an appellate court file an advisory opinion for the purpose of influencing future litigation.⁷³

Whether appellate courts, in reviewing cases, will include matters of purely advisory nature is considered in Appeal and Error § 1455.

Power of judiciary to render advisory opinions at the request of some other department or officer of the government is considered in Constitutional Law § 150, and the jurisdiction to render advisory opinions *supra* in § 36.

§ 218. Preparation, Filing, and Withdrawal

An opinion may be written by a judge who did not hear the argument, where the opinion is concurred in by those who did hear the argument, or where a statutory requirement that the opinion be written by a judge hearing the argument is waived. Opinions must be filed within the time specified by constitution or statute, and generally within a reasonable time after rendition of judgment. Both trial and appellate courts may withdraw their opinions.

Prior to the delivery of an opinion of an appellate court, the entire membership of the court considers the record, after a careful and painstaking consultation.⁷⁴ A judge who did not hear the oral argument may write such opinion where it is concurred in by the other judges who heard such argument,⁷⁵ or where a statutory requirement that in case of an oral argument the opinion must be delivered by a justice who heard such argument is waived.⁷⁶

Filing. The time within which a written opinion shall be filed is sometimes specified by the constitution or statute, which requirements are directory rather than mandatory.⁷⁷ As a general rule the opinion may be filed within a reasonable time after rendition of the judgment, especially within the term and before an appeal is perfected.⁷⁸

The necessity of filing a written opinion as a part

65. Colp.—Young v. Board of Com'rs of Park County, 79 P.2d 654, 102 Colo. 342.

Tex.—Tucker v. Higdon, Civ.App., 115 S.W.2d 973—Associated Indemnity Corporation v. Gatling, Civ.App., 75 S.W.2d 294, followed in American Nat. Ins. Co. v. Mata, 75 S.W.2d 1117.

15 C.J. p 968 note 90.

66. Ky.—Heycrick v. Dickey, 159 S. W. 666, 155 Ky. 222.

67. Cal.—Sturtevant v. Jordan, 191 P. 365, 183 Cal. 292.

Election question

Where a decision as to ballots in an election to be held soon necessitates prompt decision the appellate court may render an oral opinion and later file a written opinion to place the court's views on record.—Sturtevant v. Jordan, *supra*.

68. Mo.—State ex rel. Preisler v. Woodward, 105 S.W.2d 912, 340 Mo. 906—State ex rel. Tegethoff v. Seibel, 171 S.W. 69, 262 Mo. 220.

69. U.S.—P. H. & F. M. Roots Co. v. U. S., C.C.A.Ind., 17 F.2d 337.

70. Porto Rico.—Teillard v. Green, 7 Porto Rico Fed. 328.

71. Mo.—Missouri Dist. Telegraph Co. v. Southwestern Bell Telephone Co., 93 S.W.2d 19, 338 Mo. 692.

72. N.Y.—Ex parte Barker, 7 Cow. 143.

73. Va.—Interstate Coal, etc., Co. v. Clintwood Coal, etc., Co., 54 S.E. 593, 105 Va. 574.

Reason for rule

The functions of the appellate court are exhausted when it has ruled on the specific assignments of error submitted.—Interstate Coal,

etc., Co. v. Clintwood Coal, etc., Co., 54 S.E. 593, 105 Va. 574.

74. Tex.—Anderson & Kerr Drilling Co. v. Bruhlmeier, Civ.App., 115 S. W.2d 1212.

75. U.S.—Standard Oil Co. (Indiana) v. U. S., Ct.Cl., 7 F.Supp. 301, overruling motion 5 F.Supp. 976, certiorari denied 55 S.Ct. 116, 293 U.S. 599, 79 L.Ed. 692.

Pa.—Rosen v. Seidenberg, 170 A. 351, 111 Pa.Super. 534.

15 C.J. p 968 note 96.

76. Ala.—Alabama Western R. Co. v. Talley-Bates Constr. Co., 50 So. 341, 162 Ala. 396.

15 C.J. p 968 note 97.

77. U.S.—Monagas v. Central Eureka, C.C.A.Porto Rico, 56 F.2d 318. 15 C.J. p 968 note 13.

78. U.S.—Monagas v. Central Eureka, C.C.A.Porto Rico, 56 F.2d 318.

of the record on appeal is considered in the title Appeal and Error § 734. Likewise, whether the opinion must accompany the mandate is considered in the same title at § 1961.

Withdrawal of opinion. A trial court may withdraw its opinion prior to entry of judgment.⁷⁹ Similarly, an appellate court has inherent⁸⁰ power to withdraw its opinion at any time, so long as it retains jurisdiction of the case,⁸¹ in which case of withdrawal such opinion should be treated as not rendered.⁸²

§ 219. Adoption of Opinion of Lower Court

An appellate court may adopt the opinion of the trial court as its own.

Where the opinion of the trial court is contained in the record, an appellate court may, without impropriety, adopt such opinion as its own.⁸³ However, the mere fact that an appellate court refuses an application for a writ of error does not mean that such court necessarily adopts the opinion of the lower court.⁸⁴

§ 220. Supplemental and Modified Opinions

Supplemental opinions are permissible, and both trial and appellate courts may modify their opinions.

A supplemental opinion may be filed as of the date of the first opinion setting forth the facts on which the court acted.⁸⁵ Where the court at the time of reversing and remanding a cause files a summary of its holdings, it may, in its opinion filed after a trial of the remanded cause, include additional reasons for reversing the cause not stated in the summary.⁸⁶

Modified opinion. A trial judge has been said to have the right to withdraw an opinion for revision at any time while the case is pending including during an application for a rehearing.⁸⁷ An appellant who is dissatisfied with the declaration of law contained in an opinion of an appellate court may petition for the modification of the opinion,⁸⁸ and the appellate court has inherent power to modify its opinion at any time, so long as it retains jurisdiction of the case,⁸⁹ as on the hearing of a motion for reargument.⁹⁰ Moreover, if it appears that the original opinion may lead to confusion, it may be modified even after publication, by means of a modifying opinion.⁹¹

§ 221. Scope and Sufficiency

Unless required by statute, an opinion of an appellate court need not discuss and pass upon all points raised, the discussion being limited to meritorious assignments.

79. U.S.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.

Analogous to setting aside verdict of jury

Court, having power to set aside verdict of jury for purpose of receiving newly discovered evidence, may do likewise with its own opinion previously filed.—G. Amsinck & Co. v. Springfield Grocer Co., C.C.A.Mo., 7 F.2d 855.

80. S.D.—Lynn v. Schirber, 186 N.W. 570, 45 S.D. 10.

81. Ga.—City of Brunswick v. Gloagauer, 125 S.E. 727, 33 Ga.App. 314, withdrawing opinion 119 S.E. 420, 30 Ga.App. 727, reversed 124 S.E. 787, 158 Ga. 792.

Okl.—Hardcastle v. State, 238 P. 191, 111 Okl. 69.

Ground

The appellate court will withdraw its opinion already rendered in order to dismiss appeal, on showing that affirmation or reversal of judgment under settlement of case made by parties pending appeal would enable either party to speculate on judgment with reference to rights of other parties not before court.—Hardcastle v. State, 238 P. 191, 111 Okl. 69.

82. Tex.—Mixon v. Wallis, Civ.App., 161 S.W. 907.

83. Tex.—Buchanan v. Davis, Com.

App., 60 S.W.2d 192, affirming, Civ. App., 43 S.W.2d 279.
15 C.J. p 969 note 98.

84. Tex.—Community Natural Gas Co. v. Northern Texas Utilities Co., Civ.App., 13 S.W.2d 184, error dismissed.

Effect generally of refusal of application for writ of error see Appeal and Error § 492.

85. Pa.—Lester's Appeal, 11 A. 387, 7 Pa.Cas. 509.

86. Miss.—Adams v. Yazoo, etc., R. Co., 24 So. 200, 317, 28 So. 956, 77 Miss. 194, 60 L.R.A. 33, affirmed 21 S.Ct. 240, 180 U.S. 1, 45 L.Ed. 395, rehearing denied 21 S.Ct. 729, 181 U.S. 580, 45 L.Ed. 1011.

87. Porto Rico.—Teillard v. Green, 7 Porto Rico Fed. 328.

88. Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Friend, 143 N.E. 879, 194 Ind. 579, overruling rehearing 142 N.E. 709, 194 Ind. 579.

Unnecessary statement in opinion will be stricken from opinion on appellants' motion.—Flewellen v. Logan, C.C.A.Tex., 106 F.2d 151, denying rehearing 105 F.2d 268.

89. S.D.—Lynn v. Schirber, 186 N.W. 570, 45 S.D. 10.

Effect

Court's modification of its opinion by striking out statement that, if injunction bond was, insufficient, ap-

plication should be made to the trial court for relief did not determine that no power remained in the trial court to grant such relief, but merely that the question was not involved.—Eisenberg v. Superior Court in and for City and County of San Francisco, 236 P. 617, 193 Cal. 575.

90. Pa.—Philadelphia v. Jewell, 2 Mon. 734.

Effect of opinion on rehearing

Where a written opinion is filed on rehearing, the original opinion is modified to the extent set out in the second opinion, even though the court has reached the same result so far as the ultimate disposition of the cause is concerned.—Lesh v. Johnston Furniture Co., 13 N.E.2d 708, 214 Ind. 176, motion denied 14 N.E.2d 537.

Under a rule of court providing that opinions shall not be given out until the petition for rehearing is disposed of, the court, instead of, as formerly, handing down a separate opinion on petition for rehearing, will, whenever advisable, correct and reform the original opinion to correct errors pointed out in the petition for rehearing.—Schrodt's Ex'r v. Schrodt, 225 S.W. 151, 189 Ky. 457.

91. Wash.—State ex rel. Hill v. Port of Seattle, 180 P. 137, 104 Wash. 634.

The extent of elaboration rests with the author of the opinion, and generally the evidence supporting the findings, judgment, and verdict need not be set out, nor need the instructions attacked be set forth in all cases.

Unless required by statute or constitutional provisions,⁹² all points raised on the appeal need not be discussed and passed upon by the appellate court in its opinion.⁹³ Whenever possible, lengthy opinions should be avoided.⁹⁴ The opinion is usually no more than statements of facts and comments on legal questions under discussion.⁹⁵

The discussion should be limited to meritorious assignments,⁹⁶ and the court should not indulge in a discussion of the facts of the case, unless it tends to illuminate some legal principle involved.⁹⁷ A court should not give an opinion upon a point of law which is not raised by the evidence.⁹⁸

The purpose of a judicial opinion is to state a rule for the guidance of trial judges and the bar in future cases, and matters which have already been repeatedly decided in prior opinions should not be passed upon.⁹⁹ On the other hand, an opinion

92. In Ohio

(1) Appellate courts have a statutory duty of passing on all errors assigned.—*Babbitt v. Shade*, 19 N.E. 2d 778, 60 Ohio App. 100.

(2) The statute imposing such duty is mandatory.—*Mestetzko v. Elf Motor Co.*, 165 N.E. 93, 119 Ohio St. 575.

In Texas

(1) It has been said that by statute the court of civil appeals is required to pass specifically upon each assignment of error.—*Galveston, H. & S. A. Ry. Co. v. Hartford Fire Ins. Co.*, Civ.App., 220 S.W. 781, reversed on other grounds *Hartford Fire Ins. Co. v. Galveston, H. & S. A. R. Co.*, Com.App., 239 S.W. 919.

(2) However, the settled rule is that such court need not pass on each assignment separately.—*Hill v. Pure Oil Co.*, Civ.App., 38 S.W.2d 855, error dismissed—*Garcia v. Garcia*, Civ.App., 4 S.W.2d 257, error dismissed—*Cooper v. Newsom*, Civ.App., 224 S.W. 568, dismissed for want of jurisdiction.

(3) So, where separate propositions, although framed in different language, present practically the same matter, whether of law or fact, as reversible error, the court in its opinion on appeal need not discuss separately each proposition.—*Southern Pac. Co. v. Green*, Civ.App., 269 S.W. 877, reversed on other grounds, Com.App., 280 S.W. 198.

(4) However, it may, should it deem the practice advisable, give a full opinion as to all assignments.—*Cooper v. Newsom*, Civ.App., 224 S.W. 568, dismissed for want of jurisdiction.

(5) It must decide all issues properly presented.—*Garcia v. Garcia*, Civ.App., 4 S.W.2d 257, error dismissed.

(6) Where a justice wrote an opinion and filed conclusions of fact and law and the other justices concurred in result reached, although not as to reasons given, the court complied with the statute.—*Magnolia Petroleum Co. v. Long*, 86 S.W.2d 460, 128 Tex. 195, affirming, Civ.App., 51 S.W.2d 426.

93. Cal.—*People v. Hirschbein*, 55 P. 2d 516, 12 Cal.App.2d 447.

N.C.—*Perry v. Sykes*, 200 S.E. 923, 215 N.C. 39.

Tex.—*Daniel v. State*, 234 S.W. 77, 90 Tex.Cr. 225.

In Oregon

Under Const. art 7 § 7, providing that at the close of each term the judges shall file concise written statements of their decisions, the term "concise statement" means the conclusion, rather than the reasoning, and the court need not separately discuss each and every assignment of error.—*Schmid v. Thorsen*, 175 P. 74, 89 Or. 575, denying motion 170 P. 930, 89 Or. 575.

Inconsequential matters

Appellate court need not pass in detail on each of numerous rulings on voluminous evidence, much of which is inconsequential and irrelevant.

Md.—*Daiger v. Daiger*, 140 A. 717, 154 Md. 501.

Tex.—*Brown v. State*, 275 S.W. 1069, 101 Tex.Cr. 421.

Description by number

Opinion need not name every exception by number, but is complete if it discloses decision of determinative questions of appeal.—*Miller v. Atlantic Coast Line R. Co.*, 138 S.E. 675, 140 S.C. 123, certiorari denied *Camp Mfg. Co. v. Miller*, 48 S.Ct. 117, 275 U.S. 556, 72 L.Ed. 424.

Overlapping or repetitious assignments

It is the duty of the appellate court to consider each and all of the alleged errors urged when properly reserved, briefed and presented, in the written and published opinions of the court, but it is not incumbent on the court to treat specifically each error urged where they overlap or amount to needless repetition.

Mo.—*Evans v. Williams*, 4 S.W.2d 867, 222 Mo.App. 205.

N.C.—*Hyatt v. McCoy*, 140 S.E. 807, 194 N.C. 750.

Okl.—*Hendrix v. State*, 210 P. 734, 22 Okl.Cr. 230.

94. Ind.—*State ex rel Sluss v. Appellate Court of Indiana*, 17 N.E. 2d 824, 214 Ind. 886.

95. U.S.—*Gray v. Union Joint Stock Land Bank, C.C.A.Ohio*, 105 F.2d 275, reversed on other grounds 80 S.Ct. 291, two cases, rehearing denied *Gray v. Union Joint Stock Land Bank of Detroit*, 60 S.Ct. 381, two cases, reversed on other grounds *Platt v. Union Joint Stock Land Bank*, 60 S.Ct. 291, rehearing denied *Platt v. Union Joint Stock Land Bank of Detroit*, 60 S.Ct. 382.

96. Mich.—*Gambino v. Northern Ins. Co. of New York*, 269 N.W. 119, affirming 208 N.W. 480, 232 Mich. 561.

15 C.J. p 969 note 2.

Omission not error

That the court in affirming case omits from opinion discussion of assignment of error having no controlling influence is not error.—*Roetzel v. State*, 172 N.E. 551, 96 Ind.App. 661, denying rehearing 171 N.E. 206, 96 Ind.App. 661.

Statement as to ruling

Where plaintiff's supplementary petition contained a general demurrer to defendant's answer, to the overruling of which plaintiff excepted, the opinion of the court of civil appeals on appeal by defendant from a judgment against him, where no cross appeal was taken by plaintiff, need not state that the demurrer was filed and overruled.—*Sanger v. First Nat. Bank, Tex.Civ.App.*, 170 S.W. 1087.

97. Ala.—*Rittenberry v. Wharton*, 62 So. 872, 182 Ala. 388.

15 C.J. p 969 note 3.

98. U.S.—*Gardner v. Collins, C.C.R. I.*, 9 F.Cas.No.5,223, 3 Mason 398.

99. Okl.—*Hendrix v. State*, 210 P. 734, 22 Okl.Cr. 230.

15 C.J. p 969 note 5.

Announcing rules of law

Courts should announce rules of law that require compliance with statutes and not permit an invasion of the plain intent and purpose of statutes.—*Missouri Tp., Chariton County, v. Farmers' Bank of Forest Green*, 42 S.W.2d 353, 328 Mo. 868, transferred, App., 12 S.W.2d 763.

Dual purpose

Courts' written opinions serve dual purpose of explaining reasons for

should not extend beyond the questions immediately presented to discuss matters which may possibly arise in the future,¹ and an extended opinion should not be written where there are no meritorious questions to be considered.²

Footnote. While a footnote may sometimes make the opinion chaotic and bewildering, such footnote is as much a part of the opinion as the matter contained in the body of the opinion.³

Sufficiency. The judge who writes an opinion

must exercise his own judgment as to the degree of elaboration required.⁴ It is adequate for the opinion to show, in any decisive way, clearly how the case was decided, and the reasons therefor, as by reference to other decided cases, to an extract from a textbook, to a decree or charge, or sometimes by merely overruling the exceptions.⁵

In some jurisdictions statutes have given rise to a policy of the court not to discuss evidence in extenso in its opinions.⁶ In any event, an appellate

conclusions reached to parties litigant and becoming precedents for guidance of courts and legal profession.—*State ex rel. Sluss v. Appellate Court of Indiana*, 17 N.E.2d 824, 214 Ind. 686.

Decisions as to constitutionality

Where decisions as to constitutionality must, under a requirement of the state constitution, be filed, the appellate court has the duty of declaring the effect to be given its decision, in order that its clerk may know whether it is to be filed and that the reporter may know whether it is to be published or held in abeyance pending a possible recall by popular vote.—*People v. Western Union Telegraph Co.*, 198 P. 146, 70 Colo. 90, 15 A.L.R. 326.

Function of court is to declare what law is, and not what its members as individuals think it ought to be.—*Harris v. Watson*, 161 S.E. 215, 201 N.C. 661, 79 A.L.R. 441.

1. La.—*Wells v. Blackman*, 46 So. 437, 121 La. 394.
15 C.J. p 969 note 6.

Distinguishing inconsistent opinions

There is no obligation on the part of the appellate court to interpret and distinguish decisions of an intermediate appellate court merely because it is contended that the rule there laid down is inconsistent with the one adopted, either in previous opinions or in the opinion then pronounced, but the court may properly do so.—*Burgesser v. Bullock's*, 214 P. 649, 190 Cal. 673.

Matters not pertinent to new trial

Matters which will not occur on new trial granted for other reasons, need not be discussed.—*Brown v. State*, 275 S.W. 1069, 101 Tex.Cr. 421.

2. Okl.—*Wilson v. State*, 139 P. 528, 10 Okl.Cr. 518.

Lack of new points

Where the appellate court finds nothing new presented in appellant's brief, it will decide the case without an extended opinion.—*Davis v. Teague*, Tex.Civ.App., 256 S.W. 957—*San Antonio & A. P. Ry. Co. v. Gooch*, Tex.Civ.App., 247 S.W. 917.

3. U.S.—*Gray v. Union Joint Stock Land Bank*, C.C.A.Ohio, 105 F.2d 275, reversed on other grounds 60

S.Ct. 291, two cases, rehearing denied *Gray v. Union Joint Stock Land Bank of Detroit*, 60 S.Ct. 381, two cases, reversed on other grounds *Platt v. Union Joint Stock Land Bank*, 60 S.Ct. 291, rehearing denied *Platt v. Union Joint Stock Land Bank of Detroit*, 60 S.Ct. 382.

4. Ind.—*State ex rel. Sluss v. Appellate Court of Indiana*, 17 N.E.2d 824, 214 Ind. 686.

15 C.J. p 969 note 8.

"To lay down any 'hard and fast' formula would be to stifle the infinite variety that we find, even among the best decisions of the courts, and would be a bane to originality in the building of judicial opinions. All this must depend upon the case, the nature and training of the judge, and many other factors, too numerous to mention."—*Miller v. Atlantic Coast Line R. Co.*, 138 S.E. 675, 703, 140 S.C. 123, certiorari denied *Camp Mfg. Co. v. Miller*, 48 S.Ct. 117, 275 U.S. 556, 72 L.Ed. 424.

Maxim applicable

The Latin maxim, "De gustibus non est disputandum," is applicable.—*Miller v. Atlantic Coast Line R. Co.*, supra.

5. S.C.—*Miller v. Atlantic Coast Line R. Co.*, supra.

Opinions held sufficient

(1) The trial court's written findings of fact and conclusions of law, in action to recover overpayment of income taxes, constituted a sufficient written opinion as required by statute.—*U. S. v. First Wisconsin Trust Co.*, C.C.A.Wis., 92 F.2d 840.

(2) Statement that plaintiff and defendant had stipulated that judgment for plaintiff in divorce action should be reversed held sufficient compliance with constitutional provision requiring the court to state reasons for decision in writing.—*Clay v. Clay*, 65 P. 2d 1863, 19 Cal.App.2d 589.

6. Ala.—*Teal v. Mixon*, 185 So. 737, 237 Ala. 129.

Construction

(1) A statute providing that a court need not write opinions where the decision relates to questions of fact only has been given the effect of making the policy of the court not to discuss evidence in detail.—*Teal*

v. Mixon, supra—*McCrary v. Matthews*, 179 So. 367, 235 Ala. 409—*Beasley v. Ross*, 174 So. 764, 234 Ala. 335—*Martin v. Martin*, 171 So. 734, 233 Ala. 310—*Barley v. Wright*, 171 So. 247, 233 Ala. 282—*Davis v. Harrell*, 96 So. 616, 209 Ala. 528—*Harris v. Bowles*, 94 So. 757, 208 Ala. 545—*Harris v. Whittington*, 93 So. 526, 207 Ala. 551—*McDaniels v. Payne*, 92 So. 604, 207 Ala. 346—*Hodge v. Joy*, 92 So. 171, 207 Ala. 198—*Bixler v. Seeberg*, 91 So. 875, 207 Ala. 53—*Avant v. Avant*, 91 So. 874, 207 Ala. 46—*King v. State*, 88 So. 923, 205 Ala. 698—*Chamblee v. Johnson*, 87 So. 817, 205 Ala. 66—*Alabama Veneer Co. v. Richardson*, 78 So. 987, 201 Ala. 698—*Profile Cotton Mills v. Calhoun Water Co.*, 78 So. 389, 201 Ala. 483.

(2) The court merely announces its conclusion.—*Hodge v. Joy*, 92 So. 171, 207 Ala. 198—*Profile Cotton Mills v. Calhoun Water Co.*, 78 So. 389, 201 Ala. 483—*Farley v. Baldwin*, 77 So. 723, 201 Ala. 197.

(3) The rule applies particularly to litigation between brothers.—*Heflin v. Heflin*, 113 So. 535, 216 Ala. 519.

(4) The appellate court is not required under the statute to discuss the testimony and to show correctness of trial court's conclusion from weight of evidence.—*Howell v. Howell*, 100 So. 635, 211 Ala. 415.

(5) The court need not discuss and set out in its opinion the testimony leading it to its conclusion that the weight of the evidence does not support averments of a bill for divorce that defendant was addicted to habitual drunkenness.—*Moor v. Moor*, 99 So. 316, 211 Ala. 56.

(6) The court need not discuss and recite evidence which it holds sufficient to support decree appealed from in equity case.—*Mink v. Whitfield*, 118 So. 559, 218 Ala. 334—*Alabama Bank & Trust Co. v. Jones*, 104 So. 785, 213 Ala. 398.

(7) A detailed analysis of evidence need not be made.—*Heflin v. Heflin*, supra—*Koger v. State*, 110 So. 578, 215 Ala. 319.

(8) On appeal in equity cases, it need not indicate what testimony

court is not required to set out the testimony tending to support its findings,⁷ and in considering an assignment that the judgment is not sustained by the evidence the court is not required to discuss the evidence in extenso; it is sufficient if the opinion fairly reflects the evidence material to the decision.⁸ Where the evidence is sufficient to sustain the verdict, the court, in considering an assignment that the evidence does not support the verdict, need not set out any part thereof,⁹ but where the evidence is not sufficient to support the verdict, the court usually points out the lack of or insufficiency of the evidence.¹⁰

Where objections to instructions are clearly without merit, the court is not required to set out the instructions in its opinion.¹¹ Likewise, where the appeal is taken directly to an intermediate appellate court for final determination, such court need

not set out in its opinion the evidence and instructions for the purpose of a rehearing in the court of last resort.¹²

The parties need not be designated in the opinion by name.¹³

§ 222. Construction, Operation, and Effect

- a. Construction
- b. Operation and effect

a. Construction

General principles of construction of written instruments, particularly the principles of statutory construction, control as to the construction of opinions of courts or judges.

In interpreting an opinion of a court or judge, regard must be had for the facts of the individual case, for the ends sought to be reached, for the evils to be avoided, and the benefits to be attained.¹⁴

should not be considered.—*White v. White*, 142 So. 534, 225 Ala. 155.

(9) Likewise, under a statute authorizing the appellate court to write opinions only when such opinions will serve a useful purpose, the court need not discuss the evidence when it would serve no useful purpose.—*Wilkinson v. Flowers*, 77 So. 882, 16 Ala.App. 370.

(10) So, in a murder prosecution, the court should not, on appeal, comment unnecessarily on evidence, where civil suit for death was pending.—*Vaughn v. State*, 143 So. 211, 25 Ala.App. 204.

(11) Nor will testimony be set out in an opinion, where the "crucial testimony" is too vile and disgusting to be repeated any place.—*Murphy v. State*, 176 So. 473, 27 Ala.App. 546, certiorari denied 176 So. 475, 284 Ala. 625.

7. *Tex.—Cadillac-La Salle Corporation of Houston v. Berry*, Civ.App., 125 S.W.2d 1071.

15 C.J. p 969 note 9.

Avoidance of publicity to parties

On appeal from decree awarding alimony and counsel fees, where principal question was determination by court of clearly defined issues of fact, and testimony reflecting on those issues was such that its repetition would only assure needless painful publicity to parties concerned without any compensating advantage, court was under no obligation to do more than state its conclusions with reasons on issues of fact.—*Silverberg v. Silverberg*, 130 A. 325, 148 Md. 682.

Cumulative findings or statement of evidence additional to that stated in appellate court's original opinion is unnecessary and will not be made where opinion would thereby be un-

duly lengthened, since evidence appearing in statement of facts is available for consideration by Supreme Court.—*Wichita Royalty Co. v. City Nat. Bank of Wichita Falls*, Tex.Civ.App., 74 S.W.2d 661, modified on other grounds 89 S.W.2d 394, 127 Tex. 158, rehearing denied 93 S.W.2d 143, 127 Tex. 158.

Jury case

Where a case is tried to a jury the opinion of appellate court need not contain detailed recitals of fact.—*Whitchurst v. Howell*, 98 S.W.2d 1071, 20 Tenn.App. 314.

Negligence

In action for death of railroad freight conductor, where it is not claimed that verdict for plaintiff was excessive, it is not necessary for appellate court to abstract all evidence tending to show contributory negligence of deceased or nonnegligence of defendant.—*McCarty v. Nelson*, 195 S.W. 689, 129 Ark. 280.

8. *Cal.—Koeberle v. Hotchkiss*, 48 P. 2d 104, 8 Cal.App.2d 634—*Behler v. Kunde*, 281 P. 76, 100 Cal.App. 731. *Tex.—Bute v. Stude*, Civ.App., 264 S. W. 1037—*Farmers' Rice Milling Co. v. Standard Rice Co.*, Civ.App., 264 S.W. 276, reversed on other grounds, Com.App., 276 S.W. 904. 15 C.J. p 969 note 10.

9. *Tex.—Fidelity & Deposit Co. of Maryland v. First Nat. Bank*, Civ. App., 113 S.W.2d 622, error dismissed—*Gulf, C. & S. F. Ry. Co. v. Tarver, Steele & Co.*, Civ.App., 295 S.W. 320—*Jackson v. Anglin*, Civ.App., 252 S.W. 1085. *Va.—Boyd v. Dalton*, 192 S.E. 692, 169 Va. 17.

15 C.J. p 969 note 11.

Omission not breach of duty

When the court reviews a record to determine whether the evidence

supports the verdict and is convinced that it does and announces its conclusion without extensive analysis of the testimony, it is not justly subject to the imputation that it did not examine the record and failed to discharge its duty.—*Tyrrell v. Robinson*, 180 Ill.App. 286.

10. *Tex.—Gulf, C. & S. F. Ry. Co. v. Tarver, Steele & Co.*, Civ.App., 295 S.W. 320—*Jackson v. Anglin*, Civ. App., 252 S.W. 1085.

11. *Neb.—Holmes v. State*, 127 N. W. 1067, 87 Neb. 710.

12. *Cal.—People v. Groves*, 50 P.2d 813, 9 Cal.App.2d 317, denying rehearing 49 P.2d 888, 9 Cal.App.2d 317.

13. *N.Y.—In re Investigation Concerning a Change in Court Records*, 5 N.Y.S.2d 813, 255 App.Div. 48.

Use of "anonymous" or equivalent

The identity of a party may in a proper case be withheld in an opinion by the use of the term "anonymous" or some equivalent expression.—*In re Investigation Concerning a Change in Court Records*, supra.

Fictitious name

The text rule does not justify the substitution in the opinion of a wholly fictitious name for the correct name in which the action was instituted, thereby introducing inaccuracy into the records of the court and resulting in a confusion of identity.—*In re Investigation Concerning a Change in Court Records*, supra.

14. *U.S.—Miller v. Kansas City Light & Power Co.*, C.C.A.Mo., 13 F.2d 723.

Governing factor

In determining judicial action, the character of the situation sought to be remedied, rather than its abruptness, is the governing factor.—

The opinion of the court or judge should be interpreted as a whole.¹⁵ be construed with reference to the facts on which it is based,¹⁶ the language used must be held as re-

So it is well settled that a judicial opinion must

Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., 82 P.2d 3, 11 Cal.2d 634, 118 A.L.R. 486.

Opinions construed

(1) Opinion, sustaining exception to erroneous instruction and stating that other exceptions were not considered, did not decide that verdict did substantial justice.—Barry v. Kettelle, 140 A. 3, denying reargument 139 A. 664, 49 R.I. 50.

(2) Recital in appellate court's opinion reversing decree for defendant in patent infringement suit that decree may be silent as to other claims than the one upon which reversed held to sustain validity of patent only as to single claim as respects contract rights.—Haynes v. Union Carbide & Carbon Corporation, C.C.A.Ind., 46 F.2d 4, certiorari denied 51 S.Ct. 650, 283 U.S. 857, 75 L.Ed. 1464.

15. U.S.—Orr v. Allen, Ohio, 39 S.Ct. 23, 248 U.S. 35, 63 L.Ed. 109, affirming, D.C. Ohio, 245 F. 486—Manners v. Morosco, D.C.N.Y., 254 F. 737.

Ark.—Sloan v. Blytheville Special School Dist. No. 5, 273 S.W. 397, 169 Ark. 77.

Cal.—*Merchants' Nat. Bank of San*

be read in connection with all that is said in it.—Utah Consol. Mining Co. v. Utah Apex Mining Co., C.C.A. Utah, 285 F. 249, certiorari denied 43 S.Ct. 362, 261 U.S. 617, 67 L.Ed. 829.

(4) Separating expressions in opinions from their context in order to give them a meaning which the opinions do not sanction cannot be sustained.—Orr v. Allen, Ohio, 39 S.Ct. 23, 248 U.S. 35, 63 L.Ed. 109, affirming, D.C., 245 F. 486.

(5) General statements in judicial opinions concerning particular situation cannot be wrested from context and invoked as authority on different questions.—Thibeault v. Poole, 186 N.E. 632, 283 Mass. 480.

(6) Sentences cannot be detached from opinion, and stretched to other circumstances for which not intended.—Rosen v. U. S. Rubber Co., 167 N.E. 655, 268 Mass. 403, 65 A.L.R. 1299.

(7) Isolated expressions in opinion are not to be employed to expand opinion into holding more than its plain import, or interpreted as deciding questions not essential to determination of issues before the court.—People ex rel. Yohnka v. Kennedy, 10 N.E.2d 806, 367 Ill. 236.

58 S.Ct. 95, 302 U.S. 16, 82 L.Ed. 20, affirming, C.C.A., Aronson v. White, 87 F.2d 272, vacating, D.C., 13 F.Supp. 913, certiorari granted White v. Aronson, 57 S.Ct. 794, 301 U.S. 675, 81 L.Ed. 1336—W.R. Co. v. Sovia, C.C.A.Mich., 106 F.2d 478—Globe-Union v. Chicago Telephone Supply Co., C.C.A.Ind., 103 F.2d 722, followed in Cutler-Hammer, Inc., v. Chicago Telephone Supply Co., 103 F.2d 732—Mutual Benefit Health & Accident Ass'n v. Bowman, C.C.A.Neb., 99 F.2d 856, conforming to mandate 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521, vacating, C.C.A., 96 F.2d 7, certiorari denied 59 S.Ct. 485, 306 U.S. 637, 83 L.Ed. 1038—Moore v. Chicago Mercantile Exchange, C.C.A. Ill., 90 F.2d 735, certiorari denied 58 S.Ct. 30, 302 U.S. 710, 82 L.Ed. 548—Bennett v. Board of Trade of City of Chicago, 90 F.2d 735, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L.Ed. 548, rehearing denied 58 S.Ct. 118, 302 U.S. 774, 82 L.Ed. 600—Goddard v. U. S., C.C.A.Utah, 86 F.2d 884—Preferred Accident Ins. Co. of New York v. Combs, C. C.A.Neb., 76 F.2d 775—Texas & P. Ry. Co. v. Louisiana Oil Refining Corporation, C.C.A.La. 78 F.2d 465

27 Ga.App. 185.

Ky.—De Charette's Guardian v. Bank of Shelbyville, 291 S.W. 1054, 218 Ky. 691.

Miss.—Gulf & S. I. R. Co. v. Simmons, 121 So. 144, 153 Miss. 327.

Mont.—State ex rel. Murray Hospital v. District Court of Second Judicial Dist., 57 P.2d 813, 102 Mont. 350.

Neb.—Clark v. Hass, 260 N.W. 792, 793, 129 Neb. 112, citing *Corpus Juris*.

N.Y.—Bulova v. Barnett, 181 N.Y.S. 247, 111 Misc. 150.

Pa.—Commonwealth v. Crittenton, 191 A. 358, 326 Pa. 25.

15 C.J. p 970 note 29.

Other statements

(1) Effect of decision is not extended or determined by reference to single phrase, but it must be considered in its entirety.—Young v. Southern Pac. Co., 210 P. 254, 189 Cal. 746—Kelly v. Ferbrache, 6 P.2d 987, 119 Cal.App. 529.

(2) Excerpts from an opinion must be read in connection with rest of opinion.—State ex rel. Singleton v. Ellison, Mo., 196 S.W. 748, quashing certiorari Singleton v. Shepherd, 183 S.W. 1077, 196 Mo.App. 505.

(3) Every opinion by a court must

portions of the opinion separate from the facts, especially where the law upon the subject has many exceptions.—New York Life Ins. Co. v. Kimball, 106 A. 676, 93 Vt. 147.

By construing various statements, court was justified in saying that in another case the court had approved an instruction permitting jury to consider facts constituting defendants' negligence causing death in enhancement of damages.—State ex rel. Dunham v. Ellison, 213 S.W. 459, 278 Mo. 649, reversing Griggs v. Dunham, App., 204 S.W. 573.

Conflict with language of statute

Isolated expressions in a previous opinion cannot be permitted to override the express language of the act being construed.—In re Frick's Estate, 121 A. 35, 277 Pa. 242, reversed on other grounds Frick v. Commonwealth of Pennsylvania, 45 S.Ct. 603, 268 U.S. 473, 69 L.Ed. 1058.

Improper practice

Counsel's practice in attempting to excerpt certain language from opinion of an authority and to urge it as authority for result wholly contrary to decision attained was improper.—In re Reilly's Estate, 300 N.Y.S. 1285, 165 Misc. 214.

16. U.S.—White v. Aronson, Mass.,

certiorari denied Texas & P. Ry. Co. v. Louisiana Oil Refining Corporation, 55 S.Ct. 926, 295 U.S. 767, 79 L.Ed. 1708—Marshall v. Andrew F. Mahony Co., C.C.A.Wash., 56 F.2d 74, affirming, D.C., Andrew F. Mahony Co. v. Marshall, 46 F.2d 539, and followed in, C.C.A., Pillsbury v. Pacific S. S. Co., 56 F.2d 79—Metropolitan Casualty Ins. Co. of New York v. Colthurst, C.C.A.Cal., 36 F.2d 559, certiorari denied Colthurst v. Metropolitan Casualty Ins. Co. of New York, 50 S.Ct. 351, 281 U.S. 746, 74 L.Ed. 1158—Julian Petroleum Corporation v. Courtney Petroleum Co., C.C.A.Cal., 22 F.2d 360—Kevan v. John Hancock Mut. Life Ins. Co., D.C.Mo., 3 F.Supp. 288—Payne v. Garth, C.C.A.Neb., 285 F. 301—Utah Consol. Mining Co. v. Utah Apex Mining Co., C.C.A.Utah, 285 F. 249, certiorari denied 43 S.Ct. 362, 261 U.S. 617, 67 L.Ed. 829.

Ark.—Travelers' Protective Ass'n of America v. Stephens, 49 S.W.2d 364, 185 Ark. 660—Atkinson Improvement Co. v. Nakdimen, 248 S.W. 561, 157 Ark. 403—Dickson v. Board of Directors of Long Prairie Levee Dist., 235 S.W. 45, 151 Ark. 22—Little Rock Traction & Electric Co. v. Kimbro, 87 S.W. 131,

- 644, 75 Ark. 211—Branch v. Mitchell, 24 Ark. 431.
- Cal.—Leblanc v. Coverdale, 3 P.2d 312, 213 Cal. 654—Chater v. S. F. Refining Co., 19 Cal. 220—Wood v. Roach, 14 P.2d 170, 125 Cal.App. 631—Bachman v. Independence Indemnity Co., 298 P. 57, 112 Cal. App. 465, denying rehearing 297 P. 110, 112 Cal.App. 465.
- Colo.—Farrah v. Patton, 59 P.2d 76, 99 Colo. 41—Capitol Life Ins. Co. v. Di Iulio, 53 P.2d 1183, 98 Colo. 116—Exchange Nat. Bank of Colorado Springs v. Receivers of City Savings, Building & Loan Ass'n, 37 P.2d 394, 95 Colo. 498—Froid v. Knowles, 36 P.2d 156, 95 Colo. 223—Allen v. Bailey, 14 P.2d 1087, 91 Colo. 260—American Mortg. Co. v. Logan, 7 P.2d 953, 90 Colo. 157—People v. Texas Co., 275 P. 896, 85 Colo. 289—Gunter v. Walpole, 176 P. 290, 65 Colo. 234.
- D.C.—Robertson v. U. S. ex rel. Baldwin Co., 287 F. 942, 52 App.D.C. 368, reversed on other grounds U. S. ex rel. Baldwin Co. v. Robertson, 44 S.Ct. 508, 265 U.S. 168, 68 L.Ed. 962.
- Fla.—Kahn v. American Surety Co. of New York, 162 So. 335, 120 Fla. 50—Shelfer v. American Agr. Chemical Co., 152 So. 613, 113 Fla. 108—Madison v. Robinson, 116 So. 31, 95 Fla. 321.
- Ga.—Plummer v. State, 108 S.E. 128, 27 Ga.App. 185.
- Idaho—Eldridge v. Black Canyon Irr. Dist., 43 P.2d 1052, 55 Idaho 443.
- Ill.—People ex rel. Schuler v. Chapman, 19 N.E.2d 351, 370 Ill. 430—White v. Seitz, 174 N.E. 371, 342 Ill. 266, reversing 258 Ill.App. 318—Fels v. Arends, 159 N.E. 244, 328 Ill. 38—City of Springfield v. Springfield Consol. Ry. Co., 129 N.E. 580, 296 Ill. 17—People v. Wethel, 202 Ill.App. 77.
- Ind.—Pierce v. Blair, 149 N.E. 560, 196 Ind. 710—Royal Ins. Co., Limited, of Liverpool, v. Stewart, 129 N.E. 853, 190 Ind. 444—White v. White, 186 N.E. 349, 98 Ind.App. 587—City of Terre Haute v. Burns, 117 N.E. 519, 70 Ind.App. 712, denying rehearing 116 N.E. 604, 69 Ind.App. 7.
- Iowa—Illinois Cent. Ry. Co. v. Waterloo, C. F. & N. Ry. Co., 173 N.W. 288, 186 Iowa 1207.
- Ky.—American Mut. Liability Ins. Co. v. Hartman, 72 S.W.2d 429, 254 Ky. 712—Wallins Creek Coaleries Co. v. Jones, 283 S.W. 1067, 214 Ky. 775.
- La.—Mayer v. Board of Com'rs for Caddo Levee Dist., 150 So. 295, 177 La. 1119.
- Mass.—Grinnell Co. v. Gardner Trust Co., 193 N.E. 37, 288 Mass. 385—Millett v. Temple, 182 N.E. 921, 280 Mass. 543, 84 A.L.R. 878—Knowlton v. Inhabitants of Swampscott, 181 N.E. 849, 280 Mass. 69—Welch v. King, 181 N.E. 846, 279 Mass. 445—Eaton v. Walker, 138 N.E. 798, 244 Mass. 23—Attorney General v. Armstrong, 120 N.E. 678, 231 Mass. 196.
- Miss.—Tyson v. Utterback, 122 So. 496, 63 A.L.R. 1188.
- Mo.—Callahan v. Huhman, 98 S.W. 2d 704, 339 Mo. 634—Powers v. Kansas City Public Service Co., 66 S.W.2d 840, 334 Mo. 432—Keeton v. Gaiser, 55 S.W.2d 302, 331 Mo. 499—Devine v. Wells, 254 S.W. 65, 300 Mo. 177—State ex rel. Lashly v. Becker, 235 S.W. 1017, 290 Mo. 560—Bolin v. Sovereign Camp, W. O. W., App., 112 S.W.2d 582, transferred 98 S.W.2d 681, 339 Mo. 618, certiorari granted Sovereign Camp, W. O. W. v. Bolin, 58 S.Ct. 1058, 304 U.S. 557, 82 L.Ed. 1525, reversed on other grounds 59 S.Ct. 35, 305 U.S. 66, 83 L.Ed. 58, 119 A.L.R. 478, rehearing denied 59 S.Ct. 241, 305 U.S. 673, 83 L.Ed. 436—Sweet v. Terminal R. Ass'n of St. Louis, App., 111 S.W.2d 1000.
- Mont.—Gaines v. Van Demark, 74 P.2d 454, 106 Mont. 1—Forbes v. Mid-Northern Oil Co., 45 P.2d 678, 100 Mont. 10—Blöse v. Havre Oil & Gas Co., 31 P.2d 738, 96 Mont. 450—Farbo v. School Dist. No. 1 of Toole County, 28 P.2d 455, 95 Mont. 531—Sun River Stock & Land Co. v. Montana Trust & Savings Bank, 262 P. 1039, 81 Mont. 222—Ex parte Thompson, 251 P. 163, 77 Mont. 466—Hunt v. S. Y. Cattle Co., 244 P. 480, 75 Mont. 594—State v. District Court of Ninth Judicial Dist. in and for Gallatin County, 231 P. 1107, 72 Mont. 77—McDermott v. American Bonding Co. of Baltimore, 179 P. 828, 56 Mont. 1.
- Neb.—Clark v. Hass, 260 N.W. 792, 793, 129 Neb. 112, citing *Corpus Juris*.
- N.H.—Proctor v. Frost, 197 A. 813, 89 N.H. 304.
- N.Y.—Dougherty v. Equitable Life Assur. Soc. of U. S., 193 N.E. 897, 266 N.Y. 71, reversing 265 N.Y.S. 714, 238 App.Div. 696, affirming in part and reversing in part 259 N.Y.S. 146, 144 Misc. 363, reargument denied 195 N.E. 226, 266 N.Y. 615, and followed in Goldberg-Rudkowsky v. Equitable Life Assur. Soc. of U. S., 195 N.E. 149, 266 N.Y. 451, reversing in part and affirming in part Rudkowsky v. Equitable Life Assur. Soc. of U. S., 265 N.Y.S. 721, 238 App.Div. 704, which affirmed 261 N.Y.S. 23, 145 Misc. 765, reargument denied Goldberg-Rudkowsky v. Equitable Life Assur. Soc. of U. S., 195 N.E. 226, 266 N.Y. 615, certiorari denied 56 S.Ct. 94, 296 U.S. 583, 80 L.Ed. 412, and followed in Klockhov v. Petrogradski Mejdunarodni Commercheski Bank, 195 N.E. 216, 266 N.Y. 596, affirming 268 N.Y.S. 433, 239 App.Div. 687, and reargument denied 195 N.E. 374, 266 N.Y. 667, and certiorari denied 56 S.Ct. 101, 296 U.S. 583, 80 L.Ed. 412—Green v. Miller, 162 N.E. 593, 249 N.Y. 88, reversing 228 N.Y.S. 806, 223 App.Div. 832—Rolfe v. Hewitt, 125 N.E. 804, 227 N.Y. 486, reversing 170 N.Y.S. 1109, 184 App.Div. 920—Frank v. Carlisle, 10 N.Y.S.2d 1, 256 App.Div. 332—Haines v. Bero Engineering Const. Corporation, 243 N.Y.S. 657, 330 App.Div. 332, followed Wood v. Lyons, 250 N.Y.S. 941 (two cases) 233 App.Div. 791—City of Rochester v. Ailing, 10 N.Y.S.2d 373, 170 Misc. 477—Holzer v. Deutsche Reichsbahn Gesellschaft, 290 N.Y.S. 181, 159 Misc. 830—Devitt v. Continental Casualty Co., 277 N.Y.S. 844, 154 Misc. 603, reversed on other grounds 281 N.Y.S. 336, 245 App.Div. 115, reversed on other grounds 199 N.E. 765, 296 N.Y. 474—Mills v. Friedman, 181 N.Y.S. 285, 111 Misc. 253.
- N.C.—Osmond Barringer Co. v. Standard Fire Ins. Co., 123 S.E. 305, 188 N.C. 117—Champion Fibre Co. v. Cozad, 112 S.E. 810, 183 N.C. 600.
- Ohio—Logue v. Rouse, 192 N.E. 136, 47 Ohio App. 476.
- Or.—Schassen v. Columbia Gorge Motor Coach System, 270 P. 530, 126 Or. 863.
- Pa.—Rosenheck v. Stape, 3 A.2d 678, 332 Pa. 287—Commonwealth v. Shawell, 191 A. 17, 325 Pa. 497—In re Scott's Estate, 152 A. 560, 301 Pa. 509—Haas v. Howard Lanin Music, 192 A. 257, 126 Pa. Super. 546—Probka v. Polls, 188 A. 393, 124 Pa.Super. 129.
- S.C.—Brooker v. Silverthorne, 99 S.E. 350, 111 S.C. 553, 5 A.L.R. 1283.
- S.D.—Pooley v. Leith, 255 N.W. 153, 62 S.D. 554—First Nat. Bank v. Brule Nat. Bank of Chamberlain, 168 N.W. 1054, 41 S.D. 87.
- Tenn.—Shanks v. Phillips, 55 S.W.2d 258, 165 Tenn. 401—Prudential Ins. Co. of America v. Davis, 78 S.W.2d 358, 18 Tenn.App. 413.
- Tex.—Benson v. Adams, Com.App., 285 S.W. 818, reversing, Civ.App., 274 S.W. 210—Community Natural Gas Co. v. Northern Texas Utilities Co., Civ.App., 13 S.W.2d 184, error dismissed—Maruska v. Missouri, K. & T. R. Co. of Texas, Civ. App., 10 S.W.2d 211, error refused—Ex parte Neeley, 42 S.W.2d 445, 118 Tex.Cr. 171—Arocha v. State, 39 S.W.2d 1097, 118 Tex.Cr. 391.
- Utah—Barlow v. Utah Light & Traction Co., 298 P. 386, 77 Utah 556.
- Va.—Hawkins v. Brickhouse, 199 S.E. 482—Ames v. American Nat. Bank of Portsmouth, 176 S.E. 204, 163 Va. 1—Dickenson County Bank v. Royal Exchange Assur. of London, England, 160 S.E. 13, 157 Va. 94, 76 A.L.R. 1209—Hancock v. Norfolk & W. Ry. Co., 141 S.E. 849, 149 Va. 329—Trotman v. Trotman, 139

ferring to the particular case,¹⁷ and read in the | light of the circumstances under which it is used,¹⁸

- S.E. 490, 148 Va. 860—Payne v. Jennings, 131 S. E. 209, 144 Va. 126, 48 A.L.R. 628—Atlantic Coast Realty Co. v. Townsend, 98 S.E. 684, 124 Va. 490—City Gas Co. of Norfolk v. Poudre, 74 S.E. 158, 113 Va. 224.
- Wis.—Vinograd v. Travelers' Protective Ass'n of America, 258 N.W. 787, 217 Wis. 316, 106 A.L.R. 1227. 15 C.J. p 941 note 81—p 970 note 30.
17. U.S.—Wright v. U. S., Ct.Cl., 58 S.Ct. 395, 302 U.S. 583, 82 L.Ed. 439—People of Puerto Rico v. Shell Co., Puerto Rico, 58 S.Ct. 167, 302 U.S. 253, 82 L.Ed. 235, reversing, C.C.A., 86 F.2d 577, certiorari granted 57 S.Ct. 921, 301 U.S. 675, 81 L.Ed. 1336—Osaka Shosen Kaisha Line v. U. S., Tex., 57 S.Ct. 356, 300 U.S. 98, 81 L.Ed. 532, affirming, C.C.A., The Santos Maru, 84 F.2d 482, certiorari granted Osaka Shosen Kaisha Line v. U. S., 57 S.Ct. 30, 299 U.S. 526, 81 L.Ed. 387—Humphrey's Ex'r v. U. S., Ct.Cl., 55 S.Ct. 869, 295 U.S. 602, 79 L.Ed. 1611—O'Donoghue v. U. S., Ct.Cl., 53 S.Ct. 740, 289 U.S. 516, 77 L.Ed. 1356—Bramwell v. U. S. Fidelity & Guaranty Co., Or., 46 S.Ct. 176, 269 U.S. 483, 70 L.Ed. 368, affirming, C.C.A., 299 F. 705, which affirmed, D.C., U. S. Fidelity & Guaranty Co. v. Bramwell, 295 F. 331—Pollock v. Farmers' Loan & Trust Co., N.Y., 15 S.Ct. 673, 157 U.S. 574, 39 L.Ed. 759—Commissioner of Internal Revenue v. Western Union Life Ins. Co., C.C.A., 61 F.2d 207—In re Mill Iron Const. Co., D.C.N.Y., 56 F.2d 248—Hill v. Carter, C.C.A.Hawaii, 47 F.2d 869, certiorari denied 52 S.Ct. 10, 284 U.S. 625, 76 L.Ed. 532—Chicago, M., St. P. & P. R. Co. v. Hedges, D.C.Wash., 5 F.Supp. 752—Louisville & N. R. Co. v. Western Union Telegraph Co., C.C.A.Ky., 268 F. 4—Ellicott Machine Corp. v. Vogt Bros. Mfg. Co., D.C.Ky., 267 F. 934.
- Ala.—State v. Blair, 191 So. 237—Wilkinson v. Murphy, 186 So. 487, 237 Ala. 332, 121 A.L.R. 283—Canty v. Sims, 109 So. 373, 21 Ala.App. 469.
- Ark.—Texarkana Special School Dist. v. Consolidated School Dist. No. 2, 46 S.W.2d 631, 185 Ark. 213—J. F. McGehee & Co. v. Fuller, 277 S.W. 39, 169 Ark. 920.
- Cal.—Grant v. Murphy, 48 P. 481, 116 Cal. 432, 58 Am.S.R. 188—Chapman v. State, 38 P. 457, 104 Cal. 690, 43 Am.S.R. 153—River Farms Co. of California v. Superior Court in and for City and County of San Francisco, 21 P.2d 643, 131 Cal.App. 365—Palvutian v. Terkanian, 190 P. 503, 47 Cal.App. 47.
- Colo.—City and County of Denver v. Henry, 38 P.2d 896, 95 Colo. 582.
- Del.—State ex rel. Green v. Collison, 197 A. 836, reversed on other grounds Collison v. State ex rel. Green, 2 A.2d 97, 119 A.L.R. 1422.
- Idaho.—Bashore v. Adlof, 238 P. 534, 41 Idaho 84, 41 A.L.R. 932.
- Ill.—People v. Barber, 124 N.E. 594, 289 Ill. 556—Manufacturers State Bank v. American Surety Co., 230 Ill.App. 474.
- Kan.—Maresh v. Peoria Life Ins. Co., 3 P.2d 634, 133 Kan. 654, denying rehearing 299 P. 934, 133 Kan. 191.
- Mo.—Mayes v. Mayes, App., 104 S.W.2d 1019, reversed on other grounds 116 S.W.2d 1, 342 Mo. 401.
- Mont.—Connolly v. Harrel, 57 P.2d 781, 102 Mont. 295—McCulloch v. Horton, 56 P.2d 1344, 102 Mont. 135—Williams v. Anaconda Copper Mining Co., 29 P.2d 649, 96 Mont. 204—Lindblom v. Employers' Liability Assur. Corporation, 295 P. 1007, 88 Mont. 438—State v. Jones, 261 P. 356, 80 Mont. 574, 60 A.L.R. 441—Martien v. Porter, 219 P. 817, 68 Mont. 450.
- Neb.—Clark v. Hass, 260 N.W. 792, 793, 129 Neb. 112, citing *Corpus Juris*.
- N.Y.—People ex rel. Met. St. Ry. Co. v. Tax Com'rs, 67 N.E. 69, 174 N.Y. 417, 63 L.R.A. 884, 105 Am.S.R. 674—Galland v. Shubert Theatrical Co., 221 N.Y.S. 437, 220 App.Div. 704, reversing 208 N.Y.S. 144, 124 Misc. 371—Spring v. Fidelity Mut. Life Ins. Co., 170 N.Y.S. 253, 183 App.Div. 134—Nannes v. Ideal Garage, 269 N.Y.S. 777, 150 Misc. 522—Smith v. Pacific Improvement Co., 172 N.Y.S. 65, 104 Misc. 481.
- N.C.—Hoft v. Mohn, 2 S.E.2d 23, 215 N.C. 397—Guilford County v. Estates Administration, 197 S.E. 535, 213 N.C. 763—Styers v. Forsyth County, 194 S.E. 305, 212 N.C. 558—Sidney Spitzer & Co. v. Commissioners of Franklin County, 123 S.E. 636, 188 N.C. 30—Person v. Board of State Tax Com'rs, 115 S.E. 336, 184 N.C. 499—In re Edens' Will, 109 S.E. 269, 182 N.C. 898.
- Or.—Shea v. State Industrial Accident Commission, 247 P. 770, 118 Or. 642.
- Pa.—Commonwealth v. Shawell, 191 A. 17, 325 Pa. 497—Scalfe v. McKee, 148 A. 37, 298 Pa. 33, appeal dismissed Scalfe v. Scalfe, 50 S.Ct. 459, 281 U.S. 771, 74 L.Ed. 1177, and McKee v. Scalfe, 50 S.Ct. 459, 281 U.S. 771, 74 L.Ed. 1178—In re Kates' Estate, 128 A. 97, 282 Pa. 417—In re Frick's Estate, 121 A. 35, 277 Pa. 242, reversed on other grounds Frick v. Commonwealth of Pennsylvania, 45 S.Ct. 603, 268 U.S. 473, 69 L.Ed. 1058—Joyce, to Use of Fidelity-Philadelphia Trust Co. v. Hawtof, 4 A.2d 599, 135 Pa. Super. 30.
- R.I.—Cook, Borden & Co. v. R. Z. L. Realty Corporation, 147 A. 891, 50 R.I. 375.
- Tenn.—State ex rel. Lea v. Brown, 64 S.W.2d 841, 166 Tenn. 669, 91 A.L.R. 1246, certiorari denied State of Tennessee ex rel. Lea v. Brown, 54 S.Ct. 717, 292 U.S. 638, 78 L.Ed. 1491—Cuffman v. Blunkall, App., 124 S.W.2d 289.
- Tex.—Sloan Lumber Co. v. Southern Ornamental Iron Works, Civ.App., 66 S.W.2d 722.
- Va.—Morison v. Dominion Nat. Bank of Bristol, 1 S.E.2d 292—Maughs v. Porter, 161 S.E. 242, 157 Va. 415—Virginia Ry. & Power Co. v. Dressler, 111 S.E. 243, 132 Va. 342, 22 A.L.R. 301.
- Wash.—State v. Jordon, 248 P. 432, 139 Wash. 706—State v. Johns, 248 P. 423, 139 Wash. 525. 15 C.J. p 970 note 31.
- Bearing on other cases**
Principles are announced in opinions for purpose of illustration in their relation to particular point, but their bearing on other cases must be considered with circumspection.—Chicago, M., St. P. & P. R. Co. v. Hedges, D.C.Wash., 5 F.Supp. 752.
- Suggestion not binding**
Court's suggestion, in decision, of proper contents for conviction, or record of summary proceedings, does not prescribe minimum of sufficiency.—State v. Von Geldern, 162 A. 183, 10 N.J.Misc. 1045.
18. U.S.—Safe Deposit & Trust Co. of Baltimore, Md. v. Commonwealth of Virginia, 50 S.Ct. 59, 280 U.S. 83, 74 L.Ed. 180, 67 A.L.R. 386—Keeler v. Commissioner of Internal Revenue, C.C.A., 86 F.2d 265, 108 A.L.R. 1257, certiorari denied 57 S.Ct. 612, 300 U.S. 673, 81 L.Ed. 879—Frank Marra Co. v. Norton, D.C.Pa., 56 F.2d 246—Chung Que Fong v. Nagle, C.C.A.Cal., 15 F.2d 789—Manners v. Morosco, D.C.N.Y., 254 F. 737—Burstain & Sussman v. U. S., 16 Ct.Cust.App. 282.
- Ala.—Hudson v. Birmingham Water Works Co., 189 So. 72—In re Opinion of the Justices, 188 So. 899, 237 Ala. 671.
- Cal.—City of Oakland v. Buteau, 179 P. 170, 180 Cal. 83—People v. Burkett, 242 P. 1073, 75 Cal.App. 349, followed in People v. De Long, 242 P. 1074, 75 Cal.App. 789, and People v. Macy, 242 P. 1074, 75 Cal.App. 789.
- Idaho.—Stark v. McLaughlin, 261 P. 244, 45 Idaho 112.
- Ill.—Hoffman v. Hoffman, 161 N.E. 723, 330 Ill. 413, reversing 246 Ill. App. 60—People v. Grant, 208 Ill. App. 235, affirmed 119 N.E. 344, 283 Ill. 391.
- Ind.—Juskulski v. State, 190 N.E. 423, 206 Ind. 503—McGuire v. City of Indianapolis, 135 N.E. 257, 192

and of the issues or questions presented.¹⁹ In de- | terminating whether the language is to be extended

Ind. 73—Ogelsby v. City of Indianapolis, 149 N.E. 82, 89 Ind. App. 69—Brehm v. Hennings, 123 N.E. 821, 70 Ind.App. 625.

Iowa.—Martin v. Martin, 217 N.W. 818, 205 Iowa 209—Schoeneman Lumber Co. v. Davis, 205 N.W. 502, 200 Iowa 873.

Me.—Susl v. Davis, 177 A. 610, 133 Me. 354, 97 A.L.R. 1222.

Mo.—State v. Hendrickson, 130 S.W. 2d 503—State ex rel. Woodmansee v. Ridge, 123 S.W.2d 20—State ex rel. and to Use of Chicago Great Western R. Co. v. Public Service Commission of Missouri, 51 S.W.2d 73, certiorari denied Chicago Great Western R. Co. v. Public Service Commission of State of Missouri, 53 S.Ct. 89, 287 U.S. 641, 77 L.Ed. 555.

Mont.—Shaffroth v. Lamere, 65 P.2d 610, 104 Mont. 175—State ex rel. Delmo v. District Court of Fifth Judicial Dist., 46 P.2d 39, 100 Mont. 131—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446—State v. Board of Com'rs of Cascade County, 296 P. 1, 89 Mont. 37—Alley v. Butte & Western Mining Co., 251 P. 517, 77 Mont. 477.

Neb.—Carlsen v. State, 261 N.W. 339, 129 Neb. 84—Clark v. Hass, 260 N. W. 792, 793, 129 Neb. 112, citing *Corpus Juris*.

N.Y.—Adamec v. Post, 7 N.E.2d 120, 273 N.Y. 250, 108 A.L.R. 1110—In re Suderov's Estate, 282 N.Y.S. 405, 156 Misc. 661, affirmed 292 N.Y.S. 468, 249 App.Div. 763, affirmed In re Suderov, 10 N.E.2d 531, 274 N. Y. 525.

N.C.—Styers v. Forsyth County, 194 S.E. 305, 212 N.C. 558—Simpson v. First Nat. Bank, 185 P. 913, 94 Or. 147.

Pa.—Commonwealth v. Wert, 128 A. 484, 282 Pa. 575—Scibilia v. City of Philadelphia, 124 A. 273, 279 Pa. 549, 32 A.L.R. 981—Borough of Swathmore v. Public Service Commission, 121 A. 488, 277 Pa. 472, affirming 80 Pa.Super. 99—O'Malley v. O'Malley, 116 A. 500, 272 Pa. 528.

Tex.—Fulton v. Robinson, 55 Tex. 401—Community Natural Gas Co. v. Northern Texas Utilities Co., Civ.App., 13 S.W.2d 184, error dismissed.

Va.—Parksley Nat. Bank v. Chandler's Adm'rs, 196 S.E. 676, 170 Va. 394—Etna Casualty & Surety Co. v. Earle-Lansdell Co., 129 S.E. 263, 142 Va. 435, rehearing denied 130 S.E. 235, 142 Va. 435.

Wash.—Fisher's Blend Station v. Tax Commission of Washington, 45 P. 2d 942, 182 Wash. 163, amended Fisher's Blend Station v. State Tax Commission, 49 P.2d 1151, 182 Wash. 163, reversed on other grounds Fisher's Blend Station v.

Tax Commission of State of Washington, 56 S.Ct. 608, 297 U.S. 650, 80 L.Ed. 956—City of Tacoma v. Tax Commission, 33 P.2d 899, 177 Wash. 604—Sweet Clinic v. Lewis County, 282 P. 832, 154 Wash. 416—Johnson v. Washington Phi Kela, Inc., 218 P. 263, 126 Wash. 434.

Wis.—State ex rel. Pluntz v. Johnson, 184 N.W. 683, 176 Wis. 107.

Wyo.—State v. Kirkbride, 241 P. 709, 34 Wyo. 98.

15 C.J. p 970 note 32.

Ambiguous or uncertain language is to be construed in the light of the circumstances connected with the case.—Everts v. Barker, 200 P. 473, 58 Utah 519.

Particular opinions construed

(1) No reflection is intended upon counsel by a statement in an opinion that "appellant should not be permitted to evade its liability by a technicality which under the facts of this case is absolutely unjustified."—National Surety Co. v. Chalkley, Tex.Civ.App., 260 S.W. 216.

(2) The statement of a court in its decree confirming the report of a master that "to review the testimony in full would require a tremendous amount of labor, and, according to the view which I take of the case, would be entirely unnecessary," is not meant to indicate that the court did not fully review the testimony in the sense of weighing and giving it full credit, but merely that it was unnecessary to review it in the sense of going over it and discussing it in detail in the decree.—Talbert v. Hamlin, 68 S.E. 764, 86 S.C. 523.

(3) Where, in an action for an injury at a railroad crossing, the testimony did not disclose whether or not the engineer saw the team of plaintiff's intestate on the track, as intimated, and on appeal the court in its opinion stated: "If the facts thus supposed were true, and the engineer, seeing the team standing on the track, under the circumstances mentioned, immediately used all available appliances to stop the train, the question as to the measure of such care would nevertheless be for the jury to determine," the word "supposed" was advisedly used, in view of the grant of a new trial, and was not objectionable as authorizing a judgment to rest on conjecture.—Kunz v. Oregon R., etc., Co., 93 P. 141, 94 P. 504, 51 Or. 191, 205.

(4) In action by holder of municipal securities on bond indemnifying against loss sustained by acceptance, in good faith and without actual notice, of securities which proved to be invalid, statement in opinion in suit by municipality against holder

that holder was not bona fide holder entitled to rely on recitals that charter provisions relating to issuance of bonds had been complied with, was not conclusive finding that holder took securities without good faith and with actual notice of their invalidity, but statement only meant that municipality was not estopped from denying validity of such recitals and that doctrine of bona fide holder was inapplicable.—Chase Nat. Bank of City of New York v. Fidelity & Deposit Co. of Maryland, C.C.A. N.Y., 79 F.2d 84.

19. U.S.—People of Puerto Rico v. Shell Co., Puerto Rico, 58 S.Ct. 167, 302 U.S. 253, 82 L.Ed. 235, reversing, C.C.A., 86 F.2d 577, certiorari granted 57 S.Ct. 421, 301 U. S. 675, 81 L.Ed. 1336—Mutual Benefit Health & Accident Ass'n v. Bowman, C.C.A.Neb., 99 F.2d 856, conforming to mandate 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521, vacating 96 F.2d 7, certiorari denied 59 S.Ct. 485, 306 U.S. 637, 83 L. Ed. 1038—McCormick v. Plumstead, Cust. & Pat.App., 94 F.2d 999—Guardian Trust Co. v. Keith, C.C.A. Ark., 69 F.2d 477, certiorari denied 54 S.Ct. 862, 292 U.S. 652, 78 L.Ed. 1501—Alker v. U. S., D.C.N.Y., 38 F. 2d 879, affirmed, C.C.A., 47 F.2d 229, certiorari denied 51 S.Ct. 489, 283 U.S. 842, 75 L.Ed. 1452—Metropolitan Casualty Ins. Co. of New York v. Colthurst, C.C.A.Cal., 36 F.2d 559, certiorari denied Colthurst v. Metropolitan Casualty Ins. Co. of New York, 50 S.Ct. 351, 281 U.S. 746, 74 L.Ed. 1158—City of Omaha v. Omaha Electric Light & Power Co., C.C.A.Neb., 255 F. 801.

Ala.—New York Life Ins. Co. v. Horton, 180 So. 277, 235 Ala. 626.

Ark.—Sloan v. Blytheville Special School Dist. No. 5, 273 S.W. 397, 169 Ark. 77.

Fla.—Shelfer v. American Agr. Chemical Co., 152 So. 613, 113 Fla. 108.

Iowa.—Illinois Cent. Ry. Co. v. Waterloo, C. F. & N. Ry. Co., 173 N. W. 288, 186 Iowa 1207.

Mass.—Grinnell Co. v. Gardner Trust Co., 193 N.E. 37, 288 Mass. 385—Millett v. Temple, 182 N.E. 921, 280 Mass. 543, 84 A.L.R. 378—Knowlton v. Inhabitants v. Swampscott, 181 N.E. 849, 280 Mass. 69—Welch v. King, 181 N.E. 846, 279 Mass. 445—Eastman Marble Co. v. Vermont Marble Co., 128 N.E. 177, 236 Mass. 133.

Mo.—Willott v. Willott, 62 S.W.2d 1084, 333 Mo. 896, 89 A.L.R. 114—Etna Life Ins. Co. v. Daniel, 42 S. W.2d 584, 328 Mo. 876, transferred, App., 33 S.W.2d 424—Bolin v. Sovereign Camp, W. O. W., App., 112 S.W.2d 582, transferred 98 S.W.2d 681, 339 Mo. 618, certiorari grant-

beyond the issues to which it is applied, the reason for the rule so announced must be considered.²⁰ The interpretation also should take into account the arguments of counsel.²¹ As an opinion does not always state everything that is decided, it should be read in the light of what the judgment neces-

sarily involves.²²

General language will not readily be construed as altering or conflicting with existing and established principles;²³ and it will be construed, if possible, so that, in applying it concretely, it will not lead to absurd results or contradict other rules.²⁴

ed *Sovereign Camp, W. O. W., v. Bolin*, 58 S.Ct. 1058, 304 U.S. 557, 82 L.Ed. 1525, reversed 59 S.Ct. 35, 305 U.S. 66, 83 L.Ed. 58, 119 A.L.R. 478, rehearing denied 59 S.Ct. 241, 305 U.S. 673, 83 L.Ed. 436.

Neb.—*Clark v. Hass*, 260 N.W. 792, 793, 129 Neb. 112, citing *Corpus Juris*.

N.Y.—*Rogers v. Graves*, 5 N.Y.S.2d 967, 254 App.Div. 467, reversed on other grounds 18 N.E.2d 626, 279 N.Y. 375—In re *Weiden's Estate*, 259 N.Y.S. 573, 144 Misc. 854.

Tenn.—*Prudential Ins. Co. of America v. Davis*, 78 S.W.2d 358, 18 Tenn.App. 413.

Tex.—*Texas Power & Light Co. v. Brownwood Public Service Co.*, Civ.App., 87 S.W.2d 557—*Ferguson v. Johnson*, Civ.App., 57 S.W.2d 372, error dismissed.

Va.—*Morison v. Dominion Nat. Bank of Bristol*, 1 S.E.2d 292—*Ames v. American Nat. Bank of Portsmouth*, 176 S.E. 204, 163 Va. 1. 15 C.J. p 970 note 33.

Vital points of controversy must be ascertained.—*Vacuum Cleaner Co. v. Bissell Carpet Sweeper Co.*, C.C. N.Y., 242 F. 649.

Right to judgment on pleadings

A statement in opinion with respect to sufficiency of notice that checks were not bona fide was to be interpreted in light of fact that question before court was whether plaintiff was entitled to judgment on the pleadings.—*Lavecchia v. North Carolina Joint Stock Land Bank of Durham*, 3 S.E.2d 276, 216 N.C. 28, denying rehearing 1 S.E.2d 119, 215 N.C. 73.

20. Wash.—*Johnson v. Stalcup*, 28 P.2d 279, 176 Wash. 153.

21. N.Y.—*Galland v. Shubert Theatrical Co.*, 221 N.Y.S. 437, 220 App. Div. 704, reversing 208 N.Y.S. 144, 124 Misc. 371.

22. La.—*Godchaux Co. v. Estopinal*, 83 So. 690, 146 La. 405.

N.Y.—*People v. Hennessy*, 100 N.E. 407, 206 N.Y. 750, affirming 137 N.Y.S. 819, 152 App.Div. 767.

Construed to support decision

The opinion is to be construed, if it reasonably can be, to support, and not refute, the decision or conclusion for which it is the reason.—*Stark v. McLaughlin*, 261 P. 244, 45 Idaho 112.

Particular opinions construed

(1) Where five of the seven judges of the supreme court voted against the proposition that a sher-

iff, under a statute, was absolutely liable for amount of execution in case of failure to sell property levied on, a majority of the court assented to the proposition he was liable only for actual damages which occurred through his honest judgment in allowing an intervening claim to the property.—*State ex rel. Nolte v. Reynolds*, 223 S.W. 408, 283 Mo. 253.

(2) Statement of court on reversing, because of prejudice resulting from concurrent sales, decree ratifying sale under power in first mortgage made on the same day as a sale under power in third mortgage, that a resale if necessary should be alone under the power in the first mortgage and clear of all liens, was with reference to assumption that first mortgagee would desire to enforce his right, and did not prevent a sale, subject to the first mortgage, under power in the second mortgage, the first mortgagee being induced by mortgagor to desist from further foreclosure proceedings.—*Strohmeyer v. Remson*, 109 A. 105, 135 Md. 439.

(3) Recital of opinion after sustaining order of railroad commission requiring plaintiff to operate its railroad, on the ground that plaintiff's other business of lumbering was successful enough to stand a loss on the road, that the commission's order calls on plaintiff "to submit a new schedule for transportation which may be operated . . . at a profit for plaintiff," cannot be considered as a finding that such a schedule can be submitted, there being no evidence warranting such a finding.—*Brooks-Scanlon Co. v. Railroad Commission of Louisiana*, 40 S. Ct. 183, 251 U.S. 396, 64 L.Ed. 323, reversing 81 So. 727, 144 La. 1086.

(4) The supreme court's opinion, sustaining order of secretary of agriculture regulating handling of milk in interstate commerce, amounted to judicial determination that secretary fully complied with all statutory requirements, including his findings and proclamation respecting base period for purposes of order, where it was necessary to deal with his acts preliminary to promulgation thereof in order to dispose of case.—*U. S. v. David Buttrick Co.*, D.C.Mass., 28 F. Supp. 878.

(5) Decision of supreme court that Community High School Act of 1923 is unconstitutional held to in-

clude whole act.—*People v. Duntzman*, 151 N.E. 496, 321 Ill. 192.

23. Ark.—*Sutton v. McClain*, 99 S.W.2d 236, 193 Ark. 49.

Kan.—*Strong v. Thurston*, 191 P. 575, 107 Kan. 368.

N.J.—*Thomas v. National Bank of New Jersey*, 198 A. 539, 16 N.J. Misc. 271.

N.Y.—*William H. Waters, Inc., v. Hatters' Fur Exchange*, 174 N.Y.S. 90, 185 App.Div. 803.

Tex.—*Texas Pacific Coal & Oil Co. v. Grabner*, Civ.App., 10 S.W.2d 441.

Va.—*Morison v. Dominion Nat. Bank of Bristol*, 1 S.E.2d 292.

Definite repudiation necessary

Intent of court of last resort to alter settled law of state cannot be attributed to it in absence of express disapproval of existing law and definite repudiation of decisions establishing that law.—*Cohen v. Cohen*, 188 A. 244, 121 N.J.Eq. 299.

Distinguishable states of fact

Circuit court of appeals cannot extend language of United States supreme court until it clashes with language of another opinion dealing with same subject matter but applicable to distinguishable state of facts, and thus find conflict in two opinions.—*Moore v. Chicago Mercantile Exchange*, C.C.A.III., 90 F.2d 735, certiorari denied 58 S.Ct. 30, 302 U.S. 710, 82 L.Ed. 548—*Bennett v. Board of Trade of City of Chicago*, C.C.A.III., 90 F.2d 735, certiorari denied 58 S.Ct. 34, 302 U.S. 710, 82 L.Ed. 548, rehearing denied 58 S.Ct. 118, 302 U.S. 774, 82 L.Ed. 600.

General statement, susceptible of misconstruction, should be modified to comport with the decisions of the federal supreme court.—*Allen v. Bailey*, 14 P.2d 1087, 91 Colo. 260.

Law most recently established

In construing the opinions of the courts, the law most recently established as the law of the state prevails over conflicting law previously established.—*People v. Propp*, 15 N.Y.S.2d 83, 172 Misc. 314.

24. Utah.—*State v. Springer*, 121 P. 976, 40 Utah 471.

Result not intended

An opinion of the supreme court should not be construed so as to lead to a result which could not have been deliberately intended by the court, if the language is susceptible of any other construction more con-

The language of an opinion, like that of any other writing, must be given its plain and natural meaning, unless used in a technical sense.²⁵ Following the principle of statutory construction that, where there is in a statute a particular enactment in plain and definite terms, the particular enactment will prevail over general language contained in the same section, discussed in the C.J.S. title Statutes § 347, also 59 C.J. p 1000 note 68—p 1001 note 74, plain and definite language in an opinion separately treating of the several component elements of the case will prevail over general language combining such elements.²⁶

Cited authority. Citation of a case by a court in support of a ruling is itself a judicial construction of the opinion of the case cited.²⁷ Observations of the courts in cases cited as authorities are to be construed in the light of the issue, as well as the law, under discussion.²⁸

Use of decisions of other jurisdictions. Where opinions of cases decided in a foreign jurisdiction have been introduced in evidence as showing the law of such jurisdiction, in construing such opinions the court of the forum is entitled to consider opin-

ions in later cases even though such opinions are not introduced in evidence.²⁹ Moreover, while a foreign judicial decision not introduced in evidence cannot be considered by an appellate court as evidence, nevertheless the court may resort to it for the interpretation of opinions which were introduced in evidence.³⁰

b. Operation and Effect

An opinion by a court or judge is merely evidence of the law, and not the law. It is not a part of the record. Mere expressions of the individual views of a judge are not binding on the court. Per curiam opinions indicate the full agreement of the judges. Opinions by commissioners which are approved by the court become the opinions of the court.

While in its popular sense the term "law" includes decisions of courts,³¹ the courts do not make law, but simply declare it;³² the decision of a court is merely evidence of what is the law, and is not the law,³³ even though it has been said that an opinion filed in compliance with constitutional requirement becomes a part of the law of the state.³⁴ An opinion, however positive, is not in any sense a final act, and may always be changed before final decree.³⁵ It cannot prevail against the final order or decision.³⁶

sistent with reason and common sense.—*Everts v. Barker*, 200 P. 473, 58 Utah 519.

25. Ark.—*Booe v. Road Improvement Dist. No. 4, Prairie County*, 216 S.W. 500, 141 Ark. 140.

Opinion construed

A decision holding that complaint did not set out a substantial federal question and that, consequently, the district court lacked jurisdiction to dispose of the case upon its merits was a decision that the district court had no jurisdiction.—*Humboldt Lovelock Irr. Light & Power Co. v. Smith*, D.C.Nev., 28 F.Supp. 421.

26. Miss.—*State v. Woodruff*, 150 So. 760, 170 Miss. 744.

27. Mo.—*Lampe v. United Rys. Co. of St. Louis, App.*, 202 S.W. 438, record quashed on certiorari. *State ex rel. United Rys. Co. of St. Louis v. Reynolds*, 213 S.W. 782, 278 Mo. 554.

28. Mo.—*State v. Murphy*, 111 S.W. 2d 132, 341 Mo. 1229.

Limitation to issues

Citation by supreme court in opinion of case going further than court had occasion to go or consider in case under consideration was not pronouncement by court on any other question than that under consideration in case at hand.—*Ingraham v. Chandler*, 161 N.W. 434, 179 Iowa 304, L.R.A.1917D 713.

29. Mo.—*Campbell v. Etna Life*

Ins. Co. of Hartford, Conn., 222 S.W. 778, 283 Mo. 63.

Admissibility of opinions in evidence see the C.J.S. title Evidence § 633, also 22 C.J. p 800 notes 89–92.

30. La.—*Taylor v. Terzia*, 132 So. 781, 171 La. 1040.

Va.—*Fourth Nat. Bank of Montgomery, Ala., v. Bragg*, 102 S.E. 649, 127 Va. 47, 11 A.L.R. 1034.

31. Cal.—*Miller v. Dunn*, 14 P. 27, 32 Cal. 462, 1 Am.S.R. 67.

36 C.J. p 963 note 97.

32. N.Y.—*People ex rel. Rice v. Graves*, 273 N.Y.S. 582, 242 App. Div. 128, affirmed 200 N.E. 288, 270 N.Y. 948, certiorari denied 56 S.Ct. 953, 298 U.S. 683, 80 L.Ed. 1403.

33. La.—*Norton v. Crescent City Ice Mfg. Co.*, 150 So. 855, 178 La. 135, annulling, App., 146 So. 753, rehearing denied 147 So. 385 (first case).

N.Y.—*People ex rel. Rice v. Graves*, 273 N.Y.S. 582, 242 App.Div. 128, affirmed 200 N.E. 288, 270 N.Y. 948, certiorari denied 56 S.Ct. 953, 298 U.S. 683, 80 L.Ed. 1403.—*Lawrence-Cedarhurst Bank v. Ruth*, 294 N.Y. S. 810, 162 Misc. 82.

Tex.—*City of Tyler v. Texas Employers' Ins. Ass'n, Com.App.*, 294 S.W. 195, denying rehearing 288 S.W. 409, which reversed *Texas Employers' Ins. Ass'n v. City of Tyler, Civ.App.*, 283 S.W. 929.

15 C.J. p 969 notes 14, 15—36 C.J. p 963 note 1.

Adjudication or judgment, not the language of the opinion, establishes the decision of the case.

Mich.—*Attorney General ex rel. O'Hara v. Montgomery*, 267 N.W. 550, 275 Mich. 504.

N.Y.—*In re Wilson*, 170 N.Y.S. 725.

Conflicting opinions

The opinions furnished the reporter within sixty days after decision, as required by statute and published by him, are the final and authoritative record of what was or was not decided, and control the opinions filed with the clerk at the time the order was made, as required by statute.—*Robertson v. Monroe*, 116 A. 92, 80 N.H. 258.

Instructions which are not directly passed upon by reviewing court but which are given a "blanket endorsement" do not definitely establish the law.—*In re Eakle's Estate*, 91 P.2d 954, 33 Cal.App.2d 879.

34. Ind.—*Kryder v. State*, 15 N.E.2d 386, 214 Ind. 419, appeal dismissed *Kryder v. State of Indiana*, 59 S. Ct. 154, 305 U.S. 570, 83 L.Ed. 359.

35. Va.—*Gordon v. Schuller*, 185 N. W. 604, 192 Iowa 853.

46 C.J. p 1118 notes 20, 22.

36. Cal.—*In re Yorba*, 167 P. 854, 176 Cal. 166.

Opinion controlled by judgment see the C.J.S. title Judgments § 22, also 33 C.J. p 1104 note 39—p 1105 note 41.

The decision of the highest court of another state on a particular question will be presumed to govern the matter to which it applies in the absence of any other decision or statute to the contrary.³⁷ The presumption exists that all facts in a record bearing upon the points decided have received due consideration by the court, whether all, a part, or none of these facts are mentioned in the opinion.³⁸ Likewise, it is assumed that a dissenting opinion acquiesces in the conclusions of the majority as to uncontroverted matters.³⁹

Verbal error in an opinion is immaterial.⁴⁰

An opinion becomes no part of the record,⁴¹ nor, as is stated in the C.J.S. title New Trial § 211, also 46 C.J. p 434 note 34, is an oral statement of the ground by the judge made at the time of an order as to a motion for new trial a part of the order.

An expression of the individual views of the judge who is delivering the opinion of the court is not an expression of the opinion of the court, where it is clear that the judge is expressing merely his own views and not the views of the court as such,⁴² but an opinion prepared by a member of the court is not merely the opinion of such member, being the opinion of the court itself although prepared by the writer.⁴³

Per curiam opinion. The fact of the filing of a per curiam opinion does not detract from the force of the decision, or indicate that the question was lightly treated, but it indicates rather that the members of the court were united in regarding the

point decided as clear and as not requiring elaboration.⁴⁴

Opinions of commissioners. In some jurisdictions under rules of court opinions prepared by commissioners of appeals and submitted to the court for examination and criticism and approval are the opinions of the court,⁴⁵ and in other jurisdictions even in the absence of a rule of court a similar rule is held,⁴⁶ but there is also authority for the view that, where opinions are prepared by commissioners, they must be permitted to state their reasons in their own way, without binding the court, although it concurs in their conclusions of law and express findings of fact.⁴⁷

§ 223. Property in, and Access to, Opinions

The state cannot compel a clerk of court to refrain from furnishing copies of the opinions of courts or judges for publication by law publishers, but, while the public is entitled to free access to such opinions, law publishers have, to make copies for publication, only restricted and conditional rights of access subject to reasonable rules by the clerk of court as custodian.

In a sense, the opinion is the property of the judge.⁴⁸ The state has no such property interest in such opinions as to deprive the clerk of court of the right to furnish copies for publication in advance of the publication of the official reporter, although the constitution provides that the legislature shall provide for the speedy publication of the decisions, but that no judge shall be allowed to report them.⁴⁹

Right of access to opinions. Justice requires that the public shall have free access to the opinions of

37. S.D.—Meuer v. Chicago, etc., R. Co., 75 N.W. 828, 11 S.D. 94, 74 Am. S.R. 774.

15 C.J. p 969 note 16.

38. Cal.—Mulford v. Estudillo, 32 Cal. 131.

15 C.J. p 969 note 17.

Lack of discussion

The failure of the court to discuss the opinion of the lower court does not indicate a lack of agreement with its holdings.—Stewart v. Luhnning, Tex.Com.App., 131 S.W.2d 824, affirming Luhnning v. Stewart, Civ. App., 103 S.W.2d 184.

39. S.C.—Duncan v. Record Pub. Co., 143 S.E. 31, 145 S.C. 196.

40. Pa.—Spiess v. Ford, 71 Pa.Super. 210.

The title of a cause and the court at the head of an opinion when erroneous may be disregarded.—Love-lace v. Taylor, 6 Rob.,La., 92.

41. U.S.—Pacific Sheet Metal Works v. California Canneries Co., Cal., 164 F. 980, 91 C.C.A. 108.

15 C.J. p 970 note 21.

Opinion of lower court as not part of record see Appeal & Error § 734.

42. U.S.—Erie R. Co. v. New York, 34 S.Ct. 756, 233 U.S. 671, 58 L. Ed. 1149, 52 L.R.A.,N.S., 266, Ann. Cas.1915D 138, reversing 91 N.E. 849, 198 N.Y. 369, 139 Am.S.R. 328, 27 L.R.A.,N.S., 240, 19 Ann.Cas. 811.

Tex.—Bridgewater v. Hooks, Civ. App., 159 S.W. 1004.

43. Ky.—Louisville & N. R. Co. v. Burnam, 284 S.W. 391, 214 Ky. 736 —Gaffney v. Switow, 277 S.W. 453, 211 Ky. 232—Heydrick v. Dickey, 159 S.W. 666, 155 Ky. 222.

Unanimous opinion

Every opinion delivered by a member of the court of civil appeals is the unanimous opinion of the court unless a dissent is entered.—Anderson & Kerr Drilling Co. v. Bruhl-meyer, Tex.Civ.App., 115 S.W.2d 1212.

44. Mich.—Dowling v. Salliotte, 47 N.W. 225, 83 Mich. 131.

45. Ky.—Louisville & N. R. Co. v.

Burnam, 284 S.W. 391, 214 Ky. 736 —Heydrick v. Dickey, 159 S.W. 666, 155 Ky. 222.

46. Neb.—Lancaster County v. McDonald, 103 N.W. 78, 73 Neb. 453—Randall v. Minneapolis Nat. Bldg. L., etc., Union, 62 N.W. 252, 43 Neb. 376.

47. Neb.—Williams v. Miles, 94 N. W. 705, 96 N.W. 151, 68 Neb. 463, 62 L.R.A. 383, 110 Am.S.R. 431, 62 L.R.A. 383, 4 Ann.Cas. 306, followed in Modern Woodmen of America v. Coleman, 94 N.W. 814, 96 N.W. 154, 68 Neb. 660.

48. Porto Rico.—Teillard v. Green, 7 Porto Rico F. 328.

49. Ind.—Ex parte Brown, 78 N.E. 553, 166 Ind. 593.

Copyright of opinions:

Generally see Copyright and Literary Property § 62.

As part of law reports see Copyright and Literary Property § 37.

the courts and it is against sound public policy to prevent such access,⁵⁰ but a publisher has not the unrestricted and unconditional right of access to the opinions and decisions of a court to make copies for publication, the clerk having the right and duty to control by reasonable rules the inspection and handling of the records of his office.⁵¹

§ 224. Syllabi

A headnote, or "syllabus," is a summary of the points decided in a case which is placed at the beginning of the report. In a number of jurisdictions courts are required to write the syllabi, and in many jurisdictions the syllabi are controlling as to the holding, while in other jurisdictions the opinions contain the law of the case.

A headnote has been defined as a syllabus to a reported case; a summary of the points decided in the case, which is placed at the head or beginning of the report.⁵² The terms "headnote" and "syllabus" are synonymous.⁵³

In some jurisdictions, the courts are required by

constitutional or statutory provisions or their rules of practice to prepare syllabi of their opinions,⁵⁴ but statutory requirements of syllabi by appellate courts have in some instances been held unconstitutional as an encroachment by the legislature on the judiciary, as is stated in Constitutional Law § 128 c. Moreover, in cases involving only questions of fact, no syllabus is necessary or required.⁵⁵

The syllabus is to be confined to the points of law arising from the facts of the cause that have been determined by the court.⁵⁶

The language used in a syllabus, as in judicial opinions, must be interpreted in the light of the particular facts to which it is applied.⁵⁷

In some jurisdictions the syllabus is deemed the authoritative expression of the court, to which the entire court is committed,⁵⁸ which rule is sometimes subject to the limitation that the syllabus is an expression of the law adjudicated in the case only in

50. Mass.—Nash v. Lathrop, 6 N. E. 559, 142 Mass. 29.

51. Ind.—Ex parte Brown, 78 N.E. 553, 166 Ind. 593.

Mass.—Nash v. Lathrop, 6 N.E. 559, 142 Mass. 29.

52. Black L.D.

53. Ohio.—State v. Hauser, 181 N. E. 66, 101 Ohio St. 404.

54. Ga.—Trammell v. Atlanta Coach Co., 181 S.E. 315, 51 Ga.App. 705.

Okl.—Corbin v. Wilkinson, 52 P.2d 45, 175 Okl. 247.

In Ohio

(1) Rules of practice of the supreme court require the preparation of syllabi by the judge assigned to prepare the opinion.—Ohio River & Western Ry. Co. v. Dittey, Ohio, 34 S.Ct. 372, 232 U.S. 576, 58 L.Ed. 737.—Western Indemnity Co. v. Crafts, Ohio, 240 F. 1, 153 C.C.A. 37.

(2) However, the legislature has not provided for syllabi by the circuit courts.—Flannery v. Cleveland, C. C. & St. L. Ry. Co., 26 Ohio Cir. Ct., N.S., 49.

55. W.Va.—Feamster v. Feamster, 41 S.E. 910, 51 W.Va. 506. 15 C.J. p 971 note 42 [a].

56. U.S.—Ohio River & Western Ry. Co. v. Dittey, Ohio, 34 S.Ct. 372, 232 U.S. 576, 58 L.Ed. 737.

Decision held sufficient

Decision held to comply sufficiently with statutory requirement as to a written synopsis, although disposing of ninety special grounds in only eight paragraphs, and not dealing separately with each ground.—Trammell v. Atlanta Coach Co., 181 S.E. 315, 51 Ga.App. 705.

57. Kan.—Foresman v. Foresman,

176 P. 147, 103 Kan. 698, denying rehearing 175 P. 985, 103 Kan. 698.

In Ohio the holdings expressed in the syllabus must be considered in the light of the facts of the case.

U.S.—In re Paramount Publix Corporation, C.C.A.N.Y., 85 F.2d 83.—City of Oakwood, Ohio v. Hartford Accident & Indemnity Co., C.C.A. Ohio, 81 F.2d 717.

Mich.—Perkins v. Great Central Transport Corporation, 247 N.W. 759, 262 Mich. 616.

Ohio.—Williamson Heater Co. v. Radich, 190 N.E. 403, 128 Ohio St. 124.—Baltimore & O. R. Co. v. Baillie, 148 N.E. 233, 112 Ohio St. 567.

58. Ga.—Forrester v. Forrester, 118 S.E. 373, 155 Ga. 722, 29 A.L.R. 1363.

Okl.—Corbin v. Wilkinson, 52 P.2d 45, 175 Okl. 247.

In Kansas the syllabus of the case contains the law as adopted by the court.—McDonald v. Stiles, 54 P. 437, 7 Okl. 327.

In Ohio

(1) The syllabi of the supreme court, rather than the opinions, state the law.

U. S.—In re Paramount Publix Corporation, C.C.A.N.Y., 85 F.2d 83.—City of Oakwood, Ohio, v. Hartford Accident & Indemnity Co., C.C.A. Ohio, 81 F.2d 717.—Republic Creosoting Co. v. Boldt Const. Co., C.C.A. Ohio, 38 F.2d 789.—Coney Island Co. v. McIntyre-Paxton Co., C.C.A. Ohio, 200 F. 901.

Mich.—Perkins v. Great Central Transport Corporation, 247 N.W. 759, 262 Mich. 616.

Ohio.—Williamson Heater Co. v. Ra-

dich, 190 N.E. 403, 128 Ohio St. 124.—Baltimore & O. R. Co. v. Baillie, 148 N.E. 233, 112 Ohio St. 567.—Hart v. Andrews, 132 N.E. 846, 103 Ohio St. 218.—State v. Hauser, 181 N.E. 66, 101 Ohio St. 404.—City of Troy v. Schnell, 193 N.E. 732, 48 Ohio App. 325.—Thomas v. City of Euclid, 132 N.E. 605, 43 Ohio App. 52.—Great Lakes Stages v. Laing, 174 N.E. 784, 38 Ohio App. 34, affirmed 175 N.E. 598, 123 Ohio St. 878.

(2) However, the opinion of such court may be given precedential weight so far as not conflicting with syllabi.—Republic Creosoting Co. v. Boldt Const. Co., C.C.A. Ohio, 38 F.2d 739.

(3) The law of a case decided before adoption of rule of supreme court of Ohio requiring syllabus of points decided by court to be approved by concurring judge must be determined from opinion.—Western Indemnity Co. v. Crafts, Ohio, 240 F. 1, 153 C.C.A. 37.

(4) The so-called "syllabus rule" of the supreme court, that the syllabus of the case constitutes the law of the case, applies only to the decisions of that court.—Walsh v. E. G. Shinner & Co., C.C.A. Del., 20 F. 2d 586.

(5) So decisions of the circuit courts are to be found in the reported opinions, not in any purported syllabi, unless the syllabus is approved and announced by the court as a part of the opinion.—Lehman v. Harvey, 187 N.E. 28, 45 Ohio App. 215, error dismissed 187 N.E. 201, 127 Ohio St. 159.—Flannery v. Cleveland, C. C. & St. L. Ry. Co., 26 Ohio Cir.Ct., N.S., 49.

so far as it is warranted by the judgment of the court upon the facts,⁵⁹ so that the syllabus and opinion are to be taken together to show what has been decided.⁶⁰ However, in jurisdictions where the

headnotes are given no special force by statute or rule of court, the opinion alone will be looked to for the original and authentic statement of the grounds of the decision.⁶¹

VII RECORDS

§ 225. Nature and Necessity

A record may be described as a memorial or history of the judicial proceedings in a case. Records must be kept in the higher or more important courts.

A record is a memorial of a proceeding or act of a court of record, entered in a roll for its preservation;⁶² a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and ending with the judgment.⁶³ The orig-

inal entry of each matter in the course of a suit is essentially the record of that matter.⁶⁴

In view of the rule that the higher or more important courts can speak only through their records, see *infra* § 237, it is universally required that such courts shall keep such records,⁶⁵ the object being to secure an accurate memorial of all the proceedings in the case so that persons interested may ascertain the exact state thereof.⁶⁶ So the only court

59. Ga.—Denham v. Holeman, 26 Ga. 182, 71 Am.D. 198.

Me.—Brown v. Railway Express Agency, 188 A. 716, 134 Me. 477.

60. Ga.—Walker v. City of Cairo, 121 S.E. 138, 31 Ga.App. 307.

Opinion as aid to interpretation of syllabus

The court's reasoning in the body of the decision is an aid to the correct interpretation of the law as announced in the syllabus.—Corbin v. Wilkinson, 52 P.2d 45, 175 Okl. 247.

61. U.S.—Burbank v. Ernst, 34 S. Ct. 299, 232 U.S. 162, 58 L.Ed. 551, affirming 56 So. 430, 129 La. 528. La.—Cabral v. Victor & Provost, 158 So. 821, 181 La. 139.

N.J.—Harris v. Lahn, 4 A.2d 772, 122 N.J.Law 91, followed in Jaroszewski v. Pennsylvania R. Co., 5 A.2d 678, 122 N.J.Law 350.

Ohio rule see *supra* note 58.

Not part of decision

Syllabus by unofficial reporter, or even by court, is no part of decision.—Ohio Valley Fire & Marine Ins. Co.'s Receiver v. Skaggs, 287 S.W. 969, 216 Ky. 535.

62. U.S.—Fowler v. Byrd, Super. Ark., 9 F.Cas.No.4,999a, Hempst. 213.

63. Pa.—Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co., 167 A. 636, 640, 109 Pa.Super. 571, quoting *Corpus Juris*.

15 C.J. p 971 note 49.

Other expressions

(1) "The records of the courts are memorials of their proceedings."—Plates v. Gary State Bank, Ind.App., 17 N.E.2d 486, 487.

(2) "The record of a court is a solemn memorial of its doings in the case to which it relates."—Polichinski v. State, 230 N.W. 713, 201 Wis. 577.

Court records

(1) The expression "court records" has been held to refer to the evi-

dence of the proceedings had at a court, the object of which is to preserve a memorial.—Allen v. Phillips, 112 S.W. 403, 404, 37 Ark. 185.

(2) The term has been held not to apply to records in the department of public safety relating to the trial of a police patrolman before the director of public safety.—State ex rel. Flynn v. Davis, 137 N.E. 729, 730, 46 Ohio App. 46.

"File"

(1) A "file" may mean the record of the court.—Holman v. Chevallier, 14 Tex. 337, 339—Jones v. Wells, 3 Tex.A.Civ.Cas. § 94.

(2) The "file" in a cause includes original subpoenas issued for witnesses and all papers belonging to the cause.—Jackson v. Mobley, 47 So. 590, 157 Ala. 408.

Judicial records

(1) "Judicial records are memorials, in rolls or writings on paper or parchment, of the proceedings or acts of courts of justice."—State v. Brewer, 97 So. 160, 161, 19 Ala.App. 291.

(2) A judicial record has also been defined as a precise history of a suit from its commencement to its termination, including the conclusions of law thereon, drawn by the proper officer for the purpose of perpetuating the exact state of facts.—Burge v. Gandy, 59 N.W. 359, 41 Neb. 149, 152—34 C.J. p 1185 note 71.

(3) "Judicial records have been defined as those associated with the progress of litigated cases."—Deico Ice Mfg. Co. v. Frick Co., 178 A. 135, 137, 318 Pa. 337.

(4) A judicial record may be embraced within the meaning of the term "public writing."—Hibernia Sav. & Loan Soc. v. Boyd, 100 P. 239, 242, 155 Cal. 193.

Records and minutes

(1) There is a technical difference between records and minutes.—

Warden of U. S. Penitentiary Annex at Ft. Leavenworth, Kan., v. De Londi, C.C.A.Kan., 62 F.2d 981, reversing, D.C., In re De Londi, 2 F. Supp. 256.

(2) "Minute" compared with "record" see C.J.S. definition Minute, also 40 C.J. p 1212 note 52 [a].

64. Pa.—Wilkins v. Anderson, 1 Phila. 134.

65. Conn.—Banach v. Bohinski, 139 A. 688, 107 Conn. 156.

Ind.—O'Malia v. State, 192 N.E. 435, 207 Ind. 308.

Ky.—Equitable Trust Co. of Dover v. Bayes, 226 S.W. 390, 190 Ky. 91.

Mich.—Burk v. Amos, 247 N.W. 197, 198, 262 Mich. 332, citing *Corpus Juris*.

15 C.J. p 971 note 50.

Attendance and fees of witnesses

The duty of keeping a record of the witnesses in a case, their attendance and mileage, has been held to devolve on the clerk of the court rather than on the trial judge, and it will be presumed that the clerk has properly performed his duty in this respect.—Joynner v. City of Seattle, 258 P. 479, 144 Wash. 641.

Municipal court

Under particular statutory provisions it has been held that a municipal court was required to keep a record.—Demereaux v. State, 172 N. E. 551, 35 Ohio App. 418.

Parties

The addition of new parties or the substitution of parties in a pending case requires that such matter appear in the record of the court's proceedings.—Fountain v. Pierce, 176 N.E. 444, 123 Ohio St. 609.

66. Md.—Forest Lake Cemetery v. Baker, 77 A. 853, 113 Md. 529.

Assignments of error are retained in the supreme court of Pennsylvania for the express purpose of showing what that court decided in

orders entitled to recognition are those appearing of record or intended, at the time when they were made, to appear on the record,⁶⁷ and all orders of court not entered of record are extra-judicial and void.⁶⁸ Only the records which are made in the course of judicial duty are, however, of force.⁶⁹

The power of the court to supply lost or destroyed records is considered in the C.J.S. title Records § 42, also 15 C.J. p 980 note 85, 53 C.J. p 634 note 60-p 642 note 39.

§ 226. Making and Requisites

Records must be made and kept in such manner as to show the true state of the court's business.

The dockets, minutes, and records of a court of record must be made and kept in such manner as to represent the true state of the court's business.⁷⁰

In compliance with this requirement it has been held that the court records should show all the proceedings of such court;⁷¹ whatever proceedings the law or practice of the court requires to be enrolled;⁷² and matters required by statute to be shown;⁷³ and without regard to statute it has been held that the court record should show those pro-

ceedings which are vital to the cause presently before the court.⁷⁴ Where a court consists of several judges, a transcript of the record should show that there were justices enough to constitute a court, and therefore having authority to make, or cause to be made, a record of the court.⁷⁵ The minutes of the court should show all motions, or at least their substance.⁷⁶ On the other hand it has been held that the record need not show matters which would not aid the appellate court in deciding questions of law.⁷⁷ Proceedings not required to be enrolled need not be shown on the record unless required by order of court;⁷⁸ nor does a failure of the minutes formally to recite the opening of the court necessarily constitute a fatal defect.⁷⁹ It has also been held unnecessary that the minutes of a court should state the place at which the court sat.⁸⁰ The rule that a court of record can act only through its orders made of record does not require, where the court has large administrative and executive powers, with authority to appoint agents, that all the acts of the agents should appear of record.⁸¹ A report by a trial court in the course of its administrative duties, but having no effect on the decision of the court in the case before it, has no proper place in the court records pertaining to such case.⁸²

cases which have come before it.—Hall v. Delaware, L. W. R. Co., 113 A. 669, 270 Pa. 468, 21 A.L.R. 1128.
67. Ind.—O'Malia v. State, 192 N.E. 435, 207 Ind. 308.

68. La.—State v. Marionneaux, 45 So. 369, 120 La. 455.
Mo.—Medlin v. Platte County, 8 Mo. 235, 40 Am.D. 135.

69. Me.—State v. Houlehan, 83 A. 1106, 109 Me. 281.
Mo.—Fenn v. Reber, 132 S.W. 627, 153 Mo.App. 219.
15 C.J. p 971 note 54.

70. Ga.—Smith v. Merchants' & Farmers' Bank, 96 S.E. 342, 22 Ga. App. 505.

Duty of clerk to make records see Clerks of Courts § 39.

71. Ala.—McDonald v. Crawford, 180 So. 130, 28 Ala.App. 163.
Ga.—Brady v. Little, 21 Ga. 132.
Pa.—Commonwealth v. Robinson, 176 A. 908, 317 Pa. 321, reversing Commonwealth v. Pent, 170 A. 401, 112 Pa.Super. 215.

Nothing left to unrecorded memory
"It is a rule, and the only safe one . . . that in judicial proceedings nothing is to be left to unrecorded memory."—McDonald v. Crawford, 180 So. 130, 131, 28 Ala. App. 163.

Record speaking for itself

"The record must speak by and for itself, without the aid of oral proof or human recollection."—McDonald v. Crawford, supra.

Test

"The record must be so complete that a succeeding officer, coming into the place of the one before which the business was transacted, cannot reasonably mistake what was done."—McDonald v. Crawford, supra.

Cases pending

The court must be able to ascertain from the dockets, minutes, and records, without the aid of a jury, what cases are pending and what are not pending.—Smith v. Merchants' & Farmers' Bank, 96 S.E. 342, 22 Ga. App. 505.

72. Mo.—State ex rel. May Department Stores Co. v. Haid, 38 S.W. 2d 44, 327 Mo. 567.

73. Iowa.—Booth v. Cady, 257 N.W. 802, 219 Iowa 439.

Purpose of statute requiring clerk of district court to keep probate record containing orders or other proceedings in probate matters and orders authorizing sale or mortgage of realty by executor, administrator, or guardian was to make at once available to public record of probate matters affecting title to realty.—Booth v. Cady, supra.

74. Pa.—Commonwealth v. Robinson, 176 A. 908, 317 Pa. 321, reversing Commonwealth v. Pent, 170 A. 401, 112 Pa.Super. 215.

Swearing of jury

The swearing of the jury in a criminal case should appear from the

record under the text rule.—Commonwealth v. Robinson, supra.

75. N.C.—State v. King, 27 N.C. 203.

76. La.—Suarez v. Suarez, 104 So. 616, 158 La. 682.

77. Cal.—People v. Murphy, 200 P. 484, 53 Cal.App. 474.

Hesitation of witness

The refusal of a trial judge to have the record show that a witness hesitated to answer a question was not error, since the fact was apparent to the jury, and since the length of time taken by a witness to consider the answer he should give to a question would not aid the appellate court in deciding questions of law.—People v. Murphy, supra.

78. Mo.—State ex rel. May Department Stores Co. v. Haid, 38 S.W.2d 44, 327 Mo. 567.

79. La.—State v. Harp, 63 So. 500, 133 La. 1007.

80. Ga.—Justices Talbot County Inferior Ct. v. House, 20 Ga. 328.

81. U.S.—Bullitt County v. Washer, Ky., 9 S.Ct. 499, 130 U.S. 142, 32 L.Ed. 885.

82. Cal.—Grivi v. Superior Court in and for Los Angeles County, 45 P.2d 181, 3 Cal.2d 463.

Reprimanding attorney

Judge hearing divorce proceeding had no jurisdiction to file with records of case a report wherein judge

A rejected tender of a plea of guilty of assault and battery, on arraignment for shooting with intent to kill, should not be recorded on the court's journal.⁸³

What constitutes record. The record of a court of record has been held to consist of the docket or entry book, the file, and the minutes of the court.⁸⁴ Moreover, it has been held that in a broad sense such written memorials as a statutory register of actions, files, minutes, orders, decree, judgment, statutory judgment book and statutory docket are judicial records.⁸⁵ In actions at law the docket entries have been held to constitute the record until the full and extended record is made up.⁸⁶ In consonance with these more liberal views it has been held that court minutes kept by the clerk on being approved by the trial judge are as effective as if written by the court;⁸⁷ in a case where it appeared that the trial judge passed on the minutes it was held that, where the clerk puts the minutes of record, they constitute sufficient journal entries of record,⁸⁸ and all the authorized written minutes made in the course of the case, have been treated as part

of the record, whether made in the minute book, appearance docket, continuance docket, trial list, or argument list, or placed among the files.⁸⁹ Under particular statutory provisions authorizing the appointment of a court reporter it has been held that his record as kept becomes an official record of the court.⁹⁰ In view of the definition of a court record as a memorial or history of judicial proceedings commencing with the writ or complaint and ending with the judgment, see *supra* § 225, it is held that pleadings⁹¹ and depositions or other forms of written evidence⁹² in a case constitute part of the record. It has been held, moreover, that, when filed as required by statute, a notice of appeal becomes a part of the record in a case.⁹³ Further, an original transcript of testimony may remain a record of the lower court, although filed with the clerk of an appellate court as part of the transcript of the record of the case.⁹⁴

On the other hand, various writings associated with judicial proceedings have been held to constitute no part of the court records. For example, there are cases which hold that the minutes consti-

reprimanded plaintiff's attorney for violation of court rule requiring that default divorce cases be set through calendar department where alleged violation had no effect on interlocutory decree entered.—*Grivi v. Superior Court in and for Los Angeles County*, *supra*.

Remarks reflecting on parties

Remarks by the court reflecting on the parties to the cause made after denial of a motion to strike have no proper place in the record of such court.—*State v. District Ct.*, 97 P. 1032, 37 Mont. 590.

83. Ohio.—*Cantler v. State*, 106 N.E. 656, 90 Ohio St. 1.

84. La.—*Anderson v. Thomas*, 117 So. 573, 166 La. 512.

"Docket"

(1) An abstract, minute, or memorandum of orders of court made from time to time during the day is usually put down in a book commonly termed the "docket."

Ill.—*Morgan Hastings Co. v. Gray Dental Co.*, 108 Ill.App. 98.

Pa.—*Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co.*, 167 A. 636, 640, 109 Pa.Super. 571, citing *Corpus Juris*.

(2) "The docket is only a court book in which the judicial proceedings constituting the record are briefly noted."—*Midwest Piping & Supply Co. v. Thomas Spacing Mach. Co.*, *supra*.

Minutes

(1) "Ordinarily the clerk keeps a minute book and enters up his orders from the same, as memoranda of the

proceedings."—*Warden of U. S. Penitentiary Annex at Ft. Leavenworth, Kan. v. De Londi*, C.C.A.Kan., 62 F. 2d 981, 982, reversing, D.C., *In re De Londi*, 2 F.Supp. 256.

(2) "The minutes . . . purport to give the orders, actions, and decrees of the court."—*First Nat. Bank of Pocatello v. Poling*, 248 P. 19, 20, 42 Idaho 636.

(3) "At common law, the minutes were merely memoranda from which records were made up after the term, but under modern practice the minutes are kept by the clerk, and usually authenticated by the judge."—*First Nat. Bank of Pocatello v. Poling*, *supra*.

85. Idaho.—*Evans v. District Court of Fifth Judicial Dist.*, 293 P. 323, 50 Idaho 60.

Inclusion in judgment roll

Judgment roll, files, papers, and orders in case, whether or not included in the judgment roll, are judicial records.—*Evans v. District Court of Fifth Judicial Dist.*, *supra*.

86. Mass.—*Washington Nat. Bank v. Williams*, 77 N.E. 383, 190 Mass. 497.

15 C.J. p 979 note 59 [a], [b].

Poor debtor's recognizance

Where minutes of the trial of an action on a poor debtor's recognizance in the nature of docket entries contain a statement of what was done at the trial, they may be considered as constituting the record itself until extended.—*Warburton v. Gourse*, 79 N.E. 270, 193 Mass. 203.

87. La.—*Calhoun v. Serio*, App., 161 So. 772.

15 C.J. p 979 note 59 [c].

88. U.S.—*Warden of U. S. Penitentiary Annex at Ft. Leavenworth, Kan. v. De Londi*, C.C.A.Kan., 62 F.2d 981, reversing, D.C., *In re De Londi*, 2 F.Supp. 256.

89. Pa.—*Wilkins v. Anderson*, 1 Phila. 134.

90. Tex.—*American Nat. Bank of Wichita Falls v. Haggerton*, Civ. App., 250 S.W. 279.

91. Ill.—*Bocock v. Leet*, 210 Ill. App. 402.

Claim against estate

As a pleading in the case, a claim filed against an estate is a part of the record.—*Bocock v. Leet*, *supra*.

92. Ark.—*Chicago Title & Trust Co. v. Hagler Special School Dist.*, 12 S.W.2d 881, 178 Ark. 443.

Ill.—See *Fischer v. Haxtun*, 210 Ill. App. 506.

In chancery case

Under the practice prevailing in Arkansas it has been held that depositions when filed, or oral evidence ordered to be reduced to writing, become part of the record in a chancery court.—*Chicago Title & Trust Co. v. Hagler Special School Dist.*, 12 S.W.2d 881, 178 Ark. 443.

93. Iowa.—*Bloom v. Sioux City Tract Co.*, 126 N.W. 909, 122 N.W. 831, 148 Iowa 452.

94. Ky.—*Harbison & Walker Co., Southern Dept. v. White*, 114 S.W. 250.

tute no part of the record of a court.⁹⁵ Proceeding on the theory that the court reporter's notes are merely the record of certain of the proceedings on the trial of a cause, it has been held that such notes do not, ordinarily, constitute the minutes proper and constitute no part of the court records.⁹⁶ Among the other writings and entries which have been held to constitute no part of the records of courts are: The trial list of causes;⁹⁷ entries made by the clerk in his docket book;⁹⁸ a "subpoena docket,"⁹⁹ and an entry made by the clerk in the record pursuant to court order but after the term.¹ Unless made so by agreed statement, or the like, affidavits, depositions, and matters of parol evidence have been held to constitute no part of the record.²

Authentication. It is generally required by statute that the records or minutes of a court shall be signed by the judge³ or by the clerk.⁴ This re-

quirement has under some statutory provisions been held to be mandatory and essential to the validity of the record.⁵ In consonance with this view it has been held that a statute requiring that the minutes shall be drawn up, read, and signed on the last day of the term imposes a mandatory duty⁶ which cannot be complied with by a signing of the minutes after the term has expired by operation of law and the court is in vacation.⁷ Under other statutes the requirement for signing is considered to be merely directory,⁸ so that failure to sign the record before adjournment does not affect the validity of judgments or orders of the court,⁹ including the order of final adjournment.¹⁰ Where the essential requirements of a statute were that court proceedings be transcribed by the clerk and signed by the court, noncompliance with merely directory provisions which required reading by the clerk

95. Colo.—Hoehne v. Trugillo, 1 Colo. 161, 91 Am.D. 703.

Ky.—Equitable Trust Co. of Dover v. Bayes, 226 S.W. 390, 190 Ky. 91.

Wyo.—State v. Scott, 247 P. 699, 35 Wyo. 108.

Reason for rule

"It was not the intention that permanent records of the court should be preserved in minute books, which are solely for the purpose of keeping of the business that comes before the court or is transacted by it."—Equitable Trust Co. of Dover v. Bayes, 226 S.W. 390, 391, 190 Ky. 91.

Recording of minutes ineffective

Recording the minutes in the journal merely as a record of the minutes adds nothing to their force and effect as a record.—State v. Scott, 247 P. 699, 35 Wyo. 108.

Rough minutes of commissioner or court have been held to constitute no part of the official records of such court.—Van Tiger v. Superior Court in and for Los Angeles County, 60 P.2d 851, 7 Cal.2d 377.

96. Idaho.—First Nat. Bank v. Poling, 248 P. 19, 42 Idaho 636.

97. Pa.—Moore v. Kline, 11 Pen. & W. 129.

98. Conn.—Weed v. Weed, 25 Conn. 337.

99. Ala.—Jackson v. Mobley, 47 So. 590, 157 Ala. 408.

1. N.C.—Austin v. Rodman, 8 N.C. 71.

2. U.S.—Baltimore & P. R. Co. v. Sixth Presb. Church, 91 U.S. 127, 23 L.Ed. 260.

3. Conn.—Banach v. Bohinski, 139 A. 688, 107 Conn. 156.

R.I.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 323.

Tenn.—State v. Hardin, 43 S.W.2d 924, 925, 163 Tenn. 471, quoting Corpus Juris. 15 C.J. p 973 note 86.

Mode of signing

(1) Requirements for the signing of court records have been held to contemplate the signature of the presiding trial judge in his proper name rather than by his initials.—Fairbanks v. Beard, 141 N.E. 590, 247 Mass. 8, 30 A.L.R. 698.

(2) Accordingly in a case where a record entry was signed with the initials of the presiding judge, it was held that they might be disregarded as part of the record.—Fairbanks v. Beard, supra.

Presumptions

(1) In the absence of any proof to the contrary, it may be presumed that the minutes of the court were signed by the judge.—Sweeney v. Sweeney, 46 S.E. 76, 119 Ga. 76, 100 Am.S.R. 159.

(2) Similarly it has been held, where the trial judge's failure to sign the minutes was relied on, that the fact that minutes had not been assailed as to correctness and stood on record as court's own acts raised strong presumption that they were approved by judge.—Calhoun v. Serio, La.App., 161 So. 772.

Records kept by another tribunal

If the records of one tribunal are required to be kept with another and are made records of such other, they may be authenticated by the seal and signatures of the chief judge and clerk of the court in which they are deposited.—Taylor v. Barron, 35 N.H. 484.

Records of predecessor

On application to the surrogate to sign the records of a predecessor left incomplete, it is proper to require proof, by affidavit or otherwise,

of the fact and to recite in the record the mode in which completed.—Matter of Espie, 2 Redf.Surr., N.Y., 445.

4. Conn.—Banach v. Bohinski, 139 A. 688, 107 Conn. 156.

5. Ky.—Equitable Trust Co. of Dover v. Bayes, 226 S.W. 390, 190 Ky. 91.

Orders

Under the text rule it has been held that signing of the record by the trial judge is required to make operative, orders entered in such record.—Equitable Trust Co. of Dover v. Bayes, supra.

Unsigned minutes

The minutes of a term of court not signed by the judge have no force.—Johnson v. Johnson, 2 Heisk., Tenn., 521.

6. Miss.—Watson v. State, 146 So. 122, 166 Miss. 194.

Writing and entry as part of minutes

Writing or entry on court's minute book does not become part of minutes within the meaning of such statute until the tentative minutes are read and signed by presiding judge.—Watson v. State, supra.

7. Miss.—Watson v. State, supra.

8. Ark.—American Inv. Co. v. Hill, 292 S.W. 675, 173 Ark. 468.

Okl.—Franks v. Franks, 7 P.2d 866, 155 Okl. 91.

R.I.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 323.

Tenn.—State v. Hardin, 43 S.W.2d 924, 925, 163 Tenn. 471, quoting Corpus Juris. 15 C.J. p 974 note 87.

9. Ark.—American Inv. Co. v. Hill, 292 S.W. 675, 173 Ark. 468.

10. Ark.—Fernwood Mining Co. v. Pluna, 205 S.W. 822, 136 Ark. 107.

in an audible voice was held not to affect the validity of orders made.¹¹ In the absence of a law so requiring, records need not be made out at length and signed by the judge before the close of the term.¹² A statute confirming all acts of surrogates in certifying the records has been held to cover the record of a will in a case existing and undetermined in the courts at the passage thereof.¹³

A statute requiring that the court reporter shall within a reasonable time after trial write out and certify the record thereof has no application to daily transcripts furnished to court and counsel during the course of trial.¹⁴

Indexes. A statute requiring the judges to superintend their records and to require that the dockets "and all indexes to the record be correctly made out at the proper time" does not authorize them to order new indexes to their records;¹⁵ but a statute authorizing the transcribing or copying of records, when obliterated or in a ruinous condition, has been applied to indexes in such condition.¹⁶

Language. Under applicable constitutional or statutory provisions it is essential that the records of courts shall be kept in the English language.¹⁷ An act requiring the use of the English language in the records of the courts in the Philippine Islands has been held to be prospective only.¹⁸

Requiring record to be read. Purpose of a statute, requiring that court proceedings be entered in a specified book and be read in open court by the clerk thereof at the next session, is to permit correction of errors or omissions in the record.¹⁹

Sealing of papers. The parties to an action have been permitted to have the papers before the court at the hearing of the cause sealed, to be opened only on order of the court.²⁰

Separate records. The legislature may, by statute, require separate dockets to be kept by county and circuit courts;²¹ and it has been held not irregular to keep the minutes of civil cases in one book, and those of criminal cases in another.²²

What are entries; requisites thereof. An "entry" as applied to judicial proceedings has been held to be a statement of a conclusion reached by the court or an act done during the progress of a cause which is spread of record and designed to furnish incontestable evidence of the matter stated.²³ In the absence of any prescribed form in which the minute entries of a court are to be made they should show substantially all that was done on the trial that the law requires, and this should be set out in fit and expressive words.²⁴ The legislature may authorize the presiding judge of a court to prescribe abbreviated forms of entries of orders in the records of the court, but such legislation does not authorize the use of forms containing abbreviations of words which render them unintelligible, or the making of entries in any language other than English.²⁵ Under the view that the minutes of a court are not the records on which orders or judgments are recorded but are merely the memoranda of what takes place in court, made by the authority of the court, see *supra* this section, it has been held that a particular entry of an order for the removal of a cause was in compliance with a statute requiring that such order be entered on the minutes.²⁶ The practice of preparing entries for the court to sign and enter of record is proper.²⁷ The judge's notes should be entered by the clerk on the docket when orders, verdicts, etc., do not show more fully the action of the court.²⁸ Minute entries by a federal circuit court clerk in a record recognized

11. Ky.—Kitchner v. Commonwealth, 268 S.W. 285, 206 Ky. 707.

12. U.S.—Sprague v. Litherberry, C.C.Ohio, 22 F.Cas.No.13,251, 4 McLean 442.

15 C.J. p 974 note 88.

"Ne varietur"

If a book containing the entry of the minutes is signed by the presiding judge at the end of the term, it need not be paraphrased "ne varietur."—State v. Hardaway, 24 So. 320, 50 La. Ann. 1345.

13. N.Y.—Fetes v. Volmer, 11 N.Y. S. 552, 58 Hun 1.

14. Cal.—Dewing v. Chow, 19 P.2d 12, 129 Cal.App. 441.

15. Mo.—Ward v. Cole County Ct., 50 Mo. 401.

16. Ky.—Marion County v. Spalding, 131 S.W. 1019, 141 Ky. 27. 15 C.J. p 974 note 91.

17. Ill.—Stein v. Meyers, 97 N.E. 295, 253 Ill. 199.

Provision inapplicable

A memorandum of the list of "papers filed and writs issued" kept by the clerk of the court, from which papers and writs a record thereof is made, is not a record, within the meaning of a constitutional provision requiring the preservation of court proceedings by record in the English language.—Isbitz v. Chicago City R. Co., 192 Ill.App. 487.

18. Philippine.—Montilla v. Augustinian Corp., 24 Philippine 220.

19. Va.—New York Life Ins. Co. v. Barton, 186 S.E. 65, 166 Va. 426.

20. S.C.—Ex parte Davidge, 63 S.E. 449.

21. Or.—Western Sav. Co. v. Curry, 65 P. 360, 39 Or. 407, 37 Am. S.R. 660.

22. Ala.—Jackson v. Mobley, 47 So. 590, 157 Ala. 403.

Ga.—Wilson v. State, 69 Ga. 224.

23. Ind.—McMillan v. Plymouth Electric Light & Power Co., 123 N.E. 446, 70 Ind.App. 336.

Bill of exceptions containing the evidence in a case has been held not to constitute an "entry" within the meaning of the text.—McMillan v. Plymouth Electric Light & Power Co., 123 N.E. 446, 70 Ind.App. 336.

24. Ala.—Pate v. State, 98 So. 819, 19 Ala.App. 548.

25. Ill.—Stein v. Meyers, 97 N.E. 295, 253 Ill. 199.

26. N.D.—State v. Marty, 203 N.W. 679, 52 N.D. 478.

27. Iowa.—Stephens v. Marion, 107 N.W. 614, 132 Iowa 490.

28. Ga.—Brady v. Little, 21 Ga. 132.

by the court as its minutes are valid, although made with a rubber stamp.²⁹

Time when entries may be made. The clerk of a federal circuit court has until the end of term in which to complete the minute entries for the term,³⁰ and it has been held that a state court has the right at any time during the term to make a record entry of proceedings which were had previously in the same term and direct that such entries be made to appear as of the date they are directed to be made.³¹ It has been held, moreover, that, when through negligence or oversight the formal order of convening a term of court has not been entered on the journal entry may be made in conformity with the facts during or after the expiration of the term.³² On the other hand, it has been held that a clerk in a state court has no authority after adjournment of court to write out in full his minutes of the preceding day.³³ Under a statute contemplating that all entries on the minutes of state circuit courts shall be made in term time under the supervision of the particular court, clerks of such courts have no authority to make such entries while the court is in vacation, and this notwithstanding the particular entries are made in accordance with the bench notes of the trial judge.³⁴ Moreover, under a statute requiring that separate subpoena dockets be kept in civil and criminal cases, it has

been held that required entries as regards subpoenas be made within a reasonable time after their issuance and return, and entries made after final disposition of the cause are too late.³⁵

Liability for change by clerk. Where a change in the minutes of a trial court was made by its clerk before they were signed by the judge at the end of the term, the party who procured the clerk to make the change was not liable to the party injured.³⁶

§ 227. Entries Nunc Pro Tunc

- a. Nature, object, purpose, or function
- b. Authority to make
- c. Time for making
- d. Proceedings for entry
- e. Operation and effect

a. Nature, Object, Purpose, or Function

An entry nunc pro tunc is an entry made now of something which was previously done and to be effective as of the former date.

An entry nunc pro tunc is an entry made now of something which was previously done, to have effect as of the former date,³⁷ the function, object, or purpose of such entry being to make the record speak the truth;³⁸ to supply on the record something which has actually occurred,³⁹ but has been

29. U.S.—*Ex parte Harlan*, C.C.Fla., 180 F. 119, affirmed 31 S.Ct. 44, 218 U.S. 442, 54 L.Ed. 1101, 21 Ann. Cas. 849.

30. U.S.—*Ex parte Harlan*, *supra*.

31. Mo.—*Crecelius v. Home Heights Co.*, 217 S.W. 508.

Order not void

Where the order of a particular state court setting the jury cases and relating to the drawing of the juries had been announced in open court, it was held that the mere fact that such order was not written in the minutes of the court until a later day of the term did not render the order void.—*Sovereign Camp*, W. O. W., v. Gay, 104 So. 895, 20 Ala. App. 650, reversed on other grounds *Ex parte Gay*, 104 So. 898, 213 Ala. 5.

Recollection of judge as basis

(1) Under the view that the entry contemplated by the text rule is not nunc pro tunc, it is held that, such entry requiring a written memorandum as a basis, the entry contemplated that the mere recollection of the judge is a sufficient basis.—*Crecelius v. Home Heights Co.*, Mo., 217 S.W. 508.

(2) Writing as basis for entry nunc pro tunc see *infra* § 227.

32. Okl.—*Cornelson v. State*, 257 P. 1109, 37 Okl.Cr. 338.

33. Ky.—*Johnson v. Commonwealth*, 80 Ky. 377.

34. Ala.—*Ex parte Beaird*, 116 So. 367, 217 Ala. 355.

35. Ala.—*Jackson v. Mobley*, 47 So. 590, 157 Ala. 408.

36. Ala.—*Wilder v. Bush*, 75 So. 143, 201 Ala. 21.

37. Mich.—*Kern v. Sample*, 206 N. W. 532, 233 Mich. 140.

Absence of words "nunc pro tunc" does not prevent an entry for correction of a record as of a former date from being actually an entry nunc pro tunc.—*Ellis v. Clarke*, 160 S.E. 780, 173 Ga. 618.

Restriction to judicial proceedings

"The filing of a paper nunc is a practice peculiar to the conduct of judicial proceedings."—*In re Yakel*, 195 N.Y.S. 355, 357, 118 Misc. 641.

38. Ariz.—*American Surety Co. of New York v. Mosher*, 64 P.2d 1025, 48 Ariz. 552—*Rae v. Brunswick Tire Corporation*, 40 P.2d 976, 45 Ariz. 135.

Ark.—*Richardson v. State*, 273 S.W. 367, 169 Ark. 167.

Cal.—*Boyd v. Lancaster, App.*, 90 P. 2d 317.

Kan.—*Schneider v. Schneider*, 78 P. 2d 16, 147 Kan. 621.

Mo.—*Osagera v. Schaff*, 240 S.W. 124, 293 Mo. 333.

Ohio.—*National Life Ins. Co. v. Kohn*, 11 N.E.2d 1020, 133 Ohio St. 111—*Baylor v. Killinger*, 186 N.E. 512, 44 Ohio App. 523.

Okl.—*Woodmansee v. Woodmansee*, 278 P. 278, 137 Okl. 112—*Smiley v. State*, 1 P.2d 829, 51 Okl.Cr. 364—*Ex parte Holmes*, 287 P. 801, 47 Okl.Cr. 5.

15 C.J. p 972 note 73 [a].

Purely ministerial

"Its function is purely ministerial in nature."—*Spears v. State*, 123 S. W.2d 674, 675, 136 Tex.Cr. 55.

39. Ariz.—*American Surety Co. of New York v. Mosher*, 64 P.2d 1025, 48 Ariz. 552—*Rae v. Brunswick Tire Corporation*, 40 P.2d 976, 45 Ariz. 135.

Ark.—*Dickey v. Clark*, 90 S.W.2d 236, 192 Ark. 67.

Mich.—*Magoun v. Walker*, 282 N.W. 868, 286 Mich. 686.

Mo.—*State v. Turpin*, 61 S.W.2d 945, 332 Mo. 1012.

Ohio.—*National Life Ins. Co. v. Kohn*, 11 N.E.2d 1020, 133 Ohio St. 111.

Okl.—*Woodmansee v. Woodmansee*, 278 P. 278, 137 Okl. 112—*Marker v. Gillam*, 196 P. 126, 80 Okl. 259.

omitted from the record through inadvertence or mistake.⁴⁰ More specifically it has been held that the purpose of a nunc pro tunc entry is to correct mistakes of the clerk or other court officer, or inadvertences of counsel, or to settle defects or omissions in the record, so that it will show what actually took place.⁴¹ It is not, on the other hand, the function of such entry by a fiction to antedate the actual performance of an act which never occurred;⁴² or to supply an entire omission to act within the time limit for such action;⁴³ or to represent an event as occurring at a date prior to the time of the actual event;⁴⁴ or to make the record show

that which never existed,⁴⁵ or to restore a lost record.⁴⁶ Where the language of the court's minutes was not inconsistent with the formal record entry, it was held that there was no occasion for a nunc pro tunc entry to make the record conform to such minutes.⁴⁷

b. Authority to Make

A court is authorized to correct its own records by an entry nunc pro tunc.

It is competent for the court to make an entry nunc pro tunc⁴⁸ in order to correct its records so

Tex.—Spears v. State, 123 S.W.2d 674, 136 Tex.Cr. 55.
15 C.J. p 973 note 77.

"In other words the office of a nunc pro tunc order is to record now for then what actually did occur."—Rae v. Brunswick Tire Corporation, 40 P.2d 976, 979, 45 Ariz. 185.

Other statements of text rule

(1) "The purpose of a nunc pro tunc entry is to put in the record some action of the court which has been omitted from the record."—Taylor v. State, 182 N.E. 294, 295, 191 Ind. 200.

(2) "Its purpose is merely to insert into an otherwise incomplete record an entry of what actually occurred."—Spears v. State, 123 S.W. 2d 674, 675, 136 Tex.Cr. 55.

40. Ark.—Dickey v. Clark, 90 S.W. 2d 236, 192 Ark. 67.

Kan.—Victory Life Ins. Co. v. Freeman, 65 P.2d 559, 145 Kan. 296.

Mich.—Magoun v. Walker, 282 N.W. 868, 286 Mich. 686—Freeman v. Hulbert, 203 N.W. 158, 230 Mich. 455.

Okl.—Hines v. Armstrong, 77 P.2d 671, 182 Okl. 344—Marker v. Gilliam, 196 P. 126, 80 Okl. 259.

41. U.S.—Reynolds v. U. S., D.C. Okl., 18 F.Supp. 739.

"Its office is . . . to furnish the record of an action really had, where its recording was omitted through inadvertence or mistake."—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.

42. Cal.—St. Clair v. Joos, 226 P. 623, 66 Cal.App. 398.

Mich.—Freeman v. Hulbert, 203 N.W. 158, 230 Mich. 455.

Ohio.—Baylor v. Killinger, 186 N.E. 512, 44 Ohio App. 523.

Filing of pleadings

Where certain pleadings had not in fact been filed, it was held that a nunc pro tunc entry whereby they would be marked "filed" as of a date prior to such entry was unavailable.—Stubbs v. Mendel, 98 S.E. 476, 148 Ga. 802.

Application to court orders

(1) As applied to court orders the function of a nunc pro tunc entry is not to make an order now for then, but to enter now for then an order previously made.—Schneider v. Schneider, 78 P.2d 16, 147 Kan. 621.

(2) "The question on such order is, therefore, what order was in fact made at the time by the trial court."—Schneider v. Schneider, 78 P.2d 16, 18, 147 Kan. 621.

(3) Nunc pro tunc entry ordering name of next friend, appointed to appear for child, stricken out after entry of adoption decree, and substituting another who had not been appointed, was held to be erroneous under the text rule.—In re Privette, 185 N.E. 435, 45 Ohio App. 51.

New judgment

"The object of an order nunc pro tunc is not the rendering of a new judgment and the ascertainment and determination of new rights."—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 1030, 48 Ariz. 552.

43. Miss.—Green v. Myrick, 171 So. 774, 177 Miss. 778.

Certification of date

Where there was a conflict as regards the date relating to the presentation of bills of exceptions, a holding that the date certified by the trial court controlled was held not to violate the text rule.—Seeger v. State, 168 N.E. 577, 201 Ind. 469.

Proving attendance of witnesses

Under statutes authorizing recovery of fees for attendance of witnesses on proof presented within a specified time, their entire failure to act as required within the time prescribed by statute could not be cured by subsequent nunc pro tunc entry attempting to authorize the making of such proof.—Green v. Myrick, 171 So. 774, 177 Miss. 778.

44. Ohio.—National Life Ins. Co. v. Kohn, 11 N.E.2d 1020, 133 Ohio St. 111—Devers v. Schreiber, 200 N.E. 852, 51 Ohio App. 321.

Filing of motion

Where a motion was not actually filed until a certain date, an attempted nunc pro tunc entry attempting to record such filing as of a earlier date was held to be ineffective.—National Life Ins. Co. v. Kohn, 11 N.E. 2d 1020, 133 Ohio St. 111.

45. Okl.—State v. Houser, 249 P. 377, 121 Okl. 200.

46. Mich.—Freeman v. Hulbert, 203 N.W. 158, 230 Mich. 455.

47. Mo.—State v. Mason, 33 S.W.2d 895, 326 Mo. 973.

48. U.S.—Palermo v. U. S., C.C.A. Mo., 61 F.2d 138, certiorari denied 53 S.Ct. 318, 288 U.S. 600, 77 L. Ed. 976.

Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.

Ark.—Harris v. State, 276 S.W. 361, 169 Ark. 627—Smith v. Wallis-McKinney Coal Co., 215 S.W. 385, 140 Ark. 218.

Cal.—Carter v. J. W. Silver Trucking Co., 47 P.2d 733, 4 Cal.2d 198—Lauchere v. Lambert, 291 P. 413, 210 Cal. 274.

Ind.—Neuenschwander v. State, 161 N.E. 369, 200 Ind. 64—Miller v. Seiler, 142 N.E. 719, 82 Ind.App. 36—Shannon v. Abshire, 141 N.E. 621, 81 Ind.App. 299.

Kan.—Victory Life Ins. Co. v. Freeman, 65 P.2d 559, 145 Kan. 296—Morton v. Morton, 86 P.2d 486, 149 Kan. 77.

Ky.—Frankfort Kentucky Natural Gas Co. v. City of Frankfort, 123 S.W.2d 270, 276 Ky. 199.

Ohio.—National Life Ins. Co. v. Kohn, 11 N.E.2d 1020, 133 Ohio St. 111.

Okl.—Hines v. Armstrong, 77 P.2d 671, 182 Okl. 344—In re Cannon's Guardianship, 77 P.2d 64, 182 Okl. 171—Marker v. Gilliam, 196 P. 126, 80 Okl. 259—Ex parte Barnes, Cr., 93 P.2d 765—Ex parte Holmes, 237 P. 801, 47 Okl.Cr. 5—Ex parte Miles, 283 P. 268, 45 Okl.Cr. 296—Ex parte Payton, 281 P. 597, 45 Okl.Cr. 1.

that they shall speak the truth,⁴⁹ particularly for the correction of merely formal and inadvertent errors.⁵⁰ The power of the court to correct its records exists notwithstanding the rights of third persons may be affected.⁵¹ That a cause was dismissed and no subsequent order was made to set aside such dismissal prior to an application for an entry nunc pro tunc has been held not to affect the power of the court to correct its records by such entry.⁵²

It is held that the power of the court to make entries nunc pro tunc is inherent.⁵³

Whether a record shall be corrected by entry nunc pro tunc is addressed to the discretion of the court,⁵⁴ within certain rules relating to the showing necessary to warrant such entry, as discussed in subdivision d of this section. Entries nunc pro tunc will not be ordered except where this can be done without injustice to either party.⁵⁵

c. Time for Making

Entries nunc pro tunc may be made at any time.

It is usually held that an entry nunc pro tunc may be made at any time,⁵⁶ even after the term at which

W.Va.—Ex parte Coon, 94 S.E. 957, 81 W.Va. 532.
15 C.J. p 972 note 73.

Criminal proceedings

(1) The text rule has been held to apply to the record in criminal as well as civil proceedings.

Ark.—Richardson v. State, 273 S.W. 367, 169 Ark. 167.

Ill.—People v. Cobb, 174 N.E. 885, 343 Ill. 78.

Okl.—Petition of Breeding, 182 P. 399, 75 Okl. 169.

(2) At least when involving clerical errors or mistakes in entries as to matters of procedure, as distinguished from final judgment and conviction, it has been held that the text rule applies.—Ex parte Coon, 94 S.E. 957, 81 W.Va. 532.

Duty and right

The court has a duty, as well as a right, to make a nunc pro tunc entry in order to make the records of the court speak the truth.—Morton v. Morton, 86 P.2d 486, 149 Kan. 77—15 C.J. p 972 note 73 [b].

Furtherance of justice

"Entries nunc pro tunc are made in furtherance of justice."—Tuttle v. Tuttle, 196 A. 624, 625, 89 N.H. 219.

Particular matters held subject to correction

(1) Where clerk through error recited in commitment that defendant was sentenced for burglary instead of forgery, court could direct clerk to correct record.—Ex parte Baker, 289 P. 253, 144 Okl. 52.

(2) Where the record erroneously recited that one was convicted of stealing an automobile, it was held that an entry nunc pro tunc showing that he was actually convicted of robbery was proper.—Ex parte Martindale, 287 P. 740, 47 Okl.Cr. 17.

(3) Where record made by clerk of court did not correctly show that new trial was granted on ground of insufficiency of evidence, entry nunc pro tunc correcting record to show such ground was held to be proper.—Carson v. Emmons Draying & Safe Moving Co., 64 P.2d 176, 18 Cal.App.

2d 326, followed in 64 P.2d 178, 18 Cal.App.2d 768.

(4) Where a demand for a trial by jury is made, but by inadvertence not entered, the record may be amended nunc pro tunc.—Thomas Harrington's Sons Co. v. U. S. Express Co., 93 A. 697, 87 N.J.Law 154.

Particular matters not subject to correction

(1) Under the theory that the design of entries nunc pro tunc is to preserve to a party to a proceeding in court some right which would otherwise be lost, it was held that, where a divorce nisi had not become absolute at time of libellant's death, the divorce could not be made absolute by nunc pro tunc entry as of a time prior to such death, since such entry preserves no right of libellant.—Diggs v. Diggs, 196 N.E. 853, 291 Mass. 399.

(2) For other particular matters held not subject to correction by entry nunc pro tunc see 15 C.J. p 972 note 73 [h], [k].

49. Ark.—Smith v. Wallis-McKinney Coal Co., 215 S.W. 385, 140 Ark. 218.

Cal.—Dolan v. Superior Court of California in and for City and County of San Francisco, 190 P. 469, 47 Cal.App. 235.

Iowa.—State v. Frey, 221 N.W. 445, 206 Iowa 981.

Mont.—State ex rel. Union Bank & Trust Co. v. District Court of First Judicial Dist. in and for Lewis and Clark County, 91 P.2d 408, 108 Mont. 151.

Okl.—Ex parte Miles, 283 P. 268, 45 Okl.Cr. 296—Ex parte Payton, 281 P. 597, 45 Okl.Cr. 1.

15 C.J. p 972 note 73 [a].

Review of decree cannot be accomplished by way of an entry nunc pro tunc.—Reinbolt v. Reinbolt, 147 N.E. 808, 112 Ohio St. 526.

50. U.S.—Ex parte U. S., C.C.A.Wis., 101 F.2d 870, certiorari granted U. S. v. Stone, 59 S.Ct. 1044, 307 U.S. 620, 83 L.Ed. 1499.

Okl.—Tiger v. Coker, 68 P.2d 509, 180 Okl. 175.

15 C.J. p 972, note 73 [f].

51. Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552.

15 C.J. p 973 note 75.

52. Ariz.—Rae v. Brunswick Tire Corporation, 40 P.2d 976, 45 Ariz. 135.

Dismissal more than month prior to application

Ariz.—Rae v. Brunswick Tire Corporation, supra.

53. U.S.—Ex parte U. S., C.C.A.Wis., 101 F.2d 870, certiorari granted U. S. v. Stone, 59 S.Ct. 1044, 307 U.S. 620, 83 L.Ed. 1499—Reynolds v. U. S., D.C.Okl., 18 F.Supp. 739.

Iowa.—State v. Frey, 221 N.W. 445, 206 Iowa 981.

Okl.—Tiger v. Coker, 68 P.2d 509, 180 Okl. 175.

Probate court has inherent power to make such entry.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

54. Ark.—Richardson v. State, 273 S.W. 367, 169 Ark. 167.

Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

Refusal to hear evidence in favor of an entry nunc pro tunc was held to be within the discretion of the court.—Ex parte Cowan, 163 P. 451, 99 Kan. 711.

55. Iowa.—Floyd County v. Ramsey, 239 N.W. 237, 238, 213 Iowa 556, citing *Corpus Juris*.

15 C.J. p 973 note 76.

Mistake of party

The fact that a party, by mistake to his detriment, had the clerk change his correct entry on the court's minutes, is not ground for refusing him a nunc pro tunc entry to have the entry speak the truth, no one having been misled.—Pittsburgh, C. C. & St. L. R. Co. v. Lamm, 112 N.E. 45, 61 Ind.App. 389.

56. Okl.—Smiley v. State, 1 P.2d 829, 51 Okl.Cr. 364—Ex parte Holmes, 287 P. 801, 47 Okl.Cr. 5—Ex parte Miles, 283 P. 268, 45 Okl.Cr. 296—Ex parte Payton, 281 P. 597, 45 Okl.Cr. 1.

W.Va.—Ex parte Coon, 94 S.E. 957, 81 W.Va. 532.

the transaction occurred,⁵⁷ and it has been held that a nunc pro tunc entry after an appeal has been taken may be valid.⁵⁸

d. Proceedings for Entry

Proceedings for entry nunc pro tunc may be on motion of court or of parties, and are auxiliary to some action pending.

Entries nunc pro tunc may be made on the court's own motion⁵⁹ or on proper application by the parties.⁶⁰

In the absence of statute requiring notice it has been held that reasonable notice and an opportunity to be heard should be given to parties against whom correction of court records by entry nunc pro tunc is proposed;⁶¹ and it has been held that jurisdiction to make such entry, after the term at which the proceedings sought to be corrected were had, re-

quires that notice be given, to those who may be affected by the entry.⁶² Under particular circumstances, however, notice of an application for entries nunc pro tunc may not be necessary.⁶³ Notice served on the attorney of record of a party may be sufficient as to such party, and this notwithstanding the correctness of the record is not questioned until after entry of final judgment.⁶⁴

Proceedings to procure an entry nunc pro tunc are merely auxiliary to some action pending rather than original proceedings.⁶⁵

Showing necessary to warrant entry. It is usually held that record entries nunc pro tunc can properly be made only when based on some writing in a cause which directly or by fair inference indicates the purpose of the entry so sought to be made.⁶⁶ In accordance with this view it is held

"Pending" criminal case

A criminal case is "pending," in the sense that the court may correct its records by orders nunc pro tunc at any time, until the judgment is fully satisfied.—*Petition of Breeding*, 182 P. 399, 75 Okl. 169.

57. U.S.—*Reynolds v. U. S.*, D.C. Okl., 18 F.Supp. 739.

Ark.—*McPherson v. State*, 63 S.W. 2d 282, 187 Ark. 872—*Richardson v. State*, 273 S.W. 367, 169 Ark. 167.

Ill.—*People v. Cobb*, 174 N.E. 885, 343 Ill. 78.

Ind.—*Neuenschwander v. State*, 161 N.E. 369, 200 Ind. 64—*Reitzel v. Campbell*, 5 N.E.2d 148, 103 Ind. App. 650—*Miller v. Sellar*, 142 N.E. 719, 82 Ind.App. 36.

Kan.—*Victory Life Ins. Co. v. Freeman*, 65 P.2d 559, 145 Kan. 296.

Tex.—*Paddock v. State, Cr.*, 128 S.W.2d 389.

15 C.J. p 973 note 74.

Limitation on power

Power of trial court to make an entry nunc pro tunc after term does not extend beyond power to make a prior entry speak truth.—*Reinbolt v. Reinbolt*, 147 S.E. 808, 112 Ohio St. 526.

58. Cal.—*Carter v. J. W. Silver Trucking Co.*, 47 P.2d 733, 4 Cal. 2d 198—*Robbins v. Jenkins*, 50 P. 2d 826, 9 Cal.App.2d 580—*Ex parte Baldwin*, 259 P. 119, 85 Cal.App. 165.

Ind.—*Reitzel v. Campbell*, 5 N.E.2d 148, 103 Ind.App. 650.

Admissions

An entry nunc pro tunc made by the trial court to make its minutes show admissions of prior convictions by accused was held to be proper under the text rule.—*Ex parte Baldwin*, 259 P. 119, 85 Cal.App. 165.

Reason for rule

"A court may by an appeal lose jurisdiction of a cause, but it does not thereby lose jurisdiction over its own records."—*State ex rel. Buckner v. Ellison*, 210 S.W. 401, 403, 277 Mo. 294.

Laches

Proceeding on the theory that an appellee is not required to assist appellants in perfecting their record nor required to speak until under a duty to do so, it was held in a particular case that an appellee was not guilty of laches in asking that the record be corrected by entry nunc pro tunc.—*Reitzel v. Campbell*, 5 N.E.2d 148, 103 Ind.App. 650.

59. Kan.—*Morton v. Morton*, 86 P.2d 486, 149 Kan. 77.

60. Ind.—*Miller v. Sellar*, 142 N.E. 719, 82 Ind.App. 36—*Shannon v. Abshire*, 141 N.E. 621, 81 Ind.App. 299.

Petition for entry held sufficient

A petition for a nunc pro tunc entry with respect to certain proceedings showing submission to jury, verdict and answers to interrogatories, judgment as entered on the verdict, and as modified to agree with the answers, was held to be sufficient, where it was alleged that certain proceedings were had, and that the clerk failed to enter them in the record.—*Shannon v. Abshire*, supra.

Orders nunc pro tunc granted on motion see the C.J.S. title *Motions and Orders* §§ 57, 59, also 42 C.J. p 532 text and note 75–80, p 534 note 20–p 537 note 55.

61. W.Va.—*Ex parte Coon*, 94 S.E. 957, 81 W.Va. 532.

In a criminal case the text rule has been held to be particularly applicable.—*Ex parte Coon*, 94 S.E. 957, 81 W.Va. 532.

62. Ind.—*Baltimore & O. S. R. Co. v. Berdon*, 150 N.E. 407, 195 Ind. 265, denying rehearing *Baltimore & O. S. W. R. Co. v. Berdon*, 145 N.E. 2, 195 Ind. 265, certiorari denied 45 S.Ct. 225, 266 U.S. 633, 69 L.Ed. 479.

63. Ariz.—*American Surety Co. of New York v. Mosher*, 64 P.2d 1025, 48 Ariz. 552.

Mo.—*Collier v. Catherine Lead Co.*, 208 Mo. 246, 106 S.W. 971.

Entry of judgment

Where judgment itself recited over signature of judge that it was "done in open court" on a certain day, a nunc pro tunc entry correcting the minutes of the court to show that such judgment was rendered on such day was held to be valid, notwithstanding no notice was given to the opposing party.—*American Surety Co. of New York v. Mosher*, 64 P.2d 1025, 48 Ariz. 552.

Partition suit

Where defendants have been properly summoned in a partition suit, it is not necessary to notify them of an application for nunc pro tunc record entries after final judgment.—*Collier v. Catherine Lead Co.*, 106 S.W. 971, 208 Mo. 246.

64. Ind.—*Miller v. Sellar*, 142 N.E. 719, 82 Ind.App. 36.

65. Ind.—*Miller v. Sellar*, supra. N.Y.—*In re Yakel*, 195 N.Y.S. 355, 118 Misc. 641.

Okl.—*Petition of Breeding*, 182 P. 399, 75 Okl. 169.

Independent proceeding

A proceeding started for the sole purpose of having a paper filed nunc pro tunc was held not to be maintainable under the text rule.—*In re Yakel*, 195 N.Y.S. 355, 118 Misc. 641.

66. Ariz.—*American Surety Co. of New York v. Mosher*, 64 P.2d 1025, 48 Ariz. 552.

that such entries cannot be made from the judge's memory nor on parol proof derived from other sources,⁶⁷ or at least that such entries cannot be made on parol evidence alone,⁶⁸ although, where it appears from written evidence that judgment was rendered or other action taken, parol proof may be resorted to for the purpose of ascertaining the character, terms, and conditions of such action,⁶⁹ the personal knowledge and recollection of the court being admissible for such purpose.⁷⁰ As distinguished from those cases which require written ev-

idence as a basis for entries nunc pro tunc, there exists authority to the effect that such entries may be made on any competent evidence,⁷¹ although it be wholly outside the record,⁷² such as the memory of the court alone,⁷³ or recollection of the court together with other parol evidence.⁷⁴

Subject to the general rule that the correction of records by entry nunc pro tunc is for the discretion of the court, see *supra* this section subdivision b, it has been held that such entry should be made

Ind.—Platis v. Gary State Bank, App., 17 N.E.2d 486—Freestone v. State, 176 N.E. 877, 98 Ind.App. 523.

Ky.—Fischer v. Eby, 114 S.W.2d 763, 272 Ky. 545.

Mo.—State v. Turpin, 61 S.W.2d 945, 332 Mo. 1012—State ex rel. McSweeney v. Cox, 289 S.W. 869, 315 Mo. 1332, quashing record City of Aurora v. McSweeney, App., 283 S.W. 720—Osagera v. Schaff, 240 S.W. 124, 293 Mo. 333.

N.J.—Appel v. Fleuchaus, 145 A. 334, second case, 7 N.J.Misc. 202. 15 C.J. p 973 note 78.

"To justify such an entry some written memorandum or memorial must exist in the records of the court contemporaneous with or preceding the date of the alleged action."—O'Malia v. State, 192 N.E. 435, 436, 207 Ind. 308.

"The general rule is that a nunc pro tunc entry may be made whenever there is any memorandum, note, or other memorial found among the records of the case, required by law to be kept, showing action taken or rulings or orders made by the court which the clerk has failed to record."—Neuenschwander v. State, 161 N. E. 369, 370, 200 Ind. 64.

"At common law, even clerical mistakes or misprisions could be corrected only where the record furnished the means of correction."—In re Prouty's Estate, 163 A. 566, 568, 105 Vt. 66.

Judge's minutes as foundation

Minutes kept by judge are sufficient foundation on which to make nunc pro tunc entry when they show what records should contain.—Neuenschwander v. State, 161 N.E. 369, 200 Ind. 64.

Lost record

Where a record or paper in an action is lost, it has been held that its contents cannot be shown by parol, but it must first be established and supplied in the manner prescribed by Rev.St., 1899, § 4560, describing the procedure for establishing or supplying lost records; then such reestablished record can be used as a basis for a nunc pro tunc en-

try.—Becher v. Deuser, 69 S.W. 363, 169 Mo. 159.

Sufficient memoranda

(1) Evidence consisting of bench docket entry stating that applicant was admitted to practice law, a line drawn through entry, a bench docket entry and order book entry corresponding thereto made four days later denying application and testimony of trial judge as to intent in drawing line through entry was held to sustain finding that court had vacated original judgment, and to authorize entry of nunc pro tunc order correcting record.—In re McNames, 200 N.E. 703, 210 Ind. 1.

(2) Nunc pro tunc entry inserting blank space for name of surety contained in order allowing appeal, fixing amount of appeal bond, and approving surety was held proper where court bench docket containing judge's minutes disclosed that space was left blank, and space for name of surety was left blank in civil order book and was not inserted until after expiration of term, and court did not in fact name and approve surety during term.—Reitzel v. Campbell, 5 N.E.2d 148, 103 Ind. App. 650.

(3) Minute entry "dismissed" was held to support nunc pro tunc entry correcting record to read "movants dismissed their motion without prejudice."—In re Lueke's Estate, Mo.App., 20 S.W.2d 552.

(4) Instruction, introduced in evidence on the hearing of a motion for a nunc pro tunc order, that certain counts of information had been dismissed, was held to be minute or record authorizing nunc pro tunc entry of such dismissal pending appeal from judgment of conviction on another count.—State v. Harris, 82 S.W.2d 877, 336 Mo. 1134.

(5) For other cases wherein memoranda were held to be sufficient to constitute a basis for entry nunc pro tunc see 15 C.J. p 973 n 78 [b].

67. Mo.—Doerschuk v. Locke, 51 S.W.2d 62, 330 Mo. 819—Osagera v. Schaff, 240 S.W. 124, 293 Mo. 333.—In re Kellam's Estate, 53 S.W.2d 401, 227 Mo.App. 291.

68. Ind.—Illinois Pipe Line Co. v. Fitzpatrick, 188 N.E. 771, 207 Ind. 1—Platis v. Gary State Bank, App., 17 N.E.2d 486.

69. Ind.—In re McNames, 200 N.E. 703, 210 Ind. 1—Illinois Pipe Line Co. v. Fitzpatrick, 188 N.E. 771, 207 Ind. 1—Reitzel v. Campbell, 5 N.E.2d 148, 103 Ind.App. 650.

Ambiguity or uncertainty in the written matter may warrant resort to oral evidence.—Freestone v. State, 176 N.E. 877, 98 Ind.App. 523.

Establishing name of surety

Where record showed order approving surety on appeal bond, parol proof was held to be properly resorted to for purpose of establishing name of surety as basis for nunc pro tunc entry inserting name of surety in record.—Illinois Pipe Line Co. v. Fitzpatrick, 188 N.E. 771, 207 Ind. 1.

70. Ind.—Moerecke v. Bryan, 108 N. E. 948, 183 Ind. 591.

Mo.—Thaler v. Niedermeyer, 170 S. W. 383, 185 Mo.App. 250.

71. Okl.—Lamb v. Alexander, 179 P. 587, 74 Okl. 250.

Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

72. Vt.—In re Prouty's Estate, *supra*.

73. Or.—Richey v. Robertson, 169 P. 99, 86 Or. 525.

Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

74. Tex.—Ft. Worth & D. C. R. Co. v. Roberts, 81 S.W. 25, 98 Tex. 42, reversing, Civ.App., 78 S.W. 1000.

After term

Where a statement of facts was filed after adjournment of the court for the term, but within the time allowed by an order not entered in the minutes on an oral motion made therefor at the trial, the court at a subsequent term was held to have jurisdiction to permit the filing of such order nunc pro tunc on the recollection of the judge and other parol testimony that the order had been applied for and granted during the previous term, without any memorandum or other written evidence thereof.—Ft. Worth & D. C. R. Co. v. Roberts, *supra*.

with great caution and on the most conclusive evidence;⁷⁵ that the evidence constituting the basis for the correction of the record be clear and convincing⁷⁶ and that the entry be made only where the errors to be corrected are proved beyond all doubt.⁷⁷ In cases recognizing the rule that a record might be corrected nunc pro tunc on parol evidence alone, it was held that such evidence should be decisive and unequivocal.⁷⁸

e. Operation and Effect

Nunc pro tunc entries relate back to the time that the original entry should have been made.

A nunc pro tunc entry correcting the records of a court relates back to the time that the entry should have been made or proceedings had,⁷⁹ and makes valid those proceedings, to which the entry relates, but which were apparently defective.⁸⁰ In consonance with the general rule whereby court records are regarded as constituting legal evidence of the matters to which they relate, see *infra* § 237, an entry nunc pro tunc is competent evidence of the facts which it recites.⁸¹ Moreover, such entry imports verity⁸² where not appealed from,⁸³

and cannot be impeached collaterally.⁸⁴ It has been held, however, that a nunc pro tunc entry of findings not stating what conclusions of fact and law had theretofore been made could not have any effect on the proceedings originally had.⁸⁵ In accordance with rules governing the function, object, and purpose of entries nunc pro tunc, as stated in subdivision a of this section, it is held that such an entry cannot supply omitted action by the court,⁸⁶ nor make the record show what ought to have been done;⁸⁷ nor may an entry nunc pro tunc operate so as to extend the time within which an appeal must be taken.⁸⁸

§ 228. Filing and Withdrawal of Papers

a. Filing

b. Withdrawal

a. Filing

A paper is filed when delivered to proper officer and received by him for filing.

A paper is filed when it is delivered to the proper officer and by him received for filing.⁸⁹ A translation of the shorthand notes of the evidence in a

75. Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

76. Ind.—In re McNames, 200 N.E. 702, 210 Ind. 1—Illinois Pipe Line Co. v. Fitzpatrick, 188 N.E. 771, 207 Ind. 1.

77. Vt.—In re Prouty's Estate, 163 A. 566, 105 Vt. 66.

Recollection and affidavits supporting minutes

Minutes of trial judge supported by his personal recollection and by affidavits of attorneys, in no way impeached, are sufficient basis for nunc pro tunc orders of continuance in criminal cases.—Ex parte Coon, 94 S.E. 957, 81 W.Va. 532.

78. Ark.—St. Louis-San Francisco Ry. Co. v. Hovley, 120 S.W.2d 14, 196 Ark. 775—Dickey v. Clark, 90 S.W.2d 236, 192 Ark. 67.

Evidence sufficient

Parol evidence that surety appeared before county judge and sought to be relieved from suretyship on guardian's bond, and that judge directed entry of a minute ordering guardian to file new bond and ordering release of surety thereupon, although record did not contain such minute, justified entry of order nunc pro tunc to supply omission and complete record.—In re Cannon's Guardianship, 77 P.2d 64, 182 Okl. 171.

Evidence insufficient

Ark.—Dickey v. Clark, 90 S.W.2d 236, 192 Ark. 67.

79. Ind.—Pierce v. Ellis, 176 N.E. 81, 92 Ind.App. 445.

Okl.—In re Cannon's Guardianship, 77 P.2d 64, 182 Okl. 171—Smiley v. State, 1 P.2d 829, 51 Okl.Cr. 364—Ex parte Holmes, 287 P. 801, 47 Okl.Cr. 5.

80. Okl.—Smiley v. State, 1 P.2d 829, 51 Okl.Cr. 364.

81. Colo.—Diebold v. Diebold, 243 P. 680, 79 Colo. 7.

82. Mo.—Klaber v. Corporation of Royal Exchange Assur. of London, England, App., 48 S.W.2d 62, 64, citing *Corpus Juris*.

Okl.—Cornelson v. State, 257 P. 1109, 37 Okl.Cr. 338.

15 C.J. p 973 note 81—p 979 note 62 [d].

83. Mo.—Klaber v. Corporation of Royal Exchange Assur. of London, England, App., 48 S.W.2d 62, 64, citing *Corpus Juris*.
15 C.J. p 973 note 82.

84. Colo.—Diebold v. Diebold, 243 P. 680, 79 Colo. 7.

Mo.—Klaber v. Corporation of Royal Exchange Assur. of London, England, App., 48 S.W.2d 62.

Okl.—Hines v. Armstrong, 77 P.2d 671, 182 Okl. 344—Cornelson v. State, 257 P. 1109, 37 Okl.Cr. 338.

85. Or.—Crowe v. Albee, 169 P. 785, 87 Or. 148.

86. Cal.—St. Clair v. Josa, 226 P. 623, 66 Cal.App. 398.

Mich.—Magoun v. Walker, 282 N.W. 868, 286 Mich. 686—Freeman v. Hulbert, 203 N.W. 158, 230 Mich. 455.

Ohio.—In re Privette, 185 N.E. 435, 45 Ohio App. 51.

Okl.—Woodmansee v. Woodmansee, 278 P. 278, 137 Okl. 112—Marker v. Gillam, 196 P. 126, 80 Okl. 259.
15 C.J. p 973 note 77.

87. Ark.—St. Louis-San Francisco Ry. Co. v. Hovley, 120 S.W.2d 14, 196 Ark. 775—Dickey v. Clark, 90 S.W.2d 236, 192 Ark. 67.

Mont.—State ex rel. Union Bank & Trust Co. v. District Court of First Judicial Dist. in and for Lewis and Clark County, 91 P.2d 403, 108 Mont. 151.

88. Ind.—Pierce v. Ellis, 176 N.E. 81, 92 Ind.App. 445.

89. Okl.—Yaltz v. State, 103 P. 1104, 3 Okl.Cr. 20.

Tenn.—Cofer v. Cofer, 1 Tenn.App. 538.

Delay in actual filing

Where papers were handed to the proper officer for filing on a certain date, but due to a clerical error or oversight, as shown by the affidavit of such officer, they were not actually filed, and so marked, until a later date, they are to be regarded as filed as of the earlier date.—Cofer v. Cofer, *supra*.

Immediate record required

Where findings when made are handed to the proper officer for record on the docket, it is his duty to make such record at once.—Kelly v. Foley, 188 N.E. 349, 284 Mass. 503.

case, left with other papers in the clerk's office, and not accepted by him as a part of the record in the case, is not filed in the clerk's office, as required by law.⁹⁰ Filing a stipulation for a docket entry signed by the trial justice makes it a part of the record, whether or not the clerk then formally extends it on the record books.⁹¹

b. Withdrawal

- (1) In general
- (2) Effect of withdrawal
- (3) Restoration

(1) In General

Judicial records or papers should not be withdrawn from the files except for good reason.

Judicial records or papers should not be removed from the office of the clerk or files where they belong except for good and sufficient reasons,⁹² and no person has a right to remove them without permission of the court.⁹³ Ordinarily, papers before the court at the hearing of the cause may not be

withdrawn from the records, even on application of both parties⁹⁴ or with the consent of the clerk.⁹⁵ The court may, however, grant permission to remove papers from the records,⁹⁶ this being a matter within the discretion of the court both as to the removal⁹⁷ and as to the terms and conditions on which the permission shall be granted.⁹⁸ Accordingly, it is within the discretion of the court to permit a notice served with plaintiff's petition to be withdrawn from the record to enable the person who made the return to correct any informality therein,⁹⁹ to permit a party to take a presented bill of exceptions temporarily from the files for the purpose of making suggested corrections,¹ or to allow exhibits to be returned after they have been properly copied and thus made part of the court records.² There may, nevertheless, be circumstances in which it is not only proper but the duty of the court to deny such an application.³ During the time wherein an appeal may be taken, an application for the withdrawal of papers from the files constituting part of the record should, or may be, denied.⁴ Under a

90. Iowa.—Fitzgerald v. Paisley, 119 N.W. 166.

91. R.I.—Fales v. McDonald, 79 A. 969, 32 R.I. 406.

92. N.C.—Seay v. Yarborough, 94 N. C. 291.

Copies should be taken instead of removing the originals if what they contain is needed.

U.S.—In re King, C.C.A. Ala., 73 F.2d 175.

Idaho.—Evans v. District Court of Fifth Judicial Dist., 293 P. 323, 50 Idaho 60.

Ky.—Federal Chemical Co. v. A. L. Green & Sons, 110 S.W. 859, 33 Ky. L. 671.

N.C.—Seay v. Yarborough, 94 N.C. 291.

Supplying lost records, see the C.J.S. title Records §§ 42-52, also 53 C. J. p 634 note 60-p 642 note 39.

Taking pleadings from files, see C. J.S. title Pleading § 417, also 49 C.J. p 658 notes 95-97.

93. Canal Zone.—Morales v. Panama Bank Co., 2 Canal Zone 296.

Ky.—Federal Chemical Co. v. A. L. Green & Sons, 110 S.W. 859, 33 Ky. L. 671.

Mass.—French v. Neal, 24 Pick. 55.

Attorney preparing case

An attorney cannot withdraw a record from the files for the purpose of preparing a case for trial but may make use of it within the courthouse.—Bond v. Lockwood, 40 Ill. 119.

94. S.C.—Ex parte Davidge, 63 S.E. 449.

95. N.Y.—Steiger v. London, 122 N. Y.S. 1028, 138 App.Div. 246. 15 C.J. p 974 note 99.

96. Mass.—French v. Neal, 24 Pick. 55.

Surrogate cannot, under the provisions of the New York statutes, allow the testimony and proceedings on an application for probate to be withdrawn from his court on an abandonment of the proceedings by the proponent.—Matter of Greeley's Will, 15 Abb.Pr., N.S., N.Y., 393.

Removal from state

In South Carolina it is held that the court has no power to order a record removed from that state for use in another state in view of Cr. Code, § 307, making it a misdemeanor for the clerk of a court of record to allow the removal of any record except when attending therewith in court pursuant to process.—Ex parte Lockhart, 27 S.E. 620, 50 S. C. 156.

97. Mass.—French v. Neal, 24 Pick. 55.—Rogerson v. Neal, 16 Pick. 370.

Clerk required to preserve record

(1) A statute requiring the clerk of a circuit court to preserve books and papers coming into his hands does not interfere with the court's control over its own records.—Summers v. Louisville, 130 S.W. 1101, 140 Ky. 253.

(2) Neither does such statute preclude enforcement of a rule of court permitting a city attorney to withdraw papers in tax cases in which the city is plaintiff.—Summers v. Louisville, supra.

98. Mass.—French v. Neal, 24 Pick. 55.

99. Tex.—Blain v. McManus, 2 Tex. Unrep.Cas. 314.

1. Wyo.—Harden v. Card, 85 P. 246, 14 Wyo. 479.

2. N.Y.—Matter of Smith, 15 N.Y. St. 743.

15 C.J. p 974 note 3.

3. Mass.—French v. Neal, 24 Pick. 55.

For purpose of destruction

The power of a court to permit the withdrawal of its records from the clerk's office for the purpose of destruction should be exercised with the greatest caution, and only in the most exceptional cases.—Schecker v. Woolsey, 37 N.Y.S. 292, 2 App.Div. 52.

Removal from jurisdiction

(1) Court cannot authorize sending paper which is foundation of action outside jurisdiction.—Morales v. Panama Bank Co., 2 Canal Zone 296.

(2) On ex parte application, the court may not permit a record to be taken out of its jurisdiction into another county for use in taking depositions.—Brown v. Alexander, 11 Wkly.N.C., Pa., 95.

4. Wash.—McLean v. York, 188 P. 791, 110 Wash. 566.

On death sentence

Motion by administrator of defendant sentenced to death, that certain exhibits introduced at trial be ordered delivered to him, was held to be prematurely filed, where conviction had not become final so that it could not be set aside under any

statute requiring appellant to file in the appellate court printed transcripts of the record in the lower court, he is not entitled to withdraw from the office of the clerk of the lower court original court records, such as transcripts of evidence, bills of exceptions, or other original papers and documents on file in the case, for the purpose of having printed copies made.⁵

Ordinarily, when the originals are withdrawn, copies should be left,⁶ but the court may grant the permission with or without such condition.⁷

(2) Effect of Withdrawal

Records or papers withdrawn from the files, although with permission of the clerk, are in contemplation of law still in his possession and on the files of the court.

Records or papers, although taken from the office or files by permission of the clerk are in contemplation of law still in his possession and on the files of the court,⁸ and their removal does not affect the jurisdiction of the court to act thereon,⁹ and it is no defense to an action on certain contracts that plaintiff had improperly removed them from the files of a prior action thereon without an order of court.¹⁰ Neither may a court, having power to make an order permitting withdrawal of papers

from the file of the clerk, be precluded from receiving and considering papers that have been withdrawn without a court order as required by statute.¹¹

(3) Restoration

Papers withdrawn from the files of a court by an attorney must be restored.

An attorney who withdraws a transcript from the clerk of the court of appeals must return it, or where it is lost while in his custody, he must replace it.¹² Proceedings in a case should not, however, be stayed because an attorney has not restored papers which by permission he has withdrawn from the files.¹³

The court may, whenever it learns that a paper has, with or without permission, been withdrawn from its files, proceed on its own motion to have it restored,¹⁴ and a failure to comply with an order for its restoration may be punished as a contempt.¹⁵ If a paper which has been withdrawn from the files and not returned is necessary as evidence in a case, its restoration may be enforced by means of a subpoena duces tecum.¹⁶ Proceedings for the restoration of papers withdrawn from the files may be instituted under the title of the original action,

proceedings.—*State v. Thorp*, 172 A. 879, 86 N.H. 501.

On dismissal

Where after dismissal of a suit for breach of promise to marry but during the time wherein an appeal might have been taken, plaintiff applied for leave to withdraw certain exhibits, denial of such application was held not to constitute an abuse of discretion.—*McLean v. York*, 188 P. 791, 110 Wash. 566.

After appeal taken

In action by contractor's surety against owner of building for delivery of notes and trust deeds in escrow which were to be delivered to surety on completion of building, where notes and trust deeds were held in custodia legis, on surety's appeal from judgment finding building not to be completed, motion to withdraw notes and trust deeds from such custody was required to be denied, since to grant it would be to prejudge merits of case.—*Gavin v. Landfair Realty Corporation*, Cal., 87 P.2d 1012.

5. U.S.—*In re King*, C.C.A. Ala., 73 F.2d 175.

Paying for copies and comparison

Appellant, under circumstances indicated in the text, must pay the clerk for copies of such original papers on file as are needed for printing and for comparison with the

originals of any copies furnished by him.—*In re King*, supra.

6. U.S.—*Ex parte Tochman*, C.C.D. C., 23 F.Cas.No.14,072, 1 Hayw. & H. 268.

Ky.—*Federal Chemical Co. v. A. L. Green & Sons*, 110 S.W. 859, 33 Ky.L. 671.

Photographic copies of exhibits

On application to withdraw certain printed exhibits from the files in a copyright case for the purpose of annexing the same to a commission for the examination of witnesses in another state, such permission has been granted on condition that photographic facsimiles thereof should be made under the direction of the clerk and filed in lieu of the originals.—*Daly v. Maguire*, C.C.N. Y., 6 F.Cas.No.3,551, 6 Blatchf. 137.

Rule inapplicable

The text rule has been held not to apply where at the time of the application to withdraw papers originally filed there are no parties litigant before the court and no persons having any right to have the papers retained and the court can see no use in retaining them.—*Ex parte Tochman*, C.C.D.C., 23 F.Cas.No.14,072, 1 Hayw. & H. 268.

7. Mass.—*French v. Neal*, 24 Pick. 55.

8. Mass.—*French v. Neal*, 24 Pick. 55.

S.D.—*Pollock v. Aikens*, 57 N.W. 1, 4 S.D. 374.

9. S.D.—*Pollock v. Aikens*, supra.

10. Ky.—*Federal Chemical Co. v. A. L. Green & Sons*, 110 S.W. 859, 33 Ky.L. 671.

11. Ark.—*Gregory v. Rubel*, 41 S.W.2d 771, 184 Ark. 55.

Papers mailed to judge

Where the papers in a case were withdrawn from the file of the clerk by an attorney and mailed to the judge of the court, it was held that, since the judge would have the right to make an order permitting any one interested to take the papers, there could be no wrong, or violation of the statute referred to, in sending the papers to the judge himself.—*Gregory v. Rubel*, supra.

12. Ky.—*Heard v. Cherry*, 140 S.W. 59, 145 Ky. 79.

15 C.J. p 975 note 7.

13. N.Y.—*Wood v. Kroll*, 43 Hun 328.

14. Iowa.—*Howes v. Mutual Reserve Fund Life Ass'n*, 88 N.W. 338, 115 Iowa 285.—*Wisconsin, I. & N. R. Co. v. Given*, 29 N.W. 611, 69 Iowa 581.

15. Iowa.—*Wisconsin, I. & N. R. Co. v. Given*, supra.

16. N.Y.—*Wood v. Kroll*, 43 Hun 328.

which has been settled, the title being merely a matter of convenience and identification and the proceedings in nowise reviving the action.¹⁷

§ 229. Custody and Control

Courts have custody and control of their own records.

A court of record has general authority over its own records,¹⁸ and they are within its custody and control,¹⁹ particularly so far as they pertain to the court's business²⁰ and so far as is essential to the proper administration of justice.²¹ The control which a court exercises over its own records has been held to be inherent and is not subject to defeat by any ministerial act or omission of the clerk.²² In exercising control over its records, a court has power to protect them from irrelevant, unimportant or superfluous papers,²³ and to keep the records free from stain and scandal not pertinent to the cause and unnecessary to the decision.²⁴ The power of the court to control its records is retained while the court is in session,²⁵ but, except

as provided by statute, has been held to be lost on final adjournment for the term or on expiration of the time specified by statute.²⁶ There exists authority, however, to the effect that a court never loses jurisdiction over its records.²⁷

Subject to the general supervision and control possessed by courts of record over their own records, as stated in the preceding paragraph of this section, it has been held that particular statutory provisions contemplate that such records shall remain permanently in the custody of the clerk, and the court may, if deemed necessary for the proper administration of justice, refuse to allow the original records to be taken from such clerk as their legal custodian.²⁸ Where the clerk of a circuit court is the legal custodian of the records and files, it has been held that the supreme court has no power to compel him to surrender them to any other person;²⁹ nor will a legal custodian of the records of former county courts be compelled to surrender them to a board of county commissioners to be al-

17. Iowa.—*Howes v. Mutual Reserve Fund Life Assoc.*, 88 N.W. 338, 115 Iowa 285.

18. Idaho.—*Evans v. District Court of Fifth Judicial Dist.*, 293 P. 323, 325, 50 Idaho 60, citing *Corpus Juris*.

Kan.—*Gaston v. Collins*, 72 P.2d 84, 87, 146 Kan. 449, citing *Corpus Juris*.

Miss.—*Brown v. Sutton*, 121 So. 835, 158 Miss. 78.

15 C.J. p 974 note 97.

Protecting integrity of records

"It is elementary law, of course, that a court has the right to protect the integrity of its own records. Any court of record has that indispensable authority."—*Gaston v. Collins*, 72 P.2d 84, 87, 146 Kan. 449.

19. Securities

Production of securities in court by defendant as witness for plaintiff and their introduction into evidence by plaintiff was held to have the effect of putting them into the manual custody and control of the court.—*Dobson v. Neighbors*, 153 So. 861, 228 Ala. 407.

Records of trial court are peculiarly within control of that court.—*Gow v. Dubuque County*, 238 N.W. 578, 213 Iowa 92.

Constructing statutes together

Statutes involving custody of records of county and circuit courts should be read and construed together.—*Bend Pub. Co. v. Haner*, 244 P. 868, 118 Or. 105.

Method whereby certain courts shall be enabled to exercise control over their records has been held to be that provided by applicable stat-

utory provisions.—*Happy Coal Co. v. Brashear*, 92 S.W.2d 23, 263 Ky. 257.

20. Ind.—*Bedron v. Baran*, 169 N.E. 695, 90 Ind.App. 655.

21. Idaho.—*Evans v. District Court of Fifth Judicial Dist.*, 293 P. 323, 50 Idaho 60.

22. Ky.—*Happy Coal Co. v. Brashear*, 92 S.W.2d 23, 263 Ky. 257.

Record as only evidence of judicial action

The fact that the only competent evidence of judicial action must usually be found in record supplied by ministerial act of clerk has been held not to alter the text rule.—*Happy Coal Co. v. Brashear*, supra.

23. Mass.—*Petition of Thorndike*, 153 N.E. 888, 257 Mass. 409.

Particular order warranted

Where in a particular case, a bill of exceptions filed by a party was returned with certain filed motions, a court order that "no more papers be received or filed in said case, unless the court shall so order" was held to be warranted under the text rule.—*Petition of Thorndike*, supra.

24. Mont.—*Nadeau v. Texas Co.*, 69 P.2d 593, 104 Mont. 558, 111 A.L.R. 874.

"Scandal," within the meaning of the text rule, is an unnecessary statement which bears cruelly on an individual's moral character, or statement of anything contrary to good manners, or unbecoming court's dignity to hear.—*Nadeau v. Texas Co.*, supra.

Opinion of justice

A special concurring opinion by one of the justices of an appellate

court, applying epithets and adjectives to one of the parties and its attorneys, whereby they were charged with crimes and unprofessional and immoral conduct, was held to be scandalous under the text rule and, on motion, was ordered to be stricken from the files of the court and expunged from its records.—*Nadeau v. Texas Co.*, supra.

25. S.C.—*State v. Bilton*, 153 S.E. 269, 156 S.C. 324.

Alteration of minutes

As between the presiding judge and the clerk of the court, it was held, under the text rule, that, where the clerk in a criminal trial made an entry in the minutes as to the disagreement of the jury and the order of a mistrial, the judge properly altered the entry to show the facts on which the mistrial was ordered.—*State v. Bilton*, supra.

26. Ala.—*State v. Williams*, 109 So. 177, 21 Ala.App. 427.

27. Tex.—*Hannon v. Henson*, Civ. App., 7 S.W.2d 613, affirmed, Com. App., 15 S.W.2d 579.

W.Va.—*Dwight v. Hazlett*, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102. "The court may lose jurisdiction of the case to which the record relates but never loses jurisdiction over its records."—*Hannon v. Henson*, Tex.Civ.App., 7 S.W.2d 613, affirmed, Com.App., 15 S.W.2d 579.

28. Idaho.—*Evans v. District Court of Fifth Judicial Dist.*, 293 P. 323, 50 Idaho 60.

29. Ill.—*Anonymous*, 40 Ill. 77—*Cameron v. Savage*, 40 Ill. 76.

tered by them.³⁰ A statute relating to the custody of records is not invalid because it provides for a certified copy of a decree to be annexed to a tax record and such record to be delivered to the county treasurer in whose office it shall remain, "except as needed in the office of the county clerk," since the court may at any time repossess itself of the tax record.³¹

§ 230. Defects and Omissions

Court records, as made, have been presumed to be free from defects and omissions, although it has been held that parties are not entitled to assert any rights based on a defective or absent record.

In consonance with the rule that the more important courts speak only through their records, which constitute evidence of the matter which they contain, see *infra* § 237, it is held that interested persons may, in reliance on the record as made, properly assume that the officers charged with the duty of making and keeping the record have discharged such duty and that the record truthfully reflects what has actually occurred and what was done in the particular case.³² A default in making an entry cannot prejudice parties who rely on the integrity of the record.³³ The failure of the clerk or recording officer to make a correct record does not vitiate the proceedings in a court of record,³⁴ nor may the failure of those charged with the duty of making and keeping the record to discharge such duty, affect the validity of things done as of the date shown by the record.³⁵ It has been held, however, that, since a court must speak by its record or not at all, parties are not entitled to assert any rights based on a defective or absent record.³⁶ A court practice permitting the record to show the

filing of papers which have not, in fact, been filed is viewed with disfavor,³⁷ and where the record is made to show that exceptions to a decision were filed before the decision itself, and a preliminary motion in March is not docketed until after decision in July, the irregularities are destructive of all confidence in its accuracy.³⁸ Where the minutes recite the opening of court on a certain day pursuant to adjournment, and continuous proceedings from day to day in open court in the presence of accused and his counsel, failure of the minutes to state that the court was opened from day to day is not a fatal defect.³⁹

Changes in a record entry, which was in correct form as originally entered, will be presumed to have been done under direction of the court rather than done without authority and with malicious intent.⁴⁰ Apparent alterations and interlineations made by the clerk should be construed as mistakes corrected as soon as made, rather than as a tampering with the record,⁴¹ and interlineations and alterations in a certified record marked and verified as such by the initials of the clerk of court are presumed to have been noted at the time of authenticating the record.⁴²

A docket entry cannot be read in contradiction of the record after it has been properly extended.⁴³

§ 231. Amendment and Correction

Court records may be subject to correction and amendment. When improperly allowed, the proper remedy is by application to have an amendment set aside.

Court records are subject to amendment and correction in accordance with rules discussed in sub-

30. N.C.—Forsyth County v. Blackburn, 68 N.C. 406.

31. Mich.—Mersereau v. Miller, 70 N.W. 341, 112 Mich. 103.

32. Tenn.—Southern Continental Telephone Co. v. Alley, 72 S.W.2d 555, 167 Tenn. 561.

Proceedings in open court

Counsel are entitled to rely on the court officers properly to record in the minutes proceedings had in open court.—Blythe v. Hinckley, C.Cal., 84 F. 228, affirmed 111 F. 827, 49 C.C.A. 647, certiorari denied 22 S.Ct. 941, 184 U.S. 701, 46 L.Ed. 766. Curing defects in records by amendment see *infra* §§ 231-236.

Making and requisites of records generally see *supra* § 226.

33. U.S.—Blythe v. Hinckley, *supra*.

34. Okl.—Ex parte Cook, 103 P. 1041, 2 Okl.Cr. 684.

35. Tenn.—Southern Continental Tel-

ephone Co. v. Alley, 72 S.W.2d 555, 167 Tenn. 561.

Preparing minute record

Failure of a court and the clerk to comply with a statutory duty to prepare the minute record within the time prescribed may not affect the validity of things done as shown by the record.—Southern Continental Telephone Co. v. Alley, *supra*.

36. W.Va.—Charleston Trust Co. v. Todd, 131 S.E. 638, 101 W.Va. 31.

Filing date of affidavit

Where no record was made at the time that an affidavit was filed in a particular court, it was held that the filing date shown on the affidavit itself will be presumed to be the correct one.—Heimlich v. Dispatch Printing Co., 18 Ohio N.P.N.S., 505, affirmed 6 Ohio App. 394, 27 Ohio Cir.Ct.N.S., 333, 29 Ohio Cir.Dec. 149.

Pleas or proceedings

If record is silent as to supposed

pleas or proceedings, unless it is corrected or completed, parties are not entitled to assert rights based on defective or absent record.—Charleston Trust Co. v. Todd, 131 S.E. 638, 101 W.Va. 31.

37. Mo.—State ex rel. Barrett v. Farris, 264 S.W. 363.

38. Pa.—Trescott v. New York Co-Operative Bldg. Bank, 61 A. 478, 212 Pa. 47.

39. La.—State v. Harp, 63 So. 500, 133 La. 1007.

40. Ohio.—In re Farkash, 8 Ohio N.P.N.S., 137.

41. Pa.—Sheip v. Price, 3 Pa.Super. 1, 39 Wkly.N.C. 278.

42. N.Y.—Lazier v. Westcott, 26 N.Y. 146, 82 Am.D. 404.

43. U.S.—Jewett v. U. S., Mass., 100 F. 832, 41 C.C.A. 88, 53 L.R.A. 568, affirming, C.C., U. S. v. Jewett, 84 F. 142.

sequent sections of this title, see *infra* §§ 232-237. The correction of such records by entry nunc pro tunc has already been treated, see *supra* § 227.

As of what time amendments made. Where the court finds it necessary to amend its record in the interest of truth, the amendment should be made as of the day of the first decision.⁴⁴

What amounts to amendment. A finding by the judge after the term that the parties had consented to a continuance of a motion and the entry of such finding of record is practically an amendment of the record at the term.⁴⁵

Setting aside amendment. Where an amendment of court records has been improperly allowed, the remedy of the aggrieved party is to have such amendment set aside.⁴⁶

§ 232. — Authority to Amend

Courts possess authority to amend their records in order to make them speak the truth.

In case of an omission or error in the record, the power exists in the court to amend such record so that it shall conform to the actual facts and truth of the case;⁴⁷ especially when such facts are with-

44. R.I.—Ashaway Nat. Bank v. Superior Ct., 67 A. 523, 28 R.I. 355.

45. N.C.—Oak Hall Clothing Co. v. Bagley, 60 S.E. 648, 147 N.C. 37.

46. Mont.—State v. Turlok, 248 P. 169, 76 Mont. 549.
15 C.J. p 979 note 58.

47. U.S.—Goddard v. Electric Shovel Coal Corporation, C.C.A.III, 97 F.2d 754.

Ariz.—American Surety Co. of New York v. Mosher, 64 P.2d 1025, 48 Ariz. 552—Rae v. Brunswick Tire Corporation, 40 P.2d 976, 45 Ariz. 135.

Ark.—Sutton v. State, 260 S.W. 409, 163 Ark. 562.

Cal.—Doxsee Co. v. All Persons Claiming Any Interest in, or Lien Upon Real Property Herein Described or Any Part Thereof, 45 P.2d 192, 3 Cal.2d 609—Passow v. Superior Court in and for City and County of San Francisco, 76 P.2d 515, 25 Cal.App.2d 89—Kohstedt v. Hauseur, 74 P.2d 314, 24 Cal.App. 2d 60—Garland v. Smith, 21 P.2d 688, 131 Cal.App. 517—People's Ditch Co. v. Foothill Irr. Dist., 11 P.2d 86, 123 Cal.App. 257—Dalley v. B. & H. Transportation Co., 299 P. 748, 114 Cal.App. 320—Beall v. Erickson, 297 P. 960, 113 Cal.App. 36—Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co., 227 P. 938, 67 Cal.App. 420.

Colo.—Schattinger v. Schattinger, 216 P. 1057, 73 Colo. 573—Wheeler v. People, 165 P. 257, 63 Colo. 209.

Fla.—State ex rel. Grebstein v. Lehman, 129 So. 818, 100 Fla. 481, modifying 128 So. 811, 100 Fla. 473.

Ga.—Ellis v. Clarke, 160 S.E. 780, 173 Ga. 618—Beall v. State, 94 S.E. 74, 21 Ga.App. 73.

Ill.—Sinnock v. Marney, 250 Ill.App. 266.

Ind.—Warner v. State, 143 N.E. 288, 194 Ind. 426—State ex rel. Mechanics & Traders Ins. Co. v. Buente, 1 N.E.2d 454, 102 Ind.App. 563.

Ky.—Noel's Adm'r v. Black's Adm'r, 51 S.W.2d 955, 244 Ky. 655.

La.—State v. Milam, 147 So. 22, 176 La. 879.

Mass.—Chagnon v. Chagnon, 15 N. E.2d 231—A. Doykos & T. Pappas, Inc., v. Leventhal, 195 N.E. 348—Kelly v. Foley, 188 N.E. 349, 284 Mass. 503—Kacavas v. Toothaker, 179 N.E. 727, 278 Mass. 302—Mala-guti v. Rosen, 160 N.E. 532, 262 Mass. 555—Follins v. Dill, 118 N. E. 644, 229 Mass. 321.

Mich.—Freedman v. Burton, 274 N. W. 766, 281 Mich. 208—R. C. Mahon Co. v. R. S. Knapp Co., 268 N.W. 828, 829, 277 Mich. 103, quoting *Corpus Juris*.

Miss.—Brown v. Sutton, 121 So. 835, 837, 158 Miss. 78, citing *Corpus Juris*.

Mo.—Kansas City v. Jones Store Co., 28 S.W.2d 1008, 325 Mo. 226, certiorari denied Jones Store Co. v. Kansas City, Mo., 51 S.Ct. 78, 282 U.S. 873, 75 L.Ed. 771—Henneke v. Strack, App., 101 S.W.2d 743.

Mont.—State v. Turlok, 248 P. 169, 173, 76 Mont. 549, citing *Corpus Juris*—First State Bank of Thompson Falls v. Larsen, 233 P. 960, 963, 72 Mont. 400, quoting *Corpus Juris*—Marcellus v. Wright, 202 P. 381, 61 Mont. 274.

Nev.—Brockman v. Ullom, 286 P. 417, 52 Nev. 267, citing *Corpus Juris*.

N.J.—De Lisle v. Reeves, 126 A. 35, 96 N.J.Eq. 416, 1 N.J.Misc. 449—State v. Russakow, 145 A. 3, 7 N. J.Misc. 195.

N.Y.—People ex rel. Hirschberg v. Orange County Court, 2 N.E.2d 521, 271 N.Y. 151, reversing 284 N.Y. S. 1010, 246 App.Div. 640, affirming 282 N.Y.S. 72, 156 Misc. 529.

N.C.—Holton v. Lee, 91 S.E. 602, 173 N.C. 105.

Okl.—Harden v. District Court of Tulsa County, 53 P.2d 247, 175 Okl. 417—Ex parte Payton, 281 P. 597, 45 Okl.Cr. 1.

Pa.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387—Delco Ice Mfg. Co. v. Frick Co., 178 A. 135, 318 Pa. 337—Christ v. Dubosky, 104 A. 547, 261 Pa. 297—In re Northampton Improvement Ass'n, 93 Pa.Super. 183—Commonwealth v. Hafner, 89 Pa.Super. 173—First Nat. Bank v. Tomichuk, 33 Luz.Leg.Reg. 129—Commonwealth

v. Amanson, 53 Montg.Co. 77, 85 Pa.L.J. 548.

R.I.—Macdonald v. Barr, 154 A. 564, 51 R.I. 327.

S.C.—State v. Bilton, 153 S.E. 269, 156 S.C. 324.

Tex.—Hannon v. Henson, Com.App., 15 S.W.2d 579, affirming, Civ.App., 7 S.W.2d 613—Matthews v. Looney, Civ.App., 100 S.W.2d 1061, reversed on other grounds, Com.App., 123 S. W.2d 871.

Vt.—St. Pierre v. Beauregard, 152 A. 914, 103 Vt. 258.

W.Va.—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102, 15 C.J. p 975 note 10.

Question of law or fact

While the question whether an amendment of a judicial record shall be allowed is usually one of fact, yet the question whether it can be allowed is one of law.—Jaffrey v. Smith, 80 A. 504, 76 N.H. 168—Sawyer v. Manchester & K. R. Co., 62 N.H. 135, 18 Am.S.R. 541.

Criminal cases

(1) The power to amend, as stated in the text, extends to criminal as well as civil cases.

Ark.—Sutton v. State, 260 S.W. 409, 163 Ark. 562.

Idaho.—State v. Douglass, 208 P. 236, 35 Idaho 140.

15 C.J. p 975 note 10 [h] (1).

(2) But papers filed in a criminal case become a part of the record and cannot be changed, except by order of the court after full hearing and as authorized by law.—Carroll v. State, 118 S.W. 1031, 56 Tex.Cr. 78.

Power to change judgment

(1) "The power of a court to change its judgment, as well as the time within which such change can be made, depends upon different principles."—State v. Douglass, 208 P. 236, 238, 35 Idaho 140.

(2) Amendment and correction of judgment in general, see the C.J.S. title Judgments § 236, also 34 C.J. p 228 note 80—p 229 note 82.

Particular courts

(1) In Vermont, county and municipal courts have been held to have

in the knowledge of the court.⁴⁸

In the exercise of its power to amend court records, a court is not authorized to do more than make such records correspond to the actual facts.⁴⁹ So, a court cannot amend its records so as to make them show that which never occurred;⁵⁰ reflect a state of facts known to such court to be false;⁵¹ or create a new record or change the record so as to contradict or alter what in truth did take place.⁵² A court cannot, under the form of an amendment to its records, correct a judicial error⁵³ or remedy the effect of judicial nonaction,⁵⁴ such as by mak-

ing a record of an order or judgment that was never in fact made or rendered.⁵⁵ Neither does it fall within the power of the courts to cure, by amendment, errors or omissions of a party to court proceedings,⁵⁶ or to cure errors or omissions of counsel.⁵⁷ The court, may not, however, be precluded from correcting a record entry merely because the "record" does not show that it is, itself, incorrect.⁵⁸

The power of the court to correct its record is usually regarded as inherent,⁵⁹ and not dependent

the same power as regards amendment to their respective records.—*Cootey v. Remington*, 189 A. 151, 108 Vt. 441—*Vermont Evaporator Co. v. Taft*, 184 A. 704, 108 Vt. 209.

(2) In Massachusetts, a Boston municipal court was held to possess power to make its records conform to the truth.—*Bryer v. American Surety Co. of New York*, 189 N.E. 109, 285 Mass. 336.

(3) In Pennsylvania, orphans' courts have been held to be among those having power to amend their records.—*In re Willing's Estate*, 135 A. 751, 288 Pa. 337.

(4) City court of Meriden in Connecticut has been held to have power to amend its record to make it speak the truth.—*Reetz v. Mansfield*, 178 A. 53, 119 Conn. 563.

48. Kan.—*Overlander v. Overlander*, 268 P. 828, 126 Kan. 429, certiorari denied 49 S.Ct. 186, 278 U.S. 658, 73 L.Ed. 566.

La.—*State v. Jones*, 111 So. 492, 163 La. 51.

49. Cal.—*King v. Emerson*, 288 P. 1099, 110 Cal.App. 414, adopted 294 P. 768, 110 Cal.App. 414—*Haynes v. Los Angeles Ry. Corporation*, 252 P. 1072, 80 Cal.App. 776.

Idaho.—*State v. Douglass*, 208 P. 236, 35 Idaho 140.

15 C.J. p 975 note 10 [k].

50. U.S.—*Slade v. U. S., C.C.A. Utah*, 85 F.2d 786.

La.—*State v. Chaney*, 93 So. 119, 152 La. 347.

51. La.—*Saint v. Meraux*, 111 So. 691, 163 La. 242.

52. U.S.—*Petition of Cohen, D.C.N.Y.*, 53 F.2d 865.

Presence of counsel

It was not error to refuse to strike from the minutes of a certain date a recital that counsel for accused was present during certain proceedings when such was actually the case.—*State v. Crispino*, 98 So. 623, 154 La. 1013.

53. U.S.—*Reed v. Howbert, C.C.A. Colo.*, 77 F.2d 227.

Cal.—*Francis v. Riddle*, 59 P.2d 536, 15 Cal.App.2d 291—*King v. Emer-*

son, 288 P. 1099, 110 Cal.App. 414, adopted 294 P. 768, 110 Cal.App. 414—*Haynes v. Los Angeles Ry. Corporation*, 252 P. 1072, 80 Cal. App. 776—*McKannay v. McKannay*, 230 P. 218, 68 Cal.App. 709.

Idaho.—*State v. Douglass*, 208 P. 236, 35 Idaho 140.

Mont.—*State ex rel. Union Bank & Trust Co. v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 91 P.2d 403, 406, 108 Mont. 151, quoting *Corpus Juris*—*State v. Turlok*, 248 P. 169, 173, 76 Mont. 549, citing *Corpus Juris*. W.Va.—*Highland v. Strosnider*, 191 S.E. 531, 532, 118 W.Va. 647, citing *Corpus Juris*.

15 C.J. p 976 note 11.

"Judicial errors"

Orders made by court through mistake, inadvertence, want of sufficient consideration, oversight, or otherwise, where they affect substantial rights of litigants, are "judicial errors" within the meaning of the text rule.—*State ex rel. Union Bank & Trust Co. v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 91 P.2d 403, 108 Mont. 151.

"Inherently judicial"

"Where the error is inherently judicial rather than clerical or inadvertent, the court has no power to amend its decision."—*In re Burnett's Estate*, 79 P.2d 89, 90, 11 Cal.2d 259.

Order abrogating receiver's appointment

Where court entered order denying motion of trustee of defunct corporation to abrogate order appointing receiver, court was, under the text rule, held to be without jurisdiction to expunge such order denying abrogation at later time as having been inadvertently made.—*State ex rel. Union Bank & Trust Co. v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 91 P. 2d 403, 108 Mont. 151.

54. Cal.—*Francis v. Riddle*, 59 P.2d 536, 15 Cal.App.2d 291—*Haynes v. Los Angeles Ry. Corporation*, 252 P. 1072, 80 Cal.App. 776.

Mont.—*State ex rel. Union Bank &*

Trust Co. v. District Court of First Judicial Dist. in and for Lewis and Clark County, 91 P.2d 403, 406, 108 Mont. 151, quoting *Corpus Juris*—*State v. Turlok*, 248 P. 169, 76 Mont. 549.

Wyo.—*Washakie Livestock Loan Co. v. Meigh*, 33 P.2d 922, 924, 47 Wyo. 161, citing *Corpus Juris*.

15 C.J. p 976 note 11.

55. Cal.—*Francis v. Riddle*, 59 P.2d 536, 15 Cal.App.2d 291—*Haynes v. Los Angeles Ry. Corporation*, 252 P. 1072, 80 Cal.App. 776.

Idaho.—*State v. Douglass*, 208 P. 236, 35 Idaho 140.

Mont.—*State v. Turlok*, 248 P. 169, 76 Mont. 549.

56. U.S.—*Petition of Cohen, D.C.N.Y.*, 53 F.2d 865.

Year of birth

Where an alien in his declaration of intention to become a citizen inadvertently stated that he was born in a certain year, it was held that after his admission to citizenship the court could not amend its records to show that the birth actually occurred in another year.—*Petition of Cohen, supra*.

57. U.S.—*Slade v. U. S., C.C.A. Utah*, 85 F.2d 786.

58. Cal.—*King v. Emerson*, 288 P. 1099, 110 Cal.App. 414, adopted 294 P. 768, 110 Cal.App. 414.

59. U.S.—*Moss v. U. S., C.C.A.N.C.*, 72 F.2d 30, 31, citing *Corpus Juris*. Ala.—*Webb v. French*, 144 So. 818, 225 Ala. 617.

Ark.—*Sutton v. State*, 260 S.W. 409, 163 Ark. 562.

Cal.—*Carter v. J. W. Silver Trucking Co.*, 47 P.2d 733, 4 Cal.2d 198—*Doxsee Co. v. All Persons Claiming Any Interest In or Lien Upon Real Property Herein Described or Any Part Thereof*, 45 P.2d 192, 3 Cal. 2d 609—*Scott v. Hollingsworth*, 9 P.2d 836, 215 Cal. 314, 82 A.L.R. 995—*Halpern v. Superior Court in and for Alameda County*, 212 P. 916, 190 Cal. 384—*Kohlstedt v. Hauseur*, 74 P.2d 314, 24 Cal.App. 2d 60—*Carson v. Emmons Draying & Safe Moving Co.*, 64 P.2d 176, 18 Cal.App.2d 326, followed in 64 P.

on statutory grant,⁶⁰ although there exists authority to the effect that, in exercising the power conferred by statute to amend court records, the court exercises a special jurisdiction that did not exist at common law.⁶¹

Courts or persons who may exercise authority.
Records of a court can be altered only by the court

itself;⁶² and subject to the authority of the clerk to correct the records of the court on his own motion, under certain circumstances, see *infra* this section, the records of a court can be corrected only by order of such court.⁶³ So, one court, ordinarily, has no authority to correct the records of another court,⁶⁴ even though it has appellate jurisdiction

2d 178, 18 Cal.App.2d 768—*Hand v. Carlson*, 31 P.2d 1084, 138 Cal.App. 202—*People's Ditch Co. v. Foothill Irr. Dist.*, 11 P.2d 86, 123 Cal.App. 257—*King v. Emerson*, 288 P. 1099, 110 Cal.App. 414, adopted 294 P. 768, 110 Cal.App. 414—*Haynes v. Los Angeles Ry. Corporation*, 252 P. 1072, 80 Cal.App. 776—*Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co.*, 227 P. 938, 67 Cal.App. 420.
Colo.—*Weydevelde v. Weydevelde*, 67 P.2d 72, 73, 100 Colo. 301, citing *Corpus Juris*.
Fla.—*State v. City of Miami*, 134 So. 608, 101 Fla. 292.
Ga.—*Grand Chapter, O. E. S., v. Wolfe*, 166 S.E. 755, 175 Ga. 867—*Ellis v. Clarke*, 160 S.E. 780, 173 Ga. 618—*Neely v. Mobley*, 176 S. E. 527, 49 Ga.App. 541—*Ellis v. Boykin*, 161 S.E. 155, 44 Ga.App. 227.
Idaho.—*Haddock v. Jackson*, 8 P.2d 279, 51 Idaho 560—*State v. Douglass*, 208 P. 236, 35 Idaho 140.
Ind.—*State v. Branaman*, 183 N.E. 653, 204 Ind. 238—*Freestone v. State*, 176 N.E. 877, 98 Ind.App. 523—*Willard v. Loucks*, 175 N.E. 256, 97 Ind.App. 131.
Mass.—*Bryer v. American Surety Co. of New York*, 189 N.E. 109, 285 Mass. 336—*Webb v. Cohen*, 182 N. E. 337, 280 Mass. 292.
Mich.—*R. C. Mahon Co. v. R. S. Knapp Co.*, 268 N.W. 828, 829, 277 Mich. 103, quoting *Corpus Juris*.
Miss.—*Brown v. Sutton*, 121 So. 835, 837, 158 Miss. 78, citing *Corpus Juris*.
Mo.—*Henneke v. Strack*, App., 101 S.W.2d 743, 746, citing *Corpus Juris*—*Greggers v. Gleason*, 29 S.W. 2d 183, 224 Mo.App. 1108.
Mont.—*State v. Turlok*, 248 P. 169, 173, 76 Mont. 549, citing *Corpus Juris*.
Neb.—*Gate City Co. v. Douglas County*, 282 N.W. 532, 135 Neb. 531.
Nev.—*Brockman v. Ullom*, 286 P. 417, 52 Nev. 267.
N.Y.—*People ex rel. Hirschberg v. Orange County Court*, 2 N.E.2d 521, 271 N.Y. 151, reversing 284 N.Y.S. 1010, 246 App.Div. 640, affirming 282 N.Y.S. 72, 156 Misc. 529—*Lowry v. Himmeler*, 239 N.Y.S. 347, 136 Misc. 215—*In re Wolton*, 211 N.Y.S. 501, 125 Misc. 564.
Okla.—*Woodmansee v. Woodmansee*, 278 P. 278, 137 Okl. 112—*Davis v. Robedeaux*, 222 P. 990, 97 Okl. 86.
Pa.—*Davis v. Commonwealth Trust*

Co., 7 A.2d 3, 335 Pa. 387—*In re Willing's Estate*, 135 A. 751, 288 Pa. 337.
R.I.—*Macdonald v. Barr*, 154 A. 564, 51 R.I. 337.
Tex.—*John E. Quarles Co. v. Lee*, 58 S.W.2d 77, reversing *Lee v. John E. Quarles Co.*, Civ.App., 39 S.W. 2d 947, and costs retaxed, Com. App., 67 S.W.2d 607—*Fox v. First Nat. Bank*, Civ.App., 23 S.W.2d 888, reversed on other grounds *First Nat. Bank v. Fox*, 39 S.W.2d 1085, 121 Tex. 7—*Hannon v. Henson*, Civ. App., 7 S.W.2d 613, affirmed, Com. App., 15 S.W.2d 579.
W.Va.—*Dwight v. Hazlett*, 147 S.E. 877, 878, 107 W.Va. 192, 66 A.L.R. 102, citing *Corpus Juris*.
15 C.J. p 976 note 12.

Criminal cases

The rule that a court has inherent power to amend its records to accord with the facts applies in criminal as in civil cases.—*State v. Hill*, W.Va., 200 S.E. 587.

60. Cal.—*King v. Emerson*, 288 P. 1099, 110 Cal.App. 414, adopted 294 P. 768, 110 Cal.App. 414.
Mich.—*R. C. Mahon Co. v. R. S. Knapp Co.*, 268 N.W. 828, 829, 277 Mich. 103, quoting *Corpus Juris*.
Pa.—*In re Willing's Estate*, 135 A. 751, 288 Pa. 337.
Tex.—*Hannon v. Henson*, Civ.App., 7 S.W.2d 613, affirmed, Com.App., 15 S.W.2d 579.
15 C.J. p 976 note 13.

In New York, power of supreme court to amend records, including final judgments and decrees, is not only expressly provided for by Civ. Pract. Act §§ 105, 108, 109, 511, but is also inherent.—*In re Wolton*, 211 N.Y.S. 501, 125 Misc. 564.

61. Tenn.—*Gillespie v. Martin*, 109 S.W.2d 93, 172 Tenn. 28.

Courts not of record have power to correct their own records only so far as provided by statute.—*State v. Whitehead*, 153 P. 349, 88 Wash. 549.

62. N.Y.—*Emert v. Thorn*, 292 N.Y. S. 58, 249 App.Div. 301.
Ohio.—*E. L. Rice & Co. v. Pike*, 160 N.E. 90, 117 Ohio St. 521, affirming 154 N.E. 348, 23 Ohio App. 9.
Tex.—*Gerneth v. Galbraith-Foxworth Lumber Co.*, 300 S.W. 17, 117 Tex. 205, answers to certified questions conformed to, Civ.App., 6 S.W.2d 215.
Wis.—*Polchinski v. State*, 230 N.W.

713, 201 Wis. 577, citing *Corpus Juris*.

15 C.J. p 976 note 14.

Bill of exceptions when duly filed in a case as part of record is subject to amendment by the trial court to the same extent as other parts of the record.—*Kansas City v. Jones Store Co.*, 28 S.W.2d 1008, 325 Mo. 226, certiorari denied *Jones Store Co. v. Kansas City, Mo.*, 51 S.Ct. 78, 282 U.S. 873, 75 L.Ed. 771.

Rules of appellate court

Appellate court rules relating to procedure on appeal have been held not to impair trial court's power to correct its records to set out truly its proceedings.—*Raridan v. Bick*, 242 N.W. 886, 259 Mich. 200.

63. Ohio.—*E. L. Rice & Co. v. Pike*, 160 N.E. 90, 117 Ohio St. 521, affirming 154 N.E. 348, 23 Ohio App. 9.

64. Cal.—*In re Silva*, App., 295 P. 876, 878, quoting *Corpus Juris*, and superseded 2 P.2d 341, 213 Cal. 446.
Miss.—*Brown v. Sutton*, 121 So. 835, 837, 158 Miss. 78, citing *Corpus Juris*.
N.Y.—*Emert v. Thorn*, 292 N.Y.S. 58, 249 App.Div. 301.
15 C.J. p 976 note 16.

Equity and common law

Equity cannot amend a common-law record in the absence of fraud.—*Strong v. Wesley Hospital*, 135 Ill. App. 187, affirmed 84 N.E. 205, 233 Ill. 153, 122 Am.S.R. 163.

In different counties

A judge while holding the district court in one county within the district had no power to correct the records of the district court of another county, even on notice.—*Williams v. Dean*, 111 N.W. 931, 134 Iowa 216, 11 L.R.A., N.S., 410.

New record

A court cannot make a new record for another court to accord with parol proof of what such record should be.—*In re Dubosky*, D.C.Pa., 232 F. 380.

State court succeeding territorial court

The district court of Oklahoma is the legal successor of the territorial district court for the purpose of correcting the record of a judgment rendered by the territorial court in an action pending at the time of admission of the territory to statehood—

over such other court,⁶⁵ although the authority of one court to amend the records of another may exist by virtue of appropriate statutory provisions conferring such authority.⁶⁶ A succeeding judge may make the record speak a fact actually existent in a judicial proceeding, and which should be a part of the record.⁶⁷

In accordance with the rule that the records of the court can be altered only by the court itself, see *supra* this section, it has been held that the clerk of the court has no authority on his own responsibility to amend, change, or correct the court records,⁶⁸ particularly after adjournment.⁶⁹ There exists, however, authority to the effect that the clerk may, prior to the time that the minutes are signed by the presiding judge, or until the adjournment of court, or the expiration of the limitation fixed by statute, make the minutes speak the truth by correcting clerical errors,⁷⁰ and in a particular case, it has been held that the clerk had power of

his own motion, during the term or before the first day of the next succeeding term, to supply an omission in the record.⁷¹

No third person has a right to alter or correct court records,⁷² and it is a serious assumption for any third person to attempt to do so personally or to procure a clerk or register to do so.⁷³

Where the rights of third persons will be affected by the allowance of an amendment for the purpose of putting into a process, pleading, or return something which was not originally in such process, pleading, or return, it has been considered that such an amendment will not, as a general rule, be allowed.⁷⁴

Change or mutilation of papers or records. In exercising its power of making necessary amendments to its records, a court has no authority to change or mutilate the papers or records already on file.⁷⁵

Ex parte Howland, 104 P. 927, 3 Okl. Cr. 142, Ann.Cas.1912A 840.

Supreme court in New York has no authority to amend the records of county court of Kings County.—*In re Goodman*, 178 N.Y.S. 499.

65. Cal.—*In re Silva*, App., 295 P. 876, superseded 2 P.2d 341, 213 Cal. 446.

Miss.—*Brown v. Sutton*, 121 So. 835, 837, 158 Miss. 78, citing *Corpus Juris*.

Mo.—*Kansas City v. Jones Store Co.*, 28 S.W.2d 1008, 1013, 325 Mo. 226, certiorari denied *Jones Store Co. v. Kansas City, Mo.*, 51 S.Ct. 78, 282 U.S. 873, 75 L.Ed. 771.
15 C.J. p 976 note 17.

Reason for rule

"While the trial court loses jurisdiction of the case when an appeal is taken, it does not lose jurisdiction of its records."—*Kansas City v. Jones Store Co.*, *supra*.

Action of appellate court

Where trial court's order overruling motion to correct record constituted a final judgment from which no appeal was taken, and was res judicata as to same facts, an order of an appellate court postponing hearing on appeal and granting permission to either party to apply to trial court for correction of record, did not enlarge power of trial court or tend to undo that which court had already done, since the effect of the appellate court's action was merely to postpone the case and give the parties an opportunity if the way was still open to correct the record in the trial court.—*Humble Oil & Refining Co. v. Bearden*, 268 S.W. 36, 167 Ark. 444.

Supreme court of Mississippi has been held to have no power to alter, amend, or correct records of trial courts.—*Brown v. Sutton*, 121 So. 835, 158 Miss. 78.

66. Nev.—*Brockman v. Ullom*, 286 P. 417, 52 Nev. 267.

Bill of exceptions

In Nevada, under statutory provisions empowering the supreme court to take such steps as are necessary to complete or correct the record on appeal, such court can order the amendment of a bill of exceptions so as to make it speak the truth.—*Brockman v. Ullom*, *supra*.

67. Iowa.—*Goodrich v. Conrad*, 28 Iowa 298.

Tex.—*Hamilton v. Elland*, Civ.App., 181 S.W. 260.

68. Ark.—*Fryer v. Lambert*, 277 S.W. 48, 169 Ark. 979.
15 C.J. p 976 note 14 [a].

Error in description of land

Where complaint in mortgage foreclosure suit erroneously described land, and the precedent for the original decree and the decree itself contained the same error, the clerk had no authority to make correction.—*Fryer v. Lambert*, *supra*.

69. Ala.—*Ex parte Bealrd*, 116 So. 367, 368, 217 Ala. 355, citing *Corpus Juris*.

Ill.—*Butterfield v. Diekman*, 200 Ill. App. 627.
15 C.J. p 976 note 21.

70. Ala.—*Wilder v. Bush*, 75 So. 143, 201 Ala. 21.

Liability to injured party

Where change in minutes of trial court was made by its clerk before they were signed by judge at end of term, party who procured clerk to

make change was not liable to party injured.—*Wilder v. Bush*, *supra*.

71. Ill.—*Savio v. Vieno*, 203 Ill.App. 631.

72. Ala.—*Wilder v. Bush*, 75 So. 143, 201 Ala. 21.

Ohio.—*E. L. Rice & Co. v. Pike*, 160 N.E. 90, 117 Ohio St. 521, affirming 154 N.E. 348, 23 Ohio App. 9.
Wis.—*Polichinski v. State*, 230 N.W. 713, 201 Wis. 577.

Attorneys and parties

(1) Attorney for plaintiff in error was held unauthorized to change caption of case on file by substituting court of appeals for common pleas court, and inserting case under half number.—*E. L. Rice & Co. v. Pike*, 160 N.E. 90, 117 Ohio St. 521, affirming 154 N.E. 348, 23 Ohio App. 9.

(2) Attempt in a criminal case to amend record by stipulation of defendant and district attorney without reference to court was wholly ineffective, and would not be considered.—*Polichinski v. State*, 230 N.W. 713, 201 Wis. 577.

Referee in bankruptcy

A referee in bankruptcy cannot correct the record of a state court with respect to proceedings therein concerning a claim against the estate of the bankrupt.—*In re Dubosky*, D.C.Pa., 232 F. 380—15 C.J. p 976 note 18.

73. Ala.—*Wilder v. Bush*, 75 So. 143, 201 Ala. 21.

74. N.C.—*Foster v. Woodfin*, 65 N.C. 29.

75. S.D.—*State v. Nystrom*, 186 N.W. 750, 45 S.D. 193.

Wash.—*In re Geissler's Estate*, 169 P. 322, 99 Wash. 452.

§ 233. — Subject-Matter

Errors or omissions due to accident, mistake or inadvertence are subject to correction by amendment.

Errors or omissions in court records, due to acci-

dent, mistake, or inadvertence, are subject to correction by amendment.⁷⁶ This is particularly true as regards clerical errors or mistakes as distinguished from mistakes arising from the judicial acts of the court,⁷⁷ and as regards mistake and accident not

Date of will

(1) Where it appeared that a will filed for probate was dated at a time subsequent to actual date of execution, as appeared from proof of execution and order admitting the will to probate, it was held that a further order purporting to amend the error by inserting the correct date was subject to a writ of prohibition under the text rule.—*State v. Nystrom*, 186 N.W. 750, 45 S.D. 193.

(2) It was suggested in such case that the amending order declare that the certificate of proof and earlier order be thereby corrected to read the correct date instead of the incorrect one, thus avoiding changes or interlineations in the original papers.—*State v. Nystrom*, supra.

Indorsing matter on records

Indorsing matter on the findings and conclusions after they had been signed and filed, for the purpose of correcting supposed inadvertent errors, has been disapproved.—*In re Geissler's Estate*, 169 P. 822, 99 Wash. 452.

76. *Ariz.*—*Rae v. Brunswick Tire Corporation*, 40 P.2d 976, 45 *Ariz.* 135.

Cal.—*People's Ditch Co. v. Foothill Irr. Dist.*, 11 P.2d 86, 123 *Cal.App.* 257.

Vt.—*St. Pierre v. Beaugard*, 152 A. 914, 103 *Vt.* 258.

15 C.J. p 975 note 10.

"Evident mistake"

Within Code § 244, limiting to cases of "evident mistake" the authority to make a correction of a court record made at a previous term, that only is "evident" which is clear, noticeable, apparent to observation, or at least clearly established by the evidence.—*Hamill v. Joseph Schlitz Brewing Co.*, 143 N.W. 99, 145 N.W. 511, 165 *Iowa* 286.

Correction of attempted correction

An attempted correction of court records may, under certain circumstances, be subject to correction by amendment.—*Puckett v. Guenther*, 120 N.W. 123, 142 *Iowa* 35, 134 *Am. S.R.* 402.

Law or fact; commission and omission

Mistakes of law or of fact and errors both of commission and omission are subject to correction by amendment of court records.—*De Lisle v. Reeves*, 126 A. 35, 96 *N.J. Eq.* 416, 1 *N.J. Misc.* 449.

Particular amendments held properly allowed

(1) To correct clerk's minutes by

inserting provision for dismissal of complaint on merits and direction of judgment accordingly.—*Merchants' Transfer & Storage Co. v. Lippman*, 238 N.Y.S. 310, 135 *Misc.* 724.

(2) To correct records in criminal case to conform to original record, showing defendant's plea of guilty, sentence, and commitment.—*Moss v. U. S., C.C.A.N.C.*, 72 *F.2d* 30.

(3) To have record recite true date of judgment entry.—*Haddock v. Jackson*, 8 P.2d 279, 51 *Idaho* 560.

(4) To make journal entry of judgment conform to judgment actually rendered where parties to foreclosure action stipulated that through error and inadvertence journal entry did not show true amount of judgment rendered.—*Victory Life Ins. Co. v. Freeman*, 65 P.2d 559, 145 *Kan.* 296.

(5) To record attorneys' affidavits regarding services for defendant in homicide prosecution after allowance of claim.—*Cass County v. Page County*, 213 N.W. 426, 203 *Iowa* 572.

(6) To show admission of certain evidence.—*Amis v. Valerius*, 235 P. 833, 118 *Kan.* 455, modified on other grounds 236 P. 669, 118 *Kan.* 650.

(7) To show indictment was joint.—*State v. Haller*, 163 S.E. 635, 112 *W.Va.* 4.

(8) To show the actual date when decree was entered.—*Spear v. Spear*, 206 N.W. 102, 200 *Iowa* 1222.

(9) To show reasons for granting mistrial.—*Spelce v. State*, 103 So. 694, 20 *Ala.App.* 412, certiorari denied *Ex parte Spelce*, 103 So. 705, 212 *Ala.* 559.

(10) To show ground on which motion for new trial was granted.—*King v. Emerson*, 288 P. 1099, 110 *Cal.App.* 414, adopted 294 P. 768, 110 *Cal.App.* 414.

(11) To show that a trustee filed a required bond.—*Webb v. Cohen*, 182 N.E. 337, 280 *Mass.* 292.

(12) To show that order of reference was properly made pursuant to stipulation.—*Garland v. Smith*, 21 P.2d 688, 131 *Cal.App.* 517.

(13) To show that an order granting new trial was made on a certain day, later than the day recited on the minutes.—*Jackson v. Dolan*, 236 P. 318, 72 *Cal.App.* 48.

(14) To show that certain proceedings were not entered of record prior to a certain date.—*Buser v. Kriebbaum*, 278 N.W. 330, 224 *Iowa* 1147.

(15) To show that motion to dismiss included words "without preju-

dice," under evidence showing conclusively that motion was to dismiss without prejudice, although such words were not used in request as made first to court.—*Rae v. Brunswick Tire Corporation*, 40 P.2d 976, 45 *Ariz.* 135.

(16) To supply omission from record, in probate proceedings, of date of notice by publication of executrix' qualification.—*Rhode Island Hospital Trust Co. v. Sherman*, 159 A. 740, 52 *R.I.* 207.

(17) To supply an inadvertently omitted reference to an order which had actually been made for the preparation of a transcript of the evidence.—*People's Ditch Co. v. Foothill Irr. Dist.*, 11 P.2d 86, 123 *Cal.App.* 257.

(18) To supply the words "first degree" in the record entry of a verdict of guilty for murder, in order to conform with verdict orally announced by jury in court.—*Commonwealth v. Troup*, 153 A. 337, 302 *Pa.* 246.

77. *Cal.*—*Halpern v. Superior Court in and for Alameda County*, 212 P. 916, 190 *Cal.* 384—*Brush v. Pacific Electric Ry. Co.*, 208 P. 997, 58 *Cal. App.* 501.

R.I.—*Grieco v. Jackvony*, 109 A. 801, 43 *R.I.* 26.

Tex.—*John E. Quarles Co. v. Lee*, 58 S.W.2d 77, reversing *Lee v. John E. Quarles Co.*, *Civ.App.*, 39 S.W.2d 947, and costs retaxed, *Com.App.*, 67 S.W.2d 607.

Intentionally rendered judgment

A judgment intentionally rendered on a misapprehension of facts is not subject to vacation as a clerical error or misprision.—*Karrick v. Wetmore*, 97 N.E. 92, 210 *Mass.* 578.

Mistakes of recording officers of the court, as distinguished from mistakes arising from the judicial acts of the court, are subject to correction by amendment of the court records.—*McPherson v. State*, 63 S.W. 2d 282, 187 *Ark.* 872.

"Clerical errors"

(1) "Clerical errors," within the meaning of the text, have been held to include not only those made by clerk but also those mistakes apparent on record, made by counsel or even by court in progress of trial.—*Wilder v. Bush*, 75 So. 143, 201 *Ala.* 21.

(2) "Clerical errors" appearing from face of record may, of course, be corrected by amendment within the text rule.—*Buchanan v. West*

arising from the neglect or fault of a party.⁷⁸ Accordingly, failure to perform the mere ministerial function of recording a judicial pronouncement may be cured by subsequent amendment of the court records,⁷⁹ and, in a proper case, matter which has been improperly injected into court records may be stricken therefrom.⁸⁰ On the other hand, subject to limitations on the power of the court to authorize amendments of court records, as discussed in § 232, they cannot be amended to show the happening of an event which never in fact occurred,⁸¹ or to make a correction rendered necessary by conduct of counsel.⁸² A record which correctly represents the testimony which was given in court is not subject to amendment to show the real state of facts on discovery that such testimony was false.⁸³ In a particular case, it was held that the trial court did not err in refusing a request to amend its minutes to

show certain representations which were set forth in substance in an affidavit in support of a motion which was denied by the court.⁸⁴

§ 234. — Time for Amendment

In the absence of a statutory limitation, the right to amend is not lost by mere lapse of time.

The power of the court to amend its records so as to make them speak the truth is not lost by lapse of time,⁸⁵ unless there is a statutory limitation of the time within which amendments may be made,⁸⁶ and in accordance with this view it has been held that in a proper case a court may amend its records at any time to make them reflect the truth.⁸⁷ At any rate, the minutes or records of a trial court may be amended by such court at any time during the term,⁸⁸ or prior to the giving and enrollment of a

Kentucky Coal Co., 291 S.W. 32, 218 Ky. 259, 51 A.L.R. 281.

75. Vt.—St. Pierre v. Beauregard, 152 A. 914, 103 Vt. 258.

79. Ala.—Ex parte Schoel, 87 So. 801, 205 Ala. 248.

80. Mont.—Nadeau v. Texas Co., 69 P.2d 593, 104 Mont. 558, 111 A.L.R. 874.

15 C.J. p 975 note 10 [b], [c].

Application for new trial

An entry of an application for new trial improperly appearing of record because not filed as required by statute was subject to be stricken in order to make the record speak the truth.—State ex rel. Mechanics & Traders Ins. Co. v. Buente, 1 N.E.2d 454, 102 Ind.App. 563.

Opinion

A concurring opinion of one of the justices of an appellate court was stricken from its records as being scandalous, scurrilous, and defamatory.—Nadeau v. Texas Co., 69 P.2d 593, 104 Mont. 558, 111 A.L.R. 874.

81. La.—Rapides Grocery Co. v. Grant, 137 So. 64, 173 La. 367.

Filing of document

Records are not subject to amendment in order to show the filing of a document which never actually took place.—Rapides Grocery Co. v. Grant, supra.

82. N.Y.—Utica Nat. Bank & Trust Co. v. Nickel, 219 N.Y.S. 556, 128 Misc. 614.

Noting exception

Record will not be corrected, to note exception, on counsel's affidavit that he uttered word "Exception" in low voice, not heard by any one.—Utica Nat. Bank & Trust Co. v. Nickel, supra.

83. Iowa.—Coppock v. Reed, 178 N.

W. 382, 189 Iowa 581, 10 A.L.R. 1407.

84. Mont.—State v. Vetter, 249 P. 666, 77 Mont. 66.

85. Ark.—Fryer v. Lambert, 277 S. W. 48, 189 Ark. 979.

Cal.—Kohlstedt v. Hauseur, 74 P.2d 314, 24 Cal.App.2d 60—Treece v. Treece, 14 P.2d 95, 125 Cal.App. 726—People's Ditch Co. v. Foothill Irr. Dist., 11 P.2d 86, 123 Cal.App. 257—Haynes v. Los Angeles Ry. Corporation, 252 P. 1072, 80 Cal. App. 776.

Colo.—Schattinger v. Schattinger, 216 P. 1057, 73 Colo. 573.

Idaho.—Glennon v. Fisher, 10 P.2d 294, 51 Idaho 732—Hample v. McKinney, 281 P. 1, 48 Idaho 221—State v. Douglass, 208 P. 236, 35 Idaho 140.

Ill.—Unbehahn v. Fader, 149 N.E. 773, 319 Ill. 250.

Mont.—State v. Turlok, 248 P. 169, 76 Mont. 549.

Tex.—Hannon v. Henson, Civ.App., 7 S.W.2d 613, affirmed, Com.App., 15 S.W.2d 579.

W.Va.—Dwight v. Hazlett, 147 S.E. 877, 878, 107 W.Va. 192, 66 A.L.R. 102, citing *Corpus Juris*.

15 C.J. p 977 note 29.

After passing on motion based on the uncorrected record, the court may, by amendment, correct such record.—State v. James, 116 So. 199, 165 La. 822.

Lapse of more than five years has been held not to divest a court of its power to amend its own records.—Long v. George, Mass., 7 N.E.2d 149.

Pending criminal case

A criminal case is pending in the sense that a court may correct its records until the judgment is fully satisfied.—Dunn v. State, 196 P. 739, 18 Okl.Cr. 493.

86. Iowa.—Perry v. Kaspar, 85 N. W. 22, 113 Iowa 268.

87. Cal.—Doxsee Co. v. All Persons Claiming Any Interest In, or Lien Upon, Real Property Herein Described or Any Part Thereof, 45 P.2d 192, 3 Cal.2d 609.

La.—State v. Johnson, 131 So. 721, 171 La. 592—Hickman v. Enterprise Lumber Co., 105 So. 343, 159 La. 280.

Vt.—Cooley v. Remington, 189 A. 151, 108 Vt. 441.

"Clerical error"

A "clerical error," within the meaning of a rule authorizing courts of record to correct their own clerical errors and mistakes at any time, has been held to be an error or mistake ordinarily apparent on the face of the record, capable of being corrected by reference to the record; and is usually a mistake in the clerical work of transcribing the particular record, or is usually a mistake in form.—Wilson v. City of Fergus Falls, 232 N.W. 322, 181 Minn. 329.

Definite and certain basis

"No reason suggests itself why such amendments may not be made at any time, as long as anything definite and certain remains as a basis for the amendment."—People v. Holmes, 143 N.E. 835, 312 Ill. 284.

Rule inapplicable

The text rule was held not to apply to a situation where it was sought to have the record amended to show the filing of a petition which was not in fact filed at any time.—Rapides Grocery Co. v. Grant, 137 So. 64, 173 La. 367.

88. Ala.—Sovereign Camp, W. O. W., v. Gay, 104 So. 895, 20 Ala. App. 650, reversed on other grounds Ex parte Gay, 104 So. 898, 213 Ala. 5—Ex parte Spelce, 103

judgment or decree;⁸⁹ and it has been held, as regards clerical errors, that this may be done even after entry of final judgment.⁹⁰ Moreover, it has been held that such correction may be made by the court in chambers as well as in term.⁹¹ In consonance with the view that an amendment of court records may be had at any time to make them conform to the truth, see *supra* this section, it is very generally held that an amendment may be made after the expiration of the term at which the proceedings were had,⁹² particularly for the correction of mere clerical errors,⁹³ or in vacation,⁹⁴ or whenever the error is brought to the notice of the court, provided the rights of third persons are not prejudiced.⁹⁵ There are, on the other hand, cases in

which the right to amend the record after the term has been denied,⁹⁶ especially where the substantial or judicial amendment, as distinguished from an amendment of a mere clerical error, is sought,⁹⁷ and particularly as regards records of chancery courts which lose their jurisdiction of the cause at the end of the term at which a final decree is rendered.⁹⁸ At all events, the evidence must be sufficient and substantial to warrant correction of court records after the term at which they were made.⁹⁹

After appeal taken. In accordance with the view that a court never loses jurisdiction over its own records, see *supra* § 229, the fact that an appeal has been taken does not deprive the lower court of the power to amend its record;¹ nor does such court's

So. 705, 212 Ala. 559, denying certiorari *Spelce v. State*, 103 So. 694, 20 Ala.App. 412.

Iowa.—*Ryan v. Phoenix Ins. Co. of Hartford, Conn.*, 215 N.W. 749, 204 Iowa 655—*State v. Herzoff*, 205 N.W. 500, 200 Iowa 889.

Kan.—*Ranchmen's Trust Co. v. Jesse*, 227 P. 255, 116 Kan. 489.

Mo.—*Crecelius v. Home Heights Co.*, 217 S.W. 508.

N.C.—*State v. Brown*, 166 S.E. 396, 203 N.C. 513.

Okl.—*Davis v. Robedeaux*, 222 P. 990, 97 Okl. 86.

Or.—*Fuller v. Blanc*, 77 P.2d 440, 160 Or. 50—*Churchill v. Meade*, 182 P. 368, 92 Or. 626.

15 C.J. p 977 note 26.

89. Ind.—*Warner v. State*, 143 N.E. 288, 194 Ind. 426—*Courtney v. Luce*, 200 N.E. 501, 101 Ind.App. 622.

Me.—*Sawyer v. Calais Nat. Bank*, 138 A. 470, 126 Me. 314.

15 C.J. p 977 note 27.

90. Mass.—*Kelly v. Foley*, 188 N.E. 349, 284 Mass. 503.

91. La.—*Picard v. Prival*, 35 La. Ann. 370.

N.C.—*Falkner v. Hunt*, 68 N.C. 475.

92. U.S.—*U. S. ex rel. Jorczak v. Ragen*, C.C.A.Ill., 102 F.2d 184.

Ark.—*Randolph v. Porter*, 67 S.W.2d 574, 183 Ark. 729—*Sutton v. State*, 260 S.W. 409, 163 Ark. 562.

Idaho.—*State v. Douglass*, 208 P. 236, 35 Idaho 140.

La.—*Hickman v. Enterprise Lumber Co.*, 105 So. 343, 159 La. 280.

Me.—*Myers v. Thompson*, 102 A. 776, 117 Me. 80.

Neb.—*Amos v. Eichenberger*, 186 N.W. 330, 107 Neb. 416.

N.Y.—*In re Wolton*, 211 N.Y.S. 501, 125 Misc. 564.

Okl.—*Davis v. Robedeaux*, 222 P. 990, 97 Okl. 86.

S.D.—*First State Bank of Wood v. Anderson*, 191 N.W. 839, 46 S.D. 104.

Tex.—*McCurley v. Texas Indemnity*

Ins. Co., Civ.App., 62 S.W.2d 992, error refused.

Vt.—*Cootey v. Remington*, 189 A. 151, 108 Vt. 441—*St. Pierre v. Beaugerard*, 152 A. 914, 103 Vt. 258.

15 C.J. p 977 note 31.

Contrary rule obsolete

In a particular case, it was held that the rule prohibiting amendment after adjournment of the term has become obsolete.—*Peop^e v. Ward*, 75 P. 306, 141 Cal. 628.

Orphans' court

In Pennsylvania, as against a contention that an amendment to the records of an orphans' court could not be made after the term at which the proceedings were had, it has been held orphans' courts, being courts of equity within their proper realm, have no terms, so that the rule contended for did not apply.—*Kretzer v. Murry*, 147 A. 102, 297 Pa. 451.

93. D.C.—*Downey v. U. S.*, 91 F.2d 223, 67 App.D.C. 192.

Under statute

In Alabama, under statutory provisions, Code 1907, §§ 2891, 3256, 4139, 4140, clerical misprisions in journals of court may be corrected after adjournment.—*Wilder v. Bush*, 75 So. 143, 201 Ala. 21.

94. Okl.—*Clark v. Hennessey Bank*, 79 P. 217, 14 Okl. 572, 2 Ann.Cas. 219.

Tex.—*Baum v. Corsicana Nat. Bank*, 75 S.W. 863, 32 Tex.Civ.App. 531.

15 C.J. p 977 note 32.

95. Ga.—*Barefield v. Bryan*, 8 Ga. 463.

Okl.—*Davis v. Robedeaux*, 222 P. 990, 97 Okl. 86.

No rule of limitation applicable

"We find no rule of limitation upon courts preventing them from correcting their records at any time, in a proper case, so long as the rights of third parties have not inter-

vened."—*Sinnock v. Marney*, 250 Ill. App. 266.

96. Me.—*Davis v. Cass*, 142 A. 377, 127 Me. 167.

Ohio.—*In re Farkash*, 8 Ohio N.P., N.S., 137.

15 C.J. p 977 note 35.

Instruction

In absence of statute conferring power to amend the record in vacation, it has been held that an instruction marked "Given," on becoming part of the court records, could not be amended during vacation.—*Gulf Coast Stevedoring Co. v. Gibbs*, 86 So. 582, 124 Miss. 183.

97. Fla.—*Sawyer v. State*, 113 So. 736, 94 Fla. 60, followed in *Dwyer v. State*, 116 So. 726, 95 Fla. 846.

Me.—*In re Limerick*, 18 Me. 183.

98. Va.—*Owen v. Owen*, 162 S.E. 46, 157 Va. 580.

Adding to record

A court of chancery has been held to be without power, after losing jurisdiction of the cause at the end of the term, to add to the record.—*Ross Cutter & Silo Co. v. Rutherford*, 161 S.E. 898, 157 Va. 674.

"Final decree"

Decree granting divorce a mensa et thoro has been held to be a "final decree" within the meaning of the text.—*Owen v. Owen*, 162 S.E. 46, 157 Va. 580.

99. Mo.—*State ex rel. Sterling v. Shain*, 129 S.W.2d 1048, quashing opinion *Anderson Motor Co. v. Sterling*, 121 S.W.2d 275.

1. Cal.—*Halpern v. Superior Court in and for Alameda County*, 212 P. 916, 190 Cal. 384.

Ind.—*Reitzel v. Campbell*, 5 N.E.2d 148, 151, 103 Ind.App. 650, citing *Corpus Juris*.

La.—*Hickman v. Enterprise Lumber Co.*, 105 So. 343, 159 La. 280—*State v. Coleman*, 104 So. 705, 158 La. 755.

W.Va.—*Dwight v. Hazlett*, 147 S.E.

certification that a bill of exceptions is correct preclude an amendment from thereafter being made in a proper case;² and even after affirmance of a judgment, the trial court, on its knowledge of what took place, can correct the journal entry so as to make it recite the judgment actually rendered.³

A long delay in seeking an amendment may warrant a refusal to allow the same;⁴ and it has been held that after a party has acquiesced in the use of affidavits in proceedings in the surrogate's court, and they have been considered by the court as a part of the record, and used for all the purposes for which they were made, and no further use of them is contemplated, it is too late to move to strike them from the record, for the reason that they divulge a privileged communication.⁵

§ 235. — Proceedings for Amendment

Any interested person may institute proceedings to have court records amended to speak the truth.

Any person interested, even though not a party to court proceedings, may apply to have court records corrected so that they will speak the truth.⁶ Where the parties are sui juris, it has been held that the court cannot make an amendment of its record without a request by some of the interested parties.⁷ The solicitor general of the state has been held to be the correct officer to initiate proceedings

to correct the records of state courts in criminal proceedings.⁸

An amendment of the record may be made on motion with due notice to the opposite party,⁹ and on hearing,¹⁰ or, as is more generally observed in a particular case, the proper mode of correcting errors in court records, or supplying omissions therein, is by formal motion heard on notice and formal order entered in accordance with the facts as they are made to appear.¹¹ Accordingly, it has been held that notice to opposing parties and hearing is essential,¹² and it has been declared to be the better practice, where the rights of litigants will be affected by a proposed amendment, to require that notice be given to them.¹³ This is particularly true if the change in the record be material,¹⁴ and if made at a term subsequent to that in which the proceedings represented by the record were had.¹⁵ So, it has been held that where the parties to a cause were sui juris, it was erroneous for the trial court on its own motion to amend the record without giving to the parties affected notice or an opportunity to be heard.¹⁶ There exists, however, authority to the effect that the power to amend may be exercised by the court on its own motion without notice,¹⁷ no notice being required particularly if amendment is made at the same term as that in which the proceedings were had.¹⁸ No notice need, of course,

877, 879, 107 W.Va. 192, 66 A.L.R. 102, citing *Corpus Juris*.
15 C.J. p 977 note 36.

2. Cal.—Haynes v. Los Angeles Ry. Corporation, 252 P. 1072, 80 Cal. App. 776.

3. Kan.—State v. Stafford, 161 P. 657, 99 Kan. 265.

4. Pa.—In re Schlegel's Estate, 11 Pa.Dist. & Co. 746.
15 C.J. p 977 note 38.

5. N.Y.—In re Gall, 63 N.Y.S. 157, 49 App.Div. 3.

6. Tex.—Blain v. Broussard, Civ. App., 99 S.W.2d 993.
15 C.J. p 977 note 40 [g].

Claimant in bankruptcy proceedings in a federal court should be allowed an opportunity to have the state court correct its own record where this is necessary for the preservation of his rights.—In re Dubosky, D.C.Pa., 232 F. 380.

7. Pa.—Tasin v. Bastress, 130 A. 417, 284 Pa. 47.

8. Ga.—Ellis v. Boykin, 161 S.E. 155, 44 Ga.App. 227.

9. Cal.—Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co., 227 P. 938, 67 Cal.App. 420.
W.Va.—Dwight v. Hazlett, 147 S.E.

877, 878, 107 W.Va. 192, 66 A.L.R. 102, citing *Corpus Juris*.
15 C.J. p 977 note 40.

Notice to surety on bail bond of proceeding to correct court's records by making omitted entries of orders of continuance nunc pro tunc was in a particular case held to be unnecessary.—Palermo v. U. S., C.C.A.Mo., 61 F.2d 138, certiorari denied 53 S.Ct. 318, 283 U.S. 600, 77 L.Ed. 976.

10. Ind.—Pittsburgh, C., C. & St. L. R. Co. v. Mosher, 141 N.E. 322, 193 Ind. 577.

11. Wash.—In re Geissler's Estate, 169 P. 822, 99 Wash. 452.

12. Ga.—Schermerhorn v. National Fire Ins. Co. of Hartford, Conn., 144 S.E. 395, 38 Ga.App. 470.
Wash.—In re Geissler's Estate, 169 P. 822, 99 Wash. 452.

Ex parte proceedings

Attempted correction of records by court without notice and in absence of opposing parties or their attorneys was held to be improper under the text rule.—In re Geissler's Estate, 169 P. 822, 99 Wash. 452.

Hearing on traverse

Under statutory provisions authorizing amendment of incorrect entries by traverse and hearing thereon, it was held that the court could

not, in the absence of a hearing on the traverse, as required by law, make such amendment.—Schermerhorn v. National Fire Ins. Co. of Hartford, Conn., 144 S.E. 395, 38 Ga. App. 470.

13. Mont.—State v. Turlok, 248 P. 169, 76 Mont. 549.

N.C.—State v. Brown, 166 S.E. 396, 203 N.C. 513.

W.Va.—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.

14. N.C.—State v. Brown, 166 S.E. 396, 203 N.C. 513.

15. Ga.—Ellis v. Clarke, 160 S.E. 780, 173 Ga. 618.

16. Pa.—Tasin v. Bastress, 130 A. 417, 284 Pa. 47.

17. U.S.—U. S. ex rel. Campbell v. Bishop, C.C.A.Fla., 47 F.2d 95, 96, quoting *Corpus Juris*.

Cal.—Gulf Mail S. S. Co. v. W. A. Hammond S. S. Co., 227 P. 938, 67 Cal.App. 420.

Ind.—Warner v. State, 143 N.E. 283, 194 Ind. 426.

N.C.—State v. Brown, 166 S.E. 396, 203 N.C. 513.

W.Va.—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.
15 C.J. p 973 note 41.

18. Ga.—Ellis v. Clarke, 160 S.E. 780, 173 Ga. 618.

be given to the moving party.¹⁹

Failure of movant to verify a motion to amend court records may be waived by conduct of the opposite party in participating in the hearing on such motion without objection.²⁰ On a motion to amend, the question will not be considered collaterally as to what effect the amendment may have or whether the court had the right to do what it is alleged to have done.²¹

Where application for amendment of court records is by petition, it is not governed by strict rules of pleading.²²

Showing necessary to warrant amendment. In order to warrant an amendment of court records, it is, usually, necessary that a basis for such amendment be shown by written memorandum from such records,²³ affidavits,²⁴ or the recollection of an in-

dividual,²⁵ being insufficient for such purpose. The general rule is particularly applicable where an amendment is sought after the expiration of the term at which the proceedings were had.²⁶ There is, on the other hand, authority for the view that the evidence need not be found in the record;²⁷ that parol evidence is admissible to show the true state of facts;²⁸ and that an amendment may be based on the recollection of the court,²⁹ or on the recollection of the court supplemented or refreshed by such official memoranda as may be available under the circumstances.³⁰

Subject to certain limitations on the authority of the court, see *supra* § 232 and the preceding paragraph of this section, the question whether an amendment shall be allowed being addressed solely to the discretion of the particular court,³¹ in the

19. Ky.—Happy Coal Co. v. Bra-shear, 92 S.W.2d 23, 263 Ky. 257.

20. Mo.—Greggers v. Gleason, 29 S.W.2d 183, 224 Mo.App. 1108.

21. N.C.—Foster v. Woodfin, 65 N.C. 29.

22. Ind.—Hydro Electric Engineer-ing Corporation v. Bonifield, 178 N. E. 864, 93 Ind.App. 448.

23. Ill.—People v. Miller, 5 N.E.2d 458, 365 Ill. 56.

15 C.J. p 978 note 47.

"It is necessary that it be proved by the production of some note or memorandum from the records or quasi records of the court, or by the judge's minutes, or by the papers on file in the cause."—People v. Miller, *supra*.

Record must show basis

"The record must show the basis upon which the amendment or correction is made."—People v. Miller, 5 N.E.2d 458, 365 Ill. 56.

Process to commence suit is part of the record for the purpose of amendment, and the court will look to the return thereon when necessary, not only to show the date of the return, but also the date of its execution.—House v. Universal Crusher Corp., 79 S.E. 1049, 115 Va. 558.

Stenographic notes

The stenographic notes of a short-hand reporter have been held not to constitute such a memorial paper, note, or memorandum as the law contemplates shall be used as a basis from which to make an order amending a record.—Grand Lodge, I. O. F. S. I. v. Ohnstein, 110 Ill.App. 312.

24. Ill.—Village of Glencoe v. Industrial Commission, 188 N.E. 329, 354 Ill. 190.

Affidavit by deputy clerk

Court records may not be amended by deputy clerk's affidavit explaining his failure to indorse clerk's approval on bond filed in reviewing compensation award so as to confer jurisdiction of subject matter on court.—Village of Glencoe v. Industrial Commission, *supra*.

Affidavit of juror

Where the record shows the final discharge of the jury on a certain day, it cannot be corrected on the unsupported affidavit of a juror that the court discharged the jury on an earlier day.—Kansas City v. Mastin, 68 S.W. 1037, 169 Mo. 80.

25. Ill.—Woodward v. Ruel, 188 N. E. 911, 355 Ill. 163—People v. Simon, 244 Ill.App. 484.

15 C.J. p 978 note 47.

Another statement of rule

"Such correction cannot be made either from the memory of witnesses, from the recollection of the judge himself, or by affidavit."—People v. Miller, 5 N.E.2d 458, 365 Ill. 56.

26. Ill.—Woodward v. Ruel, 188 N. E. 911, 355 Ill. 163—McCord v. Briggs & Turivas, 170 N.E. 320, 338 Ill. 158, affirming 249 Ill.App. 516—Hickey v. Hickey, 14 N.E.2d 688, 295 Ill.App. 67—People v. Dragowski, 243 Ill.App. 216.

Ind.—Pittsburgh, C. & St. L. R. Co. v. Mosher, 141 N.E. 322, 193 Ind. 577.

15 C.J. p 978 note 46.

27. Kan.—Martindale v. Battey, 84 P. 527, 73 Kan. 92.

N.C.—Austin v. Rodman, 8 N.C. 71. 15 C.J. p 978 note 48.

28. La.—Rapides Grocery Co. v. Grant, 137 So. 64, 173 La. 367—State v. Johnson, 131 So. 721, 171 La. 592.

Clear oral testimony has been held to be sufficient to authorize an

amendment.—Bottoms v. Borah, Ark., 179 S.W. 996.

Parol and written evidence

Parol proof, as well as minutes of record or written evidence of probate court, was held to be competent in determining fact question whether the probate court granted authority to an executor to employ counsel in a will contest.—Freeman v. Hulbert, 203 N.W. 158, 230 Mich. 455.

29. Ariz.—Rae v. Brunswick Tire Corporation, 40 P.2d 976, 45 Ariz. 135.

La.—State v. Coleman, 104 So. 705, 158 La. 755.

Mont.—State v. Turlok, 248 P. 169, 76 Mont. 549.

Extent of power

"To what extent the judge may call upon his own recollection in determining the character and extent of the amendment cannot be delimited by rule; each case will depend upon its own facts."—State v. Turlok, *supra*.

30. N.M.—State v. Trujillo, 226 P. 885, 29 N.M. 629—Ojo del Espiritu Santo Co. v. Baca, 214 P. 768, 28 N.M. 509.

Personal plea of guilty

Contemporaneous records of defendant's withdrawal of plea of not guilty and personal entry of plea of guilty, his answers on allocution, and court's recollection were sufficient justification for correction of clerk's minutes which incorrectly showed that defendant pleaded guilty "through his attorney."—People v. Flato, 10 N.Y.S.2d 273, 256 App.Div. 1010.

31. Ind.—Varish v. State, 163 N.E. 513, 200 Ind. 353.

Vt.—St. Pierre v. Beauregard, 152 A. 914, 103 Vt. 253.

W.Va.—Dwight v. Hazlett, 147 S.E. 877, 107 W.Va. 192, 66 A.L.R. 102.

furtherance of justice,³² such court is the exclusive judge of the necessity and propriety of an amendment of its record and of the sufficiency of the proof offered in support thereof.³³ The court should, however, exercise its power of amendment with great caution and only where it clearly appears that a mistake has been made.³⁴ In other words, the proof to correct a record of a case should be clear and unequivocal to the effect that the written memorial does not reflect the facts.³⁵ Where the amendment is sought by way of motion, all proper evidence may be heard under the motion.³⁶ In a proceeding for correction of its record a court may, however, consider only the evidence introduced on the hearing, and may not thereafter obtain another signature, and compare it with the disputed signature, with the aid of a magnifying glass, and treat as evidence the knowledge thus obtained.³⁷

Order or record of amendment. When a court, after the parties have departed without day and after the judgment term, amends the record, the order or record of such proceeding must show the jurisdictional basis for making the order, namely, notice

or presence of parties, and the ground or basis whereupon the court acted in amending.³⁸

§ 236. — Effect of Amendment

An amendment to court records relates back to the time when proceedings were in fact had, and may make valid that which was apparently defective, or render ineffective an apparently valid record entry.

An amendment to court records relates back to the time when the proceedings were in fact had,³⁹ and may make valid that which was apparently defective⁴⁰ or render ineffective an apparently valid entry,⁴¹ as the case may be.

An amendment to court records is presumed to correct them so that they set forth the true situation,⁴² and is presumed to be based on the court's own knowledge of what actually occurred.⁴³ So, an amended record is evidence of the truth which it contains,⁴⁴ and, in accordance with the general rule as to court records generally, see *infra* § 237, imports absolute verity,⁴⁵ and cannot be collaterally attacked.⁴⁶

Saving rights of third persons. Amendments of

32. Kan.—Ranchmen's Trust Co. v. Jesse, 227 P. 255, 116 Kan. 489.

33. Ariz.—Rae v. Brunswick Tire Corporation, 40 P.2d 976, 979, 45 Ariz. 135, quoting *Corpus Juris*. 15 C.J. p 976 note 15.

Discretion abused

Where the record showing a plea of not guilty by accused was incorrect, the court's refusal to order the same corrected by amendment on motion was held to be an abuse of discretion.—State v. Drown, 81 A. 641, 85 Vt. 233.

34. N.Y.—People ex rel. Hirschberg v. Orange County Court, 2 N.E.2d 521, 271 N.Y. 151, reversing 284 N.Y.S. 1010, 246 App.Div. 640, affirming 282 N.Y.S. 72, 156 Misc. 529.

Lapse of time

(1) Where years have gone by since the making of a record sought to be corrected, amendment should be permitted with great caution.—People ex rel. Hirschberg v. Orange County Court, 2 N.E.2d 521, 271 N.Y. 151, reversing 284 N.Y.S. 1010, 246 App.Div. 640, affirming 282 N.Y.S. 72, 156 Misc. 529.

(2) So, after a lapse of years, the sentencing judge and the prosecuting attorney should be heard, if available, where the records in a criminal case were sought to be corrected on the theory that there was a clerical error in recording a plea as a felony rather than as a misdemeanor.—People ex rel. Hirschberg v. Orange County, *supra*.

(3) A lapse of more than three years calls for careful scrutiny of the evidence in support of the amendment, but does not require that the court refuse to permit the amendment.—Macdonald v. Barr, 154 A. 564, 51 R.I. 337.

Evidence held sufficient to justify order permitting correction of court's minutes to show facts testified to.—Hickman v. Enterprise Lumber Co., 105 So. 343, 159 La. 280.

35. Ark.—Murphy v. Citizens' Bank, 104 S.W. 187, 934, 84 Ark. 100.

36. Ind.—Pritchard v. Mines, 106 N.E. 411, 56 Ind.App. 671.

N.H.—Frink v. Frink, 43 N.H. 508, 80 Am.D. 189, 82 Am.D. 172.

37. Iowa.—Hamill v. Joseph Schlitz Brewing Co., 143 N.W. 99, 145 N.W. 511, 165 Iowa 266.

38. Ill.—Roblin v. Illinois Commercial College, 155 Ill.App. 420.

39. Okl.—Ex parte Baker, 289 P. 253, 144 Okl. 52—Ex parte Martin-dale, 287 P. 740, 47 Okl.Cr. 17—Ex parte Payton, 281 P. 597, 45 Okl.Cr. 1.
15 C.J. p 979 note 57.

40. Okl.—Ex parte Baker, 289 P. 253, 144 Okl. 52—Ex parte Payton, 281 P. 597, 45 Okl.Cr. 1.

41. Ky.—Equitable Trust Co. of Dover v. Bayes, 226 S.W. 390, 190 Ky. 91.

Unsigned order

Where order not signed by court was entered in order book through error of clerk, and where court on

discovery of error made notation at foot of the order, striking it from the record, and made subsequent order, reciting that such unsigned order had been entered by mistake, the order was as void as if it never had been entered, or as if it had been wholly erased therefrom.—Equitable Trust Co. of Dover v. Bayes, *supra*.

42. Cal.—Beall v. Erickson, 297 P. 960, 113 Cal.App. 36.

43. Mont.—Greenough v. Rannel, 230 P. 1094, 71 Mont. 578.

44. Mass.—Malaguti v. Rosen, 160 N.E. 532, 262 Mass. 555.

45. Mont.—Greenough v. Rannel, 230 P. 1094, 71 Mont. 578.

Amending minutes

The action of a trial judge in amending the minutes of the trial, so as to have them speak the truth, is conclusive.

Fla.—Mitchell v. State, 33 So. 1009, 45 Fla. 76.

N.C.—Kerr v. Hicks, 42 S.E. 532, 131 N.C. 90.

Okl.—In re Tucker, 111 P. 665, 4 Okl. Cr. 221.

Modifying sentence

A subsequent order which in effect modified a sentence was held not to constitute a repudiation of the minute entry of sentence as originally imposed.—Auldridge v. Womble, 120 S.E. 620, 157 Ga. 64.

46. Mass.—Malaguti v. Rosen, 160 N.E. 532, 262 Mass. 555.

Pa.—Hamilton v. Seitz, 25 Pa. 226, 64 Am.D. 694.

judicial records, whether made in or after term, from minutes or memoranda of the clerk or court, or from the recollection of the judge, are made with a saving exception, expressed or implied, in favor of the rights of third parties, acquired in reliance on the record as made by the clerk.⁴⁷

Ineffective amendment. In accordance with the view that, by amending court records as authorized by statute, a court exercises a special jurisdiction, see supra § 232, it is held that an order for an amendment failing to show essential jurisdictional facts empowering the court to make such amendment is a nullity.⁴⁸

47. Ill.—Gardner v. People, 100 Ill. App. 254.

48. Tenn.—Gillespie v. Martin, 109 S.W.2d 93, 172 Tenn. 28.

Order held nullity

Order purporting to correct an error in the record but failing to show that such error was apparent on record, or from papers in record, or from minutes or entries of trial judge, as required by statute authorizing amendment, was held to be a nullity under the text rule.—Gillespie v. Martin, supra.

49. Ind.—O'Malia v. State, 192 N.E. 435, 207 Ind. 303.

Ky.—Commonwealth v. Wilson, 132 S.W.2d 522, 280 Ky. 61—Simpson v. Antrobus, 86 S.W.2d 544, 260 Ky. 641.

Miss.—Oliver v. Miles, 110 So. 666,

Mo.—State ex rel. Spratley v. Maries County, 98 S.W.2d 623, 339 Mo. 577—State ex rel. and to Use of Conran v. Duncan, 63 S.W.2d 135, 333 Mo. 673—State ex rel. Gentry v. Westhues, 286 S.W. 396, 315 Mo. 672—Cunio v. Franklin County, 285 S.W. 1007, 315 Mo. 405—Nodaway County v. Williams, 199 S.W. 224.

Ohio.—Will v. McCoy, 20 N.E.2d 371, 185 Ohio St. 241—State ex rel. Schunk v. Hamilton, 190 N.E. 199, 127 Ohio St. 555—Fountain v. Pierce, 176 N.E. 444, 123 Ohio St. 609.

W.Va.—Charleston Trust Co. v. Todd, 131 S.E. 638, 101 W.Va. 31.

Wyo.—State v. District Court of Eighth Judicial Dist., in and for Fremont County, 227 P. 378, 31 Wyo. 413, 85 A.L.R. 1082.

Courts of record

(1) The text rule is particularly applicable to courts of record.

Ala.—Naro v. State, 101 So. 666, 212 Ala. 5.

Ky.—Equitable Trust Co. of Dover v. Bayes, 226 S.W. 380, 190 Ky. 91.

Mo.—Cunio v. Franklin County, 285 S.W. 1007, 315 Mo. 405.

Okla.—Cornelson v. State, 257 P. 1109, 37 Okl.Cr. 338.

Or.—Lauderback v. Multnomah County, 226 P. 697, 111 Or. 681.

(2) Courts of record and courts not of record see supra § 5.

50. Ill.—Teter v. Spooner, 116 N.E. 673, 279 Ill. 39.

Mo.—Cunio v. Franklin County, 285 S.W. 1007, 315 Mo. 405.

N.J.—Craddock-Terry Co. v. Scialabra, 144 A. 596, 7 N.J.Misc. 158.

Pa.—In re Brookville's Election, 5 Pa.Dist. & Co. 54.

15 C.J. p 979 note 59.

Presumption as to minutes

(1) "Minutes of a court are presumed to state accurately what action is taken relative to the matters concerning which they speak."—Rae v. Brunswick Tire Corporation, 40 P. 2d 976, 45 Ariz. 135.

(2) In other words, the minutes may be regarded as at least prima

etc., Co. v. Lehmann, 45 So. 138, 120 La. 273.

(3) At any rate, they may, under modern practice as distinguished from the common law, be looked to as evidence of the proceedings of the court.—First Nat. Bank of Pocatello v. Poling, Idaho, 248 P. 19, 42 Idaho 636.

Decision of appellate court

The record of the decision of an appellate court is the highest evidence of what the court decided, and where a point appears thereby to have been adjudicated it is controlling.—Everett v. New York Engraving, etc., Co., 43 N.Y.S. 502, 19 Misc. 360, affirmed 46 N.Y.S. 434, 20 Misc. 548.

Docket of municipal court

The docket of a municipal court may, prior to the time that the full record is made up, constitute sufficient proof of proceedings had in such court.—Good v. French, 115 Mass. 201.

Records of probate courts as notice

(1) The records of probate court have been held not to constitute constructive notice of their contents, unless such records are brought to the

§ 237. Operation and Effect

Records of a court constitute evidence of its official acts and import verity.

The higher or more important courts can speak only through their records,⁴⁹ which constitute the legal evidence of such courts' official acts,⁵⁰ and are binding on the judge or judicial officer making such records as well as on the litigating parties to the proceedings.⁵¹ On the other hand, it is held that matters relating to proceedings in courts but not disclosed by their records do not legally exist.⁵² Such records import absolute verity⁵³ unless or un-

notice of the person to be charged with notice, or facts are brought to his attention which put him on inquiry which if pursued would lead to knowledge of such facts.—Williams v. Jefferson Standard Life Ins. Co., 196 S.E. 519, 187 S.C. 103.

(2) Similarly, it has been held that the records of such courts do not constitute constructive notice of recitations therein except to parties and privies to such actions or proceedings.—Winchester v. Boggs, Tex. Civ.App., 112 S.W.2d 207.

Session of court

Whether a court of record was in session at a particular time is a question to be determined by the records of such court.—Ex parte Massengale, Okl.Cr., 93 P.2d 41.

51. Fla.—Newport v. Culbreath, 162 So. 840, 120 Fla. 152.

Court is bound by its record.—Cooke v. Cooke, 210 Ill. 50, 190 Ill. 371.

Parties to criminal case are bound by the record.—People v. Curran, 207 Ill.App. 264, affirmed 121 N.E. 637, 286 Ill. 302.

Intervening parties were held to be charged with constructive notice that a juror was a surety to a garnishment bond involved in the case and on file therein.—Wise v. Johnson, Tex.Civ.App., 198 S.W. 977.

Parties by representation

In action on life policies against company which had taken over the policies under a reinsurance agreement from original insurer which had become insolvent, records of circuit court, by virtue of which reinsurance contract was executed, were conclusive on plaintiff within the text rule.—Green v. American Life & Accident Ins. Co., Mo.App., 112 S.W.2d 924.

52. W.Va.—Meyers v. Washington Heights Land Co., 149 S.E. 819, 107 W.Va. 632—Charleston Trust Co. v. Todd, 131 S.E. 638, 101 W.Va. 31.

53. Cal.—Gavea v. Superior Court in and for Merced County, 26 Cal.

til they are reversed or set aside,⁵⁴ are conclusive as to those matters to which such records relate,⁵⁵ and cannot be contradicted within the jurisdiction of the court,⁵⁶ nor are they subject to collateral attack.⁵⁷ Recitals in the record of a court are not, however, conclusive as regards the existence of a

App.2d 27, 78 P.2d 433, 435, quoting *Corpus Juris*.

Colo.—School Dist. No. 6 of Moffat County v. Sultz, 237 P. 150, 77 Colo. 453.

Fla.—State ex rel. Grebstein v. Lehman, 129 So. 818, 100 Fla. 481, modifying 128 So. 811, 100 Fla. 473—Whitten v. State, 97 So. 496, 86 Fla. 111.

Ga.—Smith v. Merchants' & Farmers' Bank, 96 S.E. 342, 22 Ga.App. 505.

Ill.—People ex rel. Lange v. Old Portage Park Dist., 190 N.E. 664, 356 Ill. 340.

Ky.—Simpson v. Antrobus, 86 S.W. 2d 544, 260 Ky. 641.

Mich.—Burk v. Amos, 247 N.W. 197, 199, 262 Mich. 332, citing *Corpus Juris*.

Mo.—State ex rel. Spratley v. Maries County, 98 S.W.2d 623, 339 Mo. 577—State ex rel. and to Use of Conran v. Duncan, 63 S.W.2d 135, 139, 333 Mo. 673, citing *Corpus Juris*—State v. Brown, 267 S.W. 871—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328—Green v. American Life & Accident Ins. Co., App., 112 S.W.2d 924—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W.2d 865—Title Guaranty & Surety Co. v. Drennon, App., 208 S.W. 474.

Mont.—State v. Turlok, 248 P. 169, 174, 76 Mont. 549, citing *Corpus Juris*—Greenough v. Rannel, 230 P. 1094, 71 Mont. 578—State v. Murphy, 219 P. 629, 630, 68 Mont. 627, quoting *Corpus Juris*.

N.Y.—In re Cronin's Will, 257 N.Y.S. 496, 143 Misc. 559, affirmed 261 N.Y.S. 936, 237 App.Div. 856.

Ohio.—State v. Richards, 132 N.E. 23, 102 Ohio St. 455.

Okl.—Cornelson v. State, 257 P. 1109, 37 Okl.Cr. 338—Wheeler v. State, 220 P. 962, 25 Okl.Cr. 865.

Or.—State v. Goldstein, 224 P. 1087, 111 Or. 221.

Pa.—In re Brookville's Election, 5 Pa.Dist. & Co. 54.

R.I.—Macdonald v. Barr, 154 A. 564, 51 R.I. 337.

Va.—Harris v. Coleman, 170 S.E. 587, 161 Va. 182—Walker v. Commonwealth, 131 S.E. 230, 144 Va. 648.

Wis.—Polichinski v. State, 230 N.W. 713, 201 Wis. 577, citing *Corpus Juris*.

15 C.J. p 979 note 60.

"Large degree of sanctity"

"The records of a court, regular upon their face, have a large degree of sanctity attached to them, and are not to be lightly overcome."—Williams v. Alexander, 215 S.W. 721, 723, 140 Ark. 442.

Docket entries may, as part of court's record, import incontrovertible verity.—Savage v. Walshe, 140 N.E. 787, 246 Mass. 170.

Minute books; order books

Matter written in minute books is not entitled to the weight or verity of orders recorded in the order books.—Equitable Trust Co. of Dover v. Bayes, 226 S.W. 390, 190 Ky. 91.

Summons issued in commencing action and all its contents, as part of official records of court, import verity.—Karnes v. Keck, D.C.Ill., 11 F.Supp. 577.

Regularity of proceedings

Record showing that accused waived a jury trial was held to import that this was done in a proper and legal manner.—Irvin v. Zerbst, C.C.A.Ga., 97 F.2d 257, certiorari denied 59 S.Ct. 97, 305 U.S. 597, 83 L. Ed. 379.

Whether court in session

Court records have, under the text rule, been held to import verity with respect to the question whether the court was in session at a particular time.—Cornelson v. State, 257 P. 1109, 37 Okl.Cr. 338.

54. Mont.—State v. Murphy, 219 P. 629, 630, 68 Mont. 627, quoting *Corpus Juris*.

Wash.—State v. Whitehead, 153 P. 349, 88 Wash. 549.

55. Wis.—Polichinski v. State, 230 N.W. 713, 201 Wis. 577.

Reasons for acquittal

Court record that acquittal was because of variance cannot be contradicted.—Commonwealth v. Campopiano, 150 N.E. 844, 254 Mass. 560.

Dismissal

Where a suit was dismissed according to the record without prejudice, defendants could not in a subsequent suit, by their bill of exceptions or otherwise, change the record to show that the former suit was dismissed by agreement for a consideration.—Forschler v. Cash, 194 S.W. 1029, 128 Ark. 492.

Stay of execution

Time of expiration of stay of execution of sentence is conclusively settled by journal entry and is not subject to contradiction by testimony or memoranda of trial court.—Van Valkenburg v. Mackey, 251 P. 407, 122 Kan. 204.

56. Ala.—Taylor v. State, 101 So. 93, 20 Ala.App. 133—State v. Brewer, 97 So. 160, 19 Ala.App. 291.

Cal.—Gavea v. Superior Court in and for Merced County, 78 P.2d 433, 435, 26 Cal.App.2d 27, quoting *Corpus Juris*.

Ill.—People v. Dragowski, 243 Ill. App. 216.

Ky.—Simpson v. Antrobus, 86 S.W. 2d 544, 260 Ky. 641.

Mich.—Burk v. Amos, 247 N.W. 197, 199, 262 Mich. 332, citing *Corpus Juris*.

Mo.—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328.

Mont.—State v. Murphy, 219 P. 629, 630, 68 Mont. 427, quoting *Corpus Juris*.

Okl.—Wheeler v. State, 220 P. 962, 25 Okl.Cr. 365.

15 C.J. p 979 note 62.

"The truth of the record concerning matters within the jurisdiction of the court cannot be disputed."—Cole v. Richmond, 100 So. 419, 423, 156 La. 262.

Coke's description; reason for rule

(1) "Judicial records . . . are memorials of the end of strife when the dispute has been settled by the judgment of the court. Such is the description of Lord Coke."—State v. Brewer, 97 So. 160, 161, 19 Ala.App. 291.

(2) "It has been well and repeatedly said by the greatest judges of the greatest courts that, if the rule were otherwise, there would be difficulty to see where litigation would end."—State v. Brewer, *supra*.

Conversations between judge and other parties cannot impeach or overturn record of county court.—Nodaway County v. Williams, Mo., 199 S. W. 224.

57. Ariz.—Funk v. Fillman, 86 P.2d 574, 44 Ariz. 263.

Cal.—Gavea v. Superior Court in and for Merced County, 78 P.2d 433, 435, 26 Cal.App.2d 27, quoting *Corpus Juris*.

Colo.—Wheeler v. People, 165 P. 257, 63 Colo. 209.

Fla.—State ex rel. Grebstein v. Lehman, 129 So. 818, 100 Fla. 481, modifying 128 So. 811, 100 Fla. 473—Whitten v. State, 97 So. 496, 86 Fla. 111.

Ga.—Smith v. Merchants' & Farmers' Bank, 96 S.E. 342, 22 Ga.App. 505.

Mich.—Burk v. Amos, 247 N.W. 197, 199, 262 Mich. 332, citing *Corpus Juris*—Fremont Co-op. Produce Co. v. Lipman, 197 N.W. 544, 226 Mich. 387.

Mo.—State ex rel. Spratley v. Maries County, 98 S.W.2d 623, 339 Mo. 577—State ex rel. and to Use of Conran v. Duncan, 63 S.W.2d 135, 139, 333 Mo. 673, citing *Corpus Juris*—State v. Brown, 267 S.W. 871—Sisk v. Wilkinson, 265 S.W. 536, 305 Mo. 328—Inter-River Drainage Dist. of Missouri v. Henson, App., 99 S.W.2d 865.

fact which is essential to the jurisdiction of the court,⁵⁸ and where the approval of the judge is required by statute, a record which has not been so approved is not conclusive.⁵⁹ Evidence may be considered for the purpose of explaining and supporting the record rather than to contradict it.⁶⁰ Where the court and counsel disagree as to a pertinent fact or facts and there is a minute entry in relation thereto, such entry will control.⁶¹

Construction. In construing a judicial record, it must be read as a whole,⁶² and a construction which gives some effect to the record is preferred to one which makes it inoperative.⁶³ So, the records of trial courts should be so construed as to support and not defeat judgments founded thereon,⁶⁴ and papers on file as part of the record should be construed in such manner as to effectuate their purpose.⁶⁵ It may be legally presumed from the record entries that they were entered by the person having authority to make them.⁶⁶ More particularly, it may be presumed that every entry in the clerk's docket has been made by direction of the court, in pursuance of either an order for the particular entry or of a general order, or of a general usage presupposing such an order.⁶⁷ The final record, the

journal, and the appearance docket of a court of record are each records of such court, and the silence of the first does not negative the existence of a fact shown by either of the other two;⁶⁸ nor does silence of a record as to whether witnesses were sworn negative the fact where it appears that complete records required to show such fact were not always kept.⁶⁹ The fact that in the minutes for a certain day of the special term chambers, offered in evidence without calling or explaining the absence of the clerk who kept them, or showing when or how they were made, there first occur memoranda of certain determinations by one of the judges, including his approval of a certain undertaking, and on a later page memoranda of determinations by another judge, including the noting of a default of defendant in respect of the justification of sureties on the same undertaking, does not show that such orders were made at any particular time in the day, or that the entries were made consecutively in relation to time, and leaves such questions to be determined by the jury.⁷⁰

Particular record entries may be corrected by other parts of the record affirmatively showing what such entries should be.⁷¹ So, the record of a court

Mont.—State v. Murphy, 219 P. 629, 630, 68 Mont. 427, quoting *Corpus Juris*.

Pa.—Pendleton v. McSherry, 20 Erie Co. 331.

Va.—Walker v. Commonwealth, 131 S.E. 230, 144 Va. 648.
15 C.J. p 980 note 63.

Habeas corpus is not available for the purpose of attacking court records.—State ex rel. Grebstein v. Lehman, 129 So. 818, 100 Fla. 481, modifying 128 So. 811, 100 Fla. 478.

Records of court not of record are subject to collateral attack.—State v. Whitehead, 153 P. 349, 88 Wash. 549.

58. Cal.—Smith v. Superior Court in and for San Diego County, 222 P. 857, 64 Cal.App. 722.

Consent

Recitals that consent had been given to a restraining order were held not to be conclusive of the fact when the existence of such fact was essential for the court to have jurisdiction to make such order.—Smith v. Superior Court in and for San Diego County, 222 P. 857, 64 Cal.App. 722.

Court of equity may interfere and grant relief by way of permitting the record of a common-law court to be impeached, in certain circumstances, to show want of jurisdiction.—Opie v. Clancy, 60 A. 635, 27 R.I. 42.

59. Iowa.—Shepherd v. Brenton, 15 Iowa 84.

60. U.S.—Irvin v. Zerst, C.C.A.Ga., 97 F.2d 257, certiorari denied 59 S.Ct. 97, 305 U.S. 597, 83 L.Ed. 379.

Ind.—Platis v. Gary State Bank, App., 17 N.E.2d 486.

61. La.—State v. Roshto, 125 So. 67, 169 La. 251.

62. Ky.—Young v. Chesapeake, etc., R. Co., 125 S.W. 241, 136 Ky. 784.
Mo.—Rolla Special Road Dist. of Phelps County v. Phelps County, 116 S.W.2d 61, 64, 342 Mo. 459, quoting *Corpus Juris*—Ex parte Schrier, 41 S.W.2d 178, 179, 328 Mo. 726, citing *Corpus Juris*.

63. Mass.—Hays v. The Georgian, Inc., 181 N.E. 765, 280 Mass. 10, 85 A.L.R. 1251.

Mo.—Rolla Special Road Dist. of Phelps County v. Phelps County, 116 S.W.2d 61, 64, 342 Mo. 459, quoting *Corpus Juris*.
15 C.J. p 980 note 71.

64. Mo.—Hathaway v. St. Louis, etc., R. Co., 68 S.W. 109, 94 Mo. App. 343.

65. Mass.—Hays v. The Georgian, Inc., 181 N.E. 765, 280 Mass. 10, 85 A.L.R. 1251.

Appeal papers

Where appeal papers in court file stated in title and body that plaintiff's appeal was from final decree, an erroneous reference to conclusions of trial judge leading to final decree is not to be construed as destroying the real effect of such papers as an

appeal from the final decree.—Hays v. The Georgian, Inc., 181 N.E. 765, 280 Mass. 10, 85 A.L.R. 1251.

Pending cases

Where an exhibit in the record recited that certain chancery causes were "lately pending" in a certain circuit court, such recital did not show that such causes were still on docket.—Scott v. Thomas, 51 S.E. 329, 104 Va. 330.

66. R.I.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 823.

67. Mass.—Tracy v. Malony, 105 Mass. 90—Central Bridge Corp v. Lowell, 15 Gray 106—Read v. Sutton, 2 Cush. 115—Pruden v. Alden, 23 Pick. 184, 34 Am.D. 51.

68. Kan.—O'Driscoll v. Soper, 19 Kan. 574.

69. Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190.

70. N.Y.—Hamilton v. Gorman, 48 N.Y.S. 1002, 24 App.Div. 85.

71. Okl.—Tiller v. State, 247 P. 421, 35 Okl.Cr. 31.

Session of court

Fact that record contains statement that court convened on Monday, Jan. 25, 1925, from which the "2" of the "25" was stricken, was held, with other showing from record, to indicate that county court was in session at time of trial.—Tiller v. State, supra.

of general jurisdiction reciting that defendant has been duly served with process may be overthrown by other portions of the record of equal dignity showing that such recital is not true.⁷² An order of court controls the clerk's recitals where the two are in conflict.⁷³ The minutes of the court, regularly entered and approved, in a criminal case, will control over the judge's minutes on his docket, or

memorandum made by him thereon, when they are conflicting.⁷⁴ Judgment of conviction controls as against the record of conviction in case of conflict.⁷⁵ The later of two conflicting docket entries made by the same court on the same rights of the same parties prevails.⁷⁶ Where the opinion and journal of an appellate court are in conflict, it has been held that the journal controls.⁷⁷

VIII. COURTS EXERCISING ORIGINAL JURISDICTION

A. COURTS OF GENERAL OR SUPERIOR JURISDICTION

§ 238. Nature, Grounds, and Extent of Jurisdiction Generally

The jurisdiction of courts of general, original jurisdiction depends in general on the governing provisions of the constitution or statute.

The nature and character of the jurisdiction which a court possesses may be determined in many cases from the constitutional provisions in reference to such court,⁷⁸ although jurisdiction which is exercised by common-law courts or courts of general jurisdiction may depend to some extent at least on statutes conferring it.⁷⁹ Superior courts of general jurisdiction may also possess inherent powers other than those conferred by statute,⁸⁰ and the jurisdiction of such a court is not to be restricted except by the unequivocally expressed will of the legislature;⁸¹ but a limitation on jurisdiction duly imposed will, however, be given effect.⁸²

For definition of "courts of original jurisdiction,"

see supra § 3; definition of "original jurisdiction," see supra § 17; definition of "courts of general jurisdiction," see supra § 2; and definition of "general jurisdiction," see supra § 16.

§ 239. Construction and Application of Provisions Conferring Jurisdiction

In the exercise of special statutory powers or jurisdiction, courts of general jurisdiction must follow and not go beyond the statutory authorization.

In respect of the exercise of special statutory powers or jurisdiction by a court of general jurisdiction, the status of such court is in general substantially that of a court of limited and inferior jurisdiction, as shown *infra* § 245, and the court must follow, and not go beyond, the statutory authorization.⁸³

Courts of general original common-law jurisdiction have inherent power to issue writs of mandamus in proper cases;⁸⁴ and independently of this,

72. Mo.—Williams v. Monroe, 28 S. W. 853, 125 Mo. 574.
15 C.J. p 980 note 66.

73. Ill.—Campbell v. Timmerman, 139 Ill.App. 151.

74. Tex.—Spain v. State, 128 S.W. 904, 59 Tex.Cr. 538.

75. N.Y.—People v. Newman, 241 N. Y.S. 745, 137 Misc. 267.

76. Vt.—Cootey v. Remington, 189 A. 151, 108 Vt. 441.

77. Ohio.—Will v. McCoy, 20 N.E. 2d 371, 135 Ohio St. 241.

78. Ga.—Adair v. Spellman Seminary, 79 S.E. 589, 13 Ga.App. 600.
15 C.J. p 981 note 90.

Distinction between jurisdiction and exercise of jurisdiction see *supra* § 26.

Where constitution vests sole jurisdiction of certain actions in a particular court, the legislature has no power to vest any part of such jurisdiction in another tribunal.—Goldstein v. Ewing, 49 A. 517, 62 N.J.Eq. 69.

79. Ill.—Calkins v. Calkins, 82 N.E. 242, 229 Ill. 68.
15 C.J. p 981 note 91.

80. Cal.—Wright v. Central California Colony Water Co., 8 P. 70, 67 Cal. 532.

15 C.J. p 981 note 92.
Inherent powers of courts in general see *supra* § 31.

81. La.—Henry v. Keays, 12 La. 214.

It is incumbent on those who deny jurisdiction of such a court to point out the constitutional or statutory provision which abridges its powers.—Barrett v. Watts, 13 S.C. 441.

82. Nev.—Danberg v. Ruhenstroth, 70 P. 320, 26 Nev. 455.

Or.—Montesano Lumber Co. v. Portland Iron Works, 152 P. 244, 78 Or. 53.

83. Cal.—Cohen v. Barrett, 5 Cal. 195.

Ill.—Levy v. Industrial Commission, 178 N.E. 370, 346 Ill. 49.

Mo.—American Asphalt Roof Corporation v. Marler, App., 56 S.W.2d 844.

15 C.J. p 727 note 15.

Service of process

Court of general jurisdiction proceeding to act under special act providing exceptional methods for service against foreign corporations is limited by terms of such act.—Osage Oil & Refining Co. v. Interstate Pipe Co., 253 P. 66, 124 Okl. 7.

84. Colo.—Mann v. People, 66 P. 452, 16 Colo.App. 475.

Mont.—Chumasero v. Potts, 2 Mont. 242, error dismissed 92 U.S. 358, 23 L.Ed. 499.

Tenn.—Nelson v. Justices of Carter County, 1 Coldw. 207—Newman v. Justices of Scott County, 5 Sneed 695.

Court invested with all power of king's bench has jurisdiction to issue writ of mandamus.

Del.—State v. Knight, 6 Houst. 146, reversed on other grounds 6 Houst. 283—State v. Wilmington Bridge Co., 3 Harr. 312—State v. Wilmington, 3 Harr. 294.

Md.—Harwood v. Marshall, 9 Md. 83—Runkel v. Winemiller, 4 Harr. & M. 429, 1 Am.D. 411.

constitutions or statutes commonly confer such power on them either in express terms⁸⁵ or by authorizing them to issue writs in general,⁸⁶ or otherwise by implication.⁸⁷

Constitutional and statutory provisions governing jurisdiction in criminal cases are considered generally in the C.J.S. title Criminal Law §§ 112-121, also 16 C.J. p 149 note 35-p 151 note 61.

§ 240. — Of Civil Causes

General rules as to what are "civil actions" or "civil cases" apply in determining the meaning of such terms in statutory or constitutional provisions governing jurisdiction.

In determining what are "civil actions" or "civil cases," as used in constitutional or statutory provisions governing jurisdiction, rules set forth in the C.J.S. title Actions § 1 a (8), b (2) as to the meaning of such terms are applicable.⁸⁸

§ 241. — Of "Special Cases"

A "special case" within the meaning of a constitutional provision permitting the legislature to confer jurisdiction in "special cases" has been defined as a case unknown to the framework of courts of law or equity, but this definition has not been accepted universally.

The view has been taken that, within the meaning of a constitutional provision permitting the legislature to confer jurisdiction on a certain court in "special cases," a special case is a case unknown to the framework of the courts of law or equity;⁸⁹

but it has also been considered that under such a provision all remedies which were pursued by actions at common law were not excluded, and that jurisdiction might be conferred where the remedy was by a bill in equity.⁹⁰ Particular actions or proceedings have been considered and held to be "special cases" within the meaning of the constitutional provision,⁹¹ while other actions or proceedings have been held not to be "special cases."⁹²

§ 242. — Of Actions Ex Contractu

General rules as to what are actions ex contractu apply in determining whether or not a court has jurisdiction of a particular action.

In determining what are actions ex contractu within the jurisdiction of the particular court, rules set forth in the C.J.S. title Actions § 1 a (3) as to what are actions ex contractu are applicable.⁹³

Examine Pocket Parts for later cases.

§ 243. — Of Actions Ex Delicto

General rules as to what are actions in tort apply in determining whether or not a court has jurisdiction of a particular action.

In determining what are actions in tort, which are within the jurisdiction of a particular court, rules set forth in the C.J.S. title Actions § 1 a (4) as to what are actions in tort are applicable.⁹⁴

Examine Pocket Parts for later cases.

B. COURTS OF LIMITED OR INFERIOR JURISDICTION

§ 244. Nature and Scope of Limitations

In respect of jurisdiction, courts of limited or inferior jurisdiction are confined within the limits of the powers granted, and no powers are to be regarded as

granted by implication other than those which are necessary for the full exercise of powers expressly granted.

Inferior courts of limited jurisdiction may not in general assume a power by implication,⁹⁵ but must

85. Ala.—State v. Crook, 27 So. 334, 123 Ala. 657.

Conn.—Ansonia v. Studley, 34 A. 1030, 67 Conn. 170.

Ga.—Savannah v. State, 4 Ga. 26—State v. Justices of Richmond County Inferior Ct., Dudl. 37—Ex parte Carnochan, T.U.P.Charit. 216.

Ill.—Board of School Inspectors of City of Peoria v. People ex rel. Grove, 20 Ill. 525.

Kan.—Rea v. Kansas City Long-Distance Tel. Co., 125 P. 27, 87 Kan. 665, rehearing denied 127 P. 603, 88 Kan. 82.

Miss.—Swann v. Buck, 40 Miss. 268.

Mont.—Chumasero v. Potts, 2 Mont. 242, error dismissed 92 U.S. 358, 23 L.Ed. 499.

N.C.—State ex rel. Tate v. Com'rs of Haywood County, 29 S.E. 60, 122 N.C. 60.

Okl.—Starkweather v. Kemp, 88 P.

1045, 18 Okl. 28—Allen v. Reed, 60 P. 782, 63 P. 867, 10 Okl. 105.

Pa.—Commonwealth v. Barnett, 43 A. 976, 199 Pa. 161, 55 L.R.A. 382. S.C.—McIver v. State, 2 S.C. 1.

Va.—Richmond R. & E. Co. v. Brown, 32 S.E. 775, 97 Va. 26.

Wis.—State v. Shaugnessey, 57 N. W. 1105, 85 Wis. 646—Atty.-Gen. v. Chicago & N. W. R. Co., 35 Wis. 425.

86. Ala.—Etheridge v. Hall, 7 Port. 47.

Ark.—Webb v. Hanger, 1 Ark. 121.

Iowa.—U. S. v. Dubuque, Morr. 31.

Tenn.—Banton v. Wilson, 4 Tex. 400.

87. Ill.—People ex rel. Kocourek v. City of Chicago, 62 N.E. 179, 193 Ill. 507, 58 L.R.A. 333.

Mo.—St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am.D. 355—St. Louis County Court v. Ruland, 5 Mo. 268—Boone County v. Todd, 3 Mo. 140.

88. Ga.—Gilbert v. Thomas, 3 Ga. 575.

Ind.—State v. Turner, 10 Ind. 411.

15 C.J. p 981 note 96.

89. Cal.—People v. Kern County, 45 Cal. 679.

15 C.J. p 982 note 97.

90. N.Y.—Arnold v. Rees, 18 N.Y. 57, 7 Abb.Pr. 323, 17 How.Pr. 35.

91. Cal.—Harper v. Freslon, 6 Cal. 76.

15 C.J. p 982 note 97 [a].

92. N.Y.—Kundlof v. Thalheimer, 12 N.Y. 593.

15 C.J. p 982 note 97 [a].

93. N.Y.—Bowe v. Jenkins, 23 N.Y. S. 543, 69 Hun 458—Crane v. Crane, 19 N.Y.S. 691.

94. N.C.—McDonald v. Cannon, 82 N.C. 245.

95. Cal.—Winter v. Fitzpatrick, 35 Cal. 269.

15 C.J. p 726 note 14, p 982 note 10.

remain within the limits of the powers granted.⁹⁶ While it has been stated broadly that a statute conferring a limited jurisdiction is construed liberally in so far as the mode of proceeding is concerned,⁹⁷ the powers conferred on courts of limited or inferior jurisdiction must be exercised by them in the mode prescribed,⁹⁸ and such a court cannot entertain a controversy which is not clearly within the comprehension of the law conferring jurisdiction,⁹⁹ and an inferior tribunal cannot, under pretense of determining its jurisdiction, usurp a jurisdiction which is denied to it,¹ nor can it, when having jurisdiction of the subject matter in controversy, abuse or exceed its legitimate powers.²

The mere fact that a court is designated a court of record does not affect its jurisdiction;³ but if the court is a local and inferior court, its jurisdiction

must be determined from the statutes creating it.⁴

§ 245. — What Are Courts of Limited Jurisdiction

A court of whatever rank may, in the exercise of special statutory powers, have the status of a court of limited and inferior jurisdiction, and the fact that a court has exclusive jurisdiction in certain cases does not necessarily prevent its classification as a court of limited jurisdiction.

In respect of the exercise of special statutory powers, a court of whatever rank,⁵ including a court of general jurisdiction,⁶ is governed by the same rules that are applicable to courts of limited and inferior jurisdiction, and in general may, in this connection, be regarded as such a court.⁷

"Limited jurisdiction" defined see *supra* § 16.

Where certain jurisdiction is expressly conferred by statute on a court, all power necessary to carry such jurisdiction into effect is likewise conferred thereby.—*Ex parte State*, 71 Ala. 371.

96. Alaska.—*Schofield v. Powell*, 5 Alaska 373.

N.Y.—*In re Sisson*, 274 N.Y.S. 857, 152 Misc. 806.

15 C.J. p 726 note 14.

Quasi judicial body of limited jurisdiction can exercise no power not expressly or impliedly conferred on it.—*City of New York v. Public Service Commission for First Dist.*, 171 N.Y.S. 830, 104 Misc. 306, affirmed *People ex rel. City of New York v. Public Service Commission*, 172 N.Y.S. 912, 186 App.Div. 888.

Construction of statute

A statute which confers a limited jurisdiction is construed strictly in so far as the extent of the jurisdiction is concerned.—*Gary Realty Co. v. Swinney*, 269 S.W. 961, 306 Mo. 592, certiorari denied *Swinney v. Gary Realty Co.*, 45 S.Ct. 513, 268 U.S. 695, 69 L.Ed. 1162.

97. Mo.—*Gary Realty Co. v. Swinney*, *supra*.

Pleading and practice in inferior tribunals

It has been stated broadly that strict rules of pleading and procedure which are applicable to courts of record do not apply to inferior tribunals.—*Gipner v. State Civil Service Commission of California*, 56 P.2d 535, 13 Cal.App.2d 100.

98. U.S.—*Voorhees v. Jackson*, Ohio, 10 Pet. 449, 9 L.Ed. 490.

Or.—*Cason v. Stone*, 1 Or. 39.

15 C.J. p 726 note 14 [a].

99. Miss.—*Welch v. Bryant*, 128 So.

734, 736, 157 Miss. 559, quoting *Corpus Juris*.

15 C.J. p 982 note 10.

Retroactive effect of statute

Statute defining jurisdiction of a court did not apply to an action pending before the passage and approval of the statute.—*Mullen v. Renzlaman*, 119 P. 641, 31 Okl. 53, Ann.Cas.1913D 778—15 C.J. p 982 note 10 [a].

Jurisdiction not acquired

Court authorized by statute to entertain jurisdiction in a particular case only, if undertaking to exercise jurisdiction in case to which statute is inapplicable, does not acquire jurisdiction.—*Tulsa Terminal, Storage & Transfer Co. v. Thomas*, 18 P.2d 891, 162 Okl. 5.

1. W.Va.—*Norfolk & W. R. Co. v. Pinnacle Coal Co.*, 30 S.E. 196, 44 W.Va. 574, 41 L.R.A. 414.

2. W.Va.—*Norfolk & W. R. Co. v. Pinnacle Coal Co.*, *supra*.

Quasi-judicial body of limited jurisdiction cannot act in excess of its powers on matters over which it has general jurisdiction.—*City of New York v. Public Service Commission of First Dist.*, 171 N.Y.S. 830, 104 Misc. 306, affirmed *People ex rel. City of New York v. Public Service Commission*, 172 N.Y.S. 912, 186 App. Div. 888.

3. N.Y.—*Schmitt v. Querengaesser*, 158 N.Y.S. 575, 94 Misc. 640.

4. N.Y.—*Schmitt v. Querengaesser*, *supra*.

5. Ill.—*Brown v. Van Keuren*, 172 N.E. 1, 340 Ill. 118—*Keal v. Rhyderck*, 148 N.E. 53, 317 Ill. 231—*Johnson v. Von Kettler*, 84 Ill. 315.

6. Cal.—*Cohen v. Barrett*, 5 Cal. 195.

15 C.J. p 727 note 15.

7. Cal.—*Cohen v. Barrett*, *supra*.
Ill.—*Chicago & Northwestern Rail-*

way Co. v. Galt, 23 N.E. 425, 24 N.E. 674, 133 Ill. 657—*Johnson v. Von Kettler*, 84 Ill. 315.

Okl.—*Osage Oil & Refining Co. v. Interstate Pipe Co.*, 253 P. 66, 124 Okl. 7.

15 C.J. p 727 note 15.

Special jurisdiction

(1) When jurisdiction is vested by statute, contrary not appearing, court, although of general jurisdiction otherwise, is of special jurisdiction as to statutory authority.—*Blount County Bank v. Barnes*, 118 So. 460, 218 Ala. 230.

(2) A court of general jurisdiction may have special statutory jurisdiction conferred on it, not exercised according to the common law, and which does not belong to it as a court of general jurisdiction, and in such cases its decisions are treated as those of courts of special jurisdiction.—*Central Illinois Public Service Co. v. Industrial Commission*, 127 N.E. 80, 293 Ill. 62—*Calkins v. Calkins*, 82 N.E. 242, 229 Ill. 68.

(3) When a court of general jurisdiction has powers conferred on it by statute, which it did not otherwise possess, it is in that respect treated as a special tribunal.—*Maguire's Case*, 115 A. 176, 120 Me. 398.

Validity of proceedings

A view somewhat at variance with the statement in the text is found in the statement that: "The jurisdiction of the court which rendered the judgment was complete. It was a general jurisdiction over the whole subject matter; and while acting within that jurisdiction, their judgments are not to be impeached, though erroneous on the face of them. The court of common pleas did not in this case, it is true, proceed according to the course of the common law; it acted under the re-

Where an act confers on a court exclusive jurisdiction in certain cases, but abstains from conferring general jurisdiction, such court is one of limited jurisdiction.⁸ However, the view has been taken that, although courts may be limited in their jurisdiction as to the division of judicial powers between them, they are not thereby made courts of inferior jurisdiction whose judgments are void unless the record shows the facts necessary to bring all their powers into exercise.⁹

For definition of "courts of limited jurisdiction," see *supra* § 2, and of "inferior courts," see *supra* § 7.

§ 246. — Civil Jurisdiction of Criminal Courts

Civil jurisdiction, sometimes conferred on criminal courts, must be exercised in the manner, and within the limits, fixed by the applicable constitutional or statutory provision.

The civil jurisdiction of a criminal court must in each case be determined from the constitutional or statutory provision creating or conferring jurisdiction on it,¹⁰ and, where civil jurisdiction is conferred, it can be exercised only in the mode and to the extent designated.¹¹

§ 247. Limitations as to Subject Matter

- a. General considerations
- b. Title to real property

a. General Considerations

Jurisdiction may be limited by reason of the subject matter involved or in controversy.

quisitions of a particular statute; but the principle is not thereby altered. It is not thereby degraded into a court of such inferior and limited jurisdiction, as that all its proceedings are rendered void, if a single requisition of the statute be uncomplished with."—*Diehl v. Page*, 3 N.J.Eq. 143, 147.

8. U.S.—*Sabin v. Larkin-Green Logging Co.*, D.C.Or., 218 F. 984, affirmed 222 F. 814, 138 C.C.A. 240. La.—*Howard v. Lacroix*, McG. 16. Or.—*State v. McElrath*, 89 P. 803, 49 Or. 294.

9. Tex.—*Williams v. Ball*, 52 Tex. 603, 36 Am.R. 730—*Guliford v. Love*, 49 Tex. 715.

10. Mo.—*St. Louis v. Tiefel*, 42 Mo. 578.

15 C.J. p 983 note 17.

Jurisdiction not conferred

N.J.—*Cahill v. Pennsylvania R. Co.*, 29 A. 156, 56 N.J.Law 445.

11. Ky.—*Brady v. Brannon*, 131 S. W. 679, 134 Ky. 769.

15 C.J. p 983 note 17.

12. N.Y.—*Oneida County Savings Bank of Rome v. Saunders*, 166 N. Y.S. 280, 179 App.Div. 282.

15 C.J. p 983 notes 19, 20.

13. Ala.—*Elliott v. Hall*, 8 Ala. 508. Me.—*Bartlett v. Baybutt*, 39 A. 474, 91 Me. 140.

14. N.Y.—*De Vita v. Pianisani*, 217 N.Y.S. 438, 127 Misc. 611.

15. N.Y.—*Isabelle Properties v. Edelman*, 297 N.Y.S. 572, 164 Misc. 192.

16. Cal.—*People v. Kern County*, 45 Cal. 679, overruling by implication *People v. Day*, 15 Cal. 91.

Ill.—*Board of School Inspectors of City of Peoria v. People ex rel. Grove*, 20 Ill. 525.

N.Y.—*People ex rel. McMahon v. Board of Excise of City of New York*, 3 N.Y.St. 253.

N.C.—*State ex rel. Tate v. Haywood County*, 29 S.E. 60, 122 N.C. 661.

Okl.—*Starkweather v. Kemp*, 88 P. 1045, 18 Okl. 28.

Pa.—*In re Opening of Spring St.*, 3 A. 581, 112 Pa. 258, 17 Wkly.N.C.

The jurisdiction of a court may be limited by reason of the subject matter in controversy,¹² as in the case of actions which involve the title to, or an interest in, land, as shown in the following subdivision. Apart from the question as to whether or not title to real property is involved, considered in the following subdivision, certain courts have, by statute, been denied jurisdiction of an action of trespass *quare clausum fregit*.¹³ A statutory provision which permits defendant in a summary proceeding in an inferior court to recover the possession of real property to set up an equitable defense does not purport to confer equity jurisdiction on inferior courts.¹⁴ Certain inferior courts have jurisdiction to determine title to personal property as an incident to the authority to protect their own process and to aid their own officers where the exercise of equity powers is not involved.¹⁵

Courts of inferior or limited original jurisdiction have no jurisdiction to issue writs of mandamus,¹⁶ unless such jurisdiction is conferred by constitutional or statutory provision.¹⁷

b. Title to Real Property

Some courts do not have jurisdiction of actions in which title to real property is involved or in issue, or to be tried.

The jurisdiction of a court may be limited by excluding jurisdiction of actions in which the title to, or an interest in, real property is involved or in issue,¹⁸ or of actions to try, or to hear and deter-

359—*In re Sedgely Ave.*, 88 Pa. 509, 7 Wkly.N.C. 1—*Collin's Case*, 2 Grant 214—*Fenn Gas Coal Co.'s Petition*, 19 Pa.Dist. 537, 36 Pa.Co. 641—*In re Cassel*, 14 Montg. Co. 101.

S.C.—*McIver v. State*, 2 S.C. 1.

17. Ala.—*State v. Williams*, 69 Ala. 311.

Iowa.—*Brown v. Crego*, 32 Iowa 498 —*Brown v. Crego*, 29 Iowa 321.

N.Y.—*People ex rel. Ryan v. Green*, 58 N.Y. 295, reversing on other grounds 5 Daly 254—*People ex rel. Dunphy v. Chaney*, 156 N.Y.S. 1035, 171 App.Div. 303.

Tex.—*Dean v. State*, 30 S.W. 1047, 31 S.W. 185, 88 Tex. 290.

18. Ind.—*Johnson v. Greenen*, 188 N.E. 796, 98 Ind.App. 612.

S.C.—*Ex parte Wingate*, 165 S.E. 176, 166 S.C. 440.

Vt.—*Village of Brattleboro v. Yauvey*, 143 A. 295, 101 Vt. 314—*Stevens v. Hutchins*, 115 A. 229, 95 Vt. 361.

15 C.J. p 983 note 19—53 C.J. p 963 notes 64-74.

mine, title to land.¹⁹

As to whether title to, or an interest in, real property is involved or in issue so as to exclude jurisdiction, the general rule is that, if the title is the principal thing to be determined, it may be said that the title is involved or in issue;²⁰ but if the question arises only incidentally, the title is not involved or in issue so as to affect the jurisdiction of the court,²¹ even though, according to some cases, it may become necessary to pass on the question of title as an incident to the issues involved.²² As otherwise stated, a suit is one involving the title to real property so as to exclude jurisdiction only where the necessary result of the judgment or decree is that one party gains or another party loses an interest in real property, or where the title is so put in issue by the pleadings that the decision of the case necessarily involves the judicial determination of such rights.²³ Some limitations are applicable where no final judgment may be rendered which would not have the effect of divesting one of the parties of title and possession and vesting them in

the other.²⁴

A case is not necessarily within the limitation imposed on the jurisdiction of some courts merely because the suit or action involves the right of possession of real property,²⁵ nor because the records of title to real property may be competent evidence.²⁶

According to some cases title to real property is involved so as to exclude jurisdiction where in order to recover, plaintiff must either prove²⁷ or disprove title.²⁸

While, under the practice in some jurisdictions, simply raising an issue as to title by the pleading does not exclude jurisdiction,²⁹ and the question as to whether the action is one to try title to land does not necessarily depend primarily on the construction of plaintiff's petition,³⁰ whether or not the action or suit comes within the limitation so as to exclude jurisdiction may, under the governing practice, be determinable from the pleadings,³¹ and the method of putting title in issue by plea is sometimes regulated by statute or rule of court.³² Un-

19. Or.—Chapman v. Hood River County, 178 P. 379, 91 Or. 92.
Tex.—Stewart v. Rockdale State Bank, 79 S.W.2d 116, 124 Tex. 431, affirming, Civ.App., 52 S.W.2d 915—Hein v. Debusk, Com.App., 277 S.W. 1053, affirming, Civ.App., 265 S.W. 753—Bennett v. Ross, Civ.App., 278 S.W. 314—Miller v. Fenton, Civ.App., 207 S.W. 631.
15 C.J. p 983 note 19.

Easement and dedication

Alleged right in nature of easement in, and dedication of, real property may be such an interest in real property as to bring action involving such right within limitation.—Coughran v. Nunez, Com.App., 127 S.W.2d 885, setting aside, Civ.App., 106 S.W.2d 1101.

20. N.J.—Buttoro v. Whalen, 45 A. 981, 64 N.J.Law 461.
15 C.J. p 983 note 20.

Real and substantial question

Where an action is predicated on a contract, agreement, or other instrument that raises a real and substantial question as to the title or boundary to real estate, so as to come within the limitation, jurisdiction is excluded.—South Florida Amusement & Development Co. v. Blanton, 116 So. 869, 95 Fla. 885.

21. Ga.—Roberts v. Mitchell, 142 S.E. 882, 166 Ga. 229.
Tex.—Coughran v. Nunez, Com.App., 127 S.W.2d 885, setting aside, Civ.App., 106 S.W.2d 1101—Galley v. Hedrie, Civ.App., 127 S.W.2d 978—Wilder v. Cox, Civ.App., 104 S.W. 2d 897, error dismissed—Southwestern Bell Telephone Co. v. Bur-

- ris, Civ.App., 68 S.W.2d 542—Smith v. Brown, Civ.App., 32 S.W.2d 388—Davis v. Tate, Civ.App., 242 S.W. 761.

- 15 C.J. p 983 note 20—63 C.J. p 968 note 72 [a].

22. Ga.—Adair v. Spellman Seminary, 79 S.E. 589, 13 Ga.App. 600.

- Tex.—Putty v. Putty, Civ.App., 6 S.W.2d 136—Springer v. Collins, Civ.App., 108 S.W. 758.
15 C.J. p 983 note 20.

23. Fla.—Barrs v. State, 116 So. 28, 95 Fla. 75.

24. Tex.—Galley v. Hedrick, Civ.App., 127 S.W.2d 978.

25. Fla.—State ex rel. Rich v. Ward, 185 So. 846—State ex rel. West's Drug Stores, Inc. v. Cornellus, 149 So. 332, 110 Fla. 299—Ex parte Bienville Inv. Co., 136 So. 328, 102 Fla. 524.

- Iowa.—Cassidy v. Adamson, 224 N.W. 508, 208 Iowa 417.
N.Y.—McKeefry v. O'Hara, 184 N.Y.S. 700, 113 Misc. 159.

26. Fla.—Barrs v. State, 116 So. 28, 95 Fla. 75.

27. D.C.—Johnson v. Simmons, 290 F. 331, 53 App.D.C. 356—Gray v. Ward, 45 App.D.C. 498.

- Vt.—Stevens v. Hutchins, 115 A. 229, 95 Vt. 361.

28. D.C.—Johnson v. Simmons, 290 F. 331, 53 App.D.C. 356—Gray v. Ward, 45 App.D.C. 498.

29. Minn.—Little v. Dyer, 233 N.W. 7, 181 Minn. 487.

30. Tex.—Coughran v. Nunez, Com.

- App., 127 S.W.2d 885, setting aside, Civ.App., 106 S.W.2d 1101.

31. Ind.—Johnson v. Greenen, 188 N.E. 796, 98 Ind.App. 612.

Bill of particulars

Jurisdiction was not excluded where there were no allegations in plaintiff's bill of particulars which called for exercise of general equity jurisdiction or which called in question title to real property, especially where neither the answers which called for the exercise of equity jurisdiction or decision of a question regarding title nor other pleading by defendant had been filed when the court was called on to rule on a demurrer to the bill of particulars.—Bevard v. Drucker, 182 N.E. 699, 43 Ohio App. 294.

- Pleadings not excluding jurisdiction**
Pa.—Pekny v. Hrabosky, 161 A. 749, 106 Pa.Super. 393.

Answer insufficient to show title involved or in issue

- Iowa.—Wallerstein v. Palmer, 276 N.W. 605, 224 Iowa 260.

- Okla.—City of Tulsa v. Peacock, 74 P.2d 359, 181 Okl. 333.

- Utah.—Manning v. Day, 190 P. 779, 56 Utah 282.

Title not put in issue

Title is not put in issue by defendant's pleading, so as to exclude jurisdiction, where it does not allege facts which show or tend to show that title is in issue or must necessarily be tried; pleading which contains only conclusions of law is not sufficient.—Johnson v. Greenen, 188 N.E. 796, 98 Ind.App. 612.

der some statutes, the question as to jurisdiction is to be determined by the declaration.³³ The mere statement in a pleading of a conclusion that the title is involved or in issue is not sufficient to exclude jurisdiction.³⁴ Under some circumstances, the question as to whether jurisdiction is excluded may be determinable from the pleadings and proof.³⁵

Questions as to jurisdiction of justices of the peace of actions involving title to real property are considered in the C.J.S. title Justices of the Peace § 30, also 35 C.J. p 499 note 49—p 509 note 52.

Particular actions or suits. Some statutory pro-

visions which exclude jurisdiction in the case of disputed title to real property relate only to actions as distinguished from special proceedings.³⁶

Among other suits or actions³⁷ which, under particular circumstances, have been regarded as not within the particular limitation involved, so as to exclude jurisdiction, are an action for damages for trespass on real property,³⁸ a suit to enjoin trespass on land in which title is only incidentally involved,³⁹ actions against tenants,⁴⁰ and actions arising out of, or connected with, contracts for the sale or exchange of, or mortgages of, real property.⁴¹

Unverified pleading of defendant insufficient

Ind.—Johnson v. Greenen, 188 N.E. 796, 98 Ind.App. 612.

Affidavit in support of plea

(1) Affidavit in support of defendant's plea was insufficient because it failed to set forth the source, nature, and extent of the title claimed by defendant.—Kahalekulu v. Kamaka, 29 Hawaii 336.

(2) Affidavit of defendant in support of plea to jurisdiction on ground that title would be brought in question, was insufficient where it failed to show that alleged contract for purchase by defendant of property in question, on which claim of title was based, was still in force and effect.—Jellings v. Kathe, 30 Hawaii 160.

33. D.C.—Gray v. Ward, 45 App.D. C. 498.

34. Ind.—Johnson v. Greenen, 188 N.E. 796, 98 Ind.App. 612.

Okl.—Taylor v. Cox, 136 P. 576, 39 Okl. 582.

35. Petition and proof to sustain petition
Tex.—Davis v. Tate, Civ.App., 242 S. W. 761.

Alleging ownership in third person

(1) Defendant's answer denying plaintiff's ownership and alleging ownership in a third person is not sufficient to exclude jurisdiction in the absence of substantial evidence showing any conflict as to title.—City of Tulsa v. Peacock, 74 P.2d 359, 181 Okl. 383—Hodge v. Mayfield, 223 P. 853, 98 Okl. 8.

(2) Evidence has been held insufficient to show such conflict.—City of Tulsa v. Peacock, supra—Hodge v. Mayfield, supra.

36. N.Y.—Drake v. Cunningham, 111 N.Y.S. 199, 127 App.Div. 80—Quinn v. Quinn, 61 N.Y.S. 684, 46 App. Div. 241—Sage v. Crosby, 67 N.Y.S. 139, 33 Misc. 117—Dorschel v. Burkly, 41 N.Y.S. 389, 18 Misc. 240.

Summary proceedings

Notwithstanding a statutory provision denying to a particular court

jurisdiction of any "civil action" in which title to real property is involved, it was held that the court had jurisdiction of a summary proceeding to remove alleged squatters, notwithstanding defendant pleaded title, in view of another statutory provision conferring jurisdiction on such court of summary proceedings to remove tenants and owners.—In re Pirew, 172 N.Y.S. 307, 105 Misc. 21.

37. Tex.—Bennett v. Ross, Civ.App., 278 S.W. 314—Davis v. Baker, Civ. App., 268 S.W. 766.

15 C.J. p 983 note 20 [d]—[m], [o].

Jurisdiction not excluded

(1) Action for damages for waste on land in which defendant had easement.—Southwestern Bell Telephone Co. v. Burris, Tex.Civ.App., 68 S.W. 2d 542.

(2) Action involving right to rents of certain lands.—Putty v. Putty, Tex.Civ.App., 6 S.W.2d 136.

(3) Action to recover balance due under oral contract for sale of dwelling which was to be removed from land.—Bourret v. Lawmaster, 238 N. W. 739, 121 Neb. 315.

(4) Suit to set aside judgment of condemnation of lands for a public purpose and to recover the land.—Campbell's Guardian v. Breathitt County Board of Education, 84 S.W. 2d 61, 260 Ky. 145.

(5) Proceeding involving sale of property of minors under guardianship.—Wildner v. Cox, Tex.Civ.App., 104 S.W.2d 897, error dismissed.

(6) Action to recover an amount paid as taxes on certain lands because of alleged misrepresentations of defendant.—Sherrod v. Pollard, Tex.Civ.App., 21 S.W.2d 1101.

38. Tex.—Brown v. Brown, 3 Tex. A.Civ.Cas. § 32.

15 C.J. p 983 note 20 [d] (4), (17)—63 C.J. p 968 notes 87—91, p 969 note 92.

Actual possession

Question as to actual possession is not one of title so as to exclude jurisdiction of action for trespass.—

Ehle v. Quackenboss, 6 Hill, N.Y., 537.

Prior action of ejectment

Where judgment in a prior action of ejectment was conclusive between the parties, title was not in issue in a subsequent action of trespass between the parties so as to exclude jurisdiction.—Haley v. Wheeler, 8 Hun, N.Y., 569.

License

Fact that a question as to license as a basis of possession was involved did not exclude jurisdiction.—Doolittle v. Eddy, 7 Barb, N.Y., 74.

39. Tex.—Coughran v. Nunez, Com. App., 127 S.W.2d 885, setting aside, Civ.App., 106 S.W.2d 1101—Smith v. Brown, Civ.App., 32 S.W.2d 388.

40. Fla.—State ex rel. Rich v. Ward, 185 So. 846—State ex rel. West's Drug Store, Inc. v. Cornelius, 149 So. 332, 110 Fla. 299.

Iowa.—Wallerstein v. Palmer, 276 N.W. 605, 224 Iowa 260.

Action or proceeding to recover possession

Fla.—Ex parte Bienville Inv. Co., 136 So. 328, 102 Fla. 524.

Ga.—Roberts v. Mitchell, 142 S.E. 882, 166 Ga. 229.

Hawaii.—Kahalekulu v. Kamaka, 29 Hawaii 336.

Ind.—Johnson v. Greenen, 188 N.E. 796, 98 Ind.App. 612.

Iowa.—Braga v. Stowell, 259 N.W. 767, 219 Iowa 855.

N.Y.—McKeefry y. O'Hara, 184 N.Y.S. 700, 113 Misc. 159.

15 C.J. p 983 note 20 [d] (13), [o].

Action under lease

Jurisdiction of an action to recover back interest, rentals, and taxes claimed to be owing under a lease was not excluded.—Bevard v. Drucker, 182 N.E. 699, 43 Ohio App. 294.

Action for rent

Hawaii.—Jellings v. Kathe, 30 Hawaii 160.

15 C.J. p 986 note 20 [d], (19), [i].

41. Ga.—Reynolds v. Atlantic Nat. Bldg. etc., Assoc., 30 S.E. 942, 104 Ga. 703.

Tex.—Hollis v. Finks, 78 S.W. 555, 34

Among other suits or actions⁴² which, under particular circumstances, have been regarded as within the particular limitation involved, so as to exclude jurisdiction, are an action of ejectment,⁴³ an action for damages for trespass on real property in which title is in issue,⁴⁴ a suit for injunction against trespass on, or to protect possession of, or rights in, real property,⁴⁵ a suit to establish a trust,⁴⁶ a suit to cancel deed and to remove cloud from title,⁴⁷ and actions against tenants.⁴⁸

§ 248. Territorial Limitations

In respect of territorial limitations, courts of limited or inferior jurisdiction have, and may exercise, such jurisdiction, and only such jurisdiction, as is conferred by governing constitutional or statutory provisions.

In respect of territorial limitations, courts of limited or inferior jurisdiction have, and may exercise, such jurisdiction as is conferred by constitutional, or valid statutory, provisions,⁴⁹ but may not exercise jurisdiction beyond, or in excess of, the limits fixed by such provisions.⁵⁰ Questions as to terri-

Tex.Civ.App. 12—Messer v. Bassett, App. 18 S.W. 650.
15 C.J. p 983 note 20 [d] (15), [e], [f]—[m].

Action on note

(1) Jurisdiction was not excluded where, in action on notes, it was sought to establish special lien on real property conveyed as security for the debt.—Hughes v. Jefferson Standard Life Ins. Co., 102 S.E. 483, 25 Ga.App. 72—Dixon v. Bond, 88 S. E. 825, 18 Ga.App. 45.

(2) Jurisdiction of an action on note representing unpaid purchase price of land in which defendant set up loss of part of land through defect of title, with consequent right of reduction in price, was not excluded.—Riehle v. Bank of Bullochville, 123 S.E. 124, 158 Ga. 171.

Action on check

Jurisdiction of an action on a check given as earnest money on a contract for the purchase of land was not excluded.—Little v. Dyer, 233 N.W. 7, 181 Minn. 487.

Other actions in which jurisdiction not excluded

(1) Action for breach of contract for sale or purchase of land.—Barrs v. State, 116 So. 28, 95 Fla. 75—15 C.J. p 983 note 20 [d] (10), [m].

(2) Action for damages for failure to pay the full purchase price of personal property under a contract providing for payment in part by cash and in part by the conveyance of land.—Davis v. Tate, Tex.Civ.App. 242 S.W. 761.

(3) Action by purchaser of land to recover back purchase price paid, on disaffirmance.—Harris County Inv. Co. v. Davis, Tex.Civ.App., 230 S.W. 2d 761—15 C.J. p 983 note 20 [e] (6), [l].

(4) Action of assumpsit under a contract for exchange of real property.—Pekny v. Hrabosky, 161 A. 749, 106 Pa.Super. 393.

(5) Action of forcible entry and detainer by vendor against purchaser in possession under contract.—Cassidy v. Adamson, 224 N.W. 508, 208 Iowa 417.

42. Tex.—Hein v. Debusk, Civ.App.,

265 S.W. 753, affirmed, Com.App., 277 S.W. 1053.
15 C.J. p 983 note 20 [n].

Jurisdiction excluded

(1) Action which required the fixing of boundaries.—Stephens v. Jones, 129 So. 555, 14 La.App. 113.

(2) Action by municipal corporation to recover water rents, in which defendant claimed the right to be supplied with water without charge.—Village of Brattleboro v. Yauvey, 143 A. 295, 101 Vt. 314.

(3) Assumpsit for use of a party wall.—Johnson v. Simmons, 290 F. 331, 53 App.D.C. 356.

(4) Action to recover back the amount paid by plaintiff to defendant as the purchase price of land, title to which defendant had erroneously represented to be in the grantors.—Gray v. Ward, 45 App.D. C. 498.

43. S.C.—Ex parte Wingate, 165 S. E. 176, 166 S.C. 440.

44. N.Y.—Lopiano v. New York Telephone Co., 250 N.Y.S. 223, 139 Misc. 831.

63 C.J. p 983 notes 65–74, 82–86.

Constructive possession

Title is involved so as to exclude jurisdiction where possession was constructive and may be shown only by proof of title.—Willoughby v. Jenks, 20 Wend., N.Y., 96—63 C.J. p 983 notes 83–86.

45. Tex.—Coughran v. Nunez, Com. App., 127 S.W.2d 885, setting aside, Civ.App., 106 S.W.2d 1101—Galley v. Hedrick, Civ.App., 127 S.W.2d 978—Hinojosa v. Corona, Civ.App., 254 S.W. 1116.

46. Ga.—Spears v. Fendig, 99 S.E. 706, 23 Ga.App. 793.

47. Tex.—Hudson v. Nowell & Son, Civ.App., 8 S.W.2d 778.

15 C.J. p 983 note 20 [n] (11).

Action to recover possession

In an action to recover the possession of real property from, or to evict, an alleged tenant, defendant may deny the existence of the relationship of landlord and tenant with the result that the title to real property would be involved.—State ex

rel. Rich v. Ward, Fla., 185 So. 846—Ex parte Bienville Inv. Co., 136 So. 328, 102 Fla. 524.

Action for willful and malicious injury to tenement house

Vt.—Stevens v. Hutchins, 115 A. 229, 95 Vt. 361.

49. Ala.—Southern Ry. Co. v. Gogins, 73 So. 958, 198 Ala. 642.

Cal.—Southwestern Portland Cement Co. v. Cochrane, 300 P. 445, 114 Cal.App.Supp. 778—Burge v. Municipal Court of City of Los Angeles, 258 P. 164, 84 Cal.App. 425.

N.Y.—Scioldoni v. Republic Light, Heat & Power Co., 231 N.Y.S. 311, 224 App.Div. 566, affirmed 168 N. E. 432, 251 N.Y. 574—Luban v. Simonds, 61 N.Y.S. 697, 46 App.Div. 192—Rochester Exposition Ass'n v. Bogorad, 267 N.Y.S. 723, 149 Misc. 200—Livent v. Mostoff, 252 N.Y.S. 680, 141 Misc. 399—Marcus v. Day, 248 N.Y.S. 649, 139 Misc. 283.

Wis.—State ex rel. Schneider v. Midland Investment Corporation, 262 N.W. 711, 219 Wis. 161.

15 C.J. p 984 note 23.

Territorial jurisdiction defined see supra § 20.

50. Ala.—Southern Ry. Co. v. Gogins, 73 So. 958, 198 Ala. 642.
Ark.—Arnold v. Snellgrove, 127 S.W. 2d 125.

Conn.—Hazzard v. Gallucci, 93 A. 230, 89 Conn. 196—Slade v. Zeitfuss, 59 A. 406, 77 Conn. 457.

Del.—Discount & Credit Corporation v. Ehrlich, 187 A. 591, 77 W.W. Harr. 561.

Fla.—Phillips v. State, 77 So. 665, 75 Fla. 93.

Ill.—Canton Homestead & Loan Ass'n v. Simms, 241 Ill.App. 467. See Thorne v. Alcazar Amusement Co., 210 Ill.App. 173.

La.—Samuel v. Riser, 7 La.App. 143.
N.Y.—American Historical Soc. v. Glenn, 162 N.E. 481, 248 N.Y. 445—In re Hollywood Garage Corporation, 9 N.Y.S.2d 374, 169 Misc. 906—American Historical Soc. v. Glenn, 227 N.Y.S. 174, 131 Misc. 291.

Ohio.—Yontz v. McCutchin, 167 N.E. 363, 121 Ohio St. 142.

15 C.J. p 984 note 23.

torial limitations of jurisdiction of inferior courts of particular states are considered *infra* §§ 250-297, as to territorial limits of jurisdiction in general *supra* § 91, and as to the locality of criminal offenses as affecting jurisdiction in criminal cases in the C.J.S. title Criminal Law §§ 133-141, also 16 C.J.

p 162 note 21-p 174 note 58. As to territorial extent of jurisdiction of justices of the peace in criminal cases see the C.J.S. title Criminal Law § 142, also 16 C.J. p 158 note 67-p 159 note 77; in civil cases, see the C.J.S. title Justices of the Peace, § 41, also 35 C.J. p 536 note 69-p 537 note 81.

C. COURTS OF PARTICULAR STATES

§ 249. In General

- a. Preliminary statement
- b. Hawaii

a. Preliminary Statement

The constitutional and statutory provisions with reference to the jurisdiction and powers of particular courts of the several states, as well as the judicial construction thereof, and matters of procedure peculiar to particular courts, are matters of purely local interest, and for this reason in the sections which follow dealing with the courts of particular states it is deemed sufficient to refer in the notes to various cases in which such matters have been passed upon.

b. Hawaii

There have been decisions involving the procedure and review of the proceedings of the district courts.

There have been decisions involving the procedure and review of the proceedings before the Hawaiian district courts.⁵¹

§ 250. Alabama

The circuit, inferior, municipal, and certain other courts of Alabama are courts of original jurisdiction.

There have been decisions relating to the Alabama circuit courts,⁵² including decisions as to their jurisdiction⁵³ and procedure.⁵⁴

There have been decisions relating to the inferior courts,⁵⁵ including decisions as to their jurisdiction,⁵⁶ procedure,⁵⁷ and as to the review of their proceedings.⁵⁸

City or municipal courts. There have been decisions relating to the city or municipal courts,⁵⁹ including decisions as to their jurisdiction,⁶⁰ proce-

51. Written answer is unnecessary; hence a defendant, present watching the proceedings, who offers no evidence and advances no contentions of law, suffering a judgment to go against him, is entitled to appeal generally to the circuit court.—*Nylen Bros. & Co. v. Murata*, 31 Hawaii 619.
52. Ala.—*Etheridge v. Hall*, 7 Port.

47.
15 C.J. p 985 note 25.

Term of court

(1) Time for holding.—*Clio Banking Co. v. Brock*, 85 So. 297, 204 Ala. 57.

(2) Vacations and proceedings therein.—*Clio Banking Co. v. Brock*, *supra*.

53. Ala.—*Baker, Lyons & Co. v. Eliasberg & Bros. Mercantile Co.*, 79 So. 13, 201 Ala. 591.
15 C.J. p 985 note 25 [b].

Equity jurisdiction

Ala.—*Carson v. Sleigh*, 78 So. 229, 201 Ala. 373.—*Robertson v. State*, 104 So. 561, 20 Ala.App. 514.

Territorial jurisdiction

Ala.—*Moore v. State*, 127 So. 796, 23 Ala.App. 432, certiorari denied 127 So. 797, 221 Ala. 50.

54. Ala.—*State v. Crook*, 27 So. 334, 123 Ala. 657.—*Ramagnano v. Crook*,

7 So. 247, 88 Ala. 450—*Ex parte Pearson*, 76 Ala. 521.

In equity

Ala.—*Carson v. Sleigh*, 78 So. 229, 201 Ala. 373.

Consent of parties to submission of cause between terms

Ala.—*Clio Banking Co. v. Brock*, 85 So. 297, 204 Ala. 57.

55. Ala.—*McGehee v. State*, 74 So. 374, 199 Ala. 287.—*Harbin v. Hogue*, 116 So. 902, 22 Ala.App. 389, certiorari denied 116 So. 903, 217 Ala. 464.

Particular inferior court not court of record

Ala.—*Willett v. Weaver*, 87 So. 601, 205 Ala. 263.

56. Possessing only jurisdiction of justices of peace

Ala.—*Willett v. Weaver*, 87 So. 601, 205 Ala. 263.—*McGehee v. State*, 74 So. 374, 199 Ala. 287.

Jurisdictional amount

Ala.—*Sheldon v. Lyon*, 104 So. 576, 20 Ala.App. 623.

57. Powers of officers executing process

Ala.—*Woods v. Wood*, 122 So. 835, 219 Ala. 523.

58. Ala.—*Sheldon v. Lyon*, 104 So. 576, 20 Ala.App. 623.

Nature and form of remedy

Ala.—*Bramlett v. Griffin*, 133 So. 266, 222 Ala. 495.

Requisites and proceedings for transfer

Ala.—*Bramlett v. Griffin*, *supra*.

Presentation of grounds of review

Ala.—*Sheldon v. Lyon*, 104 So. 576, 20 Ala.App. 623.—*North American Acc. Ins. Co. v. Rather*, 84 So. 566, 17 Ala.App. 238.

Scope of review

Ala.—*Bramlett v. Griffin*, 133 So. 266, 222 Ala. 495.

59. Ala.—*Gulf States Steel Co. v. Houston Furniture Co.*, 110 So. 476, 21 Ala.App. 580, certiorari denied 110 So. 478, 215 Ala. 306.

15 C.J. p 985 note 29.

60. Ala.—*State v. Williams*, 69 Ala. 311.

15 C.J. p 984 note 21 [a] (5), p 985 note 29 [a]—[f].

Birmingham municipal court

(1) In general.—*Sheldon v. Lyon*, 104 So. 576, 20 Ala.App. 623.

(2) Jurisdictional amount.—*Sheldon v. Lyon*, *supra*.

(3) Discovery of assets of judgment debtor.—*State ex rel. Grace v. Hickman*, 128 So. 610, 221 Ala. 324.

dure,⁶¹ and as to the review of their proceedings.⁶²

Other courts. There have been decisions relating to the county courts,⁶³ the county commissioners' courts,⁶⁴ the Jefferson court of common claims,⁶⁵ and the court of county revenue of Franklin County, which corresponds to the courts of county commissioners or boards of revenue in the other counties in the state.⁶⁶ There is no separate chancery court in the state.⁶⁷

§ 251. Arizona

The superior courts and the district courts of Arizona are courts of original jurisdiction.

Under the Arizona state constitution, there are as many separate and independent superior courts as there are counties, and not merely one superior court with a number of judges composing it,⁶⁸ and

these courts have jurisdiction of all matters not vested exclusively in other courts.⁶⁹ There have been other decisions relating to the jurisdiction of the superior courts,⁷⁰ and the territorial district courts.⁷¹

§ 252. Arkansas

The circuit, chancery, common pleas, county, and municipal courts of Arkansas are courts of original jurisdiction.

There have been decisions relating to the jurisdiction of the Arkansas circuit courts,⁷² which constitute the repository of all jurisdiction not assigned to other courts,⁷³ and the chancery courts.⁷⁴

Common pleas court. There have been decisions as to the jurisdiction of common pleas courts,⁷⁵ and

61. Ala.—Murphy v. St. Louis Cofin Co., 43 So. 212, 150 Ala. 143.

Continuance and adjournment

Ala.—Hamrick v. Town of Albertville, 122 So. 448, 219 Ala. 465.

Venue

Ala.—Southern Ry. Co. v. Goggins, 73 So. 958, 198 Ala. 642.

Birmingham municipal court

(1) Duty of clerks to issue process.—Jeter v. State ex rel. Carlisle, 117 So. 460, 218 Ala. 12.

(2) Reinstatement of action after dismissal.—Ex p. Smith, 52 So. 895, 168 Ala. 179.—Harbin v. Hogue, 116 So. 902, 22 Ala.App. 389, certiorari denied 116 So. 903, 217 Ala. 464.

(3) Time for entry of judgment on verdict.—McEntire v. Paffe, 67 So. 713, 12 Ala.App. 507.

62. Ala.—Stephenson & Bernard Realty Co. v. Sheehan, 144 So. 370, 25 Ala.App. 269.

15 C.J. p 985 note 29 [h].

Nature and form of remedy

Ala.—Roddam v. Brown, 77 So. 403, 201 Ala. 109.

Presentation of grounds of review

Ala.—Vinyard v. Republic Iron & Steel Co., 87 So. 552, 205 Ala. 269.—Sheldon v. Lyon, 104 So. 576, 20 Ala.App. 623.

Requisites and proceedings for transfer of cause

Ala.—Coolidge v. McArdle, 100 So. 145, 211 Ala. 205.

Amendment and trial de novo

(1) Amendment.—Vinyard v. Republic Iron & Steel Co., 87 So. 552, 205 Ala. 269.

(2) Trial de novo.—Sloss-Sheffield Steel & Iron Co. v. Johnson, 103 So. 654, 212 Ala. 570.—Vinyard v. Republic Iron & Steel Co., supra.—Roddam v. Brown, 77 So. 403, 201 Ala. 109.

Harmless error

Ala.—McEntire v. Paffe, 67 So. 713, 12 Ala.App. 507.

Birmingham municipal court

(1) Requisites and proceedings for transfer of cause.—Union Mut. Ins. Co. v. Robinson, 113 So. 587, 216 Ala. 527.

(2) Record or transcript.—Union Mut. Ins. Co. v. Robinson, supra.

(3) Right to trial in preference to other cases.—Morris v. McElroy, 122 So. 606, certiorari denied 122 So. 608, 219 Ala. 369.

63. Ala.—State v. Fuller, 41 So. 990, 147 Ala. 164.

15 C.J. p 985 note 26.

Jurisdiction

Ala.—Elliott v. Hall, 8 Ala. 508.

Law and equity court of Franklin County

Presumptions as to findings and judgments.—Northwestern Rug Mfg. Co. v. Russellville Furniture & Mercantile Co., 116 So. 314, 22 Ala.App. 404.

64. Ala.—Kirby v. Marshall County Com'rs Ct., 65 So. 163, 186 Ala. 611.

Power to perform special duties during special term

Ala.—Walker v. State, 67 So. 719, 12 Ala.App. 229.

65. Jurisdictional amount

Ala.—Broyles v. Loveman, Joseph & Loeb, 156 So. 843, 229 Ala. 292.—Davis v. Jerrell, 149 So. 720, 25 Ala.App. 524.

66. Ala.—Franklin County v. Richardson, 79 So. 384, 202 Ala. 46.

Court of record

Ala.—Franklin County v. Richardson, supra.

67. Ala.—Robertson v. State, 104 So. 561, 20 Ala.App. 514.

68. Ariz.—Faires v. Frohmiller, 67 P.2d 470, 49 Ariz. 366.

69. Ariz.—Adams v. Superior Court in and for Maricopa County, 168 P. 641, 19 Ariz. 237.

70. Jurisdictional amount

Ariz.—Mosher v. Bellas, 264 P. 468, 33 Ariz. 147.

Foreclosure of mortgages and liens

Ariz.—Collister v. Inter-State Fidelity Building & Loan Ass'n of Utah, 38 P.2d 626, 44 Ariz. 427, 98 A.L.R. 1020.—Tube City Min., etc., Co. v. Otterson, 146 P. 203, 16 Ariz. 305, L.R.A.1916E 303.

Probate matters

Ariz.—Garver v. Thoman, 135 P. 724, 15 Ariz. 38.

71. Effect of act transferring jurisdiction

Ariz.—Sanford v. Ainsa, 114 P. 560, 13 Ariz. 287.

72. Ark.—Benton v. Thompson, 58 S.

W.2d 924, 187 Ark. 208.—Danielson v. Skidmore, 189 S.W. 57, 125 Ark. 572.—Webb v. Hanger, 1 Ark. 121.

15 C.J. p 985 note 32.

Amount in controversy

(1) In general.—McCuen v. Grand Lodge, I. O. O. F., 240 S.W. 19, 152 Ark. 613—15 C.J. p 985 note 32 [a].

(2) Action involving existence of lien.—Naylor v. McNair, 122 S.W. 662, 92 Ark. 345.

Abatement of liquor nuisance

Ark.—Adams v. State, 240 S.W. 5, 153 Ark. 202.

73. Ark.—Adams v. State, supra.—Grassy Slough Drain. Dist. v. National Box Co., 163 S.W. 512, 111 Ark. 144.

74. Ark.—Danielson v. Skidmore, 189 S.W. 57, 125 Ark. 572.

15 C.J. p 985 note 36.

75. Enforcing judgment by sale of land

Ark.—Waldo v. Thweatt, 40 S.W. 782, 64 Ark. 126.

as to the review of their proceedings.⁷⁶

County courts. There have been decisions relating to the county courts,⁷⁷ including decisions as to their jurisdiction and powers,⁷⁸ and as to the review of their proceedings.⁷⁹

Municipal courts. There have been decisions relating to the municipal courts,⁸⁰ including decisions

as to their jurisdiction,⁸¹ procedure,⁸² and as to the review of their proceedings.⁸³

§ 253. California

The superior, municipal, police, and recorder's courts of California are courts of original jurisdiction.

There have been decisions relating to the jurisdiction of the California superior court,⁸⁴ which is

76. Nature and form of remedy

Ark.—Brown v. Kirkland, 246 S.W. 851, 156 Ark. 542.

Requisites and proceedings for transfer

(1) In general.—Brown v. Kirkland, 246 S.W. 851, 156 Ark. 542.

(2) Bond.—Adams v. McCombs, 299 S.W. 746, 175 Ark. 520—Brown v. Kirkland, *supra*.

(3) Notice.—Brown v. Kirkland, *supra*.

77. Ark.—Bottoms v. Borah, 179 S.W. 996, 120 Ark. 631.

15 C.J. p 985 note 34.

78. Ark.—Dixie Culvert Mfg. Co. v. Perry County, 12 S.W.2d 10, 178 Ark. 454.

15 C.J. p 985 note 34 [a]—[j].

Nature and extent

(1) County courts have no common-law jurisdiction, their jurisdiction being limited to that conferred by the constitution and statutes, and they can exercise no powers not expressly conferred on them or necessarily implied from those conferred.—County Board of Election Com'rs v. Waggoner, 78 S.W.2d 821, 190 Ark. 341—Benton v. Thompson, 58 S.W.2d 924, 187 Ark. 208—Jennings v. Ft. Smith Dist., 171 S.W. 920, 115 Ark. 180.

(2) "The county courts . . . are courts of superior jurisdiction in disbursing funds of the county and in allowing claims against such funds."—State, to Use of Pike County, v. Wheeling Corrugating Co., 66 S.W.2d 282, 283, 188 Ark. 289.

(3) County courts have no extra-territorial jurisdiction.—Arnold v. Snellgrove, Ark., 127 S.W.2d 125.

No jurisdiction to grant injunction

Ark.—Wilson v. Mattix, 231 S.W. 197, 149 Ark. 23—Randolph v. Abbott, 105 S.W. 576, 84 Ark. 341.

79. Ark.—Tuggle v. Tribble, 292 S.W. 1020, 173 Ark. 392.

To what court

The circuit courts exercise appellate jurisdiction over county courts.—Ex parte Dame, 259 S.W. 754, 162 Ark. 382—Horn v. Baker, 215 S.W. 600, 140 Ark. 168—15 C.J. p 1028 note 8.

Right of review

Ark.—Carter v. Randolph County, 225 S.W. 297, 146 Ark. 221—Spivey v. Taylor, 222 S.W. 57, 144 Ark. 301.

Requisites and proceedings for transfer of cause

(1) Affidavit of appeal.—Washington County v. Broyles, 17 S.W.2d 872, 179 Ark. 733—Kittrell v. Road Improvement Dist. No. 16, 244 S.W. 469, 155 Ark. 437.

(2) Time.—Carter v. Randolph County, 225 S.W. 297, 146 Ark. 221.

(3) Order.—Tuggle v. Tribble, 292 S.W. 1020, 173 Ark. 392.

Trial de novo

Ark.—Prairie County v. Harris, 295 S.W. 725, 173 Ark. 1182—Barker v. Wist, 260 S.W. 408, 163 Ark. 511.

Determination and disposition of cause

Ark.—Williamson v. Killough, 46 S.W.2d 24, 185 Ark. 134—Washington Fire Ins. Co. v. Hogan, 213 S.W. 7, 139 Ark. 180, 5 A.L.R. 1585.

80. Ark.—Schneider v. Fairmon, 194 S.W. 251, 128 Ark. 425.

81. Ark.—Pruitt v. International Order of Twelve, Knights and Daughters of Tabor, 250 S.W. 331, 158 Ark. 437.

Jurisdictional amount

Ark.—Schneider v. Fairmon, 194 S.W. 251, 128 Ark. 425.

82. Oral pleadings permissible

Ark.—Poullas v. Kumpures, 70 S.W.2d 47, 189 Ark. 44—Upson v. Robison, 17 S.W.2d 305, 179 Ark. 600.

Setting aside judgment

Ark.—Browne-Hinton Wholesale Grocery Co. v. Grubbs, 291 S.W. 65, 172 Ark. 996—Carroll v. Texport Oil Co., 228 S.W. 390, 148 Ark. 18.

83. Ark.—Arkansas Brick & Tile Co. v. Crabtree, 5 S.W.2d 939, 177 Ark. 195.

Requisites and proceedings for transfer of cause

(1) Time.—American Workmen Ins. Co. v. Ervin, 110 S.W.2d 487, 194 Ark. 1149—Nowlin v. Merchants Nat. Bank of Fort Smith, 92 S.W.2d 390, 192 Ark. 529.

(2) Appeal affidavit.—Arkansas Brick & Tile Co. v. Crabtree, 5 S.W.2d 939, 177 Ark. 195—Arkansas Brick & Tile Co. v. Crabtree, 290 S.W. 361, 172 Ark. 752.

Record, or transcript

Ark.—Nowlin v. Merchants Nat. Bank of Fort Smith, 92 S.W.2d 390, 192 Ark. 529—Century Life Ins. Co. v.

Brooks, 47 S.W.2d 794, 185 Ark. 497.

Pleading set-off or counterclaim in circuit court

Ark.—Poullas v. Kumpures, 70 S.W.2d 47, 189 Ark. 44—Upson v. Robison, 17 S.W.2d 305, 179 Ark. 600.

Determination and disposition of cause

Ark.—Arkansas Brick & Tile Co. v. Crabtree, 290 S.W. 361, 172 Ark. 752.

Liabilities on appeal bond

Ark.—Judd v. Wilson, 32 S.W.2d 614, 182 Ark. 729.

84. Cal.—Henderson v. Oroville-Wyandotte Irr. Dist., 277 P. 487, followed in Rutherford v. Oroville Wyandotte Irr. Dist., 277 P. 489, 207 Cal. 786—Raisch v. Sausalito Land, etc., Co., 63 P. 346, 131 Cal. 215—Johnson v. Reichart, 18 P. 858, 77 Cal. 34—Lucas v. Lucas Ranching Co., 64 P.2d 160, 18 Cal. App.2d 453—Architectural Tile Co. v. Superior Court in and for Los Angeles County, 291 P. 586, 108 Cal.App. 369—Yolo Water & Power Co. v. Superior Court in and for Lake County, 185 P. 195, 43 Cal. App. 332.

15 C.J. p 985 note 42.

Court of general jurisdiction

The superior court is a court of general jurisdiction.—Cheney v. Trauzettel, 69 P.2d 832, 9 Cal.2d 158—Hopkins v. Anderson, 21 P.2d 560, 218 Cal. 62—In re Grazzini's Estate, 87 P.2d 713, 31 Cal.App.2d 168.

Actions of equitable nature generally

Cal.—Peterson v. Donelley, 91 P.2d 123, 33 Cal.App.2d 133—Grotheer v. Meyer Rosenberg, Inc., 53 P.2d 996, 11 Cal.App.2d 268—Richardson v. Superior Court in and for Los Angeles County, 32 P.2d 405, 138 Cal. App. 389—Gee Chong Pong v. Harris, 175 P. 806, 38 Cal.App. 214.

15 C.J. p 985 note 42 [f].

Action based on subrogation

Cal.—Offer v. Superior Court of City and County of San Francisco, 228 P. 11, 194 Cal. 114—Massachusetts Bonding & Ins. Co. v. San Francisco-Oakland Terminal Rys., 178 P. 974, 39 Cal.App. 388.

Action involving rescission

Cal.—Nelson v. Canavan, 53 P.2d 201, 11 Cal.App.2d 156—Freligh v. McGrew, 12 P.2d 965, 124 Cal.App. 405.

a court of record,⁸⁵ and its predecessors, the county⁸⁶ and district⁸⁷ courts.

Municipal courts. There have been decisions re-

lating to the municipal courts,⁸⁸ including decisions as to their jurisdiction⁸⁹ and procedure,⁹⁰ and as to the review of their proceedings.⁹¹

Action to compel tax refund

Cal.—Guardia v. Johnson, 25 P.2d 856, 134 Cal.App. 574.

Cases involving legality of tax, impost, or toll

Cal.—City of Madera v. Black, 184 P. 397, 181 Cal. 306.

Cases involving title to, or possession of, realty

(1) In general.—Morrissey v. Morrissey, 218 P. 396, 191 Cal. 782.

(2) Incidental involution.—Morrissey v. Morrissey, supra.

Foreclosure of liens

(1) On land.—Holbrook v. Phelan, 6 P.2d 356, 121 Cal.App.Supp. 781.

(2) On personal property.—Hopkins v. Anderson, 21 P.2d 560, 218 Cal. 62—Gee Chong Pong v. Harris, 175 P. 806, 38 Cal.App. 214.

(3) Statute changing jurisdiction of municipal court did not deprive superior court of jurisdiction to continue action to foreclose mechanic's lien commenced before statute became effective.—Wheaton v. Superior Court in and for Los Angeles County, 292 P. 499, 108 Cal.App. 702.

Probate matters

Cal.—McCaughna v. Bilhorn, 52 P.2d 1025, 10 Cal.App.2d 674.
15 C.J. p 985 note 42 [c].

Amount involved as affecting jurisdiction

Cal.—Consolidated Adjustment Co. of California v. Superior Court of Sonoma County, 207 P. 552, 189 Cal. 92—Rapaport v. Forer, 66 P. 2d 1242, 20 Cal.App.2d 271—Clark v. Bauer, 26 P.2d 729, 135 Cal. App. 65—Ryker v. Lindenberg, 20 P.2d 763—Stevens v. Superior Court in and for Los Angeles County, 293 P. 620, 109 Cal.App. 522—Stephens v. Weyl-Zuckerman & Co., 167 P. 171, 34 Cal.App. 210.
15 C.J. p 985 note 42 [a].

85. Cal.—Cheney v. Trauzettel, 69 P.2d 832, 9 Cal.2d 158.

86. Cal.—People v. Kern County, 45 Cal. 679—Brock v. Bruce, 5 Cal. 279.
15 C.J. p 985 note 39.

87. Cal.—Schuepler v. Evans, 4 Cal. 212.

88. Creation and effect thereof

Cal.—Robertson v. Langford, 273 P. 150, 95 Cal.App. 414.

Inherent powers

(1) In general.—Hart Bros. Co. v. Los Angeles County, 32 P.2d 221, 31 Cal.App.2d 766.

(2) Control of process.—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 219 Cal. 737.

89. Cal.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745—Kampton v. Appellate Division of Superior Court in and for Los Angeles County, 39 P.2d 846, 3 Cal. App.2d 374—Southwestern Portland Cement Co. v. Cochrane, 300 P. 445, 114 Cal.App.Supp. 778—Burge v. Municipal Court of City of Los Angeles, 258 P. 164, 84 Cal.App. 425.

Constitutionality of statute conferring jurisdiction

Cal.—Burge v. Municipal Court of City of Los Angeles, 258 P. 164, 84 Cal.App. 425.

Amount in controversy

(1) In general.—Glass v. Bank of America Nat. Trust & Savings Ass'n, 62 P.2d 764, 17 Cal.App.2d 645—Southwestern Portland Cement Co. v. Cochrane, 300 P. 445, 114 Cal.App. Supp. 778—Cheatham v. Municipal Court in and for City of Los Angeles, 296 P. 305, 112 Cal.App. 114—Hooper v. Miley Oil Co., 288 P. 26, 109 Cal. App.Supp. 767.

(2) Actions to foreclose liens.—Hopkins v. Anderson, 21 P.2d 560, 218 Cal. 62.

(3) Small claims division.—Hughes v. Municipal Court of City of Los Angeles, 252 P. 575, 200 Cal. 215.

Equitable jurisdiction and relief

(1) Equitable causes of action.—Glass v. Bank of America Nat. Trust & Savings Ass'n, 62 P.2d 764, 17 Cal.App.2d 645—Cook v. Winklesfeck, 59 P.2d 463, 16 Cal.App.2d Supp. 759—Fairbairn v. Eaton, 43 P.2d 1113, 6 Cal.App.2d 264—Jensen v. Harry H. Culver & Co., 15 P.2d 907, 127 Cal. App.Supp. 783—Freiligh v. McGrew, 12 P.2d 965, 124 Cal.App. 405—Live Oak Cemetery Ass'n v. Adamson, 288 P. 29, 106 Cal.App.Supp. 783—Freiligh v. McGrew, 272 P. 791, 95 Cal. App. 251.

(2) Equitable defenses.—Gardenswartz v. Equitable Life Assur. Soc. of U. S., 68 P.2d 322, 23 Cal.App.2d Supp. 745—Jacobson v. Superior Court in and for Los Angeles County, 53 P.2d 756, 5 Cal.2d 170.

Foreclosure of liens

(1) On land.—Holbrook v. Phelan, 6 P.2d 356, 121 Cal.App.Supp. 781.

(2) On personal property.—Hopkins v. Anderson, 21 P.2d 560, 218 Cal. 62.

(3) "Contractors" and "subcontractors" liens.—Gallagher v. Campononico, 5 P.2d 486, 121 Cal.App. Supp. 765.

Particular actions

(1) Action involving title to real-

ty.—Hooper v. Miley Oil Co., 288 P. 26, 109 Cal.App.Supp. 767.

(2) Conversion.—Bank of America Nat. Trust & Savings Ass'n v. Municipal Court of City of Los Angeles, 86 P.2d 144, 30 Cal.App.2d 333.

(3) For recovery of money.—Bank of America Nat. Trust & Savings Ass'n v. Municipal Court of City of Los Angeles, supra—Glass v. Bank of America Nat. Trust & Savings Ass'n, 62 P.2d 764, 17 Cal.App.2d 645—Fairbairn v. Eaton, 43 P.2d 1113, 6 Cal.App.2d 264—Jensen v. Harry H. Culver & Co., 15 P.2d 907, 127 Cal.App.Supp. 783—Taback v. Greenberg, 292 P. 279, 108 Cal.App. 759.

90. Cal.—Hughes v. Municipal Court of City of Los Angeles, 252 P. 575, 200 Cal. 215.

Venue

Cal.—Southwestern Portland Cement Co. v. Cochrane, 300 P. 445, 114 Cal.App.Supp. 778.

Effect of appearance

Cal.—Southwestern Portland Cement Co. v. Cochrane, 300 P. 445, 114 Cal.App.Supp. 778.

Vacation of judgment

Cal.—F. E. Young Co. v. Fernstrom, 79 P.2d 1117, 31 Cal.App.2d 763.

Small claims

Cal.—Hughes v. Municipal Court of City of Los Angeles, 252 P. 575, 200 Cal. 215.

91. U.S.—In re Wiegand, D.C. Cal., 27 F.Supp. 725.

Cal.—Moye v. National Surety Co., 280 P. 982, 208 Cal. 279—Sweeney v. Metropolitan Life Ins. Co., 92 P. 2d 1043, 30 Cal.App.2d Supp. 767.

Nature and form of remedy

(1) In general.—Kempton v. Appellate Division of Superior Court in and for Los Angeles County, 39 P.2d 846, 3 Cal.App.2d 374.

(2) Certiorari.—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 219 Cal. 737—Kempton v. Appellate Division of Superior Court in and for Los Angeles County, supra.

Decisions reviewable

(1) Order granting new trial in cases triable by jury as of right.—Treiman v. Kennon, 30 P.2d 636, 139 Cal.App.Supp. 796.

(2) Order granting new trial in cases not triable by jury as of right.—Misrach v. Liederman, 58 P.2d 746, 14 Cal.App.2d Supp. 757.

(3) Other cases.—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 219 Cal. 737.

Police and recorder's courts. Police and recorder's courts are both inferior courts and the jurisdiction of one is frequently, if not universally, similar to, if not identical with, that of the other.⁹² A police court cannot be created in a city having a municipal court.⁹³ There have been decisions as to the jurisdiction⁹⁴ and procedure⁹⁵ of recorder's courts, and as to the review of proceedings of the police courts⁹⁶ and the recorder's courts.⁹⁷

§ 254. Colorado

The district, county, and police courts of Colorado are courts of original jurisdiction.

Requisites and proceedings for transfer of cause

Cal.—Kettelle v. Superior Court in and for Los Angeles County, 279 P. 1018, 100 Cal.App. 349.

Supersedeas or stay of proceedings

Cal.—Mascot Pictures Corporation v. Municipal Court of City of Los Angeles, 40 P.2d 272, 3 Cal.App.2d 559.

Return, statement, record, or transcript and assignment of errors

(1) In general.—Smith v. Hume, 74 P.2d 566, 29 Cal.App.2d Supp. 747—Morgan v. Neff, 31 P.2d 1103, 140 Cal.App. Supp. 757—Masuran v. Superior Court in and for Los Angeles County, 253 P. 951, 81 Cal.App. 351.

(2) Power of superior court to order transfer of papers.—Morgan v. Neff, supra—Edmunds v. Hysong, 294 P. 1078, 110 Cal.App. 746.

Scope of review

Cal.—Erickson v. Municipal Court of City and County of San Francisco, 29 P.2d 192, 219 Cal. 737—Smith v. Hume, 74 P.2d 566, 29 Cal.App.2d Supp. 747.

Determination and disposition of cause

Cal.—Cook v. Winklefleck, 59 P.2d 463, 16 Cal.App.2d Supp. 759—Doran v. Sherman, 56 P.2d 973, 13 Cal. App.2d 226—Goble v. Appellate Department of Superior Court of Los Angeles County, 20 P.2d 345, 130 Cal.App. 737.

Liabilities on bonds

Cal.—Price v. Maryland Casualty Co., App., 40 P.2d 593, 4 Cal.App.2d 188.

92. Cal.—City of Colton v. Superior Court in and for San Bernardino County, 257 P. 909, 84 Cal.App. 303.

93. Cal.—Robertson v. Langford, 273 P. 150, 95 Cal.App. 414.

94. Case involving legality of tax, impost, or toll

Cal.—City of Madera v. Black, 184 P. 397, 181 Cal. 306—Santa Barbara v. Stearns, 51 Cal. 499.

95. Transfer of cause to superior court

Cal.—City of Madera v. Black, 184 P. 397, 181 Cal. 306.

96. Decisions reviewable

Cal.—Moyer v. Superior Court in and for Fresno County, 84 P.2d 240, 29 Cal.App.2d 330.

97. Sufficiency of notice of appeal

Cal.—City of Colton v. Superior Court in and for San Bernardino County, 257 P. 909, 84 Cal.App. 303.

98. Colo.—Laizure v. Baker, 11 P. 2d 560, 91 Colo. 48.

99. Colo.—Kerr v. Burns, 93 P. 1120, 42 Colo. 285—People v. Second Judicial Dist. Ct., 86 P. 87, 92 P. 958, 37 Colo. 443, 13 L.R.A., N.S., 768. 15 C.J. p 986 note 44.

General jurisdiction

Colo.—Laizure v. Baker, 11 P.2d 560, 91 Colo. 48.

1. Time for motion to strike pleading

Colo.—Florence Oil, etc., Co. v. Oil Well Supply Co., 87 P. 1077, 38 Colo. 124.

2. Colo.—Laizure v. Baker, 11 P.2d 560, 91 Colo. 48.

3. Colo.—Laizure v. Baker, supra.

4. Colo.—Dixon v. People, 127 P. 930, 53 Colo. 527—Terry v. Wright, 47 P. 905, 9 Colo.App. 11.

Court of record

Colo.—United Securities Corporation v. Pantex Pressing Mach., 53 P.2d 653, 98 Colo. 79.

5. Colo.—Mann v. People, 66 P. 452, 16 Colo.App. 475.

15 C.J. p 986 note 43 [a], [b].

General jurisdiction

(1) County court is court of general jurisdiction within its constitutional limitations.—In re Schmidt's Will, 273 P. 21, 85 Colo. 28.

(2) "For some purposes, county courts are superior courts of general jurisdiction."—Laizure v. Baker, 11 P.2d 560, 91 Colo. 48.

Amount in controversy

(1) In general.—Reichelt v. Town of Julesburg, 8 P.2d 708, 90 Colo. 258—15 C.J. p 986 note 43 [c].

(2) Divorce actions.—Laizure v. Baker, 11 P.2d 560, 91 Colo. 48.

Equity jurisdiction

A statute providing that the coun-

ty court may give the administratrix permission to bring a suit, the object of which is to quiet title to real property, to remove a cloud therefrom, or to procure any legal or equitable relief to make the title marketable, is in aid of the jurisdiction of the county court, and not a surrender of the same to the district court, and does not vest in the district court any part of the probate jurisdiction of the county court.—Whitlock v. Alliance Coal Co., 214 P. 546, 73 Colo. 205.

County courts. Although for some purposes the county courts are superior courts,² they are inferior courts with relation to the district courts in so far as the latter have jurisdiction of appeals from the county courts.³ There have been other decisions relating to the county courts,⁴ including decisions as to their jurisdiction⁵ and procedure,⁶ and as to the review of their proceedings.⁷

Actions involving title to lands
Colo.—Reichelt v. Town of Julesburg, 8 P.2d 708, 90 Colo. 258.

Mandamus to compel payment of judgment joined with action at law.—Board of Com'rs of El Paso County v. City of Colorado Springs, 180 P. 301, 66 Colo. 111.

Proceeding to sever farm lands from town

Colo.—Reichelt v. Town of Julesburg, 8 P.2d 708, 90 Colo. 258.

6. Applicability of district court procedure

Colo.—Glavino v. People, 224 P. 225, 75 Colo. 94.

Signing of judgment by judge unnecessary

Colo.—Hollingsworth v. Ring, 141 P. 139, 26 Colo.App. 121.

7. Court having power to review

Under a statute granting appeals to, and writs of error from, the supreme court to the party against whom a decree for divorce has been granted, the supreme court alone has jurisdiction to review a judgment in divorce proceedings, and the district court has no jurisdiction to review on appeal a judgment of the county court in such a proceeding.—Carlton v. Carlton, 96 P. 995, 44 Colo. 27.

Jurisdiction

(1) On appeal to the district court from the county court, the district court has jurisdiction to pronounce any judgment which the county court might have entered.—Martin v. Payne, 114 P. 486, 69 Colo. 171.

Police courts. The review of police court proceedings has been the subject of judicial decision.⁸

§ 255. Connecticut

The superior, city, borough, town, and common pleas courts of Connecticut are courts of original jurisdiction.

There have been decisions relating to the superior court,⁹ which is a court of general jurisdiction,¹⁰ and it is considered as one court for the whole state.¹¹

(2) On the other hand, no judgment can be entered by the district court which could not have been entered by the county court.—*Estes v. Denver & R. G. R. Co.*, 113 P. 1005, 49 Colo. 378.

Nature and form of remedy

(1) In general.—Board of Com'rs of Delta County v. Poundstone, 220 P. 234, 74 Colo. 191.—*Boyd v. Boyd*, 164 P. 703, 63 Colo. 157.

(2) In divorce proceedings.—*Lazure v. Baker*, 11 P.2d 560, 91 Colo. 48.—*Boyd v. Boyd*, supra.

Decisions reviewable

Colo.—Board of Com'rs of Delta County v. Poundstone, 220 P. 234, 74 Colo. 191.

Requisites and proceedings for transfer of cause

(1) In general.—*Barnard v. Moore*, 209 P. 800, 72 Colo. 146.

(2) Time.—*Zimmerman v. Combs*, 14 P.2d 693, 91 Colo. 313.—*Katz v. Cohen*, 271 P. 178, 84 Colo. 423.

(3) Extension of time.—*Katz v. Cohen*, supra.

(4) Notice.—*Katz v. Cohen*, supra.

(5) Appeal bond.—*Brown v. Ohman*, 27 P.2d 588, 93 Colo. 561.—*Zimmerman v. Combs*, supra.

Return, statement, record or transcript

Colo.—*Barnard v. Moore*, 209 P. 800, 72 Colo. 146.

Scope and extent of review

Colo.—*Munson v. Luxford*, 34 P.2d 91, 95 Colo. 12.

Findings presumed to be supported by evidence

Colo.—*Read v. Micek*, 94 P.2d 452.

Trial de novo

(1) In general.—*Western Wood Products v. Tittle*, 246 P. 791, 79 Colo. 473.

(2) Waiver of right to trial of collateral issues.—*Western Wood Products v. Tittle*, supra.

(3) Proceeding to trial as not waiving motion to dismiss.—*Johnson v. Staats' Estate*, 46 P.2d 900, 97 Colo. 31.

8. Requisites and proceedings for transfer of cause

Colo.—*City of Idaho Springs v. Coleman*, 30 P.2d 861, 94 Colo. 418.

9. Conn.—*Farber v. Conti*, 80 A. 581, 84 Conn. 458.—*Lockwood v. Knapp*, 4 Conn. 257.

10. Conn.—*Antman v. Connecticut Light & Power Co.*, 167 A. 715, 117 Conn. 230.—*Perell v. Warden of State's Prison*, 155 A. 221, 113 Conn. 339.—*Artman v. Artman*, 149 A. 246, 111 Conn. 124.

Action qui tam for burglary

Conn.—*Parks v. Morgan*, Kirby 159.

11. Conn.—*Perell v. Warden of State's Prison*, 155 A. 221, 113 Conn. 339.—*Mower v. State Department of Health*, 142 A. 473, 108 Conn. 74.—*Allis v. Hall*, 56 A. 637, 76 Conn. 322.

12. Conn.—*Slade v. Zeitfuss*, 59 A. 406, 77 Conn. 457.—*Sherwood v. Stevenson*, 25 Conn. 431.

Danbury city court

(1) Dual jurisdiction.—*Burr v. Ellis*, 101 A. 17, 91 Conn. 657.

(2) Amount in controversy.—*Burr v. Ellis*, supra.

Waterbury city court

Actions to obtain equitable relief.—*Ludington v. Merrill*, 71 A. 504, 81 Conn. 400.

13. Service of process

(1) On defendant.—*First Bank of Cordova, Alaska v. Lucchini*, 155 A. 88, 113 Conn. 770.

(2) On garnishee.—*First Bank of Cordova, Alaska v. Lucchini*, supra.

Stenographic record of testimony

Conn.—*Reader v. Grossman*, 119 A. 52, 98 Conn. 283.

Costs in Danbury city court

Conn.—*Burr v. Ellis*, 101 A. 17, 91 Conn. 657.

14. Conn.—*Aston Motor Car Co. v. Mannion*, 103 A. 655, 92 Conn. 568.

Court having jurisdiction

(1) The superior court was given jurisdiction of appeals from city courts in civil matters.—*Norwalk's Appeal*, 91 A. 442, 88 Conn. 471—15 C.J. p 1035 note 29.

City courts. There have been decisions as to the jurisdiction¹² and procedure¹³ of city courts, and as to the review of their proceedings.¹⁴

Common pleas courts are, at least for some purposes, inferior to the superior courts.¹⁵ The court of common pleas of New Haven County was held without jurisdiction of any case in which both parties resided in towns within the jurisdiction of the Waterbury district court.¹⁶

Other courts. There have been decisions as to

(2) The repeal of the statute giving such jurisdiction took from it appellate jurisdiction of a pending action in which no appeal had been taken.—*Neilson v. Perkins*, 85 A. 686, 86 Conn. 425.

(3) A conversator of an aged man, against whom a judgment was rendered in the city court of New Haven, had no right of appeal to the court of common pleas for New Haven County.—*Hamilton v. Pickett*, 104 A. 162, 93 Conn. 34.

Effect of appeal by codefendant

Conn.—*Donnarumma v. Korkin*, 116 A. 178, 97 Conn. 223.

Effect of failure to appeal

Conn.—*Donnarumma v. Korkin*, supra.

Requisites and proceedings for transfer of cause

Conn.—*New Haven Loan Co. v. Afinito*, 188 A. 75, 122 Conn. 151.—*Kovner v. Dubin*, 132 A. 473, 104 Conn. 112.

Record or transcript

Conn.—*Kovner v. Dubin*, supra.

Allowance of amendment of complaint by district court

Conn.—*Hychka v. Beccia*, 132 A. 405, 104 Conn. 297.

Hartford city court

(1) Right of review.—*Farber v. Conti*, 80 A. 581, 84 Conn. 458.

(2) Requisites and proceedings for transfer of cause.—*Farber v. Conti*, supra.

Norwalk city court

(1) Nature and form of remedy.—*Quinlan v. City Nat. Bank of South Norwalk*, 135 A. 435, 105 Conn. 424.

(2) Scope and extent of review.—*Quinlan v. City Nat. Bank of South Norwalk*, supra.

(3) Determination and disposition of cause.—*Quinlan v. City Nat. Bank of South Norwalk*, supra.

15. Duty to obey mandamus issued by superior court

Conn.—*Ansonia v. Studley*, 34 A. 1030, 67 Conn. 170.

16. Conn.—*Hazzard v. Gallucci*, 93 A. 230, 89 Conn. 196.

the review of proceedings of borough¹⁷ and town¹⁸ courts.

§ 256. Delaware

The superior and common pleas courts of Delaware are courts of original jurisdiction.

The jurisdiction of the superior courts¹⁹ and courts of common pleas²⁰ have been the subject of judicial inquiry, and there have been decisions as to the review of proceedings of common pleas courts.²¹

§ 257. Florida

In Florida the circuit courts, the county courts, the county judge's courts, the Escambia County court of

record, and the civil courts of record are courts of original jurisdiction.

The circuit courts of Florida are superior courts²² of record,²³ and of general jurisdiction,²⁴ both at law and in equity;²⁵ and there have been decisions relating to the circuit courts,²⁶ including decisions as to their jurisdiction of particular matters.²⁷

County and county judges' courts. Neither the county courts²⁸ nor the county judges' courts²⁹ are courts of general jurisdiction proceeding according to the course of the common law. They have only such jurisdiction as is conferred upon them by the constitution or laws of the state.³⁰ The organization of a county court operates to suspend the jurisdiction of the county judge's court in ordinary civil actions at law.³¹ There have also been other decisions relating to the county courts,³² including de-

17. Conn.—State v. Hall, 84 A. 923, 86 Conn. 191.

Nature and form of remedy

Conn.—Michelin v. MacDonald, 159 A. 336, 114 Conn. 582.

Motion to erase appeal for want of jurisdiction

Conn.—Michelin v. MacDonald, supra.

18. Stonington town court

Nature and form of remedy and decisions reviewable.—Ostman v. Lee, 101 A. 23, 91 Conn. 731.

19. Del.—State v. Knight, 6 Houst. 146—State v. Wilmington, 3 Harr. 294.

Invested with all powers of court of king's bench, in general administration of justice.—State v. Wilmington Bridge Co., 3 Harr., Del., 313.

Jurisdiction to issue writs of certiorari

Del.—Rash v. Allen, 76 A. 370, 1 Boyce 444.

20. Local court

Court of common pleas for Kent County as originally created was "local court," as respects territorial jurisdiction of such court.—Discount & Credit Corporation v. Ehrlich, 187 A. 591, 7 W.W.Harr., Del., 561.

21. Nature and form of remedy

Del.—Schagrin v. Bacon, 115 A. 364, 1 W.W.Harr. 501.

Right of review

Del.—Schagrin v. Bacon, supra.

Abandoned defenses not reviewable

Del.—Wilmington Dry Goods Co. v. National Automatic Mach. Co., Superior, 190 A. 735.

Amendment and trial de novo

(1) Pleading statute of limitations.—Red Men's Fraternal Acc. Ass'n of America v. Merritt, 117 A. 284, 2 W.W.Harr., Del., 1.

(2) Right to trial de novo.—Wiglesworth v. Brodsky, 110 A. 46, 7 Boyce, Del., 586—Red Men's Fraternal Acc. Ass'n of America v. Merritt, supra—Schagrin v. Bacon, 115 A. 364, 1 W.W.Harr., Del., 501.

(3) Practice and procedure in new trial.—Schagrin v. Bacon, supra.

22. Fla.—Curtis v. Albritton, 132 So. 677, 101 Fla. 853—Chapman v. Reddick, 25 So. 673, 41 Fla. 120.

23. Fla.—Blocker v. State, 105 So. 316, 90 Fla. 136.

24. Fla.—Bemis v. Loftin, 173 So. 683, 127 Fla. 515—Lamb v. State, 107 So. 535, 91 Fla. 396, granting stay of mandate 107 So. 530, 90 Fla. 844—Blocker v. State, 105 So. 316, 90 Fla. 136.

"The circuit courts . . . are superior courts of general jurisdiction, and nothing is intended to be out of the jurisdiction of such courts, except that which specially appears to be."—Curtis v. Albritton, 132 So. 677, 678, 101 Fla. 853.

Jurisdiction similar to king's bench in England

Fla.—Lamb v. State, 107 So. 535, 91 Fla. 396, granting stay of mandate 107 So. 530, 90 Fla. 844—Taylor v. State, 38 So. 380, 49 Fla. 69—Ex parte Henderson, 6 Fla. 279.

Limitation of jurisdiction

There is no provision in the Florida constitution limiting the jurisdiction of its courts to "cases" and "controversies."—Sheldon v. Powell, 128 So. 253, 99 Fla. 782.

25. U.S.—Parker Bros. v. Fagan, C. C.A.Fla., 68 F.2d 616, certiorari denied 54 S.Ct. 719, 292 U.S. 638, 78 L.Ed. 1490.

General equity jurisdiction

Fla.—State ex rel. Harrington v. City of Pompano, 183 So. 610—

Catlett v. Chestnut, 146 So. 241, 107 Fla. 498, 91 A.L.R. 212.

Nature of equity jurisdiction

Fla.—State v. Circuit Court for Eleventh Judicial Circuit, 135 So. 866, 102 Fla. 112.

26. Single judge constitutes circuit court

Fla.—Meyer v. Nator Holding Co., 136 So. 686, 688, 102 Fla. 689.

27. Jurisdictional amount

(1) In general.—Bailey v. Clendenon, 172 So. 94, 127 Fla. 10—State ex rel. City of West Palm Beach v. Chillingworth, 129 So. 816, 100 Fla. 489—Hutchinson v. Courtney, 93 So. 582, 86 Fla. 556—15 C.J. p 986 note 50 [a].

(2) In proceeding for taxation of costs.—State v. Reeves, 32 So. 814, 44 Fla. 179.

Actions involving realty

(1) Title or possession.—South Florida Amusement & Development Co. v. Blanton, 116 So. 869, 95 Fla. 885—Stark v. Billings, 15 Fla. 318.

(2) Boundaries.—South Florida Amusement & Development Co. v. Blanton, supra—State v. Phillips, 59 So. 241, 64 Fla. 105.

Summons ad respondendum and attachment

Fla.—Chapman v. Reddick, 25 So. 673, 41 Fla. 120.

28. Fla.—Epping v. Robinson, 21 Fla. 36.

29. Fla.—State v. Petteway, 179 So. 666, 131 Fla. 516, subsequent opinion 185 So. 619.

30. Fla.—State ex rel. West's Drug Stores v. Cornelius, 149 So. 332, 110 Fla. 299.

31. Fla.—Garcia v. Pardo, 57 So. 974, 63 Fla. 429.

32. Fla.—Seaboard Air Line R. Co. v. Ray, 42 So. 714, 52 Fla. 634. 15 C.J. p 986 note 51.

cisions as to their jurisdiction³³ and procedure,³⁴ and as to the review of their proceedings.³⁵ There have also been other decisions as to the jurisdiction³⁶ and procedure³⁷ of county judge's courts, and as to the review of their proceedings.³⁸

The Escambia County court of record has a constitutional existence and possesses all the powers

which it had as a criminal court of record as well as those subsequently conferred by the constitution.³⁹

Civil courts of record. There have been decisions relating to the civil courts of record,⁴⁰ including decisions as to their jurisdiction⁴¹ and as to the review of their proceedings.⁴² The Duval County

33. Fla.—Phillips v. State, 77 So. 665, 75 Fla. 93.

Amount in controversy

Fla.—Goldstein v. Miami Wrecking & Salvage Co., 137 So. 283, 103 Fla. 149.

15 C.J. p 986, note 51 [c].

Actions involving title to realty

(1) In general.—State ex rel. Rich v. Ward, Fla., 185 So. 846—Ex parte Bienville Inv. Co., 136 So. 328, 102 Fla. 524.

(2) Action for unlawful detention.—State ex rel. Rich v. Ward, supra.—Ex parte Bienville Inv. Co., supra.

(3) Claim of lessee as raising question of title.—State ex rel. Rich v. Ward, supra.—Ex parte Bienville Inv. Co., supra.

Actions involving real estate boundaries

Fla.—State v. Philips, 59 So. 241, 64 Fla. 105.

Declaring forfeiture of lease

Fla.—State ex rel. Rich v. Ward, 185 So. 846.

Equity powers

Fla.—Rader v. Prather, 130 So. 15, 100 Fla. 591.

Granting letters of administration

Fla.—Epping v. Robinson, 21 Fla. 36.

34. Issues in statutory proceeding

Fla.—Rader v. Prather, 130 So. 15, 100 Fla. 591.

35. Purpose of statutory provisions

Fla.—State ex rel. Associated Utilities Corporation v. Chillingworth, 181 So. 346, 132 Fla. 587.

Nature and form of remedy

Fla.—State ex rel. Associated Utilities Corporation v. Chillingworth, supra.

Requisites and proceedings for transfer of cause

(1) In general.—State ex rel. Associated Utilities Corporation v. Chillingworth, supra.

(2) Filing entry of appeal.—State ex rel. Associated Utilities Corporation v. Chillingworth, supra.—In re Switzer's Estate, 156 So. 1, 115 Fla. 780, denying mandate, 150 So. 728, 112 Fla. 525.

Motion to dismiss as constituting general appearance

Fla.—State ex rel. Associated Utilities Corporation v. Chillingworth, 181 So. 346, 132 Fla. 587.

Review of judge's fact findings

Fla.—Newman v. Smith, 82 So. 236, 77 Fla. 633, 667, 683.

Determination and disposition of cause

Fla.—Vanderpool v. Spruell, 139 So. 892, 104 Fla. 347.

36. Jurisdictional amount

Fla.—Hutchinson v. Courtney, 98 So. 582, 86 Fla. 556—Louisville, etc., R. Co. v. Sutton, 44 So. 946, 54 Fla. 247.

Actions involving title or boundaries of land

Fla.—South Florida Amusement & Development Co. v. Blanton, 116 So. 869, 95 Fla. 885.

Chancery matters

Fla.—State ex rel. Broward v. Edmunds, 153 So. 850, 114 Fla. 443—Mott v. First Nat. Bank, 124 So. 36, 98 Fla. 444.

Probate matters

Fla.—State ex rel. Broward v. Edmunds, 153 So. 850, 114 Fla. 443—Mott v. First Nat. Bank, 124 So. 36, 98 Fla. 444.

37. Direction of verdict

Fla.—Jacques v. Wellington Corporation, 183 So. 22, 133 Fla. 819, rehearing granted 183 So. 718, 134 Fla. 211, adhered to 184 So. 766.

38. Circuit court has final appellate jurisdiction of civil cases arising in county judge's court.—Benton v. State, 76 So. 341, 74 Fla. 30, following Yoeman v. State, 134 So. 237, 101 Fla. 551—15 C.J. p 1037 notes 5-9.

Presentation of grounds for review

Fla.—Jacques v. Wellington Corporation, 184 So. 766, adhering to 183 So. 22, 133 Fla. 819, rehearing granted 183 So. 718, 134 Fla. 211.

Requisites and proceedings for transfer of cause

Fla.—Gillis v. Gillis, 156 So. 496, 116 Fla. 461.

Scope and extent of review

Fla.—Jacques v. Wellington Corporation, 184 So. 766, adhering to 183 So. 22, 133 Fla. 819, rehearing granted 183 So. 718, 134 Fla. 211.

Probate matters

(1) The constitution gives circuit courts supervision and appellate jurisdiction of matters arising before county judges pertaining to their probate jurisdiction, or to the estates and interests of minors; and under such provision, notwithstanding

ing a statute provides that any order declaring a judge qualified shall be subject to review only by the supreme court, the order of a county judge denying suggestion of disqualification in a proceeding for revocation of probate of a purported will in the county judge's court, is reviewable only by appeal to the circuit court.—Petition of Kansas Masonic Home, 175 So. 526, 128 Fla. 708.

(2) Order of county judge finding himself qualified in cause seeking revocation of probate of will is matter "pertaining to probate jurisdiction" within constitutional provision giving circuit courts appellate jurisdiction in such matters.—In re Florida Conference Ass'n of Seventh Day Adventists, Fla., 175 So. 715.

(3) Under Probate Act of 1933, where a circuit judge took jurisdiction of a will contest because of the county judge's illness, an appeal from his decision lay to the circuit court, which should consider the appeal on its merits, rather than to the supreme court.—In re Wilkins' Estate, 174 So. 412, 128 Fla. 273.

(4) A different rule obtained prior to the enactment of that statute.—In re Starr's Estate, 170 So. 629, 125 Fla. 536.

39. Fla.—State ex rel. Hamilton v. Mayo, 167 So. 34, 123 Fla. 491.

40. As being courts of law

Fla.—Lafayette Fire Ins. Co. v. Camnitz, 149 So. 653, 111 Fla. 556.

41. Action for money paid for land Fla.—Barrs v. State, 116 So. 28, 95 Fla. 75.

No equity jurisdiction

Fla.—Hodges v. Lamar, 161 So. 81, 119 Fla. 566.

Where title to realty is involved these courts have no jurisdiction.—Barrs v. State, 107 So. 249, 91 Fla. 30.

42. Nature and form of remedy

Fla.—Lafayette Fire Ins. Co. v. Camnitz, 149 So. 653, 111 Fla. 556—State ex rel. Pepper v. Atkinson, 124 So. 458, 98 Fla. 996.

Decisions reviewable

Fla.—State ex rel. Pepper v. Atkinson, supra.

Requisites and proceedings for transfer of cause

(1) Service of scire facias.—Hill v. Barnes, 137 So. 159, 103 Fla. 87.

civil court of record differs in some respects from the other civil courts of record;⁴³ and there have been decisions as to the review of its proceedings.⁴⁴

§ 258. Georgia

The state constitution and statutes of Georgia have established and defined the jurisdiction of several classes of courts, such as the superior, county, police, city, and municipal courts.

In Georgia, there have been decisions relating to the superior courts⁴⁵ which have full and unre-

stricted equitable jurisdiction,⁴⁶ and the jurisdiction of whose judges is coextensive with the limits of the state;⁴⁷ the county courts⁴⁸ which conform to the practice and procedure in the superior courts;⁴⁹ the criminal courts;⁵⁰ and the police courts.⁵¹

City courts. There have been decisions relating to the city courts in Georgia,⁵² including decisions relating to particular city courts which have been established in various municipalities including Alma,⁵³ Americus,⁵⁴ Ashburn,⁵⁵ Athens,⁵⁶ Atlanta,⁵⁷ Augusta,⁵⁸ Bainbridge,⁵⁹ Baxley,⁶⁰ Blackshear,⁶¹

(2) Waiver of alleged requisite.—Hill v. Barns, *supra*—State ex rel. Pepper v. Atkinson, 124 So. 453, 98 Fla. 996.

(3) Time for suing out writ of error.—Sinclair Refining Co. v. Hunter, Fla., 191 So. 38.

What constitutes general appearance by appellee
Fla.—Hill v. Barns, 137 So. 159, 103 Fla. 87.

Proper method to set aside writ of error
Fla.—L. L. Powell & Sons v. Brunsmann, 190 So. 617.

Determination and disposition of cause
Fla.—Lafayette Fire Ins. Co. v. Camnitz, 149 So. 653, 111 Fla. 556.

Statute concerning writs of error held valid
Fla.—Sinclair Refining Co. v. Hunter, 191 So. 38.

43. Summons ad respondendum as running outside county
Fla.—State ex rel. Veal v. Barrs, 140 So. 908, 105 Fla. 27.

44. Nature and form of remedy
Fla.—Lafayette Fire Ins. Co. v. Camnitz, 149 So. 653, 111 Fla. 556.

Determination and disposition of cause
Fla.—Lafayette Fire Ins. Co. v. Camnitz, *supra*.

45. Ga.—Grimmett v. Barnwell, 192 S.E. 191, 184 Ga. 461, 116 A.L.R. 257—Shaw v. National Life Ins. Co., 180 S.E. 721, 180 Ga. 755, answering certified question 181 S.E. 872, 51 Ga.App. 794—Alvaton Mercantile Co. v. Caldwell, 119 S.E. 25, 156 Ga. 317, answers to certified questions conformed to Alvaton Mercantile Co. v. Caldwell, 120 S.E. 448, 31 Ga.App. 195—Savannah v. State, 4 Ga. 26—State v. Justices Richmond County Inferior Ct., Dudl. 37—Ex parte Carnochan, T.U.P.Charlt. 216—Sovereign Camp, W. O. W., v. Ellis, 1 S.E.2d 677, 59 Ga.App. 608—Wrenn v. Bowden, 193 S.E. 456, 56 Ga.App. 713—Drischel v. Drischel, 176 S.

E. 694, 49 Ga.App. 619—General Tire & Rubber Co. v. Brown Tire Co., 168 S.E. 75, 46 Ga.App. 548—Louisville & N. R. Co. v. Lovelace, 106 S.E. 6, 26 Ga.App. 286. 15 C.J. p 986 note 54.

46. Ga.—Sovereign Camp, W. O. W., v. Ellis, 1 S.E.2d 677, 59 Ga.App. 608—Edenfield v. Rountree, 126 S. E. 731, 33 Ga.App. 444. 15 C.J. p 986 note 54 [c].

47. Ga.—Pendergrass v. Duke, 88 S. E. 198, 144 Ga. 839.

48. Ga.—Bell v. Georgia Military College, 124 S.E. 50, 158 Ga. 539, answers to certified questions conformed to 124 S.E. 52, 32 Ga.App. 490—Branch v. Hewin, 115 S.E. 500, 29 Ga.App. 402. 15 C.J. p 986 note 56.

Amount in controversy

Ga.—Bell v. Georgia Military College, 124 S.E. 50, 158 Ga. 539, answers to certified questions conformed to 124 S.E. 52, 32 Ga.App. 490—Branch v. Hewin, 115 S.E. 500, 29 Ga.App. 402.

Recovery of statutory penalty

Ga.—Western Union Tel. Co. v. Brightwell, 21 S.E. 518, 94 Ga. 434—15 C.J. p 982 note 5.

Review of proceedings

(1) An appeal will lie from county court to superior court, at least where amount involved exceeds fifty dollars.—Bradley v. Waller, 164 S.E. 92, 45 Ga.App. 129.

(2) On appeal, the jurisdiction of superior court is identical with that of county court; and if county court, in the first instance, was without jurisdiction to try the cause, superior court would likewise be without jurisdiction.—Tomlin v. Harper, 65 S.E. 1093, 6 Ga.App. 808.

(3) Where a jury trial is had in a county court, no appeal lies to a jury in the superior court.—Davison v. Bush, 68 S.E. 495, 8 Ga.App. 34.

49. Ga.—South Georgia R. Co. v. Ryals, 51 S.E. 428, 123 Ga. 330—Newman v. Scofield, 30 S.E. 427, 102 Ga. 810.

50. Ga.—Mitchell v. State, 54 S.E. 931, 126 Ga. 84.

51. Ga.—Smith v. Atlanta, 63 S.E. 569, 5 Ga.App. 492.

52. Ga.—Cantrell v. Davis, 169 S.E. 38, 176 Ga. 745, answer conformed to 169 S.E. 39, 46 Ga.App. 710. 15 C.J. p 986 note 60.

53. Ga.—Taylor v. Stovall, 118 S.E. 795, 30 Ga.App. 678—McClellan v. Carter, 117 S.E. 118, 30 Ga.App. 150.

54. Ga.—Fuller v. Coker, 101 S.E. 1, 24 Ga.App. 418.

55. Ga.—Akers Bros. v. International Shoe Co., 93 S.E. 517, 20 Ga.App. 702—Apperson v. Mutual Fertilizer Co., 92 S.E. 1029, 20 Ga.App. 209.

56. Ga.—Long v. Cash, 139 S.E. 73, 54 Ga.App. 764—Wise v. Royal Ins. Co., 124 S.E. 556, 32 Ga.App. 719.

57. Ga.—Carder v. Arundel Mortg. Co., 169 S.E. 302, 117 Ga. 74, questions conformed to 170 S.E. 812, 47 Ga.App. 309—McRae v. Boykin, App., 179 S.E. 535—Collins v. Garrett, 177 S.E. 275, 50 Ga.App. 203—Hammack v. Davis, 174 S.E. 725, 49 Ga.App. 192—Brannan, Beckham & Co. v. Ramsaur, 152 S.E. 282, 41 Ga.App. 166—Jenkins v. Whittier Mills Co., 93 S.E. 530, 20 Ga. App. 828—Anderson v. King, 91 S. E. 788, 19 Ga.App. 471. 15 C.J. p 987 note 61.

58. Ga.—Williams v. Augusta, 36 S. E. 607, 111 Ga. 849—Nixon v. L. A. Russell Piano Co., 180 S.E. 743, 51 Ga.App. 399.

59. Ga.—Ehrlich v. Shuptrine, 45 S. E. 279, 117 Ga. 882—Horn v. Mound City Paint, etc., Co., 64 S.E. 666, 6 Ga.App. 133—Bass v. Doughty, 63 S.E. 516, 5 Ga.App. 458.

60. Ga.—Paulk v. State, 58 S.E. 1108, 2 Ga.App. 660.

61. Ga.—Dubberly v. Eason, 101 S. E. 585, 24 Ga.App. 532—Boatright v. Eason, 100 S.E. 764, 24 Ga.App. 364.

Blakely,⁶² Boston,⁶³ Brunswick,⁶⁴ Buford,⁶⁵ Cairo,⁶⁶ Camilla,⁶⁷ Carrollton,⁶⁸ Claxton,⁶⁹ Covington,⁷⁰ Crawfordville,⁷¹ Dawson,⁷² Decatur,⁷³ Dublin,⁷⁴ Eastman,⁷⁵ Fairburn,⁷⁶ Fitzgerald,⁷⁷ Floyd County,⁷⁸ Greensboro,⁷⁹ Griffin,⁸⁰ Hazelhurst,⁸¹ Ir-

win County,⁸² Lyons,⁸³ Macon,⁸⁴ Milledgeville,⁸⁵ Millen,⁸⁶ Miller County,⁸⁷ Monroe,⁸⁸ Moultrie,⁸⁹ Nashville,⁹⁰ Newman,⁹¹ Oglethorpe,⁹² Polk County,⁹³ Pelham,⁹⁴ Quitman,⁹⁵ Reidsville,⁹⁶ Richmond County,⁹⁷ Sandersville,⁹⁸ Savannah,⁹⁹ Soperton,¹

62. Ga.—Park v. Carmichael, 92 S. E. 397, 20 Ga.App. 36—Walton v. William Hester Marble Co., 86 S. E. 279, 17 Ga.App. 75.

63. Ga.—Davis v. Williams, 98 S.E. 338, 148 Ga. 765, answers to certified questions conformed to 99 S. E. 50, 23 Ga.App. 549.

64. Ga.—Johnson v. Hilton, etc., Lumber Co., 29 S.E. 819, 103 Ga. 212—Spears v. Fendig, 99 S.E. 706, 23 Ga.App. 793.

65. Ga.—Bowman v. Davis, 180 S.E. 917, 51 Ga.App. 917.

66. Ga.—Town of Whigham v. Gulf Refining Co., 93 S.E. 238, 20 Ga. App. 427.

67. Ga.—Hughes v. Jefferson Standard Life Ins. Co., 102 S.E. 463, 25 Ga. 72.

68. Ga.—Chero-Cola Bottling Co. v. Southern Express Co., 104 S.E. 233, 150 Ga. 430, affirming Southern Express Co. v. Chero-Cola Bottling Co., 100 S.E. 289, 24 Ga.App. 189—Riggs v. Kinney, 140 S.E. 41, 37 Ga.App. 307.

69. Ga.—J. J. Whitten & Son v. Rogers, 111 S.E. 678, 28 Ga.App. 441.

70. Ga.—Pitts v. Wheeler, 65 S.E. 689, 6 Ga.App. 720.

71. Ga.—Wise v. Planters' Bank, 116 S.E. 654, 30 Ga.App. 50.

72. Ga.—Joe v. State, 70 S.E. 1104, 136 Ga. 158.

73. Ga.—Richardson v. Waits, 198 S.E. 116, 58 Ga.App. 143—Cavan v. A. M. Davis Co., 189 S.E. 684, 55 Ga.App. 200—Burson v. Lunsford, 186 S.E. 213, 53 Ga.App. 411.

Motion to vacate judgment

Ga.—Cavan v. A. M. Davis Co., 189 S.E. 684, 55 Ga.App. 200.

74. Ga.—Daniel v. Citizens' Loan & Guarantee Co., 99 S.E. 226, 23 Ga. App. 684.

75. Ga.—Peacock v. J. I. Case Co., 162 S.E. 306, 44 Ga.App. 499.

76. Ga.—Neill v. State, 136 S.E. 470, 36 Ga.App. 292.

77. Ga.—Fussell v. State, 76 S.E. 597, 11 Ga.App. 843.

78. Ga.—Jones v. State, 116 S.E. 546, 30 Ga.App. 62—Tate v. State, 116 S.E. 541, 30 Ga.App. 35—Grafton v. Nunnally, 87 S.E. 693, 17 Ga.App. 470—Smith v. Knowles, 78 S.E. 264, 12 Ga.App. 715.

79. Ga.—Boswell v. Roberts, 122 S. E. 216, 157 Ga. 585, answer to certified questions conformed to, App., 122 S.E. 651.

80. Ga.—Norwood v. State, 59 S.E. 828, 3 Ga.App. 325.

81. Ga.—Morris v. Swain, 98 S.E. 358, 23 Ga.App. 430.

82. Ga.—Henderson v. Swift Fertilizer Works, 85 S.E. 613, 16 Ga.App. 448.

83. Ga.—Home Ins. Co. v. Willis, 176 S.E. 371, 179 Ga. 509.

84. Ga.—Moore v. American Nat. Bank, 120 S.E. 2, 156 Ga. 724, answers to certified questions conformed to 120 S.E. 704, 31 Ga.App. 315—Rawls v. Bowers, 172 S.E. 687, 48 Ga.App. 324—Harvey v. City Finance Co., 153 S.E. 229, 41 Ga. App. 420—Myrick v. Jones-Stewart Motor Co., 147 S.E. 917, 39 Ga. App. 614—Conyers v. Luther Williams Banking Co., 135 S.E. 515, 36 Ga.App. 52, transferred 133 S.E. 862, 162 Ga. 350—C. H. Bateman Co. v. Macon Nat. Bank, 102 S.E. 548, 25 Ga.App. 42—Georgia Casualty Co. v. Dixie Trust & Security Co., 98 S.E. 414, 23 Ga.App. 447—E. Tris Napier Co. v. Brown, 98 S.E. 120, 23 Ga.App. 212—Jelks v. Wesleyan Female College, 96 S.E. 343, 22 Ga.App. 465.

15 C.J. p 987 note 73.

Garnishment

Ga.—Myrick v. Jones-Stewart Motor Co., 147 S.E. 917, 39 Ga.App. 614—C. H. Bateman Co. v. Macon Nat. Bank, 102 S.E. 548, 25 Ga.App. 42.

New trial

Ga.—Gaines v. Continental Aid Ass'n, 95 S.E. 760, 22 Ga.App. 179.

Opening default

Ga.—Rawls v. Bowers, 172 S.E. 687, 48 Ga.App. 324.

85. Ga.—Bass v. Lawrence, 52 S.E. 296, 124 Ga. 75.

86. Ga.—Great Eastern Casualty Co. v. Haynie, 92 S.E. 939, 147 Ga. 119—Gunn v. J. M. Johnson & Co., 114 S.E. 709, 154 Ga. 568, answers to certified questions conformed to 116 S.E. 921, 29 Ga.App. 610—Daniel v. Nixon & Wright, 93 S. E. 1013, 21 Ga.App. 206.

Foreclosure of lien on personalty

Ga.—Gunn v. J. M. Johnson & Co., 114 S.E. 709, 154 Ga. 568, answers to certified questions conformed to 116 S.E. 921, 29 Ga.App. 610.

Setting aside judgment

Ga.—Great Eastern Casualty Co. v. Haynie, 92 S.E. 939, 147 Ga. 119.

87. Ga.—J. B. Colt Co. v. Miller, 117 S.E. 113, 30 Ga.App. 143.

15 C.J. p 987 note 75.

88. Ga.—Long v. Ivey, 78 S.E. 1055, 12 Ga.App. 147.

15 C.J. p 987 note 76.

89. Ga.—Stephenson v. Warren, 46 S.E. 647, 119 Ga. 504.

Court without jurisdiction where less than fifty dollars involved.—Griffin v. Humphreys, 76 S.E. 647, 11 Ga.App. 842.

90. Ga.—Pipkin v. Garrett, 162 S.E. 645, 44 Ga.App. 616—Dorough v. Morris, 94 S.E. 641, 21 Ga.App. 477.

15 C.J. p 987 note 78.

Effect of entry on docket

Ga.—Pipkin v. Garrett, 162 S.E. 645, 44 Ga.App. 616.

91. Ga.—Jemison v. Chappell, 117 S.E. 336, 30 Ga.App. 146.

92. Ga.—Botatoes v. Hill, 180 S.E. 491, 180 Ga. 739.

93. Ga.—Tate v. Leres, 200 S.E. 325, 59 Ga.App. 6.

94. Ga.—Gulf Refining Co. v. Miller, 108 S.E. 25, 151 Ga. 721—Gulf Refining Co. v. Miller, 114 S.E. 227, 29 Ga.App. 71, transferred 108 S.E. 28, 151 Ga. 727.

95. Ga.—Jones v. Hodges, 94 S.E. 831, 21 Ga.App. 594.

96. Ga.—Knight v. Banks, 103 S.E. 153, 150 Ga. 276—Tenenbaum v. Knight, 103 S.E. 496, 25 Ga.App. 374.

97. Ga.—Barrantine v. Curry, 150 S. E. 818, 169 Ga. 589—Atlantic Coast Line R. Co. v. Nellwood Lumber Co., 94 S.E. 86, 21 Ga.App. 209.

98. Ga.—Prudential Ins. Co. of America v. Hattaway, 174 S.E. 736, 49 Ga.App. 211—Cobb v. Burgamy, 147 S.E. 921, 39 Ga.App. 602.

15 C.J. p 987 note 79.

99. Ga.—Dixon v. Sable, 95 S.E. 240, 147 Ga. 623—Netts v. Reed, 188 S.E. 71, 54 Ga.App. 408—Harmon v. Wiggins, 172 S.E. 847, 48 Ga.App. 469—Buford v. Southern Cotton Oil Co., 93 S.E. 318, 20 Ga. App. 581—Clark v. Hilliard, 91 S.E. 926, 19 Ga.App. 514.

15 C.J. p 987 note 80.

Accounting between partners

Ga.—Dixon v. Hyde, 102 S.E. 910, 25 Ga.App. 84.

Declaration in attachment

Ga.—Netts v. Reed, 188 S.E. 71, 54 Ga.App. 408—Harmon v. Wiggins, 172 S.E. 847, 48 Ga.App. 469—Davis v. Kingston, 165 S.E. 865, 45 Ga. App. 749.

1. Ga.—Williford v. Marshall, 165 S. E. 588, 175 Ga. 683.

Springfield,² Statesboro,³ Sylvania,⁴ Thomasville,⁵ Valdosta,⁶ Washington,⁷ and Zebulon.⁸

The city courts are, as a rule, without equitable jurisdiction so far as affirmative relief is concerned,⁹ although they may take cognizance of equitable defenses tending merely to defeat or reduce

the amount of a plaintiff's recovery,¹⁰ and may mold their judgments in accordance with equitable principles.¹¹

There have also been decisions relating to the jurisdiction,¹² procedure,¹³ and review of the pro-

2. Ga.—Ash v. People's Bank of Oliver, 101 S.E. 912, 149 Ga. 713, answers to certified questions conformed to 102 S.E. 134, 24 Ga.App. 767.

Motion for new trial

- Ga.—Ash v. People's Bank of Oliver, 102 S.E. 134, 24 Ga.App. 767, conforming to answers to certified questions 101 S.E. 912, 149 Ga. 713.

3. Ga.—W. W. Kimball Co. v. Rogers, 87 S.E. 848, 17 Ga.App. 562.

4. Ga.—Mock v. Waters, 65 S.E. 579, 6 Ga.App. 608.

5. Ga.—Southern Surety Co. v. Dawes, 130 S.E. 577, 161 Ga. 207—Myrick v. Dixon, 140 S.E. 920, 37 Ga. App. 536—Harrell v. Shealey, 100 S.E. 800, 24 Ga.App. 389—Griffin v. May, 99 S.E. 545, 23 Ga.App. 781. 15 C.J. p 987 note 83.

Modification or vacation of judgments

- Ga.—Harrell v. Shealey, 100 S.E. 800, 24 Ga.App. 389.

6. Ga.—Patterson v. Parrish, 135 S. E. 847, 36 Ga.App. 147.

7. Ga.—Thurmond v. Groves, 55 S.E. 915, 126 Ga. 779.

8. Ga.—Morgan v. Goldstein, 92 S.E. 777, 20 Ga.App. 115.

9. Ga.—Haygood v. Improved Order of Samaritans, 195 S.E. 164, 185 Ga. 347—Chapman v. Hale, 152 S. E. 899, 170 Ga. 347—Gormley, for Use of Citizens Bank of Waynesboro v. Chance, 191 S.E. 701, 55 Ga. App. 838—Hartman v. Citizens' Bank & Trust Co., 171 S.E. 195, 47 Ga.App. 562—Bibb Basket Co. v. Eufaula Bank & Trust Co., 156 S. E. 310, 42 Ga.App. 394—Porter v. Davey Tree Expert Co., 129 S.E. 557, 34 Ga.App. 355—Horne & Ponder v. O. B. & E. J. Evans, 120 S. E. 787, 31 Ga.App. 370—Simons v. Bargainer, 105 S.E. 714, 26 Ga. App. 251—Fuller v. Coker, 101 S. E. 1, 24 Ga.App. 418. 15 C.J. p 987 note 85.

Consent to jurisdiction

Jurisdiction to grant affirmative equitable relief, cannot be conferred by the consent of the parties.—Garrison Motor Co. v. Parrish, 184 S. E. 766, 52 Ga.App. 766.

Reformation of instruments

- Ga.—Hartford Fire Ins. Co. v. Garrett, App., 5 S.E.2d 276—Wise v. Royal Ins. Co., 124 S.E. 556, 32 Ga.App. 719.

Equitable set-off

Defendant in a city court in an action arising ex contractu cannot set off damages arising ex delicto.—Collins v. Garrett, 177 S.E. 275, 50 Ga.App. 203—Hartman v. Citizens' Bank & Trust Co., 171 S.E. 195, 47 Ga.App. 562—Bibb Basket Co. v. Eufaula Bank & Trust Co., 156 S.E. 310, 42 Ga.App. 394—Porter v. Davey Tree Expert Co., 129 S.E. 557, 34 Ga. App. 355—Sammons v. F. A. Read, Inc., 121 S.E. 855, 31 Ga.App. 763.

10. Ga.—Haygood v. Improved Order of Samaritans, 195 S.E. 164, 185 Ga. 347—Arnold v. American Securities Co., 182 S.E. 2, 181 Ga. 354—Clower v. Bryan, 166 S.E. 194, 175 Ga. 790—Arthur Tufts Co. v. De Jarnette Supply Co., 123 S.E. 16, 158 Ga. 85—Hanesley v. National Park Bank of New York, 92 S. E. 879, 147 Ga. 96—Gormley, for Use of Citizens Bank of Waynesboro, v. Chance, 191 S.E. 701, 55 Ga.App. 838—Long v. Cash, 189 S. E. 78, 54 Ga.App. 764—Garrison Motor Co. v. Parrish, 184 S.E. 766, 52 Ga.App. 766—Collins v. Garrett, 177 S.E. 275, 50 Ga.App. 203—Hartman v. Citizens' Bank & Trust Co., 171 S.E. 195, 47 Ga.App. 562—Bibb Basket Co. v. Eufaula Bank & Trust Co., 156 S.E. 310, 42 Ga. App. 394—Hillhouse v. McWhorter, 153 S.E. 85, 41 Ga.App. 384—Alliance Ins. Co. v. Williamson, 137 S.E. 277, 36 Ga.App. 497—Treadaway v. Harris, 130 S.E. 827, 34 Ga.App. 583—Porter v. Davey Tree Expert Co., 129 S.E. 557, 34 Ga.App. 355—Windcamp v. Patterson, 127 S.E. 158, 33 Ga.App. 483—Edenfield v. Rountree, 126 S. E. 731, 33 Ga.App. 444—Park v. Carmichael, 92 S.E. 397, 20 Ga.App. 36.

15 C.J. p 987 note 86.

11. Ga.—Black v. Weaver, 67 S.E. 389, 7 Ga.App. 507—Rylee v. Stat-ham Bank, 67 S.E. 383, 7 Ga.App. 489.

12. Ga.—Southern Fertilizer & Chemical Co. v. Kirby, 184 S.E. 363, 52 Ga.App. 688—Edenfield v. Rountree, 126 S.E. 731, 33 Ga.App. 444.

Particular actions

(1) Action for money had and received.—Bank of Oglethorpe v. Brooks, 125 S.E. 600, 33 Ga.App. 84.

(2) Attachment.—Harmon v. Wiggins, 172 S.E. 847, 48 Ga.App. 469—

Ferger Grain Co. v. Eatonton Milling & Grocery Co., 86 S.E. 401, 17 Ga.App. 170—15 C.J. p 986 note 60 [h.].

(3) Suits involving title to realty.—Hughes v. Jefferson Standard Life Ins. Co., 102 S.E. 463, 25 Ga.App. 72—15 C.J. p 986 note 60 [a.].

(4) Suit on purchase-money note for land, on defense entitling defendant to reduction of purchase price.—Riehle v. Bank of Bullochville, 123 S.E. 124, 158 Ga. 171.

(5) Other actions or proceedings see 15 C.J. p 986 note 60 [a.]—[n].

Recoupment

Ga.—Southern Exch. Bank v. Langston, 127 S.E. 230, 33 Ga.App. 477—Park v. Carmichael, 92 S.E. 397, 20 Ga.App. 36.

13. Ga.—Riehle v. Bank of Bullochville, 123 S.E. 124, 158 Ga. 171—Davis v. Williams, 98 S.E. 338, 148 Ga. 765, answers to certified questions conformed to 99 S.E. 50, 23 Ga.App. 549—Netts v. Reed, 188 S. E. 71, 54 Ga.App. 408—Burson v. Lunsford, 186 S.E. 213, 53 Ga.App. 411—Eaves v. Georgian Co., 169 S. E. 519, 47 Ga.App. 37—Bridges v. Wilmington Sav. Bank, 186 S.E. 231, 36 Ga.App. 239—Payne v. Wilson, 111 S.E. 582, 28 Ga.App. 351—Mosely v. King Hardware Co., 91 S.E. 943, 19 Ga.App. 550.

Process

Ga.—Singer Sewing Mach. Co. v. Rosenberg, 111 S.E. 925, 28 Ga. App. 424—Trippe v. Sheppard, 94 S.E. 328, 21 Ga.App. 279.

Continuance

Ga.—Day v. Bank of Sparks, 107 S. E. 272, 26 Ga.App. 718.

Pleadings

(1) Necessity for.—Holloman v. Baird, 135 S.E. 494, 36 Ga.App. 49.

(2) Time for filing.—Lippman v. Aetna Ins. Co., 47 S.E. 593, 120 Ga. 247—Hunter v. Hinman, 66 S.E. 1039, 7 Ga.App. 387.

(3) Answers.—Walker v. Seawell, 156 S.E. 475, 42 Ga.App. 511—Myrick v. Jones-Stewart Motor Co., 147 S.E. 917, 39 Ga.App. 614.

(4) Counterclaims.—Oliver v. O'Kelley, 173 S.E. 232, 48 Ga.App. 762.

Burden of proof

Ga.—Loftis v. Allen Plumbing Co., 184 S.E. 920, 52 Ga.App. 843.

ceedings¹⁴ of the city courts. The court of appeals, under the constitutional amendment of 1916, is the court having jurisdiction of appeals from the city courts of Atlanta and Savannah and other like courts as have been or may be established in other cities;¹⁵ but, under a statute so providing, certio-

rari to the superior court is the exclusive remedy for correcting errors committed on the trial of cases in city courts which are not within the constitutional definition of city courts.¹⁶

Municipal courts. There have also been decisions respecting the Atlanta municipal court,¹⁷ involving

Trial

(1) Generally.—*Robinson v. Odom*, 147 S.E. 569, 168 Ga. 81—*Jones v. Hodges*, 94 S.E. 831, 21 Ga.App. 594—15 C.J. p 986 note 60 [q]—[s].

(2) Instructions.—*Louisville & N. R. Co. v. Lovelace*, 106 S.E. 6, 26 Ga.App. 286.

(3) Direction of verdict.—*Brown v. Eaton-Saussy & Co.*, 156 S.E. 459, 42 Ga.App. 486—*Garner v. Continental Trust Co.*, 146 S.E. 42, 39 Ga.App. 55.

(4) Findings or verdict.—*Davis v. Hayes*, 115 S.E. 148, 29 Ga.App. 330—*Atlanta Joint Terminals v. Walton Discount Co.*, 114 S.E. 908, 29 Ga.App. 225—*Wiley v. Dodson*, 114 S.E. 62, 29 Ga.App. 161—*Louisville & N. R. Co. v. Lovelace*, 106 S.E. 6, 26 Ga.App. 286—*Shearer v. Stamey*, 105 S.E. 854, 26 Ga.App. 120—*Moon v. Brandt*, 93 S.E. 43, 20 Ga.App. 396—*Greenwood Theatrical Agency v. Alkahest Lyceum System*, 92 S.E. 301, 19 Ga.App. 724.

Judgments

(1) In general.—*Nixon v. L. A. Russell Piano Co.*, 180 S.E. 743, 51 Ga.App. 399—*Cone v. Glidden Stores Co.*, 136 S.E. 170, 36 Ga.App. 246—*Hudson v. Cohen*, 128 S.E. 205, 34 Ga.App. 119—*Singer Sewing Mach. Co. v. Rosenberg*, 111 S.E. 925, 28 Ga.App. 424—*Central Bldg. Co. v. Georgia Ry. & Power Co.*, 101 S.E. 760, 24 Ga.App. 596.

(2) Cases in default.—*Jones v. North American Life Ins. Co. of Chicago*, 168 S.E. 923, 46 Ga.App. 647—*Bridges v. Wilmington Sav. Bank*, 136 S.E. 281, 36 Ga.App. 239.

(3) Opening default judgments.—*Rawls v. Bowers*, 172 S.E. 687, 48 Ga.App. 324—*Cobb v. Burgamy*, 147 S.E. 921, 39 Ga.App. 602—*Sherman v. Stephens*, 118 S.E. 567, 30 Ga.App. 509—15 C.J. p 986 note 60 [p].

(4) Setting aside judgments.—*Hutchings v. Roquemore*, 150 S.E. 571, 40 Ga.App. 566—*Sherman v. Stephens*, 118 S.E. 567, 30 Ga.App. 509—*Jones v. Hodges*, 94 S.E. 831, 21 Ga.App. 594.

New trial and motion therefor

Ga.—Marshall v. State, 129 S.E. 665, 34 Ga.App. 434—*J. J. Whitten & Son v. Rogers*, 111 S.E. 678, 28 Ga.App. 441—*Tillman v. Groover*, 102 S.E. 879, 25 Ga.App. 118—*Jones v. Shores-Mueller Co.*, 91 S.E. 1004, 19 Ga.App. 649.

14. *Ga.—Cohen v. Macks*, 165 S.E. 289, 45 Ga.App. 463—*Central of Georgia Ry. Co. v. Miller & Lipshitz*, 106 S.E. 15, 26 Ga.App. 210—*Louisville & N. R. Co. v. Lovelace*, 106 S.E. 6, 26 Ga.App. 286—*Swatts v. Harrison*, 91 S.E. 337, 19 Ga.App. 217.

Nature and form of remedy

Ga.—Taylor v. Mutual Ben. Industrial Life Ins. Ass'n of Georgia, 92 S.E. 47, 146 Ga. 660, answers to certified questions conformed to 92 S.E. 1012, 20 Ga.App. 236.

Return, statement, record, or transcript

Ga.—Atlas Assur. Co., Limited, of London, England, v. First Nat. Bank, 108 S.E. 474, 27 Ga.App. 372.

Scope of review

Ga.—Walker v. Cliff Drug Co., 99 S.E. 392, 23 Ga.App. 722.

Determination and disposition of cause

Ga.—Crine v. Morton Salt Co., 174 S.E. 723, 49 Ga.App. 150, conforming to answers 174 S.E. 347, 178 Ga. 754—*S. P. Coalson Co. v. Burney*, 113 S.E. 825, 29 Ga.App. 137—*Colclough v. Walker*, 90 S.E. 742, 19 Ga.App. 23.

15. *Ga.—Home Ins. Co. v. Willis*, 176 S.E. 371, 179 Ga. 509—*Fraser v. Hunter*, 155 S.E. 753, 171 Ga. 432, followed in *Walden v. Bryant & Thaxton*, 155 S.E. 753, 171 Ga. 433, and answers conformed to *Fraser v. Hunter*, 156 S.E. 268, 42 Ga.App. 329—*Shehane v. Wimbish*, 131 S.E. 104, 34 Ga.App. 608—*Inman Grocery Co. v. Williams*, 119 S.E. 341, 30 Ga.App. 753—*Jemison v. Chappell*, 117 S.E. 336, 30 Ga.App. 146—*Hughes v. State*, 116 S.E. 655, 30 Ga.App. 36—*Verdery v. Withers*, 116 S.E. 894, 30 Ga.App. 63.

15 C.J. p 1039 note 56, p 1038 note 32.

Constitutional city courts

A city court at any place other than Atlanta or Savannah is not a constitutional city court, and has no power to grant new trials and no writ of error lies from it to the court of appeals, unless the act creating it provides for a jury of twelve in all cases, or on demand of either party to a case, whether civil or criminal.—*Wise v. Planters' Bank*, 116 S.E. 654, 30 Ga.App. 50—*J. J.*

Whitten & Son v. Rogers, 111 S.E. 678, 28 Ga.App. 441.

What are, or are not, city or "like" courts within the constitution

(1) Courts held to be city courts or "like courts."—*Home Ins. Co. v. Willis*, 176 S.E. 371, 179 Ga. 509—*Fraser v. Hunter*, 155 S.E. 753, 171 Ga. 432, followed in *Walden v. Bryant & Thaxton*, 155 S.E. 753, 171 Ga. 433, and answers conformed to *Fraser v. Hunter*, 156 S.E. 268, 42 Ga.App. 329—*Cone v. American Surety Co.*, 115 S.E. 481, 154 Ga. 841, answers to certified questions conformed to *Cooper Auto Supply Co. v. Oxweld Acetylene Co.*, 116 S.E. 30, and *Pilcher v. Thompson*, 116 S.E. 49—*Shehane v. Wimbish*, 131 S.E. 104, 34 Ga.App. 608—*Jemison v. Chappell*, 117 S.E. 336, 30 Ga.App. 146—*Hughes v. State*, 116 S.E. 655, 30 Ga.App. 36—*Verdery v. Withers*, 116 S.E. 894, 30 Ga.App. 63—15 C.J. p 1039 note 56 [a].

(2) Courts held not to be city courts or "like courts."—*Bowman v. Davis*, 180 S.E. 917, 51 Ga.App. 917—*Yonge v. Nash Loan Co.*, 179 S.E. 570, 51 Ga.App. 35—*J. J. Whitten & Son v. Rogers*, 111 S.E. 678, 28 Ga.App. 441—*Seaboard Air Line Ry. Co. v. Greebe*, 102 S.E. 757, 25 Ga.App. 114—*Ash v. People's Bank of Oliver*, 102 S.E. 134, 24 Ga.App. 767, conforming to answers to certified questions 101 S.E. 912, 149 Ga. 713—*Tillman v. Groover*, 102 S.E. 879, 25 Ga.App. 118—*Sapp v. Buxton*, 93 S.E. 262, 20 Ga.App. 621—*Griffin v. Sisson*, 92 S.E. 558, 19 Ga.App. 828, conforming to answers to certified questions 92 S.E. 278, 146 Ga. 661—15 C.J. p 1069 note 56 [a].

Prior to amendment

Ga.—Sellers v. Mann, 39 S.E. 11, 118 Ga. 643.

15 C.J. p 1038 note 31.

16. *Ga.—Gulf Refining Co. v. Miller*, 108 S.E. 25, 151 Ga. 721.

17. *Ga.—Strickland v. Houston*, 161 S.E. 262, 173 Ga. 615—*Spielberger v. W. H. Hall & Co.*, 126 S.E. 391, 159 Ga. 511, transferred 126 S.E. 552, 33 Ga.App. 406.

Not a city court

Ga.—Griffin v. Sisson, 92 S.E. 278, 146 Ga. 661, answers to certified questions conformed to 92 S.E. 558, 19 Ga.App. 828.

its jurisdiction,¹⁸ procedure,¹⁹ and review of its | proceedings.²⁰ There have also been decisions re-

18. Ga.—Smith v. Bukofzer, 180 S. E. 353, 180 Ga. 535—Roberts v. Mitchell, 142 S.E. 832, 166 Ga. 229—Todd-Worsham Auction Co. v. Underwood, 145 S.E. 889, 38 Ga. App. 792—Lively v. Ward & McCullough, 99 S.E. 632, 23 Ga.App. 805.

Particular actions and proceedings

(1) Action for money had and received.—Feeney Hay Co. v. Suggs, Ga.App., 2 S.E.2d 806.

(2) Attachment and replevin.—Baggs-Langford Motor Co. v. J. H. Moore & Son, 133 S.E. 256, 36 Ga. App. 788—Barron Bros. v. New York, N. H. & H. R. Co., 122 S.E. 83, 31 Ga. App. 757.

(3) Garnishment.—Whitley v. Jackson, 129 S.E. 662, 34 Ga.App. 286.

(4) Suits to foreclose lien.—Noles v. Tulley, 136 S.E. 462, 36 Ga.App. 256.

Court has no jurisdiction to try case arising from injury to person or reputation.—Cantrell v. Davis, 169 S.E. 39, 46 Ga.App. 710, conforming to answer 169 S.E. 38, 176 Ga. 745.

19. Ga.—Cochran Furniture Co. v. Corbett, 176 S.E. 827, 49 Ga.App. 625.

Process

Ga.—Cooper v. Fourth Nat. Bank, 110 S.E. 723, 152 Ga. 599, affirming 105 S.E. 375, 26 Ga.App. 44—J. R. Watkins Co. v. Seawright, 149 S.E. 389, 40 Ga.App. 314, conforming to answers to certified questions 149 S.E. 45, 168 Ga. 750—Holloman v. Baird, 135 S.E. 494, 36 Ga.App. 49—Singer Sewing Mach. Co. v. Rosenberg, 111 S.E. 925, 28 Ga.App. 424—Moon v. Brandt, 93 S.E. 43, 20 Ga.App. 396.

Dismissal and nonsuit

Ga.—Bridges v. Mutual Ben. Health & Accident Ass'n, 176 S.E. 543, 49 Ga.App. 552.

Filing

(1) Generally.—Loftis v. Allen Plumbing Co., 184 S.E. 920, 52 Ga. App. 843—American Nat. Ins. Co. v. Lynch, 176 S.E. 546, 49 Ga.App. 580—Roth v. Neal Smith, Inc., 170 S.E. 314, 47 Ga.App. 253—Holland Furnace Co. v. Manning, 163 S.E. 259, 45 Ga.App. 51—Cone v. Glidden Stores Co., 136 S.E. 170, 36 Ga.App. 246—Perry v. Tumlin, 132 S.E. 141, 35 Ga. App. 50, conforming to answer 131 S.E. 70, 161 Ga. 392—Mosely v. King Hardware Co., 91 S.E. 943, 19 Ga. App. 550.

(2) Similarity to pleadings in justice's court.—Adams Loan & Investment Co. v. Dolvin Realty Co., 172 S.E. 606, 48 Ga.App. 183—Ladd Lime & Stone Co. v. Case & Cothran, 129 S.E. 6, 34 Ga.App. 190—Lingo v.

Phoenix Hermetic Co., 121 S.E. 253, 31 Ga.App. 547—Hines v. Malone, 105 S.E. 37, 25 Ga.App. 781—Walker v. Cliff Drug Co., 99 S.E. 392, 23 Ga.App. 722.

(3) Misjoinder of causes of action is immaterial.—Walker v. Cliff Drug Co., supra—Moon v. Brandt, 93 S.E. 43, 20 Ga.App. 396.

(4) Amendments.—Hill v. George, 170 S.E. 326, 47 Ga.App. 272.

Evidence; burden of proof

Ga.—Loftis v. Allen Plumbing Co., 184 S.E. 920, 52 Ga.App. 843.

Trial

(1) Direction of verdict.—Brannan, Beckham & Co. v. Ramsaur, 152 S.E. 282, 41 Ga.App. 166—Pape v. Woolford Realty Co., 134 S.E. 174, 35 Ga.App. 284—Anderson v. King, 91 S.E. 788, 19 Ga.App. 471—15 C.J. p 987 note 61 [e].

(2) New trial and motion therefor.—City Inv. Co. v. Crawley, 199 S.E. 747, 187 Ga. 48, answers to certified questions conformed to 200 S.E. 316, 59 Ga.App. 61—National Life & Accident Ins. Co. v. Lain, 179 S.E. 120, 180 Ga. 463, answer conformed to 179 S.E. 751, 51 Ga.App. 58—Turner v. Masonic Relief Ass'n, 183 S.E. 350, 52 Ga.App. 374—Hartsfield Co. v. Kitchens, 179 S.E. 920, 51 Ga.App. 154—Atlanta Wrecking Co. v. Hudson, 176 S.E. 515, 49 Ga.App. 554—Automobile Ins. Co. of Hartford, Conn., v. Watson, 146 S.E. 922, 33 Ga.App. 244—R. S. Armstrong & Bro. Co. v. Crane, 141 S.E. 217, 37 Ga.App. 537.

Judgment

(1) Generally.—Lester v. Rogers, 121 S.E. 582, 31 Ga.App. 590.

(2) Setting aside and motions therefor.—Landau Bros. v. Towery, 179 S.E. 647, 51 Ga.App. 113—Davison-Paxon Co. v. Columbia Building & Loan Ass'n, 170 S.E. 703, 47 Ga. App. 426.

(3) Defaults.—Columbus Heating & Ventilating Co. v. Upchurch, 171 S.E. 180, 47 Ga.App. 673—Bacon v. Douglas, 97 S.E. 862, 23 Ga.App. 262.

(4) Opening defaults.—Davison-Paxon Co. v. Columbia Building & Loan Ass'n, supra—Lester v. Rogers, supra—Colley v. O. A. Smith Co., 119 S.E. 350, 30 Ga.App. 680—Jenkins v. Whittier Mills Co., 93 S.E. 530, 20 Ga.App. 828—15 C.J. p 987 note 61 [b].

20. Ga.—Von Schmidt v. Noland Co., 169 S.E. 11, 176 Ga. 784—Perry v. Tumlin, 131 S.E. 70, 161 Ga. 392, answer conformed to, App., 132 S.E. 141, 35 Ga.App. 50—Reeves v. Jackson, 124 S.E. 135, 158 Ga. 676—Cox v. Dolvin Realty Co., 193 S.E. 467, 56 Ga.App. 649.

Right of review

Ga.—Dillon v. United Roofing & Supply Co., 129 S.E. 573, 34 Ga.App. 316—Williams v. Green, 125 S.E. 875, 33 Ga.App. 254—Pittman v. Alexander, 91 S.E. 910, 19 Ga.App. 475.

Court having jurisdiction to review

(1) Under the constitutional amendment of 1927 the court of appeals is authorized to review cases from Atlanta municipal court.—Jenkins v. Federal Life Ins. Co., 176 S. E. 111, 49 Ga.App. 514.

(2) Under a statute so providing, the writ of certiorari will issue from the superior court to correct errors in the Atlanta municipal court.—Shaw v. National Life Ins. Co., 181 S.E. 872, 51 Ga.App. 794, certified questions answered 180 S.E. 721, 180 Ga. 755—Terrell v. Brandt, 142 S.E. 460, 37 Ga.App. 760.

Nature and form of remedy; certiorari

Ga.—Aspirinal Laboratories v. Malinckrodt Chemical Works, 179 S.E. 709, 180 Ga. 544—Von Schmidt v. Noland Co., 169 S.E. 11, 176 Ga. 784—Echols v. Moses, 169 S.E. 57, 46 Ga.App. 704—Terrell v. Brandt, 142 S.E. 460, 37 Ga.App. 760—Holloman v. Southland Loan & Investment Co., 138 S.E. 862, 37 Ga. App. 10—Loftin v. Southern Sec. Co., 136 S.E. 163, 36 Ga.App. 201—Crider v. Hughes, 135 S.E. 491, 36 Ga.App. 32—Kirk v. Jefferson Loan Soc., 120 S.E. 696, 31 Ga.App. 425—Louisville & N. R. Co. v. Lovelace, 101 S.E. 718, 24 Ga.App. 616—Walker v. Cliff Drug Co., 99 S.E. 392, 23 Ga.App. 722—City of Atlanta v. Copeland, 96 S.E. 9, 22 Ga.App. 402—Taylor v. Mutual Benefit Industrial Life Ins. Ass'n of Georgia, 92 S.E. 1012, 20 Ga. App. 236, conforming to answers to certified questions 92 S.E. 47, 146 Ga. 660.

Finality of judgment

Ga.—Dillon v. Continental Trust Co., 175 S.E. 652, 179 Ga. 198—Columbus Heating & Ventilating Co. v. Upchurch, 163 S.E. 301, 45 Ga. App. 16—Reed v. V. H. Kriegshaber & Son, 160 S.E. 560, 44 Ga. App. 64—Massengale v. Colonial Hill Co., 131 S.E. 299, 34 Ga.App. 807—Johnson v. Barrett, 107 S.E. 168, 26 Ga.App. 781—Louisville & N. R. Co. v. Lovelace, 101 S.E. 718, 24 Ga.App. 616.

Presentation and preservation in lower court of grounds of review

Ga.—City Inv. Co. v. Crawley, 199 S. E. 747, 187 Ga. 48, answers to certified questions conformed to 200 S.E. 316, 59 Ga.App. 61—Gresham v. Lee, 111 S.E. 404, 152 Ga. 823, answer to certified questions conformed to 112 S.E. 524, 28 Ga.App.

lating to the Columbus,²¹ Macon,²² and Savannah²³ municipal courts. Under a statute expressly so providing, appeals will lie to the appellate division of certain specified municipal courts in all cases in such

municipal courts, wherein the amount involved is less than a specified sum, from an order overruling a motion for a new trial or from a final order or judgment.²⁴

576—Dixie Freight Lines v. Transportation, Inc., 187 S.E. 281, 53 Ga.App. 832—Ozburn v. National Union Fire Ins. Co., 186 S.E. 852, 53 Ga.App. 682, adhered to and opinion substituted National Union Fire Ins. Co. v. Ozburn, 194 S.E. 756, 57 Ga.App. 90—Georgia Ry. & Power Co. v. Eubanks, 125 S.E. 909, 33 Ga.App. 255—Sims v. Nelson, 121 S.E. 863, 31 Ga.App. 271—Hicks v. Walker Bros. Co., 118 S.E. 452, 30 Ga.App. 548—Stewart v. Citizens' & Southern Bank, 117 S.E. 115, 30 Ga.App. 112—Louisville & N. R. Co. v. Lovelace, 106 S.E. 6, 26 Ga.App. 286—Walker v. Cliff Drug Co., 99 S.E. 392, 23 Ga.App. 722.

Requisites and proceedings for transfer of cause

(1) Generally.—Dillon v. Continental Trust Co., 175 S.E. 652, 179 Ga. 198—Perry v. Tumlin, 181 S.E. 70, 161 Ga. 392, answer conformed to, App., 132 S.E. 141, 35 Ga.App. 50—City Inv. Co. v. Crawley, 200 S.E. 316, 59 Ga.App. 61, conforming to answers to certified questions 199 S.E. 747, 187 Ga. 48—Wrenn v. Bowden, 193 S.E. 456, 56 Ga.App. 713—Reese v. Miller, 126 S.E. 904, 33 Ga.App. 442—Hudson v. Cohen, 122 S.E. 718, 32 Ga.App. 299—Louisville & N. R. Co. v. Lovelace, 106 S.E. 6, 26 Ga.App. 286—Holcomb, Croft & Co. v. Finch, 103 S.E. 38, 25 Ga.App. 261—Louisville & N. R. Co. v. Lovelace, 101 S.E. 718, 24 Ga.App. 616.

(2) Certificate of costs on certiorari.—Thoms v. John R. Thompson Co., 145 S.E. 533, 38 Ga.App. 779.

(3) Bond.—Louisville & N. R. Co. v. Lovelace, supra.

Return, statement, record, or transcript

Ga.—Holtzinger v. Beverly, 186 S.E. 776, 53 Ga.App. 614—Hartsfield Co. v. Ray, 157 S.E. 111, 42 Ga.App. 637—Reese v. Miller, 126 S.E. 904, 33 Ga.App. 442.

Exceptions to court of appeals

(1) A statute, passed under authority of the constitutional amendment of 1927, providing for a review of an order of the Atlanta municipal court refusing a new trial or other final judgment or order, by bill of exceptions to the court of appeals in the same manner as in the case of a judgment of the superior court, is not unconstitutional.—Dillon v. Continental Trust Co., 175 S.E. 652, 179 Ga. 198—Cable Piano Co. v. Williamson, 176 S.E. 103, 49 Ga.App. 529.

(2) Under such statute, a direct bill of exceptions from Atlanta mu-

nicipal court will lie to court of appeals.—Dillon v. Continental Trust Co., 175 S.E. 652, 179 Ga. 198—Dillon v. Continental Trust Co., 176 S.E. 650, 49 Ga.App. 664.

(3) Time for presentation of bill of exceptions to trial judge for certification.—Jenkins v. Federal Life Ins. Co., 176 S.E. 111, 49 Ga.App. 514.

(4) It was formerly the rule under the constitutional amendment of 1916 (see Acts 1916 p 19), that direct bill of exceptions from the municipal court established under amendment of 1912 (see Acts 1912 p 30) would not lie to the court of appeals, which rule applied to all pending cases from municipal court irrespective of time when writ of error was sued out.—Griffin v. Sisson, 92 S.E. 278, 146 Ga. 651, answers to certified questions conformed to 92 S.E. 558, 19 Ga.App. 828—American Life & Accident Ins. Co. v. Quarterman, 92 S.E. 350, 19 Ga.App. 798.

Scope of review

Ga.—Southland Loan & Investment Co. v. Brown, 187 S.E. 131, 53 Ga.App. 786—Martin v. Murphy, 180 S.E. 216, 34 Ga.App. 488—Long v. Burge, Stevens & Conklin, 122 S.E. 716, 32 Ga.App. 97.

Determination and disposition of cause

Ga.—Automobile Ins. Co. of Hartford, Conn. v. Watson, 146 S.E. 922, 39 Ga.App. 244—McCartney v. Wilson, 141 S.E. 215, 37 Ga.App. 609.

21. Ga.—Cohn v. Rogers, 183 S.E. 818, 52 Ga.App. 533.

22. Ga.—Fuller v. Yetter, 148 S.E. 751, 40 Ga.App. 58.

Review of proceedings

(1) Nature and form of remedy.—Fuller v. Yetter, 148 S.E. 751, 40 Ga.App. 58.

(2) Presentation and preservation in lower court of grounds of review.—Fallas v. Rushin, 115 S.E. 922, 29 Ga.App. 471.

(3) Presentation of grounds for review.—Gaines v. Continental Aid Ass'n, 95 S.E. 760, 22 Ga.App. 179.

(4) Return, statement, record, or transcript.—Elder v. Abel, 125 S.E. 789, 33 Ga.App. 318—Hanna v. Jamison, 123 S.E. 150, 32 Ga.App. 375—Macon Union Co-op. Ass'n v. Chance, 122 S.E. 66, 31 Ga.App. 636.

(5) Determination and disposition of cause.—Levy v. McPhail, 127 S.E. 793, 33 Ga.App. 784.

23. Ga.—Brandon-Bond-Condon v. Swift & Co. Fertilizer Works,

177 S.E. 832, 50 Ga.App. 254—Merchants' & Miners' Transp. Co. v. Gable & Singer, 127 S.E. 807, 33 Ga.App. 743—Bingham v. Haines, 102 S.E. 923, 25 Ga.App. 136—Harte v. Sturtevant, 93 S.E. 530, 20 Ga.App. 822.

Opening of default

Ga.—Brandon-Bond-Condon v. Swift & Co. Fertilizer Works, 177 S.E. 832, 50 Ga.App. 254.

15 C.J. p 987 note 80 [a].

Review of proceedings

(1) Appeals may be taken from Savannah municipal court to superior court of Chatham County in accordance with regulations applicable to appeals from justices' courts.—Bunn v. Gamble, 188 S.E. 257, 54 Ga.App. 417.

(2) Requisites and proceedings for transfer of cause.—Leary v. Rivalis, 164 S.E. 902, 45 Ga.App. 414—Merchants' & Miners' Transp. Co. v. Gable & Singer, 127 S.E. 807, 33 Ga.App. 743.

24. Ga.—Jeter v. Turman-Brown Co., 149 S.E. 555, 169 Ga. 30, answer conformed to, App., 149 S.E. 720, 40 Ga.App. 376—McGee v. Knox, App., 2 S.E.2d 808—Valdes v. Peoples Loan & Savings Co., App., 2 S.E.2d 755—Southland Loan & Investment Co. v. Brown, 187 S.E. 131, 53 Ga.App. 786—Gibbs v. Carolina Portland Cement Co., 177 S.E. 760, 50 Ga.App. 229—Glass v. Brown, 176 S.E. 519, 49 Ga.App. 610—Whitley v. Shannon, 176 S.E. 517, 49 Ga.App. 548—Cable Piano Co. v. Williamson, 176 S.E. 103, 49 Ga.App. 529—Echols v. Moses, 169 S.E. 57, 46 Ga.App. 704—Holland Furnace Co. v. Manning, 168 S.E. 259, 45 Ga.App. 51—Cohen v. Saffer, 160 S.E. 130, 43 Ga.App. 746—Cooksey v. Roseberry, 159 S.E. 741, 43 Ga.App. 626—Cohen v. Morris Plan Co. of Georgia, 157 S.E. 913, 43 Ga.App. 84—Ceppegge Dry Cleaning Co. v. Levine, 153 S.E. 206, 41 Ga.App. 382—Goldsmith-Leslie Co. v. Whitehead, 152 S.E. 589, 41 Ga.App. 287—Branon v. Ellbee Pictures Corporation, 150 S.E. 168, 40 Ga.App. 450—Woodland Hills Co. v. Lawton, 142 S.E. 208, 37 Ga.App. 742—Holloman v. Southland Loan & Investment Co., 138 S.E. 862, 37 Ga.App. 10.

Certiorari issued by superior court.—Connally Realty Co. v. Nalley, 143 S.E. 786, 38 Ga.App. 292.

Amount in controversy

Ga.—Gavant v. Berger, 185 S.E. 506, 182 Ga. 277, answers to certified questions conformed to 185 S.E. 726, 53 Ga.App. 304—Cox v. Dolvin

§ 259. Idaho

There are decisions relating to the district and probate courts of Idaho.

In Idaho, there have been decisions relating to the district courts²⁵ and the probate courts.²⁶ The district courts are courts of general jurisdiction at law and in equity,²⁷ having jurisdiction in all special proceedings and in the issuance of writs of mandamus, certiorari, prohibition, habeas corpus, and all writs necessary to the exercise of their powers.²⁸

§ 260. Illinois

Courts exercising original jurisdiction in Illinois in-

clude circuit courts, county courts, the superior court of Cook County, city courts, and the municipal court of Chicago.

The circuit courts, in Illinois, have original jurisdiction of all causes in law and equity,²⁹ and they are courts of general common-law and chancery jurisdiction.³⁰ Circuit courts under some statutes also exercise special jurisdiction,³¹ and in exercising such jurisdiction such courts are limited to the language of the statute conferring it.³²

County courts. There have been a number of decisions relating to the county courts,³³ which are courts of record³⁴ with limited, although not inferior, jurisdiction,³⁵ having general jurisdiction

Realty Co., 193 S.E. 467, 56 Ga. App. 649.

Time to perfect appeal

Ga.—Valdes v. Peoples Loan & Savings Co., 2 S.E.2d 755—Bentley v. Anderson-McGriff Hardware Co., 188 S.E. 286, 54 Ga.App. 478, transferred 184 S.E. 297, 181 Ga. 813—Gibbs v. Carolina Portland Cement Co., 177 S.E. 760, 50 Ga.App. 229—Glass v. Brown, 176 S.E. 519, 49 Ga.App. 610—Whitley v. Shannon, 176 S.E. 517, 49 Ga.App. 548—Echols v. Moses, 169 S.E. 57, 46 Ga.App. 704—Holland Furnace Co. v. Manning, 163 S.E. 259, 45 Ga. App. 51—Columbia Building & Loan Ass'n v. Roberts, 161 S.E. 291, 44 Ga.App. 314—Federal Life Ins. Co. v. Hurst, 160 S.E. 533, 43 Ga.App. 840—Coppedge Dry Cleaning Co. v. Levine, 153 S.E. 206, 41 Ga.App. 382—Branon v. Ellbee Pictures Corporation, 150 S.E. 168, 40 Ga.App. 450.

Statement of grounds

Ga.—Fuller v. Rich's, Inc., 195 S.E. 768, 57 Ga.App. 424—Gibbs v. Carolina Portland Cement Co., 177 S.E. 760, 50 Ga.App. 229—Oxford v. Reynolds, 176 S.E. 411, 49 Ga.App. 514—Echols v. Moses, 169 S.E. 57, 46 Ga.App. 704—Holland Furnace Co. v. Manning, 163 S.E. 259, 45 Ga.App. 51—Georgia-Carolina Inv. Co. v. Coppedge Dry Cleaning Co., 161 S.E. 656, 44 Ga.App. 432—Columbia Building & Loan Ass'n v. Roberts, 161 S.E. 291, 44 Ga.App. 314—Coppedge Dry Cleaning Co. v. Levine, 153 S.E. 206, 41 Ga.App. 382—Branon v. Ellbee Pictures Corporation, 150 S.E. 168, 40 Ga. App. 450.

Determination and disposition of appeal

Ga.—National Union Fire Ins. Co. v. Ozburn, 173 S.E. 492, 48 Ga.App. 571—Talley v. Commercial Credit Co. of Georgia, 147 S.E. 175, 39 Ga.App. 297.

25. Idaho.—Whitney v. Randall, 70 P.2d 384, 58 Idaho 49, 15 C.J. p 987 note 88.

26. Idaho.—Preston A. Blair Co. v. Rose, 51 P.2d 209, 56 Idaho 114—Hanson v. Morrison, 165 P. 521, 30 Idaho 422.

Courts of probate jurisdiction generally see *infra* §§ 298–310.

Attachment

Idaho.—Hanson v. Morrison, 165 P. 521, 30 Idaho 422.

Review of proceedings

District court has jurisdiction on appeal from probate court.—Fraser v. Davis, 156 P. 913, 29 Idaho 70, opinion modified on other grounds and rehearing denied 158 P. 233.

27. U.S.—Treinies v. Sunshine Mining Co., C.C.A.Idaho, 99 F.2d 651, affirming, D.C., Sunshine Mining Co. v. Treinies, 19 F.Supp. 587, certiorari granted Treinies v. Sunshine Mining Co., 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, 15 C.J. p 988 note 89.

28. Idaho.—Rowe v. Stevens, 137 P. 159, 25 Idaho 237—Wright v. Kelley, 43 P. 565, 4 Idaho 624.

29. Ill.—People v. Preston, 177 N.E. 761, 345 Ill. 11—Kurawski v. Kurawski, 5 N.E.2d 597, 288 Ill.App. 118—People ex rel. Sokoll v. Municipal Court of Chicago, 276 Ill. App. 102, affirmed 194 N.E. 242, 359 Ill. 102.

Provisions construed

Ill.—People v. Graw, 2 N.E.2d 71, 363 Ill. 205—People ex rel. Kourek v. City of Chicago, 62 N.E. 179, 193 Ill. 507, 58 L.R.A. 833.

30. Ill.—People v. Marquette Nat. Fire Ins. Co., 184 N.E. 800, 351 Ill. 516—People v. Preston, 177 N.E. 761, 345 Ill. 11—Central Illinois Public Service Co. v. Industrial Com'n., 127 N.E. 80, 293 Ill. 62—Haywood v. Collins, 60 Ill. 328—Kenney v. Greer, 13 Ill. 432, 54 Am.D. 439—Beaubien v. Brinckerhoff, 3 Ill. 269—Foreman Bros. Banking Co. v. Kelly-Atkinson Const. Co., 218 Ill.App. 356—Mathias v. Mathias, 104 Ill.App. 344, affirmed 66 N.E. 1042, 202 Ill. 125.

15 C.J. p 988 note 92 [a], [b].

Action of debt for violation of zoning ordinance.—Village of La Grange v. Clark, 278 Ill.App. 269.

31. Ill.—Melton v. City of Paris, 164 N.E. 218, 333 Ill. 190.

Proceedings under Workmen's Compensation Act

Ill.—Central Illinois Public Service Co. v. Industrial Commission, 127 N.E. 80, 293 Ill. 62.

15 C.J. p 988 note 92 [c].

32. Ill.—Nierman v. Industrial Commission, 161 N.E. 115, 329 Ill. 623.

33. Ill.—People ex rel. Lange v. Old Portage Park Dist., 190 N.E. 664, 356 Ill. 340.

15 C.J. p 988 note 95.

Courts having jurisdiction of appeals from county courts see *supra* §§ 352, 363.

Time for filing and approval of appeal bonds

Ill.—Hall v. First Nat. Bank, 161 N.E. 311, 330 Ill. 234.

34. Wash.—Rubin v. Dale, 288 P. 223, 156 Wash. 676.

35. Ill.—Hicks v. Monahan, 209 Ill. App. 516.

15 C.J. p 988 notes 95 [k], [n], [o], [q], 96.

Matters not within jurisdiction of county courts

(1) Issuance of writ of mandamus.—Board of School Inspectors of City of Peoria v. People ex rel. Grove, 20 Ill. 525.

(2) Administration of testamentary trusts.—In re Robinson's Estate, 214 Ill.App. 262—15 C.J. p 988 note 95 [d].

(3) Appointment of probation officer for enforcement of criminal law.—People v. Huyvaert, 209 Ill.App. 40.

(4) Trial of contested rights to personal property between the representative of the estate of a deceased person and others.—Hays v. State Bank of Saybrook, 202 Ill.App. 535.

over particular classes of subjects³⁶ with power to pass on the question of their jurisdiction and to exercise it when it is once determined.³⁷ These courts have no general equity jurisdiction and can have such jurisdiction only by an express grant from the legislature.³⁸ However, they exercise a certain equitable jurisdiction in the allowance of claims against the estates of decedents,³⁹ and in the adjustment of accounts of guardians,⁴⁰ and they have, within the limits of their jurisdiction, the power to enforce certain of their decrees and orders by chancery process.⁴¹

The superior court of Cook County has general jurisdiction in both law and equity, concurrent with that of the circuit court.⁴² There is no difference between the two courts except in name, the superior court being in legal effect a circuit court, and its judges being in effect circuit judges;⁴³ but they

are separate courts and distinct entities.⁴⁴ Provisions of the Municipal Court Act do not apply to proceedings in this court.⁴⁵

City courts. There have also been decisions relating to the city courts⁴⁶ which have the same general jurisdiction as circuit courts,⁴⁷ although they are limited to causes of action arising within the city,⁴⁸ and their territorial jurisdiction, for the service of original process, is confined to the corporate limits of the city.⁴⁹ There are decisions relating to the practice and procedure in such courts,⁵⁰ and to appeals therefrom.⁵¹

The municipal court of Chicago is a constitutional court⁵² of record.⁵³ This court operates as a state agency for the administration of justice,⁵⁴ and as a part of the local municipal government of Chicago,⁵⁵ for the purpose of administering the law therein.⁵⁶ It goes under the generic name of, and is in

36. Ill.—People ex rel. Lange v. Old Portage Park Dist., 190 N.E. 664, 356 Ill. 340—People v. Miller, 171 N.E. 672, 339 Ill. 573—Little v. Blue Goose Motor Coach Co., 244 Ill.App. 427—People v. Schwartz, 244 Ill.App. 137—Ryan v. Chicago Foundry Co., 200 Ill.App. 45.
15 C.J. p 988 note 95 [a]—[c], [e]—[j], [l], [m].

Local improvement cases

Ill.—People v. Brewer, 160 N.E. 76, 328 Ill. 472.

37. Ill.—People ex rel. Lange v. Old Portage Park Dist., 190 N.E. 664, 356 Ill. 340.

38. Ill.—McDonough v. Gage, 192 N.E. 417, 357 Ill. 466.
15 C.J. p 988 note 97.

39. Ill.—In re Steele, 65 Ill. 322—Hurd v. Slaten, 43 Ill. 348—Dixon v. Buell, 21 Ill. 203.

40. Ill.—In re Steele, 65 Ill. 322.

41. Ill.—Hicks v. Monahan, 209 Ill. App. 516.

42. Ill.—Dwyer v. Dwyer, 10 N.E.2d 344, 366 Ill. 630, reversing 4 N.E. 2d 124, 286 Ill.App. 588—People v. Marquette Nat. Fire Ins. Co., 184 N.E. 800, 351 Ill. 516—Kerr v. Flewelling, 85 N.E. 624, 235 Ill. 326—Kurzawski v. Kurzawski, 5 N.E.2d 597, 288 Ill.App. 118—People ex rel. Sokoll v. Municipal Court of Chicago, 276 Ill.App. 102, affirmed 194 N.E. 242, 359 Ill. 102—Cigler v. Keinath, 167 Ill.App. 65—Mathias v. Mathias, 104 Ill. App. 344, affirmed 66 N.E. 1042, 202 Ill. 125.
15 C.J. p 988 note 93.

43. Ill.—People v. Sweitzer, 161 N.E. 730, 330 Ill. 426—Kurzawski v. Kurzawski, 5 N.E.2d 597, 288 Ill. App. 118—People ex rel. Sokoll v. Municipal Court of Chicago, 276

Ill.App. 102, affirmed 194 N.E. 242, 359 Ill. 102—Ross v. Knapp, etc., Co., 77 Ill.App. 424, appeal dismissed 55 N.E. 127, 181 Ill. 393.

44. Ill.—Mathias v. Mathias, 104 Ill. App. 344, affirmed 66 N.E. 1042, 202 Ill. 125.

45. Ill.—Gallagher v. Schmidt, 144 N.E. 319, 313 Ill. 40.

46. Ill.—People v. City Court of East St. Louis, 170 N.E. 210, 338 Ill. 363.
15 C.J. p 988 note 2.

47. Ill.—Maton Bros. v. Central Illinois Public Service Co., 269 Ill. App. 99, affirmed 191 N.E. 321, 356 Ill. 584.

15 C.J. p 988 note 2 [a]—[g].

Transitory action of assumpsit is within jurisdiction of city court.—Buchanan v. Scottish Union & Nat. Ins. Co., 210 Ill.App. 523.

48. Ill.—Maton Bros. v. Central Illinois Public Service Co., 269 Ill. App. 99, affirmed 191 N.E. 321, 356 Ill. 584.

15 C.J. p 988 note 2 [k].

Action of trespass quare clausum fregit

Ill.—Maton Bros. v. Central Illinois Public Service Co., 269 Ill.App. 99, affirmed 191 N.E. 321, 356 Ill. 584.

49. Ill.—People v. City Court of East St. Louis, 170 N.E. 210, 338 Ill. 363—Canton Homestead & Loan Ass'n v. Simms, 241 Ill.App. 467.
15 C.J. p 988 note 2 [l], [m].

Corporation may be served with process in the manner prescribed by Pract. Act § 8.—Gunter v. Mystic Workers of the World, 212 Ill.App. 178.

50. Ill.—Adams v. Adams, 251 Ill. App. 45.

15 C.J. p 988 note 2 [h].

Process

Ill.—Adams v. Adams, *supra*.

Questions for jury

Ill.—Corelis v. Chicago, B. & Q. R. Co., 244 Ill.App. 47.

51. Ill.—Ogent v. Beasley, 282 Ill. App. 357.

15 C.J. p 988 note 2 [j].

Right of review

Ill.—Ogent v. Beasley, 282 Ill.App. 357.

Presumptions in favor of correctness of action of lower court.—Geraci v. Sultan, 268 Ill.App. 294—Hersch v. H. Albrecht & Co., 202 Ill. App. 573.

Estoppel to claim error

Ill.—Kortylak v. Johnston City Bldg. & Loan Ass'n of Johnston City, 279 Ill.App. 88—Mississippi Lime & Material Co. v. Alton & Eastern R. Co., 256 Ill.App. 485.

Shifting of position on appeal prohibited

Ill.—Wallus v. Insurance Co. of N. A., 230 Ill.App. 305.

52. Ill.—Moore-Bond Co. v. Attractograph Co., 181 Ill.App. 513.

Purpose of constitutional amendment
Ill.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

53. Ill.—Gillman v. Chicago R. Co., 109 N.E. 181, 268 Ill. 305, reversing 185 Ill.App. 396.
15 C.J. p 988 note 4.

54. Ill.—Galpin v. Chicago, 159 Ill. App. 135, affirmed 94 N.E. 961, 249 Ill. 554.

55. Ill.—Ptacek v. Coleman, 5 N.E. 2d 467, 364 Ill. 618.

56. Ill.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

all essential respects, a city court,⁵⁷ but it belongs to a specific class different from the city courts created under the general city court act,⁵⁸ and, while composite in its nature and jurisdiction, it cannot be regarded as of the same class as circuit courts.⁵⁹ This court is a court of limited jurisdiction,⁶⁰ and it can exercise only such jurisdiction as is granted by the legislature,⁶¹ and its jurisdiction is inferior

to that of the circuit or superior courts,⁶² and does not extend, and cannot be extended by the legislature, beyond the corporate limits of the city.⁶³ There have been a large number of adjudications with respect to this court,⁶⁴ including decisions relating to such matters as the nature and form of actions;⁶⁵ parties;⁶⁶ process;⁶⁷ appearances;⁶⁸ pleading,⁶⁹ including decisions relating to such matters

57. Ill.—Barry v. Knight, *supra*. 15 C.J. p 988 note 6.

58. Ill.—Barry v. Knight, *supra*.

59. Ill.—Barry v. Knight, *supra*.

60. Wis.—Linschitz v. C. A. Neuberger Co., 283 N.W. 811.

No general equitable jurisdiction

Ill.—People ex rel. Dr. Pierre Chemical Co. v. Municipal Court of Chicago, 17 N.E.2d 999, 297 Ill.App. 431—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

61. Ill.—Barry v. Knight, *supra*. 15 C.J. p 989 note 9.

Particular actions

(1) Actions arising from or concerning corporations.—O'Shea v. Farrelly, 134 N.E. 2, 302 Ill. 126—Duke v. Olson, 240 Ill.App. 198—American Laundry Machinery Co. v. Chamales, 202 Ill.App. 302.

(2) Actions based on contracts.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277—Fidelity & Deposit Co. of Maryland v. Stanford, 15 N.E.2d 616, 296 Ill.App. 1—Schillinger v. O'Connell, 7 N.E.2d 158, 289 Ill.App. 271—McKey v. Davis Co., 247 Ill. App. 136—Massachusetts Bonding & Ins. Co. v. Phillips Co., 230 Ill.App. 28—Malina v. Oplatka, 223 Ill.App. 236—Strassheim v. Barnes, 212 Ill. App. 299. See Russell v. Cochran, 204 Ill.App. 418.

(3) Actions based on torts.—Malina v. Oplatka, 136 N.E. 666, 304 Ill. 381—Seney v. Knight, 126 N.E. 761, 292 Ill. 206, affirming *In re Seney*, 213 Ill.App. 382—Burton v. Harris, 18 N.E.2d 249, 298 Ill.App. 32—Nierodzinski v. City of Chicago, 1 N.E.2d 244, 284 Ill.App. 598.

(4) Action on surety bond.—E. I. Du Pont De Nemours & Co. v. McKay Engineering & Construction Co., 18 N.E.2d 64, 297 Ill.App. 495.

(5) Attachment.—Nessen Transp. Co. v. Larsen, 7 N.E.2d 765, 290 Ill. App. 22—Burns v. Shoemaker, 172 Ill.App. 290.

(6) Blue Sky Law proceedings.—Rice v. Bogart, 272 Ill.App. 292.

(7) Forcible entry and detainer.—Szulerecki v. Oppenheimer, 132 N.E. 202, 299 Ill. 68—Meyer v. Ratsky, 264 Ill.App. 82—Szulerecki v. Oppenheimer, 218 Ill.App. 508, affirmed 132 N.E. 202.

(8) Foreclosure.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

Effect of Civil Practice Act.—Barry v. Knight, *supra*.

62. Ill.—People v. Municipal Court of Chicago, 194 N.E. 242, 359 Ill. 102.

Being a court of limited jurisdiction.—Linschitz v. C. A. Neuberger Co., Wis., 283 N.W. 811.

63. Ill.—Madison & Kedzie State Bank v. Old Reliable Motor Truck Co., 236 Ill.App. 442—Thorne v. Alcazar Amusement Co., 210 Ill.App. 173.

15 C.J. p 988 note 7.

Jurisdiction over nonresidents

Ill.—Cohen v. Bendix, 17 N.E.2d 12, 369 Ill. 507.

64. Ill.—Ptacek v. Coleman, 5 N.E. 2d 467, 364 Ill. 618, affirming 279 Ill.App. 639.

15 C.J. p 988 note 8, p 989 note 11.

Adoption of rules

Ill.—New Columbus Buggy Co. v. Empire Express Storage & Van Co., 198 Ill.App. 421.

15 C.J. p 989 note 12.

Civil Practice Act does not apply to practice provisions of Municipal Court Act.—Ptacek v. Coleman, 5 N.E.2d 467, 364 Ill. 618, affirming 279 Ill.App. 639—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277—Ratner v. Bartholomew, 282 Ill.App. 298.

65. Ill.—Morse-Hubbard Co. v. Michigan Cent. R. Co., 3 N.E.2d 93, 286 Ill.App. 163.

15 C.J. p 989 note 10.

Classes of actions

(1) Generally.—Seney v. Knight, 126 N.E. 761, 292 Ill. 206, affirming *In re Seney*, 213 Ill.App. 382—Selz v. Stafford, 120 N.E. 462, 284 Ill. 610, reversing 205 Ill.App. 558—Holmes v. Straus, 119 N.E. 708, 283 Ill. 621, modifying 204 Ill.App. 305—Dickes v. Magill Weinsheimer Co., 228 Ill.App. 62.

(2) In fourth class action, form of action is determined by proof.—Morse-Hubbard Co. v. Michigan Cent. R. Co., 3 N.E.2d 93, 286 Ill.App. 163—Wintitt v. Kornblith, 248 Ill.App. 108—Obermeyer v. Wisconsin Dairy Farms Co., 211 Ill.App. 213—Hassell v. State Bank of West Pullman, 210 Ill.App. 373—Donahue v. Wheeling Mold & Foundry Co., 205 Ill.App. 301.

(3) Accordingly, the fact that a declaration is in trover instead of case is immaterial.—Burge v. Engle-

wood Motor Car & Garage Co., 218 Ill.App. 357.

Supplementary proceedings

Ill.—Baronski v. Shust, 218 Ill. App. 8.

66. Ill.—Chicago v. Tearney, 187 Ill. App. 441—Duquesne Security Co. v. Hodgins, 182 Ill.App. 88—Hamill v. Watts, 180 Ill.App. 279. 15 C.J. p 989 note 13.

67. Ill.—Szulerecki v. Oppenheimer, 132 N.E. 202, 299 Ill. 68—Chicago City Bank & Trust Co. v. Kaplan, 281 Ill.App. 97—Madison & Kedzie State Bank v. Old Reliable Motor Truck Co., 236 Ill.App. 442—MacLean Drug Co. v. Stoeffhas, 229 Ill. App. 492—Baronski v. Shust, 218 Ill.App. 8.

15 C.J. p 989 note 14.

Substituted service

Ill.—MacLean Drug Co. v. Stoeffhas, 229 Ill.App. 492.

68. Ill.—Damiani v. Froulx, 195 Ill. App. 154—Wolf v. Timmons, 192 Ill.App. 121—Brockhaus v. Garner, 188 Ill.App. 560. 15 C.J. p 989 note 15.

Notice of motion, where party is in default, is unnecessary.—Butchas v. Metropolitan State Bank, 169 N.E. 747, 337 Ill. 612.

69. Ill.—Wertheimer v. Glanz, 277 Ill.App. 389—Buchsbaum v. Halper, 265 Ill.App. 226—Cooper v. Anderson, 246 Ill.App. 1—Bregman v. Friedman, 245 Ill.App. 492—Lindenthal v. Northwest State Bank, 221 Ill.App. 145.

15 C.J. p 989 note 16.

In fourth class actions

(1) Written pleadings are not required.—Wintitt v. Kornblith, 248 Ill. 108—Lurie v. Brewer, 248 Ill. App. 525—John Sexton & Co. v. English Canning & Mfg. Co., 211 Ill.App. 504—O'Donnell v. Curran, 210 Ill. App. 200—Gans v. Lincoln Stars, 209 Ill.App. 400—Inter Ocean Cabinet Co. v. McLaughlin, 169 Ill.App. 559—Blind v. Griffin, 168 Ill.App. 19—Bridges v. Engers, 167 Ill.App. 425—Chicago, M. & St. P. Ry. Co. v. Faithorn, 167 Ill.App. 420, affirmed Chicago, M. & St. R. Co. v. Batchelder, 100 N.E. 495, 257 Ill. 107.

(2) The pleadings are not controlling.—Wertheimer v. Glanz, 277 Ill. App. 389—Walsh v. Fallis, 266 Ill. App. 341.

as construction of complaints,⁷⁰ affidavits,⁷¹ or state- | ments⁷² of claim; statements⁷³ or affidavits⁷⁴ of

(3) Precision and certainty of statement is not required.—Union Bank of Chicago v. Metropolitan Life Ins. Co., 266 Ill.App. 345—Hecht v. Goldberg, 204 Ill.App. 441.

70. Ill.—Meyer v. Ratsky, 264 Ill. App. 82.

71. Ill.—Griswold v. H. Pulman & Co., 210 Ill.App. 45—Gypsum Fireproofing Co. v. Nelson & Lewin, 205 Ill.App. 460—Burns v. Shoemaker, 172 Ill.App. 290.

15 C.J. p 990 note 18 [a], [b].

In attachment

Ill.—Joslyn v. Simmons, 208 Ill.App. 256—Levy v. Payne, 204 Ill.App. 224—Burns v. Shoemaker, 172 Ill. App. 290.

72. Ill.—Lyons v. Kanter, 120 N.E. 764, 285 Ill. 336, affirming 210 Ill. App. 78—Walter Cabinet Co. v. Russell, 95 N.E. 462, 250 Ill. 416—Thomason v. Chicago Motor Coach Co., 1 N.E.2d 729, 284 Ill.App. 593—Citizens' Securities & Inv. Co. v. Dennis, 236 Ill.App. 307—Messenger v. Wendell, 211 Ill.App. 374—Doyle v. Fallows, 209 Ill.App. 325—Hunt v. Keating, 201 Ill.App. 567—Wasmuth v. Wright, 199 Ill. App. 527—M. H. Vestal Co. v. Robertson, 189 Ill.App. 518, affirmed 115 N.E. 629, 277 Ill. 425.

15 C.J. p 990 note 19.

Admissions

Ill.—Board of Education of City of Chicago v. Chicago Bonding & Surety Co., 218 Ill.App. 20—Niblack v. Adler, 209 Ill.App. 156. See Arthur Wagner Co. v. Gallagher & Speck, 204 Ill.App. 206.

Filing

Ill.—Newport v. McPherson, 203 Ill. App. 208.

In fourth class cases

(1) Sufficiency of statement not governed by common-law rules.—Nicholson v. Kurzdorfer, 15 N.E.2d 50, 295 Ill.App. 617—Winnick v. Aetna Acceptance Co., 275 Ill.App. 438—Salduskas v. Robin, 250 Ill. App. 252.

(2) Statement of nature of demand is all that is ordinarily required.—People v. Milwaukee Dairy Co., 244 Ill.App. 341—Thon v. Jackson, 221 Ill.App. 358—Kappes v. Bacon, 209 Ill.App. 290—Hodges v. Coey, 205 Ill.App. 417—Lyons v. Kanter, 210 Ill.App. 78, affirmed 120 N.E. 764, 285 Ill. 336—Cross v. City of Chicago, 198 Ill.App. 177—Ferguson v. Hale, 162 Ill.App. 523.

(3) Party suing need not name his action, and if it is misnamed, his rights will not be affected.—Detmer Woolen Co. v. Arthur Dixon Transfer Co., 167 Ill.App. 408.

(4) Claim is what evidence makes

it.—Lurie v. Brewer, 248 Ill.App. 525.

(5) Good cause of action must be stated.—Lyons v. Kanter, 120 N.E. 764, 285 Ill. 336, affirming 210 Ill. App. 78—F. N. Matthews & Co. v. Lilienthal, 208 Ill.App. 302.

(6) No statement of claim required in replevin action.—Chicago, R. I. & P. Ry. Co. v. North American Cold Storage Co., 244 Ill.App. 522.

Signing

Ill.—Weinberger v. Werremeyer, 224 Ill.App. 217.

Time for objection

Ill.—Salduskas v. Robin, 250 Ill.App. 252.

Statements and allegations held sufficient

Ill.—People v. Milwaukee Dairy Co., 244 Ill.App. 341—Bunes v. Sander, 229 Ill.App. 392—McClunn v. Gillespie, 227 Ill.App. 400—Weinberger v. Werremeyer, 224 Ill.App. 217—Schroeder v. Levy, 222 Ill. App. 252—Thon v. Jackson, 221 Ill.App. 358—Philippe v. Curran, 218 Ill.App. 517—Ellis v. Hillson & Etten Co., 211 Ill.App. 581—Evans v. Schwartz, 211 Ill.App. 573—Moldenhauer v. Moskalczuk, 211 Ill.App. 462—Hassell v. State Bank of West Pullman, 210 Ill.App. 373—Lyons v. Kanter, 210 Ill.App. 78, affirmed 120 N.E. 764, 285 Ill. 336—Woolton v. R. C. Crist, Inc., 210 Ill.App. 62—Tull v. Clarke, 209 Ill. App. 448—U. S. Fashion & Sample Book Co. v. Schmidt, 209 Ill.App. 240—Cermak v. Schwendel, 209 Ill. App. 189—Heller v. Speedway Park Ass'n, 209 Ill.App. 181—American Contracting & Supply Co. v. Speedway Park Ass'n, 209 Ill.App. 177, 179—Cedvilas v. Sinkus, 209 Ill. App. 110—Knudsen v. Helmick, 207 Ill.App. 98—Diamond v. Goldstein, 205 Ill.App. 538—Waller v. Richter, 205 Ill.App. 440—Chicago Rys. Co. v. Morris, 203 Ill.App. 449—Reid v. McKinney, 202 Ill.App. 129—Chicago, I. & L. Ry. Co. v. Monarch Lumber Co., 202 Ill.App. 20—Kuzmierczyk v. Joseph Schlitz Brewing Co., 201 Ill.App. 479—Wiese v. Meissner, 171 Ill.App. 597.

Statements and allegations held insufficient

Ill.—Ed. Lieberman, Inc., v. South Side Furniture & Commission House, 281 Ill.App. 104—Blanke v. Hammel, 256 Ill.App. 251—Madison & Kedzie State Bank v. Old Reliable Motor Truck Co., 236 Ill.App. 442—O'Pizzi v. Valley Fruit Co., 213 Ill.App. 162—Connors v. Wagner, 211 Ill.App. 413—Lawson v. Williams, 211 Ill.App. 248—McCarthy v. Morgan, 209 Ill.App. 244—E. I. Du Pont De Nemours Pow-

der Co. v. S. R. H. Robinson & Son Contracting Co., 204 Ill.App. 529—S. S. Borden Co. v. Western Union Telegraph Co., 204 Ill.App. 353—Arthur Wagner Co. v. Gallagher & Speck, 204 Ill.App. 206—Ruthowski v. Marcowska, 203 Ill.App. 204—Levy v. Swift & Co., 201 Ill.App. 454—Post & Lester Co. v. Chicago Flexible Shaft Co., 199 Ill.App. 637—Fortune Bros. Brewing Co. v. Chicago City Ry. Co., 199 Ill.App. 476—Rauen v. Benson, 198 Ill.App. 65.

Unnecessary allegations

Ill.—Winnick v. Aetna Acceptance Co., 275 Ill.App. 438—Capital State Sav. Bank v. Larson, 255 Ill.App. 479—Cermak v. Schwendel, 209 Ill. App. 189—Smith v. Swinehart, 209 Ill.App. 175—Jackson v. Burns, 203 Ill.App. 196—Wasmuth v. Wright, 199 Ill.App. 527.

Variance

Ill.—Knight v. Seney, 211 Ill.App. 324—Hunt v. Keating, 201 Ill.App. 587—Christofana v. Anton, 198 Ill. App. 151.

Motion to strike

Ill.—Orr v. Croissant, 253 Ill.App. 396—Mladich v. McEneely, 212 Ill. App. 435—Chicago Rys. Co. v. Morris, 203 Ill.App. 449.

Time for objection

Ill.—Elaborated Ready Roofing Co. v. Hunter, 267 Ill.App. 134—Salduskas v. Robin, 250 Ill.App. 252.

Waiver of defects

Ill.—McCarthy v. Morgan, 209 Ill. App. 244—Ruthowski v. Marcowska, 203 Ill.App. 204—Jackson v. Burns, 203 Ill.App. 196.

73. Ill.—Krone Die Casting Co. v. Do-Ray Lamp Co., 18 N.E.2d 100, 237 Ill.App. 602.

74. Ill.—Scholbe v. Schuckardt, 127 N.E. 169, 292 Ill. 529, 13 A.L.R. 247, reversing 212 Ill.App. 663—Schrayer v. C. Doering & Son, 211 Ill.App. 284—Reid v. McKinney, 202 Ill.App. 129—Bradford & Co. v. U. S. Tent & Awning Co., 198 Ill. App. 505—Shimeall v. Lehmann, 198 Ill.App. 29.

15 C.J. p 990 note 22.

Sufficiency

Ill.—H. & E. Holding Co. v. W. A. Davis Lumber Co., 229 Ill.App. 409—Taft v. Herley, 211 Ill.App. 369—Morgan v. Vierling, 211 Ill. App. 317, 319—Schrayer v. C. Doering & Son, 211 Ill.App. 284—Harris v. Willis, 209 Ill.App. 401—Grossman v. Cohen, 207 Ill.App. 156—Grossfeld & Roe Co. v. William Junker Co., 205 Ill.App. 336—Marshall v. Delaware, L. & W. R. Co., 203 Ill.App. 320—Johnson v. Hogg, 202 Ill.App. 253—Reid v. McKinney, 202 Ill.App. 129—Shimeall v. Lehmann, 198 Ill.App. 29.

defense or of merits;⁷⁵ answers;⁷⁶ replications;⁷⁷ counterclaims;⁸³ the burden of proof;⁸⁴ admissibility⁸⁵ and weight and sufficiency⁸⁶ of evidence; bills of particulars;⁷⁸ interrogatories and answers;⁷⁹ the amendment of pleadings;⁸⁰ issues, trial,⁸⁷ including the right of a judge of a court proof, and variance;⁸¹ defenses;⁸² set-offs and

Waiver of objections

III.—Scholbe v. Schuchardt, 127 N. E. 169, 292 Ill. 529, 13 A.L.R. 247, reversing 212 Ill.App. 663.

75. III.—Matthiessen v. Duntley, 138 N.E. 178, 307 Ill. 36—American Hard Rubber Co. v. Howe, 117 N. E. 425, 280 Ill. 431, reversing 203 Ill.App. 353—J. L. Sugden Advertising Co. v. National Trading Co., 236 Ill.App. 269—John Sexton & Co. v. English Canning & Mfg. Co., 211 Ill.App. 504—Harris v. Willis, 209 Ill.App. 401—Stewart v. Junkin, 209 Ill.App. 186—Douglas State Bank v. Chicago Bonding & Surety Co., 203 Ill.App. 313—Hellman v. Katz, 201 Ill.App. 488.

15 C.J. p 990 note 23.

Admissions

III.—Grand Trunk Western Ry. Co. v. Hales & Hunter Co., 233 Ill.App. 109.

Affidavits held sufficient

III.—Matthiessen v. Duntley, 138 N. E. 178, 307 Ill. 36—New York Bond & Mortgage Co. v. McWilliams, 253 Ill.App. 404—George C. Peterson Co. v. Timken Roller Bearing Co., 223 Ill.App. 53—Prindle v. Sander, 207 Ill.App. 89—E. I. Du Pont De Nemours Powder Co. v. S. R. H. Robinson & Son Contracting Co., 204 Ill.App. 529—Muller v. Walensky, 204 Ill.App. 352—Brachas v. Sabath & Weiskopf Co., 198 Ill. App. 357.

Affidavits held insufficient

III.—Gaskill v. Nesselroth, 282 Ill. App. 493—Cohen v. Flaxman, 232 Ill.App. 240—Matthiessen v. Duntley, 225 Ill.App. 249—Heller v. Speedway Park Ass'n, 209 Ill.App. 181—American Contracting & Supply Co. v. Speedway Park Ass'n, 209 Ill.App. 177, 179—Waller v. Richter, 205 Ill.App. 440—Hellman v. Katz, 201 Ill.App. 488—Post & Lester Co. v. Chicago Flexible Shaft Co., 199 Ill.App. 637—Was-muth v. Wright, 199 Ill.App. 527.

Motion to strike

III.—State Street Furniture Co. v. Armour & Co., 259 Ill.App. 589, affirmed 177 N.E. 702, 345 Ill. 160, 76 A.L.R. 1298.

76. Notice of motion to strike required.—Craig v. Chicago Trust Co., 236 Ill.App. 223.

77. III.—Cohen v. New York Life Ins. Co., 256 Ill.App. 345.

78. III.—Scola v. Scola, 194 Ill.App. 336—Toledo Computing Scale Co. v. Tyden, 141 Ill.App. 31, 15 C.J. p 990 note 21.

79. III.—Armour Grain Co. v. Pittsburgh, C. C. & St. L. R. Co., 150 N.

E. 650, 320 Ill. 156—Woodlawn Trust & Savings Bank v. Donaho, 239 Ill.App. 158—Pinckovitch v. South Side Elevated R. Co., 211 Ill.App. 516.

15 C.J. p 988 note 8 [a], p 989 note 11 [d].

Corporation not required to answer interrogatories

III.—Armour Grain Co. v. Pittsburgh, C. C. & St. L. R. Co., 150 N.E. 650, 320 Ill. 156.

80. III.—Giannola v. Great Northern Life Ins. Co., 4 N.E.2d 802, 287 Ill.App. 619—Connors v. Wagner, 211 Ill.App. 413—Meacham v. Lobdell, 198 Ill.App. 359.

15 C.J. p 990 note 24.

Amendment of statement of claim

III.—Connors v. Wagner, 211 Ill.App. 413—Downs v. Lambur, 210 Ill. App. 319—Standard Brewery v. Healy, 209 Ill.App. 272—E. I. Du Pont De Nemours Powder Co. v. S. R. H. Robinson & Son Contracting Co., 204 Ill.App. 529—Geiger v. Barrell, 185 Ill.App. 517.

15 C.J. p 990 note 19 [g].

Amendment of affidavit of merits

III.—Wallace v. Armstrong, 236 Ill. App. 457.

15 C.J. p 990 note 23 [f], [g].

81. III.—Philippe v. Curran, 218 Ill.App. 517—Gans v. Lincoln Stars, 209 Ill.App. 400—Ruzicka v. Lau, 207 Ill.App. 326—Donahue v. Wheeling Mold & Foundry Co., 205 Ill.App. 301—Wilson v. Menagh, 201 Ill.App. 437—Meseke v. H. Piper Co., 198 Ill.App. 325—Kadison v. Fortune Bros. Brewing Co., 163 Ill.App. 276—Hamlin v. Piser, 163 Ill.App. 51.

15 C.J. p 990 note 17.

82. III.—Filko v. De Graff, Limited, 12 N.E.2d 27, 293 Ill.App. 624—Ubowich v. Northern Trust Co., 281 Ill.App. 109—Grossfeld & Roe Co. v. William Junker Co., 205 Ill. App. 336—J. S. Hoffman Co. v. Sterling Packing Co., 204 Ill.App. 531—Meacham v. Lobdell, 198 Ill. App. 359.

Defense of nul tiel corporation

III.—New York Bond & Mortgage Co. v. McWilliams, 253 Ill.App. 404.

Equitable defenses

III.—Kessler v. Aller, 5 N.E.2d 761, 287 Ill.App. 606.

83. III.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277—Harris v. Willis, 209 Ill.App. 401—F. N. Matthews & Co. v. Lillenthal, 208 Ill. App. 302—Post & Lester Co. v. Chicago Flexible Shaft Co., 199 Ill. App. 637.

15 C.J. p 990 note 27.

Under Civil Practice Act

III.—Barry v. Knight, 15 N.E.2d 999, 296 Ill.App. 277.

84. III.—Duquesne Security Co. v. Hodgins, 182 Ill.App. 88.

85. III.—Siotka v. Rappaport, 234 Ill.App. 576—Guerra v. Rocco, 181 Ill.App. 528.

15 C.J. p 990 note 29.

Evidence admissible

III.—Kessler v. Aller, 5 N.E.2d 761, 287 Ill.App. 606—Herdien v. Jones, 202 Ill.App. 172—Hulbert v. Richter, 199 Ill.App. 435.

Evidence inadmissible

III.—Siotka v. Rappaport, 234 Ill. App. 576—Kaperonis v. Kalodimos Bros. Ice Cream & Candy Co., 209 Ill.App. 242—Smith v. Lord & Bushnell Co., 199 Ill.App. 582.

86. III.—Burge v. Englewood Motor Car & Garage Co., 213 Ill.App. 357—G. H. Hammond Co. v. Ford, 211 Ill.App. 490—Weiss v. Corn, 203 Ill.App. 261—Frankel v. Salzenstein, 198 Ill.App. 363—Meacham v. Lobdell, 198 Ill.App. 359.

15 C.J. p 991 note 30.

87. III.—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 90—F. M. Woodsmall Const. Co. v. Hall, 198 Ill.App. 250.

15 C.J. p 991 note 32.

Particular matters

(1) Election between causes of action.—Graham v. Dr. Pratt Inst., 163 Ill.App. 91.

(2) Right to jury trial.—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 90—15 C.J. p 991 note 33.

(3) Findings.—Kee & Chapell Dairy Co. v. Pennsylvania Co., 126 N.E. 179, 291 Ill. 243—Lippel & Feit v. Horan, 3 N.E.2d 345, 286 Ill.App. 609.

(4) Verdicts.—Pitts v. Kelly, 234 Ill.App. 403—Messenger v. Wendell, 211 Ill.App. 374—Meacham v. Lobdell, 198 Ill.App. 359.

(5) Direction of verdicts.—Pitts v. Kelly, 234 Ill.App. 403—Jeffris v. Ayer, etc., Tie Co., 184 Ill.App. 533.

Instructions

(1) In general.—Paulick v. National Bank of Republic, 279 Ill.App. 160—Krupp v. National Fur Dressing & Dyeing Co., 250 Ill.App. 282—Howe v. Fulton, 225 Ill.App. 589—Markus v. Aetna Ins. Co. of Hartford, Conn., 209 Ill.App. 491—Northern Coal & Supply Co. v. Mueller Bros. Fuel Co., 171 Ill.App. 342—Lepman v. Employers' Liability Assur. Corporation, Ltd., of London, 170 Ill.

of another city to sit;⁸⁸ judgments⁸⁹ and orders and the entry thereof,⁹⁰ including the lien thereof;⁹¹ judgments by default;⁹² the modification⁹³ or vacation⁹⁴ of judgments; damages⁹⁵ and executions;⁹⁶ also continuances,⁹⁷ dismissals,⁹⁸ non-

App. 379—Kraft v. Jefferson, 150 Ill. App. 110.

15 C.J. p 991 note 34.

(2) Time for objection.—Bent v. Furnald, 159 Ill.App. 552.

(3) Purpose of rule of court respecting objections to charge.—Siegel v. Motor Vehicle Casualty Co., 4 N.E.2d 805, 287 Ill.App. 613.

88. Ill.—People v. Fitzpatrick, 192 Ill.App. 125.

89. Ill.—Bruner v. Grand Trunk Western Ry. Co., 150 N.E. 266, 319 Ill. 421, affirming 236 Ill.App. 541—O'Keefe Bros. Co. v. Finder, 237 Ill.App. 475—Halberg v. Fick, 218 Ill.App. 223—Marshall Field & Co. v. Nymann, 210 Ill.App. 214, affirmed 120 N.E. 756. See Kern v. Foster, 207 Ill.App. 362.

15 C.J. p 991 note 40.

Proper judgments

Ill.—Byrne v. Meites, 10 N.E.2d 684, 292 Ill.App. 197—J. L. Sugden Advertising Co. v. National Trading Co., 236 Ill.App. 269—Hall v. Small, 221 Ill.App. 211—Gottlieb v. Andrews & Co., 211 Ill.App. 499—Victor Electric Co. v. Miller, 199 Ill.App. 577.

Improper judgments

Ill.—Fara v. Reliable Furniture Mfg. Co., 237 Ill.App. 460—Madison & Kadzie State Bank v. Old Reliable Motor Truck Co., 236 Ill.App. 442—Doyle v. Fallows, 209 Ill.App. 325.

Against one of several defendants

Ill.—Bruner v. Grand Trunk Western Ry. Co., 150 N.E. 266, 319 Ill. 421, affirming 236 Ill.App. 541—Beike v. Bush, 218 Ill.App. 29—Doyle v. Fallows, 209 Ill.App. 325—Umlauf v. Chacamas Tropical Products Co., 209 Ill.App. 291.

Summary judgments

Ill.—Filko v. De Graff, Limited, 12 N.E.2d 27, 293 Ill.App. 624—Ratner v. Bartholomew, 282 Ill.App. 298.

90. Ill.—W. F. Hallam & Co. v. Massey, 207 Ill.App. 417.

15 C.J. p 991 notes 41, 42.

91. Ill.—Lott v. Davis, 106 N.E. 179, 264 Ill. 272.

92. Ill.—Lyons v. Kanter, 120 N.E. 764, 285 Ill. 336, affirming 210 Ill. App. 78—Moore v. Robbins Machinery & Supply Co., 252 Ill.App. 24—Breakstone v. Obsbaum, 210 Ill.App. 225—Harris v. Willis, 209 Ill.App. 401.

15 C.J. p 991 note 43.

Where statement of claim insufficient

Ill.—Lyons v. Kanter, 120 N.E. 764, 285 Ill. 336, affirming 210 Ill.App. 78—Ed. Lieberman, Inc., v. South Side Furniture & Commission

House, 281 Ill.App. 104—Ruthowski v. Marcowska, 203 Ill.App. 204—Carter v. Crist, 199 Ill.App. 371.

Where affidavit of merits not filed within time

Ill.—Cedvilas v. Sinkus, 209 Ill.App. 110.

93. Ill.—Mazer v. Schaefer, 19 N.E.2d 765, 299 Ill.App. 612—Mazor v. Handler, 208 Ill.App. 312.

15 C.J. p 991 note 44.

94. Ill.—People ex rel. Lax v. Ehler, 187 N.E. 630, 353 Ill. 595—Feldman v. Glenn, 258 Ill. 260—Edward Greenstone Furniture Co. v. Oliver, 233 Ill.App. 184—Orient Mfg. Co. v. Channell, 209 Ill.App. 438.

15 C.J. p 991 note 45.

Motion in general must be made within thirty days after entry of judgment.—Edward Greenstone Furniture Co. v. Oliver, 233 Ill.App. 184—Schick v. Durham, 209 Ill.App. 268—Collins v. Drab, 209 Ill.App. 447—Orient Mfg. Co. v. Channell, 209 Ill.App. 438—Kern v. Foster, 207 Ill. App. 362.

Motion in nature of writ of error coram nobis may be made more than thirty days after final judgment.—Mazer v. Schaefer, 19 N.E.2d 765, 299 Ill.App. 612—Central Cleaners and Dyers v. Schild, 1 N.E.2d 90, 284 Ill. App. 267—Collins v. Drab, 209 Ill. App. 447.

Petition to vacate

(1) May be filed after thirty days from the date judgment is entered.—Welley v. Klein, 257 Ill.App. 171.

(2) Nature and effect of proceeding.—De Stefano v. Miles, 268 Ill. App. 353—Welley v. Klein, 257 Ill. App. 171—Izzi v. Ialongo, 248 Ill. App. 90—Doyle v. Fallows, 207 Ill. App. 5.

(3) Power and jurisdiction of court.—People ex rel. Lax v. Ehler, 187 N.E. 630, 353 Ill. 595—Mazer v. Schaefer, 19 N.E.2d 765, 299 Ill.App. 612—Fendrich v. Kozlowski, 15 N.E.2d 31, 295 Ill.App. 614—De Stefano v. Miles, 268 Ill.App. 353—Welley v. Klein, 257 Ill.App. 171—Gottschall v. Kimbark State Bank, 220 Ill.App. 473—American Surety Co. of New York v. Bliss, 214 Ill.App. 463—Doyle v. Fallows, 207 Ill.App. 5.

(4) Form and contents of petition.—Martinkus v. Bartkus, 15 N.E.2d 907, 296 Ill.App. 637—Gold v. River-view Park Co., 3 N.E.2d 350, 286 Ill. App. 608—Welley v. Klein, 257 Ill. App. 171—Craig v. Chicago Trust Co., 236 Ill.App. 223—American Surety Co. of New York v. Bliss, 214 Ill. App. 463.

(5) Effect of defects in motion and affidavit.—Finlen v. Skelly, 141 N.E. 338, 310 Ill. 170.

(6) Hearing.—Imbrie v. Bear, 230 Ill.App. 155.

(7) Evidence.—Izzi v. Ialongo, 248 Ill.App. 90.

By appeal or bill in equity

A final judgment of the municipal court may be modified or set aside after thirty days from the date such judgment becomes final.—Mazer v. Schaefer, 19 N.E.2d 765, 299 Ill.App. 612.

Grounds for vacation

Ill.—Castro v. Smuvawsky, 16 N.E. 2d 171, 296 Ill.App. 639—Ed. Lieberman, Inc., v. South Side Furniture & Commission House, 281 Ill.App. 104—Kahn v. Rasof, 253 Ill.App. 546—Rosenthal v. Wald, 252 Ill.App. 383—Izzi v. Ialongo, 248 Ill.App. 90—Fara v. Reliable Furniture Mfg. Co., 237 Ill.App. 460—Imbrie v. Bear, 230 Ill.App. 155—Orient Mfg. Co. v. Channell, 209 Ill.App. 438—Doyle v. Fallows, 207 Ill.App. 5.

Waiver

(1) Of motion to vacate.—McCoy v. Acme Automatic Printing Co., 115 N.E. 1032, 278 Ill. 276, reversing 200 Ill.App. 55.

(2) Of insufficiency of petition to vacate.—Collateral Finance Co. v. Berman, Ill.App., 20 N.E.2d 820.

(3) Of right to complain of order vacating judgment.—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 90.

95. Ill.—Kidd & Co. v. North American Provision Co., 249 Ill.App. 28.

96. Ill.—Chicago City Bank & Trust Co. v. Kaplan, 281 Ill.App. 97—People v. Traeger, 218 Ill.App. 157.

97. Ill.—Garlick v. Shane, 209 Ill. App. 497—Bent v. Slade, 189 Ill. App. 105.

Restoration of continued cases to trial calendar

(1) Power of chief justice.—Carroll, Schendorf & Boenicke v. Hastings, 259 Ill.App. 564.

(2) Necessity for notice to parties and vacation of general continuance.—Carroll, Schendorf & Boenicke v. Hastings, supra.

98. Ill.—Charles Friend & Co. v. Goldsmith & Seidel Co., 138 N.E. 185, 307 Ill. 45, affirming 224 Ill. App. 336—Philadelphia Rapid Transit Co. v. Coast Fir & Cedar Products Co., 241 Ill.App. 320—Messenger v. Wendell, 211 Ill.App. 374.

15 C.J. p 991 note 38.

suits,⁹⁹ and records.¹

Also there have been a number of decisions relating to appeals from this court,² including adjudications in regard to the nature and grounds of appeal.

99. Ill.—American Shipping Co. v. Henderson, 216 Ill.App. 175—Kilroy v. Justrite Mfg. Co., 209 Ill. App. 499.
15 C.J. p 991 note 39.

1. Sufficiency of certified copy of the record of a judgment order.—W. F. Hallam & Co. v. Massey, 207 Ill.App. 417.

Amendment

Ill.—People v. Weinstein, 163 Ill.App. 55, reversed on other grounds 99 N.E. 589, 255 Ill. 530.

2. Ill.—Kellogg v. Kellogg, 20 N.E. 2d 585, 371 Ill. 241.
15 C.J. p 991 note 48.

3. Ill.—United Newspapers Magazine Corporation v. United Advertising Cos., 17 N.E.2d 345, 297 Ill. App. 637—Walley v. Klein, 257 Ill. App. 171—Rice v. Goldstein, 234 Ill.App. 448—Cohen v. Flaxman, 232 Ill.App. 240—Imbrie v. Bear, 230 Ill.App. 155—MacLean Drug Co. v. Stoeffhas, 229 Ill.App. 492—H. & E. Holding Co. v. W. A. Davis Lumber Co., 229 Ill.App. 409—Link v. Skeeles, 207 Ill.App. 48.
15 C.J. p 991 note 48 [b].

4. Ill.—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 99—Malecki v. Heldman, 199 Ill.App. 484.

Adherence to theory pursued below
Ill.—Hochschild v. Goddard Tool Co., 233 Ill.App. 56—Wolf v. Ladd, 220 Ill.App. 312.

Estoppel to allege or waiver of error

Ill.—Cutler v. Gardiner Metal Co., 225 Ill.App. 497—Grossman v. Nichols, 223 Ill.App. 297—Grafton v. North-American Transp. & Trading Co., 216 Ill.App. 262—Teich v. Ayer, 213 Ill.App. 41—Beike v. Bush, 213 Ill.App. 29—Harris v. Willis, 209 Ill.App. 401—Brook v. Smerling, 204 Ill.App. 250—Rezek v. Grosch, 195 Ill.App. 164—Rosenthal v. Turner, 192 Ill.App. 9—Smith v. Bankers' Engineering Co., 186 Ill.App. 115.

Motion for directed verdict

Ill.—Chicago, R. I. & P. R. Co. v. North American Cold Storage Co., 244 Ill.App. 522.

Necessity for submission of findings of fact and propositions of law
Ill.—Kagan v. Gillett, 269 Ill.App. 811.
4 C.J. p 657 note 37 [b]—15 C.J. p 991 note 48 [c].

Objections to instructions

Ill.—Lawson v. Beaudry, 9 N.E.2d 260, 290 Ill.App. 612—Faulick v.

National Bank of Republic, 279 Ill. App. 160—Nestler v. Pure Silk Hosiery Mills, 242 Ill.App. 151—Miller v. Lake View State Bank, 240 Ill.App. 395—Howe v. Fulton, 225 Ill.App. 589.

Questions not raised and properly preserved for review

Ill.—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 90—United Newspapers Magazine Corporation v. United Advertising Cos., 17 N.E.2d 345, 297 Ill.App. 637—Chicago City Bank & Trust Co. v. Kaplan, 281 Ill.App. 97—Weinstein v. Morris, 281 Ill.App. 12—Tarjan, for Use of Lefkew, v. National Surety Co., 268 Ill.App. 232—Chicago, R. I. & P. R. Co. v. North American Cold Storage Co., 244 Ill.App. 522—Stanfield v. Frank Parmelee Co., 223 Ill.App. 199—Philippe v. Curran, 218 Ill.App. 517—Board of Education of City of Chicago v. Chicago Bonding & Surety Co., 218 Ill.App. 20—John Sexton & Co. v. English Canning & Mfg. Co., 211 Ill.App. 504—O'Donnell v. Curran, 210 Ill.App. 200—Tull v. Clarke, 209 Ill.App. 448—Knudsen v. Helmick, 207 Ill. App. 98—Woods v. McCrimmin, 204 Ill.App. 399—Dahlgren v. Israel, 204 Ill.App. 340—Reid v. McKinney, 202 Ill.App. 129—Chicago, I. & L. Ry. Co. v. Monarch Lumber Co., 202 Ill.App. 20—Malecki v. Heldman, 199 Ill.App. 484.

5. Ill.—Kellogg v. Kellogg, 20 N.E. 2d 585, 371 Ill. 241.

Bond

Ill.—Alexander H. Revell & Co. v. C. H. Morgan Grocery Co., 211 Ill. App. 265—Meyer v. Providers' Life Assur. Co., 208 Ill.App. 223—Sheppard-Strassheim Co. v. Nickas, 207 Ill.App. 370—Mioduszewski v. Spoganitz, 205 Ill.App. 331.

Notice of appeal

Ill.—Kellogg v. Kellogg, 20 N.E.2d 585, 371 Ill. 241.

Writ of error

Ill.—City of Chicago v. Chicago S. S. Lines, 159 N.E. 801, 328 Ill. 309—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 723, 323 Ill. 90—Williams v. Webster Hotel Co., 145 N.E. 622, 315 Ill. 64—Posner v. Wechter, 276 Ill.App. 138—Welley v. Klein, 257 Ill.App. 171—Doyle v. Fallows, 207 Ill.App. 5.

6. Ill.—Pauler v. Bates, 166 N.E. 49, 334 Ill. 338—Kilgore Linotyping Co. v. Shanin, 209 Ill.App. 550. See Louis Weber & Co. v. Hot Point Electric Heating Co., 209 Ill.

late jurisdiction, considered below in §§ 352–363; decisions reviewable;³ the presentation and reservation of grounds of review;⁴ the requisites and proceedings for the transfer of the cause;⁵ the record and proceedings not of record;⁶ the hearing or

App. 437—Cronin v. Court of Honor, 205 Ill.App. 443.

15 C.J. p 991 note 48 [g].

Matters to be shown by record

(1) Jurisdiction of court.—De Stefano v. Miles, 268 Ill.App. 353.

(2) Rules of court.—People v. Milwaukee Dairy Co., 244 Ill.App. 341—John Sexton & Co. v. English Canning & Mfg. Co., 211 Ill.App. 504—Warren Jewelry Co. v. Kaul, 207 Ill. App. 134—Obermeyer v. Wisconsin Dairy Farms Co., 199 Ill.App. 568.

(3) Other matters.—O'Keefe Bros. v. Finder, 237 Ill.App. 475—Louis Weber & Co. v. Hot Point Electric Heating Co., 209 Ill.App. 437—Vaughn v. City of Chicago, 198 Ill.App. 100.

Bill of exceptions

(1) Where used.—Pauler v. Bates, 166 N.E. 49, 334 Ill. 338—Harris v. Willis, 209 Ill.App. 401—Grossman v. Cohen, 207 Ill.App. 156—Weingarden v. Weinberg, 203 Ill.App. 228.

(2) Where not used.—Harmon v. Callahan, 121 N.E. 194, 286 Ill. 59, reversing 207 Ill.App. 506—State Street Furniture Co. v. Armour & Co., 259 Ill.App. 589, affirmed 177 N. E. 702, 345 Ill. 160, 76 A.L.R. 1298—City of Chicago v. Boller, 203 Ill. App. 281—City of Chicago v. Simonetti, 203 Ill.App. 279.

(3) Sufficiency.—De Stefano v. Miles, 268 Ill.App. 353—Doretti v. George E. Rice Potato Co., 210 Ill. App. 300.

(4) Presentation, settlement, signing, and filing.—People v. Lyle, 160 N.E. 742, 329 Ill. 418—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 90—Williams v. Webster Hotel Co., 145 N.E. 622, 315 Ill. 64—Koscal v. Wolfson, 215 Ill.App. 1—Leinert v. Jeffris, 210 Ill.App. 74—Haines v. Knowlton Danderline Co., 156 Ill.App. 408, affirmed 93 N.E. 743, 248 Ill. 269—15 C.J. p 991 note 48 [e], [f], [l].

(5) Jurisdiction of municipal court, as to.—Butterick Pub. Co. v. Ft. Dearborn Nat. Bank, 167 Ill.App. 603.

Statement of facts

Ill.—Haggenjos v. City of Chicago, 168 N.E. 661, 336 Ill. 573—National Weeklies, Inc., v. Klein, 262 Ill. App. 146—Leguriates v. E. F. McDonald & Co., 210 Ill.App. 150—Morsbach v. Waddell, 210 Ill.App. 12—Watson v. Chicago Bldg. Const. Co., 209 Ill.App. 434.
15 C.J. p 989 note 11 [b].

Transcript and stenographic report

Ill.—Marshall Field & Co. v. Nyman, 120 N.E. 756, 285 Ill. 306, affirm-

rehearing;⁷ and there have been a number of decisions relating to review;⁸ the determination or disposition of the cause;⁹ and liabilities on bonds and undertakings.¹⁰

ing 210 Ill.App. 214—Wohlberg v. Merchants' Reserve Life Ins. Co., 213 Ill.App. 389—Newton v. Ohrenstein, 211 Ill.App. 304—Caruthers v. Macaluso, 209 Ill.App. 542—Harkins v. Sherwood, 207 Ill.App. 24—City of Chicago v. Boller, 203 Ill.App. 282—City of Chicago v. Boller, 203 Ill.App. 282—Weiss v. Corn, 203 Ill.App. 261.

15 C.J. p 989 note 11 [a], p 991 note 48 [h]—[k].

Clerk's record

Action of municipal court can be shown only by clerk's record and this cannot be impeached by clerk, judge, or other evidence.—People v. Lyle, 160 N.E. 742, 329 Ill. 418.

Common-law record

Ill.—Welley v. Klein, 257 Ill.App. 171.

Authentication and certification

Ill.—Pauler v. Bates, 166 N.E. 49, 334 Ill. 338—City of Chicago v. Walsh, 207 Ill.App. 50.

Amendment and correction

Ill.—Weinstein v. Morris, 281 Ill.App. 12.

7. Ill.—De Stefano v. Miles, 268 Ill.App. 353.

3. Ill.—McConaughy v. Gage, 252 Ill.App. 17—Bowser v. Musical Courier Co., 211 Ill.App. 372—Wolf v. Dick, 209 Ill.App. 626—Corrigan v. Harris, 207 Ill.App. 291.

Presumptions

(1) On appeal all reasonable presumptions will be indulged in favor of the correctness of the judgment or order from which the appeal was taken.—Dasey v. Williams, 252 Ill.App. 329—Salduskas v. Robin, 250 Ill.App. 252—Winitt v. Kornblith, 248 Ill.App. 108—Victor v. Warner, 248 Ill.App. 35—O'Keefe Bros. Co. v. Funder, 237 Ill.App. 475—Charles Friend & Co. v. Goldsmith & Seidel Co., 224 Ill.App. 336, affirmed 138 N.E. 185—Hirster v. Strehmann, 222 Ill.App. 593—American Spiral Pipe Works v. Universal Oil Products Co., 20 Ill.App. 383—Halberg v. Fick, 18 Ill.App. 223—Krug Coal Co. v. C. B. Blake Co., 218 Ill.App. 85—Mesenger v. Wendell, 211 Ill.App. 374—Smith v. Swinehart, 209 Ill.App. 75—Harris v. Willis, 209 Ill.App. 61—Sheppard-Strassheim Co. v. Eckas, 207 Ill.App. 370—Ramp v. W. Rooney Co., 207 Ill.App. 349—City of Chicago v. Walsh, 207 Ill.App. 50—Harkins v. Sherwood, 207 Ill.App. 4—Russell v. Cochran, 204 Ill.App. 18—Farrell v. Stafford, 203 Ill.App. 57—O'Brien v. Salerno, 203 Ill.App. 6—City of Chicago v. Simonetti, 13 Ill.App. 279—Weingarden v. Feinberg, 203 Ill.App. 228—Walsh v. City of Chicago, 201 Ill.App. 584—New City Produce Co. v. Wall, 201

Ill.App. 473—Ramming v. Roland, 198 Ill.App. 91—Jackson v. Grand Crossing Tack Co., 191 Ill.App. 375.

(2) Such presumptions cannot be drawn, however, where contrary to the record.—Central Bond & Mortgage Co. v. Roeser, 153 N.E. 732, 323 Ill. 90—People v. Milwaukee Dairy Co., 244 Ill.App. 341.

Propositions of law

Ill.—Village of River Forest v. Forbes, 2 N.E.2d 581, 285 Ill.App. 581.

Evidence may be examined by supreme court to determine the issues where there were no written pleadings.—Kee & Chapell Dairy Co. v. Pennsylvania Co., 126 N.E. 179, 291 Ill. 248.

Proofs offered at the trial determine the rights of the parties on appeal.—McConaughy v. Gage, 252 Ill.App. 17.

Reversible error

Ill.—Stewart v. Junkin, 209 Ill.App. 186—Boyle Ice Co. v. California Ice Co., 194 Ill.App. 475—Hesse v. Zaffke, 183 Ill.App. 160.

Harmless error

Ill.—Sher v. Robinson, 131 N.E. 638, 298 Ill. 181—Hosking v. Southern Pac. Co., 90 N.E. 669, 243 Ill. 320—Hochschild v. Goddard Tool Co., 233 Ill.App. 56—Thon v. Jackson, 221 Ill.App. 358—National Printing & Engraving Co. v. Winternitz, 207 Ill.App. 51—Kuzmierczyk v. Joseph Schlitz Brewing Co., 201 Ill.App. 479—Texas Co. v. Consolidated Adjustment Co., 198 Ill.App. 192—Galveston Shoe & Hat Co. v. Consolidated Adjustment Co., 198 Ill.App. 191.

Use of summary judgment method prescribed by civil practice act is subject to review only in case it has resulted in an unjust judgment.—Ratner v. Bartholomee, 282 Ill.App. 298.

Decision of appellate court

Ill.—Dandyline Co. v. Linsk, 128 N.E. 820, 295 Ill. 69, reversing 216 Ill.App. 479—Knight v. Seney, 124 N.E. 813, 290 Ill. 11—Great Northern Refining Co. v. D. K. Jeffris Lumber Co., 139 N.E. 594, 308 Ill. 342, reversing 226 Ill.App. 277.

9. Ill.—Williams v. Webster Hotel Co., 145 N.E. 622, 315 Ill. 64—Staley v. Snow, 209 Ill.App. 452—Selle v. Rosenstiel, 197 Ill.App. 637.

Affirmance

The judgment of the municipal court will be affirmed where there is no error or where the record as it stands does not clearly show error.—City of Chicago v. Bowman Dairy Co., 10 N.E.2d 994, 292 Ill.App. 825—Amstein v. Davis, 5 N.E.2d 245,

287 Ill.App. 469—Ubowich v. Northern Trust Co., 281 Ill.App. 109—Dickes v. Magill Weinsheimer Co., 228 Ill.App. 62—Wohlberg v. Merchants' Reserve Life Ins. Co., 213 Ill.App. 389—Manning v. Tobey Furniture Co., 211 Ill.App. 522—Silverman v. Korshak, 211 Ill.App. 508—Pratt v. Indian River Garden Corporation, 211 Ill.App. 505—Caruthers v. Macaluso, 209 Ill.App. 542—Colonial Trust & Savings Bank v. Sandoval Zinc Co., 209 Ill.App. 532—Union Ribbon & Carbon Co. v. Sidney Morris & Co., 209 Ill.App. 294—Lowenthal v. Williams, 207 Ill.App. 137—Thompson v. Hale, 204 Ill.App. 247—City of Chicago v. Boller, 203 Ill.App. 282—Seawell v. Oregon Short Line R. Co., 202 Ill.App. 128, affirmed 115 N.E. 861, 278 Ill. 122—Dranski v. Oglozinski, 201 Ill.App. 511.

Reversal

A judgment or order of the municipal court will be reversed where the record properly shows that reversible error has been committed.—Brian v. H. A. Born Packers' Supply Co., 203 Ill.App. 262—Bennett v. Baxter, 202 Ill.App. 236—Thornton v. Helmick, 201 Ill.App. 592—Levy v. Swift & Co., 201 Ill.App. 454.

Remand

(1) Where cause should be remanded.—Williams v. Webster Hotel Co., 145 N.E. 622, 315 Ill. 64—Brennan v. Ideal Heating Co., 201 Ill.App. 469.

(2) Where cause should not be remanded.—Bryan v. Pilgrim Nat. Life Ins. Co., 13 N.E.2d 850, 294 Ill.App. 356—Dandyline Co. v. Linsk, 226 Ill.App. 595—McCarthy v. Morgan, 209 Ill.App. 244.

Modification of verdict

Ill.—American Appraisal Co. v. Pio, 246 Ill.App. 467.

Determination of amount of damages

Ill.—Seiders v. Henry, 180 N.E. 462, 347 Ill. 467, reversing 259 Ill.App. 427.

Consolidated causes

Opinion of appellate court on cause as to which complete record was filed was controlling as to consolidated causes despite objection of appellee, where he failed to supply the full record of the consolidated causes.—Shraiberg Mfg. Co. v. Boston Ins. Co., 246 Ill.App. 196.

10. On appeal bond

Ill.—Corning Glass Works v. Adelman, 248 Ill.App. 39.

On stay bond

Ill.—Paulin v. American Surety Co. of New York, 204 Ill.App. 218.

Effect of other agreements

Ill.—Corning Glass Works v. Adelman, 248 Ill.App. 39.

§ 261. Indiana

The circuit courts are courts of general original jurisdiction, and the city, municipal, and commissioners' courts are courts of limited jurisdiction.

The circuit courts of Indiana have original jurisdiction in all cases at law and in equity,¹¹ as well as the same jurisdiction previously exercised by the courts of common pleas.¹² There have been decisions respecting the superior courts,¹³ including decisions as to their jurisdiction,¹⁴ and as to review of their proceedings.¹⁵ There have also been de-

cisions respecting the city,¹⁶ municipal,¹⁷ and commissioners'¹⁸ courts.

§ 262. Iowa

The district courts have general, original jurisdiction. There have been decisions respecting superior, municipal, and mayor's courts.

The district courts are courts of general, original jurisdiction in Iowa.¹⁹ There have been decisions respecting the municipal courts,²⁰ including decisions as to their jurisdiction,²¹ procedure,²² and the

Extent of liability

(1) Damages.—*Matarrese v. Monaco*, 274 Ill.App. 457.

(2) Attorney's fees.—*Matarrese v. Monaco*, supra.

Actions on bond or undertaking

(1) Defenses.—*Tarjan, for Use of Lefkow, v. National Surety Co.*, 268 Ill.App. 232.

(2) Evidence.—*Tarjan, for Use of Lefkow, v. National Surety Co.*, supra—*Corning Glass Works v. Adelman*, 248 Ill.App. 39.

11. Ind.—*Royal Ins. Co., Limited, of Liverpool v. Stewart*, 129 N.E. 853, 190 Ind. 444.

15 C.J. p 991 notes 50, 51.

Appointment of receivers

Ind.—*Pilliod v. Angola Railway & Power Co.*, 91 N.E. 829, 46 Ind.App. 719.

12. Ind.—*Hollingsworth v. State*, 12 N.E. 490, 111 Ind. 289.

15 C.J. p 992 note 56.

13. Statutory or legislative courts Ind.—*Fenstermacher v. Indianapolis Times Pub. Co.*, 1 N.E.2d 655, 102 Ind.App. 189.

14. Ind.—*Fenstermacher v. Indianapolis Times Pub. Co.*, supra.

15 C.J. p 991 note 52.

Courts of general jurisdiction

Ind.—*State ex rel. Allman v. Superior Court for Grant County*, 19 N.E. 2d 467—*State ex rel. American Trust & Savings Bank v. Superior Court of Vanderburgh County*, 188 N.E. 203, 206 Ind. 1.

15. Decisions reviewable

Ind.—*Northern Indiana Gas & Electric Co. v. Merchants' Improvement Ass'n*, 160 N.E. 50, 87 Ind.App. 74.

16. Ind.—*Steinmetz v. G. H. Hammond Co.*, 78 N.E. 628, 168 Ind. 153.

15 C.J. p 992 note 53.

Jurisdiction

City court is court of limited jurisdiction possessing only such power as is conferred by statute.—*Ross v. Lambert*, 137 N.E. 185, 79 Ind.App. 30.

Review of proceedings

(1) Courts to which appeals may be taken.—*Millers Nat. Ins. Co. v. American State Bank of East Chicago*, 190 N.E. 433, 206 Ind. 511—*Bedron v. Baran*, 155 N.E. 611, 85 Ind. App. 649.

(2) Decisions reviewable.—*Millers Nat. Ins. Co. v. American State Bank of East Chicago*, supra.

(3) Record on appeal.—*Millers Nat. Ins. Co. v. American State Bank of East Chicago*, supra.

(4) Correction of record.—*Bedron v. Baran*, 169 N.E. 695, 90 Ind.App. 655.

(5) Transcript of proceedings.—*Bedron v. Baran*, 155 N.E. 611, 85 Ind.App. 649.

(6) Scope of review.—*Millers Nat. Ins. Co. v. American State Bank of East Chicago*, supra.

17. Jurisdiction

(1) Municipal courts are courts of limited jurisdiction.—*Rothchild v. Citizens Loan Co. of Indianapolis*, 2 N.E.2d 810, 210 Ind.App. 297—*Capitol Amusement Co. v. Washington & New Jersey Realty Co.*, 164 N.E. 715, 90 Ind.App. 389.

(2) They have no jurisdiction of actions involving title to real estate.—*Johnson v. Greenen*, 188 N.E. 796, 98 Ind.App. 612.

(3) Proceedings held within court's jurisdiction.—*Johnson v. Greenen*, supra—*Bernstein v. Rhoades*, 157 N.E. 463, 92 Ind.App. 553, followed in *Hunter v. Smith*, 172 N.E. 926, 92 Ind.App. 609, and 175 N.E. 896, 92 Ind.App. 710.

Procedure

(1) Certification of cause and papers to circuit court if title to real estate is in issue.—*Johnson v. Greenen*, 188 N.E. 796, 98 Ind.App. 612.

(2) Determination of matters in issue.—*Johnson v. Greenen*, supra.

(3) Entry of default.—*Indianapolis Power & Light Co. v. Waltz*, 12 N.E.2d 404, 104 Ind.App. 526.

Review of proceedings

Matters held not reversible error.—*Johnson v. Greenen*, 188 N.E. 796, 98 Ind.App. 612.

18. Ind.—*Doctor v. Hartman*, 74 Ind. 221.

15 C.J. p 992 note 54 [a].

19. Iowa.—*Marsh v. Hanna*, 259 N.W. 225, 219 Iowa 682—*U. S. v. Dubuque County, Iowa*, Morr. 81.

15 C.J. p 992 note 56½.

Action for trespass, and to enjoin interference with use of land, is within the jurisdiction.—*Arnd v. Harrington, Iowa*, 287 N.W. 292.

Jurisdiction in attachment Iowa.—*Sturman v. Stone*, 31 Iowa 115.

Mandamus Iowa.—*Brown v. Crego*, 32 Iowa 498—*Brown v. Crego*, 29 Iowa 321.

20. Iowa.—*Eller v. Municipal Court of City of Des Moines*, 281 N.W. 441, 225 Iowa 501—*Model Laundry Co. v. Barnett*, 162 N.W. 830.

21. Iowa.—*Avon Lakes Corporation v. Deaton*, 255 N.W. 531, 218 Iowa 303.

Amount or value in controversy Iowa.—*Great Western Ins. Co. v. Saunders*, 274 N.W. 28, 223 Iowa 926—*Avon Lakes Corporation v. Deaton*, 255 N.W. 531, 218 Iowa 303.

15 C.J. p 992 note 57.

Territorial jurisdiction

Iowa.—*Kinsey v. Clark*, 246 N.W. 840, 215 Iowa 765—*Gumbert v. Sheehan*, 206 N.W. 604, 200 Iowa 1310.

Particular actions

(1) Actions against nonresidents.—*Kinsey v. Clark*, 246 N.W. 840, 215 Iowa 765—*West v. Heyman*, 241 N.W. 451, 214 Iowa 1173.

(2) Actions on account.—*Avon Lakes Corporation v. Deaton*, 255 N.W. 531, 218 Iowa 303.

(3) Forcible entry and detainer.—*Wallerstein v. Palmer*, 276 N.W. 605, 224 Iowa 260—*Braga v. Stowell*, 259 N.W. 767, 219 Iowa 855—*Cassidy v. Adamson*, 224 N.W. 508, 208 Iowa 417.

Equitable relief unauthorized

Iowa.—*Avon Lakes Corporation v. Deaton*, 255 N.W. 531, 218 Iowa 303.

22. Iowa.—*Des Moines & C. I. R. R. v. Powers*, 246 N.W. 274, 215 Iowa 567—*Model Laundry Co. v. Barnett*, 162 N.W. 830, 180 Iowa 55.

review of their proceedings.²³ There have also been decisions respecting the superior²⁴ and mayor's²⁵ courts.

§ 263. Kansas

The district courts are courts of general original jurisdiction in Kansas. There have been decisions with reference to city and juvenile courts.

The district courts are courts of general, original jurisdiction in Kansas.²⁶ There have been decisions

relating to the city courts, involving such matters as their jurisdiction,²⁷ procedure,²⁸ and the review of their proceedings.²⁹ There have also been decisions relating to juvenile³⁰ and police³¹ courts.

§ 264. Kentucky

The circuit courts of Kentucky have general original jurisdiction of all matters not exclusively delegated to other courts. There have been decisions relating to various other courts.

Venue and change thereof

Iowa.—Gumbert v. Sheehan, 206 N. W. 604, 200 Iowa 1310.

Process

(1) Service on nonresident.—West v. Heyman, 241 N.W. 451, 214 Iowa 1173.

(2) Contents of original notice.—Model Laundry Co. v. Barnett, 162 N.W. 830, 180 Iowa 55.

Appearance, time for

Iowa.—Boody v. Sawyer, 207 N.W. 589, 201 Iowa 496.

Trial

(1) Generally.—Eller v. Municipal Court of City of Des Moines, 281 N. W. 441, 225 Iowa 501.

(2) Time for filing motions and grants of additional time.—Eller v. Municipal Court of City of Des Moines, supra.

Judgments

(1) Generally, and effect of judgment.—Avon Lakes Corporation v. Deaton, 255 N.W. 531, 218 Iowa 303.

(2) Defaults, entry thereof.—La Forge v. Cooter, 264 N.W. 268, 220 Iowa 1258.

(3) Amendment, modification, or vacation of judgment.—Weston v. Allen, 282 N.W. 278, 225 Iowa 835—Eller v. Municipal Court of City of Des Moines, 281 N.W. 441, 225 Iowa 501—La Forge v. Cooter, supra—Borden v. Voegtlin, 245 N.W. 331, 215 Iowa 882—Mitchell v. Brennan, 241 N.W. 408, 213 Iowa 1375—Merkel v. Hallagan, 222 N.W. 393, 207 Iowa 153—Boody v. Sawyer, 207 N.W. 589, 201 Iowa 496—Lynch v. Powers, 200 N.W. 725, 198 Iowa 1060—Elwood H. Royer, Inc., v. Mershon, 169 N.W. 400, 184 Iowa 1065.

Dismissals

Iowa.—Avon Lakes Corporation v. Deaton, 255 N.W. 531, 218 Iowa 303—Des Moines & C. I. R. R. v. Powers, 246 N.W. 274, 215 Iowa 567.

23. Iowa.—Boody v. Sawyer, 207 N. W. 589, 201 Iowa 496.

Estoppel to allege error

Iowa.—Peak v. Mulvaney, 245 N.W. 748, 215 Iowa 1400.

Presentation and reservation in lower court of grounds of review

Iowa.—Norman v. Bennett, 246 N.W.

378, 216 Iowa 181—Peak v. Mulvaney, 245 N.W. 748, 215 Iowa 1400.

Presumption of regularity of action of trial judge.—La Forge v. Cooter, 264 N.W. 268, 220 Iowa 1258.

Record on appeal

Iowa.—La Forge v. Cooter, supra.

Scope of review

(1) Generally.—La Forge v. Cooter, 264 N.W. 268, 220 Iowa 1258—Norman v. Bennett, 246 N.W. 378, 216 Iowa 181.

(2) Questions of fact, verdicts, and findings.—Norman v. Bennett, supra.

24. Term "civil matters" defined with respect to jurisdiction.—Keokuk College of Physicians, etc. v. Guilbert, 69 N.W. 453, 100 Iowa 213.

25. Iowa.—Scranton v. Hensen, 144 N.W. 1024, 163 Iowa 457.

15 C.J. p 992 note 58.

26. Kan.—Citizens Building & Loan Ass'n v. Knox, 74 P.2d 161, 146 Kan. 734.

15 C.J. p 992 note 59.

Issuance of mandamus writ

Kan.—Rea v. Kansas City Long-Distance Tel. Co., 125 P. 27, 87 Kan. 665, rehearing denied 127 P. 603, 88 Kan. 82—State v. Breese, 15 Kan. 123.

Trust estates and trustees

Kan.—Citizens Building & Loan Ass'n v. Knox, 74 P.2d 161, 146 Kan. 734.

Railways and telegraph companies; jurisdiction of visitation court

Kan.—Western Union Tel. Co. v. Austin, 72 P. 850, 67 Kan. 208.

27. Kan.—Cecil v. Oppermann, 293 P. 486, 131 Kan. 722—State ex rel. Smith v. Smith, 285 P. 542, 130 Kan. 228.

15 C.J. p 992 note 60.

Action between partners

Kan.—Spaulding v. Colvin, 1 P.2d 82, 133 Kan. 409.

Trespass on real estate

Kan.—Coats v. Kansas Gas & Electric Co., 57 P.2d 41, 143 Kan. 885.

Judgments

(1) Generally.—McPherson v. Martinson, 224 P. 907, 115 Kan. 828.

(2) Time of entry.—Olthoff v. Adams, 245 P. 743, 121 Kan. 39.

29. Kan.—Glover v. State Highway Commission of Kansas, 77 P.2d 189, 147 Kan. 279, followed in Watkins v. State Highway Commission of Kansas, 77 P.2d 202—Millheiser v. Lamb, 53 P.2d 829, 143 Kan. 114—Powers v. Schultz, 274 P. 735, 127 Kan. 598—Stockyards State Bank v. Frank, 209 P. 985, 112 Kan. 45.

Amendment of pleadings

Kan.—Hoag v. Boyle, 265 P. 61, 125 Kan. 436—Rominger v. Parrish's Estate, 227 P. 544, 116 Kan. 540.

Decisions reviewable

Kan.—Powers v. Schultz, 274 P. 735, 127 Kan. 598.

Requisites and proceedings for transfer of cause

(1) Notice of appeal.—Bankers Commercial Corporation v. Markl, 84 P.2d 896, 148 Kan. 789—Wald v. Bukaty, 32 P.2d 456, 139 Kan. 489—Auto Trunk Co. v. Hahn, 29 P.2d 1115, 139 Kan. 17, denying rehearing 23 P. 2d 585, 138 Kan. 36—Brockman v. Bayman, 10 P.2d 31, 135 Kan. 238.

(2) Bonds and undertakings.—Owen-Fields, Inc., v. Allen W. Hinkel Dry Goods Co., 53 P.2d 496, 143 Kan. 184—Wald v. Bukaty, supra—Auto Trunk Co. v. Hahn, supra—Bishop v. Foley, 173 P. 289, 103 Kan. 190.

Dismissal

Kan.—Bankers Commercial Corporation v. Markl, 84 P.2d 896, 148 Kan. 789—Ohio Hydrate & Supply Co. v. H. W. Underhill Const. Co., 40 P.2d 337, 141 Kan. 213.

Trial de novo

Kan.—Bankers Commercial Corporation v. Markl, 84 P.2d 896, 148 Kan. 789.

Waiver or loss of right

Kan.—Bishop v. Foley, 173 P. 289, 103 Kan. 190.

30. Kan.—New York Foundling Hospital v. Harrington, 215 P. 303, 113 Kan. 521.

15 C.J. p 992 note 61.

31. Review of police judge's decision on parole

District court had no authority in its supervisory capacity over inferior court to review action of police judge in refusing, granting, or terminating paroles.—Bowers v. Wilson, 56 P.2d 1212, 143 Kan. 732.

The circuit courts of Kentucky have original jurisdiction of all matters, both in law and equity, of which jurisdiction is not exclusively delegated to some other tribunal,³² and exclusive jurisdiction of actions in which the title to real property is in question.³³ There have been decisions relating to the county courts, which are courts of limited jurisdiction;³⁴ the fiscal courts;³⁵ the quarterly courts;³⁶ the city courts;³⁷ and the police courts.³⁸ There have also been decisions relating to the review of

the proceedings of the county,³⁹ quarterly,⁴⁰ and police⁴¹ courts.

§ 265. Louisiana

The district courts have general, original jurisdiction in Louisiana, while the parish, juvenile, city, and mayor's and recorders' courts are courts of limited jurisdiction.

The district courts of Louisiana are courts of general, original jurisdiction.⁴² There have also been decisions relating to the parish courts,⁴³ the juvenile courts,⁴⁴ and the mayors' and recorders' courts,⁴⁵

32. Ky.—Rice v. Kelly, 10 S.W.2d 1112, 226 Ky. 347—Hatton v. Rogers, 121 S.W. 698, 134 Ky. 840.
15 C.J. p 983 note 17 [a], p 992 notes 63, 64.

Minimum jurisdictional amount in such court must be in excess of fifty dollars.—Union Light, Heat & Power Co. v. Mulligan, 197 S.W. 1081, 177 Ky. 662.

33. Ky.—Campbell's Guardian v. Breathitt County Board of Education, 84 S.W.2d 61, 260 Ky. 145—Hatton v. Rogers, 121 S.W. 698, 134 Ky. 840.

Claim to dower is assertion of right to interest in realty.—Newsome v. Reynolds, 90 S.W.2d 632, 262 Ky. 484.

34. Ky.—Adams' Heirs v. McCoy, 279 S.W. 1103, 212 Ky. 731—Silbersack v. Kraft, 240 S.W. 392, 194 Ky. 587.

15 C.J. p 992 notes 65, 66.

County court is court of record, and can speak only through its records.—Adams' Heirs v. McCoy, 279 S.W. 1103, 212 Ky. 731.

"Jurisdiction" not limited to judicial matters

Ky.—Fox v. Petty, 51 S.W.2d 260, 244 Ky. 385.

Condemnation proceedings are within the jurisdiction of the county courts.—Campbell's Guardian v. Breathitt County Board of Education, 84 S.W.2d 61, 260 Ky. 145.

"County court" and "court of the county" are convertible terms.—Palmer v. Craddock, Ky. Dec. 182.

35. **Courts of record**
Ky.—Barnett v. Gilbert, 175 S.W. 1029, 164 Ky. 564.

36. Ky.—Adams' Heirs v. McCoy, 279 S.W. 1103, 212 Ky. 731.
15 C.J. p 992 note 68.

Quarterly court is judicial tribunal
Ky.—McCracken Fiscal Court v. McFadden, 122 S.W.2d 761, 275 Ky. 819.

Monthly terms or continuous sessions may be held by quarterly courts.—Hamilton v. Spalding, 76 S.W. 517, 518, 25 Ky.L. 847.

37. Ky.—Read v. Shipley, 104 S.W. 1001, 31 Ky.L. 1253.

38. Ky.—Rieser v. Ward, 236 S.W. 255, 193 Ky. 368.

15 C.J. p 983 note 17 [b] (2), p 992 note 69.

39. Ky.—Commonwealth, by State Highway Commission, v. Crutchfield, 87 S.W.2d 598, 261 Ky. 272—Hendrickson v. Bell County Ct., 7 Ky.L. 660.

Court having jurisdiction

(1) Appeals from the county courts in civil matters will lie only to circuit court, except that in actions for divisions of land and allotment of dower an appeal will lie to court of appeals.—Cochran v. Simmons, 199 S.W. 66, 178 Ky. 402, denying rehearing 197 S.W. 930, 177 Ky. 562.

(2) An appeal lies to the circuit court from an order of the county court setting aside an order previously made exonerating appellant from the payment of a tax assessed against him, regardless of the amount of the tax involved.—Garrett v. Creekmore, 89 S.W. 166, 121 Ky. 250, 28 Ky.L. 211.

Trial on appeal is de novo

Ky.—Preece v. Commonwealth ex rel. Maynard, 80 S.W.2d 602, 258 Ky. 590.

Appeal bonds

(1) Generally.—Patterson v. Glover, 22 S.W.2d 595, 232 Ky. 145.

(2) No bond required of commonwealth on appeal by it.—Preece v. Commonwealth ex rel. Maynard, 80 S.W.2d 602, 258 Ky. 590.

(3) Clerk's approval unnecessary.—Patterson v. Glover, supra.

Filing judgment and amount of costs

Production of copies of judgment and amount of costs to clerk in appealing to circuit court is sufficient without "filing."—Blair v. Basham, 292 S.W. 300, 218 Ky. 775.

Disposition of cause

Ky.—Commonwealth v. Douglas' Ex'r, 44 S.W.2d 600, 241 Ky. 587.

40. Appeal bond

Ky.—Partin v. Gilbert, 120 S.W.2d 667, 275 Ky. 19.

41. Court having jurisdiction

(1) A city may appeal directly from a judgment of the police court

of the city, holding an ordinance invalid, to the court of appeals, without passing through the circuit court of the county on appeal to it from the judgment of the city police court.—Commonwealth v. Kroger, 122 S.W.2d 1006, 276 Ky. 20—City of Paducah v. Ragsdale, 92 S.W. 13, 122 Ky. 425, 28 Ky.L. 1057.

(2) An appeal from a judgment of a police judge does not lie to the quarterly court but to the circuit court where the amount in controversy is sufficient.—Monterfy & New Columbus Turnp. Co. v. Davis, 3 Ky. L. 465, 11 Ky.Op. 336.

42. La.—Payne v. Walmsley, App., 185 So. 88—State ex rel. Fourroux v. Board of Directors of Public Schools of Jefferson Parish, 3 La. App. 2.

15 C.J. p 992 note 70.

Mandamus

La.—State ex rel. the Mayor v. Judge of Twenty-second Judicial Dist. Ct., 35 La. Ann. 637.

Restraining public service commission

La.—Standard Oil Co. of Louisiana v. Louisiana Public Service Commn., 97 So. 859, 154 La. 557.

District court for Orleans parish

La.—Bomarito v. Max Barnett Furniture Co., 150 So. 2, 177 La. 1010—State ex rel. Mattern v. City of New Orleans, 119 So. 94, 9 La. App. 95.

43. Annulment of title to land

La.—Fellers v. Brown, 24 La. Ann. 300.

44. La.—State v. McCloskey, 67 So. 813, 136 La. 739—State v. Melton, 67 So. 174, 136 La. 387.

45. La.—State v. First Dist. Ct. Judge, 37 So. 546, 113 La. 654.
15 C.J. p 992 note 74.

Contempt proceedings

(1) For punishment of officer.—City of Gretna v. Rossner, 97 So. 335, 154 La. 117.

(2) The district court has no appellate jurisdiction of contempt proceedings in a mayor's court, since such proceedings are not appealable.—City of Gretna v. Rossner, supra.

which are courts entirely distinct from the city courts.⁴⁶ Persons sentenced to a fine or to imprisonment by mayors', recorders', or municipal courts, have the right of an appeal to the district court of the parish, on giving security for the fine and costs of the court, in which case a trial must be had de novo without a jury.⁴⁷

City courts. There have also been decisions relating to the city courts,⁴⁸ including decisions as to their jurisdiction,⁴⁹ procedure,⁵⁰ and the review of the proceedings of such courts.⁵¹

§ 266. Maine

There are decisions relating to the superior and municipal courts of Maine.

Statute not invalid

La.—Berry v. Bass, 102 So. 76, 157 La. 81.

46. La.—State v. First Dist. Ct. Judge, 37 So. 546, 113 La. 654.

47. La.—State v. Melles, 42 So. 199, 117 La. 656.

15 C.J. p. 1072 note 62.

48. La.—State v. Testa, 94 So. 895, 152 La. 951—Automobile Sec. Corporation v. Burke, 120 So. 895, 10 La.App. 307—Caron v. Kober, 6 La. App. 808.

15 C.J. p. 992 note 73.

49. La.—Clade v. La Salle Realty Co., 81 So. 598, 144 La. 989—Ethridge-Atkins Corporation v. Johnson, App., 183 So. 37—Dixon v. Futch, App., 166 So. 205—Demourelle & Sons v. Caraway, 3 La. App. 331.

Particular actions or proceedings

(1) Suit involving "real right."—Stephens v. Jones, 129 So. 555, 14 La.App. 113.

(2) Suit involving liquidation of partnership.—Maxon v. Miller, 5 La.App. 284.

(3) Other actions and proceedings see 15 C.J. p. 992 note 73 [a]—[c].

Duty to determine jurisdiction

La.—Elster v. Picou, 81 So. 710, 144 La. 1052.

Territorial jurisdiction

La.—Samuel v. Riser, 7 La.App. 143.

50. La.—Bolton v. Byrd, App., 154 So. 657—Richardson v. Caloavello, 3 La.App. 535—Giefers v. Negri, 2 La.App. 156.

Process

La.—State ex rel. Cotonio v. Mar-mouget, 34 So. 408, 110 La. 191—Automobile Sec. Corporation v. Burke, 120 So. 895, 10 La.App. 307.

Pleadings

(1) Oral pleadings.—Caron v. Kober, 6 La.App. 808.

(2) Petition.—Overton v. Nordyke, 120 So. 544, 10 La.App. 317.

(3) Time for filing answer.—Martin v. Universal Life Ins. Co. of Tennessee, La.App., 165 So. 25.

Trial

(1) Joinder of issue.—Martin v. Universal Life Ins. Co. of Tennessee, supra.

(2) Reducing testimony to writing.—Livingston Finance Corporation v. Bandin, 117 So. 741, 166 La. 624.

Judgments

La.—Hardman v. Schilling, 138 So. 189, 18 La.App. 377—Brownlee-Wells Motors v. Hollingsworth, 127 So. 754, 13 La.App. 19—Goldman v. Thomson, 3 La.App. 469.

51. La.—O. K. Realty Co. v. John A. Juliani, Inc., 102 So. 399, 157 La. 277, dismissing certiorari and mandamus 1 La.App. 1—Capital City Auto Co. v. Folse, 92 So. 300, 151 La. 689—Manteris & Co. v. National Dental Co., 77 So. 850, 142 La. 923—Vallon v. Morris Cleaners & Dyers, App., 167 So. 887—Bolton v. Byrd, App., 154 So. 657—Caron v. Kober, 6 La.App. 808.

Courts having appellate jurisdiction

(1) Generally.—State v. First Dist. Ct. Judge, 37 So. 546, 113 La. 654.

(2) The legislature may confer on the district court appellate jurisdiction of an appeal from the city court from which there would otherwise be no appeal.—State v. Melles, 42 So. 199, 117 La. 656.

Statute inapplicable to appellate court

La.—Wells v. Douglass Life Ins. Co., App., 156 So. 591, dismissing rehearing 156 So. 34, following Succession of Watson v. Metropolitan Life Ins. Co., 156 So. 29, followed in Cryer v. National Life & Accident Ins. Co., 156 So. 34, Williams v. National Life & Accident Ins. Co., 156 So. 34, and Foley v. National Life & Accident Ins. Co., 156 So. 35, rehearing refused 156 So. 590.

There have been decisions relating to the superior⁵² and municipal⁵³ courts of Maine.

§ 267. Maryland

There have been decisions relating to the circuit, orphans', and Baltimore city courts.

There have been decisions relating to the circuit courts,⁵⁴ which are courts of general, original jurisdiction, each having full common-law jurisdiction in cases arising within its county as well as the same jurisdiction formerly held by the court of chancery.⁵⁵ There have also been decisions relating to the orphans' courts⁵⁶ and the courts of Baltimore

Presentation of grounds of review

La.—Frank v. Currie, App., 172 So. 843.

Proceedings for transfer of cause

La.—Vallon v. Morris Cleaners & Dyers, App., 167 So. 887—Evans v. First Nat. Life Ins. Co., App., 142 So. 356, annulling 141 So. 101, followed in Jarreau v. Diaz, 142 So. 363, and Foundation Finance Co. v. Robbins, 142 So. 363—Streat v. Unity Industrial Life Ins. Co., App., 140 So. 709, affirmed 143 So. 106—Valley Securities Co. v. Levy, 132 So. 795, 15 La.App. 639—Tyler v. Ingraham, 119 So. 439, 9 La. App. 366—Anselmo v. Pisciotto, 6 La.App. 87.

Suspensive appeal in forma pauperis unauthorized

La.—Bailey v. Spiro, App., 169 So. 898.

Trial de novo

La.—Capital City Auto Co. v. Folse, 92 So. 300, 151 La. 689.

52. Action of trespass

Me.—Bartlett v. Baybutt, 39 A. 474, 91 Me. 140.

53. Me.—Chase v. Scolnik, 102 A. 74, 116 Me. 374.

15 C.J. p. 993 note 76.

Review

Me.—Norton v. Inhabitants of Fayette, 188 A. 281, 134 Me. 468.

54. Md.—Acton v. State, 31 A. 419, 80 Md. 547.

15 C.J. p. 993 note 77.

55. Md.—Bishop v. Safe Deposit & Trust Co. of Baltimore, 185 A. 335, 170 Md. 615—Bliss v. Bliss, 104 A. 467, 133 Md. 61.

15 C.J. p. 993 note 77.

Mandamus

Md.—Harwood v. Marshall, 9 Md. 83—Runkel v. Winemiller, 4 Harr. & M. 429, 1 Am.D. 411.

56. On submission to circuit court

When question has been submitted by orphans' court for trial in circuit court, functions of orphans' court with respect thereto are sus-

City,⁵⁷ including decisions relating to such matters as rights, remedies, and procedure generally under the Speedy Judgment Act,⁵⁸ process,⁵⁹ pleadings,⁶⁰ proof,⁶¹ judgments,⁶² and appeals.⁶³

§ 268. Massachusetts

There have been decisions relating to the superior courts, the district courts, the land courts, and the municipal courts of Massachusetts.

pendent until finding of jury be certified, after which orphans' court has no discretion in regard to question but is required to enter judgment in conformity thereto.—*Baldwin v. Hopkins*, 191 A. 565, 172 Md. 219. Courts of probate jurisdiction generally see *infra* §§ 298-310.

57. Md.—*O'Neill & Co. v. Schulze*, 7 A.2d 263—*State v. Rutherford*, 125 A. 725, 145 Md. 363. 15 C.J. p 993 note 79.

Court of common pleas; jurisdictional amount

Md.—*Legum v. Blank*, 65 A. 1071, 105 Md. 126.

58. Md.—*Musher v. Perera*, 158 A. 14, 162 Md. 44.

Rights of litigants are limited to remedies which act itself confers.—*Roth v. Baltimore Trust Co.*, 152 A. 227, 159 Md. 580.

Compliance with prescribed conditions precedent

(1) Is necessary in order to obtain benefits of act.—*Fick v. Towers*, 136 A. 648, 152 Md. 335.

(2) Is unnecessary where proper pleas have been filed and a speedy judgment avoided.—*Globe Slicing Mach. Co. v. Murphy*, 158 A. 26, 161 Md. 667.

(3) Causes the case to proceed as an ordinary action.—*Musher v. Perera*, 158 A. 14, 162 Md. 44.—*Roth v. Baltimore Trust Co.*, 152 A. 227, 159 Md. 580.

59. Md.—*O'Neill & Co. v. Schulze*, 7 A.2d 263.

60. Md.—*Roth v. Baltimore Trust Co.*, 158 A. 32, 161 Md. 340.—*Roth v. Baltimore Trust Co.*, 152 A. 227, 159 Md. 580.

Amendment of affidavit

Md.—*Commercial Credit Corporation v. Schuck*, 134 A. 349, 151 Md. 367.

Action on specialty under Speedy Judgment Act.—*Roth v. Baltimore Trust Co.*, 158 A. 32, 161 Md. 340.

Bill of particulars of defense

Md.—*Roth v. Baltimore Trust Co.*, *supra*.

Forgery held sufficiently pleaded

Md.—*Commercial Credit Corporation v. Rozier*, 136 A. 636, 152 Md. 268.

61. Md.—*Trustees of Aitz Chaim*

Hebrew Congregation of Baltimore v. Butterhoff, 118 A. 658, 141 Md. 267.

62. Default judgments

(1) Properly entered.—*Lipscomb v. Zink*, 135 A. 182, 151 Md. 430.

(2) Improperly entered.—*Roth v. Baltimore Trust Co.*, 152 A. 227, 159 Md. 580.—*Wilhelm v. Mitchell*, 101 A. 785, 131 Md. 358.

(3) Properly stricken.—*Dixon v. Baltimore American Ins. Co. of New York*, 188 A. 215, 171 Md. 695.—*Murray v. Hurst*, 163 A. 183, 163 Md. 481, 85 A.L.R. 442.—*Fick v. Towers*, 136 A. 648, 152 Md. 335.

Enrollment

Default judgment becomes enrolled in Baltimore courts thirty days after entry.—*Dixon v. Baltimore American Ins. Co. of New York*, 188 A. 215, 171 Md. 695.—*Murray v. Hurst*, 163 A. 183, 163 Md. 481, 85 A.L.R. 442.

Scire facias on judgment

Md.—*O'Neill & Co. v. Schulze*, 7 A. 2d 263.

63. Decisions reviewable

Md.—*Psalmist Baptist Church v. Board of Zoning Appeals*, 199 A. 815, 175 Md. 7.

Bill of exceptions; time for signing
Md.—*Wegefath v. Weissner*, 106 A. 854, 132 Md. 595.

Questions of fact determined by the Baltimore city court, in reviewing a decision of the appeal tax court, are not subject to review by the court of appeals.—*Hamburger v. Baltimore*, 68 A. 23, 106 Md. 479.

Presentation of grounds of review
Md.—*Roach v. Board of Zoning Appeals*, 199 A. 812, 175 Md. 1.

Presumption as to correctness of city court's decision

Md.—*Roach v. Board of Zoning Appeals*, *supra*.

Entry of judgment on appeal from orphans' court

(1) On an appeal from an orphans' court, a circuit court has no authority to enter judgment on a verdict rendered on issues sent from such orphans' court.—*Bradley v. Bradley*, 91 A. 685, 123 Md. 506.

(2) The established practice in such a case is to certify to the orphans' court the verdict of the

There have been decisions relating to the superior court, which is a court of original and general jurisdiction, possessing the inherent powers of such a court under the common law, unless expressly limited, as well as those conferred by statute;⁶⁴ the district courts, which are also courts of superior and general jurisdiction as to all matters within their jurisdiction;⁶⁵ and the land courts, which have exclusive original jurisdiction as to certain matters relating to real estate.⁶⁶ There have also been deci-

jury, and the costs, and to leave to that court the entry of the proper judgment.—*Conrades v. Heller*, 87 A. 28, 119 Md. 448.

64. Mass.—*In re Stern*, 12 N.E.2d 100.—*Adams v. Silverman*, 182 N. E. 1, 280 Mass. 23.—*Zeitz v. Nickel*, 138 N.E. 4, 243 Mass. 516.—*Williams v. Nelson*, 117 N.E. 189, 228 Mass. 191, Ann.Cas.1918D, 538.

15 C.J. p 993 note 81.

Enjoining irreparable injury to land
Mass.—*Enfield v. Woods*, 99 N.E. 331, 212 Mass. 547.

15 C.J. p 981 note 91 [g].

In equity cases not cognizable under general principles, superior court, as distinguished from supreme judicial court, has jurisdiction only when expressly conferred by statute.—*South Essex Sewerage Board v. Carr Leather Co.*, 189 N.E. 802, 286 Mass. 191.

Suit to relieve title from encumbrance

Mass.—*Fuller v. Fuller*, 125 N.E. 499, 234 Mass. 187.

Words "county court" will embrace the court of common pleas.—*Arnold v. Allen*, 8 Mass. 147, 149.

65. Mass.—*Commonwealth v. Dugan*, 154 N.E. 67, 257 Mass. 465.

66. Superior court has no jurisdiction of cases pending in the land court except for the ascertainment of facts by jury trial, for which purpose it is the only forum.—*Weid v. Clarke*, 102 N.E. 422, 215 Mass. 324.

Conclusiveness of superior court's findings

Mass.—*Olson v. Carpenter*, 4 N.E.2d 1020.

Review of land court proceedings

(1) Form and manner of perfecting.—*Sheehan Const. Co. v. Dudley*, Mass., 12 N.E.2d 180.

(2) Specification on appeal of matters complained of.—*Mead v. Cutler*, 80 N.E. 496, 194 Mass. 277.

(3) Matters considered on appeal.—*Olson v. Carpenter*, Mass., 4 N.E. 2d 1020.

(4) Conclusiveness of land court's fact findings on appeal.—*Sheehan Const. Co. v. Dudley*, Mass., 12 N.E. 2d 182.

sions with respect to the municipal courts,⁶⁷ including decisions as to their jurisdiction,⁶⁸ procedure and proceedings,⁶⁹ and the review of their proceedings.⁷⁰

§ 269. Michigan

There have been decisions relating to various Michigan courts.

There have been decisions relating to the circuit

67. Mass.—Paige v. Sinclair, 130 N. E. 177, 237 Mass. 482.
15 C.J. p 993 note 83.

68. Mass.—Brewer v. Casey, 82 N.E. 45, 196 Mass. 384.
15 C.J. p 993 note 83 [a].

Consent cannot confer jurisdiction
Mass.—Paige v. Sinclair, 130 N.E. 177, 237 Mass. 482.

Proceeding for enforcement of mechanic's lien held not within court's jurisdiction.—Cooper v. Skinner, 124 Mass. 183.

69. Mass.—Long v. George, 195 N. E. 377, 290 Mass. 316.
15 C.J. p 993 note 83 [b].

Venue
Mass.—Ferranti v. Lewis, 171 N.E. 232, 271 Mass. 186.

Parties
Mass.—Joseph S. Waterman & Sons v. Soliday, 121 N.E. 155, 231 Mass. 422.

Appearance
Mass.—Paige v. Sinclair, 130 N.E. 177, 237 Mass. 482.

Pleading
Mass.—Daniels v. Cohen, 144 N.E. 237, 249 Mass. 362.

Trial
(1) Generally.—Sweeney v. Morey & Co., 181 N.E. 782, 279 Mass. 495.
(2) Consolidation of suits.—McLaughlin v. Levenbaum, 142 N.E. 906, 248 Mass. 170.

(3) Requests not complying with court rules.—Di Lorenzo v. Atlantic Nat. Bank of Boston, 180 N.E. 148, 278 Mass. 321.—Duralith Corporation v. Leonard, 174 N.E. 511, 274 Mass. 397.

(4) Notice of decision and findings.—Sweeney v. Morey & Co., supra.

Judgment
(1) Petition to vacate.—Sweeney v. Morey & Co., 181 N.E. 782, 279 Mass. 495.

(2) Collateral attack.—Carroll v. Berger, 150 N.E. 870, 255 Mass. 132.

70. Mass.—Alfano v. Donnelly, 189 N.E. 610.

Appellate division

(1) Under a statute creating an appellate division of the municipal court of Boston, the appellate division may review questions of law shown on a report by the trial judge.—Kolda v. National Ben Franklin Fire Ins. Co., 195 N.E. 331, 290 Mass. 182.

(2) Formerly there was no statutory authority for the appellate division to review findings of fact.—

Loanes v. Gast, 103 N.E. 473, 216 Mass. 197.

(3) Under the present statute, it has discretionary power to review facts in certain cases where a question for the jury is not involved, but it cannot be required to do so.—Kolda v. National Ben Franklin Fire Ins. Co., supra.

(4) If a report submitted to the trial judge is disallowed the aggrieved party may, under a rule of court, file a petition in the appellate division to establish the truth of the report.—Cohen v. Berkowitz, 102 N.E. 124, 215 Mass. 68.

(5) The duty of the appellate division in such a case, is similar to that of the supreme judicial court sitting as a full court respecting a petition to establish the truth of exceptions.—Vengrow v. Grimes, 174 N.E. 505, 274 Mass. 278.—Burbank v. Farnham, 107 N.E. 351, 108 N.E. 492, 220 Mass. 514.

(6) Before an appeal can be taken from the appellate division to the supreme judicial court, there must be a final decision in the lower tribunal as to matters before it.—Beacon Tool & Machine Co. v. National Products Mfg. Co., 147 N.E. 572, 252 Mass. 88.
15 C.J. p 1075 note 74.

Appeal lies to supreme judicial court

Mass.—Burbank v. Farnham, 107 N.E. 351, 108 N.E. 492, 220 Mass. 514.

Nature and form of remedy

Mass.—Lynn Gas & Electric Co. v. Creditors' Nat. Clearing House, 126 N.E. 364, 235 Mass. 114.—Murphy v. Justices of Municipal Court of Dorchester Dist. of City of Boston, 116 N.E. 969, 228 Mass. 12.

Right to review

Mass.—Hall Pub. Co. v. MacLaughlin, 120 N.E. 69, 230 Mass. 534.

Decisions reviewable

(1) Questions of law.—Long v. George, 195 N.E. 377, 290 Mass. 316.—Wright v. Graustein, 118 N.E. 227, 229 Mass. 68.

(2) Final and interlocutory rulings and orders.—Krock v. Consolidated Mines & Power Co., 189 N.E. 822, 286 Mass. 177.—Daniels v. Cohen, 144 N.E. 237, 249 Mass. 362.—Real Property Co. v. Pitt, 120 N.E. 141, 230 Mass. 526.—Hall Pub. Co. v. MacLaughlin, 120 N.E. 69, 230 Mass. 534.

(3) Fact findings.—McKenna v. Andreassi, Mass., 197 N.E. 879.—Dugan v. Matthew Cummings Co., 178

N.E. 825, 277 Mass. 445.—Saunders v. Smith Granite Co., 121 N.E. 431, 232 Mass. 1.

Presentation and preservation of grounds of review

Mass.—Magrath v. Sheehan, 5 N.E. 2d 547, 108 A.L.R. 1223.—Morse v. Homer's, Inc., 4 N.E.2d 625.—Murphy v. William C. Barry, Inc., 3 N.E.2d 214.—McKenna v. Andreassi, 197 N.E. 879.—Morey & Co. v. Sweeney, 191 N.E. 389, 287 Mass. 210.—Krock v. Consolidated Mines & Power Co., 189 N.E. 822, 286 Mass. 177.—Kelly v. Foley, 188 N.E. 349, 284 Mass. 503.—Caruso v. Shalit, 184 N.E. 460, 283 Mass. 196.—Sweeney v. Morey & Co., 181 N.E. 782, 279 Mass. 495.—Wilson v. Checker Taxi Co., 161 N.E. 803, 263 Mass. 425.—Stafford v. Commonwealth Co., 160 N.E. 820, 263 Mass. 240.—Sawick v. Ciborowski, 152 N.E. 882, 256 Mass. 533.—Spevack v. Budish, 130 N.E. 191, 238 Mass. 215.—Dooley v. Murphy, 118 N.E. 287, 229 Mass. 72.

Proceedings for transfer of cause

Mass.—Wilson v. Checker Taxi Co., 161 N.E. 803, 263 Mass. 425.

Return or record on review

Mass.—Commissioner of Institutions of City of Boston v. Justices of Municipal Court of Roxbury Dist., 195 N.E. 783, 290 Mass. 460.—Kelly v. Foley, 188 N.E. 349, 284 Mass. 503.—Rodde v. Nolan, 183 N.E. 741, 281 Mass. 493.—Bornstein v. Justices of Municipal Court of Roxbury Dist. of City of Boston, 169 N.E. 410, 269 Mass. 515.

Scope and extent of review

Mass.—Barnett v. Greenfield, 1 N.E. 2d 11.—Commissioner of Institutions of City of Boston v. Justices of Municipal Court of Roxbury Dist., 195 N.E. 783, 290 Mass. 460.—Kelly v. Foley, 188 N.E. 349, 284 Mass. 503.—Bornstein v. Justices of Municipal Court of Roxbury Dist. of City of Boston, 169 N.E. 410, 269 Mass. 515.—Somers v. Commercial Finance Corporation, 189 N.E. 837, 245 Mass. 286.—Halbert v. Brooks, 131 N.E. 68, 238 Mass. 471.—Jackson Caldwell Co. v. Poto, 126 N.E. 285, 235 Mass. 58.

Determination and disposition of cause

Mass.—Fiske v. Boston Elevated Ry. Co., 194 N.E. 835, 289 Mass. 598.—Kelly v. Foley, 188 N.E. 349, 284 Mass. 503.—Newman v. Hill, 146 N.E. 46, 250 Mass. 578.—Lynn Gas & Electric Co. v. Creditors' Nat. Clearing House, 130 N.E. 111, 237 Mass. 505.

courts, which are courts of general, original jurisdiction;⁷¹ the superior courts;⁷² the city or municipal courts;⁷³ the recorders' courts;⁷⁴ the common pleas court;⁷⁵ the police courts;⁷⁶ and the courts of mediation and arbitration.⁷⁷

§ 270. Minnesota

The district courts have general, original jurisdiction in Minnesota. The municipal courts are courts of special or limited jurisdiction, possessing only such power as is conferred on them by statute.

71. Mich.—Daniels v. Detroit, G. H. & M. Ry. Co., 128 N.W. 797, 163 Mich. 468.

15 C.J. p 993 note 84.

Court of record

Mich.—Goetz v. Black, 240 N.W. 94, 256 Mich. 564, 84 A.L.R. 802.

Amount in controversy

(1) The legislature can confer jurisdiction on the circuit court in cases involving any amount.—Detroit Lumber Co. v. The Petrel, 117 N.W. 80, 153 Mich. 528.

(2) Other matters see 15 C.J. p 993 note 84 [c].

Mandamus jurisdiction

Mich.—McBride v. Grand Rapids, 32 Mich. 360.

Court can act judicially only in suits properly begun by filing of appropriate pleadings.—Goetz v. Black, 240 N.W. 94, 256 Mich. 564, 84 A.L.R. 802.

72. Mich.—Youdan v. Kelley, 255 N.W. 342, 267 Mich. 616.

15 C.J. p 993 note 85.

Process; residence of parties

To confer jurisdiction on superior court of Grand Rapids, process or declaration must show on its face that one of the parties resides in Grand Rapids.—Youdan v. Kelley, supra—15 C.J. p 993 note 85 [b].

73. Mich.—Strifling v. Baden, 118 N.W. 740, 155 Mich. 49.

15 C.J. p 993 notes 86, 87.

Attachment; mayor's court

Mich.—Welles v. Detroit, 2 Doug. 77.

74. Mich.—People v. Dimitru, 195 N.W. 420, 224 Mich. 670—Wiley v. Lindsay, 191 N.W. 826, 221 Mich. 533.

15 C.J. p 993 note 88.

No equity jurisdiction

Mich.—Adler v. Connolly, 163 N.W. 689, 197 Mich. 81.

On appeal to circuit court

(1) Appeal dismissed for premature notice.—Anderson v. Wayne Circuit Judge, 230 N.W. 923, 251 Mich. 104.

(2) Record held not to show change in theory of case.—Papo v. Schoonmaker, 241 N.W. 140, 257 Mich. 309.

(3) Amendment of plea, allowed.—Otto Baedker & Associates v. Hamtramck State Bank, 241 N.W. 249, 257 Mich. 435.

76. Mich.—In re Bushey, 62 N.W. 1036, 105 Mich. 64.

77. Rehearing

A state board of mediation and arbitration cannot grant a rehearing where no such power is conferred on the court by law.—Renaud v. State Ct. Mediation & Arbitration, 83 N.W. 620, 124 Mich. 648, 83 Am.S.R. 346, 51 L.R.A. 458.

78. Minn.—Scott v. Nordin, 214 N.W. 472, 171 Minn. 469—In re O'Leary's Estate, 161 S.W. 392, 136 Minn. 126.

Particular actions or proceedings

(1) Cases involving land titles.—In re Martinen's Estate, 214 N.W. 469, 171 Minn. 475.

(2) Excluding dishonest traders from stockyards.—Carnes v. St. Paul Union Stockyards Co., 221 N.W. 20, 175 Minn. 294.

(3) Election contests.—Whaley v. Bayer, 109 N.W. 596, 820, 99 Minn. 397.

Garnishment proceedings

Minn.—Brennan v. Cavanaugh, 227 N.W. 200, 178 Minn. 366.

79. Minn.—Great Northern Ry. Co. v. Becher-Barrett-Lockerby Co., 274 N.W. 522, 200 Minn. 258—Untiedt v. Ver Dick, 262 N.W. 568, 195 Minn. 239—Anderson v. Graue, 236 N.W. 483, 183 Minn. 336, followed in Lima v. Graue, 236 N.W. 484, 183 Minn. 338—Wm. Weisman Realty Co. v. Cohen, 195 N.W. 898, 157 Minn. 161.

15 C.J. p 993 note 92.

Courts of record

Minn.—Untiedt v. Ver Dick, 262 N.W. 568, 195 Minn. 239.

Defenses requiring affirmative equitable relief

(1) Municipal court has no jurisdiction to entertain a prayer for affirmative equitable relief.—Wm. Weisman Realty Co. v. Cohen, 195 N.W. 898, 157 Minn. 161—15 C.J. p 993 note 92 [c].

(2) Answers held not to raise equitable defenses.—Claridge v. Clar-

idge, 214 N.W. 780, 172 Minn. 214—Wm. Weisman Realty Co. v. Cohen, supra—Yeates v. Young, 185 N.W. 257, 150 Minn. 274.

Court having jurisdiction of appeal Minn.—Dahlsen v. Anderson, 109 N.W. 697, 99 Minn. 340.

Service by mail of notice of appeal is fatally defective.—Brennan v. Cavanaugh, 227 N.W. 200, 178 Minn. 366—Santala v. Hill, 173 N.W. 651, 143 Minn. 289.

Harmless error Minn.—Iowa Guarantee Mortg. Corporation v. Kingery, 233 N.W. 18, 181 Minn. 477.

80. Appeals and review (1) Practice is same as in appeals from justice to district court.—Thompson v. Berg, 187 N.W. 703, 151 Minn. 560, 152 Minn. 538.

(2) Effect of failure to appeal from judgment of district court.—Thompson v. Berg, 191 N.W. 412, 154 Minn. 149.

81. Minn.—State v. Duluth Municipal Ct., 150 N.W. 924, 128 Minn. 225—Lynch v. Free, 66 N.W. 973, 64 Minn. 277.

15 C.J. p 993 note 93.

82. No equitable jurisdiction

Minn.—Iltis v. Greengard, 123 N.W. 406, 109 Minn. 208.

83. No authority to grant new trials Minn.—Untiedt v. Ver Dick, 262 N.W. 568, 195 Minn. 239.

84. Minn.—Clark v. Dye, 197 N.W. 209, 158 Minn. 217—Lillenthal v. Tordoff, 194 N.W. 722, 154 Minn. 225.

15 C.J. p 993 note 20 [d] (20), p 993 note 95.

Particular actions and remedies

(1) Action for money had and received.—Goodell v. Accumulative Income Corporation, 240 N.W. 534, 185 Minn. 213.

(2) Remedy of interpleader.—Metropolitan Nat. Bank of Minneapolis v. Hennepin County Sav. Bank, 183 N.W. 821, 149 Minn. 367.

(3) Forcible entry and detainer.—Clark v. Dye, 197 N.W. 209, 158 Minn. 217—Lillenthal v. Tordoff, 194 N.W. 722, 154 Minn. 225—Andrus v. Dyck-

ris,⁸⁵ Spring Valley,⁸⁶ St. Paul,⁸⁷ Stillwater,⁸⁸ Waseca,⁸⁹ Winona,⁹⁰ and Worthington.⁹¹

§ 271. Mississippi

In Mississippi the circuit court has original common-law jurisdiction, while jurisdiction in matters of equity is in the chancery court. The county court has been said to be a court of general jurisdiction, although it has no jurisdiction in equity for the maintenance of civil rights.

The circuit court of Mississippi has original common-law jurisdiction in all matters not vested by the constitution in some other court,⁹² while jurisdiction in matters of equity is conferred on the chancery court, as is also jurisdiction in matters testamentary and of administration.⁹³ The police courts are inferior courts having jurisdiction concurrent with justices of the peace within certain territorial limits.⁹⁴

man Hotel Co., 148 N.W. 565, 126 Minn. 406.

Title to real estate

(1) Statute held to give court jurisdiction of action in unlawful detainer, whether title to real estate was involved or not.—*Nellas v. Carline*, 201 N.W. 299, 161 Minn. 157.

(2) In vendor's action on earnest money check, it was held that there was no issue respecting title to land.—*Little v. Dyer*, 233 N.W. 7, 181 Minn. 487.

Process may be served by publication.—*Templeton v. Van Dyke*, 210 N.W. 874, 169 Minn. 188.

Judgments

(1) Opening judgment by default.—*Metropolitan Nat. Bank of Minneapolis v. Hennepin County Sav. Bank*, 183 N.W. 821, 149 Minn. 367.

(2) Vacation of judgment.—*Pittsburgh Plate Glass Co. v. Smith*, 203 N.W. 984, 163 Minn. 513.

Certiorari is proper remedy to review judgment of Minneapolis municipal court rendered on removal from conciliation court.—*Ridgway v. Vaughan*, 246 N.W. 115, 187 Minn. 552.

85. Decisions appealable

Minn.—*Doyle v. Long*, 285 N.W. 832.

86. Minn.—*Huntley v. Hutchinson*, 97 N.W. 971, 91 Minn. 244.

87. Minn.—*Singer v. Court of Honor*, 139 N.W. 703, 120 Minn. 528—*Juster v. Court of Honor*, 139 N.W. 701, 120 Minn. 325.

15 C.J. p 993 note 97.

Change of venue

Minn.—*State ex rel. Brattland v. Municipal Court of City of St. Paul*, 283 N.W. 560, 204 Minn. 413.

88. Minn.—*Jourdain v. Luchsinger*, 97 N.W. 740, 91 Minn. 111.

15 C.J. p 994 note 98.

21 C.J.S.—31

89. Minn.—*Burns v. Millers' Mut. Casualty Co.*, 178 N.W. 812, 146 Minn. 356.

90. **Disposition of case on appeal** Minn.—*Hardenburg v. Roesner*, 85 N.W. 719, 83 Minn. 7.

91. Minn.—*Iowa Guarantee Mortg. Corporation v. Kingery*, 233 N.W. 18, 181 Minn. 477.

92. Miss.—*Illinois Cent. R. Co. v. Le Blanc*, 21 So. 760, 74 Miss. 650—*Bell v. West Point*, 51 Miss. 262. 11 C.J. p 793 note 10 [c].

In mandamus proceedings

Miss.—*Swann v. Buck*, 40 Miss. 268, —*Matison County Ct. v. Alexander*, Walk 523.

Territorial jurisdiction

Miss.—*Cook v. State*, 32 So. 312, 81 Miss. 146.

93. U.S.—*In re Armistead's Estate*, D.C.Miss., 4 F.Supp. 606.

In removal of disability of minority, the jurisdiction of the chancery court is limited and restricted.—*Duilion v. Folkes*, 120 So. 437, 153 Miss. 91.

94. Miss.—*Gober v. Phillips*, 117 So. 600, 151 Miss. 255—*Hughes v. State*, 29 So. 786, 79 Miss. 77.

95. Miss.—*Daniels v. Jordan*, 134 So. 903, 161 Miss. 78—*Wragg v. Kelley*, 42 Miss. 231.

96. Miss.—*McIntosh v. Munson Road Machinery Co.*, 145 So. 731, 167 Miss. 546—*Daniels v. Jordan*, 134 So. 903, 161 Miss. 78.

97. Miss.—*Welch v. Bryant*, 128 So. 734, 157 Miss. 559.

98. Miss.—*Speir v. Moseley*, 130 So. 53, 158 Miss. 63.

Instructions

Minn.—*Mississippi State Highway Commission v. Reddoch*, 186 So. 298, followed in 186 So. 300, and

The county court, which has jurisdiction concurrent with the circuit and chancery courts in all matters of law and equity wherein the amount or value of the thing in controversy does not exceed a certain amount,⁹⁵ has been said to be a court of general jurisdiction and a court of record,⁹⁶ although it has no jurisdiction in equity for the maintenance of civil rights.⁹⁷ There have been decisions relating to the practice and procedure in county courts,⁹⁸ and to the review of its proceedings.⁹⁹

§ 272. Missouri

The circuit courts are courts of general jurisdiction in Missouri, while the county courts are courts of limited and inferior jurisdiction.

There have been decisions relating to the Missouri circuit courts, which are constitutional courts

Mississippi State Highway Commission v. Huff, 186 So. 314.

99. Miss.—*Ellis v. S. Pellegrini, Inc.*, 141 So. 273, 163 Miss. 385—*Eagle Cotton Co. v. Blair*, 120 So. 566, 153 Miss. 43—*Williams v. Stimpson Computing Scales Co.*, 120 So. 174, 152 Miss. 305.

Court having jurisdiction

The statute authorizing appeal directly to the supreme court rather than to the circuit court, in prosecution transferred to county court from circuit court, does not violate constitutional provisions making the county court inferior to circuit court.—*Drummond v. State, Miss.*, 185 So. 207.

Time for prosecuting appeal

Miss.—*Laurel Oil & Fertilizer Co. v. McCraw*, 172 So. 503, 178 Miss. 117—*Flowers v. Trotlos*, 160 So. 581, 172 Miss. 305—*McCandless v. Day*, 140 So. 337, 162 Miss. 859.

Sufficiency of application for appeal Miss.—*Schwartz v. McKay*, 185 So. 811.

Jurisdiction on appeal

Miss.—*Mississippi State Highway Department v. Haines*, 139 So. 168, 162 Miss. 216—*Welch v. Bryant*, 128 So. 734, 157 Miss. 559.

Scope of review; trial de novo

Under statute providing for appeal from county court to circuit court, the circuit court considers the case on the record made in the county court and, if harmful error is found, grants a new trial de novo in the circuit court, if not, affirms the judgment.—*Mississippi State Highway Commission v. Reddoch*, Miss., 186 So. 298, followed in 186 So. 300 and *Mississippi State Highway Commission v. Huff*, 186 So. 314—*Carmichael v. J. Cahn Co., Miss.*, 184 So. 417—*Blount v. Miller*, 160 So. 598, 172 Miss. 492.

of record¹ having general² common-law jurisdiction.³ The county courts, which are also constitutional courts,⁴ are courts of limited and inferior jurisdiction,⁵ possessing only such powers as are conferred on them by law;⁶ and there have been decisions relating to the proceedings,⁷ and review thereof,⁸ in county courts. There have also been decisions relating to the courts of common pleas,⁹ and relating to the city courts.¹⁰

§ 273. Montana

The district courts of Montana are courts of general, original jurisdiction.

The district courts of Montana are courts of general, original jurisdiction.¹¹

§ 274. Nebraska

There have been decisions relating to the district, county, and municipal courts in Nebraska.

There have been decisions relating to the district courts¹² which may give both legal and equitable relief,¹³ and whose exercise of general equity jurisdiction is not, and cannot be, limited by statute.¹⁴

County courts. There have been decisions relating to the county courts, which are courts of record,¹⁵ having exclusive original jurisdiction in pro-

1. Mo.—Renshaw v. Reynolds, 297 S.W. 374, 376, 317 Mo. 484.

Jurisdiction is fixed by law

Mo.—State ex rel. MacNish v. Landwehr, 60 S.W.2d 4, 332 Mo. 622.

2. Mo.—Crabtree v. Aetna Life Ins. Co., 111 S.W.2d 103, 341 Mo. 1173—Yates v. Casteel, 49 S.W.2d 68, 329 Mo. 1101—State ex rel. Shoemaker v. Hall, 257 S.W. 1047—Harbstreet v. Shipman, App., 123 S.W.2d 395—Koch v. Meacham, App., 121 S.W.2d 279, transferred 116 S.W.2d 16—State ex rel. Spencer v. Anderson, App., 101 S.W.2d 530—Walton v. Walton, App., 6 S.W.2d 1025—Rubber Tire Supply Co. v. American Utilities Co., App., 279 S.W. 751—Fox-Miller Grain Co. v. Stephans, App., 217 S.W. 994.

15 C.J. p 994 note 3.

Particular actions and proceedings

(1) Administration of partnership estate.—Pryor v. Kopp, 119 S.W.2d 228, 342 Mo. 887.

(2) Action for admeasurement of dower.—Cronacher v. Runge, Mo., 98 S.W.2d 603.

(3) Attachment. — Monks v. Strange, 25 Mo.App. 12.

(4) Action for damages for pollution of water.—Windle v. City of Springfield, 8 S.W.2d 61, 320 Mo. 459, reversing, App., 275 S.W. 585.

(5) Mandamus.—St. Louis County Court v. Sparks, 10 Mo. 117, 45 Am. D. 355—St. Louis County Ct. v. Rutland, 5 Mo. 268—Boone County v. Todd, 3 Mo. 140.

(6) Over general subject of trusts.—State ex rel. Caulfield v. Sartorius, Mo., 130 S.W.2d 541.

(7) Suit against administrator of a person previously declared insane.—Tock v. Tock, Mo.App., 120 S.W.2d 169—15 C.J. p 994 note 3 [a].

(8) Other actions and proceedings see 15 C.J. p 994 note 3 [b]—[g].

No jurisdiction to render interlocutory judgment in partition

Mo.—Koch v. Meacham, App., 121 S.W.2d 279, transferred 116 S.W.2d 16.

3. Mo.—Renshaw v. Reynolds, 297 S.W. 374, 317 Mo. 484—Estes v. General Chemical Clay Co., App., 93 S.W.2d 295.

4. Mo.—State ex rel. Chadwick Consol. School Dist. v. Jackson, 84 S.W.2d 988, 229 Mo.App. 842.

5. Mo.—Drainage Dist. No. 1 of Bates County v. Bates County, 216 S.W. 949—School Dist. No. 46 v. Stewartsville School Dist., App., 110 S.W.2d 399—Ex parte McLaughlin, App., 105 S.W.2d 1020—St. Louis County, to Use of Mississippi Valley Trust Co. v. Menke, App., 95 S.W.2d 818.

6. Mo.—Morris v. Karr, 114 S.W.2d 962, 342 Mo. 179—School Dist. No. 46 v. Stewartsville School Dist., App., 110 S.W.2d 399—State ex rel. and to Use of Broughton v. Oliver, 208 S.W. 112, 202 Mo.App. 527.

15 C.J. p 994 note 2.

No common-law or equitable jurisdiction

Mo.—State ex rel. Chadwick Consol. School Dist. v. Jackson, 84 S.W.2d 988, 229 Mo.App. 842.

Constitutional questions

County court has jurisdiction to determine constitutional question arising in matter over which it otherwise has jurisdiction.—Hollowell v. Schuyler County, 18 S.W.2d 498, 322 Mo. 1230.

7. Mo.—Sublett v. Nelson, 38 Mo. 487.

8. Mo.—Platte County v. Locke, 242 S.W. 666, 294 Mo. 207—Sidwell v. Jett, 112 S.W. 56, 213 Mo. 601—School Dist. No. 46 v. Stewartsville School Dist., App., 110 S.W.2d 399. Power of circuit court to superintend county court see *infra* § 403.

Proceedings for transfer of cause

Mo.—Platte County v. Locke, 242 S.W. 666, 294 Mo. 207.

Scope of review; trial de novo

Except in so far as a trial de novo is provided for by statute on appeal, an appeal or writ of error from the county court to the circuit court merely brings up the record for review.—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543—Platte County v. Locke, 242 S.W. 666, 294 Mo. 207—School Dist. No. 46 v. Stewartsville School Dist., Mo.App., 110 S.W.2d 399.

Presumptions as to constitutional questions presented and passed on by county court.—Hollowell v. Schuyler County, 18 S.W.2d 498, 322 Mo. 1230.

9. Mo.—Koebler v. Snider, 76 S.W. 1032, 177 Mo. 546.

15 C.J. p 994 note 4.

Jurisdiction in attachment proceedings

Mo.—McHugh v. Meyer, 61 Mo. 334.

10. Mo.—Bryan v. McCaskill, 175 S.W. 961.

15 C.J. p 994 note 5.

11. Mont.—In re Stevenson's Estate, 289 P. 566, 87 Mont. 486—Thelen v. Vogel, 281 P. 753, 86 Mont. 33—Link v. Haire, 267 P. 952, 82 Mont. 406.

Specific performance of contract of adoption against decedent's estate.—Burns v. Smith, 53 P. 742, 21 Mont. 251, 69 Am.S.R. 653.

Territorial court; mandamus jurisdiction

Mont.—Chumasero v. Potts, 2 Mont. 242, error dismissed 92 U.S. 358, 23 L.Ed. 499.

12. Neb.—Lacey v. Zeigler, 152 N.W. 792, 98 Neb. 380.

15 C.J. p 994 note 15.

13. Neb.—Matteson v. Creighton University, 179 N.W. 1009, 105 Neb. 219—State v. Dickinson, 89 N.W. 431, 63 Neb. 869.

15 C.J. p 994 note 16.

14. Neb.—Lacey v. Zeigler, 152 N.W. 792, 98 Neb. 380.

15 C.J. p 994 note 17.

15. Neb.—Martin v. Sanford, 261

bate matters.¹⁶ Although county courts are without general equity powers,¹⁷ they have equity jurisdiction incidental to powers properly conferred by statute,¹⁸ and as to all subjects within their exclusive original jurisdiction, they have full equity powers.¹⁹ Although county courts have no jurisdiction of a controversy involving the title to land,²⁰ they may entertain actions for damages for breach of covenants of warranty²¹ and against encumbrances.²² There are cases relating to the review of proceedings of the county courts.²³

The municipal courts of the city of Omaha are a

branch of the judicial system of the state whose jurisdiction is limited to the boundaries of the city.²⁴ There have been decisions relating to the review of the proceedings of the municipal court.²⁵

§ 275. Nevada

There have been decisions relating to the district and municipal courts of Nevada.

There have been decisions relating to the jurisdiction and procedure of the district courts²⁶ and the municipal courts.²⁷

N.W. 136, 129 Neb. 212, 100 A.L.R. 179—*Stewart v. Herten*, 249 N.W. 552, 125 Neb. 210—*Brandeen v. Lau*, 201 N.W. 665, 118 Neb. 34. 15 C.J. p 994 notes 8, 9 [a].

Power of court to vacate or modify its judgments
Neb.—*Stone v. Jensen*, 224 N.W. 284, 118 Neb. 254.

16. Neb.—*Smith v. Bayer*, 145 N.W. 1030, 95 Neb. 483.

15 C.J. p 994 note 9.

Courts of probate jurisdiction generally see *infra* §§ 298–310.

17. Neb.—*Gotchall v. Gotchall*, 154 N.W. 243, 98 Neb. 730.

15 C.J. p 994 note 10.

18. Neb.—*In re Jensen's Estate*, 233 N.W. 196, 135 Neb. 602—*Gainsforth v. Peterson*, 207 N.W. 935, 114 Neb. 442—*In re Wilson*, 151 N.W. 316, 97 Neb. 730.

19. Neb.—*In re McLean's Estate*, 285 N.W. 915.

20. Neb.—*Northwestern State Bank of Hay Springs v. Hanks*, 225 N.W. 119, 118 Neb. 442.

15 C.J. p 994 note 12.

Action to recover balance due on dwelling, sold with understanding that it was to be removed from land, does not involve title to land, and is within county court's jurisdiction.—*Bourret v. Lawmaster*, 238 N.W. 739, 121 Neb. 815.

21. Neb.—*Birkel v. Norton*, 120 N.W. 927, 84 Neb. 175.

22. Neb.—*Birkel v. Norton*, *supra*. 15 C.J. p 994 note 14.

23. Court having jurisdiction

(1) An appeal lies to the district court from the judgments of the county courts.—*In re Creighton*, 136 N.W. 1001, 91 Neb. 654, Ann.Cas. 1913D 128—*In re Creighton*, 129 N.W. 181, 88 Neb. 107.

(2) A final order or judgment of a county court in probate matters is appealable to the district court, whether such judgment or order is on the merits or not.—*Weeke v. Wortmann*, 109 N.W. 503, 77 Neb. 407.

(3) The supreme court cannot review directly the rulings of the

county court, but on appeal or error therefrom to the district court, its judgment thereon can be reviewed.—*Kingman v. Davis*, 83 N.W. 777, 63 Neb. 578.

Nature and form of remedy

Neb.—*Frazier v. Alexander*, 198 N.W. 322, 111 Neb. 294.

Time for taking appeal

Neb.—*Welsh v. Valla*, 165 N.W. 895, 102 Neb. 84.

Right to dismiss appeal

Neb.—*Lemer v. Hunyak*, 175 N.W. 605, 104 Neb. 2.

Issues on appeal; trial de novo

(1) A case must be tried in the district court on appeal from the county court on issues tried in county court, but it is sufficient if identity of cause of action is preserved in the petition.—*Walter v. School Dist. No. 34 of Perkins County*, 276 N.W. 666, 133 Neb. 672—*Elson v. Nelson*, 272 N.W. 551, 132 Neb. 532—*In re Shierman's Estate*, 261 N.W. 155, 129 Neb. 230—*Summers v. Automobile Ins. Co. of Hartford, Conn.*, 230 N.W. 449, 119 Neb. 625—*Langdon v. Kenned*—*Holland, Delacy & McLaughlin*, 224 N.W. 292, 118 Neb. 290, 63 A.L.R. 896—*Howard County v. Enevoldsen*, 224 N.W. 280, 118 Neb. 222.

(2) The amount of damages claimed on the same cause of action may be increased, if not beyond the jurisdiction of the county court.—*Walter v. School Dist. No. 34 of Perkins County*, *supra*.

(3) An action of replevin is in part a proceeding in rem, and an appeal from county court having jurisdiction of the subject matter authorizes the district court to try the case de novo as if it had been originally instituted in that court.—*Lemer v. Hunyak*, 175 N.W. 605, 104 Neb. 2.

Determination and disposition of cause

Neb.—*Rogers v. Bodie*, 200 N.W. 799, 112 Neb. 672.

Actions involving title to land

District court is without jurisdiction on appeal from county court, where title to land is involved in for-

cible detention.—*Northwestern State Bank of Hay Springs v. Hanks*, 225 N.W. 119, 118 Neb. 442.

Amount of judgment on appeal

Where, in replevin in the county court, the appraised value of the property, as well as its actual value found by the court, is less than one thousand dollars, and plaintiff appeals from the judgment, the district court may give judgment for defendant for an amount in excess of the jurisdiction of the county court, if warranted by the facts.—*Bates v. Stanley*, 70 N.W. 972, 51 Neb. 252.

24. Neb.—*State v. Board of Com'rs of Douglas County*, 189 N.W. 639, 109 Neb. 35.

25. **Amendment of pleadings in district court is permissible.**—*Packer v. Snyder, Malone, Coffman Co.*, 277 N.W. 60, 133 Neb. 756—*Melson v. Turner*, 251 N.W. 172, 125 Neb. 603—*Baxter v. The Maccabees*, 245 N.W. 415, 124 Neb. 160.

Issues on appeal

(1) When an appeal is taken from municipal court to district court, the case is to be tried in appellate court on the issues that were presented in the court from which the appeal is taken.—*Sturgeon v. Wilson*, 185 N.W. 270, 107 Neb. 109—*Merchants' Nat. Bank of Omaha v. American Eagle Tire Co.*, 185 N.W. 309, 107 Neb. 48.

(2) However, the amount of damages claimed on same causes of action can be increased, although not beyond jurisdiction of municipal court.—*Short v. Bollen*, 266 N.W. 535, 130 Neb. 728.

26. Nev.—*Mooney v. Newton*, 187 P. 721, 43 Nev. 441.

15 C.J. p 994 note 18.

Setting aside deed

Nev.—*Allenbach v. Ridenour*, 279 P. 32, 51 Nev. 437.

Reason for name "district" courts

Nev.—*State v. Atherton*, 10 P. 901, 19 Nev. 332.

15 C.J. p 673 note 62 [d].

27. Nev.—*Ex parte Dixon*, 161 P. 737.

15 C.J. p 994 note 19.

§ 276. New Hampshire

There have been decisions relating to the municipal courts of New Hampshire.

There have been decisions relating to the municipal courts in New Hampshire.²⁸

§ 277. New Jersey

There have been decisions relating to the various courts in New Jersey.

The supreme,²⁹ chancery,³⁰ and prerogative³¹ courts are courts of state-wide original jurisdiction. There have been decisions relating to the district courts,³² the courts of common pleas,³³ the county circuit courts,³⁴ and the courts for the trial of small causes.³⁵

§ 278. New Mexico

District courts of New Mexico have general jurisdiction.

28. Process

Where municipal court had no clerk, writ signed by special justice, but not signed by justice as clerk, was valid process.—*Smith v. Tallman*, 175 A. 857, 87 N.H. 176.

29. N.J.—*Cassatt v. First Nat. Bank*, 153 A. 377, 91 N.J.Misc. 222.

Special rule

Trial at the bar of the supreme court of this state obtains only pursuant to a special rule of court, and where the amount or value involved is over three thousand dollars, and this limitation is not affected by *Pract. Act 1912 § 22*, relative to judgment without pleadings.—*Bryant v. Lindsay*, 110 A. 823, 94 N.J.Law 357, affirmed 114 A. 447, 96 N.J.Law 268.

Supervision of municipal proceedings

Supreme court is tribunal for supervision and correction of official proceedings of municipalities.—*E. M. Harrison Market v. Town of Montclair*, 147 A. 502, 105 N.J.Eq. 222.

30. N.J.—*Reiner v. Fidelity Union Trust Co.*, 8 A.2d 175, 126 N.J.Eq. 78—*Cassatt v. First Nat. Bank*, 153 A. 377, 91 N.J.Misc. 222.

Municipal or corporate elections

N.J.—*Goldstein v. Ewing*, 49 A. 517, 62 N.J.Eq. 69.

31. N.J.—*Cassatt v. First Nat. Bank*, 153 A. 377, 91 N.J.Misc. 222.

Definition, origin, and nature of prerogative court

N.J.—*In re Merrill*, 102 A. 400, 88 N.J.Eq. 261—*Harris v. Vanderveer*, 21 N.J.Eq. 424.
49 C.J. p 1332 notes 50–61.

32. N.J.—*Kirschler v. Albanesi*, 178 A. 568, 13 N.J.Misc. 366.
15 C.J. p 994 note 21.

Jurisdictional amount

N.J.—*King v. Scala*, 165 A. 426, 110 N.J.Law 321—*Standard Accident*

Ins. Co. of Detroit, Mich. v. Lloyd, 157 A. 657, 10 N.J.Misc. 28.

15 C.J. p 994 note 21 [c].

Dispossession proceedings

N.J.—*Al. Eitner, Inc. v. McGuire*, 153 A. 372, 9 N.J.Misc. 205.

15 C.J. p 994 note 21 [e].

Suits on small claims

N.J.—*Goldberger v. City of Perth Amboy*, 197 A. 267, 16 N.J.Misc. 84.

Procedure

(1) Generally.—*Levinson v. Seeman Bros.*, 166 A. 630, 11 N.J.Misc. 402.

(2) Formal pleadings unnecessary.—*Besser v. Krasny*, 176 A. 146, 114 N.J.Law 146, reversing 172 A. 533, 113 N.J.Law 81—*Rickner v. Ritz Restaurant Co. of Passaic*, 181 A. 398, 13 N.J.Misc. 818—*Bishop v. Cadman*, 159 A. 536, 10 N.J.Misc. 454.
15 C.J. p 994 note 21 [i].

33. N.J.—*Kirschler v. Albanesi*, 178 A. 568, 13 N.J.Misc. 366.

15 C.J. p 995 note 22.

Prior to amendment of 1936, L. 1936 c 200 § 1 p 493, which provides that the court of common pleas shall have general jurisdiction over all suits and actions of a civil nature at law, irrespective of the amount in controversy, the court of common pleas did not have jurisdiction of suits and actions wherein the title to real estate was in question.—*Allara v. Stevens*, 141 A. 668, 104 N.J.Law 240—*Kirschler v. Albanesi*, 178 A. 568, 13 N.J.Misc. 366.

Review of action of municipal governing body

N.J.—*City of Plainfield v. McGrath*, 188 A. 733, 117 N.J.Law 348.

34. N.J.—*State, Duford v. Decue*, 81 N.J.Law 302—*Brown v. Bissett*, 21 N.J.Law 46.

The district courts are courts of general jurisdiction in New Mexico.³⁶

§ 279. New York

- a. Supreme court
- b. County court
- c. City or municipal courts
- d. Other courts

a. Supreme Court

In New York the supreme court is a court of original general jurisdiction in both law and equity, its jurisdiction being wide enough to cover any and all causes and persons within the territorial jurisdiction of the state.

Under the New York constitution the supreme court is a court of original general jurisdiction in both law and equity.³⁷ Its jurisdiction is unlimited.

Attachment issued out of circuit court, notwithstanding suit was subsequently transferred to chancery, because circuit court was without jurisdiction, was not void, and constituted lien on land.—*Vaux v. Vaux*, 172 A. 68, 115 N.J.Eq. 586.

35. N.J.—*Weishaupt v. Weishaupt*, 142 A. 341, 104 N.J.Law 465—*Keating v. Edgar Phillips & Son*, 199 A. 719, 16 N.J.Misc. 335—*White v. Gifford*, 187 A. 45, 14 N.J.Misc. 738—*Aumack v. Cotton*, 157 A. 549, 9 N.J.Misc. 1321—*Public Service Co-ordinated Transport v. Nemeth*, 154 A. 408, 9 N.J.Misc. 500.
15 C.J. p 995 note 25.

Review of proceedings

N.J.—*Bonamassa v. Davis*, 191 A. 745, 118 N.J.Law 181, affirming 186 A. 64, 14 N.J.Misc. 499—*Department of Health of New Jersey v. Monheit*, 101 A. 413, 90 N.J.Law 448—*Weinberger v. Margo Realty Corporation*, 164 A. 447, 11 N.J.Misc. 142.

36. N.M.—*State v. Patten*, 69 P.2d 931, 41 N.M. 395.

37. N.Y.—*In re Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 420, affirming 1 N.Y.S.2d 184, 253 App.Div. 30—*City of Syracuse v. Hogan*, 138 N.E. 406, 234 N.Y. 457, reversing 193 N.Y.S. 928, 201 App.Div. 874—*Landers v. Staten Island R. Co.*, 53 N.Y. 450, 14 Abb.Pr.N.S., 346, reversing 13 Abb.Pr.N.S., 338—*Potter v. Merchants' Bank*, 28 N.Y. 641, 86 Am.D. 273—*Bangs v. Duckinfield*, 18 N.Y. 592—*Decker v. Canzoneri*, 9 N.Y.S.2d 210, 256 App.Div. 68—*Consumers' Lumber Co. v. Lincoln*, 233 N.Y.S. 530, 225 App.Div. 484.

15 C.J. p 995 notes 27–29.

Only court

The supreme court is the only

ed,³⁸ unqualified,³⁹ and coextensive with the boundaries of the state,⁴⁰ the legislature having no power to deprive it of jurisdiction,⁴¹ or limit or qualify the same,⁴² although it may grant concurrent jurisdiction to other courts.⁴³ It has jurisdiction to hear and determine any justiciable question of which the

common-law or chancery courts of England would have had cognizance, subject only to territorial limitations,⁴⁴ such jurisdiction being wide enough to cover any and all causes of action and any and all persons within the state's jurisdiction.⁴⁵

court of original general jurisdiction.—*Landers v. Staten Island R. Co.*, 53 N.Y. 450, 14 Abb.Pr., N.S., 346, reversing 13 Abb.Pr., N.S., 338.—*Decker v. Canzoneri*, 9 N.Y.S.2d 210, 256 App.Div. 68.

Regardless of amount

N.Y.—*Allen v. Fink*, 207 N.Y.S. 428, modified on other grounds 208 N.Y.S. 827, 211 App.Div. 411.

In the absence of anything limiting the general jurisdiction of the supreme court, it has power to try and determine all property rights claimed by an assignee in bankruptcy and all equity suits with regard to such property or in any way affecting it.—*Cook v. Whipple*, 55 N.Y. 150, 14 Am.R. 202.

Amount in controversy

N.Y.—*Marsh v. Benson*, 34 N.Y. 358, reversing 11 Abb.Pr. 241, 19 How. Pr. 415.

Equity jurisdiction constitutional

N.Y.—*Aberdeen Restaurant Corporation v. Gottfried*, 285 N.Y.S. 832, 158 Misc. 785.

Equitable issues under counterclaim

N.Y.—*New York v. Matthews*, 108 N.E. 80, 213 N.Y. 563, affirming 141 N.Y.S. 432, 156 App.Div. 490.

Appointment of receiver

N.Y.—*Potter v. Merchants' Bank*, 28 N.Y. 641, 86 Am.D. 273.—*Bangs v. Duckinfield*, 18 N.Y. 592.

Matters of surrogate's court jurisdiction

(1) The supreme court may take the account of a trustee, probate a will, and exercise jurisdiction in many other matters where the Surrogate's Court also has jurisdiction.—*In re Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 429, affirming 1 N.Y.S.2d 184, 253 App.Div. 30.

(2) Supreme court has jurisdiction to determine effect of disposition of real property by will.—*Daniell v. Hopkins*, 177 N.E. 390, 257 N.Y. 112, 76 A.L.R. 1367, reversing 245 N.Y.S. 818, 231 App.Div. 745.

(3) In supreme court, power to remove testamentary trustee is not limited to specific instances prescribed by statute as grounds for removal of executor, as is case in surrogate's court.—*In re Drummond's Estate*, 165 N.Y.S. 78, 100 Misc. 78.

(4) In litigation involving trust indenture and appointment under will, jurisdiction to dispose of questions of validity under statute of perpetuities and effect of acts of parties

vested in supreme court of state.—*Chase Nat. Bank v. Frazier*, 276 N.Y.S. 524, 243 App.Div. 623, affirmed 199 N.E. 526, 269 N.Y. 541.

(5) Although it has jurisdiction to determine validity and enforce contract to dispose of property by will, the supreme court will refuse to act where simpler method is available in surrogate's court.—*Schley v. Donlin*, 225 N.Y.S. 453, 131 Misc. 208.

Removal of cause from other court

Where plaintiffs, occupying apartment in Bronx County near Yonkers line in building owned by defendant corporation, whose principal place of business was in the borough of Bronx, instituted negligence action in the city court of Yonkers, whose jurisdiction covers Westchester County, defendant corporation was entitled, as a matter of law, to have action removed to the supreme court, Westchester County, and upon such removal to have it transferred to the supreme court, Bronx County.—*Hochman v. Frenbern Realty Corporation*, 1 N.Y.S.2d 676, 253 App.Div. 835.

Setting aside assignment

Children claiming reassignment of mortgages to administrator was fraudulent may sue in supreme court to set aside assignment.—*In re Wien's Estate*, 244 N.Y.S. 397, 137 Misc. 456.

38. N.Y.—*Decker v. Canzoneri*, 9 N.Y.S.2d 210, 256 App.Div. 68.

39. N.Y.—*Decker v. Canzoneri*, supra.

40. N.Y.—*Decker v. Canzoneri*, supra.—*Bronx Gas & Electric Co. v. Public Service Commission*, First District, 180 N.Y.S. 38, 190 App. Div. 13, reversing 178 N.Y.S. 172, 108 Misc. 180.

15 C.J. p 995 note 30.

Any justice may hold court in any county

N.Y.—*People v. Herrmann*, 43 N.E. 546, 149 N.Y. 190.

41. N.Y.—*In re Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 429, affirming 1 N.Y.S.2d 184, 253 App.Div. 30.

Statute relating to injunction in labor dispute

The supreme court retains its ancient equitable jurisdiction notwithstanding provisions of statute relating to issuance of injunction in cases involving a labor dispute.—*May's Furs & Ready-To-Wear*, § N.Y.S.2d 819, 255 App.Div. 643.

42. N.Y.—*Decker v. Canzoneri*, 9 N.Y.S.2d 210, 256 App.Div. 68.

43. Surrogate's court

N.Y.—*In re Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 429, affirming 1 N.Y.S.2d 184, 253 App.Div. 30.

Courts of concurrent and conflicting jurisdiction see *infra* §§ 486-521. Courts of probate jurisdiction generally see *infra* §§ 298-310.

44. N.Y.—*Bronx Gas & Electric Co. v. Public Service Commission*, First Dist., 180 N.Y.S. 38, 190 App. Div. 13, reversing 178 N.Y.S. 172, 108 Misc. 180.

The supreme court succeeded to all the powers possessed by the old court of king's bench, and, under Const. art 6 § 6, to all the powers of the old court of oyer and terminer, possessed either at common law or by L.1823 c 182 § 9, making it a continuous court.—*Jones v. People*, 79 N.Y. 45.—*People v. Goodrich*, 149 N.Y.S. 406.

45. N.Y.—*Town of Harrison v. Sunnyside Ridge Builders*, 8 N.Y.S.2d 632, 170 Misc. 161.

15 C.J. p 995 note 27.

Formal action necessary

The supreme court has inherent power to enjoin any illegal act, but it is not a summary power except when expressly made so by statute, and it can ordinarily be exercised only within well-defined limits, and through the medium of formal actions.—*In re Harvie*, 203 N.Y.S. 497, 122 Misc. 669.

Action to enforce payment of mortgage tax

N.Y.—*People v. Park Row Realty Co.*, 151 N.Y.S. 804, 88 Misc. 254, affirmed 152 N.Y.S. 1133, 169 App. Div. 903.

Declaration of rights and injunction

Supreme court has jurisdiction of actions by gas and electric corporations for declaration of rights and injunction against enforcement of statute requiring reports, payment into state treasury, and refund of unclaimed consumer deposits, court of claims being open to claimants in cases of contracts where state comptroller may not audit.—*Brooklyn Borough Gas Co. v. Bennett*, 277 N.Y.S. 203, 154 Misc. 106.

Determination as to constitutionality of act apportioning senatorial districts

N.Y.—*Sherrill v. O'Brien*, 81 N.E. 124, 188 N.Y. 185, 117 Am.S.R. 841.

The court sits in special term for the trial of equity cases⁴⁶ and the determination of motions,⁴⁷ and in trial term for the trial of jury cases,⁴⁸ but the court is the same no matter how it is sitting.⁴⁹

b. County Court

The county courts of New York are of limited jurisdiction, and possess only such power and authority as the constitution and statutes confer on them.

Ejectment

N.Y.—City of Syracuse v. Hogan, 138 N.E. 406, 234 N.Y. 457, reversing 193 N.Y.S. 928, 201 App.Div. 874.

Examination of books of bank by stockholders

Supreme court has power, in its discretion, to compel the officers of a national bank in process of liquidation, on expiration of its charter by limitation, to exhibit books, papers, and assets of the bank to the stockholders, and to permit them to examine and to take extracts therefrom.—Tuttle v. Iron Nat. Bank, 62 N.E. 761, 170 N.Y. 9, affirming 73 N.Y.S. 1150, 67 App.Div. 627.

Matrimonial cases

N.Y.—Berry v. Berry, 114 N.Y.S. 497, 130 App.Div. 53.

Recanvass of votes

It has jurisdiction by mandamus to direct recanvass of votes cast for mayor.—Matter of Brush, 75 N.Y.S. 285, 69 App.Div. 617.

Interfering with county court jurisdiction

While, under Civil Pract. Act § 130, certain ex parte orders in actions pending in a county court may be made, and subsequently vacated or modified by the supreme court, the latter court may not exercise jurisdiction in matters affecting substantial rights of the parties, or interfering with the jurisdiction and authority of the county court.—Curry v. Earll, 203 N.Y.S. 750, 209 App.Div. 205.

How issue joined

In supreme court defendant must serve an answer on plaintiff's attorney, issue being joined by service of the pleading.—Bachrach v. Fisher & Grassgren, 244 N.Y.S. 23, 137 Misc. 382.

46. N.Y.—In re Davies, 61 N.E. 118, 168 N.Y. 89, 32 N.Y.Civ.Proc. 163, 58 L.R.A. 855, reversing 67 N.Y.S. 492, 55 App.Div. 245, reversing 66 N.Y.S. 129, 32 Misc. 1.—Syenite Trap Rock Co. v. Williams, 153 N.Y.S. 74, 167 App.Div. 774, affirmed, 119 N.E. 1081, 222 N.Y. 689.

Damages for trespass and injunction
N.Y.—Racquette Falls Land Co. v. Buoyce, 89 N.Y.S. 359, 43 Misc. 402, reversed on other grounds 95 N.Y.S. 381, 108 App.Div. 67.

Partition

N.Y.—Hewlett v. Wood, 3 Hun 736, appeal dismissed 62 N.Y. 75.

Prohibition

The special term has power to

issue an alternative writ of prohibition to the court of general sessions.—People v. General Sessions Ct., 98 N.Y.S. 557, 112 App.Div. 424, reversing 98 N.Y.S. 66, 49 Misc. 72, and affirmed 78 N.E. 149, 185 N.Y. 504.

Severance of issues

In proceeding by city of New York to condemn lands, special term had jurisdiction to sever city's claims to lands under water within projected lines of streets, and after making findings thereon dismiss city's claims thereto.—In re Lands on Upper New York Bay in City of New York, 213 N.Y.S. 486, 215 App.Div. 204, modified on other grounds 214 N.Y.S. 234, 215 App.Div. 438, appeals dismissed. In re Staten Island Proceeding, City of New York, 154 N.E. 589, 243 N.Y. 522, modified on other grounds. In re Water Front on Upper New York Bay in Borough of Richmond, City of New York, 167 N.E. 911, 246 N.Y. 1, reargument denied 159 N.E. 646, 246 N.Y. 549, and certiorari denied Greater New York Dock & Warehouse Co. v. Stapleton Dock & Warehouse Corporation, 48 S.Ct. 320, 276 U.S. 626, 72 L.Ed. 738.

Procedure replacing certiorari, mandamus, and prohibition

The statutory procedure superseding certiorari to review, mandamus, and prohibition consolidates practice relating to such modes of relief, somewhat broadening meaning of terms previously used, scope of relief granted, and jurisdiction of special term.—Penn-York Natural Gas Corporation v. Maltbie, 299 N.Y.S. 1004, 164 Misc. 569.

47. N.Y.—Peabody v. West, 103 N.Y.S. 942, 119 App.Div. 103.

No general equity jurisdictions

Special term for motions has no general equity jurisdiction.—Barrett v. Barrett, 225 N.Y.S. 174, 221 App.Div. 710.—Goodwin v. Goodwin, 13 N.Y.S.2d 894, 172 Misc. 118.

An issue of law raised by a demurrer to the complaint may be tried at a special term for motions on consent.—Peabody v. West, 103 N.Y.S. 942, 119 App.Div. 103.

Order of discharge on payment into court

Where several parties made claim to the proceeds of a policy, the special term of the supreme court had jurisdiction to make an order discharging the insurer from all liability on payment of the proceeds of the policy into court.—Lane v. Equitable Life Assur. Soc., 92 N.Y.S. 877, 102 App.Div. 470.

In particular judicial district

Where material facts involved on motion for prohibition against award of contract for completing barge canal along a certain route occurred in a county within a certain judicial district, a special term within that district had jurisdiction.—People ex rel. Jordan v. Wotherspoon, 157 N.Y.S. 923, 94 Misc. 419, affirmed 162 N.Y.S. 1138, 176 App.Div. 947.

Stay of municipal court judgment

(1) Special term is without power to stay, pending final determination of foreclosure action instituted by trustee of bondholders, execution of money judgment obtained by individual bondholder in municipal court action.—Continental Bank & Trust Co. of New York v. 898 West End Ave. Corporation, 280 N.Y.S. 929, 245 App.Div. 86.

(2) Real Prop. L. § 122, pertaining to reorganization of mortgaged premises does not confer such power, where at time stay was granted reorganization plan was merely in process of formulation.—Continental Bank & Trust Co. of New York v. 898 West End Ave. Corporation, supra.

Review of commission

The purpose of amendment to civil practice act with relation to special proceedings against a body or officer was not to enlarge scope of review by special term to include certiorari proceedings based on sufficiency of evidence to sustain determination of education commissioner refusing to license a certain motion picture or weight of evidence on which determination was based, but such review is still within jurisdiction of appellate division.—Foy Productions v. Graves, 299 N.Y.S. 671, 164 Misc. 479, transferred 3 N.Y.S.2d 573, 253 App.Div. 475, affirmed 15 N.E.2d 435, 278 N.Y. 498.

48. N.Y.—In re Sisson, 166 N.Y.S. 521, 179 App.Div. 236.
15 C.J. p 995 note 33.

Trial term without jurisdiction in mandamus

Final order made by the trial term denying an application for a peremptory writ of mandamus and dismissing the proceeding is without jurisdiction, and must be reversed.—People ex rel. Blank v. Supreme Lodge Knights and Ladies of Honor, 110 N.Y.S. 148, 126 App.Div. 86.

49. N.Y.—Salmon v. Gedney, 75 N.Y. 479, affirming 11 Hun 29.—Smith v. Rathbun, 22 Hun 150, affirmed 88 N.Y. 660.

The county courts of New York⁵⁰ are courts of limited jurisdiction,⁵¹ not general jurisdiction,⁵² and possess only such jurisdiction and powers as are expressly given to them by the constitution and statutes enacted pursuant thereto.⁵³

They have no equity jurisdiction except such as is provided by statute,⁵⁴ or such as is incidental to the powers granted.⁵⁵ They have no power to determine title to,⁵⁶ or right to possession of,⁵⁷ realty, except as such questions are incident to a foreclo-

sure of a mortgage⁵⁸ or portion⁵⁹ of realty of which the county courts have jurisdiction.⁶⁰ They may also have jurisdiction of an action for the invasion of the right of possession.⁶¹

Its jurisdiction in actions to recover money only is restricted to cases in which the complaint demands judgment for a sum not exceeding a certain amount.⁶² Once having obtained jurisdiction, however, it may enter judgment for any sum.⁶³ In the case of the foreclosure of a lien on personal

50. Origin of name

The appellation was probably taken from the constitution of 1777.—*People v. Albany C. Pl.*, 19 Wend., N.Y., 27, 30.

County courts are new courts and not merely continuations of the courts of common pleas and general sessions of the peace existing prior to the constitution of 1846.—*People v. Rafferty*, 139 N.Y.S. 572, 154 App. Div. 767, reversed on other grounds 102 N.E. 582, 208 N.Y. 451.

As including court of common pleas
N.Y.—*People v. Albany C. Pl.*, 19 Wend., 27.

51. N.Y.—*Wachtel v. Diamond State Engineering Corporation*, 213 N.Y.S. 77, 215 App. Div. 15—*Oneida County Savings Bank of Rome v. Saunders*, 166 N.Y.S. 280, 179 App. Div. 282—*People v. Edsall*, 12 N.Y.S.2d 449, 171 Misc. 277—*Tappin v. Maclean*, 192 N.Y.S. 196, 117 Misc. 757—*Tobias Tile Co. v. Topping Realty Co.*, 186 N.Y.S. 734, 114 Misc. 500—*Estracher v. Locust Bldg. Co.*, 169 N.Y.S. 879, 102 Misc. 368.

15 C.J. p 995 note 36.

52. N.Y.—*People v. Turner*, 300 N.Y.S. 1054, 165 Misc. 448.

53. N.Y.—*People v. Edsall*, 12 N.Y.S.2d 449, 171 Misc. 277—*People v. Teller*, 300 N.Y.S. 1054, 165 Misc. 448—*Majestic Tile Co. v. Nicholls*, 291 N.Y.S. 551, 161 Misc. 231—*Sternberg v. Bergman*, 250 N.Y.S. 134, 140 Misc. 569—*Tobias Tile Co. v. Topping Realty Co.*, 186 N.Y.S. 734, 114 Misc. 500.

15 C.J. p 995 note 37.

Mandamus

County court has no jurisdiction to issue mandamus against town supervisor to compel his sale of bonds and turning of the money over to a drainage commission.—*People ex rel. Dunphy v. Chaney*, 156 N.Y.S. 1035, 171 App. Div. 303.

54. N.Y.—*Rohsler v. Rohsler*, 199 N.Y.S. 830, 120 Misc. 569—*Ertrachter v. Locust Bldg. Co.*, 169 N.Y.S. 879, 102 Misc. 368—*Stappenbeck v. Mather*, 133 N.Y.S. 482, 73 Misc. 434.

Specific performance

Where an option, executed after a lease, gave tenant the right to have

a new formal lease executed at the expiration of the term at a different rent, the county court, in summary proceedings against the tenant as holdover, did not have jurisdiction to dismiss landlord's petition on the merits on the ground that tenant had exercised his option, which in effect decreed specific performance of the option, since the county court has no such equitable jurisdiction.—*Armstrong v. Shapiro*, 202 N.Y.S. 305, 207 App. Div. 304, reversing 196 N.Y.S. 630, 119 Misc. 522.

55. N.Y.—*Stappenbeck v. Mather*, 133 N.Y.S. 482, 73 Misc. 434.

56. N.Y.—*Lopiano v. New York Telephone Co.*, 250 N.Y.S. 223, 139 Misc. 831—*Ertrachter v. Locust Bldg. Co.*, 169 N.Y.S. 879, 102 Misc. 368.

Consent of parties immaterial

Under Code Civ. Proc. § 340, the county court has no jurisdiction, even by consent of parties, in an action in equity to set aside certain transfers of realty alleged to have been made in fraud of creditors, where a determination of the issues raised would involve the title to realty.—*Ertrachter v. Locust Bldg. Co.*, supra.

In trespass action

N.Y.—*Lopiano v. New York Telephone Co.*, 250 N.Y.S. 223, 139 Misc. 831.

57. N.Y.—*Andrews v. Horton*, 120 N.Y.S. 431, 66 Misc. 66—*Wilkins v. Williams*, 3 N.Y.S. 897, 15 N.Y. Civ. Proc. 168.

No jurisdiction of action of ejectment

N.Y.—*Oneida County Savings Bank of Rome v. Saunders*, 166 N.Y.S. 280, 179 App. Div. 282—*Piekello v. Lake View Brewing Co.*, 119 N.Y.S. 847, 65 Misc. 365.

58. N.Y.—*Marcus v. Rosner*, 197 N.Y.S. 503, 119 Misc. 517—*Ertrachter v. Locust Bldg. Co.*, 169 N.Y.S. 879, 102 Misc. 368.

Putting purchaser in possession

Under Civ. Pract. Act §§ 67, 69, the county court, as an incident to a mortgage foreclosure, has jurisdiction of all matters relating to putting a purchaser at a foreclosure sale in possession.—*Marcus v. Rosner*, 197 N.Y.S. 503, 119 Misc. 517.

Determination of antecedent rights

If interest of infant, who conveyed property, was antecedent to mortgage executed by her grantee, in foreclosure of such mortgage, in which infant partly disaffirmed, county court did not have jurisdiction to adjudicate rights of infant.—*Oneida County Savings Bank of Rome v. Saunders*, 166 N.Y.S. 280, 179 App. Div. 282.

59. N.Y.—*Ertrachter v. Locust Bldg. Co.*, 169 N.Y.S. 879, 102 Misc. 368.

60. N.Y.—*Marcus v. Rosner*, 197 N.Y.S. 503, 119 Misc. 517—*Stappenbeck v. Mather*, 133 N.Y.S. 482, 73 Misc. 434.

Subrogation in foreclosure action

A county court has jurisdiction, after a sale under a second mortgage, to subrogate a petitioner to the rights of the first mortgagee and order the proceeds of the sale paid to her, especially since statute gives such court, within its jurisdiction, the powers of a supreme court justice.—*Bussing v. Whitaker*, 163 N.Y.S. 982, 177 App. Div. 95.

61. N.Y.—*Delamater v. Folz*, 3 N.Y.S. 711, 50 Hun 528.

62. N.Y.—*Tappin v. Maclean*, 192 N.Y.S. 196, 117 Misc. 757—*Owen v. Brown*, 139 N.Y.S. 451, 78 Misc. 273.

63. N.Y.—*Tappin v. Maclean*, 192 N.Y.S. 196, 117 Misc. 757.

Distinguished from city court

While the city court which has jurisdiction of actions, irrespective of the amount in controversy, cannot render judgment for more than two thousand dollars, the county court, the jurisdiction of which is limited to actions in which the complaint demands judgment for no more than two thousand dollars, having acquired jurisdiction, may render any judgment the supreme court might render.—*Tappin v. Maclean*, supra.

Jurisdiction over counterclaim regardless of amount

N.Y.—*Howard Iron Works v. Buffalo El. Co.*, 68 N.E. 66, 176 N.Y. 1, reversing 81 N.Y.S. 452, 81 App. Div. 386—*Weinstein v. Helfenberg*, 139 N.Y.S. 303, 78 Misc. 190.

Accrual of interest beyond two thousand dollars does not deprive county court of jurisdiction.—*Tappin*

property the court's jurisdiction is limited to a certain amount.⁶⁴ It has been held that where the action is commenced by service of a summons, and the complaint states a cause of action beyond the jurisdiction of the court, the complaint may be amended to bring it within such jurisdiction.⁶⁵

In a case of which the county court has jurisdiction, it possesses the same jurisdiction, power,

and authority as the supreme court possesses in a like case.⁶⁶

There are found in the reports numerous decisions with respect to such courts,⁶⁷ relating, inter alia, to such matters as jurisdiction over nonresidents of the county,⁶⁸ actions for money had and received,⁶⁹ procedure,⁷⁰ injunctions,⁷¹ its power over judgments of the city or municipal courts,⁷²

v. Maclean, 192 N.Y.S. 196, 117 Misc. 757.

64. N.Y.—First Trust & Deposit Co. v. Syrdelco, Inc., 292 N.Y.S. 206, 249 App.Div. 285, dismissal of appeal denied 7 N.E.2d 677, 273 N.Y. 528, appeal dismissed 11 N.E.2d 301, 275 N.Y. 468.

Mortgage on lease

Mortgage on lease of real estate held personal property mortgage, although in form of mortgage on real estate, and hence foreclosure action, although conducted as action to foreclose mortgage on real property, was for foreclosure of mortgage on personal property, as regards county court's jurisdiction.—First Trust & Deposit Co. v. Syrdelco, Inc., 292 N.Y.S. 206, 249 App.Div. 285, dismissal of appeal denied 7 N.E.2d 677, 273 N.Y. 528, appeal dismissed 11 N.E.2d 301, 275 N.Y. 468.

65. N.Y.—Owen v. Brown, 139 N.Y.S. 451, 78 Misc. 278.

66. N.Y.—Bussing v. Whitaker, 163 N.Y.S. 982, 177 App.Div. 95—Lowry v. Himmeler, 239 N.Y.S. 347, 136 Misc. 215—Gardenier v. Scripster, 210 N.Y.S. 331, 124 Misc. 332—Rohssler v. Rohssler, 199 N.Y.S. 830, 120 Misc. 569—Tappin v. Maclean, 192 N.Y.S. 196, 117 Misc. 757.

Adjusting equities in mortgage foreclosure

Under Civ.Pract.Act §§ 69, 74, county court has jurisdiction in foreclosure action by mortgagee to pass on defense that parties agreed, prior to execution of mortgage, that mortgagors would not be personally liable, and that mortgagee would look exclusively to land as security for debt.—Gardenier v. Scripster, 210 N.Y.S. 331, 124 Misc. 332.

Impressing trust

(1) County court is without jurisdiction of action by purchaser of land for partition to impress a part of the purchase money with a trust in favor of the rightful owner of the land and to substitute the money for the interests in the land owned by others and to confirm title in the purchaser, notwithstanding provision of Code Civ.Proc. § 348.—Stappenbeck v. Mather, 133 N.Y.S. 482, 73 Misc. 434.

(2) Where, in an action for partition in the county court, defendant

interposed a counterclaim to impress an implied trust on the property, it was held that, although under Const. art 6 § 14, and Civ.Pract.Act § 67, limiting the jurisdiction of the county court, the court has no jurisdiction to impress a trust on real property, under Civ. Pract.Act § 69, formerly Code Civ.Proc. § 348, giving county courts the same jurisdiction as the supreme court possesses, in a like case after jurisdiction has once been acquired, and authorizing it to render judgment or grant any relief which the supreme court might render in a like case, the court has power to render judgment on the counterclaim.—Rohssler v. Rohssler, 199 N.Y.S. 830, 120 Misc. 569.

67. N.Y.—Savage v. Mitchell, 9 N.Y.S.2d 246, 256 App.Div. 881. 15 C.J. p 995 note 40.

Action against city of New York

N.Y.—Maisch v. New York, 111 N.Y.S. 645, 127 App.Div. 424, affirmed 86 N.E. 458, 193 N.Y. 460.

Action to declare forfeiture of contract for sale of realty

N.Y.—Andrews v. Horton, 120 N.Y.S. 431, 66 Misc. 66.

Action on judgment of justice of the peace of the county against resident of the county.—Fink v. Shoemaker, 68 N.Y.S. 1112, 33 Misc. 687.

68. N.Y.—Yager v. Yager, 212 N.Y.S. 707, 214 App.Div. 671, reversing 212 N.Y.S. 263, 125 Misc. 773. 15 C.J. p 996 note 41.

Residence of defendant in county necessary to jurisdiction of county court.—Yager v. Yager, supra.

Foreign corporation

County court has no jurisdiction of action against foreign corporation, such a corporation being a nonresident of the county.—Wachtel v. Diamond State Engineering Corporation, 213 N.Y.S. 77, 215 App.Div. 15.

Pleading necessary

Complaint in county court must allege that defendant is resident of county, and absence of such allegation creates presumption of defendant's residence elsewhere.—Yager v. Yager, 212 N.Y.S. 707, 214 App.Div. 671, reversing 212 N.Y.S. 263, 125 Misc. 773.

No jurisdiction by waiver

Foreign corporation's failure to deny jurisdictional fact held not to give county court jurisdiction of it,

since jurisdiction can only be waived where, in certain circumstance, court could have jurisdiction, and not where court under constitution is without jurisdiction.—Wachtel v. Diamond State Engineering Corporation, 213 N.Y.S. 77, 215 App.Div. 15.

Damages from laying out street

Constitutional restriction is applicable only to actions for recovery of money, and not to proceedings to assess damages to landowners from the laying out of a street.—Matter of Polts St., 46 N.Y.S. 43, 18 App.Div. 563.

69. Oral realty contract

The county court has jurisdiction of subject matter of action for money had and received under oral agreement for purchase of land.—Savage v. Mitchell, 9 N.Y.S.2d 246, 256 App.Div. 881.

70. Foreclosure action

In foreclosure in county court should have permitted plaintiff to take judgment of foreclosure, subject to interest infant grantor had in property at time of execution and delivery of mortgage by his grantee, with leave to plaintiff to discontinue without prejudice to like action in court of general jurisdiction.—Oneida County Savings Bank of Rome v. Saunders, 166 N.Y.S. 280, 179 App. Div. 282.

Keeping court open for business

Purpose of Civ.Pract.Act § 70 providing that county court should always be open for transaction of business for which notice was not required to be given to adverse party except when otherwise provided by law was to give county judge in certain matters powers which court of chancery formerly possessed.—Rudd v. Hazard, 194 N.E. 764, 266 N.Y. 302, reversing 271 N.Y.S. 1042, 241 App. Div. 905, affirming 259 N.Y.S. 18, 144 Misc. 552.

71. N.Y.—People v. Dwyer, 90 N.Y. 402, 2 N.Y.Civ.Proc. 379.

72. Power over city court judgments

(1) Power of county court over judgment of city court of Buffalo is limited to enforcement of judgment after transcript thereof has been filed in Erie county clerk's office, under Buffalo City Court Act § 40.—Itzenplitz v. Chassin, 204 N.Y.S. 333, 122 Misc. 500.

and appeals.⁷³

County courts in city of New York. Since January 1, 1927, the county courts in the city of New York have only criminal jurisdiction.⁷⁴

c. City or Municipal Courts

- (1) Generally
- (2) City court of the city of New York
- (3) Municipal court of the city of New York

(2) It has no power to open or set aside default or other judgment of such court on motion.—*Smith v. Featherly*, 275 N.Y.S. 256, 242 App. Div. 386.—*Itzenplitz v. Chassin*, supra.

(3) Appellate jurisdiction of county court see *infra* § 429.

73. N.Y.—*Crescent v. Reddy*, 180 N.Y.S. 772, 191 App. Div. 909.
15 C.J. p 996 note 44.

Interlocutory orders or judgments not appealable

N.Y.—*Crescent v. Reddy*, supra—*Henn v. City of Mt. Vernon*, 179 N.Y.S. 769, 190 App. Div. 533.

74. N.Y.—*Lopiano v. New York Telephone Co.*, 250 N.Y.S. 223, 139 Misc. 331.

75. N.Y.—*Butter Amusement Corporation v. Garrison*, 229 N.Y.S. 773, 224 App. Div. 278.
15 C.J. p 996 note 45.

Power of legislature to establish
N.Y.—*Curtin v. Barton*, 34 N.E. 1093, 139 N.Y. 505.

Amount in controversy

N.Y.—*Hamburger v. Hellman*, 90 N.Y.S. 1060.

Action on judgment of supreme court
N.Y.—*Baldinger v. Turkowsky*, 74 N.Y.S. 897, 36 Misc. 822.

Submission of controversy

The court has no jurisdiction where the case was submitted on an agreed state of facts, but was not accompanied by an affidavit of good faith.—*Scheinholz v. Platt*, 127 N.Y.S. 313.

No jurisdiction of action for recovery of moneys paid under duress
N.Y.—*Goldstein v. Abramson*, 86 N.Y.S. 30.

Collateral attack on judgment

City court judgment held subject to collateral attack for want of jurisdiction in action in supreme court.—*Butter Amusement Corporation v. Garrison*, 229 N.Y.S. 773, 224 App. Div. 278.

76. Action arising from conditional sales contract

Albany city court held without jurisdiction of action to replevy chattels where defendant's wrongful detention arose from default under conditional sales contract.—*Frigid-*

aire Sales Corporation v. Dolan, 249 N.Y.S. 143, 139 Misc. 828.

Applicability of civil practice act

The silence of the Albany city court act as to the time in which an action may be commenced in the city court, as well as to how actions therein may be saved from limitation, renders applicable the sections of the civil practice act relating thereto.—*Knox v. Beckford*, 3 N.Y.S.2d 718, 167 Misc. 200.

Filing

N.Y.—*Schmidt v. Elseman*, 26 N.Y.S. 766, 6 Misc. 264.

Time for decision

(1) Justice of city court of Albany cannot render judgment after expiration of time prescribed.—*American Ry. Express Co. v. Eddy*, 220 N.Y.S. 164, 128 Misc. 502.

(2) Where, however, a jury is demanded, but is followed by a stipulation for submission to the court, plaintiff is entitled to have case restored to general calendar and date fixed for trial, the action not abating on expiration of the trial justice's term.—*American Ry. Express Co. v. Eddy*, supra.

Appeal

N.Y.—*Phillips v. Hogan*, 126 N.Y.S. 1088, 142 App. Div. 205.

Costs on appeal

Where the whole amount involved was but five hundred and fifty dollars, defendant should be allowed only fifty dollars of the one hundred and sixty-four dollars accrued costs, where plaintiff, after reversal on appeal of judgment in his favor, was allowed to amend the complaint and process.—*Tierney v. Perkins*, 179 N.Y.S. 904.

77. N.Y.—*Daley v. Dennis*, 242 N.Y.S. 408, 137 Misc. 1.

Waiver of procedural requirements

Charter provisions designed for regulation of procedure in city court may be waived like other personal, statutory, or constitutional rights or privileges.—*Daley v. Dennis*, supra.

Jurisdiction as to parties

(1) General appearance and participation in action in city court waived and cured all irregularities in preliminary proceedings.—*Daley v. Dennis*, supra.

(1) Generally

City or municipal courts have been established in a number of municipalities in the state. These courts are inferior local courts and are generally not courts of record.

City or municipal courts⁷⁵ have been established in a number of municipalities throughout the state of New York, including Albany,⁷⁶ Auburn,⁷⁷ and Binghamton.⁷⁸ City or municipal courts have also been

(2) No return is necessary in action in city court where defendant appears.—*Daley v. Dennis*, supra.

Default judgment

(1) Auburn city court acquiring jurisdiction by appearance of defendant could on default enter judgment on filing summons and complaint with proof of service.—*Daley v. Dennis*, supra.

(2) Defendant failing to apply for relief from such judgment until more than three months after entry, as required by statute, was not entitled to relief.—*Daley v. Dennis*, supra.

Charge to jury

Auburn city court judge may properly refuse to charge jury.—*Atwater v. Lober*, 239 N.Y.S. 340, 135 Misc. 560.

Appeals

(1) On appeal from Auburn city court, case is tried *novo*.—*Doyle v. Freeman*, 257 N.Y.S. 550, 235 App. Div. 345.

(2) Where plaintiff filed cross appeal from judgment demanding new trial in county court, Auburn city court judgment was superseded and action transferred to county court for exercise of original jurisdiction.—*Jennings v. Piwinski*, 241 N.Y.S. 349, 136 Misc. 447.

Appeal bonds or undertakings

(1) Appeal undertaking construed according to statute with reference to which parties are presumed to have contracted.—*Atwater v. Lober*, 239 N.Y.S. 340, 135 Misc. 560.

(2) Surety, on undertaking on appeal from Auburn city court, was not released from liability by stipulation for dismissal of appeal of which she had no notice.—*Atwater v. Lober*, supra.

78. Requirements as to residence

Residence within city either of plaintiff or of defendant is all that is necessary for jurisdiction of the court as to action within its jurisdiction.—*Gahagan v. Fairbanks*, 265 N.Y.S. 759, 147 Misc. 685.

Process

(1) In one case it was held that the city court of Binghamton acquired jurisdiction of nonresident defendant by service of process in Broome County, although outside city

established in Brooklyn.⁷⁹ City or municipal courts | palities in state of New York, including Buffalo,⁸⁰
have been established in a number of other munici-

limits, the later statute conferring such jurisdiction being considered as not violating Const. art 6 § 18 which prohibits conferring greater jurisdiction on inferior courts than that possessed by county courts.—*Gahagan v. Fairbanks*, *supra*.

(3) In another case the court was held not to have jurisdiction under such service, the earlier statute permitting the same being held invalid.—*Darling v. White*, 124 N.Y.S. 846, 67 Misc. 366.

79. N.Y.—*Barrett v. Palmer*, 31 N.E. 1017, 135 N.Y. 336, 31 Am.S.R. 835, 17 L.R.A. 720, affirming 16 N.Y.S. 94, and affirmed 16 S.Ct. 837, 162 U.S. 399, 40 L.Ed. 1015.

15 C.J. p 996 note 48.

80. N.Y.—*City of Buffalo v. De Bon*, 249 N.Y.S. 586, 232 App.Div. 318.—*City of Buffalo v. Murphy*, 239 N.Y.S. 206, 228 App.Div. 279, followed in *City of Buffalo v. Heimbürg*, 239 N.Y.S. 219, 228 App.Div. 753.—*Newman v. Schwert*, 284 N.Y.S. 682, 157 Misc. 764.

15 C.J. p 996 note 49.

Applicability of civil practice act

(1) The provisions of the civil practice act are expressly made applicable to this court with respect to practice and procedure, except as such rules conflict with the statutes dealing therewith specifically.—*Newman v. Schwert*, *supra*—*Judge v. Milligan*, 229 N.Y.S. 287, 131 Misc. 925.—*A. D. Deemer Furniture Co. v. G. H. Poppenberg, Inc.*, 216 N.Y.S. 72, 127 Misc. 117.

(2) Nothing is added to the jurisdiction of the court by such provision.—*A. D. Deemer Furniture Co. v. G. H. Poppenberg, Inc.*, *supra*.

(3) Civil practice act provision relating to entry of assignment of judgments held not in conflict with city court act and must be made applicable thereto.—*Newman v. Schwert*, *supra*.

(4) County clerk held required to accept transcript of judgment from Buffalo city court, notwithstanding assignment of judgment was indorsed on transcript, and city court act did not provide for assignments, since civil practice act provision providing for entry of assignment of judgment applied to city court act.—*Newman v. Schwert*, *supra*.

Jurisdiction like that of justice of peace

Under Buffalo City Charter § 456, L.1891 c 105, municipal court of city of Buffalo has in civil actions and proceedings jurisdiction at least equal to that of justice of the peace.—*Brownell v. Parsons*, 116 N.E. 366, 220 N.Y. 483, reversing 147 N.Y.S. 1100, 162 App.Div. 936.

Commitment of drug addicts

N.Y.—*People ex rel. Sherwood v. City of Buffalo*, 216 N.Y.S. 463, 127 Misc. 290.

Summary proceedings

Under Buffalo city charter, providing that its city court shall not have jurisdiction of a "civil action" involving title to real estate, but shall have jurisdiction of summary proceedings to remove tenants and "others," it is not ousted of jurisdiction of summary proceedings, under Code Civ.Proc. § 2232 subd 4, to remove squatters, by defendants pleading title to the land.—*In re Pirew*, 172 N.Y.S. 307, 105 Misc. 21.

Commencement of action

Either summons or voluntary appearance is essential to commencing civil action in city court of Buffalo.—*City of Buffalo v. Murphy*, 239 N.Y.S. 206, 228 App.Div. 279, followed in *City of Buffalo v. Heimbürg*, 239 N.Y.S. 219, 228 App.Div. 753.

Residence of defendants test of jurisdiction

City court of Buffalo has jurisdiction of parties in those actions in which all defendants are residents of Erie county, and all plaintiffs are nonresidents of county.—*Winslow v. Rank*, 282 N.Y.S. 654, 246 App.Div. 563.

Jurisdiction over nonresidents

(1) City court of Buffalo has jurisdiction against nonresident of county served within city.—*Revere Rubber Co. v. Genesee Valley Blue Stone Co.*, 46 N.Y.S. 889, 20 App.Div. 166.—*Livent v. Mostoff*, 252 N.Y.S. 680, 141 Misc. 399.—*Sauner v. Vohwinkel*, 208 N.Y.S. 408, 124 Misc. 494.

(2) Action commenced by service in Erie county on resident thereof could have been brought in Buffalo city court.—*Scioldoni v. Republic Light, Heat & Power Co.*, 231 N.Y.S. 311, 224 App.Div. 566, affirmed 168 N.E. 432, 251 N.Y. 574.

Interpleader

(1) On granting of insurance company's motion in action against it and individuals, claiming interests in premiums paid on canceled life insurance policies, to recover such premiums, that it be let out on paying amount thereof into court, action became equitable one in nature of interpleader, thereby depriving city court of jurisdiction.—*Mason v. Metropolitan Life Ins. Co.*, 9 N.Y.S.2d 539, 256 App.Div. 113.

(2) The section of Buffalo city court act purporting to give such court jurisdiction of interpleader actions is unconstitutional, such actions being equitable in nature.—*Mason v. Metropolitan Life Ins. Co.*, *supra*.

Changing dates of issue and return of process

The clerk alone has such authority.—*System Co. v. Kessler*, 136 N.Y.S. 232.

Service of pleadings

In civil action in Buffalo city court, brought by city to collect penalty, defendant's attorneys were not entitled to have copy of complaint served on them.—*City of Buffalo v. De Bon*, 249 N.Y.S. 586, 232 App.Div. 318.

Defective pleadings

Only remedy against defective pleading in an action brought in municipal court of Buffalo is by demurrer.—*A. D. Deemer Furniture Co. v. G. H. Poppenberg, Inc.*, 216 N.Y.S. 72, 127 Misc. 117.

Great liberality of pleading permitted

N.Y.—*Catalano v. International R. Co.*, 145 N.Y.S. 1005.

Amendment of complaint during trial

N.Y.—*Schork v. Moritz*, 6 N.Y.S. 554.

Bill of particulars

On plaintiff's failure to serve bill of particulars, order of preclusion was not necessary to exclude evidence respecting matters requested.—*Judge v. Milligan*, 229 N.Y.S. 287, 131 Misc. 925.

Calendar practice

Rule of Buffalo city court providing that, where cause has been on reserved calendar for two years, it shall be dismissed by clerk without notice, held construable as authorizing clerk merely to dismiss case from calendar and not to dismiss complaint or render judgment, and as so construed was not invalid.—*Ryan v. Hornblass*, 269 N.Y.S. 838, 151 Misc. 157.

Examination before trial

Buffalo city court held without jurisdiction to order examination of a party before trial.—*Strot v. Stork*, 287 N.Y.S. 575, 153 Misc. 906.

Depositions

The taking of depositions is by a proceeding in an action, and since the relief is subsidiary to the main relief sought, such matters relate to jurisdiction, and under L.1909 c 570 § 115, conferring on courts of the city of Buffalo jurisdiction vested prior thereto in courts of justices of the peace, the proceeding in the city court of Buffalo to take a deposition should be under Code Civ.Proc. § 2980, relating to the deposition of witnesses for use in justice's court. Such provisions apply to taking the deposition of a witness who is a party to the suit in the City Court of Buffalo.—*Windheim v. Lafayette Hotel Co.*, 190 N.Y.S. 833, 117 Misc. 113.

Corning,⁸¹ Dunkirk,⁸² Elmira,⁸³ Johnstown,⁸⁴ Mid-dletown,⁸⁵ Mount Vernon,⁸⁶ New Rochelle,⁸⁷ Ni-agara,⁸⁸ Norwich,⁸⁹ Oneonta,⁹⁰ and Rochester.⁹¹ City or municipal courts have also been established

Default judgments

(1) Applications to open default or other judgments of the city court of Buffalo, after transcript has been filed in the county clerk's office should be made directly to City Court, under Buffalo City Court Act § 20(18), L.1909 c 570, as amended by L.1915 c 188, and rules of court, and under § 46 city court has power to control any situation not provided for in former section.—Itzenplitz v. Chassin, 204 N.Y.S. 389, 122 Misc. 500.

(2) Where there were not sufficient facts before the city court of Buffalo to warrant opening the default and vacating the judgment, order opening a default judgment was improper.—Pfeiffer v. Rivoli Operating Corporation, 7 N.Y.S.2d 66, 255 App. Div. 825.

Summary judgment

(1) Buffalo City Court was held to have no power to grant summary judgment.—A. D. Deemer Furniture Co. v. G. H. Poppenberg, Inc., 216 N.Y.S. 72, 127 Misc. 117.

(2) Note, however, that an order vacating summary judgment in such court was held appealable, although a default order.—Doolittle v. Tiftickjian, 266 N.Y.S. 818, 239 App. Div. 140.

Power to charge the jury

N.Y.—Heath v. Kyles, 1 N.Y.S. 770.

Time for decision

Judge of Buffalo city court could not retain jurisdiction of case for seven months after closing of evidence by merely reserving decision and holding case for briefs. In such case he was without jurisdiction to render judgment in absence of record proof of filing of written stipulations by parties or their attorneys extending time for rendition of judgment.—Patrzykowski v. Mursten, 294 N.Y.S. 62, 250 App. Div. 355.

Notice of entry of judgment

Practice, in Buffalo city court, of giving notice of entry of summary judgment, does not amount to rule requiring notice, nor would failure to observe such rule affect validity of judgment.—Doolittle v. Tiftickjian, 266 N.Y.S. 818, 239 App. Div. 140.

Correcting date of entry of judgment

Where, on defendant's motion for new trial, and with plaintiff's consent, amount of judgment and verdict was reduced by city court, and, on defendant's motion, city court changed the date of entry of judgment to date of reduction thereof, judgment in its amended form did not become effective until court al-

lowed reduction, so that the corrected date of entry was a proper disposition of the motion on its merits.—Niro v. Mahoney, 3 N.Y.S.2d 118, 167 Misc. 27.

Judgments or orders appealable

Order denying motion to strike out from record amendment to judgment authorizing body execution was appealable.—Metropolitan Commercial Corporation v. Scheffler, 256 N.Y.S. 473, 143 Misc. 359.

Appeals

(1) Where city court judge stated reasons for decision fully in letter to interested counsel, it was not necessary that evidence be included in return for hearing of appeal.—Labianca v. Digianna, 244 N.Y.S. 437, 137 Misc. 725.

(2) Stay of execution pending.—Buffalo Wholesale Hardware Co. v. Schutrum, 166 N.Y.S. 726.

(3) Errors reviewable.—Peck v. Klepfel, 242 N.Y.S. 161, 137 Misc. 274.

(4) Sufficiency of evidence to sustain judgment.—Krehbiel v. Carroll Bros., 300 N.Y.S. 66, 252 App. Div. 933.

(5) Harmless errors.—Niro v. Mahoney, 3 N.Y.S.2d 118, 167 Misc. 27.

Adjournments

Under Code Civ. Proc. § 2933, providing for adjournment of cases in justices' courts, where commissions are issued, to afford opportunity for their execution and return, and the city charter of Buffalo, making this provision applicable to the municipal court, the calling of a case for trial in that court, the introduction of a commission, and an objection to its admission because not properly executed, was not such a commencement of the trial as to deprive the court of power to order an adjournment to permit the commission to be corrected.—Winquist v. Preston, 102 N.Y.S. 1023, 118 App. Div. 564.

81. Power and jurisdiction

Power and jurisdiction of city court of Corning, under L.1905 c 142 § 96, to grant adjournments for more than ninety days, held not limited or affected by Code Civ. Proc. § 2968, limiting period of adjournment of justice courts, § 96 coming within exceptions of § 93.—Warren Refining & Chemical Co. v. Sebring, 181 N.Y.S. 730, 192 App. Div. 14.

Payment of costs as condition precedent to appeal

N.Y.—Rising v. Sebring, 104 N.Y.S. 486, appeal dismissed 109 N.Y.S. 1144.

82. Appeals

That exhibits were not present in

return on appeal does not authorize reversal of judgment and dismissal of complaint, where absence of exhibits could not be attributed to fault of either party.—New York Cent. R. Co. v. Muszalski, 299 N.Y.S. 45, 252 App. Div. 251, reversing New York Cent. R. Co. v. Muczalski, 273 N.Y.S. 667, 154 Misc. 608.

83. N.Y.—Murray v. American Casualty Ins. Co., 85 N.Y.S. 449, 88 App. Div. 224.

Rules of justice's court applicable

(1) As to pleading.—Kopczynski v. Kusper, 143 N.Y.S. 130, 158 App. Div. 247.

(2) Service of process.—Murray v. American Casualty Ins. Co., 85 N.Y.S. 449, 88 App. Div. 224.

84. N.Y.—Sweetman v. Emple, 161 N.Y.S. 822.

85. Powers of judge

Under statute creating city court of city of Middletown, the judge thereof had the powers of a justice of the supreme court at chambers and the powers of the county judge of Orange County.—Andrews v. Andrews, 1 N.Y.S.2d 760, 166 Misc. 297.

86. Appeals from city court of Mount Vernon wherein amount demanded in complaint was less than two hundred dollars may be taken only to county court of Westchester.—Cassin v. Heath, 292 N.Y.S. 739, 249 App. Div. 856.

87. Attacking want of jurisdiction

In action by board of health of city of New Rochelle in city court for penalty for violation of ordinance of board, point that board was without authority to bring action could not be taken by demurrer, in view of New Rochelle City Charter § 209, and Code Civ. Proc. § 2939, but is timely raised by motion to dismiss at end of evidence.—Board of Health of New Rochelle v. Farrell, 165 N.Y.S. 811, 178 App. Div. 714.

88. Setting aside judgment

N.Y.—Matter of Korpilinski, 146 N.Y.S. 859, 84 Misc. 96.

89. N.Y.—Johnson v. Case, 162 N.Y.S. 841, 97 Misc. 247.

90. Action for nuisance and trespass N.Y.—Collar v. Ulster & D. R. Co., 131 N.Y.S. 56, 72 Misc. 274.

Title to land

This court has no jurisdiction where title to land comes into question on plaintiff's own showing.—Collar v. Ulster & D. R. Co., supra.

91. Applicability of civil practice act

Statute permitting a judgment to be rendered against one or more of

in Rome,⁹² Syracuse,⁹³ Troy,⁹⁴ Utica,⁹⁵ Water- | vliet,⁹⁶ White Plains,⁹⁷ and Yonkers.⁹⁸

several defendants according to their respective liabilities upon all the evidence without regard to the party by whom it has been introduced will be applied in the city court of Rochester, notwithstanding such court is not a court of record, and that provisions of the civil practice act, so far as matters of practice and procedure are concerned, apply only to courts of record except as the acts creating them invite its application, since such statute relates to a substantive matter, and hence governs such rights in whatever courts litigation to maintain them may be had.—*Wheatley v. Boyce*, 300 N.Y.S. 117, 165 Misc. 512.

Applicability of general rules of practice

The city court of Rochester is not a "court of record," in which the general rules of practice apply.—*Employers Liability Assur. Corporation v. Fisher*, 13 N.Y.S.2d 902.

Process

(1) Under Code Civ.Proc. § 3135, requiring mandates of justices of the peace to be entirely filled up, so as to have no blank in the date or otherwise, and providing that a mandate issued and delivered for execution contrary thereto is void, a summons of the city court of Rochester was a nullity, where the blank space for plaintiff's name was not filled in.—*O'Brien v. Foster*, 181 N.Y.S. 69.

(2) L.1918 c 495 § 512 subd. (c), authorizing the city court of Rochester to amend, correct, or modify any process or mandate, does not authorize it to amend or correct a null or void process; and hence Code Civ. Proc. § 3135, prohibiting blanks in mandates, is not inconsistent therewith, or repealed by that act, especially in view of § 3226, as amended by L.1918 c. 493, enumerating the provisions of the code applicable to such court.—*O'Brien v. Foster*, supra.

Territorial jurisdiction

Statute authorizing service of summons in Rochester city court action in town of Monroe county adjoining such city held not unconstitutional.—*Rochester Exposition Ass'n v. Borogard*, 267 N.Y.S. 723, 149 Misc. 200—15 C.J. p 996 note 56 [a].

Assault

Rochester city court had jurisdiction of action for assault.—*Schell v. Vergo*, 4 N.Y.S.2d 644, 166 Misc. 839.

Pleading

(1) It seems that the rules obtaining in the justice's court govern pleadings in the city court of Rochester.—*Bennett v. Piscitello*, 9 N.Y.S. 2d 69, 170 Misc. 177.

(2) In seller's action to recover balance of price of oil burner, wherein buyers based counterclaim on breach of express warranty as to oil consumption, court assumed that seller met allegations of counterclaim as to breach of warranty by "traverse or avoidance," although a reply would have been proper.—*Bennett v. Piscitello*, supra.

Jury terms

The charter provision of Rochester that all trials by jury in city court shall be had at regular jury terms unless a special jury shall be ordered by a judge in the interests of justice, is an exception to the general statutory provision that each jury trial in a summary proceeding shall be had before a jury drawn for that particular case, and the charter provision prevails where the two apparently conflict.—*Macomber v. Wilkinson*, 6 N.Y.S.2d 608.

Summary proceedings

The statutes providing for summary proceedings to recover possession of realty apply to such proceedings brought in the city court. In summary proceeding by landlord in city court of Rochester, where tenant demanded jury trial when there was no regular panel of jurors drawn for the months of July and August, court properly placed case on the next jury calendar for September under Rochester charter provision that all trials by jury shall be had at the regular jury terms unless a special jury shall be ordered by a judge in the interests of justice, as against contention that under statute trial by jury must be had before a special jury.—*Macomber v. Wilkinson*, 6 N.Y.S.2d 608.

Verdicts

Service of notice of motion to set aside verdict of a jury does not constitute the making of the motion under Rochester City Court Act § 512 subd "c," providing that a motion to set aside a verdict must be made at the close of the trial or within fifteen days after the entry of the judgment, and a motion was not made in time where notice was served thirteen days after judgment, which was returnable seventeen days after judgment.—*Cleary v. New York State Rys.*, 191 N.Y.S. 71, 199 App. Div. 28, reversing 190 N.Y.S. 300, 199 App.Div. 228.

Collateral attack on judgment

Form or validity of judgment rendered in Rochester city court specifying that it was not on merits held not subject to collateral attack in subsequent action on same cause, where defendant failed to move to amend judgment under provision of city charter or to appeal therefrom.—*Ouriel v. John Petrossi Co.*, 287

N.Y.S. 116, 247 App.Div. 861, reversing *Ouriel v. Di Fiore*, 279 N.Y.S. 395, 155 Misc. 421.

Order appealable

Order denying motion to set aside verdict and for new trial.—*Cleary v. New York State Rys.*, 190 N.Y.S. 300, 198 App.Div. 228, reversed on other grounds 191 N.Y.S. 71, 199 App.Div. 28.

On appeal county court is not bound by city court's determination of the facts.—*Levenberg v. Ludington*, 274 N.Y.S. 193, 152 Misc. 735.

92. N.Y.—*Rome v. Foot*, 162 N.Y.S. 781, 175 App.Div. 459.

93. N.Y.—*Curtin v. Barton*, 34 N.E. 1093, 139 N.Y. 505.
15 C.J. p 996 note 58.

94. Money had and received

An action to recover one hundred dollars, paid as part of consideration for contract to purchase realty alleged to have been induced by fraud, held an action at law for money had and received, over which city court of Troy had jurisdiction.—*Cohen v. Feathers*, 205 N.Y.S. 685, 209 App. Div. 780.

95. On appeal on questions of law, county court cannot retry case de novo, and the county court should not reverse the judgment as against the weight of evidence unless the lower court could not reasonably have arrived at its decision.—*Jacobson v. Mailman*, 246 N.Y.S. 433, 138 Misc. 227.

96. Appeals

(1) Appeal from city court to county court, in absence of undertaking to perfect an appeal for new trial, demanded in the notice of appeal, stands as appeal on questions of law only.—*Harrison Bros. Co. v. Excelsior Bag & Mfg. Co.*, 168 N.Y.S. 291, 180 App.Div. 790.

(2) Defendant appealing from city court to county court, showing intention to file undertaking necessary to appeal for new trial, demanded in notice of appeal, and that its default was due to neglect of its attorney, should be allowed to file it and perfect appeal.—*Harrison Bros. Co. v. Excelsior Bag & Mfg. Co.*, supra.

97. Appeals

City court's omission to grant new trial after setting aside verdict rendered in plaintiff's favor would be supplied by appellate division of supreme court.—*Caputo v. Thompson*, 286 N.Y.S. 920, 247 App.Div. 890, modifying 287 N.Y.S. 346, 247 App. Div. 797.

98. N.Y.—*Hochman v. Frenbern Realty Corporation*, 1 N.Y.S.2d 676, 253 App.Div. 835.
15 C.J. p 996 note 59.

These courts are inferior local courts⁹⁹ of limited jurisdiction, possessing only such powers as are conferred upon them by statute.¹ As such they are generally not courts of record,² and because of a constitutional prohibition the legislature has no power to make them such,³ unless, as in the case of the municipal court of the city of New York it is a continuation, consolidation, or reorganization of a formerly existing court, see subdivision c (2) of this section. Statutory provisions concerning the jurisdiction of, and practice in, such courts must be strictly followed.⁴

(2) City Court of the City of New York

The city court of the city of New York is a court of inferior and limited jurisdiction, having no jurisdiction or powers not conferred on it by the constitution and statutes.

While a court of record,⁵ the city court of the city of New York is not a court of general jurisdiction.⁶ It is an inferior court⁷ confined to the territorial limits of the city of New York,⁸ and has only such jurisdiction and powers as are conferred upon it by the constitution and statutes.⁹

No equitable jurisdiction

N.Y.—Merritt v. Halliday, 95 N.Y. S. 381, 107 App.Div. 596.

Jurisdiction as to parties

(1) Residence of either plaintiff or defendant within the city is required to confer jurisdiction on the court.—Santoro v. Frusciante, 4 N.Y.S.2d 741, 254 App.Div. 783.

(2) Cause of action within general jurisdiction of Yonkers city court is, so far as parties are concerned, likewise within that jurisdiction if statutory requirements as to defendants' residence are met.—Battaly v. Coffin, 260 N.Y.S. 96, 236 App.Div. 807, followed in 260 N.Y.S. 97, 236 App.Div. 807.

(3) Where neither plaintiff nor defendant resided in the city of Yonkers, a defendant specially appearing was entitled to an order granting her motion to vacate service of summons on ground of want of jurisdiction of city court of Yonkers.—Santoro v. Frusciante, supra.

Execution against person

Requirement that execution against person issue in county where defendant resides is fulfilled when execution is issued to city marshal against defendant living in city where he resides.—Klec v. Bablash, 247 N.Y.S. 179, 232 App.Div. 681.

99. N.Y.—Andrews v. Andrews, 1 N.Y.S.2d 760, 166 Misc. 297.

1. N.Y.—Patrzykowski v. Mursten, 294 N.Y.S. 62, 250 App.Div. 355.

2. N.Y.—Newman v. Schwert, 284 N.Y.S. 682, 157 Misc. 764.

Buffalo municipal court

By direct provision of Judiciary L. § 3, the municipal court of city of Buffalo is not a court of record.—Brownell v. Parsons, 116 N.E. 366, 220 N.Y. 483, reversing 147 N.Y.S. 1100, 162 App.Div. 936.

3. N.Y.—Andrews v. Andrews, 1 N.Y.S.2d 760, 166 Misc. 297.

4. N.Y.—Newman v. Schwert, 284 N.Y.S. 682, 157 Misc. 764.

5. N.Y.—Weinus v. Light, 170 N.Y. S. 173, 183 App.Div. 591.

Several divisions as separate entities for keeping records

Under provisions of New York city court act stating that summons must state county in which action is brought and that all subsequent proceedings shall be in the division of the court situated in the county designated in the summons, the five divisions of the court are in fact five separate entities, and each entity must keep its own records, its own files of documents, and its own judgment rolls.—Goodman v. Lusblum Realty Corporation, 14 N.Y.S.2d 746, 173 Misc. 375.

6. N.Y.—Klatzko v. Golodetz, 184 N.Y.S. 367, 193 App.Div. 854.

7. N.Y.—People ex rel. McMahon v. Board of Excise of City of New York, 3 N.Y.St. 253.
15 C.J. p 996 note 61.

8. N.Y.—American Historical Soc. v. Glenn, 162 N.E. 481, 248 N.Y. 445—In re Hollywood Garage Corporation, 9 N.Y.S.2d 374, 169 Misc. 906—American Historical Soc. v. Glenn, 227 N.Y.S. 174, 131 Misc. 291.

Applicability

Territorial limitations on jurisdiction of city courts apply to actions against residents of state.—Marcus v. Day, 248 N.Y.S. 649, 139 Misc. 283.

Statute extending limits invalid

Statute authorizing process and mandates of city court of New York to be executed in any part of state held invalid.—American Historical Soc. v. Glenn, 162 N.E. 481, 248 N.Y. 445—In re Hollywood Garage Corporation, 9 N.Y.S.2d 374, 169 Misc. 906—American Historical Soc. v. Glenn, 227 N.Y.S. 174, 131 Misc. 291.

Service of process and mandates

(1) The mandates and process of city court of city of New York may be executed only within city of New York.—In re Hollywood Garage Corporation, 9 N.Y.S.2d 374, 169 Misc. 906.

(2) Substituted service of summons in New York city court action could not be had on defendant residing outside city limits.—Cohen v.

Ziegfeld, 248 N.Y.S. 139, 139 Misc. 174.

(3) Statute held not to authorize service of summons on defendant in city court action outside state without court order.—Edmond Weil, Inc. v. Popper, 256 N.Y.S. 905, 143 Misc. 684, affirmed 258 N.Y.S. 1046, 236 App.Div. 775.

(4) Where there was no recital in order to show cause or in order appointing receiver for judgment debtor that city court of the city of New York was satisfied that with reasonable diligence judgment debtor could not be found within the state, the order appointing receiver could not be sustained.—Dwelling Managers v. Mills, 13 N.Y.S.2d 512, 171 Misc. 673.

(5) Where a defendant in action brought in city court, Bronx county, was served with summons and complaint reciting "county of Bronx" as venue, and after his default in answering, an order was entered in city court, New York county, severing action as to others and permitting entry of judgment against defendant, entry of judgment in New York county, although papers making up judgment roll were entitled in Bronx county, was void.—Goodman v. Lusblum Realty Corporation, 14 N.Y.S.2d 746, 172 Misc. 375.

Under early statute

N.Y.—Silberberg v. Rouden Mfg. Co., 184 N.Y.S. 77.

Service outside city

(1) In a mechanic's lien case the court has no jurisdiction over person of defendant served outside of the city.—McCann v. Gerding, 60 N.Y.S. 467, 29 Misc. 283.

(2) The court has no jurisdiction in a bastardy proceeding where persons reside outside of territorial jurisdiction and are not served therein.—People v. Daley, 108 N.Y.S. 1056, 124 App.Div. 562.

9. Court without jurisdiction

(1) To act pursuant to arbitration law.—Chapman-Kruege Corporation v. Jaffe, 263 N.Y.S. 737, 239 App.Div. 795.

(2) To determine whether transfer was made with intent to give pref-

Its jurisdiction is limited as to amount,¹⁰ except in a "marine cause" within the jurisdiction of the court.¹¹ The court has no jurisdiction to afford affirmative equitable relief,¹² except the foreclosure of mechanic's liens or liens on personal property within the jurisdictional amount,¹³ although it may

erence over other creditors when debtor was insolvent or insolvency was imminent.—*James Gray, Inc. v. Your Magazine Publishers*, 270 N.Y.S. 485, 150 Misc. 448.

(3) To enforce father's statutory obligation to support illegitimate child.—*Ippolito v. Terragni*, 251 N.Y.S. 374, 140 Misc. 606, affirmed 251 N.Y.S. 376, 140 Misc. 606.

(4) To separate alimony award of matrimonial court into support for children and alimony for wife, so as to render alimony for wife subject to claims of wife's judgment creditor.—*Emigrant Industrial Sav. Bank v. Lehman*, 270 N.Y.S. 589, 151 Misc. 444.

(5) To stay proceedings brought in violation of arbitration agreement for submission.—*Kipp v. Hamburg-American Line*, 235 N.Y.S. 450, 134 Misc. 481.

Trespass

City court of New York City has jurisdiction of action in trespass, although action involves issue of title to real property.—*Lopiano v. New York Telephone Co.*, 250 N.Y.S. 223, 139 Misc. 831.

Actions against city of New York

(1) The court cannot take jurisdiction of an action against the city of New York.—*O'Connor v. New York*, 83 N.E. 979, 191 N.Y. 238, affirming 105 N.Y.S. 1134, 120 App.Div. 875—15 C.J. p 997 note 66.

(2) This is so in a case to enforce a lien for materials furnished for public improvements, even though the relief demanded is against other defendants to the extent of the fund in the city's possession.—*Buess v. New York*, 141 N.Y.S. 426, 80 Misc. 391.

10. N.Y.—*McConnell v. Williams S. S. Co.*, 267 N.Y.S. 554, 239 App.Div. 393, modifying 262 N.Y.S. 574, 146 Misc. 512, and motion denied 193 N.E. 297, 265 N.Y. 513, affirmed 193 N.E. 336, 265 N.Y. 594—*Rivisto v. New York Telephone Co.*, 265 N.Y.S. 844, 148 Misc. 864—*McConnell v. Williams S. S. Co.*, 256 N.Y.S. 858, 143 Misc. 426, reversing 254 N.Y.S. 597, 142 Misc. 269.

15 C.J. p 996 note 62.

Consolidation of actions

Actions in city court by single plaintiff against different defendants may be consolidated, where amount claimed in none of actions exceeds three thousand dollars.—*A. G. Curtain Mfg. Co. v. Law Union & Rock Ins. Co., Limited*, of London, 246 N.Y.S. 483, 138 Misc. 556.

Under earlier statutes the limitation applied only to the amount for

which judgment could be rendered, the court having had power to entertain an action involving any amount.—*Margies v. Clyde S.S. Co.*, 150 N.Y.S. 4, 165 App.Div. 33—15 C.J. p 996 note 68.

11. N.Y.—*Ussop v. American West African Line*, 269 N.Y.S. 654, 151 Misc. 12.

Assault and battery

Action arising out of assault and battery by chief cook of ship on subordinate held "marine cause" based on assault and battery.—*Ussop v. American West African Line*, 269 N.Y.S. 654, 151 Misc. 12.

12. N.Y.—*Smith v. Salomon*, 172 N.Y.S. 515, 184 App.Div. 544—*Hyman v. Spector*, 268 N.Y.S. 342, 150 Misc. 145—*Schreiber v. Noe*, 243 N.Y.S. 360, 137 Misc. 105—*Schwartzreich v. Bauman*, 183 N.Y.S. 440, 112 Misc. 464—*Krugman v. Hanover Fire Ins. Co.*, 94 N.Y.S. 399—*Marcus v. Aufses*, 94 N.Y.S. 397, 15 C.J. p 997 note 64.

Grant of power must be clear

Even if equity jurisdiction may be conferred on New York city court, such grant must be clear and distinctive and not merely the subject of a questionable inference.—*Brown v. Guerin*, 296 N.Y.S. 837, 163 Misc. 79.

Declaratory relief

Attorney's motion for declaratory relief with respect to client can be addressed to city court only under summary powers of court over conduct of attorneys, statutory provision for declaratory judgments giving power over such actions to supreme court only.—*Seleznow v. Shub*, 240 N.Y.S. 829, 136 Misc. 365.

Attorney's lien

New York city court held not to have jurisdiction to enforce liens of attorneys considered as equitable in nature.—*Rubin v. Bernstein*, 231 N.Y.S. 242, 133 Misc. 95.

Action against sublessee for rent

An action in equity by an owner whose lessee was insolvent directly against the sublessee for rent is not within the jurisdiction of the city court.—*Eagle Impr. Co. v. Wagner*, 154 N.Y.S. 210, 91 Misc. 38.

Action to redeem from a deed which is in effect a mortgage.—*Oest v. Hendrick*, 134 N.Y.S. 900, 76 Misc. 258.

An action for wrongful discharge from employment on salary and specified percentage of net profits should not be dismissed as an action in equity of which the city court of New York had no jurisdiction.—*Seldin v. Block*, 150 N.Y.S. 471.

Rescission

The court has no jurisdiction to set aside, reform, or rescind an agreement.—*Wiederman v. Verschleiger*, 158 N.Y.S. 308, 93 Misc. 453, reversed on other grounds 159 N.Y.S. 226, 95 Misc. 276.

Statutory liability of corporate officers

A suit under Gen.Corp.L. § 90 subd 2, by a creditor against the president of an insolvent corporation, who had paid out the assets to certain creditors, thereby preferring them, is a suit of an equitable nature to enforce the trust obligation of the president, over which city court has no jurisdiction.—*Schwartzreich v. Bauman*, 183 N.Y.S. 440, 112 Misc. 464.

In counterclaim

N.Y.—*Schreiber v. Noe*, 243 N.Y.S. 360, 137 Misc. 105.

13. N.Y.—*Rubin v. Bernstein*, 231 N.Y.S. 242, 133 Misc. 95—*Marcus v. Sherr*, 230 N.Y.S. 425, 132 Misc. 734—*Kaplan v. Antonelli*, 230 N.Y.S. 321, 132 Misc. 572—*Schultz v. Teichman Engineering & Construction Co.*, 140 N.Y.S. 429, 79 Misc. 357—*Steiger v. London*, 102 N.Y.S. 497, 52 Misc. 462.

Validity of statute

Act conferring jurisdiction to foreclose mechanics' liens not exceeding three thousand dollars held not invalid, on ground that constitution conferred similar jurisdiction, where property did not exceed three thousand dollars.—*Kaplan v. Antonelli*, 230 N.Y.S. 321, 132 Misc. 572.

Effect of grant of power

Constitution, conferring on city court jurisdiction to foreclose mechanics' liens and liens on personalty, did not confer greater equitable jurisdiction on New York city court than it previously possessed.—*Rubin v. Bernstein*, 231 N.Y.S. 242, 133 Misc. 95.

Determining limit

(1) Word "property," in constitution, conferring jurisdiction on New York city court to foreclose mechanics' liens and liens on personal property, where "property" does not exceed three thousand dollars refers to personalty, not realty.—*Kaplan v. Antonelli*, 230 N.Y.S. 321, 132 Misc. 572.

(2) Hence the court's jurisdiction is limited to foreclosing mechanics' liens less than three thousand dollars, and is not limited to cases where realty is less than three thousand dollars.—*Kaplan v. Antonelli*, supra.

take cognizance of an equitable defense where defendant seeks no affirmative relief.¹⁴

There has been a large number of decisions relating to this court,¹⁵ including adjudications with respect to such matters as actions by¹⁶ or against¹⁷

foreign corporations, actions against receivers,¹⁸ actions ex contractu,¹⁹ actions on foreign judgments,²⁰ accounting,²¹ mandamus,²² setting aside transfers,²³ trover,²⁴ trusts,²⁵ attachment,²⁶ and pleadings.²⁷ There has been a large number of de-

Warrant of seizure

City Court may grant warrant of seizure in action to foreclose chattel mortgage.—*Marcus v. Sherr*, 230 N.Y.S. 425, 132 Misc. 734.

14. N.Y.—*Oppenheimer v. Trebla Realty Co.*, 139 N.Y.S. 894, 154 App. Div. 593, reversing 134 N.Y.S. 1095, 76 Misc. 452.

Rescission as defense

City court held to have jurisdiction to entertain insurers' defense of rescission for misrepresentations, in actions by insured on agreement of adjustment of loss under standard fire policies, since one relying on defense of rescission need not plead or establish counterclaim for equitable relief or bring action in equity for such relief.—*Kaplan v. Girard Fire & Marine Ins. Co.*, 281 N.Y.S. 301, 156 Misc. 207.

15. N.Y.—*Strauss v. Ocean Accident & Guarantee Corporation*, 262 N.Y.S. 807, 146 Misc. 766.
15 C.J. p 997 note 67.

Effect of creation of Bronx County
L.1912 c 548, creating Bronx County, did not repeal Greater New York Charter 1897 § 1345, prescribing the jurisdiction of the city court, nor did such act in any way affect the city court's jurisdiction as it existed June 6, 1895.—*De Leyer v. Britt*, 106 N.E. 57, 212 N.Y. 565, reversing 142 N.Y.S. 752, 157 App.Div. 586.

Venue

(1) In one case it was held that defendant moving for change of venue in city court of city of New York need not serve demand for change the court having power of its own motion to change venue of action improperly brought.—*Seligman Fabrics Corporation v. Bur-Lee Frocks*, 269 N.Y.S. 649, 150 Misc. 537.

(2) In another it was held that civil practice rule requiring defendant asking change of venue to serve demand on plaintiff's attorney was applicable to actions in New York city court.—*Strauss v. Ocean Accident & Guarantee Corporation*, 262 N.Y.S. 807, 146 Misc. 766.

(3) Serving notice of motion for change of venue with amended answer in city court of city of New York held full compliance with court rule requiring service of demand for change of venue by defendant demanding change of place of trial.—*Seligman Fabrics Corporation v. Bur-Lee Frocks*, supra.

(4) City court acquired no jurisdiction where plaintiffs failed to

prove residence of defendants in county and defendants sought nonsuit on that ground.—*Miller v. Katz*, 254 N.Y.S. 81, 234 App.Div. 870.

Declining to act on motion referred from special term

N.Y.—*Elias v. Coleman*, 152 N.Y.S. 451, 88 Misc. 714.

How issue joined

In New York city court, defendant must serve answer on plaintiff's attorney, and issue is joined by service of pleading.—*Bachrach v. Fisher & Grassgreen*, 244 N.Y.S. 23, 137 Misc. 382.

16. N.Y.—*Woodward Lumber Co. v. General Supply & Construction Co.*, 113 N.Y.S. 628, 60 Misc. 367.

By resident of state

The court may entertain an action by a resident of the state, but not of the city, against a foreign corporation on a cause of action which arose outside the city.—*Maas v. Cunard SS. Co.*, 43 N.Y.S. 219, 19 Misc. 100, 26 N.Y.Civ.Proc. 155.

Action by nonresident against foreign corporation on cause arising within state

N.Y.—*Susquehanna Woolen Co. v. Imperial Coal, etc., Co.*, 122 N.Y.S. 214, 66 Misc. 621—*Kline v. Imperial Coal & Coke Co.*, 122 N.Y.S. 211, 66 Misc. 616.

18. N.Y.—*John C. Orr Co. v. Cushman*, 104 N.Y.S. 510, 54 Misc. 121.

19. Court has jurisdiction

(1) Of action to collect a tax properly assessed as a debt on contract implied.—*Bowe v. Jenkins*, 23 N.Y.S. 543, 69 Hun 453.

(2) Of actions on judgments as being actions on contract within court's jurisdiction.—*Crane v. Crane*, 19 N.Y.S. 691.

20. Court has jurisdiction

N.Y.—*Spitzer v. Greenes*, 152 N.Y.S. 882, 89 Misc. 123—*Crane v. Crane*, supra.

21. N.Y.—*Poss v. Gottlieb*, 193 N.Y.S. 418, 118 Misc. 318.

15 C.J. p 997 note 72.

No jurisdiction

N.Y.—*Poss v. Gottlieb*, supra.

Partnership

(1) The court has no jurisdiction of partnership accounting.—*Lasky v. Coverdale*, 145 N.Y.S. 994, 84 Misc. 34—*Donald SS. Co., Inc. v. Lewis*, 150 N.Y.S. 89.

(2) Agreement among partners after dissolution to divide the commissions on a sale of particular property by any of them thereafter does

not create a partnership, and hence an action on such agreement does not involve a partnership transaction, and is within the jurisdiction of the city court of the city of New York.—*Mitchell v. Frank*, 142 N.Y.S. 313.

22. No power to issue

N.Y.—*People ex rel. McMahon v. Board of Excise of City of New York*, 3 N.Y.St. 253.

23. N.Y.—*Edwards v. Greenwich Sav. Bank*, 110 N.Y.S. 920, 59 Misc. 451.

24. N.Y.—*Weiss v. Weiss*, 133 N.Y.S. 1021, 75 Misc. 644, reversed on other grounds 138 N.Y.S. 1148, 154 App.Div. 890.

25. N.Y.—*Hunt v. Genet*, 14 Daly 225.

26. N.Y.—*Erdrich v. Amory*, 184 N.Y.S. 490.

Extent of jurisdiction

The court has jurisdiction to issue a warrant of attachment not exceeding two thousand dollars, with interest and costs, and must limit the liability of the sureties to that sum.—*Fagan v. Raymond Mfg. Co.*, 141 N.Y.S. 948, 80 Misc. 638.

Dependent on place of residence

Attachment may issue against a domestic corporation whose principal place of business is not within the city of New York, although it has a place of business within such city.—*Blumenthal v. Hudson River Boot & Shoe Mfg. Co.*, 15 N.Y.S. 826.

Cure of defects

If the moving papers in support of an attachment in the city court are defective, but the defects can be cured without prejudice to intervening rights, it is the duty of the court, under Code Civ.Proc. § 763, to direct that such defects be supplied nunc pro tunc.—*Erdrich v. Amory*, 184 N.Y.S. 490.

Liberal construction of moving papers

N.Y.—*Erdrich v. Amory*, supra.

27. Order permitting issue to be tried

Failure of defendant domestic corporation, sued in city court of the city of New York on a promissory note, to serve with his answer order permitting the issues to be tried, as required by Code Civ.Proc. § 1778, renders the pleading ineffective, and unless the failure is waived places defendant in the same position as though answer had never been served. In such case plaintiff could en-

cisions relating to motions,²⁸ interpleader,²⁹ calendar practice,³⁰ examinations before trial,³¹ and opening or setting aside defaults.³² There have

ter judgment as in case of default in pleading, to wit, at the expiration of six days, despite the twenty-day clause of Code Civ.Proc. § 1778.—*Hein v. Standard Die & Tool Works*, 184 N.Y.S. 78, 113 Misc. 137.

Amendments

(1) Permission by city court to amend complaint held to be conditioned on payment of full bill of costs and ten dollars motion costs, and not limited to costs before notice of trial and motion costs.—*Gidseg v. Goldsmith*, 185 N.Y.S. 42.

(2) Where a proposed amended complaint did not show so clearly that the action was in the nature of an accounting between partners as to warrant a holding that the city court had no jurisdiction, plaintiff should be allowed to amend his complaint, so that the jurisdictional question might be determined, after issue joined or on the trial.—*Lynn v. Scheffres*, 188 N.Y.S. 415.

(3) Permission will not be given to serve an amended complaint in city court omitting allegations which, when proved by defendant, even though omitted from the complaint, would destroy plaintiff's cause of action.—*Westchester Knitting Mills v. Zuckerman*, 198 N.Y.S. 358.

(4) The city court at trial term has no authority to allow an amendment to a complaint which sets up a new cause of action or substantially changes the one pleaded; only at special term may this be done.—*Hamilton v. Mendham*, 129 N.Y.S. 53, dismissed 133 N.Y.S. 977, 149 App. Div. 907.

Bill of particulars

(1) A motion for a bill of particulars in city court should not be broader than a previous demand made upon the pleader, and, if broader, the excess should be denied.—*White v. Kaliski*, 109 N.Y.S. 716.

(2) In a buyer's action in city court for seller's failure to deliver goods, alleging a resale contract, and seeking plaintiff's loss of profits and loss of plaintiff's customer, defendant was entitled to a bill of particulars as to whether plaintiff's contract with customer was oral or written, and, if written, a copy thereof.—*N. London, Inc. v. Salomon*, 185 N.Y.S. 41.

Reargument

(1) City court has power to pass on motion for reargument of motion to set aside verdict and for new trial previously denied.—*Gaston Koch & Co. v. Juliette Improvement Co.*, 239 N.Y.S. 127, 136 Misc. 55.

(2) Under Civ.Pract.Act § 549, city court justice having denied mo-

tion to set aside verdict, and judgment having been entered, was without power to grant rehearing at subsequent term, and on such rehearing grant motion to set aside verdict.—*Boslowitz v. S. Goldin & Co.*, 209 N.Y.S. 308, 124 Misc. 746.

29. N.Y.—*Marcus v. Aufses*, 94 N.Y.S. 397.

15 C.J. p 997 note 80.

Jurisdiction

(1) The cases are not in accord on the question of whether the court has jurisdiction in a case of interpleader. Some cases hold that granting of an order of interpleader transforms the action into an equitable one, of which the court would have no jurisdiction, and hence such an order will not be granted.—*Krugman v. Hanover Fire Ins. Co.*, 94 N.Y.S. 399—*Marcus v. Aufses*, 94 N.Y.S. 397—*Wells v. Corn Exchange Bank*, 87 N.Y.S. 480.

(2) Others hold that the court is not divested of jurisdiction because an interpleader has added questions of an equitable nature.—*Katz v. Witt*, 134 N.Y.S. 675, 74 Misc. 582—*U. S. Mortgage & Trust Co. v. Vermilye*, 130 N.Y.S. 303, 72 Misc. 375—*Krugman v. Hanover Fire Ins. Co.*, 90 N.Y.S. 448, 45 Misc. 346.

30. N.Y.—*Rubenstein v. Schmuck*, 113 N.Y.S. 554, 129 App.Div. 326—*West Electric Hair Curler Co. v. Hamilton Corp.*, 150 N.Y.S. 750, 88 Misc. 381.

Prosecution of action

Where an action was begun in December, 1913, and issue joined in March, 1914, cross notices of trial being served in May, 1914, resulting in the cause being first called in April, 1915, while plaintiff was absent from this country, and under the city court practice the case reappeared automatically on one or two subsequent call calendars without any result, and issues as late as April 14, 1921, having been reached and disposed of, the length of plaintiff's inaction showed an intention to abandon.—*Levey v. Thomas J. Stewart Co.*, 194 N.Y.S. 438, 118 Misc. 755.

Affected by length of trial

City Court Rules, rule 2, providing that, where a trial will occupy more than two hours, the court may send the cause to the foot of the general calendar, vested discretion in the city court to hear a case through, although the trial actually occupied more than two hours.—*Birdsey-Somers Co. v. Sleeper*, 135 N.Y.S. 1075, 77 Misc. 143.

Commercial calendar

(1) Action for breach of warranty in full covenant warranty deed under

seal could not be put upon commercial calendar.—*Heneve Holding Corporation v. Louis E. Kleban & Son*, 241 N.Y.S. 78, 137 Misc. 397.

(2) City Court Rules, rule 2, providing that a case can be placed on the commercial calendar, where plaintiff seeks to recover a specific sum of money, or one for goods sold and delivered, etc., does not include a case where plaintiff is buyer and sues seller for failure to deliver.—*Frost v. Hocking Glass Co.*, 169 N.Y.S. 1042.

(3) That four months did not elapse between breach of employment contract and commencement of action barred placing case on commercial calendar.—*Schulman v. Ravenhue Dress*, 250 N.Y.S. 385, 140 Misc. 41.

(4) Cause triable in municipal court was not entitled to be placed on commercial calendar.—*Schulman v. Ravenhue Dress*, supra.

(5) Action in New York city court for personal injuries from sale of deleterious food, under implied warranty of fitness for human use, held not "action for damages arising out of contract for sale of goods, wares and merchandise" within court rule placing such actions on commercial calendar.—*Gilbert v. Great Atlantic & Pacific Tea Co.*, 269 N.Y.S. 640, 151 Misc. 45.

Preferences

(1) Granting preference in city court action for injuries sustained in course of employment by one entitled to compensation, by setting cause down for trial for day certain at term for which plaintiff noticed case for trial, held within court's discretion.—*Weinberg v. National Transp. Co.*, 262 N.Y.S. 824, 146 Misc. 758, modified by limiting preference over other issues noticed for same term 265 N.Y.S. 945, 239 App.Div. 905.

(2) Motion for preference in action in behalf of state superintendent of banks was denied on ground that city court was without authority to grant general preference and that to grant limited preference of only one day would interfere with orderly dispatch of court's business and would be of no practical advantage to plaintiff.—*Bank of U. S. v. Fenley Realty Co.*, 260 N.Y.S. 494, 145 Misc. 579.

31. N.Y.—*Gedney v. Planten*, 153 N.Y.S. 423, 90 Misc. 275.

32. N.Y.—*Gude v. Noblett*, 183 N.Y.S. 42, 112 Misc. 219.
15 C.J. p 997 note 83.

Power of court

The city court of the city of New

also been numerous decisions relating to discontinuances,³³ conduct of trial,³⁴ verdicts,³⁵ damages,³⁶ judgments,³⁷ executions,³⁸ and appeals.³⁹

York has inherent power to relieve a defendant from the consequences of a default suffered through the omission of his attorney.—*Ruhloff v. Catts*, 174 N.Y.S. 159.

Showing necessary

On application to open a default in city court, the moving papers must show both a reasonable excuse for the default, under Code Civ.Proc. § 724, as well as facts establishing a meritorious case.—*Gude v. Noblett*, 183 N.Y.S. 42, 112 Misc. 219.

To interpose counterclaim

A default in city court will not be set aside to permit defendant to interpose a counterclaim or set-off, since in such a case defendant's cross-claim can be made the basis of an independent suit.—*Gude v. Noblett*, supra.

Liability of surety

(1) An extension of the time for the payment of the original debt will discharge the sureties on a bond given as a condition for vacating a default judgment of the city court of the city of New York.—*Montrose v. Baggott*, 146 N.Y.S. 649, 161 App. Div. 494.

(2) However, a stipulation extending the time for the entry of the judgment will not release the sureties.—*Montrose v. Baggott*, supra.

33. N.Y.—*Connolly v. Empire United R. Co.*, 151 N.Y.S. 653, 88 Misc. 118.

34. Mistrial

The city court acts within its authority in declaring a mistrial and sending a cause to the foot of the calendar where the behavior of plaintiff's attorney renders it improper to continue the trial.—*McCormick v. Shea*, 85 N.Y.S. 1029, 42 Misc. 555.

35. Increase or decrease by court

City court of New York held without power to increase or decrease amount of its verdict, since that is a matter of substance, only remedy of aggrieved party being by appeal.—*Murphy v. Export S. S. Corporation*, 273 N.Y.S. 120, 152 Misc. 322.

36. Measure

Plaintiff suing in city court of New York, having alleged and proved cause of action, was entitled under allegation of general damages to damages according to the proper measure of damages, notwithstanding misconception in preparation of bill of particulars as to the proper theory of damages.—*Cécile Costumes v. Michel*, 190 N.Y.S. 509.

37. Correction of errors

City court of New York retains power to correct errors as to form of its judgment.—*Murphy v. Export S. S. Corporation*, 273 N.Y.S. 120, 152 Misc. 322.

38. Applicability of civil practice act

The city court is a court of record, and Code Civ.Proc. §§ 338, 1365, 1489, as to executions, apply to executions on judgments of such court, in view of Code Civ.Proc. §§ 2, 3159, and § 3347, subd 10.—*Weinuss v. Light*, 170 N.Y.S. 173, 183 App.Div. 591.

39. N.Y.—*Malus v. Alter*, 237 N.Y.S. 435, 135 Misc. 212.
15 C.J. p 997 note 85.

Orders appealable

(1) Order granting preference.—*Malus v. Alter*, supra.

(2) Other orders.—*Weber v. Interborough Rapid Transit Co.*, 158 N.Y.S. 620—*Higgins v. Dewey*, 27 Abb.N.Cas. 81.
5 C.J. p 500 note 60 [a] (3), (4).

Orders not appealable

(1) Discretionary orders generally.—*Kretzer v. Allaire*, 37 N.Y.S. 687, 16 Misc. 6.

(2) Since a justice of the city court has power to revise or recall his decision, an appeal from an order imposing costs on the ground that the memorandum announcing a justice's decision did not mention costs is frivolous and will be dismissed.—*Orlando v. Palladino*, 112 N.Y.S. 1118, 61 Misc. 103.

Notice of appeal

The court has no jurisdiction to order a plaintiff to accept a notice of appeal from a judgment rendered by it.—*Benjamin v. Brownstein*, 154 N.Y.S. 191.

Time for appeal

Where order appealed from, when made, was valid exercise of city court's power, although it was inadvertently signed by justice day before it was noticed for settlement, defendant's time to appeal began to run from day it was duly entered and notice of entry served.—*Cade v. Meyer*, 169 N.Y.S. 1043.

Case on appeal

(1) Time for service.—*Lightner v. Hartmann-Blanchard Co.*, 170 N.Y.S. 49.

(2) Settling case.—*Dyer v. J. Y. J. Corporation*, 165 N.Y.S. 221, 100 Misc. 115.

(3) Municipal Court of the City of New York

- (a) Nature and jurisdiction
- (b) Procedure and practice
- (c) Review of proceedings

Record prevails over briefs

N.Y.—*Hooke v. Hopkins*, 164 N.Y.S. 117.

Matters not raised below

Where question as to sufficiency of complaint was raised for first time on appeal, and the alleged defects were highly technical, and affidavits showed necessary jurisdictional facts, it will not be considered.—*Westchester Knitting Mills v. Zuckerman*, 198 N.Y.S. 356.

Waiver of error

(1) Plaintiff does not, by proceeding to trial in city court under an order which declares a mistrial, direct him to pay thirty dollars costs to defendant, and directs the case to be placed upon the calendar for trial about a week hence, waive the error in the order in imposing costs on him.—*Modern Silk Co. v. Weinstein*, 165 N.Y.S. 721, 100 Misc. 358.

(2) By failing to take steps to appeal from order within time from day when it was formally entered and notice of entry served, defendant waived irregularity in order formally entered that it was signed by justice of city court day before noticed for settlement.—*Cade v. Meyer*, 169 N.Y.S. 1043.

Review of facts

(1) Appellate Term can review facts, although plaintiff failed to make motion for new trial.—*Thomson v. Meyercord Co.*, 174 N.Y.S. 732.

(2) Sufficiency of evidence may be reviewed.—*Johnson v. Desmond*, 165 N.Y.S. 290.

Harmless errors

N.Y.—*Kips Bay Brewing & Malting Co. v. J. H. Tooker Printing Co.*, 176 N.Y.S. 65.

Reversible errors

In an action for breach of a contract of bailment, where plaintiffs' own breach would restrict its recovery, the submission of plaintiffs' full claim to jury in city court was reversible error, not only because an improper item of damage was submitted, but because it would affect the determination of the jury in relation to defendants' counterclaim for plaintiffs' breach.—*Landau v. Goldstein*, 184 N.Y.S. 812.

Costs below

Where city court denied costs, apparently upon ground of lack of power, the appellate term, on appeal, may modify judgment, so as to award costs.—*Stevens v. Hush*, 176 N.Y.S. 602, 107 Misc. 353.

(a) Nature and Jurisdiction

The municipal court of the city of New York is a court of limited jurisdiction, of record, possessing only such powers and jurisdiction as are conferred on it by statute.

The municipal court of the city of New York is not a new court, but a continuation of the district courts of New York city, and some of the justices' courts of Brooklyn.⁴⁰ It is an inferior local court⁴¹ of record,⁴² created by statute,⁴³ of limited or special⁴⁴ civil⁴⁵ jurisdiction, which does not extend to cases wherein a recovery of more than one thousand dollars, exclusive of interest and costs, is sought,⁴⁶ except in certain cases set forth

in the statute, and possesses no inherent powers,⁴⁷ except such powers as are inherent in all courts of record,⁴⁸ but only those powers and jurisdiction which are conferred on it by the statute.⁴⁹ The jurisdiction of the court is coextensive with the limits of the city of Greater New York,⁵⁰ and it therefore has jurisdiction where defendant is a resident of the city, although he resides outside of the county in which the court is sitting.⁵¹ It has no power, however, to direct the service of process outside the city limits, see subdivision c (3) (b) of this section.

The court has no equitable jurisdiction with respect to affording affirmative relief;⁵² but it may,

40. N.Y.—Routenberg v. Schweitzer, 58 N.E. 880, 165 N.Y. 175, reversing 63 N.Y.S. 746, 50 App.Div. 218. 15 C.J. p 997 note 87.

41. N.Y.—Haggerty v. City of New York, 196 N.E. 45, 267 N.Y. 252. 15 C.J. p 998 note 90.

42. N.Y.—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748, reversing 198 N.Y.S. 514, 118 Misc. 457—In re Greenwald, 167 N.Y.S. 154, 179 App.Div. 672, affirmed Greenwald v. Boyle, 117 N.E. 1068, 221 N.Y. 688—Brinn v. Wooding, 298 N.Y.S. 971, 164 Misc. 850—Melker v. Guarino, 238 N.Y.S. 569, 135 Misc. 548—Friedman v. Phillips & Co., 201 N.Y.S. 53, 121 Misc. 21—Crowe v. Marsh Garage Co., 192 N.Y.S. 908, 117 Misc. 660—Paterno Const. Co. v. Rentner, 191 N.Y.S. 517. 15 C.J. p 997 note 88.

Constitutionality of statute

The provision making this court a court of record does not violate the constitutional prohibition against making inferior courts courts of record because this court is not a new court, but a continuation, consolidation, and reorganization of an existing court.—In re Levy, 182 N.Y.S. 792, 192 App.Div. 550.

Otherwise prior to September 1, 1915 N.Y.—Taylor v. Bell, 106 N.Y.S. 273, 121 App.Div. 437.

43. N.Y.—Haggerty v. City of New York, 196 N.E. 45, 267 N.Y. 252—Norton v. Southern Ry. Co., 246 N.Y.S. 676, 138 Misc. 784.

44. N.Y.—Richard v. National Transp. Co., 285 N.Y.S. 870, 158 Misc. 324. 15 C.J. p 998 note 91.

Jurisdiction not to exceed that of county courts

Under the constitution the municipal court can have no greater jurisdiction than county courts have. Const. art 6 § 18. But this provision has been construed as having reference to subject matter and persons and not to territory.—Kantro v. Armstrong, 60 N.Y.S. 970, 44 App.Div.

506—Irwin v. Metropolitan St. R. Co., 57 N.Y.S. 21, 38 App.Div. 253, affirming 54 N.Y.S. 195, 25 Misc. 187.

45. N.Y.—Haggerty v. City of New York, 196 N.E. 45, 267 N.Y. 252.

46. N.Y.—Gottesman v. Goldberg, 266 N.Y.S. 676, 149 Misc. 50—Horowitz v. Winter, 222 N.Y.S. 233, 129 Misc. 814—Silberstein v. Begun, 176 N.Y.S. 558, 107 Misc. 395, affirmed 181 N.Y.S. 954, 191 App.Div. 951, affirmed 133 N.E. 904, 232 N.Y. 319—Security Mortgage Co. v. Kallis, 169 N.Y.S. 566, 102 Misc. 693, affirmed 170 N.Y.S. 1111, 184 App. Div. 936.

15 C.J. p 998 note 92.

Limit as to judgment not damages

Although municipal court is limited, in awarding judgment, to one thousand dollars maximum, it is not precluded from fixing party's damages for a larger amount.—Silberstein v. Begun, 176 N.Y.S. 558, 107 Misc. 395, affirmed 181 N.Y.S. 954, 191 App.Div. 951, affirmed 133 N.E. 904, 232 N.Y. 319.

Counterclaim

Under Mun.Court Code § 86, amount of any judgment that may be rendered on counterclaim is limited to one thousand dollars, exclusive of interest and costs, but there is no limit upon amount for which counterclaim may be interposed.—Security Mortgage Co. v. Kallis, 169 N.Y.S. 566, 102 Misc. 693, affirmed 170 N.Y.S. 1111, 184 App.Div. 936.

47. N.Y.—Prinstein v. De Rosa, 126 N.Y.S. 97, 69 Misc. 619. 15 C.J. p 998 note 93.

48. N.Y.—Friedman v. Phillips & Co., 201 N.Y.S. 53, 121 Misc. 21—Paterno Const. Co. v. Rentner, 191 N.Y.S. 517.

49. N.Y.—Isabelle Properties v. Edelman, 297 N.Y.S. 572, 164 Misc. 192—Friedman v. Phillips & Co., 201 N.Y.S. 53, 121 Misc. 21. 15 C.J. p 998 note 94.

Interference with supreme court

Municipal court cannot disregard, disturb, or modify any order en-

tered in supreme court, remedy being by applying to Supreme Court.—Bruck v. Larat, 222 N.Y.S. 728, 129 Misc. 768.

50. N.Y.—Irwin v. Metropolitan St. R. Co., 57 N.Y.S. 21, 38 App.Div. 253, 6 N.Y. Ann. Cas. 374, affirming 54 N.Y.S. 195, 25 Misc. 187, 28 N.Y. Civ. Proc. 196. 15 C.J. p 998 note 98.

51. N.Y.—Irwin v. Metropolitan St. R. Co., 57 N.Y.S. 21, 38 App.Div. 253, affirming 54 N.Y.S. 195, 25 Misc. 187. 15 C.J. p 998 note 98.

52. N.Y.—Richard v. National Transp. Co., 285 N.Y.S. 870, 158 Misc. 324—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 152 Misc. 594—City Theatres Co. v. Skouras Theatres Corporation, 268 N.Y.S. 455, 150 Misc. 78—County Trust Co. of White Plains v. Tremaine, 263 N.Y.S. 104, 146 Misc. 458—502 Park Ave. Corporation v. Delmonico Hotel, 230 N.Y.S. 262, 132 Misc. 502, 686—Solomon v. Suffin, 209 N.Y.S. 671, 124 Misc. 748—Lotz v. Standard Vulcanite Pan Co., 168 N.Y.S. 446, 102 Misc. 68—Metropolitan Electric Protective Co. v. Ashlamian, 185 N.Y.S. 358—Burgener v. O'Halloran, 181 N.Y.S. 235, 111 Misc. 203—Hyman v. Nev-a-Hone Razor Strop Co., 173 N.Y.S. 56. 15 C.J. p 998 note 95.

See, however, a case stating that the municipal court, having jurisdiction of an action originally instituted to recover a sum of money, has equitable power necessary for the preservation of its jurisdiction and for the prevention of any miscarriage of justice which might be caused by the acts, whether deliberate, willful, or otherwise, of any of the parties within its jurisdiction.—Brinn v. Wooding, 298 N.Y.S. 971, 164 Misc. 850.

In summary proceedings

N.Y.—McCutcheon Realty Corporation v. Kilb, 222 N.Y.S. 244, 129 Misc. 637.

in certain cases, consider equitable defenses which are interposed merely for the purpose of reducing or defeating plaintiff's recovery or precluding the relief which he demands, no affirmative relief being sought by defendant.⁵³

Ordinarily the court is without jurisdiction to adjudicate as to the title to real estate.⁵⁴ Under statute, however, it has been held to have power to determine title in a proceeding brought by a judgment creditor as to property levied on by a marshal on his behalf but claimed by a third person.⁵⁵ So under the statutes it may entertain summary dispossession proceedings against a tenant,⁵⁶ even though the fact of title is raised collaterally therein,⁵⁷ or even though the tenant denies the title of

the landlord,⁵⁸ or asserts title in himself.⁵⁹ In such a proceeding the court may entertain an equitable defense interposed by the tenant to defeat the landlord's right to possession, although it cannot give affirmative relief to the tenant.⁶⁰ Therein it may render judgment for the landlord for rent due in any amount, the limitation as to amount of the court's jurisdiction being inapplicable therein.⁶¹

There was no presumption in favor of the jurisdiction of the municipal court, but all facts essential thereto were required to appear in the record,⁶² until a statute, taking effect in 1915, provided that every fair intendment must be made in favor of the jurisdiction of the court.⁶³

There has been a very large number of deci-

Contribution

In action for contribution municipal court of New York held without jurisdiction to pass on question whether some of defendants were insolvent, so as to authorize larger recovery against solvent defendants, since a municipal court is without equitable jurisdiction.—*Meyrowitz v. Wattel*, 267 N.Y.S. 591, 149 Misc. 862.

Actions held to be at law

N.Y.—*Gross v. Miller*, 274 N.Y.S. 82, 151 Misc. 727.—*Kleinhenz v. Hallett*, Point Garage, 179 N.Y.S. 78.

Where presence of equitable considerations in a purely legal action for damages does not divest the court of jurisdiction, especially where determination of legal action is consistent with equities involved.—*Strobel v. Irving*, 14 N.Y.S.2d 864, 171 Misc. 965.

53. N.Y.—*Isabelle Properties v. Edelman*, 297 N.Y.S. 572, 164 Misc. 192.—*Le Fevre v. Reliable Paint Supply Co.*, 273 N.Y.S. 903, 152 Misc. 594.—*Alumor Garage v. George L. Stivers, Inc.*, 218 N.Y.S. 683, 128 Misc. 400.—*De Vita v. Pianisani*, 217 N.Y.S. 438, 127 Misc. 611.—*Osterweil v. Faldo & Rizzo*, 186 N.Y.S. 234, 113 Misc. 395.—*Burgener v. O'Halloran*, 181 N.Y.S. 235, 111 Misc. 203.—*Jensen v. Barber S. S. Lines*, 180 N.Y.S. 754, 110 Misc. 632.—*Kulerban Holding Corporation v. Blauner*, 190 N.Y.S. 484.—*Metropolitan Electric Protective Co. v. Ashlamian*, 185 N.Y.S. 358, 15 C.J. p 998 note 96.

Validity of statute permitting

N.Y.—*De Vita v. Pianisani*, 217 N.Y.S. 438, 127 Misc. 611.

Avoidance of release

(1) Whether release relied on by defendant was result of mutual mistake, or mistake and fraud, may be determined in law action in municipal court, since plaintiff seeks, not equitable relief, but merely to nega-

tive affirmative defense.—*Epstein v. Kaplan*, 269 N.Y.S. 604, 150 Misc. 520.

(2) In seaman's action in municipal court for extra compensation after having executed a release, the court would be justified in disregarding the release, if seamen could establish that the release was the result of fraud or of honest mistake.—*Jensen v. Barber S. S. Lines*, 180 N.Y.S. 754, 110 Misc. 632.

Defense of fraud

N.Y.—*Kulerban Holding Corporation v. Blauner*, 190 N.Y.S. 484.

54. N.Y.—*Heiferman v. Scholder*, 119 N.Y.S. 520, 134 App.Div. 579, 15 C.J. p 998 note 99.

55. N.Y.—*Isabelle Properties v. Edelman*, 297 N.Y.S. 572, 164 Misc. 192.

56. N.Y.—*McKeefry v. O'Hara*, 184 N.Y.S. 700, 113 Misc. 159, 15 C.J. p 998 note 1.

Issues determinable

(1) Municipal court does not have jurisdiction to adjust equity between parties to summary proceeding and award title.—502 Park Ave. Corporation v. Delmonico Hotel, 230 N.Y.S. 262, 132 Misc. 502, 686.

(2) Controversy as to which party prevented sale cannot be determined in municipal court in summary proceeding.—502 Park Ave. Corporation v. Delmonico Hotel, supra.

Extent of relief

Affirmative relief, awarding possession to landlord in summary proceeding equivalent to rescinding contract of sale and restoring landlord and tenant relationship, cannot be granted by municipal court.—502 Park Ave. Corporation v. Delmonico Hotel, supra.

Parcels in different court districts

Municipal court held without jurisdiction of summary proceeding to recover separate parcels of land covered by single lease, where some of parcels were situated in different court district.—*Altman v.*

Meygro Holding Co., 252 N.Y.S. 293, 141 Misc. 202.

Removal of employee

Under agreement whereby defendant was employed to manage theater for petitioner at agreed weekly compensation for specified time, defendant held "employee" and not "occupant;" hence New York City municipal court was without jurisdiction of proceedings to remove defendant from reality.—*City Theatres Co. v. Skouras Theatres Corporation*, 268 N.Y.S. 455, 150 Misc. 78.

57. N.Y.—*Van Deventer v. Foster*, 83 N.Y.S. 1067, 87 App.Div. 62.

58. N.Y.—502 Park Ave. Corporation v. Delmonico Hotel, 230 N.Y.S. 262, 132 Misc. 502, 686, 15 C.J. p 998 note 3.

59. N.Y.—502 Park Ave. Corporation v. Delmonico Hotel, supra, 15 C.J. p 998 note 3.

Where neither party appears in such proceedings, the court cannot enter a final order in favor of the landlord.—*Katz v. Schreckinger*, 101 N.Y.S. 743, 52 Misc. 160.

60. N.Y.—*Burgener v. O'Halloran*, 181 N.Y.S. 235, 111 Misc. 203.

Limits as to amount inapplicable

Municipal court's jurisdiction in summary proceedings to render judgment is not limited to cases involving one thousand dollars or less.—*Addoms' Estate v. Citarella*, 256 N.Y.S. 669, 143 Misc. 428.

62. N.Y.—*Stodder v. New England Nav. Co.*, 118 N.Y.S. 844, 134 App. Div. 221, 15 C.J. p 998 note 5.

63. N.Y.—*Mitchell v. Schroeder*, 158 N.Y.S. 31, 94 Misc. 270, affirmed 159 N.Y.S. 1129, 174 App.Div. 857.

This provision refers only to a determination of the jurisdiction of the court in a given case, and not to its powers under the statute.—*Mitchell v. Schroeder*, supra.

sions relating to the municipal court of the city of New York,⁶⁴ many of which relate to the jurisdiction and powers of the court,⁶⁵ including such matters as actions against nonresidents,⁶⁶ actions by⁶⁷ or against⁶⁸ foreign or nonresident corporations, actions for money had and received,⁶⁹ actions

for fraud and deceit,⁷⁰ actions for conversion,⁷¹ actions to recover money deposited in escrow,⁷² actions on surety bonds or undertakings,⁷³ proceeding to try title to personal property,⁷⁴ actions for forcible entry and detainer,⁷⁵ actions to recover sums due on installments,⁷⁶ actions for torts,⁷⁷

64. N.Y.—O'Connell v. Kelly, 220 N.Y.S. 161, 129 Misc. 155.
15 C.J. p 998 note 7.

65. N.Y.—McLean v. Brower, 188 N.Y.S. 425.
15 C.J. p 998 note 8.

Effect of change in statute

Despite Mun.Court Code § 181, providing act shall not be retroactive, where former action of plaintiff's assignor was dismissed by municipal court for lack of jurisdiction, there being no adjudication on merits, and thereafter code extended court's jurisdiction to cover cause, plaintiff could bring second action in municipal court.—Cahill v. Wissner, 170 N.Y.S. 1000, 183 App.Div. 659.

Seaman's action for wages

N.Y.—Danielsen v. Sigbee, Humphrey & Co., 187 N.Y.S. 700, 115 Misc. 184.

Action by code authority

N.Y.—Schlesinger v. Kofsky-Moos, Inc., 276 N.Y.S. 980, 154 Misc. 242.

Corporate creditor's action against officers

N.Y.—De Rosa v. Bloch, 270 N.Y.S. 255, 150 Misc. 160.—Trustees of Masonic Hall and Asylum Fund v. Fontana, 164 N.Y.S. 370, 99 Misc. 497.

Between tenants in common

(1) Court has jurisdiction of action by one tenant in common of realty against another for share of rents collected.—O'Connell v. Kelly, 220 N.Y.S. 161, 129 Misc. 155.

(2) The municipal court has no jurisdiction of an action by one coowner to recover from another coowner the proportionate share of taxes or water rates paid on their common property.—Solomon v. Solomon, 13 N.Y.S.2d 889, 171 Misc. 1031.

66. N.Y.—Chavin v. Smith, 59 N.Y.S. 593, 28 Misc. 531.
15 C.J. p 999 note 9.

67. N.Y.—Lake Geneva Ice Co. v. Selva, 59 N.Y.S. 544, 28 Misc. 581.

Corporation must have an office in New York city in order to give the municipal court jurisdiction.—Epstein v. Weisberger Co., 102 N.Y.S. 488, 52 Misc. 572.

68. N.Y.—Routenberg v. Schweitzer, 58 N.E. 880, 165 N.Y. 175, reversing 63 N.Y.S. 746, 50 App.Div. 218, affirming 61 N.Y.S. 84, 29 Misc. 653.
15 C.J. p 999 note 11.

Complaint alleging that defendant is a foreign corporation but not alleging that it has an office in New York city is insufficient to confer jurisdiction.—McKeever v. Supreme Ct. I.O. F., 106 N.Y.S. 1041, 122 App.Div. 465.

Jurisdiction is limited to corporations having an office in New York city.—Epstein v. Weisberger Co., 102 N.Y.S. 488, 52 Misc. 572.

No jurisdiction where action for recovery of money only

N.Y.—Helmerding v. American Mfg. Co., 58 N.Y.S. 1022, 28 Misc. 773.

Foreign corporation as surety

No jurisdiction of action against foreign corporation as surety on bond of marshal where amount involved over five hundred dollars.—Friedland v. Union Surety, etc., Co., 86 N.Y.S. 937, 43 Misc. 38.

Action by nonresident against foreign corporation is not within the jurisdiction of the court unless the cause of action arose within the state, or the contract sued on was there made.—Sommese v. Florence Distilling Co., 107 N.Y.S. 630, 56 Misc. 670.—Allison v. T. A. Snider Preserve Co., 45 N.Y.S. 923, 20 Misc. 367.

69. N.Y.—Dean v. Bauer, 166 N.Y.S. 983, 101 Misc. 301.
15 C.J. p 999 note 12.

Although such action is equitable in nature, it may be maintained in the municipal court.—Corn Exch. Bank v. Gross, 148 N.Y.S. 2, 86 Misc. 4.

Payment on conditional sales contract

N.Y.—Dean v. Bauer, 166 N.Y.S. 983, 101 Misc. 301.—Petze v. Horace Waters & Co., 166 N.Y.S. 1000.

70. N.Y.—Youngman v. Smadbeck, 117 N.Y.S. 1030, 64 Misc. 60.
15 C.J. p 999 note 13.

71. N.Y.—Lamport Mfg. Supply Co. v. Reiss, 257 N.Y.S. 449, 143 Misc. 776.
15 C.J. p 999 note 14.

Delivery of converted note

Court has jurisdiction since court need not order indorsement.—Lamport Mfg. Supply Co. v. Reiss, supra.

Conditional vendee or mortgagee

(1) Court has no jurisdiction of action.—Commonwealth Finance Corporation v. De Vito, 179 N.Y.S. 67.

(2) It has jurisdiction of mortgagor's action against mortgagee for

conversion of rents received from mortgaged premises brought after foreclosure sale.—Maxol Syndicate v. N. T. Hegeman Co., 245 N.Y.S. 98, 138 Misc. 179.

72. N.Y.—Harris v. Snyder, 105 N.Y.S. 502, 55 Misc. 306.

73. N.Y.—Isenberg v. Rainier, 127 N.Y.S. 411, 70 Misc. 498, affirmed 130 N.Y.S. 27, 145 App.Div. 258.

Marshal's bond

Municipal court has jurisdiction of action on city marshal's bond in excess of one thousand dollars but not exceeding two thousand dollars.—Allen v. Wolkof, 169 N.Y.S. 382, 182 App.Div. 634, reversing 168 N.Y.S. 336, 102 Misc. 122.

Statutory bonds

Court has jurisdiction on such bonds.—David v. Abramowitz, 256 N.Y.S. 15, 143 Misc. 162.

Levied on but claimed by third person

The municipal court of city of New York has jurisdiction of proceeding to try title to personality levied on as property of judgment debtor and claimed by third party and can determine the title to the property.—Long Island Tinsmith Supply Corporation v. John H. Ramberg & Son, 15 N.Y.S.2d 159, 172 Misc. 158.

75. N.Y.—Mandel v. Fertig, 121 N.Y.S. 669, 65 Misc. 310.

Court has jurisdiction

The Court has jurisdiction of actions under provision of the real property law allowing recovery of treble damages in forcible entry or detainer.—Billig v. Nelson Properties, 2 N.Y.S.2d 364, 166 Misc. 301.

76. N.Y.—Toledo Computing Scale Co. v. Borick, 117 N.Y.S. 914, 64 Misc. 63.

Malicious prosecution

N.Y.—Telzer v. Brooklyn Union El. R. Co., 113 N.Y.S. 18, 61 Misc. 59.

Action for damages for wrongful attachment issued against plaintiff's property in a former action is in effect an action for malicious prosecution, of which the municipal court has no jurisdiction.—Barsotti v. Peirano, 157 N.Y.S. 844.

Wrongful expulsion of union member

The municipal court has jurisdiction to entertain a suit at law demanding damages for loss of wages caused by wrongful expulsion by a union of its member.—Strobel v. Irving, 14 N.Y.S.2d 864, 171 Misc. 965.

actions arising out of contracts of conditional sale of personalty⁷⁸ or purchase-money chattel mortgages,⁷⁹ actions for deficiency after foreclosure sale under chattel mortgage,⁸⁰ actions for inveiglement and kidnapping,⁸¹ actions for assault and battery,⁸² actions to recover damages for breach of contract,⁸³ actions on implied contracts⁸⁴ or on quasi contracts,⁸⁵ actions on attachment bonds,⁸⁶ actions for rent,⁸⁷ actions for personal injuries,⁸⁸ actions for trespass⁸⁹ or for damages for injury to

real property⁹⁰ or personal property,⁹¹ actions for assault on or ejection of passengers by employees of carriers⁹² or for assault by a street car conductor on a person not a passenger,⁹³ actions for damages for loss of service of a wife by reason of personal injuries,⁹⁴ actions on assignments of part of wages of employees,⁹⁵ actions by brokers for commissions,⁹⁶ actions to rescind contracts for the sale of land,⁹⁷ actions to enforce orders of the supreme court,⁹⁸ actions to recover money paid under

78. N.Y.—Goldwater v. Mendelson, 8 N.Y.S.2d 627, 170 Misc. 422.
15 C.J. p 999 note 20.

Action to recover installments due
N.Y.—Bloomington v. Gaudio, 147 N.Y.S. 432, 85 Misc. 389.
15 C.J. p 999 note 20 [a].

Replevin on oral contract
N.Y.—Herbert v. Humphreys, 121 N.Y.S. 235, 66 Misc. 150.

Action by purchaser to recover installments paid
N.Y.—Seabott v. Wanamaker, 150 N.Y.S. 223, 164 App.Div. 531.
15 C.J. p 999 note 20 [e].

Recovery of possession

Creditor's action to recover possession of chattel and apply proceeds of the sale thereof to debt where notice of lien, conditional bill of sale or chattel mortgage has been filed, is an action at law upon contract of which municipal court has jurisdiction.—Goldwater v. Mendelson, 8 N.Y.S.2d 627, 170 Misc. 422.

79. N.Y.—Wilcox v. Perez, 101 N.Y.S. 391, 115 App.Div. 693.—Moerman v. Johnson, 138 N.Y.S. 381.

80. N.Y.—Wilcox v. Perez, 101 N.Y.S. 391, 115 App.Div. 693.

81. N.Y.—Bellezzire v. Camardella, 88 N.Y.S. 807, 95 App.Div. 176.

82. N.Y.—O'Connell v. Josber Building Corporation, 1 N.Y.S.2d 936, 166 Misc. 8.
15 C.J. p 999 note 24.

Action by patron of bathing establishment for removal from line while waiting for bathing suit, by servant of defendant.—Aaron v. Ward, 121 N.Y.S. 673, 136 App.Div. 818, affirmed 96 N.E. 736, 203 N.Y. 851, 38 L.R.A., N.S., 204.

No jurisdiction

N.Y.—O'Connell v. Josber Building Corporation, 1 N.Y.S.2d 936, 166 Misc. 8.—Fister v. Metropolitan St. Ry. Co., 62 N.Y.S. 467, 30 Misc. 430.

83. N.Y.—Goldsmith v. Rabinowitz, 117 N.Y.S. 118.

Court has jurisdiction

N.Y.—Armstrong v. Weiss, 7 N.Y.S. 2d 26, 168 Misc. 653.—Barad v. New York Rapid Transit Corporation, 295 N.Y.S. 901, 162 Misc. 458.—At-

lantic Terra Cotta Co. v. Peter Guthy, Inc., 244 N.Y.S. 331, 138 Misc. 76.—Horowitz v. Winter, 222 N.Y.S. 233, 129 Misc. 814.—Schaefer v. Magerle, 211 N.Y.S. 469, 125 Misc. 840.

Contract to convey good title

N.Y.—Katz v. Henig, 66 N.Y.S. 530, 32 Misc. 672.

84. N.Y.—Dechen v. Dechen, 68 N.Y.S. 1043, 59 App.Div. 166.—Goldwater v. Mendelson, 8 N.Y.S.2d 627, 170 Misc. 422.

Court has jurisdiction

N.Y.—Goldwater v. Mendelson, supra.—Horowitz v. Winter, 222 N.Y.S. 233, 129 Misc. 814.

Third party beneficiary

Court has jurisdiction.—Atlantic Terra Cotta Co. v. Peter Guthy, Inc., 244 N.Y.S. 331, 138 Misc. 76.

85. N.Y.—Devery v. Winton Motor Carriage Co., 97 N.Y.S. 392, 49 Misc. 626.

Court has jurisdiction

Court has jurisdiction of action to enforce stockholders' liability to employees under Stock Corp.L. § 71, such an obligation being a quasi contract.—Horowitz v. Winter, 222 N.Y.S. 233, 129 Misc. 814.—Halkin v. Hume, 206 N.Y.S. 702, 123 Misc. 815.

Statutory obligation is quasi contract of which court has jurisdiction to amount of one thousand dollars.—Horowitz v. Winter, 222 N.Y.S. 233, 129 Misc. 814.

86. N.Y.—Ward v. American Surety Co., 54 N.Y.S. 177, 25 Misc. 198.

Installment of rent

N.Y.—Dusenbury v. Habisreitinger, 129 N.Y.S. 2, 72 Misc. 61.

Where title not in issue

N.Y.—Phelps v. Mallory, 129 N.Y.S. 397, 72 Misc. 74.

Death action

Court has jurisdiction of action by administratrix for negligent act causing her decedent's death, basis of action being personal injury causing death.—Greene v. Dowling, 270 N.Y.S. 811, 150 Misc. 865.

To stevedore

N.Y.—La Rosa v. Carter & Weekes Stevedoring Co., 188 N.Y.S. 396, 115 Misc. 392.

89. N.Y.—Bierman v. Werstein, 128 N.Y.S. 1091, 72 Misc. 29.

90. N.Y.—Post v. Levitan, 151 N.Y.S. 947, 88 Misc. 334.

Malicious injury

The court has jurisdiction to award other than actual damages in action for malicious and willful injury to property.—Billig v. Nelson Properties, 2 N.Y.S.2d 364, 166 Misc. 301.

Malicious injury

Municipal court of New York city has jurisdiction of action for malicious willful injury to property by conduct of creditor under power of attorney in executing assignment of debtor's wages in amount exceeding indebtedness.—Reilly v. Sachs, 272 N.Y.S. 125, 151 Misc. 699.

92. N.Y.—Busch v. Interborough Rapid Transit Co., 80 N.E. 107, 187 N.Y. 388, 10 Ann.Crs. 460, affirming 96 N.Y.S. 747, 110 App.Div. 705, reversing 93 N.Y.S. 372.
15 C.J. p 1000 note 32.

Action laid in contract

The court has jurisdiction of an action by a passenger against a carrier for assault, when laid in contract.—Daniel v. Brooklyn Heights R. Co., 135 N.Y.S. 698, 76 Misc. 482.

Aggravated assault followed by arrest

N.Y.—Baumstein v. New York City R. Co., 107 N.Y.S. 23, 56 Misc. 498.

93. N.Y.—Rothstein v. Brooklyn Heights R. Co., 114 N.Y.S. 344, 129 App.Div. 527.

94. N.Y.—Leyden v. Brooklyn Heights R. Co., 106 N.Y.S. 769, 122 App.Div. 383.

95. N.Y.—Thompson v. Gimbel, 128 N.Y.S. 210, 71 Misc. 126, affirmed 129 N.Y.S. 1025, 145 App.Div. 436, affirmed 100 N.E. 794, 207 N.Y. 659.

96. N.Y.—Hevia v. Lopardo, 111 N.Y.S. 663, 127 App.Div. 189.

97. N.Y.—Petersen v. Hudson P. Rose Co., 143 N.Y.S. 1038, 82 Misc. 451.

98. N.Y.—Keve v. Columbia Kid Hair Curlers Mfg. Co., 144 N.Y.S. 961, 159 App.Div. 733, affirmed 145 N.Y.S. 1072, 161 App.Div. 918.

duress,⁹⁹ actions for deceit,¹ actions involving questions of fraud,² actions on judgments rendered by the municipal court³ or by the supreme court,⁴ actions on foreign judgments,⁵ actions to recover unlawful preferences given by a bankrupt or an insolvent,⁶ actions by minors for maliciously causing discharge from employment,⁷ actions for the

dissolution of partnerships,⁸ actions to recover trust deposits in savings banks,⁹ reformation¹⁰ or cancellation¹¹ of instruments, rescission of contracts,¹² setting aside of assignments,¹³ accounting between partners,¹⁴ recovery of penalties provided for by statute,¹⁵ replevin of property¹⁶ foreclosure of

99. N.Y.—McGuire v. H. G. Vogel Co., 148 N.Y.S. 176, 86 Misc. 22. reversed on other grounds 149 N.Y.S. 756, 164 App.Div. 173.

15 C.J. p 1000 note 39.

1. N.Y.—Troster v. Dann, 145 N.Y.S. 56, 83 Misc. 399.

2. **Fraudulent award on fire insurance policy**

The court may take jurisdiction of an action on a fire insurance policy upon which an award invalid for fraud has been made.—Wilbisky v. German Alliance Ins. Co., 152 N.Y.S. 1048, 90 Misc. 335.

3. N.Y.—Heyman v. Wick, 255 N.Y.S. 356, 142 Misc. 577.

15 C.J. p 1000 note 42.

Court has jurisdiction

N.Y.—Susskind v. Freund, 263 N.Y.S. 300, 147 Misc. 486—Heyman v. Wick, 255 N.Y.S. 356, 142 Misc. 577—Mestrum v. Cranides, 153 N.Y.S. 677, 90 Misc. 610.

4. N.Y.—Weisel v. Old Dominion SS. Co., 91 N.Y.S. 140, 99 App.Div. 553.

15 C.J. p 1000 note 43.

5. N.Y.—Mills v. Mills, 158 N.Y.S. 753, 95 Misc. 231—American Cutlery Co. v. Alexander, 130 N.Y.S. 240, 72 Misc. 380.

Judgment of chancery court of New Jersey

N.Y.—Muttart v. Muttart, 93 N.Y.S. 468.

6. N.Y.—Royal Indemnity Co. v. Ginsberg, 284 N.Y.S. 551, 157 Misc. 507.

No jurisdiction

N.Y.—Early v. Electro Bleaching Gas Co., 153 N.Y.S. 698, 90 Misc. 613.

Action to recover money judgment to cover the amount alleged to have been paid as preference may be entertained.—Cohen v. Small, 105 N.Y.S. 287, 120 App.Div. 211, reversing 104 N.Y.S. 412, 54 Misc. 213, and affirmed 83 N.E. 1123, 190 N.Y. 568.

Bulk sale of corporate assets

Court has jurisdiction of creditor's action against buyer of corporate debtor's business at bulk sale, and against codefendants who were officers, directors, and stockholders of debtor, under statute imposing liability on directors and officers concerned in transferring insolvent corporation's property with intent of giving preference, and requiring transferees thereof to account, money

judgment rather than equitable relief being sought.—Royal Indemnity Co. v. Ginsberg, 284 N.Y.S. 551, 157 Misc. 507.

7. N.Y.—Scott v. Prudential Outfitting Co., 155 N.Y.S. 497, 92 Misc. 195.

8. N.Y.—Barnett v. Newbury, 150 N.Y.S. 550.

9. N.Y.—Herpe v. Herpe, 151 N.Y.S. 503, 89 Misc. 142.

10. No jurisdiction

N.Y.—Bernstein v. Colton, 5 N.Y.S. 2d 634, 254 App.Div. 896—Kabat v. Lefkowitz, 189 N.Y.S. 83—Metropolitan Electric Protective Co. v. Ashlamian, 185 N.Y.S. 358.

Lease

N.Y.—Kraus v. Smolen, 92 N.Y.S. 329, 46 Misc. 463—O'Rourke v. Snell, 147 N.Y.S. 31.

Validity of release

In action involving validity of release, judgment of municipal court, which necessarily required determination of whether the release represented true agreement between the parties, was res judicata, notwithstanding municipal court's lack of power to reform a written instrument.—Bernstein v. Colton, 5 N.Y.S. 2d 634, 254 App.Div. 896.

11. N.Y.—Pelgram v. Ehrenzweig, 109 N.Y.S. 55, 58 Misc. 195.

12. N.Y.—Bellettiere v. Lawlor, 93 N.Y.S. 471, 47 Misc. 161.

13. N.Y.—Midler v. Lese, 91 N.Y.S. 148, 45 Misc. 637.

14. N.Y.—Fischer v. Schwartz, 182 N.Y.S. 605.

15 C.J. p 1000 note 53.

No jurisdiction

N.Y.—Mennitto v. Iacovacci, 206 N.Y.S. 589, 123 Misc. 947—Rosenthal v. Garber, 202 N.Y.S. 708—Fischer v. Schwartz, 182 N.Y.S. 605.

Where partners, on dissolution, transfer accounts to one partner, he becomes the absolute owner, and may maintain an action at law in the municipal court against one of the former partners thereafter collecting assets, an accounting in such case not being necessary.—Barnett v. Newbury, 150 N.Y.S. 550.

15. N.Y.—Gormley v. Brooklyn Heights R. Co., 102 N.Y.S. 692, 52 Misc. 495.

16. N.Y.—Lyons v. Mulvihill, 125 N.Y.S. 475—Horowitz v. Decker, 88 N.Y.S. 217.

Court has jurisdiction

(1) Of action to recover possession of property seized without a search warrant by a New York city police officer, who knew that the property was stored in plaintiff's private dwelling.—Gatto v. Murray, 190 N.Y.S. 360, 116 Misc. 270, 39 N.Y.Cr. 255.

(2) Of action to replevy property purchased at auction sale.—Berman v. Peltz, 204 N.Y.S. 202, 123 Misc. 143.

(3) Of action for replevin of policies of insurance.—Weissman v. Weissman, 11 N.Y.S.2d 1008.

(4) Of action to replevin chattels, although they were unlawfully taken and detained by defendant in the city of New York, in a county other than that of plaintiff.—Luban v. Simmonds, 61 N.Y.S. 697, 46 App.Div. 192.

(5) Defendants other than chattel mortgagor withholding possession of chattel could be sued alone in replevin.—Wiggins v. Russel, 236 N.Y.S. 657, 227 App.Div. 742.

Coupling action with writ of replevin N.Y.—Triangle Mint Corporation v. Horgan, 233 N.Y.S. 570, 133 Misc. 802.

Against administrator

N.Y.—Hildredth v. Raffin, 125 N.Y.S. 695, 141 App.Div. 77.

Action arising out of terms of chattel mortgage

N.Y.—Ginzburg v. De Silvestri, 86 N.Y.S. 89, 42 Misc. 530.

Conditional vendee or mortgagee

Court has no jurisdiction of action of replevin against conditional vendee or mortgagee.—Kessler v. Zucker, 202 N.Y.S. 770—Commonwealth Finance Corporation v. De Vito, 179 N.Y.S. 67.

Conditional vendor of goods cannot maintain replevin in the municipal court against a city marshal who had taken the goods on execution directed against the purchaser's husband.—Di Toro v. Horn, 153 N.Y.S. 93.

Mortgagor

Court has no jurisdiction of replevin action against chattel mortgagor arising on chattel mortgage; and the fact that defendants other than chattel mortgagor were withholding possession did not alter fact that action was in replevin and against mortgagor.—Wiggins v.

chattel mortgages¹⁷ or other liens on personal property,¹⁸ foreclosure of mechanics' liens,¹⁹ and cancellation of mechanics' liens.²⁰

(b) Procedure and Practice

The procedure and practice in the municipal court of the city of New York is regulated largely by a code. General provisions of the civil practice act and rules apply, however, unless the matter is covered by the code or rules of the court.

The procedure and practice in the municipal court of the city of New York is regulated by

a municipal court code, and the rules as laid down therein are controlling and must be followed.²¹ In general, however, and in so far as is practical, the practice in this court conforms to that in the supreme court,²² general provisions of the civil practice act and rules being applicable in this court unless the matter covered thereby is regulated by the provisions of the municipal court code or the rules of the municipal court.²³

There are to be found in the reports numerous decisions with respect to practice in this court,²⁴

Russel, 236 N.Y.S. 657, 227 App.Div. 742.

Slot machines

Municipal court cannot determine whether slot machines constitute gambling devices by permitting return thereof before prosecution is ended.—Triangle Mint Corporation v. Horgan, 233 N.Y.S. 570, 133 Misc. 802.

17. N.Y.—Fidelity Loan Assoc. v. Connolly, 92 N.Y.S. 252.

Parol mortgage

It cannot be held that the municipal court has no jurisdiction to foreclose a lien, unless it be one created by a formal chattel mortgage, or conditional bill of sale, as provided in Mun.Court Code § 70, since a chattel mortgage may be created by parol, if accompanied by delivery.—Stultz v. Gamble, 180 N.Y.S. 424.

Proof

In action under Mun.Court Code §§ 70-77, to foreclose lien on machine sold under conditional bill of sale, machine being in possession of plaintiff, exclusion of testimony offered by plaintiff to show that machine was not "retaken," within meaning of Pers.Prop.L. §§ 65, 66, which would bar foreclosure proceedings under §§ 70-77, held error.—H. Malmén Co. v. Weaver, 164 N.Y.S. 229.

18. N.Y.—Jacobs v. Feinstein, 117 N.Y.S. 823, 133 App.Div. 416.

Jurisdiction of municipal court of city of New York as to enforcement of an attorney's lien see Attorney and Client § 238.

Seller's lien

(1) The seller may foreclose a lien in the municipal court.—Mathushek & Son, Piano Co. v. Weld, 158 N.Y.S. 169, 94 Misc. 282.—Hauss v. Savarese, 149 N.Y.S. 938, 87 Misc. 330.

(2) And this is true notwithstanding the contract of sale provided that title should remain in him until full payment of the price.—Rudenberg v. Schol, 144 N.Y.S. 748, 83 Misc. 39.

The jurisdiction is limited to foreclosing the lien, although the action also involves an injury to personal

property.—Samodwitz v. Karpf, 96 N.Y.S. 704, 80 App.Div. 496.

Equitable lien

Equitable lien of creditor on assets of debtor, transferred to holding corporation without creditor's consent, cannot be enforced in municipal court.—Atlantic Terra Cotta Co. v. Peter Guthy, Inc., 244 N.Y.S. 331, 138 Misc. 76.

19. N.Y.—County Trust Co. of White Plains v. Tremaine, 263 N.Y.S. 104, 146 Misc. 453.

15 C.J. p 1000 note 58.

Limited jurisdiction to foreclose

N.Y.—Schumer v. Kohn, 111 N.Y.S. 728.

Extent of jurisdiction

N.Y.—County Trust Co. of White Plains v. Tremaine, 263 N.Y.S. 104, 146 Misc. 453.

20. N.Y.—Steiger v. London, 102 N.Y.S. 497, 52 Misc. 462.

21. N.Y.—Mutual Braid Co. v. Jeffers, 174 N.Y.S. 730, 106 Misc. 494.—Yorke Waist Co. v. Rainbow, 154 N.Y.S. 990.

22. N.Y.—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748, reversing 193 N.Y.S. 514, 118 Misc. 457.—Long Island Machinery & Equipment Co. v. Jacobs, 281 N.Y.S. 443, 155 Misc. 794.—Sherman Sylvester Scheuer Bldg. Corporation v. Krull, 255 N.Y.S. 97, 142 Misc. 189.—Paterno Const. Co. v. Rentner, 191 N.Y.S. 517.

Except as otherwise provided

N.Y.—Friedman v. Phillips & Co., 201 N.Y.S. 53, 121 Misc. 21.

Relates to powers granted

Mun.Ct.Code § 15, requiring, except as otherwise provided, the municipal court procedure to conform to the supreme court procedure, applies only to powers specifically granted to the municipal court, or powers inherent in all courts of record.—Friedman v. Phillips & Co., 201 N.Y.S. 53, 121 Misc. 21.

23. N.Y.—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748, reversing 193 N.Y.S. 514, 118 Misc. 457.—Harber v. Gingold, 11 N.Y.S.2d 187,

170 Misc. 817.—Wilson & Co. v. Hershkowitz, 298 N.Y.S. 14, 163 Misc. 721.—Susskind v. Freund, 263 N.Y.S. 300, 147 Misc. 486.—Robert Reiner, Inc., v. Hamburg-American Line, 260 N.Y.S. 498, 145 Misc. 592.—Heyman v. Wick, 255 N.Y.S. 356, 142 Misc. 577.—Hahn v. Coltoff, 251 N.Y.S. 584, 140 Misc. 805.—Rubenstein v. Cohen, 246 N.Y.S. 692, 138 Misc. 305.—Meiker v. Guarino, 238 N.Y.S. 569, 135 Misc. 548.—Dilworth v. Yellow Taxi Corporation, 216 N.Y.S. 513, 127 Misc. 543, reversed on other grounds 221 N.Y.S. 813, 220 App.Div. 772.—Goldberg v. Candy Products Co., 215 N.Y.S. 772, 127 Misc. 455.—Irving Weinberg Dress Co. v. Goldsticker, 214 N.Y.S. 444, 126 Misc. 685.—S. L. & Co. v. Bock, 194 N.Y.S. 773, 118 Misc. 756.—Crowe v. Marsh Garage Co., 192 N.Y.S. 908, 117 Misc. 660.—Cochran v. Scherer, 192 N.Y.S. 199, 117 Misc. 765.—Ridley v. Sudbrink, 172 N.Y.S. 517, 105 Misc. 52.—I. & B. Upholstering Co. v. Kresel, 300 N.Y.S. 549.—Einstein v. Ulin, 194 N.Y.S. 830.

24. N.Y.—Tully v. Reclamation & Building Corporation, 269 N.Y.S. 835, 241 App.Div. 742.—People ex rel. 45 East Fifty-Seventh St. Co. v. Chivers, 205 N.Y.S. 460, 210 App.Div. 258.—Genet v. Johnson, 6 N.Y.S.2d 965.—Fristachi v. American Ry. Express Co., 184 N.Y.S. 473.—Hoffbauer v. Majestic Doll Co., 182 N.Y.S. 164.—Parker v. Belm, 169 N.Y.S. 592.

15 C.J. p 1000 note 62.

Disregarding unsubstantial errors

Municipal court has inherent statutory power to disregard unsubstantial omission, irregularity, or defect in proceedings.—Harlem Metal Corporation v. Segal, 3 N.Y.S.2d 969, 167 Misc. 321.

Proceeding without notice void

In municipal court, failure to give notice, whether upon motion or notice of trial, renders all subsequent proceedings, based thereon, void.—Genet v. Johnson, 6 N.Y.S.2d 965.

Retention of jurisdiction

The Municipal Court, having acquired jurisdiction of, and tried issues raised by parties to, action by

including adjudications as to such matters as and service²⁹ and including adjudications as to such venue²⁵ and change thereof,²⁶ parties,²⁷ process,²⁸

administrator of probably insolvent estate for replevin of household goods subject to warehouseman's lien, properly pleaded by defendant, for storage charges, will retain such jurisdiction, in absence of surrogate's court order transferring matter to latter court or facts showing that such transfer would serve interest of justice.—*Mingey v. Queensboro Storage Warehouse*, 7 N.Y.S.2d 614, 169 Misc. 347.

25. N.Y.—*Grady v. McHugh*, 226 N.Y.S. 608, 131 Misc. 303—*Baxter v. Bryant*, 149 N.Y.S. 527, 87 Misc. 180.

Construction of statute

Word "or" in statute authorizing action in district where all plaintiffs "or" all defendants reside out of city should be read "and."—*Grady v. McHugh*, 226 N.Y.S. 608, 131 Misc. 303.

Recovery of penalty

Under Mun.Ct.Code § 17, city's actions to recover penalty for violations of building code should be brought within the district of the municipal court in which the premises where the alleged violations occurred are situated.—*City of New York v. Greis*, 179 N.Y.S. 105, 109 Misc. 538.

Action to enforce mechanic's lien need not be brought in the county in which the property is situated.—*Baxter v. Bryant*, 149 N.Y.S. 527, 87 Misc. 180.

26. N.Y.—*Bjurstrom v. Lacov*, 171 N.Y.S. 222.

15 C.J. p 1001 note 64.

Right to change

N.Y.—*Levy v. Delwall Contracting Co.*, 243 N.Y.S. 385, 137 Misc. 687—*Great Woodworking Co. v. Walley*, 237 N.Y.S. 374, 135 Misc. 213—*Ashley v. Royal Indemnity Co.*, 210 N.Y.S. 513, 125 Misc. 161—*Prince v. Weiland*, 207 N.Y.S. 225, 124 Misc. 179—*Appelman v. Shapiro*, 176 N.Y.S. 20—*Bjurstrom v. Lacov*, 171 N.Y.S. 222.

Waiver or bar of right

N.Y.—*Rubenstein v. Cohen*, 246 N.Y.S. 692, 138 Misc. 305—*Brinn v. Rinderman*, 78 N.Y.S. 921, 38 Misc. 792.

On court's own motion

N.Y.—*Blackstone Institute v. Agnelli*, 276 N.Y.S. 713, 153 Misc. 760.

Time for motion

N.Y.—*Blackstone Institute v. Agnelli*, 276 N.Y.S. 713, 153 Misc. 760—*Rubenstein v. Cohen*, 246 N.Y.S. 692, 138 Misc. 305.

Place of business

Under Mun.Ct.Code § 17 subd 1, defendant held not entitled to change of venue from district of

plaintiff's residence to district where he had only a place of business.—*Schaffer v. Mechanics' & Traders' Ins. Co.*, 164 N.Y.S. 139, 99 Misc. 487.

Outside borough

Under Mun.Ct.Code § 7 subd 3, and § 17 subd 5, court held without power to change venue from one borough to another.—*Schaffer v. Mechanics' & Traders' Ins. Co.*, supra.

27. N.Y.—*Ridley v. Sudbrink*, 172 N.Y.S. 517, 105 Misc. 52—*Brasotti v. Peirano*, 157 N.Y.S. 844.

Bringing in additional parties

N.Y.—*Moylan v. Smith*, 189 N.Y.S. 200—*Beach v. Bongartz*, 180 N.Y.S. 420—*Fuchs v. Mutual Life Ins. Co. of New York*, 164 N.Y.S. 105—15 C.J. p 1001 note 65 [a].

Misjoinder

N.Y.—*Ridley v. Sudbrink*, 172 N.Y.S. 517, 105 Misc. 52.

28. N.Y.—*Tarrow v. The Maccabees*, Detroit, Mich., 300 N.Y.S. 856, 252 App.Div. 693.

15 C.J. p 1001 note 66.

Statement of cause of action

(1) Nature and substance of cause of action must be indorsed on, or annexed to, summons, otherwise summons is void.—*Steffens v. Martin*, 165 N.Y.S. 445, 100 Misc. 263.

(2) Without such statement or service or filing of complaint, the court does not acquire jurisdiction.—*Hughes v. Peerless Unit Ventilation Co.*, 168 N.Y.S. 641, 102 Misc. 214—*Pachman v. Greenwald*, 171 N.Y.S. 219—*Baum v. Halperin*, 169 N.Y.S. 489.

(3) Indorsement that action is for goods sold and delivered, while not sufficiently stating the nature and substance of plaintiff's cause of action, as required, is not defective as to defeat jurisdiction.—*Di Palma v. Quinn*, 171 N.Y.S. 339, 104 Misc. 93.

(4) Summons must show amount demanded is within court's jurisdiction.—*Gerken v. Gerken*, 199 N.Y.S. 169.

(5) Words "action for damage," indorsed on the summons, is not a sufficient compliance with requirement that nature and substance of action commenced by service of summons be indorsed on summons.—*Bloom v. Dicker*, 197 N.Y.S. 643, 120 Misc. 75.

Statement of time to appear or answer

N.Y.—*Tarrow v. The Maccabees*, Detroit, Mich., 300 N.Y.S. 856, 252 App.Div. 693—*Tucci v. Romeo*, 158 N.Y.S. 262, 94 Misc. 317.

Designation of district

Mistake in number of district as given in municipal court summons

was mere irregularity not affecting judgment, where correct address of clerk was given.—*Companelli v. Romono*, 249 N.Y.S. 38, 140 Misc. 72.

Alias summons

N.Y.—*Lipfert v. Maller*, 112 N.Y.S. 1056.

Raising objections to summons

Denial of motion to set aside summons does not preclude defendant from raising same objection at trial.—*Equitable Trust Co. of New York v. Salberg*, 136 N.Y.S. 52, 77 Misc. 129.

29. N.Y.—*Cantor v. Killen*, 5 N.Y.S. 2d 796, 167 Misc. 620—*Durand v. Lipman*, 299 N.Y.S. 769, 165 Misc. 1—*Pennington Furniture Co. v. Herman Miller Furniture Co.*, 275 N.Y.S. 904, 153 Misc. 669—*U. S. Cast Iron Pipe & Foundry Co. v. Hugh S. Roberts & Co.*, 187 N.Y.S. 95, 114 Misc. 560—*Sever v. Zucca*, 176 N.Y.S. 423, 106 Misc. 620—*Eureka Soap Co. v. Jungmann*, 121 N.Y.S. 233.

15 C.J. p 1001 note 67.

Validity of statute

N.Y.—*Pennington Furniture Co. v. Herman Miller Furniture Co.*, 275 N.Y.S. 904, 153 Misc. 669—*Drew v. Northwestern Corporation*, 233 N.Y.S. 292, 133 Misc. 706.

Service on attorney insufficient

N.Y.—*Newton v. Stachelberg*, 73 N.Y.S. 147, 36 Misc. 184.

Service of answer of another defendant is equivalent to service of summons by plaintiff on such defendant.—*Globe Indemnity Co. v. MacDougal*, 231 N.Y.S. 643, 133 Misc. 263.

On secretary of state

N.Y.—*Durand v. Lipman*, 299 N.Y.S. 769, 165 Misc. 1—*Osterhoudt v. Horowitz*, 240 N.Y.S. 683, 135 Misc. 744.

Personal service outside state

(1) Court has no power to direct service of summons outside city of New York.—*Tannenbaum v. Wehrle*, 233 N.Y.S. 316, 133 Misc. 577.

(2) Municipal court code held not to authorize personal service or non-resident defendant outside state after granting of attachment warrant against nonresident's property within state.—*Majestic Silk Mills v. Wenrich*, 281 N.Y.S. 444, 156 Misc. 215—*Long Island Machinery & Equipment Co. v. Jacobs*, 281 N.Y.S. 443, 155 Misc. 794.

Substituted service

(1) Procedure is purely statutory, and statutory provisions respecting it are mandatory and must be strictly construed and closely followed.—*Cantor v. Killen*, 5 N.Y.S.2d 796, 167 Misc. 620.

matters as return³⁰ of process, amendment of | process,³¹ appearances,³² pleadings³³ and amend-

(2) Proof that defendant is resident of the city of New York is necessary to justify issuance of order for substituted service.—Cantor v. Killen, 5 N.Y.S.2d 796, 167 Misc. 620.—Reiter v. Irving, 217 N.Y.S. 186, 128 Misc. 13.—Sever v. Zucca, 176 N.Y.S. 423, 106 Misc. 620.

(3) Substituted service is insufficient to give court jurisdiction, where defendant is not resident of the city.—Athias v. Hollingsworth, 179 N.Y.S. 606.

(4) Mun.Ct.Code § 23, in its provision that the contents of the order for substituted service, the method of service of summons, the proof of service, and the method of filing the order and papers on which it was granted, shall be the same as though the summons were issued out of the supreme court, unless otherwise provided, applies only to the practice and procedure where an order for substituted service has been made, and does not by reasonable implication provide the municipal court shall also have the same powers to make such an order as the supreme court possesses.—U. S. Cast Iron Pipe & Foundry Co. v. Hugh S. Roberts & Co., 187 N.Y.S. 95, 114 Misc. 560.

Mechanic's lien case

N.Y.—Bogopoler Realty Co. v. Schwartzmann, 110 N.Y.S. 853, 59 Misc. 495.

30. N.Y.—Bellom v. Schindler, 224 N.Y.S. 429, 130 Misc. 503.—Johnson v. Kalisak, 153 N.Y.S. 955, 90 Misc. 597.—H. F. N. Truelson Co. v. Rieger, 168 N.Y.S. 596.

Filing nunc pro tunc

Court has power to allow.—Bellom v. Schindler, 224 N.Y.S. 429, 130 Misc. 503.

Procedure on traverse of return

N.Y.—Phillips v. Albert, 142 N.Y.S. 325, 81 Misc. 131.

Districts where returnable

N.Y.—H. F. N. Truelson Co. v. Rieger, 168 N.Y.S. 596.

31. N.Y.—Steffens v. Martin, 165 N.Y.S. 445, 100 Misc. 263.—Krupit v. National Liberty Ins. Co. of America, 192 N.Y.S. 341.
15 C.J. p 1001 note 69.

Amending copy to conform to original

N.Y.—Krupit v. National Liberty Ins. Co. of America, 192 N.Y.S. 341.

Correction of name

N.Y.—Corn v. Heymsfeld, 183 N.Y.S. 447, 75 Misc. 478.

Void summons not amendable

N.Y.—Steffens v. Martin, 165 N.Y.S. 445, 100 Misc. 263.

32. N.Y.—Murian v. Malamor Dress Corporation, 278 N.Y.S. 184, 152

Misc. 304.—De Veaux v. Pachinsky, 169 N.Y.S. 1039.

15 C.J. p 1001 note 70.

What constitutes general appearance
N.Y.—De Veaux v. Pachinsky, 169 N.Y.S. 1039.

Effect of general appearance

(1) The court may entertain jurisdiction where defendant appears generally by attorney.—Elliott v. Savings Bank, 139 N.Y.S. 939, 79 Misc. 258.—Baum v. Halperin, 169 N.Y.S. 489.

(2) General appearance by defendant does not waive objection to jurisdiction of subject-matter on ground that defendant's business was within workmen's compensation law and that defendant had complied with such law.—Schattnner v. American Tobacco Co., 185 N.Y.S. 479, 100 Misc. 261.

Special appearance

(1) By affidavit to contest jurisdiction of person.—De Veaux v. Pachinsky, 169 N.Y.S. 1039.

(2) In action to recover sum paid, where defendant filed notice of special appearance objecting to jurisdiction of municipal court on ground that plaintiff's claim had been duly submitted to arbitration and was pending, municipal court had no jurisdiction to compel arbitration, either by mandatory order or by granting stay of proceedings pending submission thereto, since proper procedure required hearing on question raised by special appearance.—Murian Frocks v. Malamor Dress Corporation, 273 N.Y.S. 184, 152 Misc. 304.

Authority for

N.Y.—Lowenstein v. Royal Jewelry Mfg. Co., 169 N.Y.S. 994.

33. N.Y.—Beach v. Bongartz, 180 N.Y.S. 420.—Baum v. Halperin, 169 N.Y.S. 489.—Wahrenberger v. Kunz, 167 N.Y.S. 377.

15 C.J. p 1001 note 71.

To be liberally construed

N.Y.—McConnell v. Fried, 176 N.Y.S. 521.

Indorsement on summons

(1) May be considered oral complaint.—Hughes v. Peerless Unit Ventilation Co., 168 N.Y.S. 641, 102 Misc. 214.

(2) Sufficiency in replevin action.—Berman v. Peltz, 204 N.Y.S. 202, 123 Misc. 143.

Stating cause of action

N.Y.—Bloom v. Dicker, 197 N.Y.S. 643, 120 Misc. 75.

Filing writings

N.Y.—Blair & Rolland v. Turner, 168 N.Y.S. 660.

Filing answer

Where defendants attempted to file

answer within time made due by stipulation, clerk's refusal to accept it was unwarranted, and court had no power to impose terms, as on opening of a default.—Rosenberg v. Block, 181 N.Y.S. 392, 111 Misc. 437.

Sufficiency of answer

N.Y.—Stege v. Emerson, 194 N.Y.S. 457, 201 App.Div. 536.

Assigned claims

N.Y.—Rosenblum v. Warren-Nash Motor Corporation, 231 N.Y.S. 189, 133 Misc. 211.

Necessity of specific denial of signature to written instrument

N.Y.—Ward v. Jewish Leader Pub. Co., 159 N.Y.S. 762, 95 Misc. 571.

Allegation of facts authorizing equitable relief does not deprive the court of jurisdiction where the complaint demands only a money judgment.—Troster v. Dann, 145 N.Y.S. 56, 83 Misc. 399.

Set-off need not be pleaded in terms, but it is sufficient if the facts alleged apprise plaintiff of the issues, under the liberal rules for construction of pleadings in the municipal court.—Gerson v. Enterprise Tinware Co., Inc., 157 N.Y.S. 149.

Reply; necessity for

N.Y.—Kern v. Caledonian Ins. Co. of Scotland, 178 N.Y.S. 340, 109 Misc. 173.—Mundler v. Palmer, 165 N.Y.S. 987.

In summary proceedings

N.Y.—Huyler's v. Broadway-John St. Corporation, 186 N.Y.S. 290, 195 App.Div. 410.

Oral or written demurrer

N.Y.—Weiner v. Yale Knitting Mills, 123 N.Y.S. 327, 138 App.Div. 533.—U. S. Gas Fixture Co. of City of New York v. Boehmer, 126 N.Y.S. 73, 69 Misc. 618.—Soltz v. New York Taxicab Co., 115 N.Y.S. 217, 62 Misc. 492.

Verification

(1) Necessity for.—Wahrenberger v. Kunz, 167 N.Y.S. 377.

(2) Pleadings need not be verified, to entitle plaintiff to summary judgment, where cause of action is verified.—Mosca v. J. H. Parker-Eolus, 223 N.Y.S. 684, 130 Misc. 156.

Defects not appearing on face

Motion to strike defense based on affidavits not available.—Twenty Morningside Ave. Corporation v. Steinbach, 197 N.Y.S. 238, 119 Misc. 712.

Service

Under Mun.Ct.Rules, rule 33, court may regard papers filed as a nullity, where there is no service on adverse party, and may, in its discretion, order them stricken from files, or permit party in default to file them on condition.—Abraham v. Wilkes, 168

ments thereof,³⁴ bills of particulars,³⁵ counter- | claims,³⁶ joinder of actions,³⁷ consolidation of ac-

N.Y.S. 350, appeal dismissed 170 N.Y.S. 531.

Aid of court

Plaintiff without attorney is entitled to aid of court in so framing his complaint that defendant may know what to meet.—Reed v. Laudau, 115 N.Y.S. 1068.

Proof under pleadings

Mun.Ct.Code § 92, entitled, "Signature to Instrument; When Deemed Genuine," and providing that genuineness of signature to instrument is admitted, unless denied, relates solely to the genuineness of the signature, and a defendant is entitled to prove that a contract sued on was not the contract that he had made, in that it had been altered, under a general denial, without compliance with such statute.—Paramount Advertising Corporation v. Horowitz, 189 N.Y.S. 163.

Variance

N.Y.—Mamitz v. Arnofsky, 181 N.Y.S. 25.

34. N.Y.—Bunke v. N. Y. Telephone Co., 81 N.E. 1161, 188 N.Y. 600—Salmon v. D. A. Schulte, Inc., 276 N.Y.S. 535, 154 Misc. 139—Brook Iron Works v. Cohen, 246 N.Y.S. 329, 138 Misc. 416, reversed without opinion 256 N.Y.S. 411, 143 Misc. 531—Levine v. Kosher Matzo's Baking Co., 159 N.Y.S. 845, 95 Misc. 565—Universal Cutter Co. v. Emden, 107 N.Y.S. 669.

Statutory provision mandatory

N.Y.—Salmon v. D. A. Schulte, Inc., 276 N.Y.S. 535, 154 Misc. 139.

Right to generally

N.Y.—Hecht v. M & S Electric Co., 272 N.Y.S. 667, 151 Misc. 805—National City Bank of New York v. A. Stein & Co., 267 N.Y.S. 727, 149 Misc. 571—Master Modes v. Post, 252 N.Y.S. 190, 141 Misc. 351—Grossman v. Weiss, 221 N.Y.S. 266, 129 Misc. 234—Asch v. Price, 167 N.Y.S. 902, 101 Misc. 667—Miles v. Kuttner, 110 N.Y.S. 225, 59 Misc. 224—Alexander v. Sola, 185 N.Y.S. 869—Feintuck v. Atlantic Coast Line R. Co., 135 N.Y.S. 597.

Material defects are not amendable in petition and precept in summary proceeding.—Marmac Building & Holding Corporation v. Vassar Garage Corporation, 207 N.Y.S. 409, 124 Misc. 226.

Jurisdictional defects

(1) Where defendant appeared specially to object to the jurisdiction of court, court must confine rulings to objections before it, and cannot acquire jurisdiction by permitting an amendment to the complaint.—Gerken v. Gerken, 199 N.Y.S. 169.

(2) Failure of oral complaint in municipal court action for rent to allege that thirty days' notice of increase in rent was given, as required, held not jurisdictional defect, but court should have permitted landlord to amend, when tenant moved to dismiss complaint on that ground.—Kuhbach v. Stahl, 204 N.Y.S. 801, 123 Misc. 167.

Change in cause of action

Amendment introducing new cause of action or defense is permissible in furtherance of substantial justice.—Bunke v. New York Telephone Co., 97 N.Y.S. 66, 110 App.Div. 241, affirmed 81 N.E. 1161, 188 N.Y. 600—Shirtcliffe v. Wall, 74 N.Y.S. 189, 68 App.Div. 375—Hawkes v. Burke, 68 N.Y.S. 798, 34 Misc. 189—Thedford v. Reade, 59 N.Y.S. 537, 28 Misc. 563—Milch v. Westchester Fire Ins. Co., 34 N.Y.S. 15, 13 Misc. 231, 67 N.Y. St. 870—Barsotti v. Peirano, 157 N.Y.S. 844—Universal Cutter Co. v. Emden, 107 N.Y.S. 669—Morton v. Lederer, 84 N.Y.S. 132.

Conforming pleading to proof

N.Y.—Cooper v. Nelson, 268 N.Y.S. 241, 149 Misc. 688—Susskind v. Freund, 263 N.Y.S. 300, 147 Misc. 486—Marrer v. Marrer, 109 N.Y.S. 735, 58 Misc. 526—Profitos v. Comerma, 158 N.Y.S. 369, 94 Misc. 334—Poess v. Twelfth Ward Bank, 86 N.Y.S. 857, 43 Misc. 45, 14 N.Y. Ann.Cas. 439—Moran v. Brown, 113 N.Y.S. 1038.

Time for generally

N.Y.—Howe v. T. M. & J. M. Fox, 208 N.Y.S. 463, 124 Misc. 505—Cianguilli v. City of New York, 194 N.Y.S. 781—Gottlieb v. Peck & Mack Co., 125 N.Y.S. 829.

At trial

N.Y.—Equitable Auto Sales Co. v. Sherman, 170 N.Y.S. 948—Blake v. Malliet, 84 N.Y.S. 161.

After evidence is in

Under Mun.Ct.Act § 166, providing that the court must allow pleadings to be amended at any time if justice will be promoted thereby, it was not error to allow oral pleadings, in an action for the use and occupation of premises, to be amended so as to base the claim on trespass, after plaintiff's testimony was all in.—Bunke v. N. Y. Telephone Co., 81 N.E. 1161, 188 N.Y. 600, affirming 97 N.Y.S. 66, 110 App.Div. 241, affirming 91 N.Y.S. 390, 46 Misc. 97, 34 Civ.Proc.R. 170.

35. N.Y.—Silverstein v. B. F. Keith Corporation, 240 N.Y.S. 360, 136 Misc. 650—Teitelbaum v. Empire Bottling Works, 165 N.Y.S. 334, 100 Misc. 103—I. & B. Upholstering Co. v. Kresel, 300 N.Y.S. 549. 15 C.J. p 1001 note 73.

Procedure same as in supreme court N.Y.—I. & B. Upholstering Co. v. Kresel, 300 N.Y.S. 549.

Time for order

N.Y.—Paul B. Pough & Co. v. Cerimedo, 83 N.Y.S. 1054, 44 Misc. 246.

Contents

N.Y.—Bloom v. Dicker, 197 N.Y.S. 643, 120 Misc. 75.

Defects in pleading not supplied by bill

N.Y.—Samuelson v. Mayer, 123 N.Y.S. 413, 139 App.Div. 6, reversing 120 N.Y.S. 75, 65 Misc. 518.

Proof confined to bill

N.Y.—Kaplan v. Lanzner, 193 N.Y.S. 2.

Requirements as to preclusion of testimony

N.Y.—Hecht v. M & S Electric Co., 272 N.Y.S. 667, 151 Misc. 805—Silverstein v. B. F. Keith Corporation, 240 N.Y.S. 360, 136 Misc. 650—Teitelbaum v. Empire Bottling Works, 165 N.Y.S. 334, 100 Misc. 103.

Dismissal for lack of bill

Where defendant had no opportunity to move to dismiss complaint for lack of bill of particulars, there was no waiver by defendant.—Weil v. Gorman, 192 N.Y.S. 331.

35. N.Y.—Abrams v. Costas, 169 N.Y.S. 607, 102 Misc. 714—Emerson v. Benesch, 173 N.Y.S. 427. 15 C.J. p 1001 note 74.

Tort against contract proper

N.Y.—Abrams v. Costas, 169 N.Y.S. 607, 102 Misc. 714.

Counterclaim for accounting for money received by plaintiff as trustee.—Taylor v. Fitzgerald, 135 N.Y.S. 1092.

In summary proceedings to dispossess a tenant, he may set off against rent a debt due from the landlord.—Mandel v. Koerner, 152 N.Y.S. 847, 90 Misc. 9, reversing 149 N.Y.S. 455.

Set-off of judgments for costs

N.Y.—Donovan v. Powers, 156 N.Y.S. 691.

Amendment

N.Y.—O. Friedlander Chemical Co. v. Snowber, 183 N.Y.S. 43.

Disposition of counterclaim necessary

N.Y.—Reed Wire Specialties Co. v. Krasilovsky, 170 N.Y.S. 33.

37. **Civil practice act inapplicable** N.Y.—Gunner v. E. R. Squibb & Sons, 269 N.Y.S. 661, 150 Misc. 83.

What causes

(1) In action in municipal court of New York, any cause of action of which court has jurisdiction may be included in complaint, but court, in its discretion, may order severance.—Gunner v. E. R. Squibb & Sons, 269 N.Y.S. 661, 150 Misc. 83.

tions,³⁸ motions,³⁹ actions by one person on behalf of others,⁴⁰ tender in court,⁴¹ the time⁴² and mode⁴³ of raising jurisdictional questions, commissions to take testimony,⁴⁴ examinations before

trial,⁴⁵ interpleader,⁴⁶ arrest,⁴⁷ attachment⁴⁸ and garnishment,⁴⁹ warrant of seizure in foreclosure action,⁵⁰ and including adjudications as to such mat-

(2) Action against manufacturer based on negligence in manufacturing unwholesome food, and action against dealer based on breach of warranty for selling unwholesome food, held properly joined.—Gunner v. E. R. Squibb & Sons, *supra*.

38. N.Y.—Melker v. Guarino, 238 N.Y.S. 569, 135 Misc. 548.

Civil practice act applicable
N.Y.—Melker v. Guarino, *supra*.

Actions in different districts

Actions instituted in different, although proper, districts may be consolidated in one such district.—Melker v. Guarino, *supra*.

Nature of actions

Court authorized to consolidate actions for negligence arising from same circumstances and having same witnesses.—Agostinacci v. Brooklyn City R. Co., 254 N.Y.S. 485, 141 Misc. 908.

39. N.Y.—Henry v. Van Zonneveld, 168 N.Y.S. 621, 102 Misc. 216.

Renewal without leave

Denial of motion without leave to renew precludes bringing identical motion thereafter.—Birnberg v. Isquith, 214 N.Y.S. 104, 126 Misc. 584.

40. N.Y.—Reed v. Wiley, etc., Co., 101 N.Y.S. 39, 51 Misc. 574.

41. N.Y.—Douglas v. Reynard, 134 N.Y.S. 615.

42. N.Y.—Roberts, etc., Co. v. Dale, 132 N.Y.S. 404, 74 Misc. 390.

43. N.Y.—Heinzer v. Kretz, 154 N.Y.S. 197, 91 Misc. 58—Moran v. Welch, 154 N.Y.S. 157, 91 Misc. 15.

Deprivation of jurisdiction

In action for personal injuries, where complaint showed jurisdiction of subject matter in municipal court, whether it is deprived of that jurisdiction under workmen's compensation law cannot be determined by affidavits in advance of trial, but should be raised by answer or motion at close of trial, or when facts are all shown.—Schattnr v. American Tobacco Co., 165 N.Y.S. 479, 100 Misc. 261.

44. N.Y.—Anchor Realty Co. v. Bankers' Trust Co., 156 N.Y.S. 631, 93 Misc. 64—Nassau Finance Co. v. Suffrin, 150 N.Y.S. 690.

45. N.Y.—Crowe v. Marsh Garage Co., 192 N.Y.S. 908, 117 Misc. 660. 15 C.J. p 1001 note 80.

Civil practice act applicable

N.Y.—Goldberg v. Candy Products Co., 215 N.Y.S. 772, 127 Misc. 455—Crowe v. Marsh Garage Co., 192 N.Y.S. 908, 117 Misc. 660.

Validity of statute

N.Y.—Lotz v. Standard Vulcanite Pan Co., 168 N.Y.S. 446, 102 Misc. 68.

For amendment of complaint

N.Y.—Hughes v. Peerless Unit Ventilation Co., 168 N.Y.S. 641, 102 Misc. 214.

Examination of attorney not authorized

N.Y.—Hopkins v. Blossveren, 167 N.Y.S. 305, 101 Misc. 500.

Motion to vacate

Motion to vacate notice for examination of officer of defendant corporation before trial, returnable before justice of Supreme Court, is properly made in Municipal Court, where action is pending.—Goldberg v. Candy Products Co., 215 N.Y.S. 772, 127 Misc. 455.

46. N.Y.—Dealers Auto Clearing Corporation v. Gaetano, 6 N.Y.S.2d 27.

15 C.J. p 1001 note 81.

Leave to interplead after pleading general denial

N.Y.—Rohman v. Jaffer, 149 N.Y.S. 853, 87 Misc. 339.

In an action for conversion the court cannot enter an order of interpleader.—Oppenheim v. Levine, 156 N.Y.S. 599, 93 Misc. 47.

In replevin action

Statute authorizing third party to interplead and defend in municipal court is not applicable unless chattel has been replevied and impleaded defendant claims right of possession thereof.—Dealers Auto Clearing Corporation v. Gaetano, 6 N.Y.S.2d 27.

47. N.Y.—Jansen v. Meyer, 130 N.Y.S. 143.

15 C.J. p 1001 note 82.

Technical conversion by one who acts in good faith and under color of title is not a "wilful injury," within Mun.Ct.Act § 56, so as to render him subject to arrest.—Cohn v. Melancon, 151 N.Y.S. 39, 88 Misc. 549.

48. N.Y.—Mayefsky v. Davis, 248 N.Y.S. 721, 139 Misc. 506.

15 C.J. p 1001 note 83.

Validity of statute

N.Y.—L. Arbetter, Inc. v. Isabel, 263 N.Y.S. 176, 147 Misc. 54.

In rem proceeding

N.Y.—Davidoff v. Chipornoi, 166 N.Y.S. 996, 101 Misc. 291.

Affidavit

N.Y.—Nerenberg v. Keith, 167 N.Y.S. 612, 101 Misc. 551.

Service on defendant

Attachment cannot be procured in municipal court on ground of de-

fendant's nonresidence within state unless plaintiff can serve defendant within city.—Mayefsky v. Davis, 248 N.Y.S. 721, 139 Misc. 506.

Necessity for levy

N.Y.—Davidoff v. Chipornoi, 166 N.Y.S. 996, 101 Misc. 291.

Rights of third persons

(1) It has been held that Mun.Ct. Code § 50 does not provide exclusive remedy for retaking of personal property by third party claimant nor bar action in replevin for such purpose.—Hartford Acceptance Corporation v. Kirchheimer, 2 N.Y.S.2d 224, 166 Misc. 219.

(2) A contrary statement was made in a case, apparently by way of dictum, in which it was held that a third person could not move to vacate the warrant of attachment or levy made thereunder, the provision of the civil practice act permitting such motion being inapplicable to the municipal court.—L. Arbetter, Inc. v. Isabel, 263 N.Y.S. 176, 147 Misc. 54.

(3) In municipal court, remedy of third person claimant to property levied upon pursuant to attachment is confined strictly to attack upon levy.—L. Arbetter, Inc. v. Isabel, *supra*.

Vacating

Code provision requiring motion to vacate attachment to be before application of the property to the judgment, presupposes that the judgment is on valid notice, and otherwise does not apply.—Nerenberg v. Keith, 167 N.Y.S. 612, 101 Misc. 551.

Restitution

The municipal court of New York City has no power to order restitution of property sold under attachment, granting restitution after sale of property under vacated attachment and judgment not being one of general powers of court of record, such as the municipal court.—Friedman v. Phillips & Co., 201 N.Y.S. 53, 121 Misc. 21.

49. N.Y.—Lax v. Peierls, 147 N.Y.S. 801, 86 Misc. 26.

50. N.Y.—Buckley-Newhall Co. v. Bangs, 224 N.Y.S. 71, 130 Misc. 293—People v. Laueer, 141 N.Y.S. 296, 80 Misc. 438.

Notice necessary

(1) Warrant will be denied, where notice of application did not state time and place when application would be made.—Winterroth v. Scharger, 217 N.Y.S. 830, 128 Misc. 58.

(2) Affidavit in suit to foreclose lien on chattel, alleging whereabouts

ters as writs of replevin,⁵¹ notice of trial,⁵² dis- practice,⁵⁵ and including adjudications as to such continuances,⁵³ dismissals and nonsuits,⁵⁴ calendar

of mortgagor was unknown, although reasonable inquiry was made, and that, chattels had been secreted, dispensed with service of five days' notice.—*Buckley-Newhall Co. v. Bangs*, 224 N.Y.S. 71, 130 Misc. 293.

Return

Court has power to allow return to warrant of seizure nunc pro tunc as of proper date.—*Bellom v. Schindler*, 224 N.Y.S. 429, 130 Misc. 503.

Validity of writ

(1) Writ of seizure issued by city court to recover chattels on default under conditional sales contract held void.—*Grossman v. Weiss*, 221 N.Y.S. 266, 129 Misc. 234.

(2) Under provision of municipal court code requiring chattels seized in action to foreclose lien on chattels to be described by affidavit so that they may be readily identified, the granting of warrant of seizure as to chattels not enumerated in affidavit was error, and such chattels would be eliminated from the warrant.—*Municipal Capital Corporation v. Levine*, 13 N.Y.S.2d 895.

Damages for wrongful seizure

Where service on defendant was defective, depriving municipal court of jurisdiction to enter default judgment, court was without jurisdiction to assess damages and costs in defendant's favor on vacation of warrant of seizure.—*Universal Credit Co. v. Blinderman*, 288 N.Y.S. 79, 158 Misc. 917.

51. N.Y.—*Triangle Mint Corporation v. Horgan*, 233 N.Y.S. 570, 133 Misc. 802.

May be coupled with action

N.Y.—*Triangle Mint Corporation v. Horgan*, *supra*.

How issue raised

Defendant's motion in municipal court to vacate requisition of replevin and to dismiss the action must be denied as irregular procedure, his appropriate remedy being to answer and go to trial, rights of the parties not being determinable on motion.—*Berman v. Peltz*, 204 N.Y.S. 202, 123 Misc. 143.—*Herman v. Rubin*, 161 N.Y.S. 335.

Vacating writ

Court may vacate writ of replevin issued by it, especially where jurisdictional requirements are lacking.—*Triangle Mint Corporation v. Horgan*, 233 N.Y.S. 570, 133 Misc. 802.

Liability on undertaking

Demand by defendant for return of property is not condition precedent to commencement of action against surety on undertaking in replevin.—*Budracco v. National Surety Co.*, 182 N.Y.S. 590, 112 Misc. 133.

52. Statute strictly construed

N.Y.—*Haber v. Gingold*, 11 N.Y.S.2d 187, 170 Misc. 817.

Time for notice

N.Y.—*Haber v. Gingold*, 11 N.Y.S.2d 187, 170 Misc. 817.—*Bachrach v. Fisher & Grassgreen*, 244 N.Y.S. 23, 137 Misc. 382.—*Rethy v. Orszag*, 169 N.Y.S. 235, 102 Misc. 540.

Manner of service

To obtain proper jurisdiction for entry of judgment in municipal court, notice of trial must be served in manner prescribed by municipal court.—*Genet v. Johnson*, 6 N.Y.S.2d 965.

53. N.Y.—*Connecticut Blower Co. v. John Thatcher & Son*, 176 N.Y.S. 422, 106 Misc. 623.—*First National Bank v. Plimpton*, 203 N.Y.S. 102, 15 C.J. p 1001 note 85.

Supreme court rules applicable

N.Y.—*Broadway & Ninety-Fourth St. v. C. & L. Lunch Co.*, 190 N.Y.S. 563, 116 Misc. 440.

Counterclaim in issue

(1) Generally, where defendant pleads counterclaim, plaintiff may discontinue and prevent proof of the counterclaim.—*Engel v. Davis*, 142 N.Y.S. 469, 81 Misc. 202.

(2) Discontinuance by plaintiff landlord in summary proceedings will be denied in exercise of judicial discretion, where, after lengthy trial, sole issue is that raised by tenant's counterclaim.—*Broadway & Ninety-Fourth St. v. C. & L. Lunch Co.*, 190 N.Y.S. 563, 116 Misc. 440.

Terms permissible

N.Y.—*First Nat. Bank v. Plimpton*, 203 N.Y.S. 102.

54. N.Y.—*Rosenberg v. Syracuse Newspapers*, 289 N.Y.S. 91, 248 App.Div. 294.—*Kolassa v. Boockman*, 194 N.Y.S. 93, 15 C.J. p 1001 note 86.

Necessity for notice of motion

N.Y.—*Robert Reiner, Inc. v. Hamburg-American Line*, 260 N.Y.S. 498, 145 Misc. 592.

Not permissible on court's own motion

N.Y.—*Rosenberg v. Syracuse Newspapers*, 289 N.Y.S. 91, 248 App.Div. 294.

What constitutes

N.Y.—*Trost v. City of New York*, 177 N.Y.S. 220.

For want of prosecution

N.Y.—*Levy v. Metropolitan L. Ins. Co.*, 169 N.Y.S. 902, 95 Misc. 556.

For failure to file return

N.Y.—*Illowsky v. Bishop Babcock Becker Co.*, 158 N.Y.S. 247.

Failure to file complaint

Dismissal for failure to file complaint "within five days" is improper

where notice of order to file is not given.—*Schwartz, Jaffee & Chas. D. Jaffee Co. v. O. B. Potter Properties*, 182 N.Y.S. 685.

Where plaintiff fails to appear, the court can only dismiss.—*Wilson v. Silverman*, 154 N.Y.S. 143.

Duty of clerk

Municipal Court Rules, rule 8, makes it mandatory on the clerk to dismiss an action on failure of the plaintiff to file the summons with proof of service thereof within specified period.—*Kolassa v. Boockman*, 194 N.Y.S. 93.

Dismissal or nonsuit

Where court fails to note reason for dismissal, judgment is deemed to be one of nonsuit.—*Saraga v. Strauss*, 203 N.Y.S. 27, 208 App.Div. 66.

Dismissal on the merits is equivalent to a judgment for defendant on all the issues.—*Brook v. Levinson*, 159 N.Y.S. 880, 95 Misc. 567.

Dismissal of a case "reserved generally"

N.Y.—*Junk v. Moore*, 151 N.Y.S. 63, 88 Misc. 551.

55. N.Y.—*Smiley v. Hayat Carpet Cleaning Co.*, 261 N.Y.S. 224, 146 Misc. 319.—*Hahn v. Coltoff*, 251 N.Y.S. 584, 140 Misc. 805.

Construction of rules generally

Municipal court rule providing for order in which causes shall appear on trial calendar must be construed to mean daily trial calendar.—*Sherman Sylvester Scheuer Bldg. Corporation v. Krull*, 255 N.Y.S. 97, 142 Misc. 189.

Trial and reserved calendar

Order of municipal court, refusing to restore to trial calendar case placed on calendar of reserved cases, was erroneous under Municipal Court Rules, rule 9.—*Court Press v. Jackson*, 208 N.Y.S. 273, 124 Misc. 329.

Preferences

(1) Rules governing generally.—*Sherman Sylvester Scheuer Bldg. Corporation v. Krull*, 255 N.Y.S. 97, 142 Misc. 189.—*Hahn v. Coltoff*, 251 N.Y.S. 584, 140 Misc. 805.—*Esposito v. National Transp. Co.*, 248 N.Y.S. 672, 139 Misc. 504.

(2) Necessity for application.—*Hahn v. Coltoff*, *supra*.

(3) Grounds for.—*Smiley v. Hayat Carpet Cleaning Co.*, 261 N.Y.S. 224, 146 Misc. 319.

(4) Discretion of court.—*Sherman Sylvester Scheuer Bldg. Corporation v. Krull*, 255 N.Y.S. 97, 142 Misc. 189.

Restoration to day calendar

(1) Where case had been by stipulation placed on general calendar and plaintiff's attorney sought to have it restored to day calendar, copy of

matters as adjournments⁵⁶ and continuances,⁵⁷ stay | generally,⁶⁰ setting aside verdicts,⁶¹ motions for
of proceedings,⁵⁸ suits in forma pauperis,⁵⁹ trial | new trial,⁶² opening defaults,⁶³ the time within

order must be served on defendant's attorney.—U. S. Fidelity & Guarantee Co. v. Liberty Cloak Co., 185 N.Y. S. 278.

(2) Indorsement on summons not an order.—Stoneware Electric Stove Works v. Barrett, 190 N.Y.S. 120, 115 Misc. 605, reversed on other grounds 192 N.Y.S. 1.

Transfer from commercial to tort calendar

N.Y.—Smoler v. Hanscom Baking Corporation, 283 N.Y.S. 120, 156 Misc. 814.

56. N.Y.—Hertz v. Schmidt, 65 N.Y.S. 225, 31 Misc. 725—Avenue St. John & Fox St. Corp. v. Ensign Improvement Co., 164 N.Y.S. 684—Conlan v. Murry, 92 N.Y.S. 58.
15 C.J. p 1002 note 87.

Supreme Court rule applied

N.Y.—Berger v. Premo, 196 N.Y.S. 527, 119 Misc. 491.

Discretion of court

N.Y.—White v. Ritz Realty Corp., 170 N.Y.S. 409—Avenue St. John & Fox St. Corp. v. Ensign Improvement Co., 164 N.Y.S. 684.

Loss of jurisdiction by adjournment
N.Y.—Clemens v. Werner Co., 101 N.Y.S. 755, 52 Misc. 110.

Engagement of counsel

N.Y.—Goldstein v. Frumkes, 132 N.Y.S. 318, 74 Misc. 450—Dorfman v. Hirschfeld, 103 N.Y.S. 698, 53 Misc. 538—Glorieux v. Leonard, 196 N.Y.S. 497—Shandling v. Eisenberg, 181 N.Y.S. 450—Berman & Lesenger v. Phoenix Ribbon & Carbon Co., 179 N.Y.S. 850—R. M. Loewenthal & Co. v. Philadelphia Rubber Works Co., 176 N.Y.S. 738—H-as v. Silberman Realty Co., 167 N.Y.S. 341—Stein v. Cohen, 149 N.Y.S. 864—Schlesinger v. Mendelson, 130 N.Y.S. 235—Mann v. Heffer, 128 N.Y.S. 663—O'Brien v. Kuntz, 84 N.Y.S. 535, 14 Ann.Cas. 35.

Judgment after adjournment

Municipal court judgment, entered on day trial was commenced, although case was adjourned for further cross-examination, could not stand.—Lampel v. Goldstein, 167 N.Y.S. 576.

57. N.Y.—Abelow v. Bradley Contracting Co., 162 N.Y.S. 129, 97 Misc. 607.
15 C.J. p 1002 note 88.

58. N.Y.—Irving Weinberg Dress Co. v. Goldsticker, 214 N.Y.S. 444, 126 Misc. 685—Farber v. Flauman, 62 N.Y.S. 784, 30 Misc. 627.

Court is not authorized to stay proceedings until payment of costs in a former action between the same parties for the same cause.—Goldman v. Brooklyn Heights R. Co., 114

N.Y.S. 182, 129 App.Div. 657. Contra Wetzel v. Barhite, 157 N.Y.S. 297, 93 Misc. 496.

Time for service of order

N.Y.—Irving Weinberg Dress Co. v. Goldsticker, 214 N.Y.S. 444, 126 Misc. 685.

Extent of stay of warrant

N.Y.—Guttilla v. Dorf, 203 N.Y.S. 102, 122 Misc. 484.

59. N.Y.—Lampy v. Freedman, 111 N.Y.S. 685, 60 Misc. 70.

On issue of fact

Issue of fact in municipal court cannot be disposed of on motion, but requires trial.—Walteter v. Berman, 214 N.Y.S. 60, 126 Misc. 539.

Trial by court or jury

Court has no authority to direct a trial by jury after submission of cause to court.—White Star Garage v. Arizone, 176 N.Y.S. 31, 107 Misc. 237.

Conclusiveness of jury findings

Findings of jury to which framed issues of fact were submitted on consent of counsel were held conclusive on court, in view of evidentiary support therefor.—Feinstein v. City of New York, 283 N.Y.S. 335, 157 Misc. 157.

61. N.Y.—Mosapp v. Reddy, 197 N.Y.S. 222, 119 Misc. 438—Broadway & Ninety-Fourth St. v. C. & L. Lunch Co., 180 N.Y.S. 563, 116 Misc. 440—Levine v. Levine, 159 N.Y.S. 192, 95 Misc. 187.

Power of court

N.Y.—Cooper v. Nelson, 268 N.Y.S. 241, 149 Misc. 688—Stodder v. New England Nav. Co., 118 N.Y.S. 844, 134 App.Div. 221.

Motions to set aside

N.Y.—Conolly v. Jolly, 143 N.Y.S. 180, 86 Misc. 42.

Reinstatement of verdict

Court has power to reinstate verdict but should not where there was no error in original disposition.—Zeldman v. Yarrin, 6 N.Y.S.2d 65.

Motions for reargument

(1) Municipal court justice could grant reargument, and set aside verdict and grant new trial within twenty days after judgment, notwithstanding previous denial.—Prudential Paper Co. v. Ashland Press, 248 N.Y.S. 52, 231 App.Div. 515.

(2) But see case holding that the statutory power of trial judge to grant or deny motion to set aside jury verdict is exhausted after ruling on motion, the judge having no power thereafter to entertain a motion for reargument.—Guinta v. Yoost Photo Play Theatre Co., 213 N.Y.S. 394, 126 Misc. 375.

Grounds

(1) Mistake of jury is ground.—Bale v. Pass, 72 N.Y.S. 93, 64 App.Div. 302.

(2) Where the testimony was conflicting, and verdict was not against the weight of the evidence, it was error for court to set verdict aside.—Klass v. Ph. Davis & Co., 182 N.Y.S. 885.

(3) Where, in personal injury action, at the conclusion of the case no motion was made for a directed verdict, there was a sharp conflict in the evidence, and nothing to indicate that the verdict for plaintiff was the result of sympathy, bias, or prejudice, or that the accident could not have happened as plaintiff and his witness testified, the municipal court's order setting the verdict aside will be reversed.—Morgenstern v. Dry Dock, E. B. & B. R. Co., 199 N.Y.S. 68.

(4) Where specific sum is concededly due, landlord in summary proceedings in municipal court, in which proceeding tenant filed counterclaim, motion to set aside verdict for less sum, and for new trial, should be granted, unless tenant stipulates to correct verdict.—Broadway & Ninety-Fourth St. v. C. & L. Lunch Co., 190 N.Y.S. 563, 116 Misc. 440.

Retrial of case necessary

N.Y.—Murphy v. Joline, 115 N.Y.S. 108, 62 Misc. 461.

Reduction

Municipal court had no power to reduce verdict for personal injuries.—Milder v. Belt Line Ry. Corp., 168 N.Y.S. 6.

62. Time for

N.Y.—Odin Holding Corporation v. Cadwell, 275 N.Y.S. 98, 153 Misc. 426—J. M. Etzel Co. v. Fairchild Sons, 169 N.Y.S. 504—Lehman-Bleyer Paper Co. v. Public Bank of New York City, 166 N.Y.S. 707.

No power to reduce time for giving notice of motion

N.Y.—Birns Express Co., Inc. v. Foster-Scott Ice Co., 144 N.Y.S. 683.

Reference to trial justice

N.Y.—Finkelstein v. Friedman, 164 N.Y.S. 822.

63. N.Y.—Henry v. Van Zonneveld, 168 N.Y.S. 621, 102 Misc. 216—Koerkle v. Pangborn, 67 N.Y.S. 898, 33 Misc. 476—Schlamm v. De Milt, 184 N.Y.S. 479—Berman & Lesinger Phoenix Ribbon & Carbon Co., 179 N.Y.S. 850—Athias v. Hollingsworth, 179 N.Y.S. 606—Bird v. Samuel D. Davis Const. Co., 173

N.Y.S. 152—Rudolph v. Newcombe, 168 N.Y.S. 687.
15 C.J. p 1002 note 92.

Construction of statute

N.Y.—Daskal v. Corsan Cracker Co., 220 N.Y.S. 544, 219 App.Div. 329.

Grounds for

(1) In general.—Rudnick v. Hultnick, 198 N.Y.S. 354, 120 Misc. 383—Berger v. Premo, 196 N.Y.S. 527, 119 Misc. 491—Zimmer v. Union Ry. Co. of New York City, 192 N.Y.S. 229, 118 Misc. 77—Schwartz & Weisner Holding Corporation v. Fernald, 191 N.Y.S. 369, 117 Misc. 575—Clarrissio v. Coney Island & B. R. Co., 172 N.Y.S. 183, 104 Misc. 592—Friedman v. Belmont Trimming Co., 199 N.Y.S. 121—Well v. Gorman, 192 N.Y.S. 331—West v. Avidan, 191 N.Y.S. 720—South American Pub. Co. v. Argos Steel Products Corporation, 191 N.Y.S. 716—Orloff & Zweiter v. Drayer, 186 N.Y.S. 587—Browning v. Billingsley, 185 N.Y.S. 1—Margon v. General Development Co., 184 N.Y.S. 706—Seaberg v. Town Taxi Co., 184 N.Y.S. 629—Hilleary v. Wells Fargo & Co. Express, 184 N.Y.S. 493—Schlamm v. De Milt, 184 N.Y.S. 479—Giardina v. Bonanno, 184 N.Y.S. 478—Shandling v. Eisenberg, 181 N.Y.S. 450—Harlem Lumber Co. v. Mosson, 182 N.Y.S. 603—Jennings v. Carling, 181 N.Y.S. 359—Athias v. Hollingsworth, 179 N.Y.S. 606—Higgins v. Washington Heights Hospital, 170 N.Y.S. 411—Shapiro v. Gordon, 170 N.Y.S. 371.

(2) Unconstitutionality of Municipal Court Code § 48, on which plaintiff relies to show jurisdiction in attachment against nonresident defendants not served, was held not to affect right of defendants voluntarily appearing to have their motion to open default granted.—Henry v. Van Zonneveld, 168 N.Y.S. 621, 102 Misc. 216.

Requirements of motion

(1) Mere notice of motion, without affidavits, is insufficient.—Kerr v. Hobson, 182 N.Y.S. 217.

(2) Necessity for affidavit of merits.—Well v. Gorman, 192 N.Y.S. 331—Hilleary v. Wells Fargo & Co. Express, 184 N.Y.S. 493—Hurta Realty Co. v. Greenstone, 184 N.Y.S. 477—Eichenbaum v. Frank Melville, Inc., 182 N.Y.S. 163.

(3) It is immaterial that affidavit of merits accompanying motion to open default in municipal court is insufficient, where there was no default.—Lordi Const. Co. v. Priore, 191 N.Y.S. 721.

On terms

N.Y.—Cassin v. Scala, 275 N.Y.S. 162, 153 Misc. 425—Michael v. Rand Coffee Stores, 239 N.Y.S. 330, 136 Misc. 211—South American Pub. Co. v. Argos Steel Products Corpo-

ration, 191 N.Y.S. 716—Tettler v. Ebenstein, 189 N.Y.S. 33—Atkins v. K. & G. Operating Corporation, 186 N.Y.S. 616—Eagle Die Co. v. Gelatoid Corporation, 186 N.Y.S. 610—Eichenbaum v. Frank Melville, Inc., 182 N.Y.S. 163—Rosenberg v. Case Hotel Co., 166 N.Y.S. 750.

Without terms

N.Y.—Ryan v. Megrue, 198 N.Y.S. 506—Dressler v. Hochstetter, 176 N.Y.S. 1—L. Schulman & Son v. Moore, 173 N.Y.S. 365—Frank Hayden, Inc. v. Robinson, 159 N.Y.S. 861.

Notice required

N.Y.—Wiener v. Hatch, 158 N.Y.S. 805.

In summary proceedings

N.Y.—Moritz v. Gouze, 159 N.Y.S. 821.

Time for opening

(1) Court has no jurisdiction to open default more than one year from date of entry.—Scott v. Hemmer, 227 N.Y.S. 171, 131 Misc. 474, affirmed 228 N.Y.S. 896, 223 App.Div. 872—Weiss v. Forty-Second St., M. & St. N. Ave. Ry. Co., 205 N.Y.S. 428, 123 Misc. 387—Giovini v. Arluck, 190 N.Y.S. 627, 117 Misc. 100—Bernstein v. Rubin, 176 N.Y.S. 80.

(2) This rule is inapplicable where ground is lack of notice of trial.—R. Z. P. Line Poultry Market v. Goldman, 255 N.Y.S. 439, 142 Misc. 727.

(3) After entry of appellate term's order reversing municipal court's order opening defendant's default, and reinstating judgments, municipal court was without power to reopen default, in absence of leave from appellate term to renew motion, especially where no fact was shown, on renewed motion, not shown or well known to defendant when first motion was made.—Negreen v. Stokes, 206 N.Y.S. 608, 123 Misc. 929.

(4) Defendant against whom judgment was entered in municipal court could not be denied relief in 1938 simply on ground that plaintiff entered his judgment in 1934, where defendant claimed that proper notice of trial had never been served on defendant's attorney and that case had been improperly on the calendar and inquest had been unduly taken.—Genet v. Johnson, 6 N.Y.S.2d 965.

(5) As respects defendant's right to have a judgment entered in March, 1934, vacated on ground that proper notice of trial was never served on defendant's attorney, laches was to be reckoned from day that knowledge of judgment was brought home to defendant, and not from its day of entry.—Genet v. Johnson, supra.

Laches

N.Y.—Intercity Carnival Co. v. Illions, 239 N.Y.S. 128, 136 Misc. 56—Dickman v. Union Ry. Co. of New York, 233 N.Y.S. 331, 133 Misc. 710.

Order as self-operating

An order opening defendant's default on payment of ten dollars costs, and providing for denial of the motion if the costs were not paid, was self-operating, making needless second order denying motion for nonpayment of costs.—Berman & Lessenger v. Phoenix Ribbon & Carbon Co., 179 N.Y.S. 850.

Setting case for trial

(1) Statutory provision for setting case down for trial on granting motion to open default, and to vacate judgment entered thereon, was inapplicable to case wherein issue had not been joined and no facts showing propriety of such action were presented.—217 Front St. Metals & Rubber Corporation v. Klug, 256 N.Y.S. 48, 143 Misc. 164.

(2) Necessity for motion.—Weiss v. Forty-Second St., M. & St. N. Ave. Ry. Co., 205 N.Y.S. 428, 123 Misc. 387.

(3) Entry of order necessary.—Bird v. Samuel D. Davis Const. Co., 173 N.Y.S. 152.

Renewal of motion

(1) Where no fact was shown on a renewed motion to open a default judgment in the municipal court that was not either shown or well known to the parties when the first motion was denied without leave to renew it, the renewed motion will be denied, as the municipal court is a court of record, and its orders determining motions are res judicata, unless material and controlling facts not presented on the first motion are disclosed on the second.—American Dry Plate Co. v. New York Ferrotype Co., 200 N.Y.S. 115.

(2) Where successive motions to open default and vacate judgment and for reargument in the municipal court were denied, and an appeal from the last motion for reargument was dismissed, the orders were res judicata, and in the absence of facts additional to those presented on the previous motions an order on rehearing, granting the motion to open default, could not stand.—Sontag v. Katzenberg, 204 N.Y.S. 207, 123 Misc. 145.

Liability of surety on undertaking
N.Y.—Einstein v. Ulin, 194 N.Y.S. 830.

Court may require surety company bond as a condition to the vacation of a default for want of service.—Duly v. Herman, 145 N.Y.S. 900, 84 Misc. 26.

which a decision must be rendered,⁶⁴ judgments⁶⁵ | judgments by default,⁶⁸ judgments on confession or and orders⁶⁶ generally, judgments on pleadings,⁶⁷

64. N.Y.—Shaffer v. Vandewater, 137 N.Y.S. 857, 78 Misc. 133—Landesberg v. Marchitto, 180 N.Y.S. 410—Columbia Graphophone Co. v. Deutsch, 165 N.Y.S. 935.

Calculation of time

(1) Date of rendering of decision as distinguished from date of filing was held to control, as respects applicability of Municipal Court Code § 119, requiring decision to be rendered within fourteen days after submission of case, hence decision rendered within fourteen days, although not filed until fifteen days after final submission, was valid.—Drabik v. John Hancock Mut. Life Ins. Co., 279 N.Y.S. 268, 154 Misc. 829.

(2) From time of filing briefs by stipulation.—Beinert v. William M. Tivoli & Co., 116 N.Y.S. 4, 62 Misc. 616—Cohen v. Rafsky, 187 N.Y.S. 62—A. M. Eisenberg Co. v. Janzlik, 92 N.Y.S. 247.

Jurisdiction lost by delay

N.Y.—Shaffer v. Vandewater, 137 N.Y.S. 857, 78 Misc. 133—Imperiale v. Finalle, 191 N.Y.S. 341—Cohen v. Rafsky, 187 N.Y.S. 62—U. S. Realty & Improvement Co. v. Eging, 174 N.Y.S. 647—J. M. Etzel Co. v. Fairchild Sons, 169 N.Y.S. 504—Holste v. Ardle, 163 N.Y.S. 1084.

Extension of time

N.Y.—Pearlstein v. Bechtel, 188 N.Y.S. 404.

Time for rendering judgments

(1) Judgment not rendered or entered within fourteen days after submission of case is void, under Municipal Court Code § 119. In such event, the case should be placed on the general calendar.—Association of Dress Mfg. Co. v. New Era Dress Co., 199 N.Y.S. 554.

(2) Under Municipal Court Code § 119, the justice, after he has duly rendered his decision within fourteen days, may thereafter cause it to be filed with the proper clerk, and if the method adopted fails he may grant the motion of the prevailing party for an order directing the clerk to enter the judgment and to file copies of lost papers, the "rendering" of a judgment not involving the ministerial act, which may be performed after the required time.—Austin, Nichols & Co. v. Jobes, 182 N.Y.S. 777, 112 Misc. 121.

Amendatory judgment

N.Y.—Trustees of Masonic Hall and Asylum Fund v. Fontana, 164 N.Y.S. 370, 99 Misc. 497—Palmer v. Walter J. Burke Garage Co., 173 N.Y.S. 60, affirmed 176 N.Y.S. 914, 188 App.Div. 917—Hyman v. Nev-

a-Hone Razor Strop Co., 173 N.Y.S. 56.

Amendment of decision

N.Y.—Edwards v. Prudential Ins. Co. of America, 297 N.Y.S. 902, 163 Misc. 706.

65. N.Y.—Susskind v. Freund, 263 N.Y.S. 300, 147 Misc. 486—Heyman v. Wick, 255 N.Y.S. 356, 142 Misc. 577—Hall v. Superb Iron & Bronze Co., 191 N.Y.S. 690. 15 C.J. p 1002 note 94.

Construction of statute

N.Y.—Diskal v. Corsan Cracker Co., 220 N.Y.S. 544, 219 App.Div. 829.

What constitutes

A writing, signed by clerk, stating that motion for judgment to dismiss complaint has been granted, is not judgment, where there was no direction by justice to enter judgment, and decision on which it was based was to be made effective by subsequent order.—Allen v. Wolkoff, 166 N.Y.S. 1010.

Preparation of

On refusal of successful party's attorney to prepare judgment, it may be prepared by opposing attorney or clerk under court's direction.—Midtown Plottage Corporation v. Sullivan, 227 N.Y.S. 357, 131 Misc. 473.

Signing by clerk

Where clerk failed to sign judgment, justice of municipal court properly allowed judgment to be signed by the clerk nunc pro tunc.—Edelstein v. Oxman, 13 N.Y.S.2d 95, 171 Misc. 552.

Notice to clerk

Municipal court judgment, prepared and delivered without notice to clerk by attorney for unsuccessful party, was improperly entered, and court should order change of date of its entry to permit appellate review.—McIntyre v. Borrero, 215 N.Y.S. 435, 127 Misc. 149.

Entry by clerk

Statutory requirement that successful party's attorney enter judgment was merely directory, and judgment entered by clerk was valid.—Godwin v. Hauer, 227 N.Y.S. 355, 131 Misc. 772.

Necessity for notice of entry

N.Y.—Lane v. The Mirror, 236 N.Y.S. 273, 134 Misc. 767—Chatham Phoenix Nat. Bank & Trust Co. v. Pascal, 233 N.Y.S. 356, 133 Misc. 708.

As between defendants

(1) Court has power to render judgment as between defendants.—McCorken v. Spiegel, 216 N.Y.S. 561, 127 Misc. 496—Fuchs v. Mutual Life Ins. Co. of New York, 164 N.Y.S. 105.

(2) In action against two defendants, judgment for plaintiff, not

specifying which defendant it was against, was erroneous.—Markowitz v. Ratner, 145 N.Y.S. 934.

Against deceased person

N.Y.—Hopkin v. Bowsky, 246 N.Y.S. 453, 138 Misc. 251.

Actions on

N.Y.—Susskind v. Freund, 263 N.Y.S. 300, 147 Misc. 486—Heyman v. Wick, 255 N.Y.S. 356, 142 Misc. 577.

Disposition of counterclaim necessary

N.Y.—Miller v. Garfinkel, 167 N.Y.S. 293.

66. N.Y.—Fisher v. Independent Brothers of Nieshweiser, 147 N.Y.S. 390, 84 Misc. 332.

On consent

N.Y.—Dalerose Realty Corporation v. Kleinberg, 190 N.Y.S. 317, 116 Misc. 603.

Res judicata

N.Y.—Levrard Realty Corporation v. James F. Ogden, Inc., 233 N.Y.S. 221, 226 App.Div. 675.

67. N.Y.—Cochran v. Scherer, 192 N.Y.S. 199, 117 Misc. 765.

15 C.J. p 1002 note 96.

Basis for

N.Y.—Paterno Const. Co. v. Rentner, 191 N.Y.S. 517.

Motion may be made at any time after issue joined

N.Y.—Fried v. Rivkin, 159 N.Y.S. 373, 94 Misc. 319.

Right to generally

If landlord, suing to recover unpaid installment of rent, pleads prior adjudication of reasonableness thereof in summary proceeding for non-payment, judgment must be granted on pleadings, unless defendant pleads facts arising since period for which adjudication was made, affecting rental value.—Paterno Const. Co. v. Rentner, 191 N.Y.S. 517.

Defense valid on face

Court has no power to grant judgment on pleadings for plaintiff where defense is valid on face of pleadings.—Paterno Const. Co. v. Rentner, 191 N.Y.S. 517.

68. N.Y.—Cassin v. Scala, 275 N.Y.S. 162, 153 Misc. 425—Farber v. Tannenbaum, 173 N.Y.S. 131, 105 Misc. 301.

15 C.J. p 1002 note 97.

Appearance of case on calendar

N.Y.—R. Z. P. Line Poultry Market v. Goldman, 255 N.Y.S. 439, 142 Misc. 727.

Inquest in case of unliquidated damages

N.Y.—Anstendig v. A. C. & H. H. Hall Realty Co., 276 N.Y.S. 216, 153 Misc. 839—Cassin v. Scala, 275 N.Y.S. 162, 153 Misc. 425—Spector v. Frank Jacobs, Inc., 253 N.Y.S.

by consent,⁶⁹ the construction and effect of judgment,⁷² the amendment,⁷³ modification, or variations,⁷⁰ the suspension of judgments,⁷¹ summary judgment,⁷⁴ of judgments or decrees, the opening of

78, 141 Misc. 697—Brothman v. Schneider, 12 N.Y.S.2d 513.

Inquest before clerk improper

N.Y.—Brothman v. Schneider, 12 N.Y.S.2d 513.

After appearance by attorney

Default judgment after defendant's appearance by attorney and death was unauthorized, where plaintiff failed to serve proofs and affidavits before defendant's death.—Hopkin v. Bowsky, 246 N.Y.S. 453, 138 Misc. 251.

Clerk's duty to enter ministerial

N.Y.—Voltolino v. Cannatto, 231 N.Y.S. 646, 133 Misc. 267.

69. Without action

Prior to the amendment of New York City Municipal Court Code § 6 subd 3, the court had no power to render a judgment on a confession without an action.—Karlin v. Pooley, 203 N.Y.S. 113, 122 Misc. 463.

Place of entry

Provision of Civ.Pract.Act § 543, with respect to place of entry of a judgment on confession without an action, is inapplicable to municipal court.—Yorysch v. Wallach, 5 N.Y.S.2d 782, 168 Misc. 257.

70. N.Y.—Beck v. Schneider, 145 N.Y.S. 1046, 84 Misc. 23.

In case of conflict between the judgment and the stenographer's notes, the judgment controls.—Gruhn v. Brooklyn Heights R. Co., 154 N.Y.S. 1094, 91 Misc. 547.

71. N.Y.—Danzilo v. Danzilo, 143 N.Y.S. 936, 163 App.Div. 617.

Entry by clerk

On filing of written consent to judgment in municipal court, nothing remained except for clerk to enter judgment.—Tully v. Reclamation & Building Corporation, 269 N.Y.S. 835, 241 App.Div. 742.

Cure of error

(1) Clerk's omission to enter judgment in municipal court in accordance with written consent of parties is curable at any time by order nunc pro tunc.—Tully v. Reclamation & Building Corporation, supra.

(2) Such order has effect of sustaining prior and subsequent proceedings, including issuance of execution.—Tully v. Reclamation & Building Corporation, supra.

72. Rules of Civil Practice applicable

N.Y.—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, 197 N.Y.S. 405, 203 App.Div. 748, reversing 193 N.Y.S. 514, 118 Misc. 457.

Requirements for

N.Y.—Ritz Carlton Restaurant & Hotel Co. v. Ditmars, supra.

73. N.Y.—Back v. First Solotwiner

Sick Ben. Soc., 282 N.Y.S. 107, 155 Misc. 585.

15 C.J. p 1002 note 1.

Time for amendment

N.Y.—Back v. First Solotwiner Sick Ben. Soc., supra—Lane v. The Mirror, 236 N.Y.S. 273, 134 Misc. 767—Porter v. Chieffo, 149 N.Y.S. 956, 87 Misc. 318.

Amendment to accord with correct calculation of interest

N.Y.—Mitchell v. Security Bank, 160 N.Y.S. 762, 95 Misc. 506.

Amount cannot be increased

N.Y.—Schwartzschild v. National Mourning Goods Co., 167 N.Y.S. 232—Brooks v. Kaempfer, 163 N.Y.S. 1077.

Reduction of amount improper

N.Y.—Blum v. Hecht, 193 N.Y.S. 535.

Disposing of counterclaim

Under Municipal Court Code § 6 subd. 7, on motion made by plaintiff within time provided in § 129 subd 3, municipal court could make order amending judgment for plaintiff, to contain recital that defendant's counterclaim was dismissed on merits.—Greenbaum v. Goldberg, 172 N.Y.S. 744, 105 Misc. 206.

Substitution of new judgment

Where practical effect of order would be substitution of new judgment, and one for plaintiff in place of that theretofore rendered for defendant, it was wholly unauthorized and a nullity.—Parker v. Beim, 169 N.Y.S. 592.

74. N.Y.—Back v. First Solotwiner Sick Ben. Soc., 280 N.Y.S. 107, 155 Misc. 585—Fristachi v. American Ry. Express Co., 184 N.Y.S. 473—Landesberg v. Marchitto, 180 N.Y.S. 410.

15 C.J. p 1002 note 2.

Validity of statute authorizing

N.Y.—Bradstreet's Collection Bureau v. Nagler's Brass Works, 167 N.Y.S. 751, 180 App.Div. 511, affirming 159 N.Y.S. 202, 95 Misc. 188.

Power of court

(1) Power vested in municipal court to vacate judgment in furtherance of justice for any error in form or substance is not restricted to any prescribed period.—R. Z. P. Line Poultry Market v. Goldman, 255 N.Y.S. 439, 142 Misc. 727.

(2) Municipal court, after discharging jury and entering judgment on verdict directed for plaintiff, was without power to vacate judgment and direct verdict for defendant.—Happy Service Garage Corporation v. Magnante, 270 N.Y.S. 541, 150 Misc. 901.

Grounds for modification

Defendant was not entitled to modification of judgment of municipal

court for plaintiff which was not correction for error of form or substance shown in record.—Back v. First Solotwiner Sick Ben. Soc., 280 N.Y.S. 107, 155 Misc. 585.

Grounds for vacating

N.Y.—Wolf Kahn Realty Corporation v. Eckhardt-Berman Furniture Co., 262 N.Y.S. 819, 146 Misc. 767—R. Z. P. Line Poultry Market v. Goldman, 255 N.Y.S. 439, 142 Misc. 727—Connecticut Blower Co. v. Thatcher & Son, 176 N.Y.S. 422, 106 Misc. 623—Stoneware Electric Stove Works v. Barrett, 192 N.Y.S. 1, 117 Misc. 699, reversing 190 N.Y.S. 120, 115 Misc. 605—Clarizio v. Coney Island & B. R. Co., 172 N.Y.S. 183, 104 Misc. 592—Di Palma v. Quinn, 171 N.Y.S. 339, 104 Misc. 93—Review & Record Co. v. Gilbreth, 120 N.Y.S. 100, 65 Misc. 503—Glorieux v. Leonard, 196 N.Y.S. 497—Rosenthal v. C. G. Gunther's Sons, 192 N.Y.S. 869—Imperiale v. Fanelli, 191 N.Y.S. 341—Heinz v. Odwak, 171 N.Y.S. 38.

Court should give reasons

N.Y.—Sylvan Mortgage Co. v. Young, 188 N.Y.S. 516.

Vacation of default judgment on terms

N.Y.—Duly v. Herman, 145 N.Y.S. 900, 84 Misc. 26.

One justice cannot vacate a judgment entered after trial before another justice.—Borgia v. Paris, 155 N.Y.S. 347, 92 Misc. 211.

Time for motion to modify

N.Y.—Landesberg v. Marchitto, 180 N.Y.S. 410.

Time for motion to vacate

N.Y.—Unger v. Herscovitz, 233 N.Y.S. 142, 133 Misc. 753—Stoneware Electric Stove Works v. Barrett, 192 N.Y.S. 1, 117 Misc. 699, reversing 190 N.Y.S. 120, 115 Misc. 605—J. M. Etzel Co. v. Fairchild Sons, 169 N.Y.S. 504.

Time for vacation

N.Y.—R. Z. P. Line Poultry Market v. Goldman, 255 N.Y.S. 439, 142 Misc. 727—Scott v. Hemmer, 227 N.Y.S. 171, 131 Misc. 474, affirmed 228 N.Y.S. 896, 223 App.Div. 872—Barron v. Feist, 101 N.Y.S. 72, 51 Misc. 589—Johnson v. Heidenfelder, 195 N.Y.S. 73.

Without conditions as to costs

Where a court clerk refused to file an answer on the ground that the summons had not been filed, and plaintiff afterward took judgment by default, defendant was entitled to have the judgment vacated, without imposition of conditions as to costs or giving security.—Whyte v. Hansill, 193 N.Y.S. 511.

judgments rendered on consent,⁷⁵ executions⁷⁶ or supplementary proceedings in aid thereof,⁷⁷ body execution,⁷⁸ satisfaction of judgments,⁷⁹ new trials,⁸⁰ costs,⁸¹ and rights and duties of a city marshal.⁸²

(c) Review of Proceedings

Appeals from the municipal court of the city of New York are largely regulated by the code for such court, and only such appeals as are provided for in the code may be taken.

Appeals from the municipal court of the city of New York are largely regulated by the code for such court, specific provisions being contained therein as to the judgments and orders appealable, the time for appeal, the mode for taking an appeal, and other matters relating to appeals.⁸³

Generally, appeals therein lie as of right only from a judgment in an action or such orders as are specified in the code or amendments thereto,⁸⁴

Appeal from order

(1) No appeal lies from order refusing to vacate judgment, void for not having been rendered and entered within specified time.—*Association of Dress Mfg. Co. v. New Era Dress Co.*, 199 N.Y.S. 554.

(2) In such event, the case will be remitted to the trial court, with leave to appellant to renew the motion to vacate and to have the case placed on the general calendar.—*Association of Dress Mfg. Co. v. New Era Dress Co.*, supra.

Restitution

N.Y.—*Gelband v. Doe*, 266 N.Y.S. 679, 149 Misc. 3.—*Feldman v. Rabbinowitz*, 187 N.Y.S. 569.—*Fristachi v. American Ry. Express Co.*, 184 N.Y.S. 473.

75. N.Y.—*Federal Sign System v. Pescia*, 146 N.Y.S. 311.

Power of court

Municipal court has power to entertain and grant defendant's motion to vacate judgment, entered by clerk without court order or notice to defendant, for full amount agreed to be paid plaintiff by defendant in stipulation for settlement of action after default in payment of one of installments provided for, defendant's answer not being withdrawn, nor notice of application for judgment waived, by stipulation, which did not discontinue action.—*La Salle Extension University v. Parella*, 294 N.Y.S. 146, 162 Misc. 220.

Issues determinable on motion

Where defendant was not given opportunity to present the facts in connection with execution, delivery, filing and entry of confession judgment, municipal court could decide issues presented in defendant's motion to vacate judgment.—*Tropan v. Smithson*, 9 N.Y.S.2d 435.

76. For wages

N.Y.—*Keve v. Columbia Kid Hair Curlers Mfg. Co.*, 145 N.Y.S. 1072, 161 App.Div. 918.

Renewal of

N.Y.—*Wilson & Co. v. Hershkowitz*, 298 N.Y.S. 14, 163 Misc. 721.

77. No jurisdiction

N.Y.—*Solomon v. Suffin*, 209 N.Y.S. 671, 124 Misc. 748.

78. Requirements

(1) Failure of summons to bear statutory indorsement for execution against person, and failure to serve verified complaint with summons, was not error, where verified complaint was served on defendant's motion.—*Ritz Carlton Apartments v. Fried*, 232 N.Y.S. 519, 133 Misc. 607, reversed on other grounds 235 N.Y.S. 624, 134 Misc. 347.

(2) In name of assignee of judgment creditor.—*People ex rel. Greenhouse v. Sheriff of Kings County*, 298 N.Y.S. 845, 252 App.Div. 761.

Provision in judgment

(1) In action in municipal court against defendant, who induced plaintiff to cash checks which, when presented to bank, were refused for lack of funds, where summons bore proper indorsement to effect that plaintiff claimed defendant was liable to arrest and imprisonment, and defendant defaulted, court erred in refusing judgment under which execution could issue against defendant's person.—*Litten v. Haywang*, 171 N.Y.S. 274.

(2) Incorporation in judgment of provision for body execution was not discretionary with clerk in proper case, clerk being required to include such statement, and this even though case was not heard by court, but was referred to clerk for judgment.—*Volentino v. Cannatto*, 231 N.Y.S. 646, 133 Misc. 267.

Second execution

Issuance of second execution against person of judgment debtor after prior similar execution lapsed is authorized, where prior execution was returned unsatisfied.—*People ex rel. Greenhouse v. Sheriff of Kings County*, 298 N.Y.S. 845, 252 App.Div. 761.

79. Power of court

The municipal court has the same powers as the supreme court with respect to the satisfaction of its own judgments and all docket entries relating thereto under statutes, and in a proper case may direct clerk to satisfy judgment of record.—*Brinn v. Wooding*, 298 N.Y.S. 971, 164 Misc. 850.

Vacating satisfaction of judgments

N.Y.—*Duringshoff v. Coates*, 157 N.Y.S. 230, 93 Misc. 485.

80. N.Y.—*New York Petticoat Mfg. Co. v. Flickinger*, 168 N.Y.S. 676, 102 Misc. 225.

15 C.J. p 1002 note 6.

Newly discovered evidence may constitute ground for new trial where ends of justice so require.—*Mossapp v. Reddy*, 197 N.Y.S. 222, 119 Misc. 438.

Necessity for setting aside judgment N.Y.—*Johnson v. Heidenfelder*, 195 N.Y.S. 73.

Limiting issues

Under Municipal Court Code § 29 subd 5, the court, setting aside verdict on grounds other than that damages were inadequate, where question of damages was not separable, could not properly limit new trial to question of damages.—*New York Petticoat Mfg. Co. v. Flickinger*, 168 N.Y.S. 676, 102 Misc. 225.

Court should give reasons

N.Y.—*Sylvan Mortgage Co. v. Young*, 188 N.Y.S. 516.

81. N.Y.—*Levine v. Kosher Matzo's Baking Co.*, 159 N.Y.S. 845, 95 Misc. 565.—*Elchorn v. Negrin*, 158 N.Y.S. 98.

Extra costs

N.Y.—*Yankowitz v. Arkin*, 157 N.Y.S. 995.

82. Suit for conversion

Under the code, a city marshal may sue for conversion of property in his possession as result of lawful levy.—*Florea v. Shultz*, 216 N.Y.S. 412, 127 Misc. 420.

83. N.Y.—*Friedman v. McHugh*, 293 N.Y.S. 345, 161 Misc. 856.—*Standard Scale Supply Co. v. City of New York*, 165 N.Y.S. 81.

15 C.J. p 1002 note 7.

84. N.Y.—*Cassin v. Scala*, 275 N.Y.S. 162, 153 Misc. 425.—*Midtown Plottage Corporation v. Sullivan*, 227 N.Y.S. 357, 131 Misc. 473.—*Schattnar v. American Tobacco Co.*, 165 N.Y.S. 479, 100 Misc. 261.—*Gonick v. Goldfarb*, 165 N.Y.S. 226, 100 Misc. 118.—*Margolies v. Laird*, 186 N.Y.S. 448.—*Montrose Farms v. Rogerson*, 183 N.Y.S. 34.—*Landesberg v. Marchitto*, 180 N.Y.S. 410.—*Richardson v. Lehman*,

unless leave to appeal in accord with the code provision is obtained.⁸⁵ Such orders as are not appealable can only be reviewed on an appeal from the judgment or appealable final order necessarily affected by such order, if specified in the notice

of appeal.⁸⁶ Numerous decisions are to be found in the reports in which various judgments and orders have been held to be appealable⁸⁷ or not appealable.⁸⁸

176 N.Y.S. 758—Rogers v. Black & White Cab Co., 176 N.Y.S. 473—Mora v. Kuntz, 175 N.Y.S. 136—Saventa v. Hickson, Inc., 171 N.Y.S. 221—Trans-Oceanic Trading Co. v. Muller, 171 N.Y.S. 220—Allen v. Wolkoff, 166 N.Y.S. 1010.

Refusing garnishee order

Municipal court being a court of record, action of judge in refusing an order for garnishee execution is subject to review only on appeal, not on mandamus.—Friedman v. McHugh, 293 N.Y.S. 345, 161 Misc. 856.

85. N.Y.—Cassin v. Scala, 275 N.Y.S. 162, 153 Misc. 425—Midtown v. Sullivan, 227 N.Y.S. 357, 131 Misc. 473—S. L. & Co. v. Bock, 194 N.Y.S. 773, 118 Misc. 756—Byrne v. Massachusetts Mut. Life Ins. Co., 5 N.Y.S.2d 776.

86. N.Y.—Kuenzli v. Stone, 182 N.Y.S. 680, 112 Misc. 125—Mutual Braid Co. v. Jeffers, 174 N.Y.S. 730, 106 Misc. 494—Greenbaum v. Goldberg, 172 N.Y.S. 744, 105 Misc. 206—Schattnner v. American Tobacco Co., 165 N.Y.S. 473, 100 Misc. 261—Goldman v. Rothstadt, 188 N.Y.S. 373—Van Brink v. Aaron, 187 N.Y.S. 108—Rogers v. Black & White Cab. Co., 176 N.Y.S. 473—Mora v. Kuntz, 175 N.Y.S. 836—Greenstein v. J. Rothschild & Co., 170 N.Y.S. 535—Abraham v. Wilkes, 170 N.Y.S. 531, dismissing appeal 168 N.Y.S. 350—Cummins v. Marsey, 168 N.Y.S. 596—Allen v. Wolkoff, 166 N.Y.S. 1010.

Orders reviewable

N.Y.—Van Brink v. Aaron, 187 N.Y.S. 108—White Star Garage v. Arizona, 176 N.Y.S. 31, 107 Misc. 237—Tichnor Bros. v. Tuozzo, 172 N.Y.S. 453—Godhelp v. Monarch Waist & Dress Co., 168 N.Y.S. 526.

87. Order transferring cause

N.Y.—People ex rel. Wiesenthal v. Dunne, 185 N.Y.S. 452, 195 App. Div. 225.

Order granting or denying opening of default

N.Y.—217 Front St. Metals & Rubber Corporation v. Klug, 256 N.Y.S. 48, 143 Misc. 164.

Order granting or denying vacation of judgment

N.Y.—Davidoff v. Chipornoi, 166 N.Y.S. 996, 101 Misc. 291—Van Brink v. Aaron, 187 N.Y.S. 108—J. M. Etzel Co. v. Fairchild Sons, 169 N.Y.S. 504.

Other orders

N.Y.—Whyte v. Hansill, 193 N.Y.S. 511.

15 C.J. p 1002 note 7 [b].

Under earlier provisions of code

N.Y.—U. S. Cast Iron Pipe & Foundry Co. v. Hugh S. Roberts & Co., 187 N.Y.S. 95, 114 Misc. 560—Kern v. Caledonian Ins. Co. of Scotland, 178 N.Y.S. 340, 109 Misc. 173—Bendelari v. B. S. Moss Theatrical Enterprises, 202 N.Y.S. 295—Beach v. Bongartz, 180 N.Y.S. 420—Rossmann v. Serventi, 177 N.Y.S. 855.

88. N.Y.—Chielewski v. Prudential Ins. Co. of America, 294 N.Y.S. 574, 250 App.Div. 786.

Orders not entered

N.Y.—Karmel v. Ryan, 185 N.Y.S. 84.

Judgments by default

N.Y.—Hirsch v. Zittenfeld, 185 N.Y.S. 830—Berman & Lessenger v. Phoenix Ribbon & Carbon Co., 179 N.Y.S. 850—Rosenberg v. Case Hotel Co., 166 N.Y.S. 750—Hill v. Andrews, 164 N.Y.S. 224.

15 C.J. p 1002 note 97 [b].

Final orders

Order vacating service of summons is final order in an action, not in a special proceeding, and is not appealable.—Tarpey v. Jersey Co-op. Realty Co., 163 N.Y.S. 267, 98 Misc. 302, denying reargument 162 N.Y.S. 665.

Superseded order

Order opening defendant's default on payment of costs was superseded by a subsequent order denying the motion to open the default and was not appealable.—Berman & Lessenger v. Phoenix Ribbon & Carbon Co., 179 N.Y.S. 850.

Orders granting or denying interpleader

N.Y.—Oddo v. Smith, 183 N.Y.S. 4—Saventa v. Hickson, Inc., 171 N.Y.S. 221.

Order granting or denying vacation of service of summons

N.Y.—Kilpatrick v. Tucker, 176 N.Y.S. 708—Greenstein v. J. Rothschild & Co., 170 N.Y.S. 535.

Order denying transfer of cause

N.Y.—Kopisar v. Paley, 219 N.Y.S. 82, 128 Misc. 463.

Denying motion for bill of particulars

N.Y.—Greenspan v. Park Laundry Co., 231 N.Y.S. 584, 133 Misc. 409.

Orders relating to examination before trial

(1) Orders granting or denying examination.—Greenspan v. Park

Laundry Co., 231 N.Y.S. 584, 133 Misc. 409—Godhelp v. Monarch Waist & Dress Co., 168 N.Y.S. 526.

(2) Refusal to vacate order for examination before trial.—Godhelp v. Monarch Waist & Dress Co., 168 N.Y.S. 526.

Order dismissing complaint

N.Y.—Schattnner v. American Tobacco Co., 165 N.Y.S. 479, 100 Misc. 261—Rogers v. Black & White Cab Co., 176 N.Y.S. 473—Cummins v. Marsey, 168 N.Y.S. 596—Allen v. Wolkoff, 166 N.Y.S. 1010.

Order granting or denying judgment on pleadings

N.Y.—Mutual Braid Co. v. Jeffers, 174 N.Y.S. 730, 103 Misc. 494—Goldman v. Rothstadt, 188 N.Y.S. 373.

Order granting summary judgment

N.Y.—Byrne v. Massachusetts Mut. Life Ins. Co., 5 N.Y.S.2d 776.

Orders on motions directed at judgment

(1) Order on a motion to vacate, amend, or modify judgment rendered on a trial without a jury.—Gonick v. Goldfarb, 165 N.Y.S. 226, 100 Misc. 118.

(2) Denying motion to vacate judgment, where judgment entered upon service of summons was valid.—Companelli v. Romono, 249 N.Y.S. 38, 140 Misc. 72.

(3) Order denying motion to vacate default judgment as having been improperly entered by clerk without inquest after defendants' default on trial.—Cassin v. Scala, 275 N.Y.S. 162, 153 Misc. 425.

(4) Order amending judgment for plaintiff, by inserting recital that counterclaim had been dismissed on merits.—Greenbaum v. Goldberg, 172 N.Y.S. 744, 105 Misc. 206.

(5) Order denying motion to amend judgment.—Begun v. Silberstein, 179 N.Y.S. 469—Trans-Oceanic Trading Co. v. Muller, 171 N.Y.S. 220.

(6) Order denying motion to vacate or modify judgment.—Ashton Holding Co. v. Goldberg, 196 N.Y.S. 539—Baker Rim & Auto Supply Co. v. Rutherford, 165 N.Y.S. 365.

(7) Order denying motion to set aside inquest and vacate default judgment against defendant.—Clarizio v. Coney Island & B. R. Co., 172 N.Y.S. 183, 104 Misc. 592.

(8) Order granting or denying motion to vacate execution.—Davidoff

Numerous other decisions are found in the reports in which are considered and determined various questions relating to appeals from this court, such as the right of review generally,⁸⁹ the time for appeal,⁹⁰ notice of appeal,⁹¹ preservation of grounds for review,⁹² case on appeal,⁹³ records on appeal,⁹⁴

v. Chipornoi, 166 N.Y.S. 996, 101 Misc. 291.

(9) Order denying summary judgment.—Swimmer v. Silverman, 218 N.Y.S. 315, 128 Misc. 444.

Denial of rehearing

N.Y.—Korn v. Garfinkel, 9 N.Y.S.2d 20.

Other orders

(1) Order granting defendant's motion that no other body execution issue.—Goldstein Scrap Iron & Steel Co. v. Wallace, 169 N.Y.S. 445.

(2) Order denying motion to set aside settlement of summary proceeding had before trial.—Goldstein v. Orlinsky, 168 N.Y.S. 604.

(3) Order vacating general appearance and answer on opening of default is not appealable.—Lowenstein v. Royal Jewelry Mfg. Co., 169 N.Y.S. 994.

(4) Order made in municipal court, requiring nonresident, to give security for costs.—Gary v. Chambers Bros., Furriers, 169 N.Y.S. 1051, 103 Misc. 257.

(5) Order imposing improper terms on failure to file pleading on attorney.—Abraham v. Wilkes, 170 N.Y.S. 531, dismissing appeal 168 N.Y.S. 350.

(6) Order granting stay until payment of costs of former action by one having permission to bring action in forma pauperis.—Johnson v. Interborough Rapid Transit Co., 164 N.Y.S. 23.

(7) Order staying plaintiff from proceeding with trial of the action pending trial of an action in the supreme court brought by defendant.—Richardson v. Lehman, 176 N.Y.S. 758.

(8) Order made on retaxation of costs.—Greenberg v. Hurlburt Motor Truck Co., 172 N.Y.S. 459.

(9) Order denying motion to vacate order granting new trial.—Trans-Oceanic Trading Co. v. Muller, 171 N.Y.S. 220.

(10) Informal indorsement, signed by judge in summary proceedings by landlord in municipal court, that "upon stipulation filed herein, and all papers, landlord's petition dismissed."—Youngsters' Realty Corporation v. Oliver, 180 N.Y.S. 26.

(11) Order granting motion directing clerk to accept answer for filing, and to file same nunc pro tunc as of certain date.—Rosenberg v. Block, 180 N.Y.S. 415.

(12) Order granting motion for commission to take deposition of witnesses.—Birmingham, Prosser & Co. v. Shea, 181 N.Y.S. 383.

(13) Order in summary proceeding, denying landlord's motion for order directing clerk to deliver warrant.—Tauszig v. Kantor, 188 N.Y.S. 92, 115 Misc. 366.

(14) Order granting stay of issuance of warrant in summary proceedings.—Kuenzli v. Stone, 182 N.Y.S. 680, 112 Misc. 125.

(15) Order giving defendant leave to answer.—Van Brink v. Aaron, 187 N.Y.S. 108.

(16) Order denying motion to restore action to calendar, with leave to renew on proper papers on payment of costs.—Doctors Service Corps v. Budd, 206 N.Y.S. 654, 123 Misc. 935.

15 C.J. p 1002 note 7 [c].

Where rulings not appealable

N.Y.—Pirkner v. Great Atlantic & Pacific Tea Co., 11 N.Y.S.2d 716, 171 Misc. 2—Mutual Braid Co. v. Jeffers, 174 N.Y.S. 730, 106 Misc. 494—Bird v. Samuel D. Davis Const. Co., 173 N.Y.S. 152.

89. Reentry of judgment

Defendant is not deprived of benefit of appeal from municipal court judgment entered by clerk because plaintiff subsequently entered another judgment.—Godwin v. Hauer, 227 N.Y.S. 355, 131 Misc. 772.

90. N.Y.—Himmel v. Mutual L. Ins. Co., 156 N.Y.S. 608, 93 Misc. 191.

Timely appeal necessary

N.Y.—Hunter Waist Co. v. Rothman, 181 N.Y.S. 455, 111 Misc. 378—Rubenstein v. Lubelsky, 194 N.Y.S. 761—Whyte v. Hansill, 193 N.Y.S. 511.

Extension of time

Appeal from order denying motion to set aside judgment cannot extend the time to appeal from the judgment.—Gonick v. Goldfarb, 165 N.Y.S. 226, 100 Misc. 118.

91. Payment of fees on filing

(1) Clerk is justified in refusing to file notice of appeal where fee was not prepaid.—Block v. Israel, 181 N.Y.S. 454.

(2) Where appellant's attorney in good faith duly filed notice of appeal with clerk of municipal court, but through inadvertence the fee did not accompany the notice, the clerk may be required to accept the fee tendered after expiration of the time for appealing, and required to file

the notice of appeal as of the date received.—Block v. Israel, 181 N.Y.S. 454.

Setting out order appealed from N.Y.—Bergoff v. Park Row Bazaar, 184 N.Y.S. 477.

92. Marking of exhibits

Marking of exhibits for identification is mere question of practice, and there is no rule absolutely precluding the party offering them from opportunity of having them considered by appellate court merely because identification mark may have been omitted at trial.—Gordon v. Christenson, 185 N.Y.S. 112.

Objections not raised below

Objection that defendant recovering judgment against codefendant did not comply with statute requiring written demand for such judgment, made for first time on appeal, was too late.—McCorken v. Spiegel, 216 N.Y.S. 561, 127 Misc. 496.

93. Right to make

Municipal court had no power to make order declaring that appellant had waived his right to "make a case."—Julius Blum & Co. v. Amiron Supply Co., 170 N.Y.S. 375, 103 Misc. 508.

Settlement of case

(1) Settled case is necessary.—Youngsters' Realty Corporation v. Oliver, 180 N.Y.S. 26—Finkelstein v. Friedman, 164 N.Y.S. 822.

(2) Trial judge on settlement of case may abridge record so that return shall contain so much of evidence only as is material to questions to be raised.—Adler v. Confield, 283 N.Y.S. 778, 157 Misc. 420.

(3) Municipal court has no power to make an order declaring that plaintiff has waived his right to have a case on appeal settled.—Bendelari v. B. S. Moss Theatrical Enterprises, 202 N.Y.S. 295.

(4) Motion to send return back to trial judge to incorporate all of stenographer's minutes of trial would be denied where it was not claimed that return as settled by trial judge did not fully present alleged error which plaintiff sought to review.—Adler v. Confield, 283 N.Y.S. 778, 157 Misc. 420.

Amendment of case

After case on appeal to appellate term was settled by trial justice of municipal court, it was not subject to amendment, especially after appellate term had heard and disposed of same.—Standard Scale Supply Co. v. City of New York, 165 N.Y.S. 81.

94. N.Y.—Waydale Corporation v.

motions to dismiss appeals,⁹⁵ and the scope and | extent of review on appeal.⁹⁶ Numerous other de-

Pearlman, 248 N.Y.S. 299, 133 Misc. 714.

15 C.J. p 1003 note 8.

Contents

Record must contain judgment or order appealed from or appeal will be dismissed.—Waydale Corporation v. Pearlman, supra.—Kressel v. Brooklyn City R. Co., 187 N.Y.S. 190.—Karmel v. Ryan, 185 N.Y.S. 84.—Aurora Operating Co. v. Doman, 184 N.Y.S. 545.—Solinger v. Mawen, 184 N.Y.S. 494.—Kohn v. Barrett, 184 N.Y.S. 480.—Bergoff v. Park Row Bazaar, 184 N.Y.S. 477.—Cohen v. National Ladies' Specialty Corporation, 182 N.Y.S. 885.—Loft Realty Co. v. Clayden, 164 N.Y.S. 692.

Appellate Court bound by record

N.Y.—Cohen v. National Ladies' Specialty Corporation, 182 N.Y.S. 885.

Stenographer's minutes

(1) Where party, in support of motion for new trial, obtained and paid for copy of stenographer's minutes, he was entitled to file such copy with clerk on appeal.—Derre v. Dieges & Clust, 170 N.Y.S. 355.

(2) Absence of stenographer's minutes does not deprive plaintiff of his right to appeal.—Lehman-Bleyer Paper Co. v. Public Bank of New York City, 166 N.Y.S. 707.

Record controls over brief

N.Y.—Flores v. Friedman, 167 N.Y.S. 269.

Adding to record

Where defendant's letter to plaintiff was excluded from evidence when offered by defendant, and defendant's attorney did not ask that it be marked for identification, but, after the record on appeal had been filed, obtained order returning it to the municipal court for correction, and made motion that the letter be marked and sent up with the record on appeal from the judgment, such motion should not have been denied, but, in the absence of claim by plaintiff the instrument submitted on the motion was not the one offered on trial, it should have been marked and placed in the record, to enable the appellate term to determine the question of its admissibility on the appeal from the judgment.—Gordon v. Christenson, 185 N.Y.S. 112.

95. N.Y.—Schultz v. De Hart, 153 N.Y.S. 929.

96. N.Y.—Garvey v. Stickland, 158 N.Y.S. 322, 94 Misc. 315.

Defenses not pleaded or proved not considered

N.Y.—London Guarantee & Accident Co. v. Marine Repair Corporation, 199 N.Y.S. 237, 120 Misc. 596, reversing 195 N.Y.S. 492.

Matters not in case on appeal not considered

N.Y.—Rosenbaum v. National Acc. Soc., 167 N.Y.S. 325.

As determined by record

(1) Matters in brief, not recited or suggested in the record, cannot be considered.—Giardina v. Bonanno, 184 N.Y.S. 478.

(2) In proceedings by landlord against tenants, the record on appeal from municipal court does not warrant the appellate term passing on the question whether the exclusion of the tenants' names from a directory board in the hallway of the office building constituted an actual partial eviction, where it appears that the parties whose names were excluded were not the tenants, but some of their undertenants, in the premises without the landlord's consent, express or implied, in violation of the terms of the lease.—434 Broadway Realty Corporation v. Stone & Schleimer, 184 N.Y.S. 678.

(3) If respondent landlord did not, on appeal by its tenants in its proceedings against them, intend to press the point that the record did not warrant the appellate term passing on a question which was expressly mentioned in its motion for final order in the trial court, there should be some stipulation to such effect.—434 Broadway Realty Corporation v. Stone & Schleimer, supra.

(4) Under Municipal Court Code § 6 subd 6, and Arbitration Rules, rules 2 and 3, a judgment on award of arbitrator can be reversed on appeal only where error appears on the record.—Fullman v. George V. Ellis Plumbing & Engineering Co., 168 N.Y.S. 34, 102 Misc. 62.

(5) Where parties on appeal have stipulated that record contains all papers on which the court below acted in rendering judgment, and record contains no affidavit of bona fides, as provided for in Code, judgment must be reversed, on ground that lower court had no jurisdiction.—Niles v. Seeler, 181 N.Y.S. 20.

Jurisdictional questions

Where, when defendant appeared specially to object to jurisdiction of the municipal court, that court erroneously permitted plaintiff to amend the pleadings, on appeal, in passing on the question of jurisdiction, only the summons and original complaint can be considered.—Gerken v. Gerken, 199 N.Y.S. 169.

Motion not disposed of

Where, pending determination of a motion for a new trial made by plaintiff at the trial in municipal court, she made another similar motion based on newly discovered evidence, but the court decided the

earlier motion in favor of plaintiff, without disposing of the second motion, the second motion is not before the court on appeal from the order granting a new trial, and will not be passed on.—Biegeleisen v. Cohen, 192 N.Y.S. 321.

Setting aside verdict without reasons

Where order of municipal court setting aside verdict does not recite grounds for setting it aside, appellate court is obliged to assume that order was granted on exceptions taken at the trial, and where no exceptions were taken at trial, order must be reversed.—Klass v. Ph. Davis & Co., 182 N.Y.S. 885.—Griffin Roofing Co. v. Seeman, 182 N.Y.S. 883.

Order granting new trial

(1) Order granting new trial in action tried without jury should not be affirmed, unless it affirmatively appears that there was some sufficient ground therefor.—Wm. Kleeman & Co. v. United Gem Stores, 189 N.Y.S. 67.

(2) In landlord's summary dispossession proceedings, where verdict for tenant has been set aside and new trial directed, trial judge's decision will be affirmed by appellate term, where record does not present question of law apparently determinative of issues between parties.—Lederman v. Rosen, 181 N.Y.S. 375.

Amending pleading to conform to proof

Appellate term has power.—Alexander v. Sola, 185 N.Y.S. 869.—Simon Zinn, Inc., v. Herman, 184 N.Y.S. 502.

Questions of fact

(1) Wherever there is a dispute as to any particular fact, the appellate term should regard the question as determined in accordance with defendant's version, the trial justice having given judgment for defendant.—Van Sant v. Perry, 174 N.Y.S. 658.

(2) On conflicting evidence verdict of jury should not be disturbed.—Pincus v. Geo. W. Millar & Co., 199 N.Y.S. 627.

(3) Where there is no evidence to sustain finding of defendant's negligence on which plaintiff recovered, judgment of the appellate term affirming judgment of the municipal court will be reversed, and complaint dismissed.—Lang v. Hudson & M. R. Co., 155 N.Y.S. 801, 171 App.Div. 898.

Matters in discretion of trial court

On appeal from municipal court, where appellate court had granted new trial, to allow defendant opportunity to litigate an issue, the trial court, in granting defendant's motion to amend, to plead such matter, did not abuse its discretion in failing to

cisions consider and determine various questions relating to disposition of cause,⁹⁷ jurisdiction after

impose costs as a condition.—*Mundler v. Palmer*, 165 N.Y.S. 987.

Presumptions

(1) Where record does not show that any of the jury in the municipal court had actually been questioned before a demand for a jury of twelve, except the opinion of the justice that the demand was made during "the examination of talesmen," the demand will be held to have been made at the proper time.—*Palamara v. New York Rys. Co.*, 168 N.Y.S. 604.

(2) On objection to a second motion to restore a case to the trial calendar of the municipal court, that the costs on denial of the first motion had not been paid, it must be held, where the second motion was made before the same justice who heard the first, that he gave his leave to make it.—*Rossmann v. Serventi*, 177 N.Y.S. 855.

(3) In action in municipal court, where, at the close of plaintiff's case, defendants moved to dismiss the complaint for plaintiff's failure to prove his case whereupon plaintiff moved to amend to conform pleadings to proof, and the court took both motions under advisement, but there was nothing in the record to indicate that the amendment was allowed, it will be assumed, on appeal from judgment for plaintiff, that the amendment was allowed.—*Wolf v. Rabuschansky*, 192 N.Y.S. 800.

Reversible errors

N.Y.—*Hotel Touraine v. Waite*, 113 N.Y.S. 19, 61 Misc. 54—*Weissberg v. Kaplan*, 192 N.Y.S. 323—*Kindler v. Collins v. Blythe*, 192 N.Y.S. 274—*Randell v. Pollack*, 191 N.Y.S. 306—*Wright v. Oldsmobile Co.* of Brooklyn, 190 N.Y.S. 712—*Lefkowitz v. Leblang*, 187 N.Y.S. 520—*Burkwitt v. New Jersey Fidelity & Plate Glass Ins. Co.*, 182 N.Y.S. 689—*Weissman v. Greenberg*, 157 N.Y.S. 204.

Harmless errors

N.Y.—*Croger v. F. A. Sales Co.*, 174 N.Y.S. 126, 105 Misc. 620.

97. Rendering judgment

(1) Appellate term does not render judgment on appeal from judgment of municipal court.—*Chmielewski v. Prudential Ins. Co. of America*, 294 N.Y.S. 574, 250 App.Div. 786.

(2) Where defendants admitted that they received sum of which plaintiff was entitled to one half under contract as construed on appeal from municipal court, it is not necessary to order a retrial of the action, but appellate term can direct judgment for plaintiff.—*Stern v. Froman*, 190 N.Y.S. 843, 117 Misc. 180.

(3) A judgment in conversion, erroneously requiring return of the chattels, can be cured by the appellate court, if there is competent evidence of the value of the goods.—*Handlor v. Perlberg*, 158 N.Y.S. 706.

Modification of judgment

In action against railroad by injured employee, it was held that judgment overruling plaintiff's demurrer to defendant's answer, and dismissing plaintiff's complaint, would be modified by permitting plaintiff to withdraw his demurrer within twenty days, and, as modified, the judgment would be affirmed.—*Corico v. Smith*, 164 N.Y.S. 190, 178 App.Div. 33, modifying 161 N.Y.S. 293, 97 Misc. 447.

Reduction of verdict or judgment

(1) Where amount of judgment in municipal court arrived at below included by inadvertence an amount admittedly deductible, the judgment will be modified, by deducting that sum, with interest.—*Stillman v. Rees & Rees*, 189 N.Y.S. 69.

(2) Where evidence did not support municipal court's finding of damages, it was held that new trial should be granted instead of reducing recovery to amount which the court might have awarded.—*Rosalisky v. Sacks*, 167 N.Y.S. 268.

(3) Although there is nothing in the record to warrant amount of verdict where defendant conceded verdict against it for three hundred fifty-seven dollars would be supported, and the court finds evidence that would support verdict for three hundred fifty dollars, or three hundred seventy-one dollars and twenty-five cents, if plaintiff will file stipulation reducing judgment to three hundred fifty-seven dollars, the judgment will be modified and affirmed.—*Davis v. Genuine Panama Hat Works*, 181 N.Y.S. 242.

(4) If the inclusion of unproved items in judgment of municipal court were the only appearing error, the appellate court might accept the respondent's offer to reduce by excluding such items, but where there are other errors, this defect merely emphasizes the inaccuracy and infirmity of the judgment.—*Richard v. P. Franz & Co.*, 182 N.Y.S. 882.

(5) In an action on contract to furnish work and materials in alteration of building, with counterclaim for failure to fully perform contract, testimony that it cost defendant "about" forty-eight dollars to do the work which plaintiff failed to do is too indefinite to warrant appellate court in arbitrarily deducting that amount from a judgment of one hundred dollars in favor of plaintiff.—*Nelson v. Ritter*, 185 N.Y.S. 92.

(6) Where record leaves no doubt that municipal court intended to find judgment for plaintiffs for amount of their claim, subject to certain reduction, and the trial justice erroneously accepted amount set forth by plaintiffs in summons, instead of the amount proved at trial and alleged in plaintiffs' bill of particulars, judgment will be reduced, and, as modified, affirmed.—*Cusati v. Matthes*, 191 N.Y.S. 311.

Ordering new trial

(1) Where record of the evidence on appeal from the municipal court is in such a confused and undeveloped state that the theory on which the trial court reached a decision as to an amount due cannot be ascertained, except by conjecture, a new trial will be ordered.—*Ginsberg v. Nouvelle Dress Co.*, 167 N.Y.S. 310.

(2) Where action of municipal court in ordering judgment dismissing complaint to be changed to judgment for complainant was unauthorized, on appeal the order would be modified, by allowing vacation of judgment and new trial.—*Parker v. Belfm*, 169 N.Y.S. 592.

(3) Although essential facts are conceded or undisputed, appellate term, on appeal from municipal court, on reversing judgment, cannot dismiss complaint, where no motion to dismiss was made.—*P. & G. Card & Paper Co. v. Fifth Nat. Bank*, 172 N.Y.S. 638.

(4) Where justice in municipal court by final order dismissed landlord's petition on the ground that the court had no jurisdiction, and on appeal in the appellate term, respondent conceded that the action of the justice was erroneous, the order will be reversed and new trial granted.—*Beigelman v. Kennedy*, 185 N.Y.S. 830.

(5) Where court dismissed complaint for breach of contract, on construing contract as to price against plaintiff, court on appeal will reverse, and order new trial in the interest of justice, the construction of the contract raising a question whether there had been a meeting of minds, an issue not passed on.—*Horn v. Schein*, 185 N.Y.S. 851.

(6) In an action for alleged balance due under written contract for installing fixtures and under an oral agreement for additional work, in which action defendant counterclaimed for failure to install fixtures within agreed time, dismissal of both the complaint and the counterclaim was held so inconsistent as to require a new trial.—*Krasnove v. Scheff*, 199 N.Y.S. 33.

remand,²⁸ and liability on appeal bonds or undertakings.²⁹

d. Other Courts

Other courts of the state of New York considered.

Other courts which have from time to time existed or still exist in New York, and as to which

decisions are found are the court of claims, see the C.J.S. title States § 206 et seq, also 57 C.J. p 289 note 48—p 294 note 87; the superior courts;¹ the courts of common pleas;² the courts of special sessions, see the C.J.S. title Criminal Law § 123, also 16 C.J. p 152 notes 67, 68; the district courts;³ the children's court;⁴ the domestic relations court of the city of New York;⁵ the police courts;⁶ and

(7) Where former decision in municipal court required that verdict should have been directed for plaintiff, and no motion therefor was made, the cause, on appeal from that judgment in favor of defendant dismissing complaint, must be sent back for a new trial, to be properly disposed of by trial judge.—*Rose v. Rosalind Realty Co.*, 164 N.Y.S. 178.

(8) In view of liberal provisions of Municipal Court Code § 93, in order to promote substantial justice, plaintiff should after reversal of judgment for defendant in an action on account stated, be allowed on proper terms to amend his complaint in court below to show his employment by defendant.—*Zimet v. Cohen*, 175 N.Y.S. 97.

Limited new trial

(1) For assessment of damages only, where only error of court was in failing to instruct on damages.—*Kaplan v. Krauss*, 271 N.Y.S. 13, 151 Misc. 123.

(2) Where the affidavits for and against motion to vacate default for failure to serve process are sharply conflicting, and truth cannot be determined therefrom, order denying motion will be reversed, and question sent back to be tried orally.—*Korn v. Karo*, 180 N.Y.S. 644.

Dismissing complaint

On appeal from judgment for plaintiff in action in municipal court for running in plaintiff's directory defendant's full page advertisement, defended on the ground that the advertisement was not published "in opposite last page of directory," as contracted for, where the evidence was uncontradicted that the contract was altered by plaintiff's agent after its receipt from defendant, by inserting after the quoted words the words "if possible," and the action was brought on it in such altered form, the court would not only reverse the cause, but would also dismiss the complaint.—*National Garment Retailers' Ass'n v. Seidel*, 185 N.Y.S. 865.

Effect of former reversal

Judgment of dismissal, rendered by municipal court will be reversed, where similar judgment was reversed on former appeal, and there was no substantial difference in records on the two appeals.—*Rosenbaum v. National Acc. Sec.*, 167 N.Y.S. 325.

98. N.Y.—*People v. McDermott Dairy Co.*, 153 N.Y.S. 136, 90 Misc. 396.

On affirmance of order opening default

Where appellate term affirmed municipal court's order granting defendant's motion to open up default on terms and denied defendant's motion for resettlement of the order of affirmance so as to grant either leave to renew original motion or an extension of time within which to comply with the terms, municipal court on new facts presented had power to entertain motion to open defendant's default and properly granted an extension of time within which to comply with the terms on which default was opened.—*Phoenix Ribbon & Carbon Co. v. Lebovit*, 299 N.Y.S. 991, 252 App.Div. 488.

Suit on contract

Provision in contract with city for delivery of ashes that borough president's determination of all questions in relation to quantities or qualities of materials should be conclusive on contractor did not preclude suit on contract after borough president's disallowance of claim, in view of appellate term's decision in former action on contract authorizing commencement of new action after submitting disputed question of delivery to borough president.—*Moran Bros. Contracting Co. v. City of New York*, 278 N.Y.S. 173, 154 Misc. 802.

99. Timely suit necessary

N.Y.—*North Side Hoisting Co. v. Southern Surety Co.*, 157 N.Y.S. 903, 94 Misc. 167.

On affirmance

Surety on undertaking on appeal from judgment denying enforcement of mechanic's lien, but rendering personal judgment, was liable on affirmance, where the undertaking was conditioned on affirmance or dismissal of appeal, and not on sustaining the lien.—*North Side Hoisting Co. v. Southern Surety Co.*, 157 N.Y.S. 903, 94 Misc. 167.

1. N.Y.—*Paget v. Stevens*, 38 N.E. 373, 143 N.Y. 172, reversing 28 N.Y.S. 549, 8 Misc. 236.
15 C.J. p 1003 note 14.

2. N.Y.—*Paget v. Stevens*, supra.
15 C.J. p 1003 note 15.

Abolished by Const.1895 art 6 § 5.

3. N.Y.—*Mittnacht v. Kellermann*, 12 N.E. 28, 195 N.Y. 461, 26 N.Y.

Wkly.Dig. 437—*Rosen v. Rosenthal*, 48 N.Y.S. 790, 22 Misc. 143—*Douglass v. Seiferd*, 41 N.Y.S. 289, 18 Misc. 188, 75 St.R. 693—*Mal-kemesius v. Pauly*, 39 N.Y.S. 1095, 17 Misc. 371.
15 C.J. p 1003 note 17.

4. Court of limited jurisdiction

N.Y.—*In re Sisson*, 274 N.Y.S. 857, 152 Misc. 806.

5. Court of limited jurisdiction

(1) In general.—*Myers v. Myers*, 6 N.Y.S.2d 907, 169 Misc. 32, reversed on other grounds 8 N.Y.S.2d 379, 255 App.Div. 599, reargument denied 9 N.Y.S.2d 896, 256 App.Div. 807.

(2) The domestic relations court of the city of New York is a statutory court of limited jurisdiction.—*Anonymous v. Anonymous*, 15 N.Y.S.2d 26, 172 Misc. 349.

Not criminal court

(1) In general.—*In re Grenier*, 1 N.Y.S.2d 235, 165 Misc. 784—*Wignall v. Wignall*, 298 N.Y.S. 251, 163 Misc. 910.

(2) Proceedings in the family division of the domestic relations court are not criminal, and the district attorney has no standing in the domestic relations court.—*Zy v. Zy*, 13 N.Y.S.2d 415.

Territorial limits

Where domestic relations court of New York City has jurisdiction, process of court will reach respondent or petitioner in other counties of state with same effect as mandates of county courts, but court must first have jurisdiction.—*Young v. Young*, 277 N.Y.S. 821, 154 Misc. 713.

Jurisdiction

(1) The court has no equity jurisdiction except as incident to the jurisdictional powers conferred on it by the legislature under the section of the constitution dealing with inferior local courts.—*Kastner v. Kastner*, 7 N.Y.S.2d 282, 169 Misc. 259.

(2) The court has no power to inquire into the validity of a divorce decree or a marriage contract excepting as an incident to the power to provide support and maintenance for a spouse.—*Carbone v. Carbone*, 2 N.Y.S.2d 869, 166 Misc. 924.

6. N.Y.—*People v. New York Police Bd.*, 9 Hun 222—*Deposit v. Vail*, 5 Hun 310.

the marine court of the city of New York,⁷ which was the predecessor of the present city court of the city of New York, discussed above in subdivision c (2) of this section.

Surrogates' courts of New York see *infra* §§ 298-310.

§ 280. North Carolina

In North Carolina there are decisions relating to superior courts, county courts, recorders' courts, and municipal courts.

In North Carolina there are decisions relating to the superior courts,⁸ which are courts of general jurisdiction,⁹ and which exercise equity powers.¹⁰ Their jurisdiction is unlimited, except in the sense that it has been narrowed by the carving out of

portions thereof which have been given either concurrently or exclusively to other courts.¹¹

There are also decisions relating to such inferior courts as county courts,¹² recorders' courts,¹³ and municipal courts.¹⁴ There have been decisions relating to appeals from inferior courts to the superior court,¹⁵ the jurisdiction of the superior court when such an appeal is taken being derivative only.¹⁶

§ 281. North Dakota

In North Dakota there are decisions relating to district courts, county courts, and tribunals of conciliation.

There have been decisions relating to the district court,¹⁷ which has general jurisdiction, including power to hear and determine all matters which can be made the subject of a civil action or proceed-

Authority of police justice

Police justice is authorized to issue warrant to commissioners of public charities and corrections against the estate of an absconded husband and father.—Commissioners' Attachment, 2 Abb.Pr.N.S., N.Y., 83.

7. N.Y.—Hutkoff v. Demorest, 8 N. E. 899, 10 N.E. 535, 103 N.Y. 377—Carroll v. Goslin, 2 E.D.Smith 376. 6 C.J. p 48 note 59 [a]—15 C.J. p 1003 note 19.

This court was originally created as a tribunal for the settlement of causes between seamen.—Black L.D.

For complete history of this court, the extent of its jurisdiction, and the practice thereof see McAdam Mar. Ct. Pr., 2 Ed. 1872.

8. N.C.—McCoy v. Wachovia Bank & Trust Co., 169 S.E. 644, 204 N.C. 721—T. D. Meador Grocery Co. v. Vernon, 135 S.E. 462, 192 N.C. 821. 15 C.J. p 1003 note 21.

Venue

N.C.—Hendrix v. High Point, T. & D. Ry. Co., 163 S.E. 752, 202 N.C. 579.

9. N.C.—Brown v. Lipe, 185 S.E. 681, 210 N.C. 199—Armstrong Grocery Co. v. Banks, 116 S.E. 173, 185 N.C. 149.

Jurisdictional amount

N.C.—Roebuck v. Short, 144 S.E. 515, 196 N.C. 61. 15 C.J. p 1003 note 21 [a].

Mandamus

N.C.—State ex rel. Tate v. Commissioners of Haywood County, 29 S. E. 60, 122 N.C. 661—Lutterloh v. Cumberland County, 65 N.C. 403.

Tort action

N.C.—Roebuck v. Short, 144 S.E. 515, 196 N.C. 61.

15 C.J. p 1003 note 21 [b].

Action on contract sounding in tort

N.C.—McDonald v. Cannon, 82 N.C. 245.

15 C.J. p 982 note 4.

10. N.C.—Dees v. Apple, 178 S.E. 557, 207 N.C. 763.

15 C.J. p 1003 note 22.

Mortgage foreclosure

N.C.—Singer Sewing Mach. Co. v. Burger, 107 S.E. 14, 181 N.C. 241.

11. N.C.—Armstrong Grocery Co. v. Banks, 116 S.E. 173, 185 N.C. 149.

12. N.C.—West v. F. W. Woolworth Co., 198 S.E. 659, 214 N.C. 214—Robinson v. McAlhane, 198 S.E. 647, 214 N.C. 180—McCoy v. Wachovia Bank & Trust Co., 169 S.E. 644, 204 N.C. 721—Bowen Piano Co. v. Newell, 98 S.E. 774, 177 N.C. 533.

Process

N.C.—Essex Inv. Co. v. Pickelsimer, 187 S.E. 813, 210 N.C. 541—Craford v. La Fayette Life Ins. Co., 151 S.E. 249, 198 N.C. 269. 15 C.J. p 1004 note 24 [a].

13. N.C.—Allen v. Allemania Fire Ins. Co., 197 S.E. 200, 213 N.C. 586.

Jurisdiction

(1) This court is limited in territorial jurisdiction and with respect to the amount in controversy.—Barham v. Perry, 171 S.E. 614, 205 N.C. 428.

(2) Court has no power to grant affirmative equitable relief.—Allen v. Allemania Fire Ins. Co., 197 S.E. 200, 213 N.C. 586—Mauney v. Metropolitan Life Ins. Co., 184 S.E. 82, 209 N.C. 499.

(3) It may, however, allow an equitable defense.—Mauney v. Metropolitan Life Ins. Co., *supra*.

14. Municipal court of Greensboro N.C.—Dees v. Apple, 178 S.E. 557, 207 N.C. 763—G. S. Miles Co. v. Powell, 169 S.E. 828, 205 N.C. 30.

Municipal court of High Point

N.C.—City of High Point v. Brown, 175 S.E. 169, 206 N.C. 664—Grimes

v. Fulton, 147 S.E. 680, 197 N.C. 84.

15. N.C.—Allen v. Allemania Fire Ins. Co., 197 S.E. 200, 213 N.C. 586—Dees v. Apple, 178 S.E. 557, 207 N.C. 763—Tart v. Southern Ry. Co., 161 S.E. 720, 202 N.C. 52—Brock v. Ellis, 137 S.E. 585, 193 N.C. 540—Cook v. Bailey, 130 S.E. 498, 190 N.C. 599.

Time for taking appeal

N.C.—Grogg v. Graybeal, 184 S.E. 85, 209 N.C. 575—Sneed v. Darby, 91 S.E. 956, 173 N.C. 274.

Failure to serve statement of case

N.C.—Chappel v. Ebert, 152 S.E. 692, 198 N.C. 575.

Notice of motions

N.C.—Dawkins v. Phillips, 116 S.E. 723, 185 N.C. 608.

Ruling on all assignments of error

N.C.—Robinson v. McAlhane, 198 S. E. 647, 214 N.C. 180.

Determination and disposition of cause

N.C.—Brown v. Lipe, 185 S.E. 681, 210 N.C. 199—McCoy v. Wachovia Bank & Trust Co., 169 S.E. 644, 204 N.C. 721—Thomason v. Swenson, 169 S. E. 620, 204 N.C. 759.

Reinstatement of appeal

N.C.—West v. F. W. Woolworth Co., 198 S.E. 659, 214 N.C. 214.

Judgment on stay bond

N.C.—Sneed v. Darby, 91 S.E. 956, 173 N.C. 274.

16. N.C.—Allen v. Allemania Fire Ins. Co., 197 S.E. 200, 213 N.C. 586—Dees v. Apple, 178 S.E. 557, 207 N.C. 763—Barham v. Perry, 171 S.E. 614, 205 N.C. 428.

Right to hear errors of law only

N.C.—Cook v. Bailey, 130 S.E. 498, 190 N.C. 599.

17. N.D.—Rasmussen v. Schmalenberger, 235 N.W. 456, 60 N.D. 527. 15 C.J. p 1004 note 26.

ing,¹⁸ whether at law or in equity.¹⁹ In addition to county courts, with respect to which there are a number of decisions,²⁰ there have been established, by virtue of statutes providing therefor, tribunals of conciliation, which, although they are not courts, exercise the function of arbiters in controversies involving a limited amount when they are voluntarily submitted by the parties.²¹

§ 282. Ohio

In Ohio there are decisions relating to the common pleas, municipal, mayors', police, and juvenile courts.

In Ohio there are decisions relating to the common pleas court,²² which, as fixed by the legislature,²³ is a court of general jurisdiction,²⁴ in equity as well as at law.²⁵ It also exercises appellate jurisdiction over inferior courts.²⁶

By separate statutory enactment municipal courts have been established in a number of cities. Among those with respect to which there are decisions are the municipal courts of Akron,²⁷ Alliance,²⁸ Canton,²⁹ Columbus,³⁰ Dayton,³¹ Marion,³² Sandusky,³³ and Toledo.³⁴ In addition to the foregoing

18. N.D.—City of Enderlin v. Pontiac Tp., Cass County, 242 N.W. 117, 62 N.D. 105—Goodin v. Casselman, 200 N.W. 94, 51 N.D. 543.

19. N.D.—Rasmusson v. Schmalenberger, 335 N.W. 496, 60 N.D. 527.

20. N.D.—Talcott v. Bailey, 208 N.W. 549, 54 N.D. 19.
15 C.J. p 1004 note 27.

21. N.D.—Klein v. Hutton, 191 N.W. 485, 49 N.D. 248.

22. Ohio.—Pullman Co. v. Automobile Ins. Co., 140 N.E. 355, 107 Ohio St. 283—City Loan & Savings Co. v. Kyler, 198 N.E. 503, 50 Ohio App. 390—Swinburne v. Dahms, 162 N.E. 776, 29 Ohio App. 390—Pagel v. Creasy, 26 Ohio Cir.Ct.N.S., 113—Durrett v. Bellevue Brewing Co., 21 Ohio N.P.,N.S., 161—Wilson v. Helmbold, 13 Ohio N.P.,N.S., 222—Theobald v. State, 12 Ohio N.P.,N.S., 390—Myers v. Myers, 5 Ohio N.P.,N.S., 85.
15 C.J. p 1004 note 30.

How constituted

Ohio.—State v. Le Blond, 140 N.E. 510, 512, 108 Ohio St. 126.

23. Ohio.—Mattone v. Argentina, 175 N.E. 603, 123 Ohio St. 393—Long & Allstatter Co. v. Willis, 3 N.E.2d 910, 52 Ohio App. 299, appeal dismissed Willis v. Long & Allstatter Co., 2 N.E.2d 600, 131 Ohio St. 287.

24. Ohio.—Hess v. Devou, 146 N.E. 311, 112 Ohio St. 1—Huffer v. Prindle, 153 N.E. 527, 22 Ohio App. 241—Mansfield v. Cole, 16 Ohio N.P.,N.S., 209.

Cannot modify decree of court of appeals

Ohio.—Newark Natural Gas & Fuel Co. v. City of Newark, 22 Ohio N.P.,N.S., 187.

Attachment

U.S.—Voorhees v. Jackson, Ohio, 10 Pet. 449, 9 L.Ed. 490.

enforcement of partnership agreement

Ohio.—Steigert v. Steigert, 13 N.E.2d 533, 57 Ohio App. 255.

Venue

Ohio.—Barnard v. Anselm, 5 Ohio N.P.,N.S., 155.

Attorney's right to compensation
out of a fund under the court's control may be determined by the court, subject to review as to its finding on jurisdictional questions.—Barnes v. Fifth-Third Union Trust Co., 15 N.E.2d 651, 53 Ohio App. 27.

25. Ohio.—Madden v. Shallenberger, 169 N.E. 450, 121 Ohio St. 401—Barnes v. Fifth-Third Union Trust Co., 15 N.E.2d 651, 53 Ohio App. 27—Butler v. Karb, 16 Ohio N.P.,N.S., 593.

Suit for accounting

Ohio.—State v. Roach, 170 N.E. 866, 122 Ohio St. 117.

Suit in partition

Ohio.—Huffer v. Prindle, 153 N.E. 527, 22 Ohio App. 241.

26. Ohio.—Hess v. Devou, 146 N.E. 311, 112 Ohio St. 1.

Method of appeal

Ohio.—Saslaw v. Weiss, 14 N.E.2d 930, 133 Ohio St. 496.

Jurisdictional amount

Ohio.—State ex rel. Talaba v. Moreland, 5 N.E.2d 159, 132 Ohio St. 71—Shidler v. Piedmont Land Co., 198 N.E. 60, 50 Ohio App. 256.

Court of record

Ohio.—Heller v. Adelman, 197 N.E. 801, 50 Ohio App. 163.

Jurisdiction same as that of justice of peace.—Martin v. Bircher, 188 N.E. 365, 46 Ohio App. 239.

Forcible entry and detainer action

Ohio.—Martin v. Bircher, supra.

Time for filing appeal bond and transcript

Ohio.—Heller v. Adelman, 197 N.E. 801, 50 Ohio App. 163.

Jurisdictional amount

Ohio.—State ex rel. Finley v. Miller, 191 N.E. 465, 128 Ohio St. 442.

Territorial jurisdiction

Ohio.—Yontz v. McCutchin, 167 N.E. 363, 121 Ohio St. 142.

Forcible entry and detainer action

Ohio.—State v. Miller, 183 N.E. 41, 43 Ohio App. 173—Felger v. Thompson, 161 N.E. 42, 27 Ohio App. 310.

Procedure

Ohio.—Columbus Ry. Power & Light

Co. v. C. & Z. Furniture, Warehouse & Auction Co., 184 N.E. 20, 44 Ohio App. 159.

Appeal

Ohio.—Riebel v. Hunt, 185 N.E. 468, 44 Ohio App. 299—Columbus Ry., Power & Light Co. v. C. & Z. Furniture, Warehouse & Auction Co., 184 N.E. 20, 44 Ohio App. 159.

31. Ohio.—Berner v. Wellbaum, 24 Ohio N.P.,N.S., 221.

Jurisdiction

Ohio.—Dayton Morris Plan Bank v. Graham, 191 N.E. 817, 47 Ohio App. 310—Marshall v. Neff, 27 Ohio N.P.,N.S., 125.

Appearance

Ohio.—Dayton Morris Plan Bank v. Graham, 191 N.E. 817, 47 Ohio App. 310.

Review

Ohio.—Pullman Co. v. Automobile Ins. Co., 140 N.E. 355, 107 Ohio St. 283—McKiney v. Cleveland, C., C. & St. L. R. Co., 177 N.E. 511, 39 Ohio App. 346.

32. Jurisdiction

Ohio.—City Loan & Savings Co. v. Kyler, 198 N.E. 503, 50 Ohio App. 390.

Transcript of judgment

Ohio.—City Loan & Savings Co. v. Kyler, supra.

33. Ohio.—Hummell v. Mercier, 190 N.E. 633, 128 Ohio St. 49.

34. Territorial jurisdiction

Ohio.—Morse v. State, 180 N.E. 906, 41 Ohio App. 265.

Attachment bond

Ohio.—Jenkins v. Nichols, 173 N.E. 47, 36 Ohio App. 267.

Forcible entry and detainer action

Ohio.—Morse v. State, 180 N.E. 906, 41 Ohio App. 265—Poulos v. Toledo Labor Bldg. Co., 154 N.E. 57, 22 Ohio App. 426.

Review

(1) In general.—Jenkins v. Nichols, 173 N.E. 47, 36 Ohio App. 267—Barger-Mitchell Motor Co. v. Levy, 170 N.E. 443, 34 Ohio App. 84.

(2) Decisions reviewable.—Jenkins v. Nichols, supra.

there are decisions relating to the municipal court of Cincinnati,³⁵ including decisions with respect to such matters as jurisdiction,³⁶ procedure,³⁷ and review of its proceedings;³⁸ and there are also decisions relating to the municipal court of Cleveland,³⁹ some of which are with respect to such matters as jurisdiction,⁴⁰ procedure,⁴¹ and appeals.⁴²

Other courts with respect to which there are decisions include mayors' courts,⁴³ police courts,⁴⁴

juvenile courts,⁴⁵ and certain courts which are no longer in existence.⁴⁶

§ 283. Oklahoma

In Oklahoma there are decisions relating to district, superior, common pleas, county, city, and municipal courts.

There are decisions relating to the district courts of Oklahoma,⁴⁷ which are courts of original and general jurisdiction,⁴⁸ and which have equitable as

(3) Appeal bonds.—Barger-Mitchell Motor Co. v. Levy, *supra*.

(4) Presumptions.—Barnes v. Collins, 197 N.E. 795, 50 Ohio App. 196.

35. Ohio.—Keck v. Bahlke, 26 Ohio Cir.Ct., N.S., 398—Brodbeck v. Talley, 26 Ohio Cir.Ct., N.S., 334—In re Hesse, 24 Ohio Cir.Ct., N.S., 249.

Court of record

Ohio.—Leonard v. Elgin, J. & E. Ry. Co., 148 N.E. 239, 112 Ohio St. 623.

36. Ohio.—Keck v. Bahlke, 6 Ohio App. 246—Snider v. Shockey, 19 Ohio N.P., N.S., 125.

Amount in controversy

Ohio.—Levinson v. Sun Outfitting Co., 183 N.E. 113, 43 Ohio App. 275.

Location of subject matter

Ohio.—State v. Bell, 181 N.E. 454, 42 Ohio App. 187.

Equity

Except to such extent as is expressly provided for by statute, the court is without equitable jurisdiction.—Toohey v. Simmons, 19 N.E.2d 517, 60 Ohio App. 84, appeal dismissed 17 N.E.2d 269, 134 Ohio St. 357, certiorari denied Simmons v. Toohey, 59 S.Ct. 587, 306 U.S. 647, 83 L.Ed. 1046—Harmeyer v. Reid, Murdoch & Co., 183 N.E. 87, 43 Ohio App. 353—Dahms v. Swinburne, 167 N.E. 486, 31 Ohio App. 512—Kaufman v. McCall Co., 162 N.E. 818, 29 Ohio App. 283.

37. Ohio.—Hamilton v. Ratterman, 19 Ohio N.P., N.S., 94.

Fleadings

Ohio.—Levinson v. Sun Outfitting Co., 183 N.E. 113, 43 Ohio App. 275—Bevard v. Drucker, 182 N.E. 699, 43 Ohio App. 294—Main Cloak & Suit Co. v. Rosenbaum, 181 N.E. 556, 42 Ohio App. 12—McCurdy v. Stevens, 165 N.E. 855, 30 Ohio App. 545—C. E. Riley Co. v. Levy Over-all Mfg. Co., 10 Ohio App. 261.

Findings

Ohio.—Yetter v. Kleinman, 171 N.E. 362, 34 Ohio App. 433—Bloom v. Rabkin, 19 Ohio App. 23.

Judgment

Ohio.—Braun v. Poley, 18 Ohio App. 370—Morton v. Savin, 17 Ohio App. 50.

38. Ohio.—Shaw v. Al Naish Moving & Storage Co., 9 N.E.2d 300, 55

Ohio App. 211—Reiter v. Ginocchio, 187 N.E. 247, 45 Ohio App. 434—Getzug v. Belvedere Bldg. Co., 187 N.E. 22, 45 Ohio App. 326—Mulvihill v. Frohmiller, 153 N.E. 115, 21 Ohio App. 210—Rocca v. Rosentiel, 152 N.E. 677, 20 Ohio App. 367—Morton v. Savin, 17 Ohio App. 50.

39. Ohio.—Soul v. Lockhart, 164 N.E. 419, 119 Ohio St. 393.

40. U.S.—In re Conservative Mortgage & Guaranty Co., C.C.A. Ohio, 24 F.2d 38.

Ohio.—Lowe v. Union Trust Co., 177 N.E. 767, 123 Ohio St. 638—Krotine v. Link, 173 N.E. 443, 36 Ohio App. 537—Bank of Cleveland v. Rich, 168 N.E. 858, 33 Ohio App. 276.

15 C.J. p 1004 note 31 [a].

Amount in controversy

Ohio.—Soul v. Lockhart, 164 N.E. 419, 119 Ohio St. 393.

Appointment of receiver

Ohio.—Soul v. Lockhart, *supra*.

41. Ohio.—Duich v. Corello, 5 N.E.2d 339, 53 Ohio App. 388—Savoccol v. Dietrich, 174 N.E. 170, 37 Ohio App. 228.

42. Ohio.—Commonwealth Oil Co. v. Turk, 160 N.E. 856, 118 Ohio St. 273—Mock v. Mitchell, 164 N.E. 365, 30 Ohio App. 97—Hull v. Kaufman, 20 Ohio Cir.Ct., N.S., 243.

43. Ohio.—Theobald v. State, 12 Ohio N.P., N.S., 390—Decker v. State, 5 Ohio N.P., N.S., 364.

Appeal

(1) It has been held that a mayor's court is a court of record and therefore an appeal may be taken directly from such court to the court of appeals.—Heininger v. Davis, 117 N.E. 229, 96 Ohio St. 205.

(2) But, in deciding that a justice of the peace court is not a court of record so as to permit an appeal therefrom directly to the court of appeals, it has been stated that "this conclusion necessarily results in inferentially overruling the case of Heininger v. Davis, Mayor, 117 N.E. 229, 96 Ohio St. 205, because the jurisdiction of a mayor is defined to be that of a justice of the peace, and in all essential respects similar provisions are made for conducting judicial proceedings before a mayor."—

State v. Allen, 159 N.E. 591, 593, 117 Ohio St. 470.

(3) The principle announced in State v. Allen, *supra*, has been followed with respect to a mayor's court.—Pettiford v. Village of Yellow Springs, 176 N.E. 587, 38 Ohio App. 310.

44. Ohio.—Heimlich v. Dispatch Printing Co., 18 Ohio N.P., N.S., 505, affirmed 6 Ohio App. 394, 27 Ohio Cir.Ct., N.S., 333, 29 Ohio Cir.Dec. 149.

45. Ohio.—Cleveland Protestant Orphan Asylum v. Soule, 24 Ohio Cir.Ct., N.S., 151.

Superior court of Cincinnati

Ohio.—Schulte v. Johnson, 140 N.E. 116, 106 Ohio St. 359—Wilansky v. Ansche Polen Congregation, 12 Ohio App. 301—Pittsburg, C. & St. L. Ry. v. Pool, 1 Ohio App. 436, 35 Ohio Cir.Ct. 360—Scott v. Wingenberg, 26 Ohio Cir.Ct., N.S., 1—State ex rel. Leineweber v. Union Gas & Electric Co., 14 Ohio N.P., N.S., 97.

15 C.J. p 1004 note 28.

Insolvency court of Hamilton County

Ohio.—Rendigs v. Devou, 12 Ohio App. 316—In re Whallon, 26 Ohio Cir.Ct., N.S., 167.

47. Okl.—Bryan v. Seiffert, 94 P. 2d 526, 185 Okl. 496—Samuels v. Granite Sav. Bank & Trust Co., 1 P.2d 145, 150 Okl. 174—Hawkins v. Bryan, 261 P. 167, 128 Okl. 27.

15 C.J. p 1004 note 34.

48. Okl.—Samuels v. Granite Sav. Bank & Trust Co., 1 P.2d 145, 150 Okl. 174—Hawkins v. Bryan, 261 P. 167, 128 Okl. 27—Zwartz v. Dori, 253 P. 75, 123 Okl. 284—Missouri, K. & T. Ry. Co. v. City of Tulsa, 238 P. 452, 113 Okl. 21.

15 C.J. p 1004 note 34 [a].—[1]. "Original jurisdiction" defined Okl.—Petros v. Bosen, 91 P.2d 735, 185 Okl. 351.

Jurisdiction to try title to realty

Okl.—Petros v. Bosen, 91 P.2d 735, 185 Okl. 351—McKeehen v. James, 289 P. 732, 144 Okl. 101—Zwartz v. Dori, 253 P. 75, 123 Okl. 284.

Power to issue writs

Okl.—Thompson v. State, 108 P. 298, 25 Okl. 741.

well as legal powers.¹⁹ In addition to their original jurisdiction they have power to hear appeals from inferior courts.⁵⁰

There are decisions relating to courts which have, to a limited extent, concurrent jurisdiction with the district court; these include superior courts⁵¹ and courts of common pleas,⁵² which have been established in some counties, and county courts, which exist in every county of the state.⁵³ The county courts are courts of record,⁵⁴ and, while they exercise jurisdiction concurrent with the district courts in some matters,⁵⁵ they have only such jurisdiction as is granted by the constitution and statutes; but

they⁵⁶ do not have jurisdiction to adjudicate title to real estate,⁵⁷ nor to sell the same except under the exercise of probate powers.⁵⁸

Other courts with respect to which there are decisions include city⁵⁹ and municipal⁶⁰ courts.

In the *Indian Territory*, prior to statehood, mayors of cities and towns exercised, ex officio, jurisdiction in civil suits.⁶¹

§ 284. Oregon

In Oregon there are decisions relating to circuit, county, district, and municipal courts.

Territorial district courts had jurisdiction to grant writs of mandamus and habeas corpus.—*Starkweather v. Kemp*, 88 P. 1045, 18 Okl. 28—*Allen v. Reed*, 60 P. 782, 63 P. 867, 10 Okl. 105.

40. Okl.—*Wentz v. Thomas*, 15 P.2d 65, 159 Okl. 124—*Phillips v. Mitchell*, 172 P. 85, 68 Okl. 128, error dismissed 39 S.Ct. 7, 248 U.S. 531, 63 L.Ed. 405.

Distribution of trust estate's assets Okl.—*Bryan v. Seiffert*, 94 P.2d 526, 185 Okl. 496.

Probate matters

Okl.—*Bryan v. Seiffert*, 94 P.2d 526, 185 Okl. 496.

Courts of probate jurisdiction generally see *infra* §§ 298–310.

50. Appeal from county court

Okl.—*Thornton v. Moore*, 94 P.2d 554, 185 Okl. 473—In re *Leaf's Deed*, 70 P.2d 75, 180 Okl. 444—In re *Durkee's Will*, 53 P.2d 576, 175 Okl. 360—*Campbell v. Hickory*, 278 P. 1088, 137 Okl. 235—In re *Revard's Guardianship*, 272 P. 480, 134 Okl. 262—*Appeal of Barnett*, 253 P. 410, 123 Okl. 160—*Appeal of Barnett*, 252 P. 418, 122 Okl. 163—In re *Johnson*, 179 P. 605, 72 Okl. 174.

Appeal from municipal court

Okl.—*Maryland Casualty Co. v. Cowan*, 91 P.2d 756, 165 Okl. 304.

51. Okl.—*Sheridan Oil Co. v. Superior Court of Creek County*, 82 P. 2d 832, 183 Okl. 372.
15 C.J. p 1004 note 33.

Setting aside judgments of county courts

Okl.—In re *Johnson*, 179 P. 605, 72 Okl. 174.

Writs of prohibition to inferior courts

Okl.—*State v. Vaughn*, 125 P. 899, 33 Okl. 394.

52. Jurisdiction

(1) The court has jurisdiction of an action involving less than one thousand dollars where it does not come within an exception in the statute excluding jurisdiction in cases

involving title to real estate and causes in action for divorce and actions where the relief asked for in the petition is purely equitable in its nature, and actions for libel and slander.—*Badger v. Dukes*, 272 P. 414, 134 Okl. 25.

(2) The court does not have jurisdiction of appeals from municipal courts.—*Ex parte Addington*, 28 P.2d 590, 55 Okl.Cr. 203.

53. Okl.—*Hines v. Armstrong*, 77 P. 2d 671, 182 Okl. 344—*Hunter v. Cooper*, 48 P.2d 1078, 173 Okl. 404—*Hoffmeyer v. Partridge*, 249 P. 401, 119 Okl. 216—*Hamilton v. Exchange Nat. Bank of Muskogee*, 242 P. 860, 114 Okl. 30—*Hamilton v. International Bank of Haskell*, 242 P. 858, 114 Okl. 28—*Mullen v. Ruzsliaman*, 119 P. 641, 31 Okl. 53, Ann.Cas.1913D 778.
15 C.J. p 1004 note 35.

Probate powers

Okl.—*Bryan v. Seiffert*, 94 P.2d 526, 185 Okl. 496—*Petroleum Auditors Ass'n v. Landis*, 77 P.2d 730, 182 Okl. 297—In re *Barrett's Estate*, 72 P.2d 482, 181 Okl. 262—*Baird v. Patterson*, 44 P.2d 90, 172 Okl. 158—*Manuel v. Kidd*, 258 P. 732, 126 Okl. 71—*O'Neill v. Cunningham*, 244 P. 444, 119 Okl. 157—*Adams v. Tidal Oil Co.*, 237 P. 443, 113 Okl. 15—In re *Green's Estate*, 196 P. 128, 80 Okl. 256—*Vinson v. Cook*, 181 P. 97, 76 Okl. 46.
15 C.J. p 1004 note 35 [a].

54. U.S.—*Weston v. Poland*, C.C.A. Okl., 48 F.2d 738.

Okl.—*Petroleum Auditors Ass'n v. Landis*, 77 P.2d 730, 182 Okl. 297—In re *Leaf's Deed*, 70 P.2d 75, 180 Okl. 444—*Baird v. Patterson*, 44 P. 2d 90, 172 Okl. 158—*Bird v. Palmer*, 3 P.2d 894, 152 Okl. 7—*Bird v. Palmer*, 3 P.2d 890, 152 Okl. 3—*Manuel v. Kidd*, 258 P. 732, 126 Okl. 71—*Johnson v. Petty*, 246 P. 848, 118 Okl. 178—*O'Neill v. Cunningham*, 244 P. 444, 119 Okl. 157—*Adams v. Tidal Oil Co.*, 237 P. 443, 113 Okl. 15—In re *Green's Estate*, 196 P. 128, 80 Okl. 256—*Vinson v. Cook*, 181 P. 97, 76 Okl. 46—*Rogers*

v. Duncan, 156 P. 678, 57 Okl. 20—*Hickey v. State*, 252 P. 858, 36 Okl. Cr. 137.

55. Okl.—*Humphrey v. Coquillard Wagon Works*, 132 P. 899, 37 Okl. 714, 49 L.R.A.N.S., 600.

56. Okl.—In re *Johnson*, 179 P. 605, 72 Okl. 174—*Ozark Oil Co. v. Berryhill*, 143 P. 173, 43 Okl. 523.

Limitations inapplicable to criminal cases

Okl.—*Nance v. State*, 273 P. 369, 41 Okl.Cr. 379.

57. Okl.—*Austin v. Chambers*, 124 P. 310, 33 Okl. 40.

Title not involved

Okl.—*City of Tulsa v. Peacock*, 74 P.2d 359, 181 Okl. 383.

Action for rent

(1) Where it is apparent from the evidence that the title to land is in dispute, the court does not have jurisdiction.—*Marshall v. Burden*, 106 P. 846, 25 Okl. 554.

(2) But, even though ownership is denied, if there is not substantial evidence to show a conflict in title the court will not be ousted from jurisdiction.—*Hodge v. Mayfield*, 223 P. 853, 98 Okl. 8.

58. Okl.—*Kimberlin v. Anthony*, 254 P. 1, 124 Okl. 170.

Courts of probate jurisdiction generally see *infra* §§ 298–310.

59. Okl.—*Martin v. Reynolds*, 270 P. 52, 132 Okl. 234.

Appeal to district court

Okl.—*Witham v. Gage*, 230 P. 718, 106 Okl. 121—*Muskogee Electric Traction Co. v. Watterson*, 218 P. 796, 92 Okl. 183—*Muskogee Electric Traction Co. v. Johnson*, 204 P. 124, 85 Okl. 11.

60. Okl.—*Case v. City of Tulsa*, 212 P. 998, 88 Okl. 233—*Fossett v. State*, 245 P. 668, 34 Okl.Cr. 106.

Procedure on appeal

Okl.—*Maryland Casualty Co. v. Cowan*, 91 P.2d 756, 185 Okl. 304—*Fossett v. State*, 245 P. 668, 34 Okl. Cr. 106.

61. Okl.—*Turk v. Mayberry*, 121 P. 665, 32 Okl. 66.

In Oregon there have been decisions relating to the circuit courts which are courts of general jurisdiction,⁶² and which have power to hear appeals from inferior courts.⁶³ Inferior courts with respect to which there are decisions include county courts,⁶⁴ district courts,⁶⁵ and municipal courts.⁶⁶

62. Or.—Montesano Lumber & Mfg. Co. v. Portland Iron Works, 152 P. 244, 78 Or. 53.
15 C.J. p 1004 note 40.

Court of record
Or.—Murphy v. Bjellik, 170 P. 723, 87 Or. 329, denying rehearing 169 P. 520, 87 Or. 329.

Probate jurisdiction in Multnomah County

Or.—Jacobson v. Holt, 255 P. 901, 121 Or. 462.

Courts of probate jurisdiction generally see *infra* §§ 298-310.

63. Or.—Chandler v. Hultgren, 66 P. 2d 268, 156 Or. 142—Moltzner v. Cutler, 61 P.2d 93, 154 Or. 573—Brown v. Liquidators, 52 P.2d 187, 152 Or. 215—Higgins v. Fields, 47 P.2d 235, 150 Or. 528—Seeman v. Kuehl, 281 P. 185, 131 Or. 162.

Transcript

Or.—In re Ryan's Estate, 164 P. 586, 84 Or. 102.

Burden of proof on trial de novo

Or.—Goin v. Chute, 270 P. 492, 126 Or. 466, affirming 260 P. 998, 126 Or. 466.

Alternative methods of disposition

Or.—Goin v. Chute, *supra*.

Finality of decree

Or.—In re Lee's Estate, 271 P. 994, 132 Or. 1.

64. Or.—Goin v. Chute, 270 P. 492, 126 Or. 466, affirming 260 P. 998, 126 Or. 466—Dickenson v. Henderson, 176 P. 797, 90 Or. 408.
15 C.J. p 1004 note 41.

As court of special and limited jurisdiction

Or.—Kerns v. Union County, 261 P. 76, 123 Or. 103.

15 C.J. p 1004 note 41 [e].

Absence of jurisdiction to try title to realty

Or.—Chapman v. Hood River County, 178 P. 379, 91 Or. 92.

15 C.J. p 1004 note 41 [f].

Appeal to circuit court

Or.—In re Lee's Estate, 271 P. 994, 132 Or. 1—Goin v. Chute, 270 P. 492, 126 Or. 466, affirming 260 P. 998, 126 Or. 466—Cooper v. Bogue, 180 P. 108, 92 Or. 122, denying rehearing 179 P. 658, 92 Or. 122—In re Barker, 164 P. 382, 83 Or. 702.

65. Not court of record

Or.—Cohn v. Duntley, 19 P.2d 87, 142 Or. 186.

No equitable jurisdiction

Or.—Cohn v. Duntley, *supra*.

Appeal to circuit court

Or.—Chandler v. Hultgren, 66 P.2d 268, 156 Or. 142—Moltzner v. Cutler, 61 P.2d 93, 154 Or. 573—Brown v. Liquidators, 52 P.2d 187, 152 Or. 215—Higgins v. Fields, 47 P.2d 235, 150 Or. 528—Seeman v. Kuehl, 281 P. 185, 131 Or. 162—In re Barker, 164 P. 382, 83 Or. 702.

66. Or.—Ex parte Mack, 171 P. 896, 88 Or. 174.

Authorization of appeals

In the absence of duly delegated authority from the legislature, municipal corporations cannot authorize appeals from municipal courts.—City of La Grande v. Municipal Court of City of La Grande, 251 P. 308, 120 Or. 109.

67. Pa.—Keyser v. Joshua Davis Building & Loan Ass'n, 2 A.2d 590, 133 Pa.Super. 136—West Virginia Pulp & Paper Co. v. Public Service Commission, 61 Pa.Super. 555—Zimmerman v. Hartranft, 13 Pa. Dist. & Co. 86—Peerless Soda Fountain Co. v. Schneyer, 13 Pa. Dist. & Co. 56—Bloom v. Bloom, 11 Pa.Dist. & Co. 752—Gilmore v. Alexander, 28 Pa.Dist. 995, affirmed 112 A. 9, 268 Pa. 415—Hartgen v. Hartgen, 28 Pa.Dist. 677—Kramer v. Slattery, 28 Pa.Dist. 672, 47 Pa. Co. 102, 15 Del.Co. 25, 19 Lack.Jur. 311, 67 Pittsb.Leg.J. 124, 14 Schuylkill Leg.Rec. 305, 399, affirmed 73 Pa.Super. 361—In re Moorhead's Estate, 27 Pa.Dist. 15, 65 Pittsb.Leg.J. 364—Commonwealth v. Sheasley, 43 Pa.Co. 665—Hopkins v. Ladies' Auxiliary of the Hotel Brotherhood, 24 Pa.Dist. 442, 43 Pa.Co. 467—Lancaster Supply Co. v. Butt, 43 Pa.Co. 185—Commonwealth v. Owens, 43 Pa.Co. 164, 16 Lack.Jur. 37, affirmed Commonwealth ex rel. v. Owens, 63 Pa.Super. 111—George v. Gans, 43 Pa.Co. 27, 63 Pittsb.Leg.J. 37—Vichestein v. Ocean Coal Co., 37 Pa.Co. 594, 58 Pa.L.J. 97.
15 C.J. p 1005 note 46.

Transfer of cause to another court

Pa.—Coast v. Miffin, 29 Pa.Dist. 1009.

Commonwealth as party

Court of common pleas of Dauphin County has jurisdiction throughout

§ 285. Pennsylvania

There are decisions relating to various courts in Pennsylvania.

There are decisions relating to the Pennsylvania court of common pleas,⁶⁷ including decisions relating to its jurisdiction,⁶⁸ and its authority to hear appeals from lower courts.⁶⁹

the state of suits wherein the commonwealth is a party plaintiff.—Commonwealth ex rel. Attorney-General v. Millcreek Township School Directors, 30 Pa.Dist. 474—15 C.J. p 1005 note 46 [h].

In Lancaster County there formerly existed a district court which exercised jurisdiction similar to that of a court of common pleas.—Reeves v. Brown, 2 Pa.L.J. 196, 3 Pa.L.J. 464.

68. Action of trespass

Pa.—Koontz v. Messer, 172 A. 457, 314 Pa. 434—Snively v. Hackenberg, 4 Pa.Dist. & Co. 28.

Ex-uit powers

Pa.—Commonwealth ex rel. Kelley v. Pommer, 199 A. 485, 330 Pa. 421—Brown v. Brancato, 184 A. 89, 321 Pa. 54—Penn Anthracite Mining Co. v. Anthracite Miners of Pennsylvania, 174 A. 11, 114 Pa.Super. 7, affirmed 178 A. 291, 318 Pa. 401.

Lunatic's estate

Pa.—Komarnicki's Case, 3 Pa.Dist. & Co. 603—In re Davidson's Estate, 29 Pa.Dist. 1089.

Mandamus

Pa.—Commonwealth ex rel. Kelley v. Pommer, 199 A. 485, 330 Pa. 421—Commonwealth v. Barnett, 48 A. 976, 199 Pa. 161, 55 L.R.A. 882—Joos v. McCandless, 8 A. 159, 129 Pa. 492—Taylor v. Commonwealth, 103 Pa. 96, 40 Leg.Int. 359, 31 Pa. L.J. 476, 13 Wkly.N.C. 378—Commonwealth ex rel. Attorney General v. Millcreek Township School Directors, 30 Pa.Dist. 474—In re Bones's License, 29 Pa.Dist. 931—Commonwealth ex rel. Becker v. Stucker, 5 Pa.Dist. 660, 18 Pa.Co. 587—Commonwealth ex rel. Hawker v. Wickersham, 2 Pearson 336, affirmed Commonwealth v. Wickersham, 90 Pa. 311, 7 Wkly.N.C. 265—Adams v. Duffield, 4 Brewst. 9—Commonwealth ex rel. Lawrence v. Tree, 1 A. Brewst. 67, 18 Leg.Int. 372, 4 Phila 362—Petition of Cassel, 14 Montg.Co. 101—Commonwealth ex rel. McCalmont v. Keim, 38 Leg. Int. 32, 15 Phila. 1.

69. Pa.—New Castle Metal Products Co. v. Campbell, 200 A. 118, 131 Pa. Super. 367—Lappe v. H. B. Rea Motor Co., 158 A. 197, 103 Pa.Super. 120—Kress House Moving Co. v. Brennan, 77 Pa.Super. 57—Harris & Rhodes v. Brinton, 75 Pa.Super. 68.

There are also decisions relating to courts of quarter sessions of the peace.⁷⁰

A court of limited jurisdiction known as the county court has been established in Allegheny County. There have been decisions relating to this court,⁷¹ including decisions with reference to its ju-

risdiction,⁷² procedure,⁷³ and the review of its proceedings.⁷⁴

There has been created by statute a court known as the municipal court of Philadelphia, and there have been decisions relating to this court,⁷⁵ including decisions relating to such matters as its jurisdiction,⁷⁶ procedure,⁷⁷ and the review of its pro-

70. Pa.—Komarnicki's Case, 3 Pa. Dist. & Co. 603—Commonwealth v. Sutton, 29 Pa. Dist. 1002. 15 C.J. p 1005 note 47.

Jurisdiction

(1) The jurisdiction of this court is purely statutory.—Pine Hill Road, 6 Pa. Dist. & Co. 441.

(2) It has certain jurisdiction with respect to highways.—Cambria County Road, 43 Pa. Co. 13—15 C.J. p 1005 note 47 [d].

(3) It has no general equity jurisdiction.—Carlisle & M. St. R. Cos. App., 91 A. 959, 245 Pa. 561.

(4) It has no jurisdiction to award mandamus.—In re Spring St. Opening, 3 A. 581, 112 Pa. 258, 43 Leg. Int. 364, 17 Wkly.N.C. 359—In re Sedgely Ave., 88 Pa. 509, 36 Leg. Int. 106, 7 Wkly.N.C. 201—Collin's Case, 2 Grant, Pa., 214—In re Bone's License, 29 Pa. Dist. 931—Penn Gas Coal Co's Petition, 19 Pa. Dist. 337, 36 Pa. Co. 641—In re Cassel, 14 Montg. Co., Pa., 101.

(5) It has no jurisdiction to issue writs of certiorari.—Commonwealth v. Garovitz, 26 Pa. Dist. 138, 44 Pa. Co. 537, 14 Just. 323, 34 Lanc. Rev. 21, 64 Pittsb. Leg. J. 648—Commissioner of Labor & Industry v. Lasky, 25 Pa. Dist. 907, 43 Pa. Co. 299, 63 Pittsb. L. & J. 330—Commonwealth v. Owens, 43 Pa. Co. 164, 16 Lack. Jur. 73, affirmed Commonwealth ex rel. Owens v. Owens, 63 Pa. Super. 111.

(6) It is not a tribunal that can pass upon the validity of a deed restriction.—Appeal of Ted's Union Inn, 22 Westmoreland Co., Pa., 179.

71. Pa.—Petition of Park, 196 A. 495, 329 Pa. 60—Kress House Moving Co. v. Brennan, 77 Pa. Super. 57—Desantis v. Campbell, 68 Pa. Super. 495. 15 C.J. p 1004 note 42.

72. Pa.—Pyzdrowski v. Tarkowski, 3 A.2d 458, 137 Pa. Super. 118.

Amount in controversy

Pa.—Kemnitzner v. Kemnitzner, 6 A.2d 571, 335 Pa. 105—Gottschall v. Campbell, 83 A. 286, 234 Pa. 347—Cubierka v. Pennsylvania Slovak Roman and Greek Catholic Union of U. S. of America, 193 A. 828, 126 Pa. Super. 605.

Desertion actions

Under statute conferring exclusive jurisdiction on the county court of Allegheny County in desertion ac-

tions, legislature did not intend to supersede process of court of common pleas, under statutes concerning actions for support and maintenance, against husband's property for maintenance of abandoned wife and children; and hence court of common pleas of Allegheny County had jurisdiction of wife's suit to compel application of an alleged inheritance of her husband to the maintenance of herself and children.—Kemnitzner v. Kemnitzner, 6 A.2d 571, 335 Pa. 105.

Trying title to land

Pa.—Pekny v. Hrabosky, 161 A. 749, 106 Pa. Super. 393.

73. Pa.—Page v. Patterson, 161 A. 878, 105 Pa. Super. 438—Findley v. Bryans, 58 Pa. Super. 399.

74. Pa.—Lappe v. H. B. Rea Motor Car Co., 158 A. 197, 103 Pa. Super. 120—Harris & Rhodes v. Brinton, 75 Pa. Super. 68—Craig v. Atkinson, 72 Pa. Super. 120—Desantis v. Campbell, 68 Pa. Super. 495.

75. Pa.—Commonwealth v. Glass, 145 A. 278, 295 Pa. 291—Eldredge v. Eldredge, 194 A. 306, 128 Pa. Super. 284—Thomas v. Thomas, 172 A. 36, 112 Pa. Super. 578—Glazer v. Sanet, 94 Pa. Super. 480—Patterson v. Union Transfer Co., 84 Pa. Super. 273—Markowitz v. Ararat Dye Works, 73 Pa. Super. 129—Spies v. Ford, 71 Pa. Super. 210—Colucci Minors' Estates, 3 Pa. Dist. & Co. 694, reversed on other grounds 83 Pa. Super. 224. 15 C.J. p 1005 note 44.

76. Pa.—Squire v. Fridenberg, 191 A. 631, 126 Pa. Super. 508—Baker v. Carter, 157 A. 211, 103 Pa. Super. 344—Dunlap v. Dunlap, 92 Pa. Super. 603—Smith v. Wertheimer, 76 Pa. Super. 210—Dunn v. Dunn, 27 Pa. Dist. & Co. 716—Commonwealth v. Rispo, 30 Pa. Dist. 459.

Amount in controversy

(1) In actions generally.—Baker v. Carter, 157 A. 211, 103 Pa. Super. 344—Reinhart v. Shirm, 18 Pa. Dist. & Co. 151.

(2) In tort actions.—Love v. Tioga Trust Co., 68 Pa. Super. 447—Wilson v. Pullman Co., 65 Pa. Super. 499—Lerner v. Felderman, 64 Pa. Super. 287—McCaffrey v. Jackson, 23 Pa. Dist. 173.

Equitable jurisdiction

Pa.—Pennington v. Conway & Ash, 92 Pa. Super. 149.

Support

(1) This court has exclusive jurisdiction over suits by a wife against the husband for desertion and non-support, regardless of the amount involved.—Eldredge v. Eldredge, 194 A. 306, 128 Pa. Super. 284—Thomas v. Thomas, 172 A. 36, 112 Pa. Super. 578—Commonwealth v. Shetzline, 84 Pa. Super. 100—Arthur v. Arthur, 12 Pa. Dist. & Co. 578.

(2) But it does not have jurisdiction to make an order on a grandparent for the support of his grandchild.—Commonwealth v. Sachse, 65 Pa. Super. 536.

77. Pa.—Smith v. Wertheimer, 76 Pa. Super. 210. 15 C.J. p 1005 note 44 [h].

Rules of court

Pa.—Glazer v. Sanet, 94 Pa. Super. 480—Mittin Bros. v. Bass, 84 Pa. Super. 298—Feldman, Armon & Co. v. Lodge, 71 Pa. Super. 273—O'Donnell v. Neely, 66 Pa. Super. 351—Torak v. Philadelphia & Reading R. Co., 60 Pa. Super. 248.

Process

Pa.—Eldredge v. Eldredge, 194 A. 306, 128 Pa. Super. 284—Commonwealth ex rel. Leinbach v. Leinbach, 171 A. 130, 112 Pa. Super. 413—Glazer v. Sanet, 94 Pa. Super. 480—Lerner v. Felderman, 64 Pa. Super. 287.

Pleading

(1) Generally.—Russ Soda Fountain Co. v. Victor Pastry Shoppe, 190 A. 376, 125 Pa. Super. 452—Glazer v. Sanet, 94 Pa. Super. 480—Patterson v. Union Transfer Co., 84 Pa. Super. 273—Brown v. Wineland, 73 Pa. Super. 197—Margulies v. Gottlieb, 73 Pa. Super. 184—Feldman, Armon & Co. v. Lodge, 71 Pa. Super. 273—Coulbourne v. Edelman, 70 Pa. Super. 27—Standard Engineering & Const. Co. v. Smyser-Royer Co., 68 Pa. Super. 437—Berreski v. Philadelphia Electric Co., 67 Pa. Super. 215—Natale v. St. Anthony of Padua Italian Mut. Relief Soc., 66 Pa. Super. 199.

(2) Amendments.—Markowitz v. Ararat Dye Works, 73 Pa. Super. 129—Wilson v. Pullman Co., 65 Pa. Super. 499—Martin v. United Gas Impr. Co., 26 Pa. Dist. 613.

Trial

(1) Generally.—Grossman Bros. v. Goldman, 85 Pa. Super. 205—Davis v. Wilhelm & Bonnett, 76 Pa. Super. 296.

ceedings.⁷⁸

Other courts, with respect to which there are decisions, include the orphans',⁷⁹ magistrates',⁸⁰ and aldermen's⁸¹ courts.

§ 286. Rhode Island

There have been decisions relating to the various Rhode Island courts possessing original jurisdiction.

In Rhode Island, there have been decisions relat-

ing to the superior courts,⁸² which are courts of general jurisdiction,⁸³ and which have original jurisdiction in equity;⁸⁴ the court of domestic relations,⁸⁵ which was created as a division of the superior court;⁸⁶ the district courts,⁸⁷ which are courts of record,⁸⁸ including decisions with respect to their jurisdiction;⁸⁹ the municipal court;⁹⁰ and the court of common pleas, which is the predecessor of the superior court.⁹¹

—Berkowitz v. Palruba Mfg. Co., 68 Pa.Super. 559.

(2) Instructions.—Cichocki v. Dorosz, 165 A. 508, 108 Pa.Super. 498—Sookiasian v. Swift & Co., 100 Pa.Super. 69.

(3) Verdict and findings.—Deacon v. Hendricks, 66 Pa.Super. 36—Emmons v. Courtenay, 66 Pa.Super. 35.

Judgment

(1) Generally.—Cohn v. Post, 78 Pa.Super. 409—Gerson v. Pennsylvania Glass Manufacturing Co., 75 Pa.Super. 320—Rothkugel v. Smith, 70 Pa.Super. 590.

(2) Defaults.—Sokett v. Philadelphia Toilet & Laundry Co., 92 Pa.Super. 254—Mittin Bros. v. Bass, 84 Pa.Super. 298—Stern v. Lancaster, 79 Pa.Super. 27—Smith v. Wertheimer, 76 Pa.Super. 210—Rothkugel v. Smith, supra—O'Donnell v. Neely, 66 Pa.Super. 351—Provident Mutual Life Ins. Co. of Philadelphia v. Brith Achim Building & Loan Ass'n, 25 Pa.Dist. & Co. 1.

(3) Judgment by confession.—Auto Transit Co. v. Koch, 71 Pa.Super. 171—Jameson Piano Co. v. Earnest, 66 Pa.Super. 586.

(4) Setting aside judgment.—Glazer v. Sanet, 94 Pa.Super. 480—Cohn v. Post, 78 Pa.Super. 409.

New trials and motions therefor

Pa.—Schmidt v. Philadelphia Rapid Transit Co., 69 Pa.Super. 101.

78. Pa.—Packel v. McCarthy, 182 A. 769, 120 Pa.Super. 545—Graboyes v. Kapner, 181 A. 385, 120 Pa.Super. 4—Sporkin v. MacBride, 95 Pa.Super. 71—Pennington v. Conway & Ash, 92 Pa.Super. 149—Stawecka v. John Hancock Mut. Life Ins. Co., 65 Pa.Super. 148—Robinson v. Wallace, 65 Pa.Super. 54.
15 C.J. p 1005 note 44 [c, j].

79. Pa.—McGoldrick v. Corcoran, 21 Pa.Dist. & Co. 330—In re McCrea's Estate, 21 Pa.Dist. & Co. 69—In re Jenkins' Estate, 20 Pa.Dist. & Co. 671—In re Breyer's Estate, 20 Pa.Dist. & Co. 220—Martin's Estate, 4 Pa.Dist. & Co. 31—In re Davidson's Estate, 29 Pa.Dist. 1089—Stocker v. Klefer, 28 Pa.Dist. 1027—In re Alexander's Estate, 28 Pa.Dist. 993—In re Elwood's Estate, 28 Pa.Dist. 972, 48 Pa.Co.

358, 67 Pittsb.Leg.J. 840—In re Klink's Estate, 28 Pa.Dist. 760, 47 Pa.Co. 422, 35 Montg.Co. 49, 67 Pittsb.Leg.J. 653, 15 Del. 170—In re Sharpless' Estate, 28 Pa.Dist. 746—Hartgen v. Hartgen, 28 Pa.Dist. 677—In re Owen's Estate, 28 Pa.Dist. 667—In re Moorhead's Estate, 27 Pa.Dist. 15, 65 Pittsb.Leg.J. 364—In re Nicholson's Estate, 24 Pa.Dist. 138, 43 Pa.Co. 83—In re Wagner's Estate, 24 Pa.Dist. 122, 43 Pa.Co. 193.

Courts of probate jurisdiction generally see *infra* §§ 298–310.

80. Pa.—Rutenberg v. City of Philadelphia, 196 A. 73, 329 Pa. 28—Candee v. The Amberstone Co., 31 Pa.Dist. & Co. 137, 1 Monroe L.R. 120—Gulf Refining Co. v. Fudge, 24 Pa.Dist. & Co. 676—Fillman v. Messner, 17 Pa.Dist. & Co. 717, 23 North.Co. 263—Auto Equipment & Service Co., Inc. v. Edgewood Garage, 9 Pa.Dist. & Co. 262.
15 C.J. p 1005 note 45.

Alderman sitting as magistrate

Pa.—Commonwealth v. Amorin, 18 Lehigh Co.L.J. 272.

81. Pa.—New Castle Metal Products Co. v. Campbell, 200 A. 118, 131 Pa.Super. 367—Meta v. Kramer, 167 A. 641, 110 Pa.Super. 132—Zamba v. Brazell, 35 Pa.Dist. & Co. 679—Vedder v. Baugher, 46 Dauph.Co. 375—Faultless Range & Manufacturing Co. v. Strollo, 40 Lack.Jur. 129.

Jurisdiction

Pa.—Vedder v. Baugher, 46 Dauph.Co. 375—Faultless Range & Manufacturing Co. v. Strollo, 40 Lack.Jur. 129.

15 C.J. p 1005 note 43.

Appeals

Pa.—Heinrich Mette & Co. v. Walter S. Scheil, Inc., 47 Dauph.Co. 130—Landau v. Ukrainian Eastern Rite Church of St. Michael, 40 Lack.Jur. 157.

82. Time for hearing jury cases

R.I.—Frey v. Rhode Island Co., 91 A. 1, 37 R.I. 96.

83. R.I.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 323—Slocum v. Providence Steam & Gas Pipe Co., 10 R.I. 112.

Powers are statutory and cannot be extended by judicial interpretation.—Boss v. Sprague, 162 A. 710, 53 R.I. 1.

Jurisdiction on appeal from probate court

R.I.—Kenyon v. Hart, 96 A. 529, 38 R.I. 524.

84. R.I.—Angell v. Angell, 67 A. 325, 28 R.I. 330.

85. Evidence admissible

When acting in an advisory capacity, it is allowed wide discretion in receiving information; but when acting in a judicial capacity, it is not authorized to determine legal rights on hearsay evidence.—Adamo v. Adamo, R.I., 193 A. 737, 111 A.L.R. 1094.

83. R.I.—Adamo v. Adamo, *supra*.

87. R.I.—Wood v. Essex, 94 A. 666, 38 R.I. 21—Barlow v. Tierney, 59 A. 950, 26 R.I. 557—Holman v. Steadman, 58 A. 630, 26 R.I. 158—O'Connor v. O'Brien, 28 A. 765, 18 R.I. 529.

15 C.J. p 1005 note 51.

88. R.I.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 323.

89. R.I.—Hall v. Tabor, 84 A. 793, 34 R.I. 508.

15 C.J. p 1005 note 51 [a]–[e].

District courts are inferior courts with their general jurisdiction dependent on the amount in controversy.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 323.

Amount in controversy

R.I.—Mack Motor Truck Co. v. Dorsey, 119 A. 756, 45 R.I. 65—Joyce v. Cary, 113 A. 2, 43 R.I. 382.

Trespass

R.I.—Wood v. Essex, 94 A. 666, 38 R.I. 21.

90. Extension of time for appeal

R.I.—Blake v. Blake, 100 A. 391.

Affirmance or reversal in part on exceptions

R.I.—Budlong v. Budlong, 136 A. 308, 48 R.I. 144.

91. R.I.—Colagiovanni v. District Court of Sixth Judicial Dist., 133 A. 1, 47 R.I. 323.

15 C.J. p 1005 note 52.

§ 287. South Carolina

There have been decisions relating to the various courts of original jurisdiction in South Carolina.

In South Carolina there have been decisions relating to the circuit courts, consisting of the courts of common pleas and the courts of general sessions;⁹² the county courts, including decisions with respect to their jurisdiction;⁹³ the magistrate's court, including decisions with respect to the review of its proceedings;⁹⁴ the civil and criminal court of Charleston, with respect to its jurisdiction⁹⁵ and procedure;⁹⁶ and the recorder's court of the city of Charleston.⁹⁷

§ 288. South Dakota

In South Dakota there are decisions relating to the circuit, county, and municipal courts.

92. S.C.—*Jenkins v. Jenkins*, 65 S. E. 736, 83 S.C. 537—*Westlake v. Farrow*, 13 S.E. 469, 34 S.C. 270. 15 C.J. p 1005 notes 54, 55.

Issuance of writ of mandamus
S.C.—*McIver v. State*, 2 S.C. 1.

93. Action on sheriff's bond
S.C.—*Treasurer v. Young*, 3 Brev. 556.

Civil court of Florence
S.C.—*Cain v. Whitlock*, 182 S.E. 752, 178 S.C. 283.

Midland County court
S.C.—*Moore v. Moore*, 197 S.E. 597, 187 S.C. 144.

94. S.C.—*Moore v. Moore*, supra—*Brown v. Missouri State Life Ins. Co.*, 134 S.E. 224, 136 S.C. 90.

95. S.C.—*Ex parte Wingate*, 165 S. E. 176, 166 S.C. 440—*Steinberg v. South Carolina Power Co.*, 163 S. E. 281, 165 S.C. 267.

96. Rules of court of common pleas applied
S.C.—*Steinberg v. South Carolina Power Co.*, supra.

97. Selection of jurors
S.C.—*State v. Stewart*, 94 S.E. 274, 168 S.C. 401.

98. S.D.—*Vine v. Jones*, 32 N.W. 32, 13 S.D. 54.

99. S.D.—*In re Thompson*, 128 N.W. 1127, 26 S.D. 576, Ann.Cas.1913B 446.

1. S.D.—*Kimball Independent Consol. School Dist. No. 2 v. Willow Lake School Dist.*, 209 N.W. 550, 50 S.D. 279.

2. Questions of law

Appeal to circuit court may be on questions of law alone.—*In re Mulhgan's Estate*, 243 N.W. 162, 60 S.D. 74.

2. S.D.—*Rumely Products Co. v. Stakke*, 154 N.W. 328, 36 S.D. 330. 15 C.J. p 1005 note 57.

4. S.D.—*Balk v. Sachs*, 195 N.W. 837, 47 S.D. 55—*Salmonson v. Horswill*, 164 N.W. 973, 39 S.D. 402.

15 C.J. p 1005 note 57 [a], [b].

Territorial jurisdiction

S.D.—*K. & S. Sales Co. v. Sorenson*, 239 N.W. 185, 59 S.D. 239.

Equitable counterclaims

S.D.—*Artificial Ice Co. v. Pratt*, 176 N.W. 45, 42 S.D. 502—*Edward C. Plume Co. v. Voedish Jewelry Co.*, 164 N.W. 59, 39 S.D. 222—*Poulson v. Markus*, 148 N.W. 855, 34 S.D. 428.

5. Process

S.D.—*Balk v. Sachs*, 195 N.W. 837, 47 S.D. 55.

6. S.D.—*Bowman Co. v. Quimby*, 152 N.W. 345, 35 S.D. 352.

To what court

By statute appeals from municipal courts should be taken directly to supreme court and circuit court was without jurisdiction to try and determine matters at issue.—*In re McCallum*, S.D., 287 N.W. 498.

Time for taking appeals

S.D.—*Larson v. Baysore*, 176 N.W. 515, 42 S.D. 598.

7. Tenn.—*McCoy v. Bevels*, 292 S. W. 459, 155 Tenn. 313—*McLain v. State*, 6 Tenn.Civ.A. 38.

15 C.J. p 1005 note 58.

8. Tenn.—*Lamb v. Quigg*, 61 S.W.2d 466, 166 Tenn. 365—*True v. J. B. Deeds & Son*, 271 S.W. 41, 151 Tenn. 630.

9. Tenn.—*Goodman v. Palmer*, 195 S.W. 165, 137 Tenn. 556.

15 C.J. p 1005 note 60.

10. Tenn.—*McNew v. Toby*, 6 Humph. 27.

15 C.J. p 1005 note 60.

In South Dakota, there are decisions relating to the circuit courts;⁹⁸ the county courts,⁹⁹ including decisions with respect to their jurisdiction¹ and the review of their proceedings;² and the municipal courts,³ including decisions with respect to their jurisdiction,⁴ procedure,⁵ and the review of their proceedings.⁶

§ 289. Tennessee

There have been decisions relating to the various courts in Tennessee possessing original jurisdiction.

In Tennessee, there have been decisions relating to the circuit courts,⁷ including decisions with respect to their jurisdiction;⁸ the chancery courts,⁹ including decisions with respect to their jurisdiction;¹⁰ the county courts,¹¹ including decisions relating to their jurisdiction¹² and to the review of

Aiding creditor to secure satisfaction of judgment

Tenn.—*Hull v. Vaughn*, 107 S.W.2d 219, 171 Tenn. 642.

Injury to business

Tenn.—*Sandford-Day Iron Works v. Enterprise Foundry & Machine Co.*, 198 S.W. 258, 138 Tenn. 437.

Suit on bond given in compliance with judgment of criminal court—*State ex rel. Hooten v. Hooten*, 1 Tenn.App. 154.

Unliquidated damages

Chancery court has no jurisdiction of actions for injuries to person, property, or character involving unliquidated damages.—*Swift & Co. v. Memphis Cold Storage Warehouse Co.*, 158 S.W. 480, 128 Tenn. 82.

11. Tenn.—*State v. True*, 95 S.W. 1028, 116 Tenn. 294—*Southern R. Co. v. Hamblen County*, 92 S.W. 238, 115 Tenn. 526.

15 C.J. p 1005 note 59.

12. Tenn.—*Brewer v. Griggs*, 10 Tenn.App. 378.

Court of special and limited jurisdiction

Tenn.—*Reynolds v. Hamilton*, 77 S. W.2d 986, 13 Tenn.App. 380.

Probate powers

Tenn.—*Phillips v. Hoffman*, 5 Coldw. 251—*Brewer v. Griggs*, 10 Tenn. App. 378—*Walker v. Verble*, 5 Tenn.Civ.A. 651.

Courts of probate jurisdiction generally see *infra* §§ 298–310.

No jurisdiction

(1) To adjudge disputed land titles.—*McCauley v. Peoples*, 4 Tenn. App. 448.

(2) Of suit to sell land for enforcement of judgment lien.—*Turner v. Turner*, Tenn.Ch.A., 64 S.W. 392.

their proceedings;¹³ and the city court of Memphis.¹⁴

§ 290. Texas

There have been decisions relating to the various courts of original jurisdiction in Texas.

There is a comity between the courts of Texas, long recognized, under which each recognizes as

supreme the authority of the other in certain fields.¹⁵

There have been decisions in Texas with respect to the district courts,¹⁶ which are courts of general jurisdiction,¹⁷ including adjudications with respect to jurisdiction where title to land is involved,¹⁸ the amount in controversy,¹⁹ actions on bonds,²⁰ construction of wills,²¹ election contests,²² the enforce-

13. Tenn.—Green v. Craig, 51 S.W. 2d 480, 164 Tenn. 445.

Jurisdiction of appellate court
Tenn.—Reynolds v. Hamilton, 77 S.W.2d 986, 18 Tenn.App. 380.

General sessions court for Davidson County

Tenn.—James v. Kennedy, 129 S.W. 2d 215, 174 Tenn. 591.

14. **Part of state judicial system**
Tenn.—Gregory v. City of Memphis, 6 S.W.2d 332, 157 Tenn. 68.

15. Tex.—Roberts v. Gossett, Civ. App., 88 S.W.2d 507.

16. Tex.—Gulf Land Co. v. Atlantic Refining Co., 131 S.W.2d 73, affirming Atlantic Refining Co. v. Gulf Land Co., Civ.App., 122 S.W.2d 197—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—Second Nat. Bank v. Ford, Com.App., 123 S.W.2d 867, reversing Ford v. Second Nat. Bank, Civ.App., 100 S.W.2d 1112—Johnson v. Durst, Civ.App., 115 S.W.2d 1000, error dismissed—Patridge v. Peschke, Civ.App., 111 S.W.2d 1147—Traders & General Ins. Co. v. Roberts, Civ.App., 93 S.W.2d 1203—Lines v. Robinson, Civ. App., 91 S.W.2d 1108—Thompson v. Reed, Civ.App., 61 S.W.2d 557—Harrison v. Whitely, Civ.App., 299 S.W. 699, affirmed Harrison v. Whitely, Com.App., 6 S.W.2d 89.

15 C.J. p 1006 note 75.

Supervisory control

Tex.—Bradford v. Texas Electric Service Co., Civ.App., 16 S.W.2d 836, error refused.

Recovery of property for decedent's estate

Tex.—Griggs v. Brewster, 62 S.W.2d 980, 122 Tex. 588, affirming, Civ. App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114—Bain v. Coats, Civ.App., 228 S.W., 571, reversed on other grounds, Com.App., 244 S.W. 130.

Validity of the incorporation of a de facto municipality

Tex.—De Shazo v. Webb, Civ.App., 109 S.W.2d 264, certified questions answered, Sup., 113 S.W.2d 519.

Statutory rules of practice

Tex.—Walker Avenue Realty Co. v. Alaskan Fur Co., Civ.App., 123 S.W.2d 999.

On appeal from county court, district court acquires only such juris-

diction as county court had.—Cogley v. Welch, Tex.Com.App., 34 S.W.2d 349, reversing, Civ.App., 20 S.W.2d 244.

17. Tex.—Farmers' Nat. Bank of Stephenville v. Daggett, Com.App., 2 S.W.2d 834, affirming Daggett v. Farmers' Nat. Bank, Civ.App., 239 S.W. 198—Wilson v. Donna Irr. Dist. No. 1, Hidalgo County, Civ. App., 8 S.W.2d 187, error refused.

Nature of jurisdiction as general or limited

Tex.—Clonts v. Johnson, Com.App., 294 S.W. 844.

Word "suit" defined, as used in constitution describing jurisdiction of district court.—H. H. Watson Co. v. Cobb Grain Co., Tex.Com.App., 292 S.W. 174, reversing Cobb Grain Co. v. H. H. Watson Co., Civ.App., 290 S.W. 842.

18. Tex.—Conroy v. Conroy, 110 S.W.2d 568, 130 Tex. 508, reversing, Civ.App., 83 S.W.2d 355—Griggs v. Brewster, 62 S.W.2d 980, 122 Tex. 588, affirming, Civ.App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114—Hain v. De Busk, Com. App., 277 S.W. 1053, affirming, Civ. App., 265 S.W. 753—Kegans v. White, Civ.App., 131 S.W.2d 990, error refused—Lines v. Robinson, Civ.App., 91 S.W.2d 1108—Schelb v. Sparenberg, Civ.App., 89 S.W.2d 1062—Johnson v. Coit, Civ.App., 48 S.W.2d 397—Bennett v. Ross, Civ. App., 278 S.W. 314—Slider v. House, Civ.App., 271 S.W. 644—Hinojosa v. Corona, Civ.App., 254 S.W. 1116—City of El Paso v. Coffin, 88 S.W. 502, 40 Tex.Civ.App. 54.

15 C.J. p 1006 note 76.

Contract conveying interest in land
Tex.—Graham v. Omar Gasoline Co., Civ.App., 253 S.W. 896.

Adjudication of homestead interest
Tex.—Stewart v. Rockdale State Bank, Civ.App., 52 S.W.2d 915, affirmed 79 S.W.2d 116, 124 Tex. 431. 15 C.J. p 1006 note 75 [c].

Reformation of deed

Tex.—Bennett v. Ross, Civ.App., 278 S.W. 314.

19. Tex.—Wonderful Workers of World Benev. Ass'n v. Bookman, Civ.App., 29 S.W.2d 890—Ripple v. McCoury, Civ.App., 29 S.W.2d 436—

Fath v. Newman, Civ.App., 4 S.W. 2d 193—Spencer v. Davis, Civ.App., 298 S.W. 443—Austin v. Guaranty State Bank of Fullbright, Civ. App., 282 S.W. 262—Dillon v. Dillon, Civ.App., 274 S.W. 217—Hughes v. Hughes, Civ.App., 264 S.W. 579—Beverly v. Roberts, Civ. App., 215 S.W. 975—Ramsel v. Miller, Civ.App., 202 S.W. 1050—Escue v. Hartley, Civ.App., 202 S.W. 159—Jones v. Dodd, Civ.App., 192 S.W. 1134.

15 C.J. p 1006 note 78.

Jurisdiction to restrain

(1) Enforcement of judgment of inferior court.—Southern Frison Co. v. Rennels, Tex.Civ.App., 110 S.W.2d 606, error dismissed—Whittle Music Co. v. Lammons, Tex.Civ.App., 93 S.W.2d 233—Ripple v. McCoury, Civ. App., 29 S.W.2d 436.

(2) Sale of property claimed to be exempt.—Blanket State Bank of Blanket v. Redwine, Tex.Civ.App., 77 S.W.2d 553.

(3) Breach of contract involving title to land.—Graham v. Omar Gasoline Co., Tex.Civ.App., 253 S.W. 896.

(4) Collection of taxes on real estate.—City of Breckenridge v. Pierce, Tex.Civ.App., 251 S.W. 316.

Trespass

The court may restrain trespass and the cutting of timber, regardless of the value of the timber.—Jasper County Lumber Co. v. Biscamp, Tex. Civ.App., 77 S.W.2d 571—Poe v. Ferguson, Tex.Civ.App., 168 S.W. 459.

20. Tex.—Joseph v. Travis County, Civ.App., 8 S.W.2d 741, affirmed, Com.App., 16 S.W.2d 283.

15 C.J. p 1007 note 83.

21. Tex.—Griggs v. Brewster, 62 S.W.2d 980, 122 Tex. 588, affirming, Civ.App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114—Lines v. Robinson, Civ.App., 91 S.W.2d 1108—Schelb v. Sparenberg, Civ.App., 89 S.W.2d 1062.

22. Tex.—Banton v. Wilson, 4 Tex. 400—De Shazo v. Webb, Civ.App., 109 S.W.2d 264, certified questions answered, Sup., 113 S.W.2d 519—Shipman v. Jones, Civ.App., 189 S.W. 329—Swenson v. McKay, 106 S.W. 934, 47 Tex.Civ.App. 483.

ment and establishment of liens,²³ injunctions,²⁴ habeas corpus,²⁵ mandamus,²⁶ partition,²⁷ quo warranto,²⁸ and actions for rent.²⁹

There have been numerous adjudications with re-

spect to the county courts,³⁰ which are courts of limited jurisdiction,³¹ including decisions with respect to such matters as the amount of money or value of property in controversy,³² assessment of

23. Tex.—Second Nat. Bank v. Ford, Com.App., 123 S.W.2d 867, reversing Ford v. Second Nat. Bank, Civ. App., 100 S.W.2d 1112—Crowell v. Mickolasch, Civ.App., 297 S.W. 234—Davis v. Huff, Civ.App., 288 S.W. 267—Slider v. House, Civ. App., 271 S.W. 644—Ward County Irr. Dist. No. 1 v. Western Union Telegraph Co., Civ.App., 254 S.W. 1114—City of Breckenridge v. Pierce, Civ.App., 251 S.W. 316—Baldwin v. Drew, Civ.App., 195 S.W. 636.

15 C.J. p 984 note 21 [a] (4), p 1006 note 77.

Irrespective of amount involved
Tex.—Carroll v. McCarthy, Civ.App., 129 S.W.2d 1201.

Particular proceedings and liens

(1) Laborers' suit to foreclose liens on building only.—McConnell v. Frost, Tex.Civ.App., 45 S.W.2d 777, error refused.

(2) Paving lien.—Continental Sav. & Bdg. Ass'n v. Tallaferrero, Tex.Civ. App., 30 S.W.2d 814.

(3) Vendor's lien.—Gregory v. Ward, 18 S.W.2d 1049, 118 Tex. 526, modifying, Civ.App., 285 S.W. 935.

24. Tex.—Thorne v. Moore, 105 S.W. 985, 101 Tex. 205—Callaghan v. Tobin, 90 S.W. 328, 40 Tex.Civ. App. 441.

15 C.J. p 1007 note 50.

Injunction incidental to other relief
Tex.—Jones v. Dodd, Civ.App., 192 S.W. 1134.

Suppression of nuisances

Tex.—Cardwell v. Austin, Civ.App., 168 S.W. 385.

25. Tex.—Thorne v. Moore, 105 S.W. 985, 101 Tex. 205.

26. Tex.—Milliken v. Weatherford, 54 Tex. 388, 38 Am.R. 629—Banton v. Wilson, 4 Tex. 400—State Banking Board v. Smyth, Civ.App., 2 S.W.2d 536—Harrison v. Whitely, Civ.App., 299 S.W. 699, affirmed Harrison v. Whitely, Com.App., 6 S.W.2d 89—Luckey v. Short, 20 S.W. 723, 1 Tex.Civ.App. 5.

15 C.J. p 1007 note 73.

Mandamus incidental to other relief

Tex.—Jones v. Dodd, Civ.App., 192 S.W. 1134.

27. Tex.—Griggs v. Brewster, 62 S.W.2d 980, 123 Tex. 588, affirming, Civ.App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114—Johnson v. Coit, Civ.App., 48 S.W.2d 397—Quintana v. Giraud, Civ.App., 209 S.W. 770.

28. Tex.—Banton v. Wilson, 4 Tex. 400—Carter v. Harrell, Civ.App.,

126 S.W.2d 43, error dismissed, judgment correct—Shipman v. Jones, Civ.App., 199 S.W. 329.

29. Tex.—Fidelity & Deposit Co. v. Texas Land & Mortgage Co., 90 S.W. 197, 40 Tex.Civ.App., 489.

30. Tex.—Morrow v. Corbin, 62 S.W. 2d 641, 122 Tex. 553—Southern Prison Co. v. Rennels, Civ.App., 110 S.W.2d 606, error dismissed. 15 C.J. p 1006 note 63.

Particular courts

(1) County court of Edwards county.—State Bank of Barksdale v. Cloudt, Tex.Civ.App., 258 S.W. 248.

(2) County court of Hemphill county.—City of Canadian v. Guthrie, Tex.Civ.App., 87 S.W.2d 316.

(3) County court of Lubbock county.—Panther Oil & Grease Mfg. Co. v. Crews, Tex.Civ.App., 124 S.W.2d 436.

(4) Tarrant county court.—Key-stone Pipe & Supply Co. v. Osborne, Tex.Civ.App., 73 S.W.2d 120.

(5) Other particular county courts see 15 C.J. p 1006 note 63 [a].

Law and equity

County courts having jurisdiction can exercise powers of both law and equity courts.—Jones v. Missouri-Kansas-Texas R. Co. of Texas, Tex. Civ.App., 14 S.W.2d 357, affirmed Missouri-Kansas-Texas Ry. Co. of Texas v. Jones, Com.App., 24 S.W.2d 366.

Pleadings in county court may be oral.—Cooper v. Cook, Tex.Civ.App., 286 S.W. 334.

Fees of privilege is amendable in county court on appeal.—Mueller-Huber Grain Co. v. Held Bros, Tex. Civ.App., 53 S.W.2d 198.

Trial

Tex.—Quanah, etc., R. Co. v. R. D. Jones Lumber Co., Civ.App., 178 S.W. 858.

31. Tex.—R. O. Kipp Co. v. Anglin, Civ.App., 270 S.W. 893—Jaco v. W. A. Nash Co., Civ.App., 269 S.W. 1089—Bedford v. Moore, Civ.App., 244 S.W. 565.

"All of our courts under our scheme of jurisdictions are courts of limited jurisdiction, yet . . . are courts of general jurisdiction within the limits of the Constitution fixing jurisdiction."—Clonts v. Johnson, 294 S.W. 844, 846, 116 Tex. 489.

Jurisdiction of subject matter is to be determined by petition.—Crowell v. Mickolasch, Tex.Civ.App., 297 S.W. 234.

32. Tex.—J. M. Huber Petroleum Co. v. Yake, Civ.App., 121 S.W.2d

670—Racugno v. Hanovia Chemical & Manufacturing Co., Civ.App., 110 S.W.2d 249—Ripole v. McCoury, Civ.App., 29 S.W.2d 436—Rockwell Bros. & Co. v. Lee, Civ.App., 21 S.W.2d 30—Harrison v. Whitely, Civ.App., 299 S.W. 699, affirmed Harrison v. Whitely, Com.App., 6 S.W.2d 89—Bush & Gerts Plano Co. of Texas v. Strawn, Civ.App., 294 S.W. 267—Austin v. Guaranty State Bank of Fullbright, Civ.App., 282 S.W. 262—Cavitt v. Ball Hardware & Implement Co., Civ. App., 204 S.W. 798, reversed on other grounds Brown v. Fleming, 212 S.W. 483—Ramsel v. Miller, Civ.App., 202 S.W. 1050—Escue v. Hartley, Civ.App., 202 S.W. 159—Luhning v. Scott, Civ.App., 201 S.W. 663—Sweeney v. Alderete, Civ.App., 196 S.W. 367—American Disinfecting Co. v. F eestone County, Civ.App., 193 S.W. 440—Texas Cent. R. Co. v. Pool & Smith, 114 S.W. 685, 52 Tex.Civ.App. 307.

15 C.J. p 1006 note 64.

Petition only can be considered
Tex.—Crowell v. Mickolasch, Civ. App., 297 S.W. 234.

Trespass

Tex.—Coughran v. Nunez, Com.App., 127 S.W.2d 885, setting aside, Civ. App., 106 S.W.2d 1101—Smith v. Brown, Civ.App., 32 S.W.2d 388.

Portion of damages not recoverable

Where it is apparent from the face of the petition that a large portion of the damages are not recoverable under the laws of the state, and the balance was insufficient to confer jurisdiction, case should be dismissed.—A. B. Richards Medicine Co. v. Graves, Tex.Civ.App., 273 S.W. 702.

Injunction

(1) Constitutional limitations as to the amounts within the county court's jurisdiction apply to its power to issue injunctions.—Whittle Music Co. v. Lammons, Tex.Civ.App., 93 S.W.2d 233—Blanket State Bank of Blanket v. Redwine, Tex.Civ.App., 77 S.W.2d 558—Ripple v. McCoury, Tex.Civ.App., 29 S.W.2d 436—Harrison v. Whitely, Tex.Civ.App., 299 S.W. 699, affirmed Harrison v. Whitely, Com.App., 6 S.W.2d 89—Graham v. Omar Gasoline Co., Tex.Civ.App., 263 S.W. 896—Luhning v. Scott, Tex. Civ.App., 201 S.W. 663—Sweeney v. Alderete, Tex.Civ.App., 196 S.W. 367.

(2) These limitations obtain as to injunctions seeking to restrain the enforcement of justice's court judgments.—Consolidated Advertising Corporation of California v. Gibson, Tex.Civ.App., 74 S.W.2d 710—Ameri-

benefits from street improvements,³³ attachment,³⁴ condemnation proceedings,³⁵ criminal proceedings,³⁶ establishment and foreclosure of liens,³⁷ garnishment,³⁸ injunctions,³⁹ mandamus,⁴⁰ partition,⁴¹

probate jurisdiction,⁴² and quo warranto.⁴³ They have no jurisdiction to adjudicate as to the title to lands,⁴⁴ but their jurisdiction is not defeated by the fact that a title to land is incidentally involved.⁴⁵

can *Mortg. Corporation v. Thames*, Tex.Civ.App., 65 S.W.2d 447, error refused—*Dr. L. D. Le Gear Medicine Co. v. Hirston*, Tex.Civ.App., 62 S.W.2d 385—*Ripple v. McCoury*, Tex.Civ.App., 29 S.W.2d 436—*Boyd v. Adcock*, Tex.Civ.App., 21 S.W.2d 743—*U. O. Colson Co. v. Powell*, Tex.Civ.App., 13 S.W.2d 405—*Specialty Service Corporation v. Armstrong*, Tex.Civ.App., 296 S.W. 958.

(3) However, they do not obtain where the purpose of the injunction is to protect the court's already acquired jurisdiction.—*Ripple v. McCoury*, supra.

33. Tex.—*Nalle v. Austin*, Civ.App., 103 S.W. 825.

34. Tex.—*Farmers' Nat. Bank of Stephenville v. Daggett*, Com.App., 2 S.W.2d 834, affirming *Daggett v. Farmers' Nat. Bank*, Civ.App., 259 S.W. 198.

15 C.J. p 984 note 21 [a] (3).

35. Tex.—*Jones v. Missouri-Kansas-Texas R. Co. of Texas*, Civ.App., 14 S.W.2d 357, affirmed *Missouri-Kansas-Texas Ry. Co. of Texas v. Jones*, Com.App., 24 S.W.2d 366—*El Paso v. Coffin*, 88 S.W. 502, 40 Tex.Civ.App. 54.

36. Tex.—*Bolton v. State*, 154 S.W. 1197, 69 Tex.Cr. 582.
15 C.J. p 1006 note 70.

Courts of criminal jurisdiction generally see the title *Criminal Law* §§ 122-126.

37. Tex.—*Capital Oil & Gas Co. v. Casey*, Civ.App., 299 S.W. 466—*Crowell v. Mickolasch*, Civ.App., 297 S.W. 234—*R. O. Kipp Co. v. Anglin*, Civ.App., 270 S.W. 893—*Jaco v. W. A. Nash Co.*, Civ.App., 269 S.W. 1089—*Daggett v. Farmers' Nat. Bank*, Civ.App., 252 S.W. 344—*City of Breckenridge v. Pierce*, Civ.App., 251 S.W. 316.

Action on note for purchase of land
County court has jurisdiction of action on note given for purchase of land, where the suit is only for debt and not a foreclosure of a lien.—*Carter v. Gray*, 81 S.W.2d 647, 125 Tex. 219, dismissing error, Civ.App., 52 S.W.2d 91—*Bennett v. Ross*, Tex.Civ.App., 278 S.W. 314.

Attachment lien

Tex.—*Stewart v. Rockdale State Bank*, 79 S.W.2d 116, 124 Tex. 431, affirming, Civ.App., 52 S.W.2d 915—*Farmers' Nat. Bank of Stephenville v. Daggett*, Com.App., 2 S.W.2d 834, affirming *Daggett v. Farmers' Nat. Bank*, Civ.App., 259 S.W. 198—*Pantaze v. Fox-Head Spring Beverage Co.*, Civ.App., 23 S.W.2d 514, affirmed 37 S.W.2d 724, 120

Tex. 270—*Gates v. Pitts*, Civ.App., 291 S.W. 948—*Daggett v. Farmers' Nat. Bank*, Civ.App., 252 S.W. 344—*Bracht v. Adamson*, Civ.App., 211 S.W. 624.

15 C.J. p 984 note 21 [a] (3).

House as personality

Tex.—*Bedford v. Moore*, Civ.App., 244 S.W. 565.

38. Tex.—*Weems v. Miles*, 1 Tex. App.Civ.Cas. § 1207.

15 C.J. p 1006 note 69.

39. Tex.—*Cardwell v. Austin*, Civ. App., 168 S.W. 385—*Payne v. Loving*, Civ.App., 69 S.W. 92.

15 C.J. p 1006 note 66.

Joining

(1) Trespass on real estate.—*Coughran v. Nunez*, Tex.Com.App., 127 S.W.2d 885, setting aside, Civ. App., 106 S.W.2d 1101—*Smith v. Brown*, Tex.Civ.App., 32 S.W.2d 388.

(2) Execution sale where value of realty or other jurisdictional facts are not shown.—*Rockwell Bros. & Co. v. Lee*, Tex.Civ.App., 21 S.W.2d 30.

(3) State board of barber examiners from determining whether barber's license should be revoked.—*State Board of Barber Examiners of Texas v. Coffer*, Tex.Civ.App., 109 S.W.2d 1012, followed in *State Board of Barber Examiners of Texas v. Miller*, Tex.Civ.App., 109 S.W.2d 1013.

40. Tex.—*Dean v. State*, 30 S.W. 1047, 88 Tex. 290, rehearing denied 31 S.W. 185, 88 Tex. 290—*Townsend v. Shepard*, 3 Tex.App.Civ.Cas. § 349—*Goree v. Dupree*, 1 Tex.App. Civ.Cas. § 825.

15 C.J. p 1006 note 67.

41. Tex.—*Quintana v. Giraud*, Civ. App., 209 S.W. 770—*Miller v. Fenton*, Civ.App., 207 S.W. 631.

42. Tex.—*Hannon v. Henson*, Com. App., 15 S.W.2d 579.

15 C.J. p 1006 note 65.

Courts of probate jurisdiction generally see infra §§ 293-310.

Guardianship proceeding to sell interests of infants

Tex.—*Wilder v. Cox*, Civ.App., 104 S.W.2d 897, error dismissed.

43. Tex.—*Carter v. Harrell*, Civ. App., 126 S.W.2d 43, error dismissed, judgment correct.

15 C.J. p 1006 note 68.

44. Tex.—*Coughran v. Nunez*, Com. App., 127 S.W.2d 885, setting aside, Civ.App., 106 S.W.2d 1101—*Hein v. De Busk*, Com.App., 277 S.W. 1053, affirming, Civ.App., 265 S.W. 753—*Kegans v. White*, Civ. App., 131 S.W.2d 990, error refused—*Galley v. Hedrick*, Civ.App., 127

S.W.2d 978—*City of El Paso v. Coffin*, 88 S.W. 502, 40 Tex.Civ. App. 54.

15 C.J. p 1005 note 61.

No jurisdiction

(1) To reform deed.—*Woodward v. Harlin*, Tex.Civ.App., 20 S.W.2d 158, reversed on other grounds 39 S.W.2d 8, 121 Tex. 46, rehearing denied 41 S.W.2d 204, 121 Tex. 46—*Bennett v. Ross*, Tex.Civ.App., 278 S.W. 314.

(2) To cancel constable's deed and remove cloud from title.—*Hudson v. Nowell & Son*, Tex.Civ.App., 8 S.W.2d 778.

(3) To pass on judgment debtor's claim of homestead.—*Stewart v. Rockdale State Bank*, 79 S.W.2d 116, 124 Tex. 431, affirming, Civ.App., 52 S.W.2d 915.

(4) To adjudge whether attached property was community property.—*Farmers' Nat. Bank of Stephenville v. Daggett*, Tex.Com.App., 2 S.W.2d 834, affirming *Daggett v. Farmers' Nat. Bank*, Civ.App., 259 S.W. 198.

(5) To restrain interference with water rights where rights are based on a claim of cotenancy.—*Hinojosa v. Corona*, Tex.Civ.App., 254 S.W. 1116.

(6) To restrain running of livestock on plaintiff's alleged leasehold where suit if carried to final judgment would necessarily divest party of claim to land.—*Galley v. Hedrick*, Tex.Civ.App., 127 S.W.2d 978.

Subject matter held personal property

Tex.—*Davis v. Baker*, Civ.App., 268 S.W. 766.

45. Tex.—*Coughran v. Nunez*, Com. App., 127 S.W.2d 885, setting aside, Civ.App., 106 S.W.2d 1101—*Kegans v. White*, Civ.App., 131 S.W.2d 990, error refused—*Galley v. Hedrick*, Civ.App., 127 S.W.2d 978—*Wilder v. Cox*, Civ.App., 104 S.W.2d 897, error dismissed—*Smith v. Brown*, Civ.App., 32 S.W.2d 388—*Davis v. Baker*, Civ.App., 268 S.W. 766—*Davis v. Tate*, Civ.App., 242 S.W. 761.
15 C.J. p 1006 note 62—63 C.J. p 968 note 72.

Actions held not directly involving title

(1) Action by vendee of land suing to recover amount paid.—*Harris County Inv. Co. v. Davis*, Tex.Civ. App., 230 S.W. 761—*Hollis v. Finks*, 78 S.W. 555, 34 Tex.Civ.App. 12.

(2) Cancellation of note secured by vendor's lien.—*Hollis v. Finks*, 78 S.W. 555, 34 Tex.Civ.App. 12.

(3) To recover damages for misrepresentations in land transaction.

There have also been decisions relating to the review of the proceedings of the county courts.⁴⁶

There are also to be found decisions with respect to the commissioners' courts,⁴⁷ the municipal courts of the various cities,⁴⁸ and inferior courts in general.⁴⁹

§ 291. Utah

There have been decisions relating to the courts of original jurisdiction in Utah.

In Utah there have been decisions relating to the district courts,⁵⁰ including decisions with respect to their jurisdiction,⁵¹ which is general,⁵² in all matters civil and criminal not excepted by the constitution or statutes,⁵³ and with respect to the review of their proceedings.⁵⁴ There have also been decisions with reference to the city courts,⁵⁵ including decisions with respect to their jurisdiction,⁵⁶ procedure,⁵⁷ and the review of their proceedings,⁵⁸ and decisions relating to the municipal courts,⁵⁹

—*Sherrod v. Pollard*, Tex.Civ.App., 21 S.W.2d 1101—*Espey v. Boone*, 75 S.W. 570, 33 Tex.Civ.App. 83.

(4) To recover damages for waste against defendant having easement in property.—*Southwestern Bell Telephone Co. v. Burris*, Tex.Civ.App., 68 S.W.2d 542.

(5) To recover damages to live stock caused by construction of ditch on land on which plaintiff had a grazing lease.—*J. M. Huber Petroleum Co. v. Yake*, Tex.Civ.App., 121 S.W.2d 670.

(6) To recover for timber cut from plaintiff's land.—*Houston Oil Co. v. Davis*, Tex.Civ.App., 154 S.W. 337.

(7) To recover rent.—*Putty v. Putty*, Tex.Civ.App., 6 S.W.2d 136.

Breach of warranty in deed

Tex.—*Bennett v. Ross*, Civ.App., 278 S.W. 214.

15 C.J. p 1006 note 62 [b].

48. Tex.—*Kuykendall v. Gill*, Civ. App., 131 S.W.2d 249, error dismissed, judgment correct.

Affidavit in lieu of bond

Tex.—*Davis v. Moore*, Civ.App., 131 S.W.2d 798.

Requiring clerk of county court to file papers

Tex.—*Kuykendall v. Gill*, Civ.App., 131 S.W.2d 249, error dismissed, judgment correct.

Time for perfecting appeal

Tex.—*Davis v. Moore*, Civ.App., 131 S.W.2d 798.

46. Tex.—*Luckey v. Short*, 20 S.W. 723, 1 Tex.Civ.App. 5.

15 C.J. p 1007 note 86.

Determination of prevailing rate of per diem wages

Tex.—*Southern Prison Co. v. Rennels*, Civ.App., 110 S.W.2d 606, error dismissed.

Appeal to county court from award of commissioner's court

Tex.—*Karnes County v. Nichols*, Civ. App., 54 S.W. 656.

48. Tex.—*Ex parte Freedman*, 83 S. W. 1126, 47 Tex.Cr. 487—*Ex parte Wilbarger*, 55 S.W. 968, 41 Tex.Cr. 514.

15 C.J. p 1007 note 88.

Corporation courts cannot form a part of the "judicial power of the state," provided for in the constitution.—*Ex parte Coombs*, 44 S.W. 854, 38 Tex.Cr. 648.

Appeal to county court

Tex.—*Hickman v. State*, 183 S.W. 1180, 79 Tex.Cr. 125.

Corporation court in Fort Arthur

Tex.—*King v. State*, 289 S.W. 69, 105 Tex.Cr. 416.

49. Tex.—*Morrow v. Corbin*, 62 S. W.2d 641, 122 Tex. 553.

50. Utah.—*Snyder v. Pike*, 83 P. 692, 30 Utah 102.

51. **Concurrent jurisdiction with inferior courts**

Utah.—*Devlin v. District Court of Weber County*, 178 P. 73, 53 Utah 208.

Amount in controversy on appeal from city court's judgment.—*Gibson v. Equitable Life Assur. Soc. of U. S.*, 36 P.2d 105, 84 Utah 452.

Power to issue writs of injunction

Utah.—*Kramer v. Pixton*, 268 P. 1029, 72 Utah 1.

52. Utah.—*Baker v. Department of Registration*, 3 P.2d 1082, 78 Utah 424—*Brady v. McGonagle*, 195 P. 188, 57 Utah 424—*Weyant v. Utah Savings & Trust Co.*, 182 P. 189, 54 Utah 181, 9 A.L.R. 1119.

53. Utah.—*Kramer v. Pixton*, 268 P. 1029, 72 Utah 1.

54. Utah.—*Farmers' Cash Union v. Elswood*, 248 P. 477, 67 Utah 501.

Amount involved

Utah.—*Hanson v. Iverson*, 211 P. 682, 61 Utah 172.

55. **Motion to set aside garnishment** Utah.—*Hewlett v. Mallett*, 117 P. 68, 39 Utah 357.

56. Utah.—*American Theatre Co. v. Glasmann*, 80 P.2d 922, 95 Utah 303—*Thomas v. District Court of Box Elder County*, 242 P. 348, 66 Utah 300.

Territorial jurisdiction

Utah.—*Mathison v. Poultry & Stock Minerals Mining Co.*, 38 P.2d 741, 85 Utah 74.

Actions involving title

(1) Title to water.—*Thomas v.*

District Court of Box Elder County, 242 P. 348, 66 Utah 300.

(2) Title or possession of real property.—*Manning v. Day*, 190 P. 779, 56 Utah 282.

False imprisonment

Utah.—*Wrathall v. Miller*, 169 P. 946, 51 Utah 218.

57. Utah.—*Mathison v. Poultry & Stock Minerals Mining Co.*, 38 P.2d 741, 85 Utah 74.

Process

Utah.—*Farmers' Banking Co. v. Bullen*, 217 P. 969, 62 Utah 1.

Relief from default judgment for inadvertence or excusable neglect.—*J. P. Fowler Mfg. Co. v. City Court of Salt Lake City*, 182 P. 205, 54 Utah 541.

58. Utah.—*George B. Leavitt Co. v. Couturier*, 23 P.2d 1101, 82 Utah 256—*Bullen v. Anderson*, 17 P.2d 213, 81 Utah 151—*Harris v. Barker*, 12 P.2d 577, 80 Utah 21—*Farmers' Cash Union v. Elswood*, 248 P. 477, 67 Utah 501—*Benson v. Ritchie*, 230 P. 572, 64 Utah 278—*Levy v. District Court of Salt Lake County*, 215 P. 993, 61 Utah 519—*Burt & Carlquist Co. v. Marks*, 177 P. 224, 53 Utah 77.

Trial de novo

On appeal to district court, judgment of city court ceases to be final, and unless appeal is dismissed trial de novo must be had.—*Moss v. Taylor*, 273 P. 515, 73 Utah 277.

Appeal filed before entry of judgment was prematurely filed.—*Thornton v. Evans*, 185 P. 454, 55 Utah 268.

Amendment of pleadings on appeal Utah.—*Moss v. Taylor*, 273 P. 515, 73 Utah 277.

Amount involved

Utah.—*Gibson v. Equitable Life Assur. Soc. of U. S.*, 36 P.2d 105, 84 Utah 452—*Hardy v. Meadows*, 264 P. 968, 71 Utah 255—*Hanson v. Iverson*, 211 P. 682, 61 Utah 172.

59. Utah.—*Devlin v. District Court of Weber County*, 178 P. 73, 53 Utah 208.

Time for appeal

Utah.—*Devlin v. District Court of Weber County*, supra.

and other inferior courts or tribunals.⁶⁰

§ 292. Vermont

There have been decisions relating to the county and municipal courts in Vermont.

In Vermont there have been decisions relating to the county courts,⁶¹ including decisions with respect to their jurisdiction,⁶² procedure,⁶³ and the review of their proceedings;⁶⁴ and decisions relating to the municipal courts,⁶⁵ which ordinarily have no jurisdiction of actions where title to land is involved,⁶⁶ including decisions with respect to their proce-

dures,⁶⁷ and the review of their proceedings.⁶⁸

§ 293. Virginia

There have been decisions relating to the various Virginia courts possessing original jurisdiction.

In Virginia, there have been decisions relating to the circuit courts,⁶⁹ including decisions with respect to their jurisdiction⁷⁰ and procedure;⁷¹ the corporation courts, including decisions with respect to their jurisdiction,⁷² procedure,⁷³ and the review of their proceedings;⁷⁴ and the courts of the city of Richmond.⁷⁵

60. Utah.—Baker v. Department of Registration, 3 P.2d 1082, 78 Utah 424.

Trial de novo

Cause appealed to district court from inferior court or tribunal is triable de novo.—Baker v. Department of Registration, *supra*.

61. Vt.—Stevens v. Coburn, 44 A. 354, 71 Vt. 261.

15 C.J. p 1007 note 92.

62. Vt.—Alexander v. Montpelier, 71 A. 720, 81 Vt. 549.

Amount in controversy

Vt.—Stevens v. Coburn, 44 A. 354, 71 Vt. 261.

Jurisdiction in vacation

(1) County court has only such jurisdiction in vacation over judgments and matters on which they are based as conferred by statute.—Leonard v. Wilcox, 142 A. 762, 101 Vt. 195—Morgan v. Gould, 119 A. 517, 99 Vt. 275.

(2) Only the judge who presided at the term, and not one who presided only at a particular trial because of the disqualification of the presiding judge, is authorized to render judgment in vacation.—Platt v. Shields, 119 A. 520, 96 Vt. 257.

63. Vt.—Platt v. Shields, 119 A. 520, 96 Vt. 257.

Review of findings

Vt.—Platt v. Shields, *supra*.

City courts

Vt.—Jones v. Metcalf, 112 A. 831, 95 Vt. 87.

15 C.J. p 1007 note 93.

64. Vt.—Village of Brattleboro v. Yauvey, 143 A. 295, 101 Vt. 314—Stevens v. Hutchins, 115 A. 229, 95 Vt. 361.

Actions of trespass where the amount demanded does not exceed a certain sum are within the municipal court's jurisdiction.—Village of Brattleboro v. Yauvey, 143 A. 295, 101 Vt. 314.

67. Judgments, records, and proceedings

"Except as otherwise provided, a municipal court has the same powers and duties concerning its judgments,

records, and proceedings as the county court has."—Falzarano v. Demasso, 126 A. 394, 98 Vt. 209.

Making and filing findings of fact

Vt.—Levin v. Rouille, 2 A.2d 196, 110 Vt. 126—Falzarano v. Demasso, 126 A. 394, 98 Vt. 209.

Signing of writs

Vt.—Anderson v. Souliere, 151 A. 509, 103 Vt. 10.

Time for motion to dismiss

Vt.—Murphy v. Punt, 180 A. 886, 107 Vt. 421.

Stay of execution on petition for new trial is interlocutory; it renders a writ of execution inoperative.—Armstrong v. Moore, 115 A. 295, 95 Vt. 359.

65. Vt.—Parker v. Weaver, 1 A.2d 729, 110 Vt. 20—Holstein v. Blanchette, 182 A. 289, 108 Vt. 30—Village of St. Johnsbury v. Dolgin, 148 A. 879, 102 Vt. 424, followed in 149 A. 902, 102 Vt. 428—Hunt v. Paquette, 148 A. 752, 102 Vt. 403.

Appeal to county court

No appeal can be taken from municipal court to county court in civil cases.—Stevens v. Whitham, 154 A. 692, 103 Vt. 354.

Filing exceptions

Vt.—Parker v. Weaver, 1 A.2d 729, 110 Vt. 20—Village of St. Johnsbury v. Dolgin, 148 A. 879, 102 Vt. 424, followed in 149 A. 902, 102 Vt. 428—Hunt v. Paquette, 148 A. 752, 102 Vt. 403—Falzarano v. Demasso, 126 A. 394, 98 Vt. 209—Sherwin v. Ladd, 113 A. 522, 95 Vt. 187—Jones v. Metcalf, 112 A. 831, 95 Vt. 87.

66. Va.—Western State Hospital v. State Hospitals for Insane, 70 S.E. 505, 112 Va. 230.

Circuit court of city of Lynchburg

Va.—Brooks v. Epperson, 178 S.E. 787, 164 Va. 37.

Circuit superior court

Va.—Campbell v. Montgomery, 1 Rob. 392, 40 Va. 892.

County courts

There have been decisions relating to the county courts, whose jurisdiction by statute, Code 1936, c 243 § 5891, has been vested in the circuit

courts.—Jackson v. Maxwell, 5 Rand. 636, 26 Va. 636—See 15 C.J. p 1007 note 96.

70. "The circuit courts have 'original and general jurisdiction of all cases in chancery and civil cases at law.' . . . This is 'potential' jurisdiction, which, after valid service of process on the parties, gives the court 'active' jurisdiction."—Morgan v. Pennsylvania R. Co., 138 S.E. 566, 567, 148 Va. 272.

Chancery jurisdiction

Va.—Blanton v. Southern Fertilizing Co., 77 Va. 335.

"The circuit court of Hanover county is a court of general jurisdiction."—Shelton v. Sydnor, 102 S.E. 83, 86, 126 Va. 625.

71. Issuance of warrants for small claims.—Dotson v. Dickenson, 192 S.E. 700, 169 Va. 50.

72. Va.—Farant Inv. Corporation v. Francis, 122 S.E. 141, 138 Va. 417.

Proceedings to substitute trustee in deed of trust.—Abrahams v. Ball, 94 S.E. 799, 122 Va. 197.

73. Return of service and amendment thereof

Va.—Builders' Supply Co. of Hopewell v. Piedmont Lumber Co., 94 S.E. 938, 122 Va. 225.

74. Va.—Brooks v. Epperson, 178 S.E. 787, 164 Va. 37.

75. Circuit court

(1) Has general jurisdiction.—Irvine v. Randolph Lumber Corp., 69 S.E. 350, 111 Va. 408.

(2) Has jurisdiction to determine the right to mandamus.—Richmond R. & Electric Co. v. Brown, 32 S.E. 775, 97 Va. 26.

(3) Has no equity jurisdiction except such as is conferred on it by statute.—Western State Hospital v. State Hospitals for Insane, 70 S.E. 505, 112 Va. 230.

(4) Held to have exclusive jurisdiction under governing statute in cases where certain state officers are necessary or proper parties.—Universal Life Ins. Co. v. Coghill, 30 Gratt. 72, 71 Va. 72.

§ 294. Washington

In Washington, the superior courts are courts of general jurisdiction.

In Washington, there have been decisions relating to the superior courts,⁷⁶ which are courts of general jurisdiction,⁷⁷ having the same power and jurisdiction in probate proceedings as in actions at law or suits in equity.⁷⁸

§ 295. West Virginia

In West Virginia, there have been decisions relating to the circuit, county, common pleas, mayor's, and municipal courts.

In West Virginia, there have been decisions re-

lating to the circuit courts;⁷⁹ the county courts;⁸⁰ the court of common pleas;⁸¹ the mayor's courts;⁸² and the municipal courts.⁸³

§ 296. Wisconsin

There have been various decisions relating to the Wisconsin courts of original jurisdiction.

In Wisconsin, there have been decisions relating to the circuit courts,⁸⁴ including decisions with respect to their jurisdiction,⁸⁵ which is general,⁸⁶ and with respect to the review of their proceedings;⁸⁷ the superior courts;⁸⁸ the county courts,⁸⁹ including decisions with respect to their jurisdiction,⁹⁰ which is limited,⁹¹ and with respect to their proce-

Hustings court

Va.—Belvin v. Richmond, 3 S.E. 378, 85 Va. 574, 1 L.R.A. 807—Smith v. Commonwealth, 6 Gratt. 696, 47 Va. 696.

Law and equity court

Va.—Virginia-Lincoln Furniture Corporation v. Southern Factories & Stores Corporation, 174 S.E. 848, 162 Va. 767.

78. Wash.—State v. Moore, 62 P. 411, 23 Wash. 115.

15 C.J. p 1007 note 93.

77. Wash.—Bremerton Creamery & Produce Co. v. Elliott, 50 P.2d 48, 184 Wash. 80—Holland v. Silver Basin Mining Co., 153 P. 500, 113 Wash. 63—Wagner v. Alderson, 157 P. 476, 91 Wash. 157.

Power to grant writ of prohibition
Wash.—State ex rel. Dysart v. Cameron, 248 P. 408, 140 Wash. 101, 54 A.L.R. 311.

76. Wash.—In re Hoscheid, 139 P. 81, 78 Wash. 309.

15 C.J. p 1007 note 1.

Courts of probate jurisdiction generally see *infra* §§ 298-310.

Election contest

W.Va.—French v. Bennett, 72 S.E. 746, 69 W.Va. 653.

Circuit court of Kanawha County

W.Va.—Shipley v. Virginian Ry. Co., 104 S.E. 297, 87 W.Va. 139.

80. W.Va.—Mayer v. Adams, 27 W. Va. 244.

15 C.J. p 1007 note 2.

Review of proceedings

(1) Generally.—In re Kneecream's Estate, W.Va., 191 S.E. 867—In re Durham's Estate, W.Va., 191 S.E. 847.

(2) Nature and form of remedy.—Balloux v. Hart, 123 S.E. 402, 96 W. Va. 586.

(3) Requisites and proceedings for transfer of cause.—Balloux v. Hart, *supra*.

(4) Record.—In re Durham's Estate, *supra*.

81. W.Va.—Shipley v. Virginian Ry. Co., 104 S.E. 297, 87 W.Va. 139.

Common pleas court of Cabell County

W.Va.—Williams v. Irvin, 133 S.E. 390, 101 W.Va. 708.

82. Courts of limited jurisdiction
W.Va.—Ex parte Watson, 95 S.E. 648, 82 W.Va. 201.

83. W.Va.—Rutter v. Sullivan, 25 W.Va. 427.

84. Wis.—Village of Prairie du Sac v. Kramer, 217 N.W. 295, 194 Wis. 495—State v. Shaughnessey, 57 N. W. 1105, 86 Wis. 646—Attorney-General v. Chicago & N. W. R. Co., 35 Wis. 425.

15 C.J. p 1007 note 5.

85. Wis.—In re Weidman's Will, 207 N.W. 950, 189 Wis. 318—Briggs v. Miller, 186 N.W. 163, 176 Wis. 321.

Issuance of prerogative writs

Wis.—Petition of Heil, 284 N.W. 42.

81. Wis.—Langen v. Borkowski, 206 N.W. 181, 188 Wis. 277, 43 A.L.R. 622.

General equity jurisdiction

Wis.—Ekern v. McGovern, 142 N.W. 595, 164 Wis. 157, 46 L.R.A.N.S., 796—Laing v. Williams, 115 N.W. 821, 135 Wis. 253, 128 Am.S.R. 1025.

15 C.J. p 1007 note 6.

87. Wis.—Scheiderer v. A. George Schulz Co., 171 N.W. 660, 169 Wis. 6.

Conclusiveness of findings on appeal

Wis.—Martins v. Bauer, 205 N.W. 907, 188 Wis. 188—Foster v. Bauer, 180 N.W. 817, 173 Wis. 231.

88. Wis.—Gard v. Butterfield, 130 N.W. 100, 146 Wis. 115.

Condemnation proceedings

Wis.—Wisconsin River Impr. Co. v.

Pier, 118 N.W. 857, 137 Wis. 325, 21 L.R.A.N.S., 538.

89. Wis.—Smelker v. Campbell, 162 N.W. 171, 165 Wis. 358—Wisdom v. Wisdom, 145 N.W. 126, 155 Wis. 434.

15 C.J. p 1007 note 8.

Court of record

Wis.—State ex rel. Leverance v. Frey, 286 N.W. 705.

90. Wis.—Beck v. State, 219 N.W. 197, 196 Wis. 242, followed in Beck v. Milwaukee County, 219 N.W. 205, 196 Wis. 259, and certiorari denied Beck v. Milwaukee County, Wis., 49 S.Ct. 34, 278 U.S. 639, 73 L.Ed. 554—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 548.

Controversies involving decedent's estate

Wis.—In re Weidman's Will, 207 N. W. 950, 189 Wis. 318—Wisdom v. Wisdom, 145 N.W. 126, 155 Wis. 434.

Courts of probate jurisdiction generally see *infra* §§ 298-310.

Recovery of salary paid city officers

Wis.—Smelker v. Campbell, 162 N.W. 171, 165 Wis. 358.

Oneida county court

Wis.—Jansen v. Town of Schoepke, 253 N.W. 554, 214 Wis. 350.

91. Wis.—In re Farm Drainage Dist. No. 1, Waupaca County, 287 N.W. 806—In re George's Estate, 274 N.W. 294, 225 Wis. 251, vacating mandate 270 N.W. 538, 225 Wis. 251—Newcomb v. Ingram, 243 N.W. 209, 211 Wis. 88, rehearing granted 245 N.W. 121, modified on other grounds 248 N.W. 171, 211 Wis. 88—In re Kallenbach's Estate, 199 N.W. 152, 184 Wis. 171. "County court of Milwaukee county is a court of limited jurisdiction."—In re Bulewicz' Estate, 249 N.W. 534, 535, 212 Wis. 426.

ture,⁹² and the review of their proceedings,⁹³ the municipal courts,⁹⁴ including decisions with respect to their jurisdiction,⁹⁵ which is limited,⁹⁶ and with respect to their procedure,⁹⁷ and the review of their proceedings,⁹⁸ the civil court of Milwaukee county,⁹⁹ which has been held to be a municipal court,¹ including decisions with respect to its jurisdiction,² procedure,³ and the review of its proceedings;⁴

and inferior courts generally.⁵

§ 297. Wyoming

In Wyoming, the district courts have general jurisdiction.

In Wyoming, there have been decisions relating to the district courts,⁶ which are courts of general jurisdiction.⁷

92. Wis.—State ex rel. Leverance v. Prey, 286 N.W. 705.

Right to jury trial

Wis.—In re Weidman's Will, 207 N.W. 950, 189 Wis. 318.

93. Wis.—Moyer's Guardianship v. Moyer, 267 N.W. 280, 221 Wis. 610 —In re Willing's Will, 209 N.W. 602, 190 Wis. 406—In re Hughes' Will, 203 N.W. 746, 187 Wis. 14.

Application to circuit court for leave to appeal

Wis.—In re McGinty's Will, 176 N.W. 850, 171 Wis. 184.

Time to appeal

Wis.—In re Bowler's Will, 280 N.W. 684, 228 Wis. 527.

Trial de novo

Wis.—In re Willing's Will, 209 N.W. 602, 190 Wis. 406.

94. Wis.—Pfeifer v. Layton Park Oil, etc., Co., 149 N.W. 395, 159 Wis. 1.

15 C.J. p 1007 note 9.

Municipal court

(1) Of Fond du Lac County.—**Chapleau v. Manhattan Oil Co.,** 190 N.W. 361, 178 Wis. 545.

(2) Of Langdale County.—**French v. L. Starks Co.,** 197 N.W. 726, 183 Wis. 345.

(3) Of Neenah-Menasha.—**State v. Sande,** 238 N.W. 504, 205 Wis. 495.

(4) Of Racine County.—**Jones v. State,** 247 N.W. 445, 211 Wis. 9.

(5) Other courts see 15 C.J. p 1007 note 9 [e].

95. Jurisdiction may not exceed that of circuit court

Wis.—State ex rel. Schneider v. Midland Investment & Finance Corporation, 262 N.W. 711, 219 Wis. 161.

Territorial limits

Wis.—State ex rel. Schneider v. Midland Investment & Finance Corporation, 262 N.W. 711, 219 Wis. 161 —**State v. Sande,** 238 N.W. 504, 205 Wis. 495—**French v. L. Starks Co.,** 197 N.W. 726, 183 Wis. 345.

96. "A municipal court is a creature of statute and of limited jurisdiction. It must appear upon the face of its proceeding that it acted within the

powers conferred upon it."—Jones v. State, 247 N.W. 445, 446, 211 Wis. 9.

97. Wis.—Carnecross v. Treat, 227 N.W. 24, 200 Wis. 284.

Judicial notice

Wis.—Wergin v. Voss, 192 N.W. 51, 179 Wis. 603, 26 A.L.R. 933.

98. Trial de novo

Wis.—Chapleau v. Manhattan Oil Co., 190 N.W. 361, 178 Wis. 545.

99. Wis.—Berger v. Discher, 131 N.W. 444, 146 Wis. 170.

1. **Wis.—State ex rel. Schneider v. Midland Investment & Finance Corporation,** 262 N.W. 711, 219 Wis. 161.

2. **No or limited equitable jurisdiction**

Wis.—Nehring v. Niemerowicz, 276 N.W. 325, 226 Wis. 285—**Pierson v. Dorff,** 223 N.W. 579, 198 Wis. 43.

3. **Wis.—Wald v. Mitten,** 282 N.W. 634, 220 Wis. 393.

Sending equitable cases to circuit court

Wis.—Nehring v. Niemerowicz, 276 N.W. 325, 226 Wis. 285.

4. **Wis.—Stanislowski v. Metropolitan Life Ins. Co.,** 286 N.W. 10—**National Bond & Investment Co. v. Nash Sales Co.,** 205 N.W. 910, 188 Wis. 197—**Rohr v. Chicago, N. S. & M. R. R.,** 190 N.W. 827, 179 Wis. 106—**Schulteis v. Milwaukee Concrete Mixer Co.,** 183 N.W. 159, 174 Wis. 358—**Gimbel Bros. v. Kelly,** 176 N.W. 61, 170 Wis. 637—**Rathmann v. Schwanz,** 175 N.W. 812, 170 Wis. 459—**Scheiderer v. A. George Schulz Co.,** 171 N.W. 660, 169 Wis. 6—**Donovan v. Northwestern School for Stammerers,** 162 N.W. 178, 165 Wis. 331.

15 C.J. p 1007 note 8 [f].

Payment of costs and fees

Wis.—Cannon Printing Co. v. Globe & Rutgers Fire Ins. Co., 216 N.W. 498, 195 Wis. 1—**Todorovic v. Hirschberg,** 177 N.W. 884, 172 Wis. 14.

Determination and disposition of cause

Wis.—Borkowski v. Langen, 198 N.W. 389, 183 Wis. 481—**Kausch v.**

Chicago & Milwaukee Electric Ry. Co., 180 N.W. 808, 173 Wis. 220—**Defiance Mach. Works v. Gill,** 175 N.W. 940, 170 Wis. 477.

Weight, preponderance, or sufficiency of evidence

Wis.—Wald v. Mitten, 282 N.W. 634, 229 Wis. 393—**Conan v. A. C. Allyn & Co.,** 243 N.W. 400, 209 Wis. 35, amended **Conan v. A. C. Allen & Co.,** 244 N.W. 535, 209 Wis. 35 —**Industrial Heating & Engineering Co. v. Austin,** 228 N.W. 503, 200 Wis. 367—**Rauch v. Bensman,** 227 N.W. 253, 200 Wis. 36—**Martins v. Bauer,** 205 N.W. 907, 188 Wis. 188—**Dacus v. Fischer,** 192 N.W. 1019, 180 Wis. 292—**Foster v. Bauer,** 180 N.W. 817, 173 Wis. 231 —**Yahnke v. Lange,** 170 N.W. 722, 168 Wis. 512.

5. "Inferior courts must have a jurisdiction less than that of the circuit court."—**State ex rel. Schneider v. Midland Investment & Finance Corporation,** 262 N.W. 711, 712, 219 Wis. 161.

Service of process throughout state

Court process of which may be sent throughout state, is inferior court, notwithstanding act creating it calls it municipal court.—**State v. Sande,** 238 N.W. 504, 205 Wis. 495—**French v. L. Starks Co.,** 197 N.W. 726, 183 Wis. 345.

Designation by legislature as municipal or inferior

Wis.—State ex rel. Schneider v. Midland Investment & Finance Corporation 262 N.W. 711, 219 Wis. 161—**State v. Sande,** 238 N.W. 504, 205 Wis. 495—**French v. L. Starks Co.,** 197 N.W. 726, 183 Wis. 345.

6. **Wyo.—U. S. Fidelity, etc., Co. v. Nash,** 121 P. 541, 124 P. 269, 20 Wyo. 65.

15 C.J. p 1007 note 10.

7. **U.S.—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A. Wyo.,** 74 F.2d 827.

Authority to issue quo warranto

Wyo.—State ex rel. Walton v. Christmas, 44 P.2d 905, 48 Wyo. 239.

D. COURTS OF PROBATE JURISDICTION

1. JURISDICTION AND POWERS

§ 298. In General

Probate courts are creatures of the law whose basic jurisdiction is to administer justice in decedents' estates. With respect to matters to which their powers extend, they are usually regarded as courts of general jurisdiction. The jurisdiction of a probate court with respect to the administration of an estate attaches when it takes control of the estate and continues until it is fully administered. Such courts are usually courts of record.

Probate courts are creatures of the law⁸ whose basic jurisdiction is to administer justice in mat-

ters relating to decedents' estates.⁹ They have been said to be the offspring of the common law,¹⁰ although it has also been considered that the probate court system is not indebted to the common law for its existence or development.¹¹ The jurisdiction exercised by probate courts is commonly referred to as probate jurisdiction.¹²

While it has been frequently asserted that such courts are courts of special and limited jurisdiction,¹³ they are not courts of inferior, but rather

2. Me.—Cotting v. Tilton's Estate, 106 A. 113, 118 Me. 91.

Okl.—Rust v. Gillespie, 216 P. 450, 90 Okl. 59.

Definition of probate and similar courts see *supra* § 11.

3. N.Y.—In re Pulitzer's Estate, 249 N.Y.S. 87, 139 Misc. 575, opinion supplemented 251 N.Y.S. 549, 140 Misc. 572, affirmed In re Pulitzer, 260 N.Y.S. 975, 237 App.Div. 808.

Wis.—In re Sipchen's Estate, 183 N. W. 385, 180 Wis. 504.

Court of ordinary of Georgia is a court of competent jurisdiction to administer the estates of decedents. —Smith v. Jennings, Ga., 232 F. 48, 151 C.C.A. 134, reversing, D.C., Jennings v. Smith, 233 F. 921, certiorari denied Jennings v. Smith, 37 S.Ct. 399, 243 U.S. 635, 61 L.Ed. 940.

10. Wis.—Brunson v. Burnett, 2 Pinn. 185, 1 Chandl. 136.

15 C.J. p 1008 note 31.

"The origin of our probate courts is traced back to the ecclesiastical courts of England."—Plant v. Harrison, 74 N.Y.S. 411, 434, 36 Misc. 649.

Evolution of courts of probate jurisdiction.

(1) Generally.—Plant v. Harrison, *supra*.

(2) In New York.—Malone v. St. Peter & St. Paul's Church, 64 N.E. 961, 172 N.Y. 269, 274—In re Hawley, 19 N.E. 352, 104 N.Y. 250, 263, 5 St.R. 620—In re Morris, 235 N.Y.S. 461, 134 Misc. 374.

(3) In Wisconsin.—In re George's Estate, 274 N.W. 294, 225 Wis. 251, vacating mandate 270 N.W. 528, 225 Wis. 251.

11. Mich.—Grady v. Hughes, 31 N. W. 438, 64 Mich. 540.

Pa.—Fisher v. Kreebel, 1 Leg.Chron. 113.

"[Probate courts] derive their origin and jurisdiction from a source altogether distinct from the common law, and they exercise no functions peculiar to that system."—In re Quinney's Estate, 283 N.W. 599, 601,

267 Mich. 329—Holbrook v. Cook, 5 Mich. 225, 228.

12. "Probate jurisdiction" means the exercise of the ordinary power of what, *ex vi termini*, is generally understood to be the authority of courts of that name.

Mont.—Chadwick v. Chadwick, 13 P. 355, 6 Mont. 566.

N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.

13. Ala.—American Surety Co. of New York v. King, 187 So. 453, 237 Ala. 510.

Fla.—First Nat. Bank v. MacDonald, 130 So. 596, 100 Fla. 675, denying rehearing 129 So. 911, 100 Fla. 674.

Ill.—In re Talla's Estate, 281 Ill.App. 124, affirmed 1 N.E.2d 50, 362 Ill. 621—Hicks v. Monahan, 209 Ill. App. 516.

Kan.—In re Rightwre's Estate, 242 P. 138, 120 Kan. 95.

Me.—Harmon v. Fagan, 154 A. 267, 130 Me. 171—Cotting v. Tilton's Estate, 106 A. 113, 118 Me. 91.

Md.—Baldwin v. Hopkins, 187 A. 884, 171 Md. 97—Greenhawk v. Quimby, 177 A. 537, 168 Md. 396—Marbury v. Ward, 162 A. 919, 163 Md. 330—Hopper v. Hopkins, 160 A. 166, 162 Md. 448—Mudge v. Mudge, 141 A. 296, 155 Md. 1—Bowle v. Ghiselin, 30 Md. 553.

Mich.—In re Fraser's Estate, 285 N. W. 1, 288 Mich. 392—Burgess v. Jackson Circuit Judge, 229 N.W. 481, 249 Mich. 558.

Mo.—State ex rel. Barlow v. Holcamp, 14 S.W.2d 646, 322 Mo. 258—Hanssen v. Karbe, App., 115 S.W.2d 109, transferred 106 S.W.2d 415—State ex rel. Kemp v. Arnold, App., 113 S.W.2d 143—Dietrich v. Jones, 53 S.W.2d 1059, 227 Mo.App. 365.

Mont.—Philbrick v. American Bank & Trust Co., 193 P. 59, 58 Mont. 376—In re Pepin's Estate, 163 P. 104, 53 Mont. 240.

N.Y.—In re Hyams' Estate, 142 N.E. 589, 237 N.Y. 211, modifying 198 N. Y.S. 923, 205 App.Div. 893, and 199 N.Y.S. 928, 206 App.Div. 670—In re Gurevitch's Estate, 2 N.Y.S.2d

674, 166 Misc. 439—St. John v. Putnam, 220 N.Y.S. 141, 128 Misc. 714—In re Beach's Estate, 203 N. Y.S. 492, 122 Misc. 261, affirmed 203 N.Y.S. 919, 208 App.Div. 831—In re Steinhmetz' Estate, 1 N.Y.S.2d 601—Wilson v. Baptist Education Soc., 10 Barb. 308.

Ohio.—State ex rel. Black v. White, 5 N.E.2d 163, 132 Ohio St. 58—Abicht v. O'DonneH, 3 N.E.2d 993, 52 Ohio App. 513—In re Will of Schrader, 20 Ohio N.P.N.S., 433.

Okl.—Rust v. Gillespie, 216 P. 480, 90 Okl. 59—Jackson v. Porter, 209 P. 430, 432, 87 Okl. 112, citing *Corpus Juris*.

Pa.—In re Mains' Estate, 185 A. 222, 322 Pa. 243—In re Cutter's Estate, 134 A. 489, 286 Pa. 505—In re Bruster's Estate, 186 A. 147, 123 Pa. Super. 45—In re Hartzell's Estate, 173 A. 842, 114 Pa.Super. 190—In re Berkey's Estate, 156 A. 568, 102 Pa. Super. 306—In re Clunien's Estate, Pa.Orph., 34 Pa.Dist. & Co. 490—In re Kowala's Estate, 21 Pa.Dist. & Co. 77—In re Roseberry's Estate, 20 Pa.Dist. & Co. 170—In re Mutchler's Estate, 29 Pa.Dist. 271—In re Strauss' Estate, 26 North. Co. 304—In re Mellinger's Estate, 9 Somerset Leg.J. 55.

R.I.—Harrop v. Tillinghast, 195 A. 226, 59 R.I. 255—Vennerbeck & Clase Co. v. Markham's Estate, 173 A. 549, 54 R.I. 366—Thompson v. Clarke, 127 A. 569, 46 R.I. 307.

Tex.—Easley v. McClinton, 33 Tex. 288.

Vt.—Probate Court for District of Fair Haven v. Indemnity Ins. Co. of North America, 171 A. 336, 106 Vt. 207—Barber v. Chase, 143 A. 302, 101 Vt. 343.

15 C.J. p 1008 note 33.

"Probate courts are incapable of dealing completely with ordinary rights . . . [and are] courts for peculiar and limited purposes . . . outside ordinary litigation."—In re Quinney's Estate, 283 N.W. 599, 601, 287 Mich. 329—In re Graham's Estate, 267 N.W. 629, 630, 276 Mich. 321.

of superior, jurisdiction,¹⁴ and with respect to matters to which their powers extend, they are usually regarded as courts of general jurisdiction.¹⁵ Such courts are usually courts of record,¹⁶ and the same presumptions exist in favor of their proceedings as in the case of ordinary courts of general jurisdic-

tion.¹⁷ Their jurisdiction is, of course, purely civil,¹⁸ and in the settlement of estates it is primarily in rem.¹⁹

Nature of powers. The powers of a court of probate jurisdiction are judicial, administrative, and inquisitorial, each of such powers being distinct and

14. Ark.—Levinson v. Treadway, 78 S.W.2d 59, 190 Ark. 201—Branch v. Veterans' Administration, 74 S.W. 2d 800, 189 Ark. 662—Sewell v. Reed, 71 S.W.2d 191, 189 Ark. 50—Graham v. Graham & Norris, 1 S.W.2d 16, 175 Ark. 530.
Mass.—Wildner v. Orcutt, 153 N.E. 332, 257 Mass. 100.
Minn.—De Wolf v. Ericson, 220 N.W. 406, 175 Minn. 68—Davis v. Hudson, 11 N.W. 136, 29 Minn. 27, 34.
Or.—Godfrey v. Gempfer, 70 P.2d 551, 157 Or. 251—Woodburn Lodge No. 102, I. O. O. F., v. Wilson, 34 P.2d 611, 148 Or. 150.
15 C.J. p 1009 note 34.

Reason for rule

The probate court is regarded as a superior court "because it is not only a court of record, but a constitutional court of fixed and permanent character invested with general jurisdiction and plenary powers over matters committed by law to its peculiar cognizance."—Borden v. State, 11 Ark. 519, 552, 44 Am.D. 217.

Original, California probate courts were of inferior jurisdiction.—Wood v. Reach, 14 P.2d 170, 125 Cal.App. 631.

15. Ala.—Smith v. Smith, 103 So. 557, 212 Ala. 522—Ex parte Sumlin, 85 So. 810, 204 Ala. 376.
Ark.—Arkansas Valley Trust Co. v. Young, 195 S.W. 36, 128 Ark. 42.
Idaho.—Short v. Thompson, 55 P.2d 163, 56 Idaho 361.
Ill.—People, for Use of Stough, v. Danforth, 12 N.E.2d 227, 293 Ill. App. 230—Depue v. Heberling, 250 Ill.App. 82—In re Roeske's Estate, 205 Ill.App. 366.
Mass.—Schmidt v. Schmidt, 182 N.E. 374, 280 Mass. 216—Wildner v. Orcutt, 153 N.E. 332, 257 Mass. 100.
Mich.—Burgess v. Jackson Circuit Judge, 229 N.W. 481, 249 Mich. 558—Reason v. Jones, 78 N.W. 899, 119 Mich. 672.
Minn.—Davis v. Hudson, 11 N.W. 136, 139, 29 Minn. 27.
Miss.—Pollock v. Buile, 43 Miss. 140.
N.H.—Hollis v. Tilton, 5 A.2d 29, affirmed 6 A.2d 753.
N.J.—In re Beam, 117 A. 618, 93 N.J. Eq. 593—Podesta v. Binns, 60 A. 815, 60 N.J.Eq. 387.
Ohio.—In re Ferguson's Estate, 3 Ohio N.P., N.S., 549.
Okl.—Petroleum Auditors Ass'n v. Landis, 77 P.2d 730, 182 Okl. 297—Stevens v. Dill, 285 P. 845, 142 Okl. 132—Dill v. Stevens, 284 P.

- 60, 141 Okl. 24—Jackson v. Porter, 209 P. 430, 432, 87 Okl. 112, citing *Corpus Juris*.

Tex.—Dallas Joint Stock Land Bank of Dallas v. Forsyth, 109 S.W.2d 1046, 130 Tex. 563, modifying Forsyth v. Dallas Joint Stock Land Bank of Dallas, Civ.App., 81 S.W. 2d 1103, and rehearing denied 112 S.W.2d 173, 130 Tex. 563—Easterline v. Bean, 49 S.W.2d 427, 121 Tex. 327, reversing, Civ.App., 15 S.W.2d 734—Crawford v. McDonald, 33 S.W. 325, 88 Tex. 626—Buss v. Smith, Civ.App., 125 S.W.2d 712, error granted—Loewenstein v. Watts, Civ.App., 119 S.W.2d 176.
15 C.J. p 1009 notes 35, 37.
Courts not exclusively of probate jurisdiction see *infra* § 299.

16. Ala.—Whitaker v. Kennamer, 155 So. 855, 229 Ala. 80.
Alaska.—In re Matheson's Estate, 7 Alaska 292.
Idaho.—Short v. Thompson, 55 P.2d 163, 56 Idaho 361—Harkness v. Utah Power & Light Co., 291 P. 1051, 49 Idaho 756.
Kan.—Parsons v. M. E. McCabe & Son, 275 P. 173, 127 Kan. 817.
Minn.—De Wolf v. Ericson, 220 N.W. 406, 175 Minn. 68.
Mo.—Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferred, see, App., 47 S.W.2d 121—Phillips v. Phoenix Trust Co., 58 S.W.2d 313, 332 Mo. 327.
Ohio.—Fidelity & Deposit Co. v. Wolfe, 126 N.E. 414, 100 Ohio St. 332—Ritz v. Smith, 10 N.E.2d 150, 56 Ohio App. 72—Robinson v. Dunn, 17 Ohio Cir.Ct., N.S., 292, affirmed 87 Ohio St. 472—In re Ferguson's Estate, 3 Ohio N.P., N.S., 549.
Okl.—Woods v. Vann, 256 P. 918, 125 Okl. 121.
S.C.—In re Willcox, 160 S.E. 260, 162 S.C. 133.
15 C.J. p 721 note 63 [a] (1), p 1009 note 38.

County courts are courts of record in probate matters.—Baird v. Patterson, 44 P.2d 90, 172 Okl. 158.

District court when exercising jurisdiction in probate matters is a court of record.—In re Hoermann's Estate, 91 P.2d 394, 108 Mont. 386.

Not technically courts of record. Probate courts, including the prerogative court, are not technically courts of record; the prerogative court exercises jurisdiction of an ec-

clesiastical court, which is not a court of record.—In re Merrill, 102 A. 400, 88 N.J.Eq. 261.

17. Ark.—Sewell v. Reed, 71 S.W.2d 191, 189 Ark. 50.

15 C.J. p 1009 note 39.

Presumptions as to jurisdiction see *supra* § 98.

18. S.C.—Lide v. Lide, 2 Brev. 403. *Superintendence*

The jurisdiction of probate courts has been phrased as that of superintendence.—Hollis v. Tilton, 5 A.2d 29, affirmed 6 A.2d 753.

19. Cal.—Lillenkamp v. Superior Court of Los Angeles County, 93 P. 2d 1008, superseding 85 P.2d 577—Abels v. Frey, 14 P.2d 594, 126 Cal.App. 48—Warren v. Ellis, 179 P. 544, 39 Cal.App. 542.
N.Y.—In re Grube's Will, 294 N.Y. S. 306, 162 Misc. 228, affirmed 298 N.Y.S. 638, 251 App.Div. 804.

"Their jurisdiction is primarily and essentially in rem in respect to property which the incident of death has temporarily left without an adjudicated owner, and, in so far as jurisdiction in personam is properly exercised, it is primarily merely by reason of the relationship, rights, claims, or property obligations of the particular persons, in respect to whom the jurisdiction is entertained, in the rem which is the basic subject-matter of the dispositive power of such courts."—In re Bradford's Will, 288 N.Y.S. 153, 157, 159 Misc. 482.

Location of rem as determining jurisdiction

(1) As to tangible personalty having permanent situs, question of jurisdiction of surrogate's court is determinable on principles of primary power to enforce decrees on rem itself, and as to intangibles owned by decedent jurisdiction is determined on formula of mobilia sequitur personam, by which situs of intangibles is usually attributed to domicile of owner.—In re Bradford's Will, *supra*.

(2) Res held to lie outside limits of court's control.—In re Rogers' Will, 293 N.Y.S. 626, 250 App.Div. 26—In re Bradford's Will, 288 N.Y.S. 153, 159 Misc. 482.

Power of appointment furnishes no res on which jurisdiction of surrogate's court can attach.—In re Bradford's Will, 288 N.Y.S. 153, 159 Misc. 482.

statutory.²⁰ In cases where it is authorized to act, its powers are not only general²¹ but also plenary.²² Probate powers granted to a court constitute a public trust.²³

When jurisdiction attaches. In general, the jurisdiction of a probate court with respect to the administration of a particular estate attaches when it takes control of the estate in the manner and by the means prescribed by law.²⁴ More particularly, jurisdiction attaches on the filing of a petition for the appointment of a fiduciary to take into possession, marshal, and distribute the assets of the deceased.²⁵

Termination, loss, or divestiture of jurisdiction. It has been held that the jurisdiction of probate courts with respect to the settlement of estates is not lost by mere lapse of time²⁶ or failure to assume jurisdiction.²⁷ Having taken jurisdiction of the ad-

ministration of a particular estate, the jurisdiction of a probate court continues until the estate is fully administered,²⁸ more particularly, until the decedent's property is distributed to those entitled thereto²⁹ and the estate is closed.³⁰

§ 299. Probate Powers of Courts Not Exclusively of Probate Jurisdiction

In some jurisdictions probate powers are conferred on courts not exclusively of probate jurisdiction. Under these circumstances, the jurisdiction of such a court in probate matters is separate and distinct from its jurisdiction in other matters. When sitting in probate, such a court is usually considered a court of general jurisdiction.

It sometimes happens that probate powers are conferred on courts which have jurisdiction over matters other than those which would fall within the cognizance of a court which is strictly one of probate,³¹ such as chancery,³² circuit,³³ county,³⁴

20. N.Y.—Matter of Meyer, 131 N. Y.S. 27, 72 Misc. 566, 2 Civ.Proc., N.S., 364.

In determining rights of creditors the function of the probate court is judicial.—U. S. v. Paisley, D.C.Ill., 26 F.Supp. 237.

21. N.C.—Clark v. Carolina Homes, 128 S.E. 20, 183 N.C. 703.

22. Mich.—In re Strom's Guardianship, 286 N.W. 245.

N.C.—Clark v. Carolina Homes, 128 S.E. 20, 183 N.C. 703.

Vt.—In re Fisher's Estate, 156 A. 878, 104 Vt. 37.

Wis.—In re George's Estate, 274 N. W. 294, 225 Wis. 251, vacating mandate 270 N.W. 538, 225 Wis. 251.

15 C.J. p 1009 note 35.

23. Wis.—In re Willing's Will, 209 N.W. 602, 190 Wis. 406.

24. Minn.—In re Price, 162 N.W. 454, 136 Minn. 333, L.R.A.1917E 544.

25. Minn.—In re Price's Estate, supra—Hanson v. Nygaard, 117 N.W. 235, 105 Minn. 30, 127 Am.S.R. 523.

N.Y.—In re Stemmler's Estate, 12 N. Y.S.2d 478, 171 Misc. 318.

26. Vt.—In re Curtis' Estate, 192 A. 13, 109 Vt. 44.—In re Fisher's Estate, 156 A. 878, 104 Vt. 37.—Eastman v. Davis, 35 A. 73, 68 Vt. 235.—Davis v. Eastman, 30 A. 1, 66 Vt. 651.

Loss or divestiture of jurisdiction generally see supra §§ 92-95.

Duty and power not impaired

"The duty and power of the county court, so far as it affects the property of a deceased person, is not impaired by mere lapse of time, so long, at least, as title to real property, under the special statutes regulating that subject, is not questioned or rights of innocent purchasers of real or personal property affected."

—In re Reeve's Guardianship, 186 N. W. 736, 176 Wis. 579.

27. Vt.—In re Fisher's Estate, 156 A. 878, 104 Vt. 37.

28. Vt.—In re Curtis' Estate, 192 A. 13, 109 Vt. 44.—In re Fisher's Estate, 156 A. 878, 10 Vt. 37.

Effect of final settlement on jurisdiction of probate court see the C.J.S. title Executors and Administrators § 907, also 24 C.J. p 1031 notes 10, 11.

29. Idaho.—Walker Bank & Trust Co. v. Steely, 34 P.2d 56, 54 Idaho 591.

N.Y.—In re Stemmler's Estate, 12 N. Y.S.2d 478, 171 Misc. 318.

Jurisdiction ends only with final distribution of property among those entitled thereto.—Kirwin v. Attorney General, 175 N.E. 164, 275 Mass. 34.—Colby v. Stearns, 170 N.E. 465, 270 Mass. 461.

Administration completed by consent

Where agreement of distribution is made and next of kin or legatees take over property of decedent's estate in individual ownership, as tenants in common or otherwise, jurisdiction of surrogate's court is terminated, since administration of estate has been completed by consent.—In re Veniero's Estate, 300 N.Y.S. 924, 165 Misc. 293.

Controversy as to distributed property

The functions of a surrogate court are primarily limited to the appointment of estate fiduciaries, to the marshalling of the assets of decedents, and to overseeing their distribution, and when those events have occurred, its authority is at an end and if a controversy chances to arise subsequently as to rights of various individuals to property which has passed, the forum for its de-

termination is another tribunal.—In re Goldowitz' Estate, 12 N.Y.S.2d 221, 171 Misc. 198.

30. Idaho.—Walker Bank & Trust Co. v. Steely, 34 P.2d 56, 54 Idaho 591.

31. Fla.—State v. Horne, 98 So. 330, 86 Fla. 309.

15 C.J. p 1010 note 49.

Statute held invalid in attempting to confer probate jurisdiction on particular court.

Tex.—State v. Gillette's Estate, Com. App., 10 S.W.2d 984, reversing Gillette's Estate v. State, Civ.App., 286 S.W. 261.

32. Miss.—Saxon v. Ames, 47 Miss. 565.

33. Statute valid

Statute giving circuit court jurisdiction in probate matters when county judge is disqualified was valid.—State v. Horne, 98 So. 330, 86 Fla. 309.

Where county courts abolished

Circuit courts in districts in which county courts have been abolished have probate jurisdiction.—In re Pittock's Estate, 201 P. 428, 102 Or. 47.

34. Neb.—In re Shierman's Estate, 261 N.W. 155, 129 Neb. 230.—Pinn v. Pinn, 189 N.W. 371, 108 Neb. 822.

Okl.—Petroleum Auditors Ass'n v. Landis, 77 P.2d 730, 182 Okl. 297.—Baird v. Patterson, 44 P.2d 90, 172 Okl. 158.—Manuel v. Kidd, 258 P. 732, 126 Okl. 71.—O'Neill v. Cunningham, 244 P. 444, 119 Okl. 157.—Adams v. Tidal Oil Co., 237 P. 443, 113 Okl. 15.—Shawnee Nat. Bank v. Marler, 233 P. 207, 106 Okl. 71.—In re Green's Estate, 196 P. 128, 80 Okl. 256.—Vinson v. Cook, 184 P. 97, 76 Okl. 46. 15 C.J. p 1010 note 53.

district,³⁵ superior,³⁶ or supreme³⁷ courts; and under these circumstances, the jurisdiction of such a court in probate matters is separate and distinct from its jurisdiction in other matters,³⁸ and differs therefrom in that it is essentially under legislative control.³⁹ Although such a court when sitting in probate is a court of special and limited jurisdiction,⁴⁰ being vested with only such powers as are conferred by statute or constitutional provision, see *infra* § 301, yet with respect to matters to which its

probate powers extend, it is usually regarded as a court of general jurisdiction⁴¹ and is entitled to all the presumptions as such.⁴²

§ 300. Subjects of Jurisdiction

Usually the matters of which probate courts have jurisdiction are decedents' estates and guardianships, although in some states they are also given jurisdiction over other matters.

Probate courts have jurisdiction in probate⁴³ and

35. U.S.—Cuff v. U. S., C.C.A.Cal., 64 F.2d 624, certiorari denied 54 S. Ct. 96, 290 U.S. 676, 78 L.Ed. 583. applying Utah law.

Iowa.—In re Watters' Estate, 208 N.W. 281, 201 Iowa 884.

Wyo.—Church v. Quiner, 224 P. 1073, 31 Wyo. 222.

15 C.J. p 1010 note 54.

Powers of county court

The district court, when acting as a court of probate under a statute authorizing it to do so where the county judge is disqualified, possesses all the powers conferred on the county court, and its jurisdiction is neither greater nor less than that of the county court.—Bradley v. Love, 60 Tex. 472—Buss v. Smith, Tex.Civ.App., 125 S.W.2d 712, error granted.

Appellate jurisdiction only

Jurisdiction of district court in probate matters is appellate only.—In re Gentry's Estate, 13 P.2d 156, 158 Okl. 196—15 C.J. p 1010 note 54 [b].

Historical discussion of probate powers of district courts of New Mexico.—First Nat. Bank v. Dunbar, 258 P. 817, 32 N.M. 419.

36. Cal.—In re Eilert's Estate, 21 P.2d 630, 131 Cal.App. 409—State Life Ins. Co. v. Williams, 81 P.2d 481, 27 Cal.App.2d 594—In re Barreiro's Estate, 14 P.2d 786, 125 Cal. App. 752.

15 C.J. p 1010 note 53.

Only appellate jurisdiction

Superior court only acquires jurisdiction of probate matters on appeal.—Swain v. Swan, 294 P. 153, 147 Okl. 33.

37. D.C.—Keyser v. Breitbarth, 13 D.C. 332.

38. Cal.—In re Rey's Estate, 88 P. 2d 718, 31 Cal.App.2d 648—Fisher v. Superior Court in and for Ventura County, 73 P.2d 892, 23 Cal. App.2d 528.

Ind.—Fidelity & Casualty Co. of New York v. State, 184 N.E. 916, 98 Ind. App. 485.

Iowa.—Coulter v. Petersen, 255 N.W. 684, 218 Iowa 512—In re Watters' Estate, 208 N.W. 281, 201 Iowa 884. 15 C.J. p 1010 note 55.

The probate jurisdiction of the Superior Court is separate and dis-

ting from its jurisdiction in ordinary civil matters; and while engaged in the consideration of a case belonging to one of those classes it cannot in the same matter hear and determine what is essentially a case of another class.—Falias v. Superior Court in and for Alameda County, 24 P.2d 567, 569, 133 Cal.App. 525.

In Louisiana, under governing constitutional provisions, the civil district court has general civil jurisdiction, and is not divided into probate and civil sides.—Succession of Kelly, 102 So. 678, 157 La. 585.

39. Cal.—Fisher v. Superior Court in and for Ventura County, 73 P. 2d 892, 23 Cal.App.2d 528.

40. Cal.—McLellan's Estate v. McLellan, 63 P.2d 1120, 8 Cal.2d 49—McPike v. Superior Court of San Francisco County, 30 P.2d 17, 220 Cal. 254—In re Thurnell's Estate, App., 19 P.2d 14—Mahoney v. National Surety Co., 264 P. 304, 89 Cal.App. 148—In re Schaeffer's Estate, 200 P. 508, 53 Cal.App. 493—In re Polito's Estate, 197 P. 976, 51 Cal.App. 752.

Wyo.—Church v. Quiner, 224 P. 1073, 31 Wyo. 222.

15 C.J. p 1009 note 43.

"In exercising probate powers a superior court, a court of general jurisdiction, is but administering certain statutes, and its jurisdiction is limited and special."—People v. Osgood, 285 P. 753, 755, 104 Cal.App. 133.

41. County court

(1) County court in probate matters is a court of general jurisdiction.

III.—Matthews v. Hoff, 113 Ill. 90. Neb.—In re Robinson Heirship, 228 N.W. 852, 119 Neb. 285, followed in In re Clark, 228 N.W. 858, 119 Neb. 306—Fischer v. Sklenar, 163 N.W. 861, 101 Neb. 553—Bennett v. Bennett, 91 N.W. 409, 65 Neb. 432, affirmed 96 N.W. 994.

Okl.—Manuel v. Kidd, 258 P. 732, 126 Okl. 71—Hunter v. Wittler, 250 P. 793, 120 Okl. 103—Johnson v. Petty, 246 P. 848, 118 Okl. 178—Dawkins v. People's Bank & Trust Co., 245 P. 594, 117 Okl. 181—Littlehead v. Mount, 227 P. 98, 99 Okl. 225—

In re Green's Estate, 196 P. 128, 80 Okl. 256.

Or.—Anderson v. Palmer, 224 P. 629, 111 Or. 137—Nolan v. Hughes, 93 P. 362, 51 Or. 187, rehearing denied 94 P. 504.

S.D.—Equitable Life Assur. Soc. of U. S. v. Lunning, 265 N.W. 876, 64 S.D. 168—Matson v. Swenson, 58 N.W. 570, 5 S.D. 191.

Tenn.—Townsend v. Townsend, 4 Coldw. 70, 94 Am.D. 185.

Tex.—Murchison v. White, 54 Tex. 78—Vick v. Downing, Civ.App., 120 S.W.2d 279—Henry v. Carter, Civ. App., 39 S.W.2d 645—Henry v. Beauchamp, Civ.App., 39 S.W.2d 642.

(2) "In respect to his probate powers, the county judge exercises a general jurisdiction within a limited and defined sphere, but the jurisdiction so exercised by him is not that of a court of general jurisdiction according to the course of the common law."—Mott v. First Nat. Bank, 124 So. 36, 37, 98 Fla. 444.

District court, when exercising jurisdiction in probate matters, is a court of general jurisdiction.—In re Hoermann's Estate, 91 P.2d 394, 108 Mont. 386—In re Baxter's Estate, 54 P.2d 869, 101 Mont. 504.

Superior court

(1) Superior court in probate matters is a court of general jurisdiction.

Cal.—In re Cornaz' Estate, 65 P.2d 784, 8 Cal.2d 347—McPike v. Superior Court of San Francisco County, 30 P.2d 17, 220 Cal. 254—L. Harter Co. v. Geisel, 122 P. 1094, 18 Cal.App. 282.

Wash.—In re Nielsen's Estate, 87 P. 2d 298.

(2) A superior court sitting in probate loses none of its powers as a court of general jurisdiction.—In re Kelley's Estate, 74 P.2d 904, 193 Wash. 109—In re Krause's Estate, 21 P.2d 268, 173 Wash. 1.

42. Okl.—Dawkins v. People's Bank & Trust Co., 245 P. 594, 117 Okl. 181.

Or.—Anderson v. Palmer, 224 P. 629, 111 Or. 137.

43. Ill.—Healea v. Verne, 175 N.E. 562, 343 Ill. 325—In re Panico's Estate, 268 Ill.App. 585.

testamentary⁴⁴ matters. More specifically, the matters generally falling within the jurisdiction of such courts are the general supervision over the administration and settlement of estates of decedents;⁴⁵ the probate of wills, see the C.J.S. title Wills § 353, also 68 C.J. p 940 note 17—p 942 note 29; the construction of wills, see the C.J.S. title Wills § 1076, also 69 C.J. p 840 note 32—p 863 note 79; the allowance or rejection of claims against decedents' estates, see the C.J.S. title Executors and Administrators § 446, also 24 C.J. p 396 note 47—398 note 72; the payment of claims when established, see the C.J.S. title Executors and Administrators § 473, also 24 C.J. p 453 note 46; the sale of property for payment of claims, if necessary, see the C.J.S. title Executors and Administrators § 560, also 24 C.J. p 576 note 97—p 579 note 11; the distribution of the estate, see the C.J.S. title Executors and Administrators § 514, also 24 C.J. p 510 note 99—p 512 note 12; the settlement of the accounts of executors and administrators, see the C.J.S. title Executors and Administrators § 840, also 24 C.J. p 940 note 57—p 943 note 92; also the care of the persons and property of persons who are under disability and liable

for wardship;⁴⁶ the appointment of guardians, see the C.J.S. title Guardian and Ward § 8, also 28 C.J. p 1066 note 52—p 1066 note 65; the supervision of the conduct of these functionaries, see the C.J.S. title Guardian and Ward § 4, also 28 C.J. p 1065 notes 22—27; and the settlement of their accounts, see the C.J.S. title Guardian and Ward § 153, also 28 C.J. p 1214 note 57—p 1216 note 85.

In some states, such courts are also given jurisdiction in other matters,⁴⁷ such as partition, see the C.J.S. title Partition §§ 64, 65, also 47 C.J. p 358 note 2—p 360 note 29; divorce, see the C.J.S. title Divorce § 70, also 19 C.J. p 25 note 24; the validity of marriages;⁴⁸ or even ordinary actions for the recovery of money.⁴⁹

§ 301. Extent of Jurisdiction and Powers

Probate courts have no common-law jurisdiction. The nature, extent, and exercise of their jurisdiction depend on the terms of the constitutional or statutory grant.

Probate courts have no common-law jurisdiction,⁵⁰ but the nature, extent, and exercise of their

Ohio.—Fidelity & Deposit Co. v. Wolfe, 126 N.E. 414, 100 Ohio St. 332.

"Probate matters" as used in the constitution providing that probate courts shall have original jurisdiction of all probate matters, means the settlement of estates, including the granting of letters testamentary or of administration, the collection of assets, allowance of claims, payment of debts, and the sale of realty, if necessary for that purpose, and the distribution of the estate.—In re Mortenson, 94 N.E. 120, 248 Ill. 529, 21 Ann.Cas. 251.

Subject matter of widow's reumociation of will is within probate court's jurisdiction.—Kerner v. Peterson, 13 N.E.2d 384, 368 Ill. 59.

44. Ohio.—Fidelity & Deposit Co. v. Wolfe, 126 N.E. 414, 100 Ohio St. 332.

45. Ill.—Healca v. Verne, 175 N.E. 562, 343 Ill. 325—In re Panico's Estate, 268 Ill.App. 585.

Kan.—Parsons v. M. E. McCabe & Son, 275 P. 173, 127 Kan. 847.

Minn.—State ex rel. Larson v. Probate Court of Hennepin County, 283 N.W. 545, 204 Minn. 5.

Ohio.—Bucyrus Steel Casting Co. v. Farkas, 15 Ohio N.P.N.S., 609.

Okl.—Shawnee Nat. Bank v. Marler, 233 P. 207, 106 Okl. 71.

Pa.—Knoblauch v. Kiesel, 13 Pa. Dist. & Co. 41—Divine v. Skrotzky, 8 Pa. Dist. & Co. 717.

Tex.—Murphy v. Murphey, Civ.App., 131 S.W.2d 158.

Wis.—Ottstadt v. Jardine, 281 N.W. 644, 229 Wis. 85—In re Richardson's Estate, 271 N.W. 56, 223 Wis. 447.

15 C.J. p 1010 notes 64, 65—50 C.J. p 424 note 33 [a].

46. Ga.—New York Life Ins. Co. v. Gilmore, 157 S.E. 188, 171 Ga. 894, reversing 149 S.E. 799, 40 Ga.App. 431, and conformed to 159 S.E. 288, 43 Ga.App. 442.

Minn.—State ex rel. Larson v. Probate Court of Hennepin County, 283 N.W. 545, 204 Minn. 5.

15 C.J. p 690 note 57, p 1011 note 75—50 C.J. p 424 note 33 [a].

47. Idaho.—Dewey v. Schreiber Impl. Co., 85 P. 321, 12 Idaho 280.

15 C.J. p 690 note 58—15 C.J. p 1011 note 79.

Change of names

Mass.—Lord v. Cummings, 22 N.E.2d 26.

Under the Organic Act of Montana, the probate court had jurisdiction of civil causes where the amount in dispute did not exceed a specified sum, but certain probate proceedings were not regarded as civil causes within the meaning of the act.—Deer Lodge County v. Kohrs, 2 Mont. 66.

Capacity to receive jurisdiction

(1) In Ohio, the probate court has the capacity to receive any jurisdiction which the legislature may give it, provided it is within the constitutional limitations.—Hatch v. Buckeye State Bldg. & Loan Co., 32 Ohio N.P.N.S., 297.

(2) Any one or more probate courts in the state may be granted jurisdiction in divorce, alimony, partition, or mortgage foreclosure proceedings.—Geiger v. Geiger, 159 N.E. 350, 25 Ohio App. 461, affirmed 160 N.E. 28, 117 Ohio St. 451.

48. N.Y.—Matter of Farley, 155 N.Y. 8, 63, 91 Misc. 185.

15 C.J. p 1011 note 81.

49. Okl.—Rogers v. Bonnett, 37 P. 1078, 2 Okl. 553.

15 C.J. p 1011 note 82.

Action for fraud and deceit

In actions founded on fraud and deceit, the probate court has jurisdiction where the amount sought to be recovered is one thousand dollars or less, although the fraud induced plaintiffs to purchase certain land, the action not being one concerning any matter wherein the title or boundaries of land were in dispute, nor one on a contract for the sale of real estate, of which action the probate court has no jurisdiction.—Newell v. Long-Bell Lumber Co., 78 P. 104, 14 Okl. 185.

50. U.S.—Ex p. Tweedy, D.C.Tenn., 22 F. 84.

Ark.—Smith v. Walker, 58 S.W.2d 946, 187 Ark. 161—Moss v. Moose, 44 S.W.2d 825, 184 Ark. 798.

Ind.—Fidelity & Casualty Co. of New York v. State, 184 N.E. 916, 921, 98 Ind.App. 485, citing Corpus Juris. Me.—In re Thompson, 102 A. 303, 116 Me. 473.

Mo.—Peck v. Fillingham's Estate, 202 S.W. 465, 199 Mo.App. 277.

jurisdiction depend on the terms of the constitutional or statutory grant.⁵¹ They cannot exercise

Or.—In re Anderson's Estate, 71 P. 2d 1013, 157 Or. 365.

Pa.—In re Beaver's Estate, 182 A. 744, 121 Pa.Super. 159.

Powers not derived from common law

Mich.—In re Quinney's Estate, 283 N.W. 599, 601, 287 Mich. 329—In re State Highway Com'r, 279 N. W. 883, 884, 284 Mich. 414, certiorari denied Halsted v. State, Highway Commissioner, 59 S.Ct. 148, 305 U.S. 644, 83 L.Ed. 416—In re La Croix's Estate, 272 N.W. 732, 733, 279 Mich. 429—In re Meredith's Estate, 266 N.W. 351, 354, 275 Mich. 278, 104 A.L.R. 348—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 921, 262 Mich. 563—Grady v. Hughes, 31 N.W. 438, 440, 64 Mich. 540.

Ala.—American Surety Co. of New York v. King, 187 So. 458, 237 Ala. 510—Black v. Morgan, 149 So. 845, 227 Ala. 327—State v. Grayson, 123 So. 573, 220 Ala. 12—Hines v. Hines, 84 So. 712, 203 Ala. 633.

Ark.—Hart v. Wimberly, 296 S.W. 39, 173 Ark. 1083.

Cal.—McPike v. Superior Court of San Francisco County, 30 P.2d 17, 220 Cal. 254—In re Hubbell's Estate, 8 P.2d 530, 121 Cal.App. 38—People v. Osgood, 285 P. 753, 104 Cal.App. 133—In re Schaeffer's Estate, 200 P. 508, 53 Cal.App. 493—In re Polito's Estate, 197 P. 976, 51 Cal.App. 752.

Colo.—Ballou v. First Nat. Bank, 53 P.2d 592, 98 Colo. 101.

Conn.—Palmer v. Reeves, 182 A. 138, 120 Conn. 405—Union & New Haven Trust Co. v. Sherwood, 147 A. 562, 110 Conn. 150—Massey v. Foote, 101 A. 499, 92 Conn. 25.

Ill.—In re Shanks' Estate, 282 Ill. App. 1.

Me.—Harmon v. Fagan, 154 A. 267, 130 Me. 171—In re Thompson, 102 A. 303, 116 Me. 473.

Md.—Greenhawk v. Quimby, 177 A. 537, 168 Md. 396—State v. Talbott, 128 A. 908, 148 Md. 70—Housman v. Measley, 115 A. 855, 139 Md. 598—Wingert v. State, 103 A. 437, 132 Md. 243—Bowie v. Ghiselin, 30 Md. 553.

Mass.—Lord v. Cummings, 22 N.E.2d 26—Stowell v. Ranlett, 131 N.E. 451, 238 Mass. 599.

Mich.—In re Fraser's Estate, 285 N. W. 1, 288 Mich. 392—In re Quinney's Estate, 283 N.W. 599, 287 Mich. 329—In re State Highway Com'r, 279 N.W. 883, 284 Mich. 414, certiorari denied Halsted v. State Highway Commissioner, 59 S.Ct. 148, 305 U.S. 644, 83 L.Ed. 416—In re McLouth's Estate, 274 N.W. 759, 281 Mich. 191—In re La Croix's Estate, 272 N.W. 732, 279

Mich. 429—In re Graham's Estate, 267 N.W. 629, 276 Mich. 321—In re Meredith's Estate, 266 N.W. 351, 275 Mich. 278, 104 A.L.R. 348—In re Jeffers' Estate, 261 N.W. 271, 272 Mich. 127—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 262 Mich. 563—Scholten v. Scholten, 214 N.W. 320, 233 Mich. 670—Freeman v. Hulbert, 203 N.W. 158, 230 Mich. 455—Grand Rapids, L. & D. R. Co. v. Chesebro, 42 N.W. 66, 68, 74 Mich. 466.

Minn.—In re Strom's Guardianship, 286 N.W. 245—O'Brien v. Lien, 199 N.W. 914, 160 Minn. 276.

Miss.—Carmichael v. Browder, 4 Miss. 252—Blandton v. King, 3 Miss. 856—Summons v. Henderson, Freem. 493.

Mo.—State ex rel. Barlow v. Holtcamp, 14 S.W.2d 646, 322 Mo. 258—State ex rel. Kemp v. Arnold, App., 113 S.W.2d 143—Dietrich v. Jones, 53 S.W.2d 1059, 227 Mo.App. 365—Peck v. Pillingham's Estate, 202 S.W. 465, 199 Mo.App. 277—S. Albert Grocer Co. v. Painter, 66 Mo.App. 481.

Mont.—Philbrick v. American Bank & Trust Co., 193 P. 59, 58 Mont. 376.

N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114.

N.J.—Easton v. Goodwin, 181 A. 275, 119 N.J.Eq. 114—In re Struble's Estate, 101 A. 177, 87 N.J.Eq. 311—In re Crociani's Estate, 166 A. 626, 11 N.J.Misc. 828.

N.Y.—In re Hyams' Estate, 142 N.E. 589, 237 N.Y. 211, modifying 193 N.Y.S. 922, 205 App.Div. 893, and 199 N.Y.S. 928, 206 App.Div. 670—People ex rel. Safford v. Surrogate's Court, Genesee County, 128 N.E. 890, 229 N.Y. 495, reversing 182 N.Y.S. 945, 192 App.Div. 949—Wilson v. Baptist Education Soc., 10 Barb. 308—In re Auditors' Adm'x, 229 N.Y.S. 414, 223 App. Div. 654, modified on other grounds In re Auditors' Will, 164 N.E. 242, 249 N.Y. 385, 62 A.L.R. 551, motion denied Parascandola v. National Surety Co., 166 N.E. 315, 250 N.Y. 537, 62 A.L.R. 551—In re Starbuck, 225 N.Y.S. 113, 221 App. Div. 702, affirmed 162 N.E. 522, 248 N.Y. 555—Isaacs v. Isaacs, 203 N.Y.S. 25, 208 App.Div. 61—Case v. Spencer, 83 N.Y.S. 697, 86 App.Div. 454—In re Grube's Will, 295 N.Y.S. 238, 162 Misc. 578—In re Sichel's Estate, 293 N.Y.S. 559, 162 Misc. 2—In re Lakner, 255 N.Y.S. 809, 143 Misc. 117—In re Newton's Estate, 250 N.Y.S. 625, 140 Misc. 440—St. John v. Putnam, 220 N.Y.S. 141, 128 Misc. 714—In re Walsh's Ex'rs, 214 N.Y.S. 167, 126 Misc. 479—In re Pinckney's Estate, 189 N.Y.S. 49, 115 Misc. 62—Mi-

chaelis v. Flach, 186 N.Y.S. 899, 114 Misc. 225, affirmed 189 N.Y.S. 908, 197 App.Div. 478—In re Hoffman's Estate, 177 N.Y.S. 905, 103 Misc. 612—In re Hendel's Estate, 176 N.Y.S. 262, 103 Misc. 417—In re Hoyt, 170 N.Y.S. 846, 103 Misc. 614—In re Wait's Estate, 78 N.Y.S. 869, 39 Misc. 74, 12 Ann.Cas. 141, 3 Mills 293—In re Steinmetz' Estate, 1 N.Y.S.2d 601—In re McDougall's Estate, 197 N.Y.S. 735.

Ohio.—State ex rel. Black v. White, 5 N.E.2d 163, 132 Ohio St. 58—Abicht v. O'Donnell, 3 N.E.2d 993, 52 Ohio App. 513—In re Estate of Schubert, 32 Ohio N.P.N.S., 159—Westhafer v. Reed, 29 Ohio N.P.N.S., 555—In re Will of Schrader, 20 Ohio N.P.N.S., 433.

Okl.—White House Lumber Co. v. Howard, 286 P. 327, 142 Okl. 163—Rust v. Gillespie, 216 P. 480, 50 Okl. 59—Jackson v. Porter, 209 P. 430, 432, 87 Okl. 112, citing *Corpus Juris*.

Or.—In re Anderson's Estate, 71 P. 2d 1013, 157 Or. 365.

Pa.—Mellinger's Estate, 5 A.2d 321, 334 Pa. 180—In re Mains' Estate, 185 A. 222, 323 Pa. 243—In re Cutter's Estate, 134 A. 489, 236 Pa. 505—In re Beaver's Estate, 182 A. 744, 121 Pa.Super. 159—State of Ohio ex rel. Squire v. Union Trust Co. of Pittsburgh, 8 A.2d 476, 137 Pa.Super. 75—In re Stachokus' Estate, 165 A. 542, 103 Pa.Super. 523—In re Kowala's Estate, 21 Pa. Dist. & Co. 77—In re Crawford's Estate, 20 Pa.Dist. & Co. 186, 49 Monta.Co. 345, affirmed 184 A. 1, 321 Pa. 131—Kelley v. McGurl, 13 Pa.Dist. & Co. 350—Laverelle's Estate, 13 Pa.Dist. & Co. 703, affirmed 101 Pa.Super. 448—In re Kubitzka's Estate, 12 Pa.Dist. & Co. 71—Henderson's Estate, 11 Pa.Dist. & Co. 636—In re Mutchler's Estate, 29 Pa.Dist. 271—In re Strauss' Estate, 26 North.Co. 304—In re Mellinger's Estate, 9 Somerset Leg.J. 55. See Wanamaker's Petition, 25 Pa.Dist. & Co. 694—In re Reading National Bank & Trust Company's Account, 22 Pa.Dist. & Co. 654, 27 Berks Co.L.J. 108.

R.I.—Harrop v. Tillinghast, 195 A. 226, 59 R.I. 255—Vennerbeck & Clase Co. v. Markham's Estate, 173 A. 549, 54 R.I. 366, citing *Corpus Juris*—Thompson v. Clarke, 127 A. 569, 46 R.I. 307.

S.C.—Mack v. Stanley, 2 S.E.2d 792, 190 S.C. 300—Beckwith v. McAllister, 162 S.E. 623, 165 S.C. 1—Beatty v. National Surety Co., 128 S.E. 40, 182 S.C. 45.

Tex.—Harrison v. Barngrover, Civ. App., 72 S.W.2d 971, error refused, certiorari denied 55 S.Ct. 639, 294 U.S. 731, 79 L.Ed. 1260—Griggs v.

any powers other than those which have been expressly conferred on them,⁵² or which are necessarily implied from those expressly conferred,⁵³ and their powers are not to be extended by construction or by unnecessary implication.⁵⁴ Nevertheless, a probate court has vast powers with respect to matters falling within its jurisdiction,⁵⁵ and, as stated in § 304 infra, it has such incidental and ancillary

Brewster, 62 S.W.2d 950, affirming, Civ.App., 16 S.W.2d 839, 122 Tex. 588, denying rehearing 15 S.W.2d 1114.

Vt.—Probate Court for District of Fair Haven v. Indemnity Ins. Co. of North America, 171 A. 336, 106 Vt. 207—Barber v. Chase, 143 A. 302, 101 Vt. 343.

Wis.—Central Wisconsin Trust Co. v. Schumacher, 234 N.W. 562—In re George's Estate, 274 N.W. 294, 225 Wis. 251, vacating mandate 270 N.W. 538, 225 Wis. 251—Newcomb v. Ingram, 243 N.W. 209, 211 Wis. 88—In re Johnson's Estate, 185 N.W. 180, 175 Wis. 248.

15 C.J. p 1011 note 85—50 C.J. p 424 note 34 [a].

Liberal and favorable construction

(1) The probate court's jurisdiction is to be liberally construed.—In re Strom's Guardianship, 236 N.W. 245, 205 Minn. 399—Harrison v. Harrison, 70 N.W. 802, 67 Minn. 520.

(2) It has been held that statutes conferring jurisdiction on probate courts, being remedial and for the advancement of justice, should receive a favorable construction, such as will give them the force and efficiency intended by the legislature.—Seaman v. Duryea, 11 N.Y. 334, affirming 10 Barb. 523.

Statutory grant of jurisdiction held valid

Ohio.—Hatch v. Buckeye State Bldg. & Loan Co., 32 Ohio N.P.N.S., 297.

Declaratory Judgment Act did not limit or enlarge district court's jurisdiction over wills, trusts, and administration of estates.—Mulcahy v. Johnson, 252 P. 816, 30 Colo. 499.

Territorial limits of jurisdiction

In Pennsylvania, "the judges of the orphans' courts . . . are officials whose jurisdiction extends over the state."—In re Thompson's Adoption, 139 A. 737, 739, 290 Pa. 586.

Simple law issues

(1) Under a statute conferring jurisdiction on the probate court over all matters pertaining to probate business, that tribunal has jurisdiction in matters pertaining to probate business, where the issue can be settled at law and is simple.—McConnon & Co. v. Kuhlmann, 278 S.W. 822, 220 Mo.App. 821—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125—Green v. Strother, 212 S.W. 399, 201 Mo.App. 418.

(2) Court of ordinary is without jurisdiction to decide conflicting claims between heir at law and administratrix of legatee involving in-

tricate questions of law.—Coleman v. Hodges, 142 S.E. 875, 166 Ga. 288.

Terms "actions" and "civil actions," as used in constitutional provisions, providing that county courts shall not have jurisdiction in actions in which title to real estate is sought to be recovered, nor in civil actions where the debt or sum claimed shall exceed a specified amount, do not include matters concerned with settlement of estates such as proceedings to determine heirship.—Fischer v. Sklenar, 163 N.W. 861, 101 Neb. 553.

Action

(1) "An action" is not maintainable in surrogate's court.—In re Goldowitz' Estate, 12 N.Y.S.2d 221, 171 Misc. 198.

(2) Surrogate's court was held not divested of jurisdiction in a particular proceeding on theory that it was an action for damages for fraud.—In re Theiss' Estate, 293 N.Y.S. 315, 161 Misc. 533, affirmed, App.Div., In re Theiss' Will, 293 N.Y.S. 507.

52. Ark.—Smith v. Walker, 58 S.W. 2d 946, 187 Ark. 161—Huff v. Hot Springs Savings Trust & Guaranty Co., 45 S.W.2d 508, 185 Ark. 20—Moss v. Moose, 44 S.W.2d 825, 154 Ark. 798.

Conn.—Gill v. Bromley, 140 A. 721, 107 Conn. 281—Lewis v. Klingberg, 123 A. 4, 100 Conn. 201.

Ill.—In re Lalla's Estate, 281 Ill.App. 124, affirmed 1 N.E.2d 50, 362 Ill. 621.

Ind.—Fidelity & Casualty Co. of New York v. State, 184 N.E. 916, 921, 98 Ind.App. 485, citing Corpus Juris.

Md.—Baldwin v. Hopkins, 187 A. 884, 171 Md. 97—Marbury v. Ward, 162 A. 918—Hopper v. Hopkins, 160 A. 166, 162 Md. 448—Mudge v. Mudge, 141 A. 396, 155 Md. 1.

Mont.—In re Sprigg's Estate, 216 P. 1108, 68 Mont. 92—In re Stinger's Estate, 201 P. 693, 61 Mont. 173—State v. Second Judicial Dist. Court in and for Silver Bow County, 168 P. 522, 54 Mont. 172.

N.Y.—In re Briggs' Estate, 168 N.Y.S. 382, 180 App.Div. 843.

Ohio.—In re Will of Schrader, 20 Ohio N.P.N.S., 423.

Pa.—In re Watson's Estate, 170 A. 254, 314 Pa. 179—In re Baum's Estate, 103 A. 614, 260 Pa. 33—In re Hartzell's Estate, 173 A. 842, 114 Pa.Super. 190—In re Berkey's Estate, 156 A. 568, 102 Pa.Super. 306—In re Freihofer's Estate, 25 Pa. Dist. & Co. 547—In re Keppelman's Estate, 24 Pa.Dist. & Co. 706—

Leinenbach's Petition, 24 Pa.Dist. & Co. 443.

Utah.—In re Cloward's Estate, 82 P. 2d 336, 95 Utah 453, 119 A.L.R. 123, 15 C.J. p 1012 note 86.

53. Ark.—Smith v. Walker, 58 S.W. 2d 946, 187 Ark. 161—Huff v. Hot Springs Savings Trust & Guaranty Co., 45 S.W.2d 508, 185 Ark. 20—Moss v. Moose, 44 S.W.2d 825, 184 Ark. 798.

Conn.—Gill v. Bromley, 140 A. 721, 107 Conn. 281—Lewis v. Klingberg, 123 A. 4, 100 Conn. 201.

Ill.—In re Lalla's Estate, 281 Ill.App. 124, affirmed 1 N.E.2d 50, 362 Ill. 621.

Ind.—Fidelity & Casualty Co. of New York v. State, 184 N.E. 916, 921, 98 Ind.App. 485, citing Corpus Juris.

Mont.—In re Sprigg's Estate, 216 P. 1108, 68 Mont. 92—In re Stinger's Estate, 201 P. 693, 61 Mont. 173—State v. Second Judicial Dist. Court in and for Silver Bow County, 168 P. 522, 54 Mont. 172.

N.Y.—In re Briggs' Estate, 168 N.Y.S. 382, 180 App.Div. 843.

Pa.—In re Watson's Estate, 170 A. 254, 314 Pa. 179—In re Baum's Estate, 103 A. 614, 260 Pa. 33—In re Hartzell's Estate, 173 A. 842, 114 Pa.Super. 190—In re Berkey's Estate, 156 A. 568, 102 Pa.Super. 306—In re Freihofer's Estate, 25 Pa. Dist. & Co. 547—In re Keppelman's Estate, 24 Pa.Dist. & Co. 706—Leinenbach's Petition, 24 Pa.Dist. & Co. 443.

Utah.—In re Cloward's Estate, 82 P. 2d 336, 95 Utah 453, 119 A.L.R. 123, 15 C.J. p 1012 note 87.

54. Ind.—Fidelity & Casualty Co. of New York v. State, 184 N.E. 916, 921, 98 Ind.App. 485, citing Corpus Juris.

Md.—State v. Talbott, 128 A. 908, 148 Md. 70.

15 C.J. p 1012 note 88.

55. Mo.—Peck v. Fillingham's Estate, 202 S.W. 465, 199 Mo.App. 277.

In Arkansas, the probate courts may determine all issues arising within the sphere of their jurisdiction according to the principles of all involved.—Arkansas Valley Trust Co. v. Young, 195 S.W. 36, 128 Ark. 42.

In New York

(1) Under the Surrogate's Court Act § 40, as amended, that court possesses entirely unlimited jurisdiction over any and every legal and equitable question which may arise in connection with decedents' or

jurisdiction as is necessary to an efficient exercise of the jurisdiction conferred on it.

As the powers of these courts vary considerably in different states, no general rule defining precisely

their powers can be laid down, but reference is made in the notes to a number of illustrative cases in which the powers of a court of probate have been considered with respect to particular matters and persons,⁵⁶ such as attorneys;⁵⁷ compromis-

wards' estates, so far as it concerns any person actually or constructively before the court by reason of any right in, claim to, or obligation in connection with, a decedent's or ward's estate.—*MacLean v. Hart*, 239 N.Y.S. 1, 228 App.Div. 379.—In re *Zollikoffer's Will*, 3 N.Y.S.2d 305, 166 Misc. 735.—In re *Winslow's Estate*, 272 N.Y.S. 829, 151 Misc. 298.—In re *Enright's Estate*, 267 N.Y.S. 483, 149 Misc. 353.—In re *Reich's Estate*, 262 N.Y.S. 623, 146 Misc. 616.—In re *Walsh's Estate*, 262 N.Y.S. 498, 146 Misc. 56.—In re *Kirkman's Estate*, 256 N.Y.S. 495, 143 Misc. 342.—In re *Engel's Estate*, 250 N.Y.S. 648, 140 Misc. 276.—In re *McArdle's Estate*, 250 N.Y.S. 276, 140 Misc. 257.—In re *McCarthy's Funds*, 248 N.Y.S. 335, 139 Misc. 147.—In re *Morris*, 235 N.Y.S. 461, 134 Misc. 374.—In re *Sullard*, 186 N.Y.S. 251, 114 Misc. 288.—15 C.J. p 1012 note 89 [a].

(2) The statute is to be construed liberally.—In re *Enright's Estate*, 267 N.Y.S. 483, 149 Misc. 353.

(3) It must be read in the light of its history and purpose.—In re *Morris*, supra.

(4) "An amendment in 1921 emphasizes the call for a liberal construction. Till then the general grant of jurisdiction had at times been read as limited by specific grants of jurisdiction as to enumerated subjects."—*Raymond v. Davis' Estate*, 161 N.E. 421, 423, 248 N.Y. 67.—In re *Winslow's Estate*, 272 N.Y.S. 829, 837, 151 Misc. 298.

(5) The amendment gives notice that specific powers of surrogate courts shall be read as being in addition to and without limitation or restriction on, the general powers conferred under the Surrogate Ct. Act § 40.—*Raymond v. Davis' Estate*, supra.—In re *Winslow's Estate*, supra.—In re *Kirkman's Estate*, 256 N.Y.S. 495, 143 Misc. 342.—In re *Lakner*, 255 N.Y.S. 809, 143 Misc. 117.

(6) The court's jurisdiction under the statute, however, relates to matters affecting decedents' estates, but not to matters which are independent thereof.—*Isaacs v. Isaacs*, 203 N.Y.S. 25, 208 App.Div. 61.—In re *Veniero's Estate*, 300 N.Y.S. 924, 165 Misc. 293.—In re *Ihmsen's Estate*, 294 N.Y.S. 120, 161 Misc. 789, reversed on other grounds 3 N.Y.S.2d 125, 253 App.Div. 472.—In re *Leblang's Estate*, 287 N.Y.S. 910, 159 Misc. 322.

(7) General powers conferred by the statute can be exercised only on

return of process in a proceeding properly brought under some statutory provision therefor.—In re *Lakner*, supra.

(8) It has been said that the surrogate's court's jurisdiction over infant's guardianship and property is as broad and comprehensive as that of the supreme court.—In re *Vanderbilt*, 276 N.Y.S. 745, 153 Misc. 884.

Probate courts of Ohio are vested with full power to fully adjudicate all questions arising in matters properly before them.—*Wilberding v. Miller*, 106 N.E. 665, 88 Ohio St. 609, L.R.A.1916A 718.

56. Probate court has power

(1) To determine whether estate has been exhausted by payment of debts.—*Moyer v. Bray*, 116 N.E. 511, 227 Mass. 303.

(2) To determine whether legacy has lapsed.—*Silveus v. Hewins*, D.C. Mass., 4 F.Supp. 384, applying Massachusetts law.

(3) To make decree affecting disposition of funds deposited with city chamberlain or state treasury.—In re *Bergamini's Estate*, 238 N.Y.S. 749, 136 Misc. 118.

(4) To determine validity of antenuptial agreement releasing dower rights in decedent's estate.—In re *Bunimowit's Estate*, 219 N.Y.S. 763, 128 Misc. 518.

(5) To determine whether general release was obtained by fraud.—In re *Ritchie's Estate*, 242 N.Y.S. 14, 229 App.Div. 786.

(6) To determine whether there has been an assignment of legacies.—*Isaacs v. Isaacs*, 203 N.Y.S. 25, 208 App.Div. 61.

(7) To determine various other matters.—In re *Ehlers' Estate*, 232 N.Y.S. 675, 133 Misc. 424. 15 C.J. p 1012 note 91.

Probate court has no power

(1) To grant writ of mandamus.—*Starkweather v. Kemp*, 88 P. 1045, 18 Okl. 28.

(2) To interpret and enforce inter vivos agreements.—In re *Geller's Estate*, 4 N.Y.S.2d 467, 167 Misc. 578.

(3) To determine the effectiveness of an attempted exercise by will of a power given by inter vivos deed.—In re *Crosby's Estate*, 242 N.Y.S. 207, 136 Misc. 688.—*Merrill v. Lynch*, 13 N.Y.S.2d 514.

(4) To determine controversy between executor and third party.—*Marbury v. Ward*, Md., 162 A. 919.

(5) To enforce claims of surety on administratrix' lost instrument bond for reimbursement from distributees of estate unjustly enriched at surety's expense.—In re *Austin's Estate*, 268 N.Y.S. 352, 150 Misc. 51.

(6) Court of ordinary has no jurisdiction to try issue of ademption.—*Simpson v. Lowe*, 149 S.E. 789, 169 Ga. 198.

(7) Other particular matters not within its powers.—In re *Albanese*, 4 N.E.2d 732, 272 N.Y. 522, affirming 283 N.Y.S. 691, 245 App.Div. 404, motion denied 2 N.E.2d 677, 271 N.Y. 524.

15 C.J. p 1013 note 92.

Determination of jurisdictional questions

(1) Probate court is competent to determine its own jurisdiction.—*State ex rel. Nicklaus v. McClelland*, 8 N.E.2d 565, 132 Ohio St. 447.—*Wilberding v. Miller*, 106 N.E. 665, 88 Ohio St. 609, L.R.A.1916A 718.

(2) Power of court to determine its own jurisdiction generally see supra § 113.

Controversies foreign to settlement of estate cannot be litigated in the estate proceedings.—In re *Decker's Estate*, 177 P. 718, 105 Wash. 221.

Questions affecting strangers

(1) A probate court cannot adjudicate questions affecting persons who are strangers to the issues involved in the settlement of the estate before it.—*Delaney v. Kennebaugh*, 136 A. 108, 105 Conn. 557.

(2) A probate court possesses no independent jurisdiction in equity or at law over controversies between the representatives of an estate or those claiming under it, with strangers claiming adversely, nor of collateral actions.

Minn.—Marquette Nat. Bank of Minneapolis v. Mullin, 287 N.W. 233, 205 Minn. 562.—*State ex rel. Larson v. Probate Court of Hennepin County*, 283 N.W. 545, 204 Minn. 5.—*State ex rel. Nelson v. Probate Court of Hennepin County*, 271 N.W. 879, 199 Minn. 297.—*Wilson v. Erickson*, 180 N.W. 92, 147 Minn. 260.

N.D.—In re Le Page's Trust, 269 N.W. 53, 67 N.D. 15.

57. Powers of court of record

Surrogate's courts have same powers of control over attorneys as other courts of record.—In re *Dollar's Estate*, 169 N.Y.S. 333, 103 Misc. 137.

Excessive fees

Where all necessary persons were

es;⁵³ contracts between legatees or distributees and third persons;⁵⁹ controversies between heirs;⁶⁰ corporations;⁶¹ ordinary claims;⁶² partnerships;⁶³ status of particular persons;⁶⁴ stockholders' disputes;⁶⁵ and tort actions.⁶⁶ In this Title, in dealing with the extent of jurisdiction and powers of probate courts, it is intended to deal with the subject generally leaving the extent of jurisdiction and powers with respect to particular proceedings to be

dealt with in other appropriate titles of this work.

§ 302. — Equity Powers

While probate courts are not courts of general equity jurisdiction, yet, in matters falling within their jurisdiction they possess many of the powers usually exercised by courts of equity.

While probate courts are not courts of general equitable jurisdiction,⁶⁷ having only such equity pow-

parties to proceeding, surrogate court could determine whether attorney's fees for services to estate were excessive.—In re Duggan's Will, 262 N.Y.S. 512, 146 Misc. 598.

Orphans' court cannot allow counsel fees to an attorney appearing for beneficiaries and not for any fiduciary over which the court has jurisdiction.—In re McGowan's Estate, 13 Pa. Dist. & Co. 156.

Negligence of attorney
N.Y.—In re Albanese, 283 N.Y.S. 691, 245 App.Div. 404, motion denied 2 N.E.2d 677, 271 N.Y. 524, affirmed 4 N.E.2d 732, 272 N.Y. 552.

Compelling attorneys to produce records

N.Y.—In re Grube's Will, 294 N.Y.S. 306, 162 Misc. 228, affirmed 298 N.Y.S. 638, 251 App.Div. 894.

58. Surrogate's court has jurisdiction of compromise of testamentary controversy.—In re Kraetzer's Will, 264 N.Y.S. 443, 147 Misc. 609.

59. No jurisdiction

Subject to statutory exceptions surrogate's court has no jurisdiction over contracts between legatees and third persons, even if source of contract payment is to be found in some interest in estate.—In re Leblang's Estate, 287 N.Y.S. 910, 159 Misc. 322.

Beneficiary's assignments and debts

On its probate side, probate court does not ordinarily take cognizance of assignment of interest of beneficiary of trust created by will nor of unsecured debts of such beneficiary.—Madden v. Madden, 181 N.E. 771, 279 Mass. 417.

60. Probate court has no jurisdiction over contests of heirs, after the death of the intestate, not relating to acts of the deceased.—McClure v. Baker, Mo.App., 218 S.W. 1612.

61. Regulating corporate action

(1) The probate court cannot regulate the internal management of a corporation, even though executors within its jurisdiction own a dominant interest in the corporation.—In re Watson's Estate, 170 A. 254, 314 Pa. 178.

(2) It cannot set itself up as a regulatory body over corporate action.—In re Pulitzer's Estate, 248 N.Y.S. 87, 139 Misc. 575, opinion sup-

plemented 251 N.Y.S. 549, 140 Misc. 572, affirmed In re Pulitzer, 260 N.Y.S. 975, 237 App.Div. 808.

(3) Accordingly, it cannot remove from office directors of a charitable corporation organized at the direction of a decedent's will and receiving as bequest decedent's residuary estate.—In re Watson's Estate, 170 A. 254, 314 Pa. 179.

Ordering issuance of new stock certificate

Under governing statutes, the orphans' court has jurisdiction to order the issuance of a new stock certificate where a fiduciary accountable to it shows title to the stock in the fiduciary estate, the loss or destruction of the certificate, and the impossibility of making a complete distribution of the estate for lack of a muniment of title.—In re Hegerman's Estate, 28 Pa. Dist. 384.

62. Probate court has no authority

(1) To pass on an ordinary claim of one person against another for a money judgment.

Kan.—In re Rightmire's Estate, 242 P. 138, 120 Kan. 95.

N.Y.—In re Barthold's Estate, 13 N.Y.S.2d 346, 171 Misc. 625.

(2) To regulate controversy which is merely personal between one individual and another, and which does not have for its object determination of recipients of part of, or interest in, assets of deceased person.—In re Bradford's Will, 288 N.Y.S. 153, 159 Misc. 482.

63. Partnership accounts and disputes

Orphans' court is not the proper forum to settle partnership accounts or try partnership disputes.—In re Cunningham's Estate, 75 Pa.Super. 190.

64. Preliminary determination

Surrogate's court has power to determine preliminarily status of person claiming right to participate in probate proceeding pending before it.—In re Browning's Estate, 276 N.Y.S. 270.

Marriage status

County court sitting in probate could determine whether claimant was deceased woman's common-law husband.—Roe v. Fisher's Estate, Tex.Civ.App., 91 S.W.2d 476, error dismissed.

65. Surrogate's court is not authorized to determine disputes between stockholders where any of such stockholders own their shares by individual title and ownership.—In re Pulitzer's Estate, 249 N.Y.S. 87, 139 Misc. 575, opinion supplemented 251 N.Y.S. 549, 140 Misc. 572, affirmed In re Pulitzer, 260 N.Y.S. 975, 237 App.Div. 808.

66. No jurisdiction

Constitution limiting probate court's jurisdiction to "probate matters" and "settlement of estates of deceased persons" uses such words in their commonly accepted meaning, and does not contemplate jurisdiction over tort actions.—Howard v. Swift, 190 N.E. 102, 356 Ill. 80.

67. Ala.—Keith & Wilkinson v. Forsythe, 151 So. 60, 61, 227 Ala. 555, citing Corpus Juris—Coursion v. Tollison, 147 So. 635, 638, 226 Ala. 530, citing Corpus Juris.

Cal.—Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County, 37 P. 2d 69, 1 Cal.2d 749—In re Frazer's Estate, 77 P.2d 525, 25 Cal.App.2d 434—In re McLellan's Estate, 57 P.2d 1338, 14 Cal.App.2d 271—In re Thurnell's Estate, App., 19 P.2d 14. Conn.—Delaney v. Kennaugh, 136 A. 108, 105 Conn. 557.

D.C.—Brosnan v. Brosnan, 289 F. 547, 53 App.D.C. 149.

Fla.—First Nat. Bank v. MacDonald, 130 So. 596; 100 Fla. 675, denying rehearing 129 So. 911, 100 Fla. 674—Mott v. First Nat. Bank, 124 So. 36, 98 Fla. 444.

Ill.—Howard v. Swift, 190 N.E. 102, 356 Ill. 80—Davis v. Mather, 141 N.E. 209, 309 Ill. 284—Hannah v. Meinshausen, 132 N.E. 820, 299 Ill. 525, reversing In re Meinshausen's Estate, 219 Ill.App. 278—Sabree v. Sebree, 127 N.E. 392, 293 Ill. 228—Dixon v. Neftstead, 2 N.E.2d 135, 285 Ill.App. 463—In re Shanks' Estate, 282 Ill.App. 1.

Mass.—Lord v. Cummings, 22 N.E. 2d 26—Black v. Abercrombie, 166 N.E. 836, 267 Mass. 316.

Minn.—State ex rel. Larson v. Probate Court of Hennepin County, 283 N.W. 545, 204 Minn. 5—State ex rel. Nelson v. Probate Court of Hennepin County, 271 N.W. 879, 199 Minn. 297—Wilson v. Erickson, 180 N.W. 93, 147 Minn. 260—State

ers as are conferred by statutory or constitutional jurisdiction, they do possess many of the powers usually exercised by courts of equity,⁶⁹ and are au-

v. Probate Court of Lyon County, 168 N.W. 14, 140 Minn. 342.

Mo.—State ex rel. North St. Louis Trust Co. v. Wolfe, 122 S.W.2d 909—Rawlings v. Rawlings, 58 S.W.2d 735, 332 Mo. 503, reversing 45 S.W.2d 539, 226 Mo.App. 688, transferred, see Sup., 39 S.W.2d 367—State Bank of Willow Springs v. Lillibridge, 293 S.W. 116, 316 Mo. 968, affirming in part and reversing in part, App., 262 S.W. 438—In re Ermeling's Estate, App., 131 S.W. 2d 912, transferred, see Sup., 119 S.W.2d 755—Hanssen v. Karbe, App., 115 S.W.2d 109, transferred, see Sup., 106 S.W.2d 415—State ex rel. Kemp v. Arnold, App., 113 S.W.2d 143—Curlee Clothing Co. v. Boxer, App., 51 S.W.2d 894—In re Ozias' Estate, App., 29 S.W. 2d 240—State ex rel. Cantley v. Akin, 22 S.W.2d 836, 224 Mo.App. 114—In re Boland's Estate, App., 14 S.W.2d 521—McConnon & Co. v. Kuhlmann, 278 S.W. 822, 220 Mo. App. 821—Davis v. Roberts, 226 S.W. 662, 206 Mo.App. 125—Green v. Strother, 212 S.W. 399, 201 Mo. App. 418—O'Neal v. Patterson, App., 206 S.W. 596—Peck v. Fillingham's Estate, 202 S.W. 465, 199 Mo.App. 277.

Mont.—In re Stinger's Estate, 201 P. 693, 61 Mont. 173.

Neb.—In re Frerichs' Estate, 233 N.W. 458, 120 Neb. 462.

N.Y.—In re Auditors' Adm'x, 229 N.Y.S. 414, 223 App.Div. 654, modified on other grounds In re Auditors' Will, 164 N.E. 242, 249 N.Y. 335, 62 A.L.R. 551, motion denied Parascandola v. National Surety Co., 166 N.E. 315, 250 N.Y. 537, 62 A.L.R. 551—In re O'Connell's Estate, 207 N.Y.S. 259, 123 Misc. 955—In re Beach's Estate, 203 N.Y.S. 492, 122 Misc. 261, affirmed 203 N.Y.S. 919, 208 App.Div. 831—In re Kingsley's Estate, 181 N.Y.S. 496, 111 Misc. 528—In re Whittemore, 178 N.Y.S. 780, 109 Misc. 476—In re Hearne's Estate, 171 N.Y.S. 984.

N.D.—In re Le Page's Trust, 269 N.W. 53, 67 N.D. 15.

Ohio.—Funkhauser v. City of Dover, 27 Ohio N.P.N.S., 285.

Okl.—Park v. Baxter, 64 P.2d 721, 179 Okl. 75—Rust v. Gillespie, 216 P. 480, 90 Okl. 59.

Or.—In re Eder's Estate, 83 P.2d 477, 160 Or. 111, 199 A.L.R. 802—In re Anderson's Estate, 71 P.2d 1013, 157 Or. 365.

Pa.—In re Mains' Estate, 185 A. 222, 822 Pa. 243—In re Douglas' Estate, 154 A. 376, 303 Pa. 227—In re Cutter's Estate, 134 A. 489, 286 Pa. 505—In re Brusstar's Estate, 186 A. 147, 123 Pa.Super. 45—In re Hartzell's Estate, 173 A. 842, 114 Pa. Super. 190.

S.C.—Mack v. Stanley, 2 S.E.2d 792, 190 S.C. 300—Beckwith v. McAlister, 162 S.E. 623, 165 S.C. 1.

Va.—Gooch v. Suhor, 92 S.E. 843, 121 Va. 35.

Wis.—In re Richardson's Estate, 271 N.W. 56, 223 Wis. 447.

15 C.J. p 1014 note 93.

Particular matters held not within powers in absence of statutory or constitutional authorization.

(1) Specific performance of contracts.—Poston v. Delfelder, 270 P. 1068, 39 Wyo. 163, rehearing denied 273 P. 176, 39 Wyo. 163.

(2) Tracing trust funds.—Howard's Estate v. Howe, Mo., 131 S.W. 2d 517.

(3) Cancellation of deeds.—Rust v. Gillespie, 216 P. 480, 90 Okl. 59.

(4) Foreclosure of vendor's lien.—Pavelka v. Overton, Tex.Civ.App., 47 S.W.2d 369, error refused.

(5) Setting aside mortgage foreclosure.—Scott v. Nordin, 214 N.W. 472, 171 Minn. 469.

(6) Appointment of receiver.—Power v. Grogan, 81 A. 416, 232 Pa. 387—In re Freihofer's Estate, 25 Pa. Dist. & Co. 547—Loughran's Estate, 25 Pa. Dist. 97—15 C.J. p 1014 note 93 [a] (2).

(7) Striking off satisfaction of mortgage.—In re Cutter's Estate, 134 A. 489, 286 Pa. 505—In re Freihofer's Estate, 25 Pa. Dist. & Co. 547.

(8) Vacation of unappealed final judgment after lapse of the term.—In re Boland's Estate, Mo.App., 14 S.W.2d 521.

(9) Rescinding contracts between an executor, administrator, or guardian and a third party who is otherwise a stranger to the res.—State ex rel. Nelson v. Probate Court of Hennepin County, 271 N.W. 879, 199 Minn. 297.

(10) Proceedings in the nature of bills of interpleader.—Phillips v. Alford, Mo.App., 90 S.W.2d 1060.

(11) Declaring a bill of sale an equitable mortgage.—State for Use of Horsey v. Maryland Casualty Co., 163 A. 856, 164 Md. 69.

68. Ill.—Davis v. Mather, 141 N.E. 209, 309 Ill. 284—In re Shanks' Estate, 282 Ill.App. 1.

Mass.—Lord v. Cummings, 22 N.E.2d 26—Barron v. Barronian, 175 N.E. 271, 275 Mass. 77—Russell v. Shapleigh, 175 N.E. 100, 275 Mass. 15—Black v. Abercrombie, 166 N.E. 836, 267 Mass. 316—Derby v. Derby, 142 N.E. 786, 248 Mass. 310.

N.Y.—Schley v. Donlin, 225 N.Y.S. 453, 131 Misc. 208.

Ohio.—In re Schubert's Estate, 33 Ohio N.P.N.S., 169.

69. U.S.—Ex parte Crandall, D.C. Ind., 52 F.2d 659, affirmed, C.C.A., 53 F.2d 969, certiorari denied Crandall v. Habbe, 52 S.Ct. 312, 285 U.S. 540, 76 L.Ed. 933.

Ark.—Hicks v. Johnson, 116 S.W.2d 597, 598, 196 Ark. 103, quoting Corpus Juris.

Cal.—In re Cornax' Estate, 65 P.2d 784, 8 Cal.2d 347—In re E'lett's Estate, 21 P.2d 630, 131 Cal.App. 409—Johnson v. Superior Court in and for San Diego County, 283 P. 331, 102 Cal.App. 178—In re Hamalian's Estate, 206 P. 1011, 57 Cal. App. 169.

Conn.—Delaney v. Kennaugh, 136 A. 108, 105 Conn. 557.

Del.—Petition of Gray, 109 A. 574, 12 Del.Ch. 417.

Fla.—First Nat. Bank v. MacDonald, 130 So. 596, 100 Fla. 675, denying rehearing 129 So. 911, 100 Fla. 674—Mott v. First Nat. Bank, 124 So. 36, 98 Fla. 444.

Ga.—Lester v. Toole, 93 S.E. 55, 20 Ga.App. 381.

Ill.—Hannah v. Meinshausen, 132 N.E. 820, 299 Ill. 525, reversing In re Meinshausen's Estate, 219 Ill.App. 278—Sebree v. Sebree, 127 N.E. 392, 293 Ill. 228—In re Holzman's Estate, 15 N.E.2d 9, 295 Ill.App. 392—In re Schmitt's Estate, 6 N.E.2d 444, 288 Ill.App. 250—In re Kinsey's Estate, 261 Ill.App. 481—Pollock v. Cantlin, 253 Ill.App. 229—In re Riddel's Estate, 247 Ill. App. 175—Hicks v. Monahan, 209 Ill.App. 516—In re Roeske's Estate, 205 Ill.App. 366—In re Davis' Estate, 198 Ill.App. 116.

Me.—In re Neely's Estate, 1 A.2d 772, 136 Me. 79.

Mass.—Locke v. Old Colony Trust Co., 193 N.E. 892, 289 Mass. 245—Malden Trust Co. v. Brooks, 177 N.E. 629, 276 Mass. 464, 80 A.L.R. 1028.

Mich.—In re McLouth's Estate, 274 N.W. 759, 281 Mich. 191.

Minn.—State ex rel. Nelson v. Probate Court of Hennepin County, 271 N.W. 879, 199 Minn. 297—Wilson v. Erickson, 180 N.W. 93, 147 Minn. 260.

Mo.—Curlee Clothing Co. v. Boxer, App., 51 S.W.2d 894—Groves v. Aegerter, 42 S.W.2d 974, 226 Mo. App. 128—Harms v. Pohlmann, 297 S.W. 138, 222 Mo.App. 276.

Mont.—In re Stinger's Estate, 201 P. 693, 61 Mont. 173.

Neb.—In re McLean's Estate, 285 N.W. 915—In re Jensen's Estate, 283 N.W. 196, 135 Neb. 602.

N.J.—In re Herbert's Estate, 192 A. 39, 40, 121 N.J.Eq. 564, quoting Corpus Juris.

N.Y.—In re Auditors' Adm'x, 229 N.Y.S. 414, 223 App.Div. 654, modified on other grounds In re Auditors'

thorized to apply the rules and principles of equity⁷⁰ and to proceed in many respects after the manner of courts of equity.⁷¹ Indeed, under some statutes they have full jurisdiction to determine, in general, every equitable question arising in connection with decedents' and wards' estates,⁷² so far as the ques-

Will, 164 N.E. 342, 219 N.Y. 335, 62 A.L.R. 551, motion denied *Parascondola v. National Surety Co.*, 166 N.E. 315, 250 N.Y. 537, 62 A.L.R. 551—In re Goodwin's Estate, 296 N.Y.S. 733, 163 Misc. 273—In re Brown, 221 N.Y.S. 305, 129 Misc. 293.

N.D.—In re Le Page's Trust, 269 N.W. 53, 67 N.D. 15.

Ohio.—*Funkhauser v. City of Dover*, 27 Ohio N.P.N.S., 255.

Or.—In re Shepherd's Estate, 41 P. 2d 444, 152 Or. 15, mod. find on other grounds 49 P.2d 448, 152 Or. 15.

Pa.—In re Cutter's Estate, 134 A. 489, 286 Pa. 505—In re Laverelle's Estate, 101 Pa.Super. 443—In re Jeffries's Estate, 16 Pa.Dist. & Co. 303—Kaurene's Estate, 3 Pa.Dist. & Co. 290—In re Shuster's Estate, 26 Pa.Dist. 673—In re Crisswell's Estate, 86 Pa.L.J. 615.

S.D.—In re Prerost's Estate, 168 N.W. 630, 40 S.D. 536.

W's.—In re Georg's Estate, 274 N.W. 294, 225 Wis. 251, vacating mandate 270 N.W. 538, 225 Wis. 251—In re Richardson's Estate, 271 N.W. 56, 223 Wis. 447—Shupe v. Jenks, 218 N.W. 375, 195 Wis. 334, 15 C.J. p 1015 note 94.

Where necessary to do justice to all parties, probate courts, in aid of their functions as such, may exercise equitable powers.

Cal.—*State Life Ins. Co. v. Williams*, 81 P.2d 481, 27 Cal.App. 2d 594—In re Barreiro's Estate, 14 P.2d 786, 125 Cal.App. 752.

Conn.—*Hayward v. Plant*, 119 A. 241, 98 Conn. 374.

Ill.—See *Hayden v. Hargan*, 202 Ill. App. 544.

All equitable powers possessed

Orphans' court, within the scope of its jurisdiction, has all the powers of a court of equity.—In re Slagle's Estate, 7 A.2d 353, 335 Pa. 552—In re McGovern's Estate, 186 A. 89, 322 Pa. 379—In re Braunschweiger's Estate, 185 A. 753, 322 Pa. 394—In re Lonergan's Estate, 154 A. 387, 303 Pa. 142—In re Nimlet's Estate, 149 A. 658, 293 Pa. 359—In re Kaufmann's Estate, 8 A.2d 472, 137 Pa. Super. 88—In re Clunen's Estate, 34 Pa.Dist. & Co. 490.

Suits to reach and apply

Equity jurisdiction conferred on probate court by statute, although not authorizing suits to reach and apply equitable assets, gives probate court equity powers such as those exercised in bills to reach and apply, as respects matters named in the statute.—*Jones v. Jones*, Mass., 7 N. E.2d 1015.

Renunciation beneficial to ward

Under governing statutes the probate court has equitable powers concerning renunciation of wills and questions arising therefrom, and hence, in the exercise of its equitable jurisdiction over the estate of an incompetent surviving spouse it may direct the guardian ad litem or next friend to renounce a will, where it finds such renunciation beneficial to the incompetent's estate.—*Davis v. Mather*, 141 N.E. 209, 309 Ill. 284.

Probate matters are equitable in their nature.—*Walker v. Cook*, 128 N.E. 584, 294 Ill. 294.

70. Ala.—*Keith & Wilkinson v. Forsythe*, 151 So. 60, 61, 227 Ala. 555, citing *Corpus Juris*—*Courseur v. Tollison*, 147 So. 635, 638, 226 Ala. 530, citing *Corpus Juris*.

Ark.—*Arkansas Valley Trust Co. v. Young*, 195 S.W. 36, 128 Ark. 42.

Cal.—*Security-First Nat. Bank of Los Angeles v. Superior Court in and for Los Angeles County*, 37 P. 2d 69, 1 Cal.2d 749.

Iowa.—In re Lear's Estate, 213 N.W. 240, 204 I. a 346.

Md.—*Oxenham v. Mitchell*, 153 A. 71, 160 Md. 269.

Mich.—In re Quinney's Estate, 283 N.W. 599, 287 Mich. 329—In re Cox's Estate, 279 N.W. 913, 284 Mich. 628, 117 A.L.R. 1224.

Minn.—*State ex rel. Larson v. Probate Court of Hennepin County*, 283 N.W. 545, 204 Minn. 5—*State ex rel. Nelson v. Probate Court of Hennepin County*, 271 N.W. 879, 199 Minn. 297—*Wilson v. Erickson*, 180 N.W. 93, 147 Minn. 260.

Mo.—*Howard's Estate v. Howe*, 131 S.W.2d 517—*State ex rel. North St. Louis Trust Co. v. Wolfe*, 122 S.W. 2d 909—In re Ermeling's Estate, App., 131 S.W.2d 912, transferred, see Sup., 119 S.W.2d 755—*State ex rel. Kemp v. Arnold*, App., 113 S.W.2d 143—*State ex rel. Cantley v. Akin*, 22 S.W.2d 836, 224 Mo. App. 114—In re Boland's Estate, App., 14 S.W.2d 521—*Harms v. Pohlmann*, 297 S.W. 138, 222 Mo. App. 276—*McConnon & Co. v. Kuhlmann*, 278 S.W. 822, 220 Mo. App. 821—*Green v. Strother*, 212 S.W. 399, 201 Mo.App. 418—*Peck v. Fillingham's Estate*, 202 S.W. 465, 199 Mo.App. 277—*Hess v. Sandner*, 198 S.W. 1125, 198 Mo. App. 636.

Neb.—In re Frerichs' Estate, 233 N.W. 456, 120 Neb. 462.

N.D.—In re Le Page's Trust, 269 N.W. 53, 67 N.D. 15.

Or.—In re Anderson's Estate, 71 P.2d 1013, 157 Or. 365.

Pa.—In re Mellinger's Estate, 5 A.2d 321, 324 Pa. 180—In re Boles' Es-

tate, 173 A. 664, 316 Pa. 179—In re Pleasanton's Estate, 159 A. 711, 306 Pa. 355—In re Freihofer's Estate, 25 Pa.Dist. & Co. 547—In re Stahler's Estate, 55 Montg.Co. 312.

Wis.—In re Wilkins' Estate, 211 N.W. 652, 192 Wis. 111, 51 A.L.R. 1106.

15 C.J. p 1015 note 94.

"The county court . . . has the same power to recognize and apply equitable rules and principles in so far as they are applicable to matters relating to the settlement of estates of decedents, that courts of equity have to apply rules of law."—In re Richardson's Estate, 271 N.W. 56, 62, 223 Wis. 447.

Alternative relief

Where administration of estate is not removed to court of equity, but remains in probate court, circuit court will either declare contract releasing interest valid, and set up an estoppel against party releasing interest, or will declare contract inequitable and refuse relief to complainant.—*Collier v. Tatum*, 160 So. 530, 230 Ala. 218.

Equitable jurisdiction not exercised

Probate court does not exercise equitable jurisdiction merely because it invokes an equitable principle.—*Davis v. Roberts*, 226 S.W. 662, 206 Mo.App. 125.

71. Ala.—*Courseur v. Tollison*, 147 So. 635, 638, 226 Ala. 530, quoting *Corpus Juris*.

Ill.—*Sebree v. Sebree*, 127 N.E. 392, 293 Ill. 228—*Pollock v. Cantlin*, 253 Ill.App. 229.

Mo.—In re Ozias' Estate, App., 29 S.W.2d 240.

Pa.—In re Cannon's Estate, 199 A. 135, 330 Pa. 513—In re McCaskey's Estate, 160 A. 707, 307 Pa. 172—In re Hartzell's Estate, 173 A. 842, 114 Pa.Super. 190—In re Laverelle's Estate, 101 Pa.Super. 448.

15 C.J. p 1015 note 94.

72. N.Y.—*MacLean v. Hart*, 239 N.Y.S. 1, 228 App.Div. 379—In re Seaman's Will, 200 N.Y.S. 504, 205 App.Div. 681—*Van Buren v. Decker's Estate*, 198 N.Y.S. 297, 204 App.Div. 138—In re Ledyard's Estate, 10 N.Y.S.2d 327, 170 Misc. 365—In re Kornder's Estate, 6 N.Y.S.2d 324, 168 Misc. 553—In re Zollkoffer's Will, 3 N.Y.S.2d 305, 166 Misc. 735—In re Winslow's Estate, 272 N.Y.S. 829, 151 Misc. 298—In re McCafferty's Will, 264 N.Y.S. 38, 147 Misc. 179—In re Kirkman's Estate, 256 N.Y.S. 495, 143 Misc. 342—In re McArdle's Estate, 250 N.Y.S. 276, 140 Misc. 257—In re Fulitzer's Estate, 249

tion concerns any person before the court by reason of any right in, or obligation to, such estates.⁷³

Trusts. Although probate courts in some states have no power over trust estates,⁷⁴ yet, in many states they do possess certain powers with respect

to trusts, the nature, extent, and exercise of which depend on, and are limited by, the terms of the constitutional or statutory grant of jurisdiction⁷⁵ which ordinarily does not extend to trusts inter vivos.⁷⁶ The jurisdiction of courts of probate with

N.Y.S. 87, 139 Misc. 575, opinion supplemented 251 N.Y.S. 549, 140 Misc. 572, affirmed in re Pulitzer, 260 N.Y.S. 975, 237 App.Div. 808—Schley v. Donlin, 225 N.Y.S. 453, 131 Misc. 203—In re Malone's Estate, 218 N.Y.S. 382, 128 Misc. 288—In re Brady's Estate, 133 N.Y.S. 532, 111 Misc. 492.

Power equivalent to that of chancery court

Surrogate's court has equitable power with respect to decedents' estates equivalent to that of supreme court or court of chancery.—In re Proctor's Will, 284 N.Y.S. 675, 157 Misc. 708.

Matters not included within power

The court's equity powers are powers in respect of decedent's estate, and hence cannot be invoked in controversy relating to contract between life beneficiary and executor individually.—In re Matthewson's Will, 206 N.Y.S. 734, 210 App.Div. 572.

In accounting proceedings the surrogate's court has complete equitable jurisdiction.—In re Burr's Estate, 257 N.Y.S. 654, 143 Misc. 877, affirmed in re Burr's Will, 263 N.Y.S. 945, 239 App.Div. 774—In re Sewell's Estate, 216 N.Y.S. 331, 127 Misc. 202—In re Farmers' Loan & Trust Co., 163 N.Y.S. 961, 99 Misc. 420, reversed on other grounds 168 N.Y.S. 952, 181 App.Div. 642, affirmed 122 N.E. 880, 225 N.Y. 666.

More particularly, the court has power, under such statutes

(1) To set aside compromise agreement adjusting contested probate proceeding, procured by fraud.—In re Frame's Estate, 219 N.Y.S. 759, 123 Misc. 788.

(2) To determine and enforce claims made by legatee's assignees and judgment creditors and receiver and bankruptcy trustee.—In re Carman, 12 N.Y.S.2d 162, 170 Misc. 638.

(3) To determine, in accounting proceedings, the validity of, and enforce, a contract to dispose of property by will.—Schley v. Donlin, 225 N.Y.S. 453, 131 Misc. 208.

Enforcement of will

Although deceased was under contractual obligation to make certain will, and afterward changed this will by codicil, the surrogate's court has no equity jurisdiction to enforce the will as originally executed, and the remedy is by suit in equity.—Rochester Trust & Safe Deposit Co. v. Brown, 189 N.Y.S. 678, 116 Misc. 134.

73. N.Y.—In re Enright's Estate, 267 N.Y.S. 483, 149 Misc. 353—In re Reich's Estate, 262 N.Y.S. 623, 146 Misc. 616—In re Walsh's Estate, 262 N.Y.S. 498, 146 Misc. 56—In re Engel's Estate, 250 N.Y.S. 648, 140 Misc. 276—In re McCarthy's Funds, 248 N.Y.S. 335, 139 Misc. 147—In re Morris, 235 N.Y.S. 461, 134 Misc. 374.

74. Ill.—Howard v. Swift, 190 N.E. 102, 356 Ill. 80—Dixon v. Nefstead, 2 NE2d 135, 285 Ill.App. 463—Montgomery, Hart & Smith v. Dime Sav. & Trust Co., 214 Ill. App. 553, affirmed 125 N.E. 309, 290 Ill. 409.

Tex.—Ashby v. Standard Pipe & Supply Co., Civ.App., 56 S.W.2d 218, error refused.

Effect of will creating trust

Although a county court, sitting in probate, has no power to administer trusts, yet, the fact that a will creates a trust does not deprive the court of its power to perform its ordinary probate functions in respect of the testator's estate which after being administered may be ordered into the hands of the trustee in accordance with the will, whereupon the parties may resort to a court of equity to administer the trust.—Park v. Baxter, 64 P.2d 721, 179 Okl. 75.

75. Cal.—In re Barnett's Estate, 275 P. 453, 97 Cal.App. 138—Johnson v. Superior Court of California in and for Fresno County, 247 P. 249, 77 Cal.App. 599.

Conn.—De Ladson v. Crawford, 106 A. 326, 93 Conn. 402.

N.Y.—President and Directors of Manhattan Co. v. Janowitz, 14 N.Y.S.2d 375, 172 Misc. 290—In re Moller's Estate, 283 N.Y.S. 365, 157 Misc. 338—In re Crosby's Estate, 242 N.Y.S. 207, 136 Misc. 688.

Pa.—In re Fenelli's Estate, 199 A. 496, 330 Pa. 499—Miller v. Dauphin Deposit Trust Co., 46 Dauph.Co. 212.

65 C.J. p 892 note 2.

Limitations on jurisdiction

(1) It is only a trust created by will which vests in the county court any jurisdiction in probate over the trust or the trustee.—In re George's Estate, 274 N.W. 294, vacating mandate 270 N.W. 533, 225 Wis. 251—In re Richardson's Estate, 271 N.W. 56, 223 Wis. 447.

(2) Probate court's jurisdiction under statute defining its equity jurisdiction is confined to trusts creat-

ed by written instrument.—Coffey v. Rady, 166 N.E. 833, 267 Mass. 301.

Termination of trust

(1) A probate court has been held without power to terminate an express trust before the expiration of the term for which it is created.

Cal.—In re Hubbell's Estate, 3 P.2d 530, 121 Cal.App. 38.

Conn.—De Ladson v. Crawford, 106 A. 326, 93 Conn. 402.

(2) In some jurisdictions the power of a probate court to determine whether a testamentary trust has been terminated by act of the parties or otherwise has been upheld in a proper case.

Ala.—Minor v. Thomasson, 182 So. 16, 236 Ala. 247.

Mont.—Philbrick v. American Bank & Trust Co., 193 P. 59, 58 Mont. 376.

N.Y.—In re U. S. Trust Co., 67 N.E. 614, 175 N.Y. 304, affirming 80 N.Y.S. 475, 80 App.Div. 77, and reargument denied 68 N.E. 1125, 176 N.Y. 563.

(3) But in other jurisdictions this power has been denied.—In re Hagerstown Trust Co., 86 A. 932, 119 Md. 224.

Duties of probate court in respect of trust created by will.—In re Le Page's Trust, 269 N.W. 53, 67 N.D. 15.

76. N.Y.—In re Howe's Estate, 7 N.Y.S.2d 536, 255 App.Div. 230—In re Guardianship of Rosenblum, 262 N.Y.S. 501, 146 Misc. 537—Syracuse Trust Co. v. Fuller, 252 N.Y.S. 90, 14 Misc. 918—In re Crosby's Estate, 242 N.Y.S. 207, 136 Misc. 688—Merrill v. Lynch, 13 N.Y.S. 2d 514.

65 C.J. p 892 note 4 [d] (1).

Construction and effect of trust

(1) The surrogate's court is without jurisdiction to construe a trust inter vivos.—In re Janowitz' Will, 300 N.Y.S. 38, 164 Misc. 936—In re Kraetzer's Will, 264 N.Y.S. 443, 147 Misc. 609.

(2) Neither can it determine the effect of an inter vivos trust agreement.—In re Lyon's Ex'rs, 194 N.E. 682, 266 N.Y. 219—In re Ihmsen's Estate, 294 N.Y.S. 120, 161 Misc. 789, reversed on other grounds 3 N.Y.S. 2d 125, 253 App.Div. 472.

(3) But it has been held that the surrogate's court has jurisdiction, in a proper case, to determine validity of a transaction whereunder testator erected trust of preponderant

respect to particular proceedings relating to trusts and trustees is considered in other titles of this work, particularly in the title Trusts § 386, also 65 C.J. p 892 note 4-p 894 note 26, the intention being to consider in this section only generally the jurisdiction of probate courts as to trusts.

§ 303. — Over Real and Personal Property and Title Thereto

- a. In general
- b. Determination of question of title

a. In General

Probate courts have only such powers over real and personal property as are conferred by constitutional and statutory provisions.

Probate courts have only such powers over real and personal property as are conferred by constitutional and statutory provisions.⁷⁷ Within the

powers conferred their jurisdiction, as a general rule, covers primarily personal estate only and does not technically extend to real estate,⁷⁸ although they do possess certain powers in regard to real estate,⁷⁹ such as the power to order the sale of a decedent's realty in an appropriate case, see the C.J. S. title Executors and Administrators § 560, also 24 C.J. p 576 note 97-p 579 note 11.

In construing the powers of probate courts it has been held that such a court may determine rights to property so far as they depend on devolution, testate or intestate,⁸⁰ but it cannot determine rights to property left by a decedent which depend on contracts;⁸¹ neither can such a court determine adverse claims to property in the administrator's charge;⁸² adjudicate disputed property rights against an estate;⁸³ direct eviction of a defaulting purchaser of a decedent's realty;⁸⁴ compel on sum-

proportion of his property within a few weeks of his death.—In re Hearn's Will, 285 N.Y.S. 935, 158 Misc. 370.

In Pennsylvania

(1) Trusts inter vivos were outside the jurisdiction of the orphans' court prior to the enactment of Act June 26, 1931, P.L. p 1384, 20 P.S. §§ 2241-2254, conferring on that court jurisdiction over trusts inter vivos.—In re Douglas' Estate, 154 A. 376, 303 Pa. 227—Kelly's Estate, 24 Pa.Dist. 509—Jones' Estate, 15 Pa.Dist. 30.

(2) This act, however, does not apply to a trust created for a temporary purpose, even though by written instrument, but only to a continuing trust requiring both administration and distribution.—In re Stief, 32 Pa.Dist. & Co. 282.

(3) The jurisdiction conferred by the act does not extend to trusts arising by operation of law.—In re Shaffer's Estate, 21 Pa.Dist. & Co. 90.

77. Ariz.—In re Tamer's Estate, 179 P. 644, 30 Ariz. 232.

Ark.—Moss v. Moose, 44 S.W.2d 825, 184 Ark. 798.

Mich.—In re Fraser's Estate, 285 N. W. 1, 288 Mich. 392.

Mont.—In re Dolenty, 161 P. 524, 53 Mont. 33.

Pa.—In re Roessler's Estate, 5 Pa. Dist. 776, 19 Pa.Co. 161—In re Strauss' Estate, 26 North.Co. 304. Jurisdiction of probate courts to partition property see the C.J.S. title Partition §§ 64, 65, also 47 C.J. p 355 note 2-p 360 note 23.

Undisputed property of decedents and wards

Probate jurisdiction is limited in subject matter, to the undisputed property of decedents and wards.—

Central Wisconsin Trust Co. v. Schumacher, Wis., 284 N.W. 562.

Effect of describing property in pleadings or orders

The mere inclusion of the description of particular property in pleadings or orders in probate proceedings cannot confer jurisdiction over such property on the probate court.—Spitzer v. Branning, 184 So. 770, 135 Fla. 49.

Homestead rights

(1) The widow's right of homestead, if any, in lands of which her husband died seized vests immediately on his death, and is not subject to an order of the probate court affecting her interest therein other than the mere finding and determination of her status as such widow.—Davis v. Davis, 199 N.W. 113, 112 Neb. 178.

(2) Probate court's jurisdiction as to proceedings for selection, setting apart, and protection of homestead rights see the C.J.S. title Homesteads § 279, also 29 C.J. p 1030 notes 47, 48.

Personal representative's interest in property

Probate court may direct an executor or administrator as to his interest in property.—In re Orwig's Estate, 167 N.W. 654, 185 Iowa 913.

78. Okl.—Jackson v. Porter, 209 P. 430, 432, 87 Okl. 112, quoting Corpus Juris.

15 C.J. p 1016 note 96.

Protection of administrator's right to realty

Ordinarily administrator is obligated to seek protection of his rights to decedent's real estate, not in surrogate's court, but in court of general jurisdiction.—In re Burstein's Estate, 275 N.Y.S. 601, 153 Misc. 515.

Setting aside releases as to realty held not within jurisdiction of surrogate's court.—In re Carusone, 10 N.Y.S.2d 5, 256 App.Div. 310.

73. Tex.—Warren v. Helms, Civ. App., 275 S.W. 175. 15 C.J. p 1016 notes 97-4.

In respect of control and possession of realty, the probate court may

(1) Require one in possession of decedent's realty to place administrator in possession.—In re Burstein's Estate, 275 N.Y.S. 601, 153 Misc. 515.

(2) Order an administrator to take control of decedent's realty and determine facts necessary to authorize such control by him.—Rollins v. Shaner, 292 S.W. 419, 316 Mo. 953.

Enforcement of stipulation that certain real estate was deceased's separate property held for probate court.—Larsen v. Larsen, 256 P. 369, 44 Idaho 211.

80. Minn.—Jannetta v. Jannetta, 285 N.W. 619.

Title not in issue

Probate courts may determine questions which affect rights of devisees or legatees, where the title to the real or personal estate, so affected is not put in issue.—In re Nuttle's Estate, 39 P.2d 475, 3 Cal. App.2d 415—15 C.J. p 1016 note 5.

81. Rule applied to contract to make will

N.D.—Goodin v. Casselman, 200 N. W. 94, 51 N.D. 543.

82. Mo.—McClure v. Baker, App., 216 S.W. 1018.

15 C.J. p 1017 note 10.

83. Nev.—Allenbach v. Ridenour, 279 P. 32, 51 Nev. 437. 15 C.J. p 1018 note 11.

84. N.Y.—In re Desotelle's Estate, 258 N.Y.S. 119, 143 Misc. 732.

mary application an administrator in possession of property to deliver it over to one claiming to be the owner;⁸⁵ order an executor to reconvey real estate, conveyed to the testator by deed absolute, but intended only as security;⁸⁶ order an accounting by one holding assets of the estate of a decedent as trustee or assignee;⁸⁷ award partition between a surviving tenant in common and the heirs of his deceased tenant in common;⁸⁸ order a seizure, from one claiming to hold under a good title, of goods said to belong to the intestate;⁸⁹ issue a writ of possession, after confirmation of a sale under its order;⁹⁰ set aside a decree transferring a mortgage, on the ground of title thereto in the petitioner;⁹¹ determine rights of remainder;⁹² pass on priority of liens against and claims to property;⁹³ nor impress liens on realty⁹⁴ in a separate and in-

dependent proceeding therefor⁹⁵ unless authorized to do so by statute.

Territorial jurisdiction. General rules as to territorial limits of jurisdiction, see supra § 91, apply to probate courts.⁹⁶ Accordingly, a probate court of a state other than that in which land is situated cannot make a decree directly affecting such land.⁹⁷

b. Determination of Question of Title

Ordinarily a probate court cannot determine a question of title to property unless such question arises collaterally as a necessary incident to the determination of other matters within the court's jurisdiction, although in some jurisdictions it may determine such a question as between a decedent's estate and the personal representative thereof claiming title in his individual capacity.

Ordinarily, a probate court cannot determine a question of title to property,⁹⁸ especially where the

85. N.Y.—Marston v. Paulding, 10 Paige 40.

86. Cal.—Anderson v. Fisk, 41 Cal. 308.

87. Pa.—Schnepf's Estate, 20 Pa. Dist. 517.

88. Pa.—Wilhelm's Estate, 6 Pa. Dist. 236, 18 Pa.Co. 637.

89. Miss.—Phillips v. McLaughlin, 26 Miss. 597.

S.C.—State v. Mitchell, 18 S.C.L. 225.

90. Tenn.—Porter v. Woodard, 5 Coldw. 86.

91. Pa.—Curran's Estate, 9 Pa.Co. 514.

92. Mo.—Brannell v. Cole, 37 S.W. 924, 136 Mo. 201, 58 Am.S.R. 619.

93. Ga.—Paulk v. City of Ocilla, 190 S.E. 409, 55 Ga.App. 479.

94. U.S.—In re Von Ruden, D.C. Minn., 22 F.2d 860.

95. N.Y.—In re Lakner, 255 N.Y.S. 809, 143 Misc. 117.

96. **Removal of personal property**
Orphans' court of one state has no jurisdiction of personal property which was at testator's domicile in another state at the time of his death and afterward removed by his executor to the former state.—Varner v. Bevil, 17 Ala. 286.

Notes executed by nonresident and their settlement in foreign jurisdiction held within jurisdiction of surrogate's court.—McNamara v. McNamara, 62 Ga. 200.

97. Mont.—In re Bruhns' Estate, 193 P. 1115, 58 Mont. 526.

Authorizing lease of land
A probate court cannot confer authority on an administrator or guardian to lease or to collect rents from land without the state.—Smith v. Wiley, 22 Ala. 396, 58 Am.D. 262.

98. Ark.—Sides v. Janes, 66 S.W.2d 617, 188 Ark. 386—Huff v. Hot Springs Savings Trust & Guaranty

Co., 45 S.W.2d 508, 185 Ark. 20—Moss v. Moose, 44 S.W.2d 825, 184 Ark. 798—Gordon v. Clark, 232 S.W. 19, 149 Ark. 173—King v. Stevens, 225 S.W. 656, 146 Ark. 443.

Cal.—Shaw v. Palmer, 224 P. 106, 65 Cal.App. 441.

Fla.—Mott v. First Nat. Bank, 124 So. 36, 98 Fla. 444.

Ga.—Paulk v. City of Ocilla, 190 S.E. 409, 55 Ga.App. 479.

Idaho.—Simonton v. Simonton, 193 P. 386, 33 Idaho 255.

Kan.—In re Eanoshke's Estate, 37 P. 2d 1020, 140 Kan. 694—In re Hedin's Estate, 36 P.2d 1006, 140 Kan. 329, modified on other grounds and rehearing denied Johnson v. Lander, 39 P.2d 911, 141 Kan. 5—First Colored Baptist Church v. Caldwell, 30 P.2d 144, 139 Kan. 45, denying rehearing In re Jones' Estate, 27 P.2d 237, 138 Kan. 581—In re Dunn's Estate, 211 P. 161, 112 Kan. 279.

Md.—Talbot Packing Corporation v. Wheatley, 190 A. 833, 172 Md. 365—McComas v. Wiley, 104 A. 52, 132 Md. 406.

Mich.—In re Fraser's Estate, 285 N.W. 1, 288 Mich. 392.

Mo.—Nettleton Bank v. McGahey's Estate, 2 S.W.2d 771, 318 Mo. 948.

Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449—In re Dolenty, 161 P. 524, 53 Mont. 33.

Neb.—Fischer v. Sklenar, 163 N.W. 861, 101 Neb. 553.

Nev.—Allenbach v. Ridenour, 279 P. 32, 51 Nev. 437.

N.J.—In re Konigsberg's Estate, 4 A.2d 524, 125 N.J.Eq. 216.

N.D.—In re Le Page's Trust, 269 N.W. 53, 67 N.D. 15—Goodin v. Casselman, 200 N.W. 94, 51 N.D. 543.

Okl.—Rust v. Gillespie, 216 P. 480, 90 Okl. 59—Jackson v. Porter, 209 P. 430, 87 Okl. 112, followed in Stevens v. Dill, 209 P. 439, 87 Okl. 135—Strawn v. Brady, 202 P. 505, 84 Okl. 66.

Tex.—Brown v. Fleming, Com.App., 212 S.W. 483, reversing, Civ.App., 178 S.W. 964, and Cavitt v. Beall Hardware & Implement Co., 204 S.W. 798—Zamora v. Gonzalez, Civ. App., 128 S.W.2d 166, error refused—Buss v. Smith, Civ.App., 125 S.W.2d 712, error granted—Burton v. Connecticut General Life Ins. Co., Civ.App., 72 S.W.2d 318, error refused—Pavelka v. Overton, Civ. App., 47 S.W.2d 369, error refused—Berry v. Barnes, Civ.App., 26 S.W.2d 657—Johnson v. Hampton, Civ.App., 297 S.W. 891, reversed on other grounds 8 S.W.2d 640, 117 Tex. 580—Smith v. Patrick, Civ. App., 297 S.W. 482—Weeks v. De Young, Civ.App., 290 S.W. 852.

Wis.—Central Wisconsin Trust Co. v. Schumacher, 284 N.W. 562—In re George's Estate, 274 N.W. 294, 225 Wis. 251, vacating mandate 270 N.W. 538, 225 Wis. 251.

15 C.J. p 814 note 11, p 1017 note 7.

As between heir and his transferee
probate court cannot determine question of title to particular share of estate.—Bruun v. Hanson, C.C.A. Idaho, 103 F.2d 685.

Quality of title

The probate court may inquire if an estate has an interest in or title to realty, and, if the question is answered affirmatively, may distribute such estate, but it cannot determine the quality of the title, but must leave the parties to pursue their remedies in a proper forum.

Cal.—Bath v. Valdez, 11 P. 724, 70 Cal. 350.

Okl.—Fibikowski v. Fibikowski, 94 P.2d 921, 185 Okl. 520.

Statutory authority

Under governing statutes a probate court has jurisdiction to declare savings bank deposits in name of several aliases of decedent as trustee to be assets of decedent's estate.—Bar-

question arises between representatives of, or persons claiming under, decedents' or wards' estates and strangers thereto,⁹⁹ unless such question arises

collaterally as a necessary incident to the determination of other matters which are within the court's jurisdiction,¹ or unless the court, in addition to its

ron v. Barronian, 175 N.E. 271, 275 Mass. 77.

Statute held invalid in so far as it authorized county court to entertain proceedings to try title to realty.—Homer v. Loster, 219 P. 392, 95 Okl. 284, certiorari denied 44 S.Ct. 330, 264 U.S. 580, 68 L.Ed. 552.

In Pennsylvania's

(1) As a general rule, the orphans' court has no jurisdiction to determine title to a decedent's real estate as between several claimants.—In re Fry's Estate, 112 A. 757, 270 Pa. 24—In re Ludwick's Estate, 100 A. 448, 255 Pa. 548—In re Hazard's Estate, 98 A. 678, 253 Pa. 447—In re Spencer, 76 A. 172, 227 Pa. 469—In re McCorkle, 39 A. 545, 184 Pa. 626—In re Frederick's Estate, 10 Pa.Dist. & Co. 591—Artz's Estate, 2 Pa.Dist. & Co. 775—In re Bunnell's Estate, 28 Pa.Dist. 545—In re Binkley's Estate, 29 Pa.Dist. 595.

(2) Where a third person claims title to personal property which was not in decedent's possession at the time of his death and did not thereafter come into the hands of his personal representative, the orphans' court is without power to determine the question of title.—In re Crisswell's Estate, 5 A.2d 577, 334 Pa. 266—In re Keyser's Estate, 198 A. 125, 329 Pa. 514—In re McGovern's Estate, 186 A. 89, 332 Pa. 379—In re Cutler, 73 A. 1111, 225 Pa. 167—Scully's Estate, 20 Pa.Dist. 303—McGrann's Estate, 12 Pa.Dist. 219, 28 Pa.Co. 246—In re Smith's Estate, 18 Lehigh Co.L.J. 69, 52 York Leg.Rec. 127.

(3) This is so even where the claim of title is asserted against the estate by the personal representative in his individual capacity.—In re Foulke's Estate, 5 A.2d 179, 334 Pa. 186—In re Cutler's Estate, 134 A. 489, 286 Pa. 505.

(4) But, where the personal property was in decedent's actual or presumptive possession at the time of his death, or thereafter at any time came into the personal representative's possession, as part of the estate for purposes of administration, the orphans' court has jurisdiction to determine the question of title subject to the following rule.—In re Crisswell's Estate, 5 A.2d 577, 334 Pa. 266—In re Keyser's Estate, 198 A. 125, 329 Pa. 514—In re Cooper's Estate, 106 A. 98, 263 Pa. 37—In re Turner, 90 A. 916, 244 Pa. 568—In re Cutler, 73 A. 1111, 225 Pa. 167—In re Tuttle's Estate, 300 A. 921, 132 Pa.Super. 356—In re Elliott's Estate, 173 A. 880, 113 Pa.Super. 350—In re Fink's Estate, 77 Pa.Super. 267—In

re Strause's Estate, 75 Pa.Super. 276—In re Sims' Estate, 29 Pa.Dist. & Co. 163—In re Disken's Estate, 21 Pa.Dist. & Co. 138—Whitaker v. Bronsevitich's Estate, 32 Luz.Leg.Reg. 346—15 C.J. p 1017 note 8 [c].

(5) If a substantial dispute as to title or ownership is shown to exist between the rival claimants, the orphans' court has no power to determine the question, but may submit the issue to the court of common pleas for a trial by jury and the verdict so found on certification to the orphans' court may then become the basis of a decree by that court settling the controversy.—In re Crisswell's Estate, 5 A.2d 577, 334 Pa. 266—In re Keyser's Estate, 198 A. 125, 329 Pa. 514—In re Williams, 84 A. 848, 236 Pa. 259—In re Cutler, 73 A. 1111, 225 Pa. 167—In re Disken's Estate, 21 Pa.Dist. & Co. 138—Boyer's Estate, 3 Pa.Dist. & Co. 392—Hutchins's Estate, 19 Pa.Dist. 76.

(6) The mere denial of decedent's ownership of the personality, however, will not oust the orphans' court of its jurisdiction, but it may proceed to ascertain whether the denial is made in good faith and a substantial dispute exists.—In re Crisswell's Estate, 5 A.2d 577, 334 Pa. 266—In re Cutler, 73 A. 1111, 225 Pa. 167—In re Tuttle's Estate, 200 A. 921, 132 Pa.Super. 356—In re Fink's Estate, 77 Pa.Super. 267—In re Sims' Estate, 29 Pa.Dist. & Co. 163—In re Crisswell's Estate, 86 Pa.L.J. 615.

(7) Evidence held sufficient to show possession in decedent at time of death.—In re Keyser's Estate, 198 A. 125, 329 Pa. 514.

(8) Orphans' court held to have jurisdiction, on appeal from appraisal decision, to determine question of title to personality alleged to have been improperly included as a supposed estate asset in the appraisal.—In re Connell's Estate, 128 A. 503, 282 Pa. 555, 38 A.L.R. 1362.

99. Ariz.—Horne v. Blakeley, 274 P. 173, 35 Ariz. 39—In re Tamer's Estate, 179 P. 644, 20 Ariz. 232. Cal.—In re Vucinich's Estate, 44 P. 2d 567, 3 Cal.2d 235, modified on other grounds 45 P.2d 817, 3 Cal.2d 235—McPike v. Superior Court of San Francisco County, 30 P.2d 17, 220 Cal. 254—McCarthy v. McCarthy, 270 P. 211, 205 Cal. 184—In re King's Estate, 248 P. 519, 199 Cal. 113—In re Boggs' Estate, App., 90 P.2d 814—In re Inghilleri's Estate, 81 P.2d 563, 27 Cal.App.2d 664—In re Helm's Estate, 45 P.2d 250, 6 Cal.App.2d 752—In re Thurnell's Estate, App., 19 P.2d 14.

Ill.—In re Roeske's Estate, 205 Ill. App. 366.

Minn.—Merchants' & Farmers' State Bank of Grove City v. Olson, 250 N.W. 366, 189 Minn. 528, 89 A.L.R. 1289.

Utah.—Rogers v. West, 25 P.2d 971, 82 Utah 525—In re Rogers' Estate, 284 P. 992, 75 Utah 290.

"The probate court has no general equitable or common-law jurisdiction . . . [to] determine contested claims or title to real property asserted by those claiming by will or descent against strangers to the estate, or asserted by strangers against those claiming through the estate."—State v. Probate Court of Lyon County, 168 N.W. 14, 140 Minn. 342.

Reason for rule

"This is necessarily so, for the reason that either the person initiating the attack or the person resisting the attack is lacking in privity to the probate proceedings."—Bauer v. Bauer, 256 P. 820, 821, 201 Cal. 267, followed in Bauer v. Bauer, 256 P. 822, 201 Cal. 770.

A former executor who had resigned as such held a stranger to the probate proceedings.—Waterland v. Superior Court in and for Sacramento County, Cal.App., 90 P.2d 344, rehearing denied and modified on other grounds 91 P.2d 220.

Power not conferred by statute

Probate court, under statute authorizing it to determine who is entitled to distribution of estate, has no jurisdiction to try title where a stranger is claiming property adversely to the estate.—In re Dodge's Estate, 50 P.2d 839, 9 Cal.App.2d 650.

1. U.S.—Miller v. Clausen, C.C.A. Neb., 299 F. 723, appeal dismissed 46 S.Ct. 105, 269 U.S. 595, 70 L.Ed. 431.

Ark.—Thomas v. Thomas, 233 S.W. 808, 150 Ark. 43—King v. Stevens, 225 S.W. 656, 657, 146 Ark. 443, citing Corpus Juris.

Del.—Petition of Gray, 109 A. 574, 12 Del.Ch. 417.

Tex.—Zamora v. Gonzalez, Civ.App., 128 S.W.2d 166, error refused. 15 C.J. p 814 note 12, p 1017 note 8.

In the imposition of an inheritance tax on realty of estate not inventoried therein, there being no adjudication of ownership in a court of competent general jurisdiction, probate court may determine ownership in decedent at his death, on which fact the right to impose tax rests.—State v. Probate Court of Lyon County, 168 N.W. 14, 140 Minn. 342.

Construction of will

(1) A probate court may determine

probate powers, possesses general powers sufficient to enable it to determine such a question.² In some,³ but not all,⁴ jurisdictions, however, a probate court may determine a question of title arising between the estate and the personal representative thereof claiming title in his individual capacity; and it has been held that it may determine claims of property as between those interested in the estate,

although this authority only goes to the extent of determining their relative interests as derived from the estate, and not to an interest derived adversely thereto;⁵ and under some statutes conferring broad powers on probate courts, such courts may in a proper case determine questions of title to property.⁶

a question of title necessarily incidental to the construction of a will. N.Y.—In re Farmer's Will, 163 N.Y.S. 1089, 99 Misc. 437.

Pa.—In re Miller's Estate, 17 Pa.Dist. & Co. 127, 47 Montg.Co. 230.—In re Schollenberger's Estate, 5 Schuylkill Reg. 65.

(2) Notwithstanding a constitutional provision denying probate courts jurisdiction in actions affecting title to realty, such a court, when acting in discharge of powers granted to it, has the right to construe a will and determine the effect of a devise of realty for the purpose of appropriately discharging its duty.—Logue v. Ferris, C.C.A.Neb., 280 F. 286.

15 C.J. p 1017 note 8 [a] (1).

Under its general powers to consider all questions necessary in the settlement of estates, probate court has jurisdiction to determine ownership of property inventoried as assets of estate.—Brown v. Southern Ohio Sav. Bank & Trust Co., 153 N.E. 864, 22 Ohio App. 324.

2. Or.—In re Norman's Estate, 78 P.2d 346, 159 Or. 197.—In re Pittock's Estate, 201 P. 428, 102 Or. 47.

Wash.—Lew You Ying v. Kay, 24 P. 2d 596, 174 Wash. 83.—In re Wren's Estate, 299 P. 972, 163 Wash. 65.—In re Uzafove's Estate, 280 P. 85, 153 Wash. 620.—Coleman v. Crawford, 248 P. 386, 140 Wash. 117.—In re Martin, 144 P. 42, 82 Wash. 226.

3. Cal.—Bauer v. Bauer, 256 P. 820, 201 Cal. 267, followed in Bauer v. Bauer, 256 P. 822, 201 Cal. 770.—In re Fulton's Estate, 205 P. 681, 188 Cal. 489.—In re Boggs' Estate, App. 90 P.2d 814.—In re Helm's Estate, 45 P.2d 250, 6 Cal.App.2d 752.

Ill.—In re Roeske's Estate, 205 Ill. App. 366.

Md.—Talbot Packing Corporation v. Wheatley, 190 A. 833, 172 Md. 365. N.J.—In re Tulper's Estate, 132 A. 834, 99 N.J.Eq. 293.

Wyo.—Security-First Nat. Bank v. King, 23 P.2d 851, 46 Wyo. 59, 90 A.L.R. 125.

15 C.J. p 1017 note 8 [d].

Power incidental to accounting and settlement by personal representative to determine question of title arising between him and estate see the C.J.S. title Executors and Ad-

ministrators § 840, also 24 C.J. p 942 notes 75, 76.

Incidental power

The probate court has this power as a necessary incident to the determination of what property is subject to administration in the estate.—Waterland v. Superior Court in and for Sacramento County, Cal.App., 90 P.2d 344, rehearing denied and opinion modified on other grounds 91 P. 2d 220.

Termination of power

In respect of an executor, the probate court's power to determine questions of title between him and the estate ceases when the executor is no longer acting in that capacity.—Waterland v. Superior Court in and for Sacramento County, Cal.App., 91 P.2d 220, denying rehearing and modifying 90 P.2d 344.

Representative claiming title as trustee

Such power exists only where the personal representative claims title in his individual capacity, not where he claims title in his capacity as a trustee.—In re Inghilleri's Estate, 81 P.2d 568, 27 Cal.App.2d 664.

Guardian's claim of title

(1) In application of the text rule the probate court may also determine a question of title as between a ward's estate and his guardian claiming title in his individual capacity.—In re Vucinich's Estate, 44 P.2d 567, 3 Cal.2d 235, modified on other grounds 45 P.2d 817, 3 Cal.3d 235.

(2) Where the guardian claims title on behalf of a third person, the probate court may determine the question of title unless the existence of an actual serious question as to whether the property belongs to the estate or a stranger thereto is made to appear.—In re Vucinich's Estate, supra.

4. Mont.—In re Jennings' Estate, 241 P. 648, 74 Mont. 449.

Okl.—American Surety Co. of New York v. Wilson, 44 P.2d 35, 172 Okl. 107.

5. Kan.—Powers v. Scharling, 92 P. 1099, 76 Kan. 855.

N.Y.—Matter of Cary, 138 N.Y.S. 682, 77 Misc. 602.

Wash.—Stewart v. Lohr, 25 P. 457, 1 Wash. 341, 22 Am.S.R. 150.

15 C.J. p 1017 note 6.

Statute authorizing determination of distributive rights

The probate court, under a statute authorizing it to determine who is entitled to distribution of an estate, may determine rights and interests claimed in privity with the estate but not rights and titles claimed adversely to such estate.—In re Burton, 29 P. 36, 93 Cal. 459.—In re Dodge's Estate, 50 P.2d 839, 9 Cal. App.2d 650.

Jurisdiction of probate court in establishing and determining heirship or right to share in distribution in general see the C.J.S. title Descent and Distribution § 79, also 18 C.J. p 869 note 88.

6. Surrogate Court Act § 40

(1) Under Surrogate Court Act § 40, as amended in 1921, authorizing the surrogate's court to administer justice in all matters relating to the affairs of decedents and to determine all questions, legal or equitable, arising between any and all persons properly before the court, as to any and all matters necessary to be determined to make a complete disposition of the matter by such order or decree as justice requires, the power of the surrogate's court to determine questions of title to personal property has been recognized in a number of cases.—In re Buckler, 237 N.Y.S. 242, 227 App.Div. 146.—Van Buren v. Decker's Estate, 198 N.Y.S. 297, 204 App.Div. 138.—In re Lockwood's Estate, 278 N.Y.S. 768, 154 Misc. 233.—In re Reich's Estate, 262 N.Y.S. 623, 146 Misc. 616.—In re Brazil's Estate, 216 N.Y.S. 430, 127 Misc. 288, reversed on other grounds 220 N.Y.S. 331, 219 App.Div. 594.—In re Johnson's Estate, 208 N.Y.S. 655, 124 Misc. 498.

(2) So, also, its power to determine questions of title to realty has been recognized.—In re Lockwood's Estate, 276 N.Y.S. 768, 154 Misc. 233.

(3) "The objection is made that this court [surrogate's court] has no jurisdiction to determine this question of title [to realty]. Such objection would undoubtedly have been well taken prior to October 1, 1921, when the broadening effect of the amendments to section 40 of the Surrogate's Court Act became law, but it has now been an arrant anachronism for almost a decade."—In re Walsh's Estate, 262 N.Y.S. 498,

§ 304. Ancillary or Incidental Jurisdiction

In the absence of statutory restrictions probate courts have such ancillary and incidental powers as are reasonably necessary to an effective exercise of the powers expressly conferred.

In accordance with the general rules as to ancillary and incidental jurisdiction of courts generally, see § 88 supra, probate courts, in the absence of express and specific restrictions to the contrary, have such ancillary and incidental powers as are reasonably necessary to an effective exercise of the powers expressly conferred.⁷ Accordingly, when a pro-

bate court has jurisdiction of the subject matter of a case, it has the power to hear and determine all questions of law and fact, the determination of which is ancillary to a proper judgment,⁸ and, while it retains jurisdiction over the subject matter, it has full power, on due notice to all parties, to make such orders as are necessary to the proper administration of the estate before it.⁹ Since the jurisdiction of probate courts is confined to particular subject matters, however, their powers as to ancillary or incidental questions must of necessity be exercised within certain limitations,¹⁰ and, obviously,

499, 146 Misc. 56.—In re Engel's Estate, 250 N.Y.S. 648, 656, 140 Misc. 276.

(4) It has been said, however, that the surrogate's court "has jurisdiction to determine the question of ownership of real property only where it is incidental to the determination of the ownership of money."—In re Beckett's Estate, 8 N.Y.S. 2d 24, 27, 169 Misc. 475.

(5) It has been held, prior to the amendment in 1921 of Surrogate's Ct. Act § 40, that the surrogate's court, having jurisdiction only of the administration of estates, has no jurisdiction of a suit involving property sold by an administrator.—In re Heinze's Estate, 165 N.Y.S. 1017, 179 App.Div. 453.

7. Ark.—King v. Stevens, 225 S.W. 656, 146 Ark. 443.

Cal.—McPike v. Superior Court of San Francisco County, 30 P.2d 17, 220 Cal. 254.

Conn.—Union & New Haven Trust Co. v. Sherwood, 147 A. 562, 110 Conn. 150.—Hall v. Meriden Trust & Safe Deposit Co., 130 A. 157, 103 Conn. 226.—Massey v. Foote, 101 A. 499, 92 Conn. 25.

Ill.—People v. Rigdon, 204 Ill.App. 309.

Kan.—In re Noble's Estate, 41 P.2d 1021, 1024, 141 Kan. 432, quoting Corpus Juris.

Me.—Harmon v. Fagan, 154 A. 267, 130 Me. 171.—In re Thompson, 102 A. 303, 116 Me. 473.

Md.—State v. Talbott, 128 A. 908, 148 Md. 70.

Mont.—Philbrick v. American Bank & Trust Co., 193 P. 59, 58 Mont. 376.

N.J.—Easton v. Goodwin, 181 A. 275, 119 N.J.Eq. 114.

N.Y.—Michaels v. Flach, 156 N.Y.S. 399, 114 Misc. 225, affirmed 189 N.Y.S. 908, 197 App.Div. 478.—In re Hendel's Estate, 176 N.Y.S. 262, 106 Misc. 417.—In re Steinmetz' Estate, 1 N.Y.S.2d 601.

Ohio.—Aicht v. O'Donnell, 3 N.E.2d 993, 52 Ohio App. 513.

Pa.—In re Criswell's Estate, 5 A.2d 577, 234 Pa. 266.—In re Schwartz's Estate, 35 Pa.Dist. & Co. 386.—In

re Clunen's Estate, 34 Pa.Dist. & Co. 490.

S.D.—In re Prerost's Estate, 168 N.W. 630, 40 S.D. 536.

Utah.—In re Cloward's Estate, 82 P. 3d 336, 95 Utah 453, 119 A.L.R. 123.

15 C.J. p 813 notes 5-7, p 814 note 8, p 1012 note 90.

Incidental power to determine title to property see supra § 303.

Incidental powers in proceedings for distribution of decedent's estate see the C.J.S. title Executors and Administrators § 524, also 24 C.J. p 519 note 19-p 522 note 41.

Jurisdiction as to matters incidental to accounting and settlement by personal representatives see the C.J.S. title Executors and Administrators § 840, also 24 C.J. p 941 note 66-p 943 note 78.

Jurisdiction to construe wills as incident to jurisdiction over settlement and distribution of estates see the C.J.S. title Wills § 1076, also 69 C.J. p 860 note 32-p 862 note 65. Power to partition land as incident to settlement of decedents' estates see the C.J.S. title Partition § 65, also 47 C.J. p 359 note 17-p 360 note 29.

The modern tendency is to extend the jurisdiction of the probate court in respect of matters incidental and collateral to the exercise of its recognized powers.—In re Noble's Estate, 41 P.2d 1021, 141 Kan. 432.

Reason for rule

In the absence of such incidental powers the probate court would be unable to discharge its very important functions.—In re Stinger's Estate, 201 P. 693, 61 Mont. 173.—In re Davis's Estate, 71 P. 757, 27 Mont. 490.

Incidental powers held to include

(1) Power to determine to whom an allowed claim is payable.—In re Stinger's Estate, 201 P. 693, 61 Mont. 173.

(2) Right to inquire into the legitimacy of children.—In re Barthel's Estate, 177 N.Y.S. 565, 111 Misc. 727, affirmed In re Barthel, 182 N.Y.S. 914, 192 App.Div. 926.

(3) Jurisdiction to declare marriage void or voidable.—In re Sanders' Estate, 227 N.Y.S. 543, 131 Misc. 266.

(4) Jurisdiction to take and state an account between stockbrokers and deceased.—In re Theiss' Estate, 292 N.Y.S. 315, 161 Misc. 533, affirmed In re Theiss' Will, 293 N.Y.S. 507.

(5) Jurisdiction as to other matters see 15 C.J. p 814 note 8 [a].

Validity of contracts

(1) The probate court may determine the validity of contracts where the exercise of such power is necessarily incidental to the carrying into effect of the powers expressly granted over the administration, settlement, and distribution of estates.—McWillie v. Van Vacter, 35 Miss. 428, 72 Am.D. 127.

(2) Within this rule it may determine the validity of assignments.—Easton v. Goodwin, 181 A. 275, 119 N.J.Eq. 114.

(3) The same is true as to releases of legacies.—In re Kulka's Estate, 13 P.2d 1036, 142 Or. 104.

8. Cal.—Burris v. Kennedy, 41 P. 458, 108 Cal. 331.—In re Burton's Estate, 29 P. 36, 93 Cal. 459.—Falas v. Superior Court in and for Alameda County, 24 P.2d 567, 133 Cal. App. 525.

9. Or.—In re Shepherd's Estate, 41 P.2d 444, 152 Or. 15, modified on other grounds 49 P.2d 448, 152 Or. 15.

10. Ark.—Brackville v. Holt, 239 S.W. 1059, 153 Ark. 248, dissenting opinion 241 S.W. 32, 153 Ark. 248. Wis.—In re George's Estate, 274 N.W. 294, 225 Wis. 251, vacating mandate 270 N.W. 538, 225 Wis. 251.

15 C.J. p 813 note 4.

Questions as to estate assets and fiduciaries' conduct

In so far as incidental questions arising in an estate relate to the res of the assets or to the conduct of fiduciaries or their representatives in relation thereto, surrogates' courts have plenary authority to enable them completely to perform the func-

according to the decisions of the various courts, powers not of necessity incidental to the exercise of any of the powers specifically granted to probate courts cannot be exercised.¹¹

2. PRACTICE AND PROCEDURE

§ 305. In General

While procedure in probate courts must strictly conform to controlling statutes if any, such courts may, in the absence of such controlling statutes, follow chancery, common-law or code practice, as the case may be, not being trammelled by technical forms. Probate proceedings are in the nature of proceedings in rem.

The term "probate proceeding" as used in a probate code is a general designation of the actions and proceedings whereby the law is administered upon the various subjects within probate jurisdiction.¹² Proceedings in a probate court are in the nature of proceedings in rem¹³ and have been said not to be actions at law.¹⁴

The manner of the exercise of their jurisdiction by probate and similar courts may be, and frequently is, controlled by statute, which must be strictly followed;¹⁵ and it has been held that, since probate courts, as shown supra § 298, are wholly creatures of the legislature and tribunals of special and limited jurisdiction only, jurisdiction does not attach unless the preliminary requisites and the course of proceedings prescribed by law are complied with.¹⁶ The proper tribunal to determine its jurisdiction in the first instance is the probate court itself.¹⁷ The court should not decline to take cognizance of a particular matter within its jurisdiction because the

tions for which they were instituted, but further accessions to surrogates' jurisdiction are invasions of the natural functions of courts of general jurisdiction.—In re Stemmler's Estate, 12 N.Y.S.2d 478, 171 Misc. 318.

11. Conn.—Massey v. Foote, 101 A. 499, 92 Conn. 25.

Utah.—In re Cloward's Estate, 82 P. 2d 336, 95 Utah 453, 119 A.L.R. 123.

15 C.J. p 814 note 10.

Out-of-court investigation

General powers of orphans' court held not to include as incidental thereto the power to order investigations to be made out of court to discover facts relative to burial charges in administrator's account.—Tsaracalis v. Characklis, Md., 3 A.2d 725.

12. Okl.—Jackson v. Porter, 209 P. 430, 435, 87 Okl. 112.

13. Cal.—Monk v. Morgan, 192 P. 1042, 49 Cal.App. 154.

Idaho.—Harkness v. Utah Power & Light Co., 291 P. 1051, 49 Idaho 756—Talbot v. Collins, 191 P. 354, 33 Idaho 169.

Tex.—Moore v. Wooten, Com.App., 280 S.W. 742, reversing, Civ.App., 265 S.W. 210, rehearing denied, Com.App., 283 S.W. 153—Commander v. Bryan, Civ.App., 123 S.W.2d 1008.

Utah.—In re Phillips' Estate, 44 P. 2d 699, 86 Utah 358.

14. N.Y.—In re Cronin's Will, 257 N.Y.S. 496, 143 Misc. 559, affirmed 261 N.Y.S. 936, 237 App.Div. 856.

15. Cal.—In re Thomson's Estate, 244 P. 156, 76 Cal.App. 162.

Ind.—Fidelity & Casualty Co. of New York v. State, 184 N.E. 916, 98 Ind. App. 485.

Me.—Appeal of Garland, 136 A. 459, 126 Me. 84, certiorari denied Petition of Garland, 47 S.Ct. 769, 274 U.S. 759, 71 L.Ed. 1338—Cotting v.

Tilton's Estate, 106 A. 113, 118 Me. 91.

Md.—King v. Bork, 170 A. 524, 166 Md. 17.

N.J.—In re Herbert's Estate, 192 A. 39, 40, 121 N.J.Eq. 564, quoting Corpus Juris.

N.Y.—In re De Beixodon's Will, 262 N.Y.S. 565, 238 App.Div. 795, affirmed 186 N.E. 431, 262 N.Y. 168, reargument denied 188 N.E. 97, 262 N.Y. 633—In re Walsh's Will, 176 N.Y.S. 701, 107 Misc. 475.

Tex.—Moore v. Wooten, Com.App., 280 S.W. 742, reversing, Civ.App., 265 S.W. 210, rehearing denied, Com.App., 283 S.W. 153.

15 C.J. p 1018 note 20.

Applicability of particular statute

(1) Hurd Rev.St.1913 c 110 § 35, relative to actions on penal bonds, and separate judgments therein, which was repealed by Civ.Pract.Act 1933 § 94, did not apply to procedure in a probate court.—Whittemore v. Weber, 217 Ill.App. 628.

(2) A proceeding begun in the surrogate's court in 1914 was not subject to the new practice act applicable to that court.—In re Ries, 175 N.Y.S. 58, 187 App.Div. 82.

Reasonable construction

Code Civ.Proc. § 2770, making certain provisions applicable to proceedings in surrogates' courts, being remedial in character, should have a fair and reasonably liberal construction.—People ex rel. Lewis v. Fowler, 176 N.Y.S. 806, 107 Misc. 253, granting application In re Hodgman's Will, 175 N.Y.S. 608, 107 Misc. 70, and reversed on other grounds People ex rel. Lewis v. Fowler, 178 N.Y.S. 500, 189 App.Div. 335, dismissal of appeal denied 126 N.E. 920, 228 N.Y. 556, and affirmed 127 N.E. 793, 229 N.Y. 84.

16. Ga.—Campbell v. Atlanta Coach

Co., 200 S.E. 203, 58 Ga.App. 824, transferred 196 S.E. 769, 186 Ga. 77.

Idaho.—Swinehart v. Turner, 224 P. 74, 38 Idaho 602.

Me.—Cotting v. Tilton's Estate, 106 A. 113, 118 Me. 91.

Mont.—In re Sprigg's Estate, 216 P. 1108, 68 Mont. 92.

Pa.—In re Lowry's Estate, 29 Pa. Dist. & Co. 132.

15 C.J. p 1018 note 22.

Elements of jurisdiction

Proceedings in probate are statutory, and it is necessary to their validity that the court have jurisdiction of the subject-matter, that is, the estate of deceased, and also of the question which its judgment assumes to decide.—Swinehart v. Turner, 224 P. 74, 38 Idaho 602.

Notice of motion was held not proper method of instituting proceeding in surrogate's court.—In re Mosessohn's Estate, 259 N.Y.S. 448, 145 Misc. 378.

Subsequent cure of defects

Jurisdiction of court in probate proceedings cannot be conferred by subsequent filing of proofs supplying defects.—In re Owen's Estate, 259 N.Y.S. 892, 144 Misc. 688.

17. N.Y.—McCormack v. Halstead, 231 N.Y.S. 213, 132 Misc. 916—Schley v. Donlin, 225 N.Y.S. 453, 131 Misc. 208.

In Pennsylvania, where there arises a substantial dispute of a fact or facts upon which the question of the jurisdiction of the orphans' court depends, an issue becomes a matter of right; but where all the facts upon which the question of jurisdiction depends are not in dispute, the question becomes one of law, solely, to be decided in limine.—In re Welch's Estate, 32 Pa.Dist. & Co. 231.

statute does not provide for the mode of exercising jurisdiction in such cases.¹⁸

In the absence of controlling statute to the contrary, general principles of practice applicable in other civil actions apply in probate proceedings;¹⁹ and in such cases it has been considered proper for courts of probate to proceed according to the practice of chancery²⁰ or ecclesiastical²¹ courts, or according to the course of the common law;²² and it has also been said in practice, when not otherwise provided, that such courts may borrow from the code,²³ and that, where a general power is given, but the mode of its exercise is not prescribed, the procedure is to be regulated by the court in the exercise of its sound discretion.²⁴

Such courts are not trammelled by strict forms of procedure;²⁵ but nevertheless their proceedings should, in a general way, conform to the practice in the other courts of record of the state.²⁶

Where courts having jurisdiction of other matters are vested with probate jurisdiction, they should proceed in probate matters according to the practice of the probate courts.²⁷

Joinder of proceedings. A court of probate ju-

risdiction has refused to give its sanction to the practice of attempting to combine in one application various proceedings, independent of each other, which are each specifically regulated by statute.²⁸

§ 306. Parties and Process

- a. Parties
- b. Process

a. Parties

General equity rules as to parties and intervention obtain in probate courts in some states, but not in others.

According to one view, the rule of equity that all parties having an interest in the subject matter of the litigation must be made parties is inapplicable in a probate proceeding, which is purely statutory.²⁹ So it has been held that statutory provisions as to the introduction of new parties to a pending suit, and proceedings upon the transfer of the interest of a party do not apply to probate courts;³⁰ and that a probate court cannot permit any one to intervene in an issue granted.³¹ On the other hand, it has been held that the rule in equity applying to joinder or nonjoinder of parties obtains in prerogative

18. N.J.—In re Herbert's Estate, 192 A. 39, 40, 121 N.J.Eq. 564, quoting *Corpus Juris*.
N.Y.—Kohler v. Knapp, 1 Bradf.Surr. 341.

19. Ariz.—Sanders v. Sanders, 79 P. 2d 523, 52 Ariz. 156.

20. Md.—McComas v. Wiley, 104 A. 52, 132 Md. 406.

Mass.—Farrell v. Farrell, 12 N.E.2d 73—Glass v. Glass, 157 N.E. 621, 260 Mass. 562, 53 A.L.R. 1157—Harvard Trust Co. v. Frost, 154 N. E. 863, 258 Mass. 319.

N.J.—In re Herbert's Estate, 192 A. 39, 40, 121 N.J.Eq. 564, quoting *Corpus Juris*.

Okl.—Sam v. Sam, 45 P.2d 462, 172 Okl. 342.

Or.—In re Elder's Estate, 83 P.2d 477, 160 Or. 111, 199 A.L.R. 802—In re Anderson's Estate, 71 P. 2d 1013, 157 Or. 365—In re Johnson's Estate, 282 P. 1082, 131 Or. 235—In re Faling's Estate, 228 P. 321, 113 Or. 6, modified on other grounds 231 P. 148, 113 Or. 6.

15 C.J. p 1018 note 24.

In Illinois

(1) It has been held that in probate matters county courts have jurisdiction of an equitable character and may adopt the forms of equitable proceedings.—Adams v. Adams, 81 Ill.App. 637, affirmed 54 N.E. 958, 181 Ill. 210.

(2) But the probate court of Cook County is not a court of equity but

a court of law, and therefore legal rather than equitable rules must be applied.—In re Jogminas' Estate, 246 Ill.App. 518.

21. Miss.—Cowden v. Dobyns, 13 Miss. 82.

15 C.J. p 1018 note 25.

22. N.Y.—In re Zimmerman's Will, 172 N.Y.S. 80, 104 Misc. 516.

15 C.J. p 1018 note 26.

In Massachusetts proceedings in probate courts usually are not according to course of common law.—Blankenburg v. Commonwealth, 157 N.E. 693, 260 Mass. 369.

23. Mo.—Davis v. Johnson, 58 S.W. 2d 746, 332 Mo. 417, transferring, App., 47 S.W.2d 121.

In Montana, except as otherwise provided, the general rules of practice and procedure in civil matters apply to probate proceedings.—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 188 P. 137, 57 Mont. 315.

24. N.J.—In re Herbert's Estate, 192 A. 39, 40, 121 N.J.Eq. 564, quoting *Corpus Juris*.

N.Y.—Matter of Martin, 141 N.Y.S. 784, 80 Misc. 17—Campbell v. Logan, 2 Bradf.Surr. 90.

25. Md.—King v. Bork, 170 A. 524, 166 Md. 17—Schmidt v. Johnston, 140 A. 87, 154 Md. 125.

N.J.—In re Herbert's Estate, 192 A. 39, 40, 121 N.J.Eq. 564, quoting *Corpus Juris*.

Pa.—In re Cave's Estate, 26 Pa.Dist. & Co. 295.

15 C.J. p 1018 note 28.

Substance rather than form is sought in procedure in the orphans' court, except in those instances where a statute exacts a specified modal compliance, notwithstanding the practice in the orphans' court tends to conform to the flexible standards of courts of equity.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

26. Md.—Phillips v. Clark, 6 A.2d 220.

15 C.J. p 1018 note 29.

Surrogates should exercise the authorities accorded to them in a manner similar to that in which like powers are exercised by other tribunals.—In re Leary's Estate, 14 N. Y.S.2d 960, 172 Misc. 286.

27. Cal.—Texas Co. v. Bank of America Nat. Trust & Savings Ass'n, 53 P.2d 127, 5 Cal.2d 35—Mahoney v. National Surety Co., 264 P. 304, 89 Cal.App. 148.

Mo.—Bolz Cooperage Corporation v. Beardslee, 245 S.W. 611, 211 Mo. App. 109.

15 C.J. p 1018 note 30.

28. N.Y.—Matter of Gillender, 162 N.Y.S. 955, 98 Misc. 521.

29. Wis.—Simpson v. Cornish, 218 N.W. 193, 196 Wis. 125.

30. N.Y.—Tilden v. Dows, 2 Dem. Surr. 489.

31. Pa.—Whitaker's Est., 14 Phila. 289.

court³² and that the judge or surrogate may permit any person claiming an interest in the estate to intervene.³³ The court may at any time, however, bar from intervention in its processes persons who are strangers to the issue.³⁴

b. Process

No notice to parties is necessary unless required by statute, and even when required it may be waived.

Proceedings in a probate court being, as shown supra § 305, in the nature of proceedings in rem, no notice to parties is necessary unless required by statute.³⁵ Notice and opportunity to be heard is a matter of legislative favor and not essential to the jurisdiction of the court.³⁶ Where the giving of notice is directed by statute, however, such notice calls the entire world before the court which thereby gains jurisdiction over the estate and over all persons for the purpose of determining their rights therein.³⁷ The giving of the required statutory notice which serves the purpose of summons in ordinary actions, is waived by the appearance of the parties, and their participation in the proceedings.³⁸ A statute authorizing service by mail in civil actions is inapplicable to proceedings in the probate court,³⁹ but where the probate court requires a written notice and does not prescribe how it shall be served, service by mail is good if the notice is actually received by the addressee.⁴⁰ Where actual service of summons issued from a probate court is made, but the return of service is insufficient and

does not show good service, it is proper to allow an amendment.⁴¹ Under statutes vesting the court with discretion as to the manner of service on a nonresident, a service made pursuant to an order in strict accord with the statute confers jurisdiction upon the court.⁴² The proceedings of a probate court are presumed to have been regular, and, where the order shows that due notice was given to interested parties, it will be presumed that infant heirs received proper notice, and that the court had proper jurisdiction.⁴³

§ 307. Pleading and Evidence

- a. Pleading
- b. Evidence

a. Pleading

Technical strictness in pleading is not indispensable in probate court although the petition on which jurisdiction is based must show the authority of the court.

While general rules of pleading applicable to other civil actions may be applied in probate proceedings in the absence of statute specifically providing otherwise,⁴⁴ technical strictness in pleading in probate court is not indispensable,⁴⁵ and probate courts will not require the same strictness in pleadings as is required in a court of chancery, unless chancery proceedings are adopted;⁴⁶ nor are the strict rules of common-law pleading governing in other civil courts necessary in probate proceedings.⁴⁷ Nevertheless, a petition to a probate court is the founda-

32. N.J.—Bugbee v. Van Cleve, 134 A. 646, 99 N.J.Eq. 825, 100 N.J. Eq. 263.

33. N.Y.—Lawrence v. Parsons, 27 How.Pr. 26.

Right of every one

The orphans' court acting in rem, every one has a right by intervention to become a party to its proceedings.—Lowber's Lessee v. Doe, 2 Harr., Del., 139.

Legal interest

Interest which intervenor in proceeding in surrogate's court must have is legal interest in estate of deceased person on which surrogate's court has jurisdiction to adjudicate.—Matter of Heinze, 165 N.Y.S. 1017, 167 N.Y.S. 1104, 179 App.Div. 453, dismissed 118 N.E. 1062, 222 N.Y. 530.

34. N.Y.—In re Browning's Estate, 276 N.Y.S. 262, 153 Misc. 564.

35. Idaho.—Harkness v. Utah Power & Light Co., 291 P. 1051, 49 Idaho 756.

36. Minn.—In re Gilroy's Estates, 258 N.W. 584, 193 Minn. 349.

37. Cal.—Monk v. Morgan, 192 P. 1042, 49 Cal.App. 154.

False pleading and testimony

All an administrator is required to do in giving notice to heirs and others interested in the estate is to give the requisite statutory notices, and where an administrator caused such notices to be given, the probate court acquired full jurisdiction over nonresident heirs and their interest in the estate, notwithstanding the administrator falsely pleaded and testified that he and his sister were the sole heirs to the exclusion of such nonresidents.—Monk v. Morgan, supra.

38. Mont.—Matter of Davis, 89 P. 1133, 33 Mont. 539.

It is too late for respondent to question jurisdiction of orphans' court where he has filed answer to citation.—In re Bartlett's Estate, 19 Erie Co.L.J., Pa., 409.

39. Minn.—In re Nelson's Estate, 281 N.W. 218, 180 Minn. 570.

40. Minn.—In re Nelson's Estate, supra.

41. Idaho.—Call v. Rocky Mountain Bell Tel. Co., 102 P. 146, 16 Idaho 551, 133 Am.S.R. 135.

42. Pa.—In re Heinz's Estate, 169 A. 365, 313 Pa. 6.

43. Ohio.—Hamilton v. Stewart, 5 Ohio N.P.N.S., 553.

44. Ariz.—Sanders v. Sanders, 79 P. 2d 523, 52 Ariz. 156.

45. Me.—Appeal of Chaplin, 163 A. 774, 131 Me. 446.

Mo.—Murphy v. Pfeifer, App., 105 S. W.2d 39—Guthrie v. Fields, App., 299 S.W. 141—Shern v. Sims, App., 258 S.W. 1029—Smith v. Collins, App., 243 S.W. 249.
Or.—In re Anderson's Estate, 71 P.2d 1013, 157 Or. 365.

46. Miss.—Hurd v. Smith, 6 Miss. 562.

Neb.—Genau v. Abbott, 93 N.W. 942, 68 Neb. 117.
15 C.J. p 1019 note 36.

47. Iowa.—Lee v. Blumer, 179 N.W. 625, 189 Iowa 1145.

Tex.—Perdue v. Perdue, Civ.App., 208 S.W. 353, affirmed 217 S.W. 694, 220 S.W. 322, 110 Tex. 209.
15 C.J. p 1019 note 37.

Peculiar practice

The pleadings in the New York surrogate's court are peculiar to that court.—In re Walsh's Will, 176 N. Y.S. 701, 107 Misc. 475.

tion on which to base its jurisdiction, and it must state facts to show authority and power of the court to make the decree prayed for;⁴⁸ and general jurisdiction of the probate court attaches at once upon the presentation to it of a proper petition by some person entitled to take such action.⁴⁹ In some states no formal⁵⁰ or written⁵¹ pleadings are required in such courts, but where defendant does file an answer it should contain all defenses relied upon,⁵² and, where the parties submit a matter on pleadings, the court may properly dispose of the questions thus presented.⁵³ A petitioner desiring to controvert the allegations of an answer to his petition should file a replication thereto,⁵⁴ and should not be deprived of an opportunity to support his petition by evidence nor be bound by the allegations of the answer.⁵⁵

In some states pleadings in probate are subject to motions for more specific statement,⁵⁶ and to demurrer,⁵⁷ but in others there is no such thing as a demurrer in the probate court,⁵⁸ and a pleading in the form of a demurrer may be treated as an answer, or as an objection to the jurisdiction of the court, or as an exception to the sufficiency of the petition.⁵⁹ Although defendant's failure to plead is regarded as a tender of the general issue according

to one practice,⁶⁰ on failure to controvert the petition and supporting affidavit by answer or otherwise, the facts therein must be taken as true under some statutes,⁶¹ and, in an accounting, determination of a motion by a respondent to dismiss a defense set up in the answer of an adverse respondent necessarily involves the admission of all the allegations of the original petition as far as not denied by the answer, and all the allegations of the answer.⁶² A general denial does not satisfy the requirements of a probate court equity rule requiring full, direct, and specific answer to every material allegation in the petition.⁶³ Under a statute requiring every proceeding in the surrogate's court to be commenced by the filing of a petition, a provision of an answer seeking affirmative relief cannot be considered for such purpose.⁶⁴ Exercise of the statutory right of petitioner's attorney to verify the petition is not encouraged.⁶⁵

Where jurisdictional allegations are sufficient the court has authority, at any stage to the close of the pleadings, to allow amendment of merely formally incorrect pleading.⁶⁶

In Pennsylvania there is no such thing in the orphans' court as a case stated.⁶⁷

42. Wis.—In re Ott's Estate, 279 N. W. 618, 228 Wis. 462.
15 C.J. p 1019 note 38.

What constitutes sufficient petition

In probate court, a statement of facts constituting a cause of action is sufficient if filed in such form as to disclose nature of claim, and if sufficiently specific to bar another action on it.—Whitworth v. Monahan's Estate, App., 111 S.W.2d 931, transferred 100 S.W.2d 460, 329 Mo. 1123.

Petition and stipulations held sufficient

Or.—In re Baker's Estate, 67 P.2d 185, 156 Or. 256.

Petition held insufficient

Md.—Marbury v. Ward, 162 A. 919, 162 Md. 320.
Va.—Gooch v. Suhor, 92 S.E. 843, 131 Va. 35.

43. Minn.—In re Gilroy's Estates, 258 N.W. 534, 193 Minn. 349.

Substance rather than form or name of pleading, determines jurisdiction.—Sanders v. Sanders, 79 P.2d 523, 53 Ariz. 156.

44. Ill.—In re Roenke's Estate, 205 Ill.App. 366.

Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579—Hamill v. Hamill, 159 A. 247, 162 Md. 159, 82 A.L.R. 878—Horton v. Horton, 145 A. 355, 157 Md. 127—Simmons v. Hagner, 117 A. 759, 140 Md. 248—McComas v. Wiley, 104 A. 52, 132 Md. 406.

Mo.—Hall v. Greenwell, 85 S.W.2d 150, 231 Mo.App. 1093.

Okl.—Boyes' Estate v. Boyes, 87 P. 2d 1102, 184 Okl. 438.
15 C.J. p 1019 note 39.

51. Ill.—Thomson v. Barker, 102 Ill. App. 304, affirmed 65 N.E. 1092, 200 Ill. 465.

N.Y.—Matter of Sheldon, 144 N.Y.S. 94, 153 App.Div. 843.

Pa.—Matter of Lima, 2 Pearson 487.

R.I.—Robbins v. Taft, 12 R.I. 67.

15 C.J. p 1019 note 40.

52. Mo.—Sutton v. Libby, App., 201 S.W. 615.

53. Mo.—Bolz Cooperage Corporation v. Beardslee, 245 S.W. 611, 211 Mo.App. 109.

54. Md.—Horton v. Horton, 145 A. 355, 157 Md. 127.

55. Md.—Horton v. Horton, supra.

56. Iowa.—Lee v. Blumer, 179 N.W. 625, 189 Iowa 1145.

In New York, the surrogate will sometimes grant bill of particulars, in the exercise of the discretion of the court, when they relate to a claim for money.—In re Seymour's Estate, 182 N.Y.S. 726, 112 Misc. 216.

57. Iowa.—Lee v. Blumer, 179 N.W. 625, 189 Iowa 1145.

58. Md.—In re Hunter's Estate, 185 A. 327, 170 Md. 513—King v. Bork, 170 A. 524, 166 Md. 17—Hamill v.

Hamill, 159 A. 247, 162 Md. 159, 82 A.L.R. 878.

N.Y.—Kelly v. Langevin, 137 N.Y.S. 1099, 153 App.Div. 323—In re Eno's Estate, 180 N.Y.S. 889, 111 Misc. 69—In re Walsh's Will, 176 N.Y.S. 701, 107 Misc. 475.

59. Md.—In re Hunter's Estate, 185 A. 327, 170 Md. 513—Hamill v. Hamill, 159 A. 247, 162 Md. 159, 82 A.L.R. 878.

Vague petition subject to demurrer Md.—McComas v. Wiley, 104 A. 52, 132 Md. 406.

60. Mo.—Hall v. Greenwell, 85 S.W.2d 150, 231 Mo.App. 1093.

61. N.Y.—In re Ray's Estate, 270 N.Y.S. 333, 150 Misc. 728—In re French's Estate, 196 N.Y.S. 397, 119 Misc. 445.

62. N.Y.—In re New York L. Ins., etc., Co., 139 N.Y.S. 695.

63. Mass.—Bartholomew v. Waldorf System Incorporated, 196 N.E. 921, 291 Mass. 357.

64. N.Y.—In re Sabin, 191 N.Y.S. 766, 117 Misc. 656.

65. N.Y.—In re Ray's Estate, 270 N.Y.S. 333, 150 Misc. 728.

66. Me.—Appeal of Chaplin, 163 A. 774, 131 Me. 446.

67. Pa.—In re Morris's Estate, 9 Pa. Dist. & Co. 761.

b. Evidence

Rules of evidence applied in other tribunals apply in probate courts where relevant to the proceedings.

The probate court should conform its rules of evidence to those which are applied in other tribunals of the state,⁶⁸ although it has been said that technical common-law rules of evidence have little relation to probate proceedings.⁶⁹ Incompetent evidence should be excluded.⁷⁰ No pleading setting forth any interest in the property being required, if such pleading be filed it in no way fixes the burden of proof upon claimant.⁷¹

§ 308. Trial or Reference, Rehearing and New Trial

- a. Trial
- b. References
- c. Rehearing or new trial

a. Trial

- (1) In general
- (2) Questions of law and fact

(1) In General

Trial procedure in probate court is governed by the requirements of the statutes in the particular jurisdiction.

Compliance with statutes requiring notice of setting of trial is essential to the jurisdiction of the probate court to proceed therewith.⁷² A statute, applicable to probate courts, providing that, unless postponed or transferred to another court the trial of an action in a justice's court must commence at the expiration of one hour from the time specified in the summons for defendant's appearance, and must be continued without adjournment for more than twenty-four hours until all the issues are disposed of, does not ipso facto render a judgment of the probate court void for want of jurisdiction because of the fact that proofs are not made or judgment entered on the return day named in the summons.⁷³ Jurisdiction is not defeated by a hearing subsequent to the day fixed therefor had without an

order of adjournment.⁷⁴ A statute requiring testimony to be read to witnesses before signing has been held to relate to testimony taken before examiners in chancery, and to have no application to proceedings in a probate court.⁷⁵ It has been held that a court of probate may dismiss actions;⁷⁶ but it will not grant a motion for summary judgment on the pleadings where there are contested issues of fact, even though that practice may be permissible.⁷⁷ Even though defendant fails to appear at the time fixed for trial, where an issue of fact is tendered it is improper to enter a judgment for plaintiff, without requiring the submission of evidence tending to sustain his complaint.⁷⁸

Where the case is heard by an auditing judge, who is a representative of the court, he should generally pass upon the competency of witnesses and the admissibility of evidence rather than certify such questions to the court,⁷⁹ and his findings of fact will not be disturbed except for manifest error.⁸⁰ The auditing judge will not, however, pass on a plan proposed by the executor and trustee for carrying into effect a charitable bequest.⁸¹ Objections and exceptions cannot be taken in the probate court to the report of an auditor.⁸² When exceptions to the report of a master are filed the master should consider each exception seriatim, group similar ones, and concisely state to the court why he believes each exception is not well founded.⁸³

(2) Questions of Law and Fact

Issues of law are determined by the court, but the practice on determination of fact questions differs in different states, such questions being variously decided by the judge, by a jury in the probate court, or by a jury in a court of law.

In a civil action in the probate court in which defendant appears and presents issues of law, the court must determine the issues so presented.⁸⁴ Ordinarily, all proper issues of fact joined in probate proceedings like any civil action must be determined;⁸⁵ and the court may pass upon evidence,

63. N.Y.—Matter of Martin, 141 N. Y.S. 784, 80 Misc. 17.

69. N.Y.—In re Benjamin, 136 N.Y. S. 1070.

70. N.Y.—In re King, 172 N.Y.S. 868.

71. Okl.—Boyes' Estate v. Boyes, 87 P.2d 1102, 184 Okl. 438.

72. Idaho.—Johnson v. J. A. Barrett Auto Co., 4 P.2d 344, 51 Idaho 95.

73. Idaho.—Zimmerman v. Bradford-Kennedy Co., 95 P. 825, 14 Idaho 681.

74. S.D.—Van Camp v. Weber, 130 N.W. 591, 27 S.D. 276.

75. Md.—Gantt v. Trott, 68 A. 612, 107 Md. 325.

76. Neb.—Banks v. Uhl, 6 Neb. 145.

77. N.Y.—In re Waish's Estate, 296 N.Y.S. 542, 163 Misc. 104, affirmed 6 N.Y.S.2d 644, 255 App.Div. 709.

78. Idaho.—Hemminging v. Parks, 216 P. 1042, 37 Idaho 464.

79. Pa.—In re Rohn's Estate, 28 Pa. Dist. 490.

80. Pa.—In re Goodman's Estate, 28 Pa.Dist. 466—In re Kelly's Estate, 28 Pa.Dist. 87.

81. Pa.—In re Barnwell's Estate, 29 Pa.Dist. 317, affirmed 112 A. 535, 269 Pa. 443.

82. Mass.—Hodge v. Mackintosh, 143 N.E. 43, 248 Mass. 181.

83. Pa.—In re Hays' Estate, 33 Pa. Dist. & Co. 153.

84. Idaho.—Smith v. Clyne, 97 P. 40, 15 Idaho 254.

85. Cal.—In re Clifford's Estate, 60 P.2d 302, 16 Cal.App.2d 123.

either under the general rules of common law or of those prescribed by statute.⁸⁶

In some states the court of probate may judge the facts as a court,⁸⁷ and pass upon requests to find questions of law or fact,⁸⁸ it being held in some jurisdictions that he may make findings of fact and conclusions of law,⁸⁹ but is not required to do so,⁹⁰ and in others that the court should adopt appropriate findings respecting issues of fact,⁹¹ and where issues of law and of fact are properly presented the judge should pass upon them in the order presented.⁹²

In some jurisdictions provision is made for the disposition of controverted questions of fact by a jury in that court,⁹³ and in some cases the jury, as in equity proceedings, acts merely in an advisory capacity,⁹⁴ the inquisition with a jury not being a trial at law.⁹⁵ The surrogate as a judicial officer possesses the same inherent power as the justices of other courts to comment on the testimony or the conduct of a party, a witness, or an attorney appearing before him.⁹⁶

Under the practice in some states the probate

court may direct or award an issue,⁹⁷ and in proper cases may be required to grant relevant, material, and correctly drawn issues when presented.⁹⁸ Statutes authorizing the orphans' court to direct plenary proceedings in all cases of controversy in court and to make up and send to a court of law issues in plenary proceedings are of general application and apply in all cases of controversy in the jurisdiction of the orphans' courts, for which provision has not been otherwise made.⁹⁹ To warrant submission the pleadings must contain allegations which afford a sufficient basis to disclose the affirmation and denial of a material and relevant fact,¹ an "issue" within the rule being a single, certain, and material point issuing out of the allegations of the pleadings between the adverse parties;² and it is only in cases where the probate court has jurisdiction to determine the matter that it is authorized to send issues of fact to a court of law to be tried.³ An issue will not be awarded unless evidence raises a controlling disputable question of fact.⁴ The form of an issue is not required to state all the matters alleged in the pleadings,⁵ but should contain only a clear statement of the question of fact made by the plead-

83. Mass.—Eveleth v. Crouch, 15 Mass. 307.

N.Y.—Hoyt v. Jackson, 67 How.Pr. 57, 2 Dem.Surr. 443.
15 C.J. p 1020 note 52.

Refusal to allow evidence held improvident

Md.—Horton v. Horton, 145 A. 355, 157 Md. 127.

87. Pa.—Okeson's Appeal, 2 Grant 303.

15 C.J. p 1019 note 50.

88. N.Y.—Matter of Hoyt, 5 Dem. Surr. 234—Hartwell v. McMaster, 4 Redf.Surr. 383.

15 C.J. p 1023 note 91 [1].

89. N.Y.—In re Amend's Estate, 165 N.Y.S. 76, 100 Misc. 90.

15 C.J. p 1019 note 51 [a] (1).

90. Mass.—Mulloney v. Barnes, 164 N.E. 917, 266 Mass. 50.

N.Y.—In re Carpenter, 165 N.Y.S. 10, 178 App.Div. 165.

15 C.J. p 1019 note 51 [a] (2).

Equitable or mandatory proceeding

In probate proceeding by creditor of decedent's estate against executor to compel him to take action on claim, proceeding being either action of equitable cognizance or special mandatory proceeding, neither findings of fact nor conclusions of law were necessary to sustain order dismissing proceeding.—In re King's Estate, 172 P. 1167, 102 Wash. 299.

91. Cal.—In re Clifford's Estate, 60 P.2d 302, 16 Cal.App.2d 123.

92. Idaho.—Kent v. Dalrymple, 132 P. 301, 23 Idaho 694.

93. N.Y.—In re Burnham's Will, 234 N.Y. 475, 138 N.E. 413, affirming 194 N.Y.S. 811, 201 App.Div. 621—In re Walsh's Will, 176 N.Y.S. 701, 107 Misc. 475.
15 C.J. p 1019 note 48.

94. N.Y.—In re Blair's Will, 272 N.Y.S. 864, 242 App.Div. 689, modifying 271 N.Y.S. 118, 151 Misc. 192—In re Hoh's Estate, 265 N.Y.S. 408, 147 Misc. 498, affirmed In re Hoh's Will, 269 N.Y.S. 916, 240 App.Div. 1006.

95. N.Y.—In re Walsh's Will, 176 N.Y.S. 701, 107 Misc. 475.

96. N.Y.—In re Wellington's Estate, 289 N.Y. 1005, 160 Misc. 383, denying modification 276 N.Y.S. 946, 154 Misc. 271.

97. Pa.—In re Cross' Estate, 122 A. 267, 278 Pa. 170—In re Hennessy's Estate, 31 Berks Co.L.J. 300.
15 C.J. p 1019 note 49.

Framing issues

(1) Under Gen.L. c 215 § 16, power of probate court to frame issues is as broad only as that previously vested in supreme judicial court; and, generally, issues are framed for trial to jury only in such cases in probate court as involve probate of wills.—Fuller v. Sylvia, 133 N.E. 384, 240 Mass. 49.

(2) Furthermore there should be veritable controversy, and facts presented on which to found hope for result favorable to moving party, and unless such condition appears, refusal to frame issues will not be

reversed.—Cummins v. McCawley, 135 N.E. 479, 241 Mass. 427—Fuller v. Sylvia, supra.

98. Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579—Flaks v. Flaks, 196 A. 116, 173 Md. 358—Richardson v. Smith, 30 A. 571, 80 Md. 96.

Pa.—In re Cross' Estate, 122 A. 267, 278 Pa. 170—In re Blaszcak's Estate, 90 Pa.Super. 569.

99. Md.—Flaks v. Flaks, 196 A. 116, 173 Md. 358.

Proceeding is "plenary" within such statute where a petition or bill is filed and the parties against whom it is filed appear and answer.—Flaks v. Flaks, supra.

1. Md.—Harlan v. Lee, 199 A. 862, 174 Md. 579.

2. Md.—Harlan v. Lee, supra—Simmons v. Hagner, 117 A. 759, 140 Md. 248—Richardson v. Smith, 30 A. 571, 80 Md. 96.

3. Md.—Fowler v. Brady, 73 A. 15, 110 Md. 204.

Pa.—In re Turner, 90 A. 916, 244 Pa. 568.

15 C.J. p 1020 note 54.

4. Pa.—In re Cummins' Estate, 13 Wash.Co. 80.

Evidence held insufficient

Md.—Wilson v. Jarrell, 112 A. 921, 137 Md. 558.

Pa.—In re Walkinshaw's Estate, 118 A. 766, 275 Pa. 121—In re Walker's Estate, 53 York Leg.Rec. 1.

5. Md.—Simmons v. Hagner, 117 A. 759, 140 Mo. 248.

ings,⁶ and objections thereto should be made to the petition for the issue.⁷ The trial court, with respect to trial of issues which have been sent to it, has a limited statutory jurisdiction as a court ancillary to the orphans' court, and can not review the proceedings of that court with respect to the framing of the issues nor consider the propriety or sufficiency of the pleadings upon which the issues were founded,⁸ nor can the trial court disturb or alter the issue framed by the orphans' court;⁹ questions as to the form of issues or to the propriety or regularity of the proceeding in which issues were framed, or the sufficiency of pleadings to support the issues, can be raised only by appealing from the order transmitting the issues.¹⁰ The orphans' court is bound to accept the conclusions of the jury as final,¹¹ and to make them effective by proper orders or decrees.¹²

Separate trial of issues. A statute authorizing courts of record to try some issues separately before the others has been held applicable to courts of probate jurisdiction.¹³

b. References

A reference may be awarded in certain cases, and the referee has the right to correct errors in his report.

A surrogate has been held to have no authority to refer part of an account and objections thereto to a referee.¹⁴ However, on an application by an attorney for an order determining and enforcing his alleged lien, a surrogate has been held authorized to appoint a referee to take testimony and to report as to the value of services rendered by the attorney to a deceased administrator prior to the issuance of letters of administration;¹⁵ and a reference will be ordered where a beneficiary's allegations of fraud in procuring a compromise agreement adjusting claims in a contested probate

proceeding are denied.¹⁶ The referee has the right to file an amended report correcting an error in overlooking evidence, his report not being the decision of the court.¹⁷

c. Rehearing or New Trial

On a proper showing there may be a rehearing or new trial when authorized by statute.

Statutes regulating the granting of new trials or rehearings in the court of general jurisdiction are inapplicable to proceedings in probate court,¹⁸ although they may be made applicable by other statutes.¹⁹ The power of the court to grant a rehearing is limited to the causes enumerated in the controlling statute²⁰ and must be exercised within the time prescribed thereby.²¹ Where there is no express statutory limitation as to the time in which a defeated party may ask the court to review its action, the analogous limitation of the right of appeal will govern.²² A statute authorizing a surrogate to grant a new trial or a new hearing for fraud, newly discovered evidence, or other sufficient cause, limits the power to such causes, and the surrogate is without authority to grant a motion *ex gratia*;²³ and an order granting such new trial cannot be sustained where no case has been made and it does not appear that the motion was heard upon the pleadings and affidavits by consent.²⁴ To warrant a rehearing or new trial because of newly discovered evidence it must appear that the evidence was discovered since the trial, and could not, by the exercise of reasonable diligence, have been obtained and used upon the trial,²⁵ and that its character is such that it would probably have changed the result if submitted upon the trial;²⁶ and an application by the state comptroller for a new trial to contest the matter of decedent's residence must show by affidavits that the individual who was state comptroller at the time of trial did not have knowledge

6. Form held not too indefinite

Issue as to whether the executor was indebted to the estate of the deceased and if so how much.—*Simmons v. Hagner*, *supra*.

7. Md.—*Simmons v. Hagner*, *supra*.
8. Md.—*Holland v. Enright*, 175 A. 466, 167 Md. 604.

9. Pa.—In *re McGovern's Estate*, 186 A. 89, 322 Pa. 379.

10. Md.—*Holland v. Enright*, 175 A. 466, 167 Md. 604.

11. Md.—*Flaks v. Flaks*, 196 A. 116, 173 Md. 358.

Pa.—In *re Cross' Estate*, 122 A. 267, 273 Pa. 170.

15 C.J. p 1019 note 49 [b].

12. Md.—*Flaks v. Flaks*, 196 A. 116, 173 Md. 358.

13. N.Y.—*Matter of Fox*, 152 N.Y.S. 431, 166 App.Div. 718.

14. N.Y.—*Matter of Kent*, 155 N.Y.S. 383, 92 Misc. 113.

15. N.Y.—In *re Nocton*, 162 N.Y.S. 215.

16. N.Y.—In *re Frame's Estate*, 219 N.Y.S. 759, 123 Misc. 788.

17. N.Y.—In *re Morris' Estate*, 276 N.Y.S. 254, 153 Misc. 905.

18. Kan.—In *re Jones' Estate*, 27 P. 2d 237, 138 Kan. 581, rehearing denied *First Colored Baptist Church v. Caldwell*, 30 P.2d 144, 139 Kan. 45.

19. Ala.—*Bean v. Harrison*, 104 So. 244, 213 Ala. 33.

20. N.D.—In *re Hafey's Estate*, 202 N.W. 138, 52 N.D. 262—*Reichert v.*

Reichert, 170 N.W. 621, 41 N.D. 253.

21. N.D.—In *re Hafey's Estate*, 202 N.W. 138, 52 N.D. 262—*Reichert v. Reichert*, 170 N.W. 621, 41 N.D. 253.

22. N.J.—In *re Roberson*, 123 A. 721, 98 N.J.Eq. 672.

23. N.Y.—In *re Van Ness*, 140 N.Y.S. 576, 4 N.Y.Civ.Proc., N.S., 33.

24. N.Y.—*Matter of Rose*, 137 N.Y.S. 1079, 153 App.Div. 263.

25. N.J.—In *re Roberson*, 123 A. 721, 98 N.J.Eq. 672.

N.Y.—In *re Gates' Estate*, 170 N.Y.S. 299, 103 Misc. 465.

26. N.J.—In *re Roberson*, 123 A. 721, 98 N.J.Eq. 672.

N.Y.—In *re Gates' Estate*, 170 N.Y.S. 299, 103 Misc. 465.

of the alleged newly discovered facts concerning the domicile of deceased.²⁷ An application, based upon an unverified statement of the state comptroller, by his counsel, will not be considered.²⁸ The authority of probate courts to grant rehearings has been held not to extend to the granting of rehearings after decrees in drainage proceedings,²⁹ and it has been decided that a surrogate cannot grant a reargument of questions finally determined and disposed of by his predecessor.³⁰ A judge, after findings of fact have been filed and a final decree entered, is not bound to reopen the hearing for reception of evidence on application of one who did not appear at the hearing, the entry of the final decree ending the jurisdiction of the probate court, except on a bill of review, save in extreme instances.³¹

§ 309. Judgments and Orders

- a. In general
- b. Enforcement
- c. Opening, amendment, or vacation
- d. Review

a. In General

Probate courts are empowered to make orders and judgments necessary to effectuate their jurisdiction. Generally these should be in writing, and mere irregularities will not invalidate them, nor are they subject to collateral attack, although in proper cases they are liable to direct attack.

Generally speaking, the final conclusion of a probate court is a judgment,³² but in some jurisdictions

it is termed a decree, not a judgment.³³ A decree is the judgment of the court.³⁴

Probate and like courts may make the necessary orders to effectuate their jurisdiction.³⁵ An order or decree of a probate court need not recite the existence of the jurisdictional facts,³⁶ nor need it be drawn up at length during the session;³⁷ but it should be in writing³⁸ and signed by the judge,³⁹ although in the absence of statute⁴⁰ a written decision as distinguished from a final order or judgment, is not required.⁴¹ Probate courts can render judgments nunc pro tunc.⁴² Whether an ordinary's judgment is that of a court of ordinary or of the ordinary acting in a ministerial capacity is determinable by the act of the ordinary.⁴³

Mere irregularities or failure in procedural matters will not invalidate judgments in probate matters;⁴⁴ but a judgment is void on its face where the docket of the court shows insufficient notice of setting of case for trial.⁴⁵ So a judgment entered by default after timely oral answers by defendant which the judge failed to enter in his docket, as required by statute, is premature and void;⁴⁶ and an order made without the filing of a petition respecting a matter within the jurisdiction of the court has also been held void.⁴⁷ The court will not be held to have acted in excess of its jurisdiction, however, unless it clearly appears that it entered an unauthorized decree.⁴⁸ A statute providing that, where there is no contest, the hearing in the district court of a matter of probate may be had at any place within the judicial district to which the

27. N.Y.—In re Gates' Estate, supra.

28. N.Y.—In re Gates' Estate, supra.

29. Mich.—Rodgers v. Huntley, 131 N.W. 524, 166 Mich. 129.

30. N.Y.—Melcher v. Stevens, 1 Dem.Surr. 123.

31. Mass.—Baker v. Barstow, 142 N.E. 752, 248 Mass. 266.

Bill of review see *infra* § 309 d. Opening, amendment, or vacation of decree see *infra* § 309 c.

32. U.S.—Owsley v. Central Trust Co., D.C.N.Y., 196 F. 412, 415.

33 C.J. p 1048 note 5.

34. Or.—In re Johnson's Estate, 283 P. 1082, 131 Or. 235.

35. Cal.—Kindig v. Palos Verdes Homes Ass'n, 81 P.2d 645, 23 Cal. App.2d 349.

36. Mo.—Yeoman v. Younger, 83 Mo. 424.

Application

County courts, in exercise of their probate jurisdiction, may execute two kinds of orders, those based on

written application, and orders which they may make on their own motion, without written application.—Tyvand v. McDonnell, 164 N.W. 1, 37 N. D. 251.

36. Cal.—In re Dam's Estate, 14 P. 2d 162, 126 Cal.App. 70.

Okl.—Cooper v. Newcomb, 174 P. 1029, 73 Okl. 53.

15 C.J. p 1020 note 66.

37. Pa.—Hartman's Appeal, 21 Pa. 483.

38. S.C.—In re Willcox, 160 S.E. 260, 162 S.C. 133.

15 C.J. p 1020 note 65 [a].

39. N.Y.—McNaughton v. Chave, 5 Abb.N.Cas. 225.

15 C.J. p 1020 note 68.

40. "Decision in writing"

Under requirement that surrogate trying a case without a jury file a "decision in writing" directing the decree to be entered, surrogate's opinion reciting his conclusion, with direction to submit order on notice accordingly, was held equivalent to such a decision in writing.—In re Booth's Will, 281 N.Y.S. 564, 224 App.

Div. 616, resetting order 231 N.Y.S. 218, 224 App.Div. 363, which reversed In re Booth's Estate, 224 N.Y.S. 371, 138 Misc. 332.

No power to alter

Surrogate's court has no power to alter decision previously rendered.—In re Scheffel's Estate, 281 N.Y.S. 957, 156 Misc. 443.

41. Hawaii.—In re Mansbridge's Estate, 29 Hawaii 73.

42. Ala.—Whitaker v. Kennamer, 155 So. 855, 229 Ala. 80.

43. Ga.—Morse v. Caldwell, 191 S.E. 479, 55 Ga.App. 804.

44. Tex.—Hannom v. Henson, Com. App., 15 S.W.2d 579, affirming, Civ. App., 7 S.W.2d 613.

45. Idaho.—Johnson v. J. A. Barrett Auto Co., 4 P.2d 344, 51 Idaho 95.

46. U.S.—In re Nelson, D.C.Idaho, 36 F.2d 979.

47. Minn.—In re Carpenter's Guardianship, 281 N.W. 867, 203 Minn. 477.

48. Okl.—Littlehead v. Mount, 227 P. 98, 99 Okl. 225.

county in which the business is pending belongs does not render void for want of jurisdiction an order entered by consent within the judicial district, although not within the county, in which the probate proceedings were pending.⁴⁹

Decrees of probate courts in matters of probate, within the authority conferred upon them by law, are, when not appealed from, conclusive,⁵⁰ and entitled to like presumptions as are accorded judgments of a court of general jurisdiction.⁵¹ Such decrees are binding on common-law courts,⁵² and cannot be set aside in equity, even for fraud.⁵³ They import absolute verity;⁵⁴ and in accordance with the rule stated in the C.J.S. title Judgments § 407, also 34 C.J. p. 518 note 14, probate proceedings and the orders and decrees of courts of probate jurisdiction are not subject to collateral attack.⁵⁵ However, orders and decrees made in probate occupy no different status from orders and judgments in civil actions as respects the power of an equity court to set aside a judgment or order.⁵⁶ Where there is any defect in the constructive notice to persons interested in the estate to appear, and parties interested fail to receive such constructive notice, all subsequent action of the court based thereon is subject to attack either in that or in a later equitable proceeding.⁵⁷ It has also been said that, until an estate is completely administered, any previous

order entered therein may be directly attacked in the probate court when application is made for another order which involves a further step in the administration;⁵⁸ but this rule has been held inapplicable as to prior intermediary appealable orders which are final unless appealed from.⁵⁹ A proceeding to set aside a voidable final decree on the entire proceedings is a new proceeding by direct attack⁶⁰ whether brought in equity or addressed to the probate court.⁶¹

b. Enforcement

Probate courts may enforce their judgments by appropriate process.

Probate courts may enforce their judgments by execution or other appropriate process;⁶² but it has been held that they have no power to inflict a fine and then commit under a statute giving power to enforce all lawful orders, processes, etc., by attachment of the person.⁶³ A statute authorizing an execution to enforce a judgment should be confined to formal trials where issues are joined.⁶⁴

c. Opening, Amendment, or Vacation

On proper notice and for good cause a court of probate may amend, correct, open or vacate its orders or judgments, provided the proceeding is timely taken.

A court of probate may, like other courts, amend

49. Iowa.—Steiner v. Lenz, 81 N.W. 190, 110 Iowa 49.

50. U.S.—Caesar v. Burgess, C.C.A. Okl., 103 F.2d 503.

Me.—In re Neely's Estate, 1 A.2d 772, 136 Me. 79.

N.Y.—In re Bloomingdale's Estate, 9 N.Y.S.2d 333, 169 Misc. 968.

Unless vacated or revoked, probate decrees in matters within its jurisdiction are conclusive, but to have this effect, using term "jurisdiction" in its strict sense, it must appear, not only that probate court had jurisdiction over parties and cause, but also that all proceedings prescribed by law were rigidly complied with.—In re Thompson, 102 A. 303, 116 Me. 473.

51. U.S.—Caesar v. Burgess, C.C.A. Okl., 103 F.2d 503.

Okl.—Seal v. Banes, 35 P.2d 704, 168 Okl. 550—Moffet v. Jones, 169 P. 652, 67 Okl. 171.

52. Me.—In re Neely's Estate, 1 A.2d 772, 136 Me. 79.

53. Me.—In re Neely's Estate, supra.

54. Ohio.—Reitz v. Smith, 10 N.E.2d 150, 56 Ohio App. 72—Robinson v. Dunn, 17 Ohio Cir.Ct., N.S., 292, affirmed 87 Ohio St. 472.

Or.—Cole v. Marvin, 193 P., 828, 98 Or. 175.

Decree denying probate of lost will, reciting that it was rendered at a special term held on a certain day, imports absolute verity.—In re Griffin, 59 So. 303, 177 Ala. 243.

55. Ill.—Ubowich v. Northern Trust Co., 281 Ill.App. 109.

Minn.—De Wolf v. Ericson, 220 N.W. 406, 175 Minn. 68.

Ohio.—Reitz v. Smith, 10 N.E.2d 150, 56 Ohio App. 72—Robinson v. Dunn, 17 Ohio Cir.Ct., N.S., 292, affirmed 87 Ohio St. 472.

Or.—Cole v. Marvin, 193 P. 828, 98 Or. 175.

Pa.—Divine v. Skrotzky, 8 Pa.Dist. & Co. 717.

15 C.J. p 1021 note 82.

56. Mont.—Minter v. Minter, 62 P. 2d 233, 103 Mont. 219.

57. Cal.—Monk v. Morgan, 192 P. 1042, 49 Cal.App. 154.

58. Ill.—Ford v. Ford, 117 Ill.App. 502.

59. Minn.—In re Firlie's Estate, 253 N.W. 889, 191 Minn. 233.

60. Minn.—In re Koffel's Estate, 222 N.W. 68, 175 Minn. 524.

61. Utah.—In re Phillips' Estate, 44 P.2d 699, 86 Utah 358.

Modification or vacation of judgment by probate court see infra § 309 c.

62. Mo.—Yeoman v. Younger, 83 Mo. 424.

Enforcement against person

Orphans' court has power to enforce decree against person where it has jurisdiction over person and subject matter.—In re Braunschweiger's Estate, 185 A. 753, 322 Pa. 394.

Arrest

U.S.—Ex parte Merrill, D.C.Mich., 215 F. 778.

Mich.—Ex parte Merrill, 167 N.W. 30, 200 Mich. 244.

Summary process

Ill.—Hicks v. Monahan, 209 Ill.App. 516.

Summary proceeding against sheriff

Under statute probate court is authorized to render judgment in summary proceeding against sheriff for failure to make execution on judgment.—Grissett v. Hughes, 119 So. 657, 218 Ala. 621.

Statute held constitutional

Statute authorizing issuance of warrant by probate court and arrest of executor, who refused to comply with order to pay over dividends.—Ex parte Merrill, 167 N.W. 30, 200 Mich. 244.

53. N.Y.—In re Watson, 5 Lans. 466, appeal dismissed 69 N.Y. 536.

64. Cal.—Zagoren v. Hall, 10 P.2d 202, 122 Cal.App. 460.

or correct,⁶⁵ or open or vacate,⁶⁶ its judgments or orders. If any time is prescribed therefor by statute, this power must be exercised within that time;⁶⁷ and the power does not as a rule exist after the expiration of the term at which the judgment or order was rendered or made,⁶⁸ except with respect to the correction of purely clerical errors,⁶⁹ or in cases of fraud⁷⁰ or accident or mistake,⁷¹ nor, in the absence of fraud or mistake, after expiration of the time for appeal.⁷² However, a probate court has authority, at a subsequent term to which a mat-

ter has been continued, to enter an order modifying its original order entered at the prior term.⁷³ Even though terms of the probate court have been abolished by statute, an application to set aside an order of such court must be made within a reasonable time,⁷⁴ which it has been considered should not exceed six months.⁷⁵ In proceedings involving the estate of a minor, the court may, upon proper notice and for good cause, modify or vacate any order at any time prior to the majority of the minor.⁷⁶

65. Mass.—*Knowles v. Newhall*, 21 N.E.2d 942—*McLaughlin v. Feerick*, 176 N.E. 779, 276 Mass. 150—*Goss v. Donnell*, 161 N.E. 896, 263 Mass. 521—*Fuller v. Fuller*, 158 N.E. 333, 261 Mass. 82—*Burgess v. Burgess*, 152 N.E. 75, 256 Mass. 99.

N.H.—*Town of Raymond v. Goodrich*, 116 A. 38, 80 N.H. 215.

Pa.—*In re Husband's Estate*, 182 A. 72, 120 Pa.Super. 85—*McCurdy's Estate*, 3 Pa.Dist. & Co. 735. 15 C.J. p 1020 note 74.

Power liberally exercised

The orphans' court has power, not only under statute, but under its inherent power, to correct an erroneous decree, and under such power it may even protect parties from their own mistakes and where no rights have been changed in consequence of the decree such power of correction will be liberally exercised.—*In re Chappell's Estate*, 107 A. 846, 264 Pa. 436—*In re Fitzgerald's Estate*, 26 Pa. Dist. 796.

66. Idaho.—*Luke v. Kettenbach*, 181 P. 705, 32 Idaho 191.

Me.—*In re Neely's Estate*, 1 A.2d 772, 136 Me. 79—*In re Baker's Estate*, 195 A. 202, 135 Me. 277.

Mass.—*Knowles v. Newhall*, 21 N.E. 2d 942—*Dolan v. Roy*, 190 N.E. 717, 286 Mass. 519.

Minn.—*In re Koffel's Estate*, 222 N. W. 63, 175 Minn. 524.

Mo.—*State ex rel. Lefholz v. McCracken*, 95 S.W.2d 1239, 231 Mo. App. 870—*State ex rel. Gregory v. Henderson*, 88 S.W.2d 893, 230 Mo. App. 1.

N.H.—*Town of Raymond v. Goodrich*, 116 A. 38, 80 N.H. 215.

Pa.—*In re Huff's Estate*, 149 A. 179, 299 Pa. 200—*In re Devine's Estate*, 145 A. 300, 295 Pa. 333.

Wash.—*In re Olson's Estate*, 77 P.2d 781, 194 Wash. 219. 15 C.J. p 1020 note 75.

In Connecticut

While probate courts may modify and revoke ex parte orders, they have no power to set aside a final decree rendered after due notice and hearing of all parties interested.—*Hennessey v. Denihan*, 149 A. 259, 110 Conn. 646—*Schutte's Appeal*, 97 A. 906, 90 Conn. 529.

In Ohio

(1) Prior to the adoption of Gen. Code § 10501-17, effective Jan. 1, 1932, the probate court had no power to vacate or modify its orders or judgments.—*Abicht v. O'Donnell*, 3 N.E.2d 993, 52 Ohio App. 513—*Village of Mayfield Heights v. Village of Gates Mills*, 188 N.E. 758, 48 Ohio App. 349.

(2) Under that statute giving probate court same power as common pleas court to vacate or modify judgments, however, probate court was held authorized to set aside judgment of settlement of final account on ground of fraud after lapse of two and one-half years, where such power was not limited either by constitution or statute.—*Abicht v. O'Donnell*, supra.

Independent remedy

The statute authorizing a claimant whose claim against an estate is disallowed to sue in the circuit court is an independent remedy, and does not affect the right to apply to the county court to have an order disallowing his claim set aside.—*In re Stroup's Estate*, 166 N.W. 155, 40 S.D. 37.

Validity and construction of statute

Statute authorizing surrogates to open, vacate, or modify decree or order made in their court or grant new trial was held not unconstitutional and not to conflict with statute providing that only orphans' court shall hear and decide disputes respecting existence of will; nor was such statute repealed by subsequent enactment.—*In re Kellner's Estate*, 165 A. 585, 11 N.J.Misc. 201.

67. N.D.—*Reichert v. Reichert*, 170 N.W. 621, 41 N.D. 253.

Under Minnesota statute probate court is authorized to relieve party from his mistake, inadvertence, surprise, or excusable neglect within one year after notice.—*In re Simon's Estate*, 246 N.W. 39, 187 Minn. 399.

68. Ala.—*Dyer v. Lahr*, 159 So. 84, 229 Ala. 621.

15 C.J. p 1021 note 76.

In Illinois a probate court may vacate, and set aside an order entered at a prior term, its jurisdiction over an estate continuing until the estate

is finally closed and distributed.—*In re Turner's Estate*, 275 Ill.App. 366.

69. Minn.—*In re Simon's Estate*, 246 N.W. 31, 187 Minn. 399. 15 C.J. p 1021 note 77.

Making judgment read as intended

The court may at any time make the judgment read as intended.

Ala.—*Dyer v. Lahr*, 159 So. 84, 229 Ala. 621.

Minn.—*In re Simon's Estate*, 246 N. W. 31, 187 Minn. 399—*First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co.*, 203 N.W. 612, 163 Minn. 168.

70. Minn.—*In re Simon's Estate*, 246 N.W. 31, 187 Minn. 399.

Tex.—*Kansas City Life Ins. Co. v. McLaughlin*, Civ.App., 64 S.W.2d 1030.

15 C.J. p 1021 note 73.

71. Tex.—*Kansas City Life Ins. Co. v. McLaughlin*, supra.

15 C.J. p 1021 note 78.

72. Minn.—*In re Simon's Estate*, 246 N.W. 31, 187 Minn. 399.

15 C.J. p 1020 note 74 [c].

Under the New Jersey statute, however, the surrogate has authority to open his decree after expiration of the time for appeal.—*In re Kellner's Estate*, 165 A. 565, 11 N.J.Misc. 201.

73. Kan.—*Clark v. Andrews*, 13 P. 2d 294, 136 Kan. 23.

74. Idaho.—*Chandler v. Kootenai County Probate Ct.*, 141 P. 635, 26 Idaho 173.

However, in Pennsylvania a contention that in the absence of fraud an orphans' court has no power to modify or amend a decree after the term when it was entered, was held without merit where there were no terms in the orphans' court.—*In re Potter's Estate*, 13 Pa.Dist. & Co. 667.

75. Idaho.—*Chandler v. Kootenai County Probate Ct.*, 141 P. 635, 26 Idaho 173.

76. Okl.—*Tucker v. Leonard*, 183 P. 907, 76 Okl. 16—*In re Johnson*, 179 P. 605, 72 Okl. 174.

The authority of the court rests on clear proof that the decree was procured by accident or mistake or by fraud.⁷⁷ A statute authorizing the surrogate to open, vacate, modify, or set aside a decree for fraud, newly discovered evidence, clerical error, or other sufficient cause inferentially denies such power in other cases,⁷⁸ and the surrogate has no power to vacate or modify the decree for judicial error or error of law,⁷⁹ the words "other sufficient cause" meaning cause ejusdem generis,⁸⁰ but the power exists in the specified cases⁸¹ or where jurisdiction has been mistakenly assumed,⁸² and the surrogate has jurisdiction to reopen or modify in the interests of justice.⁸³ The fraud or newly discovered evidence must, however, relate to the act of probate and not the existence of the will.⁸⁴ Statutes relating to relief from default judgments do not apply where defendant resists claims based thereon on the ground that such judgments were prematurely entered.⁸⁵

The power of the probate court to vacate or modify a decree must be exercised in the same manner as a court of record and of general jurisdiction ex-

ercises the same power.⁸⁶ A party interested in having the decree stand should have the right to contest allegations of grounds for revoking it,⁸⁷ and the court has no authority to vacate the order or decree without notice to the interested parties,⁸⁸ but such notice need not be served upon persons who will be affected by the order but who have not appeared in the probate proceeding.⁸⁹ In order to be entitled to the relief, it has been held that applicant must demonstrate the merits of his cause.⁹⁰ A petition to open the decree is addressed to the sound discretion of the court,⁹¹ and decrees should not be vacated without careful consideration,⁹² but in vacating a decree the judge can draw on his personal knowledge⁹³ or obtain information from any source in ascertaining the facts on which to base his action.⁹⁴

d. Review

The court has power to allow a review of its decree.

The probate court being, as shown supra § 302, within its jurisdiction, a court of equity, it has inherent power to allow a bill of review.⁹⁵ The

77. Mass.—Untersee v. Untersee, 199 N.E. 316 293 Mass. 132—Fidelity & Casualty Co. v. Withington, 118 N.E. 902, 270 Mass. 537.

78. N.Y.—In re Ernest's Estate, 14 N.Y.S.2d 912, 257 App.Div. 617—In re White's Estate, 10 N.Y.S.2d 983, 170 Misc. 657—In re Bloomington's Estate, 9 N.Y.S.2d 333, 169 Misc. 968—In re Rosenthal's Estate, 252 N.Y.S. 596, 141 Misc. 404.

N.D.—Reichert v. Reichert, 170 N.W. 621, 41 N.D. 253.
15 C.J. p 1020 note 75 [1] (2).

Limit of power

Surrogate's power to set aside decree for "other sufficient cause" is limited to cases of obvious clerical error, lack of jurisdiction, or newly discovered evidence warranting new trial, and surrogate has no discretion to reopen determination fairly arrived at after due hearing and full information.—In re Dunne's Estate, 247 N.Y.S. 636, 138 Misc. 840.

79. N.Y.—In re Brennan's Will, 166 N.E. 797, 251 N.Y. 39—In re Chapala's Will, 259 N.Y.S. 950, 236 App. Div. 805.
15 C.J. p 1020 note 75 [o].

80. N.Y.—In re Barker's Estate, 293 N.Y.S. 199, 249 App.Div. 336, affirming 287 N.Y.S. 841, 158 Misc. 803, reversed on other grounds 18 N.E.2d 656, 279 N.Y. 449—In re Droney's Estate, 248 N.Y.S. 449, 231 App.Div. 674—In re Starbuck, 225 N.Y.S. 113, 221 App.Div. 702, affirmed 162 N.E. 522, 248 N.Y. 555—In re Jagnow's Estate, 266 N.Y. 785, 148 Misc. 657—In re

Dunne's Estate, 247 N.Y.S. 636, 138 Misc. 840.

Discretion of court

Question whether other sufficient cause is established is addressed to judicial discretion.—In re Dittmar's Estate, 276 N.Y.S. 579, 154 Misc. 28.

81. N.Y.—In re Jagnow's Estate, 266 N.Y.S. 785, 148 Misc. 657.
15 C.J. p 1020 note 75 [a].

Fraud

Surrogate's court has power to vacate decree procured by fraud.—In re Dittmar's Estate, 276 N.Y.S. 579, 154 Misc. 28.

82. N.Y.—In re Jagnow's Estate, 266 N.Y.S. 785, 148 Misc. 657.

Lapse of time immaterial

In the absence of legislative instructions on the exercise of its power, the surrogate's court, without regard to lapse of time, may vacate a decree void for lack of jurisdiction.—In re Tucker's Estate, 178 N.Y.S. 446, 108 Misc. 425.

83. N.Y.—In re Henderson's Estate, 52 N.E. 183, 157 N.Y. 423—In re Fuller's Ex'rs, 237 N.Y.S. 207, 227 App.Div. 801, affirmed 173 N.E. 847, 254 N.Y. 519, amendment of remittitur denied 173 N.E. 863, 254 N.Y. 564.
15 C.J. p 1020 note 75 [1] (1).

84. N.J.—In re Kellner's Estate, 165 A. 585, 11 N.J.Misc. 201.

85. U.S.—In re Nelson, D.C.Idaho, 36 F.2d 979.

86. N.Y.—In re Gori's Will, 222 N.Y.S. 250, 129 Misc. 541.

15 C.J. p 1020 note 75 [a], [b].

87. Mass.—Fidelity & Casualty Co. v. Withington, 118 N.E. 902, 229 Mass. 537.

88. Minn.—In re Koffel's Estate, 222 N.W. 68, 175 Minn. 524.

Okl.—Daniels v. Barnett, 253 P. 300, 122 Okl. 202.

15 C.J. p 1020 note 75 [1].

89. Cal.—Lilienkamp v. Superior Court of Los Angeles County, App. 85 P.2d 577.

90. N.Y.—In re Miller's Will, 295 N.Y.S. 943, 162 Misc. 563, affirmed 300 N.Y.S. 778, 252 App.Div. 872.

Finding held unnecessary

Probate court could vacate decree inadvertently allowing executrix' account without notice to residuary legatee's attorney who had entered appearance, and preliminary finding that legatee had meritorious controversy was unnecessary.—Dolan v. Roy, 190 N.E. 717, 236 Mass. 519.

91. Mich.—In re State Highway Com'r, 279 N.W. 883, 234 Mich. 414, certiorari denied Halsted v. State Highway Commissioner, 59 S.Ct. 148, 305 U.S. 644, 83 L.Ed. 416.

N.J.—Pinckney v. Hudson County Nat. Bank, 164 A. 269, 112 N.J.Eq. 376.

92. N.Y.—In re Kalmowitz's Will, 236 N.Y.S. 223, 134 Misc. 508.

93. Mass.—Dolan v. Roy, 190 N.E. 717, 236 Mass. 519.

94. Mo.—State ex rel. Gregory v. Henderson, 88 S.W.2d 893, 230 Mo.App. 1.

95. Pa.—In re Bailey's Estate, 140 A. 145, 291 Pa. 421—In re Trout-

grounds for a review must be stated in the petition therefor,⁹⁶ and granting or refusing the petition is discretionary with the court.⁹⁷ Ordinarily the court will not go into the evidence at large to establish or support an objection based upon a supposed error or mistake made by the court in its deduction therefrom.⁹⁸ Courts will not retry the case, but will correct palpable mistakes in an account or adjudication.⁹⁹

Review of probate cases or proceedings generally, treated elsewhere in this work, see the title Appeal and Error and the Descriptive-Word Index.

§ 310. Records

The probate court should keep proper records of the disposition of matters by it, correcting them if incorrect.

The probate court speaks only by record,¹ and an order of the court in a guardianship matter has been held to be void unless entered on the minutes.² The court should keep clear and ac-

curate records of the disposition of matters by it,³ it being the duty of the clerk to record the orders and decrees as of the date that they are made.⁴ A proper record in a probate proceeding should show that witnesses were sworn, and their names,⁵ but the use of a seal by a probate court in entering of record its orders and decrees is not essential to their validity.⁶ Where orders and proceedings of a probate court were omitted from the minutes, the court has power to order that they be entered *nunc pro tunc* with the same effect as though entered in the first place,⁷ and other records, if incorrect, may be corrected by the court.⁸ For this purpose a bill of review may be allowed,⁹ but only in accordance with the general principles governing such bills in ordinary equity practice.¹⁰ On an application to the surrogate to sign the record of business left incomplete by his predecessor, it is proper to require proof by affidavit or otherwise of the facts, and to recite in the record the mode in which the record was completed.¹¹

IX. COURTS OF APPELLATE JURISDICTION

A. IN GENERAL

§ 311. Nature and Source of Jurisdiction

Jurisdiction of particular appellate courts depends upon the applicable constitutional or statutory provisions, and their principal functions include the exercise of supervision over subordinate courts and the settlement of the law, carefully abstaining from exercising nonjudicial powers.

Nature and grounds of appellate jurisdiction generally see Appeal and Error §§ 39-45.

The jurisdiction of particular appellate courts

depends upon the terms of the constitutional or statutory provisions applicable thereto;¹² but, in accordance with the general principles stated *supra* §§ 127, 129, the legislature can neither confer on an appellate court jurisdiction which is not authorized, either expressly or impliedly, by the constitution,¹³ nor, on the other hand, deprive an appellate court of jurisdiction which is given to it by the constitution.¹⁴ It follows that, even though a

man's Estate, 113 A. 405, 270 Pa. 310.

Bill of review generally see the C.J.S. title Equity §§ 635-655, also 21 C.J. p 722 note 17 et seq.

96. Pa.—In re Braum's Estate, 90 Pa.Super. 448.

97. Pa.—Downing v. Felheim, 164 A. 593, 309 Pa. 566—In re Capuzzi's Estate, 158 A. 555, 306 Pa. 27.

Review held properly granted Pa.—In re Troutman's Estate, 112 A. 405, 270 Pa. 310.

Held properly refused

Petition based on after-discovered evidence, and not indicating such evidence was not available at former hearing.—In re Braum's Estate, 90 Pa.Super. 448.

98. Pa.—In re Capuzzi's Estate, 158 A. 555, 306 Pa. 27.

99. Pa.—In re Capuzzi's Estate, *supra*.

1. Mo.—Buchholz v. Cunningham, 100 S.W.2d 446, 340 Mo. 302—Far-

ris v. Burchard, 145 S.W. 825, 242 Mo. 1.

2. Kan.—Faler v. Culver, 146 P. 333, 94 Kan. 123.

Tex.—Blackwood v. Blackwood, Civ. App., 47 S.W. 483, affirmed 49 S.W. 1045, 92 Tex. 478.

3. Ala.—State v. Hasty, 63 So. 559, 184 Ala. 121, 50 L.R.A., N.S., 553, Ann.Cas.1916B 703.

S.C.—In re Willcox, 160 S.E. 260, 162 S.C. 133.

Records generally see *supra* §§ 225-237.

4. R.I.—Dugdale v. Chase, 157 A. 430, 52 R.I. 63.

5. Wash.—In re Deming's Guardianship, 73 P.2d 764, 192 Wash. 190.

6. Minn.—Tidd v. Rines, 2 N.W. 497, 26 Minn. 201.

7. Tex.—Alexander v. Barton, Civ. App., 71 S.W. 71.

8. N.Y.—In re Davis' Will, 164 N.Y.S. 143, 99 Misc. 447.

Pa.—In re Bailey's Estate, 140 A.

145, 291 Pa. 421—In re Slagle's Estate, 14 Northumb.L.J. 132, affirmed 7 A.2d 353.

15 C.J. p 1025 note 17.

9. Pa.—In re Bailey's Estate, 140 A. 145, 291 Pa. 421.

10. Pa.—In re Bailey's Estate, *supra*.

Bill of review in equity see the C.J.S. title Equity §§ 635-655, also 21 C.J. p 722 note 17 et seq.

11. N.Y.—Matter of Espier, 2 Redf. Surr. 445.

12. Tex.—In re House Bill No. 537 of Thirty-Eighth Legislature, 256 S.W. 573, 113 Tex. 567.

15 C.J. p 1025 note 19.

Source of jurisdiction and right of courts to assume jurisdiction generally see *supra* § 28.

13. Cal.—Ex parte People, 1 Cal. 85.

15 C.J. p 1025 note 20.

14. Cal.—In re Sutter-Butte By-Pass Assessment No. 6 of Sacramento & San Joaquin Drainage

statute confers jurisdiction over an appeal, such jurisdiction cannot be taken if the statute is unconstitutional.¹⁵ In some cases appellate jurisdiction may depend upon the nature of the cause of action,¹⁶ or of the question as to which a determination is sought.¹⁷ Although, as shown *infra* §§ 314-485, appellate courts are very generally invested with original jurisdiction in certain matters, and have certain jurisdiction incidental or ancillary to their appellate powers, the principal functions of such courts include the exercise of supervision over the subordinate courts, and the correction of errors which the latter courts have committed,¹⁸ and the duty uniformly to settle the law for the entire state and finally to determine its principles.¹⁹ They should carefully abstain from exercising any power that is not strictly judicial in its character,²⁰ and constitutional language conferring powers on an appellate court should be construed as intended to include only those powers consistent with the discharge of the inherent judicial functions of the court.²¹ When a litigant does not by appeal proceedings complain of an adjudication by the lower court, an appellate court cannot, on its own motion, create an appeal, divesting the lower court of power to act or destroying the effect of its adjudication.²² Where a constitutional amendment divides the supreme court of a state into two divisions with concurrent jurisdiction in civil cases, and gives one of such divisions exclusive jurisdiction in criminal cases, the supreme court has no superintending control over a division, as such division cannot

be said to be inferior to the court within the meaning of a constitutional provision, giving the supreme court superintending control over all inferior courts.²³ As stated in Appeal and Error § 45, where an appellate court is one of last resort, it is the exclusive judge of its own jurisdiction. The supreme court of a state may properly take jurisdiction of a collateral attack of the constitutionality of a statute pursuant to which some²⁴ or all²⁵ of its members hold office.

§ 312. Manner of Exercise of Jurisdiction

Appellate courts must exercise their power in a constitutional manner.

The supreme court must exercise directly conferred power in a constitutional manner,²⁶ even though no rule of procedure applicable to the particular case is prescribed by statute.²⁷ While the supervisory powers of an appellate court are usually called into exercise by an appeal or writ of error, bill of review, or writ of certiorari, it has been held that a general supervisory control conferred by the constitution is a distinct power, and may be exercised to control an inferior court with respect to an act from which no appeal would lie, and for which the writs appertaining to the appellate jurisdiction furnish no remedy,²⁸ although it will not be exercised when other and ordinary remedies are sufficient, or except in case of an exigency of such an extreme nature as obviously should justify the interposition of the power.²⁹ Thus, even in cases

Dist. 213 P. 974, 190 Cal. 532—
Scott v. Larson, 255 P. 248, 82 Cal.
App. 46.
Mo.—State v. Vallins, 41 S.W. 887,
140 Mo. 523.
15 C.J. p 1025 note 21.
15. Cal.—Chinn v. . an Joaquin
County Super. Ct., 105 P. 580, 156
Cal. 478.
Ill.—Aurora v. Schoeberlein, 82 N.E.
860, 230 Ill. 496.
N.J.—Hauser v. Farrell, Sup., 46 A.
784.
16. Mo.—Kinnear v. Jones, 24 Mo.
83.
N.Y.—Norris v. Nesbit, 25 N.E. 377,
124 N.Y. 650, 3 Silv.A. 183.
Requisites of appellate jurisdiction
generally see Appeal and Error §§
39-45.
17. Mo.—State v. Kuehner, 106 S.W.
60, 207 Mo. 605.
15 C.J. p 1025 note 24.
18. Ala.—Ex parte Burch, 184 So.
694, 286 Ala. 662—Ex parte State,
75 So. 327, 200 Ala. 15.
Ark.—Road Improvement Dist. No.
4 of Prairie County v. Mobley, 233
S.W. 929, 150 Ark. 149.
Colo.—Greeley & Loveland Irr. Co.

v. Handy Ditch Co., 240 P. 270, 77
Colo. 487—People v. Max, 198 P.
150, 70 Colo. 100.
Fla.—Mutual Ben. Health & Accident
Ass'n v. Bunting, 183 So. 321, 133
Fla. 646.
Wis.—In re Phelan, 274 N.W. 411.
225 Wis. 314, 112 A.L.R. 1345.
15 C.J. p 1025 note 27.
19. N.Y.—In re Miller's Will, 178
N.E. 555, 257 N.Y. 349, modifying
248 N.Y.S. 213, 231 App.Div. 587—
Reed v. McCord, 54 N.E. 737, 160
N.Y. 330.
20. Tex.—In re House Bill No. 537
of Thirty-Eighth Legislature, 256
S.W. 573, 113 Tex. 367.
21. Va.—Ætna Ins. Co. v. Common-
wealth ex rel. State Corporation
Commission, 169 S.E. 859, 160 Va.
698.
22. U.S.—Blevins v. Bank of Ameri-
ca Nat. Trust & Savings Ass'n, C.
C.A.Cal., 91 F.2d 593, certiorari de-
nied 58 S.Ct. 476, 302 U.S. 765, 82
L.Ed. 594.
23. Mo.—State v. Duestrow, 38 S.
W. 554, 39 S.W. 266, 137 Mo. 44.
24. Or.—State v. Cochran, 104 P.
419, 105 P. 384, 55 Or. 157.

25. Or.—Cline v. Greenwood, 10 Or.
230.
26. Mich.—Jones v. Eastern Michi-
gan Motorbuses, 283 N.W. 700, 728,
287 Mich. 592, quoting *Corpus Ju-
ris*.
15 C.J. p 1026 note 32.
27. Neb.—State v. Moores, 76 N.W.
530, 56 Neb. 1, 78 N.W. 529, 58 Neb.
285.
15 C.J. p 1026 note 33.
28. Cal.—Byers v. Smith, 47 P.2d
705, 707, 4 Cal.2d 209, citing *Cor-
pus Juris*.
Fla.—Bishop v. Chillingworth, 154
So. 254, 114 Fla. 286.
15 C.J. p 1026 note 37.
Merely erroneous ruling
Superintending power of supreme
court is not limited to keeping lower
court within its jurisdiction or
compelling it to act, and may be ex-
ercised where the ruling of the low-
er court was merely erroneous.—
State v. Grimm, 243 N.W. 763, 208
Wis. 366.
29. Cal.—Roma Macaroni Factory v.
Giambastiani, 27 P.2d 371, 219 Cal.
435.

in which an appellate court has original but concurrent jurisdiction with an inferior court, it is only in cases of more than ordinary magnitude or importance,³⁰ or when some good reason is shown for not making the application to the inferior court for the writ,³¹ that application for mandamus may be made to the appellate court; and, although the appellate court has original jurisdiction, it will not entertain an application for mandamus where there is an adequate remedy by application for the writ,³² or for other relief,³³ to a court of inferior jurisdiction, especially in case of private rights where there is an accumulation of work in the appellate court,³⁴ or where there are questions of fact to be tried.³⁵

§ 313. Ancillary or Incidental Jurisdiction

An appellate court has such ancillary or incidental

powers as are necessary to the proper exercise of its jurisdiction.

As a general rule an appellate court has such ancillary or incidental powers as are necessary to the proper exercise of its appellate jurisdiction;³⁶ and where such court exercises original jurisdiction it has the same ancillary or incidental powers as would be possessed by a court which was exclusively or primarily one of original jurisdiction.³⁷

However, a court which would not have original jurisdiction of the subject matter of a cross petition or answer, if it were contained in a petition, does not have such jurisdiction because contained in an answer or cross petition filed in response to a petition containing a cause of action the subject matter of which is within the court's original jurisdiction.³⁸

B. APPELLATE COURTS OF PARTICULAR STATES

§ 314. Alabama

Appellate jurisdiction in the state of Alabama is vested in the supreme court, court of appeals, and circuit courts, whose respective powers are considered in detail infra §§ 315-317.

§ 315. — Supreme Court

The supreme court of Alabama has appellate jurisdiction and supervisory control over inferior courts which will be exercised in case of usurpation or abuse of jurisdiction; and the justices may also be called upon for advisory opinions on important constitutional questions.

The jurisdiction and powers of the supreme court of Alabama are defined in the constitution. Except in cases otherwise directed, the court has appellate jurisdiction only,³⁹ under such restrictions and regulations not repugnant to the constitution, as may from time to time be prescribed by law.⁴⁰ The supreme court has also power to issue such remedial and original writs as may be necessary to give it a general superintendence and control of inferior jurisdictions;⁴¹ and it is the clear duty of the court to exercise its supervisory

Wis.—State v. Grimm, 243 N.W. 763, 208 Wis. 266.

Wyo.—State ex rel. Walton v. Christman, 44 P.2d 103, 48 Wyo. 239. 15 C.J. p 1026 note 38.

30. Fla.—State ex rel. Ake v. Swanson, 156 So. 481, 116 Fla. 464—Newberry v. Harris, 153 So. 901, 114 Fla. 379.

Mo.—State v. Cooper County Ct., 64 Mo. 174.

31. Cal.—Roma Macaroni Factory v. Giambastiani, 27 P.2d 371, 219 Cal. 435—Brougher v. Board of Public Works of City and County of San Francisco, 290 P. 140, 107 Cal.App. 15—Jones v. Keyes, 219 P. 464, 63 Cal.App. 649.

38 C.J. p 827 note 2.

32. Ala.—Lewis v. Gerald, 181 So. 306, 236 Ala. 91, followed in Gerald v. Lewis, 181 So. 309, 236 Ala. 103. Cal.—Drummev v. State Board of Funeral Directors and Embalmers, 87 P.2d 848—Wolf v. Mulcrevy, 169 P. 359, 35 Cal.App. 80.

38 C.J. p 827 note 4.

33. Kan.—State v. Breese, 15 Kan. 123.

Neb.—State v. Fillmore County, 49 N.W. 769, 32 Neb. 870.

34. Neb.—State v. Chase County School Dist. No. 24, 56 N.W. 791, 38 Neb. 237—State v. Lincoln Gas Co., 56 N.W. 789, 38 Neb. 33.

35. Mo.—State v. Lesueur, 29 S.W. 278, 126 Mo. 413.

38 C.J. p 827 note 7.

36. Fla.—Bishop v. Chillingworth, 154 So. 254, 114 Fla. 286.

15 C.J. p 815 note 17.

37. Wash.—Campbell Lumber Co. v. Deep River Logging Co., 133 P. 596, 68 Wash. 431.

38. Ohio.—State ex rel. Vastine v. City of Cincinnati, 11 N.E.2d 188, 56 Ohio App. 526.

39. Ala.—Boshell v. Boshell, 118 So. 553, 218 Ala. 320—Worthington v. Worthington, 111 So. 224, 215 Ala. 447.

15 C.J. p 1026 note 41.

Limited jurisdiction

The jurisdiction of the supreme court to review decisions of the court of appeals is limited.—Tennessee, A. & G. Ry. v. Cardon, 177 So.

173, 235 Ala. 35, denying certiorari 177 So. 171, 27 Ala.App. 585.

40. Ala.—Witherspoon v. State, 39 So. 356, 143 Ala. 65—State v. Savage, 7 So. 7, 183, 89 Ala. 1, 7 L.R.A. 426.

15 C.J. p 1026 note 43.

41. Ala.—Ex parte Roanoke, 23 So. 524, 117 Ala. 547.

15 C.J. p 1027 note 49.

Jurisdiction revisory only

Ala.—Ex parte Pearson, 76 Ala. 521. 15 C.J. p 1026 note 48 [a].

Certiorari is an appropriate remedy to review the decisions of the court of appeals by the supreme court under its constitutional power to superintend and control inferior jurisdictions.—Slayton v. State, 173 So. 645, 234 Ala. 9, reversing 173 So. 632, 27 Ala.App. 422—Ex parte Louisville & N. R. Co., 58 So. 315, 176 Ala. 631.

Mandamus

(1) Appellate courts are impliedly prohibited from exercising original jurisdiction of mandamus proceedings with relation to matters of

power whenever it appears that an inferior court is guilty of usurpation or abuse of jurisdiction.⁴² The supreme court is not authorized to direct, originally, a transfer from the law to the equity docket of the circuit court of a case in which only equity may afford appropriate relief, under a statute contemplating original action in the trial court, subject to review.⁴³ On appeal from a judgment at law the supreme court may not try the matter de novo but may only affirm or reverse the judgment.⁴⁴

Advisory opinions. The statute providing for advisory opinions on important constitutional questions, which itself is not invalid as an encroachment of one department upon the powers of another, contemplates merely advisory opinions of the individual justices, not of the court, binding neither the justices nor the department or officer requesting the opinion,⁴⁵ and the propriety of answering requests for advisory opinions is for the determination of the justices, each for himself.⁴⁶ The justices will decline to answer a legislative inquiry whether a proposed act conflicts with any constitutional provision, such inquiry being too broad and indefinite.⁴⁷

which any other court has jurisdiction.—*Lewis v. Gerald*, 181 So. 306, 236 Ala. 91, followed in *Gerald v. Lewis*, 181 So. 309, 236 Ala. 103—15 C.J. p 1026 note 48 [c], [d]—38 C.J. p 827 note 1.

(2) Supreme court exercises limited review by mandamus of interlocutory rulings of inferior courts, when no other review is available, but otherwise applicant for mandamus must show clear legal right to performance of specific duty it is imperative upon respondent to perform; hence mandamus does not lie to require court of appeals to pronounce judgment and opinion upon all assignments of error argued and urged upon court of appeals in original submission of case.—*Blackwood v. Maryland Casualty Co.*, 150 So. 180, 227 Ala. 343, denying certiorari 150 So. 179, 25 Ala.App. 308.

(3) Supreme court could entertain motion for mandamus for the annulment of unappealable judgment or decree on an appeal from the judgment or decree, where motion was timely made and the court had an authentic transcript of the record of the proceedings.—*Castleberry v. Castleberry*, 176 So. 87, 235 Ala. 266.—*Ex parte McDermott*, 141 So. 659, 224 Ala. 684.

(4) But the court will not consider petition for mandamus where full record acted on by trial court was not before it.—*Ex parte Moore*, 164 So. 210, 281 Ala. 209.

(5) Nor will a writ be granted when motion is not presented on transcript paper in suitable form for binding as required by Supreme Court Rules, rule 36.—*Ex parte Wood*, 110 So. 409, 215 Ala. 280.—*Aust v. Sumter Farm & Stock Co.*, 96 So. 872, 209 Ala. 669.

(6) Court might not consider purported copy of pleadings, decree of reference, testimony, and report of register without certificate of register that it is copy in absence of agreement, and the fact that parties admit that exceptions were filed and overruled is insufficient, where record does not show them or show reference to evidence.—*Ex parte Wood*, supra.

Prohibition

The state, with the attorney general as relator, may by petition for prohibition invoke the supervisory powers of the supreme court over inferior courts; and such inferior courts need not be first moved to avoid the subject of complaint.—*Ex parte State*, 75 So. 327, 200 Ala. 15.

42. Ala.—*Ex parte Burch*, 184 So. 694, 226 Ala. 662.

43. Ala.—*Claborne v. Nichols*, 85 So. 415, 204 Ala. 282.

44. Ala.—*Vandiver v. American Can Co.*, 67 So. 299, 190 Ala. 352.

45. Ala.—*In re Opinions of the Justices*, 96 So. 487, 209 Ala. 593.

46. Ala.—*In re Opinions of the Justices*, 148 So. 107, 226 Ala. 565.

§ 316. — Court of Appeals

The court of appeals in Alabama has final appellate jurisdiction in certain cases enumerated in the governing statute and supervisory control over inferior courts, but it has no power to declare a statute unconstitutional, and is controlled by answers to questions certified by it to the supreme court.

The jurisdiction of the court of appeals is defined in the statute creating and establishing the court. Its prerogative is appellate only,⁴⁸ but, except as to actions involving the title to or possession of land,⁴⁹ it has final appellate jurisdiction, coextensive with the state, of all suits at law, where the amount involved, exclusive of interest and costs, does not exceed one thousand dollars; and the "amount involved" in actions other than detinue is deemed to be the amount recovered other than costs where there is a recovery, but the amount claimed where there is no recovery.⁵⁰ Furthermore the court has final appellate jurisdiction in habeas corpus proceedings,⁵¹ and is also given original jurisdiction in the issuance of writs of quo warranto and mandamus with relation to matters in which it has appellate jurisdiction, and may issue such remedial and original writs as are necessary to give it a general superintendence and control of jurisdiction

47. Ala.—*In re Opinions of the Justices*, 145 So. 481—*In re Opinion of the Justices*, 113 So. 584, 216 Ala. 469.

48. Ala.—*Yielding v. State*, 125 So. 203, 23 Ala.App. 335.

49. Appeal in will contest proceeding involving, incidentally, title to land, is not within jurisdiction of court of appeals, and hence automatically transferable to supreme court, under statute.—*Gilliland v. Dobbs*, 174 So. 784, 234 Ala. 364.

Suit for statutory penalty for cutting trees and for damages for trespass *quare clausum*, *fregit* involved the title to or possession of land, and the court of appeals had no jurisdiction, so that its judgment was *coram non iudice*.—*Holloway v. Henderson Lumber Co.*, 82 So. 344, 203 Ala. 246, quashing 81 So. 867, 17 Ala. App. 89.

50. Effect of set-off

Court of appeals had jurisdiction of appeal from judgment for six hundred thirty-six dollars and ninety-five cents in action to recover license tax which had been improperly collected, notwithstanding amount involved including defendant's plea of set-off would have been over one thousand dollars.—*City of Prichard v. Harold*, 186 So. 504, 237 Ala. 277, denying certiorari 186 So. 499, 28 Ala.App. 235.

51. Ala.—*Cross v. Willis*, 182 So. 480, 28 Ala.App. 271.

inferior to it and in matters over which it has final appellate jurisdiction.⁵² Its jurisdiction in cases of felony, where the punishment has been fixed at twenty years or under, does not authorize it to pass on a motion to affirm on a certificate of appeal showing that defendant was convicted of murder and sentenced to life imprisonment.⁵³ Under the express requirement that, before striking down any statute not previously nullified by the supreme court, the question as to its validity must be submitted to the supreme court, the court of appeals is without power to declare a statute unconstitutional,⁵⁴ but it is only where the court of appeals considers a statute unconstitutional, and not when it holds the statute constitutional, that it is required to certify the question for determination by the supreme court.⁵⁵ When the supreme court decides the question and certifies its response thereto to the court of appeals, it is within the jurisdiction of the latter to proceed to final judgment in the cause under the statute as construed by the supreme court.⁵⁶ The supreme court's response to any question certified to it by the court of appeals is controlling and conclusive on the latter court,⁵⁷ and becomes the decision of the court on such question.⁵⁸ Where there is a supreme court decision on a certain point, the court of appeals should follow it, in accordance with the rule stated *supra* § 197, and should not certify the case to the supreme court so as to give it an opportunity to change its decision.⁵⁹

§ 317. — Circuit Courts

Circuit courts in Alabama have appellate jurisdic-

tion of civil actions cognizable before a justice of the peace, and, subject to some limitations, general superintendence over all inferior jurisdictions.

The circuit courts have been given appellate jurisdiction of all civil actions cognizable before a justice of the peace, and in such other cases as may be provided by law, and may exercise a general superintendence over all inferior jurisdictions.⁶⁰ It has no power, however, to mandamus a probate judge of a county in another judicial district,⁶¹ and cannot issue a supersedeas to an execution of the probate court although it has power to issue a mandamus to it.⁶²

§ 318. Arizona

Under the Arizona constitution, the supreme court has certain original jurisdiction as well as appellate and revisory powers.

The jurisdiction and powers of the supreme court of Arizona are defined in the state constitution. The court has original jurisdiction to issue writs of habeas corpus and of quo warranto and mandamus as to all state officers;⁶³ but it has no original jurisdiction to fix the statutory attorney's fees of the industrial commission when recovering an insurance premium from an employer.⁶⁴ It has appellate jurisdiction in all actions and proceedings,⁶⁵ except that its appellate jurisdiction does not extend to civil actions at law for the recovery of money or personal property, where the original amount in controversy, or the value of the property, does not exceed the sum of two hundred dollars,⁶⁶ unless the action involves the validity of a tax, impost, assessment, toll, municipal fine, or

52. Mandamus

(1) Court of appeals had jurisdiction to issue writ of mandamus compelling judge to set aside an order directing prisoner's return from county jail located in another division, although prisoner was charged with murder in first degree, court's jurisdiction in felony cases being fixed by "punishment fixed," and not by charge made.—*Ex parte State ex rel. Shirley*, 103 So. 68, 20 Ala.App. 473.

(2) Mandamus to compel trial court to vacate order might be made on motion docket, where cause was pending in reviewing tribunal, and adverse party was given due notice.—*Ex parte Sovereign Camp, W. O. W.*, 194 So. 899, 30 Ala.App. 531, certiorari denied *Ex parte Gay*, 204 So. 900, 213 Ala. 411.

Writ of prohibition

Ala.—*State v. Gunter*, 77 So. 443, 16 Ala.App. 292.

53. Ala.—*Holmes v. State*, 70 So. 982, 14 Ala.App. 661.

54. Ala.—*Hayes v. State*, 128 So. 774, 23 Ala.App. 524, certiorari denied 128 So. 776, 221 Ala. 389.

55. Ala.—*G. T. Wofford Oil Co. v. Burgin*, 66 So. 331, 11 Ala.App. 477.

56. Ala.—*Goolsby v. State*, 104 So. 901, 213 Ala. 351—*Goolsby v. State*, 104 So. 906, 20 Ala.App. 654.

57. Ala.—*Lashley v. State*, 180 So. 720, 28 Ala.App. 86, certiorari denied 180 So. 724, 236 Ala. 28—*Smith v. State*, 136 So. 266, 24 Ala.App. 412, conforming to answers to certified questions 136 So. 265, 223 Ala. 11, and reversed on other grounds 136 So. 270, 223 Ala. 346—*Mars v. State*, 129 So. 314, 23 Ala.App. 500.

58. Ala.—*Speer v. State*, 177 So. 162, 27 Ala.App. 579, certiorari denied 177 So. 167, 235 Ala. 46.

59. Ala.—*Illinois Cent. R. Co. v. Kilgore*, 67 So. 707, 12 Ala.App. 353, certiorari denied 67 So. 1002, 191 Ala. 671.

60. Probate matters

Ala.—*McKenzie v. Jensen*, 70 So. 678, 195 Ala. 36.

Review of inferior courts see *supra* § 250.

61. Ala.—*Dunbar v. Frazer*, 78 Ala. 529.

62. Ala.—*Ex parte Peterson*, 33 Ala. 74.

63. Ariz.—*State v. Jones*, 137 P. 544, 15 Ariz. 215.

15 C.J. p 1027 note 70.

64. Ariz.—*Industrial Commission v. Arizona Power Co.*, 297 P. 452, 38 Ariz. 44, affirming 295 P. 305, 37 Ariz. 425.

65. Ariz.—*Fancher v. Mohave Super. Ct.*, 138 P. 20, 15 Ariz. 276—*Sherman v. Goodwin*, 135 P. 719, 15 Ariz. 47.

66. Ariz.—*State v. Sapp*, 135 P. 718, 15 Ariz. 24—*Tyler v. Graham County, Fifth Judicial, Dist. Ct.*, 128 P. 315, 14 Ariz. 6.

Amendment of complaint

Complaints in justice court having

statute.⁶⁷ It has power to issue all writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction,⁶⁸ and accordingly may issue writs of mandamus,⁶⁹ prohibition,⁷⁰ and certiorari,⁷¹ provided the case is within its appellate jurisdiction and the issuance of the writ is necessary for the complete exercise of its appellate and revisory jurisdiction.⁷²

§ 319. Arkansas

Appellate jurisdiction in the state of Arkansas is vested in the supreme court and circuit courts, whose respective powers are considered in detail infra §§ 320-321.

§ 320. — Supreme Court

Except for a limited original jurisdiction in the issuance of writs of quo warranto, the supreme court

of Arkansas has appellate and supervisory jurisdiction only.

The jurisdiction and powers of the supreme court of Arkansas are defined by the constitution. Except in cases otherwise provided by the constitution, the supreme court has appellate jurisdiction only.⁷³ It has also a general superintending control over all inferior courts of law and equity,⁷⁴ that is, over the circuit and chancery courts;⁷⁵ it has no power to supervise or control the action of courts inferior to the circuit court except by reaching back through the decisions of that court.⁷⁶ In aid of its appellate and supervisory jurisdiction,⁷⁷ the supreme court has power to issue writs of certiorari,⁷⁸ habeas corpus,⁷⁹ prohibition,⁸⁰ mandamus,⁸¹ quo warranto,⁸² and other remedial writs;⁸³ and its judges severally have power to issue any of the aforesaid writs to preserve the status

sought to recover aggregate amount of two hundred thirty-nine dollars and ninety-nine cents, and complaint having been amended, after consolidation of cases in superior court, to reduce amount to two hundred dollars, plaintiff would not have been allowed recovery in any greater sum, so that "original amount in controversy," within Const. art 6 § 4, conferring appellate jurisdiction on supreme court, does not exceed two hundred dollars, and appeal must be dismissed.—*Arizona Eastern R. Co. v. Hinton*, 179 P. 963, 20 Ark. 266.

Reduction of assessment

On a county's appeal from a judgment of the county superior court reducing an assessment so as to reduce a tax levy of four hundred and eighty-four dollars by one hundred and fifty-seven dollars, where the whole assessment was questioned, the amount in dispute is within the supreme court's jurisdiction.—*Mohave County v. Stephens*, 149 P. 670, 17 Ark. 165.

67. *Ariz.—Tyler v. Graham County*, Fifth Judicial, Dist. Ct., 123 P. 315, 14 Ark. 6.

68. *Ariz.—Powers v. Santa Cruz County Super. Ct.*, 138 P. 21, 15 Ark. 275.—*Fancher v. Mohave County Super. Ct.*, 138 P. 20, 15 Ark. 276.

69. *Ariz.—Territory v. Gaines*, 93 P. 281, 11 Ark. 270.
15 C.J. p 1027 note 79.

70. Application of strangers to proceeding

Supreme court has jurisdiction to issue writ against further action by judge of superior court in cause of which supreme court has appellate jurisdiction, on application of persons beneficially interested in sub-

ject matter, although they are strangers to proceeding.—*Conkling v. Crosby*, 239 P. 506, 29 Ark. 60.

Discretion of court

Even though superior court is acting without jurisdiction, it is discretionary with supreme court as to whether a writ of prohibition shall be granted, particularly where it appears that the complaining parties have an adequate remedy by appeal, and that the equities are such that an injustice will be done by granting it. That municipal officials summarily abated nuisance without notice and hearing did not indicate that officials acted so arbitrarily as to justify the court in exercising its discretion by refusing to issue writ of prohibition restraining superior court from granting an injunction.—*Hislop v. Rodgers, Ariz.*, 92 P.2d 527.

71. *Ariz.—Fancher v. Mohave County Super. Ct.*, 138 P. 20, 15 Ark. 276.—*Powers v. Santa Cruz County Super. Ct.*, 138 P. 21, 15 Ark. 275.

72. *Ariz.—Fancher v. Mohave County Super. Ct.*, 138 P. 20, 15 Ark. 276.—*Powers v. Santa Cruz County Super. Ct.*, 138 P. 21, 15 Ark. 275.—*State v. Sapp*, 135 P. 713, 15 Ark. 24.

73. *Ark.—Cole v. Cole*, 270 S.W. 593 —*Road Improvement Dist. No. 4 of Prairie County v. Mobley*, 233 S.W. 929, 150 Ark. 149.
15 C.J. p 1027 note 86.

74. *Ark.—Road Improvement Dist. No. 4 of Prairie County v. Mobley*, supra—*Ferguson v. Martineau*, 171 S.W. 472, 115 Ark. 317, Ann.Cas. 1916E 421.

75. *Ark.—Ex parte Dame*, 259 S.W. 754, 162 Ark. 382.

76. *Ark.—Ex parte Dame*, supra—

Featherstone v. Folbre, 88 S.W. 554, 75 Ark. 510.

15 C.J. p 1027 note 86 [a], p 1028 note 95 [a].

77. *Ark.—Howell v. Todhunter*, 25 S.W.2d 21, 181 Ark. 250—*Road Improvement Dist. No. 4 of Prairie County v. Mobley*, 233 S.W. 929, 150 Ark. 149.

78. Application treated as for certiorari

Application for prohibition to restrain chancellor from enforcing order, made without jurisdiction but already entered, was not technically proper, but supreme court treated application as one for writ of certiorari and granted writ quashing order.—*Wasson v. Dodge*, 94 S.W.2d 720, 192 Ark. 728.

79. *Ark.—State v. Williams*, 133 S.W. 1017, 97 Ark. 243.

80. *Ark.—Jones v. Coffin*, 131 S.W. 873, 96 Ark. 332.

81. *Ark.—Ex parte Conway*, 4 Ark. 302.

15 C.J. p 1028 note 98.

Mandamus to clerk

Mandamus from supreme court in aid of its appellate jurisdiction is appropriate remedy to spur clerk to performance of duty to prepare complete transcript of record in his office.—*Knight v. State*, 43 S.W.2d 1075, 184 Ark. 995—*Bell v. Rice*, 35 S.W.2d 88, 183 Ark. 105—*Barstow v. Pine Bluff, M. & N. O. Ry. Co.*, 16 S.W. 574, 54 Ark. 551.

82. *Ark.—Louisiana & Northwest R. Co. v. State*, 88 S.W. 559, 75 Ark. 435, 5 Ann.Cas. 687.

83. *Ark.—Howell v. Todhunter*, 25 S.W.2d 21, 181 Ark. 250—*Jones v. Little Rock*, 25 Ark. 284.
15 C.J. p 1028 note 98.

quo pending appeal.⁸⁴ A provision of the constitution gives the court power, in the exercise of original jurisdiction, to issue writs of quo warranto to the circuit judges and chancellors, and to officers of political corporations, when the question involved is the legal existence of such corporations; but the original jurisdiction of the court is confined strictly to the issuance of writs of quo warranto in the two classes of cases just named.⁸⁵

§ 321. — Circuit Courts

The circuit courts of Arkansas exercise superintending control and appellate jurisdiction over inferior courts.

The appellate jurisdiction and powers of the circuit courts of Arkansas are defined in the constitution. Such courts exercise superintending control⁸⁶ and absolute appellate jurisdiction over certain inferior courts,⁸⁷ but acquire only such jurisdiction as the inferior court had.⁸⁸ The statute authorizing transfers of causes from the circuit to the chancery court, or vice versa, apply only to actions which originate in one or the other of those courts, and

confer no authority for the transfer of a case appealed to the circuit court from one of the inferior courts.⁸⁹

§ 322. California

Appellate jurisdiction in the state of California is vested in the supreme court, the district courts of appeal, and the superior courts, whose respective powers are considered in detail infra §§ 323-325.

§ 323. — Supreme Court

The supreme court of California has such jurisdiction and powers as are conferred upon it by the constitution, including appellate jurisdiction in certain cases, power to issue writs necessary to the complete exercise of its appellate jurisdiction, and power to transfer and hear causes pending in the district courts of appeal.

The jurisdiction and powers of the supreme court of California are exclusively conferred by the state constitution.⁹⁰ The supreme court has appellate jurisdiction in all cases in equity,⁹¹ except such as

84. Ark.—Carr v. State, 122 S.W. 631, 93 Ark. 585.
15 C.J. p 1028 note 2.

85. Ark.—Carr v. State, 122 S.W. 631, 93 Ark. 585.
15 C.J. p 1028 notes 3-5.

No original jurisdiction

(1) To appoint commissioner to sell lands to satisfy judgment lien.—Shephard v. Hopson, 86 S.W.2d 30, 191 Ark. 284.

(2) To compel clerk of inferior court to put judgment or decree on record.—McConnell v. Bourland, 299 S.W. 44, 175 Ark. 233.

(3) To compel circuit court stenographer to perform his duty, he being accountable to circuit court.—Knight v. State, 43 S.W.2d 1075, 184 Ark. 995—Bell v. Rice, 35 S.W.2d 88, 183 Ark. 105.

(4) To compel lower court's stenographer to deliver transcript of notes in forma pauperis.—Reynolds v. Union Bank & Trust Co., 30 S.W. 2d 218, 182 Ark. 495.

(5) To consider application on rehearing for new trial on main issue on account of newly discovered evidence, in divorce case tried de novo on record made below, and which was reversed as to one issue.—Cole v. Cole, 270 S.W. 593, 168 Ark. 381.

(6) To inquire beyond the record made by the lower court.—Road Improvement Dist. No. 4 of Prairie County v. Mobley, 233 S.W. 829, 150 Ark. 149.

(7) To issue mandamus to compel warder to summon jury to inquire into prisoner's insanity.—Howell v.

Todhunter, 25 S.W.2d 21, 181 Ark. 250.

(8) To do other things see 15 C.J. p 1028 note 5 [a].

86. Nature of superintending control

Ark.—Carnall v. Crawford County, 11 Ark. 604, overruling Levy v. Lychinski, 8 Ark. 113, Ex parte Anthony, 5 Ark. 358.

87. Ark.—Carnall v. Crawford County, 11 Ark. 604.

15 C.J. p 1028 notes 7-14.
Review of proceedings of inferior courts see supra § 252.

Probate court

Ark.—Himes v. Sharp, 184 S.W. 431, 123 Ark. 61—Levy v. Lychinski, 8 Ark. 113.

15 C.J. p 1028 note 9.

88. Ark.—Williamson v. Killough, 46 S.W.2d 24, 185 Ark. 134—Allred v. Griffith, 1 S.W.2d 65, 175 Ark. 926—Washington Fire Ins. Co. v. Hogan, 213 S.W. 7, 139 Ark. 130, 5 A.L.R. 1585—Price v. Madison County Bank, 118 S.W. 706, 90 Ark. 195—Pride v. State, 13 S.W. 135, 52 Ark. 502.

89. Ark.—McLain v. Brewington, 211 S.W. 174, 188 Ark. 157—Brownfield v. Dudley E. Jones Co., 136 S.W. 664, 98 Ark. 495—Jackson v. Gorman, 66 S.W. 346, 70 Ark. 88.

90. Cal.—People v. McKamy, 143 P. 752, 168 Cal. 531—Ex parte People, 1 Cal. 85.

15 C.J. p 1028 notes 15 [a], 16 [a], p 1029 note 31 [d].

Exceptions and qualifications

(1) Although the constitution does not enumerate special proceedings,

such proceedings are appealable to the supreme court where statutes so provide.—Morton v. Broderick, 50 P. 644, 118 Cal. 474—Risdon v. Prewett, 97 P. 73, 8 Cal.App. 434—15 C.J. p 1028 note 16 [c], [d].

(2) Appellate jurisdiction in cases of mandamus exists, even though the constitution contained no provision therefor.—Palache v. Hunt, 2 P. 245, 64 Cal. 473.

(3) The supreme court has appellate jurisdiction over an election contest.—Lord v. Dunster, 21 P. 865, 79 Cal. 82—Knowles v. Yates, 31 Cal. 82.

(4) But it has been held that appellate jurisdiction of supreme court over election contests arises only after transfer to supreme court in manner provided by law.—McClinck v. Abel, 68 P.2d 273, 21 Cal.App. 2d 11.

91. Cal.—In re Sutter-Butte By-Pass Assessment No. 6 of Sacramento & San Joaquin Drainage Dist., 213 P. 974, 190 Cal. 532—Gunder v. Superior Court in and for Riverside County, 279 P. 822, 100 Cal.App. 334—Koch v. Speedwell Motor Car Co., 140 P. 598, 600, 24 Cal.App. 133.
15 C.J. p 1029 note 17.

Proceeding equitable in nature

A third party claimant's appeal from adverse judgment, in proceeding to recover personalty allegedly unlawfully seized upon writ of execution, was properly taken to the supreme court, since proceeding was equitable in nature.—Fulton v. Webb, 72 P.2d 744, 9 Cal.2d 726.

arise in justices' courts;⁹² in all cases at law which involve the title to or possession of real estate,⁹³ or the legality of any tax, impost, assessment, toll, or municipal fine,⁹⁴ in actions to abate or prevent a nuisance,⁹⁵ and in all such probate matters as may be provided by law,⁹⁶ also, on questions of law alone, in all criminal cases where judgment of death has been rendered,⁹⁷ in addition to which it has power to issue writs of mandamus,⁹⁸ cer-

tiorari,⁹⁹ prohibition,¹ and habeas corpus,² and all other writs necessary to the complete exercise of its appellate jurisdiction;³ but the court will not ordinarily entertain a petition for a writ affecting a pending proceeding which is appealable to the district court of appeal.⁴ The supreme court will not entertain applications in original proceedings in cases in the district court of appeals unless and until the cause be transferred to the supreme court.⁵

Divorce

The supreme court has appellate jurisdiction of actions of divorce.—Sharon v. Sharon, 7 P. 456, 8 P. 709, 67 Cal. 185.

92. Cal.—Edsall v. Short, 55 P. 327, 122 Cal. 533.
15 C.J. p 1029 note 18.

93. Cal.—Tannahill v. Superior Court of Orange County, 209 P. 77, 58 Cal.App. 623.
15 C.J. p 1029 note 19.

94. Cal.—People v. Horsley, 4 P. 384, 65 Cal. 381—Keech v. Joplin, 101 P. 417, 9 Cal.App. 217.
15 C.J. p 1029 notes 19, 20.

Proceeding to validate assessment by a drainage district, being one to establish the validity of an assessment, is a "case" and not a "special proceeding," and the supreme court has jurisdiction of an appeal from a judgment therein by Const. art 6 § 4, conferring on the supreme court appellate jurisdiction in all cases in equity and in all cases at law, which involve the legality of any tax, assessment, etc., notwithstanding the statute forbids an appeal.—In re Sutter-Butte By-Pass Assessment No. 6 of Sacramento & San Joaquin Drainage Dist., 213 P. 974, 190 Cal. 532.

Civil cases only.

A fine for wrongfully collecting toll is not within the appellate jurisdiction of the supreme court, the constitutional provision referring only to civil cases, as distinguished from criminal cases.—People v. Johnson, 30 Cal. 98.

Constitutionality of act denying appeal

Act of 1868, as amended by Act of 1870 relating to modification of the grades of certain streets of San Francisco, so far as providing that the judgment of the circuit court on the report of commissioners shall be final and conclusive and thus prohibiting an appeal, is not unconstitutional as violating the constitutional provision conferring appellate jurisdiction on the supreme court, such proceeding being a special proceeding and not a case at law.—Houghton's Appeal, 42 Cal. 35.

Under the original constitutional provision, the court also had jurisdiction in all cases at law in which

the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars.—Aronson v. Levison, 83 P. 154, 148 Cal. 364—15 C.J. p 1029 note 21.

95. Cal.—Randall v. Freed, 94 P. 1056, 7 Cal.App. 553, transferred, see 97 P. 669, 154 Cal. 299.
15 C.J. p 1029 note 24.

96. Cal.—Keller v. Franklin, 5 Cal. 432.

97. **Application to prove exceptions** Cal.—People v. La Pique, 98 P. 257, 154 Cal. 518—People v. La Pique, App., 98 P. 868.
15 C.J. p 1029 note 26 [a].

98. Cal.—Roma Macaroni Factory v. Giambastiani, 27 P.2d 371, 219 Cal. 435—Dufton v. Daniels, 213 P. 949, 190 Cal. 577.
15 C.J. p 1029 note 27.

Mandamus held to lie

(1) From supreme court to court of appeal.—Stout v. Farwell, 295 P. 47, 111 Cal.App. 31, denying motion 285 P. 836, 103 Cal.App. 471, rehearing denied 286 P. 471, 103 Cal.App. 471.

(2) To determine whether superior court had jurisdiction to remove a trustee.—Middlecoff v. Superior Court in and for Los Angeles County, 31 P.2d 200, 220 Cal. 410.

Other constitutional provisions

The supreme court is not deprived of jurisdiction to entertain a petition for mandamus to compel the secretary of state to refrain from submitting a purported initiative measure to the electors, by constitutional provisions reserving to the people the power to propose laws and amend the constitution by initiative process, or by provision relating to the separation of powers.—Epperson v. Jordan, 82 P.2d 445, 12 Cal.2d 61.

99. Cal.—Roma Macaroni Factory v. Giambastiani, 27 P.2d 371, 219 Cal. 435—Tyler v. Houghton, 25 Cal. 26.

1. Cal.—Roma Macaroni Factory v. Giambastiani, 27 P.2d 371, 219 Cal. 435—Collins v. Superior Court of City and County of San Francisco, 81 P. 509, 147 Cal. 264—Tyler v. Houghton, 25 Cal. 26.

2. Cal.—Tyler v. Houghton, supra.

3. Cal.—Roma Macaroni Factory v.

Giambastiani, 27 P.2d 371, 219 Cal. 435.

15 C.J. p 1029 note 31.

Injunction

Supreme court does not possess original jurisdiction in injunction matters, and will not grant temporary injunctive relief pending appeal from orders denying injunction.—McCann v. Union Bank & Trust Co. of Los Angeles, Cal., 47 P.2d 283, 285, overruling Martin v. Rosen, 33 P.2d 855, 2 Cal.App.2d 450—15 C.J. p 1029 note 31 [c].

Writ of error

(1) A writ of error lies to bring a case to the supreme court only where no appeal or other reviewing remedy has been provided.—Sacramento, etc., R. Co. v. Harlan, 24 Cal. 334—Haight v. Gay, 8 Cal. 297, 68 Am.D. 323—Middleton v. Gould, 5 Cal. 190.

(2) Where the state constitution conferred appellate jurisdiction on the supreme court, and the legislature authorized the court to issue all writs necessary to the exercise of its powers, but provided no remedy by appeal, the case could be brought to the court by writ of error.—Ex parte Thistleton, 52 Cal. 220—Adams & Co. v. Town, 3 Cal. 247.

(3) Likewise, where the supreme court was by the constitution invested with appellate jurisdiction in all cases where the matter in dispute exceeded a specified sum, and was authorized to issue process necessary to the exercise of this jurisdiction, a writ of error was a proper and necessary writ where no other reviewing process had been authorized by statute to carry out the constitutional provision.—Adams & Co. v. Town, supra.

4. Cal.—Collins v. Superior Court of City and County of San Francisco, 81 P. 509, 147 Cal. 264.

5. Cal.—City of South Gate v. City of Los Angeles, 58 P.2d 1288, 6 Cal.2d 593.

Denial of similar application below

Application to supreme court would be denied, where it appeared that petitioner's similar application to district court of appeal theretofore had been denied, petitioner's remedy being by application for a

Cases which must be decided by the supreme court because no other court has jurisdiction are so numerous that it cannot ordinarily take up original proceedings of which there is concurrent jurisdiction with another court,⁶ hence application for writs of mandamus, certiorari, prohibition, or procedendo should ordinarily be made first to superior court, unless directed to the court itself,⁷ although the supreme court will exercise jurisdiction where some emergency exists or public welfare is involved.⁸ The court has no jurisdiction of a motion whose object is to obtain advice as to whether a proposed act would constitute a violation of an injunction issued pending an appeal;⁹ and the court will not entertain originally a motion to recall a remittitur issued in due course by the district court of appeal.¹⁰

Transfer from district court of appeal. The supreme court has power to order any cause pending before a district court of appeal to be heard and determined by itself,¹¹ it being within the discretion of the supreme court whether a case shall be removed.¹² It has been said that the provisions of

the constitution giving the supreme court in banc power to rehear any "cause" decided in department¹³ and authorizing the supreme court to transfer any "cause" to or from the district court of appeal,¹⁴ have always been understood as applying to any matter, regardless of its character; but the supreme court has no power thereunder to transfer to it a proceeding in habeas corpus initiated in a district court of appeal after decision thereof,¹⁵ and a statute authorizing a hearing in the supreme court of habeas corpus proceedings in criminal cases prosecuted by indictment or information is inapplicable where the charge was prosecuted by complaint.¹⁶

While a petition for transfer will be granted for good cause,¹⁷ the supreme court will not necessarily exercise its power to order a transfer to it in the absence of an emergency requiring an immediate decision by the highest court;¹⁸ nor will it order the transfer of a case solely for the purpose of reviewing the exercise of a discretionary power of a district court of appeal where the matter was never in any way suggested to that court,¹⁹ or to

transfer and hearing in supreme court on such petition, and not by an original application.—*Linstead v. Superior Court* in and for Mendocino County, 60 P.2d 280, 7 Cal.2d 347.—*Paige Co. of Northern California v. Superior Court* in and for Humboldt County, 231 P. 344, 194 Cal. 795—15 C.J. p 1029 note 29 [a].

6. Cal.—*Roma Macaroni Factory v. Giambastiani*, 27 P.2d 371, 219 Cal. 435.—*Jones v. Keyes*, 219 P. 464, 52 Cal.App. 649.

15 C.J. p 1029 note 27 [b].

7. Cal.—*Drummev v. State Board of Funeral Directors and Embalmers*, 57 P.2d 348.—*Roma Macaroni Factory v. Giambastiani*, 27 P.2d 371, 219 Cal. 435.—*Brougher v. Board of Public Works of City and County of San Francisco*, 250 P. 140, 107 Cal.App. 15.

23 C.J. p 827 note 3.

8. Cal.—*Roma Macaroni Factory v. Giambastiani*, 27 P.2d 371, 219 Cal. 435.

9. Cal.—*Title Ins. & Trust Co. v. California Dev. Co.*, 152 P. 563, 171 Cal. 223.

Fictitious or unnecessary controversies and questions generally see *Actions* § 17.

10. Cal.—*Heroux v. Atchison, T. & S. F. Ry. Co.*, 33 P.2d 805, denying transfer, see App., 38 P.2d 841, denying motion 32 P.2d 820, 23 Cal. App.2d 401, transferred to 34 P. 2d 820.

Reason for rule

When the subject matter of a motion is peculiarly within the prov-

ince of the district court of appeal finally to decide and it appears that that court has regularly pursued its authority, its action should be deemed final by supreme court. Also the district court of appeal has control of its own process and is in better position than supreme court to determine whether a motion to recall remittitur on grounds that it has been subjected to fraudulent imposition, has acted improvidently and by mistake, should be granted.—*Heroux v. Atchison, T. & S. F. Ry. Co.*, supra.

11. Cal.—*Wham v. Doell*, 221 P. 899, 192 Cal. 680.—*Rockridge Place Co. v. City Council of City of Oakland*, 172 P. 1110, 178 Cal. 58.

15 C.J. p 1030 note 35 [b], p 1147 note 77.

12. Cal.—*People v. Davis*, 81 P. 718, 147 Cal. 346.

13. Cal.—*In re Wells*, 163 P. 657, 174 Cal. 467.

15 C.J. p 1030 note 37.

14. Cal.—*In re Wells*, supra.

May properly transferable

Decision of the district court of appeal as to annulling reassessment of lands for street improvements.—*Rockridge Place Co. v. City Council of City of Oakland*, 172 P. 1110, 178 Cal. 58.

Readmission of disbarred attorney

(1) Application of a disbarred lawyer for readmission is a "cause," which supreme court has jurisdiction to transfer from district court of appeal for hearing and determination by supreme court.—*In re O'Con-*

nell, 250 P. 390, 199 Cal. 538, 48 A. L.R. 1232.—*In re Cate*, 241 P. 95, 197 Cal. 796.—*In re Stevens*, 241 P. 88, 197 Cal. 408.

(2) Jurisdiction of supreme court or district court of appeal over application for readmission of disbarred attorney generally see *Attorney and Client* § 41 b (1).

Effect of transfer and proceedings had thereafter see *infra* §§ 517-520.

Mode of effecting transfer of appealed cases and procedure therein see *infra* § 516.

15. Cal.—*Ex parte Page*, 5 P.2d 605, 214 Cal. 350, dismissing hearing, App., 298 P. 178, 19 Cal.App.2d 1, and followed in *In re Palmer*, 5 P.2d 608, 214 Cal. 792, dismissing hearing, App., 298 P. 179, 19 Cal. App.2d 5.—*Ex parte Zany*, 130 P. 710, 164 Cal. 724.

16. Cal.—*Ex parte Mefferd*, 6 P.2d 71, 215 Cal. 763.—*Ex parte Page*, 5 P.2d 605, 214 Cal. 350, dismissing hearing, App., 298 P. 178, 19 Cal. App.2d 1, and followed in *In re Palmer*, 5 P.2d 608, 214 Cal. 792, dismissing hearing, App., 298 P. 179, 19 Cal.App.2d 5.

17. Cal.—*Whann v. Doell*, 221 P. 899, 192 Cal. 680.

18. Cal.—*Yolo Water & Power Co. v. Superior Court*, 183 P. 453, 181 Cal. 33.

19. Cal.—*Cosgrave v. Donovan*, 199 P. 810, 52 Cal.App. 625, denying application 199 P. 808, 52 Cal.App. 625.

correct an error by the lower court which did not affect the result,²⁰ or where in substance and effect the views expressed by the district court of appeal in its written opinion correctly declared the conclusions with regard to the question at issue that were reached by the supreme court.²¹ It has been held that a transfer will not be granted to the supreme court unless an error appears upon the face of the opinion of the court of appeal,²² or a doubtful or important question is presented upon the face of the opinion,²³ but this practice is confined to appeals and does not extend to original proceedings instituted in such courts.²⁴

§ 324. — District Courts of Appeal

The district courts of appeal in California have such appellate jurisdiction as is conferred upon them by the constitution, including the power to issue all writs neces-

sary or proper to the complete exercise of their appellate jurisdiction.

The jurisdiction of the district courts of appeal is defined in the state constitution. Such courts have appellate jurisdiction on appeal from the superior courts, except in cases in which appellate jurisdiction is given to the supreme court,²⁵ in all cases at law²⁶ in which the superior courts are given original jurisdiction;²⁷ also in proceedings of mandamus,²⁸ certiorari,²⁹ contesting elections,³⁰ and in such other special proceedings as may be provided by law;³¹ also on questions of law alone in all criminal cases prosecuted by indictment or information, except where judgment of death has been rendered.³² Such courts also have power to issue writs of mandamus,³³ prohibition,³⁴ and habeas corpus,³⁵ and all other writs necessary or proper to the complete exercise of their appellate jurisdiction.³⁶ An ap-

20. Cal.—Carpenter v. Pacific States Savings & Loan Co., 66 P.2d 656, 19 Cal.App.2d 263, denying hearing 64 P.2d 1102, 19 Cal.App.2d 263—White v. White, 56 P.2d 202, 11 Cal.App.2d 570, denying hearing 54 P.2d 482, 11 Cal.App.2d 570.

21. Cal.—Bohn v. Better Biscuits, 80 P.2d 484, 26 Cal.App.2d 61, denying hearing 78 P.2d 1177, 26 Cal.App.2d 61.

22. Cal.—Oliver v. Superior Court, City and County of San Francisco, 223 P. 558, 193 Cal. 61—Bauer's Law & Collection Co. v. Berthiaume, 132 P. 833, 21 Cal.App. 670—Burke v. Maze, 101 P. 440, 10 Cal.App. 206—People v. Groves, 50 P.2d 813, 9 Cal.App.2d 317, denying rehearing 49 P.2d 888, 9 Cal.App.2d 317.

23. Cal.—People v. Groves, supra.

24. Cal.—Rockridge Place Co. v. City Council of City of Oakland, 172 P. 1110, 178 Cal. 58.

25. Cal.—People v. McKamy, 143 P. 752, 168 Cal. 531.

15 C.J. p 1031 note 55.

26. Cal.—Koch v. Speedwell Motor Car Co., 140 P. 598, 600, 24 Cal. App. 123.

15 C.J. p 1030 note 41.

Prior to amendment of 1928, the court had appellate jurisdiction in actions at law in which the demand, exclusive of interest, or the value of the property in controversy, amounted to three hundred dollars, and did not amount to two thousand dollars.—People v. Pacific Gas, etc., Co., 143 P. 727, 168 Cal. 496, Ann.Cas. 1917A 328—15 C.J. p 1030 notes 42, 43.

27. Cal.—Johnston v. Wolf, 280 P. 980, 208 Cal. 286—National City Finance Co. v. Lynch, 271 P. 540, 94 Cal.App. 557.

15 C.J. p 1030 note 40.

Action within jurisdiction of municipal court

A statute amending the municipal court act so as to deprive the district court of appeals of jurisdiction over appeals from the superior courts in any action within the jurisdiction of the municipal courts was not intended to apply retroactively and, hence, does not take from such appellate courts jurisdiction of appeals perfected at the time the amendment became effective.—D. Q. Service Corporation v. Securities Loan & Discount Co., 292 P. 497, 210 Cal. 327, following Berg v. Traeger, 292 P. 495, 210 Cal. 323.

28. Cal.—In re Davidson, 141 P. 216, 167 Cal. 727.

15 C.J. p 1030 note 48.

29. Cal.—Lamb v. McMullen, 106 P. 225, 157 Cal. 14.

15 C.J. p 1030 note 49.

30. Cal.—McClintock v. Abel, 68 P. 2d 273, 21 Cal.App.2d 11.

15 C.J. p 1031 note 52.

31. Cal.—People v. McKamy, 143 P. 752, 168 Cal. 531.

32. Cal.—People v. Pacific Gas & Electric Co., 143 P. 727, 168 Cal. 496, Ann.Cas.1917A 328.

33. Cal.—Goytino v. McAleer, 88 P. 991, 4 Cal.App. 655.

15 C.J. p 1031 note 60.

Concurrent jurisdiction

The appellate court and the superior court have concurrent jurisdiction to grant an original application for mandate.—Cohn v. Isensee, 188 P. 278, 45 Cal.App. 509.

Showing insufficient for relief

Assigning another superior court judge to department in which probate matter was pending instead of allowing judge who had conducted hearing thereon and who was assigned to another department to complete hearing and determination

was within discretion of court and presiding judge, and party was not entitled to issuance of writ of mandate commanding original judge to proceed with hearing and determination.—Cohn v. Superior Court in and for Kern County, 57 P.2d 186, 13 Cal. App.2d 565.

34. Cal.—Reclamation Dist. No. 108 v. Ash, 208 P. 394, 58 Cal.App. 238.

Alternative writ

The district court of appeal, in original proceeding for writ of prohibition, can issue an alternative writ, thus preserving the status of the controversy until the final adjudication on the merits.—Wood v. Board of Fire Com'rs of City of Los Angeles, 195 P. 739, 50 Cal.App. 593, first case.

Not applicable on appeal

The original jurisdiction of the appellate court to issue writs of prohibition does not apply to cases originating in the superior court, and brought up on appeal only.—Lickley v. Board of Education of Los Angeles County, 217 P. 133, 62 Cal. App. 527.

35. Cal.—In re Mulholland, 110 P. 585, 13 Cal.App. 734.

Requisites of memorandum

Counsel must assist court in ascertaining points to be considered in original habeas corpus proceeding by discussing each point separately under appropriate heading in any memorandum filed in such proceeding.—Ex parte Ellery, 70 P.2d 690, 22 Cal. App.2d 274.

36. Supersedeas

(1) Writs of supersedeas and probable cause are included in "other writs."—Martin v. Rosen, Cal. App., 38 P.2d 855.

(2) Court has no jurisdiction, however, to grant writ of supersedeas except in aid of its appellate juris-

plication for a writ of mandamus, certiorari, or prohibition will ordinarily be denied, however, where petitioner had not applied to the superior court for such writ,³⁷ unless his application furnishes a proper reason for not making the application to the lower court;³⁸ and the appellate court will not ordinarily entertain a petition for a writ affecting a pending proceeding which is appealable directly to the supreme court,³⁹ although it has jurisdiction to do so.⁴⁰ Where the relief which should be afforded the petitioner may not be granted under the writ sought, the court, with the facts before it, may give such relief as is warranted by the premises.⁴¹ The court has no absolute appellate jurisdiction in equi-

ty cases,⁴² but can gain jurisdiction of such cases only through the discretionary action of the supreme court.⁴³ The court has full authority to affirm, reverse, or modify the judgment or order of the trial court in any case properly before it;⁴⁴ and finality is intended to accompany the judgments of the court.⁴⁵ Where an appeal is taken to a district court of appeal in a case in which appellate jurisdiction belongs not to that court but to the supreme court, the proper practice is to transfer the appeal to the supreme court.⁴⁶

§ 325. — Superior Courts

The superior courts in California have appellate ju-

isdiction; and where petition to appellate court for writ of supersedeas was with relation to proceeding wherein self-executing judgment had been appealed to appellate court, petitioner was not entitled to writ, since there was no process to restrain.—*Norton v. Municipal Court of Los Angeles*, 48 P.2d 124, 8 Cal.App.2d 368.

Injunction

Writ of injunction is included in "other writs."—*Martin v. Rosen*, 38 P.2d 855, 2 Cal.App.2d 450.

37. Cal.—*Cassery v. City of Oakland*, App., 4 P.2d 180—*Wilshire-Commonwealth Corporation v. State Corporation Department*, 297 P. 121, 112 Cal.App. 732—*Wilson v. Police Court of City of Modesto*, 279 P. 833, 100 Cal.App. 125—*Wolf v. Mulcrevy*, 169 P. 259, 35 Cal. App. 80.

Power to issue

Court of appeal has power to issue prohibition to restrain superior court from proceeding with action, although preliminary objection has not been made in superior court, but will hesitate to do so.—*MacFarland v. Superior Court in and for Orange County*, 38 P.2d 800, 3 Cal.App.2d 173.

38. Cal.—*Wilshire - Commonwealth Corporation v. State Corporation Department*, 297 P. 121, 112 Cal. App. 732.

Sufficient reason not shown

Cal.—*Jones v. Keyes*, 219 P. 464, 63 Cal.App. 649.

Possibility of adverse decision in superior court on application for a writ of prohibition would not be sufficient cause for applying to the district court of appeal in the first instance.—*Wood v. Board of Fire Com'rs of City of Los Angeles*, 195 P. 739, 50 Cal.App. 594.

Cessation of emergency

Where emergency which led district court of appeal to assume jurisdiction of proceeding had ceased to exist at time of filing and hear-

ing of amended petition, and questions involved could best be first heard and determined in superior court where facts might more readily be ascertained and accounting had if necessary, district court of appeal would not continue its jurisdiction.—*Noble v. Provident Irr. Dist.*, 51 P.2d 896, 10 Cal.App.2d 284.

39. Cal.—*Hays v. Superior Court in and for Los Angeles County*, App., 92 P.2d 665—*Bern Oil Co. v. Superior Court of Kern County*, 41 P.2d 939, 5 Cal.App.2d 21—*Shewitt v. Superior Court in and for Los Angeles County*, 41 P.2d 941, 4 Cal. App.2d 619—*Foster v. Superior Court in and for Los Angeles County*, 41 P.2d 187, 4 Cal.App.2d 466—*Tannahill v. Superior Court of Orange County*, 209 P. 77, 58 Cal.App. 623—*In re Turner's Estate*, 177 P. 854, 39 Cal.App. 56.

40. Cal.—*Favorite v. Superior Court of Riverside County*, 184 P. 15, 181 Cal. 261, 8 A.L.R. 290—*Vallejo Bus Co. v. Superior Court in and for Solano County*, 65 P.2d 86, 19 Cal. App.2d 201—*Gunder v. Superior Court in and for Riverside County*, 279 P. 822, 100 Cal.App. 334—*Williams v. Andrews*, App., 216 P. 998.

Retention of jurisdiction

The court, having issued an alternative writ and signified its willingness to entertain the proceeding, will not dismiss it merely because the subject to which the writ pertains is, unless transferred, in the exclusive appellate jurisdiction of the supreme court.—*Reclamation Dist. No. 108 v. Ash*, 208 P. 394, 58 Cal.App. 233. *Contra*: *Tannahill v. Superior Court of Orange County*, 209 P. 77, 58 Cal.App. 623.

Different questions involved

Where sole issue on appeal to supreme court was whether superior court abused its discretion in dismissing action for lack of prosecution, and the only question involved in proceeding for writ of mandate

before district court of appeal was plaintiff's right to compel a defendant to give her deposition while case was on appeal to supreme court during time the deposition proceeding was pending in the superior court, district court of appeal was not thereby deprived of jurisdiction to issue writ of mandate.—*Hays v. Superior Court in and for Los Angeles County*, Cal.App., 92 P.2d 665.

41. Cal.—*Husband v. Superior Court in and for Los Angeles County*, 17 P.2d 764, 128 Cal.App. 444—*Johnston Gas Furnace Corporation v. Superior Court in and for Los Angeles County*, 288 P. 808, 106 Cal. App. 166.

42. Cal.—*Gunder v. Superior Court in and for Riverside County*, 279 P. 822, 100 Cal.App. 334. 15 C.J. p 1030 note 41 [a].

43. Cal.—*Foster v. Superior Court in and for Los Angeles County*, 41 P.2d 187, 4 Cal.App.2d 466.

44. Cal.—*Machado v. Machado*, 145 P. 738, 26 Cal.App. 16.

45. Cal.—*People v. Groves*, 50 P. 2d 813, 9 Cal.App.2d 317, denying rehearing 49 P.2d 838, 9 Cal.App. 2d 317.

Matters determined

In action to have rights in decedent's estate determined, appellate court was held to have jurisdiction to determine whether lapsed share of one of two daughters predeceasing testator vests in widow's estate, and amount of advances deductible from share of widow's surviving son and retained in residuary estate, but jurisdiction to determine whether any provisions of will have been impliedly revoked is advisory on probate court and confined to matters incidentally necessary to determine question properly before court.—*O'Neil v. Ross*, 277 P. 123, 93 Cal. App. 306.

46. Cal.—*Pierce v. Employers' Indemn. Exch.*, 164 P. 403, 33 Cal.App. 98. 15 C.J. p 1031 note 66.

isdiction in certain cases, as well as jurisdiction in certiorari and prohibition.

The superior courts have appellate jurisdiction in such cases as may be provided by law, and they are limited in the exercise of their jurisdiction to the extent and mode which the legislature validly prescribes.⁴⁷ The appellate department of the superior court is a court of last resort to certain kinds of cases.⁴⁸ The superior courts also have constitutional jurisdiction in certiorari;⁴⁹ and three judges of the court could hear and determine issues raised by an alternative writ of prohibition and demurrer or answer thereto, notwithstanding the writ was returnable in the department of the superior court presided over by the three judges of the appellate department of such court, and the appellate department as such was without jurisdiction to issue the alternative writ.⁵⁰ As a court of general jurisdiction, the superior court may properly interpret and give effect to any legislative, executive, or judicial document or order.⁵¹

§ 326. Colorado

Appellate jurisdiction in the state of Colorado, as shown *infra* §§ 327, 329, is vested in the supreme court, the district court, and the county courts, in addition to which, as shown *infra* § 328, there have

been, at various times, courts of appeals which, during their existence also had some appellate jurisdiction.

§ 327. — Supreme Court

Besides its appellate jurisdiction, the supreme court of Colorado has power to issue original and remedial writs and is required to give its opinion upon important questions when properly required by the governor, senate, or house of representatives.

The jurisdiction of the supreme court is conferred by the state constitution. Except as otherwise provided therein, the supreme court has appellate jurisdiction only,⁵² which is coextensive with the state,⁵³ and a general superintending control over all inferior courts,⁵⁴ under such regulations and limitations as may be prescribed by law.⁵⁵

The court also has power to issue writs of habeas corpus,⁵⁶ mandamus,⁵⁷ quo warranto,⁵⁸ certiorari,⁵⁹ injunction,⁶⁰ and other original and remedial writs.⁶¹ The supreme court is primarily and essentially a court of appellate jurisdiction, however,⁶² and will take jurisdiction under its limited original power only in questions *publici juris*⁶³ in which the sovereign state as a whole is concerned,⁶⁴ and where adequate relief may not be afforded by the inferior courts of original jurisdiction;⁶⁵ and

47. Cal.—*Sherer v. Lassen County* Super. Ct., 29 P. 716, 94 Cal. 354. 15 C.J. p 1031 notes 67, 68. Review of inferior courts see *supra* § 253.

48. U.S.—*In re Wiegand*, D.C. Cal., 27 F.Supp. 725.

49. Cal.—*State Board of Chiropractic Examiners v. Superior Court of California in and for Los Angeles County*, 255 P. 749, 201 Cal. 108.

50. Cal.—*Glasser v. Municipal Court of City of Los Angeles, Los Angeles County*, 81 P.2d 260, 27 Cal. App.2d 455.

51. Cal.—*Coast Truck Line v. Asbury Truck Co.*, 23 P.2d 513, 218 Cal. 337.

52. Colo.—*Leppel v. Garfield County Dist. Ct.*, 78 P. 682, 33 Colo. 24. 15 C.J. p 1031 note 70.

53. Colo.—*Greeley & Loveland Irr. Co. v. Handy Ditch Co.*, 240 P. 270, 77 Colo. 487.

54. Colo.—*Greeley & Loveland Irr. Co. v. Handy Ditch Co.*, *supra*—*People v. Max*, 198 P. 150, 70 Colo. 100. 15 C.J. p 1031 note 72.

What are "inferior courts?"

"Inferior courts," as used in constitutional provision granting supreme court general superintending

control, is used in sense to indicate relative rank and authority.—*Laizure v. Baker*, 11 P.2d 560, 91 Colo. 48.

55. Colo.—*Greeley & Loveland Irr. Co. v. Handy Ditch Co.*, 240 P. 270, 77 Colo. 487.

15 C.J. p 1031 note 73.

56. Colo.—*Leppel v. Garfield County Dist. Ct.*, 78 P. 682, 33 Colo. 24.

15 C.J. p 1032 note 74.

Province of court

It is not the proper realm of a court of review in issuance of original writs to act as trial and appellate judges, as well as jurymen, nor to decide a matter before evidence is taken in court below.—*Ex parte Yada*, 240 P. 942, 78 Colo. 199—*Ex parte Fushimi*, 240 P. 942, 78 Colo. 198—*Ex parte Arakawa*, 240 P. 940, 78 Colo. 193.

57. Colo.—*People v. Kennehan*, 136 P. 1033, 55 Colo. 589.

15 C.J. p 1032 note 75.

58. Colo.—*Leppel v. Garfield County Dist. Ct.*, 78 P. 682, 33 Colo. 24.

15 C.J. p 1032 note 76.

59. Colo.—*People v. Second Judicial Dist. Ct.*, 84 P. 694, 33 Colo. 14.

15 C.J. p 1032 note 77.

60. Colo.—*People v. Tool*, 86 P. 224, 229, 231, 35 Colo. 225, 117 Am.S.R. 198, 6 L.R.A., N.S., 822.

15 C.J. p 1032 note 78.

61. Colo.—*Leppel v. Garfield County Dist. Ct.*, 78 P. 682, 33 Colo. 24.

15 C.J. p 1032 note 79.

Prohibition

Colo.—*People v. District Court of Fourteenth Judicial Dist. of Colorado*, 218 P. 912, 74 Colo. 48.

15 C.J. p 1032 note 79 [a].

62. Colo.—*People v. Adams*, 264 P. 1090, 83 Colo. 321.

63. Colo.—*People v. Adams*, *supra*—*People ex rel. City and County of Denver v. District Court of Fourth Judicial Dist. in and for Douglas County*, 253 P. 24, 80 Colo. 538.

15 C.J. p 1032 notes 75 [a], 79 [d].

Question held publici juris

Right of district court after demand for change of venue to proceed in action by city to condemn lands beyond its limits for park purposes.—*People v. District Court of Second Judicial Dist. in and for City and County of Denver*, 242 P. 997, 78 Colo. 526.

64. Colo.—*People v. Adams*, 264 P. 1090, 83 Colo. 321—*People ex rel. City and County of Denver v. District Court of Fourth Judicial Dist. in and for Douglas County*, 253 P. 24, 80 Colo. 538.

15 C.J. p 1032 notes 75 [b], 79 [c], [d].

65. Colo.—*People v. Adams*, 264 P. 1090, 83 Colo. 321—*People ex rel.*

such writs in general in this court should be put only to prerogative uses.⁶⁶ The issuance of the writ is always discretionary and not as of right.⁶⁷

Opinions on important questions. The supreme court is required to give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives,⁶⁸ it being for the court to determine that the questions are important⁶⁹ and the occasion solemn.⁷⁰ The questions must relate to purely public rights.⁷¹ An inquiry by the house or senate is authorized only when a bill involving a constitutional or publici juris question is before that body;⁷² and by the governor only when such a bill has been passed by both house and senate and is before him for signature.⁷³ Constitutional questions by the governor will be answered only when he expresses doubt as to the constitutionality of the measure.⁷⁴ If the court declares a statute unconstitutional on one of the grounds submitted, it need not pass on questions as to whether it violates any other constitutional provisions.⁷⁵ Moreover, the court need not answer questions when properly to do so would require a wholesale exposition of all constitutional provisions relating to a given general subject.⁷⁶

§ 328. — Court of Appeals

At various times there have been courts of appeals in Colorado endowed by the constitution or legislature with certain jurisdiction and powers; but none exists at present.

A court of appeals was established in 1891, but as it went out of existence in April, 1905, by virtue of a constitutional amendment, it is deemed sufficient to refer in the notes to the numerous decisions relating to the jurisdiction and powers of such court.⁷⁷ In 1911 the legislature established a new court of appeals to exist for a period of four years, and, since this court also has ceased to exist, mere reference to the decisions relating to its jurisdiction and powers is likewise deemed sufficient here.⁷⁸

§ 329. — Other Courts

District and county courts in Colorado have such appellate jurisdiction as may be conferred by law.

District courts have such appellate jurisdiction as may be conferred by law,⁷⁹ and they acquire only such jurisdiction as the inferior court had.⁸⁰ Appellate jurisdiction may also be conferred on the county courts.⁸¹

City and County of Denver v. District Court of Fourth Judicial Dist., in and for Douglas County, 253 P. 24, 80 Colo. 538.

66. Colo.—People v. Adams, 264 P. 1090, 83 Colo. 321.

67. Colo.—People ex rel. City and County of Denver v. District Court of Fourth Judicial Dist. in and for Douglas County, 253 P. 24, 80 Colo. 538.

15 C.J. p 1032 note 77 [b].

68. Colo.—In re House Resolution No. 10, 114 P. 293, 50 Colo. 71.

15 C.J. p 1033 notes 82–85.

Form of submission or inquiry

Colo.—In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6, 31 P.2d 325, 94 Colo. 101.

15 C.J. p 1033 note 85 [i].

69. Colo.—In re Interrogatories of Governor Concerning Chapter 89, Session Laws 1935, 51 P.2d 695, 97 Colo. 528—In re Interrogatories of the House, 162 P. 1144, 62 Colo. 188.

Questions held important

Colo.—In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6, 31 P.2d 325, 94 Colo. 101.

15 C.J. p 1033 note 82 [e].

Question held unimportant

Colo.—In re Opinion of the Justices, 39 P.2d 705, 94 Colo. 215.

70. Colo.—In re Interrogatories of Governor Concerning Chapter 89, Session Laws 1935, 51 P.2d 695, 97 Colo. 528—In re Opinion of the Justices, 29 P.2d 705, 94 Colo. 215.

15 C.J. p 1033 note 83 [a].

Occasion held solemn

Colo.—In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6, 31 P.2d 325, 94 Colo. 101.

71. Colo.—In re Lieutenant Governorship, 129 P. 811, 54 Colo. 166.

15 C.J. p 1033 note 82 [a], [e].

72. Colo.—In re House Resolution No. 12, 298 P. 960, 88 Colo. 569.

15 C.J. p 1033 notes 82 [a], 85 [b].

73. Colo.—In re House Resolution No. 12, supra—In re Interrogatories by the Governor, 206 P. 383, 71 Colo. 331.

15 C.J. p 1033 note 84 [a].

74. Colo.—In re Interrogatories of Governor Concerning Chapter 89, Session Laws 1935, 51 P.2d 695, 97 Colo. 528—In re Interrogatories by the Governor, 206 P. 383, 71 Colo. 331.

75. Colo.—In re Interrogatories of Governor Concerning Chapter 89, Session Laws 1935, 51 P.2d 695, 97 Colo. 528.

76. Colo.—In re Senate Resolution No. 2 Concerning Constitutionality of House Bill No. 6, 31 P.2d 325, 94 Colo. 101.

77. Colo.—Mitchell v. Mitchell, 72 P. 1054, 31 Colo. 209.

15 C.J. p 1034 note 88.

78. Colo.—Archuleta Mercantile Co. v. Ortiz, 120 P. 1053, 21 Colo.App. 225.

15 C.J. p 1034 notes 89–94, p 1035 notes 95, 96.

Perfection of appeal

To authorize the court of appeals to determine an appeal originally taken to the supreme court, the appeal must have been perfected by the filing and approval of an appeal bond, and docketed in the supreme court, and the case must have been transferred to the court of appeals, so that an appeal in a case transferred to it would be dismissed by the court of appeals where the transcript was not filed with, and the case docketed in, the supreme court within the time provided by statute.—Archuleta Mercantile Co. v. Ortiz, supra.

79. Colo.—Miller v. Weston, 157 P. 1161, 61 Colo. 588, affirming 138 P. 424, 25 Colo.App. 281—Lusk v. Kershaw, 30 P. 62, 17 Colo. 481.

15 C.J. p 1035 note 97.

Review of inferior courts see supra § 254.

80. Colo.—Martin v. Payne, 114 P. 486, 50 Colo. 171—Estes v. Denver, etc., R. Co., 113 P. 1005, 49 Colo. 378.

81. Colo.—Jeffries v. Harrington, 17 P. 505, 11 Colo. 191.

15 C.J. p 1035 note 98.

§ 330. Connecticut

Appellate jurisdiction in the state of Connecticut is vested in the supreme court of errors, and the superior court, whose respective powers are considered *infra* §§ 331-332.

§ 331. — Supreme Court of Errors

The supreme court of errors in Connecticut has final jurisdiction in cases brought before it on appeal or writ of error.

Under the constitution the powers of the supreme court of errors and its jurisdiction are such as shall be defined by law. This court has a supreme and final jurisdiction in determining in the last resort the principles of law in the trial of causes, and therefore has the right to review the rulings and decisions of a court of common pleas in all matters of law not committed to its sole discretion or jurisdiction;⁸² and it is expressly empowered by statute to carry into execution all its judgments and decrees. In order that an appeal may lie under the statutory provisions to the supreme court of errors from decisions of the superior court, the court of common pleas, or any city court, or from decisions of a judge of any of these courts, or on questions of law by the state with the permission of the presiding judge, the cause must have come regularly before such lower court by appeal, writ of error, or original process or the supreme court will not take cognizance of it.⁸³ Writs of error, for errors in matters of law only, may be brought to the supreme court of errors from the judgments of the superior court, the court of common pleas, or any city court.⁸⁴ This court is without power to issue a writ of mandamus, neither statute nor custom conferring such authority.⁸⁵ An appeal taken to a term of the court held in the judicial district in which the judgment was rendered but not in a city named, is properly taken under a general statute requiring appeals

to be thus taken notwithstanding a proviso that certain appeals may be taken to the court sitting in named cities.⁸⁶ By authority of statute, the chief justice or presiding judge may by a written order direct judgment to be entered in accordance with an agreement of the parties filed with the clerk.

§ 332. — Other Courts

The superior court in Connecticut has such appellate jurisdiction as is conferred by statute.

An appeal lies to the superior court where statutory authority therefor exists.⁸⁷ Appeals from the probate courts go to the superior court.⁸⁸

§ 333. Delaware

Appellate jurisdiction in the state of Delaware is vested in the supreme court, the superior courts and the court of general sessions, whose respective powers are considered *infra* §§ 334-335.

§ 334. — Supreme Court

The powers conferred by the constitution upon the supreme court of Delaware should be liberally construed; and when written opinions of the judges are required, they need only answer the inquiry submitted.

The jurisdiction and powers of the supreme court as set forth in the constitution should be liberally construed so as to permit contested questions to be passed upon.⁸⁹

Under a statute authorizing the governor to require written opinions of the chancellor and judges upon constitutional questions, the only thing they are called upon to do when replying to an inquiry as to the constitutionality of a statute is to express their opinion upon the constitutionality of the statute.⁹⁰

§ 335. — Other Courts

In certain cases the superior courts and the court of general sessions have appellate jurisdiction.

⁸² Conn.—*Winnick v. Reilly*, 123 A. 440, 100 Conn. 291.

⁸³ Conn.—*Green v. Hobby*, 8 Conn. 165.

⁸⁴ Conn.—*Bergkofski v. Ruzofski*, 50 A. 565, 74 Conn. 204.
15 C.J. p 1035 note 13.

⁸⁵ Conn.—*In re Ansonia Water Co.*, 68 A. 378, 80 Conn. 326.

⁸⁶ Conn.—*Fritts v. New York, etc., R. Co.*, 26 A. 347, 62 Conn. 503.

⁸⁷ Conn.—*Waterbury Blank Book, etc., Co. v. Hurlburt*, 49 A. 198, 78 Conn. 715.
15 C.J. p 1035 note 20 [a].

Writs of error for errors in matters of fact, or in which errors in

matters of facts and in matters of law are joined, could be brought to the superior court from judgments and decrees of the superior court.—*Hubbard v. Hartford*, 51 A. 133, 74 Conn. 452.

Review of inferior courts see *supra* § 255.

⁸⁸ Conn.—*Wilson's App.*, 80 A. 718, 84 Conn. 560.
15 C.J. p 1035 note 28.

Pursuit of nonexistent remedy

On appeal from probate court to superior court, motion to erase or to dismiss was proper remedy, where record showed remedy pursued by appellant did not exist.—*Pettee v.*

Hartford-Connecticut Trust Co., 136 A. 111, 105 Conn. 595.

⁸⁹ Del.—*Thompson v. Thompson*, 140 A. 697, 3 W.W.Harr. 593.
15 C.J. p 1036 notes 48-51.

"Before the adoption of the constitution in 1897, vesting this Court with the jurisdiction to issue writs of error to the Court of Oyer and Terminer, and to the Court of General Sessions, and to determine all matters in error, the last named courts were each, within their respective criminal jurisdictions, courts of last resort, possessing original and final jurisdiction."—*Daniels v. State*, 48 A. 196, 18 Del. 586, 591, 54 L.R.A. 286.

⁹⁰ Del.—*In re School Code of 1919*, 108 A. 39, 7 Boyce 406.

A superior court has been held to have power to issue the common-law writ of certiorari in any case in which it was proper at common law,⁹¹ but the superior court of one county cannot exercise supervisory or appellate powers over the superior courts of other counties.⁹² The writ of mandamus is issued exclusively by the superior court;⁹³ and the court has inherent power to issue a writ of prohibition, notwithstanding the constitution gives that power to the supreme court.⁹⁴ The court in banc is a separate tribunal from the superior court, and in a sense an appellate court to which questions of law are sent by the superior court on its own motion; it is not the final court of review.⁹⁵

§ 336. Florida

Appellate jurisdiction in the state of Florida is vested in the supreme court, the circuit courts, and the county courts whose respective powers are considered infra §§ 337-338.

§ 337. — Supreme Court

Although the supreme court of Florida is primarily a court of appeals, having such appellate jurisdiction as is conferred by the constitution, it also has power to issue writs of certiorari, prohibition, mandamus, quo

warranto, etc., and is under a duty to render advisory opinions to the governor under certain circumstances.

The supreme court is primarily a court of appeals.⁹⁶ In determining questions relating to its appellate jurisdiction, consideration must be given to all the provisions of the constitution on the subject.⁹⁷ The constitution does not expressly or by clear implication forbid a statutory appeal from the circuit court to the supreme court in cases appealed to the circuit court from awards or orders of administrative boards, and where such administrative proceedings are appealed to the circuit court they may fairly be regarded as a case originating in the circuit court within the constitutional provision heretofore adverted to.⁹⁸ The constitutional jurisdiction of the supreme court to ultimately review a judgment at law after rendition thereof by the circuit court attaches at the time of the commencement of the action,⁹⁹ although in the great majority of cases it is only by an appeal or a writ of error which challenges the final decision in the case, that any of the proceedings of the circuit court in it may be actually reviewed.¹

Issuance of writs. The supreme court also has power to issue writs of certiorari,² prohibition,³ and all writs necessary or proper to the complete exercise of its jurisdiction;⁴ and under this power

91. Del.—*Rash v. Allen*, 76 A. 370, 24 Del. 44.

92. Del.—*Thomas v. Adams Express Co.*, 39 A. 1014, 17 Del. 142. Original jurisdiction see *supra* § 256.

93. Del.—*State v. New York-Mexican Oil Co.*, 122 A. 55, 2 W.W.Harr. 244.

94. Del.—*Fouracre v. White*, 102 A. 186, 7 Boyce 25.

95. Del.—*Ownbey v. Morgan*, 105 A. 838, 7 Boyce 297, affirming *Morgan v. Ownbey*, 100 A. 411, 6 Boyce 379.

96. Fla.—*State ex rel. Watkins v. Fernandez*, 143 So. 638, 106 Fla. 779, 86 A.L.R. 240, followed in *State ex rel. Jones v. Fernandez*, 143 So. 642, 107 Fla. 849 and *State ex rel. Gillespie v. Mobley*, 144 So. 840.

97. Fla.—*Mugge v. Warnell Lumber, etc., Co.*, 50 So. 645, 58 Fla. 318, 321. 15 C.J. p 1036 notes 86, 89.

98. Fla.—*South Atlantic S. S. Co. of Delaware v. Tutson*, 190 So. 675.

99. Fla.—*Bishop v. Chillingworth*, 154 So. 254, 114 Fla. 286—*Wolfe v. City of Miami*, 154 So. 196, 114 Fla. 238.

1. Fla.—*Wolfe v. City of Miami*, 154 So. 196, 114 Fla. 238.

2. Nature of writ

Writ of certiorari, which constitution authorizes supreme court to issue, is incidental to the supervisory jurisdiction of the court, and is a common-law writ.—*Great American Ins. Co. of New York v. Peters*, 141 So. 322, 105 Fla. 380.

Judgments affirmed by circuit court

The supreme court may issue writs of certiorari appropriately to review judgments of the civil court of record that have been affirmed by the circuit court.—*American Ry. Express Co. v. Weatherford*, 98 So. 820, 86 Fla. 626.

3. Fla.—*State ex rel. Garrett v. Johnson*, 150 So. 239, 112 Fla. 112.

Bill of exceptions showing facts should be made up and filed as part of record on which prohibition is sought.—*State ex rel. Pearson v. Trammell*, 169 So. 45, 124 Fla. 543.

4. Fla.—*Davidson v. Stringer*, 147 So. 228, 109 Fla. 238. 15 C.J. p 1037 note 99.

Injunctive writs

(1) Where supreme court, on original hearing, had decided to grant prohibition against circuit judge in case involving custody of insane per-

son, supreme court, on suggestion that effectiveness of court's jurisdiction would be impaired by interference with such custody during pending of rehearing petition, granted temporary restraining order.—*State ex rel. Deeb v. Fabisinski*, 152 So. 207, 111 Fla. 454, rehearing denied 156 So. 261, 111 Fla. 454.

(2) However, the supreme court is not clothed with original jurisdiction of the writ of injunction; in equity cases it has appellate jurisdiction only, and although by virtue of the constitution it is empowered to and may issue injunctive or any other writs essential to the complete exercise of its jurisdiction, it will not invoke the power so granted except in cases carefully investigated and on a showing made that the writ sought is indispensable to protect the rights of the party seeking it, or that the law affords no other remedy, or that some constitutional or statutory provision is about to be violated, or that the rights in litigation are of such peculiar or intrinsic value or nature that the facts of the case make it imperative that they be held in status quo pending the adjudication of the cause on appeal.—*Paramount Enterprises v. Mitchell*, 140 So. 328, 104 Fla. 407—*Wheeler v. Meggs*, 78 So. 685, 75 Fla. 687.

it may exercise supervisory jurisdiction over other courts.⁵ So, where the situation demands, an appropriate original writ from the supreme court may be issued before or during a criminal trial to secure the protection of defendant's fundamental rights.⁶ The court, should not, however, exercise its supervisory power merely to satisfy a litigant desiring to bring his case before a certain judge.⁷ The court is without jurisdiction to cancel a purported writ of error attempting to bring up for review by the circuit court a judgment of the civil court of record.⁸ Where the court has not acquired jurisdiction of a circuit court order it is without jurisdiction to issue a rule for contempt based on noncompliance with such order.⁹ The opinion and judgment of the supreme court filed in a case of original jurisdiction remains under the control of the court subject to being vacated, modified, or overruled during the same term of court,

while such case remains pending and undisposed of.¹⁰

The supreme court has power to issue writs of mandamus,¹¹ but this power has been habitually exercised only in cases involving some grave question of general law necessitating an early decision in the public interest.¹² Accordingly the court will decline to take jurisdiction where it does not appear that a novel question was presented¹³ or that such question of public interest was involved as would warrant its assumption of original jurisdiction respecting a matter which could be as well adjudicated in the circuit court.¹⁴ It will not pass upon whether a chancellor has jurisdiction of the subject matter of a bill before the chancellor has had an opportunity to rule on such question¹⁵ or in collateral proceedings against the clerk of the circuit court to compel performance of a minis-

5. Fla.—Mutual Ben. Health & Accident Ass'n v. Bunting, 183 So. 321, 133 Fla. 646.

Acts in derogation of process

Questions involving exercise of powers by one circuit court in derogation of processes of another circuit court lie within province of Supreme Court to decide.—State ex rel. Perky v. Browne, 142 So. 247, 105 Fla. 631.

6. Fla.—State ex rel. Brown v. Dewell, 167 So. 687, 123 Fla. 785.

7. Fla.—State ex rel. Fuller v. Jackson, 174 So. 471, 128 Fla. 240.

8. Fla.—L. L. Powell & Sons v. Brunsman, 190 So. 617.

9. Fla.—Culpepper v. Culpepper, 138 So. 798, 103 Fla. 389.

10. Fla.—State ex rel. Landis v. Ault, 176 So. 789, 129 Fla. 686.

Rehearing

Where petition for rehearing was filed at following term, but within fifteen days after judgment, in original quo warrant proceeding in supreme court, and petition was denied, supreme court could, during term at which petition was denied, vacate order denying rehearing.—State ex rel. Davis v. City of Avon Park, 151 So. 701, 117 Fla. 556, denying rehearing State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641 and modified on other grounds State ex rel. Davis v. City of Avon Park, 153 So. 159, 117 Fla. 565, 98 A.L.R. 230.

11. Fla.—State ex rel. Chavers v. Lee, 163 So. 92, 120 Fla. 738—State ex rel. Garrett v. Johnson, 150 So. 239, 112 Fla. 112.

Concurrent jurisdiction

The supreme court has jurisdiction of mandamus proceedings concurrent with the circuit court's jurisdiction.

—State ex rel. Patterson v. Lee, 164 So. 188, 121 Fla. 541—State ex rel. Harris v. Gautier, 147 So. 846, 108 Fla. 390.

Validity of tax

Constitutional provision giving circuit court exclusive original jurisdiction in cases involving legality of tax, assessment, or toll, does not limit jurisdiction of supreme court to issue mandamus and other writs necessary or proper to complete exercise of its jurisdiction; and it has original jurisdiction in mandamus proceeding by operator of chain stores to compel county tax collector to accept tendered fees and issue licenses, although proceeding involved validity of statute imposing taxes additional to those tendered.—State ex rel. Lane Drug Stores v. Simpson, 166 So. 227, 122 Fla. 582, affirming 166 So. 262, 122 Fla. 670, following State ex rel. Lane Drug Stores v. Carswell, 166 So. 249, 122 Fla. 639, rehearing denied 166 So. 574, 122 Fla. 700, rehearing denied State ex rel. Lane Drug Stores v. Simpson, 166 So. 574, 122 Fla. 700, certiorari denied Simpson v. State of Florida ex rel. Lane Drug Stores, 57 S.Ct. 15, 299 U.S. 543, 81 L.Ed. 399.

Pendency of equity suit in circuit court to enjoin county commissioners from unlawfully expending taxes collected does not preclude proceeding for writ of mandamus in supreme court to compel disposition of same fund in accordance with law. Jurisdiction of supreme court in original mandamus proceeding is not concurrent with equity jurisdiction of circuit court so as to preclude supreme court, under rule that between courts of concurrent jurisdiction, court which first acquires jurisdiction and has power to afford com-

plete relief, will be allowed to retain jurisdiction and determine the controversy.—State ex rel. City of St. Petersburg v. Pinellas County, 161 So. 66, 119 Fla. 539.

12. Avoiding unnecessary litigation

The power has been habitually exercised where some grave question of general law, possibly controlling in other cases of like character was involved, and an early decision in the interest of avoiding unnecessary litigation, was thereby necessitated.—Newberry v. Harris, 153 So. 901, 114 Fla. 379—Humphreys v. State ex rel. Palm Beach Co., 145 So. 858, 108 Fla. 92.

Decision required by federal government

The supreme court would take original jurisdiction of a proceeding testing the constitutionality of an act where the federal government required a decision by the court as to the validity of the act as a condition precedent to the making of a federal loan.—State ex rel. Weigel v. Spangler, Fla., 190 So. 425.

13. Fla.—Newberry v. Harris, 153 So. 901, 114 Fla. 379.

14. Fla.—State ex rel. Ake v. Swanson, 156 So. 481, 116 Fla. 464—Newberry v. Harris, 153 So. 901, 114 Fla. 379.

Enforcement of private rights

The supreme court will not entertain original jurisdiction of writs of mandamus requiring the court to act for the enforcement of strictly private rights as distinguished from acting judicially to settle legal questions of public interest.—State ex rel. Carter v. City of St. Petersburg, 150 So. 584, 112 Fla. 395.

15. Fla.—Newport v. Culbreath, 162 So. 340, 120 Fla. 152.

terial duty resting upon him.¹⁶ The power to review a judgment of the circuit court extends to the right to issue a writ of mandamus in aid of the appellate jurisdiction whenever it potentially exists, whether or not the appellate jurisdiction has been actually invoked.¹⁷ Accordingly the supreme court may, by mandamus, correct any inaction by the circuit court which forestalls entry of appropriate rulings, orders, or final judgment, where the matters presented are within the supreme court's power to ultimately review and correct the circuit court's judgment on writ of error, the writ of mandamus in such cases being in the nature of a *procedendo*.¹⁸ Collateral controversies which are incident to the form or substance of the record in the inferior court may be examined, reviewed, and settled on such a proceeding in mandamus, but such proceeding must be predicated on the same theory and tested by the same legal considerations as a writ of error,¹⁹ and all matters in pais relating to rulings complained of must be brought to the court by a special bill of exceptions.²⁰ The court has inherent power, as an incident to its appellate jurisdiction, by mandamus to control the proceedings of an inferior court in order that appealable rulings may be put in the prescribed form essential to the making up of an appellate record.²¹ Mandamus proceedings should be dismissed where the circuit court had previously acquired and retained

jurisdiction of the subject matter and parties,²² but a writ will be awarded to compel a state officer to perform certain duties notwithstanding a circuit court which had no jurisdiction had issued an order restraining him from performing them.²³ Where material issues of fact arise, the court may appoint a special commissioner to take testimony²⁴ or dismiss the proceeding without prejudice to the relators' right to pursue the remedy in the circuit court.²⁵

The supreme court has concurrent jurisdiction with the circuit courts to issue writs of quo warranto,²⁶ but it has consistently declined to do so except in cases where the public interest demanded, and then on an agreed statement of facts.²⁷ So in an original quo warranto case where there are issues of fact to be tried, the supreme court may decline to take jurisdiction of the case without prejudice to the right of relator to institute proceedings in the circuit court, or the cause may be dismissed without prejudice to the relator's right to commence new proceedings in the circuit court, or the supreme court may try all issues of law and fact and proceed to final judgment although it has to do so without intervention of jury, or a commissioner may be appointed to take testimony and refer it back to supreme court together with his findings,²⁸ which findings are advisory only;²⁹ but the court has no authority to send the case to a circuit

16. Fla.—Newport v. Culbreath, *supra*.

17. Fla.—Bishop v. Chillingworth, 154 So. 254, 258, 114 Fla. 286.

18. Fla.—Bishop v. Chillingworth, *supra*.

19. Fla.—Bishop v. Chillingworth, *supra*.

20. Fla.—Bishop v. Chillingworth, *supra*.

21. Fla.—Bishop v. Chillingworth, *supra*.

"Collateral controversies respecting procedural steps and the proper notation or recording thereof essential to review are based upon the appellate court's jurisdiction to ultimately entertain a writ of error, although, at the time, no writ of error has been actually issued, and cannot be issued because no final appealable order or judgment has been entered."—Bishop v. Chillingworth, *supra*.

Extent of power

The court has power to require an inferior court to rule on a proposition presented to it in proper form when it unlawfully or unreasonably refuses to do so, and also, has power to compel the inferior tribunal to make a sufficient record of its rul-

ings, so as to enable an aggrieved party to have them reviewed in due course of appellate procedure.—Bishop v. Chillingworth, *supra*.

22. Fla.—State ex rel. Farnell v. Gillen, 143 So. 659, 106 Fla. 778.

23. Fla.—State ex rel. Patterson v. Lee, 164 So. 188, 121 Fla. 541.

24. Fla.—State ex rel. De Soto County v. Sholtz, 180 So. 865, 119 Fla. 101.

25. Fla.—State ex rel. Harris v. Gautier, 147 So. 846, 108 Fla. 390.

26. Fla.—State v. Gleason, 12 Fla. 190.

27. Fla.—State ex rel. Watkins v. Fernandez, 143 So. 638, 106 Fla. 779, 86 A.L.R. 240, followed in State ex rel. Jones v. Fernandez, 143 So. 642, 107 Fla. 849, and State ex rel. Gillespie v. Mobley, 144 So. 840.

15 C.J. p 1037 note 97 [a].

28. Fla.—State ex rel. Clark v. Klingensmith, 170 So. 616, 126 Fla. 124—State ex rel. Landis v. S. H. Kress & Co., 158 So. 456, 117 Fla. 791—State ex rel. Davis v. City of Avon Park, 158 So. 159, 117 Fla. 565, 98 A.L.R. 230, modifying 151 So. 701, 117 Fla. 556, denying re-

hearing State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641—State ex rel. Landis v. Gamble, 150 So. 130, 112 Fla. 2—State ex rel. Watkins v. Fernandez, 143 So. 638, 106 Fla. 779, 86 A.L.R. 240, followed in State ex rel. Jones v. Fernandez, 143 So. 642, 107 Fla. 849, and State ex rel. Gillespie v. Mobley, 144 So. 840.

Trial on settled issues

Upon reaching an issue in the pleadings the supreme court may dismiss the proceedings without prejudice so that they may be instituted in circuit court and trial there had on the issues settled in the supreme court.—State ex rel. Clark v. Klingensmith, 170 So. 616, 126 Fla. 124.

Appeal

Either party has the right to appeal if aggrieved at the judgment when rendered by the circuit court.—State ex rel. Watkins v. Fernandez, 143 So. 638, 106 Fla. 779, 86 A.L.R. 240, followed in State ex rel. Jones v. Fernandez, 143 So. 642, 107 Fla. 849, and State ex rel. Gillespie v. Mobley, 144 So. 840.

29. Fla.—State ex rel. Clark v. Klingensmith, 170 So. 616, 126 Fla. 124.

court for trial by jury or otherwise and for certification of the record with the verdict.³⁰

Advisory opinions. It is the duty of the justices of the supreme court, when required by the governor, to render an opinion in writing as to the interpretation of any portion of the constitution upon any question affecting the governor's executive powers and duties;³¹ but such justices are not authorized to render advisory opinions on the construction of statutes,³² nor will they render such opinions on the constitutionality of statutes.³³

§ 338. — Other Courts

The circuit courts in Florida have such appellate powers as are conferred by the constitution.

The appellate jurisdiction of the circuit courts is conferred by the constitution, the manifest purpose of which is to give such courts final appellate jurisdiction by writ of error or appeal of all causes originating in all courts of the state that are inferior to the circuit court except convictions of felonies in the criminal courts of record, and except in probate and administrative matters.³⁴ Thus such courts have final appellate jurisdiction of all misdemeanors tried in criminal courts;³⁵ and they may also issue writs of certiorari to inferior boards or tribunals exercising judicial or quasi-judicial functions.³⁶ Since the constitution also gives circuit courts jurisdiction of such other matters as the legislature may provide, their jurisdiction

in statutory appeals from awards or orders of statutory administrative tribunals cannot be questioned;³⁷ but the constitution does not give them final appellate jurisdiction thereof.³⁸

§ 339. Georgia

Constitutional provisions control as to the jurisdiction of appellate courts.

The provisions of the state constitution and not the certificate of the trial judge to the bill of exceptions determines which reviewing court has jurisdiction of a case.³⁹

§ 340. — Supreme Court in General

a. Jurisdiction

b. Transfer of Causes

a. Jurisdiction

The appellate jurisdiction of the supreme court is defined by the constitution, as amended, and it has no other jurisdiction.

Under the constitution, the supreme court has no original jurisdiction, but is a court alone for the trial and correction of errors.⁴⁰ Its jurisdiction formerly extended to the correction of errors in law and equity from the superior courts in all civil cases, whether legal or equitable, originating therein,⁴¹ or carried thereto from the court of ordinary,⁴² and in all cases of conviction of a capital felony.⁴³ The jurisdiction of the court was limited by constitutional amendment in 1916. By this

30. Fla.—State ex rel. Davis v. City of Avon Park, 158 So. 159, 117 Fla. 565, 98 A.L.R. 230, modifying 151 So. 701, 117 Fla. 556, denying rehearing. State ex rel. Attorney General v. City of Avon Park, 149 So. 409, 108 Fla. 641.

31. Fla.—In re Advisory Opinion to Governor, 137 So. 881, 103 Fla. 668.

15 C.J. p 1037 note 2.

Restricted power

Advisory opinion of supreme court to governor is restricted to interpretation of constitution on question affecting executive powers and duties of governor.—In re Advisory Opinion to the Governor, 111 So. 252, 92 Fla. 939.

"Executive powers and duties" means duty pertaining to execution of laws as they exist.—In re Advisory Opinion to the Governor, 111 So. 252, 92 Fla. 939.

Held within jurisdiction

Advisory opinion on question whether act of governor in countersigning certain state warrants will be violative of any constitutional provision.—In re Advisory Opinion to the Governor, 154 So. 154, 114 Fla.

520.—In re Advisory Opinion to the Governor, 107 So. 366, 90 Fla. 708.

32. Fla.—In re Advisory Opinion to the Governor, 82 So. 606, 78 Fla. 156.

15 C.J. p 1037 note 3.

33. Fla.—In re Opinion to Governor, 68 So. 851, 69 Fla. 638.—In re Opinion of Court, 6 So. 925, 23 Fla. 297.

15 C.J. p 1037 note 4.

Statute affecting governor's executive powers and duties

Fla.—In re Advisory Opinion to Governor, 137 So. 881, 103 Fla. 668.

15 C.J. p 1037 note 4 [a].

34. Fla.—Postal Telegraph-Cable Co. v. Broome, 126 So. 149, 99 Fla. 272.—American Ry. Express Co. v. Weatherford, 98 So. 820, 86 Fla. 626.

Exercise of jurisdiction

Under former constitutional provisions which gave to the circuit court only appellate jurisdiction as to forcible entry and detainer cases, and cases from a justice of the peace court, such court could not exercise original jurisdiction in those causes, and a statute authorizing a trial de

novo in the circuit court was violative of the constitution and invalid.—State v. King, 20 Fla. 399.—State v. Vann, 19 Fla. 29.—State v. Baker, 19 Fla. 19. Original jurisdiction see *supra* § 257.

35. Fla.—Brookins v. State, 67 So. 142, 68 Fla. 426.

36. Fla.—State v. Simmons, 140 So. 187, 104 Fla. 487.

37. Fla.—South Atlantic S. S. Co. of Delaware v. Tutson, 190 So. 675.

38. Fla.—South Atlantic S. S. Co. of Delaware v. Tutson, *supra*.

39. Ga.—Scoggins v. State, 102 S.E. 39, 24 Ga.App. 677.

40. Ga.—Marloe v. Worrill, 188 S.E. 340, 183 Ga. 275.—Callaway v. Pearson, 92 S.E. 43, 146 Ga. 632.

15 C.J. p 1038 notes 26, 27.

41. Ga.—Harrell v. Nussbaum, 59 S.E. 8, 2 Ga.App. 754.

42. Ga.—Hendley v. Adams, 59 S.E. 227, 129 Ga. 518.

15 C.J. p 1038 note 29.

43. Ga.—Caesar v. State, 57 S.E. 66, 127 Ga. 710.

amendment the supreme court is a court alone for the trial and correction of errors at law from the superior courts and from the city courts and other like courts in specified cases.⁴⁴ Its jurisdiction extends and is limited to cases that involve the construction of the constitution of the state or of the United States, or of treaties between the United States and foreign governments, and to cases in which the constitutionality of any law of the state, or of the United States is drawn in question, which matters are considered *infra* § 344; cases respecting titles to land, see *infra* § 345; equity cases, see *infra* § 347; cases involving the validity and construction of wills, see *infra* § 346; habeas corpus cases; divorce and alimony cases, cases of conviction of a capital felony;⁴⁵ and cases involving extraordinary remedies.⁴⁶ It is also competent for the supreme court to require by certiorari or otherwise any case to be certified to it from the court of appeals for review and determination, with the same power and authority as if the case had been carried to the supreme court by writ of error,⁴⁷ and, as seen *infra* § 348, it has jurisdiction to determine questions certified to it by the court of ap-

peals. By the constitutional amendment of 1927 the supreme court may be given appellate jurisdiction over certain courts established in lieu of justices courts as the general assembly may provide. The supreme court has jurisdiction to issue mandamus to require a trial judge to certify a bill of exceptions only in a case of which the supreme court would have jurisdiction under the constitution.⁴⁸

Obviously the supreme court will not interfere with the proper enforcement of the criminal law.⁴⁹

b. Transfer of Causes

Any case carried to either the supreme court or the court of appeals which should have been brought to the other will be transferred to the proper court.

The constitution provides that any case carried to the supreme court or to the court of appeals which belongs to the class of which the other court has jurisdiction, shall, until otherwise provided by law, be transferred to the other court under such rules as the supreme court may prescribe, and that the cases so transferred shall be heard and determined by the court which has jurisdiction thereof.⁵⁰

44. Ga.—Marlowe v. Worrill, 188 S. E. 340, 183 Ga. 275.

15 C.J. p 1038 notes 33-35.

45. Ga.—Scoggins v. State, 102 S.E. 39, 24 Ga.App. 677.

No conviction

Where plea to murder indictment, based on lunacy adjudication, was stricken, accused's remedy was error to court of appeals, not supreme court, where defendant was not convicted, there being no conviction of a capital felony.—Humphrey v. State, 165 S.E. 587, 175 Ga. 666, transferred, see 169 S.E. 53, 46 Ga.App. 720.

46. Ga.—Casey v. McElreath, 169 S. E. 342, 177 Ga. 35—Spence v. Miller, 167 S.E. 188, 176 Ga. 96, transferred, see 171 S.E. 158, 47 Ga.App. 625.

No extraordinary remedy held involved

Ga.—Spence v. Miller, *supra*—Elmore v. Southern Bank & Trust Co., 105 S.E. 474, 150 Ga. 811—Albright v. American Cent. Ins. Co., 94 S.E. 561, 147 Ga. 493.

47. Ga.—Vaissiere v. J. B. Pound Hotel Co., 190 S.E. 354, 184 Ga. 72, affirming J. B. Pound Hotel Co. v. Vaissiere, 187 S.E. 279, 54 Ga. App. 162—Central of Georgia Ry. Co. v. Yesbik, 91 S.E. 873, 146 Ga. 620, granting certiorari Yesbik v. Central of Georgia Ry. Co., 91 S. E. 274, 19 Ga.App. 252, affirmed 92 S.E. 527, 146 Ga. 769.

15 C.J. p 1038 note 50.

Gravity and importance

Certiorari will not be granted where the case does not present a question of gravity and general importance.—Louisville & N. R. Co. v. Tomlin, 132 S.E. 90, 161 Ga. 749, dismissing certiorari 127 S.E. 416, 33 Ga. App. 585.

48. Ga.—Brown v. Hutcheson, 144 S.E. 17, 166 Ga. 644.

Mandamus not authorized

(1) Supreme court does not have jurisdiction of a petition for mandamus to compel judge to certify a bill of exceptions which raises no constitutional question nor any question within the supreme court's jurisdiction.—Brown v. Hutcheson, *supra*.

(2) The supreme court is without jurisdiction to grant a writ of mandamus on an original petition therefor to compel a judge of the circuit court to grant a writ of error coram nobis, although supreme court could aid party by writ of mandamus to bring up a case to itself from lower court.—Marlowe v. Worrill, 188 S.E. 340, 183 Ga. 275.

49. Ga.—Chivillis v. West, 185 S.E. 348, 182 Ga. 379.

50. Ga.—Bleckley v. Bleckley, 5 S.E. 2d 206—Metropolitan Life Ins. Co. v. Johnson, 3 S.E.2d 593, 188 Ga. 254, transferred, see, App. 5 S.E. 2d 920—Lunsford v. State, 199 S. E. 808, 187 Ga. 162—Frazier v. Beasley, 199 S.E. 194, 186 Ga. 861, transferred, see 1 S.E.2d 458, 59 Ga.App. 500—Jewell Tea Co. v.

City Council of Augusta, 197 S.E. 235, 186 Ga. 145, transferred, see 200 S.E. 503, 59 Ga.App. 260—Jollie v. Hughes, 193 S.E. 769, 184 Ga. 860—Cheatham v. Gormley, 186 S. E. 736, 182 Ga. 649, transferred, see 190 S.E. 38, 55 Ga.App. 295—Pearre v. Wilkinson, 183 S.E. 626, 181 Ga. 619, transferred, see 188 S.E. 553, 54 Ga.App. 638—Gormley v. Searcy, 175 S.E. 913, 179 Ga. 389—De Kalb County v. Grice, 175 S.E. 804, 179 Ga. 458, transferred, see 181 S.E. 703, 51 Ga.App. 887—Mobley v. Shannon, 152 S.E. 255, 169 Ga. 876—Felker v. Still, 151 S.E. 802, 169 Ga. 849—Columbus Heating & Ventilating Co. v. Burt, 142 S.E. 551, 166 Ga. 158—Hutchings v. Roquemore, 139 S.E. 216, 164 Ga. 637—Conyers v. Luther Williams Banking Co., 133 S.E. 862, 162 Ga. 350, transferred 135 S.E. 515, 36 Ga. App. 52—Jones v. Sikes, 131 S.E. 900, 161 Ga. 799—Veal v. Huffman, 129 S.E. 539, 161 Ga. 78—Spielberger v. W. H. Hall & Co., 126 S. E. 391, 159 Ga. 511, transferred, see 126 S.E. 552, 33 Ga.App. 406—City of Reynolds v. Carter, 125 S.E. 380, 159 Ga. 229—McDuffie Oil & Fertilizer Co. v. Sims, 117 S.E. 318, 155 Ga. 521, transferred, see 120 S.E. 549, 31 Ga.App. 261—Howell v. State, 114 S.E. 427, 154 Ga. 424, answers to certified questions conformed to 114 S.E. 717, 29 Ga.App. 174—Hulse v. Starke, 110 S.E. 275, 152 Ga. 496, transferred, see 114 S. E. 715, 29 Ga.App. 246—Brandt v. Buckley, 107 S.E. 773, 151 Ga. 582,

§ 341. — Court of Appeals in General

The court of appeals is a court for the correction of errors of law from the superior courts, and certain city courts, in all cases in which the supreme court is without jurisdiction.

The court of appeals was created by constitution-

al amendment in 1906.⁵¹ It has no original jurisdiction, but is a court for the correction of errors of law only⁵² from the superior courts in all cases in which such jurisdiction is not conferred by the constitution on the supreme court,⁵³ and from the

transferred, see 109 S.E. 692, 27 Ga.App. 515—Andrews v. Sims, 105 S.E. 641, 151 Ga. 53—Simpson v. McMillan, 102 S.E. 825, 150 Ga. 119—Water Power & Mining Co. v. Arnold, 99 S.E. 382, 149 Ga. 107, affirming Arnold v. Water Power & Mining Co., 96 S.E. 343, 22 Ga.App. 504—Burruss v. Montgomery, 97 S.E. 538, 148 Ga. 548—Watkins v. Woodberry, 96 S.E. 338, 148 Ga. 249—Frey v. Thompson, 94 S.E. 999, 147 Ga. 559—Harris v. State, 94 S.E. 572, 147 Ga. 489, transferred, see 95 S.E. 321, 21 Ga.App. 796—Arnold v. Water Power & Mining Co. of Georgia, 92 S.E. 889, 147 Ga. 91—Elkins v. Merritt, 92 S.E. 51, 146 Ga. 647—Federal Land Bank of Columbia v. Shingler, 164 S.E. 213, 45 Ga.App. 199, conforming to 162 S.E. 815, 174 Ga. 352, reversing 157 S.E. 911, 43 Ga.App. 92—Patterson v. Bank of Alapaha, 99 S.E. 141, 23 Ga.App. 622.
15 C.J. p 1039 note 52, p 1147 note 77.

Provisions construed

(1) Under the constitutional provision that "any case" carried to the supreme court may, under the described circumstances, be transferred to the court of appeals, a petition to mandamus a judge to certify a bill of exceptions is not a "case" and hence it cannot be transferred to court of appeals.—Brown v. Hutcheson, 144 S.E. 17, 166 Ga. 644.

(2) A case improperly taken to the supreme court is not "brought" to the court of appeals, within the meaning of Const. art 6 § 2 par 6, Civ.Code 1910 § 6503, relative to the time of disposing of cases, until transferred by the supreme court to the court of appeals, although so brought through the fault of plaintiff in error, and not transferred until after the close of the term of the court of appeals.—Howell v. State, 114 S.E. 427, 154 Ga. 424, answers to certified questions conformed to 114 S.E. 717, 29 Ga.App. 174.

Effect of retransfer

Where a case was transmitted by court of appeals to the supreme court, that court's retransfer of the case is equivalent to a holding that the constitutional question raised in the affidavit of illegality was not properly made and was not actually raised for review.—Felker v. City of Monroe, 95 S.E. 1023, 22 Ga.App. 301.

51. Ga.—Gainesville Midland R. Co.

v. Jackson, 57 S.E. 1007, 1 Ga.App. 632.

15 C.J. p 1039 note 53.

52. Ga.—Commercial Credit Co. v. S. E. Motor Co., 134 S.E. 180, 181, 35 Ga.App. 563—Citizens' Bank of Bainbridge v. McLeod, 105 S.E. 315, 26 Ga.App. 36—Hester v. Dreyer & Hinson, 92 S.E. 299, 19 Ga.App. 815.
15 C.J. p 1039 note 54.

53. Ga.—Lunsford v. State, 199 S.E. 808, 187 Ga. 162—Criswell v. Jones, 199 S.E. 804, 187 Ga. 55, transferred, see App., 3 S.E.2d 115—Vaissiere v. J. B. Pound Hotel Co., 190 S.E. 354, 184 Ga. 72, affirming J. B. Pound Hotel Co. v. Vaissiere, 187 S.E. 279, 54 Ga.App. 162—Marlowe v. Worrill, 188 S.E. 340, 183 Ga. 275—First Nat. Bank v. Busha, 181 S.E. 152, 180 Ga. 852—Hood v. Bibb Brokerage Corporation, 169 S.E. 110, 176 Ga. 846, transferred, see 173 S.E. 236, 48 Ga.App. 606—Mobley v. Askew, 166 S.E. 772, 176 Ga. 19, transferred, see 170 S.E. 894, 47 Ga.App. 517, following Gormley v. Askew, 170 S.E. 674, 177 Ga. 554—Langford v. Johnson, 162 S.E. 690, 174 Ga. 348, transferred, see 167 S.E. 779, 46 Ga.App. 444—Howard v. Boone, 162 S.E. 681, 174 Ga. 329—Dougherty County v. Jones, 156 S.E. 197, 171 Ga. 601, transferred, see 158 S.E. 432, 43 Ga.App. 188—Clark v. Georgia Railroad Bank, 155 S.E. 766, 171 Ga. 441—Smith v. Atlanta Mut. Ins. Co., 155 S.E. 535, 42 Ga.App. 254—Griffin v. Garrard, 152 S.E. 906, 170 Ga. 401, transferred, see 156 S.E. 270, 42 Ga.App. 337—Georgia Casualty Co. v. McRitchie, 152 S.E. 900, 170 Ga. 422, transferred, see 156 S.E. 458, 42 Ga.App. 438—Georgia Creosoting Co. v. Moody, 150 S.E. 153, 169 Ga. 322, transferred, see 154 S.E. 294, 41 Ga.App. 701—Noland v. Bowe, 147 S.E. 513, 168 Ga. 316—Brown v. Bowman, 140 S.E. 846, 165 Ga. 386—American Nat. Ins. Co. v. Brantley, 140 S.E. 760, 165 Ga. 305—Ford v. Southern Ry. Co., 124 S.E. 887, 159 Ga. 111—Wallace v. State, 117 S.E. 243, 155 Ga. 414—Gulf Refining Co. v. Miller, 108 S.E. 28, 151 Ga. 727, transferred, see, App., 114 S.E. 227, 29 Ga.App. 71—Swain v. Jaudon, 95 S.E. 696, 147 Ga. 773, answers to certified questions conformed to 95 S.E. 1020, 22 Ga.App. 276—Evans v. Pennington, 177 S.E. 357, 50 Ga.App. 146, transferred, see 179 S.E. 123, 180 Ga. 488—Rob-

inson v. Richmond Casket Co., 90 S.E. 102, 18 Ga.App. 638.
15 C.J. p 1039 note 55.

Constitutional language construed

The constitutional amendment defining the jurisdiction of the court of appeals and providing that it shall have jurisdiction in all cases in which such jurisdiction has not been conferred . . . upon the Supreme Court, clearly does not intend to confer jurisdiction in cases which could not be brought by writ of error to the supreme court at the creation of the court of appeals.—Ash v. People's Bank of Oliver, 101 S.E. 912, 914, 149 Ga. 713, answers to certified questions conformed to 102 S.E. 134, 24 Ga.App. 767—Tillman v. Groover, 102 S.E. 879, 25 Ga.App. 118.

Mandamus

In a case which is reviewable by the court of appeals, an application for mandamus should be made to that court.—Brown v. Hutcheson, 144 S.E. 17, 166 Ga. 644.

Court of appeals held to have appellate jurisdiction

(1) Action for damages for breach of contract.—Decatur County v. Praytor, Howton & Wood Contracting Co., 142 S.E. 73, 165 Ga. 742, reversing 137 S.E. 918, 36 Ga.App. 611, vacated 142 S.E. 919, 38 Ga.App. 74, and conformed to 142 S.E. 919, 38 Ga.App. 74—Lexington Presbyterian Church v. Reid, 93 S.E. 208, 147 Ga. 225, transferred, see 95 S.E. 723, 22 Ga.App. 170.

(2) Action on notes.—Johnson v. Bolton, 181 S.E. 186, 180 Ga. 859—Pan American Life Ins. Co. v. Orr, 170 S.E. 367, 177 Ga. 531, transferred, see 175 S.E. 32, 49 Ga.App. 257.

(3) Denial of change of venue.—Ruffin v. State, 108 S.E. 30, 151 Ga. 745, transferred, see 110 S.E. 311, 28 Ga.App. 40—Ruffin v. State, 108 S.E. 29, 151 Ga. 743, transferred, see 110 S.E. 311, 28 Ga.App. 40.

(4) Exceptions on judgment in contempt proceedings.—Jones v. State, 144 S.E. 106, 166 Ga. 553.

(5) Exceptions to dismissal of levy seeking personal judgment for breach of warranty.—Fite v. Whittemore, 146 S.E. 844, 167 Ga. 900, transferred, see 148 S.E. 279, 39 Ga.App. 671.

(6) Statutory garnishment proceeding.—Ledbetter v. Goodroe, 169 S.E. 106, 176 Ga. 845, transferred, see 171 S.E. 872, 48 Ga.App. 7.

(7) Suit to compel repayment of taxes illegally collected under Sales

city courts, see *supra* § 258, and in such other cases as may be prescribed by law.⁵⁴ Under the express provisions of a constitutional amendment of 1927, the court of appeals is also authorized to review cases from certain other courts as the general assembly may provide.⁵⁵

§ 342. — Superior Courts

The appellate jurisdiction of the superior court is specifically defined by both constitutional and statutory provisions.

By virtue of statutory authority, the Georgia superior courts exercise a general supervision over all inferior tribunals, and have jurisdiction to review and correct errors committed therein in the manner prescribed by law.⁵⁶ Thus, under a statute so providing, the writ of certiorari will issue from the superior court for the correction of errors committed by any inferior judicatory, except in cases touching the probate of wills, granting letters testamentary and of administration.⁵⁷

Tax Act.—*Stein & Co. v. State Tax Board*, 163 S.E. 187, 174 Ga. 611, transferred, see 167 S.E. 330, 46 Ga. App. 239.

(5) Tax collector's suit to enforce claim for taxes as prior claim against closed bank.—*Tharpe v. Gormley*, 168 S.E. 261, 176 Ga. 508, transferred, see 173 S.E. 212, 48 Ga. App. 731.

54. Ga.—*Cable Piano Co. v. Williamson*, 175 S.E. 103, 49 Ga. App. 529.

55. Ga.—*Yonge v. Nash Loan Co.*, 179 S.E. 570, 51 Ga. App. 35.

Review of municipal courts see *supra* § 258.

56. Ga.—*Pope v. Lee*, 75 S.E. 632, 133 Ga. 526—*Morgan v. Campbell*, 66 S.E. 369, 133 Ga. 549—*Teasley v. Campbell*, 66 S.E. 273, 133 Ga. 545.

15 C.J. p 1040 notes 77–85.

57. Ga.—*Gresham v. Lee*, 111 S.E. 404, 152 Ga. 829, answer to certified questions conformed to 112 S.E. 524, 28 Ga. App. 576—*Murphy v. Drum & Bugle Corps*, 190 S.E. 67, 55 Ga. App. 293—*Leary v. Rovalis*, 164 S.E. 902, 45 Ga. App. 414.

15 C.J. p 1040 note 86 [a].

58. Ga.—*Kirkman v. Gillespie*, 37 S.E. 714, 112 Ga. 507.

15 C.J. p 1040 note 97.

59. Ga.—*Hodges v. Seaboard Loan & Savings Ass'n*, 199 S.E. 105, 186 Ga. 845—*Campbell v. Atlanta Coach Co.*, 196 S.E. 769, 186 Ga. 77, transferred, see 200 S.E. 203, 58 Ga. App. 324—*Turner v. State*, 195 S.E. 431, 185 Ga. 432, transferred, see 199

S.E. 837, 58 Ga. App. 775—*Slaten v. College Park Cemetery Co.*, 193 S.E. 872, 185 Ga. 27—*Western & A. R. R. v. Michael*, 158 S.E. 426, 172 Ga. 561, answers to certified questions conformed to 160 S.E. 93, 43 Ga. App. 703—*Forbes v. Savannah*, 128 S.E. 806, 160 Ga. 701—*Patterson v. Bank of Alapaha*, 96 S.E. 863, 148 Ga. 356—*Smith v. Georgia Granite Corporation*, 194 S.E. 908, 57 Ga. App. 245, transferred, see 198 S.E. 772, 186 Ga. 634, 119 A.L.R. 550—*Maner v. Dykes*, 184 S.E. 438, 52 Ga. App. 715, transferred, see 187 S.E. 699, 183 Ga. 118, transferred, see 190 S.E. 189, 55 Ga. App. 436.

15 C.J. p 1038 note 36.

Question raised in cross bill

Where defendant in error files a cross bill of exceptions, in which are raised constitutional questions of which the supreme court alone has jurisdiction, rendering it necessary that the cross bill be transmitted to the supreme court, the main bill of exceptions should also be transmitted to such court, which will retain the entire case.—*Oliver-McDonald Co. v. Swift & Co.*, 120 S.E. 543, 157 Ga. 102.

60. Ga.—*Hodges v. Seaboard Loan & Savings Ass'n*, 199 S.E. 105, 186 Ga. 845—*Jollie v. Hughes*, 193 S.E. 769, 184 Ga. 860—*Forbes v. City of Savannah*, 128 S.E. 806, 160 Ga. 701—*Gates v. State*, 92 S.E. 974, 20 Ga. App. 171.

61. Ga.—*Hodges v. Seaboard Loan*

§ 343. — City Courts

The legislature cannot give city courts appellate jurisdiction in violation of constitutional limitations.

The legislature cannot, in violation of the provisions of the state constitution, vest appellate jurisdiction in the superior courts.⁵⁸

§ 344. — Cases Involving Construction of Constitutions or Validity and Construction of Statutes

The supreme court has exclusive jurisdiction over appeals of cases involving the constitutionality of statutes and treaties or the construction of doubtful constitutional provisions directly in question.

Under the express provisions of the state constitution, the supreme court is a court for the correction of errors of law from the superior courts and certain specified city and like courts in all cases that involve the construction of the state constitution⁵⁹ or of the constitution of the United States,⁶⁰ or of treaties between the United States and foreign governments,⁶¹ and in all cases in which the constitutionality of any state or federal law is drawn into question.⁶² Thus, the court of appeals has no

& Savings Ass'n, 199 S.E. 105, 186 Ga. 845.

62. Ga.—*Trust Co. of Georgia v. Finsterwald*, 4 S.E.2d 808, 188 Ga. 794—*Wright v. Cannon*, 195 S.E. 168, 185 Ga. 363, transferred, see 198 S.E. 301, 58 Ga. App. 268—*West v. Frick Co.*, 187 S.E. 868, 183 Ga. 182, transferred, see 192 S.E. 55, 55 Ga. App. 854—*Maner v. Dykes*, 187 S.E. 699, 183 Ga. 118, transferred, see 184 S.E. 433, 52 Ga. App. 715.

Clause construed

(1) The term any "law of the state of Georgia" as used in the constitutional provision defining the jurisdiction of the supreme court means an enactment of the general assembly.—*Maner v. Dykes*, 187 S.E. 699, 183 Ga. 118, transferred, see 184 S.E. 438, 52 Ga. App. 715, transferred, see 190 S.E. 189, 55 Ga. App. 436.

(2) A rule promulgated by the public service commission pursuant to a statute authorizing it to make rules for safety is not a "law of the state of Georgia."—*Maner v. Dykes*, *supra*.

Where question of constitutionality of law of sister state is not properly raised, the supreme court will not decide whether it or court of appeals had jurisdiction of a case involving an attack on the constitutionality of a law of a sister state.—*Jollie v. Hughes*, 193 S.E. 769, 184 Ga. 860.

Question must be raised below

The supreme court will not pass

jurisdiction over constitutional questions reserved for the supreme court by the constitution.⁶³ Nevertheless, the words "construction of the constitution" within the above provision contemplates a construction where the meaning of the constitution is directly in question and is doubtful by force

of its own terms or under the decisions of the state or federal supreme courts.⁶⁴ Therefore, this constitutional provision does not deny to the court of appeals jurisdiction of cases involving the mere application of unquestioned and unambiguous provisions of the constitution to a given state of facts.⁶⁵

on the constitutionality of a statute, unless the record clearly shows that the point was directly passed on by trial judge.—*West v. Frick Co.*, 187 S.E. 868, 183 Ga. 182, transferred, see 192 S.E. 55, 55 Ga.App. 854.—*Yarbrough v. Georgia R. & Banking Co.*, 168 S.E. 873, 176 Ga. 780, transferred, see 172 S.E. 808, 48 Ga.App. 314.

Question as to constitutionality of statute held not properly raised

Ga.—*Head v. Edgar Bros. Co.*, 200 S.E. 792, 187 Ga. 409.—*West v. Frick Co.*, 187 S.E. 868, 183 Ga. 182, transferred, see 192 S.E. 55, 55 Ga.App. 854.—*Keeney v. State*, 186 S.E. 561, 182 Ga. 523.—*Bentley v. Anderson-McGriff Hardware Co.*, 184 S.E. 297, 181 Ga. 813, transferred, see 188 S.E. 286, 54 Ga.App. 478.—*Nelson v. State*, 177 S.E. 253, 179 Ga. 743, transferred, see 180 S.E. 16, 51 Ga.App. 207.—*De Kalb County v. Grice*, 175 S.E. 804, 179 Ga. 458, transferred, see 181 S.E. 703, 51 Ga.App. 887.—*Southern Ry. Co. v. Slaton*, 173 S.E. 161, 178 Ga. 314, transferred, see 178 S.E. 392, 50 Ga.App. 570.—*Newman v. Griffin Foundry & Machine Co.*, 140 S.E. 353, 165 Ga. 227.—*Savannah Electric Co. v. Thomas*, 113 S.E. 806, 154 Ga. 258, transferred, see 118 S.E. 481, 30 Ga.App. 405.—*Crapp v. State*, 95 S.E. 993, 148 Ga. 150.—*Lee v. Central of Georgia Ry. Co.*, 94 S.E. 558, 147 Ga. 428.—*Western & A. R. R. v. Michael*, 160 S.E. 93, 43 Ga.App. 703, conforming to answers to certified questions 158 S.E. 426, 172 Ga. 561.—*U. S. Fidelity & Guaranty Co. v. Watts*, 133 S.E. 476, 35 Ga.App. 447.—*Miller v. State*, 107 S.E. 64, 26 Ga.App. 642.—*Neville v. State*, 97 S.E. 895, 23 Ga.App. 145.

63. Ga.—*Bolton v. City of Newnan*, 95 S.E. 472, 22 Ga.App. 15, transferred, see 94 S.E. 326, 147 Ga. 400.

64. Ga.—*Western Union Telegraph Co. v. King*, 2 S.E.2d 909.—*Lunsford v. State*, 199 S.E. 808, 187 Ga. 162.—*Hodges v. Seaboard Loan & Savings Ass'n*, 199 S.E. 105, 186 Ga. 845.—*Campbell v. Atlanta Coach Co.*, 196 S.E. 769, 186 Ga. 77, transferred, see 200 S.E. 203, 58 Ga.App. 824.—*Turner v. State*, 195 S.E. 431, 185 Ga. 432, transferred, see 199 S.E. 837, 58 Ga.App. 775.—*Payne v. State*, 180 S.E. 130, 180 Ga. 609.—*De Kalb County v. Grice*, 175 S.E. 804, 179 Ga. 458, transferred, see 181 S.E. 703, 51 Ga.App. 887.—*Gulf*

Paving Co. v. City of Atlanta, 99 S.E. 374, 149 Ga. 114, reversing 96 S.E. 392, 22 Ga.App. 374, and conformed to 99 S.E. 538, 24 Ga.App. 4.

No "construction of the constitution" involved

Ga.—*Methodist Episcopal Church, South v. Decell*, 1 S.E.2d 432, 187 Ga. 526.—*Head v. Edgar Bros. Co.*, 200 S.E. 792, 187 Ga. 409.—*Lunsford v. State*, 199 S.E. 808, 187 Ga. 162.—*Beckman v. Atlantic Refining Co.*, 182 S.E. 595, 181 Ga. 456, transferred *Beckmann v. Atlantic Refining Co.*, 187 S.E. 158, 53 Ga.App. 671.—*Payne v. State*, 180 S.E. 130, 180 Ga. 609.—*Gormley v. Searcy*, 175 S.E. 913, 179 Ga. 389.—*Morris v. Tatum*, 174 S.E. 340, 178 Ga. 728, transferred, see 178 S.E. 167, 50 Ga.App. 315.—*Wynn v. State*, 172 S.E. 565, 178 Ga. 193.—*Cowart v. State*, 170 S.E. 253, 177 Ga. 377, transferred, see 179 S.E. 823, 51 Ga.App. 199.—*Turner v. State*, 169 S.E. 21, 176 Ga. 823, transferred, see 169 S.E. 733, 47 Ga.App. 192.—*Felker v. Still*, 169 S.E. 15, 176 Ga. 735, transferred, see 171 S.E. 838, 48 Ga.App. 24.—*American Service Co. v. Cohen*, 158 S.E. 599, 172 Ga. 744.—*Meadows v. State*, 154 S.E. 188, 170 Ga. 802, transferred, see 158 S.E. 765, 43 Ga.App. 225.—*Clark v. Union School Dist.*, 134 S.E. 325, 162 Ga. 597, transferred, see 135 S.E. 318, 36 Ga.App. 80.—*Smith v. Atlanta Mut. Ins. Co.*, 155 S.E. 535, 42 Ga.App. 254.

65. Ga.—*James v. State*, 5 S.E.2d 236.—*Eminent Household of Columbian Woodmen v. Bryant*, 4 S.E.2d 471, 188 Ga. 594.—*Western Union Telegraph Co. v. King*, 2 S.E.2d 909.—*City of Waycross v. Harrell*, 199 S.E. 119, 186 Ga. 833, transferred, see 1 S.E.2d 681, 59 Ga.App. 615.—*Hodges v. Seaboard Loan & Savings Ass'n*, 199 S.E. 105, 186 Ga. 845.—*Sanders v. State*, 197 S.E. 801, 186 Ga. 835.—*Campbell v. Atlanta Coach Co.*, 196 S.E. 769, 186 Ga. 77, transferred, see 200 S.E. 203, 58 Ga.App. 824.—*Turner v. State*, 195 S.E. 431, 185 Ga. 432, transferred, see 199 S.E. 837, 58 Ga.App. 775.—*Silas v. State*, 184 S.E. 318, 181 Ga. 744.—*Payne v. State*, 180 S.E. 130, 180 Ga. 609.—*Gormley v. Searcy*, 175 S.E. 913, 179 Ga. 389.—*Yarbrough v. Georgia R. & Banking Co.*, 168 S.E. 873, 176 Ga. 780, transferred, see 172 S.E. 808, 48 Ga.App.

314.—*Thompson v. City of Atlanta*, 168 S.E. 312, 176 Ga. 489, transferred, see 173 S.E. 193, 48 Ga.App. 674, conforming to answers to certified questions 172 S.E. 915, 178 Ga. 281.—*Western & A. R. R. v. Leslie*, 168 S.E. 15, 176 Ga. 385, transferred, see 173 S.E. 170, 48 Ga.App. 714.—*Worth v. Borough of Atlanta*, 165 S.E. 245, 175 Ga. 377, transferred, see 169 S.E. 242, 46 Ga.App. 743.—*Mays v. State*, 165 S.E. 68, 175 Ga. 260.—*U. S. Fidelity & Guaranty Co. v. Elmondson*, 164 S.E. 773, 174 Ga. 895.—*Thompson v. State*, 164 S.E. 202, 174 Ga. 804.—*Dunn Motors v. General Motors Acceptance Corporation*, 163 S.E. 906, 174 Ga. 743, transferred, see 167 S.E. 897, 46 Ga.App. 469.—*American Mills Co. v. Doyal*, 163 S.E. 603, 174 Ga. 631, transferred, see 167 S.E. 312, 46 Ga.App. 236.—*Wadley Southern Ry. Co. v. Faglee*, 161 S.E. 847, 173 Ga. 814, reversing 155 S.E. 65, 42 Ga.App. 80, and conformed to 161 S.E. 848, 44 Ga.App. 350.—*Norman v. State*, 156 S.E. 203, 171 Ga. 527, transferred, see 160 S.E. 522, 44 Ga.App. 92.—*Meadows v. State*, 154 S.E. 188, 170 Ga. 802, transferred, see 158 S.E. 765, 43 Ga.App. 225.—*Howell v. State*, 111 S.E. 675, 153 Ga. 201.—*Gulf Paving Co. v. City of Atlanta*, 99 S.E. 374, 149 Ga. 114, reversing 96 S.E. 392, 22 Ga.App. 374, and conformed to 99 S.E. 538, 24 Ga.App. 4.—*Morris v. Tatum*, 178 S.E. 167, 50 Ga.App. 315, transferred, see 174 S.E. 340, 178 Ga. 728.—*Gormley v. Walton*, 170 S.E. 706, 47 Ga.App. 466, reversed on other grounds *Walton v. Gormley*, 178 S.E. 152, 180 Ga. 90, and vacated *Gormley v. Walton*, 178 S.E. 398, 50 Ga.App. 478, transferred, see 180 S.E. 220, 180 Ga. 660.—*Denard v. State*, 168 S.E. 311, 46 Ga.App. 513, transferred, see 168 S.E. 310, 176 Ga. 361.—*Hazlehurst v. Southern Fruit Distributors*, 167 S.E. 898, 46 Ga.App. 453.—*Perdue v. Maryland Casualty Co.*, 160 S.E. 720, 43 Ga.App. 853.—*Seaboard Air Line Ry. Co. v. Benton*, 159 S.E. 717, 43 Ga.App. 495, reversed on other grounds 165 S.E. 593, 175 Ga. 491, conformed to 166 S.E. 219, 45 Ga.App. 832.—*Southern Pac. Co. v. Di Cristina*, 137 S.E. 79, 36 Ga.App. 433.—*Daniel v. City of Claxton*, 132 S.E. 411, 35 Ga.App. 107.—*Wright v. Southern Ry. Co.*, 112 S.E. 171, 28 Ga.App. 545.—*Bryson v. State*, 108 S.E. 63, 27 Ga.App. 230.—*Rhodes*

Furthermore, the court of appeals, and not the supreme court, has jurisdiction of a case at law raising only the question of the constitutionality of a municipal ordinance.⁶⁶

It was formerly required that, where in a case pending in the court of appeals a question was raised as to the construction of a provision of the constitution of the state or the United States,⁶⁷ or as to the constitutionality of an act of the general assembly of the state,⁶⁸ and a decision of the question was necessary to the determination of the case,⁶⁹ the court of appeals should certify such question to the supreme court and was bound by the construction thereon given by the latter court;⁷⁰ but since the constitutional amendment of 1916, this duty to certify does not exist, as the supreme court has exclusive jurisdiction of cases involving such questions.⁷¹

§ 345. — Cases Involving Title to Land

Unless such matter is only incidentally involved, the

supreme court has exclusive appellate jurisdiction in all cases respecting title to land.

By express provision of the constitution, the supreme court has appellate jurisdiction, "until otherwise provided by law," in all cases respecting title to land.⁷² Under this provision, the supreme court is without jurisdiction to review cases wherein the title to land is not directly, but only incidentally, involved,⁷³ the court of appeals having jurisdiction under such circumstances in an otherwise proper case.⁷⁴

§ 346. — Cases Involving Validity or Construction of Wills

Appellate jurisdiction in all cases involving the validity or the construction of wills reposes in the supreme court.

Under an appropriate constitutional provision, the supreme court has appellate jurisdiction in all cases which involve the validity or the construction of wills.⁷⁵ However, a case which only inci-

v. Elberton & E. Ry. Co., 85 S.E. 611, 16 Ga.App. 426.

66. Ga.—Nilsen v. City of La Grange, 189 S.E. 511, 183 Ga. 742, transferred, see 191 S.E. 175, 55 Ga.App. 676—Hicks v. City of Dublin, 188 S.E. 339, 183 Ga. 390—Maner v. Dykes, 187 S.E. 699, 183 Ga. 118—Stafford v. City of Valdosta, 172 S.E. 461, 178 Ga. 224, transferred, see 174 S.E. 810, 49 Ga.App. 243—ElHott v. City Council of Augusta, 170 S.E. 787, 177 Ga. 680, transferred, see 176 S.E. 548, 49 Ga.App. 568—Thompson v. City of Atlanta, 166 S.E. 312, 176 Ga. 489, transferred, see 173 S.E. 193, 48 Ga.App. 674, conforming to answers to certified questions 172 S.E. 915, 178 Ga. 281—Neal v. City of Dublin, 92 S.E. 1021, 20 Ga.App. 263.

67. Ga.—Tooke v. State, 61 S.E. 917, 4 Ga.App. 435.

15 C.J. p 1039 note 58.

68. Ga.—Armond v. State, 88 S.E. 990, 18 Ga.App. 140.

15 C.J. p 1039 note 59.

69. Ga.—Columbian Nat. Life Ins. Co. v. Mulkey, 91 S.E. 106, 146 Ga. 267.

15 C.J. p 1039 note 60.

70. Ga.—Armond v. State, 88 S.E. 990, 18 Ga.App. 140.

15 C.J. p 1040 note 61.

71. Ga.—Gulf Paving Co. v. City of Atlanta, 96 S.E. 392, 22 Ga.App. 374, reversed on other grounds 99 S.E. 374, 149 Ga. 114, conformed to 99 S.E. 538, 24 Ga.App. 4.

72. Ga.—Young v. Cochran Banking Co., 144 S.E. 652, 166 Ga. 877—Harlowe v. Harlowe, 129 S.E. 98, 160 Ga. 822—Colley v. Atlanta & W.

P. R. Co., 118 S.E. 712, 156 Ga. 43—Elkins v. Merritt, 92 S.E. 51, 146 Ga. 647—Cates v. Duncan, 174 S.E. 925, 49 Ga.App. 191, conforming to 174 S.E. 380, 178 Ga. 748, and transferred, see 179 S.E. 121, 180 Ga. 289.

15 C.J. p 1038 note 41.

73. Ga.—Colley v. Atlanta & W. P. R. Co., 118 S.E. 712, 156 Ga. 43.

Cases held not to be "respecting title to land"

Ga.—Downs v. Weaver, 193 S.E. 858, 184 Ga. 856, transferred, see 198 S.E. 292, 58 Ga.App. 259—Farkas v. Stephens, 183 S.E. 796, 181 Ga. 669, transferred, see 188 S.E. 919, 54 Ga.App. 706—Ryals v. Atlantic Life Ins. Co., 182 S.E. 896, 181 Ga. 541—Griffin v. Securities Inv. Co., 182 S.E. 594, 181 Ga. 455—Adams v. Bishop, 162 S.E. 531, 174 Ga. 262—H. G. Hastings Co. v. Southern Natural Gas Corporation, 159 S.E. 853, 173 Ga. 212—Grobl v. Foreman, 156 S.E. 622, 171 Ga. 712, transferred, see 161 S.E. 658, 44 Ga.App. 427—Anderson v. Watkins, 153 S.E. 8, 170 Ga. 483, transferred, see 156 S.E. 43, 42 Ga.App. 319—ElHott v. Dolvin, 127 S.E. 651, 160 Ga. 320—Griffin v. Leggett, 112 S.E. 899, 153 Ga. 663—Bond v. Reid, 110 S.E. 281, 152 Ga. 481—Hodgson v. Hodgson, 110 S.E. 754, 28 Ga. App. 250.

74. Ga.—Edwards v. Bynum, 170 S.E. 367, 177 Ga. 504, transferred, see 172 S.E. 117, 48 Ga.App. 149—Jones v. Windham, 168 S.E. 6, 176 Ga. 619—Radcliffe v. Jones, 162 S.E. 679, 174 Ga. 324, transferred, see 166 S.E. 450, 46 Ga.App. 33—Anderson v. Anderson, 107 S.E. 834,

151 Ga. 518, transferred, see 108 S.E. 907, 27 Ga.App. 513—Drawdy v. Musselwhite, 105 S.E. 298, 150 Ga. 723—City of Atlanta v. West, App., 3 S.E.2d 755—Alabama Great Southern R. Co. v. Cross, 112 S.E. 654, 28 Ga.App. 629.

Damages for trespass

Ga.—City of Atlanta v. West, App., 3 S.E.2d 755.

75. Ga.—Bond v. Reid, 110 S.E. 281, 152 Ga. 481.

Cases not involving validity or construction of wills

(1) A legatees' proceeding against the executor for an accounting and a recovery of damages from the executor's sales of property at lower than procurable price is not a case "involving the construction of a will," although the will provided that executor could use its discretion in sales of property.—Trust Co. of Georgia v. Smith, 185 S.E. 525, 182 Ga. 360, transferred, see 188 S.E. 469, 54 Ga.App. 518.

(2) A suit against executors to recover the value of land claimed by plaintiff under an alleged gift from the testator prior to the will is not one involving the validity or construction of the will.—Hodgson v. Hodgson, 110 S.E. 754, 28 Ga.App. 250.

(3) A suit to establish a copy of a lost record of a will, under § 5811, is not a case involving the validity and construction of a will.—Bond v. Reid, 110 S.E. 281, 152 Ga. 481.

(4) Where parties agreed on the will's construction and validity, the case is not within the jurisdiction of the supreme court as "involving

dentally involves the construction of a will is not within the supreme courts' jurisdiction.⁷⁶

§ 347. — Equity Cases

Unless its equitable features have been eliminated,

the supreme court has appellate jurisdiction of all equity cases.

Under the express provision of the constitution, the supreme court has appellate jurisdiction of all equity cases.⁷⁷ Furthermore, where both legal and

the validity or construction of a will."—*Pignatel v. Mobley*, 160 S.E. 411, 173 Ga. 410, transferred, see 162 S.E. 159, 44 Ga.App. 555.

76. Ga.—*Hicks v. Wadsworth*, 192 S.E. 729, 184 Ga. 681, transferred, see 196 S.E. 251, 57 Ga.App. 529—*Reece v. McCrary*, 177 S.E. 741, 179 Ga. 812, transferred, see 181 S.E. 697, 51 Ga.App. 746—*Paulk v. Smith*, 192 S.E. 68, 56 Ga.App. 53.

77. Ga.—*Bleckley v. Bleckley*, 5 S.E. 2d 206—*Kidd v. Finch*, 4 S.E.2d 187, 188 Ga. 492—*Wrenn v. Atlanta Trust Co.*, 2 S.E.2d 67, 187 Ga. 663—*Dobbs v. Federal Deposit Ins. Corporation*, 1 S.E.2d 672, 187 Ga. 569—*Hicks v. Atlanta Trust Co.*, 1 S.E.2d 669, 187 Ga. 623—*Methodist Episcopal Church, South v. Decell*, 1 S.E.2d 432, 187 Ga. 526—*Harrell v. Parker*, 198 S.E. 776, 186 Ga. 760—*Smith v. Life & Casualty Ins. Co. of Tennessee*, 196 S.E. 59, 185 Ga. 572—*Chapman v. McPherson*, 192 S.E. 423, 184 Ga. 613—*Solomons v. Mayor and Aldermen of City of Savannah*, 189 S.E. 230, 183 Ga. 631—*Tomlin v. Rome Stove & Range Co.*, 187 S.E. 879, 183 Ga. 183—*O'Callaghan v. Bank of Eastman*, 180 S.E. 847, 180 Ga. 812—*Globe & Rutgers Fire Ins. Co. v. Salvation Army of Georgia*, 172 S.E. 33, 177 Ga. 890—*Gormley v. Slicer*, 172 S.E. 21, 178 Ga. 85, answer conformed to 172 S.E. 575, 48 Ga.App. 177—*Mobley v. Rucker*, 167 S.E. 104, 176 Ga. 178, reversing *Rucker v. Mobley*, 162 S.E. 851, 44 Ga.App. 705, and conformed to 167 S.E. 614, 46 Ga.App. 319—*Pearson v. Stamey*, 157 S.E. 468, 172 Ga. 282—*Hunter v. Moss*, 149 S.E. 705, 169 Ga. 100—*Elberton & E. R. Co. v. Green*, 147 S.E. 65, 167 Ga. 891, transferred, see 151 S.E. 528, 40 Ga.App. 786—*Wilkes County v. City of Washington*, 145 S.E. 47, 167 Ga. 181—*Benton v. Benton*, 139 S.E. 68, 164 Ga. 541—*Ehrlich v. Bell*, 136 S.E. 423, 163 Ga. 547—*Smith v. Hancock*, 136 S.E. 52, 163 Ga. 222—*Wyche v. Bank of Campbell County*, 127 S.E. 741, 160 Ga. 258—*Jasper School Dist. v. Gormley*, 190 S.E. 366, 55 Ga.App. 391, reversed on other grounds 193 S.E. 248, 184 Ga. 756, transferred, see 196 S.E. 232, 57 Ga.App. 537—*Hewell v. Atlanta Police Relief Ass'n*, 190 S.E. 275, 55 Ga.App. 777—*Lee v. Holman*, 183 S.E. 837, 52 Ga.App. 543—*Evans v. Pennington*, 177 S.E. 357, 50 Ga.App. 146, transferred, see 179 S.E. 123, 180

Ga. 488—*Universalist Convention v. Guest*, 171 S.E. 453, 47 Ga.App. 747, transferred, see 175 S.E. 466, 179 Ga. 168—*Peebles v. Windham*, 167 S.E. 550, 46 Ga.App. 285, transferred, see 171 S.E. 452, 177 Ga. 741.

Necessary elements

In order to make a case in equity, the allegations of the petition must be applicable to the equitable relief prayed for, and there must be a prayer for specific equitable relief or for general relief, and even though the allegations are such as to authorize the granting of equitable relief under suitable prayers therefor, if there be no prayer for specific equitable relief or for general relief, the case presented is not an "equity case" within supreme court's exclusive jurisdiction.—*Jasper School Dist. v. Gormley*, 193 S.E. 248, 184 Ga. 756, reversing 190 S.E. 366, 55 Ga.App. 391, transferred, see 196 S.E. 232, 57 Ga.App. 537.

Designation immaterial

(1) Case is not to be treated as "equity case" within constitutional provision governing supreme court's jurisdiction, merely because it is so termed by its pleadings.—*Dobbs v. Federal Deposit Ins. Corporation*, 1 S.E.2d 672, 187 Ga. 569—*Griffin v. Securities Inv. Co.*, 182 S.E. 594, 181 Ga. 455—*Equitable Life Assur. Soc. v. Bischoff*, 175 S.E. 560, 179 Ga. 255.

(2) Trial court's adjudication that a law case was a case in equity will not give supreme court appellate jurisdiction.—*Gormley v. Slicer*, 172 S.E. 21, 178 Ga. 85, answer conformed to 172 S.E. 575, 48 Ga.App. 177.

Cases held not "equity cases" within constitution

Ga.—*Atlanta Finance Co. v. Fitzgerald*, 5 S.E.2d 242—*Watson v. Watson*, 5 S.E.2d 237—*Bailey v. McElroy*, 2 S.E.2d 634—*Dobbs v. Federal Deposit Ins. Corporation*, 1 S.E.2d 672, 187 Ga. 569—*Methodist Episcopal Church, South v. Decell*, 1 S.E.2d 432, 187 Ga. 526—*Henderson v. Curtis*, 195 S.E. 152, 185 Ga. 390, transferred, see 197 S.E. 65, 57 Ga.App. 892—*Jasper School Dist. v. Gormley*, 193 S.E. 248, 184 Ga. 756, reversing 190 S.E. 366, 55 Ga.App. 391, transferred, see 196 S.E. 232, 57 Ga.App. 537—*Robinson v. Lindsey*, 192 S.E. 910, 184 Ga. 684—*Universal Garage Co. v. Fowler*, 192 S.E. 299, 184 Ga. 604, transferred, see 196 S.E. 198, 57 Ga.App. 668, affirmed *Fowler v. Universal*

Garage Co., 199 S.E. 120, 186 Ga. 395—*Jones v. Lawman*, 190 S.E. 607, 184 Ga. 25, transferred, see 194 S.E. 416, 56 Ga.App. 764—*Williford v. State*, 190 S.E. 605, 184 Ga. 59—*Royal Arcanum v. Lester*, 190 S.E. 562, 184 Ga. 51, transferred, see 193 S.E. 259, 56 Ga.App. 527—*Dowell v. Pollard*, 187 S.E. 25, 182 Ga. 792—*Jefferson Standard Life Ins. Co. v. Fendley*, 186 S.E. 722, 182 Ga. 661, transferred, see 190 S.E. 806, 55 Ga.App. 618—*Farkas v. Stephens*, 183 S.E. 796, 181 Ga. 669, transferred, see 188 S.E. 919, 54 Ga.App. 706—*Dillon v. Sills*, 183 S.E. 563, 181 Ga. 582, transferred, see 187 S.E. 725, 54 Ga.App. 299—*Reese v. Manget*, 183 S.E. 62, 181 Ga. 491—*Ryals v. Atlantic Life Ins. Co.*, 182 S.E. 896, 181 Ga. 541—*Griffin v. Securities Inv. Co.*, 182 S.E. 594, 181 Ga. 455—*Buttersworth v. Swint*, 182 S.E. 520, 181 Ga. 430—*Goodwyn v. Roop*, 182 S.E. 4, 181 Ga. 327, transferred, see 187 S.E. 127, 53 Ga.App. 847—*Atlanta Coach Co. v. Simmons*, 181 S.E. 762, 181 Ga. 67, transferred, see 190 S.E. 610, first case, 55 Ga.App. 532, conforming to answers to certified questions, 190 S.E. 610, second case, 184 Ga. 1—*Travelers Ins. Co. v. Bumstead*, 180 S.E. 729, 180 Ga. 711, conforming to answers to certified questions 186 S.E. 742, 182 Ga. 692, transferred, see 187 S.E. 736, 54 Ga.App. 284—*Williams v. Aycock*, 179 S.E. 770, 180 Ga. 570, transferred, see 183 S.E. 628, 52 Ga.App. 386, certiorari dismissed—*Aycock v. Williams*, 189 S.E. 841, 183 Ga. 800—*Aetna Life Ins. Co. v. Dorman*, 177 S.E. 703, 179 Ga. 890, transferred, see 180 S.E. 640, 51 Ga.App. 393—*Burton v. Metropolitan Life Ins. Co.*, 172 S.E. 41, 177 Ga. 899, transferred, see 173 S.E. 922, 48 Ga.App. 828—*Mechanics' Ins. Co. v. Goodwin*, 172 S.E. 32, 177 Ga. 889, transferred, see 174 S.E. 160, 48 Ga.App. 823—*Gormley v. Slicer*, 172 S.E. 21, 178 Ga. 85, answer conformed to 172 S.E. 575, 48 Ga.App. 177—*Daniel v. Chastaine*, 171 S.E. 373, second case, 177 Ga. 730, transferred, see 173 S.E. 864, 48 Ga.App. 799—*Firemen's Fund Ins. Co. v. Thomas*, 170 S.E. 222, 177 Ga. 427, transferred, see 176 S.E. 690, 49 Ga.App. 731—*Burgess v. Ohio Nat. Life Ins. Co.*, 169 S.E. 364, 177 Ga. 48, transferred, see 172 S.E. 676, 48 Ga.App. 260—*Ingraham v. Reynolds*, 168 S.E. 875, 176 Ga. 772, answers conformed to 169 S.E. 679, 47

equitable remedies are granted the supreme court has jurisdiction on appeal.⁷³ While the court of appeals has no jurisdiction of equity cases,⁷⁹ where the equitable features of such cases have been removed on or before trial, the court of appeals will take jurisdiction in otherwise proper cases.⁸⁰

§ 348. — Certification of Questions by Court of Appeals

The court of appeals may certify questions to the supreme court, which, after affording a hearing to the parties, shall give binding instructions thereon to the

court of appeals, provided the questions are proper in form and content.

By express provision of the constitution, where a case is pending before the court of appeals on which that court desires instruction, it may certify questions involved therein to the supreme court, which, after according a hearing to the parties, shall instruct the court of appeals on the questions so certified, which instructions are binding on the court of appeals.⁸¹ Where the question certified from the court of appeals is not in proper form, the supreme court is not required to answer.⁸² Each

Ga.App. 87—Spence v. Miller, 167 S.E. 183, 176 Ga. 96, transferred, see 171 S.E. 158, 47 Ga.App. 625—Alsabrook v. Prudential Ins. Co., 163 S.E. 706, 174 Ga. 637, transferred, see Alsabrook v. Prudential Ins. Co. of America, 167 S.E. 735, 46 Ga.App. 400—Perry v. Fletcher, 162 S.E. 285, 174 Ga. 180, transferred, see 167 S.E. 796, 46 Ga.App. 450—Pignatelli v. Mobley, 160 S.E. 411, 173 Ga. 420, transferred, see 162 S.E. 152, 44 Ga.App. 556—Burnett v. Lunsford, 159 S.E. 691, 173 Ga. 38, transferred, see 164 S.E. 100, 45 Ga.App. 168—Pearson v. Stamey, 157 S.E. 468, 172 Ga. 222—Piedmont Sav. Co. v. Chapman, 153 S.E. 4, 170 Ga. 331—Adams v. Bishop, 153 S.E. 108, 170 Ga. 238, transferred, see 157 S.E. 523, 42 Ga.App. 811—Burkhalter v. Virginia-Carolina Chemical Co., 152 S.E. 98, 170 Ga. 237, transferred, see 156 S.E. 272, 42 Ga.App. 312—Futrelle v. Karsman, 150 S.E. 94, 169 Ga. 371—Hunter v. Moss, 149 S.E. 705, 169 Ga. 100—Elberton & E. R. Co. v. Green, 147 S.E. 65, 167 Ga. 391, transferred, see 151 S.E. 538, 40 Ga.App. 786—Long v. S. A. Lynch Enterprise Finance Corporation, 143 S.E. 579, 166 Ga. 497—Bernstein v. Fagelson, 143 S.E. 862, 166 Ga. 281—Mulherin v. Neely, 139 S.E. 820, 165 Ga. 113—McKenzie Trust Co. v. Bullard, 127 S.E. 277, 159 Ga. 384, transferred, see 132 S.E. 125, 35 Ga.App. 19—Taylor Lumber Co. v. Clark Lumber Co., 125 S.E. 844, 159 Ga. 393—Hosch v. Smith, 115 S.E. 646, 154 Ga. 789—Hulse v. Starke, 110 S.E. 275, 152 Ga. 496, transferred, see 114 S.E. 715, 29 Ga.App. 246—King v. Rodgers, 94 S.E. 580, 147 Ga. 464, transferred, see 95 S.E. 766, 22 Ga.App. 158—Albright v. American Cent. Ins. Co., 94 S.E. 561, 147 Ga. 492—Fuller v. Georgia Ry. & Power Co., 94 S.E. 249, 147 Ga. 334—Aakins v. First Nat. Bank, 188 S.E. 574, 54 Ga.App. 596—Georgia Casualty Co. v. McRitchie, 166 S.E. 48, 45 Ga.App. 697—Cooper v. Coral Gables, 164 S.E. 227, 45 Ga.App. 230—Brandt v. Computing Cloth-Measuring Mach. Co., 109 S.E. 694,

27 Ga.App. 704, transferred, see 108 S.E. 61, 151 Ga. 583.

Good and bad cases

The jurisdiction of the supreme court is not limited to good cases in equity, but embraces both good and bad equity cases.—Bleckley v. Bleckley, Ga., 5 S.E.2d 206.

More prayer for equitable relief does not change a suit for damages for conversion into equity case within jurisdiction of supreme court.—Atlanta Finance Co. v. Fitzgerald, Ga., 5 S.E.2d 242.

72. Ga.—Evans v. Pennington, 177 S.E. 357, 50 Ga.App. 146, transferred, see 179 S.E. 123, 180 Ga. 488.

79. Ga.—U. S. Fidelity & Guaranty Co. v. Koehler, 137 S.E. 85, 36 Ga.App. 396, transferred, see 132 S.E. 64, 161 Ga. 934.

80. Ga.—Davis v. Berry Schools, 199 S.E. 808, 187 Ga. 131, transferred, see 1 S.E.2d 602, 59 Ga.App. 549—Fuller v. Calhoun Nat. Bank, 199 S.E. 116, 186 Ga. 770, transferred, see 1 S.E.2d 86, 59 Ga.App. 419—Mills Lumber Co. v. Milam, 192 S.E. 35, 184 Ga. 455, transferred, see 194 S.E. 911, 57 Ga.App. 211—Henley v. Colonial Stages South, 191 S.E. 445, 184 Ga. 445, transferred, see 193 S.E. 905, 56 Ga.App. 722—Brightwell v. Oglethorpe Telephone Co., 166 S.E. 646, 176 Ga. 65, transferred, see 171 S.E. 162, 47 Ga.App. 521—Collier v. City of Barnesville, 162 S.E. 530, 174 Ga. 294, transferred, see Collier v. City of Barnesville, 165 S.E. 146, 45 Ga.App. 380, affirmed 168 S.E. 774, 176 Ga. 733—Avant v. Hartridge, 162 S.E. 524, 174 Ga. 278, followed in Bartlett v. Hartridge, 162 S.E. 525, 174 Ga. 281, transferred, see 165 S.E. 309, 45 Ga.App. 506—Martin v. Deaton, 158 S.E. 331, 172 Ga. 557, transferred, see 162 S.E. 399, 44 Ga.App. 528—Byrd v. Piha, 149 S.E. 699, 169 Ga. 115, transferred, see 152 S.E. 624, 41 Ga.App. 262—American Nat. Ins. Co. v. Brantley, 140 S.E. 760, 165 Ga. 305—Coats v. Casey, 133 S.E. 237, 162 Ga. 236, transferred, see 134 S.E.

344, 35 Ga.App. 648—U. S. Fidelity & Guaranty Co. v. Koehler, 132 S.E. 64, 161 Ga. 934, transferred, see 137 S.E. 85, 36 Ga.App. 396—Cochran v. Stephens, 116 S.E. 303, 155 Ga. 134.

Equitable question moot

Ga.—Frigidice Co. v. Southeastern Fair Ass'n, 197 S.E. 804, 186 Ga. 263, transferred, see 199 S.E. 760, 58 Ga.App. 694.

81. Ga.—Golden v. National Life & Accident Ins. Co., 5 S.E.2d 198, answers to certified questions conformed to, App., 6 S.E.2d 112—Willis v. Georgia Power Co., 174 S.E. 625, 173 Ga. 878—Harrison v. Central of Georgia Ry. Co., 146 S.E. 317, 167 Ga. 677—Hubbard v. Bibb Brokerage Co., 157 S.E. 649, 172 Ga. 520—English v. Rosenkrantz, 105 S.E. 613, 150 Ga. 817.

15 C.J. p 1039 note 51, p 1040 note 64.

Court of appeals can propound any question of law to supreme court deemed to be presented by record and necessary. In doing so, the court of appeals may limit the inquiry of supreme court to questions, answers to which would not exhaust all questions in record, and it may base question on only part of evidence.—Penn Mut. Life Ins. Co. v. Blount, 142 S.E. 183, 37 Ga.App. 756, conforming to answer to certified questions 140 S.E. 496, 165 Ga. 193.

Certification not required

(1) Where there were no sufficient pleadings to require court of appeals to certify the case to the supreme court as involving constitutionality of act, certification will be denied.—Harte v. Sturtevant, 93 S.E. 530, 20 Ga.App. 822.

(2) Where an opportunity is afforded plaintiff in error to obtain a review of rulings complained of by applying to supreme court for writ of certiorari as authorized by constitutional amendment of 1916, court of appeals will decline to certify questions to supreme court.—Sikes v. State, 92 S.E. 553, 20 Ga.App. 80.

82. Ga.—Metropolitan Life Ins. Co.

question certified must be a distinct question or proposition of law complete within itself,⁸³ it must not involve mixed questions of law and fact,⁸⁴ it must not contain inferences drawn either from the pleadings or the evidence,⁸⁵ and it must be capable of a definite answer without regard to other issues of law or fact.⁸⁶ The whole case, even when its decision turns on a matter of law alone, cannot be certified.⁸⁷ The court of appeals will not certify a case to the supreme court merely to give that court an opportunity to reverse itself where there is no conflict in its decisions.⁸⁸ Where the justices of the supreme court are equally divided as to the proper answer to a question certified by the court of appeals, the question will be returned without an answer.⁸⁹

v. George, 192 S.E. 34, 184 Ga. 558.

82. Ga.—Willis v. Georgia Power Co., 174 S.E. 625, 178 Ga. 878—Gormley v. Slicer, 170 S.E. 224, 177 Ga. 430—Hubbard v. Bibb Brokerage Co., 157 S.E. 649, 172 Ga. 520—Cox v. Perkins, 107 S.E. 863, 151 Ga. 632, 16 A.L.R. 918, answers to certified questions conformed to 108 S.E. 206, 27 Ga.App. 273—English v. Rosenkrantz, 105 S.E. 613, 150 Ga. 817.

Dependent on other question

Questions, certified to supreme court by court of appeals, which are similar to, and dependent on a previous question are not framed in accordance with governing rules, and will not be answered.—Gormley v. Slicer, 170 S.E. 224, 177 Ga. 430.

General or contingent questions

The supreme court will not answer a certified question where the question is of objectionable generality, or contains a number of contingencies dependent on the evidence, or is so broad and indefinite as to admit of varying answers, since each question certified must be a direct question or proposition of law clearly stated, definitely answerable without regard to other issues of law or fact in the case.—Willis v. Georgia Power Co., 174 S.E. 625, 178 Ga. 878—Hubbard v. Bibb Brokerage Co., 157 S.E. 649, 172 Ga. 520.

Questions not sufficiently specific

Ga.—Hubbard v. Bibb Brokerage Co., 157 S.E. 649, 172 Ga. 520—Cato v. Southern Ry. Co., 106 S.E. 272, 151 Ga. 308, conformed to 107 S.E. 98, 26 Ga.App. 578—English v. Rosenkrantz, 105 S.E. 613, 150 Ga. 817.

84. Ga.—Johnson v. Travelers Ins. Co., 188 S.E. 27, 183 Ga. 227—Harrison v. Central of Georgia Ry. Co., 146 S.E. 317, 167 Ga. 677—Logan v. Tennessee Chemical Co., 144 S.E. 269, 166 Ga. 680, answer to certified question conformed to 144 S.

E. 351, 38 Ga.App. 534—Hally v. Standard Life Ins. Co., 142 S.E. 147, 165 Ga. 838—Southern Exchange Bank v. First Nat. Bank, 140 S.E. 753, 165 Ga. 239—J. J. Bull & Son v. Carpenter, 123 S.E. 614, 158 Ga. 360—Washington Loan & Banking Co. v. Stanton, 123 S.E. 612, 157 Ga. 885.

85. Ga.—Johnson v. Travelers Ins. Co., 188 S.E. 27, 183 Ga. 227—Gormley v. Slicer, 170 S.E. 224, 177 Ga. 430—English v. Rosenkrantz, 105 S.E. 613, 150 Ga. 817.

86. Ga.—Willis v. Georgia Power Co., 174 S.E. 625, 178 Ga. 878—Gormley v. Slicer, 170 S.E. 224, 177 Ga. 430—Hubbard v. Bibb Brokerage Co., 157 S.E. 649, 172 Ga. 520—English v. Rosenkrantz, 105 S.E. 613, 150 Ga. 817.

Answer dependent on circumstances

Certified question capable of one answer under one set of circumstances and different answer under another will not be answered.—Hubbard v. Bibb Brokerage Co., 157 S.E. 649, 172 Ga. 520.

Facts raised by questions

Where questions certified by court of appeals did not show existence of custom affecting the questions, or facts which might alter conclusions arrived at, supreme court could deal only with facts brought to view by the questions propounded.—Golden v. National Life & Accident Ins. Co., Ga., 5 S.E.2d 198, answers to certified questions conformed to, App., 6 S.E.2d 112.

87. Ga.—Johnson v. Travelers Ins. Co., 188 S.E. 27, 183 Ga. 227.

Motion to amend question

On certification of question to supreme court by court of appeals, supreme court would not, on motion of litigant, request court of appeals to amend question to cover substance of all facts shown in trial court, since final adjudication of case was

§ 349. Idaho

The appellate jurisdiction of the supreme and district courts of Idaho will be considered in the sections immediately following.

§ 350. — Supreme Court

The supreme court reviews on appeal decisions of the district courts and orders of the public utilities commission. It may issue necessary writs and hear claims against the state and make recommendatory decisions.

The constitution confers on the supreme court jurisdiction to review, on appeal, any decision of the district courts, or the judges thereof, and any order of the public utilities commission.⁹⁰ It also has original jurisdiction to issue writs of mandamus,⁹¹ certiorari,⁹² prohibition,⁹³ and habeas corp-

for court of appeals and instruction by supreme court on certified question would apply only to question certified, whereafter court of appeals could consider, in deciding case, any additional facts not certified.—Portwood v. Bennett Trading Co., 192 S.E. 217, 184 Ga. 617.

88. Ga.—Phillips v. Fireman's Fund Ins. Co., 121 S.E. 255, 31 Ga.App. 541.

Already passed on

The court of appeals will not certify a case or constitutional question to the supreme court for determination, where it has already been passed on.—Phoenix v. State, 113 S.E. 42, 29 Ga.App. 33.

89. Ga.—Ellis v. Rudeseal, 191 S.E. 913, 184 Ga. 519—La Hatte v. Walton, 184 S.E. 278, 181 Ga. 785.

90. Idaho.—Utah Credit Men's Assoc. v. Bridge, 102 P. 390, 691, 16 Idaho 751.

15 C.J. p 1041 notes 98, 99.

91. Idaho.—Blackwell Lumber Co. v. Flynn, 150 P. 42, 27 Idaho 632—Wright v. Kelley, 43 P. 565, 4 Idaho 624.

92. Idaho.—Neil v. Public Utilities Commission of Idaho, 178 P. 271, 32 Idaho 44—Coeur d'Alene v. Public Utilities Commission, 160 P. 751, 29 Idaho 508—Federal Mining & Smelting Co. v. Public Utilities Commission, 143 P. 1173, 26 Idaho 391, L.R.A.1917F 756.

93. Idaho.—Stein v. Morrison, 75 P. 246, 9 Idaho 426.

Appellants held not entitled to writs of mandamus, prohibition, and restitution, in the absence of a properly certified transcript, the supreme court being unable to determine whether the lower court acted without jurisdiction or refused to act in such manner as to justify the issuance of such writs.—Eichner v. Meyer, 58 P.2d 845, 56 Idaho 751.

us,⁹⁴ and all writs necessary or proper to the complete exercise of its appellate jurisdiction.⁹⁵ The supreme court is also given original jurisdiction to hear claims against the state, but its decision thereon is merely recommendatory to the legislature.⁹⁶ The supreme court has original jurisdiction in the matter of a contest of the election of a district judge,⁹⁷ and power to appoint a receiver pending litigation.⁹⁸ It has no original jurisdiction to try any issues involved in an action to quiet title.⁹⁹

§ 351. — District Courts

District courts have such appellate jurisdiction as may be conferred by law.

As provided by the constitution, district courts have such appellate jurisdiction as may be conferred by law.¹

94. Idaho.—Ex parte Knudtson, 79 P. 641, 10 Idaho 676.

95. Idaho.—Bedke v. Bedke, 53 P.2d 1175, 56 Idaho 235.

96. Idaho.—Howard v. Cook, 83 P. 2d 208, 59 Idaho 391.—State v. Minidoka County, 298 P. 366, 50 Idaho 419.
15 C.J. p 1041 note 7.

Original, not appellate

The supreme court's jurisdiction for recommendatory decision on claims against state is original and not appellate.—State v. Minidoka County, *supra*.

97. Idaho.—Toncray v. Budge, 95 P. 26, 14 Idaho 621.

98. Idaho.—Chemung Min. Co. v. Hanley, 81 P. 619, 11 Idaho 302.

99. Idaho.—Lawrence v. Corbelle, 178 P. 834, 32 Idaho 114.

1. Idaho.—Fraser v. Davis, 156 P. 913, 158 P. 233, 29 Idaho 70.—Kent v. Dalrymple, 133 P. 301, 23 Idaho 694.

2. Common law must be looked to in order to determine extent of judicial power conferred by constitution on supreme court.—People v. Callopy, 192 N.E. 634, 358 Ill. 11.

3. Not subject to alteration

Original jurisdiction of supreme court is fixed by constitution and can neither be enlarged nor limited by statute or by the court.—Ell Bates House v. Board of Appeals of Cook County, 193 N.E. 526, 358 Ill. 596—15 C.J. p 1041 notes 12, 13.

When jurisdiction assumed

(1) Supreme court has power in its discretion to determine in what matters it will exercise its original jurisdiction. It will be exercised to protect rights, interests, and franchises of state, or rights and interests of whole people, and to enforce performance of official duties which

affect public at large and in emergency, existence of which court determines, to protect local public interests or private rights where there is no other adequate remedy or where it is necessary to prevent failure of justice; court will not consider matters which would ultimately lead to congestion of docket and cause serious interference with court's appellate duties.—North Chicago Hebrew Congregation v. Board of Appeals of Cook County, 193 N.E. 519, 358 Ill. 549.

(2) Court will not assume original jurisdiction of question not of interest to public generally.—Ell Bates House v. Board of Appeals of Cook County, 193 N.E. 526, 358 Ill. 596.

Advisory opinions

It has been intimated that the supreme court may render advisory opinions.—People v. Bissell, 19 Ill. 229, 68 Am.D. 591.

Original jurisdiction to issue a writ of prohibition is not conferred on the supreme court by the constitution.—People ex rel. Sokoll v. Municipal Court of Chicago, 194 N.E. 242, 359 Ill. 102, affirming 276 Ill.App. 102—15 C.J. p 1041 note 13 [c].

4. Ill.—People v. Deep Rock Oil Corporation, 175 N.E. 572, 343 Ill. 388. 15 C.J. p 1041 note 14.

Jurisdiction of revenue cases on direct appeal see *infra* § 359.

Action to recover taxes

Supreme court has original jurisdiction of state's action for taxes due on gasoline sold to city, and allegations of declaration as to number of gallons of gasoline sold to city, and amount of tax due thereon being admitted by demurrer, no question of accounting defeated such jurisdiction.—People v. Deep Rock Oil Corporation, *supra*.

§ 352. Illinois

The particular courts of Illinois exercising appellate jurisdiction and the nature and extent of their jurisdiction will be considered in the following sections.

§ 353. — Supreme Court in General

The supreme court has original jurisdiction in cases relating to the revenue, in mandamus, and in habeas corpus, and appellate jurisdiction in all other cases as fixed by law, with power to issue writs in aid thereof.

Under the provisions of the constitution vesting judicial powers in the supreme court,² such court has original jurisdiction³ in cases relating to the revenue,⁴ in mandamus,⁵ and in habeas corpus,⁶ and such court has appellate jurisdiction⁷ in all oth-

5. Ill.—People v. Haas, 183 N.E. 813, 351 Ill. 68.

15 C.J. p 1041 note 15.

To compel performance of high official duties

Ill.—People ex rel. American Bankers Ins. Co. v. Palmer, 2 N.E.2d 728, 363 Ill. 499, 106 A.L.R. 447—People v. Russel, 128 N.E. 495, 294 Ill. 283.

Expunging judgment or decree

Supreme court may award writ of mandamus, requiring nisi prius court to expunge from its records an order, judgment, or decree entered without jurisdiction.—People ex rel. Barrett v. Shurtleff, 187 N.E. 271, 353 Ill. 248.

Matter of discretion

Supreme court assumes jurisdiction in original mandamus in cases only in exercise of its discretion where there is special reason, and remedy in trial court is ineffective, but may take jurisdiction on that ground, although proceeding in mandamus was pending in local court.—People v. Lueders, 122 N.E. 374, 287 Ill. 107.

Statute regulating practice in mandamus cases is inapplicable to such practice in Supreme court, but practice therein will be made to conform to that in trial courts as nearly as possible.—People ex rel. Huff v. Palmer, 191 N.E. 199, 356 Ill. 563.

6. Ill.—People v. Siman, 119 N.E. 940, 284 Ill. 28.

15 C.J. p 1041 note 16.

7. Ill.—Lake County v. Westerfield, 109 N.E. 310, 268 Ill. 501—Courter v. Simpson Constr. Co., 106 N.E. 350, 264 Ill. 488—People v. Chicago, 62 N.E. 179, 193 Ill. 507, 58 L.R. A. 833—Peak v. People, 76 Ill. 289. 15 C.J. p 1041 note 17.

Assignment of error

Jurisdiction cannot be conferred on supreme court by erroneous state-

er cases.⁸ As the constitution provides for inferior appellate courts, appellate jurisdiction of supreme court is subject to exceptions and limitations resulting from the establishment of such inferior appellate courts;⁹ and except in cases specified by the statute, direct appeals cannot be taken to the supreme court in cases for which an appeal to such other courts is provided.¹⁰ So, under the statute, appeal to the supreme court does not lie from interlocutory orders with respect to the granting of an injunction or appointment of a receiver,¹¹ even

where the appellate court attempted to authorize the appeal by granting a certificate of importance.¹²

The statute provides that the supreme court shall be vested with all powers and authority to carry into complete execution all its judgments, decrees, and determinations, in all matters within its jurisdiction, and may issue writs of mandamus, habeas corpus, certiorari,¹³ error,¹⁴ and supersedeas; it may also issue all other writs, not prohibited by law, which may be necessary to enforce the due administration of justice in all matters within its jurisdiction.¹⁵ Statutory provisions concerning

ment in assignment of error, nor by assignment of error which has been waived.—*Coal Creek Drainage and Levee Dist. v. Sanitary Dist. of Chicago*, 159 N.E. 805, 328 Ill. 360.

Former decision

Supreme court will not assume jurisdiction on direct appeal merely to refer to former decision.—*Pennsylvania Tank Line v. Jordan*, 173 N.E. 181, 341 Ill. 94, transferred, see 260 Ill.App. 397.

8. Ill.—*Lake County v. Westerfield*, 109 N.E. 309, 268 Ill. 501.—*Swedish-American Tel. Co. v. New York Fidelity, etc., Co.*, 70 N.E. 768, 208 Ill. 562.—*People v. Chicago*, 62 N.E. 179, 193 Ill. 507, 58 L.R.A. 833.

15 C.J. p 1041 note 18.

Appeals in election contests lie to the supreme court, and not to the appellate courts.—*Jackson v. Winans*, 122 N.E. 611, 287 Ill. 382.—15 C.J. p 1041 note 18 [b].

9. Ill.—*Anderson v. Anderson*, 181 N.E. 693, 349 Ill. 40.—*Murray v. Hagmann*, 146 N.E. 472, 315 Ill. 437.—*People v. Eisenberg*, 123 N.E. 532, 288 Ill. 304, affirming 212 Ill.App. 337.

15 C.J. p 1041 note 20.—3 C.J. p 802 note 39 [a].

Transfer or dismissal of case

Supreme court will not consider case of which it has no jurisdiction, but will of its own motion transfer or dismiss case.—*Brown v. Pierson*, 161 N.E. 87, 330 Ill. 92, transferred, see 250 Ill.App. 214.

10. Ill.—*Dillenburg v. Hellgren*, 21 N.E.2d 393, 371 Ill. 452, remanding 10 N.E.2d 44, 291 Ill.App. 448.—*Kellogg v. Kellogg*, 20 N.E.2d 585, 371 Ill. 241.—*Comstock v. Morgan Park Trust & Savings Bank*, 2 N.E.2d 311, 363 Ill. 341, transferred, see 4 N.E.2d 653, 287 Ill.App. 613, modified on other grounds 11 N.E.2d 394, 367 Ill. 276.—*Hall v. Cook County*, 187 N.E. 454, 353 Ill. 477, transferred, see 274 Ill.App. 503, reversed on other grounds 195 N.E. 54, 359 Ill. 528.—*Anderson v. An-*

derson, 181 N.E. 693, 349 Ill. 40.—*People ex rel. Kurtz v. Meyer*, 159 N.E. 205, 328 Ill. 122, transferred, see 251 Ill.App. 475.—*People v. Cermak*, 148 N.E. 382, 317 Ill. 590.—*Darley v. Thompson*, 132 N.E. 536, 299 Ill. 122.—*Lasley v. Tazewell Coal Co.*, 128 N.E. 475, 294 Ill. 399.—*Clark v. Chandler*, 116 N.E. 609, 279 Ill. 23.

Appeals from appellate courts see *infra* § 362.

Direct appeal held not to lie

(1) In suit by company against the commerce commission to enjoin it from enforcing the provisions and penalties of the Public Utilities Act, the appeal being from a decree in an ordinary chancery case, and not from a final order or judgment in review of an order or decision of the commerce commission.—*Illinois Bell Telephone Co. v. Commerce Commission*, 134 N.E. 807, 302 Ill. 468.

(2) From denial of motion to set aside default and vacate final decree because motion was filed after expiration of term, this being only a matter of procedure.—*Hoover v. Regner*, 151 N.E. 233, 320 Ill. 368.

(3) Where question of costs in suit constitutes sole matter of controversy.—*People v. Franklin County Bldg. Ass'n*, 161 N.E. 56, 329 Ill. 582.

(4) Where action is one at common law for damages and is not one under eminent domain statute which permitted direct appeal to supreme court.—*Grunewald v. City of Chicago*, 21 N.E.2d 739, 371 Ill. 528, transferred, see 18 N.E.2d 708, 298 Ill.App. 622.

(5) To review, on writ of error, judgment against counsel for contempt of court.—*People ex rel. Miller v. Tunnell*, 162 N.E. 855, 331 Ill. 307, transferred, see *Tunnell v. People ex rel. Miller*, 253 Ill.App. 422.

(6) To determine argument that rules of department of public health received in evidence were unreasonable.—*Baccus v. Gunderson*, 170 N.E. 225, 338 Ill. 301.

(7) To review circuit court order refusing to revoke administration granted to alleged widow.—*Fisher v. Vandry*, 172 N.E. 717, 340 Ill. 371.

(8) To consider whether circuit court erred in decreeing that husband's default in alimony payments was willful.—*Mesirow v. Mesirow*, 178 N.E. 411, 346 Ill. 219.

11. Ill.—*Murray v. Hagmann*, 146 N.E. 472, 315 Ill. 437.

Exclusive jurisdiction in appellate courts see *infra* § 354.

12. Ill.—*People v. Eisenberg*, 123 N.E. 532, 288 Ill. 304, affirming 212 Ill.App. 337.

13. The supreme court has no original jurisdiction in certiorari but may direct the issuance of the writ only in aid of or to protect its appellate jurisdiction.—*People v. Cook County Super. Ct.*, 84 N.E. 875, 234 Ill. 186, 14 Ann.Cas. 753.—15 C.J. p 1042 note 24 [b].

Where different appellate courts have reached opposite conclusions on any question of law, it is the duty of the supreme court to issue certiorari to settle that question.—*Zukas v. Appleton Mfg. Co.*, 115 N.E. 164, 277 Ill. 87.

14. Ill.—*Langworthy v. Baker*, 23 Ill. 430.—*Bowers v. Green*, 2 Ill. 42, overruling *Clark v. Ross*, 1 Ill. 334.

15. Ill.—*People ex rel. Swift v. Superior Court of Cook County*, 195 N.E. 517, 359 Ill. 612.

15 C.J. p 1042 note 29.

Writ of prohibition

While supreme court does not have original jurisdiction to issue writs of prohibition, it may issue such writs in aid of or to protect its appellate jurisdiction.—*People ex rel. Swift v. Superior Court of Cook County*, 195 N.E. 517, 359 Ill. 612.—*People ex rel. Sokoll v. Municipal Court of Chicago*, 194 N.E. 242, 359 Ill. 102, affirming 276 Ill.App. 102.—*People v. Circuit Court of Washington County*, 179 N.E. 441, 347 Ill. 34.—15 C.J. p 1042 note 29 [a].

practice do not apply to the supreme court unless it is specifically named therein.¹⁶

Appeals from inferior courts in certain classes of cases may, by virtue of express statutory provision, be taken directly to the supreme court.¹⁷ Where there is no ground for a direct appeal from such a court to the supreme court, the latter court will decline jurisdiction, although the parties do not raise the question.¹⁸

§ 354. — Appellate Courts in General

The appellate courts have jurisdiction to hear appeals from the final judgments, orders, or decrees of the circuit, county, or city courts in any proceeding at law or in chancery other than those required to be appealed di-

rectly to the supreme court, and finally to determine appeals from interlocutory orders with respect to injunctions or the appointment of receivers.

The constitution authorizes the legislature to create inferior appellate courts, and pursuant thereto four appellate courts have been created and given appellate jurisdiction¹⁹ only,²⁰ and jurisdiction of all matters of appeals, or writs of error, from the final judgments, orders, or decrees, of any of the circuit courts,²¹ or the superior court of Cook County, or county courts,²² or from the city courts,²³ in any suit or proceeding²⁴ at law²⁵ or in chancery²⁶ other than a criminal case not a misdemeanor, or a case involving a franchise, or freehold, or the validity of a statute.²⁷ Appeals also lie to the ap-

16. III.—*People v. Wells*, 99 N.E. 606, 255 Ill. 450—*People v. Haas*, 87 N.E. 1111, 239 Ill. 320.

17. III.—*Majestic Household Utilities Corporation v. Stratton*, 186 N.E. 522, 353 Ill. 86, 89 A.L.R. 852—*Bennett v. Bennett*, 149 N.E. 292, 318 Ill. 193.

18. C.J. p 1045 note 51.

Classes of cases generally included see *infra* §§ 356-360.

Eminent domain proceedings

In eminent domain proceedings, in either the circuit or the county court, or before a circuit or county judge, an appeal lies to the supreme court.—*Chicago Great Western R. Co. v. Ashelford*, 108 N.E. 761, 268 Ill. 87—*Peoria, etc., Union R. Co. v. Peoria, etc., R. Co.*, 195 Ill. 110.

18. III.—*Stoddard v. Illinois Impr., etc., Co.*, 110 N.E. 870, 271 Ill. 92.

19. III.—*Murray v. Hagmann*, 146 N.E. 472, 315 Ill. 437.

15 C.J. p 1045 note 55.

20. III.—*People v. Hoyne*, 104 N.E. 255, 262 Ill. 82.

15 C.J. p 1045 note 56.

Issuance of writs

(1) In aid of its appellate jurisdiction, the appellate court may issue all writs not prohibited by law, such as certiorari, which may be necessary to enforce the administration of justice in matters before it.—*People v. Pam*, 114 N.E. 504, 276 Ill. 181.

(2) The appellate court has power to award a writ of mandamus only in furtherance of its appellate jurisdiction.—*People v. Haas*, 183 N.E. 813, 351 Ill. 68—*Hooper v. Rooney*, 127 N.E. 711, 293 Ill. 370—*Phillips v. Ford*, 31 N.E.2d 8, 299 Ill.App. 628—15 C.J. p 1045 note 56 [a].

(3) So, also, although the appellate court does not have original jurisdiction to issue writs of prohibition, it may issue such writs in aid of or to protect its appellate jurisdiction.—*People ex rel. Sokoll v. Municipal Court of Chicago*, 194 N.E.

242, 359 Ill. 102, affirming 276 Ill.App. 102—15 C.J. p 1045 note 56 [b].

21. Allowance of claim against decedent's estate

An appeal from the circuit court on the allowance of a claim against the estate of a deceased person is properly taken first to the appellate court.—*Kolb v. Stephens*, 176 Ill.App. 391.

22. Release from capias

Appeal from county court's order, dismissing petition of judgment debtor to be released from capias ad satisfaciendum, is properly taken to appellate court.—*Abbrassart v. Bouchard*, 241 Ill.App. 484—15 C.J. p 1045 note 64 [a].

23. Municipal court of Chicago

The jurisdiction of the appellate court to review cases from the municipal court of Chicago is not dependent upon the Municipal Court Act, but exists by reason of the act establishing appellate courts, which gives them jurisdiction to review judgments of city courts.—*Williams v. Webster Hotel Co.*, 145 N.E. 622, 315 Ill. 64—*Hosking v. Southern Pac. Co.*, 90 N.E. 669, 243 Ill. 320. Review of proceedings of inferior courts of Illinois see *supra* § 260.

24. III.—*Tampico Highway Com'rs v. Tampico, etc., Drain. Com'rs, etc.*, 100 N.E. 262, 257 Ill. 25. 15 C.J. p 1045 note 66.

No jurisdiction in purely statutory proceeding

III.—*McMahan v. Trautvetter*, 137 N.E. 230, 305 Ill. 395—*Nadig v. Turner*, 126 N.E. 101, 291 Ill. 513.

25. III.—*McMahan v. Trautvetter*, 137 N.E. 230, 305 Ill. 395. 15 C.J. p 1045 note 67.

Conformity with common law

Suit or proceeding at law within statute is a suit or proceeding instituted and carried on in substantial conformity with the forms and modes prescribed by the common law.—

Sebree v. Sebree, 127 N.E. 392, 193 Ill. 228.

26. III.—*McMahan v. Trautvetter*, 137 N.E. 230, 305 Ill. 395. 15 C.J. p 1045 note 68.

Nature of actions included

Within statute, suit or proceeding in chancery is one instituted or carried on in substantial conformity with the forms and modes prescribed by the rules in chancery.—*Sebree v. Sebree*, 127 N.E. 392, 193 Ill. 228.

No jurisdiction of appeal since proceeding not one in chancery

(1) Proceeding for the appointment of a guardian.—*McMahan v. Trautvetter*, 137 N.E. 230, 305 Ill. 395.

(2) Under Administration Act §§ 123, 126, proceeding for authority to convey land pursuant to decedent's contract.—*Nadig v. Turner*, 126 N.E. 101, 291 Ill. 513.

(3) A proceeding under Administration Act §§ 81, 82, for discovery of assets in hands of a third person and to establish a fiduciary relation between him and decedent and require him to turn the assets to the personal representative.—*In re Chalfoux's Estate*, 230 Ill.App. 199, reversed on other grounds *Runyan v. Williams*, 146 N.E. 497, 315 Ill. 628.

27. III.—*Penniman v. Bennett*, 129 N.E. 741, 296 Ill. 312.

15 C.J. p 1045 notes 71, 72.

Jurisdiction not conferred by statute

Jurisdiction of appeals and writs of error in classes of cases which go directly to the supreme court, although not withheld from appellate court by Const. art 6 § 11, providing for creation of such courts, cannot be exercised by appellate courts, because not conferred on them by Appellate Court Act § 8, as amended by L.1887 p 156, specifying jurisdiction of such appellate courts.—*Murray v. Hagmann*, 146 N.E. 472, 315 Ill. 437—15 C.J. p 1045 note 72 [a].

pellate courts from the final judgments, orders, or decrees of county courts in proceedings for the confirmation of special assessments, for the sale of lands for taxes and special assessments, and in all common-law and attachment cases and cases of forcible entry and detainer.²⁸

The appellate courts have the same authority as was conferred on the supreme court to continue in force injunctions issued by the lower courts;²⁹ and an appeal from an interlocutory order or decree granting an injunction, or overruling a motion to dissolve the same, or enlarging the scope of an injunction order, or appointing a receiver, or giving other or further powers or property to a receiver already appointed, goes to the appellate court, from whose order therein no appeal or writ of error

lies to the supreme court.³⁰ The appellate courts have been held to possess the same power as the supreme court to compel a party prosecuting an appeal for delay to pay the damages provided for in the statute.³¹

§ 355. — Other Courts

Circuit courts have such appellate jurisdiction as is or may be provided by law.

Circuit courts have such appellate jurisdiction as is or may be provided by law,³² and in their respective counties, except where appeals lie to other courts, they have jurisdiction of appeals in all matters from the final orders, judgments, and decrees of the county courts.³³

The appellate courts have appellate jurisdiction of

(1) Appeal from judgment under provisions for initiative and referendum involving right to hold office and maintain commission form of government.—*In re Smith*, 256 Ill. App. 147.

(2) A bill for an injunction involving the construction of a public contract and the law governing such contract.—*Penniman v. Bennett*, 129 N.E. 741, 296 Ill. 312.

(3) Determination whether statute providing method for obtaining constructive service in chancery cases was complied with.—*Illinois Valley Bank v. Newman*, 187 N.E. 810, 354 Ill. 38.

(4) Adjudication whether ordinance entitling city to compensation for use of streets, alleys, and sidewalks for posts, poles, wires, etc., was applicable to telephone company.—*City of Edwardsville v. Central Union Telephone Co.*, 134 N.E. 716, 302 Ill. 362.

(5) Appeal from the finding of the court in a suit to recover costs, attorney's fees, and expenses after voluntary dismissal of a proceeding for the condemnation of land.—*Valley Terminal Ry. v. Eggman*, 222 Ill. App. 457.

(6) Appeal in suit to set aside fraudulent conveyance made by debtor and to subject land to payment of judgment.—*Illinois Valley Bank v. Newman*, 187 N.E. 810, 354 Ill. 38.—*Clark v. G. A. Ball-Bearing Mfg. Co.*, 154 N.E. 446, 323 Ill. 579.—*Coutre v. Ermel*, 146 N.E. 501, 315 Ill. 361.

(7) Appeal in a partition suit, which does not involve a freehold.—*Hasterlik v. Hasterlik*, 146 N.E. 498, 316 Ill. 72, transferred, see 234 Ill. App. 572.

(8) Mandamus proceedings commenced in the lower courts.—*O'Brien*

v. Frazier, 132 N.E. 434, 299 Ill. 325.—15 C.J. p 1045 note 72 [a] (5).

(9) Appeal from county court's decree in proceeding to sell decedent's land to pay debts.—*Depue v. Heberling*, 250 Ill. App. 82.

The appellate courts have not appellate jurisdiction of

(1) Statutory proceeding for which appeal to another court is provided.—*Mason v. Browner*, 245 Ill. App. 111.

(2) To consider the question whether the supreme court has jurisdiction to review on certiorari a judgment of the appellate court.—*People v. May*, 198 Ill. App. 625, affirmed 114 N.E. 685, 276 Ill. 332, 15 C.J. p 1045 note 72 [b].

28. Ill.—*West v. People*, 3 Ill. App. 377.

15 C.J. p 1046 note 73.

29. Ill.—*Bour v. Illinois Cent. R. Co.*, 159 Ill. App. 566.

30. Ill.—*Murray v. Hagmann*, 146 N.E. 472, 315 Ill. 437.—*People v. Eisenberg*, 123 N.E. 532, 288 Ill. 304, affirming 212 Ill. App. 337.—*Craig v. Craig*, 92 N.E. 925, 246 Ill. 449.—*People v. Sears*, 230 Ill. App. 484.

Interlocutory order:

Involving constitutional questions see *infra* § 356.

Relating to revenue see *infra* § 359.

31. Ill.—*Town v. Alexander*, 56 N.E. 1111, 185 Ill. 254, affirming 85 Ill. App. 512.

15 C.J. p 1046 note 76.

32. Ill.—*Swayer v. Wiemers*, 182 Ill. App. 651.

15 C.J. p 1058 note 49.

Certiorari

Cook County circuit and superior courts have jurisdiction to issue common-law certiorari to inferior tribunal exercising judicial or quasi-judicial powers to determine wheth-

er tribunal had jurisdiction and proceeded legally, when no other mode for review is provided by law.—*Bartunek v. Lastovken*, 183 N.E. 333, 350 Ill. 380.

33. Ill.—*Nadig v. Turner*, 126 N.E. 101, 291 Ill. 513.—*City of Carlyle v. Village of Beckemeyer*, 243 Ill. App. 460. See *Hayden v. Hargan*, 203 Ill. App. 544.

15 C.J. p 1058 note 50.

In matters of peculiarly probate jurisdiction, not analogous to proceedings at law or in equity, an appeal lies from the county to the circuit court.—*Sebree v. Sebree*, 127 N.E. 392, 193 Ill. 228.—*Schiele v. Dehn*, 244 Ill. App. 463.—*In re Chalifoux's Estate*, 230 Ill. App. 199, reversed on other grounds *Runyan v. Williams*, 146 N.E. 497, 315 Ill. 623.—*In re Meinshausen's Estate*, 216 Ill. App. 169.—15 C.J. p 1058 note 50 [b].

Proceeding for appointment of guardian

Ill.—*McMahan v. Trautvetter*, 137 N.E. 230, 305 Ill. 395.—*People v. Johnson*, 145 Ill. App. 446.

Extent of jurisdiction

(1) On appeal to the circuit court from county or probate court, the circuit court can exercise only such jurisdiction as the county or probate court had in the subject matter.—*Chapman v. American Surety Co.*, 104 N.E. 247, 261 Ill. 594, reversing 181 Ill. App. 146.—*In re Shanks' Estate*, 282 Ill. App. 1.—*Gary v. Senseman*, 215 Ill. App. 232.

(2) On appeal from probate court, circuit court exercises appellate jurisdiction and cannot permit amendment of a claim so as to raise a new cause of action.—*Williams v. Frederick's Estate*, 7 N.E.2d 384, 289 Ill. App. 410.

(3) Circuit court will dismiss appeal from order of Cook County probate court properly vacating a prior order which was void because en-

§ 356. — Cases Involving Construction of Constitution or Validity of Statute or Ordinance

An appeal goes directly to the supreme court where the case involves a fairly debatable question as to the validity of a statute or ordinance, or construction of the constitution, and is properly presented for review; the appellate court ordinarily may not pass on such issues and an appeal to such court operates as a waiver of the constitutional question.

Under the provisions of the statute, an appeal

goes directly to the supreme court where the case involves a construction of the constitution³⁴ or the validity of a statute,³⁵ and also where the case involves the validity of a municipal ordinance, and the trial judge certifies that in his opinion the public interest requires an appeal directly to the supreme court,³⁶ although such certification alone is not sufficient to give jurisdiction if the validity of the ordinance is not in fact involved.³⁷ It follows, as a general rule, that in all of such cases the appellate courts are without jurisdiction;³⁸ and the

tered by one having no power to act as judge of such court.—*In re Johnson's Estate*, 277 Ill.App. 319.

34. Ill.—*Crozier v. Freeman Coal Mining Co.*, 2 N.E.2d 293, 363 Ill. 362—*People ex rel. Courtney v. Ashton*, 192 N.E. 820, 358 Ill. 146—*People ex rel. Pollastrini v. Whealan*, 187 N.E. 491, 353 Ill. 500, reversing 269 Ill.App. 281—*People v. Humphreys*, 157 N.E. 446, 353 Ill. 340—*Carden v. Ensminger*, 161 N.E. 137, 329 Ill. 612, 58 A.L.R. 1256—*Brandtjen & Kluge v. Forgue*, 20 N.E.2d 616, 299 Ill.App. 585. 15 C.J. p 1046 note 77.

To what constitution applicable

(1) Act providing for direct appeals where "construction of Constitution" is involved includes constitutions of United States and of state.—*Van Dyke v. Illinois Commercial Men's Ass'n*, 193 N.E. 490, 358 Ill. 458.

(2) It does not include the constitution of another state.—*Roberts v. Sauerman Bros.*, 18 N.E.2d 853, 370 Ill. 344, transferred, see 20 N.E.2d 849, 300 Ill.App. 213.

(3) Review of judgment of court of foreign state see *infra* this section note 41.

Question not passed on

Where a full review of the case involves a consideration of constitutional questions, the supreme court may hear the appeal, even though it determines the case on other grounds and hence finds it unnecessary to pass on the constitutional question.—*People ex rel. Farwell v. Kelly*, 12 N.E.2d 614, 367 Ill. 631—*People ex rel. Farwell v. Kelly*, 12 N.E.2d 612, 367 Ill. 616—*Brown v. Federal Life Ins. Co.*, 187 N.E. 484, 353 Ill. 541—*People v. Adams*, 183 N.E. 810, 351 Ill. 79.

Constitutional question held involved

(1) Generally.—*Groves v. Farmers State Bank of Woodlawn*, 12 N.E.2d 618, 368 Ill. 37—*Continental Illinois Nat. Bank & Trust Co. of Chicago v. Peoples Trust & Sav. Bank of Chicago*, 9 N.E.2d 53, 366 Ill. 366—*Town of Kingston v. Anderson*, 220 Ill.App. 604—15 C.J. p 1046 note 77 [a].

(2) Where decree dismissed bill to enforce constitutional right to vote for corporate directors.—*Babcock v. Chicago Rys. Co.*, 155 N.E. 773, 325 Ill. 16.

(3) Question as to validity of order requiring production of records, under constitutional provision against unreasonable searches and seizures.—*Firebaugh v. Traff*, 186 N.E. 526, 353 Ill. 82.

(4) Question of validity of governor's act in removing a public officer and appointing his successor, under constitutional provisions.—*Ramsay v. Van Meter*, 133 N.E. 193, 300 Ill. 193.

35. Ill.—*Zimek v. Illinois Nat. Casualty Co.*, 19 N.E.2d 620, 370 Ill. 572—*People v. Adams*, 183 N.E. 810, 351 Ill. 79—*People v. Schaefer*, 142 N.E. 248, 310 Ill. 574—*Drina v. Charles Tea Co.*, 118 N.E. 69, 281 Ill. 259, affirming 204 Ill. App. 183. 15 C.J. p 1046 note 78.

Constitutional authority

The jurisdiction of the supreme court to review judgments of the appellate court in cases where the validity of a statute is involved is conferred by Const. art 6 § 11, and not by the Practice Act.—*Bagdonas v. Liberty Land & Investment Co.*, 140 N.E. 49, 309 Ill. 103.

Certificate of trial judge

Supreme court's determination that validity of statute is involved and not trial judge's certificate to that effect determines whether court may hear case on direct appeal.—*Brown v. Federal Life Ins. Co.*, 187 N.E. 484, 353 Ill. 541.

36. Ill.—*City of Chicago v. Ingersoll Steel & Disc Division of Borg-Warner Corporation*, 20 N.E.2d 287, 371 Ill. 183—*City of Chicago v. Ben Alpert, Inc.*, 13 N.E.2d 987, 368 Ill. 282—*Great Atlantic & Pacific Tea Co. v. Mayor and Commissioners of Danville*, 11 N.E.2d 388, 367 Ill. 310, 113 A.L.R. 1386—*Phelps v. Board of Appeals of City of Chicago*, 156 N.E. 826, 352 Ill. 625—*People v. Crowe*, 158 N.E. 451, 327 Ill. 106. 15 C.J. p 1046 note 79, p 1047 note 80.

Necessity of certification

(1) Supreme court may hear appeal involving validity of municipal ordinance only where judge certifies that appeal is required or where construction of constitution is involved, and, in absence of certification or raising of constitutional question in trial court, it has no jurisdiction of appeal.—*City of Greenville v. Nowlan*, 279 Ill.App. 311.

(2) This is so, notwithstanding plaintiff alleged and defendants denied that ordinance was invalid.—*Pollack v. Du Page County*, 20 N.E. 2d 273, 371 Ill. 199.

Validity of ordinance held not involved

Ill.—*Baccus v. Gunderson*, 170 N.E. 225, 338 Ill. 301—*City of Chicago v. Hagley*, 161 N.E. 106, 329 Ill. 635—*Brundage v. Chicago, B. & Q. R. Co.*, 154 N.E. 433, 324 Ill. 74—*Village of La Grange Park v. Jardecki*, 151 N.E. 538, 321 Ill. 177—*Epoch Producing Corp. v. Schuetzler*, 117 N.E. 479, 280 Ill. 310—*People v. Chicago*, 112 N.E. 280, 272 Ill. 451.

What constitutes "municipal ordinance"

(1) By-law or regulation of board of education, although effective as ordinance under statute, is not ordinance within text rule.—*Armstrong v. City of Chicago*, 159 N.E. 217, 328 Ill. 147—*People v. Board of Education of City of Chicago*, 156 N.E. 305, 325 Ill. 320.

(2) Agreement of municipal body with private person, not adopted as a legislative act, is not an ordinance.—*Stevens Hotel Co. v. Art Institute of Chicago*, 173 N.E. 761, 342 Ill. 180, transferred, see 260 Ill.App. 555.

37. Ill.—*City of Chicago v. Peterson*, 195 N.E. 636, 360 Ill. 177.

38. Ill.—*People ex rel. First Nat. Bank v. Kingery*, 13 N.E.2d 271, 368 Ill. 205, vacating 8 N.E.2d 733, 290 Ill.App. 393—*Middleton v. Commercial Inv. Corporation*, 22 N.E.2d 723, 301 Ill.App. 242—*People ex rel. Hollie v. Chicago Park Dist.*, 16 N.E.2d 161, 296 Ill.App. 365—*First Nat. Bank v. Lindberg*, 12 N.E.2d 917, 293 Ill.App. 474.

right to raise such questions is waived by taking an appeal to an appellate court and assigning errors of which that court has jurisdiction.³⁹ However, it has been held that questions as to the validity of municipal ordinances may be heard by the appellate court where assumption of jurisdiction by the

supreme court is precluded because the trial judge did not certify the appeal thereto, and construction of the constitution is not involved.⁴⁰

In order to authorize a direct appeal to the supreme court some constitutional question must be fairly presented⁴¹ and such constitutional question

certiorari denied *O'Brien v. First Nat. Bank*, 59 S.Ct. 103, rehearing denied 59 S.Ct. 145—*Prudential Ins. Co. of America v. Richman*, App., 11 N.E.2d 126, transferred, see 4 N.E.2d 76, 364 Ill. 234—*People ex rel. Novotny v. Smith*, 10 N.E.2d 676, 292 Ill.App. 216—*City of Chicago v. International Register Co.*, 3 N.E.2d 149, 284 Ill.App. 647—*People v. Davies*, 269 Ill.App. 306, transferred, see 183 N.E. 11, 350 Ill. 48, affirmed 188 N.E. 337, 354 Ill. 168—*People v. Stump*, 269 Ill.App. 182, transferred, see *People v. Garrison*, 181 N.E. 605, 349 Ill. 37—*In re Smith*, 256 Ill.App. 147—*People ex rel. Earley v. Bierman*, 249 Ill.App. 217—*People v. Olive*, 248 Ill.App. 220—*Wright v. Stresenreuter Bros.*, 234 Ill.App. 15—*People v. Eaton*, 233 Ill.App. 504—*American Cigar Co. v. Berger*, 221 Ill.App. 285—*People v. Barney*, 217 Ill.App. 322—*Road District No. 11, Scott County, Ill. v. Coultas*, 212 Ill.App. 18. See *Albert Pick & Co. v. Natalby*, 211 Ill.App. 486—*Curtis Pub. Co. v. City of Chicago*, 205 Ill.App. 438—*Paulin v. American Surety Co.*, 204 Ill.App. 218—*Devine v. L. Fish Furniture Co.*, 199 Ill.App. 539—*People v. Leoni*, 198 Ill.App. 376.

15 C.J. p 1047 note 81.

Validity partly involved

(1) Where a party by appealing to the appellate court has waived his right to have constitutional issues decided, the appellate court may pass on other issues in the case, within its jurisdiction.—*People v. Eaton*, 233 Ill.App. 504.

(2) But, where the question of the validity of a statute is raised in the appellate court by an assignment of cross error, such court may not retain jurisdiction and determine the case without reference to the constitutional question.—*Kowalczyk v. Swift & Co.*, 148 N.E. 59, 317 Ill. 312, reversing 233 Ill.App. 387.

Motion to dismiss appeal on ground that validity of ordinance is involved is insufficient, where the motion assigns no ground or reason for such contention.—*City of Greenville v. Nowlan*, 279 Ill.App. 311.

Statutes are deemed constitutional in the appellate court until pronounced otherwise by the supreme court.—*Gloyd v. Hotel La Salle Co.*, 221 Ill.App. 104—*People v. Leoni*, 198 Ill.App. 376.

39. Ill.—*People v. Even*, 18 N.E.2d 450, 370 Ill. 244, affirming 13 N.E. 2d 820, 294 Ill.App. 607—*People v. Rosenthal*, 18 N.E.2d 450, 370 Ill. 244, affirming 13 N.E.2d 814, 294 Ill.App. 274—*Levy v. Broadway-Carmen Bldg. Corporation*, 8 N.E. 2d 671, 366 Ill. 279, reversing 278 Ill.App. 293—*Ptacek v. Coleman*, 5 N.E.2d 467, 364 Ill. 618, affirming 279 Ill.App. 639—*People v. Terrill*, 199 N.E. 97, 362 Ill. 61—*People v. Wade*, 184 N.E. 830, 351 Ill. 484—*People v. Lawson*, 184 N.E. 828, 351 Ill. 507, transferred, see 272 Ill.App. 178—*People v. Andalman*, 178 N.E. 412, 346 Ill. 149—*People v. Garwood*, 148 N.E. 259, 317 Ill. 578—*City of Edwardsville v. Central Union Telephone Co.*, 141 N.E. 206, 309 Ill. 482, affirming 227 Ill. App. 424, error dismissed *Central Union Telephone Co. v. City of Edwardsville*, 46 S.Ct. 90, 269 U.S. 190, 70 L.Ed. 229—*People v. Armour*, 138 N.E. 661, 307 Ill. 234, affirming 224 Ill.App. 655—*City of Edwardsville v. Central Union Telephone Co.*, 134 N.E. 716, 302 Ill. 362—*Hill v. Thomas B. Jeffery Co.*, 127 N.E. 124, 292 Ill. 490—*Pemberton v. Illinois Commercial Men's Ass'n*, 124 N.E. 355, 289 Ill. 99, certiorari granted *Pemberton v. Illinois Commercial Men's Ass'n*, 40 S.Ct. 178, 251 U.S. 549, 64 L.Ed. 1032—*People v. Powers*, 119 N.E. 421, 283 Ill. 438—*Drtna v. Charles Tea Co.*, 118 N.E. 69, 281 Ill. 259, affirming 204 Ill.App. 183—*Brandtjen & Kluge v. Forgue*, 20 N.E.2d 616, 299 Ill.App. 585—*Blagay v. City of Chicago*, 7 N.E.2d 934, 290 Ill.App. 598—*Lachenmyer v. Central Mut. Ins. Co. of Chicago*, 2 N.E.2d 177, 284 Ill.App. 391—*People v. Kelly*, 1 N.E.2d 552, 285 Ill.App. 57—*Huebner v. Kornajzer*, 259 Ill. App. 540—*People v. Ayers*, 250 Ill. App. 526—*People ex rel. Earley v. Bierman*, 249 Ill.App. 217—*People v. Olive*, 248 Ill.App. 220—*People v. Westbrooks*, 242 Ill.App. 338—*People v. Barnett*, 240 Ill.App. 357—*Wright v. Stresenreuter Bros.*, 234 Ill.App. 15—*People v. Eaton*, 233 Ill.App. 504—*City of Chicago v. Danisch*, 224 Ill.App. 454—*American Cigar Co. v. Berger*, 221 Ill. App. 285—*Clark Teachers' Agency v. City of Chicago*, 220 Ill.App. 319—*People v. Grady*, 217 Ill.App. 490—*In re Pribyl's Estate*, 195 Ill. App. 314. See *Gilbert v. Sweitzer*, 211 Ill.App. 583—*Paulin v. Ameri-*

can Surety Co. of New York, 204 Ill.App. 218.

15 C.J. p 1047 note 82.

Municipal ordinance

Ill.—*Cohen v. City of Danville*, 217 Ill.App. 619.

However, while an appellant who appeals to the appellate court deprives himself of the right to raise any constitutional questions, he cannot thereby avoid such questions raised by the other party.—*Town of Kingston v. Anderson*, 220 Ill.App. 604.

40. Ill.—*City of Greenville v. Nowlan*, 279 Ill.App. 311—*Schumacher v. Klitzing*, 269 Ill.App. 60, affirmed 187 N.E. 458, 353 Ill. 530.

Oppressive exercise of power

Appellate court had jurisdiction to determine whether ordinance was invalid as being unreasonable and oppressive exercise of power granted by state.—*Illinois Anti-Vivisection Soc. v. City of Chicago*, 7 N.E.2d 379, 289 Ill.App. 391.

41. Ill.—*People v. De Young*, 16 N.E.2d 729, 369 Ill. 341—*People for Use of Shepherd v. Prpich*, 13 N.E.2d 257, 368 Ill. 169, transferred, see 17 N.E.2d 727, 297 Ill.App. 650—*People ex rel. Farwell v. Kelly*, 13 N.E.2d 181, 368 Ill. 164, transferred, see, App., 17 N.E.2d 987—*Widman v. Peoples Trust & Savings Bank of Ottawa*, 2 N.E.2d 213, 363 Ill. 345, transferred, see 3 N.E.2d 892, 286 Ill.App. 619—*Wilson v. Chicago & W. I. R. Co.*, 1 N.E.2d 224, 363 Ill. 81, transferred, see 3 N.E.2d 345, 286 Ill.App. 616, affirmed 6 N.E.2d 634, 365 Ill. 405—*Foreman-State Nat. Bank v. Sistek*, 193 N.E. 513, 358 Ill. 525—*Martin v. Bankers' Life Co.*, 193 N.E. 197, 358 Ill. 388—*Wilson v. Prochnow*, 187 N.E. 914, 354 Ill. 98—*People v. Allen*, 185 N.E. 605, 352 Ill. 262, transferred, see 276 Ill.App. 28, and reversed on other grounds 195 N.E. 478, 360 Ill. 36—*Hayden v. Wabash Ry. Co.*, 180 N.E. 795, 348 Ill. 126, transferred, see 269 Ill.App. 356—*Will v. Voliva*, 176 N.E. 766, 344 Ill. 510—*People v. Forsyth*, 171 N.E. 561, 339 Ill. 381—*Baccus v. Gunderson*, 170 N.E. 225, 338 Ill. 301—*People ex rel. Ray v. Board of Sup'rs of Knox County*, 159 N.E. 787, 328 Ill. 343, transferred, see 250 Ill.App. 13—*People ex rel. Kurtz v. Meyer*, 159 N.E. 205, 328 Ill. 122, transferred, see 251 Ill.App. 475—*Mil-*

must be presented in the trial court,⁴² must be pre- | served for review by an exception to the ruling

ler v. Illinois Cent. R. Co., 158 N.E. 441, 327 Ill. 103—Yonash v. City of Berwyn, 155 N.E. 276, 324 Ill. 433—People v. Blenz, 148 N.E. 249, 317 Ill. 639—Whittington v. National Lead Co., 142 N.E. 474, 311 Ill. 263—O'Brien v. Frazier, 132 N.E. 434, 299 Ill. 325—People v. Fensky, 135 N.E. 292, 290 Ill. 612.
15 C.J. p 1047 note 63.

Municipal ordinance

Ill.—Schoellkopf v. City of Chicago, 120 N.E. 778, 285 Ill. 453.

Necessity of determination

To give court jurisdiction on ground that validity of statute is involved, statute must be foundation of asserted right or defense, so that determination of its validity is necessary to decision.—Hawthorne Kennel Club v. Swanson, 171 N.E. 140, 329 Ill. 220, transferred, see 237 Ill. App. 499—People v. Massieon, 204 Ill.App. 70, affirmed 116 N.E. 639, 279 Ill. 312.

Constitutional question held not presented

(1) Where constitutionality of statute is not expressly challenged by allegation in the petition or assignment of error.—People v. Davies, 183 N.E. 11, 350 Ill. 48, transferred, see 269 Ill.App. 306, and affirmed 188 N.E. 337, 354 Ill. 163—People ex rel. Poage v. Walsh, 174 N.E. 881, 343 Ill. 136, transferred, see 264 Ill.App. 273.

(2) By merely alleging that trial court's construction of act rendered it unconstitutional, without particularizing the provisions violated.—McIlvaine v. City Nat. Bank & Trust Co., 21 N.E.2d 737, 371 Ill. 565—Economy Dairy Co. v. Kerner, 20 N.E.2d 568, 371 Ill. 261—People v. Spencer, 15 N.E.2d 703, 369 Ill. 57, transferred, see 16 N.E.2d 925, 296 Ill.App. 444.
15 C.J. p 1047 note 83 [b], [d] (4).

(3) Contention that court misapplied law to facts of case or misconstrued law.—Wilson v. P. ochnow, 187 N.E. 914, 354 Ill. 98—Standard Motors Securities Corporation v. Yates Co., 169 N.E. 164, 337 Ill. 250, transferred, see 257 Ill.App. 394—15 C.J. p 1047 note 83 [d] (4).

(4) Contentions that search warrant was improperly issued or did not authorize search in particular instance, raising only questions of law and procedure.—People v. Martens, 179 N.E. 275, 338 Ill. 170—People v. Bird, 187 N.E. 28, 335 Ill. 447.

(5) Contention that trial court erred in exercise of its discretion and hence denied "due process"—Benton v. Marr, 5 N.E.2d 466, 364 Ill. 628, transferred, see 10 N.E.2d 864, 291 Ill.App. 619.

(6) Where only the validity of judgment or decree is involved.—E. L. Mansure Co. v. City of Chicago, 23 N.E.2d 32, 372 Ill. 156—Dillenburg v. Heilgren, 21 N.E.2d 393, 371 Ill. 452, remanding 10 N.E.2d 44, 291 Ill. App. 448—Kellogg v. Kellogg, 20 N.E.2d 555, 371 Ill. 241—Economy Dairy Co. v. Kerner, 20 N.E.2d 568, 371 Ill. 261—Rau v. Village of Warrensburg, 17 N.E.2d 31, 369 Ill. 430—O'Connor v. Rathje, 12 N.E.2d 878, 368 Ill. 83, transferred, see 19 N.E.2d 96, 298 Ill.App. 463—Borman v. Borman, 5 N.E.2d 225, 361 Ill. 601, transferred, see 9 N.E.2d 667, 291 Ill.App. 135—De La Cour v. De La Cour, 2 N.E.2d 896, 363 Ill. 545—City of Chicago v. Peterson, 195 N.E. 636, 360 Ill. 177—Hawkins v. Hawkins, 183 N.E. 9, 350 Ill. 227—Genslinger v. New Illinois Athletic Club of Chicago, 163 N.E. 707, 322 Ill. 316, transferred, see 252 Ill.App. 298, and reversed on other grounds, 171 N.E. 514, 339 Ill. 426—Albrecht v. Omphgent Tp., 154 N.E. 898, 324 Ill. 200—Cooper v. Palais Royal Theatre Co., 150 N.E. 401, 320 Ill. 44—Ross v. Maston, 131 N.E. 94, 297 Ill. 528—Tarallo v. L. W. Hubbell Fertilizer Co., 117 N.E. 1001, 281 Ill. 288.

(7) Where determination of constitutional question is immaterial and not necessary to determination of case.—Prudential Ins. Co. of America v. Richman, 4 N.E.2d 76, 364 Ill. 234, transferred, see 11 N.E.2d 126, 292 Ill.App. 261, and 11 N.E.2d 132—Comstock v. Morgan Park Trust & Savings Bank, 2 N.E.2d 311, 363 Ill. 341, transferred, see 4 N.E.2d 653, 287 Ill.App. 613, modified on other grounds 11 N.E.2d 394, 367 Ill. 276—O. D. Jennings & Co. v. Hoffman, 173 N.E. 774, 342 Ill. 229—Fitzsimmons v. Miller, 139 N.E. 18, 308 Ill. 85—15 C.J. p 1047 note 83 [e].

(8) Contention as to unconstitutionality of provision of statute not injuriously affecting the complaining party, where invalidity of such provision would not render whole act unconstitutional.—People v. Day, 145 N.E. 160, 313 Ill. 531.

(9) Where evidence shows waiver of any violation of constitutional rights by unlawful search.—People v. Akers, 158 N.E. 410, 327 Ill. 137.

(10) Generally.—Continental Casualty Co. v. Hein, 13 N.E.2d 984, 368 Ill. 289, transferred, see App., 17 N.E.2d 622—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1545—Bates v. Commissioners of Lake Fork Special Drainage Dist., 185 N.E. 589, 352 Ill. 378—Creits v. Bennett, 182 N.E. 736, 350 Ill. 32—Sheridan-Brompton & Annex Bldg. Corporation v. Daane, 180 N.E. 779,

348 Ill. 306—Anderson v. Inter-State Business Men's Acc. Ass'n, 174 N.E. 873, 342 Ill. 612—Pennsylvania Tank Line v. Jordan, 173 N.E. 181, 341 Ill. 94, transferred, see 260 Ill.App. 397—People v. Jiras, 172 N.E. 47, 340 Ill. 208, transferred, see 260 Ill.App. 142—People v. Hord, 160 N.E. 135, 329 Ill. 117—People v. Minner, 154 N.E. 418, 323 Ill. 606—People v. Cermak, 148 N.E. 382, 317 Ill. 590—Cahill v. Plumbers', Gas and Steam Fitters' and Helpers' Local 93, 146 N.E. 130, 315 Ill. 211—Penniman v. Bennett, 129 N.E. 741, 296 Ill. 312—People v. Cache River Drainage Dist., 127 N.E. 45, 292 Ill. 467—Edlund v. Edlund, 120 N.E. 538, 285 Ill. 163—15 C.J. p 1047 note 83 [d].

Judgment by court of foreign state

(1) Ordinarily no constitutional question for determination of supreme court is raised by question as to rendition of judgment by, and jurisdiction of, court of another state under constitution of that state.—Roberts v. Sauerman Bros., 18 N.E.2d 883, 370 Ill. 344, transferred, see 20 N.E.2d 849, 300 Ill.App. 213.

(2) Only where facts recited in record of such judgment show either lack of jurisdiction of subject matter or of parties may direct appeal be taken to supreme court.—Borman v. Borman, 5 N.E.2d 225, 364 Ill. 601, transferred, see 9 N.E.2d 667, 291 Ill. App. 135—Van Dyke v. Illinois Commercial Men's Ass'n, 193 N.E. 490, 353 Ill. 458.

42. Ill.—McIlvaine v. City Nat. Bank & Trust Co., 21 N.E.2d 737, 371 Ill. 565—Economy Dairy Co. v. Kerner, 20 N.E.2d 568, 371 Ill. 261—Heine v. Degen, 199 N.E. 832, 362 Ill. 357—Sefcik Dairy Co. v. Jurca, 194 N.E. 508, 359 Ill. 237, transferred, see 6 N.E.2d 481, 288 Ill. App. 618—Foreman-State Nat. Bank v. Sistek, 193 N.E. 513, 358 Ill. 525—People v. City of Waukegan, 175 N.E. 780, 344 Ill. 60—Stevens Hotel Co. v. Art Institute of Chicago, 173 N.E. 761, 342 Ill. 180, transferred, see 260 Ill.App. 555—People v. Pettow, 151 N.E. 673, 320 Ill. 572—Taylor v. Filler, 149 N.E. 283, 318 Ill. 356—Darley v. Thompson, 132 N.E. 536, 299 Ill. 122—McNeil & Higgins Co. v. Neenah Cheese & Cold Storage Co., 125 N.E. 251, 290 Ill. 449—Hardy v. Dobler, 248 Ill.App. 361—Berndt v. Chicago Rys. Co., 260 Ill.App. 307. See Albert Pick & Co. v. Natalby, 211 Ill.App. 486.
15 C.J. p 1047 note 84.

Criminal cases generally

(1) The text rule has in many cases been applied to criminal prosecutions.—People v. Fuller, 17 N.E.2d 18, 369 Ill. 492—People v. Pointer, 180 N.E. 796, 348 Ill. 277, transferred,

thereon,⁴³ and must be shown by the record;⁴⁴ but a failure to raise such question in the trial court does not preclude consideration by the supreme court where the question did not arise until after the judgment complained of was entered.⁴⁵ The mere assertion that the validity of a statute is involved is not sufficient to confer on the

supreme court jurisdiction on direct appeal,⁴⁶ nor can such jurisdiction be conferred by a mere denial in a pleading of the validity of the statute,⁴⁷ although it has been held that the issue is sufficiently raised where the bill avers and the answer denies that a statute is unconstitutional.⁴⁸ The question must also be fairly debatable;⁴⁹ and so, where

see *People v. Tidrick*, 269 Ill.App. 191—*People v. Maffei*, 146 N.E. 131, 315 Ill. 226—*People v. Fensky*, 125 N.E. 292, 290 Ill. 612—*People v. Grady*, 217 Ill.App. 490.

(2) It has been held, however, that the supreme court has jurisdiction of a writ of error to review a conviction under an allegedly unconstitutional statute notwithstanding the constitutional question was not raised at trial.—*People v. Clardy*, 165 N.E. 638, 334 Ill. 160.

Necessity of ruling

Record must affirmatively disclose that constitutional question was not only presented for decision but was passed on by trial court.—*Holsman v. Campbell Realty Co.*, 21 N.E.2d 744, 371 Ill. 614—*Kellogg v. Kellogg*, 20 N.E.2d 585, 371 Ill. 241—*Pollack v. Du Page County*, 20 N.E.2d 273, 371 Ill. 199—*Ryan v. City of Chicago*, 2 N.E.2d 913, 363 Ill. 607, transferred, see 8 N.E.2d 369, 290 Ill.App. 604.

Primary inquiry

(1) It must appear that constitutional question was primary inquiry in trial court, and, even though question was there raised but final decree was entered on other issues, no constitutional question is presented to supreme court.—*Ryan v. City of Chicago*, 2 N.E.2d 913, 363 Ill. 607, transferred, see 8 N.E.2d 369, 290 Ill.App. 604.

(2) Question generally held sufficiently raised.—*Burket v. Reliance Bank & Trust Co.*, 11 N.E.2d 6, 367 Ill. 196—15 C.J. p 1047 note 34 [b].

(3) Oral motion to quash amounted to general demurrer sufficient to raise question of constitutionality of statute on which prosecution was based, although no specific constitutional provisions were called to trial court's attention.—*People v. Eisen*, 191 N.E. 219, 357 Ill. 105.

(4) It has been held, however, that motions to quash and in arrest were insufficient to raise question where court was not apprised that constitutionality of statute was in issue.—*People v. Ugo*, 145 N.E. 633, 315 Ill. 74.

(5) So the mere fact that constitution guarantees immunity from unreasonable search and seizure does not show that constitutional question is raised by motion to quash search warrant issued under statute not claimed to violate such provision.—

People v. Blenz, 148 N.E. 249, 317 Ill. 639.

43. Ill.—*Economy Dairy Co. v. Kerner*, 20 N.E.2d 568, 371 Ill. 261—*People v. Fuller*, 17 N.E.2d 18, 369 Ill. 492—*People ex rel. Kurtz v. Meyer*, 159 N.E. 205, 328 Ill. 122, transferred, see 251 Ill.App. 475—*Cooper v. Palais Royal Theatre Co.*, 150 N.E. 401, 320 Ill. 44—*People v. Ugo*, 145 N.E. 633, 315 Ill. 74—*McNeil & Higgins Co. v. Neenah Cheese & Cold Storage Co.*, 125 N.E. 251, 290 Ill. 449.
15 C.J. p 1048 note 85.

Exceptions held to raise question

Ill.—*Heine v. Degen*, 199 N.E. 832, 362 Ill. 357.

44. Ill.—*Holsman v. Campbell Realty Co.*, 21 N.E.2d 744, 371 Ill. 614—*McIlvaine v. City Nat. Bank & Trust Co.*, 21 N.E.2d 737, 371 Ill. 565—*Economy Dairy Co. v. Kerner*, 20 N.E.2d 568, 371 Ill. 261—*Lithuanian Alliance of America v. Home Bank & Trust Co.*, 200 N.E. 167, 362 Ill. 439, transferred, see 4 N.E.2d 792, 287 Ill.App. 621—*Foreman-State Nat. Bank v. Sisteck*, 193 N.E. 513, 358 Ill. 525—*People v. City of Waukegan*, 175 N.E. 780, 344 Ill. 60—*Lindstrom v. City of Chicago*, 162 N.E. 128, 331 Ill. 144—*People v. Levin*, 145 N.E. 75, 313 Ill. 588—*Liberty State Bank v. Louis G. Deschler Co.*, 141 N.E. 725, 310 Ill. 233—*McNeil & Higgins Co. v. Neenah Cheese & Cold Storage Co.*, 125 N.E. 251, 290 Ill. 449.
15 C.J. p 1048 note 86.

Abstract of record must show that constitutional question was raised in trial court and statement that trial judge signed certificate of importance is insufficient for this purpose.—*City of Chicago v. International Register Co.*, 196 N.E. 792, 360 Ill. 602.

45. Ill.—*Burket v. Reliance Bank & Trust Co.*, 11 N.E.2d 6, 367 Ill. 196—*Spencer v. Chicago City Ry. Co.*, 7 N.E.2d 862, 366 Ill. 120, reversing 220 Ill.App. 436—*People v. Stoyan*, 117 N.E. 464, 280 Ill. 300.

46. Ill.—*Economy Dairy Co. v. Kerner*, 20 N.E.2d 568, 371 Ill. 261—*Pollack v. Du Page County*, 20 N.E.2d 273, 371 Ill. 199—*Ryan v. City of Chicago*, 2 N.E.2d 913, 363 Ill. 607, transferred, see 8 N.E.2d 369, 290 Ill.App. 604—*Comstock v. Morgan Park Trust & Savings*

Bank, 2 N.E.2d 311, 363 Ill. 341, transferred, see 4 N.E.2d 653, 237 Ill.App. 613, modified on other grounds 11 N.E.2d 394, 367 Ill. 276—*Martin v. Bankers' Life Co.*, 193 N.E. 197, 358 Ill. 388—*Wilson v. Prochnow*, 187 N.E. 914, 354 Ill. 98—*People v. Allen*, 185 N.E. 605, 352 Ill. 262, transferred, see 276 Ill.App. 28, and reversed on other grounds 195 N.E. 478, 360 Ill. 36—*People v. Davies*, 183 N.E. 11, 350 Ill. 48, transferred, see 259 Ill.App. 306, and affirmed 183 N.E. 337, 354 Ill. 168—*Hawkins v. Hawkins*, 183 N.E. 9, 350 Ill. 227—*Sheridan-Brompton & Annex Bldg. Corporation v. Daane*, 180 N.E. 779, 348 Ill. 306—*Valerius v. Perry*, 174 N.E. 29, 342 Ill. 147—*Stevens Hotel Co. v. Art Institute of Chicago*, 173 N.E. 761, 342 Ill. 180, transferred, see 260 Ill.App. 555—*Pennsylvania Tank Line v. Jordan*, 173 N.E. 181, 341 Ill. 94, transferred, see 260 Ill. App. 397—*People v. Jiras*, 172 N.E. 47, 340 Ill. 208, transferred, see 260 Ill.App. 142—*People v. Forsyth*, 171 N.E. 561, 339 Ill. 381—*Bacous v. Gunderson*, 170 N.E. 225, 338 Ill. 301—*People v. Pettow*, 151 N.E. 678, 320 Ill. 572—*Kowalczyk v. Swift & Co.*, 148 N.E. 59, 317 Ill. 312, reversing 233 Ill.App. 337—*People v. Calkins*, 126 N.E. 200, 291 Ill. 317.
15 C.J. p 1048 note 87.

Municipal ordinance

Ill.—*City of Chicago v. Peterson*, 195 N.E. 636, 360 Ill. 177.

47. Ill.—*Pollack v. Du Page County*, 20 N.E.2d 273, 371 Ill. 199—*People v. De Young*, 16 N.E.2d 729, 369 Ill. 341—*Ryan v. City of Chicago*, 2 N.E.2d 913, 363 Ill. 607, transferred, see 8 N.E.2d 369, 290 Ill. App. 604.
15 C.J. p 1048 note 88.

48. Ill.—*Chaplain v. Highways Comrs.*, 18 N.E. 765, 126 Ill. 264.

49. Ill.—*McIlvaine v. City Nat. Bank & Trust Co.*, 21 N.E.2d 737, 371 Ill. 565—*Economy Dairy Co. v. Kerner*, 20 N.E.2d 568, 371 Ill. 261—*Comstock v. Morgan Park Trust & Savings Bank*, 2 N.E.2d 311, 363 Ill. 341, transferred, see 4 N.E.2d 653, 237 Ill.App. 613, modified on other grounds 11 N.E.2d 394, 367 Ill. 276—*Foreman-State Nat. Bank v. Sisteck*, 193 N.E. 513, 358 Ill. 525—*Wilson v. Prochnow*, 187 N.E. 914, 354 Ill. 98—*Sheridan-Brompton & Annex*

the particular constitutional question has already been decided by the supreme court, the fact that it is again raised will not authorize a direct appeal to such court,⁵⁰ unless some special reasons appear why it should receive further consideration.⁵¹ Where a direct appeal to the supreme court is authorized, that court may consider and determine

all questions arising on the record.⁵²

Where no question of the validity of the statute or construction of the constitution is involved, the fact that the case involves the construction of a statute does not authorize an appeal to the supreme court, but an appeal must go to the appellate court,⁵³ and the same is true where the contention

Bldg. Corporation v. Daane, 130 N.E. 779, 348 Ill. 306—Komorowski v. Boston Store of Chicago, 173 N.E. 159, 341 Ill. 126—Pennsylvania Tank Line v. Jordan, 173 N.E. 181, 341 Ill. 94, transferred, see 260 Ill.App. 397—People v. Jiras, 172 N.E. 47, 340 Ill. 208, transferred, see 260 Ill.App. 142—People v. Forsyth, 171 N.E. 561, 339 Ill. 351—Baccus v. Gunderson, 170 N.E. 225, 338 Ill. 391—People ex rel. Kurtz v. Meyer, 153 N.E. 205, 325 Ill. 122, transferred, see 251 Ill.App. 475—Cooper v. Palais Royal Theatre Co., 150 N.E. 401, 320 Ill. 44—Kowalczyk v. Swift & Co., 148 N.E. 59, 317 Ill. 312, reversing 233 Ill.App. 337.
15 C.J. p 1048 note 90.

Municipal ordinance

Ill.—City of Chicago v. Peterson, 195 N.E. 636, 360 Ill. 177.

50. Ill.—E. L. Mansure Co. v. City of Chicago, 23 N.E.2d 32, 372 Ill. 156—First Nat. Bank v. Village of South Pekin, 21 N.E.2d 765, 371 Ill. 605—People v. De Young, 16 N.E.2d 729, 369 Ill. 341—People v. Frankowsky, 13 N.E.2d 178, 363 Ill. 171, transferred, see 15 N.E.2d 894, 296 Ill.App. 637—O'Connor v. Rathje, 12 N.E.2d 878, 368 Ill. 83, transferred, see 19 N.E.2d 96, 298 Ill.App. 489—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1545—Burket v. Reliance Bank & Trust Co., 7 N.E.2d 850, 366 Ill. 98, transferred, see Schwartz v. Broadway Trust & Savings Bank of Aurora, 10 N.E.2d 147, 291 Ill.App. 460—Mikel v. Illinois Racing Commission, 5 N.E.2d 472, 364 Ill. 640, transferred, see 10 N.E.2d 857, 292 Ill.App. 633—People v. Shaver, 4 N.E.2d 471, 364 Ill. 326, transferred, see 7 N.E.2d 160, 289 Ill.App. 612, affirmed 11 N.E.2d 400, 367 Ill. 339—Widman v. Peoples Trust & Savings Bank of Ottawa, 2 N.E.2d 313, 363 Ill. 345, transferred, see 3 N.E.2d 392, 286 Ill.App. 619—Comstock v. Morgan Park Trust & Savings Bank, 2 N.E.2d 311, 363 Ill. 341, transferred, see App. 4 N.E.2d 653, 287 Ill.App. 613, modified on other grounds 11 N.E.2d 394, 367 Ill. 276—Wilson v. Frochnow, 187 N.E. 914, 354 Ill. 98—Mesrirow v. Mesrirow, 173 N.E. 411, 346 Ill. 219—Stevens Hotel Co. v. Art Institute of Chicago, 173 N.E. 761,

342 Ill. 180, transferred, see 260 Ill.App. 555—Pennsylvania Tank Line v. Jordan, 173 N.E. 181, 341 Ill. 94, transferred, see 260 Ill.App. 397—People v. Hord, 160 N.E. 135, 329 Ill. 117—People v. Blenz, 148 N.E. 249, 317 Ill. 639—People v. Fensky, 125 N.E. 292, 290 Ill. 612.
15 C.J. p 1048 note 91.

Municipal ordinance

Text rule applies to consideration of constitutionality of municipal ordinance notwithstanding trial judge certified that constitutionality of ordinance was involved.—City of Sterling v. Berry, 10 N.E.2d 656, 367 Ill. 111, transferred, see 15 N.E.2d 527, 295 Ill.App. 622.

Decision after question raised

Question need only be debatable at time of entry of judgment, and it is immaterial to right of supreme court to hear direct appeal that it adjudicated validity of statute in another case after entry of judgment.—Spencer v. Chicago City Ry. Co., 7 N.E.2d 862, 366 Ill. 120, reversing 220 Ill.App. 436.

51. Ill.—Griveau v. South Chicago City Ry. Co., 73 N.E. 309, 213 Ill. 633.

Attack on new ground

Where statute is attacked on grounds not previously urged, supreme court will take jurisdiction, but jurisdiction need not be taken if a new argument in support of an old ground of attack is suggested.—People v. De Young, 16 N.E.2d 729, 369 Ill. 341—People v. Frankowsky, 13 N.E.2d 178, 368 Ill. 171, transferred, see 15 N.E.2d 894, 296 Ill.App. 637—People ex rel. Rusch v. Ladwig, 7 N.E.2d 313, 365 Ill. 574.

52. Ill.—Chicago, etc., Co. v. People, 75 N.E. 368, 217 Ill. 164.

53. Ill.—First Nat. Bank v. Village of South Pekin, 21 N.E.2d 765, 371 Ill. 605—Kellogg v. Kellogg, 20 N.E.2d 585, 371 Ill. 241—Pollack v. Du Page County, 20 N.E.2d 273, 371 Ill. 199—Universal Credit Co. v. Antonsen, 19 N.E.2d 366, 370 Ill. 509—White v. Youngblood, 12 N.E.2d 650, 367 Ill. 632, certiorari denied 58 S.Ct. 1057, 304 U.S. 583, 82 L.Ed. 1545—Borman v. Borman, 5 N.E.2d 225, 364 Ill. 601, transferred, see 9 N.E.2d 667, 291 Ill. App. 135—People ex rel. Sweitzer v. Gill, 4 N.E.2d 489, 364 Ill. 344, transferred, see 9 N.E.2d 600, 291 Ill.App. 321—Wilson v. Frochnow,

187 N.E. 914, 354 Ill. 98—Illinois Valley Bank v. Newman, 187 N.E. 810, 354 Ill. 38—Sheridan-Brompton & Annex Bldg. Corporation v. Daane, 180 N.E. 779, 348 Ill. 306—Will v. Voliva, 176 N.E. 766, 344 Ill. 510—Hawthorne Kennel Club v. Swanson, 171 N.E. 140, 339 Ill. 220, transferred, see 257 Ill.App. 499—Standard Motors Securities Corporation v. Yates Co., 169 N.E. 164, 337 Ill. 250, transferred, see 257 Ill.App. 394—Ludwig v. Burgess, 162 N.E. 144, 331 Ill. 24—People ex rel. Roy v. Board of Sup'rs of Knox County, Ill., 159 N.E. 787, 328 Ill. 343, transferred, see 250 Ill.App. 13—People ex rel. Kurtz v. Meyer, 159 N.E. 205, 328 Ill. 122, transferred, see 251 Ill.App. 475—Miller v. Illinois Cent. R. Co., 158 N.E. 441, 327 Ill. 103—People v. Pettow, 151 N.E. 673, 320 Ill. 572—People v. Cary, 151 N.E. 513, 321 Ill. 45—Ambia School of Hickory Grove Tp., Ind. v. Non-High School Dist. of Iroquois County, 149 N.E. 238, 318 Ill. 321—People v. Cermak, 148 N.E. 382, 317 Ill. 590—People v. Blenz, 148 N.E. 249, 317 Ill. 639—Clark v. Main, 139 N.E. 870, 309 Ill. 38—Moore v. State Bank of Chicago, 126 N.E. 165, 291 Ill. 372—Chicago Discount Corporation v. Palmer, 279 Ill.App. 216.
15 C.J. p 1048 note 94.

Municipal ordinance

Ill.—City of Chicago v. Iroquois Iron & Steel Co., 197 N.E. 873, 361 Ill. 330, transferred, see City of Chicago v. Iroquois Steel & Iron Co., 1 N.E.2d 241, 284 Ill.App. 561—City of Chicago v. Peterson, 195 N.E. 636, 360 Ill. 177—Stevens Hotel Co. v. Art Institute of Chicago, 173 N.E. 761, 342 Ill. 180, transferred, see 260 Ill.App. 555—City of Chicago v. Hagley, 161 N.E. 106, 329 Ill. 635—Phelps v. Board of Appeals of City of Chicago, 156 N.E. 826, 325 Ill. 625—Village of La Grange Park v. Jarecki, 161 N.E. 538, 321 Ill. 177—Village of Lake Zurich v. Deschauer, 141 N.E. 761, 310 Ill. 209.

Statute admittedly valid

An appeal calling for construction of a statute, which is enacted to give effect to constitutional provisions, does not involve a constitutional question, where validity of statute is admitted, and no claim is made that adoption of any particular construction of constitutional

is that certain parts of a statute have been repealed.⁵⁴ So, also, where a claim or defense is based on statute, the appellate court has jurisdiction to determine whether such statute exists.⁵⁵

Interlocutory orders

As indicated in § 354 supra, appeals from interlocutory orders with respect to injunctions lie only to the appellate court, whose order therein is final, and accordingly, where the appeal from such order involves a constitutional question, it has been held that no provision exists for entertaining it in either the supreme court or the appellate court.⁵⁶ Other cases, however, hold that the appellate court may pass on a constitutional question raised in such an appeal.⁵⁷

§ 357. — Cases Involving Freeholds

An appeal lies only to the supreme court in cases in which a freehold is directly involved, and such is the case where title is so put in issue by the pleadings as necessarily to require a decision thereon, even though

the judgment does not result in one party's gaining, and the other's losing, the estate, but not where the appeal relates to other matters.

Under the provisions of the statute, an appeal lies direct to the supreme court in cases in which a freehold is involved.⁵⁸ The appellate court generally has no jurisdiction of an appeal in such case;⁵⁹ and an appellant who takes his case to the appellate court, or an appellee who submits his case for a hearing on the merits therein, waives the right to have any question involving a freehold considered, or to take a further appeal on the ground that such a question is involved.⁶⁰

A freehold is involved, within the meaning of the rule stated, where the whole merits of the cause cannot be adjudicated without determining the question of freehold, or where the necessary result of the judgment is that one party will lose, and the other gain, a freehold estate, or where the title is so put in issue by the pleadings that a decision of such issue is necessarily required;⁶¹ and where

provision will affect decision of question raised.—*People v. Cermak*, 148 N.E. 382, 317 Ill. 590.

54. Ill.—*Reining v. Mueller*, 94 N.E. 130, 248 Ill. 389—*Pearce v. Vitum*, 61 N.E. 1116, 193 Ill. 192—*Morgan Park v. Gahan*, 35 Ill.App. 646, reversed on other grounds 26 N.E. 1085, 136 Ill. 515.

55. Ill.—*American Live Stock Commn. Co. v. Chicago Live Stock Exch.*, 41 Ill.App. 149, affirmed 32 N.E. 274, 143 Ill. 210, 36 Am.S.R. 385, 18 L.R.A. 190.

56. Ill.—*Birch v. Denton*, 201 Ill. App. 386—*Patterson v. Denton*, 201 Ill.App. 382.

57. Ill.—*Webb v. Marozas*, 268 Ill. App. 338.

58. Ill.—*Bennett v. Bennett*, 149 N.E. 292, 318 Ill. 193—*Engler v. Engler*, 145 N.E. 206, 313 Ill. 527—*Lynn v. Lynn*, 43 N.E. 482, 160 Ill. 307—*In re Duffield's Estate*, 258 Ill. App. 78.

15 C.J. p 1048 note 97.

Successive appeals

The supreme court has jurisdiction of an action involving a freehold even though the case is improperly presented to it by successive appeals, rather than by direct appeal as provided in the statute.—*Anderson v. Anderson*, 170 N.E. 212, 338 Ill. 309.

What constitutes "freehold"

(1) Life estate is a freehold.—*Town of Kingston v. Anderson*, 220 Ill.App. 604—15 C.J. p 1048 note 97 [b].

(2) A conveyance or restriction for any term of years does not constitute a freehold interest in real es-

tate.—*Deegan v. Heckard*, 145 N.E. 160, 313 Ill. 359—*Zimmerman v. Dawson*, 222 Ill.App. 212.

(3) The term "freehold" does not include a mere right to do that which in equity will entitle a party to a freehold.—*Callner v. Greenberg*, 23 N.E.2d 29, 372 Ill. 176—*Davis v. Oliver*, 20 N.E.2d 532, 371 Ill. 287—*Taylorville Savings, Loan & Building Ass'n v. McBride*, 17 N.E.2d 221, 369 Ill. 544—*Johnson v. Hefferan*, 6 N.E.2d 638, 365 Ill. 359, transferred, see 10 N.E.2d 984, 292 Ill.App. 637—*Steindler v. Knies*, 5 N.E.2d 402, 365 Ill. 59, transferred, see *Knies v. Steindler*, 11 N.E.2d 15, 292 Ill.App. 637—*United Electric Coal Cos. v. Keefer Coal Co. of Illinois*, 170 N.E. 193, 338 Ill. 288—*Sobczewski v. King John 3d Sobieski No. 1 Building & Loan Ass'n*, 158 N.E. 402, 327 Ill. 47—*Duncanson v. Lill*, 153 N.E. 618, 322 Ill. 528—*Lennartz v. Boddie*, 136 N.E. 718, 304 Ill. 484.

15 C.J. p 1048 note 97 [a].

Freehold in another state

Supreme court had jurisdiction of appeal from court which had jurisdiction over the parties, where freehold was put in issue, notwithstanding freehold was located in another state.—*Sewell v. Sewell*, 1 N.E.2d 492, 363 Ill. 166—*White Star Min. Co. v. Hultberg*, 77 N.E. 327, 220 Ill. 578.

59. Ill.—*Schmidt v. Barr*, 159 N.E. 774, 328 Ill. 365—*Engler v. Engler*, 145 N.E. 206, 313 Ill. 527—*Schafer v. Robillard*, 13 N.E.2d 824, 294 Ill. App. 617, transferred, see 17 N.E.2d 963, 370 Ill. 92—*Town of Kingston v. Anderson*, 220 Ill.App. 604—*Adams v. Abel*, 214 Ill.App. 335—*Gorden v. Gorden*, 205 Ill.App.

77. See *Kleinschmidt v. Kleinschmidt*, 209 Ill.App. 139.

15 C.J. p 1048 note 98.

The rule has two exceptions: One is where the suit is commenced before a justice of the peace or in the county court; the other is where a freehold is involved in the original judgment or decree, but not in the points assigned for error.—*Ward v. Mississippi River Power Co.*, 188 Ill. App. 305, transferred, see 107 N.E. 115, 265 Ill. 486.

Determination as to whether freehold involved

In all cases where an appeal is taken to the appellate court, it has jurisdiction to investigate the question whether a freehold is in fact involved, although, if it finds that such is the case, it has no further jurisdiction.—*Ward v. Mississippi River Power Co.*, 188 Ill.App. 305—15 C.J. p 1055 note 28.

Interlocutory injunctions

As indicated in § 354 supra, appeals from interlocutory orders with respect to injunctions lie only to the appellate court and it has accordingly been held that it may exercise such jurisdiction notwithstanding a freehold is involved.—*Koelling v. Foster*, 150 Ill.App. 130—*Carterville Min. Co. v. Coal Belt R. Co.*, 116 Ill.App. 158—*New Ohio Washed Coal Co. v. Coal Belt R. Co.*, 116 Ill.App. 153—15 C.J. p 1050 note 3 [a].

60. Ill.—*Engler v. Engler*, 145 N.E. 206, 313 Ill. 527—*Johnson Oil Refining Co. v. Gillam*, 256 Ill.App. 531.

15 C.J. p 1049 note 99.

61. Ill.—*Harper v. Sallee*, 23 N.E.2d 27, 372 Ill. 199—*Klein v. Mangan*,

17 N.E.2d 958, 369 Ill. 645—Coburn v. Macke, 15 N.E.2d 552, 369 Ill. 106—Johnson v. Hofferan, 6 N.E.2d 636, 365 Ill. 353, transferred, see 10 N.E.2d 934, 292 Ill.App. 637—Hooper v. Wabash Automotive Corporation, 5 N.E.2d 462, 335 Ill. 30—Steindler v. Knies, 5 N.E.2d 402, 365 Ill. 59, transferred, see Knies v. Steindler, 11 N.E.2d 15, 292 Ill.App. 637—Wylie v. O'Connor, 2 N.E.2d 919, 363 Ill. 615—Wright v. Logan, 2 N.E.2d 904, 364 Ill. 23, transferred, see 6 N.E.2d 265, 266 Ill.App. 461—Sewell v. Sewell, 1 N.E.2d 492, 353 Ill. 166—Perry Coal Co. v. Richmond, 200 N.E. 329, 362 Ill. 487, transferred, see 4 N.E.2d 891, 287 Ill.App. 298—Ashton v. Macqueen, 197 N.E. 561, 361 Ill. 132—Burke v. Kleiman, 189 N.E. 372, 355 Ill. 290, transferred, see 277 Ill.App. 519—Long v. Wilson Stove & Mfg. Co., 188 N.E. 411, 354 Ill. 465—Ellis v. Richter, 184 N.E. 599, 351 Ill. 545—Christie v. Brouillette, 182 N.E. 746, 350 Ill. 60—Anderson v. Anderson, 181 N.E. 692, 349 Ill. 40—Home Building & Loan Ass'n of Paris v. Gaumer, 181 N.E. 644, 349 Ill. 226, transferred, see 269 Ill. App. 196—Winkelmann v. Winkelmann, 178 N.E. 118, 345 Ill. 566—Healea v. Verne, 175 N.E. 562, 343 Ill. 325—United Electric Coal Cos. v. Keefer Coal Co. of Illinois, 170 N.E. 193, 338 Ill. 238—Merkel v. Woodside, 165 N.E. 163, 332 Ill. 489, transferred, see 254 Ill.App. 203—Lundquist v. Iverson, 165 N.E. 135, 333 Ill. 523—Christie v. Sanitary Dist. of Chicago, 162 N.E. 126, 330 Ill. 558—Sobczenski v. King John 3d Sobleski No. 1 Building & Loan Ass'n, 158 N.E. 402, 327 Ill. 47—Olin v. Reinecke, 153 N.E. 646, 322 Ill. 449—Duncanson v. Lill, 153 N.E. 618, 322 Ill. 528—Stolowski v. Wierzbowski, 152 N.E. 552, 323 Ill. 74—Bennett v. Bennett, 149 N.E. 292, 318 Ill. 193—Illinois Central R. Co. v. Queen City Bldg. Corporation, 145 N.E. 184, 313 Ill. 539—Lennarts v. Bodie, 136 N.E. 718, 304 Ill. 484—Cunningham v. Cunningham, 135 N.E. 21, 303 Ill. 41—Road Dist. No. 6 in Johnson County v. McKinney, 132 N.E. 529, 299 Ill. 130—Kuhne v. Sanitary District of Chicago, 120 N.E. 471, 285 Ill. 129—Adams v. Abel, 214 Ill.App. 335.

15 C.J. p 1049 note 1.

Flea of liberum tenementum

(1) Such plea is ordinarily sufficient to raise issue as to the ownership of the freehold.—Tomhave v. Vortman, 113 N.E. 46, 274 Ill. 28.

(2) But the fact that appeal is from judgment in suit for damages to land in which the plea of liberum tenementum was set up does not confer appellate jurisdiction on the supreme court where no evidence is offered in support of the plea and

there is no assignment of error involving ownership.—Coal Creek Drainage and Levee Dist. v. Sanitary Dist. of Chicago, 159 N.E. 805, 328 Ill. 360.

Decision of trial court

In determining whether a freehold is involved, it is immaterial which way trial court decided the issue.—Swinson v. Sodaman, 17 N.E. 2d 40, 369 Ill. 442, transferred, see 20 N.E.2d 623, 300 Ill.App. 31.

Freehold involved

(1) In action against city for damages to property resulting from change of street grade, sidewalks, and alley adjacent to the property.—Grunevald v. City of Chicago, Ill. App., 18 N.E.2d 708.

(2) In action for damages to land where defendant denied plaintiff's title and plaintiff introduced title deeds, which was only evidence of title.—Brand v. Union Elevated R. Co., 115 N.E. 532, 277 Ill. 356.

(3) Where bill for injunction, together with cross bill and answer, puts in issue existence of freehold, which must be decided.—Sanitary Dist. of Chicago v. Chicago Title & Trust Co., 116 N.E. 161, 278 Ill. 529.

(4) Where it is the purpose of the suit to set aside a sale of real estate.—Rabblitt v. Frank C. Weber & Co., 130 N.E. 787, 297 Ill. 491.

(5) Where pleadings in judgment creditor's action to have condemnation judgment applied on judgment on theory that debtor was owner of land condemned put in issue ownership of land condemned.—Paxton v. Gubbins, 21 N.E.2d 300, 371 Ill. 435.

(6) Where suit to recover penalty for failure to rebuild dock was based on proof that public owned freehold of land underlying water in slip.—City of Chicago v. Chicago, B. & Q. R. Co., 150 N.E. 250, 319 Ill. 351.

(7) Other cases see Carter Oil Co. v. Liggett, 21 N.E.2d 569, 371 Ill. 482—Pure Oil Co. v. Evans, 17 N.E.2d 23, 269 Ill. 416—15 C.J. p 1049 note 1 [d].

Freehold not involved

(1) Appeal from order appointing a guardian for an infant, although latter possessed real property.—McMahan v. Trautvetter, 131 N.E. 127, 297 Ill. 604.

(2) Appeal from order determining heirs of deceased person, neither investing nor divesting title to real estate.—Saunders v. Saunders, 153 N.E. 593, 323 Ill. 43—Worsley v. Welch, 147 N.E. 279, 317 Ill. 90.

(3) Application for a writ of assistance which involves only the question of petitioner's right to the possession.—McDonnell v. Hartnett, 153 N.E. 666, 323 Ill. 87—Kerr v. Brawley, 61 N.E. 1057, 193 Ill. 205.

(4) Bill by owner of interest in land to redeem from sheriff's sale.—

Parsell v. Parsell, 190 N.E. 360, 356 Ill. 183.

(5) In action to compel removal of encroaching projections from building.—Illinois Cent. R. Co. v. Queen City Bldg. Corporation, 145 N.E. 184, 313 Ill. 539.

(6) In probate case involving sole question of administration of estate.—Healea v. Verne, 175 N.E. 562, 343 Ill. 325.

(7) If defendant can do some act to defeat the suit and prevent disturbance of title, as by making payment, even though the litigation may result in a loss of a freehold.—Christie v. Brouillette, 182 N.E. 746, 350 Ill. 60—Home Building & Loan Ass'n of Paris v. Gaumer, 181 N.E. 644, 349 Ill. 226, transferred, see 269 Ill.App. 196—Blodgett v. Blodgett, 175 N.E. 777, 343 Ill. 569, transferred, see 266 Ill.App. 517—Scanlon v. Beebe, 167 N.E. 25, 335 Ill. 400—Olin v. Reinecke, 153 N.E. 646, 322 Ill. 449—Kagy v. Luke, 192 N.E. 559, 357 Ill. 512.

(8) In appeal from decree enjoining forfeiture of lease with provision for ultimate conveyance of title, involving only construction of contract.—United Electric Coal Cos. v. Keefer Coal Co. of Illinois, 170 N.E. 193, 338 Ill. 238.

(9) In bill for accounting of proceeds of leasehold, not seeking to enforce sale of leasehold interest.—Stathopoulos v. Korson, 168 N.E. 877, 336 Ill. 205.

(10) In bill for dissolution of partnership and an accounting which did not pray that complainant be decreed to have an interest in real estate.—Parish v. Bainum, 126 N.E. 129, 291 Ill. 374.

(11) Question as to deduction of taxes and costs from award in condemnation proceedings.—City of Chicago v. McDonough, 184 N.E. 322, 351 Ill. 200, transferred, see 273 Ill.App. 392.

(12) Suit to cancel an agreement by which beneficiary in estate consisting of realty and personality had agreed to pay another a portion of his distributive share and assigned an undivided interest therein.—Wylie v. O'Connor, 2 N.E.2d 919, 363 Ill. 615.

(13) Suit to restrain violation of building regulation.—Brown v. Piereson, 161 N.E. 87, 330 Ill. 92, transferred, see 250 Ill.App. 214.

(14) When the litigation, under a certain contingency, may result in the loss of a freehold but does not necessarily do so.—Wylie v. O'Connor, 2 N.E.2d 919, 363 Ill. 615—Home Building & Loan Ass'n of Paris v. Gaumer, 181 N.E. 644, 349 Ill. 226, transferred, see 269 Ill.App. 196.

the title is thus in issue an appeal goes direct to the supreme court even though the judgment or decree does not result in one party's gaining, and the other's losing, the estate;⁶² but if a freehold is only incidentally or collaterally involved, an appeal cannot be taken directly to the supreme court, but must go to the appellate court.⁶³

The fact that an action as originally brought involved a freehold does not authorize an appeal direct to the supreme court where no objection is

made to the judgment or decree in so far as it affects the freehold, and the appeal relates solely to matters in which the freehold is not involved.⁶⁴

Particular matters. The foregoing principles with respect to the conditions under which a freehold is involved so as to permit direct appeal to the supreme court have been applied in actions involving title, or the transfer of title, to land;⁶⁵ and suits to quiet title.⁶⁶ The foregoing principles

(15) Where determination appealed from concerns only procedure and affirmance or reversal would not affect issue of freehold.—*Carney v. Quinn*, 193 N.E. 455, 358 Ill. 446—*Anderson v. Anderson*, 181 N.E. 693, 349 Ill. 40—*Rode v. Eftimoff*, 179 N.E. 853, 347 Ill. 430, transferred, see 267 Ill.App. 466—*Rubin v. Midlinsky*, 158 N.E. 395, 327 Ill. 89—*Smith v. Johnson*, 144 N.E. 318, 313 Ill. 17.

(16) Where main relief sought was right to redeem shares of stock and for an accounting, and reconveyance of real estate was incidental thereto.—*Schmitt v. Wright*, 192 N.E. 562, 357 Ill. 509.

(17) Where on record no ruling was asked for or made by the trial court upon the question of title.—*Christie v. Sanitary Dist. of Chicago*, 162 N.E. 126, 330 Ill. 558.

(18) Where plea putting freehold in issue is waived or abandoned as by failing to present evidence under the plea.—*Christie v. Sanitary Dist. of Chicago*, supra.

(19) "Where the right to do certain things which in equity would entitle the party to a freehold might or might not be exercised, or where the conveyance in question depends upon subsequent acts which might not be required or performed."—*Wyllie v. O'Connor*, 2 N.E.2d 919, 920, 363 Ill. 615—*Long v. Wilson Stove & Mfg. Co.*, 188 N.E. 411, 412, 354 Ill. 465.

(20) Where title is not put in issue by pleadings and there are no assignments of error respecting question.—*Lederer v. Rosenston*, 160 N.E. 154, 329 Ill. 89—*Gits v. Ullrich*, 123 N.E. 528, 288 Ill. 527.

(21) Other instances see *People ex rel. Charles De Leuw & Co. v. Village of Midlothian*, 18 N.E.2d 233, 370 Ill. 223—*Coburn v. Macke*, 15 N.E.2d 852, 369 Ill. 106—*Stevens Hotel Co. v. Art Institute of Chicago*, 173 N.E. 761, 342 Ill. 180, transferred, see 260 Ill.App. 555—*People ex rel. Kurtz v. Meyer*, 159 N.E. 205, 328 Ill. 122, transferred, see 251 Ill.App. 475—*People ex rel. Drainage Com'rs of Union Dist. No. 2 of the Towns of Momence and Goneer, Ill. v. Chicago*

& E. I. Ry. Co., 258 Ill.App. 535—15 C.J. p 1049 note 1 [e].

62. Ill.—*Ashton v. Macqueen*, 197 N.E. 561, 361 Ill. 132—*Lundquist v. Inverson*, 165 N.E. 135, 333 Ill. 523.

15 C.J. p 1050 note 2.

Not object of recovery

Freehold is involved if title is directly put in issue by pleadings, even though it is not the subject sought to be recovered.—*City of Chicago v. Chicago, B. & Q. R. Co.*, 150 N.E. 250, 319 Ill. 351.

63. Ill.—*Callner v. Greenberg*, 23 N.E.2d 29, 372 Ill. 176—*Harper v. Sallee*, 28 N.E.2d 27, 372 Ill. 199—*Swinson v. Sodaman*, 17 N.E.2d 40, 369 Ill. 442, transferred, see 20 N.E.2d 623, 300 Ill.App. 31—*Johnson v. Heffernan*, 6 N.E.2d 638, 365 Ill. 359, transferred, see 10 N.E.2d 984, 292 Ill.App. 637—*Wyllie v. O'Connor*, 2 N.E.2d 919, 363 Ill. 615—*Schmitt v. Wright*, 192 N.E. 562, 357 Ill. 509—*Kagy v. Luke*, 192 N.E. 559, 357 Ill. 512—*Long v. Wilson Stove & Mfg. Co.*, 188 N.E. 411, 354 Ill. 465—*Willson v. Labhart*, 182 N.E. 752, 350 Ill. 185, transferred, see 269 Ill.App. 93—*Winkelmann v. Winkelmann*, 178 N.E. 118, 345 Ill. 566—*Blodgett v. Blodgett*, 175 N.E. 777, 343 Ill. 569, transferred, see 266 Ill.App. 517—*Healea v. Verne*, 175 N.E. 562, 343 Ill. 325—*Merkel v. Woodside*, 165 N.E. 163, 333 Ill. 489, transferred, see 254 Ill.App. 203—*Lederer v. Rosenston*, 160 N.E. 154, 329 Ill. 89—*Cunningham v. Cunningham*, 135 N.E. 21, 303 Ill. 41.

15 C.J. p 1050 note 3.

64. Ill.—*Hooper v. Wabash Automotive Corporation*, 5 N.E.2d 462, 365 Ill. 30—*Wainwright v. McDonough*, 5 N.E.2d 452, 364 Ill. 626, transferred, see 7 N.E.2d 915, 290 Ill. App. 50—*Fyffe v. Fyffe*, 4 N.E.2d 368, 364 Ill. 281, transferred, see 11 N.E.2d 857, 292 Ill.App. 539—*McGrath v. Dunne*, 2 N.E.2d 895, 363 Ill. 549, transferred, see 9 N.E.2d 66, 290 Ill.App. 611—*Carney v. Quinn*, 193 N.E. 455, 358 Ill. 446—*Schrader v. Schrader*, 192 N.E. 648, 357 Ill. 623—*McBeath v. McBeath*, 165 N.E. 140, 334 Ill. 40—*Coal Creek Drainage and Levee*

Dist. v. Sanitary Dist. of Chicago, 159 N.E. 805, 328 Ill. 360—*Collins v. Parker*, 145 N.E. 607, 314 Ill. 370—*Harmening v. Hawley*, 115 N.E. 121, 276 Ill. 621.

15 C.J. p 1055 note 29.

65. Freehold involved

(1) Generally.—*Seely v. Rowe*, 18 N.E.2d 874, 370 Ill. 336—*People ex rel. Palmer v. Peoria Life Ins. Co.*, 192 N.E. 420, 357 Ill. 436—*Schafer v. Robillard*, 13 N.E.2d 824, 294 Ill.App. 617, transferred, see 17 N.E.2d 963, 370 Ill. 92—15 C.J. p 1050 note 4.

(2) Where divorce decree granted wife undivided interest in realty.—*Young v. Young*, 154 N.E. 405, 323 Ill. 608.

Freehold not involved

(1) Generally.—*Swinson v. Sodaman*, 17 N.E.2d 40, 369 Ill. 442, transferred, see 20 N.E.2d 623, 300 Ill.App. 31—*Kirkham v. Harris*, 199 N.E. 122, 362 Ill. 210—*Will v. Voliva*, 176 N.E. 766, 344 Ill. 510—15 C.J. p 1050 note 4.

(2) Bill seeking conveyance from defendant, holding title as security for indebtedness and release of his trust deed.—*Rubin v. Midlinsky*, 155 N.E. 276, 324 Ill. 508.

(3) Suit to cancel contract for conveyance of title to real estate and for return of consideration paid.—*Reinhardt v. Matheson*, 164 N.E. 159, 333 Ill. 56, transferred, see 253 Ill.App. 330.

(4) Where title is admitted and only question is construction of deed to determine whether appellants acquired their title as remaindermen under the deed or by direct inheritance.—*Tallent v. Tallent*, 267 Ill. App. 334.

66. Nature of cloud on title

Whether freehold is involved in bill to remove cloud depends on nature of alleged cloud and whether title is put in issue by pleadings and controverted on trial.—*Lederer v. Rosenston*, 160 N.E. 154, 329 Ill. 89—*Deegan v. Heckard*, 145 N.E. 160, 313 Ill. 359.

Freehold involved

(1) Generally.—*Gunnell v. Palmer*, 18 N.E.2d 202, 370 Ill. 206, 120 A.L.R. 871—15 C.J. p 1051 note 5.

have also been applied in partition suits;⁶⁷ proceedings to locate boundary lines;⁶⁸ actions of ejectment;⁶⁹ actions of trespass quare clausum fregit;⁷⁰ actions of forcible entry and detainer;⁷¹ suits for

specific performance of contracts and agreements involving transfer of title to land;⁷² suits involving tax sales of land, or deeds thereunder;⁷³ and actions relating to highways.⁷⁴ The foregoing prin-

(2) Bill to remove cloud from fee-simple title, where finding was that defendants had partnership interest in premises.—*Lundquist v. Iverson*, 165 N.E. 135, 333 Ill. 523.

(3) When it is sought to cancel a deed purporting to convey the freehold as a cloud on complainant's title.—*Gits v. Ullrich*, 123 N.E. 528, 288 Ill. 527.

Freehold not involved

(1) Generally.—*Callner v. Greenberg*, 23 N.E.2d 29, 372 Ill. 176—*Wainwright v. McDonough*, 5 N.E.2d 452, 364 Ill. 626, transferred, see 7 N.E.2d 915, 290 Ill.App. 59—15 C.J. p 1051 note 5.

(2) Bill seeking to remove executory or conditional contract for conveyance as cloud on title where title is not questioned.—*United Electric Coal Cos. v. Keefer Coal Co. of Illinois*, 170 N.E. 193, 338 Ill. 288—*Rankin v. Stewart*, 139 N.E. 873, 308 Ill. 598.

(3) Suit to remove clouds from title of one party, who contracted to sell to defendants, who never completed purchase, but whose contract was recorded.—*Lee v. Boyd*, 116 N.E. 646, 279 Ill. 345.

(4) Suit to remove clouds on title by having trust deed given by, and judgment against, plaintiff's predecessors in title declared null and void, involving only question of existence of liens.—*Stolowski v. Wierzbowski*, 152 N.E. 582, 322 Ill. 74.

(5) Where only issue was as to whether the conveyance to complainant was intended as a mortgage.—*Hajicek v. Goldsby*, 141 N.E. 140, 309 Ill. 372.

67. The test of whether a freehold is involved is whether the title of some of the parties or the right to partition is challenged or whether the suit involves only questions of accounting, liens upon shares of tenants in common, solicitor's fees, or other questions not involving a freehold.—*Albers v. Central Republic Bank & Trust Co.*, 22 N.E.2d 704, 372 Ill. 27—*Hasterlik v. Hasterlik*, 146 N.E. 498, 316 Ill. 72, transferred, see 234 Ill.App. 572.

Freehold involved

(1) In partition suit generally.—*Hazlett v. Moore*, 23 N.E.2d 57, 372 Ill. 193—*Hardin v. Wolf*, 148 N.E. 868, 318 Ill. 48—*Warrington v. Chester*, 128 N.E. 549, 294 Ill. 524—*MacAdam v. Bowen*, 12 N.E.2d 692, 293 Ill.App. 639, transferred, see 16 N.E.2d 732, 369 Ill. 325—*Hasterlik v. Hasterlik*, 234 Ill.App. 572, transfer-

red, see 146 N.E. 498, 316 Ill. 72—*Schmidt v. Schmidt*, 209 Ill.App. 146—15 C.J. p 1051 note 6.

(2) Issue whether complainants were owners of equitable interest and entitled to partition of premises held in trust which provided no definite time for sale of property.—*Ashton v. Macqueen*, 197 N.E. 561, 361 Ill. 132.

Freehold not involved

(1) Generally.—*Perry Coal Co. v. Richmond*, 200 N.E. 329, 362 Ill. 487, transferred, see 4 N.E.2d 891, 287 Ill. App. 298—*Schrader v. Schrader*, 192 N.E. 648, 357 Ill. 623—*Pfeiffer v. Kemper*, 154 N.E. 476, 323 Ill. 622—15 C.J. p 1051 note 6.

(2) In suit concerning only proceeds of partition sale where rights of parties in land were decided in previous partition proceedings.—*Blodgett v. Blodgett*, 175 N.E. 777, 343 Ill. 569, transferred, see 266 Ill. App. 517.

(3) Where only assignments of error on appeal from partition decree were that mortgagee of appellant was not made party, and that appeal was pending in will contest through which appellant claims share.—*McCarthy v. McCarthy*, 118 N.E. 786, 282 Ill. 488.

68. Freehold not involved

Ill.—*Tomhave v. Vortman*, 113 N.E. 46, 274 Ill. 28—*McNeil v. Allen*, 110 N.E. 887, 271 Ill. 178.

69. Freehold involved

Ill.—*Braun v. Maloy*, 15 N.E.2d 685, 369 Ill. 218.

15 C.J. p 1051 note 8.

Freehold not involved

Ill.—*Hooper v. Wabash Automotive Corporation*, 5 N.E.2d 462, 365 Ill. 30.

15 C.J. p 1051 note 8.

70. Freehold involved

Ill.—*Milligan v. Miller*, 161 Ill.App. 533.

15 C.J. p 1051 note 9.

Freehold not involved

Ill.—*Christie v. Sanitary Dist. of Chicago*, 162 N.E. 126, 330 Ill. 558.

15 C.J. p 1051 note 9.

71. Freehold not involved

Ill.—*Corwine v. Wigginton*, 125 N.E. 305, 290 Ill. 321.

15 C.J. p 1051 note 10.

72. Freehold involved

(1) Bill for specific performance of contract giving complainant right to half interest in purchase of land.—*Rae v. Klotter*, 160 N.E. 147, 329 Ill. 59.

(2) Suit against heirs for specific performance of decedent's contract to adopt complainant, with prayer that complainant recover decedent's realty.—*Winkelmann v. Winkelmann*, 178 N.E. 118, 345 Ill. 566.

(3) Suit to compel execution of conveyance of freehold estate.—*Eich v. Czervonko*, 161 N.E. 864, 330 Ill. 455, certiorari denied 49 S.Ct. 37, 278 U.S. 642, 73 L.Ed. 557—*Schmidt v. Barr*, 159 N.E. 774, 328 Ill. 365—*Gits v. Ullrich*, 123 N.E. 528, 288 Ill. 527.

15 C.J. p 1051 note 11.

Freehold not involved

(1) Generally.—*Dicus v. Fuchs*, 135 N.E. 774, 303 Ill. 489—*Trabue v. Bowman*, 287 Ill.App. 330—15 C.J. p 1051 note 11.

(2) Bill for specific performance of agreement to make contract for deed.—*Sobczenski v. King John 3d Sobieski No. 1 Building & Loan Ass'n*, 158 N.E. 402, 327 Ill. 47.

(3) Bill to specifically enforce contract for transfer of stock in corporation holding title to land.—*Benjamin v. Manufacturers' Terminal Co.*, 246 Ill.App. 590.

(4) Suit for specific performance and accounting by beneficiaries under trust of real estate, in which interest of beneficiaries was declared to be personal property.—*Duncanson v. Lill*, 153 N.E. 618, 322 Ill. 528.

(5) Suit to compel performance of an agreement to convey a leasehold interest for a term of years.—*Zimmermann v. Dawson*, 128 N.E. 546, 294 Ill. 380.

73. Freehold involved

Ill.—*Glos v. Chicago Sanitary Dist.*, 79 N.E. 562, 224 Ill. 272.

15 C.J. p 1052 note 12.

Freehold not involved

Ill.—*Mush v. Caldwell*, 79 N.E. 434, 224 Ill. 93.

15 C.J. p 1052 note 12.

74. Freehold involved

(1) Generally.—*Stengl v. Starr Bros.*, 18 N.E.2d 179, 370 Ill. 118—*Phillips v. Leininger*, 117 N.E. 497, 280 Ill. 132—15 C.J. p 1052 note 13.

(2) Where right of recovery in suit to enjoin obstruction of highway depended upon existence of perpetual easement in lands and rights acquired thereby.—*Law v. Neola Elevator Co.*, 117 N.E. 435, 281 Ill. 143—*Weiter v. Eaton*, 3 N.E.2d 706, 286 Ill.App. 391, transferred, see 7 N.E.2d 855, 366 Ill. 143.

Freehold not involved

(1) Generally.—*Penniman v. Bennett*, 129 N.E. 741, 296 Ill. 312—

ciples have also been applied in dedication proceedings;⁷⁵ actions involving easements⁷⁶ or rights of way;⁷⁷ suits involving homestead rights;⁷⁸ and suits relating to the assignment of dower.⁷⁹

The above mentioned rules have also been applied to suits relating to trusts;⁸⁰ suits relating to wills devising real estate or to the validity or construction of such devises;⁸¹ suits involving the right to subject land to the payment of debts;⁸² proceed-

City of Sullivan v. Central Illinois Public Service Co., 122 N.E. 58, 287 Ill. 19—15 C.J. p 1052 note 13.

(2) Bill to enjoin, or compel removal of obstruction of highway where ownership of freehold is not in dispute.—Mills v. Mathis, 145 N.E. 168, 314 Ill. 49—Town of Manteno v. Surprenant, 115 N.E. 180, 277 Ill. 181.

(3) Petition to restrain obstruction of highway, and answer admitting existence of highway, but invoking estoppel.—Merkel v. Woodside, 165 N.E. 163, 333 Ill. 489, transferred, see 254 Ill.App. 203.

(4) Proceedings to compel drainage district to build bridge where ditch intersected public highway, and, if necessary, to levy tax for purpose.—People v. Cache River Drainage Dist., 127 N.E. 45, 292 Ill. 467.

(5) Statutory proceeding to assess damages for land to be taken for road or road ditch.—Town of Newburg v. Foreman, 145 N.E. 629, 314 Ill. 615—Motsinger v. Chenoweth, 139 N.E. 27, 308 Ill. 31.

75. Freehold involved

Ill.—Mattoon v. Noyes, 113 Ill.App. 111—Brewster v. Cahill, 81 Ill.App. 626.

15 C.J. p 1052 note 14.

76. Duration of easement

Easement does not "involve freehold" unless it is perpetual or of indefinite duration.—Burke v. Kleiman, 139 N.E. 372, 355 Ill. 390, transferred, see 277 Ill.App. 519.

Freehold involved

(1) Generally.—Carstens v. City of Wood River, 248 Ill.App. 495—15 C.J. p 1052 note 15.

(2) Proceeding to enjoin landowners from making connection with closed drain, involving existence of perpetual easement in lands.—Adams v. Abel, 125 N.E. 320, 290 Ill. 496.

(3) Suit to remove building restrictions which created perpetual easements.—Cuneo v. Chicago Title & Trust Co., 169 N.E. 760, 337 Ill. 589.

Freehold not involved

Ill.—Coal Creek Drainage and Levee Dist. v. Sanitary Dist. of Chicago, 159 N.E. 805, 328 Ill. 360. 15 C.J. p 1052 note 15.

77. Freehold involved

Ill.—Beaver Drainage Dist. No. 3 v. Cleveland, C. & St. L. Ry. Co., 179 N.E. 429, 347 Ill. 122. 15 C.J. p 1052 note 16.

Freehold not involved

Ill.—Chicago, B. & Q. R. Co. v.

Malmgren, 130 N.E. 724, 297 Ill. 477.

15 C.J. p 1052 note 16.

78. Freehold involved

Ill.—Jones v. Jones, 117 N.E. 1013, 281 Ill. 595.

15 C.J. p 1053 note 17.

Freehold not involved

Ill.—Karle v. Badeaux, 99 N.E. 617, 255 Ill. 582.

15 C.J. p 1053 note 17.

79. Freehold involved

Ill.—Marsh v. Irwin, 47 N.E. 768, 163 Ill. 50.

15 C.J. p 1053 note 18.

Freehold not involved

(1) Generally.—Opdahl v. Johnson, 23 N.E.2d 31, 372 Ill. 180—15 C.J. p 1053 note 18.

(2) Suit to set aside conveyance involving divorced wife's inchoate dower rights.—Hayes v. Hayes, 170 N.E. 208, 338 Ill. 345, transferred, see 259 Ill.App. 600—Bennett v. Bennett, 149 N.E. 292, 318 Ill. 193.

80. Freehold involved

Ill.—Hazlett v. Moore, 23 N.E.2d 57, 372 Ill. 192—Hickey v. Hickey, 21 N.E.2d 579, 371 Ill. 476—15 C.J. p 1053 note 19.

Freehold not involved

(1) Generally.—Johnson v. Hefferan, 6 N.E.2d 638, 365 Ill. 859, transferred, see 10 N.E.2d 984, 292 Ill.App. 637—Bevier v. Hay, 127 N.E. 877, 293 Ill. 571—15 C.J. p 1053 note 19.

(2) Bill to subject lands to trust for payment of money.—Christie v. Brouillette, 182 N.E. 746, 350 Ill. 60—Blodgett v. Blodgett, 175 N.E. 777, 343 Ill. 569, transferred, see 266 Ill. App. 517.

(3) Suit against a testamentary trustee to compel it to pay to complainants amounts of income awarded them by prior decree.—Chapman v. Northern Trust Co., 128 N.E. 481, 294 Ill. 383.

(4) Suit for accounting of proceeds of trust, declaring beneficial interests personalty.—Sweesy v. Hoy, 155 N.E. 323, 324 Ill. 319.

(5) Where it appears title to real estate in question is vested in another trust agreement, since a successful appeal would not take title away from trustee.—Davis v. Oliver, 20 N.E.2d 582, 371 Ill. 287.

81. Devise in express terms

To sustain jurisdiction in supreme court, the instrument contested need not in terms devise real estate if it sufficiently appears from any part

of the record that the decedent at the time of his death owned such property.—Toomey v. Toomey, 182 N.E. 759, 350 Ill. 162—Epley v. Epley, 244 Ill.App. 237.

Freehold involved

(1) Generally.—Smith v. Shepard, 19 N.E.2d 368, 370 Ill. 491—Conover v. Parker, 226 Ill.App. 102, transferred, see 137 N.E. 204, 305 Ill. 292—15 C.J. p 1053 note 20.

(2) Appeal from order as to probate of will disposing of fee of testator's real estate.—Gorden v. Gorden, 119 N.E. 312, 283 Ill. 182—Epley v. Epley, 244 Ill.App. 237—Gorden v. Gorden, 205 Ill.App. 77.

Freehold not involved

(1) Generally.—People's Bank of Bloomington v. Trogden, 189 N.E. 370, 355 Ill. 367, transferred, see 276 Ill.App. 374—Corboy v. Graham, 149 N.E. 780, 319 Ill. 303—15 C.J. p 1053 note 20.

(2) Question whether a bequest was a charge upon the land, a right to such charge being a mere lien.—Schmidt v. Schmidt, 115 N.E. 189, 277 Ill. 191.

(3) Suit seeking recovery of proceeds of sale of devisee's interest.—Stafford v. Phelps, 125 N.E. 298, 290 Ill. 558.

(4) Suit to construe will and for accounting between devisees, not affecting title to realty.—Ellis v. Righter, 184 N.E. 599, 351 Ill. 545—Mills v. Sawyer, 135 N.E. 24, 302 Ill. 509—Cunningham v. Cunningham, 135 N.E. 21, 303 Ill. 41.

(5) Suit to construe will which in effect disposed of personal property by directing sale of real estate and division of proceeds as therein provided.—Ahrens v. Ahrens, 178 N.E. 104, 345 Ill. 269—Wolford v. Young, 133 N.E. 207, 300 Ill. 320.

82. Freehold not involved

Where complainant wished conveyance declared just and equitable, and defendants wished judgment decreed lien on premises involved.—Watson v. Willerton, 169 N.E. 166, 337 Ill. 359, transferred, see 258 Ill.App. 390—Olin v. Reinecke, 153 N.E. 646, 322 Ill. 449—15 C.J. p 1054 note 21.

Probate proceedings to sell land

(1) A freehold has been held involved in probate proceedings to sell realty.—Chapin v. Treasurer of State of Illinois, 198 N.E. 668, 361 Ill. 645.

(2) It has been similarly held of an order approving sale of testator's real estate to pay debts, where approval of sale would divest appel-

ings to set aside fraudulent conveyances;⁸³ suits to set aside judgments;⁸⁴ suits to enforce liens on land;⁸⁵ proceedings relating to foreclosure of mortgages on real estate;⁸⁶ bills to redeem mortgaged property, or to have a deed declared a mortgage;⁸⁷

lants of title to property devised to them by will.—*Retzinger v. Retzinger*, 169 N.E. 176, 337 Ill. 378.

(3) So also, where on petition to sell land to pay debts, heirs denied that deceased owned it at time of death.—*Howe v. Brown*, 123 N.E. 46, 287 Ill. 532.

(4) However, it is ordinarily held that a freehold is not involved in proceeding of an administrator to sell land of deceased to pay debts since payment could avoid disturbance of title.—*Brayshaw v. Trisler*, 118 N.E. 771, 282 Ill. 405.—*Retzinger v. Retzinger*, 239 Ill.App. 127, reversed on other grounds 162 N.E. 155, 331 Ill. 102.

83. Freehold involved

(1) Generally.—*Banning v. Patterson*, 2 N.E.2d 712, 363 Ill. 464—15 C.J. p 1054 note 22.

(2) Suit by trustee in bankruptcy to set aside conveyance of bankrupt, since in such case trustee's title to realty is involved and question is not merely one of enforcement of lien as in the case of suits by creditor's bill.—*Reisch v. Bowie*, 10 N.E. 2d 662, 367 Ill. 126.—*McKey v. Emanuel*, 184 Ill.App. 473.

Freehold not involved

(1) Bill to set aside conveyance as fraudulent and to subject land to judgment.—*Bradford Nat. Bank of Greenville v. Floyd*, 13 N.E.2d 267, 363 Ill. 187, transferred, see 17 N.E. 3d 728, 297 Ill.App. 651.—*Lasha v. Benham*, 158 N.E. 457, 354 Ill. 501, transferred, see 275 Ill.App. 130.—*Willson v. Labhart*, 182 N.E. 752, 350 Ill. 165, transferred, see 269 Ill.App. 92.—*Scanlon v. Beebe*, 167 N.E. 25, 335 Ill. 400.—*Clark v. G. A. Ball-Bearing Mfg. Co.*, 154 N.E. 446, 323 Ill. 579.—*Coutre v. Ermel*, 146 N.E. 501, 315 Ill. 361.—*First Nat. Bank v. Hayes*, 127 N.E. 716, 203 Ill. 335.

(2) Other cases see 15 C.J. p 1054 note 22.

84. Freehold not involved

(1) Suit to set aside judgment and sale under execution, since the litigation concerns only the lien of the judgment.—*Tarallo v. L. W. Hubbell Fertilizer Co.*, 117 N.E. 1001, 281 Ill. 286.

(2) Other cases see 15 C.J. p 1054 note 22.

85. Freehold not involved

Litigation involving establishment and enforcement of liens for payment of money, on realty, since disturbance of title could be prevented by making payment.—*Kagy v. Luke*, 192 N.E. 559, 357 Ill. 512.—*Ellis v. Righter*, 184 N.E. 599, 351 Ill. 545—

Christie v. Brouillette, 182 N.E. 746, 350 Ill. 60.—*Blodgett v. Blodgett*, 175 N.E. 777, 343 Ill. 569, transferred, see 266 Ill.App. 517.—*Olin v. Reinecke*, 153 N.E. 646, 322 Ill. 449.—*Enbloom v. Bullock*, 134 N.E. 8, 301 Ill. 593—15 C.J. p 1054 note 24.

86. Ill.—*Sullivan v. Abbott*, 166 N.E. 523, 335 Ill. 129. 15 C.J. p 1054 note 25.

Freehold involved

(1) Appeal from decree foreclosing trust deed free and clear of right of way through mortgaged property to landlocked tract owned by defendant not party to trust deed.—*Trapp v. Gordon*, 7 N.E.2d 869, 366 Ill. 102.

(2) Suit to set aside foreclosure decree and deed.—*Elieff v. Lincoln Nat. Life Ins. Co.*, 17 N.E.2d 47, 369 Ill. 408.—*Knaus v. Chicago Title & Trust Co.*, 7 N.E.2d 298, 365 Ill. 538.

(3) Where counterclaim to foreclosure suit alleged that defendants were seized of the fee-simple title and prayed that mortgage be declared a cloud upon their title and set aside.—*Kronan Building & Loan Ass'n v. Medeck*, 13 N.E.2d 66, 368 Ill. 118.

(4) Where pleadings in foreclosure raised question of ownership of fee on date of mortgage.—*Sullivan v. Abbott*, 166 N.E. 523, 335 Ill. 129.

Freehold not involved

(1) Generally.—*Bednarczyk v. Kudla*, 21 N.E.2d 748, 371 Ill. 533, transferred, see, App., 23 N.E.2d 199.—*Dillenburg v. Hellgren*, 21 N.E.2d 393, 371 Ill. 452, remanding 10 N.E. 2d 44, 291 Ill.App. 448—15 C.J. p 1054 note 25.

(2) Decision as to what persons are entitled to proceeds of foreclosure sale.—*Kagy v. Luke*, 192 N.E. 559, 357 Ill. 512.

(3) Question whether defendant's answer in foreclosure suit, to which exceptions were sustained, alleged fraud available as a defense to notes secured by mortgage.—*First Nat. Bank v. Huber*, 141 N.E. 135, 309 Ill. 361.

(4) Suit involving only issues as to existence and enforcement of mortgage lien.—*Steindler v. Knies*, 5 N.E.2d 402, 365 Ill. 59, transferred, see *Knies v. Steindler*, 11 N.E.2d 15, 292 Ill.App. 637.—*Jones v. Horrom*, 1 N.E.2d 694, 363 Ill. 193, transferred, see 9 N.E.2d 728, 291 Ill.App. 620.—*Lithuanian Alliance of America v. Home Bank & Trust Co.*, 200 N.E. 167, 362 Ill. 439, transferred, see 4 N.E.2d 792, 287 Ill.App. 621.—*National Bank of Republic of Chicago v.*

168 Adams Bldg. Corporation, 193 N.E. 511, 359 Ill. 27.—*Kagy v. Luke*, 192 N.E. 559, 357 Ill. 512.—*Home Building & Loan Ass'n of Paris v. Gaurner*, 181 N.E. 644, 349 Ill. 226, transferred, see 269 Ill.App. 196.—*Edgar County Building & Loan Ass'n v. Calvin*, 179 N.E. 889, 347 Ill. 263, transferred, see 268 Ill.App. 125.—*Ludwig v. Burgess*, 162 N.E. 144, 331 Ill. 24.—*Farmers' State Bank of Princeville v. Fast*, 161 N.E. 107, 329 Ill. 601.—*Lederer v. Rosenston*, 160 N.E. 154, 329 Ill. 89.—*Dunlap v. Myers*, 156 N.E. 280, 325 Ill. 398.—*Vincent v. Peterson*, 149 N.E. 232, 318 Ill. 249.—*Moloney v. Figenbaum*, 117 N.E. 485, 280 Ill. 384.

(5) Where, although title to land was put in issue by pleadings, it was not a proper matter to be litigated in a foreclosure suit.—*Prudential Ins. Co. of America v. Hoge*, 193 N.E. 660, 359 Ill. 36.

(6) Where issue in suit to foreclose mortgage or trust deed was question of priority of liens.—*Bednarczyk v. Kudla*, 18 N.E.2d 449, 370 Ill. 204.—*Walshwell v. Doberstein*, 18 N.E.2d 196, 370 Ill. 111, transferred, see 20 N.E.2d 984, 300 Ill.App. 341.—*Metropolitan Life Ins. Co. v. Rubin*, 12 N.E.2d 657, 367 Ill. 636, transferred, see 14 N.E.2d 304, 294 Ill.App. 615.—*Lawrence v. Tully*, 173 N.E. 145, 340 Ill. 631.

87. Freehold not involved

(1) Controversy between rival claimants seeking to redeem.—*Taylorville Savings, Loan & Building Ass'n v. McBride*, 17 N.E.2d 221, 369 Ill. 544.

(2) Mortgage redemptioner's petition for writ of assistance.—*Vette v. Brown*, 154 N.E. 450, 324 Ill. 40.

(3) Suit involving only right of redemption.—*Callner v. Greenberg*, 23 N.E.2d 29, 372 Ill. 176.—*Harper v. Salles*, 23 N.E.2d 27, 372 Ill. 199.—*Klein v. Mangan*, 17 N.E.2d 958, 369 Ill. 645.—*Wright v. Logan*, 2 N.E.2d 904, 364 Ill. 33, transferred, see 6 N.E.2d 265, 288 Ill.App. 481.—*Lennartz v. Boddie*, 136 N.E. 718, 304 Ill. 484.

(4) Suit to have a deed absolute on its face, declared a mortgage and for other relief, such as to foreclose or redeem.—*Swinson v. Sodaman*, 17 N.E.2d 40, 369 Ill. 442, transferred, see 20 N.E.2d 623, 300 Ill.App. 31.—*Rubin v. Midlinsky*, 155 N.E. 276, 324 Ill. 508.—*Morgan v. Carson*, 152 N.E. 564, 322 Ill. 141.—*Lill v. Pace*, 151 N.E. 517, 320 Ill. 522.—*Vincent v. Peterson*, 149 N.E. 232, 318 Ill. 249.—*Powers v. Walrath*, 143 N.E. 459, 311 Ill. 591.—*Hess v. Bartmann*, 142 N.E. 495, 311 Ill. 191.—*Wendell v. MacKenzie*,

and the trial of the right to real property seized under process and claimed by a third person.⁸⁸

§ 358. — Cases Involving Franchises

An appeal lies only to the supreme court in cases in which a franchise is involved and any such question is waived by submitting the merits of the case to the appellate court.

Under the provisions of the statute, an appeal lies direct to the supreme court in cases in which a franchise is involved;⁸⁹ and the appellate court is without jurisdiction in such a case,⁹⁰ although its jurisdiction does extend to determining whether a franchise is really involved.⁹¹ A party who takes

an appeal to, or on appeal by the adverse party submits his case to, the appellate court on the merits waives his right to insist upon any question involving a franchise, or to claim a further appeal upon the ground that such franchise is involved.⁹²

§ 359. — Cases Relating to Revenue

Generally an appeal goes directly to the supreme court in cases in which the revenue is directly involved.

As is provided by the statute, in cases relating to revenues, an appeal goes directly to the supreme court,⁹³ and the appellate court has no jurisdiction of appeals in such case,⁹⁴ except where the appeal

138 N.E. 213, 307 Ill. 109—Robnett v. Miller, 135 N.E. 705, 303 Ill. 515.

(5) Other examples see 15 C.J. p 1055 note 26.

88. Freehold involved

Ill.—Ray v. Keith, 75 N.E. 921, 218 Ill. 182—Aldurf v. Williams, 63 N.E. 686, 196 Ill. 244.

89. Ill.—People v. Board of Sup'rs of Logan County, 139 N.E. 898, 308 Ill. 543.

14a C.J. p 1147 note 47 [a].—15 C.J. p 1055 note 30.

Meaning of term

"Franchise" as used in text rule, is a special privilege conferred by grant from the sovereign power of the government, and which does not belong to the citizen of common right.—People v. Continental Beneficial Ass'n, 117 N.E. 482, 280 Ill. 113—15 C.J. p 1055 note 30 [a].

Validity or existence of franchise

In order to authorize an appeal direct to the supreme court there must be a question as to the validity or existence of the corporation or of the franchise, or of the right to exercise the privileges granted by the franchise; a mere question as to the construction to be placed on the powers granted by a franchise is not sufficient.—Wennersten v. Chicago Sanitary Dist., 113 N.E. 148, 274 Ill. 189—15 C.J. p 1056 note 33.

Franchise involved in

(1) Proceeding for mandamus to require county supervisors to act on petition for new township and to create the township.—People v. Board of Sup'rs of Logan County, 139 N.E. 898, 308 Ill. 543.

(2) Other cases see 15 C.J. p 1055 note 30 [b].

Franchise not involved in

(1) Actions involving company's right to locate poles, etc., in streets.—City of Sullivan v. Central Illinois Public Service Co., 122 N.E. 58, 287 Ill. 19.

(2) Mandamus proceeding by corporation to compel village to issue and deliver bonds to corporation in

payment of a judgment.—People ex rel. Charles De Leuw & Co. v. Village of Midlothian, 18 N.E.2d 233, 370 Ill. 223.

(3) Suit to enjoin foreign corporation from further transacting business in state, since it affects only its license to do business.—People v. Continental Beneficial Ass'n, 117 N.E. 482, 280 Ill. 113.

(4) Other suits see People ex rel. Kurtz v. Meyer, 159 N.E. 205, 328 Ill. 122, transferred, see 251 Ill.App. 475—Penniman v. Bennett, 129 N.E. 741, 296 Ill. 312—People v. Cache River Drainage Dist., 127 N.E. 45, 292 Ill. 467.

15 C.J. p 1055 note 30 [c].

A public office is not a franchise, and hence a franchise is not ordinarily involved in proceedings with respect to the title or right to a public office.—People ex rel. Hyatt v. Hogan, 167 N.E. 18, 335 Ill. 463, transferred, see 257 Ill.App. 206—People ex rel. Roy v. Board of Sup'rs of Knox County, Ill., 159 N.E. 787, 328 Ill. 343, transferred, see 250 Ill. App. 13—People v. Pettow, 151 N.E. 673, 320 Ill. 572—People v. Sweazey, 151 N.E. 487, 321 Ill. 180—People v. Cermak, 148 N.E. 382, 317 Ill. 590—O'Brien v. Frazier, 132 N.E. 434, 299 Ill. 325—15 C.J. p 1055 note 30 [d].

90. Ill.—Perry v. Bozarth, 64 N.E. 1076, 198 Ill. 328—People v. School Directors, 97 Ill.App. 108. 15 C.J. p 1056 note 31.

91. Ill.—Citizens' Horse R. Co. v. Belleville, 47 Ill.App. 388, reversed on the facts 38 N.E. 584, 152 Ill. 171, 26 L.R.A. 681.

92. Ill.—O'Donnell v. Illinois Steel Co., 53 Ill.App. 314, affirmed 41 N.E. 185, 156 Ill. 624, 47 Am.S.R. 245, 31 L.R.A. 265, and reversed on other grounds 42 N.E. 895, 159 Ill. 350, 31 L.R.A. 269.

93. Ill.—Department of Finance v. Goldberg, 19 N.E.2d 593, 370 Ill. 578—Majestic Household Utilities Corporation v. Stratton, 186 N.E. 522, 353 Ill. 86, 89 A.L.R. 852—

Talbot v. People, 171 N.E. 183, 339 Ill. 333.

15 C.J. p 1056 note 37.

Original jurisdiction of supreme court in cases of revenue see *supra* § 353.

Meaning of term "revenue"

The text rule embraces public revenue, whether state or municipal, and all taxes and assessments imposed by public authority, but not suits for the recovery of fines or forfeitures or suits under contracts for other dues to cities.—Arms v. City of Chicago, 162 N.E. 136, 331 Ill. 56, transferred, see 251 Ill.App. 532—15 C.J. p 1056 note 37 [a].

Direct appeal held to lie

(1) In a suit by the state to enforce tax liens on real estate.—People v. Taylorville Sanitary Dist., 20 N.E.2d 576, 371 Ill. 280.

(2) Where question on appeal is whether county had lien on fund under former proceedings to collect taxes, and is entitled to have fund applied on its demand.—Heinrich v. Harrigan, 123 N.E. 309, 288 Ill. 170.

(3) Where writ directed county treasurer to distribute all funds collected as tax penalties subsequent to forfeiture of real estate to various tax levying bodies.—People ex rel. Abbe v. Nash, 4 N.E.2d 101, 364 Ill. 224.

(4) Writ of error growing out of claim for collection of unpaid taxes, although the only questions involved are questions of procedure.—People v. Harrigan's Estate, 128 N.E. 334, 294 Ill. 171.

(5) Other suits.—People ex rel. Nelson v. Bank of Rushville, 271 Ill. App. 130, transferred, see 189 N.E. 299, 355 Ill. 336. 15 C.J. p 1056 note 37 [b].

Limiting decision

In cases involving revenue, supreme court limits their decision to objections made.—People v. Cairo & T. R. Co., 149 N.E. 824, 319 Ill. 118.

94. Ill.—People ex rel. Nelson v. Bank of Rushville, 271 Ill.App. 130,

is made from an interlocutory order granting or denying injunctive relief.⁹⁵ The revenue, however, must be directly involved in order to confer jurisdiction on the supreme court,⁹⁶ unless some statute applicable to the particular proceedings involved provided otherwise.⁹⁷ Of course where the revenue will be increased or decreased as a result of the suit, it is directly involved.⁹⁸

§ 360. — Cases in Which State Interested

An appeal must be taken directly to the supreme court in cases in which the state is directly and substantially interested as a party or otherwise.

Under the provisions of the statute, an appeal must be taken direct to the supreme court in cases where the state is interested,⁹⁹ as a party or otherwise.¹ The interest of the state, however, must be direct and substantial in order to warrant such appeal.²

transferred, see 189 N.E. 299, 355 Ill. 336.

15 C.J. p 1057 note 38.

95. Ill.—Bistor v. McDonough, 262 Ill.App. 404—People v. Sears, 230 Ill.App. 454.

Exclusive jurisdiction of appeals from interlocutory orders see *supra* § 354.

96. Ill.—People v. Cermak, 148 N.E. 382, 317 Ill. 590—O'Connor v. Evanston High School Dist., 120 N.E. 518, 285 Ill. 120, reversing O'Connor v. High School Board of Education of Evanston, 209 Ill. App. 247—People ex rel. Com'rs of North Fork Outlet Drainage Dist. v. Schwartz, 244 Ill.App. 137.

15 C.J. p 1057 note 39.

Text rule applies in mandamus proceeding

Ill.—People ex rel. Charles De Leuw & Co. v. Village of Midlothian, 18 N.E.2d 233, 370 Ill. 223.

When question involved

The question of revenue can be at "issue" only when some recognized authority of state, or some of its political subdivisions authorized by law to assess or collect taxes, are attempting to proceed under the law, and questions arise between them and those from whom the taxes are demanded.—People ex rel. Charles De Leuw & Co. v. Village of Midlothian, 18 N.E.2d 233, 370 Ill. 223—Heinrich v. Harrigan, 123 N.E. 309, 288 Ill. 170.

Direct appeal held not to lie

(1) Appeal involving the right of a city to charge utility companies for the right to use city streets, alleys, and sidewalks.—City of Edwardsville v. Central Union Telephone Co., 134 N.E. 716, 302 Ill. 362.

(2) Where money is conceded to be revenue and only controversy is

as to what governmental body shall have the money.—Road Dist. No. 6 v. Kimbro, 133 N.E. 227, 300 Ill. 262—People v. Holten, 131 N.E. 644, 298 Ill. 225.

(3) Where the suit is between a municipality and an individual suitor claiming to be paid for services out of the revenue, conceded to be such.—People v. Holten, *supra*.

(4) Other suits.—People v. Cache River Drainage Dist., 127 N.E. 45, 292 Ill. 467—O'Connor v. High School Board of Education of Evanston High School District, 116 N.E. 119, 278 Ill. 618.

15 C.J. p 1057 note 39 [b].

97. Ill.—People v. Sholem, 87 N.E. 390, 238 Ill. 203.

15 C.J. p 1057 note 40.

98. Ill.—People v. Webb, 100 N.E. 224, 256 Ill. 364.

99. Ill.—People v. Taylorville Sanitary Dist., 20 N.E.2d 576, 371 Ill. 280.

15 C.J. p 1057 note 42.

Direct appeal held to lie

(1) Appeal from judgment of superior court dismissing attorney general's complaint in quo warranto to oust corporation.—People ex rel. Kerner v. Railway Mail Mut. Ben. Ass'n, 20 N.E.2d 91, 371 Ill. 102.

(2) Suit by state for balance due on contract for sale of prison-made goods.—People v. Western Picture Frame Co., 13 N.E.2d 958, 368 Ill. 336.

(3) Suit by the state to enforce tax liens on real estate.—People v. Taylorville Sanitary Dist., 20 N.E.2d 576, 371 Ill. 280.

(4) Writ directing county treasurer to distribute collected tax penalties on forfeited real estate to various tax levying bodies.—People ex

§ 361. — Amount in Controversy

Except where the appeal is required to be allowed by the constitution, the supreme court may permit an appeal from the appellate court in actions ex contractu and in cases sounding in damages only if the judgment exclusive of costs is for more than the amount fixed by the statute.

In a case in which an appeal from the appellate court to the supreme court is not specifically required by the constitution to be allowed, the statute provides that the supreme court may require the case to be certified to it for review, as appears in § 362 *infra*; however, Civil Practice Act § 75, Smith-Hurd Ann.St. c 110 § 199, expressly states that such review is to be permitted in actions ex contractu, exclusive of actions involving a penalty, and in all cases sounding in damages, only if the judgment exclusive of costs is for more than fifteen hundred dollars.³

rel. Abbe v. Nash, 4 N.E.2d 101, 364 Ill. 224.

1. Ill.—Chapin v. Treasurer of State of Illinois, 198 N.E. 668, 361 Ill. 645—People ex rel. Hamilton v. Cohen, 189 N.E. 489, 355 Ill. 499.

15 C.J. p 1057 note 43.

2. Ill.—People ex rel. Poage v. Walsh, 174 N.E. 881, 343 Ill. 136, transferred, see 264 Ill.App. 273—Illinois Bell Telephone Co. v. Commerce Commission, 134 N.E. 807, 302 Ill. 468.

15 C.J. p 1057 note 45.

Monetary character

The direct and substantial interest required must be of a monetary character.—Keplinger v. Lord, 192 N.E. 549, 357 Ill. 571.

Protecting citizens' rights

State has not a substantial interest within rule where its only concern is to see that citizens are protected in their rights.—People v. Mitchell, 148 N.E. 242, 317 Ill. 439—People v. Continental Beneficial Ass'n, 117 N.E. 482, 280 Ill. 113.

Direct appeal held not to lie

Ill.—People ex rel. Charles De Leuw & Co. v. Village of Midlothian, 18 N.E.2d 233, 370 Ill. 223—People ex rel. Nelson v. Chicago Lawn State Bank, 186 N.E. 481, 353 Ill. 25.

3. Ill.—Valerius v. Perry, 179 N.E. 481, 347 Ill. 110.

Former statutory provisions

(1) The statute formerly provided that appeals or writs of error should lie to the supreme court from the final judgments, orders, or decrees of the appellate courts in all cases except where the amount involved in an action ex contractu, or the judgment in the trial court in an action sounding in damages, was less than one thousand dollars, exclusive of costs; and that appeals or writs of error

§ 362. — Appeals from Appellate Courts

Except where allowance of the appeal is required by the constitution, the judgment or decree of the appellate court is final unless such court certifies the case for appeal or unless, in a limited class of cases, the supreme court grants leave to appeal.

As is provided by the constitution, appeals and writs of error lie to the supreme court from inferior appellate courts in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law.⁴ Except for the foregoing cases in which appeals from the appellate courts are specifically required to be allowed, it is provided by the statute that the judgment or decrees of the appellate court shall be final in all cases,⁵ unless

should lie to the supreme court where the amount claimed in the pleadings exceeded one thousand dollars and there was no trial of an issue of fact in the lower court.—*Schulman v. Moser*, 119 N.E. 936, 284 Ill. 134.

(2) For adjudications under this statute with respect to actions included and amount in controversy see 15 C.J. p 1042 notes 39-41, p 1044 note 43.

(3) A later statute contained provisions similar to those of the statute contained in the text rule, except that the amount of the judgment required to confer jurisdiction was one thousand dollars.—*Dime Savings & Trust Co. v. Watson*, 119 N.E. 285, 283 Ill. 276—15 C.J. p 1044 note 47.

(4) Decisions construing such later statute see *infra* this note.

To what actions applicable

(1) The limitation as to amount is applicable to actions at law and suits in equity where the object of the suit is the recovery of money only and no other independent relief is sought, the words "in actions ex contractu . . . and in cases sounding in damages" referring to the nature of the cause of action, and not to the form of proceeding by which a cause of action may be enforced.—*Lansing v. Dempster*, 99 N.E. 254, 255 Ill. 161, dismissing certiorari 166 Ill.App. 261.

(2) Proceeding to establish claim against estate is action ex contractu within text rule.—*Dime Savings & Trust Co. v. Watson*, 119 N.E. 285, 283 Ill. 276.

(3) A motion to vacate a judgment cannot be said to be an action ex contractu or sounding in damages.—*Marabia v. Mary Thompson Hospital of Chicago for Women and Children*, 140 N.E. 836, 309 Ill. 147, reversing 224 Ill.App. 367.

(4) Purpose of bill to remove a cloud from title to land, to cancel a

contract of sale and to enjoin any further act by defendant purchaser to enforce contract, was not to recover money or property, so that right of review was not determined by amount involved.—*Lang v. Hedenberg*, 115 N.E. 566, 277 Ill. 368, affirming 198 Ill.App. 470, and *Summers v. Hedenberg*, 198 Ill.App. 460.

(5) Right to writ to review judgment in action of forcible entry and detainer is not controlled by amount of money judgment, it not being an action ex contractu or a case sounding in damages.—*Shulman v. Moser*, 119 N.E. 936, 284 Ill. 134.

Amount of judgment

(1) Whether supreme court has jurisdiction on account of amount involved depends upon judgment in trial court and not in appellate court.—*Coppola v. Marden, Orth & Hastings Co.*, 118 N.E. 499, 282 Ill. 281, reversing 204 Ill.App. 454—*Schaefer v. Washington Safety Deposit Co.*, 117 N.E. 781, 281 Ill. 43, Ann.Cas. 1918C 906, reversing 203 Ill.App. 221.

(2) If claim in suit is for costs and attorney's fees, which are allowed as part of costs, supreme court has jurisdiction, if amount involved is more than that required by statute, since allowance of such costs may be basis of action ex contractu.—*Dime Savings & Trust Co. v. Watson*, 119 N.E. 285, 283 Ill. 276.

4. Ill.—*Courter v. Simpson Constr. Co.*, 106 N.E. 350, 264 Ill. 488—*Freitag v. Union Stock Yard & Transit Co.*, 104 N.E. 901, 262 Ill. 55.

15 C.J. p 1042 note 34.

Direct appeals from trial court in cases involving such questions see *supra* §§ 356-360.

5. Ill.—*Atton v. South Chicago City R. Co.*, 86 N.E. 277, 236 Ill. 507.

Former statutory provisions see 15 C.J. p 1042 note 37—p 1044 note 44.

No jurisdiction to review

(1) Supreme court might not re-

view judgment of appellate court affirming judgment in civil proceeding without certificate of importance or certiorari.—*City of West Frankfort v. Pellegrine*, 158 N.E. 354, 327 Ill. 218, dismissing error 243 Ill.App. 457.

§ 363. — Transfer of Causes

Where an appeal is taken to the wrong court, the cause may be transferred to the proper court.

As is provided by the statute, where an appeal is

view judgment of appellate court affirming judgment in civil proceeding without certificate of importance or certiorari.—*City of West Frankfort v. Pellegrine*, 158 N.E. 354, 327 Ill. 218, dismissing error 243 Ill.App. 457.

(2) Supreme court acquired no jurisdiction where no franchise or freehold or validity of any statute was involved and appellate court, which reversed judgment, ordered that certificate of importance be allowed, but order did not set out statutory grounds for review and no certificate was issued.—*Wells v. United American Ben. Ass'n*, 191 N.E. 304, 357 Ill. 181.

6. Ill.—*Dime Savings & Trust Co. v. Watson*, 119 N.E. 285, 283 Ill. 276.

15 C.J. p 1044 notes 42, 46.

Cases not otherwise reviewable

Review by a certificate of importance is primarily provided for cases not otherwise reviewable, and will ordinarily be denied where application can be made to the supreme court for a writ of certiorari.—*Kennerly v. Calumet, H. & S. E. R. Co.*, 206 Ill.App. 17, affirmed 120 N.E. 259, 284 Ill. 301.

Requisites of certificate

Certificate need not specifically point out questions of law deemed to be important, but is sufficient if stating that case involves questions which should be passed on by supreme court.—*Kowalczyk v. Swift & Co.*, 148 N.E. 59, 317 Ill. 312, reversing 233 Ill.App. 337.

7. Ill.—*Valerius v. Perry*, 179 N.E. 431, 347 Ill. 110—*Schulman v. Moser*, 119 N.E. 936, 284 Ill. 134.

15 C.J. p 1044 note 47.

Effect of amount in controversy generally see *supra* § 361.

8. Ill.—*Courter v. Simpson Constr. Co.*, 106 N.E. 350, 264 Ill. 488.

15 C.J. p 1044 note 48.

taken to the wrong court, the cause need not be dismissed but may be transferred to the proper court.⁹

§ 364. Indiana

The jurisdiction and powers of the supreme court and of other courts having appellate jurisdiction in Indiana are discussed *infra* §§ 365–368.

§ 365. — Supreme Court in General

The Indiana supreme court is the highest judicial tribunal having appellate jurisdiction within the state. The authority of the supreme court to consider cases on appeal is defined by statute.

The supreme court is the highest judicial tribunal having appellate jurisdiction within the state,¹⁰

and it may determine the jurisdiction of all courts within the state,¹¹ including the appellate court.¹² Within the proper exercise of its constitutional powers the court is supreme over the other two departments of the state government,¹³ and the legislature cannot deprive the court of final jurisdiction of appeals.¹⁴ The authority of the supreme court, however, to consider cases on appeal is defined by statute enacted pursuant to the constitutional provision vesting in the legislature the power to regulate the jurisdiction of the several courts of the state.¹⁵

Under statutes so providing, appeals in certain classes of appealable cases may be taken directly to the supreme court.¹⁶ Among such classes of cases are cases in which there is a question duly pre-

9. Ill.—*Jackson v. Winans*, 122 N.E. 611, 287 Ill. 382.

15 C.J. p 1058 note 48.

Transfer from supreme court

(1) Where direct appeal is taken to supreme court in case involving no question authorizing such appeal, supreme court may transfer the cause to the appellate court.—*Dillenburgh v. Hellgren*, 21 N.E.2d 393, 371 Ill. 452, remanding 10 N.E.2d 44, 291 Ill.App. 448.—*Davis v. Oliver*, 20 N.E.2d 582, 371 Ill. 287.—*Continental Casualty Co. v. Hein*, 13 N.E.2d 984, 368 Ill. 289, transferred, see 17 N.E.2d 622, 297 Ill.App. 643.—*McGrath v. Dunne*, 2 N.E.2d 895, 363 Ill. 549, transferred, see 9 N.E.2d 66, 290 Ill. App. 611.—*Komorowski v. Boston Store of Chicago*, 173 N.E. 189, 341 Ill. 126.—*People v. Forsyth*, 171 N.E. 561, 339 Ill. 381.—*Albrecht v. Omphgent Tp.*, 154 N.E. 898, 324 Ill. 200.—*Brundage v. Chicago, B. & Q. R. Co.*, 154 N.E. 433, 324 Ill. 74.—*Liberty State Bank v. Louis G. Deschler Co.*, 141 N.E. 725, 310 Ill. 233.—*Hardy v. Jones*, 138 N.E. 123, 307 Ill. 149.—*Board of Education of Paris Union School Dist. No. 95 v. Board of Education of Non-High School Dist. of Edgar County*, 137 N.E. 388, 305 Ill. 445.—*McNeil & Higgins Co. v. Neenah Cheese & Cold Storage Co.*, 125 N.E. 251, 290 Ill. 449.—*Porter v. Armour*, 89 N.E. 356, 241 Ill. 145.

(2) However, where the only objection raised on direct appeal is a constitutional one which the supreme court holds not presented, it may dismiss the appeal rather than transfer it to the appellate court.—*De La Cour v. De La Cour*, 2 N.E.2d 896, 363 Ill. 545.

Transfer from appellate court

(1) Litant in appellate court may by motion suggest transfer of cause for any good reason.—*Genslinger v. New Illinois Athletic Club of Chicago*, 252 Ill.App. 298, trans-

ferred, see 163 N.E. 707, 332 Ill. 316, reversed on other grounds 171 N.E. 514, 339 Ill. 426.

(2) Where an appeal is submitted to the appellate court on a question of which it has no jurisdiction, such appeal may be transferred by the appellate court to the supreme court.—*Kowalczyk v. Swift & Co.*, 148 N.E. 59, 317 Ill. 312, reversing 233 Ill.App. 337.—*Jackson v. Winans*, 122 N.E. 611, 287 Ill. 382.—*People v. Eitel*, 83 N.E. 86, 231 Ill. 38.—*Mason v. Brownner*, 245 Ill.App. 111.—*Town of Kingston v. Anderson*, 220 Ill.App. 604.—*Von Boeckmann v. Corn Products Refining Co.*, 201 Ill.App. 94, transferred, see 113 N.E. 902, 274 Ill. 605.

(3) However, the cause need not be so transferred where the pleadings and record are insufficient to preserve the objection which would entitle the case to be directly appealed to the supreme court.—*School Directors of District No. 184 v. Briggs*, 266 Ill.App. 263.—*Hardy v. Dobler*, 248 Ill.App. 361.

(4) Also the case will not be transferred to the supreme court if that court has no jurisdiction to hear the cause.—*Mason v. Browner*, 135 N.E. 735, 303 Ill. 511.—*Patterson v. Denton*, 201 Ill.App. 382, followed in *Birch v. Denton*, 201 Ill.App. 386.

10. Ind.—*Partlow v. State*, 144 N.E. 661, 195 Ind. 164.
15 C.J. p 1058 note 54.

11. Ind.—*State v. Superior Court of Marion County*, 177 N.E. 322, 202 Ind. 589.

15 C.J. p 1058 note 55.

Procedure of trial court

The supreme court has power to determine jurisdiction of all courts within state and direct procedure and jurisdiction of trial court.—*Partlow v. State*, 144 N.E. 661, 195 Ind. 164.

12. Ind.—*Pittsburgh, C. C. & St. L. R. Co. v. Peck*, 88 N.E. 939, 172

Ind. 562, retransferred 90 N.E. 339, 45 Ind.App. 712.

13. Ind.—*Ex parte France*, 95 N.E. 515, 176 Ind. 72.
Distribution of governmental powers and functions generally see Constitutional Law §§ 104–173.

14. Ind.—*Curless v. Watson*, 102 N.E. 497, 180 Ind. 86, 98, denying transfer 100 N.E. 576, 54 Ind.App. 110.

15 C.J. p 1058 note 57 [b].

15. Jurisdiction dependent on statute

Ind.—*Pittsburgh, C. C. & St. L. R. Co. v. Peck*, 88 N.E. 627, 44 Ind. App. 62, transferred *Pittsburgh, C. C. & St. L. R. Co. v. Peck*, 87 N.E. 644, 172 Ind. 19.

15 C.J. p 1058 note 57 [c].

16. Questions to be determined

Where the amount in controversy is under fifty dollars, and an appeal is taken under Burns' St.Annot.1914 § 1391, which allows appeals in such cases where the question involved relates to the validity of a franchise or an ordinance, etc., the supreme court has no power to determine whether the trial court reached a proper conclusion on the merits, the appeal being permitted for the sole purpose of presenting the question involved in the exception.—*Essington v. Bowman*, 121 N.E. 548, 69 Ind. App. 184.

Where circuit court erroneously entertained jurisdiction of an appeal from an order of the county commissioners, a further appeal to the supreme court from the decision of the circuit court will be dismissed.—*Renicker v. Davis*, 85 N.E. 964, 171 Ind. 134.

Decisions under earlier statutes

Ind.—*Inland Steel Co. v. Yedinak*, 86 N.E. 503, 42 Ind.App. 629, transferred 87 N.E. 229, 172 Ind. 423, 139 Am.R. 389.

15 C.J. p 1059 note 58 [a].

sented,¹⁷ as to the validity of a franchise,¹⁸ the validity of an ordinance of a municipal corporation,¹⁹ the constitutionality of a statute, state or federal,²⁰ or the rights guaranteed by the state or federal constitution;²¹ cases of mandate²² and habeas corpus;²³ proceedings to establish drains²⁴ or to change or improve watercourses;²⁵ proceedings to establish or vacate public highways;²⁶ and prosecutions for contempt of the lower courts.²⁷ The fact that over six thousand dollars, exclusive of interest and costs, is in controversy no longer gives the supreme court jurisdiction of an appeal from a final judgment, as was the case under a former statute;²⁸ nor does the supreme court have juris-

diction of an appeal involving the construction of a statute, under a statute providing for an appeal in such a case, where there is no showing that the act in question is ambiguous.²⁹

It is also provided by statute that appeals may be taken to the supreme court from certain interlocutory orders,³⁰ as, for example, orders for the delivery of the possession, or for the sale, of real property,³¹ orders appointing a receiver,³² and orders granting temporary injunctions.³³

The supreme court also has jurisdiction, by authority of statute,³⁴ and in exercise and aid of its appellate powers and functions,³⁵ to issue writs of

17. Ind.—Pivak v. State, 175 N.E. 278, 202 Ind. 417, 74 A.L.R. 406—In re Wallace's Estate, 132 N.E. 597, 77 Ind.App. 95, overruling petition 131 N.E. 524, 77 Ind.App. 95.

15 C.J. p 1059 note 60.

Where constitutional question not presented to trial court, supreme court had no jurisdiction of appeal.—Ross v. Terre Haute, Indianapolis & Eastern Traction Co., 171 N.E. 665, 202 Ind. 698, transferred 173 N.E. 707, 92 Ind.App. 13.

More suggestion in briefs is not sufficient to raise constitutional question.—Ross v. Terre Haute, Indianapolis & Eastern Traction Co., supra.

18. Ind.—Indiana R. Co. v. Hoffman, 69 N.E. 399, 161 Ind. 593.

15 C.J. p 1059 note 61.

19. Ind.—Town of Newburgh v. House, 134 N.E. 292, 191 Ind. 609—Ewbank v. Yellow Cab Co., 149 N.E. 647, 84 Ind.App. 144.

15 C.J. p 1059 note 62.

20. Ind.—Pivak v. State, 175 N.E. 278, 202 Ind. 417, 74 A.L.R. 406—In re Petition to Transfer Appeals, 174 N.E. 812, 202 Ind. 365, denying transfer Busch v. State, 167 N.E. 144, 92 Ind.App. 122, which denied rehearing 165 N.E. 560, 92 Ind.App. 122—Ross v. Terre Haute, Indianapolis & Eastern Traction Co., 171 N.E. 665, 202 Ind. 698, transferred 173 N.E. 707, 92 Ind.App. 13—Kilgore v. Templar, 125 N.E. 457, 188 Ind. 675—Aetna Ins. Co. v. Reyman, 128 N.E. 933, 75 Ind.App. 182, transferred 132 N.E. 657, 191 Ind. 574.

15 C.J. p 1059 note 63.

Consideration of question must be necessary to decision.

Ind.—Shaw v. Union Trust Co. of Indianapolis, 136 N.E. 571, 192 Ind. 410, transferred 137 N.E. 895, 79 Ind.App. 277.

Constitutional question held not involved

Ind.—Bobruk v. State, 181 N.E. 157,

203 Ind. 516, dismissing petitions 167 N.E. 548, 90 Ind.App. 97, Georgades v. State, 168 N.E. 192, 90 Ind.App. 503, which is followed in 168 N.E. 194, 90 Ind.App. 713, and Miskovich v. State, 168 N.E. 715, 90 Ind.App. 677.

Supreme court has jurisdiction, even though case is one which otherwise would be within the jurisdiction of the appellate court.—Pivak v. State, 175 N.E. 278, 202 Ind. 417, 74 A.L.R. 406—In re Petition to Transfer Appeals, 174 N.E. 812, 202 Ind. 365, denying transfer Busch v. State, 167 N.E. 144, 92 Ind.App. 122, which denied rehearing in 165 N.E. 560, 92 Ind.App. 122.

21. Ind.—Pivak v. State, 175 N.E. 278, 202 Ind. 417, 74 A.L.R. 406—Ross v. Terre Haute, Indianapolis & Eastern Traction Co., 171 N.E. 665, 202 Ind. 698, transferred 173 N.E. 707, 92 Ind.App. 13.

15 C.J. p 1060 note 64.

22. Ind.—State v. Beal, 113 N.E. 225, 185 Ind. 192.

15 C.J. p 1060 note 67.

23. Ind.—Chicago, I. & L. R. Co. v. Bloomington, 105 N.E. 561, 182 Ind. 236.

15 C.J. p 1060 note 70.

24. Ind.—Kirkpatrick v. Hunt, 115 N.E. 781, 186 Ind. 233.

15 C.J. p 1060 note 73.

25. Ind.—Haefgen v. Harness, 46 N.E. 1006, 22 Ind.App. 625—Denton v. Thompson, App., 34 N.E. 128.

15 C.J. p 1060 note 74.

26. Ind.—Schofield v. Miller, 138 N.E. 261, 79 Ind.App. 702.

15 C.J. p 1060 notes 77, 78.

27. Civil contempt proceeding

Ind.—New York, C. & St. L. R. Co. v. Meek, 1 N.E.2d 611, 210 Ind. 322.

15 C.J. p 1060 note 80.

28. Ind.—Security Trust Co. v. Jaqua, 148 N.E. 148, rehearing denied 152 N.E. 298, 85 Ind.App. 234.

Decisions under former statute

Ind.—Pittsburgh, C. C. & St. L. R.

Co. v. Sneath Glass Co., 107 N.E. 72, 183 Ind. 138.

15 C.J. p 1060 note 83.

29. Ind.—Ross v. Gallogly, 120 N.E. 599, 187 Ind. 579.

30. Ind.—Pottlitzer v. Citizens' Trust Co., 108 N.E. 36, 60 Ind.App. 45.

15 C.J. p 1060 note 84.

31. Ind.—Brier v. Childers, 148 N.E. 474, 196 Ind. 520—Nation v. Green, 116 N.E. 840, 65 Ind.App. 136, for opinion in supreme court see 123 N.E. 163, 188 Ind. 697.

15 C.J. p 1060 note 89.

Order of sale in partition held not interlocutory, but final, hence not appealable to supreme court.—Heppe v. Heppe, 149 N.E. 890, 199 Ind. 566, transferred 152 N.E. 293, 85 Ind.App. 39—Stauffer v. Kesler, 127 N.E. 803, 191 Ind. 702.

32. Ind.—Pierson v. Republic Casualty Co., 160 N.E. 43, 200 Ind. 350.

15 C.J. p 1060 note 90.

33. Ind.—Leatherman v. Orange County, 47 N.E. 347, 22 Ind.App. 700—Wood v. Hughes, App., 32 N.E. 594.

15 C.J. p 1060 note 95.

34. Ind.—State v. Johnston, 185 N.E. 278, 204 Ind. 563—State v. Gleason, 119 N.E. 9, 187 Ind. 297.

Has no general or inherent power to issue writs of mandamus to inferior courts.—State v. Chambers, 181 N.E. 282, 203 Ind. 523.

35. Ind.—State v. Chambers, supra—State v. Cox, 141 N.E. 225, 193 Ind. 519.

Habeas corpus proceeding

Supreme court is as much bound to issue writ of mandamus to remove obstacle standing in applicant's way in pending habeas corpus proceeding as it is to exercise power to remove obstacle in way of applicant's motion for new trial to perfect appeal.—State v. Branaman, 183 N.E. 653, 204 Ind. 238.

mandate to particular inferior courts to compel the performance by the latter of their legal duties,³⁶ and to issue writs of prohibition to such courts to restrict them to their lawful jurisdictions.³⁷

The supreme court has no power to grant stays of execution except in aid of its appellate jurisdiction over cases pending on appeal.³⁸

§ 366. — Appellate Court in General

The appellate court of Indiana has jurisdiction of appeals other than those directed by statute to be taken directly to the supreme court.

Under the Indiana statutes, all appealable cases, other than those in which it is specified that an appeal shall be taken directly to the supreme court, are to be taken to the appellate court.³⁹ The appellate court has no jurisdiction to determine a constitutional question,⁴⁰ although it may give an opinion as to the constitutionality of a statute in answer to a certified question.⁴¹ Except under cer-

tain conditions, the appellate court's jurisdiction is final.⁴²

The appellate court has power to issue writs of mandamus only in aid of its appellate powers and functions.⁴³

§ 367. — Other Courts

The circuit court of Indiana has such appellate jurisdiction as is provided by law, with which, in general, the superior court's appellate jurisdiction is concurrent.

The circuit court has such appellate jurisdiction as may be conferred by law.⁴⁴ The superior court has, in general, concurrent appellate jurisdiction with the circuit court.⁴⁵

§ 368. — Transfer of Causes

If a case is erroneously appealed to the wrong court, that court should make an order for its transfer to the proper court. There are various statutory grounds for transfer of a case from the appellate to the supreme court.

36. Petition for writ held insufficient
Ind.—State v. Cox, 141 N.E. 225, 227, 193 Ind. 519.

"Complaint for mandamus" held improper procedure.—State v. Cox, supra.

Where allegation that defendants controlled inferior courts and had seized records in supreme court does not authorize the latter to assume jurisdiction to give original mandatory and injunctive relief where remedy by appeal was available.—Stephenson v. Daly, 186 N.E. 300, 205 Ind. 372.

Under former statute, writ did not issue to probate court.—State v. Chambers, 181 N.E. 282, 203 Ind. 523.

37. Ind.—State ex rel. Youngblood v. Warrick Circuit Court of Warrick County, 196 N.E. 254, 208 Ind. 594—Murphy v. Daly, 188 N.E. 769, 206 Ind. 179.

Interference with discretion

Supreme court will not issue writ of prohibition to interfere with exercise of trial court's discretion.—State ex rel. American Trust & Savings Bank v. Superior Court of Vanderburgh County, 188 N.E. 203, 206 Ind. 1—State ex rel. Weatherholt v. Perry Circuit Court, 185 N.E. 510, 204 Ind. 673.

Scope of writs held not extended

Statutory jurisdiction of supreme court to issue writs of prohibition to particular inferior courts does not extend or enlarge scope of such writs as recognized at common law.—State v. Gleason, 119 N.E. 9, 187 Ind. 297.

Executive officer

Supreme court has no original jurisdiction to control by writ of prohibition acts of executive officer on

theory either that he is exceeding his own official authority or is co-operating with judge who is exceeding his power.—State v. Cameron, 181 N.E. 160, 203 Ind. 526.

Under former statute, writ did not issue to municipal court.—State ex rel. Castle v. Cameron, 4 N.E.2d 533, 210 Ind. 599—State v. Cameron, 181 N.E. 160, 203 Ind. 526.

38. Ind.—Neal v. State, 15 N.E.2d 950, 214 Ind. 328.

39. Ind.—Purcell v. Woodward, 130 N.E. 404, 190 Ind. 372.

Amount in controversy

With certain exceptions, no appeal may be taken to the appellate court in any civil case where the amount in controversy, exclusive of interest and costs, does not exceed fifty dollars.—Jerzakowski v. City of South Bend, 145 N.E. 520, 82 Ind.App. 132.

Appeal from judgment of juvenile court must be taken to appellate court.—Taughinbaugh v. State, 163 N.E. 598, 200 Ind. 334.

Appellate court held to have jurisdiction

(1) Of appeal from superior court sitting as court of claims.—State v. Wright, 162 N.E. 695, 89 Ind.App. 244, denying rehearing 161 N.E. 839, 89 Ind.App. 244.

(2) Of appeal from final order appointing receiver for bank.—Farmers' Deposit Bank v. State, 166 N.E. 285, 201 Ind. 117, transferred 166 N.E. 287, 89 Ind.App. 302.

(3) Of appeal from judgment relieving party from judgment taken through mistake.—General Outdoor Advertising Co. v. City of Indianapolis, Department of Public Parks, 172 N.E. 309, 202 Ind. 85, 72 A.L.R. 453.

By transfer from the supreme court, the appellate court may obtain jurisdiction of an appeal the subject matter of which is within the supreme court's jurisdiction.—Piereson v. Republic Casualty Co., 160 N.E. 43, 200 Ind. 350.

Under former statute

Ind.—Kretzer v. Gross, 118 N.E. 977, 67 Ind.App. 708.

15 C.J. p 1061 note 98 [a].

40. Ind.—Evans v. Watt, 168 N.E. 38, 90 Ind.App. 37—Franklin Tp. v. Litch, 146 N.E. 845, 82 Ind.App. 526—Venable v. Fairmount Glass Works, 145 N.E. 581, 83 Ind.App. 77.

Constitutional question held not presented

Ind.—Ashley v. Kelley, 150 N.E. 417, 84 Ind.App. 303, denying rehearing 149 N.E. 377, 84 Ind.App. 303—In re Wallace's Estate, 132 N.E. 597, 77 Ind.App. 95, overruling petition 131 N.E. 524, 77 Ind.App. 95.

41. Ind.—Evans v. Watt, 168 N.E. 38, 90 Ind.App. 37.

42. Ind.—Newman v. Gates, 49 N.E. 826, 150 Ind. 59.

43. Ind.—State ex rel. Mechanics & Traders Ins. Co. v. Buente, 3 N.E.2d 977, 210 Ind. 432—State ex rel. Bernard v. Geckler, 189 N.E. 842, 98 Ind.App. 436—State v. Van Buskirk, 168 N.E. 867, 90 Ind.App. 361—State v. Jeffries, 149 N.E. 373, 83 Ind.App. 524.

44. Ind.—Washington Tp. v. Ratts, 101 N.E. 842, 54 Ind.App. 229.
15 C.J. p 1062 note 14.

45. Ind.—Trook v. Trook, 116 N.E. 1004, 63 Ind.App. 272.
15 C.J. p 1062 note 15.

Under the statute so providing, if any case is erroneously appealed to the wrong court, that court should make an order for its transfer to the proper court; and the appeal stands as if originally filed in the right court.⁴⁶ Under the statute, where two of the judges of either division are of the opinion that a ruling precedent of the supreme court is erroneous, the cause must be transferred to the supreme court⁴⁷ with a written statement of the rea-

sons for such opinion.⁴⁸ Also, where a petition for a rehearing is overruled, the losing party may file in the supreme court an application for the transfer of the case to the supreme court,⁴⁹ on the ground that the opinion of the appellate court contravenes a ruling precedent of the supreme court,⁵⁰ or that a new question of law is directly involved and was decided erroneously.⁵¹ A case will also be transferred to the supreme court where the latter's decisions

46. Ind.—Venable v. Fairmount Glass Works, 145 N.E. 581, 83 Ind.App. 77.

15 C.J. p 1062 note 12, p 1147 note 77.

Appeals involving constitutional questions or validity of ordinances

(1) Must be transferred to supreme court from appellate court.—Ewbank v. Yellow Cab Co., 149 N.E. 647, 84 Ind.App. 144—Venable v. Fairmount Glass Works, 145 N.E. 581, 83 Ind.App. 77—Ætna Ins. Co. v. Reymann, 128 N.E. 938, 75 Ind.App. 182, transferred 132 N.E. 657, 191 Ind. 574—Standard Steel Car Co. v. Frederick, 124 N.E. 328, 63 Ind.App. 701—Cleveland, C. C. & St. L. R. Co. v. Blind, 116 N.E. 590, 64 Ind.App. 704, transferred 117 N.E. 641, 186 Ind. 628—15 C.J. p 1059 note 63 [b] (1).

(2) When once transferred, the supreme court has no authority to re-transfer the case back to the appellate court.—Pittsburgh, C. C. & St. L. R. Co. v. Peck, 88 N.E. 627, 44 Ind. App. 62.

(3) Where no constitutional question is presented by the record, however, the appellate court is not required to transfer the case to the supreme court.—Dick v. Dick, 134 N.E. 206, 77 Ind.App. 570.

(4) And where the constitutionality of a statute has been settled by the supreme court there is no constitutional question to be decided, and a case purporting to raise such issue may properly be transferred to the appellate court by the supreme court.—Bobruk v. State, 181 N.E. 157, 203 Ind. 516, dismissing petitions 167 N.E. 548, 90 Ind.App. 97, Georgades v. State, 168 N.E. 192, 90 Ind.App. 503, which is followed in 168 N.E. 194, 90 Ind.App. 713, and Miskovich v. State, 168 N.E. 715, 90 Ind.App. 677.

Appeal from interlocutory order in receivership will be transferred from the appellate court to the supreme court.—Kallares v. Glover, Ind.App., 178 N.E. 178.

Where question of jurisdiction is doubtful, a case may be transferred to the supreme court from the appellate court, particularly in the

presence of other circumstances rendering such transfer advisable.—Nation v. Green, 116 N.E. 840, 65 Ind. App. 136, for opinion in supreme court see 123 N.E. 163, 188 Ind. 697.

Under a former statute a losing party might take an appeal from the appellate court to the supreme court when the amount in controversy, exclusive of costs and interest on the judgment in the trial court, exceeded six thousand dollars.—Rupel v. Ohio Oil Co., 88 N.E. 508, 172 Ind. 300—15 C.J. p 1062 note 9.

47. Ind.—Hutton v. Gill, App., 7 N.E.2d 1011, transferred 8 N.E.2d 818, 212 Ind. 164—Harter v. Boone County, 114 N.E. 321, 63 Ind.App. 701, transferred, see 116 N.E. 304, 186 Ind. 301.

15 C.J. p 1061 note 2.

48. Ind.—Bentley v. Ulay, 93 N.E. 459, 46 Ind.App. 660—Crawford v. Gose, 87 N.E. 709, 43 Ind.App. 373, transferring, App., 82 N.E. 984.

15 C.J. p 1061 note 3.

49. Ind.—Lesh v. Johnson Furniture Co., 13 N.E.2d 708, 214 Ind. 176, motion denied 14 N.E.2d 537, 214 Ind. 176.

15 C.J. p 1061 notes 4, 5.

A successful appellant, dissatisfied with the declaration of the law by the appellate court in reversing a judgment, may petition for the modification of its opinion, and, upon the overruling of such petition, may then petition the supreme court to transfer the cause.—Pittsburgh, C. C. & St. L. Ry. Co. v. Friend, 143 N.E. 879, 194 Ind. 579, overruling rehearing 142 N.E. 709, 194 Ind. 579.

Petition held insufficient

(1) Where it failed to disclose that petition for rehearing was filed or ruled on by appellate court.—Steel Const. Co. v. Rossville Alcohol & Chemical Corporation, 16 N.E.2d 698, 105 Ind.App. 520, dismissing petition 12 N.E.2d 987, 105 Ind.App. 520.

(2) Where transfer was requested merely "on account of error in the decision of the cause in the appellate court."—American Quarries Co. v. Lay, 76 N.E. 517, 166 Ind. 234, 235, denying transfer 73 N.E. 608, 37 Ind. App. 386—15 C.J. p 1061 note 8 [h].

50. Ind.—Lesh v. Johnson Furniture Co., 13 N.E.2d 708, 214 Ind.

176, motion denied 14 N.E.2d 537, 214 Ind. 176—Jackson v. Record, 5 N.E.2d 897, 211 Ind. 141—Julian v. Bliss, 147 N.E. 148, 196 Ind. 68, denying petition 145 N.E. 442, 83 Ind.App. 597.

15 C.J. p 1061 note 6.

Transfer denied

Ind.—J. S. Cruse Realty Co. v. Imfeld, 184 N.E. 407, 204 Ind. 419.

51. Ind.—Lesh v. Johnson Furniture Co., 13 N.E.2d 708, 214 Ind. 176, motion denied 14 N.E.2d 537, 214 Ind. 176.

15 C.J. p 1061 notes 7, 8.

Purpose of transfer

(1) The primary purpose of transferring a cause from the appellate court to the supreme court is to correct erroneous declarations of law apparent on the face of the opinion, and not to give the parties another hearing on the merits, and oral arguments are not granted after transfer at the request of the litigants.—Modern Woodmen of America v. Craiger, 93 N.E. 209, 175 Ind. 30.

(2) Other statements as to purpose of statute see 15 C.J. p 1061 notes 6 [a], 8 [a].

Where appellate court purports to decide case without written opinion a petition to transfer the case to the supreme court will be dismissed.—Sluss v. Thermoid Rubber Co., 174 N.E. 291, 202 Ind. 338—Myers v. Newcomer, 174 N.E. 290, 202 Ind. 335, denying transfer, App., 172 N.E. 927—Hunter v. Cleveland, C. C. & St. L. Ry. Co., 174 N.E. 287, 202 Ind. 328—15 C.J. p 1061 note 8 [c].

Appeals from awards under the workmen's compensation act, however, are not transferable to the supreme court where the act itself limits appeal to the appellate court.—Kingan & Co. v. Ossam, 131 N.E. 81, 190 Ind. 554, dismissing petition 121 N.E. 289, 75 Ind.App. 548.

Order refusing mandamus, by appellate court in original proceeding, is interlocutory and not a final determination; and the supreme court has no jurisdiction thereof on transfer from the appellate court.—State ex rel. Mechanics & Traders Ins. Co. v. Bunte, 3 N.E.2d 977, 210 Ind. 432—15 C.J. p 1061 note 8 [e].

on the determinative question are in conflict,⁵² where the appellate court is equally divided on a determinative point,⁵³ or where four of the judges do not concur in the result.⁵⁴ Transfer of causes in general see *infra* §§ 502-521.

§ 369. Iowa

Under the Iowa constitution the supreme court has appellate jurisdiction only in cases in chancery, and constitutes a court for the correction of errors of law; it may issue all writs necessary to secure justice to parties.

Under the constitution the supreme court has appellate jurisdiction only in cases in chancery,⁵⁵ and constitutes a court for the correction of errors at law,⁵⁶ under such restrictions as the general assembly may by law prescribe,⁵⁷ and has power to

issue all writs⁵⁸ and all process⁵⁹ necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the state.⁶⁰

§ 370. Kansas

The appellate, jurisdiction and powers of the courts of Kansas are discussed *infra* §§ 371-373.

§ 371. — Supreme Court

The supreme court of Kansas has original jurisdiction in quo warranto, mandamus, and habeas corpus, and such appellate jurisdiction as may be provided by law.

The constitution gives to the supreme court original jurisdiction⁶¹ in proceedings in quo warranto

52. Ind.—McHugh v. State, 168 N.E. 190, 90 Ind.App. 105, transferred 169 N.E. 859, 201 Ind. 527—Eshelman v. State, 168 N.E. 189, 90 Ind. App. 100, transferred 169 N.E. 861, 201 Ind. 475.

53. Ind.—Central Indiana R. Co. v. Wishard, App., 108 N.E. 35, rehearing denied 114 N.E. 970, 186 Ind. 262—Peabody Alwert Coal Co. v. Yandell, 96 N.E. 388, 48 Ind.App. 615.

54. Ind.—Lesh v. Johnston Furniture Co., 13 N.E.2d 708, 214 Ind. 176, motion denied 14 N.E.2d 537, 214 Ind. 176—Pittsburg, C. & St. L. R. Co. v. Marbale, App., 123 N.E. 223, transferred 126 N.E. 849, 189 Ind. 278—Ferrell v. Hunt, App., 123 N.E. 230, transferred 124 N.E. 745, 189 Ind. 45.

55. Iowa.—Independent School Dist. of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170—Hoskins v. Hotel Randolph Co., 221 N.W. 442, 206 Iowa 932.

15 C.J. p 1062 notes 20, 21.

Review of both law and fact

Iowa.—Independent School Dist. of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170—Hoskins v. Hotel Randolph Co., 221 N.W. 442, 206 Iowa 932.

Certiorari

Supreme court does not have original jurisdiction in actions for certiorari.—Lockie v. Rice, Iowa, 250 N.W. 381.

Injunction of unlicensed law practice

A statute vesting supreme court with exclusive power to admit persons to practice as attorneys does not give the court the implied power to enjoin unlicensed practitioners, since the supreme court does not have original jurisdiction to grant injunctive relief and such suit brought by members of the bar is not related to admission or disbarment of an unlicensed practitioner.—

Johnson v. Purcell, 282 N.W. 741, 225 Iowa 1265.

In mandamus action to compel appointment to office, the supreme court has no power to disturb findings of appointing power as to qualifications of candidates appointed to office, unless there is a clear, arbitrary abuse of discretion.—Bender v. Iowa City, 269 N.W. 779, 222 Iowa 739.

56. Iowa.—Independent School Dist. of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170—Harvey v. Miller, 25 Iowa 219.

57. Iowa.—Hoskins v. Hotel Randolph Co., 221 N.W. 442, 206 Iowa 932.

15 C.J. p 1062 note 24.

58. Iowa.—Independent School District of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170.

15 C.J. p 1062 note 25.

Certiorari to review orders of superior courts

The supreme court has the general power to review the proceedings and orders of the superior courts of the state under writs of certiorari.—Collins v. Powell, 277 N.W. 477, 224 Iowa 1015.

Mandamus

(1) May issue from the supreme court to a district court, if necessary, and in any other case where it is found necessary to enable it to exercise its legitimate power.—Westbrook v. Wicks, 36 Iowa 382.

(2) May be issued by the supreme court, under an old decision, only where it becomes necessary for the due administration of right and justice; but it will not be issued where the district court may properly issue the writ.—U. S. v. Dubuque County, Morr., Iowa 31.

59. Iowa.—Independent School Dist. of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170.

60. Iowa.—Hoskins v. Hotel Randolph Co., 221 N.W. 442, 206 Iowa 932.

15 C.J. p 1063 note 28.

Prohibition

Supreme court has power to issue writs of prohibition under constitutional provision authorizing issuance of writs necessary to secure justice and exercise of supervisory control over inferior tribunals.—State ex rel. O'Connor v. District Court in and for Shelby County, 260 N.W. 73, 219 Iowa 1165, 99 A.L.R. 967.

Limitation of issuance of certiorari

The supreme court's authority to issue writs of certiorari is limited to those addressed to an inferior judicial tribunal. They cannot be issued to state executive officers.—Independent School Dist. of Town of Ogden v. Samuelson, 262 N.W. 169, 220 Iowa 170.

61. Kan.—Champlin Refining Co. v. Ryan, 75 P.2d 245, 147 Kan. 160, certiorari denied 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521.

15 C.J. p 1063 note 29.

It is beyond power of legislature to enlarge original jurisdiction of the supreme court.—Public Service Commission of Kansas v. Kansas Gas & Electric Co., 246 P. 178, 121 Kan. 14—In re Burnette, 85 P. 575, 73 Kan. 609—15 C.J. p 1063 note 29 [el.]

Correction of judgment

It is competent for the supreme court to vacate or modify a judgment in an original proceeding at or after the term of rendition, where it appears that it was rendered under a misapprehension of facts essential to the support of the judgment.—State v. Citizens' Light, Heat & Power Co., 212 P. 86, 112 Kan. 482.

Superintending control over lower courts

The grant of original jurisdiction to the supreme court in quo warranto, mandamus, and habeas corpus

to,⁶² mandamus,⁶³ and habeas corpus,⁶⁴ and such appellate jurisdiction as may be provided by law.⁶⁵ The statute gives the supreme court jurisdiction in all cases of appeals and proceedings in error from the district and other courts in such manner as may be provided by law.⁶⁶ Its appellate jurisdiction is limited to expounding the law and correcting the errors on the record⁶⁷ in proceedings in inferior courts, whether such proceedings be presented for review by proceedings in error or by appeal.⁶⁸ It may vacate or modify judgments and certain final and other orders of district or other courts of record, except a probate court,⁶⁹ but has no juris-

diction, unless the amount or value in controversy, exclusive of costs, in civil actions exceeds one hundred dollars,⁷⁰ except in certain cases specified by statute, as, for example, in cases involving the federal or state constitutions⁷¹ or federal laws or treaties.⁷² Where a constitutional question is presented, only such question will be reviewed.⁷³

§ 372. — Court of Appeals

In Kansas a court of appeals existed for a limited period.

A court of appeals was established in 1895, but ceased to exist by statutory limitation in 1901.⁷⁴

carries with it authority to exercise superintending control over inferior courts to the extent that it may be exerted by those writs and proceedings.—*In re Pettitt*, 114 P. 1071, 84 Kan. 637.

Proceeding under declaratory judgment act can be originally brought in the supreme court only where consequential relief to be had, if controversy had reached that stage, could be obtained through quo warranto, mandamus, or habeas corpus.—*Public Service Commission of Kansas v. Kansas Gas & Electric Co.*, 246 P. 178, 121 Kan. 14.

62. Kan.—*Champlin Refining Co. v. Ryan*, 75 P.2d 245, 147 Kan. 160, certiorari denied 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521.—*Brown v. Brown*, 68 P.2d 1105, 146 Kan. 7, 15 C.J. p 1063 note 30.

Assumption of jurisdiction discretionary

Original jurisdiction of supreme court in quo warranto is not always invocable as matter of strict right, but is sometimes discretionary and controlled by considerations of broad public policy; hence, the court will not assume jurisdiction in quo warranto merely involving series of private controversies between a corporation and its members.—*State v. Kansas Wheat Growers' Ass'n*, 274 P. 731, 127 Kan. 669.

Findings of commissioner, appointed to hear evidence in original quo warranto proceeding, are advisory only, and court may or must examine record and reach its own conclusions.—*State ex rel. Beck v. Harvey*, 80 P.2d 1095, 148 Kan. 166.—*State ex rel. Boynton v. Buchanan*, 51 P.2d 5, 142 Kan. 515.—*State v. Anderson*, 230 P. 315, 117 Kan. 117, affirmed 232 P. 238, 117 Kan. 540.

63. Kan.—*Champlin Refining Co. v. Ryan*, 75 P.2d 245, 147 Kan. 160, certiorari denied 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521.—*Brown v. Brown*, 68 P.2d 1105, 146 Kan. 7, 15 C.J. p 1063 note 21.

Necessity of showing reason for not applying to district court

While the power of the supreme court is unquestioned, it will generally refuse an application for mandamus without a showing of satisfactory reasons for not first applying to the district court.—*State v. Atchison, T. & S. F. Ry. Co.*, 221 P. 259, 115 Kan. 3.—*State v. Breese*, 15 Kan. 123.

Prohibition

Mandamus to compel trial court to refrain from passing on motions is essentially prohibition over which supreme court has no original jurisdiction.—*Jones v. Roberds*, 256 P. 152, 123 Kan. 396.

Injunction

The term "mandamus" applies only to a proceeding to compel the performance of an act, and not one to restrain action; a proceeding for the latter purpose is essentially one for injunction, not mandamus, and is not within the original jurisdiction of the supreme court.—*Public Service Commission of Kansas v. Kansas Gas & Electric Co.*, 246 P. 178, 121 Kan. 14.—15 C.J. p 1063 note 29 [c].

64. Kan.—*Champlin Refining Co. v. Ryan*, 75 P.2d 245, 147 Kan. 160, certiorari denied 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521.—*Brown v. Brown*, 68 P.2d 1105, 146 Kan. 7.—15 C.J. p 1063 note 32.

65. Kan.—*Public Service Commission of Kansas v. Kansas Gas & Electric Co.*, 246 P. 178, 121 Kan. 14.

General appellate jurisdiction

The supreme court has general appellate jurisdiction even if distinct mention thereof in some particular line of procedure is omitted from statute dealing with such line of procedure.—*Champlin Refining Co. v. Ryan*, 75 P.2d 245, 147 Kan. 160, certiorari denied 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521.

Trial de novo

The supreme court has no authority to try controverted issues de novo, since, except as to proceed-

ings in quo warranto, mandamus, and habeas corpus, its jurisdiction is appellate.—*Brown v. Brown*, 68 P.2d 1105, 146 Kan. 7.

66. Kan.—*Champlin Refining Co. v. Ryan*, 75 P.2d 245, 147 Kan. 160, certiorari denied 58 S.Ct. 1056, 304 U.S. 549, 82 L.Ed. 1521.

67. Kan.—*Hess v. Conway*, 144 P. 205, 93 Kan. 246, denying rehearing 142 P. 253, 92 Kan. 787, 15 C.J. p 1063 note 36.

68. Kan.—*In re Burnette*, 85 P. 575, 73 Kan. 609.

69. Kan.—*State v. Coler*, 89 P. 693, 75 Kan. 424.—*Nash v. Campbell*, 15 Kan. 226.—*Crane v. Giles*, 3 Kan. 54.

15 C.J. p 1063 note 39.

Courts of probate jurisdiction generally see *infra* §§ 298-310.

Order held not appealable final order

Kan.—*Helman v. State Highway Commission*, 69 P.2d 685, 146 Kan. 315.

70. Kan.—*Wayman v. Soller*, 171 P. 601, 102 Kan. 661.

15 C.J. p 1064 note 40.

In action alternatively for specific performance or damages, the supreme court will determine all matters in controversy, although on examination it is determined that the action is not well founded except as to a claim of less than one hundred dollars.—*Dunn v. Winans*, 186 P. 748, 106 Kan. 80.

71. Kan.—*Thomas v. Chicago, B. & Q. R. Co.*, 273 P. 451, 127 Kan. 326, 64 A.L.R. 322.—*Anderson v. Uncle Sam Oil Co.*, 186 P. 198, 106 Kan. 433.

15 C.J. p 1064 note 41.

72. Kan.—*Thomas v. Chicago, B. & Q. R. Co.*, 273 P. 451, 127 Kan. 326, 64 A.L.R. 322.

73. Kan.—*Coghlan v. Williams*, 76 P. 394, 69 Kan. 144.

15 C.J. p 1064 note 42.

74. Kan.—*Atchison, etc., R. Co. v. Morris*, 70 P. 651, 65 Kan. 532.

15 C.J. p 1064 notes 43, 44.

In the note may be found cases bearing on the jurisdiction, powers, etc., of such court, and the limitations of the jurisdiction, powers, etc., of the supreme court during the existence of the court of appeals.⁷⁵

§ 373. — District Courts

District courts in Kansas have jurisdiction of appeals from, as well as supervision of, inferior tribunals.

District courts have jurisdiction in cases of appeal and error from all inferior courts and tribunals,⁷⁶ and general supervision and control of inferior courts and tribunals to prevent and correct error and abuses.⁷⁷ Trials on such appeals are

de novo.⁷⁸

§ 374. Kentucky

The jurisdiction and powers of the appellate courts of Kentucky are discussed *infra* §§ 375, 376.

§ 375. — Court of Appeals

The court of appeals in Kentucky is a court of appellate jurisdiction, also possessing power to issue writs necessary to give it a general control of inferior jurisdictions. Its appellate jurisdiction is regulated by statute.

The constitution gives to the court of appeals appellate jurisdiction only,⁷⁹ and also power to issue such writs⁸⁰ as may be necessary to give it a

75. Kan.—Garber v. Garber, 72 P. 267, 66 Kan. 791.

15 C.J. p 1064 note 45.

73. Kan.—In re Pettitt, 114 P. 1071 84 Kan. 637.

Appeals from probate courts go to the district court, and on such appeals the district court has only such powers as the probate court has.—Ross v. Woollard, 89 P. 680, 75 Kan. 383.

Courts of probate jurisdiction generally see *infra* §§ 298-310.

77. Kan.—In re Pettitt, 114 P. 1071, 84 Kan. 637.

Petition to set aside probate court judgment against decedent's estate for alleged fraud of defendants, including probate judge, is within the jurisdiction of the district court.—Paul v. Butler, 282 P. 732, 129 Kan. 244.

78. Kan.—In re Pettitt, 114 P. 1071, 84 Kan. 637.—Ross v. Woollard, 89 P. 680, 75 Kan. 383.

Case certified from justice of the peace

Where a case is certified by a justice of the peace to the district court on the ground that the boundaries of land are in dispute, the case will be proceeded with in the district court as though originally commenced therein.—Missouri Pac. R. Co. v. Atchison, 23 P. 610, 43 Kan. 529.

79. Ky.—City of Morehead v. Blair, 47 S.W.2d 741, 243 Ky. 84.—Good-enough v. Kentucky Purchasing Co., 45 S.W.2d 451, 241 Ky. 744.—Jefferson County v. Chilton, 33 S.W.2d 601, 236 Ky. 614.—Pioneer Coal Co. v. Asher, 278 S.W. 333, 212 Ky. 286, overruling motion 276 S.W. 487, 210 Ky. 498.

15 C.J. p 1064 notes 50, 51.

Appeal from order or judgment out of court

Jurisdiction of court of appeals extends only to final orders and judgments of inferior court and not to orders or judgments which judicial officers are authorized to make out

of court.—Proffer v. Stewart, 82 S.W.2d 468, 259 Ky. 445.

Power to control procedure

In passing on questions affecting the public interest, the court of appeals has power to control procedure to the end that cases before it shall be adequately, efficiently, and in good faith presented.—Jefferson County Fiscal Court v. Thomas, 130 S.W.2d 30, 279 Ky. 458.

Court of appeals cannot institute an original inquiry as to the existence or validity of an alleged contract of compromise of the subject matter of litigation.—Parks v. Doty, 13 Bush, Ky., 727.—Winbourn v. Winbourn, 7 Ky.L. 216.—Newport v. Woods, 5 Ky.L. 926.

Injunction

Neither the court of appeals nor one of its judges has original jurisdiction to grant an injunction.—Allensworth v. Allensworth's Ex'x, 42 S.W.2d 329, 240 Ky. 333.—Thompson v. Haden, 198 S.W. 231, 177 Ky. 841.—Bennett v. Blankenship, 197 S.W. 967, 177 Ky. 499.

Transfer of appeal

Where an appeal of which the court of appeals has sole jurisdiction is erroneously taken to another court, it must be transferred to the court of appeals.—Stone v. Cromie, 7 S.W. 920, 87 Ky. 173, 10 Ky.L. 19.

80. Ky.—Department of Public Welfare of Kentucky v. Polsgrove, 53 S.W.2d 341, 245 Ky. 159.

15 C.J. p 1064 note 54.

Where another and adequate remedy is available, either by appeal or otherwise, original jurisdiction to issue writs is not necessary and does not exist.—Maynard v. Workmen's Compensation Board, 276 S.W. 812, 210 Ky. 708.

Facts authorizing exercise by the court of appeals of its original jurisdiction must clearly appear.—Commonwealth ex rel. Cooper v. Howard, 124 S.W.2d 86, 276 Ky. 299.

Discretion to deny writs

Courts may deny extraordinary

writs when in its discretion to grant them would be harmful.—Gosney v. Butler Graded School, 292 S.W. 781, 219 Ky. 242.

As substitute for appeal

The court of appeals' original jurisdiction will not be exercised in favor of granting relief so as to supply absence of a right of appeal to such court and thereby nullify the statute limiting such right.—McFarland v. Gilbert, 124 S.W.2d 473, 276 Ky. 423.

Mandamus

(1) The court of appeals has authority to issue writs of mandamus.—Payne v. Kentucky R. Commission, 287 S.W. 560, 216 Ky. 188.—McDonald v. De Haven, 234 S.W. 277, 192 Ky. 679—15 C.J. p 1064 note 54 [a].

(2) However, the court will not exercise its limited original jurisdiction to issue writs of mandamus where another and adequate remedy is available, as, for example, where the writ may be issued, or the question involved settled, by a lower court.—Fidelity & Deposit Co. of Maryland v. Gardner, 3 S.W.2d 219, 223 Ky. 196.—Henry v. Harris, 298 S.W. 690, 221 Ky. 238.—Maynard v. Workmen's Compensation Board, 276 S.W. 812, 210 Ky. 708.—Shipp v. Stoll, 255 S.W. 75, 200 Ky. 646.—McDonald v. De Haven, *supra*.—Commonwealth v. Peter, 124 S.W. 896, 136 Ky. 689.

Prohibition

(1) The court of appeals has original jurisdiction to issue writs of prohibition.—Thomas v. Newell, 127 S.W.2d 610, 277 Ky. 712.—Partin v. Gilbert, 120 S.W.2d 667, 275 Ky. 19.—Smith v. Ward, 75 S.W.2d 538, 256 Ky. 13.—Greene v. Wolf, 193 S.W. 1048, 175 Ky. 58—15 C.J. p 1064 note 54 [b] (1).

(2) The court's power to issue the writ is more or less discretionary.—Meredith v. Sampson, 126 S.W.2d 124, 277 Ky. 263.

(3) The court's jurisdiction to issue prohibition is not dependent upon the amount in controversy when

general control of inferior jurisdictions.⁸¹ The court of appeals has jurisdiction over appeals from the circuit courts, where the title to land, the right to an easement therein, or the right to enforce a statutory lien thereon is directly involved,⁸²

regardless of the amount in controversy.⁸³ No appeal can be taken directly to the court of appeals as a matter of right from a judgment for the recovery of money or personal property, or any interest therein, or to enforce any lien thereon, if the

public funds are involved.—*Meredith v. Sampson*, *supra*.

(4) Jurisdiction to issue a writ must be determined on the basis of the allegations of the petition.—*Old Blue Ribbon Distillers v. Holbert*, 125 S.W.2d 253, 276 Ky. 687.—*Pinkleton v. Lueke*, 95 S.W.2d 1103, 265 Ky. 84.

(5) The court will not issue the writ unless the inferior court is acting or threatening to act outside its jurisdiction, unless there is no other remedy available, and unless great and irreparable injury will result if the writ does not issue.—*Auto Finance & Sales Co. v. Northcutt*, 126 S.W.2d 455, 277 Ky. 274.—*Old Blue Ribbon Distillers v. Holbert*, 125 S.W.2d 253, 276 Ky. 687.—*Partin v. Gilbert*, 120 S.W.2d 667, 275 Ky. 19.—*Lincoln Building & Loan Ass'n v. Humphreys*, 118 S.W.2d 736, 274 Ky. 359.—*Old Blue Ribbon Distillers v. Caldwell*, 116 S.W.2d 653, 273 Ky. 378.—*Northern States Contracting Co. v. Swope*, 111 S.W.2d 610, 271 Ky. 140, appeal dismissed *Anderson v. Northern States Contracting Co.*, 59 S.Ct. 143, 305 U.S. 566, 83 L.Ed. 357, *Brown v. Swords-McDougal Co.*, 59 S.Ct. 144, 305 U.S. 566, 83 L.Ed. 357, and *Knox v. Massachusetts Bonding & Insurance Co.*, 59 S.Ct. 144, 305 U.S. 566, 83 L.Ed. 357.—*Pinkleton v. Lueke*, 95 S.W.2d 1103, 265 Ky. 84.—*Perry v. Bingham*, 95 S.W.2d 1099, 265 Ky. 133.—*Goodenough v. Kentucky Purchasing Co.*, 45 S.W.2d 451, 241 Ky. 744.—*Allon v. Bach*, 26 S.W.2d 43, 233 Ky. 501.—*Clapp v. Sandidge*, 20 S.W.2d 449, 230 Ky. 594.—*Potter v. Gardner*, 1 S.W.2d 537, 222 Ky. 487.—*Henry v. Harris*, 298 S.W. 690, 221 Ky. 238.—*Tompkins v. Manning*, 265 S.W. 830, 205 Ky. 327.—*Natural Gas Products Co. v. Thurman*, 265 S.W. 475, 205 Ky. 100.—*Scott v. Mounts*, 243 S.W. 878, 195 Ky. 678.—*Lakes v. Goodloe*, 242 S.W. 632, 195 Ky. 240.—*Commonwealth v. Carmack*, 232 S.W. 644, 192 Ky. 171.—*Western Oil Refining Co. v. Wells*, 201 S.W. 473, 180 Ky. 32.—15 C.J. p. 1064 notes 54 [b] (2)—(4).

(6) The court of appeals will issue prohibition against a court inferior to the circuit court only where the inferior court is proceeding erroneously within its jurisdiction, followed by irreparable injury for which there is no adequate remedy at law, by appeal, or otherwise.—*Elliott v. Hamilton*, 124 S.W.2d 501, 276 Ky. 343.—*Wilson v. Cooper*, 60 S.W.2d 359, 249 Ky. 132.

(7) Where the circuit court has exclusive jurisdiction to issue prohibition to a court inferior to it, the court of appeals has no power to do so.—*Elliott v. Hamilton*, *supra*.

(8) Jurisdiction of circuit court to issue prohibition against courts inferior to it, see *infra* § 376.

Declaratory judgment action

Under its original jurisdiction conferred by the constitution, the court of appeals has no right to entertain declaratory judgment actions, as by treating a response, filed by a judge of the circuit court opposing dismissal of prohibition proceedings against him, as an original petition for a declaratory judgment.—*Walz v. Northcutt*, 129 S.W.2d 124, 278 Ky. 616.

81. Ky.—*Union Trust Co. v. Garnett*, 72 S.W.2d 27, 254 Ky. 573.—*Department of Public Welfare of Kentucky v. Polsgrove*, 53 S.W.2d 341, 245 Ky. 159.—*Clapp v. Sandidge*, 20 S.W.2d 449, 230 Ky. 594.—*Natural Gas Products Co. v. Thurman*, 265 S.W. 475, 205 Ky. 100. 15 C.J. p. 1065 note 55.

Limitations on original jurisdiction

(1) Court of appeals exercises original jurisdiction only when inferior tribunal proceeded against is acting without jurisdiction or is erroneously exercising jurisdiction and where irreparable injury will follow without adequate remedy.—*Frain v. Applegate*, 40 S.W.2d 274, 239 Ky. 605.

(2) The court of appeals will not issue process to control action of circuit courts, except upon ground that circuit court is proceeding or about to proceed outside of and beyond its jurisdiction, or that, although circuit court is acting within its jurisdiction, great and irreparable injury will result to applicant, and there is no other remedy open to him.—*Swartz v. Caudill*, 130 S.W.2d 80, 279 Ky. 206.

(3) Only when no other adequate remedy exists to prevent a miscarriage of justice will the court of appeals assume jurisdiction in original proceeding and exercise supervisory control over inferior court by original writ.—*Old Blue Ribbon Distillers v. Holbert*, 125 S.W.2d 253, 276 Ky. 687.—*City of Bowling Green v. Milliken*, 77 S.W.2d 777, 257 Ky. 245.

(4) If the circuit court should undertake to alter or set aside its judgment after it has become final, bas-

ed exclusively upon record that was before it when judgment was entered, it would be attempting to do something which had passed beyond its jurisdiction, and process would issue from court of appeals to prevent such action.—*Swartz v. Caudill*, *supra*.

Only inferior courts, not administrative bodies, are included in the term "inferior jurisdictions;" the court can issue writs relating only to the actions of judicial or quasi-judicial officers.—*Old Blue Ribbon Distillers v. Caldwell*, 116 S.W.2d 653, 273 Ky. 378.—*Payne v. Kentucky R. Commission*, 287 S.W. 560, 216 Ky. 188.—*Maynard v. Workmen's Compensation Board*, 276 S.W. 812, 210 Ky. 708.—15 C.J. p. 1064 note 54 [b] (5), p. 1065 note 55 [a], [b].

Petition held to seek "special control"

Petition seeking writ of mandamus to prevent workmen's compensation board from reviewing an award, is a petition for special control, not within the jurisdiction of the court of appeals.—*Maynard v. Workmen's Compensation Board*, *supra*.

82. Ky.—*Laurel County v. Hubbard*, 92 S.W.2d 359, 263 Ky. 381.—*Ficke v. Board of Trustees of Erlanger Consol. Graded School Dist.*, 90 S.W.2d 66, 262 Ky. 312.—*Sim v. Bishop*, 197 S.W. 625, 177 Ky. 279. 15 C.J. p. 1066 note 68.

Tax bill held statutory lien

Ky.—*City of Richmond v. Shackelford*, 220 S.W. 758, 187 Ky. 789.

Suit held not one to enforce statutory lien

Ky.—*Durham v. Taylor*, 117 S.W.2d 610, 273 Ky. 603.—*Muntz v. Mastin*, 47 S.W.2d 515, 242 Ky. 694.

Where defendant did not assert title in itself, but defended on ground that plaintiffs did not have title at date of alleged injuries to land, the case was not within the appellate jurisdiction of the court of appeals as "involving title to land."—*Norfolk & W. Ry. Co. v. Harmon*, 129 S.W.2d 994, 279 Ky. 9.

83. Ky.—*Ficke v. Board of Trustees of Erlanger Consol. Graded School Dist.*, 90 S.W.2d 66, 262 Ky. 312.—*Muntz v. Mastin*, 47 S.W.2d 515, 242 Ky. 694.—*Hatfield v. Richmond*, 197 S.W. 654, 177 Ky. 183.—*Sim v. Bishop*, 197 S.W. 625, 177 Ky. 279.

15 C.J. p. 1066 note 69.

value in controversy is less than five hundred dollars, exclusive of interest and costs.⁸⁴ There is no appeal of right to reverse a judgment granting a divorce,⁸⁵ or punishing for contempt;⁸⁶ nor from any order or judgment of a county court,⁸⁷ except in actions for the division of land and allotment of dower;⁸⁸ nor from any order or judgment of the quarterly, police, fiscal, or justices' court;⁸⁹ nor from any bond having the force of a judgment.⁹⁰ In all other civil cases the court of appeals has appellate jurisdiction over the final orders and judgments of the circuit court,⁹¹ provided the court may grant an appeal when it is satisfied from an examination of the record that the ends of justice require that the judgment appealed from should be reversed, or when the construction or validity of a statute or the construction of the constitution is involved, if the value of the amount or thing in controversy, exclusive of interest and costs, is as much as two hundred dollars.⁹²

§ 376. — Circuit Courts

The circuit courts of Kentucky have such appellate jurisdiction as is vested in them by statute.

84. Ky.—Gough v. Illinois Cent. R. Co., 179 S.W. 449, 166 Ky. 568.

Amount held sufficient to give jurisdiction.—Davis v. Motor Car Finance Co., 119 S.W.2d 881, 274 Ky. 547.

Amount held insufficient to give jurisdiction.—Michael v. Michael, 127 S.W.2d 864, 277 Ky. 820—Perry Lumber Co. v. Garlen, 69 S.W.2d 329, 253 Ky. 229.

85. Ky.—Hester v. Hester, 179 S.W. 451, 166 Ky. 544—Steele v. Steele, 84 S.W. 516, 119 Ky. 466, 27 Ky.L. 120.

86. Ky.—Adams v. Gardner, 195 S.W. 412, 176 Ky. 252.

87. Ky.—Hester v. Hester, 179 S.W. 451, 166 Ky. 544—Hendrickson v. Bell County Ct., 7 Ky.L. 660—Hendrickson v. Bell County Ct., 13 Ky. Op. 1004.

15 C.J. p 1065 note 59.

88. Ky.—Cochran v. Simmons, 199 S.W. 66, 178 Ky. 402, denying rehearing 197 S.W. 930, 177 Ky. 562.

Actions to set aside judgment of partition

Ky.—Davis v. Caudill, 92 S.W.2d 62, 263 Ky. 214.

89. Ky.—Brown v. Crump, 96 S.W. 1112, 123 Ky. 685, 29 Ky.L. 1226. 15 C.J. p 1065 note 62.

90. Ky.—Smith v. Commonwealth, 1 S.W. 433, 8 Ky.L. 260.

91. Under a former statute the court of appeals had in all other cases except those specifically mentioned, appellate jurisdiction over the

final orders and judgments of all courts.—Hieatt v. Settle, 195 S.W. 420, 176 Ky. 160—15 C.J. p 1065 note 67, p 1066 notes 70, 71.

92. Ky.—Gough v. Illinois Cent. R. Co., 179 S.W. 449, 166 Ky. 568. Amount held sufficient to give jurisdiction.—Commonwealth v. Bowling Green Athletic Ass'n, 288 S.W. 1088, 207 Ky. 170—Smith v. Dungey, 199 S.W. 777, 178 Ky. 702.

Amount held insufficient to give jurisdiction.—Durham v. Taylor, 117 S.W.2d 610, 273 Ky. 603—Perry Lumber Co. v. Garlen, 69 S.W.2d 329, 253 Ky. 229—Billington v. Billington, 10 S.W.2d 815, 226 Ky. 207.

Jurisdiction for one purpose is jurisdiction for all; hence, where the court of appeals has jurisdiction to review an order awarding custody of the children in divorce proceedings, it can review an award of alimony, although the amount thereof is insufficient of itself to give jurisdiction.—Hoffman v. Hoffman, 226 S.W. 119, 190 Ky. 13.

Under former statute no appeal could be taken to the court of appeals from a judgment for the recovery of money or personal property, if the value in controversy was less than two hundred dollars, exclusive of interest and costs.—Terry v. Johnson, 105 Ky. 760, 49 S.W. 767, 20 Ky.L. 1562—15 C.J. p 1065 note 56.

93. Ky.—Garrett v. Creekmore, 121 Ky. 250, 89 S.W. 166, 28 Ky.L. 211.—Jefferson County v. Young, 86

The circuit court has such appellate jurisdiction over inferior courts as is vested in it by statute.⁹³ Review of proceedings of inferior courts generally is considered in § 264 supra.

In a proper case, the circuit courts have jurisdiction, which in some circumstances is exclusive, to issue writs of prohibition against courts inferior to them to restrain the inferior courts from acting beyond their jurisdiction or erroneously within their jurisdiction.⁹⁴

§ 377. Louisiana

Appeals from a judgment on a reconventional or other incidental demand are to the court having appellate jurisdiction of the main demand; but if there is no right of appeal on the main demand, the appeal is to the court having jurisdiction as to the reconventional or incidental demand. Statutory provision is made for the transfer of cases from the supreme court, when without jurisdiction, to the courts of appeal, and vice versa.

Under the Constitution of 1921 article 7 § 1, in all cases where there is an appeal from a judgment on a reconventional or other incidental demand, the appeal must go to the court having jurisdiction of the main demand.⁹⁵ If there is no

S.W. 985, 120 Ky. 456, 27 Ky.L. 849.—Hendrickson v. Bell County Ct., 7 Ky.L. 660.

94. Ky.—Elliott v. Hamilton, 124 S.W.2d 501, 276 Ky. 343—Perry v. Bingham, 95 S.W.2d 1099, 265 Ky. 133—Stumbo v. Clark, 73 S.W.2d 8, 255 Ky. 287—Goodenough v. Kentucky Purchasing Co., 45 S.W. 2d 451, 241 Ky. 744—Scott v. Mounts, 243 S.W. 878, 195 Ky. 678.—Commonwealth v. Carmackie, 232 S.W. 644, 192 Ky. 171—Reese v. Lawless, Ky., 4 Bibb 394.

95. La.—Opelousas St. Landry Bank & Trust Co. v. Fontenot, 137 So. 339, 173 La. 430—Gentilly Development Co. v. Carabajal, 123 So. 325, 168 La. 786, followed in 121 So. 214, 10 La.App. 125—Klumpp v. Fontenot, 119 So. 66, 167 La. 327, transferred, see Klumpp v. Fontenot, 122 So. 503, 11 La.App. 27—Barker v. Houssiere-Latreille Oil Co., 112 So. 415, 163 La. 555—Puyolet v. Gehrke, 75 So. 998, 141 La. 935—Mitcham v. Mitcham, App., 160 So. 145, transferred, see, Sup., 173 So. 132—Hinckley v. Cauley, 136 So. 126, 17 La.App. 338—Williams v. Anderson, 5 La.App. 329. 15 C.J. p 1072 notes 64, 65.

Writ of sequestration being merely a remedy in aid of a principal demand, an appeal on a demand to have such writ sustained follows the appeal on the demand in aid of which the writ issued.—A. Baldwin & Co. v. McCain, 106 So. 459, 159 La. 866.

right of appeal on the main demand, the appeal lies to the court having jurisdiction of the reconventional or incidental demand.⁹⁶

Transfer of causes. Under provisions of General Statutes 1932 § 1427, Acts 1912 No. 19 § 1, which have been held constitutional,⁹⁷ if the supreme court finds that a cause, properly within the appellate jurisdiction of the courts of appeal, has been erroneously appealed to the supreme court,

instead of dismissing the appeal, it will generally transfer the cause to the proper court of appeal,⁹⁸ especially where there is no doubt of the appellate jurisdiction of the court of appeal,⁹⁹ as where the amount or value in dispute is below the amount required for the jurisdiction of the supreme court, and is within the jurisdictional amount of the court of appeal,¹ or where, although the amount is apparently within the supreme court's jurisdiction, it was manifestly inflated for that purpose.² This

Order for resale

Where value of property involved in partition action was within supreme court's jurisdiction, court likewise had jurisdiction of appeal from order for resale.—*Gentilly Development Co. v. Carbajal*, 123 So. 325, 168 La. 786, followed in 121 So. 214, 10 La.App. 125.

Third opposition and intervention is incidental demand within rule that jurisdiction of appeal therein lies to court having jurisdiction of main controversy.—*Williams v. Anderson*, 5 La.App. 339.

Demand not in reconvention

La.—*De Brueys v. Burns*, 81 So. 259, 144 La. 707.

As affected by amount involved see *infra* § 381.

96. La.—*Hinckley v. Cauley*, 136 So. 126, 17 La.App. 388.

If main demand is withdrawn, abandoned, or disposed of in such manner that no controversy exists with reference to it, the incidental demand becomes the main demand, and the appeal will lie to the court having jurisdiction of the main demand as thus created.—*Hinckley v. Cauley*, *supra*.

97. La.—*Walker v. Superior Brass & Copper Foundry Co.*, 94 So. 139, 152 La. 626—*Succession of Huxen*, 88 So. 687, 149 La. 61.

98. La.—*Baker v. Duson*, 188 So. 40, 192 La. 391, transferred, see 189 So. 510—*Madison v. Prudential Ins. Co. of America*, 181 So. 871, 190 La. 103—*A. M. Edwards Co. v. Hano*, 177 So. 691, 188 La. 632—*Reeves v. Globe Indemnity Co. of New York*, 162 So. 724, 182 La. 905—*Bacher v. Krauss*, 154 So. 733, 179 La. 675, transferred, see App., 159 So. 766—*Larroux v. Larroux's Heirs*, 117 So. 727, 166 La. 585, transferred, see 126 So. 462, 12 La.App. 498—*Olen v. Zachery*, 111 So. 463, 162 La. 1083—*Larrabee v. Landry*, 101 So. 315, 156 La. 939—*Walker v. Superior Brass & Copper Foundry Co.*, 94 So. 141, 152 La. 630—*Landry v. Gonzales*, 77 So. 287, 142 La. 577—*In re George Sarpay & Co.*, 59 So. 991, 131 La. 565.
15 C.J. p 1071 note 28, p. 1147 note 77.

If it appears that case may be within appellate jurisdiction of the court of appeal, it will be transferred from supreme court to that tribunal, but with no predetermination of question of its jurisdiction.—*In re Aztec Land Co.*, 81 So. 382, 144 La. 889.

Supreme court will notice its want of jurisdiction on its own motion, and order a cause transferred to the court of appeal.—*Fullerton's Succ.*, 38 So. 151, 114 La. 227—*Netter v. Reggio*, 37 So. 620, 113 La. 723.

Partial transfer

Where case involving homestead exemption of which supreme court has exclusive appellate jurisdiction is brought to it on appeal, such issue having been disposed of, leaving other matters as to which appeal should be returned to a court of appeal, supreme court will order such transfer under Act 1912 No. 19, for a review of judgment as to other matters.—*Green v. Kettler*, 80 So. 594, 144 La. 374.

Criminal district court for parish of Orleans is not a court of appeal within the meaning of this rule, since it is primarily a court of original jurisdiction, although it has limited appellate jurisdiction of cases tried before recorders' courts.—*State v. Ginalva*, 115 So. 571, 572, 165 La. 304.

Transfer of causes generally see *infra* §§ 502-521.

99. La.—*Bacher v. Krauss*, 154 So. 733, 179 La. 675, transferred, see App., 159 So. 766.

1. La.—*Baker v. Duson*, 188 So. 40, 192 La. 391, transferred, see 189 So. 510—*Gaillardanne v. Locascio*, 162 So. 69, 182 La. 539—*Klump v. Fontenot*, 119 So. 66, 167 La. 327, transferred, see *Klump v. Fontenot*, 122 So. 503, 11 La.App. 27—*Godchaux v. Stille*, 118 So. 481, 167 La. 1—*Gosserand v. City of Gretna*, 118 So. 122, 166 La. 1028, transferred, see 121 So. 208, 9 La.App. 554—*Vidalia Bank & Trust Co. v. Purcell*, 112 So. 725, 163 La. 796—*Nelson v. Continental Asphalt & Petroleum Co.*, 102 So. 583, 157 La. 491—*Crowell & Spencer Lumber Co. v. Lynch*, 101 So. 797, 157 La. 21—*Succession of Braughn*, 101

So. 217, 156 La. 843—*Claverie v. Lorenz*, 100 So. 427, 155 La. 285—*O'Shee v. Chaudoir*, 97 So. 796, 154 La. 517—*State ex rel. Meriwether v. City of Shreveport*, 91 So. 678, 151 La. 203—*State v. Serio & Messina*, 90 So. 385, 149 La. 1006—*McMahon v. Bresch*, 89 So. 17, 149 La. 319—*Hook v. Cusimano*, 88 So. 821, 149 La. 281—*Anticich v. Mihajevich*, 88 So. 820, 149 La. 278—*McDow v. Walker*, 86 So. 481, 147 La. 1025—*Mouton v. Lockport Central Sugar Refining Co.*, 82 So. 366, 145 La. 348—*Day v. Louisiana Central Lumber Co.*, 81 So. 328, 144 La. 820—*Southern Scrap Material Co. v. Liquidating Com'rs of Carondelet Canal & Navigation Co.*, 79 So. 176, 143 La. 647.

Good faith of appeal

An appeal to the supreme court, of which such court has not jurisdiction by reason of the amount involved, will not be dismissed, but will be transferred to the court of appeal, where the attorney for appellant files an affidavit, on appellee's motion to dismiss for willfulness, stating that the appeal was brought in good faith and not for the purpose of delay, and there is no reason to believe that the attorney would willfully impose unnecessary cost on his client by bringing an appeal to the wrong court.—*City of Shreveport v. Land*, 86 So. 499, 147 La. 1075.

Amount in dispute as affecting appellate jurisdiction generally see *infra* § 381.

2. La.—*Guidry v. Breaux*, 105 So. 43, 158 La. 1002, transferred 3 La.App. 624—*Buttner v. Palmisano*, 93 So. 830, 152 La. 587—*Lo Cicero v. Societa Italiana Di M. B. Cristoforo Colombo*, 92 So. 373, 151 La. 887—*Buck v. Latimer*, 92 So. 372, 151 La. 883—*Cusachs v. Salmen Brick & Lumber Co.*, 80 So. 608, 144 La. 411—*French v. Trout Creek Lumber Co.*, 74 So. 575, 141 La. 18.

15 C.J. p 1071 note 28 [a].

Unwarranted allegation

Where the allegation made by appellants for purposes of appellate jurisdiction, that the amount involved exceeds two thousand dollars is a mere conclusion, and unwarrant-

provision, however, is not compulsory, and the supreme court, in its discretion, instead of transferring the cause, may dismiss the appeal.³ On the other hand, if a cause, which is within the appellate jurisdiction of the supreme court, is erroneously appealed to the court of appeal, the lat-

ter court should not dismiss the appeal, but should transfer the cause to the supreme court,⁴ as where the amount in dispute exceeds the court of appeal's jurisdiction and is within the jurisdiction of the supreme court,⁵ although the jurisdiction of the court of appeal was not questioned,⁶ or although one

ed by the facts and circumstances, the appeal will be transferred to the proper appellate court.—*Foster v. Peet*, 92 So. 311, 151 La. 718.

3. La.—*Landry v. Gonzales*, 77 So. 287, 142 La. 577.

Where appeal is dismissed

Where appellant permitted judgment of court of appeal, dismissing appeal for want of jurisdiction to become final, supreme court, on appeal from district court, could not transfer case to court of appeal, but the appeal will be dismissed.—*Peucheu v. W. D. Haas & Co.*, 129 So. 531, 170 La. 923.—*Munts v. Jefferson R. Co.*, 38 So. 536, 114 La. 860.

Holding case subject to right of transfer

Where an appeal is improperly taken to the supreme court because the amount involved is below the jurisdiction of such court, it will be held for ten days subject to appellant's right to transfer to the court of appeals, and, in default of its exercise of such right, the case will be dismissed.—*Ruston Ice, etc., Co. v. Gulf Compress Co.*, 45 So. 395, 120 La. 474.

4. La.—*Soniat v. Clesi*, 115 So. 644, 165 La. 426, transferred, 8 La.App. 209.—*Leche ex rel. Moore v. U. S. Fidelity & Guaranty Co., App.*, 188 So. 197.—*Lazarone v. Hiram Walker, Inc., App.*, 132 So. 341.—*Richardson v. Charles Kirsch & Co., App.*, 179 So. 631, transferred, see 187 So. 1, 191 La. 991, transferred, see 189 So. 146, rehearing denied 189 So. 621.—*Dusentury v. Board of Com'rs for St. Tammany Drainage Dist. No. 2, App.*, 178 So. 637, transferred, see 182 So. 719, 190 La. 694.—*General Motors Truck Co. of Louisiana v. Caddo Transfer & Warehouse Co., App.*, 172 So. 178, transferred, see 179 So. 843, 183 La. 529.—*Burke v. Mayor and Board of Trustees, City of New Iberia, App.*, 171 So. 425.—*Gaar, for Use and Benefit of Glover, v. King, App.*, 171 So. 115.—*Kaufman v. H. G. Hill Stores, App.*, 158 So. 605, annulled 159 So. 745.—*Faust v. Hill-Powers Finance Corporation, App.*, 142 So. 296, transferred, see 151 So. 63, 178 La. 170.—*Jones v. King*, 125 So. 473, 12 La.App. 96.—*Clarke v. Bandolin*, 6 La.App. 564.—*State ex rel. John Scott v. Ratcliff*, 5 La.App. 412.—*Louisiana State Rice Milling Co. v. Hornsby*,

2 La.App. 584.—*Succession of Harris*, 2 La.App. 155.
15 C.J. p 1147 note 77.

Court of appeal does not have discretion of determining whether the case should be transferred or the appeal dismissed after finding that the case is within the jurisdiction of the supreme court.—*Soniat v. Clesi*, 115 So. 644, 165 La. 426, transferred, see 8 La.App. 209.

Dual appeal is not necessary to authorize a transfer, and supreme court should exercise jurisdiction notwithstanding fact that another appeal was taken simultaneously to court of appeal.—*Gentilly Development Co. v. Carbajal*, 123 So. 325, 168 La. 786, followed in 121 So. 214, 10 La.App. 125.

Motion to transfer appeal from dismissal of suit for defamation of character, not within jurisdiction of court of appeal, to supreme court will prevail over a motion to dismiss the appeal, and should be granted.—*Hepting v. Durand*, 126 So. 571, 12 La.App. 539.

Appeal taken in good faith

La.—*Soniat v. Clesi*, 115 So. 644, 165 La. 426, transferred, see 8 La.App. 209.

5. La.—*Rusillion v. Papania, App.*, 189 So. 513.—*Gilmore v. Rachel, App.*, 188 So. 423.—*Jones v. Metropolitan Life Ins. Co., App.*, 180 So. 181.—*Richland State Bank v. Brock, App.*, 177 So. 454.—*Rockefeller v. Eggleston, App.*, 177 So. 124.—*H. A. Bauman, Inc. v. Tilly, App.*, 175 So. 489, transferred, see 177 So. 657, 183 La. 531.—*Dessalles v. Tichenor, App.*, 171 So. 147, transferred, see 173 So. 897, 186 La. 1101.—*Noel Estate v. Louisiana Oil Refining Corporation, App.*, 170 So. 272, transferred, see 175 So. 744, 188 La. 45.—*Carlock v. Kusun, App.*, 167 So. 459.—*First Nat. Bank v. Jones, App.*, 161 So. 54, transferred, see 172 So. 155, 186 La. 269.—*Succession of Schneidau, App.*, 157 So. 137, transferred, see 162 So. 196, 182 La. 613.—*First Nat. Bank v. Louisiana Tax Commission, App.*, 153 So. 345.—*Liner v. Authement, App.*, 150 So. 71, rehearing refused 152 So. 115, transferred, see 162 So. 7, 182 La. 342.—*T. A. Pittman, Inc. v. Crescent City Plumbing & Heating Co., App.*, 149 So. 784.—*Brock v. People's Sav. Bank & Trust Co., App.*, 148 So. 460.—*Dubuisson & Dubuisson v. St. Landry*

Bank & Trust Co. of Opelousas, App., 142 So. 260.—*Ducure v. Milner, App.*, 141 So. 617, annulling 140 So. 158, rehearing denied 142 So. 618, set aside 141 So. 610, 175 La. 897, conformed to, App., 146 So. 734, rehearing denied 146 So. 734.—*W. K. Henderson Iron Works & Supply Co. v. Meriwether Supply Co.*, 140 So. 238, 19 La.App. 324.—*Succession of Ducure*, 139 So. 665, 19 La.App. 574.—*Bywater v. Enderle*, 139 So. 84, 19 La.App. 417.—*Prater v. Porter*, 133 So. 473, 16 La.App. 45.—*Roe v. Maniscalco*, 131 So. 607, 15 La.App. 281.—*Villomeur v. Woodward*, 130 So. 366, 14 La.App. 597, transferred, see 132 So. 361, 171 La. 831, transferred, see 134 So. 111, 16 La.App. 535.—*Hunley v. Ascani*, 129 So. 164, 14 La.App. 95, followed in *Bussey v. Barilleaux*, 129 So. 167, 14 La.App. 82, transferred, see 133 So. 446, 172 La. 204.—*Jones v. Gleason*, 120 So. 101, 9 La.App. 266, supplemented 120 So. 703, 10 La.App. 211.—*Castleberry v. Webster-Dossier Lumber Co.*, 7 La. App. 111.—*Heard v. Monroe Sand & Gravel Co.*, 6 La.App. 363.—*Campbell v. Wise*, 6 La.App. 194, 301.—*Schaumburg v. Grishman*, 2 La.App. 36.

Counsel for all parties joining in motion

Where counsel for all parties litigant in receivership proceedings joined in written motion for transferring appeal to supreme court, averring that amount of fund to be distributed by receivers exceeded jurisdictional amount of court of appeal, court of appeal, pursuant to statutory provisions, would transfer appeal to supreme court.—*In re Ruston Creamery, La.App.*, 174 So. 216.

Dismissal and not transfer

Appeal to court of appeals from interlocutory judgment, dismissing suit for more than two thousand dollars damages for violation of contractual obligation as to all except one of several items, should have been dismissed, instead of being transferred to supreme court, no appeal lying from such judgment.—*Kaufman v. H. G. Hill Stores, La. App.*, 159 So. 745, annulling 158 So. 605.

6. La.—*Bussey v. Wise-Miller*, 129 So. 166, 14 La.App. 104, transferred, see 133 So. 443, 172 La. 198, followed in *Bussey v. Barilleaux*, 129 So. 167, 14 La.App. 82,

appeal in the case had been taken to the supreme court.⁷ However, the supreme court ordinarily will not assume jurisdiction in such a case in the absence of an order in the record of the court of appeal transferring the cause;⁸ but if the court of appeal's want of jurisdiction is not raised in that court and the case is manifestly appealable to the supreme court, the latter court, in view of its authority under the constitution art 7 §§ 11 and 25, may order the cause transferred to the supreme court.⁹

§ 378. — Supreme Court in General

The constitution expressly provides for the cases in which the supreme court has appellate, original, and supervisory jurisdiction; and for the certifying of cases from courts of appeal to the supreme court.

Under the express provisions of the Constitution of 1921 article 7 § 10, and similar provisions in prior constitutions, the supreme court has appellate jurisdiction in civil suits,¹⁰ where the amount

in dispute exceeds a given sum, as explained *infra* § 381, except that it has no appellate jurisdiction, irrespective of the amount involved, in suits for damages for physical injuries to, or for the death of, a person,¹¹ or for other damages sustained by such person or his heirs or legal representatives, arising out of the same circumstances;¹² nor does its appellate jurisdiction extend to any suit for compensation under any state or federal Workmen's Compensation Law,¹³ or employer's liability act.¹⁴ The supreme court has no appellate jurisdiction in cases in which such jurisdiction is exclusively vested in the courts of appeal,¹⁵ or in district courts.¹⁶

The supreme court has appellate jurisdiction, under the provisions of article 7 § 10, of all suits for divorce or separation from bed and board, and all matters arising therein;¹⁷ of suits involving alimony;¹⁸ of suits for the nullity of marriage, or for interdiction; or of suits involving the tutorship of minors, or curatorship of interdicts, or the legitimacy¹⁹ and custody of children, and matters

transferred, see 133 So. 446, 172 La. 204.

7. La.—Brock v. People's Sav. Bank & Trust Co., App., 148 So. 460.

8. La.—In re Land Development Co., 88 So. 118, 148 La. 925.

9. La.—State ex rel. Guillot v. Central Bank & Trust Co., 79 So. 857, 143 La. 1053.

10. La.—Aubert v. Burns, 77 So. 782, 142 La. 895.

15 C.J. p 1066 notes 78, 79.

Consent of parties is not sufficient to confer appellate jurisdiction on the supreme court.—W. K. Henderson Iron Works & Supply Co. v. Highbush, 75 So. 729, 141 La. 803.

As to registration of voters

(1) In a suit involving the registration of voters, the supreme court's appellate jurisdiction is limited to cases in which the contest is as to educational and property qualifications and the grandfather clause.—Aubert v. Guyot, 77 So. 785, 142 La. 901—Aubert v. Rhody, 77 So. 784, 142 La. 900—Aubert v. Burns, 77 So. 782, 142 La. 895.

(2) Where the issue in mandamus proceedings by a voter to compel the reinstatement by the registrar of voters of his name on the registration roll was merely one of fact as to whether his change or removal of residence was beyond the precinct in which he was registered, the supreme court would have no jurisdiction of an appeal from the decision of the district court for the parish of Orleans.—State ex rel. Kahn v. Bell, 86 So. 657, 157 La. 72.

Suit against surety on sheriff's official bond to compel surety to pay

judgment in excess of two thousand dollars against sheriff for damages for death of prisoner in sheriff's custody was a suit for recovery under a bond and arose "ex contractu" and not "ex delicto," and hence judgment in suit on bond was appealable to supreme court, particularly where all issues in suit against sheriff were disposed of and sheriff was no longer a party.—Leche ex rel. Moore v. U. S. Fidelity & Guaranty Co., La. App., 188 So. 197.

11. La.—Aetna Life Ins. Co. v. De Jean, 184 So. 331, 183 La. 529, transferred, see Aetna Life Ins. Co. v. Dejean, 167 So. 864, affirmed Aetna Life Ins. Co. v. De Jean, 171 So. 450, 185 La. 1074—Reeves v. Globe Indemnity Co. of New York, 182 So. 724, 182 La. 905—Walker v. Superior Brass & Copper Foundry Co., 94 So. 139, 152 La. 630.

Suit against insurer

The supreme court is without jurisdiction of appeal in suit for injuries against liability insurer, as against contention that suit was for indemnity on a contract of insurance and was not founded on a tort by insurance carrier.—Reeves v. Globe Indemnity Co. of New York, 182 So. 724, 182 La. 905—Metropolitan Casualty Ins. Co. of New York v. Bowdon, 159 So. 394, 181 La. 295.

Amount in dispute as affecting jurisdiction generally see *infra* § 381.

12. La.—Metropolitan Casualty Ins. Co. of New York v. Bowdon, *supra*.

13. La.—Clementine v. Ritchie, 99 So. 213, 155 La. 263.

14. Suit for compensation

The supreme court has no jurisdiction of suits for compensation under any Employers' Liability Act, where the appeal was granted after the adoption of the constitution irrespective of the amount involved, and the proper court of appeal has jurisdiction.—Walker v. Superior Brass & Copper Foundry Co., 94 So. 141, 152 La. 630.

15. La.—Bunol v. Bunol, 122 So. 121, 163 La. 391.

Appellate jurisdiction of courts of appeal see *infra* § 379.

16. La.—Oberly v. Calcasieu Parish School Board, 77 So. 600, 142 La. 788.

In suits involving civil or political rights, such as the reinstatement of a child excluded from a school, appellate jurisdiction is conferred on the district courts, and not on the supreme court.—Oberly v. Calcasieu Parish School Board, *supra*. Appellate jurisdiction of district courts see *infra* § 380.

17. La.—State ex rel. Suberville v. Judges of Court of Appeal, 14 So. 118, 45 La. Ann. 1319.

15 C.J. p 1067 notes 81–83.

18. La.—State v. Edrington, 78 So. 751, 143 La. 504.

This provision is general law which must yield to art 7 § 54, providing that appeals from juvenile court shall be allowed on matters of law only.—State v. Edrington, *supra*.

19. La.—Succession of Mingo, 78 So. 565, 143 La. 298.

Suit involving legitimacy of children, within such constitutional provision giving supreme court appel-

of adoption and emancipation. Its appellate jurisdiction also extends, irrespective of the amount involved, to cases involving homestead exemptions,²⁰ notwithstanding other issues are also involved in which the value or amount in contest does not exceed two thousand dollars.²¹

The supreme court has jurisdiction to interpret its own decrees, and its interpretation is final.²² In all civil and probate cases where the supreme court is given appellate jurisdiction, the appeal shall be both on the law and the facts, but under article 7 § 54, it has jurisdiction of appeals from a juvenile court on matters of law only.²³

The appellate jurisdiction of the supreme court, under article 7 § 10, also extends to criminal cases on questions of law alone, whenever the penalty

of death, or imprisonment at hard labor may be imposed;²⁴ or where a fine exceeding three hundred dollars,²⁵ or imprisonment exceeding six months,²⁶ is actually imposed. A proceeding to forfeit an appearance bond, in a criminal case, is a criminal proceeding, and the nature of the offense charged against accused is determinative of the right to appeal to the supreme court from the judgment of forfeiture.²⁷ Two separate judgments of conviction, in neither of which the supreme court has appellate jurisdiction, cannot be combined to invest it with jurisdiction.²⁸

Under article 6 § 5 of the constitution, the supreme court is also given appellate jurisdiction of suits against the railroad commission to test the validity of regulations which it has adopted.²⁹

late jurisdiction refers to a suit in which legitimacy is matter in contest.—*Smith v. Shehee*, 143 So. 338, 175 La. 394, answers conformed to, App., 143 So. 339, and amended 144 So. 750.

Correction of death record

Mandamus proceeding to compel board of health to correct record of death of petitioner's mother, erroneously describing her as colored, although petitioner alleges that error affects validity of his marriage and legitimacy of his children, is not within supreme court's jurisdiction, as a suit involving legitimacy, or otherwise.—*State ex rel. Thurber v. Board of Health of City of New Orleans*, 96 So. 332, 153 La. 986.

20. La.—*Succession of Harper*, 161 So. 18, 152 La. 55—*Green v. Kettler*, 80 So. 594, 144 La. 374—*Green v. Traylor*, 77 So. 127, 142 La. 492—*Gaar*, for the Use and Benefit of *Glover v. King*, App., 171 So. 115—*Jones v. King*, 125 So. 478, 12 La.App. 96.

15 C.J. p 1067 note 91.

Case involves homestead exemption, within supreme court's jurisdiction when one party claims benefit thereof.—*Murff v. Ratcliff*, 131 So. 194, 171 La. 419.

"Homestead exemption"

(1) "Homestead exemption" within constitutional provision giving supreme court appellate jurisdiction in all cases involving homestead exemption is the exemption granted by constitution to every head of a family or person having some one dependent on him or her for support.—*Succession of Harper*, 161 So. 18, 152 La. 55.

(2) It does not include the statutory one thousand dollar privilege granted to widows and minor children in necessitous circumstances.—*Succession of Harper*, supra.

Garnishment proceeding

Supreme court has jurisdiction of proceeding to garnish insurance money, claimed by insured under laws exempting homestead and household articles from seizure.—*Thompson-Ritchie & Co. v. Graves*, 120 So. 634, 167 La. 1024, 63 A.L.R. 1283.

Actions not involving homestead exemptions

(1) Action by judgment creditor to recover judgment against debtor's mortgagee, although depending on whether debtor's homestead was exempt from judgment when mortgage was foreclosed.—*Murff v. Ratcliff*, 131 So. 194, 171 La. 419.

(2) An action to enjoin a constable from selling corn, hay, and fodder under a writ of sequestration, such property being alleged to be necessary for the maintenance of plaintiff, his family, and stock on his homestead, and exempt from sale by process under the homestead and exemption laws.—*Schute v. Hopkins*, 51 So. 1033, 125 La. 911.

21. La.—*Green v. Kettler*, 80 So. 594, 144 La. 374—*Green v. Traylor*, 77 So. 127, 142 La. 492—*Gaar*, for Use and Benefit of *Glover v. King*, App., 171 So. 115.

Amount in dispute as affecting jurisdiction generally see *infra* § 381.

22. La.—*Barker v. Houssiere-Latrelle Oil Co.*, 112 So. 415, 163 La. 555.

Appeal not involving interpretation

Where issues presented by appeal, the supreme court being otherwise without jurisdiction, do not involve interpretation by court of its judgment in former case of which instant case is branch, the court is without jurisdiction within rule that, when appeal is branch of first case in which supreme court rendered judgment, it has jurisdiction in matter of interpreting its own judgment

—*Succession of Williams*, 102 So. 411, 157 La. 309.

Liability for costs under a final decree on the merits by the supreme court is within the exclusive appellate jurisdiction of the supreme court.—*Bergeron v. Babin*, 125 So. 318, 12 La.App. 89.

23. La.—*State v. Edrington*, 78 So. 751, 143 La. 504.

24. La.—*State v. Cotton*, 110 So. 480, 162 La. 295—*State v. Hunter*, 38 So. 686, 114 La. 939.

15 C.J. p 1069 note 8.

25. La.—*State v. Cotton*, 110 So. 480, 162 La. 295—*State v. Martin*, 94 So. 368, 152 La. 723—*State v. Reames*, 66 So. 304, 136 La. 51.

26. La.—*State v. Cotton*, 110 So. 480, 162 La. 295—*State v. Martin*, 94 So. 368, 152 La. 723.

15 C.J. p 1069 note 10.

If sentence imposed is below supreme court's jurisdictional limits, and the constitutionality of the law under which defendant was convicted was sustained, the appeal must be dismissed, unless a transfer can be granted.—*State v. Ginalva*, 115 So. 571, 165 La. 304—*State v. Martin*, 94 So. 368, 152 La. 723.

27. La.—*State v. Cotton*, 110 So. 480, 162 La. 295.

15 C.J. p 1069 note 8 [a].

Offense of carrying weapon concealed, is punishable only by fine or imprisonment, and supreme court has no appellate jurisdiction as relates to the offense charged by reason of the nature or grade of the offense, and hence none by such reason as relates to the forfeiture of the bond.—*State v. Cotton*, supra.

28. La.—*State v. Sanders*, 106 So. 455, 159 La. 956.

29. La.—*Louisiana R. Commn. v. Kansas City Southern R. Co.*, 81 So. 858, 107 La. 450.

15 C.J. p 1071 note 27.

Original jurisdiction. The supreme court, under article 7 § 10, has such original jurisdiction as may be necessary to enable it to determine questions of fact affecting its own appellate jurisdiction in any case pending before it,³⁰ and to that end may make such orders and decrees as it may deem proper in the premises; or it may remand the case, for the purpose of determining the same question;³¹ but it cannot exercise original jurisdiction to pass on the merits of a party's claim or the validity of an adjudication.³² The supreme court also has exclusive original jurisdiction in all matters touching professional misconduct of members of the bar, with

power to suspend or disbar under such rules as may be adopted by the court,³³ and in suits for removal of judges of courts of record from office, as elsewhere provided in the constitution. The supreme court does not render advisory opinions at the request of other departments of the government.³⁴

Supervisory jurisdiction. The supreme court, under article 7 § 10, also has control of, and general supervision over, all inferior courts,³⁵ even in cases in which another court has appellate jurisdiction.³⁶ This is a plenary and discretionary power, the exercise of which depends on each individual action,³⁷

30. La.—Tatum v. Andrews, 115 So. 466, 165 La. 222—Roussel v. Railways Realty Co., 69 So. 27, 137 La. 616.

15 C.J. p 1069 note 11.

31. La.—Tatum v. Andrews, 115 So. 466, 165 La. 222—Gannon v. Grant Timber, etc., Co., 72 So. 907, 140 La. 151—Dannemann v. Charlton, 36 So. 965, 113 La. 276.

32. La.—Italian Homestead Ass'n v. Lewis, 139 So. 769, 174 La. 94.

Supreme court cannot exercise original jurisdiction

(1) To entertain a suit for an injunction restraining the execution of its judgments.—Roussel v. Railways Realty Co., 62 So. 608, 133 La. 153.

(2) To pass on the merits of the rule, on which the trial court has not yet passed, where the ground of an application for prohibition to the trial court against further proceeding in a rule, was that the effect of a suspensive appeal was to suspend execution of a judgment.—Yazoo, etc., R. Co. v. Teissier, 64 So. 928, 135 La. 19.

33. La.—In re Kenner, 152 So. 520, 178 La. 774.

34. La.—State ex rel. Day v. Rapides Parish School Board, 103 So. 757, 158 La. 251.

35. La.—Putnam & Norman v. Levee, 153 So. 685, 179 La. 180, annulling State ex rel. Levee v. Carruth, App., 149 So. 311—Allen v. Allen, 115 So. 648, 165 La. 437—Paul v. Tabony, 102 So. 503, 157 La. 400—Howcott v. Smart, 63 So. 281, 133 La. 681—State ex rel. Gentry v. O'Quinn, 5 La.App. 708.

15 C.J. p 1069 note 14.

Exercised only in special or emergency cases

Supervisory jurisdiction over inferior courts, was not designed to afford a right to appeal to all litigants dissatisfied with judgments of trial judges, and such jurisdiction will only be entertained in special or emergency cases and to prevent a great and impending injury.—Dugas

& Le Blanc v. Port Barre Timber & Tie Co., 80 So. 203, 144 La. 71.

Recusation of judge

(1) Where plaintiff filed motion to recuse judge ad hoc, which was tried and denied by special judge, question of recusation of special judge was within exclusive supervisory jurisdiction of supreme court and could not be considered by court of appeal.—Central Lumber Co. v. Jones, La.App., 175 So. 849.

(2) Where in a criminal case, accused alleges that the judge is so prejudiced as to be incapable of giving him a fair trial, and the judge declines to recuse himself, his action will be reviewed by the supreme court in the exercise of its supervisory power.—State v. Banta, 47 So. 538, 122 La. 235, followed in State v. Dunlap, 47 So. 540, 122 La. 241, State v. Danos, 47 So. 539, 122 La. 240.

To have testimony taken down in writing, in an appealable case, a litigant may invoke the supreme court's general supervision and control over other courts.—Williamson v. Enterprise Brick Co., 182 So. 556, 190 La. 415, setting aside 178 So. 197.

Whether enjoined act may cause irreparable injury

Determination of judge whether act prohibited by injunction is or is not such as may cause irreparable injury to plaintiff, so that judge may not or may dissolve injunction on bond, is subject to review by appellate court, in the exercise of its supervisory jurisdiction.—Keegan v. Board of Com'rs of Port of New Orleans, 98 So. 50, 154 La. 639—New Orleans Live Stock Exch. v. Crescent City Stock Yards & Slaughter House Co., 86 So. 659, 148 La. 77—City of Lake Charles v. Lake Charles Ry., Light & Waterworks Co., 80 So. 260, 144 La. 217.

36. La.—Paul v. Tabony, 102 So. 503, 157 La. 400.

Order allowing appeal to court of appeal does not defeat right to invoke supervisory jurisdiction of su-

preme court.—Allen v. Allen, 115 So. 648, 165 La. 437.

Taking devolutive appeal from denial of preliminary injunction does not prevent appellant's invoking supreme court's supervisory jurisdiction.—Welsh v. Board of Levee Com'rs of Orleans Levee Dist., 123 So. 705, 168 La. 1037.

37. La.—Walmsley v. O'Hara, 161 So. 587, 182 La. 213—Item Co. v. Nu-Grape Bottling Co., 107 So. 471, 160 La. 631—Westerfield v. New Orleans Port, 72 So. 905, 140 La. 146.

15 C.J. p 1069 note 14 [a].

Prevention of abuses or illegal acts, regardless of the amount involved is the concern of the supreme court in the exercise of its supervisory powers.—Keffe v. La Salle Realty Co., 112 So. 799, 163 La. 824, 53 A.L.R. 82.

Substance rather than form will be looked to

La.—Thomas v. Doughty, 111 So. 681, 163 La. 213.

Supervisory jurisdiction may be exercised

(1) To instruct the district court, in the absence of apparent jurisdiction over a cause in any appellate court, to reinstate a case dismissed on the ground that the court is without jurisdiction, if it is manifest that the court has jurisdiction.—Reynolds v. Carroll, 38 So. 470, 114 La. 610.

(2) To review, in an unappealable case, the ruling on the sufficiency of the evidence offered to relieve the prosecution from the prescriptions of Rev.St. § 986, limiting certain prosecutions to one year next after the offense is made known to a public officer.—State v. Richard, 89 So. 697, 149 La. 568.

(3) To review order of district judge discharging prisoner under writ of habeas corpus in extradition proceedings.—State ex rel. Covington v. Hughes, 102 So. 824, 157 La. 652.

and generally it will be exercised only where the inferior judge exceeds the bounds of his jurisdiction, or is guilty of a usurpation or of an abuse of his discretion.³⁸ Such supervisory jurisdiction may be invoked only where the litigant has exhausted his remedies in the court below,³⁹ and only where there is not another adequate remedy by appeal to the supreme court or to some other court,⁴⁰ but it does not exercise such supervisory jurisdiction when the relief sought is directly in aid of the appellate jurisdiction of another court.⁴¹ This supervisory jurisdiction does not extend to supervision

over officers of courts.⁴²

Issuance of remedial writs. Under the provisions of the Constitution article 7 § 2, the supreme court and each of the justices thereof has power to issue the writ of habeas corpus,⁴³ at the instance of any person in actual custody,⁴⁴ in any case where it has appellate jurisdiction.⁴⁵ It, or any justice thereof, also has power, under such provisions, in aid of its original, appellate, or supervisory jurisdiction, to issue writs of certiorari,⁴⁶ prohibition,⁴⁷ mandamus,⁴⁸ quo warranto, and other needful remedial writs, orders, or process.⁴⁹

(4) To stay execution of order fixing custody of minor child.—*Tate v. Tate*, 113 So. 370, 163 La. 1047.

Supervisory jurisdiction will not be exercised

(1) In unappealable case, to review facts bearing on guilt or innocence of accused.—*State v. Foster*, 101 So. 255, 156 La. 891—*State v. Hollingsworth*, 68 So. 834, 137 La. 478.

(2) Other cases in which supervisory jurisdiction not exercised see 15 C.J. p 1069 note 14 [c], [d].

38. La.—*Liberty Coffee Co. v. Alberti*, 134 So. 748, 172 La. 573.

39. La.—*Long v. Chas. A. Kaufman Co.*, 53 So. 583, 127 La. 8.

Demand on trial judge

In suit to set aside order of railroad commission, wherein injunction obtained by commission was set aside on a bond, and it made no demand on trial judge to vacate order of dissolution, or any attempt to suspend execution of order by suspensive appeal, its application to supreme court for supervisory writs of certiorari and prohibition will be denied.—*Brooks-Sanlon Co. v. Railroad Commission of Louisiana*, 79 So. 871, 143 La. 1090.

40. La.—*Noe v. Maestri*, 190 So. 538, 193 La. 382—*State ex rel. Martinez v. Hattier*, 187 So. 551, 192 La. 209—*Succession of Levins*, 187 So. 454, 184 La. 825—*State v. Haddad*, 160 So. 802, 181 La. 1036—*State v. Cotton*, 110 So. 450, 163 La. 295—*Item Co. v. Nu-Grape Bottling Co.*, 107 So. 471, 160 La. 631—*Westerfield v. New Orleans Port*, 72 So. 905, 140 La. 146.

15 C.J. p 1069 note 14 [f].

41. La.—*Paul v. Tabony*, 102 So. 503, 157 La. 503.

42. La.—*Alexandria Naval Stores Co. v. J. F. Ball Bro. Lumber Co.*, 54 So. 1035, 128 La. 632.

15 C.J. p 1069 note 14 [h].

43. La.—*State v. Sauvignet*, 24 La. Ann. 119, 13 Am.R. 115.

Original jurisdiction

The supreme court exercises original jurisdiction in issuing such

writ.—*In re Strickland*, 6 So. 577, 41 La. Ann. 324.

44. La.—*In re Manouvrier*, 16 La. Ann. 257.

15 C.J. p 1070 note 26 [d], [e].

45. La.—*State v. Guillory*, 54 So. 1008, 128 La. 558.

15 C.J. p 1070 note 26.

Pending appeal not necessary

La.—*State v. Rose*, 29 La. Ann. 755.

46. La.—*State ex rel. Martinez v. Hattier*, 187 So. 551, 192 La. 209—*State v. Haddad*, 160 So. 802, 181 La. 1036—*State ex rel. Dowling v. Ray*, 91 So. 443, 150 La. 1030.

15 C.J. p 1070 note 17.

Certiorari will issue to inferior judge to examine into proceedings before him affecting issues pending in the appellate court, under Code Pract. arts 855-866.—*Jaenke v. Taylor*, 109 So. 814, 161 La. 996.

Application by one convicted of contempt in criminal district court for a writ of certiorari to review the validity of the proceeding, and a writ of prohibition, prohibiting execution of the sentence, is properly made to supreme court.—*State ex rel. Dowling v. Ray*, 91 So. 443, 150 La. 1030.

Statute obsolete

Under Const. 1921, art 7 § 10, Const. 1898, art 90; Consts. 1898 and 1913, art 94, giving the Supreme Court control and general supervision over all inferior courts, Code Prac. article 357, limiting authority to issue writs of certiorari to cases where there is no right of appeal, and where the proceedings are so irregular that the judgment would be absolutely void, is obsolete.—*Keegan v. Board of Com'rs of Port of New Orleans*, 98 So. 50, 154 La. 639.

47. La.—*State ex rel. Martinez v. Hattier*, 187 So. 551, 192 La. 209—*State v. Haddad*, 160 So. 802, 181 La. 1036—*State ex rel. Dowling v. Ray*, 91 So. 443, 150 La. 1030—*In re Perez*, 82 So. 657, 146 La. 373.

15 C.J. p 1070 note 18.

Statute obsolete

Under Const. 1921 art 7 § 10, Const. 1898 art. 90; Consts. 1898, 1913 art

94, giving supreme court control and general supervision over all inferior courts, Code Pract. art 845, confining the court's authority to issue writs of prohibition to cases where the lower court exceeded its jurisdiction, is obsolete.—*Keegan v. Board of Com'rs of Port of New Orleans*, 98 So. 50, 154 La. 639—*State v. Letellier*, 90 So. 218, 149 La. 847.

48. La.—*State v. Haddad*, 160 So. 802, 181 La. 1036—*Mundy v. Phillips*, 76 So. 602, 142 La. 180—*Chatham Drug Co. v. Anders*, 69 So. 845, 137 La. 1081.

15 C.J. p 1070 note 19.

Mandamus refused

(1) To compel a judge to enjoin a city from enforcing an ordinance as against relator, where temporary delay would not work irreparable injury, and the city as yet has taken no action, either criminal or civil, against the relator.—*Murat v. New Orleans*, 44 So. 279, 119 La. 505.

(2) Other cases where mandamus refused see 15 C.J. p 1070 note 19 [a], [b].

To require testimony in writing

An appropriate method by which litigant may enforce his right in appealable case to have testimony taken down in writing, if trial judge refuses to enforce it, is to ask appellate court to issue mandamus in aid of its appellate jurisdiction.—*Williamson v. Enterprise Brick Co.*, 182 So. 556, 190 La. 415, setting aside 178 So. 197.

49. La.—*Zahn v. Unknown Owners*, 98 So. 184, 154 La. 776.

15 C.J. p 1070 note 21.

Exclusive jurisdiction

The supreme court alone has the right to issue such writs to the courts of appeal.—*Vidrine v. Dupre*, 67 So. 893, 136 La. 820.

Interveners

In a proceeding by one appointed district judge by the governor, for prohibition or other writ against one appointed by the supreme court to fill such vacancy, the clerk of such judicial district and the district attorney as interveners had no standing to question the validity of the

Supervisory jurisdiction, on an application for any of such writs, is discretionary,⁵⁰ and should be exercised only in cases of emergency,⁵¹ and where the inferior judge exceeds the bounds of his jurisdiction, or is guilty of usurpation, or an abuse of his discretion,⁵² and there is not an adequate remedy by appeal.⁵³

Procedure. In exercising supervisory jurisdiction, the supreme court requires only that the errors complained of be patent on the face of the record.⁵⁴ In a proceeding for a remedial writ, the supreme court cannot pass on the merits of the case,⁵⁵ or on errors as to matters within the trial judge's discretion,⁵⁶ these being reviewable under appellate jurisdiction. Application for writs of certiorari, mandamus, and prohibition will not be de-

nied for want of written notice of the application to respondent,⁵⁷ and an inadvertent error in such application as to the name of a party is of no consequence where the identity of such party is not questioned.⁵⁸

Cases brought up from courts of appeal; certification of question. Under the provisions of Constitution 1921, article 7 § 11, it is competent for the supreme court to require, by certiorari;⁵⁹ or otherwise, any case to be certified from the courts of appeal to it for its review and determination, with the same power and authority in the case as if it had been carried directly by appeal to the supreme court, provided application therefor is made within thirty days after a rehearing shall have been refused by the court of appeal.⁶⁰ This power cannot be ex-

governor's appointment, such matter not being in contest.—In re Perez, 83 So. 657, 146 La. 373.

Prematurity of application

A remedial writ will not be lightly dismissed on a plea of prematurity, as the question of the prematurity of the application for the writ is considered at the time the rule nisi issues directing respondent to show cause why the writ should not be issued.—McClelland v. Gasquet, 47 So. 540, 122 La. 241.

Suit dismissed

Injunction suit brought by candidate for nomination against secretary of state to compel recognition of himself as party nominee on death, prior to primary election, of other candidate for nomination, which suit was taken to supreme court on secretary's application for original writs, should be dismissed, following election of third person as party nominee, where plaintiff had moved for dismissal in district court.—Porter v. Conway, 159 So. 725, 181 La. 487.

50. La.—McClelland v. Gasquet, 47 So. 540, 122 La. 241.—State v. Foster, 31 So. 57, 106 La. 425.

51. La.—Murat v. New Orleans, 44 So. 279, 119 La. 505.

52. La.—Liberty Coffee Co. v. Alberti, 134 So. 748, 172 La. 572.—State ex rel. Tranchina v. City of New Orleans, 75 So. 683, 141 La. 788.

Legal question passed on before

The supervisory jurisdiction of the supreme court cannot be exercised to prevent a criminal court from trying a case legally pending before it over which it has jurisdiction, simply for the reason that the legal question therein involved has once before been passed on by the supreme court.—State v. Letellier, 90 So. 218, 149 La. 847.

Where proceedings have been conducted regularly and the questions decided are not of general importance, the supreme court will not exercise its supervisory jurisdiction on an application for such writs.—Seals v. Funches, 85 So. 604, 147 La. 600.

53. La.—State ex rel. Martinez v. Hattier, 187 So. 551, 192 La. 209.

Where remedy by appeal is available and adequate, supreme court will not exercise its supervisory powers by certiorari, prohibition, mandamus, or other remedial writ.—State v. Haddad, 160 So. 802, 181 La. 1036.—Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 79 So. 871, 143 La. 1090.—Bloomfield v. Thompson, 64 So. 853, 134 La. 923.

Questions not decided on application

Questions brought up on an application to the supreme court for a remedial writ that can be as well decided on appeal, are generally left to an appeal for decision if no prejudicial delay is to result and there is no immediate necessity for the review of the cause presented on the application.—McClelland v. Gasquet, 47 So. 540, 122 La. 241.

54. La.—State v. Mullen, 107 So. 698, 160 La. 925.

It is sufficient that reservations of bills of exception are noted in the minutes of the trial court, although no formal bills are presented.—State v. Mullen, 107 So. 698, 160 La. 925.

Defenses to action on note to which reference was made by trial judge and respondents in their return, but which did not explain rights urged thereby, were required to be presented by answer or some other form of defense.—Brock v. First State Bank & Trust Co., 175 So. 569, 187 La. 766.

55. La.—Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 79 So. 871, 143 La. 1090.

In suit to set aside order of railroad commission, wherein an injunction, obtained by commission, was set aside, and it applied for writs of certiorari and prohibition, validity of order can be passed on only by virtue of supreme court's jurisdiction on appeal in regular course.—Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 79 So. 871, 143 La. 1090.

56. La.—Newman v. Reems, 158 So. 13, 180 La. 904.—Mundy v. Phillips, 76 So. 602, 142 La. 180.

57. La.—Bauman v. Pennywell, 107 So. 425, 160 La. 555.

Proof of notice

Sup.Ct. Rules, rule 16, 136 La. xii 67 South. xi, requiring proof by affidavit of petitioner, or, in case of his absence from the parish, of his attorney, that a notice of intention to apply to the supreme court for a writ of certiorari or review has been filed, refers to writs of review or certiorari to the courts of appeal, and not to the district courts, and under rule 15, 136 La. xii 67 South. xi, applying to applications for remedial writs to be directed to the district courts, it is immaterial whether proof of the notice be made by affidavit of applicant or by that of his counsel.—State ex rel. Dowling v. Ray, 91 So. 443, 150 La. 1030.

58. La.—Succession of Winkler, 163 So. 414, 183 La. 382.

59. La.—In re Ingersoll, 23 So. 889, 50 La. Ann. 748.
15 C.J. p 1071 notes 34, 35.

60. La.—Morning Star Baptist Church of East Baton Rouge v. Martina, 91 So. 404, 150 La. 951.—W. J. Martinez & Bros. v. Murray, 90 So. 366, 149 La. 932.

Under former constitutions, application must have been made within thirty days after the decision of the court of appeal had been rendered and entered, or after the re-

tended by the legislature;⁶¹ and is generally discretionary;⁶² but may be exercised only where there is a deviation from the jurisprudence of the state in cases not appealable,⁶³ and only where a question of law is involved,⁶⁴ and the case presents exceptional features.⁶⁵ Cases finally decided by the court of appeal cannot be by it transmitted to the supreme court at the request of either party to the action.⁶⁶

Under article 7 § 25, a court of appeal has power to certify to the supreme court any question or proposition of law arising in any cause pending before it concerning which, for its proper decision, it desires the instruction of that court;⁶⁷ and thereupon the supreme court may either give its instruction on the question or proposition certified to it, which shall be binding on the courts of appeal in such case, or it may require the whole record to be sent up for its consideration, and thereupon decide the whole matter in controversy in the same manner as if it had been on appeal directly to the supreme court.⁶⁸

fusal of an application for a rehearing.—*Vidrine v. Dupre*, 67 So. 393, 136 La. 820—*Evangeline Oil Co. v. Trahan*, 52 So. 388, 126 La. 243—*Landry v. Ramos Lumber & Mfg. Co.*, 56 So. 592, 124 La. 599—*Rimmer v. Jones Bros.*, 42 So. 421, 117 La. 910—15 C.J. p 1071 note 39 [a], [b].

61. La.—*Brown Shoe Co. v. Hill*, 25 So. 634, 51 La. Ann. 920. 15 C.J. p 1071 note 34 [c].

62. La.—*In re Ingersoll*, 23 So. 889, 50 La. Ann. 748.

15 C.J. p 1071 note 34 [a], [b].

63. La.—*Williams v. Broussard*, 24 So. 398, 51 La. Ann. 333.

15 C.J. p 1071 note 35 [a].

64. La.—*Davenport v. Allen*, 50 So. 432, 124 La. 397—*Maffalette v. Wildenstein*, 24 So. 881, 50 La. Ann. 1377.

15 C.J. p 1071 notes 35 [c], 36 [b].

65. La.—*Fuller v. Duke*, 50 So. 433, 124 La. 396.

15 C.J. p 1071 notes 35 [b], 36 [a], [d].

Supreme court has power to review findings of fact made by the court of appeal, but will do so only in exceptional cases.—*Brignac v. California Pac. Mut. L. Ins. Co.*, 36 So. 595, 112 La. 574, 66 L.R.A. 322.

66. La.—*Vidrine v. Dupre*, 67 So. 393, 136 La. 820.

67. La.—*Fugh v. St. Louis, etc., R. Co.*, 24 So. 881, 50 La. Ann. 1378.

Necessity for complete statements of fact

The supreme court cannot be called on to instruct courts of appeal on questions of law based on incomplete statements of fact, and,

where instructions are requested, cannot be called on to find a part of the facts from an examination of the entire record.—*Newton v. Mutual L. Ins. Co.*, 55 So. 337, 128 La. 737.

68. La.—*Monteleone v. Seaboard F. & M. Ins. Co.*, 52 So. 1032, 126 La. 807.

Case not certified for determination of question of law

Where case is brought to the supreme court from the court of appeal merely because the judges of the latter court cannot agree on a judgment, the matter not being certified up by the court of appeal for the purpose of determining any question of law, the supreme court has no jurisdiction to render final judgment, but will send the case back, with an order to the court of appeal to select a district judge to sit in the case, as provided by Const. art 7 § 25.—*State v. Judges of Court of Appeals*, 23 So. 911, 50 La. Ann. 644.

69. La.—*State v. Judges of Court of Appeals*, 33 La. Ann. 358—*Chafin v. Meridian Lumber Co.*, 125 So. 483, 12 La. App. 73.

70. La.—*Chafin v. Meridian Lumber Co.*, 125 So. 483, 12 La. App. 73.

71. La.—*Gasquet's Interdiction*, 63 So. 89, 136 La. 957. 15 C.J. p 1072 note 44.

Court of appeal for parish of Orleans has appellate jurisdiction from the city courts of that parish.—*State v. Judges of Court of Appeals*, 33 La. Ann. 358—15 C.J. p 1071 note 42 [a]. Constitutional provisions construed—Const. art 7 §§ 29, 19, create no courts of appeal; they merely con-

§ 379. — Courts of Appeal in General

The constitution expressly provides for the cases in which courts of appeal have appellate, original, and supervisory jurisdiction.

A court of appeal is a court of inferior jurisdiction,⁶⁹ and has no power to ignore or alter the provisions of a statute under the guise of giving it construction.⁷⁰

Under the express provisions of Constitution article 7 § 29, the courts of appeal, except as otherwise provided in the constitution, have appellate jurisdiction only,⁷¹ which jurisdiction extends to all cases, civil and probate, of which the civil district court for the parish of Orleans, or the district courts throughout the state, have exclusive original jurisdiction,⁷² or concurrent jurisdiction exceeding one hundred dollars, exclusive of interest, and of which the supreme court is not given jurisdiction,⁷³ as over suits for damages for physical injuries to or for the death of a person or for other damages sustained by such person or his

fer jurisdiction, except as otherwise provided in the constitution, on "Courts of Appeal," in which art 7 § 1 declares that the judicial power shall be, in part, vested.—*Succession of Huxen*, 88 So. 687, 149 La. 61—15 C.J. p 1071 note 41.

72. La.—*Bunol v. Bunol*, 122 So. 121, 168 La. 391—*Riccobono v. Kearney*, 114 So. 707, 164 La. 844—*Guillory v. Police Jury of Parish of Evangeline*, 1 La. App. 195.

Action to nullify judgment in compensation suit is separate suit in determining jurisdiction of court of appeal.—*Williams v. Leyland Line S. S. Co.*, 8 La. App. 434.

73. La.—*State v. Louisiana Ry. & Nav. Co.*, 96 So. 667, 153 La. 816—*Grosjean v. American Paint Works, App.*, 160 So. 449.

Review of judgment, in petitory action involving property having value within jurisdiction, is within jurisdiction of court of appeal notwithstanding legitimacy of children was incidentally involved.—*Smith v. Shehee*, 143 So. 338, 175 La. 394, answers conformed to, App., 143 So. 339, amended 144 So. 750.

Right to distribute circulars

The court of appeal and not supreme court had appellate jurisdiction of ease involving right of gubernatorial candidate to have circulars distributed in behalf of his candidacy, where constitutionality of ordinance prohibiting distribution of circulars without permit from mayor was not at issue.—*Noe v. Maestri*, 190 So. 588, 193 La. 382.

Transfer of cause—see *supra* § 377.

heirs or legal representatives arising out of the same circumstances,⁷⁴ regardless of the amount involved, as explained *infra* § 381, except as otherwise provided in the constitution, and all appeals shall be both on the law and the facts. It has no appellate jurisdiction over matters which are within the exclusive appellate jurisdiction of the supreme court.⁷⁵ A court of appeal must take notice of its want of jurisdiction although not questioned

by the parties.⁷⁶

Original jurisdiction. A court of appeal has no original jurisdiction to determine facts affecting its appellate jurisdiction,⁷⁷ or to issue an injunction.⁷⁸

Issuance of writs. Under article 7 § 2, a court of appeal has power, in aid of its appellate jurisdiction only, to issue writs of mandamus,⁷⁹ prohibition,⁸⁰ and has power, in aid of appellate jurisdiction,

74. La.—Lazarone v. Hiram Walker, Inc., App., 183 So. 341—Aetna Life Ins. Co. v. De Jean, 164 So. 331, 183 La. 529, transferred, see Aetna Life Ins. Co. v. De Jean, 167 So. 884, affirmed Aetna Life Ins. Co. v. De Jean, 171 So. 450, 185 La. 1074—Metropolitan Casualty Ins. Co. of New York v. Bowdon, 159 So. 394, 181 La. 295—Newsom v. Starns, 142 So. 138, 174 La. 955, annulling, App., 136 So. 743, and conformed to 142 So. 704—Walker v. Superior Brass & Foundry Co., 94 So. 139, 152 La. 630.

Court of appeal, not supreme court, has appellate jurisdiction over

(1) Action for pain and suffering by persons killed by train, and for loss of companionship.—Adams v. New Orleans, T. & M. Ry. Co., 115 So. 128, 164 La. 1011.

(2) Action brought by widow in behalf of herself and as tutrix of her minor child against tort-feasor and his insurance carrier for the alleged negligent killing of her husband.—Metropolitan Casualty Ins. Co. of New York v. Bowdon, 159 So. 394, 181 La. 295.

(3) Action against an alleged tort-feasor and his insurance carrier by employer's compensation insurance carrier for employee's death allegedly caused by tort-feasor's negligence, as being an action "ex delicto" and not "ex contractu," notwithstanding employer's insurance carrier sued as statutory subrogee and conventional assignee of claims of widow and minor child of deceased.—Metropolitan Casualty Ins. Co. of New York v. Bowdon, *supra*.

(4) Action for tarring and feathering, including injuries caused by use of water, soap, and towels in removing tar and feathers.—Newsom v. Starns, 142 So. 704, conforming to 142 So. 138, 174 La. 955, annulling, App., 136 So. 743.

Demand for damages for mental torture caused by tarring and feathering is within appellate jurisdiction of court of appeal.—Newsom v. Starns, *supra*.

"Ex contractu" obligations

As respects jurisdiction of court of appeal, obligations arising from a sheriff's bond, as relates to the sureties, are obligations "ex contractu" and not "ex delicto," even when the

bond is given to cover damages resulting from torts or omissions of duty of the principal therein.—Leche ex rel. Moore v. U. S. Fidelity & Guaranty Co., La.App., 188 So. 197.

75. La.—Central Lumber Co. v. Jones, App., 175 So. 849—Succession of Harriss, 2 La.App. 155.

Alternative claim

Court of appeal has no jurisdiction of claim for homestead, but could consider alternative claims of extinguishment of judgment by novation or prescription.—McDaniel v. Smith, 127 So. 108, 13 La.App. 61.

Liability for costs

Where a party's liability for costs depends on the construction or interpretation of final judgment on the merits by the supreme court, the court of appeal has no jurisdiction over the question of liability for costs, since such matter is within the exclusive appellate jurisdiction of the supreme court.—Bergeron v. Babin, 125 So. 318, 12 La.App. 89.

Criminal matters

Court of appeal has no jurisdiction over criminal matters.—Morehouse Lumber & Building Material Co. v. Jacob & Walker, 139 So. 713, 18 La. App. 536, affirmed 144 So. 190, and 147 So. 504, 177 La. 76.

76. La.—Heard v. Monroe Sand & Gravel Co., 6 La.App. 362.

77. La.—Ducre v. Milner, 141 So. 617, annulling 140 So. 158, rehearing denied 142 So. 618, set aside 144 So. 610, 175 La. 897, conformed to, App., 146 So. 734, rehearing denied 146 So. 734.

Where there is no "contestatio litis" in lower court, case cannot be appealed because the court of appeal has no original jurisdiction.—Estate of Chapman, 1 La.App. 371.

78. La.—Siess v. Couvillion, 4 La. App. 277.

Constitutionality of statute

Gen.Sts.1932 § 2082, Act 1924 No. 29 § 5, in regard to an appeal from an order granting, continuing, refusing, or dissolving a restraining order, held not to give court of appeal original jurisdiction contrary to Const.1921 art 7 § 29.—Magendie v. Constable First City Court of New Orleans, 4 La.App. 718.

79. La.—Riccobono v. Kearney, 114 So. 707, 164 La. 844—Day v. Hel-

ena Lumber Co., 76 So. 820, 142 La. 409—Bailey v. Spiro, App., 169 So. 898—State ex rel. Levee v. Carruth, App., 149 So. 311, annulled Putnam & Norman v. Levee, 153 So. 685, 179 La. 180—Burnett v. Johnston, 140 So. 48, 19 La.App. 213—State ex rel. Griffin v. Morgan, 130 So. 868, 19 La.App. 769—State ex rel. Truxillo v. Gilbert, 128 So. 204, 14 La.App. 229—Wall v. Tangipahoa School Board, 119 So. 371, 9 La.App. 178—State ex rel. Majendie v. Constable of First City Court, 1 La.App. 139. 15 C.J. p 1072 note 52.

Appeal not yet taken

Court of appeal has power to issue mandamus in aid of appellate jurisdiction, although no appeal has as yet been taken, where court of appeal deems writs necessary to protect right which may be urged on appeal.—State ex rel. Levee v. Carruth, 149 So. 311, annulled Putnam & Norman v. Levee, 153 So. 685, 179 La. 180.

Mandamus not in aid of appeal cannot be issued by a court of appeal.—State ex rel. Anderson Post Hardwood Lumber Co. v. Bullock, La.App., 178 So. 638—State ex rel. Perron v. Fuselier, La.App., 173 So. 577—State ex rel. Griffin v. Morgan, 130 So. 868, 19 La.App. 709—State ex rel. Truxillo v. Gilbert, 128 So. 204, 14 La.App. 229—Wall v. Tangipahoa School Board, 119 So. 371, 9 La.App. 178—State ex rel. Gentry v. O Quinn, 5 La.App. 703—Police Jury of Rapides Parish v. Matthews, 5 La. App. 702.

Petition should be addressed to court of appeal, for a mandamus to compel a judge to grant appeal from order refusing injunction against execution of judgment for less than two thousand dollars, in view of Const. art 7 § 2, although supreme court, under § 10, has control and general supervision of all inferior courts.—Paul v. Tabony, 102 So. 503, 157 La. 400.

80. La.—Riccobono v. Kearney, 114 So. 707, 164 La. 844—State ex rel. Perron v. Fruge, App., 173 So. 575—Frank Melat, Consolidated, v. Cooper, App., 149 So. 468—State ex rel. Griffin v. Morgan, 130 So. 868, 19 La.App. 709—State ex rel. Truxillo v. Gilbert, 128 So. 204, 14

tion, to issue certiorari,⁸¹ and other needful writs, orders, and process;⁸² but this does not include the protection of a right which may be urged on appeal to the court of appeal.⁸³ Application for such writs in cases appealable to the court of appeal should be made to it and not to the supreme court.⁸⁴ In a proceeding for such writ, a court of appeal has no jurisdiction of the merits of the controversy, but may grant such orders only as are necessary in aid of its appellate jurisdiction.⁸⁵

A court of appeal, and each of the judges thereof, also has the power to issue writs of habeas corpus at the instance of any person in actual custody within their respective circuits.⁸⁶

Supervisory powers. The courts of appeal have no general supervisory jurisdiction over the district court and other inferior courts;⁸⁷ but have only a special or limited supervisory jurisdiction over such courts in aid of or to enforce their own appellate jurisdiction.⁸⁸ To this end, courts of appeal may, in all cases appealable to them, issue remedial orders directing district judges to perform such official functions, or to permit a litigant to take such steps, as may be necessary to enable him to perfect his appeal.⁸⁹

Practice. Under article 7 § 27, all cases on appeal to the court of appeals must be tried on the original record, pleadings, and evidence;⁹⁰ and

La.App. 229—Wall v. Tangipahoa School Board, 119 So. 371, 9 La. App. 178.

15 C.J. p 1072 notes 50 [a], 52.

May issue writ of prohibition

(1) To review action of judge of the First city court of the city of New Orleans in refusing to grant suspensive appeal.—Bailey v. Spiro, La.App., 169 So. 898.

(2) To restrain execution of default judgment, where appeal was from judgment in suit to declare default judgment null and not from default judgment itself.—Frank Melat. Consolidated, v. Cooper, La.App., 149 So. 468.

Prohibition not in aid of appellate jurisdiction of court of appeals may not be issued by it.—State ex rel. Perron v. Fuselier, La.App., 173 So. 577—State ex rel. Bourgeois v. Butler, La.App., 144 So. 752—State ex rel. Griffin v. Morgan, 130 So. 868, 19 La.App. 709—Wall v. Tangipahoa School Board, 119 So. 371, 9 La.App. 178.

81. La.—Ricobono v. Kearney, 114 So. 707, 164 La. 844—State ex rel. Perron v. Fruge, App., 173 So. 575.—Bailey v. Spiro, App., 169 So. 898.—State ex rel. Levee v. Carruth, App., 149 So. 311, annulled on other grounds Putnam & Norman v. Levee, 153 So. 685, 179 La. 180.—State ex rel. Griffin v. Morgan, 130 So. 868, 19 La.App. 709—State ex rel. Truxillo v. Gilbert, 128 So. 204, 14 La.App. 229—Wall v. Tangipahoa School Board, 119 So. 371, 9 La.App. 178—State ex rel. Majendie v. Constable of First City Court, 1 La.App. 139.

15 C.J. p 1072 note 52.

Certiorari not in aid of appellate jurisdiction should not be issued by a court of appeal.—Johnson v. Nobles, La.App., 178 So. 654—Lee v. Nobles, La.App., 178 So. 648—State ex rel. Perron v. Fuselier, La.App., 173 So. 577—State ex rel. Bourgeois v. Butler, La.App., 144 So. 752—State ex rel. Griffin v. Morgan, 130

So. 868, 19 La.App. 709—Wall v. Tangipahoa School Board, 119 So. 371, 9 La.App. 178.

In original certiorari proceeding in court of appeal, writ was required to be refused, since the court of appeal is without supervisory jurisdiction except in aid of its appellate jurisdiction.—State ex rel. Kennedy & Denny Co. v. Gulf, C. & S. F. Ry. Co., La.App., 184 So. 593.

To require cost bond

Court to which case would go on appeal had jurisdiction of certiorari to compel judge to require cost bond.—Burnett v. Johnston, 140 So. 48, 19 La.App. 213.

82. La.—Ricobono v. Kearney, 114 So. 707, 164 La. 844—State ex rel. Hayes v. Stephens, 4 La.App. 230—State ex rel. Majendie v. Constable of First City Court, 1 La.App. 139.

83. La.—Putnam & Norman v. Levee, 153 So. 685, 179 La. 180, annulling State ex rel. Levee v. Carruth, App., 149 So. 311.

84. La.—Day v. Helena Lumber Co., 76 So. 820, 142 La. 409—St. Tammany Lumber Mfg. Co. v. Stewart's Creditors, 64 So. 145, 134 La. 374.

15 C.J. p 1072 note 52 [a], [b].

85. La.—U. S. Tire Supply Co. v. Gulf Dist. Nat. Maritime Union of America, App., 189 So. 352.

Compelling granting of appeal

Where defendants in injunction action failed to show in mandamus, certiorari, and prohibition proceeding to compel trial court to grant a suspensive appeal, that plaintiff in injunction suit had been given notice of application for a suspensive appeal and there was no record from which court of appeal could reach conclusion that trial court abused its discretion in refusing to grant appeal, trial court would not be compelled by court of appeal to grant the appeal.—U. S. Tire Supply Co. v. Gulf Dist. Nat. Maritime Union of America, supra.

86. La.—Ricobono v. Kearney, 114 So. 707, 164 La. 844.

15 C.J. p 1072 note 53 [a].

87. La.—Putnam & Norman v. Levee, 153 So. 685, 179 La. 180, annulling State ex rel. Levee v. Carruth, App., 149 So. 311—Gitz & Geier v. Carroll, 121 So. 779, 9 La. App. 631—State ex rel. Gentry v. O Quinn, 5 La.App. 703—Cathey v. Henriques, 3 La.App. 223.

88. La.—Putnam & Norman v. Levee, 153 So. 685, 179 La. 180, annulling State ex rel. Levee v. Carruth, App., 149 So. 311—Lavoy v. Toye Bros. Auto. & Taxicab Co., 105 So. 292, 159 La. 209—State ex rel. Kennedy & Denny Co. v. Gulf, C. & S. F. Ry. Co., App., 134 So. 533—Johnson v. Nobles, App., 178 So. 654—Lee v. Nobles, App., 178 So. 648—State ex rel. Perron v. Fruge, App., 173 So. 575—Brasher v. St. Tammany Holding Co., App., 165 So. 724—State ex rel. Edwards v. Porter, App., 162 So. 664—State ex rel. Griffin v. Morgan, 130 So. 868, 19 La.App. 709.

Relief after refusal of injunction

Any relief given plaintiff by appellate court after district court's refusal of injunction must be under supervisory jurisdiction, devolutive appeal from the judgment being inadequate.—Wall v. Tangipahoa School Board, 119 So. 371, 9 La.App. 178.

89. La.—Putnam & Norman v. Levee, 153 So. 685, 179 La. 180, annulling State ex rel. Levee v. Carruth, App., 149 So. 311—Lavoy v. Toye Bros. Auto. & Taxicab Co., 105 So. 292, 159 La. 209—State ex rel. Anderson Post Hardwood Lumber Co. v. Bullock, App., 178 So. 638—State ex rel. Perron v. Fruge, App., 173 So. 575—State ex rel. Edwards v. Porter, App., 162 So. 664.

90. Only on appeals from district courts

This provision applies only to appeals from district courts, and does not preclude jurisdiction of an ap-

the rules of practice regulating appeals to, and proceedings in, the supreme court regulate as far as applicable appeals and proceedings in the court of appeal.⁹¹

§ 380. — District Courts

The constitution regulates the appellate jurisdiction of the district courts.

Under article 7 § 36, the district courts have jurisdiction of appeals from justices of the peace from orders requiring peace bonds,⁹² and of all civil matters regardless of the amount in dispute,⁹³ except cases where immovable property, either separately or in conjunction with movable property, is claimed as a homestead. A district court has only a limited supervisory jurisdiction in aid of its appellate jurisdiction over inferior courts.⁹⁴ The

review of the proceedings of the inferior Louisiana courts has already been considered supra § 265.

§ 381. — Amount in Controversy

As provided by the constitution, appellate jurisdiction is in the supreme court in civil suits, with certain exceptions, only where the amount in dispute or the fund to be distributed exceeds two thousand dollars exclusive of interest; and is in the courts of appeal where such amount or fund exceeds one hundred dollars and does not exceed two thousand dollars, exclusive of interest.

Under Constitution article 7 § 10, appellate jurisdiction in civil suits, except suits for damages for physical injuries to, or for the death of, a person, or for other damages sustained by such person or his heirs or legal representatives, arising out of the same circumstances, is in the supreme court, only where the amount in dispute,⁹⁵ the value of the

peal from a parish court.—*State v. Judges Cir. Ct. of App.*, 32 La. Ann. 774.

91. La.—*Thomas v. Goodwin*, 45 So. 406, 120 La. 504.

Right of supreme court to determine fact questions affecting jurisdiction is a rule of practice regulating appeals, and therefore applicable to court of appeal.—*Ducre v. Milner*, 144 So. 610, 175 La. 897, setting aside, App., 141 So. 617, which annulled 140 So. 158, rehearing denied 142 So. 618, and 146 So. 734, conformed to 146 So. 734.

92. La.—*Tremont Lumber Co. v. Talbot*, 74 So. 183, 140 La. 837.

93. Suits involving civil or political rights are within the jurisdiction of the district courts, under art 7 § 35.—*Oberly v. Calcasieu Parish School Board*, 77 So. 600, 142 La. 788.

94. La.—*City of Gretna v. Rossner*, 97 So. 335, 154 La. 117.

95. La.—*Dutton v. Harmonia Ins. Co. of Buffalo, N. Y.*, 184 So. 546, 191 La. 72.—*Madison v. Prudential Ins. Co. of America*, 181 So. 871, 190 La. 103.—*Gallardanne v. Locascio*, 162 So. 69, 182 La. 539.—*Knighton v. Safety Tire Service*, 149 So. 448, 177 La. 762, transferred, see, App., 150 So. 582.—*W. L. Pace Piano Co. v. Louisiana Seeburg Piano Co.*, 143 So. 359, 175 La. 412.—*Stafford v. Tolmas Realty Co.*, 139 So. 766, 174 La. 83, transferred, see, App., 146 So. 61.—*Stokes v. New Orleans Public Service*, 137 So. 195, 173 La. 405.—*Steg Printing & Publishing Co. v. Auto Lee Stores*, 134 So. 746, 172 La. 565, transferred, see 138 So. 899, 18 La. App. 477.—*Villemeur v. Woodward*, 132 So. 361, 171 La. 831, transferred, see 130 So. 366, 14 La. App. 597, and transferred, see 134 So. 111, 16 La. App. 535.—*Peucheu v. W. D. Haas & Co.*, 129 So.

531, 170 La. 923.—*Le Rosen v. North Central Texas Oil Co.*, 120 So. 862, 167 La. 1076.—*Larroux v. Larroux's Heirs*, 117 So. 727, 166 La. 585, transferred, see 126 So. 462, 12 La. App. 498.—*Pennywell v. George*, 114 So. 493, 164 La. 630.—*Board of Health of State of Louisiana v. Town of De Quincy*, 111 So. 789, 163 La. 369.—*Reimers v. Hebert*, 111 So. 91, 162 La. 772.—*A. Baldwin & Co. v. McCain*, 106 So. 459, 159 La. 966.—*Nelson v. Continental Asphalt & Petroleum Co.*, 102 So. 583, 157 La. 491.—*Nylka Land Co. v. City of New Orleans*, 102 So. 477, 157 La. 366.—*Clementine v. Ritchie*, 99 So. 213, 155 La. 263.—*Michel v. Michel*, 92 So. 50, 151 La. 540.—*Hook v. Cusimano*, 88 So. 821, 149 La. 281.—*Torjusen v. Linn*, 82 So. 367, 145 La. 352.—*Black v. New Orleans Ry. & Light Co.*, 82 So. 81, 145 La. 180.—*Day v. Louisiana Central Lumber Co.*, 81 So. 328, 144 La. 820.—*Succession of Ibos*, 81 So. 326, 144 La. 813.—*Minor v. Young*, 81 So. 208, 144 La. 635.—*Aubrey v. Guillaumin*, 80 So. 241, 144 La. 177.—*Wolf v. Commission Council of City of Hammond*, 80 So. 216, 144 La. 107.—*Marks v. Loewenberg*, 78 So. 444, 143 La. 196.—*Doullut v. Rush*, 77 So. 117, 142 La. 462.—*Zagame v. Chalmette Laundry Co.*, 76 So. 703, 142 La. 251.—*Hunt v. Chisholm*, App., 182 So. 332.—*France v. Firemen's Ins. Co. of Newark, N. J.*, App., 170 So. 424.—*Craten v. Etna Life Ins. Co. of Hartford, Conn.*, App., 167 So. 856, transferred, see 173 So. 306, 186 La. 757.—*Bank of Winfield v. Melton*, App., 142 So. 300.

15 C.J. p 1066 note 89.

Cases not within supreme court's jurisdictional amount

La.—*Baker v. Duson*, 188 So. 40, 192 La. 391, transferred, see 189 So. 510.—*Ratchiff v. Levin*, 139 So. 10,

173 La. 931.—*Klump v. Fontenot*, 119 So. 66, 167 La. 327, transferred, see *Klump v. Fontenot*, 122 So. 503, 11 La. App. 27.—*State ex rel. Thoman v. Williams*, 113 So. 817, 164 La. 202.—*A. Baldwin & Co. v. McCain*, 106 So. 459, 159 La. 966.—*Nelson v. Continental Asphalt & Petroleum Co.*, 102 So. 583, 157 La. 491.—*Alexandria Steam Laundry v. Fitzumun*, 101 So. 797, 157 La. 23.—*Larrabee v. Landry*, 101 So. 315, 156 La. 539.—*Succession of Braughn*, 101 So. 217, 156 La. 843.—*Clementine v. Ritchie*, 99 So. 213, 155 La. 263.—*Dugas v. City of La Fayette*, 98 So. 434, 154 La. 961.—*O'Shee v. Chaudoir*, 97 So. 796, 154 La. 517.—*Bensel v. Kuhlman*, 97 So. 347, 154 La. 150.—*Foster v. Peet*, 92 So. 311, 151 La. 718.—*State ex rel. Meriwether v. City of Shreveport*, 91 So. 678, 151 La. 203.—*Lester v. Burnett*, 91 So. 411, 150 La. 970.—*Anticich v. Mihaljevich*, 88 So. 820, 149 La. 278.—*Flores v. Steeg Printing & Publishing Co.*, 86 So. 816, 148 La. 295.—*Pawnee Land & Lumber Co. v. Guillory*, 80 So. 890, 144 La. 597.—*Green v. Kettler*, 80 So. 594, 144 La. 374.—*Crawford, Jenkins & Booth v. Fisher*, 80 So. 224, 144 La. 129.

In suit for reduction of assessment alleged to be excessive, the amount in contest is the amount of taxes levied on the alleged excess, and where that amount is less than two thousand dollars, and no question of the constitutionality or legality of the tax is presented, the supreme court has no jurisdiction of the appeal under Const. art 85.—*Getty v. Richards*, 84 So. 589, 147 La. 204.

Money demand coupled with demand for realty

Where a money demand for three hundred and thirty dollars is coupled with a demand for possession of

thing or property in dispute,⁹⁶ or the fund to be distributed,⁹⁷ irrespective of the amount claimed,⁹⁸ exceeds two thousand dollars exclusive of interest,⁹⁹ and, moreover, jurisdiction cannot be con-

reality, which exceeds in value the lower jurisdiction of the court, the supreme court has jurisdiction of an appeal.—*Ward v. Lynn*, 99 So. 359, 149 La. 1043.

No money or property involved

The supreme court has no jurisdiction of an appeal by relators seeking to compel by mandamus a city board of health to change certain designations of their ancestors and other blood relatives in its records of vital statistics from "colored" to "white," since no amount of money or property is involved.—*State ex rel. Alinet v. Board of Health of City of New Orleans*, 99 So. 559, 155 La. 758.

96. La.—*Baker v. Duson*, 188 So. 40, 192 La. 391, transferred, see 189 So. 510—*Falgout v. Johnson*, 186 So. 349, 191 La. 423—*A. M. Edwards Co. v. Hano*, 177 So. 691, 188 La. 622—*Bacher v. Krauss*, 154 So. 733, 179 La. 675, transferred, see App., 159 So. 766—*Succession of Wengert*, 152 So. 747, 178 La. 1027—*Opelousas St. Landry Bank & Trust Co. v. Fontenot*, 137 So. 339, 173 La. 430—*Villemeur v. Woodward*, 132 So. 361, 171 La. 831, transferred, see 130 So. 366, 14 La. App. 597, and transferred, see 134 So. 111, 16 La. App. 535—*Munff v. Ratcliff*, 131 So. 194, 171 La. 419—*Godchaux v. Stille*, 118 So. 481, 167 La. 1—*McGovern v. United Railway Men's Oil Ass'n*, 103 So. 280, 157 La. 966—*Bankston v. Gill*, 95 So. 701, 153 La. 234—*Vitrano v. Levy*, 92 So. 374, 151 La. 890—*Michel v. Michel*, 92 So. 50, 151 La. 540—*Franks v. Davis Bros. Lumber Co.*, 84 So. 101, 146 La. 803—*Billiot v. Terrebonne Parish School Board*, 79 So. 78, 143 La. 423—*Aubert v. Guyol*, 77 So. 785, 142 La. 361—*Aubert v. Burns*, 77 So. 782, 142 La. 395—*Noel Estate v. Louisiana Oil Refining Corporation*, App., 170 So. 372, transferred, see 175 So. 744, 188 La. 45—*Succession of Vercher*, App., 158 So. 874.

15 C.J. p 1066 note 80.

"Amount in dispute"

(1) The words "amount in dispute" in the constitutional provision that amount in dispute must exceed two thousand dollars, exclusive of interest, to vest supreme court with jurisdiction, includes value of thing in contest, where a thing instead of an amount is in dispute.—*Baker v. Duson*, 188 So. 40, 192 La. 391, transferred, see 189 So. 510—*A. Baldwin & Co. v. McCain*, 106 So. 459, 159 La. 966—*Noel Estate v. Louisiana Oil Refining Corporation*, App., 170 So. 372, transferred, see 175 So. 744, 188 La. 45.

(2) It is the value of what plaintiff claims and defendant disputes; and the value of what is involved in a collateral question which may have to be determined does not govern question of jurisdiction.—*Richardson v. Charles Kirsch & Co.*, 187 So. 1, 191 La. 991, transferred, see 179 So. 631, transferred, see App., 189 So. 146, rehearing denied 189 So. 621.

"Amount in contest"

In suit to annul sale of bank scrip because of buyer's fraud and to have value thereof inventoried as asset of seller's succession, alleged value of scrip, not face value, was the "amount in contest" respecting supreme court's jurisdiction notwithstanding allegation that defendant buyer, using scrip fraudulently obtained, purchased lot whose value exceeded jurisdictional amount.—*Carroll v. David*, 154 So. 913, 179 La. 713, transferred, see App., 158 So. 250.

Value of estate

Supreme court has appellate jurisdiction of suit to invalidate will, where value of estate exceeds two thousand dollars, regardless of value of property bequeathed.—*Succession of Wilson*, 145 So. 13, 175 La. 1078.

Value of privilege, recognition and enforcement of which is demanded, determines jurisdiction of supreme court, but suit value cannot exceed amount of debt it secures.—*A. Baldwin & Co. v. McCain*, 106 So. 459, 159 La. 966.

Third person appeal

Where value of interest claimed by third person, not a party to the suit in which a judgment is rendered, is shown to exceed amount required to confer jurisdiction on supreme court, the appeal will not be dismissed, nor will an appeal be dismissed in such case because of a doubt as to appellant's ability to establish his claim as a matter of law.—*Raines v. Dunson*, 82 So. 690, 145 La. 525.

97. La.—*Kelly, Weber & Co. v. F. D. Harvey & Co.*, 151 So. 201, 178 La. 266—*Knighon v. Safety Tire Service*, 149 So. 448, 177 La. 762, transferred, see App., 150 So. 582—*W. L. Pace Piano Co. v. Louisiana Seeburg Piano Co.*, 143 So. 359, 175 La. 412—*Succession of Koppel*, 129 So. 727, 171 La. 119—*New Orleans Silica Brick Co. v. John Thatcher & Son*, 107 So. 236, 160 La. 392—*Kahn v. Kahn*, 98 So. 167, 154 La. 729—*Union Nat. Bank of Monroe v. Marx*, 88 So. 301, 148 La. 1038—*Succession of Kyle v. Pecot*, 87 So. 714, 148 La. 691—*Succession of Pietri*, 85 So. 623, 147 La. 642—*Douliut v. Ruseh*, 77 So. 117, 142 La. 462—*Zagame v.*

Chalmette Laundry Co., 76 So. 703, 142 La. 251—*Barnes v. Allen*, App., 183 So. 56—*General Motors Truck Co. of Louisiana v. Caddo Transfer & Warehouse Co.*, App., 172 So. 178, transferred, see 179 So. 843, 189 La. 529—*Faust v. Hill-Powers Finance Corporation*, App., 142 So. 236, transferred, see 151 So. 68, 178 La. 170.

15 C.J. p 1066 note 80 [a], [b].

Approving or amending account

Jurisdiction of appeal from judgment approving or amending an account or a tableau of distribution of receiver, liquidator, or administrator is determined entirely by amount of fund to be distributed.—*General Motors Truck Co. of Louisiana v. Caddo Transfer & Warehouse Co.*, App., 172 So. 178, transferred, see 179 So. 843, 189 La. 529.

In cases of succession and insolvency, the test of the supreme court's appellate jurisdiction is not the actual amount distributed in a provisional account, or amount of assets handled, but the total amount of fund to be distributed.—*Succession of Wengert*, 152 So. 747, 178 La. 1027—*Knighon v. Safety Tire Service*, 149 So. 448, 177 La. 762, transferred, App., 150 So. 582—*Succession of Johnson*, 75 So. 743, 141 La. 842.

Custody or disposal of fund not involved

As under Act 1921 No. 118 §§ 7, 8, members of supervising boards of road districts are mere agents, serving without pay, and not charged with the custody or disposal of a fund, the two thousand dollars necessary to give the supreme court jurisdiction on appeal is not involved on an appeal from a decree holding void an ordinance of defendant police jury discharging plaintiffs from such board of supervisors, and enjoining defendant from interfering with plaintiffs in the discharge of their duties as such board members.—*Fellows v. Police Jury of Tangipahoa*, 107 So. 514, 160 La. 749.

98. La.—*H. A. Bauman, Inc. v. Tilly*, 177 So. 657, 188 La. 531, transferred, see App., 175 So. 489—*Kelly, Weber & Co. v. F. D. Harvey & Co.*, 151 So. 201, 178 La. 266—*Hanover Fire Ins. Co. v. Southern Amusement Co.*, 146 So. 316, 176 La. 631, transferred, see App., 150 So. 92—*General Motors Truck Co. of Louisiana v. Caddo Transfer & Warehouse Co.*, App., 172 So. 178, transferred, see 179 So. 843, 189 La. 529.

99. La.—*General Motors Truck Co. of Louisiana v. Caddo Transfer & Warehouse Co.*, App., 172 So. 178,

ferred by agreement of the litigants.¹ A provision limiting the supreme court's jurisdiction to cases where a fine exceeds three hundred dollars or imprisonment not exceeding six months does not apply to an appeal from a juvenile court.² The supreme court, however, has jurisdiction, regardless of the amount or value in dispute, to construe the

provisions of its own judgment or decree.³

Under Constitution article 7 §§ 10, 29, courts of appeal have appellate jurisdiction only where the matter in dispute, or the funds to be distributed, exceed one hundred dollars, exclusive of interest,⁴ and do not exceed two thousand dollars, exclusive of interest;⁵ and, as announced supra § 377, if

transferred, see 179 So. 843, 189 La. 529.

Principal of claim only, exclusive of accrued interest, must be considered in a revocatory action, in determining the jurisdiction of the supreme court on appeal, relative to jurisdictional amount.—Weinfurter v. Cresap, 99 So. 528, 155 La. 632.

Interest as amount in dispute

Where demand is for interest alone, total amount of interest sought to be recovered is "amount in dispute" in determining which appellate court has jurisdiction.—Brock v. People's Sav. Bank & Trust Co., App., 148 So. 460.

Damages equal to interest as "principal"

Where a judgment in a suit to dissolve an agreement for the sale of land awards damages in a sum equal to the interest on the agreed price to the date of the judgment, such sum constitutes "principal" and not "interest" within the provision limiting the supreme court's appellate jurisdiction to two thousand dollars exclusive of interest.—Soniat v. Clesi, 115 So. 644, 165 La. 426, transferred, see 8 La.App. 209.

1. La.—State ex rel. Long v. Board of Deacons v. Good Hope Second Baptist Church of Algiers, 80 So. 608, 144 La. 413—Rockefeller v. Eggleston, App., 177 So. 124.

Cumulating demands

Plaintiffs having separate and distinct causes of action, none of which is sufficient in amount to give the supreme court appellate jurisdiction, cannot give such jurisdiction by cumulating their demands in a single suit.—Hotard v. Perilloux, 107 So. 515, 160 La. 752—Alessi v. Town of Independence, 76 So. 792, 142 La. 338.

2. La.—State v. Campbell, 148 So. 708, 177 La. 559.

3. La.—Barker v. Houssiere-Latreille Oil Co., 112 So. 415, 163 La. 555.

15 C.J. p 1066 note 80 [c].

As to taxation of costs

Supreme court had jurisdiction to construe provision in its own decree for taxation of costs, regardless of amount of costs involved.—Barker v. Houssiere-Latreille Oil Co., supra.

4. La.—Gaillardanne v. Locascio, 162 So. 69, 182 La. 539—Ducre v. Milner, 144 So. 610, 175 La. 397,

setting aside, App., 141 So. 617, which annulled 140 So. 158, rehearing denied 142 So. 618, and 146 So. 734, conformed to 146 So. 734—Larroux v. Larroux's Heirs, 117 So. 727, 166 La. 585, transferred, see 126 So. 462, 12 La.App. 498—Viering v. N. K. Fairbanks Co., 100 So. 729, 156 La. 592—In re Land Development Co., 88 So. 118, 148 La. 925—Ethridge-Atkins Corporation v. Johnson, App., 183 So. 37—Smith v. Shehee, App., 143 So. 339, conforming to answers 143 So. 338, 175 La. 394, and amended on other grounds, App., 144 So. 750—Merchants' & Farmers' Bank & Trust Co. v. Johnson, App., 142 So. 153—Swope v. Holmes, 125 So. 768, 12 La.App. 212—Crais v. Castaing, 6 La.App. 144—Tobias v. Schloss, 5 La.App. 234.

15 C.J. p 1072 note 47.

Attorney's fees as part of demand

Court of appeal has jurisdiction of appeal in suit on note for one hundred dollars, providing for attorney's fees of fifteen per cent. thereon, since attorney's fees form part of plaintiff's demand.—Thomas v. Lavigne, La.App., 149 So. 298.

Appeals under Workmen's Compensation Law are returnable to the court of appeal where the amount exceeds one hundred dollars, regardless of the maximum amount claimed.—Clementine v. Ritchie, 99 So. 213, 155 La. 263.

5. La.—Richardson v. Charles Kirsch & Co., 187 So. 1, 191 La. 391, transferred, see 179 So. 631, transferred, see App., 189 So. 146, rehearing denied 189 So. 621—Madison v. Prudential Ins. Co. of America, 181 So. 871, 190 La. 103—A. M. Edwards Co. v. Hano, 177 So. 694, 188 La. 632—Gaillardanne v. Locascio, 162 So. 69, 182 La. 539—Hanover Fire Ins. Co. v. Southern Amusement Co., 146 So. 316, 176 La. 631, transferred, see App., 150 So. 92—Ducre v. Milner, 144 So. 610, 175 La. 397, setting aside, App., 141 So. 617, which annulled 140 So. 158, rehearing denied 142 So. 618, and 146 So. 734, conformed to 146 So. 734—Chickasaw Wood Products Co. v. Vail-Donaldson Co., 136 So. 87, 173 La. 59, transferred, see 138 So. 680, 19 La.App. 315—Steege Printing & Publishing Co. v. Auto Lec Stores, 134 So. 746, 172 La. 565, transferred, see, 138 So. 899, 18 La.App.

477—Larroux v. Larroux's Heirs, 117 So. 727, 166 La. 585, transferred, see 126 So. 462, 12 La.App. 498—Viering v. N. K. Fairbanks Co., 100 So. 729, 156 La. 592—Succession of Von Phul, 82 So. 883, 145 La. 763—Southern Scrap Material Co. v. Liquidating Com'rs of Carondelet Canal & Navigation Co., 79 So. 176, 143 La. 647—Green v. Traylor, 77 So. 127, 142 La. 492—Miller v. Albert Hanson Lumber Co., 58 So. 502, 130 La. 662—State ex rel. Kenner v. Jones, App., 191 So. 288—Rusillon v. Papania, App., 189 So. 513—State ex rel. Moss v. Willis, App., 184 So. 221—Succession of Lasseigne, App., 181 So. 879—Carlock v. Kusin, App., 167 So. 459—Thibodeaux v. Bergeron, App., 166 So. 898, affirmed 171 So. 34, 185 La. 794—Lowe v. Garriga, App., 162 So. 441, cause remanded 166 So. 131, 184 La. 436, conformed to, App., 169 So. 109—Prejean v. Richard, App., 158 So. 693—Kaufman v. H. G. Hill Stores, App., 158 So. 605, annulled on other grounds 159 So. 745—Succession of Hunzelman, App., 157 So. 118—Taylor v. American Bank & Trust Co., 133 So. 402, 17 La.App. 458—Boisseau v. Vallon & Jordano, 132 So. 237, 15 La.App. 389, transferred, see 139 So. 304, 173 La. 972—Willis v. Word, 7 La.App. 447—Giacona v. Juliani, 3 La.App. 317—Brown v. Parish, 1 La.App. 246.

15 C.J. p 1072 note 48.

Cases not within jurisdictional amount of court of appeal

La.—Rusillon v. Papania, App., 189 So. 513—Leche ex rel. Moore v. U. S. Fidelity & Guaranty Co., App., 188 So. 197—Spector v. Union City Transfer, App., 182 So. 534—Gast v. Gast, App., 181 So. 204—Richland State Bank v. Brock, App., 177 So. 454—Rockefeller v. Eggleston, App., 177 So. 124—H. A. Bauman, Inc. v. Tilly, App., 175 So. 489, transferred, see 177 So. 657, 188 La. 531—Dessalles v. Tichenor, App., 171 So. 147, transferred, see 173 So. 897, 186 La. 1101—Noel Estate v. Louisiana Oil Refining Corporation, App., 170 So. 272, transferred, see 175 So. 744, 188 La. 45—Perryman v. Trimble, App., 170 So. 253, transferred, see 179 So. 577, 189 La. 398—Shreveport Laundries v. St. Paul-Mercury Indemnity Co. of St. Paul, App., 169 So. 353—Branch v. Acme

an appeal within the jurisdictional amount of a court of appeal is erroneously brought in the supreme court, it will be transferred to a court of appeal.

In a suit for damages, appellate jurisdiction is in the supreme court, and not in a court of appeal, if the amount of damages involved exceeds two thousand dollars,⁶ but in a court of appeal if the amount involved is less than that amount;⁷ except that the jurisdiction is in a court of appeal, re-

gardless of the amount involved, if the suit is for damages for physical injuries to, or for the death of, a person,⁸ or for other damages sustained by such person or his heirs or legal representatives arising out of the same circumstances.⁹

The court having appellate jurisdiction of the main demand, has appellate jurisdiction of an appeal from a judgment on a reconventional or incidental demand, regardless of the amount involved.¹⁰ On the other hand, if the amount of the main

Homestead Ass'n, App., 169 So. 129—Mitcham v. Mitcham, App., 160 So. 145, transferred, see, Sup., 173 So. 132—Succession of Vercher, App., 158 So. 874—Liner v. Authement, App., 150 So. 72, rehearing refused 152 So. 115, transferred, see 162 So. 7, 122 La. 342—Liner v. Authement, App., 150 So. 71, rehearing refused 152 So. 115, transferred, see 162 So. 7, 132 La. 342—Brook v. People's Sav. Bank & Trust Co., App., 148 So. 466—Faust v. Hill-Powers Finance Corporation, App., 142 So. 296, transferred, see 151 So. 63, 178 La. 170—Dubuisson & Dubuisson v. St. Landry Bank & Trust Co. of Opelousas, App., 142 So. 260—State ex rel. Navo v. Baynard, 140 So. 47, 19 La. App. 289, transferred, see 146 So. 41, 176 La. 520—Succession of Dure, 135 So. 665, 19 La.App. 574—Bywater v. Enderle, 133 So. 84, 19 La.App. 417—Prater v. Porter, 133 So. 473, 16 La.App. 45—Boisseau v. Vallon & Jordano, 132 So. 237, 15 La.App. 389, transferred, see 139 So. 304, 173 La. 972—Roe v. Maniscalco, 131 So. 607, 15 La.App. 251—Villemeur v. Woodward, 130 So. 366, 14 La.App. 597, transferred, see 132 So. 361, 171 La. 831, transferred, see 134 So. 111, 16 La.App. 525—Babb v. Hollingsworth, 129 So. 423, 14 La.App. 273—State ex rel. Louisiana Highway Commission v. Young, 128 So. 185, 13 La. App. 565—Dyer v. Bridge Heights Realty Co., 127 So. 750, 19 La.App. 309, transferred, see 129 So. 647, 170 La. 1692—Jones v. Gleason, 120 So. 101, 9 La.App. 268, supplemented 120 So. 703, 10 La.App. 211—Williams v. Leyland Line S. S. Co., 8 La.App. 431—Brooks v. Byrd & Clopton, 7 La.App. 253—Heard v. Monroe Sand & Gravel Co., 6 La. App. 362—Campbell v. Wise, 6 La. App. 194, 301—Green v. Aluminum Line & New Amsterdam Casualty Co., 5 La.App. 47—People's Homestead & Savings Ass'n v. Adams, 3 La.App. 161.

Fund held as evidence

When a criminal proceeding in which money held as evidence terminates, and a controversy arises over a right to such money, a "civil action" arises, and an appeal lies in

such action to the court of appeals where the amount involved is within the jurisdiction of that court.—Byrnes v. Richardson, 116 So. 496, 165 La. 1025, answers to certified questions conformed to 8 La.App. 633.

Merits of case

Where amount in dispute in suit on indemnity bond was in excess of amount of which court of appeal had jurisdiction, such court was without jurisdiction to determine correctness of ruling that insurer had incurred statutory penalty by refusing to pay part of insured's demand, since such determination required consideration of merits of entire case.—Shreveport Laundries v. St. Paul-Mercury Indemnity Co. of St. Paul, La.App., 169 So. 353.

6. La.—Newsom v. Starns, 142 So. 138, 174 La. 955, annulling, App., 136 So. 743, and conformed to 142 So. 704—Sonlat v. Clesi, 115 So. 614, 165 La. 426, transferred, see 8 La.App. 209—Sandlin v. Coyle, 78 So. 261, 143 La. 121, L.R.A.1918D 383—Gilmore v. Rachel, App., 188 So. 428—Lazarone v. Hiram Walker, Inc., App., 182 So. 341—Nagle v. Shreveport Journal Pub. Co., App., 170 So. 270—Williams v. Leyland Line S. S. Co., 8 La.App. 434—Clarke v. Bandelin, 6 La.App. 564—Spearman v. Toye Bros. Auto & Taxicab Co., 4 La.App. 476.

Mental anguish, not accompanied by physical injuries.—Spearman v. Toye Bros. Auto & Taxi-Cab Co., 114 So. 591, 164 La. 677—Duplant v. Chauvin, La.App., 158 So. 653, transferred, see 161 So. 610, 182 La. 281—Kaufman v. H. G. Hill Stores, La. App., 158 So. 605, annulled on other grounds 159 So. 745.

Damage to business, character, or reputation

La.—Lazarone v. Hiram Walker, Inc., App., 182 So. 341—Newsom v. Starns, App., 142 So. 704, conforming to 142 So. 138, 174 La. 955, annulling, App., 136 So. 743.

Slander and defamation

La.—Searcy v. Interurban Transp. Co., App., 179 So. 93, reversing 171 So. 468 and reversed on other grounds 179 So. 75, 189 La. 183—Fernandez v. Hannagriff, App., 141

So. 469, transferred, see Fernandez v. Hannagriff, 153 So. 683, 179 La. 175—Hepting v. Durand, 126 So. 571, 12 La.App. 539.

7. La.—Wagner v. New Orleans Ry. & Light Co., 91 So. 817, 151 La. 400—Reine v. Pontchartrain R. Co., 81 So. 301, 144 La. 750.

8. La.—Newsom v. Starns, 142 So. 138, 174 La. 955, annulling, App., 136 So. 743, and conformed to 142 So. 704—Walker v. Superior Brass & Foundry Co., 94 So. 139, 152 La. 633—Jumonville v. Frey's, Inc., App., 171 So. 590—Kaufman v. H. G. Hill Stores, App., 158 So. 605, annulled on other grounds 159 So. 745—Applewhite v. New Orleans, App., 148 So. 261—Clarke v. Bandelin, 6 La.App. 564—Spearman v. Toye Bros. Auto & Taxicab Co., 4 La.App. 476.

Failure to summon medical assistance

The court of appeal had appellate jurisdiction of action against bus company for breach of contract of carriage in failing to summon medical assistance in aid of passenger while passenger was suffering from an apoplectic stroke, irrespective of amount demanded.—Searcy v. Interurban Transp. Co., App., 179 So. 93, reversing 171 So. 468 and reversed on other grounds 179 So. 75, 189 La. 183.

9. La.—Kaufman v. H. G. Hill Stores, App., 158 So. 605, annulled on other grounds 159 So. 745—Applewhite v. New Orleans Great Northern R. Co., App., 148 So. 261.

"Other damages" arising out of the same circumstances, as used in the constitutional provision refers primarily to property damages, such as to motor vehicles when damaged or destroyed by the same negligence that caused injury to, or death of, the operator or others in the vehicle at the time.—Searcy v. Interurban Transp. Co., App., 179 So. 93, reversing 171 So. 468 and reversed on other grounds 179 So. 75, 189 La. 183.

10. La.—Naef v. Miller-Goll Mfg. Co., 143 So. 61, 175 La. 240—Snyder Wagon Co. v. Campbell Ice Cream Co., 137 So. 855, 178 La. 467—Automobile Finance & Securities Co.

demand is insufficient the supreme court is without jurisdiction, notwithstanding the claim in reconvention exceeds the jurisdictional amount.¹¹

Determination of jurisdictional amount. Appellate jurisdiction, whether in the supreme court or in a court of appeal, is determined by the amount remaining in contest when the case has been submitted for decision in the court of original jurisdiction,¹² or, as otherwise expressed by the amount in

dispute at the time the judgment appealed from was rendered.¹³

As a general rule, the amount of the main claim or demand, as placed in dispute by the pleadings controls in determining the jurisdictional amount,¹⁴ and where no pecuniary amount is in dispute, the value of the thing or object in controversy determines appellate jurisdiction,¹⁵ and the particular amount or value to be considered is largely con-

v. Duggan, Inc., 91 So. 291, 150 La. 903—Robinson Mercantile Co. v. Freeman, App., 172 So. 797—First Nat. Bank v. Louisiana Tax Commission, App., 153 So. 345—State v. Strother, App., 146 So. 345, transferred 154 So. 22, 179 La. 354—Villemeur v. Woodward, 132 So. 361, 171 La. 331, transferred, see 130 So. 366, 14 La.App. 597, and transferred, see 134 So. 111, 16 La. App. 535—Barker v. Houssiere-Latreille Oil Co., 112 So. 415, 163 La. 555—Monjure v. Cousins, 106 So. 735, 160 La. 208.

What demand is basis for determining to which court the appeal shall be, whether appeal be taken from the judgment on the principal and the reconventional demand or from either, and whether by plaintiff or defendant.—Robinson Mercantile Co. v. Freeman, La.App., 172 So. 797.

Suit in nature of third opposition

As regards appellate jurisdiction of court of appeal in a suit in the nature of a third opposition wherein the third opponent contended that an automobile levied on in an in rem action against another party belonged to the third opponent, a demand for one hundred dollars to cover counsel fee for the third opponent was merely incidental to the question of the ownership of the automobile.—Ethridge-Atkins Corporation v. Johnson, La.App., 183 So. 37. Reconventional or incidental demand as affecting appellate jurisdiction generally see *supra* § 377.

11. La.—Heard v. Monroe Sand & Gravel Co., 116 So. 386, 165 La. 925—Louisiana State Rice Milling Co. v. Gage, 110 So. 555, 162 La. 350—Savings & Homestead Ass'n v. Frank, 80 So. 190, 144 La. 35.

Value of entire contract, only incidentally involved, does not determine jurisdiction of supreme court, where plaintiff merely seeks damages for its breach.—Heard v. Monroe Sand & Gravel Co., 116 So. 386, 165 La. 925.

12. La.—Hanover Fire Ins. Co. v. Southern Amusement Co., 146 So. 316, 176 La. 631, transferred, see App., 160 So. 92—Stafford v. Tolmas Realty Co., 139 So. 766, 174 La. 83, transferred, see App., 146

So. 61—Opelousas St. Landry Bank & Trust Co. v. Fontenot, 137 So. 339, 173 La. 430—Chickasaw Wood Products Co. v. Vall-Donaldson Co., 136 So. 87, 173 La. 59, transferred, see 138 So. 680, 19 La.App. 315—Steeg Printing & Publishing Co. v. Auto Lec Stores, 134 So. 746, 172 La. 565, transferred, see 138 So. 899, 18 La.App. 477—Heard v. Monroe Sand & Gravel Co., 116 So. 386, 165 La. 925—Crowell & Spencer Lumber Co. v. Lynch, 101 So. 797, 157 La. 21—Spector v. Union City Transfer, App., 182 So. 524—Rockefeller v. Eggleston, App., 177 So. 124—Morey v. Gladden, 5 La. App. 301.

Attorney's fees awarded must be considered in determining amount in dispute for appellate jurisdictional purposes.—Richland State Bank v. Brock, La.App., 177 So. 454.

13. La.—Madison v. Prudential Ins. Co. of America, 181 So. 871, 190 La. 103—H. A. Bauman, Inc., v. Tilly, 177 So. 657, 188 La. 531, transferred, see App., 175 So. 489—Pritchard v. Southern Ins. Co. of Nashville, Tenn., 137 So. 907, 173 La. 504—Givens v. Yazoo & M. V. R. Co., 137 So. 66, 173 La. 372—Norwood v. Lake Bisteneau Oil Co., 83 So. 25, 145 La. 823—Crawford, Jenkins & Booth v. Fisher, 80 So. 224, 144 La. 129—Wolf v. Thomas, 69 So. 269, 137 La. 833—Spector v. Union City Transfer, App., 182 So. 524—Olivia v. Mitchell, 5 La.App. 588.

Amount for which judgment could be rendered controls jurisdiction.—Johnson v. National Casualty Co., 4 La.App. 574.

Second action increasing amount claimed

Where, after dismissal of a suit for a sum below the supreme court's appellate jurisdiction, plaintiff sued for a sum within such jurisdiction, but the judgment was below such jurisdiction, the supreme court would not assume jurisdiction.—Ham v. Louisiana, etc., R. Co., 68 So. 133, 136 La. 1083.

14. La.—Dutton v. Harmonia Ins. Co. of Buffalo, N. Y., 184 So. 546, 191 La. 72—O'Shea v. Chadoir, 97 So. 796, 154 La. 517—Tremont Lumber Co. v. Talbot, 74 So. 183,

140 La. 887—Hunt v. Chisholm, La.App., 182 So. 332—Baumann v. Michel, App., 176 So. 907, transferred, see 181 So. 549, 190 La. 1—Robinson Mercantile Co. v. Freeman, App., 172 So. 797—Duplantis v. Chauvin, App., 158 So. 653, transferred, see 161 So. 610, 182 La. 281—T. A. Pittman, Inc., v. Crescent City Plumbing & Heating Co., App., 149 So. 784—Thalheim v. City of Gretna, 136 So. 184, 17 La. App. 657—Hinckley v. Cauley, 136 So. 126, 17 La.App. 388—Babb v. Hollingsworth, 129 So. 423, 14 La. App. 273.

Amount of expenditure as test

La.—Board of Health of State of Louisiana v. Town of De Quincy, 111 So. 789, 163 La. 369—State ex rel. Chandler v. City of Shreveport, 91 So. 850, 151 La. 491.

Amount of tax

In suit to cancel and annul assessments erroneously assessed in name of one not the owner, and to restrain a city from acting under such assessments, amount of tax claimed to be due determines jurisdiction of supreme court.—Nyika Land Co. v. City of New Orleans, 102 So. 477, 157 La. 386.

Existence and extent of lien

Where matter in dispute was as to existence and extent of lien, extent of lien and amount claimed as attorney's fees, and not value of property, determined which court had appellate jurisdiction.—Wesson v. John Woodley, Inc., 139 So. 676, 19 La.App. 369.

Money demand

Where the money demand in a suit for slander of title exceeds two thousand dollars, the supreme court has jurisdiction on appeal, although the value of the possession of the property is not shown.—Interstate Land Co. v. Fellman, 64 So. 404, 134 La. 538.

15. La.—Ethridge-Atkins Corporation v. Johnson, App., 183 So. 37—Perryman v. Trimble, App., 170 So. 253, transferred, see 179 So. 577, 189 La. 398—Hourquette v. City of Gretna, 137 So. 344, 18 La.App. 336.

Value of right

Where issue is right of possession of property, value of such right de-

trolled by the nature of the action or proceeding.¹⁶ This, however, has reference to actual controversies and not to fictitious, unfounded, and inflated claims and demands obviously made to create jurisdiction.¹⁷ Where the matter in contest is the pos-

session of an office, appellate jurisdiction, whether in the supreme court or in a court of appeal is to be determined by the amount of the emoluments of the office.¹⁸

termines question of jurisdiction of appellate court.—*Babst v. Hartz*, 1 La.App. 498.

Where ownership of small fund is in dispute and that question depends on the existence or nonexistence of a right worth many thousands of dollars, and the appeal clearly presents both questions, the pecuniary value of the right constitutes the real amount in dispute for jurisdictional purposes.—*Perryman v. Trimble*, La. App., 170 So. 253, transferred, see 179 So. 577, 189 La. 398.

Uncertain values not considered

On appeal in suit to set aside sheriff's deed, value of mineral lease would not be considered in fixation of value of property in determination of jurisdiction of court of appeals, since mineral rights are regarded as fugitive rights which have uncertain existence and value.—*Thibodeaux v. Bergeron*, App., 166 So. 398, affirmed 171 So. 34, 185 La. 794.

16. La.—*Falgout v. Johnson*, 186 So. 349, 191 La. 823—*General Motors Truck Co. of Louisiana v. Caddo Transfer & Warehouse Co.*, App., 172 So. 178, transferred, see 179 So. 843, 189 La. 529—*Villemeur v. Woodward*, 132 So. 361, 171 La. 831, transferred, see 130 So. 366, 14 La.App. 597, and transferred, see 134 So. 111, 16 La.App. 535—*Gast v. Gast*, App., 181 So. 204—*Succession of Minter*, App., 149 So. 296, transferred, see *Minter v. Union Central Life Ins. Co.*, 156 So. 167, 180 La. 38—*Bywater v. Enderle*, 139 So. 84, 19 La.App. 417.

Against principal and surety

Principal and sureties have common interest, and, when codefendants, amount in dispute is total amount of demand against them.—*Louisiana State Rice Milling Co. v. Herasby*, 2 La.App. 584.

Enforcement of Men

Where litigant seeks to enforce lien, as securing a claim for money, the amount in dispute is determined for purposes of appellate jurisdiction of supreme court and of courts of appeal by amount of claim, and not by value of property against which it is asserted.—*Day v. Helena Lumber Co.*, 76 So. 820, 142 La. 409.

In action of partition, value of whole property, and net value of share or shares of litigants, is test of jurisdiction of court of appeal.—*Mitcham v. Mitcham*, La.App., 160 So. 145, transferred, see Sup., 178 So.

132—*Gentilly Development Co. v. Carbajal*, 123 So. 325, 168 La. 786, followed in 121 So. 214, 10 La.App. 125.

In action in simulation, the value of the property or transaction involved controls.—*Aubrey v. Guillaumin*, 50 So. 241, 144 La. 177—*Lowe v. Garriga*, La.App., 162 So. 441, cause remanded 166 So. 131, 184 La. 436, conformed to, App., 169 So. 109—*First Nat. Bank v. Jones*, La.App., 161 So. 54, transferred, see 172 So. 155, 186 La. 269.

In concursus proceeding, the jurisdictional amount involved is the fund to be distributed.—*Kelly, Weber & Co. v. F. D. Harvey & Co.*, 151 So. 201, 178 La. 266—*McDonald v. Harris Gas & Oil Co.*, 2 La.App. 241.

In contest between judgment creditor and third person

Where judgment creditor seizes property by garnishment process or otherwise and third person sets up ownership of property or rights against it superior to those of seizing creditor, amount involved is value of property seized and not amount of judgment.—*Bacher v. Krauss*, 154 So. 733, 179 La. 675, transferred, see App., 159 So. 766.

In contest between judgment creditor and judgment debtor, the amount in contest is the amount of the judgment or debt and not the value of the property.—*Gaillardanne v. Locascio*, 162 So. 69, 182 La. 539—*Bacher v. Krauss*, 154 So. 733, 179 La. 675, transferred, see App., 159 So. 766—*Louisiana Western Lumber Co. v. Stanford*, 152 So. 755, 178 La. 1052—*Succession of Williams*, 102 So. 411, 157 La. 309.

In possessory action, the value of the possession must exceed two thousand dollars to vest the supreme court with jurisdiction.—*Stafford v. Murray*, 93 So. 195, 152 La. 389—*Immanuel Presbyterian Church v. Riedy*, 27 So. 888, 52 La. Ann. 1353.

In revocatory action the amount of the claim or debt sought to be collected controls the forum of appeal.—*Weinfurter v. Cresap*, 99 So. 528, 155 La. 682—*Gast v. Gast*, La. App., 181 So. 204—*Lowe v. Garriga*, La.App., 162 So. 441, cause remanded 166 So. 131, 184 La. 436, conformed to, App., 169 So. 109.

In suit to rescind land contract, the amount in dispute, as regards the jurisdiction, is the purchase price

or value of the property, and not the amount of the deposit.—*Richardson v. Charles Kirsch & Co.*, La.App., 179 So. 631, transferred, see 187 So. 1, 191 La. 991, transferred, see 189 So. 146, rehearing denied 189 So. 621—*Bussey v. Wise-Miller*, 129 So. 166, 14 La.App. 104, transferred, see 133 So. 443, 172 La. 198, followed in *Bussey v. Barilleaux*, 129 So. 167, 14 La.App. 82, transferred, see 172 La. 204—*Hunley v. Ascani*, 129 So. 164, 14 La.App. 95, followed in *Bussey v. Barilleaux*, 129 So. 167, 14 La.App. 82, transferred, see 133 So. 446, 172 La. 204.

Petitory action

(1) In petitory action, title itself is in dispute, and amount involved is not merely value of right of occupancy.—*Bywater v. Enderle*, 139 So. 84, 19 La.App. 417.

(2) In such an action to have title to property recognized, coupled with demand for rent, an appeal from judgment for sum less than minimum jurisdiction of supreme court is not dismissible.—*Pino v. Dufour*, 140 So. 31, 174 La. 227.

Where executory process had been sued out by mortgagee against mortgagor seizing mortgaged property, amount of claim and not value of property against which mortgage was asserted determines appellate jurisdiction.—*Gaillardanne v. Locascio*, 162 So. 69, 182 La. 539.

17. La.—*Fontenot v. Ludeau*, 182 So. 125, 190 La. 133—*Buttner v. Palmisano*, 93 So. 880, 152 La. 587—*Wagner v. New Orleans Ry. & Light Co.*, 91 So. 817, 151 La. 400—*Reine v. Pontchartrain R. Co.*, 81 So. 301, 144 La. 750—*Cusachs v. Salmen Brick & Lumber Co.*, 80 So. 608, 144 La. 411—*Trascher v. Johnson*, App., 163 So. 431—*Greco v. Frigerio*, 3 La.App. 649.

15 C.J. p 1066 note 80 [g].

Allegation of one litigant as to value of right involved in suit or amount in dispute is not controlling on question of appellate jurisdiction, especially when made for obvious purpose of establishing jurisdiction.—*Fontenot v. Ludeau*, 182 So. 125, 190 La. 133.

18. La.—*State ex rel. Harvey v. Stanly*, 138 So. 845, 173 La. 807—*Perez v. Cognevich*, 100 So. 444, 156 La. 331—*State ex rel. Smith v. Beauregard Parish Democratic Executive Committee*, 97 So. 876, 154 La. 603—*McDow v. Walker*, 86 So. 481, 147 La. 1025—*Williamson v. Cridelle*, 79 So. 873, 143 La.

Although the jurisdictional amount should be alleged,¹⁹ in determining the question of jurisdiction, the appellate court is not bound to accept allegations as to the amount in controversy but will look into the record to ascertain the real amount in dispute,²⁰ and may consider proof by affidavits.²¹

Reduction of amount. A remittitur, admission, or withdrawal, reducing the amount claimed, before judgment in the trial court, to below the particular appellate court's jurisdictional amount, deprives that court of appellate jurisdiction,²² but not where such

1098—Coco v. Oden, 79 So. 287, 143 La. 718, 8 A.L.R. 679, error dismissed Odon v. Coco, 39 S.Ct. 386, 249 U.S. 587, 63 L.Ed. 790—State ex rel. Moss v. Willis, App., 184 So. 221—Davis v. Hill, 8 La.App. 43, 15 C.J. p 1066 note 80 [e], [f].

In quo warranto involving right to office of director in corporation, value of shares of stock owned by defendants and net value of assets of corporation were not pertinent in determining question of jurisdiction of court of appeal to try title to the office.—State ex rel. Moss v. Willis, La.App., 184 So. 221.

Under statute creating new boards "Matter in dispute" on applications of members of fire and police department boards, appointed under statute abolishing boards existing under city charter and creating new boards with new members, for writs of certiorari and prohibition ordering members of old boards to desist from execution of judgment restraining members of new boards from taking office, would not be measured by value of offices of members of new boards, as regards whether supreme court had jurisdiction.—Walmsley v. O'Hara, 161 So. 587, 182 La. 213.

19. La.—State v. Sewerage, etc., Board, 37 So. 878, 113 La. 924, 15 C.J. p 1066 note 80 [l], [m].

Uncertainty of demand

Where demand for judgment commanding highway commission to put in adequate culverts was too uncertain to warrant relief, it was too uncertain to show cost of culverts would exceed jurisdiction of court of appeal.—Murrif v. Louisiana Highway Commission, 146 So. 767, denying rehearing 146 So. 328.

20. La.—H. A. Bauman, Inc., v. Tilly, 177 So. 657, 188 La. 531, transferred, see App., 175 So. 489—Le Rosen v. North Central Texas Oil Co., 120 So. 862, 167 La. 1076—Trenchard v. Central Laundry Co., 98 So. 558, 154 La. 1003—Wagner v. New Orleans Ry. & Light Co., 91 So. 817, 151 La. 400—In re Aztec Land Co., 81 So. 382, 144 La. 889—State ex rel. Long v. Board of Deacons of Good Hope Second Baptist Church of Algiers, 80 So. 608, 144 La. 413—Wunderlich v. New Orleans Ry. & Light Co., 79 So. 80, 143 La. 626—State ex rel. Moss v. Willis, App., 184 So. 221—Templeman v. Templeman Bros., App., 161 So. 48, transferred, see Sup., 187 La. 482, 175 So. 34.

Asking for less than amount in issue

An appellant's brief does not have the effect of amending his pleadings, and where the amount in issue is over two thousand dollars, the supreme court has jurisdiction of the appeal, although appellant's brief asks judgment for less than that amount.—Ducros v. St. Bernard Cypress Co., 114 So. 654, 164 La. 787.

Amount acknowledged to be due

On question of appellate jurisdiction, amount which defendant in answer judicially acknowledges to be due is not in dispute.—Steege Printing & Publishing Co. v. Auto Lec Stores, 134 So. 746, 172 La. 565, transferred, see 138 So. 899, 18 La.App. 477.

Burden of proof

On appeal of civil case of which district court had exclusive original jurisdiction, appellant has burden of affirmatively proving amount in dispute was under two thousand dollars to establish court of appeals jurisdiction.—Ducre v. Milner, 141 So. 617, annulling 140 So. 158, rehearing denied 142 So. 618, set aside 144 So. 610, 175 La. 897, conformed to, App., 146 So. 734, rehearing denied 146 So. 735.

Petition and answer

In determining jurisdiction of supreme court, amount demanded is determined from petition, while amount in dispute is determined from petition and answer.—Villemeur v. Woodward, 132 So. 361, 171 La. 831, transferred, see 130 So. 366, 14 La.App. 597, and transferred, see 134 So. 111, 16 La.App. 535.

Supreme court may review evidence in a suit for damages, in order to determine if the amount claimed as damages has been inflated, for the purpose of conferring appellate jurisdiction.—Trenchard v. Central Laundry Co., 98 So. 558, 154 La. 1003.

Where record does not affirmatively show that the amount involved exceeds two thousand dollars, the supreme court has no jurisdiction.—Nick v. Bensberg, 48 So. 986, 123 La. 351.

21. La.—Fontenot v. Ludeau, 182 So. 125, 190 La. 133—Ducre v. Milner, 144 So. 610, 175 La. 897, setting aside, App., 141 So. 617, which annulled 140 So. 158, rehearing denied 142 So. 618, and 146 So. 734, conformed to 146 So. 734—

Quaker Realty Co. v. City of New Orleans, 111 So. 791, 163 La. 374—Cousin v. St. Tammany Bank & Trust Co., 83 So. 685, 146 La. 393—In re Aztec Land Co., 81 So. 382, 144 La. 889—State ex rel. Moss v. Willis, App., 184 So. 221—Ethridge-Atkins Corporation v. Johnson, App., 183 So. 37—Young v. Geter, App., 170 So. 410, conforming to certified questions 170 So. 240, 185 La. 709, 107 A.L.R. 608.

Affidavit annexed to appeal from order appointing receiver that amount involved was more than two thousand dollars has been held sufficient to give supreme court jurisdiction.—A. Weinfeld, Inc., v. Ferd. S. Kaufman, Inc., 143 So. 277, 175 La. 321.

Place of filing

Affidavit of value in proof of amount in contest to determine appellate jurisdiction should be filed in appellate court, and filing in district court affidavit of value for proving amount in contest, is not filing in appellate court, entitling affidavit to consideration in determining jurisdiction.—Ducre v. Milner, La.App., 142 So. 618, denying rehearing 141 So. 617, annulling 140 So. 158, set aside, Sup., 144 So. 610, conformed to, App., 146 So. 734.

Time of filing

Affidavits as to value of property involved in suits may be filed in supreme court by appellants after filing of motions to dismiss appeals thereto for lack of pecuniary jurisdiction.—Fontenot v. Ludeau, 182 So. 125, 190 La. 133.

Where petition contains sworn statement that value of property in dispute exceeds two thousand dollars in value, the appeal will not be dismissed for want of jurisdiction.—Lane v. Ferre, 85 So. 186, 147 La. 796.

22. La.—Hanover Fire Ins. Co. v. Southern Amusement Co., 146 So. 316, 176 La. 631, transferred, see App., 150 So. 92—Reed v. Eureka Homestead Soc., 141 So. 847, 174 La. 823—Givens v. Yazoo & M. V. R. Co., 137 So. 66, 173 La. 372—Chickasaw Wood Products Co. v. Vail-Donaldson Co., 136 So. 87, 173 La. 59, transferred, see 138 So. 680, 19 La.App. 315—City of New Orleans, by and through Public Belt Railroad Commission, v. New Orleans Coal & Bisso Towboat Co., 123 So. 724, 168 La. 1093, transferred, see 124 So. 693, 12 La.App.

reduction is made after judgment or verdict.²³

§ 382. — Cases Involving Constitutional Questions

The supreme court has appellate jurisdiction in a case in which an ordinance or statute has been declared unconstitutional.

Under Constitution article 7 § 10, the supreme court has appellate jurisdiction in all cases where in an ordinance of a parish, municipal corporation, board, or subdivision of the state²⁴ or a law of the state,²⁵ has been declared unconstitutional, by the lower court,²⁶ in which cases the appeal on the law and the facts shall be directly from the court in which the case originated to the supreme court, except in cases in which appeal to the court of ap-

peal is required by a special provision of the constitution.²⁷ Under the provision of article 7 § 10, however, the appellate jurisdiction of the supreme court, in such cases, is limited to passing on the constitutionality of the ordinance or statute declared to be unconstitutional.²⁸

§ 383. — Cases Involving Tax, Toll, Impost, Fine, or Penalty

The supreme court has appellate jurisdiction of cases in which is contested the constitutionality or legality of any tax, toll, impost, fine, forfeiture, or penalty.

Under Constitution article 7 § 10, the supreme court has appellate jurisdiction in all cases where in is contested the constitutionality or legality of any tax,²⁹ or the constitutionality or legality of

124—O'Shee v. Chaudoir, 97 So. 796, 154 La. 517—Automobile Finance & Securities Co. v. Dugan, Inc., 91 So. 291, 150 La. 903—Southern Scrap Material Co. v. Liquidating Com'rs of Carondelet Canal & Navigation Co., 79 So. 176, 143 La. 647.

Amount admitted due in answer must be deducted from amount claimed in petition in determining amount in controversy for jurisdictional purposes.—Nelson v. Continental Asphalt & Petroleum Co., 103 So. 583, 157 La. 491.

Confession of judgment

Supreme court is without jurisdiction of appeal, in action to recover of an adjoining proprietor one half the value of a party wall, where defendants, by confessing judgment in favor of plaintiff for smaller amount, and praying that she have judgment against them for that sum, thereby reduces amount in dispute below minimum appellate jurisdiction of supreme court.—Fitzgerald v. Katzenstein, 105 So. 226, 159 La. 64.

Failure to dispute part of claim as not affirmative admission

La.—Burnstein v. Fallo, 99 So. 285, 155 La. 345.

23. La.—Givens v. Yazoo & M. V. R. Co., 137 So. 66, 173 La. 372—State ex rel. Kenner v. Jones, App., 191 So. 288—Shreveport Laundries v. St. Paul-Mercury Indemnity Co. of St. Paul, App., 169 So. 353—Carlock v. Kusun, App., 167 So. 459—Spector v. Union City Transfer, App., 182 So. 524.

After appeal is taken, appellee cannot, by abandoning part of the claim or acquiescing in part of the judgment, change the forum to which the case should be appealed.—Pritchard v. Southern Ins. Co. of Nashville, Tenn., 137 So. 907, 173 La. 504—Norwood v. Lake Bisteneau Oil Co., 83 So. 25, 145 La. 823.

24. La.—City of Shreveport v. Gregory, 172 So. 435, 186 La. 407—Wolf v. Commission Council of City of Hammond, 80 So. 216, 144 La. 107—Grosjean v. American Paint Works, App., 160 So. 449—Soniat v. Village of Krotz Springs, 2 La. App. 706.

15 C.J. p 1069 notes 2, 4.

If ordinance has not been declared unconstitutional by the trial court, the supreme court, has no jurisdiction under this provision.—Wolf v. Commission Council of City of Hammond, 80 So. 216, 144 La. 107.

25. La.—Paul v. Tabony, 102 So. 503, 157 La. 400—Grosjean v. American Paint Works, App., 160 So. 449—State ex rel. John Scott v. Ratcliff, 5 La.App. 412.

15 C.J. p 1069 notes 3, 4.

Estoppel to challenge validity

Where mortgagor sought benefit of Moratorium Law, mortgagee having acquiesced in proceeding by answering rule to show cause and invoking statute without attacking validity thereof cannot challenge validity of law in reviewing court.—Newman v. Reems, 158 So. 13, 180 La. 904.

26. La.—Paul v. Tabony, 102 So. 503, 157 La. 400—State ex rel. Paillet v. Board of Parole, 91 So. 759, 151 La. 345—State ex rel. Kahn v. Bell, 86 So. 657, 148 La. 72.

15 C.J. p 1069 note 4.

Where law has been declared constitutional by the lower court, the supreme court is without appellate jurisdiction, under this provision.—State ex rel. Thoman v. Williams, 113 So. 817, 164 La. 202—State v. Breau, 79 So. 209, 143 La. 653—Landry v. Gonzales, 77 So. 287, 142 La. 577—State v. Hunter, 38 So. 686, 114 La. 939.

Jurisdiction of court of appeal

This provision impliedly gives court of appeal jurisdiction of cases where trial court upholds constitutionality of law.—Pinder v. Board

of Sup'rs of Election of Calcasieu Parish, La.App., 146 So. 715.

Merely raising constitutional question does not vest the supreme court with appellate jurisdiction.—Clementine v. Ritchie, 99 So. 213, 155 La. 263—State v. Price, 124 La. 670, 50 So. 647.

Presumption

Where the judgment appealed from may have been based either on the ground that the case presented was not within the law relied on, or on the ground that such law is unconstitutional, it will not be presumed for the purpose of the jurisdiction on appeal, that the latter was the ground adopted.—State v. Yazoo, etc., R. Co., 40 So. 630, 116 La. 189.

27. **Appeal by removed member of police jury to court of appeal, as provided by Const. 1913 § 222.**—State ex rel. Garland v. Singleton, 82 So. 371, 145 La. 361.

28. La.—City of New Orleans v. Postek, 158 So. 553, 180 La. 1048—State v. Sibley, 94 So. 410, 152 La. 825—State ex rel. Kahn v. Bell, 86 So. 657, 148 La. 72—City of Shreveport v. Mackie, 73 So. 842, 140 La. 724—Hammond v. Badeau, 69 So. 202, 137 La. 828.

Liability for license

Where defendant is sued for a license as a retail liquor dealer, and defends on the ground that he was a wholesale merchant, the question on review is one of fact as to his liability, and an appeal will not lie to the supreme court on the ground of the unconstitutionality of the act under which the taxes are levied.—New Orleans v. Reems, 21 So. 599, 49 La. Ann. 793.

29. La.—State ex rel. Grosjean v. Standard Oil Co. of Louisiana, 162 So. 185, 182 La. 577—State v. Whitehead Motor Co., 154 So. 912, 179 La. 710—State v. Armbruster, 139 So. 753, 174 La. 41—Clade v. La Salle Realty Co., 81 So. 598.

any local improvement assessment,³⁰ any toll or wherein is contested the legality or constitutionality of any fine,³¹ forfeiture,³² or penalty³³ imposed by a parish, municipality, board, or subdivision of the state;

144 La. 989—Town of Minden v. Stewart, 77 So. 118, 142 La. 467—Dusenbury v. Board of Com'rs for St. Tammany Drainage Dist. No. 2, App., 178 So. 637, transferred, see 182 So. 719, 190 La. 694—Grosjean v. American Paint Works, App., 160 So. 449—Esto Real Estate Corporation v. Louisiana Tax Commission, 127 So. 12, 13 La.App. 81, transferred, see 129 So. 117, 170 La. 649.

15 C.J. p 1067 note 92.

Constitutionality or legality is contested

(1) Where applicability of taxing statute to entire class is in dispute.—State v. Moore, 140 So. 516, 19 La. App. 364, transferred, see 143 So. 707, 175 La. 607, followed in State v. Charles E. Wermuth Co., 140 So. 699, 19 La.App. 443, transferred, see 147 So. 692, 177 La. 83.

(2) When judicial interpretation of tax statute invoked is necessary to determine whether tax claimed is due, or when defendant pleads that there is no statute compelling payment of tax claimed.—State v. Whitehead Motor Co., 154 So. 912, 179 La. 710—State v. Cedar Grove Refining Co., 152 So. 531, 178 La. 810—State v. Wenar, 42 So. 726, 118 La. 141.

(3) Where, in a suit to annul and avoid an assessment of property for taxation and to enjoin collection of the tax, plaintiff contends that the property is not subject to assessment or taxation in any amount, and, therefore, the assessment is illegal and void.—Esto Real Estate Corporation v. Louisiana Tax Commission, 127 So. 12, 13 La.App. 81, transferred, see 129 So. 117, 170 La. 649.

Attack on assessment only will not suffice, so as to give the supreme court jurisdiction on appeal, as involving the validity of a tax.—Teabault v. New Orleans, 32 So. 983, 108 La. 686.

License tax

A case presenting a contest as to the constitutionality or legality of a license tax is within the appellate jurisdiction of the supreme court.—State v. Cedar Grove Refining Co., 152 So. 531, 178 La. 810—Downs v. Dunn, 111 So. 82, 162 La. 747—State ex rel. Brittain v. Hayes, 78 So. 143, 143 La. 39—State v. Moore, 140 So. 516, 19 La.App. 364, transferred, see 143 So. 707, 175 La. 607, followed in State v. Charles E. Wermuth Co., 140 So. 699, 19 La.App. 443, transferred, see 147 So. 692, 177 La. 83. 15 C.J. p 1067 note 92 [a].

Direct appeal

(1) Defendant attacking by exception and answer constitutionality of statute imposing tax has right to appeal directly to supreme court on constitutional question in proceedings for recovery of tax.—Grosjean v. American Paint Works, La.App., 160 So. 449.

(2) Where amount of tax depends on the construction of revenue statute, the legality of tax is in contestation, and an appeal lies from court of first instance directly to supreme court.—State ex rel. Guillot v. Central Bank & Trust Co., 79 So. 857, 143 La. 1053.

30. La.—Boagni v. Mayor and Board of Aldermen of City of Opelousas, 149 So. 494, 177 La. 835, transferred, see App., 145 So. 780—Saunders v. City of Opelousas, 105 So. 608, 159 La. 527—Town of Winnfield v. Collins, 78 So. 747, 143 La. 493—Burke v. Mayor and Board of Trustees, City of New Iberia, App., 171 So. 425—Boagni v. Mayor and Board of Aldermen of City of Opelousas, App., 145 So. 780, transferred, see 149 So. 494, 177 La. 835.

As "tax"

(1) Where local assessment for street improvements is made or levied by compulsion of law, without regard to the assent or dissent of the abutting owners, it presents the case of a "tax," as used in the constitutional provision conferring jurisdiction on supreme court.—Town of Minden v. Stewart, 77 So. 118, 142 La. 467—15 C.J. p 1067 note 92 [c].

(2) A local assessment or forced contribution imposed under authority of a petition of a majority of property owners is not a "tax," within such provision.—City of Shreveport v. Land, 86 So. 499, 147 La. 1075—Grasser Paving & Contracting Co. v. Richardson, 81 So. 429, 144 La. 933—Ayers Asphalt Pav. Co. v. Loewengardt, 33 So. 553, 109 La. 439.

Denial that assessment is properly apportioned raises the question of the legality of the assessment and creates an issue of which the supreme court has jurisdiction, without regard to the amount in dispute.—Moody v. Spotorno, 36 So. 836, 112 La. 1008.

Court of appeal has no jurisdiction in cases involving constitutionality of municipal local improvement assessments.—City of Monroe v. Cooper, 120 So. 551, 9 La.App. 291.

31. La.—New Orleans v. Williams, 64 So. 229, 134 La. 421. 15 C.J. p 1068 note 95.

Appeal from city criminal court

Supreme court could have jurisdiction of appeal from judgment of city criminal court, convicting defendant of violation of ordinance of sewerage and water board of city of New Orleans, and fining her twenty dollars, only on hypothesis that appeal involved legality of fine imposed by municipal corporation.—State v. Servat, 78 So. 437, 113 La. 175.

Decision must be necessary

The supreme court will not take jurisdiction of an appeal from a judgment of a justice's court, taken on the ground that the constitutionality of an ordinance imposing a fine was in controversy, unless the pleadings raised the issue, and the facts called for a decision thereon.—Moss v. Newhouse, 27 So. 536, 52 La. Ann. 945.

32. La.—Coreil v. Welsh, 45 So. 438, 120 La. 557.

15 C.J. p 1068 note 96.

33. La.—Noe v. Maestri, 190 So. 588, 193 La. 382—Town of Waterproof v. Towles, 156 So. 211, 180 La. 168.

15 C.J. p 1068 note 97.

In prosecution in mayor's court under city ordinance, if question of constitutionality or legality of ordinance had been tendered and decided therein, either town or defendant would have had right of appeal direct to supreme court on question of validity of ordinance, and defendant would have had right of appeal to district court on other questions.—Town of St. Martinville v. Dugas, 103 So. 761, 158 La. 262.

Violation of liquor ordinance

The supreme court has jurisdiction of appeal from conviction and sentence for violating parish ordinance prohibiting sale of intoxicating liquor, when the constitutionality or legality of the ordinance is in contest, even though the court below has declared the ordinance constitutional and legal, as such ordinance is a penal ordinance.—State v. Wactor, 179 So. 865, 189 La. 535.

Ordinance directing impounding of animals found running at large and authorizing public sales imposes "penalty," giving supreme court appellate jurisdiction.—Boykin v. Police Jury of Richland Parish, 126 So. 511, 169 La. 1014.

Supreme court and not criminal district court has jurisdiction of an appeal from New Orleans recorder's court, when constitutionality or legality of penalty imposed by ordinance is in question.—City of New Orleans v. New Orleans Butchers'

or subdivision of the state.³⁴ If the question of constitutionality or legality is properly contested, the supreme court has appellate jurisdiction in such cases regardless of the amount in dispute,³⁵ and regardless of the decision of the lower court;³⁶ but it has no appellate jurisdiction if neither the constitutionality of the ordinance or statute involved nor the legality of the tax, toll, fine, or penalty is disputed in the lower court, and the jurisdictional amount is absent.³⁷ If the constitutionality of an ordinance is first invoked on appeal to a district court, the supreme court has no appellate jurisdiction thereof.³⁸

The supreme court's appellate jurisdiction in such cases extends only to the question of the constitutionality or legality of the ordinance or statute involved,³⁹ and not as to whether it applies to a particular case,⁴⁰ nor to questions as to the regularity or legality of the trial or proceedings.⁴¹ Other questions must be disposed of by the court

of appeal, as explained supra § 379, or by another court, as authorized by the constitution.⁴²

§ 384. Maine

The supreme judicial court of Maine is a court of general common-law and appellate jurisdiction, exercising general superintendence over all inferior courts; it is obliged to give advisory opinions on important questions of law and on solemn occasions when requested by the governor, council, senate or house of representatives. The supreme court of probate exercises certain appellate jurisdiction over probate courts.

The supreme judicial court has general common-law jurisdiction in all cases, unless its powers are restricted by constitution or statute;⁴³ it has general superintendence of all courts of inferior jurisdiction, for the prevention and correction of errors and abuses, where the laws do not expressly provide a remedy,⁴⁴ and it may issue all writs and processes, not within the exclusive jurisdiction of the superior court, necessary for the furtherance of justice or the execution of the laws.⁴⁵

Co-op Abattoir, 96 So. 113, 153 La. 536.

Supreme court will not restrain arrest and prosecution of those who violate penal statutes, except in cases where property rights will be injuriously affected by the arrest and prosecution.—Leesville Club v. Town of Leesville, 125 So. 125, 169 La. 284.

34. La.—De Ridder v. Head, 72 So. 374, 139 La. 340.

Municipal corporation is parish within the meaning of the constitution.—State v. Hagen, 67 So. 935, 126 La. 268.

35. La.—State ex rel. Grosjean v. Standard Oil Co. of Louisiana, 162 So. 185, 182 La. 577—Town of Waterproof v. Towles, 156 So. 211, 180 La. 168—State v. Whitehead Motor Co., 154 So. 912, 173 La. 710—State v. Armbruster, 139 So. 753, 174 La. 41—Town of Jonesville v. Boyd, 108 So. 481, 161 La. 278, 48 A.L.R. 142—Saunders v. City of Opelousas, 105 So. 608, 159 La. 527—Town of Winnfield v. Collins, 78 So. 747, 143 La. 493—State ex rel. Brittain v. Hayes, 78 So. 143, 143 La. 39—Town of Minden v. Stewart, 77 So. 118, 142 La. 467. 15 C.J. p 1058 note 1.

Amount in controversy as affecting jurisdiction generally see supra § 381.

36. La.—State v. Bonner, 190 So. 625, 193 La. 400—State v. Wacter, 179 So. 865, 189 La. 535.

Sustaining constitutionality of ordinance in lower court does not prevent the supreme court from taking appellate jurisdiction of the question of the legality or constitutionality of the ordinance.—City of

New Orleans v. Compagnet, 99 So. 395, 155 La. 437—City of New Orleans v. Hartman, 99 So. 394, 155 La. 436—City of New Orleans v. Poulet, 99 So. 394, 155 La. 435—City of New Orleans v. Ernst, 99 So. 391, 155 La. 426—City of New Orleans v. Vinci, 96 So. 110, 153 La. 528, 28 A.L.R. 1382.

37. La.—State v. Bonner, 190 So. 625, 193 La. 400—Oden v. Zachery, 111 So. 463, 162 La. 1083—Larabee v. Landry, 101 So. 315, 156 La. 939—Hughes v. S. B. Hicks Motor Co., 99 So. 47, 155 La. 228—State v. Louisiana Ry. & Nav. Co., 91 So. 253, 150 La. 887—State v. Serlo & Messina, 90 So. 385, 149 La. 1006—Ballard v. Patenotte, 86 So. 367, 147 La. 936.

15 C.J. p 1067 note 92 [f], [h], [j], [l], [o], [p], p 1069 note 2 [d].

38. La.—Town of Springhill v. Murphy, 129 So. 634, 170 La. 1054—Town of St. Martinville v. Dugas, 103 So. 761, 158 La. 262.

39. La.—State v. Louisiana Ry. & Nav. Co., 96 So. 667, 153 La. 816—City of New Orleans v. New Orleans Butchers' Co-op. Abattoir, 96 So. 113, 153 La. 536—State v. Gallagher Transfer & Storage Co., 96 So. 111, 153 La. 533.

15 C.J. p 1067 note 92 [n], p 1068 notes 95 [a], 97 [a], [b], p 1069 note 2 [a].

40. La.—State v. Gallagher Transfer & Storage Co., 96 So. 111, 153 La. 533.

41. La.—Town of Waterproof v. Towles, 156 So. 211, 180 La. 168—City of Shreveport v. Nejin, 73 So. 986, 140 La. 785—Hammond v. Badeau, 69 So. 202, 137 La. 828.

15 C.J. p 1069 note 2 [c].

42. La.—Ruston v. Fountain, 42 So. 644, 118 La. 53.

Criminal district court

In case originating in New Orleans recorder's court involving question of constitutionality or legality of ordinance imposing fine, forfeiture, or penalty, the criminal district court has exclusive appellate jurisdiction of all questions except that as to validity of the ordinance.—City of New Orleans v. New Orleans Butchers' Co-op. Abattoir, 96 So. 113, 153 La. 536.

43. Me.—Badger v. Towle, 48 Me. 20.

Removal of forcible entry and detainer action

*Under Rev.St. c 96 § 6, providing for removal of an action of forcible entry and detainer to the supreme court when defendant files a brief statement of title in himself or in another under whom he claims, but not providing for removal where defendant merely denies plaintiff's title, the only issue open to defendant in the supreme court is the issue of his title, as by pleading title and securing a removal all the other issues are waived.—Reed v. Reed, 95 A. 211, 113 Me. 522.

44. Me.—Waukeag Ferry Ass'n v. Arey, 146 A. 10, 128 Me. 108—Harriman v. Waldo County Comrs., 53 Me. 83.

45. Me.—Harriman v. Waldo County Comrs., supra.

Writ of prohibition

Me.—Norton v. Emery, 81 A. 671, 108 Me. 472—Harriman v. Waldo County Comrs., 53 Me. 83.

When sitting as a law court it is not a constitutional court, but one created by statute and its jurisdiction is limited thereby;⁴⁶ and it has been held that, while sitting in banc as such a court, it does not have original jurisdiction and so cannot grant leave to amend,⁴⁷ nor hear a motion to set aside a verdict as against the weight of evidence where there has been no ruling thereon by the court below.⁴⁸ The court has only such equity powers as are conferred by statute;⁴⁹ but under the statutes the court possesses full equity jurisdiction, according to the usage and practice of courts of equity, in all cases where there is not a plain, adequate, and complete remedy at law.⁵⁰

Advisory opinions. The justices of this court are, by virtue of a constitutional provision, obliged to give their opinion on important questions of law, and on solemn occasions, when required by the governor, council, senate, or house of representatives;⁵¹ but such advisory opinions are proper only with respect to matters of instant concern, and not as to matters of past or future concern.⁵²

The supreme court of probate exercises, with certain statutory exceptions, appellate jurisdiction over the probate court;⁵³ and questions of law when properly presented by bills of exception,⁵⁴ or by an agreed statement of facts,⁵⁵ may be tak-

en from the supreme court of probate to the law court.

Formerly the supreme judicial court was also the supreme court of probate, the latter court being held by one member of the court at nisi prius term;⁵⁶ but under the present statute the superior court sits in that capacity.⁵⁷

§ 385. Maryland

Particular appellate courts in the state of Maryland are considered infra §§ 386, 387.

§ 386. — Court of Appeals

The court of appeals in Maryland has appellate jurisdiction only, with power to issue such writs as may be necessary to the exercise of such jurisdiction.

The court of appeals has appellate jurisdiction only,⁵⁸ and it is beyond the power of the legislature to confer original jurisdiction upon it, and accordingly, this court is without jurisdiction to issue original writs of certiorari, habeas corpus, or mandamus;⁵⁹ but such writs may be issued where it is necessary to a proper exercise of the court's appellate jurisdiction.⁶⁰ Except where otherwise provided by statute,⁶¹ the court of appeals is the proper court to review a decision of the orphans' court.⁶²

46. Me.—Appeal of Kelley, 1 A.2d 183, 136 Me. 7—Ex parte Holbrook, 177 A. 418, 133 Me. 276—State v. Gustin, 122 A. 856, 123 Me. 307.

47. Me.—Haim v. Coleman, 135 A. 33, 125 Me. 478.

48. Me.—State v. Gustin, 122 A. 856, 123 Me. 307.

49. Me.—Charles Cushman Co. v. Mackesy, 200 A. 505, 135 Me. 490, 118 A.L.R. 148—Tuscan v. Smith, 153 A. 289, 130 Me. 36, 73 A.L.R. 1344—Androscoggin & Kennebec R. Co. v. Androscoggin R. Co., 49 Me. 392.

50. Me.—Tuscan v. Smith, 153 A. 289, 130 Me. 36, 73 A.L.R. 1344—Eaton v. Thayer, 128 A. 475, 124 Me. 311.

Prevention of constitutional violation
By virtue of its enlarged equity powers the supreme judicial court is fully invested with jurisdiction to enable it to prevent a manifest violation of the constitution.—Blood v. Beal, 60 A. 427, 100 Me. 30.

Under former statute
Me.—Tappan v. Deblois, 45 Me. 122—15 C.J. p 1073 note 86.

51. Me.—In re Opinion of the Justices, 191 A. 487, 134 Me. 510—In re Opinion of the Justices, 128 A. 181, 124 Me. 501.
15 C.J. p 1072 notes 66, 67.

Questions held to require answer
Me.—Opinion of the Justices, 133 A. 265, 125 Me. 529.

Questions held not to require answer
Me.—In re Opinion of the Justices, 191 A. 487, 134 Me. 510—In re Opinion of the Justices, 191 A. 485, 135 Me. 519—In re Opinion of the Justices, 182 A. 17, 134 Me. 507—In re Opinion of the Justices, 174 A. 843, 132 Me. 509—In re Opinion of the Justices, 133 A. 265, 125 Me. 529—In re Opinion of the Justices, 128 A. 691, 124 Me. 512—In re Opinion of the Justices, 128 A. 181, 124 Me. 501—In re Opinion of the Justices, 126 A. 354, 124 Me. 453.

Power, duty and authority of executive

Justices of supreme judicial court may, at request of governor, or executive council, or both, advise regarding power, duty, and authority vested in executive branch of government, but not on request of legislature or either branch thereof.—In re Opinion of the Justices, 167 A. 176, 132 Me. 491.

52. Me.—In re Opinion of the Justices, 191 A. 487, 134 Me. 510.

Acts already done
Me.—Opinion of the Justices, 133 A. 265, 125 Me. 529.

53. Me.—Appeal of Clements, 119 A. 115, 122 Me. 164—Stilphen's Ap-

peal, 60 A. 888, 100 Me. 146, 4 Ann. Cas. 153.
15 C.J. p 1073 note 3.

54. Me.—Appeal of Eastman, 194 A. 586—Cotting v. Tilton's Estate, 106 A. 113, 118 Me. 91—In re Swan, 99 A. 449, 115 Me. 501—McKenney v. Alvord, 73 Me. 221—Carvill v. Carvill, 73 Me. 136.

55. Me.—Appeal of Clements, 119 A. 115, 122 Me. 164.

56. Me.—Kenney v. Alvord, 73 Me. 221.

57. Me.—Appeal of Eastman, 194 A. 586.

58. Md.—Hendrick v. State, 81 A. 18, 115 Md. 552.

59. Md.—State v. Rutherford, 125 A. 725, 145 Md. 363—Hendrick v. State, 81 A. 18, 115 Md. 552.
15 C.J. p 1073 note 11.

60. Md.—State v. Rutherford, 125 A. 725, 145 Md. 363.

61. Md.—Baldwin v. Hopkins, 191 A. 565, 172 Md. 219.
15 C.J. p 1073 note 16.

62. Md.—Baldwin v. Hopkins, supra.
15 C.J. p 1073 note 14.

Courts of probate jurisdiction generally see infra §§ 298-310.

Questions involving jurisdiction

(1) The court of appeals may review a decision of the orphans' court

§ 387. — Other Courts

The circuit court exercises certain appellate jurisdiction.

The circuit courts exercise appellate jurisdiction in certain cases,⁶³ and their judgment in the exercise of this jurisdiction is final, unless a statute expressly authorizes an appeal to the court of appeals, or unless the jurisdiction of the circuit court is involved.⁶⁴ Review of the proceedings of inferior Maryland courts generally is considered in § 267.

§ 388. Massachusetts

The appellate courts in Massachusetts are considered *infra* §§ 389, 390.

§ 389. — Supreme Judicial Court

The supreme judicial court exercises appellate jurisdiction and general supervisory control over inferior

courts, as well as certain original jurisdiction. Also it is obliged to give advisory opinions on important questions of law and on solemn occasions when requested by either branch of the legislature or the governor and council.

The supreme judicial court has appellate jurisdiction over the superior court,⁶⁵ over the supreme judicial court when it is sitting as a trial court for a county,⁶⁶ and, except as may be otherwise provided by statute, over probate courts.⁶⁷ Also it has general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein where no other remedy is expressly provided;⁶⁸ and it may issue all writs and processes which may be necessary to the furtherance of justice and to the regular execution of the laws.⁶⁹ The supreme judicial court sitting for a county may exercise certain appellate jurisdiction over other courts;⁷⁰ but questions of law, such as arise by assignments of error,⁷¹ exceptions,⁷² or a report of the case on an agreed statement or case stated⁷³ are within the exclusive jurisdiction of the full court,

which transcends its restricted power.—*Newton v. Johnson*, 195 A. 312, 173 M.J. 166.

(2) Where the petition in a probate proceeding improperly combines an allegation as to the omission of assets, over which subject the orphans' court has jurisdiction, with other independent matters over which the orphans' court has no jurisdiction, and the order of the court, following the petition, deals with and determines both subject matters, the appeal does not lie to the circuit court, when taken from both rulings, but to the court of appeals.—*Stonesifer v. Shriver*, 59 A. 139, 100 Md. 24.

Order requiring filing of further inventory
Md.—*Pratt v. Hill*, 92 A. 543, 124 Md. 253.

63. Md.—*Daldwin v. Hopkins*, 191 A. 565, 172 Md. 219.

64. Md.—*Harford County v. Jay*, 39 A. 715, 122 Md. 324—*Stephens v. Crisfield*, 39 A. 429, 122 M.J. 190. 15 C.J. p 1073 note 17.

Certification of issue of jurisdiction
Where the issue of a circuit court's jurisdiction is involved, as in the case on appeal from a justice of the peace whose jurisdiction of the subject matter is questioned, it is proper procedure to send that issue up to the court of appeals on a certificate.—*Whittington v. Hall*, 82 A. 163, 116 Md. 467.

65. **Order of board of appeal on motor vehicle liability policies**

Under a statute providing that the decision of the superior court on appeal from an order of the board of appeal on motor vehicle liability policies should be final, the supreme ju-

dicial court has jurisdiction in certiorari concerning such a decision by the superior court.—*Merchants Mut. Casualty Co. v. Justices of Superior Court*, 197 N.E. 166, 291 Mass. 164.

66. Mass.—*Sherburne v. Howland*, 132 N.E. 183, 239 Mass. 439.

67. Mass.—*Weston v. Fuller*, 9 N. E.2d 538.

15 C.J. p 1075 notes 61-71.

A judgment of the court of common pleas, rendered on appeal from the decision of commissioners on an insolvent estate appointed by the judge of probate, was reversed for want of jurisdiction, as the appeal should have been taken to the supreme judicial court.—*Waters v. Randall*, 8 Metc., Mass., 132.

Hearing by single justice

Mass.—*Ripley v. Collins*, 38 N.E. 1133, 162 Mass. 450.

68. Mass.—*Barron v. Barronian*, 175 N.E. 271, 275 Mass. 77.

15 C.J. p 1074 notes 26-28.

This power is not invocable, however, by parties who have had their day in court and opportunity to avail themselves of remedies for review.—*Barron v. Barronian*, *supra*.

69. **Mandamus**

Mass.—*In re Strong*, 20 Pick. 484—*Howard v. Gage*, 6 Mass. 462.

15 C.J. p 1074 note 31.

Prohibition

Mass.—*Jaquith v. Fuller*, 45 N.E. 54, 167 Mass. 123—*Connecticut River R. Co. v. Franklin County Com'rs*, 127 Mass. 50, 34 Am.R. 338.

70. Mass.—*Sherburne v. Howland*, 132 N.E. 183, 239 Mass. 439.

Writ of error

A single justice of the supreme judicial court may hear the evidence

relative to issues of fact upon a writ of error, and, if he chooses, may report the case to the full court.—*Rothschild v. Knight*, 57 N.E. 337, 176 Mass. 48, affirmed 22 S.Ct. 391, 184 U.S. 334, 46 L.Ed. 573.

71. Mass.—*Joyce v. Thompson*, 119 N.E. 777, 230 Mass. 254—*Conto v. Silvia*, 49 N.E. 86, 170 Mass. 152—*Tufts v. Newton*, 119 Mass. 476.

72. Mass.—*Conto v. Silvia*, 49 N.E. 86, 170 Mass. 152—*Granger v. Bassett*, 98 Mass. 462.

15 C.J. p 1075 note 59 [c].

Exceptions from district court

Under a former statute, exceptions and appeals could be taken directly from a district court to the supreme judicial court where a jury trial was had, but not otherwise.—*Haas v. Harrington*, 116 Mass. 135.

Correction of record

The proper practice to secure correction of the record, after the entry of the exceptions or the report, is by motion to discharge the exceptions or the report for the purpose of having the corrections made, or by an agreement that corrections made by the trial judge may be considered part of the record.—*Burbank v. Farnham*, 107 N.E. 351, 108 N.E. 492, 220 Mass. 514.

73. Mass.—*Weil v. Boston El. R. Co.*, 104 N.E. 343, 216 Mass. 545—*Massachusetts Nat. Bank v. Bullock*, 120 Mass. 86.

When findings of fact by the lower court are necessary to present the question of law involved, the trial judge cannot omit to make such findings before presenting the case to the full court.—*Atlantic Maritime Co. v. City of Gloucester*, 117 N.E. 924, 228 Mass. 519.

rather than of the court when held by a single justice.

The supreme judicial court sitting for a county may exercise original jurisdiction,⁷⁴ including jurisdiction in equity in so far as it has been conferred by statute, expressly or by implication.⁷⁵

Advisory opinions. Under a constitutional provision each branch of the legislature, as well as the governor and council, has authority to require the opinions of the justices of the supreme judicial court upon important questions of law and upon solemn occasions.⁷⁶ Although such opinions presuppose judicial examination and consideration by the justices, they are advisory only,⁷⁷ and cannot overrule adjudicated cases,⁷⁸ and they are sub-

ject to reexamination when the questions involved are litigated.⁷⁹ Advisory opinions should not be given unless the question propounded comes clearly within the constitutional requirement.⁸⁰ Limitations on the obligation to give advisory opinions include requirements that the questions be such as must be determined by the body making the inquiry,⁸¹ that the questions relate to matters then pending before such body,⁸² and that the questions be doubtful ones which require solution.⁸³ Questions propounded should be explicit and specific,⁸⁴ as the practice of the justices is to confine their answers to particular questions of law submitted;⁸⁵ they are not required to answer purely abstract questions of law,⁸⁶ or discuss generally the constitutionality of a proposed statute in its entirety.⁸⁷ Questions of fact,⁸⁸ or questions of law

74. Mass.—Clark v. State St. Trust Co., 169 N.E. 897, 270 Mass. 140—Coffin v. Hussey, 12 Pick. 289. 15 C.J. p 1075 note 45 [a].

Actions not within jurisdiction

(1) An action in replevin where the value of the property is less than twenty dollars.—Leonard v. Hannon, 105 Mass. 113.

(2) An action to recover damages for an injury resulting from a defect in a highway.—Salem Turnpike & Chelsea Bridge Corp. v. Hayes, 5 Cush, Mass., 458—Hunt v. Inhabitants of Hanover, 8 Metc., Mass., 343.

75. Mass.—Allen v. Commonwealth—Atlantic Nat. Bank, 143 N.E. 149, 248 Mass. 302.

15 C.J. p 1074 note 34 [a], p 1075 note 45 [b]—[c].

Foreclosure of mortgage on street railway

Mass.—Federal Trust Co. v. Bristol County St. R. Co., 105 N.E. 1064, 218 Mass. 367.

Exclusive jurisdiction in equity conferred on supreme judicial court by Rev.L. c 159 § 2, is confined to matters not within the general principles of chancery jurisprudence, cognizable under statutes which do not expressly provide that the superior court also shall have jurisdiction.—Williams v. Nelson, 117 N. E. 189, 228 Mass. 191, Ann.Cas.1918D 538.

Former jurisdiction over annulment of marriages

Me.—Trask v. Trask, 95 A. 352, 114 Me. 60.

76. Mass.—In re Opinion of the Justices, 15 N.E.2d 813—In re Opinion of the Justices, 2 N.E.2d 789, 294 Mass. 616.

15 C.J. p 1073 notes 20, 21, p 1074 notes 22–25.

Constraining constitutionality of bill
In determining whether bill re-

garding the employment in public service of married women, if enacted, would be constitutional, justices were required to give it the meaning that it would then have.—In re Opinion of the Justices, Mass., 22 N. E.2d 49, 123 A.L.R. 199.

77. Mass.—Lowell Co-op. Bank v. Co-operative Central Bank, 191 N. E. 921, 287 Mass. 338.

78. Mass.—In re Opinion of the Justices, 165 N.E. 904, 266 Mass. 590, 63 A.L.R. 952.

Weight accorded opinions

Opinions of the justices of the supreme judicial court, required by the legislature or governor and council, while advisory and inconclusive, are accorded weight by the public and the profession as indicating what the law is.—In re Answer of Justices, 102 N.E. 644, 214 Mass. 602.

79. Mass.—City of Lynn v. Commissioner of Civil Service, 169 N. E. 502, 269 Mass. 410.

80. Mass.—In re Opinion of the Justices, 195 N.E. 357, 290 Mass. 601.

15 C.J. p 1073 note 20 [b], p 1074 note 22 [a].

81. Mass.—In re Opinion of the Justices, 195 N.E. 357, 290 Mass. 601.

Question by preceding legislative body

Generally, constitution does not require justices to give an opinion to a succeeding legislative body in reply to a request propounded by a preceding legislative body.—In re Opinion of the Justices, 195 N.E. 357, 290 Mass. 601.

82. Mass.—In re Opinion of the Justices, 22 N.E.2d 49, 123 A.L.R. 199—In re Opinion of the Justices, 191 N.E. 38, 286 Mass. 611—In re

Opinion of the Justices, 115 N.E. 921, 226 Mass. 607.

15 C.J. p 1074 notes 22 [b], 23 [a], 24 [g].

Question held pending

Mass.—In re Opinion of the Justices, 19 N.E.2d 807.

Existing statutes

Supreme judicial court is not required to express to general court, or either branch, opinions as to constitutionality or construction of statutes already enacted.—In re Opinion of the Justices, 122 N.E. 763, 231 Mass. 603—In re Opinion of the Justices, 115 N.E. 921, 226 Mass. 607.

83. Mass.—In re Opinion of the Justices, 195 N.E. 357, 290 Mass. 601—In re Opinion of the Justices, 168 N.E. 536, 289 Mass. 611, 66 A. L.R. 1477—In re Opinion of the Justices, 135 N.E. 173, 210 Mass. 601.

84. Mass.—In re Answer of the Justices to the Senate, 13 N.E.2d 787—In re Opinion of the Justices, 133 N.E. 453, 239 Mass. 606.

85. Mass.—In re Opinion of the Justices, 22 N.E.2d 49, 123 A.L.R. 199—In re Answer of the Justices to the Senate, 13 N.E.2d 787—In re Opinion of the Justices, 147 N. E. 681, 251 Mass. 569.

15 C.J. p 1074 note 23 [b].

83. Mass.—In re Opinion of the Justices, 17 N.E.2d 906.

15 C.J. p 1074 note 24 [b], [c].

87. Mass.—In re Opinion of the Justices, 8 N.E.2d 179—In re Opinion of the Justices, 176 N.E. 649, 275 Mass. 580—In re Opinion of the Justices, 159 N.E. 70, 261 Mass. 556—In re Opinion of the Justices, 159 N.E. 55, 261 Mass. 523.

88. Mass.—In re Opinion of the Justices, 17 N.E.2d 906.

15 C.J. p 1074 note 24 [b], [d], [e].

which seem likely to come up for judicial determination,⁸⁹ should not be answered.

§ 390. — Other Courts

Certain appellate jurisdiction is exercised by the superior court and the appellate division of the municipal court of Boston.

The superior court of Massachusetts has jurisdiction of all civil actions and proceedings which are legally brought before it by appeal or removal, and appellate jurisdiction of crimes tried, etc., in specified courts.⁹⁰ The review of the proceedings of the inferior courts is considered in § 268 supra.

§ 391. Michigan

Decisions relating to the Michigan supreme and circuit courts as appellate courts are discussed in the sections immediately following.

§ 392. — Supreme Court

The supreme court of Michigan has general superintending control and appellate jurisdiction over inferior courts. It has no original jurisdiction except power to issue certain remedial writs.

The supreme court of Michigan has general superintending control over all inferior courts, and it has power to issue certain writs, including writs of error,⁹¹ mandamus,⁹² quo warranto,⁹³ and other original and remedial writs.⁹⁴ Except for its power to issue such original writs, the jurisdiction of the supreme court is appellate only,⁹⁵ and it has no original equity jurisdiction.⁹⁶ In the exercise of its powers as an appellate court, however, it may inaugurate and utilize any appropriate writ or procedure as in its judgment may be deemed fit.⁹⁷

The constitution has not empowered the supreme court to settle nonjudicial controversies.⁹⁸

89. Mass.—In re Opinion of the Justices, 131 N.E. 31, 237 Mass. 613.

90. Mass.—Pinson v. Potter, 10 N.E.2d 136—Town of Hopkinton v. B. F. Sturtevant Co., 189 N.E. 107, 285 Mass. 272.

15 C.J. p 1075 note 72.

Appellate division, Boston municipal court

Mass.—Cohen v. Berkowitz, 102 N.E. 124, 215 Mass. 68—15 C.J. p 993 note 83.

91. **To circuit court**

A writ of error lies to the circuit court to remove adjudication on an appeal from probate as to a bequest in a will.—American Baptist Missionary Union v. Peck, 9 Mich. 445.

Courts to which writ does not lie

A writ of error does not lie to any inferior court, the decisions of which are first reviewable by a court other than the supreme court.—Hiney v. Cade, 1 Mich. 163.

92. Mich.—Chemical Bank & Trust Co. v. Oakland County, 251 N.W. 395, 264 Mich. 673—Thompson v. Auditor General, 247 N.W. 360, 261 Mich. 624—Groesbeck v. Board of State Canvassers, 232 N.W. 387, 251 Mich. 286—Detroit Trust Co. v. Lamb, 193 N.W. 870, 223 Mich. 49.

15 C.J. p 1076 note 78.

Jurisdiction plenary

Mich.—Chemical Bank & Trust Co. v. Oakland County, 251 N.W. 395, 264 Mich. 673.

15 C.J. p 1076 note 78 [a].

Exercise of power discretionary

Mich.—Detroit Bar Ass'n v. American Life Ins. Co., 250 N.W. 288, 264 Mich. 495.

15 C.J. p 1076 note 78 [b].

Mandamus to judge of probate will not be issued save for exceptional

reasons.—Seilnacht v. Wayne Probate Judge, 157 N.W. 77, 190 Mich. 461.

To county board

Mich.—Chemical Bank & Trust Co. v. Oakland County, 251 N.W. 395, 264 Mich. 673.

To collect money demands unauthorized

A private corporation cannot, by entering into a peculiar form of contract, avoid an action at law for its breach, or give an appellate court original jurisdiction of mandamus for the collection thereunder of money demands against it; nor will its insolvency, or the fact that it cannot meet such demands until it has raised the necessary funds, confer such jurisdiction.—Burland v. Northwestern Mut. Ben. Assoc., 11 N.W. 269, 47 Mich. 424.

Exclusive jurisdiction held in district court

An original application to the supreme court for mandamus directing the district court and the judge and clerk thereof to transfer all records and files in an action to the court of another county, the clerk having refused to transmit the same, will not be entertained, the district court having exclusive jurisdiction.—State v. Swift County Dist. Ct., 146 N.W. 480, 125 Minn. 522.

93. Mich.—Lamoreaux v. Atty.-Gen., 50 N.W. 812, 89 Mich. 146.

15 C.J. p 1076 note 79.

94. Mich.—Jones v. Eastern Michigan Motorbuses, 283 N.W. 710, 287 Mich. 619.

15 C.J. p 1076 note 81.

Proceeding treated as certiorari

Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.

Prohibition

Mich.—Baskin v. Dingeman, 209 N.W. 925, 236 Mich. 15.

95. Mich.—Tucker v. Drain Comr., 14 N.W. 676, 50 Mich. 5.

15 C.J. p 1076 note 82.

Commitment of child to institution

The supreme court's common-law jurisdiction over infants, idiots, and insane persons does not empower it to commit a child to the farm colony for epileptics, on determination that commitment by probate court is void for insufficient service of notice of hearing, the determination as to the necessity of the commitment being originally for the probate court, under Comp.L.1915 §§ 1601, 1613.—Greenman v. Dixon, 180 N.W. 487, 212 Mich. 687.

96. Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710, modifying 272 N.W. 881, 279 Mich. 493. 15 C.J. p 1076 note 83 [b].

97. Mich.—Jones v. Eastern Michigan Motorbuses, 283 N.W. 710, 287 Mich. 619.

Injunctions

(1) The supreme court does not sit for the purpose of granting injunctions, except it be on final hearing, when it is vested with jurisdiction on appeal; and, aside from the power exercised in such cases, it can interpose, if at all, only in case of a plain and gross abuse of discretion by the lower court.—Detroit, etc., Plank-Road Co. v. Frazer, 56 N.W. 1109, 98 Mich. 141.

(2) The supreme court can grant a temporary injunction, pending appeal, to prevent the removal of the subject matter beyond the jurisdiction of the court, or to otherwise prevent its decree from being rendered ineffective.—Patek v. Patek, 131 N.W. 1103, 166 Mich. 443.

98. Mich.—Hipp v. Charlevoix County, 29 N.W. 77, 62 Mich. 456.

§ 393. — Circuit Courts

The circuit courts of Michigan have appellate jurisdiction over all inferior courts and a supervisory control of the same.

The circuit courts have appellate jurisdiction over all inferior courts and tribunals,⁹⁹ and a supervisory control of the same.¹ They also have power to issue such writs as may be necessary to carry into effect their orders, judgments, or decrees, and give them general control over inferior courts and tribunals within their respective jurisdictions;² and under this power the circuit courts have been held to have jurisdiction to issue such writs as mandamus³ and certiorari.⁴

§ 394. Minnesota

Decisions relating to the Minnesota supreme court and as to appellate jurisdiction of district

courts are discussed in the sections immediately following.

§ 395. — Supreme Court

The supreme court of Minnesota has original jurisdiction in certain cases and appellate jurisdiction in all cases, both in law and equity.

Under the Minnesota constitution the supreme court has original jurisdiction in such remedial cases as may be prescribed by law,⁵ and appellate jurisdiction in all cases, both in law and equity,⁶ but there can be no trial by jury in such court.⁷ Under a statute conferring jurisdiction, it has power to issue such writs and processes as may be necessary to the execution of the laws and the furtherance of justice,⁸ including writs of mandamus,⁹ certiorari,¹⁰ prohibition,¹¹ and quo warranto.¹² The court also has, by virtue of statu-

99. Mich.—*Scilnacht v. Wayne Probate Judge*, 157 N.W. 77, 190 Mich. 461.

15 C.J. p 1076 note 85.

Appeal from probate court

(1) Where litigation instituted in probate court is taken by appeal or certification to circuit court, that court exercises appellate jurisdiction only and is restricted to issues presented by reasons assigned in support of appeal.—*In re McLouth's Estate*, 287 N.W. 477, 290 Mich. 311, certiorari granted U. S. v. Shaw, 60 S.Ct. 383.

(2) Under a statute providing that on appeal from the probate to the circuit court the latter shall proceed to trial according to the rules of law, and, if there be any question of fact it may be submitted to a jury does not contemplate a general trial or a general verdict, and the findings of the jury are to aid the court in determining questions that belong to its own equitable discretion.—*Gott v. Culp*, 7 N.W. 787, 45 Mich. 265.

(3) Upon an appeal from a probate court the circuit court is without authority to strike an amended claim from the certified record of the proceedings, but should remand the case for recertification. If the circuit court does strike such amended claim and dismisses the appeal, claimant is entitled to a reinstatement of the appeal. The claimant cannot submit to a nonsuit in the circuit court reserving a right to relitigate in the probate court.—*In re Oberle's Estate*, 270 N.W. 283, 278 Mich. 244.

1. Interference with discretion not permitted

Where probate judge, in requiring additional bond of executrix when present bond was shown to be in-

sufficient, fixed sum in excess of that necessary reasonably to protect estate, but not so much so as to constitute abuse of discretion, circuit court had no jurisdiction under general supervisory control over inferior courts to interfere with exercise of discretion by probate judge.—*In re Brant's Estate*, 256 N.W. 855, 269 Mich. 201.

2. Mich.—*In re Brant's Estate*, supra.

15 C.J. p 1076 note 93.

3. Mich.—*People v. McKay*, How.N. P. 103.

15 C.J. p 1076 note 88.

4. Mich.—*Swift v. Wayne Cir. Judges*, 31 N.W. 434, 64 Mich. 479 —*Wilson v. Bartholomew*, 7 N.W. 227, 45 Mich. 41—*Merrick v. Arabela Tp.*, 2 N.W. 922, 41 Mich. 630 —*Taylor v. St. Clair Cir. Judge*, 32 Mich. 95.

15 C.J. p 1076 note 91.

5. Minn.—*Hunt v. Hoffman*, 146 N.W. 783, 125 Minn. 249.

15 C.J. p 1076 note 94, p 1077 note 95.

6. Minn.—*Lauritsen v. Seward*, 109 N.W. 404, 99 Minn. 313.

15 C.J. p 1077 note 96.

7. Minn.—*Crowell v. Lambert*, 10 Minn. 369—*Prignitz v. Fischer*, 4 Minn. 366—*Harknis v. Scott County*, 2 Minn. 342.

15 C.J. p 1077 note 97.

8. Habeas corpus

Minn.—*In re Doll*, 50 N.W. 607, 47 Minn. 518.

Jurisdiction is limited to the cases which were determinable through such writs at the time of the adoption of the constitution.—*Lauritsen v. Seward*, 109 N.W. 404, 99 Minn. 313.

9. Minn.—*Ames v. Boland*, 1 Minn. 365.

15 C.J. p 1077 note 4.

10. Necessity that public interest require issuance

(1) The supreme court will not entertain original jurisdiction in certiorari, except in cases where general public interest requires immediate determination.—*State v. Schulz*, 171 N.W. 263, 142 Minn. 112.

(2) Without some special emergency, supreme court will not issue writ of certiorari to review probate court's order denying application for extension of time to present claims in estate under administration, but will leave applicant to his remedy in district court, which may issue the writ in such cases.—*State v. Probate Court of Hennepin County*, 172 N.W. 210, 142 Minn. 499.

11. Minn.—*Ames v. Boland*, 1 Minn. 365.

When writ may issue

Prohibition may issue out of supreme court when it clearly appears that inferior court has no rightful jurisdiction or is exceeding its legitimate powers in a matter of which it has jurisdiction, as where the district court makes an "ex parte" order appointing receiver to take over finance company's property, no emergency being shown to exist.—*State ex rel. Claude v. District Court for Fourth Judicial Dist.*, 283 N.W. 738, 204 Minn. 415.

12. Minn.—*State v. Kent*, 104 N.W. 948, 96 Minn. 255, 1 L.R.A., N.S., 824, 6 Ann.Cas. 905.

15 C.J. p 1077 note 6.

Effect of findings of fact by referee

In an original quo warranto proceeding findings of fact by a referee have the effect of a special verdict of a jury.—*State ex rel. Town of Stuntz*

tory authority, certain original jurisdiction with respect to elections.¹³

Advisory opinions, not being provided for in the constitution, cannot properly be given by the supreme court.¹⁴

§ 396. — District Courts

The district courts of Minnesota have such appellate jurisdiction as may be prescribed by law.

The district courts have such appellate jurisdiction as may be prescribed by law.¹⁵

§ 397. Mississippi

Decisions relating to the Mississippi supreme court, and to the appellate jurisdiction of the circuit courts, are considered in §§ 398, 399 *infra*.

§ 398. — Supreme Court

Except for such quasi-original jurisdiction as is necessary to preserve the dignity and decorum of the court and to give full operation to its appellate powers, the supreme court has appellate jurisdiction only. In a proper case it may give advisory opinions.

The supreme court of Mississippi has only appellate jurisdiction; it has no original jurisdiction,¹⁶

except such incidental jurisdiction of a quasi-original character as may be necessary to preserve its dignity and decorum and to give full and complete operation to its appellate powers.¹⁷ Accordingly the statutory authority to issue certain remedial writs can be invoked by the court only in aid of its appellate jurisdiction.¹⁸

Advisory opinions. Under a constitutional provision relating to the discharge of the duties of the office of governor upon the inability of the incumbent to act and providing that the judges of the supreme court shall give their opinion on certain doubtful questions arising under that section, the authority of the judges to answer questions is confined to those questions which relate to the discharge of the duties of the governor's office.¹⁹

§ 399. — Circuit Court

The circuit court in Mississippi has such appellate jurisdiction as prescribed by law.

Under the constitution the circuit court has such appellate jurisdiction as shall be prescribed by law,²⁰ and it has the power of superintendence over an inferior court exercising similar jurisdiction.²¹ Under a statute so providing the judgment of the

v. City of Chisholm, 273 N.W. 235, 199 Minn. 403.

13. Minn.—Hunt v. Hoffman, 146 N. W. 733, 125 Minn. 249.

15 C.J. p 1076 note 94 [c], p 1077 note 11.

14. Minn.—Rice v. Austin, 19 Minn. 103.—In the Matter of the Application of the Senate, 10 Minn. 78.

15. Appeal from probate court

(1) Under the constitution, probate appeals to district court are statutory both as to mode and right.—In re Dahmen's Estate, 273 N.W. 364, 200 Minn. 55.

(2) On appeal the district court is limited to those matters of which probate court had jurisdiction.—In re O'Leary, 161 N.W. 392, 136 Minn. 126.

(3) A party who, on appeal from the probate court to the district court, could be relieved, without prejudice to the other parties, of his defaults in failing to serve the appeal bond, which had been filed, and in failing to file and serve within the statutory time a concise statement of the propositions of law and fact on which he relied for reversal, should be granted an amendment relieving him of his defaults, where appeal is taken in good faith and defaults were due to mistake.—Dahn v. Dahn, 279 N.W. 715, 203 Minn. 19. Review of inferior courts see *supra* § 270.

16. Miss.—Wynne v. Illinois Cent.

R. Co., 66 So. 411, 105 Miss. 784, 108 Miss. 376.

15 C.J. p 1077 note 13.

Appeals in election contests

An appeal could be prosecuted directly to the supreme court from the judgment of a special statutory tribunal consisting of circuit judge and municipal election commissioners holding a primary election valid and dismissing an election contest.—Hayes v. Abney, Miss., 188 So. 533.

Correction of errors alleged to have been made by a court having full jurisdiction of a cause is committed solely to the supreme court on direct appeal from the judgment or decree complained of.—Hinton v. Shedd, 76 So. 144, 115 Miss. 208.

No jurisdiction over court stenographer in lower court

Miss.—Berry v. Brown, 67 So. 662, 109 Miss. 64.—Brooks v. Gentry, 64 So. 214, 106 Miss. 506.

No original jurisdiction on appeal

Miss.—Moore v. White, 137 So. 99, 161 Miss. 390.

The court is not required to assist litigants in making up bills of exceptions.—Brooks v. Gentry, 64 So. 14, 106 Miss. 506.

17. Miss.—Brown v. Sutton, 121 So. 835, 158 Miss. 78.—Brown v. Carraway, 47 Miss. 668.

15 C.J. p 1077 note 13 [a] (1).

18. Miss.—Wynne v. Illinois Cent. R. Co., 66 So. 411, 105 Miss. 784—

Wynne v. Illinois Cent. R. Co., 66 So. 410, 108 Miss. 376.—Ex parte Prewitt, 63 So. 225, 106 Miss. 62.

Supersedeas will not lie under a statute respecting remedial writs grantable by supreme and circuit judges where such statute deals solely with original jurisdiction.—Alexander v. Johnson, 138 So. 329, 165 Miss. 721.

Injunction to preserve status quo

If chancellor of district having jurisdiction of receivership improperly refuses injunction writ, judge of supreme court on proper showing will issue writ to preserve status quo of case until chancellor passes on merits; this is not exercising original jurisdiction.—Sullivan v. Hughes, 161 So. 316, 172 Miss. 744.

19. Miss.—In re Opinion of the Justices, 114 So. 857, 148 Miss. 427.

20. Miss.—Power v. Robertson, 93 So. 769, 130 Miss. 188.

15 C.J. p 1078 note 26.

Duty to restrain inferior tribunal

The circuit court by virtue of its inherent powers as an appellate tribunal in proper cases should exercise its authority to restrain inferior tribunal and constrain it, to yield obedience to lawful requirements.—Fassman v. Town of Centreville, Miss., 186 So. 641.

21. Miss.—Drummond v. State, 185 So. 207.

circuit court is final in cases originating in certain inferior courts, unless a constitutional question is involved.²²

§ 400. Missouri

A statute which seeks to enlarge or restrict the jurisdiction of either the supreme court or the courts of appeals, in Missouri, in contravention of the constitution is invalid.

The jurisdiction of the supreme court of Missouri and of the courts of appeals is defined by the constitution of Missouri, and a statute which seeks to enlarge or restrict the jurisdiction of either in contravention of the constitution is invalid.²³

§ 401. — Supreme Court in General

The supreme court, except in cases otherwise directed by the constitution, has appellate jurisdiction only, which is limited to the classes of cases specified in the consti-

tution. It has superintending control over all inferior courts, and power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, and other remedial writs, and to hear and determine the same. It also has superintending control over the courts of appeals by mandamus, prohibition, and certiorari.

Under the Constitution of Missouri, 1875, Article 6, § 2, the supreme court, except in cases otherwise directed by the constitution, has appellate jurisdiction only,²⁴ which is limited to the classes of cases specified in the constitution.²⁵ In accordance with Article VI § 12, the supreme court has appellate jurisdiction where the amount in dispute, exclusive of costs, exceeds a certain sum, see *infra* § 409; where the construction of the constitution of the United States, or of the state, is involved, see *infra* § 404; where the validity of a treaty,²⁶ or of a statute of the United States,²⁷ or of authority exercised under the United States²⁸ is

22. Miss.—Johnson v. City of Hattiesburg, 155 So. 418, 170 Miss. 527.

Under former statute

Miss.—Pass Christian v. Lizana, 64 So. 209, 106 Miss. 470.

15 C.J. p 1077 note 25.

23. Mo.—State ex rel. Pitcairn v. Public Service Commission of Missouri, 90 S.W.2d 395, transferred, see App., 100 S.W.2d 635, reversed on other grounds State ex rel. Pitcairn v. Shain, 106 S.W.2d 901, 341 Mo. 27, conformed to State ex rel. Pitcairn v. Public Service Commission, App., 111 S.W.2d 222, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902, second case—State ex rel. Gehrs v. Public Service Commission of Missouri, 90 S.W.2d 394, transferred, see App., 100 S.W.2d 636, cause reinstated 114 S.W.2d 161—State ex rel. Pitcairn v. Public Service Commission of Missouri, 90 S.W.2d 392, 338 Mo. 180, transferred, see App., 100 S.W.2d 636, reversed on other grounds 106 S.W.2d 898, 341 Mo. 19, conformed to State ex rel. Pitcairn v. Public Service Commission, App., 110 S.W.2d 367, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902—State ex rel. Gehrs v. Public Service Commission of Missouri, 90 S.W.2d 390, 338 Mo. 177, transferred, see App., 99 S.W.2d 858.

24. Mo.—Stipp v. Bailey, 53 S.W.2d 872, 331 Mo. 374, transferred, see App., 22 S.W.2d 178—State ex rel. Waterworth v. Harty, 204 S.W. 500, 275 Mo. 59.

15 C.J. p 1078 note 29.

Appeal from interlocutory order

Parties taking appeal from interlocutory order thereby, treat order as final and make proceeding separate case, as regards jurisdiction.—

Stipp v. Bailey, 53 S.W.2d 872, 331 Mo. 374, transferred, see App., 22 S.W.2d 178.

25. Mo.—State ex rel. Wabash Ry. Co. v. Shain, 106 S.W.2d 898, 341 Mo. 19, reversing, App., State ex rel. Pitcairn v. Public Service Commission of Missouri, 100 S.W.2d 636, transferred, see 90 S.W.2d 392, 338 Mo. 180, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902, first case, conformed to State ex rel. Pitcairn v. Public Service Commission, App., 110 S.W.2d 367—Hanssen v. Karbe, 106 S.W.2d 415, transferred, see, App., 115 S.W.2d 109—State ex rel., to Use of Alton R. Co. v. Public Service Commission, 100 S.W.2d 474, transferred, see, App., 110 S.W.2d 1121, certiorari quashed State ex rel. Public Service Commission v. Shain, 119 S.W.2d 220, 342 Mo. 867—State ex rel. Pitcairn v. Public Service Commission, 92 S.W.2d 831, transferred, see, App., State ex rel. Pitcairn v. Public Service Commission of Missouri, 100 S.W.2d 637, 231 Mo.App. 446, reversed on other grounds State ex rel. Pitcairn v. Shain, 106 S.W.2d 901, 341 Mo. 27, conformed to State ex rel. Pitcairn v. Public Service Commission, 111 S.W.2d 983, 232 Mo.App. 755, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902, second case—Fleischaker v. Fleischaker, 92 S.W.2d 169, retranferred, see 70 S.W.2d 104, 228 Mo.App. 98—Ashbrook v. Willis, 89 S.W.2d 659, 338 Mo. 226, transferred, see 100 S.W.2d 943, 231 Mo.App. 460—Wilmer v. Union Electric Light & Power Co., 81 S.W.2d 607—Mitchell v. Dabney, 58 S.W.2d 731, 332 Mo. 410, transferred, see, App., 71 S.W.2d 165—Stuart v. Stuart, 8 S.W.2d 613, 320 Mo. 486—Ward v.

Consolidated School Dist. No. 136 of Nodaway County, 7 S.W.2d 659, 320 Mo. 385—State ex rel. Rucker v. Hoffman, 288 S.W. 16, 313 Mo. 667, transferred, see, App., 294 S.W. 429—Williams v. Short, 263 S.W. 200, transferred, see 268 S.W. 706, 219 Mo.App. 99.

15 C.J. p 1081 note 60.

26. Mo.—Kemper Mill & Elevator Co. v. Missouri Pac. R. Co., 178 S.W. 502.

15 C.J. p 1079 note 48.

27. Mo.—Beekman Lumber Co. v. Acme Harvester Co., 114 S.W. 1087, 215 Mo. 221.

15 C.J. p 1079 note 49.

Construction of federal statute

It is only where the validity of a federal statute is involved that the supreme court has jurisdiction and it has no jurisdiction where only the interpretation, construction, or application of a federal statute is involved.—Service Purchasing Co. v. Brennan, Mo., 32 S.W.2d 81, transferred, see 42 S.W.2d 39, 226 Mo.App. 110—Mitchell v. Joplin Nat. Bank, Mo., 201 S.W. 903—State v. Chicago, M. & St. P. Ry. Co., 199 S.W. 121, 272 Mo. 520—Kemper Mill & Elevator Co. v. Missouri Pac. R. Co., Mo., 178 S.W. 502—Hawkins v. St. Louis & San Francisco Ry. Co., Mo.App., 202 S.W. 1060.

Effect of review by United States supreme court

The fact that the construction of a federal statute is determinable by supreme court of United States on appeal, from highest state court is not determinative of jurisdiction of state supreme court.—Mitchell v. Joplin Nat. Bank, Mo., 201 S.W. 903.

23. Mo.—U. S. ex rel. and to Use of First Nat. Bank v. Lufcy, 49 S.W.2d 8, 329 Mo. 1224.

15 C.J. p 1079 note 50.

called into question; where the construction of the revenue laws of the state, see *infra* § 406, or title to office under the state, see *infra* § 408, is involved; where title to real estate is involved, see *infra* § 405; where a county or other political subdivision of the state or any state officer is a party, see *infra* § 407; and in all cases of felony.²⁹ The appellate jurisdiction of the supreme court must affirmatively appear from the record,³⁰ and it is the province of the supreme court on its own motion to determine the question of its jurisdic-

tion.³¹ Constitution, 1865, Article VI § 11, required the judges of the supreme court to give opinions on important questions of constitutional law when required by the governor or either branch of the general assembly,³² but the present constitution contains no such provision.

Under Constitution, 1875, Article VI § 3, the supreme court has general superintending control over all inferior courts;³³ and power to issue writs of habeas corpus, mandamus,³⁴ quo warran-

29. Mo.—State v. Bailey, 234 S.W. 324.

15 C.J. p 1081 note 58.

Misdemeanor cases

The supreme court has no appellate jurisdiction of misdemeanor cases in the absence of a constitutional question.—State v. Legan, Mo., 80 S.W.2d 122—State v. Selleck, Mo., 46 S.W.2d 570, transferred, see, App., 55 S.W.2d 496—State v. Richter, Mo., 33 S.W.2d 926, reversing 27 S.W.2d 708, 224 Mo.App. 430—State v. Bell, Mo., 289 S.W. 334—State v. Tatman, Mo., 278 S.W. 713, 312 Mo. 134, transferred, see, App., 291 S.W. 151—State v. Ewing, Mo., 278 S.W. 712, transferred, see, App., 289 S.W. 348—State ex rel. Hulén v. Trimble, 275 S.W. 536, 310 Mo. 274—State v. Baker, Mo., 274 S.W. 359—State v. Hull, Mo., 273 S.W. 1039, transferred, see, App., 279 S.W. 221—State v. Sparks, Mo., 268 S.W. 51—State v. Cox, Mo., 259 S.W. 1041, transferred, see, App., 266 S.W. 734—State v. Mullinix, 257 S.W. 121, 301 Mo. 385—State v. Bright, Mo., 256 S.W. 741, transferred, see, App., 263 S.W. 559—State v. Graham, 247 S.W. 194, 295 Mo. 695, transferred, see, App., 250 S.W. 925, retr transferred 256 S.W. 770, 301 Mo. 272—State v. Kramer, Mo., 222 S.W. 822—State v. Meyers, Mo., 217 S.W. 100—15 C.J. p 1081 note 60 [a].

30. Mo.—Peer v. Ashauer, 92 S.W. 2d 154, transferred, see, App., 102 S.W.2d 764—Ashbrook v. Willis, 89 S.W.2d 659, 338 Mo. 226, transferred, see 100 S.W.2d 943, 231 Mo. App. 460—Ray v. Missouri Christian College, 84 S.W.2d 614—Mitchell v. Dabney, 58 S.W.2d 731, 322 Mo. 410, transferred, see, App., 71 S.W.2d 165—Casebolt v. International Life Ins. Co., 38 S.W.2d 1044, transferred, see, App., 42 S.W.2d 939—Schildnecht v. City of Joplin, 35 S.W.2d 35, 327 Mo. 126, transferred, see 41 S.W.2d 590, 226 Mo.App. 47—Green v. Owen, 31 S.W.2d 1027, 326 Mo. 450, transferred, see 38 S.W.2d 496, 225 Mo. App. 746—State v. Briscoe, 135 S.W. 58, 140 S.W. 885, 237 Mo. 154—Hogue v. St. Louis-San Francisco Ry. Co., App., 12 S.W.2d 103.

31. Mo.—Ashbrook v. Willis, 89 S.

W.2d 659, 338 Mo. 226, transferred, see 100 S.W.2d 943, 231 Mo.App. 460—Chilton v. Drainage Dist. No. 8 of Pemiscot County, 61 S.W.2d 744, 332 Mo. 1173, transferred, see 28 S.W.2d 120, 224 Mo.App. 467, transferred, see 63 S.W.2d 421, 228 Mo.App. 4—Wuertenbaeher v. Feik, 36 S.W.2d 913, transferred, see, App., 43 S.W.2d 848—Bankers' Mortg. Co. v. Lessley, 31 S.W.2d 1055, transferred, see 38 S.W.2d 485, 225 Mo.App. 643—Mulik v. Jorganian, 30 S.W.2d 998, 326 Mo. 106, transferred, see, App., 37 S.W. 2d 963—Cunningham v. Cunningham, 30 S.W.2d 63, 325 Mo. 1161—Bothe v. Chicago, B. & Q. R. Co., 154 S.W. 98, 248 Mo. 36—Ortt v. Leonhardt, App., 68 S.W. 577.

Determination of right to appeal

Where trial court found for defendant based upon the determination that it did not have jurisdiction over the cause, the determination by the supreme court of defendant's statutory right to appeal was held not to involve determination of jurisdiction of supreme court over the subject matter of the action requiring determination by that court of the case on its merits.—McClain v. Kansas City Bridge Co., 88 S.W.2d 1019, 338 Mo. 7, reversing, App., 83 S.W.2d 132.

32. Mo.—Opinion of Court, 55 Mo. 497.

15 C.J. p 1081 note 61.

33. Mo.—State ex rel. Duraflor Products Co. v. Percy, 29 S.W.2d 83, 325 Mo. 335—State v. Thomas, 256 S.W. 1028, 301 Mo. 603—State ex rel. McAllister v. Slate, 214 S.W. 85, 278 Mo. 570, 8 A.L.R. 1226. 15 C.J. p 1078 note 32.

Exercise of control

(1) Supreme court's power of general superintendence over inferior courts can be exercised only within its jurisdiction.—State ex rel. Allen v. Trimble, 10 S.W.2d 519, 321 Mo. 230.

(2) Its superintending control is exclusive as to causes within its appellate jurisdiction, and concurrent with courts of appeals in cases within latter courts' jurisdiction.—State

ex rel. Duraflor Products Co. v. Percy, 29 S.W.2d 83, 325 Mo. 335.

Assumption of wrongful action of circuit court

Supreme court cannot assume wrongful action on part of circuit court or judge thereof.—State ex rel. and to Use of Public Service Commission v. Sevier, 106 S.W.2d 903, 341 Mo. 162.

34. Mo.—State ex rel. City of St. Louis v. Sartorius, 102 S.W.2d 890, 340 Mo. 832—State ex rel. Boatmen's Nat. Bank of St. Louis v. Webster Groves General Sewer Dist. No. 1 of St. Louis County, 37 S.W.2d 905, 327 Mo. 594—State ex rel. Nolen v. Nelson, 275 S.W. 927, 310 Mo. 526—State ex rel. City of Jefferson v. Hackmann, 229 S.W. 1082, 287 Mo. 156.

15 C.J. p 1078 note 34.

Not limited by appellate jurisdiction

Supreme court's authority to issue mandamus is not limited by appellate jurisdiction.—State ex rel. and to use of Gorman v. Offutt, Mo., 9 S.W.2d 595.

Discretion of court

Issuance of alternative writ in mandamus proceedings before supreme court is discretionary.—State ex rel. Nolen v. Nelson, 275 S.W. 927, 310 Mo. 526.

Mandamus within jurisdiction of trial court

(1) It is only in cases of more than ordinary magnitude or importance that the supreme court will issue a writ of mandamus and will not refer the relator to the trial court.—State ex rel. Hopkins v. County Court of Cooper County, 64 Mo. 170—15 C.J. p 1078 note 34 [c].

(2) The supreme court will not entertain the writ where there are questions of fact to be tried.—State ex rel. Jamison v. Lesueur, 29 S.W. 278, 126 Mo. 413.

(3) Although the supreme court will not entertain jurisdiction of an original mandamus proceeding whose sole object, in the last analysis, is the contest of a local option election, or to order vel non the issuance of a dramshop license, yet where such point was interwoven with oth-

to,³⁵ certiorari,³⁶ and other original remedial writs,³⁷ and to hear and determine the same.³⁸ However, the supreme court, under a rule of court, will usually refuse to issue any original remedial writ, with the exception of habeas corpus, over which a court of appeals has jurisdiction,³⁹ but where it does issue such a writ it will not quash it on the grounds that application could have been made to a court of appeals if respondent had notice of the application and failed to object.⁴⁰ Applicants for remedial writs must conform to the su-

preme court rules.⁴¹

Under Constitution, 1875, Article VIII § 9, and Revised Statutes, 1909, § 5951, the supreme court is entitled to determine an election contest for judge of the supreme court.⁴²

Superintending control over courts of appeals. Under the express provisions of Constitutional Amendment, 1884, Article VI § 8, supreme court has superintending control over courts of appeals⁴³ by mandamus,⁴⁴ and has superintending control

er points presented, of which the courts had jurisdiction, it will proceed to determine it, so that there may be a complete disposition of the case.—State v. Carter, 165 S.W. 773, 257 Mo. 52.

Follows case to end

Where alternative writ of mandamus is once issued supreme court follows case to end.—State ex rel. General Motors Acceptance Corporation v. Brown, 48 S.W.2d 857, 330 Mo. 220—State ex rel. Nolen v. Nelson, 275 S.W. 927, 310 Mo. 526.

35. Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 119 A.L.R. 710—State ex inf. McKittrick ex rel. City of Campbell v. Arkansas-Missouri Power Co., 93 S.W.2d 887, 339 Mo. 15—State ex inf. Ellis ex rel. Patterson v. Ferguson, 65 S.W.2d 97, 333 Mo. 1177, certiorari denied Ferguson v. State of Missouri ex inf. Ellis, 54 S.Ct. 559, 291 U.S. 682, 78 L.Ed. 1070—State ex rel. Gentry v. Sullivan, 8 S.W.2d 616, 320 Mo. 362—State ex inf. Otto v. Kansas City College of Medicine and Surgery, 285 S.W. 980, 315 Mo. 101, 46 A.L.R. 1472—State ex inf. Barrett v. Imhoff, 238 S.W. 122, 291 Mo. 603.

15 C.J. p 1078 note 35.

Distribution of funds

Supreme court in quo warranto proceedings to prevent fire insurance companies from collecting increase in insurance rate denied by superintendent of insurance could not take charge of and distribute funds impounded in circuit court in review proceedings, representing such increase, as these funds were within circuit court's jurisdiction.—State ex inf. McKittrick v. American Colony Ins. Co., 80 S.W.2d 876, 336 Mo. 406.

36. Mo.—State ex rel. Duraflor Products Co. v. Percy, 29 S.W.2d 82, 325 Mo. 335—State ex rel. Gentry v. Westhues, 286 S.W. 396, 315 Mo. 672.

15 C.J. p 1078 note 36.

37. Mo.—State ex rel. Burton v. Montgomery, 291 S.W. 472, 316 Mo. 658—State ex rel. Orr v. Latschaw, 237 S.W. 770, 291 Mo. 592.

15 C.J. p 1078 note 37.

Discretion of court

Granting or refusal of original writ of prohibition is discretionary with an appellate court.—State ex rel. City of St. Louis v. Sartorius, 102 S.W.2d 890, 340 Mo. 832.

Exclusive jurisdiction

The supreme court rather than the court of appeals has jurisdiction under the constitution of a writ of prohibition in cases where the supreme court would have exclusive appellate jurisdiction under the constitutional provisions.—State ex rel. Ghan v. Gideon, Mo.App., 119 S.W.2d 89.

38. Mo.—State ex inf. McKittrick v. Wymore, 119 S.W.2d 941, 119 A.L.R. 710.

15 C.J. p 1078 note 38.

Findings of fact by commissioner

A special commissioner's findings of fact are not binding on the supreme court in an original proceeding, but are persuasive.—In re Parkinson, Mo., 128 S.W.2d 1023.

39. Mo.—State ex rel. Douglas v. Tune, 200 S.W. 1062, 273 Mo. 355.

40. Mo.—State ex rel. General Motors Acceptance Corporation v. Brown, 48 S.W.2d 857, 330 Mo. 220.

41. Mo.—State ex rel. Hurst Automatic Switch & Signal Co. v. Wurdemann, 250 S.W. 46.

Abstracts of record

(1) Supreme court rules requiring abstracts of record apply to original proceedings in supreme court as well as to cases coming to supreme court by appeal.—State ex rel. Dilliner v. Cummins, 92 S.W.2d 605, 338 Mo. 609.

(2) An alternative writ in original mandamus proceeding should be abstracted, but failure to abstract it does not require dismissal where respondent's pleading, which is properly abstracted, furnishes court all facts which an abstract of alternative writ would have given.—State ex rel. Dilliner v. Cummins, supra.

(3) So too a motion to quash preliminary writ and to dismiss petition for writ of prohibition on ground that abstract and brief do not comply with supreme court rules would be denied where question for decision was reasonably well presented

in the brief, although abstract did not contain all that it should.—State ex rel. Hannigan v. Kirkwood, 114 S.W.2d 1026, 342 Mo. 242.

(4) Where the rule of court fixes the penalty at dismissal of proceedings for failure to serve a printed abstract of record, a respondent is not entitled to judgment for relator's failure.—State ex rel. Gentry v. Bray, 20 S.W.2d 56, 323 Mo. 562.

Waiver of delay

Relators, by obtaining leave to file reply brief after hearing, waived right to complain of delayed answering brief.—State ex rel. Bensberg v. Hartmann, 19 S.W.2d 637, 323 Mo. 171.

42. Mo.—Gantt v. Brown, 149 S.W. 644, 344 Mo. 271, Ann.Cas.1913D 1283.

43. Mo.—State ex rel. Evans v. Broadus, 149 S.W. 473, 245 Mo. 123—State ex rel. Lindsay v. Kansas City, 20 S.W.2d 7, 225 Mo.App. 139, certiorari quashed State ex rel. Kansas City v. Trimble, 20 S.W.2d 17, 322 Mo. 360, prohibition denied 20 S.W.2d 20, second case, 322 Mo. 368.

15 C.J. p 1078 note 39.

Requiring record to be sent up

Supreme court, in interest of uniformity of decisions, may, in exercise of supervising control, require record of cause decided by court of appeals to be sent up.—State ex rel. Union Biscuit Co. v. Becker, 293 S.W. 783, 316 Mo. 865, certiorari quashing Spina v. Union Biscuit Co., App., 273 S.W. 428.

44. Mo.—State ex rel. Kansas City Light & Power Co. v. Trimble, 258 S.W. 696, 303 Mo. 284.

Mandamus to determine case

The supreme court may by mandamus compel a court of appeals to hear and determine a case within its jurisdiction.

U.S.—Miller v. Kansas City Light & Power Co., C.C.A.Mo., 13 F.2d 723. Mo.—State ex rel. Midwest Pipe & Supply Co. v. Hald, 52 S.W.2d 183, 330 Mo. 1093—State ex rel. Wallace State Bank v. Trimble, 272 S.W. 72, 308 Mo. 278—State ex rel. Kansas City Light & Power Co. v.

over the courts of appeals by prohibition,⁴⁵ and certiorari;⁴⁶ and under Constitutional Amendment, 1884, Article VI § 6, the last previous rulings of the supreme court on any question of law or equity shall in all cases be controlling authority in the

courts of appeals.⁴⁷ The supreme court will on certiorari quash a judgment, or that part of a judgment, of a court of appeals which conflicts with a prior controlling decision of the supreme court;⁴⁸

Trimble, 258 S.W. 696, 393 Mo. 284—State ex rel. Field v. Ellison, 266 S.W. 107, 277 Mo. 46—State v. Smith, 73 S.W. 134, 172 Mo. 615.

45. Mo.—Ramsay v. Huck, 181 S.W. 966, 267 Mo. 333.

46. Mo.—State ex rel. Greer v. Cox, 274 S.W. 373, quashing certiorari Smith v. Greer, 257 S.W. 823, 216 Mo.App. 155—State ex rel. Ambrose v. Trimble, 263 S.W. 840, 364 Mo. 533, certiorari denied Chicago & A. R. Co. v. Ambrose, 45 S.Ct. 354, 267 U.S. 598, 69 L.Ed. 806—State ex rel. Byrne v. Ellison, 199 S.W. 403, quashing certiorari Byrne v. News Corp., 190 S.W. 933, 195 Mo.App. 265.

15 C.J. p 1079 note 42.

Printed abstract of record

Under a rule of the supreme court of Missouri, relators, on certiorari to review a judgment of a court of appeals, are required to file and serve printed abstract of record.—State ex rel. Paine v. Trimble, Mo., 290 S.W. 132, dismissing certiorari Peacock Productions v. Paine, 289 S.W. 341, 221 Mo.App. 377.

47. Mo.—State ex rel. Byrne v. Ellison, 199 S.W. 403, quashing certiorari Byrne v. News Corp., 190 S.W. 933, 195 Mo.App. 265.

Decision in same case

A court of appeals is bound by what the supreme court has said in the same case which was transferred by the supreme court to the court of appeals.—Dolin v. Sovereign Camp, W. O. W., App., 112 S.W.2d 582, transferred 98 S.W.2d 681, 339 Mo. 618.

Supreme court decision subsequent to trial

If an opinion of court of appeals conflicted with supreme court opinion, fact that supreme court decision was rendered subsequent to trial of the case in which court of appeals rendered its opinion would not entitle court of appeals opinion to stand.—State ex rel. Terminal R. Ass'n of St. Louis v. Hostetter, 119 S.W.2d 208, 342 Mo. 859, quashing certiorari Brown v. Terminal R. Ass'n of St. Louis, App., 85 S.W.2d 226.

Cases held distinguishable on facts

Mo.—Schroeder v. Western Union Telegraph Co., App., 129 S.W.2d 917—Wells v. Metropolitan Life Ins. Co., App., 125 S.W.2d 86—Fogle v. Equitable Life Assur. Soc. of U. S., App., 123 S.W.2d 695—Newberry v. City of St. Louis, App., 109 S.W.2d 876—Drake v.

Kansas City Public Service Co., App., 54 S.W.2d 427, denying rehearing 41 S.W.2d 1066, 226 Mo. App. 365.

48. Mo.—State ex rel. Massman Const. Co. v. Shain, 130 S.W.2d 491, quashing certiorari Nelson v. Massman Const. Co., App., 120 S.W.2d 77—State ex rel. Waters v. Hostetter, 126 S.W.2d 1164, quashing record Waters v. Hays, App., 113 S.W.2d 39, conforming to State ex rel. Steinbruegge v. Hostetter, 115 S.W.2d 802, 342 Mo. 341, quashing Waters v. Hays, App., 103 S.W.2d 498, mandate conformed to, App., 130 S.W.2d 220—State ex rel. Mutual Life Ins. Co. of New York v. Shain, 126 S.W.2d 181—State ex rel. Baldwin v. Shain, 125 S.W.2d 41, quashing opinion Boyer v. Baldwin, App., 106 S.W.2d 21—State ex rel. Clark v. Shain, 122 S.W.2d 882, quashing opinion In re Williams, App., 113 S.W.2d 353, mandate conformed to, App., 128 S.W.2d 1098—State ex rel. Steinbruegge v. Hostetter, 115 S.W.2d 802, 342 Mo. 341, quashing Waters v. Hays, App., 103 S.W.2d 498, conformed to, App., 118 S.W.2d 39, record quashed State ex rel. Waters v. Hostetter, 126 S.W.2d 1164, mandate conformed to Waters v. Hays, App., 130 S.W.2d 220—State ex rel. Security Ben. Ass'n v. Shain, 114 S.W.2d 965, 342 Mo. 199, quashing Wilhelm v. Security Ben. Ass'n, App., 104 S.W.2d 1042, mandate conformed to 121 S.W.2d 295—State ex rel. Clark v. Shain, 119 S.W.2d 971, quashing certiorari State ex rel. Clark v. National Surety Co., App., 82 S.W.2d 616, and In re Parker's Trust Estate, 67 S.W.2d 114, 228 Mo.App. 400—State ex rel. Hoyt v. Shain, 93 S.W.2d 992, 338 Mo. 1208, quashing opinion in part Lampton Realty Co. v. Hoyt, App., 80 S.W.2d 249, conformed to 99 S.W.2d 145, 231 Mo. App. 143—State ex rel. City of St. Charles v. Becker, 83 S.W.2d 583, 336 Mo. 1187, modifying City of St. Charles v. Wabash Ry. Co., App., 65 S.W.2d 655—State ex rel. St. Louis Public Service Co. v. Hald, 63 S.W.2d 15, 333 Mo. 845, quashing certiorari Sneed v. St. Louis Public Service Co., App., 53 S.W.2d 1062—State ex rel. Brown v. Trimble, 23 S.W.2d 162, 324 Mo. 353—State ex rel. Siegel v. Daues, 300 S.W. 272, quashing Siegel v. Wells, App., 287 S.W. 775—State ex rel. American Car & Foundry Co. v. Daues, 282 S.W. 389, 313 Mo.

681, quashing certiorari Cobb v. American Car & Foundry Co., App., 270 S.W. 398—State ex rel. Continental Life Ins. Co., of Kansas City v. Allen, 262 S.W. 43, 303 Mo. 608, modifying Brabhand v. Pioneer Life Ins. Co. of America, App., 253 S.W. 786—State ex rel. Clayton v. Bland, 256 S.W. 757, 301 Mo. 131, quashing Van Hoften v. Clayton, App., 246 S.W. 964—State ex rel. Missouri State Life Ins. Co. v. Allen, 243 S.W. 839, 295 Mo. 307—Ford v. Ellison, 230 S.W. 637, 287 Mo. 683—State ex rel. Stetina v. Reynolds, 227 S.W. 47, 286 Mo. 120, quashing record Stetina v. Bergstein, 221 S.W. 420, 204 Mo. App. 366—State ex rel. Peper v. Reynolds, 226 S.W. 550, 286 Mo. 126, quashing record Peper v. Bell, 218 S.W. 438, 283 Mo. 126, conformed to Peper v. Bell, App., 229 S.W. 1111—State ex rel. Arel v. Farrington, 197 S.W. 913—State ex rel. Arel v. Farrington, 197 S.W. 912, 272 Mo. 157, quashing certiorari Arel v. First Nat. Bank, 190 S.W. 78, 195 Mo.App. 165—State ex rel. Crockett v. Ellison, 196 S.W. 1140, 271 Mo. 416, quashing Ex parte Crockett, 190 S.W. 81, 195 Mo.App. 54—State ex rel. Hays v. Robertson, 196 S.W. 1132, 271 Mo. 475, quashing Mergenthaler Linotype Co. v. Hays, App., 181 S.W. 1183, and conformed to 202 S.W. 300, error dismissed Mergenthaler Linotype Co. v. Davis, 40 S.Ct. 133, 257 U.S. 256, 64 L.Ed. 255—State v. Ellison, 176 S.W. 11.

Court of appeals exceeding jurisdiction

Court of appeals in reaching its conclusion exceeds its jurisdiction if announcing any rule or principle of law conflicting with controlling decision of supreme court.—State ex rel. American Car & Foundry Co. v. Daues, 282 S.W. 389, 313 Mo. 681, quashing certiorari Cobb v. American Car & Foundry Co., App., 270 S.W. 398.

Must conflict with last previous ruling

On certiorari seeking to have quashed judgment of court of appeals on ground that it conflicts with supreme court decisions, the question is not whether a conflict exists as to a particular decision, but as to whether one exists with reference to the last previous ruling of the supreme court.—State ex rel. Henry v. Allen, Mo., 263 S.W. 190, quashing certiorari State v. Henry, App., 256 S.W. 523.

Duty of supreme court to quash

Although the court of appeals is obliged to follow the last ruling of the supreme court, the supreme court is not required, under constitution, to quash opinion of court of appeals correctly declaring law, although in conflict with erroneous decision of supreme court.—State ex rel. Woodson v. Trimble, Mo., 287 S.W. 626, quashing certiorari Woodson v. Leogrunwald Vinegar Co., 272 S.W. 1084, 220 Mo.App. 831.

Assignment of errors

Assignment of errors has no place in original proceeding by certiorari to quash opinion and judgment of court of appeals as in conflict with supreme court opinion.—State ex rel. Security Mut. Life Ins. Co. v. Allen, 267 S.W. 379, 305 Mo. 607, quashing certiorari Howell v. Security Mut. Life Ins. Co., App., 253 S.W. 411.

Necessity for discussion in court of appeals

Where court of appeals' disposition necessarily involves holding in conflict with supreme court's decisions establishing rule, it is immaterial that rule was not discussed.—State ex rel. Gordon v. Trimble, 300 S.W. 475, 318 Mo. 341.

All conflicts determined

On certiorari, all conflicts between decision of court of appeals and decisions of supreme court should be determined whether suggested by relator or respondent, or discovered by the court.—State ex rel. Shawhan v. Ellison, 200 S.W. 1042, 273 Mo. 218, quashing certiorari Shawhan v. Shawhan Distillery Co., 197 S.W. 369, 195 Mo.App. 445.

Decisions held in conflict with controlling decision

Mo.—State ex rel. Massman Const. Co. v. Shain, 130 S.W.2d 491, quashing certiorari Nelson v. Massman Const. Co., App., 120 S.W.2d 77—State ex rel. Sterling v. Shain, 129 S.W.2d 1048, quashing opinion Anderson Motor Co. v. Sterling, App., 121 S.W.2d 275—State ex rel. Banks v. Hostetter, 128 S.W.2d 1022, quashing in part Day v. Banks, App., 102 S.W.2d 955—State ex rel. Prudential Ins. Co. of America v. Shain, 127 S.W.2d 675, quashing Gasperino v. Prudential Ins. Co. of America, App., 107 S.W.2d 819—State ex rel. Brosnahan v. Shain, 126 S.W.2d 1193, quashing opinion Powell v. Brosnahan, App., 115 S.W.2d 140—State ex rel. Melbourne Hotel Co. v. Hostetter, 126 S.W.2d 1189, quashing opinion Caldwell v. Melbourne Hotel Co., App., 116 S.W.2d 222—State ex rel. Mutual Life Ins. Co. of New York v. Shain, 126 S.W.2d 181—State ex rel. Adams v. Allen, 125 S.W.2d 854, quashing record Adams v. Ohio Nat. Life Ins. Co., 105 S.W.2d 64, 231 Mo.App. 881—State ex rel.

Banks v. Hostetter, 125 S.W.2d 835, quashing opinion in part Day v. Banks, App., 102 S.W.2d 946—State ex rel. City of Jefferson v. Shain, 124 S.W.2d 1194, quashing in part Bornhoft v. City of Jefferson, App., 118 S.W.2d 93—State ex rel. Grisham v. Allen, 124 S.W.2d 1080, quashing opinion Grisham v. Free-wald, 95 S.W.2d 349, 230 Mo.App. 1203, and mandate conformed to, App., 130 S.W.2d 653—State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, quashing certiorari Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151—State ex rel. Prudential Ins. Co. of America v. Shain, 119 S.W.2d 309, 342 Mo. 1040, quashing Eagan v. Prudential Ins. Co. of America, App., 107 S.W.2d 133—State ex rel. Trading Post Co. v. Shain, 116 S.W.2d 99, 342 Mo. 588, quashing Stanfill v. Trading Post Co., App., 106 S.W.2d 952—State ex rel. and to Use of Heuring v. Allen, 112 S.W.2d 843, 342 Mo. 81, quashing opinion and record Heuring v. Central States Life Ins. Co. of St. Louis, 87 S.W.2d 661, 230 Mo.App. 42—State ex rel. Golladay v. Shain, 110 S.W.2d 719, 341 Mo. 889, quashing Meyers v. Golladay, App., 104 S.W.2d 1007—State ex rel. Randall v. Shain, 108 S.W.2d 122, 341 Mo. 201—State ex rel. Gnekow v. Hostetter, 105 S.W.2d 928, 340 Mo. 1177, quashing Gnekow v. Metropolitan Life Ins. Co., App., 99 S.W.2d 126, reversed on other grounds 108 S.W.2d 621—State ex rel. Kansas City Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, quashing record and remanding cause State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065, mandate conformed to 113 S.W.2d 132—State ex rel. S. S. Kresge Co. v. Shain, 101 S.W.2d 14, 340 Mo. 145—State ex rel. Mutual Life Ins. Co. of Baltimore v. Shain, 98 S.W.2d 690, 339 Mo. 621, conformed to, App., 105 S.W.2d 994—State ex rel. Order of United Commercial Travelers of America v. Shain, 98 S.W.2d 597, 339 Mo. 903—State ex rel. Hoyt v. Shain, 93 S.W.2d 992, 338 Mo. 1208, quashing opinion in part Lampton Realty Co. v. Hoyt, App., 80 S.W.2d 249, conformed to 99 S.W.2d 145, 231 Mo.App. 143—State ex rel. Chicago, R. I. & P. Ry. Co. v. Shain, 89 S.W.2d 654, 338 Mo. 217—State ex rel. People's Motorbus Co. of St. Louis v. Becker, 87 S.W.2d 433, 337 Mo. 1002, conformed to, App., 97 S.W.2d 847—State ex rel. Fidelity & Deposit Co. of Maryland v. Allen, 85 S.W.2d 455, quashing

Naylor Special Road Dist. of Ripley County v. Fidelity & Deposit Co., App., 75 S.W.2d 436—State ex rel. City of St. Charles v. Becker, 83 S.W.2d 583, 326 Mo. 1187, modifying City of St. Charles v. Wabash Ry. Co., App., 65 S.W.2d 655—State ex rel. State Highway Commission v. Cox, 77 S.W.2d 116, 336 Mo. 271, quashing State ex rel. State Highway Commission v. Freehold Inv. Co., 52 S.W.2d 577, 227 Mo.App. 335—State ex rel. Continental Ins. Co. of City of New York v. Becker, 77 S.W.2d 100, 336 Mo. 59, quashing Weiss v. Continental Ins. Co., App., 61 S.W.2d 392—State ex rel. Isaacson v. Trimble, 73 S.W.2d 111, 335 Mo. 213, quashing in part Isaacson v. Van Gundy, App., 48 S.W.2d 208—State ex rel. Mutual Benefit, Health & Accident Ass'n v. Trimble, 68 S.W.2d 685, 334 Mo. 920—State ex rel. Metropolitan Life Ins. Co. v. Shain, 66 S.W.2d 871, 334 Mo. 385—State ex rel. Talbott v. Shain, 66 S.W.2d 826, 334 Mo. 617—State ex rel. Horspool v. Haid, 65 S.W.2d 923, quashing Forsythe v. Horspool, App., 49 S.W.2d 687, conforming to State ex rel. Horspool v. Haid, 40 S.W.2d 611, 328 Mo. 327—State ex rel. Ebert v. Trimble, 63 S.W.2d 83, 333 Mo. 711, quashing Ebert v. A. J. Kasper Co., App., 49 S.W.2d 653—State ex rel. Berberich v. Haid, 64 S.W.2d 667, quashing Quinn v. Berberich, App., 51 S.W.2d 153—State ex rel. Shartel v. Trimble, 63 S.W.2d 37, 333 Mo. 888—State ex rel. Sears, Roebuck & Co. v. Haid, 60 S.W.2d 41, quashing Cook v. Sears, Roebuck & Co., App., 51 S.W.2d 134, followed in State ex rel. Sears, Roebuck & Co. v. Haid, 60 S.W.2d 43, quashing Wells v. Sears, Roebuck & Co., App., 51 S.W.2d 136—State ex rel. Weddle v. Trimble, 52 S.W.2d 864, 331 Mo. 1, quashing opinion Weddle v. St. Joseph Ry., Light, Heat & Power Co., App., 47 S.W.2d 1098—State ex rel. Hayward v. Haid, 51 S.W.2d 79, 330 Mo. 686, quashing Hayward v. Ham, App., 29 S.W.2d 243—State ex rel. American Asphalt Roof Corporation v. Trimble, 44 S.W.2d 1103, 329 Mo. 495—State ex rel. Gilday v. Trimble, 44 S.W.2d 57, quashing record Gilday v. Smith Bros., App., 32 S.W.2d 118, and conformed to 50 S.W.2d 191, 226 Mo.App. 1246—State ex rel. Robinson v. Trimble, 43 S.W.2d 1044, 329 Mo. 77—State ex rel. Estes v. Trimble, 43 S.W.2d 1040, 329 Mo. 16—State ex rel. Cunningham v. Haid, 40 S.W.2d 1048, quashing Cunningham v. Franke, App., 18 S.W.2d 106—State ex rel. Horspool v. Haid, 40 S.W.2d 611, 328 Mo. 327, conformed to Forsythe v. Horspool, App., 49 S.W.2d 687,

quashed 65 S.W.2d 923, 334 Mo. 196—State ex rel. Ward v. Trimble, 39 S.W.2d 372, 327 Mo. 773, quashing opinion Ward v. Western Union Telegraph Co., 22 S.W.2d 81, 224 Mo.App. 16, affirmed 46 S.W.2d 268, 226 Mo.App. 752—State ex rel. Mills Lumber Co. v. Trimble, 39 S.W.2d 355, 327 Mo. 899—State ex rel. Stevens v. Arnold, 30 S.W.2d 1015, 326 Mo. 32—State ex rel. Percy v. Cox, 30 S.W.2d 46, 325 Mo. 938, quashing opinion Rock Island Plow Co. v. Perry, 20 S.W.2d 956, 224 Mo.App. 639—State ex rel. Tonnar v. Bland, 25 S.W.2d 462, 324 Mo. 987—State ex rel. Wells v. Haid, 25 S.W.2d 92, 324 Mo. 759, quashing opinion Schweig v. Wells, App., 16 S.W.2d 684, followed in Engel v. Wells, 16 S.W.2d 687—State ex rel. Union Pac. R. Co. v. Bland, 23 S.W.2d 1029, 324 Mo. 601—State ex rel. Vesper-Buick Automobile Co. v. Daues, 19 S.W.2d 700, 323 Mo. 383, 67 A.L.R. 157, quashing part of opinion Lanham v. Vesper-Buick Automobile Co., App., 6 S.W.2d 995—State ex rel. Trachsel Motor Car Co. v. Trimble, 18 S.W.2d 839, 322 Mo. 1077—State ex rel. Kroger Grocery & Baking Co. v. Haid, 18 S.W.2d 478, 323 Mo. 9, quashing opinion Simmons v. Kroger Grocery & Baking Co., App., 6 S.W.2d 1023—State ex rel. Northwestern Nat. Ins. Co. v. Trimble, 18 S.W.2d 21, 322 Mo. 1236, quashing opinion in part Hoffman v. Northwestern Nat. Ins. Co., App., 38 S.W.2d 730—State ex rel. and to Use of Brancato v. Trimble, 18 S.W.2d 4, 322 Mo. 218—State ex rel. and to Use of Gagnepain v. Daues, 15 S.W.2d 815, 322 Mo. 376, quashing Gagnepain v. Levee Dist. No. 1 of Perry County, App., 7 S.W.2d 285, followed in Rozier v. Levee Dist. No. 1 of Perry County, App., 7 S.W.2d 288, reversed on other grounds, 28 S.W.2d 1116, second case, conformed to Gagnepain v. Levee Dist. No. 1 of Perry County, Mo., 28 S.W.2d 1116, first case—State ex rel. Fleming v. Bland, 15 S.W.2d 798, 322 Mo. 565—State ex rel. Dean v. Daues, 14 S.W.2d 990, 321 Mo. 1126, quashing opinion Dean v. Dean, App., 1 S.W.2d 235, and opinion conformed to 15 S.W.2d 1116—State ex rel. Commonwealth Casualty Co. v. Cox, 14 S.W.2d 600, 322 Mo. 38, quashing opinion Luak v. Commonwealth Casualty Co., App., 4 S.W.2d 497—State ex rel. City of Macon v. Trimble, 12 S.W.2d 727, 321 Mo. 671, quashing opinion Downey v. City of Macon, 6 S.W.2d 63, 223 Mo.App. 845—State ex rel. Levine v. Trimble, 8 S.W.2d 927, 320 Mo. 526—State ex rel. Barber v. Daues, 6 S.W. 998, conformed to Barber v. American Car & Foundry Co., App., 14 S.W.2d 478—State ex rel. Hop-

kins v. Daues, 6 S.W.2d 893, 319 Mo. 733, quashing opinion Hopkins v. American Car & Foundry Co., App., 295 S.W. 841—State ex rel. Land v. Trimble, 2 S.W.2d 616, 318 Mo. 963—State ex rel. Missouri State Highway Board, to Use of Fredonia Portland Cement Co. v. Cox, 1 S.W.2d 787, 318 Mo. 387, quashing Missouri State Highway Board for Use and Benefit of Fredonia Portland Cement Co. v. Southern Surety Co., App., 290 S.W. 652—State ex rel. R. E. Funsten Co. v. Becker, 1 S.W.2d 103, quashing opinion Universal Paper Products Co. v. R. E. Funsten Co., App., 285 S.W. 516, conformed to 6 S.W.2d 1020—State ex rel. Security Ins. Co. v. Trimble, 300 S.W. 812, 318 Mo. 173—State ex rel. Gordon v. Trimble, 300 S.W. 475, 318 Mo. 341—State ex rel. Zorn v. Cox, 298 S.W. 837, 318 Mo. 112, quashing Aldridge v. Zorn, App., 287 S.W. 650—State ex rel. Kansas City v. Trimble, 298 S.W. 833, 317 Mo. 1209, quashing opinion State ex rel. Lindsay v. Kansas City, App., 20 S.W.2d 1, and followed in State ex rel. Kansas City v. Trimble, Sup., 298 S.W. 835, quashing opinion State ex rel. Ross v. Kansas City, App., 20 S.W.2d 16, first case. Followed in State ex rel. Kansas City v. Trimble, Sup., 298 S.W. 836, quashing opinion State ex rel. Young v. Kansas City, App., 20 S.W.2d 11, first case, and State ex rel. Gough v. Kansas City, 20 S.W.2d 14. Followed in State ex rel. Kansas City v. Trimble, Sup., 298 S.W. 837, quashing opinion State ex rel. Neyhart v. Kansas City, App., 20 S.W.2d 12—State ex rel. Allen v. Trimble, 297 S.W. 378, 317 Mo. 751, quashing record Allen v. Best, 279 S.W. 728, 220 Mo.App. 1041—State ex rel. Johnson v. Arnold, 297 S.W. 59, 317 Mo. 858—State ex rel. Union Biscuit Co. v. Becker, 293 S.W. 783, 316 Mo. 865, certiorari quashing record and judgment Spina v. Union Biscuit Co., App., 273 S.W. 428—State ex rel. McSweeney v. Cox, 289 S.W. 869, 315 Mo. 1332, quashing record City of Aurora v. McSweeney, App., 283 S.W. 720—State ex rel. Roberts v. Trimble, 289 S.W. 796, 316 Mo. 354—State ex rel. American Car & Foundry Co. v. Daues, 288 S.W. 13, 315 Mo. 1229, quashing Harrison v. American Car & Foundry Co., App., 280 S.W. 60, reversed on other grounds Harrison v. American Car & Foundry Co., 296 S.W. 214—State ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709—State ex rel. Mountain Grove Creamery, Ice & Electric Co. v.

Cox, 286 S.W. 368, 315 Mo. 619, quashing opinion in part Vaughn v. Mountain Grove Creamery, Ice & Electric Co., App., 275 S.W. 592—State ex rel. Wabash Ry. Co. v. Bland, 281 S.W. 690, 313 Mo. 246—State ex rel. Burton v. Allen, 278 S.W. 772, quashing opinion in part, Burton v. Newark Fire Ins. Co., App., 263 S.W. 539, conformed to, App., 284 S.W. 865—State ex rel. Metropolitan Life Ins. Co. v. Allen, 276 S.W. 877, 310 Mo. 378, quashing record Simpson v. Metropolitan Life Ins. Co., App., 263 S.W. 521, in which judgment was reversed, App., 282 S.W. 454—State ex rel. Boeving v. Cox, 276 S.W. 869, 310 Mo. 367, quashing opinion Petty v. Boeving, 264 S.W. 66, 216 Mo.App. 271—State ex rel. Fogel Const. Co. v. Trimble, 274 S.W. 1028, 310 Mo. 248, quashing opinion Poynter v. Fogel Const. Co., App., 265 S.W. 841—State ex rel. Fabrico v. Trimble, 274 S.W. 712, 309 Mo. 415—State ex rel. Scott v. Trimble, 272 S.W. 66, 308 Mo. 123, quashing record State ex rel. and to Use of Clinkscales v. Scott, 261 S.W. 680, 216 Mo.App. 114—State ex rel. Missouri Gas & Electric Service Co. v. Trimble, 271 S.W. 43, 307 Mo. 536—State ex rel. North British & Mercantile Ins. Co. v. Cox, 270 S.W. 113, 307 Mo. 194, quashing opinion in part Rozell v. North British & Mercantile Ins. Co., 257 S.W. 520, 216 Mo.App. 168—State ex rel. Connecticut Fire Ins. Co. of Hartford, Conn., v. Cox, 268 S.W. 87, 306 Mo. 537, 37 A.L.R. 1456, quashing record Howell v. Connecticut Fire Ins. Co., 257 S.W. 178, 215 Mo.App. 386—State ex rel. Western Automobile Ins. Co. v. Trimble, 249 S.W. 902, 297 Mo. 659—State ex rel. Citizens' Bank of Warrenton v. Allen, 247 S.W. 411, 296 Mo. 636, quashing Koelling v. Citizens' Bank of Warrenton, App., 237 S.W. 176, opinion conformed to, App., 249 S.W. 1118 and Stadtman v. Citizens' Bank of Warrenton, 249 S.W. 1119—State ex rel. National Council of Knights and Ladies of Security v. Trimble, 239 S.W. 467, 292 Mo. 371—State ex rel. Brotherhood of American Yeoman v. Reynolds, 229 S.W. 1057, 287 Mo. 169, reversing Wilson v. Brotherhood of American Yeomen, App., 223 S.W. 992—State ex rel. Van Hafften v. Ellison, 226 S.W. 559, 285 Mo. 301, 12 A.L.R. 1157, quashing record Williams v. Van Deusen, 219 S.W. 395, 203 Mo.App. 162—State ex rel. Boatmen's Bank v. Reynolds, 218 S.W. 337, 281 Mo. 1, quashing record Boatmen's Bank v. Semple Place Realty Co., 213 S.W. 900, 202 Mo.App. 57—State ex rel. Cruzen v. Ellison, 211 S.W. 880, 278 Mo. 199, reversing Robinson v. Cruzen, App., 202 S.W. 449

unless the supreme court is of the opinion that the decision by the court of appeals correctly states the law and that prior decisions of the supreme court should be overruled.⁴⁹ The supreme court entertains certiorari to review a decision of a court of appeals in cases within the latter's jurisdiction

only for the purpose of maintaining uniformity in the opinions and harmony in the law,⁵⁰ and it will quash the decision only where it impairs that uniformity by being in conflict with a controlling decision;⁵¹ the fact that the supreme court is of the opinion that the decision is erroneous is not grounds

—State ex rel. Bankers' Life Co. of Des Moines, Iowa, v. Reynolds, 208 S.W. 618, 277 Mo. 14.

49. Mo.—State ex rel. Mills v. Allen, 128 S.W.2d 1040, quashing certiorari Mills v. Carthage Marble Corporation, 102 S.W.2d 769, 231 Mo.App. 334.

50. Mo.—State ex rel. Mills v. Allen, supra—State ex rel. Banks v. Hostetter, 125 S.W.2d 835, quashing opinion in part Day v. Banks, App., 102 S.W.2d 946—State ex rel. Missouri-Kansas-Texas R. Co. v. Shain, 124 S.W.2d 1141, quashing certiorari Hamarstrom v. Missouri-Kansas-Texas R. Co., App., 116 S.W.2d 280, certiorari denied Missouri-Kansas-Texas R. R. v. Hamarstrom, 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, quashing certiorari Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151—State ex rel. Kansas City Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913—State ex rel. Himmelsbach v. Becker, 85 S.W.2d 420, 337 Mo. 341, quashing certiorari Parsons v. Himmelsbach, App., 68 S.W.2d 841—State ex rel. Silverforb v. Smith, 43 S.W.2d 1054, quashing certiorari Durst v. Townes, 31 S.W.2d 583, 224 Mo. App. 675—State ex rel. Bull Dog Auto Ins. Ass'n of Chicago v. Bland, 291 S.W. 499, 316 Mo. 559, quashing certiorari McGee v. Newton Burial Park, App., 290 S.W. 644—State, ex rel. John Hancock Mut. Life Ins. Co. of Boston, Mass., v. Allen, 282 S.W. 46, 313 Mo. 384, quashing opinion Mueller v. John Hancock Mut. Life Ins. Co., App., 261 S.W. 709—State ex rel. Greer v. Cox, 274 S.W. 373, quashing certiorari Smith v. Greer, 257 S.W. 829, 216 Mo.App. 155—State ex rel. Berkshire v. Ellison, 230 S.W. 970, 287 Mo. 654.

51. Mo.—State ex rel. Melbourne Hotel Co. v. Hostetter, 126 S.W.2d 1189, quashing opinion Caldwell v. Melbourne Hotel Co., App., 116 S.W.2d 232—State ex rel. United Factories v. Hostetter, 126 S.W.2d 1173, quashing certiorari United Factories v. Brigham, App., 117 S.W.2d 662—State ex rel. Missouri-Kansas-Texas R. Co. v. Shain, 124 S.W.2d 1141, quashing certiorari Hamarstrom v. Missouri-

Kansas-Texas R. Co., App., 116 S.W.2d 280, certiorari denied Missouri-Kansas-Texas R. R. v. Hamarstrom, 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—State ex rel. Wors v. Hostetter, 124 S.W.2d 1072, quashing certiorari Wors v. Tarlton, App., 95 S.W.2d 1199—State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W.2d 789, quashing certiorari Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151—State ex rel. Clark v. Shain, 119 S.W.2d 971, quashing certiorari State ex rel. Clark v. National Surety Co., App., 82 S.W.2d 616, and In re Parker's Trust Estate, 67 S.W.2d 114, 228 Mo.App. 400—State ex rel. Terminal R. Ass'n of St. Louis v. Hostetter, 119 S.W.2d 208, 342 Mo. 859, quashing certiorari Brown v. Terminal R. Ass'n, of St. Louis, App., 85 S.W.2d 226—State ex rel. Ocean Accident & Guarantee Corporation v. Hostetter, 108 S.W.2d 17, 341 Mo. 488—State ex rel. Kansas City Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, quashing record and remanding cause, State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065, mandate conformed to 113 S.W.2d 132—State ex rel. Superior Mineral Co. v. Hostetter, 85 S.W.2d 743, 337 Mo. 718, denying quashal of opinion, Woodruff v. Superior Mineral Co., App., 70 S.W.2d 1104—State ex rel. Metropolitan Life Ins. Co. v. Allen, 85 S.W.2d 469, 337 Mo. 525, denying quashal of opinion Kane v. Metropolitan Life Ins. Co., 73 S.W.2d 826, 228 Mo.App. 649—State ex rel. Ely & Walker Dry Goods Co. v. Cox, 73 S.W.2d 743, 335 Mo. 596, quashing certiorari Kenser v. Ely & Walker Dry Goods Co., 48 S.W.2d 167, 226 Mo.App. 1016—State ex rel. Metropolitan Life Ins. Co. v. Shain, 66 S.W.2d 871, 334 Mo. 385—State ex fel. Hayward v. Haid, 51 S.W.2d 79, 330 Mo. 686, quashing Hayward v. Ham, App., 29 S.W.2d 243—State ex rel. Silverforb v. Smith, 43 S.W.2d 1054, quashing certiorari Durst v. Townes, 31 S.W.2d 583, 224 Mo.App. 675—State ex rel. Arndt v. Cox, 38 S.W.2d 1079, quashing certiorari Arndt v. Frye, App., 20 S.W.2d 920

—State ex rel. Continental Life Ins. Co. v. Trimble, 38 S.W.2d 1017, 327 Mo. 781—State ex rel. St. Louis-San Francisco Ry. Co. v. Haid, 37 S.W.2d 437, 327 Mo. 217, quashing error, Seidel v. St. Louis-San Francisco Ry. Co., App., 18 S.W.2d 126—State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901, quashing certiorari Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo. App. 508—State ex rel. City of St. Charles v. Haid, 28 S.W.2d 97, 325 Mo. 107, denying quashal of opinion Cregger v. City of St. Charles, 11 S.W.2d 750, 224 Mo.App. 232—State ex rel. Weisheyer v. Haid, 26 S.W.2d 939—State ex rel. Northwestern Nat. Ins. Co. v. Trimble, 20 S.W.2d 46, 323 Mo. 458, denying quashal of opinion and judgment Luthy v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 20 S.W.2d 299, 224 Mo.App. 371—State ex rel. Vesper-Buick Automobile Co. v. Dues, 19 S.W.2d 700, 323 Mo. 388, 67 A.L.R. 157, quashing part of opinion Lanham v. Vesper-Buick Automobile Co., App., 6 S.W.2d 995—State ex rel. Bull Dog Auto Ins. Ass'n of Chicago v. Bland, 291 S.W. 499, 316 Mo. 559, quashing certiorari McGee v. Newton Burial Park, App., 290 S.W. 644—State ex rel. Roberts v. Trimble, 289 S.W. 796, 316 Mo. 354—State ex rel. Kilkenny v. Dues, 289 S.W. 550, quashing certiorari Kilkenny v. Kilkenny, 279 S.W. 184, 220 Mo. App. 535—State ex rel. Conant v. Trimble, 277 S.W. 916, 311 Mo. 128—State ex rel. Anastas v. Allen, 276 S.W. 382, quashing certiorari, Balauri v. Anastas, App., 263 S.W. 458—State ex rel. Lehrack v. Trimble, 274 S.W. 416, 308 Mo. 597—State ex rel. Missouri Gas & Electric Service Co. v. Trimble, 271 S.W. 43, 307 Mo. 536—State ex rel. Frank Adam Electric Co. v. Allen, 251 S.W. 917, 299 Mo. 25, quashing certiorari Stoll v. Frank Adam Electric Co., 240 S.W. 245, 213 Mo.App. 395—State ex rel. Chicago, B. & Q. R. Co. v. Allen, 246 S.W. 538, quashing certiorari Hatten v. Chicago, B. & Q. R. Co., App., 233 S.W. 281—State ex rel. Elms v. Allen, 242 S.W. 679—State ex rel. St. Louis Brewing Ass'n v. Reynolds, 326 S.W. 579, quashing certiorari Lampe v. St. Louis Brewing Ass'n, 221 S.W. 447, 204 Mo.App. 373—State ex rel. Bush v. Sturgis, 221 S.W. 91, 281 Mo. 598,

for quashing it.⁵³ The writ of certiorari will be | quashed where no conflict exists.⁵³ Only rulings

9 A.L.R. 1315—State ex rel. Peters v. Reynolds, 214 S.W. 121—State ex rel. Mechanics' American Nat. Bank v. Sturgis, 206 S.W. 453, 276 Mo. 559—State ex rel. Arel v. Farrington, 197 S.W. 913—State ex rel. Arel v. Farrington, 197 S.W. 912, 272 Mo. 157, quashing certiorari Arel v. First Nat. Bank, 190 S.W. 78, 195 Mo.App. 165—State ex rel. Crockett v. Ellison, 196 S.W. 1140, 271 Mo. 416, quashing Ex parte Crockett, 190 S.W. 81, 195 Mo.App. 54.

15 C.J. p 1079 note 42 [b] (3).

Construction of statute

(1) Supreme court cannot interfere with construction of a statute by a court of appeals unless the supreme court has previously given a different construction to the statute.—State ex rel. Wors v. Hostetter, Mo., 124 S.W.2d 1073, quashing certiorari Wors v. Tarlton, App., 95 S.W.2d 1199—State ex rel. Clark v. Shain, Mo., 119 S.W.2d 971, quashing certiorari State ex rel. Clark v. National Surety Co., App., 82 S.W.2d 616, and In re Parker's Trust Estate, 67 S.W.2d 114, 228 Mo.App. 400—State ex rel. Superior Mineral Co. v. Hostetter, 85 S.W.2d 743, 337 Mo. 718, denying quashal of opinion Woodruff v. Superior Mineral Co., App., 70 S.W.2d 1104—State ex rel. Arndt v. Cox, Mo., 38 S.W.2d 1079, quashing certiorari Arndt v. Frye, App., 20 S.W.2d 920—State ex rel. Ott v. Trimble, Mo., 28 S.W.2d 75, quashing certiorari Ott v. Stone, 29 S.W.2d 726, 225 Mo.App. 132—State ex rel. Frank Adam Electric Co. v. Allen, 251 S.W. 917, 299 Mo. 25, quashing certiorari Stoll v. Frank Adam Electric Co., 240 S.W. 245, 299 Mo. 25, 213 Mo.App. 395—State ex rel. Brotherhood of American Yeoman v. Reynolds, 229 S.W. 1057, 287 Mo. 169, reversing Wilson v. Brotherhood of American Yeomen, App., 223 S.W. 992—State ex rel. Mechanics' American Nat. Bank v. Sturgis, 203 S.W. 453, 276 Mo. 579—Majestic Mfg. Co. v. Reynolds, Mo., 186 S.W. 1072.

(2) Where the meaning of a statute is debatable, supreme court cannot, on certiorari, overturn construction of a court of appeals merely because it violates some general canon of construction recognized in supreme court's decisions, but where a statute plainly can have only one meaning under canons of construction established by the supreme court, and a court of appeals gives it another meaning, supreme court may interfere on certiorari because the necessary effect of such erroneous holding is to violate such established canons.—State ex rel.

Wors v. Hostetter, Mo., 124 S.W.2d 1073, quashing certiorari Wors v. Tarlton, App., 95 S.W.2d 1199.

(3) If the construction of a statute by a court of appeals turns on its application to specific facts, supreme court must have construed statute differently with reference to the same or similar facts before it may interfere on certiorari.—State ex rel. Wors v. Hostetter, supra.

(4) In determining whether a decision of court of appeals in a compensation case contravenes decisions of the supreme court, decisions from other states in compensation cases cannot be considered.—State ex rel. Wors v. Hostetter, supra.

53. Mo.—State ex rel. Mills v. Allen, 128 S.W.2d 1040, quashing certiorari Mills v. Carthage Marble Corporation, 102 S.W.2d 769, 231 Mo.App. 334—State ex rel. Gentry v. Hostetter, 125 S.W.2d 72, quashing certiorari Robinson v. Gentry, App., 106 S.W.2d 913—State ex rel. Wors v. Hostetter, 124 S.W.2d 1073, quashing certiorari Wors v. Tarlton, App., 95 S.W.2d 1199—State ex rel. Clark v. Shain, 119 S.W.2d 971, quashing certiorari State ex rel. Clark v. National Surety Co., App., 82 S.W.2d 616, and In re Parker's Trust Estate, 67 S.W.2d 114, 228 Mo.App. 400—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, quashing record and remanding cause, State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065, mandate conformed to 113 S.W.2d 132—State ex rel. Superior Mineral Co. v. Hostetter, 85 S.W.2d 743, 337 Mo. 718, denying quashal of opinion Woodruff v. Superior Mineral Co., App., 70 S.W.2d 1104—State ex rel. Continental Life Ins. Co. v. Trimble, 38 S.W.2d 1017, 327 Mo. 731—State ex rel. Weisheyer v. Hald, 26 S.W.2d 939—State ex rel. Massachusetts Bonding & Insurance Co. v. Allen, 271 S.W. 757, 308 Mo. 109, quashing certiorari Niese Grocer Co. v. Massachusetts Bonding & Ins. Co., App., 259 S.W. 952—State ex rel. American Press v. Allen, 256 S.W. 1049, quashing certiorari, Stubbs v. American Press, App., 254 S.W. 105—State ex rel. Agricultural Ins. Co. of Watertown, N. Y., v. Allen, 254 S.W. 194—State ex rel. Frank Adam Electric Co. v. Allen, 251 S.W. 917, 299 Mo. 25, quashing certiorari Stoll v. Frank Adam Electric Co., 240 S.W. 245, 213 Mo.App. 395—State ex rel. Chicago, B. & Q. R. Co. v. Allen, 246 S.W. 538, quashing certiorari Hatten v. Chicago, B. & Q. R. Co., App., 233 S.

W. 281—State ex rel. Jenkins v. Trimble, 236 S.W. 651, 291 Mo. 227, quashing certiorari Minter, Williams & Minter v. Jenkins, 229 S.W. 402, 206 Mo.App. 642—State ex rel. American Packing Co. v. Reynolds, 230 S.W. 642, 287 Mo. 697, quashing certiorari Heckfuss v. American Packing Co., App., 224 S.W. 99—State ex rel. Commonwealth Trust Co. v. Reynolds, 213 S.W. 804, 278 Mo. 695—State ex rel. Mechanics' American Nat. Bank v. Sturgis, 203 S.W. 453, 276 Mo. 559.

53. Mo.—State ex rel. Public Service Commission v. Shain, 119 S.W.2d 220, 342 Mo. 867, quashing certiorari State ex rel. and to Use of Alton R. Co. v. Public Service Commission, App., 110 S.W.2d 1121, transferred, see Sup., 100 S.W.2d 474—State ex rel. American School of Osteopathy v. Daues, 18 S.W.2d 487, 322 Mo. 991, quashing certiorari Noren v. American School of Osteopathy, 2 S.W.2d 215, 223 Mo.App. 278, affirming 298 S.W. 1061—State ex rel. First Nat. Bank v. Trimble, 287 S.W. 432, 315 Mo. 966, quashing certiorari First Nat. Bank of Milan v. Kibble, 273 S.W. 148, 221 Mo.App. 311—State ex rel. Koch v. Farrington, 195 S.W. 1044, quashing certiorari Rhodes v. Koch, 189 S.W. 641, 195 Mo. App. 182—State v. Robertson, 187 S.W. 34.

Decisions not in conflict with controlling decision

Mo.—State ex rel. St. Louis Car Co. v. Hostetter, 131 S.W.2d 558, quashing certiorari Kearley v. St. Louis Car Co., App., 111 S.W.2d 976—State ex rel. Couplin v. Hostetter, 129 S.W.2d 1, quashing certiorari Couplin v. Couplin, App., 121 S.W.2d 186—State ex rel. Mills v. Allen, 128 S.W.2d 1040, quashing certiorari Mills v. Carthage Marble Corporation, 102 S.W.2d 769, 231 Mo.App. 334—State ex rel. Ashauer v. Hostetter, 127 S.W.2d 697, quashing Pier v. Ashauer, App., 102 S.W.2d 764, transferred, see Sup., 92 S.W.2d 154—State ex rel. United Factories v. Hostetter, 126 S.W.2d 1173, quashing certiorari United Factories v. Brigham, App., 117 S.W.2d 662—State ex rel. Gentry v. Hostetter, 125 S.W.2d 72, quashing certiorari Robinson v. Gentry, App., 106 S.W.2d 913—State ex rel. Missouri-Kansas-Texas R. Co. v. Shain, 124 S.W.2d 1141, quashing certiorari Hamarstrom v. Missouri-Kansas-Texas R. Co., App., 116 S.W.2d 280, certiorari denied Missouri-Kansas-Texas R. R. v. Hamarstrom, 59 S.Ct. 1032, 307 U.S. 636, 83 L.Ed. 1518—State ex rel. Kansas City

Public Service Co. v. Shain, 124 S.W.2d 1097, quashing certiorari King v. Kansas City Public Service Co., App., 91 S.W.2d 89—State ex rel. Wors v. Hostetter, 124 S.W.2d 1072, quashing certiorari Wors v. Tarlton, App., 95 S.W.2d 1199—State ex rel. Pryor v. Anderson, 123 S.W.2d 181, quashing mandamus, App., 112 S.W.2d 857—State ex rel. Brotherhood of Locomotive Firemen and Enginemen v. Shain, 123 S.W.2d 1, quashing certiorari Roberson v. Brotherhood of Locomotive Firemen and Enginemen, App., 114 S.W.2d 136—State ex rel. and to Use of Reeves v. Shain, 122 S.W.2d 885, quashing certiorari Mulanix v. Reeves, App., 112 S.W.2d 100—State ex rel. Clark v. Shain, 119 S.W.2d 971, quashing certiorari State ex rel. Clark v. National Surety Co., App., 82 S.W.2d 616, and In re Parker's Trust Estate, 67 S.W.2d 114, 228 Mo.App. 400—State ex rel. Ben Hur Life Ass'n v. Shain, 119 S.W.2d 236, 342 Mo. 928, quashing certiorari Helm v. Ben Hur Life Ass'n, App., 107 S.W.2d 844—State ex rel. Terminal R. Ass'n of St. Louis v. Hostetter, 119 S.W.2d 208, 342 Mo. 859, quashing certiorari Brown v. Terminal R. Ass'n of St. Louis, App., 85 S.W.2d 226—State ex rel. Washington Fidelity Nat. Ins. Co. v. Hostetter, 117 S.W.2d 1083, 342 Mo. 843, quashing certiorari Hall v. Washington Fidelity Nat. Ins. Co., App., 105 S.W.2d 970—State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733, quashing certiorari Lyons v. St. Joseph Belt Ry. Co., App., 84 S.W.2d 933—State ex rel. Ocean Accident & Guarantee Corporation v. Hostetter, 108 S.W.2d 17, 341 Mo. 488—State ex rel. Govro v. Hostetter, 107 S.W.2d 22, 341 Mo. 262—State ex rel. F. T. O'Dell Const. Co. v. Hostetter, 104 S.W.2d 671, 340 Mo. 1155, quashing certiorari Buhrkuhl v. F. T. O'Dell Const. Co., App., 95 S.W.2d 843—State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, 340 Mo. 965, quashing certiorari In re Flynn's Estate, App., 95 S.W.2d 1208, transferred, see 92 S.W.2d 671, 338 Mo. 522—State ex rel. Thym v. Shain, 104 S.W.2d 237, 340 Mo. 927, quashing certiorari Drake v. Thym, 97 S.W.2d 128, 231 Mo.App. 383—State ex rel. Sirkin & Needles Moving Co. v. Hostetter, 101 S.W.2d 50, 340 Mo. 211—State ex rel. Tunget v. Shain, 101 S.W.2d 1, 340 Mo. 434—State ex rel. Missouri Electric Power Co. v. Allen, 100 S.W.2d 868, 340 Mo. 44—State ex rel. Metropolitan Life Ins. Co. v. Allen, 100 S.W.2d 487, 339 Mo. 1186, quashing certiorari Young v. Metropolitan Life Ins. Co., 84 S.W.2d 1065, 229 Mo.App. 823—State ex

rel. Metropolitan Life Ins. Co. v. Hostetter, 92 S.W.2d 122, 338 Mo. 559, followed in 92 S.W.2d 126, which quashed certiorari Farmer v. Metropolitan Life Ins. Co., 85 S.W.2d 235, 230 Mo.App. 80, and quashing certiorari Moss v. Metropolitan Life Ins. Co., 84 S.W.2d 395, 230 Mo.App. 70—State ex rel. Electric Household Stores v. Hostetter, 89 S.W.2d 28, 333 Mo. 79, quashing certiorari Cameron v. Electric Household Stores, 78 S.W.2d 548, 231 Mo.App. 889—State ex rel. Kansas City Life Ins. Co. v. Allen, 85 S.W.2d 886, 337 Mo. 770—State ex rel. Superior Mineral Co. v. Hostetter, 85 S.W.2d 743, 337 Mo. 718, denying quashal of opinion Woodruff v. Superior Mineral Co., App., 70 S.W.2d 1104—State ex rel. Himmelsbach v. Decker, 85 S.W.2d 420, 337 Mo. 341, quashing certiorari Parsons v. Himmelsbach, App., 68 S.W.2d 841—State ex rel. Schrowang v. Hostetter, 85 S.W.2d 417, 337 Mo. 522, denying quashal of opinion Schrowang v. Von Hoffman Press, App., 75 S.W.2d 649—State ex rel. Bowdon v. Allen, 85 S.W.2d 63, 337 Mo. 260, quashing certiorari Bowdon v. Metropolitan Life Ins. Co., App., 78 S.W.2d 474—State ex rel. Missouri Mut. Ass'n v. Allen, 78 S.W.2d 862, 336 Mo. 352, quashing certiorari Macon v. Missouri Mut. Ass'n, App., 60 S.W.2d 402—State ex rel. Clark v. Becker, 73 S.W.2d 769, 335 Mo. 785, quashing certiorari Clark v. John Hancock Mut. Life Ins. Co., 53 S.W.2d 484, 230 Mo.App. 593—State ex rel. Ely & Walker Dry Goods Co. v. Cox, 73 S.W.2d 743, 335 Mo. 596, quashing certiorari Kenser v. Ely & Walker Dry Goods Co., 48 S.W.2d 167, 226 Mo.App. 1016—State ex rel. Associated Holding Co. v. Shain, 73 S.W.2d 391, 335 Mo. 474—State ex rel. Stein v. Becker, 67 S.W.2d 755, 334 Mo. 749, quashing certiorari Perry v. Stein, App., 63 S.W.2d 296—State ex rel. and to Use of Hurley v. Becker, 66 S.W.2d 524, 334 Mo. 537, quashing certiorari Hurley v. Missouri Pacific Transp. Co., App., 56 S.W.2d 620—State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115, quashing certiorari Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032—State ex rel. Williams v. Daves, 66 S.W.2d 137, 334 Mo. 91, quashing certiorari Niedringhaus v. Wm. F. Niedringhaus Inv. Co., App., 54 S.W.2d 79, transferred, see Niedringhaus v. Niedringhaus Inv. Co., 52 S.W.2d 395, 330 Mo. 1089—State ex rel. Union Indemnity Co. v. Shain, 66 S.W.2d 102, 334 Mo. 153, quashing certiorari Chernus v. Kennedy-Coats Const. Co., 55 S.W.2d 744, 227 Mo.

App. 582—State ex rel. Kurz v. Bland, 64 S.W.2d 638, 333 Mo. 941, quashing certiorari Kurz v. Greenlease Motor Car Co., App., 52 S.W.2d 498—State ex rel. St. Louis Public Service Co. v. Haid, 63 S.W.2d 15, 323 Mo. 845, quashing certiorari Sneed v. St. Louis Public Service Co., App., 53 S.W.2d 1062—State ex rel. Caraker v. Becker, 62 S.W.2d 899, 333 Mo. 400—State ex rel. Probst v. Haid, 62 S.W.2d 869, 333 Mo. 390, quashing certiorari Probst v. St. Louis Basket & Box Co., App., 52 S.W.2d 501—State ex rel. Gatewood v. Trimble, 62 S.W.2d 756, 333 Mo. 207, quashing, certiorari Citizens' Sec. Bank of Englewood v. Gatewood, App., 36 S.W.2d 426—State ex rel. Hauck Bakery Co. v. Haid, 62 S.W.2d 400, 333 Mo. 76, quashing certiorari Blackwill v. Franke, App., 49 S.W.2d 211—State ex rel. Blando v. Haid, 60 S.W.2d 38, quashing certiorari Vitale v. Blando, App., 52 S.W.2d 24—State ex rel. State Highway Commission of Missouri v. Haid, 59 S.W.2d 1057, 332 Mo. 606, quashing certiorari State ex rel. State Highway Commission of Missouri v. Caruthers, App., 51 S.W.2d 126—State ex rel. and to Use of Missouri Pac. R. Co. v. Haid, 59 S.W.2d 690, 332 Mo. 616, quashing certiorari Superior Minerals Co. v. Missouri Pac. R. Co., 45 S.W.2d 912, 227 Mo.App. 1044—State ex rel. Missouri Pac. R. Co. v. Trimble, 59 S.W.2d 622, quashing certiorari Atchison v. Missouri Pac. R. Co., App., 46 S.W.2d 230—State ex rel. Burger v. Trimble, 55 S.W.2d 422, 331 Mo. 748, quashing certiorari Burgher v. Niedorp, App., 50 S.W.2d 174—State ex rel. Loving v. Trimble, 53 S.W.2d 1033, 331 Mo. 446, quashing certiorari Loving v. Becker, App., 33 S.W.2d 1037—State ex rel. Elliott's Department Store Co. v. Haid, 51 S.W.2d 1015, 330 Mo. 959, quashing certiorari Essenspreis v. Elliott's Department Store, App., 37 S.W.2d 458—State ex rel. Southern Surety Co. of New York v. Haid, 49 S.W.2d 41, 329 Mo. 1220, quashing certiorari Texas Co. v. Wax, 36 S.W.2d 122, 226 Mo. App. 850—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 46 S.W.2d 849, 329 Mo. 292, quashing certiorari Hankins v. St. Louis-San Francisco Ry. Co., App., 31 S.W.2d 596—State ex rel. Silverforb v. Smith, 43 S.W.2d 1054, quashing certiorari Durst v. Townes, 31 S.W.2d 583, 224 Mo. App. 675—State ex rel. Cary v. Trimble, 43 S.W.2d 1050, quashing certiorari, App., Buzby v. Cary, 30 S.W.2d 171—State ex rel. Consolidated School Dist. No. 2 of Pike County v. Haid, 41 S.W.2d 806, 328 Mo. 729, quashing certiorari Com-

solidated School Dist. No. 2 v. Cooper, App., 28 S.W.2d 344—State ex rel. Gosselin v. Trimble, 41 S.W.2d 801, 329 Mo. 760, quashing certiorari Gosselin v. Yellow Cab Co., App., 29 S.W.2d 186—State ex rel. Schroeder & Tremayne v. Haid, 41 S.W.2d 789, 328 Mo. 807, quashing certiorari Cushulas v. Schroeder & Tremayne, 22 S.W.2d 872, 325 Mo.App. 567—State ex rel. Arndt v. Cox, 38 S.W.2d 1079, quashing certiorari Arndt v. Frye, App., 20 S.W.2d 920—State ex rel. Continental Life Ins. Co. v. Trimble, 38 S.W.2d 1017, 327 Mo. 781—State ex rel. St. Louis-San Francisco Ry. Co. v. Haid, 37 S.W.2d 437, 327 Mo. 217, quashing error Seidel v. St. Louis-San Francisco Ry. Co., App., 18 S.W.2d 126—State ex rel. City of Springfield v. Cox, 38 S.W.2d 102, 327 Mo. 152, quashing certiorari Cunningham v. City of Springfield, 31 S.W.2d 123, 226 Mo.App. 23—State ex rel. Kirby v. Trimble, 32 S.W.2d 569, 326 Mo. 675, quashing certiorari Brady v. Kirby, 22 S.W.2d 52, 224 Mo.App. 184—State ex rel. Harrington v. Trimble, 31 S.W.2d 783, 326 Mo. 623—State ex rel. Strodman v. Haid, 30 S.W.2d 466, 325 Mo. 1137, denying quashal of opinion Ex parte Meyer, App., 18 S.W.2d 560—State ex rel. Strohfeld v. Cox, 30 S.W.2d 462, 325 Mo. 901, quashing certiorari Meyer Milling Co. v. Strohfeld, 20 S.W.2d 963, 224 Mo.App. 508—State ex rel. Kansas City Public Service Co. v. Bland, 30 S.W.2d 445, 325 Mo. 505, quashing certiorari Grubbs v. Kansas City Public Service Co., App., 30 S.W.2d 441—State ex rel. American Surety Co. of New York v. Haid, 30 S.W.2d 100, 325 Mo. 949, quashing certiorari Wellston Trust Co. v. American Surety Co. of New York, 14 S.W.2d 23, 224 Mo.App. 241—State ex rel. St. Louis Bridge & Terminal Rys. Co. v. Haid, 29 S.W.2d 714, 325 Mo. 532, quashing certiorari Howard v. Lewin Metals Corporation, App., 22 S.W.2d 84—State ex rel. Valentine Coal Co. v. Trimble, 28 S.W.2d 1028, 325 Mo. 277, quashing certiorari Cotter v. Valentine Coal Co., 14 S.W.2d 660, 222 Mo.App. 1138—State ex rel. City of St. Charles v. Haid, 28 S.W.2d 97, 325 Mo. 107, denying quashal of opinion Cregger v. City of St. Charles, 11 S.W.2d 750, 224 Mo.App. 232—State ex rel. Ott v. Trimble, 23 S.W.2d 75, quashing certiorari Ott v. Stone, 29 S.W.2d 726, 325 Mo.App. 132—State ex rel. Weisheyer v. Haid, 26 S.W.2d 935—State ex rel. Jones v. Cox, 23 S.W.2d 112, denying quashal of opinion Jones v. Gilliox, App., 9 S.W.2d 89—State ex rel. Fichtner v. Haid, 22 S.W.2d 1045, 324 Mo.

130, quashing certiorari Fichtner v. Mohr, 16 S.W.2d 739, 223 Mo. App. 752—State ex rel. Northwestern Nat. Ins. Co. v. Trimble, 20 S.W.2d 46, 323 Mo. 458, denying quashal of opinion and judgment Luthy v. Northwestern Nat. Ins. Co. of Milwaukee, Wis., 20 S.W.2d 299, 224 Mo.App. 371—State ex rel. Noe v. Cox, 19 S.W.2d 695, 323 Mo. 520, denying quashal of opinion Schroll v. Noe, App., 297 S.W. 999—State ex rel. American School of Osteopathy v. Daues, 18 S.W.2d 487, 322 Mo. 991, quashing certiorari Noren v. American School of Osteopathy, 2 S.W.2d 215, 223 Mo.App. 278, reversing 298 S.W. 1061—State ex rel. Chicago Great Western R. Co. v. Trimble, 14 S.W.2d 978, quashing certiorari Neely v. Chicago Great Western R. Co., App., 14 S.W.2d 972—State ex rel. Indemnity Co. of America v. Daues, 13 S.W.2d 1059, 321 Mo. 1035, quashing certiorari, Goerss v. Indemnity Co. of America, 3 S.W.2d 272, 223 Mo.App. 316, followed in Krueger v. Indemnity Co. of America, App., 3 S.W.2d 277, certiorari quashed State ex rel. Indemnity Co. of America v. Daues, Sup., 13 S.W.2d 1061—State ex rel. Jones v. Daues, 13 S.W.2d 537, 321 Mo. 910—State ex rel. MacLay v. Cox, 10 S.W.2d 940, 320 Mo. 1218, quashing certiorari MacLay v. Missouri Pac. Ry. Co., App., 299 S.W.2d 626—State ex rel. National Ammonia Co. v. Daues, 10 S.W.2d 931, 320 Mo. 1234, quashing certiorari Turley v. National Ammonia Co., App., 299 S.W. 53—State ex rel. Security Ben. Ass'n v. Cox, 9 S.W.2d 953, 321 Mo. 130, quashing certiorari Spencer v. Security Benefit Ass'n, App., 297 S.W. 989—State ex rel. City of Cameron v. Trimble, 9 S.W.2d 876, 321 Mo. 221, quashing certiorari Wyckoff v. City of Cameron, App., 9 S.W.2d 872—State ex rel. English v. Trimble, 9 S.W.2d 624, 320 Mo. 1113—State ex rel. Wells v. Daues, 3 S.W.2d 731, quashing certiorari Bocklitz v. Wells, 293 S.W. 71, 221 Mo.App. 279—State ex rel. Al. G. Barnes Amusement Co. v. Trimble, 300 S.W. 1064, 318 Mo. 274—State ex rel. Locke v. Trimble, 298 S.W. 782—State ex rel. Metropolitan Life Ins. Co. v. Daues, 297 S.W. 951, quashing certiorari Hickey v. Metropolitan Life Ins. Co., App., 270 S.W. 388—State ex rel. St. Louis-San Francisco Ry. Co. v. Cox, 293 S.W. 122, quashing certiorari Paul v. St. Louis-San Francisco Ry. Co., App., 275 S.W. 575—State ex rel. Holman v. Trimble, 293 S.W. 98, 316 Mo. 1041, quashing certiorari State ex rel. Bell v. Holman, 293 S.W. 93, 222 Mo.App. 531, followed in State ex rel. Ball & Neal v.

Holman, 293 S.W. 98, State ex rel. Dreps & Sons v. Holman, App., 293 S.W. 98, and State ex rel. Holmes v. Holman, App., 293 S.W. 98—State ex rel. Williams v. Daues, 292 S.W. 58, quashing certiorari Marsden v. Williams, App., 282 S.W. 478—State ex rel. Bull Dog Auto Ins. Ass'n of Chicago v. Bland, 291 S.W. 499, 316 Mo. 559, quashing certiorari McGee v. Newton Burial Park, App., 290 S.W. 644—State ex rel. Winters v. Trimble, 290 S.W. 115, 315 Mo. 1295, quashing certiorari Winters v. Reserve Loan Life Ins. Co., 290 S.W. 109, 221 Mo.App. 519—State ex rel. Park v. Daues, 289 S.W. 957, 316 Mo. 346, quashing certiorari Park v. Fidelity & Casualty Co. of New York, App., 279 S.W. 246—State ex rel. Bradley v. Trimble, 289 S.W. 922, 316 Mo. 97, quashing certiorari Smith v. Nicholson, 289 S.W. 349, 221 Mo.App. 438—State ex rel. Pevely Dairy Co. v. Daues, 289 S.W. 835, 316 Mo. 418, quashing certiorari Williams v. Pevely Dairy Co., App., 285 S.W. 149—State ex rel. Fulton Iron Works v. Allen, 289 S.W. 583, quashing certiorari Ferguson v. Fulton Iron Works, App., 259 S.W. 811—State ex rel. Kilkenny v. Daues, 289 S.W. 550, quashing certiorari Kilkenny v. Kilkenny, 279 S.W. 184, 220 Mo.App. 535—State ex rel. Koenen v. Daues, 288 S.W. 14, quashing certiorari Koenen v. Terminal Railroad Ass'n, App. 280 S.W. 73—State ex rel. Woodson v. Trimble, 287 S.W. 626, quashing certiorari Woodson v. Leo-Grunwald Vinegar Co., 272 S.W. 1084, 220 Mo.App. 831—State ex rel. Utz v. Daues, 287 S.W. 606, quashing certiorari Utz v. Mayes, App., 267 S.W. 59—State ex rel. Anderson v. Daues, 287 S.W. 603, quashing certiorari Anderson v. Wells, 273 S.W. 233, 220 Mo.App. 19—State ex rel. Travelers' Indemnity Co. v. Daues, 285 S.W. 479, 315 Mo. 22, quashing certiorari Kistenmacher v. Travelers' Indemnity Co., App., 273 S.W. 125—State ex rel. Tummons v. Cox, 282 S.W. 694, 313 Mo. 672, quashing certiorari Tummons v. Stokes, App., 274 S.W. 528—State ex rel. American Car & Foundry Co. v. Daues, 282 S.W. 389, 313 Mo. 681, quashing certiorari Cobb v. American Car & Foundry Co., App., 270 S.W. 398—State ex rel. Taylor v. Daues, 281 S.W. 398, 313 Mo. 200, quashing certiorari Taylor v. Security Ben. Ass'n of Topeka, Kan., App., 270 S.W. 132—State ex rel. Cox v. Trimble, 279 S.W. 60, 312 Mo. 322—State ex rel. Conant v. Trimble, 277 S.W. 916, 311 Mo. 128—State ex rel. Major v. Judges of St. Louis Court of Appeals, 276 S.W. 1026, 310 Mo. 386, quashing certiorari Major v. Host, App., 263

and decisions are reviewable,⁵⁴ and they must be | based on a state of facts parallel to the supreme

S.W. 466—State ex rel. Kansas City Life Ins. Co. v. Trimble, 276 S.W. 1020, 310 Mo. 446—State ex rel. Anastas v. Allen, 276 S.W. 382, quashing certiorari Balauri v. Anastas, App., 263 S.W. 458—State ex rel. McLaughlin v. Trimble, 274 S.W. 391—State ex rel. Greer v. Cox, 274 S.W. 373, quashing certiorari Smith v. Greer, 257 S.W. 829, 216 Mo.App. 155—State ex rel. Mississippi River & B. T. Ry. v. Allen, 272 S.W. 925, 308 Mo. 487, quashing certiorari Ramsey v. Mississippi River & B. T. Ry., App., 253 S.W. 1079—State ex rel. Massachusetts Bonding & Insurance Co. v. Allen, 271 S.W. 757, 308 Mo. 109, quashing certiorari Niese Grocer Co. v. Massachusetts Bonding & Ins. Co., App., 259 S.W. 952—State ex rel. Terry v. Allen, 271 S.W. 469, 308 Mo. 230, quashing certiorari Terry v. Hague, App., 251 S.W. 77—State ex rel. Cole v. Trimble, 271 S.W. 374—State ex rel. Cole v. Trimble, 269 S.W. 959, 307 Mo. 57, quashing certiorari W. J. Howey Co. v. Cole, 269 S.W. 955, 219 Mo.App. 34—State ex rel. Dew v. Trimble, 269 S.W. 617, 306 Mo. 657—State ex rel. Smith v. Allen, 267 S.W. 843, quashing certiorari Smith v. Donk Bros. Coal & Coke Co., App., 260 S.W. 545—State ex rel. John Hancock Mut. Life Ins. Co. of Boston v. Allen, 267 S.W. 832, 306 Mo. 197, quashing certiorari Cradick v. John Hancock Mut. Life Ins. Co. of Boston, Mass., App., 256 S.W. 501—State ex rel. Missouri Pac. R. Co. v. Cox, 267 S.W. 382, 306 Mo. 27—State ex rel. Security Mut. Life Ins. Co. v. Allen, 267 S.W. 379, 305 Mo. 607, quashing certiorari Howell v. Security Mut. Life Ins. Co., App., 253 S.W. 411—State ex rel. Henry v. Allen, 263 S.W. 190, quashing certiorari State v. Henry, App., 256 S.W. 523—State ex rel. Snyder v. Trimble, 262 S.W. 697, quashing certiorari Snyder v. Kansas City, 262 S.W. 695, 218 Mo.App. 24—State ex rel. Kansas City Light & Power Co. v. Trimble, 262 S.W. 357, quashing certiorari Godfrey v. Kansas City Light & Power Co., 247 S.W. 451, 213 Mo.App. 139—State ex rel. Wabash Ry. Co. v. Trimble, 260 S.W. 1000, quashing certiorari Koontz v. Wabash R. Co., App., 253 S.W. 413—State ex rel. Kansas City Rys. Co. v. Trimble, 260 S.W. 746, quashing certiorari Conley v. Kansas City Rys. Co., App., 259 S.W. 153—State ex rel. Thomas v. Trimble, 259 S.W. 1052, 303 Mo. 266—State ex rel. Business Men's Assur. Co. v. Allen, 259 S.W. 77, 302 Mo. 525,

quashing certiorari Melville v. Business Men's Acc. Assur. Co., App., 253 S.W. 68—State ex rel. American Press v. Allen, 256 S.W. 1049, quashing certiorari Stubbs v. American Press, App., 254 S.W. 105—State ex rel. Quincy, O. & K. C. R. Co. v. Trimble, 254 S.W. 846, quashing certiorari Gobin v. Quincy, O. & K. C. R. Co., App., 255 S.W. 327—State ex rel. Agricultural Ins. Co. of Watertown, N.Y., v. Allen, 254 S.W. 194—State ex rel. Olsen v. Allen, 253 S.W. 1012, quashing certiorari Olsen v. Supreme Council of Royal Arcanum, App., 237 S.W. 889—State ex rel. D'Arcourt v. Daues, 253 S.W. 956, quashing certiorari D'Arcourt v. Little River Drainage Dist., 245 S.W. 394, 212 Mo.App. 610—State ex rel. Seibel v. Trimble, 253 S.W. 215, 299 Mo. 164, quashing certiorari Price v. Seibel, App., 253 S.W. 212—State ex rel. Hausgen v. Allen, 250 S.W. 905, 298 Mo. 448, quashing certiorari Hausgen v. Elsberry Drainage Dist., App., 245 S.W. 401—State ex rel. Dowell v. Allen, 250 S.W. 580, quashing certiorari Ford v. Dowell, App., 243 S.W. 386—State ex rel. Shaw Transfer Co. v. Trimble, 250 S.W. 396, quashing certiorari Jepsen v. Shaw Transfer Co., 243 S.W. 370, 211 Mo.App. 366—State ex rel. Hartford Fire Ins. Co. v. Trimble, 250 S.W. 393, 298 Mo. 418, quashing certiorari Hartford Fire Ins. Co. v. Payne, App., 243 S.W. 357—State ex rel. Shaw Transfer Co. v. Trimble, 250 S.W. 384, quashing certiorari Burke v. Shaw Transfer Co., 243 S.W. 449, 211 Mo.App. 353—State ex rel. Nafziger Baking Co. v. Trimble, 247 S.W. 146—State ex rel. Pellgreen Const. Co. v. Allen, 246 S.W. 171, quashing certiorari Riddle v. Pellgreen Const. Co., 237 S.W. 827, 211 Mo.App. 133—State ex rel. Missouri State Life Ins. Co. v. Allen, 243 S.W. 839, 295 Mo. 307—State ex rel. Scott v. Cox, 243 S.W. 144—State ex rel. Elms v. Allen, 242 S.W. 679—State ex rel. United Rys. Co. of St. Louis v. Allen, 240 S.W. 117—State ex rel. Stevens Motor Car Co. v. Allen, 239 S.W. 105, 292 Mo. 360—State ex rel. Harbis v. Trimble, 238 S.W. 809, 292 Mo. 333, transferred, see Harbis v. Cudahy Packing Co., 241 S.W. 980, 211 Mo. App. 183—State ex rel. Chicago & A. R. Co. v. Allen, 236 S.W. 868, 291 Mo. 206, quashing certiorari Wagner v. Chicago & A. R. Co., 232 S.W. 771, 209 Mo.App. 121—State ex rel. Calhoun v. Reynolds, 238 S.W. 483, 289 Mo. 506, quashing certiorari State ex rel. Priest v. Calhoun, 226 S.W. 329, 207 Mo.App.

149—State ex rel. Mann v. Trimble, 232 S.W. 100, 290 Mo. 661—State ex rel. American Packing Co. v. Reynolds, 230 S.W. 642, 287 Mo. 697, quashing certiorari Heckfuss v. American Packing Co., App., 224 S.W. 99—State ex rel. St. Louis, I. M. & S. R. Co. v. Reynolds, 226 S.W. 564, 286 Mo. 204, modifying Schulz v. St. Louis, I. M. & S. Ry. Co., App., 223 S.W. 757—State ex rel. Metropolitan St. R. Co. v. Ellison, 224 S.W. 820, quashing certiorari Quirk v. Metropolitan St. Ry. Co., App., 210 S.W. 106—State ex rel. City of St. Joseph v. Ellison, 223 S.W. 671, quashing certiorari Bradford v. City of St. Joseph, App., 214 S.W. 281—State ex rel. Duvall v. Ellison, 223 S.W. 651, quashing certiorari Gibbs v. Duvall, App., 201 S.W. 605—State ex rel. City of Webster Groves v. Reynolds, 223 S.W. 412, quashing certiorari City of Webster Groves ex rel. McMahon v. Reher, App., 212 S.W. 38—State ex rel. Abbott v. Bradley, 223 S.W. 98—State ex rel. Kansas City Theological Seminary v. Ellison, 216 S.W. 967—State ex rel. Peters v. Reynolds, 214 S.W. 121—State ex rel. Granite Bituminous Paving Co. v. Reynolds, 213 S.W. 68, 278 Mo. 560—State ex rel. Douglas v. Reynolds, 209 S.W. 100, 276 Mo. 638—State ex rel. Mechanics'-American Nat. Bank v. Sturgis, 208 S.W. 458, 276 Mo. 559—State ex rel. Metropolitan St. Ry. Co. v. Ellison, 208 S.W. 443—State ex rel. Shawhan v. Ellison, 200 S.W. 1042, 273 Mo. 218, quashing certiorari Shawhan v. Shawhan Distillery Co., 197 S.W. 369, 195 Mo.App. 445—State ex rel. St. Regis Realty & Investment Co. v. Reynolds, 200 S.W. 1039—State ex rel. Harriman v. Reynolds, 200 S.W. 296, 273 Mo. 131, quashing certiorari Harriman v. Sayman, 193 S.W. 1001, 197 Mo. App. 208—State ex rel. Wahl v. Reynolds, 199 S.W. 978, 272 Mo. 588, quashing certiorari Flack v. Wahl, 193 S.W. 56, 197 Mo.App. 10—State ex rel. Byrne v. Ellison, 199 S.W. 403, quashing certiorari Byrne v. News Corp., 190 S.W. 923, 195 Mo.App. 265—State ex rel. Adam Roth Grocery Co. v. Reynolds, 196 S.W. 1136—State ex rel. Singleton v. Ellison, 196 S.W. 743, quashing certiorari Singleton v. Shepherd, 183 S.W. 1077, 196 Mo. App. 503—State ex rel. Metropolitan St. Ry. Co. v. Ellison, 192 S.W. 725.

54. Mo.—State ex rel. St. Louis-San Francisco Ry. Co. v. Haid, 37 S.W. 2d 437, 327 Mo. 217, quashing writ Seidel v. St. Louis-San Francisco Ry. Co., App., 18 S.W.2d 126—State

court decision,⁵⁵ but it is not necessary that the conflicting decisions be absolutely identical if both require an application of the same rule.⁵⁶ That the decision conflicts with other decisions of courts of appeals is not grounds for quashing it on certiorari.⁵⁷

Where a court of appeals has exercised jurisdiction or powers not vested in it the supreme court can quash the opinion without reference to any question of conflict.⁵⁸

§ 402. — Courts of Appeals in General

The courts of appeals have jurisdiction of all appeals except those in which the constitution confers jurisdiction on the supreme court, and within the limits of their jurisdiction they are courts of last resort. Their functions are mainly those of appellate tribunals, but they

have power to issue writs of habeas corpus, quo warranto, mandamus, certiorari, and other original and remedial writs, and to hear and determine the same, and they have a superintending control over all inferior courts of record in the counties within their respective territorial jurisdictions.

Constitution, 1875, article VI § 12 originally established the St. Louis Court of Appeals and the amendment of 1884 article VI § 2 established the Kansas City court of appeals; article VI § 3 of the amendment authorized the general assembly to create an additional court of appeals, and pursuant to this authority, the legislature in 1909 established the Springfield court of appeals.⁵⁹ The courts of appeals have general appellate jurisdiction, that is to say, they have jurisdiction of all appeals except those in which the jurisdiction is conferred by the constitution on the supreme court,⁶⁰ and, when

ex rel. Fogel Const. Co. v. Trimbel, 274 S.W. 1028, 310 Mo. 248, quashing opinion Poynter v. Fogel Const. Co., App., 265 S.W. 841—State ex rel. Bush v. Sturgis, 221 S.W. 91, 281 Mo. 598, 9 A.L.R. 1315—State ex rel. Byrne v. Ellison, 199 S.W. 403, quashing certiorari Byrne v. News Corp., 190 S.W. 933, 195 Mo.App. 265.

Matters not in opinion

Scope of review on certiorari to declare majority opinion of court of appeals void for want of jurisdiction because in conflict with ruling of supreme court, does not embrace consideration of record of case further than set forth in opinion.—State ex rel. Wahl v. Reynolds, 199 S.W. 978, 272 Mo. 588, quashing certiorari Flack v. Wahl, 193 S.W. 56, 197 Mo. App. 10.

53. Mo.—State ex rel. Kansas City Light & Power Co. v. Trimble, 262 S.W. 357, quashing certiorari Godfrey v. Kansas City Light & Power Co., 247 S.W. 451, 213 Mo.App. 139.

53. Mo.—State ex rel. Metropolitan Life Ins. Co. v. Shain, 121 S.W. 2d 783, quashing certiorari Bailey v. Metropolitan Life Ins. Co., App., 115 S.W.2d 151—State ex rel. Kansas City Southern Ry. Co. v. Shain, 105 S.W.2d 915, 340 Mo. 1195, quashing Adams v. Kansas City Southern Ry. Co., App., 83 S.W.2d 913—State ex rel. Union Pac. R. Co. v. Bland, 23 S.W.2d 1029, 324 Mo. 801—State ex rel. Business Men's Assur. Co. v. Allen, 259 S.W. 77, 302 Mo. 525, quashing certiorari Melville v. Business Men's Acc. Assur. Co., App., 253 S.W. 68.

"Conflict of decision"

There is a "conflict of decision" between a decision of the court of civil appeals and of the supreme court so as to justify certiorari to review a decision of the court of ap-

peals because of a "conflict of decision," where an opinion of the court of appeals rules differently from the supreme court's ruling as to the legal effect of the same or substantially similar facts or contravenes a general principle of law stated in decisions of the supreme court.—State ex rel. and to Use of Heuring v. Allen, 112 S.W.2d 843, 342 Mo. 81, quashing opinion and record Heuring v. Central States Life Ins. Co. of St. Louis, 87 S.W.2d 661, 230 Mo.App. 42.

57. Mo.—State ex rel. Massman Const. Co. v. Shain, 130 S.W.2d 491, quashing certiorari Nelson v. Massman Const. Co., App., 120 S.W.2d 77—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, quashing record and remanding cause State ex rel. State Highway Commission v. Lindley, App., 96 S.W.2d 1065, reversed on other grounds 113 S.W.2d 132—State ex rel. Superior Mineral Co. v. Hostetter, 85 S.W.2d 743, 337 Mo. 718, denying quashal of opinion Woodruff v. Superior Mineral Co., App., 70 S.W.2d 1104—State ex rel. Kansas City Life Ins. Co. v. Trimble, 276 S.W. 1020, 310 Mo. 446—State ex rel. Dick & Bros. Quincy Brewery Co. v. Ellison, 229 S.W. 1059, 287 Mo. 139, quashing record Vaughn v. William F. Davis & Sons, App., 221 S.W. 782.

Certification assumed if conflict exists

On certiorari to review decision of court of appeals, it will be assumed that such court, if its decision was out of harmony with decision of another court of appeals, would on its own motion have certified case to supreme court.—State ex rel. Harriman v. Reynolds, 200 S.W. 296, 273 Mo. 131, quashing certiorari Harriman v. Sayman, 193 S.W. 1001, 197 Mo.App. 208.

58. Mo.—State ex rel. Clark v. Shain, 119 S.W.2d 971, quashing certiorari State ex rel. Clark v. National Surety Co., App., 82 S.W. 2d 616, and In re Parker's Trust Estate, 67 S.W.2d 114, 228 Mo.App. 400—State ex rel. Terminal R. Ass'n of St. Louis v. Hostetter, 119 S.W.2d 208, 342 Mo. 859, quashing certiorari Brown v. Terminal R. Ass'n of St. Louis, App., 85 S.W.2d 228.

Improperly constituted court of appeals

Supreme court may quash record of improperly constituted court of appeals without showing conflict with supreme court ruling.—State ex rel. Allen v. Trimble, 297 S.W. 378, 317 Mo. 751, quashing record Allen v. Beat, 279 S.W. 728, 220 Mo.App. 1041.

59. Mo.—Mott Store Co. v. St. Louis, etc., R. Co., 163 S.W. 929, 254 Mo. 654.

60. Mo.—State ex rel. Pitcairn v. Public Service Commission, 92 S.W.2d 881, transferred, see State ex rel. Pitcairn v. Public Service Commission of Missouri, 100 S.W.2d 637, 231 Mo.App. 446, reversed on other grounds State ex rel. Pitcairn v. Shain, 106 S.W.2d 901, 341 Mo. 27, mandate conformed to State ex rel. Pitcairn v. Public Service Commission, App., 111 S.W.2d 982, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902, second case—State ex rel. Pitcairn v. Public Service Commission of Missouri, 90 S.W.2d 392, 338 Mo. 180, transferred, see, App., 100 S.W.2d 636, reversed on other grounds 106 S.W.2d 898, 341 Mo. 19, mandate conformed to State ex rel. Pitcairn v. Public Service Commission, 110 S.W.2d 367, 232 Mo.App. 609, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d

acting within their jurisdictional limits, as long as they promulgate no rule of law conflicting with former controlling decisions of the supreme court, they are courts of last resort and have the inherent right to determine issues involved whether their rulings be right or wrong.⁶¹ The several courts of appeals have exclusive jurisdiction of such appeals taken within the territorial limits of their respective districts.⁶² In cases which fall within the appellate jurisdiction of the supreme court,

the courts of appeals are without jurisdiction,⁶³ and no act of the parties either by agreement or estoppel can confer jurisdiction.⁶⁴ The court has in any case the power to determine whether an appeal brought before it does, or does not, relate to such matters, or involve such questions, as to exclude its jurisdiction.⁶⁵

Under Constitution, 1875, article VI § 12, courts of appeals have power to issue writs of habeas corpus,⁶⁶ quo warranto,⁶⁷ and mandamus,⁶⁸ and

902—*Mitchell v. Dabney*, 58 S.W. 2d 731, 332 Mo. 410, transferred, see, App., 71 S.W.2d 165—*City of Doniphan v. Cantley*, 50 S.W.2d 658, 330 Mo. 639, transferred, see, App., 52 S.W.2d 417—*Village of Grandview, of Jackson County, v. McElroy*, 298 S.W. 760, 318 Mo. 135—*Boggs v. Missouri-Kansas-Texas R. Co.*, App., 50 S.W.2d 164, transferred, see 80 S.W.2d 141, 336 Mo. 528.

Jurisdiction not affirmatively shown

An appeal which does not affirmatively appear as falling within class of which supreme court has jurisdiction lies as matter of course to court of appeals of the district in which the cause was tried.—*City of Doniphan v. Cantley*, 50 S.W.2d 658, 330 Mo. 639, transferred, see, App., 52 S.W.2d 417.

Injunction cases

Where none of the specific grounds for jurisdiction of the supreme court is present, courts of appeals have appellate jurisdiction in injunction cases, whether injunction be granted or denied.—*Mitchell v. Dabney*, 58 S.W.2d 731, 332 Mo. 410, transferred, see, App., 71 S.W.2d 165—*Local Union No. 66 of United Leather Workers' International Union v. Herkert & Meisel Trunk Co.*, 5 S.W.2d 671, 232 Mo.App. 383.

Wills

The courts of appeals have jurisdiction to construe wills unless precluded by the amount in dispute or some other constitutional provision.—*Hourigan v. McBee*, Mo., 119 S.W. 2d 404.

Jurisdiction held in court of appeals

Mo.—State ex rel. *Shartel v. Trimble*, 63 S.W.2d 37, 333 Mo. 888—*Viertel v. Viertel*, 111 S.W. 579, 212 Mo. 562—*Ashbrook v. Willis*, 100 S.W.2d 943, 231 Mo.App. 460, transferred, see 89 S.W.2d 659, 338 Mo. 226—*Sanders v. Owens*, 40 S.W.2d 738, 225 Mo.App. 442—State ex rel. *Lindsay v. Kansas City*, 20 S.W.2d 7, 225 Mo.App. 139, certiorari quashed State ex rel. *Kansas City v. Trimble*, 20 S.W.2d 17, 322 Mo. 360, prohibition denied 20 S.W.2d 20 (second case), 322 Mo. 368.

61. Mo.—State ex rel. *Hoyt v.*

Shain, 93 S.W.2d 992, 338 Mo. 1208, quashing opinion in part, App., *Lampton Realty Co. v. Hoyt*, 80 S.W.2d 249, conformed to 99 S.W.2d 145, 231 Mo.App. 143—State ex rel. *Weisheyer v. Hald*, 26 S.W.2d 939—State ex rel. *Fichtner v. Hald*, 22 S.W.2d 1045, 324 Mo. 130, quashing certiorari *Fichtner v. Mohr*, 16 S.W.2d 739, 223 Mo.App. 752—State ex rel. *Bradley v. Trimble*, 289 S.W. 922, 316 Mo. 97, quashing certiorari *Smith v. Nicholson*, 289 S.W. 349, 221 Mo.App. 428—State ex rel. *Tummons v. Cox*, 282 S.W. 694, 313 Mo. 672, quashing certiorari *Tummons v. Stokes*, App., 274 S.W. 528—State ex rel. *American Car & Foundry Co. v. Daues*, 282 S.W. 389, 313 Mo. 681, quashing certiorari *Cobb v. American Car & Foundry Co.*, App., 270 S.W. 398—State ex rel. *Cox v. Trimble*, 279 S.W. 60, 312 Mo. 322—State ex rel. *Coonley v. Hall*, 246 S.W. 35, 296 Mo. 201—State ex rel. *Lindsay v. Kansas City*, 20 S.W.2d 7, 225 Mo.App. 139, certiorari quashed State ex rel. *Kansas City v. Trimble*, 20 S.W.2d 17, 322 Mo. 360, prohibition denied 20 S.W.2d 20 (second case), 322 Mo. 368.

15 C.J. p 1090 note 39.

Construction of statutes

(1) A court of appeals has jurisdiction to construe statutes and determine their applicability to a given state of facts.—State ex rel. *Missouri Electric Power Co. v. Allen*, 100 S.W.2d 868, 340 Mo. 44—*Fischbach Brewing Co. v. City of St. Louis*, 87 S.W.2d 648, 337 Mo. 1044—*Mellon v. Stockton & Lampkin*, 30 S.W.2d 974, 326 Mo. 129, transferred, see 35 S.W.2d 612, 225 Mo.App. 122, followed in *Mellon v. Burns*, App., 35 S.W.2d 614—State ex rel. *Missouri Gas & Electric Service Co. v. Trimble*, 271 S.W. 43, 307 Mo. 586—15 C.J. p 1090 note 39 [a].

(2) The rule applies also to the construction of a federal statute.—*Mitchell v. Joplin Nat. Bank*, Mo., 201 S.W. 903—*Miller v. Kansas City Western R. Co.*, 168 S.W. 336, 180 Mo.App. 371.

62. Mo.—*Mott Store Co. v. St. Louis, etc., R. Co.*, 163 S.W. 929, 254 Mo. 654, adopting 158 S.W.

103, 173 Mo.App. 189—State v. *Nixon*, 138 S.W. 312, 233 Mo. 345—State v. *Nixon*, 134 S.W. 538, 232 Mo. 496.

15 C.J. p 1091 note 55.

63. Mo.—State ex rel. *Pemberton v. Shain*, 124 S.W.2d 1087, quashing judgment and opinion *Plemmons v. Pemberton*, App., 117 S.W.2d 393—State ex rel. *Shoemaker*, 257 S.W. 1047—*Sandy Hites Co. v. State Highway Commission*, App., 128 S.W.2d 646—State ex rel. and to Use of *Beckenstein v. Frankenhoff*, App., 122 S.W.2d 381—*Smith v. Citizens Bank of Gerald*, App., 106 S.W.2d 45—State ex rel. *State Highway Commission v. Brown*, 95 S.W.2d 661, 231 Mo.App. 56—*Allen v. Fewel*, App., 70 S.W.2d 1107—*Bowman v. Phelps County*, App., 36 S.W.2d 414, transferred, see 51 S.W.2d 3, 330 Mo. 826—State ex rel. *Pickwick Stage Lines v. Barton*, 4 S.W.2d 852, 222 Mo. App. 1236—*Lyons v. School Dist. of Joplin*, App., 246 S.W. 610—State, to Use of *Nee v. Gorsuch*, App., 230 S.W. 663, transferred, see, Sup., 260 S.W. 455.

15 C.J. p 1090 note 47.

Felony

A court of appeals does not have jurisdiction of an appeal in a felony case.—State ex rel. and to Use of *Hazel v. Watkins*, App., 227 S.W. 1059, transferred, see 245 S.W. 1059, 295 Mo. 648.

64. Mo.—State ex rel. *Pemberton v. Shain*, 124 S.W.2d 1087, quashing judgment and opinion *Plemmons v. Pemberton*, App., 117 S.W.2d 393—*Klingelhofer v. Smith*, 71 S.W. 1008, 171 Mo. 455.

65. Mo.—*Nolker v. Nolker*, App., 208 S.W. 135—*Sikes v. Freeman*, App., 204 S.W. 948.

15 C.J. p 1091 note 49.

66. Mo.—*Lawlor v. Lawlor*, 76 Mo. App. 293—In re *McDonald*, 19 Mo. App. 370—State v. *Green*, 1 Mo. App. 226.

67. Mo.—*Lawlor v. Lawlor*, 76 Mo. App. 293—State v. *Green*, 1 Mo. App. 226.

15 C.J. p 1090 note 41.

68. Mo.—State ex rel. *Hazel v. Watkins*, 245 S.W. 1059, 295 Mo. 648,

such courts have power to issue writs of certiorari,⁶⁹ and other original and remedial writs,⁷⁰ and to hear and determine the same,⁷¹ and have a superintending control over all inferior courts of record in the counties within their respective territorial jurisdictions.⁷² The functions of the courts of appeals are mainly those of appellate tribunals,⁷³ and, except for the original jurisdiction granted in these classes of cases, they have no original jurisdiction;⁷⁴ even with respect to the issuance of these writs, it has been said that they should discourage the presentation to them of petitions therefor.⁷⁵ In a case in which it has no appellate jurisdiction, a court of appeals has no jurisdiction to issue a writ of mandamus,⁷⁶ certiorari,⁷⁷ or prohibition to the circuit court,⁷⁸ but the original jurisdiction vested in a court of appeals to hear and determine habeas corpus cases necessarily carries with it the authority to determine whatever questions may be involved in those cases.⁷⁹ A court of appeals has no jurisdiction of a suit to set aside an order of a circuit court granting an appeal to the supreme court.⁸⁰

§ 403. — Other Courts

The circuit courts have such appellate jurisdiction from inferior tribunals as is or may be provided by law,

and they exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals, in each county in their respective circuits.

In accordance with Constitution, 1875, article VI § 22, the circuit courts have such appellate jurisdiction from inferior tribunals and justices of the peace, as is, or may be, provided by law.⁸¹ Constitution, 1875, article VI § 23 provides that the circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace and all inferior tribunals in each county in their respective circuits; and "superintending control" within the concept of this provision is the power to keep the inferior tribunals within the bounds of their jurisdiction by means of extraordinary common-law writs and other writs and process;⁸² when the power is resorted to for an authority over and above that comprehended by the ordinary common-law writs, it extends only to the matter of compelling the proper performance of purely ministerial duties and not to matters involving discretion or the exercise of a judicial power.⁸³ County courts have no superintending control over probate courts in their respective counties in the absence of a statute so providing.⁸⁴

transferred, see, App., 227 S.W. 1959—State ex rel. Douglas v. Tune, 200 S.W. 1062, 273 Mo. 255—State ex rel. Johnson v. Regan, 76 S.W.2d 736, 229 Mo.App. 237—State ex rel. Goldman v. Missouri Workmen's Compensation Commission, 32 S.W.2d 142, 225 Mo.App. 59.

15 C.J. p 1090 note 42.

69. Mo.—State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425. 15 C.J. p 1090 note 43.

70. Mo.—State ex rel. McGee v. Owen, App., 121 S.W.2d 765. 15 C.J. p 1090 note 44.

71. Mo.—State v. Johnson, 121 S.W. 780, 133 Mo.App. 306—State v. Green, 1 Mo.App. 226.

72. Mo.—State v. Johnson, 121 S.W. 780, 133 Mo.App. 306. 15 C.J. p 1090 note 45.

Assumption of correct decision

Where circuit court had not had opportunity to determine whether first suit was pending at time second suit was brought, appellate court in refusing writ to prohibit second suit because defendants had a good defense thereto by answer assumed that circuit court would, if defense of former suit was properly brought to its attention, correctly decide issue.—State ex rel. Dunn v. Cowan, 105 S.W.2d 1009, 231 Mo.App. 717.

73. Mo.—State v. Green, 1 Mo.App. 226.

74. Mo.—State v. St. Louis Ct. of App., 88 Mo. 135—Wilson v. Ruthrauff, 87 Mo.App. 226—Lawlor v. Lawlor, 76 Mo.App. 293. 15 C.J. p 1091 note 52.

75. Mo.—State v. Green, 1 Mo.App. 226. 15 C.J. p 1091 note 54.

76. Mo.—State v. Tune, App., 191 S.W. 1078.

77. Mo.—State v. Norton, 98 S.W. 554, 201 Mo. 1.

78. Mo.—State ex rel. Ghan v. Gideon, App., 119 S.W.2d 89—State ex rel. Pickwick Stage Lines v. Barton, 4 S.W.2d 252, 222 Mo.App. 1236.

15 C.J. p 1090 note 44 [a] (2).

79. Mo.—Ex parte Webers, 205 S.W. 620, 275 Mo. 677, transferred, see 197 S.W. 850, 200 Mo.App. 29—Ex parte Beckenstein, App., 104 S.W.2d 404.

80. Mo.—Miller v. Missouri, etc., R. Co., App., 129 S.W. 1019.

Mandamus to circuit court

Court of appeals is without power to compel circuit court, by mandamus, to set aside its order allowing owner an appeal to supreme court.—State ex rel. Moritz v. Cowan, 81 S.W.2d 349, 229 Mo.App. 747.

81. Mo.—Stanton v. Johnson, 163 S.W. 296, 177 Mo.App. 54. 15 C.J. p 1094 note 74.

Review of inferior court see supra § 272.

Power coextensive with probate judge

On an appeal from the probate court in a statutory proceeding cognizable only by the probate judge, the power of circuit judge is derivative from and coextensive with that of the probate judge.—State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, quashing certiorari in re Flynn's Estate, App., 95 S.W.2d 1208, transferred, see 92 S.W.2d 671, 338 Mo. 522—In re Ermeling's Estate, Mo. App., 131 S.W.2d 912, transferred, see, Sup., 119 S.W.2d 755.

82. Mo.—State ex rel. Auto Finance Co. v. Landwehr, 71 S.W.2d 144, 229 Mo. 1221.

15 C.J. p 1094 note 76 [a].

Appointment of guardian

The circuit court has jurisdiction, under its power of superintending control over inferior courts, to determine the legality of the action of the probate court appointing a general guardian in place of the testamentary guardian.—In re Breck, 158 S.W. 843, 252 Mo. 302, followed in State v. Holtcamp, 158 S.W. 843, 252 Mo. 333.

83. Mo.—State ex rel. Auto Finance Co. v. Landwehr, 71 S.W.2d 144, 229 Mo. 1221.

84. Mo.—Koehler v. Snider, 76 S.W. 1032, 177 Mo. 546.

§ 404. — Cases Involving Constitutional Questions

The supreme court of Missouri has appellate jurisdiction of cases involving the construction of the constitution of the United States and of the state of Missouri. For jurisdiction to attach the constitutional question must be necessary to the decision and it must be properly before the court.

In accordance with the express provisions of

the Constitution of Missouri, 1875, article VI § 12, as amended by Constitutional Amendment, 1884, article VI § 5, the supreme court has appellate jurisdiction in cases involving the construction of the constitution of the United States or of the state.⁸⁵ It is necessary that the constitutional question should be real and substantial, and not merely colorable,⁸⁶ and that a construction of the constitution

85. Mo.—Clark v. Security Ben. Ass'n, 121 S.W.2d 148—Clarence Special School Dist. of Shelby County v. School Dist. No. 67 of Shelby County, 107 S.W.2d 5, 341 Mo. 178—Hines v. Hook, 89 S.W. 2d 52, 338 Mo. 114—Noell v. Missouri Pac. R. Co., 74 S.W.2d 7, 335 Mo. 687, 94 A.L.R. 684, followed in 74 S.W.2d 14—Rechow v. Bankers' Life Co., 73 S.W.2d 794, 335 Mo. 668, transferred, see, App., 58 S.W. 2d 1089—Kristanik v. Chevrolet Motor Co., 70 S.W.2d 890, 335 Mo. 60—State v. Hammer, 61 S.W.2d 965, 333 Mo. 40, transferred, see, App., 56 S.W.2d 415, transferred, see 63 S.W.2d 181—State ex rel. Neu v. Waechter, 58 S.W.2d 971, 332 Mo. 574—Tate v. School Dist. No. 11 of Gentry County, 23 S.W. 2d 1013, 324 Mo. 477, 70 A.L.R. 771—Kansas City ex rel. Barlow v. Robinson, 17 S.W.2d 977, 322 Mo. 1050, dissenting opinion, 32 S.W.2d 1075, 322 Mo. 1050—Butler v. Board of Education of Consolidated School Dist. No. 1 of Audrain County, 16 S.W.2d 44—Aufderheide v. Polar Wave Ice & Fuel Co., 4 S.W.2d 776, 319 Mo. 337—Morgan v. Willman, 1 S.W.2d 193, 318 Mo. 151, 58 A.L.R. 1518—Privitt v. St. Louis-San Francisco Ry. Co., 300 S.W. 726—Rose v. Smiley, 296 S.W. 815—Cooper County Bank v. Bank of Buncheon, 276 S.W. 622, 310 Mo. 519, transferred, see 288 S.W. 95, 221 Mo.App. 814—Wolf v. Hartford Fire Ins. Co., 263 S.W. 846, 304 Mo. 459, transferred, see 269 S.W. 701, 219 Mo.App. 307—State ex rel. Jordan v. Woodman, 193 S.W. 570—State ex rel. and to Use of Beckenstein v. Frankenhoff, App., 122 S.W.2d 381—Chilton v. Drainage Dist. No. 8 of Pemiscot County, 28 S.W.2d 120, 224 Mo. App. 487, transferred, see 61 S.W. 2d 744, 332 Mo. 1173, transferred, see 63 S.W.2d 421, 228 Mo.App. 4—State v. Sillyman, App., 2 S.W. 2d 139—State ex rel. Bloker v. Byrd, 237 S.W. 166, 208 Mo.App. 514—Parsons v. Harvey, App., 195 S.W. 530, affirmed 221 S.W. 21, 281 Mo. 413.

15 C.J. p 1081 notes 63–65, p 1082 note 66.

Misdemeanor cases

The supreme court has jurisdiction even in misdemeanor cases where a

constitutional question is involved. —State v. Hammer, 61 S.W.2d 965, 333 Mo. 40, transferred, see App. 56 S.W.2d 415, transferred, see 63 S.W. 2d 181—State v. McBride, 37 S.W.2d 423, 327 Mo. 184, transferred, see, App., 33 S.W.2d 134—State v. Marshall, 297 S.W. 63, 317 Mo. 413—State v. Barrelli, 296 S.W. 413, 317 Mo. 461—State v. Mohr, 289 S.W. 554, 316 Mo. 204—State v. Pigg, 278 S.W. 1030, 312 Mo. 212—State v. Cobb, 273 S.W. 736, 309 Mo. 89—State v. West, App., 20 S.W.2d 160—State v. Lee, App., 7 S.W.2d 385—State v. Huff, App., 290 S.W. 87, transferred, see 296 S.W. 121, 317 Mo. 399—State v. Linton, App., 217 S.W. 874, transferred, see 222 S.W. 847, 283 Mo. 1.

No constitutional question involved Mo.—Silberstein v. H-A Circus Operating Corporation, 124 S.W.2d 1207, transferred, see, App., 129 S.W.2d 1085—State v. Sanderson, 124 S.W.2d 1071, transferred, see, App., 107 S.W.2d 965, transferred 128 S.W.2d 277—Daniel & Henry Co. v. F. Bierman & Sons Metal & Rubber Co., 116 S.W.2d 26, transferred, see, App., 121 S.W.2d 200—Bushnell v. Mississippi & Fox River Drainage Dist. of Clark County, 102 S.W.2d 871, 340 Mo. 811, transferred, see, App., 111 S.W.2d 946—Fischbach Brewing Co. v. City of St. Louis, 87 S.W.2d 648, 337 Mo. 1044—Commercial Bank of Jamesport v. Songer, 62 S.W.2d 903, transferred, see 74 S.W.2d 100, 229 Mo.App. 168—Dietrich v. Brickey, 37 S.W.2d 428, 327 Mo. 189—Bankers' Mortg. Co. v. Lessley, 31 S.W. 2d 1055, transferred 38 S.W.2d 485, 225 Mo.App. 643—Mellon v. Stockton & Lampkin, 30 S.W.2d 974, 326 Mo. 129, transferred, see 35 S.W. 2d 612, 225 Mo.App. 122, followed in Mellon v. Burns, App., 35 S.W. 2d 614—Gold Lumber Co. v. Baker, 25 S.W.2d 457, 324 Mo. 984, transferred, see 36 S.W.2d 130, 225 Mo. App. 849—Supreme Lodge of the World, Loyal Order of Moose, v. Paramount Progressive Order of Moose, 17 S.W.2d 327, 222 Mo. 866, transferred, see 26 S.W.2d 826, 224 Mo.App. 276—Guillot v. Kansas City Power & Light Co., 11 S.W.2d 1036, 321 Mo. 586, transferred, see 18 S.W.2d 97, 224 Mo.App. 382—Corbett v. Lincoln Savings & Loan Ass'n, 4 S.W.2d 824, transferred, see 17 S.W.2d 275, 223 Mo.App. 329

—Newman v. John Hancock Mut. Life Ins. Co., 290 S.W. 133, 316 Mo. 454—Zach v. Fidelity & Casualty Co. of New York, 257 S.W. 124, 302 Mo. 1—State v. Hale, 248 S.W. 958—City of Kirkwood, to Use of Farmers' & Merchants' Trust Co., v. Hillcrest Realty Co., 226 S.W. 835, 285 Mo. 552, transferred, see, App., 234 S.W. 1023—Trembley v. Fidelity & Casualty Co. of New York, 223 S.W. 887, transferred, see, App., 232 S.W. 179—Kribs v. United Order of Foresters, 222 S.W. 1005, transferred, see, App., 233 S.W. 89—Mound City v. Melvin, 199 S.W. 256—Berryman v. Maryland Motor Car Ins. Co., 197 S.W. 850—Mercantile Trust Co. v. Lyon, 195 S.W. 1032—Kelly v. Howard, App., 123 S.W.2d 581—Heorath v. Halpin, 60 S.W.2d 744, 227 Mo.App. 984—Bank of Corning v. Consolidated School Dist. No. 6 of Atchison County, 54 S.W.2d 486, 227 Mo.App. 523—Boggs v. Missouri-Kansas-Texas R. Co., App., 50 S.W.2d 164, transferred, see 80 S.W.2d 141, 336 Mo. 528—Pearson Elevator Co. v. Missouri, K. & T. R. Co., App., 46 S.W.2d 247, transferred, see 80 S.W.2d 137, 336 Mo. 583—Hake v. Hake, App., 13 S.W. 2d 573.

15 C.J. p 1082 note 66 [a]–[d].

86. Mo.—Daniel & Henry Co. v. F. Bierman & Sons Metal & Rubber Co., 116 S.W.2d 26, transferred, see, App., 121 S.W.2d 200—Esmar v. Haeussler, 106 S.W.2d 412, 341 Mo. 33, transferred, see, App., 115 S.W.2d 54—Junior v. Junior, 84 S.W.2d 909—Woodling v. Westport Hotel Operating Co., 55 S.W.2d 477, 331 Mo. 812, transferred, see 63 S.W.2d 207, 227 Mo.App. 1231—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see, App., 49 S.W.2d 226—State v. Tatman, 278 S.W. 713, 312 Mo. 134, transferred, see, App., 291 S.W. 151—Berberet v. Electric Park Amusement Co., 276 S.W. 36, 310 Mo. 555—Dorrah v. Pemiscot County Bank, 248 S.W. 960—State v. Goad, 246 S.W. 917, 296 Mo. 452—McManus v. Burrows, 217 S.W. 512, 280 Mo. 327—Hake v. Hake, App., 13 S.W.2d 573—State ex rel. Johnston v. Hiller, App., 295 S.W. 132.

15 C.J. p 1084 note 73.

should be essential to the determination of the case,⁸⁷ but it is not necessary that it should be apparent that the constitutional objections relied on are well taken.⁸⁸ In order to entitle a party to invoke the jurisdiction of the supreme court on the ground that a constitutional question is involved, the ruling of the trial court on such question must have been adverse to him,⁸⁹ and the violation of the

constitution must operate to his detriment.⁹⁰ The court will determine whether such a question is involved before passing on the merits of the case.⁹¹

A court of appeals has no appellate jurisdiction to decide a constitutional question,⁹² or to decide a case in which a constitutional question is directly involved,⁹³ but the restriction applies only to cases

87. *Mo.—Bolin v. Sovereign Camp*, W. O. W., 98 S.W.2d 681, 339 Mo. 618, transferred, see, App., 112 S.W.2d 582, certiorari granted *Sovereign Camp, W. O. W., v. Bolin*, 58 S.Ct. 1058, 304 U.S. 557, 52 L.Ed. 1525, reversed on other grounds 59 S.Ct. 35, 305 U.S. 66, 83 L.Ed. 45, 119 A.L.R. 478, rehearing denied 59 S.Ct. 241, 305 U.S. 673, 83 L.Ed. 436, mandate conformed to *Bolin v. Sovereign Camp, W. O. W., Sup.*, 127 S.W.2d 718—*Bankers' Mortg. Co. v. Lessley*, 31 S.W.2d 1055, transferred, see 38 S.W.2d 485, 225 Mo.App. 643—*Syz v. Milk Wagon Drivers' Union*, Local 603, 18 S.W.2d 441, 323 Mo. 130—*Supreme Lodge of the World, Loyal Order of Moose, v. Paramount Progressive Order of Moose*, 17 S.W.2d 327, 322 Mo. 866, transferred, see 26 S.W.2d 826, 224 Mo.App. 276—*Corbett v. Lincoln Savings & Loan Ass'n*, 4 S.W.2d 824, transferred, see 17 S.W.2d 275, 223 Mo.App. 329—*State v. Hale*, 248 S.W. 958—*Powell v. Reidinger*, 228 S.W. 503, transferred, see, App., 234 S.W. 850—*Adelman v. Altman*, 226 S.W. 953, 285 Mo. 503, transferred, see App., 240 S.W. 272—*Trembley v. Fidelity & Casualty Co. of New York*, 223 S.W. 887, transferred, App., 232 S.W. 179—*State v. Kramer*, 222 S.W. 823—*Rollins v. Business Men's Ass'n of America*, 213 S.W. 52, transferred, see, App., 220 S.W. 1022—*Boggs v. Missouri-Kansas-Texas R. Co.*, App., 50 S.W.2d 164, transferred, see 80 S.W.2d 141, 336 Mo. 528—*State ex rel. Pickwick Stage Lines v. Barton*, 4 S.W.2d 852, 223 Mo.App. 1236.
15 C.J. p 1084 note 74.

Construction of statute

(1) A case which involves merely the construction or interpretation of a state statute does not present a constitutional question within the jurisdiction of the supreme court.—*Stock v. Schloman*, 18 S.W.2d 428, 322 Mo. 1209, transferred, see 42 S.W.2d 61, 226 Mo.App. 334—*City of Kirkwood, to Use of Farmers' & Merchants' Trust Co., v. Hillcrest Realty Co.*, 226 S.W. 835, 285 Mo. 552, transferred, see, App., 234 S.W. 1023—*State ex rel. Crow v. Carothers*, 214 S.W. 857—15 C.J. p 1079 note 49 [b].

(2) So, too, the construction of a federal statute does not involve a constitutional question where its validity is not attacked.—*Miller v. Connor*, 157 S.W. 81, 250 Mo. 677—*Lall v. Pacific Express Co.*, 81 Mo.App. 232.

Validity of statute of another state

(1) The supreme court may decide, in a case properly before it, the validity of an act of a sister state from the standpoint of its conformity to the United States constitution.—*Kwiliekl v. Holman*, 167 S.W. 989, 258 Mo. 624.

(2) However, there is nothing to prevent a court of appeals from passing on the validity of a statute of another state, under the constitution of that state.—*Miller v. Kansas City Western R. Co.*, 168 S.W. 336, 180 Mo.App. 371.

Constitutional question apparently involved

Where a constitutional question is apparently involved and the supreme court assumes jurisdiction, the fact that it may finally dispose of the case on other grounds without an examination of the constitutional question does not affect its jurisdiction.—*Milan v. Allen*, Mo., 175 S.W. 933—*Stanley v. St. Louis, I. M. & S. R. Co.*, 162 S.W. 210, 254 Mo. 237—*Stinner v. St. Louis, I. M. & S. R. Co.*, 162 S.W. 237, 254 Mo. 223—*State v. Heffernan*, 148 S.W. 90, 243 Mo. 442.

88. *Mo.—State v. Woodman*, 193 S.W. 570—*Elks Inv. Co. v. Jones*, 187 S.W. 71—*King v. Stott*, 162 S.W. 246, 254 Mo. 198.

89. *Mo.—Schildnecht v. City of Joplin*, 35 S.W.2d 35, 327 Mo. 126, transferred, see 41 S.W.2d 590, 226 Mo.App. 47—*State v. Richter*, 33 S.W.2d 926, 927, citing *Corpus Juris*, and reversing 27 S.W.2d 708, 224 Mo.App. 430—*McGill v. City of St. Joseph*, 31 S.W.2d 1038, transferred, see 38 S.W.2d 725, 225 Mo.App. 1033—*Corbett v. Lincoln Savings & Loan Ass'n*, 4 S.W.2d 824, transferred, see 17 S.W.2d 275, 223 Mo.App. 329—*Lux v. Milwaukee Mechanics' Ins. Co.*, 285 S.W. 424, transferred, see 295 S.W. 847, 221 Mo.App. 999—*Cotter v. Valentine Coal Co.*, 14 S.W.2d 660, 232 Mo.App. 1138, certiorari quashed, *State ex rel. Valentine Coal Co. v.*

Trimble, 23 S.W.2d 1028, 325 Mo. 277.

15 C.J. p 1084 note 77.

90. *Mo.—Weisberg v. Boatmen's Bank*, 245 S.W. 1053, transferred, see App., 251 S.W. 393.

15 C.J. p 1084 note 78.

91. *Mo.—Bankers' Mortg. Co. v. Lessley*, 31 S.W.2d 1055, transferred, see 38 S.W.2d 485, 225 Mo.App. 643—*Sheets v. Iowa State Ins. Co.*, 126 S.W. 413, 226 Mo. 613.

92. *Mo.—State ex rel. Kansas City v. Trimble*, 298 S.W. 833, 317 Mo. 1208, quashing opinion, *State ex rel. Linday v. Kansas City, App.*, 20 S.W.2d 1, and followed in *State ex rel. Kansas City v. Trimble, Sup.*, 298 S.W. 835, quashing opinion *State ex rel. Ross v. Kansas City, App.*, 20 S.W.2d 16 (first case), followed in *State ex rel. Kansas City v. Trimble, Sup.*, 298 S.W. 836, quashing opinion *State ex rel. Young v. Kansas City, App.*, 20 S.W.2d 11 (first case), and *State ex rel. Gough v. Kansas City*, 20 S.W.2d 14, followed in, *State ex rel. Kansas City v. Trimble, Sup.*, 298 S.W. 837, quashing opinion, *State ex rel. Neyhart v. Kansas City, App.*, 20 S.W.2d 12—*State ex rel. Shoemaker v. Hall*, 237 S.W. 1047—*State ex rel. and to Use of Beckenstein v. Frankenhoff, App.*, 122 S.W.2d 381—*Smith v. Citizens Bank of Gerald, App.*, 106 S.W.2d 45—*State v. Van Graafeiland, App.*, 293 S.W. 445—*State v. Turner, App.*, 284 S.W. 827—*Landwehr v. Lingenfelder, App.*, 249 S.W. 723—*State ex rel. Johnson v. Stewart, App.*, 240 S.W. 824—*Commerce Trust Co. v. Syndicate Lot Co.*, 235 S.W. 150, 208 Mo.App. 261—*Commerce Trust Co. v. Syndicate Lot Co.*, 232 S.W. 1055, 208 Mo.App. 261—*West v. Dyer, App.*, 191 S.W. 1024.

93. *Mo.—State v. Sanderson, App.*, 107 S.W.2d 965, transferred, see App., 128 S.W.2d 277—*State ex rel. State Highway Commission v. Brown*, 95 S.W.2d 661, 231 Mo.App. 56—*Lentz v. Asphalt Paving Co., App.*, 50 S.W.2d 1063—*State v. Ottensmeyer, App.*, 37 S.W.2d 497, transferred, see 51 S.W.2d 39, 330 Mo. 754, transferred, see App., 55 S.W.2d 499—*State v. England, App.*, 3 S.W.2d 1077—*State ex rel.*

which reach the court by appeal or writ of error⁹⁴ unless superintending control over trial courts is involved,⁹⁵ and the original jurisdiction vested in a court of appeals to hear and determine habeas corpus cases carries with it the authority to determine constitutional questions involved therein.⁹⁶ If only the application of a constitutional provision and not its construction is involved, a court of appeals has jurisdiction.⁹⁷ It has jurisdiction of actions which merely involve the determination of whether a local or foreign law governs, or the construction of foreign law, as against the contention that the full faith and credit clause of the

federal constitution is involved in such cases;⁹⁸ but where the contention is that the matter has been adjudicated in another state, the full faith and credit clause is involved and the supreme court has jurisdiction.⁹⁹ To invest the supreme court with jurisdiction on the grounds that a statute is unconstitutional, the challenge must be that the statute is inherently and totally invalid and not merely that a certain interpretation of the statute renders it invalid.¹ A contention that the construction of a statute by the trial or circuit court,² or courts of appeals,³ or by a commission,⁴ is erroneous does not raise a constitutional question conferring jurisdic-

Pickwick Stage Lines v. Barton, 4 S.W.2d 852, 222 Mo.App. 1236—State ex rel. Hogan v. Sess, 266 S.W. 765, 217 Mo.App. 415—California Special Road Dist. v. Buckner, App., 231 S.W. 71—Kircher v. Evers, App., 210 S.W. 917—Berry v. Majestic Milling Co., App., 202 S.W. 622, transferred, see 223 S.W. 733, 234 Mo. 182.

94. Mo.—Ex parte Dillon, 29 S.W. 2d 236, 225 Mo.App. 280—State v. Blakemore, 40 Mo.App. 406.

95. Mo.—State ex rel. Pickwick Stage Lines v. Barton, 4 S.W.2d 852, 222 Mo.App. 1236.

96. Mo.—Ex parte Webers, 205 S.W. 620, 275 Mo. 677, transferred, see 197 S.W. 850, 200 Mo.App. 29—Ex parte Beckenstein, App., 104 S.W.2d 404—Ex parte Gadwood, App., 71 S.W.2d 177—Ex parte Dillon, 29 S.W.2d 236, 225 Mo.App. 280.

97. Mo.—Wolf v. Hartford Fire Ins. Co., 263 S.W. 846, 304 Mo. 459, transferred, see 269 S.W. 701, 219 Mo.App. 307—McManus v. Burrows, 217 S.W. 512, 280 Mo. 327—Ragsdale v. Brotherhood of Railroad Trainmen, 80 S.W.2d 272, 229 Mo.App. 545—Boggs v. Missouri-Kansas-Texas R. Co., App., 50 S.W.2d 164, transferred, see 80 S.W. 2d 141, 336 Mo. 528.

Error in construction of pleadings

Where the pleadings in a civil case are erroneously construed as not to demand a jury trial, no constitutional question for the supreme court is involved.—George L. Cousins Contracting Co. v. Acer Realty Co., Mo., 102 S.W.2d 936, transferred, see App., 110 S.W.2d 885—Wolf v. Hartford Fire Ins. Co., 263 S.W. 846, 304 Mo. 459, transferred, see 269 S.W. 701, 219 Mo.App. 307.

98. Mo.—Esmer v. Haeussler, 106 S.W.2d 412, 341 Mo. 33, transferred, see App., 115 S.W.2d 54—Early v. Knights of the Maccabees of the World, 48 S.W.2d 890, transferred, see Dawson v. Knights of the Maccabees of the World, App., 57 S.W.2d 748—Brown v. Wabash Ry.

Co., 274 S.W. 338, 309 Mo. 217, transferred, see App., 281 S.W. 64—Zich v. Fidelity & Casualty Co. of New York, 237 S.W. 124, 302 Mo. 1—Reece v. Security Ben. Ass'n, App., 114 S.W.2d 207, transferred, see Sup., 124 S.W.2d 1146—Ragsdale v. Brotherhood of Railroad Trainmen, 80 S.W.2d 272, 229 Mo.App. 545.

99. Mo.—Robertson v. Security Ben. Ass'n, 114 S.W.2d 1009, 342 Mo. 234.

1. Mo.—Langan v. U. S. Life Ins. Co., 114 S.W.2d 984, transferred, see App., 121 S.W.2d 268, transferred, see Sup., 130 S.W.2d 479—Moyer v. Orek Coal Co., 78 S.W. 2d 107, transferred, see 82 S.W.2d 924, 229 Mo.App. 811—Detmer, Bruner & Mason v. New York Cent. R. Co., 72 S.W.2d 984, transferred, see 80 S.W. 222, 229 Mo.App. 702—Curtin v. Zerbst Pharmacal Co., 62 S.W.2d 771, 333 Mo. 346, transferred, see 72 S.W.2d 152, 229 Mo.App. 82—Chilton v. Drainage Dist. No. 8 of Pemiscot County, 61 S.W.2d 744, 332 Mo. 1173, transferred, see 28 S.W.2d 120, 224 Mo.App. 467, transferred, see 63 S.W.2d 421, 228 Mo.App. 4—Dietrich v. Brickey, 37 S.W.2d 428, 327 Mo. 189—Service Purchasing Co. v. Brennan, 32 S.W.2d 81, transferred, see 42 S.W.2d 39, 226 Mo.App. 110—Nickell v. Kansas City, St. L. & C. R. Co., 32 S.W.2d 79, 326 Mo. 338, transferred, see 41 S.W.2d 595, 226 Mo.App. 302.

Construction in certain manner if accepted by court

That the construction of a statute or ordinance in a certain manner or as contended for by one party might, if accepted by the court, result in a rule which would violate some constitutional provision, if the statute had so provided, does not involve the construction of the constitution so as to give the supreme court jurisdiction.—Moyer v. Orek Coal Co., Mo., 78 S.W.2d 107, transferred, see 82 S.W.2d 924, 229 Mo.App. 811—State ex inf. Miller v. St. Louis Union Trust Co., 74 S.W.2d

343, 335 Mo. 845—State ex rel. Burnett v. School Dist. of City of Jefferson, 74 S.W.2d 30, 335 Mo. 803—Curtin v. Zerbst Pharmacal Co., 62 S.W.2d 771, 333 Mo. 346, transferred, see 72 S.W.2d 152, 229 Mo.App. 82—Chilton v. Drainage Dist. No. 8 of Pemiscot County, 61 S.W.2d 744, 332 Mo. 1173, transferred, see 28 S.W. 2d 120, 224 Mo.App. 467, transferred, see 63 S.W.2d 421, 228 Mo.App. 4—Nickell v. Kansas City, St. L. & C. R. Co., 32 S.W.2d 79, 326 Mo. 338, transferred, see 41 S.W.2d 595, 226 Mo.App. 302—Fred Wolfman B'dg. Co. v. General Outdoor Advertising Co., App., 30 S.W.2d 157.

Validity of statute determines jurisdiction

In determining whether the supreme court has jurisdiction on the ground that the constitutionality of a statute is involved, it is the validity, and not the construction of the statute which determines jurisdiction.—State v. Goad, 246 S.W. 917, 296 Mo. 452.

2. Mo.—Langan v. U. S. Life Ins. Co., 114 S.W.2d 984, transferred, see App., 121 S.W.2d 268—Commercial Bank of Jamesport v. Songer, 62 S.W.2d 903, transferred, see 74 S.W.2d 100, 229 Mo.App. 168—Curtin v. Zerbst Pharmacal Co., 62 S.W.2d 771, 333 Mo. 346, transferred, see 72 S.W. 2d 152, 229 Mo.App. 82—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see App., 49 S.W.2d 226—Corbett v. Lincoln Savings & Loan Ass'n, 4 S.W.2d 824, transferred, see 17 S.W.2d 275, 223 Mo.App. 329—Bealmer v. Hartford Fire Ins. Co. of Hartford, Conn., 220 S.W. 954, 281 Mo. 495.

3. Mo.—Staggs v. Gotham Mining & Milling Co., 228 S.W. 461.

4. Mo.—Curtin v. Zerbst Pharmacal Co., 62 S.W.2d 771, 333 Mo. 346, transferred, see 72 S.W.2d 152, 229 Mo.App. 82—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see App., 49 S.W.2d 226.

tion on the supreme court. Likewise, a constitutional question is not raised by the assertion that if plaintiff is allowed to recover defendant will be deprived of his property without due process of law.⁵

Previous decision on same question. Where a constitutional question has once been settled by the supreme court, an appeal cannot be taken to that court in a subsequent case on the ground that the same question is again involved,⁶ but where a constitutional question had not been decided at the time when an appeal was taken to the supreme court on the ground that such question was involved, that

court will retain jurisdiction of the appeal, notwithstanding the fact that, since the appeal was taken, but before a decision thereon, the constitutional question had been decided in another case.⁷

Disposition of entire cause. Where a case is transferred from a court of appeals to the supreme court because a constitutional question is involved, the supreme court has jurisdiction to determine the whole case on its merits.⁸

Presentation and preservation of constitutional question. For jurisdiction of the supreme court to attach on this ground, the constitutional question must have been duly and properly⁹ raised and pre-

Judicial determination by commission

A contention that a commission in determining a question as authorized by statute has violated a provision of the constitution which vests judicial power in the courts does not confer jurisdiction on the supreme court where the statute itself is not attacked and only the construction of the statute to determine whether the commission exceeded its authority is involved.—*State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 93 S.W.2d 882, 338 Mo. 572, transferred, see *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission of Missouri*, 98 S.W.2d 126, 231 Mo.App. 293, reversed on other grounds *State ex rel. Orscheln Bros. Truck Lines v. Shain*, 106 S.W.2d 901, 341 Mo. 27, conformed to *State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission*, 110 S.W.2d 364, 232 Mo.App. 605, cause reinstated 110 S.W.2d 364, 232 Mo.App. 605.

5. Mo.—*Dorrah v. Pemiscot County Bank*, 248 S.W. 960—*Burns v. Prudential Ins. Co. of America*, 247 S.W. 159, 295 Mo. 680, transferred, see App., 253 S.W. 81.

6. Mo.—*City of Marshfield ex rel. to Use of Hasten v. Brown*, 88 S.W.2d 339, 337 Mo. 1136, transferred, see App., 79 S.W.2d 519, transferred, App., 99 S.W.2d 485—*Fischbach Brewing Co. v. City of St. Louis*, 87 S.W.2d 648, 337 Mo. 1044—*Wolf v. Hartford Fire Ins. Co.*, 263 S.W. 846, 304 Mo. 459, transferred, see 269 S.W. 701, 219 Mo.App. 307—*State v. Campbell*, 259 S.W. 430, transferred, see App., 266 S.W. 764—*Webster v. U. S. Railroad Administration*, 234 S.W. 790, transferred, see *Webster v. Davis*, App., 245 S.W. 625—*Hardwicke v. Wymore*, 228 S.W. 757, transferred, see 235 S.W. 171, 208 Mo.App. 414—*Trembley v. Fidelity & Casualty Co. of New York*, 223 S.W. 887, transferred, see App., 232 S.W. 179—*State ex rel. Simmons*

(now Hatton) v. American Surety Co. of New York, 210 S.W. 428—*Non-Royalty Show Co. v. Phoenix Assur. Co., Limited, of London, England*, 210 S.W. 37, 277 Mo. 399—*Cheek v. Prudential Ins. Co. of America*, 209 S.W. 928, transferred, see App., 223 S.W. 754, error dismissed *Prudential Ins. Co. of America v. Cheek*, 40 S.Ct. 343, 252 U.S. 567, 64 L.Ed. 719, and affirmed 42 S.Ct. 516, 259 U.S. 530, 66 L.Ed. 1044, 27 A.L.R. 27—*Lewis v. New York Life Ins. Co.*, 201 S.W. 851, 352—*Knapp Bros. Mfg. Co. v. Kansas City Stockyards Co.*, 199 S.W. 168, transferred, see App., 204 S.W. 194—*State v. Swift & Co.*, 195 S.W. 996, 270 Mo. 694, transferred, see App., 198 S.W. 457, reversed on other grounds 200 S.W. 1066, 273 Mo. 462, L.R.A.1918C 1150—*Wollums v. Mutual Ben. Health & Accident Ass'n*, 46 S.W.2d 259, 226 Mo.App. 647.

15 C.J. p 1084 note 80.

However, in some cases a previous decision on a constitutional question has been held not to preclude an appeal to the supreme court in a subsequent case where the same question is raised.—*Curtice v. Schmidt*, 101 S.W. 61, 202 Mo. 703, 10 Ann.Cas. 702—*State v. Smith*, 75 S.W. 625, 177 Mo. 69—15 C.J. p 1084 note 79.

Decision by United States supreme court

Appellant's contention that a federal statute is unconstitutional does not give the supreme court jurisdiction of the appeal, where the United States supreme court has decided against the contention.—*Ham v. Chicago, B. & Q. Ry. Co.*, 235 S.W. 1046, transferred, see *Hamm v. Chicago, B. & Q. Ry. Co.*, 245 S.W. 1109, 211 Mo.App. 460.

Question pending in United States supreme court

Where a case involving the constitutionality of a statute has been decided by the supreme court, but is pending in the United States supreme court on a writ of error, the

constitutionality of the statute is still an open question, so that the supreme court will take jurisdiction of an appeal in a subsequent case in which the constitutionality of the same statute is questioned.—*O'Donnell v. Kansas City, St. L. & C. R. Co.*, 95 S.W. 196, 197 Mo. 110, 114 Am.S.R. 753, followed in *Doyle v. Kansas City, St. L. & C. R. Co.*, Mo., 95 S.W. 200.

Dictum in previous case as to the question of constitutionality does not prevent an appeal to the supreme court.—*Cotton Lumber Co. v. La Crosse Lumber Co.*, 204 S.W. 957, 200 Mo. App. 7.

Question of unreasonable search and seizure

Supreme court, by previous ruling in similar case, could not put at rest constitutional question of unreasonable search and seizure, since whether a search is unreasonable depends on the facts in the particular case.—*State v. McBride*, App., 32 S.W.2d 134, transferred, see 37 S.W.2d 423, 327 Mo. 184.

7. Mo.—*McFall v. Barton-Mansfield Co.*, 61 S.W.2d 911, 333 Mo. 110—*Privitt v. St. Louis-San Francisco Ry. Co.*, 300 S.W. 726.

15 C.J. p 1085 note 81.

Question held not previously decided Mo.—*State ex rel. and to Use of Beckenstein v. Frankenhoff*, App., 122 S.W.2d 381.

8. Mo.—*Taylor v. Dimmitt*, 78 S.W.2d 841, 336 Mo. 330, 98 A.L.R. 995—*Little River Drainage Dist. v. Houck*, 222 S.W. 384, 282 Mo. 458—*State v. Chandler*, 33 S.W. 797, 132 Mo. 155, 53 Am.S.R. 483.

9. Mo.—*Federal Land Bank of St. Louis v. Bross*, 116 S.W.2d 6, transferred, see App., 122 S.W.2d 35—*State ex rel. Missouri Electric Power Co. v. Allen*, 100 S.W.2d 868, 340 Mo. 44—*State ex rel. to Use of Alton R. Co. v. Public Service Commission*, 100 S.W.2d 474, transferred, see App., 110 S.W.2d 1121, certiorari quashed *State ex rel. Public Service Commission v.*

sent in the trial court,¹⁰ unless the question is so necessarily involved that no judgment could have been rendered by the trial court without determining the question.¹¹ The record must show that the question was involved¹² and passed on,¹³ although this is not necessary where the proceedings

Shain, 119 S.W.2d 220, 342 Mo. 867—State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission, 92 S.W.2d 882, 338 Mo. 572, transferred, see State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission of Missouri 98 S.W.2d 126, 231 Mo.App. 293, reversed on other grounds State ex rel. Orscheln Bros. Truck Lines v. Shain, 106 S.W.2d 901, 341 Mo. 27, conformed to State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission, 110 S.W.2d 364, 232 Mo.App. 605, cause reinstated 110 S.W.2d 364, 232 Mo. App. 605—State ex rel. Pitcairn v. Public Service Commission, 92 S.W.2d 881, transferred, see State ex rel. Pitcairn v. Public Service Commission of Missouri, 100 S.W.2d 637, 231 Mo.App. 446, reversed on other grounds State ex rel. Pitcairn v. Shain, 106 S.W.2d 901, 341 Mo. 27, conformed to State ex rel. Pitcairn v. Public Service Commission, 111 S.W.2d 982, 232 Mo. App. 755, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902, second case—Walter L. Lacy Co. v. National Finance Corporation, 73 S.W.2d 747, transferred, see App., 79 S.W.2d 1078—State v. Hammer, 61 S.W.2d 965, 333 Mo. 40, transferred, see App., 56 S.W.2d 415, transferred, see 63 S.W.2d 181—Cox v. Frank L. Schaab Stove & Furniture Co., 58 S.W.2d 700, 332 Mo. 492, transferred, see App., 67 S.W.2d 790—Wheat v. Platte City Ben. Assessment Special Road Dist. of Platte County, 52 S.W.2d 856, 330 Mo. 1245, transferred, see 59 S.W.2d 88, 227 Mo.App. 869—State v. Selleck, 46 S.W.2d 579, transferred, see App., 55 S.W.2d 496—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see 49 S.W.2d 226—Nickell v. Kansas City, St. L. & C. R. Co., 32 S.W.2d 79, 326 Mo. 338, transferred, see 41 S.W.2d 595, 226 Mo.App. 302—Devoto v. Devoto, 31 S.W.2d 805, 326 Mo. 511, transferred, see App., 39 S.W.2d 1083—Lieber v. Hell, 30 S.W.2d 143, 325 Mo. 1148, transferred, see 296 S.W. 200, 220 Mo. App. 896—Houston v. Wilhite, 20 S.W.2d 553, transferred, see 27 S.W.2d 772, 224 Mo.App. 695—Syz v. Milk Wagon Drivers' Union, Local 603, 18 S.W.2d 441, 323 Mo. 130—In re Aiken's Estate, 297 S.W. 953—Newman v. John Hancock Mut. Life Ins. Co., 290 S.W. 133, 316 Mo. 454—State v. Cox, 259 S.W. 1041, transferred, see App., 266 S.W. 734—State v. Mackay, 259 S.W. 430, transferred, see App., 267 S.W.

5—State v. Graham, 256 S.W. 770, 301 Mo. 272, retransferred, see 247 S.W. 194, 295 Mo. 695, and transferred, see App., 250 S.W. 925—Dorrah v. Pemiscot County Bank, 248 S.W. 960—Burns v. Prudential Ins. Co. of America, 217 S.W. 159, 295 Mo. 680, transferred, see App., 253 S.W. 81—Johnson v. Kansas City Electric Light Co., 232 S.W. 1094—Lavelle v. Metropolitan Life Ins. Co., 231 S.W. 616, transferred, see App., 238 S.W. 504—Chapman v. Adams, 230 S.W. 80, transferred, see 243 S.W. 401, 210 Mo.App. 680—Huckshold v. United Rys. Co. of St. Louis, 226 S.W. 852, 265 Mo. 497, transferred, see App., 234 S.W. 1072—Harbis v. Cudahy Packing Co., 223 S.W. 578, transferred, see 241 S.W. 960, 211 Mo.App. 188, certiorari quashed State ex rel. Harbis v. Trumble, 238 S.W. 809, 292 Mo. 333—Parker-Washington Co. v. Field, 219 S.W. 598, transferred, see App., 239 S.W. 569—Strother v. Atchison, T. & S. F. Ry. Co., 203 S.W. 207, 274 Mo. 272—Funk v. Kansas City, 197 S.W. 343—Klohr v. Edwards, App., 94 S.W. 2d 99—State ex rel. Johnston v. Hiller, 295 S.W. 132—Commerce Trust Co. v. Syndicate Lot Co., 235 S.W. 150, 208 Mo.App. 261.

15 C.J. p 1083 note 68.

Question sufficiently raised

Mo.—Berry v. Majestic Milling Co., App., 202 S.W. 622, transferred, see 223 S.W. 738, 284 Mo. 182.

10. Mo.—State ex rel. Rose v. Webb City, 64 S.W.2d 597, 333 Mo. 1127, transferred, see App., 74 S.W.2d 45—Beck v. Kansas City Public Service Co., 37 S.W.2d 589, transferred, see App., 48 S.W.2d 213—Schildecht v. City of Joplin, 35 S.W.2d 35, 327 Mo. 126, transferred, see 41 S.W.2d 590, 226 Mo.App. 47—State v. Richter, 23 S.W.3d 926, reversing 27 S.W.2d 708, 224 Mo.App. 430—McGill v. City of St. Joseph, 31 S.W.2d 1038, transferred, see 38 S.W.2d 725, 225 Mo. App. 1033—Lieber v. Hell, 30 S.W.2d 143, 325 Mo. 1148, transferred, see 296 S.W. 200, 220 Mo. App. 896—Stock v. Schloman, 18 S.W.2d 428, 322 Mo. 1209, transferred, see 42 S.W.2d 61, 226 Mo. App. 234—Aufferheide v. Polar Wave Ice & Fuel Co., 4 S.W.2d 776, 319 Mo. 337—Keena v. Keena, 3 S.W.2d 352—Newman v. John Hancock Mut. Life Ins. Co. 290 S.W. 133, 316 Mo. 454—State v. Bell, 289 S.W. 834—Goodwin & Jean v. American Ry. Express Co., 280 S.W. 1043—State v. Cox, 259 S.W. 1041, transferred, see App., 266 S.W. 734—State v. Hale, 248 S.W.

958—Burns v. Prudential Ins. Co. of America, 247 S.W. 159, 295 Mo. 680, transferred, see App., 253 S.W. 81—Deming v. City of Springfield, 217 S.W. 27—Hydraulic Press Brick Co. v. Lane, 205 S.W. 801—Strother v. Atchison, T. & S. F. Ry. Co., 203 S.W. 207, 274 Mo. 272—Littlefield v. Littlefield, 197 S.W. 1057, 272 Mo. 163, retransferring, see App., 168 S.W. 841—Limbaugh v. Monarch Life Ins. Co., Springfield, Mass., App., 81 S.W.2d 208—Lins v. Boeckeler Lumber Co., 299 S.W. 150, 221 Mo.App. 181—State ex rel. Johnston v. Hiller, App., 295 S.W. 132—Cameron v. Massachusetts Protective Ass'n, 275 S.W. 988, 220 Mo.App. 780—State v. Brownfield, App., 256 S.W. 143—Commerce Trust Co. v. Syndicate Lot Co., 235 S.W. 150, 208 Mo.App. 261.

15 C.J. p 1083 note 69.

Waiver

Constitutional question as distinguished from jurisdictional question, may be waived by not raising it below.—Syz v. Milk Wagon Drivers' Union, Local 603, 18 S.W.2d 441, 323 Mo. 130.

11. Mo.—State ex rel. State Bldg. Commission v. Smith, 81 S.W.2d 613, 336 Mo. 810—State ex rel. Rose v. Webb City, 64 S.W.2d 597, 333 Mo. 1127, transferred, see App., 74 S.W.2d 45—Schildecht v. City of Joplin, 35 S.W.2d 35, 327 Mo. 126, transferred, see 41 S.W.2d 590, 226 Mo.App. 47—Wabash R. Co. v. Flannigan, 117 S.W. 722, 218 Mo. 566, transferred, see 100 S.W. 661, 118 Mo.App. 124.

15 C.J. p 1083 note 70.

12. Mo.—State ex rel. Rose v. Webb City, 64 S.W.2d 597, 333 Mo. 1127, transferred, see App., 74 S.W.2d 45—Lieber v. Hell, 30 S.W.2d 143, 325 Mo. 1148, transferred, see 296 S.W. 200, 220 Mo.App. 896—City of Laclede v. Libby, 278 S.W. 372, transferred, see City of Laclede, to Use of Abell v. Libby, 285 S.W. 178, 221 Mo.App. 703—State Savings, Loan & Trust Co. v. Swimmer, 229 S.W. 390, transferred, see 236 S.W. 1057, 208 Mo.App. 503—Davis v. Missouri Electric Power Co., App., 88 S.W.2d 217.

15 C.J. p 1083 note 71.

13. Mo.—State ex rel. Rose v. Webb City, 64 S.W.2d 597, 333 Mo. 1127, transferred, see App., 74 S.W.2d 45—Brown Shoe Co. v. Aetna Life Ins. Co., 281 S.W. 963, transferred, see 291 S.W. 522, 220 Mo.App. 649—Berry v. Majestic Milling Co., 223 S.W. 738, 284 Mo. 182, transferred, see App., 202 S.W. 622.

15 C.J. p 1083 note 72.

are summary in nature requiring no record.¹⁴ The question must be presented in the lower court at the first opportunity occurring in the due course of ordinary procedure,¹⁵ and must thereafter be pre-

served and kept alive by appropriate steps.¹⁶ The specific provision of the constitution alleged to be violated must be designated,¹⁷ and the facts showing the nature and manner of the violation must be

14. Mo.—State v. Campbell, 32 S. W.2d 69, 325 Mo. 531.

15. Mo.—Crescent Planing Mill Co. v. Mueller, 117 S.W.2d 247, 118 A.L.R. 709, transferred, see App., 123 S.W.2d 193—State v. Williams, 87 S.W.2d 423, 337 Mo. 937—St. Louis Union Trust Co. v. Hill, 76 S.W.2d 685, 336 Mo. 17—Walter L. Lacy Co. v. National Finance Corporation, 73 S.W.2d 747, transferred, see App., 79 S.W.2d 1078—Merchants' Savings & Loan Ass'n of Kansas City v. Ancona Realty Co., 72 S.W.2d 797, 335 Mo. 366, transferred, see 78 S.W.2d 470, 229 Mo. App. 714—Woodling v. Westport Hotel Operating Co., 55 S.W.2d 477, 331 Mo. 812, transferred, see 63 S.W.2d 207, 227 Mo.App. 1231—Lawson v. Capital City Contracting Co., 43 S.W.2d 775, 329 Mo. 19—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see 49 S.W.2d 226—Beck v. Kansas City Public Service Co., 37 S.W.2d 583, transferred, see App., 48 S.W.2d 213—Nickell v. Kansas City, St. L. & C. R. Co., 32 S.W.2d 79, 326 Mo. 338, transferred, see 41 S.W.2d 593, 226 Mo.App. 302—State v. Tatman, 278 S.W. 713, 312 Mo. 134, transferred, see App., 291 S.W. 151—State v. Hull, 273 S.W. 1039, transferred, see App., 279 S.W. 221—State v. Hale, 248 S.W. 958—Severson v. Dickinson, 248 S.W. 595—Mike Berniger Moving Co. v. O'Brien, 234 S.W. 807, transferred, see App., 240 S.W. 431—Lavelle v. Metropolitan Life Ins. Co., 231 S.W. 616, transferred, see App., 238 S.W. 504—Chapman v. Adams, 230 S.W. 80, transferred, see 243 S.W. 401, 210 Mo.App. 680—Bealmer v. Hartford Fire Ins. Co. of Hartford, Conn., 220 S.W. 154, 281 Mo. 495—West v. Dyer, 22 S.W. 880, transferred, see App., 217 S.W. 584—State ex rel. Simmons (now Hatton) v. American Surety Co. of New York, 210 S.W. 428—Strother v. Atchison, T. & S. F. Ry. Co., 203 S.W. 207, 274 Mo. 273—State ex rel. State Highway Commission v. Brown, 95 S.W.2d 661, 231 Mo.App. 56—Limbaugh v. Monarch Life Ins. Co., Springfield, Mass., App., 84 S.W.2d 208—State v. Van Graafelland, App., 293 S.W. 445—State v. Dodo, App., 253 S.W. 76.

In court of appeals

(1) Constitutional question depriving court of appeals of jurisdiction may be raised in court of appeals if raised at the first opportunity.—State ex rel. Pickwick Stage Lines

v. Barton, 4 S.W.2d 852, 222 Mo.App. 1236.

(2) On appeal to court of appeals, constitutional question which would put jurisdiction in supreme court and deprive court of appeals of jurisdiction should not be postponed until after other questions have been raised, but should be urged at earliest possible moment, otherwise it will be regarded as waived.—Concrete Engineering Co. v. Grande Bldg. Co., 56 S.W.2d 595, 230 Mo. App. 443.

Motion for new trial

(1) Generally, a constitutional question to give the supreme court jurisdiction cannot be first raised in a motion for a new trial.—Lawson v. Capital City Contracting Co., 43 S.W.2d 775, 329 Mo. 19—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see App., 49 S.W.2d 226—Lieber v. Heil, 30 S.W.2d 143, 325 Mo. 1148, transferred, see 296 S.W. 200, 220 Mo.App. 896—Joe Dan Market v. Wentz, 13 S.W.2d 641, 321 Mo. 943, transferred, see 20 S.W.2d 567, 223 Mo.App. 773—Village of Grandview, of Jackson County, v. McElroy, 298 S.W. 760, 318 Mo. 135—State v. Tatman, 278 S.W. 713, 312 Mo. 134, transferred, see App., 291 S.W. 151—State v. Luna, 259 S.W. 797, transferred, see App., 266 S.W. 755—Hamm v. Chicago, B. & Q. Ry. Co., 235 S.W. 1046, transferred, see Hamm v. Chicago, B. & Q. R. Co., 245 S.W. 1109, 211 Mo.App. 460—City of St. Joseph v. Cox, 226 S.W. 871, retranferred, see 232 S.W. 256, 208 Mo.App. 109—Tinsley v. Aethna Ins. Co. of Hartford, Conn., 199 S.W. 121—Platte Valley Drainage Dist. of Worth County v. National Surety Co., 295 S.W. 1083, 221 Mo. App. 898—15 C.J. p 1083 note 69 [c].

(2) However, where the question arises on determination of motion after final judgment and no counterpleading is required, it is not too late to present point in motion for new trial.—Kristanik v. Chevrolet Motor Co., 70 S.W.2d 890, 335 Mo. 60.

Question held timely raised

Mo.—Massey-Harris Harvester Co. v. Federal Reserve Bank of Kansas City, 104 S.W.2d 385, 340 Mo. 1133, 111 A.L.R. 133—Woodling v. Westport Hotel Operating Co., 55 S.W.2d 477, 331 Mo. 812, transferred, see 63 S.W.2d 207, 227 Mo.App. 1231—Butler v. Board of Education of Consolidated School Dist. No. 1 of Audrain County, 16 S.W.2d 44—State v. Tunnell, 259 S.W. 128, 302 Mo. 433.

16. Mo.—Crescent Planing Mill Co.

v. Mueller, 117 S.W.2d 247, 118 A.L.R. 709, transferred, see App., 123 S.W.2d 193—State ex rel. Missouri Electric Power Co. v. Allen, 100 S.W.2d 868, 340 Mo. 44—State v. Williams, 87 S.W.2d 423, 337 Mo. 937—St. Louis Union Trust Co. v. Hill, 76 S.W.2d 685, 336 Mo. 17—Normandy Consol. School Dist. of St. Louis County v. Wellston Sewer Dist. of St. Louis County, 74 S.W.2d 621, transferred, see App., 77 S.W.2d 477—State ex rel. Rose v. Webb City, 64 S.W.2d 597, 333 Mo. 1127, transferred, see App., 74 S.W.2d 45—State v. Hammer, 61 S.W.2d 965, 333 Mo. 40, transferred, see App., 56 S.W.2d 415, transferred, see 63 S.W.2d 181—State ex rel. Walker v. Locust Creek Drainage Dist., 58 S.W.2d 452, transferred, see 67 S.W.2d 840, 228 Mo. App. 434—State v. Ottensmeyer, 51 S.W.2d 39, 330 Mo. 754, transferred, see App., 37 S.W.2d 497, and transferred, see 55 S.W.2d 499—Beck v. Kansas City Public Service Co., 37 S.W.2d 583, transferred, see App., 48 S.W.2d 213—McGill v. City of St. Joseph, 31 S.W.2d 1038, transferred, see 38 S.W.2d 725, 225 Mo.App. 1033—Keena v. Keena, 3 S.W.2d 352—State v. Tatman, 278 S.W. 713, 312 Mo. 134, transferred, see App., 291 S.W. 151—State of Oklahoma ex rel. Freeling v. National City Bank of Kansas City, Mo., 267 S.W. 118, transferred, see State ex rel. Freeling v. National City Bank of Kansas City, App., 274 S.W. 945—State v. Goetz, 233 S.W. 710—California Special Road Dist. v. Buckner, 248 S.W. 927, remanded, App., 256 S.W. 98—Burns v. Prudential Ins. Co. of America, 247 S.W. 159, 295 Mo. 680, transferred, see App., 253 S.W. 81—State v. Goad, 246 S.W. 917, 296 Mo. 452—Kircher v. Evers, 238 S.W. 1086, transferred, see App., 247 S.W. 251—State v. Hartman, 222 S.W. 442, 282 Mo. 680—State v. Solars, 200 S.W. 1052, transferred, see App., 202 S.W. 623—Klohr v. Elwards, App., 94 S.W.2d 99—Finkle v. Western Automobile Ins. Co., 26 S.W.2d 843, 224 Mo.App. 285.

Question held properly preserved

Mo.—Massey-Harris Harvester Co. v. Federal Reserve Bank of Kansas City, 104 S.W.2d 385, 340 Mo. 1133, 111 A.L.R. 133—State v. Ottensmeyer, 37 S.W.2d 497, transferred, see 51 S.W.2d 39, 330 Mo. 754, transferred, see App., 55 S.W.2d 499.

17. Mo.—Consolidated School Dist. No. 4 of Greene County v. Day,

set forth,¹⁸ or, where the unconstitutionality of a statute is alleged, the place wherein the statute conflicts with the constitution must be pointed out.¹⁹

Where a constitutional question raised at the trial is withdrawn or the point conceded, and the case determined on other grounds,²⁰ or is not presented, briefed, or relied on on the appeal²¹ the supreme court is without jurisdiction.

§ 405. — Cases Involving Title to Real Estate

The supreme court has appellate jurisdiction in cases

where the title to real estate is actually and directly involved.

Under the express provisions of Missouri Constitution, 1875, article VI § 12, as amended by Constitutional Amendment, 1884, article VI § 5, the supreme court has appellate jurisdiction in cases where the title to real estate is involved.²² In order for the court to take jurisdiction on this ground, the title to such real estate must be actually and directly involved,²³ by which it is meant that the judgment rendered on the entire case as made by

43 S.W.2d 428, 328 Mo. 1105—Hohlslein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see App., 49 S.W.2d 226—Schildnecht v. City of Joplin, 35 S.W.2d 35, 327 Mo. 126, transferred, see 41 S.W.2d 530, 226 Mo. App. 47—State v. Richter, 33 S.W.2d 926, 927, citing *Corpus Juris*, and reversing 27 S.W.2d 708, 224 Mo.App. 430—Nickell v. Kansas City, St. L. & C. R. Co., 32 S.W.2d 79, 326 Mo. 338, transferred, see 41 S.W.2d 595, 226 Mo.App. 302—Syz v. Milk Wagon Drivers' Union, Local 603, 18 S.W.2d 441, 323 Mo. 130—City of St. Joseph v. Georgetown Lodge No. 627, I. O. O. F., of St. Joseph, 8 S.W.2d 979—State v. Campbell, 269 S.W. 430, transferred, see App., 266 S.W. 764—State v. Hale, 248 S.W. 958—State ex rel. Tadlock v. Mooneyham, 247 S.W. 163, 206 Mo. 421—State v. Kramer, 222 S.W. 822—City of Lancaster v. Reed, 201 S.W. 95—State ex rel. Johnston v. Hiller, App., 295 S.W. 132—State v. Kan-
an, App., 282 S.W. 465 (second case)—State v. Jones, App., 269 S.W. 954—Johnson v. Kansas City Electric Light Co., App., 232 S.W. 1094.

15 C.J. p 1083 note 68 [c].

Provision sufficiently designated

Mo.—Berry v. Majestic Milling Co., 223 S.W. 738, 284 Mo. 182, transferred, see App., 202 S.W. 622—State ex rel. Bloker v. Byrd, 237 S.W. 166, 208 Mo.App. 514—State v. Linton, 217 S.W. 874, transferred, see 222 S.W. 847.

18. Mo.—Crescent Planing Mill Co. v. Mueller, 117 S.W.2d 247, 118 A. L.R. 709, transferred, see App., 123 S.W.2d 193—City of Marshfield ex rel. to Use of Hasten v. Brown, 88 S.W.2d 339, 337 Mo. 1136, transferred, see App., 79 S.W.2d 519, transferred, see App., 99 S.W.2d 485—Village of Grandview, of Jackson County, v. McElroy, 298 S.W. 760, 318 Mo. 135.

19. Mo.—State v. Williams, 87 S.W. 2d 423, 337 Mo. 987—McGill v. City of St. Joseph, 31 S.W.2d 1038,

transferred, see 33 S.W.2d 725, 225 Mo.App. 1033—State v. Smith, 256 S.W. 468—State v. Berry, 253 S.W. 712—State v. Goetz, 253 S.W. 710—State v. McIntyre, 252 S.W. 396, transferred see App., 256 S.W. 141—State v. Nece, 248 S.W. 963—State v. Hale, 248 S.W. 958—State v. Goad, 246 S.W. 917, 296 Mo. 452—Bealmer v. Hartford Fire Ins. Co. of Hartford, Conn., 220 S.W. 954, 281 Mo. 495.

15 C.J. p 1083 note 68 [d].

Statute sufficiently designated

Mo.—Berry v. Majestic Milling Co., 223 S.W. 738, 284 Mo. 182, transferred, see App., 202 S.W. 622.

20. Mo.—Standard Oil Co. v. City of Moberly, 23 S.W.2d 1004, transferred, see 33 S.W.2d 157, 324 Mo. 577.

15 C.J. p 1085 note 82.

21. Mo.—Junior v. Junior, 84 S.W. 2d 909—Walter L. Lacy Co. v. National Finance Corporation, 73 S.W.2d 747, transferred, see App., 79 S.W.2d 1078—Allen v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 607, 327 Mo. 526, transferred, see 54 S.W. 2d 787, 227 Mo.App. 468—Bankers' Mortg. Co. v. Lessley, 31 S.W.2d 1055, transferred, see 33 S.W.2d 485, 225 Mo.App. 643—Brooks v. Menaugh, 6 S.W.2d 902, 320 Mo. 183—Village of Grandview, of Jackson County, v. McElroy, 298 S.W. 760, 318 Mo. 135—Brown Shoe Co. v. Aetna Life Ins. Co., 281 S.W. 963, transferred, see 291 S.W. 522, 220 Mo.App. 649—Cooper County Bank v. Bank of Bunceton, 276 S.W. 622, 310 Mo. 519, transferred, see 288 S.W. 95, 221 Mo. App. 814—Coombs v. Fuller, 223 S.W. 741—Little River Drainage Dist. v. Houck, 222 S.W. 384, 282 Mo. 458—Kansas City Breweries Co. v. Markowitz, 212 S.W. 849, transferred, see App., 221 S.W. 398.

15 C.J. p 1085 note 83.

22. Mo.—State ex rel. Pemberton v. Shain, 124 S.W.2d 1087, quashing judgment and opinion Plemmons v. Pemberton, App., 117 S.W.2d 392—Weller v. Searcy, 123 S.W.2d 73,

transferred, see App., 111 S.W.2d 246—Hudler v. Muller, 55 S.W.2d 419—Mitchell v. Nichols, 52 S.W.2d 855, transferred, see App., 20 S.W.2d 554—State ex rel. Greisinger v. Cox, 292 S.W. 75, quashing judgment and record Greisinger v. Klinhart, App., 252 S.W. 473—Toothaker v. Pleasant, 288 S.W. 38, 315 Mo. 1233—Elliott v. Winn, 264 S.W. 391, 305 Mo. 105, certiorari denied Winn v. Elliott, 45 S.Ct. 100, 266 U.S. 621, 69 L.Ed. 472—Watts v. Watts, 263 S.W. 421, 304 Mo. 361—Doas v. Cliffdale Land & Farm Co., 193 S.W. 806—First Nat. Bank v. Kinser, App., 104 S.W.2d 283, transferred, see 109 S.W.2d 1221, 341 Mo. 819, remanding cause, App., 112 S.W.2d 84—Thomas v. Craghead, App., 22 S.W.2d 1057, transferred, see 53 S.W.2d 281, 322 Mo. 211—Proctor v. Proctor, App., 255 S.W. 110—Powell v. Powell, App., 203 S.W. 601—Wright v. Cobb, App., 201 S.W. 913—Whitcotton v. Wilson, App., 197 S.W. 168.

15 C.J. p 1085 note 86.

Joint proceedings

Under provision for appeal to supreme court from decisions involving title to realty, if one of two joint proceedings involves title, whole case is so treated.—Nettleton Bank v. McGahey's Estate, 2 S.W.2d 771, 318 Mo. 948.

23. Mo.—In re Ellis' Estate, 127 S.W.2d 441, remanding cause, App., 110 S.W.2d 864—Hanssen v. Karbe, 106 S.W.2d 415, transferred, see App., 115 S.W.2d 109—Ballenger v. Windes, 93 S.W.2d 852, 338 Mo. 1039, transferred, see App., 99 S.W.2d 158—Bingle v. City of Richmond Heights, 57 S.W.2d 1035, citing *Corpus Juris*, and transferred, see App., 68 S.W.2d 866—Sasse v. Sparkman, 53 S.W.2d 261, 262, citing *Corpus Juris*, and transferred, see App., 45 S.W.2d 1112 and case remanded App., 65 S.W.2d 1067—Rawlings v. Rawlings, 39 S.W.2d 367, transferred, see 45 S.W.2d 539, 226 Mo.App. 688, reversed on other grounds 58 S.W.2d 735, 332 Mo. 503—Wuertenbaeher v. Feik, 36 S.

the pleadings and the evidence will in some way affect the title to real estate,²⁴ and that this will result from the litigation directly and without any subsequent proceeding.²⁵ In other words, the judgment must adjudicate a title controversy and must be such as will directly determine title in some

measure or degree adversely to one litigant and in favor of another.²⁶ The fact that such title is incidentally involved is not sufficient.²⁷

These principles have been applied in determining appellate jurisdiction in actions of ejectment;²⁸ and these principles have been applied in actions

W.2d 913, 914, quoting *Corpus Juris*, and transferred, see App., 43 S.W.2d 848—Cunningham v. Cunningham, 30 S.W.2d 63, 325 Mo. 1161—State ex rel. Miller v. Board of Education of Consolidated School Dist. No. 1 of Holt County, 18 S.W.2d 26, transferred, see 21 S.W.2d 645, 224 Mo.App. 120—Nettleton Bank v. McGahey's Estate, 2 S.W.2d 771, 318 Mo. 948—Toothaker v. Pleasant, 238 S.W. 36, 315 Mo. 1239—Dexino v. William S. Drozda Realty Co., App., 13 S.W.2d 659—Wearen v. Woodson, App., 268 S.W. 648.

15 C.J. p 1085 note 37.

Form of action

Mere form of action is not determinative of question whether title to realty is involved within supreme court's jurisdiction.—Devoto v. Devoto, 31 S.W.2d 805, 326 Mo. 511, transferred, see App., 39 S.W.2d 1083—Cunningham v. Cunningham, 30 S.W.2d 63, 325 Mo. 1161.

Illustrative cases holding title not involved

Mo.—Peoples Finance Corporation v. Lincoln, 131 S.W.2d 520—Hyer v. Baker, 130 S.W.2d 516, transferred, see App., 128 S.W.2d 1067—General Theatrical Enterprises v. Lyras, 121 S.W.2d 139—Ballenger v. Windes, 93 S.W.2d 882, 338 Mo. 1039, transferred, see App., 99 S.W.2d 158—Normandy Consol. School Dist. of St. Louis County v. Wellston Sewer Dist. of St. Louis County, 74 S.W.2d 621, transferred, see App., 77 S.W.2d 477—McCaskey v. Duffley, 73 S.W.2d 188, 335 Mo. 383, transferred, see 78 S.W.2d 141, 229 Mo.App. 141—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826, transferred, see App., 69 S.W.2d 677—Bingle v. City of Richmond Heights, 57 S.W.2d 1085, transferred, see App., 68 S.W.2d 866—Stipp v. Bailey, 53 S.W.2d 872, 331 Mo. 374, transferred, see App., 23 S.W.2d 178—Drew v. Platt, 44 S.W.2d 623, 329 Mo. 442, transferred, see App., 52 S.W.2d 1041—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545—Wuerstenbaeher v. Feik, 36 S.W.2d 913, transferred, see App., 42 S.W.2d 848—Mulik v. Jorganian, 30 S.W.2d 998, 326 Mo. 106, transferred, see App., 37 S.W.2d 963—State ex rel. Miller v. Board of Education of Consolidated School Dist. No. 1 of Holt County, 18 S.W.2d 26, transferred, see 21 S.W.

2d 645, 224 Mo.App. 120—Nettleton Bank v. McGahey's Estate, 2 S.W.2d 771, 318 Mo. 948—Handlan v. Stifel, 219 S.W. 616—Porter v. Johnson, App., 115 S.W.2d 529—Dezino v. William S. Drozda Realty Co., App., 13 S.W.2d 659—Gatson v. Farber Fire Brick Co., 282 S.W. 179, 219 Mo.App. 558—Simmons v. Kansas City, C. & S. Ry. Co., 213 S.W. 149, 201 Mo.App. 477.

15 C.J. p 1085 note 89 [b].

Illustrative cases holding title involved

Mo.—State ex rel. Pemberton v. Shain, 124 S.W.2d 1087, quashing judgment and opinion Plemmons v. Pemberton, App., 117 S.W.2d 392—Roth v. Roth, 104 S.W.2d 314, 348 Mo. 1043—Overfield v. Overfield, 30 S.W.2d 1073, 326 Mo. 83.

15 C.J. p 1085 note 89 [a].

24. Mo.—Williams v. Mackey, 52 S.W.2d 831, 331 Mo. 68, transferred, see App., 40 S.W.2d 1098, and transferred, see 61 S.W.2d 968, 227 Mo.App. 1016—Clinton County Trust Co. v. Metzger, 266 S.W. 321—Corbett v. Brown, 263 S.W. 233—Sikes v. Turner, 242 S.W. 940, transferred, see 247 S.W. 803, 212 Mo.App. 419—Mathews v. Hughes, 232 S.W. 99, transferred, see App., 237 S.W. 808—Heath v. Beck, 225 S.W. 993, retranferred, see App., 231 S.W. 657—Proctor v. Proctor, App., 256 S.W. 110—Potts-Turnbull Advertising Co. v. Gatchell, App., 236 S.W. 1078.

15 C.J. p 1085 note 88.

25. Mo.—Weil v. Richardson, 7 S.W.2d 348, 320 Mo. 310, transferred, see 24 S.W.2d 175, 224 Mo.App. 390—Nettleton Bank v. McGahey's Estate, 2 S.W.2d 771, 318 Mo. 948—Heman v. Wade, 43 S.W. 162, 141 Mo. 598.

26. Mo.—Proffer v. Proffer, 114 S.W.2d 1035, 342 Mo. 184, transferred, see App., 106 S.W.2d 51—Gibbany v. Walker, 113 S.W.2d 792, 342 Mo. 156, transferred, see App., 121 S.W.2d 317—First Nat. Bank v. Kinser, 109 S.W.2d 1221, 341 Mo. 819, transferred, see App., 104 S.W.2d 283, remanding cause, App., 112 S.W.2d 84—Peer v. Ashauer, 92 S.W.2d 154, transferred, see App., 102 S.W.2d 764—Frey v. Leidigh & Havens Lumber Co., 88 S.W.2d 863, 338 Mo. 1—Tucker v. Burford, 88 S.W.2d 144, 337 Mo. 1073—Stout v. Frick, 62 S.W.2d 1057, 333 Mo. 826, transferred, see App., 69 S.W.2d 677—Bingle v.

City of Richmond Heights, 57 S.W.2d 1085, transferred, see App., 68 S.W.2d 866—Devoto v. Devoto, 31 S.W.2d 805, 326 Mo. 511, transferred, see App., 39 S.W.2d 1083—Stock v. Schloman, 18 S.W.2d 428, 322 Mo. 1209, transferred, see 42 S.W.2d 61, 226 Mo.App. 234—Nettleton Bank v. McGahey's Estate, 2 S.W.2d 771, 318 Mo. 948—Williams v. Mackey, App., 40 S.W.2d 1098, transferred, see 52 S.W.2d 831, 331 Mo. 68, transferred, see 61 S.W.2d 968, 227 Mo.App. 1016.

Determination of ownership

The constitutional limitation on courts of appeal as to passing on title to real estate is such that courts have full power to pass on such issue so long as the decision of such courts does not determine who is and who is not the owner of the real estate in issue as an end of adjudicating title.—Gibbany v. Walker, App., 121 S.W.2d 317, transferred, see 113 S.W.2d 792, 342 Mo. 156.

27. Mo.—Hyer v. Baker, 130 S.W.2d 516, transferred, see App., 128 S.W.2d 1067—Wakefield v. Dinger, 130 S.W.2d 490, transferred, see App., 135 S.W.2d 17—Ballenger v. Windes, 93 S.W.2d 882, 338 Mo. 1039, transferred, see App., 99 S.W.2d 158—Morgan v. York, 88 S.W.2d 146, 337 Mo. 1076, transferred, see App., 61 S.W.2d 972—Bingle v. City of Richmond Heights, 57 S.W.2d 1085, transferred, see App., 68 S.W.2d 866—Mulik v. Jorganian, 30 S.W.2d 998, 326 Mo. 106, transferred, see App., 37 S.W.2d 963—Nettleton Bank v. McGahey's Estate, 2 S.W.2d 771, 318 Mo. 948—Schroer v. Brooks, 200 S.W. 1068, transferred, see 224 S.W. 53, 204 Mo.App. 567—City of St. Louis v. Gottschall, App., 121 S.W.2d 239.

15 C.J. p 1085 note 90.

28. Mo.—Gibbany v. Walker, 113 S.W.2d 792, 342 Mo. 156, transferred, see App., 121 S.W.2d 317.

15 C.J. p 1086 note 91.

Effect of decision refusing jurisdiction

A decision of the supreme court that it was without appellate jurisdiction of ordinary ejectment action would not jeopardize titles to realty which were founded on court's prior judgments in ejectment.—Gibbany v. Walker, 113 S.W.2d 792, 342 Mo. 156, transferred, see App., 121 S.W.2d 317.

or proceedings of replevin;²⁹ to quiet title to land;³⁰ to subject real estate to the payment of debts;³¹ to impress or to establish liens on real estate;³² to set aside deeds;³³ to set aside fraudulent conveyances;³⁴ to set aside judgments;³⁵ to es-

tablish lost deeds;³⁶ to redeem real estate;³⁷ to recover the purchase price of land;³⁸ to enforce mechanics' liens;³⁹ to foreclose mortgages or deeds of trust;⁴⁰ also in actions for waste,⁴¹ for trespass,⁴² for partition,⁴³ for specific performance of

Title held involved

Mo.—Murphy v. Milby, 130 S.W.2d 518—Welsh v. Brown, 96 S.W.2d 345, 339 Mo. 235—Williams v. Maxwell, 82 S.W.2d 270—Tooker v. Missouri Power & Light Co., 80 S.W.2d 691, 336 Mo. 592, 101 A.L.R. 365, transferred, see, App., 63 S.W.2d 217—Norton v. Reed, App., 200 S.W. 667—McKinney v. Hawkins, App., 192 S.W. 466.

Title held not involved

Mo.—Wakefield v. Dinger, 130 S.W.2d 490, transferred, see, App., 135 S.W.2d 17—Frederich v. Tobaben, 117 S.W.2d 251, transferred, see, App., 124 S.W.2d 592—Federal Land Bank of St. Louis v. Bros, 116 S.W.2d 6, transferred, see, App., 122 S.W.2d 35—Haynes v. Dunstan, 98 S.W.2d 539, transferred, see, App., 104 S.W.2d 1025—Sasse v. Sparkman, 53 S.W.2d 261, transferred, see, App., 27 S.W.2d 1112, and remanded, 65 S.W.2d 1067—Gibbany v. Walker, App., 121 S.W.2d 317, transferred, see 113 S.W.2d 792, 342 Mo. 156—Boyd v. Pennewell, App., 78 S.W.2d 456.

29. Mo.—Turner v. Morris, 121 S.W. 9, 222 Mo. 21.
15 C.J. p 1086 note 92.

30. Mo.—Stipp v. Bailey, App., 22 S.W.2d 178, transferred, see 53 S.W.2d 872, 331 Mo. 374.
15 C.J. p 1086 note 93.

31. Mo.—Bank of Forest City v. Pettijohn, 92 S.W.2d 189, 338 Mo. 506, transferred, see In re Swope's Estate, 99 S.W.2d 154, 231 Mo.App. 139—Nettleton Bank v. McGahey's Estate, 2 S.W.2d 771, 313 Mo. 948—In re Dildine's Estate, App., 225 S.W. 130, transferred, see 239 S.W. 112, 293 Mo. 393.
15 C.J. p 1086 note 94.

32. Mo.—Rust Sash & Door Co. v. Gate City Bldg. Corporation, 114 S.W.2d 1023, 342 Mo. 206, transferred, see Rust Sash & Door Co. v. Bryant, App., 124 S.W.2d 544—Morgan v. York, 88 S.W.2d 146, 337 Mo. 1076, transferred, see, App., 61 S.W.2d 972—Wharton v. Citizens' Bank of Bosworth, 15 S.W.2d 860, 223 Mo.App. 236.
15 C.J. p 1086 notes 95, 96.

Priority between liens

(1) That priority of liens on land as between judgment and claims is at issue does not give supreme court appellate jurisdiction, where it would have none if only establishment of one lien was sought.—King v. Hayes, 4 S.W.2d 1062, 319 Mo. 569.

(2) Suit for determination of priority between liens was held not to involve title to realty so as to give supreme court appellate jurisdiction.—Gold Lumber Co. v. Baker, 25 S.W.2d 457, 324 Mo. 984, transferred, see 36 S.W.2d 130, 225 Mo.App. 349.

Title held involved

Mo.—Holt v. Rea, App., 32 S.W.2d 776, transferred, see 52 S.W.2d 877, 330 Mo. 1237.

Title held not involved

Mo.—City of Marshfield ex rel., to Use of Hasten v. Brown, 88 S.W.2d 339, 337 Mo. 1136, transferred, see App., 79 S.W.2d 519, transferred, see 99 S.W.2d 485—Williams v. Barr, 55 S.W.2d 467, transferred, see, App., 61 S.W.2d 420—McHolland v. Treadway, 41 S.W.2d 375, transferred, see 45 S.W.2d 903, 226 Mo.App. 212—City of St. Louis v. Dietering, 19 S.W.2d 382, transferred, see, App., 27 S.W.2d 711—Stock v. Schloman, 18 S.W.2d 428, 322 Mo. 1209, transferred, see 42 S.W.2d 61, 236 Mo. App. 234—King v. Hayes, 4 S.W.2d 1062, 319 Mo. 569—Jine v. Jine, 217 S.W. 93.

33. Mo.—Jones v. Peterson, 72 S.W.2d 76, 335 Mo. 242—Cordia v. Matthes, App., 122 S.W.2d 32—Shaw v. Wrisberg, App., 62 S.W.2d 1101.
15 C.J. p 1086 note 97.

34. Mo.—Green v. Wilks, 109 S.W.2d 859—Brennecke v. Riemann, 102 S.W.2d 874, 109 A.L.R. 1214—Sallia v. Pillman, 43 S.W.2d 1038, 323 Mo. 1212, transferred, see App., 49 S.W.2d 215—Bank of Pocahontas v. Miller, App., 204 S.W. 817.
15 C.J. p 1086 note 98.

35. Mo.—Sullivan v. Holbrook, 109 S.W. 668, 211 Mo. 99.
15 C.J. p 1086 note 99.

36. Mo.—Thomas v. Scott, 113 S.W. 1093, 214 Mo. 430.

Title held involved

Mo.—Thomas v. Scott, supra.

37. Mo.—Casner v. Schwartz, 276 S.W. 58, transferred, see App., 286 S.W. 401.

15 C.J. p 1086 note 2.

38. Mo.—Park v. Park, 269 S.W. 417—Sturdivant Bank v. Houck, App., 215 S.W. 758.

15 C.J. p 1086 note 3.

39. Mo.—Frey v. Leidigh & Havens Lumber Co., 88 S.W.2d 863, 338 Mo. 1.

Title held not involved

Mo.—Rust Sash & Door Co. v. Gate City Bldg. Corporation, 114 S.W.2d 1023, 342 Mo. 206, transferred,

see Rust Sash & Door Co. v. Bryant, App., 124 S.W.2d 544—Frey v. Leidigh & Havens Lumber Co., 88 S.W.2d 863, 338 Mo. 1—Hydraulic Press Brick Co. v. Lane, 205 S.W. 801—F. M. Bruner Granitoid Co. v. Klein, 70 S.W. 687, 170 Mo. 235.

40. Mo.—Rust v. Geneva Inv. Co., 124 S.W.2d 1135—Cantley v. Piggett, 52 S.W.2d 846, 331 Mo. 30—Williams v. Mackey, 52 S.W.2d 831, 331 Mo. 68, transferred, see, App., 40 S.W.2d 1098, and transferred, see 61 S.W.2d 968, 227 Mo. App. 1016—Hull v. McCracken, 39 S.W.2d 351, 327 Mo. 957, retransferred, see App., 1 S.W.2d 205, 53 S.W.2d 405—Duhowsky v. Binggell, 167 S.W. 999, 258 Mo. 197, transferred, see 171 S.W. 12, 184 Mo.App. 361.

41. Mo.—Heman v. Wade, 43 S.W. 162, 141 Mo. 598.

Title held not involved

Mo.—Heman v. Wade, supra.

42. Mo.—Norman v. Summerfield Jones Const. Co., 4 S.W.2d 1064, transferred, see, App., 18 S.W.2d 559—Sikes v. Turner, 242 S.W. 940, transferred, see 247 S.W. 803, 212 Mo.App. 419—Dillard v. Sanderson, 222 S.W. 766, 282 Mo. 436—Dennig v. Graham, 59 S.W.2d 699, 227 Mo. App. 717.

15 C.J. p 1086 note 7.

43. Mo.—Rawlings v. Rawlings, 39 S.W.2d 367, transferred, see 45 S.W.2d 539, 236 Mo.App. 638, reversed on other grounds 53 S.W.2d 735, 332 Mo. 503—Studer v. Harlan, App., 109 S.W.2d 687.

Title held involved

Mo.—Weller v. Searcy, App., 111 S.W.2d 206, transferred, see, Sup., 123 S.W.2d 73—Pilkington v. Wheat, App., 35 S.W.2d 666, transferred, see 51 S.W.2d 42, 330 Mo. 767—Groes v. Brockman, App., 246 S.W. 608.

Title held not involved

Mo.—Tucker v. Burford, 88 S.W.2d 144, 337 Mo. 1073—Clevenger v. Odle, 44 S.W.2d 622, 329 Mo. 387, transferred, see 49 S.W.2d 267, 226 Mo.App. 1176—Kaufmann v. Kaufmann, 40 S.W.2d 555, transferred, see 43 S.W.2d 879, 226 Mo.App. 172—Hull v. McCracken, 39 S.W.2d 351, 327 Mo. 957, retransferred, see App., 1 S.W.2d 205, 53 S.W.2d 405—Brockman v. St. Louis Union Trust Co., 38 S.W.2d 1010, transferred, see, App., 44 S.W.2d 877—Utz v. Dormann, 31 S.W.2d 991, transferred, see, App., 43 S.W.2d 833—Deveto v. Deveto, 31 S.W.2d

contracts to convey land,⁴⁴ or for the reformation of instruments;⁴⁵ also to actions relating to trusts,⁴⁶ relating to executions,⁴⁷ relating to easements, franchises, or rights of way,⁴⁸ relating to

public or private roads,⁴⁹ relating to dower or curtesy,⁵⁰ relating to homesteads,⁵¹ relating to deeds of trust or mortgages,⁵² relating to wills and

805, 326 Mo. 511, transferred, see, App., 39 S.W.2d 1083—Cunningham v. Cunningham, 30 S.W.2d 63, 325 Mo. 1161—Funk v. Funk, 223 S.W. 780, 205 Mo.App. 178—Herchenroeder v. Herchenroeder, 75 Mo. App. 283.

44. Mo.—Barnes v. Stone, 95 S.W. 915, 198 Mo. 471.

Title held involved

Mo.—Barnes v. Stone, supra—Hawkins v. Hyde, App., 219 S.W. 974.

45. Mo.—Heath v. Beck, 225 S.W. 993, retransferred, see App., 231 S.W. 657—Phillips v. Cope, App., 101 S.W.2d 276, transferred, see, Sup., 111 S.W.2d 81—Nevins v. Coleman, 200 S.W. 445, 198 Mo. App. 252.

15 C.J. p 1087 note 10.

43. Mo.—Rutherford v. Farrar, 112 S.W.2d 517, transferred, see App., 118 S.W.2d 79—De Hatre v. Ruenpohl, 108 S.W.2d 357, 341 Mo. 749, transferred, see, App., 123 S.W.2d 243—Park v. Park, 259 S.W. 417—Thorn v. Poynor, 201 S.W. 850, transferred see 172 S.W. 1195, 187 Mo.App. 390—De Hatre v. Ruenpohl, App., 123 S.W.2d 243, transferred, see 103 S.W.2d 357, 341 Mo. 749—Cassity v. Cassity, App., 240 S.W. 486.

15 C.J. p 1087 note 11.

47. Mo.—Green v. Wilks, 109 S.W.2d 859—Mercantile Bank of Louisiana, Mo., v. Decker, 40 S.W.2d 626, 75 A.L.R. 1227, transferred, see, App., 43 S.W.2d 862—Flinn v. Richardson, 7 S.W.2d 356—Weil v. Richardson, 7 S.W.2d 348, 320 Mo. 310, transferred, see 24 S.W.2d 175, 224 Mo.App. 900—Sibole v. McKinnies, 213 S.W. 795, transferred, see App., 217 S.W. 577—City of St. Louis v. Gottschall, App., 131 S.W.2d 239.

15 C.J. p 1087 note 12.

43. Mo.—St. Louis-San Francisco Ry. Co. v. Silver King Oil & Gas Co., 117 S.W.2d 225, transferred, see App., 127 S.W.2d 31—Oliver v. Wilhite, 45 S.W.2d 1083, 329 Mo. 524, transferred, see 41 S.W.2d 825, and transferred, see App., 55 S.W.2d 491, 227 Mo.App. 538—Wallach v. Stetina, 20 S.W.2d 663, transferred, see, App., 28 S.W.2d 389—Davis v. Lea, 239 S.W. 823, 293 Mo. 660—Stough v. Steelville Electric Light & Power Co., 217 S.W. 515—Proctor v. Proctor, App., 256 S.W. 110—Horine v. People's Sewer Co., 204 S.W. 735, 200 Mo.App. 233—Heath v. Beck, App., 204 S.W. 43—Stough v. Steelville Elec-

tric Light & Power Co., App., 196 S.W. 37.

15 C.J. p 1087 note 13.

49. Mo.—State ex rel. Palmer v. Elliff, 58 S.W.2d 283, 332 Mo. 229, transferred, see 43 S.W.2d 1059, 226 Mo.App. 187—Mitchell v. Nichols, 52 S.W.2d 885, 330 Mo. 1233, transferred, see, App., 20 S.W.2d 554—Richter v. Rodgers, 37 S.W.2d 523, 327 Mo. 543—State ex rel. Cornelius v. McClanahan, 273 S.W. 1059, transferred, see, App., 278 S.W. 88—State ex rel. Pulley v. Thompson, 267 S.W. 605, 306 Mo. 239—Borders v. Glenn, 226 S.W. 915, transferred, see App., 232 S.W. 1062—Ripkey v. Gresham, 214 S.W. 851, 279 Mo. 521—Reading v. Chandler, 192 S.W. 94, 269 Mo. 589—State ex rel. Palmer v. Elliff, 43 S.W.2d 1059, 226 Mo.App. 187, transferred, see 58 S.W.2d 283, 332 Mo. 229—Thomas v. Craghead, App., 22 S.W.2d 1057, transferred, see 58 S.W.2d 281, 332 Mo. 211—Mitchell v. Nichols, App., 20 S.W.2d 554, transferred, see 52 S.W.2d 885, 330 Mo. 1233—Mayo v. Schumer, App., 256 S.W. 549—State ex rel. Pulley v. Thompson, 244 S.W. 940, 211 Mo.App. 434—Cannady v. Beaumont, App., 205 S.W. 974, certified questions answered, Sup., 213 S.W. 827.

15 C.J. p 1087 note 14.

Sidewalk

An injunction restraining a city from taking up and removing a sidewalk does not so involve the title to real estate as to confer appellate jurisdiction on the supreme court.—Brader v. City of Carthage, Mo., 250 S.W. 43, transferred, see, App., 256 S.W. 548.

50. Mo.—Ferguson v. Long, 107 S.W.2d 7, 341 Mo. 182—Jenkins v. Jenkins, 231 S.W. 581, transferred, see App., 234 S.W. 365—Gebbeken v. Grownney, 205 S.W. 721—In re Ellis' Estate, App., 110 S.W.2d 864, cause remanded, Sup., 127 S.W.2d 441—Johnston v. Johnston, App., 280 S.W. 76, transferred, see, Sup., 16 S.W.2d 91—Nordquist v. Nordquist, App., 278 S.W. 810, transferred, see 14 S.W.2d 583, 321 Mo. 1244.

15 C.J. p 1087 note 15.

51. Mo.—Lewellen v. Lewellen, 5 S.W.2d 4, 319 Mo. 854.

15 C.J. p 1087 note 16.

52. Mo.—Rust v. Geneva Inv. Co., 124 S.W.2d 1135—In re Ermeling's Estate, 119 S.W.2d 755—Hanssen v. Karbe, 106 S.W.2d 415, transferred, see, App., 115 S.W.2d 109—

Morgan v. York, 88 S.W.2d 146, 337 Mo. 1076, transferred, see, App., 61 S.W.2d 972—Medich v. Stippec, 73 S.W.2d 998, 335 Mo. 796—Williams v. Mackey, 52 S.W.2d 831, 331 Mo. 68, transferred, see App., 40 S.W.2d 1098, and transferred, see 61 S.W.2d 968, 227 Mo. App. 1016—Musso v. S. C. Realty Construction & Financing Corporation, 29 S.W.2d 52—Stock v. Schlozman, 18 S.W.2d 428, 322 Mo. 1209, transferred, see 42 S.W.2d 61, 226 Mo.App. 234—Steffen v. Stahl, 266 S.W. 474—Clinton County Trust Co. v. Metzger, 266 S.W. 321—Puthoff v. Walker, 239 S.W. 108, transferred, see 248 S.W. 619, 213 Mo.App. 228—Milby v. Murphy, App., 121 S.W.2d 169—In re Swope's Estate, 97 S.W.2d 154, 231 Mo.App. 139, transferred, see Bank of Forest City v. Pettijohn, 92 S.W.2d 189, 338 Mo. 508—Morgan v. York, App., 61 S.W.2d 972, transferred, see 88 S.W.2d 146, 337 Mo. 1076.

15 C.J. p 1087 note 17.

Suit to cancel

(1) A suit to cancel or set aside a deed of trust on real estate is a suit involving the title to real estate.—Peters v. Kirkwood Federal Savings & Loan Ass'n, Mo., 130 S.W.2d 507—In re Ermeling's Estate, Mo., 119 S.W.2d 755—Castorina v. Herrmann, 104 S.W.2d 297, 310 Mo. 1026—Hendrix v. Goldman, Mo., 92 S.W.2d 733—Meredith v. Pound, Mo., 92 S.W.2d 698—Phillips v. Phoenix Trust Co., 58 S.W.2d 318, 319, 332 Mo. 327, citing Corpus Juris—Koeving v. Greene County Building & Loan Ass'n of Springfield, 38 S.W.2d 40, 327 Mo. 680—Linneman v. Henry, 291 S.W. 109, 316 Mo. 674—Caneer v. Kent, App., 108 S.W.2d 457, transferred, see 119 S.W.2d 214, 342 Mo. 878—Tressler v. Whitsett, Mo.App., 280 S.W. 438—Soehngen v. Jantzen, Mo.App., 218 S.W. 423—15 C.J. p 1086 note 97 [c] (1).

(2) However, in a suit where title or the cancellation of the instrument is only incidentally involved, as where the real issue is whether the debt has been paid or the amount remaining due on the debt, and like issues, title to real estate is not sufficiently involved to give the supreme court jurisdiction.—Peters v. Kirkwood Federal Savings & Loan Ass'n, Mo., 130 S.W.2d 507—Brutcher v. Fitzsimmons, Mo., 122 S.W.2d 881—Musso v. S. C. Realty Construction & Financing Corporation, Mo., 29 S.W.2d 52—Farrell v. Seelig, Mo., 19 S.W.2d 648, transferred, see App.,

devises,⁵³ relating to the establishment of a right as heir,⁵⁴ relating to disposition of the proceeds of a sale of realty on foreclosure;⁵⁵ also in tax proceedings,⁵⁶ and condemnation proceedings.⁵⁷

§ 406. — Revenue Cases

The supreme court has appellate jurisdiction where the construction of the revenue laws of the state is directly involved.

27 S.W.2d 489—Clinton County Trust Co. v. Metzger, Mo., 266 S.W. 321—Corbett v. Brown, Mo., 263 S.W. 232—15 C.J. p 1088 note 97 [c] (2-3).

(3) Where cancellation of a mortgage is sought on the ground that the debt is barred by the statute of limitations, no title to realty is involved.—Stock v. Schloman, 18 S.W.2d 428, 322 Mo. 1209, transferred see 42 S.W.2d 61, 226 Mo.App. 234.

53. Mo.—In re Flynn's Estate, 92 S.W.2d 671, 338 Mo. 522, transferred, see App., 95 S.W.2d 1208, certiorari quashed State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, 340 Mo. 965.

15 C.J. p 1088 note 18.

Title held involved

Mo.—State ex rel. Pemberton v. Shain, 124 S.W.2d 1087, quashing judgment and opinion Plemmons v. Pemberton, App., 117 S.W.2d 392—Proffer v. Proffer, 114 S.W.2d 1035, 342 Mo. 184, transferred, see, App., 106 S.W.2d 51—Proffer v. Proffer, App., 106 S.W.2d 51, transferred, see 114 S.W.2d 1035, 342 Mo. 184.

Title held not involved

Mo.—In re Ellis' Estate, 127 S.W.2d 441, remanding cause, App., 110 S.W.2d 864—Hourigan v. McBee, 119 S.W.2d 404—Koch v. Meacham, 116 S.W.2d 16, transferred, see App., 121 S.W.2d 279—In re Flynn's Estate, 92 S.W.2d 671, 338 Mo. 522, transferred, see App., 95 S.W.2d 1208, certiorari quashed State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, 340 Mo. 965—Peer v. Ashauer, 92 S.W.2d 154, transferred, see App., 102 S.W.2d 764—Fields v. Luck, 34 S.W.2d 710, 327 Mo. 113, transferred, see In re Roff's Estate, 50 S.W.2d 156, 226 Mo.App. 1203—Mathews v. Hughes, 232 S.W. 99, transferred, see App., 237 S.W. 808—Cunningham v. Kinneker, App., 74 S.W.2d 1107.

54. Mo.—McCary v. McCary, App., 217 SAV. 547.

55. Mo.—Eubank v. Fennell, App., 73 S.W. 354.

15 C.J. p 1088 note 19.

56. Mo.—First Nat. Bank v. Kinser, 109 S.W.2d 1221, 341 Mo. 819, transferred, see, App., 104 S.W.2d 283, remanding cause 112 S.W.2d 84—State ex rel. Ross and to Use of Drainage Dist. No. 6 of Pemiscot

County, v. Martin, 93 S.W.2d 911, 338 Mo. 1067, transferred, see State ex rel. Ross v. Martin, App., 99 S.W.2d 875—City of Marshfield ex rel., to Use of Hasten v. Brown, 88 S.W.2d 339, 337 Mo. 1136, transferred, see, App., 79 S.W.2d 519, transferred, see 99 S.W.2d 485—Associated Holding Co. v. W. B. Kelley & Co., 81 S.W.2d 624, 336 Mo. 851—Stumpe v. City of Washington, 43 S.W.2d 414, transferred, see, App., 54 S.W.2d 731—Village of Grandview, of Jackson County, v. McElroy, 298 S.W. 760, 318 Mo. 135—City of Laclede v. Libby, 278 S.W. 372, transferred, see City of Laclede, to Use of Abell v. Libby, 285 S.W. 178, 221 Mo.App. 703—State ex rel. Lancaster v. Kennedy, 199 S.W. 953, 273 Mo. 122—Mound City v. Melvin, 199 S.W. 256—Stumpe v. City of Washington, App., 54 S.W.2d 731, transferred, see 43 S.W.2d 414, 338 Mo. 1081. 15 C.J. p 1088 note 20.

57. Mo.—State ex rel. State Highway Commission v. Carroll, 34 S.W.2d 74, transferred, see 44 S.W.2d 1105, 226 Mo.App. 563—State ex rel. Piepmeyer v. Camren, 33 S.W.2d 913, transferred, see 41 S.W.2d 902, 226 Mo.App. 100—Missouri Power & Light Co. v. Creed, 30 S.W.2d 605, transferred, see, App., 32 S.W.2d 783—Consolidated School Dist. No. 2 of Clinton County v. O'Mall, App., 115 S.W.2d 171, transferred, see Sup., 125 S.W.2d 818—State ex rel. State Highway Commission v. Wright, App., 11 S.W.2d 66.

15 C.J. p 1088 note 21.

Title held involved

Mo.—Consolidated School Dist. No. 2 of Clinton County v. O'Malley, 125 S.W.2d 818, transferred, see App., 115 S.W.2d 171—Thomas v. Craghead, 58 S.W.2d 281, 332 Mo. 211, transferred, see App., 22 S.W.2d 1057—State ex rel. State Highway Commission v. Gordon, 36 S.W.2d 105, 327 Mo. 160, followed in State ex rel. State Highway Commission v. Lewis, 36 S.W.2d 108—Prairie Pipe Line Co. v. Shipp, App., 240 S.W. 473, transferred, see 267 S.W. 647, 305 Mo. 663.

Title held not involved

Mo.—City of St. Louis v. Franklin Bank, 98 S.W.2d 534—State ex rel.

Under the express provisions of the Missouri Constitution, 1875, article VI § 12, as amended by Constitutional Amendment, 1884, article VI § 5, the supreme court has appellate jurisdiction where the construction of the revenue laws of the state is involved.⁵⁸ Within the concept of the constitution, the construction of the revenue laws must be directly and primarily concerned in the litigation to give the supreme court jurisdiction.⁵⁹

State Highway Commission v. Day, 35 S.W.2d 37, 327 Mo. 122, transferred, see 47 S.W.2d 147, 226 Mo. App. 884—Missouri Power & Light Co. v. Creed, 30 S.W.2d 605, transferred, see, App., 32 S.W.2d 783—Eighme v. Indiana, B. & W. R. Co., 238 S.W. 479—Murphy v. Barron, 228 S.W. 492, 286 Mo. 390.

58. Mo.—Liquidation of Peoples Bank of Butler, 127 S.W.2d 669—Wymore v. Markwry, 81 S.W.2d 9, 338 Mo. 46—State ex rel. and to Use of Parish v. Young, 33 S.W.2d 1021, 1022, 327 Mo. 909, citing Corpus Juris—State ex rel. and to Use of Rudder v. Haphe, 31 S.W.2d 788, 326 Mo. 460, followed in State ex rel. and to Use of Rudder v. Guest, 31 S.W.2d 791—Wright County ex rel. E'k Creek Tp. v. Farmers' & Merchants' Bank, 30 S.W.2d 32—State ex rel. White v. Fendorf, 226 S.W. 787, 317 Mo. 579—State ex rel. Johnson v. Atchison, T. & S. F. Ry. Co., 275 S.W. 932, 310 Mo. 587—State ex rel. Divine v. Collier, 256 S.W. 455, 301 Mo. 72—State ex rel. and to Use of Marlowe v. Hummelberger-Harrison Lumber Co., App., 25 S.W.2d 489—White v. Boyne, App., 11 S.W.2d 1083—Lyons v. School Dist. of Joplin, App., 246 S.W. 610. 15 C.J. p 1079 note 51.

Term "revenue law," as regards supreme court's jurisdiction includes laws relating to disbursement of revenue and its preservation.—T. J. Moss Tie Co. v. Allen, 300 S.W. 436, 318 Mo. 440.

59. Mo.—White v. Boyne, 23 S.W.2d 107, 324 Mo. 176—State ex rel. Miller v. Board of Education of Consolidated School Dist. No. 1 of Holt County, 18 S.W.2d 26, transferred, see 21 S.W.2d 645, 224 Mo. App. 120.

Construction of revenue laws held not involved

Mo.—Bushnell v. Mississippi & Fox River Drainage Dist. of Clark County, 102 S.W.2d 871, 340 Mo. 811, transferred, see, App., 111 S.W.2d 946—Associated Holding Co. v. W. B. Kelley & Co., 81 S.W.2d 624, 336 Mo. 851—Holly v. Rolwing, 76 S.W.2d 1076—Normandy Consol. School Dist. of St. Louis County v. Wellston Sewer Dist. of St. Louis County, 74 S.W.2d 621,

§ 407. — Character of Parties

The supreme court of Missouri has appellate jurisdiction in cases where a county or other political subdivision of the state or any state officer is a party of record.

In accordance with the express provisions of Missouri Constitution, 1875, article VI § 12, as amended by Constitutional Amendment, 1884, article VI § 5, the supreme court has appellate jurisdiction in cases where a county⁶⁰ or other political

subdivision of the state,⁶¹ or any state officer,⁶² is a party; but only when a party of record.⁶³ The term "political subdivision of the state" does not include a school district,⁶⁴ drainage district,⁶⁵ road district,⁶⁶ sewer district,⁶⁷ or a state hospital.⁶⁸ It includes an organized township in a county under township organization.⁶⁹ A city or town within a county is not included within the term,⁷⁰ but the city of St. Louis which is not within a county is a political subdivision,⁷¹ although the supreme

transferred, see App., 77 S.W.2d 477—Chilton v. Drainage Dist. No. 8 of Pemiscot County, 61 S.W.2d 744, 332 Mo. 1173, transferred, see 28 S.W.2d 120, 224 Mo.App. 467, transferred, see 63 S.W.2d 421, 228 Mo.App. 4—White v. Doyno, 23 S.W.2d 107, 324 Mo. 176—State ex rel. Miller v. Board of Education of Consolidated School Dist. No. 1 of Holt County, 18 S.W.2d 26, transferred, see 21 S.W.2d 645, 224 Mo.App. 120—T. J. Moss Tie Co. v. Allen, 300 S.W. 486, 318 Mo. 440—State ex rel. Kersey v. Sims, 274 S.W. 359—State ex rel. Broughton v. Oliver, 201 S.W. 868, 273 Mo. 537, retransferred, see State ex rel. County Collector v. Oliver, 172 S.W. 75, 186 Mo.App. 272—State ex rel. Lancaster v. Kennedy, 199 S.W. 953, 273 Mo. 122—Richmond v. Creel, 161 S.W. 794, 253 Mo. 256—State ex rel. Kearsey v. Coleman, App., 274 S.W. 1108—Douglass v. Ray, 199 S.W. 568, 199 Mo.App. 24.

60. Mo.—Howard County v. Montetieu County, 78 S.W.2d 96, 336 Mo. 295—Platte River Drainage Dist. No. 1 of Buchanan County v. Andrew County, 278 S.W. 387—Kansas City Sanitary Co. v. Laclede County, 269 S.W. 395, 307 Mo. 10—Howell County, to Use of School Fund, v. Cook, App., 48 S.W.2d 83—Bowman v. Phelps County, 36 S.W.2d 414, transferred, see 51 S.W.2d 3, 330 Mo. 826—State, to Use of Nee v. Gorsuch, App., 230 S.W. 663, transferred, see 260 S.W. 455, 303 Mo. 295.

15 C.J. p 1080 note 54, p 1081 note 57.

61. Mo.—Liquidation of Peoples Bank of Butler, 127 S.W.2d 668—Wright County ex rel. Elk Creek Tp. v. Farmers' & Merchants' Bank, 30 S.W.2d 32—Harrison and Mercer County Drainage Dist. v. Trail Creek Tp., 297 S.W. 1, 317 Mo. 933, 15 C.J. p 1080 note 55.

62. Mo.—Butler v. Board of Education of Consolidated School Dist. No. 1 of Audrain County, 16 S.W.2d 44—Shelley v. Missouri Commission for the Blind, 274 S.W. 688, 309 Mo. 612.

15 C.J. p 1081 note 56.

63. Mo.—Perkins v. Burks, 61 S.W.2d 755, transferred, see App., 64

S.W.2d 712, and affirmed 78 S.W.2d 845, 336 Mo. 248—State ex rel. Walker v. Locust Creek Drainage Dist., 58 S.W.2d 452, transferred, see 67 S.W.2d 840, 228 Mo.App. 434—Dietrich v. Brickey, 37 S.W.2d 428, 327 Mo. 189—Bank of Darlington v. Atwood, 27 S.W.2d 1029, transferred, see 36 S.W.2d 429, 225 Mo.App. 974, and motion overruled, App., 47 S.W.2d 1097—City of St. Louis v. Dietering, 19 S.W.2d 882, transferred, see App., 27 S.W.2d 711—State ex rel. Stipp v. Cornish, 19 S.W.2d 294, transferred, see 24 S.W.2d 667, 223 Mo.App. 978—Village of Grandview, of Jackson County, v. McElroy, 298 S.W. 760, 318 Mo. 135—State ex rel. Cornelius v. McClanahan, 273 S.W. 1059, transferred, see App., 273 S.W. 88—State, to Use of Nee v. Gorsuch, 260 S.W. 455, 303 Mo. 295, transferred, see App., 230 S.W. 663—State ex rel. Tadlock v. Mooneyham, 247 S.W. 163, 296 Mo. 421—Mike Berniger Moving Co. v. O'Brien, 234 S.W. 807, transferred, see App., 240 S.W. 481—Bowman v. Phelps County, App., 36 S.W.2d 414, transferred, see 51 S.W.2d 3, 330 Mo. 826—Dietrich v. Brickey, App., 277 S.W. 615, opinion and judgment quashed on other grounds State ex rel. Dietrich v. Daues, 287 S.W. 430, 315 Mo. 701.

64. Mo.—Normandy Consol. School Dist. of St. Louis County v. Weston Sewer Dist. of St. Louis County, 74 S.W.2d 621, transferred, see App., 77 S.W.2d 477—Consolidated School Dist. No. 2 of Clinton County v. Gower Bank of Gower, 53 S.W.2d 280, transferred, see In re Liquidation of Gower Bank, App., 55 S.W.2d 713—Gray v. School Dist. No. 73 of Clay County, 20 S.W.2d 657, transferred, see 28 S.W.2d 683, 224 Mo.App. 905—State ex rel. Cravens, to Use of Consolidated School Dist. No. 2 of Worth County, v. Thompson, 17 S.W.2d 342, 322 Mo. 444, transferred, see App., 22 S.W.2d 196—State ex rel. Consolidated School Dist. No. 2 v. Ingram, 298 S.W. 37, 317 Mo. 1141—School Dist. No. 1 v. Boyle, 81 S.W. 409, 182 Mo. 347, 348.

15 C.J. p 1080 note 55 [a] (1).

65. Mo.—Bushnell v. Mississippi &

Fox River Drainage Dist. of Clark County, 102 S.W.2d 871, 340 Mo. 811, transferred, see App., 111 S.W.2d 946—Chilton v. Drainage Dist. No. 8 of Pemiscot County, 61 S.W.2d 744, 332 Mo. 1173, transferred, see 28 S.W.2d 120, 224 Mo.App. 467, transferred see 63 S.W.2d 421, 228 Mo.App. 4.

15 C.J. p 1080 note 55 [a] (2).

66. Mo.—Wheat v. Platte City Ben. Assessment Special Road Dist. of Platte County, 52 S.W.2d 856, 330 Mo. 1245, transferred, see 59 S.W.2d 88, 227 Mo.App. 869.

67. Mo.—Normandy Consol. School Dist. of St. Louis County v. Weston Sewer Dist. of St. Louis County, 74 S.W.2d 621, transferred, see App., 77 S.W.2d 477.

68. Mo.—John O'Brien Boiler Works Co. v. Third Nat. Bank of St. Louis, 222 S.W. 788, 232 Mo. 670, retransferred see App., 231 S.W. 1053.

69. Mo.—Liquidation of Peoples Bank of Butler, 127 S.W.2d 669—Norborne Land Drainage Dist. Co. of Carroll County v. Cherry Valley Tp., of Carroll County, 31 S.W.2d 201, 325 Mo. 1197—Wright County ex rel. Elk Creek Tp. v. Farmers' & Merchants' Bank, 30 S.W.2d 32—Reilly v. Sugar Creek Tp. of Harrison County, App., 121 S.W.2d 298—Missouri Tp., Chariton County, v. Farmers' Bank of Forest Green, App., 12 S.W.2d 763, transferred, see 42 S.W.2d 353, 328 Mo. 868.

70. Mo.—Associated Holding Co. v. W. B. Kelley & Co., 81 S.W.2d 624, 336 Mo. 851—McGill v. City of St. Joseph, 31 S.W.2d 1038, transferred, see 38 S.W.2d 725, 225 Mo.App. 1033—Green v. Owen, 31 S.W.2d 1037, 326 Mo. 450, transferred, see 38 S.W.2d 496, 225 Mo.App. 746—City of St. Joseph v. Georgetown Lodge No. 627, I. O. O. F., of St. Joseph, 8 S.W.2d 979—Village of Grandview, of Jackson County, v. McElroy, 298 S.W. 760, 318 Mo. 135.

15 C.J. p 1080 note 55 [b] (2).

71. Mo.—Volz v. City of St. Louis, 32 S.W.2d 72, 326 Mo. 362—City of St. Louis v. Southcombe, 8 S.W.2d 1001, 320 Mo. 865—City of St.

court does not have jurisdiction in a case which concerns the city of St. Louis only in its corporate or ministerial capacity as a municipality, and which does not involve county rights and functions as a political subdivision,⁷² or where the city of St. Louis although a party has no real interest in the case.⁷³

A "state officer," within the constitutional provision, is an officer whose official duties are coextensive with the boundaries of the state,⁷⁴ and to confer jurisdiction on the supreme court, he must be acting as a real party in his official capacity.⁷⁵ The term does not include circuit judges,⁷⁶ mem-

bers of the county court,⁷⁷ a county treasurer,⁷⁸ a board of election commissioners⁷⁹ or an excise commissioner and license collector⁸⁰ of the city of St. Louis, a sheriff,⁸¹ a policeman,⁸² a manager of a state hospital,⁸³ a road overseer,⁸⁴ or a county superintendent of schools.⁸⁵ The term includes the secretary of state,⁸⁶ members of the commission for the blind,⁸⁷ members of the state board of health,⁸⁸ and the state superintendent of insurance.⁸⁹ A public service commission although composed of state officers is an artificial legal entity and is not a state officer,⁹⁰ and this is also true of the state highway commission⁹¹ and the workmen's compen-

Louis v. Murta, 222 S.W. 430, 283 Mo. 77.

15 C.J. p 1080 note 55 [b] (1).

72. Mo.—Fischbach Brewing Co. v. City of St. Louis, 87 S.W.2d 648, 337 Mo. 1044—Lovins v. City of St. Louis, 84 S.W.2d 127, 338 Mo. 1194, followed in Koontz v. City of St. Louis, 84 S.W.2d 131—City of St. Louis v. Gottschall, App., 121 S.W.2d 239—Fadem v. City of St. Louis, App., 99 S.W.2d 511.

73. Mo.—City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co., 212 S.W. 887—Hilton v. Universal Const. Co., 212 S.W. 867—Frolichstein v. Cupples' Station Light, Heat & Power Co., 201 S.W. 897—Barnett v. City of St. Louis, 195 S.W. 1017, retranferred, see, App., 198 S.W. 452.

74. Mo.—Fischbach Brewing Co. v. City of St. Louis, 87 S.W.2d 648, 337 Mo. 1044—Dietrich v. Brickey, 37 S.W.2d 428, 327 Mo. 189—State ex rel. Consolidated School Dist. No. 2 v. Ingram, 298 S.W. 37, 317 Mo. 1141—State v. Higgins, 46 S.W. 423, 144 Mo. 410.

Finance commissioner liquidating delinquent bank

(1) The state commissioner of finance in liquidating a delinquent bank is not a "state officer," so as to give the supreme court jurisdiction, for his duties in so doing are in a representative capacity only and in such capacity he does not exercise statewide functions coextensive with state boundaries.—In re Wellston Trust Co., Mo., 131 S.W.2d 720—State v. Farmers' Exchange Bank of Gallatin, 56 S.W.2d 129, 331 Mo. 689—Consolidated School Dist. No. 2 of Clinton County v. Gower Bank of Gower, Mo., 53 S.W.2d 280, transferred, see In re Liquidation of Gower Bank, App., 55 S.W.2d 713—Cantley v. Piggott, 52 S.W.2d 846, 331 Mo. 30—City of Doniphan v. Cantley, 50 S.W.2d 658, 330 Mo. 639, transferred, see App., 52 S.W.2d 417—Bank of Darlington v. Atwood, Mo., 27 S.W.2d 1029, transferred, see 36

S.W.2d 429, 225 Mo.App. 974, and motion overruled 47 S.W.2d 1097.

(2) An earlier case was transferred to the supreme court on the ground that the commissioner of finance was a party thereto.—Tate v. Cantley, Mo.App., 23 S.W.2d 190.

75. Mo.—Klaber v. O'Malley, 90 S.W.2d 396—State v. Dillon, 2 S.W. 417, 90 Mo. 229.

76. Mo.—State ex rel. Rucker v. Hoffman, 288 S.W. 16, 313 Mo. 667, transferred, see App., 294 S.W. 429.

77. Mo.—Hill v. Hopson, 120 S.W. 29, 221 Mo. 103.

78. Mo.—Normandy Consol. School Dist. of St. Louis County v. Wellston Sewer Dist. of St. Louis County, 74 S.W.2d 621, transferred, see, App., 77 S.W.2d 477—Dietrich v. Brickey, 37 S.W.2d 428, 327 Mo. 189.

79. Mo.—State v. Higgins, 46 S.W. 423, 144 Mo. 410.

80. Mo.—Fischbach Brewing Co. v. City of St. Louis, 87 S.W.2d 648, 337 Mo. 1044.

81. Mo.—State v. Higgins, 46 S.W. 423, 144 Mo. 410.

82. Mo.—State v. Kansas City Police Comrs., 80 Mo.App. 206, affirmed 71 S.W. 215, 88 S.W. 27, 184 Mo. 109.

83. Mo.—John O'Brien Boiler Works Co. v. Third Nat. Bank of St. Louis, 222 S.W. 788, 282 Mo. 670, retranferred, see, App., 231 S.W. 1053.

84. Mo.—Hill v. Hopson, 120 S.W. 29, 221 Mo. 103.

85. Mo.—State ex rel. and to Use of Gorman v. Offutt, 9 S.W.2d 595—State ex rel. Consolidated School Dist. No. 2 v. Ingram, 298 S.W. 37, 317 Mo. 1141.

86. Mo.—State v. Farmers' Exchange Bank of Gallatin, 56 S.W.2d 129, 331 Mo. 689.

87. Mo.—Foster v. Missouri Commission for Blind, 37 S.W.2d 450, 327 Mo. 416.

88. Mo.—State ex rel. Lentine v.

State Board of Health, 65 S.W.2d 943, 334 Mo. 220—State ex rel. Horton v. Clark, 9 S.W.2d 635, 320 Mo. 1190.

89. Mo.—Klaber v. O'Malley, 90 S.W.2d 396.

15 C.J. p 1081 note 56 [b].

90. Mo.—State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission, 92 S.W.2d 882, 338 Mo. 572, transferred, see State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission of Missouri, 98 S.W.2d 126, 231 Mo.App. 293, reversed on other grounds State ex rel. Orscheln Bros. Truck Lines v. Shain, 106 S.W.2d 901, 341 Mo. 27, conformed to State ex rel. Orscheln Bros. Truck Lines v. Public Service Commission, 110 S.W.2d 364, 232 Mo.App. 605, cause reinstated 110 S.W.2d 364, 232 Mo. App. 605—State ex rel. Pitcairn v. Public Service Commission, 92 S.W.2d 881, transferred, see State ex rel. Pitcairn v. Public Service Commission of Missouri, 100 S.W.2d 637, 231 Mo.App. 446, reversed on other grounds State ex rel. Pitcairn v. Shain, 106 S.W.2d 901, 341 Mo. 27, conformed to State ex rel. Pitcairn v. Public Service Commission, App., 111 S.W.2d 982, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902, second case—State ex rel. Pitcairn v. Public Service Commission of Missouri, 90 S.W.2d 392, 338 Mo. 180, transferred, see, App., 100 S.W.2d 636, reversed on other grounds 106 S.W.2d 898, 341 Mo. 19, conformed to State ex rel. State ex rel. Pitcairn v. Public Service Commission, 110 S.W.2d 367, 232 Mo.App. 609, certiorari dismissed State ex rel. Pitcairn v. Shain, Sup., 106 S.W.2d 902—State ex rel. Gehrs v. Public Service Commission of Missouri, 90 S.W.2d 390, 338 Mo. 177, transferred, see, App., 99 S.W.2d 858.

91. Mo.—Pope Const. Co. v. State Highway Commission, 84 S.W.2d 920, 337 Mo. 30—Wheat v. Platte City Ben. Assessment Special Road

sation commission,⁹² but the commission for the blind has been held not a legal entity separate from its members and the supreme court has jurisdiction.⁹³ Where it is doubtful whether a certain officer is a state officer, the proper procedure is for the court of appeals to transfer the case to the supreme court for its judgment and determination.⁹⁴

§ 408. — Title to Office

The supreme court of Missouri has appellate jurisdiction of cases involving the title to any office under the state.

Under the express provisions of Missouri Constitution 1875, article VI § 12, as amended, Amendment, 1884, article VI § 5, the supreme court has appellate jurisdiction of cases involving the title to any office under the state.⁹⁵ That a person holding an office under the state is involved in litigation does not give the supreme court jurisdiction if title to the office is not involved.⁹⁶ The term "office under this state" includes the office of school director,⁹⁷ road commissioner,⁹⁸ clerk of the circuit court,⁹⁹ county collector of revenue,¹ township offi-

cers,² policeman,³ and constable.⁴ The term does not include the office of village trustee,⁵ executor of an estate,⁶ or offices created and governed by municipal charter or ordinances such as the office of mayor of a third class city,⁷ city attorney,⁸ or city collector.⁹

§ 409. — Amount in Controversy

The supreme court of Missouri has appellate jurisdiction of cases where the amount in controversy is in excess of the sum designated by statute as provided for by the constitution. The amount must be actually in dispute and it must be affirmatively disclosed by the record.

The Constitutional Amendment of 1884 § 3, gives to the legislature power to increase or diminish the pecuniary limits of the jurisdiction of the courts of appeal, and under this power the limits have been successively increased from the original amount of twenty-five hundred dollars fixed by Constitution, 1875, article VI § 12, to forty-five hundred dollars by Laws, 1901, p 107, and to seventy-five hundred dollars by Laws, 1909, p 397. The supreme court has appellate jurisdiction of cases where the amount in dispute is in excess of the designated sum,¹⁰ but where no other special grounds for its

Dist. of Platte County, 52 S.W.2d 856, 330 Mo. 1245, transferred, see 59 S.W.2d 88, 227 Mo.App. 869—Christeson v. State Highway Commission, 40 S.W.2d 615, transferred, see 46 S.W.2d 906—State ex rel. State Highway Commission v. Day, 35 S.W.2d 37, 327 Mo. 122, transferred, see 47 S.W.2d 147, 226 Mo. App. 884—State ex rel. State Highway Commission v. Carroll, 34 S.W.2d 74, transferred, see 44 S.W.2d 1105, 226 Mo.App. 563.

92. Mo.—State ex rel. Goldman v. Missouri Workmen's Compensation Commission, 27 S.W.2d 1026, 325 Mo. 153—State ex rel. Goldman v. Missouri Workmen's Compensation Commission, 32 S.W.2d 142, 225 Mo. App. 59.

93. Mo.—Shelley v. Missouri Commission for the Blind, 274 S.W. 688, 309 Mo. 612.

94. Mo.—Linehart v. Farmers' State Bank of North Salem, App., 27 S.W.2d 751.

95. Mo.—State ex inf. Marr v. Allen, 291 S.W. 454, 316 Mo. 754. 15 C.J. p 1080 note 52.

96. Mo.—State ex rel. Consolidated School Dist. No. 2 v. Ingram, 298 S.W. 37, 317 Mo. 1141.

97. Mo.—State ex rel. Worsham v. Ellis, 44 S.W.2d 129, 329 Mo. 124, transferred, see, App., 11 S.W.2d 1095—State ex rel. Gentry v. Sullivan, 8 S.W.2d 616, 320 Mo. 362—State ex inf. of Barrett ex rel. McCann v. Parrish, 270 S.W. 688, 307

Mo. 455—State ex rel. West ex inf. Thudium v. Consolidated School Dist. No. 2 in Linn County, 234 S.W. 54, 290 Mo. 134—State ex inf. Barrett ex rel. McCann v. Parish, App., 262 S.W. 412.

15 C.J. p 1080 note 52 [a] (3).

98. Mo.—State ex inf. Holt, ex rel. Jones v. Meyer, 12 S.W.2d 489, 321 Mo. 858—State ex rel. Richardson v. Baldey, App., 40 S.W.2d 720.

99. Mo.—State v. Rombauer, 14 S.W. 726, 101 Mo. 499.

1. Mo.—Sanders v. Lacks, 43 S.W. 653, 142 Mo. 255.

2. Mo.—State ex inf. Barrett v. Imhoff, 238 S.W. 122, 291 Mo. 603—Macrae v. Coles, 183 S.W. 578.

3. Mo.—State v. Kansas City Police Comrs., 80 Mo.App. 206.

4. Mo.—State ex rel. Davidson v. Caldwell, 276 S.W. 631, 310 Mo. 397.

5. Mo.—State ex rel. Otto, ex rel. Bales v. Hyde, 296 S.W. 775, 317 Mo. 714.

6. Mo.—Fields v. Luck, 34 S.W.2d 710, 327 Mo. 113, transferred, see In re Roff's Estate, 50 S.W.2d 156, 226 Mo.App. 1203.

7. Mo.—State v. Walker, 33 S.W. 813, 132 Mo. 210.

Office in charitable institution

The supreme court has no jurisdiction of an appeal in certiorari proceedings to review the action of the commissioners on charitable institutions of the city of St. Louis in dis-

charging an officer of such an institution.—Dristol v. Fischel, 51 S.W. 678, 151 Mo. 34.

8. Mo.—Green v. Owen, 31 S.W.2d 1037, 326 Mo. 450, transferred, see 38 S.W.2d 496, 225 Mo.App. 746.

9. Mo.—Ibbetson v. Schulz, 59 S.W.2d 617, 332 Mo. 850, transferred, see, App., 64 S.W.2d 313.

10. Mo.—Winn v. Matthews, 130 S.W.2d 484—Sayles v. Kansas City Structural Steel Co., 128 S.W.2d 1046—Kimmie v. Terminal R. Ass'n of St. Louis, 126 S.W.2d 1197—Bates v. Bates, 124 S.W.2d 1117—Miller v. Ralston Purina Co., 109 S.W.2d 866, 341 Mo. 811—Roethemeier v. Veith, 108 S.W.2d 346, 341 Mo. 706—C. Bewes, Inc., v. Buser, 108 S.W.2d 66, 341 Mo. 578—City of St. Louis v. Franklin Bank, 107 S.W.2d 3—Edwards v. Al Fresco Advertising Co., 100 S.W.2d 513, 340 Mo. 342—Heitzeberg v. Von Hoffmann Press, 100 S.W.2d 307, 340 Mo. 265—Wills v. Berberich's Delivery Co., 98 S.W.2d 569, 339 Mo. 856—Timper v. Missouri Pac. R. Co., 98 S.W.2d 548—Hannibal v. Hannibal Bros. Ice Co., 93 S.W.2d 1010, 338 Mo. 1242—Schoenherr v. Stoughton, 78 S.W.2d 84, 336 Mo. 290—Bland v. Buoy, 74 S.W.2d 612, 335 Mo. 967—Newman v. Rice-Stix Dry Goods Co., 73 S.W.2d 264, 335 Mo. 572, 94 A.L.R. 751—Platies v. Theodorow Bakery Co., 66 S.W.2d 147, 334 Mo. 508—Brewer v. Silverstein, 64 S.W.2d 289—Burgstrand v. Crowe Coal Co., 62 S.W.

jurisdiction exist, it has no jurisdiction of cases of that sum, and the court of appeals has jurisdiction.¹¹ To give the supreme court jurisdiction, where the amount in controversy is not in excess

2d 406, 333 Mo. 43—Shroyer v. Missouri Livestock Commission Co., 61 S.W.2d 713, 332 Mo. 1219—New First Nat. Bank v. C. L. Rhodes Produce Co., 58 S.W.2d 742, 332 Mo. 163, transferred, see 37 S.W.2d 986, 225 Mo.App. 438—Gray v. Doe Run Lead Co., 53 S.W.2d 877, 331 Mo. 481—Dawson v. Scott, 40 S.W.2d 87, 330 Mo. 185—Huttig v. Brennan, 41 S.W.2d 1054, 328 Mo. 471—Rombauer v. Compton Heights Christian Church, 40 S.W.2d 545—State ex rel. Brenner v. Trimble, 32 S.W.2d 760, 326 Mo. 702—Meyers v. Drake, 24 S.W.2d 116, 324 Mo. 613—Schaub v. Sun Realty Co., 24 S.W.2d 111, two cases—Kingshighway Presbyterian Church v. Sun Realty Co., 24 S.W.2d 108, 324 Mo. 510—Robert v. Mercantile Trust Co., 23 S.W.2d 32, 324 Mo. 314—Butler v. Board of Education of Consolidated School Dist. No. 1 of Audrain County, 16 S.W.2d 44—Kitchen v. City of Clinton, 8 S.W.2d 602, 320 Mo. 569—State ex rel. Pyle v. University City, 8 S.W.2d 73, 320 Mo. 451—Aufderheide v. Polar Wave Ice & Fuel Co., 4 S.W.2d 776, 319 Mo. 337—Osburn v. Chicago, R. I. & P. Ry. Co., 1 S.W.2d 181—Whitwell v. Whitwell, 300 S.W. 455, 318 Mo. 476—Burke v. Pappas, 293 S.W. 142, 316 Mo. 1235—Rodgers v. Travelers' Ins. Co., 278 S.W. 368, 311 Mo. 249—Webb v. Cotton, 271 S.W. 768, 308 Mo. 272—In re McMenamy's Guardianship, 270 S.W. 632, 307 Mo. 98—Tureman v. Ketterlin, 263 S.W. 202, 304 Mo. 221, 43 A.L.R. 1155—Perkins v. Silverman, 223 S.W. 895, 284 Mo. 238—Matlack v. Kline, 216 S.W. 323, 280 Mo. 139—State ex rel. Wurde-man v. Reynolds, 204 S.W. 1093, 275 Mo. 113—Sandy Hites Co. v. State Highway Commission, App., 128 S.W.2d 646—Bunner v. Patti, App., 107 S.W.2d 143, transferred, see 343 Mo. 274, 121 S.W.2d 153—Allen v. Fewel, App., 70 S.W.2d 1107—Davis v. Johnson, App., 47 S.W.2d 121, transferred, see 58 S.W.2d 746, 332 Mo. 417—New First Nat. Bank v. C. L. Rhodes Produce Co., 37 S.W.2d 986, 225 Mo. App. 438, transferred, see 58 S.W.2d 742, 332 Mo. 163—Holt v. Rea, App., 32 S.W.2d 776, transferred, see 52 S.W.2d 877, 330 Mo. 1237—Cooper v. Armour & Co., App., 277 S.W. 967, retransferred, see 6 S.W.2d 567—State ex rel. Renfro v. Service Cushion Tube Co., App., 274 S.W. 491, transferred, see State ex rel. Renfro v. Service Cushion Tube Co., 291 S.W. 106, 316 Mo. 640—McCary v. McCary, App., 217 S.W. 547—Fred A. H. Garlichs Agency Co. v. Anderson,

App., 202 S.W. 260, remanded 223 S.W. 641, 284 Mo. 200.

Materiality of form or nature of proceedings

Relative to amount in controversy to give supreme court jurisdiction on appeal, form or nature of proceeding is immaterial, where right in dispute is susceptible of pecuniary valuation in excess of seven thousand five hundred dollars.—Fred A. H. Garlichs Agency Co. v. Anderson, App., 202 S.W. 260, remanded 223 S.W. 641, 284 Mo. 200.

11. Mo.—Rust v. Geneva Inv. Co., 124 S.W.2d 1135—General Theatrical Enterprises v. Lyris, 121 S.W.2d 139—Crescent Planing Mill Co. v. Mueller, 117 S.W.2d 247, 118 A.L.R. 709, transferred, see 123 S.W.2d 193—Pilant v. Erwin, 116 S.W.2d 104, transferred, see 130 S.W.2d 173—Gibbany v. Walker, 113 S.W.2d 792, 342 Mo. 156, transferred, see 121 S.W.2d 317—De Hatre v. Ruenpohl, 108 S.W.2d 357, 341 Mo. 749, transferred, see 123 S.W.2d 243—Nies v. Stone, 108 S.W.2d 349, transferred, see 117 S.W.2d 407—Bushnell v. Mississippi & Fox River Drainage Dist. of Clark County, 102 S.W.2d 871, 340 Mo. 811, transferred, see 111 S.W.2d 946—Evans v. Chevrolet Motor Co., 102 S.W.2d 594, transferred, see, App., 105 S.W.2d 1081—Hardt v. City Ice & Fuel Co., 102 S.W.2d 592, 340 Mo. 721, transferred, see 109 S.W.2d 836—Town of Canton v. Moberly, 101 S.W.2d 722, 340 Mo. 610, transferred, see 111 S.W.2d 969—Matz v. Miami Club Restaurant, 100 S.W.2d 476, 339 Mo. 1133—Godefroy Mfg. Co. v. Lady Lennox Co., 100 S.W.2d 271, 339 Mo. 1107, transferred, see 110 S.W.2d 803—Haynes v. Dunstan, 98 S.W.2d 539, transferred, see, App., 104 S.W.2d 1025—Stine v. Southwest Bank of St. Louis, 98 S.W.2d 539—City of St. Louis v. Franklin Bank, 98 S.W.2d 534—In re Flynn's Estate, 92 S.W.2d 671, 338 Mo. 522, transferred, see, App., 95 S.W.2d 1208, certiorari quashed State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, 340 Mo. 965—Fleischaker v. Fleischaker, 92 S.W.2d 169, 338 Mo. 797, quashing mandamus and retransferred, see 70 S.W.2d 104, 228 Mo.App. 98—Breit v. Bowland, 92 S.W.2d 110, transferred, see 100 S.W.2d 599, 231 Mo.App. 433, record quashed State ex rel. and to Use of Breit v. Shain, 119 S.W.2d 758, 342 Mo. 1148—Fischbach Brewing Co. v. City of St. Louis, 87 S.W.2d 648, 337 Mo. 1044—Pope Const. Co. v. State Highway Commission, 84 S.W.2d 920, 337 Mo. 30—McCaskey v. Duffley, 73 S.W.2d 188, 335 Mo. 383,

transferred, see 78 S.W.2d 141, 229 Mo.App. 141—Merchants' Savings & Loan Ass'n of Kansas City v. Ancona Realty Co., 72 S.W.2d 797, 325 Mo. 356, transferred, see 78 S.W.2d 470, 229 Mo.App. 714—Stephens v. D. M. Oberman Mfg. Co., 70 S.W.2d 899, 334 Mo. 1078—Commercial Bank of Jamesport v. Songer, 62 S.W.2d 903, transferred, see, App., 74 S.W.2d 100, 229 Mo.App. 165—Mitchell v. Dabney, 59 S.W.2d 731, 332 Mo. 410, transferred, see, App., 71 S.W.2d 165—Cox v. Frank L. Schaub Stove & Furniture Co., 58 S.W.2d 700, 332 Mo. 492, transferred, see, App., 67 S.W.2d 790—State ex rel. Walker v. Locust Creek Drainage Dist., 58 S.W.2d 452, transferred, see 67 S.W.2d 840, 228 Mo.App. 434—Niedringhaus v. Niedringhaus Inv. Co., 52 S.W.2d 395, 330 Mo. 1089, transferred, see Wm. F. Niedringhaus Inv. Co., App., 54 S.W.2d 79, certiorari quashed State ex rel. Williams v. Daues, 66 S.W.2d 137, 334 Mo. 91—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see 49 S.W.2d 226—Christeson v. State Highway Commission, 40 S.W.2d 615, transferred, see 46 S.W.2d 906—Casebolt v. International Life Ins. Co., 38 S.W.2d 1044, transferred, see, App., 42 S.W.2d 939—Dietrich v. Brickey, 37 S.W.2d 428, 327 Mo. 189—Schildnecht v. City of Joplin, 35 S.W.2d 35, 327 Mo. 126, transferred, see 41 S.W.2d 590, 226 Mo.App. 47—Green v. Owen, 31 S.W.2d 1037, 326 Mo. 450, transferred, see 38 S.W.2d 496, 225 Mo.App. 746—Mellon v. Stockton & Lampkin, 30 S.W.2d 974, 326 Mo. 129, transferred, see 35 S.W.2d 612, 225 Mo.App. 122, followed in Mellon v. Burns, 35 S.W.2d 614—Cunningham v. Cunningham, 30 S.W.2d 63, 325 Mo. 1161—Gray v. School Dist. No. 73 of Clay County, 20 S.W.2d 657, transferred, see 28 S.W.2d 683, 224 Mo.App. 905—Bante v. Bante Development Co., 19 S.W.2d 641, 323 Mo. 649, transferred, see, App., 27 S.W.2d 481—State ex rel. Cravens, to Use of Consolidated School Dist. No. 2 of Worth County, v. Thompson, 17 S.W.2d 342, 322 Mo. 444, transferred, see 22 S.W.2d 196—Macon County Levee Dist. No. 1, Macon County, v. Goodson, 14 S.W.2d 561, transferred, see 22 S.W.2d 651, 224 Mo.App. 131—Joe Dan Market v. Wentz, 13 S.W.2d 641, 321 Mo. 943, transferred, see 20 S.W.2d 567, 223 Mo.App. 772—Callison v. Wabash Ry. Co., 12 S.W.2d 451, 321 Mo. 795—Guilloid v. Kansas City Power & Light Co., 11 S.W.2d 1036, 321 Mo. 586, trans-

the record must affirmatively disclose the jurisdictional amount,¹² and the amount must be actually in dispute,¹³ it must have been litigated in the trial

ferred, see 18 S.W.2d 97, 224 Mo. App. 382—In re Wilson's Estate, 8 S.W.2d 973, 320 Mo. 975, transferred, see, App., 16 S.W.2d 737—Stuart v. Stuart, 8 S.W.2d 613, 320 Mo. 486—Ward v. Consolidated School Dist. No. 136 of Nodaway County, 7 S.W.2d 689, 320 Mo. 385—Lewellen v. Lewellen, 5 S.W.2d 4, 319 Mo. 854—Corbett v. Lincoln Savings & Loan Ass'n, 4 S.W.2d 824, transferred, see 17 S.W.2d 275, 223 Mo.App. 329—Pyle v. University City, 1 S.W.2d 799, 318 Mo. 856—McGregory v. Gaskill, 296 S.W. 123, 317 Mo. 122, transferred, see, App., 296 S.W. 833—Brown Shoe Co. v. Aetna Life Ins. Co., 281 S.W. 963, transferred, see 291 S.W. 522, 220 Mo.App. 649—State ex rel. Lamm v. Mid-State Serum Co., 264 S.W. 878—State v. Gould, 246 S.W. 547—Cambest v. McComas Hydro Electric Co., 239 S.W. 477, 292 Mo. 570, transferred, see 345 S.W. 598, 212 Mo.App. 325—Huggins v. Hill, 236 S.W. 1056, transferred, see, App., 245 S.W. 1105—Bertha A. Mining Co. v. Empire District Electric Co., 232 S.W. 113, transferred, see 235 S.W. 508, 210 Mo.App. 622—Mathews v. Hughes, 232 S.W. 99, transferred, see 237 S.W. 808—Gary Realty Co. v. Kelly, 224 S.W. 410, 284 Mo. 418—Fred A. H. Garlachs Agency Co. v. Anderson, 223 S.W. 641, 284 Mo. 200, remanded, App., 202 S.W. 260—Stough v. Steelville Electric Light & Power Co., 217 S.W. 515—Jine v. Jine, 217 S.W. 93—State ex rel. Commonwealth Trust Co. v. Reynolds, 213 S.W. 804, 278 Mo. 695—City of St. Louis ex rel. and to Use of Hydraulic Press Brick Co. v. Ruecking Const. Co., 212 S.W. 889—Humphrey v. McKown, 209 S.W. 883—Keleher v. Johnson, 199 S.W. 935, 272 Mo. 699—Speer v. Graham, 199 S.W. 139—State v. Chicago, M. & St. P. Ry. Co., 199 S.W. 121, 272 Mo. 520—Bates v. Werries, 196 S.W. 1124, transferred, see 199 S.W. 758, 198 Mo. App. 209—Roll v. Fidelity Nat. Bank & Trust Co. of Kansas City, App., 115 S.W.2d 148—Millhouser v. Kansas City Public Service Co., App., 71 S.W.2d 160—Allen v. Best, 58 S.W.2d 810, 227 Mo.App. 851—Robinson v. Union Electric Light & Power Co., App., 43 S.W.2d 912—Frederichsen v. Farmers' State Bank of Branson, App., 19 S.W.2d 302—Hutchinson v. Missouri Pac. Ry. Co., App., 288 S.W. 91—Lamkin v. Kaiser, App., 256 S.W. 558—Sikes v. Freeman, App., 204 S.W. 948.

15 C.J. p 1088 note 22, p 1089 note 25.

Amount exactly seventy-five hundred dollars

Where the amount is exactly seventy-five hundred dollars, jurisdiction is in the court of appeals and not in the supreme court.—Pyle v. University City, 1 S.W.2d 799, 318 Mo. 856—Germo Mfg. Co. v. Combs, 229 S.W. 1072, 287 Mo. 273, transferred, see 240 S.W. 872, 209 Mo.App. 651.

12. Mo.—In re Wellston Trust Co., 131 S.W.2d 720—Winn v. Matthews, 130 S.W.2d 484—Aurlen v. Security Nat. Bank Savings & Trust Co. of St. Louis, 129 S.W.2d 1047—In re Ellis' Estate, 127 S.W.2d 441, remanding 110 S.W.2d 864—Hanley v. Carlo Motor Service Co., 126 S.W.2d 229, transferred, see 130 S.W.2d 187—Rust v. Geneva Inv. Co., 124 S.W.2d 1135—Ross v. Speed-O Corporation of America, 121 S.W.2d 865—Crescent Planing Mill Co. v. Mueller, 117 S.W.2d 247, 118 A.L.R. 709, transferred, see 123 S.W.2d 193—Grant v. Bremen Bank & Trust Co., 108 S.W.2d 347—Hansen v. Karbe, 106 S.W.2d 415, transferred, see 115 S.W.2d 109—Esmar v. Haussler, 106 S.W.2d 412, 341 Mo. 33, transferred, see 115 S.W.2d 54—Evans v. Chevrolet Motor Co., 102 S.W.2d 594, transferred, see, App., 105 S.W.2d 1081—Whitworth v. Monahan's Estate, 100 S.W.2d 460, 339 Mo. 1123, transferred, see 111 S.W.2d 931—Stine v. Southwest Bank of St. Louis, 98 S.W.2d 539—Fleischaker v. Fleischaker, 92 S.W.2d 169, 338 Mo. 797, quashing mandamus and retransferred, see 70 S.W.2d 104, 228 Mo.App. 98—Dorsett v. Dorsett, 79 S.W.2d 742—Burroughs v. Lasswell, 79 S.W.2d 107, 336 Mo. 463, transferred, see, App., 86 S.W.2d 962—McCaskey v. Duffley, 73 S.W.2d 188, 335 Mo. 383, transferred, see 78 S.W.2d 141, 229 Mo. App. 141—Blankenship v. Ratcliff, 73 S.W.2d 183, 335 Mo. 387, transferred, see, App., 76 S.W.2d 741—Platies v. Theodorow Bakery Co., 66 S.W.2d 147, 334 Mo. 508—Mitchell v. Dabney, 58 S.W.2d 781, 332 Mo. 410, transferred, see, App., 71 S.W.2d 165—Stipp v. Bailey, 53 S.W.2d 872, 331 Mo. 374, transferred, see, App., 22 S.W.2d 178—City of Doniphan v. Cantley, 50 S.W.2d 658, 330 Mo. 639, transferred, see, App., 52 S.W.2d 417—Drew v. Platt, 44 S.W.2d 623, 329 Mo. 442, transferred, see 52 S.W.2d 1041—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 578, 328 Mo. 899, transferred, see 49 S.W.2d 226—Estel v. Midgard Inv. Co., 38 S.W.2d 1046—McGill v. City of St. Joseph, 31 S.W.2d 1038, trans-

ferred, see 38 S.W. 725, 225 Mo. App. 1033—Green v. Owen, 31 S.W.2d 1037, 326 Mo. 450, transferred, see 38 S.W.2d 496, 225 Mo.App. 746—Schaub v. Sun Realty Co., 24 S.W.2d 111, two cases—Kingshighway Presbyterian Church v. Sun Realty Co., 24 S.W.2d 108, 324 Mo. 510—Bante v. Bante Development Co., 19 S.W.2d 641, 323 Mo. 649, transferred, see App., 27 S.W.2d 481—Joe Dan Market v. Wentz, 13 S.W.2d 641, 321 Mo. 943, transferred, see 20 S.W.2d 567, 223 Mo. App. 772—Ward v. Consolidated School Dist. No. 136 of Nodaway County, 7 S.W.2d 689, 320 Mo. 385—Flinn v. Richardson, 7 S.W.2d 356—In re Bennett's Estate, 243 S.W. 769—Cambest v. McComas Hydro Electric Co., 239 S.W. 477, 292 Mo. 570, transferred, see 245 S.W. 598, 212 Mo.App. 325—Gary Realty Co. v. Kelly, 224 S.W. 410, 284 Mo. 418—Fred A. H. Garlachs Agency Co. v. Anderson, 223 S.W. 641, 284 Mo. 200, remanded, App., 202 S.W. 260—Handlan v. Stifel, 219 S.W. 616—Vordick v. Vordick, 219 S.W. 591, 281 Mo. 279—In re Sturdivant Bank, App., 89 S.W.2d 89—In re Liquidation of Fidelity Bank & Trust Co., App., 77 S.W.2d 480—In re Central Trust Co. of St. Charles, App., 68 S.W.2d 919—Southwest Pump & Machinery Co. v. Forslund, 29 S.W.2d 165, 225 Mo.App. 262—In re Moll's Estate, App., 299 S.W. 127.

Speculation or conjecture cannot be indulged in by the supreme court to determine the amount in dispute.—Crescent Planing Mill Co. v. Mueller, 117 S.W.2d 247, 118 A.L.R. 709, transferred, see 123 S.W.2d 193—Nies v. Stone, 108 S.W.2d 349, transferred, see 117 S.W.2d 407—Hanssen v. Karbe, 106 S.W.2d 415, transferred, see 115 S.W.2d 109—In re Flynn's Estate, 92 S.W.2d 671, 338 Mo. 522, transferred, see App., 95 S.W.2d 1208, certiorari quashed State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, 340 Mo. 965—Consolidated School Dist. No. 2 of Clinton County v. Gower Bank of Gower, 53 S.W.2d 280, transferred, see, App., In re Liquidation of Gower Bank, 55 S.W.2d 713.

13. Mo.—State ex rel. Brown & Williamson Tobacco Corporation v. Workmen's Compensation Commission, 126 S.W.2d 230—Rust Sash & Door Co. v. Gate City Bldg. Corporation, 114 S.W.2d 1023, 342 Mo. 206, transferred, see Rust Sash & Door Co. v. Bryant, 124 S.W.2d 544—Grant v. Bremen Bank & Trust Co., 108 S.W.2d 347—Esmar v. Haussler, 106 S.W.2d 412, 341 Mo. 33, transferred, see 115 S.W.2d 54

court,¹⁴ and it must be presented for review in the supreme court.¹⁵ The amount conceded due will be deducted from the sum claimed.¹⁶ The matter in question must be money or some right the value of which may be ascertained in money,¹⁷ and where the object of a suit is not to obtain a money judg-

ment but other relief, the amount involved must be determined by the value in money of the relief to plaintiff or of the loss to defendant.¹⁸

The court must determine from the whole record the sum which is involved.¹⁹ The amount in

—In re Flynn's Estate, 92 S.W.2d 671, 338 Mo. 522, transferred, see App., 95 S.W.2d 1208, certiorari quashed State ex rel. Kinealy v. Hostetter, 104 S.W.2d 303, 340 Mo. 965—Peer v. Ashauer, 92 S.W.2d 154, transferred, see, App., 102 S.W.2d 764—State ex rel. Pitcairn v. Public Service Commission of Missouri, 90 S.W.2d 392, 338 Mo. 180, transferred, see 100 S.W.2d 636, reversed on other grounds State ex rel. Wabash Ry. Co. v. Shain, 106 S.W.2d 898, 341 Mo. 19, conformed to State ex rel. Pitcairn v. Public Service Commission, 110 S.W.2d 367, certiorari dismissed State ex rel. Pitcairn v. Shain, 106 S.W.2d 902—Ashbrook v. Willis, 89 S.W.2d 659, 338 Mo. 226, transferred, see 100 S.W.2d 943, 231 Mo.App. 460—State ex rel. Pieper v. Mueller, 59 S.W.2d 719, 227 Mo.App. 1101.
15 C.J. p 1088 note 22 [a].

Rights incidentally affected

It is the amount determined in the suit in question that settles the jurisdiction of the supreme court of an appeal, and not the rights which may be incidentally affected.—Gary Realty Co. v. Kelly, 224 S.W. 410, 284 Mo. 418—Fred A. H. Garlich's Agency Co. v. Anderson, 223 S.W. 641, 284 Mo. 200, remanded, App., 202 S.W. 260.

14. Mo.—Schaub v. Sun Realty Co., 24 S.W.2d 111 (two cases)—Kingshighway Presbyterian Church v. Sun Realty Co., 24 S.W.2d 108, 324 Mo. 510.

15. Mo.—Ashbrook v. Willis, 89 S.W.2d 659, 338 Mo. 226, transferred, see 100 S.W.2d 943, 231 Mo.App. 460.

16. Mo.—In re Wellston Trust Co., 131 S.W.2d 720—Town of Canton v. Moberly, 101 S.W.2d 722, 340 Mo. 610, transferred, see 111 S.W.2d 969—Bietsch v. Midwest Piping & Supply Co., 76 S.W.2d 1079—Consolidated School Dist. No. 2 of Clinton County v. Gower Bank of Gower, 53 S.W.2d 280, transferred, see, App., In re Liquidation of Gower Bank, 55 S.W.2d 713—Hohlsteln v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see 49 S.W.2d 226—Casebolt v. International Life Ins. Co., 38 S.W.2d 1044, transferred, see, App., 42 S.W.2d 939—Sleyster v. Eugene Donzelot & Son, 20 S.W.2d 69, 323 Mo. 822—Hannan-Hickey Bros. Const. Co. v. Chicago, B. & Q. Ry. Co., 226 S.W. 881, trans-

ferred, App., 247 S.W. 436, 442—In re Sturdivant Bank, App., 89 S.W.2d 89—In re Liquidation of Fidelity Bank & Trust Co., App., 77 S.W.2d 480—In re Central Trust Co. of St. Charles, App., 68 S.W.2d 919—Allen v. Best, 58 S.W.2d 810, 227 Mo.App. 851—Anderson v. Aetna Bricklaying & Construction Co., App., 27 S.W.2d 755.

17. Mo.—State ex rel. Pitcairn v. Public Service Commission, 92 S.W.2d 881, transferred, see State ex rel. Pitcairn v. Public Service Commission of Missouri, 100 S.W.2d 637, 231 Mo.App. 446, reversed on other grounds State ex rel. Pitcairn v. Shain, 106 S.W.2d 901, 341 Mo. 27, conformed to State ex rel. Pitcairn v. Public Service Commission, 111 S.W.2d 982, certiorari dismissed State ex rel. Pitcairn v. Shain, 106 S.W.2d 902, second case—Bates v. Werries, 196 S.W. 1124, transferred, see Appellate Court 199 S.W. 758, 198 Mo.App. 209—Cooper v. Armour & Co., App., 277 S.W. 967, retranferred, see 6 S.W.2d 567—Wall v. Kansas City Gas Co., App., 235 S.W. 161.

18. Mo.—Winn v. Matthews, 130 S.W.2d 484—Ross v. Speed-O Corporation of America, 121 S.W.2d 865—Bushnell v. Mississippi & Fox River Drainage Dist. of Clark County, 102 S.W.2d 871, 340 Mo. 811, transferred, see 111 S.W.2d 946—Matz v. Miami Club Restaurant, 100 S.W.2d 476, 339 Mo. 1133—Fleischaker v. Fleischaker, 92 S.W.2d 169, 338 Mo. 797, quashing mandamus and retranferred, see 70 S.W.2d 104, 228 Mo.App. 98—Simplex Paper Corporation v. Standard Corrugated Box Co., 76 S.W.2d 1075, transferred, see 97 S.W.2d 862, 231 Mo.App. 764—Blankenship v. Ratcliff, 73 S.W.2d 183, 335 Mo. 387, transferred, see, App., 76 S.W.2d 741—Mitchell v. Dabney, 58 S.W.2d 731, 322 Mo. 410, transferred, see, App., 71 S.W.2d 165—Stipp v. Bailey, 53 S.W.2d 872, 331 Mo. 374, transferred, see, App., 22 S.W.2d 178—Consolidated School Dist. No. 2 of Clinton County v. Gower Bank of Gower, 53 S.W.2d 280, transferred, see In re Liquidation of Gower Bank, App., 55 S.W.2d 713—Joe Dan Market v. Wentz, 13 S.W.2d 641, 321 Mo. 943, transferred, see 20 S.W.2d 567, 223 Mo.App. 772—City of St. Joseph v. Georgetown Lodge No. 627, I. O. O. F., of St. Joseph, 8 S.W.2d 979—

In re Wilson's Estate, 8 S.W.2d 973, 320 Mo. 975, transferred, see, App., 16 S.W.2d 737—Aufderheide v. Polar Wave Ice & Fuel Co., 4 S.W.2d 776, 319 Mo. 337—McGregory v. Gaskill, 296 S.W. 123, 317 Mo. 123, transferred, see, App., 296 S.W. 833—Hornig v. Jones, App., 252 S.W. 981—Cambest v. McComas Hydro Electric Co., 239 S.W. 477, 292 Mo. 570, transferred, see 245 S.W. 598, 212 Mo.App. 325—Fred A. H. Garlich's Agency Co. v. Anderson, 223 S.W. 641, 284 Mo. 200, remanded, App., 202 S.W. 260.

Will contests

(1) The rule is applicable to cases seeking interpretation of or contesting wills.—Fleischaker v. Fleischaker, 92 S.W.2d 169, 338 Mo. 797, quashing mandamus and retranferred, see 70 S.W.2d 104, 228 Mo. App. 98.

(2) Value of estate fixes jurisdiction on appeal from judgment for will contestants.—Fowler v. Fowler, 2 S.W.2d 707, 318 Mo. 1078.

Proceeding to remove executor or administrator

(1) In a proceeding to remove an executor or administrator, the pecuniary value of the right to administer the estate and not the value of the property to be administered, fixes the appellate jurisdiction.—Fields v. Luck, 34 S.W.2d 710, 327 Mo. 113, transferred, see In re Roff's Estate, 50 S.W.2d 156, 226 Mo. App. 1203—In re Wilson's Estate, 8 S.W.2d 973, 320 Mo. 975, transferred, see, App., 16 S.W.2d 737—In re Bennett's Estate, 243 S.W. 769.

(2) The pecuniary value of the office is determined by the executor's or administrator's statutory fees.—Fields v. Luck, 34 S.W.2d 710, 327 Mo. 113, transferred, see In re Roff's Estate, 50 S.W.2d 156, 226 Mo. App. 1203—In re Wilson's Estate, 8 S.W.2d 973, 320 Mo. 975, transferred, see, App., 16 S.W.2d 737.

19. Mo.—Winn v. Matthews, 130 S.W.2d 484—General Theatrical Enterprises v. Lyris, 121 S.W.2d 139—Esmar v. Haeussler, 106 S.W.2d 412, 341 Mo. 33, transferred, see 115 S.W.2d 54—Aufderheide v. Polar Wave Ice & Fuel Co., 4 S.W.2d 776, 319 Mo. 337—Walker v. Ozark Cooperage & Lumber Co. of New Jersey, 212 S.W. 881, 278 Mo. 403—Roll v. Fidelity Nat. Bank & Trust Co. of Kansas City, App.,

dispute, as determinative of jurisdiction, may be the amount claimed in good faith in the petition,²⁰ the amount of the judgment or verdict rendered in the trial court,²¹ or the difference between the amount of the petition and the amount of the judgment or verdict,²² dependent on the precise amount which actually remains in dispute between the parties on appeal.²³

The constitutional provision giving the legislature power to increase or to diminish the pecuniary limits of the jurisdiction of the courts of appeals did not authorize the legislature to amend a statute fixing such limits by adding a proviso that the supreme court should retain jurisdiction in any pending case in which it had made any decision or ruling.²⁴

Where the special grounds of jurisdiction exist, the amount in controversy is immaterial.²⁵

Amendment and remittitur. After a judgment or

determination against plaintiff, an amendment of the pleadings to reduce the amount claimed to less than seventy-five hundred dollars so as to confer jurisdiction on the court of appeals is ineffectual for this purpose,²⁶ and a remittitur by plaintiff after judgment for him is likewise ineffectual if no new judgment is rendered,²⁷ but a remittitur after a verdict but before judgment may fix appellate jurisdiction in the court of appeals.²⁸

§ 410. — Transfer of Cases to Court in Banc

When the judges of a division of the supreme court are equally divided or when a judge of a division dissents from an opinion or when a federal question is involved, the cause, on the application of the losing party or when a division in which the case is pending shall so order, must be transferred to the court in banc for its decision.

Causes are transferable to the supreme court in banc,²⁹ in accordance with the constitution of Missouri, Constitution Amendment, 1890, article VI §

115 S.W.2d 148—Sikes v. Freeman, App., 204 S.W. 948.

15 C.J. p 1088 note 22 [d] (2), (3).
Consolidated cases

Jurisdiction of court, on appeal from judgment rendered after consolidation of cases, is determined by aggregate sum of the consolidated actions, and so in a suit on behalf of numerous property owners for injunction, value of total relief granted to all plaintiffs was considered in determining appellate jurisdiction of supreme court—Aufferheide v. Polar Wave Ice & Fuel Co., 4 S.W.2d 776, 319 Mo. 337.

20. Mo.—Johnston v. Ramming, 100 S.W.2d 466, 310 Mo. 311—Powell v. St. Joseph Ry., Light, Heat & Power Co., 81 S.W.2d 957, 336 Mo. 1016—Carnes v. Thompson, 48 S.W.2d 903—Webb v. Cotton, 271 S.W. 768, 308 Mo. 272—Poe v. Kansas City, C. C. & St. J. Ry. Co., 238 S.W. 1082—Brown v. Holman, 238 S.W. 1065, 292 Mo. 641—State ex rel. Wurdeman v. Reynolds, 204 S.W. 1093, 275 Mo. 113—Sexton v. Sexton, App., 224 S.W. 47, transferred, see 243 S.W. 315, 295 Mo. 134—Brown v. Holman, App., 220 S.W. 687.

15 C.J. p 1088 note 22 [d] (1), [f].

21. Mo.—Cooper v. Armour & Co., 6 S.W.2d 567, retransferred, see App., 277 S.W. 967—Wood v. White Eagle Oil & Refining Co., 274 S.W. 894, 230 Mo.App. 1004—Fidelity Nat. Bank & Trust Co. v. Tootle-Campbell Dry Goods Co., App., 220 S.W. 697.

Appeal by defendant from judgment

Where an appeal is by defendant from a judgment against him, the amount of the judgment is the

standard to be used in determining the amount in dispute for purposes of appellate jurisdiction.—Reynolds v. Grain Belt Mills Co., 69 S.W.2d 947, 334 Mo. 712, transferred, see Reynolds v. Grain Belt Mills, App., 59 S.W.2d 744, and remanded 78 S.W.2d 124, 229 Mo.App. 380—Shroyer v. Missouri Livestock Commission Co., 61 S.W.2d 713, 332 Mo. 1219—Gray v. Doe Run Lead Co., 53 S.W.2d 877, 331 Mo. 481—Allen v. Chicago, R. I. & P. Ry. Co., 37 S.W.2d 607, 327 Mo. 526, transferred, see 54 S.W.2d 787, 227 Mo.App. 468—Pyle v. University City, 1 S.W.2d 799, 313 Mo. 856—Bates v. Werries, 196 S.W. 1124, transferred, see 199 S.W. 758, 198 Mo.App. 209—McKim v. Metropolitan St. Ry., Mo.App., 209 S.W. 622.

Appeal from order setting aside verdict

Where plaintiff appeals from an order setting aside the verdict and granting a new trial, the amount of the verdict fixes appellate jurisdiction.—State ex rel. Long v. Ellison, 199 S.W. 984, 272 Mo. 571, quashing record Clark v. Long, App., 196 S.W. 409.

22. Mo.—Sofian v. Douglas, 23 S.W.2d 126, 324 Mo. 258.

Inadequate recovery

(1) Where plaintiff appeals from an order denying a new trial after a verdict for less than the amount sued for, the difference between plaintiff's claim and the actual recovery is the amount in dispute.—Craton v. Huntzinger, Mo.App., 177 S.W. 816.

(2) Where defendant appeals from an order granting a new trial on the ground that the verdict is in-

adequate, the amount in dispute is the difference between the sum sued for and the amount of the verdict.—Sofian v. Douglas, 23 S.W.2d 126, 324 Mo. 258—Ford v. K. Jones Motor Co., Mo.App., 115 S.W.2d 3.

23. Mo.—Shroyer v. Missouri Livestock Commission Co., 61 S.W.2d 713, 332 Mo. 1219.

24. Mo.—Rourke v. Holmes St. R. Co., 166 S.W. 272, 257 Mo. 555.

25. Mo.—Kwilecki v. Holman, 167 S.W. 989, 258 Mo. 624—Williams v. Atchison, etc., R. Co., 136 S.W. 304, 233 Mo. 666—Cable v. Duke, 106 S.W. 643, 208 Mo. 557.

26. Mo.—Powers v. Missouri Pac. R. Co., 172 S.W. 1, 262 Mo. 701—Hogue v. St. Louis-San Francisco Ry. Co., App., 12 S.W.2d 103.

However, if the cause is transferred to the court of appeals after the amendment and plaintiff acquiesces in the jurisdiction until verdict is rendered, he cannot, by motion to transfer the cause to the supreme court, deny the jurisdiction of the court of appeals.—Minter v. Tootle-Campbell Dry Goods Co., Mo., 204 S.W. 725.

27. Mo.—Gray v. Doe Run Lead Co., 53 S.W.2d 877, 331 Mo. 481.

28. Mo.—Reynolds v. Grain Belt Mills Co., 69 S.W.2d 947, 334 Mo. 712, transferred, see Reynolds v. Grain Belt Mills, App., 59 S.W.2d 744, and remanded 78 S.W.2d 124, 229 Mo.App. 380—State ex rel. Long v. Ellison, 199 S.W. 984, 272 Mo. 571, quashing record in Court of Appeals Clark v. Long, 196 S.W. 409.

29. Mo.—State v. Hamey, 67 S.W. 620, 168 Mo. 167, 57 L.R.A. 846.

4, which provides that when the judges of a division of the supreme court are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or when a federal question is involved, the cause must, on the application of the losing party, be transferred to the court in banc for its decision; or when a division in which a cause is pending shall so order, the cause must be transferred to the court in banc for its decision. As used herein, the words "federal question" should be interpreted as involving construction of the federal constitution or the validity of a treaty or a statute of, or authority exercised under, the United States, as defined in Constitution Article VI § 12.³⁰ The federal question must be substantial,³¹ and it cannot be raised for the first time on the motion to transfer.³² The decision of a division that no federal question is involved and its consequent refusal to transfer the case to the court in banc cannot be reviewed by the court in banc.³³ The supreme court in banc cannot entertain a motion to order the transfer of a case decided by one of the divisions to it for review, where none of the grounds for the transfer specified in the constitution appear.³⁴

§ 411. — Appeals from Court of Appeals to Supreme Court

In cases wherein the supreme court in Missouri has appellate jurisdiction, appeals do not lie first to the court of appeals but lie directly from the trial court to the supreme court.

The Missouri Constitution, 1875, article VI § 12, formerly gave to the supreme court jurisdiction of appeals from the court of appeals in certain cas-

es, but this appellate jurisdiction has been abolished by Constitution Amendment, 1884, article VI § 5, and under this amendment, in the classes of cases specified in the constitution as within the supreme court's appellate jurisdiction, direct appeals lie to the supreme court from circuit courts and courts having jurisdiction pertaining to circuit courts, and writs of error may be issued by the supreme court to such courts.³⁵ As stated in § 402 supra, the courts of appeal, when acting within their jurisdictional limits, as long as they promulgate no rule of law conflicting with former controlling decisions of the supreme court, are courts of last resort.

§ 412. — Certification of Cases to Supreme Court

When a court of appeals in Missouri renders a decision which any of the judges sitting therein deems contrary to any previous decision of any one of the courts of appeal or of the supreme court, such court of appeals must of its own motion certify and transfer such cause or proceeding to the supreme court, and thereupon the supreme court must rehear and determine the cause or proceeding, as in the case of jurisdiction obtained by ordinary appellate process.

In accordance with the express provisions of Constitutional Amendment, 1884, Article VI § 6, when a court of appeals renders a decision which any of the judges sitting therein deems contrary to any previous decision of any one of the courts of appeal or of the supreme court, such court of appeal must of its own motion, pending the same term, and not afterward, certify and transfer such cause or proceeding and the original transcript therein to the supreme court,³⁶ and thereupon the

30. Mo.—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005.

No federal question involved

Mo.—Huckleberry v. Missouri Pac. R. Co., 26 S.W.2d 980, 324 Mo. 1025—McAllister v. St. Louis Merchants' Bridge Terminal Ry. Co., 25 S.W.2d 791, 324 Mo. 1005—Wilson & Co. v. Hartford Fire Ins. Co., 254 S.W. 266, 300 Mo. 1—St. Louis v. Consolidated Coal Co., 20 S.W. 699, 118 Mo. 83.

31. Mo.—Wilson & Co. v. Hartford Fire Ins. Co., 254 S.W. 266, 300 Mo. 1.

32. Mo.—Wilson & Co. v. Hartford Fire Ins. Co., supra.

33. Mo.—State v. Duestrow, 38 S. W. 554, 39 S.W. 266, 137 Mo. 44.

34. Mo.—McFadin v. Catron, 38 S. W. 932, 39 S.W. 771, 138 Mo. 197.

Nonconcurrence as to one paragraph

On concurrence of all members of division of supreme court in opinion, regardless of fact that one judge did not concur as to some language of one paragraph, motion to transfer will be overruled.—Rawie v. Chicago, B. & Q. R. Co., 274 S.W. 1031, 310 Mo. 72.

35. Mo.—State ex rel. Wabash Ry. Co. v. Shain, 106 S.W.2d 898, 341 Mo. 19, reversing State ex rel. Pitcairn v. Public Service Commission of Missouri, 100 S.W.2d 636, transferred, see 90 S.W.2d 392, 338 Mo. 180, certiorari dismissed State ex rel. Pitcairn v. Shain, 106 S.W.2d 902, first case, mandate conformed to, State ex rel. Pitcairn v. Public Service Commission, 110 S.W.2d 367.

15 C.J. p 1079 notes 43, 44.

36. Mo.—Edwards v. Bell, 123 S.W. 2d 83, denying hearing, App., 103 S.W.2d 315—State v. Winterbauer, 300 S.W. 1071, 318 Mo. 693, re-

versing on another ground, App., 296 S.W. 219—Knapp Bros. Mfg. Co. v. Kansas City Stockyards Co., 199 S.W. 168, transferred, see, App., 204 S.W. 194—Schmohl v. Travelers' Ins. Co., 197 S.W. 60, answering certified questions, App., 189 S.W. 597—Dillbeck v. Johnson, App., 122 S.W.2d 412—Hodge v. Feiner, App., 78 S.W.2d 478, affirmed 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 483—Kirk v. Metropolitan Life Ins. Co., App., 72 S.W.2d 185, transferred, see 81 S.W.2d 333, 336 Mo. 765—Perkins v. Burks, App., 64 S.W.2d 712, transferred, see 61 S.W.2d 756, affirmed 78 S.W.2d 845, 336 Mo. 248—Pine v. Rybolt, App., 60 S.W.2d 640, affirmed 63 S.W.2d 28, 330 Mo. 670—Price v. Kansas City Public Service Co., App., 42 S.W.2d 51, affirmed 50 S.W.2d 1047, 330 Mo. 706—Texas Empire Pipe Line Co. v. Stewart, 35 S.W.2d 627, reversed on other grounds 55 S.W.2d 233, 331 Mo. 525—Wheeler v. Missouri Pac. R.

supreme court must rehear and determine the cause or proceeding as in the case of jurisdiction obtained by ordinary appellate process;³⁷ and the last previous rulings of the supreme court on any ques-

tion of law or equity shall in all cases be controlling authority in the courts of appeal.³⁸ Except for the reasons stated, the court of appeals cannot certify a case of which it has jurisdiction to

Co., App., 33 S.W.2d 179, transferred, see 42 S.W.2d 579, 328 Mo. 888—Central State Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 30 S.W.2d 774, 224 Mo.App. 573, reversed on other grounds Central States Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 66 S.W.2d 550, 324 Mo. 580—Child Saving Institute v. Knobel, App., 29 S.W.2d 725—Heath v. Salisbury Home Telephone Co., App., 27 S.W.2d 31, affirmed 33 S.W.2d 118, 326 Mo. 875—Bank of Republic v. Republic State Bank, App., 24 S.W.2d 678, affirmed 42 S.W.2d 27, 328 Mo. 848—Burton v. Wabash Ry. Co., App., 22 S.W.2d 201, affirmed 58 S.W.2d 443, 332 Mo. 268, followed in Bosworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash R. Co., App., 21 S.W.2d 1110—Starnes v. St. Joseph Ry., Light, Heat & Power Co., App., 22 S.W.2d 73, affirmed 52 S.W.2d 852, 331 Mo. 44—Ferber v. Brueckl, App., 7 S.W.2d 279, adopted 17 S.W.2d 524, 322 Mo. 892—Newton County Farmers' & Fruit Growers' Exchange v. Kansas City Southern Ry. Co., App., 2 S.W.2d 125, adopted in part 31 S.W.2d 803, 326 Mo. 617—State ex rel. and to Use of Winebrenner v. Detroit Fidelity & Surety Co., App., 300 S.W. 833, affirmed 32 S.W.2d 572, 326 Mo. 684, 71 A.L.R. 1131—Hays v. Hays, App., 291 S.W. 508, reversed on other grounds 24 S.W.2d 997, 324 Mo. 810—Stover Bank v. Welpman, App., 284 S.W. 177, transferred, see 19 S.W.2d 740, 323 Mo. 234—Federal Reserve Bank of St. Louis v. Millsbaugh, App., 275 S.W. 583, affirmed 282 S.W. 706, 314 Mo. 1—Bank of Poplar Bluff v. Millsbaugh, App., 275 S.W. 579, affirmed 281 S.W. 733, 313 Mo. 412, 47 A.L.R. 754—Monett State Bank v. Rathens, App., 259 S.W. 489, affirmed 297 S.W. 45, 317 Mo. 890—Kirby v. Heston, App., 253 S.W. 21, affirmed Kirby v. Heaton, Sup., 286 S.W. 76—Williams v. Hybskman, App., 247 S.W. 203, cause certified 278 S.W. 377, 311 Mo. 332—Pryor v. Payne, 244 S.W. 369, 209 Mo.App. 7—M. L. Barrett & Co. v. Chilton, App., 241 S.W. 434, affirmed 264 S.W. 802, 304 Mo. 679—Fogarty v. Davis, App., 240 S.W. 888, affirmed 264 S.W. 879, 305 Mo. 388—Donohue v. Southwestern Surety Ins. Co., App., 202 S.W. 272, reversed on other grounds, 219 S.W. 930, 281 Mo. 267—Scales v. National Life & Accident Ins. Co.,

App., 186 S.W. 948, reversed on other grounds, Sup., 212 S.W. 8. 15 C.J. p 1092 notes 61–63, p 1093 notes 64–66.

Unanimity as to conflict

(1) A cause may properly be certified when all the judges of the court of appeals regard the decision as contrary to a previous decision of the other court of appeals.—Rodgers v. Western Home Town Mut. F. Ins. Co., 85 S.W. 369, 186 Mo. 248.

(2) If court of appeals as a whole agree that their opinion is in conflict with an opinion of the supreme court, it is their duty to make their opinion conform to the opinion of the supreme court, and such court as a whole cannot certify the case to supreme court.—Woodson v. Leo-Greenwald Vinegar Co., Mo., 264 S.W. 674.

15 C.J. p 1092 note 63 [g] (8).

Order of certification

An order of certification, reciting that a judge of the court of appeals deems decision of majority in conflict with certain designated opinions of supreme court, is in substantial compliance with constitution, although its exact language is not used.—Schmohl v. Travelers' Ins. Co., Mo., 197 S.W. 60, answering certified questions, App., 189 S.W. 597.

Origin of cases

The constitutional amendment includes all cases whether originating in the court of appeals or not.—Child Sav. Institute v. Knobel, 37 S.W.2d 920, 327 Mo. 609, 76 A.L.R. 1068, transferred, see, App., 29 S.W.2d 725—15 C.J. p 1093 note 66 [f].

Statute not considered in previous case

Where decision rendered is necessitated by statute which apparently was not considered by another court of appeals in previous case, there is no such conflict between decisions of the two courts as requires transferring cause to supreme court.—Massey-Harris Harvester Co. v. Federal Reserve Bank of Kansas City, 48 S.W.2d 158, 226 Mo.App. 916.

Citation of previous decisions by dissenting judge

The amendment does not apply to a decision in which one of the judges dissents, citing previous supreme court decisions in support of his dissenting opinion, where he certifies that he does not deem the decision of the court contrary to any previous decision.—State v. Smith, 16 S.W. 401, 17 S.W. 901, 107 Mo. 527.

37. Mo.—Newdiger v. Kansas City,

114 S.W.2d 1047, 242 Mo. 252, affirming App., 106 S.W.2d 51—Allen v. St. Louis-San Francisco Ry. Co., 90 S.W.2d 1050, 338 Mo. 395, 105 A.L.R. 1222—Biggs v. Modern Woodmen of America, 82 S.W.2d 898, 336 Mo. 879, reversing, App., 71 S.W.2d 783—Farmers' Exchange Bank of Marshfield v. Farm & Home Savings & Loan Ass'n of Missouri, 61 S.W.2d 717, 332 Mo. 1041, reversing Farmers' Exchange Bank v. Farm & Home Savings & Loan Ass'n, App., 52 S.W.2d 608—Bowman v. C. O. Jones Bldg. Co., 58 S.W.2d 718, 332 Mo. 520, modifying Bowman v. Jones, App., 50 S.W.2d 203—State ex rel. and to Use of Winebrenner v. Detroit Fidelity & Surety Co., 32 S.W.2d 572, 326 Mo. 684, 71 A.L.R. 1131, affirming, App., 300 S.W. 833—Berry v. Equitable Fire & Marine Ins. Co., 298 S.W. 63, 317 Mo. 1119, certified, App., 263 S.W. 884. 15 C.J. p 1093 note 67.

Disposal on merits

The supreme court may dispose of the case on its merits.—Pearson Elevator Co. v. Missouri-Kansas-Texas Ry. Co., Mo., 80 S.W.2d 137, transferred, see, App., 46 S.W.2d 247—15 C.J. p 1093 note 67 [a].

Conflict determined by supreme court

Mo.—Rankin v. Wyatt, 73 S.W.2d 764, 335 Mo. 628, 94 A.L.R. 941, transferred, see, App., 49 S.W.2d 243, overruling motion 48 S.W.2d 88.

38. Mo.—Brookshier v. McIlrath, 87 S.W. 607, 112 Mo.App. 687. 15 C.J. p 1093 note 68.

Determination by dissenting judge

(1) Dissenting judge of court of appeals has right to determine which is last decision on given state of facts, and his determination that opinion of court of appeals conflicts with it is sole criterion of alleged conflict so far as conferring jurisdiction on supreme court is concerned.—Schmohl v. Travelers' Ins. Co., Mo., 197 S.W. 60, answering certified questions, App., 189 S.W. 597.

(2) Where supreme court on certiorari quashes record of court of appeals, fact that opinion in that case is followed by court of appeals on further hearing of case does not preclude dissenting judge of that court from believing that second opinion is contrary to last decision of supreme court on facts of that case.—Schmohl v. Travelers' Ins. Co., supra.

the supreme court.³⁹ Even though the court of appeals is in error in deeming its decision in conflict with a previous decision, the supreme court has jurisdiction.⁴⁰ The case must be actually decided by the court of appeals before the supreme court has jurisdiction.⁴¹

§ 413. — Transfer of Appeals

Where the supreme court or a court of appeals finds that a case brought before it on appeal or writ of error from a lower court is not within its jurisdiction, the case must be transferred to the court which has appellate jurisdiction therein.

Under a statute so providing, where the supreme court, or a court of appeals, finds that a

case brought before it is not within its jurisdiction, the case must be transferred to the court which has appellate jurisdiction therein,⁴² and where a case is brought into the wrong court of appeals, it must be transferred to the proper court.⁴³ The statute is limited to cases sent from a lower court on appeal or writ of error and so the case cannot be transferred under the statute where it is before the court by special appeal granted by appellate judges,⁴⁴ or where the proceedings have originated in the appellate court.⁴⁵ Where a case taken to the supreme court on the ground that a constitutional question is involved is by such court transferred to a court of appeals, this amounts to a determination that

39. Mo.—Little v. Hooker Steam Pump Co., 129 S.W. 221, 228 Mo. 673.

15 C.J. p 1093 note 69.

Motion by one of parties

A motion by one of the parties to certify case from court of appeals to supreme court for conflict of decisions is unauthorized.—State ex rel. Al. G. Barnes Amusement Co. v. Trimble, 300 S.W. 1064, 318 Mo. 274.

40. Mo.—Child Sav. Institute v. Knobel, 37 S.W.2d 920, 327 Mo. 609, 76 A.L.R. 1068, transferred, see App., 29 S.W.2d 725.—State v. Christopher, 2 S.W.2d 621, 318 Mo. 225.—Boyd v. Kansas City, 237 S.W. 1001, 291 Mo. 623.

15 C.J. p 1092 note 63 [b].

Decisions held not in conflict with previous decisions

Mo.—Barber v. Kellogg, 123 S.W.2d 100, affirming, App., 111 S.W.2d 201.—Allen v. St. Louis-San Francisco Ry. Co., 90 S.W.2d 1050, 338 Mo. 395, 105 A.L.R. 1222.—Hodge v. Feiner, 90 S.W.2d 90, 338 Mo. 268, 103 A.L.R. 488, affirming, App., 78 S.W.2d 478.—Lamoreux v. St. Louis-San Francisco Ry. Co., 87 S.W.2d 640, 337 Mo. 1028, denying rehearing and affirming, App., 73 S.W.2d 324.—Pine v. Rybolt, 63 S.W.2d 28, 330 Mo. 670, affirming, App., 60 S.W.2d 640.—Hall v. Fulton Iron Works Co., 31 S.W.2d 81, 326 Mo. 20, affirming, App., 296 S.W. 351.—Blondi v. Central Coal & Coke Co., 9 S.W.2d 596, 320 Mo. 1130, affirming, App., 297 S.W. 171.—Williams v. Hytskman, 278 S.W. 377, 311 Mo. 332, certified, App., 247 S.W. 203.—City of Mountain View v. Farmers' Telephone Exch. Co., 243 S.W. 153, 294 Mo. 623, affirming, App., 224 S.W. 155.—Lehner v. Roth, 243 S.W. 91, 295 Mo. 174, transferred, see 227 S.W. 333, 211 Mo.App. 1, and 229 S.W. 232, 211 Mo.App. 1.—Galloway v. Kansas City Rys. Co., 233 S.W. 385.—Cluett v. Union Electric Light &

Power Co., 220 S.W. 865, affirming, App., 205 S.W. 72.—Voss v. Des Moines & Mississippi Levee Dist. No. 1, 201 S.W. 533, affirming 187 S.W. 820, 195 Mo.App. 636.

15 C.J. p 1092 note 63 [p].

Decisions held in conflict with previous decisions

Mo.—Burton v. Wabash Ry. Co., 58 S.W.2d 443, 332 Mo. 268, affirming, App., 22 S.W.2d 201, and followed in Bozworth v. Wabash Ry. Co., 58 S.W.2d 448, 332 Mo. 277, affirming Bosworth v. Wabash Ry. Co., App., 21 S.W.2d 1110.—Bank of Poplar Bluff v. Millsbaugh, 281 S.W. 733, 313 Mo. 412, 47 A.L.R. 754, affirming, App., 275 S.W. 579.

41. Mo.—Edwards v. Bell, 123 S.W. 2d 83, denying hearing, App., 103 S.W.2d 315.

15 C.J. p 1092 notes 61, 63 [d].

42. Mo.—Crescent Planing Mill Co. v. Mueller, 117 S.W.2d 247, 118 A.L.R. 709, transferred, see App., 123 S.W.2d 193.—Hohlstein v. St. Louis Roofing Co., 42 S.W.2d 573, 328 Mo. 899, transferred, see App., 49 S.W.2d 226.—Farrell v. Seelig, 19 S.W.2d 648, transferred, see App., 27 S.W.2d 489.—Joe Dan Market v. Wentz, 13 S.W.2d 641, 321 Mo. 943, transferred, see 20 S.W.2d 567, 223 Mo.App. 772.—City of St. Joseph v. Georgetown Lodge No. 627, I. O. O. F., of St. Joseph, 8 S.W.2d 979.—Norman v. Summerfield Jones Const. Co., 4 S.W.2d 1064, transferred, see App., 18 S.W. 2d 559.—King v. Hayes, 4 S.W.2d 1062, 319 Mo. 569.—Keena v. Keena, 3 S.W.2d 352.—State v. Gross, 275 S.W. 769, 306 Mo. 1.—Williams v. Short, 263 S.W. 200, transferred, see 268 S.W. 706, 219 Mo.App. 99.—Rice v. White, 239 S.W. 141.—Lavelle v. Metropolitan Life Ins. Co., 231 S.W. 616, transferred, see 238 S.W. 504.—Morton v. Southwestern Telegraph & Telephone Co., 217 S.W. 831, 280 Mo. 360.—Rollins v. Business Men's Acc. Ass'n of America, 213 S.W.

52, transferred, see App., 220 S.W. 1022.—State Bar Committee v. Stumbaugh, App., 109 S.W.2d 874, transferred, see Sup., 123 S.W.2d 51.—State v. Hammer, App., 56 S.W.2d 415, transferred, see 61 S.W. 2d 965, 333 Mo. 40, transferred, see App., 63 S.W.2d 181.—Lines Music Co. v. Holt, App., 48 S.W.2d 92, transferred, see L. E. Lines Music Co. v. Holt, 60 S.W.2d 32, 333 Mo. 749, dissenting opinion 61 S.W.2d 326, 332 Mo. 749.—Nolker v. Nolker, App., 208 S.W. 135.—Sikes v. Freeman, App., 204 S.W. 948.—People's Savings Bank v. McDowell, App., 204 S.W. 406.—Ex parte Webbers, 197 S.W. 850, 200 Mo.App. 29, remanded 205 S.W. 620, 275 Mo. 677.

15 C.J. p 1093 note 70, p 1147 note 77.

Jurisdiction doubtful

When jurisdiction of court of appeals is doubtful, such court will transfer cause to supreme court.—In re Ellis' Estate, Mo.App., 110 S.W. 2d 864, remanded, Sup., 127 S.W.2d 441.—Hogue v. St. Louis-San Francisco Ry. Co., Mo.App., 12 S.W.2d 103.—In re McMenemy's Guardianship, Mo.App., 242 S.W. 1010.—Fred A. H. Garlich's Agency Co. v. Anderson, App., 202 S.W. 260, remanded 223 S.W. 641, 284 Mo. 200.

15 C.J. p 1147 note 77 [b] (1).

43. Mo.—State v. Ellison, 168 S.W. 1174, 260 Mo. 535.—Mott Store Co. v. St. Louis, etc., R. Co., 163 S.W. 929, 54 Mo. 654, adopting 158 S.W. 108, 173 Mo.App. 189.

15 C.J. p 1091 note 56.

Transfer of appealed cases generally see infra § 516.

44. Mo.—Platies v. Theodorow Bakery Co., 66 S.W.2d 147, 334 Mo. 508.—State v. Hartman, 222 S.W. 442, 282 Mo. 680.

45. Mo.—In re Sparrow, 90 S.W.2d 401, 338 Mo. 203.—Child Sav. Institute v. Knobel, 37 S.W.2d 920, 327 Mo. 609, 76 A.L.R. 1068, transferred, see App., 29 S.W.2d 725.

no constitutional question is involved and eliminates any such question;⁴⁶ and where a cause certified by a court of appeals after reversal to the supreme court as involving title to real estate was certified back to it on the ground that title was not involved, the case should be redocketed, and set down for rehearing, since by its certificate that title was involved in its determination it necessarily set aside its own decision previously rendered therein.⁴⁷ Where cross appeals have been taken to a court of appeals, and one appeal is transferable to the supreme court, the other should be transferred at the same time.⁴⁸

§ 414. Montana

The jurisdiction of the supreme court is treated

in § 415 infra; that of the district court in § 416 infra.

§ 415. — Supreme Court

The supreme court has appellate jurisdiction, supervisory control over inferior courts, and power to issue original and remedial writs.

Under the constitution, except as otherwise provided therein, the supreme court has appellate jurisdiction only.⁴⁹ The appellate jurisdiction of the supreme court extends to all cases at law and in equity, subject to such regulations and limitations as may be prescribed by law.⁵⁰ The court has original jurisdiction,⁵¹ in its discretion,⁵² to issue, hear, and determine writs of habeas corpus,⁵³ mandamus,⁵⁴ quo warranto,⁵⁵ certiorari,⁵⁶ prohibition,⁵⁷ injunction,⁵⁸ and such other original and

46. Mo.—Scientific American Club v. Horchitz, 151 S.W. 475, 168 Mo. App. 35.

15 C.J. p 1094 note 71.

47. Mo.—Bradley v. Milwaukee Mechanics' Ins. Co., 63 S.W. 844, 163 Mo. 553, followed in Bradley v. German American Ins. Co., 63 S.W. 1132, 163 Mo. 559.

48. Mo.—Sandusky v. Sandusky, 177 S.W. 390, 265 Mo. 219—Albers v. Moffitt, 172 S.W. 11, 262 Mo. 645.

Appeals taken to different courts

Where cross appeals are taken, one to the supreme court and the other to a court of appeals, the latter court should transfer the case to the supreme court.—Walsh v. Southwestern Bell Telephone Co., 52 S.W.2d 839, 331 Mo. 118—15 C.J. p 1147 note 81.

49. Mont.—State v. Helena Waterworks Co., 115 P. 200, 43 Mont. 169. 15 C.J. p 1094 note 84.

"Jurisdiction extends to grievances in esse and not to fancied grievances in posse."—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 300 P. 544, 547, 90 Mont. 213.

Substitution of judges

A statute providing that the supreme court shall order the substitution of one district judge for another on a petition signed by the district judge properly presiding, and stating that petitioner cannot obtain an impartial trial without such substitution, is invalid as an attempt to extend the jurisdiction of the supreme court beyond the limits fixed by the constitution.—In re Weston, 72 P. 512, 28 Mont. 207.

50. Mont.—Finlen v. Heinze, 69 P. 829, 70 P. 517, 27 Mont. 107. 15 C.J. p 1095 note 91.

51. Mont.—State ex rel. Nagle v. Kelsey, 55 P.2d 685, 102 Mont. 8.

"This court was created primarily to review and correct errors through

the exercise of its appellate jurisdiction. The limited original jurisdiction which it has was conferred only in aid of its appellate powers, or to meet exigent cases wherein the remedy by appeal is inadequate to afford the relief to which an injured party is entitled."—State v. District Court of Fourth Judicial Dist., Ravalli County, 241 P. 240, 74 Mont. 488.

52. Time to object to exercise of discretion

Contention that supreme court could not assume original jurisdiction on ground that there was sufficient time for hearing and decision in district court and review, if desired, came too late after supreme court had issued order to show cause, since supreme court thereby exercised discretion given by constitution in favor of jurisdiction.—Ford v. Mitchell, 61 P.2d 815, 103 Mont. 99.

53. Mont.—State v. Fergus County Dist. Ct., 149 P. 973, 51 Mont. 195. 15 C.J. p 1095 note 95.

54. Mont.—State ex rel. Lynch v. Batani, 62 P.2d 565, 103 Mont. 353.

15 C.J. p 1095 note 96.

Available only if no other adequate remedy exists

Mont.—State v. District Court of Fourth Judicial Dist., Ravalli County, 241 P. 240, 74 Mont. 488.

Can only compel act

Supreme court could compel district court to hold a hearing, but could not decide how district court should decide question, presented by the motion.—State ex rel. Brophy v. District Court of Second Judicial Dist., in and for Silver Bow County, 27 P.2d 509, 95 Mont. 479.

Question of public law

Where in a prior appeal the land classification act was held unconstitutional since which a remedial statute had been enacted and its effect

upon the prior judgment was raised in a petition for mandamus to county officials to secure payment for work done under the land classification act, a question of public law was involved of which the supreme court has original jurisdiction.—State v. Tyler, 208 P. 1081, 64 Mont. 124.

Method for securing review of judgment

Mont.—State ex rel. Lynch v. Batani, 62 P.2d 565, 103 Mont. 353.

55. Mont.—State ex rel. Nagle v. Kelsey, 55 P.2d 685, 102 Mont. 8.

56. Supervisory control cannot be exercised under original writ

Mont.—State v. First Judicial Dist. Ct., 63 P. 395, 24 Mont. 539.

15 C.J. p 1095 note 98.

57. Mont.—State v. Horgan, 62 P. 493, 24 Mont. 379, 51 L.R.A. 958.

15 C.J. p 1095 note 99.

Absence of transcript of oral testimony does not bar court from considering sufficiency of evidence on which trial court determined that it had jurisdiction.—State ex rel. Ellan v. District Court of Eighth Judicial Dist. in and for Cascade County, 33 P.2d 526, 97 Mont. 160, 93 A.L.R. 865.

58. Mont.—Finlen v. Heinze, 69 P. 829, 70 P. 517, 27 Mont. 107.

15 C.J. p 1095 note 1.

59. Mont.—Finlen v. Heinze, 69 P. 829, 70 P. 517, 27 Mont. 107.

15 C.J. p 1095 note 1.

Public rights

(1) Under a statute so providing, the court has original jurisdiction of injunction proceedings only where the state is a party, or the public is interested, or the rights of the public are involved.—Sawyer Stores v. Mitchell, 62 P.2d 342, 103 Mont. 148—Guillot v. State Highway Commission of Montana, 56 P.2d 1072, 102 Mont. 149—State ex rel. Fisher v. School Dist. No. 1 of Silver Bow County, 34 P.2d 522, 97 Mont. 358.

(2) Public and private rights may be involved in same case, and in protecting public rights private

remedial writs as may be necessary or proper to the complete exercise of its appellate jurisdiction. On an application for an extraordinary remedy, the court will grant appropriate relief regardless of what writ is requested.⁵⁹

Supervisory jurisdiction. The court is given a general supervisory control over all inferior courts,⁶⁰ under such regulations and limitations

as may be prescribed by law.⁶¹ In the exercise of its supervisory power it may issue a supervisory writ.⁶² Its supervisory jurisdiction, when exercised, is in the nature of a summary appeal and is confined to exigencies arising during the progress of litigation in inferior courts to remedy manifest wrongs or tyrannical or arbitrary acts which cannot otherwise be righted and which will re-

rights may be incidentally protected and enforced, but public rights must be paramount and moving consideration in determining whether supreme court has original jurisdiction to issue writ of injunction.—*Sawyer Stores v. Mitchell*, supra.

Enforcement of criminal statute

Supreme court has jurisdiction of original proceeding by state board of education to enjoin enforcement of statute imposing criminal liability on public officers, commissions, boards, and departments employing aliens and noncitizens.—*State ex rel. State Board of Education v. Nagle*, 45 P.2d 1041, 100 Mont. 86.

Contested allegations of fact will not be considered where cause is submitted without proof.—*State ex rel. City of Missoula v. Holmes*, 47 P.2d 624, 100 Mont. 256, 100 A.L.R. 581.

Amendment of defects in pleading considered as having been made for the purposes of the case.—*State v. Stewart*, 210 P. 465, 64 Mont. 453.

59. Mont.—*State ex rel. Casey v. Brewer*, 88 P.2d 49, 107 Mont. 550.

60. Mont.—*State v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 252 P. 388, 78 Mont. 92.
15 C.J. p 1094 note 86.

Where questions of fact are involved in application for supervisory writ, court will defer action until those questions are determined by the trial court.—*State ex rel. Haynes v. District Court*, 85 P.2d 4, 105 Mont. 604.

Allegations of complaint taken as true on application for writ of supervisory control of court which issued temporary injunction.—*State ex rel. Tillman v. District Court of Tenth Judicial Dist. in and for Fergus County*, 53 P.2d 107, 101 Mont. 176, 103 A.L.R. 376.

Insufficient evidence

(1) Where facts shown by record were insufficient to enable court to pass on question intelligently and question was not argued on appeal, court would not pass on question.—*State ex rel. Stone v. District Court of Ninth Judicial Dist. in and for Glacier County*, 63 P.2d 147, 103 Mont. 515.

(2) Supreme court refused to di-

rect entry of order fixing attorney fees in settlement of estate, upon finding that order was procured by constructive fraud, where additional evidence was necessary for final determination of issue.—*State ex rel. Clark v. District Court of Second Judicial Dist. in and for Silver Bow County*, 57 P.2d 809, 102 Mont. 227.

Filing corrected transcript denied

Mont.—*State v. District Court of Eighth Judicial Dist. in and for Cascade County*, 208 P. 952, 64 Mont. 181.

Recount of ballots

The supreme court would not on application examine particular ballots and advise board of canvassers as to its proper action on recount, in order to correct allegedly erroneous advice of district court relating thereto.—*State ex rel. Peterson v. District Court of Ninth Judicial Dist. in and for Teton County*, 85 P.2d 403, 107 Mont. 482.

Plea in bar in criminal prosecution held mere preliminary matter.—*State ex rel. Odenwald v. District Court of Tenth Judicial Dist. in and for Fergus County*, 38 P.2d 269, 98 Mont. 1.

Absence of evidence was assumed where no evidence was produced on supreme court's order to district court to certify all records and evidence in contempt proceedings.—*State ex rel. Floch v. District Court of Third Judicial Dist. in and for Deer Lodge County*, 81 P.2d 692, 107 Mont. 185.

Parties held not precluded from seeking relief by supervisory control.—*State ex rel. Tillman v. District Court of Tenth Judicial Dist. in and for Fergus County*, 53 P.2d 107, 101 Mont. 176, 103 A.L.R. 376.

Impeachment of judicial record

Judicial record presented in proceedings for writ of supervisory control could not be impeached by judge's return stating testimony of party contradicting record.—*State v. District Court of Second Judicial Dist. in and for Silver Bow County*, 273 P. 638, 83 Mont. 511.

61. Mont.—*State ex rel. Finley v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 43 P.2d 682, 99 Mont. 200.

The supervisory control is not dormant for want of legislation prescribing the mode of exercise, where

the code sufficiently overcomes any such objection.—*State v. First Judicial Dist. Ct.*, 63 P. 395, 24 Mont. 539.

62. Mont.—*State ex rel. Regis v. District Court of Second Judicial Dist., Silver Bow County*, 55 P.2d 1295, 102 Mont. 74.—*State v. District Court of Third Judicial Dist. in and for Powell County*, 278 P. 122, 85 Mont. 215.

Application for writ is timely if made within reasonable time after action sought to be remedied was taken; reasonableness of time depending on particular facts and whether adverse party was injured by delay.—*State ex rel. Thelen v. District Court of Nineteenth Judicial Dist. in and for Toole County*, 17 P.2d 57, 93 Mont. 149.

Power not exercisable under other writs

The supervisory control constitutes a grant of power independent of the court's appellate jurisdiction or power to issue original writs, and cannot be exercised under an original writ.—*State v. First Judicial Dist. Ct.*, 63 P. 395, 24 Mont. 539—15 C.J. p 1095 note 98 [a].

Petition to intervene in proceedings for writ denied, where no petition to become party was made in trial court.—*State ex rel. State Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 25 P.2d 396, 94 Mont. 551.

Allegations of petition for writ admitted

(1) By motion to quash writ.—*State ex rel. Floch v. District Court of Third Judicial Dist. in and for Deer Lodge County*, 81 P.2d 692, 107 Mont. 185.—*State ex rel. Hamilton v. District Court of Second Judicial Dist. of Montana*, 57 P.2d 1227, 102 Mont. 341.

(2) By respondent's failure to appear.—*State v. District Court of Tenth Judicial Dist. in and for Judith Basin County*, 227 P. 579, 71 Mont. 89.

Writ of supervisory control denied

Mont.—*State ex rel. Stoddard v. District Court in and for Granite County*, 88 P.2d 34.—*State ex rel. Public Service Commission v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 84 P.2d 335, 107 Mont. 240.

sult in irreparable damage unless relief is granted.⁶³ Its supervisory jurisdiction may be exercised if there is no other adequate remedy,⁶⁴ as when there is no right of appeal,⁶⁵ or the remedy by appeal is too slow or otherwise inadequate,⁶⁶ or the action complained of cannot be reviewed by any

63. Mont.—State ex rel. Crowley v. District Court of Sixth Judicial Dist. in and for Gallatin County, 88 P.2d 23, 121 A.L.R. 1031—State ex rel. Nelson v. District Court of Fourth Judicial Dist. in and for Missoula County, 81 P.2d 699, 107 Mont. 167—State ex rel. McCabe v. District Court of Third Judicial Dist. in and for Deer Lodge County, 76 P.2d 634, 106 Mont. 272—State ex rel. Finley v. District Court of First Judicial Dist. in and for Lewis and Clark County, 43 P.2d 682, 99 Mont. 200—State ex rel. North American Life Ins. Co. of Chicago v. District Court of Tenth Judicial Dist. in and for Fergus County, 87 P.2d 323, 97 Mont. 523—State ex rel. State Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County, 25 P.2d 396, 94 Mont. 551—State ex rel. Thelen v. District Court of Nineteenth Judicial Dist. in and for Toole County, 17 P.2d 57, 93 Mont. 149—State v. District Court of Eighth Judicial Dist. in and for Cascade County, 292 P. 904, 88 Mont. 290—State v. District Court of Fourteenth Judicial Dist. in and for Wheatland County, 284 P. 125, 86 Mont. 358—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 273 P. 638, 83 Mont. 511—State v. District Court of Third Judicial Dist. in and for Granite County, 254 P. 863, 79 Mont. 1—State v. District Court of Third Judicial Dist. in and for Powell County, 254 P. 414, 78 Mont. 435—State v. District Court of Eighteenth Jud. Dist. in and for Hill County, 194 P. 308, 58 Mont. 684.

"The writ of supervisory control is in the nature of a summary appeal, and the last refuge whereby relief may be had. It will issue only when there is no other plain, speedy, or adequate remedy at law by appeal or other constitutional writ."—State v. District Court of Thirteenth Judicial Dist. in and for Yellowstone County, 203 P. 860, 862, 62 Mont. 60—State v. District Court of Fifth Judicial Dist. in and for Madison County, 197 P. 741, 743, 59 Mont. 505.

Actual malice on part of court need not be shown to establish order made as tyrannical; that conclusion follows if the order or judgment is not warranted by any substantial evidence in the record.—State v. District Court of Third Judicial Dist. in and for Powell County, 278 P. 132, 85 Mont. 215.

Inadvertence or fraud

(1) If order on settlement of ac-

counts in probate proceeding is made by inadvertence or fraud, it may be reached in the exercise of supervisory jurisdiction, even though an appeal might lie.—State ex rel. Clark v. District Court of Second Judicial Dist. in and for Silver Bow County, 57 P.2d 809, 102 Mont. 227—State ex rel. Regis v. District Court of Second Judicial Dist., Silver Bow County, 55 P.2d 1295, 102 Mont. 74—State ex rel. Brophy v. District Court, Second Judicial Dist., in and for Silver Bow County, 33 P.2d 266, 97 Mont. 83.

(2) In proceedings for writ of supervisory control based on alleged inadvertence of trial court in entering decree, finding of trial court that there was no inadvertence will not be disturbed where supported by some evidence, though there was evidence which would have sustained holding to the contrary.—State ex rel. Brophy v. District Court, Second Judicial Dist., in and for Silver Bow County, *supra*.

Record not containing testimony

Motion to quash proceeding for writ of supervisory control would not be sustained on ground that all of testimony was not before reviewing court, since court was not reviewing correctness of ruling of judge on testimony before him.—State ex rel. Clark v. District Court of Second Judicial Dist. in and for Silver Bow County, 57 P.2d 809, 102 Mont. 227.

64. Mont.—State ex rel. Stimatz v. District Court of Second Judicial Dist., 74 P.2d 8, 105 Mont. 510—State ex rel. State Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County, 25 P.2d 396, 94 Mont. 551—State ex rel. Thelen v. District Court of Nineteenth Judicial Dist. in and for Toole County, 17 P.2d 57, 93 Mont. 149—State v. District Court of Fourteenth Judicial Dist. in and for Wheatland County, 284 P. 125, 86 Mont. 358—State v. District Court of Third Judicial Dist. in and for Powell County, 278 P. 122, 85 Mont. 215—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 273 P. 638, 83 Mont. 511—State v. District Court of Fourth Judicial Dist. in and for Missoula County, 250 P. 609, 77 Mont. 214.

15 C.J. p 1094 note 86 [a] (1).

65. Mont.—State ex rel. Finley v. District Court of First Judicial Dist. in and for Lewis and Clark County, 43 P.2d 682, 99 Mont. 200—State v. District Court of Nine-

teenth Judicial Dist. in and for Toole County, 245 P. 529, 76 Mont. 143—State v. District Court of Thirteenth Judicial Dist. in and for Yellowstone County, 203 P. 860, 62 Mont. 60—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 195 P. 549, 58 Mont. 316—State v. Tattan, 181 P. 984, 56 Mont. 211—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 172 P. 1030, 54 Mont. 602—State v. District Court of Fourth Judicial Dist. in and for Ravalli County, 171 P. 273, 54 Mont. 461.

15 C.J. p 1094 note 86 [a] (2).

66. Mont.—State ex rel. Haynes v. District Court of First Judicial Dist., in and for Lewis and Clark County, 78 P.2d 937, 106 Mont. 470—State ex rel. Furschong v. District Court of Third Judicial Dist. in and for Deer Lodge County, 69 P.2d 119, 105 Mont. 37—State ex rel. Jensen v. District Court of Ninth Judicial Dist. in and for Glacier County, 64 P.2d 835, 103 Mont. 461—State ex rel. Public Service Commission v. District Court of First Judicial Dist., 83 P.2d 1032, 103 Mont. 563—State ex rel. Meyer v. District Court of Fourth Judicial Dist. in and for Missoula County, 57 P.2d 778, 102 Mont. 222—State ex rel. Regis v. District Court of Second Judicial Dist., Silver Bow County, 55 P.2d 1295, 102 Mont. 74—State ex rel. Tillman v. District Court of Tenth Judicial Dist. in and for Fergus County, 53 P.2d 107, 101 Mont. 176, 103 A.L.R. 376—State ex rel. Finley v. District Court of First Judicial Dist. in and for Lewis and Clark County, 43 P.2d 682, 99 Mont. 200—State ex rel. McHose v. District Court of Fourteenth Judicial Dist. in and for Golden Valley County, 26 P.2d 345, 95 Mont. 230—State v. District Court of Second Judicial Dist. in and for Silver Bow County, 273 P. 638, 83 Mont. 511—State v. District Court of Third Judicial Dist. in and for Powell County, 254 P. 414, 78 Mont. 435—State v. District Court of Tenth Judicial Dist. in and for Judith Basin County, 227 P. 579, 71 Mont. 89—State v. District Court of Eighth Judicial Dist. in and for Cascade County, 208 P. 952, 64 Mont. 181—State v. District Court of First Judicial Dist. in and for Lewis and Clark County, 195 P. 549, 58 Mont. 316—Philbrick v. American Bank & Trust Co., 193 P. 59, 58 Mont. 376—State v. Tattan, 181 P. 984, 56 Mont. 211.

of the specified writs;⁶⁷ and the writ may be employed to prevent extended and needless litigation.⁶⁸ Supervisory control can be exercised only where the inferior court acted within its jurisdiction.⁶⁹ The supreme court has the right in its supervisory capacity to direct the district court to proceed so as finally to settle the rights of the parties as expeditiously as possible,⁷⁰ and to control the ex-

ercise of discretion lodged in the inferior court.⁷¹ This jurisdiction is for the control of inferior courts, not the control of litigants or private individuals.⁷² Where the facts before the court are sufficient to warrant relief, the proper relief will be granted where the application is for a writ of supervisory control or other appropriate relief.⁷³

—*State v. District Court of Fourth Judicial Dist. in and for Ravalli County*, 171 P. 273, 54 Mont. 461.

Exigency which will render ordinary remedy by appeal inadequate is something arising suddenly out of circumstances calling for immediate action or remedy, or where something helpful needs to be done at once, yet not so pressing as an emergency.—*State ex rel. Odenwald v. District Court of Tenth Judicial Dist. in and for Fergus County*, 38 P.2d 289, 98 Mont. 1.

Failure to exercise right of appeal does not give rise to right to invoke supervisory control of supreme court.—*State ex rel. Stimatz v. District Court of Second Judicial Dist.*, 74 P.2d 8, 105 Mont. 510.—*State ex rel. Meyer v. District Court of Fourth Judicial Dist. in and for Missoula County*, 57 P.2d 778, 102 Mont. 222.

Remedy by appeal inadequate

(1) Where court abuses its discretion in refusing an amendment of the answer.—*State ex rel. Chicago, M., St. P. & P. R. Co. v. District Court of Fifth Judicial Dist. in and for Madison County*, 73 P.2d 204, 105 Mont. 396.—*State ex rel. Gold Creek Mining Co. v. District Court, Second Judicial Dist. in and for Silver Bow County*, 43 P.2d 249, 99 Mont. 33.

(2) Where order of interpleader is denied, such order being reviewable only on appeal from final judgment.—*State ex rel. State Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 25 P.2d 396, 94 Mont. 551.—*State ex rel. Thelen v. District Court of Nineteenth Judicial Dist. in and for Toole County*, 17 P.2d 57, 93 Mont. 149.

(3) Where petitioner is poor and cannot post appeal bond.—*State ex rel. Nelson v. District Court of Fourth Judicial Dist. in and for Missoula County*, 81 P.2d 699, 107 Mont. 167.

(4) Where petitioner would be liable to punishment for contempt while awaiting hearing on his appeal.—*State v. District Court of Second Judicial Dist. in and for Silver Bow County*, 210 P. 1062, 65 Mont. 197.

(5) Where trial court overruled demurrers to first and third varieties of causes of action set forth in com-

plaint but improperly sustained demurrers to second variety, and evidence to be adduced under first and third varieties would be largely the same as evidence necessary to establish the second.—*State ex rel. Crowley v. District Court of Sixth Judicial Dist. in and for Gallatin County*, Mont., 88 P.2d 23, 121 A.L.R. 1031.

(6) Where writ of assistance has issued.—*State v. District Court of Eighth Judicial Dist. in and for Cascade County*, 292 P. 904, 88 Mont. 290.

Stated conversely, supervisory control will not be exercised where there is an adequate remedy by appeal.—*State ex rel. Nelson v. District Court of Fourth Judicial Dist. in and for Missoula County*, 81 P.2d 699, 107 Mont. 167.—*State ex rel. Hayes v. District Court, First Judicial Dist. in and for Lewis and Clark County*, 70 P.2d 440, 105 Mont. 89.—*State ex rel. Furshong v. District Court of Third Judicial Dist. in and for Deer Lodge County*, 69 P.2d 119, 105 Mont. 37.—*State ex rel. Public Service Commission v. District Court of First Judicial Dist.*, 63 P.2d 1032, 103 Mont. 563.—*State v. District Court of Third Judicial Dist. in and for Powell County*, 254 P. 414, 78 Mont. 435.—*State v. District Court of Thirteenth Judicial Dist. in and for Carbon County*, 242 P. 431, 75 Mont. 132.—*State v. District Court of Fourth Judicial Dist. in and for Ravalli County*, 171 P. 273, 54 Mont. 461.

67. Mont.—*State v. District Court of Fourth Judicial Dist. in and for Missoula County*, 250 P. 609, 77 Mont. 214.—*State v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 172 P. 1030, 54 Mont. 602.—*State v. Second Judicial Dist. Ct.*, 65 P. 1020, 25 Mont. 504.

68. Mont.—*State ex rel. Regis v. District Court of Second Judicial Dist., Silver Bow County*, 55 P.2d 1295, 102 Mont. 74.

Remedy by hundreds of appeals was inadequate warranting supervisory writ.—*State v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 300 P. 544, 90 Mont. 213.

69. Mont.—*State ex rel. Stewart v. District Court of First Judicial*

Dist. in and for Lewis and Clark County, 63 P.2d 141, 103 Mont. 487.

—*State ex rel. Finley v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 43 P.2d 682, 99 Mont. 200.—*State ex rel. State Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 25 P.2d 396, 94 Mont. 551.—*State v. District Court of Eighth Judicial Dist. in and for Cascade County*, 292 P. 904, 88 Mont. 290.—*State v. District Court of Third Judicial Dist. in and for Powell County*, 278 P. 122, 85 Mont. 215.—*State v. District Court of Second Judicial Dist. in and for Silver Bow County*, 273 P. 638, 83 Mont. 511.—*State v. District Court of Fourth Judicial Dist. in and for Missoula County*, 250 P. 609, 77 Mont. 214.—*State v. Tattan*, 181 P. 984, 56 Mont. 211.

Supervisory writ, not certiorari, is proper remedy where trial court erred in basing its conclusions on findings contrary to facts in agreed statement of facts, since court acted within its jurisdiction.—*State ex rel. Nelson v. District Court of Fourth Judicial Dist. in and for Missoula County*, 81 P.2d 699, 107 Mont. 167.

Habeas corpus and supervisory control are not concurrent remedies, and one cannot be invoked in aid of the other. The former challenges the jurisdiction of the lower court, while the latter concedes it.—*State v. Fergus County Dist. Ct.*, 149 P. 973, 51 Mont. 195.

70. Mont.—*Union Bank & Trust Co. of Helena v. State Bank of Townsend*, 62 P.2d 677, 103 Mont. 260.

71. Mont.—*State ex rel. State Bank of Townsend v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 25 P.2d 396, 94 Mont. 551.

72. Mont.—*State v. District Court of Second Judicial Dist. in and for Silver Bow County*, 273 P. 638, 83 Mont. 511.

Answer to writ must be by judge; answer by litigant has no place in the proceedings.—*State v. District Court of Second Judicial Dist. in and for Silver Bow County*, 273 P. 638, 83 Mont. 511.

73. Mont.—*State v. District Court of Fourth Judicial Dist. in and for*

§ 416. — District Courts

District courts have such appellate jurisdiction as is conferred upon them by law.

The constitution gives to the district courts appellate jurisdiction in such cases arising in justices' and other inferior courts in their respective districts as may be prescribed by law and consistent with the constitution.⁷⁴

§ 417. Nebraska

Decisions relating to the supreme and district courts of Nebraska will be discussed in the sections immediately following.

§ 418. — Supreme Court

The supreme court has appellate jurisdiction with respect to judgments and decrees of the district court. It may issue writs of mandamus, quo warranto, and habeas corpus, and it has original jurisdiction of civil cases to which the state is a party and of actions relating to the state revenue.

The constitution gives to the supreme court original jurisdiction⁷⁵ in all cases relating to the revenue,⁷⁶ civil cases in which the state is a party,⁷⁷ mandamus,⁷⁸ quo warranto,⁷⁹ and habeas corpus, and such appellate jurisdiction as may be provided by law. Under the governing statutes, the supreme court has appellate and final jurisdiction

of all matters of appeal and proceedings in error which may be taken from the judgments or decrees of the district courts in all matters of law, fact, or equity, where the rules of law or the principles of equity appear from the files, exhibits, or records of such court, to have been erroneously determined.⁸⁰ The specification in the constitution of cases in which the supreme court may exercise original jurisdiction excludes all others;⁸¹ but where jurisdiction is in direct terms conferred upon the supreme court, it will be exercised in such manner as constitutionally it may be exercised, even though no rules of procedure applicable to such a case have been provided by the legislature.⁸² The supreme court has rendered advisory opinions without express constitutional or statutory authority.⁸³

§ 419. — District Courts

The district courts have such appellate jurisdiction as the legislature may provide. Review of proceedings of inferior courts see *supra* § 274.

§ 420. Nevada

The jurisdiction of the supreme court is treated in § 421 *infra*; that of the district courts in § 422 *infra*.

Missoula County, 250 P. 609, 77 Mont. 214.

Considered as application for writ of prohibition

Mont.—State ex rel. Stewart v. District Court of First Judicial Dist. in and for Lewis and Clark County, 63 P.2d 141, 103 Mont. 487.

74. The legislature may provide for appeals from the state board of medical examiners, for the constitution does not limit appellate jurisdiction to appeals from justices' and inferior courts so as to exclude legislative power in this respect.—State v. First Judicial Dist. Ct., 34 P. 298, 13 Mont. 370.

75. Original jurisdiction, when not expressly restricted, is concurrent with that of the district courts of the proper counties and will be entertained in accordance with the terms, orders, and rules prescribed.—In re Petition of Atty.-Gen., 58 N. W. 945, 40 Neb. 402.

76. Neb.—Provident Sav. L. Assur. Soc. v. Omaha, 100 N.W. 1127, 72 Neb. 113—Aachen, etc., F. Ins. Co. v. Omaha, 100 N.W. 137, 72 Neb. 112.

15 C.J. p 1095 note 6.

77. Neb.—State v. Chicago, etc., R. Co., 130 N.W. 295, 88 Neb. 669, 34 L.R.A.N.S., 258.

15 C.J. p 1095 note 7.

78. Neb.—State v. Moores, 99 N.W. 842, 72 Neb. 5.

15 C.J. p 1096 note 8.

Adequate relief in lower court

Court will not entertain application for mandamus where there is an adequate remedy by application for other relief to a court of inferior jurisdiction.—State v. Fillmore County, 49 N.W. 769, 32 Neb. 870.

Appeal from denial of writ

Where an appeal from a denial of a writ of mandamus by the district court had not been taken within the time provided by law, the appeal could not be treated as an original application for mandamus so as to bring it within the supreme court's jurisdiction.—State v. Amsberry, 178 N.W. 822, 104 Neb. 273, vacating 177 N.W. 179, 104 Neb. 273.

Reason for application to supreme court, rather than to district court, must appear.—State v. Merrell, 56 N. W. 1082, 38 Neb. 510—15 C.J. p 1096 note 8 [c].

79. Neb.—State ex rel. Good v. Conklin, 255 N.W. 925, 127 Neb. 417.

15 C.J. p 1096 note 9.

"Quo warranto," as used in constitution conferring on supreme court original jurisdiction when di-

rected to executive state officer, is civil proceeding to try right or title under which he claims to hold office and not to test legality of his official acts.—State ex rel. Good v. Conklin, 255 N.W. 925, 127 Neb. 417.

80. Neb.—Armstrong v. Mayer, 83 N.W. 401, 60 Neb. 423—Smith v. State, 4 Neb. 277.

15 C.J. p 1096 note 12.

Jurisdiction to review decisions of state railroad commission

Neb.—Hooper Tel. Co. v. Nebraska Tel. Co., 147 N.W. 674, 96 Neb. 245.

81. Neb.—State ex rel. Good v. Conklin, 255 N.W. 925, 127 Neb. 417—Larson v. Wegner, 233 N.W. 253, 120 Neb. 449.

15 C.J. p 1096 note 15.

Original application for moratorium held not within supreme court's original jurisdiction.—Lincoln Safe Deposit Co. v. Carlson, 250 N.W. 236, 125 Neb. 361—Wallace v. Clements, 250 N.W. 235, 125 Neb. 358.

82. Neb.—State v. Moores, 76 N.W. 530, 56 Neb. 1.

83. Neb.—In re Brown, 50 N.W. 273, 15 Neb. 688—In re School Fund, 50 N.W. 272, 15 Neb. 684—In re Babcock, 32 N.W. 641, 21 Neb. 500.

§ 421. — Supreme Court

The supreme court is a court of appellate jurisdiction possessing power to issue various writs.

The appellate jurisdiction of the supreme court of Nevada is prescribed by the constitution of that state,⁸⁴ and the court is given appellate jurisdiction in all cases in which the demand, exclusive of interest, or the value of the property in controversy exceeds three hundred dollars.⁸⁵ The court is also given power to issue various writs,⁸⁶ including writs of mandamus,⁸⁷ certiorari,⁸⁸ prohibition,⁸⁹ and quo warranto.⁹⁰

§ 422. — District Courts

District courts have appellate jurisdiction with respect to inferior courts.

District courts have appellate jurisdiction over cases arising in inferior tribunals.⁹¹

§ 423. New Hampshire

The supreme court of New Hampshire has appellate jurisdiction and supervisory power over inferior courts.

The justices of the supreme court are required to give advisory opinions.

The constitution gives to the general court (the legislature) the authority to erect and constitute judicatories and courts of record. By the statute of 1901, two courts were established instead of the court then existing, to be known as the supreme court and the superior court. The supreme court has general superintendence of all courts of inferior jurisdiction, and is required to do and perform all the duties reasonably requisite and necessary to be done by a court of final jurisdiction of questions of law and general superintendence of inferior courts.⁹²

Advisory opinions. Under the constitution each branch of the legislature as well as the governor and council has authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.⁹³ This advisory power is limited to the expression of opinion on important questions of law⁹⁴ necessary to be determined by the body requesting advice,⁹⁵ and the court will not give opinions on mere

84. Jurisdiction limited to questions of law

Nev.—State v. Mills, 12 Nev. 403.

The appellate jurisdiction is limited to court proceedings, and hence no appeal lies to the supreme court from an order of the district judge requiring a county assessor to file in the county court a statement of taxes.—Lyon County v. Esmeralda County, 1 P. 339, 18 Nev. 166.

Court may allow counsel fee on appeal in divorce case

Nev.—Lake v. Lake, 30 P. 878, 17 Nev. 230.

Judgment of district court on appeal

Where a suit to foreclose a lien is brought in a justice's court and appealed to the district court, an appeal lies to the supreme court from the judgment of the district court.—Dickson v. Corbett, 10 Nev. 439.

Tax, impost, assessment, or municipal fine

An order of a justice's court imposing costs against a garnishee who refused to make a statement is not a tax, impost, assessment, or municipal fine within the meaning of the constitutional grant of jurisdiction provision.—Wearne v. Haynes, 13 Nev. 103.

85. By demand in controversy is meant the sum sought to be recovered by plaintiff, and not that for which he actually receives judgment.—Klein v. Allenbach, 6 Nev. 159.

86. The power to issue writs is an original jurisdiction and not merely auxiliary to appellate jurisdiction.—State v. McCullough, 3 Nev. 202.

87. Nev.—State v. Lamb, 138 P. 907, 37 Nev. 19.

15 C.J. p 1097 note 37.

88. Nev.—National Mines Co. v. Humboldt County Sixth Judicial Dist. Ct., 116 P. 996, 34 Nev. 67.

15 C.J. p 1097 note 38.

89. Nev.—O'Brien v. Trousdale, 167 P. 1007, 41 Nev. 90.

15 C.J. p 1097 note 39.

Power same as at common law

Intention of framers of constitution in conferring jurisdiction upon supreme court to issue writs of prohibition was to confer right to issue writ as it had been recognized at common law.—O'Brien v. Trousdale, supra.

90. Neb.—State v. Dickerson, 113 P. 105, 33 Nev. 540.—State v. Sadler, 68 P. 284, 59 P. 546, 63 P. 128, 25 Nev. 131, 33 Am.S.R. 573.

15 C.J. p 1097 note 40.

91. Nev.—Cavanaugh v. Wright, 2 Nev. 166, 167.

15 C.J. p 1097 note 51.

92. N.H.—Genest v. Odell Mfg. Co., 74 A. 593, 75 N.H. 365.—Bath v. Haverhill, 63 A. 307, 73 N.H. 511.

15 C.J. p 1098 note 65.

Claims against insolvent debtor

Court has no original jurisdiction of claims against estate of insolvent debtor.—Hunt v. O'Shea, 45 A. 480, 69 N.H. 600.

93. N.H.—In re Opinion of the Justices, 171 A. 443, 86 N.H. 604.

15 C.J. p 1097 notes 60–62, p 1098 note 63.

Other officers or bodies than those mentioned in the constitution cannot

require advisory opinions.—Wyatt v. State Bd. of Equalization, 70 A. 387, 74 N.H. 552—15 C.J. p 1097 note 61 [f], [g].

94. N.H.—In re Opinion of the Justices, 128 A. 812, 81 N.H. 573.

15 C.J. p 1097 note 62.

Administrative action

Justices will refuse opinion on question on which an administrative hearing and finding is necessary.—In re Opinion of the Justices, 190 A. 425, 88 N.H. 434.

Scope of review

In giving advisory opinion, it is not province of justices to review bills to which questions relate in detail to determine whether they are objectionable in minor respect.—In re Opinion of the Justices, 149 A. 321, 84 N.H. 557, 559.

Validity of state contracts is question of law, as to which legislature is entitled to advice.—In re Opinion of the Justices, 128 A. 812, 81 N.H. 573.

95. N.H.—In re Opinion of the Justices—Adjutant General, 112 A. 525, 79 N.H. 635.

15 C.J. p 1097 note 61 [b].

Assistance in performance of duties

Opinion of justices in answer to questions of governor and council should not go beyond assistance to them in performance of their executive duties.—In re Opinion of the Justices, 190 A. 425, 88 N.H. 434.

Questions to be decided by bodies other than state courts

(1) The court's duty to advise is not limited to questions which may

questions of expediency,⁹⁶ or on questions involving private vested rights which are protected by the constitution.⁹⁷ The justices will decline to answer questions which are not pending and awaiting action in the body propounding the inquiry,⁹⁸ or where no answer can be returned in time to be of aid to the body requesting advice.⁹⁹ The justices may also ask to be excused from answering where they are divided in opinion on the questions asked.¹ The court's opinions are merely advisory and are not adjudications.²

§ 424. New Jersey

Decisions relating to particular courts in New Jersey possessing appellate jurisdiction will be discussed in the sections immediately following.

§ 425. — Court of Errors and Appeals

The New Jersey court of errors and appeals is an appellate court of last resort.

be adjudicated by the courts of the state.—In re Opinion of the Justices, 113 A. 293, 80 N.H. 595.

(2) "It is often said that a court will not declare beyond legislative power a law which has been duly enacted unless the conflict with the Constitution clearly appears. In the present case, where we are asked to advise as to legislative power in advance of action upon a question not within the jurisdiction of the state, it is clear we cannot safely give advice which might induce affirmative action unless the power clearly exists."—In re Opinion of the Justices, 113 A. 293, 299, 80 N.H. 595.

96. N.H.—In re Opinion of the Justices, 128 A. 812, 81 N.H. 573.

Opinion cannot be requested as to

(1) Moral obligation of state with respect to trust property.—In re Opinion of the Justices, 128 A. 812, 81 N.H. 573.

(2) Questions of state policy.—In re Opinion of the Justices, 128 A. 812, 81 N.H. 573.

(3) Wisdom of proposed legislation.—In re Opinion of Justices, 79 A. 21, 76 N.H. 588.

97. N.H.—In re Opinion of the Justices, 128 A. 684, 81 N.H. 563. 15 C.J. p 1098 note 63 [a].

98. N.H.—In re Opinion of the Justices, 6 A.2d 763.

Adjournment of legislature

The justices will decline to answer questions propounded by resolution of the house of representatives received after final adjournment of the legislature, where no further session was anticipated, since the question was not pending at time of inquiry.—In re Opinion of the Justices, 176 A. 423, 86 N.H. 607—In re Opinion

of the Justices, 150 A. 551, 84 N.H. 584.

Calling of special session

It is the duty of the court to answer questions submitted by the governor and the council, where the calling of a special session of the legislature depends on the solution of the questions submitted.—In re Opinion of Justices, 63 A. 505, 73 N.H. 625, 6 Ann.Cas. 689.

99. N.H.—In re Opinion of Justices, 50 A. 329, 70 N.H. 640. 15 C.J. p 1097 note 61 [e].

1. N.H.—In re Opinion of Justices, 79 A. 490, 76 N.H. 597.

2. N.H.—In re Opinion of the Justices, 138 A. 284, 82 N.H. 561. 15 C.J. p 1097 note 62 [c].

Declaratory judgments

"Although advisory opinions . . . are not judgments establishing the law, in practice they appear to be relied upon as authority as fully as decisions in litigated cases. . . . The practical result is that these opinions have in effect the weight of declaratory judgments upon questions within the jurisdiction of the court of which the justices are members."—In re Opinion of the Justices, 113 A. 293, 299, 80 N.H. 595.

Reservation that operation of statute may reveal unforeseen difficulties
N.H.—In re Opinion of the Justices, 154 A. 217, 85 N.H. 562.

3. N.J.—New Jersey Franklinite Co. v. Ames, 12 N.J.Eq. 507.
Court is indiscreet by legislature
N.J.—In re Schultz's Will, 133 A. 762, 102 N.J.Eq. 14.

4. N.J.—Eutries v. State, 47 N.J. Law 140. 15 C.J. p 1098 note 69.

Under the constitution, the court of errors and appeals is one of last resort in all cases, and its jurisdiction is purely appellate.³ Writs and processes may issue out of the court of errors and appeals,⁴ and writs of error lie to remove final judgments in any circuit court directly into such court and may be brought in the same manner and subject to the same rules as exist in case of a writ of error to the supreme court.⁵ On the law side, the court is under the constitution confined to the review of judicial errors committed in the supreme and circuit courts and cannot review the judgments of courts inferior to them.⁶

§ 426. — Other Courts

There have been decisions relating to the appellate jurisdiction of various New Jersey courts.

The supreme court has such appellate jurisdiction as may be conferred upon it by law.⁷ It is

Error to review denial of mandamus

A writ of error does not lie to remove into the court of errors and appeals an order by the supreme court discharging a rule to show cause why mandamus should not issue, excepting in cases decided in the supreme court upon the constitutionality of a statute.—Browne v. King, 102 A. 383, 91 N.J.Law 317, dismissing appeal 106 A. 893, 91 N.J. Law 317.

5. N.J.—Anonymous, 20 N.J.Law 495.

15 C.J. p 1098 note 70.

6. N.J.—De Feo v. People's Gas Co. of New Jersey, 138 A. 876, 104 N.J.Law 156.

Direct appeal from court of common pleas is not permissible.—Koch v. Peoples Building & Loan Ass'n, 8 A.2d 330, 123 N.J.Law 276—De Feo v. People's Gas Co. of New Jersey, 138 A. 876, 104 N.J.Law 156.

Review of ordinary's findings

Ordinary is only statutory agent to hear and determine inheritance tax questions, and his findings cannot be reviewed by court of errors and appeals on appeal, but only by supreme court on certiorari, but, where respondent does not object, the court, in order to avoid unnecessary litigation, will review an intermediate order on the merits.—Miller v. McCutcheon, 175 A. 155, 117 N.J.Eq. 123, 95 A.L.R. 702, reversing 170 A. 666, 115 N.J.Eq. 459.

7. N.J.—Young v. Spagnuolo, 72 A. 28, 77 N.J.Law 434. 15 C.J. p 1098 note 71.

A writ of restitution can issue from a court only in aid of a judgment of that court theretofore entered, and cannot be the object of an

given power to determine the constitutionality of statutes merely on petition of the attorney general.⁸ The supreme court may issue writs of mandamus,⁹ quo warranto,¹⁰ and certiorari.¹¹ The supreme court, although generally dividing itself into parts for the convenient transaction of business, has inherent power to sit in banc.¹²

The prerogative court,¹³ the circuit court,¹⁴ the court of common pleas,¹⁵ the orphans' court,¹⁶ and the court of sessions¹⁷ have such appellate jurisdiction as may be conferred upon them by law.

original proceeding to give relief before legal relationship of parties has been determined by judgment.—*St. Mary's Church, Gloucester, v. Mayor and Common Council of Gloucester City*, 199 A. 900, 120 N.J.Law 420.

8. N.J.—*In re Public Utility Bd.*, 84 A. 706, 83 N.J.Law 303.
15 C.J. p 1098 note 73.

9. N.J.—*City of Millville v. Board of Education of City of Millville in Cumberland County*, 134 A. 748, 100 N.J.Eq. 162, affirmed 137 A. 916, 101 N.J.Eq. 303.
15 C.J. p 1098 note 71 [f].

Submission without argument

Rule to show cause why writ of mandamus should not issue would not be considered by supreme court, where case was improperly submitted on briefs without oral argument, without written stipulation or consent in open court.—*Colyer v. Pierson*, 171 A. 487, 12 N.J.Misc. 225.

10. N.J.—*City of Millville v. Board of Education of City of Millville in Cumberland County*, 134 A. 748, 100 N.J.Eq. 162, affirmed 137 A. 916, 101 N.J.Eq. 303.

11. N.J.—*City of Millville v. Board of Education of City of Millville in Cumberland County*, supra.
15 C.J. p 1098 note 71 [d], [e].

Power exclusive

(1) Under the constitution, the power of supreme court to issue certiorari is exclusive.—*In re Prudential Ins. Co. of America*, 88 A. 970, 83 N.J.Eq. 335.

(2) An appeal to the court of errors and appeals cannot be substituted for the certiorari power of the supreme court.—*In re Prudential Ins. Co. of America*, supra.

(3) Accordingly the certiorari power of the supreme court cannot be transferred to other courts.—*Green v. Heritage*, 46 A. 634, 64 N.J.Law 567, reversing 43 A. 698, 63 N.J.Law 455—*McCullough v. Essex County Cir. Ct.*, 34 A. 1072, 59 N.J.

Law 103—*Green v. Heritage*, 46 A. 634, 64 N.J.Eq. 567.

12. N.J.—*In re Hudson County*, 144 A. 169, 106 N.J.Law 62, denying *In re Freeholders of Hudson County*, 143 A. 536, 105 N.J.Law 57.

13. N.J.—*In re Frank's Will*, 114 A. 857, 93 N.J.Eq. 405.
49 C.J. p 1332 note 61.

Surrogate's order granting administration is not appealable to the prerogative court.—*Diamant v. Lore*, 31 N.J.Law 220—*Moyna v. Prudential Life Ins. Co.*, 125 A. 99, 96 N.J.Eq. 293—*In re Grissom*, 41 A. 676, 56 N.J.Eq. 373.

Surrogate's decree vacating probate is appealable to prerogative court.—*In re Frank's Will*, 114 A. 857, 93 N.J.Eq. 405.

14. N.J.—*Reilly v. Newark Second Dist. Ct.*, 42 A. 842, 63 N.J.Law 541.
15 C.J. p 1098 note 72 [d], [e].

15. N.J.—*Lochanowski v. McKeone*, 41 A. 1117, 61 N.J.Law 288, affirming 36 A. 882, 60 N.J.Law 118—*Rahway v. Hunt*, 65 A. 164, 74 N.J.Law 116.
15 C.J. p 1098 note 72 [b].

16. **Surrogate's decree vacating probate is not appealable to orphans' court.**—*In re Frank's Will*, 114 A. 857, 93 N.J.Eq. 405.

17. N.J.—*Brant v. Froehlich*, 8 A. 283, 49 N.J.Law 336—*Dunn v. Overseers of Poor*, 32 N.J.Law 275—*Hildreth v. Overseers of Poor*, 13 N.J.Law 5.
15 C.J. p 1098 note 72 [c].

18. N.M.—*Thurman v. Grimes*, 1 P. 2d 972, 35 N.M. 498.

19. N.M.—*Jordan v. Jordan*, 218 P. 1035, 29 N.M. 95.

The mere injection of constitutional questions into proceeding, whether in lower court or for first time in supreme court, does not authorize review of lower court's judgment by appeal not authorized by any valid statute.—*State v. Eychaner*, 73

§ 427. New Mexico

The supreme court and the district courts have such appellate jurisdiction and such power to issue writs as is conferred upon them by law.

The supreme court of New Mexico is a court of review.¹⁸ Although the constitution prescribes the appellate jurisdiction of the supreme court, it does not give to litigants the right to invoke such jurisdiction by appeal; that right is granted by the legislature.¹⁹ The supreme court has original jurisdiction in quo warranto and mandamus against all state officers, boards, and commissions,²⁰ and a superintending control over all inferior courts.²¹ The supreme court also has power to issue various writs, including writs of mandamus²² and pro-

P.2d 805, 41 N.M. 677, followed in 73 P.2d 809, 41 N.M. 683.

20. N.M.—*Turkett v. Western College, etc.*, M. E. Church, 145 P. 138, 19 N.M. 572, restraining enforcement of judgment 125 P. 1085, 17 N.M. 275—*State v. Chacon*, 145 P. 125, 19 N.M. 466.
15 C.J. p 1099 notes 74–77.

Substituting state as plaintiff

Supreme court in original mandamus action by state on the relation of capital addition commission to compel state treasurer to counter-sign debentures for constructing capital addition, could, on objection to relator's capacity to sue, treat pleadings as amended by substituting as plaintiff state on relation of attorney general.—*State ex rel. Capitol Addition Bldg. Commission v. Connelly*, 46 P.2d 1097, 39 N.M. 312, 100 A.L.R. 878.

Mandamus to compel publication of proposed constitutional amendment

N.M.—*Hutcheson v. Gonzales*, 71 P. 2d 140, 41 N.M. 474.

21. N.M.—*Albuquerque Gas & Electric Co. v. Curtis*, 89 P.2d 615, 43 N.M. 234.
15 C.J. p 1099 note 78.

The term "inferior courts" means courts placed under the supervisory or appellate control of the supreme court, including the district courts.—*State v. Medler*, 142 P. 376, 19 N.M. 252.

Where no harm results to defendant by being compelled to await review on final judgment, supreme court will not invoke extraordinary power to review under supervisory power.—*Albuquerque Gas & Electric Co. v. Curtis*, 89 P.2d 615, 43 N.M. 234.

22. Ministerial duties

The supreme court is without jurisdiction to mandamus a district judge to certify that a recount of ballots was made in his presence, since his status in the performance

hibition.²³ The original jurisdiction granted to the supreme court by the constitution is by implication a denial of any other original jurisdiction.²⁴

The district courts, under the constitution, have appellate jurisdiction of all cases originating in inferior courts in their districts, and supervisory control over the same.²⁵ They have power to issue habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and all other writs, remedial or otherwise, in the exercise of their jurisdiction.²⁶

§ 428. New York

The county courts have such appellate jurisdiction as may be conferred upon them by law.

The county courts have such appellate jurisdiction, and such appellate jurisdiction only, as is conferred on them by law.²⁷ Where a statute so provides, the only mode by which the county court may review a judgment is by an appeal.²⁸ The county court should give the judgment which should

have been given below;²⁹ and in the exercise of its power to modify the judgment of the lower court it may render an entirely different judgment.³⁰ The county court, on appeal, may allow an amendment of the answer.³¹

§ 429. — Court of Appeals

The jurisdiction of the court of appeals is prescribed by the constitution and by statutes enacted under the legislative power to restrict such jurisdiction.

The jurisdiction of the court of appeals is prescribed by the state constitution.³² The legislature may, however, restrict its jurisdiction and the right to appeal to it³³ save that the right of appeal cannot be made to depend upon the amount involved;³⁴ the legislature may not enlarge the right of appeal.³⁵

Under the governing constitutional and statutory provisions appeals may be taken to the court of appeals in civil cases.³⁶ (1) As of right from a judgment or order entered upon the decision of an appellate division of the supreme court which final-

of such duty is not that of a state officer, board, or commission, or of an inferior court, to whom the court's writ of mandamus may run.—*State v. Helmick*, 294 P. 316, 35 N.M. 219.

23. Question not passed on by lower court

The supreme court will not determine that the court has not acquired personal jurisdiction, in absence of a ruling thereon by the lower court, but will require that the question be submitted to that court; the supreme court assumes that a question pending before an inferior court will be correctly decided.—*State ex rel. Stanley v. Lujan*, 77 P.2d 178, 42 N.M. 291.

24. N.M.—*Thurman v. Grimes*, 1 P. 2d 972, 35 N.M. 498.

25. District court sitting as inferior court

The constitutional provision that the district court shall have appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts does not provide for an appeal from district court sitting as an inferior tribunal to the district court sitting as such.—*State ex rel. Weltmer v. Taylor*, 79 P.2d 937, 42 N.M. 405.

26. Certiorari as ancillary process

District courts may issue writ of certiorari as ancillary process in aid of their jurisdiction.—*Lea County State Bank v. McCaskey Register Co.*, 49 P.2d 577, 39 N.M. 454.

27. N.Y.—*Itzenplitz v. Chassin*, 204 N.Y.S. 389, 122 Misc. 500.

Statute construed

N.Y.—*Leake v. Hartman*, 121 N.Y. S. 771, 137 App.Div. 451, affirmed 96 N.E. 1119, 202 N.Y. 605.

28. N.Y.—*Smith v. Featherly*, 275 N.Y.S. 256, 242 App.Div. 886—*El-las v. Thomas Furniture Works*, 212 N.Y.S. 127, 125 Misc. 683.

Motion to dismiss appeal

Whether motion was seasonably made to set aside verdict and for new trial is to be determined in the county court on appeal from order denying the motion and not by motion to dismiss the appeal.—*Cleary v. New York State Rys.*, 190 N.Y.S. 300, 198 App.Div. 228, reversed on other grounds 191 N.Y.S. 71, 199 App. Div. 28.

Exhibits

That exhibits were not present in return did not authorize reversal of judgment, where absence of exhibits could not be attributed to fault of either party.—*New York Cent. R. Co. v. Muszalski*, 299 N.Y.S. 45, 252 App.Div. 251, reversing *New York Cent. R. Co. v. Muczalski*, 278 N.Y. S. 667, 154 Misc. 608.

29. N.Y.—*Levenberg v. Ludington*, 274 N.Y.S. 193, 152 Misc. 735.

30. N.Y.—*Grosvenor v. Holland*, 288 N.Y.S. 105, 158 Misc. 925, reversed on other grounds 291 N.Y.S. 202, 249 App.Div. 672—*Cookinham v. Hepler*, 259 N.Y.S. 87, 144 Misc. 359.

31. N.Y.—*Harrison Bros. Co. v. Excelsior Bag & Mfg. Co.*, 168 N.Y. S. 291, 180 App.Div. 790.

32. Court of review

The court of appeals is purely a court of review and can consider only errors which it is alleged were committed by the court below.—*People v. Dewey*, 27 N.E. 1017, 3 Silv.A. 506, affirming 11 N.Y.S. 602—*Delaney v. Brett*, 61 N.Y. 78, affirming 27 N.Y.Super. 712, 1 Abb.Pr.N.S., 421.

For authorities as to the law prior to Dec. 31, 1895, see 15 C.J. p 1099 note 87 [a].

33. N.Y.—*Charles W. Sommer & Bros. v. Albert Lorsch & Co.*, 172 N.E. 271, 254 N.Y. 146. 15 C.J. p 1100 note 95.

34. N.Y.—*Terwilliger v. Browning*, 101 N.E. 463, 207 N.Y. 479.

35. N.Y.—*Charles W. Sommer & Bros. v. Albert Lorsch & Co.*, 172 N.E. 271, 254 N.Y. 146.

Former § 9 of the constitution was held not to prohibit the conferment of additional jurisdiction on the court of appeals.—*People v. Cullen*, 47 N.E. 894, 153 N.Y. 629, 44 L.R.A. 420, reversing 40 N.Y.S. 1, 7 App. Div. 118, 45 N.Y.S. 1146, 17 App.Div. 635—15 C.J. p 1100 note 95 [a].

36. Special appeal provisions superseded

The general statute as to appeals regulates the practice on all appeals and supersedes and repeals all special provisions for appeals in particular types of cases.—*Brigham v. City of New York*, 124 N.E. 209, 227 N.Y. 576, dismissing appeal 171 N.Y.S. 1080, 185 App.Div. 917.

ly determines an action or special proceeding³⁷ wherein is directly involved the construction of the constitution of the state or of the United States,³⁸ or where one or more of the justices of the appellate division dissents from the decision of the court,³⁹ or where the judgment or order is one of reversal or modification.⁴⁰ (2) As of right, from an order of the appellate division granting a new trial where appellant stipulates that, upon affirmance, judgment absolute shall be rendered against him.⁴¹ (3) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution

of the state or of the United States;⁴² and on any such appeal only the constitutional question shall be considered and determined by the court.⁴³

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment, or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.⁴⁴ (5) From a judgment or order entered upon the decision of an appellate di-

37. N.Y.—Jensen v. Union Ry. Co. of New York City, 182 N.E. 226, 260 N.Y. 1, dismissing appeal 256 N.Y.S. 951, 235 App.Div. 786. 15 C.J. p 1099 note 91, p 1100 note 98.

Judgment entered after reversal of order vacating inquest

Judgment on trial or inquest, entered after appellate division reversed order vacating inquest, was not a judgment entered upon the decision of the appellate division. A judgment entered upon the decision of the appellate division is a judgment entered by the clerk to whom the order of the appellate division and the case and papers upon which the appeal was heard are transmitted, pursuant to such order.—Jensen v. Union Ry. Co. of New York City, supra.

Order directing payment of rent to receiver, appointed in foreclosure suit to which tenant was party, was an intermediate one, and hence not reviewable without allowance of appeal or certification of question, although a justice of the appellate division dissented from the affirmance of the order.—Klasko Finance Corporation v. Belleaire Hotel Corporation, 177 N.E. 289, 257 N.Y. 1, dismissing appeal 249 N.Y.S. 850, 233 App.Div. 657.

38. N.Y.—People ex rel. Astoria Light, Heat & Power Co. v. Cantor, 141 N.E. 901, 236 N.Y. 417, 30 A.L.R. 1458, modifying 196 N.Y.S. 944, 203 App.Div. 893, affirming 187 N.Y.S. 467, 114 Misc. 419—Valz v. Sheepshead Bay Bungalow Corporation, 163 N.E. 124, 249 N.Y. 122, affirming 223 N.Y.S. 329, 221 App.Div. 280, motion denied 161 N.E. 188, 247 N.Y. 576, and certiorari denied 49 S.Ct. 82, 278 U.S. 647, 73 L.Ed. 560.

Decision against appellant

The fact that court of appeals decides constitutional question against

appellant does not make it less a ground for appeal.—Davega City Radio v. State Labor Relations Board, 22 N.E.2d 145, 281 N.Y. 13, affirming 10 N.Y.S.2d 236.

39. N.Y.—Klasko Finance Corporation v. Belleaire Hotel Corporation, 177 N.E. 289, 257 N.Y. 1, dismissing appeal 249 N.Y.S. 850, 233 App.Div. 657.

40. N.Y.—In re Public Beach, Borough of Queens, City of New York, 7 N.E.2d 703, 273 N.Y. 533, denying motion 290 N.Y.S. 635, 248 App.Div. 902.

Estoppel

Motion to dismiss appeal from judgment of modification on ground that judgment was unanimous affirmance due to fact that appellant's designation of judgment as unanimous affirmance in applications for leave to appeal estopped appellants from denying judgment was unanimous affirmance, that permission to appeal had not been obtained, and that no constitutional question was involved, was denied.—Duncan v. McMurtry, 193 N.E. 292, 265 N.Y. 504, denying motion 270 N.Y.S. 979, 241 App.Div. 765, and affirmed 193 N.E. 416, 265 N.Y. 623.

41. N.Y.—In re Schoenewerg's Estate, 14 N.E.2d 777, 277 N.Y. 424, reversing In re Schoenewerg, 300 N.Y.S. 593, 252 App.Div. 745, reversing In re Schoenewerg's Estate, 290 N.Y.S. 817, 160 Misc. 819, motion and stay granted 1 N.Y.S. 2d 653, 253 App.Div. 715—Roberts v. Baumgarten, 27 N.E. 470, 126 N.Y. 336, 27 Abb.N.Cas. 12, affirming 58 N.Y.Super. 407, 11 N.Y.S. 699.

Surrogate's decree

A stipulation for judgment absolute would be inappropriate in case of an order which reversed a surrogate's decree in a special proceeding and directed a new hearing. Consequently, an appeal by leave of

the appellate division granted pursuant to Civ.Pract.Act § 538 subd 4 will not be dismissed for lack of stipulation for judgment absolute.—In re Schoenewerg's Estate, 14 N.E. 2d 777, 277 N.Y. 424, reversing In re Schoenewerg, 300 N.Y.S. 593, 252 App.Div. 745, reversing In re Schoenewerg's Estate, 290 N.Y.S. 817, 160 Misc. 819, motion and stay granted 1 N.Y.S.2d 653, 253 App.Div. 715.

42. N.Y.—Coler v. Corn Exchange Bank, 164 N.E. 832, 250 N.Y. 136, 65 A.L.R. 879, affirming 230 N.Y.S. 86, 132 Misc. 449, and affirmed Corn Exchange Bank v. Coler, 50 S.Ct. 94, 280 U.S. 218, 74 L.Ed. 378. Appeal must present, directly and primarily, an issue determinable only by a construction of the constitution.—People ex rel. Ryan v. Lynch, 186 N.E. 28, 262 N.Y. 1, dismissing appeal 250 N.Y.S. 987, 233 App.Div. 834, motion denied 185 N.E. 728, 261 N.Y. 537.

That constitutional question was presented below is not conclusive of right of review in court of appeals.—People ex rel. Ryan v. Lynch, supra.

43. N.Y.—Honeyman v. Clark, 17 N.E.2d 131, 278 N.Y. 467, affirmed Honeyman v. Jacobs, 59 S.Ct. 702, 306 U.S. 539, 83 L.Ed. 972—Adamec v. Post, 7 N.E.2d 120, 273 N.Y. 250, 109 A.L.R. 1110—Carow v. Board of Education of City of New York, 6 N.E.2d 47, 272 N.Y. 341.

44. N.Y.—In re Schoenewerg's Estate, 14 N.E.2d 777, 277 N.Y. 424, reversing In re Schoenewerg, 300 N.Y.S. 593, 252 App.Div. 745, reversing In re Schoenewerg's Estate, 290 N.Y.S. 817, 160 Misc. 819, motion and stay granted 1 N.Y.S. 2d 653, 253 App.Div. 715—Neglia v. Zimmerman, 142 N.E. 442, 237 N.Y. 131, motion denied 143 N.E. 760, 237 N.Y. 604—Greenberg v. Jerome H. Remick & Co., 182 N.Y.S. 229, 192 App.Div. 966.

vision of the supreme court which finally determines an action or special proceeding, but which is not appealable under (1) *supra*, where the appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or where, in case of the refusal so to certify, an appeal is allowed by the court of appeals; such an appeal shall be allowed when required in the interest of substantial justice.⁴⁵ (6) Where final judgment is rendered in the court below, after the affirmance, reversal, or modification of an interlocutory judgment, upon an appeal to the appellate division of the supreme

court,⁴⁶ or after the refusal by the appellate division, of a new trial, either upon an application, made in the first instance at a term thereof, or upon an appeal from an order of the special term, or of the judge before whom the issues, or questions of fact, were tried by a jury,⁴⁷ the party aggrieved may appeal directly from the final judgment to the court of appeals, notwithstanding it was rendered at a special term or at a trial term or pursuant to the directions contained in a referee's report; but such an appeal brings up for review only the determination of the appellate division of the supreme court.⁴⁸

15 C.J. p 1099 note 34.

Certified questions generally see Appeal and Error § 390 a.

Right to terminate attorney-client contract

The question whether a client can arbitrarily terminate contract of employment of an attorney for a fixed period, not with reference to any particular litigation, is of such general interest that plaintiff attorney, demurrer to whose complaint setting up such question has been sustained, will be permitted on motion to appeal to the court of appeals, the question being certified.—*Greenberg v. Jerome H. Remick & Co.*, 182 N.Y.S. 229, 192 App.Div. 966.

45. N.Y.—*People v. Ekerold*, 105 N.E. 670, 311 N.Y. 386, L.R.A.1915D 223, Ann.Cas.1915C 552.

15 C.J. p 1100 notes 13-17.

Appeal dismissed

Where grounds for appeal as of right did not exist, and no permission had been granted to appeal from unanimous affirmance to court of appeal, appeal may be dismissed.—*Squier v. Houghton*, 193 N.E. 390, 265 N.Y. 501, dismissing appeal 271 N.Y.S. 951, 241 App.Div. 809, certiorari denied 55 S.Ct. 506, 294 U.S. 711, 79 L.Ed. 1245.

Time for making application to appellate division for leave to appeal on certified questions runs from date of service on opposite party of appellate division order with notice of entry thereof.—*Kessler v. Fligel*, 192 N.E. 415, 265 N.Y. 239, reversing 191 N.E. 624, 264 N.Y. 689, granting motion 269 N.Y.S. 664, 240 App.Div. 232. Affirmed 195 N.E. 176, 266 N.Y. 508.

Permission will be refused

(1) Where appeal is sought on a question not presented to the appellate division, as it is for the court of appeals to determine whether it should consider such a question.—*Groonstad v. Robbins Dry Dock & Repair Co.*, 196 N.Y.S. 412, 203 App.Div. 33, denying reargument *Groonstad v. Robbins Dry Dock & Repair Co.*, 194 N.Y.S. 475, 201 App.Div. 581,

and reversed on other grounds 139 N.E. 777, 236 N.Y. 52.

(2) Where appellate division, on unanimously affirming judgment of the supreme court on verdict of jury, considers evidence amply sufficient to sustain verdict.—*Luckhardt v. City of New York*, 185 N.Y.S. 95, 194 App.Div. 953.

Decisions under repealed statute N.Y.—*Flickinger v. Glass*, 118 N.E. 792, 222 N.Y. 404, reversing 156 N.Y.S. 1122, 171 App.Div. 974.

15 C.J. p 1101 note 26, p 1102 note 32.

43. N.Y.—*Hill v. Gross*, 237 N.Y.S. 501, 227 App.Div. 821, denying appeal 236 N.Y.S. 593, 226 App.Div. 621, affirming 233 N.Y.S. 76, 133 Misc. 470, and affirmed 171 N.E. 785, 253 N.Y. 567—*Reife v. Osmer*, 233 N.Y.S. 171, 225 App.Div. 895.

Choice of remedies

The aggrieved party has a choice of remedies. "He might appeal directly to this court in which event the only subject of review would be the interlocutory order. . . . He might appeal again to the appellate division, in which event the only subject of review would be the proceedings subsequent to the interlocutory order. . . . If those proceedings were confirmed, an appeal to this court with notice of intention to review the earlier proceedings would bring the entire record here."—*Redman v. Verplex Art Co.*, 143 N.E. 650, 237 N.Y. 475, reversing 199 N.Y.S. 945, 206 App.Div. 703.

Leave must be obtained, from the appellate division or the court of appeals if the affirmance was unanimous.—*Sultzbach v. Sultzbach*, 144 N.E. 638, 238 N.Y. 353.

When a final judgment is entered by the appellate division on an appeal from an interlocutory order, the sole remedy is by appeal to the court of appeals.—*Redman v. Verplex Art Co.*, 143 N.E. 650, 237 N.Y. 475, reversing 199 N.Y.S. 945, 206 App.Div. 703.

Prior to the amendment of the statute, this procedure was available only if the appellate division affirmed. In other cases it was necessary for appellant to appeal first to the appellate division, and from its judgment to the court of appeals.—*Bowne v. Colt*, 123 N.E. 741, 226 N.Y. 758, dismissing appeal 157 N.Y.S. 417, 171 App.Div. 409, and reargument denied 125 N.E. 913, 227 N.Y. 585—*Noble v. Kendall*, 122 N.E. 223, 225 N.Y. 613, dismissing appeal 170 N.Y.S. 231, 182 App.Div. 801, and motion denied 123 N.E. 881, 226 N.Y. 559—*Stemmler v. Alsdorf*, 121 N.E. 270, 224 N.Y. 426, affirming 157 N.Y.S. 1146, 172 App.Div. 908—*Rose v. Bristol*, 117 N.E. 1057, 222 N.Y. 11, granting dismissal of appeal 161 N.Y.S. 1143, 175 App.Div. 934, affirming 160 N.Y.S. 335, 174 App.Div. 15—15 C.J. p 1101 note 25.

47. N.Y.—*Jensen v. Union Ry. Co. of New York City*, 182 N.E. 226, 280 N.Y. 1, dismissing appeal 256 N.Y.S. 951, 235 App.Div. 786.

Trial of fact issue

Appeal cannot be taken directly to court of appeals from supreme court judgment, rendered after trial of fact issue, unless appellate division refuses new trial.—*Jensen v. Union Ry. Co. of New York City*, *supra*.

Reversal of order granting new trial

An appeal lies directly to the court of appeals from a judgment entered upon a verdict after the appellate division reverses an order granting a new trial and reinstates the verdict.—*Logan v. Guggenheim*, 128 N.E. 903, 230 N.Y. 19, reversing 172 N.Y.S. 904, 186 App.Div. 931—*Garrison v. Sun Printing & Publishing Ass'n*, 119 N.E. 81, 222 N.Y. 691, dismissing appeal 150 N.Y.S. 284, 164 App.Div. 737—15 C.J. p 1101 note 25 [b].

48. N.Y.—*Kade v. Sanitary Fireproofing & Contracting Co.*, 176 N.E. 428, 256 N.Y. 371, denying dismissal of appeal 236 N.Y.S. 75, 227 App.Div. 622, adhered to 233 N.Y.S. 858, 228 App.Div. 646, ap-

The jurisdiction of the court of appeals is subject to the limitations that: (1) No appeal shall be taken to such court from a final judgment or order of the appellate division in any civil case or proceeding originally commenced in any court other than the supreme court, a county court, a surrogate's court, or a court of claims unless the appellate division allows the appeal and certifies that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.⁴⁹ (2) The jurisdiction of the court is limited to the review of questions of law,⁵⁰ except that the court may review facts found by the appellate division, where the appellate division, on reversing or modifying a final judgment in an action or a final order in a special proceeding, makes new findings of fact

and renders final judgment or a final order thereon.⁵¹

§ 430. — Supreme Court and Appellate Division Thereof

The appellate division, appellate term, and special term of the supreme court have such jurisdiction as is vested in them by the constitutional and statutory provisions of the state.

Under Const. Art VI § 2 the several appellate divisions of the supreme court are vested with the jurisdiction resting in certain courts from and after the last day of December, 1895, and with such additional jurisdiction as may be conferred by the legislature.⁵² The appellate division is not a separate court, but a branch of the supreme court; in effect it is the supreme court sitting in banc.⁵³

peal dismissed 177 N.E. 421, 257 N.Y. 203.

15 C.J. p 1101 note 25.

Ground for entry of judgment

Where the appellate division reversed an interlocutory judgment, and directed that an additional party be joined and a new trial had; and judgment was entered against plaintiff on his failure to join the additional party, plaintiff could appeal directly to the court of appeals, but such review would be limited to the question of joining an additional party.—*Kade v. Sanitary Fireproofing & Contracting Co.*, 176 N.E. 428, 256 N.Y. 371, denying dismissal of appeal 236 N.Y.S. 78, 227 App.Div. 622, adhered to 238 N.Y.S. 858, 228 App.Div. 646, appeal dismissed 177 N.E. 421, 257 N.Y. 203.

49. N.Y.—*Sidwell v. Greig*, 51 N.E. 267, 157 N.Y. 30, dismissing appeal 53 N.Y.S. 1115, 32 App.Div. 212.

15 C.J. p 1101 notes 19–22.

50. N.Y.—*People v. Barker*, 46 N.E. 875, 152 N.Y. 417, reversing 39 N.Y.S. 682, 6 App.Div. 356.

15 C.J. p 1099 note 89.

Reinstating trial court's judgment

Where the appellate division reverses the trial court on both the law and the facts, the court of appeals, in reversing the appellate division on the law, cannot reinstate the trial court's judgment, but a new trial must be directed on the facts.—*Marks v. Cowdin*, 123 N.E. 139, 226 N.Y. 138, reversing 162 N.Y.S. 567, 175 App.Div. 700.—*Queeney v. Willi*, 122 N.E. 198, 225 N.Y. 374, reversing 157 N.Y.S. 642, 171 App.Div. 588.—*Maguire v. Barrett*, 119 N.E. 79, 223 N.Y. 49, reversing 154 N.Y.S. 468, 168 App.Div. 836.—*Gressing v. Musical Instrument Sales Co.*, 118 N.E. 627, 222 N.Y. 215, reversing 154 N.Y.S. 420, 169 App.Div. 38.—*Constantino v. Watson Contracting Co.*,

114 N.E. 802, 219 N.Y. 443, reversing 148 N.Y.S. 1110, 163 App.Div. 939.—*Meisle v. New York Cent. & H. R. Co.*, 114 N.E. 347, 219 N.Y. 317, Ann.Cas.1918E 1081, reversing 153 N.Y.S. 1128, 168 App.Div. 939.

51. N.Y.—*Fairview-Chase Corporation v. Scharf*, 233 N.Y.S. 329, 226 App.Div. 652, denying 232 N.Y.S. 530, 225 App.Div. 232, dismissal of appeals denied 168 N.E. 419, 251 N.Y. 541, motion denied 171 N.E. 768, 253 N.Y. 529, and affirmed 171 N.E. 904, 254 N.Y. 551, reargument denied 173 N.E. 868, 254 N.Y. 564.

Verdict supported by evidence

Under the former constitutional provision, the court of appeals could not review a unanimous decision of the appellate division that there was evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court.—*Fox v. Proctor*, 112 N.E. 470, 217 N.Y. 711, affirming 145 N.Y.S. 709, 160 App.Div. 712—15 C.J. p 1099 note 90.

52. N.Y.—*In re Association of Bar of City of New York*, 227 N.Y.S. 1, 222 App.Div. 580.

15 C.J. p 1102 notes 34–40, p 1103 note 45.

Certiorari

Under the former statute the appellate division could issue writs of certiorari and hear and determine the same.—*People v. Lazansky*, 102 N.E. 556, 208 N.Y. 435—15 C.J. p 1104 note 67.

Prohibition against proceeding in adjoining judicial department may issue only if the appellate division of that department is not in session.—*People ex rel. Whitman v. Woodward*, 134 N.Y.S. 910, 150 App.Div. 180, 3 N.Y.Civ.Proc.N.S., 301.

Review of determination of public officer or board

(1) Where review of determination of public officer or board is sought in

pursuance of Civ.Pract.Act § 1283 et seq, partially upon the sufficiency of the evidence taken to sustain the determination, and partially upon questions of law arising independently of the sufficiency of the evidence, the entire proceeding to review should be transferred to the appellate division thus at one time all of the questions raised may be determined.—*Galusha v. Picard*, 1 N.Y.S.2d 222, 165 Misc. 539.

(2) Under the former provision of the statute, Civ.Pract.Act § 1318, it was held that the appellate division was without authority to grant original mandamus order directed to state board of parole.—*Carey v. Moore*, 279 N.Y.S. 168, 244 App.Div. 763.

Transfer of cause

Where justices qualified to hear appeal to appellate division of one judicial department are equally divided in opinion, court must, as provided by statute, direct transfer of appeal to appellate division of another department for hearing and determination.—*Hurley v. Wyckoff*, 11 N.Y.S.2d 878, transferred, see 13 N.Y.S.2d 891.

53. N.Y.—*In re Association of Bar of City of New York*, 227 N.Y.S. 1, 222 App.Div. 580.

Books and papers illegally detained

The court has inherent power to order the return of books or papers illegally detained by a public officer charged with the administration of the criminal law and this power can be exercised as against a supreme court justice acting as a magistrate.—*In re Both*, 193 N.Y.S. 822, 200 App.Div. 423, 39 N.Y.Cr. 446.

Original jurisdiction

While as a matter of administrative convenience the appellate division will ordinarily decline to take original jurisdiction, it has full power to do so, and may do so whenever

No justice of the appellate division can exercise in his department any of the powers of a justice of the supreme court other than those of a justice out of court and those pertaining to the appellate division or to the hearing and decisions of motions submitted by consent of counsel.⁵⁴

An appeal may be taken to the appellate division of the supreme court from a final judgment rendered in the supreme court upon a trial by a referee, or by the court without a jury, or upon the verdict of a jury, upon questions of law, or upon the facts, or upon both.⁵⁵ In some counties the appellate division of the supreme court has jurisdiction of appeals from the lower courts.⁵⁶ The appellate division, in the exercise of its appellate jurisdiction, may do that which the trial court should have done in the first instance,⁵⁷ and, at least in cases triable by the court without a jury, the appellate division may make new findings of fact.⁵⁸ The appellate division has the power to reverse, or affirm, wholly or partly, or to modify the order appealed from.⁵⁹ It has plenary power to review the acts of the special or trial terms of the su-

preme court in matters of discretion,⁶⁰ but it can review the discretionary power of the surrogate's court only so far as authorized by statute.⁶¹

Appellate and special terms. The appellate term of the supreme court, which under the constitution the appellate divisions in the first and second departments have power to establish, has jurisdiction of appeals from judgments or orders of the city and municipal courts of the city of New York.⁶² An appellate term may allow an appeal from its judgment to the appellate division,⁶³ but has no power to certify any question to the appellate division⁶⁴ or to limit its powers when an appeal is allowed.⁶⁵ Where judgment is entered by the municipal or city court, pursuant to a determination by the appellate term, the aggrieved party must obtain leave in order to appeal from the judgment directly to the appellate division.⁶⁶ The special term of the supreme court has such appellate jurisdiction as is conferred on it by law.⁶⁷ In some counties it has jurisdiction of appeals from the lower courts.⁶⁸

it sees fit.—In re Association of Bar of City of New York, 227 N.Y.S. 1, 223 App.Div. 580—Mitchel v. Cropsey, 164 N.Y.S. 336, 177 App.Div. 663—15 C.J. p 1103 note 45 [a].

Political activities of lawyers

Appellate division assumes no authority as to any general investigation of legislative acts or action of political conventions, and its powers are not adapted to inquiring into political activities of either lawyers or laymen.—Application of City Club of New York, 253 N.Y.S. 100, 233 App.Div. 351.

Under former provision of Civ. Pract. Act § 1317, supreme court could mandamus county court in criminal matter in which both courts had, for trial and sentence, concurrent jurisdiction.—People ex rel. Woodin v. Ottaway, 220 N.Y.S. 871, 129 Misc. 120, affirmed 224 N.Y.S. 887, 222 App.Div. 711, affirmed 161 N.E. 157, 247 N.Y. 493, reargument denied 163 N.E. 511, 248 N.Y. 527.

54. N.Y.—Uttal v. Uttal, 125 N.Y.S. 2, 140 App.Div. 225.
15 C.J. p 1103 note 41.

55. N.Y.—Ritacco v. City of New Rochelle, 168 N.Y.S. 190, 180 App. Div. 559.
15 C.J. p 1103 notes 42–44.

Remarks of counsel

The appellate division may look to the facts, as well as to the exceptions taken, and award new trial for prejudicial remarks of counsel.—Ritacco v. City of New Rochelle, supra.

56. N.Y.—McTurck v. Foussadier, 64 N.Y.S. 962, 51 App.Div. 218.
15 C.J. p 1103 note 59.

57. N.Y.—Terry & Gibson v. Bank of New York & Trust Co., 273 N.Y.S. 32, 242 App.Div. 699.
15 C.J. p 1102 note 40 [c].

58. N.Y.—York Mortgage Corporation v. Clotar Const. Corp., 172 N.E. 265, 254 N.Y. 128.
15 C.J. p 1103 note 43.

Affirmance on new findings

(1) The appellate division cannot upon new findings contrary to those made upon trial affirm the judgment of the special term but must direct a new trial.—Farrell v. Farrell, 98 N.E. 857, 205 N.Y. 450.

(2) On the other hand, it has also been held that the appellate division is not required to grant a new trial in an action tried before the court, where the judgment is right on the material facts as it finds them.—Levering & Garrigues Co. v. Century Holding Co., 150 N.Y.S. 649, 165 App. Div. 174.

Substitution for surrogate's findings
The appellate division, in exercising its original jurisdiction, may substitute its findings of fact for the surrogate's.—In re Spondre, 162 N.Y.S. 943, 98 Misc. 524.

59. N.Y.—White v. Richmond Light & R. Co., 206 N.Y.S. 872, 211 App. Div. 861.

60. N.Y.—Muldoon v. Day, 130 N.Y.S. 513, 146 App.Div. 873, affirmed 101 N.E. 1104, 208 N.Y. 516.
15 C.J. p 1104 note 65.

61. N.Y.—Matter of Pye, 48 N.Y.S. 865, 23 App.Div. 206.
15 C.J. p 1104 note 66.

62. N.Y.—Both v. Metropolitan Life Ins. Co., 3 N.Y.S.2d 403, 254 App. Div. 683—Katz v. Waneta Realty Co., 181 N.Y.S. 770, 191 App.Div. 509.
15 C.J. p 1103 note 60.

Granting of leave to appeal by court below does not give to appellate term jurisdiction where the order is not appealable.—Reeck v. Royfe, 211 N.Y.S. 587, 125 Misc. 825.

63. N.Y.—O'Rourke v. Feist, 59 N.Y.S. 157, 42 App.Div. 136.
15 C.J. p 1104 note 62.

64. N.Y.—O'Rourke v. Feist, supra.

65. N.Y.—O'Rourke v. Feist, supra.

66. N.Y.—Cuyler Realty Co. v. Teneo, Co., 188 N.Y.S. 340, 196 App.Div. 440, reversing 184 N.Y.S. 791, and leave to appeal granted and reargument denied 188 N.Y.S. 917, 197 App.Div. 934, and affirmed 135 N.E. 154, 233 N.Y. 647.

67. N.Y.—Radomska v. Prudential Ins. Co. of America, 268 N.Y.S. 289, 240 App.Div. 1010.

68. N.Y.—O'Neil v. Mansfield, 95 N.Y.S. 1009, 47 Misc. 516.
15 C.J. p 1103 note 61.

Reversal on facts

Special term, in reversing on the facts money judgment on jury verdict, should have granted new trial.—Boehm v. Buffalo Sav. Bank, 221 N.Y.S. 609, 220 App.Div. 514.

§ 431. North Carolina

Particular rules and decisions relating to the North Carolina supreme and superior courts will be discussed in the sections immediately following.

§ 432. — Supreme Court

The supreme court has jurisdiction of appeals from the superior court and has original jurisdiction to render advisory opinions on questions of law involved in claims against the state.

The constitution gives the supreme court jurisdiction to review on appeal any decision of the courts below upon any matter of law or legal inference, and to decide facts and issues of fact in equitable matters,⁶⁹ and power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts.⁷⁰ It is purely an appellate court⁷¹ and it has no original jurisdiction except as to claims against the state,⁷² where its decision is purely recommendatory.⁷³ No process in the nature of execution can issue thereon,⁷⁴ but the decision must be reported to the next session of the general assembly for its action.⁷⁵

69. N.C.—Lacy v. State, 141 S.E. 886, 195 N.C. 284.

15 C.J. p 1104 note 68.

Appeal only from superior court

An appeal to the supreme court will lie only from the superior court.—State v. Wilmington & W. R. Co., 29 S.E. 834, 122 N.C. 877. 15 C.J. p 1104 note 68 [b].

Mistake of court clerk

An appeal may be taken to the supreme court from an order of the superior court on a motion to vacate a judgment entered by the clerk because of the clerk's mistake, inadvertence, or neglect.—Caldwell v. Caldwell, 128 S.E. 329, 189 N.C. 805.

70. N.C.—Lacy v. State, 141 S.E. 886, 195 N.C. 284.

15 C.J. p 1104 note 69.

71. N.C.—Seaboard Air-Line Ry. Co. v. Horton, 96 S.E. 954, 176 N.C. 115.

Supersedeas

The supreme court has no power to grant a supersedeas pending a petition to the United States supreme court for certiorari.—Seaboard Air-Line Ry. Co. v. Horton, 96 S.E. 954, 176 N.C. 115.

Reopening cause

(1) After a decision on an appeal has been rendered and certified, the court has no power to reopen its decree and modify it to conform to a settlement reached by the parties.—Town of Newton v. State Highway Commission, 139 S.E. 613, 194 N.C.

303, dismissing petition 138 S.E. 601, 194 N.C. 159.

(2) Parties cannot, by a motion to rehear the judgment, call upon the supreme court to specifically perform a contract of compromise, so as to try the facts of such agreement between the parties.—Neal v. Cowles, 71 N.C. 266.

72. N.C.—Lacy v. State, 141 S.E. 886, 195 N.C. 284.

15 C.J. p 1104 note 70.

Existence of other remedy

Where claimant, by reason of the consent of the state, could or can bring an ordinary action on his claim, the court will not afford jurisdiction.—Rotan v. State, 141 S.E. 733, 195 N.C. 291.

Questions of fact

(1) Court will consider only such claims as present serious questions of law and will not consider claims presenting only issues of fact.—Vinson v. O'Berry, 183 S.E. 424, 209 N.C. 289—Cohoon v. State, 160 S.E. 183, 201 N.C. 312—Warren v. State, 153 S.E. 864, 199 N.C. 211—Lacy v. State, 141 S.E. 886, 195 N.C. 284—Calkins Dredging Co. v. State, 131 S.E. 665, 191 N.C. 243.

(2) Supreme court will dismiss proceeding to enforce claim against state, where no law question is involved and will not transfer it to superior court for trial.—Lacy v. State, supra.

(3) Where questions of both law and fact are involved, the court may

§ 433. — Superior Courts

The superior courts have jurisdiction of appeals from the lower courts.

Superior courts have appellate jurisdiction of all issues of law or of fact, determined by a clerk of the superior court or a justice of the peace, and of all appeals from inferior courts for errors assigned in matters of law.⁷⁶ Under the constitution, appeals from inferior courts must be heard by the superior before they can be considered by the supreme court.⁷⁷

§ 434. North Dakota

Decisions dealing with the supreme court and the district court are discussed infra §§ 435, 436.

§ 435. — Supreme Court

The provisions of the constitution have been construed to vest in the supreme court: (1) Appellate jurisdiction; (2) general superintending control over inferior courts; (3) power to issue the writs specified, not only in the furtherance of other jurisdiction but also in the exercise of original jurisdiction; and (4) authority to issue such other original and remedial writs as may be necessary to the proper exercise of the jurisdiction vested in the court.

adopt such procedure as it deems best for the determination of the questions of fact, and it cannot be controlled in this matter by statutes.—Lacy v. State, supra.

(4) Where questions of both law and fact are involved the court may order the issues of fact to be tried by the superior court.—Cohoon v. State, 160 S.E. 183, 201 N.C. 312.

73. N.C.—Bledsoe v. State, 64 N.C. 392.

15 C.J. p 1104 note 71.

74. N.G.—Rotan v. State, 141 S.E. 733, 195 N.C. 291.

15 C.J. p 1104 note 72.

75. N.C.—Rotan v. State, supra.

15 C.J. p 1104 note 73.

76. N.C.—Cook v. Bailey, 130 S.E. 498, 190 N.C. 599.

15 C.J. p 1104 note 74.

Judge sitting outside of district cannot hear appeal from ruling of clerk of superior court denying a motion to increase the amount of an undertaking for an attachment.—Byrd v. Nivens, 127 S.E. 673, 189 N.C. 621.

77. N.C.—Rhyne v. Lipscombe, 29 S.E. 57, 122 N.C. 650.

Statute providing for appeals directly to the supreme court from inferior courts is invalid and, if the statute fails to provide for an appeal to the superior court, that court may issue certiorari to review orders or judgments which are appealable.—Rhyne v. Lipscombe, supra.

The North Dakota supreme court is given by the constitution, except as otherwise provided, appellate jurisdiction only, which is coextensive with the state,⁷⁸ and a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.⁷⁹ It is also given power to issue writs⁸⁰ of habeas corpus,⁸¹ mandamus,⁸² quo warranto,⁸³ certiorari,⁸⁴ injunction,⁸⁵ and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction.⁸⁶ These provisions have been construed to vest in the court: (1) Appellate jurisdiction. (2) General superintending control over inferior courts. (3) Power to issue the writs specified, not only in the furtherance of other jurisdiction, but also in the exercise of original jurisdiction. (4) Authority to issue such other original and remedial writs as may be necessary to

the proper exercise of the jurisdiction vested in the court.⁸⁷ The court possesses such jurisdiction, and only such, as is either expressly or by necessary implication granted to it by these provisions in the constitution.⁸⁸

The writs named in the constitution are to be used by the supreme court to take original cognizance of a case as well as to aid and effectuate its other jurisdiction.⁸⁹ The court's jurisdiction to issue original writs, except those writs necessary to the proper exercise of appellate jurisdiction and to aid the court in its supervisory control over inferior courts, extends only to prerogative writs;⁹⁰ and such writs will issue only in cases *publici juris* wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberties of the citizens,⁹¹ and then only when the cir-

78. N.D.—*Christianson v. Farmers' Warehouse Ass'n*, 67 N.W. 300, 5 N.D. 438, 32 L.R.A. 730.

15 C.J. p 1104 notes 76, 77.

Appeal from county court directly to the supreme court does not lie from judgment entered by county court in probate matter.—*In re Rusch's Estate*, 241 N.W. 789, 62 N.D. 138.

79. N.D.—*State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist.*, 277 N.W. 843, 68 N.D. 211—*State v. District Court of Third Judicial District in and for Ransom County*, 184 N.W. 745, 49 N.D. 1127.

15 C.J. p 1104 note 79.

Course of litigation

Under this power the supreme court may, in a proper case, so control the course of litigation in the district courts, as to prevent injustice in cases where there is no appeal, or the remedy by appeal is inadequate.—*State v. District Court of Stutsman County*, 186 N.W. 381, 49 N.D. 27.

Legislature can require supreme court in the exercise of its supervisory jurisdiction to designate a district judge to hear and determine an action for the liquidation of a state bank.—*State v. First State Bank of Jud*, 202 N.W. 391, 52 N.D. 231.

Purpose of grant

"The power of general superintending control over all inferior courts was granted to insure the harmonious working of the judicial system of the state to meet emergencies, and enables and requires the Supreme Court in a proper case to control the course of judicial proceedings and litigation so as to prevent injustice in cases where there is no adequate remedy by appeal or otherwise."—*State ex rel. Jacobson v. District*

Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 844, 68 N.D. 211.

80. N.D.—*State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist.*, *supra*.

15 C.J. p 1104 note 80.

81. N.D.—*State v. Thompson*, 131 N.W. 231, 21 N.D. 426.

15 C.J. p 1104 note 81.

82. N.D.—*State v. McDonald*, 170 N.W. 873, 41 N.D. 389—*State v. Kositzky*, 166 N.W. 534, 38 N.D. 616, L.R.A.1918D 237.

15 C.J. p 1105 note 82.

83. N.D.—*State v. Thompson*, 131 N.W. 231, 21 N.D. 426.

15 C.J. p 1105 note 83.

Fact question

Where questions of fact properly triable to jury arise in original quo warranto proceeding in supreme court, but conditions exist making it practically impossible to secure jury trial, supreme court will try and determine all issues in case, both of fact and law, especially where parties waived jury trial, and request such procedure.—*State ex rel. Sathre v. Moodie*, 258 N.W. 558, 65 N.D. 340.

84. N.D.—*State v. Thompson*, 131 N.W. 231, 21 N.D. 426.

15 C.J. p 1105 note 84.

85. N.D.—*State v. McLean*, 159 N.W. 847, 35 N.D. 203—*Anderson v. Gordon*, 83 N.W. 983, 9 N.D. 480, 52 L.R.A. 134.

15 C.J. p 1105 note 85.

86. N.D.—*State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist.*, 277 N.W. 843, 68 N.D. 211—*State v. Langer*, 177 N.W. 408, 46 N.D. 462.

15 C.J. p 1105 note 86.

This grant was unnecessary, and was doubtless inserted for greater certainty.—*State ex rel. Jacobson v.*

District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211—*State v. District Court of Stutsman County*, 186 N.W. 381, 49 N.D. 27—*State v. Archibald*, 66 N.W. 234, 5 N.D. 359.

District court judge sitting in the place of a supreme court judge, who has disqualified himself, may legally issue an alternative writ under a statute providing that any judge of the supreme court may issue any writ.—*State v. Kositzky*, 166 N.W. 534, 38 N.D. 616, L.R.A.1918D 237.

87. N.D.—*State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist.*, 277 N.W. 843, 68 N.D. 211—*State v. District Court of Stutsman County*, 186 N.W. 381, 49 N.D. 27—*State v. Archibald*, 66 N.W. 234, 5 N.D. 359—*State v. Nelson County*, 45 N.W. 33, 1 N.D. 88, 26 Am.S.R. 609, 8 L.R.A. 283.

88. N.D.—*Guilford School Dist. No. 3 of Stutsman County v. Dakota Trust Co.*, 178 N.W. 727, 46 N.D. 307—*State v. Nuchols*, 119 N.W. 632, 18 N.D. 233, 20 L.R.A.N.S., 413.

Transmissal of papers by supreme court to district court pursuant to statute is not an assumption of "jurisdiction," which means the power to hear and determine a controversy.—*State v. First State Bank of Jud*, 202 N.W. 391, 52 N.D. 231.

89. N.D.—*State v. Archibald*, 66 N.W. 234, 5 N.D. 359.

90. N.D.—*State v. Norton*, 127 N.W. 717, 20 N.D. 180.

15 C.J. p 1104 note 80 [a], p 1105 note 86 [c].

91. N.D.—*State ex rel. Conrad v. Langer*, 277 N.W. 504, 68 N.D. 167—*State ex rel. Salisbury v. Vogel*, 256 N.W. 404, 65 N.D. 137—*Meyers v. Bertsch*, 234 N.W. 513, 60 N.D. 127—*State v. Norton*, 127 N.W. 717,

circumstances demanding such writ are so extraordinary and peremptory that to intrust their determination to, or await their adjudication in, inferior courts would result in failure or inadequacy of relief.⁹² The court is without jurisdiction to issue any writ other than those enumerated in the constitution, except where its issuance is necessary to the proper exercise of its jurisdiction in a pending cause, or to effectuate the court's general superintending control over inferior courts.⁹³

The supreme court's power to exercise general superintending control over inferior courts is a separate power, and applies to both civil and criminal proceedings.⁹⁴ The power of superintending control will not be exercised upon light occasions. It will be exercised only when there is no other adequate remedy and where the exigency is of

such nature as obviously to justify the interposition of the general superintending power of the court.⁹⁵ In the exercise of this power the court may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction.⁹⁶ The limitation on its power to issue original or prerogative writs to cases *publici juris* wherein are directly involved the sovereignty of the state, its franchises or prerogatives, or the liberty of the citizens relates to the original or prerogative jurisdiction of the supreme court; and does not apply to the writs that may be issued by the court in the exercise of its appellate jurisdiction or its superintending control over inferior courts.⁹⁷

§ 436. — District Courts

District courts have such jurisdiction as may be conferred by law.

20 N.D. 180—Duluth El. Co. v. White, 90 N.W. 12, 11 N.D. 534—State v. Archibald, 66 N.W. 234, 5 N.D. 359.
15 C.J. p 1104 notes 80, 81, p 1105 notes 82–86.

Court judges for itself in each case whether that particular case is within its jurisdiction.—State ex rel. Salisbury v. Vogel, 256 N.W. 404, 65 N.D. 137—State v. Archibald, 66 N.W. 234, 5 N.D. 359.

Matters within court's jurisdiction

(1) A case involving the validity of an order purported to have been made by the board of railroad commissioners granting a certain water supply company an increase in rates.—City Commission of Bismarck v. Bismarck Water Supply Co., 181 N.W. 586, 47 N.D. 179.

(2) Application for mandamus to state auditor to require him to issue warrant on state treasurer to pay expenses of judges of supreme court without the filing of itemized statement.—State v. Kositzky, 166 N.W. 534, 38 N.D. 616, L.R.A.1918D 237.

(3) Proceeding involving the right of possession to the office of superintendent of public instruction.—State v. McDonald, 170 N.W. 873, 41 N.D. 389.

(4) Proceeding between two claimants of office of state highway commissioner.—State ex rel. Salisbury v. Vogel, 256 N.W. 404, 65 N.D. 137.

(5) Other matters.—State v. Langer, 177 N.W. 408, 46 N.D. 462.
15 C.J. p 1105 notes 82 [b], [c], [f], 86 [j]—[i].

Matters and actions not within court's original jurisdiction

(1) Taxpayer's action.—State ex rel. Conrad v. Langer, 277 N.W. 504, 68 N.D. 167.

(2) Other matters see 15 C.J. p

1105 notes 82 [d], [e], 86 [g]—[i], [m].

Who may invoke jurisdiction

(1) This jurisdiction is reserved for the use of the state itself; the state is always the plaintiff and the only plaintiff, whether the action be brought by the attorney general, or, against his consent, on the relation of a private individual under the permission and direction of the court.—State ex rel. Conrad v. Langer, 277 N.W. 504, 68 N.D. 167—Meyers v. Bertsch, 234 N.W. 513, 60 N.D. 127—City Commission of Bismarck v. Bismarck Water Supply Co., 181 N.W. 586, 47 N.D. 179—15 C.J. p 1105 note 86 [a], [c].

(2) A person applying to supreme court for leave to institute original proceeding, on ground that attorney general, after request, has refused or unreasonably delayed to do so, may not present for determination in such proceeding a state of facts or grounds different from those which he presented to attorney general.—State ex rel. Conrad v. Langer, supra.

Private rights

Original jurisdiction of supreme court cannot be exercised to vindicate private rights, regardless of their importance.—State ex rel. Conrad v. Langer, 277 N.W. 504, 68 N.D. 167—Meyers v. Bertsch, 234 N.W. 513, 60 N.D. 127—State v. Sorlie, 212 N.W. 829, 55 N.D. 183—State v. Hagan, 175 N.W. 372, 44 N.D. 306—15 C.J. p 1105 notes 83 [b], 84 [a], 86 [e].

92. N.D.—State v. Thompson, 131 N.W. 231, 21 N.D. 426.
15 C.J. p 1105 note 86 [d].

93. N.D.—State v. Nuchols, 119 N.W. 632, 18 N.D. 233, 20 L.R.A.N.S., 413.

15 C.J. p 1105 note 86 [m].

94. N.D.—State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211.

95. N.D.—State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist., supra.

Acts within jurisdiction of lower court

The fact that the acts of the trial court were within its jurisdiction, or that erroneous or irregular orders were made within its jurisdiction, is not a bar to relief under the supervisory jurisdiction.—State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist., supra—State v. District Court of Third Judicial District in and for Ransom County, 194 N.W. 745, 49 N.D. 1127.

Facts warranting exercise of power

N.D.—State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211—State v. District Court of Fifth Judicial Dist. in and for Ward County, 215 N.W. 87, 55 N.D. 641—State v. District Court of Stutsman County, 186 N.W. 381, 49 N.D. 27.

It is for the court to determine when a proper case is presented for the exercise of its superintending control.—State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211—State v. District Court of Third Judicial District in and for Ransom County, 194 N.W. 745, 49 N.D. 1127.

96. N.D.—State v. Lowe, 210 N.W. 501, 54 N.D. 697—State v. District Court of Stutsman County, 186 N.W. 381, 49 N.D. 27.

97. N.D.—State ex rel. Jacobson v. District Court of Ward County, Fifth Judicial Dist., 277 N.W. 843, 68 N.D. 211.

District courts have such appellate jurisdiction as may be conferred by law.⁹⁸

§ 437. Ohio

Decisions relating to particular Ohio courts will be considered in detail in the sections immediately following.

§ 438. — Supreme Court

The original and appellate jurisdiction of the supreme court is derived exclusively from the Ohio constitution.

The jurisdiction of the supreme court is derived exclusively from the Ohio constitution,⁹⁹ and the

legislature has no power to limit or increase that jurisdiction.¹ Under the constitution, the supreme court has appellate jurisdiction in cases involving questions arising under the constitution of the United States or of the state,² in cases of felony on leave first obtained,³ and in cases which originated in the courts of appeals,⁴ and it has such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law.⁵

Review of certified cases. Under the constitution in cases of public or great general interest the supreme court may, within the time prescribed by law, direct any court of appeals to certify its record to the supreme court for review.⁶ Cases

98. Statute restricting court's jurisdiction

District court to which party had perfected his appeal is not ousted of jurisdiction by subsequent enactment of statute restricting such appeals to the supreme court.—Jenson v. Frazer, 130 N.W. 832, 21 N.D. 267.

99. Ohio.—State v. Fender, 140 N.E. 182, 106 Ohio St. 191.—State v. Mansfield, 104 N.E. 1001, 89 Ohio St. 20.

Inherent or implied jurisdiction

The jurisdiction expressly conferred by the constitution carries with it such inherent jurisdiction as is necessary to effectuate it.—Tuck v. Chapple, 151 N.E. 48, 114 Ohio St. 155.

Prior to constitutional amendment of 1912

Ohio.—Gompf v. Wolfinger, 65 N.E. 378, 67 Ohio St. 144.
15 C.J. p 1106 note 95 [b].

Cases pending when constitutional amendment took effect

Ohio.—Hupp v. Hock-Hocking Oil, etc., Co., 101 N.E. 1053, 88 Ohio St. 61, Ann.Cas.1914B 1004.
15 C.J. p 1106 note 95 [a].

1. Ohio.—State v. Mansfield, 104 N.E. 1001, 89 Ohio St. 20.

Statute conferring jurisdiction in election contests

(1) The legislature in the exercise of the power conferred upon it by the constitution to determine before what authority, and in what manner the trial of contested elections shall be conducted may provide for a direct appeal from the court of common pleas to the supreme court in election contests.—Jolly v. Deeds, 21 N.E.2d 108, 135 Ohio St. 369.—Mehling v. Moorehead, 14 N.E.2d 15, 133 Ohio St. 395.

(2) Such direct appeals are addressed to the political rather than the judicial power of the supreme court.—Jolly v. Deeds, supra.

2. Ohio.—Travis v. Public Utilities

Commission of Ohio, 175 N.E. 586, 123 Ohio St. 355.
15 C.J. p 1106 notes 96, 97.

No denial of constitutional rights

(1) By an erroneous interpretation of statute.—Schoenl v. Warner White Co., 164 N.E. 534, 119 Ohio St. 460, dismissing petition 167 N.E. 598, 32 Ohio App. 59.

(2) By taking case from jury on ground of absence of evidence proving some essential averment of plaintiff's petition.—Keller v. Stark Electric Ry. Co., 130 N.E. 508, 102 Ohio St. 114.

Presentation of grounds of review

Where no motion is made to certify the record, the supreme court will not hear an error proceeding filed as of right because involving constitutional questions unless questions were presented to, and determined by court of first instance.—Thatcher v. Pennsylvania, O. & D. R. Co., 167 N.E. 682, 121 Ohio St. 205, affirming 168 N.E. 859, 33 Ohio App. 242.

Time and manner

Supreme court's jurisdiction over case involving constitution of United States, or state, must be invoked in manner and within time limited by statute.—Travis v. Public Utilities Commission of Ohio, 175 N.E. 586, 123 Ohio St. 355.

Where no debatable constitutional question is involved, the petition in error will be dismissed.—State v. Hill, 16 N.E.2d 945, 134 Ohio St. 354.—State v. Gardner, 10 N.E.2d 930, 133 Ohio St. 32.—Wolfe v. Wolfe, 187 N.E. 201, 127 Ohio St. 160, dismissing error 187 N.E. 86, 45 Ohio App. 309.—Fullerton v. Fullerton, 187 N.E. 21, 127 Ohio St. 102.—Elsaesser v. Geo. Golde, Inc., 187 N.E. 7, 127 Ohio St. 90.—Metzel v. Peerless Paper Box Co., 186 N.E. 733, 126 Ohio St. 643.—Copeland v. State, 160 N.E. 452, 118 Ohio St. 69.—Leonard v. Elgin, J. & E. Ry. Co., 148 N.E. 239, 112 Ohio St. 623.

3. Ohio.—Miami v. Dayton, 110 N.E. 726, 92 Ohio St. 215.—State v.

Mansfield, 104 N.E. 1001, 89 Ohio St. 20.

4. Ohio.—Cohen v. Goldberger, 140 N.E. 514, 108 Ohio St. 243.
15 C.J. p 1106 note 99.

Intervention in court of appeals

(1) Where, after affirmance by the supreme court of a judgment, the claims of intervening petitioners were presented to, and determined by, the court of appeals, the case, in so far as it involved such claims, originated in the court of appeals.—Cohen v. Goldberger, supra.

(2) But intervention in court of appeals in case instituted in lower court will not under some circumstances make intervenor's case one originating in court of appeals.—Haldaday v. York Lake Co., 183 N.E. 791, 125 Ohio St. 608.

(3) Where a person is denied leave to intervene in the court of appeals, his case cannot be said to have originated in that court.—Betman v. Kuerze, 157 N.E. 487, 117 Ohio St. 225.

Only final orders or judgments are appealable.—Leashley v. Rezac, 7 N.E.2d 229, 132 Ohio St. 304.

Petition to vacate judgment of court of appeals on appeal from common pleas court did not transform case into one originating in former court.—Metzel v. Peerless Paper Box Co., 186 N.E. 733, 126 Ohio St. 643.

5. Ohio.—State ex rel. Nichols v. Gregory, 198 N.E. 182, 130 Ohio St. 165.—State v. Geiger, 176 N.E. 84, 38 Ohio App. 253.

Rules of public utilities commission
Courts inferior to supreme court have no power to pass upon question of reasonableness of rules, regulations, and rates on file with public utilities commission.—Phelps v. Ohio Bell Telephone Co., 144 N.E. 435, 111 Ohio St. 200.—Cincinnati & Suburban Bell Telephone Co. v. Rhoades, 186 N.E. 457, 45 Ohio App. 40.

6. Ohio.—Fredrick v. Mutual Bldg. & Inv. Co., 191 N.E. 729, 128 Ohio

certified by a court of appeals, in accordance with the provision set forth in § 439 *infra*, because its decision conflicts with the decision of any other court of appeals must be reviewed by the supreme court,⁷ provided they are filed therein within seventy days after entry of judgment in the court of appeals.⁸ The review in such cases extends to the entire case and not merely the certified conflict.⁹

Original jurisdiction. The supreme court has no original jurisdiction except as provided by the constitution.¹⁰ Under the constitution it has original jurisdiction in quo warranto,¹¹ mandamus,¹² prohibition,¹³ habeas corpus,¹⁴ and procedendo; and no law may be passed or rule made preventing any person from invoking such jurisdiction.¹⁵ Under

the terms of a schedule attached to the constitution, statutes antedating the adoption of the constitution are invalid to the extent that they impair the supreme court's original jurisdiction.¹⁶

§ 439. — Courts of Appeals

The original and appellate jurisdiction of the courts of appeals is derived exclusively from the Ohio constitution.

The appellate jurisdiction of the courts of appeals of Ohio is conferred by the state constitution,¹⁷ and the legislature is without power to increase or limit such jurisdiction,¹⁸ although it may prescribe methods of exercising it.¹⁹ Under the constitution the courts of appeals have appellate

St. 474, affirming *Mutual Bldg. & Inv. Co. v. Fredrick*, 183 N.E. 114, 43 Ohio App. 270, certiorari denied 55 S.Ct. 239, 293 U.S. 624, 79 L.Ed. 711.

Only the courts of appeals, and no other courts, can be directed to certify their records.—*State v. Mansfield*, 104 N.E. 1001, 89 Ohio St. 20.

The overruling of a motion to certify the record by the supreme court does not constitute an affirmance of the decision of the court of appeals, but amounts only to a determination that the case presented is not one of public or great general interest.—*Kern v. Contract Cartage Co.*, 9 N.E.2d 869, 55 Ohio App. 481.

7. Ohio.—*Flury v. Central Pub. House of Reformed Church in U. S.*, 160 N.E. 679, 118 Ohio St. 154, affirming *Central Pub. House of Reformed Church in U. S. v. Flury*, 157 N.E. 794, 25 Ohio App. 214.—*Johnson v. Industrial Commission*, 22 N.E.2d 921, 61 Ohio App. 535.

8. Ohio.—*Duncan v. State*, 164 N.E. 527, 119 Ohio St. 453.

15 C.J. p 1107 note 23 [b].

The denial of a motion for a rehearing in the court of appeals does not operate to extend the time for filing.—*Duncan v. State*, *supra*.

9. Ohio.—*Pettibone v. McKinnon*, 183 N.E. 786, 125 Ohio St. 605, affirming *McKinnon v. Pettibone*, 184 N.E. 707, 44 Ohio App. 147.

10. Ohio.—*State v. Mansfield*, 104 N.E. 1001, 89 Ohio St. 20.—*Kent v. Mahaffy*, 2 Ohio St. 498.

Injunctions

(1) The supreme court has no original jurisdiction in an action where an injunction is the sole relief prayed for and not merely incident to a suit in quo warranto.—*State v. Walters*, 119 N.E. 137, 96 Ohio St. 807. 15 C.J. p 1106 note 89 [d] (1), (2).

(2) The allowance of an injunction as a temporary remedy, while a case

is pending on error, is the exercise of appellate and not of original jurisdiction.—*Yeoman v. Lasley*, 36 Ohio St. 416.

Suit to set aside judgment of inferior court on ground of fraud held not within original jurisdiction of supreme court.—*State v. Marsh*, 169 N.E. 564, 121 Ohio St. 477.—*State v. Marsh*, 168 N.E. 473, 121 Ohio St. 321.

11. Ohio.—*State v. The Maccabees*, 142 N.E. 888, 109 Ohio St. 454.—*State v. Fender*, 140 N.E. 182, 106 Ohio St. 191.

12. Ohio.—*State ex rel. Homan v. Board of Embalmers and Funeral Directors of Ohio*, 21 N.E.2d 102, 135 Ohio St. 321.—*State v. Todd*, 4 Ohio 351.

13. Ohio.—*State v. Brugh*, 113 N.E. 683, 94 Ohio St. 115.—*State v. Clen Dening*, 112 N.E. 1029, 93 Ohio St. 264.

14. Ohio.—*Ex p. Bushnell*, 9 Ohio St. 77.

15. Effect of provision

(1) The constitution "merely confers original jurisdiction in quo warranto upon this court; it confers no grant of power for the invocation of that remedy, but safeguards the remedy only where the law empowers its exercise."—*State v. The Maccabees*, 142 N.E. 888, 889, 109 Ohio St. 454.

(2) The rule requiring leave to file a petition to invoke the original jurisdiction of the supreme court was annulled by this provision.—*State v. The Maccabees*, *supra*—*State v. Lynch*, 101 N.E. 352, 87 Ohio St. 444.

16. Ohio.—*State v. Fender*, 140 N.E. 182, 106 Ohio St. 191.

17. Ohio.—*In re Hawke*, 140 N.E. 583, 107 Ohio St. 341.—*State v. Wallace*, 140 N.E. 305, 107 Ohio St. 557.—*Complete Bldg. Show Co. v. Albertson*, 121 N.E. 817, 99 Ohio

St. 11.—*Haas v. Mutual Life Ins. Co. of New York*, 115 N.E. 1020, 95 Ohio St. 137.—*Cincinnati Polyclinic v. Balch*, 111 N.E. 159, 92 Ohio St. 415.—*Bayes v. Midland Casualty Co.*, 110 N.E. 751, 92 Ohio St. 303.—*In re Wernet's Estate*, 22 N.E.2d 490, 61 Ohio App. 304.—*First Nat. Bank v. Rawson*, 7 N.E.2d 6, 54 Ohio App. 285.—*Colby v. Price*, 177 N.E. 382, 39 Ohio App. 198.—*State v. Blair*, 157 N.E. 801, 24 Ohio App. 413.—*In re Chipman's Estate*, 13 Ohio App. 186.—*McMahon v. Keller*, 11 Ohio App. 410.

Successors of circuit courts

(1) Courts of appeals are the successors of the circuit courts.—*Cincinnati Polyclinic v. Balch*, 111 N.E. 159, 92 Ohio St. 415.—15 C.J. p 1107 note 2.

(2) Decisions relating to jurisdiction of circuit courts.—*Kramer v. Toledo, etc., R. Co.*, 42 N.E. 252, 53 Ohio St. 436.—15 C.J. p 1107 note 2 [b].

18. Ohio.—*In re Hawke*, 140 N.E. 583, 107 Ohio St. 341.—*State v. Wallace*, 140 N.E. 305, 107 Ohio St. 557.—*Complete Bldg. Show Co. v. Albertson*, 121 N.E. 817, 99 Ohio St. 11.—*Heininger v. Davis*, 117 N.E. 229, 96 Ohio St. 205.—*Haas v. Mutual Life Ins. Co. of New York*, 115 N.E. 1020, 95 Ohio St. 137.—*Cincinnati Polyclinic v. Balch*, 111 N.E. 159, 92 Ohio St. 415.—*In re Chipman's Estate*, 13 Ohio App. 186.—*McMahon v. Keller*, 11 Ohio App. 410.

19. Ohio.—*Heininger v. Davis*, 117 N.E. 229, 96 Ohio St. 205.—*Haas v. Mutual Life Ins. Co. of New York*, 115 N.E. 1020, 95 Ohio St. 137.—*Cincinnati Polyclinic v. Balch*, 111 N.E. 159, 92 Ohio St. 415.—*In re Wernet's Estate*, 22 N.E.2d 490, 61 Ohio App. 304.—*In re Arrasmith's Estate*, 7 N.E.2d 826, 54 Ohio App. 391.—*Dally, Adm'r, v. Dowty*, 3 N.E.2d 430, 52 Ohio App. 430.

jurisdiction²⁰ in the trial of chancery cases,²¹ and to review, affirm, modify or reverse the judgments²² of the courts of common pleas,²³ superior courts,²⁴ and other courts of record within their

districts,²⁵ as may be provided by law.

Original jurisdiction. The courts of appeals have no original jurisdiction except that conferred by the state constitution.²⁶ Under the con-

20. The term "appellate jurisdiction" includes proceedings in error.—*Miami v. Dayton*, 110 N.E. 726, 92 Ohio St. 215.

21. Ohio.—In re Hawke, 140 N.E. 583, 107 Ohio St. 341—*Barnes v. Christy*, 131 N.E. 352, 102 Ohio St. 160—*Haas v. Mutual Life Ins. Co. of New York*, 115 N.E. 1020, 95 Ohio St. 137—*Manning v. Lake-wood*, 113 N.E. 661, 94 Ohio St. 85—In re Arrasmith's Estate, 7 N.E.2d 826, 54 Ohio App. 391—*Shank v. Beers*, 26 Ohio Cir.Ct., N.S., 264.

Error proceedings and appeals in chancery cases distinguished

Ohio.—*Colby v. Price*, 177 N.E. 382, 39 Ohio App. 198—*State v. Deneen*, 28 Ohio Cir.Ct., N.S., 543, 7 Ohio App. 117.

What constitutes chancery case generally

(1) The test as to whether an action constitutes a chancery case in Ohio is whether the action or proceeding was originally recognized as a subject of chancery jurisdiction before the adoption of the code of civil procedure.—*Squire v. Bates*, 5 N.E.2d 690, 132 Ohio St. 161—In re Gurnea's Estate, 146 N.E. 308, 111 Ohio St. 715—*Clark v. Clark*, 144 N.E. 743, 110 Ohio St. 644.

(2) The appealability of a case to the court of appeals, as a chancery case does not depend on whether or not the right and remedy are created by statute, but on whether the basic principle of the statute is equitable in character and based on some equitable doctrine.—*Harper & Kirschten Shoe Co. v. S. & B. Shoe Co.*, 16 Ohio App. 387.

Particular cases held chancery cases

(1) Action brought under bulk sales law on an account, in which plaintiff prays for an accounting, that a receiver be appointed, and that one of the defendants be declared a trustee.—*Harper & Kirschten Shoe Co. v. S. & B. Shoe Co.*, supra.

(2) Action construing a will creating a charitable trust.—*Gearhart v. Richardson*, 142 N.E. 890, 109 Ohio St. 418.

(3) Action for an accounting of the earnings and income derived from a trust fund.—*Andrews Asphalt Paving Co. v. City of Middletown*, 14 Ohio App. 436.

(4) Action to enjoin county auditor from changing tax returns.—*Columbia Life Ins. Co. v. Hess*, 162 N.E. 466, 28 Ohio App. 107, affirmed *Hess v. Columbia Life Ins. Co.*, 156 N.E. 504, 116 Ohio St. 416.

(5) Action to foreclose mortgage of mechanic's lien on land.—*Hummer v. Parsons*, 146 N.E. 62, 111 Ohio St. 595.

(6) Action to quiet title.—*Clark v. Clark*, 144 N.E. 743, 110 Ohio St. 644.

(7) Other cases.—*Best v. McClure*, 141 N.E. 217, 108 Ohio St. 481.

Particular cases held not chancery cases

(1) Action by a creditor of a solvent estate against the executor thereof, to recover for service rendered and labor performed for the testate.—*Yarian v. Stouffer*, 14 Ohio App. 306.

(2) Action for money as a debt or as damages.—*Complete Bldg. Show Co. v. Albertson*, 121 N.E. 817, 99 Ohio St. 11.

(3) Proceeding in a juvenile court to have a child adjudged to be a dependent.—*State v. Hoffman*, 12 Ohio App. 341.

(4) Settlement in probate court of account of executor.—In re Gurnea's Estate, 146 N.E. 308, 111 Ohio St. 715.

(5) Settlement in probate court of account of testamentary trustee.—*Squire v. Bates*, 5 N.E.2d 690, 132 Ohio St. 161.

(6) Statutory proceeding challenging proceeding to incorporate village and praying for an injunction.—*Sackett v. Irish*, 11 Ohio App. 403.

(7) Statutory proceeding for the sale of an entailed estate.—*Clark v. Clark*, 144 N.E. 743, 110 Ohio St. 644.

(8) Suit, under statute, to recover back taxes illegally collected.—*McBride v. University Club*, 146 N.E. 804, 112 Ohio St. 69.

(9) Other cases.—In re Chipman's Estate, 13 Ohio App. 186—*State v. Deneen*, 28 Ohio Cir.Ct., N.S., 543, 544, 7 Ohio App. 117.

22. Ohio.—*State v. Blair*, 157 N.E. 801, 24 Ohio App. 413.

Only final judgments or final orders are reviewable.—*Colby v. Price*, 177 N.E. 382, 39 Ohio App. 198—*Rothman v. I. Seldin & Kneller*, 174 N.E. 794, 37 Ohio App. 408.

A final order is not reviewable unless it operates as a final determination of the rights of the parties in action and is thus included in the term "judgment."—*McMahon v. Keller*, 11 Ohio App. 410.

23. Ohio.—*Cincinnati Polyclinic v. Balch*, 111 N.E. 159, 92 Ohio St. 415

—*Kern v. Contract Cartage Co.*, 9 N.E.2d 869, 55 Ohio App. 481—*State v. Blair*, 157 N.E. 801, 24 Ohio App. 413—In re Vura, 26 Ohio Cir.Ct., N.S., 481—*Village of Euclid v. Bramley*, 20 Ohio Cir.Ct., N.S., 453.

Cases originating in other courts

The court of appeals has jurisdiction upon a proceeding in error from the court of common pleas in a case which originated in the municipal court of the city of Cincinnati.—*United Distillers Co. v. Zeisler*, 119 N.E. 139, 97 Ohio St. 62.

24. Cincinnati superior court

(1) An appeal will lie from the Cincinnati superior court to the court of appeals.—*Haas v. New York Mut. L. Ins. Co.*, 115 N.E. 1020, 95 Ohio St. 137. *Contra Postal Life Ins. Co. v. Harmeyer*, 2 Ohio App. 438, affirmed *Harmeyer v. Postal Life Ins. Co.*, 3 Ohio App. 104.

(2) A chancery case tried in the superior court of Cincinnati is appealable to the court of appeals of that district under the rules of procedure for appeals from the court of common pleas.—*Haas v. New York Mut. L. Ins. Co.*, supra.

25. Ohio.—*American Casualty Co. v. Howell*, 180 N.E. 544, 125 Ohio St. 62—*Marks v. Marks*, 16 N.E.2d 509, 58 Ohio App. 266—*Merrell v. Matt*, 182 N.E. 348, 42 Ohio App. 403—*Sharpling v. City of Lorain*, 178 N.E. 601, 40 Ohio App. 381—*Colby v. Price*, 177 N.E. 382, 39 Ohio App. 198—*Pettiford v. Village of Yellow Springs*, 176 N.E. 587, 38 Ohio App. 310—*Rothman v. I. Seldin & Kneller*, 174 N.E. 794, 37 Ohio App. 408—*Rendigs v. Devou*, 12 Ohio App. 316.

26. Ohio.—*Hirsch v. Conn*, 152 N.E. 185, 115 Ohio St. 87—*State ex rel. Vastine v. City of Cincinnati*, 11 N.E.2d 188, 56 Ohio App. 526. 15 C.J. p 1107 note 4.

Chancery cases

The court of appeals has no original jurisdiction in chancery cases.—*State v. Board of Education of Mad River Tp. Rural School Dist.*, 136 N.E. 196, 104 Ohio St. 360.

Injunctions

(1) The court of appeals has no original jurisdiction of suits for injunctions.—*State v. Zangerle*, 184 N.E. 32, 44 Ohio App. 65, affirmed 185 N.E. 69, 126 Ohio St. 247—*State v. Board of Education of Mad River Tp. Rural School Dist.*, 136 N.E. 196, 104 Ohio St. 360.

stitution they have original jurisdiction in quo warranto,²⁷ mandamus,²⁸ habeas corpus, prohibition, and procedendo. Such original jurisdiction, however, cannot be exercised in cases involving the proceedings of administrative officers, to the extent that the legislature has conferred exclusive jurisdiction to revise the proceedings of administrative officers upon the supreme court.²⁹

Certifying record to supreme court. Whenever the judges of a court of appeals find that a judgment upon which they have agreed conflicts with a judgment pronounced on the same question by another court of appeals, it is their duty to certify the record of the case to the supreme court;³⁰ but they are not authorized to certify the record where they find that their judgment conflicts with a judgment pronounced on the same question by a circuit court.³¹

Finality of judgments. Under the state constitution the judgments of the courts of appeals are final in all cases, except cases involving questions arising under the constitution of the United States or of the state,³² cases of which it has original jurisdiction,³³ cases of public or great general interest, in which the supreme court may direct the court of appeals to certify its record to that court,³⁴ and cases of felony.

§ 440. — Other Courts

The courts of common pleas, the courts of insolvency, and the general term of the superior court have appellate jurisdiction in certain cases.

Certain appellate jurisdiction with respect to inferior tribunals has been conferred upon the courts of common pleas,³⁵ the courts of insolvency,³⁶ and the general term of the superior court.³⁷ Where the probate and common pleas courts of a county have been combined, there is but one court, the court of common pleas, and an appeal from the probate division thereof, to the court itself, will not lie.³⁸

§ 441. Oklahoma

- a. Supreme court
- b. Other courts

a. Supreme Court

The supreme court of Oklahoma has appellate jurisdiction in all civil cases and a limited original jurisdiction, extending to a general superintending control over all inferior courts, commissions, and boards.

The supreme court is the highest court in Oklahoma's judicial system, and all other courts are inferior thereto.³⁹ Its appellate jurisdiction is derived exclusively from the constitution and laws

(2) Court of appeals could not, on original petition for mandamus, assume original jurisdiction of an injunction suit pending in court of common pleas.—*State v. Zangerle*, 184 N.E. 32, 44 Ohio App. 65, affirmed 185 N.E. 69, 126 Ohio St. 247.

Effect of cross petition or answer

Where the court of appeals would not have original jurisdiction of subject matter of cross petition or answer, if it were contained in a petition, it does not have such jurisdiction because contained in an answer or cross petition in response to a petition within its original jurisdiction.—*State ex rel. Vastine v. City of Cincinnati*, 11 N.E.2d 188, 56 Ohio App. 526.

27. Ohio.—*Hirsch v. Conn*, 152 N.E. 185, 115 Ohio St. 87.

28. Ohio.—*State ex rel. Vastine v. City of Cincinnati*, 11 N.E.2d 188, 56 Ohio App. 526.

Compelling industrial commission by mandamus to grant rehearing in compensation case held within jurisdiction of court of appeals.—*State ex rel. Nichols v. Gregory*, 198 N.E. 182, 130 Ohio St. 165.

29. Ohio.—*State v. Geiger*, 176 N.E. 84, 38 Ohio App. 253.

Exclusive jurisdiction held not conferred on supreme court by legislature.—*State ex rel. Nichols v.*

Gregory, 198 N.E. 182, 130 Ohio St. 165.

30. Ohio.—*Flury v. Central Pub. House of Reformed Church in U. S.*, 160 N.E. 679, 118 Ohio St. 154, affirming *Central Pub. House of Reformed Church in U. S. v. Flury*, 157 N.E. 794, 25 Ohio App. 214.—*Johnson v. Industrial Commission*, 22 N.E.2d 921, 61 Ohio App. 535.

15 C.J. p 1107 note 23.

Supreme court's jurisdiction of certified cases see § 438 supra.

Nature of conflict

(1) A court of appeals has no right to secure a review of its decisions by certifying record on ground that its judgment is in conflict with that of another court of appeals unless as a matter of fact there is an actual conflict on the same legal question.—*Johnson v. Industrial Commission*, 22 N.E.2d 921, 61 Ohio App. 535.

(2) Decisions held not conflicting.—*Johnson v. Industrial Commission*, supra.

31. Ohio.—*McLarren v. Johnson*, 110 N.E. 249, 91 Ohio St. 103.

32. Ohio.—*Cleveland-Akron Bag Co. v. Akron*, 113 N.E. 835, 93 Ohio St. 486.—*Moody, etc., Milling Co. v. Akron*, 113 N.E. 835, 93 Ohio St.

484.—*Columbus Mut. L. Ins. Co. v. Ford*, 107 N.E. 510, 90 Ohio St. 238. 15 C.J. p 1107 note 17.

33. Ohio.—*Columbus Mut. L. Ins. Co. v. Ford*, supra.

34. Ohio.—*Columbus Mut. L. Ins. Co. v. Ford*, supra.

35. Ohio.—*Caryl v. Scheiderer*, 22 N.E.2d 463, 61 Ohio App. 147.—*Weber v. Eppstein*, 170 N.E. 191, 34 Ohio App. 10.—*Lewis v. City of Columbus*, 25 Ohio N.P.N.S., 213.—*H. W. Schneider & Son v. Macintosh*, 16 Ohio N.P.N.S., 298.—*Mansfield v. Cole*, 16 Ohio N.P.N.S., 209.—*Mead v. Cush*, 13 Ohio N.P.N.S., 470.—*Stasel v. Rider*, 12 Ohio N.P.N.S., 141.—*Fouts v. Price & Co.*, 4 Ohio N.P.N.S., 55.

15 C.J. p 1107 note 25.

36. Ohio.—*State v. Hanousek*, 19 Ohio Cir.Ct. 303, 10 Ohio Cir.Dec. 516.

15 C.J. p 1107 note 26.

37. Ohio.—*Robert Mitchell Furniture Co. v. Cleveland, etc., R. Co.*, 9 Ohio S. & C.P. 674, 7 Ohio N.P. 640.

38. Ohio.—*Thompson v. Gusler*, 167 N.E. 896, 32 Ohio App. 236.

39. Okl.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37.

Finality of judgments

Neither constitution nor statutes

of the state.⁴⁰ Under the constitution the supreme court has appellate jurisdiction which is coextensive with the state, and extends to all civil cases at law and in equity.⁴¹

Original jurisdiction. The supreme court has no original jurisdiction other than that conferred by the constitution or statutes enacted pursuant thereto.⁴² Under the constitution its original jurisdiction extends to a general superintending control over all inferior courts⁴³ and all commissions and

boards⁴⁴ created by law. However, such superintending control can be exercised only in instances when such inferior courts⁴⁵ or commissions and boards⁴⁶ engage in the performance of judicial functions, or in the determination of any matter from which an appeal may be taken or to which certiorari, or other like writs, will lie. The supreme court also has power to issue writs of habeas corpus,⁴⁷ mandamus,⁴⁸ quo warranto,⁴⁹ certiorari,⁵⁰ prohibition,⁵¹ and such other remedial writs as may

give any state court jurisdiction to review, modify, override, or vacate supreme court's final judgment under guise of any writ or process, and any attempt by any state court to do so is void, and must be so adjudged by supreme court, when brought to it for review.—*Dancy v. Owens*, *supra*.

40. Okl.—*In re Leaf's Deed*, 70 P. 2d 75, 180 Okl. 444—*Campbell v. Hickory*, 278 P. 1088, 137 Okl. 235. 15 C.J. p 1107 note 28.

Judgments of a district court on appeals from decisions of county commissioners are reviewable.—*Garvin County v. Lindsay Bridge Co.*, 124 P. 324, 32 Okl. 784.

Judgments of county court on appeals from decisions of county boards, commissions, and officers are not reviewable.—*McAlester Trust Co. v. Watson*, 146 P. 586, 45 Okl. 607—15 C.J. p 1107 note 28 [c]—[e].

The approval of an Indian's conveyance by a county court as required by an act of congress is not reviewable in the supreme court.—*In re Leaf's Deed*, 70 P.2d 75, 180 Okl. 444—*In re Coachman's Estate*, 187 P. 465, 77 Okl. 155.

41. Okl.—*Robertson v. Bozarth*, 209 P. 742, 87 Okl. 102. 15 C.J. p 1107 note 28, p 1108 note 30.

Scope of review

Upon error to the supreme court for review of the action of a district court in a case brought there upon petition in error and bill of exceptions, only such matters as were properly before and acted upon by that court can be considered.—*Muskogee Electric Traction Co. v. Waterson*, 218 P. 796, 92 Okl. 183.

42. Okl.—*Seay v. EMis County*, 112 P. 1033, 27 Okl. 515. 15 C.J. p 1108 note 33.

Laws providing for elections for the creation of new counties held not to confer original jurisdiction on the supreme court as to matters arising prior to an election.—*Gulick v. Linn*, 216 P. 460, 90 Okl. 201.

Matters involving real estate titles, or the right to possession of real estate, are not within the su-

preme court's original jurisdiction.—*Bilby v. Harrison*, 227 P. 407, 100 Okl. 67.

43. Okl.—*State v. Rowe*, 300 P.2d 727, 149 Okl. 240—*Redcorn v. District Court of Eighth Judicial Dist.*, 284 P. 1113, 141 Okl. 237—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Chambers*, 220 P. 890, 96 Okl. 78—*Robertson v. Bozarth*, 209 P. 742, 87 Okl. 102. 15 C.J. p 1108 note 34.

The criminal court of appeals is subject to the superintending control of the supreme court.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37.

Preventing judge from performing duties

The supreme court cannot issue a writ of superintending control to prevent a judge who has not been removed or suspended in the manner authorized by law from performing his official duties during his appeal from a felony conviction.—*State ex rel. Murray v. Bozarth*, 29 P.2d 579, 167 Okl. 321.

44. Okl.—*McAlester Gas & Coke Co. v. Corporation Commission*, 224 P. 698, 101 Okl. 268—*Robertson v. Bozarth*, 209 P. 742, 87 Okl. 102—*State v. Kight*, 152 P. 362, 49 Okl. 202.

This power is distinct from the appellate jurisdiction of the court.—*State v. Kight*, *supra*.

45. Okl.—*Haddock v. Johnson*, 194 P. 1077, 80 Okl. 250.

Approval of Indian's conveyance

(1) The approval of certain conveyances by Indians by a county court as required by an act of congress does not constitute an exercise of any judicial function, and neither an appeal nor certiorari will lie from such action of the county court.—*Haddock v. Johnson*, *supra*.

(2) But congress has since provided for an appeal to the district courts in such cases.—*In re Leaf's Deed*, 70 P.2d 75, 180 Okl. 444.

46. Okl.—*State v. Crockett*, 206 P. 816, 86 Okl. 124—*Haddock v. Johnson*, 194 P. 1077, 80 Okl. 250—*State v. Pruett*, 144 P. 365, 43 Okl. 766—*Homesteaders v. McCombs*, 103 P. 691, 24 Okl. 201, 38 L.R.A.N.S., 1000.

47. Okl.—*Starkweather v. Kemp*, 88 P.2d 1045, 18 Okl. 28.

48. Okl.—*State v. Short*, 240 P. 700, 113 Okl. 187—*Robertson v. Bozarth*, 209 P. 742, 87 Okl. 102—*Clark v. Warner*, 204 P. 929, 85 Okl. 153—*State v. Ross*, 183 P. 918, 76 Okl. 11—*Starkweather v. Kemp*, 88 P. 1045, 18 Okl. 28. 15 C.J. p 1108 note 38.

49. Okl.—*State v. Rowe*, 300 P. 727, 149 Okl. 240. 15 C.J. p 1108 note 39.

While the ancient writ is obsolete, the constitution, in conferring upon the supreme court the power to issue the writ of quo warranto, confers upon the court the power to entertain civil actions brought under statutes authorizing the granting of relief similar to that obtainable under the ancient writ.—*Jarman v. Mason*, 229 P. 459, 102 Okl. 278.

50. Okl.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*Gregg v. Hughes*, 214 P. 904, 89 Okl. 168. 15 C.J. p 1108 note 40.

Limits of power

Supreme court can issue writ of certiorari for jurisdictional errors only.—*Common School Dist. No. 32 v. Independent School Dist. No. 56*, 181 P. 938, 75 Okl. 70—15 C.J. p 1108 note 40 [a].

51. Okl.—*State ex rel. Mudd v. Osage County Court*, 34 P.2d 244, 168 Okl. 470—*State ex rel. School Dist. 40 v. Walden*, 28 P.2d 546, 167 Okl. 144, certiorari denied *Walden v. State of Oklahoma ex rel. School Dist. No. 40*, *Bryon County, Okl.*, 54 S.Ct. 772, 292 U.S. 639, 78 L.Ed. 1491—*Redcorn v. District Court of Eighth Judicial Dist.*, 284 P. 1113, 141 Okl. 237—*State v. Mathews*, 273 P. 352, 134 Okl. 288—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1—*Harris v. Hudson*, 250 P. 532, 122 Okl. 171, certiorari denied *Hudson v. Harris*, 47 S.Ct. 336, 273 U.S. 743, 71 L.Ed. 869 and *Owens v. Harris*, 47 S.Ct. 336, 273 U.S. 743, 71 L.Ed. 869—*State v. Chambers*, 220 P. 890, 96 Okl. 78.

In criminal matters

(1) The supreme court does not.

be provided by law,⁵² and to hear and determine the same, and may also exercise such other and further jurisdiction as may be conferred on it by law.⁵³ Under the supreme court rules, in all original actions or proceedings instituted therein briefs must be filed,⁵⁴ and petitioner must state fully, by affidavit, the reason why the action or proceeding is brought in the supreme court instead of in one of the inferior courts of concurrent jurisdiction.⁵⁵ It will ordinarily exercise such jurisdiction only in matters of public importance, or when a refusal to entertain jurisdiction would work a great wrong.⁵⁶

Ancillary jurisdiction. The supreme court has power to issue injunctions in support of its decisions.⁵⁷

have jurisdiction to issue the writ of prohibition against the district court to prevent trial of a criminal case in view of the constitution and statutes giving the court of criminal appeals exclusive appellate jurisdiction in criminal cases.—*Jeter v. District Court of Tulsa County*, 206 P. 331, 87 Okl. 3.

(2) But the criminal court of appeals may be prevented by a writ of prohibition from releasing on rule to show cause why habeas corpus should not be issued one imprisoned by supreme court for contempt.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1.

52. Okl.—*State v. Rowe*, 300 P. 727, 149 Okl. 240.
15 C.J. p 1108 note 42.

Injunction

(1) The supreme court has not original jurisdiction to issue writs of injunction where the relief prayed is purely injunctive.—*State v. Kenner*, 97 P. 258, 21 Okl. 817—15 C.J. p 1108 note 42 [a].

(2) The supreme court will not consider whether it has jurisdiction to grant purely injunctive relief in a case in which there is no occasion for the exercise of such jurisdiction.—*State ex rel. Smith v. State Election Board*, 36 P.2d 497, 169 Okl. 163.

53. Okl.—*In re Gross Production Tax of Wolverine Oil Co.*, 154 P. 362, 53 Okl. 24.
15 C.J. p 1108 note 33 [a], [c].

54. Okl.—*State v. Linn*, 176 P. 224, 71 Okl. 177.

55. Okl.—*Kelly v. Anderson*, 9 P.2d 948, 158 Okl. 158—*Presbury v. County Court of Kay County*, 213 P. 311, 88 Okl. 273—*In re School Budgets for 1919-1921 for Dist. No. 1, City of Coalgate*, 209 P. 325,

87 Okl. 127—*Chambers v. Walker*, 206 P. 202, 85 Okl. 289.
15 C.J. p 1108 notes 33 [b], 39 [b].

Attorney general held subject to rule
Okl.—*State v. McCullough*, 168 P. 413, 67 Okl. 8.

56. Okl.—*Jarman v. Mason*, 229 P. 459, 102 Okl. 278.

Constitutionality of general statute
Supreme court in its discretion will assume original jurisdiction to determine constitutionality of act of general public importance. In such case only constitutionality of primary purpose of act is properly before the court, and not the operative provisions of act, unless some specific action toward their enforcement has been taken and such matter is also properly presented.—*State v. Mathews*, 273 P. 352, 134 Okl. 288.

Moot questions

The supreme court will not exercise its original jurisdiction merely for the purpose of passing upon a moot question.—*Adams v. Ogden*, 40 P.2d 677, 170 Okl. 429—*Schneider v. Swindall*, 280 P. 412, 138 Okl. 66.

Rule applied to writs of

(1) *Mandamus*.—*Kelly v. Anderson*, 9 P.2d 948, 158 Okl. 158—*State v. Swan*, 281 P. 803, 139 Okl. 204—*State v. Short*, 240 P. 700, 113 Okl. 187—*State v. Crockett*, 206 P. 816, 86 Okl. 124—*Clark v. Warner*, 204 P. 929, 85 Okl. 153—*State v. Ross*, 183 P. 918, 76 Okl. 11—*State v. Lyon*, 165 P. 419, 63 Okl. 285—*State v. Pruett*, 144 P. 365, 43 Okl. 766.

(2) *Prohibition*.—*State v. Mathews*, 273 P. 352, 134 Okl. 288.

Where respondent admits right to writ of prohibition on an original application to the supreme court, the court will grant writ, if application reasonably supports it.—*State ex rel. Risher v. District Court of Seminole County*, 27 P.2d 826, 167 Okl. 43.

b. Other Courts

The Oklahoma criminal court of appeals is a statutory court of special and limited appellate jurisdiction. The district and superior courts have appellate jurisdiction in certain cases.

Under the Oklahoma constitution, authority is granted to the legislature to confer appellate jurisdiction in criminal cases on a criminal court of appeals.⁵⁸ The criminal court of appeals, created pursuant to the permissive authority thus vested in the legislature, is not a constitutional court.⁵⁹ Its jurisdiction exists and can be exercised solely by virtue of statute⁶⁰ and is special and limited.⁶¹ It has exclusive appellate jurisdiction in criminal causes,⁶² but no civil jurisdiction whatever.⁶³ With a few exceptions, its jurisdiction is limited to appeals⁶⁴ and proceedings in aid thereof.⁶⁵ In aid

57. Okl.—*State v. Chambers*, 220 P. 890, 96 Okl. 78.

58. Okl.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1.

59. Okl.—*State v. Rowe*, 300 P. 727, 149 Okl. 240—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1.

60. Okl.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1.

Issuance of extraordinary writs

If the statute purports to give the criminal court of appeals power to issue extraordinary writs, the legislature has the right to regulate the issuance thereof and the power and authority of the court acting thereon.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1.

61. Okl.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1—*Eubanks v. Cole*, 109 P. 742, 4 Okl. Cr. 38.

62. Okl.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1—*Jeter v. District Court of Tulsa County*, 206 P. 331, 87 Okl. 3—*State v. Brown*, 126 P. 245, 8 Okl. Cr. 40.
15 C.J. p 1108 notes 45, 48.

63. Okl.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1—*Buchanan v. State*, 236 P. 903, 30 Okl. Cr. 362.
15 C.J. p 1108 note 50.

64. Okl.—*Langley v. State*, 12 P.2d 254, 53 Okl. Cr. 401—*Crump v. State*, 124 P. 632, 7 Okl. Cr. 535.

65. Okl.—*Dancy v. Owens*, 258 P. 879, 126 Okl. 37—*State v. Davenport*, 256 P. 340, 125 Okl. 1.

of its appellate jurisdiction it may issue writs of prohibition⁶⁶ or writs of mandamus⁶⁷ to inferior courts, but it is without power to issue writs of mandamus to public officers.⁶⁸ While it is without power to review the final judgments of the supreme court,⁶⁹ within the limits of its own jurisdiction its decisions are final.⁷⁰ It is the duty of the criminal court of appeals to see that a uniform system of criminal jurisprudence is followed.⁷¹

The appellate jurisdiction of courts in criminal cases generally is considered in the C.J.S. title Criminal Law § 1636, also 17 C.J. p 21 note 75-p 23 note 82.

Advisory opinions. The statute authorizing the governor to require the opinion of the judges of the criminal court of appeals, or any of them, upon the statement furnished by the judge of a court at which a conviction requiring a judgment of death is had contemplates an advisory opinion⁷² as to whether there has been an observance of all the formalities of law essential to the taking of human life, and whether the trial, conviction, and sentence of death have been in accord-

ance with law,⁷³ which will be given only where an appeal has not been taken from the judgment and sentence of death, and the time for appeal has expired.⁷⁴

The district and superior courts have such appellate jurisdiction as is vested in them by statute.⁷⁵ A case pending on appeal in the county court from a justice of the peace court may be transferred on motion of plaintiff to the superior court.⁷⁶

§ 442. Oregon

Decisions relating to the Oregon supreme and circuit courts will be discussed in the sections immediately following.

§ 443. — Supreme Court

The Oregon supreme court, a constitutional court, has jurisdiction to revise the final decisions of the circuit court, and has limited original jurisdiction.

The supreme court of Oregon is a constitutional court.⁷⁷ It has jurisdiction to review the final decisions of the circuit court;⁷⁸ and, in its discretion,⁷⁹ it may take original jurisdiction in manda-

66. Okl.—Herndon v. Hammond, 115 P. 775, 28 Okl. 616—Corley v. Adair County Ct., 134 P. 835, 10 Okl.Cr. 104.
15 C.J. p 1108 note 52.

67. Okl.—Moore v. Taylor, 215 P. 965, 24 Okl.Cr. 80—Allen v. Huston, 165 P. 743, 13 Okl.Cr. 522.
15 C.J. p 1108 note 53.

Disqualifying trial judge

The criminal court of appeals has power to grant a petition for a writ of mandamus on motion of the state to disqualify a judge from trying a criminal case.—State v. Brown, 126 P. 245, 8 Okl.Cr. 40, Ann.Cas.1914C 394.

68. Okl.—Moore v. Taylor, 215 P. 965, 24 Okl.Cr. 80.

69. Okl.—Dancy v. Owens, 258 P. 879, 126 Okl. 37—State v. Davenport, 256 P. 340, 125 Okl. 1.

70. Okl.—Dancy v. Owens, 258 P. 879, 126 Okl. 37.

71. Okl.—State v. Davis, 130 P. 962, 9 Okl.Cr. 84, 44 L.R.A.,N.S., 1083.

72. Okl.—In re Opinion of the Judges, 195 P. 149, 18 Okl.Cr. 366.
15 C.J. p 1109 note 54 [c].

73. Okl.—In re Opinion of the Judges, 36 P.2d 310, 56 Okl.Cr. 188—In re Opinion of the Judges, 195 P. 146, 18 Okl.Cr. 360—In re Opinion of the Judges, 118 P. 156, 6 Okl. Cr. 210.

74. Okl.—In re Opinion of the Judges, 40 P.2d 692, 56 Okl.Cr. 372—In re Opinion of the Judges, 36

P.2d 310, 56 Okl.Cr. 188—In re Opinion of the Judges, 31 P.2d 159, 55 Okl.Cr. 381—In re Opinion of the Judges, 14 P.2d 956, 54 Okl.Cr. 103—In re Opinion of the Judges, 14 P.2d 955, 54 Okl.Cr. 101—In re Opinion of the Judges, 14 P.2d 238, 54 Okl.Cr. 56—In re Opinion of the Judges, 277 P. 283, 43 Okl.Cr. 40—In re Opinion of the Judges, 251 P. 757, 36 Okl.Cr. 38—In re Opinion of the Judges, 248 P. 350, 35 Okl.Cr. 39—In re Opinion of the Judges, 244 P. 50, 33 Okl.Cr. 354—In re Opinion of the Judges, 242 P. 539, 33 Okl.Cr. 250—In re Opinion of the Judges, 195 P. 146, 18 Okl.Cr. 360—In re Opinion of the Judges, 189 P. 198, 17 Okl.Cr. 369.
15 C.J. p 1109 note 55.

Reason for rule

"To render an advisory opinion where the time given for an appeal has not yet expired, and where an appeal may be perfected, would be to prejudice the case upon an ex parte proceeding, which might be brought before the court upon an appeal."—In re Opinion of the Judges, 40 P.2d 692, 693, 56 Okl.Cr. 372.

Opinion rendered before expiration of time for appeal

Okl.—In re Opinion of the Judges, 195 P. 149, 18 Okl.Cr. 366.

75. Probate matters

The superior courts may, by statute, be given appellate jurisdiction over the county courts in probate matters, but such appellate jurisdiction does not confer supervisory con-

trol over the county courts.—Swain v. Swan, 294 P. 153, 147 Okl. 33.
Review of inferior courts see supra § 283.

75. Okl.—Yarborough v. Richardson, 131 P. 680, 38 Okl. 11—Oklahoma F. Ins. Co. v. Phillip, 111 P. 334, 27 Okl. 234.

77. A permanent institution

Or.—Warren Const. Co. v. Grant, 2 P.2d 1118, 137 Or. 410, denying rehearing 299 P. 686, 137 Or. 410.

78. Or.—In re Winters' Estate, 80 P. 2d 714, 159 Or. 637—McCargar v. Moore, 175 P. 77, 89 Or. 597, granting motion to recall mandate 173 P. 258, 88 Or. 682.

Place where appeals heard

Or.—Hayes v. Cummings, 235 P. 304, 115 Or. 13.

Prior to constitutional amendment of 1910, the supreme court had jurisdiction only to revise final judgments of the circuit court.—In re Winters' Estate, 80 P.2d 714, 159 Or. 637—15 C.J. p 1109 note 56.

79. Or.—State v. State Industrial Accident Commission, 237 P. 680, 115 Or. 484.

"We should carefully consider First, the condition of the business of this court; second, the hardships to the petitioner incident to a denial of the writ; third, whether the petitioner has any plain, speedy, adequate remedy in the circuit court; and, fourth, whether he has a remedy by appeal."—State v. Plummer, 189 P. 405, 406, 97 Or. 518—Ex parte Jerman, 112 P. 416, 418, 57 Or. 387.

mus,⁸⁰ quo warranto,⁸¹ and habeas corpus⁸² proceedings. Aside from these instances the supreme court is a court of review only,⁸³ although in order to preserve its jurisdiction over the subject of a suit on appeal, it may, as an incident to its appellate jurisdiction, issue a temporary injunction,⁸⁴ but such power should be exercised only upon the most urgent necessity.⁸⁵

§ 444. — Circuit Courts

The Oregon circuit courts have appellate jurisdiction and supervisory control over all inferior officers and tribunals.

Under the Oregon constitution all judicial power, authority, and jurisdiction not vested thereby, or by laws consistent therewith, in other courts, belong to the circuit courts; and they have appellate jurisdiction and supervisory control over all other inferior courts, officers, and tribunals.⁸⁶

80. Or.—In re Winters' Estate, 80 P.2d 714, 159 Or. 637—State v. State Industrial Accident Commission, 237 P. 680, 115 Or. 484—State v. Plummer, 189 P. 405, 97 Or. 518—Central Oregon Irr. Co. v. Public Service Commn., 157 P. 1070, 80 Or. 607.

81. Or.—In re Winters' Estate, 80 P. 2d 714, 159 Or. 637—Central Oregon Irr. Co. v. Public Service Commn., 157 P. 1070, 80 Or. 607.

82. Or.—In re Winters' Estate, 80 P.2d 714, 159 Or. 637—Central Oregon Irr. Co. v. Public Service Commn., 157 P. 1070, 80 Or. 607—Ex p. Jerman, 112 P. 416, 57 Or. 387.

83. Or.—In re Winters' Estate, 80 P.2d 714, 159 Or. 637—Rorvick v. Astoria Box & Paper Co., 299 P. 333, 136 Or. 381—State v. Dormitzer, 261 P. 428, 123 Or. 172—State v. Kozier, 247 P. 806, 118 Or. 556—McIntosh Livestock Co. v. Buffington, 217 P. 635, 108 Or. 358—McCargar v. Moore, 175 P. 77, 89 Or. 597, granting motion to recall mandate 173 P. 258, 88 Or. 682—Wallace v. Portland Ry., Light & Power Co., 170 P. 283, 88 Or. 219.

15 C.J. p 1109 note 59 [a].

A writ of review cannot be granted by the supreme court.—State v. Kozier, 247 P. 806, 118 Or. 556.

Organization of drainage districts

In determining regularity of proceedings in organization of drainage and irrigation districts, supreme court is not a court of original or concurrent jurisdiction, but is strictly an appellate court.—In re Scappoose Drainage Dist., 239 P. 193, 115 Or. 541, denying petition 237 P. 1117, 115 Or. 541, which modified 237 P. 684, 115 Or. 54.

84. Or.—Noyes-Holland Logging Co. v. Pacific Live Stock & Lumber Co., 165 P. 236, 84 Or. 386—Livesley v. Krebs Hop Co., 97 P. 718, 57 Or. 352, 107 P. 460, 112 P. 1.

85. Or.—Noyes-Holland Logging Co. v. Pacific Live Stock & Lumber Co., 165 P. 236, 84 Or. 386.
15 C.J. p 1109 note 56 [c].

86. Or.—State v. Kozier, 247 P. 806, 118 Or. 556.

87. Pa.—In re White Tp. School Dist., 150 A. 744, 300 Pa. 422.

88. Pa.—Apex Hosiery Co. v. Philadelphia County, 200 A. 598, 331 Pa. 177.

Powers of king's bench

(1) The supreme court has all the powers of the English court of king's bench.—Apex Hosiery Co. v. Philadelphia County, supra.—In re Carbon County Judicial Vacancy, 141 A. 249, 292 Pa. 300—15 C.J. p 1109 note 64 [a].

(2) Sending a judge to sit in an inferior court was undoubtedly within the power of king's bench and is therefore within the power of the supreme court.—In re Carbon County Judicial Vacancy, supra.

The promulgation of a rule of practice as to the time of filing answer to a writ of scire facias is within the power of the supreme court.—Vinnacombe v. City of Philadelphia, 147 A. 826, 297 Pa. 564.

Nonjudicial duties cannot, by virtue of an express constitutional inhibition, be conferred upon the supreme court.—Malett v. Kaler, 22 Pa. Dist. & Co. 20.

89. Pa.—In re Carbon County Judicial Vacancy, 141 A. 249, 292 Pa. 300.

§ 445. Pennsylvania

The Pennsylvania appellate courts cannot assume duties and functions delegated exclusively to other tribunals by the legislature.

The appellate courts of Pennsylvania cannot assume duties and functions delegated exclusively to other tribunals by the legislature.⁸⁷

§ 446. — Supreme Court

The Pennsylvania supreme court has appellate jurisdiction in all cases provided by law and it also has limited original jurisdiction.

The Pennsylvania supreme court possesses all the powers conferred upon it by the constitution and by valid statutes,⁸⁸ and the powers conferred by statute can be taken away only by express words or irresistible implication.⁸⁹ Under the constitution it has appellate jurisdiction by appeal,⁹⁰ certiorari,⁹¹ or writ of error in all cases provided by law.⁹² By statute the supreme court has appellate jurisdiction of pleas, complaints, and causes

90. Pa.—City of Duquesne v. Fincke, 112 A. 130, 269 Pa. 112.
15 C.J. p 1109 note 71.

Cases outside the superior court's appellate jurisdiction may be appealed directly to the supreme court.—Appeal of Walker, 144 A. 288, 294 Pa. 385—City of Duquesne v. Fincke, 112 A. 130, 269 Pa. 112—15 C.J. p 1109 note 71 [c], [d].

Appeals involving title or right to public office are within the supreme court's jurisdiction.—In re Appointment of Two Directors for Wells Tp. School Dist., 94 Pa.Super. 583—15 C.J. p 1110 note 83 [a].

Allegheny county court

One convicted of wife desertion in the Allegheny county court may appeal directly to the supreme court, in the absence of a statutory right of appeal to the superior court.—Commonwealth v. Speer, 110 A. 268, 267 Pa. 129.

91. Pa.—City of Duquesne v. Fincke, 112 A. 130, 269 Pa. 112.
15 C.J. p 1109 note 72.

When the right of appeal is denied by the legislature, the scope of the supreme court's inquiry on certiorari is limited to jurisdictional questions.—In re White Tp. School Dist., 150 A. 744, 300 Pa. 422.

92. To what court's power extends

The judicial authority of the supreme court extends to the review and correction of all proceedings of all inferior courts, except where such review is expressly excluded by statute, and it may issue all sorts of process, and use and adopt all sorts of legal forms necessary, to give effect to such supervisory authority.—Schmuck v. Hartman, 70 A. 1091, 222 Pa. 190.

removed from any other court of the state, and may examine and correct all manner of errors of the justices, magistrates, and courts of the state in process, proceedings, judgments, and decrees, and may reverse, modify, or affirm the same.⁹³ As appears in § 447 *infra*, certain cases are committed to the exclusive and final appellate jurisdiction of the superior court, including appeals from the common pleas, or orphans' courts involving less than an amount fixed by statute. Thus, while appeals lie directly to the supreme court from the decisions of the common pleas, or orphans' courts, if the amount in controversy exceeds the amount thus fixed,⁹⁴ the supreme court's jurisdiction does not extend to appeals involving less than such amount.⁹⁵ Even though a case falls within the general class of cases within the exclusive and

final appellate jurisdiction of the superior court, an appeal may be taken to the supreme court if the case involves the construction or application of the state or federal constitution, or a statute or treaty of the United States;⁹⁶ or if the superior court, or a judge of the supreme court allows the appeal;⁹⁷ or if the jurisdiction of the superior court is in issue. Appeals erroneously taken to the supreme court, instead of to the superior court, must be remitted to the latter court.⁹⁸

Original jurisdiction. Under the state constitution the judges of the supreme court have original jurisdiction in cases of injunction where a corporation is a party defendant,⁹⁹ of mandamus to courts of inferior jurisdiction,¹ of quo warranto as to all officers of the commonwealth whose jurisdiction extends over the state,² and of habeas

93. Pa.—Schmuck v. Hartman, supra. 15 C.J. p 1110 note 76.

94. Pa.—Hoffer v. Reading Co., 134 A. 415, 287 Pa. 120. 15 C.J. p 1110 note 79.

95. Pa.—In re Wilbur's Estate, 5 A.2d 362, 334 Pa. 79.—In re Schuetz' Estate, 172 A. 865, 315 Pa. 105, remitted, see 174 A. 832, 114 Pa. Super. 602.—In re Everson's Estate, 163 A. 520, 309 Pa. 291. 15 C.J. p 1110 note 78.

Determination of amount

(1) In determining whether a case involves the necessary jurisdictional amount only the amount really in controversy is considered.—School Dist. of Baldwin Tp. v. Pittsburgh Terminal Coal Corporation, 194 A. 900, 328 Pa. 17, transferred, see 200 A. 885, 132 Pa. Super. 148.—In re Schuetz' Estate, 172 A. 865, 315 Pa. 105, remitted, see 174 A. 832, 114 Pa. Super. 602.

(2) In actions involving title or possession of property, jurisdiction is determined by the certificate of the judge as to value of the interest in controversy.—In re McGlinn's Estate, 113 A. 548, 270 Pa. 273.—Green v. Duffee, 80 A. 886, 231 Pa. 393.

(3) In actions involving the payment of money, jurisdiction is conclusively determined by the amount of the judgment or award.—Miller v. Myers, 149 A. 745, 299 Pa. 482.—Nick v. Craig, 148 A. 709, 298 Pa. 411.—Sharp v. Keiser, 140 A. 772, 292 Pa. 142.—In re McGlinn's Estate, 113 A. 548, 270 Pa. 273.

(4) Ordinarily the verdict as rendered or as diminished by remittitur will be treated as correct amount of judgment, and the judgment cannot be raised above amount of verdict by including interest from date of verdict to date of judgment in the absence of special circumstances ap-

pearing in the record and warranting inclusion of interest in judgment.—Sharp v. Keiser, supra.

(5) If plaintiff recovers nothing the amount in controversy, is determined by the amount claimed in the statement of claim, or declaration, together with interest thereon.—Cara v. Newark Fire Ins. Co., 163 A. 289, 309 Pa. 71.

(6) The separate claims of separate appellants cannot be added.—In re Schuetz' Estate, 172 A. 865, 315 Pa. 105, remitted, see 174 A. 832, 114 Pa. Super. 602.—In re McGlinn's Estate, 113 A. 548, 270 Pa. 273.—15 C.J. p 1110 note 78 [c].

(7) Nor can separate claims of the same appellant be added.—In re McGlinn's Estate, supra.

(8) However, two or more awards to the same appellant in the same proceeding based on claims of the same nature may be treated as one.—Miller v. Myers, 149 A. 745, 299 Pa. 482.

(9) Other cases involving determination of amount see 15 C.J. p 1110 note 78 [e], [f].

Companion suits

Certificate that amount in controversy in partition suit exceeded twenty-five hundred dollars did not give supreme court jurisdiction of companion suit between same parties based on same evidence but in which separate decree was entered.—Zucaro v. Pepe, 149 A. 650, 299 Pa. 354.

96. Only unsettled questions, and not questions which have been fully considered, and more than once definitively settled, are contemplated by this provision.—In re Boyle, 42 A. 1025, 190 Pa. 577, 45 L.R.A. 399.

97. The construction of an important statute being involved, the supreme court allowed an appeal from the superior court.—Gorges v. Great-

er Adelphi Building & Loan Ass'n, 185 A. 815, 322 Pa. 569, reversing 182 A. 804, 120 Pa. Super. 322.

98. Pa.—In re Everson's Estate, 163 A. 520, 309 Pa. 291.—In re Audit of Finances of School Dist. of Manor Tp., 128 A. 251, 281 Pa. 116.—In re McGlinn's Estate, 113 A. 548, 270 Pa. 273.—In re Shoemaker, 34 A. 627, 175 Pa. 159.—Christner v. John, 33 A. 107, 171 Pa. 527.

99. Pa.—Philadelphia Gas Works Co. v. City of Philadelphia, 1 A.2d 156, 331 Pa. 321.—Wilson v. Philadelphia County, 179 A. 553, 319 Pa. 47.—Wentz v. City of Philadelphia, 151 A. 833, 301 Pa. 261.—Raff v. City of Philadelphia, 100 A. 815, 256 Pa. 312.

15 C.J. p 1109 notes 65, 66.

Action by the court is discretionary and relief will be granted only where the corporation is a proper party defendant and the necessity for action is apparent.—Wentz v. City of Philadelphia, 151 A. 833, 301 Pa. 261.

Municipal, as well as private, corporations, are subject to the power granted.—Wentz v. City of Philadelphia, supra.—Wheeler v. Philadelphia, 77 Pa. 338.

Particular matters not considered in original proceedings.—Davidowitz v. Philadelphia County, 187 A. 585, 324 Pa. 17.

1. Pa.—Blaxis v. Bechtel, 100 A. 967, 256 Pa. 529.

15 C.J. p 1109 note 68.

2. Pa.—Commonwealth v. Glass, 145 A. 278, 295 Pa. 291.

15 C.J. p 1109 note 69.

Judges

(1) The supreme court has jurisdiction of an original quo warranto proceeding to oust the judges of the Philadelphia municipal court.—Com-

corpus; but they cannot exercise any other original jurisdiction.³ When the supreme court assumes jurisdiction in an original proceeding involving the same issues involved in a suit pending in a lower court, it may remove such suit from the lower court and dispose of it.⁴

§ 447. — Superior Court

The appellate and original jurisdiction of the superior court is purely statutory.

The jurisdiction of the Pennsylvania superior court is purely statutory.⁵ It is not a fact finding tribunal and does not weigh evidence,⁶ and has no original jurisdiction except that under the provisions of the statute it, or any judge thereof, has full power and authority to issue writs of habeas corpus returnable therein. It has exclusive and final appellate jurisdiction of all appeals in: (1) All proceedings in the court of quarter sessions of the peace or before any judge thereof, except cases involving the right to a public office.⁷ (2) All proceedings in the court of oyer and terminer and general jail delivery, except cases of felonious homicide.⁸ (3) Any action, claim, distribution, or dispute of any kind in the common pleas, at law or in equity, whether originating therein or reaching that court by appeal or certiorari from a jus-

tice of the peace or alderman, or magistrate, or any single claim, any dispute, distribution or other proceeding in the orphans' court, if the amount or value really in controversy is not greater than an amount fixed by statute,⁹ and if also the subject of the controversy is either money, chattels real or personal, or the possession of or title to real property, and if also the action, or other proceeding, is not brought, authorized, or defended by the attorney general in his official capacity. Appeals in proceedings for divorce must be taken to the superior court.¹⁰

The superior court has broad statutory powers in disposing of cases appealed thereto.¹¹ Appeals erroneously taken to the superior court, instead of the supreme court, must be certified to the latter court.¹² The superior court has no power to review the action of the supreme court in directing that an adjudication of the orphans' court should be open so that additional testimony might be taken.¹³

§ 448. — Other Courts

The Pennsylvania common pleas courts, the court of quarter sessions, and the county courts, may have appellate jurisdiction in certain cases.

The courts of common pleas,¹⁴ quarter sessions,¹⁵

monwealth ex rel. Kelley v. Brown, 193 A. 258, 327 Pa. 136.

(2) The president judge of the Philadelphia municipal court is an officer whose jurisdiction extends over the state.—Commonwealth v. Glass, 145 A. 278, 295 Pa. 291.

(3) Other judges see 15 C.J. p 1109 note 69 [a].

3. Pa.—Gliwa v. U. S. Steel Corporation, 185 A. 584, 322 Pa. 225, certiorari denied 57 S.Ct. 117, 299 U. S. 593, 81 L.Ed. 437. 15 C.J. p 1109 note 70.

4. Pa.—Philadelphia Gas Works Co. v. City of Philadelphia, 1 A.2d 156, 331 Pa. 321.

5. Pa.—Appeal of Weinbach, 175 A. 500, 316 Pa. 333—Appeal of Walker, 144 A. 288, 294 Pa. 385—City of Duquesne v. Finke, 112 A. 130, 269 Pa. 112—Commonwealth v. Atlantic Refining Co., 67 Pa.Super. 551. 15 C.J. p 1110 note 82 [a], [b].

Appeals involving title or right to public office are not within the superior court's jurisdiction.—In re Appointment of Two Directors for Wells Township School District, 94 Pa.Super. 583—15 C.J. p 1110 note 83 [a].

The action of a county salary board in refusing to fix the salary of a deputy sheriff would ordinarily be outside the superior court's ju-

isdiction.—Appeal of Ludwick, 178 A. 339, 117 Pa.Super. 471.

6. Pa.—Automobile Banking Corporation v. Draper, 195 A. 441, 129 Pa.Super. 501.

7. Pa.—In re Audit of Finances of School Dist. of Manor Tp., 126 A. 251, 281 Pa. 116. 15 C.J. p 1110 note 83.

8. Pa.—In re Shoemaker, 34 A. 627, 175 Pa. 159.

9. Pa.—In re Schuetz' Estate, 172 A. 865, 315 Pa. 105, remitted, see 174 A. 832, 114 Pa.Super. 602—In re McGlinn's Estate, 113 A. 548, 270 Pa. 273.

15 C.J. p 1110 note 86, p 1111 note 90. Determination of jurisdictional amount in fixing jurisdiction of supreme court see § 446 supra.

Appeals involving greater amount than that fixed by the superior court act may be heard by the superior court unless the appellee objects.—In re McGlinn's Estate, supra.

10. Pa.—Hartje v. Hartje, 71 A. 538, 222 Pa. 371. 15 C.J. p 1110 note 85 [a].

11. Pa.—Leland v. Firemen's Ins. Co. of Newark, N. J., 2 A.2d 542, 133 Pa.Super. 225—De Rosa v. West Penn. Rys. Co., 182 A. 101, 120 Pa.Super. 90.

12. Pa.—In re Appointment of Two Directors for Wells Tp. School

Dist., 94 Pa.Super. 583—Neubert v. Armstrong Water Co., 26 Pa.Super. 608.

Where jurisdiction doubtful

It has been held that, if it is impossible to determine from the record whether the superior court has jurisdiction, the case will be certified to the supreme court.—In re Misselwitz, 1 Pa.Super. 221.

13. Pa.—In re DeHaven, 41 Pa. Super. 382.

14. Pa.—Miller v. Metropolitan L. Ins. Co., 58 Pa.Super. 464—Huntingdon and Broad Top Mountain Railroad v. Fluke, 32 Pa.Super. 126 —Commonwealth v. Rudy, 3 Pa. Dist. & Co. 383.

15 C.J. p 1110 note 82 [a].

Court may review

(1) Decisions of workmen's compensation boards.—Vargo v. Carnegie Steel Co., 27 Pa.Dist. 30, 65 Pittsb. Leg.J. 591, 31 York Leg.Reg. 95.

(2) Assessments fixed by boards of revision.—New York & Lehigh Coal Co.'s Appeal, 24 Pa.Dist. 462, 43 Pa. Co. 1.

15. Pa.—Commonwealth v. Miller, 25 Pa.Dist. 144, 43 Pa.Co. 264, 63 Pittsb.Leg.J. 689.

Appeals erroneously taken to the court of quarter sessions, instead of the court of common pleas, cannot be transferred to the latter court.—

and certain county courts¹⁶ have such appellate jurisdiction as is vested in them by statute.

§ 449. Rhode Island

The Rhode Island supreme court has final revisory and appellate jurisdiction of all questions of law and equity, and such other jurisdiction as has been conferred upon it by law, and it has power to issue prerogative writs.

Under the constitution of Rhode Island the supreme court has final, revisory, and appellate jurisdiction of all questions of law and equity.¹⁷ It also has power to issue prerogative writs,¹⁸ and

such other jurisdiction as may be conferred upon it by law.¹⁹ The supreme court judges are required by the constitution to give their written opinion upon any question of law whenever requested by the governor, or by either house of the general assembly.²⁰ It is also provided by statute that whenever in any action or proceeding pending before any court, the constitutionality of an act of the general assembly is brought in question on the record, the court shall forthwith certify the question to the supreme court to be heard and determined.²¹ The supreme court cannot entertain a petition by a probate judge and the interested par-

Commonwealth v. Rudy, 3 Pa. Dist. & Co. 383.

18. Allegheny county courts

(1) The Allegheny county court has jurisdiction of appeals from judgments in all civil suits other than suits for penalties, before justices of the peace, or other magistrates having like jurisdiction, in the county.—Commonwealth v. Atlantic Refining Co., 67 Pa. Super. 551.

(2) The courts of common pleas of Allegheny county formerly had jurisdiction of appeals from the Allegheny county court in certain cases.—Commonwealth v. Speer, 110 A. 268, 267 Pa. 129—Commonwealth v. Atlantic Refining Co., 67 Pa. Super. 551.

15 C.J. p 1111 note 93.

The Dauphin county court of common pleas has final and exclusive jurisdiction of appeals from the state board of undertakers.—Grime v. Department of Public Instruction, 188 A. 337, 324 Pa. 371.

17. R.I.—MacKenzie & Shea v. Rhode Island Hospital Trust Co., 122 A. 774, 45 R.I. 407.

15 C.J. p 1111 note 2.

This jurisdiction cannot be curtailed or impaired by statute.—MacKenzie & Shea v. Rhode Island Hospital Trust Co., supra—15 C.J. p 1111 note 3.

18. R.I.—Carpenter v. Sprague, 119 A. 561, 45 R.I. 29.

Prerogative writs may be modified or adapted, or used in their accepted form, by the supreme court in the exercise of the powers of review given it by the constitution and statutes.—In re Lanni, 131 A. 52, 47 R.I. 158.

Petitions in equity in nature of quo warrant to determine right to public office, are exclusively within the jurisdiction of the supreme court.—Black v. Cummings, R.I., 5 A.2d 858.

Exercise of power

(1) Ordinarily, petition for writ of mandamus should be addressed in

first instance to superior rather than supreme court; but in first litigated case involving construction and procedure under voting machine law, wherein application had previously been made to superior court in form of petition in equity, which court refused to take jurisdiction, supreme court would retain jurisdiction in view of fact that immediate decision was desirable.—Ruerat v. Cappelli, 188 A. 637, 56 R.I. 480.

(2) A writ or process of injunction in the nature of a prerogative writ may be issued by the supreme court at the petition of the attorney general on behalf of the state to restrain some threatened action injuriously affecting public right.—Carpenter v. Sprague, 119 A. 561, 45 R.I. 29.

An alimony decree cannot be modified by the supreme court in an original proceeding invoking its power to issue prerogative writs.—Ex parte Asadoorian, 135 A. 322, 48 R.I. 50.

19. R.I.—In re Lanni, 131 A. 52, 47 R.I. 158—Carpenter v. Sprague, 119 A. 561, 45 R.I. 29.

15 C.J. p 1111 note 95.

20. R.I.—In re Opinion to the House of Representatives, 5 A.2d 455—To Certain Members of the Senate in the General Assembly, 191 A. 518, 58 R.I. 142—To Certain Members of the House of Representatives in the General Assembly, 191 A. 269—In re Opinion to the Governor, 103 A. 513, 41 R.I. 209.

15 C.J. p 1111 note 1 [a].

"This constitutional provision imposes, in a proper case, a duty upon the judges of this court to respond. It likewise guarantees a right to the House of Representatives which cannot be denied by any one without a serious breach of the Constitution."—To Certain Members of the House of Representatives in the General Assembly, R.I., 191 A. 269, 271.

The opinions are merely advisory

R.I.—In re The Constitutional Convention, 178 A. 433, 55 R.I. 56—In re Opinion of the Justices, 154 A. 647, 51 R.I. 322—In re Opinion

to the Governor, 103 A. 513, 41 R.I. 209.

Formal and collective action by the house of representatives assembled in meeting is necessary to support a request for an advisory opinion, and the supreme court will not entertain a petition made by a majority of the members of the house.—To Certain Members of the House of Representatives in the General Assembly, R.I., 191 A. 269.

In cases not reasonably within the provision for the rendering of advisory opinions, the supreme court is under a duty to abstain from rendering such opinions.—To Certain Members of the Senate in the General Assembly, 191 A. 518, 58 R.I. 142.

Only questions of law are required to be answered and the court is not required to answer every legislative doubt and difficulty that might present itself during the general assembly's proceedings.—To Certain Members of the Senate in the General Assembly, supra.

The legislature's adjournment sine die before the supreme court has time to render an opinion as to the proper course of legislative action relieves the court of its duty to answer the legislature's question.—To Certain Members of the Senate in the General Assembly, supra.

Where question is beyond court's jurisdiction to determine authoritatively, the justices cannot do any more than furnish information on the subject.—In re Opinion to the Governor, 103 A. 513, 41 R.I. 209.

21. R.I.—Probate Court of East Providence v. McCormick, 185 A. 592, 56 R.I. 308, reargument denied 189 A. 2, 57 R.I. 157.

15 C.J. p 1111 note 4.

Form of question

Constitutional question certified under statute should be clear and definite, and where otherwise record should be clarified in superior court and not in supreme court.—Probate Court of East Providence v. McCormick, supra.

ties to proceedings for the allowance of a claim against a guardian for the construction of a statute under a statute authorizing parties having adversary interests in the construction of a state statute to certify the case to the supreme court.²²

The supreme court formerly consisted of an appellate and a common pleas division.²³

§ 450. South Carolina

Decisions relating to South Carolina courts possessing appellate jurisdiction will be discussed in the sections immediately following.

§ 451. — Supreme Court

The South Carolina supreme court has appellate jurisdiction only in cases of chancery, and is a court for the correction of errors at law under such regulations as may be prescribed by law, and it has limited original jurisdiction.

Under the South Carolina constitution the supreme court has appellate jurisdiction only in cases of chancery,²⁴ and it is constituted a court for the correction of errors at law under such regulations as the general assembly may by law prescribe.²⁵

Original jurisdiction. The supreme court has only such original jurisdiction as has been conferred upon it by the constitution or statutes.²⁶ Under the constitution the supreme court has power to issue writs or orders of injunction,²⁷ mandamus,²⁸ quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs.²⁹ The court will exercise its original jurisdiction only when it is shown that public interests are involved, or special grounds of emergency, or other good reasons exist.³⁰ Proceedings invoking its original jurisdiction are not civil "actions,"³¹ and the rules of procedure governing civil actions generally need not be applied thereto.³² Thus the court may acquire jurisdiction of the person and of the subject-matter involved merely by the service of a rule to show cause without a summons.³³ In exercising its original jurisdiction the court looks to the substance of things and not their form.³⁴

Court in banc. It is provided that whenever upon the hearing of any cause or question before the supreme court, in the exercise of its original or appellate jurisdiction, it shall appear to the justices thereof, or any three of them, that there

22. R.I.—In re Rathbun, 110 A. 649, 43 R.I. 173.

23. R.I.—Higgins v. Tax Assessors of Pawtucket, 63 A. 34, 27 R.I. 401—Floyd v. Quinn, 52 A. 880, 24 R.I. 147.

15 C.J. p 1111 notes 94 [a], 95 [c], [g]—[i].

The common pleas division of the supreme court was a statutory name indicative of the place where the pleas of the common people were heard.—State v. Bacon, 61 A. 653, 27 R.I. 252, 260.

24. S.C.—Montgomery & Crawford v. Arcadia Mills, 176 S.E. 589, 173 S.C. 464.

15 C.J. p 1112 note 12.

The word "appellate" as used in this constitutional provision was intended to express the idea of full review of all phases of a case, law and fact.—Montgomery & Crawford v. Arcadia Mills, 176 S.E. 589, 173 S.C. 464—Sandel v. State, 122 S.E. 571, 128 S.C. 178, dismissing petition 119 S.E. 776, 126 S.C. 1, appeal dismissed 44 S.Ct. 5, 263 U.S. 672, 68 L.Ed. 500, and error dismissed 46 S.Ct. 100, 269 U.S. 532, 70 L.Ed. 397.

25. S.C.—Sandel v. State, supra. 15 C.J. p 1112 note 13.

26. S.C.—Clary v. Harvey, 180 S.E. 673, 176 S.C. 512.

A proceeding to vacate a town charter is not within the supreme court's original jurisdiction.—State v. Tritter, S.C., 30 S.E. 273.

A controversy involving the construction of a will is not within the supreme court's original jurisdiction.—Hayne v. Irvine, 24 S.C. 595.

27. S.C.—Dacus v. Johnston, 185 S.E. 491, 180 S.C. 329—State ex rel. Daniel v. John P. Nutt Co., 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007—Hearon v. Calus, 183 S.E. 13, 178 S.C. 381—Little v. Town of Conway, 171 S.E. 447, 171 S.C. 27.

15 C.J. p 1111 note 5, p 1112 note 16.

In enjoining the prosecution of actions in court of common pleas, the supreme court does not undertake to enjoin court of common pleas, but acts directly on defendants.—State ex rel. Daniel v. John P. Nutt Co., 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007.

28. S.C.—Walpole v. Wall, 149 S.E. 760, 153 S.C. 106.

15 C.J. p 1111 note 6.

Enforcement of contract rights

Supreme court has jurisdiction of original mandamus to enforce high school teacher's rights under a valid contract, matter not being one of local concern or administration.—Walpole v. Wall, supra.

29. S.C.—Dacus v. Johnston, 185 S.E. 491, 180 S.C. 329.

15 C.J. p 1112 note 11.

30. S.C.—King v. Aetna Ins. Co., 167

S.E. 12, 168 S.C. 84—State v. Gibbs, 93 S.E. 449, 108 S.C. 136.

Who determines merits of showing
The justice to whom a petition is presented determines, in the first instance, whether a proper showing, calling for the exercise of the court's original jurisdiction, has been made, his determination being subject to review by the court.—King v. Aetna Ins. Co., 167 S.E. 12, 168 S.C. 84.

31. S.C.—Dacus v. Johnston, 185 S.E. 491, 180 S.C. 329—Heyward v. Long, 183 S.E. 145, 178 S.C. 351, 114 A.L.R. 1130.

32. Time to answer

In original proceeding; defendants were not entitled to twenty days from service of rule to show cause and petition to answer petition.—Heyward v. Long, supra.

33. S.C.—Dacus v. Johnston, 185 S.E. 491, 180 S.C. 329—Heyward v. Long, 183 S.E. 145, 178 S.C. 351, 114 A.L.R. 1130—Burnett v. Langston, 162 S.E. 72, 164 S.C. 99—Walpole v. Wall, 149 S.E. 760, 153 S.C. 106.

"Ordinarily, matters may be brought in the original jurisdiction . . . only upon rule issued by this [the supreme] court."—Clary v. Harvey, 180 S.E. 673, 176 S.C. 512.

Waiver of irregularity

Proceeding by summons and complaint instead of upon rule issued by court held irregular, but court could waive irregularity.—Clary v. Harvey, supra.

34. S.C.—Heyward v. Long, 183 S.E. 145, 178 S.C. 351, 114 A.L.R. 1130.

is involved a question of constitutional law, or of conflict between the constitution and laws of the state and of the United States, or between the duties and obligations of her citizens under the same, upon the determination of which the entire court is not agreed, or whenever the justices of said court, or any two of them, desire it on any cause or question so before said court, the chief justice, or in his absence, the presiding associate justice, shall call to the assistance of the supreme court all of the judges of the circuit court.³⁵ The supreme court justices and the circuit judges, when thus convened, constitute an independent tribunal known as the court in banc,³⁶ which differs materially from the supreme court in that it is merely a consultative one and loses jurisdiction when it has answered the questions submitted.³⁷ The supreme court's power to call the court in banc is discretionary,³⁸ and will be exercised only when some grave question of public concern is involved.³⁹

§ 452. — Other Courts

South Carolina courts, other than the supreme court, have such appellate jurisdiction as is vested in them by the constitution or statutes.

South Carolina courts, other than the supreme

court, have such appellate jurisdiction as is vested in them by the constitution and valid statutes.⁴⁰

§ 453. South Dakota

Decisions relating to South Dakota courts possessing appellate jurisdiction will be discussed in the sections immediately following.

§ 454. — Supreme Court

The South Dakota supreme court has appellate jurisdiction and general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law. It has such original jurisdiction as is conferred by the constitution.

The South Dakota supreme court has, under the constitution, appellate jurisdiction⁴¹ which is coextensive with the state; and general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.⁴² None of the provisions of the constitution prohibits the legislature from limiting appeals to a defined class of cases.⁴³

Original jurisdiction. The supreme court has under the constitution, except as otherwise provided thereby, appellate jurisdiction only.⁴⁴ Under the constitution the supreme court has power to issue original and remedial writs,⁴⁵ including writs

35. S.C.—Duncan v. Record Pub. Co., 143 S.E. 31, 145 S.C. 196.

The words "appellate jurisdiction" as used in this provision are not used in the limited sense employed in the constitutional provision defining the supreme court's jurisdiction, but embrace jurisdiction to correct errors at law, as well as appellate jurisdiction in chancery cases.—Sandel v. State, 122 S.E. 571, 128 S.C. 178, dismissing petition 119 S.E. 776, 126 S.C. 1, appeal dismissed 44 S.Ct. 5, 263 U.S. 672, 68 L.Ed. 500, and error dismissed 46 S.Ct. 100, 269 U.S. 532, 70 L.Ed. 397.

Time of call

Call for "court en banc" should be made before supreme court determines cause.—Duncan v. Record Pub. Co., 143 S.E. 31, 145 S.C. 196.

Claim that judge charged on facts does not raise question of constitutional law.—Duncan v. Record Pub. Co., supra.

36. S.C.—Duncan v. Record Pub. Co., supra.

37. S.C.—Citizens' Bank v. Heyward, 143 S.E. 651, 144 S.C. 365.

38. S.C.—Duncan v. Record Pub. Co., 143 S.E. 31, 145 S.C. 196.

39. S.C.—Duncan v. Record Pub. Co., supra.

That circuit judge charged on facts does not raise "grave question of

public concern."—Duncan v. Record Pub. Co., supra.

40. Circuit court

The circuit court has appellate jurisdiction only and cannot send a case back to the probate court to take testimony omitted at the original hearing.—Ex p. White, 12 S.E. 5, 33 S.C. 442.

41. S.D.—Commercial Credit Co. v. Nissen, 213 N.W. 943, 51 S.D. 357, 51 A.L.R. 287, modifying 207 N.W. 61, 49 S.D. 303, 51 A.L.R. 287—White Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397—Winner Milling Co. v. Chicago & N. W. R. Co., 181 N.W. 195, 43 S.D. 574, 15 C.J. p 1112 note 23.

"Appellate" jurisdiction of supreme court is limited to appeals from inferior courts, and any other jurisdiction of supreme court is "original" as distinguished from "appellate."—Chicago, M., St. P. & P. R. Co. v. Board of Railroad Com'rs of South Dakota, 266 N.W. 660, 64 S.D. 297—Winner Milling Co. v. Chicago & N. W. R. Co., 181 N.W. 195, 43 S.D. 574.

42. S.D.—Pickus v. Perry, 239 N.W. 839, 59 S.D. 350, followed in Egbert v. Perry, 256 N.W. 372, 60 S.D. 1, 15 C.J. p 1112 note 25.

Exercise of power

The supreme court's power of gen-

eral superintending control should be exercised only where sound judicial discretion clearly indicates the necessity for its use and will not ordinarily be exercised where another remedy exists, nor will it ordinarily be exercised as a substitute for appellate jurisdiction.—Pickus v. Perry, 239 N.W. 839, 59 S.D. 350, followed in Egbert v. Perry, 256 N.W. 372, 60 S.D. 1.

43. S.D.—McClain v. Williams, 73 N.W. 72, 10 S.D. 332, 43 L.R.A. 287.

44. S.D.—Commercial Credit Co. v. Nissen, 213 N.W. 943, 51 S.D. 357, 51 A.L.R. 287, modifying 207 N.W. 61, 49 S.D. 303, 51 A.L.R. 287—White Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397—Winner Milling Co. v. Chicago & N. W. R. Co., 181 N.W. 195, 43 S.D. 574, 15 C.J. p 1112 note 23.

45. S.D.—Putnam v. Pyle, 232 N.W. 20, 57 S.D. 250, 15 C.J. p 1112 note 31.

Prohibition

(1) Prohibition will lie to prevent the circuit court from taking further action in a proceeding outside its jurisdiction.—Nelson v. Dickenson, 268 N.W. 103, 64 S.D. 456.

(2) But prohibition will not lie to restrain a ministerial act.—State v. Ewert, 156 N.W. 90, 36 S.D. 622.

of mandamus,⁴⁶ quo warranto,⁴⁷ certiorari,⁴⁸ and injunction.⁴⁹ The original jurisdiction of the supreme court cannot be invoked as a matter of right, but will be exercised only in the court's discretion.⁵⁰ It should be exercised when the interests of the state at large are directly involved in the preservation of its sovereign prerogatives or franchises, in the prevention of usurpation or invasion of its offices, or for the protection of the liberty of its citizens,⁵¹ especially when it is apparent that the issues involved must eventually be decided by the supreme court;⁵² but this jurisdiction will not be exercised to protect private or local rights, except when an application cannot properly be made to a subordinate court.⁵³

Any person aggrieved by the refusal of the state auditor to allow a just claim against the state may, by statute, institute an action in the supreme court,⁵⁴ except in the particular cases in which the legislature has authorized a suit in the circuit court.⁵⁵

Advisory opinions. The governor may require

the opinion of the judges of the supreme court upon important questions of law involved in the exercise of his executive power upon solemn occasions.⁵⁶

§ 455. — Circuit Courts

The South Dakota circuit courts have such appellate jurisdiction as is conferred by law and power to issue original and remedial writs.

The South Dakota circuit courts have such appellate jurisdiction as may be conferred by law and as is consistent with the constitution. They and the judges thereof also have jurisdiction and power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other original and remedial writs with authority to hear and determine the same.⁵⁷

§ 456. Tennessee

The Tennessee appellate courts can act only within their territorial jurisdiction. The circuit courts have appellate jurisdiction in certain cases.

The revisory powers of the Tennessee appel-

46. S.D.—Parsons v. Smith, 205 N.W. 36, 48 S.D. 445.
15 C.J. p 1112 note 27.

47. *Action in nature of quo warranto*
S.D.—Gibbs v. Bergh, 214 N.W. 838, 51 S.D. 432.

48. S.D.—Chicago, M., St. P. & P. R. Co. v. Board of Railroad Com'rs of South Dakota, 266 N.W. 660, 64 S.D. 297.

49. S.D.—White Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397.

50. S.D.—Chicago, M., St. P. & P. R. Co. v. Board of Railroad Com'rs of South Dakota, 266 N.W. 660, 64 S.D. 297—Putnam v. Pyle, 232 N.W. 20, 57 S.D. 250.
15 C.J. p 1112 notes 27 [b], 29 [a].

51. S.D.—State ex rel. Botkin v. Welsh, 251 N.W. 189, 61 S.D. 593, followed in Flannery v. Welsh, 251 N.W. 216, 61 S.D. 656—Putnam v. Pyle, 232 N.W. 20, 57 S.D. 250—White Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397.

Validity of statute authorizing state to sell gasoline will be tested in an original proceeding in the supreme court, since the statute directly affects interests of state and its citizens.—White Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397.

Suits against public officers; parties

(1) Generally the supreme court will not exercise its original jurisdiction in suits to restrain public officers from an illegal act, unless the

action is prosecuted in the name of the state upon the relation or information of attorney general; but where the attorney general refuses to prosecute the action and is made a party defendant the court will take jurisdiction of an action instituted by a taxpayer.—State ex rel. Jensen v. Kelly, 274 N.W. 319, 65 S.D. 345—White Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397.

(2) This rule applies even though it does not appear that the attorney general refused to prosecute the action where he is made a party defendant and defends the action.—State ex rel. Jensen v. Kelly, supra.

52. S.D.—Gibbs v. Bergh, 214 N.W. 838, 51 S.D. 432—White v. Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397.

53. S.D.—Gibbs v. Bergh, 214 N.W. 838, 51 S.D. 432—White v. Eagle Oil & Refining Co. v. Gunderson, 205 N.W. 614, 48 S.D. 608, 43 A.L.R. 397—Oss v. State Depositors' Guaranty Fund Commission, 204 N.W. 21, 48 S.D. 258—Everitt v. Board of County Commissioners of Hughes County, 47 N.W. 296, 1 S.D. 365.
15 C.J. p 1112 note 31 [b].

Circumstances warranting exercise of jurisdiction

Where an alternative writ had issued from the supreme court directing the superintendent of banks to ascertain amount due to petitioner, and certify same to depositors' guaranty fund commission, and was later argued and remained pending in the

supreme court for over two years, it was held that, since during that period petitioner could not proceed elsewhere, fairness to petitioner required a disposition on the merits.—Parsons v. Smith, 205 N.W. 36, 48 S.D. 445.

54. S.D.—Brams v. State, 262 N.W. 89, 62 S.D. 571.

55. S.D.—Fransen v. State, 240 N.W. 503, 59 S.D. 432.

56. S.D.—In re Opinion of the Judges, 246 N.W. 295, 61 S.D. 107.
15 C.J. p 1113 note 32.

Subjects of advisory opinions

(1) Question relating to authority of legislature to pass legislative reapportionment act, is within advisory jurisdiction of supreme court.—In re Opinion of the Judges, 246 N.W. 295, 61 S.D. 107.

(2) Supreme court, in advisory opinion, cannot pass generally upon constitutionality of proposed legislative act, possible form and contents of which are unknown.—In re Opinion of the Judges, 246 N.W. 295, 61 S.D. 107.

(3) Only the gravest and most urgent necessity will justify the judges of the supreme court in rendering an ex parte opinion, where private rights are concerned.—In re Opinion of the Judges, 180 N.W. 64, 43 S.D. 645—15 C.J. p 1113 note 32 [b].

(4) Other cases see 15 C.J. p 1113 notes 32 [a], [c], [d].

57. S.D.—Chicago, M., St. P. & P. R. Co. v. Board of Railroad Com'rs of South Dakota, 266 N.W. 660, 64 S.D. 297.

late courts are limited to the correction of errors of tribunals located within their territorial jurisdiction.⁵⁸ The circuit courts have appellate jurisdiction of all suits and actions, unless otherwise provided, instituted before any inferior jurisdiction.⁵⁹

§ 457. — Supreme Court

The Tennessee supreme court has appellate jurisdiction only, and then only in a limited number of cases.

The supreme court of Tennessee is a constitutional court.⁶⁰ Its jurisdiction under the state constitution is appellate only,⁶¹ under such restrictions and regulations as may from time to time be prescribed by law,⁶² and it is beyond the power of the

legislature to confer original jurisdiction upon it;⁶³ but it possesses such other jurisdiction as was conferred by law upon it at the time of the adoption of the constitution.⁶⁴ In all cases in which appellate jurisdiction is not conferred upon the court of appeals, the exclusive right of review is in the supreme court.⁶⁵ Appeals and writs of error, or other proceedings for the correction of error, lie from the inferior courts⁶⁶ and court of appeals⁶⁷ as provided by statute. A review of the facts in chancery cases presented to the supreme court on certiorari is permissible only to the extent that the findings of the chancellor and the court of appeals are shown by the record to be contradictory.⁶⁸ Where the supreme court has no jurisdic-

58. Tenn.—*McKee v. Board of Elections*, 117 S.W.2d 752, 173 Tenn. 269.

Circuit court; certiorari

The circuit court of Shelby county was without jurisdiction to review by certiorari the proceedings of the state board of elections, located at Nashville in Davidson county, removing election commissioners of Shelby county.—*McKee v. Board of Elections*, *supra*.

59. Tenn.—*Flowers v. Cherry*, 8 S.W.2d 483, 157 Tenn. 359.—*State v. Bockman*, 201 S.W. 741, 139 Tenn. 422.

60. Tenn.—*Clements v. Roberts*, 231 S.W. 902, 144 Tenn. 152, denying rehearing 230 S.W. 30, 144 Tenn. 129.

61. Tenn.—*In re Cumberland Power Co.*, 249 S.W. 818, 147 Tenn. 504.—*Fine v. Lawless*, 205 S.W. 124, 140 Tenn. 453.—*Memphis v. Halsey*, 12 Heisk. 210.

15 C.J. p 1113 notes 34-36.

The phrase "appellate jurisdiction" refutes any idea of framing and settling issues in a court of such jurisdiction in regard to a matter of fact transpiring pending the appeal.—*Fine v. Lawless*, 205 S.W. 124, 140 Tenn. 453.

Auxiliary or incidental jurisdiction

(1) The supreme court has inherent, as well as statutory, power to enforce its final judgments and protect them from interference.—*Caldwell v. Spicer & McEvoy*, 19 S.W.2d 238, 159 Tenn. 465.—*State v. Hebert*, 154 S.W. 957, 127 Tenn. 220.

(2) It can in aid of its appellate jurisdiction issue writs of mandamus.—*State v. Sneed*, 58 S.W. 1070, 105 Tenn. 711.—15 C.J. p 1113 note 26 [a].

(3) But even in aid of its appellate jurisdiction, it has no power to issue writs of prohibition.—*Memphis v. Halsey*, 12 Heisk. Tenn., 210.

62. Tenn.—*State v. Bockman*, 201 S.W. 741, 139 Tenn. 422.
15 C.J. p 1113 note 37.

63. Tenn.—*In re Bowers*, 192 S.W. 919, 137 Tenn. 193, rehearing denied 194 S.W. 1093, 137 Tenn. 189.

64. Tenn.—*Memphis v. Halsey*, 12 Heisk. 210.
15 C.J. p 1113 note 38.

65. Tenn.—*State v. Rowan*, 106 S.W.2d 861, 171 Tenn. 612.—*Rutherford v. City of Nashville*, 79 S.W. 2d 581, 168 Tenn. 499.—*King v. King*, 51 S.W.2d 488, 164 Tenn. 666.—*State v. Retail Credit Men's Ass'n of Chattanooga*, 43 S.W.2d 918, 163 Tenn. 450.—*McLeroy v. McLeroy*, 40 S.W.2d 1027, 163 Tenn. 124.—*Collier v. City of Memphis*, 26 S.W.2d 152, 160 Tenn. 500.—*City of Nashville v. Dad's Auto Accessories*, 285 S.W. 52, 154 Tenn. 194, error dismissed Dad's Auto Accessories v. City of Nashville, 47 S.Ct. 20, 273 U.S. 770, 71 L.Ed. 883.—*Going v. Going*, 256 S.W. 890, 148 Tenn. 522, 31 A.L.R. 633.—*Federal Coal Co. v. U. S. Fuel Corporation*, 246 S.W. 528, 147 Tenn. 212.—*Lexington Compress Oil Mill Co. v. Johnston & Jennings Co.*, 239 S.W. 183, 146 Tenn. 65.—*State v. Grindstaff*, 234 S.W. 510, 144 Tenn. 554.—*Clements v. Roberts*, 231 S.W. 902, 144 Tenn. 152, denying rehearing 230 S.W. 30, 144 Tenn. 129.—*Mooney v. Hicks*, 225 S.W. 1051, 143 Tenn. 413.—*Hutchins v. Wilson*, 210 S.W. 155, 141 Tenn. 297.—*Key v. Harris*, 92 S.W. 235, 116 Tenn. 161, 8 Ann.Cas. 200.—*State ex rel. v. Monday*, 7 Tenn.App. 257.—*Mattel v. Clark Hardware Co.*, 3 Tenn.App. 379.—*Howard & Herrin v. Nashville C. & St. L. Ry. Co.*, 3 Tenn.App. 174.—*Northwestern Mutual Life Ins. Co. v. Newsom*, 2 Tenn.App. 70.—*Karns v. Loftis*, 1 Tenn.App. 574.—*Summers v. Kollock*, 1 Tenn.App. 142.

Particular classes of cases outside court of appeals' jurisdiction see § 458 *infra*.

66. Tenn.—*Cockrill v. People's Sav. Bank*, 293 S.W. 996, 155 Tenn. 342.
15 C.J. p 1113 note 43.

Juvenile court held not a court of law or of equity from which proceedings for the correction of errors can be taken directly to the supreme court.—*State v. Bockman*, 201 S.W. 741, 139 Tenn. 422.

Certiorari

(1) The powers of supreme court on certiorari to inferior court are broad and comprehensive, whenever latter exceeds jurisdiction or acts illegally.—*City of Nashville v. Dad's Auto Accessories*, 285 S.W. 52, 154 Tenn. 194, error dismissed Dad's Auto Accessories v. City of Nashville, 47 S.Ct. 20, 273 U.S. 770, 71 L.Ed. 883.—15 C.J. p 1113 note 41.

(2) Where lower court acts illegally, supreme court has power to issue writ of certiorari before final judgment.—*City of Nashville v. Dad's Auto Accessories*, *supra*.

(3) The supreme court has the same jurisdiction to award certiorari where an appeal or writ of error does not lie that the circuit court has.—*Cockrill v. People's Sav. Bank*, 293 S.W. 996, 155 Tenn. 342.

Supersedeas

Supreme court may supersede interlocutory orders merely negative or prohibitory in character, where supersedeas is incidental to issuance of writ of certiorari.—*City of Nashville v. Dad's Auto Accessories*, 285 S.W. 52, 154 Tenn. 194, error dismissed Dad's Auto Accessories v. City of Nashville, 47 S.Ct. 20, 273 U.S. 770, 71 L.Ed. 883.

67. Only upon petition for certiorari are the errors of the court of appeals reviewable by the supreme court.—*Independent Life Ins. Co. v. Hunter*, 63 S.W.2d 668, 166 Tenn. 498.

68. Tenn.—*Cooley v. East & West Ins. Co.*, 61 S.W.2d 656, 166 Tenn. 405.—*Miller v. Kendrick*, 285 S.W. 51, 153 Tenn. 596.

tion of a case, it cannot give an advisory opinion.⁶⁹ 1925 in lieu of the court of civil appeals,⁷⁰ which

§ 458. — Court of Appeals

The jurisdiction of the Tennessee court of appeals is appellate only, and extends to all civil cases with certain exceptions.

The Tennessee court of appeals was created in

had succeeded the court of chancery appeals.⁷¹ Its jurisdiction is appellate only,⁷² and extends to all civil cases except those involving constitutional questions,⁷³ the right to hold a public office,⁷⁴ workmen's compensation,⁷⁵ state revenue,⁷⁶ mandamus,⁷⁷ in the nature of quo warranto,⁷⁸ ouster,

69. Tenn.—Crane Enamelware Co. v. Smith, 76 S.W.2d 644, 168 Tenn. 203.

70. Tenn.—Hibbett v. Pruitt, 36 S.W.2d 897, 162 Tenn. 285.

One of the objects of its creation was to relieve the supreme court of the investigation of questions of fact in chancery causes, and give to the supreme court the benefit of findings by the court of appeals.—McCalla v. Rogers, 116 S.W.2d 1022, 173 Tenn. 239.

Effect on pending cases

(1) Under the act of 1925 creating the court of appeals and reorganizing the appellate courts system, all cases then pending before the court of civil appeals and undecided were transferred to the appellate court having jurisdiction of the case by the act.—Swing v. Harnaday, 1 Tenn.App. 568—Summers v. Kollock, 1 Tenn. App. 142.

(2) The provision for the transfer of pending cases did not authorize the transfer of cases from one section of the court of appeals to another.—Dunlap v. P'Pool, 1 Tenn.App. 173.

(3) In so far as the act of 1925 repealed provisions relating to the transfer of cases from one section of the court of civil appeals to another it was not retroactive.—Dunlap v. P'Pool, supra.

Decisions relating to court of civil appeals

(1) The appellate jurisdiction of the court of civil appeals extended to all cases brought up from courts of equity or chancery, except, among others, cases in which the amount involved exceeded one thousand dollars.—Lexington Compress Oil Mill Co. v. Johnston & Jennings Co., 239 S.W. 183, 146 Tenn. 65—Wright v. Curtis, 237 S.W. 1103, 145 Tenn. 623—Mooney v. Hicks, 225 S.W. 1051, 143 Tenn. 413—Hutchins v. Wilson, 210 S.W. 155, 141 Tenn. 297—15 C.J. p 1113 note 49, p 1114 note 50.

(2) In order to come within this exception, a money judgment in excess of one thousand dollars was required to be the main relief sought and not merely incidental to a bill for other relief.—Hutchins v. Wilson, supra—15 C.J. p 1114 note 50 [a]—[c].

(3) Ejectment suits were also excepted from the jurisdiction of the court of civil appeals.—Bouldin v.

Taylor, 275 S.W. 340, 152 Tenn. 97—15 C.J. p 1114 note 54.

(4) Appeal lay from judgment of circuit court refusing restoration of citizenship.—In re Curtis' Petition, 6 Tenn.Civ.A. 12.

(5) Other decisions relating to the court of civil appeals, other than those cited or referred to in the succeeding notes in connection with statutory provisions contained in the act of 1925 creating the court of appeals which are identical with, or analogous to, the provisions applicable to the court of civil appeals, will be found in 15 C.J. p 1114 notes 55, 59 [a].

71. Tenn.—Memphis St. R. Co. v. Byrne, 104 S.W. 460, 119 Tenn. 278. 15 C.J. p 1113 note 45.

72. Tenn.—John Weis, Inc., v. Reed, 118 S.W.2d 677, 22 Tenn.App. 90—Mathews v. Mathews, 3 Tenn.App. 172—Swing v. Harnaday, 1 Tenn. App. 568.

In aid of its appellate jurisdiction the court of appeals has inherent power to issue writs of mandamus.—Stargel v. Stargel, 107 S.W.2d 520, 21 Tenn.App. 193—Blanton v. Tennessee Cent. Ry. Co., 4 Tenn.App. 335—Hyde v. Dunlap, 3 Tenn.App. 368.

Question for trial court held presented.—John Weis, Inc., v. Reed, 118 S.W.2d 677, 22 Tenn.App. 90.

The jurisdiction of the court of civil appeals was appellate only.—State v. Bockman, 201 S.W. 741, 139 Tenn. 422—15 C.J. p 1113 note 47.

73. Tenn.—City of Nashville v. Dad's Auto Accessories, 285 S.W. 52, 154 Tenn. 194, error dismissed Dad's Auto Accessories v. City of Nashville, 47 S.Ct. 20, 273 U.S. 770, 71 L.Ed. 883—State v. Monday, 7 Tenn.App. 257—Mattel v. Clark Hardware Co., 3 Tenn.App. 379—Howard & Herrin v. Nashville, C. & St. L. Ry. Co., 3 Tenn.App. 174—Karns v. Loftis, 1 Tenn.App. 574.

Nature of question

(1) In order to come within this exception the constitutional question must be substantial or bona fide.—Jones v. Anderson, 121 S.W.2d 542, 173 Tenn. 494—Williams v. Realty Development Co., 33 S.W.2d 64, 161 Tenn. 451—Brady v. Correll, 97 S.W.2d 448, 20 Tenn.App. 224.

(2) It is essential that the constitutional question be directly in-

volved, not as an abstract, theoretical, or merely incidental issue, but as an issue presented in good faith substantially determinative of the rights asserted, or the defense relied on.—Howard & Herrin v. Nashville, C. & St. L. Ry. Co., 3 Tenn.App. 174. Prior to 1925

(1) Cases involving the constitutionality of state statutes were excepted from the jurisdiction of the court of civil appeals.—Schoenlau-Steiner Trunk Top & Veneer Co. v. Hilderbrand, 274 S.W. 543, 152 Tenn. 163—Clements v. Roberts, 231 S.W. 902, 144 Tenn. 152, denying rehearing 230 S.W. 30, 144 Tenn. 129—15 C.J. p 1114 note 51.

(2) This exception was held to extend to any case involving a constitutional question.—Going v. Going, 256 S.W. 590, 143 Tenn. 522, 31 A.L.R. 633—Clements v. Roberts, supra.

(3) But in order to fall within this exception it was essential that the constitutional question be directly involved, not as an abstract, theoretical or merely incidental issue, but as an issue presented in good faith, substantially determinative of the rights asserted.—Schoenlau-Steiner Trunk Top & Veneer Co. v. Hilderbrand, supra.

74. Prior to 1925, election contests were excepted from the jurisdiction of the court of civil appeals, and almost any controversy over an office was regarded as an election contest.—State v. Grindstaff, 234 S.W. 510, 144 Tenn. 554.

75. Physician's suit against employer for services furnished injured employee covered by compensation act held not within exception.—Knox Stove Works v. Hodge, 289 S.W. 505, 154 Tenn. 187.

76. Tenn.—State v. Rowan, 106 S.W.2d 861, 171 Tenn. 612—Federal Coal Co. v. U. S. Fuel Corporation, 246 S.W. 528, 147 Tenn. 212—Milne v. Blair, 189 S.W. 685, 136 Tenn. 325.

77. Tenn.—State v. Martin, 292 S.W. 451, 155 Tenn. 322—Stargel v. Stargel, 107 S.W.2d 520, 21 Tenn. App. 193—Blanton v. Tennessee Cent. Ry. Co., 4 Tenn.App. 335—Hyde v. Dunlap, 3 Tenn.App. 368.

78. Tenn.—State v. Retail Credit Men's Ass'n of Chattanooga, 43 S.W.2d 918, 163 Tenn. 450.

habeas corpus, and cases which have been finally determined in the lower court on demurrer or other method not involving a review or determination of the facts, or in which all the facts have been stipulated.⁷⁹ It is provided by statute that all cases within the jurisdiction of the court of appeals must for purposes of review be taken directly to the court of appeals in the division within which the case arose, and, as appears in § 457 supra, as to all other cases the exclusive right of review is in the supreme court. The character of the case presented in the lower court determines whether the court of appeals or the supreme court has jurisdiction.⁸⁰

§ 459. — Transfer of Cases

Cases erroneously removed by appeal or writ of error to the Tennessee supreme court, instead of the court of appeals, or vice versa, must be transferred to the proper court.

Cases which rightly belong to the Tennessee supreme court but which are removed by mistake to the court of appeals or vice versa, must,

by statute, be transferred to the proper court by the court to which they have been erroneously removed.⁸¹ This provision applies only to cases removed by appeal, or writ of error, to the wrong court, and not to cases in which the supreme court, or some member thereof, erroneously grants writs of certiorari and supersedeas removing a case to the supreme court.⁸²

§ 460. Texas

Decisions relating to appellate courts of Texas will be discussed in detail in the following sections.

§ 461. — Supreme Court

The supreme court has appellate jurisdiction extending to questions of law arising in cases of which the courts of civil appeals have appellate jurisdiction under such restrictions and regulations as the legislature has prescribed and it has power to issue various extraordinary writs in certain cases.

Under the constitution of Texas, the supreme court has appellate jurisdiction only, except as specified therein,⁸³ which is coextensive with the limits

79. Tenn.—Rutherford v. City of Nashville, 79 S.W.2d 531, 163 Tenn. 499—McLeroy v. McLeroy, 40 S.W.2d 1027, 163 Tenn. 124—Collier v. City of Memphis, 26 S.W.2d 152, 160 Tenn. 500—First Nat. Bank v. Planters' Nat. Bank of Clarksdale, Miss., 12 S.W.2d 528, 158 Tenn. 50—Garrett v. Garrett, 300 S.W. 9, 156 Tenn. 253—Cormany v. Ryan, 289 S.W. 497, 154 Tenn. 432—State of Georgia v. City of Chattanooga, 284 S.W. 359, 153 Tenn. 349—Lincoln County Bank v. Maddox, 114 S.W.2d 821, 21 Tenn.App. 648—In re De Franceschi's Estate, 70 S.W.2d 513, 17 Tenn.App. 873—Northwestern Mutual Life Ins. Co. v. Newsom, 2 Tenn.App. 70—Swing v. Harnaday, 1 Tenn.App. 568—Summers v. Kolloc, 1 Tenn.App. 142.

That only questions of law are involved will not of itself deprive the court of appeals of jurisdiction.—Johnson v. Stuart, 299 S.W. 779, 155 Tenn. 618—Creasey v. Comargo Coal Co., 289 S.W. 524, 154 Tenn. 372—Cox v. Smith, 289 S.W. 524, 154 Tenn. 369—Lincoln County Bank v. Maddox, 114 S.W.2d 821, 21 Tenn.App. 648.

The method of trial in the lower court determines whether the court of appeals has appellate jurisdiction, and, unless that method precludes a determination in the lower court of the facts, the appeal lies to the court of appeals.—Garrett v. Garrett, 300 S.W. 9, 156 Tenn. 253—Cox v. Smith, 289 S.W. 524, 154 Tenn. 369—Williams v. Cantrell, Tenn.App., 124 S.W.2d 29—Lincoln County Bank

v. Maddox, 114 S.W.2d 821, 21 Tenn.App. 648.

Case heard on stipulated items of evidence rather than on a stipulation of all the facts held not within exception.—Cumberland Trust Co. v. Bart, 43 S.W.2d 379, 163 Tenn. 272.

Dispute as to inferences to be drawn from stipulated facts held not to render exception inapplicable.—King v. King, 51 S.W.2d 488, 164 Tenn. 666.

Where there are issues of fact to be passed upon, the court of appeals has jurisdiction under the statute.—Clemmons v. Haynes, 3 Tenn.App. 20.

80. Tenn.—State v. Retail Credit Men's Ass'n of Chattanooga, 43 S.W.2d 918, 163 Tenn. 450.

81. Tenn.—Knox Stove Works v. Hodge, 289 S.W. 505, 154 Tenn. 187. Prior to 1925

(1) The same duty was imposed upon the court of civil appeals and the supreme court with respect to cases appealed to the wrong court.—State v. Brown, 257 S.W. 415, 148 Tenn. 647—Wright v. Curtis, 237 S.W. 1103, 145 Tenn. 623—Ault v. Drummond, 196 S.W. 393, 138 Tenn. 613—15 C.J. p 1114 note 61.

(2) Where an appeal was granted to the court of civil appeals but the appeal bond indicated an appeal to the supreme court and the transcript was filed in that court, it was held proper to transfer the case to the court of civil appeals.—Delap v. La Folette Nat. Bank, 190 S.W. 456, 136 Tenn. 494.

82. Tenn.—State of Georgia v. City of Chattanooga, 284 S.W. 359, 153 Tenn. 349.

83. Tex.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—Yett v. Cook, 268 S.W. 715, 115 Tex. 175. 15 C.J. p 1114 notes 63–65.

Advisory power

(1) While the supreme court has no advisory power under the constitution, the general statute authorizing certification in advance of decision by courts of civil appeals to the supreme court does not involve the exercise of purely advisory powers and is valid.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—Douglas Oil Co. v. State (Whiteside Case), Civ.App., 81 S.W.2d 1064, reversed on other grounds Federal Royalty Co. v. State, 98 S.W.2d 993, 128 Tex. 324.

(2) But a statute permitting certified questions calling for advisory action only, and requiring no judgment or decree on which appellate power of court may act is invalid.—Smith Bros. v. Guardian Trust Co., 62 S.W.2d 655, 122 Tex. 577—Pond v. Matheson, 62 S.W.2d 654, 122 Tex. 580—Stennett v. Pfeiffer, 62 S.W.2d 652, 122 Tex. 582—Wright v. San Jacinto Trust Co., 62 S.W.2d 652, 122 Tex. 575—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553.

(3) A certificate granted under such statute must be dismissed.—Smith Bros. v. Guardian Trust Co., 62 S.W.2d 655, 122 Tex. 577—Pond v. Matheson, 62 S.W.2d 654, 122 Tex. 580—Stennett v. Pfeiffer, 62 S.W.2d

of the state,⁸⁴ and extends to questions of law⁸⁵ arising in cases of which the courts of civil appeals have appellate jurisdiction,⁸⁶ under such restrictions and regulations as the legislature may prescribe.⁸⁷ The powers absolutely delegated to the supreme court by the constitution may be exercised without regard to statutory omissions or declarations.⁸⁸ Under the statutes enacted pursuant to the authority vested in the legislature, the supreme court has appellate jurisdiction coextensive with the

limits of the state, extending to questions of law⁸⁹ arising in the following cases, when the same have been brought to the court of civil appeals by writ of error or appeal from final judgments of the trial courts:⁹⁰ (1) Those in which the judges of the courts of civil appeals disagree on any question of law material to the decision.⁹¹ (2) Those in which one of the courts of civil appeals holds differently⁹² from a prior decision⁹³ of its own,⁹⁴ or of another court of civil appeals,⁹⁵ or of the supreme

652, 122 Tex. 582—Wright v. San Jacinto Trust Co., 62 S.W.2d 652, 122 Tex. 575—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553.

Supervisory power

Supreme court has no power of general supervision over inferior courts.—Curtis v. Moore, 110 S.W.2d 1146, 130 Tex. 396.

84. Tex.—Pevito v. Rodgers, 52 Tex. 581.

85. Tex.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375, dismissing error Texas & N. O. Ry. Co. v. Wagner, Civ.App., 262 S.W. 902, Mims v. Hunken, Civ.App., 262 S.W. 930, L. B. Price Mercantile Co. v. Moore, Civ.App., 263 S.W. 657, Chapman v. Leaverton, Civ.App., 263 S.W. 1083, International Travelers' Ass'n v. Griffing, Civ.App., 264 S.W. 263, National Compress Co. v. Hamlin, Civ.App., 264 S.W. 488, and Alexander v. Alexander, Civ.App., 265 S.W. 1072.

15 C.J. p 1115 note 67.

86. Tex.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—Scurry v. Friberg, 32 S.W.2d 637, 119 Tex. 463.

15 C.J. p 1115 note 67.

Original actions instituted in the court of civil appeals are not within the supreme court's appellate jurisdiction.—Dallas Railway & Terminal Co. v. Watkins, 86 S.W.2d 1081, 126 Tex. 116—Forrest v. Moore, 33 S.W.2d 1066, 119 Tex. 521—Scurry v. Friberg, 32 S.W.2d 637, 119 Tex. 463—Quinn v. Halbrook, 285 S.W. 1079, 115 Tex. 513, dismissing certified questions Halbrook v. Quinn, Civ.App., 286 S.W. 954—Long v. Martin, 285 S.W. 1075, 115 Tex. 519—City of Houston v. City of Palestine, 267 S.W. 663, 114 Tex. 306.

87. Tex.—City of Abilene v. McMahan, Com.App., 292 S.W. 525, dismissing error McMahan v. City of Abilene, Civ.App., 261 S.W. 455.

Jurisdiction under superseded statutes

15 C.J. p 1115 note 81 [a], p 1116 note 92.

88. Tex.—Seagraves v. Green, 288 S.W. 417, 116 Tex. 220.

89. Tex.—National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375, dismissing error Texas & N. O. Ry. Co. v. Wagner, Civ.App., 262 S.W. 902, Mims v. Hunken, Civ.App., 262 S.W. 930, L. B. Price Mercantile Co. v. Moore, Civ.App., 263 S.W. 657, Chapman v. Leaverton, Civ.App., 263 S.W. 1083, International Travelers' Ass'n v. Griffing, Civ.App., 264 S.W. 263, National Compress Co. v. Hamlin, Civ.App., 264 S.W. 488, and Alexander v. Alexander, Civ.App., 265 S.W. 1072.

15 C.J. p 1115 note 82.

Jurisdiction is not limited to questions of substantive law in the first five classes of cases set forth in Vernon's Civ.St. Annot. art 1728.—Compton v. Dannenbauer, 35 S.W.2d 682, 120 Tex. 14, 79 A.L.R. 1488, affirming Dannenbauer v. Messerer's Estate, Civ.App., 4 S.W.2d 620.

Fact questions

(1) Supreme court's appellate jurisdiction does not extend to fact questions, whether invoked by certified questions or application for writ of error.—Ramin v. Cosio, 79 S.W.2d 617, 124 Tex. 471, dismissing certificate, Civ.App., 85 S.W.2d 802, and reversed on other grounds 113 S.W.2d 524, 131 Tex. 362—Anderson, Clayton & Co. v. State, 62 S.W.2d 107, 122 Tex. 530—McCullough v. McCullough, 36 S.W.2d 459, 120 Tex. 209, answering certified questions, Civ.App., 20 S.W.2d 224, rehearing denied 39 S.W.2d 105—Chicago, R. I. & G. Ry. Co. v. Harris, 24 S.W.2d 385, 119 Tex. 65—Gerneth v. Galbraith-Foxworth Lumber Co., 300 S.W. 17, 117 Tex. 205, answers to certified questions conformed to, Civ. App., 6 S.W.2d 215—Sherman v. Hatcher, 299 S.W. 227, 117 Tex. 166—Owens v. Tedford, 269 S.W. 418, 114 Tex. 390.

(2) On a writ of error all fact questions not disposed of by the court of civil appeals must be remanded and disposed of by that court.—Greathouse v. Fort Worth & D. C. Ry. Co., Tex.Com.App., 65 S.W.2d 762, reversing Fort Worth & D. C. Ry. Co. v. Greathouse, Civ.App., 41 S.W.2d 418.

90. Tex.—Seagraves v. Green, 288

S.W. 417, 116 Tex. 220—City of Houston v. City of Palestine, 267 S.W. 663, 114 Tex. 306, dismissing error, Civ.App., 262 S.W. 215.

15 C.J. p 1115 note 83.

91. Tex.—Standard Savings & Loan Ass'n v. Miller, Civ.App., 114 S.W.2d 1201.

15 C.J. p 1115 note 84.

92. When writ of error may be refused

In cases of conflict named in this subdivision, the court may in its discretion refuse a writ of error where it is in agreement with the decision of the court of civil appeals in the case in which the application is made.—Glenn v. Steele, Tex., 61 S.W.2d 810, dismissing error Steele v. Glenn, Civ.App., 57 S.W.2d 908—Johnson v. Star, 47 S.W.2d 608, 121 Tex. 195, refusing error Star v. Johnson, Civ.App., 44 S.W.2d 429, and affirmed Johnson v. Star, 53 S.Ct. 265, 287 U.S. 527, 77 L.Ed. 473.

The nature of the conflict necessary to confer jurisdiction is considered in § 462 infra.

93. Tex.—City Nat. Bank in Childress v. Phillips Petroleum Co., 78 S.W.2d 576, 124 Tex. 456, dismissing error, Civ.App., 47 S.W.2d 357—Westchester Fire Ins. Co. v. Redditt, 204 S.W. 106, 109 Tex. 211.

94. Tex.—City Nat. Bank in Childress v. Phillips Petroleum Co., 78 S.W.2d 576, 124 Tex. 456, dismissing error, Civ.App., 47 S.W.2d 357.

15 C.J. p 1116 note 85.

95. Tex.—Olloqui v. Duran, 92 S.W.2d 436, 127 Tex. 156, setting aside, Civ.App., 60 S.W.2d 808—Gulf, C. & S. F. Ry. Co. v. Hamilton, 89 S.W.2d 208, 126 Tex. 542, dismissing appeal, Civ.App., 57 S.W.2d 309—City Nat. Bank in Childress v. Phillips Petroleum Co., 78 S.W.2d 576, 124 Tex. 456, dismissing error, Civ.App., 47 S.W.2d 357—Malone v. Dawson, 5 S.W.2d 965, 117 Tex. 377, 60 A.L.R. 665, reversing Dawson v. Malone, Civ. App., 283 S.W. 634—Vann v. National Life & Accident Ins. Co., Com.App., 24 S.W.2d 347, reversing National Life & Accident Ins. Co. v. Vann, Civ.App., 11 S.W.2d 364—City of Abilene v. McMahan,

court⁹⁶ on any question of law.⁹⁷ (3) Those involving the construction or validity of statutes necessary to a determination of the case.⁹⁸ (4) Those involving the revenue laws of the state.⁹⁹ (5) Those in which the railroad commission is a party.¹ (6) Those in which it is made to appear that an error of substantive law has been committed by the court of civil appeals, but excluding those cases in which the jurisdiction of the court of civil

appeals is made final by statute.² These provisions must be construed with the provisions set forth in § 462 infra, making the judgments of the court of civil appeals conclusive in certain cases.³ Except in cases in which jurisdiction has been specially conferred by other statutes,⁴ some one or more of the grounds above enumerated must exist to authorize the supreme court to exercise jurisdiction.⁵ While the supreme court can answer

Com.App., 292 S.W. 525, dismissing error McMahan v. City of Abilene, Civ.App., 261 S.W. 455—St. Louis Southwestern Ry. Co. v. Buice, Com.App., 275 S.W. 996, reversing, Civ.App., 262 S.W. 558.
15 C.J. p 1116 note 86.

Questions determined

Supreme court must determine every properly presented question necessary to right disposition of case involving conflict between court of civil appeals' decisions.—Malone v. Dawson, 5 S.W.2d 965, 117 Tex. 377, 60 A.L.R. 665, reversing Dawson v. Malone, Civ.App., 253 S.W. 634.

96. Tex.—Olloqui v. Duran, 92 S.W. 2d 436, 127 Tex. 156, setting aside, Civ.App., 60 S.W.2d 808—Gulf, C. & S. F. Ry. Co. v. Hamilton, 89 S.W.2d 208, 126 Tex. 542, dismissing appeal, Civ.App., 57 S.W.2d 309—City Nat. Bank in Childress v. Phillips Petroleum Co., 78 S.W.2d 576, 124 Tex. 456, dismissing error, Civ.App., 47 S.W.2d 357—Malone v. Dawson, 5 S.W.2d 965, 117 Tex. 377, 60 A.L.R. 665, reversing Dawson v. Malone, Civ.App., 253 S.W. 634—City of Abilene v. McMahan, Com.App., 293 S.W. 525, dismissing error McMahan v. City of Abilene, Civ.App., 261 S.W. 455.

15 C.J. p 1116 note 87.

Disposition of case

Where the conflict is with a prior supreme court opinion, the court may in its discretion, without the necessity of granting a writ of error, reverse and remand the case on the application for writ of error.—Adams v. Bida, 84 S.W.2d 693, 125 Tex. 458, reversing, Civ.App., 83 S.W.2d 420—Castevens v. Texas & P. R. Co., 32 S.W.2d 637, 119 Tex. 456, 73 A.L.R. 89, reversing, Civ.App., 28 S.W.2d 238.

97. Tex.—Compton v. Dannenbauer, 35 S.W.2d 682, 120 Tex. 14, 79 A.L.R. 1488, affirming Dannenbauer v. Messer's Estate, Civ.App., 4 S.W.2d 620.

15 C.J. p 1116 note 88.

98. Tex.—Simmonds v. St. Louis, B. & M. Ry. Co., 91 S.W.2d 332, 127 Tex. 23, modifying St. Louis, B. & M. Ry. Co. v. Simmonds, Civ.App., 50 S.W.2d 343—Brown v. Fore, Com.App., 12 S.W.2d 114, 63 A.L.R. 435, reversing, Civ.App., 299 S.W.

950—Morgan v. Massillon Engine & Thresher Co., Civ.App., 274 S.W. 255, error denied 277 S.W. 78, 115 Tex. 146.

15 C.J. p 1116 note 89.

Character of involvement

(1) The question as to the construction or validity of the statute must be necessary to a determination of the case.—Gulf, C. & S. F. Ry. Co. v. Hamilton, 89 S.W.2d 208, 126 Tex. 542, dismissing appeal, Civ.App., 57 S.W.2d 309—Ligon v. Alexander Film Co., Tex.Com.App., 55 S.W.2d 1030, reversing Alexander Film Co. v. Ligon, Civ.App., 36 S.W.2d 313, and certiorari denied 53 S.Ct. 793, 289 U.S. 760, 79 L.Ed. 1503—Brown v. Fore, Tex.Com.App., 12 S.W.2d 114, 63 A.L.R. 435, reversing, Civ.App., 299 S.W. 950.

(2) There must be a real controversy about the meaning of the statute.—Mooers v. Hunter, Tex.Com.App., 67 S.W.2d 860, dismissing error, Civ.App., 45 S.W.2d 387.

(3) There must be a reasonable ground for attempting to apply the statute.—National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375, dismissing error Texas & N. O. Ry. Co. v. Wagner, Civ.App., 262 S.W. 902, Mims v. Hunken, Civ.App., 262 S.W. 930, L. B. Price Mercantile Co. v. Moore, Civ.App., 263 S.W. 657, Chapman v. Leaverton, Civ.App., 263 S.W. 1083, International Travelers' Ass'n v. Griffing, Civ.App., 264 S.W. 263, National Compress Co. v. Hamlin, Civ.App., 264 S.W. 483, and Alexander v. Alexander, Civ.App., 265 S.W. 1072—Mooers v. Hunter, supra.

Statute held not rendered invalid by decision of court of civil appeals.—Scott v. American Nat. Ins. Co., Tex.Com.App., 276 S.W. 643, affirming American Nat. Ins. Co. v. Scott, Civ.App., 257 S.W. 934.

99. Tex.—Archer City First State Bank v. Power, 163 S.W. 581, 106 Tex. 210.

15 C.J. p 1116 note 90.

1. Tex.—Archer City First State Bank v. Power, supra.

2. Tex.—Williamson County v. Travis County, Com.App., 15 S.W.2d 577, dismissing error Travis County v. Williamson County, Civ.App., 4 S.W.2d 610.

Under prior form of statute

Tex.—National Compress Co. v. Hamlin, 269 S.W. 1024, 114 Tex. 375, dismissing error Texas & N. O. Ry. Co. v. Wagner, Civ.App., 262 S.W. 902, Mims v. Hunken, Civ.App., 262 S.W. 930, L. B. Price Mercantile Co. v. Moore, Civ.App., 263 S.W. 657, Chapman v. Leaverton, Civ.App., 263 S.W. 1083, International Travelers' Ass'n v. Griffing, Civ.App., 264 S.W. 263, National Compress Co. v. Hamlin, Civ.App., 264 S.W. 483, and Alexander v. Alexander, Civ.App., 265 S.W. 1072—City of Abilene v. McMahan, Com.App., 292 S.W. 525, dismissing error McMahan v. City of Abilene, Civ.App., 261 S.W. 455.
15 C.J. p 1116 note 92.

3. Tex.—Maxwell v. Hall, 267 S.W. 670, 114 Tex. 319—Warren Hardware Co. v. Dodson, 222 S.W. 157, 110 Tex. 576, dismissing error Dodson v. Warren Hardware Co., Civ.App., 162 S.W. 952—Camp v. National Equitable Soc. of Belton, 191 S.W. 699, 108 Tex. 246, denying rehearing National Equitable Soc. of Belton v. Camp, Civ.App., 184 S.W. 589—Williamson County v. Travis County, Com.App., 15 S.W.2d 577, dismissing error Travis County v. Williamson County, Civ.App., 4 S.W.2d 610.

4. Tex.—Houston Oil Co. of Texas v. Village Mills Co., 202 S.W. 725, 109 Tex. 169, reversing Village Mills Co. v. Houston Oil Co. of Texas, Civ.App., 191 S.W. 723, concurring opinion 226 S.W. 1075, 109 Tex. 169.

5. Tex.—J. B. Colt Co. v. Wheeler, Com.App., 23 S.W.2d 299, dismissing error, Civ.App., 12 S.W.2d 1102—City of Abilene v. McMahan, Com.App., 292 S.W. 525, dismissing error McMahan v. City of Abilene, Civ.App., 261 S.W. 455.

Writ of error improperly granted should be dismissed for want of jurisdiction if on further consideration the court determines that jurisdictional grounds are wanting.—Maryland Casualty Co. v. Dobbs, 100 S.W.2d 349, 128 Tex. 547, dismissing appeal, Civ.App., 70 S.W.2d 751—Gulf, C. & S. F. Ry. Co. v. Hamilton, 89 S.W.2d 208, 126 Tex. 542, dismissing appeal, Civ.App., 57 S.W.2d 309—Sumner v. General Contract Fur-

questions certified by a court of civil appeals in advance of the latter court's decision,⁶ a writ of error will lie only in the case of final judgments of the court of civil appeals.⁷

By statute, the court has power to make, establish, and enforce all necessary rules of practice and procedure not inconsistent with the laws of the state.⁸

Power to issue writs. Under the constitution the supreme court, and the justices thereof, have power to issue writs of habeas corpus, as may be prescribed by law,⁹ and under such regulations as may be prescribed by law, the court and the jus-

tices thereof may issue writs of mandamus¹⁰ and such other writs as may be necessary to enforce its jurisdiction.¹¹ The legislature may under the constitution confer original jurisdiction on the supreme court to issue writs of quo warranto¹² and mandamus,¹³ in such cases as may be specified, except as against the governor of the state. These constitutional provisions have been made the basis of a legislative enactment giving the supreme court, or any justice thereof, power to issue among others, writs of quo warranto¹⁴ or mandamus¹⁵ agreeable to the principles of law regulating such writs,¹⁶ against any district judge,¹⁷ or court of civil appeals or judges thereof,¹⁸ or officer of the state

chase Corporation, 80 S.W.2d 741, 125 Tex. 51, dismissing error General Contract Purchase Corporation v. Sumner, Civ.App., 49 S.W.2d 960—City Nat. Bank in Childress v. Phillips Petroleum Co., 78 S.W.2d 576, 124 Tex. 456, dismissing error, Civ. App., 47 S.W.2d 357—City of Abilene v. McMahan, Tex.Com.App., 292 S.W. 525, dismissing error McMahan v. City of Abilene, Civ.App., 261 S.W. 455.

6. Tex.—Morrow v. Corbin, 62 S.W. 2d 641, 122 Tex. 553.

7. Tex.—Smith v. Free, Com.App., 107 S.W.2d 588, reversing Free v. Smith, Civ.App., 80 S.W.2d 419.

Order overruling motion to affirm case on certificate held to be an interlocutory order not subject to review.—Prince v. Guyer, Tex., 103 S.W.2d 128—Smith v. Free, Com.App., 107 S.W.2d 588, reversing Free v. Smith, Civ.App., 80 S.W.2d 419.

8. Tex.—Sherman v. Hatcher, 299 S.W. 227, 117 Tex. 168—Lido Oil Co. v. W. T. Waggoner Estate, Civ. App., 31 S.W.2d 154, error refused.

9. **Court cannot review evidence on habeas corpus.**—Ex parte Reid, 89 S.W. 956, 99 Tex. 405.

10. Tex.—Hines v. Morse, 47 S.W. 516, 92 Tex. 194.
15 C.J. p 1115 note 73.

11. Tex.—Curtis v. Moore, 110 S.W. 2d 1146, 130 Tex. 396—Harney v. Pickens, 37 S.W.2d 717, 120 Tex. 263.

15 C.J. p 1115 note 76.

"This power . . . exists, regardless of statutory omissions or declarations."—Cleveland v. Ward, 285 S.W. 1063, 1068, 116 Tex. 1.

Particular writs

(1) Injunction. — Cleveland v. Ward, *supra*.

(2) Prohibition.—Curtis v. Moore, 110 S.W.2d 1146, 130 Tex. 396—Prince v. Miller, 69 S.W.2d 52, 123 Tex. 118—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1.
15 C.J. p 1115 note 76 [a].

12. Tex.—State v. Manry, 16 S.W.2d 809, 118 Tex. 449.

13. Tex.—State v. Ferguson, 125 S.W.2d 272—Love v. Wilcox, 23 S.W. 2d 515, 119 Tex. 256, 76 A.L.R. 1484—Yett v. Cook, 268 S.W. 715, 115 Tex. 175—Webb v. Hall, 238 S.W. 1105, 111 Tex. 446—Gulf, C. & S. F. Ry. Co. v. Muse, 207 S.W. 897, 109 Tex. 352, 4 A.L.R. 613—Critchfield v. Watson, Civ.App., 275 S.W. 257.

15 C.J. p 1115 note 78.

14. Tex.—State v. Manry, 16 S.W. 2d 809, 118 Tex. 449.

15. Tex.—State v. Ferguson, 125 S.W.2d 272—Yett v. Cook, 268 S.W. 715, 115 Tex. 175—McDowell v. Hightower, 242 S.W. 753, 111 Tex. 585—Warren v. Willson, 192 S.W. 529, 108 Tex. 262—Critchfield, v. Watson, Civ.App., 275 S.W. 257.

15 C.J. p 1116 note 96.

Issues of fact cannot be determined on an original application for mandamus.—Mattinson v. McDonald, 109 S.W.2d 467, 130 Tex. 250—Rogers v. Lynn, 49 S.W.2d 709, 121 Tex. 467, rehearing denied 51 S.W.2d 1113, 121 Tex. 467—Pitman v. Mercer, 17 S.W.2d 766, 118 Tex. 481—Wagner v. Robison, 201 S.W. 171, 109 Tex. 114—Sheppard v. Jacksboro Refining Co., Tex.Civ.App., 123 S.W.2d 497, error dismissed, judgment correct—15 C.J. p 1115 note 78 [a], p 1116 note 96 [a].

Matters held outside jurisdiction of supreme court in original mandamus proceedings.—Socony Vacuum Oil Co. v. Coe, 90 S.W.2d 557, 126 Tex. 590—Federal Laboratories Inc. v. Towne Young, 90 S.W.2d 556, 126 Tex. 567—Innes v. State Banking Board, 254 S.W. 117, 113 Tex. 300.

Rehearing on an order refusing mandamus is not a matter of statutory right, but of discretion only, and on rehearing the supreme court will not examine the brief to supply defects in the original petition, nor will it consider allegations made in motion for new trial in aid of such

petition.—Innes v. State Banking Board, 254 S.W. 117, 113 Tex. 300.

16. Tex.—State v. Ferguson, 125 S.W.2d 272.

In other words, writs may be issued in all cases when courts of law or equity under settled rules would have the power to issue them.—Yett v. Cook, 268 S.W. 715, 115 Tex. 175.

Mandamus

(1) Mandamus never lies to control official discretion or to correct mere errors in the exercise of judicial power.—Seagraves v. Green, 288 S.W. 417, 116 Tex. 220—McDowell v. Hightower, 242 S.W. 753, 111 Tex. 585.

(2) The supreme court is without jurisdiction of an application for a writ of mandamus in a case in which the court of criminal appeals has taken jurisdiction of the person of the relator and the subject matter of his relief.—Millikin v. Jeffrey, 239 S.W. 397, 117 Tex. 152—Millikin v. Jeffrey, 299 S.W. 393, 117 Tex. 134.

17. Tex.—State v. Ferguson, 125 S.W.2d 272.

Mandamus

Tex.—State v. Ferguson, *supra*—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553—Harney v. Pickens, 37 S.W.2d 717, 120 Tex. 263—Hutchens v. Mercer, 29 S.W.2d 1031, 119 Tex. 431, 69 A.L.R. 1103—Gulf, C. & S. F. Ry. Co. v. Muse, 207 S.W. 897, 109 Tex. 352, 4 A.L.R. 613.

Quo warranto

Tex.—State v. Manry, 16 S.W.2d 809, 118 Tex. 449.

Directing setting aside of judgment of dismissal entered by district court is held outside original jurisdiction of supreme court.—Texas-Carolina Oil Co. v. Fires, 48 S.W. 2d 600, 121 Tex. 396.

18. Tex.—Gordon v. Willson, 104 S.W. 1043, 101 Tex. 43.

15 C.J. p 1117 note 5.

Mandamus to compel certification

(1) The supreme court will not compel the court of civil appeals by

government,¹⁹ except the governor of the state. By virtue of statutory authorization, the court may also issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause,²⁰ or to compel any officer of the executive department of the state to perform any act or duty he is authorized to perform, whether such act be judicial, ministerial, or discretionary,²¹ or to compel any member of any executive, or primary, committee, or primary election officer of any political party to perform any duty imposed on them by law,²² and it may issue writs of habeas corpus in all cases where any person is restrained in his liberty by virtue of any order, process, or

commitment issued by any court or judge on account of any order, judgment, or decree theretofore made, rendered, or entered by such court or judge in any civil cause. The supreme court will not exercise its original jurisdiction in cases in which an inferior court has concurrent jurisdiction, unless there is some unusual reason therefor.²³

§ 462. — Courts of Civil Appeals

The courts of civil appeals have appellate jurisdiction over the county and district courts in certain civil cases, which jurisdiction is final in certain cases. They also have limited original jurisdiction and power to issue

mandamus to certify questions because of conflicting decisions in cases in which the supreme court has jurisdiction on appeal by writ of error.—*Harris v. Willson*, 59 S.W. 2d 106, 122 Tex. 323—*Aldridge v. Conner*, 37 S.W.2d 725, 120 Tex. 243—*International & Great Northern R. Co. v. Pleasants*, 296 S.W. 283, 116 Tex. 568—*Maxwell v. Hall*, 267 S.W. 670, 114 Tex. 319.

(2) But in cases within its final jurisdiction, the court of civil appeals may be compelled by mandamus to certify questions because its decision conflicts with an opinion of the supreme court or of another court of civil appeals.—*Wright v. Dunklin*, Tex., 123 S.W.2d 301—*Atwood Cotton Breeding Farms v. Gallagher*, 73 S.W.2d 525, 123 Tex. 505—*Stone Fort Nat. Bank of Nacogdoches v. Hall*, 62 S.W.2d 86, 122 Tex. 526—*Citizens' Nat. Bank of Cameron v. Jones*, 61 S.W.2d 987, 122 Tex. 551, ordering certification of questions *Citizens' Nat. Bank of Cameron v. U. S. Bond & Mortgage Co.*, Civ.App., 48 S.W.2d 676—*Kreuger v. Hall*, 61 S.W.2d 985, 122 Tex. 547, ordering certification of questions *Umberson v. Krueger*, Civ.App., 49 S.W.2d 528—*Curlee Clothing Co. v. Hall*, 60 S.W.2d 202, 123 Tex. 456, commanding certification of questions *Curlee Clothing Co. v. Wickliffe*, Civ.App., 38 S.W.2d 175—*Harris v. Willson*, 59 S.W.2d 106, 122 Tex. 323—*Oliver v. Gallagher*, 26 S.W.2d 903, 119 Tex. 178—*Layton v. Hightower*, 12 S.W.2d 110, 118 Tex. 166—*Hinn v. Gallagher*, 263 S.W. 132, 114 Tex. 322—*Maxwell v. Hall*, 267 S.W. 670, 114 Tex. 319—*Jacobs v. Pleasants*, 267 S.W. 251, 114 Tex. 242—*Garrett v. Fly*, 266 S.W. 779, 114 Tex. 233—*Armer v. Fly*, 265 S.W. 125, 114 Tex. 170.

(3) Formerly, mandamus was available only in cases of conflicting decisions of the courts of civil appeals.—*Garritty v. Rainey*, 247 S.W. 825, 112 Tex. 369—*Braumiller v. Burke*, 230 S.W. 400, 111 Tex. 145—*Texas & P. Ry. Co. v. Conner*, 229 S.

W. 844, 111 Tex. 99—15 C.J. p 1115 note 73 [a].

(4) The application therefor must be made in the supreme court within a reasonable time after the court of civil appeals has refused certification.—*La Priele v. Key*, 261 S.W. 366, 114 Tex. 1.

(5) The application should conform to the well-established rules of pleading.—*Harris v. Willson*, 59 S.W. 2d 106, 122 Tex. 323.

(6) The question of what constitutes conflicting decisions is discussed in § 462 infra.

19. "Officers of the state government" means only such officers as are charged with the general administration of state affairs, and not such persons as constitute a board of officers.—*McFall v. State Board of Education*, 110 S.W. 739, 101 Tex. 572—*Betts v. Johnson*, 73 S.W. 4, 96 Tex. 360—*Herring v. Houston Nat. Exch. Bank*, Tex.Civ.App., 241 S.W. 534.

Persons held not state officers

(1) County judge.—*Bostic v. County Judge of Rockwall County*, 195 S.W. 186, 108 Tex. 421.

(2) Other cases see 15 C.J. p 1117 note 7 [a], [b].

20. Tex.—*Dallas Railway & Terminal Co. v. Watkins*, 86 S.W.2d 1081, 126 Tex. 116—*Southland Greyhound Lines v. Richardson*, 86 S.W.2d 731, 126 Tex. 118—*Millikin v. Jeffrey*, 299 S.W. 393, 117 Tex. 134—*Cortimiglia v. Davis*, 292 S.W. 875, 116 Tex. 412—*Yett v. Cook*, 268 S.W. 715, 115 Tex. 175.

Correlative powers

The power to compel a judge to proceed to trial and judgment carries with it the correlative power to prohibit and enjoin other judges from proceeding.—*Texas Farm Bureau Cotton Ass'n v. Lennox*, 297 S.W. 743, 117 Tex. 94—*Cleveland v. Ward*, 285 S.W. 1063, 116 Tex. 1.

When action has been properly prohibited by the court of civil appeals, the supreme court will not is-

sue a writ of mandamus to compel trial thereof.—*Long v. Martin*, 287 S.W. 494, 116 Tex. 135.

21. Prison commissioners held not officers of executive department of state.—*Herring v. Houston Nat. Exch. Bank*, Tex.Civ.App., 241 S.W. 534.

22. Tex.—*Ferguson v. Wilcox*, 28 S.W.2d 526, 119 Tex. 280—*Love v. Wilcox*, 28 S.W.2d 515, 119 Tex. 256, 70 A.L.R. 1484.

Writ refused

Tex.—*Anderson v. Aldrich*, 120 S.W. 2d 91, 131 Tex. 629.

23. Tex.—*State v. Ferguson*, 125 S.W.2d 272—*Miller v. Stine*, 91 S.W. 2d 315, 127 Tex. 22—*Ford Rent Co. v. Hughes*, 88 S.W.2d 85, 126 Tex. 255—*Dallas Railway & Terminal Co. v. Watkins*, 86 S.W.2d 1081, 126 Tex. 116—*Prince v. Miller*, 69 S.W. 2d 52, 123 Tex. 118—*Box v. Kirby*, 42 S.W.2d 777, 121 Tex. 90—*Love v. Wilcox*, 28 S.W.2d 515, 119 Tex. 256, 70 A.L.R. 1484—*Houtchens v. Mercer*, 27 S.W.2d 795, 119 Tex. 244.

Jurisdiction will be exercised

(1) When relief has been refused by a court of civil appeals.—*Dallas Railway & Terminal Co. v. Watkins*, 86 S.W.2d 1081, 126 Tex. 116—*Houtchens v. Mercer*, 29 S.W.2d 1031, 119 Tex. 431, 69 A.L.R. 1103.

(2) When the circumstances are such that a court of civil appeals cannot grant relief without interfering with the judgment or order of another court of civil appeals.—*Long v. Martin*, 285 S.W. 1075, 116 Tex. 519.

(3) When the orderly processes of government have been disturbed and the case is such that the state as a whole is affected.—*State v. Ferguson*, Tex., 125 S.W.2d 272.

(4) When the delay resulting from an application to the district court would or might cause irreparable injury.—*Love v. Wilcox*, 28 S.W.2d 515, 119 Tex. 256, 70 A.L.R. 1484—*Seagraves v. Green*, 288 S.W. 417, 116 Tex. 220.

extraordinary writs, and power, and in some cases the duty, to certify questions to the supreme court.

Under the state constitution, the courts of civil appeals of Texas have appellate jurisdiction co-extensive with the limits of their respective districts, which extends to all civil cases of which the district or county courts have original or appellate jurisdiction,²⁴ under such restrictions and regulations as may be prescribed by law.²⁵ Other

jurisdiction, original and appellate, may be conferred on the courts of civil appeals by law.²⁶ Under the statutes, the appellate jurisdiction of the courts of civil appeals extends to civil cases²⁷ within the limits of their respective districts,²⁸ of which the district and county courts have or assume jurisdiction²⁹ when the amount in controversy, or the judgment rendered, exceeds one hundred dollars, exclusive of interest and costs.³⁰ The

24. *Tex.*—*Motley v. Tom Green County*, *Tex.Civ.App.*, 93 S.W.2d 768, reversed on other grounds *Tom Green County v. Motley*, *Com.App.*, 118 S.W.2d 306.

15 C.J. p 1117 notes 12-16.

25. *Tex.*—*Morrow v. Corbin*, 62 S.W.2d 641, 122 Tex. 553—*Pure Oil Co. v. Clark*, *Com.App.*, 56 S.W.2d 850, reversing *Clark v. State*, *Civ.App.*, 35 S.W.2d 488—*Motley v. Tom Green County*, *Civ.App.*, 93 S.W.2d 768, reversed on other grounds *Tom Green County v. Motley*, *Com.App.*, 118 S.W.2d 306.

26. *Tex.*—*Morrow v. Corbin*, 62 S.W.2d 641, 122 Tex. 553—*City of Houston v. City of Palestine*, 267 S.W. 663, 114 Tex. 306, dismissing error *City of Palestine v. City of Houston*, *Civ.App.*, 262 S.W. 215—*Motley v. Tom Green County*, *Civ.App.*, 93 S.W.2d 768, reversed on other grounds *Tom Green County v. Motley*, *Com.App.*, 118 S.W.2d 306—*Farrell v. Young*, *Civ.App.*, 23 S.W.2d 468.

"Original" and "appellate" jurisdiction as employed in the constitution means those types of original and appellate jurisdiction which from time immemorial the common-law courts have exercised.—*Morrow v. Corbin*, 62 S.W.2d 641, 122 Tex. 553.

Advisory powers

(1) Courts of civil appeals have no advisory power under organic law, and none can be conferred on them by the legislature.—*Morrow v. Corbin*, *supra*.

(2) A statute permitting certified questions from the district courts to the courts of civil appeals calling for advisory action only, and requiring no judgment or decree on which the appellate power of the court may act is invalid.—*Pond v. Matheson*, 62 S.W.2d 654, 122 Tex. 580—*Wright v. San Jacinto Trust Co.*, 62 S.W.2d 652, 122 Tex. 575—*Morrow v. Corbin*, 62 S.W.2d 641, 122 Tex. 553.

Concurrent jurisdiction of appeals from a particular county may be conferred on two courts of civil appeals.—*McClung Const. Co. v. Taylor*, *Tex.Civ.App.*, 297 S.W. 503.

27. *Tex.*—*City of Graham v. Seal*, *Civ.App.*, 235 S.W. 668, dismissed for want of jurisdiction.

15 C.J. p 1117 note 15.

Criminal contempt proceeding held not reviewable.—*Beverly v. Roberts*, *Tex.Civ.App.*, 215 S.W. 975.

On appeal in suit to enjoin criminal prosecution, the court of civil appeals is reluctant to determine whether certain facts constitute a penal offense since such determination might result in a conflict with the court of criminal appeals, which has exclusive jurisdiction in criminal matters.—*Roberts v. Gossett*, *Tex.Civ.App.*, 88 S.W.2d 507.

28. *Tex.*—*Cleveland v. Ward*, 285 S.W. 1063, 116 Tex. 1—*National Debenture Corporation v. Adams*, *Civ.App.*, 115 S.W.2d 757—*Buffalo Engineering Co. v. Welch*, *Civ.App.*, 61 S.W.2d 855—*Cleveland v. Home Nat. Bank of Cleburne*, *Civ.App.*, 265 S.W. 734—*Home Nat. Bank of Cleburne v. Wilson*, *Civ.App.*, 265 S.W. 732.

15 C.J. p 1117 note 19.

Appeals from Palo Pinto county may be taken to the court of civil appeals of either the second or eleventh supreme judicial district.—*McClung Const. Co. v. Taylor*, *Tex.Civ.App.*, 297 S.W. 503.

29. *Tex.*—*Southern Pine Lumber Co. v. Whiteman*, *Civ.App.*, 104 S.W.2d 635, error dismissed.

Guardianship matters

An appeal from the decision, order, or judgment of a county court in guardianship will not lie to the courts of civil appeals, the legislature having provided for an appeal to the district courts in such cases.—*Pure Oil Co. v. Clark*, *Tex.Com.App.*, 56 S.W.2d 850, reversing, *Civ.App.*, *Clark v. State*, 35 S.W.2d 488, followed in *Pure Oil Co. v. Clark*, *Tex.Com.App.*, 56 S.W.2d 853, first case, reversing, *Civ.App.*, 40 S.W.2d 962.

Scope of review is limited to matters determined by trial court.—*Tex. as Employers' Ins. Ass'n v. Adcock*, *Tex.Civ.App.*, 27 S.W.2d 363, error dismissed.

Under earlier form of statute

(1) The earlier form of the statute did not contain the word "assume," and the court of civil appeals had no jurisdiction of an appeal unless the court from which the appeal was taken had original or appellate jurisdiction.—*Luhning v. Scott*, *Tex.Civ.App.*, 201 S.W. 663.

(2) Other cases see 15 C.J. p 1117 notes 20-22.

30. *Tex.*—*International & G. N. Ry. Co. v. Lyon*, 243 S.W. 973, 112 Tex. 30, answering certified questions, *Civ.App.*, 200 S.W. 228, rehearing overruled 244 S.W. 668—*McClendon v. Homeseekers' Realty Co.*, *Civ.App.*, 272 S.W. 216—*Gibson v. St. Anthony Hotel*, *Civ.App.*, 198 S.W. 412.

15 C.J. p 1117 note 23.

Amount claimed in petition does not fix the amount in controversy where it appears on the face of the pleadings that a portion of the items sued for could form no proper basis for suit.—*Dunn v. Wilkerson*, *Tex.Civ.App.*, 203 S.W. 59.

Amount of counterclaim cannot be added to plaintiff's demand in determining the amount involved; one of the demands separately considered must exceed the jurisdictional amount.—*Martinez v. Viola*, *Tex.Civ.App.*, 276 S.W. 769.

Amendment on appeal to county court, increasing the demand to an amount within the appellate jurisdiction of the court of civil appeals but beyond the original jurisdiction of the trial court, cannot be allowed.—*Dunn v. Wilkerson*, *Tex.Civ.App.*, 203 S.W. 59.

Interest, as damages, may be included in determining the amount involved.—*McClendon v. Homeseekers' Realty Co.*, *Tex.Civ.App.*, 272 S.W. 216.

In ancillary suit for injunction against the institution of proceedings interfering with the enforcement of plaintiff's judgment against defendant, the amount in controversy is the amount of the judgment.—*Universal Credit Co. v. Cunningham*, *Tex.Civ.App.*, 103 S.W.2d 699.

In garnishment proceeding, although it is ancillary to the main action, when interest on the original judgment and the costs of the original action are properly made a part of plaintiff's demand, the amount in controversy is not limited to the amount of the original judgment but includes accrued interest thereon and the original costs.—*Fannin County Nat. Bank v. Gross*, *Tex.Civ.App.*, 200 S.W. 187.

right of appeal has been regulated by statutes and an appeal must conform to some one of the methods provided before the court of civil appeals acquires jurisdiction.³¹

The courts also have statutory power, on affidavit or otherwise, as they may deem proper, to ascertain such matters of fact as may be necessary to the proper exercise of their jurisdiction;³² and they also have been given power to punish for contempt, such punishment not to exceed one thousand dollars fine or imprisonment for twenty days.

Finality of judgments. The judgments of the courts of civil appeals are conclusive in all cases

on the facts of the case,³³ and are conclusive on both the law and the facts³⁴ in the following cases: (1) Any civil case appealed from a county court or from a district court when, under the constitution, the county court would have had original or appellate jurisdiction to try it,³⁵ except in probate matters,³⁶ and in cases involving the state revenue laws³⁷ or the validity or construction of a statute,³⁸ or in cases involving conflicts between decisions of the courts of civil appeals or between a decision of a court of civil appeals and a decision of the supreme court.³⁹ (2) All cases of slander.⁴⁰ (3) All cases of divorce.⁴¹ (4) All

31. *Tex.—Motley v. Tom Green County, Civ.App., 98 S.W.2d 768, reversed on other grounds Tom Green County v. Motley, Com.App., 118 S.W.2d 306.*

32. *Tex.—Woodrum Truck Lines v. Bailey, Com.App., 57 S.W.2d 92, affirming Bailey v. Woodrum Truck Lines, Civ.App., 36 S.W.2d 1090—Browning-Ferris Machinery Co. v. Thomson, Tex.Civ.App., 55 S.W.2d 168.*

Whether appeal bond was seasonably filed is question of fact and determinable by court of civil appeals.—*Woodrum Truck Lines v. Bailey, Tex.Com.App., 57 S.W.2d 92, affirming Bailey v. Woodrum Truck Lines, Civ.App., 36 S.W.2d 1090.*

33. *Tex.—McCrary v. McCrary, Civ. App., 230 S.W. 187. 15 C.J. p 1118 note 24.*

34. *Tex.—Hinn v. Gallagher, 268 S. W. 123, 114 Tex. 322—Maxwell v. Hall, 267 S.W. 670, 114 Tex. 319. 15 C.J. p 1118 note 25.*

Under earlier statute, the judgments of the courts of civil appeals were conclusive on the law and facts in all boundary cases.—*Kenedy Pasture Co. v. State, 231 S.W. 683, 111 Tex. 200, affirming, Civ.App., 196 S. W. 287, and certiorari denied Kenedy v. State of Texas, 42 S.Ct. 271, 259 U.S. 617, 66 L.Ed. 793—Schiele v. Kimball, 194 S.W. 944, 113 Tex. 1—Williamson County v. Travis County, Tex.Com.App., 15 S.W.2d 577, dismissing error Travis County v. Williamson County, Civ.App., 4 S.W.2d 610—Braumiller v. Burke, Tex.Civ. App., 232 S.W. 907—15 C.J. p 1118 note 26.*

35. *Tex.—Grand Lodge Colored Knights of Pythias of Texas v. Green, 101 S.W.2d 219, 128 Tex. 593, dismissing error, Civ.App., 69 S.W.2d 149—Gulf, C. & S. F. Ry. Co. v. Hamilton, Com.App., 89 S.W. 2d 208, 126 Tex. 542, dismissing appeal, Civ.App., 57 S.W.2d 309—First Texas State Ins. Co. v. Hightower, 214 S.W. 293, 110 Tex. 52—American Fruit Growers v.*

Harlan-Elzy-Randall Co., Com. App., 16 S.W.2d 261, dismissing error Harlan-Elzy-Randall Co. v. American Fruit Growers, Civ.App., 7 S.W.2d 132—J. B. Colt Co. v. Knight & Perry, Com.App., 13 S.W. 2d 357, dismissing error, Civ.App., 3 S.W.2d 879—McGinty v. Dennehy, Com.App., 13 S.W.2d 68, dismissing error, Civ.App., 2 S.W.2d 546—Flexlume Corporation v. A. T. Vick Co., Com.App., 291 S.W. 1084, dismissing error A. T. Vick Co. v. Flexlume Corporation, Civ. App., 285 S.W. 699.

15 C.J. p 1118 note 26.

Trespass to try title case instituted in district court held not within final jurisdiction of court of civil appeals.—*Parker v. Bailey, Tex.Com. App., 15 S.W.2d 1033.*

Cases within county court's jurisdiction.

(1) The judgment of the court of civil appeals is final in civil cases appealed from the district court when the amount in controversy is less than one thousand dollars, exclusive of interest.—*Long v. Green & Co., 101 S.W. 786, 100 Tex. 510—Travelers' Ins. Co. v. Barker, Tex.Com. App., 80 S.W.2d 953, dismissing error Barker v. Travelers' Ins. Co., Civ. App., 52 S.W.2d 285—Jameson v. Williams, Tex.Com.App., 67 S.W.2d 228, dismissing error Williams v. Jameson, Civ.App., 44 S.W.2d 498.*

(2) An abandoned plea in a suit in the district court may be considered in determining whether an appeal lies to the supreme court.—*Causeway Inv. Co. v. Nass, 112 S.W.2d 712, 131 Tex. 12, denying rehearing 111 S.W.2d 703, 131 Tex. 12, reversing, Civ.App., 84 S.W.2d 571.*

36. *Tex.—Travelers' Ins. Co. v. Barker, Com.App., 80 S.W.2d 953, dismissing error Barker v. Travelers' Ins. Co., Civ.App., 52 S.W.2d 285.*

37. *Tex.—Travelers' Ins. Co. v. Barker, supra.*

38. *Tex.—Travelers' Ins. Co. v. Barker, supra—American Fruit*

Growers v. Harlan-Elzy-Randall Co., Com.App., 16 S.W.2d 261, dismissing error Harlan-Elzy-Randall Co. v. American Fruit Growers, Civ.App., 7 S.W.2d 132.

39. *Tex.—Grand Lodge Colored Knights of Pythias of Texas v. Green, 101 S.W.2d 219, 128 Tex. 593, dismissing error, Civ.App., 69 S.W.2d 149—Gulf, C. & S. F. Ry. Co. v. Hamilton, 89 S.W.2d 208, 126 Tex. 542, dismissing appeal, Civ.App., 57 S.W.2d 309—Garcia v. American Nat. Ins. Co., 78 S.W.2d 170, 124 Tex. 466, dismissing error American Nat. Ins. Co. v. Garcia, Civ.App., 46 S.W.2d 1011—Aldridge v. Conner, 37 S.W.2d 725, 120 Tex. 243—Maxwell v. Hall, 267 S.W. 670, 114 Tex. 319—Travelers' Ins. Co. v. Barker, Com.App., 80 S.W. 2d 953, dismissing error Barker v. Travelers' Ins. Co., Civ.App., 52 S.W.2d 285—Hanchett v. Ward, Com. App., 65 S.W.2d 268, dismissing Ward v. Hanchett, Civ.App., 47 S.W.2d 360—American Fruit Growers v. Harlan-Elzy-Randall Co., Com.App., 16 S.W.2d 261, dismissing error Harlan-Elzy-Randall Co. v. American Fruit Growers, Civ.App., 7 S.W.2d 132—J. B. Colt Co. v. Knight & Perry, Com.App., 13 S.W.2d 357, dismissing error, Civ.App., 3 S.W.2d 879—McGinty v. Dennehy, Com.App., 13 S.W.2d 68, dismissing error, Civ.App., 2 S.W.2d 546—Blackmon v. Trail, Com. App., 12 S.W.2d 967, reversing Trail v. Blackmon, Civ.App., 1 S.W.2d 937—McMahan v. City of Abilene, Civ.App., 261 S.W. 455, error dismissed City of Abilene v. McMahan, Com.App., 292 S.W. 525.*

Earlier statute did not contain this exception.—*Maxwell v. Hall, 267 S.W. 670, 114 Tex. 319—15 C.J. p 1118 note 25 [a].*

40. *Tex.—Layton v. Hightower, 12 S.W.2d 110, 118 Tex. 166.*

41. *Tex.—Burguières v. Farrell, 87 S.W.2d 463, 126 Tex. 209—McCrary v. McCrary, Civ.App., 230 S.W. 187. 15 C.J. p 1118 note 32.*

cases of contested elections of every character, other than for state officers, except where the validity of the statute is attacked by the decision.⁴² (5) All appeals from interlocutory orders appointing receivers or trustees, or such other interlocutory appeals as may be allowed by law.⁴³ (6) All other cases, except where appellate jurisdiction is given to the supreme court and not made final in

the courts of civil appeals.⁴⁴

Original jurisdiction and power to issue writs. The courts of civil appeals have no original jurisdiction other than that conferred by statute.⁴⁵ These courts and the judges thereof have, by statute, power to issue writs of mandamus,⁴⁶ and all other writs necessary to enforce their jurisdiction;⁴⁷ they may also issue a writ of mandamus, to

Phrase "all cases of divorce" refers to "divorce actions" which include not only part of action for dissolution of bonds of matrimony, but also part of action for determination of property rights.—*Burguières v. Farrell*, 87 S.W.2d 463, 126 Tex. 209.

42. Tex.—*Pease v. State*, Com.App., 208 S.W. 162, modifying, Civ.App., 155 S.W. 657.

In a case dual in its nature and separable presenting a question arising out of a contested election, and a question involving the recovery of salary of the office, the supreme court granted a writ of error as to the latter branch of the case.—*Pease v. State*, supra.

43. Tex.—*Wright v. Dunklin*, 123 S.W.2d 301.—*Stone Fort Nat. Bank of Nacogdoches v. Hall*, 62 S.W.2d 86, 122 Tex. 526.—*Harris v. Willson*, 59 S.W.2d 106, 122 Tex. 323.—*Hinn v. Gallagher*, 268 S.W. 132, 114 Tex. 322.—*Standard Savings & Loan Ass'n v. Miller*, Civ.App., 114 S.W.2d 1201.—*Davenport v. Wood Motor Co.*, Civ.App., 107 S.W.2d 1093.—*Walker v. Walter*, Civ.App., 241 S.W. 524.

15 C.J. p 1118 note 36.

On dissent, or showing of conflict with other decisions, a writ of error will lie on an appeal from an interlocutory order.—*Standard Savings & Loan Ass'n v. Miller*, Tex.Civ.App., 114 S.W.2d 1201.

44. Judgments in original actions instituted in the courts of civil appeals are final.—*Scurry v. Friberg*, 32 S.W.2d 637, 119 Tex. 463.

45. Tex.—*Lone Star Gas Co. v. City of Fort Worth*, 68 S.W.2d 605, reversed on other grounds 98 S.W.2d 799, 128 Tex. 392, 109 A.L.R. 374.—*Thorp Springs Christian College v. Dabney*, Civ.App., 37 S.W.2d 193.—*Taylor v. American Trust & Savings Bank of El Paso*, Civ. App., 265 S.W. 727.—*Texas Electric & Ice Co. v. City of Vernon*, Civ. App., 254 S.W. 503.

46. Tex.—*Houtchens v. Mercer*, 27 S.W.2d 795, 119 Tex. 244.—*Life Ins. Co. of Virginia v. Sanders*, Civ. App., 62 S.W.2d 348.—*Wichita Falls Traction Co. v. Cook*, Civ.App., 50 S.W.2d 422.

15 C.J. p 1118 note 39.

"A Court of Civil Appeals is . . . empowered to issue . . . writs [of

mandamus] only when the same are deemed necessary to aid or enforce its appellate jurisdiction."—*Adams v. Mitchell*, Tex.Civ.App., 86 S.W.2d 884, 885.

Matter in trial court's discretion

Court of civil appeals was without power to compel trial court by mandamus to reverse order denying suspension of operation of temporary writ of injunction pending appeal from order granting writ and to exercise its own discretion in lieu of that of trial court.—*Oak Downs v. Watkins*, Tex.Civ.App., 85 S.W.2d 1100.

47. Tex.—*Houtchens v. Mercer*, 27 S.W.2d 795, 119 Tex. 244.—*Antner v. State*, Civ.App., 114 S.W.2d 640.—*Nash v. McCallum*, Civ.App., 74 S.W.2d 1046.—*Farrell v. Young*, Civ.App., 23 S.W.2d 468.—*Cleveland v. Home Nat. Bank of Cleburne*, Civ.App., 265 S.W. 734.—*Taylor v. American Trust & Savings Bank of El Paso*, Civ.App., 265 S.W. 727.—*Fulmore v. Benson*, Civ.App., 245 S.W. 124.

15 C.J. p 1118 note 40.

Scope and extent of power generally

(1) The court of civil appeals is without jurisdiction to issue extraordinary writs except in aid of its own jurisdiction.—*Yantis v. McCallum*, Tex.Civ.App., 121 S.W.2d 610.—*Adams v. Mitchell*, Tex.Civ.App., 86 S.W.2d 884.—*Life Ins. Co. of Virginia v. Sanders*, Tex.Civ.App., 62 S.W.2d 348.—*City of Farmersville v. Texas-Louisiana Power Co.*, Tex.Civ.App., 33 S.W.2d 271.

(2) In exercising its power to issue extraordinary writs, the court is not limited by the statute confining its appellate jurisdiction to courts within its district.—*National Debenture Corporation v. Adams*, Tex.Civ.App., 115 S.W.2d 757.—*Buffalo Engineering Co. v. Welch*, Tex.Civ.App., 61 S.W.2d 855.—*Reed v. Bryant*, Tex.Civ.App., 291 S.W. 605.

(3) The court has power to prevent interference with its judgments, including judgments affirmed by it, by the issuance of appropriate writs.—*Elder v. Byrd-Frost, Inc.*, Tex.Civ. App., 110 S.W.2d 172.—*Cunningham v. Universal Credit Co.*, Tex.Civ.App., 92 S.W.2d 1097.—*Nash v. Hanover Fire Ins. Co.*, Tex.Civ.App., 79 S.W.2d 182.—*Texas Nat. Bank v. Cellers*, Tex.Civ.App., 75 S.W.2d 890.—*Nash*

v. McCallum, Tex.Civ.App., 74 S.W.2d 1046.—*Life Ins. Co. of Virginia v. Sanders*, Tex.Civ.App., 62 S.W.2d 348.—*Browning-Ferris Machinery Co. v. Thomson*, Tex.Civ.App., 55 S.W.2d 163.—*Halbrook v. Quinn*, Tex.Civ. App., 286 S.W. 954.—*City of Palestine v. City of Houston*, Civ.App., 262 S.W. 215, error dismissed City of Houston v. City of Palestine, 267 S.W. 663, 114 Tex. 306.

(4) But one court of civil appeals cannot prevent interference with the judgments of another court of civil appeals.—*Farrell v. Young*, Tex.Civ. App., 23 S.W.2d 468.

(5) As an incident to its power to prevent interference with its judgments, the court may determine whether the maintenance of a particular suit constitutes such interference.—*State v. Epperson*, 42 S.W.2d 228, 121 Tex. 80.

(6) Acts held to constitute an interference with judgment or encroachment on court's jurisdiction.—*Nash v. Hanover Fire Ins. Co.*, Tex. Civ.App., 79 S.W.2d 182.—*Life Ins. Co. of Virginia v. Sanders*, Tex.Civ. App., 62 S.W.2d 348.

(7) Acts held not to constitute an interference with judgment or encroachment on court's jurisdiction.—*Stanolind Oil & Gas Co. v. Railroad Commission of Texas*, Tex.Civ.App., 107 S.W.2d 633.—*Stanolind Oil & Gas Co. v. Edgar*, Tex.Civ.App., 107 S.W.2d 631.

Injunction

(1) The court cannot issue injunctions except in aid of its own jurisdiction.—*Antner v. State*, Tex.Civ. App., 114 S.W.2d 640.—*Beard v. Smith*, Tex.Civ.App., 85 S.W.2d 843.—*Shelton v. City of Abilene*, Tex.Civ. App., 75 S.W.2d 934.—*Hardy v. City of Throckmorton*, Tex.Civ.App., 62 S.W.2d 1104.—*Madison v. Martinez*, Tex.Civ.App., 42 S.W.2d 84, error refused.—*City of Farmersville v. Texas-Louisiana Power Co.*, Tex.Civ. App., 33 S.W.2d 271.—*Reynolds Mortg. Co. v. Smith*, Tex.Civ.App., 280 S.W. 881.—*Taylor v. American Trust & Savings Bank of El Paso*, Tex.Civ.App., 265 S.W. 727.—*Texas Electric & Ice Co. v. City of Vernon*, Tex.Civ.App., 254 S.W. 503.—*Fulmore v. Benson*, Tex.Civ.App., 245 S.W. 124.—*City of Graham v. Seal*, Tex. Civ.App., 235 S.W. 668, dismissed for want of jurisdiction.—*Benavides v.*

compel a judge of the district or county court to | proceed to trial and judgment in a cause.⁴⁸

Thomas, Tex.Civ.App., 234 S.W. 205—Ford v. State, Tex.Civ.App., 209 S.W. 490—Pollard v. Spear, Tex.Civ.App., 207 S.W. 620—15 C.J. p 1118 note 40 [b].

(2) The court may issue an injunction to prevent interference with its judgment.—Long v. Martin, 287 S.W. 494, 116 Tex. 135—Morse v. Scott, Tex.Civ.App., 130 S.W.2d 1041—Stanolind Oil & Gas Co. v. Edgar, Tex.Civ.App., 98 S.W.2d 222, error dismissed—Nash v. Hanover Fire Ins. Co., Tex.Civ.App., 79 S.W.2d 182—Madison v. Martinez, Tex.Civ.App., 42 S.W.2d 84, error refused.

(3) When the court has acquired jurisdiction of an appeal, it may issue an injunction to protect the subject-matter thereof pending a determination of the appeal.—Madison v. Martinez, supra—Bird v. Alexander, Tex.Civ.App., 288 S.W. 606—Ford v. State, Tex.Civ.App., 209 S.W. 490—15 C.J. p 1118 note 40 [c].

(4) This is true, at least, after supersedeas.—McDowell v. Hightower, 242 S.W. 753, 111 Tex. 585—Cleveland v. Alpine Lumber Co., Tex.Civ.App., 70 S.W.2d 257—Stewart v. Poinbeuf, Tex.Civ.App., 201 S.W. 1025—Houston, B. & T. Ry. Co. v. Hornberger, Tex.Civ.App., 141 S.W. 311.

(5) But if the appeal is effected simply by cost bond, the court is not authorized to grant an injunction.—Cleveland v. Alpine Lumber Co., supra.

(6) On an appeal from an order or judgment refusing an injunction, the court has been held to be without jurisdiction to grant a temporary injunction pending the determination of the appeal.—Shelton v. City of Abilene, Tex.Civ.App., 75 S.W.2d 934—City of Farmersville v. Texas-Louisiana Power Co., Tex.Civ.App., 33 S.W.2d 271—Taylor v. American Trust & Savings Bank of El Paso, Tex.Civ.App., 265 S.W. 727—Texas Electric & Ice Co. v. City of Vernon, Tex.Civ.App., 254 S.W. 503.

(7) But an injunction has been issued in such case where it was necessary to insure the effective operation of any judgment the court might render on the appeal.—Madison v. Martinez, Tex.Civ.App., 42 S.W.2d 84.

Prohibition

(1) The court of civil appeals has power in a proper case to issue an original writ of prohibition.—City of Houston v. City of Palestine, 267 S.W. 663, 114 Tex. 306, dismissing writ City of Palestine v. City of Houston, Civ.App., 262 S.W. 215—National Debenture Corporation v. Adams, Tex.Civ.App., 115 S.W.2d 757.

(2) The court cannot issue writs of prohibition except in aid of its own jurisdiction.—Cunningham v. Universal Credit Co., Tex.Civ.App., 93 S.W.2d 1097—Adams v. Mitchell, Tex.Civ.App., 86 S.W.2d 884—Cleveland v. Alpine Lumber Co., Tex.Civ.App., 70 S.W.2d 257—Bell v. Young, Tex.Civ.App., 20 S.W.2d 135—15 C.J. p 1118 note 40 [d].

(3) The court can also issue such writs in aid of its jurisdiction to issue a writ of mandamus to compel a judge to proceed to trial and judgment.—National Debenture Corporation v. Adams, Tex.Civ.App., 115 S.W.2d 757.

(4) The court can also issue such writs to prevent interference with its judgments.—Long v. Martin, 287 S.W. 494, 116 Tex. 135—Morse v. Scott, Tex.Civ.App., 130 S.W.2d 1041—Elder v. Byrd-Frost, Inc., Tex.Civ.App., 110 S.W.2d 172—Evans v. Moore, Tex.Civ.App., 109 S.W.2d 359—Stanolind Oil & Gas Co. v. Edgar, Tex.Civ.App., 98 S.W.2d 222, error dismissed—Cunningham v. Universal Credit Co., Tex.Civ.App., 92 S.W.2d 1097—Nash v. Hanover Fire Ins. Co., Tex.Civ.App., 79 S.W.2d 182—Nash v. McCallum, Tex.Civ.App., 74 S.W.2d 1046—Browning-Ferris Machinery Co. v. Thomson, Tex.Civ.App., 55 S.W.2d 168—Bell v. Young, Tex.Civ.App., 20 S.W.2d 135—Halbrook v. Quinn, Tex.Civ.App., 286 S.W. 954, certified questions dismissed Quinn v. Halbrook, 285 S.W. 1079, 115 Tex. 513—Pierce v. Box, Tex.Civ.App., 284 S.W. 231—Waurika Oil Ass'n v. Ellis, Tex.Civ.App., 267 S.W. 523—City of Palestine v. City of Houston, Tex.Civ.App., 262 S.W. 215, error dismissed City of Houston v. City of Palestine, 267 S.W. 663, 114 Tex. 306—Long v. Martin, Tex.Civ.App., 260 S.W. 327, error dismissed, Sup., 278 S.W. 1115.

(5) This jurisdiction continues until its judgment has been completely executed.—Pierce v. Box, Tex.Civ.App., 284 S.W. 231—City of Palestine v. City of Houston, Civ.App., 262 S.W. 215, error dismissed City of Houston v. City of Palestine, 267 S.W. 663, 114 Tex. 306.

(6) The court's jurisdiction continues until it is lost by granting and perfecting of writ of error by supreme court.—City of Palestine v. City of Houston, supra.

(7) The court on application for writ of prohibition, can determine validity of statute, where act interfering with court's jurisdiction was done in pursuance of such statute.—Life Ins. Co. of Virginia v. Sanders, Tex.Civ.App., 62 S.W.2d 348.

(8) The court cannot grant a writ pending appeal effected simply by cost bond.—Cleveland v. Alpine Lumber Co., Tex.Civ.App., 70 S.W.2d 257.

(9) Other matters see Cleveland v. Alpine Lumber Co., supra. 15 C.J. p 1118 note 40 [d].

Rehearing

Court of civil appeals is not required to entertain and consider motion for rehearing in original proceeding seeking issuance of extraordinary writs.—Nash v. McCallum, Tex.Civ.App., 74 S.W.2d 1046.

48. Tex.—Dallas Railway & Terminal Co. v. Watkins, 86 S.W.2d 1081, 126 Tex. 116—Long v. Martin, 285 S.W. 1075, 115 Tex. 519—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—American Nat. Ins. Co. v. Sutton, Civ.App., 130 S.W.2d 441—Friske v. Graham, Civ.App., 128 S.W.2d 139—Yantis v. McCallum, Civ.App., 121 S.W.2d 610—City of Big Spring v. Garlington, Civ.App., 88 S.W.2d 1095—Adams v. Mitchell, Civ.App., 86 S.W.2d 884—Parker v. Boyd, Civ.App., 70 S.W.2d 1022—Allen v. Strode, Civ.App., 62 S.W.2d 289—McPhail v. Scarborough, Civ.App., 16 S.W.2d 858—Rouff v. Boyd, Civ.App., 16 S.W.2d 403.

15 C.J. p 1119 note 41.

Scope and extent of power generally

(1) A judge can be compelled to proceed only when there is a "cause" pending before him.—City of Big Spring v. Garlington, Tex.Civ.App., 88 S.W.2d 1095—Barnett v. Sutton, Tex.Civ.App., 31 S.W.2d 887.

(2) "The power to order one judge to proceed . . . does of itself, necessarily imply the power to prohibit all other judges from interference with obedience to such order."—National Debenture Corporation v. Adams, Tex.Civ.App., 115 S.W.2d 757, 761.

(3) A writ can rightly issue only when the judge improperly refuses to act on a matter within his jurisdiction.—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—American Nat. Ins. Co. v. Sutton, Tex.Civ.App., 130 S.W.2d 441—Cleveland v. Home Nat. Bank of Cleburne, Tex.Civ.App., 265 S.W. 734—Home Nat. Bank of Cleburne v. Wilson, Tex.Civ.App., 265 S.W. 732.

(4) Where no appeal was perfected by either party, the court has been held to be without jurisdiction to issue a writ of mandamus.—Wichita Falls Traction Co. v. Cook, Tex.Civ.App., 50 S.W.2d 422.

Power to order particular acts

(1) Ordinarily, the court of civil appeals cannot control a judge as to the character of judgment to be entered.—Allen v. Strode, Tex.Civ.App., 62 S.W.2d 289—Harris v. O'Brien, Tex.Civ.App., 54 S.W.2d 277.

(2) The court has power to compel a judge to render and enter a

Certification of questions. The statutes provide for the certification of questions from the courts of civil appeals to the supreme court⁴⁹ when an issue of law arises which the court of civil appeals deems it advisable to present to the supreme court for adjudication,⁵⁰ when one of the judges of a

judgment on a verdict.—*Chaffin v. Drane*, Tex.Civ.App., 131 S.W.2d 672.—*American Nat. Ins. Co. v. Sutton*, Tex.Civ.App., 130 S.W.2d 441.—*Friske v. Graham*, Tex.Civ.App., 123 S.W.2d 139.—*Allen v. Strode*, Tex.Civ.App., 62 S.W.2d 289.

(3) The court may direct a judge to set aside an order setting aside a judgment and granting a new trial, made after the judgment had become final.—*Houston Lighting & Power Co. v. Boyd*, Tex.Civ.App., 114 S.W.2d 934.

(4) It is without power to compel a judge to set aside an order sustaining a demurrer to a bill.—*Yantis v. McCallum*, Tex.Civ.App., 121 S.W.2d 610.

49. Certification of entire case

(1) The court of civil appeals should formulate the specific question of law to be determined by the supreme court and should not certify the entire case.—*State v. Robb & Rowley United*, 114 S.W.2d 225, 131 Tex. 188.—*City of Fort Worth v. Burnett*, 112 S.W.2d 702, 131 Tex. 34.—*Southwestern Drug Corporation v. Taylor*, 101 S.W.2d 550, 129 Tex. 5, answer to certified question conformed to, Civ.App., 103 S.W.2d 883.—*Jones v. Wynne*, 98 S.W.2d 177, 128 Tex. 279.—*Scanlan v. Continental Inv. Co.*, 87 S.W.2d 476, 126 Tex. 401, conformed to, Civ.App., 93 S.W.2d 1189.—*Douglas Oil Co. v. State*, 76 S.W.2d 1043, 124 Tex. 232, reversed on other grounds *Federal Royalty Co. v. State*, 98 S.W.2d 993, 128 Tex. 324.—*Wyatt C. Hedrick, Inc. v. Ratcliff*, 58 S.W.2d 41, 122 Tex. 313, dismissing certificate, 63 S.W.2d 877, 122 Tex. 313, error refused.—*Chicago, R. I. & G. Ry. Co. v. Harris*, 24 S.W.2d 385, 119 Tex. 65.—*First Nat. Bank v. Zorn*, 299 S.W. 847, 117 Tex. 180.—*Taylor v. Higgins Oil & Fuel Co.*, 293 S.W. 891, 117 Tex. 149.—*Owens v. Tedford*, 269 S.W. 418, 114 Tex. 390.—*Hollis v. Parkland Corporation*, Tex.Com.App., 29 S.W.2d 309.—*Board of Equalization of City of Fort Worth v. McDonald*, Tex.Civ.App., 113 S.W.2d 806, reversed on other grounds, Com.App., 129 S.W.2d 1135.—*Turman v. Turman*, Tex.Civ.App., 99 S.W.2d 947, error dismissed, certiorari denied 57 S.Ct. 933, 301 U.S. 698, 81 L.Ed. 1353, rehearing denied 58 S.Ct. 7, 302 U.S. 774, 82 L.Ed. 600—15 C.J. p 1119 note 44 [c].

(2) Thus, a certificate presenting question whether judgment was correct cannot be considered.—*First Nat. Bank v. Zorn*, 299 S.W. 847, 117 Tex. 180.—*Taylor v. Higgins Oil & Fuel Co.*, 293 S.W. 891, 117 Tex. 149.

(3) Where there was but one controlling question in the case, certification was denied on the ground that it would be tantamount to certifying the entire case.—*Board of Equalization of City of Fort Worth v. McDonald*, supra.

(4) On the other hand, it has been stated that the fact that the answers to the proposed questions for certification would be determinative of the entire case does not preclude certification.—*Douglas Oil Co. v. State* (Whiteside Case), Civ.App., 81 S.W.2d 1064, reversed on other grounds, *Federal Royalty Co. v. State*, 98 S.W.2d 993, 128 Tex. 324.

Time for certification

The court of civil appeals has no jurisdiction to certify questions after the expiration of the term at which it finally disposed of the case.—*Gulf, C. & S. F. Ry. Co. v. Taylor*, 280 S.W. 542, 115 Tex. 238, vacating and dismissing certified question 277 S.W. 96, 115 Tex. 121, which answered certified question, Civ.App., 198 S.W. 600.—*La Puelle v. Key*, 261 S.W. 366, 114 Tex. 1.—*Dillingham v. Roberts Ice Co.*, Tex.Civ.App., 101 S.W.2d 1042—15 C.J. p 1119 note 44 [b].

50. Tex.—*First Nat. Bank v. Zorn*, 299 S.W. 847, 117 Tex. 180.—*Taylor v. Higgins Oil & Fuel Co.*, 293 S.W. 891, 117 Tex. 149.—*Gulf, C. & S. F. Ry. Co. v. Gorman*, 245 S.W. 418, 112 Tex. 147.—*Wilson v. Giraud*, 195 S.W. 848, 113 Tex. 3.

15 C.J. p 1119 notes 44–46.

Exercise of power generally

(1) The court will certify only when the particular circumstances make certification advisable.—*Wyllie v. State*, Tex.Civ.App., 115 S.W.2d 979, error dismissed.—*Ladd v. Yett*, Tex.Civ.App., 273 S.W. 1006.—*Davis v. Simmons*, Tex.Civ.App., 240 S.W. 970, dismissed for want of jurisdiction.—*Texas & N. O. R. Co. v. Peveto*, Tex.Civ.App., 224 S.W. 552, reversed on other grounds *Peveto v. Texas & N. O. R. Co.*, Com.App., 238 S.W. 892.

(2) The court will certify where the case would otherwise become moot before a supreme court adjudication could be had, such as cases involving questions of outstanding importance to the jurisprudence of the state and of first impression, and in which its jurisdiction is final.—*Wyllie v. State*, Tex.Civ.App., 115 S.W.2d 979, error dismissed.

(3) The court will refuse to certify where it has no doubt as to correctness of its holding.—*Scannell v. Scannell*, Tex.Civ.App., 117 S.W.2d 538.—*Chambers v. First Nat. Bank*, Tex.Civ.App., 104 S.W.2d 58.—*Eidel-*

bach v. Davis, Tex.Civ.App., 99 S.W.2d 1067, error dismissed.—*Lubbock Independent School Dist. v. Lubbock Hotel Co.*, Tex.Civ.App., 62 S.W.2d 271.—*Southern Pine Lumber Co. v. Martin*, Tex.Civ.App., 274 S.W. 181, reversed on other grounds *Martin v. Southern Pine Lumber Co.*, Com.App., 284 S.W. 918.

15 C.J. p 1119 note 46 [I].

When writ of error will lie, the court of civil appeals will not ordinarily certify questions to the supreme court.—*Edwards v. Gifford*, Tex.Civ.App., 132 S.W.2d 155, error granted.—*Sportatorium, Inc. v. State*, Tex.Civ.App., 115 S.W.2d 483, error dismissed.—*Cannon Ball Motor Freight Lines v. Grasso*, Tex.Civ.App., 59 S.W.2d 337, affirmed *Grasso v. Cannon Ball Freight Lines*, 81 S.W.2d 482, 125 Tex. 154.—*Weldmer v. Stott*, Tex.Civ.App., 48 S.W.2d 389, error refused.—*Gulf, C. & S. F. Ry. Co. v. Pearlstone Mill & Elevator Co.*, Tex.Civ.App., 37 S.W.2d 299, reversed on other grounds, Com.App., 53 S.W.2d 1001.—*Elk Mfg. Co. v. Citizens' Nat. Bank of Abilene*, Tex.Civ.App., 18 S.W.2d 747, reversed on other grounds *Citizens' Nat. Bank of Abilene v. Elk Mfg. Co.*, Com.App., 29 S.W.2d 1062.—*Marnett Oil & Gas Co. v. Munsey*, Tex.Civ.App., 232 S.W. 867, reversed on other grounds *Munsey v. Marnett Oil & Gas Co.*, 254 S.W. 311, 113 Tex. 212—15 C.J. p 1119 note 44 [a].

Where jurisdiction final

(1) The court of civil appeals may certify questions arising in cases within its final jurisdiction.—*Gulf, C. & S. F. Ry. Co. v. Gorman*, 245 S.W. 418, 112 Tex. 147.—*American Nat. Ins. Co. v. Tabor*, 230 S.W. 397, 111 Tex. 155.—*Perry v. Greer*, 221 S.W. 981, 110 Tex. 549.—*Missouri, K. & T. Ry. Co. of Texas v. Lovell*, 221 S.W. 929, 110 Tex. 546, answering certified questions, Civ.App., 179 S.W. 1111, and answers conformed to 223 S.W. 1024.—*Wilson v. Giraud*, 195 S.W. 848, 113 Tex. 3—15 C.J. p 1119 note 46 [d].

(2) But on appeals from interlocutory orders when it is important that the case be tried on its merits as soon as possible, the court will refuse to certify.—*Lubbock Independent School Dist. v. Lubbock Hotel Co.*, Tex.Civ.App., 62 S.W.2d 274.—*Gilmore v. Sammons*, Tex.Civ.App., 269 S.W. 861.

Where jurisdiction original

Questions arising in cases within the original jurisdiction of the court of civil appeals should not be certified and cannot be answered by the supreme court.—*Quinn v. Halbrook*,

court of civil appeals dissents as to any conclusion of law material to the decision of the case,⁵¹ or when the court's decision is in conflict with an opinion of the supreme court, or of another court of civil appeals, on any question of law.⁵² In answering a question certified from the court of civil ap-

285 S.W. 1079, 115 Tex. 513, dismissing certified questions *Halbrook v. Quinn*, Civ.App., 286 S.W. 954—*Long v. Martin*, 285 S.W. 1075, 115 Tex. 519.

Character of questions which may be certified or answered

(1) Only questions of law may be certified and answered.—*McCullough v. McCullough*, 36 S.W.2d 459, 120 Tex. 209, answering certified questions, Civ.App., 20 S.W.2d 224, rehearing denied 39 S.W.2d 105—*Bluitt v. Pearson*, 7 S.W.2d 524, 117 Tex. 467, answering certified questions in part, Civ.App., 8 S.W.2d 310—*Gerneth v. Galbraith-Foxworth Lumber Co.*, 300 S.W. 17, 117 Tex. 205, answers to certified questions conformed to, Civ.App., 6 S.W.2d 215—*Taylor v. Higgins Oil & Fuel Co.*, 298 S.W. 891, 117 Tex. 149—*Owens v. Tedford*, 269 S.W. 418, 114 Tex. 390—*Sovereign Camp, W. O. W., v. Ayers*, 261 S.W. 1000, 113 Tex. 564—*Taylor v. Higgins Oil & Fuel Co.*, Tex.Civ.App., 2 S.W.2d 283, error dismissed—15 C.J. p 1119 note 46 [m].

(2) More precisely, only questions of law arising on the record on appeal may be certified.—*Douglas Oil Co. v. State (Whiteside Case)*, Civ.App., 81 S.W.2d 1064, reversed on other grounds *Federal Royalty Co. v. State*, 98 S.W.2d 993, 128 Tex. 324.

(3) Certified question held one of fact.—*McCullough v. McCullough*, 36 S.W.2d 459, 120 Tex. 209, answering certified questions, Civ.App., 20 S.W.2d 224, rehearing denied 39 S.W.2d 105.

(4) Questions in such form that an answer would not be decisive and conclusive of an issue of law in the case should not be certified and cannot be answered.—*Ramin v. Cosio*, 79 S.W.2d 617, 124 Tex. 471, dismissing certificate, Civ.App., 35 S.W.2d 802, and reversed on other grounds 113 S.W.2d 524, 131 Tex. 362—*Owens v. Tedford*, 269 S.W. 418, 114 Tex. 390.

(5) The same rule applies to hypothetical or abstract questions.—*Ramin v. Cosio*, supra—County Democratic Executive Committee in and for Bexar County v. Booker, 52 S.W.2d 908, 122 Tex. 89—*Pullman Co. v. Hays*, 271 S.W. 1108, 114 Tex. 490, answering certified questions, Civ.App., 257 S.W. 686—*Owens v. Tedford*, 269 S.W. 418, 114 Tex. 390—*Douglas Oil Co. v. State (Whiteside Case)*, Civ.App., 81 S.W.2d 1064, reversed on other grounds *Federal Royalty Co. v. State*, 98 S.W.2d 993, 128 Tex. 324—15 C.J. p 1119 note 46 [b], [c].

(6) Question is "abstract," where court of civil appeals has manifestly entered correct judgment regardless of answer to question.—County Democratic Executive Committee in and for Bexar County v. Booker, supra.

(7) Questions which have become abstract because of answers to other certified questions are likewise not required to be answered.—*City of Amarillo v. Stapf*, 101 S.W.2d 229, 129 Tex. 81—*Hurt v. Cooper*, Civ.App., 113 S.W.2d 929, conforming to certified questions 110 S.W.2d 896, 130 Tex. 433.

(8) Where all members of court of civil appeals agreed that answer to certified question was necessary to disposition of appeal, supreme court would resolve doubt in favor of materiality of question and return answer.—*Westbrook v. Houston Chronicle Pub. Co.*, 102 S.W.2d 197, 129 Tex. 95.

(9) Supreme court refused to answer certified questions where any answer made would create implications concerning principal law question which was not certified.—*Gillespie v. Fuller Const. Co.*, 61 S.W.2d 977, 122 Tex. 506, dismissing certificate, Civ.App., 66 S.W.2d 798, error refused.

Sufficiency of certificate

The certificate should contain all the facts required to answer the question certified.—*Ramin v. Cosio*, 79 S.W.2d 617, 124 Tex. 471, dismissing certificate, Civ.App., 35 S.W.2d 802, and reversed on other grounds 113 S.W.2d 524, 131 Tex. 362—*Brown v. Johnson*, 299 S.W. 862, 117 Tex. 199.

15 C.J. p 1119 note 46 [e].

Tentative opinion

The certificate of the court of civil appeals must be accompanied by the court's tentative opinion, except in an emergency case, in which case the certificate must set forth the reasons or circumstances giving rise to an emergency, the supreme court being free to determine whether they do so.—*City of Fort Worth v. Burnett*, 112 S.W.2d 702, 131 Tex. 34.

Effect of answers

(1) The supreme court's answers are res judicata as to the questions certified.—*Douglas Oil Co. v. State (Whiteside Case)*, 81 S.W.2d 1064, reversed on other grounds *Federal Royalty Co. v. State*, 98 S.W.2d 993, 128 Tex. 324.

(2) Such answers are binding on the court of civil appeals.—County Democratic Executive Committee in and for Bexar County v. Booker, 52 S.W.2d 908, 122 Tex. 89—*Hurt v.*

Cooper, Tex.Civ.App., 113 S.W.2d 929, conforming to certified questions 110 S.W.2d 896, 130 Tex. 433—*Jones v. Jones*, Tex.Civ.App., 99 S.W.2d 1012—*Douglas Oil Co. v. State (Whiteside Case)*, supra.

(3) But the application of such answers to the record for the purpose of determining the judgment to be rendered is for the court of civil appeals.—*Douglas Oil Co. v. State (Whiteside Case)*, supra.

(4) The court of civil appeals may dispose of all questions not certified, as though no certification had been made.—*Glenn v. Dallas County Bois D'Arc Island Levee Dist.*, Civ.App., 282 S.W. 339, reversing 275 S.W. 137, conforming to answers, 288 S.W. 452, 114 Tex. 325, and reversed on other grounds *Dallas County Bois D'Arc Island Levee Dist. v. Glenn*, Com. App., 288 S.W. 165.

(5) It will not remand the case for further proceedings, but will render judgment in accordance with supreme court's decision.—*Hurt v. Cooper*, Civ. App., 113 S.W.2d 929, conforming to certified questions 110 S.W.2d 896, 130 Tex. 433.

51. Tex.—*Sellers v. Puckett*, Civ. App., 180 S.W. 639.
15 C.J. p 1119 notes 44, 45, p 1120 note 47.

In cases within court's final jurisdiction, the filing of a dissent does not require certification.—*Perry v. Greer*, 221 S.W. 931, 110 Tex. 549—*Missouri, K. & T. Ry. Co. of Texas v. Lovell*, 221 S.W. 929, 110 Tex. 546, answering certified questions, Civ. App., 179 S.W. 1111, and answers conformed to 223 S.W. 1024—*Wilson v. Giraud*, 195 S.W. 848, 113 Tex. 3—*Fleming-Stitzer Road Bldg. Co. v. Boyett*, Tex.Civ.App., 253 S.W. 561—*Walker v. Walter*, Tex.Civ.App., 241 S.W. 524—15 C.J. p 1120 note 47 [f], [g].

Abstract questions should not be certified and cannot be answered.—*Owens v. Tedford*, 269 S.W. 418, 114 Tex. 390.

Only questions of law should be certified.—*McCrary v. McCrary*, Tex. Civ.App., 230 S.W. 187.

Points of dissent must appear in order to afford a basis for a certificate of dissent.—*Cameron County Water Improvement Dist. No. 1 v. Tomiyasu*, Tex.Civ.App., 35 S.W.2d 506—15 C.J. p 1120 note 47 [i].

52. Tex.—*Harris v. Willson*, 59 S.W. 2d 106, 122 Tex. 323—*Layton v. Hightower*, 12 S.W.2d 110, 118 Tex. 166—*Roddy v. Fly*, 272 S.W. 437, 114 Tex. 515—*Gulf, C. & S. F. Ry. Co. v. Willson*, 261 S.W. 368, 113

peals, the supreme court may predicate the answer solely on the statement of the case as contained in the certificate.⁵³

What constitutes a conflict of decisions. A conflict of decisions within the meaning of the statutory provision conferring jurisdiction on the supreme court in certain such cases, or of the rule authorizing the supreme court to issue writs of mandamus to compel the courts of civil appeals to certify in certain of such cases, both of which ap-

pear in § 461 supra, or of the related provisions, set forth in this section supra, excepting such cases from the final jurisdiction of the courts of civil appeals, and requiring such courts to certify in such cases, must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions.⁵⁴ In all in-

Tex. 531—Myers v. F. Dodson & Son, Civ.App., 254 S.W. 1112.
15 C.J. p 1119 notes 44, 45, p 1120 note 48.

Certification is mandatory in cases falling within the terms of the statute.—Wright v. Dunklin, Tex., 123 S.W.2d 301.

Question as to whether decision is in conflict with certain decisions of other courts should not be certified and cannot be answered.—Owens v. Tedford, 269 S.W. 418, 114 Tex. 390.

When writ of error is refused by the supreme court because the judgment of the court of civil appeals is correct, a motion to certify will be denied.—Trico Oil Co. v. Pelton, Tex.Civ.App., 120 S.W.2d 539, denying motion 114 S.W.2d 1209.

Finality of decision as affecting power or duty

(1) Certification is not required in cases in which a writ of error will lie.—Gulf Production Co. v. Warren, Tex.Civ.App., 99 S.W.2d 616, error refused, certiorari denied Oakwood Realty Co. v. Gulf Production Co., 58 S.Ct. 27, 302 U.S. 707, 82 L.Ed. 546—International-Great Northern R. Co. v. Mallard, Tex.Civ.App., 262 S.W. 789, affirmed, Com.App., 277 S.W. 1051—McMahan v. City of Abilene, Tex.Civ.App., 261 S.W. 455, error dismissed City of Abilene v. McMahan, Com.App., 292 S.W. 525—Ketch v. Weaver Bros., Tex.Civ.App., 261 S.W. 380, reversed on other grounds, Com.App., 276 S.W. 676—Braumiller v. Burke, Tex.Civ.App., 232 S.W. 907.

(2) The court may, however, certify in cases in which its jurisdiction is final, that is, where a writ of error will not lie.—Perry v. Greer, 221 S.W. 931, 110 Tex. 549—Missouri, K. & T. Ry. Co. of Texas v. Lovell, 221 S.W. 929, 110 Tex. 546, answering certified questions, Civ.App., 179 S.W. 1111, and answers conformed to 223 S.W. 1024.

(3) But on appeals from interlocutory orders, the court will refuse to certify where it is important that the case be tried on its merits as soon as possible.—Gillmore v. Sammons, Tex.Civ.App., 269 S.W. 861.

Rehearing of motion to certify will be denied where the supreme court overruled moving party's motion asking leave of that court to file a petition for a writ of mandamus requiring the court of civil appeals to certify.—Trico Oil Co. v. Pelton, Tex.Civ.App., 120 S.W.2d 539, denying motion 114 S.W.2d 1209.

Under earlier statute, conflict with a supreme court decision did not require certification.—Stuart v. Meyer, Tex.Civ.App., 196 S.W. 615, error refused—Warren v. Willson, 192 S.W. 529, 108 Tex. 262—15 C.J. p 1120 note 48 [1].

53. Tex.—George W. Armstrong Co. v. Adair, 247 S.W. 848, 112 Tex. 439.

15 C.J. p 1120 note 49.

54. Tex.—Wright v. Dunklin, 123 S.W.2d 301—Grand Lodge Colored Knights of Pythias of Texas v. Green, 101 S.W.2d 219, 128 Tex. 593, dismissing error, Civ.App., 69 S.W.2d 149—Gulf, C. & S. F. Ry. Co. v. Hamilton, 89 S.W.2d 208, 126 Tex. 542, dismissing appeal, Civ.App., 57 S.W.2d 309—Garcia v. American Nat. Ins. Co., 78 S.W.2d 170, 124 Tex. 466, dismissing error American Nat. Ins. Co. v. Garcia, Civ. App., 46 S.W.2d 1011—Citizens' Nat. Bank of Cameron v. Jones, 61 S.W.2d 987, 122 Tex. 551, ordering certification of questions Citizens' Nat. Bank of Cameron v. U. S. Bond & Mortgage Co., Civ.App., 48 S.W.2d 676—Krueger v. Hall, 61 S.W.2d 985, 122 Tex. 547, ordering certification of questions Umberston v. Krueger, Civ.App., 49 S.W.2d 528—Harris v. Willson, 59 S.W.2d 106, 122 Tex. 323—Layton v. Hightower, 12 S.W.2d 110, 118 Tex. 166—Benson v. Jones, 296 S.W. 865, 117 Tex. 68, denying mandamus Neyland v. Benson, Civ.App., 292 S.W. 251—Hinn v. Gallagher, 268 S.W. 132, 114 Tex. 322—Jacobs v. Pleasants, 267 S.W. 251, 114 Tex. 242—Garrett v. Fly, 266 S.W. 779, 114 Tex. 233—American Nat. Bank of Wichita Falls v. Hall, 265 S.W. 378, 114 Tex. 164—Pierce v. Willson, 263 S.W. 581, 114 Tex. 136—Garrity v. Rainey, 247 S.W. 825, 112 Tex. 369—Travelers' Ins. Co. v. Barker, 80 S.W.2d 953, dismiss-

ing error Barker v. Travelers' Ins. Co., Civ.App., 52 S.W.2d 285—Moore v. Hunter, Com.App., 67 S.W.2d 860, dismissing error, Civ.App., 45 S.W.2d 387—Campsey v. Brumley, Com.App., 55 S.W.2d 810—Jones v. Hickman, Com.App., 48 S.W.2d 982—Vann v. National Life & Accident Ins. Co., Com.App., 24 S.W.2d 347, reversing National Life & Accident Ins. Co. v. Vann, Civ. App., 11 S.W.2d 364—J. B. Colt Co. v. Wheeler, Com.App., 23 S.W.2d 299, dismissing error, Civ.App., 12 S.W.2d 1102—McGinty v. Dennehy, Com.App., 13 S.W.2d 68, dismissing error, Civ.App., 2 S.W.2d 546—Jarecki Mfg. Co. v. Hinds, Com.App., 6 S.W.2d 343, dismissing error, Civ.App., 295 S.W. 274—City of Abilene v. McMahan, Com.App., 292 S.W. 525, dismissing error McMahan v. City of Abilene, Civ. App., 261 S.W. 455—Yeates v. St. Louis Southwestern Ry. Co. of Texas, Com.App., 244 S.W. 503, dismissing error Yeates v. St. Louis Southwestern Ry. Co. of Texas, Civ.App., 184 S.W. 636—Tide Water Oil Co. v. Bean, Civ.App., 118 S.W.2d 358—Willys-Overland Co. of California v. Chapman, Civ. App., 206 S.W. 978.

15 C.J. p 1116 note 85 [a], p 1120 note 48 [a], [c]—[e].

Term "facts," within the meaning of the rule that if, as to any given point, any of the substantial facts stated in the opinions are materially different, considering the opinions as a whole, conflict is not presented on such point, includes relevant parts of the trial and appellate record and procedure.—American Nat. Bank of Wichita Falls v. Hall, 265 S.W. 378, 114 Tex. 164.

Decisions held conflicting

Tex.—Wright v. Dunklin, 123 S.W.2d 301—Grand United Order of Odd Fellows of Texas v. White, 105 S.W.2d 886, 129 Tex. 590, reversing, Civ.App., 78 S.W.2d 639—Citizens' Nat. Bank of Cameron v. Jones, 61 S.W.2d 987, 122 Tex. 551, ordering certification of questions Citizens' Nat. Bank of Cameron v. U. S. Bond & Mortgage Co., Civ.App., 48 S.W.2d 676—Krueger v. Hall, 61 S.W.2d 985, 122 Tex. 547, ordering

stances enumerated, the conflict must be between a decision of a court of civil appeals and that of the supreme court, or of another court of civil appeals,⁵⁵ except insofar as the supreme court's appellate jurisdiction, as appears in § 461 supra, also

includes cases in which a court of civil appeals holds differently from a prior decision of its own, and it must be between decisions which are authoritative and binding as precedents.⁵⁶

certification of questions *Umberson v. Krueger*, Civ.App., 49 S.W.2d 528—*Olliqui v. Duran*, 92 S.W.2d 436, 127 Tex. 156, setting aside, Civ. App., 60 S.W.2d 505—*Curlee Clothing Co. v. Hall*, 60 S.W.2d 202, 122 Tex. 456, commanding certification of questions *Curlee Clothing Co. v. Wickliffe*, Civ.App., 38 S.W.2d 175—*Casstevens v. Texas & P. R. Co.*, 32 S.W.2d 637, 119 Tex. 456, 73 A.L.R. 89, reversing, Civ.App., 28 S.W.2d 288—*Layton v. Hightower*, 12 S.W.2d 110, 118 Tex. 166—*Malone v. Dawson*, 5 S.W.2d 965, 117 Tex. 377, 60 A.L.R. 665, reversing *Dawson v. Malone*, Civ.App., 283 S.W. 634—*Jacobs v. Pleasants*, 267 S.W. 251, 114 Tex. 242—*Seamans Oil Co. v. Guy*, 262 S.W. 473, 114 Tex. 42, granting petition, Civ. App., 239 S.W. 696, and reversed 276 S.W. 424, 115 Tex. 93—*Franklin Fire Ins. Co. v. Shadid*, Com.App., 68 S.W.2d 1030, modifying, Civ. App., 45 S.W.2d 769—*Vann v. National Life & Accident Ins. Co.*, Com.App., 24 S.W.2d 347, reversing *National Life & Accident Ins. Co. v. Vann*, Civ.App., 11 S.W.2d 364—*St. Louis Southwestern Ry. Co. v. Buice*, Com.App., 275 S.W. 996, reversing, Civ.App., 262 S.W. 558.

Decisions held not conflicting

Tex.—*Wright v. Dunklin*, 123 S.W.2d 301—*Grand Lodge Colored Knights of Pythias of Texas v. Green*, 101 S.W.2d 219, 128 Tex. 593, dismissing error, Civ.App., 69 S.W.2d 149—*Maryland Casualty Co. v. Dobbs*, 100 S.W.2d 349, 128 Tex. 547, dismissing appeal, Civ.App., 70 S.W.2d 751—*Gulf, C. & S. F. Ry. Co. v. Hamilton*, 89 S.W.2d 208, 126 Tex. 542, dismissing appeal, Civ.App., 57 S.W.2d 309—*Sumner v. General Contract Purchase Corporation*, 80 S.W.2d 741, 125 Tex. 51, dismissing error *General Contract Purchase Corporation v. Sumner*, Civ.App., 49 S.W.2d 960—*City Nat. Bank in Childress v. Phillips Petroleum Co.*, 78 S.W.2d 576, 124 Tex. 456, dismissing error, Civ.App., 47 S.W.2d 357—*Garcia v. American Nat. Ins. Co.*, 78 S.W.2d 170, 124 Tex. 466, dismissing error *American Nat. Ins. Co. v. Garcia*, Civ.App., 46 S.W.2d 1011—*Atwood Cotton Breeding Farms v. Gallagher*, 73 S.W.2d 525, 123 Tex. 505—*Harris v. Willson*, 59 S.W.2d 106, 122 Tex. 323—*Oliver v. Gallagher*, 26 S.W.2d 903, 118 Tex. 178—*Benson v. Jones*, 296 S.W. 865, 117 Tex. 68, denying mandamus *Neyland v. Benson*, Civ. App., 292 S.W. 251—*Fleming v.*

Pellum, 287 S.W. 492, 116 Tex. 130, refusing error *Pellum v. Fleming*, Civ.App., 233 S.W. 531—*Garess v. Fly*, 266 S.W. 779, 114 Tex. 233—*American Nat. Bank of Wichita Falls v. Hall*, 265 S.W. 378, 114 Tex. 164—*Pierce v. Willson*, 263 S.W. 581, 114 Tex. 136, denying mandamus *Sewell v. Pierce*, Civ. App., 245 S.W. 745—*Malloy v. Pleasants*, 262 S.W. 740, 114 Tex. 100, denying mandamus *Malloy v. Industrial Cotton Oil Properties*, Civ.App., 238 S.W. 984—*Nesbitt v. Conner*, 261 S.W. 1002, 114 Tex. 32—*First Texas State Ins. Co. v. Hightower*, 214 S.W. 299, 110 Tex. 52—*Mooers v. Hunter*, Com.App., 67 S.W.2d 860, dismissing error, Civ.App., 45 S.W.2d 387—*J. B. Colt Co. v. Wheeler*, Com.App., 23 S.W.2d 299, dismissing error, Civ.App., 12 S.W.2d 1102—*J. B. Colt Co. v. Knight & Perry*, Com.App., 13 S.W.2d 357, dismissing error, Civ. App., 3 S.W.2d 879—*McGinty v. Dennehy*, Com.App., 13 S.W.2d 63, dismissing error, Civ.App., 2 S.W.2d 546—*Jarecki Mfg. Co. v. Hinds*, Com.App., 6 S.W.2d 343, dismissing error, Civ.App., 295 S.W. 274—*Reddell v. O'Fiel*, Com.App., 6 S.W.2d 92, affirming *O'Fiel v. Reddell*, Civ.App., 298 S.W. 142—*Schaffner v. Consolidated Oil Co. of Texas*, Com.App., 293 S.W. 159, affirming *Consolidated Oil Co. of Texas v. Schaffner*, Civ.App., 286 S.W. 258—*City of Abilene v. McMahan*, Com.App., 292 S.W. 525, dismissing error *McMahan v. City of Abilene*, Civ.App., 261 S.W. 455—*Price v. Supreme Home of Ancient Order of Pilgrims*, Com.App., 285 S.W. 310, affirming *Supreme Home of Ancient Order of Pilgrims v. Price*, Civ.App., 274 S.W. 1019—*Ford & Damon v. Flewellen*, Com. App., 276 S.W. 903, affirming, Civ. App., 264 S.W. 602—*Yeates v. St. Louis Southwestern Ry. Co. of Texas*, Com.App., 244 S.W. 503, dismissing error *Yeates v. St. Louis Southwestern Ry. Co. of Texas*, Civ.App., 184 S.W. 636—*Gulf Production Co. v. Warren*, Civ.App., 99 S.W.2d 616, error refused, certiorari denied *Oakwood Realty Co. v. Gulf Production Co.*, 58 S.Ct. 27, 302 U.S. 707, 32 L.Ed. 546—*Smith v. El Paso & N. E. R. Co.*, Civ.App., 67 S.W.2d 362, error dismissed—*Grubstake Inv. Ass'n v. Kirkham*, Civ.App., 10 S.W.2d 184, error refused—*Gorbett v. Berryman & Watters*, Civ.App., 7 S.W.2d 100, error dismissed—*Mitchell v. Deane*,

Civ.App., 294 S.W. 347, affirmed, Com.App., 10 S.W.2d 717—*Burton v. Roff*, Civ.App., 275 S.W. 273, affirmed, Com.App., 292 S.W. 159—*Ladd v. Yett*, Civ.App., 273 S.W. 1006—*Braumiller v. Burke*, Civ. App., 232 S.W. 907—*Davies v. Rutland*, Civ.App., 219 S.W. 1114, denying motion 219 S.W. 235—*Stuart v. Meyer*, Civ.App., 196 S.W. 615, error refused.

55. Commission of appeals opinion in a case where only the judgment recommended was adopted by the supreme court was held not to afford basis for "conflict."—*American Nat. Bank of Wichita Falls v. Hall*, 265 S.W. 378, 114 Tex. 164.

Decisions of same court of civil appeals do not afford a basis for "conflict."—*American Nat. Bank of Wichita Falls v. Hall*, supra—15 C. J. p 1120 note 48 [h].

Old court of appeals opinion was held not to afford basis for "conflict."—*Roddy v. Fly*, 272 S.W. 437, 114 Tex. 615—15 C.J. p 1116 note 86 [a].

56. Decision in accord with supreme court decision, although it conflicts with the decision of another court of civil appeals, will not afford a basis of "conflict."—*Harris v. Leslie*, 96 S.W.2d 276, 128 Tex. 81—*Atna Life Ins. Co. v. Gallagher*, 94 S.W.2d 410, 127 Tex. 553—*Fleming v. Pellum*, 287 S.W. 492, 116 Tex. 130, refusing error *Pellum v. Fleming*, Civ. App., 283 S.W. 531—*Sherwin-Williams Co. of Texas v. Delahoussaye*, Tex.Civ.App., 124 S.W.2d 870, error dismissed—*City of Corpus Christi v. McMurray*, Tex.Civ.App., 92 S.W.2d 1108, denying motion 90 S.W.2d 868—*Price v. Schnauffer*, Tex.Civ.App., 81 S.W.2d 160, denying motion 79 S.W.2d 872—*Cook v. Texas & P. Ry. Co.*, Tex.Civ.App., 297 S.W. 913—*Mitchell v. Deane*, Tex.Civ.App., 294 S.W. 347, affirmed, Com.App., 10 S.W.2d 717—*Myers v. F. Dodson & Son*, Tex.Civ.App., 254 S.W. 1112—*Village Mills Co. v. Houston Oil Co. of Texas*, Tex.Civ.App., 186 S.W. 785, reversed on other grounds *Houston Oil Co. of Texas v. Village Mills Co.*, Com. App., 241 S.W. 122—15 C.J. p 1120 note 48 [g].

Decision which is not yet final will not afford a basis of "conflict."—*Trico Oil Co. v. Pelton*, Tex.Civ.App., 120 S.W.2d 539, denying motion 114 S.W.2d 1209—*Garrison v. Great Southern Life Ins. Co.*, Tex.Civ.App., 69 S.W.2d 218.

§ 463. — Other Courts

The Texas court of criminal appeals has final appellate jurisdiction in criminal matters and power to issue writs necessary to enforce its jurisdiction. The district and county courts have limited appellate jurisdiction.

Under the constitution and statutes of Texas the court of criminal appeals has appellate jurisdiction coextensive with the limits of the state, in all criminal cases of whatever grade,⁵⁷ with such exceptions and under such regulations as may be prescribed by law.⁵⁸ Its jurisdiction is final in criminal cases.⁵⁹ The court and the judges thereof under the constitution and statutes have power to issue the writ of habeas corpus,⁶⁰ and, under such regulations as may be prescribed by law, to issue such writs as may be necessary to enforce the

jurisdiction of the court.⁶¹ The legislature has given the court and the judges thereof express power to issue writs of mandamus⁶² and certiorari,⁶³ agreeably to the principles of law regarding such writs, whenever necessary to enforce the court's jurisdiction. While the court of criminal appeals is not a nisi prius court,⁶⁴ under the constitution and statutes it has power, on affidavit or otherwise, to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction.⁶⁵

The appellate jurisdiction of courts generally in criminal matters is considered in the title Criminal Law § 1636, also 17 C.J. p 21 note 75—p 23 note 80.

District and county courts. The constitution and statutes also give certain appellate jurisdiction in small cases to the district courts⁶⁶ and to the coun-

Later decision of another court of civil appeals, rendered after the supreme court had denied an application for a writ of error, will not afford a basis for conflict.—Trico Oil Co. v. Pelton, Tex.Civ.App., 120 S.W.2d 539, denying motion 114 S.W.2d 1209.

Overruled decisions will not afford a basis for "conflict."—Hanchett v. Ward, Tex.Com.App., 65 S.W.2d 268, dismissing error Ward v. Hanchett, Civ.App., 47 S.W.2d 360—15 C.J. p 1116 note 86 [b].

Recorded opinion is controlling and the court will not go behind it for the purpose of producing a conflict.—Thacker v. Lindahl, Tex.Com.App., 43 S.W.2d 588, affirming Lindahl v. Thacker, Civ.App., 26 S.W.2d 283.

Unreported cases, not regarded as authority by supreme court, were held not to afford a basis for "conflict."—City of Wichita Falls v. Mauldin, Tex.Com.App., 39 S.W.2d 859, affirming, Civ.App., 23 S.W.2d 771.

Withdrawn opinion was held not to afford basis for "conflict."—American Nat. Bank of Wichita Falls v. Hall, 265 S.W. 378, 114 Tex. 164.

57. Tex.—Kubish v. State, 84 S.W.2d 480, 128 Tex.Cr. 666—Ex parte Minor, 27 S.W.2d 805, 115 Tex.Cr. 634.

15 C.J. p 1120 note 50—p 1121 note 53.

Jurisdiction continues until the case made by the appeal is completely executed by the court below.—Millikin v. Jeffrey, 299 S.W. 393, 117 Tex. 134.

Judgment forfeiting bail bond is held reviewable by court of criminal appeals and not by court of civil appeals.—Williams v. State, Tex.Civ.App., 9 S.W.2d 280, error dismissed.

Order declining to discharge dependent or neglected child committed to public institution in statutory civil proceedings is held not reviewable

by court of criminal appeals.—Ex parte Hill, 114 S.W.2d 247, 134 Tex. Cr. 40.

Right of judge to hold office can be tested only in a civil proceeding, and the court of criminal appeals is without jurisdiction to determine such right on appeal in a criminal case.—Snow v. State, 114 S.W.2d 838, 134 Tex.Cr. 263.

58. Tex.—Kubish v. State, 84 S.W.2d 480, 128 Tex.Cr. 666—Duffield v. State, 43 S.W.2d 104, 118 Tex.Cr. 191—Ex parte Minor, 27 S.W.2d 805, 115 Tex.Cr. 634.

15 C.J. p 1121 note 54.

59. Tex.—Commissioners' Court of Nolan County v. Beall, 81 S.W. 526, 98 Tex. 104.

15 C.J. p 1121 note 55.

"The Court of Criminal Appeals . . . [is] an appellate court with more extensive jurisdiction than . . . [the supreme court] in criminal matters, and certainly co-ordinate in matters of habeas corpus."—Millikin v. Jeffrey, 299 S.W. 393, 117 Tex. 134.

60. Tex.—Millikin v. Jeffrey, supra—Ex parte Day, 66 S.W.2d 695, second case, 125 Tex.Cr. 9—Ex parte Carlile, 244 S.W. 611, 92 Tex. Cr. 495.

15 C.J. p 1121 note 56.

61. Tex.—Millikin v. Jeffrey, 299 S.W. 397, 117 Tex. 152—Millikin v. Jeffrey, 299 S.W. 393, 117 Tex. 134—Duffield v. State, 43 S.W.2d 104, 118 Tex.Cr. 191—Ex parte Hagler, 28 S.W.2d 550, 115 Tex.Cr. 393—Ex parte Minor, 27 S.W.2d 805, 115 Tex.Cr. 634—Eaves v. Landis, 258 S.W. 1056, 98 Tex.Cr. 555—Ex parte Fread, 204 S.W. 113, 83 Tex.Cr. 465.

15 C.J. p 1121 note 57.

62. Tex.—Millikin v. Jeffrey, 299 S.W. 435, 108 Tex.Cr. 84.

In aid of its habeas corpus jurisdiction, the court may issue writs of

mandamus.—Millikin v. Jeffrey, 299 S.W. 393, 117 Tex. 134.

On ex parte hearing, the court is without jurisdiction to issue a writ of mandamus.—Millikin v. Jeffrey, 299 S.W. 435, 108 Tex.Cr. 84.

63. Tex.—Ex parte Minor, 27 S.W.2d 805, 115 Tex.Cr. 634.

64. Tex.—Ex parte Day, 66 S.W.2d 695, second case, 125 Tex.Cr. 9—Ex parte Carlile, 244 S.W. 611, 92 Tex.Cr. 495.

65. Tex.—Duffield v. State, 43 S.W.2d 104, 118 Tex.Cr. 191.

66. Tex.—Pure Oil Co. v. Reece, 78 S.W.2d 932, 124 Tex. 476, reversing Reece v. Pure Oil Co., Civ.App., 48 S.W.2d 440—Pure Oil Co. v. Clark, Com.App., 56 S.W.2d 850, reversing Clark v. State, Civ.App., 35 S.W.2d 488, followed in Pure Oil Co. v. Clark, Com.App., 56 S.W.2d 853, first case, reversing, Civ. App., 40 S.W.2d 962—Stewart v. Moore, Com.App., 291 S.W. 886—Pierce v. Foreign Mission Board of Southern Baptist Convention, Com.App., 235 S.W. 552, reversing, Civ.App., 218 S.W. 140—Conroy v. Conroy, Civ.App., 83 S.W.2d 355, reversed on other grounds 110 S.W.2d 568, 130 Tex. 508—Johnston v. Stephens, Civ.App., 300 S.W. 225, reversed on other grounds 49 S.W.2d 431, 121 Tex. 374—Bird v. Alexander, Civ.App., 288 S.W. 606—Minor v. Hall, Civ.App., 225 S.W. 784, dismissed for want of jurisdiction—Hutchens v. Dresser, Civ.App., 196 S.W. 969, dismissed for want of jurisdiction.

15 C.J. p 1121 note 59.

Supervisory control may be exercised through the district court's equitable jurisdiction.—Bird v. Alexander, Tex.Civ.App., 288 S.W. 606.

Methods of review

Tex.—Schwind v. Goodman, Com. App., 221 S.W. 579, reversing Good-

ty⁶⁷ courts.

§ 464. Utah

Decisions relating to the Utah supreme and district courts are considered in the sections immediately following.

§ 465. — Supreme Court

Except for original jurisdiction vested in it to issue certain writs, the supreme court of Utah has appellate jurisdiction only.

The Utah supreme court has original jurisdiction to issue writs of mandamus,⁶⁸ certiorari,⁶⁹ prohibition,⁷⁰ quo warranto,⁷¹ and habeas corpus.⁷² In other cases,⁷³ the supreme court has appellate jurisdiction only, and power to issue writs necessary and proper for the exercise of that jurisdiction.⁷⁴ The supreme court is the exclusive judge of its own jurisdiction.⁷⁵

man v. Schwind, Civ.App., 186 S. W. 282—Hurley v. Hirsch, Civ.App., 66 S.W.2d 387.

67. Tex.—Kubish v. State, 84 S.W.2d 480, 128 Tex.Cr. 666.
15 C.J. p 1121 note 60.

68. Utah.—Woolley v. Wight, 238 P. 1114, 65 Utah 619, 41 A.L.R. 433—State v. Morse, 87 P. 705, 31 Utah 213, 7 L.R.A., N.S., 1127.
15 C.J. p 1121 note 62.

Where application for writ of prohibition reveals situation calling for type of relief more nearly analogous to purpose of writ of mandamus, and neither standing alone would bring about desired result, supreme court is authorized to issue both writs of mandamus and prohibition.—Child v. Ogden State Bank, 20 P.2d 599, 81 Utah 464, 88 A.L.R. 1284.

Forwarding statement of school population

In a proceeding by divers school districts to review proceedings of the board of education of a district with respect to the apportionment and distribution of school funds by the state, where the parties have stipulated that the controversy might be determined upon its merits, the supreme court can properly grant a mandatory order requiring the clerk of defendant board to forward a true statement of the school population of defendant district in accordance with the enumeration made by the enumerators of the district, and further requiring superintendents to make apportionments in accordance with such enumeration.—Board of Education of Alpine School Dist., Utah County, v. Board of Education of Salt Lake City, 219 P. 542, 62 Utah 392.

69. Utah.—Robinson v. Second Judicial Dist. Ct., 113 P. 1026, 38 Utah 379.

15 C.J. p 1121 note 63.

Whether trial court had exceeded or was without its jurisdiction in making and entering judgment complained of, only may be determined in original proceeding in supreme court to review proceedings in district court and to annul the judgment therein.—Jeffries v. Third Judicial Dist. Court of Salt Lake County, 63 P.2d 242, 90 Utah 525.

70. Utah.—Child v. Ogden State Bank, 20 P.2d 599, 81 Utah 464, 88 A.L.R. 1284.

15 C.J. p 1121 note 64.

Sufficiency of pleadings

Where the lower court determines that a complaint or information does not state sufficient facts to constitute a cause of action or an offense, the supreme court will not review such decision or stay further proceedings thereon by writ of prohibition.—Atwood v. Cox, 55 P.2d 377, 88 Utah 437.

Common-law functions of writ are not a restriction on the court which may issue prohibition against the exercise of a ministerial function in excess of or without authority, and the constitutional grant of power to issue the writ is interpreted in the light of the enlarged definition thereof given by territorial legislation.—Barnes v. Lehi City, 279 P. 878, 74 Utah 321.

At relation of private party

In absence of urgent necessity, jurisdiction in quo warranto will not be assumed by the supreme court at the relation of a private party, as

§ 466. — District Courts

District courts of Utah have appellate jurisdiction from all inferior courts and a supervisory control of the same.

The Utah district courts have appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same, and may issue writs necessary to effect such control.⁷⁶

§ 467. Vermont

Decisions relating to the Vermont supreme and county courts are discussed in the sections immediately following.

§ 468. — Supreme Court

The supreme court of Vermont has such jurisdiction as is conferred on it by law.

The supreme court of Vermont has no general original jurisdiction,⁷⁷ but by statute it may issue and determine, among others, writs of mandamus,⁷⁸

the district court has ample jurisdiction to grant relief.—State v. Elliott, 44 P. 248, 13 Utah 200—15 C. J. p 1121 note 65.

72. Utah.—Godbe v. Salt Lake City, 1 Utah 68.
15 C.J. p 1121 note 66.

Original concurrent jurisdiction with district courts is possessed.—Bell v. Corless, 196 P. 568, 57 Utah 604.

Phrase construed

"In other cases" refers to appeals from final judgments only.—North Point Cons. Irr. Co. v. Utah, etc., Canal Co., 46 P. 824, 14 Utah 155.
15 C.J. p 1121 note 67 [a].

74. Utah.—North Point Cons. Irr. Co. v. Utah & S. L. Canal Co., supra.
15 C.J. p 1121 notes 67, 68.

75. Utah.—Halley First Nat. Bank v. Lewis, 45 P. 890, 13 Utah 507.

76. Utah.—Levy v. District Court, 215 P. 993, 61 Utah 519—State v. Third Judicial District, 103 P. 261, 36 Utah 267.

77. Vt.—Town of Woodstock v. Galup, 28 Vt. 588.

Vacation of order

The court has jurisdiction to vacate an order inadvertently made by a judge in a suit on a probate bond.—Clerk v. Foster, 2 Tyler, Vt., 467.

78. Vt.—City of Burlington v. Mayor of City of Burlington, 127 A. 892, 98 Vt. 388—In re White River Bank, 28 Vt. 478.

Mandamus in nature of procedendo will be issued where an inferior court disposes of the matters on some incidental question and refuses to hear the case on its merits.—

prohibition,⁷⁹ and quo warranto,⁸⁰ to courts of inferior jurisdiction, to corporations, or to individuals, whenever the same is necessary to the furtherance of justice and the regular execution of the laws.⁸¹ The court has been held to possess inherent power to issue writs of scire facias.⁸² The court has been given jurisdiction of appeals from the court of chancery,⁸³ and from county courts⁸⁴ and other tribunals,⁸⁵ as provided by law.

§ 469. — County Courts

The Vermont county courts have such appellate jurisdiction as is vested in them by statute.

The county courts have appellate jurisdiction in probate matters⁸⁶ and over decisions of certain inferior courts and tribunals.⁸⁷

§ 470. Virginia

The corporation courts have such appellate jurisdiction as is vested in them by law.

The corporation courts have such appellate jurisdiction as is vested in them by law.⁸⁸

Decisions relating to the supreme court of ap-

peals, the special court of appeals, and the circuit courts are discussed in the sections immediately following.

§ 471. — Supreme Court of Appeals

The Virginia supreme court of appeals has original jurisdiction in cases of habeas corpus, mandamus, and prohibition, but in other cases in which it has jurisdiction, it has appellate jurisdiction only.

The supreme court of appeals⁸⁹ has original jurisdiction in cases of habeas corpus,⁹⁰ mandamus⁹¹ and prohibition⁹² but in other cases it has appellate jurisdiction only.⁹³ Its appellate jurisdiction extends to all cases involving the constitutionality of a law as being repugnant to the constitution of the state or of the United States,⁹⁴ or involving the life or liberty of any person,⁹⁵ and to such other cases within the limits defined by the constitution as may be prescribed by law.⁹⁶ In civil cases the court is without jurisdiction where the amount in controversy, exclusive of costs, is less in value or amount than three hundred dollars,⁹⁷ unless there be drawn in question a freehold or franchise or the title or boundaries of land,⁹⁸ or the action of the

Town of Woodstock v. Gallup, 28 Vt. 584.

Granting discretionary

Vt.—Crystal Brook Farm v. Control Com'rs of Derby, 168 A. 912, 106 Vt. 8.

79. Vt.—Bullard v. Thorpe, 30 A. 36, 66 Vt. 599, 44 Am.S.R. 867, 25 L.R.A. 605.

80. Vt.—State v. Zanleoni, 122 A. 495, 97 Vt. 212—State v. Watson, 117 A. 663, 96 Vt. 131.

81. Vt.—In re White River Bank, 23 Vt. 478.

82. Vt.—Shumway v. Sargeant, 27 Vt. 440.

83. Vt.—Westinghouse Electric Mfg. Co. v. Barre & Montpelier Traction & Power Co., 123 A. 201, 97 Vt. 306—Steffanazzi v. Italian Mut. Benefit Society, 101 A. 1010, 91 Vt. 538, L.R.A.1918B 308.
15 C.J. p 1122 note 82.

84. Vt.—County of Orleans, 32 Vt. 253.

85. Public service commission

Vt.—Essex Storage Electric Co. v. Victory Lumber Co., 108 A. 426, 93 Vt. 437.

86. Vt.—Holmes v. Holmes, 26 Vt. 536.
15 C.J. p 1122 note 84.

87. Vt.—Andrew v. Buck, 124 A. 74, 97 Vt. 454.

88. Va.—Ragsdale v. Danville, 82 S. E. 77, 162 Va. 484.

89. Court of limited jurisdiction Va.—Forbes v. State Council, J. O. U. A. M., 60 S.E. 81, 107 Va. 853.
15 C.J. p 1122 note 85 [a].

90. Va.—State Prison Assoc. v. Ashby, 25 S.E. 893, 93 Va. 667.

91. Va.—Page v. Clopton, 30 Gratt. 415, 71 Va. 415.
15 C.J. p 1122 note 87.

92. Va.—Commonwealth v. Latham, 8 S.E. 488, 85 Va. 632.
15 C.J. p 1122 note 88.

93. Va.—Mathieson Alkali Works v. Virginia Banner Coal Corporation, 124 S.E. 470, 140 Va. 89.
15 C.J. p 1122 note 89.

Statute held not violative of constitution as conferring original jurisdiction on court.—Duncan v. Carson, 105 S.E. 62, 127 Va. 306, affirming 103 S.E. 665, 127 Va. 306.

94. Va.—Hulvey v. Roberts, 55 S.E. 585, 106 Va. 189.
15 C.J. p 1122 notes 90–92, p 1123 note 14.

Error in construction of a statute will not of itself confer jurisdiction on the supreme court of appeals; "the constitutionality of the statute, as distinguished from its interpretation, is the source of appellate jurisdiction."—Hulvey v. Roberts, 55 S.E. 585, 106 Va. 189.

95. Va.—Forbes v. State Council, J. O. U. A. M., 60 S.E. 81, 107 Va. 853.
15 C.J. p 1122 note 93.

96. Va.—Richmond Cedar Works v. Harper, 106 S.E. 516, 129 Va. 481.

97. Va.—Henritze v. Mill Mountain Estates, 1 S.E.2d 338.
15 C.J. p 1122 note 95.

Amount of claim, rather than ultimate award, determines the jurisdictional amount on appeal from an award in condemnation proceeding.—Duncan v. State Highway Commission, 128 S.E. 546, 142 Va. 135.

Statute reducing minimum jurisdictional amount is remedial and is applicable to appeal from a judgment rendered before the enactment of the law, but which did not become final until the adjournment of the term of court subsequent to the statute.—Allison's Ex'r v. Wood, 52 S.E. 559, 104 Va. 765.

Under Constitution of 1902, the supreme court did not have jurisdiction in civil cases where the matter in controversy, exclusive of costs, was less than five hundred dollars, except in controversies concerning the title or boundaries of land, the probate of a will, the appointment or qualification of a personal representative, guardian, committee, or curator, or concerning a mill, roadway, ferry, or landing, or the right of a corporation of a county to levy tolls or taxes.—Callan v. Bransford, 10 S.E. 317, 86 Va. 535—15 C.J. p 1122 notes 96–9.

98. Va.—Jones v. Buckingham Slate Co., 81 S.E. 28, 116 Va. 120—Hutchinson v. Kellam, 3 Munf. 202, 17 Va. 202.

15 C.J. p 1122 note 97.

Suits to subject land to judgment are not deemed as "concerning" "the

state corporation commission, or some matter not merely pecuniary.⁹⁹

§ 472. — Special Court of Appeals

A special court of appeals in Virginia is authorized by the constitution to facilitate the disposal of appeals.

The constitution provides that the general assembly may provide for a special court of appeals to try any case on the docket of the supreme court of appeals with respect to which a majority of the judges are so situated as to make it improper for them to sit, and to try any cases on such docket which cannot be disposed of with convenient dispatch.¹

§ 473. — Circuit Courts

Circuit courts of Virginia have a limited appellate jurisdiction.

Certain limited appellate jurisdiction has been vested by statute in the circuit courts.²

title to land," and the jurisdictional amount must be present to give the court jurisdiction.—*Steinman v. Clinchfield Coal Corp.*, 93 S.E. 684, 121 Va. 611.

99. Va.—*Price v. Smith*, 24 S.E. 474, 93 Va. 14.

1. It is superior court, and is not regarded as supreme court of appeals.—*Sharpe v. Robertson*, 5 Gratt. 518, 46 Va. 518.

2. Va.—*Carter v. Kelly*, 28 Gratt. 787, 69 Va. 787.
15 C.J. p 1123 note 18.

3. Wash.—*State v. Hartley*, 257 P. 396, 144 Wash. 135.
15 C.J. p 1123 note 19.

All inherent power of courts of equity are possessed by the supreme court in the exercise of its original jurisdiction.—*State v. King County Super. Ct.*, 163 P. 765, 95 Wash. 258.—*Campbell Lumber Co. v. Deep River Logging Co.*, 123 P. 596, 68 Wash. 431.

Failure to give notice of appeal

There is nothing in the section of the constitution giving the court original jurisdiction which authorizes review of a judgment, where the supreme court has no jurisdiction, by reason of a failure to give timely notice of appeal.—*State ex rel. Department of Public Service v. Northern Pac. Ry. Co.*, Wash., 94 P.2d 502.

4. Wash.—*Ex parte Miller*, 225 P. 429, 129 Wash. 538.—*Ex parte Emch*, 214 P. 1043, 124 Wash. 401.

5. Wash.—*State v. Hartley*, 257 P. 396, 144 Wash. 135.

6. Wash.—*State v. Clausen*, 214 P. 635, 124 Wash. 389.

Jurisdiction not exclusive

Wash.—*State v. Savidge*, 249 P. 996, 140 Wash. 361.—*State v. Savidge*, 234 P. 1, 133 Wash. 532.—*State v. Clausen*, 214 P. 635, 124 Wash. 389.

Jurisdiction refused

(1) Where superior court can give complete relief.—*State v. Savidge*, 234 P. 1, 133 Wash. 532.

(2) Where it does not appear that the superior court has refused to act in the matter.—*State v. Superior Court in and for Pierce County*, 170 P. 130, 99 Wash. 619, L.R.A.1918C 921.

(3) Where questions of fact are involved and procedure has for its purpose the enforcement of a private right.—*State v. Clausen*, 214 P. 635, 124 Wash. 389.

Jurisdiction assumed

(1) Cases of immediate necessity.—*State v. Hinkle*, 229 P. 317, 131 Wash. 86.

(2) Matters of state concern.—*State v. State Board of Equalization*, 249 P. 996, 140 Wash. 432.

(3) Where the constitutionality of statutes and important public rights are involved.—*State v. Savidge*, 233 P. 946, 132 Wash. 631.

Persons held not state officers

(1) Chairman of state highway committee.—*State v. Hartley*, 257 P. 396, 144 Wash. 135.

(2) Judge of superior court.—*State v. Hurn*, 180 P. 400, 106 Wash. 362.

§ 474. Washington

Decisions relating to the supreme and superior courts of Washington are discussed in the sections immediately following.

§ 475. — Supreme Court

The Washington supreme court has, with certain exceptions, appellate jurisdiction in all actions and proceedings, and it also possesses original jurisdiction in habeas corpus, quo warranto and mandamus as to all state officers.

The supreme court is vested with original jurisdiction, as prescribed by the constitution,³ in habeas corpus,⁴ quo warranto,⁵ and mandamus,⁶ as to all state officers.⁷ It has appellate jurisdiction in all actions and proceedings as defined by the constitution,⁸ excepting that its appellate jurisdiction does not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars,⁹ unless the action involves, among other things, the legality of a tax,¹⁰ or the validity of a

8. Wash.—*State v. Daggett*, 68 P. 340, 28 Wash. 1.

15 C.J. p 1123 notes 24, 27-30.

Issues proper to courts of original jurisdiction will not be determined by the supreme court on appeal, and, accordingly, the pleadings may not therein be amended to substitute the administratrix of an estate for the same person in her individual capacity.—*Howe v. Whitman County*, 206 P. 968, 120 Wash. 247, affirmed 212 P. 164, 120 Wash. 247.

9. Wash.—*National Ass'n of Creditors v. O'Shea*, 15 P.2d 1114, 170 Wash. 200.

15 C.J. p 1123 note 25.

Proceeding to recover on judgment for costs being independent of action in which judgment was rendered, amount of costs recovered by judgment determines appellate jurisdiction of supreme court.—*State v. Smith*, 173 P. 428, 102 Wash. 574.

Separate actions

Where separate actions are brought against same defendant, in determining the amount involved on the question of jurisdiction to issue a writ of prohibition to prevent trial of the actions, the jurisdictional amount is determined by that in each action, and not the aggregate amount sought in the four actions.—*State v. Hurn*, 180 P. 400, 106 Wash. 362.

10. Whether tax has been satisfied by compromise and judgment is not a question involving the legality of a tax, within the meaning of the constitutional provision limiting the jurisdiction of the supreme court—

statute.¹¹ The court also has power to issue writs of mandamus,¹² review,¹³ prohibition,¹⁴ habeas corpus,¹⁵ certiorari,¹⁶ and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.¹⁷ The court, of course, has inherent power to protect itself.¹⁸

§ 476. — Superior Courts

The superior courts of Washington have such appellate jurisdiction as is provided by law.

The superior courts have such appellate jurisdiction in cases arising in inferior courts in their respective counties as may be prescribed by law.¹⁹

Sylvester v. Franklin County, 156 P. 843, 90 Wash. 648.

11. Wash.—Shook v. Sexton, 79 P. 1093, 37 Wash. 509.
15 C.J. p 1123 note 31.

Extent of jurisdiction

Where an action is appealable only because the validity of a statute is drawn in question, the jurisdiction of the court extends only so far as the validity of the statute.—*Henderson v. Farley*, 277 P. 852, 152 Wash. 327—15 C.J. p 1123 note 31 [a].

12. Wash.—*State v. King County Super. Ct.*, 64 P. 778, 24 Wash. 605.
15 C.J. p 1123 note 32.

Amount in controversy

(1) Jurisdictional amount is necessary for the supreme court to issue mandamus in exercise of its appellate jurisdiction in a law action for the recovery of money.—*State v. Superior Court of Clarke County*, 177 P. 679, 105 Wash. 167.

(2) Other particulars of rule see 15 C.J. p 1123 note 32 [a].

13. In civil actions jurisdictional amount in excess of two hundred dollars is a prerequisite to the issuance of the writ of review.—*State v. Smith*, 173 P. 428, 102 Wash. 574—15 C.J. p 1123 note 33 [a].

14. Wash.—*State v. Taylor*, 172 P. 217, 101 Wash. 148.
15 C.J. p 1123 note 34.

Unauthorized judicial or quasi-judicial acts

(1) Only unauthorized judicial or quasi-judicial acts constitute grounds for issuance of prohibition.—*People v. Hinkle*, 227 P. 861, 130 Wash. 419—*State v. Taylor*, 172 P. 217, 101 Wash. 148.

(2) The supreme court can issue a writ of prohibition to restrain the exercise of unauthorized judicial or quasi-judicial acts although not issued in aid of its appellate or revisory jurisdiction.—*State v. Taylor*, 172 P. 217, 101 Wash. 148.

Jurisdictional amount

In civil actions for the recovery of money or personal property, the ju-

isdictional amount must be present for the writ to issue.—*State v. Hurn*, 180 P. 400, 106 Wash. 362.

15. Wash.—*In re Rafferty*, 25 P. 465, 1 Wash. 382.

16. Wash.—*State ex rel. Meehan v. Superior Court for King County*, 74 P.2d 1012, 193 Wash. 249.
15 C.J. p 1124 note 36.

Jurisdictional amount of two hundred dollars in civil actions is required.—*State v. Smith*, 173 P. 428, 102 Wash. 574.

17. Wash.—*State v. Superior Court in and for Pierce County*, 170 P. 130, 99 Wash. 619, L.R.A.1918C 921—*State v. Superior Court of Spokane County*, 47 P. 31, 15 Wash. 668.

15 C.J. p 1124 note 37.

Applications for writs regarded interchangeable

The supreme court treats applications for extraordinary writs interchangeably so that if application is made in terms for a particular writ and it appears from the record that relator is not entitled to the writ applied for, but is entitled to another writ, the application will be treated as made for the proper writ.—*State ex rel. Meehan v. Superior Court for King County*, 74 P.2d 1012, 193 Wash. 249.

Equity powers in aid of appellate jurisdiction

Supreme court in aid of appellate jurisdiction possesses all inherent power of courts of equity and, when a party is denied relief to which in equity and good conscience he is entitled, it is its duty to find some method within its jurisdiction by which such relief may be granted.—*State v. Superior Court for King County*, 163 P. 765, 95 Wash. 258.

Injunctive relief

(1) Power to enjoin performance of act by public officer does not pertain to the duties of the supreme court whose jurisdiction is revisory and appellate.—*State v. Darwin*, 142 P. 441, 81 Wash. 1.

§ 477. West Virginia

Decisions relating to the West Virginia supreme court of appeals and the circuit courts are discussed in the sections immediately following.

§ 478. — Supreme Court of Appeals

The supreme court of appeals of West Virginia has original jurisdiction in cases of habeas corpus, mandamus, and prohibition. It has appellate jurisdiction in civil cases where the matter in controversy is greater than one hundred dollars, and in such other cases as the constitution and valid statutes provide.

The supreme court of appeals under the authorities has original jurisdiction²⁰ in cases of habeas

(2) On original application to the supreme court, injunction will not be granted merely because the petitioner is respondent in an action on appeal in the same court, since the supreme court's jurisdiction to grant injunctive relief is limited to cases where the appeal would be rendered ineffectual by a continuance of the acts restrained, plaintiff's remedy being to enforce the writ of superseas, or, if the acts were not within it, an action in the court of original jurisdiction.—*Van Siclen v. Muir*, 87 P. 498, 44 Wash. 361.

Original petition under declaratory judgment act will be denied where it calls for further relief involving an adjudication of questions not raised by the appeal and which were beyond the original jurisdiction of the reviewing court.—*Schoenwald v. Diamond K Packing Co.*, 73 P.2d 748, 192 Wash. 409.

18. Wash.—*In re Bruen*, 172 P. 1152, 102 Wash. 472, overruling *In re Waugh*, 72 P. 710, 32 Wash. 50.

19. Wash.—*Hotchkiss v. Russell*, 89 P. 183, 46 Wash. 7.
15 C.J. p 1124 note 39.

Strictly judicial questions only may be considered by a superior court in appeals from the board of county commissioners in highway cases.—*Sweeney v. Board of Com'rs of San Juan County*, 86 P. 200, 43 Wash. 138—*Selde v. Lincoln County*, 65 P. 192, 25 Wash. 198.

20. W.Va.—*State v. Houchins*, 123 S. E. 185, 96 W.Va. 375.
15 C.J. p 1134 notes 40, 41.

Limited original jurisdiction

(1) The original jurisdiction of the court is limited to the cases named in the constitution.—*State v. Houchins*, supra.

(2) The court is not given original jurisdiction to award injunctions.—*Deitz Colliery Co. v. Ott*, 129 S.E. 708, 99 W.Va. 653.

(3) The court has no original jurisdiction on the petition of an employer to review by certiorari the

corpus,²¹ and has such jurisdiction in mandamus,²² and prohibition.²³ It is also, by statute, vested with original jurisdiction to review the orders of the public service commission.²⁴ It has appellate jurisdiction in civil cases,²⁵ where the matter in controversy, exclusive of costs, is of greater value or amount than one hundred dollars;²⁶ in controversies concerning, among other things, the titles or boundaries of land,²⁷ or concerning the right of a corporation or county to levy tolls or taxes;²⁸ in cases of mandamus²⁹ or certiorari;³⁰ in cases involving the constitutionality of a law;³¹ and such other appellate jurisdiction as may be prescribed by law.³²

§ 479. — Circuit Courts

The circuit courts in West Virginia have appellate jurisdiction over inferior tribunals.

The circuit court has supervision and control

over all proceedings before inferior tribunals by mandamus, prohibition, and certiorari,³³ and appellate jurisdiction in all cases, civil and criminal, where an appeal, writ of error, or other appellate process may be allowed to the judgment or proceedings of any inferior tribunal.³⁴ It has also such other supervisory or appellate jurisdiction as is provided by law.³⁵

§ 480. Wisconsin

Decisions relating to Wisconsin appellate courts are discussed in the sections immediately following.

§ 481. — Supreme Court

The constitution of the state of Wisconsin grants the supreme court appellate, superintending, and original jurisdiction.

The jurisdiction of the supreme court is con-

action of the state compensation commissioner in awarding compensation.—*Deitz Colliery Co. v. Ott*, supra.

Legislature may enlarge somewhat the scope of the court's original jurisdiction by bringing in matters not included within the scope of the writs at common law.—*United Fuel Gas Co. v. Public Service Commission*, 80 S.E. 931, 73 W.Va. 571—15 C.J. p 1124 note 43 [b].

21. Bail

(1) The supreme court of appeals has original jurisdiction to award a writ of habeas corpus having for its sole purpose the obtaining of bail in a felony case, and to grant bail on it.—*Ex parte Hill*, 41 S.E. 903, 51 W.Va. 586.

(2) The question was raised but not decided, due to a divided court, in an earlier case.—*Ex parte Eastham*, 27 S.E. 896, 43 W.Va. 637.

22. W.Va.—*State v. Benwood & McMechen Water Co.*, 120 S.E. 918, 94 W.Va. 724.

15 C.J. p 1124 note 43.

Matters which may be appealed

The court will not exercise its original jurisdiction in mandamus to consider matter which must come to it on appeal.—*State v. Waugh*, 116 S.E. 79, 93 W.Va. 28.

23. W.Va.—*Midland Inv. Corporation v. Ballard*, 133 S.E. 316, 101 W.Va. 591.

15 C.J. p 1124 note 44.

24. W.Va.—*City of Charleston v. Public Service Commission*, 99 S.E. 62, 83 W.Va. 718.

25. W.Va.—*State v. Houchins*, 123 S.E. 185, 96 W.Va. 375.

15 C.J. p 1124 note 45.

Supervisory jurisdiction

Court has no supervisory jurisdiction.—*Deitz Colliery Co. v. Ott*, 129 S.E. 708, 99 W.Va. 663.

Courts inferior to circuit court

(1) Court inferior to circuit court may not certify questions arising in cases pending before it to the supreme court of appeals.—*Atkinson v. Empire Savings & Loan Co.*, 151 S.E. 173, 108 W.Va. 425—*Ashworth v. Hatcher*, 123 S.E. 93, 98 W.Va. 323—*State v. Houchins*, 123 S.E. 185, 96 W.Va. 375.

(2) A statute providing for review of the judgments of such a court by the supreme court of appeals has been held to be unconstitutional.—*Robinson v. Charleston Interurban R. Co.*, 92 S.E. 441, 80 W.Va. 290.

26. W.Va.—*Bowling v. City of Bluefield*, 140 S.E. 685, 104 W.Va. 589—*Roush v. Longdale Independent Tel. Co.*, 88 S.E. 623, 78 W.Va. 136. 15 C.J. p 1124 note 46.

27. **Action in trespass quare clausum fregit for damages held not to concern the title or boundaries of land.**—*Greathouse v. Sapp*, 26 W.Va. 87.

28. W.Va.—*Bramwell Bank v. Mercer County Ct.*, 15 S.E. 78, 36 W.Va. 341. 15 C.J. p 1124 note 56.

29. **Mandamus refused as to matter on which the lower court had not acted.**—*State v. Waugh*, 116 S.E. 79, 93 W.Va. 28.

30. W.Va.—*Town of Davis v. Davis*, 21 S.E. 906, 40 W.Va. 464. 15 C.J. p 1124 note 60.

31. W.Va.—*Baer v. Gore*, 90 S.E. 539, 79 W.Va. 50. 15 C.J. p 1124 note 63.

32. W.Va.—*State v. Houchins*, 123 S.E. 185, 96 W.Va. 185—*Clark v. Dower*, 68 S.E. 369, 67 W.Va. 298. 15 C.J. p 1124 note 66.

Collateral issues that would confer jurisdiction, if litigated directly, do not confer jurisdiction where the jurisdictional amount is lacking.—*Clark v. Dower*, 68 S.E. 369, 67 W.Va. 298.

Sufficiency of bill for injunction, no plea putting that question in issue having been filed or disposed of, cannot, under Code 1916 c 135 § 1, be certified to supreme court of appeals by judge of circuit court based alone on his vacation order awarding temporary injunction.—*City of Wheeling v. Chesapeake & Potomac Telephone Co. of West Virginia*, 94 S.E. 511, 81 W.Va. 438.

33. W.Va.—*Chesapeake & O. Ry. Co. v. McDonald*, 63 S.E. 968, 65 W.Va. 201—*Michaelson v. Cantley*, 32 S.E. 170, 45 W.Va. 533.

34. W.Va.—*Robinson v. Charleston Interurban R. Co.*, 92 S.E. 441, 80 W.Va. 290.

15 C.J. p 1124 note 73.

Exclusive jurisdiction

(1) A statute undertaking to confer jurisdiction on the supreme court of appeals directly from judgments of courts inferior to the circuit court is unconstitutional, as depriving circuit courts of appellate jurisdiction vested in them.—*Robinson v. Charleston Interurban R. Co.*, supra.

(2) On the other hand, a statute giving to an intermediate court jurisdiction concurrently with the circuit court, and under the same regulations provided in the general law for such appeals, has been held to be valid.—*Rosin Coal Land Co. v. Martin*, 94 S.E. 358, 81 W.Va. 33.

35. W.Va.—*State v. Houchins*, 123 S.E. 185, 96 W.Va. 375. 15 C.J. p 1125 note 76.

tained in three independent grants by the constitution, each compact and congruous in itself, namely appellate, superintending, and original jurisdiction.³⁶ Mere advisory opinions will not be rendered in the absence of a constitutional provision so requiring, even though such opinion be requested by coördinate branches of the government.³⁷ The court also has inherent jurisdiction in matters pertaining to its own work and calendar,³⁸ and its officers, including attorneys at law.³⁹

Appellate jurisdiction. Except as otherwise provided in the constitution, the supreme court has appellate jurisdiction only.⁴⁰

Superintending jurisdiction. The court has gen-

eral superintending control over all inferior courts in both criminal and civil cases.⁴¹ All common-law writs necessary to superintending control over inferior courts may be issued,⁴² including mandamus,⁴³ prohibition,⁴⁴ certiorari,⁴⁵ and procedendo.⁴⁶ The court will exercise its supervisory jurisdiction to prevent irreparable mischief,⁴⁷ extraordinary hardship,⁴⁸ and great burdens in expense,⁴⁹ or where the fundamental rights of a party are ignored,⁵⁰ an inferior court acts beyond its jurisdiction,⁵¹ or other adequate remedy is lacking.⁵² The power of superintending control, however, will be exercised only at the behest of a party,⁵³ unless in aid of the court's appellate⁵⁴ or original⁵⁵ jurisdiction. The supreme court will not exercise its

36. Wis.—State v. Frear, 134 N.W. 673, 148 Wis. 456—State v. Johnson, 79 N.W. 1081, 103 Wis. 591—Attorney General v. Blossom, 1 Wis. 317.

37. Wis.—State ex rel. La Follette v. Dammann, 264 N.W. 627, 220 Wis. 17, 103 A.L.R. 1089.

38. Independent of its superintending control over inferior courts, the supreme court has inherent power to require any inferior judicial officer to perform with reasonable diligence the work that is essential to enable the supreme court to do its work, and to remove all obstacles to the speedy determination of causes pending before it, including procuring a reasonably speedy furnishing of the transcript of testimony of the case.—In re Snyder, 198 N.W. 616, 184 Wis. 10.

39. Wis.—State v. Cannon, 221 N.W. 603, 196 Wis. 534.

40. Wis.—Employers Mut. Liability Ins. Co. v. Industrial Commission, 284 N.W. 40—Klein v. Valerius, 57 N.W. 1112, 87 Wis. 54, 22 L.R.A. 609.

15 C.J. p 1125 note 77.

Statutory grant of original jurisdiction to the supreme court, in cases wherein under the constitution it has appellate jurisdiction only, is null and void.—Klein v. Valerius, supra.

41. Wis.—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345—In re Relocation of Federal-Aid Project U. S. Trunk Highways Nos. 12 and 18, 244 N.W. 584, 209 Wis. 181—State v. Grimm, 243 N.W. 763, 208 Wis. 763—State v. Zimmerman, 231 N.W. 590, 202 Wis. 69—State ex rel. Federal Mut. Automobile Ins. Co. v. Kellogg, 208 N.W. 246, 189 Wis. 638—Libby v. Central Wisconsin Trust Co., 197 N.W. 206, 182 Wis. 599—State v. Helms, 118 N.W. 158, 136 Wis. 432. 15 C.J. p 1125 note 82.

42. Wis.—State v. Johnson, 79 N.W. 1081, 103 Wis. 591, 51 L.R.A. 33. 15 C.J. p 1126 note 88 [b].

43. Wis.—State v. Williams, 116 N.W. 225, 136 Wis. 1—State v. Johnson, 79 N.W. 1081, 103 Wis. 591.

Change of venue may be compelled by issuance of the writ of mandamus from the supreme court acting in its supervisory capacity.—State ex rel. Kuhn v. Luchsinger, Wis., 286 N.W. 72—State v. Mahoney, 235 N.W. 926, 204 Wis. 440—State ex rel. Federal M. A. Ins. Co. v. Kellogg, 208 N.W. 246, 189 Wis. 638.

Construction of mandate of supreme court by trial court, on reversal and remanding of a case, may be reviewed by the supreme court in the exercise of its supervisory power.—State ex rel. Reynolds v. Breidenbach, 237 N.W. 81, 205 Wis. 483.

Trial court may be compelled to proceed by mandamus on refusal to do so after an erroneous decision on a preliminary question, despite the rule that the court's supervisory power cannot be used to serve the purpose of a writ of error.—State v. Helms, 118 N.W. 158, 136 Wis. 432.

Refusal to pursue only course open to court on facts presented is failure to perform duty within its jurisdiction, and may be corrected by mandamus in exercise of supreme court's superintending power over inferior courts.—State v. Circuit Court of St. Croix County, 203 N.W. 923, 187 Wis. 1, 48 A.L.R. 894.

44. Wis.—Petition of Heil, 284 N.W. 42, 230 Wis. 428—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345—State v. Johnson, 79 N.W. 1081, 103 Wis. 591.

Where lower court exceeds its jurisdiction.

Wis.—State v. Zimmerman, 231 N.W. 590, 202 Wis. 69.

Similar action pending in federal court

Wis.—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345.

45. Wis.—State v. Johnson, 79 N.W. 1081, 103 Wis. 591.

46. Wis.—State v. Williams, 116 N.W. 225, 136 Wis. 1—State v. Johnson, supra.

47. Wis.—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345.

48. Wis.—Petition of Heil, 284 N.W. 42, 230 Wis. 428—State ex rel. C. W. Fischer Furniture Co. v. Detling, 279 N.W. 616, 228 Wis. 68—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345.

Test of hardship to warrant exercise of supervisory control, depends on the facts of each case, and the hardship must be so great that the remedy by appeal or error is wholly inadequate.—State v. Grimm, 243 N.W. 763, 208 Wis. 366.

49. Wis.—Petition of Heil, 284 N.W. 42, 230 Wis. 428—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345.

50. Wis.—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345.

51. Wis.—State v. Zimmerman, 231 N.W. 590, 202 Wis. 69.

15 C.J. p 1125 note 82 [b].

52. Wis.—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345—State v. Grimm, 243 N.W. 763, 208 Wis. 366—State v. Shaughnessy, 232 N.W. 861, 202 Wis. 537. 15 C.J. p 1125 note 82 [e], [h], [i].

If circuit court offers adequate remedy, the supreme court will not exercise its supervisory jurisdiction.—State v. Pollard, 87 N.W. 1107, 112 Wis. 232.

53. Wis.—Petition of Heil, 284 N.W. 42, 230 Wis. 428.

54. Wis.—Petition of Heil, supra.

55. Wis.—Petition of Heil, supra.

superintending power to control the discretion of another court,⁵⁶ nor to perform the office of an appeal.⁵⁷

Original jurisdiction. The supreme court is vested by the constitution with original jurisdiction to issue writs of habeas corpus,⁵⁸ mandamus,⁵⁹ injunction,⁶⁰ quo warranto,⁶¹ certiorari,⁶² and other original and remedial writs,⁶³ and with power to hear and determine the same.⁶⁴ The supreme court has power to exclude inferior courts from any interference with the exercise of its original jurisdiction in a proper case.⁶⁵ The original jurisdiction of the supreme court should be invoked by a petition for leave.⁶⁶

With respect to the exercise of original jurisdiction, such jurisdiction will be exercised in matters *publici juris*,⁶⁷ affecting the sovereignty of the

state, its franchises or prerogatives, or the liberties of the people.⁶⁸ It seems that this jurisdiction will be exercised in cases merely *publici juris*, and involving none of the elements of prerogative or sovereignty,⁶⁹ but in cases not involving the sovereignty of the state, a very strong showing of exigency must be made before the court will assume original jurisdiction.⁷⁰ The circumstances may also warrant assumption of jurisdiction where the case is *publici juris*, even though local in scope, if there is no other adequate remedy,⁷¹ but the court will not take original jurisdiction in cases involving only local or private interests where there is an adequate remedy in the lower courts.⁷² Mere expedition of causes, convenience of parties to actions, and prevention of a multiplicity of suits are matters which do not form a basis for the exercise of original jurisdiction.⁷³ Ordinarily, the supreme

56. Wis.—In re Phelan, 274 N.W. 411, 225 Wis. 314, 112 A.L.R. 1345—State v. Grimm, 243 N.W. 763, 208 Wis. 366.

57. Wis.—State v. Grimm, *supra*.

58. Wis.—In re Pierce, 44 Wis. 411. 15 C.J. p 1125 note 83.

59. Wis.—State v. City of Appleton, 222 N.W. 244, 197 Wis. 442. 15 C.J. p 1125 note 84.

Certification of case to inferior court

On refusal to take jurisdiction in mandamus, supreme court may, under the statute, certify the case to the proper circuit court.—State v. Board of Sup'rs of La Crosse County, 161 N.W. 356, 165 Wis. 164.

60. Wis.—State v. Smith, 200 N.W. 65, 184 Wis. 455—State v. Bancroft, 134 N.W. 330, 148 Wis. 124, 38 L.R.A.N.S., 526—Atty.-Gen. v. Chicago, etc., R. Co., 35 Wis. 425. 15 C.J. p 1125 note 85.

61. Wis.—State v. Pierce, 209 N.W. 693, 191 Wis. 1. 15 C.J. p 1126 note 86.

Whether lieutenant governor holds office lawfully is a proper occasion for invoking the original jurisdiction of the supreme court in quo warranto proceedings.—State ex rel. Martin v. Ekern, 280 N.W. 393, 228 Wis. 645.

62. Wis.—In re Booth, 3 Wis. 1. 15 C.J. p 1126 note 87.

63. Wis.—Attorney General v. Railroad Companies, 35 Wis. 425. 15 C.J. p 1126 note 88.

64. Wis.—Attorney General v. Railroad Companies, *supra*. 15 C.J. p 1126 note 89.

65. Wis.—Petition of Heil, 284 N.W. 42, 230 Wis. 428.

66. Wis.—In re Exercise of Original Jurisdiction of Supreme Court, 229 N.W. 643, 201 Wis. 123.

Petition should state nature of action and why it involves public right, with reasons for granting stay if stay is sought.—In re Exercise of Original Jurisdiction of Supreme Court, *supra*.

Copy of petition should be served on the opposite party together with notice of hearing on regular motion day.—In re Exercise of Original Jurisdiction of Supreme Court, *supra*.

Order to show cause will not be granted on merits; and will be granted, only in cases of great urgency, for the purpose of shortening the time for application.—In re Exercise of Original Jurisdiction of Supreme Court, *supra*.

67. Wis.—State ex rel. Reynolds v. City of Appleton, 222 N.W. 244, 197 Wis. 442—State v. Zimmerman, 210 N.W. 381, 191 Wis. 10—State v. Brechler, 202 N.W. 144, 185 Wis. 599—State v. Smith, 200 N.W. 65, 184 Wis. 455. 15 C.J. p 1126 note 90.

68. Wis.—In re State ex rel. Atty. Gen., 264 N.W. 633, 220 Wis. 25—In re Zabel, 261 N.W. 669, 219 Wis. 49—State v. Davidson, 88 N.W. 596, 114 Wis. 563, 90 N.W. 1067, 58 L.R.A. 739. 15 C.J. p 1126 note 91.

Original jurisdiction held properly invoked

Wis.—State ex rel. Martin v. Ekern, 280 N.W. 393, 228 Wis. 645.

69. Wis.—Petition of Heil, 284 N.W. 42, 230 Wis. 428.

Cases warranting exercise of original jurisdiction

Wis.—Petition of Heil, *supra*—State v. Smith, 200 N.W. 65, 184 Wis. 455—State v. Frear, 134 N.W. 673, 135 N.W. 164, 148 Wis. 456, L.R.A. 1915B 609, 569, Ann.Cas.1913A 1147.

70. Wis.—Petition of Heil, 284 N.W. 42, 230 Wis. 428—In re Zabel, 261 N.W. 669, 219 Wis. 49.

Greatest reluctance

The supreme court will, with the greatest reluctance, grant leave for the exercise of its original jurisdiction in cases merely *publici juris*.—In re Exercise of Original Jurisdiction of Supreme Court, 229 N.W. 643, 201 Wis. 123.

Vindication of sovereignty

Original jurisdiction to entertain action for purpose of vindicating state's sovereignty is not in supreme court to exclusion of other tribunals.—Petition of Heil, 284 N.W. 42, 230 Wis. 428.

Basis of determination

Whether supreme court will exercise exclusive original jurisdiction of action, pending in circuit court having concurrent jurisdiction thereof, must be determined from nature of issues involved, rather than mere consideration of convenience or expediency, in doubtful cases.—Petition of Heil, *supra*.

71. Wis.—State v. Brechler, 202 N.W. 144, 185 Wis. 599—State v. Circuit Court for Marathon County, 190 N.W. 563, 178 Wis. 468—State v. Erickson, 174 N.W. 919, 170 Wis. 205. 15 C.J. p 1126 note 92.

72. Wis.—Petition of Heil, 284 N.W. 42, 230 Wis. 428—In re Zabel, 261 N.W. 669, 219 Wis. 49—State v. Board of Sup'rs of La Crosse County, 161 N.W. 356, 165 Wis. 164. 15 C.J. p 1126 note 84 [d].

73. Wis.—State ex rel. Attorney General v. John F. Jelke Co., 284 N.W. 494—Petition of Heil, 284 N.W. 42, 230 Wis. 428.

court will not exercise its original jurisdiction where questions of fact are involved.⁷⁴

The legislature, by virtue of the constitutional provision that "the legislature shall direct by law in what manner and in what courts suits may be brought against the state," may vest the supreme court with original jurisdiction of suits brought against the state.⁷⁵ The supreme court may also have original jurisdiction of an action under the Declaratory Judgment Act, since such statute does not enlarge the court's jurisdiction, but merely authorizes the court to take jurisdiction at an earlier point than it ordinarily would.⁷⁶

§ 482. — Other Courts

Particular inferior Wisconsin courts have such appellate jurisdiction as is granted them by the constitution and statutes.

The circuit courts have appellate jurisdiction from inferior courts and tribunals,⁷⁷ and a supervisory control over the same,⁷⁸ and power to issue writs necessary to enforce a general control over inferior courts.⁷⁹

Municipal courts have jurisdiction in appeals from inferior courts as provided by statute.⁸⁰

74. Wis.—State ex rel. Attorney General v. John F. Jelke Co., 284 N.W. 494.—In re State ex rel. Atty. Gen., 284 N.W. 633, 220 Wis. 25.—In re Exercise of Original Jurisdiction of Supreme Court, 229 N.W. 643, 201 Wis. 123.

75. Wis.—Wadhams Oil Co. v. State, 245 N.W. 646, 210 Wis. 448, rehearing denied 246 N.W. 687, 210 Wis. 448.—Northwestern Mut. L. Ins. Co. v. State, 155 N.W. 609, 158 N.W. 328, 163 Wis. 484.

76. Wis.—In re State ex rel. Atty. Gen., 284 N.W. 633, 220 Wis. 25.

Issues of fact

Supreme court may decline to exercise jurisdiction in an action seeking a declaratory judgment, where issues of fact are involved which could be appropriately tried in the circuit and other trial courts.—State ex rel. Attorney General v. John F. Jelke Co., Wis., 284 N.W. 494.

77. Wis.—In re Zabel, 261 N.W. 669, 219 Wis. 49.
15 C.J. p 1126 note 93.

This jurisdiction may be taken away from the circuit courts by statute.—State v. Superior Court of Dane County, 175 N.W. 927, 170 Wis. 385.

Order of commissioner of insurance refusing to renew licenses of insurance companies may be reviewed in the circuit court, but not exclusively therein.—State v. Smith, 200 N.W. 65, 184 Wis. 455.

78. Wis.—State v. Superior Court of

Dane County, 175 N.W. 927, 170 Wis. 385.

15 C.J. p 1126 note 94.

This power may be exercised to keep inferior courts within their jurisdiction.—In re Farm Drainage Dist. No. 1, Waupaca County, Wis., 287 N.W. 806.

79. Wis.—State v. Pollard, 87 N.W. 1107, 112 Wis. 232.

15 C.J. p 1126 note 95.

80. Wis.—Plano Mfg. Co. v. Rasey, 34 N.W. 85, 69 Wis. 246.

15 C.J. p 1126 note 96.

81. Wyo.—State ex rel. Mau v. Ausherman, 72 P. 200, 73 P. 548, 11 Wyo. 410.

15 C.J. p 1126 note 97.

82. Wyo.—State v. True, 184 P. 229, 26 Wyo. 314.—State ex rel. Mau v. Ausherman, 72 P. 200, 73 P. 548, 11 Wyo. 410.

15 C.J. p 1127 notes 2-4.

Course of litigation

Plenary power is vested in the supreme court to control the course of litigation in the trial courts.—State v. District Court of Ninth Judicial Dist., 263 P. 700, 37 Wyo. 516.

83. Wyo.—State v. Clay, 31 P. 409, 3 Wyo. 393.

84. Wyo.—State ex rel. Mau v. Ausherman, 72 P. 200, 73 P. 548, 11 Wyo. 410.

15 C.J. p 1127 note 11.

State engineer held not "inferior court" within the constitution, and

§ 483. Wyoming

Decisions relating to the Wyoming supreme and district courts are discussed in the sections immediately following.

§ 484. — Supreme Court

The supreme court of Wyoming has general appellate jurisdiction; general superintending control over all inferior courts; and original jurisdiction in quo warranto and mandamus as to all state officers, and in habeas corpus.

The supreme court has general appellate jurisdiction coextensive with the state,⁸¹ and general superintending control over all inferior courts under such rules as may be prescribed by law.⁸² It may also issue writs of mandamus,⁸³ review, prohibition,⁸⁴ habeas corpus, certiorari,⁸⁵ and other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.⁸⁶ The court has only such original jurisdiction as is conferred by the constitution,⁸⁷ namely, in quo warranto⁸⁸ and mandamus,⁸⁹ as to all state officers,⁹⁰ and in habeas corpus,⁹¹ and will issue such writs only when necessary and proper.⁹²

consequently the supreme court in the exercise of its superintending or revisory power lacks original jurisdiction to issue a writ of prohibition against him.—State v. True, 184 P. 229, 26 Wyo. 314.

85. Wyo.—State v. Dahlem, 263 P. 708, 37 Wyo. 498.

15 C.J. p 1127 note 13.

86. Wyo.—State v. True, 184 P. 229, 26 Wyo. 314.

15 C.J. p 1127 notes 10-14.

87. Wyo.—State v. True, 184 P. 229, 26 Wyo. 314.

88. Where facts are disputed and the district court has jurisdiction which will afford satisfactory relief, the supreme court will not exercise its original jurisdiction in quo warranto for contest at election of district judge on ground that, if action were brought in district court, contestant would be at mercy of his opponent, since opponent is disqualified and could be required to call in another judge.—State ex rel. Walton v. Christmas, 44 P.2d 905, 48 Wyo. 239.

89. Wyo.—State v. Clay, 31 P. 409, 3 Wyo. 393.

90. Wyo.—State ex rel. Walton v. Christmas, 44 P.2d 905, 48 Wyo. 239.

91. Wyo.—Miskimins v. Shaver, 58 P. 411, 8 Wyo. 392.

92. Wyo.—State ex rel. Walton v.

§ 485. — District Courts

The district courts of Wyoming have such appellate jurisdiction as is vested in them by law.

The district courts of Wyoming have such appel-

late jurisdiction in cases arising in inferior courts and tribunals in their respective counties as may be prescribed by law.⁹³

X. CONCURRENT AND CONFLICTING JURISDICTION

A. Courts of Same State

1. MATTERS OF JURISDICTION

§ 486. Exclusive or Concurrent Jurisdiction

The jurisdiction of a particular court may be either concurrent or exclusive, and where exclusive can be exercised by no other court.

The jurisdiction of a particular court may, in accordance with the constitutional or statutory provisions by which it is established, be either exclusive or concurrent,⁹⁴ the terms having already been defined and distinguished in § 18 of this treatise. Where exclusive jurisdiction is either expressly or by necessary implication conferred upon a court, no other court may exercise such jurisdiction⁹⁵ unless the case is brought within some exception to the grant.⁹⁶ Constitutional provisions defining the jurisdiction of particular courts should be harmonized, if possible, so that each court, whether trial or appellate, may exercise the power conferred upon it without conflict with the authority confided to other tribunals.⁹⁷

§ 487. — Grant of Exclusive Jurisdiction

A grant of exclusive jurisdiction may be either express or by clear implication.

Where jurisdiction over particular subject matters is conferred in express terms upon one court and not upon another, it has been held that it is the intention that the jurisdiction conferred shall be exclusive,⁹⁸ although it has also been held to the contrary that the use of the term "jurisdiction" alone, without qualifying terms, does not necessarily preclude the possession of concurrent jurisdiction by other courts.⁹⁹ For example, where a new right or cause of action is created by a statute providing the particular tribunal which shall take cognizance thereof, no other court has jurisdiction;¹ but, where a remedy entirely new is conferred upon courts of record generally, all courts of record may take the power although if merely an additional ground for invoking an existing remedy is added

- Christmas, 44 P.2d 905, 48 Wyo. 239.
93. Wyo.—City of Sheridan v. Cadle, 157 P. 892, 24 Wyo. 293—Pointer v. Jones, 85 P. 1050, 15 Wyo. 1—Clendenning v. Guise, 55 P. 447, 8 Wyo. 91.
- Board of land commissioners
- Wyo.—Buckum v. Johnson, 127 P. 904, 21 Wyo. 26.
94. Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.
95. Ark.—Jackson v. Elder, 63 S.W. 2d 991, 187 Ark. 1094.
- Cal.—Norton v. Baranov, 50 P.2d 67, 4 Cal.2d 443.
- Fla.—Hodges v. Lamar, 161 So. 81, 119 Fla. 566.
- Ill.—People v. Wallace, 163 N.E. 820, 332 Ill. 427, reversing 247 Ill.App. 571—White v. City of Ottawa, 230 Ill.App. 493, affirmed 149 N.E. 521, 318 Ill. 463.
- N.J.—Patrick Connelly, Inc., v. Hugh Montague & Son Co., 4 A.2d 779, 17 N.J.Misc. 36.
- N.M.—Durham v. Rasco, 227 P. 599, 30 N.M. 16, 34 A.L.R. 838.
- N.Y.—Haan v. Haan, 231 N.Y.S. 58, 133 Misc. 197.
- Ohio.—Fulton v. Kabaker, 197 N.E. 131, 49 Ohio App. 213.
- Okl.—Stock v. Sentinel Rural & Long Distance Telephone Co., 87 P.2d 656, 184 Okl. 380—Crossley v. Cox, 64 P.2d 663, 179 Okl. 52—Abrams v. Neal, 61 P.2d 1103, 178 Okl. 158—Esch v. Callaway, 251 P. 1028, 123 Okl. 38.
- Pa.—Commonwealth v. Superintendent of House of Correction, 64 Pa. Super. 613.
- Tenn.—International Baking Co. v. Polk, 295 S.W. 472, 155 Tenn. 461.
- Tex.—State Highway Commission of Texas v. Tenge, Civ.App., 57 S.W. 2d 929—Jackson v. Lancaster, Civ. App., 199 S.W. 1179.
- Wis.—In re Adams' Estate, 272 N.W. 19, 224 Wis. 237, 109 A.L.R. 1364—Thorne v. Webster, 213 N.W. 646, 193 Wis. 97.
- 15 C.J. p 1130 note 9.
- Correction of mistake in county settlement
- Where exclusive original jurisdiction to correct alleged mistakes in settlements with collector of taxes for county rested with the county court, the chancery court lacked jurisdiction to entertain a bill failing to allege fraud but alleging merely mistake.—Jackson v. Elder, 63 S.W. 2d 991, 187 Ark. 1094.
98. Ill.—People v. Wallace, 163 N.E. 820, 332 Ill. 427, reversing 247 Ill.App. 571.
- Tex.—Lawrie v. Miller, Com.App., 45 S.W.2d 172, reversing Miller v. Lawrie, Civ.App., 25 S.W.2d 984.
- Wis.—Becker v. Chester, 91 N.W. 87, 650, 115 Wis. 90.
- 15 C.J. p 1130 note 9.
97. Tex.—Morrow v. Corbin, 62 S.W.2d 641, 122 Tex. 553.
98. Iowa.—Macklot v. Davenport, 17 Iowa 379.
- La.—Knox v. Gurnett, 28 La. Ann. 601.
- 15 C.J. p 1130 note 8.
99. Cal.—Hopkins v. Anderson, 21 P. 2d 560, 218 Cal. 62.
- Fla.—State v. Sullivan, 116 So. 255, 95 Fla. 191.
1. Ind.—Great Western Life Assur. Co. v. State, 102 N.E. 849, 181 Ind. 28, rehearing denied 103 N.E. 843, 181 Ind. 28—Aldrich v. Hawkins, 6 Blackf. 125.
- Neb.—Armstrong v. Mayer, 83 N.W. 401, 60 Neb. 423.
- 1 C.J. p 990 note 83—15 C.J. p 981 note 91 [d], p 1130 note 10.

it is applicable only to courts exercising the jurisdiction to which the addition is made.² Where original and exclusive jurisdiction is conferred upon one court, another court which formerly possessed such jurisdiction is deprived thereof.³ The effect of a constitutional grant of exclusive jurisdiction as a restriction upon the legislative power as to courts has been discussed in § 124 supra.

§ 488. — Grant of Concurrent Jurisdiction

As to matters as to which courts have concurrent jurisdiction, they are of equal dignity, and the conferring of concurrent jurisdiction upon a court does not of itself deprive other courts of similar jurisdiction theretofore possessed by them.

There is nothing in the inherent nature of jurisdiction which precludes two or more courts from having concurrent jurisdiction of the same subject matter, and, subject to constitutional restrictions considered supra § 122, when constitution or statute vests jurisdiction in any tribunal without use of the qualifying term "exclusive" or its equivalent, the legislature may in its discretion vest the like jurisdiction in another court or tribunal.⁴ Courts of concurrent jurisdiction are courts of equal dig-

nity as to the matters concurrently cognizable,⁵ neither having supervisory power over process from the other,⁶ and, as shown infra § 492, the one first exercising such jurisdiction acquires control to the exclusion of the other.

A court is not ousted of the jurisdiction which it possesses over a subject by a subsequent legislative enactment conferring jurisdiction over the same subject on another court⁷ or other tribunal,⁸ unless such an intention is plainly manifested either by the words of the statute or by a necessary implication therefrom;⁹ and, unless expressly limited in the grant of coördinate jurisdiction to a new tribunal, the powers of the tribunal to which the new authority is granted are to be deemed coextensive with those of the court formerly possessing exclusive power.¹⁰

The giving of jurisdiction to a lower court concurrent with that of an appellate court does mean that such jurisdiction shall be exclusive and final.¹¹

Contractual provisions purporting to deprive a court of its constitutional or statutory concurrent jurisdiction are invalid.¹²

2. N.Y.—*People v. New York Exercise Bd.*, 3 N.Y.St. 253.

3. Ind.—*Fisher v. Prewitt*, 7 Ind. 519.

Municipal and superior courts

Statute granting jurisdiction of certain actions to municipal court ipso facto deprived superior court thereof.—*Glass v. Bank of America Nat. Trust & Savings Ass'n*, 62 P.2d 764, 17 Cal.App.2d 645.

4. Fla.—*State v. Sullivan*, 116 So. 255, 256, 95 Fla. 191.

Constitutional and other courts

As long as jurisdiction of courts named in constitution is not exclusive, legislature may vest such courts or commissions as it establishes with jurisdiction original or concurrent with jurisdiction of courts recognized in constitution.—*State v. Sullivan*, supra.

"Inferior courts" as term is used in constitution

"The term 'inferior courts', employed in section 11 of article 5 of the Constitution [defining the circuit courts' exclusive jurisdiction] has reference to those courts provided for in the Constitution at the time of its adoption, but the term may now embrace not only those originally provided for, but all those which may be established pursuant to section 1 of article 5 as amended in 1914."—*State v. Sullivan*, supra.

5. Fla.—*Ex parte Sirmans*, 116 So. 282, 94 Fla. 832.

Corporation courts and hustings courts are courts of coordinate dignity with circuit courts.—*Woodhouse v. Burke & Herbert Bank & Trust Co.*, 185 S.E. 876, 166 Va. 706 —*Watson v. Blackstone*, 38 S.E. 939, 98 Va. 618.

Common pleas and orphan's courts are of like grade and rank, each being distinct and separate with respect to its jurisdiction, and neither can confer jurisdiction on the other sua sponte, but only by legislative warrant.—*In re Hohehn's Estate*, 108 A. 173, 265 Pa. 14.

6. Ind.—*Shideler v. Vrijlich*, 145 N.E. 881, 195 Ind. 563.

As to compelling compliance with statutory duty

The power exists to compel a judicial tribunal's compliance with a statutory duty, but such power is never conferred upon a tribunal of equal rank and grade with that complained against as being in default.—*In re Hohehn's Estate*, 108 A. 173, 265 Pa. 14.

7. Cal.—*People v. Denault*, 253 P. 151, 154, 81 Cal.App. 1, quoting *Corpus Juris*.

III.—*Spencer v. Means*, 231 Ill.App. 351.

Pa.—*Schwartz v. Schwartz*, 175 A. 386, 316 Pa. 318, citing *Corpus Juris*—*In re Breyer's Estate*, 19 Pa. Dist. & Co. 255.

15 C.J. p 1131 note 22.

8. Industrial board
Giving additional jurisdiction to

other tribunals, such as industrial board, does not take general jurisdiction away from supreme court.—*Barone v. Aetna Life Ins. Co.*, 183 N.E. 900, 260 N.Y. 410, affirming 256 N.Y. S. 221, 235 App.Div. 759.

9. Cal.—*People v. Denault*, 253 P. 151, 154, 81 Cal.App. 1, quoting *Corpus Juris*.

15 C.J. p 1131 notes 22, 23.

10. N.Y.—*In re Stern's Estate*, 291 N.Y.S. 732, 161 Misc. 272.

11. Concurrent jurisdiction of probate court

Under Rev.St. c 67 § 2, providing that courts of probate shall have jurisdiction in equity concurrent with the supreme judicial court of all cases relating to administration of estates, etc., the word "concurrent" does not mean exclusive or final, for that would negative the right to resort to the law court, but the lower court has final jurisdiction subject to appeal.—*Norris v. Moody*, 113 A. 24, 120 Me. 151.

12. Tex.—*Bull Dog Fire Ins. Ass'n v. Brown*, Civ.App. 287 S.W. 76.

Attempt of insurance company to preclude resort to court of concurrent jurisdiction

County court having concurrent original jurisdiction with district court over action on automobile fire policy under constitution and statute, provision in policy requiring suit in highest court of original jurisdiction is void.—*Bull Dog Auto Fire Ins. Ass'n v. Brown*, supra.

§ 489. — Election of Tribunal

Plaintiff may select which of two courts of concurrent jurisdiction he will proceed in, but having once made his election is bound thereby.

Where two courts have concurrent jurisdiction a party may elect to bring his action in either,¹³ and when his election is made it is binding upon him,¹⁴ and, as shown *infra* § 492, the court in which the action is first brought ordinarily has exclusive jurisdiction of that particular case, so that the pendency of the cause of action in one court is ground for abatement of the same suit in another court, as discussed in Abatement and Revival § 17.

§ 490. — Jurisdiction of Particular Courts

- a. Courts of justices of the peace
- b. Probate, orphans', surrogates', and similar courts
- c. Other particular courts

a. Courts of Justices of the Peace

The jurisdiction of justices of the peace is ordinarily not exclusive except as to cases involving small amounts, but is concurrent with that of other courts.

Other courts,¹⁵ such as circuit courts,¹⁶ district courts,¹⁷ municipal courts,¹⁸ police courts,¹⁹ and superior courts,²⁰ usually have jurisdiction concurrent with that given justices of the peace, the nature and scope of whose jurisdiction generally are considered in the C.J.S. title Justices of the Peace § 26, also 35 C.J. p 487 note 26—p 491 note 56, and the fact that the jurisdiction of justices of the peace may be extended to cases originally cognizable in other courts exclusively will not take away the jurisdiction of the latter.²¹ In some jurisdictions, however, the constitution or statute confers upon justices exclusive jurisdiction in certain cases,²² generally where the amount in controversy does not exceed a certain sum,²³ or provides for ex-

13. Ill.—*People v. Haas*, 183 N.E. 812, 351 Ill. 68.

Mass.—*Adams v. Silverman*, 182 N.E. 1, 280 Mass. 23.

N.Y.—*Lutus v. Labor*, 226 N.Y.S. 108, 222 App.Div. 132—*In re Leary's Estate*, 14 N.Y.S.2d 960, 172 Misc. 286.

Pa.—*Consumers' Mining Co. v. Chatlak*, 92 Pa.Super. 17.

15 C.J. p 1131 note 24.

Minor's right of election

A dependent minor child of divorced parents could choose the forum in which she desired to obtain support from her father.—*Meyers v. Meyers*, 8 N.Y.S.2d 262, 169 Misc. 860.

14. Ill.—*People v. Haas*, 183 N.E. 812, 351 Ill. 68.

15 C.J. p 1131 note 25.

Effect of election

A litigant should not be accorded privileges or immunities by reason of its selection of the surrogate's court as a forum, which would be denied in like litigation in a court of general jurisdiction.—*In re Leary's Estate*, 14 N.Y.S.2d 960, 172 Misc. 286.

Time and forum

Plaintiff has the "option of determining the time and forum" of the proceedings he brings in one of two courts of concurrent jurisdiction.—*El. L. Hustling Co. v. Coca-Cola Co.*, 216 N.W. 833, 194 Wis. 311.

Rule applied to mandamus proceeding

Ill.—*People v. Haas*, 183 N.E. 812, 351 Ill. 68.

15. Ga.—*Phillips v. Rawls*, 167 S.E. 189, 46 Ga.App. 200.

Ind.—*McKinney v. Crawford*, 155 N.E. 185, 87 Ind.App. 431.

Pa.—*Fisher v. Stevens Coal Co.*, 7 A.2d 573, 136 Pa.Super. 394—*Sharpless v. Hardy*, 28 Del.Co. 73.

Tenn.—*Gouge v. McInturf*, 90 S.W.

2d 753, 169 Tenn. 678, modified on other grounds 92 S.W.2d 198, 170 Tenn. 72.

15 C.J. p 1132 note 32—35 C.J. p 491 note 58.

16. Tenn.—*Service Stamp Co. v. Ketchen*, 10 Tenn.App. 59.

17. La.—*Brignac v. Buller & Fontenot*, App., 151 So. 437.

Mont.—*State ex rel. Hamshaw v. Justice's Court of Union Tp. in and for Madison County*, 88 P.2d 1—*State v. Justice Court of Silver Bow Tp.*, 274 P. 495, 84 Mont. 173.

N.D.—*Jorgenson v. Farmers' & Merchants' Bank of Robinson*, 170 N.W. 894, 44 N.D. 98.

18. Cal.—*Borden v. Thomas*, 259 P. 1008, 85 Cal.App. 646.

19. Miss.—*Gober v. Phillips*, 117 So. 600, 151 Miss. 255.

20. Ga.—*Phillips v. Rawls*, 167 S.E. 189, 46 Ga.App. 200.

N.C.—*Bryan v. Street*, 183 S.E. 366, 209 N.C. 284—*Singer Sewing Mach. Co. v. Burger*, 107 S.E. 14, 181 N.C. 241—*Pendergraph v. American Ry. Express Co.*, 100 S.E. 525, 178 N.C. 344.

21. Ga.—*Farmers' Hardware Co. v. Bearden*, 123 S.E. 730, 32 Ga.App. 445.

Okl.—*Petros v. Bosen*, 91 P.2d 785, 185 Okl. 351.

35 C.J. p 492 note 59.

22. Cal.—*Shipp v. Superior Court in and for San Bernardino County*, 289 P. 825, 209 Cal. 671—*Ex parte Jacobson*, 60 P.2d 1001, 16 Cal.App. 2d 497.

Mo.—*State ex rel. State Highway Commission of Missouri v. Park*, 15 S.W.2d 785, 322 Mo. 293.

15 C.J. p 1132 note 32—35 C.J. p 492 note 60.

23. Ark.—*Russell v. Johnson*, 101

S.W.2d 172, 193 Ark. 541—*J. W. Black Lumber Co. v. Kingman Plow Co.*, 196 S.W. 933, 130 Ark. 107.

Cal.—*Holm v. Davis*, 47 P.2d 537, 8 Cal.App.2d 328.

N.C.—*Singer Sewing Mach. Co. v. Burger*, 107 S.E. 14, 181 N.C. 241.

35 C.J. p 492 notes 60, 61.

Computation of value

(1) Under code provisions conferring exclusive jurisdiction on justices' courts in all cases in law where the value of the property in controversy amounts to one thousand dollars or less, justice's court, class A, had original and exclusive jurisdiction of action for possession of personal property where complaint alleged that value of property was seven hundred and fifty dollars and that value of use of property from time of detention was four hundred dollars, since the main object of the proceeding was worth less than a thousand dollars and the value of the use was merely incidental. The fact that plaintiff was entitled to reasonable attorney's fee under contract which provided that defendant would pay ten per cent as attorney's fee in case suit was instituted to collect contract price of the property did not deprive the justice's court of jurisdiction, as the seven hundred and fifty dollar value plus the seventy-five dollar attorney fee would be eight hundred and twenty-five dollars, or less than one thousand dollars.—*Holm v. Davis*, 47 P.2d 537, 8 Cal.App.2d 328.

(2) Where plaintiff sued on alleged note for two hundred and fifty dollars, but judgment was rendered for only one hundred and forty five dollars, such fact did not make case one within exclusive jurisdiction of

clusive jurisdiction of certain sums and for concurrent jurisdiction of larger sums not exceeding a certain amount.²⁴ Where exclusive jurisdiction resides in another court, the justice court may not take cognizance of the case,²⁵ and where exclusive jurisdiction rests in the justice's court no other court may take jurisdiction.²⁶ Under statute it has been held that a county court has no concurrent jurisdiction with a magistrate's court, but on the contrary is an appellate court to which appeals from a magistrate's court may be taken;²⁷ and it has also been held that county courts have no general jurisdiction over justices' courts, and no authority to enforce the enforcement of judgments or executions in aid thereof unless the amount involved is within the jurisdiction of the county court.²⁸

Where another court is given concurrent jurisdiction with a justice's court it impliedly follows that such other court has precisely the same powers in respect of such concurrent matters as the jus-

tice's court.²⁹

Criminal jurisdiction. The exclusive and concurrent jurisdiction of justices over criminal offenses is considered in the C.J.S. title Criminal Law § 126, also 16 C.J. p 159 note 78—p 160 note 82.

b. Probate, Orphans', Surrogates', and Similar Courts

The original jurisdiction of courts of probate is ordinarily exclusive as to matters falling within their cognizance, although this is subject to the qualification that where the court of probate cannot afford complete and adequate relief jurisdiction may rest with another court, and that under the provisions of applicable laws jurisdiction of particular matters may be either exclusive or concurrent; neither a court of probate nor another court may invade the exclusive jurisdiction of the other.

The jurisdiction of probate courts, which has been considered supra §§ 298, 300-304, is frequently exclusive with respect to matters ordinarily falling within the cognizance of such courts³⁰ save as their acts may be subject to review by appellate courts,³¹

justice's court, inasmuch as the amount demanded by plaintiff in complaint, and not the amount for which the judgment is rendered, determines matter of jurisdiction, except where sum is claimed fraudulently to confer jurisdiction.—*Nations v. Lindley*, Tex.Civ.App., 275 S.W. 163.

24. Ind.—*Leathers v. Hogan*, 17 Ind. 242.

Mich.—*Detroit Lumber Co. v. Petrel*, 117 N.W. 80, 153 Mich. 528.

25. Mo.—*Underwood v. Oregon County*, 8 S.W.2d 597, 320 Mo. 514. N.C.—*Greenville Banking & Trust Co. v. Leggett*, 131 S.E. 752, 191 N.C. 362.

Tex.—*Trustees of Crosby Independent School Dist. v. West Disinfecting Co.*, Civ.App., 121 S.W.2d 661, error granted.

County court's exclusive jurisdiction of incompetent's estate

Justice court is without jurisdiction of action for necessities allegedly furnished to incompetent under guardianship at his request when guardian failed to provide therefor, since county court, having jurisdiction of incompetent's estate, is vested with exclusive jurisdiction.—*Capps v. Kelley*, 57 P.2d 824, 177 Okl. 98.

26. Cal.—*Holm v. Davis*, 47 P.2d 537, 8 Cal.App. 328.

27. S.C.—*Moore v. Moore*, 197 S.E. 507, 187 S.C. 144.

28. Tex.—*Chamberlain Medicine Co. v. Spoons*, Civ.App., 296 S.W. 991.

29. Mont.—*Doggett v. Johnson*, 234 P. 252, 72 Mont. 443.

Restraind from exercise of equitable powers

District court may not exercise its equitable powers in cases in which

justices' courts have concurrent jurisdiction, under Const. art. 8 § 21, since in such cases a district court has precisely the same authority as a justice's court.—*Doggett v. Johnson*, 234 P. 252, 72 Mont. 443.

30. U.S.—*Farwell v. Commissioner of Internal Revenue*, C.C.A., 38 F. 2d 791.—*In re Armistead's Estate*, D.C.Miss., 4 F.Supp. 606.

Ala.—*Marx v. Loeb*, 153 So. 266, 228 Ala. 196.

Ark.—*Laws v. Wheeler*, 284 S.W. 775, 171 Ark. 514.

Cal.—*Smith v. Fidelity & Deposit Co. of Maryland*, 19 P.2d 1018, 130 Cal. App. 45.

Idaho.—*Short v. Thompson*, 55 P.2d 163, 56 Idaho 361.

Ind.—*Gray v. Union Trust Co. of Indianapolis*, 12 N.E.2d 931, 218 Ind. 675, rehearing denied and mandate modified in other respects *Gray v. Union Trust Co.*, 14 N.E.2d 532, 213 Ind. 675.

Mich.—*R. L. Aylward Coal Co. v. Luyckx*, 246 N.W. 156, 261 Mich. 394.

Minn.—*State ex rel. Nelson v. Probate Court of Hennepin County*, 271 N.W. 879, 199 Minn. 297.

Ohio.—*Unger v. Wolfe*, 15 N.E.2d 955, 134 Ohio St. 69.—*Madigan v. Dollar Building & Loan Co.*, 4 N.E.2d 68, 52 Ohio App. 553.—*Keever v. Brown*, 172 N.E. 626, 36 Ohio App. 1.

Pa.—*In re Mellinger's Estate*, 5 A. 2d 321, 334 Pa. 180.—*Wilson v. Board of Directors of City Trusts*, 188 A. 588, 324 Pa. 545.—*In re Link's Estate*, 180 A. 1, 319 Pa. 513.—*In re Masters' Estate*, 85 Pa.Super. 292.—*Manzer v. Wycoff*, 78 Pa.Super. 560.—*Divine v. Skrotsky*, 8 Pa.Dist. & Co. 717.

R.I.—*Dugdale v. Chase*, 157 A. 430, 52 R.I. 63.

Vt.—*In re Curtis' Estate*, 192 A. 13, 109 Vt. 44.

Wash.—*State v. Superior Court in and for Yakima County*, 290 P. 870, 158 Wash. 265.

15 C.J. p 1009 note 45, p 1131 note 31.

Enforcement of land sale contract after death of either party

Pa.—*Manzer v. Wycoff*, 78 Pa.Super. 560.

Guardianship

The jurisdiction of a probate court over persons under guardianship, such as persons who, because of old age are mentally incompetent, is in its origin exclusive.—*In re Strom's Guardianship*, Minn., 286 N.W. 245.

Misconduct in partition sale

Probate court had exclusive jurisdiction of suit founded on misconduct of commissioner in conducting sale in partition suit, and petitioners' offer to adopt, as valid, mortgage given by subsequent purchaser, did not remove suit founded on misconduct of commissioner conducting partition sale from exclusive jurisdiction of probate court.—*O'Connor v. Boyden*, 167 N.E. 268, 268 Mass. 111.

Partnership matters

Jurisdiction to remove surviving partner, for misconduct, from management of partnership estate, held to rest exclusively in probate court.—*Groves v. Aegerter*, 42 S.W.2d 974, 226 Mo.App. 128.

Postnuptial contract

Probate court has exclusive jurisdiction to decide validity of postnuptial contract.—*In re Zinke's Estate*, 209 N.W. 83, 235 Mich. 201.

31. Idaho.—*Larsen v. Larsen*, 256 P. 369, 44 Idaho 211.

and except as the remedies available in such courts are inadequate.³² Thus their jurisdiction over decedents' estates is frequently exclusive in character,³³ although this means merely that the jurisdiction of the court of probate is exclusive within its appointed orbit and not that every case incidental-

ly bearing on settlement of a decedent's estate falls within such exclusive jurisdiction.³⁴ On the other hand, under some constitutional and statutory provisions the jurisdiction of distinct probate courts over certain matters is not exclusive, but is concurrent with that of other courts,³⁵ such as circuit

Minn.—First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co., 203 N.W. 612, 167 Minn. 168.

Pa.—Divine v. Skrotsky, 8 Pa. Dist. & Cr. 717.

Vt.—In re Curtis' Estate, 192 A. 13, 109 Vt. 44.

15 C.J. p 1909 note 46.

District court limited to review

District court of Minnesota has no jurisdiction over settlement of administrator's account, except on appeal, exclusive original jurisdiction being in the probate court.—In re McDonald's Estate, D.C.Minn., 42 F. 2d 266.

32. U.S.—Tussing v. Central Trust Co., D.C.Mich., 34 F.2d 312.

Mich.—Schutz v. Read, 280 N.W. 45, 284 Mich. 548—Grigg v. Harina, 278 N.W. 125, 281 Mich. 443—Rudolphi v. Gilbert, 176 N.W. 400, 209 Mich. 141—Brooks v. Hargrave, 146 N.W. 325, 179 Mich. 136.

33. U.S.—Hamburg Bank v. Ouachita Nat. Bank in Monroe, C.C.A.Ark., 78 F.2d 100, certiorari denied Ouachita Nat. Bank v. Hamburg Bank, 56 S.Ct. 382, 296 U.S. 655, 80 L. Ed. 467—In re McDonald's Estate, D.C.Minn., 42 F.2d 266—First Nat. Bank & Trust Co. in Minneapolis v. National Surety Corporation, D. C. Minn., 25 F.Supp. 392.

Ala.—Ex parte Sumlin, 85 So. 810, 204 Ala. 376.

Ark.—Watkins v. Acker, 111 S.W.2d 458, 195 Ark. 203—Sewell v. Reed, 71 S.W.2d 191, 189 Ark. 50—Laws v. Wheeler, 284 S.W. 775, 171 Ark. 514.

Cal.—In re Hughes' Estate, 40 P.2d 295, 3 Cal.App.2d 551, followed in Teshick v. Gromeko, 40 P.2d 296, 3 Cal.App.2d 755—Rothschild v. Gianelli, 280 P. 552, 100 Cal.App. 799—Meilink v. Gianelli, 280 P. 551, 100 Cal.App.2d 615—Eastwood v. Stewart, 222 P. 369, 64 Cal.App. 614.

Idaho.—Moyes v. Moyes, 94 P.2d 722—Larsen v. Larsen, 256 P. 369, 44 Idaho 211—Maloney v. Zipf, 237 P. 622, 41 Idaho 30.

Kan.—Page v. Van Tuyl, 92 P.2d 110, 150 Kan. 285—State v. Zimmerman, 246 P. 516, 121 Kan. 346.

Mass.—Buttrick v. Snow, 178 N.E. 620, 277 Mass. 401—Rolfe v. Atkinson, 156 N.E. 51, 259 Mass. 76—S. S. Pierce Co. v. Fiske, 129 N. E. 609, 237 Mass. 39.

Mich.—Schutz v. Read, 280 N.W. 45, 284 Mich. 548—Raseman v. Raseman, 208 N.W. 35, 234 Mich. 237

—Rudolphi v. Gilbert, 176 N.W. 400, 209 Mich. 141.

Minn.—In re Peterson's Estate, 277 N.W. 529, 203 Minn. 31—First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co., 203 N.W. 612, 163 Minn. 168—Klessig v. Lea 196 N.W. 655, 158 Minn. 14.

Mo.—State ex rel. Nute v. Bruce, 70 S.W.2d 854, 334 Mo. 1107—Phillips v. Blessing, App., 127 S.W.2d 62—Hax v. O'Donnell, App., 117 S.W.2d 667—Neelsen v. Bess, App., 99 S.W. 2d 863—State ex rel. Lamm v. Lamm, App., 216 S.W. 332.

N.H.—Robinson v. Dana's Estate, 174 A. 772, 87 N.H. 114—Patten v. Patten, 109 A. 415, 79 N.H. 388.

N.M.—Barka v. Hopewell, 219 P. 799, 29 N.M. 166.

N.Y.—In re Ledyard's Estate, 10 N. Y.S.2d 327, 170 Misc. 365—In re Lesser's Estate, 277 N.Y.S. 123, 154 Misc. 364.

Pa.—In re Siagle's Estate, 7 A.2d 353, 335 Pa. 552—In re Crisswell's Estate, 5 A.2d 577, 334 Pa. 266—Wilson v. Board of Directors of City Trusts, 188 A. 588, 324 Pa. 545—Bunce v. Galbrath, 112 A. 143, 268 Pa. 389—Abrahams v. Wilson, 3 A.2d 1016, 134 Pa.Super. 297—In re Brusstar's Estate, 186 A. 147, 123 Pa.Super. 45—In re Marsteller's Estate, 76 Pa.Super. 377—Kelley v. McGurl, 13 Pa. Dist. & Co. 350—Knoblauch v. Kiesel, 13 Pa. Dist. & Co. 41—Divine v. Skrotsky, 8 Pa. Dist. & Co. 717—Frey v. Long, 8 Pa. Dist. & Co. 121—In re Sherly's Estate, 19 Erie Co. 486.

Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—Mathews v. Drew, 172 A. 638, 106 Vt. 245—Walker v. Hendee, 197 A. 334, 100 Vt. 362.

Wash.—State v. Superior Court in and for Yakima County, 290 P. 870, 158 Wash. 255.

Administrator's account

Minn.—First Trust & Savings Bank v. U. S. Fidelity & Guaranty Co., 194 N.W. 376, 156 Minn. 231.

Avoiding gift causa mortis

Mo.—Kerwin v. Kerwin, App., 204 S. W. 922.

Compliance with antenuptial contract where incidental to distribution of estate

Minn.—O'Brien v. Lien, 199 N.W. 914, 160 Minn. 276.

Devolution of trust property by virtue of intestate laws

N.Y.—In re Garland's Estate, 293 N. Y.S. 283, 249 App.Div. 923.

Distribution of intestate remainder
Conn.—Home Trust Co. v. Beard, 165 A. 208, 116 Conn. 396.

Estate consisting wholly of personalty

Where estate consisted entirely of personal property, probate court had exclusive original jurisdiction to direct payment of debts and distribution of remainder, if any.—In re Anderson's Estate, 71 P.2d 1013, 157 Or. 365.

"Proceeding to discover assets"

Mo.—Davis v. Johnson, 58 S.W.2d 746, 332 Mo. 417, transferred, see, App., 47 S.W.2d 121.

Removal of executor

Md.—Flaks v. Flaks, 196 A. 116, 173 Md. 358.

Trust estates created by will

Pa.—Wilson v. Board of Directors of City Trusts, 188 A. 588, 324 Pa. 545.

Widow's exemption

Pa.—Bridgeford v. Groh, 160 A. 451, 306 Pa. 566.

34. Pa.—Overbrook Heights Building & Loan Ass'n v. Wilson, 5 A. 2d 529, 333 Pa. 449—Van Dyke's Appeal, 60 Pa. 481.

Ownership of deposit certificates of intestate

Unless suit to determine ownership of deposit certificates allegedly given to plaintiff by defendant's intestate was proper one for equity cognizance, probate court had exclusive jurisdiction to determine ownership thereof, and petition was held to state cause of action at law against defendant bank on such certificates, in view of bank's answer consisting substantially of pleading in nature of bill of interpleader, although where defendant bank filed pleading in nature of bill of interpleader, circuit court had original jurisdiction, and could entertain cause as suit in equity, in absence of any attack on pleadings or objection to jurisdiction.—Phillips v. Alford, Mo.App., 90 S.W.2d 1060.

Statutory bond

Probate court has exclusive jurisdiction of matters pertaining directly to settlement of estate, except as to jurisdiction conferred on circuit court by statute for suits on statutory bond of executor or administrator.—Smith v. St. Louis Union Trust Co., 104 S.W.2d 341, 340 Mo. 979.

35. Ala.—Warren v. Ellis, 150 So. 484, 227 Ala. 497—Ex parte Brown, 148 So. 132, 226 Ala. 578—Coursion

courts,³⁶ courts of common pleas,³⁷ superior courts,³⁸ or supreme courts,³⁹ or is exclusive as to some matters and concurrent as to others.⁴⁰ The creation of probate courts in particular coun-

v. Tollison, 147 So. 635, 226 Ala. 530.—Ex parte Chapman, 142 So. 540, 225 Ala. 168.—Watson v. White, 113 So. 260, 216 Ala. 396.—Yarbrough v. Yarbrough, 75 So. 932, 200 Ala. 184.

Conn.—Dettenborn v. Hartford-National Bank & Trust Co., 185 A. 82, 121 Conn. 388.—Preston v. Preston, 128 A. 292, 102 Conn. 96.

Ga.—Spooner v. Bank of Donalsonville, 125 S.E. 456, 159 Ga. 295.—McKinney v. Powell, 100 S.E. 375, 149 Ga. 422.—Strickland v. Strickland, 94 S.E. 766, 147 Ga. 494.

N.J.—In re Schultz's Will, 133 A. 762, 102 N.J.Eq. 14.—Landis v. Vineland Historical & Antiquarian Soc., 124 A. 604, 96 N.J.Eq. 246.—Home Brewing Co. v. Mahler, 112 A. 506, 92 N.J.Eq. 323.

Or.—In re Anderson's Estate, 71 P. 2d 1013, 157 Or. 365.

Va.—Nicholas v. Nicholas, 193 S.E. 689, 169 Va. 399.

15 C.J. p 1131 note 31.

Insane persons

Probate court of Shelby county has concurrent jurisdiction with chancery court over persons and estates of insane persons.—Union Planters' Nat. Bank & Trust Co. v. Bornds, 77 S.W.2d 645, 168 Tenn. 289.

Demands against decedents' estates

Constitutional provision, defining probate courts' jurisdiction, vested in such courts, not exclusive jurisdiction, but merely concurrent jurisdiction with other courts of record, to entertain suits against administrators to establish demands against decedents' estates.—State ex rel. Lefholz v. McCracken, 95 S.W.2d 1239, 231 Mo.App. 870.

Court of chancery, prerogative court, and orphans' courts may all have concurrent jurisdiction in certain cases.—In re Schultz's Will, 133 A. 762, 102 N.J.Eq. 14.—In re Bernhard's Estate, N.J.Prerog., 143 A. 92.

Concurrent jurisdiction of two or more courts of probate

In section giving surrogate's court of each county exclusive jurisdiction to grant letters of administration where nonresident decedent died without the state, leaving personalty within such county and "no other," or leaving personalty which has since his death come into that county and "no other" and remains unadministered, words "no other" relate to such exclusive jurisdiction, and do not affect concurrent jurisdiction conferred by the succeeding section on two or more surrogate's courts where each has property of a decedent within its territorial limits.

—In re Mendley's Estate, 276 N.Y.S. 555, 154 Misc. 59.

36. Ill.—Howard v. Swift, 190 N.E. 102, 356 Ill. 80.

Mo.—Pryor v. Kopp, 119 S.W.2d 224, 342 Mo. 887.—Horwitz v. Schaper, App., 119 S.W.2d 474.—State ex rel. Cantley v. Akin, 22 S.W.2d 836, 224 Mo.App. 114.—State ex rel. Tempel v. Garesche, 200 S.W. 735, 198 Mo.App. 457.

S.D.—Jacquish v. Deming, 167 N.W. 157, 40 S.D. 265.

Insane persons

Jurisdiction of probate court over claims against the estate of an insane person is not exclusive, and the circuit court has jurisdiction of all claims against insane persons whether arising before or during guardianship, and jurisdiction of probate court ceases after insane person has been adjudged restored to sanity, his property restored to him, and his guardian discharged.—Sidwell v. Kaster, 232 S.W. 1005, 239 Mo. 174.

When jurisdiction not concurrent

Jurisdiction of circuit court in establishing claims against estate is not concurrent with that of probate court where circuit court is limited to exercise of jurisdiction derived from justice's court.—Newman v. Weinstein, 75 S.W.2d 871, 230 Mo. App. 794.

37. Pa.—Overbrook Heights Building & Loan Ass'n v. Wilson, 5 A.2d 529, 333 Pa. 449.—In re McCrea's Estate, 21 Pa.Dist. & Co. 69.—Kreitzer v. Carrick, 22 Westmoreland Co. 210.

S.C.—Morris v. Maryland Casualty Co., 197 S.E. 505, 187 S.C. 150.—Muldrow v. Jeffords, 142 S.E. 602, 144 S.C. 509.—Chapman v. Smith, 130 S.E. 212, 133 S.C. 122.—Beatty v. National Surety Co., 128 S.E. 40, 132 S.C. 45.

Residence of testator

Ohio.—Cunningham v. Bessemer Trust Co., 178 N.E. 217, 39 Ohio App. 535.

Sale of realty to pay debts

Ohio.—Heimbold v. Heimbold, 158 N.E. 499, 25 Ohio App. 32.

S.C.—Dorn v. Stidham, 137 S.E. 331, 139 S.C. 66.

Suit to compel accounting by administratrix

S.C.—Carolina Life Ins. Co. v. Arrowsmith, 176 S.E. 728, 174 S.C. 161.

Trusts inter vivos

Jurisdiction of orphans' court over trusts inter vivos is concurrent with that of courts of common pleas.—Wilson v. Board of Directors of City Trusts, 188 A. 588, 324 Pa. 545—

Schwartz v. Schwartz, 175 A. 386, 316 Pa. 218, followed in In re Roseberry's Estate, 176 A. 216, 317 Pa. 45.—Pudelford v. Real Estate-Land Title & Trust Co., 183 A. 442, 121 Pa. Super. 193.

38. Cal.—In re McLennan's Estate, App., 85 P.2d 499.

Ill.—Kurzawski v. Kurzawski, 5 N.E. 2d 597, 258 Ill.App. 118.

Custody of infant

The superior court is the proper forum to determine the question of the custody of an infant, raised in divorce proceedings, or by writ of habeas corpus; in other cases probate courts have exclusive jurisdiction.—Pfeiffer v. Pfeiffer, 121 A. 174, 99 Conn. 154.

39. N.Y.—In re Atterbury, 118 N.E. 858, 222 N.Y. 355, reversing 167 N.Y.S. 88, 179 App.Div. 648.—Ex parte Lee, 116 N.E. 352, 230 N.Y. 532, reversing 161 N.Y.S. 1100, 176 App. Div. 141, and reargument denied In re Lee, 116 N.E. 1057, 231 N.Y. 542.—In re Miller's Will, 248 N.Y.S. 213, 231 App.Div. 587, modified in other respects 178 N.E. 555, 257 N.Y. 349.—Michaels v. Flach, 189 N.Y.S. 908, 197 App.Div. 478, affirming 186 N.Y.S. 899, 114 Misc. 225.—Snedeker v. Ellis, 241 N.Y.S. 563, 136 Misc. 607.—Van Buren v. Wensley, 169 N.Y.S. 789, 102 Misc. 248.

Guardians

(1) Supreme court and surrogate's court have concurrent jurisdiction over appointment of guardians.—In re Yardum, 241 N.Y.S. 326, 228 App. Div. 854, followed in 241 N.Y.S. 327, 228 App.Div. 855.—In re Staten Island Nat. Bank & Trust Co., 282 N.Y.S. 163, 156 Misc. 330.—In re De Saulles, 167 N.Y.S. 445, 101 Misc. 447.

(2) Supreme court has predominant jurisdiction over affairs of infants and their guardians, and, so far as legislature has granted jurisdiction to surrogate's court, it is concurrent therewith.—In re Albanese, 283 N.Y.S. 691, 245 App.Div. 404, motion denied 2 N.E.2d 677, 271 N.Y. 524, affirmed 4 N.E.2d 732, 272 N.Y. 552.

40. Ind.—Henkel v. Indiana Nat. Bank, 152 N.E. 857, 85 Ind.App. 407.

Exclusive and concurrent character of jurisdiction defined

Probate court authorized by Burns St.Annot.1926 § 1753 et seq (Burns St.Annot.1914 § 1806 et seq), has exclusive original jurisdiction in all matters pertaining to appointment of trustees and settlement of trust, and concurrent jurisdiction of all actions by and against executors, administrators, guardians, assignees, and

ties may operate to divest other courts of such counties of the probate jurisdiction which they formerly possessed;⁴¹ but, where there is no distinct probate court, probate powers may be conferred on courts also exercising a general jurisdiction, such as county and district courts, as shown supra § 299, and the rules heretofore set forth re-

specting the exclusive or concurrent character of the jurisdiction of probate courts also apply to such courts of general jurisdiction when sitting as courts of probate.⁴² In some states exclusive original jurisdiction over decedents' estates is conferred on county courts of general jurisdiction when sitting in probate,⁴³ except as statute or special circum-

trustees.—*Henkel v. Indiana Nat. Bank*, supra.

41. Ill.—*Meserve v. Delaney*, 105 Ill. 53.

42. Ill.—*Dixon v. Neftstead*, 2 N.E. 2d 135, 285 Ill.App. 463.

Ky.—*Central Trust Co. of Owensboro v. Bennett*, 270 S.W. 821, 208 Ky. 281.

Neb.—In re *Warner's Estate*, 288 N.W. 39—In re *Mattingly's Estate*, 270 N.W. 487, 131 Neb. 891—In re *Shierman's Estate*, 261 N.W. 155, 129 Neb. 230—*Wilkins v. Deal*, 257 N.W. 466, 128 Neb. 78.

Okl.—*Fidelity & Deposit Co. of Maryland v. Clanton*, 28 P.2d 566, 167 Okl. 106—*Swain v. Swan*, 294 P. 153, 147 Okl. 33.

S.D.—*State v. Nieuwenhuis*, 178 N.W. 976, 43 S.D. 193.

Tenn.—*Hodges v. Hale*, 97 S.W.2d 451, 20 Tenn.App. 233.

Tex.—*Buchanan v. Davis*, Com.App., 60 S.W.2d 192, affirming, Civ.App., 43 S.W.2d 279—*Cogley v. Welch*, Com.App., 34 S.W.2d 849, reversing Civ.App., 20 S.W.2d 244—*Moore v. Sanders*, Civ.App., 106 S.W.2d 337—*Freeman v. Banks*, Civ.App., 91 S.W.2d 1078, error refused—*Bohlsson v. Bohlsson*, Civ.App., 58 S.W.2d 913—*Reedy v. Jones*, Civ.App., 41 S.W.2d 1044—*Magee v. Magee*, Civ.App., 272 S.W. 252—*Denton v. Meador*, Civ.App., 268 S.W. 762.

Wis.—In re *Weidman's Will*, 207 N.W. 950, 189 Wis. 318.

15 C.J. p 1010 note 48, p 1131 note 31.

County court

(1) County courts have exclusive original jurisdiction of minors, residents in respective counties, guardianship, settlement of their accounts, and management of their property.—*Stewart v. Herten*, 249 S.W. 552, 125 Neb. 210.

(2) County courts have exclusive original jurisdiction under statute of estates of minors and incompetents.—In re *Vaughn's Guardianship*, 73 P. 2d 411, 181 Okl. 274.

(3) A county court has no jurisdiction of custody of minors, except as wards of guardians appointed by it, since district court alone has jurisdiction of proceeding involving custody of minor.—*Douglass v. Stover*, Civ.App., 268 S.W. 1039.

District court sitting in probate has exclusive jurisdiction to appoint guardians.—*John Hancock Mut. Life Ins. Co. v. Dower*, 271 N.W. 193, 222 Iowa 1377.

Superior court

(1) Superior court sitting in probate has exclusive jurisdiction of heir's action to establish trust in real property against executrix.—*Bauer v. Bauer*, 256 P. 822, 201 Cal. 770—*Bauer v. Bauer*, 256 P. 820, 201 Cal. 267.

(2) Superior court had exclusive, original, and inherent jurisdiction of petition by owner of property under mesne conveyances from former testamentary trustee to revoke appointment of administratrix de bonis non with will annexed, such proceeding being wholly in probate.—In re *Laack's Estate*, 62 P.2d 1087, 188 Wash. 463.

43. Colo.—*Davis v. Harbaugh*, 230 P. 103, 76 Colo. 73.

Neb.—*Starr v. Fidelity & Deposit Co. of Maryland*, 278 N.W. 478, 134 Neb. 240—*Carter v. Carrell*, 247 N.W. 348, 124 Neb. 542—*Pinn v. Pinn*, 189 N.W. 371, 108 Neb. 822—*State v. O'Connor*, 166 N.W. 556, 102 Neb. 187.

Okl.—*Bryan v. Seiffert*, 94 P.2d 526, 185 Okl. 496—In re *Gentry's Estate*, 13 P.2d 156, 158 Okl. 196.

Or.—*Richey v. Haley*, 233 P. 587, 113 Or. 612—In re *Failing's Estate*, 228 P. 821, 113 Or. 6, modified in other respects 231 P. 148, 113 Or. 6—*Mahon v. Harney County Nat. Bank of Burns*, 206 P. 224, 104 Or. 323.

Tex.—*Lauraine v. Ashe*, 196 S.W. 501, 109 Tex. 69, granting motion to modify opinion 191 S.W. 563—*Lawrie v. Miller*, Com.App., 45 S.W.2d 172, reversing *Miller v. Lawrie*, Civ.App., 25 S.W.2d 984—*Dempsey v. Gibson*, Civ.App., 105 S.W.2d 423, error dismissed—*Pitts v. Thompson*, Civ.App., 71 S.W.2d 368, error dismissed—*Ferguson v. Ferguson*, Civ.App., 66 S.W.2d 755—*Miller v. Valley Building & Loan Ass'n*, Civ.App., 29 S.W.2d 865—*Becknal v. Becknal*, Civ.App., 296 S.W. 917—*Nevill v. Hinkle*, Civ.App., 276 S.W. 324—*Meyer v. Meyer*, Civ.App., 223 S.W. 259, error refused—*Van Grinderbeck v. Lewis*, Civ.App., 204 S.W. 1042—*Hutchens v. Dresser*, Civ.App., 196 S.W. 969, dismissed for want of jurisdiction.

Wis.—*Cawker v. Drentzer*, 221 N.W. 401, 197 Wis. 98—*Marshall & Ilsley Bank v. Schuerbrock*, 217 N.W. 416, 195 Wis. 203—In re *Weidman's Will*, 207 N.W. 950, 189 Wis. 318.

Appointment of administrator

Only county court has original jurisdiction to appoint administrator of estate.—*Stock v. Sentinel Rural & Long Distance Telephone Co.*, 87 P. 2d 656, 184 Okl. 380—In re *Copperfield's Estate*, 12 P.2d 490, 158 Okl. 40.

Partition among heirs

Probate court has exclusive jurisdiction to partition deceased's land among heirs, where no question of title is involved.—*Le Fors v. Le Fors*, Tex.Civ.App., 41 S.W.2d 517, error dismissed.

Limitations on amount

Under constitutional provisions to the effect that county courts shall have original jurisdiction of all probate matters where the amount involved does not exceed two thousand dollars, except that as respects decedents' estates the limitation as to amount shall not apply, only county court had original jurisdiction of testamentary trusts involving more than two thousand dollars where settlement of estate could not be accomplished until trusts should be fully executed, the court saying: "The distinction is found in the intention of the testator. If he intend to establish a trust free of the administration of the county court, his estate is settled 'after the payment in full of all debts and legacies,' and only the jurisdiction of the district court, when properly invoked, would attach. But where he intends that the administration of his estate shall continue after the payment in full of all debts and legacies, his estate is not to be considered settled until the trust or trusts created by his will have been fully executed, and the jurisdiction of the county court must be sought."—*Kingdom of Yugo-Slavia v. Jovanovich*, 69 P.2d 311, 314, 100 Colo. 406.

Foreclosure of mortgage given by decedent and collection of debts

County court, not district court, was proper forum to foreclose mortgage given by decedent and collect debt, since mortgagee can obtain all rightful relief against estate of deceased mortgagor in county court, which may sell the land to pay the debt. Neither joinder of minor child of deceased mortgagor in foreclosure proceeding nor joinder of junior mortgagee without alleging it has an unpaid claim authorized foreclosing mortgage of decedent in district in place of probate court.

stances may change the rule,⁴⁴ as where the remedy in the county court is incomplete,⁴⁵ and auxiliary or appellate jurisdiction is conferred on the district courts,⁴⁶ or the jurisdiction of the county and district courts is concurrent as to certain mat-

ters;⁴⁷ and the mere fact that a decedent's estate is incidentally involved will not deprive a district court of jurisdiction over matters falling primarily within the scope of its powers rather than within that of the county court.⁴⁸ In other jurisdictions

While separate property of wife, which was mortgaged to secure debt of deceased husband, may not be subjected to payment in probate proceedings, in foreclosing mortgage of decedent and wife, proceedings may not be had in district court rather than probate court by reason of mortgage covering wife's separate property.—*Reynolds Mortg. Co. v. Smith*, Tex.Civ.App., 280 S.W. 879.

44. Or.—*Jacobson v. Holt*, 255 P. 901, 121 Or. 462.

Tex.—*Jones v. Wynne*, Com.App., 129 S.W.2d 279, affirming, Civ. App., 104 S.W.2d 141—*Helge v. American Central Life Ins. Co.*, Civ.App., 124 S.W.2d 191, error dismissed, judgment correct—*Booty v. O'Connor*, Civ.App., 13 S.W.2d 220, affirmed *Brooks v. O'Connor*, 39 S.W.2d 22, 120 Tex. 121—*Nevill v. Hinkle*, Civ.App., 276 S.W. 324.

W.Va.—*Page v. Huddleston*, 126 S.E. 579, 98 W.Va. 104.

Case not within exceptions

District court was without jurisdiction of suit to foreclose vendor's lien on lands of decedent and recover deficiency, such matter not falling within any of the recognized exceptions to the constitutional provisions giving the county court jurisdiction in matters relating to the settlement of estates of deceased persons.—*Cowart v. Miner*, Tex.Com. App., 29 S.W.2d 1007, dismissing error, Civ.App., 17 S.W.2d 1077.

Administration unnecessary

Courts having jurisdiction of subject matter have original jurisdiction of suits involving estates of decedents where there is no administration pending on estate and no necessity therefor, but, to acquire jurisdiction in such courts, petition must allege exception from general rule that county court has jurisdiction and proof must follow allegation; in absence of showing that there is no necessity for administration of decedent's estate, presumption obtains that administration is pending; where, however, facts show there is no necessity for administration of decedent's estate, presumption obtains that there is none pending.—*Pitts v. Thompson*, Tex.Civ. App., 71 S.W.2d 368, error dismissed.

45. Tex.—*Griggs v. Brewster*, 62 S.W.2d 980, 122 Tex. 588, affirming, Civ.App., 16 S.W.2d 839, denying rehearing 15 S.W.2d 1114—*O'Neil v. Norton*, Com.App., 29 S.W.2d 1060, reversing *Norton v. O'Neil*, Civ.App., 17 S.W.2d 66—*Dempsey*

v. Gibson, Civ.App., 105 S.W.2d 423, error dismissed—*Feder v. Texas Bitulithic Co.*, Civ.App., 52 S.W.2d 724—*Bartholomew v. Bartholomew*, Civ.App., 264 S.W. 721.

Wis.—*Hudson v. First Trust Co. in Oshkosh*, 228 N.W. 121, 200 W.S. 220—*Jones v. Citizens' Savings & Trust Co.*, 171 N.W. 648, 163 Wis. 646.

Suit against surviving partner and estate of deceased partner

Where attorneys residing in Illinois performed services for an Ohio copartnership in a suit against a Wisconsin corporation, and pending the litigation one of the partners died, but the surviving partner continued the business in the same name as before, such attorneys could maintain an action to recover for their services against the surviving partner and the estate of the deceased partner in a circuit court in Wisconsin, based on garnishment of the Wisconsin corporation, and were not required to resort to the court administering the estate either of the domicile of decedent or one exercising ancillary jurisdiction.—*Jones v. Citizens' Savings & Trust Co.*, 171 N.W. 648, 163 Wis. 646.

46. Tex.—*Dunaway v. Easter*, Com. App., 129 S.W.2d 286, reversing, Civ.App., 119 S.W.2d 421—*Slavin v. Greever*, Civ.App., 209 S.W. 479.

Special cases

Where the probate jurisdiction of county court under Const. art 5 § 16 is inadequate to adjust equities in settlement of question arising during administration of estate, resort may be had to equity powers of district court, judgment to be performed through probate court, district court's jurisdiction in such case being auxiliary and ancillary to that of probate court, and to be exercised only in special cases.—*Slavin v. Greever*, Tex.Civ.App., 209 S.W. 479.

Adjustment of equities between lienholders

It being necessary in a foreclosure suit to adjust the equities between different lienholders, the district court may assume jurisdiction, although the controversy involve a claim against a decedent's estate.—*Willis v. Graf*, Tex.Civ.App., 257 S.W. 664.

Failure to invoke jurisdiction of county court

Under *Vernon's Sayles Civ.St.Annot.* 1914 art 3556, the heirs of a married woman could have required her husband, as community survivor, to

distribute the estate by suit in the county court of probate jurisdiction, and if such right was not exercised within twelve months from filing of the community survivor's bond, district court had jurisdiction of suit at instance of heirs for partition and distribution.—*Simons v. Ware*, Tex. Civ.App., 219 S.W. 858.

Limitations on review

District court has no jurisdiction to review action of probate court in approving claims against estate by independent suit brought therein for that purpose.—*Jones v. Wynne*, Tex. Civ.App., 104 S.W.2d 141, affirmed, Com.App., 129 S.W.2d 279.

Review only on direct appeal

(1) If probate court's order appointing administrator was valid, orders approving claims were final and not subject to review in district court, except on direct appeal.—*Dunaway v. Easter*, Tex.Com. App., 129 S.W.2d 286, reversing, Civ. App., 119 S.W.2d 421.

(2) Where it did not appear that there were any items in claim for which decedent could not have been personally liable or that any of items were such that they could not be approved as a money demand against her estate, if probate court incorrectly approved claim as a money demand against the estate, order of approval was erroneous only, and not void, so that remedy of review by direct appeal was available and original proceeding could not be instituted in district court to determine rights of the parties.—*Jones v. Wynne*, Tex.Com.App., 129 S.W.2d 279, affirming, Civ.App., 104 S.W.2d 141.

47. Equitable relief

Jurisdiction of district and county court to allow claim against estate of deceased for damages for breach of contract may be concurrent, where equitable relief is essential to complete remedy.—*Robinette v. Olsen*, 209 N.W. 614, 114 Neb. 728, followed in *In re Boyden's Estate*, 209 N.W. 617, 114 Neb. 726.

48. Tex.—*Equitable Building & Loan Ass'n v. Jones*, Civ.App., 36 S.W.2d 252—*Cantrell v. Brannon*, Civ.App., 16 S.W.2d 400—*Brooks v. O'Connor*, Civ.App., 15 S.W.2d 182, reversed on other grounds 39 S.W.2d 14, 120 Tex. 126—*McCanless v. Clough*, Civ.App., 298 S.W. 643.

Partition

Power of district court to partition property does not interfere with exclusive original jurisdiction of

primary and plenary jurisdiction over decedents' estates is conferred on district courts,⁴⁹ or concurrent jurisdiction over settlement of estates is conferred on the superior court and the clerk of such court.⁵⁰ Under the practice prevailing in some states the county court has original and exclusive probate jurisdiction of various matters,⁵¹ and the district court may determine such matters only on appeal from the county court.⁵²

Jurisdiction of probate courts over the administration of estates as exclusive from, or concurrent with, that of courts of equity, and the ancillary or corrective jurisdiction of courts of equity over courts of probate with respect to administration of estates, are considered in the C.J.S. title Equity § 61, also 21 C.J. p 119 note 54—p 130 note 22. The

jurisdiction of the probate court as exclusive from, or concurrent with, that of courts of equity in respect of guardianship or partnership matters is treated in the C.J.S. title Guardian and Ward § 153, also 28 C.J. p. 1215 notes 73 and 74, and the C.J.S. title Partnership §§ 411, also 47 C.J. p 1205 note 42[a], respectively, and the exclusive or concurrent character of the jurisdiction of probate courts and courts of equity to decree specific performance is considered in the C.J.S. title Specific Performance § 115, also 58 C.J. p 1118 notes 54 and 55.

Effect of exclusive or concurrent jurisdiction. Where exclusive jurisdiction of specified matters resides in the court of probate, no other court may take cognizance of such matters;⁵³ but the jurisdic-

county court over estates.—McWhorter v. Gray, Tex.Civ.App., 4 S.W.2d 302.

Removing cloud on title; liens

Materialmen's liens not being on property of deceased subcontractor, district court could adjudicate lien in suit to remove cloud on title.—Penniman Gravel & Material Co. v. Hutton, Tex.Civ.App., 16 S.W.2d 848, affirmed Standfill v. Penniman Gravel & Material Co., Com.App., 27 S.W.2d 135.

49. Mont.—O'Sullivan v. Alexander, 334 P. 1099, 73 Mont. 12.

50. N.C.—Gurganus v. McLawhorn, 193 S.E. 844, 212 N.C. 397—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.

51. Okl.—Kirkpatrick v. Osborne, 36 P.2d 55, 169 Okl. 99.

Tex.—Zamora v. Gonzalez, Civ.App., 128 S.W.2d 166, error refused—Quiroz v. Cantu, Civ.App., 119 S.W.2d 569, error dismissed—Becknal v. Becknal, Civ.App., 296 S.W. 917.

52. Okl.—In re Douglas' Estate, 90 P.2d 35—Kirkpatrick v. Osborne, 36 P.2d 55, 169 Okl. 99—Bowling v. Hepburn, 249 P. 925, 121 Okl. 275—King v. Hepburn, 249 P. 924, 121 Okl. 375.

Tex.—O'Neil v. Norton, Com.App., 29 S.W.2d 1060, reversing Norton v. O'Neil, Civ.App., 17 S.W.2d 66—Zamora v. Gonzalez, Civ.App., 128 S.W.2d 166, error refused—Quiroz v. Cantu, Civ.App., 119 S.W.2d 569, error dismissed—Becknal v. Becknal, Civ.App., 296 S.W. 917.

53. Ala.—Marx v. Loeb, 153 So. 266, 228 Ala. 196.

Ark.—Shackelford v. Shackelford, 107 S.W.2d 344, 194 Ark. 381.

Colo.—Whitlock v. Alliance Coal Co., 314 P. 546, 73 Colo. 205.

Conn.—First Nat. Bank & Trust Co. v. McCoy, 198 A. 183, 124 Conn. 111—People's Bank & Trust Co. v. Seydel, 109 A. 861, 94 Conn. 525.

Ga.—Elliott v. Johnson, 173 S.E. 399, 178 Ga. 384.

Kan.—Elliott v. Grand Lodge Degree of Honor of Kansas, 53 P.2d 466, 143 Kan. 146.

Mass.—Stuck v. Schumm, 194 N.E. 895, 290 Mass. 159—Buttrick v. Snow, 178 N.E. 620, 277 Mass. 401.

Minn.—Klessig v. Lea, 196 N.W. 655, 158 Minn. 14.

Mo.—West St. Louis Trust Co. of St. Louis v. Brokaw, App., 102 S.W.2d 792—Beck v. Hall, App., 211 S.W. 127.

Neb.—Stewart v. Herten, 249 S.W. 552, 125 Neb. 210.

N.Y.—Brown v. O'Neil, 209 N.Y.S. 221, 124 Misc. 486.

Ohio.—Keever v. Brown, 172 N.E. 626, 36 Ohio App. 1.

Okl.—Bryan v. Seiffert, 94 P.2d 526, 185 Okl. 496—Dillard v. Franklin, 57 P.2d 629, 177 Okl. 34—Bingham v. Horn, 252 P. 847, 123 Okl. 193.

Pa.—Wilson v. Board of Directors of City Trusts, 188 A. 588, 324 Pa. 545—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315—Commonwealth v. Hughes, 25 Pa.Dist. & Co. 210—Stillman v. Massey, 25 Pa.Dist. & Co. 183—Frey v. Long, 8 Pa.Dist. & Co. 121.

Tex.—Second Nat. Bank v. Ford, Com.App., 123 S.W.2d 867, reversing Ford v. First Nat. Bank, Civ.App., 100 S.W.2d 1112—Faulkner v. Reed, Com.App., 241 S.W. 1002, reversing, Civ.App., 229 S.W. 945—Pierce v. Pierce, Com.App., 235 S.W. 557, reversing, Civ.App., 218 S.W. 144—Dempsey v. Gibson, Civ.App., 105 S.W.2d 423, error dismissed—Oakwood State Bank of Oakwood v. Durham, Civ.App., 21 S.W.2d 536—Van Grinderbeck v. Lewis, Civ. App., 204 S.W. 1042.

Allowance of attorney's fees by court of common pleas was void where such allowance was within the exclusive jurisdiction of the probate

court in the case of a requisitor, who contested claim against estate with partial success.—Koelble v. Runyan, 158 N.E. 279, 25 Ohio App. 426.

Appointment of trustee

Exclusive jurisdiction of probate court to appoint trustee cannot be invaded by appointment by superior court as binding direction, and superior court has no power to advise or direct in advance action of probate court in respect to trust or interfere with due administration therein.—Rockwell v. Dow, 154 A. 229, 85 N.H. 58.

Minors' estates

District court, in proceedings for declaratory judgment, involving appointment of guardians for minors and management and control of minors' estates, is without jurisdiction, in view of original and exclusive power vested in county court over subject matter of proceedings.—Stewart v. Herten, 249 S.W. 552, 125 Neb. 210.

Settlement of executor's account

The superior court cannot exercise jurisdiction primarily reposed by statute in probate courts, and it can settle an executor's account only on an appeal from probate court, and then only so far as it can without exercising a power vested exclusively in probate court.—First Nat. Bank & Trust Co. v. McCoy, 198 A. 183, 124 Conn. 111.

Common-law and equity courts precluded from acting in cases where orphans' court has exclusive jurisdiction.—Manzer v. Wycoff, 78 Pa.Super. 560.

State's right of contest of will

Statutes conferring exclusive jurisdiction over the probate of wills on courts of probate do not deprive the state of the right to contest a will in the regular way after it has been admitted to probate.—State v. Keach, 65 P.2d 598, 145 Kan. 403.

tion of the probate court must be exclusive.⁵⁴ Conversely, where exclusive jurisdiction rests in another court, the court of probate may not entertain such a matter.⁵⁵ Where a matter ordinarily within the exclusive jurisdiction of a court of probate also involves other features beyond the probate court's jurisdiction, another court of competent jurisdic-

tion may properly entertain and decide the whole case.⁵⁶ However, where a court of probate jurisdiction can afford adequate and complete relief, a court of general jurisdiction, although it may have concurrent jurisdiction as to a particular subject matter, will ordinarily refuse to exercise it.⁵⁷ An

54. Md.—McLaughlin v. McGee, 101 A. 682, 131 Md. 156.

Mass.—Townsend v. Townsend, 147 N.E. 562, 252 Mass. 111.

Pa.—Dunlap v. Dunlap, 92 Pa.Super. 602.

S.D.—Smith v. Keener, 212 N.W. 498, 51 S.D. 124.

Tex.—Corbett v. Raymondville Independent School Dist., Civ.App., 56 S.W.2d 325, error dismissed.

Action against insurer by beneficiary

One claiming fund adversely to estate as deceased lodge member's beneficiary could sue lodge therefor in court of competent jurisdiction.—Coombes v. Bush, 15 S.W.2d 602, 118 Tex. 386.

Incidental determination of mental capacity

In purchaser's action to quiet title and for declaratory judgment, that district court was required to determine vendor's mental capacity to convey, did not oust jurisdiction of probate court, since finding on such issue would be only incidental to general jurisdiction to determine such actions, under statutes and constitution.—Whitney v. Randall, 70 P.2d 384, 58 Idaho 49.

55. Cal.—In re Harris' Estate, 72 P. 2d 873, 9 Cal.2d 649.

Minn.—In re Peterson's Estate, 268 N.W. 707, 198 Minn. 45—Masek v. Hedlund, 202 N.W. 732, 162 Minn. 291—Colby v. Street, 178 N.W. 599, 146 Minn. 290.

Mo.—Smith v. St. Louis Union Trust Co., 104 S.W.2d 341, 340 Mo. 979—Cape County Sav. Bank v. Wilson, 34 S.W.2d 981, 225 Mo.App. 14.

Neb.—In re King's Estate, 272 N.W. 205, 132 Neb. 372.

N.Y.—In re Grube's Will, 295 N.Y.S. 238, 162 Misc. 578—In re Phillips' Estate, 258 N.Y.S. 951, 144 Misc. 347.

N.D.—Goodin v. Casselman, 200 N.W. 94, 51 N.D. 543.

Okl.—In re Vance, 227 P. 881, 102 Okl. 129.

Or.—Borge v. Traaen, 75 P.2d 939, 158 Or. 454, rehearing denied 76 P. 2d 1127, 158 Or. 454—Grandy v. Williams, 34 P.2d 622, 147 Or. 409.

Pa.—In re Stopp's Estate, 199 A. 493, 330 Pa. 493—In re Stopp's Estate, 184 A. 558, 122 Pa.Super. 47—In re Hober's Estate, 180 A. 140, 118 Pa.Super. 209—In re Blaszcak's Estate, 90 Pa.Super. 589—In re

Taylor's Estate, 26 Pa.Dist. & Co. 475.

Tenn.—In re Hodge's Estate, 99 S.W. 2d 561, 20 Tenn.App. 411.

Tex.—Johnston v. Stephens, 49 S.W. 2d 431, 121 Tex. 374, reversing. Civ.App., 300 S.W. 225—Stanfill v. Penniman Gravel & Material Co., Com.App., 27 S.W.2d 135, affirming Penniman Gravel & Material Co. v. Hutton, Civ.App., 16 S.W.2d 848—Winston v. Griffith, 108 S.W.2d 745, affirmed, Com.App., 128 S.W.2d 25—Schelb v. Sparenberg, Civ.App., 89 S.W.2d 1062.

Wis.—In re Staver's Estate, 260 N.W. 655, 218 Wis. 114.

Accounting by representatives of deceased partner's widow and surviving partner

Court of common pleas sitting in equity and not orphans' court has jurisdiction over suit by deceased partner's minor child for accounting by personal representatives of deceased partner's widow and the surviving partner who with knowledge of minor's interest in deceased's estate formed and conducted new partnership without an accounting by original partnership.—Kreinson v. Commercial Nat. Bank, 185 A. 756, 323 Pa. 332.

Claims under contract with decedent, sought to be recovered in surrogate's court, should be determined in supreme court action by executor to annul contract and injunction will be granted restraining the determination of the claims in the surrogate's court.—MacLean v. Hart, 239 N.Y.S. 1, 228 App.Div. 379.

Custody of children of petitioners for divorce

Special statutory jurisdiction of superior court to regulate custody of children of petitioners for divorce is superior to probate court's jurisdiction precluding latter's interference with former's decree.—Budlong v. Budlong, 142 A. 537, certiorari denied 49 S.Ct. 36, 278 U.S. 642, 73 L.Ed. 556, and 50 S.Ct. 354, 281 U.S. 750, 74 L.Ed. 1161.

Custody of minor

Order of probate court, fixing amount of bond to be given as supersedeas by temporary guardian appealing from refusal of appointment as permanent guardian, and leaving custody of minor with temporary guardian pending appeal, was not an attempt to exercise jurisdiction over custody of minor, of which district

court alone has jurisdiction, since right of custody accrued through execution of supersedeas bond.—Douglass v. Stover, Tex.Civ.App., 268 S.W. 1029.

Declaratory judgment

Court of common pleas and not the orphans' court has jurisdiction over proceeding, under the Uniform Declaratory Judgments Act, to determine legal right of one of lessors under proposed lease.—Petition of Kariher, 131 A. 265, 284 Pa. 455.

Income tax claims

County court is without jurisdiction to order barred claims against decedent's estate for state income taxes because claims had not been filed within time allowed.—In re Adams' Estate, 272 N.W. 19, 234 Wis. 237, 109 A.L.R. 1364.

Specific performance

The probate court was without jurisdiction to grant specific performance of oral agreement to devise property, the district court alone having jurisdiction over action for specific performance.—In re Roberts' Estate, 277 N.W. 549, 202 Minn. 217.

56. Md.—McLaughlin v. McGee, 101 A. 682, 131 Md. 156.

District court holding property in receivership of insane person

District court, which, through receiver, had taken possession of property belonging to son and mother had jurisdiction of suit on joint indebtedness of son and mother, although probate court had appointed guardian of mother's estate on account of her insanity, and had jurisdiction to fix priorities of several liens asserted upon joint property of mother and son and to direct sale of property to enforce the judgment.—Lauraine v. Vaughn, Tex.Civ.App., 193 S.W. 712, error refused—Lauraine v. Masterson, Tex.Civ.App., 193 S.W. 708, error refused.

Remission to equity

A probate court which had jurisdiction over a testamentary trust did not abuse its discretion in settling final account of trustee and ordering conflicting claims to corpus of trust to be determined in quiet title action in superior court sitting as a court of equity.—In re McLennan's Estate, Cal.App., 85 P.2d 499.

57. N.Y.—Ris v. Ris, 12 N.Y.S.2d 154.

Wis.—Pietraszwicz v. Pietraszwicz, 181 N.W. 722, 173 Wis. 523.

exception to this rule is recognized in proceedings calling for the construction of a will,⁵⁸ but the court will not of its own motion dismiss a proceeding where the parties do not raise the question of jurisdiction and, more particularly, where most, if not all, of plaintiff's case has been heard.⁵⁹ Where a probate court and another court have concurrent jurisdiction, their orders must not conflict,⁶⁰ and the jurisdiction must be exercised in the manner customary in the tribunal possessing primary authority.⁶¹

While the granting of equitable powers to a court of probate, such as the surrogate's court does not

impair the general equitable jurisdiction of another court,⁶² the latter should refuse to exercise its jurisdiction in probate matters where the former has complete power to safeguard the interests of the parties,⁶³ although where the proceeding involves matters beyond the jurisdiction of the surrogate's court, or court of probate, the court of broader jurisdiction may properly entertain the action,⁶⁴ and where the parties fail to raise the point that there is a proceeding already pending in the surrogate's court and acquiesce in proceedings in the supreme court the latter may properly exercise its general jurisdiction.⁶⁵

Transfer of cause

City's statutory right to inspect books, papers, and documents of board of directors of city trusts through mayor should be exercised by application to orphans' court, not petition to court of common pleas for writ of mandamus to compel submission of documents by board to experts appointed by mayor for inspection, examination, and audit, and supreme court will transfer to such court an action by the mayor for mandamus on appeal from order of court of common pleas discharging rule to dismiss action for want of jurisdiction, although latter court has concurrent jurisdiction with orphans' court.—*Wilson v. Board of Directors of City Trusts*, 188 A. 588, 324 Pa. 545.

Mode of objection

Although motion for summary judgment dismissing amended complaint in supreme court in an action to declare as a nullity a will that had been admitted to probate in surrogate's court was made apparently pursuant to rules of civil practice, and it could not be held as a matter of law that supreme court was without jurisdiction, it was proper to hear defendants on such motion in application to invoke rule that supreme court will not retain jurisdiction of a cause as to which surrogate's court has concurrent jurisdiction unless special facts require it.—*Noll v. Ruprecht*, 9 N.Y.S.2d 651, 256 App.Div. 926.

58. Wis.—*Tharp v. Smith*, 195 N.W. 331, 182 Wis. 107.

Discontinuance by surrogate

A surrogate's court will discontinue a proceeding for construction of a will which purports to leave property to the trustees under an inter vivos agreement, on petitioner's motion, to permit commencement of new proceedings for similar and other relief in the supreme court, since the construction raises issues upon which the surrogate's court has no authority to act.—*In re Janowitz Will*, 300 N.Y.S. 38, 164 Misc. 936.

Return to probate court

In suit involving construction of will, chancery court, after disposing of matter, should have left cause in probate court, where debts were not paid and administration not dispensed with.—*Union Trust Co. v. Rossi*, 22 S.W.2d 370, 180 Ark. 552.

59. N.Y.—*Ris v. Ris*, 12 N.Y.S.2d 154.

60. N.Y.—*Matter of Lee*, 116 N.E. 352, 220 N.Y. 532—*In re Vanderbilt*, 276 N.Y.S. 745, 153 Misc. 884.

Separation of phases of guardianship

(1) Two phases of application for appointment as guardian of infant's person and property will be separated and part as to guardianship of property continued in surrogate's court after final decision of issues as to infant's custody by supreme court in habeas corpus proceeding.—*In re Vanderbilt*, 276 N.Y.S. 745, 153 Misc. 884.

(2) Testimony, at hearing before surrogate's court on mother's application for appointment as additional coguardian of her infant daughter's property after supreme court awarded child's custody to applicant, must be limited strictly to issues raised by petition and answer, as to whether additional guardian should be appointed to conserve property and whether mother is fit person for such appointment, and no evidence as to her moral character will be received.—*In re Vanderbilt*, supra.

61. N.Y.—*Matter of Ashner's Estate*, 246 N.Y.S. 129, 231 App.Div. 127.

Costs or disbursements

N.Y.—*In re Manzi*, 280 N.Y.S. 643, 155 Misc. 670.

62. N.Y.—*In re Ehlers' Estate*, 232 N.Y.S. 675, 133 Misc. 424.
15 C.J. p 1016 note 95.

Dower

Statutory jurisdiction conferred on courts of probate in allotment of dower does not take away original jurisdiction prevailing in courts of chancery.—*Yarbrough v. Yarbrough*, 75 So. 932, 200 Ala. 184.

63. N.Y.—*Cassidy v. Savage*, 269 N.Y.S. 751, 150 Misc. 127—*In re Ehlers' Estate*, 232 N.Y.S. 675, 133 Misc. 424—*Chenango Valley Sand & Gravel Co. v. Paddelford*, 13 N.Y.S.2d 1006.

64. N.Y.—*Van Buren v. Wensley*, 169 N.Y.S. 789, 102 Misc. 248—*Chenango Valley Sand & Gravel Co. v. Paddelford*, 13 N.Y.S.2d 1006.

Removal of trustee

Action to remove trustees on grounds not included in surrogate's court act, limiting power of surrogate court will be considered by supreme court.—*Crummey v. Murray*, 224 N.Y.S. 49, 130 Misc. 378.

Specific performance of contract to make will and incidental matters

The jurisdiction given the surrogate over the accounts of an administratrix is not exclusive, but impliedly limits the general original jurisdiction of the supreme court only when the surrogate has jurisdiction to determine all questions involved in the particular account, and, since the surrogate has no jurisdiction, either to enforce specific performance of a contract to make a will or to award damages for its breach, in view of Code Civ.Proc. § 2510, the supreme court can entertain jurisdiction of an action for that purpose, and in that action will settle the account of the administratrix of the estate.—*Blaine v. Richardson*, 193 N.Y.S. 612.

65. N.Y.—*In re Malloy's Estate*, 17 N.E.2d 108, 278 N.Y. 429, affirming 1 N.Y.S.2d 184, 253 App.Div. 30.

Judgment as irregular but binding

Where parties waived jury trial and made certain stipulations and submitted proposed findings of fact but did not raise question of jurisdiction of the supreme court, judgment of the supreme court was binding notwithstanding proceeding was informal and irregular and not to be approved and that another proceeding was pending before surrogate's court.—*In re Malloy's Estate*, supra.

Statutes conferring additional but not plainly exclusive jurisdiction on probate courts do not operate to deprive other courts of a theretofore existing jurisdiction over the same subject matter.⁶⁶ Concurrent jurisdiction conferred on a probate court by statute will not be extended to cover cases other than those expressly delegated to it by the legislature.⁶⁷

c. Other Particular Courts

Controlling constitutional and statutory provisions govern the exclusive or concurrent jurisdiction of various

courts, such as county, district, juvenile, superior and other particular courts.

The exclusive or concurrent character of the jurisdiction of particular courts is controlled by applicable constitutional and statutory provisions construed in the light of the rules set forth supra §§ 486-488, and under such provisions exclusive or concurrent jurisdiction has been held to attach to such courts, as the court of a commissioner,⁶⁸ a court of quarter sessions,⁶⁹ a chancery court,⁷⁰ a children's court,⁷¹ a circuit court,⁷² a common pleas court,⁷³ a county court,⁷⁴ a district

66. U.S.—*Roberts v. Anderson*, C.C. A.Okl., 66 F.2d 874.

Mass.—*Old Colony Trust Co. v. Segal*, 182 N.E. 578, 280 Mass. 212.
N.Y.—*Bradley v. Roe*, 13 N.Y.S.2d 693, 257 App.Div. 1005.

67. Tenn.—*Chester v. Turner*, 284 S.W. 365, 153 Tenn. 451.

68. Tex.—*Matagorda County Drain. Dist. No. 5 v. Borden*, Civ.App., 181 S.W. 780.

69. Pa.—*Commonwealth v. Novel*, 59 Pa.Super. 516.

70. Ark.—*Fidelity & Casualty Co. of New York v. State, for Use of Columbia County*, 126 S.W.2d 293, 197 Ark. 1027.

Miss.—*Vansant v. Dodds*, 144 So. 688, 164 Miss. 787, suggestion of error overruled 145 So. 613, 164 Miss. 787.

N.J.—*In re Schultz's Will*, 133 A. 762, 102 N.J.Eq. 14—*Patrick Connelly, Inc., v. Hugh Montague & Son*, 4 A.2d 779, 17 N.J.Misc. 36.
15 C.J. p 1132 note 37.

71. N.Y.—*Miorin v. Miorin*, 3 N.Y.S. 2d 79, 254 App.Div. 619—*Walsh v. Walsh*, 263 N.Y.S. 517, 146 Misc. 604.

72. Fla.—*Hodges v. Lamar*, 161 So. 81, 119 Fla. 566—*State ex rel. Whyte v. Gray*, 156 So. 493, 116 Fla. 510.

Ill.—*Howard v. Swift*, 190 N.E. 102, 356 Ill. 80.

Mich.—*Petition of Board of Education of City of Detroit*, 214 N.W. 239, 239 Mich. 46.

Miss.—*Vansant v. Dodds*, 144 So. 688, 164 Miss. 787, suggestion of error overruled 145 So. 613, 164 Miss. 787.

Mo.—*Underwood v. Oregon County*, 8 S.W.2d 597, 320 Mo. 514—*Barber v. Nunn*, 205 S.W. 14, 275 Mo. 565.

S.D.—*State v. Nieuwenhuis*, 178 N.W. 976, 43 S.D. 198.

Tenn.—*Department of Highways v. Steppe*, 266 S.W. 776, 150 Tenn. 682.

Wis.—*In re Adam's Estate*, 272 N.W. 19, 224 Wis. 237, 109 A.L.R. 1364—*Thorne v. Webster*, 213 N.W. 646, 193 Wis. 97—*Rusk v. Perry*, 201 N.W. 762, 185 Wis. 454.
15 C.J. p 1132 note 38.

Circuit court's jurisdiction is concurrent with that of county court in some matters.

Ky.—*Newsome v. Reynolds*, 90 S.W. 2d 682, 262 Ky. 454—*Duke v. Allen*, 248 S.W. 894, 198 Ky. 368.

Tenn.—*Carnes v. Henderson*, 10 Tenn. App. 166.

Wis.—*St. Vincent's Infant Asylum v. Central Wisconsin Trust Co.*, 206 N.W. 921, 189 Wis. 482.

Exercise of concurrent jurisdiction as deferred to county court

(1) The jurisdiction of the circuit court will not be exercised originally in matters wherein the county court has jurisdiction, unless it appears that the county court cannot grant relief as adequate, complete, prompt, and efficient as can be granted by the circuit court.—*In re Knoll Guardianship*, 167 N.W. 744, 167 Wis. 461.

(2) Circuit court will not entertain action by legatees under will against executors thereof and others for damages for converting assets of the estate which is being or has been probated in the county court, plaintiff having an adequate remedy in the county court, under statute, as to compelling filing of correct inventory, etc.—*Lehmann v. Weiner*, 167 N.W. 806, 167 Wis. 428.

Concurrence with supreme court

Circuit courts and supreme court have original concurrent jurisdiction in certain matters.—*State v. Sullivan*, 116 So. 255, 95 Fla. 191.

73. Ohio.—*Fulton v. Kabaker*, 197 N.E. 131, 49 Ohio App. 213.

Pa.—*Independent Brewing Co. of Pittsburgh v. Colonial Trust Co.*, 116 A. 518, 273 Pa. 12—*Scherr v. Page*, 162 A. 317, 107 Pa.Super. 220.
S.C.—*Fidelity Fire Ins. Co. v. Windham*, 133 S.E. 35, 134 S.C. 373.
15 C.J. p 1132 note 36.

Concurrence with supreme court

Original jurisdiction of supreme court is concurrent with jurisdiction exercised by court of common pleas.—*State ex rel. Daniel v. John P. Nutt Co.*, 185 S.E. 25, 180 S.C. 19, certiorari denied Jno. P. Nutt Co. v. State of South Carolina ex rel. Daniel, 56 S.Ct. 668, 297 U.S. 724, 80 L.Ed. 1007.

74. Ark.—*Montgomery County v. Elder*, 96 S.W.2d 453, 192 Ark. 845—*County Board of Election Com'rs v. Waggoner*, 78 S.W.2d 821, 190 Ark. 341—*Benton v. Thompson*, 58 S.W. 2d 924, 157 Ark. 208.

Ill.—*White v. City of Ottawa*, 230 Ill. App. 493, affirmed 149 N.E. 521, 318 Ill. 463.

Ky.—*Rice v. Bradley*, 263 S.W. 336, 203 Ky. 775.

Miss.—*Vansant v. Dodds*, 144 So. 688, 164 Miss. 787, suggestion of error overruled 145 So. 613, 164 Miss. 787.

Mo.—*Parsons v. Wilcox*, 227 S.W. 620, 206 Mo.App. 603.

Okl.—*Courtney v. Daniel*, 253 P. 990, 124 Okl. 46—*Esch v. Callaway*, 251 P. 1028, 123 Okl. 38.

Pa.—*Commonwealth v. Speer*, 110 A. 268, 267 Pa. 129—*Commonwealth v. Miller*, 156 A. 734, 102 Pa.Super. 323.

Tenn.—*Department of Highways v. Stepp*, 266 S.W. 776, 150 Tenn. 682.

Tex.—*Gulf Production Co. v. Colquitt*, Civ.App., 25 S.W.2d 989, modified as to other matters *Colquitt v. Gulf Production Co.*, Com.App., 52 S.W.2d 235—*Alderete v. Guaderrama*, Civ.App., 265 S.W. 766—*Van Ness v. Crow*, Civ.App., 215 S.W. 572.

Wis.—*State v. Circuit Court of La Crosse County*, 188 N.W. 645, 177 Wis. 548.

15 C.J. p 1133 note 40.

Concurrent jurisdiction with circuit court see supra note 72.

Concurrent jurisdiction with district court

(1) Of all civil cases wherein the matter in controversy exceeds eight hundred dollars and does not exceed one thousand dollars.—*Bull Dog Auto Fire Ins. Ass'n v. Brown*, Tex. Civ.App., 287 S.W. 76.

(2) Of determination of who are heirs of deceased citizen allottee of one of the Five Civilized Tribes of Indians having restricted heirs.—*March v. Peter*, 64 P.2d 912, 179 Okl. 207.

Concurrent jurisdiction with municipal or city court of certain matters.

court,⁷⁵ a family court,⁷⁶ a juvenile court,⁷⁷ a municipal or city court,⁷⁸ a superior court,⁷⁹ and a

(1) Action on bond given to obtain release of automobile from attachment.—*Vella v. U. S. Fidelity & Guaranty Co.*, 281 N.Y.S. 17, 245 App. Div. 339.

(2) Proceeding to remit forfeiture of undertaking or deposit.—*People v. Schorr*, 207 N.Y.S. 549, 124 Misc. 64.

Exclusive jurisdiction is granted county court in some matters.

Ark.—*Jackson v. Elder*, 63 S.W.2d 991, 187 Ark. 1094.

Ky.—*Rice v. Bradley*, 263 S.W. 336, 203 Ky. 775.

Okl.—*Esch v. Callaway*, 251 P. 1028, 123 Okl. 38.

Tex.—*Putney v. Livingston*, Civ.App., 192 S.W. 259, error granted.

Exclusive and concurrent territorial jurisdictions of county and district courts

Conn.—*Rubin v. Lipson*, 114 A. 86, 95 Conn. 281.

75. La.—*Brignac v. Buller & Fontenot*, App., 151 So. 437.

Minn.—In re Peterson's Estate, 268 N.W. 707, 198 Minn. 45.

N.J.—*Handelman v. Harris*, 107 A. 34, 93 N.J.Law 66.

Okl.—*Courtney v. Daniel*, 253 P. 990, 124 Okl. 46—*Cromwell v. Hamilton*, 209 P. 395, 87 Okl. 66.

Tex.—*Zamora v. Gonzalez*, Civ.App., 128 S.W.2d 166, error refused—*Maryland Casualty Co. v. Overstreet*, Com.App., 61 S.W.2d 810, reversing, Civ.App., 42 S.W.2d 160—*Van Ness v. Crow*, Civ.App., 215 S.W. 572.

15 C.J. p 1133 note 39.

Concurrent jurisdiction with county courts see supra note 74.

Exclusive jurisdiction of district courts

(1) Generally.

N.M.—*Durham v. Rasco*, 227 P. 599, 30 N.M. 16, 34 A.L.R. 838.

Tex.—*Trustees of Crosby Independent School Dist. v. West Disinfecting Co.*, Civ.App., 121 S.W.2d 661, error granted.

(2) The Sixty-Fifth and Forty-First district courts of El Paso county are separate and distinct courts, and the jurisdiction of each is plenary and exclusive as to cases filed therein until a transfer is made from one court to the other, under Vernon Civ.St.Annot.Supp.1918 art 30 subd 34.—*Ex parte Gonzalez*, 238 S.W. 685, 111 Tex. 399.

76. N.Y.—*People v. Pollock*, 198 N.Y.S. 569.

77. Ind.—*State ex rel. Geckler v. Cox*, 9 N.E.2d 93, 212 Ind. 440.

Ky.—*Strangway v. Allen*, 240 S.W. 384, 194 Ky. 681.

31 C.J. p 938 note 64 [a].

78. Cal.—*Grigsby v. Ross*, 33 P.2d

450, 138 Cal.App. 757—*Williams Co. v. Superior Court of California*, within and for Los Angeles County, 275 P. 838, 97 Cal.App. 422.

N.Y.—*People v. Schorr*, 207 N.Y.S. 549, 124 Misc. 64.

Ohio.—*Toohy v. Simmons*, 19 N.E.2d 517, 60 Ohio App. 84, appeal dismissed 17 N.E.2d 269, 134 Ohio St. 357, certiorari denied *Simmons v. Toohy*, 59 S.Ct. 587, 306 U.S. 647, 83 L.Ed. 1046—*Fulton v. Kabaker*, 197 N.E. 131, 49 Ohio App. 213.

Pa.—*Scott v. Scott*, 80 Pa.Super. 141, 15 C.J. p 1132 note 35.

Concurrent jurisdiction with county courts see supra note 74.

Concurrent with jurisdiction of superior court, prior to amendment by constitution in 1928 see Hopkins v. Anderson, 21 P.2d 560, 218 Cal. 62.

Concurrent jurisdiction with superior court lacking as to

(1) Proceedings of an equitable nature generally.

Cal.—*Fairview Farms Co. v. Superior Court of California in and for Los Angeles County*, 10 P.2d 1011, 123 Cal.App. 9—*Ingalls v. Superior Court in and for Los Angeles County*, 9 P.2d 266, 121 Cal.App. 453. Ga.—*Ahlgren v. Walton*, 128 S.E. 585, 34 Ga.App. 42.

(2) Cancellation.—*Patterson v. Clifford F. Reid, Inc.*, 23 P.2d 35, 132 Cal.App. 454.

(3) Rescission.—*Tullis v. Title Guarantee & Trust Co.*, 54 P.2d 65, 11 Cal.App.2d 391—*Whittaker v. E. E. McCalla Co.*, 16 P.2d 282, 127 Cal. App. 583.

(4) That complainant secured attachment in prohibition proceeding did not estop him from proceeding on theory that action for rescission was for equitable relief with jurisdiction in superior, and not municipal, court.—*Fairview Farms Co. v. Superior Court of California in and for Los Angeles County*, supra.

Concurrence of jurisdiction with supreme court

(1) Generally.—*Bessan v. Public Service Co-Ordinated Transport*, 237 N.Y.S. 689, 135 Misc. 368—*People v. Meyer*, 207 N.Y.S. 741, 124 Misc. 285.

(2) City court, in proceedings supplementary to execution, is without authority to set aside fraudulent transfers which conceal assets of debtor such power remaining in supreme court.—*Hyman v. Spector*, 268 N.Y.S. 342, 150 Misc. 145.

(3) The supreme court, Albany County, rather than city court of city of New York, had jurisdiction of proceeding by judgment creditor for examination of third party concerning property of judgment debtor who

had his place of business in Albany county, notwithstanding judgment was recovered in municipal court of city of New York; and a judgment creditor may institute proceeding for examination of third party concerning property of judgment debtor in supreme court of county in which debtor has place of business, although judgment is recovered in municipal court of city of New York, when third party is neither resident of nor has place of business in City of New York.—In re Hollywood Garage Corporation, 9 N.Y.S.2d 374, 169 Misc. 906.

Exclusive jurisdiction of action at law for sum not over specified amount.—*Philpott v. Superior Court in and for Los Angeles County*, 36 P.2d 635, 1 Cal.2d 512, 95 A.L.R. 990—*Sturgeon v. Security First Nat. Bank*, 33 P.2d 874, 139 Cal.App. 197.

Equitable matters pleaded as defense

(1) Municipal courts have exclusive jurisdiction under statute over all cases in which equitable matters are pleaded as defense, when original jurisdiction of such cases is in municipal court.—*Jacobson v. Superior Court in and for Los Angeles County*, 53 P.2d 756, 5 Cal.2d 170.

(2) When complaint is filed in superior court and cause is not pending in municipal court, mere filing of pleadings which raise equitable defenses does not oust superior court of jurisdiction nor thereby confer jurisdiction on municipal court, since a municipal court is vested with jurisdiction over equitable issues only when pleaded as defensive matter in a case properly pending in the municipal court.—*Tennesen v. Prudential Ins. Co. of America*, 47 P.2d 1066, 8 Cal.App.2d 160.

As between different municipal courts

"Each municipal court has exclusive jurisdiction of a cause of action arising within the city or county and county wherein it is established," and such cause of action is excluded from jurisdiction of any other municipal court.—*Adolph M. Schwartz, Inc. v. Burnett Pharmacy*, 295 P. 508, 112 Cal.App.Supp. 781.

Respecting small claims court

Municipal court had jurisdiction of assignee's action to recover less than fifty dollars, since action being brought by assignee was not cognizable in small claims court.—*Adolph M. Schwartz, Inc. v. Burnett Pharmacy*, 295 P. 508, 112 Cal.App. Supp. 781.

79. Cal.—*U. S. Fidelity & Guaranty Co. v. Superior Court of City and County of San Francisco*, 6 P.2d 243, 214 Cal. 468—*State v. Superior*

supreme court.⁸⁰

Concurrent jurisdiction of justices' and probate courts with that of the particular courts considered in this subdivision of this section is discussed in subdivisions a and b respectively, *supra*.

§ 491. — Jurisdiction Over Particular Matters

The exclusive or concurrent jurisdiction of a court as to particular matters rests upon, and is limited by, the specific statutory and constitutional provisions applicable.

Constitutional and statutory provisions defining the jurisdiction of particular courts control the exclusive or concurrent character of such courts over particular matters, as has been shown in respect of probate jurisdiction *supra* § 490 b. Such provisions determine as to the exclusive or concurrent jurisdiction of courts over proceedings concerning abatement of a nuisance,⁸¹ aliens,⁸² claims against the state,⁸³ decedents' estates,⁸⁴ eminent domain,⁸⁵ enforcement of vendors' or mechanics' liens,⁸⁶ and such provisions determine as to the exclusive ju-

Court in and for San Diego County, 23 P.2d 1076, 133 Cal.App. 65 —Molino v. Pippo, 10 P.2d 78, 122 Cal.App. 437—Williams Co. v. Superior Court of California, within and for Los Angeles County, 275 P. 838, 97 Cal.App. 422.

Iowa.—Corn Belt Telephone Co. v. Superior Court of City of Oelwein, 184 N.W. 168, 180 Iowa 985.

Mass.—Foley v. Commissioner of Banks, 197 N.E. 448, 292 Mass. 83 —Allen v. Commonwealth-Atlantic Nat. Bank, 143 N.E. 149, 248 Mass. 302.

N.C.—Scott v. American Ry. Express Co., 127 S.E. 252, 189 N.C. 377—Singer Sewing Mach. Co. v. Burger, 107 S.E. 14, 181 N.C. 241.

Okl.—Cromwell v. Hamilton, 209 P. 395, 87 Okl. 66.

R.I.—Ex parte Asadoorian, 135 A. 322, 48 R.I. 50.

15 C.J. p 1133 note 41.

Concurrent jurisdiction with municipal or city court see *supra* note 78.

Concurrent jurisdiction with supreme court

(1) The superior court as well as the supreme judicial court has original and concurrent jurisdiction of all matters of equity cognizable under the general principles of chancery jurisprudence, under Gen.L. c 214, §§ 1, 2.—Allen v. Commonwealth-Atlantic Nat. Bank of Boston, 143 N.E. 149, 248 Mass. 302.

(2) Gen.L. c 167 § 36, giving the supreme judicial court jurisdiction in equity to enforce §§ 22-35, relating to liquidation of banks, cannot be interpreted as making exclusive in the supreme judicial court a jurisdiction which but for that section would be original and concurrent both in the supreme judicial court and in the superior court, in view of Gen.L. c 214 §§ 1, 2.—Allen v. Commonwealth-Atlantic Nat. Bank of Boston, *supra*.

(3) Under statutes conferring on the superior court a general jurisdiction in equity, coextensive with that of the supreme judicial court, original powers are concurrently exercised by justices of these com-

mon-law courts, according to the usage and practice in chancery.—Eastern Maine General Hospital v. Harrison, 193 A. 246, 135 Me. 190.

Exclusive jurisdiction is conferred on superior courts as to certain matters.

Cal.—Ingalls v. Superior Court in and for Los Angeles County, 9 P. 2d 266, 121 Cal.App. 453—Scott v. Superior Court in and for Los Angeles County, 292 P. 290, 108 Cal. App. 764—Johnston Gas Furnace Corporation v. Superior Court in and for Los Angeles County, 288 P. 808, 106 Cal.App. 166.

Ga.—Tyson v. Tyson, 167 S.E. 172, 176 Ga. 137.

80. Idaho.—State v. Minidoka County, 298 P. 366, 50 Idaho 419.

N.Y.—In re Staten Island Nat. Bank & Trust Co., 282 N.Y.S. 163, 156 Misc. 330—People v. Pollock, 198 N.Y.S. 569.

15 C.J. p 1133 note 42.

Exclusive original jurisdiction is conferred on supreme court as to some matters.

N.Y.—In re Phillips Estate, 258 N.Y. S. 951, 144 Misc. 347—In re Wolton, 211 N.Y.S. 501, 125 Misc. 564.

Tex.—State Highway Commission of Texas v. Tnegg, Civ.App., 57 S. W.2d 929.

81. La.—Natchitoches v. Coe, 3 Mart., N.S., 140.

82. N.Y.—In re Wolton, 211 N.Y.S. 501, 125 Misc. 564.

Naturalization of aliens lies within the exclusive jurisdiction of the supreme court in New York.—In re Wolton, *supra*.

83. Idaho.—Thomas v. State, 100 P. 761, 16 Idaho 81.

Recommendatory judgment

Trial court has no jurisdiction to enter recommendatory judgment that claim is obligation against state the supreme court having original jurisdiction to hear claims against the state and render decision recommendatory to the next session of the legislature.—State v. Minidoka County, 298 P. 366, 50 Idaho 419.

Suit against "Authority" as not claim against state

The supreme court and not the court of claims has jurisdiction of claim by patient against the Saratoga Springs Authority for negligence by the authority's employees in giving treatments, the state not being liable for torts of the authority.—Pantess v. Saratoga Springs Authority, 8 N.Y.S.2d 103, 255 App.Div. 426.

84. Cal.—State v. Superior Court in and for San Diego County, 23 P.2d 1076, 133 Cal.App. 65.

Mo.—State Bank of Willow Springs v. Lillibridge, App., 262 S.W. 433, affirmed in part and reversed in part 293 S.W. 116, 316 Mo. 968. 15 C.J. p 1133 notes 45, 46.

85. Tenn.—Department of Highways v. Steppe, 266 S.W. 776, 150 Tenn. 682.

15 C.J. p 1133 note 50.

Opening and establishing new roads Rev.St.1919 §§ 10625-10628, give the county courts exclusive original jurisdiction to open and establish new roads and determine questions relating to practicability; hence such questions cannot be disposed of in the circuit court on suit to enjoin petitions for the establishment of a road.—Parsons v. Wilcox, 227 S.W. 620, 206 Mo.App. 603.

86. Cal.—Scott v. Superior Court in and for Los Angeles County, 292 P. 290, 108 Cal.App. 764.

Ind.—Vaught v. Knue, 115 N.E. 108, 64 Ind.App. 467.

N.J.—Patrick Connelly, Inc. v. Hugh Montague & Son Co., 4 A.2d 779, 17 N.J.Misc. 36.

15 C.J. p 1133 note 52.

Chancery court has exclusive jurisdiction under municipal mechanics' lien law.—Patrick Connelly, Inc. v. Hugh Montague & Son Co., *supra*.

Equitable action to foreclose mechanic's lien on property situated outside city is within exclusive jurisdiction of superior court and not within jurisdiction of municipal court.—Johnston Gas Furnace Corporation v. Superior Court in and for

jurisdiction of courts over proceedings concerning es- | fants,⁹⁰ landlord and tenant,⁹¹ lunatics,⁹² motor ve-
cheats,⁸⁷ homesteads,⁸⁸ husband and wife,⁸⁹ in- | hicles,⁹³ partners,⁹⁴ penalties,⁹⁵ real estate,⁹⁶ re-

Los Angeles County, 258 P. 805, 106 Cal.App. 166.

87. S.D.—State v. Nieuwenhuis, 178 N.W. 976, 43 S.D. 198.
15 C.J. p 1133 note 49.

88. Tex.—Lyne v. Panhandle Const. Co., Civ.App., 114 S.W.2d 1195, error dismissed—Federal Land Bank of Houston v. Tarter, Civ.App., 86 S.W.2d 523, error dismissed.

89. Ariz.—Berman v. Thomas, 19 P. 2d 685, 41 Ariz. 457.

Ga.—Green v. Beaumont, 147 S.E. 911, 39 Ga.App. 606.

Divorce and alimony

(1) Supreme court is without jurisdiction of original petition seeking modification of order for allowance in divorce action since exclusive original jurisdiction of divorce and alimony resides in the superior court.—Ex parte Asadoorian, 135 A. 322, 48 R.I. 50.

(2) Generally speaking the superior court has exclusive jurisdiction of questions respecting alimony, so that the city court may not entertain a suit based on the superior court's judgment for alimony.—Tyson v. Tyson, 167 S.E. 172, 176 Ga. 137.

(3) But the exclusive jurisdiction of the superior court applies "only as respects proceedings to adjudicate the plaintiff's right to alimony and to render a judgment or decree therefor. Exclusive jurisdiction is not vested in the superior court as respects suits instituted upon a contract entered into between a husband and wife by which he agrees to pay alimony to her," and where suit is instituted in a city court on a contract approved by the judge of the superior court, a plea to the jurisdiction on the ground that the action was one for alimony and therefore within the exclusive jurisdiction of the superior court is properly stricken.—Green v. Beaumont, 147 S.E. 911, 912, 39 Ga.App. 606.

Marriage contract

The ascertainment of rights and application of remedies in relation to the marriage contract are within the civil jurisdiction of the supreme court, and where that is all that is involved the family court is without jurisdiction.—People v. Pollock, 198 N.Y.S. 569.

Matrimonial actions and support

Supreme court and magistrate's courts have concurrent jurisdiction in actions to obtain support, but supreme court has exclusive jurisdiction of matrimonial actions.—People v. Meyer, 207 N.Y.S. 741, 124 Misc. 285.

90. Ind.—State ex rel. Geckler v. Cox, 9 N.E.2d 93, 212 Ind. 440.

Ky.—Strangway v. Allen, 240 S.W. 384, 194 Ky. 681.

N.Y.—Miorin v. Miorin, 3 N.Y.S.2d 79, 254 App.Div. 619.

15 C.J. p 1133 note 43—31 C.J. p 988 notes 63, 64.

Adoption

Tenn.—Carnes v. Henderson, 10 Tenn. App. 166.

Wis.—St. Vincent's Infant Asylum v. Central Wisconsin Trust Co., 206 N.W. 921, 189 Wis. 483.

Custody

(1) Generally.—Commonwealth v. Miller, 156 A. 734, 102 Pa.Super. 323—15 C.J. p 1133 note 43 [a].

(2) Determination of whether father or mother has superior right to custody of children, having regard to their best interests and welfare, is within jurisdiction of supreme court, and not children's court under applicable constitutional and statutory provisions.—Walsh v. Walsh, 263 N.Y.S. 517, 146 Misc. 604.

(3) The jurisdiction of the juvenile court over the custody of children, which is limited to boys under seventeen and girls under eighteen years, and is exercised on behalf of the state only, does not exclude the jurisdiction of the circuit court sitting in equity to determine the right to custody of the child in a controversy between individuals claiming such right, or where the child is not dependent or delinquent within the juvenile court act.—Strangway v. Allen, 240 S.W. 384, 194 Ky. 681.

Delinquency

Neb.—Ex parte Henderson, 283 N.W. 372, 135 Neb. 613.

Support

Special sessions court of New York City has exclusive jurisdiction of action to compel father to support illegitimate child, and supreme court cannot render declaratory judgment thereon.—Haan v. Haan, 231 N.Y.S. 58, 133 Misc. 197.

91. N.J.—Taylor v. Small Cause Court, 7 A.2d 872, 123 N.J.Law 40.
N.C.—Bryan v. Street, 183 S.E. 366, 209 N.C. 284.

District and justices' courts compared

(1) The district court of city of Camden has exclusive jurisdiction over proceedings under landlord and tenant act for removal of tenant from premises located anywhere in Camden County, so that judgment of justice of the peace, dispossessing tenant of premises located in such county, but outside city of Camden, must be set aside on certiorari; and the statute extending jurisdiction of

justices of the peace holding small cause courts to proceedings between landlords and tenants did not give such justices general jurisdiction in such cases so far as it conflicts with landlord and tenant act giving district courts in counties wherein leased premises are situated exclusive jurisdiction to remove tenants.—Taylor v. Small Cause Court for Camden County, 7 A.2d 872, 123 N.J.Law 40.

(2) The landlord and tenant act, giving district court of city exclusive jurisdiction over proceedings thereunder for removal of tenant from premises located anywhere in county wherein city is located, is not unconstitutional so far as it attempts to change small cause court act, giving justices of the peace holding such courts jurisdiction of proceedings between landlords and tenants.—Taylor v. Small Cause Court for Camden County, supra.

Eviction

Landlord was not required to bring summary proceeding in ejectment in justice's court to evict tenant, but could sue in ejectment in superior court, since as between landlord and tenant superior courts have concurrent jurisdiction with justice's court, and defendant in ejectment commenced in superior court, by denying plaintiff's title, controverting allegation of tenancy, and pleading betterments, conferred jurisdiction of action upon superior court.—Bryan v. Street, 183 S.E. 366, 209 N.C. 284.

92. La.—Segur v. Pellerin, 16 La. 63.

S.C.—Walker v. Russell, 10 S.C. 82.

93. N.Y.—Bessan v. Public Service Co-Ordinated Transport, 237 N.Y.S. 689, 135 Misc. 368.

Injuries arising from operation within city

City court has concurrent jurisdiction with supreme court in city of New York in action for injuries by operation of motor vehicle in city.—Bessan v. Public Service Co-Ordinated Transport, supra.

94. Okl.—Cromwell v. Hamilton, 209 P. 395, 87 Okl. 66.

47 C.J. p 1205 note 42 [a] (1).
Exclusive or concurrent jurisdiction of courts of law and equity over proceedings for dissolution of a partnership and accounting is considered in the C.J.S. title Partnership § 411, also 47 C.J. p 1204 note 34—p 1205 note 36.

95. Ariz.—Miami Copper Co. v. State, 149 P. 758, 17 Ariz. 179, Ann.Cas. 1916E 494.

15 C.J. p 1134 note 54.

96. Fla.—Barrs v. State, 116 So. 28 95 Fla. 75.

ceivers,⁹⁷ specific performance,⁹⁸ statutory bonds,⁹⁹ taxes and assessments,¹ waste,² water rights,³ and the issuance of writs of prohibition,⁴ habeas corpus,⁵ mandamus,⁶ and quo warranto.⁷

§ 492. Priority and Retention of Jurisdiction

That court which first takes cognizance of an action over which it has jurisdiction and power to afford complete relief has the exclusive right to dispose of the controversy without interference from other courts of

concurrent jurisdiction in which similar actions are subsequently instituted between the same parties seeking similar remedies and involving the same questions.

Where two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction, its power being adequate to the administration of complete justice, retains its jurisdiction and may dispose of the whole controversy,⁸ and no court of

Ky.—*Newsome v. Reynolds*, 90 S.W. 2d 682, 262 Ky. 484.

La.—*Ducre v. Milner*, 141 So. 617, annulling 140 So. 158, and rehearing denied 142 So. 618, set aside 144 So. 610, 175 La. 897, conformed to, App., 146 So. 734. Rehearing denied, App., 146 So. 734.

Miss.—*Vansant v. Dodds*, 144 So. 688, 164 Miss. 787, suggestion of error overruled 145 So. 613, 164 Miss. 787.

15 C.J. p 1133 note 48.

Forcible entry and unlawful detainer

Under provision of constitution giving justices' courts concurrent jurisdiction with district courts in cases of "forcible entry" and "unlawful detainer," all actions falling within the general category of forcible and unlawful entry and forcible and unlawful detainer are included in its terms, since the words "forcible entry" are sufficient to comprehend "unlawful entry" and words "unlawful detainer" are sufficient to comprehend "forcible detainer."—*State ex rel. Hamshaw v. Justice's Court of Union Tp. in and for Madison County, Mont.*, 88 P.2d 1.

Partition

(1) Generally.

Ky.—*Newsome v. Reynolds*, 90 S.W. 2d 682, 262 Ky. 484—*Duke v. Allen*, 248 S.W. 894, 198 Ky. 368.

Tex.—*Alderete v. Guaderrama*, Civ. App., 265 S.W. 766.

15 C.J. p 1133 note 48 [a].

(2) The concurrent jurisdiction of state courts possessing general equity powers with courts of law and probate courts over partition proceedings is discussed in the C.J.S. title Partition § 62, also 47 C.J. p 356 note 78—p 357 note 98, p 359 note 7.

Title

(1) "Under our system of courts, the jurisdiction to make a conclusive and final adjudication of title to land rests alone with the circuit and chancery courts, and now to a limited extent with the county courts."—*Vansant v. Dodds*, 144 So. 688, 690, 164 Miss. 787, suggestion of error overruled 145 So. 613, 164 Miss. 787.

(2) District court alone, to exclusion of county court and executors,

has power to determine issue of title as between devisees and widow, claiming contrary to will.—*Johnson v. Colt*, Tex.Civ.App., 48 S.W.2d 397.

97. Tenn.—*Taylor v. Smith*, 111 S.W.2d 1020, 173 Tenn. 247.

98. Minn.—*O'Brien v. Lien*, 199 N.W. 914, 160 Minn. 276.

Okl.—*Esch v. Callaway*, 251 P. 1023, 123 Okl. 38.

99. Tex.—*Myers v. State*, 105 S.W. 48, 47 Tex.Civ.App. 336.

1. Ark.—County Board of Election Com'rs v. *Waggoner*, 78 S.W.2d 821, 190 Ark. 341—*Jackson v. Elder*, 63 S.W.2d 991, 187 Ark. 1094.

Miss.—*Waits v. Black Bayou Drainage Dist.*, 185 So. 577.

15 C.J. p 1134 note 55.

Assessment of omitted property

Ky.—*Rice v. Bradley*, 263 S.W. 336, 203 Ky. 775.

Income taxes

Jurisdiction to pass upon issues involved in ordering barred claims for state income taxes can be acquired and exercised only by tribunals and in manner and under conditions prescribed in income tax act, and the county court was without jurisdiction to order barred claims against decedent's estate for income taxes because not filed in time, where under statute exclusive jurisdiction of such matters was vested in the tax commission, county boards of review, and circuit courts.—*In re Adams Estate*, 272 N.W. 19, 224 Wis. 237, 109 A.L.R. 1364.

2. Ky.—*Collins v. Security Trust Co.*, 266 S.W. 910, 206 Ky. 30.

3. Idaho.—*Hillcrest Irr. Dist. v. Nampa & Meridian Irr. Dist.*, 66 P. 2d 115, 57 Idaho 408.

N.C.—*Perry v. Shepherd*, 78 N.C. 83.

4. W.Va.—*Chesapeake, etc., R. Co. v. McDonald*, 63 S.E. 968, 65 W.Va. 201.

5. Fla.—*State ex rel. Williams v. Prescott*, 148 So. 533, 110 Fla. 261. 15 C.J. p 1134 note 57.

6. Ill.—*People v. Southern Illinois Ry. & Power Co.*, 227 Ill.App. 497.

Tex.—*Trustees of Crosby Independent School Dist. v. West Disinfect-*

ing Co., Civ.App., 121 S.W.2d 661, error granted—*State Highway Commission of Texas v. Tengge*, Civ.App., 57 S.W.2d 929.

10 C.J. p 63 note 21 [a]—15 C.J. p 1134 note 57.

7. Ariz.—*State v. Jones*, 137 P. 544, 15 Ariz. 215.

15 C.J. p 1134 note 57.

8. U.S.—*Reconstruction Finance Co. v. Zimmerman, C.C.A.S.C.*, 76 F.2d 313, 316, citing *Corpus Juris*—*Employers' Reinsurance Corporation v. Fidelity Union Casualty Fire Ins. Co.*, D.C.Tex., 36 F.2d 813.

Ala.—*Glazner v. Jenkins*, 186 So. 475, 237 Ala. 262—*Ex parte McAneny*, 186 So. 142, 237 Ala. 135—*Ex parte Burch*, 184 So. 694, 697, 236 Ala. 662, citing *Corpus Juris*—*Minor v. Thomasson*, 182 So. 16, 236 Ala. 247—*State v. Worthington*, 149 So. 709, 227 Ala. 204, denying certiorari 149 So. 707, 25 Ala.App. 511—*Monroe County Bank v. Smith*, 134 So. 797, 798, 223 Ala. 53, citing *Corpus Juris*—*Morris v. McElroy*, 122 So. 606, 607, 23 Ala.App. 96, citing *Corpus Juris*, and certiorari denied 122 So. 608, 219 Ala. 369.

Ark.—*Wasson v. Dodge*, 94 S.W.2d 720, 192 Ark. 728—*Moore v. Price*, 70 S.W.2d 563, 565, quoting *Corpus Juris*—*Davis v. Lawhon*, 52 S.W.2d 887, 186 Ark. 51—*Wright v. Le Croy*, 44 S.W.2d 355, 184 Ark. 837—*Vaughan v. Hill*, 242 S.W. 826, 154 Ark. 528.

Cal.—*Slinack v. Superior Court in and for Tulare County*, 13 P.2d 670, 216 Cal. 99—*Cutting v. Bryan*, 274 P. 326, 206 Cal. 254, certiorari denied 50 S.Ct. 16, 280 U.S. 556, 74 L.Ed. 611—*Gorman v. Superior Court in and for Fresno County*, 72 P.2d 774, 776, 223 Cal.App.2d 173, quoting *Corpus Juris*—*Corcoran v. Harris*, 270 P. 391, 94 Cal.App. 19.

Colo.—*People v. Morley*, 234 P. 178,

180, 77 Colo. 25, citing *Corpus Juris*.
Fla.—*Moss v. Sperry*, 191 So. 531—*Ocean Accident & Guarantee Corporation v. Tucker*, 150 So. 606, 112 Fla. 401—*Ex parte Sirmans*, 116 So. 282, 94 Fla. 832—*Maddox Grocery Co. v. Hay*, 100 So. 747, 87 Fla. 492—*Sanford v. State*, 78 So. 340, 75 Fla. 393.

- Ill.—*People v. Haas*, 183 N.E. 513, 351 Ill. 68—*Taylor v. Atchison, T. & S. Ry. Co.*, 11 N.E.2d 610, 292 Ill. App. 457, certiorari denied *Atchison, T. & S. Ry. Co. v. Taylor*, 58 S.Ct. 942, 304 U.S. 560, 82 L.Ed. 1528—*Chicago City Bank & Trust Co. v. Paschong*, 4 N.E.2d 254, 287 Ill.App. 1—*Brown v. Hamsmith*, 247 Ill.App. 358—*McCormick v. McCormick*, 243 Ill.App. 55.
- Ind.—*State ex rel. Tuell v. Shelby Circuit Court of Shelby County*, 23 N.E.2d 425—*State ex rel. Kunkel v. Circuit Court of La Porte County*, 200 N.E. 614, 209 Ind. 682—*Brown v. Doak Co.*, 135 N.E. 343, 192 Ind. 113, transferred, see 133 N.E. 172, 77 Ind.App. 130.
- Iowa.—*First M. E. Church of Ottumwa v. Hull*, 280 N.W. 531, 535, 225 Iowa 306, quoting *Corpus Juris*.
- Kan.—*Bank Sav. Life Ins. Co. of Topeka v. Schroll*, 41 P.2d 731, 141 Kan. 442—*City of Hutchinson v. Hutchinson Gas Co.*, 264 P. 68, 74, 125 Kan. 346, 57 A.L.R. 137, quoting *Corpus Juris*—*Bumgardner v. Halverstadt*, 222 P. 762, 115 Kan. 124.
- Md.—*Woodcock v. Woodcock*, 179 A. 826, 169 Md. 40.
- Mass.—*Morin v. Ellis*, 189 N.E. 95, 285 Mass. 370—*Old Colony Trust Co. v. Segal*, 182 N.E. 578, 280 Mass. 212.
- Minn.—*State v. District Court, Fourth Judicial Dist.*, 262 N.W. 155, 157, quoting *Corpus Juris*.
- Mo.—*State ex rel. Townsend v. Mueller*, 51 S.W.2d 8, 330 Mo. 641—*State ex rel. Banner Loan Co. v. Landwehr*, 27 S.W.2d 25, 324 Mo. 1142—*Grey v. Independent Order of Foresters, App.*, 196 S.W. 779—*Miller v. International Fire Assur. Co. of America, App.*, 196 S.W. 452—*Miller v. Continental Assur. Co. of America, App.*, 196 S.W. 448.
- Mont.—*O'Sullivan v. Alexander*, 234 P. 1099, 73 Mont. 12.
- Neb.—*Lincoln Joint Stock Land Bank v. Fuller*, 273 N.W. 14, 132 Neb. 677.
- Nev.—*Metcalf v. District Court of Second Judicial Dist. in and for Washoe County*, 274 P. 5, 51 Nev. 253.
- N.J.—*Barton v. Silver*, 152 A. 382, 107 N.J.Eq. 314.
- N.Y.—*In re Vanderbilt*, 276 N.Y.S. 745, 152 Misc. 884—*Haber v. Chase Nat. Bank of New York*, 275 N.Y.S. 776, 153 Misc. 393—*Producers' Royalty Co. v. Ottinger*, 222 N.Y.S. 373, 129 Misc. 694.
- N.C.—*Allen v. Allemania Fire Ins. Co.*, 197 S.E. 200, 213 N.C. 586.
- Ohio.—*Addams v. State*, 135 N.E. 687, 104 Ohio St. 475—*Morehead v. Central Trust Co.*, 5 N.E.2d 932, 54 Ohio App. 9—*State v. Zangerle*, 184 N.E. 32, 44 Ohio App. 65, affirmed 185 N.E. 69, 126 Ohio St. 247—*Culp v. Hecht*, 183 N.E. 437, 43 Ohio App. 430—*Cleveland Prot-*
- estant Orphan Asylum v. Soule*, 5 Ohio App. 67.
- Okl.—*Schofield v. Melton*, 25 P.2d 279, 166 Okl. 64—*Courtney v. Daniel*, 253 P. 990, 993, 124 Okl. 46, quoting *Corpus Juris*—*Cromwell v. Hamilton*, 209 P. 395, 87 Okl. 66.
- Or.—*La Follett v. La Follett*, 299 P. 299, 300, 136 Or. 332, citing *Corpus Juris*.
- Pa.—*Trees v. Glenn*, 181 A. 579, 319 Pa. 487, 102 A.L.R. 304—*Fidelity Mortg. Guarantee Co. v. Bobb*, 160 A. 120, 306 Pa. 411, followed in 160 A. 123, 306 Pa. 423—*Magoun v. Dauphin County Pennsylvania Authority*, 29 Pa.Dist. & Co. 401, 43 Dauph.Co. 357—*In re Breyer's Estate*, 19 Pa.Dist. & Co. 255—*In re Celenza's Estate*, 17 Pa.Dist. & Co. 319—*In re Crisswell's Estate*, 86 Pa.L.J. 615.
- S.C.—*Fidelity Fire Ins. Co. v. Windham*, 133 S.E. 35, 134 S.C. 373.
- Tenn.—*Valley v. Lambuth*, 1 Tenn. App. 547.
- Tex.—*V. D. Anderson Co. v. Young*, 101 S.W.2d 798, 128 Tex. 631—*McCurdy v. Gage*, 69 S.W.2d 56, 123 Tex. 558, affirming *Gage v. McCurdy, Civ.App.*, 60 S.W.2d 468, and rehearing denied *McCurdy v. Gage, Com.App.*, 75 S.W.2d 1107—*Russell v. Taylor*, 49 S.W.2d 733, 121 Tex. 450—*State v. Baker*, 40 S.W.2d 41, 43, 120 Tex. 307, citing *Corpus Juris*, and affirming *Baker v. State, Civ.App.*, 26 S.W.2d 324—*Conn v. Campbell*, 24 S.W.2d 813, 119 Tex. 82—*Neal v. Texas Employers' Ins. Ass'n*, 14 S.W.2d 793, 118 Tex. 236, denying error *Texas Employers' Ins. Ass'n v. Neal, Civ.App.*, 11 S.W.2d 847—*Barrier v. Lowery*, 13 S.W.2d 688, 118 Tex. 227, denying rehearing 11 S.W.2d 298, 118 Tex. 227—*Cleveland v. Ward*, 285 S.W. 1083, 1070, 116 Tex. 1, citing *Corpus Juris*—*Cavers v. Sioux Oil & Refining Co., Com.App.*, 39 S.W.2d 862, reversing, *Civ.App.*, 23 S.W.2d 421, and rehearing denied, *Com. App.*, 43 S.W.2d 578—*Lynn County School Bd. v. Garlynn C. Co. L. Sch. Dist.*, *Civ.App.*, 118 S.W.2d 1070, 1072, citing *Corpus Juris*—*Miller v. White, Civ.App.*, 112 S.W.2d 487, error dismissed—*Coker v. Logan, Civ.App.*, 101 S.W.2d 284, error refused—*Cooper v. United Producers Co., Civ.App.*, 95 S.W.2d 211—*Brand v. Eubank, Civ.App.*, 81 S.W.2d 1023, error dismissed—*Texas Gas Utilities Co. v. City of Uvalde, Civ.App.*, 77 S.W.2d 750—*Edmondson v. Carroll, Civ.App.*, 65 S.W.2d 1107, error dismissed—*Buffalo Engineering Co. v. Welch, Civ. App.*, 61 S.W.2d 855—*Corzelli v. Cosby Producing & Royalty Co., Civ.App.*, 52 S.W.2d 270—*Richardson v. Kent, Civ.App.*, 21 S.W.2d 72, error refused—*Wootters v. Wynne, Civ.App.*, 7 S.W.2d 940—*Henderson v. Miller, Civ.App.*, 286 S.W. 501—
- Berndt v. Kloss, Civ.App.*, 263 S.W. 949—*Cunningham v. City of Corpus Christi, Civ.App.*, 260 S.W. 266—*Dilworth & Marshall v. Kirby, Civ. App.*, 253 S.W. 860, modified on other grounds *Kirby v. Dilworth & Marshall, Com.App.*, 260 S.W. 152.
- Utah.—*Nielson v. Schiller*, 66 P.2d 365, 368, quoting *Corpus Juris*—*Escalante Co. v. Kent*, 7 P.2d 276, 278, quoting *Corpus Juris*.
- Vt.—*Weiner v. Prudential Ins. Co. of America*, 1 A.2d 708, 118 A.L.R. 1237.
- Va.—*Preston v. Legard*, 168 S.E. 445, 160 Va. 364.
- W.Va.—*State v. Shepherd*, 121 S.E. 98, 95 W.Va. 335—*Abney-Barnes Co. v. Davy-Pocantotas Coal Co.*, 98 S.E. 298, 83 W.Va. 292—*McGrew v. Maxwell*, 94 S.E. 395, 80 W.Va. 718.
- 15 C.J. p 1134 note 58, p 1131 note 26—38 C.J. p 65 note 10.
- Actions in courts of law and equity having concurrent jurisdiction see C.J.S. title Equity § 21, also 21 C. J. p 40 note 39—p 41 note 41.
- Manner of commencement**
- Text rule applies regardless of whether litigation is commenced by petition or summons.—*Colson v. Pelgram*, 182 N.E. 19, 259 N.Y. 370, reversing 256 N.Y.S. 640, 235 App.Div. 137.
- Sufficiency of petition**
- (1) The fact that the petition first filed may be subject to demurrer does not prevent application of the text rule.—*Dallas Joint Stock Land Bank of Dallas v. Sutherland, Tex. Civ.App.*, 74 S.W.2d 291—*Duncan v. National Union Fire Ins. Co., Tex. Civ.App.*, 4 S.W.2d 278.
- (2) It has been held, however, that no suit is instituted so as to preclude other courts from taking jurisdiction when no parties are named and "no pleading setting up a cause of action against any one is alleged."—*State Nat. Bank of San Antonio v. Lancaster, Tex.Civ.App.*, 229 S.W. 883, 885, error refused.
- When jurisdiction acquired**
- (1) Question of priority of jurisdiction of two courts will be determined as from date of filing original petition and issuance of process, provided such petition and cause of action stated in it were not abandoned.
- Mo.—*Julian v. Commercial Assur. Co.*, 279 S.W. 740, 220 Mo.App. 115.
- Ohio.—*Union Savings Bank & Trust Co. v. Pike Building Co.*, 1 Ohio N. P., N.S., 454.
- 15 C.J. p 1134 note 58 [b].
- (2) It has been held that the court in which process was first served had jurisdiction over whole litigation, although complaint had not been first filed in that court.
- Cal.—*De Brincat v. Mogan, App.*, 86 P.2d 245, 246, quoting *Corpus Juris*,

coördinate power is at liberty to interfere with its action.⁹ This rule rests on comity and the necessity of avoiding conflict in the execution of judg-

ments by independent courts, and is a necessary one because any other rule would unavoidably lead to

and followed in *De Brincat v. Swart*, App., 36 P.2d 247. Mo.—*State ex rel. Davis v. Ellison*, 208 S.W. 439, 276 Mo. 642. Ohio.—*Creager v. Creager*, 154 N.E. 316, 22 Ohio App. 261.

(3) It has also been held that jurisdiction attaches in the court in which petition was first filed and not in the proceeding in which citation was first issued where the delay in issuance of process in the first action was not attributable to plaintiff.—*Stewart v. Poinboeuf*, 233 S.W. 1095, 111 Tex. 299—*Powers v. Temple Trust Co.*, Tex.Com.App., 78 S.W.2d 951, affirming *Temple Trust Co. v. Powers*, Civ.App., 50 S.W.2d 362, and followed in *Roberts v. Temple Trust Co.*, Civ.App., 50 S.W.2d 363 and *Temple Trust Co. v. Sewell*, Civ.App., 50 S.W.2d 364.

(4) Other authority holds that the proceeding in which process was first issued is prior in time, although process was first served in another proceeding.—*Robb v. Shore Bus Transp. Co.*, 159 A. 527, 10 N.J.Misc. 458.

(5) In determining which court first took cognizance of the cause, fractions of a day will be considered.—*Davis v. Detwiller*, 26 Pa.Dist. 1110.

(6) Where proceedings were brought in two courts on the same day, seeking the same relief, a party who seeks to defeat the jurisdiction of one of such courts must show that the jurisdiction of the other court was the one first invoked.—*Whiting v. Shipley*, 96 A. 285, 127 Md. 113.

Questions of law and fact

No substantial difference exists between questions of law and fact in determining whether court has acquired exclusive jurisdiction.—*Haney v. Temple Trust Co.*, Tex.Civ.App., 55 S.W.2d 894.

Jurisdiction prior to motion to stay proceedings

Each court in which suit was filed had jurisdiction of controversy on service of process in each action prior to making of motion by opponent to stay proceedings in such action.

Cal.—*De Brincat v. Mogan*, App., 36 P.2d 245, followed in *De Brincat v. Swart*, App., 36 P.2d 247. N.Y.—*People ex rel. Van Wert v. Watson*, 220 N.Y.S. 79, 128 Misc. 513.

Parties

Court first acquiring jurisdiction acquired exclusive jurisdiction to determine cause not only as to defendants then called to answer but

as to all parties necessary to final adjudication.—*Way v. Coca Cola Bottling Co.*, 29 S.W.2d 1067, 119 Tex. 419.

9. Ala.—*Wright v. Price*, 147 So. 675, 226 Ala. 463—*Lassiter v. Wilson*, 93 So. 598, 207 Ala. 669—*State v. Worthington*, 149 So. 767, 25 Ala.App. 511, certiorari denied 149 So. 709, 227 Ala. 204.

Cal.—*Browne v. Superior Court in and for City and County of San Francisco*, App., 95 P.2d 178.

Colo.—*Arakawa v. Co-operative Farmers' Exchange*, 253 P. 830, 81 Colo. 92.

Conn.—*Amato v. Erskine*, 123 A. 536, 100 Conn. 497.

Ill.—*Crystal Lake Park Dist. v. Consumers' Co.*, 145 N.E. 215, 313 Ill. 395—*City of Chicago v. Chicago Rys. Co.*, 228 Ill.App. 579.

Iowa.—*First M. E. Church of Ottumwa v. Hull*, 280 N.W. 531, 535, 225 Iowa 306, quoting *Corpus Juris*.

Ky.—*Breeding v. Commonwealth*, 264 S.W. 1050, 204 Ky. 433—*Commonwealth v. Gordon*, 247 S.W. 45, 197 Ky. 367.

La.—*Succession of Williams*, 95 So. 607, 153 La. 206—*Osborn v. City of Shreveport*, 79 So. 542, 143 La. 932, 3 A.L.R. 955.

Mont.—*State ex rel. Swanson v. District Court of First Judicial Dist. in and for Lewis and Clark County*, 82 P.2d 779, 780, 107 Mont. 203, citing *Corpus Juris*.

N.Y.—*In re Berkowitz' Estate*, 10 N.Y.S.2d 279, 170 Misc. 334—*Meyers v. Meyers*, 8 N.Y.S.2d 262, 169 Misc. 860—*In re Hearn's Will*, 285 N.Y.S. 935, 158 Misc. 370—*In re Freisen-dorfer's Estate*, 193 N.Y.S. 764, 118 Misc. 524.

Okl.—*Citizens' Trust Co. v. Bird*, 19 P.2d 577, 162 Okl. 156.

Pa.—*Slate Belt Electric St. Ry. Co. v. Pennsylvania Utilities Co.*, 110 A. 245, 267 Pa. 61—*Commonwealth v. Miller*, 156 A. 734, 102 Pa.Super. 323.

Tex.—*State v. Epperson*, 42 S.W.2d 228, 121 Tex. 80—*Conn v. Campbell*, 24 S.W.2d 813, 119 Tex. 82—*Cleveland v. Ward*, 285 S.W. 1063, 1070, 116 Tex. 1, citing *Corpus Juris*—*Cavers v. Sloux Oil & Refining Co.*, Com.App., 39 S.W.2d 862, reversing, Civ.App., 23 S.W.2d 421, and rehearing denied, Com.App., 43 S.W.2d 578—*Brand v. Eubank*, Civ.App., 81 S.W.2d 1023, error dismissed—*Gage v. McCurdy*, Civ.App., 60 S.W.2d 468, affirmed *McCurdy v. Gage*, 69 S.W.2d 56, 123 Tex. 558, rehearing denied, Com.App., 75 S.W.2d 1107—*Haney v. Temple Trust Co.*, Civ.App., 55 S.W.2d 891, er-

ror dismissed, and followed in 59 S.W.2d 1117, 59 S.W.2d 1118, two cases, and 59 S.W.2d 1119—*Guerra v. City Nat. Bank of Corpus Christi*, Civ.App., 26 S.W.2d 354, 355, error refused—*Grawunder v. Stravoski*, Civ.App., 234 S.W. 655—*Ex parte Grimes*, Civ.App., 216 S.W. 251, reversed on other grounds *Whittenberg v. Craven*, Com.App., 256 S.W. 162.

Apparently so holding.—*Johnson v. Durst*, Civ.App., 115 S.W.2d 1000, error dismissed.

Utah.—*Nielson v. Schiller*, 66 P.2d 365, 92 Utah 137.

Wis.—*Cawker v. Dreutzer*, 221 N.W. 401, 197 Wis. 98.

15 C.J. p 1135 note 59.

Suspension of proceedings subsequently instituted:

Staying proceedings until determination of prior action see *Actions* § 133 c.

Enjoining parties from proceeding see *infra* § 498.

By writ of prohibition see C.J.S. title *Prohibition* § 11, also 50 C.J. p 667 note 22—p 668 note 25.

Second proceeding is void where it interferes with jurisdiction acquired by first court.—*Way v. Coca Cola Bottling Co.*, 29 S.W.2d 1067, 119 Tex. 419—*O'Neil v. Norton*, Tex. Com.App., 29 S.W.2d 1060, reversing *Norton v. O'Neil*, Civ.App., 17 S.W.2d 66—*Simpson v. Amarillo Mut. Benev. Ass'n*, Tex.Civ.App., 63 S.W.2d 597—*Duncan v. National Union Fire Ins. Co.*, Tex.Civ.App., 4 S.W.2d 278.

Judgment not res judicata

Court of general jurisdiction, having obtained prior jurisdiction, retained it against defense of res judicata by judgment in subsequent suit in court of limited jurisdiction.—*Nash Woodland Motor Co. v. Lusk*, 168 N.E. 67, 32 Ohio App. 343.

Special term of court

After giving of notice of motion for judgment returnable before one special term of court, another special term had no jurisdiction and the right to assert the jurisdiction of the first court is reserved by the presentation and filing of objections at the hearing held by the second court.—*Stillman v. Stillman*, 196 N.Y.S. 354, 119 Misc. 868.

However, it was held that the municipal court having concurrent jurisdiction of the subject matter properly overruled a plea in bar alleging pendency of a similar action in the superior court; but it did not appear which action was first instituted.—*Johnson v. Greenen*, 188 N.E. 796, 98 Ind.App. 612.

perpetual collision and be productive of most calamitous results.¹⁰

The rule has been applied to proceedings in different courts of concurrent probate jurisdiction,¹¹ and likewise to proceedings in a probate court, and

a court of equity, where the probate court has assumed jurisdiction and nothing intervenes to render such jurisdiction inadequate,¹² and also generally where a probate court and some other state court have concurrent jurisdiction of a particular matter or proceeding.¹³

10. Ala.—Ex parte Burch, 184 So. 694, 236 Ala. 662—Morris v. McElroy, 122 So. 606, 23 Ala.App. 96, certiorari denied 122 So. 608, 219 Ala. 369.

Ind.—State ex rel. Cook v. Circuit Court of Madison County, 138 N.E. 762, 193 Ind. 20.

Iowa.—First M. E. Church of Ottumwa v. Hull, 280 N.W. 531, 535, 225 Iowa 306, quoting *Corpus Juris*. 15 C.J. p 1136 note 60.

Basis not bar of judgment

The rule does not depend for application on whether any judgment that may be rendered in the case first instituted could be pleaded in bar in the second suit as a former adjudication, the proper test being whether or not the court in which the first suit is filed has acquired jurisdiction of the same parties and same subject matter of controversy.—Ward v. Scarborough, Tex.Civ.App., 223 S.W. 1107, affirmed, Com.App., 236 S.W. 441.

11. Cal.—In re Spencer's Estate, 245 P. 176, 198 Cal. 329—Hill v. Superior Court of San Luis Obispo County, 205 P. 430, 188 Cal. 352—Miller v. Superior Court of Yolo County, 199 P. 805, 186 Cal. 453—Jordan v. Clausen, 56 P.2d 240, 13 Cal.App.2d 16—Holabird v. Superior Court in and for Fresno County, 281 P. 108, 101 Cal.App. 49.

Colo.—Stratton v. Rice, 181 P. 529, 66 Colo. 407.

Ga.—Robinson v. Georgia Sav. Bank & Trust Co., 196 S.E. 395, 185 Ga. 688.

Mass.—Phillips v. McCandlish, 121 N.E. 861, 239 Mass. 301—Dorsey v. Corkery, 116 N.E. 870, 227 Mass. 498.

Mich.—In re Carney's Estate, 165 N.W. 791, 199 Mich. 663.

Mo.—State ex rel. Bartlett v. Littrell, 26 S.W.2d 768, 325 Mo. 35—State ex rel. Lefholz v. McCracken, 95 S.W.2d 1238, 231 Mo.App. 870—State ex rel. Mitchell v. Gideon, App., 237 S.W. 220.

N.Y.—In re Maginn's Will, 213 N.Y.S. 325, 215 App.Div. 790—In re Zollikoff's Will, 3 N.Y.S.2d 305, 166 Misc. 735—In re Stephan's Estate, 300 N.Y.S. 813, 164 Misc. 240—In re Rotstein's Estate, 293 N.Y.S. 520, 162 Misc. 37—In re Mendley's Estate, 276 N.Y.S. 555, 154 Misc. 59—In re Humpfer's Estate, 263 N.Y.S. 309, 146 Misc. 461, affirmed.—In re Humpfer, 265 N.Y.S. 966, 240 App.Div. 745—In re Daniels,

Will, 249 N.Y.S. 436, 140 Misc. 89—Colson v. Pelgram, 238 N.Y.S. 398, 135 Misc. 833—In re Lichtblau, 228 N.Y.S. 239, 131 Misc. 826—In re Farmers' Loan & Trust Co., 205 N.Y.S. 895, 123 Misc. 600—In re Appell's Estate, 204 N.Y.S. 889, 123 Misc. 12, affirmed 213 N.Y.S. 757, 215 App.Div. 769—In re Harkness' Estate, 196 N.Y.S. 287, 119 Misc. 361—In re Webb's Estate, 172 N.Y.S. 809, 105 Misc. 287.

N.C.—Clark v. Carolina Homes, 128 S.E. 20, 189 N.C. 703.

Ohio.—State ex rel. Black v. White, 5 N.E.2d 163, 132 Ohio St. 58—State v. Gregory, 172 N.E. 365, 122 Ohio St. 512.

Okl.—Woodruff v. Firestone, 79 P. 2d 210, 182 Okl. 606—Sewell v. Christison, 245 P. 632, 114 Okl. 177—Baird v. England, 205 P. 1098, 85 Okl. 276—State v. Hazelwood, 196 P. 937, 81 Okl. 69.

Pa.—Hanbest's Est., 20 Pa.Co. 382.

Tex.—St. Louis Southwestern Ry. Co. of Texas v. Smitha, 232 S.W. 494, 111 Tex. 285, affirming, Civ.App., 190 S.W. 237—Balfour v. Collins, Com.App., 25 S.W.2d 804, answer to certified question conformed to, Civ.App., 27 S.W.2d 185.

Utah.—Gee v. Baum, 199 P. 680, 58 Utah 445.

Wash.—In re Smith's Estate, 238 P. 898, 135 Wash. 636.

Wis.—In re Jones' Estate, 241 N.W. 387, 207 Wis. 354—Connell v. Connell, 234 N.W. 894, 203 Wis. 545—First Wisconsin Trust Co. v. Helmholtz, 225 N.W. 181, 198 Wis. 573—Cawker v. Dreutzer, 221 N.W. 401, 197 Wis. 98—In re Sipchen's Estate, 193 N.W. 385, 180 Wis. 504—State v. Circuit Court of La Crosse County, 188 N.W. 645, 177 Wis. 548.

15 C.J. p 1136 note 61.

Venue

While the conflict between probate courts of different counties over exercise of jurisdiction over estate is question of venue rather than of jurisdiction, invoking jurisdiction of one court precludes subsequent exercise of jurisdiction by another probate court, unless first proceeding is discontinued.—Martin v. Martin, 247 N.W. 515, 188 Minn. 408.

Appointment of administrator

Court order in one county, appointing special administrator, is not determination of jurisdiction preventing court of another county from appointing general administrator.—

State v. Superior Court for Thurston County, 255 P. 376, 143 Wash. 358—15 C.J. p 1136 note 61 [a].

12. Ala.—Kling v. Goodman, 164 So. 748, 231 Ala. 313—Sewell v. Sewell, 92 So. 475, 207 Ala. 239—Carpenter v. Carpenter, 75 So. 472, 200 Ala. 96.

Cal.—Application of Dowdall, 191 P. 685, 183 Cal. 348.

Colo.—Whitlock v. Alliance Coal Co., 214 P. 546, 73 Colo. 205.

Ga.—Benton v. Turk, 4 S.E.2d 580, 188 Ga. 710—Tinsley v. Maddox, 188 S.E. 297, 176 Ga. 471—Gibbs v. Gibbs, 108 S.E. 214, 151 Ga. 745.

Iowa.—Anderson v. Meier, 287 N.W. 250, 252, citing *Corpus Juris*—First M. E. Church of Ottumwa v. Hull, 280 N.W. 531, 532, 225 Iowa 306, citing *Corpus Juris*.

Kan.—Staker v. Gillen, 53 P.2d 821, 143 Kan. 212.

Mich.—Johnson v. Douglas, 274 N.W. 780, 281 Mich. 247—Allen v. Allen, 176 N.W. 587, 209 Mich. 362—Tipson v. Jeannot, 169 N.W. 874, 204 Mich. 403.

Mo.—Smith v. St. Louis Union Trust Co., 104 S.W.2d 341, 340 Mo. 979—Hax v. O'Donnell, App., 117 S.W.2d 667.

N.J.—Miller v. Marshall, 171 A. 318, 115 N.J.Eq. 445—Civic Enterprises v. Mechanics' Trust Co. of New Jersey, 169 A. 696, 115 N.J.Eq. 66—Landis v. Vineland Historical & Antiquarian Soc., 124 A. 604, 96 N.J.Eq. 246.

N.M.—Barka v. Hopewell, 219 P. 799, 29 N.M. 166—Michael v. Bush, 195 P. 904, 26 N.M. 612.

N.Y.—In re Ledyard's Estate, 10 N.Y.S.2d 327, 170 Misc. 365.

R.I.—Wilbor v. Buckhout, 111 A. 873, 43 R.I. 317.

S.D.—Haugen v. Peterson, 260 N.W. 826, 63 S.D. 492.

Tex.—Boyle v. Paul, 86 S.W.2d 744, 126 Tex. 242—Meyer v. Meyer, Civ. App., 223 S.W. 269, error refused.

Vt.—Smith v. White's Estate, 188 A. 901, 108 Vt. 473—Vermont People's Nat. Bank v. Robbins' Estate, 166 A. 6, 105 Vt. 283.

Va.—Nicholas v. Nicholas, 193 S.E. 689, 169 Va. 399.

Wis.—Pietraszwicz v. Pietraszwicz, 181 N.W. 722, 173 Wis. 523.

15 C.J. p 1136 note 62.

13. U.S.—Cole v. Franklin Life Ins. Co., C.C.A.Tex., 93 F.2d 620.

Ark.—Phillips v. Phillips, 220 S.W. 52, 143 Ark. 240—Raymond v. Boyd, 205 S.W. 708, 135 Ark. 265.

Other applications of the rule are to be found in cases involving trusts or trustees,¹⁴ guardianships | persons,¹⁵ and such applications are to be found

Colo.—Colorado Nat. Bank v. McCue, 249 P. 3, 80 Colo. 55—People v. El Paso County Court, 219 P. 215, 74 Colo. 123.

Ga.—Terry v. Chandler, 158 S.E. 572, 172 Ga. 715.

Ill.—Novotny v. Acacia Mut. Life Ins. Co., 4 N.E.2d 978, 287 Ill.App. 361—Slad v. Hajicek, 203 Ill.App. 396.

Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County, 23 N.E.2d 425—Bell v. Union Trust Co. of Indianapolis, 12 N.E.2d 510—Hack v. Bolint, 191 N.E. 177, 110 Ind.App. 133.

Kan.—Shuckrow v. Maloney, 83 P.2d 118, 148 Kan. 403—In re Park's Estate, 75 P.2d 842, 147 Kan. 142—Staker v. Gillen, 53 P.2d 831, 143 Kan. 212—Wright v. Simpson, 51 P.2d 1, 142 Kan. 507—Fry v. Riley, 291 P. 748, 131 Kan. 252—McCleery v. McCleery Lumber Co., 283 P. 647, 129 Kan. 520—Holmes v. Conway, 278 P. 8, 128 Kan. 430—Correll v. Vance, 275 P. 174, 127 Kan. 840.

Md.—Gaver v. Gaver, 4 A.2d 132. Mass.—Old Colony Trust Co. v. Segal, 182 N.E. 578, 280 Mass. 212.

Mich.—Henkel v. Henkel, 276 N.W. 522, 282 Mich. 473—Tipson v. Jeannot, 169 N.W. 874, 204 Mich. 403.

Minn.—Mundinger v. Breeze, 248 N.W. 47, 188 Minn. 621.

Mo.—Peer v. Ashauer, App., 102 S.W.2d 764, transferred, see Sup., 92 S.W.2d 154, certiorari quashed State ex rel. Ashauer v. Hostetter, 127 S.W.2d 697—Grace v. Lee, 57 S.W.2d 1095, 227 Mo.App. 766.

N.H.—Cobleigh v. Spring, 157 A. 886, 85 N.H. 560.

N.J.—Browne v. Bayonne Trust Co., 193 A. 179, 118 N.J.Law 376, affirmed 196 A. 741, 119 N.J.Law 349.

N.Y.—Noll v. Ruprecht, 9 N.Y.S.2d 651, 256 App.Div. 926—In re Matheson's Estate, 270 N.Y.S. 17, 240 App.Div. 285, reversing 268 N.Y.S. 317, 149 Misc. 561, and reversed on other grounds 191 N.E. 842, 265 N.Y. 81—MacLean v. Hart, 239 N.Y.S. 1, 228 App.Div. 379—In re Janowitz' Will, 300 N.Y.S. 38, 164 Misc. 936—In re Heann's Will, 285 N.Y.S. 935, 153 Misc. 370—In re Whitehouse's Estate, 265 N.Y.S. 405, 148 Misc. 601—In re Erlanger's Estate, 265 N.Y.S. 393, 148 Misc. 339.

Ohio.—Home Bldg. & Sav. Co. v. Sanford, 18 N.E.2d 127, 59 Ohio App. 302—Peoples Sav. Ass'n v. Sanford, 18 N.E.2d 126, 59 Ohio App. 294—Morehead v. Central Trust Co., 5 N.E.2d 932, 54 Ohio App. 9. Okl.—Simms v. Hendricks, 45 P.2d 748, 172 Okl. 532—State v. Worten, 17 P.2d 424, 161 Okl. 130—In re

Gentry's Estate, 13 P.2d 156, 157 Okl. 196—Davis v. Harjo's Unknown Heirs, etc., 279 P. 306, 137 Okl. 242.

Pa.—In re Single's Estate, 7 A.2d 353, 325 Pa. 552—Bergman v. Gross, 196 A. 458, 329 Pa. 67—Pendleton v. McSherry, 20 Erie Co. 331.

S.C.—American Surety Co. of New York v. Muckenfuss, 173 S.E. 290, 172 S.C. 169—Batty v. National Surety Co., 128 S.E. 40, 132 S.C. 45.

S.D.—Marker v. Van Gerpen, 166 N.W. 151, 39 S.D. 648.

Tex.—Connor Bros. v. Williams, 112 S.W.2d 709, 130 Tex. 572, reversing Williams v. Connor Bros., Com. App., 83 S.W.2d 692—Laubhan v. Peoria Life Ins. Co., 102 S.W.2d 399, 129 Tex. 225, answers to certified questions conformed to, Civ. App., 105 S.W.2d 286—O'Neill v. Norton, Com.App., 29 S.W.2d 1060, reversing Norton v. O'Neill, Civ. App., 17 S.W.2d 66—Zamora v. Gonzalez, Civ.App., 123 S.W.2d 166, error refused—R. L. White Co. v. Stout, Civ.App., 102 S.W.2d 1065, error dismissed—Crawford v. Holt, Civ.App., 92 S.W.2d 1144—Federal Land Bank of Houston v. Tarter, Civ.App., 86 S.W.2d 523, error dismissed—Williams v. Connor Bros., Civ.App., 83 S.W.2d 692, reversed on other grounds, Com.App., Connor Bros. v. Williams, 112 S.W.2d 709, 130 Tex. 572—Ferguson v. Ferguson, Civ. App., 66 S.W.2d 755—Phelps v. Thurber Brick Co., Civ.App., 62 S.W.2d 596—Ford v. Wheat, Civ. App., 59 S.W.2d 469—Dalton v. Allen, Civ.App., 56 S.W.2d 205—Reedy v. Jones, Civ.App., 41 S.W.2d 1044—Le Fors v. Le Fors, Civ.App., 41 S.W.2d 517, error dismissed—Miller v. Valley Building & Loan Ass'n, Civ.App., 29 S.W.2d 865—Maxwell's Unknown Heirs v. Bolding, Civ.App., 11 S.W.2d 814—Dowe v. Mixon, Civ.App., 299 S.W. 346—McCanless v. Clough, Civ.App., 298 S.W. 643—Becknal v. Becknal, Civ.App., 296 S.W. 917—Wallace v. Dubose, Civ.App., 242 S.W. 351.

Vt.—Scott v. Bradford Nat. Bank, 179 A. 149, 107 Vt. 226—In re Prouty's Estate, 144 A. 691, 101 Vt. 496.

Wash.—State v. Superior Court in and for Yakima County, 290 P. 870, 158 Wash. 255.

W.Va.—Charlotten v. Gordon, 200 S.E. 740—Webb v. Keck, 191 S.E. 572, 118 W.Va. 684.

Wis.—Banking Commission of Wisconsin v. Muzik, 257 N.W. 174, 216 Wis. 596.

15 C.J. p 1136 note 63.

Appointment of receiver

Statute authorizing circuit court to appoint receiver is inapplicable to estates of deceased persons in custody of probate court for administration.—Seibert v. Harden, 8 S.W.2d 905, 319 Mo. 1105.

Determination of matrimonial status

Surrogate's court will determine whether appearance by deceased's first wife should be stricken out without granting her request that such court relinquish jurisdiction and permit determination in supreme court of matrimonial status in action brought there for declaratory judgment, in view of delay which would be caused in probate proceeding.—In re Browning's Estate, 276 N.Y.S. 270.

Sending issues to court of law

The sending of issues to and decision thereon by court of law is not an interference with power or jurisdiction of probate court, since this is intended only as an aid to the probate court in the exercise of its jurisdiction.—Flaks v. Flaks, 196 A. 116, 173 Md. 358.

14. Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County, 23 N.E.2d 425.

Me.—Eastern Maine General Hospital v. Harrison, 193 A. 246, 135 Me. 190.

Mo.—Cell v. Robinson, App., 79 S.W.2d 489.

N.J.—Summerill v. Summerill, 134 A. 113, 99 N.J.Eq. 502.

Pa.—In re Harton's Estate, 1 A.2d 292, 331 Pa. 507—Wilson v. Board of Directors of City Trusts, 138 A. 588, 324 Pa. 545—In re Breyer's Estate, 19 Pa.Dist. & Co. 255.

S.D.—In re Eckhoff's Estate, 251 N.W. 892, 62 S.D. 110.

15 C.J. p 1137 note 64.

15. Ala.—McGathay v. Thompson, 138 So. 811, 224 Ala. 163.

Cal.—Adams v. Martin, 44 P.2d 572, 3 Cal.2d 246.

Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County, 23 N.E.2d 425.

N.Y.—In re Fisher, 5 N.Y.S.2d 188, 254 App.Div. 225, reargument denied 6 N.Y.S.2d 652, 254 App.Div. 935, appeal denied 18 N.E.2d 313, 279 N.Y. 684, affirmed 19 N.E.2d 92, 279 N.Y. 797—In re Yardum, 241 N.Y.S. 336, 228 App.Div. 854, followed in 241 N.Y.S. 327, 228 App.Div. 855—In re Vanderbilt, 276 N.Y.S. 745, 153 Misc. 884—In re Stillman, 190 N.Y.S. 495, 117 Misc. 61—In re De Saulles, 167 N.Y.S. 445, 101 Misc. 447.

Okl.—Powers v. Brown, 252 P. 27, 122 Okl. 40.

Tex.—Wootters v. Wynne, Civ.App.,

in cases of receivers and receiverships;¹⁶ and assignments for the benefit of creditors,¹⁷ condemnation proceedings,¹⁸ proceedings for the determination of water rights,¹⁹ proceedings for the enforcement of mortgages and other liens,²⁰ judicial

7 S.W.2d 940—Williams v. Foster, Civ.App., 229 S.W. 896.

Wash.—State v. Superior Court of King County, 235 P. 957, 134 Wash. 400.

Wis.—In re Bagley's Guardianship, 233 N.W. 563, 203 Wis. 89.

15 C.J. p 1137 note 65.

Custody of child

(1) Where a court in granting divorce awarded custody of child to one party and acquired continuing jurisdiction of such custody, another court could not later appoint a third person as guardian of child.

Alaska.—In re Brown's Children, 7 Alaska, 411.

Ohio.—Addams v. State, 135 N.E. 667, 104 Ohio St. 475.

(2) On the other hand, it has been held that an award of custody does not preclude a subsequent special statutory proceeding to appoint a guardian of person or property of child.—Collins v. Superior Court of Monterey County, 199 P. 352, 52 Cal. App. 579.

16. U.S.—M. H. Hussey Lumber Co. v. Puget Sound Saw Mills & Shingle Co., D.C.Wash., 37 F.2d 117.

Ala.—Ex parte Goodwyn, 149 So. 216, 227 Ala. 173—Carter v. Mitchell, 142 So. 514, 225 Ala. 287.

Cal.—Slinack v. Superior Court in and for Tulare County, 13 P.2d 476, 216 Cal. 99.

Ill.—Little v. Chicago Nat. Life Ins. Co., 7 N.E.2d 326, 289 Ill.App. 433 —Chicago City Bank & Trust Co. v. Paschong, 4 N.E.2d 254, 287 Ill.App. 1.

Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County, 23 N.E.2d 425—Hack v. Bollat, 191 N. E. 177, 101 Ind.App. 133.

Mich.—Livingston v. Southern Surety Co. of New York, 247 N.W. 712, 262 Mich. 438—In re Farber, 245 N. W. 792, 260 Mich. 652.

Miss.—Rea v. Stinson, 164 So. 588, 174 Miss. 340—Sullivan v. Calvin, 161 So. 677, 173 Miss. 80.

Mo.—Seibert v. Harden, 8 S.W.2d 905, 219 Mo. 1105—State ex rel. Hampe v. Ittner, 263 S.W. 158, 304 Mo. 135—Reed v. St. Louis & S. F. R. Co., 209 S.W. 892, 277 Mo. 79.

Nev.—E. Reinhart Co. v. Oklahoma Gold Mining Co., 233 P. 842, 48 Nev. 32.

N.M.—Cooper v. Otero, 29 P.2d 341, 38 N.M. 164.

Okl.—Schofield v. Melton, 25 P.2d 279, 168 Okl. 64—Gayer v. Roddie, 7 P.2d 847, 155 Okl. 27.

Tex.—McCurdy v. Gage, 69 S.W.2d 56, 123 Tex. 558, affirming Gage v. McCurdy, Civ.App., 60 S.W.2d 468, and rehearing denied McCurdy v.

Gage, Com.App., 75 S.W.2d 1107—Patten v. Rabinowitz, Civ.App., 114 S.W.2d 310—Simpson v. Amarillo Mut. Benev. Ass'n, Civ.App., 68 S. W.2d 597—Dickerson v. Hopkins, Civ.App., 288 S.W. 1103.

W.Va.—State v. Shepherd, 121 S.E. 98, 95 W.Va. 335.

15 C.J. p 1137 note 66.

Liability on bond

Ga.—McCord v. McPherson, 151 S.E. 53, 40 Ga.App. 614.

Which court first acquired jurisdiction

(1) The first court in which a petition is filed in a suit, the object of which is to control, affect, or direct the disposition of the property involved, acquires jurisdiction thereof, notwithstanding it appoints a receiver after another court appoints one.

U.S.—In re Couch Cotton Mills Co., D.C.Ga., 275 F. 496—Wilmer v. Atlantic & R. Air-Line R. Co., 30 F.Cas.No.17,775, 2 Woods 409.

Ind.—Givan v. Marion Superior Court, Room 2, 191 N.E. 144, 207 Ind. 74.

Kan.—Bridgeport Mach. Co. v. Arthur A. Beard, Inc., 11 P.2d 990, 135 Kan. 711.

Tex.—La Rue Holding Co. v. Essex, Civ.App., 45 S.W.2d 319.

(2) So, the fact that receiver appointed by court first acquiring jurisdiction had not qualified did not authorize another court to appoint receiver of same property.—Richardson v. Beasley, Tex.Civ.App., 50 S.W. 2d 420.

(3) However, where a suit is first filed for another purpose, the court is without jurisdiction to appoint a receiver or enjoin the prosecution of suit subsequently instituted in another court, where the latter court had already appointed a receiver for the property involved.—Gage v. McCurdy, 60 S.W.2d 468, affirmed McCurdy v. Gage, Com.App., 69 S.W.2d 56, 123 Tex. 558, rehearing denied 75 S.W.2d 1107.

Other corporate property

After appointment of receiver, court of concurrent jurisdiction was unauthorized to appoint different receiver for other corporate property, constituting part of coordinated enterprise.—Strother v. McCord, 132 So. 717, 222 Ala. 450.

Compensation

Receiver appointed by court notwithstanding pending receivership action in another court having jurisdiction cannot claim compensation for services from latter court but must make application to court appointing him, even though it has

transferred the res to the other court.—McRae v. Dodt, 72 P.2d 444, 50 Ariz. 336.

17. Ohio.—Madigan v. Dollar Building & Loan Co., 4 N.E.2d 68, 52 Ohio App. 553—Madigan v. Dollar Building & Loan Co., 195 N.E. 250, 49 Ohio App. 69.

15 C.J. p 1137 note 67.

Defect to be raised by answer

While court of common pleas may not assume jurisdiction to foreclose mortgage where probate court already has jurisdiction of assignment for benefit of creditors made by mortgagor, facts establishing jurisdiction of probate court must be raised by answer and not by demurrer to foreclosure petition.—Prudential Ins. Co. of America v. Goodman, 2 N.E.2d 15, 51 Ohio App. 525.

18. Tex.—Bobbitt v. Gordon, Civ. App., 108 S.W.2d 234.

15 C.J. p 1137 note 68.

Not nullified by statute

Act giving circuit court concurrent jurisdiction of private road proceedings did not nullify proceeding pending in county court.—Flowers v. Cherry, 8 S.W.2d 483, 157 Tenn. 359.

19. Colo.—Faden v. Hubbell, 28 P. 2d 477, 93 Colo. 358—Hazard v. Joseph W. Bowles Reservoir Co., 287 P. 854, 87 Colo. 364—Stratton v. Beaver Farmers' Canal & Ditch Co., 257 P. 1077, 82 Colo. 118—Bijou Irr. Co. v. Lower Latham Ditch Co., 184 P. 292, 67 Colo. 356—Farmers' Ditch & Reservoir Co. v. Boyd Lake Reservoir & Irrigation Co., 178 P. 561, 66 Colo. 29—Consolidated Home Supply Ditch, etc., Co. v. New Loveland, etc., Irr., etc., Co., 62 P. 364, 24 Colo. 521.

Mont.—State ex rel. Swanson v. District Court of First Judicial Dist. in and for Lewis and Clark County, 82 P.2d 779, 107 Mont. 203.

N.M.—El Paso & R. I. Ry. Co. v. District Court of Fifth Judicial Dist. within and for Chaves County, 8 P.2d 1064, 36 N.M. 94.

20. Ark.—Wasson v. Dodge, 94 S.W. 2d 720, 192 Ark. 128—Moore v. Price, 70 S.W.2d 563, 189 Ark. 117. Colo.—Colorado Nat. Bank v. McCue, 249 P. 2, 80 Colo. 55.

La.—Reugger v. De Brueys, 83 So. 556, 146 La. 283.

Ohio.—Elmwood Place Loan & Bldg. Co. v. Schenk, 9 Ohio App. 365.

Tex.—Rich v. Walker-Smith Co., Civ. App., 91 S.W.2d 760, error dismissed—Vaughn v. Porter, Civ.App., 44 S.W.2d 1009.

Va.—Adams v. Tri-City Amusement Co., 98 S.E. 647, 124 Va. 473.

sales,²¹ proceedings for partition,²² proceedings for injunctions,²³ proceedings with reference to drainage districts,²⁴ tax proceedings,²⁵ and divorce suits or proceedings.²⁶

Limitations of rule. In order that the rule may

be applicable which prevents interference by another court with the jurisdiction of the court first assuming it, the second action should be between the same parties,²⁷ seeking on the one hand, and opposing on the other, the same remedy,²⁸ and should relate to the same question.²⁹ It is also necessary

W.Va.—McGrew v. Maxwell, 94 S.E. 395, 80 W.Va. 718.
15 C.J. p 1137 note 70.

Restraint threatened sale

Court first acquiring jurisdiction of mortgagors' suit to restrain threatened sale under deed of trust is entitled to retain jurisdiction as against court of another county in which mortgagee subsequently filed suit to foreclose deed of trust.—Dallas Joint Stock Land Bank of Dallas v. Sutherland, Tex.Civ.App., 74 S.W.2d 291.

21. La.—Phillip Werlein, Limited, v. Phillips, App., 157 So. 797.

22. Mo.—In re Dildine's Estate, 239 S.W. 112, 293 Mo. 393, transferred, see App., 225 S.W. 130.

Pa.—In re Doyle's Estate, 139 A. 829, 291 Pa. 263.—Davis v. Detwiller, 26 Pa.Dist. 1110.—In re Weil's Estate, 45 Dauph.Co. 105.

15 C.J. p 1137 note 71.

Determining all controversies

Court first taking jurisdiction of partition suit will determine all controversies between parties as to legal title and possession.—Miller v. Griffin, 128 So. 416, 99 Fla. 976.

23. Conn.—Thompson v. Coe, 115 A. 219, 96 Conn. 644, 17 A.L.R. 1233.
Ill.—Brinkerhoff v. Huntley, 223 Ill. App. 591.

Ind.—Pittsburgh, C. & St. L. Ry. Co. v. Williamson, 123 N.E. 478, 74 Ind.App. 106.

N.Y.—Producers' Royalty Co. v. Ottinger, 222 N.Y.S. 373, 129 Misc. 694.

Ohio.—State v. Joint Board of Com'rs. of Wood and Hancock Counties, 140 N.E. 124, 106 Ohio St. 201.

Tex.—Cunningham v. City of Corpus Christi, Civ.App., 260 S.W. 266.
15 C.J. p 1137 note 72.

24. Ill.—Singamon, etc., Drain. Dist. v. Eminger, 100 N.E. 906, 257 Ill. 281.
15 C.J. p 1137 note 73.

25. Suit to recover for services in collecting delinquent taxes

Tex.—State v. Epperson, 42 S.W.2d 228, 121 Tex. 80.

Proceedings for relief against erroneous taxation

Ky.—McCann v. Louisville, 63 S.W. 446, 23 Ky.L. 558.

26. La.—Hirtzler v. Hirtzler, 100 So. 505, 161 La. 825.

Md.—Woodcock v. Woodcock, 179 A. 826, 169 Md. 40.

Mo.—State ex rel. Davis v. Ellison, 208 S.W. 439, 276 Mo. 642.

Ohio.—Kettenring v. Kettenring, 163 N.E. 43, 29 Ohio App. 62.

Or.—Matlock v. Matlock, 170 P. 528, 87 Or. 307.

15 C.J. p 1138 note 75.

Involving support of children

Colo.—Cartier v. Cartier, 28 P.2d 1010, 94 Colo. 157.

N.Y.—Meyers v. Meyers, 8 N.Y.S.2d 262, 169 Misc. 860.

Custody of children

Mich.—Schell v. Schell, 241 N.W. 223, 257 Mich. 85.

Discontinuance of original suit

Where party, after stipulating discontinuance of divorce suit, appeared and answered in subsequent suit by defendant in another circuit, court in which original suit was filed had no further jurisdiction and could not interfere with the other proceeding.—Baskin v. Dingeman, 209 N.W. 925, 235 Mich. 15.

27. Ark.—Anderson v. Erberich, 112 S.W.2d 634, 195 Ark. 321.

Kan.—City of Hutchinson v. Hutchinson Gas Co., 264 P. 68, 74, 125 Kan. 346, 57 A.L.R. 137, quoting Corpus Juris.

Miss.—First Nat. Bank v. Poston, 97 So. 882, 140 Miss. 64.

Va.—Lee v. Lee, 128 S.E. 524, 142 Va. 244.

15 C.J. p 1138 note 78.

Garnishment

Pendency of garnishment proceedings against insurer did not preclude action on policy by insured, at least where court in garnishment proceeding gave permission to sue on policy.—Fidelity Phenix Fire Ins. Co. v. Ford & Cantrell, 46 S.W.2d 64, 164 Tenn. 107, rehearing denied 47 S.W. 2d 558, 164 Tenn. 107.

28. Ala.—State v. Worthington, 149 So. 709, 227 Ala. 204, granting certiorari and reversing 149 So. 707, 25 Ala.App. 511.

Ark.—Davis v. Lawhon, 52 S.W.2d 887, 186 Ark. 51.

Kan.—City of Hutchinson v. Hutchinson Gas Co., 264 P. 68, 74, 125 Kan. 346, 57 A.L.R. 137, quoting Corpus Juris.

La.—Tennett v. Caffery, 129 So. 128, 170 La. 680.

N.J.—Barton v. Silver, 152 A. 382, 107 N.J.Eq. 314.—In re Cooke's Estate, 125 A. 320, 96 N.J.Eq. 587, affirmed 138 A. 919, 101 N.J.Law 292.

Tenn.—International Baking Co. v. Polk, 295 S.W. 472, 155 Tenn. 461.

Tex.—Oliver Farm Equipment Sales

Co. v. Gregory, Civ.App., 31 S.W.2d 538.

15 C.J. p 1138 note 79.

Subsequent suit held to relate to different remedy

(1) Pendency of father's petition in divorce court for modification of allowance for children's support, did not bar proceeding in juvenile court to punish willful failure to support destitute children.—State v. Worthington, 149 So. 709, 227 Ala. 204, granting certiorari and reversing 149 So. 707, 25 Ala.App. 511.

(2) Heirs who received undivided portions of realty by agreement, could sue in district court for partition, although administration was pending in probate court.—McCanless v. Clough, Tex.Civ.App., 298 S.W. 643.

Aid to prior suit

Court may take jurisdiction to grant relief in aid of prior suit filed in another court which would in no way interfere with the jurisdiction of such other court to determine the issues before it.—Board of Prison Com'rs v. Binford, Tex.Civ.App., 259 S.W. 169.

Alternative remedies

Under Illinois law, while claimant against estate may present and prosecute his demand in probate court, he may also resort to court of equity to establish claim, or present claim to probate court and proceed in equity in circuit court for specific performance of contract out of which claim arises, or present mortgage note to probate court and sue in equity for foreclosure so as to share in assets of estate for deficiency in security.—Pufahl v. Parks' Estate, 57 S.Ct. 151, 299 U.S. 217, 81 L.Ed. 133, affirming In re Park's Estate, 283 Ill.App. 95, certiorari granted Pupahl v. Parks' Estate, 56 S.Ct. 749, 298 U.S. 649, 80 L.Ed. 1378.

29. Colo.—Faden v. Hubbell, 28 P.2d 247, 93 Colo. 358.—Colorado Nat. Bank v. McCue, 249 P. 3, 80 Colo. 55.

Ill.—Brinkerhoff v. Huntley, 223 Ill. App. 591.

Kan.—City of Hutchinson v. Hutchinson Gas Co., 264 P. 68, 74, 125 Kan. 346, 57 A.L.R. 137, quoting Corpus Juris.

Ky.—Preston v. Second Nat. Bank, 63 S.W.2d 774, 250 Ky. 673.

Mich.—Ex parte Adams, 183 N.W. 241, 214 Mich. 199.

N.J.—Barton v. Silver, 152 A. 382, 107 N.J.Eq. 314.

that the court first obtaining jurisdiction should be in a position to determine the whole controversy and to settle all the rights of the parties; and if by

reason of the limited jurisdiction or mode of proceedings of that court these results cannot be accomplished, another court may take jurisdiction.³⁰

N.Y.—In re Oster's Estate, 8 N.Y.S. 2d 249.—In re Webb's Estate, 172 N.Y.S. 809, 105 Misc. 287.
S.C.—Phillips v. Hill, 107 S.E. 909, 116 S.C. 218.
Tex.—Eaten v. Campbell, Civ.App., 62 S.W.2d 1010.
Wis.—Stickles v. Reichardt, 234 N.W. 728, 203 Wis. 579.
15 C.J. p 1138 note 80.

Test is whether the second suit is based on a different cause of action and seeks relief different from that sought in first suit.—Gilley v. Jarvis, 109 A. 41, 94 Vt. 135.

Amendment of pleadings

If suit subsequently filed relates to different question, court may retain jurisdiction notwithstanding amendment of pleadings in first action to embrace such question where such amendment did not occur until after institution of second suit.—National Debenture Corporation v. Adams, Tex.Civ.App., 115 S.W.2d 757.—Oliver Farm Equipment Sales Co. v. Gregory, Tex.Civ.App., 31 S.W.2d 838.

Proceedings held to raise independent question cognizable in court other than one first acquiring jurisdiction:

(1) Generally.—Eastern Maine General Hospital v. Harrison, 193 A. 246, 135 Me. 190.

(2) Suits relating to enforcement of liens and mortgages.
Miss.—First Nat. Bank v. Poston, 97 So. 852, 140 Miss. 64.
Tex.—Fulton Nat. Truck Co. v. Tipps, Civ.App., 245 S.W. 732.

(3) Suits involving determination of water rights.—Bijou Irr. Dist. v. Weldon Valley Ditch Co., 184 P. 382, 67 Colo. 336.

(4) Condemnation proceedings.—Houston North Shore Ry. Co. v. Tyrrell, 98 S.W.2d 786, 128 Tex. 248, 108 A.L.R. 1508.

(5) Partition proceedings.—Eurengy v. Equitable Realty Corporation, 107 S.W.2d 68, 341 Mo. 341.

(6) Interstate commerce appeals or enforcement proceedings.—People ex rel. Illinois Commerce Commission v. Dohrn Transfer Co., 2 N.E.2d 89, 363 Ill. 232.

Probate proceedings

(1) Suits held not to involve question within scope of proceeding pending in probate court.

Ark.—Phillips v. Phillips, 220 S.W. 52, 143 Ark. 240.

Cal.—Chiapella v. County Nat. Bank & Trust Co. of Santa Barbara, 19 P.2d 983, 217 Cal. 503.

Kan.—Babst v. Babst, 288 P. 593, 130 Kan. 826.

Mich.—Walden v. Crego's Estate, 285 N.W. 457, 288 Mich. 564.

Minn.—Anderson v. Anderson, 266 N.W. 841, 197 Minn. 252.

Mo.—Harrison v. Slaton, 49 S.W.2d 31.

Neb.—Parker v. Luehrmann, 252 N.W. 402, 126 Neb. 1.

N.J.—In re Kellner's Estate, 165 A. 585, 11 N.J.Misc. 201.

Okl.—March v. Peter, 64 P.2d 912, 179 Okl. 207.—Batchelder v. Kneettle, 58 P.2d 873, 177 Okl. 327.

Pa.—Schwartz v. Schwartz, 175 A. 386, 316 Pa. 318, followed in In re Roseberry's Estate, 176 A. 216, 317 Pa. 45.

Tenn.—Hull v. Vaughn, 107 S.W.2d 219, 171 Tenn. 642.

Tex.—Johnson v. Snaman, Civ.App., 76 S.W.2d 824, error refused.

Vt.—Kreichman v. Webster, 2 A.2d 199, 110 Vt. 105.

(2) Probate of will in one court notwithstanding pending proceeding for issuance of letters of administration in another court is not precluded by statutory provision that where jurisdiction is once exercised in matter, "further proceedings" must be had in same court and another court cannot act in the "same matter," since probate of will is neither the "same matter" or a "further proceeding."—In re Mills' Estate, 11 N.Y.S. 2d 929, 171 Misc. 42.

(3) However, other cases have in similar circumstances held that the second court could not acquire jurisdiction.—In re Feinberg's Estate, 280 N.Y.S. 540, 155 Misc. 844.

Receivership proceedings

(1) Issue whether suit to cancel mineral lease involved same subject matter as subsequent suit in another court to adjudicate title to lease and have receiver appointed should be tested out on trial of second suit, and judgment therein is conclusive on appeal in first suit.—McCurdy v. Gage, 69 S.W.2d 56, 123 Tex. 558, affirming Gage v. McCurdy, Civ.App., 60 S.W. 2d 468, and rehearing denied McCurdy v. Gage, Com.App., 75 S.W.2d 1107.

(2) Suit held not to interfere with prior receivership proceeding.—Michigan Surety Co. v. Muskegon County, 253 N.W. 283, 266 Mich. 244.

(3) Appointment of receiver for bank and judicial determination of deficiency of assets by receivership court does not vest such court with exclusive jurisdiction to try suit to determine stockholders' liability.—Parker v. Luehrmann, 252 N.W. 402, 126 Neb. 1.

(4) Rule that creditor, and even a lienholder, must enforce his rights

in court appointing receiver, does not apply where judgment charging a specific lien has been obtained.—State ex rel. Dean Automatic Telegraph Co. v. Southern, 267 S.W. 422, 218 Mo. App. 266.

(5) Under statute so providing, receiver may sue or be sued in any court of state having jurisdiction of cause, notwithstanding pending receivership proceeding, if suit does not interfere with possession or disposition of property in receiver's hands.—Prince v. Miller, 69 S.W.2d 52, 123 Tex. 118.—Joiner v. Currin, Tex.Civ.App., 118 S.W.2d 652.

Remitting parties to other court

Where court which acquired prior jurisdiction refused to adjudicate certain question and remitted parties to another court to litigate it, the fact that first court held case in abeyance until question was decided did not divest second court of jurisdiction to determine matter submitted to it.—Arnold v. Oliver, 237 S.W. 425, 153 Ark. 47.

Same subject matter held involved

(1) Generally.—Barrier v. Lowery, 13 S.W.2d 688, 118 Tex. 227, denying rehearing 11 S.W.2d 298, 118 Tex. 227.

(2) Where suit to cancel indemnity bonds would relieve sureties from liability thereunder, subsequent suit in another court seeking recovery on bond was precluded as involving identical question, although such later suit was also against sureties who were not included in first suit.—Duncan v. National Union Fire Ins. Co., Tex.Civ.App., 4 S.W.2d 278.

30. Ill.—Brinkerhoff v. Huntley, 223 Ill.App. 591.

Kan.—City of Hutchinson v. Hutchinson Gas Co., 264 P. 68, 74, 125 Kan. 346, 57 A.L.R. 137, quoting *Corpus Juris*.

Ky.—Cochran v. Simmons, 197 S.W. 930, 177 Ky. 562, rehearing denied 199 S.W. 66, 178 Ky. 402.

Md.—Woodcock v. Woodcock, 179 A. 826, 169 Md. 40.

N.Y.—In re Milton's Estate, 265 N.Y.S. 38, 147 Misc. 884.

Ohio.—Weis v. Mann, 26 Ohio N.P. N.S., 552.

Va.—Lee v. Lee, 128 S.E. 524, 142 Va. 244.

15 C.J. p 1138 note 82.

Necessary parties

(1) "In order for the court where the suit is first filed to have prior jurisdiction over the court where it is subsequently filed, the first court must have all necessary parties before it, or it must have power to bring them before it."—V. D. Ander-

So, assumption of jurisdiction by another court is permissible notwithstanding that a prior proceeding has been instituted in the probate court where the latter court lacks jurisdiction in the matter or where its jurisdiction has terminated or is inadequate to afford the necessary relief.³¹ It has also

son Co. v. Young, 101 S.W.2d 798, 800, 128 Tex. 631.

(2) So, where the proceeding prior in time is defective in that a necessary party has not been brought in, such court retains jurisdiction when the defect is cured by amendment adding the party, even though suit has also been brought in another court prior to such amendment.—In re Doyle's Estate, 139 A. 829, 291 Pa. 263.

(3) However, where the amendment adding a party in effect sets up a new cause of action, suit filed in another court prior to such amendment confers on it exclusive jurisdiction of matter involved.—National Debenture Corporation v. Adams, Tex.Civ.App., 115 S.W.2d 757.

Court without jurisdiction

An action or proceeding commenced in a court which is without jurisdiction does not offer any obstacle to the commencement of a similar action or proceeding in a court which may properly take jurisdiction thereof.—Texas Gas Utilities Co. v. City of Uvalde, Tex.Civ.App., 77 S.W.2d 750—15 C.J. p 1138 note 82 [b].

Divorce proceedings

(1) After denial of alimony pendente lite because of agreement waiving right thereto, another judge of same district had jurisdiction of action to cancel agreement.—Metcalfe v. District Court of Second Judicial Dist. in and for Washoe County, 274 P. 5, 51 Nev. 253.

(2) Court granting divorce had exclusive jurisdiction to make orders respecting custody of children, notwithstanding decree of court of another county in prior action denying divorce, but providing for custody of children.—Jones v. Jones, 58 P.2d 330, 177 Okl. 181.

Receivership proceedings

(1) Only when a court acquires jurisdiction of a cause and thus appoints a receiver may another court of coordinate jurisdiction not interfere or divest the receiver of such cause.—Joiner v. Currin, Tex.Civ.App., 118 S.W.2d 652.

(2) So, where statute provides that in certain cases one court shall have exclusive jurisdiction to appoint a receiver, such court acquires and retains jurisdiction notwithstanding prior appointment of receiver by another court.—Walker v. McMillen, 61 S.W.2d 455, 187 Ark. 536.

(3) Fact that mortgaged premises are already in constructive possession of receiver appointed in proceedings for liquidation of insolvent bank does not preclude appointment of re-

ceiver of rents and profits in mortgage foreclosure action, since court in former action had no power to grant mortgagee complete relief.—Prudential Ins. Co. of America of Newark, N. J. v. Farm Inv. Co., 243 N.W. 812, 123 Neb. 578, vacating Prudential Ins. Co. of America v. Farm Inv. Co., 240 N.W. 766, 122 Neb. 561, and overruling Wells v. Farmers' State Bank of Overton, 237 N.W. 402, 121 Neb. 462, followed in Wells v. Farmers' State Bank of Overton, 237 N.W. 403, 121 Neb. 466.

Proceedings for guardianship or administration of incompetent's estate

(1) Text rule generally applies.—Texas & N. O. R. Co. v. Jones, Tex.Civ.App., 103 S.W.2d 1043, error refused.—Inman v. Texas Land & Mortgage Co., Tex.Civ.App., 78 S.W.2d 1032.

(2) Where a county court judicially determines jurisdictional facts necessary to authorize it to appoint a guardian of the person and estate of a minor, jurisdiction acquired is exclusive, notwithstanding the prior commencement of proceedings for appointment of a guardian in another county court.—Micco v. Huser, 91 P. 2d 1069, 185 Okl. 394—Jackson v. Haney, 25 P.2d 771, 166 Okl. 13.

Creditor's suit

(1) The institution of a creditor's suit does not give the court in which such suit is instituted exclusive jurisdiction of the entire matter so as to preclude suits by other creditors in another court; but if the court in which one such suit is pending orders a reference convening the creditors, all proceedings in the other suits must be stayed.—Craig v. Hoge, 28 S.E. 317, 95 Va. 275—15 C.J. p 1139 notes 83, 85.

(2) Nor is the court which first assumes jurisdiction, and under whose mesne or final process the first actual seizure of the land is made, entitled to exclusive control thereof until sale and distribution of the proceeds, but another court may assume jurisdiction of proceedings for sale under another claim.—Miller v. Lash, 4 Pa.Super. 292.

(3) A bill in the nature of a creditors' bill to reach the interests of the heirs of decedent for the payment of sums disbursed and expenses incurred by complainant on behalf of the heirs in connection with litigation over the estate is not objectionable, as seeking to overthrow the orders of distribution made by a court having jurisdiction of the estate, where complainant must look to the orders as the basis on which

his bill must be maintained, and equity has jurisdiction of the controversy.—Coram v. Davis, 95 N.E. 238, 209 Mass. 219.

Absence of conflict of jurisdiction

While under statute, a court having acquired jurisdiction may be subsequently divested thereof when another court has exercised its superior jurisdiction, the jurisdiction of the inferior court may continue where no conflict arises.

Mass.—Pease v. Pease, 130 N.E. 96, 237 Mass. 563.

N.Y.—Rosenberg v. Rosenberg, 272 N.Y.S. 789, 241 App.Div. 411—Magner v. Smyth, 260 N.Y.S. 665, 144 Misc. 840.

31. Ark.—Smith v. Walker, 58 S.W. 21 946, 187 Ark. 161—Adams v. Shell, 33 S.W.2d 1107, 182 Ark. 959.

Cal.—Hollyfield v. Geibel, 66 P.2d 755, 20 Cal.App.2d 142.

D.C.—Shields v. Shields, 101 F.2d 255, 69 App.D.C. 331.

Kan.—Sparks v. Nech, 26 P.2d 586, 138 Kan. 313.

Mass.—Derby v. Derby, 142 N.E. 786, 218 Mass. 310.

Minn.—Marquette Nat. Bank of Minneapolis v. Mullin, 287 N.W. 233—Jannetta v. Jannetta, 285 N.W. 619—State ex rel. Larson v. Probate Court of Hennepin County, 283 N.W. 545, 204 Minn. 5—Fulton v. Ok's, 232 N.W. 570, 195 Minn. 247—In re Lee, 213 N.W. 736, 171 Minn. 182—Meiby v. Nelson, 211 N.W. 465, 169 Minn. 273.

Miss.—Williams v. Hodge, 141 So. 905, 163 Miss. 809.

Mo.—Wilson v. Hoover, 119 S.W.2d 703, 342 Mo. 1182.

Neb.—Lincoln Joint Stock Land Bank v. Fuller, 273 N.W. 14, 132 Neb. 677.

N.J.—Browne v. Bayonne Trust Co., 193 A. 179, 118 N.J.Law 396, affirmed 196 A. 741, 119 N.J.Law 349.

N.Y.—Doyle v. Gleason, 278 N.Y.S. 802, 244 App.Div. 52, affirming 274 N.Y.S. 183, 152 Misc. 641—Colson v. Pelgram, 256 N.Y.S. 640, 235 App.Div. 137, reversed on other grounds 182 N.E. 19, 259 N.Y. 370—In re Janowitz' Will, 300 N.Y.S. 38, 164 Misc. 936.

N.C.—Guilford County v. Estates Administration, 197 S.E. 535, 213 N.C. 763.

Ohio.—State ex rel. Black v. White, 5 N.E.2d 163, 132 Ohio St. 58.

Okl.—March v. Peter, 64 P.2d 912, 179 Okl. 207.

Pa.—In re Conner's Estate, 153 A. 730, 302 Pa. 534—In re Gerlach's Estate, 193 A. 467, 127 Pa.Super. 293—First Nat. Bank, to Use of

been held that until the court in which process is first served assumes full jurisdiction, a court of concurrent jurisdiction in which the second action is brought has jurisdiction to proceed with the trial.³² The rule that the court first acquiring jurisdiction must decide the case is not applicable

Wilson, v. Getty, 179 A. 764, 118 Pa.Super. 326.
S.C.—Appeal of Lucas Bank, 119 S.E. 18, 125 S.C. 446.
Tenn.—Hyder v. Hyder, 66 S.W.2d 235, 16 Tenn.App. 64.
Tex.—Anderson v. Armstrong, 120 S.W.2d 414, 132 Tex. 122, reversing Armstrong v. Anderson, Civ.App., 91 S.W.2d 775—First State Bank of Bellevue v. Gaines, 50 S.W.2d 774, 121 Tex. 559, affirming Gaines v. First State Bank of Bellevue, Civ.App., 23 S.W.2d 297—Brooks v. O'Connor, 39 S.W.2d 14, 120 Tex. 126, reversing, Civ.App., 15 S.W.2d 152—Laubhan v. Peoria Life Ins. Co., Com.App., 102 S.W.2d 399, answers to certified questions conformed to, Civ.App., 105 S.W.2d 286—Cook v. Baker, Com.App., 45 S.W.2d 161, reversing, Civ.App., 27 S.W.2d 893—Helge v. American Central Life Ins. Co., Civ.App., 124 S.W.2d 191, error dismissed, judgment correct—Winston v. Griffith, Civ.App., 108 S.W.2d 745, affirmed, Com.App., 128 S.W.2d 25—Dempsey v. Gibson, Civ.App., 105 S.W.2d 423, error dismissed—Williamson v. Bowman, Civ.App., 98 S.W.2d 449, error refused—Hake v. Dilworth, Civ.App., 96 S.W.2d 121, error dismissed—Lines v. Robinson, Civ.App., 91 S.W.2d 1108—Feder v. Texas Bitulithic Co., Civ. App., 82 S.W.2d 724—Johnson v. Snaman, Civ.App., 76 S.W.2d 824, error refused—Barfield v. Miller, Civ.App., 70 S.W.2d 632, error dismissed—Jones v. Hunt, Civ.App., 60 S.W.2d 1106, error refused—Ford v. Wheat, Civ.App., 59 S.W.2d 469—Attaway v. Teague, Civ. App., 59 S.W.2d 269—Rhoades v. Gay, Civ.App., 53 S.W.2d 153—Ramsey v. Abilene Building & Loan Ass'n, Civ.App., 57 S.W.2d 877—Pavelka v. Overton, Civ. App., 47 S.W.2d 869, error refused—Cox v. Gaines, Civ.App., 45 S.W.2d 444, error refused—Wyss v. Bookman, Civ.App., 212 S.W. 297, reversed on other grounds, Com. App., 235 S.W. 567.
Vt.—Kreichman v. Webster, 2 A.2d 199, 110 Vt. 105.
Wash.—Lew You Ying v. Kay, 24 P.2d 596, 174 Wash. 83.
Wis.—Mitchell v. Mitchell, 283 N.W. 448—City of Milwaukee v. Drew, 265 N.W. 682, 220 Wis. 511, 104 A.L.R. 1387—Grover v. Grover, 222 N.W. 228, 197 Wis. 347—Giblin v. Giblin, 182 N.W. 357, 173 Wis. 632.
15 C.J. p 1138 note 82.
No pending proceeding
Where petition for appointment of

administrator pendente lite was nullity because will had not been lodged for probate, there was no proceeding pending which would preclude another court of probate jurisdiction from receiving the will for probate.—Morrissey's Will, 107 A. 70, 91 N. J.Eq. 289.

Particular matters

(1) Since in probate proceeding to establish papers as will, construction of will is not question before court, circuit court has jurisdiction of later suit involving construction of will.—Adams v. Cowan, 168 S.E. 750, 160 Va. 1.

(2) Settlement of administration in chancery court did not prevent probate court on discovery of unadministered assets from appointing an administrator de bonis non.—Peters Mineral Land Co. v. Hooper, 94 So. 606, 208 Ala. 324.

(3) Pending probate proceeding for appointment of general or special administrator does not preclude application in court of another county where property is situated to appoint special administrator to preserve such property until general administrator is appointed.—Miller v. Superior Court of Yolo County, 199 P. 805, 186 Cal. 453.

(4) However, the special administrator appointed in court first acquiring jurisdiction may be made to account to the court subsequently appointing special general administrator.—Phillips v. Superior Court of City and County of San Francisco, 216 P. 32, 191 Cal. 265.

(5) General principle that court first taking jurisdiction will retain it is inapplicable to proceeding to restrain applications for unnecessary administration pending in another county.—Chase v. Bartlett, 166 S.E. 832, 176 Ga. 40.

Court of equity may take jurisdiction

(1) Where relief sought by a party requires exercise of equitable powers, not within the jurisdiction of the probate court.

Ark.—Sewell v. Benson, 128 S.W.2d 683—Hancock v. Hancock, 125 S.W.2d 104, 197 Ark. 853.

Cal.—Barber v. Superior Court of California in and for San Diego County, 184 P. 952, 43 Cal.App. 221—Joost v. Castet, 91 P.2d 172, 33 Cal.App.2d 138.

Fla.—Lykes Bros. Florida Co. v. King, 169 So. 595, 125 Fla. 101.

Ga.—Shingler v. Shingler, 192 S.E. 824, 184 Ga. 671.

Kan.—Dent v. Morton, 79 P.2d 875, 148 Kan. 97—Bojczuk v. Skradski, 19 P.2d 468, 137 Kan. 4.

Md.—Noel v. Noel, 195 A. 315, 172 Md. 152—Willinger v. German Bank of Baltimore City, 103 A. 433, 132 Md. 237.

Mich.—Johnson v. Douglas, 274 N.W. 780, 281 Mich. 247—Lane v. Wood, 242 N.W. 909, 259 Mich. 266.

Minn.—Schaefer v. Thoeny, 273 N.W. 190, 199 Minn. 610.

Mo.—Hax v. O'Donnell, App., 117 S.W.2d 667.

N.J.—Freeth v. Rule, 176 A. 578, 117 N.J.Eq. 490, affirmed 178 A. 770, 118 N.J.Eq. 285—Ely v. Crane, 37 N.J.Eq. 157, reversed on other grounds 37 N.J.Eq. 564.

Ohio.—State ex rel. Black v. White, 5 N.E.2d 163, 132 Ohio St. 58.

S.D.—Song v. Song, 268 N.W. 905, 64 S.D. 555.

Tex.—Laubhan v. Peoria Life Ins. Co., Civ.App., 105 S.W.2d 286, conforming to answers to certified questions 102 S.W.2d 399, 129 Tex. 225.

Vt.—Vermont-People's Nat. Bank v. Robbins' Estate, 166 A. 6, 105 Vt. 283.

W.Va.—Travis v. Travis, 182 S.E. 285, 116 W.Va. 541.

15 C.J. p 1138 note 82 [c].

(2) To appoint a trustee to administer certain provisions of the will of deceased, without infringing on the authority of the administrator appointed by the probate court.—Sharp v. State, 109 A. 454, 135 Md. 551.

(3) Fact of existence of will and qualification of executor named therein is not sufficient to show pending probate proceeding for settlement of accounts, excluding assumption of jurisdiction of a court of equity for such settlement.—Robinson v. Georgia Sav. Bank & Trust Co., 196 S.E. 395, 185 Ga. 688—Terry v. Chandler, 158 S.E. 572, 172 Ga. 715—Calbeck v. Herrington, 152 S.E. 53, 169 Ga. 869—Clements v. Fletcher, 114 S.E. 637, 154 Ga. 386.

Return of case to probate court

While a court may assume jurisdiction to settle matters over which the probate court lacks jurisdiction, it must afterward return the case to the probate court for adjudication of other matters within the latter court's jurisdiction.—Murphey v. Murphey, Tex.Civ.App., 131 S.W.2d 158.

32. Cal.—De Brincat v. Mogan, App., 36 P.2d 245, followed in De Brincat v. Swart, 36 P.2d 247.

where both actions are in the same court which has general jurisdiction of the entire litigation.³³

*The mere fact that another court might have jurisdiction does not, where such jurisdiction has not been invoked, warrant a court having concurrent jurisdiction in a refusal to entertain an action or proceeding.*³⁴

§ 493. Assumption and Exercise of Conflict-jurisdiction in General

Courts seek to avoid conflicts in matters of concurrent jurisdiction; and a litigant may not pursue the same remedy in two courts at the same time.

The policy of courts in matters of concurrent jurisdiction is to avoid a conflict of jurisdiction.³⁵ So, while courts have been said to be liberal in permitting a party commencing an action to select his forum,³⁶ a litigant may not seek the same remedy on the same state of facts in two different courts at the same time and pursue such remedy in both courts concurrently to a conclusion.³⁷

Rulings on evidence. A court has no power to make rulings on evidence to be offered at a trial to be held in a court of coördinate jurisdiction.³⁸

§ 494. Prisoners under Arrest, Commitment, or Sentence

Questions as to the retention of jurisdiction of a

person accused of crime by the court first acquiring jurisdiction as well as of the interference by one court with the commitment or sentence of another are discussed in the C.J.S. title Criminal Law § 111, also 16 C.J. p 148 notes 25-32, and 15 C.J. p 1139 note 93—p 1140 note 97. The liability to arrest on a criminal charge of one in custody on another criminal charge is considered in Arrest § 3 notes 61, 62; the liability to arrest on a civil charge of one convicted of crime in Arrest § 28 b; and of one under arrest in another action in Arrest § 28 a.

§ 495. Property in Custodia Legis

A court cannot interfere with property of which another court of concurrent jurisdiction has possession, whether actual or constructive; but jurisdiction of controversies concerning such property may be exercised so far as can be done without disturbing the latter court's possession.

A court which has in its possession, control, or equivalent dominion, property or funds involved in litigation may exercise exclusive jurisdiction over such property or funds to determine the rights therein, such as questions respecting the title, possession, control, management, and disposition thereof; and another court of concurrent or coördinate jurisdiction cannot interfere with such possession or control.³⁹ Accordingly one court should ordi-

33. Mass.—Baker v. Langley, 141 N. E. 671, 247 Mass. 127.

Different departments of one court in effect constitute one court and fact that one department assumes jurisdiction in matter which might more properly be heard in pending action in another department constitutes only an irregularity not affecting jurisdiction.—In re Johnson's Estate, 281 P. 435, 101 Cal.App. 110—15 C.J. p 1134 note 58 [f].

34. N.Y.—Ludwig v. Bungart, 63 N.Y.S. 91, 48 App.Div. 613, reversing 56 N.Y.S. 51, 26 Misc. 247.

Wis.—State v. Kellogg, 208 N.W. 246, 189 Wis. 638.

35. Ala.—Alabama Chemical Co. v. Hall, 101 So. 456, 212 Ala. 8.

36. Iowa.—In re Watters' Estate, 208 N.W. 281, 201 Iowa 884.

37. Cal.—Reilly v. Police Court, City of Oakland, Alameda County, Dept. 1, 238 P. 860, 194 Cal. 375.

Administration of estate cannot be split up and concurrent proceedings therein had in two courts at same time.—Young v. Wall, 110 So. 135, 215 Ala. 131.

38. N.Y.—People ex rel. Todd v. Brennan, 4 N.Y.S.2d 743, 254 App. Div. 866, motion granted 6 N.Y.S. 2d 348, 254 App.Div. 884.

39. U.S.—Isaacs v. Hobbs Tie & Timber Co., 51 S.Ct. 270, 282 U.S. 734, 75 L.Ed. 645—Murphy v. John Hofman Co., N.Y., 29 S.Ct. 154, 211 U.S. 562, 53 L.Ed. 327—Park v. Stryker, C.C.A.Neb., 6 F.2d 457. Ala.—Strother v. McCord, 132 So. 717, 222 Ala. 450.

Cal.—Dickerman v. Ahern, 269 P. 180, 93 Cal.App. 166.

Fla.—Adams v. Burns, 172 So. 75, 126 Fla. 685—Miller v. Griffin, 123 So. 416, 99 Fla. 976.

Ind.—Stair v. Meissel, 193 N.E. 398, 99 Ind.App. 495.

Ky.—Wilson v. Gibbs, 280 S.W. 1109, 213 Ky. 268.

La.—Board of Missions of Methodist Episcopal Church South v. C. D. Craighead Co., 58 So. 888, 130 La. 1076.

Mo.—In re Janisch's Estate, App., 117 S.W.2d 358.

N.J.—Koplowitz v. Trugman, 146 A. 663, 105 N.J.Eq. 38.

Ohio.—State v. Allread, 160 N.E. 26, 117 Ohio St. 584—Koelble v. Runyan, 158 N.E. 279, 25 Ohio App. 426.

Okl.—State v. Gassaway, 285 P. 978, 142 Okl. 140—State v. District Court of Hughes County, 235 P. 234, 108 Okl. 32—State v. District Court of Tulsa County, 198 P. 480, 82 Okl. 54.

Pa.—Mausser v. Mauser, 192 A. 137, 326 Pa. 257.

Tex.—Durham v. Scrivener, Com. App., 270 S.W. 161, affirming, Civ. App., 259 S.W. 606—Stewart v. Howell Co., Civ.App., 264 S.W. 208 —Mudge v. Hughes, Civ.App., 212 S.W. 819.

15 C.J. p 1140 notes 98, 99.

"The reason of the rule, as stated by the courts, is that, when a court acquires jurisdiction of goods, chattels, or money in one case, the orderly process of the court requires that it shall be permitted to determine the rights of the parties in that case, without the interference or interruption of a conflicting jurisdiction or of a separate and distinct action or proceeding."—Outerbridge Horsey Co. v. Martin, 120 A. 235, 236, 142 Md. 52.

Decedent's property; specific performance

(1) Where a proceeding specifically to enforce a contract made with a decedent was begun in the probate court and transferred to the circuit court, the probate court thereafter had no right to order the administrator of the estate to take possession of and rent the real estate involved in such suit.—State ex rel.

narly not interfere with property or funds of | the latter's officer⁴⁰ or representative,⁴¹ such as a
which another court has custody or control through | receiver,⁴² or such as an executor or administra-

Mueller v. Wurdeman, Mo., 232 S.W. 1002.

(2) Probate court held to have no jurisdiction to order sale of decedent's property during pendency of appeal from judgment of circuit court in suit for specific performance of deceased's contract to transfer one-half of his property to plaintiff.—In re Janisch's Estate, Mo.App., 117 S.W.2d 358.

Disposition of bank deposit pending divorce action

Where a court in which a divorce action was pending restrained the disposition of a bank deposit held in the names of the husband and wife, a court of concurrent jurisdiction could not impound the fund in a garnishment proceeding.—Holm v. Pratt, 176 P. 266, 52 Utah 593.

Bank in liquidation

The property of an insolvent bank in process of liquidation by the banking commissioner is in custodia legis, and the court of the county where the bank is located has exclusive jurisdiction and custody of the subject matter of the liquidation.—Ogden v. Edwards, Tex.Civ.App., 108 S.W.2d 675.

40. U.S.—Isaacs v. Hobbs Tie & Timber Co., 51 S.Ct. 270, 282 U.S. 734, 75 L.Ed. 645—Park v. Stryker, C.C.A.Neb., 6 F.2d 457.

Fla.—Adams v. Burns, 172 So. 75, 126 Fla. 685.

Mich.—Michigan Trust Co. v. National Bank of Ionia, 216 N.W. 472, 241 Mich. 146.

15 C.J. p 1140 note 98 [c].

Execution against property in custody of law see the C.J.S. title Executions § 55, also 23 C.J. p 357 note 90—p 360 note 22.

Fund held by a clerk of court in his official capacity is in custodia legis, and cannot be controlled by another court.

Ohio.—Culp v. Hecht, 183 N.E. 437, 43 Ohio App. 430.

Pa.—Commonwealth v. Sitler, 104 A. 604, 261 Pa. 261.

41. Ind.—State ex rel. Tuell v. Shelby Circuit Court of Shelby County, 23 N.E.2d 425.

42. U.S.—Massachusetts Mut. L. Ins. Co. v. Chicago & A. R. Co., C. Cill., 13 F. 857, affirmed 3 S.Ct. 594, 109 U.S. 702, 27 L.Ed. 1081.

Ala.—Strother v. McCord, 132 So. 717, 222 Ala. 450.

Ill.—Little v. Chicago Nat. Life Ins. Co., 7 N.E.2d 326, 289 Ill.App. 433.

Iowa.—Bates v. Evans, 284 N.W. 385.

Kan.—Bridgeport Mach. Co. v. Arthur A. Beard, Inc., 11 P.2d 990, 135 Kan. 711.

La.—Board of Missions of Methodist

Episcopal Church South v. C. D. Craighead Co., 58 So. 888, 130 La. 1076.

Mo.—Miller v. Continental Assur. Co. of America, App., 196 S.W. 448, followed in Miller v. International Fire Assur. Co. of America, App., 196 S.W. 452.

Neb.—Prudential Ins. Co. of America of Newark, N. J., v. Farm Inv. Co., 243 N.W. 812, 123 Neb. 578, vacating Prudential Ins. Co. of America v. Farm Inv. Co., 240 N.W. 766, 122 Neb. 561.

Okl.—State v. Halley, 12 P.2d 523, 159 Okl. 14—Gayer v. Roddie, 7 P. 2d 847, 155 Okl. 27.

S.C.—Ex parte International Harvester Co. of America, 134 S.E. 530, 137 S.C. 124.

Tex.—Lauraine v. Ashe, 191 S.W. 563, 109 Tex. 69, motion granted 196 S.W. 501, 109 Tex. 69—Dillingham v. Anthony, 11 S.W. 139, 73 Tex. 47, 3 L.R.A. 634, 15 Am.S.R. 753—Fleider v. Parker, Civ.App., 119 S.W.2d 1089—Ogden v. Edwards, Civ.App., 108 S.W.2d 675—Scarborough v. Connell, Civ.App., 84 S.W.2d 734—Glenn v. Connell, Civ.App., 74 S.W.2d 451, followed in 74 S.W.2d 455—Wright v. Lynskey, Civ.App., 285 S.W. 655—Dilworth & Marshall v. Kirby, Civ.App., 253 S.W. 860, modified on other grounds Kirby v. Dilworth & Marshall, Com.App., 260 S.W. 152.

Wis.—Alexander v. Wald, 286 N.W. 6, 15 C.J. p 1140 note 1.

Property in custody of receiver as in custody of court see the C.J.S. title Receivers § 104, also 53 C.J. p 95 note 72—p 96 note 77.

"The court first exercising jurisdiction by appointing a receiver has the untrammelled right to control and administer the property or fund derived from it to the end, and, if creditors or others claim liens or preferences, they should apply to the court appointing the receiver for the protection of their rights."—Fleeger v. Swift, 251 P. 187, 188, 122 Kan. 6.

Jurisdiction prior to actual appointment

Filing of bill for receiver, judge's sanction of it, and service in accordance with his order, gave court exclusive jurisdiction of property involved, even though it did not appoint a receiver until a later date; hence, where a receiver appointed by a second court took possession after the first court so acquired jurisdiction, he must account to the receiver subsequently appointed by the first court.—La Rue Holding Co. v. Essex, Tex.Civ.App., 45 S.W.2d 319.

Coördinate branch of same court

Where a court has appointed receivers to administer funds of an in-

solvent corporation, a coördinate branch of the same court cannot place such funds in possession of other receivers in another proceeding.—People v. Murray Hill Bank, 41 N.Y.S. 804, 10 App.Div. 328, 26 N.Y. Civ.Proc. 1.

Property sold subject to liens

A court whose receiver sold property subject to certain liens was held to have retained jurisdiction over the property and power to sell it to enforce the liens, notwithstanding another court appointed an operating receiver for the company to which the property had been sold.—State ex rel. Elder v. Circuit Court of Madison County, 5 N.E.2d 641, 212 Ind. 1, dissenting opinion 3 N.E.2d 86, 212 Ind. 1.

Receiver for insolvent trustee

Where receiver was appointed by one court to take charge of insolvent trust company which had been appointed coexecutor and cotrustee by another court, the latter court could not compel the receiver to account for the trust assets.—Bates v. Evans, Iowa, 284 N.W. 385.

Statute authorizing suits against receivers

(1) Under a statute permitting suits against receivers in courts other than that in which the receivership is pending, a suit to establish a debt and foreclose a lien on property held by the receiver may be brought and prosecuted to judgment in such other courts.—Lynch Davidson & Co. v. Hinnant, Tex.Civ.App., 93 S.W.2d 532—National Equitable Soc. v. Alexander, Tex.Civ.App., 220 S.W. 184.

(2) Such a statute, although authorizing suits against receivers without first obtaining leave of the court which appointed them, does not confer on one court the right to interfere with the custody, control, management, or possession of property in the hands of the receiver of another court.—McCurdy v. Gage, 69 S.W.2d 56, 123 Tex. 558, affirming Gage v. McCurdy, Civ.App., 60 S.W. 2d 468, and rehearing denied McCurdy v. Gage, Com.App., 75 S.W.2d 1107—Prince v. Miller, 69 S.W.2d 52, 123 Tex. 118—Eaton v. Whisenant, Tex.Civ.App., 50 S.W.2d 1109—Mudge v. Hughes, Tex.Civ.App., 212 S.W. 819.

(3) Hence, under such statute, while one court may decree foreclosure against property held by the receiver of another court, it cannot order a sale of the property.—Ogden v. Edwards, Tex.Civ.App., 108 S.W. 2d 675—Lynch Davidson & Co. v. Hinnant, Tex.Civ.App., 93 S.W.2d 532.

tor,⁴³ or a sheriff.⁴⁴

While it has been said that one court has no right to interfere with the possession of property in the custody and control of another court unless it has direct supervisory control over such other court or some superior jurisdiction in the premises,⁴⁵ other cases have held that the rule in favor of the jurisdiction of the court first acquiring jurisdiction of specific property has no reference to the supremacy of one tribunal over the other or the superiority in rank of the respective claims on behalf of which the conflicting jurisdictions are invoked.⁴⁶

A court is not deprived of jurisdiction over controversies concerning property in the custody of another court in so far as it can exercise such jurisdiction without disturbing the possession of such other court;⁴⁷ and, of course, a court does not disturb another court's possession where the property is not in fact in custodia legis.⁴⁸ Further, where one not a party to a proceeding has a superior right in property, which right cannot be adjudicated by the court having jurisdiction and custody of the property, he may seek relief in another court which has the necessary jurisdiction and power.⁴⁹

(4) The adjudication of an attorney's claim and right to a lien on property in the hands of the receiver was held not an interference with the receiver's possession; nor was such interference shown by the fact that the action against the receiver might tend to hamper his disposal of lots, or that such suit and attempt to foreclose plaintiff's lien may have induced action against the receiver by third parties.—*Kirby v. Dilworth & Marshall, Tex.Com.App.*, 260 S.W. 152, modifying *Dilworth & Marshall v. Kirby, Civ.App.*, 253 S.W. 860.

Incidental receivership after change of venue

Where a change of venue has been taken in the main action and only an incidental receivership remains pending in the original court, the court to which the main action has been transferred may proceed to determine the merits of the action.—*Stair v. Meissel*, 193 N.E. 398, 99 Ind.App. 495.

Receiver held not guilty of contempt where he refused to obey an order to deliver property to another receiver appointed by a court having no jurisdiction to make such appointment.—*Bridgeport Mach. Co. v. Arthur A. Beard, Inc.*, 11 P.2d 990, 135 Kan. 711.

43. Ind.—*State ex rel. Tuell v. Shelby Circuit Court of Shelby County*, 23 N.E.2d 425.

La.—*Succession of Williams*, 95 So. 607, 153 La. 206.

Tex.—*Tyson v. Union Cent. Life Ins. Co.*, Civ.App., 53 S.W.2d 79, error refused.

Restraining use of decedent's property under foreclosure

Where a decedent's estate was being administered in the probate court, one foreclosing a mortgage on live stock belonging to the estate could not in such suit secure an injunction restraining the use of the animals, since the probate court had exclusive jurisdiction of the estate property.—*Dunovant v. Stafford*, 81 S.W. 101, 36 Tex.Civ.App. 33.

44. Fla.—*Young v. Stoutamire*, 179 So. 797, 131 Fla. 535.

Md.—*Outerbridge Horsey Co. v. Martin*, 120 A. 235, 142 Md. 52.

Okl.—*State v. Gassaway*, 265 P. 978, 142 Okl. 140.

"The possession of the sheriff's bailee or custodian is the possession of the sheriff; and so the property is still in custodia legis."—*Adams v. Burns*, 172 So. 75, 79, 126 Fla. 655.

45. Fla.—*Adams v. Burns*, supra.

46. Ky.—*Wilson v. Gibbs*, 260 S.W. 1109, 213 Ky. 268.

Tex.—*Robins v. Sandford, Civ.App.*, 1 S.W.2d 520, affirmed, Com.App., 29 S.W.2d 969—*Dilworth & Marshall v. Kirby, Civ.App.*, 253 S.W. 860, modified on other grounds *Kirby v. Dilworth & Marshall, Com.App.*, 260 S.W. 152—*Mudge v. Hughes, Civ.App.*, 212 S.W. 819.

47. Tex.—*Durham v. Scrivener, Com. App.*, 270 S.W. 161, affirming, Civ. App., 259 S.W. 606—*Kirby v. Dilworth & Marshall, Com.App.*, 260 S.W. 152, modifying *Dilworth & Marshall v. Kirby, Civ.App.*, 253 S.W. 860.

15 C.J. p 1140 note 3.

Examination of books

"We cannot see . . . wherein the possession, operation, control, or disposition of the property in the receiver's hands would in any material way be interfered with by an examination of the books of the receiver's business by officials clothed with the power and charged with the duty of making such examination."—*State v. Curtis, Tex.Civ.App.*, 100 S.W.2d 735, 736.

Establishment of debt against receiver

While no court can interfere with custody of property held by another court through a receiver, a court may establish by its judgment a debt against receivership, which must be recognized.

S.C.—*Ex parte International Harvester Co. of America*, 134 S.E. 530, 137 S.C. 124.

Tex.—*Dillingham v. Anthony*, 11 S.W. 139, 73 Tex. 47, 3 L.R.A. 634, 15 Am.S.R. 753.

Attachments; proceeding to judgment

Where creditors attach on writs issuing from different courts, each may proceed to judgment, but his attachment is subject to those of prior date.—*Hambley & Co. v. H. W. White & Co.*, 133 S.E. 399, 192 N.C. 31.

48. Iowa.—*First Nat. Bank v. Murtha*, 236 N.W. 433, 212 Iowa 415, followed in *Andrew v. Murtha*, Iowa, 236 N.W. 437.

Mont.—*Griffiths v. Thrasher*, 26 P.2d 983, 95 Mont. 238.

N.Y.—*Cohn v. Bartlett*, 169 N.Y.S. 604, 182 App.Div. 245.

Tenn.—*Fidelity Phenix Fire Ins. Co. v. Ford & Cantrell*, 46 S.W.2d 64, 164 Tenn. 107, rehearing denied 47 S.W.2d 558, 164 Tenn. 107.

Lawful taking required

"When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise."—*Young v. Stoutamire*, 179 So. 797, 800, 131 Fla. 535.

Trustee appointed by parties

In an action for an accounting and to wind up a partnership business, the property was held not to be in custodia legis where the parties themselves appointed a trustee to take charge of the business and assets.—*Ogden v. Syphrett, Tex.Civ. App.*, 236 S.W. 143, dismissed for want of jurisdiction.

Appearance without admission of liability

Where insurance company did not admit liability, its voluntary appearance in garnishment proceeding could not transfer alleged intangible rights of insured on policy to custody of court.—*Fidelity Phenix Fire Ins. Co. v. Ford & Cantrell*, 46 S.W.2d 64, 164 Tenn. 107, rehearing denied 47 S.W.2d 557, 164 Tenn. 107.

49. Neb.—*Prudential Ins. Co. of America of Newark, N.J., v. Farm Inv. Co.*, 243 N.W. 842, 123 Neb. 578, vacating *Prudential Ins. Co. of America v. Farm Inv. Co.*, 240 N.W. 766, 122 Neb. 561.

Segregation of estate's interests

"Where rights are involved that cannot be adjusted through the pro-

So, it has been held that, notwithstanding an attachment of mortgaged personalty, the mortgagee may sue in another court to protect his rights as against the attaching creditors, and the latter court may appoint a receiver for the property.⁵⁰

Actual or constructive possession. The rule giving exclusive jurisdiction over property to the court first acquiring possession applies so as to prevent interference with actual or constructive possession,⁵¹ and not simply with actual physical possession.⁵²

Replevin against officer attaching property. An action of replevin to recover property wrongfully attached by an officer need not be brought in the court which issued the attachment.⁵³

Criminal cases. It has been said that the doctrine of noninterference to prevent conflict of authority of jurisdiction over property or money, which is established in cases of civil practice, is also applicable to criminal cases and the procedure thereunder.⁵⁴

§ 496. Process, Judgments, or Records of Another Court

- a. Process
- b. Judgments
- c. Records

bate court as in this case, where the interests of the estate must be segregated from the interests of the heirs of the first marriage . . . the district court may intervene for the purpose of settling such matters."—*Murphey v. Murphey*, Tex. Civ.App., 131 S.W.2d 158, 162.

50. Neb.—*Prudential Ins. Co. of America of Newark, N. J., v. Farm Inv. Co.*, 243 N.W. 842, 845, 123 Neb. 578, quoting *Corpus Juris*, and vacating *Prudential Ins. Co. of America v. Farm Inv. Co.*, 240 N.W. 766, 122 Neb. 561.

Tex.—*Crow v. Red River County Bank*, 52 Tex. 362.

51. U.S.—*In re Hall & Stilson Co.*, C.C.Cal., 73 F. 527.

Neb.—*Prudential Ins. Co. of America of Newark, N. J., v. Farm Inv. Co.*, 243 N.W. 842, 123 Neb. 578, vacating *Prudential Ins. Co. of America v. Farm Inv. Co.*, 240 N.W. 766, 122 Neb. 561.

Determination of existence of lien

Neither actual nor constructive possession was held in any manner involved in determining the question of whether a lien on property existed.—*Kirby v. Dilworth & Marshall*, Tex.Com.App., 260 S.W. 152, modifying judgment *Dilworth & Mar-*

shall v. Kirby, Civ.App., 253 S.W. 860.

Property held not within court's possession

Where money in hands of constable was not raised by, or under direction of, the Jersey City court, and such officer failed to comply with statutes prescribing the manner of making executions, neither the funds nor the chattels from which the funds were realized came into the actual or constructive possession of such court.—*Siccardi v. Caruso*, 198 A. 370, 120 N.J.Law 111.

52. Okl.—*State v. District Court of Tulsa County*, 198 P. 480, 82 Okl. 54.

Commencement of an action to enforce a lien against specific property brings the property into custodia legis "whether the court took actual physical possession or not;" and, even though actual possession of property was taken by receiver appointed by court of coordinate or concurrent jurisdiction, the possession of such receiver is subject to the final decree of the court of prior jurisdiction.—*Atlas Supply Co. v. Roberts*, 68 P.2d 76, 180 Okl. 100.

53. Ind.—*Hoover v. Lewin*, 105 N.E. 400, 56 Ind.App. 367.
15 C.J. p 1140 note 5.

a. Process

The court from which process originally issues has control thereof for every purpose.

The court from which process originally issues, or the judge thereof, has control of such process for every purpose;⁵⁵ and one court of record may not entertain an application merely to set aside or quash the process or writ of another court of record.⁵⁶ Where mesne or final process is issued by a court of general jurisdiction, a court of another jurisdiction will not review or decide on the regularity of such process.⁵⁷

b. Judgments

- (1) In General
- (2) Enforcement
- (3) Execution
- (4) Satisfaction

(1) In General

A court may determine the ownership of a judgment not rendered by it, but cannot, without statutory authority, review, or grant a supersedeas to, another court's decree.

Apart from the review by superior tribunals of the acts of inferior tribunals as considered passim in Appeal and Error and also in §§ 311-485 supra, one court generally has no power to review the decree of another court,⁵⁸ in the absence of statutory authority,⁵⁹ or to grant a supersedeas there-

Jurisdiction and venue of actions by third persons claiming attached property see Attachment § 354. Replevin of property in custody of law see the C.J.S. title Replevin §§ 25-41, also 54 C.J. p 426 note 53-p 442 note 52.

54. Md.—*Outerbridge Horsey Co. v. Martin*, 130 A. 235, 142 Md. 52.

55. Pa.—*Commonwealth v. Smith*, 4 Phila. 419.

"Under the well-settled rule of law in this state each court has exclusive control of its own process, one court cannot interfere with the process of another court, and any relief against the process of a court must be applied for in that court."—*State ex rel. Sexton v. Roehrig*, 19 S.W.2d 626, 627, 323 Mo. 515.

56. Tex.—*Kelley v. Stubblefield*, Civ. App., 26 S.W.2d 281.

57. Md.—*Nelson v. Turner*, 2 Md. Ch. 73.

Wis.—*How v. Kane*, 2 Pinn. 531, 2 Chandl. 222, 54 Am.D. 152.

58. N.Y.—*Freeman v. Nelson*, 4 Redf.Surr. 374.

N.C.—*Walton v. Pearson*, 85 N.C. 34.
Va.—*Hancock v. Hutcherson*, 76 Va. 609.

59. Va.—*Hancock v. Hutcherson*, supra.

to;⁶⁰ but the ownership of a judgment may be determined by a court other than the one which rendered the decision.⁶¹

It has been held that, where a court has several divisions, it is not error to assign the hearing of a writ of scire facias to revive a judgment to a division other than the one by which the judgment was rendered.⁶²

(2) Enforcement

To enforce a judgment, resort should generally be to the court which rendered it, although in some cases another court may assume jurisdiction for the purpose.

Resort should generally be had to the court in which a decree or judgment was obtained for the enforcement thereof,⁶³ although in some cases another court has been permitted to assume jurisdiction for this purpose,⁶⁴ as where a court is without power to enforce a particular part of its judgment.⁶⁵

(3) Execution

Courts have been held without jurisdiction to compel

the enforcement of, or to supersede or quash, the executions of other courts.

A judge of one court has been held to have no jurisdiction, in the absence of statute, to compel a sheriff to enforce an execution issued by another court,⁶⁶ and a superior court judge to have no jurisdiction to issue mandamus directing the ministerial officer of a judge of another court to execute an order not emanating from such superior court judge.⁶⁷

Supersedeas. Under a statute conferring jurisdiction on judges of the county courts concurrent with that of the circuit courts to issue writs of certiorari and supersedeas, a county court judge is not authorized to supersede an execution issued by a justice of the peace unless such action is ancillary to a certiorari to remove the cause from the justice for a trial de novo.⁶⁸

Quashal. One court of record may not entertain an application merely to set aside or quash the writ of execution of another court of rec-

60. Tenn.—Dibrell v. Eastland, 3 Yerg. 507.

18 C.J. p 1141 note 11.

Jurisdiction to grant supersedeas generally see the C.J.S. title Supersedeas § 2, also 60 C.J. p 1156 note 22-p 1157 note 42.

61. Tex.—Kruegel v. Rawlins, 124 S.W. 419, 103 Tex. 86.

62. Mo.—Goddard v. Delaney, 80 S. W. 886, 181 Mo. 564.

An independent suit to revive a judgment and obtain execution cannot be maintained in a county other than that in which the judgment was rendered.—Thompson v. Parker, 83 Ind. 96.

63. Colo.—Weiland v. Reorganized Catlin Cons. Canal Co., 156 P. 596, 61 Colo. 125.

15 C.J. p 1141 note 14.

Enforcement of judgments generally see the C.J.S. title Judgments §§ 585-591, also 34 C.J. p 737 note 83-p 742 note 68.

Divesting court's jurisdiction by own order

A chancery court was held without power to divest itself of jurisdiction to enforce its own decrees by ordering the transfer of funds from its own jurisdiction to that of a circuit court.—Parker v. Baker, 114 S.W.2d 23, 195 Ark. 761.

Action at law to enforce decree in equity

Where a court of equity has rendered a decree that a sum of money be paid, an action at law within the same jurisdiction to recover such sum will not lie.—Boyle v. Schindel, 52 Md. 1.

Rights to be exercised under the order and direction of the court making an interlocutory and administrative decree cannot be asserted by an independent suit in another court.—Cheever v. Rutland & B. R. Co., 39 Vt. 653.

64. Tex.—Tyson v. Union Cent. Life Ins. Co., Civ.App., 53 S.W.2d 79, error refused. 15 C.J. p 1141 note 15.

Enforcement of judgment against receiver

(1) A judgment rendered against a receiver in his official capacity by a court other than the one which has appointed him must be referred to the appointing court for enforcement.—Kirby v. Dilworth & Marshall, Tex. Com.App., 260 S.W. 152, modifying Dilworth & Marshall v. Kirby, Civ. App., 253 S.W. 860.—Baylor University v. Chester Sav. Bank, Tex.Civ. App., 82 S.W.2d 738, error refused.—Eaton v. Whisenant, Tex.Civ.App., 50 S.W.2d 1109.

(2) Such procedure was held to have been followed where application for sale of land to satisfy trust deed was filed in an injunction proceeding incident to the receivership and not in the receivership proceeding.—Scarborough v. Connell, Tex.Civ.App., 84 S.W.2d 734.

Determination of shares in recovery for wrongful death

Question of who was entitled to share in recovery for wrongful death must be determined in probate proceedings, not in death action.—Reidy v. Chicago, B. & Q. Ry. Co., 249 N. W. 347, 216 Iowa 415.

Certification of judgment to probate court

(1) Where recovery for wrongful death is for estate, and continued probate proceedings are necessary, judgment should be certified to probate court.—Adams v. Shell, 33 S.W. 3d 1107, 182 Ark. 959.

(2) Where district court has intervened for purpose of settling matters which could not be adjusted in the probate court, the judgment of the district court in so far as it relates to matters pertaining purely to the administration of the estate should be certified to the probate court for observance.—Murphey v. Murphey, Tex.Civ.App., 131 S.W.2d 158.

65. S.C.—McKibben v. Salinas, 19 S. E. 302, 41 S.C. 105.

Money assessment in partition; probate court

Where the judgment of a probate court in partition proceedings provided for the payment of a money assessment by one party to another, and the latter's right to enforce payment was not within the probate judge's jurisdiction, an action was held maintainable in the court of common pleas to enforce payment.—McKibben v. Salinas, 19 S.E. 302, 41 S.C. 105.

66. S.C.—Gibbes v. Morrison, 17 S.E. 803, 39 S.C. 369.

67. Ga.—Sherill v. Parrott, 26 Ga. 388.

68. Ala.—Gray v. Dennis, 3 Ala. 716.

Jurisdiction to stay execution generally see the C.J.S. title Executions § 139, also 23 C.J. p 527 notes 54-62.

ord.⁶⁹ So, where an execution is issued by the court of one county to the sheriff of another county, a court of the latter county has no jurisdiction to quash it.⁷⁰

(4) Satisfaction

A court ordinarily has exclusive power over the satisfaction of its own judgments.

Every court ordinarily has power to control the satisfaction of its own judgments, and no other court has any power in respect thereof.⁷¹

c. Records

One court cannot take an original paper from another. Where a record of one court is certified to another, the latter can consider the record only as certified.

No power exists in a court to draw or to take an original paper from another court.⁷² It has been held that, where a judicial record of a court is certified to a court of another county, the latter court can consider the record only as certified.⁷³

§ 497. Suspension of Proceedings

Generally, a court may not by order stay proceedings

in an action pending in another court; the remedy is by action for injunction.

Generally, one court may not by an order in one action stay proceedings in an action pending in another court.⁷⁴ The stay should be sought in the court where the action to be stayed is pending,⁷⁵ or in an independent equity action wherein such relief is demanded in the complaint,⁷⁶ as by seeking injunction.⁷⁷

Under governing constitutional provisions, the supreme court of Wisconsin, when it has taken original jurisdiction of a case, may restrain or suspend interfering or conflicting action by any inferior court.⁷⁸

§ 498. Enjoining Proceedings in Another Court

One court may, in some cases and subject to well recognized limitations, restrain a party from proceeding further in another court. To impose restraint directly on a court or judge thereof, a writ of prohibition from a higher court is necessary.

In some cases one court may restrain parties from proceeding further in another court in the same state,⁷⁹ as where the former, but not the

69. Tex.—Kelley v. Stubblefield, Civ. App., 26 S.W.2d 261.

Jurisdiction to quash execution generally see the C.J.S. title Executions § 144, also 23 C.J. p 541 notes 21-32.

70. Mo.—McDonald v. Tiemann, 17 Mo. 603.

71. Mo.—Maupin v. Franklin County, 67 Mo. 327.

15 C.J. p 1141 note 16.

72. Ala.—Smith v. Collins, 10 So. 334, 94 Ala. 394.

15 C.J. p 1139 note 92.

Custody and control of records generally see § 229 supra.

73. Pa.—International Harvester Co. of America v. Farmer & Ochs Co., 28 Pa. Dist. & Co. 643.

74. N.Y.—In re Lowe Pharmacy, 292 N.Y.S. 755, 249 App.Div. 845—Thorne v. Thorne, 197 N.Y.S. 377, 203 App.Div. 786—Purdy v. Baker, 56 N.Y.S. 1065, 92 App.Div. 242—Johnson v. Victoria Chief Copper Min., etc. Co., 113 N.Y.S. 1021, 60 Misc. 464.

As between courts of different districts

In view of rules of civil practice, providing that a motion cannot be made in the first district in an action triable elsewhere, a supreme court in the first district will not, even if it has the power, grant a motion in an action, pending before it to stay proceedings in a prior action in another district, and the court first acquiring jurisdiction

should be allowed to proceed.—Peaslee v. Miller, 197 N.Y.S. 134, 119 Misc. 452.

75. N.Y.—Van Beuren v. Van Beuren, 291 N.Y.S. 194, 249 App.Div. 650—Thorne v. Thorne, 197 N.Y.S. 377, 203 App.Div. 786—Indestructible Metal Products Co. v. Summergrade, 188 N.Y.S. 642, 197 App.Div. 199.

Stay of proceedings pending in same court see Actions §§ 131-137.

Stay affecting parties to another suit

So far as defendant's motion for stay of proceeding affected status of persons who were parties to suit in another court, application for relief should have been made in that court.—Grinwald v. Mayer, 241 N.W. 376, 207 Wis. 418.

76. N.Y.—Van Beuren v. Van Beuren, 291 N.Y.S. 194, 249 App.Div. 650.

77. N.Y.—Indestructible Metal Products Co. v. Summergrade, 188 N.Y.S. 642, 197 App.Div. 199—Barnes v. Midland R. Terminal Co., 138 N.Y.S. 546, 153 App.Div. 365.

Enjoining proceedings in another court generally see §§ 498-500 infra.

Injunctions against actions and other legal proceedings see the C.J.S. title Injunctions §§ 36-51, also 32 C.J. p 84 note 59-p 119 note 12.

Venue of suits for injunction to stay proceedings see the C.J.S. title Injunctions § 170, also 32 C.J. p 292 notes 71-78.

Undertaking required

A supreme court order which is in effect an injunction staying an action in the municipal court, was held improperly granted where it contained no provision requiring plaintiff to execute an undertaking in accordance with a statute requiring an undertaking for such an injunction order.—Indestructible Metal Products Co. v. Summergrade, 188 N.Y.S. 642, 197 App.Div. 199.

78. Wis.—Petition of Hell, 284 N.W. 42.

79. Ark.—Bleatt v. Echols, 25 S.W. 2d 431, 181 Ark. 235.

Ill.—Hirsh v. Arnold, 148 N.E. 882, 318 Ill. 28—McCormick v. McCormick, 243 Ill.App. 55.

N.Y.—Gould v. Gould, 197 N.Y.S. 524, 203 App.Div. 817, affirming 195 N.Y.S. 113, 118 Misc. 576—Gould v. Gould, 178 N.Y.S. 37, 108 Misc. 42.

Okl.—Gayer v. Roddie, 7 P.2d 847, 155 Okl. 27.

Pa.—In re Crisswell's Estate, 5 A.2d 577, 334 Pa. 266.

Tex.—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—Connor v. Connor, Civ.App., 113 S.W.2d 298—Hunt Production Co. v. Burrage, Civ. App., 104 S.W.2d 84, error dismissed—Dallas Joint Stock Land Bank of Dallas v. Glenn, Civ.App., 25 S.W.2d 164.

Court which has actually acquired possession of property may, by injunction, protect such property against suits or proceedings in other courts.

latter, court possesses the requisite jurisdiction⁸⁰ or the courts have concurrent jurisdiction but the exercise of jurisdiction by the former court is prior in time.⁸¹

Frequently, however, proceedings in one court should not be enjoined by another court in the same state.⁸² Sometimes this is because of want of power or jurisdiction to grant the injunction,⁸³

as where the proceedings sought to be enjoined are in a court having exclusive jurisdiction thereof⁸⁴ or where the courts are of equal rank or concurrent jurisdiction and the court whose proceedings are sought to be enjoined has previously acquired jurisdiction of the parties and the subject matter;⁸⁵ and sometimes it is because of lack of good grounds or reasons for granting the injunction.⁸⁶

U.S.—*Western Union Tel. Co. v. U. S., etc., Trust Co., Kan.*, 221 F. 545, 137 C.C.A. 113.
Tex.—*Neill v. Johnson, Civ.App.*, 234 S.W. 147.

Another division of same court

(1) Chancery branch of circuit court can enjoin enforcement of replevin bond taken in common pleas division of that court where bond was signed by surety alone.—*Ewing v. Union Central Bank*, 72 S.W.2d 4, 254 Ky. 623.

(2) Where administrator of succession pending in division E of the civil district court brought a suit which was assigned to division A in which an alias *fi. fa.* was issued under which all rights of the succession in another suit pending in division E were seized, the suit in division A was properly transferred to division E in order that the judge having jurisdiction over the succession and its property might pass on the question involved before both divisions as to a judgment creditor's right to seize assets in the hands of an administrator and a preliminary injunction issued by division E restraining proceedings under the alias *fi. fa.* was erroneously set aside.—*Succession of Williams*, 95 So. 607, 163 La. 206.

80. Cal.—*Stratton v. Superior Court of Los Angeles County*, 43 P.2d 539, 2 Cal.2d 693.

La.—*San-I-Baker Corporation v. Magendie*, 102 So. 821, 157 La. 643.

Pa.—*In re Crisswell's Estate*, 5 A. 2d 577, 334 Pa. 266.

Jurisdiction over property

A court in a county wherein certain real property lies may restrain interference with such property by a receiver appointed by a court in another county having no jurisdiction over such property.—*French v. Buf-fatt*, 33 S.W.2d 92, 161 Tenn. 500.

81. Kan.—*Bank Sav. Life Ins. Co. of Topeka v. Schroll*, 41 P.2d 731, 141 Kan. 442.

Tex.—*Glenn v. McCarty, Civ.App.*, 75 S.W.2d 165.

82. Ga.—*Ragan v. National City Bank of Rome*, 170 S.E. 889, 177 Ga. 686.

Md.—*Outerbridge Horsey Co. v. Martin*, 120 A. 235, 142 Md. 52.

Tex.—*Richardson v. Kent, Civ.App.*, 21 S.W.2d 72, error refused—*State*

Nat. Bank of San Antonio v. Lancaster, Civ.App., 229 S.W. 583, error refused.

Utah.—*Nielson v. Schiller*, 66 P.2d 365, 92 Utah 137.

83. Ark.—*Wasson v. Dodge*, 94 S.W. 2d 720, 192 Ark. 728.

Ga.—*Smith v. Dalton*, 91 S.E. 779, 146 Ga. 615.

Ind.—*State ex rel. Spencer v. Marion Circuit Court*, 7 N.E.2d 993, 212 Ind. 54.

Minn.—*Mundinger v. Breeze*, 248 N. W. 47, 188 Minn. 621.

Mo.—*State ex rel. St. Louis Coopera-ge Co. v. Green, App.*, 92 S.W.2d 930.

N.Y.—*Van Beuren v. Van Beuren*, 291 N.Y.S. 194, 249 App.Div. 650.

Tex.—*Forman v. Prince, Civ.App.*, 97 S.W.2d 1002—*Bird v. Alexander, Civ.App.*, 294 S.W. 305.

Execution of writ of mandamus

(1) If a peremptory writ of mandamus is issued by the highest court of a state or another court of competent jurisdiction, an inferior court has no power to stay the same.—*Weber v. Zimmerman*, 23 Md. 45.

(2) Where application for mandamus to compel permission to inspect corporate books was first filed with one district court of county, subsequent filing of petition in another district court to enjoin relator from proceeding with a conspiracy to obtain a list of stockholders for an improper purpose did not deprive first judge of jurisdiction.—*Roberts v. Munroe, Tex.Civ.App.*, 193 S.W. 734, dismissed for want of jurisdiction.

84. Tex.—*Harrison v. Whitely, Civ. App.*, 299 S.W. 699, affirmed *Harrison v. Whiteley, Com.App.*, 6 S.W. 2d 89.

Condemnation proceeding

Where the county court has obtained jurisdiction of a condemnation proceeding, its exclusive jurisdiction having been properly invoked, it has jurisdiction of the entire controversy and the district court has no jurisdiction to interfere in the matter at all, by injunction or otherwise, either to stay the proceeding in the county court or to preserve the status quo pending the trial in that court.—*Lone Star Gas Co. v. Birdwell, Tex.Civ.App.*, 74 S. W.2d 294—*Cook v. Ochiltree County,*

Tex.Civ.App., 64 S.W.2d 1018—*Hill v. City of Bellville, Tex.Civ.App.*, 30 S. W.2d 407—*Lone Star Gas Co. v. Webb, Tex.Civ.App.*, 20 S.W.2d 222—*Wilson v. Donna Irr. Dist. No. 1, Hidalgo County, Tex.Civ.App.*, 8 S.W. 2d 157, error refused.

Jurisdiction over records and papers

The circuit court of Cook County had no jurisdiction to restrain the clerk of the probate court of such county from removing or allowing to be removed from his office to a county in a foreign state the last will of complainant's wife for the purpose of producing it before the probate court of such county as a basis for procuring general letters of administration there, as the probate court of Cook County has exclusive control of its records, and jurisdiction of its officers with reference thereto, except in certain cases differing from the instant one.—*Kahl v. Devine*, 234 Ill.App. 363.

85. U.S.—*Wise v. Pacific States Life Ins. Co., D.C.Ill.*, 11 F.Supp. 895, citing *Corpus Juris*.

Ark.—*Wright v. Le Croy*, 44 S.W.2d 355, 184 Ark. 837.

Ill.—*Brinkerhoff v. Huntley*, 223 Ill. App. 591.

Minn.—*State ex rel. Minnesota Nat. Bank of Duluth v. District Court, Fourth Judicial Dist.*, 262 N.W. 155, 195 Minn. 169.

Tex.—*State v. Epperson*, 42 S.W.2d 228, 121 Tex. 80—*Barrier v. Lowery*, 11 S.W.2d 298, 118 Tex. 227, rehearing denied 13 S.W.2d 688, 118 Tex. 227—*Driscoll v. Casstevens, Civ.App.*, 110 S.W.2d 958.

Utah.—*Nielson v. Schiller*, 66 P.2d 365, 92 Utah 137.

W.Va.—*McGrew v. Maxwell*, 94 S.E. 395, 80 W.Va. 718.

86. Ga.—*Arnold v. Harris*, 177 S.E. 738, 179 Ga. 896—*Darby v. Green*, 162 S.E. 493, 174 Ga. 146—*Hobby v. Ford*, 99 S.E. 624, 149 Ga. 176.

N.Y.—*Merritt-Chapman & Scott Corporation v. Mutual Ben. Life Ins. Co.*, 260 N.Y.S. 374, 237 App.Div. 70, followed in *Merritt-Chapman & Scott Corporation v. New England Mut. Life Ins. Co. of Boston, Mass.*, 260 N.Y.S. 381, 236 App.Div. 833, *Merritt Chapman & Scott Corporation v. Prudential Ins. Co. of America*, 260 N.Y.S. 381, 236 App.Div. 833, *Merritt-Chapman & Scott Corporation v. Berkshire Life Ins. Co.*

When so provided by statute, actions for injunctions to stay proceedings at law may be brought only in the county in which the proceedings at law are had⁸⁷ or an action to enjoin proceedings in a civil action may be brought only in the county and the court in which such action is pending.⁸⁸ So also a statute providing that a writ of injunction granted to stay proceedings in a suit shall be returnable to, and be tried in, the court where the suit is pending will, when applicable, be accorded effect;⁸⁹ but it is applicable only where the second suit is purely for injunctive relief and not where injunctive relief is simply ancillary to the main purpose of the suit.⁹⁰

An injunction to prevent the prosecution of further proceedings in another court may be granted, if at all, only against the parties; it may not be granted against the court itself⁹¹ or a judge thereof.⁹² However, the fact that an injunctive order runs against a party and not against the court is not alone sufficient to justify it;⁹³ it may otherwise be unauthorized or improper as shown above in this section.

An order restraining the sheriff from enforcing a certain law against named persons does not prevent the granting of an injunction by another court,

under statutory authority, on application of the county attorney, restraining such persons from violating such law, neither the parties nor the subject matter affected by the two orders being the same.⁹⁴

Prohibition. A writ of prohibition is an appropriate remedy to obtain a determination by the highest court of the state as to which one of two lower coordinate courts asserting exclusive jurisdiction of a suit has the right to proceed.⁹⁵ By such a writ a higher court may prevent an inferior court from seizing property which another inferior court has previously seized, actually or constructively, and over which it still maintains jurisdiction.⁹⁶ However, one district court cannot issue a writ of prohibition against another district court of equal rank.⁹⁷

§ 499. — Enforcement of Judgment

It is a rule, subject to several exceptions, that one court cannot enjoin enforcement of a judgment rendered by another court.

It is a general rule, affirmed by statute in some states, that the enforcement of a judgment can be enjoined only by the court which rendered the judgment and not by another court⁹⁸ unless the

260 N.Y.S. 382, 236 App.Div. 833, *Merritt-Chapman & Scott Corporation v. Mutual Life Ins. Co. of New York*, 260 N.Y.S. 382, 236 App.Div. 834, *Merritt-Chapman & Scott Corporation v. Provident Mut. Life Ins. Co. of Philadelphia*, 260 N.Y.S. 383, 236 App.Div. 834, *Merritt-Chapman & Scott Corporation v. Penn Mut. Life Ins. Co. of Philadelphia*, 260 N.Y.S. 383, 236 App.Div. 834, *Merritt-Chapman & Scott Corporation v. Guardian Life Ins. Co. of America*, 260 N.Y.S. 384, 236 App.Div. 834, *Merritt-Chapman & Scott Corporation v. Massachusetts Mut. Life Ins. Co.*, 260 N.Y.S. 384, 236 App.Div. 834, and *Merritt-Chapman & Scott Corporation v. Aetna Life Ins. Co.*, 260 N.Y.S. 385, 236 App.Div. 834.

Tex.—Eclipse Oil Co. v. McAlister, Civ.App., 103 S.W.2d 420, error dismissed—*Mann v. Pace*, Civ.App., 58 S.W.2d 1070, error refused—*Schramm v. Knolle*, Civ.App., 240 S.W. 612—*Twin City Co. v. Birchfield*, Civ.App., 228 S.W. 616.

Grounds for restraining legal proceedings see the C.J.S. title Injunctions §§ 37-39, also 32 C.J. p 85 note 85-p 98 note 35.

87. Ill.—*Gombi v. Taylor Washing Mach. Co.*, 7 N.E.2d 929, 290 Ill. App. 53.

88. Iowa.—*Keeling v. Priebe*, 257 N.W. 199, 219 Iowa 155—*Bankers'*

Trust Co. v. Scott, 246 N.W. 836, 215 Iowa 1107.

89. Tex.—*Driscoll v. Casstevens*, Civ.App., 110 S.W.2d 958—*Hunt Production Co. v. Burrage*, Civ. App., 104 S.W.2d 84, error dismissed—*Mann v. Pace*, Civ.App., 58 S.W.2d 1070, error refused.

90. Tex.—*Fleider v. Parker*, Civ. App., 119 S.W.2d 1089—*Connor v. Connor*, Civ.App., 113 S.W.2d 298—*Hunt Production Co. v. Burrage*, Civ.App., 104 S.W.2d 84, error dismissed—*Mann v. Pace*, Civ.App., 58 S.W.2d 1070, error refused—*Geary v. Word*, Civ.App., 259 S.W. 309.

91. Tex.—*Steger v. Shofner*, Civ. App., 54 S.W.2d 1013.

92. Or.—*Daniels v. City of Portland*, 265 P. 790, 124 Or. 677, 59 A. L.R. 512.

Tex.—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—*Duncan v. National Union Fire Ins. Co.*, Civ. App., 4 S.W.2d 278—*Home Nat. Bank of Cleburne v. Wilson*, Civ. App., 265 S.W. 732—*Wardlaw v. Savage*, Civ.App., 191 S.W. 1176.

Contra Juhlin v. Hutchings, 135 P. 598, 136 P. 942, 90 Kan. 618.

93. Utah.—*Nielson v. Schiller*, 66 P. 2d 365, 92 Utah 137.

94. Tex.—*Ford v. Tyson*, Civ.App., 42 S.W.2d 619.

95. Mich.—*Baskin v. Dingeman*, 209 N.W. 925, 236 Mich. 15.

Jurisdiction to issue prohibition see the C.J.S. title Prohibition § 18 also 50 C.J. p 694 note 65-p 695 note 74.

When writ of prohibition lies see the C.J.S. title Prohibition §§ 8-16, also 50 C.J. p 662 note 70-p 692 note 94.

96. Ala.—*Strother v. McCord*, 132 So. 717, 222 Ala. 450.

Action involving title

Where action was first brought and is pending in one district court as to title of bank deposit, prohibition will issue from the supreme court to prevent another district court from satisfying its judgment as against such property.—*State v. District Court of Hughes County*, 235 P. 234, 108 Okl. 32.

97. Tex.—*Pierce v. Box*, Civ.App., 284 S.W. 231—*City of Palestine v. City of Houston*, Civ.App., 262 S.W. 215, error dismissed *City of Houston v. City of Palestine*, 267 S.W. 663, 114 Tex. 306.

98. Iowa.—*Educational Film Exchanges of Iowa v. Hansen*, 266 N.W. 487, 221 Iowa 1153—*Keeling v. Priebe*, 257 N.W. 199, 219 Iowa 155—*Farmers' Union Exch. of Riverside v. Iowa Adjustment Co.*, 203 N.W. 283, 201 Iowa 78.

Ky.—*Daniels v. Gillum*, 262 S.W. 272, 203 Ky. 262.

Okl.—*McAusland v. Williams*, 54 P. 2d 622, 177 Okl. 25—*Harris v. Hud-*

judgment is void⁹⁹ and its invalidity appears on the face of the record,¹ or it has been satisfied,² or the case is within some constitutional or statutory provision creating an exception to the rule,³ or the validity of the judgment is not attacked, and the injunction sought is merely incidental to other relief.⁴ The general rule or a statute to the same effect may apply even though the court in which

the injunction is sought has jurisdiction superior to that of the court by which the judgment is rendered;⁵ but it is otherwise where only the superior court, and not the court which rendered the judgment, has power to issue injunctions.⁶

Order. Under some circumstances a court which did not make an order may nevertheless enjoin its enforcement;⁷ but a guardian appointed by a

son, 250 P. 532, 122 Okl. 171, certiorari denied *Hudson v. Harris*, 47 S.Ct. 336, 273 U.S. 743, 71 L.Ed. 869, and *Owens v. Harris*, 47 S.Ct. 336, 273 U.S. 743, 71 L.Ed. 869.

Tex.—*Gohlman v. Whittle*, 273 S.W. 808, 115 Tex. 9—*Carey v. Looney*, 251 S.W. 1040, 113 Tex. 93—*Glenn v. Green*, Civ.App., 65 S.W.2d 386 followed in *Glenn v. Cawley*, Civ. App., 65 S.W.2d 388, *Glenn v. Hay*, Civ.App., 65 S.W.2d 388 and *Glenn v. Roe*, Civ.App., 65 S.W.2d 1119, error refused—*Chapman Milling Co. v. Yakey*, Civ.App., 51 S.W.2d 639, error dismissed—*Salamy v. Bruce*, Civ.App., 21 S.W.2d 380—*Parmer v. East Texas Securities Co.*, Civ.App., 18 S.W.2d 711—*Darlington v. Allison*, Civ.App., 12 S.W.2d 839, error dismissed—*First Nat. Bank v. Little*, Civ.App., 6 S.W.2d 819—*Citizens' Bank v. Brandau*, Civ.App., 1 S.W.2d 466, error refused—*Lindsey v. B. F. Avery & Sons Plow Co.*, Civ.App., 284 S.W. 606—*A. B. Richards Medicine Co. v. Reeves*, Civ.App., 266 S.W. 594—*Long v. Martin*, Civ.App., 260 S.W. 327, error dismissed 278 S.W. 1115, 114 Tex. 581—*O'Neil v. Duffey*, Civ.App., 250 S.W. 772—*Mathews v. Eyres*, Civ.App., 206 S.W. 963, dismissed for want of jurisdiction—*Mann v. Brown*, Civ.App., 201 S.W. 438, error refused.

W.Va.—*Trahern v. Hughes*, 151 S.E. 704, 108 W.Va. 509—*McGrew v. Maxwell*, 94 S.E. 395, 80 W.Va. 718, 15 C.J. p 1142 note 27.

Contra *Michael v. Rigler*, 120 A. 382, 142 Md. 125.

Compliance with judgment should not be enjoined.—*Donna Irr. Dist. Hidalgo County No. 1 v. Magnolia Petroleum Co.*, Tex.Civ.App., 62 S.W. 2d 207, error dismissed.

99. Iowa.—*Farmers' Union Exch. of Riverside v. Iowa Adjustment Co.*, 203 N.W. 283, 201 Iowa 78.

Ky.—*Viall v. Walker*, 58 S.W.2d 415, 248 Ky. 197—*Hoffman v. Shuey*, 2 S.W.2d 1049, 223 Ky. 70, 58 A.L.R. 842.

Tex.—*San Jacinto Finance Corporation v. Perkins*, Civ.App., 94 S.W. 2d 1213—*Glenn v. Connell*, Civ. App., 74 S.W.2d 451, followed in 74 S.W.2d 455—*O'Banion v. Weaver*, Civ.App., 62 S.W.2d 212—*Long v. Martin*, 260 S.W. 327, error dismissed 278 S.W. 1115, 114 Tex. 581.

Utah.—*Kramer v. Pixton*, 268 P. 1029, 72 Utah 1.

Wis.—*Reilly v. Andro*, 211 N.W. 780, 191 Wis. 597.

15 C.J. p 1142 note 34.

Exception not recognized

It has been held that even though a judgment is void, its enforcement cannot be enjoined by a court other than that by which it was rendered.—*Scott v. Runner*, 44 N.E. 755, 146 Ind. 12, 58 Am.S.R. 345.

1. Tex.—*Johnston v. Stephens*, Civ. App., 300 S.W. 225, reversed on other grounds 49 S.W.2d 431, 121 Tex. 374—*A. B. Richards Medicine Co. v. Reeves*, Civ.App., 266 S.W. 594—*Landa Cotton Oil Co. v. Watkins*, Civ.App., 255 S.W. 775—*Ketelsen v. Pratt*, Civ.App., 100 S.W. 1172.

Writ of injunction restraining filing of abstract of void judgment in another county need not be returned to court rendering judgment where the record affirmatively shows that the court rendering judgment was without jurisdiction.—*Scruggs v. Gribble*, Tex.Civ.App., 17 S.W.2d 153.

Judgment valid on face

Where judgment of county court was subsisting and valid on its face, enforcement thereof could not be restrained by county court of another county or by district court.—*Bond v. Dugat*, Tex.Civ.App., 81 S.W.2d 736—*Crosby v. Arrietta*, Tex.Civ.App., 209 S.W. 252.

Judgment reciting due service

Court was without jurisdiction to interfere with enforcement of judgment of another court on ground of improper service, where judgment recited due service was made.—*Switzer v. Smith*, Tex.Com.App., 300 S.W. 31, 68 A.L.R. 377, affirming, *Smith v. Switzer*, Civ.App., 293 S.W. 850.

Evidence dehors record

Where determination of validity of judgment sought to be enjoined requires resort to evidence dehors record, court pronouncing judgment has exclusive power to try injunction.—*First Nat. Bank v. Little*, Tex.Civ. App., 6 S.W.2d 819.

2. Ind.—*Ashcraft v. Knoblock*, 45 N.E. 69, 146 Ind. 169.

Minn.—*Baune v. Maryland Casualty Co.*, 210 N.W. 396, 168 Minn. 484.

Promise to satisfy

It has been held that the enforcement of a judgment of one district court, which the judgment creditor had promised to satisfy, may properly be enjoined by another district court.—*Holderman v. Tedford*, 53 P. 887, 7 Kan.App. 657.

Payment in another suit

(1) Bill will lie to restrain collection of garnishment judgment where defendant was required to pay same debt in divorce suit of prior jurisdiction.—*McCormick v. McCormick*, 243 Ill.App. 55.

(2) Where creditor of insured garnisheed insurer, which paid amount of policy into district court after insured had sued on the policy in county court, and the creditor got judgment which was paid, the district court may perpetually enjoin enforcement of the county court judgment against the insurer.—*North British & Mercantile Ins. Co. of London & Edinburgh v. Klaras*, Tex.Com. App., 222 S.W. 208, reforming judgment, *Klaras v. North British & Mercantile Ins. Co. of London v. Edinburgh*, Civ.App., 200 S.W. 584.

3. Mo.—*Green v. Tittman*, 27 S.W. 391, 124 Mo. 372.

15 C.J. p 1142 notes 30, 31.

4. N.C.—*North Carolina Joint Stock Land Bank v. Kerr*, 175 S.E. 102, 104, 206 N.C. 610, citing *Corpus Juris*.

Tex.—*Carey v. Looney*, 251 S.W. 1040, 113 Tex. 93.

15 C.J. p 1143 note 37.

5. Mo.—*Green v. Tittman*, 27 S.W. 391, 124 Mo. 372.

15 C.J. p 1142 note 28.

6. Ark.—*Twila City Bank of North Little Rock v. J. S. McWilliams Auto*, 34 S.W.2d 229, 182 Ark. 1086.

7. Orders in dismissed suit

After the dismissal of a suit, the enforcement of an order made therein prior to dismissal may be enjoined by a court of another county, as may also the enforcement of an order purporting to have been made therein after dismissal, the former order having fallen with the dismissal and there being nothing on which jurisdiction to make the latter order could rest.—*Kiser v. Crawford*, 166 N.W. 577, 182 Iowa 1249.

court vested with exclusive jurisdiction to appoint and remove guardians cannot be enjoined by another court from performing his duties under the order of appointment.⁸

§ 500. — Enforcement of Execution

Ordinarily one court may not enjoin the issuance, levy, or enforcement of, or sale under, an execution issued on the judgment of another court; but it may do so where the judgment is void or satisfied; and it may enjoin the levy on, or sale of, property not subject thereto.

Under the rule, stated *supra* § 496, that one court cannot control the process of another court, as

well as under governing statutes,⁹ it is usually held that one court cannot enjoin the issuance of an execution from another court,¹⁰ or the levy and enforcement of an execution issued on the judgment of another tribunal,¹¹ or a sale thereunder,¹² even though an execution of a court of one county is placed in the hands of the sheriff or coroner of another county.¹³ In some cases, however, the right of one court to enjoin the enforcement of an execution from another court is asserted,¹⁴ as where the execution is on a satisfied¹⁵ or void¹⁶ judgment, or where the court from which the execution issued has no general equity powers or jurisdiction of injunction suits.¹⁷ Also a court may

Order void or not judgment

Enforcement of an order may be enjoined over objection that the court granting the injunction did not render the judgment enjoined, where the order is not a judgment, the judge or commissioner who made it having acted merely in a ministerial capacity and not in the exercise of a judicial function and it not being entered, or required by law to be entered, on the records of any court as a judgment, or, if it can be called a judgment, it is void.—*E. H. Taylor, Jr., & Sons v. Thornton*, 199 S.W. 40, 178 Ky. 463.

8. Okl.—*Ex parte Spurrier*, 238 P. 956, 111 Okl. 242.

9. Limits of authority under statute

(1) Under a statute providing that writs of injunction granted to stay execution on a judgment shall be returnable to, and tried in, the court where the judgment was rendered, the utmost another court can do is to grant a temporary writ of injunction returnable to the court which rendered judgment; it cannot hear and determine the issues involved.—*First Nat. Bank v. Little*, *Tex.Civ.App.*, 6 S.W.2d 819—*Texas Employers' Ins. Ass'n v. Tabor*, *Tex.Civ.App.*, 291 S.W. 311—*Murph v. Bass*, *Tex.Civ.App.*, 276 S.W. 767—*Aleman v. Gonzales*, *Tex.Civ.App.*, 246 S.W. 726.

(2) After the perfection of an appeal in the original suit, another district court is wholly without authority to enter any order restraining proceedings under an execution or order of sale based on the judgment, even a temporary injunction returnable to the court which rendered the judgment.—*State v. Wright*, *Tex.Civ.App.*, 56 S.W.2d 950.

10. *Tex.*—*Switzer v. Smith*, *Com.App.*, 300 S.W. 31, 68 A.L.R. 377, affirming *Smith v. Switzer*, *Civ.App.*, 293 S.W. 850—*J. M. Radford Grocery Co. v. Estelline State Bank*, *Civ.App.*, 75 S.W.2d 121, 15 C.J. p 1143 note 39.

Court of equal jurisdiction will not issue injunction restraining court in which cause has been regularly filed from issuing execution after disposal of case.—*Palais Royal v. Calhoun*, 92 F.2d 515, 67 App.D.C. 364.

11. *Ind.*—*Hofmann v. State*, 194 N.E. 331, 207 Ind. 695—*Morgan v. Amick*, 4 N.E.2d 51, 102 Ind.App. 603.

Ky.—*O'Neal v. Turney's Ex'r*, 300 S.W. 913, 222 Ky. 361.

Okla.—*Chandler v. Cummins*, 81 P.2d 651, 183 Okl. 5.

Tex.—*Honea v. Graham*, *Civ.App.*, 66 S.W.2d 802—*O'Banion v. Weaver*, *Civ.App.*, 62 S.W.2d 212—*Murph v. Bass*, *Civ.App.*, 276 S.W. 767.

15 C.J. p 1143 note 40.

Principles of comity forbid circuit court of one county to enjoin enforcement of writ of execution issuing out of circuit court of another county, without showing of great urgency.—*Hume v. Rice*, 167 P. 578, 86 Or. 93.

12. *Minn.*—*Wagner v. Farmers' Co-op. Exch. Co. of Good Thunder*, 180 N.W. 231, 147 Minn. 376, 14 A.L.R. 279.

Mo.—*Flinn v. Richardson*, *App.*, 15 S.W.2d 941.

N.J.—*Building Trades Paint & Specialties Corporation v. Beilig*, 147 A. 460, 7 N.J.Misc. 905.

Okla.—*McAusland v. Williams*, 54 P.2d 622, 177 Okl. 25.

Tex.—*Holland Texas Hypotheek Bank of Amsterdam, Holland, v. Nolen*, *Civ.App.*, 110 S.W.2d 230—*Railroad Commission v. McDonald*, *Civ.App.*, 100 S.W.2d 155—*Dallas Joint Stock Land Bank v. Ray*, *Civ.App.*, 71 S.W.2d 589—*Honea v. Graham*, *Civ.App.*, 66 S.W.2d 802—*Friedrich v. Brand*, *Civ.App.*, 28 S.W.2d 279—*Brunson v. Donald*, *Civ.App.*, 3 S.W.2d 596, error refused.

15 C.J. p 1143 note 41.

Decisions under unconstitutional statute

(1) It was said that, as a matter of mere construction, and irrespective

of validity, the provision of a moratorium act authorizing the judge of the court of the county in which the land involved or a part thereof is situated to restrain temporarily a sale thereof under execution or order of sale necessarily supersedes a statute requiring that writs of injunction granted to stay proceedings in suit or execution on judgment shall be returned to court where such suit is pending or judgment was rendered.—*Dallas Joint Stock Land Bank of Dallas v. Ballard*, *Civ.App.*, 74 S.W.2d 297, affirmed *Ballard v. Dallas Joint Stock Land Bank of Dallas*, 76 S.W.2d 1042, 124 Tex. 113.

(2) However, this provision of the act was considered unconstitutional and void as against public policy.—*Glenn v. Hollums*, *Tex.Civ.App.*, 73 S.W.2d 1068—*Dallas Joint Stock Land Bank v. Ray*, *Tex.Civ.App.*, 71 S.W.2d 589.

(3) Also, as recited in Constitutional Law § 393 b, the act was held void as impairing the obligations of contracts.

13. *Ind.*—*Hoffman v. State*, 194 N.E. 331, 207 Ind. 695—*Morgan v. Amick*, 4 N.E.2d 51, 102 Ind.App. 603.

15 C.J. p 1143 note 42.

14. *La.*—*Gondran v. Nelson Co-op. Ass'n*, 93 So. 918, 152 La. 609.

15 C.J. p 1143 note 43.

Enjoining sale

Ohio.—*Willis v. Street*, 30 Ohio N.P. N.S. 579.

15 C.J. p 1143 note 43 [a].

15. *Tenn.*—*Greenfield v. Hutton*, 1 Baxt. 216.

16. *Ky.*—*Commonwealth, for Use and Benefit of Eversole, v. West*, 87 S.W.2d 385, 261 Ky. 204.

Tex.—*Automobile Finance Co. v. Bryan*, *Civ.App.*, 3 S.W.2d 835.

15 C.J. p 1143 note 50.

17. *D.C.*—*Palais Royal v. Calhoun*, 92 F.2d 515, 67 App.D.C. 364.

Tex.—*Kieschnick v. Martin*, *Civ.App.*, 208 S.W. 948, affirmed *Martin v. Kieschnick*, *Com.App.*, 231 S.W. 330.

enjoin illegal acts under the final process of another court,¹⁸ particularly the levy on, or sale of, property not subject thereto,¹⁹ such as the property of a person other than the judgment debtor,²⁰ property in the possession of a court through a receiver,²¹ or property which is exempt or is claimed as a homestead.²²

Where a judgment, although rendered in one county, becomes a judgment in another county by the filing of a transcript therein under statutory authority and the clerk of the court of the latter county issues an execution thereon, the court of the latter county has jurisdiction of an action to restrain and prevent a sale of property under the execution.²³ In the case of two courts having precisely the same jurisdiction, such as two county courts at law in the same county, one may enjoin

the levy of a writ of execution issued on a judgment rendered by the other.²⁴

§ 501. Vacating, Modifying, or Annulling Decisions

Generally speaking, one court may not, otherwise than on appeal or other proceeding for review, modify or set aside a judgment or decree of another court; and likewise one judge should not vacate or modify an order of another judge of coördinate jurisdiction who is still available. The authorities are not in harmony as to what, if any, exceptions to the rule should be recognized.

As a general rule, a judgment or decree rendered by a court of competent jurisdiction and not void on its face may be modified, annulled, vacated, or set aside only by the court which rendered it or a court exercising appellate jurisdiction²⁵ and not by any other court,²⁶ especially a court of inferior,²⁷ equal, like, concurrent, or coördinate²⁸

18. Ind.—Zimmerman v. Makepeace, 52 N.E. 992, 152 Ind. 199.
15 C.J. p 1143 note 44.

19. Tex.—Carey v. Looney, 251 S.W. 1040, 113 Tex. 93.

20. Mont.—First State Bank of Shelby v. Bottineau County Bank, 185 P. 162, 56 Mont. 363, 8 A.L.R. 631.

Property claimed by another

Injunction to stay execution on property claimed by one not party to judgment need not be tried in court which rendered judgment.—Rockwell Bros. & Co. v. Lee, Tex.Civ. App., 21 S.W.2d 30.

21. Tex.—Fielder v. Parker, Civ. App., 119 S.W.2d 1089.

22. Tex.—Baker v. Crosbyton South- plains R. Co., 182 S.W. 287, 107 Tex. 566, reversing, Civ.App., 146 S.W. 569.

15 C.J. p 1143 notes 45, 46, 48.

After adjudication that property is subject to process, another court cannot issue an injunction on the ground that the property is exempt.—Mann v. Brown, Tex.Civ.App., 201 S.W. 438, error refused.

23. Ark.—Brick v. Sovereign Grand Lodge of Accepted Free Masons of Arkansas, 117 S.W.2d 1060, 196 Ark. 372.

24. Tex.—Wilkenfeld v. Ballard, Civ. App., 84 S.W.2d 279.

25. Colo.—People ex rel. City and County of Denver v. District Court of Fourth Judicial Dist., in and for Douglas County, 253 P. 24, 80 Colo. 538.

La.—Dugas v. New York Casualty Co., 159 So. 572, 181 La. 322—Succession of Cotton, 129 So. 361, 170 La. 328.

N.Y.—In re Berkowitz' Estate, 10 N.Y.S.2d 279, 170 Misc. 334—In re Altmann's Will, 266 N.Y.S. 773, 149 Misc. 115.

Tex.—Bohlissen v. Bohlissen, Civ.App., 56 S.W.2d 913—Corley v. W. D. Cleveland & Sons, Civ.App., 14 S.W. 2d 123—Jones v. Casualty Reciprocal Exch., Civ.App., 275 S.W. 279. Wis.—Wescott v. Catencamp, 209 N.W. 691, 190 Wis. 520.

Statutory proceeding for relief against judgment taken against a party through his mistake, inadvertence, surprise, or excusable neglect must be instituted in the court wherein the judgment was rendered.—Christ v. Jovanoff, 151 N.E. 26, 84 Ind.App. 676, rehearing denied 152 N.E. 2, 84 Ind.App. 676.

26. Md.—Wingert v. State, 103 A. 437, 132 Md. 243.

Mont.—In re Pepin's Estate, 163 P. 104, 53 Mont. 240.

Neb.—Rasmussen v. Rasmussen, 269 N.W. 818, 131 Neb. 724.

N.Y.—Herpe v. Herpe, 122 N.E. 204, 225 N.Y. 323, reversing Herpe v. German Sav. Bank of Brooklyn, 159 N.Y.S. 1118, 173 App.Div. 967—In re Farmers' Loan & Trust Co., 168 N.Y.S. 952, 181 App.Div. 612, reversing 163 N.Y.S. 961, 99 Misc. 420, affirmed 122 N.E. 880, 225 N.Y. 666—In re Berkowitz' Estate, 10 N.Y.S.2d 279, 170 Misc. 334—Neal v. Brundage, 240 N.Y.S. 569, 136 Misc. 695—Lowry v. Himmler, 239 N.Y.S. 347, 136 Misc. 215.

Tex.—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1—Price v. Smith, Civ.App., 109 S.W.2d 1144, error dismissed—Richardson v. Kent, Civ.App., 21 S.W.2d 72, error refused—Jones v. Casualty Reciprocal Exch., Civ.App., 275 S.W. 279. Wis.—Reilly v. Andro, 211 N.W. 780, 191 Wis. 597.

Judgment or decree of probate court in respect of matters particularly within the jurisdiction of such court cannot be modified or annulled

by an original proceeding in another court.

Mass.—Barron v. Barronian, 175 N.E. 271, 275 Mass. 77—Farquhar v. New England Trust Co., 158 N.E. 836, 261 Mass. 209.

Mich.—Chapin v. Chapin, 201 N.W. 530, 229 Mich. 515.

Pa.—Caveny v. Curtis, 101 A. 853, 257 Pa. 575.

15 C.J. p 1144 note 54.

Conviction in recorder's court having jurisdiction of offense and person is not reviewable by bill in equity.—Kougoulas v. Sorias, 233 N.W. 414, 252 Mich. 557.

Search warrant

District court of county has no power to quash search warrant issued out of another court and not connected with matter pending.—Graeb v. State, 283 S.W. 819, 104 Tex. Cr. 293.

Discharge from imprisonment for contempt see Contempt § 107.

27. Okl.—Dancy v. Owens, 258 P. 379, 126 Okl. 37.

28. Cal.—Brown v. Happy Valley Fruit Growers, 274 P. 977, 206 Cal. 515.

Ga.—Johnson v. People's Bank, 160 S.E. 235, 173 Ga. 250.

Ill.—Marshall Field & Co. v. Nyman, 120 N.E. 756, 285 Ill. 306, affirming 210 Ill.App. 214.

Ind.—Traders' Loan & Inv. Co. v. Houchins, 144 N.E. 879, 195 Ind. 256—Board of Com'rs of La Porte County v. Summy, 140 N.E. 913, 193 Ind. 456.

Ky.—Commonwealth v. Miniard, 99 S.W.2d 166, 266 Ky. 405.

La.—Murray v. Hardee, App., 189 So. 376.

Md.—Loft, Inc., v. Buckler, 129 A. 914, 148 Md. 647.

N.C.—Mitchell v. Talley, 109 S.E. 882, 182 N.C. 683.

jurisdiction, or even a court of superior jurisdiction, where its authority is invoked otherwise than by appeal or other proceeding for review.²⁹ While, as noted hereinafter in this section, exceptions to the rule are sometimes announced, nevertheless, apart from exceptions established by statute,³⁰ the courts are not in complete agreement as to what, if any, exceptions should be recognized. At any rate, whatever power one court may possess to set aside the judgments of another court should not be used except in clear cases;³¹ and, regardless of whether or not a court has power in an independent action to set aside the decree of another court, it lacks the power of a reviewing court to direct

what further proceedings shall be taken in the other court.³²

The general rule against the modification or vacation of the judgment, decree, or order of one court by another court may preclude a judgment, order, or decree of another court which does not in terms modify or nullify the former but does so in effect by reason of its conflict or inconsistency therewith,³³ or where the action of the one court does not modify or set aside the action of another court,³⁴ or where the acts of one court, although related to the acts of another court or the judge thereof, have no improper effect thereon.³⁵

Ohio.—Fessenden v. Fessenden, 165 N.E. 746, 32 Ohio App. 16.

Okl.—McAusland v. Williams, 54 P. 2d 622, 177 Okl. 25.

Pa.—In re Brown's Estate, 161 A. 471, 105 Pa.Super. 236—Columbia Alliance Loan Society v. Schweidel, 19 Pa.Dist. & Co. 223.

Wash.—State v. Superior Court for Grays Harbor County, 245 P. 929, 139 Wash. 125, 49 A.L.R. 801. 15 C.J. p 1144 note 53.

After execution of process under judgment

Court will not entertain jurisdiction of suit to set aside earlier judgment entered in court of coordinate jurisdiction, where process issued under former judgment had been fully executed.—Brown v. Happy Valley Fruit Growers, 274 P. 977, 206 Cal. 515.

Review, control or supervision

(1) Courts of equal power and dignity have no power to review or control the decisions, judgments, or decrees of each other.

Ark.—Ex parte Dame, 259 S.W. 754, 162 Ark. 382.

Tenn.—Fidelity Phenix Fire Ins. Co. v. Ford & Cantrell, 46 S.W.2d 64, 164 Tenn. 107, rehearing denied 47 S.W.2d 558, 164 Tenn. 107.

(2) An action cannot be maintained in one district court to review the judgment of another district court.—Guidetti v. Industrial Commission of Colorado, 284 P. 119, 86 Colo. 587.

(3) Declaratory judgment determining validity of rights of parties under lease executed by testamentary trustee, authorized by order of supreme court in former proceeding, would be improper, as reviewing judgment of court of concurrent jurisdiction.—Kings County Trust Co. v. Melville, 216 N.Y.S. 278, 127 Misc. 374.

(4) The circuit court of one county has no power to supervise the judgments and decrees of a circuit court of another county.—Brinkerhoff v. Huntley, 228 Ill.App. 591.

No appeal lies from one superior court to another.—Dall v. Hawkins, 189 S.E. 774, 211 N.C. 283.

Intermediate appellate court

(1) Except on transfer, one court of civil appeals cannot review causes confided to, adjudicate the validity of judgments and orders of, or vacate orders made by, another court of civil appeals.—Cleveland v. Ward, 285 S.W. 1063, 116 Tex. 1.

(2) It cannot annul a writ of prohibition issued by another court of civil appeals.—Long v. Martin, 285 S.W. 1075, 115 Tex. 519.

(3) Also it cannot review the decision of another court of appeals in the same case and on appeal from the same judgment.—Sumrall v. Russell, Tex.Civ.App. 274 S.W. 640.

29. R.I.—Ex parte Asadoorian, 185 A. 222, 48 R.I. 50.

After filing of transcript

Although a transcript of a judgment has been filed in a higher court so as to become a judgment of the latter court for purposes of collection and enforcement, yet where no attempt has been made to obtain a review thereof by appeal, common-law writ, or equitable action, the higher court is without power, on motion, to set aside the judgment or strike the transcript thereof from the files and judgment docket.

N.Y.—Ellias v. Thomas Furniture Works, 212 N.Y.S. 127, 125 Misc. 683.

Wis.—Wernick v. Roth, 218 N.W. 812, 195 Wis. 519.

30. Higher court may open or vacate default judgments of a lower court when authorized by statute to do so.

R.I.—Moore v. Stillman, 68 A. 419, 28 R.I. 470.

Vt.—Mosseaux v. Brigham, 19 Vt. 457.

15 C.J. p 1144 note 57.

31. Tenn.—Tennessee Cent. R. Co. v. Tedder, 98 S.W.2d 307, 170 Tenn. 639.

32. Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558.

33. N.Y.—Hakala v. Van Schaick, 12 N.Y.S.2d 928, 171 Misc. 418—Emigrant Industrial Sav. Bank v. Lehman, 270 N.Y.S. 589, 151 Misc. 444.

Direction to administrator

In assignee's suit to restrain collection of money due on accounts and leases assigned by deceased, equity court could not direct administrator to collect what court might think was an asset belonging to estate of assignor, since order of orphans' court, in so far as account was concerned, was binding.—First Nat. Bank & Trust Co. of Tarentum v. Jaffe, 173 A. 845, 114 Pa.Super. 315.

34. Wash.—Du Pont Cellophane Co. v. Kinney, 42 P.2d 441, 181 Wash. 140.

35. Former approval by judge

(1) Proceeding to surcharge and falsify county tax collector's reports and accounts, approved by circuit judge, is not beyond chancery court's jurisdiction as attempt to review decision of court of equal, coordinate jurisdiction, the approval being a ministerial, and not a judicial, act.—Yates v. State, 54 S.W.2d 981, 186 Ark. 749.

(2) Also an order by clerk of court allowing attorneys' fees was appealable to superior court, although approved by resident judge, since resident judge had no authority or duty to approve order, and order remained essentially one of the clerk.—Collins v. Wooten, 193 S.E. 385, 212 N.C. 359.

Former procedural order

There is no merit in an objection that a judgment awarding rents to the real owner of the property nullifies an order authorizing a levy on the rents in the hands of an agent of the judgment debtor, the order, to which plaintiff in the subsequent action was not a party and by which he was not bound, being predicated on the assumed ownership of the judgment debtor and amounting to no more than formal procedure to

Judicial sale. It is usually held that, where a sale has been made under the order of and confirmed by a court of competent jurisdiction, a proceeding for the annulment of such sale should be brought before the court issuing the order;³⁶ but there is also authority for the view that an action to annul such sale may be brought in another court.³⁷

Change of venue. Where a suit to vacate a decree was instituted in the district court for the county in which such decree was originally granted, but the venue was afterward changed to the district court of another county, a decree of vacation made by the latter court is valid.³⁸

Fraud. According to a number of decisions, a judgment procured in one court by fraud may be annulled, vacated, or set aside by another court exercising equitable jurisdiction;³⁹ but other de-

cisions take a contrary view.⁴⁰

Want of jurisdiction. It has been held that an order made by a judge or court without authority may be reviewed by a court of coordinate jurisdiction, and should be vacated by it on notice.⁴¹ Indeed, it has been held that any court has a right to declare the decree of any other court null and void for want of jurisdiction;⁴² but it has also been held that an orphans' court, which is of limited jurisdiction, is, in the absence of a statute conferring it, without power or jurisdiction to set aside a decree of a court of common pleas on the ground that the latter court was without jurisdiction.⁴³

Branch, division, or department of court. In some states, where a court has several branches or departments, one branch or department may, by order, vacate or set aside an order previously made by another branch or department;⁴⁴ but in another

make effective a levy on rights and credits, and the subsequent action being essentially one by the real owner to hold the sheriff and execution creditor of another for a wrongful levy.—*Gaudiosi v. Micone*, 141 A. 575, 6 N.J.Misc. 425.

Former decree in habeas corpus proceedings for custody of minor

(1) While a decree of a court of equity, in habeas corpus proceedings, awarding the custody of a minor to one person is, while it remains in force and effect, a barrier to a final order by a probate court for adoption of the minor by another person, it does not prevent the entry of an interlocutory order for adoption to be made final if and when it can be done conformably to the decree of the court of equity.—*Wright v. Price*, 147 So. 675, 226 Ala. 468.

(2) It is said that the right to modify or set aside judgment on habeas corpus, determining rights of parties litigant to custody of minor child, is not confined to court where it was rendered; but apparently what is meant is that, where conditions have materially changed since the judgment, another proceeding, constituting in effect a new suit, may be brought in another court to determine the right to custody at the time it is instituted.—*Hardy v. McCulloch*, Tex.Civ.App., 236 S.W. 629.

Matters not involved or only incidentally involved

(1) Suit to set aside void or voidable judgment affirmed by court of civil appeals does not encroach upon jurisdiction of such court where issue as to validity of such judgment was not involved, or adjudicated in such affirmance.—*Nash v. Hanover Fire Ins. Co.*, Tex.Civ. App., 79 S.W.2d 182.

(2) If the question of the nullity of a judgment is only incidentally involved in an action, it has been held that such action may be brought before any court of competent jurisdiction.—*Bledsoe v. Erwin*, 33 La. Ann. 615.

(3) Adjudication by one district court that a judgment of another district court had been satisfied before an execution sale was made under it and that the sale could not divest owner of title or invest title in purported purchaser, was not void for want of jurisdiction over subject matter, not being an impeachment of the integrity of such judgment of the other court, nor such an attack upon it as could only be presented in the court that rendered it.—*Williams v. Croom*, Tex.Civ.App., 215 S.W. 156.

(4) However, where sole relief sought in action is that judgment of the county court be satisfied and discharged and declared no longer to be a lien, in view of control of its judgments by the county court, a court of concurrent jurisdiction will not take jurisdiction.—*Libby v. Central Wisconsin Trust Co.*, 197 N.W. 206, 182 Wis. 599.

36. Fla.—*Ray v. Phosphate Co.*, 52 So. 589, 59 Fla. 598.

15 C.J. p 1144 note 60.

37. N.C.—*Gulley v. Macy*, 81 N.C. 356.

15 C.J. p 1144 note 61.

38. Iowa.—*State v. Whitcomb*, 2 N. W. 970, 53 Iowa 85, 35 Am.R. 258.

39. Cal.—*Young v. Young Holdings Corporation*, 80 P.2d 723, 27 Cal. App.2d 129.

Ga.—*Johnson v. People's Bank*, 160 S.E. 235, 173 Ga. 250.

Mont.—*Bullard v. Zimmerman*, 268 P. 512, 82 Mont. 434.

Ohio.—*Dahms v. Swinburne*, 167 N.E. 486, 31 Ohio App. 512.

Okl.—*Campbell v. Hickory*, 273 P. 1088, 137 Okl. 235—*Courtney v. Daniel*, 253 P. 990, 124 Okl. 46—*Johnson v. Petty*, 246 P. 848, 118 Okl. 178—*O'Neill v. Cunningham*, 244 P. 444, 119 Okl. 157—*Southwestern Surety Ins. Co. v. Holt*, 213 P. 80, 88 Okl. 281.

15 C.J. p 1144 note 55.

40. Fla.—*Reybaine v. Kruse*, 174 So. 720, 128 Fla. 278.

Ill.—*People v. Sterling*, 192 N.E. 229, 357 Ill. 354, followed in *People v. Small*, 192 N.E. 235, 357 Ill. 288.

Ky.—*Rice v. Bradley*, 263 S.W. 336, 203 Ky. 775.

Mass.—*Farquhar v. New England Trust Co.*, 158 N.E. 836, 261 Mass. 209.

41. Mont.—*State v. District Ct.*, 152 P. 753, 51 Mont. 310.

N.Y.—*Stewart v. Stewart*, 111 N.Y.S. 734, 127 App.Div. 724.

42. Colo.—*Fields v. Kincaid*, 184 P. 832, 67 Colo. 20.

43. Pa.—*In re Roseberry's Estate*, 20 Pa.Dist. & Co. 170.

44. Cal.—*Haines v. Commercial Mortg. Co.*, 273 P. 35, 206 Cal. 10—*Dorland v. Hanson*, 22 P. 552, 81 Cal. 202, 15 Am.S.R. 44.

Ill.—*Marshall Field & Co. v. Nyman*, 120 N.E. 756, 285 Ill. 306, affirming 210 Ill.App. 214.

It is otherwise where a proceeding to enforce the order is pending in the department wherein the order was made and the original proceeding assigned to that department has not been finally disposed of therein or legally removed therefrom.—*Williams v. Superior Court in and for Los Angeles County*, Cal.App., 91 P.

state one division of a court cannot disturb a judgment rendered by another division.⁴⁵

Trial and special terms. In New York, the court at a special term is bound by, and may not review, reverse, modify, or amend, an order made at another special term⁴⁶ or at a trial term;⁴⁷ and a denial of a motion at a special term is binding on the court at a trial term.⁴⁸

Judges. Notwithstanding a few decisions to the contrary as to rulings on demurrers,⁴⁹ it is general-

ly considered that, in the same case, one judge may not review and overrule the prior decisions, or vacate or modify the prior orders, of another judge of the same court or possessing equal and coordinate power and jurisdiction, where the other judge is available at the time of the application to set aside or change his order or decision.⁵⁰ Furthermore, where this rule is applicable, it is not permissible to violate it by making an order which conflicts, or is inconsistent, with a prior order by another judge.⁵¹ Of course, particular orders not in

2d 152, superseded, Sup., 96 P.2d 531.

Conflicting orders

(1) It has been held that a conflicting order cannot be made by another department while the former order remains in force.—*Giffen v. Christ's Church*, 191 P. 718, 48 Cal. App. 151.

(2) Opposed to this, however, are holdings that the overruling of a general demurrer to a complaint by one department does not preclude another department from granting judgment for defendant on the pleadings or sustaining an objection to the introduction of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action.—*Wrightson v. Dougherty*, 54 P.2d 13, 5 Cal. 2d 257—*Timm v. McCartney*, 49 P.2d 315, 9 Cal.App.3d 230.

45. Mo.—*State ex rel. Allen v. Buckner*, 47 S.W.2d 256, 226 Mo. App. 807.

46. N.Y.—*In re Moller's Will*, 283 N.Y.S. 919, 247 App.Div. 35—*Feiber Realty Corporation v. Abel*, 274 N.Y.S. 579, 242 App.Div. 786.

47. N.Y.—*Conlew, Inc., v. Uhler*, 267 N.Y.S. 596, 23 App.Div. 380.

48. N.Y.—*Connell v. Equitable Motor Truck Co.*, 190 N.Y.S. 851, 198 App.Div. 849.

49. Fla.—*Jones v. McConnon & Co.*, 130 So. 760, 100 Fla. 1158.

Hawaii.—*In re Hyan*, 31 Hawaii 547.

50. U.S.—*Jurgenson v. National Oil & Supply Co.*, C.C.A.N.J., 63 F.2d 727—*Erie Transfer Co. v. J. Cutler Iron Works*, D.C.N.Y., 47 F.2d 1074, modified, C.C.A., 47 F.2d 1078—*Commercial Union of America v. Anglo-South American Bank*, C.C.A.N.Y., 10 F.2d 937—*Block v. Mansfield Mining & Smelting Co.*, D.C.N.Y., 23 F.Supp. 700—*Wright v. Barnard*, D.C.Del., 264 F. 582.

Iowa.—*Taylor v. Grimes Canning Corporation*, 257 N.W. 353, 218 Iowa 1281—*Denman v. Sawyer*, 232 N.W. 819, 211 Iowa 56.

Mass.—*Lane v. J. W. Lavery & Son*, 1 N.E.2d 378—*Barringer v. Northridge*, 165 N.E. 400, 266 Mass. 315.

Mich.—*Wiener v. Valley Steel Co.*,

236 N.W. 905, 254 Mich. 681—*McConnell v. Merriam*, 203 N.W. 661, 231 Mich. 184.

N.Y.—*Jensen v. Union Ry. Co. of New York City*, 182 N.E. 226, 260 N.Y. 1, dismissing appeal 256 N.Y.S. 951, 235 App.Div. 786—*Gunter v. American Label Co.*, 275 N.Y.S. 861, 243 App.Div. 528—*Skinner, Cook & Babcock v. Fourth Church of Christ, Scientist (Borough of Manhattan, City of New York)*, 264 N.Y.S. 812, 238 App.Div. 573—*Lacqua v. General Linen Supply & Laundry Co.*, 233 N.Y.S. 338, 226 App.Div. 684—*Willard v. Willard*, 185 N.Y.S. 569, 194 App.Div. 123—*Monument Garage Corporation v. Levy*, 268 N.Y.S. 213, 149 Misc. 791, affirmed 271 N.Y.S. 966, 241 App.Div. 856, modified on other grounds 194 N.E. 848, 266 N.Y. 339—*Schwartzberg v. Weisblatt*, 233 N.Y.S. 120, 133 Misc. 476—*Palmer v. Rotary Realty Co.*, 178 N.Y.S. 461, 109 Misc. 243—*Milton Holding Corporation v. Gross*, 193 N.Y.S. 75—*Burkitt v. New Jersey Fidelity & Plate Glass Ins. Co.*, 182 N.Y.S. 689—*McManaway v. Sisson*, 170 N.Y.S. 670.

N.C.—*Kistler v. Wilmington Development Co.*, 200 S.E. 400, 214 N.C. 630—*East Coast Fertilizer Co. v. Hardee*, 188 S.E. 623, 211 N.C. 56—*State v. Standard Oil Co. of New Jersey*, 170 S.E. 134, 205 N.C. 123—*Price v. Life & Casualty Ins. Co. of Tennessee*, 160 S.E. 367, 201 N.C. 376—*Wellons v. Lassiter*, 157 S.E. 434, 200 N.C. 474—*Caldwell v. Caldwell*, 128 S.E. 329, 189 N.C. 805—*In re Ricks' Will*, 126 S.E. 422, 189 N.C. 187.

Or.—*Klamath Development Co. v. Lewis*, 299 P. 705, 136 Or. 445—*Sheedy v. Sheedy*, 274 P. 316, 128 Or. 397.

S.C.—*Spencer v. National Union Bank of Rock Hill*, 200 S.E. 721, 189 S.C. 197—*McCormick v. Rush*, 180 S.E. 43, 176 S.C. 235—*Carolina Baking Co. v. Geilfuss*, 168 S.E. 849, 169 S.C. 348—*Lipman v. Perry*, 123 S.E. 772, 129 S.C. 83—*In re Doran*, 123 S.E. 501, 129 S.C. 26—*Dumas v. Carroll*, 99 S.E. 801, 112 S.C. 284.

Wash.—*State ex rel. Nelson v. Su-*

perior Court for King County, 49 P.2d 903, adhered to 54 P.2d 1215, 184 Wash. 97—*Johnston v. Johnston*, 199 P. 737, 116 Wash. 322.

No appeal lies from final order of one judge of superior court to another.—*Broadhurst v. Board of Com'rs of Pender County Drainage Dist. No. 4*, 142 S.E. 477, 195 N.C. 439.

Judge holding succeeding term has no power to review judgment, rendered at former term held by another judge, on the ground that the judgment is erroneous.—*Herbert B. Newton & Co. v. Wilson Furniture Mfg. Co.*, 174 S.E. 449, 206 N.C. 533—*Caldwell v. Caldwell*, 128 S.E. 329, 189 N.C. 805.

Necessity of consideration of subsequent motion by original judge

(1) Where, in a landlord's summary proceeding, it was agreed that all questions except that of reasonable rental should be eliminated, and the trial judge heard evidence on that question and handed down an opinion, a motion before another justice to dismiss the complaint should have been referred to the justice before whom the proceedings were then pending.—*Levy v. Baum*, 187 N.Y.S. 574, 115 Misc. 201.

(2) Motion to vacate appeal allowed by one judge should be considered by him or by court in banc.—*Commonwealth v. MacDonald*, 94 Pa.Super. 486.

Restoration of original determination

Where county judge's discretionary denial of felony bail was overruled by justice of the supreme court, possessing only concurrent and coordinate jurisdiction in the matter, and bail was fixed by justice, county judge, in whose court indictment awaited trial, had power to reinstate his original determination and could revoke bail fixed by supreme court justice.—*People v. Ackerson*, 1 N.Y.S.2d 427, 166 Misc. 130.

51. La.—*Sanders v. Wyatt*, 176 So. 137, conforming to 174 So. 161, 187 La. 80, reversing 170 So. 519, rehearing denied 171 So. 431.

S.C.—*Smith v. Baldwin*, 149 S.E. 339.

terms vacating or modifying prior orders of another judge may be construed not to be in conflict or necessarily inconsistent therewith;⁵² a party may, by arguing the motion for the second order, waive the point that the prior order of another judge is conclusive;⁵³ a statement in an order appointing a receiver that it is entered without prejudice to the making of a motion before another judge to terminate the receivership supports the view that, in granting the motion to terminate, there is no attempt to review the order of a court of concur-

rent jurisdiction;⁵⁴ and after reversal of the judgment, an earlier decision by the trial judge as to costs is not binding on another judge.⁵⁵

Under the terms and construction of an applicable statute, a judge may, in a particular action or proceeding, have power to vacate an order granted by another judge⁵⁶ or the judge who granted the order may be without authority to vacate it, as where he is a nonresident judge and acted only because of the absence and inaccessibility of the resident judge.⁵⁷

2. TRANSFER OF CAUSES

§ 502. In General

- a. Power to transfer generally
- b. When transfer proper

a. Power to Transfer Generally

The legislature generally has power to provide for the transfer of causes from one court to another; but a court has no power to transfer a cause in the absence of statutory authority.

As a general rule, it is within the constitutional powers conferred upon the legislature of a state to provide by statute for the removal of causes from one court to another,⁵⁸ as distinguished from the removal of causes from state courts to federal courts under acts of congress, discussed in the title Removal of Causes, and a change of the place of trial from one county or district to another, treated in the title Venue. However, unless expressly authorized so to do, a court has no authority to transfer a cause from itself to another court, and thereby give the other court possession of the case to hear and determine it,⁵⁹ although the other court

would have had jurisdiction of the cause if it had come to it by due process.⁶⁰ While a statute is invalid in so far as it undertakes to vest a court with power, to be exercised compulsorily and against the will of the parties, to transfer to another court actions of which the original court had jurisdiction when the constitution was adopted,⁶¹ the statute may be given effect, so far as to authorize a transfer with the consent of the parties.⁶²

Construction of statutes. Statutes authorizing the transfer of causes from courts of limited jurisdiction when necessary must be construed within reasonable and fair limitations.⁶³

Prospective or retrospective operation. A general statute relating to the transfer of causes between superior and district courts is applicable to a superior court which came within the purview of the statute after its enactment although not originally within the purview thereof.⁶⁴ A statute authorizing the transfer of causes from one court to another relates to procedure only, and applies

152 S.C. 129.—In re Doran, 123 S.E. 501, 129 S.C. 26.

Order, dismissing case held under advisement by judge of another district court, was unauthorized, without jurisdiction, and void.—De Zavala v. Scanlan, Tex.Com.App., 65 S.W.2d 489, reversing, Scanlan v. De Zavala, Civ.App., 42 S.W.2d 849.

52. Iowa.—In re Dodge's Estate, 189 N.W. 759, 194 Iowa 512.
Mass.—Lane v. J. W. Lavery & Son, 1 N.E.2d 373.
S.C.—Ex parte Citizens' Bank of Fairfax, 119 S.E. 903, 126 S.C. 291.

Order directing sheriff to set off homestead does not modify order of another judge for entry of default judgment.—Ex parte Morrow, 190 S.E. 506, 183 S.C. 170, 110 A.L.R. 898.

53. S.C.—Lombard Iron Works & Supply Co. v. Town of Allendale, 196 S.E. 513, 187 S.C. 89.

54. Ill.—Quitman v. Dowd, 23 N.E. 2d 207, 301 Ill.App. 403.

55. N.Y.—R. & A. Building Corporation v. Sonn, 4 N.Y.S.2d 441, 167 Misc. 616.

56. N.Y.—Glickman v. Kirtland, 254 N.Y.S. 470, 142 Misc. 313.
Va.—Nichols v. Central Virginia Power Co., 130 S.E. 764, 143 Va. 405, 44 A.L.R. 727.

57. Tex.—Hooser v. Barnett, Civ. App., 87 S.W.2d 519.

58. Miss.—Ex parte Tucker, 143 So. 700, 701, 164 Miss. 20, citing *Corpus Juris*.
Tex.—Currie v. Dobbs, Civ.App., 10 S.W.2d 438.
15 C.J. p 1145 note 64.

Statute held unconstitutional

Acts 1920 c 425 § 322A, providing for the removal of equity cases in the courts in Baltimore City where a party believes that he cannot have a fair trial, is unconstitutional, as

being in conflict with Const. art 4 § 32, providing for the assignment of judges to the courts of Baltimore City.—Wilmer v. Light St. Sav. & Bldg. Ass'n of Baltimore City, 118 A. 414, 141 Md. 238.

59. Mass.—Stoneman v. Coakley, 164 N.E. 802, 266 Mass. 64.
15 C.J. p 1145 note 68.

Power not inherent even in a court of general jurisdiction.—T. Blumenthal & Co. v. Theo Tiedemann & Sons, 194 N.Y.S. 86, 118 Misc. 560.

60. Mo.—State v. Nixon, 133 S.W. 336, 232 Mo. 98.

61. N.Y.—Alexander v. Bennett, 60 N.Y. 204.

62. N.Y.—Anderson v. Reilly, 66 N.Y. 189.

63. N.Y.—U. S. Fidelity & Guaranty Co. v. McGuire & Co., 298 N.Y.S. 455, 164 Misc. 120.

64. Okl.—Acme Oil & Gas Co. v. Cooper, 33 P.2d 191, 168 Okl. 346.

to actions pending at the time the statute went into effect.⁶⁵

Curative acts. A legislative act validating all proceedings in district courts in causes transferred thereto validates the transfer of a cause from the superior court to a district court and subsequent proceedings therein, if the proceedings sought to be validated could lawfully have been authorized in the first instance.⁶⁶

b. When Transfer Proper

The questions from or to what court a cause may

be transferred, what causes may be transferred, and what constitutes a sufficient ground for a transfer, involve a construction of the constitutional or statutory provisions relating to the subject.

Since the power to transfer a cause from one court to another is dependent on constitutional or statutory provisions, as stated supra § 502 a, the particular constitutional or statutory provision in force in a state at the time when a transfer is sought must, of course, be looked to in order to determine from or to what court a cause may be transferred,⁶⁷ what causes are subject to be so transferred,⁶⁸ and what constitutes a sufficient

65. Cal.—Goldie v. Superior Court in and for San Diego County, 56 P. 2d 261, 13 Cal.App.2d 12—Bershon v. Municipal Court of City of Los Angeles, 42 P.2d 649, 5 Cal.App.2d 519.

Ill.—Brauer v. Laughlin, 211 Ill.App. 534.

66. Okl.—Chicago, R. I. & P. Ry. Co. v. Austin, 153 P. 517, 63 Okl. 169, L.R.A.1917D 666.

67. N.Y.—Breen v. Picard, 4 N.Y.S. 2d 301, 167 Misc. 561.

Okl.—McJunkin v. Turner, 267 P. 628, 131 Okl. 37—Mann v. Osborne, 261 P. 146, 128 Okl. 32.

Tex.—L. G. Balfour Co. v. Gossett, 115 S.W.2d 594, 131 Tex. 348, reversing on other grounds Gossett v. L. G. Balfour Co., Civ.App., 111 S.W.2d 1119.

15 C.J. p 1145 note 67.

Repeal of statute

L.1909 c 14 art 7 § 10, as amended by L.1911 c 121 § 1, providing for transfer of causes from superior to district court, was not repealed by L.1911 c 39 § 2, adopting Revised Code of Laws; hence omission of revisors to include provision for transferring causes from superior to district courts is without effect.—In re Nichols' Will, 166 P. 1087, 54 Okl. 241.

Power under particular statutes

(1) Under Civ.Pract.Act § 1283 et seq. § 1296, every proceeding to review weight, competency, and sufficiency of evidence taken by board or officer pursuant to "statutory direction" must be transferred in first instance to appellate division regardless of whether additional questions are raised, and every other proceeding must be determined by the special term, which shall itself dispose of the cause on the merits.—Rochester Gas & Electric Corporation v. Maitble, 15 N.Y.S.2d 163, 172 Misc. 359.

(2) Civ.Pract.Act §§ 96, 97, 1572, do not confer jurisdiction to remove an action pending in one court of record to another court of record, not the supreme court.—T. Blumenthal & Co. v. Theo. Tiedemann & Sons, 194 N.Y.S. 86, 118 Misc. 560.

(3) Under New York City Municipal Court Code § 17 subd 5, a justice presiding in one district has no power to make, by consolidation of actions, a transfer of a case pending in another district to the district in which he is presiding, such a transfer not being essential to the disposition of the case pending in his district, notwithstanding Municipal Court Code §§ 5, 15, and Civ.Pract. Act §§ 96, 97.—Ralph M. Levey Co. v. Fox, 200 N.Y.S. 274, 121 Misc. 113.

(4) Order removing a municipal court action and consolidating it with general assignment proceeding under debtor and creditor law is not within power of special term to make.—In re Taylor Specialty Stores, 279 N.Y.S. 567, 244 App.Div. 809.

(5) Under L.1907-1908 c 16 art 1 § 1, the district court was empowered to transfer guardianship proceeding to county court of county having jurisdiction.—McJunkin v. Turner, 267 P. 628, 131 Okl. 37—Mann v. Osborne, 261 P. 146, 128 Okl. 32.

(6) Cause at issue in superior court at time of decision, as to validity of law creating court, was pending in legally created court, as regards transfer to another court.—Isle v. Inman, 276 P. 490, 136 Okl. 77.

(7) The courts of the 30th, 78th, and 89th districts for Wichita County are separate and independent tribunals, under statute authorizing judges to transfer cases from one such district to another.—Harvey v. Wichita Nat. Bank, Tex.Civ.App., 113 S.W.2d 1022.

(8) Under Remington Code 1915 §§ 46, 1774, and 1671-23, actions for penalties or fines declared by city ordinance and exceeding one hundred dollars cannot be transferred from police court of city of the third class to a justice court.—State v. Woolson, 167 P. 1088, 98 Wash. 505.

Duty to transfer

L.1915 p 487 does not make it the duty of county court to certify a cause to the district court when no stipulation to that effect has been

made.—Stratton v. Rice, 181 P. 529, 66 Colo. 407.

68. Ala.—Crawford v. Carlisle, 89 So. 585, 206 Ala. 379.

Me.—Head v. Fuller, 118 A. 714, 122 Me. 15.

N.Y.—In re Noel, 283 N.Y.S. 876, 246 App.Div. 740.—In re Pedrette's Estate, 274 N.Y.S. 607, 153 Misc. 106.

Ohio.—Knight v. Johnson, 1 Ohio N. P., N.S., 260.

Wis.—Kessler v. Olen, 280 N.W. 352, 228 Wis. 662, rehearing denied 281 N.W. 661, 228 Wis. 662.

15 C.J. p 1145 note 68.

Habeas corpus proceedings

Upon original proceeding in St. Louis court of appeals for a writ of habeas corpus it has no power to certify the cause to the supreme court.—Ex parte Webers, 205 S.W. 620, 275 Mo. 677, remanding cause 197 S.W. 850, 200 Mo.App. 23.—Ex parte Webers, 206 S.W. 244, 200 Mo. App. 368.

Injunction proceedings

(1) Under Const.1890 § 162 court of chancery, in suit wherein injunctive relief was sole relief sought, could not transfer cause to circuit court.—Barnes v. McLeod, 140 So. 740, 165 Miss. 437.

(2) Chancellor ordering issuance of writ of injunction could not transfer case to county court for hearing on whether injunction should be made perpetual.—Welch v. Bryant, 128 So. 734, 157 Miss. 559.

(3) Under Rev.St.1911 art 4653, a court issuing temporary writ enjoining enforcement of judgment properly transferred case to court rendering judgment.—Farmer v. East Texas Securities Co., Tex.Civ.App., 18 S.W.2d 711.

(4) Orders setting off hearing and transferring suit to enjoin enforcement of judgment to district court, wherein rendered, made restraining order returnable thereto as required by statute.—Citizens' Bank v. Brandau, Tex.Civ.App., 1 S.W.2d 466, error refused.

Suit relating to corporate bonds

Where corporate bondholders' suit

ground for a transfer.⁶⁹ Where the constitution | or statute states the grounds for transfer, a trans-

was filed before suit by trustee under agreement securing bonds, transfer to court in which trustee's suit was pending was properly denied.—*First Nat. Bank v. Brown*, Tex.Civ. App., 34 S.W.2d 412, error dismissed, 53 S.W.2d 604, 122 Tex. 168.

Possessory actions

Gen.L.1909 c 286 §§ 7, 8, in connection with § 5 of the same act, providing for the removal from district court to the superior court of a cause for the possession of a tenement, where plaintiff or defendant makes claim for a jury trial, is mandatory and certification should be made, although the application therefor is by the plaintiff, and although a demurrer to the declaration is pending and undetermined in the district court.—*Durfee v. District Court of First Judicial District*, 119 A. 60, 44 R.I. 462.

Forcible entry and detainer

(1) Forcible entry and detainer action in municipal court was not transferable to district court as involving title to realty.—*Music v. De Long*, 229 N.W. 673, 209 Iowa 1068.

(2) Even if such action is transferable, removal is authorized only when evidence raises issue.—*Mercantile State Bank v. Vogt*, 226 N.W. 847, 178 Minn. 282.

(3) Under a statute providing that if defendant in forcible entry and detainer shall recognize to claimant, conditional to pay all intervening damages, etc., and that if claimant shall recognize to defendant, conditional to enter suit at next term of superior court, and that if either party neglects to recognize to adverse party, judgment shall be rendered against him as on nonsuit or default, municipal court in which forcible entry and detainer action was filed had duty to enter judgment against defendant as on default, where plaintiff filed recognizance but defendant neglected to recognize to plaintiff. The case was not in order for transfer to superior court and such had no jurisdiction to enter default.—*Haskell v. Young*, 184 A. 394, 134 Me. 221.

Proceedings affecting decedents' estates

(1) On due application the administration of an estate may be removed from the probate court to a court of equity for construction of a will and for administration of the estate in the latter court.—*Crawford v. Carlisle*, 89 So. 565, 296 Ala. 379.

(2) In suit against administrator by creditor of decedent to impress assets with special lien, thus establishing demand as preferred claim, it is not within power of circuit court, on plaintiff's failure to establish demand, to order it cer-

tified to probate court for allowance as "general" claim.—*Raymuth Real Estate & Building Co. v. Robinson*, 204 S.W. 276, 199 Mo.App. 515.

(3) Purpose of statute permitting transfer of litigation relating to estates of decedents to surrogate's court was avoidance of delay in settlement of decedent's estates.—*In re Miller's Estate*, 286 N.Y.S. 867, 158 Misc. 775.

(4) Generally, consent to transfer of litigation relating to estates of decedents from other courts to surrogate's court should be withheld, unless it appears that otherwise settlement of decedent's estate would be long delayed.—*In re Miller's Estate*, supra.

(5) Where action, instituted by deceased to recover for personal injuries sustained by him before enactment of personal injury survival statute, was continued in name of deceased's executor, executor was not entitled to have case transferred from supreme court to surrogate's court, since pendency of litigation would not delay settlement of estate.—*In re Miller's Estate*, supra.

(6) In an action brought by a legatee to construe a will and restrain the transfer of certain notes by the widow, and to settle the estate finally in chancery court, where the executor filed a cross bill and asked for affirmative relief, the chancery court acquired jurisdiction of the cause and the estate was properly ordered transferred from the county court to the chancery court there to be administered and settled.—*Scholze v. Scholze*, 2 Tenn.App. 80.

(7) A proceeding on a claim against testator's estate for reasonable value of services performed by daughter of testator in consideration for testator's oral agreement to devise estate to daughter, which testator, whose agreement was void because of statute of frauds, failed to do, was triable in circuit court by a jury where the daughter demanded jury trial and timely demanded that the case be sent to the circuit court for trial.—*Kessler v. Olen*, 280 N.W. 352, 228 Wis. 662, rehearing denied 281 N.W. 691, 228 Wis. 662.

Criminal cases

Where inferior courts are created with jurisdiction of felonies, an indictment may originate in a superior court and thence be transferred for trial to the inferior court.—*Ex parte Tucker*, 143 So. 700, 164 Miss. 20.

62. Md.—*Wilmer v. Light St. Sav. & Bldg. Ass'n of Baltimore City*, 118 A. 414, 141 Md. 238.
Mo.—*Phillips v. Blessing*, App., 127 S.W.2d 62.
N.Y.—*In re Sutton*, 165 N.Y.S. 58, 15 C.J. p 1146 note 69.

Disqualification of judge

(1) Where surrogate disqualified himself from hearing controversy which involved establishment of marriage between petitioner and testator and became important witness against petitioner, a new trial was directed to be had in atmosphere different from that of surrogate's court and preferably in supreme court before jury, unless parties waived jury.—*In re Gally's Will*, 2 N.Y.S.2d 29, 253 App.Div. 905.

(2) In absence of substantial compliance with statute authorizing probate judge to certify cases to circuit court when disqualified to hear them, probate court was without jurisdiction to certify proceedings to revoke authority of an executor upon motion of probate judge, when there was no showing of disqualification of judge or that parties in interest consented to certification.—*Phillips v. Blessing*, Mo.App., 127 S.W.2d 62.

(3) The probate court has exclusive original jurisdiction to entertain proceedings to revoke the authority of an executor, and the circuit court can acquire jurisdiction of such proceedings only by appeal or by certification under provisions of statute authorizing probate judge to certify cases to circuit court when disqualified to determine them.—*Phillips v. Blessing*, supra.

(4) Where proceedings are commenced in the county court in which the county judge is a party or interested, they may be transferred to the circuit court.—*In re Bethel's Estate*, 209 P. 311, 111 Or. 178.

Case improper for judge to try

Transfer of suit to enforce judgment by sale of land and application of proceeds on debt to city corporation court by circuit court judge, deeming it improper for him to preside at hearing, is valid as expressly authorized by statute, although transfers in other ways are authorized by other statutes.—*Woodhouse v. Burke & Herbert Bank & Trust Co.*, 185 S.E. 876, 166 Va. 706.

Where party cannot have fair trial

Const. art 4 § 8, allowing removal where party cannot have a fair trial, etc., does not apply to equity cases.—*Wilmer v. Light St. Sav. & Bldg. Ass'n of Baltimore City*, 118 A. 414, 141 Md. 238—*Cooke v. Cooke*, 41 Md. 362.

Facilitating proceedings

(1) Action in New York city court involving ownership of proceeds of life policy issued upon life of son of deceased whose estate was being administered in surrogate's court would be transferred to surrogate's court where winding up of each of estates involved would thereby be

fer on other grounds is improper.⁷⁰ A petition for | a transfer will also be denied where the cause is,

facilitated.—In *re Burza's Estate*, 274 N.Y.S. 811, 153 Misc. 112.

(2) City court case growing out of same accident as case in supreme court should be removed and actions consolidated.—*Goltz v. Art Awning Mfg. Co.*, 260 N.Y.S. 162, 145 Misc. 754.

(3) Where statute authorized president justice of municipal court of New York City to transfer cases from one district to another to facilitate business of court, order transferring case to effect efficient administration of justice as well as to otherwise facilitate transaction of business of court was proper.—*Millhauser v. Schwach*, 273 N.Y.S. 944, 152 Misc. 546.

(4) That reason for transferring jury case was excessive demands for jury trials and prejudicial sentiment of community precluding fair trial was held not to prevent transfer tending, in opinion of president justice, to effect justice and facilitate business of court.—*Millhauser v. Schwach*, *supra*.

(5) Order of president justice of municipal court of New York City transferring jury cases from fifth to fourth district, and providing that justice assigned to fifth district should sit at trial of transferred cases, was not invalid as leaving fifth district without justice, since president justice could assign another judge to sit in fifth district.—*Millhauser v. Schwach*, *supra*.

(6) President justice of municipal court of New York City could transfer to another district summary proceeding affecting real estate begun in district in which real estate was situated, where either party demanded jury trial or president justice determined that emergency existed.—*Millhauser v. Schwach*, *supra*.

(7) He could transfer to another district in same borough summary proceeding by landlord against tenant brought in district where property was situated where jury trial was demanded and president justice determined that landlord could not obtain fair trial within district.—*Millhauser v. Schwach*, *supra*.

(8) Where there was no showing that order transferring jury case was not made in good faith, contention that order was oppressive and unreasonable would not be sustained.—*Millhauser v. Schwach*, *supra*.

(9) Surrogate's consent to transfer from supreme court to surrogate's court of action against estate for board, lodging, and medical care would be granted, where action was brought pending hearing on issues

raised by claimant's objections to disallowance of his claim and claimant subsequently declined opportunity of trial in surrogate's court, and where only obstacle to final distribution to next of kin was pendency of action and its continuance in supreme court would result in delay due to unavoidable calendar congestion.—In *re Pfersich's Estate*, 275 N.Y.S. 928, 153 Misc. 609.

Transfer to another department or division

(1) Where justice of appellate division who sat upon the argument of particular appeals died, and remaining justices qualified to hear the appeals were equally divided, the court directed the appeals to be sent to another department of the appellate division to be heard and determined.—*People v. Mieske*, 13 N.Y.S. 2d 699, 257 App.Div. 1066.

(2) Under Const.1898 art 134, and rules of civil district court, judge of one division of that court could not transfer a cause allotted to his division to another division because suit arising from same accident and against same defendant, with others, was previously allotted to the latter division, and was discontinued pending submission of exceptions, and another suit against one defendant had been brought.—*James v. St. Charles Hotel Co.*, 77 So. 117, 142 La. 464.

Nonresidence of parties

(1) City court of city of New York having jurisdiction of subject matter and having acquired jurisdiction of parties, mere nonresidence of parties within its territorial jurisdiction is not sufficient ground for removal of cause to supreme court of another county, in view of New York City Court Act §§ 18, 19, 22, L1920 c 935, but motion must be founded on grounds specified in Civ. Pract.Act § 187, for changing place of trial.—*Harris v. Hellyer*, 206 N.Y.S. 287, 210 App.Div. 399.

(2) Action in municipal court without jury, brought in district where neither party resided nor had place of business, could be transferred to proper district.—*Grady v. Selden Truck Corporation*, 231 N.Y.S. 255, 133 Misc. 97.

Rights of claimant of property seized under execution

Where claimant of proceeds of property seized under fieri facias from city court, jurisdiction of which is limited by Const.1921 art 7 § 91 pars 1 and 3, is thereby prevented from going before that court to contest his claim with creditor in fieri facias, he can compel creditor to come into civil district court to litigate claim.—*San-I-Baker Cor-*

poration v. Magendie, 102 So. 821, 157 La. 643.

Miscellaneous grounds

(1) Removal of settlement of guardianship from probate to chancery court was proper where guardian's surety alleged fraudulent collusion between two guardians and ward to procure unjust decree, insolvency of guardian, and sought discovery and accounting of numerous complicated matters peculiar to powers and jurisdiction of chancery court.—*Ex parte Brown*, 148 So. 132, 226 Ala. 578.

(2) Judgment creditors' suit against surety on insolvent foreign insurance company's qualifying bond was properly transferred to court where receivership proceedings were pending, and which would have possession of common fund to which creditors must look for payment of claims.—*Cognovich v. Sun Indemnity Co. of New York*, 145 So. 774, 176 La. 373.

(3) Plaintiff pleading permanent injuries is entitled to change of forum from city court to supreme court in order to recover larger sum.—*Morris v. Perelman*, 260 N.Y.S. 354, 145 Misc. 892, affirmed 261 N.Y.S. 986, 237 App.Div. 857.

(4) Where, when action for installments of rent, amounting to one thousand two hundred fifty-eight dollars and thirty cents, under guaranty, was commenced in city court of New York, plaintiff had recovered in supreme court judgment for over two thousand dollars for previous installments, but, after action in city court was commenced, judgment in supreme court was vacated, plaintiff was entitled to removal of action from city court into supreme court, under Code Civ.Proc. § 319a subd 2.—In *re Sutton*, 165 N.Y.S. 58.

(5) President justice cannot transfer action from one district to another district because action was not begun in district specified in municipal court act.—*Grady v. Selden Truck Corporation*, 231 N.Y.S. 255, 133 Misc. 97.

(6) In an action where a case was tried before a judge of one division and a mistrial was had and the case was thereafter reassigned by the presiding judge to another division for trial, because the first judge was busy engaged in trying other cases, it was held that the fact that the judge was busy constituted good cause for transferring the case.—*Bry-Block Mercantile Co. v. Byrd*, 4 Tenn.App. 178.

70. La.—*James v. St. Charles Hotel Co.*, 77 So. 117, 142 La. 464. N.Y.—*Retting v. Baff*, 200 N.Y.S. 252, 130 Misc. 650.

in effect, already in the court to which the transfer is asked.⁷¹ In order that a petition to transfer a case may be entertained there must be a pending case to be transferred.⁷² The pendency of an appeal does not deprive a court of its jurisdiction to transfer the cause to another court of coordinate jurisdiction.⁷³ It has been held that a statute permitting the transfer of "actions" to another court is inapplicable to summary proceedings;⁷⁴ that a statute authorizing the transfer of cases "commenced" in a certain court did not authorize the transfer of a case coming to such court on appeal from a justice of the peace;⁷⁵ that a statute providing that "actions at law" in the supreme court may be transferred to the surrogate court was not intended to include actions in equity, notwithstanding the distinction between actions at law and suits in equity have been abolished,⁷⁶ and that proceedings in a county court to set aside a homestead to a widow cannot be transferred to

the district court under a statute authorizing such transfer where title to or boundary of land is involved.⁷⁷ An appellate court will not transfer jurisdiction of disbarment proceedings instituted therein to another court, even though such court may have concurrent jurisdiction of the proceedings.⁷⁸

§ 503. Discretion of Court

The transfer of a cause is sometimes left to the discretion of the court, but where the statute is mandatory a transfer does not involve judicial discretion.

The transfer of a case is sometimes left to a considerable extent to the sound discretion of the court;⁷⁹ and where it is provided by statute that when a case has been pending in a certain court for a certain period of time it shall be removed to another court on motion, without notice, although no discretion is left to the court as to the cause of removal, yet some discretion is conferred

71. N.Y.—Retting v. Baff, supra.

On the acceptance by plaintiff's attorney of answer entitled in "Supreme Court," the action is effectually instituted in that court, although the summons and complaint were entitled in the "County Court," and hence a removal from the county court to the supreme court, even if such an order might be made, is unnecessary and will be denied.—Retting v. Baff, supra.

72. Miss.—Baker v. Moore, 169 So. 773, 176 Miss. 431.

N.J.—Lunger v. Page, 2 A.2d 606, 16 N.J.Misc. 529.

Void proceedings

Where attachment proceedings in district court against nonresident executor were void, proceedings were not "pending" within statute permitting the district court to transfer a "pending" action to an appropriate tribunal if the court is without jurisdiction of the subject matter.—Lunger v. Page, supra.

Want of process

Where no summons issued from circuit court wherein detainee action purportedly originated, order of removal to corporation court did not give corporation court jurisdiction, hence such court should have sustained specially appearing defendant's motion to quash writ of seizure.—Preston v. Legard, 168 S.E. 445, 160 Va. 364.

Where cause dismissed in county court, and no appeal taken, circuit court properly refused to entertain petition to transfer case to circuit court.—Baker v. Moore, 169 So. 773, 176 Miss. 431.

73. Tex.—Texas Employers' Ins. Ass'n v. Tabor, Civ.App., 291 S.W. 311.

74. Me.—Head v. Fuller, 118 A. 714, 122 Me. 15.

Compelling support of minor child Priv. & Sp. L.1919 c 3 § 2 subd 4, providing that, where the demand exceeds twenty dollars, "actions" brought in municipal court may on defendant's motion be removed to the superior court, does not apply to petitions brought under Rev.St. c 66 § 9 to compel a father's contribution to support of minor child, since such proceeding is summary, and not an "action" within the meaning of the removal statute, and since to allow removal would serve same purpose as an appeal which does not lie.—Head v. Fuller, supra.

75. Mich.—Pruyn v. Kent Cir. Judge, 85 N.W. 733, 126 Mich. 244.

76. N.Y.—In re Pedrette's Estate, 274 N.Y.S. 607, 153 Misc. 106.

Action held not in equity

Action against executor to recover amount which testator allegedly agreed to bequeath in consideration of services rendered and of moneys expended in testator's behalf during his last illness was not "action in equity" so as to bar transfer of action from supreme court to surrogate's court.—In re Franklin's Estate, 274 N.Y.S. 612, 153 Misc. 110.

77. Okl.—Tarman v. Pierce, 33 P.2d 203, 168 Okl. 348.

78. Miss.—In re Steen, 134 So. 67, 160 Miss. 374.

79. Ohio.—Knight v. Johnson, 1 Ohio N.P., N.S., 260.

Tex.—Kraker v. Bettman-Kleinhauer Clothing Co., Civ.App., 12 S.W.2d 247.

15 C.J. p 1146 note 70.

Discretion properly exercised

(1) Where mandamus could not be successfully maintained, trial court was not required to dismiss action but could, in its discretion, permit plaintiff to file additional or amended pleadings in order that he might establish such right as he might have, especially where necessary parties have been served with summons and were in court, and although summons was returnable in a county other than its issuance, the case could be transferred to civil issue docket of proper county.—Harris v. Board of Education of Vance County, 4 S.E.2d 328, 216 N.C. 147.

(2) Refusal to transfer suit by private citizen to enjoin operation of pari-mutuel system of betting on dog races to district court in which was pending suit by operators of dog-racing plant to enjoin district attorney from maintaining criminal prosecutions for operation of such system and from instituting civil proceedings interfering with operation of such system, was not abuse of discretion.—Oak Downs, Inc. v. Schmid, Civ.App., 95 S.W.2d 1040, reversed on other grounds 97 S.W.2d 671, 128 Tex. 214.

Discretion improperly exercised

Denial of application for removal of action from city court of Yonkers to supreme court, New York County, was improper exercise of discretion where all but one of defendant's necessary and material witnesses were residents of New York County, and city court of Yonkers was without power to issue its subpoena for service outside county of Westchester.—Application of John Hancock Mut. Life Ins. Co. of Boston, Mass., 295 N.Y.S. 152, 250 App.Div. 879.

upon it as to the time when the motion will be entertained.⁸⁰ On the other hand, statutes requiring the transfer of causes have been held mandatory, and, where the statutory ground for a transfer exists, the court has no discretion in the matter.⁸¹

§ 504. Issues of Fact

Issues of fact may in some cases be transferred to another court for trial, but not issues of law, or issues dependent on both law and fact.

Issues of fact may in some cases be transmitted from one court to another for trial;⁸² but a similar rule does not apply to issues of law,⁸³ and where an issue depends on both law and fact, it cannot be sent to another court.⁸⁴

80. Va.—Spengler v. Davy, 15 Gratt. 381, 56 Va. 381.

81. Iowa.—Corn Belt Telephone Co. v. Superior Court of City of Oelwein, 164 N.W. 168, 180 Iowa 985. N.Y.—Rochester Gas & Electric Corporation v. Maltbie, 15 N.Y.S.2d 163, 172 Misc. 359.

Statute held mandatory

Statute providing that in counties in which superior court is held at county seat, and at no other place, judges of superior courts and judges of district courts shall, on motion, transfer cause to district or superior court, is mandatory, and order of transfer does not involve judicial discretion.—Acme Oil & Gas Co. v. Cooper, 33 P.2d 191, 168 Okl. 346.

Nonresidence of party

Code Suppl.1907 § 261 held mandatory as to transfer of causes from superior to district courts, when defendant's nonresidence is shown, and superior court has no discretion.—Corn Belt Telephone Co. v. Superior Court of City of Oelwein, 164 N.W. 168, 180 Iowa 985.

82. Pa.—Thomas' Appeal, 17 A. 181, 124 Pa. 646.

15 C.J. p 1146 note 72.

Issue of fact not involved

In statutory proceeding to review determination of public service commission, which denied gas company right to use pipe line crossing public highways, on ground that company had no right to obtain consents of local authorities to use of public highways, no "triable issue of fact" within statutory provision was presented, notwithstanding answer denying certain allegations of petition, and hence special term could dispose of cause on merits rather than transfer proceeding to appellate division.—Penn-York Natural Gas Corporation v. Maltbie, 299 N.Y.S. 1004, 164 Misc. 569.

83. Pa.—Robinson v. Zollinger, 9 Watts 169.

84. Pa.—Mothland v. Wireman, 3 Penr. & W. 185, 33 Am.D. 71.

85. Cal.—Cook v. Winklefleck, 59 P. 2d 463, 16 Cal.App.2d Supp. 759. 15 C.J. p 1147 note 75.

86. Cal.—Goldie v. Superior Court in and for San Diego County, 56 P.2d 261, 13 Cal.App.2d 12.

N.H.—Langdell v. Eastern Basket & Veneer Co., 99 A. 90, 78 N.H. 343.

Wis.—In re Jones' Estate, 241 N.W. 387, 207 Wis. 354.

15 C.J. p 1147 note 76.

Causes properly transferred

(1) In an action by the city of Madera in the recorder's court to recover from a sewer user a charge, levied upon him by ordinance, constituting a tax, impost, and toll within Const. art 6 § 5, providing that the superior court shall have exclusive original jurisdiction of a case involving the legality of any such charge, it appearing from the answer that the legality of the charge was involved, the recorder should have transferred the cause to the superior court.—City of Madera v. Black, 184 P. 397, 181 Cal. 306.

(2) Plaintiffs, erroneously suing in county court to enforce mechanic's lien, are entitled, under Civ.Pract.Act § 110, to remove action to supreme court.—Luther v. Silver, 223 N.Y.S. 468, 130 Misc. 21.

(3) Court wherein suit to set compensation award aside is filed, on ascertaining suit should be tried in county where injury occurred, must transfer cause to such other county.—Lloyds Casualty Co. of New York v. Lem, Tex.Civ.App., 62 S.W.2d 497, error dismissed.

Amount in controversy

Where complaint in action in city court sought recovery of amount beyond its monetary jurisdiction, action should be removed to proper court under Civ.Pract.Act § 110.—De Lisa v. Trifoglio Const. Co., 266 N.

§ 505. Actions Brought in Court without Jurisdiction

Actions brought in a court without jurisdiction should be dismissed and not transferred to another court, unless the statute authorizes such transfer. The filing of a counterclaim for liquidated damages in excess of the court's jurisdiction is ground for a transfer of the cause under some statutes.

Where an action is brought in a court which has no jurisdiction thereof, such court has no power to transfer the action to another court having jurisdiction to entertain it, but should dismiss it,⁸⁵ unless provision is made by statute for the transfer of cases under such circumstances;⁸⁶ but such a statute does not authorize a court which has jurisdiction of a cause to transfer it to another court.⁸⁷

Y.S. 798, 149 Misc. 532—Deal v. Zarelli Realty Corporation, 265 N.Y. S. 845, 148 Misc. 865.

87. Cal.—Cook v. Winklefleck, 59 P. 2d 463, 16 Cal.App.2d Supp. 753. N.J.—Commonwealth Roofing Co. v. Riccio, 87 A. 114, 81 N.J.Eq. 488. See Commonwealth Roofing Co. v. Riccio, 88 A. 385, 81 N.J.Eq. 315.

Causes held within jurisdiction of removing court

(1) The district court has jurisdiction over the subject matter of an action commenced by attachment for work done and services rendered so as to preclude transfer of the cause under statute limiting the court's power of transfer to cases in which the court is without jurisdiction of the subject matter.—Lunger v. Page, 2 A.2d 606, 16 N.J.Misc. 529.

(2) Count which was in effect a proceeding in unlawful detainer involving monthly rental value of more than two hundred dollars, stated cause of action within jurisdiction of superior court, and one which was not transferable to municipal court.—Cook v. Winklefleck, 59 P.2d 463, 16 Cal.App.2d Supp. 759.

(3) Count which was substantially an action of ejectment involving property of value in excess of three thousand dollars stated cause of action within jurisdiction of superior court, and one which was not transferable to municipal court.—Cook v. Winklefleck, supra.

(4) That superior court acting upon the evidence exercised its discretion against granting of declaratory relief did not alter nature of action brought therefor from one for declaratory relief to one for incidental relief asked for in the nature of money judgment, and hence superior court was not warranted in transferring case to municipal court on theory action was one for recovery of money judgment only.—Cook v. Winklefleck, supra.

It has been held that if, prior to final judgment, a matter arises judicially which discloses that the apparent jurisdiction of the court no longer exists, the action shall be dismissed for want of jurisdiction, or be transferred to a tribunal having jurisdiction.⁸⁸

Effect of counterclaim exceeding jurisdiction. Under some statutes, where it appears that a counterclaim will necessarily involve the determination of questions not within the jurisdiction of the court, the action should be transferred to a court having jurisdiction;⁸⁹ but if the statute provides that, on filing a counterclaim for liquidated damages exceeding the jurisdiction of the district court, the cause may be transferred by the judge of that court to the circuit court, the filing of a counterclaim for unliquidated damages does not authorize a transfer.⁹⁰

(5) Nor was transfer warranted on theory that action was one for the incidental relief asked for in the nature of a money judgment, since action for declaratory relief being essentially an equitable proceeding, superior court having once obtained jurisdiction should have retained it and determined the entire case.—Cook v. Winklefleck, *supra*.

(6) Where causes of action stated in second and third counts of complaint were within jurisdiction of superior court only, cause of action stated in first count, even if it were within jurisdiction of municipal court, could not be transferred there by superior court, since an action could be transferred only as a unit.—Cook v. Winklefleck, *supra*.

Suit for alimony

(1) The chancery court has full jurisdiction in suits for alimony under Const.1890 § 159, and may entertain a suit by the wife against sureties on the husband's bond to pay alimony, where the bond is given in accordance with a decree of the court. It is therefore error for the chancery court to transfer such suit to the circuit court against the consent of the complainant. It is only in cases where the circuit court has "exclusive jurisdiction" that a cause may be transferred under Const.1890 § 162, unless by consent of the parties.—Cadenhead v. Estes, 99 So. 361, 134 Miss. 569.

(2) Where none of the sureties on a bond for alimony lived in the county where a decree for alimony was rendered, and to satisfy which a bond was given by the defendant in the alimony suit and the sureties on such bond, a suit on the bond may be brought in the chancery court of the county where some of the sureties live, and such suit will be re-

garded as ancillary to the court where the alimony suit is pending, and in such case the sureties may not have the cause transferred to the circuit court.—Cadenhead v. Estes, *supra*.

88. Colo.—People v. Max, 198 P. 150, 70 Colo. 100.

89. Cal.—Stratton v. Superior Court of Los Angeles County, 43 P.2d 539, 2 Cal.2d 693.

Statute held mandatory

Cal.—Brady v. Kobey, 81 P.2d 263, 27 Cal.App.2d 505.

Choice of remedies

Where defendant, sued in municipal court, has counterclaim not within jurisdiction of such court, he may plead counterclaim and have municipal court transfer cause to proper court, or he may bring suit on claim in superior court.—Stratton v. Superior Court of Los Angeles County, 43 P.2d 539, 2 Cal.2d 693.

Amendment of counterclaim increasing amount

Where the civil court acquired jurisdiction of the parties and over the causes stated in the complaint and counterclaims as first interposed, but had no jurisdiction over one of the counterclaims after amendment increasing the amount, the civil court could either dismiss such amended counterclaim or certify it to the circuit court, and, where it so certified, defendant was not prejudiced.—Sells v. Elmergreen, 198 N.W. 267, 183 Wis. 532.

90. N.J.—Brown v. Schwartz, 165 A. 100, 11 N.J.Misc. 196—Toone v. Skorupski, 154 A. 621, 9 N.J.Misc. 381—Tigler v. Fabrics Finishing Corporation, 150 A. 228, 8 N.J.Misc. 303.

What are liquidated damages

(1) "Liquidated damages" within

How want of jurisdiction shown. Under a statute providing for the transfer of a cause to a court having jurisdiction where it appears from the pleadings or at the trial that the determination of the action, or of a counterclaim or cross complaint, will involve questions not within the jurisdiction of the court in which the action is pending, such court has no power to transfer the cause unless its want of jurisdiction appears on the face of the pleadings or from the evidence introduced in support thereof.⁹¹

§ 506. Waiver of Right to Transfer

The right to the transfer of a cause to another court may be waived.

The right to have a cause transferred from one court to another may be waived;⁹² it is held, by delay in making an application therefor,⁹³ by submitting to the jurisdiction without objection,⁹⁴ by

statute governing removal of cases from district to circuit court, are those agreed upon or capable of being ascertained with certainty by mere arithmetical computation.—Toone v. Skorupski, 154 A. 621, 9 N.J.Misc. 381.

(2) Counterclaim for damages based on plaintiff's procuring defendant's wrongful discharge from employment was not for "liquidated damages," precluding removal of case from district to circuit court.—Toone v. Skorupski, *supra*.

An order of the circuit court wherein defendant filed counterclaim for one thousand dollars damages to action begun in district court, directing transfer of case to circuit court, was void.—Brown v. Schwartz, 165 A. 100, 11 N.J.Misc. 196.

91. Cal.—Stratton v. Superior Court of Los Angeles County, 43 P.2d 539, 2 Cal.2d 693.

Municipal court cannot transfer cause to superior court where defendant filed no pleadings in municipal court raising issues beyond such court's jurisdiction, but merely showed that defendant had instituted in superior court an action for damages, in excess of municipal court's jurisdiction, for fraudulent inducement of contract sued on in municipal court.—Stratton v. Superior Court of Los Angeles County, *supra*.

92. N.Y.—Brinn v. Rinderman, 78 N.Y.S. 921, 38 Misc. 792.

93. Me.—Toothaker v. Fennell, 76 A. 488, 106 Me. 188.
15 C.J. p 1148 note 83.

94. N.Y.—Enright v. Franklin Pub. Co., 52 N.Y.S. 704, 24 Misc. 180.
15 C.J. p 1148 note 84.

obtaining an adjournment after issue joined,⁹⁵ or by other conduct inconsistent with an intention to assert or to insist upon such right;⁹⁶ but the right is not waived by demanding a bill of particulars, where defendants acted promptly and the demand did not cause an adjournment,⁹⁷ by obtaining an adjournment in order to join issue and make a motion for a transfer,⁹⁸ by a motion to dismiss the complaint, when based on proceedings preliminary to the joinder of issue,⁹⁹ by proceeding to trial after denial of a motion for a transfer,¹ or by an ineffectual trial.²

§ 507. Mode of Effecting Transfer and Procedure Therefor

To effect a valid transfer of a cause the statutes or rules of court relating thereto must be complied with. Under the various statutes the court wherein an action is pending may direct its transfer from one subordinate court to another, or may direct a transfer to itself of a cause pending in a subordinate court.

95. N.Y.—*Duke v. Caluwaert*, 83 N. Y.S. 10, 40 Misc. 623.

15 C.J. p 1148 note 85.

96. Mo.—*Kahn v. Mercantile Town Mut. Ins. Co.*, 128 S.W. 995, 228 Mo. 585, 137 Am.S.R. 665.

15 C.J. p 1148 note 86.

97. N.Y.—*Solis v. Balbas*, 83 N.Y. S. 181, 40 Misc. 658.

98. N.Y.—*Duke v. Caluwaert*, 82 N. Y.S. 10, 40 Misc. 623.

99. N.Y.—*Schnitzpahn v. Davis Sewing Mach. Co.*, 44 N.Y.S. 385, 19 Misc. 621.

1. N.Y.—*Queck-Berner v. Spann*, 161 N.Y.S. 255, 97 Misc. 423.

2. Va.—*Danville v. Blackwell*, 80 Va. 38.

3. Conn.—*O'Leary v. Waterbury Title Co.*, 166 A. 673, 117 Conn. 39. Mass.—*H. K. Webster Co. v. Mann*, 169 N.E. 151, 269 Mass. 381.

15 C.J. p 1148 note 92.

Particular requirements

Order transferring issues of testator's competency, coercion, etc., to supreme court for jury trial in contested probate proceeding, under Surrogate's Court Act § 68, will not be granted until compliance with § 148, requiring that notice of filing of objections to probate be given to all legatees and devisees who have not appeared.—*In re Ginty's Will*, 210 N. Y.S. 727, 125 Misc. 158.

Transfer held valid

Under Rev.St.1911 art 30 subd 11, as amended by Acts 38th Leg. 1923, c 104, regulating procedure in district courts in counties having two or more district courts with civil jurisdiction only, and reorganizing eleven, fifty-fifth, sixty-first, and eightieth judicial districts, and

prescribing their jurisdiction and mode of procedure, judge of fifty-fifth judicial district, in absence of judge of eightieth district court, was authorized to transfer pending suit of trespass to try title from eightieth district court to his court, and order of transfer so made was as valid and binding as if made by judge of eightieth district.—*Porch v. Rooney*, Tex.Civ.App., 275 S.W. 494.

4. Mont.—*Finlen v. Heinze*, 80 P. 918, 32 Mont. 354.

Action brought in wrong district

Supreme court practice is applicable to transfer of actions in municipal court brought in improper districts, in absence of provision therefor.—*Grady v. Selden Truck Corporation*, 231 N.Y.S. 255, 133 Misc. 97.

5. Okl.—*Parker v. Hamilton*, 154 P. 65, 49 Okl. 693.

6. Miss.—*Woodville v. Jenks*, 48 So. 620, 94 Miss. 210.

Consent of surrogate's court to making of order by supreme court transferring therefrom to surrogate's court action against executor to recover money which testator allegedly agreed to bequeath to plaintiff would not be given, notwithstanding action halted administration of estate, where records in surrogate's court did not disclose pendency of accounting proceeding in which claim could be tried.—*In re Franklin's Estate*, 274 N.Y.S. 612, 153 Misc. 110.

7. Me.—*Toothaker v. Pennell*, 76 A. 488, 106 Me. 188.

8. Ind.—*Riverside Coal Co. v. North Indianapolis Cradle Works*, 142 N. E. 377, 194 Ind. 176, overruling rehearing 139 N.E. 674, 194 Ind. 176.

In effecting a transfer of a cause from one court to another, there should be a compliance with the requirements of the statute on the subject,³ while a transfer from one department to another of the same court must be made in accordance with the rules of the court relating to such transfer.⁴ An irregularity in the transfer may, however, be waived.⁵

Jurisdiction to direct transfer. Under some statutes the transfer is ordered by the court in which the case is pending and from which a transfer is sought,⁶ while under others the higher courts of the state are authorized to direct transfers from one subordinate court to another,⁷ or a higher court may in some instances direct the transfer of a cause to itself from a subordinate court.⁸

§ 508. — Who May Move for Transfer and Parties

The right of a particular person to move for the

Supreme court special term may remove to itself a cause commenced in city court of New York.—*In re Sutton*, 165 N.Y.S. 58.

Report of costs or fees may be required on the transfer of a cause to another court.

Ala.—*Ex parte Burton*, 14 So. 651, 100 Ala. 391.

N.Y.—*Luther v. Silver*, 223 N.Y.S. 468, 130 Misc. 21.

Where a cause has proceeded to trial, a subsequent application for a transfer thereof to another court may be granted on condition that applicant pay costs.—*Luther v. Silver*, supra.

Jury fees

Upon application for transfer to surrogate's court of action at law from New York city court, wherein plaintiff paid jury fee, party seeking transfer is required to pay balance of jury fee payable in surrogate's court, jury fees in each court being payable into city treasury.—*In re Levine's Estate*, 274 N.Y.S. 610, 153 Misc. 109.

Fees for custody of attached property

Where, in an action in the district court, property is attached as that of defendant, and on petition properly presented the district court makes an allowance to the sheriff for keeper's fees and custody of the property, defendant, on judgment rendered for plaintiff, must include such allowance in his tender of costs to the district court to entitle him to have the case certified to the superior court for jury trial.—*Trotter Plastering Co. v. District Court of Sixth Judicial Dist.*, R.I., 123 A. 358.

transfer of a cause depends on the statutes. One who has no interest in a cause is not a proper party to proceedings for its transfer.

A transfer may be effectively sought by, and only by, a party who, under the statute, is entitled to have the case transferred if the grounds alleged therefor are sustained,⁹ and where the statute provides that a transfer may be had on the application of a defendant a cause will not be removed on the application of one of several defendants.¹⁰

Parties. One who has no interest in the cause is not a proper party to the proceedings for the transfer.¹¹

§ 509. — Time for Application

The application for a transfer must be seasonably made, and must not be premature.

The time at which an application for a transfer may be made is governed largely by constitutional and statutory provisions.¹² A defendant cannot move for a transfer until he has appeared in the cause;¹³ but under some statutes such an application

by defendant must be made at or before the joinder of issue,¹⁴ or before an adjournment is granted.¹⁵ A cause cannot be transferred after a judgment by default has been rendered,¹⁶ and, by the same course of reasoning, after a motion has been made for a default judgment the right of transfer is in suspense until the motion has been decided.¹⁷ So it has been held that a removal of a cause to an inferior court exercising concurrent jurisdiction is improper where the proceedings are at such a stage that the removal would practically give the inferior court powers of review.¹⁸ Proceedings for divorce have been held removable after the issuance of a preliminary injunction restraining defendant from disposing of his property and after defendant has entered appearance;¹⁹ but a motion for removal, made after verdict for defendant and before a motion for a new trial by plaintiff has been acted upon, should not be granted, although the statute with respect to the transfer of causes provides that "where any suit . . . shall have remained pending in a county court more than one year without being determined, such court on motion of any party to such suit . . . shall order it to

9. N.Y.—*People v. Roesch*, 57 N.Y. S. 295, 27 Misc. 44.

Transfer from one appellate court to another see *infra* § 516.

Administration of decedents' estates

(1) In Alabama under Gen. Acts 1915 p 738, a suit to remove the administration of an estate from probate to a court of equity for construction of a will may be maintained by an executor, administrator cum testamento annexo, or by a testamentary or other guardian or trustee, qualified and acting, or by any person, heir, devisee, legatee or distributee having a pecuniary or representative interest in the questions involved and the property of the decedent.—*Crawford v. Carlisle*, 89 So. 565, 206 Ala. 379.

(2) Under Acts 1911 p 574 § 3, an heir or distributee of an estate, or a devisee or legatee under a will, at any time before the probate court has taken steps looking to final settlement of the estate, without settling up any special equity therefor, may remove the administration of the estate from the probate court into a court of equity for further administration and final settlement.—*McKeithen v. Rich*, 86 So. 377, 204 Ala. 588.

(3) On the other hand it has been held that the right of an heir, legatee, or distributee to have the administration of the estate removed to the chancery court without assigning any reasons therefor does not extend to the administrator, and is not conferred by the fact that the administrator in such an attempt joins

with him one of the heirs as a complainant.—*Kirkbride v. Kelly*, 52 So. 660, 167 Ala. 570.

Contest of will

As Rev. L. 1910 § 6210, relating to will contest, declares that contestant is plaintiff and petitioner defendant, order, transferring will contest from superior to district court on motion of contestants, is valid under a statute providing for the transfer of a cause on motion of plaintiff.—*In re Nichols' Will*, 166 P. 1087, 64 Okl. 241.

Nonresident corporation is entitled to benefit of Code Suppl. 1907 § 261, as to transfer of causes from superior to district court on motion of defendant not residing in the city.—*Corn Belt Telephone Co. v. Superior Court of City of Oelwein*, 164 N.W. 168, 180 Iowa 985.

10. N.Y.—*People v. Roesch*, 57 N.Y. S. 295, 27 Misc. 44.
16 C.J. p 1148 note 98.

11. Ala.—*Tillery v. Tillery*, 46 So. 582, 155 Ala. 495.

Surviving partner is not a proper party to a bill to remove the administration of the deceased partner's estate from the probate to the chancery court, as such surviving partner has no interest in the administration of the estate of the deceased partner, nor has the administration of such estate any connection with the settlement of the partnership affairs, except the right of the administrator to call on the surviving partner for a settlement.—*Tillery v. Tillery*, *supra*.

12. Me.—*Toothaker v. Pennell*, 76 A. 458, 106 Me. 188.

15 C.J. p 1148 note 1.
Time for removal from one appellate court to another see *infra* § 516.

13. S.C.—*Taylor v. Williamson*, 16 S.C. Eq. 348.

14. N.Y.—*City of New York v. Greis*, 179 N.Y.S. 105, 109 Misc. 538.
15 C.J. p 1149 note 3.

15. N.Y.—*Heinrichs v. Interurban St. R. Co.*, 88 N.Y.S. 193, 43 Misc. 651.—*Levenson v. Zimmerman*, 64 N.Y.S. 723, 31 Misc. 642.

16. Md.—*Schaible v. Home Ins. Co.*, 105 A. 165, 132 Md. 680.—*Northern Central Railway Co. v. Rutledge*, 41 Md. 372.

17. Md.—*Schaible v. Home Ins. Co.*, 105 A. 165, 132 Md. 680.

Where fair trial cannot be had

Where, in an action begun in the circuit court for Baltimore County, plaintiff moved under the speedy judgment act for judgment by default for want of proper pleas, plaintiff, before any action was taken on the motion, was not entitled to remove the cause under Const. art 4 § 8, allowing removal where a party cannot have a fair trial, etc., so that the court to which the cause was transferred did not have jurisdiction to render judgment moved for.—*Schaible v. Home Ins. Co.*, *supra*.

18. Mich.—*Heath v. Kent County Circuit Judge*, 37 Mich. 372.

19. Mich.—*Wood v. Adsit*, 63 N.W. 419, 105 Mich. 378.

be moved to the circuit court."²⁰ Where the right to a transfer is dependent upon the amount in controversy, and a suit is brought for an amount which would authorize a transfer, but plaintiff is permitted to reduce his demand to an amount which is not sufficient to authorize a transfer, a subsequent application by defendant for a transfer comes too late.²¹

§ 510. — Motion or Demand for Transfer

A motion or demand for the transfer of a cause is usually necessary, and such demand must, under some statutes, be accompanied by an affidavit in the form prescribed.

Although under some statutes a cause may be transferred to another court without previous notice or motion,²² it is usually incumbent on the party desiring the transfer of a cause to make a timely motion or demand therefor,²³ and the district to which a transfer is desired must, under some statutes, be specified.²⁴ The demand for a transfer is

sometimes required to be accompanied by an affidavit that the matter pleaded by the moving party is true,²⁵ or, if the application is for a transfer to another court for a trial by jury, the affidavit must state that, in the opinion of the applicant, there is an issue of fact requiring a trial, and that such trial is intended in good faith.²⁶

§ 511. — Petition for Transfer

The petition for a transfer must specify the grounds therefor and should be verified where the statute so provides.

On a proper petition to the court in which a cause is pending, the court may transfer the cause to another court.²⁷ The petition for transfer should be verified where the statute so provides,²⁸ and should show that the case is such as may be transferred, and that sufficient grounds for a transfer exist, specifying them.²⁹ An objection to the sufficiency of the petition should be made before a determination thereon.³⁰

20. W.Va.—Jelenko v. Coleman, 22 W.Va. 321.

21. N.Y.—Bunke v. New York Tel. Co., 97 N.Y.S. 66, 110 App.Div. 241, affirming 91 N.Y.S. 390, 46 Misc. 97, 34 N.Y.Civ.Proc. 170, and affirmed 81 N.E. 1161, 133 N.Y. 600.

22. Va.—Baltimore Merchant's Bank v. Campbell, 75 Va. 455.

23. N.Y.—City of New York v. Greis, 179 N.Y.S. 105, 109 Misc. 538 —Fischer v. Brooklyn Heights R. Co., 84 N.Y.S. 254.

Transfer from one appellate court to another on court's own motion see infra § 516.

24. N.Y.—Fischer v. Brooklyn Heights R. Co., supra.

Demand for transfer "to some other district" is insufficient.—Fischer v. Brooklyn Heights R. Co., supra.

25. Me.—Toothaker v. Pennell, 76 A. 488, 106 Me. 138.

26. Mass.—H. K. Webster Co. v. Mann, 169 N.E. 151, 269 Mass. 381 —McLaughlin v. Levenbaum, 142 N.E. 906, 248 Mass. 170.

Denial of motion not an abuse of discretion where required affidavit was not filed.—H. K. Webster Co. v. Mann, 169 N.E. 151, 269 Mass. 381.

27. Okl.—Mann v. Osborne, 261 P. 146, 128 Okl. 32.

Constitutional provision is not exclusive procedure for transfer of probate proceedings from district court to county court, but district court may, under statute, on proper petition, order such transfer.—Mann v. Osborne, supra.

28. Ala.—Dooley v. Dooley, 87 So. 545, 205 Ala. 281.

29. Ala.—Ex parte Brown, 148 So.

132, 226 Ala. 578—Dooley v. Dooley, 87 So. 545, 205 Ala. 281.

15 C.J. p 1149 note 15.

Petition for transfer from one appellate court to another see infra § 516.

Administration proceedings

(1) When a bill of complaint or petition in writing, verified by affidavit, is filed by a devisee or legatee of an estate, stating that in his opinion the estate can be better administered in the circuit court, equity side of the docket, than in the probate court, that there has been no final settlement of the estate in the probate court, and that no application has been made therein for a final settlement, and that the purpose is to have real estate sold for division, in that it cannot be equitably partitioned without a sale, and to require the executors to file an inventory, it is the duty of the circuit court to enter a decree ordering the removal of the administration from the probate court to the circuit court, under Acts 1911 p 574 § 3, as amended by Acts 1915 p 738.—Parker v. Robertson, 88 So. 418, 205 Ala. 434.

(2) The court did not improvidently order removal to chancery court, although bill was not framed to meet Acts 1915 p 738, authorizing summary order for removal, where respondents demurred, without denying the will, its probate, the pendency of the administration in probate court or that complainant had not been paid her legacy.—Gurley v. Bushnell, 76 So. 324, 200 Ala. 408.

(3) The bill need not allege that decedent died, or that the estate had assets in the county in which the ad-

ministration is pending, those facts being referable to the issuance of letters of administration by the probate court.—Colquitt v. Gill, 41 So. 784, 147 Ala. 554.

(4) The bill or petition is insufficient if it does not contain an averment the equivalent of the statutory requirement that testator's estate can be better administered in the circuit court in equity.—Dooley v. Dooley, 87 So. 545, 205 Ala. 281.

(5) Where, from aught appearing in the bill, testator's estate, except the distribution of the proceeds of sale of land the possibility of which depends upon whether the terms of the will were complied with, had been fully settled long before filing of the bill, or, if not so, steps had been taken in the probate court looking to final settlement, the bill will not warrant a decree of removal to the chancery court in the absence of averment of some special equity.—Dooley v. Dooley, supra.

Guardianship proceedings

While surety on guardian's bond is interested party, he has no right to remove settlement of guardianship to chancery court without averring a special equity where jurisdiction to make final settlement has attached.—Ex parte Brown, 148 So. 132, 226 Ala. 578—Ex parte Chapman, 142 So. 540, 225 Ala. 163.

Unlawful detainer

Defendant's petition to remove unlawful detainer case from municipal to circuit court, since omitting jurisdictional averments regarding defendant's entry upon land, did not authorize removal.—Ex parte Lockhart, 140 So. 762, 224 Ala. 517.

30. Ind.—Kraus v. Lehman, 83-N.E.

§ 512. — Bond or Undertaking

A defendant seeking a transfer must comply with the statute by tendering within the prescribed time a sufficient bond or undertaking.

Where the statute requires a defendant desiring the transfer of a cause to another court to tender a bond or undertaking, failure to comply with the statute³¹ within the prescribed time,³² by tendering a bond or undertaking sufficient in form and substance,³³ deprives defendant of the right to a transfer. Where the required bond is given, the court must order a transfer of the cause, and it has no jurisdiction to grant plaintiff's application for dismissal of the action.³⁴ Irregularities in the bond may be waived.³⁵

§ 513. — Hearing and Order

To effect a valid transfer of a cause there must ordinarily be a hearing, and an order of transfer.

A court is not required to transfer a case on a mere assertion that it is in the wrong court, but may set down the matter for a hearing.³⁶

Order. The transfer of a cause from one court to another must ordinarily be effected by an order of court directing the transfer,³⁷ but such an order may be unnecessary where a court is abolished by constitutional provision and its jurisdiction vest-

ed in another court.³⁸ Where proceedings have been instituted timely but in the wrong court, and the judges of the two courts are the same, the one in which the proceedings were instituted may, even after final judgment, make an order transferring the proceedings to the proper court *nunc pro tunc*.³⁹ A transfer is effected by a lawful order of transfer, rather than by the clerk's ministerial act of entering it on the minutes.⁴⁰ So it has been held that an order of transfer entered on the journal or minutes of the court transferring the cause confers jurisdiction on the court to which the transfer is made, although the order is not included in the transcript transmitting the proceedings nor docketed in the court to which the cause is transferred.⁴¹ However, the court to which a cause is transferred acquires no jurisdiction where a certified copy of the order of removal is not served on the adverse party, as required by statute.⁴² Since the jurisdiction of the supreme court extends over the state, it is not improper in an original proceeding in that court to lay the venue as of the county in which the cause of action arose or would be triable if the action were brought in the circuit court; but where the supreme court sends a case to a circuit court it orders the cause to be sent to the county of the proper venue.⁴³ An order transferring a cause is final

714, 84 N.E. 769, 170 Ind. 408, 15 Ann.Cas. 849.

31. Mass.—H. K. Webster Co. v. Mann, 169 N.E. 151, 269 Mass. 381.

Denial of motion not abuse of discretion where required bond was not filed.—H. K. Webster Co. v. Mann, *supra*.

32. Mass.—H. K. Webster Co. v. Mann, *supra*.

N.Y.—Bunke v. New York Tel. Co., 97 N.Y.S. 66, 110 App.Div. 241, affirmed 81 N.E. 1161, 188 N.Y. 600.

Clerk's refusal to receive bond prerequisite to removal from district court, or pass on sufficiency of sureties, was proper, where bond was not timely filed or clerk directed to receive bond.—H. K. Webster Co. v. Mann, 169 N.E. 151, 269 Mass. 381.

33. N.Y.—Greve v. Wallowitz, 54 N.Y.S. 175, 24 Misc. 601.

Bond held sufficient

N.Y.—New York Lumber & Storage Co. v. Noone, 92 N.Y.S. 349, 46 Misc. 470.

Failure of court to fix amount

Where defendant applies for a transfer and gives a bond in the maximum sum required by statute, he is entitled to a transfer although the court has not fixed the amount.—Levenson v. Zimmerman, 64 N.Y.S. 723, 31 Misc. 642.

Where first undertaking is insufficient, the court may allow defendant an opportunity to furnish a new undertaking.—Greve v. Wallowitz, 54 N.Y.S. 175, 24 Misc. 601.

34. N.Y.—Meisen v. Rothfeld, 85 N.Y.S. 221, 89 App.Div. 447—Tuttle v. Galligan, 51 N.Y.S. 359, 23 Misc. 457.

35. R.I.—Grieco v. Jackvony, 109 A. 801, 43 R.I. 26.

By going to trial on merits without objection, and subjecting defendant to unnecessary expenses, plaintiff must be deemed to have waived all objections to a bond filed under Gen.L.1909 c 288 §§ 7, 9, on application by defendant for a jury trial in the superior court, and cannot complain that the clerk, who approved the bond, had no authority, and that there was no seal affixed.—Grieco v. Jackvony, *supra*.

36. Mo.—State v. Elhison, 168 S.W. 1174, 260 Mo. 585.

37. Ark.—Ayers v. Anderson-Tully Co., 116 S.W. 199, 89 Ark. 160, 15 C.J. p 1150 note 20. Order for transfer from one appellate court to another see *infra* § 516.

Causes included

An order of seventh district court of Smith County transferring certain causes of action to special dis-

trict court of such county, which order did not transfer cases in which service of process was not complete, did not effect a transfer of a cause wherein record did not disclose service on interveners' cross action at or before date of order of transfer, and which disclosed that for nearly two months after entry of transfer order, judge of district court was exercising jurisdiction over such cause of action and appointed receiver therein, and hence special district court had no jurisdiction of such action.—Whitfield v. Atkinson, Tex.Civ.App., 106 S.W.2d 804.

38. N.Y.—People v. Hoch, 44 N.E. 976, 150 N.Y. 291.

39. Pa.—In re Allegheny County Election, 171 A. 694, 314 Pa. 183—Appeal of Fields, 157 A. 262, 305 Pa. 125.

40. Tex.—Currie v. Dobbs, Civ.App., 10 S.W.2d 438.

41. Okl.—Martin v. Brannon, 299 P. 877, 149 Okl. 143.

Tex.—Johnson v. Williams, Civ.App., 24 S.W.2d 79, error refused.

42. Conn.—O'Leary v. Waterbury Title Co., 166 A. 673, 117 Conn. 39.

43. S.C.—State v. Gibbs, 95 S.E. 346, 109 S.C. 135.

and conclusive until reversed or set aside by regular proceedings;⁴⁴ but an order of transfer, void on the face of the record, is assailable wherever and whenever it may be produced, and whether the attack on it is direct or collateral.⁴⁵ It has been held that an order of the court of last resort transferring a cause to a subordinate appellate court for want of jurisdiction is not *res judicata* as to certiorari proceedings to quash the judgment of the subordinate court, whether the court of last resort had merely passed on its own jurisdiction, or had undertaken to adjudicate the jurisdiction of the subordinate court.⁴⁶

§ 514. — Transfer of Papers

The papers in a transferred cause, so far as necessary for a determination of the issues, should be transmitted to the court to which the transfer is made; but the jurisdiction of such court is not defeated by the clerk's failure to certify the record at the proper time, if there is a subsequent certification.

While the papers and records of a cause should be transmitted or certified to the court to which the cause is transferred,⁴⁷ nevertheless if an issue can be tried intelligently without the original petition a transfer of such petition as part of the papers in the case has been held unnecessary.⁴⁸ Where by a special law authorizing the transfer of the administration of an estate to another county, a transmission by the probate judge was required of the administrator's original bond with a full and complete copy of the record of all proceedings theretofore had, it was held that the acts of the court to which the cause was transferred were not rendered void by the accidental omission of the proceedings during the original administration.⁴⁹ Where papers are certified back, as required by statute, to the court from which the cause was

transmitted, and an order is made in the case by the court to which it was removed, the latter court has no jurisdiction to set aside the order and recall the papers.⁵⁰ The failure of the clerk, at the proper time, to perform his duty to certify the record from the court in which it is pending to the court to which the case is transferred, cannot defeat the jurisdiction of the latter court on subsequent certification.⁵¹ Where a subordinate court had jurisdiction of a cause when it certified a question to the court of last resort, the former court did not lose jurisdiction because its clerk, acting ministerially, did not transmit to the higher court a certified copy of the question, with the record, until after the second term after the writ was brought.⁵² On a second removal of a cause the trial may be had on the papers sent with the first removal.⁵³

§ 515. — Transfer by Stipulation or Agreement

Transfers to another court may in some states be made by agreement of the parties; but a cause cannot even by consent be transferred to a court which has no jurisdiction of the subject matter.

In some states a transfer may be effected by a stipulation or agreement of the parties,⁵⁴ which has the effect of vesting the court to which the transfer is made with jurisdiction of the persons of the parties.⁵⁵ However, as consent cannot give jurisdiction of the subject matter, as stated *supra* § 85, a case cannot, by consent of parties, be transferred to a court which has no jurisdiction to hear it.⁵⁶

§ 516. — Appealed Cases

The proceedings for the transfer of causes from one

44. Ky.—Schroll v. Speed, 14 Bush 186.

45. Cal.—Cook v. Winklefleck, 59 P. 2d 463, 16 Cal.App.2d Supp. 759.

Question raised on appeal

Where order of superior court transferring action to municipal court was made without legal authority and its invalidity was apparent on face of record, such invalidity could be raised on appeal to appellate department of superior court from judgment of municipal court to which action had been transferred.—Cook v. Winklefleck, *supra*.

46. Mo.—State ex rel. Aquamsi Land Co. v. Hostetter, 79 S.W.2d 463, 336 Mo. 391, quashing certiorari First Nat. Bank v. Aquamsi Land Co., App., 70 S.W.2d 90.

47. Cal.—City of Madera v. Black, 184 P. 397, 181 Cal. 306.

R.I.—Duffee v. District Court of First Judicial District, 119 A. 60, 44 R.I. 462.

Transfer of papers or transfer of cause from one appellate court to another see *infra* § 516.

48. Ky.—Harrell v. Howard, 80 Ky. 51.

49. Miss.—Learned v. Matthews, 40 Miss. 210.

50. U.S.—McClaskey v. Barr, C.C. Ohio, 54 F. 781.

51. R.I.—Duffee v. District Court of First Judicial District, 119 A. 60, 44 R.I. 462.—Wilbur v. Best, 48 A. 824, 22 R.I. 550.

52. Ga.—Columbian Nat. Life Ins. Co. v. Mulkey, 91 S.E. 344, 19 Ga. App. 247.

53. N.C.—State v. Lewis, 10 N.C. 410.

54. Mo.—Bank of Kennett v. Cotton Exchange Bank, 72 S.W.2d 842, 228 Mo.App. 859.

15 C.J. p 1150 note 29.

In vacation

Under Missouri statute, agreements to remove cause to another court may be filed and acted upon in vacation.—Bank of Kennett v. Cotton Exchange Bank, *supra*.

55. Ala.—Ex parte Rice, 15 So. 450, 102 Ala. 671.

Mo.—Bosard v. Powell, 79 Mo.App. 184.

56. Cal.—Cook v. Winklefleck, 59 P. 2d 463, 16 Cal.App.2d Supp. 759.

Ky.—Commonwealth, for Use and Benefit of Bates v. Hall, 64 S.W.2d 585, 261 Ky. 280.

N.C.—Rodman v. Davis, 53 N.C. 134.

appellate court to another are governed by constitutional and statutory provisions.

On the transfer of causes from one appellate court to another, as permitted on the grounds stated in discussing the jurisdiction of appellate courts

in the different states, see *supra* IX B, the constitution and statutes in a particular state determine who may move for a transfer,⁵⁷ the time for the application,⁵⁸ the motion or demand for the transfer,⁵⁹ the order of transfer⁶⁰ or the certifi-

57. Ind.—*Elliott v. Kern*, 169 N.E. 46, 90 Ind.App. 453, denying transfer 161 N.E. 662, 90 Ind.App. 453. Effect of transfer from one appellate court to another, and the proceedings thereafter see *infra* § 517.

Death of party

Since death of party ends power of his attorney, petition by attorneys to transfer cause from appellate to supreme court was nullity.—*Elliott v. Kern*, *supra*.

In California the supreme court may transfer to itself certiorari proceeding in district court of appeal relating to assessment for public improvements, on petition of one not a party to the proceeding.—*Rockridge Place Co. v. City Council of City of Oakland*, 172 P. 1110, 178 Cal. 58.

58. In California

(1) A petition to transfer a cause from the court of appeal to the supreme court, filed more than ten days after the judgment in the former court became final, will be stricken from the files.—*Hewlett v. Beede*, 83 P. 1089, 7 Cal.A.Unrep.Cas. 246, denying transfer 83 P. 1086, 2 Cal.App. 561.

(2) Application to have cause heard by supreme court after judgment in district court of appeal had been pronounced, but before it had become final, was denied in view of constitutional provision granting supreme court power to order cause to be heard by supreme court only where cause was pending before district court of appeal, or in civil cases, within thirty days after judgment should have become final.—*City of Pasadena v. Chamberlain*, 36 P.2d 392, 1 Cal.App.2d 125, denying hearing 36 P.2d 387, 1 Cal.App.2d 125.

(3) Where a judgment was rendered by a district court of appeal on Jan. 8, 1906, reversing the order appealed from, and on February 7 following, the court denied a petition for rehearing, but modified its opinion, without changing the final judgment, the judgment became final thirty days after Jan. 8, 1906, and hence an application to transfer the case to the supreme court in banc, filed March 12, 1906, was not filed within sixty days, as required by Const. art 6 § 4, and was therefore too late.—*California Nat. Bank v. Los Angeles Iron, etc., Co.*, 84 P. 466, 468, 2 Cal.App. 659.

(4) Under Const. art 6 § 4, authorizing the supreme court to order

any cause pending before the district court of appeal to be heard by the supreme court before judgment has been pronounced by the district court of appeal, or within thirty days after such judgment shall have become final, without limiting the power to causes in which a petition for rehearing has been filed, the supreme court had the power to transfer the cause to the supreme court after decision in the district court of appeal at any time within sixty days after such decision, notwithstanding rule requiring petition for a rehearing to be filed within ten days after the judgment has become final, since supreme court could have ordered cause transferred for a rehearing on its own motion without a petition for rehearing.—*Hygienic Health Food Co. v. Grant*, 204 P. 389, 188 Cal. 131, denying motion 202 P. 653, 187 Cal. 431.

In Colorado a motion to remove a case from the court of appeals to the supreme court, made after the calling of the submission docket and the assignment of the case for argument, but before argument, was held to be made too late to permit the review of the trial court's judgment by the supreme court.—*Smislaert v. Prudential Ins. Co.*, 61 P. 598, 27 Colo. 339.

In Indiana

(1) Petition for transfer of cause from appellate court to supreme court under Burns St.Annot.1914 § 1394, more than eight months after statutory time for filing petition, will be denied by the supreme court, in the absence of a showing of diligence.—*Pipe Creek School Tp. v. Wagler*, 143 N.E. 514, 194 Ind. 496, denying transfer *Pipe Creek School Tp., Miami County, v. Wagler*, 139 N. E. 295, 81 Ind.App. 419.

(2) Petition for transfer will be denied where prematurely filed.—*Metropolitan Life Ins. Co. v. Frankel*, 104 N.E. 856, denying transfer 103 N.E. 501, 58 Ind.App. 115.

In Missouri, after the expiration of the term at which a final decision has been entered by a court of appeals in Missouri, it has no jurisdiction to make an order transferring the cause to the supreme court, and its only remaining jurisdiction is to order its mandate to the trial court.—*Hess v. Gansz*, 90 Mo.App. 439.

In Texas

(1) Rev.St. art 1623, requiring courts of civil appeals in case of conflict to certify questions of law

to supreme court, does not authorize such courts even on their own motion to take any action after their judgment has become final, by term of court expiring, and court having at such time finally disposed of all questions that had been brought to their attention.—*Wood v. Harper*, 262 S.W. 248, 114 Tex. 133.

(2) Where motion to certify to supreme court was filed six days after motion for rehearing was overruled, and to grant motion the order overruling motion for rehearing would have to be set aside, and no good reason for such action exists, the motion to certify will be refused.—*Paggi v. Rose Mfg. Co.*, Tex. Civ.App., 259 S.W. 962.

59. In California, where notice is of an appeal to the wrong court, the proper practice is to file the record in the court to which the appeal is taken, and to make a motion in that court to transfer the cause.—In re Russell, 84 P. 155, 148 Cal. 768.

60. In California

(1) Supreme court decisions on applications for transfers to it from the district courts of appeals must be made under its own rules and within ten days, as required by Const. art 6 § 4, and rule 30, 177 Cal. 57.—*Whann v. Doell*, 221 P. 899, 192 Cal. 680.

(2) Petition for hearing of cause in supreme court was denied by operation of law, where order granting hearing was not concurred in by necessary number of justices, and time expired within which court could make such order after judgment in district court of appeal.—*Giometti v. Etienne*, 25 P.2d 826, denying rehearing 23 P.2d 52, 132 Cal. App. 602, and motion denied 23 P.2d 913, 219 Cal. 687.

In Louisiana

(1) The supreme court will not assume jurisdiction over a case in the absence of an order in the record of the court of appeal transferring the case.—In re Land Development Co., 85 So. 118, 148 La. 925.

(2) Court of appeal will by supplemental order fix time for filing record in supreme court on appellee's motion, where appeal was transferred.—*Jones v. Gleason*, 120 So. 703, 10 La.App. 211, supplementing 120 So. 101, 9 La.App. 266.

(3) Appellate court, allowing transfer of appeal, has duty of prescribing time within which transcript must be filed.—*Scott v. Ratcliff*, 119 So. 33, 167 La. 237.

cate⁶¹ of transfer, the transmission of the original papers,⁶² and other proceedings relating to such transfers.⁶³

Where the court to which a case is appealed, whether the court of last resort or a subordinate appellate court, has no jurisdiction, it may of its

(4) Appellee, apparently acquiescing in appellate court's refusal to fix time limit for filing transcript after transfer of appeal, was not entitled to dismissal.—*Scott v. Ratchiff*, supra.

In Pennsylvania, where appeals from supervisors' audit had been taken in proper time but mistakenly filed in quarter sessions court, order, after time within which new appeals could be taken, transferring appeals to common pleas courts nunc pro tunc, was proper.—*Appeal of Fields*, 157 A. 262, 305 P. 125.

In Texas it was held that, since, under *Sayles Civ.St.Annot.* 1897, art 1387, appeals generally are perfected when the bond is filed, the court of civil appeals for the seventh district, creation of which became operative June 9, 1911, under the act of April 3, 1911, Acts 32d Leg. c 120, has no jurisdiction of an appeal, where the bond was filed May 25, 1911, and no order of the supreme court transferring the cause to the new court is shown.—*Keator v. Whittaker*, Tex.Civ.App., 140 S.W. 120.

61. In Missouri a certificate transferring a case from a court of appeals to the supreme court, on the ground of an alleged conflict with opinions of another court of appeals, but containing no certification by the court or one of the judges that there was a conflict, but merely reciting that plaintiff claimed a conflict, was ineffective to confer jurisdiction, under Const.Amendm. 1884 § 6.—*Woodson v. Leo-Greenwald Vinegar Co.*, 264 S.W. 674.

62. In Illinois

(1) The decree, in cause transferred from appellate court will not be affirmed merely because briefs and abstracts there filed were not also transferred.—*Schmidt v. Barr*, 165 N.E. 131, 333 Ill. 494, 65 A.L.R. 1.

(2) Where appeal was prayed and granted to appellate court in good faith, on its transfer to the supreme court, appellees were not entitled to a dismissal because the transcript did not reach the latter court within the time prescribed.—*People v. Elitel*, 83 N.E. 86, 231 Ill. 38.

In Louisiana

(1) Where an appealed case is transferred by order of a court of appeal to the supreme court, the failure of appellant to have the motion to transfer copied in the transcript furnishes no ground for the dismissal of the appeal as thus lodged in the supreme court, nor has the mover a standing to question the juris-

diction of the supreme court, although he may call attention, as the court itself may direct its attention, to such a lack of constitutional or legal power as should preclude it from further dealing with the case.—*Succession of Huxan*, 88 So. 687, 149 La. 61.

(2) Appeals transferred from courts of appeal to supreme court will not be dismissed for delay in filing of transcripts, where delay was not attributable to fault of appellants.—*Mitcham v. Mitcham*, 165 So. 635, 184 La. 111—*De Bruys v. Burns*, 81 So. 259, 144 La. 707.

(3) Transferred appeal will not be dismissed for failure to file transcript within designated time, where transcript was not forwarded to clerk of district court within such time through oversight of clerk of court of appeal.—*Mitcham v. Mitcham*, supra.

(4) In transferring appeals to supreme court, courts of appeal should order clerks to return record to clerk of district court as soon as order making transfer becomes final and immediately notify appellant, and should fix time limit for filing of transcript in supreme court after date on which record is received by district court clerk.—*Mitcham v. Mitcham*, supra.

(5) After return of record to clerk of district court upon transfer of appeal from court of appeal to supreme court, appellant has duty to file transcript in supreme court within time fixed by court of appeal or extensions thereof.—*Mitcham v. Mitcham*, supra.

In Missouri, on certiorari in the supreme court to decide whether a decision of a court of appeals is contrary to a previous ruling of the former, the opinion of the latter is properly made part of the record for the purpose of ascertaining what the court of appeals decided.—*State ex rel. Byrne v. Ellison*, 199 S.W. 403, quashing certiorari *Byrne v. News Corp.*, 190 S.W. 933, 195 Mo.App. 265.

63. Conditions precedent

(1) Appellants, who appealed from adverse judgment to court of appeal, which transferred appeal to supreme court, were not required, as condition precedent to lodging appeal in supreme court, to pray for a rehearing in court of appeal, where they acquiesced in judgment of that court directing transfer of appeal.—*Gilmore v. Lyon Lumber Co.*, 105 So. 85, 159 La. 18.

(2) A case transferred by the supreme court to the court of appeal

in 1919 did not require an affidavit that the appeal had not been brought for the purpose of delay under Acts 1904 No. 56, as amended by Acts 1912 No. 19.—*In re Aztec Land Co.*, 85 So. 634, 147 La. 672—*De Bruys v. Burns*, 81 So. 259, 144 La. 707.

Inches

Appeal would not be dismissed for laches in lodging appeal transferred from court of appeal in supreme court, where part of delay was caused by appellants' application for permission to file original record in lieu of transcript, and another part was attributable to illness of clerk and his deputy, delay of three weeks intervening between time transcript was expressed to appellants and time that it was filed not working by itself nor in connection with other delays a dismissal of appeal.—*Gilmore v. Lyon Lumber Co.*, 105 So. 85, 159 La. 18.

In Georgia

(1) Where error was properly brought to October term, 1916, of supreme court, and, after ratification of constitutional amendment, see Acts 1916 p 19, relating to transfer of causes, argument was heard in supreme court on jurisdiction, and decision was reserved until March term, 1917, when it was ordered transferred to court of appeals and duly transmitted thereto and docketed for October term, 1917, after docket for March term, 1917, had been closed, court of appeals had until end of March term, 1917, in which to dispose of case.—*Water Power & Mining Co. v. Arnold*, 99 S.E. 382, 149 Ga. 107, affirming *Arnold v. Water Power & Mining Co.*, 96 S.E. 343, 22 Ga.App. 504.

(2) Such constitutional amendment contemplates reception of a writ of error by court of appeals, whether in due course or by transmission from supreme court, and a writ of error to supreme court of which court of appeals, under the constitution, has jurisdiction, is not brought to court of appeals until supreme court has determined jurisdiction and ordered a transfer.—*Water Power & Mining Co. v. Arnold*, supra.

In Indiana, whether appellate court erred in refusing to issue special supersedeas directing trial judge to enter order keeping in force writ of attachment and attachment bond pending appeal cannot be considered by supreme court on petition to transfer to supreme court original action filed in appellate court.—*J. S. Cruse Realty Co. v. Imfeld*, 184 N.E. 407, 204 Ind. 419.

own motion transfer the appeal to the other appellate court having jurisdiction.⁶⁴

As in the case of transfers between courts of original jurisdiction, see *supra* § 511, a petition to transfer a cause from one appellate court to another should allege facts showing a right to such transfer under the statute.⁶⁵

§ 517. Effect of Transfer and Proceedings Had Thereafter

a. In general

b. Imputed notice of transfer

64. Cal.—Hygienic Health Food Co. v. Grant, 204 P. 339, 188 Cal. 13; denying motion 202 P. 653, 187 Cal. 431.—Rockridge Place Co. v. City Council of City of Oakland, 172 P. 1110, 178 Cal. 58.

Ill.—Schmidt v. Barr, 159 N.E. 774, 328 Ill. 365.

La.—Weinfurter v. Cresap, 99 So. 528, 155 La. 682.—Michel v. Michel, 92 So. 50, 151 La. 540.—Himel v. Fellman, 133 So. 451, 16 La.App. 347, denying rehearing 132 So. 532, 16 La.App. 347.

Mo.—Norman v. Summerfield Jones Const. Co., 4 S.W.2d 1064, transferred, see App., 18 S.W.2d 559.—Severson v. Dickinson, 248 S.W. 595.—Rollins v. Business Men's Ass'n of America, 213 S.W. 52, transferred, see 220 S.W. 1022, 204 Mo.App. 679.—Linehart v. Farmers' State Bank of North Salem, App., 27 S.W.2d 751.

Although neither party questions propriety of transfer from court of appeals, supreme court must determine jurisdiction before considering appeal on merits.—Hull v. McCracken, 39 S.W.2d 351, 327 Mo. 957, retransferring, App., 1 S.W.2d 205, to App., 53 S.W.2d 405.

Freehold involved

Appellate court must, of its own motion, order record of cause involving freehold transferred to supreme court.—Schmidt v. Barr, 159 N.E. 774, 328 Ill. 365.

Amount in controversy

(1) Where amount in controversy does not exceed two thousand dollars, the supreme court, under Const. 1921 art 7 § 10, must decline to entertain the appeal, although no motion has been made to dismiss it or to transfer it to the proper court.—Nelson v. Continental Asphalt & Petroleum Co., 102 So. 583, 157 La. 491.

(2) Where, in an action for personal injuries resulting in judgment for plaintiff for five hundred dollars, plaintiff, answering defendant's appeal, alleges the judgment should be increased to one thousand dollars, the appeal, on the

motion of the supreme court, will be transferred to the court of appeal.—Mancuso v. Joseph Chalona Co., 93 So. 183, 145 La. 896.

(3) Where the amount involved in a case appealed to a court of intermediate appeal exceeded the jurisdiction of the court, it might, of its own accord, take notice that it had no jurisdiction, and the case would be removed to the court of last resort.—Bowles v. Troll, 154 S.W. 871, 172 Mo.App. 102.

(4) Where an appeal to the court of appeal involves an amount exceeding the court's jurisdiction, it will, without a pleading, transfer appeal to supreme court.—State v. People's Industrial Life Ins. Co. of Louisiana, 7 La.App. 178.

65. Ind.—Pittsburgh, C. C. & St. L. R. Co. v. Hoffman, 162 N.E. 493, 200 Ind. 178, denying petition to transfer and error 155 N.E. 622, 87 Ind.App. 619.

Mo.—State ex rel. Byrne v. Ellison, 199 S.W. 493, quashing certiorari Byrne v. News Corp., 190 S.W. 933, 195 Mo.App. 265.

Object of petition for transfer under Burns St.Annot.1914 § 1394 cl 2, is to submit to consideration of supreme court legal principles declared by appellate court in particular case on record furnished by opinion, and not a review of case on its merits.—Julian v. Bliss, 147 N.E. 148, 196 Ind. 68, denying petition 145 N.E. 442, 82 Ind.App. 597.

Examination of record

On petition to transfer from appellate court to supreme court, the supreme court will not examine the record to determine whether such facts exist.—Julian v. Bliss, 147 N.E. 148, 196 Ind. 68, denying petition 145 N.E. 442, 82 Ind.App. 597.—In re Aurora Gaslight, Coal & Coke Co., 115 N.E. 673, 186 Ind. 690.

Allegations as to amount in controversy

An appeal will not be certified from the superior to the supreme court under the act of June 24, 1895, P.L. p 212, on the petition of appellant,

a. In General

As a general rule, where a cause is properly transferred from one court to another, the former court is deprived of jurisdiction, and the latter has jurisdiction to proceed as though the cause had originally been instituted in the court.

Where an order of removal of a cause from one court to another is properly made, the former court is thereby divested of jurisdiction and the jurisdiction of the latter court attaches and the cause proceeds as if originally instituted there,⁶⁶ unless, by virtue of some statutory provision, a transfer of

where the petition for such transfer does not allege that the amount really in controversy exceeds one thousand five hundred dollars, and where the appellee does not object to the jurisdiction of the superior court as specified by the act of May 5, 1899, P.L. p 248.—Hogsett v. Columbia Iron, etc., Co., 15 Pa.Super. 474.

Constitutional question involved

On a motion to transfer a cause from the court of appeals to the supreme court, on the ground that a constitutional question is involved, the specific articles or sections of the constitution claimed to have been violated must be distinctly indicated.—State v. Brownfield, Mo.App., 266 S.W. 143.

Decision contrary to ruling of supreme court

On certiorari in the supreme court to review a decision of a court of appeals as being contrary to a previous ruling of the former, the petition must allege what particular cases and rulings of the supreme court are involved.—State ex rel. Byrne v. Ellison, Mo., 199 S.W. 403, quashing certiorari Byrne v. News Corp., 190 S.W. 933, 195 Mo.App. 265.

Insufficient showing

Where showing of appellant in support of its application for a writ of supersedeas was insufficient to justify granting such application, appellant's petition for a transfer of the cause after decision by district court of appeal was denied by supreme court.—Kane v. Universal Film Exchanges, 91 P.2d 577, 32 Cal. App.2d 365, denying hearing 89 P.2d 683, 32 Cal.App.2d 365.

66. U.S.—Phebus v. Search, C.C.A. Okl., 264 F. 407, 409, citing *Corpus Juris*.

Ala.—McKeithen v. Rich, 86 So. 377, 204 Ala. 583.

Cal.—Weber v. Nasser, 292 P. 637, 210 Cal. 607.

Colo.—Hartner v. Davis, 68 P.2d 456, 100 Colo. 464.

Ind.—Riverside Coal Co. v. North Indianapolis Cradle Works, 142 N.E. 377, 194 Ind. 176, overruling rehearing 139 N.E. 674, 194 Ind. 176.

Ky.—*Marcum v. Addison Branch Land Co.*, 95 S.W.2d 32, 264 Ky. 541.

Mass.—*Thayer v. Shorey*, 191 N.E. 435, 247 Mass. 76, 94 A.L.R. 367.

Mo.—*Rankin v. Wyatt*, 73 S.W.2d 764, 335 Mo. 628, 91 A.L.R. 941, transferred, see, App., 49 S.W.2d 243, overruling motion 48 S.W.2d 88.

Okl.—*Bingenheimer v. Hoke*, 291 P. 66, 141 Okl. 275—*Isle v. Inman*, 276 P. 497, 136 Okl. 77—*Freeman v. Bryant*, 164 P. 76, 78, 76 Okl. 51, citing *Corpus Juris*—*In re Nichols' Will*, 166 P. 1087, 64 Okl. 241.

Wash.—*Clark v. Kraft*, 24 P.2d 74, 173 Wash. 561.

15 C.J. p 1150 note 33.

Powers and proceedings after transfer

(1) Where action pending in state court is removed to another state court, any attempted subsequent action therein by first tribunal is beyond its jurisdiction.—*Ex parte City Bank & Trust Co.*, 76 So. 372, 200 Ala. 440.

(2) Proceedings taken in circuit court after issuance of order or removal by another circuit court in which action was pending, wherein attachment had been issued against property involved therein, were ineffective and judgment entered therein void.—*Marcum v. Addison Branch Land Co.*, 95 S.W.2d 32, 264 Ky. 541.

(3) Where attachment proceedings were begun in county court and certified to district court under statute, district court had jurisdiction to consider and dismiss another creditors petition of intervention which county court had permitted to be filed.—*Hartner v. Davis*, 68 P.2d 456, 100 Colo. 464.

(4) Judgment of dismissal rendered by district court wherein suit was originally filed and the elapsing of more than thirty days without the filing of motion for a new trial did not deprive another district court of the same county of jurisdiction to try the case and render judgment therein, when at the time the judgment of dismissal was entered the case had been transferred to, and was in process of trial by, another district court of the county.—*De Zavala v. Scanlan*, Tex.Com.App., 65 S.W.2d 489, reversing on other grounds, *Scanlan v. De Zavala*, Civ.App., 42 S.W.2d 849.

(5) Where action commenced in seventh district court of Smith County to try issue of invalidity of prior judgment entered in such court was transferred to special district court of such county, such court's failure to determine issue of invalidity was error, even if cause was properly transferred, since order of transfer clothed special district court with same power to determine validity

of prior judgment as transferring court had.—*Whitfield v. Atkinson*, Tex.Civ.App., 106 S.W.2d 804.

(6) Where case was transferred from one district court to another pending dissolution of former court, writ to stay execution on judgment was returnable to latter court.—*Texas Employers' Ins. Ass'n v. Tabor*, Tex.Civ.App., 291 S.W. 311.

(7) Where action against insurer for premiums paid on industrial policy was transferred from municipal court to surrogate's court for determination of interest of estate of insured on policy, surrogate's court was entitled to determine only whether proceeds belonged to estate, and after such determination to be without jurisdiction to decide conflicting claims between insurer and claimant.—*In re Krasnofsky's Estate*, 284 N.Y.S. 738, 157 Misc. 759.

(8) A final order, made in a cause or proceeding after it has been transferred under Or.L. § 939, providing that, where proceedings are commenced in the county court in which the county judge is a party or interested, they may be certified to the circuit court where actions at law shall be proceeded with as on appeal from the county to the circuit court, and, if the matter be in probate, then all original papers and proceedings shall be certified to the circuit court, is the judgment or decree of the circuit court, and any party may appeal therefrom to the supreme court.—*In re Bethel's Estate*, 209 P. 311, 111 Or. 178.

(9) Under statute providing that where case is sent from county court to circuit court because jury is demanded, the circuit court may determine the fees or compensation of attorneys or executors, where the county court has power to fix them, the circuit court did not have mandatory duty to fix such fees or compensation.—*Kessler v. Olen*, 280 N.W. 352, 228 Wis. 662, rehearing denied 281 N.W. 691, 228 Wis. 662.

After transfer between subordinate appellate courts

(1) Court of civil appeals will not consider motion overruled by another court of civil appeals before transfer of case.—*Shipp Buick Co. v. Tolbert*, Tex.Civ.App., 296 S.W. 329.

(2) Motion to affirm on certificate, made after transfer of case from another court of appeals will be overruled, where such other court overruled similar motion on same ground before transfer.—*Smith v. Continental Supply Co.*, Tex.Civ.App., 283 S.W. 1082.

(3) Decision of court of civil appeals of another district permitting filing of transcript was not after transfer reexamined on motion to strike transcript.—*Mauldin Drilling*

Co. v. Weyman, Tex.Civ.App., 3 S.W. 2d 585, error dismissed.

After transfer between subordinate appellate court and court of last resort generally

(1) Where a cause appealed to a subordinate appellate court is transferred to the court of last resort, the latter court has jurisdiction to determine all questions to the same extent as if the appeal had been taken to it in the first instance.—*Rankin v. Wyatt*, 73 S.W.2d 764, 335 Mo. 628, 94 A.L.R. 941, transferred, see, App., 49 S.W.2d 243, overruling motion 48 S.W.2d 88—*Alexander v. St. Louis-San Francisco Ry. Co.*, 38 S.W.2d 1023, 327 Mo. 1012, reversing on other grounds, App., 4 S.W.2d 838—*Cash v. Sonken-Galamba Co.*, 17 S.W.2d 927, 322 Mo. 349—*Block v. U. S. Fidelity & Guaranty Co. of Baltimore, Md.*, 290 S.W. 429, 316 Mo. 278—*Geninazza v. R. U. Leonori Auction & Storage Co.*, Mo., 252 S.W. 417, transferred, see *Geninazzi v. Leonori*, App., 233 S.W. 75—*Robertson v. Robertson*, 192 S.W. 988, 270 Mo. 137.

(2) If the subordinate appellate court has rendered a decision such division is vacated by the transfer and the matter stands as though no decision had been rendered.

Cal.—*Heroux v. Atchison, T. & S. F. Ry. Co.*, 93 P.2d 805, denying transfer, App., 86 P.2d 841, denying motion 82 P.2d 620, 28 Cal.App.2d 401, transferred to 94 P.2d 820—*McDonough v. Goodcell*, 91 P.2d 1035, 13 Cal.2d 741, 123 A.L.R. 1205—*Weber v. Nasser*, 292 P. 637, 210 Cal. 607—*Martin v. Howe*, 211 P. 453, 190 Cal. 187—*Rockridge Place Co. v. City Council of City of Oakland*, 172 P. 1110, 178 Cal. 58.

Ind.—*Riverside Coal Co. v. North Indianapolis Cradle Works*, 142 N.E. 377, 194 Ind. 176, overruling rehearing 139 N.E. 674, 194 Ind. 176.

(3) Upon transfer of an appeal from the district court of appeal to the supreme court, opinion and decision of the district court of appeal become a nullity and of no force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed, unless approved or adopted by the supreme court.—*Knouse v. Nimocks*, 66 P.2d 438, 8 Cal.2d 482—*In re Kent's Estate*, 57 P.2d 901, 6 Cal.2d 154.

(4) The case is set at large for decision upon the entire record, and not limited to a decision of the questions affecting the parties who secured the transfer.—*Martin v. Howe*, supra.

(5) Question whether district court of appeal, at time of rendition of its opinion, was a legally constituted court, became moot upon order of transfer of cause to supreme court.—*Van Tiger v. Superior Court*

in and for Los Angeles County, 60 P.2d 851, 7 Cal.2d 377—In re Kent's Estate, *supra*.

(6) Supreme court's practice of considering only opinion of district court of appeal, when passing on petitions for hearing is confined to cases not involving original jurisdiction of district court of appeal.—In re O'Connell, 250 P. 390, 199 Cal. 535, 48 A.L.R. 1232.

(7) Supreme court may treat application for reinstatement of attorney, after disbarment, when transferred to it from district court of appeal, as *de novo* proceeding.—In re O'Connell, *supra*.

(8) Court to which appeal is transferred has power to reexamine ruling of subordinate appellate court on motion to dismiss.—In re Stierlen's Estate, 248 P. 509, 199 Cal. 140.

(9) Where record on certiorari to court of appeals discloses that court of appeals erred in retaining jurisdiction of case, questions other than jurisdiction raised on certiorari will not be adjudicated, but case will be decided on original bill of exceptions and record after transfer thereof to supreme court.

GA.—Walton v. Gormley, 178 S.E. 152, 180 Ga. 90, reversing Gormley v. Walton, 170 S.E. 706, 47 Ga.App. 466, vacated 178 S.E. 398, 50 Ga. App. 478, transferred 180 S.E. 220, 180 Ga. 660.

IND.—Cushman v. Hussey, 118 N.E. 816, 187 Ind. 228.

(10) Where court of appeals transfers case to supreme court because constitutional questions are involved, supreme court's jurisdiction of appeal extends to all questions properly made by assignments of error.—Chattanooga Dayton Bus Line v. Burney, 23 S.W.2d 669, 160 Tenn. 294.

(11) District court of appeal may revise, correct, and modify opinion, to uphold judgment, after transfer of cause to supreme court.—In re Cate, Cal.App., 273 P. 617, supplementing 271 P. 356, which denied rehearing 270 P. 968.

(12) Where an appeal was determined on its merits by district court of appeal and supreme court denied petition for a hearing, the granting by the supreme court of a hearing after a decision of the district court of appeal denying respondent's motion to recall remittitur of district court of appeal on ground that fraud and imposition had been practiced did not transfer entire cause on its merits to the supreme court, but only motion to recall remittitur.—Heroux v. Atchison, T. & S. F. Ry. Co., 93 P.2d 805, denying transfer, App., 86 P.2d 841, denying motion 82 P.2d 620, 28 Cal.App.2d 401, transferred to 94 P.2d 820.

(13) Where the judges of the court of appeals disagreed as to whether what purported to be a bill of exceptions in appellee's abstract of the record was properly authenticated, and the case was transferred to the supreme court, the supreme court has jurisdiction just as if the cause had come by appeal from the nisi prius court, and the appellants may within due time file a corrected abstract, thus eliminating all questions of the insufficiency of the original.—Williams v. Kansas City Terminal Ry. Co., 231 S.W. 954, 285 Mo. 11, transferred, see App., 223 S.W. 132.

(14) On transfer from appellate to supreme court, appellant has right to file corrected abstract in supreme court, if it is served and filed in time for latter hearing.—Rock Island Implement Co. v. Wally, Mo.App., 268 S.W. 804.

(15) Appellant is not limited, on transfer of case to supreme court, to assignments of error and points submitted in court of appeals.—Cash v. Sonken-Galamba Co., 17 S.W.2d 927, 322 Mo. 349.

(16) On transfer of cause from supreme court to court of appeals, questions raised in supreme court concerning time and notice of filing abstract of record were not before court of appeals where all were duly filed in court of appeals in due time.—Ashbrook v. Willis, 100 S.W.2d 943, 231 Mo.App. 460, transferred, see 89 S.W.2d 659, 338 Mo. 226.

(17) Where supreme court has declined jurisdiction of cause on ground that motions for new trial and in arrest of judgment were not filed in contemplation of law, and has transferred cause to court of appeals, that court is confined to consideration of record proper.—State v. Rollinger, Mo.App., 267 S.W. 17, transferred, see Sup., 256 S.W. 460.

(18) In an action on tax bills issued by a municipality under and in strict pursuance to a local option act adopted by its qualified voters, where an appeal was taken to the supreme court, on a constitutional question, and that court declared that the question was improperly raised, and transferred the case to the court of appeals, the defense that no notice of the proposed tax was given will not be considered in the latter court, there being no provision in the act for such notice.—Chapman v. Adams, 243 S.W. 401, 210 Mo.App. 680, transferred, see Sup., 230 S.W. 39.

Conflicting decisions

Where a case is transferred to the supreme court by one of the courts of appeal for the reason that a judge believes the decision of that court in conflict with the decision of another court of appeals, it is the duty of the supreme

court to hear and determine the cause as in case of jurisdiction obtained by ordinary appellate process; in other words, the question of conflict drops out of the case, under Const.Amendm.1884 § 6.—City of Brunswick ex rel. Barkwell v. Benecke, 233 S.W. 169, 289 Mo. 307.

Dissenting opinion

Where the only ground for reversal of judgment of the court of civil appeals presenting a question within the jurisdiction of the supreme court is a point of the admissibility of evidence as to which one judge of the court of civil appeals dissents, questions of the admissibility of other evidence, as to which all the members of the court of civil appeals were agreed, and of the insufficiency of the evidence to warrant the judgment, on which they were also agreed, being exclusively within the jurisdiction of such court.—Gatewood v. Fort Worth & D. C. Ry. Co., 232 S.W. 493, 111 Tex. 291, affirming Ft. Worth & D. C. Ry. Co. v. Gatewood, Civ.App., 185 S.W. 932.

Title to land involved

(1) The court of appeals cannot render decree affecting title to realty in cause transferred thereto by supreme court after being revived in name of administratrix of deceased appellant's estate without making deceased's heirs parties thereto, as successors to his title are not in court.—De Hatre v. Ruenpohl, App., 123 S.W.2d 243, transferred, see 108 S.W.2d 357, 341 Mo. 749.

(2) Nor would the court of appeals render such a decree even if the successors to decedent's title were in court.—De Hatre v. Ruenpohl, *supra*.

(3) Nor would the court of appeals have power to render or direct decree affecting title to tracts of land as to which defendant in suit for establishment of constructive trust in realty and accounting of rents and profits collected therefrom disclaimed any title or interest by answer.—De Hatre v. Ruenpohl, *supra*.

(4) A judgment for defendant in suit for establishment of constructive trust in realty and accounting of rents and profits collected therefrom should not be construed as adjudging or affecting title to tracts as to which defendant disclaimed any title or interest by court of appeals, to which cause was transferred by supreme court after being revived in name of administratrix of deceased plaintiff's estate, where deceased's heirs are not in court and it was not claimed that defendant collected any rents or profits from such tracts, but plaintiff's reply alleged that he had been in possession thereof continu-

the cause has the effect of limiting the issues,⁶⁷ and all subsequent proceedings in the court to which the cause was transferred must conform to the practice and procedure of that court.⁶⁸ So, where a motion is made to dismiss an appeal to the supreme court of a state, and the court transfers the appeal to a subordinate appellate court, the motion to dismiss still pends and may be heard and determined by a latter court.⁶⁹

A subordinate appellate court will not determine questions relating to the brief or assignments of error where the cause must be transferred to a higher appellate court as involving title to land.⁷⁰

It is usually held that, where an order removing a cause has become final, a subsequent order by the same court, which has the effect of depriving

the court to which the case was removed of jurisdiction, is a mere nullity;⁷¹ but it has also been held that a court of general jurisdiction may revoke a certificate transferring questions to another court for trial where such certificate was made without notice to the adverse party of the application therefor,⁷² and that a subordinate appellate court may rescind an order transferring a cause of the court of last resort under a statute which had been declared void by the latter court.⁷³

The jurisdiction of the court to which a cause is transmitted may cease by reason of the failure of a party to the action to comply with an order of such court, as a result of which there is no issue to try.⁷⁴

Where the only reason for granting an appeal

ously for twenty years.—*De Hatre v. Ruenpohl*, supra.

(5) Where ejectment action was transferred from the supreme court on the ground that title to realty in the constitutional sense was not involved, defendant's right, if any, to the fee-simple title to the land in question could not be determined in the action or by the court of appeals.—*Frederich v. Tobaben*, Mo.App., 124 S.W.2d 593, transferred, see Sup., 117 S.W.2d 251.

(6) The only question the court of appeals need determine was whether plaintiffs were entitled to possession at time suit was filed and judgment rendered.—*Friederich v. Tobaben*, supra.

67. Forcible entry and detainer

(1) Defendant by pleading the general issue and filing a brief statement setting up title in himself, thus securing a removal of the cause from the municipal court to the superior court, waives other defenses, and, on report of case to the supreme court, the only issue is defendant's title.—*Pomerleau v. Pomerleau*, 124 A. 243, 123 Me. 522—15 C.J. p 1151 note 34 [a].

(2) Defendant, having waived all defenses other than her title, admits disseisin if she has no title.—*Pomerleau v. Pomerleau*, supra.

68. Ala.—*McKeithen v. Rich*, 86 So. 377, 204 Ala. 588.
N.Y.—*In re Baum's Estate*, 277 N.Y. S. 900, 154 Misc. 371.

Transfer from probate to equity court

(1) Where a cause is removed from a probate court into a court of equity, proceeding had and rules and practice that prevail are the general jurisdiction and procedure of court of equity and powers conferred by law.—*Hamilton v. James*, 166 So. 425, 231 Ala. 668.

(2) The administration and settlement of a decedent's estate is a single and continuous proceeding, and there can be no splitting up of such administration, any more than any other cause of action; and, when the administration is once removed into a court of equity, its jurisdiction becomes exclusive, and it must operate to final and complete settlement, following its own action and governed by its own procedure.—*McKeithen v. Rich*, 86 So. 377, 204 Ala. 588.

Transfer from city court to surrogate's court

Where claim against decedent's estate for board and lodging furnished decedent was rejected, action was brought by claimant against executor, and claimant's objections to executor's account for improperly rejecting claim were overruled, executor's "proposed judgment" dismissing claimant's complaint cannot be signed nor could accompanying bill of costs be taxed after transfer of case to surrogate's court, since rights of parties must be expressed in decree, although "proposed judgment" would be proper in city court where action was commenced.—*In re Baum's Estate*, 277 N.Y.S. 900, 154 Misc. 371.

Transfer from surrogate's court to supreme court

Where the surrogate of Kings County filed a certificate of disqualification and the county judge as acting surrogate transferred the case to the supreme court at special term, under Surrogate's Court Act § 8, the surrogate's court became functus officio, and the supreme court acquired full jurisdiction to grant a jury trial at trial term, under Civ.Pract. Act § 429, and the provisions of Surrogate's Court Act § 68, authorizing the surrogate, in his discretion, to direct a jury trial of controverted questions of fact, are not applicable

thereto.—*In re Brooklyn Trust Co.*, 201 N.Y.S. 571, 121 Misc. 502.

69. Mo.—*Kansas City Breweries Co. v. Markowitz*, 221 S.W. 398, 203 Mo.App. 390, transferred, see Sup., 212 S.W. 849.—*Hydraulic Press Brick Co. v. Bambrick Bros. Const. Co.*, App., 211 S.W. 93.

Effect of higher court's failure to act on motion

Where the supreme court transferred an appeal to the court of appeals on the ground of its want of jurisdiction, the failure of the supreme court to act on a motion to dismiss the appeal on the ground appellant's brief did not comply with the rules is not an implied holding that the brief was sufficient.—*Kansas City Breweries Co. v. Markowitz*, 221 S.W. 398, 203 Mo.App. 390, transferred, see Sup., 212 S.W. 849.

70. Mo.—*Groes v. Brockman*, App., 246 S.W. 608.

71. U.S.—*Phebus v. Search*, C.C.A. Okl., 264 F. 407, 409, citing *Corpus Juris*.

Okl.—*In re Nichols' Will*, 166 P. 1087, 64 Okl. 241.

15 C.J. p 1151 note 35.

In Georgia city court having concurrent jurisdiction with superior court over a warrant for the eviction of a tenant holding over, which erroneously dismissed the proceeding and transmitted it to superior court, after adjournment of superior court, had no authority to reinstate case in city court and order trial there.—*Adams v. Jervis*, 91 S.E. 1003, 19 Ga. App. 627.

72. N.J.—*Pritchard v. Howell*, 99 A. 845, 87 N.J.Eq. 252.

73. La.—*Hendricks v. Bartness*, 88 So. 234, 148 La. 965.

74. N.C.—*Vaughan v. Vincent*, 88 N. C. 116.

to the court of last resort was the raising of a constitutional question, that court loses jurisdiction where the party raising the question abandons it, and will transfer the appeal to a subordinate appellate court, which has jurisdiction to decide all the remaining questions.⁷⁵

The transfer to a subordinate court of a cause appealed to the court of last resort is a holding by the higher court that the subordinate court has jurisdiction of the appeal.⁷⁶ So, where the court of last resort determines that no constitutional question is involved and transfers the cause to a subordinate appellate court which has no pow-

er to decide constitutional questions, any such question is eliminated from the case,⁷⁷ and the transfer itself is in effect a determination by the higher court that no constitutional question was properly raised and presented.⁷⁸ In considering an appeal in a case transferred to a subordinate appellate court from the court of last resort, the subordinate court is controlled by the order of the transferring court.⁷⁹ The action of a subordinate appellate court in transferring a cause to the court of last resort is a holding that jurisdiction of the cause is in the higher court, and the assumption of jurisdiction by the latter court is an implied holding to the same effect.⁸⁰

75. Mo.—Cooper County Bank v. Bank of Bunceton, 276 S.W. 622, 310 Mo. 519, transferred 288 S.W. 85, 221 Mo.App. 814.

76. Ga.—Smith v. Downing Co., 95 S.E. 19, 21 Ga.App. 741.
Ind.—Robbins v. State, 172 N.E. 504, 92 Ind.App. 155, transfer denied in re Petition to Transfer Appeals, 174 N.E. 812, 202 Ind. 365—De-muinck v. State, 166 N.E. 545, 89 Ind.App. 424, denying rehearing 166 N.E. 7, 89 Ind.App. 424.

Amount in controversy

(1) Where an appeal is transferred from the supreme court to the court of appeals because the amount in controversy is insufficient to give to supreme court jurisdiction, the determination as to such amount by the supreme court is binding on the court of appeals.—Vordick v. Vordick, 226 S.W. 59, 205 Mo.App. 555.

(2) The court of appeals is limited not only by such determination, but also by the constitution and statutes, to rendering a judgment for seven thousand five hundred dollars in addition to the amount of the circuit court judgment not in dispute.—Vordick v. Vordick, *supra*.

Title to realty not involved

(1) Where defendant argued the case on the theory that the title to real estate was involved in the proceeding, and it appeared that an appeal had been prosecuted to the supreme court, where the cause was transferred to the appellate court, it was to be assumed that if such contention had been correct the supreme court would have taken jurisdiction of the appeal.—McNeill v. Allen, 205 Ill.App. 199.

(2) On appeal to supreme court in ejectment action wherein defendant denied plaintiff's ownership and specifically alleged ownership in himself, transfer of cause to court of appeals on stipulation of parties on ground that supreme court was without jurisdiction implied finding that title to real estate was not directly

involved.—Brown v. Wilson, Mo.App. 181 S.W.2d 848.

No franchise involved

Where an appeal from quo warranto proceedings was first taken to the supreme court on the theory that the case involved a franchise as well as an office, and was transferred to the appellate court, presumably on the theory that no franchise is involved, the sole question for the consideration of the latter court is whether it involves an office.—People v. Brady, 223 Ill.App. 95, affirmed 135 N.E. 87, 302 Ill. 576.

Determination that suit is at law

Supreme court's transfer of case to court of appeals determines proceeding is at law and not in equity.—Flanigan v. Hutchins, 146 S.E. 500, 39 Ga.App. 220—U. S. Fidelity & Guaranty Co. v. Koehler, 137 S.E. 85, 36 Ga.App. 396, transferred 132 S.E. 64, 161 Ga. 934—Taylor Lumber Co. v. Clark Lumber Co., 127 S.E. 905, 23 Ga.App. 815—Stone v. Edwards, 124 S.E. 54, 32 Ga.App. 479—Smith v. A. D. Adair & McCarthy Bros., 110 S.E. 317, 27 Ga.App. 717, transferred, see 107 S.E. 64, 151 Ga. 439—Brown v. Brown, 101 S.E. 315, 24 Ga.App. 512—Whately v. J. J. Cohen & Co., 101 S.E. 310, 24 Ga.App. 514—Mayer v. Walker, 97 S.E. 881, 23 Ga.App. 185.

77. Ga.—Harrison v. Douglas, 104 S.E. 783, 25 Ga.App. 789.

Mo.—Beck v. Kansas City Public Service Co., App., 48 S.W.2d 213, transferred, see, Sup., 37 S.W.2d 589—City of Cape Girardeau v. Bennett, App., 27 S.W.2d 447—Macon County Levee Dist. No. 1 v. Goodson, App., 22 S.W.2d 651, transferred, see, Sup., 14 S.W.2d 561—State v. Veltrop, App., 6 S.W.2d 638—State v. Turner, App., 284 S.W. 827—State ex rel. Cornelius v. McClanahan, 278 S.W. 88, 221 Mo.App. 399, transferred, see, Sup., 273 S.W. 1059—State v. Nece, App., 255 S.W. 1075.

15 C.J. p 1151 note 38.

78. Ga.—Wadley Southern Ry. Co. v.

Faglee, 155 S.E. 65, 42 Ga.App. 89, reversed on other grounds 161 S.E. 847, 173 Ga. 814, and conformed to 161 S.E. 848, 44 Ga.App. 350—Raffaelli v. Raffaelli, 103 S.E. 860, 25 Ga.App. 611—Stanford v. McConnon & Co., 102 S.E. 908, 25 Ga.App. 226—Paulk v. Berrien County, 102 S.E. 172, 24 Ga.App. 753, affirmed Berrien County v. Paulk, 105 S.E. 491, 150 Ga. 829—Ballard v. Morgan County, 100 S.E. 763, 24 Ga.App. 371—Lewis v. State Board of Medical Examiners, 99 S.E. 147, 23 Ga.App. 607—Davis v. City of Rome, 98 S.E. 231, 23 Ga.App. 183—Bolton v. City of Newman, 95 S.E. 472, 22 Ga.App. 15, transferred, see 94 S.E. 236, 147 Ga. 400.

Ill.—Strom v. Postal Telegraph-Cable Co., 200 Ill.App. 431, transferred, see 111 N.E. 555, 271 Ill. 544.

Ind.—Shaw v. Union Trust Co. of Indianapolis, 137 N.E. 895, 79 Ind. App. 277, transferred, see 136 N.E. 571, 192 Ind. 410—Mikels v. Citizens' Nat. Bank of Crawfordsville, 137 N.E. 584, 79 Ind.App. 165—Peale v. Town of Arcadia, 123 N.E. 425, 70 Ind.App. 258.

Mo.—First Nat. Bank v. Aquamsi Land Co., App., 70 S.W.2d 90, certiorari quashed State ex rel. Aquamsi Land Co. v. Hostetter, 79 S.W.2d 463, 336 Mo. 391—Hart v. Bothe, App., 247 S.W. 356—Town of Kirkwood v. Meramec Highlands Co., 68 S.W. 761, 94 Mo.App. 637—State v. Metcalf, 65 Mo.App. 681.

15 C.J. p 1151 note 38.

79. Ill.—Prudential Ins. Co. of America v. Richman, App., 11 N.E.2d 126, transferred, see 4 N.E.2d 76, 364 Ill. 234—People ex rel. Sweitzer v. Gill, 9 N.E.2d 600, 291 Ill.App. 321, transferred, see 4 N.E.2d 489, 364 Ill. 344.

80. Ind.—Nation v. Green, 116 N.E. 840, 65 Ind.App. 136, for opinion in supreme court see 123 N.E. 163, 188 Ind. 697.

It has further been held that the court, by transfer of a cause to the court of another county does not divest itself of jurisdiction to try other cases between different parties which had been begun before the complaint in the transferred cause was filed;⁸¹ that void proceedings in the wrong court are not validated by transferring the cause to the proper court;⁸² that a cause certified from the probate court to the circuit court retains its probate character;⁸³ that a judge of the municipal court of a district to which a cause has been transferred from another district in the same borough by the president justice of the municipal court acting as a judicial officer has no power to pass on the validity of the order of transfer;⁸⁴ that, in the absence of explicit statutory regulation, the court to which an action for possession of tenements has been transferred for a jury trial has authority so to regulate the travel of the cause in that court that there may be a speedy determination of the cause and that the rights of defendant may be protected;⁸⁵ that, where a subordinate appellate court erred in refusing to transfer a cause to the court of last resort, the latter court will decide the case on the original bill of exceptions and record after the subordinate court has transferred the same to it;⁸⁶ and that the court of last resort, on the transfer of disbarment proceedings from a subordinate appellate court, after a decision by the latter court, will accept such decision as a correct determination of issues of fact.⁸⁷

b. Imputed Notice of Transfer

The parties are bound to take notice of the transfer and subsequent proceedings.

Where a case has been transferred, the parties are bound to take notice of the transfer and subsequent proceedings.⁸⁸ So a defendant properly brought into court by citation is chargeable with notice of an order transferring the cause to another court on account of disqualification of the judge.⁸⁹

§ 518. — Pleadings

On transfer of a cause the pleadings remain the same unless an amendment is allowed or unless the statute permits the filing of further pleas.

Where a case is transferred after joinder of issue, the pleadings remain the same unless an amendment is allowed⁹⁰ or unless the statute permits the filing of further pleas.⁹¹

Equitable issues tendered by a substituted petition after the cause reaches the court to which it is transferred are within the jurisdiction of that court.⁹²

§ 519. — Improper Transfer

The court to which a cause is improperly transferred acquires no jurisdiction, but error in transferring a cause from one division of a court to another division has been held a mere irregularity. Irregularity in the transfer may be waived, or a party may be estopped to deny jurisdiction. A court may correct its own erroneous transfer.

It has been held that, in case it appears that a cause has been transferred erroneously from one court to another, the one to which it has been so transferred acquires no jurisdiction,⁹³ and should

81. Cal.—McMorris v. Superior Court of California in and for Sutter County, 201 P. 797, 54 Cal.App. 76.

82. Ill.—Gill v. Lynch, 10 N.E.2d 812, 367 Ill. 203.

83. Mo.—Hewitt v. Duncan's Estate, 43 S.W.2d 87, 226 Mo.App. 254—Keele v. Weeks, 94 S.W. 775, 118 Mo.App. 262.

84. N.Y.—Millhauser v. Schwach, 273 N.Y.S. 944, 152 Misc. 546.

85. R.I.—Durfee v. District Court of First Judicial District, 119 A. 60, 44 R.I. 462.

86. Ga.—Mobley v. Rucker, 167 S.E. 104, 176 Ga. 178, reversing Rucker v. Mobley, 162 S.E. 851, 44 Ga.App. 705, and conformed to 167 S.E. 614, 46 Ga.App. 319.

87. Cal.—In re McCowan, 170 P. 1100, 175 Cal. 51, 177 Cal. 93.

88. Md.—Phelps v. Stewart, 17 Md. 231.

Okl.—Freeman v. Bryant, 184 P. 76, 78, 76 Okl. 51, citing *Corpus Juris*

89. Tex.—Perkins v. Wood, 63 Tex. 396.

90. N.Y.—Vail v. Blumenthal, 89 N.Y.S. 287—Halloran v. Coney Island Jockey Club, 81 N.Y.S. 143.

Amendment allowable

Superior court to which action of tort for damages for waste was removed from district court could allow amendment to include claim for recovery of premises for waste, since superior court had as extensive jurisdiction of case as if case were first instituted in that court.—Thayer v. Shorey, 191 N.E. 435, 287 Mass. 76, 94 A.L.R. 307.

General issue as part of record, although no such plea filed

Under Gen.L. c 237 § 3, Judiciary Act c 17, where, in trespass, there is an entry of appearance by defendant in the district court, and the case is certified to the common pleas division on a claim for jury trial, the plea of the general issue is deemed a part of the record, and defendant

may put in any evidence admissible under the general issue of not guilty although such plea was not filed.—Collier v. Jenks, 34 A. 998, 19 R.I. 493.

91. Pa.—Kramer v. Slattery, 28 Pa. Dist. 672, 47 Pa.Co. 102, 19 Lack. Jur. 311, 67 Pittsb.Leg.J. 124, 15 Del. 25, 14 Schuylkill Leg.Reg. 305, 399, affirmed 73 Pa.Super. 361. R.I.—Wildes v. Draper, 52 A. 1086, 24 R.I. 262.

92. Iowa.—Gardner v. Kerlin, 169 N.W. 177, 184 Iowa 793.

93. Mo.—Phillips v. Blessing, App. 127 S.W.2d 62. N.C.—Lewellyn v. Lewellyn, 166 S.E. 737, 203 N.C. 575.

Burden of proof

Where action commenced in seventh district court of Smith County was transferred to special district court of such county, interveners who were successful in their cross action had burden to show affirmatively that special district court had

strike the cause from the docket;⁹⁴ but there is also authority for the view that any error in transferring a cause from one division of a court to another is a mere irregularity not fatal to the jurisdiction.⁹⁵

A cause which is transferred from a subordinate appellate court to the court of last resort on the wrongful assumption that it involves a constitutional question will be retained by the latter court, if the cause should have been appealed to it in the first instance as involving title to an office.⁹⁶

Irregularities in the transfer of a cause may be waived by the parties,⁹⁷ and when so waived any judgment rendered by the court to which the transfer was made, within its jurisdiction, is valid.⁹⁸ A party who goes to trial in the court to which a transfer is made waives any objection to the propriety of such transfer,⁹⁹ and such waiver may also result from other conduct inconsistent with an intention to insist upon the impropriety.¹ A party may also be estopped to deny that the court to which the case is transferred has jurisdiction

over his person.²

A court may correct its own erroneous transfer of a cause to another court,³ provided a motion therefor is timely made;⁴ and, where an order of transfer is void, jurisdiction remains in the court in which the action was brought,⁵ and the exercise of such jurisdiction may be presumed without the issuance or service of new process.⁶

Improper transfer of a cause from one court to another as ground for retransferring or remanding the cause to the court which transferred it is discussed *infra* § 520.

§ 520. — Retransfer and Remanding

A cause improperly transferred may in some cases be retransferred to the court from which it came, and under some circumstances the judgment rendered in the court to which a transfer is made will be certified back to the original court for enforcement.

In some jurisdictions a case improperly transferred may be retransferred or remanded to the court from whence it came,⁷ and it has been held

jurisdiction to try such cause.—*Whitfield v. Atkinson*, Tex.Civ.App., 106 S.W.2d 804.

94. La.—*State v. Yazoo & M. V. R. Co.*, 40 So. 630, 116 La. 189. 15 C.J. p 1151 note 43.

95. Mo.—*Stripling v. Maguire*, 84 S.W. 164, 108 Mo.App. 594.

96. Mo.—*State ex rel. Thompson ex rel. Pugh v. Bright*, 250 S.W. 599, 298 Mo. 335.

97. Okl.—*Price v. Peeples*, 168 P. 191, 66 Okl. 139.

98. Okl.—*Price v. Peeples*, *supra*.

99. Colo.—*Kindel v. Le Bert*, 48 P. 641, 23 Colo. 385, 58 Am.S.R. 234.

N.Y.—*Lesser v. Adolph*, 91 N.Y.S. 705, 46 Misc. 265.

1. Okl.—*Price v. Peeples*, 168 P. 191, 66 Okl. 139.

15 C.J. p 1151 note 46.

2. N.Y.—*Vogel v. Banks*, 70 N.Y.S. 1010, 60 App.Div. 459.

3. Mo.—*Bowles v. Troll*, 171 S.W. 326, 262 Mo. 377.

Grounds for setting aside order

Where case was appealed to supreme court because it involved a federal question, and that court on its motion transferred case to Springfield court of civil appeals, if supreme court transferred case on the sole question of amount involved, without noticing federal question, defendant's remedy was by motion in the supreme court to have it set aside order of transfer.—*Armstrong v. First Nat. Bank of Bolivar*, Mo. App., 195 S.W. 562.

4. Ind.—*McCutcheon v. State*, 143 N.E. 625, 194 Ind. 560.

Motion to set aside order of transfer to appellate court is in effect a petition for rehearing, and must be filed within sixty days from the time the supreme court made the order.—*Bobruk v. State*, 181 N.E. 157, 203 Ind. 516, dismissing petitions 167 N.E. 548, 90 Ind.App. 97.—*Bobruk v. State*, 181 N.E. 157, 203 Ind. 516, dismissing petition *Georgades v. State*, 168 N.E. 192, 90 Ind.App. 503, followed in 168 N.E. 194, 90 Ind.App. 713.—*Miskovich v. State*, 181 N.E. 157, dismissing petition 168 N.E. 715, 90 Ind. App. 677.—*McCutcheon v. State*, 143 N.E. 625, 194 Ind. 560.

5. Kan.—*Armour Packing Co. v. Howe*, 75 P. 1014, 68 Kan. 663. Tex.—*Boyd v. Mara*, Civ.App., 284 S.W. 703.

Jurisdiction once acquired is not divested by an erroneous transfer.—*Boyd v. Mara*, *supra*.

Revival of jurisdiction

Where city court of a county transferred case to superior court of newly created county under Civ.Code 1910 § 829, after the case had been twice tried in such city court, and where superior court of new county dismissed the case from its docket, neither judgment constituted a dismissal of the case, but judgment of such city court merely suspended jurisdiction of such court pending action of superior court of the county, so that the case should be tried as one pending in the city court with jurisdiction in such court revived from the day of judgment of dis-

missal in superior court, in view of § 4644 subd 4.—*Subers v. Hirschensohn*, 127 S.E. 825, 33 Ga.App. 752.

6. Kan.—*Armour Packing Co. v. Howe*, 75 P. 1014, 68 Kan. 663.

7. Cal.—*Foot v. Superior Court within and for Los Angeles County*, 10 P.2d 539, 122 Cal.App. 519. La.—*Villemeur v. Woodward*, 132 So. 361, 171 La. 831, transferred, see 130 So. 366, 14 La.App. 597, and transferred 134 So. 111, 16 La.App. 535.

Me.—*Haskell v. Young*, 184 A. 394, 134 Me. 221.

Mo.—*State v. Graham*, App., 250 S.W. 925, retransferred, see 256 S.W. 770, 301 Mo. 272.

15 C.J. p 1152 note 5^o

Grounds for retransfer

(1) Circuit court properly retransferred unlawful detainer case to municipal court, where defendant's petition for removal to circuit court omitted jurisdictional averments regarding defendant's entry upon land.—*Ex parte Lockhart*, 140 So. 762, 224 Ala. 517.

(2) Where supreme court, which granted petition for hearing after decision by district court of appeal refusing to recall its remittitur, determined that denial of motion by district court of appeal was regular, supreme court would not rule on the motion or dismiss the same, but would transfer it to district court of appeal.—*Heroux v. Atchison, T. & S. F. Ry. Co.*, Cal., 93 P.2d 805, denying transfer, App. 86 P.2d 841, denying motion 82 P.2d 620, 28 Cal.App.2d 401, transferred, see 94 P.2d 820,

that, where a cause was transferred from a lower appellate court to the court of last resort on the motion of defendant in error, and a motion to remand was made, of which motion he had due notice, and he failed to enter any appearance in the court of last resort, the motion would be granted and the cause remanded as of course, with costs to plaintiff in error, without considering the question of jurisdiction.⁸ Where a motion to remand a case transferred from the court of last resort to a lower appellate court is abandoned, the case is left for the determination of the latter court.⁹ A case which has been properly transferred cannot be sent back,¹⁰ and the court to which a cause has been removed should not send it back because it does not appear from the transcript of the record that it was transferred according to law.¹¹ Where an appellate court other than the court of last resort decides a case and then transfers it to the court of last resort, and the latter court retransfers it for want of jurisdiction, the decision made by the other appellate court stands, and its only remaining jurisdiction is to enforce the judgment by proper mandate.¹² Where a court of last resort transferred a cause to a subordinate appellate court on the ground that no constitutional question was involved, and the subordinate court reversed the judgment of the trial court, but transferred the cause back to the higher appellate court because deeming its opinion in conflict with other decisions of the subordinate appellate court, the higher court reheard and determined the cause as if it had obtained jurisdiction by ordinary appellate

process.¹³ Where a cause was transferred to the court of last resort by a lower appellate court on the ground that constitutional questions were involved, the overruling of a motion to retransfer the cause to the lower appellate court does not relieve the court of last resort from the duty to determine its jurisdiction when called on to exercise it on final hearing.¹⁴

Certifying judgment back for enforcement. Under some statutes a suit against the banking commissioner on a claim against an insolvent bank may be transferred to a coördinate court of the same county for trial, without transferring the entire liquidation proceedings, and the judgment rendered in such suit should be certified back to the transferring court for enforcement.¹⁵

§ 521. Effect of Refusal of Transfer

The overruling of a petition to transfer an appeal from a lower appellate court to the court of last resort is an approval of the legal principles announced by the lower appellate court, but not an approval of all its reasoning. An order of the court of last resort denying a motion to transfer an appeal to a lower appellate court for want of jurisdiction does not preclude a subsequent transfer on that ground.

Where a petition is made to transfer an appeal from a lower appellate court to the court of last resort, a ruling of the latter court denying the petition is in effect an approval of the statement of legal principles by the lower appellate court as announced by the court of last resort,¹⁶ but it cannot be regarded as an approval of all that

(3) Since the law has placed upon the district court of appeal the duty to investigate applications for admission to practice, the supreme court on transfer of the case will not conduct the investigation, but will retransfer the matter.—*In re Wells*, 163 P. 657, 174 Cal. 467.

(4) Forcible entry and detainer action should be dismissed from docket of superior court and returned to court from which it was transferred to be disposed of in accordance with law, where defendant had failed to file recognizance as required by statute prior to transfer.—*Haskell v. Young*, 184 A. 394, 134 Me. 221.

(5) Where appeal from conviction of crime to supreme court on ground constitutional question was involved was transferred to the court of appeals, because there was no bill of exceptions in the transcript, and permission is granted in the court of appeals to file original bill of exceptions, which bill raises the constitutional question, the case will be retransferred to the supreme court.—*State v. Graham*, Mo.App., 250 S.W.

925, retransferred, see 256 S.W. 770, 301 Mo. 273.

Discretion of court

Under statute regarding transfer of causes between superior and district courts where cause has been transferred from one court to another on motion of party, neither party is entitled to have cause retransferred as matter of right, but courts have discretionary right to retransfer cause.—*Acme Oil & Gas Co. v. Cooper*, 33 P.2d 191, 168 Okl. 346.

In Indiana there is no statutory authority for retransfer of a cause which has been transferred from one court to another, unless it be a provision for transfers because of disparity between the number of cases pending in the two courts.—*Pittsburgh, C. C. & St. L. R. Co. v. Peck*, 88 N.E. 627, 44 Ind.App. 62, transferred, see 87 N.E. 644, 172 Ind. 19.

8. Colo.—*People v. Denman*, 64 P. 194, 28 Colo. 217.

9. Colo.—*Chicago, R. I. & P. R. Co. v. Rhodes*, 121 P. 769, 21 Colo.App. 229.

10. Tex.—*Gulf, C. & S. F. Ry. Co. v. Smith*, 38 S.W. 750, 92 Tex. 12, 15 C.J. p. 1152 note 55.

11. N.C.—*Boyden v. Williams*, 84 N. C. 608.

12. Mo.—*Bradley v. Milwaukee Mechanics' Ins. Co.*, 90 Mo.App. 349.

13. Mo.—*Langan v. U. S. Life Ins. Co.*, 130 S.W.2d 479, 123 A.L.R. 1409, transferred, see, App., 121 S.W.2d 268, transferred, see, Sup., 114 S.W.2d 984.

14. Mo.—*State ex rel. Simmons (now Hatton) v. American Surety Co. of New York*, 210 S.W. 428.

15. Tex.—*L. G. Balfour Co. v. Gossett*, 115 S.W.2d 594, 131 Tex. 348, reversing on other grounds *Gossett v. L. G. Balfour Co.*, Civ.App., 111 S.W.2d 1119.

16. Ind.—*Harter v. Board of Com'rs of Boone County*, 116 N.E. 304, 186 Ind. 301, transferred, see 114 N.E. 321, 63 Ind.App. 701—*New York, C. & St. L. R. Co. v. Martin*, 77 N.E. 290, 37 Ind.App. 705.

was said by the lower appellate court in argument as to what the law might be.¹⁷ In other words, the denial of the petition is an approval of the lower tribunal's conclusion, but not necessarily an approval of all its reasoning.¹⁸ An or-

der of the court of last resort overruling a motion to transfer an appeal to a subordinate appellate court for want of jurisdiction is not res judicata precluding a subsequent transfer where the want of jurisdiction is discovered.¹⁹

B. STATE COURTS AND UNITED STATES COURTS

§ 522. Independent Tribunals

Generally speaking, although state and federal courts form a part of a single system of jurisprudence, they are independent tribunals.

The courts of the United States and the courts of the various states are independent of each other,²⁰ except as judgments of state courts are subject to review by the federal supreme court, as indicated in the C.J.S. title Federal Courts §§ 238-271, also 25 C.J. p 924 note 61-p 946 note 6, or as actions originally brought in a state court may be removed to a federal court, under the rules considered in the C.J.S. title Removal of Causes § 1 et seq, also 54 C.J. p 200 et seq. So ordinarily the pendency of a suit in a federal court is not a bar to a suit in a state court involving the same controversy, and vice versa.²¹ However, the two courts are not foreign to each other; they form one system of jurisprudence, which constitutes the law of the land, and should be considered as courts of

the same country, having jurisdiction partly different and partly concurrent,²² and as a matter of comity one of such courts will not ordinarily determine a controversy of which another of such courts has previously obtained jurisdiction, as is shown infra § 529.

§ 523. Exclusive Jurisdiction

With respect to each other, exclusive jurisdiction of state and federal courts is considered infra §§ 524, 525. Exclusive jurisdiction of courts in general see supra § 486 et seq.

§ 524. — State Courts

State courts have exclusive jurisdiction over matters not falling within the jurisdiction of federal courts.

State courts have exclusive jurisdiction over matters not falling within the jurisdiction of federal courts.²³ Such matters include: The domes-

17. Ind.—Harter v. Board of Com'rs of Boone County, 116 N.E. 304, 186 Ind. 301, transferred, see 114 N.E. 321, 63 Ind.App. 701.

18. Cal.—Eisenberg v. Superior Court in and for City and County of San Francisco, 226 P. 617, 193 Cal. 575.

Matters not necessary to decision

Where malpractice action was brought by infant by guardian ad litem, and not by infant's father or mother, alleged error in opinion of the district court of appeal concerning running of limitations against action by father or mother was not necessary to the decision, and did not affect the soundness of the conclusion reached by the district court of appeal.—Scott v. McPheeters, 93 P.2d 562, 33 Cal.App.2d 629, denying hearing 92 P.2d 678, 33 Cal.App.2d 629.

However, in denying petition for hearing of case wherein a municipality was a defendant, the supreme court withheld approval of portion of opinion of district court of appeal holding that the defense of ultra vires is not available to a municipality unless pleaded.—General Petroleum Corporation of California v. City of Los Angeles, 72 P.2d 551, 22 Cal.App.2d 332, denying hearing 70 P.2d 998, 22 Cal.App.2d 332.

19. Mo.—State ex rel. Otto ex rel.

Bales v. Hyde, 296 S.W. 775, 317 Mo. 714.

20. U.S.—Claffin v. Houseman, N.Y., 93 U.S. 130, 23 L.Ed. 833—U. S. ex rel. Stewrl v. Warden of Clinton Prison at Dannemora, D.C.N.Y., 21 F.Supp. 502.

15 C.J. p 1152 note 61.

Federal courts have no general supervisory or appellate powers over state courts.—Lulkaert v. Farmers' Lumber Co., C.C.A.Wyo., 38 F.2d 588.

21. U.S.—Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 55 S.Ct. 386, 294 U.S. 189, 79 L.Ed. 850, reversing Commonwealth ex rel. Schnader v. Penn General Casualty Co., 173 A. 637, 316 Pa. 1, certiorari granted. Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed. 651—Bryant v. Atlantic Coast Line R. Co., C.C.A.N.Y., 92 F.2d 569—Rogers v. Paving Dist. No. 1 of City of Eureka Springs, C.C.A.Ark., 84 F.2d 555—Marrs v. City of Oxford, D.C.Kan., 24 F.2d 541, affirmed, C.C.A., 32 F.2d 134, 67 A.L.R. 1336, certiorari denied Ramsey v. City of Oxford, 50 S.Ct. 24, 280 U.S. 563, 74 L.Ed. 617, and Marrs v. City of Oxford, 50 S.Ct. 29, 280 U.S. 573, 74 L.Ed. 625—Stansbury v. Koss, D.C.N.Y., 10 F.

Supp. 477—Knudsen v. First Trust & Savings Bank, Mont., 245 F. 81, 157 C.C.A. 377, affirming, D.C., First Trust & Savings Bank v. Bitter Root Valley Irr. Co., 237 F. 733. 15 C.J. p 1152 notes 61, 62.

22. U.S.—Claffin v. Houseman, N.Y., 93 U.S. 130, 23 L.Ed. 833.

23. U.S.—Lubetich v. Pollock, D.C. Wash., 6 F.2d 237. 15 C.J. p 1153 note 64.

Due regard for the rightful independence of state governments requires that federal courts should scrupulously confine their own jurisdiction to the precise limits which the statute has defined.—Healy v. Ratta, N.H., 54 S.Ct. 700, 292 U.S. 263, 78 L.Ed. 1248, reversing, C.C.A., 67 F.2d 554, affirming, D.C., Ratta v. Healy, 1 F.Supp. 669, appeal dismissed Healy v. Ratta, 53 S.Ct. 522, 289 U.S. 701, 77 L.Ed. 1459.

Suit by materialman on contractor's express promise to pay for materials furnished was matter over which federal courts would have no jurisdiction.—In re Fritz' Estate, 257 N.W. 667, 216 Wis. 477.

Action for injuries to employee of railroad while engaged in intrastate commerce was held to be maintainable only in state court.—Delaware, L. & W. R. Co. v. Peck, N.Y., 255 F. 261, 166 C.C.A. 481.

tic relations of husband and wife and parent and child;²⁴ including divorce,²⁵ filiation,²⁶ and the custody of children;²⁷ the custody of insane persons;²⁸ the dissolution of a state corporation;²⁹ the forfeiture of franchises of a street railroad company;³⁰ the conduct of clerks of state courts;³¹ and certain activities of local administrative bodies.³² Also, while the federal courts have some jurisdiction as regards probate matters, as is shown in the C.J.S. title Federal Courts § 12 also 25 C.J. p 695 notes 9-11, and the jurisdiction of federal and state courts is concurrent as to other matters involving probate, as indicated below in § 526, federal courts of equity and state probate courts are not courts of concurrent jurisdiction,³³ and generally the jurisdiction of state courts is to a very large extent exclusive in probate proceedings and

the administration of decedent's estates.³⁴ Furthermore, whether rights under the federal constitution have been waived sometimes is a question exclusively for state courts.³⁵

§ 525. — Federal Courts

Federal courts have exclusive jurisdiction in so far as the constitution of the United States and statutes enacted pursuant thereto expressly or impliedly so provide.

Federal courts have exclusive jurisdiction in so far as the constitution of the United States and statutes enacted pursuant thereto so provide,³⁶ and state courts cannot invade a field occupied by federal control under federal laws,³⁷ or deprive the federal courts of their lawful jurisdiction.³⁸ Under

24. U.S.—State of Ohio ex rel. Popovici v. Agler, 50 S.Ct. 154, 280 U.S. 379, 74 L.Ed. 489, affirming State ex rel. Popovici v. Agler, 164 N.E. 524, 119 Ohio St. 484, certiorari granted 49 S.Ct. 265, 279 U.S. 828, 73 L.Ed. 979.

25. U.S.—State of Ohio ex rel. Popovici v. Agler, *supra*.
Iowa.—Miller v. Miller, 206 N.W. 262, 200 Iowa 1193.

26. Minn.—State v. Flores, 268 N.W. 194, 197 Minn. 590.

27. U.S.—Ex parte Burrus, Neb., 10 S.Ct. 850, 136 U.S. 586, 34 L.Ed. 1500—Ex parte Bell, D.C.Cal., 240 F. 758—Clifford v. Williams, C.C. Wash., 131 F. 100.

28. U.S.—Hoadley v. Chase, C.C.Ind., 126 F. 818, affirmed 129 F. 1005, 64 C.C.A. 319.

29. U.S.—D'Esopo v. Hanover Order of Owls Nest 131, D.C.Pa., 7 F. Supp. 996—Hirsch v. Independent Steel Co., C.C.W.Va., 196 F. 104, appeal dismissed 32 S.Ct. 841, 225 U.S. 698, 56 L.Ed. 1263.

30. U.S.—People v. Bleecker St. & F. F. R. Co., C.C.N.Y., 178 F. 156.

31. N.Y.—In re 1610 Avenue P, 6 N.Y.S.2d 241, 168 Misc. 918.

32. U.S.—Red Ball Transit Co. v. Marshall, D.C.Ohio, 8 F.2d 635, motion denied 46 S.Ct. 356, 270 U.S. 632, 70 L.Ed. 771, appeal dismissed 47 S.Ct. 569, 273 U.S. 782, 71 L.Ed. 890.

Railroad commission

Carrier should seek relief in state court if railroad commission erroneously required certificate of public convenience.—Madden Bros. v. Railroad & Warehouse Commission of Minnesota, D.C.Minn., 43 F.2d 236, appeal dismissed, C.C.A., 49 F.2d 1080.

33. U.S.—Atwood v. Rhode Island Hospital Trust Co., C.C.A.R.I., 34

F.2d 18, affirming, D.C., 30 F.2d 707, and certiorari denied 50 S.Ct. 81, 280 U.S. 600, 74 L.Ed. 646.

34. U.S.—In re McDonald's Estate, D.C.Minn., 42 F.2d 266—Watkins v. Madison County Trust & Deposit Co., D.C.N.Y., 40 F.2d 91—Atwood v. Rhode Island Hospital Trust Co., C.C.A.R.I., 34 F.2d 18, affirming, D.C., 30 F.2d 707, certiorari denied 50 S.Ct. 81, 280 U.S. 600, 74 L.Ed. 646—Carstensen v. U. S. Fidelity & Guaranty Co., C.C.A.Wash., 27 F.2d 11—O'Connor v. Slaker, C.C.A.Neb., 22 F.2d 147, appeal dismissed Slaker v. O'Connor, 49 S.Ct. 158, 278 U.S. 188, 73 L.Ed. 258—Stansbury v. Koss, D.C.N.Y., 10 F.Supp. 477—Smith v. Jennings, Ga., 238 F. 48, 151 C.C.A. 124, reversing, D.C., Jennings v. Smith, 232 F. 921, and certiorari denied 37 S.Ct. 399, 243 U.S. 635, 61 L.Ed. 940.
15 C.J. p 1153 note 69.

Federal courts without jurisdiction

(1) To adjust account of administrator, or to interfere with order of probate court requiring administrator and surety to account.—In re McDonald's Estate, D.C.Minn., 42 F.2d 266.

(2) To construe a state statute of wills or to entertain suits by legatees or devisees, or interpret testamentary provisions, except where founded on proved will.—Boal v. Metropolitan Museum of Art of City of New York, C.C.A.N.Y., 19 F.2d 454, certiorari denied 48 S.Ct. 122, 275 U.S. 565, 72 L.Ed. 429.

(3) To decide issue of devisavit vel non.—In re Armistead's Estate, D.C.Miss., 4 F.Supp. 606.

(4) To declare plaintiffs the heirs of mortgagors in suit to set aside the mortgage and foreclosure proceedings.—Santiago v. Roses, Porto Rico, 242 F. 209, 155 C.C.A. 49.

(5) To determine what constitutes will under state laws, and whether

trust instrument was properly authenticated as part of will.—Atwood v. Rhode Island Hospital Trust Co., C.C.A.R.I., 34 F.2d 18, affirming, D.C., 30 F.2d 707, and certiorari denied 50 S.Ct. 81, 280 U.S. 600, 74 L.Ed. 646.

(6) To review decision of state court granting letters of administration on estate of deceased veteran and deciding that his son was entitled to war risk insurance.—Cuff v. U. S., C.C.A.Cal., 64 F.2d 624, certiorari denied 54 S.Ct. 96, 290 U.S. 676, 78 L.Ed. 583.

35. Tex.—Louisiana Ry. & Nav. Co. v. State, Civ.App., 298 S.W. 462, affirmed, Com.App., 7 S.W.2d 71, rehearing denied 17 S.W.2d 457.

36. U.S.—Clafin v. Houseman, N.Y., 93 U.S. 130, 23 L.Ed. 833.

Determination of validity of federal estate tax is not within jurisdiction of state equity court, as remedy by suit to recover back tax is exclusive, under Rev.St.U.S. §§ 3220, 3224, 3226, 3227.—Pratt v. Dean, 140 N.E. 924, 246 Mass. 300.

37. Pa.—T. Mendelson Co. v. Pennsylvania R. Co., 2 A.2d 820, 332 Pa. 470.

38. N.Y.—Bean v. Stoddard, 206 N.Y.S. 753, 124 Misc. 262, modified on other grounds In re Bean, 201 N.Y.S. 827, 207 App.Div. 276, appeal dismissed 144 N.E. 888, 238 N.Y. 552, and 144 N.E. 900, 238 N.Y. 581, and affirmed Bean v. Stoddard, 144 N.E. 916, 238 N.Y. 618.
15 C.J. p 1153 note 71.

Corpus Juris has been cited for the proposition that the construction placed by the supreme court of the United States upon an act of congress is binding alike upon state and federal courts.—Winton v. Thompson, Tex.Civ.App., 123 S.W.2d 951, 952.

Constitutionality of National Industrial Recovery Act is not for

the express provisions of § 256 of the Judicial Code, as amended, defining the cases and proceedings wherein the federal courts have exclusive jurisdiction,³⁹ such courts have jurisdiction to the exclusion of state courts of all crimes and offenses cognizable under the authority of the United States, as is indicated in the C.J.S. title Criminal Law §§ 16, 131, also 16 C.J. p 62 note 37—p 63 note 50, p 160 note 84—p 162 note 17; of all suits for penalties and forfeitures incurred under the laws of the United States;⁴⁰ of civil causes of admiralty and maritime jurisdiction, as considered in Admiralty §§ 5-65; of all cases arising under the patent right, or copyright laws of the United States, as is shown below; of all matters and proceedings in bankruptcy, as is shown in Bankruptcy § 29; and of all suits and proceedings against ambassadors, or other public ministers, or their domestics,

or domestic servants, or against consuls or vice consuls.⁴¹ Federal courts have also been granted exclusive jurisdiction over cases or prescribed kinds of cases arising under particular laws of the United States,⁴² including the anti-trust laws,⁴³ the Trading with the Enemy Act,⁴⁴ the Railway Labor Act,⁴⁵ and other enactments considered below in this section. However, the jurisdiction of a state court over an action not arising under such laws is not defeated by the fact that rights existing under such laws may be incidentally involved, as is shown above in § 526.

The supreme court of the United States has exclusive final jurisdiction over the subject of the effect to be given in each state to the records and judgments of courts of sister states,⁴⁶ and over disputes between states as to boundary lines.⁴⁷

state court to determine, but must be determined by federal courts.—*Darweger v. Staats*, 275 N.Y.S. 394, 153 Misc. 522, affirmed 278 N.Y.S. 87, 243 App.Div. 380, leave to appeal to court of appeals granted 278 N.Y.S. 94, 243 App.Div. 825, affirmed 196 N.E. 61, 267 N.Y. 290, followed in *People v. Greenbaum*, 280 N.Y.S. 771, 244 App.Div. 778.

Wage scales in public building construction

State court lacks jurisdiction to enjoin general contractor erecting public building of United States from interfering with employment of workmen by subcontractor at less than prevailing wage scale as determined under act of congress.—*Frazier v. Aronsberg-Freed Co.*, 19 Pa. Dist. & Co. 710, 81 Pittsb. Leg. J. 317.

39. U.S.—*Raphael v. Munroe*, C.C.A. Mass., 80 F.2d 16, certiorari granted *Munroe v. Raphael*, 53 S.Ct. 117, 287 U.S. 591, 77 L.Ed. 516, reversed on other grounds 53 S.Ct. 424, 288 U.S. 435, 77 L.Ed. 910.

Minn.—*Grob v. Continental Mach. Specialties*, 283 N.W. 774, 777, 204 Minn. 459, quoting *Corpus Juris*.
Mo.—*Davis v. Carney & McColgan*, 240 S.W. 883, 210 Mo.App. 694.

40. U.S.—*Gelston v. Hoyt*, N.Y., 3 Wheat. 246, 4 L.Ed. 381.—*The Greyhound*, C.C.A.N.Y., 68 F.2d 832, reversing, D.C., 4 F.Supp. 184.

Mo.—*Ex parte Gounis*, 263 S.W. 988, 304 Mo. 428.

N.Y.—*In re Engel's Estate*, 250 N.Y. S. 648, 140 Misc. 276.

15 C.J. p 782 note 92, p 783 note 98, p 1159 note 30 [a].

Concurrent jurisdiction see *infra* § 526.

For excessive attorney's fee

(1) Federal statute making collection of fee in excess of ten dollars for collecting policy of war risk in-

surance without suit a misdemeanor does not penalize payment of amount in excess thereof or confer right to recovery of fee from administrator of veteran's estate in state court.—*Denny's Adm'r v. Denny's Heirs*, 94 S.W.2d 978, 264 Ky. 467.

(2) Such statute has also been held to be penal in character and hence not enforceable by a state court.—*In re Engel's Estate*, 250 N.Y.S. 648, 140 Misc. 276.

41. N.Y.—*Higginson v. Higginson*, 158 N.Y.S. 92, 96 Misc. 457.
15 C.J. p 1154 note 82.

42. Minn.—*Grob v. Continental Mach. Specialties*, 283 N.W. 774, 777, 204 Minn. 459, quoting *Corpus Juris*.
15 C.J. p 1154 note 74.

43. U.S.—*General Inv. Co. v. Lake Shore & M. S. Ry. Co.*, Ohio, 43 S. Ct. 106, 260 U.S. 261, 67 L.Ed. 244, modifying, C.C.A., 269 F. 235.—*Williamson v. Columbia Gas & Electric Corporation*, D.C.Del., 27 F. Supp. 198.—*Southern States Oil Co. v. Standard Oil Co. of New Jersey*, D.C.S.C., 26 F.Supp. 633.

Mass.—*Codman v. New York, N. H. & H. R. Co.*, 148 N.E. 467, 253 Mass. 144.

N.Y.—*Barns v. Dairymen's League Co-op. Ass'n*, 222 N.Y.S. 294, 220 App.Div. 624.—*Eastman Kodak Co. v. Powers Film Products*, 179 N.Y. S. 325, 189 App.Div. 556, reversing *Eastman Kodak Co. v. Warren*, 178 N.Y.S. 14, 108 Misc. 680.—*Venner v. New York Cent. & H. R. R. Co.*, 164 N.Y.S. 626, 177 App.Div. 296, affirming *Venner v. New York Cent. R. Co.*, 158 N.Y.S. 602, 94 Misc. 671.

S.C.—*McMaster v. Ford Motor Co.*, 103 S.E. 87, 114 S.C. 100.

Tex.—*American Refining Co. v. Gasoline Products Co.*, Civ.App., 294 S. W. 967.

15 C.J. p 1154 note 78.

Counterclaim which alleged a violation of federal anti-trust laws was demurrable as asserting cause of action cognizable only in federal courts.—*Pennsylvania-Dixie Cement Corporation v. H. Wales Lines Co.*, 178 A. 659, 119 Conn. 603.

44. Ky.—*Commonwealth ex rel. Attorney General v. Von Zedtwitz*, 285 S.W. 224, 215 Ky. 413, certiorari denied *Commonwealth of Kentucky ex rel. Dougherty v. Von Zedtwitz*, 47 S.Ct. 243, 273 U.S. 735, 71 L.Ed. 866.

N.Y.—*In re Sielcken's Estate*, 3 N.Y. S.2d 793, 167 Misc. 327.—*Anglo-Continental Trust Maatschappij v. Allgemeine Elektricitäts-Gesellschaft*, 12 N.Y.S.2d 964.

Or.—*Sutherland v. Wickey*, 289 P. 375, 133 Or. 266.

Validity of orders of president and attorney general

The validity of president's executive order, authorizing attorney general to revoke orders issued in favor of claimants under Trading with the Enemy Act without legal authority or as result of claimants' misrepresentations or fraud, and attorney general's revocation of previous attorney general's orders allowing claims and permitting relinquishment or return of funds in alien property custodian's hands to claimants, cannot be litigated in surrogate's court, as such questions are justiciable only in federal courts.—*In re Sielcken's Estate*, 3 N.Y.S.2d 793, 167 Misc. 327.

45. Cal.—*Ferryboatmen's Union of California v. Southern Pac. Co.*, App., 38 P.2d 425.

46. Neb.—*Hadacheck v. Chicago, etc., R. Co.*, 104 N.W. 878, 74 Neb. 385.

47. Tex.—*Wortham v. Walker*, 128 S.W.2d 1138.

It has been held that a state court has no jurisdiction to rule an attorney at law for failure to pay over to his client money collected on process from a federal court,⁴⁸ and a state court may not pass on the validity of a patent to land issued pursuant to an act of congress.⁴⁹

Patents and copyrights. Under the judicial code,

federal courts have exclusive jurisdiction over cases arising under the patent laws,⁵⁰ including cases involving the validity⁵¹ and infringement⁵² of patents, and the rights secured thereby.⁵³ Likewise, under the judicial code, federal courts have exclusive jurisdiction of actions arising under the copyright laws,⁵⁴ including suits for copyright in-

48. Ga.—Wilkinson County v. Lindsey, 31 S.E. 792, 106 Ga. 25.

49. Mich.—Gillespie v. Dunn, 224 N.W. 374, 246 Mich. 415.

50. Cal.—Davis v. Kittle Mfg. Co., 25 P.2d 253, 134 Cal.App. 254.

Ky.—Cheatham Electric Switching Device Co. v. Kentucky Switch & Signal Co., 280 S.W. 469, 213 Ky. 23.

Me.—Maxim v. E. L. Tebbets Spool Co., 171 A. 698, 132 Me. 398.

Mass.—George C. Miller & Co. v. Beagen, 199 N.E. 344.

Minn.—Grob v. Continental Mach. Specialties, 283 N.W. 774, 777, 204 Minn. 459, quoting *Corpus Juris*.

N.Y.—New Era Electric Range Co. v. Serrell, 169 N.E. 105, 252 N.Y. 107, reversing 233 N.Y.S. 839, 225 App.Div. 651, affirming 229 N.Y.S. 453, 132 Misc. 354.

Ohio.—Cleveland Worm & Gear Co. v. Noyes, 17 Ohio N.P.N.S., 529.

Tenn.—Kelly Mfg. Co. v. Brower, 1 Tenn.App. 428.

15 C.J. p 1154 note 76.

Concurrent jurisdiction see *infra* § 526.

Petition determines jurisdiction of action relating to patents.—Cheatham Electric Switching Device Co. v. Kentucky Switch & Signal Co., 280 S.W. 469, 213 Ky. 23.

51. Ill.—West Disinfecting Co. v. U. S. Sanitary Specialties Corporation, 221 Ill.App. 372.

Pa.—Quaker State Oil Refining Co. v. Talbot, 155 A. 586, 322 Pa. 155.

52. U.S.—Cinema Patents Co. v. Columbia Pictures Corporation, C.C.A. Cal., 62 F.2d 310.

Mich.—Richards v. Kline, 236 N.W. 821, 254 Mich. 426.

Neb.—Thimman v. State, 251 N.W. 837, 125 Neb. 696, certiorari denied Thimman v. State of Nebraska, 54 S.Ct. 864, 292 U.S. 656, 78 L.Ed. 1504.

N.J.—Radio Corporation of America v. De Forest Radio Telephone & Telegraph Co., 127 A. 678, 97 N.J. Eq. 37—Parkhurst v. Kinsman, 6 N.J. Eq. 600.

N.Y.—Hyatt v. Ingalls, 26 N.E. 285, 124 N.Y. 93, affirming 2 N.Y.S. 727, 55 N.Y.Super. 507—Middlebrook v. Broadbent, 47 N.Y. 443, 7 Am.R. 457—Birdsall v. American Sales Book Co., 195 N.Y.S. 91, 202 App. Div. 733—Eastern Extracting Co. v. Greater New York Extracting Co., 110 N.Y.S. 738, 126 App.Div.

928—Zenobia Co. v. American Pistachio Corporation, 5 N.Y.S.2d 278, 1*8 Misc. 312.

Ohio.—Hrny Gehring Co. v. McCue, 154 N.E. 171, 23 Ohio App. 281.

Tex.—Brown & Root v. Jaques, Civ. App., 98 S.W.2d 257—Egan v. Stitt, Civ.App., 297 S.W. 290.

Wis.—Traffic Signal Light Mfg. Co. v. Lange, 200 N.W. 1021, 185 Wis. 202.

Action for damages

(1) The state courts cannot entertain an action to recover damages for an infringement of a patent.—Denise v. Swett, 37 N.E. 627, 142 N.Y. 602, reversing 22 N.Y.S. 950, 68 Hun 188.

(2) Defendant debtor's claim against another for damages for established patent infringement was not subject to garnishment issued out of state court, since suit for such damages is a "suit arising under patent laws" and "suit brought for infringement of letters patent" over which federal courts have exclusive jurisdiction.—German v. Universal Oil Products Co., D.C.Mo., 6 F.Supp. 53.

Action for breach of contract not to infringe on article manufactured involved primarily validity and infringement of patent, and was not within state court's jurisdiction.—Model Brassiere Co. v. Maiden Form Brassiere Co., 248 N.Y.S. 185, 139 Misc. 694.

Suit under declaratory judgment act involving infringement of patent is within exclusive jurisdiction of federal court.

U.S.—Lionel Corporation v. De Filippis, D.C.N.Y., 11 F.Supp. 712.

Ky.—Cheatham Electric Switching Device Co. v. Kentucky Switch & Signal Co., 280 S.W. 469, 213 Ky. 23.

Accounting of royalties earned after notice of cancellation of license agreement relating to patented devices was exclusively within federal jurisdiction.—Electric Regulator Mfg. Corporation v. American Mechanical Laboratories, 232 N.Y.S. 220, 225 App. Div. 37.

Injunction

(1) Suit to restrain manufacture of patented devices in violation of exclusive license, must be brought in federal court.—Ebsary Gypsum Co. v. Ruby, 176 N.E. 820, 256 N.Y. 406,

reversing 239 N.Y.S. 889, 228 App. Div. 875, motion granted 177 N.E. 134, 256 N.Y. 546.

(2) Licensors could not obtain state court injunction against licensee's use of patented devices after cancellation of license agreement, matter being exclusively within federal jurisdiction.—Electric Regulator Mfg. Corporation v. American Mechanical Laboratories, 232 N.Y.S. 220, 225 App.Div. 37.

(3) Whether defendants violated that part of agreement not to infringe certain letters patent was a question for federal courts alone, and state court had no jurisdiction to enjoin violation of such part of agreement.—Comerma Co. v. Comerma, 169 N.Y.S. 884, 182 App.Div. 576, affirmed 122 N.E. 878, 225 N.Y. 676.

53. Minn.—Grob v. Continental Mach. Specialties, 283 N.W. 774, 204 Minn. 459.

Conspiracy to steal

The state courts had no jurisdiction of action to recover damages for alleged conspiracy by defendants to steal plaintiffs' claimed inventions, where no patent had been issued to any of the parties, and interference proceedings were still pending before the patent office.—Grob v. Continental Mach. Specialties, *supra*.

Interference with ownership

Federal court has exclusive jurisdiction of suit to enjoin defendants' claim to plaintiff's patent and interference with plaintiff in asserting rights thereunder.—Egan v. Stitt, Tex.Civ.App., 297 S.W. 290.

Suit under declaratory judgment act for declaration of right of plaintiff to make and sell patented article, could only be brought in a federal court. U.S.—Lionel Corporation v. De Filippis, D.C.N.Y., 11 F.Supp. 712.

Ky.—Cheatham Electric Switching Device Co. v. Kentucky Switch & Signal Co., 280 S.W. 469, 213 Ky. 23.

54. U.S.—Caruthers v. R. K. O. Radio Pictures, D.C.N.Y., 20 F.Supp. 906.

Minn.—Grob v. Continental Mach. Specialties, 283 N.W. 774, 777, 204 Minn. 459, quoting *Corpus Juris*. 18 C.J. p 1192 note 35—15 C.J. p 1154 note 77.

Accounting

A state court has no jurisdiction

fringement.⁵⁵

Interstate commerce. Regulation of interstate commerce is exclusive in the federal courts, except where their jurisdiction in this regard is restricted by congress.⁵⁶ In so far as congress has so provided, federal courts have exclusive jurisdiction of suits arising under the Shipping Act, as amended,⁵⁷ and the Interstate Commerce Act as amended,⁵⁸ including actions assailing the validity of rules, regulations, or orders made by or filed with the interstate commerce commission, or asking that they be restrained, annulled, or set aside.⁵⁹

United States property and territory. Federal courts have exclusive jurisdiction of suits brought by the United States to quiet title to lands,⁶⁰ and

state courts are without jurisdiction to ascertain and abate alleged nuisances created by canals, dams, and levies constructed by the United States in aid of navigation,⁶¹ and cannot interfere with the primary disposition of the soil by the general government.⁶²

If the United States acquires territory by convention with another sovereign power, it has authority to enact laws for the protection and determination of property rights of the inhabitants of such territory in accordance with the terms of such treaty, and such laws, affecting title to real property within a state, must be construed by the United States courts.⁶³ Likewise, while there is also authority to the contrary,⁶⁴ it has been held that, if property is ceded by a state to the federal govern-

over an accounting, where the rights of the parties depend on a copyright under the laws of the United States.—*De Mille Co. v. Casey*, 189 N.Y.S. 275, 115 Misc. 646.

55. N.Y.—*Schenck v. Underhill*, 199 N.Y.S. 606, 205 App.Div. 162—*Underhill v. Schenck*, 193 N.Y.S. 745, 201 App.Div. 48—*Dell Pub. Co. v. Norwood Pub. Co.*, 272 N.Y.S. 896, 152 Misc. 213—*De Mille Co. v. Casey*, 201 N.Y.S. 20, 121 Misc. 78—*Underhill v. Schenck*, 187 N.Y.S. 589, 114 Misc. 520.

Action to recover damages on quantum meruit for unauthorized use of copyrighted musical compositions, in absence of contractual or fiduciary relationship between parties, is not within jurisdiction of state court, plaintiff's sole remedy being action in federal court for infringement of copyrights.—*Cohan v. Robbins Music Corporation*, 280 N.Y.S. 571, 244 App. Div. 697.

56. U.S.—*Campbell River Mills Co. v. Chicago, M. St. P. & P. R. Co.*, D.C.Wash., 42 F.2d 775, affirmed, C. C.A., Chicago, M. St. P. & R. Co. v. *Campbell River Mills Co.*, 53 F.2d 69, certiorari denied 52 S.Ct. 310, 285 U.S. 536, 76 L.Ed. 930.

Property introduced from without the United States and in the possession of a carrier for transportation in bond, is beyond the jurisdiction of the state courts, by the acts of Congress of March 2, 1933, and Febr. 23, 1887.—*Galveston, H. & S. A. Ry. Co. v. Terrazas*, Tex.Civ.App., 171 S.W. 303. Concurrent jurisdiction see *infra* § 526.

57. N.Y.—*New York Lumber Trade Ass'n v. Lacey*, 281 N.Y.S. 647, 245 App.Div. 262, reversing 277 N.Y.S. 519, 154 Misc. 747, and affirmed 199 N.E. 688, 269 N.Y. 595, amended 200 N.E. 54, 269 N.Y. 677, cer-

tiorari denied 56 S.Ct. 954, 298 U.S. 684, 80 L.Ed. 1404.

58. Ind.—*Pittsburgh, C. C. & St. L. R. Co. v. Wood*, 84 N.E. 1009, 45 Ind.App. 1, rehearing denied 88 N.E. 709, 45 Ind.App. 1.

Pa.—*Hall v. Pennsylvania R. Co.*, 100 A. 1035, 257 Pa. 54, L.R.A.1917F 414.

Tenn.—*Petition of Southern Lumber & Mfg. Co.*, 210 S.W. 639, 141 Tenn. 325.

Tex.—*Southwestern Greyhound Lines v. Railroad Commission of Texas*, 99 S.W.2d 263, 269, 128 Tex. 560, 109 A.L.R. 1235, citing *Corpus Juris*, and reversing, Civ.App., 92 S.W.2d 296.

15 C.J. p 1154 note 79.

59. U.S.—*Midland Valley R. Co. v. Barkley*, 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664, reversing 291 S.W. 431, 172 Ark. 398, certiorari granted 48 S.Ct. 37, 275 U.S. 514, 72 L.Ed. 401—*Venner v. Michigan Cent. R. Co.*, Ohio, 46 S.Ct. 444, 271 U.S. 127, 70 L.Ed. 868—*Lambert Run Coal Co. v. Baltimore & O. R. Co.*, W.Va., 42 S.Ct. 349, 258 U.S. 377, 66 L.Ed. 671, modifying *Baltimore & O. R. Co. v. Lambert Run Coal Co.*, 267 F. 776, certiorari denied 41 S.Ct. 148, 254 U.S. 651, 65 L.Ed. 457—*Southern Pac. Co. v. City of Willow Glen*, C.C.A.Cal., 49 F.2d 1005, certiorari denied City of Willow Glen v. *Southern Pac. Co.*, 52 S.Ct. 39, 284 U.S. 666, 76 L.Ed. 564.

Fla.—*State ex rel. Davis v. Atlantic Coast Line R. Co.*, 140 So. 824, 103 Fla. 1204, denying petition 140 So. 817, 103 Fla. 1204, certiorari denied State of Florida ex rel. *Davis v. Atlantic Coast Line R. Co.*, 52 S.Ct. 640, 286 U.S. 557, 76 L.Ed. 1291.

Ga.—*Southern Ry. Co. v. State*, 4 S.E.2d 233, 188 Ga. 569.

Ill.—*People v. Illinois Cent. R. Co.*, 155 N.E. 841, 324 Ill. 591, 51 A.L.R.

1236, certiorari denied 48 S.Ct. 37, 275 U.S. 541, 72 L.Ed. 415—*People v. Illinois Cent. R. Co.*, 237 Ill.App. 24.

Ky.—*Louisville & N. R. Co. v. Brashers*, 289 S.W. 1094, 217 Ky. 439. N.Y.—*People v. Long Island R. Co.*, 186 N.Y.S. 589, 195 App.Div. 897, reversing *People v. Long Island R. Co.*, 185 N.Y.S. 594, 113 Misc. 700.

Tex.—*Texas Steel Co. v. Fort Worth & D. C. Ry. Co.*, 40 S.W.2d 78, 120 Tex. 597, answering certified questions, Civ.App., 45 S.W.2d 794—*Railroad Commission of Texas v. Texas Steel Co.*, Civ.App., 43 S.W.2d 137, error refused, certiorari denied *Texas Steel Co. v. Railroad Commission of Texas*, 52 S.Ct. 644, 286 U.S. 562, 76 L.Ed. 1295.

Wash.—*State ex rel. Department of Public Works v. Northern Pac. Ry. Co.*, 19 P.2d 128, 172 Wash. 37.

Order refusing permission to restore abandoned railroad line by interstate commerce commission did not ipso facto forestall execution of state court's mandamus writ commanding restoration.—*State ex rel. Davis v. Atlantic Coast Line R. Co.*, 140 So. 824, 103 Fla. 1204, denying petition 140 So. 817, 103 Fla. 1204, certiorari denied State of Florida ex rel. *Davis v. Atlantic Coast Line R. Co.*, 52 S.Ct. 640, 286 U.S. 557, 76 L.Ed. 1291.

60. U.S.—*U. S. v. McIntosh*, D.C.Va., 57 F.2d 573.

61. Cal.—*Cory v. City of Stockton*, 266 P. 552, 90 Cal.App. 634.

62. Mo.—*Grove v. Fulsome*, 16 Mo. 543, 57 Am.D. 247. 15 C.J. p 1158 note 15 [b].

63. Cal.—*Gardiner v. Miller*, 47 Cal. 570.

64. U.S.—*In re Bradley*, C.C.Cal., 96 F. 969.

15 C.J. p 1155 note 90.

ment, the state court has no jurisdiction over it,⁶⁵ unless it is otherwise provided in the act of cession.⁶⁶

State courts have no jurisdiction over the proprietary title of the United States to land within the state,⁶⁷ although, in case of controversy between two persons seeking to obtain title to government lands, a state court may protect the possession of the one appearing to have the better right until the controversy is settled by federal authority.⁶⁸

Suits against United States, its representatives, and agencies. In the absence of congressional sanction, state courts cannot entertain suits against the United States⁶⁹ or its agencies,⁷⁰ including corporations created by the national government,⁷¹

and are without jurisdiction to control or restrain the official conduct of federal officers or agents,⁷² federal courts having exclusive jurisdiction over such suits.

Actions on bonds. Under the Judicial Code, federal courts have exclusive jurisdiction of an action on a bond given for the return of a vessel seized for a violation of the prohibition law.⁷³ Also, under an act of congress so providing, such courts have exclusive jurisdiction over actions on statutory bonds executed by persons contracting for the construction or repair of public buildings or public works;⁷⁴ but federal courts do not have exclusive jurisdiction over actions which, although involving such bonds, are not of the character specified in the statute.⁷⁵

65. Me.—State v. Intoxicating Liquors, 6 A. 4, 78 Me. 401.
Va.—Foley v. Shriver, 81 Va. 568.
15 C.J. p 1155 note 89.

66. N.Y.—Barrett v. Palmer, 16 N.Y.S. 94, affirmed 31 N.E. 1017, 135 N.Y. 336, 31 Am.S.R. 535, 17 L.R.A. 720, affirmed 16 S.Ct. 837, 162 U.S. 399, 40 L.Ed. 1015.
15 C.J. p 1155 note 91.

Jurisdiction transferred to federal courts

Under a state statute so providing, jurisdiction over lands acquired in the state by the United States, for specified governmental purposes, is transferred from the state to the federal courts.—U. S. v. McIntosh, D. C.Va., 2 F.Supp. 244, rehearing denied 3 F.Supp. 715, appeal dismissed, C.C.A., McIntosh v. U. S., 70 F.2d 507, certiorari denied 55 S.Ct. 101, 293 U.S. 586, 79 L.Ed. 682.

67. Minn.—Shevlin-Mathieu Lumber Co. v. Fogarty, 153 N.W. 871, 130 Minn. 456.
15 C.J. p 1155 note 92.

68. Or.—McComas v. Northern Pac. R. Co., 161 P. 562, 162 P. 862, 82 Or. 639.
Concurrent jurisdiction see *infra* § 526.

69. N.J.—Cowperthwaite v. Wallworth, 149 A. 353, 105 N.J.Eq. 657.
Concurrent jurisdiction see *infra* § 526.

Court designated by congress as that in which United States may be sued has exclusive jurisdiction.—Washington Market Co. v. U. S., 60 Ct.Cl. 930, certiorari denied 46 S.Ct. 27, 269 U.S. 571, 70 L.Ed. 418.

70. N.Y.—Goldstein v. Sommervell, 10 N.Y.S.2d 747, 170 Misc. 602.

The "Works Progress Administration" is a "federal agency" and as such is immune from suit in a state court.—Goldstein v. Sommervell, *supra*.

71. U.S.—Knox Nat. Farm Loan Ass'n v. Phillips, Ohio, 57 S.Ct. 418, 300 U.S. 194, 81 L.Ed. 599, 108 A.L.R. 738.
14 C.J. p 98 notes 5-7.

National farm loan association is an instrumentality of the federal government, and the time and manner of its liquidation are governed by the federal statute, and state courts have no jurisdiction to wind up its business by receivership or otherwise.—Knox Nat. Farm Loan Ass'n v. Phillips, *supra*.

72. U.S.—McClung v. Silliman, Ohio, 6 Wheat. 598, 5 L.Ed. 340—Ex parte Shockley, D.C. Ohio, 17 F.2d 133—Beckett v. Sheriff Hartford County, C.C.Md., 21 F. 32.
W.Va.—Hinkle v. Town of Franklin, 191 S.E. 291, 118 W.Va. 585.

Postmaster general

State court has no jurisdiction to entertain proceedings to restrain a proposed increase in city telephone rates, due to an order of the postmaster general, made under joint resolution of congress, and proclamation of president made pursuant thereto.—Groesbeck v. Michigan State Telephone Co., 172 N.W. 799, 206 Mich. 372.

W. F. A. administrator

Supreme court had no jurisdiction of the person or subject matter in a suit to enjoin the administrator of the Works Progress Administration, a federal agency, as administrator or individually, from enforcing a regulation requiring fingerprinting of certain employees.—Goldstein v. Sommervell, 10 N.Y.S.2d 747, 170 Misc. 602.

State director of F. W. A.

A state court cannot control by mandamus action of state director of federal emergency administration of public works by directing administration of funds under his control.—

Hinkle v. Town of Franklin, 191 S.E. 291, 118 W.Va. 585.

District director of naturalization

State court cannot compel district director of naturalization to issue certificate of arrival against instructions of his superior.—Ex parte Shockley, D.C. Ohio, 17 F.2d 133.

Master in federal court

State court cannot determine question whether one serving as master in federal court should be required to return part of fees paid.—In re Gilbert, N.Y., 48 S.Ct. 210, 276 U.S. 6, 72 L.Ed. 441.

73. U.S.—U. S. v. Brown, D.C.N.Y., 3 F.Supp. 608.

Notwithstanding appointment of liquidator under New York law for surety on bond securing return of vessel seized under prohibition laws, federal court had jurisdiction of action on bond.—U. S. v. Brown, *supra*.

74. Ark.—Maryland Casualty Co. v. Davenport, 62 S.W.2d 35, 187 Ark. 663.

Conn.—Macdonald v. Aetna Indemnity Co., 105 A. 470, 93 Conn. 165.
N.Y.—Alleva v. Maryland Casualty Co., 287 N.Y.S. 583, 248 App.Div. 599.

15 C.J. p 1155 note 83.

In determining whether state court has jurisdiction of suit by materialman against surety on contractor's bond, original government contract, contractor's bond, and surety's supplemental agreement on taking over work, must be considered together.—Maryland Casualty Co. v. Davenport, 62 S.W.2d 35, 187 Ark. 663.

75. La.—Landis & Young v. Gossett & Winn, App., 169 So. 178.
Concurrent jurisdiction see *infra* § 526.

Action by contractor against subcontractor for loss sustained through nonperformance of subcontract was properly instituted in state court in

§ 526. Concurrent Jurisdiction

State courts, when authorized by state law, have concurrent jurisdiction with federal courts to enforce rights secured by the constitution and laws of the United States, in so far as congress has not expressly or impliedly vested the federal courts with exclusive jurisdiction.

Concurrent jurisdiction in federal and state courts to enforce rights granted by federal law is not uncommon,⁷⁶ and may exist even without an express grant.⁷⁷ Generally, whenever a legal right arises and the state court is competent to administer justice, the right may be asserted in such court, although the federal court may have concurrent jurisdiction, unless the jurisdiction is limited by law to the federal courts, or unless the state courts are expressly or by necessary implication excluded by statute.⁷⁸ So, where congress has the right to take over exclusive jurisdiction, and has not covered the particular subject under consideration, the power of the state courts is upheld until congress acts.⁷⁹ In accordance with these principles it has been held that state courts have jurisdiction of suits relating to public lands;⁸⁰ of ac-

tions connected with bankruptcy, as indicated in the title Bankruptcy § 29; of actions involving insolvency, and assignments for benefit of creditors, in cases where the jurisdiction of the federal courts is not exclusive;⁸¹ of an action to recover duties, where there is no act of congress to the contrary;⁸² of a mandamus action to compel the acceptance of sureties for removal of a cause to the circuit court;⁸³ of suits for the enforcement of police regulations relating to navigation;⁸⁴ of actions involving obstruction of navigable waters;⁸⁵ of an action for a collision between a vessel and a bridge;⁸⁶ and of cases relating to maritime contracts or liens.⁸⁷

Federal courts, subject to limitations imposed by the federal law, may have concurrent jurisdiction with state courts over actions arising under state law.⁸⁸ Accordingly, where there is diversity of citizenship and the jurisdictional amount is involved, or where other basis for assuming jurisdiction under the federal law exists, federal courts have jurisdiction of actions under the workmen's compensation statutes of some states;⁸⁹ of actions

parish of subcontractor's domicile as against contention jurisdiction was in federal court under Heard Act.—*Landis & Young v. Gossett & Winn*, supra.

Action based on obligation to furnish bond is not within jurisdiction of federal court under the act of Congress of Aug. 13, 1894, as amended.—*Strong v. American Fence Const. Co.*, 156 N.E. 92, 245 N.Y. 48, reversing 218 N.Y.S. 51, 218 App.Div. 163, reversing 214 N.Y.S. 433, 126 Misc. 690.

Claim not based on bond so as to give federal court exclusive jurisdiction.—*In re Fritz' Estate*, 257 N.W. 667, 216 Wis. 477.

76. N.Y.—*Elliott v. Steinfeldt*, 4 N.Y.S.2d 9, 254 App.Div. 739, followed in *Murphy v. Steinfeldt*, 4 N.Y.S.2d 10, 254 App.Div. 741.
15 C.J. p 1155 note 94.

77. N.Y.—*Elliott v. Steinfeldt*, 4 N.Y.S.2d 9, 254 App.Div. 739, followed in *Murphy v. Steinfeldt*, 4 N.Y.S.2d 10, 254 App.Div. 741.

78. Ala.—*Lindsey v. Standard Accident Ins. Co. of Detroit*, 162 So. 267, 230 Ala. 633.—*Middleton v. St. Louis & S. F. R. Co.*, 153 So. 256, 228 Ala. 323.

Or.—*Sutherland v. Wickey*, 289 P. 375, 379, 133 Or. 266, citing *Corpus Juris*.
15 C.J. p 1155 note 95, p 1156 note 96.

79. Or.—*Red Hawk v. Joines*, 278 P. 572, 129 Or. 620.

80. Wyo.—*Clinton v. Elder*, 277 P.

968, 40 Wyo. 350, rehearing denied 280 P. 889, 40 Wyo. 350.
15 C.J. p 1158 note 15.

Action to determine right to possession of mineral lands, title to which is in federal government, is within jurisdiction of state court.—*Graham v. Superior Court of Siskiyou County*, 21 P.2d 621, 131 Cal. App. 579.

Action to quiet title, based on complaint alleging plaintiff's ownership of the land under a government patent, and that defendant's reservoir company had constructed a reservoir on the land, and therein impounded water conveyed from a government ditch, causing plaintiff's land to be overflowed, and that the company's claim of easement for reservoir purposes was without right, and praying that the easement be declared forfeited, was within jurisdiction of state court.—*Carns v. Idaho-Iowa Lateral & Reservoir Co.*, 202 P. 1071, 34 Idaho 330.

81. U.S.—*O'Neil v. Welch*, Pa., 245 F. 261, 157 C.C.A. 453, reversing, D.C., *Welch v. Union Casualty Ins. Co.*, 238 F. 968.
15 C.J. p 1159 note 31.

Determination of solvency of insurance company

Under Act Pa. June 1, 1911, P.L. 599, state courts have jurisdiction to determine solvency of insurance company, which jurisdiction is concurrent with that of federal court on stockholder's bill to determine same question.—*O'Neil v. Welch*, supra.

82. Mass.—*Ammidown v. Freeland*, 101 Mass. 303, 3 Am.R. 359.
N.Y.—*U. S. v. Graft*, 4 Hun 634, 67 Barb. 304.

83. Ohio.—*State v. Fairfield County Ct. C. Pl.*, 15 Ohio St. 377.
15 C.J. p 1160 note 39.

84. U.S.—*Smith v. Maryland*, 18 How. 71, 15 L.Ed. 269.
15 C.J. p 1159 note 32.

85. Mo.—*Silver v. Missouri Pac. R. Co.*, 13 S.W. 410, 101 Mo. 79.
15 C.J. p 1159 note 33.

86. U.S.—*Martin v. West*, 32 S.Ct. 42, 222 U.S. 191, 56 L.Ed. 159, 36 L.R.A.N.S., 592, affirming 97 P. 1102, 51 Wash. 85, 21 L.R.A.N.S., 324.

87. Ky.—*Arnold v. Eastin*, 76 S.W. 555, 116 Ky. 686, 25 Ky.L. 895.
15 C.J. p 1159 note 35.

88. Kan.—*Thomas v. Chicago, B. & Q. R. Co.*, 273 P. 451, 127 Kan. 326, 64 A.L.R. 322.

89. U.S.—*United Dredging Co. v. Lindberg*, C.C.A.Tex., 18 F.2d 453, affirming, D.C., *Lindberg v. Southern Casualty Co.*, 15 F.2d 54, and certiorari denied *United Dredging Co. of New Jersey v. Lindberg*, 47 S.Ct. 769, 274 U.S. 759, 71 L.Ed. 1337.

Review of award

Federal court has jurisdiction of suit to review award by industrial accident board under Texas workmen's compensation act, where diversity of citizenship and jurisdictional amount are shown.—*Ellis v. Associated Industries Ins. Corpora-*

for the foreclosure of liens, under the statutes of other states;⁹⁰ of actions for the recovery of state taxes paid;⁹¹ and of certain matters connected with probate and administration,⁹² such as the preservation of assets of the estate, pending administration in a state court of competent probate jurisdiction, when they are shown to be in danger of waste or dissipation,⁹³ or the adjudication of claims of creditors or next of kin or heirs to share in the estate.⁹⁴ Likewise, federal courts have concurrent jurisdiction with the state courts over an action to recover premises, the title to which was acquired from the United States,⁹⁵ in certain matters of assignments for the benefit of creditors or of insolvency,⁹⁶ and in all cases of fraud, excepting fraud in obtaining a will of real and personal estate;⁹⁷ and the blending of legal and equitable remedies in a state statute will not affect the ancient equitable jurisdiction of federal courts.⁹⁸ However, the concurrent jurisdiction of the national

government with that of the states, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the constitution in the District of Columbia.⁹⁹

The federal courts are the most appropriate forum in which to test the constitutionality of legislation by congress, even though the state courts have concurrent jurisdiction.¹ Likewise federal statutes should be interpreted by federal rather than state courts,² although, in the absence of a petition for removal, state courts possess the same power in this respect as do the federal courts.³

Under federal constitution and statutes. Upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by the constitution and laws of the United States whenever those rights are involved in any suit or proceedings before them;⁴ and, where

tion, C.C.A.Tex., 24 F.2d 809, affirming, D.C., Associated Industrial Ins. Co. v. Ellis, 15 F.2d 464—New York Indemnity Co. v. Rasmussen, D.C. Tex., 1 F.Supp. 156.

90. U.S.—American Tank Co. v. Continental & Commercial Trust & Savings Bank, C.C.A.Ark., 3 F.2d 132—Town of Fairfax, ex rel. Barringer v. Hubler, D.C.Okl., 23 F. Supp. 66.

91. U.S.—Chicago, B. & Q. R. Co. v. Osborne, Neb., 44 S.Ct. 431, 265 U. S. 14, 68 L.Ed. 878.

92. U.S.—Stansbury v. Koss, D.C.N.Y., 10 F.Supp. 477.
15 C.J. p 1153 note 70.

Suit by United States against executor

Under federal statute giving federal district courts jurisdiction of suits brought by the United States, federal district court had jurisdiction of action against executor by the United States for income taxes for years prior to death of decedent whose estate was being administered in Indiana probate court, notwithstanding Indiana statute giving Indiana probate courts exclusive jurisdiction in such matters, the jurisdiction of the federal and Indiana courts being concurrent; and the federal court was not vested with discretion to renounce its jurisdiction.—U. S. v. Peoples Trust & Savings Co. of Fort Wayne, C.C.A.Ind., 97 F.2d 771, reversing, D.C., 19 F.Supp. 437.

93. U.S.—Jennings v. Smith, D.C. Ga., 242 F. 561—Smith v. Jennings, Ga., 238 F. 48, 151 C.C.A. 124, reversing, D.C., Jennings v. Smith, 232 F. 921, certiorari denied 37 S. Ct. 399, 243 U.S. 635, 61 L.Ed. 940.

94. U.S.—O'Connor v. Slaker, C.C.A.

Neb., 22 F.2d 147, appeal dismissed Slaker v. O'Connor, 49 S.Ct. 158, 278 U.S. 188, 73 L.Ed. 258—Stansbury v. Koss, D.C.N.Y., 10 F.Supp. 477—Harrison v. Moncravie, C.C.A. Okl., 264 F. 776, appeal dismissed Van Tine v. Moncravie, 41 S.Ct. 374, 255 U.S. 562, 65 L.Ed. 787—Swann v. Austell, D.C.Ga., 253 F. 807, rehearing denied 257 F. 870, affirmed, C.C.A., 261 F. 465, certiorari denied 40 S.Ct. 344, 252 U.S. 579, 64 L.Ed. 726—Jennings v. Smith, D.C. Ga., 242 F. 561—Smith v. Jennings, Ga., 238 F. 48, 151 C.C.A. 124, reversing, D.C., Jennings v. Smith, 232 F. 921, and certiorari denied 37 S.Ct. 399, 243 U.S. 635, 61 L. Ed. 940.
15 C.J. p 1153 note 70 [c], [e].

Creditor's bill to sell real estate

Under state statute which vests the courts of equity with coordinate jurisdiction with the orphans' courts to order a sale of real estate of a decedent, where the personal estate is insufficient to pay debts, a federal court of equity may entertain a bill by a creditor whose status entitles him to invoke its jurisdiction for the enforcement of his claim and those of other creditors against the real estate of a decedent, on an allegation of insolvency of the estate, and may appoint a receiver for such real estate.—Perkins v. Warburton, D.C.Md., 4 F.2d 742.

95. U.S.—Eaton v. Calhoun, C.C. Tenn., 47 F. 422.
15 C.J. p 1160 note 42.

96. U.S.—New York Trust Co. v. Portsmouth & Exeter St. R. Co., C. C.N.H., 192 F. 728—Brochon v. Wilson, Wis., 91 F. 617, 34 C.C.A. 31.
15 C.J. p 1160 note 44.

97. U.S.—Gould v. Gould, C.C.Mass., 10 F.Cas.No.5,637, 3 Story 516.

98. U.S.—Gammill Lumber Co. v. Board of Sup'rs of Rankin County, D.C.Miss., 274 F. 630.

99. U.S.—Ex parte Siebold, Md., 100 U.S. 371, 25 L.Ed. 717.

1. N.Y.—People v. Hurlburt, 67 How. Pr. 362.

2. Colo.—Rico-Argentine Mining Co. v. Rico Consol. Mining Co., 223 P. 31, 74 Colo. 444.

3. Mich.—Dougherty v. Michigan Bell Telephone Co., 209 N.W. 200, 235 Mich. 416.

4. U.S.—U. S. v. Bank of New York & Trust Co., N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirmed, C. C.A., 77 F.2d 866, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—U. S. v. President and Directors of Manhattan Co., N.Y., 56 S. Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C.C.A., 77 F.2d 881, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U. S. 558, 80 L.Ed. 393—U. S. v. Pink, N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C.C.A., U. S. v. Van Schaick, 77 F.2d 880, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—Mooney v. Holohan, 55 S.Ct. 340, 294 U.S. 103, 79 L.Ed. 791, 98 A.L.R. 406, rehearing denied Ex parte Mooney, 55 S.Ct. 511, 294 U.S. 732, 79 L.Ed. 1261—Baker v. Atchison, T. & S. F. Ry. Co., C. C.A.Colo., 106 F.2d 525, certiorari denied Atchison, T. & S. F. R. Co. v. Baker, 60 S.Ct. 296.

Pa.—Miller v. Reading Co., 140 A. 618, 292 Pa. 44.

Federal courts do not have exclusive jurisdiction of controversies

exclusive jurisdiction has not been expressly or impliedly granted to the federal courts, state courts have concurrent jurisdiction to enforce such rights,⁵ provided they are authorized by the state constitution and statutes to take jurisdiction.⁶

As a general rule, the grant of jurisdiction to federal courts does not of itself imply that the jurisdiction is to be exclusive.⁷ So, where a right of action, given by a statute of the United States, is in advancement of a common-law right, exist-

arising under constitution.—Taylor v. De Hart, D.C.Mo., 22 F.2d 206, dismissed 47 S.Ct. 767, 274 U.S. 726, 71 L.Ed. 1335.

5. U.S.—Grubb v. Public Utilities Commission, Ohio, 50 S.Ct. 374, 231 U.S. 470, 74 L.Ed. 972, affirming, D.C., 33 F.2d 323—Lehigh Valley R. Co. of New Jersey v. Martin, C. C.A.N.J., 100 F.2d 139, certiorari denied 59 S.Ct. 592, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 784, 306 U.S. 669, 83 L.Ed. 1063, certiorari denied Central R. Co. of New Jersey v. Martin, 59 S.Ct. 592, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 784, 306 U.S. 669, 83 L.Ed. 1063, certiorari denied 59 S.Ct. 592, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1064, certiorari denied Delaware, L. & W. R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1064, certiorari denied New York Cent. R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1064, certiorari denied New Jersey & N. Y. R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1064, certiorari denied New York, S. & W. R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1064, certiorari denied Erie R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1064, certiorari denied Lehigh Valley R. Co. v. Martin, 59 S.Ct. 593, 306 U.S. 651, 83 L.Ed. 1049, rehearing denied 59 S.Ct. 785, 306 U.S. 670, 83 L.Ed. 1064—Guterman v. Pennsylvania R. Co., D.C. N.Y., 48 F.2d 831.

Kan.—Thomas v. Chicago, B. & Q. R. Co., 273 P. 451, 127 Kan. 326, 64 A.L.R. 322.

Mo.—State ex inf. McKiltrick v. American Colony Ins. Co., 80 S.W. 2d 876, 336 Mo. 406—Ex parte Gounis, 263 S.W. 988, 304 Mo. 428.

N.J.—Fryns v. Fair Lawn Fur Dressing Co., 168 A. 862, 114 N.J.Eq. 462.

N.Y.—New York Lumber Trade Ass'n v. Lacey, 281 N.Y.S. 647, 245 App. Div. 262, reversing 277 N.Y.S. 519, 154 Misc. 747, and affirmed 199 N.E. 688, 269 N.Y. 595, amended 200 N.E. 54, 269 N.Y. 677, certiorari

denied 56 S.Ct. 954, 298 U.S. 684, 80 L.Ed. 1404—Venner v. New York Cent. & H. R. R. Co., 164 N.Y.S. 626, 177 App.Div. 296, affirming Venner v. New York Cent. R. Co., 158 N.Y.S. 602, 94 Misc. 671—U. S. v. Sirianni, 250 N.Y.S. 77, 140 Misc. 124.

Okl.—Severson v. Home Owners Loan Corporation, 88 P.2d 344, 184 Okl. 496.

Tex.—Caruthers v. Hines, Com.App., 290 S.W. 155, affirming, Civ.App., 232 S.W. 244, and certiorari denied 48 S.Ct. 18, 275 U.S. 525, 72 L.Ed. 406.

Wis.—U. S. v. Richards, 229 N.W. 657, 201 Wis. 130—Smithers v. Brunkhorst, 190 N.W. 349, 178 Wis. 530—Chicago, M. & St. P. Ry. Co. v. McGinley, 185 N.W. 218, 175 Wis. 565.

15 C.J. p 1156 note 3.

Federal court not divested of jurisdiction

Concurrent remedy in state court does not divest federal court of jurisdiction in case involving federal constitution.—Gamage v. Masonic Cemetery Ass'n, D.C.Cal., 31 F.2d 308, reversed on other grounds, C.C.A., Masonic Cemetery Ass'n v. Gamage, 38 F.2d 950, 71 A.L.R. 1027, certiorari denied Gamage v. Masonic Cemetery Ass'n, 51 S.Ct. 30, 232 U.S. 852, 75 L.Ed. 755.

Compelling payment of sum due under federal statute

State court's jurisdiction in mandamus to compel county officers to pay state sum due under federal statute was not incompatible with federal courts' jurisdiction.—State v. Siegmund, 266 P. 1075, 125 Or. 197, certiorari denied State of Oregon ex rel. Van Winkle v. Siegmund, 49 S.Ct. 12, 278 U.S. 608, 73 L.Ed. 534.

Although construction of federal statute is involved state court has jurisdiction:

(1) Of a suit to determine the title to land in the state, between citizens thereof.

Mo.—Perry v. O'Hanlon, 11 Mo. 585, 49 Am.D. 100.

S.D.—Egan v. McDonald, 153 N.W. 915, 36 S.D. 92.

(2) Of an action to determine title to personal property sold by collector of port.—O'Gorman v. Kaplan, 198 N.Y.S. 221, 120 Misc. 327, affirmed 202 N.Y.S. 942, 208 App.Div. 714.

6. Mo.—Ex parte Gounis, 263 S.W. 988, 304 Mo. 428.

N.Y.—U. S. v. Sirianni, 250 N.Y.S. 77, 140 Misc. 124.

Limitation by state

The state, by provisions in its Constitution or by appropriate legislation, may limit the jurisdiction of the courts so that they may not take cognizance of actions brought under a federal statute.—U. S. v. Sirianni, supra.

Personal injury action by railway postal clerk against railroad was held within jurisdiction of state court, as against contention that action rested on construction and enforcement of laws of congress, as to which state court was unauthorized by the constitution and laws of the state.—Pittsburgh, C. & St. L. Ry. Co. v. Stephens, 157 N.E. 58, 86 Ind.App. 251.

7. U.S.—U. S. v. Bank of New York & Trust Co., N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirmed, C.C.A., 77 F.2d 866, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 538, 80 L.Ed. 393—U. S. v. President and Directors of Manhattan Co., N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C.C.A., 77 F.2d 881, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—U. S. v. Pink, 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C.C.A., U. S. v. Van Schaick, 77 F.2d 880, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393.

Provisions of judicial code defining jurisdiction of federal district courts authorize plaintiff falling within its terms to institute suit in federal court, but do not divest state court of jurisdiction.—Columbian Nat. Life Ins. Co. v. Cross, Mass., 9 N.E.2d 402.

Effect of federal labor legislation

Federal legislation establishing the national labor relations board and conferring on that board certain powers respecting labor disputes did not take jurisdiction away from state court in action between labor unions over possession of the hiring hall maintained at certain port for longshoremen, and hence state court's order, finding individual guilt of contempt of court for criticizing decision in that action and threatening certain conduct if decision should be attempted to be enforced, was not invalid on ground that court had no jurisdiction.—Bridges v. Superior Court in and for Los Angeles County, Cal., 94 P.2d 983.

ing independently of the legislation of congress in pursuance of the powers delegated by the constitution of the United States, the concurrent jurisdiction of the state courts is not taken away.⁸ Also, where the state courts have long enjoyed jurisdiction over the subject matter of an action, jurisdiction is not withdrawn by federal statute unless such an intention is distinctly manifested.⁹ However, mere reservation of partially concurrent jurisdiction to state courts by an act of congress conferring an otherwise exclusive jurisdiction on na-

tional courts cannot create substantive rights or obligations or indicate assent to their creation by the states.¹⁰

State courts, in accordance with these rules, except in so far as they are unauthorized under state law and except as exclusive jurisdiction has been vested in the federal courts, have jurisdiction of cases involving or arising under federal statutes, such as the Employers' Liability Act,¹¹ the Agricultural Adjustment Act,¹² the National Industrial Recovery Act,¹³ the National Prohibition Act,¹⁴ the

8. Or.—Sutherland v. Wiekey, 289 P. 375, 379, 133 Or. 266, quoting *Corpus Juris*.
15 C.J. p 1156 note 97.

9. N.Y.—Elliott v. Steinfeldt, 4 N.Y. S.2d 9, 254 App.Div. 739, followed in *Murphy v. Steinfeldt*, 4 N.Y.S.2d 10, 254 App.Div. 741.

10. U.S.—Knickerbocker Ice Co. v. Stewart, N.Y., 40 S.Ct. 433, 253 U.S. 149, 64 L.Ed. 834, 11 A.L.R. 1145, reversing *Stewart v. Knickerbocker Ice Co.*, 123 N.E. 352, 236 N.Y. 302, affirming 173 N.Y.S. 924, 187 App.Div. 915.
Exclusive jurisdiction see *supra* § 525.

11. U.S.—McKnett v. St. Louis & S. F. Ry. Co., 54 S.Ct. 690, 292 U.S. 230, 78 L.Ed. 1227, reversing 149 So. 822, 227 Ala. 349, certiorari granted 54 S.Ct. 210, 290 U.S. 621, 78 L.Ed. 542, motion denied 54 S.Ct. 439, rehearing denied 54 S.Ct. 855, 292 U.S. 613, 78 L.Ed. 1472.

Ark.—St. Louis-San Francisco Ry. Co. v. Pearson, 281 S.W. 910, 170 Ark. 842, certiorari denied 47 S.Ct. 101, 273 U.S. 711, 71 L.Ed. 853.

Ill.—Taylor v. Southern Ry. Co., 182 N.E. 805, 350 Ill. 139, reversing 259 Ill.App. 271—Spencer v. Chicago & N. W. Ry. Co., 168 N.E. 686, 336 Ill. 560, reversing 249 Ill.App. 463, and certiorari denied 50 S.Ct. 249, 231 U.S. 736, 74 L.Ed. 1151—Walton v. Pryor, 115 N.E. 2, 276 Ill. 563, L.R.A.1916E 914, error dismissed 38 S.Ct. 10, 245 U.S. 675, 62 L.Ed. 542—Taylor v. Atchison, T. & S. F. Ry. Co., 11 N.E.2d 610, 292 Ill.App. 457, certiorari denied Atchison, T. & S. F. Ry. Co. v. Taylor, 58 S.Ct. 942, 304 U.S. 560, 52 L.Ed. 1523—Hayes v. Wabash R. Co., 130 Ill.App. 511, error dismissed Wabash R. Co. v. Hayes, 34 S.Ct. 729, 234 U.S. 86, 58 L.Ed. 1226.

La.—Porter v. Lancaster, 2 La.App. 47.

Minn.—Boritt v. Chicago, R. I. & P. R. Co., 230 N.W. 457, 180 Minn. 52—Witort v. Chicago & N. W. Ry. Co., 226 N.W. 934, 173 Minn. 261—Kowalski v. Chicago & N. W. Ry. Co., 199 N.W. 178, 159 Minn. 382.

Okl.—Lusk v. Phelps, 175 P. 756, 71 Okl. 150.

S.C.—Crawford v. Davis, 134 S.E. 247, 136 S.C. 95.

Wis.—Chicago, M. & St. P. Ry. Co. v. McGinley, 185 N.W. 218, 175 Wis. 565.

15 C.J. p 1156 note 4.

Notwithstanding incidental burden to interstate commerce, state court has jurisdiction.

Minn.—State v. District Court of Lyon County, 194 N.W. 780, 156 Minn. 380.

Mo.—Meek v. New York, C. & St. L. R. Co., 88 S.W.2d 333, 337 Mo. 1183, certiorari denied New York, C. & St. L. R. Co. v. Meek, 56 S.Ct. 663, 297 U.S. 722, 80 L.Ed. 1006.

Duty of court to take jurisdiction.

(1) The employers' liability act does not purport to require state courts to entertain suits arising under it, but only empowers them to do so. There is nothing in the act that purports to force a duty upon such courts as against an otherwise valid excuse.—*McKnett v. St. Louis & S. F. Ry. Co.*, 54 S.Ct. 690, 292 U.S. 230, 78 L.Ed. 1227, reversing 149 So. 822, 227 Ala. 349, certiorari granted 54 S.Ct. 210, 290 U.S. 621, 78 L.Ed. 542, motion denied 54 S.Ct. 439, rehearing denied 54 S.Ct. 855, 292 U.S. 613, 78 L.Ed. 1472—*Douglas v. New York, N. H. & H. R. Co.*, 49 S.Ct. 355, 279 U.S. 377, 73 L.Ed. 747, affirming 162 N.E. 532, 248 N.Y. 580, certiorari granted 49 S.Ct. 25, 278 U.S. 590, 73 L.Ed. 523 and affirming 227 N.Y.S. 797, 223 App.Div. 787—*Southern Ry. Co. v. Cochran*, C.C.A.Ky., 56 F.2d 1019.

(2) Likewise, this act indicates no intent to prohibit an equity court of a state from regulating the conduct of its citizens when suing under such act in another state by injunction, to prevent hardship, oppression, or fraud, where such power existed prior to the act.—*Chicago, M. & St. P. Ry. Co. v. McGinley*, 185 N.W. 218, 175 Wis. 565.

(3) However, it is the duty of a state court to exercise jurisdiction of a cause arising under such act, when its jurisdiction as prescribed by local

law is appropriate for the occasion and is properly invoked.

U.S.—*McKnett v. St. Louis & S. F. Ry. Co.*, 54 S.Ct. 690, 292 U.S. 230, 78 L.Ed. 1227, reversing 149 So. 822, 227 Ala. 349, certiorari granted 54 S.Ct. 210, 290 U.S. 621, 78 L.Ed. 542, motion denied 54 S.Ct. 439, rehearing denied 54 S.Ct. 855, 292 U.S. 613, 78 L.Ed. 1472.

Minn.—State v. District Court of Lyon County, 194 N.W. 780, 156 Minn. 380.

Mo.—Bright v. Wheelock, 20 S.W.2d 684, 223 Mo. 840, 66 A.L.R. 263.

Ohio.—*Loftus v. Pennsylvania R. Co.*, 140 N.E. 94, 107 Ohio St. 352, affirming 16 Ohio App. 371, and error dismissed 45 S.Ct. 97, 266 U.S. 639, 69 L.Ed. 483—*Casebolt v. Kanawha & M. Ry. Co.*, 5 Ohio App. 431.

Exclusive right of federal courts to construe the act not encroached by state court by holding contributory negligence must be pleaded.—*Chesapeake & O. Ry. Co. v. Shirley's Adm'r*, 291 S.W. 395, 218 Ky. 337.

12. Cal.—*Brook v. Superior Court in and for Los Angeles County*, 86 P. 2d 805, 12 Cal.2d 605.

Existence of valid license

A superior court had jurisdiction to determine whether at time director of agriculture issued license for marketing citrus fruits a valid federal license provided for by the National Agricultural Adjustment Act, existed as required by statute.—*Brook v. Superior Court in and for Los Angeles County*, *supra*.

13. N.Y.—*Cleaners' & Dyers' Board of Trade v. Spotless Dollar Cleaners*, 270 N.Y.S. 153, 150 Misc. 699—*Sherman v. Abeles*, 269 N.Y.S. 849, 150 Misc. 497, affirmed 269 N.Y.S. 864, 241 App.Div. 676, reversed on other grounds, 193 N.E. 241, 265 N.Y. 383, 95 A.L.R. 1384.

N.C.—*James v. Sartin Dry Cleaning Co.*, 181 S.E. 341, 208 N.C. 412.

14. Wis.—*U. S. v. Richards*, 229 N.W. 657, 201 Wis. 130.

Actions to abate and enjoin nuisances, under the National Prohibition Act, may be maintained in state courts.

postal laws,¹⁵ laws relating to public lands,¹⁶ the Safety Appliance Act,¹⁷ the Sherman Anti-Trust Act and the Clayton Act,¹⁸ the Trading with the Enemy Act,¹⁹ and the War Risk Insurance Act.²⁰ Also it has been held that a state court has jurisdiction of a suit to determine the constitutionality of a state statute, which is attacked as in violation of the federal constitution,²¹ and may deter-

mine the validity of a federal law where the enforcement of a state statute depends thereon.²²

Suits in which United States or its representative or agency is a party. The constitution of the United States does not commit to the federal courts and withhold from the state courts jurisdiction of all suits in which a federal agency or instrumentality is a party.²³ So the jurisdiction of federal

Conn.—U. S. v. Stevens, 130 A. 249, 103 Conn. 7.

Mo.—Ex parte Gounis, 263 S.W. 988, 304 Mo. 428.

Wis.—U. S. v. Richards, 229 N.W. 657, 201 Wis. 130.

Action for damages

State court could enforce the right of action for damages for the unlawful sale of intoxicating liquor provided by Volstead Act.—*Smithers v. Brunkhorst*, 190 N.W. 349, 178 Wis. 530.

15. U.S.—*Lewis Pub. Co. v. Wyman*, C.C.Mo., 152 F. 200.

16. Ariz.—*Boyce v. Pima County*, 293 P. 410, 24 Ariz. 259.

Land granted to state in trust

The reservation by congress in granting certain lands to a state in trust, of the right of the attorney general of the United States to institute suit in the United States courts to enforce the provisions of the trust, does not deprive the state courts of jurisdiction to compel the performance by state officers of the duties imposed on them by state statute for the performance of the trust; and since there is nothing in the language of the Enabling Act of June 20, 1910, § 23, conferring exclusive jurisdiction on federal courts to enforce such trust, or to prevent its breach, state courts have concurrent jurisdiction of any actions or proceedings arising out of the administration thereof.—*Boyce v. Pima County*, supra.

Homestead claims

When an entryman has complied with the laws of the United States relative to taking possession of unsurveyed and unappropriated public lands as a homestead, and has performed acts in settlement thereon, the state courts will protect him in his possession as though he had initiated his rights under the state law. Ariz.—*Wamble v. Evans*, 203 P. 554, 23 Ariz. 307.

Cal.—*Fuller v. Fuller*, 169 P. 369, 176 Cal. 637.

Establishment of trust as to mining claim

Secretary of interior, by granting lease to assignee of locators of mining claim pursuant to a federal statute, did not deprive state court of jurisdiction to determine suit to establish trust as to locator's profits.—

Atchley v. Varner, 280 P. 616, 138 Okl. 156.

17. Pa.—*Miller v. Reading Co.*, 140 A. 618, 202 Pa. 44.

Effect of state legislation

Workmen's Compensation Act did not oust state courts' jurisdiction of actions under Federal Safety Appliance Act.—*Miller v. Reading Co.*, supra.

18. U.S.—*Guterman v. Pennsylvania R. Co.*, D.C.N.Y., 48 F.2d 851.

Action for accounting

State court had jurisdiction of action brought by stockholder against railroad corporation and directors thereof to compel accounting for losses growing out of violations of Clayton Act and Sherman Anti-Trust Law.—*Hand v. Kansas City Southern Ry. Co.*, D.C.N.Y., 55 F.2d 712—*Guterman v. Pennsylvania R. Co.*, D.C.N.Y., 48 F.2d 851.

Defenses

(1) In suit to rescind contract, wherein defendant filed counterclaim for amount due thereunder, it was held that plaintiff was entitled to maintain defense that contract was invalid under the Sherman and Clayton Acts, where illegality of contract was alleged in reply as defense to counterclaim and plaintiff sought no affirmative advantage by reason of such statutes.—*Remington Rand v. International Business Mach. Corporation*, 3 N.Y.S.2d 515, 167 Misc. 108.

(2) However, there is authority to the effect that the determination of issues arising under the federal anti-trust laws, whether raised by way of attack or defense, rests exclusively within the jurisdiction of the federal courts.—*General Talking Pictures Corporation v. De Marce*, 279 N.W. 750, 203 Minn. 28.

Action to restrain combination in restraint of trade was not within exclusive jurisdiction of federal courts where evil alleged did not affect interstate commerce so as to come within the scope of the Sherman and Clayton Acts.—*Dothan Oil Mill Co. v. Espy*, 127 So. 178, 220 Ala. 605.

No federal question

On demurrer to bill by labor union to restrain interference with contract with employer granting right to use union stamp and requiring employment of union members, such

contract did not involve federal question under Sherman Anti-Trust Law.—*Goyette v. C. V. Watson Co.*, 140 N.E. 285, 245 Mass. 577.

19. U.S.—*Miller v. Clausen*, C.C.A. Neb., 299 F. 721, appeal dismissed 46 S.Ct. 105, 269 U.S. 595, 70 L.Ed. 431.

Jurisdiction of state courts

(1) County court had jurisdiction to determine who were heirs to land, although alien property custodian had taken possession thereof under the Trading with the Enemy Act, as amended.—*Miller v. Clausen*, supra.

(2) A deceased alien enemy's funds or securities in bank's possession are within surrogate court's jurisdiction and may be made subject of provision in decree settling accounts of executor of his will for repayment to United States attorney general as successor of alien property custodian, by whom they were paid or delivered to estate and deceased's widow pursuant to previous attorney general's orders.—*In re Sielcken's Estate*, 3 N.Y.S.2d 793, 167 Misc. 327.

20. Ohio.—*Dorland v. Whitmer*, 182 N.E. 686, 43 Ohio App. 285, certiorari denied *Dorland v. Whitmer*, 53 S.Ct. 507, 238 U.S. 616, 77 L.Ed. 989.

Establishment of trust in proceeds of war risk insurance is within jurisdiction of state court.

Ill.—*Mueller v. Mueller*, 222 Ill.App. 435.

Ohio.—*Dorland v. Whitmer*, 182 N.E. 686, 43 Ohio App. 285, certiorari denied *Dorland v. Whitmer*, 53 S.Ct. 507, 238 U.S. 616, 77 L.Ed. 989.

Determination of rights under contract by beneficiary of war risk insurance to pay proceeds thereof to another is within jurisdiction of state court.—*Bostrom v. Bostrom*, 236 N.W. 732, 60 N.D. 792.

21. U.S.—*Blythe v. Hinckley*, Cal., 21 S.Ct. 390, 180 U.S. 333, 45 L.Ed. 557.

15 C.J. p 1158 note 20.

22. Me.—*State v. Sawyer*, 94 A. 886, 113 Me. 458, L.R.A.1915F 1031.

23. Okl.—*Severson v. Home Owners Loan Corporation*, 88 F.2d 344, 184 Okl. 496.

courts over suits by the United States is not exclusive,²⁴ and the jurisdiction of a state court, where appropriate to the occasion, may be invoked, in conformity to local laws, by a federal agent, agency, or instrumentality, when permission by congress has been expressly or impliedly given.²⁵ Similarly, state courts have jurisdiction of a suit against a federal officer,²⁶ agent,²⁷ or agency,²⁸ except where

exclusive jurisdiction is given the federal courts. Furthermore, even where federal courts have been given exclusive control over claims against a particular officer or agent by act of congress, state courts are not necessarily deprived of jurisdiction over actions indirectly involving a claim against such person,²⁹ and the jurisdiction of the federal courts is not exclusive, under a charter of a cor-

Working under government contract

State court is not deprived of jurisdiction of personal injury action because parties were engaged in work under contract with the United States government.—*Ohio River Contract Co. v. Gordon*, Ky., 37 S.Ct. 599, 244 U.S. 68, 61 L.Ed. 997.

24. U.S.—*U. S. v. Bank of New York & Trust Co.*, C.C.A.N.Y., 77 F.2d 886, affirming D.C., 10 F.Supp. 263, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393, affirmed 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, and aff'd, C.C.A., U. S. v. President and Directors of Manhattan, 77 F.2d 881—*Merryweather v. U. S.*, C.C.A.Wash., 12 F.2d 407. Ohio.—*Knox Nat. Farm Loan Ass'n v. Phillips*, 7 N.E.2d 566, 54 Ohio App. 334.

Proceeding for taking private property for a fort site by the federal government, is within jurisdiction of state court.—*Gilmer v. Line Point*, 18 Cal. 239.

25. Okl.—*Severson v. Home Owners Loan Corporation*, 88 P.2d 344, 184 Okl. 496.

Home Owners' Loan Corporation can maintain foreclosure action in state court.

Ohio.—*Home Owners' Loan Corporation v. Sherwin*, 18 N.E.2d 992, 59 Ohio App. 567, appeal dismissed *Home Owners' Loan Corporation v. Welsh*, 17 N.E.2d 270, 134 Ohio St. 356.

Okl.—*Severson v. Home Owners Loan Corporation*, 88 P.2d 344, 184 Okl. 496.

Director general against whom damages were recovered by shipper could bring action against second shipper whose error caused the loss, to recover the amount paid, in a state court.—*Davis v. Carney & McCogan*, 240 S.W. 883, 210 Mo.App. 694.

Alien property custodian

State court had jurisdiction of action by alien property custodian for conversion of stock seized from enemy owners.—*Sutherland v. Wickey*, 289 P. 375, 133 Or. 266.

Action for the death of soldier of the national guard killed on railroad while guarding bridge, was within jurisdiction of state court.—*Gulf & S. I. R. Co. v. Prime*, 79 So. 62, 118 Miss. 90.

26. Pa.—*Haines v. Lone Star Shipbuilding Co.*, 110 A. 788, 268 Pa. 92.

15 C.J. p 1157 note 6, p 1158 note 16.

Officer of national guard

In time of peace state courts have jurisdiction of a proceeding against an officer in the national guard to require him to discharge a member thereof, since, under the National Defense Act, as amended, the national guard is only a potential part of the United States army, and not in fact a part thereof until congress has made requisite declaration of existence of emergency.—*Blanco v. Austin*, 197 N.Y.S. 328, 204 App.Div. 34.

27. U.S.—*Davis v. George B. Newton Coal Co.*, 45 S.Ct. 305, 267 U.S. 392, 69 L.Ed. 617, affirming *George B. Newton Coal Co. v. Davis*, 126 A. 192, 281 Pa. 74.

Director general of railroads

(1) Where director general, pursuant to orders of fuel administrator under Lever Act, seized coal during transportation from seller to buyer, and paid seller the contract price therefor under Transportation Act, action was maintainable in a state court against him for the difference between such contract price and the market price at the time of taking.—*Davis v. George B. Newton Coal Co.*, supra.

(2) Under Federal Control Act of 1918 and Transportation Act of 1920, and presidential proclamation of April 11, 1918, state courts had jurisdiction of action against director general to recover overcharges on intra-state shipments. — *Gorham Bros. Co. v. Ann Arbor R. Co.*, 200 N.W. 287, 228 Mich. 273.

Federal court receivers

(1) Receiver of railway appointed by federal court was suable as of right in state court for negligent killing of person through operation of train by receiver's employees.—*Gay v. Ruff*, 54 S.Ct. 608, 242 U.S. 25, 78 L.Ed. 1099, 92 A.L.R. 970, affirming, C.C.A., *Ruff v. Gay*, 67 F.2d 684, reversing, D.C., 3 F.Supp. 264, and certiorari granted *Gay v. Ruff*, 54 S.Ct. 377, 291 U.S. 654, 78 L.Ed. 1047.

(2) Action against corporation which assumed liabilities of federal receiver after his discharge, was properly brought in state court.—

Bremer v. Chicago & E. I. Ry. Co., 247 Ill.App. 406.

28. Mich.—*Burr v. Heffner*, 286 N. W. 169, 289 Mich. 91.

Federal Housing Administration

Where statute creating Federal Housing Administration authorized administrator in his official capacity to "sue and be sued" in any court of competent jurisdiction, Federal Housing Administration through its state director was subject to be sued as garnishee defendant in state court.—*Burr v. Heffner*, supra.

Emergency Fleet Corporation

(1) It has been held that congress has authorized the bringing of suits against the Emergency Fleet Corporation in state courts.

U.S.—*Sloan Shipyard Corporation v. United States Shipping Board Emergency Fleet Corporation*, Wash., 42 S.Ct. 386, 258 U.S. 549, 66 L.Ed. 762—*Atlantic Corporation v. U. S. Shipping Board Emergency Fleet Corporation*, D.C.N.H., 286 F. 222.

Pa.—*Haines v. Lone Star Shipbuilding Co.*, 110 A. 788, 268 Pa. 92.

(2) However, there is authority to the contrary.—*Southern Bridge Co. v. U. S. Shipping Board Emergency Fleet Corporation*, D.C.Ala., 266 F. 747.

Federal farm loan association

State court had jurisdiction in suit to quiet title by insolvent farm loan association's member as creditor and stockholder to appoint receiver for association and to determine member's right to have his stock accepted at its face value on payment of his loan.—*Knox Nat. Farm Loan Ass'n v. Phillips*, 7 N.E.2d 566, 54 Ohio App. 334.

Federally controlled business

An action against a telegraph company for damages sustained from the delay in the delivery of a telegraphic message during federal control was properly brought in state court.—*Brewer v. Postal Telegraph-Cable Co.*, 212 P. 106, 112 Kan. 571.

29. Or.—*Sutherland v. Wickey*, 289 P. 375, 133 Or. 266.

Alien property custodian

Exclusive jurisdiction vested in federal courts over claim against alien property custodian does not deprive state court of general jurisdiction over torts.—*Sutherland v. Wickey*, supra.

poration declaring it capable of suing and being sued in such courts.³⁰

Interstate commerce. State courts, except where they are unauthorized under state law and except in so far as exclusive jurisdiction has been vested in the federal courts, have concurrent jurisdiction over cases pertaining to interstate commerce, including cases involving or arising under federal statutes regulating interstate commerce, such as the Interstate Commerce Act and amendments thereto.³¹ In accordance with this rule it has been held that state courts have concurrent jurisdiction with federal courts over actions for the enforcement of

rights concerning interstate commerce, but not involving the specific enforcement of the provisions of the Interstate Commerce Act;³² actions involving a construction of orders of the interstate commerce commission,³³ or a determination of whether a railroad, prior to authorization by the commission, can abandon a portion of its line lying wholly within the state;³⁴ actions involving carriers in commerce between the United States and foreign nations;³⁵ actions to enforce awards of a federal railway labor board;³⁶ actions to recover unpaid pension installments from railroads;³⁷ actions for failure to furnish cars in interstate commerce;³⁸

30. Minn.—Scheffer v. National L. Ins. Co., 25 Minn. 534.

31. U.S.—Grubb v. Public Utilities Commission of Ohio, Ohio, 50 S.Ct. 374, 281 U.S. 470, 74 L.Ed. 972, affirming, D.C., 33 F.2d 323.

Iowa.—Baird Bros. v. Minneapolis & St. L. R. Co., 165 N.W. 412, 181 Iowa 1104.

Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo.App. 743.

Pa.—Soman Shaft Coal Co. v. Pennsylvania R. Co., 88 A. 746, 241 Pa. 487—Puritan Coal Min. Co. v. Pennsylvania R. Co., 85 A. 426, 237 Pa. 420, Ann.Cas.1914B 37—Walnut Coal Co. v. Pennsylvania R. Co., 85 A. 440, 237 Pa. 410—Amos v. Delaware River Ferry Co., 77 A. 12, 228 Pa. 362.

S.C.—Aldrich v. Southern R. Co., 79 S.E. 316, 95 S.C. 427—Hardaway v. Southern R. Co., 73 S.E. 1020, 90 S.C. 475, Ann.Cas.1913D 286—Gibson v. Atlantic Coast Line R. Co., 70 S.E. 1030, 88 S.C. 360—N. H. Blitch Co. v. Atlantic Coast Line R. Co., 69 S.E. 16, 87 S.C. 107.

Tex.—Houston & T. C. R. Co. v. Lewis, 129 S.W. 594, 103 Tex. 452—Pecos & N. T. R. Co. v. Porter, Civ.App., 156 S.W. 267—Ft. Worth & D. C. R. Co. v. Land & Cattle Co., Civ.App., 150 S.W. 461—St. Louis, S. F. & T. R. Co. v. Roff Oil, etc., Co., 128 S.W. 1194, 61 Tex. Civ.App. 190.

Wash.—Charles H. Lilly Co. v. Northern Pac. R. Co., 117 P. 401, 64 Wash. 589.

W.Va.—McCormick v. Southern Express Co., 93 S.E. 1048, 81 W.Va. 87—Robinson v. Baltimore & O. R. Co., 63 S.E. 323, 64 W.Va. 406. 15 C.J. p 1157 notes 12, 13.

Exclusive jurisdiction see *supra* § 525.

Under interstate commerce act

(1) State courts are not without jurisdiction in every case involving rights or questions under the interstate commerce act.—Detroit, M. &

St. L. Ry. v. City of Monroe, D.C. Mich., 262 F. 177.

(2) It is the expressed public policy of the federal government, not only not to restrict the jurisdiction of state courts in the enforcement of the interstate commerce act, but on the contrary to encourage resort to such jurisdiction.—State ex rel. and to Use of St. Louis B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511, affirmed 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, 43 A.L.R. 232.

Federal motor carrier act does not deprive state courts of all general and concurrent jurisdiction of matters arising under both federal and state laws. It does not deprive state courts of jurisdiction of suit by motor carrier to set aside order of railroad commission granting competitor certificate of convenience and necessity to operate motorbus service and to enjoin him from operating and commission from permitting him to operate under such certificate.—Southwestern Greyhound Lines v. Railroad Commission of Texas, 99 S.W.2d 263, 128 Tex. 560, 109 A.L.R. 1235, reversing Railroad Commission of Texas v. Southwestern Greyhound Lines, Civ.App., 92 S.W.2d 296.

Review of action of state commission

State court's power to review action of public service commission in fixing rates is not exercised to exclusion of federal courts.—International Ry. Co. v. Prendergast, D.C.N.Y., 29 F.2d 296.

32. Iowa.—Baird Bros. v. Minneapolis & St. L. R. Co., 165 N.W. 412, 181 Iowa 1104.

Action in tort for negligently or fraudulently failing to take steps to procure interstate commerce commission's assent to a rebate as promised, was within the state court's jurisdiction, being based on failure to perform a common-law duty.—Carr v. Maine Cent. R. R., 102 A. 532, 78 N.H. 502, L.R.A.1918E, 389.

33. U.S.—Central New England Ry. Co. v. Boston & A. R. Co., 49 S.Ct. 253, 279 U.S. 415, 73 L.Ed. 770, affirming New York Cent. R. Co. v. Central New England Ry. Co., 162 N.E. 324, 264 Mass. 128, certiorari granted Central New England Ry. Co. v. Boston & A. R. Co., 49 S.Ct. 176, 278 U.S. 596, 73 L.Ed. 526. Tex.—Texas Steel Co. v. Missouri, K. & T. R. Co., Civ.App., 70 S.W.2d 454, certiorari denied Texas Steel Co. v. Missouri Kansas-Texas R. Co., 55 S.Ct. 109, 293 U.S. 594, 79 L.Ed. 687.

Injunction against increase of intra-state rates

State court has jurisdiction of suit to enjoin express companies from putting into effect special tariffs increasing intra-state rates, although answer sets up a justification order of interstate commerce commission, where from allegations it is apparent order did not apply.—American Exp. Co. v. State of South Dakota ex rel. Caldwell, 37 S.Ct. 656, 244 U.S. 617, 61 L.Ed. 1352, modifying State v. American Express Co., 161 N.W. 132, 38 S.D. 227.

34. Fla.—State v. Atlantic Coast Line R. Co., 116 So. 48, 95 Fla. 14, certiorari denied Atlantic Coast Line R. Co. v. State of Florida ex rel. Davis, 50 S.Ct. 245, 281 U.S. 727, 74 L.Ed. 1144.

35. N.Y.—Ball v. Nippon Yusen (Kabushiki Kaisha), 253 N.Y.S. 260, 142 Misc. 201, affirmed, 256 N.Y. 238, 143 Misc. 243, following Brown v. Canadian Pac. Ry. Co., 256 N.Y.S. 294, 143 Misc. 239.

36. Miss.—Rhodes v. New Orleans Great Northern R. Co., 91 So. 281, 129 Miss. 78.

37. Tex.—Texas & N. O. R. Co. v. Jones, Civ.App., 103 S.W.2d 1043, error refused.

38. Ark.—Midland Valley R. Co. v. Barkley, 291 S.W. 431, 172 Ark. 898, certiorari granted 48 S.Ct. 37, 275 U.S. 514, 72 L.Ed. 401, reversed on other grounds 48 S.Ct. 342, 276 U.S. 482, 72 L.Ed. 664.

actions for delay, loss of, or injury to property in interstate transportation;³⁹ actions involving the correct application of an interstate carrier's published rules, rates, or practices;⁴⁰ actions to recover for overcharges on interstate shipments;⁴¹ and actions to inquire into the usurpation or misuser of interstate railroad corporation franchises.⁴²

Patents. State courts have jurisdiction of actions relating to or involving patents, which do not arise under the patent laws or involve the validity or infringement of patents, or which generally are not within the exclusive jurisdiction of the federal courts,⁴³ and they have jurisdiction of questions arising under the patent laws when merely incidental to cases which do not arise thereunder.⁴⁴

Okl.—St. Louis-San Francisco Ry. Co. v. Hobart Mill & Elevator Co., 239 P. 165, 111 Okl. 295.

39. U.S.—State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 45 S.Ct. 47, 266 U.S. 200, 69 L.Ed. 247, affirming State ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 251 S.W. 383, 298 Mo. 474, certiorari granted State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 44 S.Ct. 132, 263 U.S. 696, 68 L.Ed. 511—Nelms, Kehoe & Nelms v. Davis, D.C.Tex., 277 F. 982.

Conn.—New England Fruit & Produce Co. v. Hines, 116 A. 243, 97 Conn. 225.

Iowa.—Baird Bros. v. Minneapolis & St. L. R. Co., 165 N.W. 412, 181 Iowa 1104.

Miss.—Illinois Cent. R. Co. v. Terry, 102 So. 391, 137 Miss. 371.

Attachment authorized

Ga.—Southern Pac. Co. v. Di Cristina, 127 S.E. 151, 33 Ga.App. 439.

40. U.S.—Brownsville Nav. Dist. of Cameron County v. St. Louis, B. & M. Ry. Co., C.C.A.Tex., 91 F.2d 502, certiorari granted St. Louis, B. & M. R. Co. v. Brownsville Nav. Dist. of Cameron County, Tex., 58 S.Ct. 42, 302 U.S. 669, 82 L.Ed. 517, reversed on other grounds 58 S.Ct. 868, 304 U.S. 295, 82 L.Ed. 1357, rehearing denied 59 S.Ct. 55, 305 U.S. 668, 83 L.Ed. 433.

Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.

41. Ark.—St. Louis, I. M. & S. Ry. Co. v. Ft. Smith & V. B. Ry. Co., 191 S.W. 902, 127 Ark. 238.

Kan.—Ft. Morgan Bean Co. v. Chicago, B. & Q. R. Co., 288 P. 589, 130 Kan. 859, affirmed 293 P. 526, 131 Kan. 679—Kellogg Huff Grain Co. v. Chicago, R. I. & P. Ry. Co., 274 P. 272, 127 Kan. 577—Thomas v. Chicago, B. & Q. R. Co., 273 P. 451, 127 Kan. 326, 64 A.L.R. 322.

Minn.—McCaull-Dinsmore Co. v. Great Northern Ry. Co., 191 N.W. 42, 154 Minn. 28, certiorari granted Great Northern R. Co. v. McCaull-Dinsmore Co., 43 S.Ct. 361, 261 U.S. 610, 67 L.Ed. 825, and reversed on other grounds Davis v. Portland Seed Co., 44 S.Ct. 380, 264 U.S. 403, 68 L.Ed. 762.

Okl.—Chicago, R. I. & P. Ry. Co. v. Gist, 190 P. 878, 79 Okl. 8.

Where award made by commission

Under Interstate Commerce Act § 16, when an award of damages for charging an improper rate has been made by the interstate commerce commission, but such order has not been complied with by the carrier, the shipper may institute suit either in the federal or state court.—Petition of Southern Lumber & Mfg. Co., 210 S.W. 639, 141 Tenn. 325.

Interstate shipment not involved

Mere condition in carrier's tariffs that rates charged should apply only on shipments for manufacture, where finished product was to be shipped out over defendant's railroad, claimed to be authorized by Comp.L.1915 § 8119, as to transit rates, did not render shipments interstate and deprive state courts of jurisdiction of action for overcharges, under Comp.L.1915 § 8117, final destination of shipments being unknown.—Gorham Bros. Co. v. Ann Arbor R. Co., 200 N.W. 287, 228 Mich. 273.

42. Ohio.—State v. Cincinnati, W. & B. R. Co., 23 N.E. 928, 47 Ohio St. 130.

43. U.S.—Felix v. Scharnweber, Ill., 8 S.Ct. 759, 125 U.S. 54, 31 L.Ed. 687—Dale Tile Mfg. Co. v. Hyatt, N.Y., 8 S.Ct. 756, 125 U.S. 46, 31 L.Ed. 683—Albright v. Teas, N.J., 1 S.Ct. 550, 106 U.S. 613, 27 L.Ed. 295—Wilson v. Sanford, La., 10 How. 99, 13 L.Ed. 344—Cely v. Griffin, C.C.S.C., 113 F. 981—Standard Dental Mfg. Co. v. National Tooth Co., C.C.Pa., 95 F. 291—Blanchard v. Sprague, C.C.Mass., 3 Fed.Cas.No.1516, 1 Cliff. 288—Goodyear v. Day, C.C.N.Y., 10 Fed.Cas.No.5568, 1 Blatchf. 565, Fish. Pat.Rep. 385.

Me.—One Box Mach. Makers v. Wirebounds Patents Co., 163 A. 167, 131 Me. 356.

Ohio.—Henry Gehring Co. v. McCue, 154 N.E. 171, 23 Ohio App. 281.

15 C.J. p 1158 note 24.
Exclusive jurisdiction see supra § 525.

Injunctions may be granted by state courts, in their limited jurisdiction over patents.—Southern Lead Corporation v. Glass, 138 So. 59, 103 Fla. 657.

44. Cal.—Davis v. Kittle Mfg. Co., 25 P.2d 253, 134 Cal.App. 254—Deakins v. Superior Court of California, in and for Los Angeles

County, 266 P. 563, 90 Cal.App. 630.

Conn.—Rich v. Atwater, 16 Conn. 409.

Ky.—Cheatham Electric Switching Device Co. v. Kentucky Switch & Signal Co., 280 S.W. 469, 213 Ky. 23.

Mass.—Respro, Inc., v. Worcester Backing Co., 197 N.E. 198, 231 Mass. 467—Aronson v. Orlov, 116 N.E. 951, 228 Mass. 1, certiorari denied Orlov v. Aronson, 38 S.Ct. 61, 245 U.S. 662, 62 L.Ed. 536.

N.Y.—New Era Electric Range Co. v. Serrell, 169 N.E. 105, 252 N.Y. 107, reversing 233 N.Y.S. 839, 226 App. Div. 651, affirming 229 N.Y.S. 453, 132 Misc. 354—Brandt v. Ad-Tape Co., 7 N.Y.S.2d 135.

Pa.—Quaker State Oil Refining Co. v. Talbot, 185 A. 586, 322 Pa. 156.

The test as to whether the case arises under the patent laws is whether complainant sets up some right, title, or interest thereunder, or makes it appear that some right or privilege will be defeated by one construction, or sustained by another construction of such laws.

Mass.—George C. Miller & Co. v. Beagen, 199 N.E. 344, 293 Mass. 54.

N.Y.—Zenie v. Miskend, 284 N.Y.S. 63, 245 App.Div. 634, affirmed 1 N.E.2d 367, 270 N.Y. 636.

Tex.—Southland Sweet Potato Curing & Storage Ass'n v. Beck, Civ. App., 221 S.W. 656.

Action for unfair competition in circulating statements among plaintiffs' customers asserting that he was infringing patent, was within jurisdiction of state court, although it might be necessary to determine incidentally validity of defendants' patent.—Zenie v. Miskend, 284 N.Y.S. 63, 245 App.Div. 634, affirmed 1 N.E.2d 367, 270 N.Y. 636.

Counterclaim for damages for slander of defendant's property by plaintiff's false statements to persons at the trial that the articles manufactured by defendant infringed patents owned by plaintiff states a case arising in tort, and not under the patent laws, although it may indirectly involve a question arising under the patent laws as to the validity and scope of the patent, and such counterclaim is within the jurisdiction of the state court.—Han-

Accordingly, state courts have jurisdiction of actions on contracts relating to patents,⁴⁵ of actions to determine title to patents,⁴⁶ or to determine property rights in allegedly patentable devices,⁴⁷ and of actions to prevent or repair breaches of fiduciary relationship as to inventions or trade secrets,⁴⁸ although questions arising under the patent laws may be incidentally involved.

Copyright and literary property. State courts have jurisdiction of actions which do not arise under the copyright laws, in which a copyright is in-

centally involved.⁴⁹ Accordingly state courts have jurisdiction of an action on a contract relating to copyrighted matter;⁵⁰ of an action to determine the title to a copyright;⁵¹ or of an action to restrain a combination to control the price of copyrighted books, although the issue may require the court to construe the rights of the parties under the copyright law.⁵² Likewise, where the complaint asserts no rights under the copyright laws, an answer pleading a defense based on the copyright laws does not oust the state court of jurisdiction.⁵³

son v. Hall Mfg. Co., 190 N.W. 967, 194 Iowa 1213.

45. U.S.—National Clay Products Co. v. Heath Unit Tile Co., C.C.A. Iowa, 40 F.2d 617—Becher v. Contoure Laboratories, C.C.A.N.Y., 29 F.2d 31, certiorari granted 49 S.Ct. 179, 278 U.S. 597, 73 L.Ed. 527, affirmed 49 S.Ct. 356, 279 U.S. 388, 73 L.Ed. 752—By-Products Recovery Co. v. Mabec, D.C.Ohio, 238 F. 401.

Cal.—Union Die Casting Co. v. Anderson, 76 P.2d 703, 25 Cal.App.2d 195—Davis v. Kittle Mfg. Co., 25 P.2d 253, 134 Cal.App. 254—Coleman v. Dawson, 234 P. 13, 110 Cal. App. 201—Stevens v. Privett, 264 P. 549, 88 Cal.App. 706.

Ill.—Scott v. Hall, 221 Ill.App. 115. Kan.—Ridgway v. Wetterhold, 169 P. 1159, 102 Kan. 217.

Me.—Maxim v. E. L. Tebbets Spool Co., 171 A. 698, 132 Me. 398.

Mass.—Respro, Inc., v. Worcester Backing Co., 197 N.E. 198, 291 Mass. 467—LaChapelle v. United Shoe Machinery Corporation, 172 N.E. 586, 272 Mass. 465—Marshall Engine Co. v. New Marshall Engine Co., 85 N.E. 741, 199 Mass. 546, affirmed 32 S.Ct. 238, 223 U.S. 473, 56 L.Ed. 513.

Mich.—Daniels v. Parradee, 203 N.W. 658, 231 Mich. 251—Goodman v. Wobig, 184 N.W. 532, 216 Mich. 51.

Mo.—Meissner v. Standard Ry. Equipment Co., 109 S.W. 730, 211 Mo. 112.

N.Y.—Bedell v. Dictograph Products Co., 296 N.Y.S. 25, 251 App.Div. 243, affirmed 13 N.E.2d 48, 276 N.Y. 657, reargument denied 14 N.E.2d 203, 277 N.Y. 651—American Tri-Ergon Corporation v. Ton-Bild Syndikat, A. G., 271 N.Y.S. 57, 241 App.Div. 110—Electric Regulator Mfg. Corporation v. American Mechanical Laboratories, 232 N.Y.S. 220, 225 App.Div. 37—Claude Neon Lights v. Air Reduction Co., 228 N.Y.S. 412, 131 Misc. 834, affirmed 230 N.Y.S. 817, 224 App.Div. 733—Brandt v. Ad-Tape Co., 7 N.Y.S.2d 135.

Pa.—Hubbard v. Allen, 16 A. 772, 123 Pa. 198.

Tex.—Egan v. Stitt, Civ.App., 297

S.W. 290—Southland Sweet Potato Curing & Storage Ass'n v. Beck, Civ.App., 221 S.W. 656.

Whether license agreement was in effect or had been canceled was issue that might properly be determined in pending state court action.—Lionel Corporation v. De Filippis, D.C.N.Y., 11 F.Supp. 712.

Injunctive relief may be granted by state court:

(1) In action to reform contract for sale of patent rights.—Holmes v. Anderson, 265 P. 1010, 90 Cal.App. 276.

(2) As incident to a decree for specific performance of a contract to convey a patent.—By-Products Recovery Co. v. Mabec, D.C.Ohio, 238 F. 401.

46. U.S.—Becher v. Contoure Laboratories, C.C.A.N.Y., 29 F.2d 31, certiorari granted 49 S.Ct. 179, 278 U.S. 597, 73 L.Ed. 527, affirmed 49 S.Ct. 356, 279 U.S. 388, 73 L.Ed. 752.

Iowa.—Hanson v. Hall Mfg. Co., 190 N.W. 967, 194 Iowa 1213.

N.Y.—New Era Electric Range Co. v. Serrell, 169 N.E. 105, 252 N.Y. 107, reversing 233 N.Y.S. 839, 226 App.Div. 651, affirming 229 N.Y.S. 453, 132 Misc. 354.

Assignment of patent may be decreed by state court.—Nahikian v. Mattingly, 251 N.W. 421, 265 Mich. 128.

47. Pa.—Quaker State Oil Refining Co. v. Talbot, 185 A. 586, 322 Pa. 155.

48. U.S.—Becher v. Contoure Laboratories, N.Y., 49 S.Ct. 356, 279 U.S. 388, 73 L.Ed. 752, affirming, C.C.A., 29 F.2d 31, certiorari granted 49 S.Ct. 179, 278 U.S. 597, 73 L.Ed. 527, and followed in Contoure Laboratories, Inc., v. Becher, 236 N.Y.S. 772, 227 App.Div. 731.

Cal.—Holley v. Hunt, 56 P.2d 1240, 13 Cal.App.2d 335.

Mass.—George C. Miller & Co. v. Beagen, 199 N.E. 344, 293 Mass. 54—Aronson v. Orlov, 116 N.E. 951, 228 Mass. 1, certiorari denied Orlov v. Aronson, 38 S.Ct. 61, 245 U.S. 662, 62 L.Ed. 536.

N.J.—Irving Iron Works v. Kerlow

Steel Flooring Co., 136 A. 291, 96 N.J.Eq. 702.

Tenn.—Kelly Mfg. Co. v. Brower, 1 Tenn.App. 428.

Fact is not prevented from being proved in state court, in action such as is described in the text, merely because, if true, important patent is void.—Becher v. Contoure Laboratories, N.Y., 49 S.Ct. 356, 279 U.S. 388, 73 L.Ed. 752, affirming, C.C.A., 29 F.2d 31, certiorari granted 49 S.Ct. 179, 278 U.S. 597, 73 L.Ed. 527, and followed in Contoure Laboratories, Inc., v. Becher, 236 N.Y.S. 772, 227 App.Div. 731.

49. U.S.—Carl Laemmle Music Co. v. Stern, N.Y., 219 F. 534, 135 C.C.A. 284.

N.Y.—Underhill v. Schenck, 143 N.E. 773, 238 N.Y. 7, modifying 193 N.Y.S. 745, 201 App.Div. 46.

13 C.J. p 1193 note 44.

Exclusive jurisdiction see supra § 525.

50. Ill.—Bird v. Thanhouser, 160 Ill. App. 653.

N.Y.—Fisher v. Hill, 209 N.Y.S. 369, 212 App.Div. 646—April Productions v. Harms, Inc., 1 N.Y.S.2d 382, 165 Misc. 883, affirmed 5 N.Y.S.2d 768, 254 App.Div. 728.

13 C.J. p 1193 note 45.

Action against licensee under copyright to require him to surrender to joint adventure profits gained in unfair competition was within jurisdiction of state court.—Underhill v. Schenck, 143 N.E. 773, 238 N.Y. 7, modifying 193 N.Y.S. 745, 201 App. Div. 46.

Construction of contract

Rights of parties under contract granting right to dramatize cartoons did not involve question of copyright, but merely construction of contract, and matter was within jurisdiction of court.—Fisher v. Hill, 209 N.Y.S. 369, 212 App.Div. 646.

51. U.S.—Dorf v. Denton, D.C.N.Y., 17 F.Supp. 531.

52. N.Y.—Straus v. American Publishers' Ass'n, 92 N.Y.S. 153, 45 Misc. 251, affirmed 92 N.Y.S. 1052, 103 App.Div. 277.

53. N.C.—Landis Christmas Sav.

State courts also have jurisdiction of suits relating to literary property and the prevention of wrongs connected therewith,⁵⁴ and the copyright laws have not taken away or affected their jurisdiction over the common-law right of an author in his unpublished works.⁵⁵ In fact, state courts have exclusive jurisdiction of actions or suits concerning common-law intellectual property,⁵⁶ and of contracts relating thereto,⁵⁷ except where the requisite diversity of citizenship exists to give a concurrent jurisdiction to the federal courts.⁵⁸ Under a statute which provides that it shall not be construed to annul or limit the right of the author or proprietor of an unpublished work, at common-law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent and to obtain damages therefor, the statutory remedy has been held to be cumulative to that given by the common law, and the jurisdiction of state and federal courts in such cases is concurrent.⁵⁹ A picture is not a manuscript within the meaning of the statute.⁶⁰

Trademarks, trade names, and unfair competition. State courts have jurisdiction of suits to restrain the infringement of a trademark,⁶¹ and of actions for unfair competition.⁶²

Penalties and forfeitures. If an act of congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, it may be enforced by a proper action in a state court, in the absence of an act of congress providing otherwise.⁶³

However, such jurisdiction cannot be conferred upon a state court by act of congress.⁶⁴

Cases affecting ambassadors, ministers, and consuls. The provision of the federal constitution giving United States courts jurisdiction in all cases affecting ambassadors, other public ministers and consuls does not exclude the jurisdiction of state courts, and acts of congress enacted pursuant thereto, including § 256 of the Judicial Code, do not purport to exclude state courts from jurisdiction except where they grant it to federal courts.⁶⁵ Also, such provisions are to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used.⁶⁶ Accordingly, the state courts are not thereby deprived of jurisdiction of proceedings involving the domestic relations of such persons,⁶⁷ including divorce⁶⁸ and filiation proceedings.⁶⁹

Actions by or against nonresident or alien parties. State courts have been held to have jurisdiction of an action by a foreign sovereign against a citizen of the state,⁷⁰ as well as an action by another state, to restrain the transfer, in the state where the suit is brought, of negotiable securities issued by the former state;⁷¹ and a nonresident may bring an action in a state court although on account of his residence in another state he might have brought the suit in the first instance in a federal court.⁷² Also, state courts have been held to have jurisdiction of a suit brought by a state against citizens of other states;⁷³ over a bill filed

Club v. Merchants' Nat. Bank, 100 S.E. 607, 178 N.C. 403.
13 C.J. p 1153 note 47.

54. U.S.—*Photo Drama Motion Picture Co. v. Social Uplift Film Corp.*, D.C.N.Y., 213 F. 374, affirmed 220 F. 448, 137 C.C.A. 42.
15 C.J. p 1159 note 27.

Suit for injunction and accounting. Action to restrain publication and sale by defendants of a song which plaintiff claimed all rights to under assignment from one of the defendants, and for an accounting of the profits and income derived therefrom, was within supreme court's jurisdiction, such an action being one to enforce common-law rights, and not an action under the United States copyright statutes.—*Kortlander v. Bradford*, 190 N.Y.S. 311, 116 Misc. 664.

55. N.Y.—*Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.*, 49 N.E. 872, 155 N.Y. 241, 63 Am.S.R. 666, 41 L.R.A. 846, reversing 32 N.Y.S. 41, 84 Hun 12.
13 C.J. p 994 note 1.

56. U.S.—*Press Pub. Co. v. Monroe*, N.Y., 73 F. 196, 19 C.C.A. 429, 51

L.R.A. 353, appeal dismissed 17 S.Ct. 40, 164 U.S. 105, 41 L.Ed. 367.

13 C.J. p 994 note 2.

57. N.Y.—*Widmer v. Greene*, 56 How.Pr. 91.
13 C.J. p 994 note 3.

58. U.S.—*Press Pub. Co. v. Monroe*, N.Y., 17 S.Ct. 40, 164 U.S. 105, 41 L.Ed. 367, dismissing appeal 73 F. 196, 19 C.C.A. 429, 51 L.R.A. 353.
13 C.J. p 994 note 4.

59. N.Y.—*Palmer v. De Witt*, 47 N.Y. 532, 7 Am.R. 480.
13 C.J. p 994 notes 5, 10.

60. U.S.—*Parton v. Frang*, C.C. Mass., 18 F.Cas.No.10,784, 3 Cliff. 537.

61. N.Y.—*Philadelphia Storage Battery Co. v. Mindlin*, 296 N.Y.S. 176, 163 Misc. 52.
15 C.J. p 1159 note 28.

62. N.Y.—*Douglas v. Newark Cheese Co.*, 274 N.Y.S. 961, 153 Misc. 718.
15 C.J. p 1159 note 29.

63. U.S.—*Claffin v. Houseman*, N.Y., 93 U.S. 130, 23 L.Ed. 833.
Conn.—*Pennsylvania-Dixie Cement*

Corp. v. H. Wales Lines Co., 178 A. 659, 119 Conn. 603.
15 C.J. p 1159 note 30.

64. Conn.—*Davidson v. Champlin*, 7 Conn. 244.
N.H.—*State v. Pike*, 15 N.H. 83.
15 C.J. p 782 note 93.

65. N.Y.—*State of Ohio ex rel. Popovici v. Agler*, 50 S.Ct. 154, 280 U.S. 379, 74 L.Ed. 489, affirming *State ex rel. Popovici v. Agler*, 164 N.E. 524, 119 Ohio St. 484, certiorari granted 49 S.Ct. 265, 279 U.S. 828, 73 L.Ed. 979.

66. U.S.—*State of Ohio ex rel. Popovici v. Agler*, supra.

67. U.S.—*State of Ohio ex rel. Popovici v. Agler*, supra.

68. U.S.—*State of Ohio ex rel. Popovici v. Agler*, supra.

69. Minn.—*State v. Flores*, 268 N.W. 194, 197 Minn. 590.

70. Mo.—*King of Prussia v. Kueper*, 22 Mo. 550, 66 Am.D. 689.

71. N.Y.—*DeLafield v. Illinois*, 26 Wend. 192, 2 Hill 159.

72. Ark.—*Linnay v. E. J. Linnay & Co.*, 228 S.W. 1049, 148 Ark. 106.

73. U.S.—*Plaquemines Tropical*

by a citizen of the state against a citizen of another state to compel the performance of a contract of sale of land within the former state;⁷⁴ and over controversies between citizens and aliens.⁷⁵ Furthermore, where the right sought to be enforced against a nonresident arises solely under an act of congress, it may nevertheless be enforced in the state court by attachment, unless some federal policy is thereby violated or some federal right secured to the nonresident is impaired.⁷⁶

Actions on bonds. State courts have jurisdiction of an action on a bond given by the collector of customs, for the delivery of certain property seized or forfeited to the United States, the facts being conceded in the bond,⁷⁷ and of actions on bonds or undertakings given in a federal court.⁷⁸ Federal courts, on the other hand, may have jurisdiction of actions on bonds given in state courts.⁷⁹ Exclusive jurisdiction of actions on bonds see *supra* § 525.

§ 527. — Election of Tribunal

Where state and federal courts have concurrent jurisdiction over a particular cause, the plaintiff is entitled to elect his forum; but having done so he is bound thereby.

- Fruit Co. v. Henderson*, La., 18 S. Ct. 685, 170 U.S. 511, 42 L.Ed. 1126.
15 C.J. p 1156 note 99.
74. S.C.—*Telfair v. Telfair*, 2 S.C. Eq. 271.
75. Mo.—*King of Prussia v. Kuemper*, 22 Mo. 550, 66 Am.D. 639.
15 C.J. p 1156 note 1.
76. Ga.—*Southern Pac. Co. v. Di Cristina*, 127 S.E. 151, 33 Ga.App. 439.
77. N.Y.—*Sailly v. Cleveland*, 10 Wend. 156—U. S. v. *Dodge*, 14 Johns. 95.
78. U.S.—*Pierce v. National Bank of Commerce in St. Louis*, C.C.A. Mo., 282 F. 100.
- La.—*Davis v. Poitevant & Favre Lumber Co.*, 132 So. 790, 15 La. App. 657.
15 C.J. p 1158 note 23.
79. U.S.—*Dawson v. Rankin*, C.C. Ga., 7 F.Cas.No.3,671.
N.Y.—*Bartlett v. Spicer*, 75 N.Y. 528.
80. U.S.—*Waltman v. Union Cent. Life Ins. Co.*, D.C.Tex., 25 F.2d 320.
15 C.J. p 1160 note 50.

Where diversity of citizenship exists, plaintiff may sue in federal court in first instance, and insist on maintaining suit there.—*General Outdoor Advertising Co. v. Williams*, D.C.Mass., 9 F.2d 165, reversed on other grounds, C.C.A., 12 F.2d 773, certiorari denied *Williams v. General Outdoor Advertising Co.*, 47 S.Ct. 111, 273 U.S. 721, 71 L.Ed. 858.

Where state and federal courts have concurrent jurisdiction over a particular cause, plaintiff is entitled to elect his forum,⁸⁰ and a grant of concurrent jurisdiction to such courts implies that in the first instance plaintiff shall have the choice of the court, and incidentally whatever remedial advantage inheres therein.⁸¹ This right is a valuable one and may not be arbitrarily denied.⁸²

A party who invokes the jurisdiction of either of such courts, where they have concurrent jurisdiction, is bound by his election, and cannot thereafter bring an action in the other tribunal,⁸³ unless the later suit involves questions which cannot be considered in the earlier.⁸⁴

In case the relief sought is in the main identical, the state court may require the parties to elect between suits in both federal and state courts, although there are parties in the suit in the federal court who are not parties in the state court.⁸⁵

§ 528. — Comity

The doctrine of comity applies to prevent unseemly conflicts between state and federal courts where they have concurrent jurisdiction.

Nonresident plaintiff has right to pursue in federal court all of his remedies against defendant and it makes no difference what his motive may be in electing to invoke federal jurisdiction.—*Sies v. Johnson*, C.C.A. Mich., 86 F.2d 766.

Reconstruction Finance Corporation, as a federal corporation having the right to bring suit for enforcement of constitutional individual liability of stockholders for debts of bank in either state or federal court, had right to elect forum.—*Reconstruction Finance Corporation v. Central Republic Trust Co.*, D.C.Ill., 11 F.Supp. 976.

After termination of administrative proceedings

Where a party is required to exhaust all administrative remedies before resorting to the courts, his right to elect either a state or federal court for the enforcement of his cause of action begins as soon as the administrative stage of action is completed.—*Nelson v. First Nat. Bank*, C.C.A.Iowa, 42 F.2d 30.

81. U.S.—*State of Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 45 S.Ct. 47, 266 U.S. 200, 69 L. Ed. 247, affirming *State ex rel. St. Louis, B. & M. Ry. Co. v. Taylor*, 251 S.W. 383, 298 Mo. 474.

In action for seaman's death, choice of forum was in plaintiff under statutory provision for concurrent jurisdiction of federal and state

courts.—*Goetz v. Interlake S. S. Co.*, D.C.N.Y., 47 F.2d 753.

82. U.S.—*Los Angeles Ry. Corporation v. Railroad Commission of California*, D.C.Cal., 29 F.2d 140, affirmed *Railroad Commission of California v. Los Angeles Ry. Corporation*, 50 S.Ct. 71, 280 U.S. 145, 74 L.Ed. 234—*Lewis v. Schrader*, D.C.Tex., 287 F. 893.

83. U.S.—*Vanderwater v. City Nat. Bank of Kankakee*, D.C.Ill., 28 F. Supp. 89.
15 C.J. p 1160 note 48.

Where complainant filed answers in various suits in state court, he could not thereafter maintain in the federal court a bill to restrain the suitors in state court on the ground of multiplicity of suits.—*Robinson v. Wemmer*, D.C.Ohio, 253 F. 790.

84. U.S.—*Hill City Ry. Co. v. Youngquist*, D.C.Minn., 32 F.2d 819.

Proceeding before state commission and appeal to state court did not estop railroad from suing in federal court to enjoin interference with proposed abandonment of its line, where the right of abandonment was not involved in the state proceedings, as an independent ground, and the commission had no jurisdiction over such question as a ground for relief.—*Hill City Ry. Co. v. Youngquist*, *supra*.

85. N.J.—*New Jersey Cent. R. Co. v. New Jersey West Line R. Co.*, 32 N.J.Eq. 67.

Comity between federal and state courts is necessary to prevent scandal from unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice.⁸⁶ While the rule of comity between such courts is one of sound public policy and should be applied in a spirit of liberality, its application must depend somewhat on the circumstances.⁸⁷ In applying the rule, federal courts refuse to extend their jurisdiction over matters equally cognizable by state tribunals, unless the elements of that jurisdiction are so clearly present that the principle of comity has no place in the matter,⁸⁸ and plaintiffs will be left to their remedy in the state court, where a temporary injunction is sought in the federal court merely as ancillary to such remedy and a decree rendered in the former court makes the acts sought to be enjoined a contempt if done.⁸⁹ There is also a rule of comity against rendering a decree that may practically destroy the effect of a supersedeas, and under this rule it is the duty of a state court to preserve an entire fund, pending an appeal or writ of error to the state court, where others in the United States supreme court are also claiming payment out of such fund.⁹⁰ However, comity between a state and a federal court should not preclude the determination of a cause by the latter, where it has jurisdiction thereof and can speedily hear the same and give the desired relief, and such cause is one of great moment to the parties and the public.⁹¹ In other words, the rule of comity does not go to the extent of relieving federal courts from the duty

of proceeding promptly to enforce rights asserted under the federal constitution,⁹² and all considerations of comity must give way to the duty of a federal court to accord a citizen of the United States his right to invoke the court's powers and process in the defense or enforcement of his rights.⁹³ In fact it has been stated authoritatively that the federal court, if properly appealed to, cannot decline, on the ground of discretion or comity, to take jurisdiction of a suit to the cognizance of which its powers extend,⁹⁴ although there is authority to the effect that the exercise of jurisdiction by a federal court becomes one of discretion, where the only reason why it should not take cognizance of a cause rests on the ground of comity.⁹⁵ Also, the rule of comity does not deprive the federal court of jurisdiction as against a plea of possession as receivers under an order of the state court, and that the accounting prayed for had been made and the subject matter adjudicated,⁹⁶ and judicial comity does not require a federal court to allow the use of pleadings and papers in a pending suit by a state court which has assumed jurisdiction of the same controversy.⁹⁷

§ 529. Priority and Retention of Jurisdiction

- a. General rules
- b. Limitations of rules

a. General Rules

At least in actions in rem or quasi in rem, as between a state and a federal court having concurrent

86. U.S.—Reconstruction Finance Corporation v. Zimmerman, C.C.A. S.C., 76 F.2d 313—In Re Potell, D.C.N.Y., 53 F.2d 877, 880, quoting *Corpus Juris*—Mercantile Trust Co. v. Binford, D.C.Tex., 6 F.2d 285—Wise v. Pacific States Life Ins. Co., D.C.Ill., 11 F.Supp. 895, 896, citing *Corpus Juris*.
Iowa.—Reconstruction Finance Corporation v. Dingwell, 278 N.W. 281, 224 Iowa 1172.
15 C.J. p 1160 note 52.

Where two suits have been commenced in federal and state courts, and the suits are in rem or quasi in rem, so that the officers of the courts must exercise dominion over property which is the subject of litigation, jurisdiction of one court must yield to the other.—American Automobile Ins. Co. v. Freundt, C.C.A.Ill., 103 F.2d 613.

87. Wyo.—Rothwell v. Knight, 258 P. 576, 37 Wyo. 11.

88. U.S.—Shanks v. Banting Mfg. Co., D.C.Ohio, 9 F.2d 116.

89. U.S.—Garrett v. New York Transit & Terminal Co., C.C.N.Y., 36 F. 513.
15 C.J. p 1161 note 58.

90. La.—State v. Burke, 35 La.Ann. 185.

91. U.S.—Wise v. Pacific States Life Ins. Co., D.C.Ill., 11 F.Supp. 895, 896, citing *Corpus Juris*.
15 C.J. p 1161 note 55.

92. U.S.—Everglades Drainage Dist. v. Florida Ranch & Dairy Corporation, C.C.A.Fla., 74 F.2d 914, rehearing denied 75 F.2d 1013.

Federal injunction authorized

Bondholder not being party to proceedings in state court, which ordered issuance of mandamus to compel drainage district commissioners to transmit lists of lands for assessment, could seek federal injunction restraining commissioners from transmitting such lists, and decree granting such injunction was not objectionable as disregarding rule of comity, especially since state court suspended issuance of mandamus and further proceedings until federal court's decision.—Everglades Drainage Dist. v. Florida Ranch & Dairy Corporation, *supra*.

93. U.S.—Carpenter Steel Co. v. Metropolitan-Edison Co., D.C.Pa., 268 F. 980.

94. U.S.—Willcox v. New York Cons. Gas Co., N.Y., 29 S.Ct. 192, 212 U.S. 19, 53 L.Ed. 382, 48 L.R.A.N.S., 1134, 15 Ann.Cas. 1034, reversing, C.C., 157 F. 840.
15 C.J. p 1161 note 54.

In consolidated cause

It is improper for a federal court, having jurisdiction of a consolidated cause involving three separate actions, to surrender its jurisdiction over one of the actions, in the absence of an application for such surrender.—The Nanuet, C.C.A.N.Y., 55 F.2d 222.

95. U.S.—In re New England Breeders' Club, D.C.N.H., 175 F. 501—Green v. Porter, C.C.Mass., 123 F. 351.

La.—Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 44 So. 510, 119 La. 864.
15 C.J. p 1160 note 53.

96. U.S.—Andrews v. Smith, C.C.Vt., 5 F. 833, 19 Blatchf. 100.
15 C.J. p 1161 note 56.

97. U.S.—Wadley v. Blount, C.C.Va., 65 F. 667, reversed on other grounds 19 S.Ct. 119, 172 U.S. 148, 43 L.Ed. 399.

jurisdiction, the court which first acquires jurisdiction of the subject matter and the parties has a right to retain, maintain, and exercise it, to the exclusion of the other court, until the final disposition of the controversy; and the other court may not so exercise its jurisdiction as to defeat, impair, or interfere with the jurisdiction of the first court.

Where a state and a federal court have concurrent jurisdiction over the same parties or privies and the same subject matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to

fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case.⁹⁸ This jurisdiction continues until the judgment rendered in the first action is satisfied⁹⁹ and extends to proceedings which are ancillary or incidental to the action first brought.¹ Accordingly, where the jurisdiction of a state or a federal court has once attached, it is not, and cannot be, taken away, arrested, diminished, disturbed, or interfered with by proceedings subsequently instituted in the other court,² especially where the suit in the latter

93. U.S.—Hall v. Cottingham, D.C.

S.C., 55 F.2d 659, affirmed, C.C.A., Cottingham v. Hall, 55 F.2d 664—Bereth v. Sparks, C.C.A.Wis., 51 F.2d 441, 80 A.L.R. 909—In re Cochran, D.C.Wash., 40 F.2d 282, affirmed, C.C.A., Seattle Curb Exchange v. Knight, 46 F.2d 34—Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk, N.Y., D.C.N.Y., 27 F.2d 142—Norrie v. Lohman, C.C.A.N.Y., 16 F.2d 355—Atlas Life Ins. Co. v. W. I. Southern, Inc., D.C.Okl., 23 F.Supp. 334, affirmed, C.C.A., 105 F.2d 668—U. S. Fidelity & Guaranty Co. v. Lawson, D.C.Ga., 15 F.Supp. 116—Wise v. Pacific States Life Ins. Co., D.C.Ill., 11 F.Supp. 895—Silveus v. Hewins, D.C.Mass., 4 F.Supp. 384—Monamotor Oil Co. v. Johnson, D.C.Iowa, 3 F.Supp. 189, affirmed 54 S.Ct. 575, 292 U.S. 86, 78 L.Ed. 1141—Lewis v. Schrader, D.C.Tex., 287 F. 803—Havner v. Hegnes, C.C.A.Iowa, 269 F. 537—McClelland v. Rose, Tex., 247 F. 721, 159 C.C.A. 579, Ann.Cas.1918C, 341—O'Neill v. Welch, Pa., 245 F. 261, 157 C.C.A. 453, reversing, D. C., Welch v. Union Casualty Ins. Co., 238 F. 968—Knudsen v. First Trust & Savings Bank, Mont., 245 F. 81, 157 C.C.A. 377, affirming, D. C., First Trust & Savings Bank v. Bitter Root Valley Irr. Co., 237 F. 733.

Cal.—Ex parte Cohen, 244 P. 359, 198 Cal. 221—Morrow v. Superior Court in and for Kings County, 48 P.2d 188, 9 Cal.App.2d 16, rehearing denied 50 P.2d 66, 9 Cal.App.2d 16.

Colo.—Reagan v. Dick, 233 P. 159, 76 Colo. 544.

D.C.—Frazier v. Frazier, 61 F.2d 920, 61 App.D.C. 279.

Fla.—Miller v. Griffin, 128 So. 416, 418, 99 Fla. 976, citing *Corpus Juris*—Wade v. Clower, 114 So. 548, 551, 94 Fla. 817, citing *Corpus Juris*.

Ill.—Meldahl v. West, 117 N.E. 593, 280 Ill. 421.

Mass.—Shapiro v. Goldman, 148 N.E. 217, 253 Mass. 60.

Mich.—Detroit United Ry. v. Dingman, 170 N.W. 641, 204 Mich. 543.

Neb.—Chicago & N. W. Ry. Co. v.

Bauman, 271 N.W. 256, 132 Neb. 67—State ex rel. Sorensen v. Mitchell Irr. Dist., 262 N.W. 543, 129 Neb. 586, certiorari denied Mitchell Irr. Dist. v. State of Nebraska ex rel. Sorensen, 56 S.Ct. 667, 297 U.S. 723, 80 L.Ed. 1007.

Okl.—Howard v. Owens, 285 P. 5, 142 Okl. 82, certiorari denied 51 S.Ct. 21, 282 U.S. 840, 75 L.Ed. 746.

Or.—City of Salem v. Oregon-Washington Water Service Co., 23 P.2d 539, 544, 144 Or. 93, citing *Corpus Juris*.

Pa.—Hoyt v. Kolber, 16 Pa.Dist. & Co. 249, 250, quoting *Corpus Juris*. Tex.—Durham v. Scrivener, Civ.App., 259 S.W. 606, affirmed, Com.App., 270 S.W. 161.

15 C.J. p 1161 note 60.

Under doctrine of comity the court that first acquires jurisdiction retains it.—Carter v. Blaine County Inv. Co., D.C.Idaho, 45 F.2d 642—U. S. Fidelity & Guaranty Co. v. Lawson, D.C.Ga., 15 F.Supp. 116.

Unexercised jurisdiction of another tribunal

(1) The fact that other courts, or a state public service commission, have likewise jurisdiction of the subject matter of a suit, affords no ground for a United States district court to refuse to grant the relief prayed, if no other tribunal has as yet exercised its jurisdiction.—Carpenter Steel Co. v. Metropolitan-Edison Co., D.C.Pa., 270 F. 255.

(2) After a decision by a state commission, board, or department respecting rates, the telephone or railroad company or other utility affected is not required to resort to the state courts for a review, but may instead seek relief in a federal court where diversity of citizenship exists or a federal question is involved.—Pacific Telephone & Telegraph Co. v. Kuykendall, Wash., 44 S.Ct. 553, 265 U.S. 196, 68 L.Ed. 975—International Ry. Co. v. Prendergast, D.C.N.Y., 52 F.2d 293—Pacific Telephone & Telegraph Co. v. Whitcomb, D.C.Wash., 12 F.2d 279, affirmed Denney v. Pacific Telephone & Telegraph Co., 45 S.Ct. 223, 276 U.S. 97, 72 L.Ed. 483—Northwestern Bell Telephone Co. v. Hilton, D.C.Minn., 274 F. 384—Belt

Line Ry. Corporation v. Newton, D. C.N.Y., 273 F. 272.

(3) Where state director of insurance took no steps to name receiver for insurance company, federal court had jurisdiction of receivership suit and to appoint receiver.—Dallou v. Davis, C.C.A.Ill., 75 F.2d 138, certiorari denied 55 S.Ct. 926, 295 U.S. 766, 73 L.Ed. 1708.

Time when suit is commenced and jurisdiction attaches, so as to give priority, depends on the law of the particular jurisdiction and may variously be when process is served, when the complaint is filed and summons is delivered to the sheriff for service, or, in equity, when the bill is filed.

U.S.—Brown v. Pacific Mut. Life Ins. Co., C.C.A.S.C., 62 F.2d 711—George W. Armbruster, Jr., Inc., v. City of Wildwood, D.C.N.J., 41 F.2d 823.

Minn.—McCormick v. Robinson, 167 N.W. 271, 139 Minn. 483.

15 C.J. p 1161 note 60 [b].

99. Fla.—Wade v. Clower, 114 So. 548, 551, 94 Fla. 817, citing *Corpus Juris*.

15 C.J. p 1162 note 61.

Liability under final decree

One who seeks to hold the purchaser from a receiver liable for damages caused by the receiver under the final decree cannot accept the benefits of that decree and avoid its burdens, and therefore must enforce his claim in the federal court, which retains sole jurisdiction to determine liability under the decree.—Smith v. Missouri Pac. Ry. Co., C.C.A.Mo., 266 F. 653.

L. U.S.—Sain v. Montana Power Co., D.C.Mont., 20 F.Supp. 843.

Fla.—Wade v. Clower, 114 So. 548, 551, 94 Fla. 817, citing *Corpus Juris*.

15 C.J. p 1162 note 62.

2. U.S.—Riehle v. Margolies, N.Y., 49 S.Ct. 310, 279 U.S. 218, 73 L. Ed. 669, affirming, C.C.A., Hatch v. Merosco Holding Co., 26 F.2d 247, certiorari granted Riehle v. Margolies, 49 S.Ct. 29, 278 U.S. 591, 73 L.Ed. 523—In re Gray's Estate, C. C.A.Ind., 66 F.2d 367—New York Life Ins. Co. v. Marshall, D.C.La.,

court is filed in violation of a temporary restraining order issued in the suit first commenced.³ Indeed, it is asserted in some cases that, after one court has acquired jurisdiction, another court will decline to assume,⁴ or is without,⁵ jurisdiction; but, apart from cases wherein the first court has exclusive jurisdiction of the subject matter of the

cause of action⁶ or has already made a determination,⁷ it is not strictly accurate, or at least it is not consistent with other rules, to say that the second court is without jurisdiction; as noted *infra* § 529 b, the second suit is not dismissible for want of jurisdiction, it being sufficient to suspend proceedings therein or, at least, in accordance with the

21 F.2d 172, affirmed, C.C.A., 23 F. 2d 225, certiorari denied 48 S.Ct. 434, 277 U.S. 537, 72 L.Ed. 1001—*International & G. N. Ry. Co. v. Adkins*, D.C.Tex., 14 F.2d 149, affirmed, C.C.A., *International-Great Northern R. Co. v. Adkins*, 18 F. 2d 481, certiorari denied 48 S.Ct. 30, 215 U.S. 533, 72 L.Ed. 411—*Wise v. Pacific States Life Ins. Co.*, D.C.Ill., 11 F.Supp. 895.

Cal.—*Morrow v. Superior Court in and for Kings County*, 48 P.2d 188, 9 Cal.App.2d 16, hearing denied 50 P.2d 66, 9 Cal.App.2d 16.

D.C.—*Rosenberger v. Rosenberger*, 95 F.2d 349, 68 App.D.C. 220—*Frazier v. Frazier*, 61 F.2d 920, 61 App.D.C. 279.

Fla.—*Wade v. Clower*, 114 So. 548, 551, 84 Fla. 317, citing *Corpus Juris*.

Mich.—*Detroit Trust Co. v. Manilow*, 261 N.W. 303, 272 Mich. 211—*Consumers' Power Co. v. Michigan Public Utilities Commission*, 258 N.W. 250, 270 Mich. 213.

Neb.—*State ex rel. Sorensen v. Mitchell Irr. Dist.*, 263 N.W. 543, 129 Neb. 586, certiorari denied *Mitchell Irr. Dist. v. State of Nebraska ex rel. Sorensen*, 56 S.Ct. 667, 297 U.S. 723, 80 L.Ed. 1007.

Pa.—*Thompson v. Fitzgerald*, 198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed *Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285.

Tex.—*Cleveland v. Ward*, 285 S.W. 1053, 1069, 116 Tex. 1, citing *Corpus Juris*—*Brand v. Eubank*, Civ.App., 81 S.W.2d 1023, error dismissed—*Supreme Forest Woodmen Circle v. City of Belton*, Civ.App., 66 S.W.2d 439, 441, citing *Corpus Juris*—*Missouri, K. & T. Ry. Co. of Texas v. State*, Civ.App., 275 S.W. 673, certiorari granted 46 S.Ct. 483, 271 U.S. 653, 70 L.Ed. 1134, certiorari vacated *Missouri-Kansas-Texas R. Co. v. State of Texas*, 48 S.Ct. 82, 275 U.S. 494, 72 L.Ed. 231.

15 C.J. p 1163 note 63.

Lawful removal of plaintiff's residence to another state could not authorize courts of that state to annul or supersede jurisdiction of District of Columbia court which had previously attached and still continued.

Davis v. Davis, 57 F.2d 414, 61 App. D.C. 48.

Subsequent proceeding in territorial court

Federal court in which action was pending did not lose jurisdiction when counterclaim for same cause of action was subsequently asserted in local territorial court of concurrent jurisdiction.—*Franceschi v. De Tord*, C.C.A.Puerto Rico, 71 F.2d 95.

3. U.S.—*Union Light, Heat & Power Co. v. Railroad Commission of Commonwealth of Kentucky*, D.C. Ky., 17 F.2d 143.

4. D.C.—*Phillips v. Noel Const. Co.*, 266 F. 603, 49 App.D.C. 379, certiorari denied 41 S.Ct. 7, 254 U.S. 631, 65 L.Ed. 447.

N.Y.—*In re Smathers' Will*, 293 N. Y.S. 314, 249 App.Div. 523.

15 C.J. p 1161 note 60 [a].

5. U.S.—*First Nat. Bank v. Charles Broadway Rouss, Inc.*, C.C.A.Ga., 61 F.2d 489, certiorari denied *Charles Broadway Rouss, Inc. v. First Nat. Bank*, 53 S.Ct. 314, 287 U.S. 670, 77 L.Ed. 577—*Johnson v. Burke Manor Bldg. Corporation*, C. C.A.Ill., 48 F.2d 1031, 83 A.L.R. 1273—*Feist v. Fidelity Union Trust Co.*, D.C.N.J., 29 F.Supp. 51.

Mich.—*Detroit United Ry. v. Dingman*, 170 N.W. 641, 204 Mich. 543.

Ohio.—*State v. Indiana, C. & E. Traction Co.*, 157 N.E. 15, 116 Ohio St. 532.

6. U.S.—*Tolman v. Clark County Drainage Dist.*, C.C.A.Wis., 62 F. 2d 226, certiorari denied 53 S.Ct. 523, 289 U.S. 724, 77 L.Ed. 1474—*Ladd v. Tallman*, C.C.A.W.Va., 59 F.2d 732—*Gullfoil v. Hayes*, D.C. Va., 17 F.Supp. 535.

Tex.—*Durham v. Scribener*, Civ.App., 259 S.W. 606, affirmed, Com.App., 270 S.W. 161.

7. Bill in federal court is properly dismissed where matter has been determined in state court.—*Pacific Improvement Co. v. Pittsburgh, S. & N. R. Co.*, C.C.A.Pa., 33 F.2d 505, certiorari denied 50 S.Ct. 35, 280 U.S. 585, 74 L.Ed. 634.

In quo warranto to obtain declaratory judgment that certain county bonds were void as issued without authority, a binding declaration will be refused where if bonds were declared invalid intolerable consequences would result and court

would be placed in antagonism to federal court, which has decreed that bonds should issue.—*State v. Board of Com'rs of Wyandotte County*, 230 P. 531, 117 Kan. 151.

Prior grant of application to abandon branch railroad line

Where interstate system of interurban railroads is in custody of receiver appointed by federal court, and that court grants application to abandon branch line on ground that it is operated at a loss, such order may not be disturbed by state commission or state courts.—*Board of Com'rs of Franklin County v. Public Utilities Commission*, 140 N.E. 37, 107 Ohio St. 442, 30 A.L.R. 429.

Prior allowance of claims by probate court

Federal district court has no supervisory or reviewing power over state probate court which entered order allowing void claims; it must assume that probate court on proper application to rehear will disallow claims, or that on failure of probate court so to do, the reviewing courts of state will order refusal of approval of claims.—*Holyfield v. Guaranty Title & Trust Co.*, D.C.Tex., 22 F.Supp. 896.

Prior grant or refusal of injunction

(1) A bill in a federal court for an injunction was properly dismissed, where it appeared that plaintiffs had brought a suit on the same ground in a state court, had obtained therein a temporary injunction, and that the suit was then pending in the state court of civil appeals, without any showing that the temporary injunction was not still in force.—*Armour & Co. v. City of Dallas*, Tex., 41 S.Ct. 291, 255 U.S. 280, 65 L.Ed. 635.

(2) Contractor's surety which was not party in garnishment proceeding against contractor could not be required by federal court to pay materialman while contractor was enjoined from payment by order of state court of competent jurisdiction.—*W. F. Pigg & Son v. U. S.*, for Use of Leach, C.C.A.Colo., 81 F.2d 334.

(3) Where state court denied injunction to restrain school directors from building a consolidated schoolhouse, principle of comity required federal court to decline jurisdiction of bill seeking same relief.—*Heller v. Kreider*, C.C.A.Pa., 98 F.2d 106.

requirement stated *supra* this section, to refrain from exercising jurisdiction in such a manner as to defeat or impair the jurisdiction of the first court.

Suits in rem or quasi in rem. As between a state and a federal court having concurrent jurisdiction over suits in rem or quasi in rem, including not only cases where property is actually seized under judicial process but also suits to marshal assets, ad-

minister trusts, or liquidate estates, and other suits of similar nature wherein the court, in order to proceed with the cause, and grant the relief sought, is required to have possession or control of the res, the court which first assumes jurisdiction may maintain and exercise it, to the exclusion of the other,⁸ until it has finally and completely disposed of the matter⁹ and effectuated its judgment or decree;¹⁰ and the other court may not so exercise

8. U.S.—Princess Lida of Thurn and Taxis v. Thompson, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285, affirming Thompson v. Fitzgerald, 198 A. 58, 329 Pa. 497, certiorari granted Princess Lida of Thurn and Taxis v. Fitzgerald, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366—U. S. v. Bank of New York & Trust Co., N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirmed, C.C.A., 77 F.2d 866, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—U. S. v. President and Directors of Manhattan Co., N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C.C.A., 77 F.2d 881, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—U. S. v. Pink, N.Y., 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, affirming, C.C.A., U. S. v. Van Schaick, 77 F.2d 880, certiorari granted U. S. v. Pink, 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393—Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 55 S.Ct. 386, 294 U.S. 189, 79 L.Ed. 850, reversing Commonwealth ex rel. Schnader v. Penn General Casualty Co., 173 A. 637, 316 Pa. 1, certiorari granted Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed. 651—Holley v. General American Life Ins. Co., C.C.A. Mo., 101 F.2d 172, certiorari denied 59 S.Ct. 1038, 307 U.S. 615, 83 L.Ed. 1496—Hutchins v. Pacific Mut. Life Ins. Co. of California, C.C.A. Cal., 97 F.2d 58, affirming, D.C., 20 F.Supp. 150—Rogers v. Paving Dist. No. 1 of City of Eureka Springs, C.C.A.Ark., 84 F.2d 555—U. S. Nat. Bank of Omaha v. Pamp, C.C.A.Neb., 83 F.2d 493—Reconstruction Finance Corporation v. Zimmerman, C.C.A.S.C., 76 F.2d 313—Harnischfeger Sales Corporation v. National Life Ins. Co., C.C.A.Wis., 72 F.2d 921—Lee v. Edmunds, C.C.A.Fla., 66 F.2d 122—Consolidated Music Co. v. Brinkerhoff Piano Co., C.C.A.Utah, 64 F.2d 884—Hall v. Cottingham, D.C.S.C., 75 F.2d 659, affirmed, C.C.A., Cottingham v. Hall, 55 F.2d 664—In re Prunotto, D.C.N.Y., 51 F.2d 802—Barnett v. Mayes, C.C.A.Okl.,

43 F.2d 521—In re Moore, D.C.Ga., 42 F.2d 475—Drown v. Duffin, C.C.A.Ky., 13 F.2d 703—Pacific Telephone & Telegraph Co. v. Star Pub. Co., D.C.Wash., 2 F.2d 151—Sain v. Montana Power Co., D.C.Mont., 20 F.Supp. 813—Klein v. Peter, C.C.A. Idaho, 283 F. 362—Central Dist. Printing & Telegraph Co. v. Farmers' & Producers' Nat. Bank of Sistersville, W.Va., 255 F. 59, 166 C.C.A. 387—Amusement Syndicate Co. v. El Paso Land Improvement Co., D.C.Tex., 251 F. 345. Cal.—De Brincat v. Mogan, App. 36 P.2d 245, 246, 1 Cal.App.2d 7, citing *Corpus Juris*. N.J.—Etna Casualty & Surety Co. v. International Re-Insurance Corporation, 169 A. 113, 114 N.J.Eq. 516. Okl.—Operators Royalty & Producing Co. v. Tulsa Rig. Reel & Manufacturing Co., 56 P.2d 400, 176 Okl. 442. Tenn.—Valley v. Lambuth, 1 Tenn. App. 547. 15 C.J. p 1161 note 60 [b] (6).

Basis of doctrine
(1) Doctrine that earlier court's jurisdiction in suits involving custody over res is exclusive rests on requisite that jurisdiction in suits in rem depends on actual possession of res or power at any time to assume it.—In re Putnam, C.C.A.N.Y., 55 F.2d 73, reversing, D.C., The Alcione, 50 F.2d 186, and certiorari denied Putnam v. Christie, 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292.
(2) The noninterference principle is based on a possible future need for possession of specific property by the court which has first undertaken a jurisdiction of such nature that in the course of the proceedings possession by the court, through its officer, may become necessary.—Hinkley v. Art Students' League of New York, C.C.A.Md., 37 F.2d 225, certiorari denied 50 S.Ct. 247, 281 U.S. 733, 74 L.Ed. 1149, affirming, D.C., Art Students' League of New York v. Hinkley, 31 F.2d 469.

Suit to quiet title is within the application of the rule, it being, under statute, in the nature of a suit in rem.

U.S.—Boston Acme Mines Corporation v. Salina Canyon Coal Co.,

C.C.A.Utah, 3 F.2d 729—Dennison Brick & Tile Co. v. Chicago Trust Co., C.C.A.Ohio, 286 F. 518. Neb.—Skinner v. Ashford, 268 N.W. 51, 131 Neb. 353.

Quo warranto proceeding against corporation is closely analogous to a proceeding in rem and, from the time it is instituted in a state court, the jurisdiction of that court is exclusive and superior to that of a federal court in which a suit in equity is subsequently instituted for the appointment of a receiver and an injunction against the continued prosecution of pending suits.—Lillard v. Lonergan, C.C.A.Kan., 72 F.2d 865, certiorari denied Lonergan v. Lillard, 55 S.Ct. 147, 293 U.S. 615, 79 L.Ed. 704.

9. U.S.—Employers' Reinsurance Corporation v. Fidelity Union Casualty Fire Ins. Co., D.C.Tex., 36 F.2d 813. D.C.—Rosenberger v. Rosenberger, 95 F.2d 319, 68 App.D.C. 220. Okl.—Operators Royalty & Producing Co. v. Tulsa Rig. Reel & Manufacturing Co., 56 P.2d 400, 176 Okl. 442. Pa.—In re McCahan's Estate, 168 A. 685, 312 Pa. 515.

Scope of jurisdiction retained

(1) Court first acquiring jurisdiction of res may retain it for all purposes.—York v. Acadia Land Co., D.C.La., 58 F.2d 1042.

(2) State court first acquiring jurisdiction of property in litigation, must be permitted to exhaust remedy before federal court interferes; it is vested, while holding possession of property involved, with power to determine all controversies relating thereto.—Insurance Finance Corporation v. Phoenix Securities Corporation, D.C.Idaho, 42 F.2d 933.

10. Okl.—Black Panther Oil & Gas Co. v. Swift, 170 P. 238, 69 Okl. 33.

Custodial decrees

Where, in creditor's foreclosure suit state court entered decree directing receiver to return properties to owner, which was ordered to operate them, suit was in rem, decree was custodial, and federal court could not appoint receiver for same properties.—Arn v. Operators' Royal-

its jurisdiction as to defeat, frustrate, impair, or interfere with the jurisdiction first acquired.¹¹ In such cases, the court whose jurisdiction and process are first invoked by the filing of a bill or complaint has the prior right, as constructive

possession exists and jurisdiction attaches at that time, at least where process subsequently issues in due course, regardless of whether or not that court is the first actually to seize the property or to take physical possession thereof.¹² On the other hand,

ty & Producing Co., D.C.Okl., 4 F. Supp. 370.

Determination of title and obligations under decree

A court, which has had possession of property and has, through its officers sold it, can retain jurisdiction over, and constructive possession of, the property after delivering actual possession thereof to the purchaser, for the purpose of determining any issue which may subsequently arise in connection with the nature and extent of the title acquired under the decree of sale, or of determining what liens or demands the purchaser, by reason of his purchase, has become obligated to discharge.—*Price v. Bryan & C. T. I. Ry. Co.*, D.C.Tex., 272 F. 753.

11. U.S.—*Lion Bonding & Surety Co. v. Karatz*, Minn. & Neb., 43 S.Ct. 480, 262 U.S. 77, 67 L.Ed. 871, reversing C.C.A.Minn., 281 F. 1021 and C.C.A.Neb., *Hertz v. Lion Bonding & Surety Co.*, 280 F. 540, in which appeal dismissed 43 S.Ct. 90, 260 U.S. 696, 67 L.Ed. 468, motion denied 43 S.Ct. 641, 262 U.S. 640, 67 L.Ed. 1151, and 43 S.Ct. 701, 262 U.S. 733, 67 L.Ed. 1206—*Kline v. Burke Const. Co.*, Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077, reversing, C.C.A., *Burke Const. Co. v. Kline*, 271 F. 605—*Holley v. General American Life Ins. Co.*, C.C.A.Mo., 101 F. 2d 172, certiorari denied 59 S.Ct. 1038, 307 U.S. 615, 83 L.Ed. 1496—*Harnischfeger Sales Corporation v. National Life Ins. Co.*, C.C.A.Wis., 72 F.2d 921—*Christian v. R. Hoe & Co.*, C.C.A.N.Y., 63 F.2d 221—*York v. Acadia Land Co.*, D.C.La., 58 F. 2d 1042—*Lummus Cotton Gin Co. v. Townsend*, D.C.S.C., 36 F.2d 364—*Hershey v. First Nat. Bank & Trust Co. in Waynesboro*, D.C.Pa., 22 F.Supp. 517—*Old First Nat. Bank & Trust Co. of Fort Wayne, Ind.*, v. *Barrett*, D.C.Ill., 14 F.Supp. 778—*U. S. v. American Ditch Ass'n*, D.C.Idaho, 2 F.Supp. 867—*Klein v. Peter*, C.C.A.Utah, 284 F. 797, 29 A.L.R. 1497.

D.C.—*Rosenberger v. Rosenberger*, 95 F.2d 349, 68 App.D.C. 220. N.J.—*Umland v. United Public Service Co.*, 163 A. 794, 111 N.J.Eq. 563, affirmed 163 A. 17, 111 N.J.Eq. 613. N.Y.—*Sullivan v. St. Louis-San Francisco R. Co.*, 263 N.Y.S. 396, 147 Misc. 485.

Okl.—*Black Panther Oil & Gas Co. v. Swift*, 170 P. 238, 69 Okl. 32.

Pa.—*Thompson v. Fitzgerald*, 198 A.

58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed *Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285. S.C.—*Marchant v. Wannamaker*, 180 S.E. 350, 176 S.C. 369. Tex.—*Lewis v. Pitts*, Civ.App., 275 S.W. 473.

Subordinate jurisdiction of other court

Orphans' court having once acquired control over property, jurisdiction of all other courts, although concurrent, is subject thereto.—*In re McCahan's Estate*, 168 A. 685, 312 Pa. 515.

Surrender of res

(1) Under rules of comity, the court in which an action was last begun will surrender possession of the res, where action was first begun in another court and possession of the res was essential to judgment.—*Ward v. Foulkrod*, C.C.A.Pa., 264 F. 627, affirming D.C., *Wheeler v. Badenhause*, 260 F. 991.

(2) Receivers appointed by federal court subsequent to receivership in state court will be required to surrender property involved to state court receivers.—*Lee v. Edmunds*, C.C.A.Fla., 66 F.2d 122.

Judgment or decree entitling party to interfere

Where res has come into possession and under control of state court, person having right to go into federal court cannot obtain judgment or decree entitling him to interfere with administration of res by court having its possession.—*Pufahl v. Parks' Estate*, 57 S.Ct. 151, 299 U.S. 217, 81 L.Ed. 133, affirming *In re Park's Estate*, 283 Ill.App. 95, certiorari granted *Pufahl v. Parks' Estate*, 56 S.Ct. 749, 298 U.S. 649, 80 L.Ed. 1378.

Permission to interfere

The court first acquiring jurisdiction may alone determine how far it will permit the other court to interfere.—*Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 386, 294 U.S. 189, 79 L.Ed. 850, reversing *Commonwealth ex rel. Schnader v. Penn General Casualty Co.*, 173 A. 637, 316 Pa. 1, certiorari granted *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed. 651—*Reconstruction Finance Corpo-*

ration v. Zimmerman, C.C.A.S.C., 76 F.2d 313.

12. U.S.—*Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 386, 294 U.S. 189, 79 L.Ed. 850, reversing *Commonwealth ex rel. Schnader v. Penn General Casualty Co.*, 173 A. 637, 316 Pa. 1, certiorari granted *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed. 651—*Harkin v. Brundage*, Ill., 48 S.Ct. 268, 276 U.S. 36, 72 L.Ed. 457, reversing, C.C.A., 13 F. 2d 617, certiorari granted 47 S.Ct. 237, 273 U.S. 882, 71 L.Ed. 838—*Mitchell v. Maurer*, C.C.A.Cal., 69 F.2d 233, certiorari granted 55 S.Ct. 71, 293 U.S. 544, 79 L.Ed. 648, reversed on other grounds 55 S.Ct. 162, 293 U.S. 237, 79 L.Ed. 338—*Boynton v. Moffat Tunnel Improvement Dist.*, C.C.A.Colo., 57 F.2d 772, certiorari denied *Moffat Tunnel Improvement Dist. v. Boynton*, 53 S.Ct. 20, 287 U.S. 620, 77 L.Ed. 538—*Hutchins v. Pacific Mut. Life Ins. Co. of California*, D.C.Cal., 20 F.Supp. 150, affirmed, C.C.A., 97 F. 2d 58—*Ward v. Foulkrod*, C.C.A.Pa., 264 F. 627, affirming, D.C., *Wheeler v. Badenhause*, 260 F. 991.

Ala.—*Alabama, T. & N. Ry. v. Tolman*, 76 So. 381, 200 Ala. 449.

Ariz.—*Forst v. Intermountain Building & Loan Ass'n*, 65 P.2d 1379, 49 Ariz. 246.

Okl.—*Operators Royalty & Producing Co. v. Tulsa Rig, Reel & Manufacturing Co.*, 56 P.2d 400, 176 Okl. 442.

Court which first entertains valid proceeding to complete which will require possession of specific property is first in time, and therefore in right, regardless of whether or not that court is the first court actually to seize the property.—*In re Gallimore*, D.C.Ga., 16 F.2d 800, affirmed, C.C.A., 21 F.2d 999.

Drawing possession to court

(1) An action in rem draws to the court possession or control, actual or potential, of the res.—*Kline v. Burke Const. Co.*, Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077, reversing, C.C.A., *Burke Const. Co. v. Kline*, 271 F. 605.

(2) Filing action in state court to have securities distributed and issuance of summons drew to that court possession of res.—*Insurance Finance Corporation v. Phoenix Securi-*

where the jurisdiction of the two courts is not the same or concurrent, and the subject matter in litigation in one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of actual possession that determines priority of jurisdiction.¹³ The difficulty in applying these rules is in determining whether the conflicting jurisdictions are actually concurrent and the same.¹⁴ Another doubtful question may be whether a bill is of such a character that its filing is the taking of constructive possession of the property.¹⁵

b. Limitations of Rules

Due to limitations on its application and operation,

the rule that as between a state and a federal court the one first acquiring jurisdiction may retain it without interference from the other may not be effective, in a particular case, to prevent or invalidate the judicial act, step, or proceeding in question.

Frequently, the rule that as between a state and federal court having concurrent jurisdiction the one first acquiring jurisdiction is entitled to retain it without interference by the other is not applicable or effective so as to prevent or nullify a particular judicial act, step, or proceeding.¹⁶ There is, of course, no reason or occasion for the application of the rule where there is no conflict of jurisdiction,¹⁷ or the exercise of jurisdiction by one court does not defeat, impair, or interfere with the pre-

ties Corporation, D.C.Idaho, 42 F.2d 933.

Potential possession

Mere appointment of receiver in federal court with right to take possession of property was insufficient to give federal court prior jurisdiction over state court theretofore rendering judgment on which execution had issued and was in the hands of the sheriff; the state court had potential possession which was sufficient to give it priority of jurisdiction.—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.

Filing of bill and service of order or rule to show cause are sufficient to confer prior and exclusive jurisdiction over the trust fund or other property involved.

U.S.—Patterson v. Veasey, D.C.Ga., 295 F. 163.

N.J.—Ætna Casualty & Surety Co. v. International Re-Insurance Corporation, 169 A. 113, 114 N.J.Eq. 516.

Issuance of ad interim injunction

After the court has acquired jurisdiction under Code Civ.Proc. § 416, by issuing ad interim injunction, although summons has not been served, and has not lost that jurisdiction, it can appoint a receiver and exercise complete control over the assets of defendant, notwithstanding an intervening appointment of a receiver by the federal court.—City of New York v. Staten Island Midland Ry. Co., 181 N.Y.S. 124, 110 Misc. 695.

13. U.S.—Harkin v. Brundage, Ill., 48 S.Ct. 268, 276 U.S. 36, 72 L.Ed. 457, reversing, C.C.A., 13 F.2d 617, and certiorari granted 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 838.—Boynton v. Moffat Tunnel Improvement Dist., C.C.A.Colo., 57 F.2d 772, certiorari denied Moffat Tunnel Improvement Dist. v. Boynton, 53 S.Ct. 20, 287 U.S. 620, 77 L.Ed. 538.

Ariz.—Forst v. Intermountain Building & Loan Ass'n, 65 P.2d 1379, 49 Ariz. 246.

Different issues and relief

Of two courts having concurrent jurisdiction of actions involving different issues and seeking different relief, but affecting the same res, that court which first gained actual possession of the res will retain jurisdiction thereafter, though action was first brought in the other court.—Vard v. Foulkrod, C.C.A.Pa., 264 F. 627, affirming, D.C. Wheeler v. Badenhausen Co., 260 F. 991.

Relief asked after institution of suit

Where a suit filed in the federal court was in personam and the original bill alleged no grounds for the appointment of a receiver and did not pray for that relief, and subsequently a suit in rem was filed in a state court and a receiver appointed on the same day, custody and possession of the property involved then passed into the state court and the federal court was without jurisdiction thereafter, on application for the appointment of a receiver, to oust the possession of the state court by the appointment of a receiver or otherwise.—Terrell v. Gary, C.C.A.Tex., 98 F.2d 14.

14. U.S.—Harkin v. Brundage, Ill., 48 S.Ct. 268, 276 U.S. 36, 72 L.Ed. 457, reversing, C.C.A., 13 F.2d 617, and certiorari granted 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 838.

15. U.S.—Harkin v. Brundage, supra.

16. U.S.—General Baking Co. v. Harr, Pa., 57 S.Ct. 540, 300 U.S. 433, 81 L.Ed. 730, reversing, C.C.A., 85 F.2d 932, affirming, D.C., General Baking Co. v. Gordon, 9 F.Supp. 210, affirmed, C.C.A., General Baking Co. v. Harr, 92 F.2d 162, certiorari denied 58 S.Ct. 369, 302 U.S. 761, 82 L.Ed. 531, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603, certiorari granted 57 S.Ct. 322, 299 U.S. 539, 81 L.Ed. 397.—Coffey v. Lawman, C.C.A.Tenn., 99 F.2d 245.—Sain v. Montana Power Co., C.C.A.Mont., 84 F.2d 126, reversing, D.C., 5 F.Supp.

792.—Irving Trust Co. v. U. S., C.C. Ohio, 83 F.2d 20, certiorari denied 56 S.Ct. 956, 298 U.S. 636, 80 L.Ed. 1405.—Fisheries Products Co. v. Timmons, C.C.A.N.C., 16 F.2d 266.—Franz v. Buder, C.C.A.Mo., 11 F.2d 854.—Hackler v. Farm & Home Savings & Loan Ass'n, D.C.Mo., 6 F.Supp. 610, appeal dismissed, C.C.A., 73 F.2d 999.

Ala.—Middleton v. St. Louis & S. F. R. Co., 153 So. 256, 228 Ala. 323.

Or.—Hardy v. Oregon Elkers Music House, 195 P. 563, 99 Or. 340.

S.C.—King v. Ætna Ins. Co., 167 S.E. 12, 168 S.C. 84.

Utah.—State by and through State Land Board v. Blake, 20 P.2d 871, 88 Utah 584, modified on other grounds 56 P.2d 1347, 88 Utah 600.

Va.—America Nat. Bank of Portsmouth v. Ames, 194 S.E. 784, 169 Va. 711, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540.

17. U.S.—Carter v. Blaine County Inv. Co., D.C.Idaho, 45 F.2d 613.—Columbia Ry., Gas & Electric Co. v. Blease, D.C.S.C., 42 F.2d 463.—Maryland Casualty Co. v. Board of Water Com'rs of City of Dunkirk, N. Y., D.C.N.Y., 27 F.2d 142.—Rydstrom v. Massachusetts Accident Co., D.C.Md., 25 F.Supp. 359.—McAtamney v. Commonwealth Hotel Const. Corporation, D.C.N.Y., 296 F. 500.

Ariz.—Forst v. Intermountain Building & Loan Ass'n, 65 P.2d 1379, 49 Ariz. 246.

Del.—Stone v. Jewett, Bigelow & Brooks Coal Co., 125 A. 340, 14 Del.Ch. 256.

N.J.—Umland v. United Public Service Co., 163 A. 17, 111 N.J.Eq. 613, affirmed 163 A. 794, 111 N.J.Eq. 563.

Okl.—Bowling v. Beaver, 229 P. 501, 102 Okl. 286, error dismissed 46 S.Ct. 17, 269 U.S. 527, 70 L.Ed. 395.

Wis.—Knuth v. Lepp, 193 N.W. 519, 180 Wis. 529.

Where due recognition of subordination of federal receivership or possession of federal receiver to pro-

viously acquired jurisdiction of another court,¹⁸ or disturb, or interfere with, the possession of property by such other court or its officer.¹⁹ Ordinarily the rule is considered applicable only where the parties to, the subject matter of, and the relief sought in the two suits are the same, so that if the first suit had already been disposed of the judgment therein should be treated in bar as a former adjudication;²⁰ but where, although the proceedings in the two courts are not the same, they are closely related and there is fraud or sharp practice by a party in delaying the state court until the federal court can act and inducing the federal court to act without a full disclosure of prior proceedings, the federal court, on learning the method by which its jurisdiction has been invoked, should, as a matter of comity and good faith, deny to the guilty party the further use of its jurisdiction until after the state court has been given an opportunity to

exercise the jurisdiction it is entitled to exercise.²¹ It is also held that the exclusive jurisdiction of the court in which suit is first brought does not include all matters which may possibly become involved or arise in the suit, but extends only to questions which properly and ordinarily arise in the progress of the first suit;²² and, where a statute makes the jurisdiction of the federal court exclusive in special proceedings, it is limited to determining matters material to, and directly connected with, the judgment sought to be obtained, and does not necessarily extend to other questions growing out of the subject matter as between different parties to the exclusion of the jurisdiction of other competent courts.²³ Furthermore, it is held that the rule does not apply where: The subject matter is located in different states, in the respective territorial jurisdictions of which the suits are brought;²⁴ the proceedings in the first court are

ceeding or receivership in a state court is accorded, there is no breach of comity.—*Harris v. Gurley*, C.C.A. Tex., 80 F.2d 744—*Fred T. Ley & Co. v. Wheat*, C.C.A. Fla., 64 F.2d 257.

18. U.S.—*Kline v. Burke Const. Co.*, Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077, reversing, C.C.A., *Burke Const. Co. v. Kline*, 271 F. 605—*Harnischfeger Sales Corporation v. National Life Ins. Co.*, C.C.A. Wis., 72 F.2d 921—*Hall v. Cottingham, D.C.S.C.*, 55 F. 2d 659, affirmed *Cottingham v. Hall*, C.C.A., 55 F.2d 664—*Jackson v. Railroad Commission of Texas*, D. C. Tex., 12 F.Supp. 348—*Stansbury v. Koss*, D.C.N.Y., 10 F.Supp. 477—*Monamotor Oil Co. v. Johnson*, D.C.Iowa, 3 F.Supp. 189, affirmed 54 S.Ct. 575, 292 U.S. 86, 78 L.Ed. 1141—*Wootton Land & Fuel Co. v. Ownbey*, C.C.A. Colo., 265 F. 91.

Mich.—*Michigan Trust Co. v. Land Owners Ass'n*, 284 N.W. 894, 288 Mich. 323.

Miss.—*First Nat. Bank v. Poston*, 97 So. 882, 140 Miss. 64.

19. U.S.—*Rogers v. Paving Dist. No. 1 of City of Eureka Springs*, C.C.A. Ark., 84 F.2d 555—*Newberry v. Davison Chemical Co.*, C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, two cases, 290 U.S. 660, 78 L.Ed. 571—*Brown v. Crawford*, D.C.Or., 254 F. 146.

20. U.S.—*Newberry v. Davison Chemical Co.*, C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, two cases, 290 U.S. 660, 78 L.Ed. 571—*Boynton v. Moffat Tunnel Improvement Dist.*, C.C.A. Colo., 57 F.2d 772, certiorari denied *Moffat Tunnel Improvement Dist. v. Boynton*, 53 S. Ct. 20, 287 U.S. 620, 77 L.Ed. 538—*Ingram v. Jones*, C.C.A. Okl., 47 F. 2d 135—*Russell v. Detrick*, C.C.A. Nev., 28 F.2d 175—*Road Improve-*

ment Dist. No. 7 of Poinsett County, Ark., *v. Guardian Savings & Trust Co.*, C.C.A. Ark., 8 F.2d 932, certiorari denied 46 S.Ct. 475, 271 U.S. 663, 70 L.Ed. 1139—*Eckerson v. Utter*, D.C. Idaho, 7 F.Supp. 201, affirmed, C.C.A., 78 F.2d 307—*McAtamney v. Commonwealth Hotel Const. Corporation*, D.C.N.Y., 296 F. 500.

Cal.—*Cross Water Co. v. Ferrero*, App., 90 P.2d 98.

La.—*State v. Great Atlantic & Pacific Tea Co.*, 183 So. 219, 190 La. 925, certiorari denied *Great Atlantic & Pacific Tea Co. v. State of Louisiana*, 59 S.Ct. 108, 305 U.S. 637, 83 L. Ed. 410.

Mich.—*Detroit Trust Co. v. Manilow*, 261 N.W. 303, 272 Mich. 211.

N.Y.—*Zenie v. Miskend*, 284 N.Y.S. 63, 245 App.Div. 634, affirmed 1 N.E.2d 367, 270 N.Y. 636—*Weiss v. Fox Theatres Corporation*, 242 N. Y.S. 283, 136 Misc. 312.

Vt.—*Weiner v. Prudential Ins. Co. of America*, 1 A.2d 708, 709, citing *Corpus Juris*.

15 C.J. p 1164 note 67.

Both suits must involve substantial identity in interests, rights, and purposes.—*U. S. v. Humboldt Lovelock Irr. Light & Power Co.*, C.C.A. Nev., 97 F.2d 38, reversing, D.C., 19 F.Supp. 489, certiorari denied *Humboldt Lovelock Irr. Light & Power Co. v. U. S.*, 59 S.Ct. 94, 305 U.S. 630, 83 L.Ed. 404.

Where issues or matters in controversy are different, both courts may obtain and retain jurisdiction.—*Brown v. Crawford*, D.C.Or., 254 F. 146—*Knudsen v. First Trust & Savings Bank*, Mont., 245 F. 81, 157 C. C.A. 377, affirming, D.C., *First Trust & Savings Bank v. Bitter Root Valley Irr. Co.*, 237 F. 732.

Where causes of action are different, the rule is inapplicable.—*Jones v. Maxwell Motor Co.*, 115 A. 312, 13 Del.Ch. 76.

Where separate and independent liabilities are involved, the actions may proceed concurrently.—*A. Paladini, Inc. v. Superior Court in and for City and County of San Francisco*, 21 P.2d 941, 218 Cal. 114.

Different parties

A suit involving the question of the right of the United States to dispose of or administer its property may be brought by it in a federal court notwithstanding the pendency in a state court of an action between other parties presenting the same question. The jurisdiction of the federal court is not ousted because individuals, suing in the state court, assert interests in, or the right to the use of, property which the government claims to be the owner of or to have the right to supervise and administer.—*U. S. v. Deasy*, D.C. Idaho, 24 F.2d 108.

21. U.S.—*Harkin v. Brundage*, Ill., 48 S.Ct. 268, 276 U.S. 36, 72 L.Ed. 457, reversing, C.C.A., 13 F.2d 617, and certiorari granted 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 838—*First Nat. Bank v. Horuff*, C.C.A. La., 65 F.2d 318.

22. U.S.—*Buck v. Colbath*, Minn., 2 Wall. 334, 18 L.Ed. 257.

15 C.J. p 1165 note 68.

23. U.S.—*Guardian Trust Co. v. Kansas City Southern R. Co.*, Mo., 171 F. 43, 96 C.C.A. 285, 28 L.R.A. N.S., 620.

15 C.J. p 1165 note 69.

24. U.S.—*Woodbury v. Allegheny & K. R. Co.*, C.C.Pa., 72 F. 371.

Large assets in one state

Federal court in Arizona did not abuse discretion in appointing re-

sham or collusive or a mere evasion of jurisdiction;²⁵ or the proceedings in such court, as in case of assignees filing an account, cannot be considered as a suit.²⁶ The issuance of the summons in a suit in equity wrongly begun on the law side does not give the federal court jurisdiction as against a state court in which the suit was begun between the issuance of the summons and the filing of the complaint.²⁷

The general rule under consideration is not applicable where, although an action in a state court is first instituted, exclusive authority is given a federal court,²⁸ as where, on the filing of a petition in bankruptcy, the jurisdiction of the federal court becomes exclusive within the authority of the Bankruptcy Act, see Bankruptcy § 29 a, or where a limitation of liability proceeding assumes such form that only a federal court is competent to afford relief.²⁹ Likewise, federal jurisdiction, although first attaching, must be relinquished to the state where

the matter involved is peculiarly within the province and duty of the state and its officers or courts.³⁰

The rules of comity must give way to constitutional rights; and where, notwithstanding the pendency of an appeal to a state court from an order of a state commission fixing or refusing to change utility rates, a supersedeas pending appeal has been refused and the rates are alleged to be confiscatory, the utility is entitled to apply to a federal court for relief.³¹

Both the general rule under consideration and the similar rule dealing with suits in rem or quasi in rem, are applicable only where both actions deal either actually or potentially with specific property or objects, and not where either or both actions are in personam, it being permissible in the latter instance for both actions, although involving the same issues, to proceed concurrently until a judgment is rendered in one which becomes res judicata in the other.³² In determining whether the rules

ceiver pendente lite for all assets of insolvent Utah building and loan association situated in Arizona, where association's assets in Arizona were greater than those in any other state, since interests of forum and creditors rendered inapplicable rule of comity recognizing title conferred by lex domicilii upon assignee.—*Intermountain Building & Loan Ass'n v. Gallegos*, C.C.A. Ariz., 78 F.2d 972, certiorari denied 56 S.Ct. 172, 296 U.S. 639, 80 L.Ed. 454.

25. U.S.—*Berl v. Crutcher*, C.C.A. Tex., 60 F.2d 440, certiorari denied 53 S.Ct. 314, 287 U.S. 670, 77 L.Ed. 578.—*Peltason, Tenenbaum & Harris v. Refunding Board of Arkansas*, D. Ark., 16 F.Supp. 179.—*Shoemaker v. Merrill Mortuaries*, D.C. Mont., 2 F.Supp. 672, appeal dismissed, C.C.A., *Merrill Mortuaries v. Shoemaker*, 71 F.2d 1012.

15 C.J. p 1165 note 72.

26. U.S.—*Shelby v. Bacon*, Pa., 10 How. 56, 13 L.Ed. 326.—*Farmers' Bank of Cuba City, Wis. v. Wright*, C.C. Iowa, 158 F. 841.

Statement criticized

The statement in *Shelby v. Bacon*, Pa., 10 How., U.S., 56, 13 L.Ed. 326, to the effect that the filing of an account in a state court did not constitute a suit and did not confer jurisdiction on the state court, is said to have been unnecessary to the decision and not to be in accord with the law of the state as declared by its own supreme court.—*Princess Lida of Thurn and Taxis v. Thompson*, Pa., 59 S.Ct. 275, 305 U.S. 456, 33 L.Ed. 285, affirming *Thompson v. Fitzgerald*, 198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of*

Thurn and Taxis v. Fitzgerald, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366.

27. U.S.—*Waldo v. Wilson*, N.C., 231 F. 654, 145 C.C.A. 540, reversing 221 F. 505, and certiorari denied 36 S.Ct. 724, 241 U.S. 673, 60 L.Ed. 1231.

28. U.S.—*In re Prunotto*, D.C.N.Y., 51 F.2d 602.

29. U.S.—*Langnes v. Green*, Wash., 51 S.Ct. 243, 282 U.S. 531, 75 L. Ed. 520, reversing, C.C.A., *The Aloha*, 35 F.2d 447, which reversed, D.C., *Petition of Langnes*, 32 F.2d 284, and certiorari granted *Langnes v. Green*, 50 S.Ct. 246, 281 U.S. 708, 74 L.Ed. 1131.

30. U.S.—*Hutchins v. Pacific Mut. Life Ins. Co. of California*, D.C. Cal., 20 F.Supp. 150.

Relinquishing property to receiver in dissolution proceedings

In a stockholders' suit for a receivership in which no rights of creditors were involved, a federal court properly directed the assets in the hands of its receiver turned over to the receiver subsequently appointed by a state court in its home state, in a suit for dissolution of the corporation instituted pursuant to a vote of its stockholders.—*Yocum v. Parry Medicine Co.*, C.C. A. Pa., 5 F.2d 273.

31. U.S.—*Oklahoma Natural Gas Co. v. Russell*, Okl., 43 S.Ct. 353, 261 U.S. 290, 67 L.Ed. 659.—*Oklahoma Gas & Electric Co. v. Corporation Commission of Oklahoma*, D.C. Okl., 1 F.Supp. 966.

32. U.S.—*Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285, affirming *Thompson v. Fitzgerald*,

198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366.—*Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 386, 294 U.S. 189, 79 L.Ed. 850, reversing *Commonwealth ex rel. Schnader v. Penn General Casualty Co.*, 173 A. 637, 316 Pa. 1, certiorari granted *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed. 651.—*Grubb v. Public Utilities Commission of Ohio*, 50 S.Ct. 374, 281 U.S. 470, 74 L.Ed. 972, affirming, D.C., 33 F.2d 323.—*Riehle v. Margolies*, N.Y., 49 S.Ct. 310, 279 U.S. 218, 73 L.Ed. 669, affirming, C.C.A., *Hatch v. Morosco Holding Co.*, 26 F.2d 247, certiorari granted *Riehle v. Margolies*, 49 S.Ct. 29, 278 U.S. 591, 73 L.Ed. 523.—*Kline v. Burke Const. Co.*, Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077, reversing, C.C.A., *Burke Const. Co. v. Kline*, 271 F. 605.—*Wells v. Helms*, C.C.A. Okl., 105 F.2d 402.—*Byrd-Frost, Inc. v. Elder*, C.C.A. Tex., 93 F.2d 30, 115 A.L.R. 342, certiorari denied 58 S.Ct. 646, 303 U.S. 647, 82 L.Ed. 1108.—*Bryant v. Atlantic Coast Line R. Co.*, C.C.A. N.Y., 92 F.2d 589.—*Armour & Co. v. Miller*, C.C.A. N.D., 91 F.2d 521.—*Rogers v. Paving Dist. No. 1 of City of Eureka Springs*, C.C.A. Ark., 84 F.2d 555.—*Sain v. Montana Power Co.*, C.C.A. Mont., 84 F.2d 126, reversing, D.C., 5 F.Supp. 792.—*Vacuum Oil Co. v. Land Title Guaranty & Trust Co.*, C.C.A. Ohio, 80 F.2d 476.—*U. S. v. Bank of New York & Trust Co.*, C.C.A. N.Y., 77 F.2d 866, affirming, D.C., 10 F.Supp.

are applicable, the line of distinction between proceedings in personam and those in rem is not to be drawn with academic nicety; the question is one of practical regard for the orderly and efficient administration of justice.³³

After termination, by dismissal or otherwise, of litigation in one court, or after the release of property in the possession of the court or its officer, any exclusive jurisdiction or freedom from interference which it may have possessed is at an end; and another court may, in a proper case, deal with the property or subject matter which, by the former suit, was not withdrawn forever from subsequent litigation.³⁴

A state court's priority of jurisdiction may be waived and abandoned by acquiescence and long delay,³⁵ and plaintiff in the second suit, having

selected the forum, cannot complain that defendant asserts his defense there.³⁶

As between a state and a federal court, the mere pendency of a suit in one court does not exclude the jurisdiction of the other court over another suit subsequently instituted therein,³⁷ it not being a bar to the subsequent suit, as shown supra § 522, nor a ground for the abatement thereof, as noted in Abatement and Revival § 67. The usual practice is for the court in which the second action is brought not to dismiss such action, but to suspend proceedings therein until the first action is tried and determined,³⁸ and in a few cases the federal courts have declined even to stay proceedings until the determination of an action between the same parties for the same cause previously commenced in a state court, basing such refusal on a lack of power.³⁹ The question may be one, not of the ex-

269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393, affirmed 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, and affirmed, C.C.A., U. S. v. President and Directors of Manhattan, 77 F.2d 881—Harnischfeger Sales Corporation v. National Life Ins. Co., C.C.A.Wis., 72 F.2d 921—Schwartz v. Randolph, C.C.A.Md., 72 F.2d 892, 96 A.L.R. 487—Desha County, Ark., v. Crocker First Nat. Bank, C.C.A.Md., 72 F.2d 359—Chicago Title & Trust Co. v. Fox Theatres Corporation, C.C.A.N.Y., 69 F.2d 60, 91 A.L.R. 991—Southern Pac. Co. v. Klinge, C.C.A.Utah, 65 F.2d 85, certiorari denied Klinge v. Southern Pac. Co., 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569—Boynton v. Moffat Tunnel Improvement Dist., C.C.A.Colo., 57 F.2d 773, certiorari denied Moffat Tunnel Improvement Dist. v. Boynton, 53 S.Ct. 20, 287 U.S. 620, 77 L.Ed. 538—Hall v. Cottingham, D.C.S.C., 55 F.2d 659, affirmed, C.C.A., Cottingham v. Hall, 55 F.2d 664—Great North Woods Club v. Raymond, C.C.A.Mich., 54 F.2d 1017—Ackerman v. Tobin, C.C.A.Mo., 22 F.2d 541, certiorari denied Tobin v. Ackerman, 48 S.Ct. 321, 276 U.S. 628, 72 L.Ed. 739—Brown v. Duffin, C.C.A.Ky., 13 F.2d 708—General Outdoor Advertising Co. v. Williams, C.C.A.Mass., 12 F.2d 773, reversing, D.C., 9 F.2d 165, and certiorari denied Williams v. General Outdoor Advertising Co., 47 S.Ct. 111, 273 U.S. 721, 71 L.Ed. 858—Pure Oil Co. v. Standard Oil Co., D.C.La., 2 F.2d 260—Meade v. Phillips, D.C.N.Y., 27 F.Supp. 800—Rydstrom v. Massachusetts Accident Co., D.C.Md., 25 F.Supp. 359—Standard Accident Ins. Co. v. Alexander, Inc., D.C.Tex., 23 F.Supp. 807—Jackson v. Railroad Commission of Texas, D.C.Tex., 12 F.Supp. 348—Stansbury

v. Koss, D.C.N.Y., 10 F.Supp. 477—Dennison Brick & Tile Co. v. Chicago Trust Co., C.C.A.Ohio, 286 F. 818.

Ariz.—Forst v. Intermountain Building & Loan Ass'n, 65 P.2d 1379, 49 Ariz. 246.

Ga.—F. S. Royster Guano Co. v. Stedham, 172 S.E. 555, 178 Ga. 217.

Iowa.—Lippke v. Portable Milling Co., 244 N.W. 845, 215 Iowa 134.

Mo.—Carroll v. St. Louis-San Francisco Ry. Co., App., 274 S.W. 837.

Tex.—Trinity Universal Ins. Co. v. De Martin, Civ.App., 118 S.W.2d 901, error refused.

15 C.J. p 1165 notes 74-76.

Lack of necessity of possession of property

Where the prior jurisdiction is of such nature that possession of property by the court can never be necessary, the rule must be inapplicable.

—Hinkley v. Art Students' League of New York, C.C.A.Md., 37 F.2d 225, affirming, D.C., Art Students' League of New York v. Hinkley, 31 F.2d 469, and certiorari denied Hinkley v. Art Students League of New York, 50 S.Ct. 247, 281 U.S. 733, 74 L.Ed. 1149.

33. Pa.—Thompson v. Fitzgerald, 198 A. 58, 329 Pa. 497, certiorari granted Princess Lida of Thurn and Taxis v. Fitzgerald, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed Princess Lida of Thurn and Taxis v. Thompson, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285.

34. U.S.—International & G. N. Ry. Co. v. Anderson County, Tex., 38 S.Ct. 370, 246 U.S. 424, 62 L.Ed. 807, affirming, Civ.App., 174 S.W. 305—Tyronza Special School Dist. of Poinsett County v. Speer, C.C.A.Ark., 94 F.2d 825—Federal Reserve Bank of Richmond v. Kalin, C.C.A.N.C., 77 F.2d 50—Mathis v. Ligon,

C.C.A.Okl., 89 F.2d 455, denying rehearing 37 F.2d 635, and certiorari denied 51 S.Ct. 26, 282 U.S. 846, 75 L.Ed. 751—Drew v. Burley, D.C.Or., 287 F. 916—Price v. Bryan & C. T. I. Ry. Co., D.C.Tex., 272 F. 753.

Miss.—Gardner v. Standard Oil Co., 175 So. 203, 179 Miss. 176.

Mo.—State ex rel. Koeln v. Motlow, 76 S.W.2d 421, 336 Mo. 50, certiorari granted Motlow v. State of Missouri ex rel. Koeln, 55 S.Ct. 545, 294 U.S. 703, 79 L.Ed. 1239, affirmed 55 S.Ct. 661, 295 U.S. 97, 79 L.Ed. 1327, rehearing denied 55 S.Ct. 912, 295 U.S. 769, 79 L.Ed. 1709.

15 C.J. p 1163 note 66.

35. U.S.—Fred T. Ley & Co. v. Wheat, C.C.A.Fla., 64 F.2d 257.

Failure of commission to act

Failure of state commission to act on the schedule of rates for two years after decree of state court reversing order of commission and directing further proceedings, while telephone company was operating at loss, presents case for equitable relief in federal court.—Smith v. Illinois Bell Telephone Co., Ill., 46 S.Ct. 408, 270 U.S. 587, 70 L.Ed. 747.

36. Mich.—Wabash Ry. Co. v. Marshall, 195 N.W. 134, 224 Mich. 593.

37. U.S.—Hudson v. McWilliams, C.C.A.Cal., 17 F.2d 733.

38. Fla.—Wade v. Clower, 114 So. 548, 551, 94 Fla. 817, citing Corpus Juris.

15 C.J. p 1163 note 64.

39. U.S.—Woren v. Witherbee, Sherman & Co., D.C.N.Y., 240 F. 1013—Defiance Water Co. v. Defiance, C.C.Ohio, 100 F. 178.

15 C.J. p 1163 note 65.

Propriety of stay see Actions § 133 e (7).

istence of jurisdiction, but of the propriety of exercising it by disposing of the case.⁴⁰ Again, jurisdiction of the court having priority may be exclusive only so far as to render the decision of the other court subordinate thereto, without regard to which judgment or decree is first rendered.⁴¹

Prior proceeding in probate court. The exclusive jurisdiction of a probate court or court exercising probate jurisdiction over the administration of the estate of a decedent, does not prevent a federal court, where jurisdictional requisites exist, from entertaining and proceeding with a suit to construe a will, establish rights, adjudicate the validity and amount of a claim, enforce a personal liability of an executor or administrator, or obtain any other adjudication, judgment, or relief which does not interfere with the administration of the estate by the probate court or disturb that court's control and possession of property.⁴² This is especially true where the controversy in the second suit falls within a field in which the probate court has no power to act.⁴³

Where part of the estate of a decedent is situated in the District of Columbia and part in a state, the fact that a court of one jurisdiction has, as to property within its borders, granted letters of administration or entertained an action to construe a will does not prevent a court of the other jurisdiction from doing likewise, as to property within its territorial limits.⁴⁴

§ 530. Prisoners under Arrest, Commitment, or Sentence

Conflicting jurisdiction between state and federal

al courts with respect to prisoners under arrest, commitment, or sentence, is considered in the title Criminal Law § 145.

§ 531. — Persons Detained under State Authority

Conflicting jurisdiction between state and federal courts with respect to persons detained under state authority is considered in the title Criminal Law § 145.

§ 532. — Persons Detained under Federal Authority

Conflicting jurisdiction between state and federal courts with respect to persons detained under federal authority is considered in the title Criminal Law § 145.

§ 533. Property in Custody of Another Court

The rule that where property is in the custody of a court of competent jurisdiction, another court of concurrent jurisdiction will not deprive it of the right to deal with such property or interfere with its possession, applies as between federal and state courts, but possession of property by either court does not deprive the other of the power to render judgments not in conflict with the other court's authority.

As between federal and state courts, where property is in the custody of one court of competent jurisdiction, another court of concurrent jurisdiction cannot deprive it of the right to deal with such property or interfere with its possession.⁴⁵ The exclusive jurisdiction which arises

40. U.S.—Langnes v. Green, Wash., 51 S.Ct. 243, 282 U.S. 531, 75 L.Ed. 520, reversing, C.C.A., The Aloha, 35 F.2d 447, which reversed, D.C., Petition of Langnes, 32 F.2d 284, and certiorari granted Langnes v. Green, 50 S.Ct. 246, 281 U.S. 708, 74 L.Ed. 1131.

41. U.S.—Sharon v. Tenry, C.C.Cal., 36 F. 337, 13 Sawy. 387, 1 L.R.A. 572, affirmed 9 S.Ct. 705, 131 U.S. 40, 33 L.Ed. 94.

15 C.J. p 1165 note 70.

42. U.S.—Pufahl v. Parks' Estate, 57 S.Ct. 151, 299 U.S. 217, 81 L.Ed. 133, affirming In re Parks' Estate, 263 Ill.App. 95, certiorari granted Pufahl v. Parks' Estate, 56 S.Ct. 749, 298 U.S. 649, 80 L.Ed. 1378—Oxley v. Sweetland, C.C.A.W.Va., 94 F.2d 33—Franceschi v. De Tord, C.C.A.Puerto Rico, 71 F.2d 95—Cottingham v. Hall, C.C.A.S.C., 55 F.2d 664, affirming, D.C., Hall v. Cottingham, 55 F.2d 659—Gilmore v. Gilmore, D.C.La., 18 F.2d 614—

Vanderwater v. City Nat. Bank of Kankakee, D.C.Ill., 28 F.Supp. 89—U. S. v. Wood, D.C.Mass., 27 F. Supp. 375—Dolcater v. Manufacturers & Traders Trust Co., D.C.N.Y., 25 F.Supp. 637—Harrison v. Moncravie, C.C.A.Okla., 264 F. 776, appeal dismissed Van Tine v. Moncravie, 41 S.Ct. 374, 255 U.S. 562, 65 L.Ed. 787.

Conn.—Security Co. v. Pratt, 32 A. 396, 65 Conn. 161.

Iowa.—Reconstruction Finance Corporation v. Dingwell, 278 N.W. 281, 224 Iowa 1172.

Mich.—In re McLouth's Estate, 274 N.W. 759, 281 Mich. 191.

43. U.S.—Hamburg Bank v. Ouachita Nat. Bank in Monroe, C.C.A. Ark., 78 F.2d 100, certiorari denied Ouachita Nat. Bank v. Hamburg Bank, 56 S.Ct. 382, 296 U.S. 655, 80 L.Ed. 467.

44. D.C.—In re Grinnage's Estate, 101 F.2d 695, 69 App.D.C. 370.

Va.—Rinker v. Trout, 198 S.E. 913, 171 Va. 327.

45. U.S.—Princess Lida of Thurn and Taxis v. Thompson, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 255, affirming Thompson v. Fitzgerald, 198 A. 58, 329 Pa. 497, certiorari granted Princess Lida of Thurn and Taxis v. Fitzgerald, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366—Lion Bonding & Surety Co. v. Karatz, 43 S.Ct. 480, 262 U.S. 77, 67 L.Ed. 871, reversing, C.C.A.Minn., 281 F. 1021, and, C.C.A.Neb., Hertz v. Lion Bonding & Surety Co., 280 F. 540, certiorari granted 43 S.Ct. 89, 260 U.S. 713, 67 L.Ed. 477, and appeal dismissed 43 S.Ct. 90, 260 U.S. 696, 37 L.Ed. 468, motion denied 43 S.Ct. 641, 262 U.S. 640, 67 L.Ed. 1151, and 43 S.Ct. 701, 262 U.S. 733, 67 L. Ed. 1206—Investors Syndicate v. Smith, C.C.A.Or., 105 F.2d 611—Reconstruction Finance Corporation v. Zimmerman, C.C.A.S.C., 76 F.2d 313, 316, citing Corpus Juris—Irving

from the possession of the res extends to the issues adjudicated, and to those ancillary, incidental, and dependent thereto,⁴⁶ and the tribunal whose jurisdiction first attaches holds the res to the exclusion of other courts until its duty is fully performed and the jurisdiction involved is exhausted.⁴⁷ The rule that a court which first acquires jurisdiction of the res will retain it is not limited to cases where property has been seized under judicial process before the institution of the second suit in the other court, but applies as well to

suits to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in all suits of like nature;⁴⁸ and the res need not be anything tangible, but may be merely a status, such as marriage or the probate of a will;⁴⁹ although it has been said that the rule is limited to actions which deal directly or potentially with specific property or debts.⁵⁰

In order for the rule to operate, there must have been a valid seizure and actual control of the property under legal process,⁵¹ as the property

Trust Co. v. Fleming, C.C.A.W.Va., 73 F.2d 423, reversing, D.C., In re McCrory Stores Corporation, 8 F. Supp. 811—In re Greenlie-Halliday Co., C.C.A.N.Y., 57 F.2d 173—Bryan v. Speckman, C.C.A.Ga., 53 F.2d 463, reversing, D.C., In re Lookout Mountain Hotel Co., 50 F.2d 421, and certiorari denied *Speckman v. Bryan*, 52 S.Ct. 312, 285 U.S. 539, 76 L.Ed. 932—Ingram v. Jones, C.C.A.Okl., 47 F.2d 135—Ackerman v. Tobin, C.C.A.Mo., 22 F.2d 541, certiorari denied *Tobin v. Ackerman*, 48 S.Ct. 321, 276 U.S. 638, 72 L.Ed. 739—In re Gallimore, D.C.Ga., 16 F.2d 800, affirmed C.C.A., 21 F.2d 999—Mace v. Mayfield, D.C.S.C., 10 F.2d 231—Bortman v. Urban Motion Picture Industries, C.C.A.N.Y., 4 F.2d 913—Cohen v. Alcoa Oil Co., D.C.Tex., 23 F.Supp. 425—U. S. ex rel. Strewl v. Warden of Clinton Prison at Dannemora, D.C.N.Y., 21 F.Supp. 502—In re Howard Lanin Music Corporation, D.C.Pa., 18 F.Supp. 123—U. S. v. Sterling, D.C.N.Y., 231 F. 695—Berg v. Fidelity & Casualty Co. of New York, C.C.A.Kan., 274 F. 311—Havner v. Hegnes, C.C.A.Iowa, 269 F. 537—Martin v. Oliver, C.C.A.Ark., 260 F. 89, 171 C.C.A. 125—Brown v. Crawford, D.C.Or., 254 F. 146—O'Neill v. Welch, Pa., 245 F. 261, 157 C.C.A. 453, reversing, D.C., Welch v. Union Casualty Ins. Co., 238 F. 963.
Ala.—Ex parte Consolidated Graphite Corporation, 129 So. 262, 221 Ala. 394.
Ariz.—Forst v. Intermountain Building & Loan Ass'n, 65 P.2d 1379, 49 Ariz. 246.
N.Y.—Guaranty Trust Co. of New York v. New York & Queens County Ry. Co., 4 N.Y.S.2d 532, 167 Misc. 795.
N.C.—Hambley & Co. v. H. W. White & Co., 133 S.E. 399, 192 N.C. 31.
Vt.—In re Dawley, 131 A. 847, 99 Vt. 396.
15 C.J. p 1169 note 36.

By injunction, a court asserts its jurisdiction over property involved, over the res, and vests itself with exclusive right to control and administer it, and when thus taken into

a court's jurisdiction, the res is as much withdrawn from judicial power of other courts as if it had been carried into a different territorial sovereignty.—*Sain v. Montana Power Co.*, D.C.Mont., 20 F.Supp. 843.

46. U.S.—*Sain v. Montana Power Co.*, supra.

Fees and charges

(1) Court having jurisdiction over and possession of res is authorized to fix fees and charges to which res is subject.—*Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, C.C.A.Tex., 77 F.2d 152.

(2) In application to fix allowances in receivership, chancery is without jurisdiction to fix fees in proceeding in federal court.—*Landsman v. Globe Art Mfg. Co.*, 141 A. 313, 102 N.J. Eq. 464.

47. U.S.—Investors Syndicate v. Smith, C.C.A.Or., 105 F.2d 611—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn., v. Lafferty, 16 F.Supp. 740, certiorari denied *Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn.*, 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied *Cramer v. Phoenix Mut. Life Ins. Co.*, 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, *Coburn v. Phoenix Mut. Life Ins. Co. of Hartford, Conn.*, 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied *Coburn v. Phoenix Mut. Life Ins. Co.*, 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied *Cramer v. Aetna Life Ins. Co.*, 58 S.Ct. 141, 302 U.S. 339, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied *Coburn v. Aetna Life Ins. Co.*, 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602.

Pa.—*Thompson v. Fitzgerald*, 198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed *Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285.

Mechanic's lien on distillery premises cannot be enforced in a state court, after proceedings in rem have been commenced in a United States court.—*Heidritter v. Elizabeth Oil-Cloth Co.*, C.C.N.J., 6 F. 138, affirmed 5 S.Ct. 135, 112 U.S. 294, 28 L.Ed. 729.

Where trustee in bankruptcy obtained judgment that he was entitled to bankrupt's funds which trust company had misappropriated, bankruptcy court should retain jurisdiction to determine whether trust company's assets in hands of commissioner of banks were impressed with a trust in favor of bankruptcy trustee, notwithstanding trustee filed preference claim with commissioner.—*MacDonald v. Guy*, C.C.A.Mass., 63 F.2d 334.

43. U.S.—*Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285, affirming *Thompson v. Fitzgerald*, 198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366—*Mace v. Mayfield*, D.C.S.C., 10 F.2d 231.

Where county court made or confirmed appointment of trustees, audited accounts of trustees, and controlled the management and administration of trust funds for considerable period of time, a suit in federal court for accounting by, and for removal of, trustees would be restrained, since county court had exclusive jurisdiction over the res.—*Thompson v. Fitzgerald*, 198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed *Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285.

49. Pa.—*Thompson v. Fitzgerald*, supra.

50. Ariz.—*Forst v. Intermountain Building & Loan Ass'n*, 65 P.2d 1379, 49 Ariz. 246.

51. U.S.—*Eckerson v. Utter*, D.C. Idaho, 7 F.Supp. 201, affirmed, C.C.A., 78 F.2d 307—*Fountain v. 624*

must be in the actual or constructive possession⁵² of a court⁵³ other than the one that is asked to act;⁵⁴ but constructive possession is sufficient,⁵⁵ although it is otherwise with respect to a proceeding in attachment which merely creates a lien on the property for payment of the judgment and does not draw it into the custody of the court.⁵⁶ A court which has the actual custody of property to which another court of concurrent jurisdiction has a superior right may lawfully retain the property until the latter court, through its proper officers, requests and offers to receive the actual possession.⁵⁷

As regards actions quasi in rem, the rule that the first filed of two actions in different courts excludes the later action is limited to actions dealing actually or potentially with specific property or objects not actually seized by judicial process,⁵⁸ and for the first of two actions quasi in rem to exclude the later one both must invoke the same jurisdiction.⁵⁹

Where the foregoing rules apply, property in the custody of a federal court of competent jurisdiction cannot be interfered with by process from a state court;⁶⁰ and, on the other hand, if proper-

Pieces of Timber, D.C.Ala., 140 F. 381.

Necessity for seizure under legal process

That vessel allegedly seized because of use in unlawful fishing had been seized by the Washington director of fisheries did not place vessel in "custody of the law" so as to justify proceeding in rem in state court for forfeiture of vessel, since, to be in "custodia legis," property must be taken by legal process. Also, the attachment by United States marshal of libeled vessel did not necessarily give federal court exclusive jurisdiction, where attachment was not under authority of the revenue law.—*The Bessie Mac*, D.C.Wash., 21 F.Supp. 220.

Property in custody of marshal is not liable to be proceeded against for the internal revenue tax while in his custody.—*The Victory*, D.C.Mass., 28 F.Cas.No.16,938, 2 Sprague 226.

Property in custody of sheriff

Where property is seized under a state process and is in the custody of the sheriff awaiting the judgment of the court, the possession of the sheriff cannot be legally interfered with by internal revenue officers.—*Buck v. Colbath*, Minn., 3 Wall., U.S., 334, 18 L.Ed. 257—14 Op. Atty.-Gen. p 370.

52. U.S.—*Ackerman v. Tobin*, C.C.A. Mo., 22 F.2d 541, certiorari denied Tobin v. Ackerman, 48 S.Ct. 321, 276 U.S. 628, 72 L.Ed. 739—*Drew v. Burley*, D.C.Or., 287 F. 916.

Pendency of suit in federal court to obtain a judgment and a decree establishing a mechanic's lien, in which the court does not take possession of the property which remains in defendant, does not, however, affect the jurisdiction of the state court to entertain a suit for the foreclosure of a mortgage on the property.—*National Fdy., etc., Works v. Oconto City Water Supply Co.*, Wis., 113 F. 793, 51 C.C.A. 465.

Bonds deposited as bail on appeal in criminal case

Order in creditor's suit directing payment to plaintiff of remainder of bonds deposited in United States dis-

trict court as bail on appeal, after appeal bond was satisfied, is within court's authority where no process was issued by the federal trial court.—*Dickerman v. Ahern*, 269 P. 180, 93 Cal.App. 166.

53. U.S.—*Commonwealth Trust Co. of Pittsburgh v. Bradford*, Pa., 56 S.Ct. 600, 297 U.S. 613, 80 L.Ed. 920, affirming, C.C.A., *Commonwealth Trust Co. of Pittsburgh v. Atwood*, 78 F.2d 92, certiorari granted 56 S.Ct. 124, 296 U.S. 566, 80 L.Ed. 399.

Administrative or legislative agencies

Administrative and legislative agencies are neither courts nor agents of courts, and do not come within doctrine of comity that property in possession of a court by its agents will not be disturbed by other courts.—*Acken v. New York Title & Mortgage Co.*, D.C.N.Y., 9 F.Supp. 521.

Possession of trustee appointed by court

Where national bank receiver consented to state court's appointment of successor trustee for mortgage pool trust of which bank had been trustee, federal court properly exercised jurisdiction of receiver's suit to obtain adjudication of his rights in pool, as against contention that suit would unnecessarily interfere with control of res in state court's custody and that under rules of comity federal court should have dismissed suit.—*Commonwealth Trust Co. of Pittsburgh v. Bradford*, 56 S.Ct. 600, 297 U.S. 613, 80 L.Ed. 920, affirming, C.C.A., *Commonwealth Trust Co. of Pittsburgh v. Atwood*, 78 F.2d 92, certiorari granted 56 S.Ct. 124, 296 U.S. 566, 80 L.Ed. 399.

Funds deposited with clerk of court

As respects federal court's jurisdiction of action by receiver of insolvent national bank to recover bonds securing state court clerk's deposits, funds which had been deposited with clerk as provided by state law were in custody of state court; but the federal court had jurisdiction of action by receiver of

insolvent national bank to recover bonds securing state court clerk's deposits consisting of litigants' awards and fees and costs, notwithstanding clerk secured money thus deposited by reason of his official position, where state court never assumed jurisdiction over bonds.—*Utter v. Eckerson*, C.C.A.Idaho, 78 F.2d 307, affirming, D.C., *Eckerson v. Utter*, 7 F.Supp. 201.

54. U.S.—*Acken v. New York Title & Mortgage Co.*, D.C.N.Y., 9 F.Supp. 521.

55. U.S.—*First Nat. Bank v. Charles Broadway Rouss, Inc.*, C.C.A.Ga., 61 F.2d 489, certiorari denied *Charles Broadway Rouss, Inc. v. First Nat. Bank*, 53 S.Ct. 314, 287 U.S. 670, 77 L.Ed. 577—*In re Greenlie-Halliday Co.*, C.C.A.N.Y., 57 F.2d 173.

Pa.—*Thompson v. Fitzgerald*, 198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed *Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285.

15 C.J. p 1171 note 43.

56. U.S.—*National Fire Ins. Co. v. Sanders*, C.C.A.Tex., 38 F.2d 212, reversing, D.C., 33 F.2d 157—*Pacific Coast Pipe Co. v. Conrad City Water Co.*, Mont., 245 F. 846, 158 C.C.A. 186, affirming, D.C., 237 F. 673.

15 C.J. p 1171 note 44.

57. U.S.—*St. Louis Boatmen's Bank v. Fritzen*, Kan., 135 F. 650, 68 C.C.A. 288, reversing, C.C., *Weldon v. Fritzen*, 128 F. 608, and certiorari denied 25 S.Ct. 803, 198 U.S. 586, 49 L.Ed. 1174.

58. U.S.—*Boynnton v. Moffat Tunnel Improvement Dist.*, C.C.A.Colo., 57 F.2d 772, certiorari denied *Moffat Tunnel Improvement Dist. v. Boynnton*, 53 S.Ct. 20, 287 U.S. 620, 77 L.Ed. 538.

59. U.S.—*Boynnton v. Moffat Tunnel Improvement Dist.*, supra.

60. U.S.—*C. T. C. Investment Co. v. Daniel Boone Coal Corporation*, D.C.Ky., 58 F.2d 305—*In re Schulte*

ty has come into the possession of a state court | interfere by replevin or otherwise with such possession of competent jurisdiction a federal court cannot | session.⁶¹ Accordingly, property seized under

United, D.C.N.Y., 50 F.2d 243—Central Surety & Insurance Corporation v. Bagley, D.C.Cal., 44 F.2d 808—Ford v. U. S., Okl., 260 F. 657, 171 C.C.A. 421.

Ga.—Inter-Southern Life Ins. Co. v. McQuarie, 96 S.E. 424, 148 Ga. 233. 15 C.J. p 1169 note 37.

Jurisdiction attaching before state liquidation

Jurisdiction obtained by federal district court over suit against bank did not fall when for undisclosed cause bank went into liquidation under Louisiana bank liquidation law, where representatives of bank's assets had thereupon been made parties, and consent of Louisiana civil district court was not necessary to make representatives of bank parties to suit instituted before liquidation proceedings were commenced.—Interstate Trust & Banking Co. v. Jones County, Miss., C.C.A.La., 77 F. 2d 806, certiorari denied 56 S.Ct. 124, 296 U.S. 608, 80 L.Ed. 431.

Money deposited in court

Where proceeds of life policies were deposited in registry of federal district court, such court had exclusive jurisdiction to determine all questions respecting title, possession, and control of proceeds.—Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Iowa, 91 F.2d 141, affirming, D.C., Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty, 16 F.Supp. 77, certiorari denied Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 303 U.S. 739, 82 L.Ed. 571, rehearing denied Cramer v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied Coburn v. Phoenix Mut. Life Ins. Co. of Hartford, Conn., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied Coburn v. Phoenix Mut. Life Ins. Co., 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied Cramer v. Aetna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 339, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied Coburn v. Aetna Life Ins. Co., 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602.

State court judgment is not attachable lien on bonds deposited with federal court clerk by alien in lieu of bail to appear for deportation judgment and deposited with designated depository by clerk.—In re Stark, D.C.N.Y., 36 F.2d 280.

Water rights

The principle that either state or federal court by acquiring possession of res acquires exclusive jurisdiction applies to water right suits.

—Sain v. Montana Power Co., D.C. Mont., 20 F.Supp. 843.

Appointment of receiver by state court

An order of state court directing state insurance commissioner to take possession of business and property of insurance corporation and enjoining others from taking possession was unauthorized, where federal district court had first acquired jurisdiction to liquidate corporation's property by prior filing of receivership suit and had issued injunction against interference. The state court, having appointed receiver for corporation after federal court, in prior proceeding, had acquired jurisdiction over corporation's property, should give receiver directions for surrender of property and may make suitable orders permitting him to take possession and proceed with liquidation when federal court surrenders its jurisdiction; and by confirming his right to liquidate insurance corporation after federal court had acquired jurisdiction, state court conferred on commissioner requisite authority to apply to federal court to relinquish its jurisdiction in favor of state administration.—Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 55 S.Ct. 386, 294 U.S. 189, 79 L.Ed. 850, reversing Commonwealth ex rel. Schnader v. Penn General Casualty Co., 173 A. 637, 316 Pa. 1, certiorari granted Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed. 651.

61. U.S.—Pufahl v. Parks' Estate, 57 S.Ct. 151, 299 U.S. 217, 81 L.Ed. 133, affirming In re Parks' Estate, 283 Ill.App. 95, certiorari granted Pufahl v. Parks' Estate, 56 S.Ct. 749, 298 U.S. 649, 80 L.Ed. 1378—Hutchins v. Pacific Mut. Life Ins. Co. of California, C.C.A.Cal., 97 F. 2d 58, affirming, D.C., 20 F.Supp. 150—Department of Financial Institutions of Indiana v. Mercantile-Commerce Bank & Trust Co., C.C.A.Ind., 92 F.2d 639, certiorari denied Mercantile-Commerce Bank & Trust Co. v. Department of Financial Institutions of State of Indiana, 58 S.Ct. 760, 303 U.S. 656, 82 L.Ed. 1116, two cases—In re Standard Baths, C.C.A.N.Y., 85 F. 2d 110, certiorari denied Virdone v. Dows Estate, 57 S.Ct. 231, 299 U.S. 604, 81 L.Ed. 446—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, 290 U.S. 660, 78 L.Ed. 571, two cases—Link-Belt Co. v. Hanner, D.C.Fla., 12 F.2d 453—In re Garner, D.C.Pa., 10 F.Supp. 380—U. S. v. Barber, D.C.Fla., 289 F.

523—Lydick v. Neville, C.C.A.Neb., 287 F. 479—O'Neil v. Welch, Pa., 245 F. 261, 157 C.C.A. 453, reversing, D.C., Welch v. Union Casualty Ins. Co., 238 F. 968—Smith v. Schwed, C.C.Mo., 9 F. 483, dismissed 1 S.Ct. 221, 106 U.S. 183, 27 L.Ed. 156.

Vt.—In re Dawley, 131 A. 847, 99 Vt. 308.

15 C.J. p 1170 note 42.

Money deposited in court

Plaintiff, who by depositing money in court obtained temporary injunction, is in no position to claim that the money was not in custody of the law because order requiring deposit was conditional on deposit of tax receipts by defendant, and although the suit in which money was ordered deposited to await final determination of another suit had been dismissed, the money was still in the custody of the law and could not be recovered in a federal court.—Menasha Wooden Ware Co. v. Southern Oregon Co., Or., 244 F. 90, 156 C.C.A. 518—Menasha Wooden Ware Co. v. Southern Oregon Co., 244 F. 83, 156 C.C.A. 511.

Property attached in state courts

Where plaintiff in state court attaches, proceeds of drafts in hands of bank, and afterward forwarding bank, a nonresident, brings action in federal court claiming title to funds, forwarding bank may be required to litigate its claim in state court.—Hambley & Co. v. H. W. White & Co., 133 S.E. 399, 192 N.C. 31.

Appointment of receiver by federal court

(1) Receiver appointed by federal court had no authority to direct sheriff, theretofore levying on property under state court judgment, to return execution.—Chicago Trust Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 302.

(2) Neither federal court nor receiver had right to interfere with levy on execution issued pursuant to judgment theretofore rendered in state court, and judgment creditors are entitled to relief as against receiver wrongfully interfering with sheriff in levy of execution on judgment theretofore rendered by state court.—Newberry v. Davison Chemical Co., C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, 290 U.S. 660, 78 L.Ed. 571, two cases—C. T. C. Investment Co. v. Daniel Boone Coal Corporation, D.C.Ky., 58 F.2d 305.

(3) An order of federal court appointing receiver is not subject to modification with respect to delivery of property to receiver, since it did not interfere with the sheriff with respect to possession or levy of ex-

process from a federal court cannot be replevied in a state court,⁶² although it has also been held that a state court may entertain replevin in such case where the federal court consents,⁶³ where the

property seized is that of a third person,⁶⁴ and where the value of the property is below the limit of the jurisdiction of the federal court.⁶⁵ Likewise, where the state court has exceeded its

execution.—*Chicago Trust Co. v. Daniel Boone Coal Corporation*, supra.

(4) As between court having exclusive jurisdiction of property and court whose receiver took wrongful possession, former alone can decide whether latter's receiver should be reimbursed from property for expenditures.—*Speakman v. Bryan*, C.C.A.Ga., 61 F.2d 430.

Property in possession of state official

(1) Where property in the hands of a state superintendent of insurance, or a commissioner of banking and insurance, is regarded as in custodia legis, federal courts will not interfere.—*U. S. v. Bank of New York & Trust Co.*, C.C.A.N.Y., 77 F.2d 866, affirming, D.C., 10 F.Supp. 269, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393, affirmed 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, and affirmed, C.C.A., *U. S. v. President and Directors of Manhattan*, 77 F.2d 881—*Jacoby v. Bond & Mortgage Guarantee Co.*, C.C.A.N.Y., 72 F.2d 420, certiorari denied 55 S.Ct. 216, 293 U.S. 619, 79 L.Ed. 707—*Fulla v. Warranty Building & Loan Ass'n of Newark*, N. J., D.C.N.Y., 5 F.Supp. 952.

(2) However, where such officer is regarded as an officer of the executive department of the state his custody is not regarded as excluding the jurisdiction of the federal courts.—*Farrell v. Stoddard*, D.C.N.Y., 1 F.2d 802—*Acken v. New York Title & Mortgage Co.*, D.C.N.Y., 9 F.Supp. 521.

Property in hands of executor or administrator

(1) Federal courts have no power of disposition of funds in probate courts of state.—*Watkins v. Madison County Trust & Deposit Co.*, D.C.N.Y., 40 F.2d 91—*Tussing v. Central Trust Co.*, D.C.Mich., 34 F.2d 312—*Perkins v. Warburton*, D.C.Md., 4 F.2d 742.

(2) An administrator appointed by a state court is an officer of that court and takes possession of decedent's property in obedience to orders of the court and his possession is the court's possession and cannot be disturbed by any other court.—*Wells v. Helms*, C.C.A.Okla., 105 F.2d 402—*Kahl v. Chicago Title & Trust Co.*, D.C.Ill., 299 F. 793.

(3) In suit against executor in federal court, on decree directing accounting for trust property commingled by executor's testator with his own funds, execution should not in first instance issue while administration in state court is pending.

—*Alexander v. Fidelity Trust Co.*, Pa., 249 F. 1, 161 C.C.A. 61.

(4) Although administrators are acting under temporary letters, which might have been issued by clerk, but were issued by ordinary, they are nevertheless officers of the court of ordinary, and contrary claim, as a basis for the federal court taking jurisdiction of a suit involving the estate, cannot be supported, as where a petition for administration of an estate was filed with the court of ordinary, such court, although not in actual possession of the estate, is entitled to possession, and has such jurisdiction over the administration proceedings that the federal court cannot entertain bill involving estate on the theory that no administration was pending. Further, since equity cannot take jurisdiction over an estate to prevent waste and dissipation, unless the administration is vacant and the danger of loss imminent, where administration was pending the federal court cannot take jurisdiction, nor could it appoint a receiver on the theory that the administration was vacant, because temporary administrators appointed pursuant to Georgia practice had no power to carry on decedent's business; and where temporary administrators had given sufficient bond, and a number of them were persons of property, a receiver cannot be appointed by the federal court on the ground of waste or dissipation of assets, although administrators were claimed to have exceeded their authority.—*Smith v. Jennings*, Ga., 238 F. 48, 151 C.C.A. 124, reversing, D.C., *Jennings v. Smith*, 232 F. 921, and certiorari denied *Jennings v. Smith*, 37 S.Ct. 399, 243 U.S. 635, 61 L.Ed. 940.

Proceedings for liquidation

(1) Under the Indiana statutes, giving the court in which an action for the liquidation of a bank is brought, complete jurisdiction over the assets and, under which, it directs the management, control, and operation of the property, settles the rights of the parties, allows and fixes the amount of claims and directs distribution and liquidation, the custody of property by the department of financial institutions, under an order of the court, gives the court such possession of the res as disables a federal court from foreclosing a mortgage and ordering a sale of the property.—*Department of Financial Institutions of Indiana v. Mercantile-Commerce Bank & Trust Co.*, C.C.A. Ind., 92 F.2d 639, certiorari denied

Mercantile Commerce Bank & Trust Co. v. Department of Financial Institutions of State of Indiana, 58 S.Ct. 760, two cases, 303 U.S. 656, 32 L.Ed. 1116.

(2) State court proceedings for liquidation of insolvent bank, and intervention of United States therein to establish claim, is in rem, precluding subsequent exercise of jurisdiction by federal court in suit to establish priority.—*People's Trust Co. v. U. S.*, C.C.A.N.H., 23 F.2d 381, vacating, D.C., *U. S. v. People's Trust Co.*, 17 F.2d 437.

Garnishment

Where garnishment proceeding was begun in state court and garnishee filed interpleader suit in federal court, state court could proceed to judgment.—*City Nat. Bank of Lawton, Okl. v. Lummus Cotton Gin Sales Co.*, Tex.Civ.App., 297 S.W. 563, affirmed *Liverpool & London & Globe Ins. Co. v. Lummus Cotton Gin Sales Co.*, Com.App., 6 S.W.2d 728, motion denied 9 S.W.2d 1112.

Partition

State court, having first acquired jurisdiction of specific property by issuance and service of process in partition suit, could retain jurisdiction for purpose of partitioning land, without interference by federal court in action to quiet title.—*Miller v. Griffin*, 128 So. 416, 99 Fla. 976.

Action to foreclose lien

(1) If the state court once assumes jurisdiction of an action to enforce a mechanic's lien, it will retain it to the exclusion of any interference with its control of the property by a federal court until the lien action is finally determined.—*Rogers, etc., Hardware Co. v. Cleveland Bldg. Co.*, 32 S.W. 1, affirmed 34 S.W. 57, 132 Mo. 442, 31 L.R.A. 335, 53 Am.S.R. 494.

(2) However, if the property has been seized in a forfeiture proceeding by the United States, a state court cannot enforce a mechanic's lien.—*Heldritter v. Elizabeth Oil-Cloth Co.*, C.C.N.J., 6 F. 138, affirmed 5 S.Ct. 135, 112 U.S. 294, 28 L.Ed. 729.

62. U.S.—*Freeman v. Howe*, Mass., 24 How. 450, 16 L.Ed. 749.

15 C.J. p 1170 note 38.

63. Colo.—*Hill v. Corcoran*, 25 P. 171, 15 Colo. 270.

15 C.J. p 1170 note 39.

64. Mich.—*Heyman v. Covell*, 6 N.W. 846, 14 Mich. 332, 38 Am.R. 272.

15 C.J. p 1170 note 40.

65. Mich.—*Carew v. Matthews*, 2 N.

jurisdiction, the jurisdiction of the federal courts with respect to the property is not thereby defeated;⁶⁶ and it is also held that where a sheriff has taken, under process of a state court, more than enough property to satisfy the judgment, the property is not in custodia legis in such sense as to prevent a subsequent levy under process of a federal court, so as to give the creditor at whose instance such process is issued a lien on the excess.⁶⁷ So, also, where a vessel has a lien on the cargo in its possession, enforceable in admiralty, a state court cannot preclude the vessel from enforcing such lien in admiralty, or deprive it of such possession while the lien continues.⁶⁸ Where, because of a mortgagee's failure to disclose the facts, a federal court has, on his petition, appointed a receiver over property after the state court has acquired jurisdiction and control over it in a foreclosure proceeding, the federal court may, as a

condition precedent to allowing plaintiff to proceed in the state court, require that he reimburse the federal court receiver for sums paid for taxes and other expenses in preserving the property.⁶⁹

Notwithstanding a federal court has taken possession of the property, its jurisdiction is exclusive only in so far as restriction of the power of other courts is necessary for the federal court's appropriate control and disposition of the property;⁷⁰ and state courts having jurisdiction to adjudicate rights in the property do not, because the property is possessed by a federal court, lose power to render any judgment not in conflict with the federal court's authority to decide questions within its jurisdiction and to make such decisions effective by its control of the property;⁷¹ and, similarly, a federal court may make like adjudications with respect to property in the possession of a state court.⁷²

W. 829, 41 Mich. 576, followed in *Cooper v. Tompkins*, 5 N.W. 456, 43 Mich. 406.

66. U.S.—*The Vigilancia*, D.C.N.Y., 63 F. 733.

15 C.J. p 1171 note 46.

67. Ark.—*Goodbar v. Brooks*, 22 S. W. 96, 57 Ark. 450.

68. Wis.—*Warehouse, etc., Supply Co. v. Galvin*, 71 N.W. 804, 96 Wis. 523, 65 Am.S.R. 57.

69. U.S.—*York v. Acadia Land Co.*, D.C.La., 58 F.2d 1042.

70. U.S.—*U. S. v. Klein*, 58 S.Ct. 536, 303 U.S. 276, 82 L.Ed. 840, affirming *In re Escheat of Moneys in Custody of U. S. Treasury*, 192 A. 256, 326 Pa. 260.

71. U.S.—*U. S. v. Klein*, supra—*Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 383, 294 U.S. 189, 79 L.Ed. 850, reversing *Commonwealth ex rel. Schnader v. Penn General Casualty Co.*, 173 A. 637, 316 Pa. 1, certiorari granted *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed. 651.

Judgment of state court in personam was not affected by possession of defendant's property by federal court.—*International & G. N. Ry. Co. v. Adkins*, D.C.Tex., 14 F.2d 149, affirmed, C.C.A., *International Great Northern Ry. Co. v. Adkins*, 18 F.2d 481, certiorari denied 48 S.Ct. 36, 275 U.S. 533, 72 L.Ed. 411.

Pennsylvania court's decree declaring escheat to commonwealth of unclaimed moneys found by federal district court to be due to bondholders and subsequently transferred from court's registry to federal treasury's account in bank within common-

wealth was not an unconstitutional interference with district court, where district court acquired jurisdiction because of diversity of citizenship, since, after adjudicating parties' rights, district court retained jurisdiction only to dispose of moneys, and beyond that its jurisdiction and possession did not curtail power which commonwealth could constitutionally exercise over persons and property within its territory.—*U. S. v. Klein*, 58 S.Ct. 536, 303 U.S. 276, 82 L.Ed. 840, affirming *In re Escheat of Moneys in Custody of U. S. Treasury*, 192 A. 256, 326 Pa. 260.

Appointment of state officer to control property

State court, after jurisdiction of federal district court over assets of insolvent corporation had attached, could nevertheless designate state insurance commissioner as vehicle of state authority to control property of corporation whenever control could lawfully be acquired.—*Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 386, 294 U.S. 189, 79 L.Ed. 850, reversing *Commonwealth ex rel. Schnader v. Penn General Casualty Co.*, 173 A. 637, 316 Pa. 1, certiorari granted *Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader*, 55 S.Ct. 126, 293 U.S. 547, 79 L.Ed. 651.

72. U.S.—*U. S. v. Klein*, 58 S.Ct. 536, 303 U.S. 276, 82 L.Ed. 840, affirming *In re Escheat of Moneys in Custody of U. S. Treasury*, 192 A. 256, 326 Pa. 260.

Right to share in distribution of estate

A citizen of another state who is a distributee of an estate may establish in federal court his right to share in such estate and enforce such adjudication against the administra-

tor or his sureties or against any other person liable therefor or proceed in any way which does not disturb the possession of the property by the state court.—*Wells v. Helms*, C.C.A.Okla., 105 F.2d 402.

Adjudication of claims

(1) In suit by national bank receiver in federal court to establish receiver's claims against mortgage pool trust fund administered in state court, federal court, although authorized to adjudicate claims and their priority over claims of participation certificate holders, had no right to order trustee to pay bank out of moneys collected on the mortgages, that being interference with res in possession of state court.—*Commonwealth Trust Co. of Pittsburgh v. Atwood*, C.C.A.Pa., 78 F.2d 92, certiorari granted 55 S.Ct. 124, 296 U.S. 566, 80 L.Ed. 399, affirmed *Commonwealth Trust Co. of Pittsburgh v. Bradford*, 56 S.Ct. 600, 297 U.S. 613, 80 L.Ed. 920.

(2) While federal court cannot reach into state court and take res there being administered or enforce right to specific property in possession of state court's receiver or trustee, federal court on jurisdiction otherwise shown, such as diversity of citizenship or liquidation of national bank, may establish claim constituting basis of right to participate in distribution of property in possession of state court and has jurisdiction of national bank receiver's suit to establish claim against mortgage pool trust of which bank had been trustee but which was now being administered in state court by successor trustee, although establishment of such claim would involve adjudication of priority of the claim over claims of participation certificate holders.—*Commonwealth Trust Co. of*

Priority of possession controls with respect to jurisdiction of property so that the court which first obtains possession of the property has jurisdiction thereof to the exclusion of another court of concurrent jurisdiction in which an action relating to the property was first commenced;⁷³ but the orderly administration of justice and the necessity of avoiding a conflict of jurisdiction require that the court which last acquired jurisdiction, although it be the first to acquire possession of the property involved in the litigation, shall surrender such possession, on application, to the court of concurrent jurisdiction which first acquired jurisdiction of the controversy, unless the issues in the subsequent suit are different from the issues in the prior suit relating to the same property.⁷⁴ Where a court has improvidently and without jurisdiction taken possession of property, it should surrender posses-

sion.⁷⁵

After custody of one court has terminated, another court is, of course, at liberty to take possession of the property.⁷⁶

§ 534. — Effect of Receivership in General

- a. General statement
- b. Limitations of rule

a. General Statement

The appointment of a receiver brings the property into the custody of the court; and where either a federal court or a state court appoints a receiver the other court will not thereafter interfere with his possession of the property.

The appointment of a receiver brings property into the custody of the court in such sense that it

Pittsburgh v. Atwood, C.C.A.Pa., 78 F.2d 92, certiorari granted 56 S.Ct. 124, 296 U.S. 566, 80 L.Ed. 399, affirmed *Commonwealth Trust Co. of Pittsburgh v. Bradford*, 56 S.Ct. 600, 297 U.S. 613, 80 L.Ed. 920.

(3) Rule withdrawing property, taken into possession of court of competent jurisdiction through its officers by appropriate proceedings, from jurisdiction of all other courts, does not prevent one entitled to invoke federal jurisdiction from resorting to federal court to establish amount of his debt and validity of his mortgage on property in possession of state court, and to obtain, but not to execute, foreclosure decree.—*Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, C.C.A.Tex., 77 F.2d 152.

(4) A federal district court had jurisdiction of suit for declaratory judgment as to right to liens or preference against funds of surety company being liquidated by state superintendent of insurance under New York Insurance Law, as against contention that claims should be asserted in state court having funds in its hands.—*Dempsey v. Pink*, C.C.A.N.Y., 92 F.2d 572, certiorari denied *Pink v. Dempsey*, 58 S.Ct. 745, 303 U.S. 648, 83 L.Ed. 1109, *Dempsey v. Pink*, 58 S.Ct. 747, 303 U.S. 648, 82 L.Ed. 1109.

Enforcement of lien

Holder of mortgage on property in possession of state probate court is entitled to enforce lien in any tribunal having proper jurisdiction.—*Benington County Sav. Bank v. Commercial Nat. Bank of Shreveport*, D.C.La., 2 F.Supp. 201.

Administration of trust

The rule that action brought in federal court merely to establish interest or right to share in property being administered in state court

may properly be prosecuted, since judgment in such suit would not disturb the control of the state court over the fund or estate as to which it had taken jurisdiction, is subject to limitation that exercise of such jurisdiction of federal court does not include power to draw to it the administration of the estate or to interfere in any way with its management or control. The administration of a trust falls within the class of cases governed by the principle giving to the court first assuming jurisdiction in proceedings quasi in rem the exclusive right to determine questions of administration and management, as distinguished from the adjudication of individual rights and interests in the res; and an accounting by fiduciaries is in itself a proceeding "quasi in rem" in the sense that it not only adjudicates legality of investments constituting the trust, but also, if it results in a surcharge, orders payment and restitution of monies to the trust res.—*Thompson v. Fitzgerald*, 198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed *Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285.

Claim and delivery action brought in a federal court to recover possession of property in a sheriff's possession under an attachment does not involve interference with the state court's jurisdiction where the federal court has the power to award a judgment for the value of the property.—*Oakes v. Lake*, Idaho, 54 S.Ct. 13, 290 U.S. 59, 78 L.Ed. 168, reversing, C.C.A., 62 F.2d 728, and certiorari granted 53 S.Ct. 594, 289 U.S. 717, 77 L.Ed. 1469.

Suit to enforce assignment of interest in an estate may be brought

in a federal court of equity jurisdiction although the res is in possession of a probate court.—*Chase Nat. Bank of New York v. Sayles*, C.C.A.R.I., 11 F.2d 948, 48 A.L.R. 207, reversing, D.C., 6 F.2d 403, and certiorari denied *Sayles v. Chase Nat. Bank of City of New York*, 47 S.Ct. 99, 273 U.S. 708, 71 L.Ed. 841.

73. U.S.—*Boynnton v. Moffat Tunnel Improvement Dist.*, C.C.A.Colo., 57 F.2d 772, certiorari denied *Moffat Tunnel Improvement Dist. v. Boynnton*, 53 S.Ct. 20, 287 U.S. 620, 77 L.Ed. 538.

15 C.J. p 1171 note 50.

74. U.S.—*Ingram v. Jones*, C.C.A.Okl., 47 F.2d 135.

75. U.S.—*Cochrane v. W. F. Potts Son & Co.*, C.C.A.Fla., 47 F.2d 1026.

76. U.S.—*Crisuolo v. Atlas Imperial Diesel Engine Co.*, C.C.A.Cal., 84 F.2d 273—*The Greyhound*, C.C.A.N.Y., 68 F.2d 832, reversing, D.C., 4 F.Supp. 184—*Pappas v. Lufkin*, D.C.Mass., 17 F.2d 988—*U. S. v. Morris*, D.C.Colo., 262 F. 514.

N.J.—*McDonald v. Matoil Service & Transport Co.*, 179 A. 310, 115 N.J.Law 239.

15 C.J. p 1171 note 51.

Property removed from jurisdiction

Where a federal court, after permitting the recording of liens on two naval tugs being constructed allowed the United States to take and remove them from its jurisdiction without notice to the lienors, its failure to protect the liens was not a denial of the lienors' right to pursue their remedies against the vessels elsewhere, so that to grant such rights in the state to which the vessels were removed would not be reviewing an order of the federal court.—*Obrecht v. Vinyard*, 114 A. 168, 12 Del.Ch. 350.

is entitled to retain exclusive jurisdiction with respect thereto,⁷⁷ even though the receiver has not taken actual possession.⁷⁸ Accordingly, the general rule is that, where a receiver has been appointed by a federal court, his possession will not be interfered

with by any proceedings in a state court,⁷⁹ and the federal courts will accord the same deference to the possession of a receiver appointed by a state court.⁸⁰ The rule extends to reserving the exclusive jurisdiction of the court over all matters

77. U.S.—Detroit Trust Co. v. Schantz, D.C.Mich., 16 F.2d 942—Field v. Kansas City Refining Co., C.C.A.Mo., 296 F. 500, certiorari denied 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471.

N.H.—McGreavey v. Straw, 5 A.2d 270.

N.Y.—Guaranty Trust Co. of New York v. New York & Queens County Ry. Co., 4 N.Y.S.2d 532, 167 Misc. 795.

15 C.J. p 1171 note 53.

Procedure to acquire property

Court appointing receiver has possession of res, and comity requires another court, instead of immediately ordering receiver to surrender res, to instruct its officer to request possessing court to direct surrender by receiver, and, on refusal, demanding court will determine whether to direct appeal or to adopt coercive measures.—In re White Star Refining Co., C.C.A.Tex., 74 F.2d 269, certiorari denied *Portner v. State of Texas*, 55 S.Ct. 637, 294 U.S. 727, 79 L.Ed. 727, two cases.

78. U.S.—Employers' Reinsurance Corporation v. Boston Mut. Life Ins. Co., C.C.A.Tex., 45 F.2d 593—U. S. v. Sterling, D.C.N.Y., 291 F. 695.

15 C.J. p 1171 note 54.

79. U.S.—Quinn v. Bancroft-Jones Corporation, D.C.N.Y., 12 F.2d 958—Woodbury v. Pickering Lumber Co., D.C.Mo., 17 F.Supp. 575—Meek v. Republic Nat. Bank & Trust Co., D.C.Tex., 9 F.Supp. 651, modified on other grounds, C.C.A., Wallace v. Republic Nat. Bank & Trust Co. of Dallas, 80 F.2d 787, certiorari denied *Crook v. Wallace*, 56 S.Ct. 952, 298 U.S. 683, 80 L.Ed. 1402—Field v. Kansas City Refining Co., Mo., 296 F. 800, certiorari denied 45 S.Ct. 98, 266 U.S. 618, 69 L.Ed. 471.

N.Y.—Neal v. Hayes, 219 N.Y.S. 179, 218 App.Div. 500, affirming 219 N.Y.S. 176, 128 Misc. 700—In re 221st Street in City of New York, 190 N.Y.S. 234, 116 Misc. 506.

Tex.—Temple Trust Co. v. Haney, Civ.App., 103 S.W.2d 1035, affirmed, Sup., 107 S.W.2d 368.

15 C.J. p 1172 note 55.

Receiver of foreign corporation

Where federal court in New York appointed receivers for Delaware chain-store corporation doing business in several states, including Georgia, who were also appointed in federal court in Georgia in ancillary proceeding, Georgia superior court's

refusal to vacate its appointment of receiver is erroneous.—*Isaac Silver & Bros. Co. v. Kalmon*, 165 S.E. 434, 175 Ga. 244.

Garnishment

(1) Levy of garnishment, issued out of state court, to impound funds in hands of federal equity receiver, is void.—*Republic Supply Co. v. Del Rey Oil & Refining Co.*, D.C.Cal., 50 F.2d 639.

(2) Where federal court appointed receiver to take possession of assets of building and loan association, while creditor could maintain suit for personal judgment in state court, he could not enforce it by writ of garnishment against property in possession of the receiver previously appointed, even though appeal was taken, supersedeas bond given, and receiver did not take possession.—*Forst v. Intermountain Building & Loan Ass'n*, 65 P.2d 1379, 49 Ariz. 246.

15 C.J. p 1172 note 55 [c].

Quo warranto proceedings

As a state court will not seize or undertake to exercise authority over property properly in possession of federal court, a state court should not in quo warranto proceeding direct ouster of street railroad company operating under federal court receivership, although quo warranto proceeding was begun before appointment of receiver, since constructive possession is not acquired by quo warranto proceedings.—*State ex rel. Wear v. Cincinnati & L. E. R. Co.*, 190 N.E. 224, 128 Ohio St. 95.

Where receiver appointed for real estate

Where decedent was exclusive owner of plant furnishing electric power, which he conveyed in trust under a deed entitling him during his lifetime to demand and receive from trustees beneficial certificates representing value of his interest in the property, his interest therein constituted personal property, and circuit court's power to assume jurisdiction of trust estate, and to administer it for benefit of persons interested therein, was not affected by proceedings in United States district court assuming jurisdiction of all real estate of which decedent died possessed.—*Elkton Electric Co. v. Perkins*, 125 A. 851, 145 Md. 224, certiorari denied 45 S.Ct. 90, 266 U.S. 602, 69 L.Ed. 462 and error dismissed 45 S.Ct. 124, 266 U.S. 585, 69 L.Ed. 454.

Where construction of federal statutes involved

Where right of receiver appointed by chancery court, to money in safe deposit box of insolvent national bank, depends on construction of federal statute, federal court is proper forum for determination of right.—*Toussaint v. R. & R. Mfg. Co.*, N.J. Ch., 160 A. 88.

Temporary receiver

Where order of federal court appointing receiver gave him full authority to take possession of all property, and use every method to preserve it, subject to the jurisdiction of the court, and enjoined the company and its creditors from interfering with such possession, the rule as to interference with possession by other courts applied, although receiver was called a temporary receiver.—*Forst v. Intermountain Building & Loan Ass'n*, 65 P.2d 1379, 49 Ariz. 246.

Trial court abused its discretion in appointing general receiver for corporation at request of minority stockholders seeking to recover money judgments from officers and directors of corporation for alleged mismanagement, where corporation was not a party to the action and its assets had been transferred to another corporation whose assets were in the custody of a receiver in federal court.—*Skirvin v. Coyle*, 94 P.2d 234, 185 Okl. 487.

80. U.S.—Terrell v. Gary, C.C.A. Tex., 98 F.2d 14—*Bryan v. Welsh*, C.C.A.Okl., 72 F.2d 618—*Consolidated Music Co. v. Brinkerhoff Piano Co.*, C.C.A.Utah, 64 F.2d 884—*Mullendore v. American Surety Co. of New York*, C.C.A.Mont., 27 F.2d 572, certiorari denied *American Surety Co. of New York v. Mullendore*, 49 S.Ct. 178, 278 U.S. 653, 73 L.Ed. 563—In re *Lasserot*, Cal., 240 F. 325, 153 C.C.A. 251—*Wilmer v. Atlantic & R. Air-Line R. Co.*, C.C.Ga., 30 F.Cas.No.17,775, 2 Woods 409.

N.J.—*Universal Stamp & Stationery Co. v. Garod Corporation*, 136 A. 329, 100 N.J.Eq. 453.

15 C.J. p 1172 note 56.

Appointment of receiver by federal court

A stockholder is not entitled to appointment of receiver by federal court on ground of fraud in procuring appointment of state court receiver with knowledge that plaintiff was about to file bill and other stockholders' assurances, because of

legitimately connected with, or growing out of, the receivership,⁸¹ and applies even though the appointment of the receiver was improvident;⁸² but it is otherwise if the court had no jurisdiction to appoint a receiver.⁸³

Where a federal court has erroneously appointed a receiver, he may continue in possession of the property until the appointment of a receiver by a state court or, in default thereof, until the federal court has had hearings on whether its order appointing the receiver should be made permanent.⁸⁴ Where a state court has acquired jurisdiction of the property by the appointment of a receiver, it may order a sale of the property on a decree of a federal court entered and certified to the state court after the latter had acquired juris-

diction.⁸⁵ Where, under the laws of a state the state banking commissioner in taking charge of property of an insolvent bank does not act in the capacity of a receiver, his possession is not the possession of a state court which would exclude the jurisdiction of a federal court to entertain a suit to establish rights in the property, where it otherwise has jurisdiction.⁸⁶ On the other hand, where a state insurance superintendent on taking over a corporation's property becomes in effect a receiver, the property is in custodia legis and a federal court has no right to interfere.⁸⁷ Where a state court, proceeding in rem for foreclosure of a mortgage, has not perfected its jurisdiction by a seizure of the property or even issued process whereby a constructive seizure could be established, and a fed-

which he postponed doing so; and claims that corporation's note was procured by fraud, that holder was not purchaser for value nor stockholder, that action for appointment of receiver was collusive, etc., do not go to state court's jurisdiction to appoint receiver. The federal court will not appoint a receiver on ground that stockholder's rights will not be protected in state court because of its receiver's relationship to president of bank holding corporation's notes, court assuming that state court will do justice to all, and such relationship did not affect state court's jurisdiction to appoint receiver.—*Superior Oil Corporation v. Matlock*, C.C.A.Okla., 47 F.2d 993.

Attachment issued out of federal court

The jurisdiction of a court of equity in receivership proceedings over a corporation doing business in the state is not impaired by attachment of the corporation's property on process issuing out of a federal court in the absence of a supervening and binding act of congress to that effect.—*New England Theatres v. Olympia Theatres*, Mass., 192 N. E. 98, certiorari denied *E. M. Loew's Inc. v. New England Theatres*, 55 S. Ct. 509, 294 U.S. 713, 79 L.Ed. 1247.

Priority of state receivership

(1) State court receiver was not bound to intervene in subsequent receivership proceeding in federal court and become party, but might petition summarily for possession of property, and the federal receivership under principles of comity should yield possession of property to state court receiver, where federal court receivership was junior to that of state court.—*Lee v. Edmunds*, C.C.A.Fla., 66 F.2d 122.

(2) Receiver appointed by state court having jurisdiction may retain

possession and control of properties after later appointment of federal court receiver.—*Superior Oil Corporation v. Matlock*, C.C.A.Okla., 47 F.2d 993.

Voluntary surrender held not shown

State court of competent jurisdiction first acquiring custody of property and having it in possession of receiver cannot be thereafter divested of that custody by order of federal court made in a subsequently instituted equitable action, and an ex parte statement of attorney that judge of state court had expressed willingness to surrender possession of property then in custody of receiver is insufficient to constitute voluntary surrender so as to vest federal court with jurisdiction of such property.—*U. S. v. Mashunkashey*, C.C.A.Okla., 72 F.2d 847, rehearing denied 73 F.2d 487, certiorari denied *Mashunkashey v. U. S.*, 55 S. Ct. 551, 294 U.S. 724, 79 L.Ed. 255.

Liquidation proceedings

Where principal under bond, securing return of vessel seized under prohibition laws, deposited money with surety, and money was taken over by liquidator of surety appointed under New York laws, federal court was without jurisdiction of claim for deposit, state court having exclusive jurisdiction thereof in liquidation proceedings.—*U. S. v. Brown*, D.C.N.Y., 3 F.Supp. 608.

81. Mich.—*Rogers v. Chippewa Cir. Judge*, 97 N.W. 154, 135 Mich. 79, 3 Ann.Cas. 114.
15 C.J. p 1173 note 57.

Funds in state auditor's hands

Intervening petition, praying that state court, assuming jurisdiction of proceedings for liquidation of bank, to which petitioner was appointed successor as trustee of certain fund, direct payment of petitioner's claim to trust assets, not accounted for by bank receiver, from

proceeds of securities deposited with state auditor by bank as condition precedent to doing trust business, is sufficient to confer jurisdiction over fund in auditor's hands on state court, and the mere fact that some necessary parties to state court proceedings for liquidation of bank are not before such court would not justify federal court in assuming jurisdiction over such proceeds.—*Old First Nat. Bank & Trust Co. of Fort Wayne, Ind. v. Barrett*, D.C. Ill., 14 F.Supp. 778.

Proofs and allowance of claims

In proceedings by trustees in bankruptcy to subject, to payment of claims, bonds deposited by insolvent state bank in order to qualify as depository for moneys of bankrupt estates, federal court should provide only for payment, from proceeds of sale of bonds, of costs, expenses, and for ratable distribution among trustees and leave proofs of claims against receivership estate and extent to which they may be allowed to state court appointing receiver.—*Evans v. New Haven Bank*, N. B. A., C.C.A.Conn., 72 F.2d 664.

82. U.S.—*Pacific Coast Pipe Co. v. Conrad City Water Co.*, D.C.Mont., 237 F. 673.

83. U.S.—*Pacific Coast Pipe Co. v. Conrad City Water Co.*, supra.

84. U.S.—*Christian v. R. Hoe & Co.*, C.C.A.N.Y., 63 F.2d 221.

85. Tex.—*Emmy Dittmar Imp. Co. v. A. B. Frank Co.*, Civ.App., 114 S.W.2d 912, error refused.

86. U.S.—*Allen v. U. S.*, C.C.A.Mass., 285 F. 678.

87. U.S.—*Tollfree v. New York Title & Mortgage Co.*, C.C.A.N.Y., 72 F.2d 702, certiorari denied 55 S. Ct. 216, 293 U.S. 619, 79 L.Ed. 707.—*Rees v. New York Title & Mortgage Co.*, C.C.A.N.Y., 72 F.2d 702, certiorari denied 55 S.Ct. 216, 293 U.S. 619, 79 L.Ed. 707.

eral receiver has been appointed who has taken possession of the property, the federal court should yield possession of the property to the state court where it appears that the delay was caused by the mortgagor.⁸⁸

On a motion in a federal court for an order directing its receivers to turn over the property of a corporation to receivers appointed by a state court after a hearing, the federal court cannot review the findings of the state court based on evidence, but is limited to a consideration of the question of priority of jurisdiction.⁸⁹ Where a state court has first acquired jurisdiction, it may properly direct its receiver, appointed after a federal receiver had been appointed, to intervene in the federal court and ask for the discharge of the federal court receiver and surrender of the property to the receiver of the state court.⁹⁰

Mere commencement of an action seeking a receivership of the property of a corporation has been held to give a state court in which such action is brought such jurisdiction over the property of the corporation within the state as to exclude the jurisdiction of a federal court with respect thereto;⁹¹ and, likewise, commencement of a suit in the federal court will give it exclusive jurisdiction;⁹² but the contrary view has been asserted where the suits were not identical as to the interests of parties.⁹³

On termination of receivership another court may take possession of the property,⁹⁴ even though no

order discharging the receiver has ever been entered of record.⁹⁵

Production of evidence in other courts by receiver. Comity requires that a federal court whose receiver has possession of documents should facilitate the production of evidence required for litigation pending in a state court so far as this may be done without interfering with the administration of the receivership;⁹⁶ and the state court may request the production of books from the federal receiver in furtherance of justice, where consented to by the federal court;⁹⁷ such court having the inherent power to request the federal court to enable the examination of books in the possession of the federal receiver, and to subpoena documentary evidence without notice.⁹⁸ It is exclusively within the jurisdiction of the court appointing the receiver to determine whether the production of such evidence will unduly interfere with the receivership.⁹⁹

b. Limitations of Rule

The appointment of a receiver will not preclude one court from entertaining proceedings which relate to the property in the hands of the receiver, where such proceedings do not interfere with the receivership or the possession of the court by which the receiver was appointed.

The rule does not preclude one court from entertaining proceedings which may relate to the property which is in the hands of a receiver, where such proceedings do not interfere with the receivership or the possession of the court by which the receiver was appointed;¹ and the fact that a

88. U.S.—First Nat. Bank v. Horuff, C.C.A.La., 65 F.2d 318.

89. U.S.—McKinney v. Landon, Kan., 209 F. 300, 126 C.C.A. 226, affirming, D.C., 206 F. 772.

90. Ala.—Alabama, T. & N. Ry. v. Tolman, 76 So. 381, 200 Ala. 449.

91. U.S.—Havner v. Hegnes, C.C.A. Iowa, 269 F. 537.
15 C.J. p 1173 note 60.

92. U.S.—Chillicothe Furniture Co. v. Revelle, C.C.A.Mo., 14 F.2d 501, certiorari denied 47 S.Ct. 335, 273 U.S. 741, 71 L.Ed. 868.

93. U.S.—Liggett v. Glenn, Mo., 51 F. 381, 2 C.C.A. 286.

94. U.S.—Abarca v. Banco Commercial de Puerto Rico, C.C.A. Puerto Rico, 32 F.2d 375—Home Trust Co. v. Miller Petroleum Co., D.C.Kan., 27 F.2d 748.

Okla.—Operators Royalty & Producing Co. v. Tulsa Rig, Reel & Manufacturing Co., 56 P.2d 400, 176 Okl. 442.

Pa.—Pennsylvania Co. for Insurance on Lives and Granting Annu-

ties v. Barker, 190 A. 193, 124 Pa. Super. 557.

Tex.—Houston & T. C. R. Co. v. City of Ennis, Civ.App., 201 S.W. 256, certiorari denied 40 S.Ct. 393, 252 U.S. 583, 64 L.Ed. 728, error dismissed 41 S.Ct. 622, 256 U.S. 684, 65 L.Ed. 1171.

15 C.J. p 1173 note 63.

Reservation of jurisdiction in federal court decree, wherein validity and priority of claims on principles of equity were determined did not preclude state court from passing on claim, under Rev.St.1911 art 6625, against property sold by receiver on termination of the receivership.—International & G. N. Ry. Co. v. Concrete Inv. Co., Tex.Civ.App., 201 S.W. 713, affirmed, Com.App., 263 S.W. 265.

95. U.S.—Andrews v. Smith, C.C.Vt., 5 F. 833, 19 Blatchf. 100.

96. U.S.—Whan v. Green Star S. S. Corporation, C.C.A.N.Y., 38 F.2d 68—In re Moody, D.C.Tex., 10 F. Supp. 825.

Books of corporation in hands of receiver are books of receiver under control of federal court.—Continental Ins. Co. v. Equitable Trust Co. of New York, 244 N.Y.S. 377, 137 Misc. 28, affirmed 243 N.Y.S. 200, 228 App.Div. 657.

97. N.Y.—Continental Ins. Co. v. Equitable Trust Co. of New York, supra.

98. N.Y.—Continental Ins. Co. v. Equitable Trust Co. of New York, supra.

99. U.S.—In re Moody, D.C.Tex., 10 F.Supp. 825.

1. Mich.—Marshall v. Wabash Ry. Co., 167 N.W. 19, 201 Mich. 167. Tex.—Durham v. Scrivener, Com. App., 270 S.W. 161, affirming, Civ. App., 259 S.W. 606.

15 C.J. p 1174 note 65.

Claims of receiver

The federal court was not without jurisdiction of suit by receiver of insolvent national bank to recover assessments against stock composing

part of estate of deceased stockholder on ground that res was in possession of a state court.—*Hart v. Burke*, D.C.Pa., 25 F.Supp. 945.

Claims against purchaser of railroad sold in receivership

(1) Under a statute requiring a purchaser of a railroad at a receivership sale, as a condition to reincorporating and doing business in the state, to pay for "current expenses" of operation accruing within two years of the sale, execution on judgment of state court for such expenses is not interference by state court with jurisdiction of federal courts, although federal court reserved jurisdiction for purpose of disposition of claims; and the mortgagee of railroad took mortgage subject to the statute, but such taking would not deprive it of right to be heard in state court, before that court could take from it any property rights.—*Mercantile Trust Co. v. Binford*, D. C.Tex., 6 F.2d 285.

(2) Although plaintiffs' demand was originally against old railroad company, where purchasers of property from receiver incorporated under the statute making property liable for old company's debts, the basis of plaintiffs' claim against the property was an independent and voluntary transaction in nature of contract and fact that federal court had jurisdiction of receivership and determined validity and priority of claims therein did not preclude state court from jurisdiction on claim under statute.

U.S.—*International-Great Northern R. Co. v. Binford*, C.C.A.Tex., 10 F. 2d 436, certiorari denied 47 S.Ct. 91, 273 U.S. 694, 71 L.Ed. 844, followed in *International Great Northern R. Co. v. Edgeley*, 10 F. 2d 501, certiorari denied 47 S.Ct. 91, 273 U.S. 694, 71 L.Ed. 844, and *International-Great Northern R. Co. v. Texas Co.*, 47 S.Ct. 91, 273 U.S. 702, 771, 71 L.Ed. 884.

Tex.—*International & G. N. Ry. Co. v. Concrete Inv. Co.*, Com.App., 263 S.W. 265, affirming, Civ.App., 201 S.W. 718.

(3) Retained jurisdiction of federal court of railroad receivership proceeding does not preclude determination by state court of claim against successor company.—*International-Great Northern R. Co. v. Swayne*, 1 S.W.2d 609, 117 Tex. 247—*International-Great Northern R. Co. v. Texas Co.*, Tex.Civ.App., 280 S.W. 282, petition dismissed 47 S.Ct. 96, 273 U.S. 702, 771, 71 L.Ed. 884.

(4) In an action for personal injuries occurring during receivership of railroad against one purchasing the property at sale under decree of federal court, a judgment by its terms operating only against defend-

ant's person or at most establishing amount and validity of the claim without directing payment out of any particular property, was within the jurisdiction of the state court, and assuming that the federal district court, in confirming the sale, could reserve jurisdiction over personal injury suits filed against the company after foreclosure and delivery of the property, its subsequent order refusing to restrain prosecution of such suit in a county court showed that it did not do so.—*International-Great Northern R. Co. v. Oehler*, Tex.Civ. App., 262 S.W. 785.

Foreclosure

A federal court had jurisdiction of bill by trustee for mortgage bondholders to establish indebtedness and obtain foreclosure decree, notwithstanding mortgaged property was in hands of receiver appointed by state district court, but its decree of foreclosure of property in possession of receiver appointed by state court is an improper invasion of state court's jurisdiction in so far as undertaking completely to direct and control foreclosure proceedings to be had in state court, including making of allowances against proceeds, and in so far as reserving jurisdiction to proceed with foreclosure, if state court did not.—*Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, C.C.A. Tex., 77 F.2d 152.

Garnishment

Words "court of competent jurisdiction" within statute providing that comptroller administering affairs of insolvent national banks shall make ratable dividends of moneys paid over to him by receivers on all such claims as may have been proved to his satisfaction or adjudicated in court of competent jurisdiction are not confined to federal courts, but apply as well to state courts, and hence funds in hands of receiver of national bank were subject to writ of garnishment of state court.—*Rawlings v. American Oil Co.*, 161 So. 851, 173 Miss. 683.

Injunction

(1) Mortgagee of street railway, by securing receiver in state court, was not precluded from suing in federal court to enjoin operation of motor busses by others.—*Equitable Trust Co. of New York v. Denney*, C.C.A.Ind., 24 F.2d 169.

(2) Injunction against federal receiver operating bus company illegally is not interference with property in receiver's custody, but related to acts outside receivership which state court could enjoin.—*Yonkers R. Co. v. Hume*, 233 N.Y.S. 63, 225 App.Div. 313.

Trustee in bankruptcy as stakeholder

Under stipulation for sale by trustee

of bankrupt's assets and holding of proceeds pending decision in replevin action, no question of adjudicating title to property already in custodia legis was involved in such action.—*Sparks v. Kuss*, 216 N.W. 329, 135 Wis. 378, modified on other grounds 218 N.W. 208, 195 Wis. 378.

Sale of leasehold interest in property in hands of receiver

A federal court, in receivership suit involving the "property, assets and business owned by, or under the control, or in the possession of," an oil company, had no jurisdiction of an undivided interest owned by an individual in an oil and gas leasehold estate, although oil company owned rest of lease and had exclusive right to develop and operate the entire leasehold, and hence sale to third persons of individual's interest under foreclosure and execution proceedings was not void as depriving the receiver of possession of property.—*Patton v. Rabinowitz*, Tex.Civ.App., 114 S.W.2d 310.

Appointment of receiver by state court

Notwithstanding the fact that assets of corporation were within control of receivers of federal district court, who were conducting its business, a receiver would be appointed where Corporation Act, 2 Comp.St. 1910 p 1638, § 63 et seq, relating to insolvency, and public policy required that there should be a statutory agent known as a receiver, and creditors and stockholders were entitled to appointment of receiver to represent their interests as well as interests of corporation, and the court of chancery would take jurisdiction, under the statute whose statutory requisites were present, since proceedings in the federal district court did not exclude proceedings in court of chancery under the act. The receiver appointed by the court of chancery would be instructed to apply to federal court, whose receivers were administering its business, to set up proceedings in court of chancery and urge that they supersede proceedings in federal court, and ask it to direct delivery of assets to court of chancery for administration, but not to subject himself to jurisdiction of federal court, and will be directed to cooperate with federal district court.—*Michel v. William Necker, Inc.*, 106 A. 449, 90 N.J.Eq. 171.

Continuance of suit filed in state court for accounting by liquidating trustees before suit in federal court for receivership is not barred by federal receivership, although it must proceed strictly in personam for benefit of original plaintiffs.—*Brown v. Duffin*, C.C.A.Ky., 13 F.2d 708.

bill filed in a state court incidentally prays for relief which, if granted, might interfere with the constructive possession of property by receivers of a federal court does not authorize the latter court to enjoin the prosecution of the suit, where the principal relief sought therein does not trench on its jurisdiction.² So, also, a state court is not deprived of the jurisdiction of a mandamus proceeding brought by a subscriber to the stock of a consolidated association to compel the recorder of mortgages, on the ground that the state stock subscribed has been fully paid for, to cancel the record of a mortgage given to secure the subscription, the mortgage having been pledged by the association to the state as security for a loan, by the fact that receivers for such association have been appointed by the United States circuit court;³ and where the subject matter of a receivership in a federal court has been disposed of, it is proper to issue an order of sale where a judgment has been obtained in a state court foreclosing a tax lien.⁴ Possession of the property of a corporation by a federal court receiver will not prevent proceedings in a state court to oust the corporation from the state,⁵ but a restraining order issued by the state court to prevent the corporation from receiving any of the property in the possession of the receiver would be ineffectual.⁶ The appointment of a receiver for a corporation by a state court does not prevent one who began a suit in a federal court before such appointment from prosecuting it to judgment;⁷ and where receivership proceedings were pending against an old corporation in a federal court, a state court did not encroach on the jurisdiction of the federal court by assuming jurisdiction of an action against a new corporation, as successor of the old corporation, on a judgment against the latter.⁸ Neither will a federal court be prevented from entertaining jurisdiction of a suit to set aside conveyances, as void against judgment creditors, by the fact that a re-

ceiver has been appointed in the state court.⁹ Where a receiver is appointed by both a federal and a state court, the latter court, although first appointing him, is held to have no jurisdiction over him as to property out of the state;¹⁰ and where a railroad runs through several states, and the entire line is inseparable, a federal court may appoint a receiver therefor, notwithstanding the fact that different state courts have appointed receivers.¹¹ A federal court which in a foreclosure suit has taken possession by its receivers of all the property of a corporation, situated in several states, has power to turn over possession and control and management of the property in one of such states to receivers appointed by a court of such state.¹² Where a suit by nonresident stockholders of a corporation for the appointment of a receiver was brought within the jurisdiction of a federal court by bad faith or through collusion, the federal court will not retain jurisdiction as against proceedings in a state court for dissolution of the corporation.¹³

A federal court receiver of a corporation which assigned a leasehold as security for an indebtedness which had not been paid is not entitled to possession of the leasehold as against a subsequently appointed state court receiver of the assignee in possession, as the receiver of the corporation had no greater right than the corporation, which could acquire the right to possession of the leasehold only on payment of the debt.¹⁴

§ 535. — Actions by or against Receivers

- a. Actions by receivers
- b. Actions against receivers

a. Actions by Receivers

In a proper case, a receiver appointed by a state court may bring an action in a federal court; and, similarly, a receiver appointed by a federal court may bring an action in a state court.

2. U.S.—Guaranty Trust Co. v. North Chicago St. R. Co., Ill., 130 F. 801, 65 C.C.A. 65, certiorari denied 24 S.Ct. 860, 194 U.S. 638, 48 L.Ed. 1161.

3. U.S.—Calhoun v. Lanoux, La., 8 S.Ct. 1345, 127 U.S. 634, 32 L.Ed. 297.

4. Tex.—Houston City St. R. Co. v. Storrie, Civ.App., 44 S.W. 693, reversed on other grounds 46 S.W. 796, 92 Tex. 129, 44 L.R.A. 716.

5. U.S.—Brieston Mfg. Co. v. Close, C.C.A.Neb., 25 F.2d 794, certiorari dismissed 49 S.Ct. 249, 278 U.S. 666, 73 L.Ed. 571.

Effect of judgment of ouster

Judgment of state court ousting corporation prevented enforcement of federal court mandate as to local property in receiver's hands, required by mandate to be returned to corporation.—Brieston Mfg. Co. v. Close, supra.

6. U.S.—Brieston Mfg. Co. v. Close, supra.

7. U.S.—Sims v. United Wireless Tel. Co., C.C.N.J., 179 F. 540.

8. Kan.—Alberger Condenser Co. v. United Water, etc., Co., 126 P. 1087, 87 Kan. 843.

9. U.S.—Bacon v. Harris, C.C.Iowa, 62 F. 99.

15 C.J. p 1174 note 71.

10. U.S.—Lehigh Coal, etc., Co. v. Central R. Co., C.C.Pa., 15 F.Cas. No.8,213.

11. U.S.—Wilmer v. Atlanta, etc., R. Co., C.C.Ga., 30 F.Cas.No.17,775, 2 Woods 409.

12. U.S.—Kansas City Pipe Line Co. v. Fidelity Title, etc., Co., Kan., 217 F. 187, 133 C.C.A. 181.

13. U.S.—Welsh v. Union Casualty Ins. Co., D.C.Pa., 238 F. 968. 15 C.J. p 1175 note 75.

14. Tex.—Dunn v. Oil Well Supply Co., Civ.App., 8 S.W.2d 285.

A receiver appointed by a state court may in some cases bring an action in the federal court affecting the receivership property;¹⁵ but if the state court refuses to permit a receiver of an insolvent corporation appointed by it to sue the officers for fraudulent misappropriation of its property, jurisdiction of the suit will not be entertained by a federal court.¹⁶ A receiver appointed by a federal court, who commences an action in a state court to collect money alleged to be due him as such receiver, cannot object to the jurisdiction of the state court to adjudicate on a set-off pleaded by defendant.¹⁷ Where a receiver sues in a federal court on a claim against an estate in the possession of a state court, the federal court can do no more than adjudicate the validity and amount of the claim.¹⁸

b. Actions against Receivers

In a proper case, actions against receivers appointed by federal or state courts may be brought in courts other than those of the jurisdiction appointing the receiver. Where leave to sue is required, it must be obtained before suit can be brought in a court other than the one appointing the receiver.

Where a state court has jurisdiction of the parties and the subject matter, it may entertain a suit against a receiver appointed by a federal court for the purpose of recovering a money judgment;¹⁹ nor is a federal receivership of a railroad any obstacle to a mandamus from a state court requiring the railroad to construct a line through a county seat according to the state constitution and

statutes.²⁰ Where, pending a bill against a corporation for injunction and accounting for infringement of a patent, the corporation is dissolved by a state court, and its assets placed in the hands of a receiver, the federal court has power to grant a bill of revivor against the receiver.²¹ However, a state court cannot entertain an action against a federal receiver to prevent him from carrying out the orders of the court of which he is an officer;²² or to compel him to do what the order of the court appointing him makes a matter for his discretion;²³ nor can a railroad maintain in a state court a proceeding against the federal receiver of another railroad to condemn a grade crossing.²⁴ A federal court of one state will not refuse to entertain garnishment against a receiver appointed by a court of equity of another state, although he is exempt from such proceeding in the latter state, where the petition is properly presented by citizens within the jurisdiction of the former court, and no objection to jurisdiction exists on other grounds.²⁵ An action in tort against a receiver is controlled by the appointing court so far as is necessary to insure prompt equitable distribution of the receivership funds.²⁶

Leave of court making the appointment is not a prerequisite to an action in a state court against a federal receiver where the cause of action is based on some act or omission connected with the carrying on of the business pertaining to the receivership;²⁷ but in other cases leave of the appointing

15. U.S.—Chambers v. McDougal, C.C.Kan., 42 F. 694.
15 C.J. p 1175 note 77.

16. U.S.—Porter v. Sabin, Minn., 13 S.Ct. 1008, 149 U.S. 473, 37 L.Ed. 815, affirming, C.C., 36 F. 475.

17. U.S.—Grant v. Buckner, La., 19 S.Ct. 163, 172 U.S. 232, 43 L.Ed. 430.

18. U.S.—Schram v. Poole, C.C.A. Cal., 97 F.2d 566.

19. Mo.—State ex rel. Rice v. Portersfield, 253 S.W. 66, 214 Mo.App. 37—Riffe v. Wabash Ry. Co., 207 S.W. 78, 200 Mo.App. 397.
15 C.J. p 1175 note 81.

Protection of federal receivers from suit

The federal government has ample power to determine wisdom of protecting federal receivers from suits and to protect them where it is deemed necessary against inequitable proceedings, notwithstanding statute permitting actions against federal receivers to be maintained in state courts without leave of court appointing receiver, and determination of what is equitable, or inequitable, rests with federal government, and any curtailment of power of federal courts to control actions against receivers would be assumed by state court to have been deliberately done by congress on considerations which were deemed sufficient; and state courts should not exercise equitable jurisdiction to restore to federal receivers protection against suits, of which protection congress has seen fit to deprive them. The determination of the jurisdiction in which federal receivers may be sued is for congress and the federal courts, and state courts have no jurisdiction to control situs of actions against them. Thus, an Indiana court was without jurisdiction to grant injunction restraining employee injured on a railroad in Indiana from prosecuting an action in Illinois against receivers of railroad appointed by federal court in Missouri, on ground that prosecution of action in Illinois would subject receivers to hardship, inconvenience, and expense.—Pitcairn v. Drummond, Ind., 23 N.E.2d 21.

20. Tex.—Kansas City, etc., R. Co. v. State, 163 S.W. 582, 106 Tex. 249, modifying, Civ.App., 155 S.W. 561.

21. U.S.—Griswold v. Hilton, C.C.N.Y., 87 F. 256.

22. U.S.—Royal Trust Co. v. Washburn, etc., R. Co., C.C.Wis., 113 F. 531, modified on other grounds 139 F. 865, 71 C.C.A. 579.

23. U.S.—State of Oklahoma v. State of Texas, 44 S.Ct. 607, 265 U.S. 490, 68 L.Ed. 1116.

24. U.S.—Coster v. Parkersburg Branch R. Co., C.C.W.Va., 131 F. 115, affirmed 135 F. 707, 68 C.C.A. 345.

25. U.S.—Central Trust Co. v. Chattanooga, etc., R. Co., C.C.Tenn., 68 F. 685.

26. N.H.—McGreavey v. Straw, 5 A.2d 270.

27. U.S.—Slover v. Chicago, M. & St. P. Ry. Co., D.C.Mo., 16 F.2d 609.

Ark.—Bush v. Southern Grocery Co., 208 S.W. 299, 137 Ark. 262.

Iowa.—Poweshiek County v. Merchants' Nat. Bank of Grinnell, 228

court must be obtained before a federal receiver can be sued in a state court.²⁵ A provision of the judicial code authorizing federal court receivers to be sued without leave does not give another court jurisdiction of a suit affecting the possession, control, or management of the property by the receiver or the conduct of his business.²⁹ The federal courts will decline to entertain an action against a receiver appointed by a state court, which action is brought without leave of the state court.³⁰

§ 536. Assumption and Exercise of Conflict-jurisdiction in General

Whether a state or federal court can or will assume jurisdiction of controversies of which the other court has previously assumed jurisdiction is considered generally in § 529 supra; over proceedings involving the process or judgments of the other court, see §§ 537-539 infra; or with respect to prisoners under arrest, commitment, detention, or sentence see the title Criminal Law § 145.

Examine Pocket Parts for later cases.

§ 537. Process or Judgments of Another Court

Jurisdiction of federal courts with respect to

the process and judgments of state courts is considered in § 538 infra, and jurisdiction of state courts with respect to the process and judgments of federal courts, in § 539 infra.

§ 538. — Jurisdiction of Federal Court with Respect to State Court

A federal court may take jurisdiction of an action or suit based on a judgment of a state court. While a federal court cannot ordinarily vacate or modify the judgment, it may, by reason of such matters outside the record as fraud or want of jurisdiction, grant proper relief and deprive a party of the benefits of a judgment obtained by extrinsic fraud.

A federal court may take jurisdiction of an action or suit based on a judgment rendered in a state court,³¹ and may give equitable relief under a state statute, on a judgment and execution in a state court, where property has been fraudulently conveyed to defeat creditors.³²

In accordance with the rules governing equitable relief against judgments generally, which are considered in the C.J.S. title Judgments §§ 341-400, also 34 C.J. p 432 note 1-p 501 note 2, federal courts of equity, having no supervisory or appellate jurisdiction over state courts, cannot ordinarily reverse, vacate, modify, or annul a judgment, or decree rendered by a state court of competent jurisdiction,³³

N.W. 32, 209 Iowa 467, 82 A.L.R. 39.

15 C.J. p 1175 note 87.

Actions held properly brought without permission

(1) Federal receivership court's permission for creditor to commence state suit to liquidate debt is unnecessary, and the federal receivership court's denying petition of guarantor, sued in state court on guaranty of debtor corporation's contract, to join receivers as defendants, is not abuse of discretion, particularly since guarantor's claim could be liquidated by suing corporation.—Chicago Title & Trust Co. v. Fox Theatres Corporation, C.C.A.N.Y., 69 F.2d 60, 91 A.L.R. 991.

(2) Under Judicial Code § 66, Comp.St. § 1048, authorizing suits against receivers without leave of court, an action against one purchasing property of a railroad company at foreclosure sale, under a decree requiring it to assume the liabilities of the receiver appointed in the foreclosure suit, is properly brought, in a state court, and this provision of the Code does not limit the preceding clause, authorizing suits against the receivers, but merely reserves to the court appointing a receiver jurisdiction over the mode of enforcing collection of the claim when judicially liquidated, so

far as necessary to protect the property and adjust the equities of all claimants.—American Brake Shoe & Foundry Co. v. Pere Marquette R. Co., D.C.Mich., 263 F. 237.

28. Ga.—Bugg v. Consolidated Grocery Co., 118 S.E. 56, 155 Ga. 550, reversing 113 S.E. 60, 28 Ga.App. 809, conformed to, App., 118 S.E. 704.

15 C.J. p 1175 note 88.

Suits for possession of property in hands of federal receivers are not maintainable in state court without consent of federal court.—Field v. Kansas City Refining Co., C.C.A.Mo., 9 F.2d 213, certiorari denied 46 S.Ct. 489, 271 U.S. 676, 70 L.Ed. 1146.

More continuous administration of property under order of court does not constitute an "act" or "transaction," within Judicial Code § 66, permitting certain suits to be brought without leave.—Field v. Kansas City Refining Co., supra.

Attachment

Claimant in primary equity receivership in federal court was not entitled to enforce claim and levy writ of attachment, without leave of court, in state court in jurisdiction where ancillary receiver had been appointed, since claimant thereby undertook to interfere with property constructively in ancillary receiver's

possession.—Woodbury v. Pickering Lumber Co., D.C.Mo., 17 F.Supp. 575.

29. U.S.—Dickinson v. Wilks, D.C. Iowa, 239 F. 171.

30. U.S.—Porter v. Sabin, Minn., 13 S.Ct. 1008, 149 U.S. 473, 37 L.Ed. 815, affirming, C.C., 36 F. 475.

15 C.J. p 1175 note 89.

31. U.S.—Bacon v. Harris, C.C. Iowa, 62 F. 99—Barr v. Simpson, C.C.Pa., 2 F.Cas.No.1,038, Baldw. 543—Wilson v. City Bank, C.C. Mass., 30 F.Cas.No.17,797, 3 Summ. 422.

32. U.S.—Wilkinson v. Yale, C.C. Mich., 29 F.Cas.No.17,678, 6 McLean 16.

33. U.S.—Asher v. Bone, C.C.A.Idaho, 100 F.2d 315—Hentschel v. Fidelity & Deposit Co. of Maryland, C.C.A.Mo., 87 F.2d 833—Moffett v. Robbins, C.C.A.Kan., 81 F.2d 431, affirming, D.C., 14 F.Supp. 602, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397—Budlong v. Budlong, C.C.A.Ariz., 79 F.2d 829, appeal denied 56 S.Ct. 245, 296 U.S. 550, 80 L.Ed. 389—Gorman v. Shaffer Oil & Refining Co., C.C.A.Okl., 74 F.2d 610, certiorari denied 55 S.Ct. 654, 295 U.S. 739, 79 L.Ed. 1636—U. S. v. Mashunkashey, C.C.A.Okl., 72 F.2d 847, rehearing denied 73 F.2d 487, certiorari denied Mashunkashey v. U. S., 55 S.Ct. 551, 294 U.S. 724, 79 L.Ed. 255—Folk v.

nor can they by mandate compel the state court to do so.³⁴ However, a federal court may, where the elements of federal and equity jurisdiction are present, grant relief and render ineffective a judgment of a state court for matters outside the record,³⁵ such as fraud in obtaining the judgment³⁶

or want of jurisdiction as shown by extrinsic facts,³⁷ or may deprive a party of the benefits of a judgment obtained through extrinsic fraud, as by declaring a trust in the proceeds received thereunder;³⁸ and an *ex parte* preliminary injunction granted in the state court before removal of the

Monnell, C.C.A.Okla., 71 F.2d 816—City of Norwalk, Ohio, v. Equitable Trust Co. of New York, C.C.A.Ohio, 53 F.2d 911, certiorari granted Chase Nat. Bank of New York v. City of Norwalk, Ohio, 54 S.Ct. 73, 290 U.S. 614, 78 L.Ed. 537, reversed on other grounds Chase Nat. Bank v. City of Norwalk, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894—Harrison Beverage Co. v. Pennington, C.C.A.N.J., 61 F.2d 277—American Automobile Ins. Co. v. Benedetto, C.C.A.N.J., 58 F.2d 918, certiorari denied 53 S.Ct. 20, 287 U.S. 621, 77 L.Ed. 539—McCormick v. East Coast Enterprises, C.C.A.Fla., 57 F.2d 859, certiorari denied 53 S.Ct. 81, 287 U.S. 627, 77 L.Ed. 544—Campbell River Mills Co. v. Chicago, M., St. P. & P. R. Co., D.C.Wash., 42 F.2d 775, affirmed, C.C.A., Chicago, M. St. P. & P. R. Co. v. Campbell River Mills Co., 53 F.2d 69, certiorari denied 52 S.Ct. 310, 285 U.S. 536, 76 L.Ed. 930—Luikart v. Farmers' Lumber Co., C.C.A.Wyo., 38 F.2d 538—Dolcater v. Manufacturers & Traders Trust Co., D.C.N.Y., 25 F.Supp. 637—Davega-City Radio v. Boland, D.C.N.Y., 23 F.Supp. 969, 970—Tannille v. Copeland, D.C.Tex., 288 F. 860—Sterling Tire Corporation v. Sullivan, C.C.A.Cal., 279 F. 336—The Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, D.C.S.C., 278 F. 816, modified on other grounds C.C.A., 282 F. 811, certiorari denied Marlboro Cotton Mills v. The Firestone Tire & Rubber Co., 43 S.Ct. 248, 260 U.S. 749, 67 L.Ed. 494—Keeley v. Evans, D.C.Or., 271 F. 520, appeal dismissed 42 S.Ct. 184, 257 U.S. 667, 66 L.Ed. 426—Queens Land & Title Co. v. Kings County Trust Co., D.C.N.Y., 255 F. 222, affirmed 40 S.Ct. 395, 252 U.S. 572, 64 L.Ed. 722—Diamond v. Connolly, Idaho, 251 F. 234, 163 C.C.A. 390, certiorari denied 39 S.Ct. 7, 248 U.S. 561, 63 L.Ed. 422.

15 C.J. p 1176 note 95.

Constitutional question

(1) Federal courts do not have jurisdiction to set aside judgment of state court for error even though a constitutional question was involved.—Reese v. Louisville Trust Co., C.C.A.Ky., 58 F.2d 638—15 C.J. p 1176 note 95 [b].

(2) In another case, which did not expressly assert or deny the power of the federal court to set aside a

judgment of the state court on the ground that due process had been denied, evidence was held insufficient to establish such denial.—Willis v. Scott, C.C.A.Okla., 40 F.2d 330, rehearing denied 41 F.2d 523, and certiorari denied 51 S.Ct. 80, 252 U.S. 877, 75 L.Ed. 774.

Presumption of validity; futility of action

In action in federal court to set aside state supreme court judgment affirming judgment of superior court, it must be presumed that the judgment was concurred in by the requisite number of judges, in absence of showing to the contrary; and even if that judgment was a nullity it would not be set aside, since the superior court judgment would still be in effect.—Lolita Holding Co. v. Aronson, & Co., C.C.A.Cal., 28 F.2d 869, certiorari denied 49 S.Ct. 482, 279 U.S. 868, 73 L.Ed. 1005.

Nonresidents

A federal court will not review matters which were decided by, or could have been raised in, the state court, even though the parties seeking relief in the federal court were not residents of the state, since that fact does not entitle them to await outcome of proceedings in the state court and then call on federal court to determine issues determinable in state court.—Grimes v. Grimes, D.C.Nev., 52 F.2d 171.

Amendment of execution cannot be allowed by a federal court where the state supreme court has refused to allow such amendment.—Kent v. Roberts, C.C.Me., 14 F.Cas.No. 7,715, 2 Story 591.

Prior jurisdiction in federal court

Where, however, after the federal court had acquired jurisdiction of the parties and subject matter in a condemnation proceeding, a special proceeding, involving the same parties and subject matter, was started in a state court, the federal court could, where the circumstances warranted it, set aside the orders and decrees of the state court and place the parties in the same position they were in before the state proceeding was started, and could subsequently decide all questions in the condemnation proceeding.—U. S. v. Blanton, D.C.N.C., 270 F. 321.

Rights under naturalization certificate

Where, by statute, federal court would have jurisdiction of an action

to cancel a naturalization certificate, it has jurisdiction of a suit by the United States to set aside a judgment of a state court reestablishing rights granted under a certificate which was destroyed.—U. S. v. De Tolna, D.C.N.Y., 288 F. 143.

34. U.S.—Moffitt v. Robbins, C.C.A.Kan., 81 F.2d 431, affirming, D.C., 14 F.Supp. 602, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397—U. S. v. Mashunkashey, C.C.A.Okla., 72 F.2d 847, rehearing denied 73 F.2d 437, certiorari denied Mashunkashey v. U. S., 55 S.Ct. 551, 294 U.S. 724, 79 L.Ed. 255—Dolcater v. Manufacturers & Traders Trust Co., D.C.N.Y., 25 F.Supp. 637—Keeley v. Evans, D.C.Or., 271 F. 520, appeal dismissed 42 S.Ct. 184, 257 U.S. 667, 66 L.Ed. 426.

35. U.S.—Little Rock Junction R. Co. v. Burke, Ark., 66 F. 83, 13 C.A. 341.

Injunction see *infra* § 543.

36. U.S.—Howard v. De Cordova, Tex., 20 S.Ct. 817, 177 U.S. 609, 44 L.Ed. 908.

15 C.J. p 1176 note 96.

Contractual view

"A federal court cannot set aside the judgment of a state court on the ground of extrinsic fraud."—Murrell v. Stock Growers' Nat. Bank of Cheyenne, C.C.A.Wyo., 74 F.2d 827, 830.

Final judgment only

(1) This rule applies only to final judgments.—Holyfield v. Guaranty Title & Trust Co., D.C.Tex., 22 F.Supp. 896.

(2) A judgment appointing temporary administrators is not final and cannot be set aside by the federal courts on the ground of fraud, notwithstanding its power as court of equity to relieve against such a judgment.—Smith v. Jennings, Ga., 238 F. 48, 151 C.C.A. 124, reversing, D.C., Jennings v. Smith, 232 F. 921, certiorari denied 37 S.Ct. 399, 243 U.S. 635, 61 L.Ed. 940.

More suggestion of fraud held insufficient.—Tannille v. Copeland, D.C.Tex., 288 F. 860.

37. U.S.—Cooper v. Newell, Tex., 19 S.Ct. 506, 173 U.S. 555, 43 L.Ed. 808.

15 C.J. p 1176 note 96.

38. U.S.—Asher v. Bone, C.C.A.Idaho, 100 F.2d 315—Dolcater v. Manufacturers & Traders Trust Co., D.C.N.Y., 25 F.Supp. 637—McMurray v. Chase Nat. Bank of City of New

cause to the federal court may be dissolved by the latter court.³⁹ In a proper case, a federal court may also allow an equitable set-off against a state court judgment;⁴⁰ and it may, in an action to quiet title to real property or to remove a cloud therefrom, inquire into the jurisdiction of a state court to render a judgment relied on by a party.⁴¹

Judicial sales. In accordance with the rules stated above, it has been held that a federal court has no jurisdiction to set aside a judicial sale made by a state court,⁴² except on the ground of fraud,⁴³ although it has been held otherwise in a case of land sold for taxes under order of a state court.⁴⁴

§ 539. — Jurisdiction of State Court with Respect to Federal Court

A state court may enforce a federal court judgment.

York, D.C.Wyo., 10 F.Supp. 960—*Diamond v. Connolly*, Idaho, 251 F. 234, 163 C.C.A. 390, certiorari denied 39 S.Ct. 7, 248 U.S. 561, 63 L.Ed. 422.

Reason for rule

"In such a case, the court does not act as one of review; neither does it consider irregularities occurring in the proceedings of the state court. It scrutinizes the conduct of the party obtaining the judgment and if it is found that he was guilty of fraud in securing it, he is deprived of its benefits. The action operates upon the party, not the judgment or decree of the state court. Such a case presents a new and different cause of action from that determined by the state court."—*U. S. v. Mashunkashey*, C.C.A.Okl., 72 F.2d 847, 851, rehearing denied 73 F.2d 487, certiorari denied *Mashunkashey v. U. S.*, 55 S.Ct. 551, 294 U.S. 724, 79 L.Ed. 255.

Enjoining enjoyment of fruits of judgment

"In cases where it has jurisdiction the federal court may, on the ground of extrinsic fraud in obtaining a state court judgment, enjoin a party guilty of such fraud from enjoying the fruits of such judgment or compel him to surrender it."—*Murrell v. Stock Growers' Nat. Bank of Cheyenne*, C.C.A.Wyo., 74 F.2d 827, 830.

What constitutes extrinsic fraud

"Extrinsic fraud operates not upon matters pertaining to the judgment itself, but relates to the manner in which it is procured. Extrinsic fraud is any fraudulent conduct of the successful party which is practiced outside of an actual adversary trial, and which is practiced directly and affirmatively upon the defeated party, or his agents, attorneys or witnesses, whereby such defeated party is prevented from presenting

fully and fairly his side of the case."—*Phillips Petroleum Co. v. Jenkins*, C.C.A.Ark., 91 F.2d 183, 187.

Intrinsic fraud or error

(1) Intrinsic fraud, as where the state court had before it the same issue of fraud, is not ground for equitable relief.—*Phillips Petroleum Co. v. Jenkins*, C.C.A.Ark., 91 F.2d 183.

(2) Intrinsic error, such as error in construing a will, unmixed with extrinsic fraud, is not ground for granting equitable relief.—*Asher v. Bone*, C.C.A.Idaho, 100 F.2d 815.

Newly discovered evidence, unmixed with extrinsic fraud, is not ground for equitable relief.—*Phillips Petroleum Co. v. Jenkins*, C.C.A.Ark., 91 F.2d 183.

Title fraudulently obtained

A federal court may relieve against a title fraudulently obtained in a state court, by enjoining the assertion of such title.—*Robb v. Vos*, C.C.Ohio, 36 F. 132, affirmed 15 S.Ct. 4, 155 U.S. 13, 39 L.Ed. 52.

In suit to declare trust as to separate property distributed by state court decree, contention as to property never part of estate could not be considered.—*Grimes v. Grimes*, D.C.Nev., 52 F.2d 171.

39. U.S.—*Sharp v. Whiteside*, C.C. Tenn., 19 F. 156.

40. U.S.—*Northwestern Port Huron Co. v. Babcock*, S.D., 228 F. 479, 139 C.C.A. 27.

41. U.S.—*North Star Lumber Co. v. Johnson*, D.C.Or., 196 F. 56, affirmed 206 F. 624, 125 C.C.A. 118.

42. U.S.—*White v. Crow*, C.C.Colo., 17 F. 98, 5 McCrary 310, affirmed 4 S.Ct. 71, 110 U.S. 183, 28 L.Ed. 113.—*Sahlgaard v. Kennedy*, C.C. Minn., 13 F. 242, 4 McCrary 133.

43. U.S.—*Arrowsmith v. Gleason*,

While ordinarily it may not review, annul, or modify such judgment, or interfere with its execution, it may grant relief where the judgment was procured by fraud.

A state court may take jurisdiction of a proceeding to enforce a judgment rendered by a federal court,⁴⁵ and also, in some cases, of proceedings with respect to a title asserted under a judgment or execution sale of a federal court;⁴⁶ and a state court has been held to have jurisdiction to look into the proceeding of an officer of a federal court subsequent to the judgment.⁴⁷

While a state court cannot ordinarily review, annul, or modify the judgments or decrees of a federal court,⁴⁸ or interfere with the execution thereof,⁴⁹ it may grant relief where there has

Ohio, 9 S.Ct. 237, 129 U.S. 86, 32 L.Ed. 630.

44. U.S.—*De Forest v. Thompson*, C.C.W.Va., 40 F. 375.

45. N.C.—*Coughlan v. White*, 68 N. C. 102.

15 C.J. p 1176 note 2.

46. Ill.—*Wetherell v. Eberle*, 14 N. E. 675, 123 Ill. 666, 5 Am.S.R. 534. La.—*Lowry v. Erwin*, 6 Rob. 192, 39 Am.D. 556.

Or.—*Dowell v. Applegate*, 33 P. 937, 24 Or. 440.

Suit to recover realty from adjudicatee at foreclosure sale in federal receivership proceedings was not a suit to annul federal judgment and was within state court's jurisdiction.—*Nelson v. York*, 132 So. 652, 171 La. 979.

47. La.—*Garrard v. Reed*, 5 Rob. 506.

43. Ala.—*Ex parte Consolidated Graphite Corporation*, 129 So. 262, 221 Ala. 394.

Miss.—*Gulf, M. & N. R. Co. v. Hill Mfg. Co.*, 90 So. 358, 127 Miss. 644.

Tex.—*Supreme Forest Woodmen Circle v. City of Belton*, Civ.App., 66 S.W.2d 439, error refused. 15 C.J. p 1176 note 8.

49. Ill.—*Sproehnle v. Dietrich*, 110 Ill. 202.

Redress against abuse of process

An application for redress against abuse of the process of a federal court should be directed to such court.

Ill.—*Sproehnle v. Dietrich*, 110 Ill. 202.

Va.—*Samuels v. Commonwealth*, 66 S.E. 222, 110 Va. 901, 19 Ann.Cas. 380.

Setting aside execution sale

Where land has been sold on execution under a judgment of a federal court, a bill to set aside such sale

been fraud on the federal court in procuring the judgment.⁵⁰

§ 540. Suspension of Proceedings

The suspension by a state or federal court of its own proceedings because of the pendency of an action in the other court is considered in the title Actions § 133 c (7), and the power of a state or federal court to enjoin or restrain proceedings in the other court, in §§ 542-543 *infra*. The effect of a proceeding in the federal court to limit a shipowner's liability, as staying state court proceedings on claims against such owner, or as giving the federal court the right to enjoin such proceedings, is considered in the C.J.S. title Shipping § 251, also 58 C.J. p 669 note 28—p 671 note 47.

§ 541. Injunction against Proceedings in Another Court

One will not be enjoined from proceeding with a pending equity suit in a court of another jurisdiction, state, or federal, except to prevent manifest wrong, or unless it clearly appears that full relief cannot be obtained in such suit.

It is the general rule that one will not be restrained by injunction from proceeding with a pending suit in equity in a court of another jurisdiction, whether state or federal, except to prevent a manifest wrong or injustice, or unless it clearly

appears that full and complete relief cannot be obtained in such pending suit.⁵¹ More specifically, whether a state court can or will enjoin proceedings in a federal court is considered in § 542 *infra*, and whether a federal court can or will enjoin proceedings in a state court, in § 543 *infra*.

§ 542. — By State Court against Proceedings in Federal Court

Except where it may be necessary to protect its own prior acquired jurisdiction, and with some other exceptions, a state court generally cannot or will not enjoin the institution or prosecution of an action in a federal court, or the enforcement of such court's judgments.

Except as appears below, a state court generally cannot or will not enjoin the institution or prosecution of an action in a federal court,⁵² particularly where the federal court has obtained jurisdiction of the parties to, and the subject matter of, the controversy;⁵³ nor can the enforcement of a judgment rendered by a federal court in such a case be enjoined by a state court.⁵⁴

There may, however, be circumstances under which the right to enjoin may exist.⁵⁵ Thus, a state court which has first acquired jurisdiction of a controversy may enjoin the prosecution of a proceeding in a federal court where, and in so far as, that proceeding will impair or defeat the pro-

should not be brought in a state court.—*Sproehle v. Dietrich*, 110 Ill. 202.

Executory order

Only the court issuing an order can enjoin an alleged violation thereof while it is executory; thus, no other court, state or federal, has jurisdiction to enjoin an alleged violation of an executory order of a federal district court.—*Woods v. Root*, Ill., 123 F. 402, 59 C.C.A. 206—15 C.J. p 1176 note 9.

50. Mo.—*Wonderly v. Lafayette County*, 51 S.W. 745, 150 Mo. 635, 73 Am.S.R. 474, 45 L.R.A. 386. 15 C.J. p 1176 note 4.

Unfair settlement of minor's suit

Where federal court entered judgment on an unfair settlement of a minor's suit without investigating its fairness, and there was no adequate remedy at law, a state court of equity will set aside the judgment.—*Moebius v. McCracken*, 246 N.W. 163, 261 Mich. 409.

51. U.S.—*Frink Co. v. Erikson, C.*, C.A.Mass., 20 F.2d 707, vacating, D.C., *Erikson v. Frink Co.*, 16 F.2d 498—*American Seeding Mach. Co. v. Dowagiac Mfg. Co.*, Mich., 241 F. 875, 154 C.C.A. 577.

Enjoining proceedings in another court in general see *supra* § 498.

Priority and retention of jurisdiction see *supra* § 529.

52. Ga.—*Filligin v. Thornton*, 49 Ga. 384.

N.Y.—*Barry v. New York Mutual Life Ins. Co.*, 2 Thomps. & C. 15—*Schuyler v. Pelissier*, 3 Edw. 191. 15 C.J. p 1177 note 10.

Action under Federal Employers' Liability Act

(1) A state court has been held to have no power to enjoin a citizen of the state from prosecuting an action in a federal district court of another state pursuant to the Federal Employers' Liability Act.—*McConnell v. Thomson, Ind.*, 8 N.E.2d 986, 113 A.L.R. 1429, rehearing denied 11 N.E.2d 183, 113 A.L.R. 1429.

(2) This is so even though a state statute authorizes such injunction.—*Chicago, M. & St. P. Ry. Co. v. Schendel*, C.C.A.Minn., 293 F. 326.

(3) Neither can a state court consider the merits of a cause so begun.—*Baltimore & O. R. Co. v. Barry*, 87 Pa.L.J. 351.

(4) However, it has also been held that the state court has jurisdiction to grant such injunction.—*Bryant v. Atlantic Coast Line R. Co.*, C.C.A.N.Y., 92 F.2d 569.

53. U.S.—*Clapp v. Otoe County, Neb.*, 104 F. 473, 45 C.C.A. 579, cer-

tiorari denied 21 S.Ct. 920, 180 U.S. 638, 45 L.Ed. 710.

Colo.—*Reagan v. Dick*, 233 P. 159, 160, 76 Colo. 544, citing *Corpus Juris*.

N.J.—*Fort v. Lang Co.*, 180 A. 395, 118 N.J.Eq. 537.

N.Y.—*Wheeler v. Vimalert Co.*, 255 N.Y.S. 114, 235 App.Div. 643.

Tex.—*Supreme Forest Woodmen Circle v. City of Belton*, Civ.App., 66 S.W.2d 439, 441, citing *Corpus Juris*.

Vt.—*In re Dawley*, 131 A. 847, 99 Vt. 306.

15 C.J. p 1177 note 10.

Such injunction is void

Colo.—*Reagan v. Dick*, 233 P. 159, 76 Colo. 544.

Inability to present all defenses in any one of the proceedings pending in the federal court is not ground for granting injunction of such proceedings by state court.—*Susquehanna S. S. Co. v. A. O. Anderson & Co.*, 186 N.Y.S. 338, 195 App.Div. 161.

54. N.J.—*Fort v. Lang Co.*, 180 A. 395, 118 N.J.Eq. 527.

15 C.J. p 1177 note 11.

55. Wis.—*Atty.-Gen. v. Frost*, 88 N.W. 912, 89 N.W. 915, 113 Wis. 623.

15 C.J. p 1177 note 12.

ceeding before the state court;⁵⁶ for example, a state court which first acquired jurisdiction of the res in an action in rem may enjoin prosecution of an action involving the same res in a federal court,⁵⁷ at least in so far as that action would prejudice the state court proceeding.⁵⁸

Moreover, the enforcement of a judgment of a federal court may be enjoined by a state court where the judgment was obtained by fraud,⁵⁹ or where it is sought to seize⁶⁰ or to sell⁶¹ the property of a third person under execution on a judgment in a federal court; and a state court may enjoin the prosecution of an action before a federal court where such action is unconscionable or inequitable,⁶² as where the action in the federal court is at law and the petitioner has an equitable defense.⁶³

The fact that, by federal enactment, only the federal courts have jurisdiction to enjoin or set aside the orders of the interstate commerce commission does not deprive the state court of jurisdiction to enjoin the performance of certain acts by a railroad receiver where such injunction does not interfere with the orders of the commission.⁶⁴

§ 543. — By Federal Court against Proceedings in State Court

- a. In general
- b. Limitations of, and exceptions to, rule

a. In General

Under, or without reference to, a statute so providing, a federal court generally, but with numerous exceptions, cannot enjoin or restrain proceedings in a state court. The statutory prohibition applies to all steps in actions in the state court, including enforcement of judgments, and to orders which necessarily, although indirectly, stay proceedings, such as restraints directed against the parties.

Under, or without reference to, § 265 of the Judicial Code, 28 U.S.C.A. § 379, prohibiting any court of the United States from granting an injunction to stay proceedings in any state court, except where authorized by laws relating to bankruptcy proceedings, a federal court generally, but with numerous exceptions appearing in subdivision b of this section, cannot enjoin or restrain proceedings in a state court,⁶⁵ and the state court cannot be deprived of its previously acquired jurisdiction by the federal court's injunction in violation of this

56. U.S.—Kline v. Burke Construction Co., Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077.

Colo.—Reagan v. Dick, 233 P. 159, 75 Colo. 514.

Ga.—Bryan v. Hickson, 40 Ga. 405.

N.J.—Home Ins. Co. v. Howell, 24 N.J.Eq. 238.

S.C.—Marchant v. Wannamaker, 180 S.E. 350.

Wis.—Akerly v. Vilas, 15 Wis. 401. Priority and retention of jurisdiction see supra § 529.

57. U.S.—Kline v. Burke Construction Co., Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077.

Vt.—In re Dawley, 131 A. 847, 99 Vt. 306.

Seizure of res essential

Pendency of suit to enjoin exercise of powers of sale in security deeds and for accounting and cancellation of deeds, where court took no action equivalent to seizure of res, did not authorize enjoining grantee from suing on security deed notes in federal court.—F. S. Royster Guano Co. v. Stedham, 172 S.E. 555, 178 Ga. 217.

Action quasi in rem

Where state court has acquired jurisdiction of an action quasi in rem, it may enjoin the parties from further prosecution of a proceeding in the federal courts for relief which could be granted in the state court, the state court's jurisdiction being exclusive.—Princess Lida of Thurn and Taxis v. Thompson, 59 S.Ct.

275, 305 U.S. 456, 83 L.Ed. 285, affirming Thompson v. Fitzgerald, 198 A. 58, 329 Pa. 497, certiorari granted Princess Lida of Thurn and Taxis v. Fitzgerald, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366.

58. S.C.—Marchant v. Wannamaker, 180 S.E. 350.

59. Tenn.—Keith v. Alger, 85 S.W. 71, 114 Tenn. 1.

60. La.—Möck v. Kennedy, 11 La. Ann. 525, 66 Am.D. 203—Dunn v. Vail, 7 Mart. 416, 12 Am.D. 512.

61. S.C.—Howard v. Cannon, 32 S.C.Eq. 23, 75 Am.D. 736.

62. N.Y.—Dinsmore v. Neresheimer, 32 Hun 204—Pusey v. Bradley, 1 Thomps. & C. 681.

63. Mass.—Karcher v. Burbank, 21 N.E.2d 542, 124 A.L.R. 1292.

64. Ga.—Standard Steel Works Co. v. Williams, 124 S.E. 21, 158 Ga. 434.

65. U.S.—Hill v. Martin, N.J., 56 S.Ct. 278, 256 U.S. 393, 80 L.Ed. 293, affirming, D.C., Dorrance v. Martin, 12 F.Supp. 746—U. S. v. Land Title Bank & Trust Co., C.C.A.Pa., 90 F.2d 970—Putnam v. Citizens' Nat. Trust & Savings Bank of Los Angeles, C.C.A.Cal., 77 F.2d 58—Klaber v. Maryland Casualty Co., C.C.A.Neb., 69 F.2d 934, 106 A.L.R. 617—Insurance Finance Corporation v. Phoenix Securities Corporation, D.C.Idaho, 42 F.2d 933—Tussing v. Central Trust Co., D.C.Mich., 34 F.2d 312—Rust Land & Lumber Co. v. Applegate, C.C.A.

Ark., 29 F.2d 567—Russell v. Detrick, C.C.A.Nev., 23 F.2d 175—Fidelity & Deposit Co. of Maryland v. A. S. Reid & Co., D.C.Pa., 16 F.2d 502—Miller v. Kansas City Light & Power Co., C.C.A.Mo., 13 F.2d 723—National Quarries Co. v. Detroit, T. & I. R. Co., C.C.A.Ohio, 10 F.2d 139—Republic Power & Service Co. v. Security Bank & Trust Co., D.C.La., 9 F.2d 476—Puget Sound Power & Light Co. v. Asia, D.C.Wash., 2 F.2d 485—Davaga-City Radio v. Boland, D.C.N.Y., 23 F.Supp. 969—Pullen v. Patton, D.C.Tex., 19 F.Supp. 340—Blackmore v. Public Service Commission of Pennsylvania, D.C.Pa., 12 F.Supp. 751, appeal dismissed 57 S.Ct. 757, 299 U.S. 617, 81 L.Ed. 455—Stansbury v. Koss, D.C.N.Y., 10 F.Supp. 477—Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., D.C.Okl., 6 F.Supp. 893, vacated on other grounds 54 S.Ct. 732, 292 U.S. 386, 78 L.Ed. 1318—Monamotor Oil Co. v. Johnson, D.C.Iowa, 3 F.Supp. 189, affirmed 54 S.Ct. 575, 299 U.S. 86, 78 L.Ed. 1141—Clinton v. Coppedge, D.C.Okl., 2 F.Supp. 935—Bennington County Sav. Bank v. Commercial Nat. Bank of Shreveport, D.C.La., 2 F.Supp. 201—King v. Ferrelly, D.C.Fla., 283 F. 451—Cumberland Telephone & Telegraph Co. v. Stevens, D.C.Miss., 274 F. 745—Rensselaer & S. R. Co. v. Bennington & R. R. Co., C.C.Vt., 18 F. 617—Freeney v. First Nat. Bank, C.C.Neb., 16 F. 433, 3 McCrary 622—

statute;⁶⁶ and it has been broadly declared that even apart from the statute a federal court ordinarily cannot or will not enjoin state court proceedings.⁶⁷ However, since the purpose of this section is to achieve harmony between the state and federal courts,⁶⁸ the statutory prohibition will

Chaffin v. St. Louis, C.C.Mo., 5 F. Cas.No.2,572, 4 Dill. 19—*Dudley's Case*, C.C.Pa., 7 F.Cas.No.4,114, 1 Clark 96—*Fisher v. Lord*, C.C. Mass., 9 F.Cas.No.4,821—*Rogers v. Cincinnati*, C.C.Ohio, 20 F.Cas.No. 12,008, 5 McLean 337.

15 C.J. p 1178 note 16.

Injunction by bankruptcy courts see title Bankruptcy § 143.

This provision means that, "except as may be authorized by laws relating to proceedings in bankruptcy, the powers of federal courts to stay proceedings in a state court are no greater than those with which state courts are invested under the general rules of the equity practice."—*City of Norwalk, Ohio, v. Equitable Trust Co. of New York*, C.C.A.Ohio, 63 F.2d 911, 912, certiorari granted *Chase Nat. Bank of New York v. City of Norwalk, Ohio*, 54 S.Ct. 73, 290 U.S. 614, 78 L.Ed. 537, reversed on other grounds *Chase Nat. Bank v. City of Norwalk, Ohio*, 51 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894.

Fear of erroneous decision

(1) A federal court will not enjoin the prosecution of an action in a state court merely because that court might render an erroneous decision, since it will be presumed that the court will properly decide the case, and since, if the decision is erroneous, it may be reviewed on appeal.—*American Engineering Co. v. Metropolitan By-Products Co.*, D.C.N.Y., 3 F.2d 451.

(2) This is so even where the construction of a federal statute is involved, since in such case the decision may eventually be reviewed by the federal supreme court.—*U. S. v. Dewar*, D.C.Nev., 18 F.Supp. 931.

(3) Whether a particular person is a necessary party, and was not made a party, is an issue for state court, subject to right of appeal, and federal court could not assume that state court would erroneously decide issue.—*U. S. v. Dewar*, supra.

Denial of constitutional rights in the state court proceeding does not relieve the federal court from the operation of the statutory prohibition, since other methods have been provided for review of proceedings denying constitutional rights.—*Essanay Film Mfg. Co. v. Kane*, N.J., 42 S.Ct. 318, 258 U.S. 358, 66 L.Ed. 658, affirming, C.C.A., 264 F. 959, which affirmed, D.C., 256 F. 271.

A state court's failure to give full faith and credit to a decision of a federal court cannot be corrected by federal court's enjoining prosecution of the state court suit, the remedy being by appeal from state court's

decision.—*Bryant v. Atlantic Coast Line R. Co.*, C.C.A.N.Y., 92 F.2d 569.

Incidental federal question

The mere fact that a federal question is incidentally, but not directly, involved in the state court suit does not authorize the federal court to enjoin its prosecution.—*Detroit, M. & T. S. L. Ry. v. City of Monroe*, D.C.Mich., 262 F. 177.

The statute prevents privies to a state court proceeding, as well as parties of record, from seeking to enjoin such proceeding.—*Hill v. Martin*, N.J., 56 S.Ct. 278, 296 U.S. 393, 80 L.Ed. 293, affirming, D.C., *Dorrance v. Martin*, 12 F.Supp. 746.

Declaratory judgment act

(1) A declaratory judgment act does not set aside this statute.—*Standard Accident Ins. Co. v. Alexander, Inc.*, D.C.Tex., 23 F.Supp. 807.

(2) As modifying this statute see *infra* subdivision b.

District of Columbia courts are courts of the United States within the statute.—*Harlan v. Harlan*, 281 F. 602, 52 App.D.C. 93, modified on other grounds 44 S.Ct. 135, 263 U.S. 681, 68 L.Ed. 504—*Hyattsville Bldg. Assoc. v. Boule*, 44 App.D.C. 408.

Prior jurisdiction over res; federal court receiver

(1) Where a state court first acquired jurisdiction of the res involved in an action, the federal court could not enjoin such action.—*Hershey v. First Nat. Bank & Trust Co. in Waynesboro*, D.C.Pa., 22 F.Supp. 517.

(2) This is also true where the federal court, subsequent to the state court's acquisition of jurisdiction, appointed a receiver to administer the property.—*Ke-Sun Oil Co. v. Hamilton*, C.C.A.Mont., 61 F.2d 215, 85 A.L.R. 204—*Lydick v. Neville*, C.C.A.Neb., 287 F. 479—*Dey v. Brenack Stevedoring Co.*, D.C.N.Y., 272 F. 127.

(3) However, the federal court may authorize its receiver to apply to the state court for a stay.—*Dey v. Brenack Stevedoring Co.*, supra.

(4) Where a subscriber to stock of a corporation in part payment for which he gave his negotiable note, brought an action in a state court to recover the amount paid, including that represented by the note, on the ground that his subscription was obtained by fraud, the fact that a receiver for the corporation, later appointed by a federal court, had possession of the note, did not authorize that court to enjoin the action in the state court, but the receiver might appear and defend the state action,

and if defeated, surrender the note in reduction of the recovery.—*Lydick v. Neville*, supra.

Winding up of national bank by comptroller held not "proceedings in bankruptcy," within statutory exception.—*Lehman v. Spurway*, C.C.A. Fla., 58 F.2d 227, certiorari denied *Spurway v. Lehman*, 53 S.Ct. 20, 287 U.S. 621, 77 L.Ed. 539.

Stay pending appeal

The doctrine that a court may stay proceedings pending an appeal from a judgment dissolving a temporary injunction, although the court may be of opinion that the parties securing the injunction may not eventually prevail, cannot be invoked as against the statutory prohibition.—*Marblehead Land Co. v. Los Angeles County*, D.C.Cal., 276 F. 305.

66. Mass.—*Katz v. Dunn*, 189 N.E. 54, 285 Mass. 340.

Property in state court's custody

Federal court could not, by issuing injunction against state court proceedings, acquire jurisdiction over property already rightfully in custody of state court under attachment therein; and, even if it did acquire some right or power over the property by the temporary injunction, that power or right was lost when the injunction was dissolved by final decree.—*Raphael v. Monroe*, C.C.A. Mass., 66 F.2d 16, certiorari granted *Munroe v. Raphael*, 53 S.Ct. 117, 237 U.S. 591, 77 L.Ed. 516, reversed on other grounds 53 S.Ct. 424, 288 U.S. 435, 77 L.Ed. 910.

67. U.S.—*In re Mt. Forest Fur Farms of America*, C.C.A.Mich., 103 F.2d 69—*Reisler v. Forsyth*, D.C.N.J., 21 F.Supp. 610.

15 C.J. p 1178 note 16.

"Federal courts are loath to interfere with proceedings in the courts of a state unless the necessity for such action is clear."—*Southern Grocery Stores v. Hollis*, C.C.A.S.C., 63 F.2d 351, 352.

"Upon broad general principles of equity, a chancery court should decline to entertain a suit to nullify, or which in its effect would nullify, the valid order of another court of concurrent jurisdiction in a case between the same parties and involving the same subject-matter."—*Amusement Syndicate Co. v. El Paso Land Improvement Co.*, D.C.Tex., 251 F. 345, 350.

68. U.S.—*Hale v. Bimco Trading*, Fla., 59 S.Ct. 526, 306 U.S. 375, 83 L.Ed. 771—*Amusement Syndicate Co. v. El Paso Land Improvement Co.*, D.C.Tex., 251 F. 345.

not apply where there is no occasion to bring this safeguard into play.⁶⁹

The rule first stated above has been applied to various types of actions in state courts,⁷⁰ and the prohibition, as embodied in the statute or as other-

wise observed, applies to all steps which have been, or may be, taken in actions in the state courts,⁷¹ including, with exceptions appearing in subdivision b of this section, the enforcement of a judgment or decree rendered by a state court having jurisdiction of the controversy.⁷² The

69. U.S.—Hale v. Bimco Trading, Fla., 59 S.Ct. 526, 306 U.S. 375, 83 L.Ed. 771.

Granting of stay by state court of proceedings pending therein, until determination of the constitutional question by the federal supreme court, constitutes recognition of the propriety of the proceeding in the federal court, so that there is no occasion for bringing the statutory safeguard into play.—Hale v. Bimco Trading, *supra*.

70. Accounting

Where trustee filed its account in state court for purpose of having account confirmed by court, which account was advertised and all beneficiaries received actual notice of proceeding, accounting was a proceeding within the statutory prohibition.—Hershey v. First Nat. Bank & Trust Co. in Waynesboro, D.C.Pa., 22 F.Supp. 517.

Assessment or collection of taxes under state authority

U.S.—Hill v. Martin, N.J., 56 S.Ct. 278, 296 U.S. 393, 80 L.Ed. 293, affirming, D.C., Dorrance v. Martin, 12 F.Supp. 746—Monamotor Oil Co. v. Johnson, Iowa, 54 S.Ct. 575, 292 U.S. 86, 78 L.Ed. 1141, affirming, D.C., 3 F.Supp. 139—Moore v. Holliday, C.C.Mo., 17 F.Cas.No.9,765, 4 Dill. 52—15 C.J. p 1179 note 27.

Enforcement of claim against Indians

U.S.—U. S. v. Parkhurst-Davis Mercantile Co., Kan., 20 S.Ct. 423, 176 U.S. 317, 44 L.Ed. 485.

Enforcement of quarantine regulations of a state

U.S.—Minneapolis, St. P. & S. S. M. R. Co. v. Milner, C.C.Mich., 57 F. 276.

Action to recover for death caused by a collision of vessels.—The Lotta, D.C.S.C., 150 F. 219.

Suit to reform policy, which federal court had previously held could not be recovered on as written, it being for the state court to determine whether plaintiff was merely trying to relitigate matters already decided in federal court.—Allen v. American Fidelity & Casualty Co., C.C.A. Tex., 80 F.2d 458.

Removal of city officer by municipal authorities

U.S.—In re Sawyer, Neb., 3 S.Ct. 482, 124 U.S. 200, 31 L.Ed. 402.

Action of trespass against a federal officer for seizing the property of a stranger to the writ.—Evans v.

Pack, C.C.Mich., 3 F.Cas.No.4,566, 2 Filipp. 267.

71. U.S.—Phillips Petroleum Co. v. Jenkins, C.C.A.Ark., 91 F.2d 183—Pughe v. Patton, D.C.Tex., 21 F. Supp. 182—Pullen v. Patton, D.C. Tex., 19 F.Supp. 340—Blackmore v. Public Service Commission of Pennsylvania, D.C.Pa., 12 F.Supp. 751, appeal dismissed 57 S.Ct. 757, 299 U.S. 617, 81 L.Ed. 455—Marblehead Land Co. v. Los Angeles County, D.C.Cal., 276 F. 305—Amusement Syndicate Co. v. El Paso Land Improvement Co., D.C. Tex., 251 F. 345.

"It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process. It applies to appellate as well as to original proceedings; and is independent of the doctrine of res judicata. It applies alike to action by the court and by its ministerial officers; applies not only to an execution issued on a judgment, but to any proceeding supplemental or ancillary taken with a view to making the suit or judgment effective. The prohibition is applicable whether such supplementary or ancillary proceeding is taken in the court which rendered the judgment or in some other."—Hill v. Martin, N.J., 56 S.Ct. 278, 296 U.S. 393, 80 L.Ed. 293, affirming, D.C., Dorrance v. Martin, 12 F.Supp. 746—Ritholz v. North Carolina State Board of Examiners in Optometry, D.C.N.C., 18 F. Supp. 409, 412.

Necessity of further proceedings

Suit to enjoin collection of inheritance tax assessed by New Jersey authorities held within statute, where writ of certiorari had been taken from prerogative court to state supreme court to review assessment, even though further proceedings would have to be taken to enforce collection of tax.—Hill v. Martin, N.J., 56 S.Ct. 278, 296 U.S. 393, 80 L.Ed. 293, affirming, D.C., Dorrance v. Martin, 12 F.Supp. 746.

Taking of depositions

A federal court cannot enjoin the taking of depositions in an action in the state court.—W. E. Stewart Land Co. v. Arthur, C.C.A.Iowa, 267 F. 184—American Shipbuilding Co. v. Whitney, C.C.Ohio, 190 F. 109.

72. U.S.—Wade v. Clower, C.C.A. Fla., 91 F.2d 379—American Automobile Ins. Co. v. Benedetto, C.C.A. N.J., 58 F.2d 918, certiorari denied

53 S.Ct. 20, 287 U.S. 621, 77 L.Ed. 539—City of Norwalk, Ohio v. Equitable Trust Co. of New York, C.C.A.Ohio, 63 F.2d 911, certiorari granted Chase Nat. Bank of City of New York v. City of Norwalk, Ohio, 54 S.Ct. 73, 290 U.S. 614, 78 L.Ed. 537, reversed on other grounds Chase Nat. Bank v. City of Norwalk, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894—Lehman v. Spurway, C.C.A.Fla., 58 F.2d 227, certiorari denied Spurway v. Lehman, 53 S.Ct. 20, 287 U.S. 621, 77 L.Ed. 539—American Surety Co. of New York v. Baldwin, D.C.Idaho, 51 F.2d 596, reversed, C.C.A., 55 F. 2d 555, certiorari granted Baldwin v. American Surety Co. of New York, 52 S.Ct. 500, 286 U.S. 537, 76 L.Ed. 1276, reversed Baldwin v. American Surety Co., 53 S.Ct. 98, 287 U.S. 156, 77 L.Ed. 231, 86 A.L.R. 298—Southwest Nat. Bank v. Farracy, D.C.Tex., 50 F.2d 959—Owens v. Battenfield, C.C.A.Okla., 33 F.2d 753, certiorari denied 50 S.Ct. 88, 280 U.S. 605, 74 L.Ed. 649—Lynch v. International Banking Corporation, C.C.A.Cal., 31 F.2d 942, certiorari denied 50 S.Ct. 28, 280 U.S. 571, 74 L.Ed. 624—International & G. N. Ry. Co. v. Adkins, D.C. Tex., 14 F.2d 149, affirmed, C.C.A., International Great Northern R. Co. v. Adkins, 18 F.2d 481, certiorari denied 48 S.Ct. 30, 275 U.S. 533, 72 L.Ed. 411—Moffett v. Robbins, D.C.Kan., 14 F.Supp. 602, affirmed, C.C.A., 81 F.2d 431, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397—In re Smith, D.C.Ill., 7 F.Supp. 863—Murray v. Overstoltz, C.C.Mo., 8 F. 110, 1 McCrary 606.

Del.—Miles v. Layton, 193 A. 567, 8 W.W.Harr. 411, 112 A.L.R. 786, 15 C.J. p 1178 note 18.

"The prohibition . . . extends to the entire proceedings from the commencement of the suit until the execution issued on the judgment is satisfied."—Blackmore v. Public Service Commission of Pennsylvania, D.C. Pa., 12 F.Supp. 751, appeal dismissed 57 S.Ct. 757, 299 U.S. 617, 81 L.Ed. 455.

Attempt to review state court decision

A suit for such injunction would be an attempt to have reviewed in a federal court a decision of the state court.—Ritholz v. North Carolina State Board of Examiners in Optometry, D.C.N.C., 18 F.Supp. 409.

prohibition extends not only to orders which directly restrain proceedings in the state court, but also to all orders which necessarily have that effect,⁷³ such as an injunction directed against the acts of a receiver appointed by a state court,⁷⁴ or against a sheriff to require him to disregard the orders of a state court as to execution of its process,⁷⁵ or against the parties to an action in a state court, rather than to the court or its officers.⁷⁶ The prohibition does not, however, prevent a federal court from enjoining state officers from instituting suits to enforce an unconstitutional statute,⁷⁷ or from enjoining one not a party to the state court proceeding from seeking to induce enforcement of the state court's judgment, even though it was the purpose or hope of the petition-

er in the federal court thereby to induce the state officials to refrain from enforcing the state court judgment until adjudication of the federal court suit;⁷⁸ and a successful mandamus proceeding in the state court against state officials, to enforce a challenged statute, does not bar injunctive relief in a federal court against such enforcement at the suit of strangers to the mandamus proceeding, since they are not bound thereby.⁷⁹

Criminal proceedings in state court. In accordance with the general rule stated above, a federal court cannot restrain a criminal proceeding in a state court,⁸⁰ or the enforcement of a conviction therein,⁸¹ except where the effect of a statute is to permit such restraint,⁸² or where justice or the

Injunction against enforcement of judgment lien is in effect injunction against state court suit, and is prohibited.—*Newberry v. Davison Chemical Co.*, C.C.A.N.C., 65 F.2d 724, certiorari denied 54 S.Ct. 75, two cases, 290 U.S. 660, 78 L.Ed. 571.—*Bortman v. Urban Motion Picture Industries*, C.C.A.N.Y., 4 F.2d 913.

Writ in aid of judgment

Where a state court has issued a writ in aid of its judgment, the federal court will not enjoin acts performed pursuant to such writ, the orderly procedure being to move the state court to have the writ recalled if improperly issued.—*Marblehead Land Co. v. Los Angeles County*, D.C.Cal., 276 F. 305.

73. U.S.—*Harrison v. Trin'x Gold Mines*, C.C.A.Mass., 33 F.2d 667.—*Amusement Syndicate Co. v. El Paso Land Improvement Co.*, D.C.Tex., 251 F. 345.—*Stenger v. Stenger Broadcasting Corporation*, D.C.Pa., 28 F.Supp. 407.—*Pullen v. Patton*, D.C.Tex., 19 F.Supp. 340.

Restraint on performance of acts ordered by state court

(1) An order enjoining one from performing acts which he has been ordered to perform by a mandamus by a state court is within the statutory prohibition.—*Reisler v. Forsyth*, D.C.N.J., 21 F.Supp. 610.

(2) A federal court cannot enjoin the receipt of property by a person as directed by a state court.—*Domestic & Foreign Missionary Soc. v. Hinman*, C.C.Neb., 13 F. 161, 2 McCrary 543.—*Hutchinson v. Green*, C.C.Mo., 6 F. 333, 2 McCrary 471.

An injunction against enforcing a statute, where the only steps taken to enforce it were by proceedings in the state court, is equivalent to injunction against enforcement of the state court's judgment, and is within the statutory prohibition.—*Ritholz v. North Carolina State Board of Ex-*

aminers in Optometry, D.C.N.C., 18 F.Supp. 409.

Action for specific performance of agreement to execute release, which was necessary in order to effect settlement of a state court action, is not a suit to stay proceedings in state court.—*Commercial Nat. Bank of San Antonio v. Continental Bank & Trust Co. of New York*, C.C.A.Tex., 58 F.2d 160, certiorari denied 57 S.Ct. 795, 301 U.S. 692, 81 L.Ed. 1348.

74. U.S.—*Phelps v. Mutual Reserve Fund Life Assoc.*, Kv., 112 F. 453, 50 C.C.A. 339, 61 L.R.A. 717, reversing, C.C., 103 F. 515, and affirmed 23 S.Ct. 707, 190 U.S. 147, 47 L.Ed. 987, 15 C.J. p 1179 note 26.

75. U.S.—*U. S. v. Morris*, D.C.Colo., 262 F. 514.

76. U.S.—*Essanay Film Co. v. Kane*, N.J., 42 S.Ct. 318, 258 U.S. 358, 66 L.Ed. 658, affirming, C.C.A., 264 F. 959, which affirmed, D.C., 256 F. 271.—*Insurance Finance Corporation v. Phoenix Securities Corporation*, D.C.Idaho, 42 F.2d 933.—*Tussing v. Central Trust Co.*, D.C.Mich., 34 F.2d 312.—*Harrison v. Triplex Gold Mines*, C.C.A.Mass., 33 F.2d 667.—*Russell v. Detrick*, C.C.A.Nev., 23 F.2d 175.—*Stenger v. Stenger Broadcasting Corporation*, D.C.Pa., 28 F.Supp. 407.—*Union Central Life Ins. Co. v. McAden*, D.C.Tex., 21 F.Supp. 110.—*Ritholz v. North Carolina State Board of Examiners in Optometry*, D.C.N.C., 18 F.Supp. 409.—*Lowther v. New York Life Ins. Co.*, C.C.A.N.J., 278 F. 405.—*Amusement Syndicate Co. v. El Paso Land Improvement Co.*, D.C.Tex., 251 F. 345.

15 C.J. p 1178 note 17.
Contra *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, C.C.A.Okla., 100 F.2d 770, certiorari granted 59 S.Ct. 789, 306 U.S. 629, 83 L.Ed. 1032.

77. U.S.—*Starr v. Chicago*, R. I. & P. R. Co., C.C.Neb., 110 F. 3, af-

firmed 23 S.Ct. 398, 189 U.S. 537, 47 L.Ed. 584.—*Tuchman v. Welch*, C.C.Kan., 42 F. 548.

78. U.S.—*Chase Nat. Bank v. City of Norwalk*, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894, reversing, C.C.A., *City of Norwalk*, Ohio, v. *Equitable Trust Co. of New York*, 63 F.2d 911, certiorari granted *Chase Nat. Bank of City of New York v. City of Norwalk*, Ohio, 54 S.Ct. 73, 290 U.S. 614, 78 L.Ed. 537.

79. U.S.—*Hale v. Bimco Trading*, Fla., 59 S.Ct. 526, 306 U.S. 375, 83 L.Ed. 771.—*Everglades Drainage Dist. v. Florida Ranch & Dairy Corporation*, C.C.A.Fla., 74 F.2d 914, rehearing denied 75 F.2d 1013.

80. U.S.—*Fitts v. McGhee*, Ala., 19 S.Ct. 269, 172 U.S. 516, 43 L.Ed. 535.

15 C.J. p 1178 note 20.

Grazing sheep on cattle range

Plaintiff who had been charged in state court with offense of grazing sheep on cattle range in violation of Idaho statute was not entitled, even if there had been no statutory prohibition, to maintain suit to enjoin further prosecution in criminal action pending in state court, on ground that Idaho statute had been abrogated by federal grazing act in so far as it affected grazing of live stock on public lands included within grazing district, since state court was competent to deal with federal question involved, which was subject to ultimate review in supreme court.—*Babcock v. Noh*, C.C.A.Idaho, 99 F.2d 738, reversing, D.C., *Noh v. Babcock*, 21 F.Supp. 519.

81. U.S.—*Borland v. Johnson*, C.C.A.Cal., 88 F.2d 376, certiorari denied 58 S.Ct. 24, 302 U.S. 704, 82 L.Ed. 544.

82. Habeas corpus proceeding

Under statute providing that pending appeal to the circuit court of appeals in a habeas corpus proceeding any proceeding against the relator in

righteous demands of the superior sovereignty so require.⁸³ While the federal court has the power to enjoin state officers from instituting criminal actions,⁸⁴ since neither the state court nor the grand jury is thereby enjoined,⁸⁵ it will not do so except under extraordinary circumstances, as where the danger of irreparable property loss is great and immediate,⁸⁶ or to prevent a multiplicity of suits.⁸⁷ It will not, however, enjoin the court trying the criminal proceeding.⁸⁸

b. Limitations of, and Exceptions to, Rule

The rule and statute prohibiting the federal courts from enjoining state court proceedings do not, as a general rule, prevent a federal court which is properly vested with jurisdiction of a particular matter from acting in aid and in furtherance of such jurisdiction by enjoining proceedings which would have the effect of defeating or impairing such jurisdiction, or from depriving a party, by injunction, of the benefit of a final judgment obtained in a state court in circumstances where its enforcement would be contrary to recognized principles of equity and good conscience; nor does the statute prevent the restraining of nonjudicial proceedings.

By judicial construction, various exceptions and

limitations have been engrafted on Judicial Code § 265, 28 U.S.C.A. § 379, which, as appears in subdivision a of this section, supra, prohibits any court of the United States from granting an injunction to stay proceedings in any state court, except where authorized by laws relating to bankruptcy proceedings.⁸⁹ Broadly speaking, this statute is not regarded as depriving federal courts of their jurisdiction in a proper case to enjoin or restrain state court proceedings, but merely as going to the equity of the particular bill, making it the duty of the court to determine whether the specific case presented is or is not within the prohibition.⁹⁰ The grant of particular jurisdiction to the federal courts includes the power and duty to protect such jurisdiction,⁹¹ and the prohibition of Judicial Code § 265 must be construed in connection with, and is limited by, § 262, 28 U.S.C.A. § 377, which authorizes the federal courts to issue all writs, not specifically provided for by statute, which may be necessary for the exercise of their jurisdictions, and are agreeable to law.⁹²

the state court shall be void, it was proper, on motion pending relator's appeal for the circuit court of appeals to make a restraining order preserving existing conditions until it could hear and decide whether it has, and the court had, jurisdiction of such proceeding.—U. S. v. Shipp, Tenn., 27 S.Ct. 186, 203 U.S. 563, 51 L.Ed. 319.—U. S. v. Brown, C.C.A. Minn., 281 F. 657.

83. U.S.—State of Tennessee v. Keenan, D.C.Tenn., 13 F.Supp. 784—Ex parte Beach, D.C.Cal., 259 F. 956.

84. U.S.—Fenner v. Boykin, Ga., 46 S.Ct. 492, 271 U.S. 240, 70 L.Ed. 927, affirming, D.C., 3 F.2d 674—Ex parte Young, Minn., 28 S.Ct. 441, 209 U.S. 123, 52 L.Ed. 714, 13 L.R.A.N.S., 932, 14 Ann.Cas. 764.

85. U.S.—Ex parte Young, supra—Fenner v. Boykin, D.C.Ga., 3 F.2d 674.

86. U.S.—Fenner v. Boykin, Ga., 46 S.Ct. 492, 271 U.S. 240, 70 L.Ed. 927, affirming, D.C., 3 F.2d 674—Ex parte Young, Minn., 28 S.Ct. 441, 209 U.S. 123, 52 L.Ed. 714, 13 L.R.A.N.S., 932, 14 Ann.Cas. 764—Pughe v. Patton, D.C.Tex., 21 F.Supp. 182—Pope v. Blanton, D.C.Fla., 10 F.Supp. 18, modified on other grounds 57 S.Ct. 321, 299 U.S. 521, 81 L.Ed. 384.

More assertion of unconstitutionality of the state law is not sufficient basis for request to enjoin criminal prosecution under alleged unconstitutional enactment.—Pughe v. Patton, D.C.Tex., 21 F.Supp. 182.

Absence of impediment to defense

The federal court will not interfere with prosecutions in the state courts, where there is no impediment interposed to the raising in those prosecutions of any defense which accused may have, or may think he has, under the constitution of the United States; and a stipulation by accused not to engage in the illegal practice of medicine, entered in a prior prosecution for that offense, would not preclude accused from attacking the state statute as contrary to the United States constitution in a subsequent prosecution, and so such stipulation is not ground for injunction by the United States courts against prosecutions.—Lindsey v. Allen, D.C.Mass., 269 F. 658, appeal dismissed 42 S.Ct. 462, 258 U.S. 613, 66 L.Ed. 791.

Allegations held not to warrant injunction

Allegations in application for injunction held not to show that state officials would unconstitutionally prosecute action against applicant, even though they may have done so in the past as against others.—Pughe v. Patton, D.C.Tex., 21 F.Supp. 182.

87. U.S.—Pope v. Blanton, D.C.Fla., 10 F.Supp. 15, modified on other grounds 57 S.Ct. 321, 299 U.S. 521, 81 L.Ed. 384.

88. U.S.—Pope v. Blanton, supra.

89. U.S.—Pacific Indemnity Co. v. Hite, D.C.Or., 24 F.Supp. 662.

90. U.S.—Sovereign Camp, W. O. W., v. O'Neill, Tex., 45 S.Ct. 49, 266 U.S. 292, 69 L.Ed. 293, reversing, D.C., 286 F. 734—Smith v. Apple,

Kan., 44 S.Ct. 311, 264 U.S. 274, 68 L.Ed. 678—Toucey v. New York Life Ins. Co., C.C.A.Mo., 102 F.2d 16—Equitable Life Assur. Soc. of U. S. v. Wert, C.C.A.Neb., 102 F.2d 10—American Optometric Ass'n v. Ritholz, C.C.A.Ill., 101 F.2d 883, certiorari denied Ritholz v. American Optometric Ass'n, 59 S.Ct. 1047, 307 U.S. 647, 83 L.Ed. 1527—Miller v. Climax Molybdenum Co., C.C.A.Colo., 96 F.2d 254—Jamerson v. Alliance Ins. Co. of Philadelphia, C.C.A.Ill., 87 F.2d 253, affirming, D.C., Alliance Ins. Co. of Philadelphia v. Jamerson, 12 F.Supp. 957, certiorari denied Jamerson v. Alliance Ins. Co. of Philadelphia, 57 S.Ct. 753, 300 U.S. 683, 81 L.Ed. 886—Russell v. Detrick, C.C.A.Nev., 23 F.2d 175—Maryland Casualty Co. v. Tighe, D.C.Cal., 29 F.Supp. 69.

91. U.S.—Fiske v. State of Missouri, C.C.A.Mo., 62 F.2d 150, certiorari granted State of Missouri v. Fiske, 53 S.Ct. 696, 289 U.S. 720, 77 L.Ed. 1471, reversed on other grounds 54 S.Ct. 18, 290 U.S. 18, 78 L.Ed. 145.

92. U.S.—Riehle v. Margolies, N.Y., 49 S.Ct. 310, 279 U.S. 218, 73 L.Ed. 689—Kline v. Burke Const. Co., Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077, reversing, C.C.A., Burke Const. Co. v. Kline, 271 F. 605—U. S. v. McIntosh, D.C.Va., 57 F.2d 573—Chicago, M. & St. P. Ry. Co. v. Schendel, C.C.A.Minn., 292 F. 326—U. S. v. Inaba, D.C.Wash., 291 F. 416—Sharon v. Terry, C.C.Cal., 36 F. 337, 338, 13 Sawy. 387, 1 L.R.A. 574, affirmed Terry v. Sharon, 9 S.Ct.

Accordingly, while the power should be exercised only in cases presenting an actual necessity,⁹³ as a general rule, both in the application of the statute and apart therefrom, federal courts properly exercising jurisdiction of particular matters, as in a case of exclusive jurisdiction, are regarded as having power to aid and further their jurisdiction

by enjoining or restraining proceedings in a state court which would have the effect of defeating or impairing it;⁹⁴ and in such case it may enjoin the state court proceedings before judgment as well as afterward.⁹⁵ So, the granting of an injunction is permissible where such action by the feder-

705, 131 U.S. 40, 33 L.Ed. 94.

"The rule of this statute, read with section 262, 28 U.S.C.A. § 377, is subject to well-recognized exceptions."—Chicago Title & Trust Co. v. Fox Theatres Corporation, C.C.A.N.Y., 69 F.2d 60, 61.

93. U.S.—Clinton v. Coppedge, D.C. Okl., 2 F.Supp. 935.

Extent limited by necessity

Federal court in protecting its jurisdiction and decrees in litigation should go no further than necessary in enjoining or otherwise indirectly controlling proceedings in state court.—Wannamaker v. Eaves, C.C.A.S.C., 79 F.2d 553—Mississippi Valley Trust Co. v. Franz, C.C.A.Mo., 51 F.2d 1047.

Reversal of federal court's injunction

Federal district court could not, after its decree enjoining enforcement of rates fixed by state and restraining suits for overcharges had been reversed by supreme court, prevent persons not parties to suit from suing in state courts to recover such overcharges.—St. Louis, I. M. & S. Ry. Co. v. McKnight, Ark., 37 S.Ct. 611, 244 U.S. 368, 61 L.Ed. 1200.

94. U.S.—Munroe v. Raphael, 53 S.Ct. 424, 288 U.S. 485, 77 L.Ed. 910, reversing, C.C.A., Raphael v. Munroe, 60 F.2d 16, certiorari granted Munroe v. Raphael, 53 S.Ct. 117, 287 U.S. 591, 77 L.Ed. 516—Toucey v. New York Life Ins. Co., C.C.A.Mo., 102 F.2d 16, certiorari denied 59 S.Ct. 1037, 307 U.S. 638, 83 L.Ed. 1519, 122 A.L.R. 1415—Chicago Title & Trust Co. v. Fox Theatres Corporation, C.C.A.N.Y., 69 F.2d 60, 91 A.L.R. 991—Fiske v. State of Missouri, C.C.A.Mo., 62 F.2d 150, certiorari granted State of Missouri v. Fiske, 53 S.Ct. 696, 289 U.S. 720, 77 L.Ed. 1471, reversed on other grounds 54 S.Ct. 18, 290 U.S. 18, 78 L.Ed. 145—U.S. v. McIntosh, D.C.Va., 57 F.2d 573—Mississippi Valley Trust Co. v. Franz, C.C.A.Mo., 51 F.2d 1047—Guaranty Trust Co. of New York v. Broadway & S. A. R. Co., D.C.N.Y., 43 F.2d 130—National Fire Ins. Co. v. Sanders, C.C.A.Tex., 38 F.2d 212, reversing, D.C., 33 F.2d 157—Sand Springs Home v. Title Guarantee & Trust Co., C.C.A.Okl., 16 F.2d 917—Republic Power & Service Co. v. Security Bank & Trust Co., D.C.La., 9 F.2d 476—Pacific Telephone & Telegraph Co. v. Agnew, C.C.A.Wash., 5 F.2d 221, reversing,

D.C., 2 F.2d 155—Union Central Life Ins. Co. v. McAden, D.C.Tex., 21 F.Supp. 110—Pullen v. Patton, D.C.Tex., 19 F.Supp. 340—Murray v. Transit Commission, D.C.N.Y., 11 F.Supp. 27, affirmed, C.C.A., Murray v. Transit Commission, Metropolitan Division, Dept. of Public Service of State of New York, 104 F.2d 1017—Katz Drug Co. v. W. A. Sheaffer Pen Co., D.C.Mo., 6 F.Supp. 212—Clinton v. Coppedge, D.C.Okl., 2 F.Supp. 935—American Mut. Liability Ins. Co. v. Volpe, C.C.A.N.J., 284 F.75—U. S. v. Brown, C.C.A.Minn., 281 F. 657—Lowther v. New York Life Ins. Co., C.C.A.N.J., 278 F. 405—Wilson v. Alexander, C.C.A.Tex., 276 F. 875—Terre Haute, & I. R. Co. v. Peoria & P. U. R. Co., C.C.Ill., 82 F. 943—Garner v. Second Nat. Bank, R.I., 67 F. 833, 16 C.C.A. 86, certiorari denied 16 S.Ct. 1201, 163 U.S. 688, 41 L.Ed. 319.

"Where the elements of federal and equity jurisdiction are present, the provision does not prevent the federal courts from . . . maintaining and protecting their own jurisdiction, properly acquired and still subsisting, by enjoining attempts to frustrate, defeat or impair it through proceedings in the state courts."—Wells Fargo & Co. v. Taylor, Miss., 41 S.Ct. 93, 96, 254 U.S. 175, 65 L.Ed. 205, reversing Taylor v. Wells Fargo & Co., 249 F. 109, 161 C.C.A. 161.

Rights of United States

(1) Where the federal court has acquired exclusive jurisdiction of an action involving the rights of the United States as a party, it may enjoin proceedings in the state courts affecting such rights.—Babcock v. U. S., C.C.A.Ind., 9 F.2d 905, modifying, D.C., U. S. v. Babcock, 6 F.2d 160—U. S. v. Dewar, D.C.Nev., 18 F.Supp. 981—U. S. v. Inaba, D.C.Wash., 291 F. 416.

(2) However, a state court proceeding may not be enjoined on such ground where the rights of the United States are not in fact involved and need not be protected in such manner.—U. S. v. Dewar, D.C.Nev., 18 F.Supp. 981.

(3) Also, while the United States, in a proceeding under the Anti-Trust Act might be entitled to an injunction against the enforcement of a state court judgment, such an injunction will not be granted at the

instance of a private party for its own advantage.—Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., Ohio, 46 S.Ct. 61, 269 U.S. 42, 70 L.Ed. 155.

Enforcement of commission's orders

In an action brought to enforce orders of the interstate commerce commission with respect to the transfer of railroad property, the court could enjoin the parties from circumventing the commission's orders even though the effect would be to stay suits brought in the state courts to effect the end prohibited by the orders.—Miller v. Climax Molybdenum Co., C.C.A.Colo., 96 F.2d 254.

Proceedings not impairing jurisdiction

(1) Where prosecution of state court suit does not interfere with subject matter in possession of federal court or impair federal court's jurisdiction, injunction against such suit cannot be obtained.—Allen v. American Fidelity & Casualty Co., C.C.A.Tex., 80 F.2d 458—Union Central Life Ins. Co. v. McAden, D.C.Tex., 21 F.Supp. 110.

(2) This is the rule even without the prohibition of the statute.—Aetna Casualty & Surety Co. v. Yeatts, C. C.A.Va., 99 F.2d 665.

Federal court without jurisdiction

"A federal court may sometimes enjoin proceedings in a state court to protect its own jurisdiction lawfully acquired, but may not interfere even temporarily when it has none."—Schell v. Food Machinery Corporation, C.C.A.Fla., 87 F.2d 385, 387, certiorari denied Food Machinery Corporation v. Schell, 57 S.Ct. 670, 300 U.S. 679, 81 L.Ed. 833.

Protecting jurisdiction of territorial court

A newly created federal district court, which, by act of congress, assumed jurisdiction over some of the cases pending in the territorial court which had previously existed in the district, is distinct from the territorial court, and cannot enjoin a state court proceeding in order to protect the jurisdiction and judgments of the territorial court.—Sand Springs Home v. Title Guarantee & Trust Co., C.C.A.Okl., 16 F.2d 917.

95. U.S.—Sand Springs Home v. Title Guarantee & Trust Co., supra. Enjoining enforcement of judgment see *infra* this section.

al court is necessary to protect or render effective a judgment or decree of such court.⁹⁶

It also follows that the prohibition of the statute or rule is inapplicable where a federal court

has been vested with priority of jurisdiction over the subject matter and parties, and in order to protect its jurisdiction it is necessary to enjoin the proceeding in the state court,⁹⁷ at least where the

96. U.S.—Dugas v. American Surety Co. of New York, La., 57 S.Ct. 515, 300 U.S. 414, 81 L.Ed. 720, affirming, C.C.A., 82 F.2d 953, certiorari granted 57 S.Ct. 47, 299 U.S. 532, 81 L.Ed. 391, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365—Hesselberg v. Aetna Life Ins. Co., C.C.A.Mo., 102 F.2d 23—Toucey v. New York Life Ins. Co., C.C.A.Mo., 102 F.2d 16, certiorari denied 59 S.Ct. 1037, 307 U.S. 638, 83 L.Ed. 1519, 122 A.L.R. 1415—Provident Mut. Life Ins. Co. of Philadelphia v. Parsons, C.C.A.N.C., 70 F.2d 833, certiorari denied Parsons v. Provident Mut. Life Ins. Co., 55 S.Ct. 95, 293 U.S. 582, 79 L.Ed. 678—Sand Springs Home v. Title Guarantee & Trust Co., C.C.A.Okl., 16 F.2d 917—Magid v. Westmoreland, D.C.Ga., 15 F.2d 884, affirmed, C.C.A., 15 F.2d 885—Mercantile Trust Co. v. Binford, D.C.Tex., 6 F.2d 285—Clinton v. Coppedge, D.C.Okl., 21 Supp. 935—U. S. v. Reading Co., D.C.Pa., 300 F. 477—Pierce v. National Bank of Commerce in St. Louis, C.C.A.Mo., 282 F. 100—Wilson v. Alexander, C.C.A.Tex., 276 F. 875—St. Louis-San Francisco Ry. Co. v. McElvain, D.C.Mo., 253 F. 123—Rensselaer & S. R. Co. v. Bennington & R. R. Co., C.C.Vt., 18 F. 617.

15 C.J. p 1179 note 29.

Independent or ancillary proceeding

(1) Federal court may entertain ancillary bill to enjoin proceedings in state court affecting decree.—Fiske v. State of Missouri, C.C.A.Mo., 62 F.2d 150, certiorari granted State of Missouri v. Fiske, 53 S.Ct. 696, 289 U.S. 720, 77 L.Ed. 1471, reversed on other grounds 54 S.Ct. 18, 290 U.S. 18, 78 L.Ed. 145—American Surety Co. of New York v. Baldwin, D.C. Idaho, 2 F.Supp. 679—Wilson v. Alexander, C.C.A.Tex., 276 F. 875.

(2) Whether suit to enjoin state court action involving matter previously adjudicated in federal court be deemed an independent action or one ancillary to former suit, federal court could treat it as ancillary, assert its jurisdiction, and preserve integrity of its judgment.—Hickey v. Johnson, C.C.A.Okl., 9 F.2d 498, mandamus granted on other grounds Hickey v. Williams, 22 F.2d 787.

Where title acquired under decree in federal court is attacked in an action in the state court, the text rule applies.—Bryant v. Atlantic Coast Line R. Co., C.C.A.N.Y., 92 F.2d 569—Hickey v. Johnson, C.C.A.Okl., 9 F.2d 498, mandamus granted

on other grounds Hickey v. Williams, 22 F.2d 787—Phipps v. Chicago, R. I. & P. Ry. Co., C.C.A.Mo., 284 F. 945—28 A.L.R. 1184, certiorari granted 43 S.Ct. 363, 261 U.S. 611, 67 L.Ed. 826, and error dismissed 43 S.Ct. 701, 262 U.S. 762, 67 L.Ed. 1221—Pierce v. National Bank of Commerce in St. Louis, C.C.A.Mo., 282 F. 100.

Jurisdiction reserved by decree

Where final decree in a proceeding in federal court retained sole jurisdiction to determine certain claims, an action thereon in the state court can be enjoined by the federal court.—Smith v. Missouri Pac. R. Co., C.C.A.Mo., 266 F. 653.

After termination of receivership in federal court, that court had jurisdiction to enjoin parties from maintaining a suit in the state court to relitigate matters determined in the receivership suit, although the suit in the state court was in personam and did not involve any lien on property under the dominion of the federal court.—Bethke v. Grayburg Oil Co., C.C.A.Tex., 89 F.2d 536, certiorari denied 58 S.Ct. 54, 302 U.S. 730, 82 L.Ed. 564.

Decree held not attacked

Suit in state court by bondholders against purchaser at mortgage foreclosure sale in federal court, to impress trust on property, was not enjoinable as attack on federal court's decree.—Magid v. Westmoreland, D.C.Ga., 15 F.2d 884, affirmed, C.C.A., 15 F.2d 885.

57. U.S.—Kline v. Burke Const. Co., Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L. Ed. 226, 24 A.L.R. 1077, reversing, C.C.A., Burke Const. Co. v. Kline, 271 F. 605—Looney v. Eastern Texas R. Co., Tex., 38 S.Ct. 460, 247 U.S. 214, 62 L.Ed. 1084, dismissing appeal, D.C., Eastern Texas R. Co. v. Railroad Commission of Texas, 242 F. 300—Holmes v. Rowe, C.C.A.Cal., 97 F.2d 537—Berdie v. Kurtz, C.C.A.Cal., 75 F.2d 898—Harnischfeger Sales Corporation v. National Life Ins. Co., C.C.A.Wis., 72 F.2d 921—Brown v. Pacific Mut. Life Ins. Co., C.C.A.S.C., 62 F.2d 711—Fiske v. State of Missouri, C.C.A.Mo., 62 S.W.2d 150, certiorari granted State of Missouri v. Fiske, 53 S.Ct. 696, 289 U.S. 720, 77 L.Ed. 1471, reversed on other grounds 54 S.Ct. 18, 290 U.S. 18, 78 L.Ed. 145—Interborough Rapid Transit Co. v. Gilchrist, D. C.N.Y., 25 F.2d 164, reversed on other grounds, C.C.A., 32 F.2d 1015—Harvey Brokerage Co. v. Ambassador Hotel Corporation, D.C.N.Y.,

6 F.Supp. 345—Seeley v. Cornell, D. C.Tex., 6 F.Supp. 241—Higgins v. California Prune & Apricot Growers, C.C.A.N.Y., 282 F. 550—Berg v. Fidelity & Casualty Co. of New York, C.C.A.Kan., 274 F. 311—St. Louis-San Francisco Ry. Co. v. McElvain, D.C.Mo., 253 F. 123—Swift v. Black Panther Oil & Gas Co., Okl., 244 F. 20, 156 C.C.A. 448—Union Mutual L. Ins. Co. v. Chicago University, C.C.Ill., 6 F. 443, 10 Diss. 191.

D.C.—Frazier v. Frazier, 61 F.2d 920, 61 App.D.C. 279.

15 C.J. p 1179 note 30.

Priority and retention of jurisdiction see supra § 529.

Reason for rule

"Otherwise, after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court, after it had obtained full jurisdiction of person and subject-matter."—Fisk v. Union Pac. R. Co., C.C.N.Y., 9 F.Cas.No.4,830, 10 Blatchf. 518, 520.

Corpus Juris cited in support of proposition that federal court first acquiring jurisdiction will retain it as against other courts.—Reconstruction Finance Corporation v. Zimmerman, C.C.A.S.C., 76 F.2d 313, 316.

Enjoining enforcement of state court order

Federal court may enjoin enforcement of order of state court restraining defendant therein from appearing as witness in federal action where federal court had first acquired jurisdiction of the subject matter.—Chicago, M. & St. P. Ry. Co. v. Schendel, C.C.A.Minn., 292 F. 326.

When jurisdiction first acquired

Federal equity court, first acquiring jurisdiction of cause by filing of bill, may enjoin proceeding at law in state court, although latter's process was first served.—Brown v. Pacific Mut. Life Ins. Co., C.C.A.S.C., 62 F.2d 711.

Text rule recognized but held not to apply

(1) Where federal court had not acquired prior jurisdiction.—Puget Sound Power & Light Co. v. Asia, C. C.A.Wash., 277 F. 1, certiorari denied 42 S.Ct. 272, 258 U.S. 619, 66 L. Ed. 794.

(2) Where although the res involved in both actions had been deposited with the federal court, the state court had first acquired jurisdiction of the parties and subject matter with ample power to control

state court suit would affect the control, possession, or disposition of the res by the federal court.⁹⁸ It is frequently held that this exception to the prohibition applies only where the federal court ac-

tion is one in rem and custody of the res is disturbed by the proceedings in the state court, and that where both actions are in personam there is no interference warranting an injunction;⁹⁹ but there

the disposition of the res.—*Harlan v. Harlan*, 281 F. 602, 52 App.D.C. 98 modified on other grounds 44 S.Ct. 135, 263 U.S. 681, 68 L.Ed. 504.

(3) Where the state court suit would not interfere with the jurisdiction of the federal court with respect to the matter before it.—*Chancey v. Bauer*, C.C.A.Fla., 97 F.2d 293, rehearing denied 97 F.2d 994—*Chicago Title & Trust Co. v. Fox Theaters Corporation*, C.C.A.N.Y., 69 F.2d 60, 91 A.L.R. 991—*Raphael v. Monroe*, C.C.A.Mass., 60 F.2d 16, certiorari granted *Munroe v. Raphael*, 53 S.Ct. 117, 287 U.S. 591, 77 L.Ed. 516, reversed on other grounds 53 S.Ct. 424, 288 U.S. 485, 77 L.Ed. 910—*Puget Sound Power & Light Co. v. Asia*, D.C.Wash., 2 F.2d 485.

(4) Where property administered by a receiver appointed by federal court had been sold, and the receiver discharged, the federal court would not enjoin execution of judgment lien of state court against the property in the hands of the purchaser.—*International-Great Northern R. Co. v. Adkins*, C.C.A.Tex., 18 F.2d 481, affirming, D.C., *International & G. N. R. Co. v. Adkins*, 14 F.2d 149, and certiorari denied *International & G. N. R. Co. v. Adkins*, 48 S.Ct. 30, 275 U.S. 533, 72 L.Ed. 411.

98. U.S.—*Riehle v. Margolies*, N.Y., 49 S.Ct. 310, 279 U.S. 218, 73 L.Ed. 669—*Equitable Life Assur. Soc. of U. S. v. Wert*, C.C.A.Neb., 102 F.2d 10—*Bryant v. Atlantic Coast Line R. Co.*, C.C.A.N.Y., 92 F.2d 569—*Wannamaker v. Eaves*, C.C.A.S.C., 79 F.2d 553—*Central Surety & Insurance Corporation v. Bagley*, D.C.Cal., 44 F.2d 808—*Barnett v. Mayes*, C.C.A.Okl., 43 F.2d 521—*Hatch v. Morosco Holding Co.*, C.C.A.N.Y., 19 F.2d 766, certiorari granted *Riehle v. Margolies*, 49 S.Ct. 29, 278 U.S. 591, 73 L.Ed. 523—*First Nat. Bank v. Stewart Fruit Co.*, D.C.Cal., 17 F.2d 621—*Franz v. Quinn*, C.C.A.Mo., 15 F.2d 797—*Quinn v. Bancroft-Jones Corporation*, D.C.N.Y., 12 F.2d 958—*Pierce v. National Bank of Commerce in St. Louis*, C.C.A.Mo., 282 F. 100—*Havner v. Hegnes*, C.C.A.Iowa, 269 F. 537—*Oppenheimer v. San Antonio Land & Irrigation Co.*, Tex., 246 F. 934, 159 C.C.A. 206.

S.C.—*Marchant v. Wannamaker*, 180 S.E. 350.

Interference with receivership

(1) With respect to suit in state court for wrongs of receiver appointed by federal court, generally there will be no injunction by federal court

unless state court action threatens to interfere with control of functions of federal receivership, which involves such matters as title, possession, means, and methods of administration, liquidation, establishment of relative equities, and time and manner of distribution.—*McGreavey v. Straw*, N.H., 5 A.2d 270.

(2) Enforcement of judgment of state court docketed after appointment by federal court of receiver for debtor's property may be restrained by the federal court to protect its prior jurisdiction over the res.—*Davis v. Seneca Falls Mfg. Co.*, D.C.N.Y., 8 F.2d 546, modified on other grounds, C.C.A., 17 F.2d 546.

Enforcing bond

Federal court retained control over manner of enforcing bond given for protection of all creditors by one purchasing assets in receivership proceeding, and therefore had jurisdiction to restrain single creditor's proceedings on bond in state court.—*Munroe v. Raphael*, 53 S.Ct. 424, 288 U.S. 485, 77 L.Ed. 910, reversing, C.C.A., *Raphael v. Monroe*, 60 F.2d 16, certiorari granted *Munroe v. Raphael*, 53 S.Ct. 117, 287 U.S. 591, 77 L.Ed. 516.

99. U.S.—*Honolulu Oil Corporation v. Patrick*, C.C.A.Cal., 71 F.2d 654—*Hatch v. Morosco Holding Co.*, C.C.A.N.Y., 19 F.2d 766, certiorari granted *Riehle v. Margolies*, 49 S.Ct. 29, 278 U.S. 591, 73 L.Ed. 523—*Johnson v. New York O. & W. Ry. Co.*, D.C.N.Y., 3 F.Supp. 80—*Chicago M. & St. P. Ry. Co. v. Schendel*, C.C.A.Minn., 292 F. 326—*W. E. Stewart Land Co. v. Arthur*, C.C.A.Iowa, 267 F. 184—*Standley v. Roberts*, Ind.T., 59 F. 836, 8 C.C.A. 305.

Pa.—*Thompson v. Fitzgerald*, 198 A. 58, 329 Pa. 497, certiorari granted *Princess Lida of Thurn and Taxis v. Fitzgerald*, 59 S.Ct. 72, 305 U.S. 582, 83 L.Ed. 366, affirmed *Princess Lida of Thurn and Taxis v. Thompson*, 59 S.Ct. 275, 305 U.S. 456, 83 L.Ed. 285.

Apparently so holding *Young v. Standard Oil Co.*, D.C.Cal., 35 F.2d 551.

"The rank and authority of the [federal and state] courts are equal, but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction is a rule of right and of law based upon necessity,

and where the necessity, actual or potential does not exist, the rule does not apply. Since that necessity does exist in actions in rem, and does not exist in actions in personam, involving a question of personal liability only, the rule applies in the former, but does not apply in the latter."—*Kline v. Burke Const. Co.*, Ark., 43 S.Ct. 79, 83, 260 U.S. 226, 57 L.Ed. 226, 24 A.L.R. 1077, reversing, C.C.A., *Burke Const. Co. v. Kline*, 271 F. 605.

Actual or potential control

Exception to federal court's lack of power to enjoin pending proceeding in state court is based, on actual or potential power of a res.—*Sansbury v. Koss*, D.C.N.Y., 10 F. Supp. 477.

Suit to cancel policy

Suit brought in federal court to cancel insurance policy containing incontestable clause on ground of fraud of insured was "action in personam," as distinguished from "action in rem," and hence defendant could not be enjoined from prosecuting subsequently instituted action in state court to recover on policy.—*Harnischfeger Sales Corporation v. National Life Ins. Co.*, C.C.A.Wis., 72 F.2d 921, distinguishing *Drown v. Pacific Mut. Life Ins. Co.*, C.C.A.S.C., 62 F.2d 711 on difference in facts.

Action asserting rates confiscatory

Action by telephone company against director of public works, supervisor of public utilities, and others, asserting rates were confiscatory, was proceeding in rem, and not in personam, within text rule.—*Pacific Telephone & Telegraph Co. v. Star Pub. Co.*, D.C.Wash., 2 F.2d 151.

Suits not disturbing custody

(1) The federal court may not enjoin suits to declare the rights of claimants to a res in its custody if such suits do not and cannot disturb its custody.—*Bryant v. Atlantic Coast Line R. Co.*, C.C.A.N.Y., 92 F.2d 569.

(2) So, the pendency in a state court of an action in personam which involves no claim to, or lien on, specific property in the possession of the federal court, and no issue of which that court has acquired exclusive jurisdiction, presents no ground for a dependent bill to stay it.

U.S.—*Riehle v. Margolies*, N.Y., 49 S.Ct. 310, 279 U.S. 218, 73 L.Ed. 669—*Holmes County, Miss. v. Burton Const. Co.*, C.C.A.Miss., 272 F. 565—*In re Sugar Products Co.*, D.C.N.Y., 247 F. 623.

S.C.—*Little v. Southern Cotton Oil Co.*, 153 S.E. 462, 156 S.C. 480.

is some authority upholding the right of a federal court of equity to enjoin proceedings at law in the state courts impairing the jurisdiction assumed notwithstanding that both actions are in personam.¹

The prohibition of the statute is subject to the further exception that the federal court may in a proper case issue an injunction where the state court is without jurisdiction.² Also, where the elements of federal and equity jurisdiction are present, the federal courts may enjoin the institution of proceedings to enforce local statutes and regulations which are repugnant to the federal constitution,³ and it has been broadly said that where such a question is involved, an exception to the statutory prohibition exists permitting a federal

court of equity to intervene in state court proceedings.⁴ Of course, injunctive relief which does not interfere with the action of a state court may be granted by a federal court.⁵

Where an injunction is necessary and proper, as to protect the first acquired jurisdiction of the federal court, it should ordinarily be directed to the parties and not to the judge of the state court.⁶

Effect of removal of cause. It is generally held that the prohibition against injunction does not apply where a cause is properly removed from a state court to a federal court, and that the latter court may protect the exclusive jurisdiction thereby acquired by enjoining subsequent proceedings in the cause in the state court,⁷ the issuance of the injunc-

1. U.S.—*Brown v. Pacific Mut. Life Ins. Co.*, C.C.A.S.C., 62 F.2d 711, 713.

"Upon further consideration of the *Kline* case, [*Kline v. Burke Const. Co.*, Ark., 43 S.Ct. 79, 260 U.S. 226, 67 L.Ed. 226, 24 A.L.R. 1077, reversing, C.C.A., *Burke Const. Co. v. Kline*, 271 F. 605] we find nothing in it which limits to actions in rem the right of a federal court of equity, to protect its jurisdiction. It involved no situation where it was necessary for a court of equity to protect against encroachment on its jurisdiction or the lawful effect of its orders and decrees, but merely one where independent proceedings were pending in the state and federal courts, in both of which the ultimate relief sought was a money judgment."—*Brown v. Pacific Mut. Life Ins. Co.*, supra.

Suit to cancel policy

Federal equity court first acquiring jurisdiction of suit to cancel insurance policy for fraud had power to enjoin interference with jurisdiction by prosecution of proceedings at law in state court.—*New York Life Ins. Co. v. Truesdale*, C.C.A.S.C., 79 F.2d 481, followed in *Truesdale v. New York Life Ins. Co.*, 79 F.2d 486.—*Brown v. Pacific Mut. Life Ins. Co.*, C.C.A.S.C., 62 F.2d 711.

2. U.S.—*Union Central Life Ins. Co. v. McAden*, D.C.Tex., 21 F.Supp. 110.—*Pullen v. Patton*, D.C.Tex., 19 F.Supp. 340.—*Pierce v. National Bank of Commerce in St. Louis*, C.C.A. Mo., 282 F. 100.

15 C.J. p 1179 note 32.

3. U.S.—*Wells Fargo & Co. v. Taylor*, Miss., 41 S.Ct. 93, 254 U.S. 175, 65 L.Ed. 205, reversing *Taylor v. Wells Fargo & Co.*, 249 F. 109, 161 C.C.A. 161.—*American Mut. Liability Ins. Co. v. Volpe*, C.C.A.N.J., 284 F. 75.—*Lowther v. New York Life Ins. Co.*, C.C.A.N.J., 278 F. 405.

Reason for rule

The prohibition of the statute does

not apply for the reason that no proceedings in the state courts have yet begun.—*Lindsley v. Natural Carbonic Gas Co.*, C.C.N.Y., 162 F. 954.—*Palatka Waterworks v. Palatka*, C.C.Fla., 127 F. 161.

Regulation fixing confiscatory rates

The United States courts have jurisdiction to restrain the enforcement of a regulation fixing rates for railway fares which were admittedly confiscatory.—*City of San Antonio v. San Antonio Public Service Co.*, Tex., 41 S.Ct. 428, 255 U.S. 547, 65 L.Ed. 777, affirming, D.C., *San Antonio Public Service Co. v. City of San Antonio*, 257 F. 467.

Injunction by statutory court

(1) Under Judicial Code § 266, 28 U.S.C.A. § 380, providing that only a specially constituted court shall issue interlocutory injunctions against the enforcement of state statutes on the ground of their unconstitutionality, and that such injunctions shall be stayed if a stay against the enforcement of the statute is granted in a state court, a federal court cannot deprive a state court of competent jurisdiction of the power to hear an action for enforcement of a state statute on the merits where application is made in such suit for a stay of other proceedings to enforce the statute.—*Michigan Public Utilities Commission v. Michigan State Telephone Co.*, 200 N.W. 749, 228 Mich. 658.

(2) However, the federal court injunction is not stayed by the state court proceeding where the state court has granted no stay of enforcement of the statute.—*Interborough Rapid Transit Co. v. Gilchrist*, D.C.N.Y., 25 F.2d 164, reversed on other grounds, C.C.A., 32 F.2d 1015.

(3) An injunction issued under this statute does not deprive defendant of remedy for the enforcement of the statute, but merely withholds the remedy until the validity of the statute is determined.—*Daniel v.*

Conestee Mills, 191 S.E. 76, 183 S.C. 337.

4. U.S.—*Land Development Co. of Louisiana v. City of New Orleans*, D.C.La., 13 F.2d 898, reversed on other grounds, C.C.A., 17 F.2d 1016.

5. U.S.—*Pinckney v. Wylie*, C.C.A. Tex., 86 F.2d 541.

15 C.J. p 1181 note 50.

6. U.S.—*Havner v. Hegnes*, C.C.A. Iowa, 269 F. 537.

7. U.S.—*Equitable Life Assur. Soc. of U. S. v. Wert*, C.C.A.Neb., 102 F.2d 10.—*Bryant v. Atlantic Coast Line R. Co.*, C.C.A.N.Y., 92 F.2d 569.—*Queensboro Nat. Bank of the City of New York v. Kelly*, D.C.N.Y., 15 F.2d 395.—*State ex rel. Glassell v. Shell Petroleum Corporation*, D.C.La., 20 F.Supp. 795.—*Kolkin v. Gotham Sportswear*, D.C.N.Y., 10 F.Supp. 682.—*Automobile Ins. Co. of Hartford, Conn. v. Harrison*, D.C.N.Y., 7 F.Supp. 846.—*El Paso & Southwestern Co. v. Riddle*, D.C.Tex., 287 F. 173, affirmed, C.C.A., 294 F. 892.—*Colleton Mercantile & Manufacturing Co. v. Savannah River Lumber Co.*, C.C.A.S.C., 280 F. 358.—*Hunt v. Pearce*, C.C.A. Okl., 284 F. 321, affirming, D.C., 271 F. 498.—*McCabe v. Guaranty Trust Co. of New York, N.Y.*, 243 F. 845, 156 C.C.A. 357.—*Frazier v. Hines*, D.C.S.C., 260 F. 874.—*Palmer v. Delaware, L. & W. R. Co.*, D.C.N.Y., 222 F. 461.—*Donovan v. Wells, Fargo & Co.*, Mo., 169 F. 363, 94 C.C.A. 609, 22 L.R.A., N.S., 1250.—*Chicago, R. I. & P. R. Co. v. Stepp*, C.C.Mo., 151 F. 908, affirmed 164 F. 785, 90 C.C.A. 431, 22 L.R.A., N.S., 350.—*New York Mut. L. Ins. Co. v. Langley*, C.C.S.C., 145 F. 415.—*Rochester German Ins. Co. v. Schmidt*, C.C.S.C., 126 F. 998.—*Virginia-Carolina Chemical Co. v. Home Ins. Co.*, S. C., 113 F. 1, 51 C.C.A. 21, certiorari dismissed 23 S.Ct. 854, 189 U.S. 517, 47 L.Ed. 926.—*Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.*, C.C.Ill., 32 F. 943.—*Sinclair v.*

tion being a matter of discretion;⁸ but this rule does not apply where the case was wrongfully removed to the federal court.⁹ Since the jurisdiction of the federal court attaches upon the filing of a sufficient petition for removal and bond, as appears in the C.J.S. title Removal of Causes § 222, also 54 C.J.

p 334 note 50—p 335 note 59, it may grant such an injunction at the time of such filing,¹⁰ although it has also been held that it may not do so until a transcript of the state court proceeding has been filed in the federal court.¹¹ The injunction must

Pierce, C.C.Mass., 50 F. 851—*Bridges v. Sheldon*, C.C.Vt., 7 F. 19, 18 Blatchf. 295, 507.

S.C.—*Thrower v. Kistler*, 178 S.E. 126, 174 S.C. 479.

15 C.J. p 1181 note 51.

Contra *Fisk v. Union Pac. R. Co.*, C.C.N.Y., 9 F.Cas.No.4327, 6 Blatchf. 362—*Penrose v. Penrose*, C.C.N.Y., 19 F.Cas.No.10,958, 17 Blatchf. 332.

Requisites to jurisdiction of injunction suit

Where a law action was removed from a state court to a federal court, the question of the latter's jurisdiction of a suit to enjoin plaintiff in the law action from proceeding further in the state court "resolved itself into three constituent questions: Did the court have jurisdiction of the parties? Did it have jurisdiction of the subject-matter? Did it have jurisdiction in the main—that is, the law-action?"—*Dillinger v. Chicago, B. & Q. R. Co.*, C.C.A.Mo., 19 F.2d 196, 197.

Auxiliary proceeding

(1) The injunction is ordinarily granted in an equity proceeding ancillary to the action removed.—*Madisonville Traction Co. v. St. Bernard Min. Co.*, Ky., 25 S.Ct. 251, 196 U.S. 239, 49 L.Ed. 462—*Dillinger v. Chicago, B. & Q. R. Co.*, C.C.A.Mo., 19 F.2d 196—*Kolkin v. Gotham Sportswear, D.C.N.Y.*, 10 F.Supp. 682—*Donovan v. Wells, Fargo & Co.*, Mo., 169 F. 363, 94 C.C.A. 609, 22 L.R.A.N.S. 1250—*McAllister v. Chesapeake & O. R. Co.*, Ky., 157 F. 740, 85 C.C.A. 316, 13 Ann.Cas. 1068.

(2) The determination of whether a cause should be removed should be by the federal court having jurisdiction of the action at law, and not as a part of the injunction suit.—*Donovan v. Wells, Fargo & Co.*, supra.

Subsequent separate action in state court

(1) Removal of action to federal court does not warrant federal court's granting injunction to restrain prosecution of a second action, based on a separate and distinct cause of action, in the state court.—*Western Union Tel. Co. v. Cooper*, C.C.Ga., 182 F. 710—15 C.J. p 1181 note 51 [b].

(2) Where action was removed to federal court, prosecution of second action on same cause of action, but for less than amount sufficient to give federal court jurisdiction, against foreign corporation and two

of its officers, who were citizens of state where action was brought could not be enjoined by federal court.—*Honolulu Oil Corporation v. Patrick*, C.C.A.Cal., 71 F.2d 634.

In Porto Rico

The rule applies to causes removed from insular courts of Porto Rico to district court of United States.—*Russell & Co. v. Mestre*, 12 Porto Rico Fed. 338—*Wenar v. Pohl*, 1 Porto Rico Fed. 37.

8. U.S.—*Young v. Southern Pac. Co.*, C.C.A.N.Y., 15 F.2d 280.

Injunction not necessary

The federal court will not grant an injunction where the state court granted the motion to remove and it did not appear that any attempt would be made to continue the proceedings in the state court.—*McCabe v. Guaranty Trust Co.*, N.Y., 243 F. 845, 156 C.C.A. 357.

9. W.Va.—*White v. Holt*, 20 W.Va. 792.

Cause not removable

The statutory prohibition against the granting by a federal court of an injunction to stay proceedings in a state court, cannot be evaded by the filing of removal papers by a defendant, and then by injunction staying further proceedings in the federal court, if the cause be in fact not removable.—*Higgins v. California Prune & Apricot Grower*, C.C.A. N.Y., 3 F.2d 896.

10. U.S.—*Chesapeake & Ohio Ry. Co. v. Cookrell*, Ky., 34 S.Ct. 278, 232 U.S. 146, 58 L.Ed. 544—*Chesapeake & O. R. Co. v. McDonald*, Ky., 29 S.Ct. 546, 214 U.S. 191, 53 L.Ed. 963—*Chesapeake & O. R. Co. v. McCabe*, Ky., 29 S.Ct. 430, 213 U.S. 207, 53 L.Ed. 765—*Atchison, T. & S. F. Ry. Co. v. Smith*, C.C. A.Cal., 47 F.2d, 223—*Lamson v. Superior Court of California in and for Santa Clara County*, D.C.Cal., 12 F.Supp. 812—*Wieland v. New York Cent. R. Co.*, D.C.N.Y., 9 F. Supp. 572—*Muir v. Louisville & N. R. Co.*, D.C.Ky., 247 F. 888.

15 C.J. p 1181 note 52.

Injunction pending determination as to removal

(1) A federal court may, under several authorities, enjoin proceedings in the state court pending its determination of whether or not the cause is removable.

U.S.—*Frazier v. Hines*, D.C.S.C., 260 F. 874—*Donovan v. Wells, Fargo & Co.*, Mo., 169 F. 363, 94 C.C.A.

609, 22 L.R.A.N.S., 1250—*McAllister v. Chesapeake & O. R. Co.*, Ky., 157 F. 740, 85 C.C.A. 316, 13 Ann.Cas. 1068—*Warren v. Ives*, C.C.Mich., 29 F.Cas.No.17,197, 1 Flipp. 356.

Mont.—*Golden v. Northern Pacific R. Co.*, 104 P. 549, 39 Mont. 435, 34 L.R.A.N.S., 1154, 18 Ann.Cas. 886.

(2) However, it has also been held that an injunction will not be granted until the question of the right to remove the cause has been finally decided.—*Frishman v. Insurance Companies*, C.C.Kan., 41 F. 449—*Wagner v. Drake*, D.C.Iowa, 31 F. 849.

Danger of irreparable injury necessary

The acts of congress contemplate the issue of ex parte orders from a federal court to restrain the trial in a state court of a cause that is entitled to removal only when it appears that there is danger of irreparable injury from delay.—*People v. Judge Detroit Super. Ct.*, 1 N.W. 955, 41 Mich. 31.

Decision on motion to remand prerequisite

Injunction will not ordinarily be granted before a motion to remand the cause has been decided, unless the right of removal is beyond dispute.—*Sinclair v. Pierce*, C.C.Mass., 50 F. 851.

Where petition for removal is held insufficient to warrant removal, the federal court will not enjoin the state court proceeding.—*Daker v. Jacksonville Traction Co.*, D.C.Fla. 247 F. 718.

11. U.S.—*Coeur D'Alene R. & Nav. Co. v. Spalding*, Idaho, 93 F. 280, 35 C.C.A. 295, certiorari denied 19 S.Ct. 884, 174 U.S. 801, 43 L.Ed. 1187.

15 C.J. p 1181 note 53.

Inability to obtain transcript

Where plaintiff refused to file in the state court his pleadings, etc., seeking in that way to prevent removal of the cause to the federal court, as proper transcript could not be made up, the federal court may enjoin plaintiff from further proceedings in the cause; but, where plaintiff by stipulation agreed to a method of curing the deficiency, no injunction can be issued until the transcript has been filed and the cause removed.—*Atlantic Coast Line R. Co. v. Feaster*, D.C.S.C., 260 F. 881.

be directed to the parties, and not to the state court itself.¹²

As incident to equitable jurisdiction generally. Where a federal court has assumed jurisdiction of a suit based on some well recognized equitable ground, and the case is one which is appropriate for the exercise of equitable and injunctive powers of the court, it may enjoin proceedings in a state court which may have the effect of defeat-

ing or impairing the jurisdiction so assumed;¹³ and this is the case even though the state court proceedings were first instituted, if the remedy there available is inadequate.¹⁴ So the federal court may grant equitable relief involving the enjoining of suits at law in the state courts where the remedy at law is inadequate,¹⁵ or where the state court proceeding was brought only for vexatious or malicious purposes,¹⁶ or in order to prevent a person from being subjected to a multiplicity of suits.¹⁷

12. U.S.—Madisonville Traction Co. v. St. Bernard Min. Co., Ky., 25 S.Ct. 251, 196 U.S. 239, 49 L.Ed. 463—Palmer v. Delaware, L. & W. R. Co., D.C.N.Y., 222 F. 461.

13. U.S.—Equitable Life Assur. Soc. of U. S. v. Wert, C.C.A.Neb., 102 F.2d 10—Jamerson v. Alliance Ins. Co. of Philadelphia, C.C.A.Ill., 87 F.2d 253, affirming, D.C., Alliance Ins. Co. of Philadelphia v. Jamerson, 12 F.Supp. 957, certiorari denied Jamerson v. Alliance Ins. Co. of Philadelphia, 57 S.Ct. 753, 320 U.S. 653, 81 L.Ed. 886—New York Life Ins. Co. v. Truesdale, C.C.A.S.C., 79 F.2d 481, followed in Truesdale v. New York Life Ins. Co., 79 F.2d 486—Katz Drug Co. v. W. A. Sheaffer Pen Co., D.C.Mo., 6 F.Supp. 212—U. S. v. McIntosh, D.C.Va., 2 F. Supp. 244, rehearing denied 3 F. Supp. 715, appeal dismissed, C.C.A., McIntosh v. U. S., 70 F.2d 507, certiorari denied 55 S.Ct. 101, 293 U.S. 586, 79 L.Ed. 682.

"While by the act a limitation upon equitable jurisdiction is created, this statutory prohibition does not prevent the federal court from enjoining the maintenance or institution of suits in the state court which would interfere with or frustrate equity jurisdiction, if such is presented by the bill."—Alliance Ins. Co. of Philadelphia v. Jamerson, D.C.Ill., 12 F.Supp. 957, 963, affirmed, C.C.A. Jamerson v. Alliance Ins. Co. of Philadelphia, 87 F.2d 253, certiorari denied 57 F.2d 753, 300 U.S. 683, 81 L.Ed. 886.

Limited relief

The statute does not deprive the federal court of jurisdiction of the subject matter of a suit seeking equitable relief against an action in the state court even though the court is prevented by the statute from granting complete relief, and it may grant such relief as is within its power.—Western Union Telegraph Co. v. Tompa, C.C.A.N.Y., 51 F.2d 1032.

Unfair use of processes of courts

A federal court may prevent a plaintiff from making an unfair use of the processes of courts of law to deprive complainants of rights

which, under the facts alleged in the bill, the state court cannot adequately protect.—National Surety Co. v. State Bank of Humboldt, Neb., 120 F. 593, 600, 56 C.C.A. 657, 61 L. R.A. 394—15 C.J. p 1180 note 46.

Injunction depriving of jury trial

Injunctions by federal court of equity against prosecution of actions in state courts, which will deprive defendant of right to a jury trial, should not be granted without very substantial reasons therefor.—New York Life Ins. Co. v. Stoner, C.C.A. Mo., 92 F.2d 845.

Necessity for injunctive relief not shown

(1) Generally.—Southern Grocery Stores v. Hollis, C.C.A.S.C., 63 F.2d 351—Kennedy v. City of White Bear Lake, D.C.Minn., 22 F.2d 862—National Quarries Co. v. Detroit, T. & I. R. Co., C.C.A.Ohio, 10 F.2d 139—Union Central Life Ins. Co. v. McAden, D.C.Tex., 21 F.Supp. 110.

(2) A federal court of equity will not enjoin a state court proceeding on the ground that if the funds are permitted to go to defendant receivers they will be dissipated by the costs of the receivership, where there is no certainty that the same would not be true if the funds were turned over to plaintiffs, who are also receivers.—Phillips v. Noel Const. Co., 266 F. 603, 49 App.D.C. 379, certiorari denied 41 S.Ct. 7, 254 U.S. 631, 65 L.Ed. 447.

14. U.S.—Brown v. Pacific Mut. Life Ins. Co., C.C.A.S.C., 62 F.2d 711.

15. U.S.—Ruhlin v. New York Life Ins. Co., C.C.A.Pa., 93 F.2d 416, certiorari granted 58 S.Ct. 408, 302 U.S. 681, 82 L.Ed. 526, vacated on other grounds 58 S.Ct. 860, 304 U.S. 202, 82 L.Ed. 1290, mandate conformed to, D.C., New York Life Ins. Co. v. Ruhlin, 25 F.Supp. 65—Western Union Telegraph Co. v. Tompa, C.C.A.N.Y., 51 F.2d 1032—Pacific Mut. Life Ins. Co. of California v. Hartman, D.C.Okla., 10 F. Supp. 425—U. S. v. McIntosh, D.C.Va., 2 F.Supp. 244, rehearing denied 3 F.Supp. 715, appeal dismissed, C.C.A., McIntosh v. U. S., 70 F.2d 507, certiorari denied 55

S.Ct. 101, 293 U.S. 586, 79 L.Ed. 682.

Practical inadequacy

"Something more than a theoretical inadequacy of legal remedy must exist in order to justify the issuance of an injunction. . . . It must be a practical inadequacy of remedy sufficient to justify a court of equity in exercising its jurisdiction in favor of a plaintiff whose rights will be substantially and adversely affected if such injunction is not granted."—Equitable Life Assur. Soc. of U. S. v. Wert, C.C.A.Neb., 102 F.2d 10, 15.

16. U.S. — American Optometric Ass'n v. Ritholz, C.C.A.Ill., 101 F. 2d 883, certiorari denied Ritholz v. American Optometric Ass'n, 59 S.Ct. 1047, 307 U.S. 647, 83 L.Ed. 1527, motion and petition denied 60 S.Ct. 70—Higgins v. California Prune & Apricot Growers, C.C.A.N.Y., 282 F. 550.

Equitable necessity for injunctive relief not shown

U.S.—New York Life Ins. Co. v. Stoner, C.C.A.Mo., 92 F.2d 845.

17. U.S.—Armour & Co. v. Haugen, C.C.A.N.D., 95 F.2d 196, 15 C.J. p 1180 note 47.

Factors to be considered; requisite allegations

(1) In determining whether federal court of equity will so act, the factors to be considered are the real and substantial convenience of all parties, the adequacy of plaintiff's legal remedy, the situations of the different parties, the points to be contested and the result which will follow if jurisdiction is assumed or denied; and such suits will not be enjoined where the issues in the suits are not necessarily identical and rights of parties would be prejudiced.—Armour & Co. v. Haugen, supra.

(2) Although state court actions constituted a "multiplicity of suits," they will not be enjoined in absence of allegation that result of one trial in state court would not dispose of all cases or that state court was powerless to try all cases as one case.—Equitable Life Assur. Soc. of U. S. v. Wert, C.C.A.Neb., 102 F.2d 10.

On the other hand, a federal court cannot grant equitable relief to restrain the prosecution of an action in the state courts where the complaining party could secure full and adequate relief in the state court proceedings.¹⁸

Enjoining enforcement of judgment. A federal court exercising equitable powers may deprive a

party, by means of an injunction, of the benefit of a final judgment obtained in a state court in circumstances where its enforcement would be contrary to recognized principles of equity and the standards of good conscience, as where the judgment is void, or based on fraud, accident, or mistake, without fault or negligence of the complaining party.¹⁹ Indeed, there is authority broadly to

18. U.S.—Pacific Indemnity Co. v. Hite, D.C.Or., 24 F.Supp. 662.

However, it has been said that the federal court may furnish equitable relief within its jurisdiction notwithstanding the party seeking to restrain prosecution of the state action has a remedy in the state court.—Western Union Telegraph Co. v. Tompa, C.C.A.N.Y., 51 F.2d 1032.

Federal judgment in bar

Suit brought by party failing to obtain judgment in law action in federal court, to relitigate same matter in state court under pretense of equitable action to reform, will not be enjoined by federal court, since defendant in such suit need only plead federal court judgment as bar.—Allon v. American Fidelity & Casualty Co., C.C.A.Tex., 80 F.2d 458.

19. U.S.—Atchison, T. & S. F. Ry. Co. v. Wells, Tex., 44 S.Ct. 469, 265 U.S. 101, 68 L.Ed. 928, reversing, C.C.A., 285 F. 369—Wells Fargo & Co. v. Taylor, Miss., 41 S.Ct. 93, 254 U.S. 175, 65 L.Ed. 205, reversing, C.C.A., Taylor v. Wells Fargo & Co., 249 F. 109, 161 C.C.A. 161—Bryant v. Atlantic Coast Line R. Co., C.C.A.N.Y., 92 F.2d 569—Folk v. Monsell, C.C.A.Okl., 71 F.2d 816—City of Norwalk, Ohio, v. Equitable Trust Co. of New York, C.C.A.Ohio, 63 F.2d 911, certiorari granted Chase Nat. Bank of City of New York v. City of Norwalk, Ohio, 54 S.Ct. 73, 290 U.S. 614, 78 L.Ed. 537, reversed on other grounds Chase Nat. Bank v. City of Norwalk, Ohio, 54 S.Ct. 475, 291 U.S. 431, 78 L.Ed. 894—American Surety Co. of New York v. Baldwin, C.C.A. Idaho, 55 F.2d 555, reversing, D.C., 51 F.2d 596, and certiorari granted Baldwin v. American Surety Co. of New York, 52 S.Ct. 500, 286 U.S. 537, 76 L.Ed. 1276, reversed on other grounds Baldwin v. American Surety Co., 53 S.Ct. 98, 287 U.S. 156, 77 L.Ed. 231, 86 A.L.R. 298—Riverside Oil & Refining Co. v. Dudley, C.C.A. Okl., 33 F.2d 749—Lynch v. International Banking Corporation, C.C.A.Cal., 31 F.2d 942, certiorari denied 50 S.Ct. 28, 280 U.S. 571, 74 L.Ed. 624—Jefferson v. Gypsy Oil Co., C.C.A.Okl., 27 F.2d 304—Ballard & Ballard Co. v. Munson S. S. Line, C.C.A.Ky., 25 F.2d 252, certiorari denied 49 S.Ct. 17, 278 U.

S. 611, 73 L.Ed. 536—Smith v. Apple, C.C.A.Kan., 6 F.2d 559—Union Central Life Ins. Co. v. McAden, D.C.Tex., 21 F.Supp. 110—Pullen v. Patton, D.C.Tex., 19 F.Supp. 340—Exchange Nat. Bank of Shreveport, La. v. Joseph Reid Gas Engine Co., C.C.A.La., 287 F. 870, affirming, D.C., Joseph Reid Gas Engine Co. v. Exchange Nat. Bank, 281 F. 847—American Mut. Liability Ins. Co. v. Volpe, C.C.A.N.J., 284 F. 75—Wagner Electric Mfg. Co. v. Lyndon, C.C.A.Mo., 252 F. 219, certiorari denied 43 S.Ct. 361, 261 U.S. 614, 67 L.Ed. 827, and appeal dismissed 43 S.Ct. 589, 262 U.S. 226, 67 L.Ed. 961—Pierce v. National Bank of Commerce in St. Louis, C.C.A.Mo., 282 F. 100—Lowther v. New York Life Ins. Co., C.C.A.N.J., 278 F. 401—Seaboard Air Line Ry. Co. v. Fowler, D.C.N.C., 275 F. 239—Mohawk Oil Co. v. Layne, D.C.La., 370 F. 841—Pierce v. National Bank of Commerce in St. Louis, C.C.A.Mo., 278 F. 487—U. S. Railroad Administration v. Burch, D.C.S.C., 254 F. 140, 15 C.J. p 1179 note 35, p 1180 note 46, p 1181 note 49.

Fraud

(1) Party suing to enjoin enforcement of judgment fraudulently obtained in state court must show valid defense to cause of action on which judgment was rendered, that he was revented by extrinsic fraud, accident, mistake, concealment, or other chicanery from presenting such defense, and that he had not been negligent in availing himself of it.—McClaff v. Robbins, C.C.A.Kan., 81 F.2d 431, affirming, D.C., 14 F.Supp. 602, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397.

(2) It has been held that the federal courts will act only in the case of extrinsic or collateral fraud operating not on matters pertaining to the judgment itself, but with respect to the manner in which it was procured, as where it was practiced on a party so as to prevent him from making a full defense; the courts will not enjoin enforcement of a judgment on account of intrinsic fraud, practiced during the course of the trial, such as the use of forged instruments or perjured testimony, nor can they act on the ground of newly discovered evidence.—Phillips Petroleum Co. v. Jenkins, C.

C.A.Ark., 91 F.2d 183—McClaff v. Robbins, C.C.A.Kan., 81 F.2d 431, affirming, D.C., 14 F.Supp. 602, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397.

(3) A federal court may set aside a sale of the land of an infant, fraudulently made by his guardian under authority derived from a state court.—Arrowsmith v. Gleason, Ohio, 9 S.Ct. 237, 129 U.S. 86, 32 L.Ed. 630.

Remedy in state court

(1) Where federal court had jurisdiction of action to restrain enforcement of final judgment fraudulently or unlawfully obtained in a state court, it was error to deny relief on the ground that complainants had a right to petition in the state court to have the judgment set aside, since complainants were not confined to such remedy.—The Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, C.C.A.S.C., 282 F. 811, modifying, D.C., 278 F. 816, certiorari denied Marlboro Cotton Mills v. Firestone Tire & Rubber Co., 43 S.Ct. 248, 260 U.S. 749, 67 L.Ed. 494.

(2) However, it has been held that a bill to prevent enforcement of judgment on ground of fraud and perjured testimony is properly dismissed, where state supreme court, while asserting that it had power to order new trial, refused to do so.—American Bakeries Co. v. Vining, C.C.A.Fla., 80 F.2d 932, affirming, D.C., 13 F.Supp. 323.

Legal remedy held inadequate, requiring application of text rule.—Fetzer v. Johnson, C.C.A.Okl., 15 F.2d 145, certiorari denied Johnson v. Fetzer, 47 S.Ct. 456, 273 U.S. 751, 71 L.Ed. 873.

Equitable grounds for injunctive relief not shown

(1) Generally.—Superior Oil Corporation v. Matlock, C.C.A.Okl., 47 F.2d 993—Fidelity & Deposit Co. of Maryland v. Gaston, Williams & Wigmore, D.C.N.Y., 13 F.2d 267, affirmed, C.C.A., 13 F.2d 268—American Bakeries Co. v. Vining, D.C.Fla., 13 F.Supp. 323, affirmed, C.C.A., 80 F.2d 932.

(2) As against objections that necessary party to action was missing, that there had been no adversary trial, and that the action was barred by the statute of limitations.—McClaff v. Robbins, C.C.A.Kan., 81 F.2d 431, affirming, D.C., 14 F.Supp. 602,

the effect that, whatever may be the application of the prohibitory statute with respect to injunctions affecting actions in the state courts before final judgment therein, the statute does not prohibit the federal courts from acting in a proper case to enjoin the enforcement of a final judgment,²⁰ and that the prohibition of the statute does not extend to the issuance of an injunction against the enforcement of a judgment obtained in a state action where the prosecution of the state suit would be enjoined but for the statute.²¹ So, notwithstanding some authority apparently to the contrary,²² it is held that a federal court may restrain the execution of a state court judgment against the property of third person not a party to the judgment.²³ It has even been held that in a proper case the court need not wait until judgment in the

state action is obtained, but may enjoin the enforcement of the judgment should one be obtained.²⁴

On the other hand, an injunction will not be granted where the only objection to the judgment of the state court is that it was erroneously decided,²⁵ or where no final decree capable of being enforced has been entered by the state court, but only an interlocutory decree.²⁶ Neither will enforcement of the judgment be enjoined where the fraud, accident, or mistake resulted in whole or in part from the fault or negligence of the complaining party.²⁷

Exercise of jurisdiction conferred by statute. Since the statute prohibiting the enjoining of state court proceedings is a mere limitation upon the general equity powers of the federal courts, it may be varied by congress to meet the requirements of

certiorari denied 56 S.Ct. 940, 298 U. S. 675, 80 L.Ed. 1397.

(3) Where it is not alleged or proved that the fraud complained of affected the outcome of the litigation.—*Moffett v. Robbins*, supra—*Riverside Oil & Refining Co. v. Dudley*, C.C.A.Okl., 33 F.2d 749.

(4) Where failure to enjoin enforcement of judgment will not result in irreparable loss and injury to the moving party.—*Pierce v. National Bank of Commerce in St. Louis*, C.C.A.Mo., 282 F. 100—*Pierce v. National Bank of Commerce in St. Louis*, C.C.A.Mo., 268 F. 487.

20. U.S.—*Seay v. Hawkins*, C.C.A. Okl., 17 F.2d 710—*Fetzer v. Johnson*, C.C.A.Okl., 15 F.2d 145, certiorari denied *Johnson v. Fetzer*, 47 S.Ct. 455, 273 U.S. 751, 71 L.Ed. 873—*Smith v. Apple*, C.C.A.Kan., 6 F.2d 559—*Chicago, R. I. & P. Ry. Co. v. Callicotte*, C.C.A.Mo., 267 F. 799, certiorari denied *Callicotte v. Chicago, R. I. & P. R. Co.*, 41 S.Ct. 375, 255 U.S. 570, 65 L.Ed. 791, 16 A.L.R. 386.

Del.—*Miles v. Layton*, 193 A. 567, 112 A.L.R. 786.

15 C.J. p 1179 note 34.

Reason for rule is that the federal action is a new and independent suit for equitable relief, presenting a question not presented to, or decided by, the state court, and operates directly on the party to take from him a benefit to which he is not entitled.—*Wells Fargo & Co. v. Taylor*, Miss., 41 S.Ct. 93, 254 U.S. 175, 65 L.Ed. 205, reversing *Taylor v. Wells Fargo & Co.*, 249 F. 109, 161 C.C.A. 161—*Moffett v. Robbins*, C.C.A.Kan., 81 F.2d 431, affirming, D.C., 14 F.Supp. 602, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397.

21. U.S.—*Western Union Telegraph Co. v. Tompa*, C.C.A.N.Y., 51 F.2d 1032.

22. U.S.—*Mills v. Provident Life, etc., Co.*, Wash., 100 F. 344, 40 C.C. A. 394—*Daly v. Sheriff*, C.C.La., 6 F.Cas.No.3,553, 1 Woods 175.

23. U.S.—*Julian v. Central Trust Co., N.C.*, 115 F. 956, 53 C.C.A. 438, affirmed 24 S.Ct. 399, 193 U.S. 93, 48 L.Ed. 629.

15 C.J. p 1180 note 37.

24. U.S.—*Western Union Telegraph Co. v. Tompa*, C.C.A.N.Y., 51 F.2d 1032.

25. U.S.—*Andrew Iannetta Funeral Home v. State Board of Undertakers of Department of Health of Pennsylvania*, D.C.Pa., 27 F.Supp. 518—*American Brake Shoe & Foundry Co. v. Pere Marquette R. Co.*, D.C.Mich., 278 F. 832.

Erroneous application of statute of foreign state

U.S.—*Moffett v. Robbins*, C.C.A.Kan., 81 F.2d 431, affirming, D.C., 14 F.Supp. 602, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397—*Hartford Life Ins. Co. v. Johnson*, C.C.A.Mo., 268 F. 36.

Appointment of receiver

Federal court, on application for injunction to restrain proceedings, in state court, is concerned only with jurisdiction to appoint receiver, and not proper exercise thereof.—*Clinton v. Coppedge*, D.C.Okl., 2 F.Supp. 935.

Erroneous assumption of jurisdiction

Although state court judgment may be attacked in federal courts under due process clause for lack of notice, federal jurisdiction cannot be predicated on erroneous assumption of jurisdiction of subject matter by state court, where subject matter is defined by state law and notice and opportunity to raise judicial question are afforded in state courts.—*Lambert v. Central Bank of Oakland*, C.C.A.Cal., 85 F.2d 954, certiorari denied 57 S.Ct. 437, 300 U.S. 458, 81 L.Ed. 867.

Remedy in state courts

(1) The remedy is by appeal in the state courts, and it will be assumed that state court will do justice and correct errors in exercise of jurisdiction, if any.—*Clinton v. Coppedge*, D.C.Okl., 2 F.Supp. 935.

(2) The text rule is especially applicable where judgment was affirmed by the state supreme court.—*Wagner Electric Mfg. Co. v. Lyndon*, C.C.A.Mo., 282 F. 219, certiorari denied 43 S.Ct. 361, 261 U.S. 614, 67 L.Ed. 827, and appeal dismissed 43 S.Ct. 589, 262 U.S. 226, 67 L.Ed. 961.

Defect not relied on for appeal

A judgment cannot be enjoined because rendered without sufficient evidence where the complaining party elected to appeal therefrom on questions of law alone.—*Lambert v. Central Bank of Oakland*, C.C.A.Cal., 85 F.2d 954, certiorari denied 57 S.Ct. 436, 300 U.S. 458, 81 L.Ed. 867.

26. U.S.—*Essanay Film Mfg. Co. v. Kane*, C.C.A.N.J., 264 F. 959, affirming, D.C., 256 F. 271, and affirmed 42 S.Ct. 318, 258 U.S. 358, 66 L.Ed. 658.

27. U.S.—*Riverside Oil & Refining Co. v. Dudley*, C.C.A.Okl., 33 F.2d 749.

Injunctive relief properly denied

(1) In absence of allegation that matters constituting fraud were not known to complainant in time for timely presentation in the state court before rendition of judgment.—*Riverside Oil & Refining Co. v. Dudley*, supra.

(2) Where complaining party continued in the trial without objection after having gained knowledge of the alleged defect in the proceedings.—*Moffett v. Robbins*, C.C.A.Kan., 81 F.2d 431, affirming, D.C., 14 F.Supp. 602, certiorari denied 56 S.Ct. 940, 298 U.S. 675, 80 L.Ed. 1397.

federal litigation.²⁸ So the Interpleader Act, Judicial Code § 24(26), 28 U.S.C.A. § 41 (26), which authorizes the enjoining of parties to the interpleader from further prosecuting any suits in any other courts on account of the property involved, has been held to modify the prohibition.²⁹ Also it appears that a federal court entertaining a proceeding under the Declaratory Judgment Act, Judicial Code § 274d, 28 U.S.C.A. § 400, may in a proper case enjoin a state court suit interfering with its

jurisdiction over the matter;³⁰ but jurisdiction to grant such relief will not be assumed where a full and complete remedy exists in the state court.³¹

Enjoining nonjudicial exercise of power. The prohibition against injunction applies only to the restraining of the exercise of judicial powers by state courts;³² and accordingly, notwithstanding the statute, a federal court may enjoin state courts acting in a nonjudicial capacity,³³ and it may en-

28. U.S.—*Treinies v. Sunshine Mining Co.*, 60 S.Ct. 44, 308 U.S. 66, 84 L.Ed. —, affirming, C.C.A., 90 F.2d 651, affirming, D.C., *Sunshine Mining Co. v. Treinies*, 19 F.Supp. 587, certiorari granted *Treinies v. Sunshine Mining Co.*, 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, rehearing denied 60 S.Ct. 464.

"Congress has authority, where there is conflicting jurisdiction over the subject-matter, either to confer upon the federal courts power to enjoin proceedings in a state court . . . or to prohibit the exercise of that power."—*Fidelity & Deposit Co. of Maryland v. A. S. Reid & Co.*, D.C. Pa., 16 F.2d 502, 504.

29. U.S.—*Treinies v. Sunshine Mining Co.*, 60 S.Ct. 44, 308 U.S. 66, 84 L.Ed. —, affirming, C.C.A., 90 F.2d 651, affirming, D.C., *Sunshine Mining Co. v. Treinies*, 19 F.Supp. 587, certiorari granted *Treinies v. Sunshine Mining Co.*, 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029, rehearing denied 60 S.Ct. 464—*Dugas v. American Surety Co. of New York, Inc.*, 57 S.Ct. 515, 300 U.S. 414, 81 L.Ed. 720, affirming, C.C.A., 82 F.2d 953, certiorari granted 57 S.Ct. 47, 299 U.S. 532, 81 L.Ed. 391, rehearing denied 57 S.Ct. 787, 301 U.S. 712, 81 L.Ed. 1365—*Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn.*, C.C.A.Iowa, 91 F.2d 141, affirming, D.C., *Phoenix Mut. Life Ins. Co. of Hartford, Conn. v. Lafferty*, 16 F.Supp. 740, certiorari denied *Cramer v. Phoenix Mut. Life Ins. Co. of Hartford, Conn.*, 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, *Coburn v. Phoenix Mut. Life Ins. Co. of Hartford, Conn.*, 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied *Cramer v. Aetna Life Ins. Co.*, 58 S.Ct. 141, 302 U.S. 339, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602, certiorari denied *Coburn v. Aetna Life Ins. Co.*, 58 S.Ct. 141, 302 U.S. 739, 82 L.Ed. 571, rehearing denied 58 S.Ct. 263, 302 U.S. 778, 82 L.Ed. 602—*Worcester County Trust Co. v. Long*

D.C.Mass., 14 F.Supp. 754, reversed on other grounds, C.C.A., *Riley v. Worcester County Trust Co.*, 59 F.2d 59, certiorari granted *Worcester County Trust Co. v. Riley*, 57 S.Ct. 931, 201 U.S. 678, 81 L.Ed. 1338, affirmed 58 S.Ct. 135, 302 U.S. 292, 82 L.Ed. 268.

Interpleader by sureties

Federal court, on sureties paying amount of bond and disclaiming interest, may enjoin pending suit on bond by citizens of different states.—*Fidelity & Deposit Co. of Maryland v. A. S. Reid & Co.*, D.C.Pa., 16 F.2d 502.

A former provision of the interpleader statute, merely authorizing the court in suits thereunder to issue "the necessary writs usual and customary in such cases" was, however, held not to authorize the court to enjoin state court proceedings as against the statutory prohibition of such injunctions.—*Lowther v. New York Life Ins. Co.*, C.C.A.N.J., 278 F. 405.

30. U.S.—*Standard Accident Ins. Co. v. Alexander, Inc.*, D.C.Tex., 23 F. Supp. 807.

Determining insurer's liability

(1) Federal court entertaining action by insurer for declaratory judgment as to its liability under policy may enjoin state court suit against insured on claim for which insurer might be liable, since issue of insurer's liability could not be properly tried in state action.—*Maryland Casualty Co. v. Tighe*, D.C.Cal., 24 F.Supp., 49, appeal dismissed, C.C.A., *Tighe v. Maryland Casualty Co.*, 99 F.2d 727—*Standard Accident Ins. Co. v. Alexander, Inc.*, D.C.Tex., 23 F.Supp. 807.

(2) However, in similar circumstances, other authority, without mention of the text rule, has held that the state court proceedings could not be enjoined.—*Maryland Casualty Co. v. Consumers Finance Service of Pennsylvania*, C.C.A.Pa., 101 F.2d 514, reversing, D.C., 23 F. Supp. 433—*Glens Falls Indemnity Co. v. Brazen*, D.C.Pa., 27 F.Supp. 582—*Associated Indemnity Corporation v. Manning*, D.C.Wash., 16 F. Supp. 430, reversed on other grounds, C.C.A., 92 F.2d 168.

(3) It has been indicated that the federal court could not enjoin the state court action because such action is one in personam for damages and in no wise interferes with the proceedings in the federal court to determine rights under the policy, and the fear of the insurer that it might be estopped from setting up the defense of noncoverage if it defends the state action is not sufficient reason for restraining such action.—*Aetna Casualty & Surety Co. v. Yeatts*, C.C.A.Va., 99 F.2d 665.

(4) So where the district court refused to adjudicate insurer's liability under double indemnity provision of life policies, it would not enjoin beneficiaries from instituting action at law to recover on policies pending review of decision by circuit court of appeals, since the state court action would be one in personam, seeking only a monetary judgment.—*New York Life Ins. Co. v. Roe*, D.C.Ark., 22 F.Supp. 1000, reversed on other grounds, C.C.A., 102 F.2d 28.

31. U.S.—*Standard Accident Ins. Co. v. Alexander, Inc.*, D.C.Tex., 23 F. Supp. 807.

32. U.S.—*Public Service Co. of Northern Illinois v. Corboy, Ind.*, 39 S.Ct. 440, 250 U.S. 153, 63 L. Ed. 905.

33. U.S.—*Public Service Co. of Northern Illinois v. Corboy*, supra. 15 C.J. p 1178 note 16 [d].

County commissioners' court acting ministerially

U.S.—*August Busch & Co. v. Webb*, C.C.Tex., 122 F. 655, appeal dismissed 34 S.Ct. 857, 194 U.S. 640, 48 L.Ed. 1162.

Approval of rates

It has been indicated that an action may be brought in a federal court to enjoin enforcement of rates approved by state courts where such approval is in an administrative, rather than in a judicial, capacity.—*Pacific Telephone & Telegraph Co. v. Kuykendall*, Wash., 44 S.Ct. 553, 265 U.S. 196, 68 L.Ed. 975.

Taxation

(1) Review by court of decree affirming tax assessment is a judicial proceeding within statute prohibiting

join proceedings before a body which is not legally a court.³⁴ So the federal courts may enjoin proceedings before, or the enforcement of orders of,

administrative agencies of the state, without violating the prohibitory statute.³⁵

C. COURTS OF DIFFERENT STATES OR COUNTRIES

§ 544. Exclusive or Concurrent Jurisdiction in General

- a. In general
- b. Actions to construe wills

a. In General

The jurisdiction of the court of a state over actions which are local to such state is exclusive, but not so as to actions which are transitory in nature.

As may be seen in § 38 of this Title the jurisdiction of the courts of a state over actions which are local to such state is exclusive, while in regard to actions which are transitory in nature the courts of a state may assume jurisdiction thereof, even

though such actions are based on acts done in another state or country.

It has been said to be well settled as a general proposition that actions involving title and possession of real property are in the exclusive jurisdiction of the courts of the state in which the realty is situated.³⁶ Thus the court of the state in which realty is located is the court in which should be litigated the question whether a vendor's lien exists against such property if no personal judgment is sought.³⁷ However, the rights and equities of the citizens of a state in property wherever located or under whatever laws acquired will be protected by the courts of such state when this may be

injunction thereof, notwithstanding power of reviewing court to reverse or affirm the assessment in whole or in part, since such power does not necessarily imply an exercise of administrative discretion.—*Hill v. Martin*, N.J., 56 S.Ct. 278, 296 U.S. 393, 80 L.Ed. 293, affirming, D.C., *Dorrance v. Martin*, 12 F.Supp. 746—*Central R. Co. of New Jersey v. Martin*, D.C.N.J., 19 F.Supp. 82.

(2) Where entry of judgment for taxes was purely an administrative duty prescribed by statute to effectuate tax lien after approval of assessment by board of tax appeals, federal court could issue injunctive orders against collection of tax.—*Central R. Co. of New Jersey v. Martin*, D.C.N.J., 19 F.Supp. 84.

34. U.S.—*Joseph H. Weiderhoff, Inc. v. Neal*, D.C.Mo., 6 F.Supp. 798.

15 C.J. p 1180 note 39.

Board of tax appeals

U.S.—*Lehigh Valley R. Co. of New Jersey v. Martin*, D.C.N.J., 19 F.Supp. 63.

State industrial accident commission is judicial tribunal, whose proceedings federal court cannot stay.—*North Pacific S. S. Co. v. Industrial Accident Commission*, D.C.Cal., 23 F.2d 109.

35. U.S.—*U. S. Smelting, Refining & Mining Co. v. Evans*, C.C.A.Utah, 35 F.2d 459, certiorari denied 50 S.Ct. 350, 281 U.S. 744, 74 L.Ed. 1157.

Particular agencies

(1) City board of valuation.—*Stone v. Commonwealth Bank*, Ky., 19 S.Ct. 881, 174 U.S. 799, 43 L.Ed. 1187, affirming, C.C., 88 F. 383—15 C.J. p 1180 note 44.

(2) Compensation commission.—*Joseph H. Weiderhoff, Inc. v. Neal*, D.C.Mo., 6 F.Supp. 798.

(3) Corporation commission.—*Atchison, T. & S. F. R. Co. v. Love*, C.C.Okla., 174 F. 59, aff'd med 185 F. 321, 107 C.C.A. 403, certiorari denied 31 S.Ct. 721, 220 U.S. 618, 55 L.Ed. 612—*Southern R. Co. v. Greensboro Ice & Coal Co.*, C.C.N.C., 134 F. 82, modified on other grounds 26 S.Ct. 722, 202 U.S. 543, 50 L.Ed. 1142.

(4) Public service commission.—*Bacon v. Rutland R. Co.*, Vt., 34 S.Ct. 233, 232 U.S. 134, 53 L.Ed. 538.

(5) Railroad commission.—*Mississippi R. Comrs. v. Illinois Co.*, Miss., 27 S.Ct. 90, 203 U.S. 335, 51 L.Ed. 209, affirming 138 F. 327, 70 C.C.A. 617—15 C.J. p 1180 note 40.

(6) Special commission appointed to wind up the affairs of a state dispensary.—*Fleischman Co. v. Murray*, C.C.S.C., 161 F. 162, affirmed 164 F. 1, 92 C.C.A. 1, reversed on other grounds 29 S.Ct. 458, 213 U.S. 151, 53 L.Ed. 742.

Completion of administrative proceeding

(1) Federal court has jurisdiction to give relief from administrative order only where administrative proceedings are completed.—*Blackmore v. Public Service Commission of Pennsylvania*, D.C.Pa., 12 F.Supp. 751, appeal dismissed 57 S.Ct. 757, 299 U.S. 617, 81 L.Ed. 455.

(2) A federal court has jurisdiction to enjoin enforcement of an order of a state public utilities commission notwithstanding no appeal from the order has been taken to the courts of the state, where the appellate function of the state courts with respect to such orders is judicial and

not legislative and the order is considered complete when it became operative.—*Columbia Ry., Gas & Electric Co. v. Blease*, D.C.S.C., 42 F.2d 463—*U. S. Smelting, Refining & Mining Co. v. Evans*, C.C.A.Utah, 35 F.2d 459, certiorari denied 50 S.Ct. 350, 281 U.S. 744, 74 L.Ed. 1157—*Northwestern Bell Telephone Co. v. Spillman*, D.C.Neb., 6 F.2d 663—*Rosslyn Gas Co. v. Fletcher*, D.C.Va., 5 F.Supp. 25—*Pacific Telephone & Telegraph Co. v. Cushman*, C.C.A.Wash., 292 F. 930, petition dismissed *Cushman v. Pacific Telephone & Telegraph Co.*, 44 S.Ct. 181, 263 U.S. 729, 68 L.Ed. 529—*Monroe Gaslight & Fuel Co. v. Michigan Public Utilities Commission*, D.C.Mich., 292 F. 139—15 C.J. p 1180 note 42 [a].

Erroneous award

Notwithstanding the application of the text rule, enforcement of a compensation board's award cannot be enjoined where the board acted within its jurisdiction and it is merely claimed that the award is erroneous.—*U. S. Smelting, Refining & Mining Co. v. Evans*, C.C.A.Utah, 35 F.2d 459, certiorari denied 50 S.Ct. 350, 281 U.S. 744, 74 L.Ed. 1157.

36. Kan.—*Caldwell v. Newton*, 163 P. 163, 99 Kan. 846.

37. Ind.—*Dowdle v. Central Brick Co.*, 189 N.E. 145, 206 Ind. 242.

Lien based on fraud

Question whether Ohio corporation and its stockholders, alleging that corporation's Ohio property was sold to Indiana corporation through latter's fraud, were entitled to vendor's lien on Ohio property is question which should be litigated in Ohio courts, not in Indiana receivership.—*Dowdle v. Central Brick Co.*, supra.

accomplished through process in person on adverse parties in the jurisdiction, and no foreign court has obtained jurisdiction over the subject matter and the parties for the determination of such rights and equities.³⁸

Status. As is stated in Conflict of Laws § 14 b the law of the domicile governs and controls the status of individuals. Hence, a court will not yield to a foreign jurisdiction the exclusive right to determine the status of one of its residents when the determination of that question is affected by the welfare of both society and the individual members thereof,³⁹ and it has been said that ordinarily the courts of one state have no power to change the status of citizens of another state.⁴⁰

b. Actions to Construe Wills

Ordinarily the construction of a will in so far as it involves real estate is for the courts of the state in which the real estate is located, while in respect of personalty the construction of the will is for the courts of the testator's domicile.

The courts of a state in which land disposed of by will is situated alone have jurisdiction to construe the will in so far as it relates to the land so situated,⁴¹ since a judgment rendered by the courts of a state as to title to land situated without the state is a nullity.⁴² This rule has been held to apply, although the testator resided⁴³ or made the will⁴⁴ in a state other than that in which the land was situated. It has been also held, however, that the courts of a testator's domicile are justified in construing the will to determine its intent, although the devised realty be located in a foreign state.⁴⁵ A statute expressly authorizing an action to determine the validity and construction or

effect of a will under the laws of the state of a testamentary disposition of land situated within it does not authorize an action to construe a will disposing of land situated within another state.⁴⁶

In the case of a will disposing of personal property, the courts of the state wherein the testator resided ordinarily have exclusive jurisdiction of a suit to construe the will, or that portion of it which disposes of the property, wherever it may be situated or found,⁴⁷ the court of a state in which the testator was domiciled having jurisdiction to construe the will with respect to personalty, even though a domiciliary administrator had been appointed in another state.⁴⁸ Although real and personal property are given by the same clause of the will, and on the same trust, they are severable, and the validity of the disposition as to one does not depend on that as to the other; and a suit to construe the will as regards its disposition of personal property must therefore be brought in the state where the testator resided at the time of his decease.⁴⁹

Where a person acting as executor in one state has, under order of court, transmitted all the estate in his hands as such executor to himself, acting as executor in another state, the courts of the former state have no jurisdiction of a suit in equity for the construction of the will, the executor having performed all his duties in that state, and being no longer accountable as executor there;⁵⁰ but the executor of a nonresident testator may bring an action for instructions in the court of another state, in which he has been granted ancillary letters testamentary, if the personal estate found in that state is sufficient for the payment of

38. Ala.—Strawn v. Caffee, 178 So. 430, 235 Ala. 218.

Enforcement of trust

A bill by beneficiary to enforce testamentary trust was within jurisdiction of Alabama court, although will was executed and probated, and estate was being administered, in South Carolina, in which state trustee had given bond, and South Carolina laws governed construction of will, where trust was not attached to office of executor, both trustee and beneficiary were domiciled in Alabama, it did not appear that trust estate had situs in South Carolina, but it appeared that estate in hands of trustee had been segregated and passed out of testator's estate, and it did not appear that any court of competent jurisdiction had assumed jurisdiction of res or parties for purpose of enforcing trust.—Strawn v. Caffee, supra.

39. Tex.—Goldsmith v. Salkey, 112 S.W.2d 166, 131 Tex. 139, 116 A.

L.R. 1293, answers to certified question conformed to, Civ.App., 115 S.W.2d 778.

40. La.—Person v. Person, 135 So. 225, 172 La. 740.

41. N.Y.—In re Craft's Estate, 3 N.Y.S.2d 377.

69 C.J. p 865 note 14.

Ancillary administration

The county court, in which ancillary proceedings for administration of nonresident's estate were begun after probate of his will in state of his residence, had jurisdiction and authority to construe will as effecting realty in county.—In re Hobbleswhite's Will, 280 N.W. 334, 228 Wis. 259.

42. N.Y.—Davis v. Tremain, 98 N.E. 383, 205 N.Y. 236.

43. N.Y.—Roosevelt v. Porter, 73 N.Y.S. 800, 36 Misc. 441.

44. N.Y.—Monypeny v. Monypeny, 95 N.E. 1, 202 N.Y. 90.

45. Mich.—Fuller v. McKim, 154 N.W. 55, 187 Mich. 667.

46. N.Y.—Davis v. Tremain, 98 N.E. 383, 205 N.Y. 236.

47. Mass.—Hutchins v. Commissioner of Corporations and Taxation, 172 N.E. 605, 272 Mass. 422, 71 A.L.R. 677.

69 C.J. p 866 note 19.

48. Utah.—In re Campbell's Estate, 173 P. 688, 53 Utah 487.

Possibility of different construction immaterial

Contention that courts of Utah are precluded from construing a will because courts of California, where domiciliary administration is had, may place a construction thereon different from that given it by the courts of Utah is without merit.—In re Campbell's Estate, supra.

49. N.Y.—Knox v. Jones, 47 N.Y. 389.

50. Mass.—Emery v. Batchelder, 132 Mass. 452.

debts and legacies and the legatees are within the jurisdiction of the court.⁵¹

It has been held that, where a will executed in one state was admitted to probate in another state, and a substituted trustee, who was seeking a discharge, was appointed by the courts of the latter state, having charge of assets located there, and the lapse of time was so great as to remove any possibility that there were still creditors interested in the estate in the place of decedent's domicile, the court, in the exercise of its discretion, will assume jurisdiction to determine the validity of a bequest essential to final distribution by the substituted trustee.⁵²

§ 545. General Rules of Comity

Principles of comity have frequently been used to explain a court's taking of jurisdiction or rejecting it as to matters involving foreign laws.

The courts of a state are frequently called upon to ascertain the substantive law of another state or country and to enforce the same according to the remedial processes of the law of the forum,⁵³ courts having inherent power to furnish assistance, so far as is consistent with their own jurisdiction, to the courts of another state or country,⁵⁴ which power may be restricted or enlarged by statute.⁵⁵

In determining whether courts of different states or countries have exclusive or concurrent jurisdiction over particular matters, resort is frequently had by the courts to the doctrine of comity, discussed at length in Conflict of Laws §§ 3, 4. This doctrine is often used by the courts to explain their taking jurisdiction of particular causes and the extent to which they will act in so doing and also to explain their refusal to take jurisdiction.

It has been frequently reiterated that the extent to which the law of one state or country operates in another,⁵⁶ and whether a court of one state or country should permit an action based on foreign law to be maintained therein,⁵⁷ depend on comity, and except where the full faith and credit clause of the constitution is applicable this is a question exclusively for such court to determine.⁵⁸

Comity has been stated to be the recognition which one state or nation allows within its territory of the law of another, having due regard, both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws,⁵⁹ and applied judicially it means the local enforcement in a suit of which the court has taken jurisdiction of laws of a foreign jurisdiction.⁶⁰ The doctrine applies ordinarily only to rights and does not embrace remedies,⁶¹ nor can

51. Mass.—Welch v. Adams, 25 N.E. 34, 152 Mass. 74, 9 L.R.A. 244.

52. N.Y.—United States Trust Co. v. Wood, 131 N.Y.S. 427, 146 App. Div. 751, affirmed 98 N.E. 1118, 205 N.Y. 564.

53. Ala.—Strawn v. Caffee, 178 So. 430, 235 Ala. 213.

54. U.S.—In re Letters Rogatory from Examining Magistrate of Tribunal of Versailles, France, D.C. Md., 26 F.Supp. 852—U. S. v. Hofmann, D.C.N.Y., 24 F.Supp. 847.

55. U.S.—U. S. v. Hofmann, supra.

56. U.S.—U. S. v. Belmont, C.C.A.N.Y., 35 F.2d 542, certiorari granted 57 S.Ct. 313, 299 U.S. 537, 81 L.Ed. 396, motion denied 57 S.Ct. 505, 300 U.S. 641, 81 L.Ed. 856, reversed on other grounds 57 S.Ct. 758, 301 U.S. 324, 81 L.Ed. 1134—Harrison v. Triplex Gold Mines, C.C.A.Mass., 33 F.2d 667—Franklin Sugar Refining Co. v. William D. Mullen Co., D.C.Del., 7 F.2d 470—U. S. v. Bank of New York & Trust Co., D.C.N.Y., 10 F.Supp. 269, affirmed, C.C.A., 77 F.2d 866, certiorari granted 56 S.Ct. 111, 296 U.S. 558, 80 L.Ed. 393, affirmed 56 S.Ct. 343, 296 U.S. 463, 80 L.Ed. 331, and affirmed, C.C.A., U. S. v. President and Directors of Manhattan, 77 F.2d 881.

Ariz.—Forgan v. Bainbridge, 274 P. 155, 34 Ariz. 408.

Fla.—Hartford Accident & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 100 Fla. 748.

Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

Mo.—Geiser Mfg. Co. v. Todd, App., 224 S.W. 1006.

N.J.—Polychronos v. Polychronos, 8 A.2d 265, 17 N.J.Misc. 250.

N.Y.—Vladikavkazsky Ry. Co. v. New York Trust Co., 189 N.E. 456, 263 N.Y. 369, affirming 264 N.Y.S. 669, 238 App.Div. 581, and reargument denied 191 N.E. 581, 264 N.Y. 595.

Va.—Toler v. Oakwood Smokeless Coal Corporation, 4 S.E.2d 364.

57. Tex.—Western Union Telegraph Co. v. Epley, Civ.App., 218 S.W. 528.

58. Md.—Universal Credit Co. v. Marks, 163 A. 810, 164 Md. 130.

Mo.—Geiser Mfg. Co. v. Todd, App., 224 S.W. 1006.

N.J.—Broderick v. Abrams, 170 A. 214, 112 N.J.Law 309, affirmed 174 A. 507, 113 N.J.Law 305, reversed on other grounds Broderick v. Rosner, 56 S.Ct. 589, 294 U.S. 629, 79 L.Ed. 1100, 100 A.L.R. 1133.

N.Y.—Roseman v. Fidelity & Deposit Co. of Maryland, 265 N.Y.S. 557, 148 Misc. 132, modifying 262 N.Y.S. 491, 146 Misc. 522.

Or.—McGill v. Brewer, 285 P. 208,

132 Or. 422, adhering to judgment 280 P. 508, 132 Or. 422.

59. Fla.—Beckwith v. Bailey, 161 So. 576, 119 Fla. 316—Harron v. Passallaigue, 110 So. 539, 92 Fla. 818.

Ill.—People v. Rushworth, 128 N.E. 555, 294 Ill. 455.

Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

"Comity is the recognition which one nation allows within its territory to legislative, executive, or judicial acts of another nation."—Howard v. Howard, 158 S.E. 101, 103, 200 N.C. 574.

States as separate sovereignties

States of Union are considered as separate sovereignties as regards comity.

Ariz.—Forgan v. Bainbridge, 274 P. 155, 34 Ariz. 408.

N.C.—Howard v. Howard, 158 S.E. 101, 200 N.C. 574.

60. Fla.—Hartford Accident & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 100 Fla. 748.

N.J.—In re Fischer's Will, 181 A. 875, 119 N.J.Eq. 217.

61. U.S.—E. C. Warner Co. v. W. B. Foshay Co., C.C.A.Minn., 57 F.2d 656, certiorari denied 52 S.Ct. 641, 286 U.S. 558, 76 L.Ed. 1292.

Tex.—Portwood v. Portwood, Civ. App., 109 S.W.2d 515, error dis-

it supply jurisdiction otherwise absent.⁶²

While it is frequently reiterated that comity is not a matter of right, but rather a matter of courtesy and good will,⁶³ or that it is neither a matter of absolute obligation nor of courtesy or good will,⁶⁴ or that it is not a rule of law, but one of practice, convenience, and expediency which persuades but does not command,⁶⁵ it has also been said to be part of the common law of the state.⁶⁶ Comity is to be distinguished from full faith and credit under the federal constitution in that the former is a matter of courtesy, complaisance, and respect, not of

right, but of deference and good will, while the latter imposes an obligation.⁶⁷

Under rules of comity, which are sometimes embodied in statutes,⁶⁸ except as there are statutory requirements to the contrary,⁶⁹ the courts of one state will recognize the proceedings of the courts of another state or country,⁷⁰ and the former will not assume, either directly or otherwise, any appellate jurisdiction over the latter.⁷¹ Thereunder such courts will enforce rights arising under the laws of, or in, other states or countries,⁷² some-

missed—*Strawn Mercantile Co. v. First Nat. Bank*, Civ.App., 279 S. W. 473.

62. N.Y.—*In re Armstrong's Estate*, 4 N.Y.S.2d 413, 167 Misc. 592.

63. Mo.—*Woodard v. Bush*, 220 S.W. 839, 282 Mo. 163—*Jerome P. Parker-Harris Co. v. Stephens*, 224 S. W. 1036, 205 Mo.App. 373.

Okl.—*Dudding v. Pitman*, 280 P. 801, 138 Okl. 222.

64. Fla.—*Beckwith v. Bailey*, 161 So. 576, 119 Fla. 316.

Me.—*Pringle v. Gibson*, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

65. N.J.—*Polycronos v. Polycronos*, 8 A.2d 265, 17 N.J.Misc. 250.

Tex.—*Strawn Mercantile Co. v. First Nat. Bank*, Civ.App., 279 S.W. 473.

Vt.—*In re Dennis' Estate*, 129 A. 166, 98 Vt. 514.

Basis of theory

The rule of comity is based on the theory that a court which first asserted jurisdiction will not be interfered with in the continuance of its assertion by another court of foreign jurisdiction until it is convenient and desirable that the one give way to the other, and is not a rule of law, but one of practice, convenience, and expediency.—*National Park Bank of New York v. Old Colony Trust Co.*, 186 N.Y.S. 717, 114 Misc. 127.

Justice and policy

Va.—*Toler v. Oakwood Smokeless Coal Corporation*, 4 S.E.2d 364.

66. Md.—*Holloway v. Safe Deposit & Trust Co. of Baltimore*, 134 A. 497, 151 Md. 321, error dismissed *Nones v. Holloway*, 47 S.Ct. 762, 274 U.S. 724, 71 L.Ed. 1329.

67. Mo.—*Esmar v. Haussler*, 106 S. W.2d 412, 341 Mo. 33, transferred, see App., 115 S.W.2d 54.

68. Ill.—*People v. Rushworth*, 128 N.E. 555, 294 Ill. 455.

69. Colo.—*Mosko v. Matthews*, 284 P. 1021, 1023, 87 Colo. 55.

"A state may by appropriate legislation decline to observe it [rule of comity]."—*Mosko v. Matthews*, supra.

70. Fla.—*Herron v. Passallaigue*, 110 So. 539, 92 Fla. 818.

Ill.—*People v. Rushworth*, 128 N.E. 555, 294 Ill. 455.

Nev.—*Baker v. Baker*, 87 P.2d 800, 804, citing *Corpus Juris*, and modified on other grounds 96 P.2d 200. 15 C.J. p 1181 note 54.

Foreign decrees

Recognition of Russian government by United States established public policy to recognize validity of decrees of such government within its territory.—*U. S. v. Bank of New York & Trust Co.*, C.C.A.N.Y., 77 F. 2d 866, affirming, D.C., 10 F.Supp. 269, and certiorari granted 56 S.Ct. 111, 236 U.S. 558, 80 L.Ed. 393, affirmed 56 S.Ct. 313, 296 U.S. 463, 80 L.Ed. 331, and affirmed, C.C.A., U. S. v. President and Directors of Manhattan, 77 F.2d 881.

Payment to administrator

Foreign insurance company doing business in state, paying insurance money to administrator for nonresident decedent, under principle of comity, would not be liable in action by domiciliary administrator.—*Rochford v. Metropolitan Life Ins. Co.*, 164 N.E. 713, 88 Ind.App. 540.

71. N.J.—*Caruso v. Caruso*, 143 A. 771, 103 N.J.Eq. 487, reversed on other grounds 143 A. 862, 106 N. J.Eq. 130.

72. U.S.—*Mutual Ben. Health & Accident Ass'n v. Baldridge*, C.C.A. Colo., 70 F.2d 236—*Atchison, T. & S. F. Ry. Co. v. Spencer*, C.C.A. Ariz., 20 F.2d 714—*Franklin Sugar Refining Co. v. William D. Mullen Co.*, D.C.Del., 7 F.2d 470, reversed on other grounds, C.C.A., 12 F.2d 885—*By-Products Recovery Co. v. Mabee*, D.C.Ohio, 288 F. 401.

Ark.—*White Co. v. Bragg*, 273 S.W. 7, 168 Ark. 670.

Cal.—*Smith v. Shepler*, 48 P.2d 999, 8 Cal.App.2d 717.

Fla.—*Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 130 So. 7, 100 Fla. 748—*Herron v. Passallaigue*, 110 So. 539, 92 Fla. 818. Ind.—*Sweigart v. State*, 13 N.E.2d 134, 114 A.L.R. 1117.

Miss.—*Floyd v. Vicksburg Coopera-*

ge Co., 126 So. 395, 156 Miss. 567.

Mo.—*Associates Inv. Co. v. Froelich*, App., 34 S.W.2d 987.

N.J.—*Polycronos v. Polycronos*, 8 A.2d 265, 17 N.J.Misc. 250.

N.Y.—*State of Colorado v. Harbeck*, 179 N.Y.S. 510, 139 App.Div. 865, reversing 175 N.Y.S. 685, 106 Misc. 319—*Roseman v. Fidelity & Deposit Co. of Maryland*, 262 N.Y.S. 491, 146 Misc. 532, modified on other grounds 265 N.Y.S. 557, 148 Misc. 132—*Commonwealth of Pennsylvania*, for use of *Beals v. Beas*, 249 N.Y.S. 232, 139 Misc. 785—*Sokoloff v. National City Bank of New York*, 224 N.Y.S. 102, 130 Misc. 66, affirmed 237 N.Y.S. 907, 223 App.Div. 751, affirmed 164 N.E. 745, 230 N.Y. 69—*Hilladay v. Worthington*, 163 N.Y.S. 362, 99 Misc. 141.

N.C.—*In re Chase*, 141 S.E. 471, 195 N.C. 143, certiorari denied *Chase v. Bartlett*, 49 S.Ct. 9, 278 U.S. 600, 73 L.Ed. 529.

Or.—*McGill v. Brewer*, 285 P. 208, 132 Or. 422, adhering to judgment 280 P. 508, 132 Or. 422—*State v. Tazwell*, 266 P. 233, 243, 125 Or. 523, 59 A.L.R. 1436, citing *Corpus Juris*, and motion denied 270 P. 486, 126 Or. 525.

Tex.—*Western Union Telegraph Co. v. Epley*, Civ.App., 218 S.W. 538.

Vt.—*Brown v. Perry*, 156 A. 910, 104 Vt. 66.

15 C.J. p 1181 note 55.

"While it is fundamental no law has any effect, of its own force, beyond limits of the sovereignty from which its authority is derived and the extent to which the law of one state or nation is allowed to operate within dominion of another depends on comity, yet . . . in the exercise of comity, one country or state will respect and give effect to the laws of another so far as can be done consistently with its own interests."—*Franklin Sugar Refining Co. v. William D. Mullen Co.*, D.C. Del., 7 F.2d 470, 472, reversed on other grounds, C.C.A., 12 F.2d 885.

Foreign law as defining rights and duties

No court enforces foreign law, but in adjusting rights of suitors, courts will impute to them rights and du-

times even though no similar right exists in the state of the forum,⁷³ and usually even though a reciprocal right to sue is not accorded by the state whose law is being sought to be recognized or enforced,⁷⁴ although the contrary has been held in some jurisdictions with respect to this last.⁷⁵ Such

recognition will not be accorded where so to do would be contrary to the laws or public policy,⁷⁶ or the sentiments of good morals or justice⁷⁷ of the state in which such enforcement is sought, or where such recognition would work injury on the state or citizens.⁷⁸ The employment of the rule of

ties similar to those which arise in place where transactions occurred.—*Direction der Disconto-Gesellschaft v. U. S. Steel Corporation*, D.C.N.Y., 300 F. 741, affirmed 45 S.Ct. 207, 267 U.S. 22, 69 L.Ed. 495.

Lex loci governs

Ark.—*American Ry. Express Co. v. Davis*, 238 S.W. 50, 1063, 152 Ark. 258.

Ky.—*Trent v. Norfolk & W. Ry. Co.*, 180 S.W. 792, 167 Ky. 319.

Matter of grace

Statutes of foreign state are administered merely as matter of grace, upon principles of comity.—*London Guarantee & Accident Co. v. Balgowan S. S. Co.*, Md., 155 A. 334, 77 A.L.R. 1302.

Proof of foreign law

In the absence of proof of foreign law in action based thereon, the law of the forum will be applied in some jurisdictions.—*American Ry. Express Co. v. Davis*, 238 S.W. 50, 1063, 152 Ark. 258.

Transitory character of action

Application of comity rule depends on whether action is transitory.—*Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 130 So. 7, 100 Fla. 743.

72. Conn.—*Boderick v. McGuire*, 174 A. 314, 119 Conn. 83, 94 A.L.R. 890.

74. N.M.—*Hart v. Oliver Farm Equipment Sales Co.*, 21 P.2d 96, 37 N.M. 267, 87 A.L.R. 962.

N.Y.—*Union Guardian Trust Co. v. Broadway Nat. Bank & Trust Co.*, 245 N.Y.S. 2, 9, 138 Misc. 18.

"They [principles of comity] are not enforced for purposes of reciprocity nor should their enforcement be denied for purposes of retaliation."—*Union Guardian Trust Co. v. Broadway Nat. Bank & Trust Co.*, supra.

75. Wyo.—*Union Securities Co. v. Adams*, 236 P. 513, 33 Wyo. 45, 50 A.L.R. 23.

Reason for rule

Comity implies mutuality and reciprocity.—*Union Securities Co. v. Adams*, supra.

Reciprocity

United States courts grant same relief against British shipowner which courts of England grant to Americans.—*Powers v. Cunard S. S. Co.*, D.C.N.Y., 32 F.2d 720.

76. U.S.—*U. S. v. Belmont, C.C.A.N.Y.*, 85 F.2d 542, certiorari granted 57 S.Ct. 313, 299 U.S. 537, 31 L.Ed.

396, motion denied 57 S.Ct. 505, 300 U.S. 641, 81 L.Ed. 856, reversed on other grounds 57 S.Ct. 758, 301 U.S. 324, 81 L.Ed. 1134—*Atchison, T. & S. F. Ry. Co. v. Spencer*, C.C.A. Ariz., 20 F.2d 714—*Franklin Sugar Refining Co. v. William D. Mullen Co.*, D.C.Del., 7 F.2d 470, reversed on other grounds, C.C.A., 12 F.2d 855.

Ariz.—*Forgan v. Bainbridge*, 274 P. 155, 34 Ariz. 408.

Cal.—*Smith v. Shepler*, 48 P.2d 999, 8 Cal.App.2d 717—*Hudson v. Von Hamm*, 259 P. 374, 85 Cal.App. 323.

Colo.—*Mosko v. Matthews*, 284 P. 1021, 37 Colo. 55.

Del.—*Vitaphone Corporation v. Electrical Research Products*, 166 A. 255, 19 Del.Ch. 247, affirmed 167 A. 845, 19 Del.Ch. 354, reversed on other grounds *Electrical Research Products v. Vitaphone Corporation*, 171 A. 723, 20 Del.Ch. 417.

Fla.—*Hartford Accident & Indemnity Co. v. City of Thomasville, Ga.*, 130 So. 7, 100 Fla. 743—*Herron v. Passalunig*, 110 So. 539, 92 Fla. 818.

Ill.—*People v. Rushworth*, 128 N.E. 555, 294 Ill. 45.

Ind.—*Sweigart v. State*, 12 N.E.2d 134, 114 A.L.R. 1117.

Me.—*Pringle v. Gibson*, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

Mich.—*Kircher v. Kircher*, 286 N.W. 120, 288 Mich. 669.

Mo.—*Burg v. Knox, App.*, 54 S.W.2d 797, transferred, see 67 S.W.2d 96, 334 Mo. 329—*Associates Inv. Co. v. Froelich, App.*, 34 S.W.2d 987—*Jerome P. Parker-Harris Co. v. Stephens*, 221 S.W. 1036, 205 Mo. App., 373.

N.H.—*Saloshin v. Houle*, 155 A. 47, 85 N.H. 126.

N.J.—*Polycronos v. Polycronos*, 8 A.2d 265, 17 N.J.Misc. 250.

N.Y.—*Vladikavkazsky Ry. Co. v. New York Trust Co.*, 189 N.E. 456, 263 N.Y. 369, affirming 264 N.Y.S. 669, 238 App.Div. 581, and reargument denied 191 N.E. 581, 264 N.Y. 595—*Skandinaviska Granit Aktiebolaget v. Weiss*, 234 N.Y.S. 202, 226 App.Div. 56—*In re Killough's Estate*, 265 N.Y.S. 301, 148 Misc. 73—*Commonwealth of Pennsylvania, for use of Beals v. Beals*, 249 N.Y.S. 232, 139 Misc. 785.

N.C.—*In re Chase*, 141 S.E. 471, 195 N.C. 143, certiorari denied 49 S. Ct. 9, 278 U.S. 600, 73 L.Ed. 529.

Or.—*McGill v. Brewer*, 285 P. 208,

132 Or. 422, adhering to judgment 280 P. 508, 132 Or. 422—*State v. Tazwell*, 266 P. 238, 125 Or. 528, 69 A.L.R. 1436, motion denied 270 P. 486, 126 Or. 585.

Tex.—*Portwood v. Portwood, Civ. App.*, 109 S.W.2d 515, error dismissed—*J. R. Watkins Co. v. McMullan, Civ.App.*, 6 S.W.2d 823—*Strawn Mercantile Co. v. First Nat. Bank, Civ.App.*, 279 S.W. 473.

Vt.—*Brown v. Perry*, 156 A. 910, 104 Vt. 66—*In re Dennis' Estate*, 129 A. 166, 98 Vt. 514.

Wash.—*Mirgon v. Sherck*, 84 P.2d 362, 196 Wash. 690.

Wyo.—*Union Securities Co. v. Adams*, 236 P. 513, 33 Wyo. 45, 50 A.L.R. 23.

15 C.J. p 1181 note 56.

Confiscatory statute or decree

(1) Neither comity nor public policy required courts to give effect to confiscatory statute of foreign power against domestic corporation, assignee of rights under foreign contract.—*Frenkel & Co. v. L'Urbaine Fire Ins. Co. of Paris, France*, 187 N.E. 430, 251 N.Y. 243, 65 A.L.R. 1490, modifying 233 N.Y.S. 206, 235 App.Div. 332.

(2) That decree, confiscating assets of corporation arbitrarily dissolved, contrary to public policy of state, was enacted by foreign government recognized by United States, affords no controlling reason for enforcement thereof in state court.—*Vladikavkazsky Ry. Co. v. New York Trust Co.*, 189 N.E. 456, 263 N.Y. 369, affirming 264 N.Y.S. 669, 238 App.Div. 581, and reargument denied 191 N.E. 581, 264 N.Y. 595.

(3) Nationalization decrees of Soviet government are not given extraterritorial effect in our courts despite recognition of Soviet.—*P. V. Baranowsky Co. v. Guaranty Trust Co. of New York*, 280 N.Y.S. 427, 156 Misc. 74.

77. Me.—*Pringle v. Gibson*, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 553, 135 Me. 512.

Miss.—*Floyd v. Vicksburg Cooperative Co.*, 126 So. 395, 156 Miss. 567.

N.C.—*In re Chase*, 141 S.E. 471, 195 N.C. 143, certiorari denied 49 S.Ct. 9, 278 U.S. 600, 73 L.Ed. 529.

Or.—*McGill v. Brewer*, 285 P. 208, 132 Or. 422, adhering to judgment 280 P. 508, 132 Or. 422.

78. U.S.—*Franklin Sugar Refining Co. v. William D. Mullen Co.*, D.C. Del., 7 F.2d 470, reversed on other grounds, C.C.A., 12 F.2d 855.

comity in a proper case is not considered as inimical to the interests of the citizens of the state.⁷⁹

Under comity, courts will entertain suits brought by citizens of other states⁸⁰ and where the person or property of a nonresident is within the jurisdiction of a state court, it may retain such jurisdiction for the purpose of administering justice to its own citizens.⁸¹ Comity, however, does not require that a court should accord to a litigant from another state any advantage over other litigants.⁸² The prosecution of transitory actions in a country other than that in which the cause of action arose is based on comity, so that, where under the *lex loci* no right of action exists, none can be enforced in the jurisdiction of suit;⁸³ and, where the courts of the state where a contract is made refuse to enforce such a contract, it will not ordinarily be

enforced by the court of another state.⁸⁴ However, a court of one state, by rendering judgment in an action which would not be entertained in the state where the cause of action arose, does not thereby fail to give full faith and credit to the public acts, records, and judicial proceedings of such other state.⁸⁵

A court of one state may decline to take jurisdiction of a controversy which is such that comity requires that it should be left to the determination of the courts of another state,⁸⁶ but comity does not require that it should be assumed by the courts of one state that those of another state are more competent to determine a case and do justice between the parties than are the courts of the state to whose jurisdiction the actor in the suit has voluntarily submitted it.⁸⁷

Cal.—Smith v. Shepler, 48 P.2d 999, 8 Cal.App.2d 717.

Colo.—Mosko v. Matthews, 284 P. 1021, 87 Colo. 55.

Fla.—Hartford Accident & Indemnity Co. v. City of Thomasville, Ga., 130 So. 7, 100 Fla. 748—Herron v. Passalunig, 110 So. 530, 92 Fla. 818.

Ill.—People v. Rushworth, 128 N.E. 555, 294 Ill. 455.

Ind.—Sweigart v. State, 12 N.E.2d 134, 114 A.L.R. 1117.

Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 533, 135 Me. 512.

Miss.—Floyd v. Vicksburg Cooperage Co., 126 So. 395, 156 Miss. 567.

Mo.—Jerome P. Parker-Harris Co. v. Stephens, 221 S.W. 1036, 205 Mo. App. 373.

N.J.—Polykronos v. Polykronos, 8 A.2d 265, 12 N.J.Misc. 250.

N.Y.—Commonwealth of Pennsylvania, for use of Beals, v. Beals, 249 N.Y.S. 202, 130 Misc. 785.

N.C.—In re Chase, 141 S.E. 471, 195 N.C. 143, certiorari denied Chase v. Bartlett, 49 S.Ct. 9, 278 U.S. 600, 73 L.Ed. 529.

Or.—McGill v. Brewer, 285 P. 208, 132 Or. 422, adhering to judgment 280 P. 508, 132 Or. 422.

Tex.—Portwood v. Portwood, Civ. App., 109 S.W.2d 515, error dismissed.

Wyo.—Union Securities Co. v. Adams, 236 P. 513, 33 Wyo. 45, 50 A.L.R. 23.

79. Colo.—Mosko v. Matthews, 284 P. 1021, 87 Colo. 55.

80. Cal.—Smith v. Shepler, 48 P.2d 999, 8 Cal.App.2d 717.

Ga.—Southern R. Co. v. Decker, 62 S.E. 678, 5 Ga.App. 21.

Or.—State v. Tazwell, 266 P. 238, 125 Or. 528, 59 A.L.R. 1436, motion denied 270 P. 486, 126 Or. 585.

81. Ga.—Callaway v. Jones, 19 Ga.

277—Seaboard Air-Line R. Co. v. Burns, 86 S.E. 270, 17 Ga.App. 1.

82. La.—Devant v. Pecou, 128 So. 700, 13 La.App. 594.
15 C.J. p 1182 note 53.

83. Me.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 533, 135 Me. 512.

Mo.—Burg v. Knox, 67 S.W.2d 96, 374 Mo. 329, transferred, see App., 51 S.W.2d 797.

N.H.—Gray v. Gray, 174 A. 508, 87 N.H. 82, 94 A.L.R. 1404.

N.Y.—M. Salmoiré & Co. v. Standard Oil Co. of New York, 186 N.E. 673, 262 N.Y. 220, 89 A.L.R. 345, affirming M. Salmoiré & Co. v. Standard Oil Co., 262 N.Y.S. 633, 737 App. Div. 686—Roseman v. Fidelity & Deposit Co. of Maryland, 277 N.Y.S. 471, 154 Misc. 320.

Or.—State v. Tazwell, 266 P. 238, 244, 125 Or. 528, 59 A.L.R. 1436, citing *Corpus Juris*, and motion denied 270 P. 486, 126 Or. 585.

Tex.—Western Union Telegraph Co. v. Eoley, Civ.App., 218 S.W. 528.

Vt.—Osborne v. Grand Trunk R. Co., 88 A. 512, 87 Vt. 104, Ann.Cas.1916 C 74.

Lex loci governs

Actionable quality of acts causing death or bodily injuries is determinable by *lex loci*.—Miller v. Tennis, 282 P. 315, 140 Okl. 185.

Right abrogated by lex loci

If the right to recover for injury is abrogated by the law of the place where the injuries were received, then the law of the forum does not give it new life to determine its incidents, such as pleading, practice, and evidence.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 533, 135 Me. 512.

Relief limited

Creditor on foreign cause of action is entitled only to relief obtainable in foreign courts.—Sokoloff v. Na-

tional City Bank of New York, 224 N.Y.S. 102, 130 Misc. 66, affirmed 227 N.Y.S. 907, 223 App.D.v. 751, affirmed 164 N.E. 745, 250 N.Y. 69.

Right or remedy

A New Brunswick statute barring recovery by a gratuitous automobile passenger from the owner or driver does not merely affect the passenger's remedy so as to permit an action in Maine for injury sustained in accident in New Brunswick.—Pringle v. Gibson, 195 A. 695, 135 Me. 297, rehearing denied 197 A. 533, 135 Me. 512.

84. U.S.—Franklin Sugar Refining Co. v. William D. Mullen Co., D.C. Del., 7 F.2d 470, reversed on other grounds, C.C.A., 12 F.2d 885.

Mo.—Hizer v. Sovereign Camp, W. O. W., App., 112 S.W.2d 922.
15 C.J. p 1182 note 59.

85. Minn.—Strampe v. Minnesota Farmers' Mut. Ins. Co., 123 N.W. 1083, 109 Minn. 364, 134 Am.S.R. 781, 26 L.R.A., N.S., 999.

86. Ohio.—Wilson v. Helmbold, 18 Ohio N.P., N.S., 222.

Tex.—Southern Surety Co. v. Illinois Powder Mfg. Co., Civ.App., 31 S.W.2d 314.

Wash.—Smith v. Fletcher, 173 P. 19, 102 Wash. 218, rehearing denied 173 P. 636, 102 Wash. 218.
15 C.J. p 1182 note 62.

Effect of foreign process

The appropriate forum in which to test effect of alleged service of process, issued in action brought in court of foreign country, is in such court, and state court will not pass on question of such foreign court's jurisdiction.—Paramount Pictures v. Blumenthal, 11 N.Y.S.2d 768, 256 App. Div. 756.

87. N.J.—Bigelow v. Old Dominion Copper Min., etc., Co., 71 A. 153, 74 N.J.Eq. 457.

15-C.J. p 1182 note 63.

A right of action created by statute providing an exclusive remedy for its enforcement will not be enforced in the courts of another state⁸⁸ by a different remedy.⁸⁹

A court of one state in construing an act of congress as to its effect on a contract made in another state is not compelled by comity to follow the construction which the court of the latter state has placed on such act,⁹⁰ nor can the doctrine of comity between states be invoked in aid of an award founded on the submission to arbitration of an illegal transaction.⁹¹ It has also been held that a court may exercise a jurisdiction which is ancillary to that of a court of another state, where an attempt is made by a litigant by trick or fraud to avoid service of process in the latter court which is that of his place of residence;⁹² but a court of one state is not authorized, by the comity between states, to collate advancements made by an intestate who had resided and died in another state to his children therein.⁹³

Where a liability is created only by the statutes of a state, the question of its enforcement is not one of comity but of the power of the courts of the forum.⁹⁴

§ 546. Election of Tribunal

Generally a litigant may in good faith select the forum for the trial of his action if it has jurisdiction of his cause and is competent to afford relief.

Generally a litigant may select the forum in which to seek relief provided the forum selected has jurisdiction of the action and is competent to afford relief,⁹⁵ and the motive for such selection is not

ordinarily open to question, if the selection is in good faith. This is so even though the forum selected is not that of the adversary, and even though the litigant hopes to secure a preceudral advantage by his selection of a forum.⁹⁶

In § 76 of this Title is discussed the jurisdiction of the courts of a state over actions against non-residents.

§ 547. Constitutionality of Statute of Another State

While it has been asserted that the courts of a state may determine the constitutionality of a statute of another state under the latter's constitution, it has been denied that such courts may determine the validity of such a statute under the federal constitution.

The doctrine has been asserted that a court of one state may, when necessary to the decision of a cause within its jurisdiction, determine the question whether a statute of another state violates the constitution of that state.⁹⁷ On the other hand, the right of one state to determine whether a statute of another state is in conflict with the federal constitution has been denied.⁹⁸

The right of the courts of one state to construe the constitution and statutes of another state, is considered in § 204. In § 93 a of Constitutional Law the courts which may determine the constitutionality of statutes are discussed.

§ 548. Effect of Pendency of Action in Another State or Country

On the principle of comity a court of concurrent jurisdiction may refuse to take jurisdiction of a cause while

88. *Tex.—Southern Surety Co. v. Illinois Powder Mfg. Co.*, Civ.App., 31 S.W.2d 314.

Different remedies provided

Where each of two states has provided for itself an exclusive remedy for a liability, which it was constitutionally authorized to impose, neither is bound, apart from the compulsion of the full faith and credit clause, to enforce the laws of the other, nor can the law of either by its own force determine the choice of law to be applied in the other.—*Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California*, 59 S.Ct. 629, 306 U.S. 494, 83 L.Ed. 940, affirming 75 P.2d 1058, 10 Cal.2d 567, certiorari granted 59 S.Ct. 76, 305 U.S. 563, 83 L.Ed. 355.

89. *R.I.—Farrell v. Employers' Liability Assur. Corporation*, 168 A. 911, 54 R.I. 18.

90. *Ala.—Southern R. Co. v. Harri-*

son, 24 So. 552, 119 Ala. 539, 72 Am.S.R. 936, 48 L.R.A. 385.

91. *Ga.—Benton v. Singleton*, 40 S. E. 811, 114 Ga. 548, 58 L.R.A. 181.

92. *Pa.—Commonwealth v. Sage*, 2 Pa. Dist. 553.

93. *Tenn.—Parkes v. Gilbert*, 1 Baxt. 97.

94. *N.H.—Crippen v. Loughton*, 44 A. 538, 69 N.H. 540, 76 Am.S.R. 192, 46 L.R.A. 467.

95. *U.S.—Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro*, D.C.N.Y., 27 F.2d 1002.

Mass.—Cressey v. Erie R. Co., 180 N. E. 160, 273 Mass. 284.

N.Y.—Paramount Pictures v. Blumenthal, 11 N.Y.S.2d 768, 256 App. Div. 756—*Roseman v. Fidelity & Deposit Co. of Maryland*, 277 N.Y. S. 471, 154 Misc. 320.

Stockholders, who could sue foreign corporation in New York, where principal office was located, or in

Texas, where domestic subcorporation was located, could choose forum.—*Williams v. Freeport Sulphur Co.*, Tex.Civ.App., 40 S.W.2d 817.

96. Convenience of adversary immaterial

A party is not compelled to sue where it is most convenient for his opponent, but is entitled to any procedural advantage he can secure by suing in different forum, and court should not deny him such privilege, unless exercised in bad faith and in such manner as to outweigh all other considerations.—*Paramount Pictures v. Blumenthal*, 11 N.Y.S.2d 768, 256 App.Div. 756.

97. *Mass.—Woodward v. Central Vermont R. Co.*, 62 N.E. 1051, 180 Mass. 599.

Pa.—Stoddart v. Smith, 5 Binn. 355.

98. *Mo.—Reed v. Western Union Tel. Co.*, 56 Mo.App. 168.

Pa.—Kean v. Rice, 12 Serg. & R. 203.

15 C.J. p. 1183 note 72.

a similar suit is pending between the same parties in another jurisdiction.

The pendency of an action in the courts of one state or country is not a bar to the institution of another action between the same parties and for the same cause of action in a court of another state or country,⁹⁹ nor is it the duty of the court in which the latter action is brought to stay the same pending a determination of the earlier action, even though the court in which the earlier action is brought has jurisdiction sufficient to dispose of the entire controversy.¹ Nevertheless, sometimes stat-

ed as a matter of comity, not of right,² it is usual for the court in which the later action is brought to stay proceedings under such circumstances until the earlier action is determined, see Actions § 133 c (6), and upon the same principle a court of one state may refuse to entertain jurisdiction where an action between the same parties involving the same controversy and subject matter is pending in a court of another state,³ and while this rule is based on comity it is also a rule of necessity.⁴ The court of one jurisdiction cannot presume that a court of another is incompetent to do justice in cas-

99. Mich.—In re Elliott's Estate, 281 N.W. 330, 332. 235 Mich. 579, citing *Corpus Juris*.
15 C.J. p 1183 note 73.

"A foreign court does not lose jurisdiction by reason of the pendency of litigation covering the same subject matter in the court of another state."—In re Elliott's Estate, *supra*.

Death action

That an administrator has been appointed in another state, and an action on the claim for the wrongful death of a decedent commenced there, does not go to the jurisdiction of the probate court of this state, where an action has been commenced on the same claim.—State v. Probate Court in and for Hennepin County, 184 N.W. 43, 149 Minn. 464.

1. Md.—Cole v. Flitcraft, 47 Md. 312.
15 C.J. p 1183 note 73.

2. U.S.—Phelps v. Mutual Reserve Fund Life Ass'n, Ky., 112 F. 453, 50 C.C.A. 339.

La.—Succession of Cotton, 129 So. 361, 170 La. 828.

N.Y.—Hanna v. Stedman, 173 N.Y.S. 223, 185 App.Div. 491.

Pa.—In re Cronin, 192 A. 397, 326 Pa. 343.

Wash.—Lauer v. Freudenthal, 165 P. 98, 96 Wash. 394.
15 C.J. p 1183 note 74.

3. U.S.—Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, D.C.N.Y., 27 F. 2d 1002.

Cal.—Leggate v. Porter, 79 P.2d 756, 26 Cal.App.2d 545.

Mass.—Wright v. Post, 167 N.E. 278, 268 Mass. 126.

Mich.—Mulford v. Stender, 184 N.W. 490, 215 Mich. 637.

N.J.—Prudential Ins. Co. of America v. Merritt-Chapman & Scott Corporation, 163 A. 894, 112 N.J.Eq. 179.

N.Y.—In re Reed's Estate, 168 N.Y.S. 785.

Ohio.—Wilson v. Helmbold, 13 Ohio N.P.N.S., 222.

Pa.—In re Cronin, 192 A. 397, 326 Pa. 343.

15 C.J. p 1183 note 75.

"The court which first obtains jurisdiction has the exclusive right to decide the matter in issue."—Mulford v. Stender, 184 N.W. 490, 491. 215 Mich. 637.

As between courts of concurrent jurisdiction of different states or countries, the court which first acquires jurisdiction of a controversy or res should be suffered by every other court to decide every question within the pending cause.

U.S.—Phelps v. Mutual Reserve Fund Life Ass'n, Ky., 112 F. 453, 50 C.C.A. 339.

La.—Succession of Cotton, 129 So. 361, 170 La. 828.

N.Y.—Hanna v. Stedman, 173 N.Y.S. 223, 185 App.Div. 491.

Injunction suit

Issuing temporary injunction before pleadings were completed held not assumption of jurisdiction, precluding refusal of final injunction on ground that litigation should be settled in courts of corporate domicile where action is pending.—Wright v. Post, 167 N.E. 278, 268 Mass. 126.

Limitation of liability proceeding

Brazilian corporation could not institute limitation of liability proceeding in Belgium after United States court acquired jurisdiction.—Royal Mail Steam Packet Co. v. Companhia de Navegacao Lloyd Brasileiro, D.C.N.Y., 27 F.2d 1002.

Actions involving wills

(1) Will of nonresident should not be originally probated in state, where courts of domicile have assumed jurisdiction of estate.—In re Leonori's Estate, 223 N.Y.S. 777, 180 Misc. 499.

(2) A court of chancery will not exercise any jurisdiction or control over foreign courts and their proceedings as to the probate of wills or the settlement of estates.—Beach v. Norton, 9 Conn. 182.

(3) Other applications of text rule see 15 C.J. p 1183 note 75 [b].

Claim against trust estate

In proceeding by commonwealth

against resident trustee, which was under control of New York court where administration proceedings were pending, to recover money expended by commonwealth on beneficiary, who was an inmate of hospital for mentally diseased in commonwealth, and for an order for future expenditures, principles of comity required that portion of order providing for weekly payment for future expenditures should be effective only so long as trust property was sufficient to comply with weekly orders, after making allowance for cost of administration and other claims and expenses lawfully chargeable against property execution to be stayed until proceedings in New York are completed by final judgment.—In re Cronin, 192 A. 397, 326 Pa. 343.

Priority in possession of controversy is controlling factor in determining which of two coordinate courts should yield.—Prudential Ins. Co. of America v. Merritt-Chapman & Scott Corporation, 163 A. 894, 112 N.J.Eq. 179.

Test of prior possession of controversy

As regards question whether jurisdiction would be retained where action was brought in foreign jurisdiction, possession of controversy is obtained by chancery court at least on filing of bill, issuance of subpoena, and delivery thereof to sheriff for service.—Prudential Ins. Co. of America v. Merritt-Chapman & Scott Corporation, *supra*.

Competency of witnesses

That witness was disqualified in New York but competent in New Jersey is not ground for permitting defendant to shift scene of contest to New York.—Prudential Ins. Co. of America v. Merritt-Chapman & Scott Corporation, *supra*.

4. U.S.—Phelps v. Mutual Reserve Fund Life Ass'n, Ky., 112 F. 453, 50 C.C.A. 339.

La.—Succession of Cotton, 129 So. 361, 170 La. 828.

N.Y.—Hanna v. Stedman, 173 N.Y.S. 223, 185 App.Div. 491.

es within its jurisdiction.⁵ Where, however, the court in which an action was first instituted obtained no jurisdiction of defendant, a suit by the latter dealing with the same subject matter could be entertained by the courts of another state obtaining jurisdiction of the parties.⁶

Of course, the court in which the first action is commenced cannot be ousted of, nor will it yield, jurisdiction by reason of the subsequent commencement of another action between the same parties for the same cause of action in another state or country.⁷

The pendency of an action in a foreign jurisdiction as ground for abatement is treated in Abatement and Revival § 65.

Duress by court action. Where actionable duress

is accomplished by an action in court, the party aggrieved must resort to the tribunal in which the cause of action constituting the duress is pending, and not to the courts of another state.⁸

§ 549. Persons under Arrest

The courts of one state may inquire into the cause for detention of one held therein under requisition from the governor of another state.

Where a person is held in one state under a requisition from the governor of another state, a court of the former state may compel the production of the body of the prisoner before it and inquire into the cause of the detention.⁹ The surrender of one in custody in the asylum state on a criminal charge to another state is discussed in the C.J.S. title Extradition § 11, also 25 C.J. p 259

5. N.J.—Caruso v. Caruso, 143 A. 771, 103 N.J.Eq. 487, reversed on other grounds 143 A. 882, 106 N.J.Eq. 130.

Threat of reprisal

Treat of reprisal on parties litigant will not deter court from doing its full duty under law operating on property within state.—Caruso v. Caruso, *supra*.

6. Ari.—Miller v. Kearnes, 46 P.2d 638, 45 Ariz. 548.

Cancellation of mortgage

State court, having jurisdiction of parties, could entertain action for cancellation of mortgage, notwithstanding foreclosure suit in sister state¹ in which land was located had gone to judgment, and could apply such remedy, acting in personam, as against defendant, as might be reasonable and proper under all circumstances of case.—Miller v. Kearnes, *supra*.

7. Fla.—Gratz v. Gratz, 180 So. 580. Ill.—Meldahl v. West, 117 N.E. 593, 280 Ill. 421.

Kan.—Illinois Life Ins. Co. v. Young, 235 P. 104, 118 Kan. 308, certiorari denied Young v. Stillwell, 46 S.Ct. 21, 269 U.S. 560, 70 L.Ed. 412—Hepner v. Hepner, 223 P. 1095, 115 Kan. 647.

La.—Succession of Cotton, 129 So. 361, 170 La. 838.

Mo.—State ex rel. New York, C. & St. L. R. Co. v. Nortoni, 55 S.W.2d 272, 331 Mo. 764, 85 A.L.R. 1345—Alford v. Wabash Ry. Co., App., 73 S.W.2d 277, 279, citing *Corpus Juris*—Lindsey v. Wabash Ry. Co., App., 61 S.W.2d 369, 370, citing *Corpus Juris*—Grey v. Independent Order of Foresters, App., 196 S.W. 779.

15 C.J. p 1133 note 76.

Judgment unaffected

Pendency of another action in another jurisdiction between same litigants over same subject matter does not affect judgment of court of prior jurisdiction.—Illinois Life Ins. Co. v. Young, 235 P. 104, 118 Kan. 308, certiorari denied Young v. Stillwell, 46 S.Ct. 21, 269 U.S. 560, 70 L.Ed. 412.

Retention of jurisdiction

Court which first obtains jurisdiction retains it as against court of another state in which suit is subsequently filed until final judgment. Mo.—Grey v. Independent Order of Foresters, App., 196 S.W. 779. Tenn.—Dantzler v. Sadd, 6 Tenn.Civ. A. 574.

Partition suit

Where superior court of Cook County, Ill., first obtained jurisdiction of trustees in partition suit, circuit court of Walworth County, Wis., obtained no jurisdiction as against it by reason of trustees' proceedings in that court.—Meldahl v. West, 117 N.E. 593, 280 Ill. 421.

Suit for alimony

A court having prior jurisdiction of an action by a wife against her husband for alimony cannot be ousted of its jurisdiction over the parties and subject matter by the institution of a later action in another state by the husband against the wife for divorce, nor because such later action proceeds to judgment by default in the husband's favor, which is not a bar to the wife's prior action for alimony where the wife did nothing to abandon her right to litigate her cause to a conclusion in the court of prior jurisdiction.—Hepner v. Hepner, 223 P. 1095, 115 Kan. 647.

Subsequent appointment of receiver does not divest foreign court of jurisdiction of suit obtained prior thereto, even though such appointment preceded final decree in foreign court.—Evans v. Illinois Surety Co., 233 Ill.App. 398.

Custody of child

Court of Kansas, in divorce suit, was not authorized to ignore prior jurisdiction over child of marriage asserted and acted upon by juvenile division of circuit court of Missouri, although child had from necessity been temporarily taken into Kansas by its mother.—State ex rel. Coffield v. Buckner, 200 S.W. 94, 198 Mo. App. 230.

Divorce proceedings

A decree of separation obtained in New York after wife's divorce suit was instituted in Florida, and before her amended bill was filed, by husband residing in New York, did not deprive Florida court of jurisdiction of divorce action, notwithstanding wife established residence in Florida for purpose of instituting divorce action.—Gratz v. Gratz, Fla., 188 So. 580.

8. Tex.—Halley v. Fenner & Beane, Civ.App., 246 S.W. 412.

Recovery of deposit for release from attachment

Where plaintiff whose property had been attached in a foreign jurisdiction was apprehensive of injury thereto, and therefore deposited a certain sum in a bank to the credit of the attaching creditors on condition that they would release the impounded property in the foreign jurisdiction, and thereafter immediately commenced suit against them to recover the deposit as made under duress, plaintiff's proper legal remedy was in the foreign court and not in the state where the deposit was made, since, where the form of duress complained of is accomplished by action in court, the aggrieved party must resort to the very tribunal in which the cause of action constituting the duress is pending.—Halley v. Fenner & Beane, *supra*.

9. Cal.—In re Robb, 1 P. 881, 64 Cal. 431.

notes 83-91. The examination and review of extradition proceedings by the courts is discussed in the C.J.S. title Extradition § 17, also 25 C.J. p 270 notes 80-82.

§ 550. Property in Custody of Court

Ordinarily, the courts of one state will not interfere with respect to property rightfully in the custody of the courts of another state.

Sometimes stated as under the rule of comity,¹⁰ the rights of a court of one state as to the control

of property which has come into its possession and over which it has jurisdiction will be recognized by courts of other states, and such possession will not ordinarily be interfered with by the latter.¹¹ However, it is within the discretion of the court having custody of a res to allow claims against it to be litigated elsewhere.¹² In accord with the foregoing, the courts of one state will not ordinarily interfere with the administration of insolvent,¹³ or decedent,¹⁴ or trust¹⁵ estates properly in the courts of another state,¹⁶ unless called on by the

10. N.Y.—In re Bean, 201 N.Y.S. 827, 207 App.Div. 276, modifying Bean v. Stoddard, 206 N.Y.S. 753, 124 Misc. 262, appeal dismissed In re Bean, 144 N.E. 888, 238 N.Y. 552, and 144 N.E. 900, 238 N.Y. 581, aff'd Bean v. Stoddard, 144 N.E. 916, 238 N.Y. 618.

11. Tenn.—York v. Bank of Commerce & Trust Co., 93 S.W.2d 333, 19 Tenn.App. 594.
15 C.J. p 1184 note 78.

Judgment against foreign executor

County court of Oklahoma was without authority to direct Tennessee executor of deceased widow's estate to satisfy such court's judgment for amount advanced to widow by executors of her deceased husband's estate out of Tennessee assets subject to Tennessee probate court's exclusive control.—York v. Bank of Commerce & Trust Co., supra.

Administration proceedings

Where testator and his second wife were domiciled in Ohio until shortly before his death there, and his will could not be proved in that state against her objections because it was holographic and offended the community law of that state, her ex parte administration proceedings therein gave the Ohio court plenary jurisdiction over all assets decedent left in that state.—Hutton v. Blackburn, 192 N.Y.S. 527, 117 Misc. 434.

Custody not interfered with

(1) Where plaintiff in South Carolina borrowed money from nonresident corporation and pledged stock of South Carolina corporation as security for loan, attachment by plaintiff of nonresident's interest in stock was attachment of property located in South Carolina and did not interfere with right which foreign court had to adjudicate or administer equity of redemption or reversionary interest of plaintiff and another in such, and hence, attachment was not affected by pendency of suit in foreign court involving such stock.—La Varre v. International Paper Co., D.C.S.C., 37 F.2d 141.

(2) The creditor's interest in the stock of the South Carolina corporation pledged as security was held not abrogated by the Georgia court

taking charge of stock for purpose of operation and control so as to prevent attachment of such interest.—La Varre v. International Paper Co., supra.

12. U.S.—In re Kelley, D.C.N.Y., 297 F. 676.

13. U.S.—Motlow v. Southern Holding & Securities Corporation, C.C. A.Mo., 95 F.2d 721, 726, 119 A.L.R. 1331, certiorari denied 59 S.Ct. 68, 305 U.S. 609, 83 L.Ed. 388.

Reason for rule

"Experience has demonstrated that, in order to secure an economical, efficient, and orderly liquidation and distribution of the assets of an insolvent corporation for the benefit of all creditors and stockholders, it is essential that the title, custody, and control of the assets be intrusted to a single management under the supervision of one court. Hence other courts, except when called upon by the court of primary jurisdiction for assistance, are excluded from participation."—Motlow v. Southern Holding & Securities Corporation, supra.

14. Conn.—Beach v. Norton, 9 Conn. 182.

N.J.—Griswold v. Kelly-Springfield Tire Co., 120 A. 324, 94 N.J.Eq. 308.

Claims of opposing administrators to corporate stock

Where there was no controversy as to the ownership of stock in a domestic corporation, which admittedly was in a nonresident decedent, the courts of the state should not undertake to settle the claims of two sets of administrators appointed by courts of different states to administer on the stock.—Griswold v. Kelly-Springfield Tire Co., supra.

Absence of local creditors

Under N.Y.Code Civ.Proc. § 2515, giving the surrogate exclusive jurisdiction to grant letters testamentary or of administration where a nonresident dies leaving personal property within the state, and N.Y. General Construction Law § 39, defining personal property, the surrogate's jurisdiction over the administration of certificates of stock in a New Jersey corporation, which cer-

tificates were taken into the state by a resident of Ohio, who died in New York, heavily indebted to citizens of that state, will not be interfered with by New Jersey court, where there are no creditors there.—Griswold v. Kelly-Springfield Tire Co., supra.

15. Cal.—Schuster v. Superior Court in and for Los Angeles County, 277 P. 509, 98 Cal.App. 619.

Court appointing trustee

Jurisdiction to control administration of trusts is limited to court which appoints trustee.—Schuster v. Superior Court in and for Los Angeles County, supra.

Rule inapplicable

(1) That realty comprising assets of testamentary trust was located in Tennessee and was being administered by court of that state did not deprive Florida court of jurisdiction over subject matter of contempt proceeding against trustee against whom personal judgment was rendered for failure to file an accounting in Florida.—Baskin v. Montedonico, D.C.Tenn., 26 F.Supp. 834.

(2) A testamentary trustee could not avoid liability in suit on Florida judgment rendered against him for failing to file an accounting of his administration of trust property located in Tennessee, on ground that he could not lawfully transfer funds from Tennessee to Florida without express order of Tennessee probate court, in absence of any showing that he sought to obtain such authority.—Baskin v. Montedonico, supra.

Trust estate

Where estate of testatrix, a resident of New York, was administered in New York according to its law, and administration included an award of trust property to trustee in Pennsylvania for benefit of inmate of hospital for mentally diseased in Pennsylvania, New York surrogate's court retained jurisdiction over continued administration of trust and trustee was required to account there for remainder of trust property not consumed.—In re Cronin, 192 A. 397, 326 Pa. 343.

court of primary jurisdiction¹⁷ the jurisdiction of the latter court being a continuing one until the proceedings are finally disposed of and closed.¹⁸ This primary jurisdiction of the court will not be interfered with because of dissatisfaction of litigants with its decrees.¹⁹

§ 551. Enforcing Judgment

The courts of one state may enforce judgments of a court of competent jurisdiction of another state.

A state court may take jurisdiction of proceedings for the purpose of enforcing a judgment of a court of competent jurisdiction of another state.²⁰

For a treatment of the operation and effect of foreign judgments see the C.J.S. title Judgments §§ 889-898, also 34 C.J. p 1125 note 42-p 1156 note 24.

Obtaining leave of court to sue. A statutory or code provision that no action shall be brought after final judgment in foreclosure to recover any part of the mortgage debt without leave of the court in which foreclosure was had does not apply to an action to recover a balance due after foreclosure of a mortgage in the court of another state on land situated in the latter state.²¹

§ 552. Annulling Judgment

The courts of one state have no authority to modify, vacate, or annul the judgments or decrees of courts of other states or countries.

A court of one state has no authority to modify, vacate, or annul the judgment or decree of a court of another state or country,²² and determination by a court that a judgment or decree of a court of another state was rendered without jurisdiction does not have the effect of vacating such judgment or decree in the latter state.²³

§ 553. Suspension of Proceedings

The courts of one state cannot stay proceedings in the courts of another state or country.

Although, as may be seen in Actions § 133 c (6), a court has the power in a proper case to stay proceedings before it during the pendency of a similar suit in a foreign court, a court of one state cannot stay proceedings in an action instituted in another state or country,²⁴ nor will it stay the parties to the action before it from prosecuting an action in a foreign court if no valid ground therefor appears.²⁵

§ 554. Enjoining Proceedings

A court of one state or country cannot restrain the courts of another state or country from proceeding with

17. U.S.—*Motlow v. Southern Holding & Securities Corporation*, C.C. A.Mo., 85 F.2d 721, 119 A.L.R. 1331, certiorari denied 59 S.Ct. 63, 305 U.S. 609, 83 L.Ed. 388.

18. Cal.—*Schuster v. Superior Court in and for Los Angeles County*, 277 P. 509, 98 Cal.App. 619.

After termination of proceedings

Under Washington decree distributing decedent's personality, including personality not known or described, subsequent Idaho proceeding to enforce trust arising out of distribution of stock not inventoried in Washington proceeding gave Idaho court jurisdiction prior to that of Washington court in third proceeding, brought to enforce trust, since Washington court had no continuing jurisdiction, under statutes, in that proper distribution of stock could be determined under decree of distribution.—*Sunshine Mining Co. v. Treinies*, D.C.Idaho, 19 F.Supp. 587, affirmed, C.C.A., *Treinies v. Sunshine Mining Co.*, 99 F.2d 651, certiorari granted 59 S.Ct. 489, 306 U.S. 624, 83 L.Ed. 1029.

19. Cal.—*Schuster v. Superior Court in and for Los Angeles County*, 277 P. 509, 98 Cal.App. 619.

20. Ky.—*Page v. McKee*, 3 Bush 135, 96 Am.D. 201.

15 C.J. p 1184 note 79.

21. N.Y.—*Mutual L. Ins. Co. v. Smith*, 54 N.Y.Super. 400, 19 Abb. N.Cas. 69.

22. U.S.—*Harrison v. Triplex Gold Mines*, C.C.A.Mass., 83 F.2d 667.

Colo.—*De La Mater v. Graves*, 193 P. 552, 69 Colo. 295, citing *Corpus Juris*.

Iowa.—*Barnett v. Blakeley*, 209 N.W. 412, 202 Iowa 1.

La.—*McKisson v. McKisson*, 154 So. 618, 619, 179 La. 593, citing *Corpus Juris*—*Putnam & Norman v. Conner*, 80 So. 265, 144 La. 231.

Mass.—*Harding v. Townsend*, 182 N.E. 369, 280 Mass. 256.

15 C.J. p 1184 note 81.

Order of distribution

Where decedent was a resident of, and his property consisting of certificates of stock in corporations foreign to this state was actually situated in, New York and was willed to his heirs, residents therein, and his will admitted to probate under the laws thereof, and his property distributed to his heirs according to that state's laws by order of its surrogate court, the supreme court of Oklahoma is without jurisdiction to interfere with said order.—*In re Harkness' Estate*, 204 P. 911, 83 Okl. 107, 42 A.L.R. 399.

Order of sale and confirmation

Where creditors of Mississippi

bank in receivership in Mississippi chancery court were only demanding that receivers' sale of bank's Louisiana property be annulled, because of their interest in the proceeds of another sale, their contention that sale violated Louisiana law because not offered at public auction, was without merit, as any such error affected only the proceeds, and not the title, and a Louisiana district court could not annul chancery court's order to sell nor its decree confirming sale.—*Putnam & Norman v. Conner*, 80 So. 265, 144 La. 231.

Plea of prescription

Louisiana court cannot adjudicate on plea of prescription in suit to annul judgment rendered by court of another state.—*McKisson v. McKisson*, 154 So. 618, 179 La. 593.

23. Ark.—*Husband v. Crockett*, 115 S.W.2d 882, 195 Ark. 1031.

Reason for rule

Courts have right to determine their own jurisdiction and cannot be prevented from doing so by a decision of court of sister state.—*Husband v. Crockett*, supra.

24. N.Y.—*Johnson v. Victoria Chief Copper Mining & Smelting Co.*, 118 N.Y.S. 1021, 60 Misc. 464, affirmed 114 N.Y.S. 1132, 130 App.Div. 880.

25. N.Y.—*Morrison v. Morrison*, 250 N.Y.S. 411, 232 App.Div. 519.

actions before it. In a proper case, however, the parties to the action over whom jurisdiction in personam has been obtained may be so enjoined.

A court of one state or country cannot of course restrain the prosecution of an action in a court of another state or country by any order or decree directed to the court or its officers;²⁶ but a court which has acquired jurisdiction of the parties has power, on proper cause shown, to enjoin them from proceeding with an action in a court of another

state or country,²⁷ particularly where such parties are citizens or residents of the state,²⁸ or with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court.²⁹ This power of a court should be exercised sparingly, not capriciously,³⁰ and not unless a clear equity is presented requiring the interposition of the court to prevent manifest wrong and injustice.³¹ It will not be used merely to compel liti-

26. La.—Natalbany Lumber Co. v. McGraw, 178 So. 377, 188 La. 863, followed in Daniels v. McGraw, 178 So. 380, 188 La. 874.

Mo.—State ex rel. New York, C. & St. L. R. Co. v. Norton¹, 55 S.W.2d 272, 331 Mo. 764, 85 A.L.R. 1345. 15 C.J. p 1184 note 82.

27. U.S.—Hyafill v. Buffalo Marine Const. Co., D.C.N.Y., 266 F. 553.

Ala.—Hull v. Milligan, 128 So. 438, 221 Ala. 233, 69 A.L.R. 618—Horst v. Barret, 104 So. 530, 213 Ala. 173.

Colo.—Meyer v. Milliken, 76 P.2d 420, 101 Colo. 564, certiorari denied Milliken v. Meyer, 59 S.Ct. 63, 305 U.S. 598, 83 L.Ed. 379.

Del.—Sun Life Assur. Co. of Canada v. Merritt-Chapman & Scott Corporation, 163 A. 649, 19 Del.Ch. 110.

Ill.—See Wallace v. Meldahl, 202 Ill. App. 97.

Ind.—New York, C. & St. L. R. Co. v. Perdue, 187 N.E. 349, 97 Ind. App. 517.

Kan.—Williams v. Payne, 94 P.2d 341, 150 Kan. 462.

Mo.—State ex rel. New York, C. & St. L. R. Co. v. Norton¹, 55 S.W.2d 272, 331 Mo. 764, 85 A.L.R. 1345—Kansas City Rys. Co. v. McCadle, 232 S.W. 464, 288 Mo. 354.

N.J.—Caruso v. Caruso, 143 A. 771, 103 N.J.Eq. 487, reversed on other grounds, 148 A. 882, 106 N.J.Eq. 130.

N.Y.—Clark v. Bankers' Trust Co., 163 N.Y.S. 748, 99 Misc. 300, reversed on other grounds 164 N.Y.S. 544, 177 App.Div. 627.

Tenn.—Smalling v. Cox, 13 Tenn. App. 425—Dautzler v. Sadd, 6 Tenn.Civ.A. 574.

Tex.—Wm. Cameron & Co. v. Abbott, Civ.App., 258 S.W. 562. 15 C.J. p 1184 note 83.

28. Ga.—McDaniel v. Alford, 97 S. E. 673, 148 Ga. 609.

Ill.—Catherwood v. Hokanson, 201 Ill.App. 462.

Ind.—New York, C. & St. L. R. Co. v. Perdue, 187 N.E. 349, 97 Ind. App. 517.

Ky.—Reed's Adm'x v. Illinois Cent. R. Co., 206 S.W. 794, 182 Ky. 455.

La.—Natalbany Lumber Co. v. McGraw, 178 So. 377, 188 La. 863, followed in Daniels v. McGraw, 178 So. 380, 188 La. 874.

Minn.—State v. District Court, Hennepin County, 168 N.W. 589, 140 Minn. 494, 1 A.L.R. 145.

Mo.—State ex rel. New York, C. & St. L. R. Co. v. Norton¹, 55 S.W.2d 272, 331 Mo. 764, 85 A.L.R. 1345—Kansas City Rys. Co. v. McCadle, 232 S.W. 464, 288 Mo. 354. N.J.—Caruso v. Caruso, 143 A. 771, 103 N.J.Eq. 487, reversed on other grounds 148 A. 882, 106 N.J.Eq. 130.

Tex.—Buchanan-Vaughan Auto Co. v. Woosley, Civ.App., 218 S.W. 554, 555, dismissed for want of jurisdiction, citing *Corpus Juris*.

Full faith and credit clause not violated

The courts of another state may on equitable grounds enjoin its citizens from proceeding in Minnesota courts to enforce a cause of action given by the statute of the foreign state, without violating the full faith and credit clause of the United States constitution.—State v. District Court, Hennepin County, 168 N.W. 589, 140 Minn. 494, 1 A.L.R. 145.

Railroad company doing business in the state must become a citizen of the state, under St. § 841, and is within the rule that a citizen of the state may be enjoined from suing another citizen in the courts of another state.—Reed's Adm'x v. Illinois Cent. R. Co., 206 S.W. 794, 182 Ky. 455.

Federal Employers' Liability Act, limiting the venue of actions thereunder, does not take away the right of one state to enjoin a citizen thereof from prosecuting an action against another citizen thereof in the courts of another state.—Reed's Adm'x v. Illinois Cent. R. Co., supra.

29. U.S.—The Salvore, C.C.A.N.Y., 36 F.2d 712, reversing, D.C., *Petition of Navigazione Libera Triestina, S. A.*, 33 F.2d 967.

Del.—Connecticut Mut. Life Ins. Co. v. Merritt-Chapman & Scott Corporation, 163 A. 646, 119 Del.Ch. 103.

Kan.—Williams v. Payne, 94 P.2d 341, 150 Kan. 462.

N.J.—Prudential Ins. Co. of America v. Merritt-Chapman & Scott Corporation, 163 A. 894, 112 N.J.Eq. 179.

Vt.—International Paper Co. v. Belows Falls Canal Co., 100 A. 684, 91 Vt. 350.

Test of priority

Chancery court acquired jurisdiction to restrain law action in another jurisdiction where subpoena issued on day bill was filed, and law action was filed following day, although summons was served that morning and subpoena served in afternoon.—Connecticut Mut. Life Ins. Co. v. Merritt-Chapman & Scott Corporation, 163 A. 646, 19 Del.Ch. 103.

Existence of defense immaterial

That complete remedy was afforded insurer by way of defense to subsequent action at law to collect on policy was held not to justify refusing insurer which instituted prior equity suit to cancel policy, injunction restraining prosecution of action pending determination of suit.—Connecticut Mut. Life Ins. Co. v. Merritt-Chapman & Scott Corporation, supra.

30. Del.—Sun Life Assur. Co. of Canada v. Merritt-Chapman & Scott Corporation, 163 A. 649, 19 Del.Ch. 110.

Ga.—McDaniel v. Alford, 97 S.E. 673, 148 Ga. 609.

Kan.—Williams v. Payne, 94 P.2d 341, 150 Kan. 462.

La.—Natalbany Lumber Co. v. McGraw, 178 So. 377, 188 La. 863, followed in Daniels v. McGraw, 178 So. 380, 188 La. 874.

Tex.—Wm. Cameron & Co. v. Abbott, Civ.App., 258 S.W. 563.

Comity

On grounds of comity, power of one state to interfere with litigant duly pursuing legal rights and remedies in courts of another state should be sparingly exercised.—New York, C. & St. L. R. Co. v. Perdue, 187 N.E. 349, 97 Ind.App. 517.

31. Ga.—McDaniel v. Alford, 97 S. E. 673, 148 Ga. 609.

Ill.—Catherwood v. Hokanson, 201 Ill.App. 462.

Mich.—J. W. Wells Lumber Co. v. Menominee River Boom Co., 168 N. W. 1011, 203 Mich. 14.

Mo.—State ex rel. New York, C. & St. L. R. Co. v. Norton¹, 55 S.W.2d 272, 331 Mo. 764, 85 A.L.R. 1345.

Equities for forum to determine

Whether equities of action under Federal Employers' Liability Act warranted Indiana court's enjoining prosecution of such action in Mis-

gants to use the courts of their own state,³² nor even because the complaining party has good reason to apprehend a less favorable result for himself in a foreign court,³³ it having been considered that such a course is inconsistent with interstate harmony and should not be resorted to.³⁴ See the C.J.S. title Injunctions, also 32 C.J. p 114 note 38—p 119 note 12, for a consideration of the grounds on which actions or proceedings in foreign courts will be enjoined.

While a court usually will not, as a matter of comity permit a party to violate an injunction issued in another state against prosecution of the suit in such court,³⁵ neither comity nor the full faith and credit clause of the federal constitution requires a court to respect such an injunction, it operating against the parties and not the foreign court.³⁶

souri court is for Indiana court to determine.—*State ex rel. New York, C. & St. L. R. Co. v. Norton*, supra.
32. Ga.—*McDaniel v. Alford*, 97 S.E. 673, 148 Ga. 609.

La.—*Natalbany Lumber Co. v. McGraw*, 178 So. 377, 188 La. 863, followed in *Daniels v. McGraw*, 178 So. 380, 188 La. 874.

33. Ga.—*McDaniel v. Alford*, 97 S.E. 673, 148 Ga. 609.

La.—*Natalbany Lumber Co. v. McGraw*, 178 So. 377, 188 La. 863, followed in *Daniels v. McGraw*, 178 So. 380, 188 La. 874.

34. U.S.—*French v. Hay*, 22 Wall. 250, 22 L.Ed. 857.

15 C.J. p 1184 note 84.

35. Ala.—*Hall v. Milligan*, 123 So. 438, 221 Ala. 233, 69 A.L.R. 618.

La.—*New Orleans & N. E. R. Co. v. Bernich*, 150 So. 860, 178 La. 153.

36. U.S.—*Doyle v. Northern Pac. Ry. Co.*, D.C.Minn., 55 F.2d 708.

Minn.—*Peterson v. Chicago, B. & Q. Ry. Co.*, 244 N.W. 823, 187 Minn. 223—*Frye v. Chicago, R. I. & P. Ry. Co.*, 195 N.W. 629, 157 Minn. 52, certiorari denied *Chicago, R. I. & P. Ry. Co. v. Frye*, 44 S.Ct. 231, 263 U.S. 723, 68 L.Ed. 525, and followed in *Frye v. Chicago, R. I. & P. Ry. Co.*, 196 N.W. 280, 157 Minn. 52—*State v. District Court, Hennepin County*, 168 N.W. 589, 140 Minn. 494, 1 A.L.R. 145.

Mo.—*Alford v. Wabash Ry. Co.*, 73 S.W.2d 277, 229 Mo.App. 102, superseding *Lindsey v. Wabash Ry. Co.*, App., 61 S.W.2d 369.

Full faith and credit clause not violated

Rejection of records of another state offered to prove injunction had been obtained there prohibiting further proceedings is not violative of full faith and credit clause.—*Kepner v. Cleveland, C. C. & St. L. Ry. Co.*,

15 S.W.2d 825, 322 Mo. 299, 65 A.L.R. 599, certiorari denied *Cleveland, C. C. & St. L. Ry. Co. v. Kepner*, 50 S.Ct. 24, 280 U.S. 564, 74 L.Ed. 618.

Mandamus proper

A writ of mandamus to compel a district court to proceed with an action for wrongful death under a Nebraska statute will not be refused, notwithstanding the courts of Nebraska have enjoined its prosecution, the injunction not operating on the tribunal, but on the parties to the suit.—*State v. District Court, Hennepin County*, 168 N.W. 589, 140 Minn. 494, 1 A.L.R. 145.

Action prior to injunction

An Illinois court had jurisdiction of fireman's suit against railroad under the Federal Employers' Liability Act for injuries sustained in collision occurring in Kansas where railroad operated a railway line, owned property, maintained offices, and kept regular employees and staff of lawyers in county in Illinois in which suit was brought, and hence injunction restraining plaintiff from proceeding with suit in Illinois, issuing out of Kansas court subsequent to institution of suit in Illinois, was ineffective.—*Taylor v. Atchison, T. & S. F. Ry. Co.*, 11 N.E.2d 610, 232 Ill. App. 457, certiorari denied *Atchison, T. & S. F. Ry. Co. v. Taylor*, 58 S.Ct. 942, 304 U.S. 560, 82 L.Ed. 1528.

37. Colo.—*Meyer v. Milliken*, 76 P. 2d 420, 101 Colo. 564, certiorari denied *Milliken v. Meyer*, 59 S.Ct. 63, 305 U.S. 598, 83 L.Ed. 379.

Failure to seek review immaterial

The failure of deceased or his administratrix to seek review of adverse foreign judgment which was void on its face did not deprive administratrix of right to maintain equitable action to enjoin enforce-

Enjoining enforcement of judgment. The courts of a state may enjoin enforcement of a palpably void foreign judgment between citizens of the state and of whom it has obtained jurisdiction.³⁷

§ 555. Receivers

The appointment of a receiver by the courts of one state gives him no power, apart from comity, beyond the limits of the jurisdiction of the court appointing him. Ordinarily the courts of one state do not interfere with the administration of estates by receivers properly appointed by courts of other states.

The appointment of a receiver by the court of one state gives him no power or authority beyond the limits of the jurisdiction of the court making the appointment.³⁸ On principles of comity, however, such a receiver is recognized and permitted to exercise in another state functions vested in him by his appointment,³⁹ but this is permitted only

ment of judgment.—*Meyer v. Milliken*, supra.

Property rights involved

A plaintiff deprived of her property rights by foreign judgment which appeared on its face to be void as conflicting with findings of court rendering judgment could maintain equitable action to enjoin enforcement of judgment.—*Meyer v. Milliken*, supra.

Procedure

A suit to enjoin enforcement of foreign judgment which was void on its face was not governed by rules applicable to an attack on a domestic judgment.—*Meyer v. Milliken*, supra.

33. Neb.—*Miller v. American Co-op. Ass'n*, 195 N.W. 167, 110 Neb. 773.

39. Neb.—*Miller v. American Co-op. Ass'n*, supra.

15 C.J. p 1181 note 54 [a] (1).

Obtaining possession of property

On the principles of interstate comity, a receiver of a railroad corporation appointed in one state may be allowed to institute proceedings in another state to obtain possession of the rolling stock, although such stock has been attached in the former state by a creditor of the corporation.—*Merchants' Bank v. McLeod*, 38 Ohio St. 174.

Primary and ancillary receiver

Where a receiver was appointed for an insolvent New Jersey corporation in that state, an order by the New York supreme court subsequently appointing such receiver as receiver of the corporation's assets in New York was subsidiary to, and in recognition of, his appointment in New Jersey, so that the orders and decrees of the New Jersey court in the receivership proceedings were binding on the New York courts.—*Coe v. Patterson*, 106 N.Y.S. 659, 122

where it will not violate the public policy of such other state, or infringe on or defeat rights of domestic creditors.⁴⁰

The courts of one state will not ordinarily interfere with the administration of an insolvent estate by a receiver properly appointed by the courts of another state.⁴¹ Hence, the creditors of an insolvent corporation cannot enforce claims thereof in the courts of another state without leave of the court under whose jurisdiction the receiver is administering the estate;⁴² nor can claims of such creditors be enforced in the courts of other states against property of the insolvent in such state,

title to which is in the receiver under the statutes of the other state.⁴³ Where, however, under the statutes of the state in which the insolvent's estate is being administered, title to the property does not vest in the receiver, creditors may enforce their claims against property in another state in the courts of such state.⁴⁴

A court of a state in which a corporation is organized is not ousted of its jurisdiction to appoint a general receiver for such corporation by the fact that a foreign court has taken charge of the corporate assets within its jurisdiction and appointed a receiver thereof,⁴⁵ even if purportedly

App.Div. 76, reversing 103 N.Y.S. 472, 53 Misc. 412, and reargument denied 103 N.Y.S. 1127, 123 App.Div. 914.

40. Neb.—*Miller v. American Co-op. Ass'n*, 195 N.W. 167, 110 Neb. 773.

15 C.J. p 1181 note 54 [a] (1).

41. U.S.—*Motlow v. Southern Holding & Securities Corporation, C.C. A.Mo.*, 95 F.2d 721, 119 A.L.R. 1331, certiorari denied 59 S.Ct. 68, 305 U.S. 609, 83 L.Ed. 388.

Filing claim with receiver

A holder of certificates of deposit issued in Iowa by Iowa private bank and payable in Iowa, who filed claims thereon with Iowa receiver of bank and accepted payments on account from receiver, thereby elected his forum and could not sue owner of bank individually in California, notwithstanding Iowa court had not yet ordered receiver to sue owner for benefit of bank's creditors.—*Leggate v. Porter*, 79 P.2d 756, 26 Cal.App.2d 545.

42. D.C.—*Lewis v. Lilliston*, 89 F.2d 847, 67 App.D.C. 103.

Application for leave to sue necessary

While Virginia court appointing receiver of Virginia bank could authorize bank creditors to sue on bank claims in another state, such suit cannot be so maintained if the Virginia court refuses to authorize the same, mere allegation that receiver has refused to sue, without showing that they applied to the court appointing the receiver for an order requiring him to sue, or, in the alternative, permitting plaintiffs to sue not being sufficient to give court jurisdiction.—*Lewis v. Lilliston*, supra.

43. U.S.—*Clark v. Williard*, 54 S.Ct. 615, 292 U.S. 112, 78 L.Ed. 1160, modifying *Mieyr v. Federal Surety Co. of Davenport, Iowa*, 23 P.2d 959, 94 Mont. 508, certiorari granted *Clark v. Williard*, 54 S.Ct. 103, 290 U.S. 619, 78 L.Ed. 540.
Minn.—*Pride v. Bank of Commerce*,

Milbank, S. D., 212 N.W. 3, 170 Minn. 120.

Full faith and credit clause violated

Decree of Montana supreme court, in so far as permitting judgment creditors of dissolved Iowa insurance corporation to take out and levy execution against local assets to satisfy judgment as against title to such assets of Iowa insurance commissioner as statutory liquidator and successor to dissolved corporation, on theory that insurance commissioner was receiver deriving title through judicial proceedings, is invalid as denying full faith and credit to statutes and judicial proceedings of Iowa.—*Clark v. Williard*, 54 S.Ct. 615, 292 U.S. 112, 78 L.Ed. 1160, modifying *Mieyr v. Federal Surety Co. of Davenport, Iowa*, 23 P.2d 959, 94 Mont. 508, certiorari granted *Clark v. Williard*, 54 S.Ct. 103, 290 U.S. 619, 78 L.Ed. 540.

Appointment of receiver

Indiana policyholders or creditors of insolvent Missouri insurance corporation are not entitled to have receivers appointed in Indiana, where Missouri superintendent of insurance by court decree had acquired title to all corporation's property, and there was no evidence that corporation had any substantial amount of property within Indiana or that Indiana policyholders and creditors would be discriminated against in liquidation of corporation under Missouri law.—*O'Malley v. Hankins*, 194 N.E. 168, 207 Ind. 589.

Garnishment

On the principle of comity Minnesota courts should not entertain garnishment by Minnesota creditor to collect claim from assets of insolvent South Dakota bank in Minnesota, where title to such assets is in superintendent of bank of South Dakota.—*Pride v. Bank of Commerce, Milbank, S. D.*, 212 N.W. 3, 170 Minn. 120.

44. Del.—*Philadelphia Nat. Bank v. New Jersey Fidelity & Plate Glass Ins. Co.*, 181 A. 1, 7 W.W.Harr. 174.

Full faith and credit clause not violated

New Jersey statute providing for stay of judgments against insolvent insurance corporations, on insurance commissioner's taking possession of property thereof, does not preclude creditor from reducing claims against insolvent corporation to judgment, in New Jersey courts or elsewhere, nor preclude judgment creditor from instituting action of foreign attachment and attaching property of corporation located in another state, notwithstanding full faith and credit clause where title to the corporate property remains in corporation.—*Philadelphia Nat. Bank v. New Jersey Fidelity & Plate Glass Ins. Co.*, supra.

45. Del.—*Frankland v. Remington Phonograph Corporation*, 119 A. 127, 128, 13 Del.Ch. 312.

Reason for rule

"It would be contrary to well-established and universally accepted principles if the court of the corporation's domicile could thus be ousted from that jurisdiction which the sovereign creating the corporation had conferred over the affairs of its creature. There can be no reason for debate concerning the jurisdiction of this court to exercise its recognized chancery powers, as well those founded in its general equity jurisdiction as in statutory grant, to appoint receivers over corporations whose existence is due solely to the grace of the sovereign here creating them, regardless of what might be the action of courts elsewhere in taking charge of their affairs. If there be any debatable ground with respect to such matters, it lies solely in that field of discussion where questions are raised concerning the extent to which other courts may properly go in exercising jurisdiction over corporations which, as to their jurisdiction, are foreign."—*Frankland v. Remington Phonograph Corporation*, supra.

a general receiver.⁴⁶ Where, however, a court in one state through appointment of a receiver takes into its possession property of the corporation in such state, it obtains a jurisdiction over that property which cannot be controlled by any other court, including the one where the receivership was first instituted.⁴⁷ If a person is appointed receiver in actions in courts of several states, in each of which states the corporation was incorporated, relief may be obtained against the receiver in one of such states without conflicting with the jurisdiction of the others.⁴⁸

It has been held that the appointment of a receiver of a corporation by a domiciliary court does not bring corporate property in another state into

custodia legis until the receiver has reduced such property to possession,⁴⁹ and until this is done it does not defeat or destroy the lien of attaching creditors in another state acquired after appointment of such receiver.⁵⁰ Where, however, a court appointing a receiver approves the transfer of property in possession of its receiver to the primary receiver in another state, the courts of the latter have jurisdiction to adjudicate conflicting claims to such property.⁵¹

Where mortgages on land in a state are sent to a domestic receiver by a foreign receiver of a foreign corporation, the courts of such state will have jurisdiction of the proceeds in the absence of any agreement or condition for collection.⁵²

D. CIVIL COURTS AND COURTS MARTIAL

§ 556. General Statement

As appears in Army and Navy § 54 a of this work, civil courts may have concurrent jurisdiction of offenses triable before courts-martial, although as to strictly military offenses the jurisdiction of courts-martial is exclusive. In § 59 of such

work is considered generally the right to, and extent of, review in civil courts of proceedings before courts-martial, while in the C.J.S. title Habeas Corpus § 31, also 29 C.J. p 93 note 63—p 94 note 73, is considered the right to and extent of, review of such proceedings by habeas corpus.

COURTYARD. The term is said to be a corrupted form of "cortilage," and has been defined as meaning a court or an inclosure about a house or adjacent to it.¹

COUSIN. The term has been defined as meaning the son or daughter of a brother or sister of one's father or mother; also the issue respectively of two brothers or two sisters, or of a brother and a sister.² In the absence of language extending its

46. Del.—Frankland v. Remington Phonograph Corporation, *supra*.

47. Conn.—Receivers of Middlesex Banking Co. v. Realty Inv. Co., 132 A. 390, 104 Conn. 206.

Delegation of authority to foreign court

Since the jurisdiction of a court to appoint a receiver in so far as it affects property within the state is independent of the jurisdiction of foreign courts, an order appointing a receiver will not be modified so as to make the action pending in one state collateral or ancillary to an action pending in another state, especially where such modification would be a delegation of the court's authority to the tribunal of the other state.—Taylor v. Atlantic, & G. W. R. Co., 57 How.Pr., N.Y., 9.

48. N.Y.—Matter of U. S. Rolling Stock Co., 55 How.Pr. 286.

49. Neb.—Miller v. American Co-op. Ass'n, 195 N.W. 167, 110 Neb. 773.

50. Neb.—Miller v. American Co-op. Ass'n, *supra*.

51. Conn.—Receivers of Middlesex

Banking Co. v. Realty Inv. Co., 132 A. 390, 104 Conn. 206.

Contract between receivers and claimants

(1) Where receivers of corporation owning land in several states borrowed money to finance cropping operations thereon, with agreement that they were to sell crops in all states and bring sums realized into one fund from which the loans would be paid, which agreement was approved by the courts of the several states, the court of the state where the contract was made had jurisdiction thereof and of conflicting claims to the funds realized from the cropping operations.—Receivers of Middlesex Banking Co. v. Realty Inv. Co., *supra*.

(2) The receivers in such case are not debarred from asking court to adjudicate claims to proceeds because approval of its acts by courts of other states was also sought and obtained.—Receivers of Middlesex Banking Co. v. Realty Inv. Co., *supra*.

52. N.Y.—People v. Granite State Provident Ass'n, 58 N.Y.S. 510, 41

App.Div. 257, affirmed 55 N.E. 1053, 161 N.Y. 492.

1. Mass.—Commonwealth v. Barney, 10 Cush. 480, 482.

N.Y.—In re Lafayette Ave. in City of New York, 193 N.Y.S. 802, 805, 118 Misc. 161.

15 C.J. p 1185 note 3.

2. N.Y.—In re Salyer's Estate, 255 N.Y.S. 81, 83, 142 Misc. 300—In re Hering's Estate, 244 N.Y.S. 138, 137 Misc. 867.

Similarly expressed

(1) "The son or daughter of one's uncle or aunt (called more fully own, first, or full, cousin, or cousin-german), or one related by descent in a diverging line from a known common ancestor."

N.J.—Walker v. Chambers, 96 A. 359, 360, 85 N.J.Eq. 376.

N.Y.—In re Blum's Estate, 243 N.Y. S. 222, 223, 136 Misc. 441.

(2) "Kindred in the fourth degree, being the issue (male or female) of the brother or sister of one's father or mother."—Black L.D.

The two definitions compared

"The last definition might be construed to be broader than the first

meaning, the term is held to include only first cousins or cousins german,³ the word "german," or "germanus," signifying, in matters of descent, whole or entire;⁴ but in particular connections it may be broadened so as to include others⁵ such as children of first cousins, that is, second cousins or first cousins once removed,⁶ or third cousins.⁷ According to one early authority, the word has been used as meaning "parents" and to include uncles and other cousins, who, when the father is dead, are in loco parentis.⁸ The term may be used to designate a class or be regarded as merely descriptive of persons named for purposes of identification.⁹

Half cousin. A first cousin once removed, a second cousin, the child of one's father's or mother's cousin; sometimes applied to the child of one's own cousin, or to the cousin of one's father or mother.¹⁰

Second cousins. Persons having the same great-grandfathers and great-grandmothers.¹¹ The children of one's first cousins are his second cousins.¹² These are sometimes called "first cousins once removed."¹³

Third cousins. The children of second cousins are third cousins to each other; they have a common great-great-grandfather, and are in the eighth degree to each other.¹⁴

Other phrases: "Maternal cousins,"¹⁵ "my cousins,"¹⁶ "my female cousins,"¹⁷ "paternal cousins,"¹⁸ and "quater-cousins" or "cater cousins."¹⁹

COUSTOM. Custom, toll, or tribute.²⁰

COUSTOUMIER. Otherwise spelled "coustumier" or "coutumier." In old French law, a collection of customs, unwritten laws, and forms of procedure.²¹

COUTHUTLAUGH. In Saxon and early English law, a person who willingly and knowingly received an outlaw, and cherished or concealed him, for which offense he underwent the same punishment as the outlaw himself.²²

COUVERTURE. In French law, the deposit ("margin") made by the client in the hands of the broker, either of a sum of money or of securities, in order to guaranty the broker for the payment of the securities which he purchases for the client.²³

COVE. The word is defined by the Century Dictionary as meaning a small inlet, creek, or bay; a recess or nook in the shore of any considerable body of water.²⁴

Phrases: "Cove lands,"²⁵ and "cove rights" see the C.J.S. title Navigable Waters § 64, also 45 C.J. p 495 note 5 [a].

definition and to include second cousins as well as first cousins, but evidently the primary and first meaning of the word is that contained in the first definition given."—In re Salyer's Estate, 255 N.Y.S. 81, 83, 142 Misc. 300.

3. Conn.—Culver v. Union & New Haven Trust Co., 179 A. 487, 489, 120 Conn. 97, 99 A.L.R. 663.

Mass.—Bishop v. Russell, 134 N.E. 233, 241 Mass. 29, 19 A.L.R. 1408.

N.J.—Walker v. Chambers, 96 A. 359, 360, 85 N.J.Eq. 376.

N.Y.—In re Salyer's Estate, 255 N.Y.S. 81, 83, 142 Misc. 300—In re Hering's Estate, 244 N.Y.S. 138, 137 Misc. 867.

15 C.J. p 1185 note 9 [a].

Cousins-german or first cousins, are the children of one brother or sister and the children of another brother or sister.

Conn.—Culver v. Union & New Haven Trust Co., 179 A. 487, 489, 120 Conn. 97, 99 A.L.R. 663.

N.J.—In re O'Mara's Estate, 151 A. 67, 72, 106 N.J.Eq. 311.

N.Y.—People v. Clark, 16 N.Y.S. 473, 474, 62 Hun 84.

4. 2 Bouvier Inst. p 358 No. 1959 note a.

5. See 15 C.J. p 1185 notes 10, 11, p 1186 note 12.

6. Md.—Weaver v. Liberty Trust Co., 133 A. 544, 548, 170 Md. 212.

7. N.Y.—People v. Clark, 16 N.Y.S. 473, 474, 62 Hun 84.

8. Coke Litt. p 81b.

9. N.Y.—Moffett v. Elmendorf, 46 N.E. 845, 847, 152 N.Y. 475, 57 Am. S.R. 529.

10. Eng.—In re Chester, [1914] 2 Ch. 580, 581.

29 C.J. p 209 notes 12–16.

11. "Persons who are related to each other by descending from the same great-grandfather or great-grandmother."—Black L.D.

12. N.Y.—People v. Clark, 16 N.Y.S. 473, 474, 62 Hun 84.

13. Conn.—Culver v. Union & New Haven Trust Co., 179 A. 487, 489, 492, 120 Conn. 97, quoting *Corpus Juris*.

Md.—Weaver v. Liberty Trust Co., 133 A. 544, 548, quoting *Corpus Juris*.

S.C.—South Carolina Nat. Bank of Columbia v. Bates, 178 S.E. 611, 613, 175 S.C. 168, quoting *Corpus Juris*.

14. N.Y.—People v. Clark, 16 N.Y.S. 473, 474, 62 Hun 84.

15. **Defined**

"Those who are descended from

the brothers or sisters of the mother."—Black L.D.

16. **Held limited to "first cousins"** N.J.—Harris v. Harris, 127 A. 108, 109, 97 N.J.Eq. 190.

N.Y.—In re Blum's Estate, 243 N.Y.S. 222, 223, 136 Misc. 441.

17. N.Y.—In re Hering's Estate, 244 N.Y.S. 133, 137 Misc. 867.

18. **Defined**

"Those who are descended from the brothers or sisters of the father."—Black L.D.

19. **Meanings**

Properly, cousins in the fourth degree, but the term has come to express any remote degree of relationship, and even to bear an ironical signification in which it denotes a very trifling degree of intimacy and regard, often corrupted into "cater" cousin.—Black L.D.

20. Rapalje & L.L.D.

15 C.J. p 1186 note 22.

21. Black L.D.

22. Black L.D.

15 C.J. p 1186 notes 23, 24.

23. Black L.D.

24. See 15 C.J. p 1186 notes 25, 26.

25. R.I.—Murphy v. Bullock, 37 A. 348, 349, 20 R.I. 35.

COVENABLE. A French word signifying convenient or suitable; as convenably endowed. Anciently written "convenable."²⁶

COVENANT.

As a Noun

As meaning generally an agreement to do or permit the doing of a particular act, see the C.J.S. title Covenants § 1; as the name of one of the common law actions see the C.J.S. title Covenant, Action of § 1, and as distinguished from "condition" see the C.J.S. titles Covenants § 18; Deeds § 141, also 18 C.J. p 352 note 68, and 12 C.J. p 401 note 28, p 402 note 32; and Landlord and Tenant § 242, also 35 C.J. p 1189 notes 34-37.

Phrases: "Covenant coupled with condition subsequent,"²⁷ "covenant for the direct benefit of the property,"²⁸ "covenant not to sue" see the C.J.S. titles Contracts §§ 103, 104, 527, and Release § 3, also 53 C.J. p 1197 notes 23-25, "covenant of non-claim,"²⁹ "covenant or agreement,"³⁰ and "covenant to stand seized to uses;"³¹ and also "covenants performed" see Covenant, Action of §§ 30, 33.

For other phrases descriptive of particular covenants, or the classes thereof, see the title Covenants §§ 1-19 and 37-73.

As a Verb

To agree with; to enter into a formal agreement.³²

26. Black L.D.

27. Va.—Neil v. State-Planters Bank & Trust Co., 184 S.E. 203, 205, 166 Va. 153.

28. Cal.—Richardson v. Callahan, 3 P.2d 927, 930, 213 Cal. 683.

29. Defined

A covenant sometimes employed, particularly in the New England states, and in deeds of extinguishment of ground rents in Pennsylv-

ania, that neither the vendor, nor his heirs, nor any other person, etc., shall claim any title in the premises conveyed.—Black L.D.

30. Pa.—Karp v. Fidelity-Phoenix Fire Ins. Co., Super., 4 A.2d 529, 532.

31. S.C.—Elliott v. Bristow, 196 S.E. 378, 380, 186 S.C. 544.

32. Vt.—Vermont Shade Roller Co.

v. Burlington Traction Co., 150 A. 138, 142, 102 Vt. 489.

Distinguished from

(1) "Agree" see 3 C.J.S. p 354 note 61.

(2) "Confirm."—Vermont Shade Roller Co. v. Burlington Traction Co., 150 A. 138, 142, 102 Vt. 489.

"Covenants and agrees"

N.Y.—Murray Realty Co. v. Regal Shoe Co., 270 N.Y.S. 737, 739, 240 App.Div. 462.

COVENANT, ACTION OF

This Title includes actions of covenant, as distinguished from other forms of action; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom they may be maintained; proceedings therein; review of proceedings; and costs in such actions.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index.

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§ 1. Nature and Scope of Action

The action of covenant is a personal action to recover damages for breach of a contract under seal.

The common-law action of covenant is a remedy for the recovery of damages for the breach of a covenant or contract under seal.¹ It is a personal action,² and, as is shown in Actions § 33, is classed with actions ex contractu.

§ 2. — Origin and History

Originally the action of covenant was used for various purposes, including the recovery of a leasehold by the lessee, but in modern times it is a personal action ex contractu.

The action of covenant, as stated in 15 C.J. p 1188 notes 2-7, is said to have descended from the ancient writ breve de conventionne. Primarily its purpose seems to have been to enforce the specific performance of the covenant broken, although if the breach was such that performance could not be enforced, or defendant continued refractory, damages occasioned thereby in proportion to the injury sustained were accorded to plaintiff.

Furthermore, by virtue of this action fines were collected at common law; and the action was the ancient remedy of a lessee, if ejected, against his lessor to recover the term and damages, or if the term had expired, or the ouster had been committed by a stranger claiming paramount title, then to recover damages only.

At an early date the use of the action of covenant as a real action disappeared, except for conveyancing, but as a personal action ex contractu it has survived, although, as appears in Actions § 39, codes of civil procedure and practice acts in some states have abolished the distinction between the different common-law forms of action.

§ 3. — Distinguished from Other Actions

The action of covenant is distinct, differing materially from other forms of action.

The action of covenant differs from other actions.³

The distinction between the action of covenant

and the actions of account, assumpsit, case, and debt is discussed in Actions § 36.

§ 4. — Statutory Provisions

As is shown in § 9 infra, in some jurisdictions, as a result of statute, an action of covenant may be maintained on an unsealed instrument. Furthermore, as appears in Actions § 39, codes of civil procedure and practice acts in many jurisdictions have abolished the distinctions between the different common-law forms of action and have provided for a single form of civil action.

Examine Pocket Parts for later cases.

§ 5. What Law Governs

To sustain an action of covenant the instrument must be a specialty under the *lex fori*.

Under the general rule stated in Conflict of Laws § 22 b and Contracts § 21, an action of covenant will not lie on an instrument which is not a specialty, by the law of the forum, although it would be considered as under seal in the place where it was made.⁴

§ 6. Right of Action and Grounds in General

A mere equitable right to receive a legal title to particular property will not support an action of covenant.

A mere equitable right to require the transfer of the legal title to specified property, arising out of a transaction constituting a mortgage, does not, it has been held, furnish a foundation for the action of covenant.⁵

§ 7. Necessity for Written Instrument Signed and Sealed

As a general rule, an action of covenant may be maintained only on a written, signed, and sealed instrument.

As a general rule, covenant may be maintained only on an agreement in writing which has been properly and lawfully signed and sealed by the party,⁶ or by his authority,⁷ and which is recognized in law as a sealed instrument.⁸

1. Me.—Van Buren Light & Power Co. v. Inhabitants of Van Buren, 109 A. 3, 118 Me. 452—Drew v. Western Union Telegraph Co., 89 A. 144, 111 Me. 346—Dunn v. Auburn Electric Motor Company, 42 A. 389, 92 Me. 165.

N.J.—Patten v. Heustis, 26 N.J.Law 293.

15 C.J. p 1188 note 1.

Other definitions

U.S.—Rondot v. Rogers Tp., Mich., 99 F. 202, 209, 39 C.C.A. 462.

15 C.J. p 1188 note 1 [a].

Form of remedy for breach of covenant see Covenants § 114.

Necessity of seal see infra § 7.

2. Colo.—Hayden v. Patterson, 88 P. 437, 39 Colo. 15.

3. Me.—Manning v. Perkins, 29 A. 1114, 86 Me. 419.

4. R.I.—Nowell v. Waterman, 163 A. 402, 403, 53 R.I. 16, citing *Corpus Juris*.

15 C.J. p 1192 note 67.

5. R.I.—Knowles v. Knowles, 59 A. 854, 26 R.I. 534.

6. Me.—Manning v. Perkins, 29 A. 1114, 86 Me. 419.

15 C.J. p 1189 note 26, p 1301 note 32. Modification by parol see infra § 12.

7. N.Y.—Hanford v. McNair, 9 Wend. 54.

15 C.J. p 1190 note 27. Necessity for sealed authority of agent see Agency § 27 d.

8. N.Y.—Rees v. Overbaugh, 6 Cow. 746.

15 C.J. p 1190 note 28.

The fact that an instrument, in conclusion, states that it is signed and sealed does not justify an action of covenant thereon if it does not in law constitute a specialty,⁹ but the fact that the seal on an agreement was torn off does not destroy its effect as a deed, and covenant will lie thereon.¹⁰

Instrument sealed by grantor only. While the general rule is to the contrary,¹¹ it has been held in some jurisdictions that an action of covenant may be maintained against the grantee in an instrument signed and sealed by the grantor only where the grantee has recognized and accepted the instrument,¹² although it has also been held that the exceptions to the general rule do not embrace mere personal contracts by which no estate in land passes.¹³

§ 8. — Exceptions to Rule

In some instances at common law an action of covenant could be maintained on an unsealed instrument.

To the general rule stated in § 7 supra, at common law there existed an exception, founded on the custom of London and other particular places, which permitted an action of covenant on unsealed instruments.¹⁴ The action could be maintained on an unsealed instrument where defendant derived title under a grant or patent from the crown.¹⁵

§ 9. — Modification or Change by Statute

Under statutory changes in some jurisdictions, an action of covenant may be maintained on unsealed instruments.

As an exception to the general rule stated in § 7 supra, where the distinction between sealed and unsealed instruments has been abolished by statute,

see the C.J.S. title Seals § 2, also 56 C.J. p 890 note 12, it has been held in some jurisdictions that the action of covenant may be maintained on any writing operating as a deed,¹⁶ or on which debt or assumpsit might have been maintained before the abolition of such distinction.¹⁷

§ 10. Nature of Promise or Agreement

To support an action of covenant there must be a binding obligation, although the form in which the agreement is expressed is not controlling.

As a foundation for an action of covenant a binding agreement or obligation is necessary.¹⁸ However, the covenant need not be formal, or precise, or in any particular form,¹⁹ but the action will lie as long as the instrument on which it is based is a writing under seal, containing an agreement or obligation.²⁰

Thus covenant will lie for a breach of a writing obligatory to pay a certain sum of money;²¹ for the breach of covenant to make a deed;²² for the breach of a cropper's agreement;²³ and on the mutual covenants of tenants in common.²⁴ However, it may not be maintained on a receipt given for attached property for the proceeds of the property which had been sold by permission.²⁵

Where the obligation arises from the nature of the transaction and not from the instrument, and the obligation and remedy would exist if there were no instrument in writing, the action of covenant may not be maintained.²⁶

Covenant in præsenti. In the old authorities it is said that the action may not be maintained on a covenant in præsenti,²⁷ but this distinction is not generally recognized.²⁸

Unsealed lease held not within statute providing that certain classes of instruments shall be deemed to be sealed instruments although no seal is attached thereto; hence, covenant is not maintainable thereon.—*Nowell v. Waterman*, 163 A. 402, 53 R.I. 16. Requisites of seal see the C.J.S. title Seals § 3, also 56 C.J. p 892 note 28 et seq.

9. N.H.—*Cutts v. Frost*, Smith 309. Wis.—*Davis v. Judd*, 6 Wis. 85.

10. Mass.—*Powers v. Ware*, 2 Pick. 451.

N.Y.—*Rees v. Overbaugh*, 6 Cow. 746. 15 C.J. p 1190 note 30.

11. Me.—*Baldwin v. Emery*, 36 A. 994, 89 Me. 496.

15 C.J. p 1190 note 32.

12. N.J.—*Sparkman v. Gove*, 44 N.J. Law 252.

15 C.J. p 1190 note 31.

13. N.J.—*Harrison v. Vreeland*, 38 N.J. Law 866.

14. Mich.—*Jerome v. Ortman*, 33 N. W. 759, 66 Mich. 668.

15 C.J. p 1190 note 36.

15. Mich.—*Jerome v. Ortman*, supra.

15 C.J. p 1190 note 37.

16. U.S.—*Rondot v. Rogers Tp.*, Mich., 99 F. 202, 39 C.C.A. 462.

Mich.—*Jerome v. Ortman*, 33 N.W. 759, 66 Mich. 668.

15 C.J. p 1190 note 38.

17. Ky.—*Steele v. Curle*, 4 Dana 381.

15 C.J. p 1190 note 39.

18. U.S.—*U. S. v. Brown*, C.C.N.Y., 24 F.Cas.No.14,670, 1 Paine 422.

15 C.J. p 1191 note 51.

19. Ind.—*Sheets v. Vandalia R. Co.*, 127 N.E. 609, 74 Ind.App. 597.

20. N.H.—*Ewins v. Gordon*, 49 N. H. 444.

15 C.J. p 1190 note 41.

Effect of failure to record

The mere fact that a lease is not

valid by reason of its not being recorded as required by statute will not preclude an action of covenant thereon, if it contains a valid personal agreement.—*Bridgmans v. Wells*, 13 Ohio 43.

21. D.C.—*Clark v. Harmer*, 5 App. D.C. 114.

15 C.J. p 1191 note 42.

22. Tenn.—*Davidson v. Jourdan*, 2 Coldw. 255.

23. N.J.—*Patten v. Heustis*, 26 N.J. Law 293.

24. Pa.—*Hall v. Stewart*, 12 Pa. 211.

25. Ky.—*Wilcoxon v. Rix*, 1 A.K. Marsh. 421.

26. Ky.—*Wilcoxon v. Rix*, supra.

27. N.H.—*Stickney v. Stickney*, 21 N.H. 61.

15 C.J. p 1191 note 47.

28. Mo.—*Dickson v. Desire*, 23 Mo. 151, 66 Am.D. 661.

15 C.J. p 1191 note 48.

§ 11. — May Be Implied

To support an action of covenant, the agreement may be implied as well as expressed.

As a foundation for an action of covenant it is not essential that the covenant be an express one; it is sufficient if the words used are such that the law will imply an agreement.²⁹ So, where an instrument shows that the parties thereto intended to bind themselves to the performance of stipulated acts, it will support an action in the form of covenant,³⁰ even though the word "covenant" does not appear in the instrument.³¹

§ 12. — Modified by Parol

A sealed instrument modified or enlarged by parol will not support an action of covenant.

Covenant may not be maintained on a sealed instrument which is shown to have been modified or enlarged by parol.³²

The action may, however, be maintained on a specialty, although an unexecuted parol agreement is attached thereto;³³ or when the oral agreement merely regulates the application of the instrument as a specialty without modifying it;³⁴ or when the oral agreement merely gives precision to the indefinite terms of the contract.³⁵

§ 13. — Money Payable in Installments

Covenant will lie to recover each installment of a debt as it becomes due, but it will not lie where all payments are due and payable.

Although, as is shown *infra* § 22, plaintiff must set out in his declaration the covenant as made, nevertheless, since a failure to pay the installments of a debt when due constitutes a breach, a party

may have an action of covenant to recover such installments, without depriving himself of his remedy for other breaches which may subsequently occur.³⁶ The action will not lie, however, where all of the payments are due and payable.³⁷

§ 14. Performance by Plaintiff

To support an action of covenant plaintiff must show a strict performance of his part of the agreement, unless such performance is waived or excused.

As a general rule, in order to maintain an action of covenant on a contract under seal, plaintiff must show a strict performance of his part of the agreement.³⁸ Where, however, the contract has been performed in part, and its full performance has been prevented by defendant, complete performance is excused so as to permit an action of covenant on the writing;³⁹ and in such case, when the contract has not been repudiated by defendant, plaintiff's only remedy is an action on the writing.⁴⁰

When defendant waives the performance of a part of a specialty, it does not constitute the contract a new one, and covenant may still be brought thereon.⁴¹

§ 15. Defenses

An action of covenant may be brought at any time within the period limited by statute.

Unless barred by the statute of limitations, the action of covenant may be brought at any time;⁴² but, if the time for commencing the action is limited by statute, the action must be instituted within the time prescribed.⁴³

The statute commences to run from the time when the cause of action accrues.⁴⁴

29. U.S.—Wilson v. Griswold, C.C.N.Y., 30 F.Cas.No.17,806, 9 Blatchf. 257.

15 C.J. p 1191 note 52.
Implied covenants see the Covenants §§ 9-19.

30. Mass.—Gardiner v. Corson, 15 Mass. 500.
15 C.J. p 1191 note 53.

31. Mass.—Newcomb v. Presbrey, 8 Metc. 406.
15 C.J. p 1191 note 54.

32. U.S.—Phillips & Colby Constr. Co. v. Seymour, III, 91 U.S. 646, 23 L.Ed. 341.
15 C.J. p 1191 note 58.

33. Pa.—Ellmaker v. Franklin F. Ins. Co., 6 Watts & S. 439.

34. Pa.—Ellmaker v. Franklin F. Ins. Co., *supra*.

35. N.J.—Potts v. Point Pleasant Land Co., 8 A. 109, 49 N.J.Law 411.
15 C.J. p 1191 note 61.

36. Md.—Waldeck Co. v. Emmart, 96 A. 634, 127 Md. 470.

15 C.J. p 1191 note 56.
Covenant on bond payable in installments see Bonds § 105.

37. Md.—Merryman v. Wheeler, 101 A. 551, 130 Md. 566—Booth v. Hall, 6 Md. 1.

15 C.J. p 1191 note 57.

38. N.Y.—Stagg v. Munro, 8 Wend. 399.

15 C.J. p 1191 note 62.
Performance of simple contracts see Contracts §§ 451-517.

39. U.S.—Young v. Preston, D.C., 4 Cranch 239, 2 L.Ed. 607.
15 C.J. p 1192 note 63.

40. U.S.—Young v. Preston, *supra*.
15 C.J. p 1192 note 64.

41. U.S.—District of Columbia v. Camden Iron Works, D.C., 21 S.Ct. 680, 181 U.S. 453, 45 L.Ed. 948.

Pa.—Monocacy Bridge Co. v. American Iron Bridge Mfg. Co., 83 Pa. 517.

Parol modification of covenant see *supra* § 12.

42. Miss.—Burrus v. Wilkinson, 31 Miss. 537.
Mo.—Maeder v. Carondelet, 26 Mo. 112.

43. U.S.—Rondot v. Rogers Tp., Mich., 99 F. 202, 39 C.C.A. 462.
15 C.J. p 1192 note 75.

Limitations:
Applicable to sealed instruments see the C.J.S. title Limitations of Actions §§ 52-57, also 37 C.J. p 750 note 53 et seq.
In actions for breach of covenant see Covenants § 122.

44. Me.—Manning v. Perkins, 29 A. 1114, 86 Me. 419, 421.
15 C.J. p 1192 note 73.

Waiver

In an action of covenant for the alleged breach of a contract to execute purchase-money notes, the fact that defendant accepted a deed to the property from plaintiff six years

§ 16. Persons Entitled to Sue

At common law only parties to a sealed instrument may maintain an action of covenant thereon. A person may maintain the action although he, himself, may not be thus sued and although he and defendant are partners.

Unless authorized by statute, one not a party to a sealed instrument may not maintain an action of covenant thereon.⁴⁵ The action will lie only between those parties between whom there exists a privity of contract or estate.⁴⁶

Covenant binding on defendant only. The fact that the execution of the instrument sued on by plaintiff is so defective that he may be proceeded against only in assumpsit will not deprive him of the right to bring an action of covenant against defendant who duly signed and sealed the instrument.⁴⁷ Furthermore, an infant may maintain an action of covenant against a person of full age, although the infant is not bound by his own covenant.⁴⁸

Partners. Where there is a valid and subsisting covenant existing between the parties, the mere fact that they are partners does not preclude a resort to this remedy for a breach of such covenant,⁴⁹ even though there may be accounts between the parties which would require unraveling in a court of equity.⁵⁰

Covenant will not lie, however, at the suit of one partner against another for a balance due on partnership account.⁵¹

§ 17. Persons Liable

An action of covenant ordinarily is maintainable against an executor except for breach of a covenant to be performed by the testator personally.

after the time specified in the agreement does not constitute a waiver of the stipulation so as to cause the statute of limitations to run only from the acceptance of such deed.—*Davis v. McMullen*, 9 S.E. 1095, 86 Va. 256.

45. Ky.—*Lovell v. Nelson*, 6 J.J. Marsh. 247.

Me.—*Hinkley v. Fowler*, 15 Me. 285. N.M.—*Parker v. Beasley*, 54 P.2d 687, 693, 40 N.M. 68, citing *Corpus Juris*.

Pa.—*Greene County v. Southern Surety Co.*, 141 A. 27, 292 Pa. 304.

Persons entitled to enforce:

Personal covenants see *Covenants* § 35.

Real covenants see *Covenants* §§ 80–85.

Right of third party beneficiary to sue on sealed contract see *Contracts* § 519 c (3).

One describing himself as agent, but who covenants as in his own

right, may maintain an action of covenant against a covenantee who enters and enjoys the premises.—*Potts v. Rider*, 3 Ohio 70, 17 Am.D. 581—15 C.J. p 1193 note 81.

46. Fla.—*American Surety Co. of New York v. Smith*, 130 So. 440, 442, 100 Fla. 1012, citing *Corpus Juris*.

15 C.J. p 1193 note 77.

47. N.C.—*Brown v. Bostian*, 51 N. C. 1.

15 C.J. p 1190 note 34.

48. Pa.—*Directors of Poor v. McFadden*, 1 Grant 230.

49. N.Y.—*Glover v. Tuck*, 24 Wend. 153.

15 C.J. p 1193 note 82.

50. N.Y.—*Glover v. Tuck*, supra.

15 C.J. p 1193 note 83.

51. N.Y.—*Niven v. Spickerman*, 12 Johns. 401.

Generally speaking, an action of covenant may be maintained against an executor⁵² although he is not named in the instrument.⁵³ However, the rule is otherwise where the covenant is to be performed by the testator in person.⁵⁴

Instrument sealed by grantor only. As is shown in § 7 supra, as a general rule an action of covenant may not be maintained on an instrument signed and sealed by the grantor only.

§ 18. Jurisdiction and Venue

At common law, covenant is a local action when founded on privity of estate, transitory when founded on privity of contract.

Under the common law the action of covenant when founded on privity of contract is transitory and may be brought as a transitory action, but when founded on privity of estate the action is local and must be brought where the land is located.⁵⁵ However, where the venue of such an action is regulated by statute, such legislation controls.⁵⁶

§ 19. Parties

The persons entitled to maintain an action of covenant, have been considered in § 16 supra. As to the parties to an action for breach of a covenant, consult *Covenants* § 123.

Examine *Pocket Parts* for later cases.

§ 20. Declaration

In covenant, the declaration must state the essential elements of a cause of action.

The general rules governing pleadings in civil actions, discussed in the C.J.S. title *Pleading* § 2 et seq, also 49 C.J. p 32 note 8 et seq, ordinarily ap-

52. S.C.—*Brisbane v. McCrady*, 10 S.C.L. 104, 9 Am.D. 676.

Form of remedy in actions by or against personal representative see the C.J.S. title *Executors and Administrators* §§ 705, 706, also 24 C.J. p 743 note 5 et seq.

Persons liable on:

Personal covenants see *Covenants* § 36.

Real covenants see *Covenants* § 86.

53. S.C.—*Brisbane v. McCrady*, supra.

54. S.C.—*Brisbane v. McCrady*, supra.

15 C.J. p 1193 note 80.

55. Mass.—*Lienow v. Ellis*, 6 Mass. 331.

15 C.J. p 1192 note 68.

Venue in actions for breach of covenant see *Covenants* § 121.

56. Tex.—*Chaison v. Beauchamp*, 34 S.W. 303, 12 Tex.Civ.App. 109.

15 C.J. p 1192 note 70.

ply in an action of covenant.⁵⁷ The declaration must contain averments necessary to constitute a cause of action in covenant.⁵⁸

While a declaration in an action of covenant may be varied according to the nature of the instrument declared on,⁵⁹ as a general rule it is sufficient where it declares on the instrument according to its legal operation and assigns breaches substantially in the words of the covenant.⁶⁰ Averments which are unnecessary to a recovery, when not contradictory, will be considered as surplusage.⁶¹

The declaration must show with whom defendant covenanted;⁶² and must aver the amount of damages claimed,⁶³ especially where plaintiff claims special damages such as the law does not imply from the facts stated.⁶⁴

The usual conclusion in a declaration of covenant, "that the defendant (although often requested so to do,) hath not kept his said covenant, but hath broken the same," followed by a demand of damages, is merely formal and is not necessary to the legality of the declaration.⁶⁵

Amendments. If it appears upon oyer of a deed that some of the defendants are not parties thereto, the declaration may, it has been held, be amended by striking out their names on payment of costs.⁶⁶

§ 21. — The Instrument

A declaration in covenant must allege defendant's execution and sealing of the instrument.

The declaration in covenant must allege that defendant entered into the covenant declared on, and where the action may only be maintained on a

sealed instrument, see §§ 7-9 supra, the declaration must also allege an agreement under seal.⁶⁷

It is not sufficient to allege merely that defendant made his covenant,⁶⁸ or that he executed a writing, setting it forth in *hæc verba*, concluding with "sealed and delivered," etc., and the name of the covenantor, with the letters L S, but nowhere else alleging that the instrument was sealed.⁶⁹ However, the use of words which import that the instrument was sealed, as, for example, "indenture," "deed," or "writing obligatory," has been held sufficient.⁷⁰

§ 22. — The Covenant

A declaration in covenant must aver a promise or set out equivalent words, but the instrument need not be set out in *hæc verba*.

The declaration in covenant must aver or assert a promise, or must contain words equivalent to a promise.⁷¹ Where the agreement contains several distinct parts or covenants, and the cause of action arises on less than the whole, it is sufficient to set out only such part as relates to the breaches to be assigned.⁷²

Where there has been a mistake in the wording of the instrument, the declaration may be drawn according to the actual agreement of the parties with proper averments showing the mistake;⁷³ but a declaration on a covenant contained in an instrument which is produced may not be aided by allegations setting forth a covenant different from that in the original document.⁷⁴ If the language of the covenant is such that it may operate in several ways, it must be set forth so as to show the particular purpose for which it is produced.⁷⁵

Implied covenants may be set forth in the decla-

57. N.Y.—Krower v. Reynolds, 1 N. E. 775, 99 N.Y. 245, reversing 19 N.Y.Wkly.Dig. 383.

Pleading in action:

For breach of covenant see Covenants § 125.

On contract see Contracts §§ 533-577.

58. N.Y.—Krower v. Reynolds, supra.

Declaration held sufficient

Fla.—Betha v. Houck, 86 So. 502, 80 Fla. 630.

Declaration held insufficient

Md.—Merryman v. Wheeler, 101 A. 551, 101 Md. 566.

59. Ohio.—Courcier v. Graham, 1 Ohio 330.

60. Ky.—Withers v. Prickett, Litt. Sel.Cas. 192.

15 C.J. p 1193 note 86.

61. Wis.—La Point v. Cady, 2 Pinn. 515, 2 Chandl. 202.

15 C.J. p 1193 note 87.

62. Mo.—Keatly v. McLaugherty, 4 Mo. 221.

15 C.J. p 1193 note 89.

63. Tenn.—Robertson v. Waters, 1 Yerg. 200.

15 C.J. p 1194 note 90.

64. N.J.—Ryerson v. Marseillis, 16 N.J.Law 450.

15 C.J. p 1194 note 91.

65. Md.—Outtoun v. Dulin, 20 A. 134, 72 Md. 536.

66. N.C.—McClure v. Burton, 4 N. C. 84.

67. Fla.—Ballas v. Lake Weir Light & Water Co., 130 So. 421, 100 Fla. 913.

15 C.J. p 1195 note 22.

68. Ark.—Hays v. Lasater, 3 Ark. 565.

Ill.—Wineman v. Hughson, 44 Ill. App. 22.

15 C.J. p 1196 note 23.

69. N.Y.—Macomb v. Thompson, 14 Johns. 207—Van Santwood v. Sandford, 12 Johns. 197.

15 C.J. p 1196 note 24.

70. N.Y.—Van Santwood v. Sandford, 12 Johns. 197.

15 C.J. p 1196 note 25.

71. Mo.—Perkins v. Reeds, 8 Mo. 33. 15 C.J. p 1194 note 94.

72. N.Y.—Sandford v. Halsey, 2 Den. 235.

15 C.J. p 1194 note 95.

73. Pa.—Gower v. Sterner, 2 Whart. 75.

74. U.S.—Jobbins v. Kendall Mfg. Co., D.C.R.I., 196 F. 216.

75. N.Y.—Willard v. Tillman, 2 Hill 274.

ration in like manner as if they were expressed in the deed.⁷⁶

Where the covenant is for the payment of money, the declaration should allege the happening of the event or condition upon which the obligation was to become due and payable.⁷⁷

Setting out instrument or its legal effect. It is not necessary that the instrument be set out in *hæc verba*;⁷⁸ but it must either be set forth in the words of the contract itself, or, according to its legal effect, by stating its true meaning and intention.⁷⁹

Where a sealed instrument has been subsequently modified by another sealed instrument, both should be averred in the declaration.⁸⁰

§ 23. — The Breach

A declaration in covenant must sufficiently assign a breach of the covenant declared on.

A declaration in covenant must allege a breach of the covenant in suit.⁸¹ The allegation must be sufficient.⁸²

The breach must be alleged with certainty.⁸³ For the allegation to be sufficient, the breach assigned must not vary from the sense and substance of the contract, or be either more limited or more extensive than the covenant;⁸⁴ but where the assignment is sufficient as to some and insufficient as to other breaches, plaintiff may recover for those sufficiently assigned.⁸⁵

As a general rule, plaintiff may assign a breach by negating the words of the covenant,⁸⁶ pro-

vided such general assignment necessarily amounts to a breach.⁸⁷ Where, however, an assignment of a breach in the words of the covenant does not necessarily imply that the covenant has been broken, the assignment is insufficient, and the breach must be specially alleged.⁸⁸ A breach assigned in the words of the covenant is insufficient where the words of a covenant taken in connection with the residue of the instrument do not mean the same as when they are separated from their context;⁸⁹ or where the law implies a covenant, although there is none expressed, or where, by construction of law, the operation of the covenant is more restricted than the words of the covenant in their usual import would indicate.⁹⁰

On the other hand, it is not necessary that the breach be assigned in the words of the covenant, but it is generally sufficient that the words of the assignment show unequivocally a substantial breach,⁹¹ or that it distinctly appears, by express words or by necessary implication, that the covenant has been broken by defendant.⁹² So, the breach may be assigned in other words which are coextensive with the import and effect of the covenant,⁹³ or in words as general as those in which the covenant is expressed,⁹⁴ or may be assigned by stating its legal effect.⁹⁵

The averment of a breach should negative every mode of performance which the previous averments would authorize.⁹⁶

§ 24. — The Consideration

A declaration in covenant ordinarily need not allege a consideration.

76. N.Y.—Barney v. Keith, 4 Wend. 502—Grannis v. Clark, 8 Cow. 36.

77. W.Va.—Harris v. Lewis, 5 W.Va. 575.

78. Md.—Waldeck Co. v. Emmart, 96 A. 634, 127 Md. 470. 15 C.J. p 1194 note 2.

79. Md.—Waldeck Co. v. Emmart, supra. 15 C.J. p 1194 note 3.

Mistake in stating legal effect of the instrument, or in extending the breach so as to give it a different meaning, is fatal on demurrer.—Humphries v. Goulding, 3 Ark. 581.

Safer practice is to plead the deed according to the forms of the covenants therein and to leave the effect to be ascertained by the court.—Peck v. Houghtaling, 35 Mich. 127.

80. Ala.—Nesbitt v. McGehee, 26 Ala. 748. 15 C.J. p 1194 note 4.

81. N.Y.—Krower v. Reynolds, 1 N.

El. 775, 99 N.Y. 245, reversing 19 N.Y.Wkly.Dig. 383.

82. U.S.—Jobbins v. Kendall Mfg. Co., D.C.R.I., 196 F. 216.

83. Tenn.—Eastham v. Crowder, 10 Humphr. 194. 15 C.J. p 1194 note 6.

84. N.H.—Atlantic Mut. F. Ins. Co. v. Sanders, 36 N.H. 252. 15 C.J. p 1195 note 18.

85. Me.—Swett v. Patrick, 11 Me. 179. 15 C.J. p 1195 note 7.

86. Me.—Glover v. O'Brien, 62 A. 656, 100 Me. 551. 15 C.J. p 1195 note 8.

87. Me.—Glover v. O'Brien, supra. 15 C.J. p 1195 note 9.

88. Mass.—Marston v. Hobbs, 2 Mass. 433, 3 Am.D. 61. 15 C.J. p 1195 note 10.

89. Ill.—Chicago, M. & St. P. R. Co. v. Hoyt, 44 Ill.App. 48, affirmed

Dunlap v. Chicago, M. & St. P. R. Co., 38 N.E. 89, 151 Ill. 409. 15 C.J. p 1195 note 11.

90. Ky.—Rees v. Buckner, 5 Litt. 328.

91. U.S.—Fletcher v. Peck, Mass., 6 Cranch 87, 127, 3 L.Ed. 162. 15 C.J. p 1195 note 13.

92. Me.—Damren v. Trask, 65 A. 513, 102 Me. 89. 15 C.J. p 1195 note 14.

93. U.S.—Wilcox v. Cohn, C.C.N.Y., 29 F.Cas.No.17,640, 5 Blatchf. 346. 15 C.J. p 1195 note 15.

94. U.S.—Bender v. Fromberger, Pa., 4 Dall. 436, 1 L.Ed. 898. Me.—Damren v. Trask, 65 A. 513, 102 Me. 39.

95. U.S.—Wilcox v. Cohn, C.C.N.Y., 29 F.Cas.No.17,640, 5 Blatchf. 346. Me.—Damren v. Trask, 65 A. 513, 102 Me. 39.

96. Ky.—Dorsey v. Lawrence, Hard. 508.

As a general rule, a declaration in covenant need not contain a statement of the consideration.⁹⁷

§ 25. — Performance of Conditions Precedent

A declaration in covenant must allege performance or tender of performance, of any prior covenant or condition binding on plaintiff.

If the liability of defendant depends on the performance of a prior covenant or condition on the part of plaintiff, performance, or a tender of performance of such condition, must be averred in a declaration of covenant;⁹⁸ but plaintiff need not aver the performance of acts which he is not legally bound to perform.⁹⁹

§ 26. Plea

In an action of covenant defendant must either traverse, or confess and avoid, the declared breach, and his plea must be responsive to, and coextensive with, the whole declaration.

The general rules relative to pleas in civil actions, discussed in the C.J.S. title Pleading § 99 et seq, also 49 C.J. p 179 note 58 et seq, ordinarily apply in actions of covenant.¹

Where the declaration or complaint sets out particularly the facts constituting the breach, and the assignment shows a breach sufficient in law, defendant must either confess and avoid, or traverse, the breach thus set out.² Any part of the declaration not answered or denied is admitted,³ although it has been held that matters of defense which are not well pleaded do not constitute an admission of the cause of action.⁴

Except in the case of an ill-assigned breach, which need not be answered,⁵ the plea or answer

must be responsive to, and coextensive with, the whole declaration;⁶ and, if it is thus responsive, it is sufficient.⁷ The answer or plea should avoid duplicity.⁸

Where several breaches are assigned, defendant may plead to a part and demur to part,⁹ but he may not do so where the count is indivisible;¹⁰ and a plea to the whole action must be good as to each breach.¹¹ Where the plea professes to be an answer to the whole declaration or count, and in truth is only an answer to a part, plaintiff may demur but may not take judgment for the part unanswered.¹² However, such a plea is not demurrable when all of the breaches assigned are answered severally by separate pleas.¹³

Abatement or bar to action. In some jurisdictions it has been held that the plea need not be technically either in abatement or bar to the action but may set up whatever facts which may influence the judgment.¹⁴

Pleading proviso or exception. Where the covenant contains a proviso or exception not in the body of the covenant itself, but in a separate clause of the contract, in order to avail himself thereof in an action for a breach of the covenant the party seeking to avoid it must specially plead such proviso or exception.¹⁵

Putting in issue plaintiff's performance. Where defendant desires to take advantage of plaintiff's failure to perform his covenant he must set forth specially such covenant with the time and manner in which it was to be performed, and must aver that he is ready and willing, and has offered, to perform his part of the agreement.¹⁶ The plea should also specify the particulars in which plaintiff has

97. N.Y.—*Bush v. Stevens*, 24 Wend. 256.

15 C.J. p 1196 note 26.

Necessity for consideration in contracts under seal see *Contracts* § 72.

Pleading of consideration in actions on contracts under seal see *Contracts* § 536.

98. U.S.—*Wilcox v. Cohn*, C.C.N.Y., 29 F.Cas.No.17,640, 5 Blatchf. 346. 15 C.J. p 1195 note 20.

99. Mo.—*Rector v. Purdy*, 1 Mo. 186, 13 Am.D. 494.

1. Vt.—*Freeman v. Henry*, 48 Vt. 553.

2. N.J.—*De Long v. Spring Lake Beach Impr. Co.*, 51 A. 431, 67 N.J.Law 379.

15 C.J. p 1196 note 28.

3. Vt.—*Freeman v. Henry*, 48 Vt. 553.

4. Ill.—*Radzinski v. Ahlsvede*, 185 Ill.App. 513.

Answer to allegation of damages

Defendant may omit in his plea to deny the amount of damages averred in the declaration, and by so doing will not admit the amount of damages alleged.—*Hackett v. Richards*, 3 E.D.Smith 13, reversed on other grounds 13 N.Y. 138—15 C.J. p 1197 note 43.

5. Mass.—*Wait v. Maxwell*, 4 Pick. 87.

15 C.J. p 1196 note 31.

6. U.S.—*Fletcher v. Peck*, Mass., 6 Cranch 87, 3 L.Ed. 162.

15 C.J. p 1196 note 32.

7. Ill.—*Burroughs v. Clancey*, 53 Ill. 30.

15 C.J. p 1196 note 30.

8. N.J.—*Star Brick Co. v. Ridsdale*, 34 N.J.Law 428.

N.Y.—*Camp v. Morse*, 5 Den. 161. 15 C.J. p 1196 note 33.

9. N.Y.—*Angell v. Kelsey*, 1 Barb. 16.

10. N.Y.—*Angell v. Kelsey*, supra.

15 C.J. p 1196 note 34.

11. Ky.—*Muldrow v. McClelland*, 1 Litt. 1—*Breckenridge v. Lee*, 3 Bibb 329.

12. Ky.—*Muldrow v. McClelland*, 1 Litt. 1.

15 C.J. p 1196 note 36.

13. Mo.—*Colgan v. Sharp*, 4 Mo. 263. 15 C.J. p 1196 note 37.

14. Pa.—*Kase v. Kase*, 34 Pa. 128. 15 C.J. p 1197 note 40.

15. Mo.—*Consolidated Coal Co. v. Mexico Fire-Brick Co.*, 66 Mo.App. 296.

16. Ark.—*McLaughlin v. Hutchins*, 3 Ark. 207, 212.

15 C.J. p 1197 note 55.

failed to perform.¹⁷ Likewise, where defendant relies on the breach of plaintiff's covenant as a defense, he should set out in the plea the covenant which it is claimed was broken,¹⁸ since the practice of merely setting out the deed containing the covenant as a part of the pleading is condemned.¹⁹ A plea setting forth an independent covenant on the part of plaintiff in favor of defendant is bad.²⁰

In some jurisdictions the usual method of requiring plaintiff to prove performance of his covenants is to add the words *absque hoc* to the plea of covenants performed.²¹

A subsequent plea *puis darrein continuance*, by one of the defendants, after issue joined on a joint plea to the merits, has been held to be an abandonment by him of the former joint plea, although the latter would stand as the several plea of the other defendant, to the same effect as if he had pleaded alone.²²

Sham, frivolous, and improper pleas. A sham or frivolous plea will be stricken out,²³ and this is true also of frivolous pleas even where the declaration is itself insufficient.²⁴

While it has been held that the technical plea of payment is irrelevant to an action of covenant and is properly stricken out,²⁵ the plea has also been allowed without objection;²⁶ and it has been held that the pleas of non est factum and payment may properly be joined.²⁷

The following pleas have been held to be inappropriate in an action of covenant: "Not guilty,"²⁸ "nil debet" and "non damnificatus,"²⁹ and "never promised."³⁰

Conclusion of plea. A plea which is a denial of a direct material averment in the declaration should conclude to the country;³¹ but where new matter is introduced by way of confession and avoidance, the plea must conclude with a verification.³²

§ 27. — Necessity of Special Plea

In covenant, defendant ordinarily must plead specially all matters of defense.

Strictly speaking, there is no plea of the general issue in an action of covenant;³³ hence, as a general rule, defendant must plead specially all matters of defense.³⁴ Performance ordinarily must be specially pleaded, see § 30 infra.

It has been held to be no objection to a special plea that it amounts to a plea of the general issue.³⁵

Statutory provisions. Pursuant to statutory regulation, defendant may plead the general issue in an action of covenant.³⁶ Under a statute making covenant and debt concurrent remedies, a plea of the general issue in debt, interposed in an action of covenant, is correctly used to answer the same end that it does in an action of debt.³⁷

§ 28. — Non Est Factum

In covenant, the plea of non est factum has been considered in the nature of a general issue.

Although strictly speaking, there is no plea of the general issue in an action of covenant, see supra § 27, and, as is shown infra § 33 a (2), a plea of non est factum merely puts the deed in issue, nevertheless, non est factum has been considered in the nature of a general issue to the extent that special matters of defense may be subjoined thereto,

17. Fla.—Livingston v. Anderson, 11 So. 270, 30 Fla. 117.

18. Iowa.—McC Campbell v. Vastine, 10 Iowa 538.

19. Iowa.—McC Campbell v. Vastine, supra.

20. Mo.—Cook v. Johnson, 3 Mo. 242.

15 C.J. p 1197 note 59.

21. Pa.—Reiter v. Morton, 96 Pa. 229.

15 C.J. p 1197 note 60.

Issues and proof under plea of performance *absque hoc* see infra § 33 a (3).

22. Mich.—Wheelock v. Rice, 1 Dougl. 267.

23. N.J.—Hogencamp v. Ackerman, 24 N.J.Law 133.

24. N.J.—Hogencamp v. Ackerman, supra.

15 C.J. p 1197 note 53.

25. Miss.—Barnes v. Lloyd, 2 Miss. 584.

Tenn.—Russell v. Smith, 1 Tenn.Cas. 18.

26. Ky.—Clarkson v. White, 3 B. Mon. 376.

27. Mass.—Merry v. Gay, 3 Pick. 388.

28. Fla.—Sanford v. Cloud, 17 Fla. 532.

29. Mich.—Wheelock v. Rice, 1 Dougl. 267.

15 C.J. p 1197 note 49.

30. Md.—Waldeck Co. v. Emmart, 96 A. 634, 127 Md. 470.

"Never promised as alleged is not the general issue to an action of covenant."—Phillips v. Garrett, 147 So. 857, 858, 109 Fla. 435.

31. N.J.—Star Brick Co. v. Ridsdale, 34 N.J.Law 428.

15 C.J. p 1197 note 45.

32. S.C.—Wolfe v. Norris, 29 S.C.L. 322.

15 C.J. p 1197 note 46.

33. R.I.—Greenstein v. Rosenstein, 117 A. 528, 44 R.I. 407.

15 C.J. p 1197 note 62.

34. W.Va.—Brooke County Court v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 121 S.E. 422, 428, 95 W.Va. 439, citing *Corpus Juris*, 15 C.J. p 1198 note 63.

35. Pa.—Smith v. Justice, 6 Phila. 234.

"Where special pleas put in issue facts which are alleged by the plaintiff or which he must prove to entitle him to recover, such pleas amount to the general issue and will be stricken off on motion."—Oeser v. Union Ins. Co., 2 Pa.Co. 210.

36. Mich.—Ingalls v. Eaton, 25 Mich. 32.

15 C.J. p 1198 note 65.

37. Ill.—Longley v. Norvall, 2 Ill. 389.

where such matters could be subjoined to the general issue.³⁸

§ 29. — Non Infregit Conventionem

In covenant, a plea of non infregit conventionem admits the deed but denies the breach.

In an action of covenant the plea of non infregit conventionem admits the deed but denies the breaches assigned.³⁹

Where the breach of the covenant is assigned in the negative,⁴⁰ or where the declaration states several breaches,⁴¹ the plea of non infregit conventionem is bad on demurrer, although good on motion in arrest after verdict.⁴²

The statutes of limitations may be pleaded by adding to the plea of non infregit conventionem the allegation that defendant did not break the covenant within the period fixed by such statutes.⁴³

§ 30. — Performance

In covenant, performance ordinarily must be pleaded specially, and separately to each breach. In some cases a plea of tender before suit brought must be renewed.

Where all of the covenants are in the affirmative, and comprehend a multiplicity of matters general in their nature, a plea of general performance is good.⁴⁴

Ordinarily, however, a plea of general performance is insufficient.⁴⁵ Where the declaration contains an assignment of a particular breach, a plea of performance amounts to a plea of general performance,⁴⁶ and issue cannot be taken thereon.⁴⁷ Defendant must specially plead as matters of defense, and aver the time, place, and manner in which the covenant was performed or the facts which constitute the defense where he desires to rely on performance of the covenant,⁴⁸ or on a valid excuse from performance,⁴⁹ or matters in discharge thereof.⁵⁰ Defendant should plead separately to each breach assigned.⁵¹

A plea alleging performance on the part of defendant and nonperformance by plaintiff of conditions precedent has been held both double and inconsistent.⁵²

Tender of performance. A plea of tender before suit brought must renew the tender in court;⁵³ and a plea of readiness to perform without averring an offer of performance is bad.⁵⁴ However, it is sufficient to plead a tender in accordance with the covenant, without repeating the tender, in the case of cumbrous property,⁵⁵ or in an action on a covenant that another person will fulfill his agreement to pay, etc.⁵⁶

38. R.I.—Greenstein v. Rosenstein, 117 A. 528, 44 R.I. 407.
15 C.J. p 1198 note 67.

Necessity of demurrer to defective plea

While a plea alleging that the instrument sued on was without consideration and void is defective as a plea of non est factum, if plaintiff fails to demur thereto, it will be regarded as sufficient for that purpose.—Clark v. Harmer, 5 App.D.C. 114.

Necessity of verification of pleading denying execution of written instrument see the C.J.S. title Pleading § 352, also 49 C.J. p 588 note 27—p 590 note 80.

39. N.Y.—Roosevelt v. Fulton, 7 Cow. 71.
15 C.J. p 1198 note 72—46 C.J. p 486 note 13.

40. Vt.—Drouin v. Wilson, 67 A. 825, 80 Vt. 335, 13 Ann.Cas. 93.
15 C.J. p 1198 note 73.

41. Del.—Houston v. Spruance, 4 Del. 117.
15 C.J. p 1198 note 74.

42. U.S.—Bender v. Fromberger, Pa., 4 Dall. 436, 1 L.Ed. 398.

Vt.—Drouin v. Wilson, 67 A. 825, 80 Vt. 335, 13 Ann.Cas. 93.
15 C.J. p 1198 note 75.

43. Va.—Davis v. McMullen, 9 S.E. 2095, 86 Va. 256.
15 C.J. p 1198 note 76.

44. W.Va.—Brooke County Court v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 121 S.E. 422, 95 W.Va. 439.
15 C.J. p 1199 note 86.

45. Va.—Norfolk, etc., R. Co. v. Suffolk Lumber Co., 23 S.E. 737, 92 Va. 413.
15 C.J. p 1199 note 81.

Withdrawal of plea

A defendant may be permitted to withdraw the plea of covenants performed and file a special plea.—Gill v. Patten, D.C., 10 E.Cas.No.5, 427, 1 Cranch C.C. 114—15 C.J. p 1199 note 87.

46. Ill.—Radzinski v. Ahlsvede, 185 Ill.App. 513.

47. Ohio.—Taylor v. Browder, 1 Ohio St. 225.
15 C.J. p 1199 note 83.

Covenant of existence of fact

(1) Where defendant merely warranted a fact to exist, the plea of performance of the covenant does not present an issue, and is improper. Ark.—Bird v. Smith, 8 Ark. 368.

Ky.—Champ v. Ardery, 2 A.K.Marsh. 246.

(2) The plea has been held good, however, after verdict and judgment on the issue so raised.—McCoy v. Martin, 4 Dana, Ky., 580.

48. W.Va.—Brooke County Court v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 121 S.E. 422, 95 W.Va. 439.
15 C.J. p 1198 note 78.

49. Mo.—Colgan v. Sharp, 4 Mo. 263.
15 C.J. p 1199 note 79.

50. U.S.—Alexandria Mar. Ins. Co. v. Hodgson, D.C., 6 Cranch 206, 3 L.Ed. 200.
15 C.J. p 1199 note 80.

51. U.S.—Simonton v. Winter, D.C., 5 Pet. 141, 8 L.Ed. 75.
15 C.J. p 1199 note 84.

52. Ill.—Witter v. McNeil, 4 Ill. 433.

53. Ky.—Harris v. Campbell, 4 Dana 586.

Where defendant desires to put in issue the sufficiency of a deed or instrument under which he claims a tender of performance, or readiness to perform, such deed or instrument should be set out in the plea or a proffer made of it.

Ky.—Sobk v. Knowles, 1 Bibb 283.
Ohio.—Taylor v. Browder, 1 Ohio St. 225.

54. Ill.—Buckmaster v. Grundy, 2 Ill. 310.

55. Ky.—Harris v. Campbell, 4 Dana 586.

56. Ky.—Harris v. Campbell, supra

§ 31. — Fraud

In covenant, fraud in inducing the contract may be pleaded by alleging the particular facts and circumstances.

In an action of covenant on a contract under seal, defendant may plead that the contract was obtained by fraud and imposition.⁵⁷ Such a plea has been held sufficient where the fraud is assigned in general terms,⁵⁸ but the usual and better practice is to allege the facts and circumstances which constitute the fraud.⁵⁹

§ 32. Subsequent Pleadings

General rules pertaining to demurrer, replications, and rejoinders ordinarily apply in actions of covenant.

Where there are several counts alleging breach of covenants,⁶⁰ or where several breaches are assigned in one count,⁶¹ a general demurrer to the whole will be overruled if any count or assignment is good.

Replication. Generally, where a plea or subsequent pleading sets up new matter in avoidance, a reply must be made to or issue joined on such pleading;⁶² but the mere absence of a similiter to a plea or subsequent pleading tendering an issue will not cause a reversal of a judgment where the parties have voluntarily gone to trial without insisting on it.⁶³ A replication containing no new matter and barely denying the facts alleged in the plea should conclude to the country and not with a verification, but such defect can be taken advantage of only by a special demurrer.⁶⁴

In the replication there must be no departure, in any material matter, from the allegations made in the declaration,⁶⁵ but it may sustain and fortify the declaration by reaffirming the cause of action therein set out.⁶⁶

Replication de injuria. Although the replication de injuria was originally confined to actions in tort, and its proper use was somewhat in controversy⁶⁷

it has been held to be properly used in a plea of leave and license to a count for breach of covenant.⁶⁸

Rejoinder. Defendant's rejoinder in answer to plaintiff's replication must support and not depart from the plea;⁶⁹ but where it fails to deny material allegations of the preceding pleading it is defective and will not support a judgment rendered thereon.⁷⁰

§ 33. Issues, Proof and Variance

- a. Issues and proof
- b. Variance

a. Issues and Proof

- (1) In general
- (2) Under plea of non est factum
- (3) Under plea of performance
- (4) Under plea of non infregit conventionem
- (5) Under declaration alleging performance

(1) In General

The statutory general issue in actions of covenant puts in issue plaintiff's entire cause of action.

General rules pertaining to issues, proof, and variance ordinarily apply in actions of covenant.⁷¹

The general issue as allowed by statute in some jurisdictions, see § 27 supra, puts in issue plaintiff's entire cause of action, and compels him to prove it.⁷² Under a statute which does not require administrators and executors to set up special matters of defense in an action of covenant, it has been held that evidence of special matters of defense could be given under any plea that puts in issue the merits of the case.⁷³

(2) Under Plea of Non Est Factum

A plea of non est factum ordinarily puts in issue only the lawful execution of the covenant.

57. Mass.—Hazard v. Irwin, 18 Pick. 95.

58. Ky.—Sharp v. White, 1 J.J. Marsh. 106.

15 C.J. p 1199 note 98.

59. Ky.—Sharp v. White, supra.

60. Me.—Swett v. Patrick, 11 Me.

179, 181.

Mo.—Turley v. Barcroft, 1 Mo. 502.

15 C.J. p 1200 note 13.

61. U.S.—Gill v. Stebbins, C.C.N.Y., 10 F.Cas.No.5,431, 2 Paine 417.

Me.—Blanchard v. Hoxie, 34 Me. 376.

62. Fla.—Livingston v. Anderson, 11 So. 270, 30 Fla. 117.

N.Y.—Abbott v. Allen, 14 Johns. 243.

63. Fla.—Livingston v. Anderson, 11 So. 270, 30 Fla. 117.

64. N.Y.—Morris v. Wadsworth, 11 Wend. 100.

65. Neb.—Merrill v. Suing, 92 N.W. 618, 66 Neb. 404.

15 C.J. p 1200 note 5.

Replication held not departure from declaration

When defendant by his plea in bar makes it necessary, plaintiff in his replication may show that he has done what by the plea is required to substantiate, in a legal sense, the averments in the declaration, and show his right to recover.—Fowler v. Macomb, 2 Root, Conn., 388.

66. N.Y.—Bame v. Drew, 4 Den. 287.

67. N.J.—Douglass v. Hoppaugh, 46 N.J.Law 114.

68. N.J.—Douglass v. Hoppaugh, supra.

69. N.Y.—Church v. Gilman, 15 Wend. 656, 30 Am.D. 82.

15 C.J. p 1200 note 11.

70. Ind.—Dodd v. Noble, 5 Blackf. 30.

71. Md.—O'Brien v. Fowler, 11 A. 174, 67 Md. 561.

72. Mich.—Ingalls v. Eaton, 25 Mich. 32.

73. Ala.—Martin v. White, 1 Stew. 473.

In an action of covenant, the plea of non est factum, see supra § 28, ordinarily puts in issue only the execution of the covenant in a lawful manner,⁷⁴ and admits all other material averments of the declaration.⁷⁵

While under this plea defendant may contend at the trial that the deed was never executed in point of fact,⁷⁶ or show that his agent by whom the deed was executed had no authority so to do,⁷⁷ he may not deny its validity in point of law.⁷⁸ Furthermore, defendant may not question his power to enter into the covenant;⁷⁹ nor, in an action between a lessor and a lessee, may the title to land be questioned under such plea.⁸⁰

Defendant may, however, under the plea of non est factum, avail himself, on the trial, of a variance in the statement of the deed either in respect of a misstatement or of the omission of a covenant qualifying the contract.⁸¹ If the declaration does not aver the covenant in its exact language and simply alleges its legal effect, the plea has been held to put in issue the actual covenant as well as its due execution;⁸² but according to other authorities if defendant has over of the instrument and, instead of demurring, pleads non est factum, he may not object that there is a variance.⁸³

(3) Under Plea of Performance

The authorities are somewhat in conflict as to what matters are deemed to be admitted by a plea of performance. The plea ordinarily may be supported only by evidence of performance.

In an action of covenant, as a general rule plea of performance see § 30 supra, admits all matters that are properly alleged.⁸⁴ The plea admits the covenant as set out in the declaration.⁸⁵ However, the plea does not relieve plaintiff of the necessity of proving the damages claimed,⁸⁶ and in the absence of such proof nominal damages only will be allowed;⁸⁷ and in some jurisdictions plaintiff must prove his cause of action the same as if no plea, or negative pleas only, were filed.⁸⁸

According to some authorities, the plea of performance admits that the adverse party has performed his agreement, at least where, in addition, defendant fails to plead "absque hoc."⁸⁹

In some jurisdictions the addition of "absque hoc," etc., to the plea of covenants performed in an action on mutual covenants will put plaintiff to proof of performance on his part,⁹⁰ although it does not put in issue plaintiff's title⁹¹ or the execution of the instrument declared on.⁹²

Under a plea of covenants performed with notice of special matter, it has been held that an equitable defense may be given in evidence.⁹³

Ordinarily a plea of covenant performed can be supported only by evidence that defendant has performed his covenant, and not by evidence excusing his nonperformance,⁹⁴ or showing failure of consideration,⁹⁵ nonperformance of collateral covenants on the part of plaintiff,⁹⁶ or an alteration or variation of the covenant by parol;⁹⁷ but where

74. Fla.—Phillips v. Garrett, 147 So. 857, 109 Fla. 435.

R.I.—Greenstein v. Rosenstein, 117 A. 523, 44 R.I. 407.

15 C.J. p 1200 note 25.

Illegality of consideration may be shown under the plea of non est factum.—Dale v. Roosevelt, 9 Cow., N.Y., 307, 24 Am.D. 160.

Mutual mistake is a good defense under the plea of non est factum.—Gove v. Wooster, Lator, N.Y., 30.

75. R.I.—Douglas v. Hennessy, 3 A. 213, 7 A. 1, 10 A. 583, 15 R.I. 272. 15 C.J. p 1201 note 26.

76. D.C.—Clark v. Harmer, 5 App. D.C. 114.

77. Mich.—State Prison v. Lathrop, 1 Mich. 438.

78. D.C.—Clark v. Harmer, 5 App.D. C. 114.

79. Ill.—Holcomb v. Illinois & Michigan Canal, 3 Ill. 228.

80. N.Y.—Barney v. Keith, 6 Wend. 555.

81. Mo.—Treat v. Brush, 11 Mo. 310. 15 C.J. p 1201 note 34.

82. W.Va.—Snider v. Robinett, 88 S. E. 599, 78 W.Va. 88.

83. Mass.—Dorr v. Fenno, 12 Pick. 521.

N.Y.—Henry v. Cleland, 14 Johns. 400.

84. Vt.—Drouin v. Wilson, 67 A. 825, 80 Vt. 335, 13 Ann.Cas. 93. 15 C.J. p 1201 note 38.

85. U.S.—Alexandria Mar. Ins. Co. v. Hodgson, D.C., 6 Cranch 206, 3 L. Ed. 209.

15 C.J. p 1201 note 41.

86. Ill.—Reed v. Hobbs, 3 Ill. 297.

Tenn.—Baker v. Jordan, 5 Humphr. 485.

87. Ill.—Reed v. Hobbs, 3 Ill. 297.

88. Ala.—Bryant v. Simpson, 3 Stew. 339.

15 C.J. p 1201 note 44.

89. Ky.—Barnett v. Crutcher, 3 Bibb 202.

Pa.—Zents v. Legnard, 70 Pa. 192. However, it has been held that the plea of performance does not admit that the adverse party has fully performed his agreement.—Neave v. Jenkins, 2 Yeates, Pa., 107.

On pleas of "covenants performed" and issue, the question of whether plaintiff had complied with the terms

of a proviso was properly before the jury.—Fenwick v. McMurdo, 2 Munf. 244, 16 Va. 244.

90. Pa.—Zents v. Leghard, 70 Pa. 192.

15 C.J. p 1202 note 51, p 1338 note 1.

91. Pa.—Hite v. Kier, 38 Pa. 72.

92. Pa.—Farmers' etc., Turnp. Co. v. McCullough, 25 Pa. 303.

93. N.Y.—Beadle v. Hopkins, 3 Cal. 150, Col. & C.Cas. 485.

94. W.Va.—Brooke County Court v. U. S. Fidelity & Guaranty Co. of Baltimore, Md., 121 S.E. 422, 95 W. Va. 439.

15 C.J. p 1201 note 47, p 1202 note 59.

Tender

Under the plea of covenants performed, a tender before suit brought may be given in evidence.—McCormick v. Crall, 6 Watts, Pa., 207.

95. Pa.—Evans v. Negley, 13 Serg. & R. 218.

96. Pa.—Evans v. Negley, supra.

97. Pa.—Heckscher v. Sheaffer, 14 A. 53.

15 C.J. p 1202 note 62.

it appears on the face of the covenant, as set out in the declaration, that defendant is not personally bound, he may take advantage of it after verdict on a plea of covenants performed.⁹⁸

Plea of covenants performed, with leave. As used in some jurisdictions, the plea of covenants performed, with leave, amounts to an agreement that defendant may give in evidence anything which he might plead, and which, in point of law, can protect him from plaintiff's claim.⁹⁹

Entry of issue. Where defendant pleads covenants performed, and the entry "and issue" is made in the docket, it is to be considered as a direction to the prothonotary to make a formal entry of the issue and the omission so to do is merely a clerical error.¹

(4) Under Plea of Non Infregit Conventionem

A plea of non infregit conventionem puts in issue the breach of, and defendant's obligation under, the covenant.

Since the plea of non infregit conventionem admits the deed but denies the breaches assigned, as is shown supra § 29, it permits proof of all such matters as show that the covenant is not broken,² or that defendant was never under an obligation to fulfill the covenant declared on.³

Parol enlargement of time for the performance of a covenant may not be shown under this plea.⁴

(5) Under Declaration Alleging Performance

Under a declaration alleging performance, evidence of excuse for nonperformance is admissible.

Where a declaration alleges full performance by plaintiff, evidence is admissible that plaintiff was prevented from performing by defendants, as an excuse for nonperformance tantamount to performance.⁵

b. Variance

General rules pertaining to variance between the pleadings and proof ordinarily apply in actions of covenant.

General rules pertaining to variance between the pleadings and proof in civil actions ordinarily apply in actions of covenant.⁶ The evidence must be responsive to the pleadings and must conform to the declaration and instrument declared on;⁷ and plaintiff must recover secundum allegata et probata, or not at all.⁸

To be fatal, a variance between the proof and the allegations in the pleadings must affect some material part of the action.⁹

§ 34. Evidence

The rules of evidence in actions for breach of covenant generally are discussed in Covenants §§ 129-133. Examine Pocket Parts for later cases.

§ 35. Trial

General rules regulating the trial of civil actions ordinarily apply in actions of covenant.

General rules pertaining to the trial of civil actions ordinarily apply in actions of covenant.¹⁰

§ 36. Judgment

Judgment in covenant should be for damages, without accruing interest.

In an action of covenant the judgment should be for damages;¹¹ and a judgment which allows accruing interest is erroneous.¹²

Rules as to judgments in actions for breach of covenants generally are discussed in Covenants § 138.

98. Tenn.—Jordan v. Trice, 6 Yerg. 479.

99. Pa.—Ellmaker v. Franklin F. Ins. Co., 5 Pa. 183—Roth v. Miller, 15 Serg. & R. 100. 15 C.J. p 1202 note 50.

1. Pa.—Hanna v. Burkholder, 7 Serg. & R. 228.

2. N.Y.—Roosevelt v. Fulton, 7 Cow. 71. Pa.—Smith v. Justice, 6 Phila. 234.

3. N.Y.—Roosevelt v. Fulton, 7 Cow. 71.

4. Md.—Franklin F. Ins. Co. v. Hamill, 6 Gill 87. 15 C.J. p 1202 note 56.

5. Pa.—Huntingdon, etc., R. Co. v. McGovern, 29 Pa. 78.

6. S.C.—Mathews v. Sims, 9 S.C.L. 103.

7. Md.—O'Brien v. Fowler, 11 A. 174, 67 Md. 561. 15 C.J. p 1202 note 57.

8. S.C.—Mathews v. Sims, 9 S.C.L. 103.

9. Va.—Laughlin v. Flood, 3 Munf. 255, 17 Va. 255. 15 C.J. p 1202 note 65.

Consideration of covenant

If the consideration for a covenant is set forth in the declaration in the words of the agreement containing the covenant, there can be no variance.—Smith v. Edmunds, 16 Vt. 687.

10. Direction of verdict

In action of covenant, evidence was insufficient to warrant instructed verdict for plaintiff on any count in declaration.—Crystal Beach Development Co. v. Alvord, 133 So. 858, 101 Fla. 1403, affirmed 136 So. 669, 101 Fla. 1411.

Rules as to trial of actions for breach of covenant generally see Covenants §§ 134-137.

11. Ky.—Hull v. Caldwell, 6 J.J. Marsh. 208—Jenkins v. Yeates, 2 J. J. Marsh. 48.

15 C.J. p 1202 note 67.

12. Ky.—Hull v. Caldwell, 6 J.J. Marsh. 208.

§ 37. Appeal and Error

Rules as to appeal and error in actions for breach of covenant generally are discussed in Covenants § 140. Examine Pocket Parts for later cases.

§ 38. Damages

Rules as to damages in actions for breach of covenant generally are discussed in Covenants §§ 142-150. Examine Pocket Parts for later cases.

COVENANTS

This Title includes promises under seal in general, and more particularly such promises relating to the title, possession, or use of real property; their nature, requisites, validity, incidents, construction, operation, and effect; what constitutes a breach of covenant, and actions therefor.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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I. NATURE, REQUISITES, AND VALIDITY

§ 1. In General

- a. Definition and nature
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a. Definition and Nature

A covenant is an agreement to do or not to do a particular act.

A covenant is an agreement duly made to do or not to do a particular act.¹ It is a species of express contract;² and is a contract of a special nature.³

For the purpose of investigation, covenants may be divided into two classes: Covenants in deed, or express covenants;⁴ and covenants in law, or implied covenants.⁵

Particular words and provisions in various instruments have been held to constitute⁶ and not to constitute⁷ covenants.

b. Distinctions

A covenant differs from a condition; it has also been distinguished from an easement.

Although the term "condition" has, under particular circumstances, been construed as being used as equivalent to "covenant,"⁸ and while there are cases in which an instrument may contain both a condition and a covenant,⁹ as where it contains promissory words,¹⁰ a condition differs from a covenant,¹¹ both in the language that constitutes it and in the consequences which follow from a breach.¹²

A covenant is distinguished from a condition in that a condition is created by the mutual agree-

1. Ill.—Rooks Creek Evangelical Lutheran Church v. First Lutheran Church of Pontiac, 134 N.E. 793, 795, 200 Ill. 133, 7 A.L.R. 1422—Bald v. Nuernberger, 108 N.E. 724, 726, 267 Ill. 616.

Mont.—Atlantic Pacific Oil Co. of Montana v. Gas Development Co., 69 P.2d 750, 756, 105 Mont. 1. N.Y.—Israelsky v. Levine, 209 N.Y.S. 577, 578, 124 Misc. 827, citing *Corpus Juris*, and reversed on other grounds 213 N.Y.S. 589, 215 App. Div. 94.

Tex.—Missouri, K. & T. Ry. Co. of Texas v. State, Civ.App., 275 S.W. 673, 678, citing *Corpus Juris*. 15 C.J. p 1209 note 10.

In common parlance a covenant is a written agreement, whether under seal or not.—Curry v. Cotton, 191 N.E. 307, 310, 356 Ill. 538, citing *Corpus Juris*—15 C.J. p 1209 note 13.

Other definitions

(1) The word "covenant" is defined as "an agreement, convention or promise of two or more parties, by deed in writing signed, sealed and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done or stipulates for the truth of certain facts."—Curry v. Cotton, 191 N.E. 307, 310, 356 Ill. 538.

(2) "A covenant has been defined as an agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or nonperformance of certain acts, or that a given state of things does or shall, or does not or shall not exist."—Queen City Park Ass'n v. Gale, 3 A.2d 529, 532, 110 Vt. 110.

(3) "An agreement duly made between the parties to do or not to do a particular act, or whereby either

doth promise to the other that something is done already or shall be done afterwards, or a stipulation as to the nonperformance of some specified duty, or stipulation as to the truth of certain facts."—Lowery v. May, 104 So. 5, 8, 213 Ala. 66.

(4) "Any words in a writing under the hand, whether sealed or unsealed, of a person importing an agreement, is a covenant."—Guld v. Wallis, 279 P. 546, 548, 130 Or. 148.

(5) "An agreement to do or not to do a particular act in the future."—Board of Education for Jefferson County v. Mill Creek Methodist Church, South, 45 S.W.2d 1026, 1029, 242 Ky. 147.

(6) "A contract under seal, made by the parties, in which they mutually state what is to be performed by each."—Woods v. Woods, 44 N.C. 290, 291.

(7) Further definitions.

Pa.—Green v. Green, 99 A. 801, 803, 255 Pa. 224. Tex.—Reinert v. Lawson, Civ.App., 113 S.W.2d 293, 295.

15 C.J. p 1209 notes 3-9, 12 [a].

2. Ill.—Chicago Mill & Lumber Co. of Cairo v. Townsend, 203 Ill.App. 457, 464.

3. N.Y.—Clark v. Devoe, 26 N.E. 275, 124 N.Y. 120, 124, 21 Am.S.R. 652—Fox v. International Hotel Co., 58 N.Y.S. 441, 41 App.Div. 140, 143, affirmed 61 N.E. 1129, 168 N.Y. 658.

4. N.C.—Kent v. Edmondston, 49 N.C. 529.

5. N.H.—Lovering v. Lovering, 13 N.H. 513.

15 C.J. p 1209 note 2.

6. Contract preamble reciting execution of note in amount including certain sums to be advanced by bank—

Hunt v. United Bank & Trust Co., 291 P. 184, 187, 210 Cal. 103.

"Option" in mortgage to require delivery of new mortgage and bonds N.Y.—People ex rel. Home Mortgage Inv. Company of New York v. State Board of Tax Com'rs, 169 N.Y.S. 978, 980, 182 App.Div. 699.

Restriction establishing building lines in filed articles of dedication and plat.—Menstell v. Johnson, 262 P. 853, 125 Or. 180, 57 A.L.R. 311, modified on other grounds and rehearing denied 266 P. 891, 125 Or. 150, 57 A.L.R. 311.

Written promise to clear defects in title, delivered contemporaneously with general warranty deed.—Davies v. Blasingame, 170 S.E. 477, 177 Ga. 450.

7. Agreement in lease to pay rent N.Y.—Realty Advertising & Supply Co. v. Hickson, 171 N.Y.S. 455, 458, 184 App.Div. 168.

Recital of money consideration in deed Ga.—Coles v. Mozley, 95 S.E. 963, 143 Ga. 21.

8. N.J.—Barclay v. Charles Roome Parmele Co., 61 A. 715, 70 N.J.Eq. 218.

9. U.S.—Hale v. Finch, Wash., 104 U.S. 261, 270, 26 L.Ed. 732. 15 C.J. p 1217 note 97.

10. Mich.—Blanchard v. Detroit, etc., R. Co., 31 Mich. 43, 18 Am.R. 142. 15 C.J. p 1218 note 98.

11. Mont.—Atlantic Pacific Oil Co. v. Gas Development Co., 69 P.2d 750, 756, 105 Mont. 1, quoting *Corpus Juris*.

12 C.J. p 401 note 28—18 C.J. p 352 note 68.

12. Md.—Bartell v. Senger, 155 A. 174, 160 Md. 685.

ment of the parties and is binding on both,¹³ whereas a covenant is in the words,¹⁴ and is a promise or an agreement, of the covenantor only.¹⁵ They are further distinguished in that, while a "covenant" is sometimes defined as a promise or agreement under seal to do or not to do a particular thing, the office of a "condition" is generally to indicate the terms on which a certain right will arise, or continue, or be defeated.¹⁶

The chief distinction between a condition and a covenant pertains to the remedy in event of a breach.¹⁷ Thus the agreement is a condition if a

breach thereof pertains to the validity of the instrument or, as in the case of a condition subsequent, is a ground for forfeiture;¹⁸ but the agreement is a covenant if the remedy for a breach is merely an action at law for damages,¹⁹ although equitable relief in such case has also been held to be available.²⁰

Whether a particular provision is a condition or a covenant depends on the intention of the parties to the instrument,²¹ or, in the case of a will, on the intent of the testator,²² and on the contract and the circumstances.²³

13. Ala.—*Murphy v. Schuster Springs Lumber Co.*, 111 So. 427, 215 Ala. 412.
- Cal.—*Moe v. Gier*, 2 P.2d 852, 116 Cal. App. 403—*Joyce v. Krupp*, 257 P. 124, 83 Cal.App. 391.
- Mont.—*Atlantic Pacific Oil Co. v. Gas Development Co.*, 69 P.2d 750, 756, 105 Mont. 1, quoting *Corpus Juris*.
- 12 C.J. p 401 note 29—15 C.J. p 1217 note 96—18 C.J. p 352 note 68 [a].
14. Mich.—*Langley v. Ross*, 20 N.W. 886, 55 Mich. 163, 165.
15. Ala.—*Murphy v. Schuster Springs Lumber Co.*, 111 So. 427, 215 Ala. 412.
- Cal.—*Moe v. Gier*, 2 P.2d 852, 116 Cal.App. 403—*Joyce v. Krupp*, 257 P. 124, 83 Cal.App. 391.
- Mont.—*Atlantic Pacific Oil Co. v. Gas Development Co.*, 69 P.2d 750, 756, 105 Mont. 1, quoting *Corpus Juris*.
- 13 C.J. p 401 note 29—18 C.J. p 352 note 68 [a].
16. Mich.—*De Grasse v. Verona Min. Co.*, 152 N.W. 242, 185 Mich. 514, 526.
17. Iowa.—*Brown v. Chicago & N. W. R. Co.*, 82 N.W. 1003, 1004.
- Ky.—*Board of Education for Jefferson County v. Mill Creek Methodist Church, South*, 45 S.W.2d 1026, 242 Ky. 147.
- Mont.—*Atlantic Pacific Oil Co. v. Gas Development Co.*, 69 P.2d 750, 756, 105 Mont. 1, quoting *Corpus Juris*.
18. Cal.—*Joyce v. Krupp*, 257 P. 124, 83 Cal.App. 391—*Knight v. Black*, 126 P. 512, 19 Cal.App. 518.
- Ill.—*Rooks Creek Evangelical Lutheran Church v. First Lutheran Church of Pontiac*, 124 N.E. 793, 795, 290 Ill. 133, 7 A.L.R. 1422, citing *Corpus Juris*.
- Iowa.—*Cavanaugh v. Iowa Beer Co.*, 113 N.W. 856, 136 Iowa 236—*Brown v. Chicago & N. W. R. Co.*, 82 N.W. 1003.
- Kan.—*Citizens Building & Loan Ass'n of Emporia v. Jones*, 87 P.2d 633, 685, 149 Kan. 302, citing *Corpus Juris*.
- Ky.—*Board of Education for Jefferson County v. Mill Creek Methodist Church, South*, 45 S.W.2d 1026, 242 Ky. 147.
- Md.—*Bartell v. Senger*, 155 A. 174, 176, 160 Md. 685.
- Mass.—*Everett Factories & Terminal Corporation v. Oldetyme Distillers Corporation*, 15 N.E.2d 829.
- Mo.—*Globe American Corporation v. Miller Hatcheries*, 110 S.W.2d 393, 396, quoting *Corpus Juris*.
- Mont.—*Atlantic Pacific Oil Co. v. Gas Development Co.*, 69 P.2d 750, 756, 105 Mont. 1, quoting *Corpus Juris*.
- N.Y.—*In re Gaffers' Estate*, 5 N.Y.S. 2d 671, 254 App.Div. 448—*New Edgewood Lake Corporation v. Kingston Trust Co.*, 285 N.Y.S. 130, 245 App.Div. 163.
- S.C.—*Prudential Ins. Co. of America v. Franklin Fire Ins. Co. of Philadelphia*, 185 S.E. 537, 180 S.C. 250.
- Tenn.—*Phoenix Mut. Life Ins. Co. for Use of First Nat. Bank v. Aetna Ins. Co.*, 59 S.W.2d 517, 166 Tenn. 126.
- Tex.—*Leonard v. Prater, Com.App.*, 36 S.W.2d 216—*Stanolind Oil & Gas Co. v. Barnhill, Civ.App.*, 107 S.W. 2d 746—*Kozelski v. Bronder, Civ. App.*, 297 S.W. 664—*Rosek v. Kotzur, Civ.App.*, 267 S.W. 759.
- 12 C.J. p 409 note 38.
20. Cal.—*Joyce v. Krupp*, 257 P. 124, 83 Cal.App. 391.
- Ill.—*Northwestern University v. Wesley Memorial Hospital*, 125 N.E. 13, 18, 290 Ill. 205.
- Ky.—*Board of Education for Jefferson County v. Mill Creek Methodist Church, South*, 45 S.W.2d 1026, 242 Ky. 147.
- Tex.—*Leonard v. Prater, Com.App.*, 36 S.W.2d 216—*Kozelski v. Bronder, Civ.App.*, 297 S.W. 664.
21. Ala.—*Murphy v. Schuster Springs Lumber Co.*, 111 So. 427, 215 Ala. 412.
- Ill.—*Rooks Creek Evangelical Lutheran Church v. First Lutheran Church of Pontiac*, 124 N.E. 793, 795, 290 Ill. 133, 7 A.L.R. 1422, citing *Corpus Juris*.
- Iowa.—*Brown v. Chicago & N. W. R. Co.*, 82 N.W. 1003.
- Kan.—*Citizens Building & Loan Ass'n of Emporia v. Jones*, 87 P.2d 633, 685, 149 Kan. 302, citing *Corpus Juris*.
- Mont.—*Atlantic Pacific Oil Co. v. Gas Development Co.*, 69 P.2d 750, 105 Mont. 1.
- 18 C.J. p 357 note 13—35 C.J. p 1189 note 34.
22. N.Y.—*In re Gaffers' Estate*, 5 N.Y.S.2d 671, 254 App.Div. 448.
23. Ala.—*Murphy v. Schuster Springs Lumber Co.*, 111 So. 427, 215 Ala. 412.
- Ill.—*Rooks Creek Evangelical Lutheran Church v. First Lutheran*

As distinguished from an easement, which is a claim on lands, a covenant is a personal undertaking.²⁴

c. Consideration and Validity

A covenant must be valid and must be supported by a consideration.

Unless the instrument is sealed and a consideration is unnecessary, a covenant, like other contracts, must be supported by a sufficient consideration²⁵ which may, in a particular case, consist of a detriment suffered by the covenantee caused by a breach of the covenant.²⁶

Validity and legality. A covenant must express the purpose of the parties thereto;²⁷ to be valid or enforceable, it must not be too indefinite,²⁸ and it must not be contrary to public policy.²⁹

Where one of several covenants in a contract is held illegal and void, the balance of the contract, including the remaining covenants, may be enforceable so far as it is not prohibited by public policy.³⁰

§ 2. Express Covenants

An express covenant is one explicitly stated in words.

An express covenant is a covenant explicitly stated in words,³¹ while an implied covenant, as is defined in § 9 infra, is one which is inferred or imputed in law from the words used.

A covenant in fact or in deed is one which is

expressly agreed between the parties in specified terms;³² a covenant expressed in words, or inserted in a deed in specific terms.³³

§ 3. — Parties

A covenantor need not necessarily possess more than a limited estate in order to make a valid covenant, or, in certain cases, any estate at all; but the covenantee may not be a stranger to the deed.

The person who makes the covenant is known as the covenantor,³⁴ while the covenantee is he to whom the covenant is made.³⁵

Any person sui juris, although owning only a limited estate, may make a valid covenant.³⁶ Furthermore, there is nothing to prevent a person from warranting title to land that he neither owns nor claims,³⁷ although it has been held that a person, conveying with warranty the interest he expects to inherit, is not bound by such warranty.³⁸

A grantor cannot covenant with a stranger to the deed;³⁹ and the covenantee must be privy to some present agreement by the covenantor.⁴⁰

§ 4. — Formal Requisites in General

No particular form of words is essential to the creation of a covenant, although the covenant must usually be in writing, and, when embodied in a deed, the deed itself must be valid unless the covenant is entirely collateral or independent.

No precise or set form of words is necessary to make a covenant.⁴¹ The intent of the parties con-

Church of Pontiac, 124 N.E. 793, 795, 290 Ill. 133, 7 A.L.R. 1422, citing *Corpus Juris*.

Iowa.—Brown v. Chicago & N. W. R. Co., 82 N.W. 1003.

Kan.—Citizens Building & Loan Ass'n of Emporia v. Jones, 87 P.2d 633, 695, 149 Kan. 302, citing *Corpus Juris*.

Mont.—Atlantic Pacific Oil Co. v. Gas Development Co., 69 P.2d 750, 105 Mont. 1.

12 C.J. p 411 note 55.

24. Wyo.—Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n, 297 P. 385, 43 Wyo. 41.

25. Consideration held sufficient Cal.—Platner v. Vincent, 229 P. 24, 194 Cal. 436.

Ill.—Dodd v. Rotterman, 161 N.E. 756, 330 Ill. 362.

N.Y.—Belden v. City of Niagara Falls, 241 N.Y.S. 5, 136 Misc. 406, reversed on other grounds 245 N.Y. S. 510, 230 App.Div. 601.

Or.—Norby v. Section Line Drainage Dist., 76 P.2d 966, 159 Or. 80.

Consideration for contracts see Contracts §§ 70-131.

26. Cal.—Platner v. Vincent, 229 P. 24, 194 Cal. 436.

27. Okl.—Ball v. Coyle, 233 P. 750, 108 Okl. 30.

28. Covenant held valid or enforceable Ga.—Gulf Refining Co. v. Smith, 139 S.E. 716, 164 Ga. 811—Phillips v. Blackwell, 139 S.E. 547, 164 Ga. 856.

Covenant held invalid

Cal.—Morgan v. Dibble, 184 P. 704, 43 Cal.App. 116.

29. N.C.—Lee v. Oates, 88 S.E. 889, 171 N.C. 717, Ann.Cas.1917A 514.

Covenant held not contrary to public policy

N.Y.—Belden v. City of Niagara Falls, 241 N.Y.S. 5, 136 Misc. 406, reversed on other grounds 245 N.Y. S. 510, 230 App.Div. 601.

30. Ill.—Dodd v. Rotterman, 161 N.E. 756, 330 Ill. 362.

31. N.H.—Lovering v. Lovering, 13 N.H. 513.

15 C.J. p 1210 note 16.

32. English L.D.

33. Burrill L.D.

34. N.C.—Kent v. Edmondston, 49 N.C. 529.

35. N.C.—Kent v. Edmondston, supra.

36. U.S.—Barlow v. Delaney, C.C. Mo., 40 F. 97. Parties in actions for breach of covenant see infra § 123.

37. U.S.—Keith Lumber Co. v. Houston Oil Co. of Texas, Tex., 257 F. 1, 168 C.C.A. 213, certiorari denied 40 S.Ct. 13, 250 U.S. 666, 63 L.Ed. 1197.

Estoppel to assert after-acquired title to real estate see the C.J.S. title Estoppel §§ 21-23, also 21 C. J. p 1074 note 57—p 1079 note 9.

38. Son's interest in father's estate Ky.—Taul v. Brickey, 219 S.W. 430, 187 Ky. 375.

39. N.Y.—Hornbeck v. Westbrook, 9 Johns. 73.

15 C.J. p 1210 note 22.

40. Mass.—Saunders v. Saunders, 28 N.E. 270, 154 Mass. 337.

15 C.J. p 1210 note 25.

41. Ind.—Sheets v. Vandalla R. Co., 127 N.E. 609, 74 Ind.App. 597.

Or.—Weddle v. Parrish, 295 P. 454, 456, 135 Or. 345.

trols,⁴² and any words that amount to or import an agreement are sufficient.⁴³ An express covenant must be reduced to writing⁴⁴ and generally must state the name of the person covenanting.⁴⁵

It has been stated broadly that an express covenant can be created only by deed,⁴⁶ the cases supporting the rule being, however, apparently limited to those involving covenants of title,⁴⁷ such as a covenant of warranty,⁴⁸ or other covenants relating to and affecting land, as, for example, a covenant restricting the use of the land,⁴⁹ or an agreement to pay taxes on the land⁵⁰ or to maintain a boundary fence⁵¹ or a bridge⁵² or for a right to overflow adjoining land.⁵³ It is generally held, in such case, that the deed must itself be valid and binding in order to effect the validity of the covenant,⁵⁴ but this rule does not apply to collateral and independent covenants;⁵⁵ and it has been held, as well, that a personal covenant in a deed may be binding on the obligor notwithstanding the deed itself was invalid because it was not properly witnessed.⁵⁶

§ 5. — Statutory Forms

As is discussed in § 10, statutory provisions in some jurisdictions determine the covenants which shall be implied from the use of particular terms in conveyances. Other statutes, as shown in § 11, abolish implied covenants.

Examine Pocket Parts for later cases.

§ 6. — Particular Covenants

The operation and effect of particular express covenants is considered in detail in §§ 20–86 infra.

Examine Pocket Parts for later cases.

§ 7. — Execution and Delivery

Proper execution and delivery of the instrument by which an express covenant is created is essential.

A seal is generally held to be essential to a covenant,⁵⁷ but in many cases, frequently by force of

Pa.—Green v. Green, 99 A. 801, 255 Pa. 224.

15 C.J. p 1209 note 14.

Formal words held unnecessary

(1) "Covenant."—Sheets v. Vandallia R. Co., 127 N.E. 609, 74 Ind. App. 597—15 C.J. p 1209 note 14 [c].

(2) "Promise."—Sheets v. Vandallia R. Co., supra.

42. Cal.—Stillwell Hotel Co. v. Anderson, 50 P.2d 441, 4 Cal.2d 463 —Allan v. Guaranty Oil Co., 168 P. 884, 176 Cal. 421.

Pa.—Green v. Green, 99 A. 801, 255 Pa. 224.

43. Cal.—Hunt v. United Bank & Trust Co., 291 P. 184, 210 Cal. 108. Or.—Guild v. Wallis, 279 P. 546, 130 Or. 148.

Tex.—Missouri, K. & T. Ry. Co. of Texas v. State, Civ.App., 275 S.W. 673, 678, citing *Corpus Juris*. 15 C.J. p 1210 note 15.

Any words in a deed which show an agreement to do a thing constitute a covenant.—Hale v. Finch, Wash., 104 U.S. 261, 26 L.Ed. 732.

A mere statement in a deed of the purpose of the conveyance, or a clause therein limiting the use of the premises, will not create a covenant.—Van De Bogert v. Reformed Dutch Church of Poughkeepsie, 220 N.Y.S. 50, 128 Misc. 603, affirmed 220 N.Y.S. 58, 219 App.Div. 220.

Unfilled blanks in conveyance

(1) Unfilled blanks in conveyance may be disregarded where they are manifest clerical errors, and the intent is evident.—Smith v. Lloyd, 29 Mich. 382.—Peck v. Houghtaling, 35 Mich. 127.

(2) Failure to fill blanks, however, is a material defect, where it renders the covenant meaningless.—Day v. Brown, 2 Ohio 345.

44. Fla.—Smith v. Home Seekers' Realty Co., 122 So. 708, 709, 97 Fla. 236, 67 A.L.R. 807, citing *Corpus Juris*.

Ill.—Curry v. Cotton, 191 N.E. 307, 356 Ill. 538.

Pa.—Green v. Green, 99 A. 801, 255 Pa. 224.

Tex.—Missouri, K. & T. Ry. Co. of Texas v. State, Civ.App., 275 S.W. 673, 678, citing *Corpus Juris*.

Vt.—Queen City Park Ass'n v. Gale, 3 A.2d 529.

15 C.J. p 1209 note 4.

45. S.C.—Tilghman Lumber Co. v. Matheson, 70 S.E. 1683, 88 S.C. 432. 15 C.J. p 1210 note 24.

46. N.Y.—Atlantic Dock Co. v. Leavitt, 54 N.Y. 35, 13 Am.R. 556.

Covenant in consideration clause of deed

A promise to perform a covenant to keep drainage ditches open, which was a part of the consideration for the conveyance of land, was properly inserted in the consideration clause of the deed.—Guild v. Wallis, 279 P. 546, 130 Or. 148.

Covenant in quitclaim deed

"While ordinarily quitclaim deeds do not contain covenants, yet, if one is clearly expressed in that form of deed . . . it should . . . be as enforceable . . . as in any other form of deed."—Guild v. Wallis, 279 P. 546, 130 Or. 148.

Contract of purchase of land
Under a contract of purchase of

land containing a stipulation that the vendor would execute a warranty deed when one half of the purchase price was paid, it has been held that the land was "sold" to the purchasers so as to confer the right on them to call on the warrantor to indemnify them for losses sustained by their eviction from the land.—Willis v. Hamilton, La.App., 168 So. 355.

47. Pa.—Scott v. Scott, 70 Pa. 241.

48. Pa.—Scott v. Scott, supra.

49. N.Y.—Atlantic Dock Co. v. Leavitt, 54 N.Y. 35, 13 Am.R. 556.

50. N.D.—Alsterberg v. Bennett, 106 N.W. 49, 14 N.D. 596.

51. Mass.—Boston & A. R. Co. v. Briggs, 132 Mass. 24.

52. Ill.—Hord v. Montgomery, 26 Ill. App. 41.

53. Mass.—Fitch v. Seymour, 9 Metc. 462.

54. N.Y.—Schefer v. Ball, 104 N.Y. S. 1028, 53 Misc. 448.

15 C.J. p 1211 note 29.

55. Mass.—Wade v. Merwin, 11 Pick. 280.

15 C.J. p 1211 note 31.

56. Ohio.—Vattier v. Flindley, 1 Ohio Dec., Reprint, 58, 1 West.L.J. 398.

57. Ill.—Curry v. Cotton, 191 N.E. 307, 356 Ill. 538.

Pa.—Green v. Green, 99 A. 801, 255 Pa. 224.

15 C.J. p 1209 note 6.

Contract under seal see Contracts § 63.

If the seal affixed is not that of the party who substantially makes the promise, and who is to be charged by it, the promise remains,

statute, a seal has been held to be unnecessary.⁵⁸ Delivery is ordinarily a prerequisite.⁵⁹

Where conditions precedent to the operation of the instrument exist, they must be fulfilled before the instrument can become effective.⁶⁰

§ 8. — Acceptance of Deed Containing Covenants on Part of Grantee

As a general rule, a grantee's acceptance of a deed containing a covenant on his part is equivalent to an agreement by him to perform the covenant.

As a general rule, in some instances under stat-

utes specifically so providing, the acceptance of a deed, whether poll or inter partes, containing a covenant on the part of the grantee is equivalent to an agreement on his part to perform the same,⁶¹ and it is immaterial that the deed is not signed,⁶² sealed,⁶³ or executed⁶⁴ by him.

The rule is not without qualification, however,⁶⁵ and, in addition, great lack of judicial harmony exists, in some instances among courts of the same state, as to the nature of the grantee's liability, some cases holding that it rests as on an express covenant,⁶⁶ while others contend that it rests only on

and is not changed into a contract of a higher nature.—*Cram v. Bangor House*, 12 Me. 354.

52. Or.—*Guild v. Wallis*, 270 P. 546, 130 Or. 148.
15 C.J. p 1209 note 5.

53. Ill.—*Curry v. Cotton*, 191 N.E. 307, 356 Ill. 538.
15 C.J. p 1209 note 7.
Delivery of contract see *Contracts* § 64.

Delivery in escrow

Where a deed delivered to a bank to be held in escrow for the purchaser of realty was never delivered, due to the purchaser's discovery of false representations by the vendor, it was held that the deed did not become operative and that no cause of action in favor of the purchaser accrued by reason of the covenants of the deed.—*Drake v. Nunn*, 97 So. 211, 210 Ala. 136.

60. Securing required number of signatures

(1) Where a specified number of signatures to the instrument must be secured before it becomes operative, such condition must be complied with.—*Foster v. Stewart*, 25 P. 2d 497, 134 Cal.App. 482—*Oberwise v. Poulos*, 12 P.2d 156, 124 Cal.App. 247.

(2) A neighborhood scheme of restrictions as to the use or occupancy of property by members of a certain race must be universal and reciprocal since the theory of such a scheme is that the restrictions are a benefit to all, the consideration for the imposition of the restrictions on each lot being that the same restrictions are imposed on all of the other lots.—*Thornhill v. Herdt*, Mo.App., 130 S.W. 2d 175.

(3) One signing such an instrument cannot withdraw his signature until after a reasonable time for procuring the other signatures; and what constitutes a reasonable time is determined by considering the nature of the contract, the diligence used, and all the facts and circumstances.—*Russell v. Wallace*, 30 F.2d 981, 58 App.D.C. 357, certiorari denied 49 S.Ct. 512, 279 U.S. 371, 73 L.Ed. 1007.

(4) One otherwise properly qualified to sign such an instrument as a property owner did not invalidate his signature by adding to it a descriptive term, such as "executor."—*Russell v. Wallace*, supra.

61. Ala.—*McKee v. Club-View Heights*, 162 So. 671, 230 Ala. 652.—*Hill v. Weil*, 80 So. 536, 202 Ala. 400—*Weil v. Hill*, 69 So. 438, 193 Ala. 407.

Cal.—*Pedro v. Humboldt County*, 19 P.2d 776, 217 Cal. 493—*Marshall v. Standard Oil Co. of California*, 61 P.2d 520, 524, 17 Cal.App.2d 19, citing *Corpus Juris*.

Ga.—*Ottawaquechee Sav. Bank v. Elliott*, 158 S.E. 316, 172 Ga. 656—*Peebles v. Perkins*, 140 S.E. 360, 165 Ga. 159—*Phillips v. Blackwell*, 139 S.E. 547, 164 Ga. 856.

Ill.—*Carder v. Hughett*, 243 Ill.App. 170.

Mass.—*Everett Factories & Terminal Corporation v. Oldetyme Distillers Corporation*, 15 N.E.2d 829.

Mo.—*Scott v. Scott*, 26 S.W.2d 598, 324 Mo. 1055.

N.Y.—*Vogeler v. Alwyn Improvement Corporation*, 159 N.E. 886, 247 N.Y. 131, reversing 222 N.Y.S. 918, 220 App.Div. 829.

N.C.—*Coxe v. Dillard*, 148 S.E. 545, 197 N.C. 344—*Peel v. Peel*, 147 S.E. 295, 196 N.C. 782.

Or.—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 159 Or. 80.

Tenn.—*Hunt v. Curry*, 282 S.W. 201, 153 Tenn. 11—*Carnegie Realty Co. v. Carolina, C. & O. Ry. Co.*, 189 S.W. 371, 136 Tenn. 300—*Johnson v. Robinson*, 7 Tenn.App. 457.

15 C.J. p 1211 note 35, p 1212 note 36.

Assumption of mortgage indebtedness by acceptance of deed see the C.J.S. title *Mortgages* § 407, also 41 C.J. p 725 note 89 et seq.

Knowledge of covenant presumed

The grantee is presumed to have had knowledge of the existence of a covenant in a deed which he accepted, and it is not necessary that there should be a formal promise on his part to assume the obligation

thereof.—*Dutton v. Locke-Paddon*, 174 P. 674, 37 Cal.App. 693.

62. Ala.—*McKee v. Club-View Heights*, 162 So. 671, 230 Ala. 652. Ga.—*Peebles v. Perkins*, 140 S.E. 360, 165 Ga. 159—*Phillips v. Blackwell*, 139 S.E. 547, 164 Ga. 856.

Ill.—*Carder v. Hughett*, 243 Ill.App. 170.

Or.—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 159 Or. 80.

Tenn.—*Carnegie Realty Co. v. Railroad*, 189 S.W. 371, 136 Tenn. 371.
15 C.J. p 1211 note 35, p 1212 note 36.

63. Or.—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 159 Or. 80.

64. Mass.—*Everett Factories & Terminal Corporation v. Oldetyme Distillers Corporation*, 15 N.E.2d 829. N.C.—*Coxe v. Dillard*, 148 S.E. 545, 197 N.C. 344.

In South Carolina, in a case involving the question of whether a grantee is bound by covenants in a deed poll, the court held that, if a written, formal acceptance were necessary to bind the grantee, it could not be charged in the instant case because the acceptance actually written and signed by the grantee was neither witnessed nor probated as required by law.—*Epting v. Lexington Water Power Co.*, 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

65. Absence of evidence of parties' intent

The acceptance by the grantee of a deed poll to land charged with a dower interest has been held not to import a covenant to be personally answerable therefor in the absence of further evidence that such was the intent of the parties.—*Schoenberg v. Hay*, 40 Pa. 132.

66. Ala.—*McKee v. Club-View Heights*, 162 So. 671, 230 Ala. 652. Cal.—*Pedro v. Humboldt County*, 19 P.2d 776, 217 Cal. 493.

Or.—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 159 Or. 80.

Tenn.—*Carnegie Realty Co. v. Railroad*, 189 S.W. 371, 136 Tenn. 371.
15 C.J. p 1211 note 35.

an implied undertaking.⁶⁷

As appears in the C.J.S. title Estoppel § 18, also 21 C.J. p 1073 notes 48, 53, while the acceptance of a deed poll will not estop the grantee to deny the grantor's title, the rule is well settled in a number of jurisdictions that, where the deed contains agreements or covenants to be performed by the grantee, his acceptance of the deed estops him to deny them.

§ 9. Implied Covenants in General

An implied covenant is one inferred or implied in law from the words used and is based on the presumed intention of the parties. Such covenants are not favored.

An implied covenant is one which is inferred or imputed in law from the words used,⁶⁸ for example, in a deed⁶⁹ or, as appears in the C.J.S. title Landlord and Tenant, §§ 235-243, also 35 C.J. p 1184 note 48, p 1189 note 45, in a lease. Such covenants depend for their existence on the intendment and construction of law⁷⁰ and are based on the presumed

intention of the parties.⁷¹ Implied warranties are not favored by the common law,⁷² and the tendency of modern decisions is not to imply covenants which might and ought to have been expressed if intended.⁷³ An implied covenant must rest on a satisfactory basis in the express contract of the parties,⁷⁴ and it must appear that it was so clearly in their contemplation that they deemed it unnecessary to express it and, therefore, omitted to do so, or it must appear that it is necessary to imply such a covenant in order to give effect to and effectuate the purpose of the contract as a whole.⁷⁵

Under an executory agreement to sell specific real estate, there is an implied warranty that the title shall be good⁷⁶ and that the same shall be free from encumbrance;⁷⁷ but such warranty exists only so long as the contract remains executory and does not carry over into the deed.⁷⁸

As a rule, no covenant of title,⁷⁹ quantity,⁸⁰ or freedom from encumbrance,⁸¹ or as to the condi-

Obligation enforceable in equity

Acceptance of title to land subject to restrictive covenant imposes obligation enforceable in equity against grantee.—*Vogeler v. Alwyn Improvement Corporation*, 159 N.E. 886, 247 N.Y. 131, reversing 222 N.Y. S. 918, 220 App.Div. 829.

67. Mass.—*Everett Factories & Terminal Corporation v. Oldetyme Distillers Corporation*, 15 N.E.2d 829, 15 C.J. p 1212 note 36.

Creates simple contract only

A recital in warranty deed that deed was made subject to betterment assessment which grantees, who did not sign or seal deed, assumed to pay, created only a simple contract when grantees accepted the deed.—*Fred T. Ley & Co. v. Sagalyn, Mass.*, 19 N.E.2d 687.

68. Cal.—*O'Sullivan v. Griffith*, 95 P. 873, 96 P. 323, 153 Cal. 502.

Other definition

"An implied covenant is one which may reasonably be inferred from the whole agreement and the circumstances attending its execution. Implication when used in that sense is synonymous with intention."—*Brimmer v. Union Oil Co. of California*, C.C.A.Wyo., 81 F.2d 437, 105 A.L.R. 454, certiorari denied 56 S.Ct. 833, 298 U.S. 658, 80 L.Ed. 1391.

Covenant for development

A covenant for development implied in an oil and gas lease is not a true covenant in that it does not impose a continuing enforceable duty.—*Gulf Production Co. v. Kishi*, Tex.Com.App., 103 S.W.2d 965.

69. Tex.—*American Sulphur Royalty Co. of Texas v. Freeport Sulphur Co.*, Civ.App., 276 S.W. 448,

affirmed 6 S.W.2d 1039, 117 Tex. 439, 60 A.L.R. 890.

70. U.S.—*Hambly v. Delaware, etc., R. Co.*, C.C.Del., 21 F. 541, 552.

71. N.J.—*Coudert v. Sayre*, 19 A. 190, 46 N.J.Eq. 386.

72. S.C.—*Biggs v. Bradley*, 1 McCord 100.

73. Ala.—*Prudential Ins. Co. of America v. Zeidler*, 171 So. 634, 233 Ala. 328.

Tenn.—*Weatherly v. American Agricultural Chemical Co.*, 65 S.W.2d 592, 598, 16 Tenn.App. 613, citing *Corpus Juris*.

15 C.J. p 1212 note 39.

74. Tenn.—*Weatherly v. American Agricultural Chemical Co.*, 65 S.W.2d 592, 16 Tenn.App. 613.

Tex.—*Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas*, 6 S.W.2d 1039, 117 Tex. 439, 60 A.L.R. 890, affirming *American Sulphur Royalty Co. of Texas v. Freeport Sulphur Co.*, Civ.App., 276 S.W. 448—*Marvin Drug Co. v. Couch*, Civ.App., 134 S.W.2d 356.

75. Tenn.—*Weatherly v. American Agricultural Chemical Co.*, 65 S.W.2d 592, 16 Tenn.App. 613.

Tex.—*Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas*, 6 S.W.2d 1039, 117 Tex. 439, 60 A.L.R. 890, affirming *American Sulphur Royalty Co. of Texas v. Freeport Sulphur Co.*, Civ.App., 276 S.W. 448—*Marvin Drug Co. v. Couch*, Civ.App., 134 S.W.2d 356.

Legal necessity

"Implied covenants can be justified only on the ground of legal necessity. It is not enough merely to say fairness, prudence, or wisdom demanded it under the circum-

stances. It must be necessary to the operation of the contract, or of words found in it or effectuation of the intention of the parties, made manifest by their words."—*Belle-Mead Lumber Co. v. Turnbull, W.Va.*, 87 S.E. 382, 384.

76. N.Y.—*Wheeler v. State*, 83 N.E. 54, 190 N.Y. 406, 123 Am.S.R. 555—*Clark v. Post*, 20 N.E. 573, 113 N.Y. 17—*Burwell v. Jackson*, 9 N.Y. 535—*Johnson v. State*, 175 N.Y.S. 784, 188 App.Div. 33, affirming 175 N.Y.S. 234, 104 Misc. 201.

77. N.Y.—*Johnson v. State*, supra.

78. Ky.—*Kentucky River Coal Corporation v. Swift Coal & Timber Co.*, 239 S.W. 201, 221 Ky. 593. N.Y.—*Clark v. Post*, 20 N.E. 573, 113 N.Y. 17.

79. Ky.—*Kentucky River Coal Corporation v. Swift Coal & Timber Co.*, 239 S.W. 201, 202, 221 Ky. 593, citing *Corpus Juris*.

N.Y.—*Harmon Nat. Real Estate Corporation v. Egan*, 241 N.Y.S. 708, 137 Misc. 297—*Lewy v. Clark Ave.*, 217 N.Y.S. 185, 128 Misc. 16.

N.C.—*Guy v. First Carolinas Joint Stock Land Bank of Columbia*, 171 S.E. 341, 205 N.C. 357.

15 C.J. p 1212 note 40.

Not an assertion of title

Grant of land does not imply assertion of title in grantor, or covenant in favor of grantee warranting land.—*Egnor v. Roberts*, 191 S.E. 532, 118 W.Va. 671—*Baker v. Letskus*, 168 S.E. 806, 113 W.Va. 533.

80. N.C.—*Guy v. First Carolinas Joint Stock Land Bank of Columbia*, 171 S.E. 341, 205 N.C. 357.

81. N.C.—*Guy v. First Carolinas*

tion of the property,⁸² will be implied from the fact of the conveyance of real property, although it has been held that the transfer of a certificate for land issued by the state to a discharged soldier implies a warranty of title;⁸³ and it has also been held that in case of exchange or partition of land a covenant of title may be implied,⁸⁴ but there is authority to the contrary.⁸⁵ However, except where implied covenants have been abolished by statute, see *infra* § 11, where, from the text of an agreement under seal, either in the body of the instrument or in its references, there is manifested a clear intention that one of the parties shall do or forbear to do certain acts, a covenant to that effect will be implied.⁸⁶ So, too, where land is conveyed with full covenants, and it is at the time in possession of a tenant, an agreement to accept the deed and the tenant's possession as the possession of the purchaser will be inferred, where nothing appears to the contrary, and the purchaser has full knowledge of the tenancy and the rights of the tenant.⁸⁷

In some jurisdictions, warranty is an incident of every sale where the parties do not agree otherwise;⁸⁸ but this applies only to a voluntary sale, a bargaining, a trafficking and an agreement, a giving of consent, and does not apply to transfers in invitum.⁸⁹

§ 10. — Statutory Provisions in General

In many jurisdictions, by statutory provision, certain covenants are implied from designated words in conveyances. Such statutes are strictly construed and only the covenants provided for will be implied and they only from the designated words.

In many jurisdictions the statutes provide that covenants of title shall be implied from the use of particular words in conveyances of realty,⁹⁰ and, under some statutes, from such words not only in deeds executed, but also in articles of agreement for the conveyance of land,⁹¹ and in mortgages.⁹² Such statutes, however, have been held not to apply to quitclaim deeds;⁹³ nor, in some jurisdictions, to deeds which do not purport to convey an absolute estate in fee,⁹⁴ or to transfers of personality.⁹⁵ Under the operation of such statutes, the implied covenants are to be read into the deed as if they had been separately written therein at full length,⁹⁶ and are as effective as if they had been expressly inserted in the conveyance;⁹⁷ but covenants other than those provided for will not be implied.⁹⁸ Although there is authority to the contrary,⁹⁹ it is generally held that such statutes, being in derogation of the common law, must be strictly construed.¹ Hence, although the rule is not strictly enforced in some jurisdictions,² it is generally held that, in

Joint Stock Land Bank of Columbia, *supra*.

82. N.Y.—*Harmon Nat. Real Estate Corporation v. Egan*, 241 N.Y.S. 708, 137 Misc. 297—*Lewy v. Clark Ave.*, 217 N.Y.S. 185, 128 Misc. 16.

83. Tex.—*Ripley v. Withee*, 27 Tex. 14.

84. Iowa.—*Brandt v. Foster*, 5 Iowa 287.

85. Mo.—*Rector v. Waugh*, 17 Mo. 13, 57 Am.D. 251.

86. N.Y.—*Booth v. Cleveland Rolling Mill Co.*, 74 N.Y. 15, 15 C.J. p 1213 note 50.

87. Ind.—*Page v. Lashley*, 15 Ind. 152, 15 C.J. p 1213 note 51.

88. La.—*Purcell v. Board of Com'rs of Port of New Orleans*, 96 So. 279, 153 La. 615.

Grantor holding under void deed

One, although holding under a deed which is nullity, who attempts a further conveyance, warrants title so conveyed.—*Lewis v. King*, 103 So. 19, 157 La. 718.

89. La.—*Purcell v. Board of Com'rs of Port of New Orleans*, 96 So. 279, 153 La. 615.

Against encumbrances

Where municipal water district having condemned certain land secured possession of land through an order of court by a proceeding in

invitum, there was no implied covenant, as in a voluntary conveyance by grant, against encumbrances or liens.—*Marin Municipal Water Dist. v. North Coast Water Co.*, 180 P. 620, 40 Cal.App. 260.

90. Mo.—*Crosby v. Evans*, 219 S.W. 948, 231 Mo. 202, answering questions certified, App., 195 S.W. 514.

W.Va.—*Listing v. Rodes*, 122 S.E. 282, 96 W.Va. 38, 15 C.J. p 1213 note 52.

91. Pa.—*Seitzinger v. Weaver*, 1 Rawle 377.

92. Ill.—*Esler v. Heffernan*, 41 N.E. 1113, 159 Ill. 38—*Lagger v. Mutual Union Loan & Bldg. Ass'n*, 33 N.E. 946, 146 Ill. 283.

93. Ark.—*Holmes v. Countiss*, 115 S.W.2d 553, 195 Ark. 1014.

Cal.—*Southern Pac. Co. v. Dore*, 163 P. 147, 34 Cal.App. 521.

Tex.—*Baldwin v. Drew*, Civ.App., 180 S.W. 614.

94. Mo.—*Waldermeyer v. Loebig*, 121 S.W. 75, 222 Mo. 540.

95. Cal.—*Chandler v. Bowman*, 279 P. 1041, 100 Cal.App. 221.

Transfer of oil

Instruments granting one per cent of oil produced on land constituted conveyance of interest in realty subject to implied warranty against encumbrances.—*Chandler v. Bowman*, *supra*.

96. Ind.—*Dehority v. Wright*, 101 Ind. 382.

15 C.J. p 1213 note 52 [g].

97. Ind.—*Kent v. Cantrall*, 44 Ind. 452—*Carver v. Louthain*, 38 Ind. 530.

Tex.—*Garrett v. Butler*, Civ.App., 260 S.W. 1069.

98. U.S.—*Parsons v. Clarke*, C.C.A. Cal., 24 F.2d 338.

Ala.—*Hood v. Clark*, 37 So. 550, 141 Ala. 397.

Idaho.—*Bliss Town-Site Co. v. Morris-Roberts Co.*, 190 P. 1028, 33 Idaho 110.

Tex.—*Bond v. Bumpass*, Civ.App., 100 S.W.2d 1047, affirmed 114 S.W. 2d 1172, 131 Tex. 266.

Failure of title

Under California statute, failure of title of grantee of right of way by bargain and sale deed gives him no right of action against grantor, in absence of express warranty.—*Parsons v. Clarke*, C.C.A. Cal., 24 F.2d 338.

99. Idaho.—*Polak v. Mattson*, 128 P. 39, 22 Idaho 727.

1. U.S.—*Douglass v. Lewis*, 9 S.Ct. 634, 131 U.S. 75, 33 L.Ed. 53, affirming 9 P. 377, 3 N.M. 345, 15 C.J. p 1214 note 53.

2. W.Va.—*Listing v. Rodes*, 122 S.E. 282, 96 W.Va. 38, 15 C.J. p 1214 note 56.

order to constitute the statutory covenants, the words of the statute must be strictly followed,³ and that the use of different words,⁴ or of more⁵ or less⁶ than all the words implying the covenant is insufficient. Under statutes which provide that the covenants are implied only against acts done or suffered by the grantor, the word "suffered" implies reasonable control, and does not apply to defects not caused by the act of the grantor, nor within his power to prevent,⁷ but it also implies that it is not confined to the voluntary acts of the grantor.⁸ Under some statutes a grantor, who in a deed of land represents himself to be the owner, warrants the title, but such representation must be found in the deed.⁹

§ 11. — Abolition of Implied Covenants

In a number of jurisdictions, under the statutes in force therein, no covenant is implied in a conveyance.

3. Ill.—*Biwer v. Martin*, 128 N.E. 518, 294 Ill. 488.
15 C.J. p 1214 note 54.

4. Ark.—*Holmes v. Countiss*, 115 S. W.2d 553, 195 Ark. 1014.

5. Cal.—*Matter of Wells*, 94 P. 856, 7 Cal.App. 515.

Where "grant" implies covenant

The use of the words "give, grant, alien, and confirm" do not imply a covenant against encumbrances, under a statute implying such a covenant from the use of the word "grant" in a conveyance.—*Matter of Wells*, 94 P. 856, 7 Cal.App. 515.

6. Ill.—*Wheeler v. Wayne County*, 24 N.E. 525, 132 Ill. 599.

15 C.J. p 1214 note 55.

7. Cal.—*Crist v. Fife*, 183 P. 197, 41 Cal.App. 509.

Idaho.—*Polak v. Mattson*, 128 P. 89, 22 Idaho 727.

Defects not fault of grantor

The grantee cannot recover from the grantor a proportion of the consideration because of failure of title through no fault of the grantor, for the covenants implied by the word "grant" would not cover any defect or failure of title not due to the grantor's acts.—*Gaffey v. Welk*, 189 P. 300, 46 Cal.App. 385.

Defects prior to grantor's title

(1) "The covenants implied by the statute are limited to the acts of the grantor and those claiming under him, and do not extend to defects of title anterior to the conveyance to him."—*Mackintosh v. Stewart*, 61 So. 956, 181 Ala. 328, 333.

(2) Encumbrances on the property at the time the grantor acquired the title to it are not within the covenant against encumbrances "done, made, or suffered" by the grantor.

Cal.—*Crist v. Fife*, 183 P. 197, 41 Cal.App. 509.

Idaho.—*Polak v. Mattson*, 128 P. 89, 22 Idaho 727.

(3) The implied covenant against encumbrances is only against encumbrances done or suffered by the grantor, and not against encumbrances generally.—*Hood v. Clark*, 37 So. 550, 141 Ala. 397.

8. Pa.—*Shaffer v. Greer*, 87 Pa. 370.

Taxes

The covenant extends to a tax assessed on the land during the grantor's title, even though such tax does not create a personal liability.—*Shaffer v. Greer*, *supra*.

9. U.S.—*Bird Arias v. Societe Anonyme Des Sucreries De Saint Jean*, C.C.A.Porto Rico, 62 F.2d 410.

Owners in common

Statement in deed that named grantors were "undivided owners in common" in specified proportions are joint representations that they were undivided owners in common in such proportions and, where such proportions totaled the entire property, that they were all the owners of the property described.—*Bird Arias v. Societe Anonyme Des Sucreries De Saint Jean*, *supra*.

10. Mich.—*Pickalo v. Mack*, 186 N. W. 502, 217 Mich. 274.

Minn.—*Dewey v. Kaplan*, 274 N.W. 161, 200 Minn. 289.

15 C.J. p 1214 note 57.

Assignment of reversion

An assignment of a reversion is a conveyance within the meaning of such a statute.—*Dewey v. Kaplan*, *supra*.

Covenant to repair

Under a statute providing that no covenant shall be implied in any conveyance of real estate, whether

Under some statutes, and subject, in some jurisdictions, to certain specified exceptions, no covenant shall be implied in a conveyance, whether the conveyance contains any special covenant or not,¹⁰ although in some jurisdictions the prohibition is applicable solely to conveyances of real property, that is, of lands, tenements, and hereditaments, and not to conveyances generally, nor to conveyances of interests in real property,¹¹ nor, as appears in the C.J.S. title *Landlord and Tenant*, § 236, also 15 C.J. p 1214 note 58, to leases. In jurisdictions where such statutes are in force no implied covenant arises from a conveyance of real property.¹² After a contract of sale of realty has become executed and the conveyance accepted, the grantee must rely solely on the covenants in his deed,¹³ and if his deed

such conveyance contains special covenants or not, a deed which grants plaintiff a mill lot, bounded on one side by the canal or race, on condition that the plaintiff make one third of all necessary repairs on the dam or race, cannot be construed as covenanting that the grantors will make the other two thirds of such repairs.—*Koch v. Hustis*, 87 N.W. 834, 113 Wis. 599, 89 N.W. 838, 113 Wis. 604.

Building line as express not implied covenant

Where articles of dedication, filed by owner of tract divided into residence lots, recited that blue lines on plat which were certain distances from streets and avenues constituted "building lines," and such building lines were represented on plat filed, it was held that words referring to building lines were words of covenant constituting an express covenant, and not ineffective, under statute providing that no covenant shall be implied in any conveyance of real property.—*Menstell v. Johnson*, 232 P. 853, 857, 125 Or. 150, 57 A.L.R. 311, modified on other grounds and rehearing denied 266 P. 891, 125 Or. 150, 57 A.L.R. 311.

11. N.Y.—*Fifth Ave. Bldg. Co. v. Kernochan*, 117 N.E. 579, 221 N.Y. 370, affirming 165 N.Y.S. 122, 178 App.Div. 19, reargument denied 118 N.E. 1057, 222 N.Y. 525.

12. N.Y.—*Logan v. United Interests*, 140 N.E. 240, 236 N.Y. 194—*Harmon Nat. Real Estate Corporation v. Egan*, 241 N.Y.S. 708, 137 Misc. 297—*Lewy v. Clark Ave.*, 217 N.Y. S. 185, 128 Misc. 16.

13. N.Y.—*Wheeler v. State*, 83 N.E. 54, 190 N.Y. 406, 123 Am.S.R. 555—*Andrew D. Baird Holding Corporation v. Burns Bros.*, 204 N.Y.S. 820, 209 App.Div. 601—*Johnson v.*

contains no covenants, he is without remedy, either for eviction or encumbrance.¹⁴

§ 12. — Words of Conveyance in General

Except as provided otherwise by statute, covenants will not ordinarily be implied from the use of words of conveyance usual and necessary in deeds.

Unless provided otherwise by statute, for which see *infra* § 13, and with the exception of the words "do" or "dedi" in deeds of feoffment,¹⁵ or except with reference to contracts which are not a conveyance of land,¹⁶ as in the case of a lease, considered in the C.J.S. title Landlord and Tenant § 239, also 35 C.J. p 1187 note 4, a covenant will not be implied from the use of words usual and necessary in a conveyance, such as "grant," "bargain," "sell," "convey," and "warrant."¹⁷ However, in some ju-

risdictions, under the law therein, a warranty is presumed unless expressly waived;¹⁸ and, under some statutes, if specified statutory forms for deeds are followed the covenants usual in conveyances at common law are implied therein.¹⁹

§ 13. — Particular Words

In many jurisdictions, by express statutory provision, particular words such as "grant, bargain and sell," "convey and warrant," etc., imply specified covenants, such as covenants of seizin, of quiet enjoyment, against encumbrances, for further assurance, of good right to convey, and of general warranty.

Under statutes providing that certain covenants shall be implied from the use of specified words in conveyances of realty, it has been held that the use of the word or words specified implies a covenant of seizin;²⁰ a covenant of quiet enjoyment;²¹

State, 175 N.Y.S. 784, 188 App.Div. 33, affirming 175 N.Y.S. 234, 104 Misc. 201—Harmon Nat. Real Estate Corporation v. Egan, 241 N.Y. S. 708, 137 Misc. 297.

14. N.Y.—Wheeler v. State, 83 N.E. 54, 190 N.Y. 406, 123 Am.S.R. 555—Johnson v. State, 175 N.Y.S. 784, 188 App.Div. 33, affirming 175 N.Y. S. 234, 104 Misc. 201—Harmon Nat. Real Estate Corporation v. Egan, 241 N.Y.S. 708, 137 Misc. 297.

15. N.C.—Rickets v. Dickens, 5 N.C. 343, 4 Am.D. 555.

16 C.J. p 1212 note 45.

16. N.Y.—Sanford v. Travers, 40 N.Y. 140.

17. Ill.—Alcorn v. Epler, 206 Ill. App. 140.

N.Y.—Burwell v. Jackson, 9 N.Y. 535.

15 C.J. p 1213 note 48.

Seizin

A covenant of seizin is not implied from the use of the words "grant, bargain, sell, convey, and confirm," contained in a deed.—Bliss Town-Site Co. v. Morris-Roberts Co., 190 P. 1023, 33 Idaho 110.

Against encumbrances

Conveyance of Florida lands by agent, holding bare legal title, to his principal, already entitled thereto in equity, cannot be construed as carrying with it a covenant against encumbrances, especially in view of law of Florida, according to which it must be interpreted, word "grant" not implying such covenant under law of that state.—Henry v. Amos, 239 P. 1059, 197 Cal. 139.

18. U.S.—Logan v. Union Sulphur Co., D.C.La., 29 F.Supp. 33.

19. Miss.—Allen v. Caffee, 38 So. 186, 85 Miss. 766.

Substantial compliance required

In order for an instrument to carry the covenants specified in the statute, it must not only be "a war-

ranty deed" but it must be made in substantial compliance with the provisions of the statute.—Langford v. Newsom, Tex.Com.App., 220 S.W. 544, affirming Newsom v. Langford, Civ. App., 174 S.W. 1036.

General covenant of warranty

The general covenant of warranty, as prescribed by the statute setting forth the forms of conveyance, implies all the usual covenants in a deed of conveyance in fee simple.—Van Wagner v. Van Nostrand, 19 Iowa 422—Funk v. Creswell, 5 Iowa 62.

General warranty deed

(1) In Illinois, there is implied in a warranty deed, in substance in the form provided by statute, a covenant against encumbrances.—Jones v. Taylor, 261 Ill.App. 403.

(2) In Oklahoma, a general warranty deed made in compliance with the statute contains by operation of law a warranty of seizin as well as of right to convey and certain other covenants of warranty.

Okl.—Faller v. Davis, 118 P. 382, 30 Okl. 56, Ann.Cas.1913B 1181.

Tex.—Newsom v. Langford, Civ.App., 174 S.W. 1036, affirmed Langford v. Newsom, Com.App., 220 S.W. 544.

(3) In South Carolina, since the act of 1795, a deed of general warranty has been "interpreted to embrace all the covenants used in conveyances of land prior to that time, namely, that the vendor is seized in fee; that he has a right to convey; that the vendee shall quietly enjoy; and that free from all encumbrances; and, also, it seems for further assurances."—Lessly v. Bowie, 3 S.E. 199, 200, 27 S.C. 193, 197.

15 C.J. p 1213 note 52 [n].

20. Words held to imply covenant

(1) "Conveys and warrants."—Jackson v. Green, 14 N.E. 89, 112 Ind. 341—Dehority v. Wright, 101

Ind. 382—Kent v. Cantrall, 44 Ind. 452—Maitlen v. Maitlen, 89 N.E. 966, 44 Ind.App. 559—Worley v. Hineman, 33 N.E. 260, 6 Ind.App. 240.

(2) "Warrant."—Allen v. Caffee, 38 So. 186, 85 Miss. 766.

(3) "Grant, bargain and sell."

Ark.—Holmes v. Countiss, 115 S.W. 2d 553, 195 Ark. 1014.

Mo.—Crosby v. Evans, 219 S.W. 948, 281 Mo. 202, answering questions certified, App., 195 S.W. 514—Waldermeyer v. Loebig, 121 S.W. 75, 222 Mo. 540.

Pa.—Seitzinger v. Weaver, 1 Rawle 377.

(4) "The words 'bargained and sold' or words to the same effect."—Douglass v. Lewis, 9 S.Ct. 634, 131 U.S. 75, 33 L.Ed. 53, affirming 9 P. 377, 3 N.M. 345.

Mortgage

(1) A covenant of seizin is implied in a mortgage which contains the words "grant, bargain and sell."—Pratt v. Pratt, 96 Ill. 184.

(2) A covenant of seizin is implied in a mortgage which contains the words "and warrants."—King v. King, 74 N.E. 89, 215 Ill. 100.

21. Words held to imply covenant

(1) "Conveys and warrants."—Dehority v. Wright, 101 Ind. 382—Kent v. Cantrall, 44 Ind. 452—Maitlen v. Maitlen, 89 N.E. 966, 44 Ind.App. 559—Worley v. Hineman, 33 N.E. 260, 6 Ind.App. 240.

(2) "Warrant."—Allen v. Caffee, 38 So. 186, 85 Miss. 766.

(3) "Grant, bargain and sell."

Ark.—Holmes v. Countiss, 115 S.W. 2d 553, 195 Ark. 1014.

Pa.—Seitzinger v. Weaver, 1 Rawle 377—Grange Trust Co. v. Shade, 156 A. 620, 102 Pa.Super. 122.

Mortgage

A covenant of quiet enjoyment is implied in a mortgage which contains the words "and warrants."—

a covenant against encumbrances;²² a covenant for further assurance;²³ a covenant of general warranty;²⁴ a covenant of good right to convey;²⁵ and a covenant that previous to the time of the execution of the conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.²⁶

§ 14. — Language of Express Covenants

Covenants may be implied from the language of express covenants in order to effectuate their intention, but they will not be implied where they were purposely withheld or as to matter specifically covered by express covenants.

Covenants may be implied in an instrument in

which there are express covenants;²⁷ and such covenants may be implied from the language of express covenants in order to effectuate their clear intention and give them their full and beneficial operation.²⁸ Thus, a covenant of general warranty has been held to include a covenant of quiet enjoyment,²⁹ but not to imply a covenant of seizin.³⁰ However, a covenant will not be implied when it appears to have been purposely withheld,³¹ or as to a matter which the instrument contains an express covenant in regard to,³² or which is specifically covered by the written terms of the contract;³³ and, as appears *infra* § 32, express covenants exclude inconsistent implied covenants and in some jurisdictions exclude all implied statutory covenants. No other warranty can be implied in a deed

King v. King, 74 N.E. 89, 215 Ill. 100.

22. Words held to imply covenant

(1) "Convey and warrant." Ill.—Dalton v. Taliaferro, 101 Ill. App. 592.

Ind.—Dehority v. Wright, 101 Ind. 382—Kent v. Cantrall, 44 Ind. 452—Ragle v. Dedman, 98 N.E. 367, 50 Ind.App. 359—Maitlen v. Maitlen, 89 N.E. 966, 44 Ind.App. 559—Worley v. Hineman, 33 N.E. 263, 6 Ind. App. 240.

(2) "Warrant."—Sutton v. Cannon, 100 So. 24, 135 Miss. 368—Allen v. Caffee, 38 So. 186, 85 Miss. 766.

(3) "Grant, bargain and sell." Ala.—Hood v. Clark, 37 So. 550, 141 Ala. 397.

Ark.—Holmes v. Countiss, 115 S.W. 2d 553, 195 Ark. 1014—Crawford v. McDonald, 106 S.W. 206, 84 Ark. 415.

Mo.—Crosby v. Evans, 219 S.W. 948, 281 Mo. 202, answering questions certified, App., 195 S.W. 514.

Pa.—Shaffer v. Greer, 87 Pa. 370.

(4) "Grant" or "convey." Ariz.—Sherman v. Goodwin, 89 P. 517, 11 Ariz. 141.

Tex.—Bond v. Bumpass, Civ.App., 100 S.W.2d 1047, affirmed 114 S.W.2d 1172, 131 Tex. 266—Garrett v. Butler, Civ.App., 260 S.W. 1069—Robinson v. Street, Civ.App., 220 S.W. 648, error refused—Alston v. Pierson, Civ.App., 158 S.W. 1165—Cruger v. Ginnuth, 3 Tex.App.Civ. Cas. § 24.

(5) "Grant." Cal.—Chandler v. Bowman, 279 P. 1041, 100 Cal.App. 221.

Idaho.—Carssow v. Brinton, 208 P. 1031, 35 Idaho 667—Brinton v. Johnson, 208 P. 1023, 35 Idaho 656—Polak v. Mattson, 128 P. 89, 22 Idaho 727.

(6) "The words bargained and sold" or words to the same effect."—Douglass v. Lewis, 9 S.Ct. 634, 131 U.S. 75, 33 L.Ed. 53, affirmed 9 P. 377, 3 N.M. 345.

Mortgage

(1) A covenant against encumbrances is implied in a mortgage which contains the words "grant, bargain and sell."—Pratt v. Pratt, 96 Ill. 184.

(2) A covenant against encumbrances is implied in a mortgage which contains the words "and warrants."—King v. King, 74 N.E. 89, 215 Ill. 100.

23. Words held to imply covenant "Grant, bargain and sell."—Crosby v. Evans, 219 S.W. 948, 281 Mo. 202, answering questions certified, App., 195 S.W. 514—Armstrong v. Darby, 26 Mo. 517.

24. Words held to imply covenant

(1) "Conveys and warrants."—Dehority v. Wright, 101 Ind. 382—Kent v. Cantrall, 44 Ind. 452—Maitlen v. Maitlen, 89 N.E. 966, 44 Ind.App. 559.

(2) "Grant, bargain and sell."—Grange Trust Co. v. Shade, 156 A. 620, 102 Pa.Super. 122.

(3) Where a conveyance is made whereby grantor conveys and warrants a tract of land, the word "warrants" is not a word of conveyance of, but assurance of, title, and operates as a general warranty of title.—Listing v. Rodes, 122 S.E. 282, 96 W.Va. 38.

Mortgage

A covenant of general warranty is implied in a mortgage which contains the words "and warrants."—King v. King, 74 N.E. 89, 215 Ill. 100.

25. Words held to imply covenant

(1) "Conveys and warrants."—Dehority v. Wright, 101 Ind. 382—Kent v. Cantrall, 44 Ind. 452—Maitlen v. Maitlen, 89 N.E. 966, 44 Ind.App. 559.

(2) "Warrant."—Allen v. Caffee, 38 So. 186, 85 Miss. 766.

Mortgage

A covenant of good right to con-

vey is implied in a mortgage which contains the words "and warrants."—King v. King, 74 N.E. 89, 215 Ill. 100.

23. Words held to imply covenant

(1) "Grant" or "convey."—Bond v. Bumpass, Tex.Civ.App., 100 S.W.2d 1047, affirmed 114 S.W.2d 1172, 131 Tex. 266.

(2) "Grant." Cal.—Lyles v. Perrin, 63 P. 472, 134 Cal. 417—Chandler v. Bowman, 279 P. 1041, 100 Cal.App. 221. Idaho.—Polak v. Mattson, 128 P. 89, 22 Idaho 727.

27. U.S.—Hambly v. Delaware, etc., R. Co., C.C.Del., 21 F. 541, 552.

28. Tex.—Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas, 6 S.W.2d 1039, 1042, 117 Tex. 439, 60 A.L.R. 890, quoting *Corpus Juris*, and affirming American Sulphur Royalty Co. of Texas v. Freeport Sulphur Co., Civ.App., 276 S.W. 448.

15 C.J. p 1214 note 60.

29. N.C.—Fishel v. Browning, 58 S. E. 759, 145 N.C. 71.

30. N.Y.—Vanderkarr v. Vanderkarr, 11 Johns. 122.

31. N.Y.—Bruce v. Fulton Nat. Bank, 79 N.Y. 154, 35 Am.R. 505. 15 C.J. p 1215 note 63.

32. N.Y.—Chisholm v. Muller, 254 N.Y.S. 76, 234 App.Div. 102.

Tex.—Gulf Production Co. v. Kishi, Com.App., 103 S.W.2d 965.

33. Ohio.—Kachelmacher v. Laird, 110 N.E. 933, 92 Ohio St. 324, Ann. Cas.1917E 1117.

Pa.—Greek v. Wylie, 109 A. 529, 266 Pa. 18.

Tex.—Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas, 6 S.W.2d 1039, 1042, 117 Tex. 439, 60 A.L.R. 890, quoting *Corpus Juris*, and affirming American Sulphur Royalty Co. of Texas v. Freeport Sulphur Co., Civ.App., 276 S.W. 448.

which contains only a covenant of special warranty.³⁴

§ 15. — Recitals

A covenant may be implied from a recital, but the courts are not favorable thereto.

A covenant expressed by way of recital may be as obligatory as if expressed in the formal part of the agreement;³⁵ but the courts are cautious in construing a covenant out of a recital in a deed and in many cases have refused to imply them therefrom.³⁶

§ 16. — Description of Premises

A covenant will not be implied from matter descriptive of the premises, so statements as to the quantity of land conveyed will not imply a covenant for that amount, unless an intention to assure that particular quantity is apparent; however, the conveyance of land described as bounded by a street or way or by reference to a map or plat designating certain portions of the land as streets or ways creates an implied covenant that such street or way exists, provided the grantor owns the soil beneath such street or way.

No covenant will be implied from matter contained in a deed merely descriptive of the premises conveyed,³⁷ and when land is conveyed as bounded by an adjoining owner, there is no covenant that a conventional line pointed out by the parties is the true line.³⁸

As respects quantity of land. It is only when it is apparent that the deed was intended to assure a particular quantity of land to the purchaser that a covenant as to quantity can be implied.³⁹ As a general rule, the statement of the quantity of land conveyed in the deed will be construed merely as

matter of description, and implies no covenant that the land contains the quantity stated unless clearly so expressed.⁴⁰ So, where land is sold in bulk for a lump sum,⁴¹ as where the land is particularly described by metes and bounds, or other known specifications, with a statement as to the number of acres added,⁴² a covenant for quantity will not be implied, and there is no right to relief for a variation in the quantity, unless the excess or deficiency in the quantity conveyed is so great as to justify an inference of fraud or mistake equivalent to fraud,⁴³ for the reason that in such a sale quantity is not of the essence of the contract,⁴⁴ and should there be a deficiency in the quantity, the right to relief is founded on fraud, misrepresentation, or gross mistake.⁴⁵ However, the rule is otherwise where an intention is clearly manifest to regard the quantity stated as an essential element of the contract,⁴⁶ as where the land conveyed is sold by the acre,⁴⁷ or where the boundaries of the land conveyed can only be fixed by the quantity,⁴⁸ or, according to some authorities, where land is sold in gross for a sum certain on a statement of the quantity;⁴⁹ and where land is described by metes and bounds, and includes land which the grantor did not own, so that the deed of the grantor fails to convey to the grantee title to a part of the land it purports to convey, the grantor is liable on his warranty for the quantity of land his deed fails to convey good title to.⁵⁰

As respects streets and ways. The conveyance of land described as bounded by a street or way or by reference to a map or plat which designates certain portions of the land to be used as streets cre-

34. Ky.—Kentucky River Coal Corporation v. Swift Coal & Timber Co., 299 S.W. 201, 221 Ky. 593.

35. Pa.—Waslee v. Rossman, 80 A. 643, 231 Pa. 219.

15 C.J. p 1215 note 64.

36. N.Y.—Clark v. Post, 20 N.E. 573, 113 N.Y. 17.

15 C.J. p 1215 note 66.

37. Me.—Manson v. Peaks, 69 A. 690, 103 Me. 430, 125 Am.S.R. 311.

15 C.J. p 1216 note 67.

38. Mass.—Cornell v. Jackson, 9 Metc. 150.

39. Conn.—Aherns v. Drew, 148 A. 549, 110 Conn. 546.

40. Tex.—Nicholson v. C. C. Slaughter Co., Civ.App., 217 S.W. 716, error refused.

15 C.J. p 1216 note 69.

41. Tex.—Nicholson v. C. C. Slaughter Co., supra.

Gross sum

Where sale is for a gross sum and not by the acre, and the acre-

age stated in the conveyance is qualified by the words "more or less," there is no warranty of the exact quantity.—Ogilvie v. Stackland, 179 P. 669, 92 Or. 352.

42. Ark.—Brown v. Le May, 141 S. W. 759, 101 Ark. 95—Ryan v. Batchelor, 129 S.W. 787, 95 Ark. 375.

Conn.—Aherns v. Drew, 148 A. 549, 110 Conn. 546.

S.C.—Lorick v. Hawkins, 1 Rich. 417.

W.Va.—Hansford v. Chesapeake Coal Co., 22 W.Va. 70.

43. Ala.—Brassell v. Fisk, 45 So. 70, 153 Ala. 558.

Tenn.—Rich v. Scales, 91 S.W. 59, 116 Tenn. 57.

44. Ala.—Brassell v. Fisk, 45 So. 70, 153 Ala. 558.

45. Ark.—Ryan v. Batchelor, 129 S. W. 787, 95 Ark. 375.

46. Ga.—Beall v. Berkhalter, 26 Ga. 564.

15 C.J. p 1216 note 71.

47. Tex.—Meade v. Warring, Civ. App., 35 S.W. 308.

48. Mo.—Pecare v. Chouteau's Adm'r, 13 Mo. 527.

49. Md.—Mendenhall v. Steckel, 47 Md. 453, 28 Am.R. 481—Marbury v. Stonestreet, 1 Md. 147.

50. Tex.—Houston v. Cameron, Civ. App., 135 S.W. 699—Chesnutt v. Chism, 48 S.W. 549, 20 Tex.Civ. App. 23—Reeves v. Lindsey, 2 Tex. Unrep.Cas. 309.

Public lands

A covenant of general warranty of title is breached where a part of the land within the boundaries of the land described in the deed is covered by navigable waters and as such belongs to the public, and the grantee is entitled to recover damages for the breach of the warranty, which should be estimated on the basis of the number of acres to which title failed.—Hynes v. Packard, Tex.Civ.App., 44 S.W. 548.

ates an implied covenant that such street or way exists,⁵¹ provided the grantor owns the soil beneath such street or way, or has the right to grant a right of way in such street or way,⁵² and, although in a few early cases a different view is expressed,⁵³ as a general rule, a covenant is implied that the grantee shall have the use of such street or way as a means of passage to and from his premises, which use passes as appurtenant to the grantee's estate,⁵⁴ the rule being manifestly founded on the doctrine of estoppel.⁵⁵ So, where land is granted to another and described as abutting on a street or alley, when there is in fact no such street or alley, but a strip of the grantor's land is left abutting the tract so conveyed, there arises an implied covenant that a street shall remain open thereon for the public use.⁵⁶ However, if the grantor is not the owner of the adjacent land described in the boundary as a street or way, or does not have the right to grant a right of way therein, there is no implied covenant that there is such a way or street;⁵⁷ and where an owner files a plan subdividing land into lots, which plan is recorded, a subsequent conveyance, the purpose of which is not to follow but to abandon the plan, does not give the grantee a right of passage in or over a street shown on the plan.⁵⁸ So where a grantor bounds the premises by a public highway which was closed at the time the deed was made, and the grantee knew or was bound to know that fact, there is no implied covenant that the highway existed.⁵⁹ Also, a boundary on a street as exhibited on a plan, but not yet laid out in fact, will not carry an absolute right to have such street even as against the lessor and those claiming under him, where, by an act of the legisla-

ture, no streets in the city laid out by individuals could be established as public streets, until they were approved and accepted by the corporation, which did not accept them, but laid out other streets in a manner entirely different from and inconsistent with them.⁶⁰ Where the transfers are in invitum the deeds will not warrant the existence of streets.⁶¹ An implied covenant as to the existence of a street or way prevents the grantor from changing its location; and the grantor or those holding under him are prohibited from altering the location,⁶² and, although in some jurisdictions, no covenant will be implied that the street or way is of the width set out in the conveyance,⁶³ in other jurisdictions the covenant applies so as to prevent any narrowing of the width of the street or way,⁶⁴ especially where the width of such street or way seems to have been a substantial part of the contract.⁶⁵ A covenant will not be implied that the street or way has been actually opened and put into condition for use, but only that it has been laid out;⁶⁶ nor will a covenant be implied that the street or way will be made and maintained fit for travel.⁶⁷ So, it has been held that the descriptive words as to the street or way, particularly if the deed refers to an accompanying plan of lots or streets, are not to be understood merely as signifying that the street in question is coextensive with the lot conveyed, but that its extent, direction, and termini are to be such as are delineated on the plan, or otherwise indicated by the deed,⁶⁸ but this does not apply to the streets not adjacent to, but lying in the vicinity of, the land granted as to which there is no implied agreement that they shall remain as platted,⁶⁹ and the implied covenant that the streets and ways

51. Mass.—McKenzie v. Gleason, 69 N.E. 1076, 184 Mass. 452, 100 Am.S.R. 566.

15 C.J. p 1217 note 78.

52. Mass.—Cole v. Hadley, 39 N.E. 279, 162 Mass. 579.

15 C.J. p 1217 note 79.

53. Mass.—Clap v. McNeil, 4 Mass. 589.

N.Y.—In re New York, 4 Cow. 542.

54. N.J.—Herold v. Columbia Inv. & Real Estate Co., 67 A. 607, 72 N.J.Eq. 857, 14 L.R.A.N.S., 1067, 129 Am.S.R. 718, 16 Ann.Cas. 580—Sennig v. Ocean City Ass'n, 7 A. 491, 41 N.J.Eq. 606, 56 Am.R. 16.

15 C.J. p 1217 note 85.

55. Mass.—Howe v. Alger, 4 Allen 206.

15 C.J. p 1217 note 86.

56. Mo.—Field v. Mark, 28 S.W. 1004, 125 Mo. 502.

57. Mass.—Cole v. Hadley, 39 N.E. 279, 162 Mass. 579.

15 C.J. p 1217 note 80.

58. Mass.—Stevens v. Young, 123 N.E. 777, 238 Mass. 304.

59. N.Y.—King v. New York, 6 N.E. 395, 102 N.Y. 172.

Impossible to grant easement in public highway

The only easement which by possibility could be even claimed from the words of the deed, if construed as more than mere description, would be a right in common with the public over a public highway, and that, if it existed, the grantor could not effectually convey, and so it could not be appurtenant to the land and pass by reason of the grantor's bounding the premises thereby.—King v. New York, *supra*.

60. N.Y.—Underwood v. Stuyvesant, 19 Johns. 181, 10 Am.D. 215.

61. La.—Purcell v. Board of Com'rs of Port of New Orleans, 96 So. 279, 153 La. 615.

62. N.J.—Herold v. Columbia Inv. & Real Estate Co., 67 A. 607, 72 N.J.

Eq. 857, 14 L.R.A.N.S., 1067, 129 Am.S.R. 718, 16 Ann.Cas. 580.

63. Mass.—Walker v. Worcester, 6 Gray 548—Clap v. McNeil, 4 Mass. 589.

64. N.J.—Herold v. Columbia Inv. & Real Estate Co., 67 A. 607, 72 N.J. Eq. 857, 14 L.R.A.N.S., 1067, 129 Am.S.R. 718, 16 Ann.Cas. 580.

65. Pa.—Dalley v. Beck, Brightly 107, 4 Pa.L.J.R. 53, 6 Pa.L.J. 383.

66. Mass.—Loring v. Otis, 7 Gray 563.

N.Y.—Interborough Rapid Transit Co. v. Littlefield, 149 N.Y.S. 741, 166 App.Div. 567.

67. Conn.—Buckley v. Maxson, 181 A. 922, 120 Conn. 511.

15 C.J. p 1217 note 90.

68. Mass.—Fox v. Union Sugar Refinery, 109 Mass. 292.

15 C.J. p 1217 note 91.

69. Mass.—Coolidge v. Dexter, 129 Mass. 167.

named in the plot of a proposed town referred to in a deed shall be open to public use goes no further than the streets on which the lot faces and such other convenient streets as may be required to give a convenient way to the public roads.⁷⁰

However, while these cases use the terminology of covenants, they are not readily distinguishable from the cases of implied easements created by the conveyance of realty with reference to a map or plat on which streets and ways are delineated or by the conveyance of land described as bounded by a road, street or alley, considered extensively in the title Easements C.J.S. §§ 39-40, also 19 C. J. p 928 note 61-p 934 note 49, and are probably not cases of true covenants.

§ 17. — Reservations

A reservation in a deed will be construed as an implied covenant on the part of the grantee, if it cannot be construed as an exception.

Where a reservation in a deed cannot be construed as an exception, as where the thing reserved is not a part of that previously granted, it will be construed as an implied covenant on the part of the grantee.⁷¹ There will not be implied a negative covenant on the part of the grantor not to use the ungranted portion of a copyright estate to the detriment of the licensed estate, where the rights to the ungranted portion is expressly reserved to the grantor.⁷²

§ 18. — Conditions

Words of proviso and condition will not be construed to constitute a covenant unless the whole instrument shows an agreement or engagement to do or not to do some act on the part of the person sought to be charged, except that, in case of doubt as to whether a provision was intended as a condition subsequent which would cause a forfeiture or a covenant, the breach of which may be compensated in damages, it will be construed as a covenant.

Although it has been held that words of proviso and condition will not be construed into words of covenant unless it can be collected from the whole instrument that there was, on the part of the person sought to be charged, an agreement or engagement to do or not to do some act,⁷³ yet since, as appears in the title Contracts § 407, forfeitures are not favored either in law or in equity, conditions subsequent, in as much as they tend to destroy estates are not favored in law, and except where implied covenants are abolished by statute, considered supra § 11, if it is reasonably doubtful whether a provision in a conveyance was intended as a condition subsequent or a covenant, the breach of which may be compensated in damages, it will be held to be a covenant;⁷⁴ and it has even been held that this rule applies in some cases to express conditions,⁷⁵ if necessary to avoid a forfeiture;⁷⁶ but it has also been held that, where the language imports a condition merely, without any words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through forfeiture of the estate.⁷⁷

§ 19. — Restrictions on Use of Property

Restrictions as to the use of property are not favored and will not be implied, unless clearly established.

The laws favors the free and unrestricted use of property, resolving doubts and ambiguities in favor thereof.⁷⁸ Equity will not infer a negative covenant, except where equity and justice requires;⁷⁹ and such a covenant must be clearly implied and understood by all the parties,⁸⁰ and should not be implied, unless it is indispensable to carry the intention of the parties into effect.⁸¹ So, although restrictive covenants as to the use of property, when reasonable and within the policy of the law, are valid,⁸² they are not favored,⁸³ and will

70. Del.—Hoffman v. Whallen, 2 Del. Co. 529, 3 Lanc.L.Rev. 217.

71. Tex.—Freeport Sulphur Co. v. American Sulphur Royalty Co. of Texas, 6 S.W.2d 1039, 1043, 117 Tex. 439, 60 A.L.R. 890, quoting *Corpus Juris*, and affirming American Sulphur Royalty Co. of Texas v. Freeport Sulphur Co., Civ.App., 276 S.W. 448.

15 C.J. p 1217 note 95.

72. U.S.—Macloon v. Vitagraph, C.C. A.N.Y., 30 F.2d 634.

73. U.S.—Hale v. Finch, Wash., 104 U.S. 261, 26 L.Ed. 732. Covenant distinguished from condition see supra § 1.b.

74. Conn.—Scovill v. McMahon, 26 A. 479, 62 Conn. 378, 36 Am.S.R. 350, 21 L.R.A. 58. 15 C.J. p 1218 note 4.

75. N.Y.—Clement v. Burtis, 24 N. E. 1013, 121 N.Y. 708—Post v. Weil, 22 N.E. 145, 115 N.Y. 361, 12 Am.S.R. 809, 5 L.R.A. 422.

76. N.Y.—Underhill v. Saratoga, etc., R. Co., 20 Barb. 455.

77. Pa.—Sharon Iron Co. v. Erie, 41 Pa. 341.

78. U.S.—Macloon v. Vitagraph, C. C.A.N.Y., 30 F.2d 634.

Mo.—Gardner v. Maffitt, 74 S.W.2d 604, 335 Mo.App. 959, 95 A.L.R. 452—Whitaker v. Lafayette Realty & Investment Co., 196 S.W. 109, 197 Mo.App. 377—Kitchen v. Hawley, 131 S.W. 142, 150 Mo.App. 497. Ohio.—Goodyear Heights Realty Co. v. Furry, 170 N.E. 23, 33 Ohio App. 432.

Subdivision of lots

In determining existence of implied covenant against subdividing lots of allotment sold, all doubt should be resolved in favor of free use of lot.—Goodyear Heights Realty Co. v. Furry, 170 N.E. 23, 33 Ohio App. 432.

79. U.S.—Macloon v. Vitagraph, C. C.A.N.Y., 30 F.2d 634.

80. U.S.—Macloon v. Vitagraph, C. C.A.N.Y., 30 F.2d 634.

81. U.S.—Macloon v. Vitagraph, supra.

82. Mo.—Kenwood Land Co. v. Hancock Inv. Co., 155 S.W. 861, 169 Mo.App. 715.

83. Ga.—Kitchens v. Noland, 153 S. E. 562, 172 Ga. 684.

not be implied unless clearly established.⁸⁴ They will not be inferred from the absence of words of restriction;⁸⁵ but, if not created by express words, must be shown by reasonable inferences from words employed, clearly indicative of such a purpose.⁸⁶ Where no general plan is adopted and followed, equity will not impose a restriction on lots sold beyond that expressed in the plan and contracts,⁸⁷ and will not imply a covenant not to sell lots of smaller dimensions than those indicated on a plan from the mere making of a map and sale of lots with reference thereto.⁸⁸ Building restrictions may be created by a recorded plat.⁸⁹ A building line may be established by express language in the

legend on a recorded plat;⁹⁰ but, although there is authority to the contrary,⁹¹ it has been held that a mere designated line drawn on a map or plat of property, without more, will not suffice to create a covenant establishing a building line.⁹²

The nature and validity of covenants or restrictions in deeds as to the use of the property conveyed are discussed in the C.J.S. title Deeds § 162, also 18 C.J. p 384 note 84-p 386 note 15, 15 C.J. p 1218 notes 8-14; and of covenants or restrictions in leases as to the use of the property leased, in the C.J.S. title Landlord and Tenant § 238, also p 1185 note 78-p 1187 note 2.

II. CONSTRUCTION AND OPERATION

A. COVENANTS IN GENERAL

§ 20. General Rules of Construction

The primary rule in the construction of covenants is that the intention of the parties controls. In determining such intention, the covenant is construed, as the parties have construed it and as against the covenantor; words employed usually are assigned their ordinary meaning.

Where the language of a covenant is unambiguous, clear, and specific, the rule, similar to that adopted in the construction of statutes, is that no room is left either for interpretation or for construction.⁹³ Otherwise, however, the paramount rule for the interpretation of covenants is so to

Mo.—Zinn v. Sidler, 187 S.W. 1172, 268 Mo. 680, L.R.A.1917A 455—Bernard v. Winkley, App., 130 S.W. 2d 196—Charlot v. Regents Mercantile Corporation, App., 251 S.W. 421—Kenwood Land Co. v. Hancock Inv. Co., 155 S.W. 861, 169 Mo.App. 715.

N.Y.—Marsh v. Adams, 12 N.Y.S.2d 691, 171 Misc. 414.

84. Ga.—Atlanta Ass'n of Baptist Churches v. Cowan, 188 S.E. 21, 183 Ga. 187.

Mo.—Zinn v. Sidler, 187 S.W. 1172, 268 Mo. 680, L.R.A.1917A 455—Charlot v. Regents Mercantile Corporation, App., 251 S.W. 421.

N.Y.—Peterson v. City of New York, 258 N.Y.S. 139, 235 App.Div. 41, modified on other grounds 183 N.E. 280, 260 N.Y. 156.

Use for apartments and stores

Restrictions on the use of property for apartments and stores must be clearly established and strictly construed.—Kitchens v. Noland, 158 S.E. 562, 172 Ga. 684.

Proof necessary

Restriction must be proved by more than mere preponderance of evidence.—Atlanta Ass'n of Baptist Churches v. Cowan, 188 S.E. 21, 183 Ga. 187.

85. Mo.—Zinn v. Sidler, 187 S.W. 1172, 268 Mo. 680, L.R.A.1917A 455—Bernard v. Winkley, App., 130 S.W.2d 196—Charlot v. Regents Mercantile Corporation, App., 251 S.W. 421.

86. Mo.—Zinn v. Sidler, 187 S.W. 1172, 268 Mo. 680, L.R.A.1917A 455—Whitaker v. Lafayette Realty & Investment Co., 196 S.W. 109, 197 Mo.App. 377.

87. Mich.—Ututian v. Boldt, 218 N.W. 692, 242 Mich. 331, 57 A.L.R. 761.

Size of lots

(1) In absence of general plan restricting lots to certain size, equity will not impress restriction on all lots in plat.—Ututian v. Boldt, 218 N.W. 692, 242 Mich. 331, 57 A.L.R. 761.

(2) Purchaser of lot referred to by number on recorded plat may subdivide lot unless expressly prohibited.—Goodyear Heights Realty Co. v. Furry, 170 N.E. 23, 33 Ohio App. 432.

(3) Sale of lot in allotment by number on recorded plat did not establish common scheme to effect that lots should not be subdivided by purchasers.—Goodyear Heights Realty Co. v. Furry, supra.

88. Mich.—Ututian v. Boldt, 218 N.W. 692, 242 Mich. 331, 57 A.L.R. 761.

N.J.—Herold v. Columbia Inv. & Real Estate Co., 67 A. 607, 72 N.J. Eq. 857, 14 L.R.A., N.S., 1067, 129 Am.S.R. 718, 16 Ann.Cas. 580.

Ohio.—Goodyear Heights Realty Co. v. Furry, 170 N.E. 23, 33 Ohio App. 432.

Pa.—Stoeve v. Gowen, 124 A. 684, 280 Pa. 424.

89. Ill.—Loomis v. Collins, 111 N.E. 999, 272 Ill. 221.

90. Mo.—Bernard v. Winkley, App., 130 S.W.2d 193.

91. Ill.—Simpson v. Mikkelsen, 63 N.E. 1086, 196 Ill. 575.

92. Mo.—Zinn v. Sidler, 187 S.W. 1172, 268 Mo. 680, L.R.A.1917A 455—Bernard v. Winkley, App., 130 S.W.2d 196—O'Malley v. Smith, App., 208 S.W. 849—Whitaker v. Lafayette Realty & Investment Co., 196 S.W. 109, 197 Mo.App. 377.

Line with words "building line"

A broken or dotted line, appearing on recorded plat of subdivision, together with words "25' building line" printed thereunder without reference to building line in legend of plat, is insufficient to establish building restriction.—Bernard v. Winkley, Mo. App., 130 S.W.2d 196.

93. N.J.—Lynch v. Commercial Casualty Ins. Co., 108 A. 188, 93 N.J. Law 425.

Construction of:

Covenants, express or implied, in leases see the C.J.S. title Landlord and Tenant §§ 235-243, also 35 C.J. p 1184 note 47-p 1189 note 43.

Covenants or restrictions in deeds as to the use of property see the C.J.S. title Deeds § 163, also 18 C.J. p 386 note 16-p 389 note 32.

expound them as to give effect to the actual intent of the parties,⁹⁴ as of the time the covenant was made,⁹⁵ and as collected from the whole instrument⁹⁶ construed in connection with the circumstances surrounding its execution,⁹⁷ with a view to support, rather than to defeat, the instrument.⁹⁸ Nothing should be read into the language of a covenant extending its meaning beyond what its language fairly imports.⁹⁹

Ordinary or technical meaning. The language of a covenant must be read in an ordinary or popular, and not in a legal or technical, sense.¹ It has been said that technical words should be construed as they are understood by scientific men and mechanics acquainted with the business in regard to which the covenant is made;² but, since intent, and not words, is the essence of every agreement,³ it would seem that such words are to be construed, if possible, to effectuate the intent of the parties,⁴ and hence according to their accustomed meaning as used and understood by the community at large, unless the circumstances and context indicate that

a different meaning was intended.⁵

Practical construction. Where the language of a covenant is ambiguous, the construction placed thereon by the parties may properly be considered,⁶ and is the best evidence of their intention.⁷

Construction against covenantor. Covenants will be most strongly construed against the covenantor,⁸ at least where the terms used therein are equivocal,⁹ and except in the case of covenants of forfeiture,¹⁰ or, as is shown supra § 13, in the case of statutory covenants implied from the use of particular words. As is shown in the C.J.S. title Deeds § 163, also 18 C.J. p 387 note 19, restrictive covenants in deeds are generally strictly construed against the person seeking to enforce them.

§ 21. What Law Governs

The *lex loci contractus* governs the construction of personal covenants.

The construction of personal covenants is generally held to be governed by the *lex loci contractus*.¹¹ However, as will be noted in § 55 in-

94. Ala.—White v. Harrison, 81 So. 565, 566, 202 Ala. 623, citing *Corpus Juris*.

Del.—Shaw v. General Chemical Co., 120 A. 850, 2 W.W.Harr. 172.

Mo.—Thornhill v. Herdt, App., 130 S.W.2d 175.

N.Y.—Johnson v. Colter, 297 N.Y.S. 345, 251 App.Div. 697.

Or.—Pearson v. Richards, 211 P. 167, 106 Or. 78.

S.C.—Cheves v. City Council of Charleston, 138 S.E. 867, 140 S.C. 423.

15 C.J. p 1219 note 16.

All rules of construction are subordinate aids to the discovery and determination of the intent of the parties.—Addison County v. Blackmer, 143 A. 700, 101 Vt. 384.

95. Pa.—Dennis v. Burke, 26 Pa. Dist. 535.

96. N.Y.—Johnson v. Colter, 297 N.Y.S. 345, 251 App.Div. 697.

S.C.—Cheves v. City Council of Charleston, 138 S.E. 867, 140 S.C. 423.

Tex.—Beckham v. Ward County Irr. Dist. No. 1, Civ.App., 278 S.W. 316.

15 C.J. p 1219 note 16.

Covenants in a deed must be read together and construed as a whole.—Feigin v. Russek, 226 N.Y.S. 258, 131 Misc. 30.

Covenants in pari materia, in a deed, must be read together to evince the intent of the parties.—Kumble v. Jaffee, 134 A. 673, 100 N.J.Eq. 290.

97. Mo.—Thornhill v. Herdt, App., 130 S.W.2d 175.

S.C.—Cheves v. City Council of

Charleston, 138 S.E. 867, 140 S.C. 423.

Tex.—Beckham v. Ward County Irr. Dist. No. 1, Civ.App., 278 S.W. 316.

15 C.J. p 1219 note 16.

Entire or divisible

Agreement of grantees in deeds of platted lands, at the time outside a city, annually to pay to a maintenance corporation a proportionate part, not exceeding a certain sum, of cost of lighting and repairing streets, roads, etc., was held, in view of surrounding circumstances and practical construction of parties, divisible, and not invalidated by county paying some of such expense, and city after incorporation of lots therein more of it, the tax under the deeds being applied to work within the things specified, and other things supplementary thereto, for which the county and city were not liable.—Wehr v. Roland Park Co., 122 A. 363, 143 Md. 384.

98. Mo.—Godfrey v. Hampton, 127 S.W. 626, 148 Mo.App. 157.

15 C.J. p 1219 note 16.

99. N.Y.—Sweet v. Hollearn, 254 N.Y.S. 625, 142 Misc. 408.

S.C.—Epting v. Lexington Water Power Co., 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

"If parties desire to create mutual rights in real property they must say so and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them, which constitute the final expression of their understanding."—Coul-

ter v. Sausalito Bay Water Co., 10 P.2d 780, 785, 122 Cal.App. 480.

1. Va.—Hilteich v. Leicht Real Estate Co., 107 S.E. 735, 130 Va. 224, 18 A.L.R. 441.

Words "cut through a street," in conveyance of lot, mean the physical improvement of the street by the cutting away of obstructions and the filling of hollows.—Zygmunt v. Avenue Realty Co., 155 A. 544, 108 N.J. Eq. 462.

2. N.J.—Rogers v. Danforth, 9 N.J. Eq. 289.

3. N.Y.—Jackson v. Myers, 3 Johns. 388, 3 Am.D. 504.

4. N.Y.—Jackson v. Myers, supra. 15 C.J. p 1220 note 25.

5. N.Y.—Graves v. Deterling, 24 N.E. 655, 120 N.Y. 447, affirming 31 N.Y.St. 695.

15 C.J. p 1220 note 26.

6. Md.—Wehr v. Roland Park Co., 122 A. 363, 143 Md. 384.

7. Pa.—De Sanno v. Earle, 117 A. 200, 273 Pa. 265.

15 C.J. p 1219 note 17.

8. Ala.—White v. Harrison, 81 So. 565, 566, 202 Ala. 623, citing *Corpus Juris*.

La.—Dallas Compress Co. v. Liepold, 88 So. 681, 685, 205 La. 562, citing *Corpus Juris*.

15 C.J. p 1219 note 22.

9. La.—Dallas Compress Co. v. Liepold, 88 So. 681, 205 La. 562.

10. Ohio.—Presbyterian Church v. Pickett, Wright 57.

11. Ind.—Jackson v. Green, 14 N.E. 89, 112 Ind. 341.

15 C.J. p 1220 note 23.

fra, the construction of covenants running with the land is generally governed by the *lex loci rei sitae*.

§ 22. Real or Personal Covenants

Real, as distinguished from personal, covenants are those so closely connected with the realty that their benefit or burden passes with it. Various covenants have been held to be real or personal covenants.

All covenants are either real or personal.¹² The rule has been broadly stated that real covenants are those so closely connected with the realty that their benefit or burden passes with it,¹³ and that all others, as, for example, those intended to bind the covenantor only and not to become a charge on the realty, are considered personal covenants.¹⁴ It is not enough that a covenant should merely concern real estate in order to render it a real covenant.¹⁵

Covenants of seizin, right to convey, and against

encumbrances. Personal covenants have been held to embrace some of the ordinary covenants of title to realty, which ordinarily are broken, if at all, when made, as appears *infra* §§ 37, 40-42, as that the grantor is lawfully seized,¹⁶ that he has good right to convey,¹⁷ and that the land is free from encumbrance.¹⁸

However, it has also been held, as to covenants of seizin and of right to convey, that they may be either personal or real; that, if they once attach to the land, as for example, where the grantor is in actual adverse possession at the time of the delivery of the deed, they are real;¹⁹ and, as appears *infra* § 63 as to covenants of seizin, the general rule that such covenants do not run with the land is, by many authorities, limited to cases in which no possession accompanies the deed.

Covenant for quiet enjoyment is not strictly personal.²⁰

What law governs:

Actions for breach of covenant see *infra* § 115.

*Personal covenants see Conflict of Laws § 19 b (3).

In North Carolina, where a warranty of title is treated as a personal covenant, an action of covenant may only be maintained thereon when the party could have vouched in an action real.—*Smith v. Ingram*, 40 S.E. 984, 130 N.C. 100, 61 L.R.A. 878.

12. Ga.—*Atlanta, K. & N. R. Co. v. McKinney*, 53 S.E. 701, 124 Ga. 929, 110 Am.S.R. 215, 6 L.R.A.N.S., 436.

13. Ark.—*Bank of Hoxie v. Meriwether*, 265 S.W. 642, 166 Ark. 38.

Or.—*Pearson v. Richards*, 211 P. 167, 106 Or. 78.

Pa.—*De Sanno v. Earle*, 117 A. 200, 202, 273 Pa. 265, citing *Corpus Juris*.

15 C.J. p 1220 note 32.

Only when a covenant attaches to the land or some interest therein actually granted the covenantee is it a covenant real.—*Rawling v. Fisher*, 132 S.E. 489, 101 W.Va. 253.

Covenant not to compete

Covenant of seller of motion picture theater equipment that seller would not reënter the business for certain period "as affects said [buyer] or his estate" was held not covenant running with the equipment sold, but was personal to buyer or his estate.—*Yates v. Blythe*, Civ. App., 79 S.W.2d 913, error dismissed *Blythe v. Yates*, 86 S.W.2d 219, 126 Tex. 85.

Covenants running with land see *infra* §§ 54-86.

14. Conn.—*Bradford Realty Corporation v. Beetz*, 142 A. 395, 108 Conn. 26.

Iowa.—*Iowa Implement Co. v. Aetna Explosives Co.*, 165 N.W. 408, 409, 181 Iowa 1186.

Pa.—*De Sanno v. Earle*, 117 A. 200, 273 Pa. 265.

Wis.—*Lincoln Fireproof Warehouse Co. v. Greusel*, 224 N.W. 98, 199 Wis. 428, 70 A.L.R. 1096, adhered to 227 N.W. 6, 199 Wis. 428, 70 A.L.R. 1096.

15 C.J. p 1220 note 33.

"A covenant intended solely for the benefit of the grantor, his heirs and assigns, so that he or they may deal as desired in disposing of remaining lands . . . [is] 'personal' to the grantor."—*Pulitzer v. Campbell*, 262 N.Y.S. 743, 748, 147 Misc. 700.

Covenant which does not affect land conveyed is "personal covenant."—*Epting v. Lexington Water Power Co.*, 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 778.

"All covenants that are not prospective and do not pass with the land are personal."—*Pearson v. Richards*, 211 P. 167, 171, 106 Or. 78.

Doctrine of equitable easement running with land is inapplicable where agreement to leave light well between buildings was clearly personal between parties.—*Heimborge v. State Guaranty Corporation*, 2 P. 2d 998, 116 Cal.App. 380.

15. Cal.—*Maynard v. Polhemus*, 15 P. 451, 74 Cal. 141.

16. Ill.—*Firebaugh v. Wittenberg*, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

N.M.—*Beecher v. Tinnin*, 189 P. 44, 26 N.M. 59.

N.C.—*Guy v. First Carolinas Joint Stock Land Bank of Columbia*, 164 S.E. 323, 202 N.C. 803.

Tenn.—*Curtis v. Brannon*, 38 S.W. 1073, 98 Tenn. 153, 69 L.R.A. 760

—*Pace v. Watson*, App., 126 S.W.2d 404—*Grant Bond & Mortgage Co. v. Ogle*, 65 S.W.2d 1091, 17 Tenn. App. 112—*Young v. Brannon*, 5 Tenn.App. 1—*Cobb v. Sanders*, 1 Tenn.App. 326.

15 C.J. p 1220 note 37.

Covenants of seizin, right to convey, and against encumbrances as running with land see *infra*, §§ 63-65.

17. Ill.—*Firebaugh v. Wittenberg*, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

N.J.—*Carter v. Denman*, 23 N.J.Law 260.

N.M.—*Merchants' Nat. Bank of Clinton, Iowa v. Otero*, 175 P. 781, 24 N.M. 598.

18. U.S.—*Coral Gables v. Payne*, C. C.A.S.C., 94 F.2d 593.

Ill.—*Firebaugh v. Wittenberg*, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

Md.—*Levine v. Hull*, 109 A. 141, 135 Md. 444.

N.J.—*Carter v. Denman*, 23 N.J.Law 260.

N.M.—*Parker v. Beasley*, 54 P.2d 687, 40 N.M. 68.

N.C.—*Thompson v. Avery County*, 5 S.E.2d 146, 216 N.C. 405—*Lockhart v. Parker*, 126 S.E. 313, 189 N.C. 138.

Or.—*Pearson v. Richards*, 211 P. 167, 106 Or. 78.

19. Ohio.—*Devore v. Sutherland*, 17 Ohio 52, 49 Am.D. 442.

20. N.C.—*Guy v. First Carolinas Joint Stock Land Bank of Columbia*, 164 S.E. 323, 202 N.C. 803.

Covenant for quiet enjoyment as running with land see *infra* § 66.

Covenant of warranty. The old common-law warranty which, as is shown *infra* § 47, was applicable only to estates of freehold, was in its nature essentially real,²¹ although it seems that, when necessary to prevent a failure of justice, it might be construed as a personal covenant where it could not operate as a covenant real.²²

In the United States the old common-law warranty has, as is shown *infra* § 37, been superseded by a set of covenants. Of these, the covenant of warranty has, in a number of cases, been regarded as personal,²³ at least in the sense that it is not a real covenant within the meaning of the ancient feudal law,²⁴ or at least as imposing on the covenantor a personal liability sufficient to support a personal action of covenant,²⁵ as distinguished from the liability which was imposed on the warrantor by the ancient common-law warranty and which was enforceable by *warrantia charta*.²⁶ However, the covenant of warranty has also expressly been designated as a real covenant;²⁷ and, as appears *infra* § 68, it has been held to run with the land.

Other covenants. Other covenants which have been held to be personal include a proviso in a deed that any sale of the property by the grantee should be to the grantor at the original price,²⁸ a warranty by a grantor who has only a life estate,²⁹ a covenant by an assignee in bankruptcy for himself, his heirs and assigns,³⁰ and covenants in a deed limiting the use of other land of the grantor adjoining that conveyed.³¹

§ 23. Collateral and Auxiliary Covenants

A collateral covenant is one connected with a thing granted, but which does not run with the land; an

auxiliary covenant is one in aid of, and dependent on, a principal covenant.

A collateral covenant is one made in connection with a thing granted, but which does not run with the land.³² If it is in restraint of the objects of the principal covenants which have been substantially performed, it will not be enforced in equity.³³

An auxiliary covenant differs from a collateral covenant in that it is dependent on the fate of the principal covenant,³⁴ while on a collateral covenant the covenantor is liable, although the conveyance is void.³⁵

§ 24. Alternative and Disjunctive Covenants

Alternative or disjunctive covenants, construable according to the parties' intent, give the covenantor an election to perform either of the covenants.

Alternative or disjunctive covenants in the proper legal sense of the term are those which give an election to the party bound by them to perform one or the other of the acts to which they relate,³⁶ and by the fulfillment of one covenant to discharge himself wholly from the performance of the other.³⁷

Such covenants are to be construed according to the manifest intent of the parties.³⁸

§ 25. Dependent or Independent Covenants

As distinguished from an independent covenant, a dependent covenant is one where performance by one party is conditioned on, and subject to, performance by the other.

Generally, covenants are said to be dependent when they are such that the thing covenanted to

21. N.J.—Chapman v. Holmes, 10 N. J. Law 20.

15 C.J. p 1237 note 6.

22. Va.—Stout v. Jackson, 2 Rand. 132, 23 Va. 132.

15 C.J. p 1237 note 6.

23. W.Va.—Rex v. Creel, 22 W.Va. 373.

15 C.J. p 1238 note 10.

24. N.J.—Carter v. Denman, 23 N.J. Law 260.

25. N.J.—Chapman v. Holmes, 10 N. J. Law 20.

N.Y.—Townsend v. Morris, 6 Cow. 123.

Va.—Tabb v. Binford, 4 Leigh 132, 31 Va. 132, 26 Am.D. 317.

28. N.Y.—Townsend v. Morris, 6 Cow. 123.

Va.—Tabb v. Binford, 4 Leigh 132, 31 Va. 132, 26 Am.D. 317.

27. Conn.—Davis v. Lyman, 6 Conn. 249.

Ky.—Hatcher v. Galloway, 2 Bibb 180.

N.J.—Carter v. Denman, 23 N.J. Law 260.

N.M.—Merchants' Nat. Bank v. Otero, 175 P. 781, 24 N.M. 598.

N.C.—Mizell v. Ruffin, 23 S.E. 927, 118 N.C. 69.

Tenn.—Cobb v. Sanders, 1 Tenn. App. 326.

Not a personal covenant

Ohio.—Lyons v. Chapman, 178 N.E. 24, 40 Ohio App. 1.

28. Cal.—Maynard v. Polhemus, 15 P. 451, 74 Cal. 141.

29. N.C.—Hauser v. Craft, 46 S.E. 756, 134 N.C. 319.

30. Tenn.—Curtis v. Brannon, 38 S. W. 1073, 98 Tenn. 153, 69 L.R.A. 760.

31. Tenn.—Yates v. Chandler, 38 S. W.2d 70, 71, 162 Tenn. 388, quoting *Corpus Juris*.

15 C.J. p 1220 note 42.

32. Ohio.—Worthington v. Hewes, 19 Ohio St. 66.

15 C.J. p 1220 note 43.

33. N.J.—Grigg v. Landis, 21 N.J. Eq. 494.

34. Mass.—Wade v. Merwin, 11 Pick. 280.

15 C.J. p 1221 note 47.

35. Mass.—Wade v. Merwin, *supra*. 15 C.J. p 1221 note 47.

36. N.Y.—Harmony v. Bingham, 8 N.Y. Super. 209, affirmed 12 N.Y. 99, 62 Am.D. 142.

37. Pa.—Stewart v. Bedell, 79 Pa. 336.

15 C.J. p 1221 note 50.

When covenants not alternative

Where the breach of one covenant is necessary to give effect to the other, they are not alternative.—Stewart v. Bedell, 79 Pa. 336.

38. N.J.—White v. Stretch, 22 N.J. Eq. 76.

15 C.J. p 1221 note 51.

be done on the part of each party enters into the whole consideration for the covenant on the other part,³⁹ or where the acts or covenants of the parties are concurrent and are to be done or performed at the same time.⁴⁰

An independent covenant has been defined to be one which goes only to a part of the consideration on both sides, and a breach of which may be paid for in damages,⁴¹ although it has been held that this is not a conclusive test.⁴² Two covenants are independent where both cannot be performed,⁴³ or where something is to be done on one side before the whole can be performed by the other,⁴⁴ and, if the covenants are once established to be independent covenants, they continue so throughout.⁴⁵

Where covenants, although mutual, are independent, either party may recover damages from the other for an injury which he may have sustained by reason of nonperformance, although he has failed to comply with the stipulations on his part;⁴⁶ but, where the covenants are dependent on each other, the rule is otherwise, and neither par-

ty may maintain an action against the other without averring and proving performance on his part.⁴⁷ The question whether covenants are dependent or independent does not arise where the breach of one covenant is offered as a set-off against the breach of another,⁴⁸ but only where the nonperformance of one covenant is pleaded as a direct and preëemptory bar to an action on another.⁴⁹

Determination of character. While the order of time in which covenants are to be performed is an important consideration in determining whether they are dependent or independent,⁵⁰ it is difficult to lay down any general principle by which to determine what covenants are dependent and what independent,⁵¹ the cases being agreed that this question must be determined by the intention and meaning of the parties as it appears in the instrument,⁵² and by the application of common sense to each particular case,⁵³ to which intention, when once discovered, all technical forms of expression must yield.⁵⁴

In doubtful cases the courts are generally in-

39. U.S.—Huggins v. Daley, W.Va., 99 F. 606, 40 C.C.A. 12, 48 L.R.A. 320.

Fla.—Zambetti v. Commodores Land Co., 136 So. 644, 102 Fla. 586.

Mich.—Palmer v. Fox, 264 N.W. 361, 274 Mich. 252, 104 A.L.R. 1057.

Pa.—Shure v. Shure, 1 Fay.L.J. 135. Dependent or independent covenants and stipulations generally see Contracts § 344.

Other definitions

(1) A covenant which depends on the prior performance of some act or condition.—Lowery v. May, 104 So. 5, 213 Ala. 66.—Bailey v. White, 3 Ala. 330.

(2) An agreement to do, or to omit to do, something with reference to the thing on which it depends, and to which it relates.—Norman v. Wells, 17 Wend., N.Y., 136.

40. Fla.—Zambetti v. Commodores Land Co., 136 So. 644, 102 Fla. 586. 15 C.J. p 1221 note 55.

41. Ala.—Lowery v. May, 104 So. 5, 213 Ala. 66.

Fla.—Smith v. Home Seekers' Realty Co., 122 So. 708, 709, 97 Fla. 236, 87 A.L.R. 807, citing *Corpus Juris*.

Pa.—Shure v. Shure, 1 Fay.L.J. 135. 15 C.J. p 1221 note 56.

42. N.Y.—Grant v. Johnson, 5 N.Y. 247.

15 C.J. p 1221 note 57.

43. Tenn.—Ricks v. Burlleson, 4 Yerg. 44.

44. Mass.—White v. Atkins, 8 Cush. 367.

Va.—Matthews v. Jenkins, 80 Va. 463.

45. N.Y.—Wilcox v. Ten Eyck, 5 Johns. 78.

46. Ala.—Lowery v. May, 104 So. 5, 213 Ala. 66.

N.Y.—Laveites v. Gottlieb, 187 N.Y. S. 452, 115 Misc. 218.

Or.—Loveland v. Warner, 204 P. 622, 624, 108 Or. 638, quoting *Corpus Juris*.

15 C.J. p 1222 note 68.

47. Ala.—Lowery v. May, 104 So. 5, 213 Ala. 66.

Fla.—Zambetti v. Commodores Land Co., 136 So. 644, 102 Fla. 586.

Or.—Loveland v. Warner, 204 P. 622, 108 Or. 638.

15 C.J. p 1222 note 69.

48. Or.—Loveland v. Warner, 204 P. 622, 624, 108 Or. 638, quoting *Corpus Juris*.

Pa.—Ewart v. Irwin, 1 Phila. 78.

49. Or.—Loveland v. Warner, 204 P. 622, 108 Or. 638.

Pa.—Ewart v. Irwin, 1 Phila. 78.

50. Mich.—Blansky v. Hogan, 157 N.W. 13, 190 Mich. 463.

51. Ark.—Manuel v. Campbell, 3 Ark. 324.

Covenants held independent

(1) A covenant of warranty and a covenant against encumbrances are regarded as independent covenants.—Pearson v. Richards, 211 P. 167, 106 Or. 78.

(2) Covenant to maintain partition fence held independent of covenant for particular use of land.—Stover v. Harlan, 154 N.E. 882, 87 Ind.App. 347.

52. Fla.—Zambetti v. Commodores Land Co., 136 So. 644, 102 Fla. 586.

Iowa.—Stephenson v. Neppel, 182 N. W. 869, 192 Iowa 246.

Minn.—Clark v. Clark, 204 N.W. 936, 164 Minn. 201.

Tex.—Rigsby v. Boone County State Bank, Civ.App., 241 S.W. 207, 209, citing *Corpus Juris*.

Va.—Miller v. Southern Ry. Co., 108 S.E. 838, 131 Va. 239.

15 C.J. p 1221 note 63.

Rule otherwise stated

"The dependence or independence of covenants . . . [is] to be ascertained by and from the evident sense and meaning of the parties, having a due regard to whole instrument, and . . . however transposed in the instrument such provisions may be, their precedency must depend on the order of time in which the intent of the transaction requires their performance."—Lowery v. May, 104 So. 5, 8, 213 Ala. 66.

53. Fla.—Zambetti v. Commodores Land Co., 136 So. 644, 102 Fla. 586.

Minn.—Clark v. Clark, 204 N.W. 936, 164 Minn. 201.

Va.—Miller v. Southern Ry. Co., 108 S.E. 838, 131 Va. 239.

15 C.J. p 1221 note 63.

54. Fla.—Zambetti v. Commodores Land Co., 136 So. 644, 102 Fla. 586. 15 C.J. p 1221 note 63.

clined to construe covenants to be dependent,⁵⁵ although it has also been said to be safest, when the intention of the parties is doubtful, to construe their covenants to be independent.⁵⁶

§ 26. Parties to Covenants in General

Although a grantor covenants only for his heirs, etc., as a general rule he is personally bound. A fiduciary ordinarily is bound by his covenants.

As a general rule, a grantor will be held personally bound, even though he covenants only for his heirs, executors, administrators, or assigns,⁵⁷ although there is some authority to the contrary;⁵⁸ and covenants which, by statute, are implied from the use of particular words, see *supra* § 13, are restrained, as against the grantor, by a covenant expressly limited to the heirs, executors, and administrators of the grantor.⁵⁹

Fiduciaries. As a general rule, persons acting in a fiduciary capacity are held personally bound by their covenants,⁶⁰ even though expressly made in such capacity.⁶¹ Thus a guardian may be held personally liable on his covenants of warranty contained in a deed of his ward's estate, even though the estate was sold under a license of the probate court;⁶² and, in the absence of a statute to the contrary,⁶³ or of a manifest intention to the contrary expressed on the face of the paper,⁶⁴ a warranty clause in a deed made by a trustee, as such, will bind him personally.⁶⁵ Furthermore, executors

or administrators who sell their decedent's real estate under a court order are personally liable on their covenants of warranty.⁶⁶

However, one covenanting in a fiduciary capacity may limit his liability by the use of language clearly showing that it was not his intention to become personally bound,⁶⁷ as, for example, where an executor warrants the title in so far as it is vested in him as executor.⁶⁸

§ 27. Joint or Several Covenants

Covenantors may covenant jointly or severally, or jointly and severally, and may be bound severally, although having joint interests; an obligation created by two or more ordinarily is presumed to be joint.

As a rule covenantors may covenant jointly or severally, or jointly and severally,⁶⁹ and, it seems, they may be bound severally, although their interests are joint.⁷⁰ A several covenant is a covenant by two or more, separately;⁷¹ one made so as to bind the parties severally or individually;⁷² the covenant of one with another.⁷³ Where a grantee of land devises it in severalty to his heirs, the heirs have been held to have a joint interest in the covenants in their ancestor's deed.⁷⁴

Except as to reimbursement of the purchase price,⁷⁵ the obligation of a joint vendor extends to the entire title,⁷⁶ and, where an obligation is created by two or more, the general presumption is that it is joint,⁷⁷ and words of severance are neces-

55. U.S.—*Roberts v. Steelman*, C.C. A.N.J., 1 F.2d 180.
15 C.J. p 1221 note 66.

56. Ky.—*Young v. Singleton*, 6 J.J. Marsh. 316.

As conditions precedent

Covenants are generally treated as independent rather than in the nature of conditions precedent.—*La-veltes v. Gottlieb*, 187 N.Y.S. 452, 115 Misc. 218.

57. Minn.—*Judd v. Randall*, 29 N. W. 589, 36 Minn. 12.
15 C.J. p 1222 note 73.

Parties:

Actions for breach of covenant see *infra* § 123.

Contracts see *Contracts* §§ 346–355.

58. N.D.—*Brown v. Wolcott*, 48 N. W. 426, 1 N.D. 497.
15 C.J. p 1222 note 74.

59. N.D.—*Dun v. Dietrich*, 53 N.W. 81, 3 N.D. 3.

60. U.S.—*Taylor v. Mayo*, Ill., 4 S. Ct. 147, 110 U.S. 330, 28 L.Ed. 163.
15 C.J. p 1222 note 77.

Reason for rule is that, unless a party who contracts in the right of another, having no authority to bind his principal, is to be held personally liable, the covenantee would

have no remedy for a breach of the contract.—*Knipp v. Bagby*, 95 A. 60, 126 Md. 461, L.R.A.1915F 1072.

61. U.S.—*Taylor v. Mayo*, Ill., 4 S. Ct. 147, 110 U.S. 330, 28 L.Ed. 163.
15 C.J. p 1222 note 77.

62. Mass.—*Donahoe v. Emery*, 9 Metc. 68.

63. Ga.—*Shacklett v. Ransom*, 54 Ga. 350.

64. Tenn.—*Jordan v. Trice*, 6 Yerg. 479.

65. Md.—*Knipp v. Bagby*, 95 A. 60, 126 Md. 461, L.R.A.1915F 1072.
15 C.J. p 1222 note 83.

66. Mass.—*Sumner v. Williams*, 8 Mass. 162, 5 Am.D. 83.
15 C.J. p 1222 note 84.

67. Mont.—*Lyon v. Featherman*, 261 P. 268, 80 Mont. 504.
15 C.J. p 1222 note 85.

68. Ga.—*Baxter v. Camp*, 54 S.E. 1036, 126 Ga. 354.
Ky.—*Manifee v. Morrison*, 1 Dana 208.

69. Kan.—*Allen v. Elwell*, 282 P. 706, 128 Kan. 296.
15 C.J. p 1223 note 87.
Joint or several contracts generally see *Contracts* §§ 349–355.

Two or more may covenant with one, making a joint covenant on the one side and a several covenant on the other; or two or more may together covenant with two or more, making a joint covenant on each side.—*Allen v. Elwell*, *supra*.

70. N.Y.—*Westcott v. King*, 14 Barb. 32.

15 C.J. p 1223 note 87.

71. Black L.D.

72. Black L.D.

73. Kan.—*Allen v. Elwell*, 282 P. 706, 707, 128 Kan. 296, quoting *Corpus Juris*.

74. Md.—*Crisfield v. Storr*, 36 Md. 129, 11 Am.R. 480.
15 C.J. p 1223 note 91.

75. La.—*Soule v. West*, 170 So. 26, 185 La. 655.
15 C.J. p 1223 note 92.

76. La.—*Soule v. West*, *supra*.
Tex.—*Moses v. Chapman*, Civ.App., 280 S.W. 911.
15 C.J. p 1223 note 93.

77. La.—*Soule v. West*, 170 So. 26, 185 La. 655.
Tex.—*Germany v. Turner*, Com.App., 123 S.W.2d 874, reversing *Turner v. Germany*, Civ.App., 94 S.W.2d

sary to overcome this primary presumption.⁷⁸ This rule does not, however, apply to covenants joint in form made by husband and wife in conveyances of the husband's property,⁷⁹ unless it appears that the sole consideration for the deed was received by her and was by her husband so intended.⁸⁰

As a general rule, the question as to whether the liability incurred is joint or several, or joint and several, is to be determined by looking at the words of the covenant.⁸¹ By some authorities this test is exclusive,⁸² the subject matter of the contract and the interests of the parties assuming the liability being regarded as having nothing to do with the question.⁸³ On the other hand, however, it has been held that, where from the subject matter of the covenants it is the evident intent of the parties that they should be taken distributively, they may be so taken, although there are no words

of severalty.⁸⁴

Covenantees. As to covenantees, the rule generally upheld, although there is early authority apparently to the contrary,⁸⁵ is that, if the language of the covenant is capable of being so construed, it will be taken to be joint or several according to the interest of the parties to it.⁸⁶

§ 28. Subject Matter in General

In determining the subject matter of a covenant the intention of the parties controls.

In determining the subject matter of a covenant, it is the duty of the court to give effect to the lawful intent of the parties.⁸⁷ When the language employed is so ambiguous and contradictory as to leave the intention of the parties doubtful, the court should then call to its aid the surrounding circumstances, the object had in view by the parties, and their state and condition.⁸⁸

1177—*Moses v. Chapman*, Civ.App., 380 S.W. 911.
15 C.J. p 1223 note 94.

78. Tex.—*Moses v. Chapman*, supra. Vt.—*Catlin v. Barnard*, 1 Aik. 9.
15 C.J. p 1223 note 94.

79. Mich.—*Agar v. Streeter*, 150 N. W. 160, 183 Mich. 600, L.R.A.1915D 196, Ann.Cas.1916E 518.

Okl.—*Sunfield v. Brown*, 42 P.2d 876, 878, 171 Okl. 395, quoting *Corpus Juris*.

80. Mich.—*Agar v. Streeter*, 150 N. W. 160, 183 Mich. 600, L.R.A.1915D 196, Ann.Cas.1916E 518.

81. Pa.—*Philadelphia v. Reeves*, 48 Pa. 472, affirming 5 Phila. 357.
15 C.J. p 1223 note 99.

Covenant held joint and several

Where deed purported to convey entire fee, undivided as between two grantors, covenant must be construed as warranty of that fee on joint and several responsibility of both grantors.—*McClelland v. Coston*, 149 So. 697, 227 Ala. 267.

82. Pa.—*Philadelphia v. Reeves*, 48 Pa. 472, affirming 5 Phila. 357.
15 C.J. p 1223 note 1.

83. Md.—*Boyd v. Klenzle*, 46 Md. 294.
15 C.J. p 1223 note 1.

84. Mo.—*Waldermeyer v. Loebig*, 121 S.W. 75, 222 Mo. 540.
15 C.J. p 1223 note 3.

85. Vt.—*Catlin v. Barnard*, 1 Aik. 9.

86. U.S.—*Farni v. Tesson*, III, 1 Black 309, 17 L.Ed. 67.
15 C.J. p 1223 note 5.

One coparcener cannot sue separately for his portion of the rents accruing to him and his fellows.—*Tapscott v. Williams*, 10 Ohio 442.

87. Ohio.—*Kratz v. Risch*, 13 Ohio N.P.N.S., 478.
15 C.J. p 1225 note 32.

Covenant to pay valid liens on land

A deed, absolute in form, by husband and wife, defendants in suit by judgment creditors, made pending suit, whereby grantee assumed to settle valid liens decreed against the land, if valid, did not cover judgments not decreed in such suit or those of creditors failing to appear and prove their liens therein.—*Bent v. Read*, 97 S.E. 286, 82 W.Va. 680.

Covenant to subdivide accretions to land

Owner's covenant, in agreement to convey land lying between ocean and street parallel with shore, that all lands which should be made by accretions from the ocean, should be subdivided into lots, was held not limited to accretions to part of owner's tract not lying to seaward of land covered by conveyance.—*Lambert v. Vars*, 101 A. 726, 88 N.J.Eq. 81, affirmed 103 A. 1053, 89 N.J.Eq. 211.

Covenants for construction and maintenance of drainage ditch held not to include covenant to do anything in respect of ditch to prevent water from percolating into covenantees' basement.—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 159 Or. 80.

Covenant to "care for" grantor

(1) Deed of remainder interest to granddaughter, providing granddaughter was to continue to care for grantor during grantor's life, created covenant binding granddaughter to continue to live with grantor and care for her.—*Burkhalter v. De Loach*, 155 S.E. 513, 171 Ga. 384.

(2) Under a deed requiring the grantee to live with the grantor "seeing after her welfare and taking care of her during her natural life," grantee was held to covenant that she would support and maintain the grantor, as well as give her personal attention.—*Wyatt v. Nailer*, 111 S.E. 419, 153 Ga. 72.

Covenants restricting alienation to negroes

(1) While in the strictest sense a negro is not an "Ethiopian," the latter term, as used in a deed in a restrictive covenant against alienation to "any person of Ethiopian race or descent," will be deemed to have been used in its popular sense and to include negroes.—*White v. White*, 150 S.E. 531, 532, 103 W.Va. 128, 66 A.L.R. 518.

(2) The term "negroes" in a restrictive covenant against alienation to members of that race is synonymous with the term "colored persons;" hence, it includes a woman of one-eighth negro blood and her husband of three-fourths negro blood.—*Ridgway v. Cockburn*, 296 N.Y.S. 936, 940, 163 Misc. 511.

(3) Covenant restricting disposal of lots to colored persons was for protection of property to which covenants applied, and restriction was not affected by similar conditions which might arise in adjoining property, as respects right of lot owners to have restriction removed on ground that adjoining territory was occupied by colored persons.—*Grady v. Garland*, 89 F.2d 817, 67 App.D.C. 73, certiorari denied 58 S.Ct. 13, 302 U.S. 634, 82 L.Ed. 536.

88. Ohio.—*Kratz v. Risch*, 13 Ohio N.P.N.S., 478.
15 C.J. p 1225 note 32.

§ 29. Limitations and Exceptions in General

General rules of construction of covenants apply in construing limitations and exceptions therein; exceptions and restrictions are construed strictly against the grantor.

The general rules of construction applicable to covenants, see *supra* §§ 20-25, govern the construction of the limitations and exceptions contained therein.⁸⁹ Where a covenant of warranty contains no exceptions, the previous mention of the existence of an encumbrance does not take it out of the covenant of warranty to defend the title against all lawful claims whatsoever.⁹⁰

Exceptions and restrictions are to be construed strictly against the grantor, and are not to be extended beyond the fair import of the language expressed except by necessary implication.⁹¹

§ 30. Limitation to Premises Conveyed

In the absence of a contrary intention, general cove-

nants are limited to the premises purported and intended to be conveyed.

Subject to a manifest intention to the contrary,⁹² general covenants will be construed as limited to the premises purported and intended to be conveyed.⁹³

§ 31. Limitation to Estate Conveyed

Unless a contrary intention is manifested, general covenants are limited to the estate purported and intended to be conveyed.

Subject to a manifest intention to the contrary,⁹⁴ general covenants will be construed as limited to the estate purported and intended to be conveyed.⁹⁵ Thus, if a deed purports to convey the right, title, and interest of the grantor to the land described instead of conveying the land itself, a general covenant of warranty will be limited to that right or interest;⁹⁶ and, where lands are conveyed sub-

Under covenant to "use" certain product on property equipped for sale of oil, "sale" is one of "uses" to which property can be subjected, and such covenant to "use" the specified product is, under the circumstances, a covenant not to sell competing products.—*Gulf Refining Co. v. Smith*, 139 S.E. 716, 718, 164 Ga. 811.

Covenant to repair streets

In absence of exception or provision to contrary, lanes, paths, and sidewalks are included in covenants for payment of proportion of cost of "keeping the streets in repair."—*Wehr v. Roland Park Co.*, 122 A. 363, 143 Md. 384.

Covenant to pay for garbage removal

Snow and leaves on and about sidewalk may well be considered within the term "rubbish" in covenant annually to contribute to expense of disposition of garbage, ashes, and rubbish on the land.—*Wehr v. Roland Park Co.*, *supra*.

88. Md.—*Wehr v. Roland Park Co.*, 122 A. 363, 143 Md. 384.

15 C.J. p 1226 note 37.

Exceptions in contracts see *Contracts* § 343.

The ordinary province of an exception or proviso is to limit or detract from the scope of the covenant to which it is attached, although it may enlarge by explaining an ambiguous restrictive covenant.—*Thomas v. Hillman*, 134 A. 655, 100 N.J. Eq. 328.

Title to excepted property

Deed warranting title to lot therein described, but excepting included alley, merely passed quitclaim title to alley.—*Williams v. Burt*, 140 So. 751, 224 Ala. 442.

90. Mich.—*Welbon v. Welbon*, 67 N. W. 338, 109 Mich. 356.

91. N.Y.—*Duryea v. New York*, 62 N.Y. 592.

92. Colo.—*Miller v. De Graffenried*, 95 P. 941, 43 Colo. 306, 15 Ann.Cas. 981.

15 C.J. p 1226 note 41.

Covenant implied from description of premises see *supra* § 16.

93. U.S.—*Ellwell v. Weagley*, C.C.A. Md., 13 F.2d 712.

N.Y.—*Morrill Realty Corporation v. Rayon Holding Corporation*, 240 N. Y.S. 38, 135 Misc. 845, affirmed 241 N.Y.S. 918, 229 App.Div. 760, affirmed 172 N.E. 494, 254 N.Y. 268.

N.C.—*Evans v. Davis*, 118 S.E. 845, 186 N.C. 41.

Tex.—*Pochyla v. Cralle*, Civ.App., 42 S.W.2d 793—*Cleveland State Bank v. Gardner*, Civ.App., 274 S.W. 220, reversed on other grounds, Com. App., 286 S.W. 173.

Wis.—*Campbell v. Rogers*, 211 N.W. 768, 191 Wis. 570.

15 C.J. p 1226 note 42, p 1253 note 99.

Uniform restrictions adopted pursuant to general plan or scheme of development for subdivided area and under which lots were sold were held to have no effect on title to unsold lots and undeveloped portion of boundary acquired by estate of owner of original boundary under foreclosure of purchase-money deeds of trust which had been executed prior to adoption of restrictions.—*St. Louis Union Trust Co. v. Foster*, 190 S.E. 522, 211 N.C. 331.

94. Colo.—*Miller v. De Graffenried*, 95 P. 941, 43 Colo. 306, 15 Ann. Cas. 981.

15 C.J. p 1226 note 41.

95. Conn.—*Zandri v. Tendler*, 193 A. 598, 123 Conn. 117, 111 A.L.R. 1280. Okl.—*Ball v. Coyle*, 233 P. 750, 108 Okl. 30.

Tex.—*Edwards v. Worthington*, Civ. App., 118 S.W.2d 328—*Walling v. Harendt*, Civ.App., 37 S.W.2d 280, error dismissed—*Campbell v. Jones*, Civ.App., 230 S.W. 710.

W.Va.—*King v. Smith*, 106 S.E. 704, 88 W.Va. 312.

15 C.J. p 1226 note 42, p 1253 note 99.

Covenant for further assurance applies only to the estate and interest granted.—*Uhl v. Ohio River R. Co.*, 41 S.E. 340, 51 W.Va. 106—15 C.J. p 1237 note 91.

96. Fla.—*Cromartie v. Everglade Lumber Co.*, 129 So. 767, 100 Fla. 532.

Mont.—*Green v. Baker*, 214 P. 88, 66 Mont. 568.

S.D.—*Avon State Bank v. Commercial & Savings Bank*, 207 N.W. 554, 49 S.D. 575, 44 A.L.R. 1462.

Tex.—*Wilson v. Wilson*, Civ.App., 118 S.W.2d 403.

15 C.J. p 1227 note 43.

In Oklahoma, in view of Comp.St. 1921 §§ 5283, 5284, prescribing respectively forms of warranty deed and quitclaim deed, and §§ 5258, 5259, describing effect of quitclaim deed and of warranty deed, where grantors used prescribed form of warranty deed, and afterward covenanted to warrant title and hold premises unto party of the second part, his heirs and assigns, free and clear of all former grants, and inserted words "all of our right, title, and interest" immediately before description of lands conveyed, covenant refers to land described in deed, and not to right, title, and interest of

ject to encumbrance, the covenants of warranty extend only to the estate actually conveyed.⁹⁷

§ 32. Limitation by Other Covenants

Whether or not a covenant is independent of, or restricted by, other covenants in the same instrument is determined by the intention of the parties.

Where a deed contains several covenants, the courts construe them either as independent, or as restrictive, of each other according to the apparent intention of the parties.⁹⁸

Express covenants as controlling implied covenants. Express covenants, whether general or limited, ordinarily override and control inconsistent, implied covenants.⁹⁹ There is, however, some conflict of authority as to the effect of express covenants on the statutory covenants implied from the use of particular words; thus, some authorities contend that these statutory covenants are only intended to operate when the parties have omitted to insert covenants and that such implied covenants are limited and restrained by the terms of express covenants,¹ at least when the express covenants refer to the implied statutory covenants and undertake to confine their operation,² or when the covenants are so irreconcilable that they cannot all have their full force;³ and some of the cases go to the extent of holding that the implied covenants do not even arise when express covenants are inserted.⁴ On the other hand, it has been held that statutory implied covenants are not qualified or restrained by those which are expressed,⁵ at least where the implied covenants are to be construed

under the statute as express covenants.⁶

However, the courts will give effect to each covenant where there is no inconsistency between the express covenant and the implied statutory covenant,⁷ or between the express covenant and an implied one not of statutory creation,⁸ or where the implied statutory and the express covenants are independent of each other.⁹

Covenants having same or different objects. Restrictive words inserted in the first of several covenants having the same object will be construed as extending to all the covenants, although they are distinct;¹⁰ but, where covenants are of materially different import and directed to different things, the general rule is that restrictive words added to one will not control the generality of the others, although they relate to the same land.¹¹ However, it has been held that a preceding special covenant against encumbrances, excluding the encumbrance in question, is to be recognized as an exception of such encumbrance from a following covenant of general warranty.¹²

General covenants as limited by restrictive covenants. A subsequent limited covenant will not restrict a preceding general covenant, unless an express intention to do so appears or the covenants are inconsistent,¹³ or unless the general covenant and the restrictive covenant appear to be connected, or there are qualifying words in the covenant itself;¹⁴ but, since the professed object of this rule is the ascertainment of the intentions of the parties to the covenant, it should not be applied when it would evidently fail of this purpose.¹⁵

grantors, and general warranty is not limited by use of such words.—*Kimbro v. Harper*, 238 P. 840, 113 Okl. 46.

97. Ala.—*Toney v. Dewey*, 78 So. 887, 201 Ala. 533.

Conn.—*Zandri v. Tendler*, 193 A. 598, 123 Conn. 117, 111 A.L.R. 1280.

Tex.—*Campbell v. Jones*, Civ.App., 230 S.W. 710.
15 C.J. p 1227 note 44.

98. Mo.—*Wright v. Boram*, 177 S.W. 324, 190 Mo.App. 336.
15 C.J. p 1227 note 47.

99. U.S.—*Brimmer v. Union Oil Co. of California*, C.C.A.Wyo., 81 F.2d 437, 105 A.L.R. 454, certiorari denied 56 S.Ct. 833, 298 U.S. 668, 80 L.Ed. 1391—*Hambly v. Delaware, M. & V. R. Co.*, C.C.Del., 21 F. 541.
15 C.J. p 1227 note 48.

Covenants implied from language of express covenants see supra § 14.

1. Miss.—*Staton v. Henry*, 94 So. 237, 130 Miss. 372.
15 C.J. p 1228 note 52.

Covenants implied from use of particular words see supra § 13.

2. Mo.—*Miller v. Bayless*, 92 S.W. 482, 194 Mo. 630, affirming 74 S.W. 648, 101 Mo.App. 487.
15 C.J. p 1228 note 53.

3. Mo.—*Miller v. Bayless*, 92 S.W. 482, 194 Mo. 630.
15 C.J. p 1228 note 54.

4. Ark.—*Doak v. Smith*, 208 S.W. 795, 137 Ark. 509.
N.M.—*Knight v. Cox*, 245 P. 250, 31 N.M. 325, 45 A.L.R. 510.
15 C.J. p 1228 note 55.

5. Tex.—*Rotan v. Hays*, 77 S.W. 654, 33 Tex.Civ.App. 471.
15 C.J. p 1228 note 56.

6. Ill.—*Hawk v. McCullough*, 21 Ill. 220.

Ind.—*Jackson v. Green*, 14 N.E. 89, 112 Ind. 341.

7. N.D.—*Dun v. Dietrich*, 53 N.W. 81, 3 N.D. 3.
15 C.J. p 1228 note 58.

8. Idaho.—*Polak v. Mattson*, 128 P. 89, 22 Idaho 727.
15 C.J. p 1228 note 49.

9. N.D.—*Dun v. Dietrich*, 53 N.W. 81, 3 N.D. 3.

15 C.J. p 1228 note 58.

10. Va.—*Allemon v. Gray*, 23 S.E. 298, 92 Va. 216.

15 C.J. p 1228 note 59.

11. U.S.—*Duvall v. Craig*, Ky., 2 Wheat 45, 4 L.Ed. 180.

15 C.J. p 1229 note 67.

12. Ohio.—*Bricker v. Bricker*, 11 Ohio St. 240.

13. Okl.—*Joiner v. Ardmore L. & T. Co.*, 124 P. 1073, 33 Okl. 266.
15 C.J. p 1228 note 61.

Covenants for quiet enjoyment and of general warranty held not limited in scope by covenant against encumbrances not running with the land.—*Knight v. Cox*, 245 P. 250, 31 N.M. 325, 45 A.L.R. 510.

14. Ind.—*Jackson v. Green*, 14 N.E. 89, 112 Ind. 341.
15 C.J. p 1229 note 61.

15. U.S.—*Bender v. Fromberger*, Pa., 4 Dall. 436, 1 L.Ed. 898.
Colo.—*Dunn v. Dunn*, 3 Colo. 510.

§ 33. Duration of Personal Covenants

A personal covenant may be unlimited in duration, but the liability of the covenantor in such case ceases on the covenantee's death.

A personal covenant may be unlimited in duration,¹⁶ as, for instance, during the friendly relations of the parties.¹⁷ However, the death of the covenantee will determine the covenantor's liability.¹⁸

§ 34. Release or Discharge of Personal Covenants

Liability on a personal covenant can be released only by the covenantee, who, as a general rule, cannot take advantage of a breach induced by his own act or agreement. A personal covenant may also be discharged by an act of law rendering performance impossible.

Liability on a personal covenant can be released or discharged only by the covenantee,¹⁹ and at common law this could be done, before breach, only by an instrument under seal;²⁰ but, as is shown in Accord and Satisfaction § 8 a (2), after breach of covenant has occurred, an accord executed may be pleaded in discharge, although the acceptance of a part performance after breach has been held not to release the covenantee's right of action.²¹

It is now generally held, however, that, whenever the breach complained of has been superinduced by the action or agreement of the covenantee, and the

matter is properly availed of in defense, he will not be allowed to take advantage of the technical breach thus produced,²² although the covenantor will not thereby be relieved of his obligation to perform such part of the covenant as the covenantee's act has not rendered impossible of performance.²³

A personal covenant may also be discharged by an act of law which renders its performance impossible.²⁴ An assignment by the covenantor does not, without the covenantee's consent, release the former from his obligation.²⁵

§ 35. Persons Entitled to Enforce Personal Covenants

One not a party to a personal covenant ordinarily may not maintain an action thereon, and at common law a personal covenant may not be enforced by anyone other than the covenantee and his personal representative.

An action on a personal covenant will not, as a general rule, lie in favor of a person not a party to it,²⁶ even though the covenant was made for his benefit.²⁷ On the other hand, the general rule has been held not to apply where the third party is brought in privity with the promisor;²⁸ and it has been held that the purchaser at a foreclosure sale may enforce the covenants contained in the deed of trust under which he purchased.²⁹

By the common-law rule an action on a covenant may be brought only by the covenantee,³⁰ or by

16. Conn.—Bishop v. Quintard, 18 Conn. 395.

17. Ill.—See Hood v. Christie, 208 Ill. App. 51.

Duration:

Contracts see Contracts § 385.

Real covenants see infra § 74.

17. Ill.—Gerling v. Lain, 109 N.E. 972, 269 Ill. 337.

15 C.J. p 1229 note 71.

18. S.C.—Melf v. Doscher, 161 S.E. 859, 164 S.C. 111, citing *Corpus Juris*.

15 C.J. p 1229 note 72.

19. N.Y.—Hastings Land Impr. Co. v. Zinsser, 140 N.Y.S. 791, 155 App. Div. 561.

15 C.J. p 1229 note 73.

Discharge:

Contracts see Contracts §§ 385-448.

Real covenants see infra §§ 75-79.

20. Md.—Herzog v. Sawyer, 61 Md. 344.

15 C.J. p 1229 note 74.

21. Ala.—Nesbitt v. McGehee, 26 Ala. 748.

22. Minn.—Hall v. Crook, 174 N.W. 519, 144 Minn. 82.

15 C.J. p 1230 note 77.

23. Minn.—Hall v. Crook, *supra*.

24. Me.—Great Pond Min. Agricultural Co. v. Buzzell, 39 Me. 173.

25. U.S.—Mound Valley Vitriified Brick Co. v. Mound Valley Natural Gas & Oil Co., C.C.Kan., 258 F. 936.

26. U.S.—Mound Valley Vitriified Brick Co. v. Mound Valley Natural Gas & Oil Co., C.C.Kan., 258 F. 936.

15 C.J. p 1224 note 12.

Trustee for vendor

As respects right to recover for breach of warranty of title, vendee in possession of land under contract to purchase could claim nothing under deed which vendee procured from third party, since vendee held such title which was adverse to his vendor as trustee for vendor.—Tyler v. Rudisill, 155 So. 353, 114 Fla. 301.

27. Ill.—Harms v. McCormick, 22 N. E. 511, 132 Ill. 104.

15 C.J. p 1224 note 12, p 1300 note 6. Contracts for benefit of third person see Contracts § 519.

28. U.S.—Town of Readsboro v. Hoosac Tunnel & W. R. Co., C.C.A. Vt., 6 F.2d 733.

15 C.J. p 1224 note 19.

It is not sufficient that the performance of a covenant may benefit a third person, but it must have been entered into for his benefit, or at least such benefit must be the direct result of performance, and so within the contemplation of the parties, in order to give such third person a right of action thereon.—Staff v. Bemis Realty Co., 183 N.Y.S. 886, 111 Misc. 635.

Existence of privity

Privity has been held not to exist, under a personal covenant creating an easement for light, between the grantee's remote successors in title and the grantor's tenant under a ninety-nine year lease.—Heimborge v. State Guaranty Corporation, 2 P. 2d 998, 116 Cal.App. 380.

29. Mo.—Blanchard v. Hazeltine, 79 Mo.App. 248.

30. Conn.—Bradford Realty Corporation v. Beetz, 142 A. 395, 108 Conn. 26.

Fla.—Zemurray v. Kilgore, 177 So. 714, 717, 130 Fla. 317, quoting *Corpus Juris*.

15 C.J. p 1239 note 1.

Persons entitled to enforce real covenants see infra §§ 80-85.

his personal representative,³¹ and an assignee of the covenantee could not maintain an action of covenant.³² Covenants of title which are broken, if at all, as soon as made, and which are, therefore, regarded as mere choses in action, not assignable, and not running with the land, see §§ 63-68, must be sued on by the covenantee or his legal representative.³³ Thus, where a covenant of seizin is regarded as a personal covenant, see *supra* § 22, an action for breach thereof may not be brought by an assignee of the land,³⁴ although, as will also be noted *infra* § 63, this rule is limited by some authorities to cases in which no possession accompanied the deed. So, too, where a covenant in a deed to a portion of the grantor's lands was for the protection of the grantor's remaining lands, a subsequent grantee of one of the lots sold has no such interest as will permit him to intervene in an action involving the enforcement of the covenant;³⁵ and the substitution of the name of a third person as grantee in a deed after its delivery, although it is done by consent of both grantor and grantee, will not enable such substituted grantee to maintain an action on a covenant of seizin contained in the deed.³⁶

However, where the cause of action on the covenant broken is assignable, as it is frequently the case by reason of statute, see Assignments § 31, the assignee may sue,³⁷ and, furthermore, the assignee may sue where the statute expressly permits suit against the original grantor.³⁸

§ 36. Persons Liable on Personal Covenants

Generally, only the covenantor and his personal representatives are bound on a personal covenant; an assignee may be liable in equity, but, in the absence of agreement, he is not liable at law.

A person is not liable on a covenant which he has not signed.³⁹ As a general rule, only the covenantor and his personal representatives are bound on a personal covenant.⁴⁰ Thus covenants made by an executor do not bind devisees.⁴¹ Furthermore, one is not bound by covenants in a deed made by a cotenant or a coparcener holding the record title;⁴² and, without acceptance by remaindermen, they are not bound by covenants in a deed of settlement between the life tenants.⁴³ Heirs are bound only when expressly named.⁴⁴

In the absence of agreement, assignees are not liable at law on the covenants of their assignor,⁴⁵ but they may be held liable in equity⁴⁶ where they

Origin of rule

This rule has its origin in the nature of the action of covenant inasmuch as only a party to an instrument under seal can bring that action.—Webster v. Fleming, 52 N.E. 975, 178 Ill. 140, affirming 73 Ill.App. 234—15 C.J. p 1300 note 5.

31. Fla.—Zemurray v. Kilgore, 177 So. 714, 130 Fla. 317.
N.Y.—Mott v. Mott, 11 Barb. 127.
15 C.J. p 1299 note 2.

Heirs

A personal covenant does not descend to the heirs of the covenantee.—Dodd v. Rotterman, 161 N.E. 756, 330 Ill. 362.

32. U.S.—Broadwell v. Banks, C.C. Mo., 134 F. 470.

Iowa.—Iowa Implement Co. v. Aetna Explosives Co., 165 N.W. 408, 181 Iowa 1186.

15 C.J. p 1259 note 97 [f].

33. Mass.—Gallison v. Downing, 138 N.E. 315, 244 Mass. 33.

Mich.—Davenport v. Davenport, 18 N.W. 371, 52 Mich. 587.

Mo.—Ladd v. Montgomery, 83 Mo. App. 355.

N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

15 C.J. p 1299 notes 1, 2.

Remedy of remote covenantee, compelled to discharge encumbrance, was against intermediate covenantor whose recourse was against original covenantor.—Smith v. Nussbaum, Mo. App., 71 S.W.2d 82.

34. N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

N.C.—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 108.

Tenn.—Cobb v. Sanders, 1 Tenn.App. 326.

15 C.J. p 1224 note 14, p 1258 note 76.

Right of assignor after conveyance

Where a covenant of seizin is a personal covenant, the grantor may maintain an action for breach after he has conveyed the land.—Clement v. Rutland Bank, 17 A. 717, 61 Vt. 298, 4 L.R.A. 425—Catlin v. Hurlburt, 3 Vt. 403.

35. Cal.—Guaranty Realty Co. v. Recreation Gun Club, 107 P. 625, 12 Cal.App. 383.

36. Wis.—Hilmert v. Christian, 29 Wis. 104.

37. Cal.—Pedro v. Humboldt County, 19 P.2d 776, 217 Cal. 493.

Fla.—Zemurray v. Kilgore, 177 So. 714, 130 Fla. 317.

Mo.—Van Doren v. Relfe, 20 Mo. 455.

N.M.—Parker v. Beasley, 54 P.2d 687, 40 N.M. 68.

15 C.J. p 1224 note 10, p 1258 notes 91, 92.

Covenant of warranty is not contract for payment of money, on which suit must be brought by beneficial owner, under Code 1923 § 5699.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

38. Me.—Wilson v. Widenham, 51 Me. 566—Allen v. Little, 36 Me. 170.

39. Mo.—Mueninghaus v. James, 24 S.W.2d 1017, 324 Mo. 767.

40. U.S.—Mound Valley Vittrified Brick Co. v. Mound Valley Natural Gas & Oil Co., C.C.Kan., 258 F. 936.
Md.—Allen v. Seff, 153 A. 54, 56, 160 Md. 240, citing *Corpus Juris*.
S.C.—Epting v. Lexington Water Power Co., 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

15 C.J. p 1225 note 22.

Parties defendant in action for breach see *infra* § 123.

Persons liable on real covenants see *infra* § 86.

41. Tenn.—Cicalla v. Miller, 58 S.W. 210, 105 Tenn. 255.

42. Tex.—Jones v. Chapman, Civ. App., 41 S.W. 527.

43. Ala.—Abney v. Abney, 62 So. 64, 182 Ala. 213.

44. U.S.—Mound Valley Vittrified Brick Co. v. Mound Valley Natural Gas & Oil Co., C.C.Kan., 258 F. 936.
15 C.J. p 1225 note 27.

45. U.S.—Mound Valley Vittrified Brick Co. v. Mound Valley Natural Gas & Oil Co., *supra*.
15 C.J. p 1225 note 28.

46. U.S.—Mound Valley Vittrified Brick Co. v. Mound Valley Natural Gas & Oil Co., *supra*.

have taken with notice of the covenant.⁴⁷ Not every personal covenant, however, is enforceable in equity against the covenantor's grantee,⁴⁸ but only those of such a character that a court of equity can make an efficient decree and enforce it when made.⁴⁹

B. COVENANTS OF TITLE

§ 37. In General

In the absence of covenants of title in general, the grantee in the conveyance assumes all risks as to title, and, if it fails, he has no remedy either at law or in equity against the grantor.

Covenants of title are not in general implied, in the absence of statutory regulation, as shown supra § 9, and do not apply to land not included in the deed.⁵⁰ In the absence of fraud or mistake, if a deed contains no covenants of title, all questions of title are at the risk of the grantee,⁵¹ so that, if the title fails, he is without remedy, either at law or in equity, against the grantor;⁵² in such case, a question as to good or bad title is irrelevant.⁵³

The general warranty of title contained in ancient deeds has long been supplanted in the United States by a set of covenants,⁵⁴ and, subject to variations arising from local usage in the different states, and even in different parts of the same state, it may be stated broadly, that in the United States the usual covenants of title are the covenants of seizin, or right to convey, against encumbrances, for quiet enjoyment, and of warranty,⁵⁵ and there is sometimes included in the enumeration a cove-

nant for further assurance.⁵⁶ It has been stated that, in lieu of the covenant of warranty, the usual covenant in England is a covenant for further assurance.⁵⁷ In some jurisdictions, there is in use a covenant of nonclaim,⁵⁸ which has usually been regarded as amounting to the ordinary covenant of warranty and as operating equally by way of estoppel.⁵⁹ Various of these covenants are considered in certain aspects separately and in detail, infra §§ 40-49.

The general rule is that covenants of title in praesenti, if broken, are broken when made,⁶⁰ or, as more specifically stated, when the deed is delivered,⁶¹ as, for example, the covenant of seizin, considered infra § 40, the covenant of right to convey, considered infra § 41, and the covenant against encumbrances, considered infra § 42.

It has been stated broadly that a grantee who has paid for the real property and has received the grantor's covenant of title occupies, as between himself and the grantor, the position of surety, to the extent of the real property, for any existing obligation of the grantor against the real property.⁶²

47. Conn.—*H. J. Lewis Oyster Co. v. West*, 107 A. 133, 93 Conn. 513.
 Ga.—*Rosen v. Wolff*, 110 S.E. 377, 152 Ga. 578.
 Md.—*Dawson v. Western Maryland R. Co.*, 68 A. 301, 107 Md. 70, 126 Am.S.R. 337, 14 L.R.A.,N.S., 809, 15 Ann.Cas. 678.
 Mo.—*Poage v. Quincy, O. & K. C. R. Co.*, 23 S.W.2d 221, 225, citing *Corpus Juris*.
 N.Y.—*Rubel Bros. v. Dumont Coal & Ice Co.*, 192 N.Y.S. 705, 200 App. Div. 135, reversing 132 N.Y.S. 204, 111 Misc. 658, and dismissal of appeal denied 135 N.E. 942, 233 N.Y. 618—*Jayne v. Cortland Water Works Co.*, 95 N.Y.S. 227, 197 App. Div. 517.
 Or.—*Guild v. Wallis*, 279 P. 546, 130 Or. 148.
 Vt.—*Queen City Park Ass'n v. Gale*, 3 A.2d 529, 110 Vt. 110.
 15 C.J. p 1225 note 29.

Estoppel to assert that covenant is personal

In action in equity on covenant to protect and save harmless grantor from assessments for street opening, the purchaser from the grantee which assumed obligation of covenant would be estopped to assert

that covenant was personal and did not run with land, notwithstanding estoppel was not fully pleaded.—*Maher v. Cleveland Union Stockyards Co.*, 9 N.E.2d 995, 55 Ohio App. 412.

48. Cal.—*Berryman v. Hotel Savoy Co.*, 117 P. 677, 160 Cal. 559, 37 L.R.A.,N.S., 5.
 15 C.J. p 1225 note 30.

49. Ill.—*Gerling v. Lain*, 109 N.E. 972, 269 Ill. 337.
 15 C.J. p 1225 note 31.

50. Ga.—*White v. Stewart*, 62 S.E. 590, 131 Ga. 460, 15 Ann.Cas. 1198.

51. N.C.—*Guy v. First Carolinas Joint Stock Land Bank of Columbia*, 171 S.E. 341, 205 N.C. 357—*Pritchard v. Pasquotank, etc., Steamboat Co.*, 86 S.E. 171, 169 N.C. 467, L.R.A.1916A 961.
 15 C.J. p 1230 note 33.

52. N.C.—*Pritchard v. Pasquotank, etc., Steamboat Co.*, supra.
 15 C.J. p 1230 note 33.

53. Ala.—*Alger-Sullivan Lumber Co. v. Union Trust Co.*, 92 So. 254, 207 Ala. 138.

54. Ark.—*Davis v. Tarwater*, 15 Ark. 236.

N.Y.—*Townsend v. Morris*, 6 Cow. 123.

Va.—*Tabb v. Binford*, 4 Leigh 132, 31 Va. 132, 28 Am.D. 317.

55. Ala.—*McKleroy v. Tulane*, 34 Ala. 78.

15 C.J. p 1230 note 92.

56. Ill.—*Murphy v. Lockwood*, 21 Ill. 611.

Ohio.—*Footte v. Burnet*, 10 Ohio 317, 36 Am.D. 103.

15 C.J. p 1230 note 93.

57. N.J.—*Wilson v. Wood*, 17 N.J. Eq. 216, 88 Am.D. 231.

58. Ill.—*Holbrook v. Debo*, 99 Ill. 372.

15 C.J. p 1230 note 95.

59. Cal.—*Gee v. Moore*, 14 Cal. 472.
 15 C.J. p 1230 note 95.

60. Ala.—*Copeland v. McAdory*, 13 So. 545, 100 Ala. 558.

N.Y.—*Green Point Sav. Bank v. Krowkow*, 256 N.Y.S. 423, 235 App.Div. 126.

15 C.J. p 1267 note 44.

61. Ill.—*Firebaugh v. Wittenberg*, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

15 C.J. p 1267 note 44.

62. Mo.—*Bacon v. Theiss*, 203 S.W. 254.

§ 38. Knowledge of Defects of Title

The fact that either or both of the parties to a conveyance knew of a defect in the grantor's title, or of his want of title, does not necessarily defeat the right of the grantee to claim the benefit of a covenant.

As a general rule, the fact that the grantee or covenantee,⁶³ or the grantor or covenantor,⁶⁴ or both,⁶⁵ knew, at the time of the conveyance, that the grantor's title was defective or that the grantor had no title in a part or in the whole of the land does not affect the right of recovery for a breach of covenant. Such knowledge may be considered, however, in determining whether it was

intended that the covenant should extend to such defect.⁶⁶ It has been held or recognized that the general rule does not apply where it appears that a grantee purchases at his own peril and risk,⁶⁷ as when an estate is conveyed by a deed describing it so that the parties must understand therefrom that the estate is subservient to a superior title, which cannot be extinguished nor acquired,⁶⁸ or, as in the case of a covenant of general warranty in a deed from an heir to a coheir of all his interest in the estate of their common ancestor.⁶⁹ Furthermore, the general rule does not apply, it seems, where a subsequent grantee seeks

63. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138.

Ark.—Belleville Land & Lumber Co. v. Griffith, 6 S.W.2d 36, 177 Ark. 170.—Texas Co. v. Snow, 291 S.W. 826, 172 Ark. 1128.

Ga.—Curran v. Milhollin, 185 S.E. 380, 53 Ga.App. 270.

Ky.—Lashley v. Lashley, 266 S.W. 247, 205 Ky. 601.—Foxwell v. Justice, 231 S.W. 509, 510, 191 Ky. 749, quoting *Corpus Juris*.

Mo.—Scott v. Tanner, App., 208 S.W. 264.

N.H.—Labonté v. Lacasse, 102 A. 540, 78 N.H. 489.—Chamberlain v. Meeder, 16 N.H. 381.

N.Y.—Callanan v. Keenan, 121 N.E. 376, 224 N.Y. 503, reversing 166 N.Y.S. 71, 179 App.Div. 405, rehearing denied 122 N.E. 877, 225 N.Y. 662.

Or.—Winn v. Taylor, 194 P. 857, 98 Or. 556, affirming 190 P. 342, 98 Or. 556.

S.C.—Sanders v. Boynton, 98 S.E. 854, 112 S.C. 56.

Utah.—Van Cott v. Jacklin, 226 P. 460, 63 Utah 412.

Va.—Bossieux v. Shapiro, 153 S.E. 667, 669, 154 Va. 255, citing *Corpus Juris*.

Wash.—Fagan v. Walters, 197 P. 635, 115 Wash. 454.

15 C.J. p 1230 note 96.

Actual or constructive notice

(1) Neither actual nor constructive notice has an effect on the rights of the grantor or grantee as between themselves.—City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co., 131 N.E. 554, 231 N.Y. 18, 16 A.L.R. 1059, reversing 179 N.Y.S. 914, 190 App.Div. 939, and reargument denied 132 N.E. 903, 231 N.Y. 598.—Hertzog v. Marx, 94 N.E. 1062, 202 N.Y. 1, 35 L.R.A., N.S., 976.

(2) Doctrine of constructive notice by record does not apply against grantee in action against immediate grantor for breach of covenant, failure of grantee to examine records being immaterial.—Bossieux v. Shapiro, 153 S.E. 667, 154 Va. 255.

(3) Where a grantee protects himself by express covenants, he is not required to go further, even though the means by which he could have fully informed himself as to title are at hand.—Brown v. Carr, 23 Ohio N.P., N.S., 361.

(4) Fact that prior deed of minerals was of record was immaterial.—Foxwell v. Justice, 231 S.W. 509, 191 Ky. 749.

(5) The Registry Laws being intended to provide notice to third persons, and having no application to the parties, a purchaser was not under obligation to search the records to ascertain whether his vendor had sold standing timber which was not reserved.—Young v. Sartor, 95 So. 223, 152 La. 1064.

(6) One acquiring land by a deed calling for a clear title does not acquire subject to a recorded sale of standing timber so as to prevent the grantee claiming the benefit of the grantor's warranty.—Woollums v. Hewitt, 77 So. 295, 142 La. 597.

Warranties in general

(1) Warranties cover defects within legal effect of such covenants, whether known to grantee or unknown.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

(2) Under Civ.Code 1910 §§ 4194, 4195, a general warranty of title against the claims of all persons covers defects in the title, although known to the purchaser at the time.—Peters v. Miller, 114 S.E. 640, 154 Ga. 500.

Claim of third person

Knowledge on the part of the grantee or purchaser that a third person was claiming rights in the real property involved does not constitute a defense, nor estop the grantee or purchaser from relying on the covenant.—Jones v. Hodgkins, 26 S.W.2d 19, 233 Ky. 491.—Dotson v. Blankenship, 6 S.W.2d 1073, 224 Ky. 638.

Purchaser of certificate of sale on foreclosure

That plaintiff knew of a defect in

the title when he purchased a foreclosure certificate, giving him a right of action against a prior grantor for breach of covenant of seisin as a part of the mortgage security, did not deprive him of the right to recover.—Knapp v. Foley, 168 N.W. 183, 140 Minn. 423.

Removal of buildings by lessee

Grantee was not precluded from recovering from grantor for breach of warranty resulting from lessee's removal of houses by fact that grantee had notice of contract giving lessee right to remove houses.—Curran v. Milhollin, 185 S.E. 380, 53 Ga.App. 270—15 C.J. p 1230 note 96 [a] (1).

Prior transfer of minerals or mining rights

III.—Ibbetson v. Knodle, 201 Ill.App. 378.

Ky.—Stratton v. McGuire, 60 S.W.2d 380, 249 Ky. 101.—Sales v. Duncan, 256 S.W. 17, 201 Ky. 161.—Bayes v. Blair, 251 S.W. 623, 199 Ky. 455.—Foxwell v. Justice, 231 S.W. 509, 191 Ky. 749.

64. Ky.—Foxwell v. Justice, 231 S.W. 509, 510, 191 Ky. 749, quoting *Corpus Juris*.

15 C.J. p 1230 note 96.

65. Ky.—Foxwell v. Justice, 231 S.W. 509, 510, 191 Ky. 749, quoting *Corpus Juris*.

15 C.J. p 1230 note 96.

Defense to action on purchase-money notes

Notes given for the purchase price of land were unenforceable as against a defense of breach of covenant, in that the vendor and grantor did not have title, even though both parties knew of the defect in the title.—Herron v. Harbour, 182 P. 243, 75 Okl. 127, 29 A.L.R. 906.

66. Pa.—New York, etc., Coal Co. v. Graham, 75 A. 657, 226 Pa. 348.

67. U.S.—Feurer v. Stewart, C.C. Wash., 83 F. 793.

15 C.J. p 1231 note 98.

68. U.S.—Feurer v. Stewart, supra. 15 C.J. p 1231 note 99.

69. Ky.—Combs v. Combs, 114 S.W. 334, 130 Ky. 827.

15 C.J. p 1231 note 1.

to recover on a warranty in a deed made by a remote grantor with full knowledge of the fact that the conveyance was not intended to pass the title but was only a mortgage,⁷⁰ or where a former owner with full knowledge of the condition of the premises seeks to recover on a warranty contained in a reconveyance to him from a subsequent owner.⁷¹

Lack of knowledge by covenantor. An individual who makes a deed containing covenants of clear title must make the title good even though he had no knowledge of defects in title when the deed was executed.⁷²

§ 39. Knowledge of Encumbrances

As a general rule, mere knowledge on the part of the covenantor or grantee of the existence of an encumbrance on the real property involved will not of itself prevent his claiming the benefit of a covenant against or including encumbrances.

Mere knowledge on the part of the purchaser,

grantee, or covenantor, of the existence of an encumbrance on the land will not prevent him from recovering for breach of a covenant against or including encumbrances,⁷³ and this rule has been held to apply with reference to a lien for paving taxes,⁷⁴ or to the existence of an outstanding lease.⁷⁵ Although it has been held or recognized that an agreement or covenant to deliver possession, or of right of possession, is not breached where the covenantor or grantee has knowledge of the lease.⁷⁶ It has been held or recognized that the general rule above stated does not apply where, in addition to the purchaser's knowledge of the encumbrance, there is something in the transaction of sale showing that the parties did not intend that it should be within the covenant.⁷⁷

In some jurisdictions, the general rule is that a covenant which ordinarily may be breached by the existence of an encumbrance applies to an outstanding easement, notwithstanding the covenantor had knowledge of the easement.⁷⁸ In cer-

70. Ky.—Snadon v. Salmon, 121 S. W. 970, 135 Ky. 47.

71. Ind.—Allen v. Kersey, 8 N.E. 557, 104 Ind. 1.

72. Mo.—Batavia v. Leahy, App., 115 S.W.2d 78.

73. Ala.—Colson v. Harden, 141 So. 639, 224 Ala. 665.

Ark.—Texas Co. v. Snow, 291 S.W. 326, 172 Ark. 1128.

Colo.—McClellan v. Morris, 206 P. 575, 71 Colo. 304.

Ill.—Sondag v. Keefe, 251 Ill.App. 378.

Iowa.—Pope v. Coe, 225 N.W. 939, 208 Iowa 759.

Ky.—Bynum v. Bailey, 265 S.W. 1110, 205 Ky. 384.

Mich.—Lavey v. Graessle, 224 N.W. 436, 245 Mich. 681, 64 A.L.R. 1477.

Miss.—Sutton v. Cannon, 100 So. 24, 135 Miss. 368.

Mo.—Scott v. Tanner, App., 208 S.W. 264—Dudley v. Waldrop, App., 183 S.W. 1095.

N.H.—Fletcher v. Chamberlain, 61 N. H. 438.

N.Y.—City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co., 131 N.E. 554, 231 N.Y. 18, 16 A.L.R. 1059, reversing 179 N.Y.S. 914, 190 App.Div. 939, reargument denied 132 N.E. 903, 231 N. Y. 598—Callanan v. Keenan, 121 N.E. 376, 224 N.Y. 503, reversing 166 N.Y.S. 71, 179 App.Div. 405, rehearing denied 122 N.E. 877, 225 N. Y. 662.

Or.—Winn v. Taylor, 194 P. 857, 98 Or. 556, affirming 190 P. 342, 98 Or. 556.

Tex.—Nesley v. Lane, Civ.App., 205 S.W. 154—Askew v. Bruner, Civ. App., 205 S.W. 152.

Va.—Bossieux v. Shapiro, 153 S.E. 667, 154 Va. 255.

Wash.—Fagan v. Walters, 197 P. 635, 115 Wash. 454.

Wis.—Peterson v. Gales, 210 N.W. 407, 191 Wis. 137, 47 A.L.R. 956. 15 C.J. p 1231 note 4.

74. Iowa.—Doyle v. Emerson, 124 N.W. 176, 145 Iowa 358. 15 C.J. p 1232 note 5.

75. Or.—Winn v. Taylor, 194 P. 857, 98 Or. 556, affirming 190 P. 342, 98 Or. 556—Estep v. Bailey, 185 P. 227, 94 Or. 59.

Tenn.—Brown v. Taylor, 88 S.W. 933, 115 Tenn. 1, 4 L.R.A., N.S., 309, 112 Am.S.R. 811. 15 C.J. p 1232 note 6.

Knowledge of outstanding term and acceptance of rent

An action for breach of covenant against encumbrances may be maintained, where there is an outstanding term on lands conveyed, although its existence is known to the grantee at the time of the execution and the delivery of the deed, and acceptance of rent by the grantee from the lessee does not waive breach of the covenant, not being in disaffirmance of the covenant, but operating to reduce damages.—Klipfel v. Borngesser, 188 N.W. 654, 177 Wis. 423.

Estoppel

Affirmative defense that plaintiff knew of oral leases, and agreed to accept tenants, was insufficient to constitute estoppel to claim damages for breach of covenant against encumbrances.—Western Grain Co. v. Beaver Land-Stock Co., 253 P. 539, 120 Or. 678.

76. Ind.—Lindley v. Dakin, 13 Ind. 388—Ream v. Goslee, 52 N.E. 93, 21 Ind.App. 241. 15 C.J. p 1232 note 7.

Right of possession

Occupancy by a tenant, where the fact and title of the tenant are known to the grantee at the time property was conveyed, is not a breach of the covenant of right of possession, and, in the absence of a special contract with reference thereto, the occupant becomes tenant to the grantee.—Lindley v. Dakin, 13 Ind. 388.

77. Ky.—Sansom v. Ewell, 169 S.W. 571, 160 Ky. 112. N.Y.—Bridge v. Pierson, 45 N.Y. 601. 15 C.J. p 1232 note 9.

Deed not accepted subject to lease

Right of grantee to claim the benefit of a covenant of general warranty in respect of outstanding oil and gas lease was not defeated by fact that grantee, at the time of conveyance, had knowledge of oil and gas derricks on the land, in view of special finding by the jury that grantee did not accept deed with knowledge that there was an outstanding lease, which finding was consistent with the general verdict.—Krein v. Steigerwald, 193 A. 390, 123 Pa.Super. 51.

Assumption of encumbrance as affecting liability on covenant against encumbrance see *infra* § 98.

78. Conn.—Hubbard v. Norton, 10 Conn. 422.

Iowa.—Harrison v. Des Moines, etc., R. Co., 58 N.W. 1081, 91 Iowa 114. 15 C.J. p 1232 note 12.

tain jurisdictions, the rule apparently applies to all types of easements,⁷⁹ including public roads or highways over the land conveyed,⁸⁰ but in other jurisdictions in which this general rule is recognized, such road or highway is not within the cove-

nant.⁸¹ In some cases, the view has been taken that such a covenant does not in general apply to open and notorious easements which affect only the condition of the property,⁸² for the reason that

Assurance that easement had expired or been abandoned

The right of a grantee to the benefit of the covenant has been recognized where, although he had noticed some indications of an easement and a deed reserving an easement was recorded, he had received assurances that the easement had expired or had been abandoned.—*Fagan v. Walters*, 197 P. 635, 115 Wash. 454.

Private right of way

Mich.—*Lavey v. Graessle*, 224 N.W. 436, 246 Mich. 681, 64 A.L.R. 1477.

Ohio.—*Kunkle v. Beck*, 1 Ohio App. 70.

15 C.J. p 1276 note 4, p 1286 note 64.

Railroad right of way

Ind.—*Quick v. Taylor*, 16 N.E. 583, 113 Ind. 540.

Iowa.—*Flynn v. White Breast Coal, etc., Co.*, 32 N.W. 471, 72 Iowa 738.

—*Gerald v. Elley*, 45 Iowa 322—*Barlow v. McKinley*, 24 Iowa 69.

Mo.—*Kellogg v. Malin*, 50 Mo. 496, 11 Am.R. 426.

Wash.—*McDonald v. Ward*, 169 P. 351, 99 Wash. 354, L.R.A.1918F 662.

15 C.J. p 1277 note 6.

In Idaho

(1) In a case in which a private right of way was involved, cases supporting the general rule stated in the text have been cited with apparent approval, but it was noted that the general rule was modified to some extent by the case of *Schurger v. Moorman*, 117 P. 122, 20 Idaho 97, 36 L.R.A.,N.S., 313, Ann. Cas.1912D 1114.

(2) As to an easement and right of way for an irrigation canal, however, the view was taken that a purchaser of the land was chargeable with notice of the existence of the canal, and that the existence of the easement and servitude was not a breach of the covenant against encumbrances.—*Schurger v. Moorman*, supra.

In New York

(1) The rule stated in the text has been recognized.—*City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co.*, 131 N.E. 554, 231 N.Y. 18, 16 A.L.R. 1059, reversing 179 N.Y.S. 914, 190 App.Div. 939, and reargument denied 132 N.E. 903, 231 N.Y. 598—15 C.J. p 1232 note 12.

Compare *In re Whitlock*, 32 Barb. 48.

(2) Rule applies to a private right of way.—*Eller v. Moore*, 63 N.Y.S. 83, 48 App.Div. 408.

(3) It has been held that, notwithstanding a grantee was aware that a railroad was located on a portion of the premises involved, he could rely on a covenant in the deed to him that, if the grantor did not give good title and possession to the whole or any part of the premises, and of and to the privileges set forth, the grantee could reconvey and receive back the purchase money.—*Pryor v. City of Buffalo*, 90 N.E. 423, 197 N.Y. 123, affirming 118 N.Y.S. 1136, 134 App.Div. 911, modifying 113 N.Y.S. 249, 61 Misc. 162.

(4) But it has been held that a grantee could not recover in an action for breach of a covenant of quiet possession in view of the presumption that he purchased with knowledge of the facts, where his action was based on the fact that he could not build on a certain part of the land because of a statutory restriction.—*Neeson v. Bray*, 19 N.Y.S. 841.

Existence of easement as breach of covenant against encumbrances in general see *infra* § 101, of covenant of warranty in general see *infra* § 110.

79. Conn.—*Hubbard v. Norton*, 10 Conn. 422.

Mo.—*Kellogg v. Malin*, 50 Mo. 496, 11 Am.R. 426.

Vt.—*Butler v. Gale*, 27 Vt. 739.

80. Conn.—*Hubbard v. Norton*, 10 Conn. 422.

Vt.—*Butler v. Gale*, 27 Vt. 739.

Existence of public highway as breach of covenant against encumbrances in general see *infra* § 101, of Covenant of Warranty in general see *infra* § 110.

81. Iowa.—*Harrison v. Des Moines, etc., R. Co.*, 58 N.W. 1081, 91 Iowa 114.

In Maine

Where land conveyed is bounded by the center of a public road, and is so described in the deed, the grantee accepts the land cum onere, and may not complain of the encumbrance as a breach of the covenants in his deed.—*Holmes v. Danforth*, 21 A. 845, 83 Me. 139.

In New York

(1) It seems that a public highway and the lawful structures thereon constitute an exception to the general rule.—*Callanan v. Keenan*, 121 N.E. 376, 224 N.Y. 503, reversing 166 N.Y.S. 71, 179 App.Div. 405, rehearing denied 122 N.E. 877, 225 N.Y. 662—*Pryor v. City of Buffalo*, 90 N.E. 423, 177 N.Y. 123, affirming 118

N.Y.S. 1136, 134 App.Div. 911, modifying 113 N.Y.S. 249, 61 Misc. 162.

(2) A grantee who took his deed knowing that an elevated railroad was in operation in the street on which the lot abutted, took with notice that the railroad company had some claim of right to the easements in the street, and he could not recover from his grantor on the ground that such railroad was an encumbrance, within a covenant against encumbrances.—*Bacharach v. Von Eiff*, 26 N.Y.S. 842, 74 Hun 533.

In Washington

(1) It has been stated broadly that a public highway is impliedly exempted from the effect of a covenant against encumbrances.—*Hoyt v. Rothe*, 163 P. 925, 95 Wash. 369.

(2) This rule is, however, confined to rural property and does not apply to city property.—*Bank of Alaska v. Ashland*, 224 P. 7, 128 Wash. 572.

82. Ark.—*Kahn v. Cherry*, 198 S.W. 266, 131 Ark. 49.

Wis.—*Kutz v. McCune*, 22 Wis. 628, 99 Am.D. 85.

15 C.J. p 1232 note 13.

Private or public easement

In some jurisdictions, an easement obviously and notoriously affecting the physical condition of land at the time of its sale is not embraced in a general covenant against encumbrances, whether it is a private or public easement.—*Chandler v. Gault*, 194 N.W. 33, 181 Wis. 5—15 C.J. p 1232 note 13.

Railroad right of way has been regarded in some cases as within the rule stated in the text.—*Van Ness v. Royal Phosphate Co.*, 53 So. 381, 382, 60 Fla. 284, 30 L.R.A.,N.S., 833, Ann.Cas.1912C 647—15 C.J. p 1277 note 7.

Telephone line

The presence of a transformer and telephone line on land sold was not such an encumbrance as constituted a defect in vender's title, entitling the purchaser to sue for breach of covenants of seisin and against encumbrances, the presence thereof being sufficient to charge the purchaser with full knowledge of the character and nature of the easement, which was open, obvious, and notorious.—*Chandler v. Gault*, 194 N.W. 33, 181 Wis. 5.

In Georgia

In a case in which the court declined to express an opinion as to whether a private road would be a

the purchaser or grantee is presumed to have contracted with reference thereto.⁸³

Lack of knowledge by covenantor. An individual who makes a deed containing covenants of clear title must make the title good even though he had no knowledge of an existing encumbrance when the deed was executed,⁸⁴ and a general warranty of title is a warranty of title as against a lien which has attached at the time the deed is given, notwithstanding the grantor at the time of execution of the deed had no knowledge of the existence of the lien.⁸⁵

breach of a covenant of warranty against encumbrances, it was held that the existence of a public road on land, of which the grantee had knowledge at the time of his purchase, was not a breach of such covenant.—*Desvergers v. Willis*, 56 Ga. 515, 21 Am.R. 289.

In Kentucky

(1) The rule stated in the text has been recognized in respect of a railroad right of way, on the ground that it must be presumed that the price was fixed with reference to the actual condition of the land.—*Patterson v. Jones*, 32 S.W.2d 408, 235 Ky. 838.—*Bird v. Bank of Williams-town*, 13 S.W. 430, 11 Ky.L. 368.

(2) A like rule applies in respect of a public highway.—*Butte v. Riffe*, 98 Ky. 352.

(3) It seems that the rule is different as to a private way.—*Helton v. Asher*, 123 S.W. 285, 135 Ky. 751.

In Pennsylvania

(1) The rule stated in the text has been recognized or applied.—*Memmert v. McKee*, 4 A. 542, 112 Pa. 315—15 C.J. p 1232 note 13, p 1276 note 99 [a]. (3).

(2) A private right of way may be within the covenant if the land was not plainly and openly subject to the easement.—*Eby v. Elder*, 15 A. 423, 122 Pa. 342.

(3) A private way of which the grantee had only constructive notice was held to be within the covenant involved.—*Wilson v. Cochran*, 46 Pa. 229.

(4) A distinction has been made between an implied covenant against encumbrances and an express and positive covenant against encumbrances in recognizing that the latter would be operative and effective in the case of an existing railroad right of way, notwithstanding the purchaser's knowledge.—*Strong v. Brinton*, 63 Pa.Super. 267.

In Tennessee

(1) In a comparatively recent case in the court of appeals, the view was

taken, in respect of a joint driveway located on lands of adjoining owners, that, in view of the facts that the driveway was open, visible, obvious, and notorious, and that the parties to the conveyance contracted with reference to it, it could not be considered an encumbrance within the meaning of the covenant against encumbrances.—*Jones v. Whitaker*, 12 Tenn.App. 551.

(2) In an earlier case in the former court of chancery appeals, it was pointed out that the grantee's knowledge of a passageway across the land at the time of purchase would not necessarily show that he knew of the right of a third person to use it, and it was held that, in view of the finding of the jury showing that the covenantee did not know of the legal existence of the easement, there was a breach of covenant.—*Perry v. Williamson*, Tenn.Ch.A., 47 S.W. 189.

83. Ark.—*Kahn v. Cherry*, 198 S.W. 266, 131 Ark. 49.
15 C.J. p 1232 note 13.

84. Mo.—*Batavia v. Leahy*, App., 115 S.W.2d 78.

85. Ga.—*Pone v. Barbre*, 196 S.E. 287, 57 Ga.App. 684.

86. Conn.—*Lockwood v. Sturdevant*, 6 Conn. 373.
N.C.—*Pridgen v. Long*, 98 S.E. 451, 177 N.C. 189.
15 C.J. p 1233 note 20.

Title in fee

(1) Covenant of title in fee simple is covenant of seisin.—*Whatcom Timber Co. v. Wright*, 173 P. 724, 102 Wash. 566.—*Potwin v. Blasher*, 37 P. 710, 9 Wash. 460.

(2) Covenant that grantor was lawfully seized of an indefeasible estate in fee simple, etc., in accordance with Remington Code § 8747 subd 1, Remington Rev.St. § 10552 subd 1, is a covenant of seisin.—*Brown v. Carpenter*, 169 P. 331, 99 Wash. 227.

Indefeasible estate in fee simple

The rule stated in the text has been recognized in respect of a covenant of seisin of an indefeasible

§ 40. Covenant of Seizin

While, according to some cases, an indefeasible title is not necessary in order to support the covenant of seisin, the covenant is now usually regarded as a covenant of title, involving an assurance that the covenantor has the estate which he purports to convey. It is usually regarded as a covenant in presenti.

A covenant of seisin is now generally regarded as a covenant of title,⁸⁶ and has been defined to be an assurance that the grantor has the very estate in quantity and quality which he purports to convey.⁸⁷ In some cases, however, it has been held that it is not necessary that the covenantor should have a seisin under an indefeasible title,⁸⁸ but that

estate in fee simple.—*Frazer v. Peoria County*, 74 Ill. 282—*Clapp v. Hardman*, 25 Ill.App. 509.

Statute

Under Real Property Law § 253, covenant of seisin means that grantor at time of conveyance was lawfully seized of good, absolute, and indefeasible estate of inheritance in fee simple, and had power to convey, and possession will not satisfy covenant.—*Hilliker v. Rueger*, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907.

87. Fla.—*Burton v. Price*, 141 So. 728, 729, 105 Fla. 544.
N.C.—*Potter v. Miller*, 133 S.E. 193, 195, 191 N.C. 814.
Tenn.—*Pace v. Watson*, App., 126 S.W.2d 404, 409—*Grant Bond & Mortgage Co. v. Ogle*, 65 S.W.2d 1091, 17 Tenn.App. 112—*Young v. Brannan*, 5 Tenn.App. 1.
15 C.J. p 1233 note 21.

Primary and secondary meaning

Covenant of seisin implies that at the time the deed is delivered "the covenantor then had, not only the possession, but the right of possession and the right of property. This is the primary meaning of seisin; its secondary meaning is possession alone."—*Pridgen v. Long*, 98 S.E. 451, 454, 177 N.C. 189.

In Nebraska

(1) The rule stated in the text has been recognized.—*Real v. Hollister*, 29 N.W. 189, 20 Neb. 112.

(2) In an earlier case, the view was expressed that if the grantor was in exclusive possession under claim of title, even if adverse to the owner, the covenant was not broken until the purchaser or those claiming under him were evicted by title paramount.—*Scott v. Twiss*, 4 Neb. 133.

88. Mass.—*Marston v. Hobbs*, 2 Mass. 433, 3 Am.D. 61.
15 C.J. p 1234 note 23.

In Indiana

(1) Good title in fee simple is not, under all circumstances, necessary to support a covenant of seisin,

a seizin in fact is sufficient,⁸⁹ whether the covenantor gained it by his own disseizin or under a disseizin.⁹⁰

The authorities agree that an indefeasible seizin is required where the covenant expressly provides that the seizin is of such an estate,⁹¹ or where use of particular words specified by statute amounts to a covenant that the grantor is seized of an indefeasible estate in fee simple.⁹² The view has been taken, however, that a covenant of seizin extends only to title existing in a third person and not to one existing in the covenantee, as shown infra § 96.

The covenant is usually referred to as a personal covenant, as shown supra § 22. The general

rule is that it is a covenant in praesenti and that, if broken, it is broken as soon as it is made,⁹³ or, more specifically, when the deed or conveyance is delivered.⁹⁴ In some jurisdictions, however, the view has been taken that the covenant is not broken when made where the grantor was in actual possession at the time of conveyance and the grantee entered under the deed.⁹⁵ These rules should be considered in connection with the detailed discussions as to whether the covenant of seizin runs with the lands, infra § 63, as to performance or breach of such covenant, infra § 96, as to the time to sue on covenants, infra § 122, and as to damages recoverable, infra § 143.

A covenant of seizin is equivalent to a covenant of right to convey,⁹⁶ but it is not necessarily a cove-

and any existing title may be sufficient.—Axtel v. Chase, 77 Ind. 74—15 C.J. p 1234 note 23.

(2) In an action in which the covenant declared on was that defendant grantor was "seized in fee" of the land, it was said that "in an action on the covenant of seizin, it is sufficient to allege, in the direct negative, that the defendant was not seized in fee."—Martin v. Baker, Ind., 5 Blackf. 332, 236.

89. Mass.—Follett v. Grant, 5 Allen 174.
15 C.J. p 1234 note 23.

In Ohio

(1) Actual possession by the grantor at the time the conveyance is made is sufficient to support the covenant until eviction, where the grantee entered under the deed.—Great Western Stock Co. v. Saas, 24 Ohio St. 542—15 C.J. p 1234 note 23.

(2) The definition of the covenant "as an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey" has, however, been quoted with apparent approval.—Wetzel v. Richcreek, 40 N.E. 1004, 53 Ohio St. 62, 68.

(3) A covenant that the grantors are "the true and lawful owners of said premises and have full power to convey the same" has apparently been regarded as denoting the possession of a fee simple title.—McCarthy v. Hansel, 4 Ohio App. 425.

90. Mass.—Marston v. Hobbs, 2 Mass. 433, 3 Am.D. 61.
15 C.J. p 1234 note 23.

91. Ala.—Mackintosh v. Stewart, 61 So. 956, 181 Ala. 328.
15 C.J. p 1234 note 25.

92. Ark.—Seldon v. Dudley E. Jones Co., 85 S.W. 778, 74 Ark. 348.
15 C.J. p 1234 note 27.

Statutory provisions in respect of implied covenants in general see supra § 10.

93. Ala.—Russell v. Belsher, 128 So. 452, 221 Ala. 360—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

Ill.—Meyers v. Veres, 245 Ill.App. 127.

Iowa.—Mitchell v. Kepler, 39 N.W. 241, 75 Iowa 207.

N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

N.M.—Beecher v. Tinnin, 189 P. 44, 26 N.M. 59.

N.Y.—Green Point Sav. Bank v. Krowkow, 256 N.Y.S. 428, 235 App.Div. 126.

Okl.—Rogers v. Amrey, 251 P. 1013, 123 Okl. 70—Rennie v. Gibson, 183 P. 483, 75 Okl. 282—Riddle v. Hudson, 172 P. 921, 68 Okl. 172.

Pa.—Seitzinger v. Weaver, 1 Rawle 377.

Tenn.—Curtis v. Brannon, 38 S.W. 1073, 98 Tenn. 153, 68 L.Ed. 760—Page v. Watson, App., 126 S.W.2d 404—Grant Bond & Mortgage Co. v. Ogle, 65 S.W.2d 1091, 17 Tenn. App. 112—Young v. Brannan, 5 Tenn.App. 1.

Tex.—Langford v. Newsom, Com. App., 220 S.W. 544, affirming Newsome v. Langford, Civ.App., 174 S.W. 1036.

Va.—Otey v. Oakey, 160 S.E. 8, 10, 157 Va. 314, citing *Corpus Juris*.

Wash.—Whatcom Timber Co. v. Wright, 173 P. 724, 102 Wash. 566—Brown v. Carpenter, 169 P. 331, 99 Wash. 227—Wick v. Rea, 103 P. 462, 54 Wash. 424—Potwin v. Blasher, 37 P. 710, 9 Wash. 460.

Va.—Otey v. Oakey, 160 S.E. 8, 157 Va. 314.

15 C.J. p 1246 note 7.

Want of possession and title

Covenant of seizin was broken as soon as made where at that time the covenantor was not in possession of, and had no title to, the property in question.—Adkins v. Tomlinson, 26 S.W. 573, 121 Mo. 487—Rainey v. Davidson, 26 S.W.2d 841, 224 Mo. App. 679—15 C.J. p 1246 notes 7, 10.

94. Colo.—Stone v. Rozich, 297 P. 999, 88 Colo. 399.

Fla.—Burton v. Price, 141 So. 722, 105 Fla. 544.

Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

Ky.—Dortch's Ex'r v. Willoughby, 113 S.W.2d 832, 272 Ky. 231.

N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907.

N.C.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 164 S.E. 323, 202 N.C. 803—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 108—Cover v. McAden, 112 S.E. 817, 183 N.C. 641—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189—Wilson v. Vreeland, 97 S.E. 427, 176 N.C. 504.

N.D.—Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 46 N.D. 646.

Tenn.—Cobb & Wife v. Sanders, 1 Tenn.App. 326.

15 C.J. p 1246 note 7.

95. Ohio.—Great Western Stock Co. v. Saas, 24 Ohio St. 542.

15 C.J. p 1246 note 10.

96. Ala.—Russell v. Belsher, 128 So. 452, 221 Ala. 360.

Ky.—Fitzhugh v. Croghan, 2 J.J. Marsh. 429, 430, 19 Am.D. 139.

N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907.

N.C.—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189.

Tex.—Langford v. Newsom, Com. App., 220 S.W. 544, 545.

15 C.J. p 1234 note 31.

Synonyms

The covenants of "seizin" and of "good right to convey" are usually regarded as synonymous.

Okl.—Rogers v. Amrey, 251 P. 1013, 123 Okl. 70—Rennie v. Gibson, 183 P. 483, 75 Okl. 282.

Tex.—Langford v. Newsom, Com. App., 220 S.W. 544, 545, affirming Newsom v. Langford, Civ.App., 174 S.W. 1036.

nant against encumbrances.⁹⁷ The covenant of warranty, considered in detail *infra* §§ 47-49, has been distinguished from the covenant of seizin on the grounds that the former in general involves disturbance of possession and relates to events subsequent to the making of the covenant, whereas the covenant of seizin in general goes to the title only, does not refer to possession, and is broken, if at all, when the covenant is made;⁹⁸ and like distinctions between the covenant of seizin and the covenant for quiet enjoyment, considered in detail *infra* § 45, have been recognized.⁹⁹ Furthermore, the covenant of seizin differs from the covenant of warranty in that a covenant of seizin does not in general prevent the grantor from setting up an after-acquired title in himself.¹

§ 41. Covenant of Right to Convey

While, according to some cases, the covenant of good right to convey implies only actual seizin and possession, it has been regarded as a covenant relating to title. It is usually regarded as a covenant in praesenti.

The covenant of good right to convey, which has been regarded as synonymous with, or equivalent to, the covenant of seizin, as shown *supra* § 40, according to some cases, relates to the title,² importing only that the grantor had a right to convey.³

It has been said that the covenant is a guaranty against any title existing in a third person which might defeat the estate granted.⁴ If, however, the doctrine of actual seizin, considered *supra* §

40, controls, the covenant of good right to convey implies only actual seizin and possession.⁵

In English deeds there is sometimes inserted a covenant that the grantor has good right to convey an indefeasible estate in fee; but it has been stated that this covenant is seldom introduced in our deeds of conveyance, and the view has been taken that, on the construction of covenants against encumbrances, such covenant is unnecessary.⁶

The covenant has been regarded as a personal covenant, as shown *supra* § 22. According to the rule usually recognized, it is a covenant in praesenti and, if broken, it is broken as soon as it is made,⁷ or, as more specifically stated, when the deed is delivered.⁸ In some jurisdictions, however, the view has been taken that the covenant is not broken when made if the grantor is in actual possession when the conveyance is made and the grantee enters under the deed.⁹ These rules should be considered in connection with the detailed discussions as to whether the covenant of right to convey runs with the land, *infra* § 64, as to performance and breach, *infra* § 97, as to the time to sue on covenants, *infra* § 122, and as to damages recoverable, *infra* § 144.

The covenant of warranty, considered in detail, *infra* §§ 47-49, has been distinguished from the covenant of full power to convey on the ground that the former in general involves disturbance of possession and relates to a time subsequent to the making of the covenant, whereas the covenant of full power to convey in general goes to the title

Va.—Otey v. Oakey, 160 S.E. 8, 157 Va. 314.

15 C.J. p 1234 note 31 [a].

97. In Kentucky

(1) The rule stated in the text has been recognized.—Fitzhugh v. Croghan, 2 J.J.Marsh. 429, 439, 19 Am.D. 139.

(2) The view has been taken, however, that a covenant "that the title so conveyed is clear, free and unencumbered" is a covenant of seizin.—Fennessey v. Abbott, 5 Ky.Op. 42.

98. N.J.—Greenwood v. Robbins, 154 A. 333, 334, 108 N.J.Eq. 122.

N.C.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 164 S.E. 323, 202 N.C. 803—Cover v. McAden, 112 S.E. 817, 183 N.C. 641. Tenn.—Allison v. Allison, 1 Yerg. 16—Kincaid v. Brittain, 5 Sneed, Tenn., 119.

15 C.J. p 1237 note 5 [b]. See also 15 C.J. p 1234 note 33.

Inclusion of covenant of seizin in covenant of warranty see *infra* § 47.

Performance and breach in general of covenant of warranty, see *infra*

§§ 110-112, of covenant of seizin, see *infra* § 96.

99. N.Y.—Abbott v. Allen, 14 Johns. 248, 252.

N.C.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 164 S.E. 323, 202 N.C. 803—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189.

Tenn.—Kincaid v. Brittain, 5 Sneed 119.

Performance and breach of covenant for quiet enjoyment in general see *infra* § 108.

1. Me.—Thompson v. Thompson, 19 Me. 235, 240, 36 Am.D. 751.

15 C.J. p 1234 note 33.

2. Conn.—Lockwood v. Sturdevant, 6 Conn. 378.

3. Ky.—Triplett v. Gill, 7 J.J.Marsh. 432.

15 C.J. p 1234 note 36.

4. Tex.—Langford v. Newsom, Com. App., 220 S.W. 544, affirming Newsom v. Langford, Civ.App., 174 S.W. 1036.

5. Mass.—Follett v. Grant, 5 Allen 174.

15 C.J. p 1234 note 40.

6. Mass.—Prescott v. Trueman, 4 Mass. 627, 3 Am.D. 246.

7. Ala.—Russell v. Belsher, 128 So. 452, 221 Ala. 360.

Ill.—Meyers v. Veres, 245 Ill.App. 127.

N.M.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

Okl.—Rogers v. Amrey, 251 P. 1013, 123 Okl. 70—Rennie v. Gibson, 183 P. 483, 75 Okl. 282.

Tex.—Westrope v. Chambers' Estate, 51 Tex. 178—Langford v. Newsom, Com.App., 220 S.W. 544, affirming Newsom v. Langford, Civ.App., 174 S.W. 1036—Compton v. Trico Oil Co., Civ.App., 120 S.W.2d 534, error refused.

Va.—Otey v. Oakey, 160 S.E. 8, 10, 157 Va. 314, citing *Corpus Juris*, 15 C.J. p 1246 note 12.

8. Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

15 C.J. p 1246 note 12.

9. Ohio.—Devore v. Sunderland, 17 Ohio 52, 49 Am.D. 442.

only, does not refer to possession, and is broken, if at all, when the covenant is made.¹⁰

§ 42. Covenant against Encumbrances

The covenant against encumbrances in general constitutes security against rights to, or interests in, the real property granted which may subsist in a third person to the diminution in value of the estate granted, although consistent with the passing of the fee. The covenant is in general a covenant in praesenti.

While it has been stated that the word "encumbrance" has no technical legal meaning,¹¹ it is said to be anything which "constitutes a burden upon the title",¹² "a burden or charge,"¹³ "any right existing in another to use the land or whereby the use by the owner is restricted",¹⁴ or any claim which "charges, burdens, obstructs, or impairs its use [of the land], or prevents or impedes its transfer."¹⁵ As now generally recognized by the courts, a covenant against encumbrances is one which has for its object security against those rights to, or interest in, the land granted which may subsist in third persons to the diminution in value of the estate although consistent with the passing of the fee.¹⁶ In general, the covenant extends to adverse claims or liens on the estate conveyed whereby the same may be defeated wholly or in part,¹⁷ whether, according to some cases, the claims or liens are uncertain and contingent or other-

wise.¹⁸ These rules should be considered in connection with the detailed discussions as to performance and breach of the covenant, including discussions as to particular charges, claims, or liens, the existence of which will constitute a breach of the covenant, *infra* §§ 98-107.

Broadly speaking, the covenant is an engagement that the title conveyed is unencumbered;¹⁹ it is not a covenant to defend a suit on an encumbrance.²⁰ Where grantors covenant generally against encumbrances made by them, it may be construed as extending to several as well as joint encumbrances.²¹

Apart from covenants implied under statute, from the use of particular words, considered *supra* § 13, what will constitute a covenant against encumbrances, as well as its scope, may become a question of construction, to be determined by the intention of the parties as manifested by the deed.²² Some statutes make detailed and mandatory provision as to how a covenant that the premises are free from encumbrances is to be construed.²³

The covenant has been regarded as a personal covenant, as shown *supra* § 22. According to the rule usually recognized, it is a covenant in praesenti and, if broken, it is broken, as soon as it is made,²⁴ or, as more specifically, stated, when the deed is

10. Tenn.—Allison v. Allison, 1 Yerg. 16.

Performance and breach in general: Of covenant of good right to convey, see *infra* § 97.

Of covenant of warranty, see *infra* §§ 110-112.

11. Ala.—Tuskegee Land, etc., Co. v. Birmingham Realty Co., 49 So. 378, 161 Ala. 542, 23 L.R.A., N.S., 992.

12. Mich.—Post v. Campau, 3 N.W. 272, 42 Mich. 90, 94.

13. Minn.—Carver v. Lane, 190 N.W. 68, 69, 153 Minn. 203.

14. N.Y.—Forster v. Scott, 32 N.E. 976, 136 N.Y. 577, 582, 18 L.R.A. 543.

15. N.Y.—Anonymous, 2 Abb.N.Cas. 56, 63.

16. Iowa.—First Unitarian Soc. v. Citizens' Sav., etc., Co., 142 N.W. 87, 162 Iowa 389, 51 L.R.A., N.S., 428, Ann.Cas.1916B 575.

Kan.—Shunk v. Fuller, 236 P. 449, 118 Kan. 682.

Minn.—Carver v. Lane, 190 N.W. 68, 69, 153 Minn. 203.

N.Y.—Johnson v. State, 175 N.Y.S. 784, 188 App.Div. 33, affirming 175 N.Y.S. 234, 104 Misc. 201.

Tex.—Faull v. City of Dallas, Civ. App., 97 S.W.2d 1031, error dismissed.

15 C.J. p 1235 notes 48, 57.

Paramount right

Mass.—Prescott v. Trueman, 4 Mass. 627, 3 Am.D. 246.

17. Mass.—Shearer v. Ranger, 22 Pick. 447.

15 C.J. p 1235 note 57.

18. Mass.—Shearer v. Ranger, *supra*.

15 C.J. p 1235 note 57.

19. Tex.—Walcott v. Kershner, Com. App., 291 S.W. 195, reversing, Civ. App., 285 S.W. 902—Faull v. City of Dallas, Civ.App., 97 S.W.2d 1031, 1033, error dismissed.

20. Mich.—S. C. Hall Lumber Co. v. Gustin, 20 N.W. 616, 54 Mich. 624.

21. U.S.—Duvall v. Craig, Ky., 2 Wheat. 45, 4 L.Ed. 180.

22. Me.—Cole v. Lee, 30 Me. 392.

N.Y.—Stearns v. Eldridge, 16 Johns. 254.

15 C.J. p 1235 note 64.

Excepted encumbrances

Grantee is presumed to have relied on covenants contained in deed and is not chargeable with notice of restrictions not referred to therein.—Feigin v. Russek, 226 N.Y.S. 258, 131 Misc. 30.

23. In New York, in view of the mandatory character of Real Prop.L. § 253 subd 3, defining what is meant by freedom from encumbrances, under a deed containing a covenant that

the premises are free from encumbrances, except as aforesaid, restrictions assumed by grantee in warranty deed could not be extended beyond those specified in deed.—Feigin v. Russek, *supra*.

24. Ala.—Alexander v. Bond Bros., 168 So. 561, 232 Ala. 533—Colson v. Harden, 141 So. 639, 224 Ala. 665—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448—Blankenship v. Lanier, 101 So. 763, 212 Ala. 60—Anniston Lumber & Mfg. Co. v. Griffin, 73 So. 418, 419, 198 Ala. 122.

Ark.—Smith v. Thomas, 278 S.W. 39, 169 Ark. 1110—Kahn v. Cherry, 198 S.W. 266, 131 Ark. 49.

Ill.—Meyers v. Veres, 245 Ill.App. 127.

Mich.—Lavey v. Graessle, 224 N.W. 436, 245 Mich. 681, 64 A.L.R. 1477. N.J.—Greenwood v. Robbins, 154 A. 338, 108 N.J.Eq. 122—Emery v. Hansen, 151 A. 731, 107 N.J.Eq. 117—Goldsmith v. Meyer, 109 A. 298, 94 N.J.Law 40—Denman v. Mentz, 52 A. 1117, 63 N.J.Eq. 618—Kellog v. Platt, 33 N.J.Law 328.

N.M.—Parker v. Beasley, 54 P.2d 687, 40 N.M. 68—Beecher v. Tinnin, 189 P. 44, 26 N.M. 59.

N.Y.—Doonan v. Killilea, 118 N.E. 851, 222 N.Y. 399, reversing 155 N.Y.S. 1103, 170 App.Div. 954, and reargument denied and remittitur

delivered.²⁵ The breach at the time the covenant is made may, however, be merely technical or nominal,²⁶ and, according to some cases, the covenant is in effect a covenant or contract of indemnity.²⁷ These general rules as to the time of breach and as to the nature of the covenant as one of indemnity should be considered in connection with the detailed discussions as to whether the covenant runs with the land, *infra* § 65, as to performance or breach, *infra* §§ 98-107, as to time to sue on covenants, *infra* § 122, and as to damages recoverable, *infra* § 145.

The covenant of warranty, considered in detail *infra* §§ 47-49, has been distinguished from the covenant against incumbrances on the grounds that the former is in general a covenant in futuro and runs with the land, whereas the covenant against incumbrances is a covenant in praesenti, is broken when made, and does not run with the land,²⁸ and that an eviction or its equivalent is in general an element of a breach of a covenant of warranty, but is not an element of a breach of a covenant against encumbrances.²⁹ A like distinction in respect of eviction as an element of breach has been made between the covenant for quiet enjoyment, considered in detail, *infra* § 45, and the covenant against encumbrances.³⁰

Questions as to the effect of knowledge of the

existence of encumbrances on the operative effect of a covenant against encumbrances are considered *supra* § 39.

§ 43. — Easements

Questions as to whether easements are encumbrances within the meaning of, and as to whether the existence of easements constitutes a breach of, a covenant against encumbrances are considered in detail *infra* § 101. Questions as to the effect of knowledge of the existence of easement on the operative effect of a covenant against encumbrances are considered *supra* § 39.

§ 44. — Taxes and Assessments

Questions as to whether liens or charges for taxes or special assessments are encumbrances, within the meaning of, and as to whether the existence of such liens or charges constitutes a breach of, a covenant against encumbrances are considered in detail *infra* § 106.

Examine Pocket Parts for later cases.

§ 45. Covenant for Quiet Enjoyment

The covenant for quiet enjoyment is an assurance against the effect of a defective title and of any resultant disturbance, subject to such limitations as are contained in the conveyance.

amended 120 N.E. 861, 223 N.Y. 559
—Lauer v. Maga, 1 N.Y.S.2d 743.
N.C.—Lockhart v. Parker, 126 S.E.
313, 189 N.C. 138, quoting *Corpus Juris*.
Ohio.—Lyons v. Chapman, 178 N.E.
24, 40 Ohio App. 1.—Schick v. Uil-
land, 24 Ohio N.P.N.S., 401.
Pa.—Herbert v. Northern Trust Co.,
112 A. 471, 269 Pa. 306.
Wis.—Capital City Lumber Co. v. Ol-
son, 208 N.W. 891, 190 Wis. 182.
12 C.J. p 1247 note 16.

Accrual of right of action

(1) Covenant against encumbrances in deed was broken as soon as made, and right of action for breach then accrued.—Garrison v. Downing, 138 N.E. 315, 244 Mass. 33.

(2) Right of action for breach of covenant against encumbrances accrues immediately on execution of deed.—Smith v. Thomas, 278 S.W. 39, 199 Ark. 1110.

25. Ala.—Bailey v. Levy, 104 So. 415, 213 Ala. 80.

Conn.—Tomes v. Thompson, 151 A. 531, 112 Conn. 190, 72 A.L.R. 297.

Ill.—Firebaugh v. Wittenberg, 141 N. E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

N.C.—Thompson v. Avery County, 5 S.E.2d 146, 216 N.C. 405.

Pa.—Berger v. Weinstein, 63 Pa. Super. 153.

Tex.—Walcott v. Kershner, Com.App., 291 S.W. 195, reversing Kershner v. Walcott, Civ.App., 285 S.W. 902. 12 C.J. p 1247 note 16.

26. Iowa.—McClure v. Dee, 88 N.W. 1093, 115 Iowa 546, 91 Am.S.R. 181. N.Y.—Green Point Sav. Bank v. Krow, 256 N.Y.S. 428, 235 App.Div. 126.

Ohio.—Nyce v. Obertz, 17 Ohio 71. 15 C.J. p 1247 note 22.

Implied covenant

Covenant against encumbrances, implied, under statute, from use of certain words, looks to the future in certain respects, notwithstanding there is a technical breach as soon as made.—Woodward v. Harlin, 39 S.W.2d 8, 121 Tex. 46, reversing, Civ. App., 20 S.W.2d 158, and rehearing denied 41 S.W.2d 204, 121 Tex. 46.—Seibert v. Bergman, 44 S.W. 63, 91 Tex. 411.

27. N.Y.—Hansen v. Pattberg, 206 N.Y.S. 866, 212 App.Div. 49.—Lauer v. Maga, 1 N.Y.S.2d 743.

Or.—De Carl v. O'Brien, 41 P.2d 411, 150 Or. 35, 97 A.L.R. 693.

R.I.—Zambrano v. Morvillo, 161 A. 106, 52 R.I. 438.

Tex.—Woodward v. Harlin, 39 S.W. 2d 8, 121 Tex. 46, reversing, Civ. App., 20 S.W.2d 158, and rehearing denied 41 S.W.2d 204, 121 Tex. 46.—Faull v. City of Dallas, Civ.App.,

97 S.W.2d 1031, 1033, error dismissed.—Kershner v. Walcott, Civ. App., 285 S.W. 902, reversed on other grounds Walcott v. Kershner, Com.App., 291 S.W. 195.

15 C.J. p 1247 note 22, p 1271 note 25.

28. N.J.—Kellog v. Platt, 33 N.J. Law 328.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 123.

Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

15 C.J. p 1236 notes 65-67.

29. N.Y.—Stanton v. Conley, 278 N. Y.S. 275, 244 App.Div. 84.—Sturmer v. Holden, 213 N.Y.S. 339, 215 App. Div. 33.—Mead v. Stackpole, 40 Hun 473.

Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

Performance and breach in general: Of covenant against encumbrances see *infra* §§ 98-107.

Of covenant of warranty see *infra* §§ 110-112.

30. N.Y.—Stanton v. Conley, 278 N. Y.S. 275, 244 App.Div. 84.—Sturmer v. Holden, 213 N.Y.S. 339, 215 App. Div. 33.—Mead v. Stackpole, 40 Hun 473.

15 C.J. p 1236 notes 65-67.

Performance and breach of covenant for quiet enjoyment in general see *infra* § 108.

While it has been laid down that the covenant for quiet enjoyment goes to the possession and not to the title,³¹ such covenant is an assurance against the consequences of a defective title and of any disturbance thereupon,³² and, broadly and generally speaking, it extends to all lawful outstanding claims on the premises conveyed,³³ subject to the general rule that it applies only to the acts of those claiming under paramount and lawful title existing at the time the covenant was made.³⁴

The covenant has been regarded as an agreement that the grantor will not trouble, molest, evict, nor disturb the grantee,³⁵ and also as a covenant against disturbance by any encumbrancer.³⁶ As sometimes stated, the covenant not only bars the grantor from claiming the estate granted, but also requires him to defend it when assailed by a paramount title.³⁷ Where, however, the party covenants for quiet enjoyment against himself and those claiming under him, he excludes the idea of a covenant against all the world.³⁸ Various applications and qualifications of these rules are considered in connection with the detailed discussion of performance and breach of the covenant, *infra* § 108.

In general, the covenant operates prospective-ly or in futuro,³⁹ and it is usually held or recogniz-

ed, subject to certain qualifications or limitations, that the covenant runs with the land as shown *infra* § 66, and that there is no breach until there has been an eviction or the equivalent, as shown *infra* § 108.

What will and what will not constitute a covenant for quiet enjoyment is a question dependent on the true intention of the parties, as shown by the whole instrument.⁴⁰

The covenant of warranty, considered in detail *infra* §§ 47-49, and the covenant for quiet enjoyment are usually regarded as substantially equivalent or identical in operation and effect,⁴¹ and in some jurisdictions this operation and effect is given to the covenants of quiet enjoyment which are implied from the use of particular words.⁴² Some cases have, however, noted distinctions between these covenants,⁴³ in stating or intimating that the covenant for quiet enjoyment is one to defend the possession merely, while the covenant of warranty is in addition an undertaking to defend the land and the estate in it,⁴⁴ and that, in the case of the covenant of quiet enjoyment, the eviction is merely required to be of lawful right, while in the covenant of warranty the eviction must not only be of lawful right but by paramount title.⁴⁵

31. Ill.—Beebe v. Swartawout, 8 Ill. 162.

N.Y.—Cassada v. Stabel, 90 N.Y.S. 533, 98 App.Div. 600.

Pa.—Berger v. Weinstein, 63 Pa. Super. 153.

32. Iowa.—Kane v. Mink, 19 N.W. 852, 853, 64 Iowa 84, quoting Bouvier L.D.

15 C.J. p 1236 note 68.

Other definitions

"An assurance against the consequences of a defective title, or of any disturbance in the enjoyment of the land conveyed."—Keel v. Ikard, 133 So. 906, 907, 222 Ala. 617, citing *Corpus Juris*—Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am.D. 36—15 C.J. p 1236 note 68 [a].

Full title and estate

It has been said that the covenant refers to the full title and estate which the deed purports to grant.—Keel v. Ikard, 133 So. 906, 222 Ala. 617.

33. Ala.—Murgrove v. Cordova Coal, etc., Co., 67 So. 532, 191 Ala. 419. 15 C.J. p 1236 note 73.

34. N.Y.—Webb v. Alexander, 7 Wend. 281.

Okl.—Brown v. International Land Co., 116 P. 799, 29 Okl. 341.

Tex.—Atter v. Erskine, 111 S.W. 186, 50 Tex.Civ.App. 576.

15 C.J. p 1279 notes 48, 49.

35. N.Y.—Cassada v. Stabel, 90 N.Y.S. 533, 98 App.Div. 600.

36. Ala.—Keel v. Ikard, 133 So. 906, 222 Ala. 617.

37. Ill.—Marvin v. Donaldson, 160 N.E. 179, 329 Ill. 30—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488.

38. Tex.—Atter v. Erskine, 111 S.W. 186, 50 Tex.Civ.App. 576. 15 C.J. p 1236 note 70.

39. Ala.—Musgrove v. Cordova Coal, etc., Co., 67 So. 532, 191 Ala. 419.

Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

N.Y.—Cassada v. Stabel, 90 N.Y.S. 533, 98 App.Div. 600.

N.C.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 164 S.E. 323, 202 N.C. 803.

Wash.—Whatcom Timber Co. v. Wright, 173 P. 724, 102 Wash. 566. 15 C.J. p 1279 note 49.

Covenantee's failure or inability to obtain possession as breach see *infra* § 108.

40. Cal.—Stillwell Hotel Co. v. Anderson, 50 P.2d 441, 4 Cal.2d 463. 15 C.J. p 1236 note 78.

Specific words not required

Cal.—Stillwell Hotel Co. v. Anderson, *supra*.

Covenant held one for quiet enjoyment

Mont.—Green v. Baker, 214 P. 38, 66 Mont. 568.

15 C.J. p 1236 note 68 [b].

41. Ala.—Keel v. Ikard, 133 So. 906, 907, 222 Ala. 617.

Neb.—Campbell v. Gallentine, 215 N.W. 111, 115 Neb. 789, 61 A.L.R. 1. 15 C.J. p 1236 note 73, p 1238 note 12.

Synonymous

Covenants of warranty are treated as synonymous with covenants for quiet enjoyment of the estate granted.—Biwer v. Martin, 128 N.E. 518, 522, 294 Ill. 488.

42. Ark.—Gibbons v. Moore, 136 S.W. 937, 98 Ark. 501.

Statutory deed

Warranty deed with full statutory covenants of warranty includes a covenant for the quiet enjoyment of the estate granted.—Marvin v. Donaldson, 160 N.E. 179, 329 Ill. 30.

43. Mass.—Kramer v. Carter, 136 Mass. 504.

15 C.J. p 1236 notes 75, 76, p 1238 note 13.

44. Wash.—West Coast Mfg., etc., Co. v. West Coast Impr. Co., 66 P. 97, 25 Wash. 627.

15 C.J. p 1238 note 13.

45. N.Y.—Fowler v. Poling, 6 Barb. 165.

Performance and breach in general of:

Covenant for quiet enjoyment see *infra* § 108.

Covenant of warranty see *infra* §§ 110-112.

A covenant for further assurance has been distinguished from a covenant for quiet enjoyment.⁴⁶

§ 46. Covenant for Further Assurance

The covenant for further assurance relates both to the title of the grantor and to the instrument of conveyance, and in general requires those bound by the covenant to make such further assurances as those entitled to the benefit of the covenant may lawfully and reasonably require.

The covenant for further assurance relates both to the title of the vendor and to the instrument of conveyance to the purchaser,⁴⁷ and operates as well to secure the performance of all acts necessary for supplying any defects in the former as to remove all objections to the sufficiency of the latter.⁴⁸ The effect of the covenant is that the grantor binds himself and his heirs to make all such further assurances of the land as shall lawfully and reasonably be required by the grantee or his heirs.⁴⁹ The covenant applies only to the estate and interest granted, as shown *supra* § 31, which estate cannot be enlarged by the covenant.⁵⁰ It is intended by the covenant, however, to give full effect and operation to the estate and interest conveyed by the deed.⁵¹ In some jurisdictions, the statutory covenant for further assurance, implied from the use of certain words, relates only to such defects as the grantor can supply.⁵²

The covenant is prospective in operation,⁵³ and runs with the land, as shown *infra* § 67.

No technical words are necessary to create the covenant.⁵⁴

A covenant that, if the grantors obtain title

from the United States, they will convey the same to the grantees by deed of general warranty, is a covenant for further assurance,⁵⁵ entitling the grantees to a conveyance of the legal title when the contingency happens, as shown *infra* § 109. There is authority for the view that a quitclaim deed with covenants of further assurance operates to convey to the grantee an after acquired title to the premises obtained by the grantor from a state or from the United States.⁵⁶

The covenant of a son for further assurance in respect of property which he expected to receive from his father on the latter's death has been regarded as valid where there was adequate consideration, the transaction was bona fide, and the father consented.⁵⁷

The covenant of warranty, considered in detail *infra* §§ 47-49, has been distinguished from the covenant for further assurance.⁵⁸

Questions as to performance or breach of the covenant for further assurance are considered in various aspects and in detail, *infra* § 109.

§ 47. Covenant of Warranty

A covenant of warranty is an undertaking or contract to compensate the grantee in money if title fails, or, in general, to protect against adverse and lawful claims and demands.

A covenant of warranty in a deed has been defined as an undertaking to compensate the grantee in money if the title fails,⁵⁹ a contract by which the grantor of land undertakes to protect the land from all lawful claims and demands existing at the time of the grant,⁶⁰ and as a covenant to defend,

46. Proceedings to enforce, or to determine, rights

"An essential difference between the covenant for further assurance and the covenants of quiet enjoyment and warranty is that, on breach of the latter, the validity of the adverse claim must be determined by proceedings taken by the adverse claimant against the grantee, or by what is equivalent thereto, while, on a bill for specific performance of the covenant for further assurance, the validity of the claim is determined in a suit between the grantee and grantor, to which the claimant is not a party, and by which he is not bound."—*Zabriskie v. Baudendistel*, N.J.Ch., 20 A. 163, 165.

47. Md.—*Cochran v. Pascault*, 54 Md. 1.
15 C.J. p 1236 note 80.

48. Md.—*Cochran v. Pascault*, 54 Md. 1.
15 C.J. p 1236 note 80.

49. Ark.—*Davis v. Tarwater*, 15 Ark. 286.

N.Y.—*Colby v. Osgood*, 29 Barb. 339.
15 C.J. p 1236 note 82.

In Missouri

In considering a statutory covenant for further assurance, it has been said that "this covenant is substantially a covenant that the vendor will, at the request and cost of the vendee, perform all 'acts, deeds, conveyances and assurances,' either by fine, recovery or other form of assurance, which may be wanting to the confirmation of the vendee's title."—*Armstrong v. Darby*, 26 Mo. 517, 520.

50. W.Va.—*Uhl v. Ohio River R. Co.*, 41 S.E. 340, 51 W.Va. 106.

51. N.J.—*Zabriskie v. Baudendistel*, Ch., 20 A. 163.

52. Mo.—*Armstrong v. Darby*, 26 Mo. 517—*Luther v. Brown*, 66 Mo. App. 227.

53. Ill.—*Firebaugh v. Wittenberg*, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

54. Ark.—*Davis v. Tarwater*, 15 Ark. 286.

Cal.—*Wholey v. Cavanaugh*, 25 P. 1112, 88 Cal. 132.

55. U.S.—*Lamb v. Burbank*, C.C.Or., 14 F.Cas.No.8,012, 1 Sawy. 227.

56. Cal.—*Wholey v. Cavanaugh*, 25 P. 1112, 88 Cal. 132—*Smith v. Bran-*
nan, 13 Cal. 107.

Effect of quitclaim deed on after-acquired title in general see the C.J.S. title Deeds § 118, also 18 C.J. p 315 notes 43-51.

57. Mass.—*Fitch v. Fitch*, 8 Pick. 480.

58. N.J.—*Zabriskie v. Baudendistel*, Ch., 20 A. 163.

15 C.J. p 1236 note 80 [b].

59. Cal.—*Tropico Land, etc., Co. v. Lambourn*, 148 P. 206, 170 Cal. 33, 38.

Ohio.—*King v. Kerr*, 5 Ohio 155, 22 Am.D. 777.

60. Conn.—*King v. Kilbride*, 19 A. 519, 58 Conn. 109, 116.

not the possession merely, but the land and the estate in it.⁶¹ It is an assurance that the grantee and his heirs and assigns shall not be deprived of the possession by force of paramount title.⁶² Generally speaking, this covenant includes only such claims and suits as have a legal foundation,⁶³ and does not include adverse claims or suits, without legal foundation, for which the covenantor is not responsible.⁶⁴ In general, the grantee under a warranty deed is entitled to the immediate possession of the property conveyed.⁶⁵ Various applications and limitations of these rules are considered in the detailed discussion of performance and breach of the covenant, *infra* §§ 110-112.

A covenant of warranty is not considered a debt until the covenant is broken.⁶⁶

The general rule is that this covenant operates prospectively or in futuro,⁶⁷ and it is usually held or recognized, subject to certain qualifications, that the covenant runs with the land, as shown *infra* § 68, and that there is no breach until there has been an eviction or the equivalent, as shown *infra* § 112.

It seems that the old common-law warranty was usually regarded as essentially real, as shown *supra* § 22, and as applicable to estates of freehold.⁶⁸ The covenant of warranty now in use, however, has been regarded or characterized in some cases as a personal covenant, as explained *supra* § 22. In some jurisdictions, express warranties are given the same effect as implied warranties at common law.⁶⁹

No technical words are indispensable to a covenant of warranty,⁷⁰ but any language evidencing the intention of the parties is sufficient.⁷¹

Subject to certain limitations or qualifications, a covenant of warranty is in effect substantially the same as a covenant for quiet enjoyment, as shown *supra* § 45. It has been held or recognized that, in the absence of statutory provision to the contrary, various usual covenants, at least those other than the covenant for quiet enjoyment, are not embraced in a covenant of warranty,⁷² but in some jurisdictions covenants of warranty are held to embrace all the usual common-law covenants,⁷³ and various of the usual covenants are sometimes included by virtue of statute.⁷⁴

61. Mass.—Kramer v. Carter, 136 Mass. 504, 508.

Vt.—Williams v. Wetherbee, 1 Aik. 233, 241.

62. N.Y.—Rindskopf v. Farmers' L. & T. Co., 58 Barb. 36, 15 C.J. p 1238 note 10.

Right to relief or restitution

The general rule that, where there is a mistake made by purchaser in regard to validity of grantor's title as to land, the mistake is not ground for relief or restitution of amount mistakenly paid for a void title does not apply where a grantee receives a warranty of title.—Givens v. Turner, 113 S.W.2d 1166, 272 Ky. 211.

63. Iowa.—Thorne v. Clark, 84 N.W. 701, 112 Iowa 548, 84 Am.S.R. 356. Miss.—Presley v. Haynes, 180 So. 71, 182 Miss. 44, 15 C.J. p 1239 note 19.

64. Iowa.—Thorne v. Clark, 84 N.W. 701, 112 Iowa 548, 84 Am.S.R. 356, 15 C.J. p 1239 note 19.

65. Mont.—Adams v. Durfee, 215 P. 664, 67 Mont. 315.

66. Vt.—McKillop v. Burton, 74 A. 78, 82 Vt. 403.—Clark v. Winchell, 53 Vt. 408.—Blackmer v. Blackmer, 5 Vt. 355.

67. Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

N.C.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 164

S.E. 323, 202 N.C. 803.—Cover v. McAden, 112 S.E. 817, 183 N.C. 641. Wash.—Whatcomba Timber Co. v. Wright, 173 P. 724, 102 Wash. 566. Covenantor's failure or inability to obtain possession as breach see *infra* § 112.

68. Va.—Stout v. Jackson, 2 Rand. 132, 142, 23 Va. 132, 142, 15 C.J. p 1237 note 6.

69. Ill.—Biber v. Martin, 128 N.E. 518, 294 Ill. 488.

70. N.C.—Tarault v. Seip, 74 S.E. 3, 158 N.C. 363.

15 C.J. p 1239 note 22.

71. N.C.—Tarault v. Seip, *supra*, 15 C.J. p 1239 note 23.

Intention to convey land

Where there is a clear intention apparent on the face of the deed to convey the land itself, and not merely the grantor's right, title, and interest in the land, the deed will be construed as a warranty, and not as a quitclaim deed.—Kempner v. Beaumont Lumber Co., 49 S.W. 412, 20 Tex.Civ.App. 307.

72. Pa.—Stewart v. West, 14 Pa. 336.

Va.—Marbury v. Thornton, 1 S.E. 909, 82 Va. 702.

15 C.J. p 1238 note 17.

Covenant of seisin not included

Deed covenanting "to warrant and forever defend * * * the said premises" did not contain a covenant of seisin.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 171 S.E. 341, 205 N.C. 357.

73. S.C.—Morris v. Lain, 180 S.E. 206, 207, 176 S.C. 310, 100 A.L.R. 1189, quoting *Corpus Juris*, 15 C.J. p 1238 note 14.

74. Ky.—Eli v. Trent, 241 S.W. 324, 195 Ky. 26.

Okl.—Kimbrow v. Harper, 238 P. 840, 113 Okl. 46, 15 C.J. p 1238 note 15.

What law governs

It has been held that a statutory provision for reading various covenants into a statutory form of warranty deed was effective only as to the conveyance of real estate situated in the state by which the statute was enacted and could not affect real property in another state; in a state in which such statute exists, the court cannot read covenants into a conveyance of lands in another state, containing a general warranty, unless provision therefor is made by a law, of such other state, and, in the absence of any such law, the courts of the forum may at most give such effect to the conveyance as would be given to it at common law.—Alcorn v. Epler, 206 Ill.App. 140.

In Mississippi

(1) Under statute, the word "warrant," within warranty deed, embraces all five covenants of warranty known to common law, including seisin, power to sell, freedom from encumbrance, quiet enjoyment, and warranty of title.

Ky.—Dortch's Ex'r v. Willoughby,

§ 48. — General Warranty

A covenant of general warranty relates to the title and to the right, interest, or estate granted.

The covenant of general warranty has been characterized as the broadest and most effective covenant.⁷⁵ While questions as to possession or interference with possession may be involved, as appears from the detailed discussion as to eviction in connection with breach of the covenant, *infra* § 112, a covenant of general warranty relates to the title,⁷⁶ and, as a general rule, only to the title as it existed at the time the conveyance was made,⁷⁷ although an exception to the rule has been recognized where the subsequent but prevailing title is created by the act of the covenantor,⁷⁸ as more fully appears in the discussion of performance and breach of the covenant, *infra* § 110. While, under some circumstances, the warranty may, in con-

nection with the description of the land conveyed, refer to and include the quantity or area,⁷⁹ usually the covenant does not warrant nor guarantee the quantity of land.⁸⁰ Questions as to the creation by description of premises of implied covenant in respect of the quantity of land are considered *supra* § 16.

The covenant does not pass any estate,⁸¹ nor does it enlarge⁸² nor restrict⁸³ the estate conveyed; but it may be a circumstance to be considered in determining the estate which it was intended to grant.⁸⁴

The covenant extends to the right, interest, or estate granted.⁸⁵ Where the deed duly construed purports to convey the fee, it has been held that a covenant to warrant and defend the premises against the lawful claims and demands of all persons is a warranty of title.⁸⁶ The covenant does

113 S.W.2d 832, 272 Ky. 231, applying law of Mississippi.

Miss.—Martin v. Partee, 83 So. 673, 121 Miss. 482.

(2) A covenant by a vendor of land that the will forever warrant and defend the title thereto does not, however, include a covenant of seizure.—Staton v. Henry, 94 So. 237, 130 Miss. 372—Witty v. Hightower, 20 Miss. 478.

In South Dakota

"Warranty deed" purports to convey fee title to property free and clear of all incumbrances.—First Nat. Bank v. Bowe, 273 N.W. 4, 65 S.D. 255.

75. Tex.—Compton v. Trico Oil Co., Civ.App., 120 S.W.2d 534, 537, error refused.

Covenant one of general warranty
Ky.—Fennessey v. Abbott, 5 Ky.Op. 42.

Mont.—Green v. Baker, 214 P. 88, 66 Mont. 568.

76. Ga.—Finn v. Lifsey, 150 S.E. 908, 909, 169 Ga. 599, quoting *Corpus Juris*, and reversing Lifsey v. Finn, 145 S.E. 519, 38 Ga.App. 671, and conformed to Lifsey v. Finn, 151 S.E. 392, 40 Ga.App. 735.

Tex.—Cock v. Norwood, Civ.App., 243 S.W. 571—Gillespie v. Gray, Civ. App., 230 S.W. 1027, error refused.—Mosteller v. Astin, 129 S.W. 1136, 61 Tex.Civ.App. 455.

15 C.J. p 1226 note 33, p 1239 note 24.

77. Ga.—Finn v. Lifsey, 150 S.E. 908, 909, 169 Ga. 599, quoting *Corpus Juris*, and reversing Lifsey v. Finn, 145 S.E. 519, 38 Ga.App. 671, and conformed to Lifsey v. Finn, 151 S.E. 392, 40 Ga.App. 735.

Tex.—Hoge v. Garcia, Civ.App., 296 S.W. 982.

15 C.J. p 1239 note 25.

78. Me.—Curtis v. Deering, 12 Me. 499.

Vt.—Staples v. Flint, 28 Vt. 794.

79. Tex.—Davis v. Fain, Civ.App., 152 S.W. 218—Reeves v. Lindsey, 2 Tex.Unrep.Cas. 309—Webb v. Brown, 2 Tex.Unrep.Cas. 36.

15 C.J. p 1226 note 34, p 1239 note 27.

80. Tex.—Rahl v. Compton, Civ. App., 112 S.W.2d 509—Reid v. Byrd, Civ.App., 34 S.W.2d 305—Briley v. Hay, Civ.App., 13 S.W.2d 997—Ross v. Brewer, Civ.App., 251 S.W. 307—Liberto v. Sanders, Civ. App., 248 S.W. 120, reversed on other grounds, Com.App., 259 S.W. 1080—Cock v. Norwood, Civ.App., 243 S.W. 571—Gillespie v. Gray, Civ.App., 230 S.W. 1027—Nicholson v. C. C. Slaughter Co., Civ.App., 217 S.W. 716, error refused—Mosteller v. Astin, 129 S.W. 1136, 61 Tex.Civ. App. 455.

15 C.J. p 1226 note 33, p 1239 note 24.

Breach of covenant by deficiency in number of acres see *infra* § 110.

81. Wash.—West Coast Mfg., etc., Co. v. West Coast Impr. Co., 66 P. 97, 25 Wash. 627, 62 L.R.A. 763.

82. Fla.—Cromartie v. Everglade Lumber Co., 129 So. 767, 100 Fla. 532.

Mass.—Corbin v. Healy, 20 Pick. 514. S.C.—Mathis v. Hair, 99 S.E. 810, 112 S.C. 320.

Tex.—Wilson v. Wilson, Civ.App., 118 S.W.2d 403.

Wash.—West Coast Mfg., etc., Co. v. West Coast Impr. Co., 66 P. 97, 25 Wash. 627, 62 L.R.A. 763.

W.Va.—King v. Smith, 106 S.E. 704, 88 W.Va. 312.

83. Wash.—West Coast Mfg., etc., Co. v. West Coast Impr. Co., 66 P. 97, 25 Wash. 627, 62 L.R.A. 763.

84. S.C.—Mathis v. Hair, 99 S.E. 810, 112 S.C. 320.

85. Ill.—Marvin v. Donaldson, 160 N.E. 179, 329 Ill. 30—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488.

Mass.—Corbin v. Healy, 20 Pick. 514.

Easements or incorporeal rights

(1) Easement appurtenant was included in covenant.—Weaver v. Propst, Tex.Civ.App., 28 S.W.2d 872, error refused.

(2) Water rights not appurtenant to the land were not within the general covenant.—George v. Robison, 63 P. 819, 23 Utah 79.

Timber

Warranty in deed of land did not apply to timber unless it was part of the realty and was intended to be conveyed.—Cheatham v. Head, 262 S.W. 622, 203 Ky. 489.

General warranty not reduced to special warranty

Where a certain parcel of land was included in the description of the land conveyed, the character of the covenant was not changed from one of general warranty to one of special warranty by a recital added to the description in view of the fact that such recital did not necessarily limit the description.—Dotson v. Blankenship, 6 S.W.2d 1073, 224 Ky. 638.

Extent of liability

A grantor's liability as warrantor extends to failure of title to land which, by its terms, the deed purports to convey.—Peavy-Moore Lumber Co. v. Duhig, Tex.Civ.App., 119 S.W.2d 688, error granted.

86. "Undivided interest" and "premises"

A deed purporting to grant, bargain, and sell "the following described real estate . . . to wit: All our undivided interest," and contain-

not extend to land included by mistake,⁸⁷ nor embrace land not described in the deed.⁸⁸ Questions as to the limitation of a covenant of general warranty to the estate conveyed are considered in various aspects supra § 31.

While covenants of seizin, of good right to convey, of freedom from encumbrances, and to warrant and defend against the lawful claims of all persons are sometimes referred to as covenants of general warranty,⁸⁹ yet, subject to certain statutory modifications,⁹⁰ the obligation in a general warranty of title is not, in general that the covenantor is the true owner,⁹¹ or that he is seized in fee, with the right to convey,⁹² but that he will defend and protect the covenantee against the rightful claims of all persons thereafter asserted,⁹³ under title paramount to that conveyed.⁹⁴ It has been stated broadly that the covenant is to the effect that the grantor has not conveyed the same estate or any right, title, or interest therein to any person other than the grantee and that the property conveyed is free from encumbrances.⁹⁵ It implies that the grantor has not done any act nor created any encumbrance by which the estate granted by him could be defeated;⁹⁶ and unless it is otherwise provided, it has the effect of warranting against claims and judgments outstanding against

the grantor but is not a warranty against claims and judgments outstanding against the grantee.⁹⁷ The covenant includes a warranty against the state,⁹⁸ and the United States.⁹⁹

Where a grantor conveys with "warranty" only, the covenant will be regarded as a "general warranty."¹

In Louisiana, in determining the extent of the warranty or the obligation of the vendor of immovable property, where the transfer is made with a stipulation of general warranty, the act of sale alone is to be considered and construed with the law declaring the effect of a general warranty, in the absence of allegations and proof of error.²

The rules stated in this section should be considered in connection with the discussion of performance and breach of the covenant infra §§ 110-112.

§ 49. — Special Warranty

A covenant of warranty is special when it is limited or restricted, in its operation, to certain persons or claims.

A covenant of warranty is special when it applies only to certain persons or claims to which its operation is limited or restricted.³ Covenants of

ing the covenant described in the text, was construed as purporting to convey the fee, and the deed contained a covenant of title applicable to the fee and to the claims of third persons; the word "premises," as used in the covenant, meant "only the property, the land, described in the deed, whether the quantum of interest be the entire fee or an undivided interest therein."—*Coston v. McClelland*, 127 So. 176, 177, 220 Ala. 598.

97. Tex.—*Laufer v. Moppins*, 99 S. W. 109, 44 Tex.Civ.App. 472.

98. Ga.—*Littleton v. Green*, 61 S.E. 593, 130 Ga. 692.

99. Ala.—*Blair v. Morris*, 101 So. 745, 212 Ala. 91.

In Mississippi

A general warranty in a conveyance includes a warranty against encumbrances.—*Hicks v. Sullivan*, 89 So. 811, 127 Miss. 148—*Martin v. Partee*, 83 So. 673, 121 Miss. 482.

90. Ga.—*Osburn v. Pritchard*, 30 S. E. 656, 104 Ga. 145.

Ill.—*King v. King*, 74 N.E. 89, 215 Ill. 100.
15 C.J. p 1239 note 31.

91. Wash.—*West Coast Mfg., etc., Co. v. West Coast Impr. Co.*, 66 P. 97, 25 Wash. 627, 62 L.R.A. 763.
15 C.J. p 1239 note 34.

92. Wash.—*West Coast Mfg., etc., Co. v. West Coast Impr. Co.*, supra. 15 C.J. p 1239 note 34.

93. Wash.—*West Coast Mfg., etc., Co. v. West Coast Impr. Co.*, supra. 15 C.J. p 1239 note 34.

94. Ky.—*Walter v. Robinson*, 174 S. W. 503, 163 Ky. 618.
N.Y.—*Fowler v. Poling*, 6 Barb. 165.
Barring covenantor and heirs and undertaking to defend

Covenants of warranty constitute an engagement or covenant that the covenantor and his heirs shall be barred from ever claiming the estate, and that he and they shall undertake to defend it when assailed by a paramount title.—*Biwer v. Martin*, 128 N.E. 518, 294 Ill. 488.

Not guaranty of perfect title

(1) "The covenant of warranty is not an absolute guaranty of perfect title, but is simply an assurance to the grantee of quiet enjoyment of the title conveyed, and that the covenantor and his heirs will not thereafter claim the estate, but will undertake to defend it whenever assailed by paramount title."—*Smith v. Gaub*, 123 N.W. 827, 19 N.D. 337, 340.

(2) Warranty of title does not covenant for a perfect record title but only for an actual fee-simple title, that is to say, one free of actu-

al, as distinguished from technical, defects.—*Fresley v. Haynes*, 180 So. 71, 182 Miss. 44.

95. Tex.—*Compton v. Trico Oil Co.*, Civ.App., 120 S.W.2d 534, error refused—*Rives v. James*, Civ.App., 3 S.W.2d 932, error dismissed.

96. Pa.—*Herbert v. Northern Trust Co.*, 112 A. 471, 269 Pa. 306.

97. Okl.—*Storm v. Garnett*, 227 P. 417, 99 Okl. 284.

98. Wash.—*West Coast Mfg., etc., Co. v. West Coast Impr. Co.*, 66 P. 97, 25 Wash. 627, 62 L.R.A. 763.
15 C.J. p 1220 note 36.

99. N.C.—*Cover v. McAden*, 112 S.E. 817, 183 N.C. 641.

1. W.Va.—*Allen v. Yeater*, 17 W.Va. 128.

2. La.—*Long v. Grisham*, 123 So. 492, 38 La.App. 486.

3. U.S.—*Buckner v. Street*, C.C.Ark., 15 F. 365, 5 McCrary 59.
Md.—*Gittings v. Worthington*, 9 A. 228, 67 Md. 139.

Ohio.—*Fountain Square Theatre Co. v. Pendery*, 6 Ohio Cir.Ct., N.S., 78, 17 Ohio Cir.Dec. 285, affirming 3 Ohio N.P., N.S., 41.
15 C.J. p 1239 note 40.

"Special warranty deed"

It has been stated broadly that a "special warranty deed" simply warrants title against all defects there-

special warranty have been expressed in various forms.⁴

A warranty against all persons, or the claims of all persons, claiming by, through, or under the grantor cannot be extended to a general covenant of warranty against all persons.⁵ It has been held or recognized that a covenant of this type refers in general only to the existing title or interest granted,⁶ and, consequently, does not bar the covenantor from claiming the same premises against his own covenantee, or grantee by title acquired subsequent to the making of his own deed.⁷ While

there is authority for the view that a covenant of special warranty does not cover a lien for taxes arising while the grantor was the owner, because of his failure to pay such taxes, where the grant was of his right, title, and interest,⁸ it has been held or recognized that a covenant of special warranty may extend to acts of, or claims created by, the grantor while he was the owner of the property.⁹

The rules here stated should be considered in connection with the discussion of performance and breach of the covenant of warranty, *infra* §§ 110-112.

in done or suffered by grantor.—*Reeves v. Wisconsin & Arkansas Lumber Co.*, 42 S.W.2d 11, 184 Ark. 254.

4. *Mo.*—*Miller v. Bayless*, 74 S.W. 648, 101 Mo.App. 487.
15 C.J. p 1239 note 40.

Various forms regarded as special warranty

(1) "Against all persons claiming by, through, or under" the grantor.—*Raymond v. Raymond*, 10 Cush., Mass. 134—15 C.J. p 1239 note 40.

(2) "Against the lawful claims of all persons claiming by, from, through, or under the grantor."—*Fountain Square Theatre Co. v. Pendery*, 6 Ohio Cir.Ct., N.S., 78, 17 Ohio Cir.Dec. 285, affirming 3 Ohio N.P., N.S., 41.

(3) "Against the lawful claim of all persons whomsoever, by, through and under" the grantor.—*Burton v. Price*, 141 So. 728, 105 Fla. 544.

"Holding through or under"

(1) Covenant of warranty "against the lawful claims or demands of all persons, holding through or under us" is made a special covenant by the clause "holding through or under us," the restriction not relating to the nature of the encumbrances covered by the warranty, but to the time and manner in which they accrued.—*Dothan Nat. Bank v. Hollis*, 103 So. 589, 212 Ala. 628.

(2) "Holding through" the grantor implies a claim or encumbrance created by the act of the grantor, while "holding under" the grantor has a wider meaning.—*Dothan Nat. Bank v. Hollis*, *supra*.

(3) Dower and homestead claims of a wife are not covered by the husband's covenant against those claiming "under" him.—*McCracken v. Taylor*, Tex.Civ.App., 146 S.W. 693.

"Warrant specially"

The words "warrant specially" in

a conveyance is merely a covenant that the grantor and his heirs and representatives warrant the title against the claims of all persons claiming through or under the grantor.—*Jones v. Metzger*, 96 So. 161, 132 Miss. 247.

Special warranty not created

Deed in which grantors covenanted that at delivery they were lawfully seized and possessed of absolute estate in the land, and that it was free and clear from all encumbrances except a named mortgage, and that "they will warrant forever defend the title" to the same, is not a special warranty against the mortgage mentioned.—*Holland v. W. C. Belcher Land Mortg. Co.*, Tex.Civ.App., 248 S. W. 808.

5. *Fla.*—*Burton v. Price*, 141 So. 728, 105 Fla. 544.
Mass.—*Raymond v. Raymond*, 10 Cush. 134.
15 C.J. p 1240 note 42.

Prior owner

(1) Covenant of special warranty did not protect purchaser against claims of children of vendor's grantor, since special warranty does not protect grantee from claims against such grantor.—*Kentucky River Coal Corporation v. Swift Coal & Timber Co.*, 299 S.W. 201, 221 Ky. 593.

(2) Quitclaim deed warranting title against persons claiming title by, through, or under grantor relieved grantor of warranty against homestead claim of persons from whom the grantor had acquired his interest in the property by a deed of general warranty in form, which was in fact intended as a mortgage.—*Hein v. Henry*, Tex.Civ.App., 299 S.W. 456.

6. *Ohio.*—*Fountain Square Theatre Co. v. Pendery*, 6 Ohio Cir.Ct., N.S., 78, 17 Ohio Cir.Dec. 285, affirming 3 Ohio N.P., N.S., 41.
15 C.J. p 1240 note 43.

Paramount title

Where a purchaser accepts a deed of conveyance containing a warranty of title expressly limited to claims under the vendor, the covenant, in effect declares the vendor does not warrant against a title paramount, and nothing short of fraudulent intent of the vendor in representing his title to be good, or concealment where the duty of disclosure exists, can authorize relief for his misrepresentations as to the title.—*Hawthorne v. Odenson*, 120 A. 797, 94 N. J.Eq. 588.

7. *U.S.*—*Lamb v. Burbank*, C.C.Or., 14 F.Cas.No.8,012, 1 Sawy. 227.
15 C.J. p 1240 note 43.

8. *Ohio.*—*Fountain Square Theatre Co. v. Pendery*, 6 Ohio Cir.Ct., N.S., 78, 17 Ohio Cir.Dec. 285, affirming 3 Ohio N.P., N.S., 41.

9. Statutory regulation

Under Code Pub.Gen.L.1924 art 21 § 76, covenant of special warranty makes it grantor's duty to defend title against claims which he may have created at any prior time; in suit for breach of covenant of special warranty, based on fact that defendants had previously conveyed adjacent land to another under deed containing covenant restricting use of plaintiffs' land, the fact that defendants had parted with and reacquired property sold plaintiffs after making conveyance imposing restriction was not a defense.—*Wempe v. Schoentag*, 163 A. 868, 163 Md. 647.

Taxes

It has been held that, where a grantor conveys land by special warranty, he is under obligation to pay accrued taxes or to notify the purchaser of proceedings for the foreclosure of a certificate of delinquency.—*Collins v. Hoffman*, 133 P. 450, 74 Wash. 264.

C. COVENANTS AS TO USE OF REAL PROPERTY

§ 50. In General

Since the validity of covenants or restrictions in conveyances as to the use and improvement of real property together with the construction, operation, and enforcement of such covenants or restrictions are ordinarily questions not depending on the character of the stipulation as being technically in the nature of a covenant, or of a condition, or of a restriction, they are discussed in the C.J.S. title Deeds §§ 162-171, also 18 C.J. p 386 note 16-p 404 note 27. Restrictions in leases as to the use of the premises are discussed in the C.J.S. title Landlord and Tenant § 238, also 35 C.J. p 1185 note 78-p 1187 note 2.

§ 51. Buildings, Structures and Improvements

The construction and operation of covenants

or restrictions in deeds as to buildings, structures, and improvements, including the character, height, and location of such buildings, etc., are discussed in the C.J.S. title Deeds §§ 164-166, also 18 C.J. p 386 note 16-p 393 note 7.

§ 52. — Tenement Houses

Covenants or restrictions as to the erection of tenements, flats, or apartment houses on the property conveyed are discussed in the C.J.S. title Deeds § 164, also 18 C.J. p 392 notes 78-80.

§ 53. Nuisances and Particular Occupations

Covenants or stipulations prohibiting the use of property for business, manufacturing, or offensive purposes are discussed in the C.J.S. title Deeds § 165, also 18 C.J. p 393 notes 83-6.

D. COVENANTS RUNNING WITH THE LAND

§ 54. In General

Covenants running with the land are such as so affect the land that their benefits or obligations pass with the ownership. It is ordinarily stated as essential that they affect the land, that they be intended to run with it, and that there be privity of estate or contract between the original parties.

A covenant running with the land is one so relating to the land,¹⁰ or which so "touches and concerns the land" itself,¹¹ that its benefit or obligation passes with the ownership¹² irrespective of the consent of subsequent parties.¹³ Some authori-

ties consider that only real covenants run with the land¹⁴ and such covenants ordinarily do run with the land, whereas personal covenants ordinarily do not so run in the absence of express stipulation, as is stated supra § 22. However, covenants which are by some authorities considered as "personal" have nevertheless been held to run with the land, as in the case of certain covenants of title discussed infra §§ 63-68. A covenant will not run with the land merely because it is part of the consideration expressed in a deed.¹⁵ Parol covenants of themselves do not run with the land.¹⁶

10. Ky.—Commonwealth v. Elkhorn-Piney Coal Min. Co., 43 S.W.2d 684, 686, 241 Ky. 245, citing *Corpus Juris*.

Ohio.—Northern Ohio Traction & Light Co. v. Quaker Oats Co., 152 N.E. 5, 9, 114 Ohio St. 685, citing *Corpus Juris*.

Pa.—De Sanno v. Earle, 117 A. 200, 273 Pa. 265.

Va.—Dickinson v. Hoomes, 8 Gratt. 353, 403, 49 Va. 353, 403.

11. Tex.—Beckham v. Ward County Irr. Dist. No. 1, Civ.App., 278 S.W. 316.

15 C.J. p 1240 note 48.

In determining whether covenants "touch" and "concern" land so as to run with the land, court must decide on the facts in each case whether the covenants in purpose and effect substantially alter legal rights which otherwise would flow from ownership of the land.—Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav.

Bank, 15 N.E.2d 793, 278 N.Y. 248, 118 A.L.R. 973, affirming 300 N.Y.S. 1341, 252 App.Div. 876 and answering questions certified 300 N.Y.S. 1353, 253 App.Div. 722, reargument denied 16 N.E.2d 852, 278 N.Y. 704, 118 A.L.R. 982.

12. Ark.—Bank of Hoxie v. Meriwether, 265 S.W. 642, 166 Ark. 39. Fla.—Osius v. Barton, 147 So. 862, 109 Fla. 556, 88 A.L.R. 394—Burdine v. Sewell, 109 So. 648, 92 Fla. 375.

Iowa.—Iowa Implement Co. v. Aetna Explosives Co., 165 N.W. 408, 181 Iowa 1186.

Md.—Union Trust Co. of Maryland v. Rosenberg, 189 A. 421, 171 Md. 409.

15 C.J. p 1240 note 49.

Apportionability see infra § 82. Covenants conferring benefits see infra § 62.

Covenants imposing burdens see infra § 69.

Easements, servitudes, liens, or charges see infra § 73.

13. N.Y.—Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 15 N.E.2d 793, 278 N.Y. 248, 118 A.L.R. 973, affirming 300 N.Y.S. 1341, 252 App.Div. 876, and answering questions certified 300 N.Y.S. 1353, 253 App.Div. 722, reargument denied 16 N.E.2d 852, 278 N.Y. 704, 118 A.L.R. 982.

Wyo.—Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n, 297 P. 385, 43 Wyo. 41.

14. Ga.—Smith v. Gulf Refining Co., 134 S.E. 446, 162 Ga. 191, 51 A.L.R. 1323.

Or.—First Nat. Bank of Albany v. Klock Produce Co., 166 P. 955, 85 Or. 403.

15. S.C.—Epting v. Lexington Water Power Co., 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

16. Ky.—Kentucky Central R. Co. v. Kenney, 82 Ky. 154.

The common-law test of a covenant running with the land requires that its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the estate demised to which it must relate.¹⁷ The essentials of such a covenant have been stated to be that the grantor and grantee must have intended that the covenant run with the land; the covenant must affect or concern the land with which it runs; and there must be privity of estate between the party claiming the benefit and the party who rests under the burden.¹⁸ It has been held to make no difference in determining whether a covenant runs with the land whether the method of enforcement is at law or in equity,¹⁹ but under some authority a stipulation not in the form of a technical covenant sealed by the grantee, and for that reason not held a covenant running with the land, will not be enforced at law, although relief may be had in equity.²⁰

Where the intention of the parties is the determining factor, such intent will be ascertained from the facts, as appear from the grant itself and the surrounding circumstances.²¹

Where a statute directs what covenants shall run with the land, covenants other than those specified do not run.²²

Covenants of title. Whereas in England all covenants for title appear to run with the land,²³ the weight of American authority is that covenants in *presenti* do not run with the land²⁴ and that covenants in *futuro* do so run,²⁵ but that even the latter cease to run with the land from the time they are broken, as considered *infra* § 74. The usual covenants in *presenti* are seizin, right to convey, and against encumbrances, and the usual covenants in *futuro* are quiet enjoyment, further assurance, and warranty, as discussed *supra* §§ 40-49. These covenants descend to heirs and vest in assignees,²⁶ although the assignment is by quitclaim deed,²⁷ or bargain and sale deed,²⁸ and cannot pass or be assigned otherwise than with the land to which they are annexed.²⁹

Covenant as to acreage. A covenant in a deed as to acreage does not run with the land.³⁰

Covenants in leases, express or implied, as running with the land are considered in the C.J.S. title Landlord and Tenant § 240, also 35 C.J. p 1187 note 10-p 1189 note 32.

Licenses in real property, as distinguished from covenants running with the land, are considered in

Utah.—Knight v. Southern Pac. Co., 172 P. 689, 52 Utah 42.

Failure to put agreement in writing, such as a mortgage, evidences an intention on the part of the parties that the covenant is not to run with the land.—Bradford Realty Corporation v. Beetz, 142 A. 395, 108 Conn. 26.

17. Ga.—Smith v. Gulf Refining Co., 134 S.E. 446, 162 Ga. 191, 51 A.L.R. 1323.—Rosen v. Wolff, 110 S.E. 877, 152 Ga. 573.

Ill.—Keogh v. Peck, 147 N.E. 266, 316 Ill. 318, 38 A.L.R. 1151.

Md.—Safe Deposit & Trust Co. of Baltimore v. Baltimore-Gillet Co., 6 A.2d 226.

S.C.—Epting v. Lexington Water Power Co., 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

18. N.Y.—Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 15 N.E.2d 793, 278 N.Y. 248, 118 A.L.R. 973, affirming 300 N.Y.S. 1341, 252 App.Div. 876 and answering questions certified 300 N.Y.S. 1353, 253 App.Div. 722, reargument denied 16 N.E.2d 852, 278 N.Y. 704, 118 A.L.R. 982.—Meado-Lawn Homes v. Westchester Lighting Co., 13 N.Y.S.2d 709, 171 Misc. 669.

Intention is material inquiry

Conn.—Bradford Realty Corporation v. Beetz, 142 A. 395, 108 Conn. 26.

Ohio.—Johnson v. American Gas Co., 8 Ohio App. 124.

In equity test of whether covenant runs with land is intention of parties.—Finley v. Glenn, 154 A. 299, 303 Pa. 131.

19. Ill.—Furvis v. Shuman, 112 N.E. 679, 273 Ill. 286, L.R.A.1917A 121.

20. Me.—Mayo v. Dearborn, 163 A. 779, 131 Me. 455.

21. Ga.—Smith v. Gulf Refining Co., 134 S.E. 446, 162 Ga. 191, 51 A.L.R. 1323.

Me.—Gilman v. Forgione, 149 A. 620, 621, 129 Me. 66, quoting *Corpus Juris*.

Ohio.—Maher v. Cleveland Union Stockyards Co., 9 N.E.2d 995, 55 Ohio App. 412.

Or.—Pearson v. Richards, 211 P. 167, 171, 106 Or. 78, citing *Corpus Juris*.

Pa.—De Sanno v. Earle, 117 A. 200, 273 Pa. 265.—Shawnee Lake Ass'n v. Uhler, 198 A. 910, 131 Pa.Super. 146.

S.C.—Cheves v. City Council of Charleston, 138 S.E. 867, 140 S.C. 423.

15 C.J. p 1244 note 36, p 1250 note 48. Effects of agreement of parties generally see *infra* § 61.

22. Cal.—Pedro v. Humboldt County, 19 P.2d 776, 217 Cal. 493.—Pomona Land & Water Co. v. San Antonio Water Co., 93 P. 881, 152 Cal. 618—

Sacramento Suburban Fruit Lands Co. v. Whaley, 194 P. 1054, 50 Cal. App. 125.

23. Conn.—Mitchell v. Warner, 5 Conn. 497.
15 C.J. p 1245 note 6.

24. N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.
N.C.—Hahn v. Fletcher, 128 S.E. 326, 189 N.C. 729.—Lockhart v. Parker, 126 S.E. 313, 189 N.C. 138.

Or.—Pearson v. Richards, 211 P. 167, 106 Or. 78.
15 C.J. p 1245 note 99.

25. N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.
N.C.—Hahn v. Fletcher, 128 S.E. 326, 189 N.C. 729.

Or.—Pearson v. Richards, 211 P. 167, 106 Or. 78.

Va.—Dickinson v. Hoomes, 8 Gratt. 353, 49 Va. 353.

26. Okl.—Arnold v. Joines, 150 P. 130, 50 Okl. 4.
15 C.J. p 1243 note 30.

27. Neb.—Troxell v. Stevens, 77 N. W. 781, 57 Neb. 329.
15 C.J. p 1249 note 32.

28. N.Y.—Growen Realty Corporation v. Levy, 256 N.Y.S. 729, 143 Misc. 797.

29. N.C.—Lewis v. Cook, 35 N.C. 193.
15 C.J. p 1249 note 31.

30. N.Y.—Fairchild v. Scarsdale, 151 N.Y.S. 1042, 166 App.Div. 616.
15 C.J. p 1246 note 11.

the C.J.S. title Licenses § 79, also 37 C.J. p 281 note 97.

§ 55. What Law Governs

The *lex situs* generally governs the ascertainment, construction, and effect of covenants running with the land.

Except where the common-law distinction between local and transitory actions no longer exists,³¹ covenants which run with the land are governed by the *lex loci rei sitae*.³² Such law ordinarily determines whether a particular covenant runs with the land³³ and the construction³⁴ and effect³⁵ of such covenants.

§ 56. Property to Which Annexable

A covenant running with the land ordinarily must relate to the property conveyed; a covenant which is collateral to the land or which relates to personalty usually does not run with the land.

In order that a covenant may run with the land, it must respect the property conveyed,³⁶ and the act covenanted to be done or omitted must concern the land or the estate conveyed.³⁷ However, as is stated *infra* § 62, there is authority to the effect that the question whether a covenant will or will not run with the land does not depend so much on whether it is to be performed on the land it-

self as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned or occupied; and, even though a covenant is one which touches the land, it is a question of intention in each case to be determined on the construction of the particular instrument with due regard to the nature of the covenant and the surrounding circumstances whether its benefit or burden does in fact run with the land at law.³⁸

Covenants which are personal and collateral to the land do not run with the land;³⁹ and, as a rule, covenants relating to personal property do not run with the land.⁴⁰

Where a statute declares what covenants in grants of real property run with the land, it has been held that, in addition to those specifically named, such covenants as by reason of their character are within the meaning of the statute also run with the land.⁴¹

§ 57. Interest or Estate to Which Annexable

Ordinarily, a covenant runs only with the legal title, and, if any estate passes which creates privity, it is sufficient to cause the covenant to run with the land.

Although a different rule may prevail in equity,⁴² ordinarily covenants run only with the legal title to lands and tenements.⁴³

31. Ind.—*Worley v. Hineman*, 33 N. E. 280, 6 Ind.App. 240—inferentially overruling *Fisher v. Parry*, 68 Ind. 465.

15 C.J. p 1245 note 96.

Jurisdiction and venue in action for breach of covenant see *infra* § 121.

32. Cal.—*Platner v. Vincent*, 202 P. 655, 187 Cal. 443.

Ky.—*Dortch's Ex'r v. Willoughby*, 113 S.W.2d 322, 272 Ky. 231.

15 C.J. p 1245 note 97.

What law governs:

Actions for breach of covenant see *infra* § 115.

Construction of personal covenants see *supra* § 21.

Real covenants see *Conflict of Laws* § 19 b (2).

33. Cal.—*Hemry v. Amos*, 239 P. 1059, 197 Cal. 139—*Platner v. Vincent*, 202 P. 655, 187 Cal. 443.

15 C.J. p 1245 note 97.

34. Cal.—*Platner v. Vincent*, *supra*.

15 C.J. p 1245 note 97.

Election of law of forum

Where plaintiff, in an action for breach of covenants of seisin and warranty in a deed for lands in Texas, relies entirely on the laws of Missouri to support his claim, he must be held to have elected to rely on the laws of that state for recovery; and, in the absence of any at-

tempt to show that defendant's liability under the laws of Texas was otherwise than by the laws of Missouri, the latter laws will be applied in determining the liability. *Coleman v. Lucksinger*, 123 S.W. 441, 224 Mo. 1, 26 L.R.A.N.S., 934.

35. Tex.—*Langford v. Newsom*, Com. App., 220 S.W. 544, affirming *Newsom v. Langford*, Civ.App., 174 S. W. 1036.

36. Ga.—*Grant-Jeter Co. v. American Real Estate Co.*, 125 S.E. 73, 159 Ga. 80.

S.C.—*Epting v. Lexington Water Power Co.*, 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

15 C.J. p 1240 note 51.

37. Ga.—*Grant-Jeter Co. v. American Real Estate Co.*, *supra*.

Ill.—*Keogh v. Peck*, 147 N.E. 266, 316 Ill. 318, 38 A.L.R. 1151.

Pa.—*Monongahela River Consol. Coal & Coke Co. v. Hines*, 64 Pa.Super. 6. W.Va.—*Rawling v. Fisher*, 132 S.E. 489, 101 W.Va. 253.

15 C.J. p 1240 note 51.

Covenant to furnish electrical current for operation of a gin and mill on other land of the grantor does not run with the land.—*Epting v. Lexington Water Power Co.*, 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

38. S.C.—*Cheves v. City Council of*

Charleston, 138 S.E. 867, 140 S.C. 423.

15 C.J. p 1241 note 55.

39. Ga.—*Grant-Jeter Co. v. American Real Estate Co.*, 125 S.E. 73, 159 Ga. 80—*Henderson Lumber Co. v. Waycross & W. Ry. Co.*, 96 S.E. 263, 148 Ga. 69.

Mass.—*Bronson v. Coffin*, 108 Mass. 175, 11 Am.R. 335.

Mich.—*Mueller v. Bankers' Trust Co. of Muskegon*, 247 N.W. 103, 262 Mich. 53.

S.C.—*Epting v. Lexington Water Power Co.*, 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773, citing *Corpus Juris*.

Tex.—*Montgomery v. Creager*, Civ. App., 22 S.W.2d 463.

40. Mich.—*Buhl Land Co. v. Franklin Co.*, 242 N.W. 772, 773, 258 Mich. 377, citing *Corpus Juris*.

S.C.—*Epting v. Lexington Water Power Co.*, 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

15 C.J. p 1241 note 56.

41. N.D.—*Northern Pac. R. Co. v. McClure*, 81 N.W. 52, 9 N.D. 73, 47 L.R.A. 149.

42. Pa.—*Watson v. Blaine*, 12 Serg. & R. 131, 14 Am.D. 669.

15 C.J. p 1242 note 59.

43. N.Y.—*Logan v. United Interests*, 140 N.E. 240, 236 N.Y. 194, affirm-

If any estate passes, so as to create privity, it is sufficient to carry the covenants.⁴⁴ Thus, the legal possession of land, although the lowest interest or title that a person can have, when conveyed, creates a sufficient privity of estate between the grantor and the grantee to carry the covenants of warranty and quiet enjoyment through successive conveyances to a remote grantee.⁴⁵

Covenants may run with incorporeal as well as with corporeal hereditaments,⁴⁶ for otherwise the covenantee might be deprived of the beneficial use of the land;⁴⁷ but there is some authority which seems opposed to this doctrine,⁴⁸ especially if the covenant was made subsequent to the deed.⁴⁹

§ 58. Necessity of Privity of Estate

Privity of estate ordinarily is essential in order that a covenant may run with the land.

Ordinarily, a covenant may run with the land

only when there is a subsisting privity of estate between the covenantor and covenantee,⁵⁰ that is, when the land itself, or some estate or interest therein, even though less than the entire title, to which the covenant may attach as its vehicle of conveyance, is transferred;⁵¹ and, if there is no privity of estate between the contracting parties, the assignee will not be bound by, nor have the benefit of, any covenants between the contracting parties,⁵² notwithstanding they relate to the land which he takes by purchase or assignment from one of the parties to the contract.⁵³ The covenant of a stranger to the title is incapable of transmission by a mere conveyance of the land.⁵⁴ Particularly is privity of estate essential in the case of covenants imposing burdens,⁵⁵ although such privity may not be required in the case of covenants conferring benefits.⁵⁶

Where a wife's inchoate right of dower is a mere

ing 197 N.Y.S. 109, 203 App.Div. 634.

12 C.J. p 1242 note 60.

44. Or.—Ford v. Oregon Electric R. Co., 117 P. 809, 811, 60 Or. 278, 36 L.R.A., N.S., 358, Ann.Cas.1914A 280. 15 C.J. p 1243 note 71.

Necessity of privity of estate see infra § 58.

Existence of privity

(1) Where fee is passed to covenantor and no reversion left in covenantee, there is no privity of estate or tenure between parties, and burden imposed on land conveyed is solely for personal benefit of covenantee.—Bressee v. Dunn, 172 P. 387, 178 Cal. 96.

(2) Where deed from realty company created covenant running with the land for payment of annual charge for improvements on residential tract then being developed by company, and provided that such charge should create lien enforceable by property owner's association thereafter to be organized, such association was in effect in privity of estate with subsequent owner of land and could foreclose the lien.—Neponset Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 15 N.E. 2d 793, 278 N.Y. 248, 118 A.L.R. 973, affirming 300 N.Y.S. 1341, 252 App. Div. 876 and answering questions certified 300 N.Y.S. 1353, 253 App.Div. 722, reargument denied 16 N.E.2d 852, 278 N.Y. 704, 118 A.L.R. 982.

45. Mo.—Commerce Trust Co. v. Foulds, 273 S.W. 229, 221 Mo.App. 317—Iowa Loan & Trust Co. v. Fullen, 91 S.W. 53, 114 Mo.App. 633.

15 C.J. p 1243 note 72.

46. Ala.—Gilmer v. Mobile & M. R. Co., 79 Ala. 569, 58 Am.R. 623. 15 C.J. p 1243 note 73.

47. Ill.—Fitch v. Johnson, 104 Ill. 111.

48. Conn.—Mitchell v. Warner, 5 Conn. 497.

49. Nev.—Wheeler v. Schad, 7 Nev. 204.

15 C.J. p 1243 note 76.

50. Ala.—Cummings v. Alexander, 169 So. 310, 311, 233 Ala. 10, citing *Corpus Juris*.

Cal.—Pomona Land & Water Co. v. San Antonio Water Co., 93 P. 881, 152 Cal. 618—Heimbuerge v. State Guaranty Corporation, 2 P.2d 998, 116 Cal.App. 380.

Ga.—Henderson Lumber Co. v. Waycross & W. Ry. Co., 96 S.E. 263, 143 Ga. 69.

Ky.—Swiss Oil Corporation v. Dials, 22 S.W.2d 912, 232 Ky. 298.

N.Y.—Salvi v. John A. Manning Paper Co., 7 N.Y.S.2d 36, 168 Misc. 661—Rubel Bros. v. Dumont Coal & Ice Co., 182 N.Y.S. 204, 111 Misc. 658, reversed on other grounds 192 N.Y.S. 705, 200 App.Div. 135, dismissal on appeal denied 135 N.E. 942, 233 N.Y. 618.

Wyo.—Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n, 297 P. 385, 43 Wyo. 41.

15 C.J. p 1242 note 62.

Necessity of privity of estate to entitle remote grantee to sue see infra § 84.

Restrictive covenants see the C.J.S. title Deeds §§ 167, 171, also 18 C.J. p 394 note 10 et seq.

Effect of use of words "heirs and assigns"

Whatever confusion may exist in the cases with reference to the use of the words "heirs and assigns" it is clear that they cannot dispense with some privity of estate in order to carry the covenant with the land, and it has never been held that a

covenant which, in its nature or otherwise, is personal is made to run with the land by the mere employment of the words.—Mygatt v. Coe, 42 N.E. 17, 147 N.Y. 456.

When privity of estate ends, in absence of express agreement, basis for liability of an assignee or grantee on covenants running with land is gone.—Union Trust Co. of Maryland v. Rosenberg, 189 A. 421, 171 Md. 409.

51. Or.—Ford v. Oregon Electric R. Co., 117 P. 809, 60 Or. 278, 36 L.R.A., N.S., 358, Ann.Cas.1914A 280. 15 C.J. p 1242 note 62.

Covenant as part of conveyance see infra § 59.

"Privity of estate" defined see the C. J.S. definition Privity, also 50 C.J. p 407 note 83—p 408 note 12.

52. Or.—Ford v. Oregon Electric R. Co., supra.

15 C.J. p 1243 note 64.

53. Or.—Ford v. Oregon Electric R. Co., supra.

15 C.J. p 1243 note 64.

54. Mo.—Commerce Trust Co. v. Foulds, App., 273 S.W. 229—Iowa Loan & Trust Co. v. Fullen, 91 S. W. 53, 114 Mo.App. 633.

Wyo.—Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n, 297 P. 385, 43 Wyo. 41.

15 C.J. p 1243 note 67.

55. Cal.—Pomona Land & Water Co. v. San Antonio Water Co., 93 P. 881, 152 Cal. 618.

Nev.—Wheeler v. Schad, 7 Nev. 204. 15 C.J. p 1249 note 38.

Covenants imposing burdens see infra § 69.

56. Mass.—Norcross v. James, 2 N. E. 946, 140 Mass. 188.

N.Y.—Cole v. Hughes, 54 N.Y. 444, 13 Am.R. 611.

chose in action, see the C.J.S. title Dower § 42, also 19 C.J. p 494 note 87, a covenant of warranty in a deed from her husband which she has signed to release her dower interest is not a covenant by her running with the land so as to make her liable for a breach thereof;⁵⁷ and the same is true of a husband's covenants in a conveyance of his wife's land, unless it appears that he, as well as his wife, is in possession of the land and delivers such possession to the grantee.⁵⁸

§ 59. Covenant as Part of Conveyance

In order that a covenant may run with the land the agreement must be an instrument of conveyance or grant of an easement.

Ordinarily, privity of estate is necessary in order that a covenant may run with the land, see § 58 supra, and such privity can be spelled out only in case the agreement is or can be regarded as an instrument of conveyance or grant of an easement,⁵⁹ particularly where a grant of an estate is required by statutory regulation.⁶⁰

§ 60. Covenant for Heirs and Assigns

The use of the words "heirs and assigns" ordinarily

is not controlling in determining whether a covenant runs with the land.

According to the common-law rule, claimed to have been formulated in Spencer's case, a covenant which concerned a thing not in esse would not run with the land unless the words "heirs and assigns" were included in the covenant.⁶¹ This rule has been followed in some jurisdictions,⁶² but it has been severely criticized by various courts,⁶³ and the modern trend has been more to relax the rule than to follow it.⁶⁴ The rule which now seems sustained by the better reasoning as well as by the weight of authority is that, where the covenant is of such nature and character that it may run with the land, the words "heirs and assigns" are not controlling if it can reasonably be inferred from the language of the instrument that the parties intended that the covenant should run with the land,⁶⁵ even if the covenant concerns a thing not in esse.⁶⁶

Express provisions binding a party's heirs and assigns evidence an intention to create a covenant running with the land,⁶⁷ but are not necessarily conclusive as to the intention of the parties which may be determined from the deed and the surrounding circumstances.⁶⁸ Likewise, the absence of the

Covenants conferring benefits see *infra* § 62.

57. Md.—Pyle v. Gross, 48 A. 713, 92 Md. 132.

15 C.J. p 1243 note 69.

58. N.Y.—Mygatt v. Coe, 26 N.E. 611, 124 N.Y. 212, 11 L.R.A. 646, 46 N.E. 949, 152 N.Y. 457, 57 Am. S.R. 521.

59. N.Y.—Cole v. Hughes, 54 N.Y. 444, 13 Am.R. 611—Rubel Bros. v. Dumont Coal & Ice Co., 132 N.Y.S. 204, 111 Misc. 658, reversed on other grounds 192 N.Y.S. 705, 200 App.Div. 135, dismissal on appeal denied 135 N.E. 942, 233 N.Y. 618.

N.C.—Barringer v. Virginia Trust Co., 43 S.E. 910, 132 N.C. 409.

Wyo.—Lingle Water Users' Ass'n v. Occidental Bldg. & Loan Ass'n, 297 P. 385, 43 Wyo. 41.

15 C.J. p 1242 note 63, p 1253 notes 94-96.

Conveyance as transfer of covenant see *infra* § 83.

Covenants creating easements see *infra* § 73.

Interest or estate to which covenant annexable see *supra* § 57.

Restrictive covenants see the C.J.S. title Deeds § 167, also 13 C.J. p 294 note 9 et seq.

"The maxim, *Transit terra cum onere*, presupposes a transfer of the land, and when that actually takes place, it forms the medium of a privity between the assignees."—Mygatt v. Coe, 26 N.E. 611, 124 N.Y. 212, 11 L.R.A. 646.

60. Cal.—Pomona Land & Water Co. v. San Antonio Water Co., 93 P. 831, 152 Cal. 618.

Agreement to furnish water is not a "grant" of an estate to support a covenant running with the land.—Coulter v. Sausalito Bay Water Co., 10 P.2d 780, 122 Cal.App. 480.

61. Ohio.—Johnson v. American Gas Co., 8 Ohio App. 124.

15 C.J. p 1243 note 77, p 1244 note 84. Persons liable on real covenants:

Generally see *infra* § 86.

Devisees see the C.J.S. title Wills § 1315, also 69 C.J. p 1219 note 77—p 1220 note 82.

Heirs see the C.J.S. title Descent and Distribution § 126, also 18 C.J. p 950 note 40—p 951 note 60.

62. Tex.—Lakewood Heights Co. v. McCuiston, Civ.App., 226 S.W. 1109, error refused.

15 C.J. p 1244 note 81.

63. S.C.—Epting v. Lexington Water Power Co., 181 S.E. 86, 177 S. C. 303, 102 A.L.R. 773.

15 C.J. p 1244 note 82.

64. S.C.—Epting v. Lexington Water Power Co., *supra*.

15 C.J. p 1244 note 84.

65. Md.—Union Trust Co. of Maryland v. Rosenberg, 189 A. 421, 424, 171 Md. 409, quoting *Corpus Juris*.

Minn.—Vawter v. Crafts, 42 N.W. 483, 41 Minn. 14.

Ohio.—Maher v. Cleveland Union Stockyards Co., 9 N.E.2d 995, 55 Ohio App. 412—Johnson v. American Gas Co., 8 Ohio App. 124—

Kratz v. Risch, 13 Ohio N.P., N.S., 478.

Pa.—Brush v. Lehigh Valley Coal Co., 138 A. 860, 290 Pa. 322.

15 C.J. p 1244 note 86.

66. Ill.—Purvis v. Shuman, 112 N. E. 679, 273 Ill. 236, L.R.A.1917A. 121.

Ohio.—Maher v. Cleveland Union Stockyards Co., 9 N.E.2d 995, 55 Ohio App. 412—Johnson v. American Gas Co., 8 Ohio App. 124.

In conveyance of land to corporation, "its successors and assigns," a covenant of warranty in fee to the corporation and its "successors" was not limited to those who succeeded to the corporate character of the grantee, but was intended to run in favor of assigns as well.—Dallas Compress Co. v. Liepold, 88 So. 681, 205 Ala. 562.

67. U.S.—Murphy v. Kerr, C.C.A.N. M., 5 F.2d 908, 41 A.L.R. 1359, affirming, D.C., 296 F. 536.

Mass.—Battelle v. City of Worcester, 128 N.E. 631, 236 Mass. 395.

N.M.—Bolles v. Pecos Irr. Co., 167 P. 280, 23 N.M. 32.

Failure to repeat words of inheritance after use thereof in the beginning of a contract does not affect intention manifested of binding heirs and assigns, nor prevent the covenant from running with the land.—H. J. Lewis Oyster Co. v. West, 107 A. 138, 93 Conn. 518.

68. N.Y.—Pulitzer v. Campbell, 262 N.Y.S. 743, 748, 147 Misc. 700.

words "heirs and assigns," or words of similar import, may be considered in connection with the context of the deed in arriving at the intent of the parties.⁶⁹

§ 61. Effect of Agreement of Parties

By agreement a covenant may be prevented from running, or may be made to run, with the land.

Although the nature and character of a covenant may be such that it would ordinarily run with the land, yet the contracting parties may, by the express terms of their contract, provide that it shall not so run.⁷⁰ However, the absence of a specific statement that the covenant runs with the land does not indicate that it was intended not to run.⁷¹

A covenant manifesting an agreement that it should run with the land, and complying with other requirements passes with the land and inures to the benefit of subsequent assignees;⁷² but, on the other hand, no agreement between the parties, however

strongly expressed, can cause a covenant to be attached to the land if it is not of such a nature that the law permits it to be attached,⁷³ although such an agreement may create a lien on the land as against a subsequent purchaser with notice,⁷⁴ notwithstanding it will not bind such purchaser personally.⁷⁵

§ 62. Covenants Conferring Benefits

A covenant conferring benefits may run with the land.

There are many cases to the effect that the question whether a covenant will or will not run with the land does not depend so much on whether it is to be performed on the land itself as on whether it tends directly or necessarily to enhance its value or render it more beneficial and convenient to those by whom it is owned and occupied,⁷⁶ and that, if this be the case, every successive assignee of the land will be entitled to enforce the covenant;⁷⁷ but

Sufficiency of language

Language in quitclaim deed by son of his interest in father's land to father and his "remaining heirs," with recital that grantor was an heir is not such as to give character of a warranty or "covenant running with the land."—*Douglass v. Hammel*, 285 S.W. 433, 313 Mo. 514.

69. Or.—*Brown v. Southern Pac. Co.*, 58 P. 1104, 36 Or. 123, 78 Am. S.R. 761, 47 L.R.A. 407.
15 C.J. p 1245 note 37.

"Successors and assigns"

Omission from deed of "successors and assigns," used in preliminary sale contract binding purchasers "and their successors and assigns" by such obligation, together with fact that grantor divested himself of title to portion of land, subsequently acquired by parties "going grantees' successors in title for enforcement of covenant, during interim between execution of contract and deed was held to show intention that the affirmative covenant to repair a dike was not to run with the land.—*Salvi v. John A. Manning Paper Co.*, 7 N.Y.S.2d 36, 163 Misc. 661.

70. N.Y.—*Wilmurt v. McGrame*, 45 N.Y.S. 32, 16 App.Div. 412, 417.
15 C.J. p 1245 note 89.

71. U.S.—*Murphy v. Kerr*, C.C.A.N. 11, 5 F.2d 903, 41 A.L.R. 1359, affirming, D.C., 296 F. 536.

72. Ky.—*Walker v. City of Richmond*, 139 S.W. 1122, 173 Ky. 26, Ann.Cas.1918E 1084.

Or.—*Pearson v. Richards*, 211 P. 167, 106 Or. 78.

S.C.—*Cheves v. City Council of Charleston*, 138 S.E. 867, 140 S.C. 423.

Tex.—*Gulf, C. & S. F. Ry. Co. v.*

Thornton, Civ.App., 109 S.W. 220.
Option to repurchase on agreed terms
Conn.—*H. J. Lewis Oyster Co. v. West*, 107 A. 133, 93 Conn. 518.

73. U.S.—*Zanes v. Lehigh Valley Transit Co.*, D.C.Pa., 41 F.2d 552.

Ill.—*Keogh v. Peck*, 259 Ill.App. 503, 512, quoting *Corpus Juris*.

N.Y.—*Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank*, 15 N.E.2d 793, 278 N.Y. 248, 118 A.L.R. 973, affirming 300 N.Y.S. 1341, 252 App.Div. 876 and answering questions certified 300 N.Y.S. 1353, 253 App.Div. 722, reargument denied 16 N.E.2d 852, 278 N.Y. 704, 118 A.L.R. 982.—*Morgan Lake Co. v. New York, N. H. & H. R. Co.*, 136 N.E. 685, 262 N.Y. 234, reversing 281 N.Y.S. 913, 237 App.Div. 841.—*Greenfarb v. R. S. K. Realty Corporation*, 241 N.Y.S. 439, 229 App.Div. 250, affirmed 175 N.E. 649, 256 N.Y. 130, reargument denied 177 N.E. 190, 256 N.Y. 678.—*Rubel Bros. v. Dumont Coal & Ice Co.*, 182 N.Y.S. 204, 111 Misc. 658, reversed on other grounds 192 N.Y.S. 705, 200 App.Div. 135, dismissal of appeal denied 135 N.E. 942, 233 N.Y. 618.

Wyo.—*Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n*, 297 P. 385, 43 Wyo. 41.
15 C.J. p 1245 notes 89, 90.

In California, under statute requiring that covenants running with the land be contained in a direct grant for the direct benefit of the property, an agreement of the landowner to deliver certain crops, such as peach crops, does not run with the land, although the contract expressly so provides.—*Pratt-Low Preserving Co. v. Evans*, 204 P. 241, 55 Cal.App. 724.—*California Packing*

Corporation v. Grove, 196 P. 891, 51 Cal.App. 253.

74. Cal.—*Fresno Canal & Irrigation Co. v. Rowell*, 22 P. 53, 80 Cal. 114, 13 Am.S.R. 112.—*California Packing Corporation v. Grove*, 196 P. 891, 51 Cal.App. 253.

75. Cal.—*Fresno Canal & Irrigation Co. v. Rowell*, 22 P. 53, 80 Cal. 114, 13 Am.S.R. 112.

76. Ala.—*Cummings v. Alexander*, 169 So. 810, 233 Ala. 10.

Ga.—*Rosen v. Wolff*, 110 S.E. 377, 881, 152 Ga. 578, citing *Corpus Juris*.

Iowa.—*Gammel v. Goode*, 72 N.W. 531, 103 Iowa 301.

Mich.—*Mueller v. Bankers' Trust Co. of Muskegon*, 247 N.W. 103, 262 Mich. 53.

Minn.—*Vawter v. Crafts*, 42 N.W. 483, 41 Minn. 9.

15 C.J. p 1241 note 52.

Covenants respecting erection and maintenance of fences see *infra* § 69.

Covenant permitting removal of improvements by grantee is a covenant running with the land and inures to the benefit of a subsequent vendee.—*Guardian Loan & Trustee Co. v. Schunke*, Tex.Civ.App., 36 S.W.2d 585, error refused.

Vendor's guaranty of maximum ditch upkeep charge to purchasers is not covenant running with land.—*Wanamaker Ditch Co. v. Pettit*, 3 P.2d 295, 89 Colo. 344.

77. Ga.—*Rosen v. Wolff*, 110 S.E. 377, 152 Ga. 578.

Mich.—*Mueller v. Bankers' Trust Co. of Muskegon*, 247 N.W. 103, 262 Mich. 53.

15 C.J. p 1241 note 52.

this doctrine is limited to those cases in which the rights conferred are of such a character as to attach to the land and pass as incidents thereto.⁷⁸ In all other cases, privity of estate is essential, as considered supra § 58.

Where the statute so provides, in order for a covenant to run with the land it must be a covenant for the direct benefit of the land conveyed.⁷⁹

§ 63. Covenant of Seizin

In the absence of contrary statutory regulations, a covenant of seizin generally does not run with the land.

As is explained in §§ 22, 40, supra, the covenant of seizin ordinarily is regarded as a personal covenant in praesenti, and, unless otherwise controlled by statute,⁸⁰ as a general rule does not run with the land nor pass to an assignee,⁸¹ although according to many authorities the rule is limited to cases in which no possession accompanies the deed.⁸² Moreover, according to some authorities which follow the English rule, the covenant of seizin runs with land.⁸³

78. Ark.—Ft. Smith Gas Co. v. Gean, 55 S.W.2d 63, 186 Ark. 573. Or.—Beck v. Lane County, 18 P.2d 594, 141 Or. 580. S.C.—Epting v. Lexington Water Power Co., 181 S.E. 66, 70, 177 S.C. 308, 102 A.L.R. 773, citing *Corpus Juris*. 15 C.J. p 1249 note 35.

79. Cal.—Pedro v. Humboldt County, 19 P.2d 776, 217 Cal. 493—Pomona Land & Water Co. v. San Antonio Water Co., 93 P. 881, 152 Cal. 618.

S.D.—Hill v. City of Huron, 165 N. W. 534, 39 S.D. 530.

"Direct benefit of the property"

The words "direct benefit of the property," as used in Civ.Code § 1462, providing that covenants made for the direct benefit of the property run with the land, means any covenant which affects the title to real property or any interest or estate therein of the covenantee, and such covenant is one which is intended to restore to the covenantee or the owner of the land some right with respect thereto which he has parted with pro re nata or for a special purpose; in other words, a covenant for the direct benefit of the estate or interest of the covenantee in the land mortgaged.—Sacramento Suburban Fruit Lands Co. v. Whaley, 194 P. 1054, 50 Cal.App. 125.

80. Mo.—Graham v. Finnerty, 232 S.W. 129. 15 C.J. p 1246 note 8.

81. Colo.—Stone v. Rozich, 297 P. 999, 88 Colo. 399.

Ill.—Firebaugh v. Wittenberg, 141 N. E. 379, 309 Ill. 536.

N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

N.M.—Beecher v. Tinnin, 189 P. 44, 26 N.M. 59.

N.C.—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 108.

Tenn.—Great Bond & Mortgage Co. v. Ogle, 65 S.W.2d 1091, 17 Tenn. App. 112—Cobb v. Sanders, 1 Tenn. App., 326, 332, quoting *Corpus Juris*.

15 C.J. p 1246 note 7. Performance or breach of covenant see infra § 96.

82. Ohio.—Baugman v. Hower, 10 N.E.2d 176, 179, 56 Ohio App. 162, citing *Corpus Juris*. 15 C.J. p 1246 note 10.

83. Iowa.—Rockafellow v. Gray, 191 N.W. 107, 194 Iowa 1280. 15 C.J. p 1245 note 6.

84. Me.—Prescott v. Hobbs, 30 Me. 345. 15 C.J. p 1247 note 13.

85. Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536.

N.M.—Merchants Nat. Bank of Clinton, Iowa v. Otero, 175 P. 781, 24 N.M. 598.

15 C.J. p 1246 note 12. Performance or breach of covenant see infra § 97.

86. Ohio.—Devore v. Sunderland, 17 Ohio 52, 49 Am.D. 442.

§ 64. Covenant of Right to Convey

In the absence of contrary statutory regulations, the covenant of right to convey ordinarily does not run with the land.

As is explained in §§ 22, 41 supra, the covenant of right to convey is usually regarded as a personal covenant in praesenti, and, unless otherwise provided by statute,⁸⁴ ordinarily does not run with the land.⁸⁵

However, it has been held that, where a grantor is in actual possession at the date of the delivery of the deed, although by his own disseizin, his covenant of right to convey is real and runs with the land.⁸⁶

§ 65. Covenant against Encumbrances

In the absence of contrary statutory regulations, a covenant against encumbrances generally does not run with the land.

As is stated in §§ 22, 42 supra, the covenant against encumbrances ordinarily is regarded as a personal covenant in praesenti, and, unless otherwise controlled by express or implied statutory regulations,⁸⁷ as a general rule does not run with the land.⁸⁸

87. Colo.—Wheeler v. Roley, 95 P. 2d 2.

Idaho.—Brinton v. Johnson, 208 P. 1028, 35 Idaho 656.

Ill.—Jones v. Taylor, 261 Ill.App. 403.

15 C.J. p 1247 note 18.

88. U.S.—Coral Gables v. Payne, C.C.A.S.C., 94 F.2d 593, 595, citing *Corpus Juris*.

Md.—Levine v. Hull, 109 A. 141, 135 Md. 444.

N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

N.M.—Beecher v. Tinnin, 189 P. 44, 26 N.M. 59.

N.C.—Thompson v. Avery County, 5 S.E.2d 146, 216 N.C. 405—Lockhart v. Parker, 126 S.E. 313, 315, 189 N.C. 138, quoting *Corpus Juris*.

Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

15 C.J. p 1247 note 16.

Performance or breach of covenant see infra § 98.

Special covenant against reassessment

A covenant, "It is hereby understood that there is a certain reassessment for street improvement now in litigation against said property which grantors hereby agree and promise to pay should the court adjudge the same as a lien against said property," was held intended to operate prospectively, and hence to run with the land, so that a remote grantee could sue for breach occurring during his ownership.—Pearson v. Richards, 211 P. 167, 106 Or. 78.

On the other hand, according to some authorities the covenant is substantially one of indemnity, see § 42 supra, and as such runs with the land and passes to a remote grantee notwithstanding it is technically broken on the execution of the original deed,⁸⁹ especially where a manifest intention appears that it shall operate in the future, as where it is intimately associated with the covenant for quiet enjoyment or for further assurance,⁹⁰ although it has been said that, where a covenant against encumbrances is coupled with, and supplemental to, the covenant of warranty, it would seem to be in its operation no more than a covenant against encumbrances in praesenti joined with a covenant of warranty in futuro.⁹¹

Assignability of choses in action. Where a chose in action is assignable, see Assignments §§ 5, 30, it has been held that a covenant against encumbrances runs with the land,⁹² although there is contrary authority.⁹³

§ 66. Covenant for Quiet Enjoyment

Unless otherwise controlled by a statute or an agreement, a covenant for quiet enjoyment runs with the land.

As is explained in § 45 supra, a covenant for quiet enjoyment is prospective, and, unless a statute, or an agreement between the parties, negatives such transmission,⁹⁴ the covenant runs with

the land.⁹⁵ Until breached, as is shown in § 74 infra, the covenant passes with the fee to any subsequent grantee of the same title,⁹⁶ although the assignment is by quitclaim deed.⁹⁷

This doctrine applies even where the covenant is regarded as a personal obligation,⁹⁸ and in some jurisdictions it has been applied in cases where neither the grantor nor his immediate grantee ever had possession.⁹⁹

§ 67. Covenant for Further Assurance

In the absence of contrary statutory regulations, a covenant for further assurance runs with the land.

As is observed in § 46 supra, the covenant for further assurance is in futuro, and, in the absence of contrary statutory regulations, and until a breach, see § 74 infra, the covenant runs with the land,¹ and inures to the benefit of any subsequent grantee.²

§ 68. Covenant of Warranty

In the absence of a statute or an agreement to the contrary, a covenant of warranty ordinarily runs with the land.

As §§ 47-49 supra explain, a covenant of warranty ordinarily is in futuro, and, unless a statute, or an agreement between the parties, negatives such transmission,³ until broken, see § 74 infra, the cove-

89. Wis.—Wileman v. Ladd, 245 N. W. 838, 209 Wis. 594—Capital City Lumber Co. v. Olson, 208 N.W. 891, 190 Wis. 182.
15 C.J. p 1247 note 22.

In Illinois

(1) A covenant that the land is free from encumbrances, although technically broken when made may run with the land and inure to the benefit of a grantee who sustains the whole damage.—Richard v. Bent, 59 Ill. 38, 14 Am.R. 1—Newman v. Sevier, 134 Ill.App. 544.

(2) A covenant that the land is free from encumbrances is personal and does not run with the land.

Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

Covenant to save husband and heirs harmless from any claim of dower on the part of his wife in consideration of a conveyance by the husband of certain property in trust for the use and benefit of the wife has been held to run with the land.—Gaines v. Poor, 3 Metc., Ky., 503, 79 Am.D. 559.

90. Mich.—Post v. Campau, 3 N.W. 272, 42 Mich. 90.
15 C.J. p 1248 note 23.

21 C.J.S.—59

91. N.J.—Carter v. Denman, 23 N. J.Law 260.
15 C.J. p 1248 note 24.

92. Idaho.—Brinton v. Johnson, 208 P. 1023, 35 Idaho 656.
Ohio.—Shick v. Ulland, 24 Ohio N.P., N.S., 401—McKnight v. Columbian Land & Bldg. Co., 23 Ohio N.P., N.S., 189.
15 C.J. p 1247 note 17.

93. N.C.—Lockhart v. Parker, 126 S.E. 313, 139 N.C. 137.

94. Cal.—Platner v. Vincent, 202 P. 655, 187 Cal. 443.
Ga.—Tucker v. McArthur, 30 S.E. 283, 103 Ga. 409.
Effect of agreement of parties see supra § 61.

95. Ala.—Cummings v. Alexander, 169 So. 310, 233 Ala. 10—Keel v. Ikard, 133 So. 906, 222 Ala. 617—Dallas Compress Co. v. Liepold, 88 So. 681, 205 Ala. 562.

Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

Neb.—Campbell v. Gallentine, 215 N. W. 111, 115 Neb. 789, 61 A.L.R. 1.
Utah.—East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 65 Utah 560—Van Cott v. Jacklin, 226 P. 460, 63 Utah 412.
15 C.J. p 1248 note 26.

96. Ala.—Dallas Compress Co. v. Liepold, 88 So. 681, 205 Ala. 562.
Utah.—East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 65 Utah 560.
15 C.J. p 1248 note 27.
Performance or breach of covenant see infra § 108.

97. N.Y.—Hunt v. Amidon, 4 Hill 345, 40 Am.D. 283.
15 C.J. p 1249 note 32.

98. Ala.—Dallas Compress Co. v. Liepold, 88 So. 681, 205 Ala. 562.

99. S.D.—Solberg v. Robinson, 147 N.W. 87, 34 S.D. 55.
15 C.J. p 1248 note 23.

1. Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

N.C.—Hahn v. Fletcher, 128 S.E. 326, 189 N.C. 729.
15 C.J. p 1248 note 26.

2. Mo.—Graham v. Finnerty, 232 S. W. 129—Staed v. Rossier, 137 S. W. 901, 157 Mo.App. 300.
15 C.J. p 1248 note 27.
Performance or breach of covenant see infra § 109.

3. Ga.—Tucker v. McArthur, 30 S. E. 283, 103 Ga. 409.
Effect of agreement of parties see supra § 61.

nant runs with the land,⁴ whether the warranty is general⁵ or special,⁶ and inures to the benefit of subsequent grantees.⁷

However, according to some authorities, the covenant of warranty will not run with the land where the grant vests neither title⁸ nor possession in the grantee.⁹ Furthermore, the implied warranty between parties to a partition, whether coparceners, joint tenants, or tenants in common, does not run with the land.¹⁰

§ 69. Covenants Imposing Burdens in General

A covenant imposing a burden, including a covenant to do an affirmative act, as to erect and maintain a fence, ordinarily may run with the land.

As a general rule a covenant imposing a burden, if in other respects such as the law permits to attach to land, will run with the land as readily as

one conferring a benefit,¹¹ although the rule does not apply to unreasonable burdens.¹² The burden must redound primarily to the benefit of related lands rather than to the grantor personally.¹³ Thus a covenant by a grantee to pay an encumbrance does not run with the land.¹⁴

Although privity of estate generally is required, see § 58 supra, it seems that the privity of estate required in this class of cases between the covenantor and the covenantee means only that the covenant must impose such a burden on the land of the covenantor as to be in substance or to carry with it a grant of an easement or quasi easement, or must be in aid of such a grant,¹⁵ and it has been said that the material inquiries are whether the parties meant to charge the land and whether the burden is one that may be imposed consistently with policy and principle.¹⁶

Affirmative covenants. Although according to

4. Ala.—*Cummings v. Alexander*, 169 So. 310, 233 Ala. 10—*Dallas Compress Co. v. Liepold*, 88 So. 681, 205 Ala. 562.

Ark.—*Wade v. Texarkana Building & Loan Ass'n*, 233 S.W. 937, 150 Ark. 99—*Quinn v. Lee Wilson & Co.*, 207 S.W. 211, 137 Ark. 69.

Ga.—*McEntyre v. Merritt*, 175 S.E. 681, 49 Ga.App. 416.

Ill.—*Firsbaugh v. Wittenberg*, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77—*Blwer v. Martin*, 128 N.E. 518, 294 Ill. 488.

Mass.—*Gallison v. Downing*, 138 N.E. 815, 244 Mass. 33.

Neb.—*Campbell v. Gallentine*, 215 N.W. 111, 115 Neb. 789, 61 A.L.R. 1.

N.J.—*Greenwood v. Robbins*, 154 A. 333, 108 N.J.Eq. 122.

N.M.—*Beecher v. Tinnin*, 189 P. 44, 26 N.M. 59—*Merchants' Nat. Bank of Clinton, Iowa, v. Otero*, 175 P. 781, 24 N.M. 598.

Ohio.—*Lyons v. Chapman*, 178 N.E. 24, 40 Ohio App. 1.

Tenn.—*Cobb v. Sanders*, 1 Tenn.App. 325.

Tex.—*Wiggins v. Stephens*, Com. App., 246 S.W. 84, affirming, Civ. App., 191 S.W. 777—*Cunningham v. Buel*, Civ.App., 287 S.W. 683—*Liberto v. Sanders*, Civ.App., 243 S.W. 120, reversed on other grounds, Com.App., 259 S.W. 1080.

15 C.J. p 1248 note 26.
Performance or breach of covenant see infra § 110.

5. Ala.—*Keel v. Ikard*, 133 So. 906, 222 Ala. 617—*Dallas Compress Co. v. Liepold*, 88 So. 681, 205 Ala. 562.

Ohio.—*Williams v. Haller*, 13 Ohio N.P.N.S., 329.

Pa.—*Herbert v. Northern Trust Co.*, 112 A. 471, 269 Pa. 306.

S.C.—*Morris v. Lain*, 180 S.E. 206, 176 S.C. 310, 100 A.L.R. 1189.

Utah.—*East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co.*, 238 P. 283, 65 Utah 560—*Van Cott v. Jacklin*, 226 P. 460, 63 Utah 412.

15 C.J. p 1248 note 26.

6. N.C.—*Hahn v. Fletcher*, 128 S.E. 326, 189 N.C. 729.

15 C.J. p 1248 note 26.

7. N.Y.—*Rollton Syndicate v. Widlitz*, 219 N.Y.S. 383, 219 App.Div. 537.

15 C.J. p 1248 note 27.

8. Ala.—*Prestwood v. McGowin*, 29 So. 386, 128 Ala. 267, 86 Am.S.R. 136.

Kan.—*Colver v. McInturff*, 212 P. 88, 112 Kan. 604, motion overruled 212 P. 908, 112 Kan. 604.

N.M.—*Merchants Nat. Bank of Clinton, Iowa v. Otero*, 175 P. 781, 24 N.M. 598.

9. Kan.—*Colver v. McInturff*, 212 P. 88, 112 Kan. 604, motion overruled 212 P. 908, 112 Kan. 604.

15 C.J. p 1248 note 28.

10. Ky.—*Jones v. Bigstaff*, 25 S.W. 889, 95 Ky. 395, 15 Ky.L. 321, 44 Am.S.R. 251.

11. Ga.—*Smith v. Gulf Refining Co.*, 134 S.E. 446, 162 Ga. 191, 51 A.L.R. 1323.

Ky.—*Illinois Cent. R. Co. v. Meacham Contracting Co.*, 202 S.W. 859, 180 Ky. 430.

Ohio.—*Krats v. Risch*, 13 Ohio N.P., N.S., 476.

Or.—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 159 Or. 80.

15 C.J. p 1249 note 40.

Agreement to furnish steam, water, etc.

Instrument merely indicating steam plant owner agreed to furnish adjoining building steam, hot

water, and janitor service for certain period did not create covenant following land.—*Layne v. Bryant*, 291 P. 615, 108 Cal.App. 324.

12. N.J.—*Morris & E. R. Co. v. Hoboken & M. R. Co.*, 59 A. 332, 68 N.J.Eq. 328.

Wyo.—*Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n*, 297 P. 385, 393, 43 Wyo. 41, citing *Corpus Juris*.

15 C.J. p 1250 note 41.

13. Ark.—*Ft. Smith Gas Co. v. Gean*, 55 S.W.2d 63, 186 Ark. 573.

Mass.—*Orenberg v. Horan*, 168 N.E. 794, 269 Mass. 312.

Tex.—*Abernathy v. Adoue*, Civ.App., 49 S.W.2d 476.

Lands benefited and burdened need not be contiguous

Pa.—*Brush v. Lehigh Valley Coal Co.*, 133 A. 860, 290 Pa. 322.

14. U.S.—*Zanes v. Lehigh Valley Transit Co.*, D.C.Pa., 41 F.2d 552, affirmed, C.C.A., *Lehigh Valley Transit Co. v. Zanes*, 46 F.2d 848, certiorari denied 52 S.Ct. 8, 284 U.S. 619, 76 L.Ed. 528.

Ill.—*Scholten v. Barber*, 75 N.E. 460, 217 Ill. 148.

Covenant of mortgagor to pay debt as running with land see the C.J.S. title *Mortgages* § 103, also 41 C.J. p 394 notes 61, 62.

15. N.Y.—*Rubel Bros. v. Dumont Coal & Ice Co.*, 182 N.Y.S. 204, 111 Misc. 658, reversed on other grounds 192 N.Y.S. 705, 200 App. Div. 135, dismissal on appeal denied 135 N.E. 942, 233 N.Y. 618.

15 C.J. p 1250 note 46.

16. Iowa.—*Sexauer v. Wilson*, 113 N.W. 941, 136 Iowa 357, 14 L.R.A., N.S., 185, 15 Ann.Cas. 54.

Ohio.—*Johnson v. American Gas Co.*, 8 Ohio App. 124.

some authorities an affirmative covenant ordinarily is personal,¹⁷ as a general rule an affirmative covenant, as well as a negative or restrictive covenant, may run with the land.¹⁸

Covenants as to fences. When otherwise of the nature and character to constitute a covenant real, covenants stipulating for the erection and maintenance of fences will run with the land¹⁹ and bind remote assignees of the covenantor;²⁰ and it seems that this rule may apply to agreements between adjoining landowners as to a division fence,²¹ especially if in existence at the time of the agreement.²²

However, a covenant running with the land for the erection and maintenance of fences cannot, it has been held, be created by a stipulation in a deed poll,²³ nor by parol agreement,²⁴ nor by mere usage;²⁵ and hence the mere fact that adjoining landowners had long been accustomed jointly to maintain a partition fence would not constitute a covenant running with the land.²⁶

Where an heir or assign is not bound by a covenant as to matters not in esse because he is not

named, see § 60 supra, a covenant by a grantor to build a fence along an adjoining railroad right of way, and, on neglect to do so, not to hold the company responsible for any damages resulting to the grantor, omitting the word "assigns," does not run with the land.²⁷

§ 70. Covenants as to Use of Property

Whether covenants as to the use of property run with the land is discussed in the C.J.S. title Deeds § 167, also 18 C.J. p 393 note 8-p 397 note 59.

§ 71. — Buildings, Structures and Improvements

Covenants relating to the erection and maintenance of buildings, improvements, and other structures on land as constituting covenants running with the land are considered in the C.J.S. title Deeds § 167, also 18 C.J. p 393 note 8-p 397 note 59; while in the C.J.S. title Party Walls § 22, also 47 C.J. p 1357 note 86-p 1359 note 3, covenants relating to party walls are discussed.

17. In New York

(1) Generally, a covenant to do an affirmative act does not run with the land.—*Neponsit Property Owners' Ass'n v. Emigrant Industrial Bank*, 15 N.E.2d 793, 278 N.Y. 248, 118 A.L.R. 973, affirming 300 N.Y.S. 1341, 252 App.Div. 876 and answering questions certified 300 N.Y.S. 1353, 253 App.Div. 722, reargument denied 16 N.E.2d 852, 278 N.Y. 704, 118 A.L.R. 982.—*Guaranty Trust Co. of New York v. New York & Q. C. Ry. Co.*, 170 N.E. 887, 253 N.Y. 190, modifying 235 N.Y.S. 127, 226 App.Div. 299, and reargument denied 172 N.E. 264, 254 N.Y. 126, appeal dismissed 56 S.Ct. 86, 282 U.S. 803, 75 L.Ed. 722.—*Salvi v. John A. Manning Paper Co.*, 7 N.Y.S.2d 36, 168 Misc. 661.

(2) Exceptions are recognized in the case of covenants respecting boundary fences, party walls, railroad crossings, rent, repairs, and improvement assessments.—*Greenfarb v. R. S. K. Realty Corporation*, 175 N.E. 649, 256 N.Y. 130, affirming 241 N.Y.S. 439, 229 App.Div. 250, and reargument denied 177 N.E. 190, 256 N.Y. 678.—*Levy v. Schnurmacher Const. Corporation*, 174 N.E. 70, 255 N.Y. 83, reversing 237 N.Y.S. 823, 227 App.Div. 816.—*Salvi v. John A. Manning Paper Co.*, supra.

(3) To enforce affirmative covenant in deed as against subsequent purchaser of land conveyed, it must appear that grantor and grantee intended covenant to run with land.—*Salvi v. John A. Manning Paper Co.*, supra.

(4) Grantee's covenant to pay proportionate share of cost of maintaining private roads, walks, sewers, and drains was held to run with land.—*Lawrence Park Realty Co. v. Crichton*, 218 N.Y.S. 278, 218 App.Div. 374.

18. U.S.—*Murphy v. Kerr*, C.C.A. N.M., 5 F.2d 908, 41 A.L.R. 1359, affirming, D.C., 296 F. 536.

Ala.—*Cummings v. Alexander*, 169 So. 310, 233 Ala. 10.

Cal.—*Miller & Lux v. San Joaquin Agr. Co.*, 209 P. 592, 58 Cal.App. 753.

Pa.—*Cohen v. Turner*, 90 Pa.Super. 255.

Tex.—*Parks v. Hines*, 68 S.W.2d 364, affirmed *Hines v. Parks*, 96 S.W.2d 970, 128 Tex. 289.

15 C.J. p 1249 note 40.

Negative or restrictive covenants see the C.J.S. title Deeds § 167, also 13 C.J. p 393 note 8-p 397 note 59.

Covenant to pay assessment

A covenant in a deed which recited payment of two dollars as consideration, and that as part of consideration grantee agreed to protect and save harmless grantor from assessments for "opening" of proposed avenue which would abut grantor's property after conveyance manifested intent of parties that covenant provided for postponement of payment of actual consideration and should run with the land since assessments for street improvements are against the land only, but the covenant did not include covenant to pay assessment cost of sewerage such street.—*Maher*

v. Cleveland Union Stockyards Co., 9 N.E.2d 935, 55 Ohio App. 412.

19. Ind.—*Stover v. Harlan*, 154 N.E. 882, 87 Ind.App. 347.

Mass.—*New York Cent. & H. R. R. v. Clarke*, 117 N.E. 322, 228 Mass. 274.

15 C.J. p 1250 note 50.

Covenant of railroad as running with land see the C.J.S. title Railroads § 95, also 51 C.J. p 559 note 1 et seq.

20. Mass.—*New York Cent. & H. R. R. v. Clarke*, 117 N.E. 322, 228 Mass. 274.

15 C.J. p 1250 note 50.

21. Iowa.—*Sexauer v. Wilson*, 113 N.W. 941, 139 Iowa 357, 14 L.R.A., N.S., 185, 15 Ann.Cas. 54.

15 C.J. p 1253 note 86.

Agreements to construct or maintain partition fences see the C.J.S. title Fences § 7, also 25 C.J. p 1013 note 63-p 1019 note 81.

22. Wis.—*Hartung v. Witte*, 18 N. W. 175, 59 Wis. 285.

15 C.J. p 1253 note 87.

23. Mass.—*Kennedy v. Owen*, 136 Mass. 199.

15 C.J. p 1251 note 53.

24. Utah.—*Knight v. Southern Pac. Co.*, 172 P. 689, 52 Utah 42.

15 C.J. p 1251 note 54.

25. Conn.—*Wright v. Wright*, 21 Conn. 329.

26. Conn.—*Wright v. Wright*, supra.

27. Or.—*Brown v. Southern Pac. R. Co.*, 58 P. 1104, 36 Or. 123, 78 Am.S.R. 761, 47 L.R.A. 409.

Covenants relating to fences as running with the land are considered supra § 69.

§ 72. — Nuisances and Particular Occupations

Whether covenants prohibiting the use of land or buildings thereon for certain purposes run with the land is discussed in the C.J.S. title Deeds § 167, also 18 C.J. p 393 note 8—p 397 note 59.

§ 73. Covenants Creating Easement, Lien or Charge

A covenant creating an easement, lien, or charge may run with the land.

As is explained in the C.J.S. title Easements § 28, also 19 C.J. p 910 note 69 et seq, an easement on land may be created by covenant, and generally such covenants will run with the land so as to bind sub-

sequent owners,²⁸ although the rule has not always been upheld where the easement constituted a burden on the land,²⁹ especially when the deed containing the covenant has not been duly acknowledged and recorded as required by statute.³⁰

Covenants creating charges and liens. A lien or charge fixed on land by a covenant may run with the land and follow it into the hands of subsequent purchasers,³¹ such as a covenant to pay rent,³² or to make repairs or divide the expense of repairs.³³ Likewise, unless otherwise controlled by statute,³⁴ a covenant to pay taxes and assessments has been held to run with the land,³⁵ although, according to some authorities, such a covenant is considered as purely personal.³⁶

Furthermore, a covenant to furnish gas or pay a yearly sum in lieu thereof has been held to run with the land,³⁷ although a covenant to furnish gas has also been held to be personal.³⁸ Where land

28. U.S.—*Murphy v. Kerr*, C.C.A.N. M., 5 F.2d 908, 41 A.L.R. 1359, affirming, D.C., 296 F. 536.

Ark.—*Holthoff v. Joyce*, 294 S.W. 1006, 174 Ark. 248.

Ill.—*Wise v. Wouters*, 123 N.E. 35, 288 Ill. 29.

Ky.—*Mannin v. Adkins*, 250 S.W. 974, 199 Ky. 241.

N.M.—*Bolles v. Pecos Irr. Co.*, 167 P. 280, 23 N.M. 32.

N.Y.—*Israelsky v. Levine*, 209 N.Y.S. 577, 578, 124 Misc. 827, citing *Corpus Juris*, and reversed on other grounds 213 N.Y.S. 589, 215 App. Div. 94.

N.C.—*Walker v. Phelps*, 162 S.E. 727, 202 N.C. 344.

Ohio.—*Katz v. Risch*, 13 Ohio N.P., N.S., 478.

15 C.J. p 1252 note 79.

29. Mass.—*Wheelock v. Thayer*, 16 Pick. 68.

15 C.J. p 1252 note 80.

30. Ky.—*M. & L. T. P. R. Co. v. Louisville*, 9 Ky.L. 684.

15 C.J. p 1252 note 81.

31. Pa.—*Cohen v. Turner*, 90 Pa. Super. 255.

15 C.J. p 1252 note 83.

Particular covenants:

Fences see supra § 69.

Party walls see the C.J.S. title

Party Walls § 22, also 47 C.J. p 1357 note 87—p 1363 note 52.

Water rights see the C.J.S. title Waters § 211, also 67 C.J. p 1092 notes 14, 15.

Charge for improvements

(1) Annual charge for improvements on entire residential tract being developed by realty company placed in a covenant in deed from it that land should be subject to such lien payable to company or its assigns, including a property owner's association thereafter to be or-

ganized, ran with the land and authorized foreclosure of such lien by property owner's association, against purchaser of land at judicial sale.—*Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank*, 15 N.E.2d 793, 278 N.Y. 248, 118 A.L.R. 973, affirming 300 N.Y.S. 1341, 252 App.Div. 876 and answering questions certified 300 N.Y.S. 1353, 253 App.Div. 722, reargument denied 16 N.E.2d 852, 278 N.Y. 704, 118 A.L.R. 982.

(2) Where deed of land connected with exclusive residential development contained covenants binding grantee to pay annual assessment to be used in maintaining certain improvements, such assessment to become lien on land such covenants were held to run with land entitling grantor's successor to lien against purchaser from original grantee.—*Kennilwood Owners Ass'n v. Jaybro Realty & Development Co.*, 281 N.Y.S. 541, 156 Misc. 604.

32. U.S.—*Hurst v. Rodney*, Pa., 12 F.Cas.No.6,937, 1 Wash.C.C. 375.

15 C.J. p 1252 note 84.

Covenants running with land:

Covenant as to ground rent see the C.J.S. title Ground Rents § 11, also 28 C.J. p 861 note 41—p 862 note 75.

Covenant in lease see the C.J.S. title Landlord and Tenant § 240, also 35 C.J. p 1187 note 11 et seq.

33. N.Y.—*Greenfarb v. R. S. K. Realty Corporation*, 175 N.E. 649, 256 N.Y. 130, affirming 241 N.Y.S. 439, 229 App.Div. 250, and reargument denied 177 N.E. 190, 256 N.Y. 678—*Plattsburg Gas & Electric Co. v. Miller*, 206 N.Y.S. 42, 123 Misc. 651, reversed on other

grounds 207 N.Y.S. 335, 211 App. Div. 623.

15 C.J. p 1252 note 85.

Covenants to repair in leases as running with the land see the C. J.S. title Landlord and Tenant §§ 368, 418, also 36 C.J. p 136 notes 98-5, p 137 notes 28-34, p 201 notes 83-91.

Property subject to covenant

Covenant to repair imposed on lots abutting on driveway did not apply to portion of abutting lot which did not abut on driveway.—*Levy v. Schnurmacher Const. Corporation*, 174 N.E. 70, 255 N.Y. 83, reversing 237 N.Y.S. 823, 227 App.Div. 816.

34. Cal.—*McPike v. Heaton*, 63 P. 179, 131 Cal. 109, 82 Am.S.R. 335.

15 C.J. p 1253 note 90.

35. Mass.—*Security System Co. v. S. S. Pierce Co.*, 154 N.E. 190, 258 Mass. 4.

Or.—*Oregon & Western Colonization Co. v. Strang*, 260 P. 1002, 1003, 128 Or. 377, citing *Corpus Juris*.

S.C.—*Epting v. Lexington Water Power Co.*, 181 S.E. 66, 177 S.C. 308, 102 A.L.R. 773.

15 C.J. p 1253 note 91.

Covenant of tenant to pay taxes as running with the land see the C.J. S. title Landlord and Tenant § 361, also 36 C.J. p 121 notes 76-78.

36. Ind.—*Graber v. Duncan*, 79 Ind. 565.

Not covenant running with land

N.J.—*Child v. C. H. Winans Co.*, 183 A. 300, 119 N.J.Eq. 556.

37. Ind.—*Indiana Natural Gas, etc., Co. v. Harper*, 98 N.E. 743, 50 Ind. App. 555.

Ohio.—*Johnson v. American Gas Co.*, 8 Ohio App. 124.

38. Ark.—*Ft. Smith Gas Co. v. Gean*, 55 S.W.2d 63, 186 Ark. 573.

is conveyed in consideration of a covenant by the grantee to support the grantor, or other persons designated, such covenant runs with the land and is binding on subsequent owners,³⁹ although such a covenant has also been held to be personal.⁴⁰

Where no limitation is put to the absolute and unqualified ownership of the grantee, and there is no condition, charge, or lien, a covenant of the grantee contained in the conveyance does not run with the land.⁴¹

§ 74. Duration of Real Covenants

Real covenants cease to run with the land on the termination of the estate and on breach.

Where a covenant is annexed to an estate, in the absence of a breach it runs as long as does the estate.⁴² On the other hand, a covenant attached to an estate cannot endure beyond the termination of the estate.⁴³

Furthermore, a covenant, when broken, ceases to run with the land,⁴⁴ and becomes a chose in action.⁴⁵ Whether an assignee of the land may en-

force such a chose in action is discussed *infra* § 82.

§ 75. Release or Discharge from Liability

Broadly speaking, release or discharge from liability on covenants running with the land may result from a deed of release, from parol agreement, or from any matter in pais showing a real or conclusively presumed intent to terminate the covenant.

The English doctrine that a covenant which runs with the land can be released only by an instrument of as high a nature as the deed containing it, although some exceptions to the rule were there recognized, seems to have been followed in a few of the states,⁴⁶ although recordation of the release has been held unnecessary;⁴⁷ but, if such a release is required at all, it would seem important that it should be recorded to protect the warrantor against the suit of a subsequent purchaser.⁴⁸ By the great weight of American authority, however, such a covenant may be released either by matter in pais, or by parol,⁴⁹ the intention of the parties being the controlling factor.⁵⁰

39. Ill.—Gallaher v. Herbert, 7 N.E. 511, 117 Ill. 160—Carder v. Hughett, 243 Ill.App. 170.
15 C.J. p 1253 note 88.

40. Ga.—Jones v. Brown, 119 S.E. 624, 156 Ga. 452.

For benefit of third person

In a deed to land from a father to his son a covenant by the son to provide his sister a home and maintain her is personal.—Harkins v. Doran, Pa., 15 A. 928.

41. U.S. — Consolidated Arizona Smelting Co. v. Hinchman, Me., 212 F. 813, 129 C.C.A. 267.
15 C.J. p 1253 note 97.

42. Ohio.—Northern Ohio Traction & Light Co. v. Quaker Oats Co., 152 N.E. 5, 114 Ohio St. 685.
Duration of personal covenants see *supra* § 33.

Termination of restrictions in deeds see the C.J.S. title Deeds § 170, also 18 C.J. p 401 note 96—p 402 note 6.

Perpetual duration

When grantor conveys all title to real property to grantees "their successors and assigns forever," covenants running with land, constituting part of consideration for conveyance, are perpetual and irrevocable.—Northern Ohio Traction & Light Co. v. Quaker Oats Co., *supra*.

Abandonment of estate by the grantee will not terminate affirmative covenants, particularly after acceptance of benefits.—Northern Ohio Traction & Light Co. v. Quaker Oats Co., *supra*.

Death of covenantee will not revoke a covenant running with the land before the end of its term.—In re Scott, 193 N.Y.S. 403, 200 App.Div. 599.

Surviving destruction of building

A distinct part of a building may be conveyed with covenants, agreements, or conditions creating rights in the grantee which will survive the destruction of the building.—Weaver v. Osborne, 134 N.W. 168, 154 Iowa 10, 38 L.R.A.N.S., 706.

43. N.C.—Register v. Rowell, 48 N. C. 312—Lewis v. Cook, 35 N.C. 193.

44. Kan.—Schultz v. Cities Service Oil Co., 86 P.2d 533, 536, 149 Kan. 148, citing *Corpus Juris*.

Ky.—Pioneer Coal Co. v. Asher, 276 S.W. 487, 210 Ky. 498, motion overruled 278 S.W. 833, 212 Ky. 286.
N.M.—Merchants' Nat. Bank of Clinton, Iowa v. Otero, 175 P. 781, 24 N.M. 598.

Or.—Pearson v. Richards, 211 P. 187, 171, 106 Or. 78, citing *Corpus Juris*.
15 C.J. p 1253 note 6.

Covenants of warranty

Mass.—Gallison v. Downing, 138 N. E. 315, 244 Mass. 33.
N.M.—Beecher v. Tinnin, 189 P. 44, 26 N.M. 59.
Tex.—Wiggins v. Stephens, Com.App., 246 S.W. 84, affirming, Civ.App., 191 S.W. 777—Shannon v. Childers, Civ.App., 202 S.W. 1030, error refused.

45. Cal.—Platner v. Vincent, 202 P. 655, 187 Cal. 443.

Kan.—Schultz v. Cities Service Oil Co., 86 P.2d 533, 149 Kan. 148.

N.M.—Merchants' Nat. Bank of Clinton, Iowa v. Otero, 175 P. 781, 24 N.M. 598.
15 C.J. p 1253 note 5.

46. Me.—Heath v. Whidden, 29 Me. 103—Brown v. Staples, 28 Me. 497, 48 Am.D. 504.
15 C.J. p 1253 notes 3, 9.

47. Me.—Littlefield v. Getchell, 32 Me. 390.
Tenn.—Pile v. Benham, 3 Hayw. 176.

48. Mass.—Field v. Snell, 4 Cush. 504.
Pa.—Susquehanna, etc., R. Co. v. Quick, 61 Pa. 328.

49. Fla.—Osius v. Barton, 147 So. 862, 109 Fla. 556, 83 A.L.R. 394.
Mo.—Pickel v. McCawley, 44 S.W.2d 857, 329 Mo. 166.
N.Y.—Obrock v. Crolley Co., 205 N.Y. S. 231, 209 App.Div. 624.
Or.—Norby v. Section Line Drainage Dist., 76 P.2d 966, 159 Or. 80.
Pa.—Henry v. Eves, 159 A. 857, 306 Pa. 250.
15 C.J. p 1254 note 13.

Informal writing

Where deed reserved to grantor right to alter or annul restrictions "by written agreement," informal writing evidencing grantor's consent to change in use of premises was sufficient, it being unnecessary to execute formal instrument or to cause it to be recorded.—People, on Complaint of Wolff v. Margolies, 1 N.Y. S.2d 969, 166 Misc. 135.

50. N.J.—Supplee v. Cohen, 83 A. 373, 80 N.J.Eq. 83, affirmed 86 A. 266, 81 N.J.Eq. 500.
15 C.J. p 1254 note 14.

A fundamental change in the neighborhood, as shown *infra* this section, may terminate a restrictive covenant, as may a foreclosure sale of the land under a mortgage,⁵¹ and the grantee of property subject to restrictive covenant and his grantee abandon the restriction by the making and accepting of a conveyance free of the restrictions so that they are estopped from enforcing it.⁵² If full recovery is had by a person entitled to sue therefor, the covenant is satisfied and it may no longer be regarded as binding in favor of the grantee and his privies in estate.⁵³ One accepting a deed with knowledge that the property is less in quantity than warranted in the deed and failing to complain within a reasonable time may not thereafter recover for the shortage.⁵⁴

Restrictive covenants are not terminated by subsequent sale of other property without such restrictions,⁵⁵ abandonment of restrictive covenants is not shown by acquiescence in mere minor violations thereof,⁵⁶ and an owner or lessee of property for the benefit of which restrictions have been created will not be deemed to have abandoned the covenant so long as it is of value to him;⁵⁷ nor, it has been held, will relinquishment of a covenant by acquiescence in breach, or waiver, be inferred from delay in taking steps to prevent its violation.⁵⁸ The neglect of a purchaser to record his title does not release the vendor from his covenants;⁵⁹ and a grantee by releasing his grantor from liability on

his covenants does not thereby affect his own title.⁶⁰ A covenant of seizin is not extinguished by a release of the estate without covenants,⁶¹ nor by arranged foreclosures designed to clear title;⁶² and release of a title insurer on payment of a certain sum does not serve to effect the release of the grantor from his covenant against encumbrances.⁶³

In order that a release may bind a subsequent assignee it must have been made prior to the assignment,⁶⁴ unless the releasor has paid the damages occasioned by a breach of the covenant to such assignee.⁶⁵ Where the continuity of a covenant is broken by the conveyance of land with new covenants, the subsequent grantee cannot maintain an action against the original covenantor;⁶⁶ and an assignment by a vendor to a third person of his rights against his warrantors, made after the eviction of his vendee in possession under contract of sale, cannot in equity deprive the vendee of his recourse against such warrantors.⁶⁷ Grantees of land subject to restrictive covenants may convey the whole tract free thereof except as against the original covenantor or his privies.⁶⁸

Changed conditions rendering a covenant substantially inapplicable to the new set of circumstances may operate to terminate the covenant,⁶⁹ as where changes occur in the neighborhood so radical in character as to defeat the purpose of a re-

51. Md.—Boyd v. Park Realty Corporation, 111 A. 129, 137 Md. 36.

Foreclosure of mortgage held not to terminate restrictions under facts.—Magnolia Petroleum Co. v. Drauer, 83 P.2d 840, 183 Okl. 579, 119 A.L.R. 1112.

52. N.Y.—Obrock v. Crolley Co., 205 N.Y.S. 231, 209 App.Div. 624.

Conveyance to self as executrix
Plaintiff, by conveying to herself as executrix by warranty deed free from covenant, abandoned any right to enforce covenant.—Goldman v. Lewis, 233 N.Y.S. 598, 226 App.Div. 745.

53. Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

54. Tenn.—Sommers v. Thompson, 1 Tenn.App. 410.

55. N.J.—Camp v. Krulewicz, 127 A. 669, 97 N.J.Eq. 384.

56. Del.—Rogers v. Zwolak, 110 A. 674, 12 Del.Ch. 200.

N.J.—La Fetra v. Beveridge, 199 A. 70, 124 N.J.Eq. 24.

57. Iowa.—Johnson v. Robertson, 135 N.W. 585, 156 Iowa 64, Ann.Cas. 1915B 137.

58. Ill.—Star Brewery Co. v. Primas, 45 N.E. 145, 163 Ill. 652.

15 C.J. p 1254 note 16.

59. La.—Boyer v. Amet, 6 So. 734, 41 La.Ann. 721.

60. N.Y.—Dawley v. Rugg, 35 Hun 143.

61. N.Y.—Bennett v. Irwin, 3 Johns. 363—Utica Bank v. Mersereau, 3 Barb.Ch. 528, 49 Am.D. 189.

62. Mo.—Crosby v. Evans, 219 S.W. 948, 281 Mo. 202, answering questions certified, App., 195 S.W. 514.

Deliberate default

Where vendors, who were unable to give good title, entered into an arrangement with the purchaser whereby he defaulted, the purchase-money mortgage was foreclosed, and the vendors then foreclosed an earlier deed of trust, under an agreement that they should buy in the property, and, having cut off outstanding titles, convey good title to the purchaser, such arrangement was consistent with the covenant of seizin in the original conveyance and did not supersede it.—Crosby v. Evans, *supra*.

63. Or.—De Carli v. O'Brien, 41 P. 2d 411, 150 Or. 35, 97 A.L.R. 698.

64. N.J.—Bowen v. Smith, 74 A. 675, 76 N.J.Eq. 456.

15 C.J. p 1254 note 19.

65. N.H.—Chase v. Weston, 12 N.H. 413.

66. N.Y.—Geiszler v. De Graaf, 59 N.E. 993, 166 N.Y. 339, 82 Am.S.R. 659, affirming 60 N.Y.S. 651, 44 App. Div. 173.

15 C.J. p 1254 note 21.

67. Ky.—Stewart v. Wilson, 5 Dana 50.

68. Mo.—Toothaker v. Pleasant, 288 S.W. 38, 315 Mo. 1239.

Covenant against negro ownership
Mo.—Toothaker v. Pleasant, *supra*.

69. Or.—Norby v. Section Line Drainage Dist., 76 P.2d 966, 159 Or. 80.

Protection of well

A drainage district was not required to continue to comply with covenant in deed requiring district to construct cement fill in ditch to prevent water from percolating into grantors' well where well had been abandoned, and grantors had obtained another source of water supply.—Norby v. Section Line Drainage Dist., *supra*.

strictive covenant,⁷⁰ such as one against negro ownership,⁷¹ although, where the change is not so fundamental in character as to destroy the general purpose of the restrictive covenant, it will remain in full force and effect.⁷² A change in the territory surrounding the restricted area will not necessarily terminate the restrictions,⁷³ and, where it appears that the covenant is for the exclusive benefit of the dominant lot and still of substantial value to it, a court of equity will restrain violation notwithstanding the changed condition of the neighborhood wherein the lot is situated.⁷⁴ The mere fact that because of changed conditions removal of restrictive covenants would greatly enhance the value of plaintiff's land will not justify their removal at plaintiff's suit as against other owners who insist on maintenance of the restrictions,⁷⁵ and, in a proper case, equity will enforce restrictive covenants remaining of substantial value, even though changed conditions will cause hardship to the servient es-

tate.⁷⁶

§ 76. — Agreement of Parties

Agreements to terminate restrictive covenants are effective if, and only if, joined in by all interested parties.

A covenant running with the land may be modified or terminated by agreement of all interested parties,⁷⁷ although it will not be discharged by an agreement made by less than all interested parties,⁷⁸ and, where the covenant permits termination of restrictions on consent of a specified percentage of lot owners, a consent by less than the specified percentage is ineffectual.⁷⁹

§ 77. — Acts or Omissions of Covenantor

The acts or omissions of the covenantor are ordinarily not of themselves sufficient to terminate covenants running with the land.

The covenantor, who has created restrictions by his original grant, lacks power to discharge cove-

70. Fla.—*Osius v. Barton*, 147 So. 862, 109 Fla. 556, 88 A.L.R. 394.

Ky.—*Goodwin Bros. v. Combs Lumber Co.*, 120 S.W.2d 1024, 275 Ky. 114.

Mo.—*Pickel v. McCawley*, 44 S.W.2d 857, 329 Mo. 166—*Rombauer v. Compton Heights Christian Church*, 40 S.W.2d 545.

N.Y.—*Winston v. 524 West End Ave.*, 251 N.Y.S. 96, 233 App.Div. 5.

N.C.—*Oldham v. McPheeters*, 164 S.E. 731, 203 N.C. 141—*Stroupe v. Truesdale*, 145 S.E. 925, 196 N.C. 303—*Higgins v. Hough*, 143 S.E. 212, 195 N.C. 652—*Starkey v. Gardner*, 138 S.E. 408, 194 N.C. 74.

It would be an anachronism to interpose equitable relief in support of a restrictive covenant where strict adherence to its terms has become futile or ineffective owing to altered conditions in the neighborhood rendering the covenant useless to the dominant tenement.—*Henry v. Eves*, 159 A. 857, 306 Pa. 250.

Building and other restrictions in deeds see the C.J.S. title Deeds §§ 158, 169, 170, also 18 C.J. p 400 note 84-p 401 note 93.

Enforcement of covenants as to use of property by injunction see the C.J.S. title Injunctions § 87, also 32 C.J. p 212 note 30-p 213 note 40.

71. Mo.—*Pickel v. McCawley*, 44 S.W.2d 857, 329 Mo. 166.

Affirmative relief from covenant

Where plaintiff joined with other property owners of the district in signing a written covenant, which was duly recorded, to prevent negroes from buying or obtaining homes within such district, and later sued to be relieved from such covenant, and, where the evidence showed such

subsequent change of conditions within the district by reason of an influx of negro residents as to defeat the main purpose of the covenant, it was held that the restrictive covenant had become nugatory and that plaintiff was entitled to be relieved therefrom.—*Pickel v. McCawley*, supra.

72. Ind.—*Bachman v. Colpaert Realty Corporation*, App., 194 N.E. 783. Ky.—*Greer v. Bornstein*, 54 S.W.2d 927, 246 Ky. 286.

Mo.—*Rombauer v. Compton Heights Christian Church*, 40 S.W.2d 545. W.Va.—*Kaminsky v. Barr*, 145 S.E. 267, 106 W.Va. 201.

73. Mo.—*Rombauer v. Compton Heights Christian Church*, 40 S.W.2d 545—*Thornhill v. Herdt*, App., 130 S.W.2d 175—*Porter v. Johnson*, App., 115 S.W.2d 529.

Change not shown as to particular block in city

Where property owners in neighborhood made agreement involving entire city block against use and occupancy by negroes, fact that large number of negroes thereafter occupied adjoining block and intersecting streets would not preclude enforcement of such agreement by enjoining occupancy by negro, in absence of showing that property had become untenanted and unmarketable.—*Mead v. Dennistone*, 196 A. 330, 173 Md. 295, 114 A.L.R. 1227.

Restrictions against sale to negroes are not nullified by negro occupancy of territory surrounding the covenanted area, even though changed conditions render the restrictive covenant less valuable, where such restrictions, still retain substantial value.—*Porter v. Johnson*, Mo.App., 115 S.W.2d 529.

74. Fla.—*Barton v. Moline Properties*, 164 So. 551, 121 Fla. 683, 103 A.L.R. 725.

75. Ga.—*Reeves v. Comfort*, 157 S.E. 629, 172 Ga. 331.

76. Mo.—*Rombauer v. Compton Heights Christian Church*, 40 S.W.2d 545.

77. Del.—*Rogers v. Zwolak*, 110 A. 674, 12 Del.Ch. 200.

N.Y.—*Cook v. Murlin*, 195 N.Y.S. 793, 202 App.Div. 552.

Agreement by only persons entitled to enforce restriction

Agreement between adjoining owners, who were only persons entitled to enforce restriction imposed by their common grantor, to cancel restriction is sufficient to free premises of restriction, and purchaser from one of them could, therefore, be required specifically to perform.—*Obrock v. Croll Co.*, 205 N.Y.S. 231, 209 App.Div. 624.

78. Mass.—*Goulding v. Phinney*, 125 N.E. 703, 234 Mass. 411.

N.Y.—*Bulkley v. Rouken Glen, Inc.*, 226 N.Y.S. 544, 222 App.Div. 570, affirmed 162 N.E. 560, 248 N.Y. 647. Wis.—*Genske v. Jensen*, 205 N.W. 548, 188 Wis. 17.

Necessity that all grantees join in release

Where restriction has been imposed on several lots by a common grantor, the right to enforce such restriction is vested in all lot owners and common grantor, and can be released only by consent of all grantees of lots for whose benefit restriction is imposed.—*Genske v. Jensen*, supra.

79. Conn.—*Morgan v. Sigal*, 157 A. 412, 114 Conn. 39.

nants running with the land by his acts or omissions as against the equitable rights of subsequent owners of such land,⁸⁰ and the grantor's release of some lots from restrictive covenants will not bind purchasers of other lots who bought in reliance on such covenants.⁸¹ The grantor may, however, by appropriate reservations in his original conveyances, preclude the inception of restrictive covenants incapable of subsequent release by himself.⁸²

§ 78. — Merger or Revesting of Estate in Covenantor

Merger of estates into a single ownership, as in the case of a revesting in the covenantor, may terminate covenants running with the land, although a revesting of title as to part only does not destroy covenants as to unrevested portions of the land.

The revesting of the covenantor with the same estate he has conveyed extinguishes all covenants running with the land,⁸³ because all benefit of the warranty vests in him who is liable under the warranty,⁸⁴ and it has been held that this rule is applicable to the grantee in a deed who has given a bond to the grantor to reconvey the granted premises on demand;⁸⁵ nor has such covenantor any claim in warranty for dangers of eviction, existing

when he himself sold, as against the intermediate holders,⁸⁶ although revesting in the covenantor of title to only part of the land subject to covenants will not extinguish covenants as to the other parts of the land, there being in such case no merger of a dominant and servient tenement.⁸⁷ A covenant of warranty does not include an encumbrance which the grantee by an instrument of as high a nature as the deed has engaged to discharge,⁸⁸ hence, the grantee, or one holding under him with notice,⁸⁹ cannot enforce such covenant as an estoppel against his own covenant of warranty of the same premises to the original covenantor,⁹⁰ but a promise by a vendee to his grantor subsequent to the purchase to pay off an existing mortgage against the premises out of an installment of the purchase price before the same would be due is not binding without a consideration to support it.⁹¹ It has been held, however, that a covenantor's covenants as to building restrictions are not discharged on his subsequent acquisition and resale of the premises.⁹² Foreclosure of a mortgage revesting absolute title in the covenantor may terminate restrictive covenants in the original conveyance.⁹³

Merger into a single ownership of two or more lots or tracts of land following previous separate

80. Conn.—*Armstrong v. Leverone*, 136 A. 71, 105 Conn. 464—*Baker v. Lunde*, 114 A. 673, 96 Conn. 530.

Ill.—*Wise v. Wouters*, 123 S.E. 35, 288 Ill. 29.

Mich.—*Bohm v. Silberstein*, 189 N.W. 899, 220 Mich. 278.

N.J.—*Schreiber v. Drossness*, 136 A. 515, 100 N.J.Eq. 591, affirmed *Schreiber v. Drossness*, 135 A. 920, 100 N.J.Eq. 591—*De Rossett v. Bianchi*, 136 A. 301, 100 N.J.Eq. 439. N.Y.—*Getchal v. Lawrence*, 201 N.Y. S. 121, 121 Misc. 359.

Grantors' quitclaim deed to lot, previously conveyed subject to restrictive covenants, cannot affect rights of other lot owners claiming uniform plan of development.—*Lunde v. Minch*, 136 A. 552, 105 Conn. 657.

A grantor's release of restrictive covenants does not preclude other parties, to whom he made deeds previously, or makes them subsequently, from enforcing their rights against any purchaser violating the restrictive covenants.—*Muller v. Weiss*, 108 A. 768, 91 N.J.Eq. 29, affirmed 109 A. 357, 91 N.J.Eq. 321.

Grantors may neither by solemn deed nor by silent omission deprive grantees of the benefit of restrictive covenants running with the land.—*Clark v. Kurtz*, 196 A. 727, 123 N.J. Eq. 174.

81. Mich.—*Harvey v. Rubin*, 189 N. W. 17, 219 Mich. 307.

82. N.C.—*Snyder v. Heath*, 117 S.E. 294, 185 N.C. 362.

83. Ala.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 215 Ala. 212. 15 C.J. p 1254 notes 24, 25.

Covenants of seisin and general warranty

Former owner conveying with covenants of seisin and general warranty, and later repurchasing the lands with like covenants from one holding through him, cannot sue for want of title outstanding at the time of his former ownership, although the rule would be different if he had been required by his grantee or successor to make good his own breach of warranty.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 215 Ala. 212.

84. Ala.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, supra.

85. Me.—*Hatch v. Kimball*, 14 Me. 9.

86. La.—*Wright v. Wood*, 6 La. Ann. 176.

87. Conn.—*Baker v. Lunde*, 114 A. 673, 96 Conn. 530.

88. Me.—*Brown v. Staples*, 28 Me. 497, 48 Am.D. 504.

N.H.—*Watts v. Welman*, 2 N.H. 458.

89. Me.—*Brown v. Staples*, 28 Me. 497, 48 Am.D. 504.

90. Me.—*Brown v. Staples*, supra.

91. Tex.—*Taylor v. Witherspoon*, 23 Tex. 642.

92. Ill.—*Wiegman v. Kusel*, 110 N. E. 884, 270 Ill. 520.

93. N.Y.—*McKenna v. Bregman*, 185 N.Y.S. 362.

Mortgage without restrictive covenants

Where a grantee, whose deed contained restrictive covenants in favor of other lands of the grantor, gave a mortgage to the grantor containing no restrictive covenants, and it was subsequently foreclosed, the mortgage was an absolute reconveyance, and destroyed the easement created by the conveyance.—*McKenna v. Bregman*, supra.

Merger under referee's deed

Where a grantee, whose deed contained restrictive covenants, gave a mortgage to the grantor containing no such covenants, which was subsequently foreclosed, the referee's deed related back to the mortgage, and conveyed all title of the mortgagee, and the purchaser must be deemed to represent it, and, the ownership of the dominant and servient estates being thereby merged, the purchaser in conveying could continue the easement or restrictions in any form which he might desire.—*McKenna v. Bregman*, supra.

ownership thereof extinguishes mutual restrictive covenants.⁹⁴

§ 79. — Reconveyance with Similar Covenants

Identical covenants in deeds of conveyance and of reconveyance may discharge each other; this is not true, however, of a reconveyance by way of mortgage before forfeiture by breach of condition.

One taking an absolute deed to realty by way of security for debt, which deed contains the usual covenants, is not bound to a subsequent grantee of his debtor on identical covenants contained in a deed of reconveyance, given the debtor on repayment;⁹⁵ but, where the owner of realty conveys it to another by general warranty deed containing the usual covenants, and his vendee gives back a deed of trust or mortgage securing a part of the purchase price and containing like covenants of warranty, the vendee does not thereby release the vendor from liability on the original covenants in the warranty deed,⁹⁶ unless the grantee after breach of the conditions in the mortgage surrenders possession to the grantor and becomes his tenant.⁹⁷

§ 80. Persons Entitled to Enforce Real Covenants

As a general rule, a real covenant may be enforced by one for whose benefit it was made.

94. Mass.—Spector v. Traster, 176 N.E. 567, 270 Mass. 545.

N.Y.—Morrill Realty Corporation v. Rayon Holding Corporation, 172 N.E. 494, 254 N.Y. 268, affirming 241 N.Y.S. 918, 229 App.Div. 760, which affirmed 240 N.Y.S. 38, 135 Misc. 845.

95. Ga.—Willis v. McGough & Co., 56 Ga. 198.

Mo.—Johnston v. Bank of Poplar Bluff, 294 S.W. 111, 221 Mo.App. 127.

96. Mo.—Johnston v. Bank of Poplar Bluff, 294 S.W. 111, 221 Mo.App. 127—Crosby v. Evans, App., 195 S.W. 514, certified questions answered 219 S.W. 948, 281 Mo. 202, 15 C.J. p 1255 note 33.

97. Mass.—Gilman v. Haven, 11 Cush. 330.

98. N.M.—Merchants' Nat. Bank of Clinton, Iowa v. Otero, 175 P. 781, 24 N.M. 598.

15 C.J. p 1255 note 39.

Heirs of grantor

Where the grantee in a deed to a strip of land which abutted on lots of the grantor covenanted that he would keep the strip open as a private way for the use of the owners

and occupants, and no others unless the same was condemned for a street, the heirs of the grantor had no interest therein which would enable them to declare a forfeiture where the grantee appropriated to his own use a portion of the strip which was not taken when a street was established by condemnation.—Druecker v. McLaughlin, 85 N.E. 647, 235 Ill. 367.

99. Va.—Newberry Land Co. v. Newberry, 27 S.E. 899, 95 Va. 119, 15 C.J. p 1300 note 19.

1. N.Y.—Root v. Wright, 84 N.Y. 72, 38 Am.D. 495, 15 C.J. p 1255 note 42.

2. N.M.—Merchants' Nat. Bank of Clinton, Iowa v. Otero, 175 P. 781, 24 N.M. 598, 15 C.J. p 1300 note 25.

Deed taken for benefit of another

Where deed is taken in name of one acting for himself and another, the latter is a real party in interest, and may maintain an action on the deed, for breach of warranty of good right to convey the same as the named grantee may do.—Merchants' Nat. Bank of Clinton, Iowa v. Otero, supra.

The authorities are not fully in accord as to whether a third person may sue on a promise made for his benefit, although the prevailing rule in the United States, stated in Contracts § 519 c (1), is that the action may be maintained.

With respect to a real covenant, as a general rule, it may be enforced by one for whose benefit it was made,⁹⁸ provided, according to some authorities, that he is plainly designated by the instrument as the beneficiary, and the covenant is made for his sole benefit.⁹⁹ The mere fact that a third person may be benefited by performance of a covenant does not authorize him to enforce it.¹ In jurisdictions where a third person may enforce a real covenant made for his benefit, he may sue thereon in his own name, at least where authorized to do so by statute.²

It has been held that creditors can exercise all the rights of their debtors in actions of warranty.³

§ 81. — Covenantees

The covenantee may sue for the breach of a real covenant, although a mortgagor covenantee has been denied such right.

For the breach of a real covenant, the person with whom it is made may sue,⁴ unless, as is shown infra § 82, he has parted with his title.

3. La.—Lynch v. Kitchen, 2 La. Ann. 843.

15 C.J. p 1256 note 46.

4. Colo.—Wellshire Land Co. v. City and County of Denver, 87 P.2d 1, 103 Colo. 416.

Tenn.—Hawkins v. Spicer, 101 S.W.2d 151, 20 Tenn.App. 528.

15 C.J. p 1255 note 36.

Effect of conveyance after breach of covenant see infra § 83.

Survivorship

Where one of two joint covenantees dies, the action on the contract must be in the name of the survivor; and if he should die, then in the name of his executor or administrator.—Crocker v. Beal, C.C.Mass., 6 F.Cas.No.3,396, 1 Lowell 416—15 C.J. p 1300 note 10 [d].

Common enterprise

Where owners of island contracted to reclaim island by draining it and maintaining levees, obligated themselves to pay proportionate share of cost, and agreed that covenants should run with, and be perpetual burden on, land, covenants were mutual and any breach became breach of all covenantors, and hence lessees of one of owners, even if they were "assigns" of covenantor, were mutual covenantors and covenantees with

Where the mortgagee is regarded in law as the legal owner, see the C.J.S. title Mortgages § 1, also 41 C.J. p 274 note 5 et seq, as long as the indebtedness is unpaid and the mortgage is in force the mortgagee may,⁵ but the mortgagor may not,⁶ maintain an action on the covenants in the conveyance to the mortgagor. On the other hand, where a purchaser of real estate causes the property to be conveyed to a third person as security for the purchase money borrowed from him, it has been held that the interest of the third person is that of a mortgagee, and that the purchaser, as equitable owner, is entitled to maintain an action on the covenants in the deed.⁷

§ 82. — Grantees and Assignees in General

- a. Right of owner at time of breach
- b. Right of former grantee

other owners and could not sue other owners for damages allegedly resulting from failure to maintain levee.—Higgins v. Monckton, 83 P.2d 516, 28 Cal.App.2d 723.

5. Tenn.—Hawkins v. Spicer, 101 S.W.2d 151, 20 Tenn.App. 528.

6. Ky.—McGoodwin v. Stephenson, 11 B.Mon. 21.

Ohio.—Williams v. Holcomb, 6 Ohio Dec., Reprint, 860, 8 Am.L.R. 484. Right of equitable owner to sue see infra § 82.

7. Iowa.—Harper v. Perry, 28 Iowa 57.

Third person may not sue

Grantee holding title in trust for one furnishing purchase money could not sue grantor's widow for breach of covenant of warranty.—Warren v. Houston Oil Co. of Texas, Tex.Civ.App., 296 S.W. 637, affirmed, Com.App., 6 S.W.2d 341.

8. Ala.—Keel v. Ikard, 133 So. 906, 222 Ala. 617—Dallas Compress Co. v. Liepold, 88 So. 681, 205 Ala. 562.

Ark.—Holthoff v. Joyce, 294 S.W. 1006, 174 Ark. 248—Wade v. Texarkana Building & Loan Ass'n, 233 S.W. 937, 150 Ark. 99.

Iowa.—Rockafellow v. Gray, 191 N.W. 107, 194 Iowa 1280.

Ky.—Dortch's Ex'r v. Willoughby, 113 S.W.2d 832, 272 Ky. 231.

Mass.—Gallison v. Downing, 138 N.E. 315, 244 Mass. 33.

Mich.—Mueller v. Bankers' Trust Co. of Muskegon, 247 N.W. 103, 262 Mich. 53.

Mo.—Baird v. Harris, 290 S.W. 80, 220 Mo.App. 1290.

N.M.—Beecher v. Tinnin, 189 P. 44, 26 N.M. 59.

Ohio.—McKnight v. Columbian Land & Bldg. Co., 23 Ohio N.P.N.S., 189,

Or.—Pearson v. Richards, 211 P. 167, 170, 106 Or. 78, citing *Corpus Juris*. S.C.—Morris v. Lain, 180 S.E. 206, 176 S.C. 310.

Tenn.—Hawkins v. Spicer, 101 S.W.2d 151, 20 Tenn.App. 528—Cobb & Wife v. Sanders, 1 Tenn.App. 326. Tex.—Wiggins v. Stephens, Com.App., 246 S.W. 84, affirming, Civ.App., 191 S.W. 777.

Utah.—East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 65 Utah 560. 15 C.J. p 1256 note 49, p 1258 notes 77, 80, p 1300 note 16.

Liability of covenantor see infra § 86.

Particular covenants running with the land see supra §§ 54–73.

Requirement of privity see infra § 84.

Intermediate modification of covenant

"Vendees, holding the title, have their remedy against the remote vendors, provided there was no intermediate modification of such general warranty by quitclaim deeds or otherwise, to break continuity of the covenant."—Liberto v. Sanders, Tex.Civ.App., 248 S.W. 120, 123, reversed on other grounds, Com.App., 259 S.W. 1080.

Special warranty on same matter by immediate grantor does not bar suit against prior covenantor on warranty to hold harmless from sums due on mortgage notes and from taxes and water charges.—Cunningham v. Buel, Tex.Civ.App., 287 S.W. 683.

No consideration for covenant

(1) Remote grantee and assignee cannot recover on covenants of his, remote grantor where he knew of failure of consideration for deed, and

c. Right of assignee taking conveyance after breach

a. Right of Owner at Time of Breach

The owner of the land at the time of the breach, including an owner of part of the land, may sue on a real covenant.

Where a covenant runs with the land, the owner of the land at the time of its breach, whether an immediate or remote grantee or assignee, may maintain an action for its breach in his own name against any or all of the covenantors,⁸ although the holder of a real covenant can have but one satisfaction for its breach.⁹

On the other hand, one who is not the owner of the land at the time of the breach ordinarily is not entitled to enforce a real covenant.¹⁰ The holder of the legal title at the time of the breach has been held to be the proper person to sue,¹¹

gave nothing to his immediate grantor other than credit on past-due debt.—Eves v. Curtiss, 167 P. 748, 98 Wash. 367.

(2) Vendor may be liable to subvendee for breach of covenant of warranty of title in vendor's deed, even if vendor took legal title to land merely as accommodation to vendee, and made no profit on the transaction and even though vendee would have been estopped to assert breach, where vendor's and vendee's warranty deeds were contemporaneously executed and subvendee paid part of consideration directly to vendor in payment of money advanced by vendor for vendee.—Long v. Sullivan, 183 S.E. 71, 52 Ga.App. 318.

(3) Limitation of damages in action by remote grantee to consideration received by covenantor see infra § 142.

9. Tex.—Penney v. Woodey, Civ.App., 147 S.W. 872.

15 C.J. p 1261 note 27.

10. Tex.—Young v. Harbin Citrus Groves, Civ.App., 130 S.W.2d 896, error refused—Warren v. Houston Oil Co. of Texas, Civ.App., 296 S.W. 637, affirmed, Com.App., 6 S.W.2d 341.

Insertion of another grantee after execution

Where, without knowledge or consent of grantor, name of grantee in deed was erased, and name of another was inserted, party whose name was substituted cannot recover from grantor for breach of covenant of warranty in deed.—Sipes v. Perdomo, 247 P. 689, 118 Okl. 181.

11. N.Y.—Haynes v. Buffalo, etc., R. Co., 38 Hun 17.

15 C.J. p 1300 note 10.

and the equitable owner at such time has been denied the right.¹²

Owner of part of tract; apportionment. While it is a general principle of law founded on convenience, that covenants are not apportionable,¹³ yet since the land itself is apportionable, whenever justice or even greater convenience requires a covenant to be apportioned,¹⁴ an exception to the general rule prevails.¹⁵

A covenant that runs with the land is divisible into as many parts or interests as the land itself may be divided into by subsequent successive conveyances,¹⁶ and the grantee of each parcel or interest may, as to the same, maintain suit on such covenant against the original covenantor or his legal representative;¹⁷ but the interest of the grantee must be in part of the land as distinguished from part of the estate.¹⁸

b. Right of Former Grantee

Unless a grantee is bound to indemnify his assignee, he may not sue for breach of a real covenant occurring after he has conveyed the land.

As a rule, where land conveyed with real covenants has passed by subsequent conveyances through the hands of various covenantees, only the last covenantor or assignee in whose possession the land is when the covenant is broken may sue for its breach,¹⁹ and his right of action extends to any or to all of the prior covenantors.²⁰ However, when by the nature and terms of his conveyance, an intermediate grantor is bound to indemnify the grantee during whose ownership the breach occurred, he may sue a prior covenantor in his own name²¹ after he has been compelled to satisfy the claim of such grantee.²²

Where a real covenant is breached and the own-

12. N.Y.—Haynes v. Buffalo, etc., R. Co., supra.

Right of mortgagor as equitable owner to sue see supra § 81.

Executory contract of sale

(1) One holding under an executory contract to purchase may not sue for breach of a real covenant.—Haynes v. Buffalo, etc., R. Co., supra.

(2) Purchaser could not recover for shortage in acreage against his remote grantor on such grantor's warranty of title, where purchaser had acquired only an equitable title, having purchased subject to vendor's liens, and where remote grantor had previously settled for deficit in number of acres with intermediate purchaser under whom purchaser claimed, since purchaser as holder of only an equitable title took title with all its imperfections and equities.—Nicholson v. C. C. Slaughter Co., Tex.Civ. App., 217 S.W. 716, error refused.

(3) Where the owner in fee of land gives his bond for conveyance with warranty, and after the vendee has paid most of the purchase price and the vendor has become insolvent, a holder of the paramount title recovers the land, the right of recourse which the vendor has against his grantor will in equity vest in the vendee.—Stewart v. Wilson, 5 Dana, Ky., 60.

Relief in equity from encumbrance

A remote assignee may maintain an action in equity against a former owner to be relieved from an encumbrance on the land which such prior owner had covenanted to remove.—Kellogg v. Wood, 4 Paige, N.Y., 578.

13. Va.—Dickinson v. Hoomes, 8 Gratt. 353, 49 Va. 353.

14. Va.—Dickinson v. Hoomes, supra.

15. Or.—Pearson v. Richards, 211 P. 167, 106 Or. 78.

16. Or.—Pearson v. Richards, supra. 15 C.J. p 1259 note 94.

17. N.M.—Merchants Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

Or.—Pearson v. Richards, 211 P. 167, 173, 106 Or. 78, citing *Corpus Juris*. 15 C.J. p 1259 notes 94, 95.

One of several tenants in common who has become the sole owner of the fee by conveyance of his cotenants may maintain an action against the successor of a railroad company for breach of a covenant to maintain fences contained in a right of way deed to its predecessor by the former tenants in common.—Toledo, etc., R. Co. v. Cosand, 83 N.E. 251, 6 Ind.App. 222.

18. Ohio.—St. Clair v. Williams, 7 Ohio Pt. II 110, 30 Am.D. 194. 15 C.J. p 1259 note 96.

Enforcement by tenant

(1) Under Civ.Code § 1465, declaring that a covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property, covenants running with the land may not be enforced by lessees.—Higgins v. Menckton, 83 P.2d 516, 28 Cal.App. 2d 723.

(2) Where a railroad company has a right of way over mining lands, and covenants with the owner thereof that on notice it will change its location, or permit the coal underneath the right of way to be mined, a tenant of such owner, the terms of whose lease give him the right to mine all the coal in the land demised, may sue in the name of the landlord for a breach of such covenant.—Mine Hill, etc., R. Co. v. Lippincott, 86 Pa. 468.

(3) Tenant of covenantor may enforce covenant.—Brockmeyer v. Chicago Sanitary Dist., 118 Ill.App. 49. 15 C.J. p 1256 note 49 [b] (2).

19. Mich.—Hunt v. Middlesworth, 7 N.W. 57. 44 Mich. 448.

Minn.—Anderson v. Larson, 225 N.W. 902, 177 Minn. 606.

15 C.J. p 1257 note 65, p 1300 note 10.

20. Ohio.—Lyons v. Chapman, 178 N. E. 24, 40 Ohio App. 1. 15 C.J. p 1257 note 65.

21. Ohio.—Lyons v. Chapman, supra.

Vt.—Clement v. Rutland Bank, 17 A. 717, 61 Vt. 298, 4 L.R.A. 425. 15 C.J. p 1257 note 68.

22. Minn.—Anderson v. Larson, 225 N.W. 902, 177 Minn. 606.

Tex.—Wiggins v. Stephens, Com.App., 246 S.W. 84, affirming, Civ.App., 191 S.W. 777.

15 C.J. p 1257 note 69. Conditions precedent in action by intermediate grantee see *infra* § 117 d.

Reason for rule

"The reason of the rule seems to be to prevent the obvious injustice which would arise from making prior vendees liable to all subsequent owners in turn, and thus pay damages more than once for the same breach of covenant. The principle that the intermediate covenantee can never sue until he has satisfied the damages was adopted to prevent such an injustice."—Kenyon v. Russell, 5 Tenn.App. 401, 414.

Fayment not compelled

Where the intermediate grantor pays his grantee's claim for breach of warranty, he may obtain indemnity from his covenantor, even though he was not compelled to make the

er of the land at the time of the breach then conveys the land, in some cases such owner has been permitted to sue,²³ at least where he has been compelled to pay damages.²⁴ In other cases, a former grantee has been denied the right to sue,²⁵ at least where he has suffered no damage as a result of the breach of the covenant;²⁶ and, as is observed in subdivision c of this section, the assignee has been permitted to sue. Furthermore, it has been said that, where the assignment is made after breach, the assignor is the only person who can bring the action,²⁷ but this doctrine has been repudiated.²⁸ At any rate, the grantee may sue for a breach of a real covenant if in his conveyance he reserves the

cause of action.²⁹

c. Right of Assignee Taking Conveyance after Breach

As a general rule, in the absence of an express assignment, an assignee may not sue on a real covenant for a breach occurring prior to his acquisition of the land.

A real covenant which has been broken ceases to run with the land and becomes a mere chose in action, see § 74 supra, and unless such right of action is assignable, see Assignments §§ 30, 31, and is expressly assigned,³⁰ as a general rule, it does not pass with a transfer of the land so as to enable a remote grantee to sue thereon.³¹ The right

payment.—*Lyons v. Chapman*, 178 N. E. 24, 40 Ohio App. 1.

23. Covenants of warranty

Vt.—*Clement v. Rutland Bank*, 17 A. 717, 61 Vt. 298, 4 L.R.A. 425—*Keith v. Day*, 15 Vt. 660.

Assignment pendente lite

Tex.—*Lewis v. Ross*, Civ.App., 65 S. W. 504.

Assignment by grantee assignee after verdict

Where grantee conveyed property after breach of covenant, a verdict in his favor in an action for the breach of covenant would not be set aside where, after verdict in his favor, he obtained from his grantee a written relinquishment of all claim to the cause of action.—*Kaufman v. Wade*, 201 N.Y.S. 832, 121 Misc. 598.

Effect of purchase by grantor at foreclosure sale

Grantee is entitled to sue for breach of covenants of warranty which occurred after grantors had foreclosed purchase-money mortgage, since a foreclosure sale operates as an assignment of the cause of action for breach of warranty only if the loss falls on the purchaser at the foreclosure sale.—*Crosby v. Evans*, Mo.App., 195 S.W. 514, certified questions answered 219 S.W. 948, 281 Mo. 202.

Tax sale will not pass a covenant of warranty to the purchaser so as to preclude the original covenantee from suing for a breach of the covenant.—*Bellows v. Litchfield*, 48 N.W. 1062, 83 Iowa 36.

Partial failure of title

On partial failure of title to land conveyed, grantee may keep what he has and sue on the covenant of warranty for what he has lost.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 215 Ala. 212.

Covenant to discontinue nuisance

Where plaintiff, a property owner, discontinued his suit for damages arising out of the operation of defendant's laboratory in the vicinity

in consideration of defendant's covenant to discontinue the laboratory for a period of five years, the fact that plaintiff sold his property prior to the commencement of the suit would not bar his action to recover for a breach of the covenant.—*Grasselli v. Lowden*, 11 Ohio St. 349.

24. **Covenant of quiet enjoyment**
N.Y.—*Adams v. Conover*, 22 Hun 424, affirming 87 N.Y. 422.

25. **Covenant against encumbrances**

N.Y.—*Gamorsil Realty Corporation v. Graef*, 220 N.Y.S. 221, 128 Misc. 596.

Effect of mortgage foreclosure

Subsequent purchaser by permitting foreclosure of trust deed, securing a debt which he had assumed to pay, lost right to sue original covenantor for breach of warranty in deed misdescribing land; foreclosure destroyed his rights just as a conveyance would have.—*Baird v. Harris*, 290 S.W. 80, 220 Mo.App. 1290.

26. Mo.—*Smith v. Clinkingbeard*, App., 226 S.W. 630.

27. N.Y.—*Kane v. Sanger*, 14 Johns. 89.

28. N.Y.—*Withy v. Mumford*, 5 Cow. 137.

N.C.—*Markland v. Crump*, 18 N.C. 94, 27 Am.D. 230.

29. Mass.—*Thompson v. Shattuck*, 2 Metc. 615.

Conveyance subject to encumbrance

Where a grantee who has a cause of action for breach of a covenant against encumbrances conveys the land subject to such encumbrances, the cause of action remains in the first grantee and does not pass or inure to the benefit of the second grantee.—*Shalet v. Stoloff*, 120 N.Y.S. 345, 135 App.Div. 376.

30. Ky.—*Witt v. Louisville & N. R. Co.*, 270 S.W. 732, 208 Ky. 126—*Elli v. Trent*, 241 S.W. 324, 195 Ky. 26.

Or.—*Pearson v. Richards*, 211 P. 167, 171, 106 Or. 78.

Conveyance required

A right of action on a covenant

may not be assigned without conveying the land.—*Ravenal v. Ingram*, 42 S.E. 967, 131 N.C. 549.

Assignee takes rights of assignor

Where grantee under a covenant conveyed the land to plaintiff subject to an outstanding assessment which he had not paid, and assigned to plaintiff his cause of action for breach of the covenant by reason of the assessment, plaintiff acquired no greater cause of action than her assignee possessed, and could recover only nominal damages, even though she paid the assessment before suing the covenantor.—*Mandigo v. Conway et al.*, 90 N.Y.S. 324, 45 Misc. 389.

Intermediate transfer to original vendor

A defendant vendor, after placing a mortgage on land, sold the land to another who sold it to defendant bank without warranting the title, but with a complete transfer and subrogation of all rights and actions of warranty against all former proprietors. Thereupon the bank sold back the property to the vendor, who then sold it to plaintiff, both transfers being by warranty deed. Subsequently, the mortgage was foreclosed, and plaintiff was compelled to pay. When the bank sold the property to the vendor, it did not warrant against the mortgage debt, since the vendor was the "principal debtor," within Civ.Code § 3410; and since the vendor had no right of action against the bank as warrantor to protect him against the mortgage debt on which he was primarily liable, he could not subrogate his transferee (plaintiff) to a right of action against the bank as warrantor against the payment of such obligation.—*Carpenter v. Herndon*, 136 So. 577, 173 La. 239.

31. Ala.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 215 Ala. 212.

Ark.—*Jerome Hardwood Lumber Co. v. Munsell*, 275 S.W. 709, 169 Ark. 201.

of action is personal to the one during whose ownership the covenant was broken and he, or his assignee, is the only person who can bring the suit.³²

However, according to some authorities, a conveyance of the land to a remote grantee thereby passes the claim for breach of a real covenant³³; and enables such grantee to sue thereon;³⁴ and the English and Canadian rule is that a covenant is a continuing obligation for the breach of which a subsequent grantee may maintain an action against the original covenantor, although the breach occurs prior to conveyance to such grantee.³⁵ Furthermore, certain covenants which frequently are regarded as personal, such as a covenant of seizin or a covenant against encumbrances, see §§ 63, 65, supra, nevertheless are held in some jurisdictions

where choses in action are assignable to run with the land although technically broken when made and to inure to the benefit of a remote grantee who suffers damage.³⁶ However, a real covenant, such as a covenant of warranty or a covenant for quiet enjoyment, no longer runs with the land for the benefit of an assignee if the eviction or actual damage has occurred prior to the assignment.³⁷

§ 83. — Conveyance as Transfer of Covenant

Real covenants pass with any deed that conveys the land.

Any deed which will convey the land will convey covenants running with the land.³⁸ Such cove-

Ind.—Junction R. Co. v. Sayers, 28 Ind. 318.

Ky.—Witt v. Louisville & N. R. Co., 270 S.W. 732, 208 Ky. 126—Elli v. Trent, 241 S.W. 324, 325, 195 Ky. 26, citing *Corpus Juris*.

N.M.—Beecher v. Tinnin, 189 P. 44, 26 N.M. 59—Merchants Nat. Bank of Clinton, Iowa v. Otero, 175 P. 781, 24 N.M. 598.

Or.—Pearson v. Richards, 211 P. 167, 170, 106 Or. 78, citing *Corpus Juris*. 15 C.J. p 1258 note 82.

B remedy against immediate vendor

The remedy of the subsequent grantee in such case is against his immediate vendor who has given the same covenant.—Compton v. Trico Oil Co., Tex.Civ.App., 120 S.W.2d 534, error refused.

32. Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

Ky.—Elli v. Trent, 241 S.W. 324, 195 Ky. 26, citing *Corpus Juris*.

Tex.—Compton v. Trico Oil Co., Civ. App., 120 S.W.2d 534, 538, error refused, citing *Corpus Juris*.

33. Mo.—Smith v. Clinkingbeard, App., 226 S.W. 630.

Right of owner at time of breach to sue after conveyance see subdivision b of this section.

34. Miss.—Brunt v. McLaurin, 172 So. 309, 178 Miss. 86.

S.C.—Cheves v. City Council of Charleston, 138 S.E. 867, 140 S.C. 423.

Quitclaim deed

(1) "There is good ground for the argument that one who, having received a deed with the usual covenants, but having neither title nor possession, executes to another a like document, intends thereby to transfer by assignment all rights acquired under the deed to him, including that of recovering damages for the breach of covenants. But he who executes

a mere quit-claim, which involves no assertion of title on his part and does not purport to pass any, and in which he undertakes no responsibility, cannot, in our judgment, be regarded as intending to transfer anything more than such interest in the property as he may have, and such covenants as in strictness run with the land."—Colver v. McInturf, 212 P. 88, 112 Kan. 604, motion overruled 212 P. 908, 112 Kan. 604.

(2) Quitclaim deed assigns the grantor's right of action for breach of covenant.—Diggs v. Henson, 163 S.W. 565, 181 Mo.App. 34.

35. Ky.—Elli v. Trent, 241 S.W. 324, 195 Ky. 26.

Minn.—Anderson v. Larson, 225 N.W. 932, 177 Minn. 606.
15 C.J. p 1258 note 88.

36. Idaho.—Brinton v. Johnson, 208 P. 1028, 35 Idaho 656.
15 C.J. p 1247 note 22, p 1258 note 90.

Reason for rule

"The principle which was at the foundation of the common-law rule that choses in action were not assignable having become obsolete, there is no reason that I can perceive why the rule should survive the reason upon which it was founded. We hold, therefore, that the covenant against incumbrances attaches to and runs with the land, and passes to a remote grantee through the line of conveyances, whether there is a nominal breach or not when the deed is delivered."—Geiszler v. De Fraaf, 59 N.E. 993, 995, 166 N.Y. 339, 82 Am. S.R. 659.

Covenant against encumbrances

Idaho.—Carssow v. Brinton, 208 P. 1031, 35 Idaho 667—Brinton v. Johnson, 208 P. 1028, 35 Idaho 656.
Iowa.—Knadler v. Sharp, 36 Iowa, 232.

N.Y.—Gamorsll Realty Corporation v. Graef, 220 N.Y.S. 221, 128 Misc. 596—Clarke v. Priest, 42 N.Y.S. 766, 18 Misc. 501.

Covenant of seizin

Minn.—Anderson v. Larson, 225 N.W. 902, 177 Minn. 606—Kimball v. Bryant, 25 Minn. 496.

Mo.—Talbert v. Grist, 201 S.W. 906, 198 Mo.App. 492.

Intermediate transfer subject to encroachment

"The plaintiff's immediate grantor . . . purchased expressly subject to the incumbrance; and while he owned the land he could not take advantage of the original covenant. . . . The effect of his purchase, subject to the assessment, was to relieve the prior grantors from any liability to him on the covenant. . . . [He] conveyed to the plaintiff with a covenant against incumbrances. But the plaintiff acquired only such rights as his immediate grantor could assert against prior grantors."—Geiszler v. De Graaf, 59 N.E. 993, 995, 166 N.Y. 339, 82 Am.S.R. 659.

37. Ill.—Barry v. Guild, 28 Ill.App. 39, affirmed 18 N.E. 759, 126 Ill. 439, 2 L.R.A. 334.

38. Ill.—Brady v. Spurck, 27 Ill. 478.
N.H.—Chandler v. Brown, 59 N.H. 370.

Covenant as part of conveyance see supra § 59.

Void deed

(1) Grantee under void deed cannot hold prior grantors on their covenants, even though he has been in possession of the land claiming ownership under the void deed.—Beardsley v. Knight, 4 Vt. 471.

(2) A covenant of warranty in a void deed is of no avail to a remote grantee.—Smith v. Ingram, 44 S.E. 643, 132 N.C. 959, 95 Am.S.R. 680, 61 L.R.A. 878, 40 S.E. 984, 130 N.C. 100, 61 L.R.A. 878.

nants pass with the title without any warranty from the immediate grantor.³⁹

Covenants running with the land pass with the title when transferred by act of law,⁴⁰ although it seems that this rule is subject to some limitations.⁴¹

A purchaser at a judicial or execution or foreclosure sale is entitled to the benefit of all covenants running with the land contained in a prior deed to the land conveyed.⁴² Likewise, a sale by a trustee under power of sale contained in the instrument creating the trust will vest in the purchaser the right to the benefit of real covenants in prior deeds to the land,⁴³ but a purchaser under a commissioner's sale takes no benefit of the covenants in a prior deed to the land, where the decree of confirmation of the sale is reversed before a deed is actually issued.⁴⁴

(3) Defendant is liable on his covenant to a subsequent grantee, although the intermediate deeds were void, where there was a judgment in an action between the defendant's grantee and the subsequent grantee determining that all of defendant's grantee's interest in the land was owned by the subsequent grantee.—*Talbert v. Grist*, 201 S.W. 906, 198 Mo.App. 492.

Intermediate grantors need not have had possession of the land.—*Chandler v. Brown*, 59 N.H. 370.

Title not perfected until after conveyance

Where administrator applied to ordinary for leave to sell lands of an intestate, which was granted and tract sold, that at the time administrator had only an interest in the land evidenced by bond for title from vendor to intestate with part of purchase money paid would not invalidate sale and prevent purchaser from suing original vendor on breach of warranty of title, purchaser having paid full purchase price to administrator, who turned balance over to vendor, in view of Civ.Code 1910 § 4192.—*Rowan v. Newbern*, 123 S.E. 148, 32 Ga.App. 363.

39. Mo.—*Graham v. Finnerty*, 232 S.W. 129.
15 C.J. p 1259 note 97.

Quitclaim deed sufficient
Mo.—*Graham v. Finnerty*, supra.
15 C.J. p 1259 note 97 [c].

40. N.H.—*Chandler v. Brown*, 59 N.H. 370.
N.J.—*Carter v. Denman*, 23 N.J.Law 260.

41. Ala.—*Deason v. Findley*, 40 So. 220, 145 Ala. 407.
15 C.J. p 1260 note 2.

42. Minn.—*Anderson v. Larson*, 225 N.W. 902, 177 Minn. 606.

Mo.—*Graham v. Finnerty*, 232 S.W. 129.

Tenn.—*Hawkins v. Spicer*, 101 S.W. 2d 151, 20 Tenn.App. 528.
15 C.J. p 1260 note 10.

Relation back of title on foreclosure
When title vests in a purchaser at a mortgage foreclosure, it relates back and takes effect as of the date of the mortgage, and the rights of a purchaser against prior covenants are of that date, and subsequent grantees of the mortgagor have no interest and cannot join with the purchaser or his assignee in an action for breach of the warranty.—*Allis v. Foley*, 147 N.W. 670, 126 Minn. 14.

43. Iowa.—*Iowa L. & T. Co. v. Fullen*, 91 S.W. 58, 114 Mo.App. 633.
15 C.J. p 1260 note 11.

44. Ky.—*Campbell v. Johnston*, 4 Dana 177.

45. N.Y.—*Rollton Syndicate v. Widlitz*, 219 N.Y.S. 383, 219 App.Div. 537.

Tenn.—*Cobb & Wife v. Sanders*, 1 Tenn.App. 326, 334, citing *Corpus Juris*.
15 C.J. p 1260 note 17.

Privity of conscience

"A true covenant which runs with the land runs by reason of privity of estate, and can only be enforced at law by the original parties thereto or their privies. Equity . . . will enforce a lawful contract against a person who takes with notice 'which rests upon privity of conscience.' In such a case, the person violating the agreement is a privy in conscience with the maker thereof."

§ 84. — Privity of Estate between Covenantor and Grantee

As a general rule, privity of estate between the covenantor and subsequent grantee is essential to enable the grantee to sue on a real covenant.

As a rule, a covenant can run with the land only when there is a privity of estate between the covenantor and the covenantee, see § 58 supra, and in order to give a right of action against the covenantor to the alienee of the covenantee, it is well settled that mere privity of contract between the covenantor and the alienee is not sufficient, but there must be a subsisting privity of estate between them;⁴⁵ and some estate to which the covenant may attach should, as a rule, have passed from the covenantor to the covenantee.⁴⁶

A subsequent grantee may not maintain an action for breach of a covenant if the covenantor had no title or possession at the date of his conveyance,⁴⁷ although it has been held that, if the cove-

—*Rosen v. Wolff*, 110 S.E. 877, 880, 152 Ga. 578.

Waiver of lack of privity

Where vendor accepted performance of land contract by, and executed warranty deed to, vendee's assignee, although the assignment was contrary to the terms of the contract, vendor could not subsequently assert lack of privity as defense to assignee's action for breach of covenant.—*Mueller v. Bankers' Trust Co. of Muskegon*, 247 N.W. 103, 262 Mich. 53.

Tenancy as sufficient interest to obtain real covenant

Where a tenant of a part of the landlord's land has trackage rights and terminal storage privileges on the remainder, the tenant, occupying the remainder, has sufficient interest therein to procure for the entire land a covenant with the railroad company running with the land, inuring to the benefit of the landlord and his future tenants.—*Baird v. Erie R. Co.*, 129 N.Y.S. 329, 72 Misc. 162, affirmed 132 N.Y.S. 971, 148 App.Div. 452, affirmed 104 N.E. 614, 210 N.Y. 225.

46. Kan.—*Colver v. McInturf*, 212 P. 88, 112 Kan. 604, motion overruled 212 P. 908, 112 Kan. 604.

Tex.—*Hay v. Briley*, Civ.App., 43 S.W.2d 301.
15 C.J. p 1260 note 17.

47. Kan.—*Colver v. McInturf*, 212 P. 88, 89, 112 Kan. 604, motion overruled 212 P. 908, 112 Kan. 604.

15 C.J. p 1257 notes 61, 62, p 1258 note 85.

Reason for rule

"Our view is that the covenants of a deed which is made by a grantor who has neither title nor possession to a grantee who obtains no posses-

nantee takes possession of and conveys the land to another, a sufficient privity is established between himself and his grantee to give the latter a right of action against the covenantor, even though he had neither title nor possession at the time of the execution of his covenant.⁴⁸

In some jurisdictions a covenant will not so run with the land as to give a right of action against the covenantor to the alienee of the covenantee unless there exists a privity of contract between them.⁴⁹

§ 85. — Heirs and Devisees

The heirs and devisees of a covenantee ordinarily are entitled to enforce real covenants.

The heirs and devisees of a covenantee are entitled to enforce covenants running with the land,⁵⁰

sion do not run with the land, and do not upon that principle pass with succeeding conveyances; and this not merely because the covenants are broken as soon as the deed is made, resulting in the accrual of a personal cause of action, but also because, inasmuch as the grantor gives no right to the land and the grantee takes none, no interest in it is passed and there is nothing to which the covenants can attach and the transfer of which they can follow. They cannot run with the realty because they have not become attached to it."—*Colver v. McInturff*, *supra*.

48. Mo.—*Allen v. Kennedy*, 2 S.W. 142, 91 Mo. 142.

15 C.J. p 1261 note 19.

49. La.—*Hardy v. Pecot*, 28 So. 936, 104 La. 136.

15 C.J. p 1260 notes 13, 14.

50. Fla.—*Zemurray v. Kilgore*, 177 So. 714, 717, 130 Fla. 317, quoting *Corpus Juris*.

15 C.J. p 1261 note 20, p 1299 note 4—24 C.J. p 148 note 86.

Heirs of covenantee's grantee

N.Y.—*Preiss v. Le Foldevin*, 19 Abb. N.Cas. 123.

15 C.J. p 1261 note 20 [b].

Covenant against encumbrances

The heirs of decedent who had conveyed certain land which was encumbered by a deed of trust could not maintain an action against a former grantor for breach of a covenant against encumbrances, where the encumbrance was not discharged by decedent before her death, or where it was not paid out of the assets of the estate.—*Ladd v. Montgomery*, 83 Mo. App. 355.

Implied warranty arising from partition

Where an implied warranty of title arises by reason of the voluntary partition of land among several devisees, see the C.J.S. title Partition

unless an evident intention is manifested to confine them to the covenantee,⁵¹ or unless the covenant has been broken in the lifetime of decedent,⁵² in which case the action can be brought by decedent's personal representative.⁵³

§ 86. Persons Liable on Real Covenants

For breach of a real covenant, the original and intermediate covenantors are liable; and where the covenant constitutes a burden on the land, a grantee of the owner of the land burdened is responsible for a breach.

Where a covenant runs with the land, the original and every intermediate covenantor are liable to the one during whose tenure the covenant is broken,⁵⁴ unless personal responsibility is expressly or by reason of the nature of the transaction impliedly excluded;⁵⁵ and unless the covenantee con-

§ 17, also 47 C.J. p 282 note 79½ et seq., such implied warranty runs with the land in favor of the heirs of the devisees, although such warranty does not pass to an alienee or vendee of one of the several devisees.—*Jones v. Bigstaff*, 25 S.W. 889, 95 Ky. 395, 15 Ky.L. 821, 44 Am. S.R. 245.

51. Ind.—*Martin v. Baker*, 5 Blackf. 232.

15 C.J. p 1261 note 21.

52. Ala.—*Prestwood v. McGowin*, 29 So. 336, 128 Ala. 267, 86 Am.S.R. 136.

15 C.J. p 1261 note 22—23 C.J. p 1135 note 76 [b].

Action by heirs on choses in action see the C.J.S. title Descent and Distribution § 84, also 18 C.J. p 902 note 41 et seq.

53. Fla.—*Zemurray v. Kilgore*, 177 So. 714, 717, 130 Fla. 317, quoting *Corpus Juris*.

15 C.J. p 1299 note 3—23 C.J. p 1135 note 76 [b].

Action by representative on choses in action connected with realty see the C.J.S. title Executors and Administrators § 100, also 23 C.J. p 1135 note 75 et seq.

54. Cal.—*Pratt-Low Preserving Co. v. Evans*, 204 P. 241, 243, 55 Cal. App. 724, citing *Corpus Juris*.

Ga.—*Reese v. Manget*, 186 S.E. 880, 53 Ga.App. 637.

Mo.—*Baird v. Harris*, 290 S.W. 80, 220 Mo.App. 1290.

15 C.J. p 1261 note 28.

Parties in actions for breach of covenant see *infra* § 123.

Persons liable on personal covenants see *supra* § 36.

Right of grantee and assignee to sue see *supra* § 82.

Joint liability

(1) Wife executing deed with husband as joint and several obligors, could be sued alone after husband's

death for breach of covenants.—*Plattner v. Vincent*, 229 P. 24, 194 Cal. 436, 102 P. 655, 187 Cal. 443.

(2) Deed by life tenant and contingent remaindermen, containing no words of severance, imposed joint liability under covenant of warranty.—*Campbell v. Lewisburg & N. R. Co.*, 28 S.W.2d 141, 160 Tenn. 477.

Liability of partnership members on oral covenant

An oral covenant made by one member of a firm engaged in the business of building and selling residence houses to remove a nuisance from land adjoining a residence purchased from such firm could be enforced against the members of the partnership.—*Immel v. Herb*, 50 Pa. Super. 241.

55. Tex.—*Hopper v. Tancil*, Com. App., 3 S.W.2d 67, modifying, Civ. App., 285 S.W. 900.

15 C.J. p 1261 note 29.

Grantor holding title as security

Grantor, who had held title as security, conveying to grantee at equitable owner's direction, without consideration from grantee, was not liable to grantee on warranty in deed to grantee or grantee's successors, who were not innocent purchasers.—*Hopper v. Tancil*, *supra*.

Contract as governing rights of parties

Where defendant, guardian of minors owning land, contracted with plaintiff to convey to him whatever title defendant could secure by probate court proceedings, and codefendant was selected as intermediary to convey such interest to plaintiff, neither defendant nor intermediary was bound by covenant in intermediary's deed; defendant did all that she was required to do by the contract and plaintiff knew that intermediary had no interest in the transaction.—*Rich-*

sents, a covenantor cannot evade responsibility for his covenant by transferring the obligation to a third person.⁵⁶ Where a statute so provides, only those who acquire the whole estate of the covenantor in some part of the property are liable on a real covenant.⁵⁷

As a general rule, no one is bound by the covenants of a deed who did not execute it and who is not named or referred to therein as being bound by the covenants.⁵⁸ Thus, the equitable owner of land is not liable for breach of a covenant contained in a deed executed by the holder of the legal title, where he does not join in the deed.⁵⁹ Furthermore, at common law, an undisclosed principal is not liable on covenants in a deed executed by his agent;⁶⁰ and under statutes abolishing the use or necessity of seals, an undisclosed principal has been held not to be liable on such covenants,⁶¹ at least where it is not shown that the principal ever owned any interest in the property, or was in possession of it, or that he received any of the consideration given by the grantee.⁶²

Since covenants are construed so as to carry into effect the intention of the parties, see § 20 *supra*, a grantor is not liable for breach of a real covenant where the only construction that can be placed on the covenant is that the grantor did not intend to bind himself, but only to charge his estate in the hands of his legal representatives,⁶³ although the rule has been held to be inapplicable to covenants which, if broken at all, are broken as soon as made.⁶⁴ Where a deed executed by the attorney in fact of the grantor shows that the property is in the grantor and that the purchase money is payable to him, and the receipt is acknowledged by the attorney in fact as such, the fact that the granting and warranting clauses purport to be the act of the attorney will not make him liable on the covenant of warranty.⁶⁵

Grantees. As one who holds under a warrantor cannot ignore the warranty,⁶⁶ where a covenant imposing burdens on the land runs with the land, see § 69 *supra*, the grantee of the covenantor is liable for its breach;⁶⁷ and, as stated *supra* § 36,

ards v. Billingslea, 282 S.W. 985, 170 Ark. 1100.

56. *Tex.—Smith v. Pitts*, 122 S.W. 46, 50, 57 *Tex.Civ.App.* 97.

57. *Cal.—Hartman Ranch Co. v. Associated Oil Co.*, 73 P.2d 1163, 10 Cal.2d 232.

58. *Kan.—Ludwig v. Dean*, 284 P. 369, 370, 129 *Kan.* 636, citing *Corpus Juris*.

15 C.J. p 1262 note 32.

Parties to express covenant see *supra* § 3.

Mortgagee who joins in deed

(1) Is liable on covenants.—*Luchetti v. Frest*, 65 P. 969, 6 *Cal. Unrep.Cas.* 763.

(2) Is not liable on covenants.—*Tilghman Lumber Co. v. Matheson*, 70 S.E. 1033, 88 S.C. 432.
15 C.J. p 1262 note 32.

Effect of insertion of grantee's name

A wife is not liable on covenants in a deed by her and her husband from which the grantee's name was omitted when the covenant had been changed by the husband from a limited to a general one and the name of the grantee inserted by the husband during her absence and without her knowledge, although she had verbally authorized such insertion.—*Basford v. Pearson*, 9 *Allen, Mass.*, 387, 85 *Am.D.* 764.

One who advances money to purchaser with which to purchase land on notes payable to such person directly instead of to the vendor is not liable on the warranty of the vendor.—*Roberts v. Prather*, *Tex.Civ.App.*, 153 S.W. 789.

59. *Ky.—Bowling v. Bengé*, 55 S.W. 422, 21 *Ky.L.* 1424.

60. *Mo.—Donner v. Whitecotton*, 212 S.W. 378, 201 *Mo.App.* 443.

Liability of undisclosed principal on sealed contracts see *Agency* § 246.

61. *Mo.—Donner v. Whitecotton*, *supra*.

Recovery on theory of unjust enrichment

Although suit may not be maintained against the undisclosed principal on the covenant, nevertheless a recovery may be had on the theory that the principal has obtained through his agent money to which he was not entitled and for which he gave nothing.—*Donner v. Whitecotton*, *supra*.

62. *Kan.—Ludwig v. Dean*, 284 P. 369, 129 *Kan.* 636.

63. *Ill.—Rufner v. McConnel*, 14 *Ill.* 168.

Covenant "for his heirs, executors and administrators"

Ill.—Traynor v. Palmer, 86 *Ill.* 477.

64. **Covenant against encumbrances**
Wash.—Harsin v. Oman, 123 P. 1, 68 *Wash.* 278.

65. *Tex.—Daughtrey v. Knolle*, 44 *Tex.* 450.

66. *La.—Hardy v. Pecot*, 86 *So.* 992, 113 *La.* 350.

Destruction of contingent remainders

Covenants of warranty binding on a grantor are likewise binding on one who stands in his place, so as to preclude a transfer of the reversion that will destroy contingent remainders created by the warranty deed.—

Biwer v. Martin, 128 N.E. 518, 294 *Ill.* 488.

67. *Ga.—Godfrey v. Huson*, 179 S.E. 114, 180 *Ga.* 483—*Rosen v. Wolff*, 110 S.E. 877, 152 *Ga.* 578.

Md.—Union Trust Co. of Maryland v. Rosenberg, 189 *A.* 421, 171 *Md.* 409.

15 C.J. p 1262 note 48.

Assignor must be bound

"A covenant cannot run with the land so as to bind an assignee unless it exists at the time of the conveyance so as to bind an assignor."—*Logan v. United Interests*, 140 N.E. 240, 241, 236 N.Y. 194, affirming 197 N.Y.S. 109, 203 *App.Div.* 634.

Privity of estate

A covenant will not run with the land so as to be a burden on it in the hands of a purchaser, unless there is some privity of estate between him and the covenantor.—*Brewer v. Marshall*, 18 N.J.Eq. 337, affirmed 19 N.J.Eq. 537, 97 *Am.D.* 679.

Owners of part of tract

(1) In suit for breach of deed covenant requiring grantee to maintain ditches for drainage of grantor's land, grantor is entitled to damages jointly against grantee's successors to each part of tract, where covenant covered every part of land covered by deed and amount of damage caused by each defendant cannot be segregated.—*Guild v. Wallis*, 40 P. 2d 737, 150 *Or.* 69, supplemented 41 P.2d 1119, 150 *Or.* 69, rehearing denied 42 P.2d 916.

(2) Where a deed to two persons contained a covenant running with the land as to payment of expenses

a covenant will be enforced in equity against a grantee who purchases with notice, although it does not technically run with the land.

However, an assignee or grantee is liable only for such breaches of covenant as occur while he is the owner of the land.⁶⁸ Where a grantee covenants perpetually to maintain a division fence, he is not liable on such covenant after he has parted with his title.⁶⁹ Furthermore, a grantee of lands other than those covenanted is not in the category of

an heir or devisee and is not liable for breach of the grantor's covenants.⁷⁰

Heirs and devisees. The liability of the covenantor's heirs is treated in the C.J.S. title Descent and Distribution § 126, also 18 C.J. p 950 note 41—p 951 note 60, 15 C.J. p 1262 note 51—p 1263 note 58; while in the C.J.S. title Wills § 1315, also 69 C.J. p 1219 note 77—p 1220 note 82, 15 C.J. page 1263 notes 59–62, is discussed the liability of devisees of the covenantor.

III. PERFORMANCE OR BREACH

§ 87. Obligation to Perform in General

Failure to perform a covenant is excused where performance is illegal or the covenantee prevents performance; but the occurrence of an accident or other unforeseen contingency will not excuse performance. Equities existing between the original parties do not bind a subsequent purchaser without notice.

To excuse the nonperformance of an express covenant it must be shown either that it is a covenant prohibited by law,⁷¹ or that the performance of the covenant by the covenantor has been prevented by the act of the covenantee himself;⁷² and while there is some authority to the effect that failure to perform an express covenant may be excused where its performance has become impossible by the intervention of causes which human agencies could not prevent,⁷³ upon the ground that such causes were not in contemplation of the parties provided against by the covenant,⁷⁴ yet the rule that a party who by his own contract creates a duty or charge upon himself is bound to make it

good, notwithstanding any inevitable accident or other contingency, applies with equal force to covenants;⁷⁵ and if a covenant be within the range of possibility it will be upheld, however absurd or improbable the idea of the execution of it may be.⁷⁶

Equities between original parties. The covenants in a deed are unaffected in the hands of an assignee by equities existing between the original parties;⁷⁷ thus a conveyance of land by the grantor for the purpose of preventing his vendor from procuring a reconveyance will not affect the title of the grantee;⁷⁸ but this rule does not apply to a remote grantee who purchases with notice of such equities.⁷⁹ It has been held that the refusal of a vendor to take upon himself the ordinary liability, as where he gives only a special warranty, although a general warranty is usual, must be regarded as sufficient, unless satisfactorily explained, to put every one of ordinary prudence upon inquiry as to the

of litigation in regard to water rights, and the two grantees partitioned the land, the covenant bound each grantee only as to the particular lands to which the fee vested wholly in him, under Civ.Code, § 1466, so that, where such expense was incurred, each was liable for his pro rata, based on lands retained. —*Miller & Lux v. San Joaquin Agr. Co.*, 209 P. 592, 58 Cal.App. 753.

63. Cal.—*Miller & Lux v. San Joaquin Agr. Co.*, 209 P. 952, 58 Cal. App. 753.

Md.—*Union Trust Co. of Maryland v. Rosenberg*, 189 A. 421, 425, 171 Md. 409.

Or.—*Guild v. Wallis*, 40 P.2d 737, 150 Or. 69, supplemented 41 P.2d 1119, 150 Or. 69, rehearing denied 42 P.2d 916.

Wyo.—*Lingle Water Users' Ass'n v. Occidental Building & Loan Ass'n*, 297 P. 385, 392, 43 Wyo. 41, citing *Corpus Juris*.

15 C.J. p 1262 note 50.

21 C.J.S.—60

69. Iowa.—*Sexauer v. Wilson*, 113 N. W. 941, 136 Iowa 357, 14 L.R.A.N. S., 185, 15 Ann.Cas. 64.

70. Ala.—*Dallas Compress Co. v. Liepold*, 88 So. 681, 205 Ala. 562.

71. Ala.—*Morrow v. Campbell*, 7 Port. 41, 31 Am.D. 704.

Ky.—*Stephens v. Vaughan*, 4 J.J. Marsh. 206, 20 Am.D. 206.

Supervening illegality excuses non-performance of a covenant.—*Goldberg v. Callender Bros.*, 113 A. 170, 96 Conn. 182.

72. Pa.—*Huntingdon, etc., R. Co. v. McGovern*, 29 Fa. 78.

15 C.J. p 1263 note 64.

Failure to request cooperation

Where a vendor agreed to prosecute or defend any suit necessary to vest title in the purchaser, the purchaser, who had a substantial interest in the property, was not delinquent in not returning the evidences of title to the vendor so he could defend such a suit in his own name, where no request for the return was

made.—*Vanasse Land Co. v. Hewitt*, 164 P. 196, 95 Wash. 643.

72. Ala.—*Morrow v. Campbell*, 7 Port. 41, 31 Am.D. 704.

Ky.—*Singleton v. Carroll*, 6 J.J. Marsh. 527, 22 Am.D. 95.

74. Ky.—*Singleton v. Carroll*, supra.

75. N.Y.—*Cobb v. Harmon*, 23 N.Y. 148—*Harmony v. Bingham*, 12 N.Y. 99, 62 Am.D. 142.

15 C.J. p 1263 note 63.

76. N.Y.—*Beebe v. Johnson*, 19 Wend. 500, 32 Am.D. 518.

77. Mo.—*Githens v. Barnhill*, App. 184 S.W. 145.

15 C.J. p 1298 note 81.

73. Ill.—*Grant v. Bennett*, 96 Ill. 513.

Mass.—*Mansfield v. Dyer*, 131 Mass. 200.

79. Ky.—*Snadon v. Salmon*, 121 S.W. 970, 135 Ky. 47.

N.C.—*Newbern v. Hinton*, 129 S.E. 181, 190 N.C. 108.

source and validity of the title thus brought under suspicion,⁸⁰ and that the grantee of a quitclaim deed is not to be regarded as a bona fide purchaser without notice of outstanding equities,⁸¹ although his vendee with warranty is not affected by the vendor's implied mala fides.⁸²

§ 88. Demand of Performance in General

A demand for performance is not required for an action for breach of covenant except in some circumstances, as where the instrument requires a demand.

Notice of breach and demand of performance are not required of the covenantee in order to entitle him to an action against the covenantor upon breach of his covenant,⁸³ unless the event upon which the action accrues is mainly or exclusively within the knowledge of the covenantee,⁸⁴ or unless performance is impossible without his coöperation,⁸⁵ or unless it is fixed at an indefinite future time,⁸⁶ or unless by the terms of the instrument itself demand of performance is required.⁸⁷

§ 89. Notice to Maintain or Defend Title

A covenantee notifying his covenantor of the bringing of suit against him on an adverse claim generally need not prove, in an action on the covenant, the validity of

the adverse claimant's title, unless judgment was obtained by his collusion or negligence. The covenantee may vouch the covenantor into the action in which the title is being attacked, or may bring him in to defend against a title set up against the covenantee in a suit by the latter.

Where suit is brought on an adverse claim against one who is entitled to the benefit of a covenant for title, he can, by giving proper notice of the action to the party bound by the covenant, relieve himself of the burden of proving, in a subsequent action on the covenant against the covenantor so notified, the validity of the title of the adverse claimant,⁸⁸ and this, even though the judgment was rendered upon an agreement to which the covenantor was not a party,⁸⁹ or although a valid defense might have been made to the action,⁹⁰ or although the covenantee, to save himself from eviction under the judgment, purchased the outstanding title;⁹¹ but the rule does not apply if the judgment was obtained by collusion or negligence on the part of the covenantee,⁹² or if the paramount claim was derived through the covenantee,⁹³ or subsequently to the making of the covenant.⁹⁴

The covenantor may be vouched into the action so that the covenantee may obtain full relief without instituting a subsequent action.⁹⁵ So too it has

80. U.S.—*Oliver v. Platt*, Ohio, 3 How. 333, 11 L.Ed. 622.
15 C.J. p 1298 note 83.

81. Iowa.—*Springer v. Bartle*, 46 Iowa 688—*Watson v. Phelps*, 40 Iowa 482.

82. Iowa.—*Winkler v. Miller*, 6 N. W. 698, 54 Iowa 476.

83. Okl.—*Arnold v. Joines*, 150 P. 130, 50 Okl. 4.
15 C.J. p 1263 note 70.

84. Ala.—*Fitzpatrick v. Hanrick*, 11 Ala. 783—*Huff v. Campbell*, 1 Stew. 543.

85. Ark.—*Humphries v. Goulding*, 3 Ark. 581—*Childress v. Foster*, 3 Ark. 252.

86. Ark.—*Taylor v. Patterson*, 3 Ark. 238.

Ky.—*Stainton v. Brown*, 6 Dana 248.

Two demands are required where a covenant to execute a conveyance specifies no time for its performance, so as to give the covenantor a reasonable time to prepare and execute the conveyance.—*Pearsoll v. Frazer*, 14 Barb. N.Y., 564.

87. Mass.—*Morse v. Aldrich*, 1 Metc. 544.

15 C.J. p 1263 note 74.

Suit as demand

Grantor's suing grantee's successors in interest held to be a demand for performance of grantee's covenant to reconvey on demand, perfecting right to conveyance.—*Dodd v.*

Rotterman, 161 N.E. 756, 330 Ill. 362.

Reasonable time to perfect title

Under contracts and conveyances for more than forty-five thousand acres of land, it was held that from May 19, 1913, to Sept. 27, 1920, was more than reasonable time for the grantors to perfect title according to their agreement to do so on demand by obtaining quitclaim conveyances or by appropriate judicial proceedings.—*Alger-Sullivan Lumber Co. v. Union Trust Co.*, 96 So. 436, 209 Ala. 432.

88. Ga.—*May v. Loeb*, 196 S.E. 268, 270, 57 Ga.App. 788, citing *Corpus Juris*, and affirmed 198 S.E. 785, 186 Ga. 742.

Ill.—*Biwer v. Martin*, 128 N.E. 518, 294 Ill. 488.

Tex.—*Sherman v. Piner*, Civ.App., 91 S.W.2d 1185, citing *Corpus Juris*.
15 C.J. p 1264 note 95.

The death of the warrantor pending the suit and after receiving notice thereof does not require that further notice should be given to his legal representatives in order for them to be concluded by the judgment in the action.—*Brown v. Taylor*, 13 Vt. 631, 37 Am.D. 618.

89. Mass.—*Chamberlain v. Preble*, 11 Allen 370.

15 C.J. p 1265 note 96.

90. Ky.—*Elliot v. Saufley*, 11 S.W. 200, 89 Ky. 57, 10 Ky.L. 958.

91. Ark.—*Collier v. Cowger*, 12 S.W. 702, 52 Ark. 322, 6 L.R.A. 107.

Ill.—*McConnell v. Downs*, 48 Ill. 271.

92. Ill.—*Biwer v. Martin*, 128 N.E. 518, 294 Ill. 488.
15 C.J. p 1265 note 99.

93. Ill.—*Sisk v. Woodruff*, 15 Ill. 15.

94. Vt.—*Swazey v. Brooks*, 34 Vt. 451.

15 C.J. p 1265 note 2.

95. La.—*Walker v. Baer Thayer Hardwood Co.*, 129 So. 218, 14 La. App. 381, modifying 126 So. 541, 14 La.App. 381.

15 C.J. p 1264 note 95 [c], [d], p 1265 note 96 [a].

Under statute a grantee sued for recovery of land conveyed to him by warranty deed may by notice require the warrantor to defend in his behalf.—*Harmon v. Nofire*, 267 P. 650, 131 Okl. 1.

Successive vouchers

(1) If one who has conveyed land with warranty is vouched in by his grantee he may in turn vouch in his grantor with like covenants to defend the same suit.

La.—*Walker v. Baer Thayer Hardwood Co.*, supra.

Mass.—*Chamberlain v. Preble*, 11 Allen 370.

(2) The last vouchee may show that, notwithstanding the eviction was by title paramount to the first vouchee, yet it was not paramount to

generally been held that a covenantor may be brought in to defend against a title set up against his grantee in a suit by the latter;⁹⁶ however, there is some authority to the contrary,⁹⁷ and in Louisiana plaintiff in a petitory action has no right to call his vendor in warranty,⁹⁸ although that form of proceeding seems to have been permitted in that state where no objection was made thereto.⁹⁹

§ 90. — Necessity

Notice to the covenantor of an action in which an adverse title is asserted is not essential to a right of action on the covenant; but a covenantor not receiving such notice is not concluded by the judgment against the covenantee, who must show that the eviction was under a paramount title.

While a covenantee must deal fairly and in fidelity to his covenantor,¹ and if he is sought to be illegally evicted must resist the proceeding or notify his covenantor,² yet, in the absence of statute so requiring,³ it is not essential to his right of action on the covenant that he should give his covenantor notice to come in and defend the title, when it is attacked, or that he should vouch his cove-

nantor into the action;⁴ but where no notice is given, the judgment does not conclude the covenantor and the covenantee does not make out a prima facie case by showing the judgment or decree against him and eviction thereunder; he must go further and show that the eviction was under a paramount title,⁵ at least where the covenantor was not a party to the eviction suit;⁶ and, unless such notice is given, there can be no recovery of special damages or expenses incurred in defending the suit.⁷

§ 91. — Form and Sufficiency

Notice to the covenantor of suit on an adverse claim should be unequivocal and explicit, but need not, under most authorities, be written. Some authorities require that the notice expressly call upon the covenantor to defend the action. The notice must be given in time to allow him a reasonable opportunity to prepare for the trial.

In order to conclude the covenantor, the notice given by the covenantee of the bringing of suit on an adverse claim should be unequivocal, certain, and explicit,⁸ and notice given to the covenantor's

his title.—*Middleton v. Thompson*, 28 S.C.L. 67.

Trespasser

(1) Trespasser cannot call anybody in warranty to defend trespass he is committing.—*Walker v. Baer Thayer Hardwood Co.*, 129 So. 218, 14 La.App. 381, modifying 126 So. 541, 14 La.App. 381—*Hickman v. Hill, Harris & Co.*, 123 So. 606, 163 La. 381.

(2) Plaintiff cannot have defendant regarded as trespasser and denied right to call its vendor to defend title merely by alleging that defendant is trespasser.—*Walker v. Baer Thayer Hardwood Co.*, supra.

Promise to obtain title

Transfer of right of grantor, promising to acquire title from state, gave grantee's successor no right to call grantor in warranty.—*Lee v. Riggs*, 127 So. 114, 13 La.App. 34.

Partition

Although a partition proceeding may be summary, defendant has a right to call his vendors in warranty when his possession of the property is disturbed.—*Vance v. Noel*, 78 So. 741, 143 La. 477.

Grantee of state

One desiring state to defend action in ejectment involving land covered by its deed to him should request it to intervene.—*Corbishley v. Gribben*, 208 N.W. 34, 234 Mich. 304.

Call in warranty against prior vendor

A vendor who acquiesced in the joint judgment obtained by his vendee against him and his vendor for

damages because the house on improved premises sold encroached on the land of a neighbor, necessitating expense in its removal, may insist on his call in warranty against his grantor.—*Schill v. Churchill*, 123 So. 139, 11 La.App. 181.

92. Tex.—*McCreary v. Douglass*, 24 S.W. 367, 5 Tex.Civ.App. 492, 15 C.J. p 1265 note 3.

97. Tenn.—*Ferrell v. Alder*, 8 Humphr. 44, 15 C.J. p 1265 note 4.

93. La.—*Foote v. Pharr*, 38 So. 835, 115 La. 35.

99. La.—*Parrott v. Edwards*, 19 La. 366.

1. Miss.—*Sisters of Perpetual Adoration v. Jane*, 70 So. 818, 110 Miss. 612.

15 C.J. p 1265 note 7.

2. La.—*Landry v. Gamet*, 1 Rob. 362.

3. Personal service not required

Statute providing that grantee must "notify" grantor, sought to be held liable on warranty, at least twenty days before trial of suit against grantee for recovery of realty, does not require personal service, it being sufficient if proper notice is mailed, where grantor acknowledges in writing receipt of notice in due time.—*Fast v. Scruggs*, 23 P.2d 383, 164 Okl. 196.

4. Ga.—*Cheatham v. Palmer*, 167 S. E. 522, 176 Ga. 227.

Idaho.—*Bliss Town-Site Co. v. Morris-Roberts Co.*, 190 P. 1028, 33 Idaho 110.

Mo.—*Smith v. Nussbaum*, App., 71 S. W.2d 82.

Wyo.—*Hawkins v. Stoffers*, 276 P. 452, 456, 40 Wyo. 226, citing *Corpus Juris*, rehearing denied 273 P. 76, 40 Wyo. 226.

15 C.J. p 1265 note 9, p 1296 note 44.

5. Ala.—*Smith v. Gaines*, 97 So. 739, 740, 210 Ala. 245, citing *Corpus Juris*.

La.—*Ardill v. Heirs of Martinez*, 6 La.App. 150.

Mo.—*Smith v. Nussbaum*, App., 71 S.W.2d 82.

15 C.J. p 1266 note 10.

6. Ala.—*Smith v. Gaines*, 97 So. 739, 210 Ala. 245.

Okla.—*Rennie v. Gibson*, 183 P. 483, 75 Okl. 282.

15 C.J. p 1266 note 11.

7. Ala.—*Smith v. Gaines*, 97 So. 739, 210 Ala. 245.

D.C.—*Richmond Fairfield Ry. Co. v. U.S. Housing Corporation*, 72 F.2d 78, 63 App.D.C. 285.

Covenant to protect from expenses
of defending property from adverse claims can be enforced only if notice of the pending suit is given to the covenantor, unless the court has jurisdiction of him.—*Lasswell v. Prairie Oil & Gas Co.*, 47 P.2d 593, 173 Okl. 273.

8. Ky.—*Burchett v. Blackbourne*, 248 S.W. 553, 198 Ky. 304, 34 A.L.R. 1425.

15 C.J. p 1266 note 14.

Notice of claim for improvements

The failure of the covenantee to state in the notice of pendency of action that an allowance for improvements made upon the property would be sought does not render the notice

agent,⁹ or mere knowledge of suit brought to covenantor by an outside party,¹⁰ has been held insufficient, although it has been held that the covenantor's appearance in the action by attorney will be sufficient to charge him with notice of the suit.¹¹

According to some authorities the notice must expressly call upon the covenantor to appear and defend,¹² but according to others a sufficient notice is all that is required.¹³ The notice need not be in any particular form,¹⁴ nor, it is generally held, need it be in writing or of record,¹⁵ although it is doubtless the better practice to give written notice,¹⁶ and some authorities require it.¹⁷

Waiver of notice. The notice may be waived by the covenantor expressly or impliedly as by appearing and undertaking the defense,¹⁸ or by refusing to assist in remedying a defect in the title of which he was cognizant.¹⁹

Whether sufficient notice has been given is not governed by any fixed or arbitrary rule, but depends upon the facts and circumstances;²⁰ and where the notice does not appear of record the question whether it has been actually given becomes a question of fact.²¹

Time of notice. Since the object of the notice

is to enable the covenantor to come in and defend his title,²² it must be given in time to afford him a reasonable opportunity not only to participate in the trial but also to prepare for it;²³ and a notice of a suit against the covenantee, given for the first time after an adverse judgment, and advising the covenantor that the covenantee is about to appeal from the judgment against him, is not sufficient to charge the covenantor with costs;²⁴ but an irregularity as to the time of service on the covenantee will not affect the sufficiency of the notice from him to his covenantor,²⁵ and plaintiff cannot be delayed by defendant's neglect to bring in his warrantor.²⁶

§ 92. — Effect on Liability

A covenantor who has been given sufficient notice of an action against his covenantee upon a ground which, if valid, would involve infringement of his covenant is bound by the judgment therein.

A covenantor who has been given sufficient notice to come in and defend an action against his covenantee brought upon a ground which, if adjudged valid, would involve infringement of his covenant is concluded by a judgment rendered therein against the covenantee in a subsequent suit brought against him by the covenantee,²⁷ and

ineffective.—*Talbert v. Grist*, 201 S. W. 906, 198 Mo.App. 492.

9. Ala.—*Graham v. Tankersley*, 15 Ala. 634.

15 C.J. p 1266 note 15.

Wis.—*Somers v. Schmidt*, 24 Wis. 417, 1 Am.R. 191.

10. Pa.—*Paul v. Witman*, 3 Watts & S. 407.

"His knowledge of such pendency, in order to make the judgment therein binding upon him, should rest in higher and more substantial proof than a mere casual allunde notice of the pendency of the suit which did not emanate from the warrantee."—*Burchett v. Blackburne*, 248 S.W. 853, 854, 198 Ky. 304, 34 A.L.R. 1425.

11. Ill.—*Harding v. Larkin*, 41 Ill. 413.

12. Va.—*Morgan v. Haley*, 58 S.E. 564, 107 Va. 331, 122 Am.S.R. 846, 13 L.R.A.N.S. 732, 13 Ann.Cas. 204. 15 C.J. p 1266 note 13.

13. Miss.—*Cummings v. Harrison*, 59 Miss. 275.

15 C.J. p 1266 notes 19, 20.

14. Mass.—*Richstein v. Welch*, 83 N. E. 417, 197 Mass. 224.

15 C.J. p 1266 note 21.

15. Ky.—*Davenport v. Muir*, 3 J.J. Marsh. 310, 20 Am.D. 143.

15 C.J. p 1266 note 22.

16. Ind.—*Sarlis v. Beckman*, 104 N.

E. 598, 55 Ind.App. 638—*Teague v. Whaley*, 50 N.E. 41, 20 Ind.App. 26.

17. Mich.—*Mason v. Kellog*, 38 Mich. 132.

Dictum Teague v. Whaley, 50 N.E. 41, 20 Ind.App. 26.

Notice not "writ" or "process"

Written notice required by statute to be served on grantors or persons bound by warranty in deed is not "writ" or "process," within constitution, nor process under statute.—*Harmon v. Nofire*, 267 P. 650, 131 Okl. 1.

18. Mo.—*Rice v. Cook*, 120 S.W. 1191, 141 Mo.App. 1.

15 C.J. p 1267 note 26.

19. Ind.—*Sarlis v. Beckman*, 104 N. E. 598, 55 Ind.App. 638.

20. N.Y.—*Morette v. Bostwick*, 111 N.Y.S. 1021, 127 App.Div. 701, reversing 106 N.Y.S. 1102, 56 Misc. 140.

21. Ind.—*Morgan v. Muldoon*, 82 Ind. 347—*Pence v. Rhonemus*, 108 N.E. 129, 58 Ind.App. 268.

22. S.C.—*Davis v. Wilbourne*, 19 S. C.L. 27, 26 Am.D. 154—*Middleton v. Thompson*, 28 S.C.L. 67.

Wis.—*Somers v. Schmidt*, 24 Wis. 417, 1 Am.R. 191.

23. Okl.—*Lasswell v. Prairie Oil & Gas Co.*, 47 P.2d 598, 173 Okl. 278. 15 C.J. p 1267 note 33.

"The time which the law allows to a defendant furnishes, perhaps, the

safest rule."—*Middleton v. Thompson*, 28 S.C.L. 67, 69—*Davis v. Wilbourne*, 19 S.C.L. 27, 29, 26 Am.D. 154.

Notice after several years of litigation in trial court held insufficient.

—*Richmond Fairfield Ry. Co. v. U. S. Housing Corporation*, 72 F.2d 78, 63 App.D.C. 285.

24. N.Y.—*Finton v. Egelston*, 16 N. Y.S. 721, 61 Hun 246.

25. Mich.—*Cook v. Curtis*, 36 N.W. 692, 68 Mich. 611.

26. La.—*Zimmer v. Thompson*, 13 La. 22.

15 C.J. p 1267 note 36.

After a case is set and called for trial, a call in warranty will not be allowed.—*Hyman v. Bailey*, 13 La. Ann. 450.

27. Ga.—*Cook v. Pollard*, 179 S.E. 264, 265, 50 Ga.App. 752, citing *Corpus Juris*.

Ind.—*Bollenbacher v. Lee*, 121 N.E. 663, 75 Ind.App. 330.

Tex.—*Sherman v. Piner*, Civ.App., 91 S.W.2d 1185, citing *Corpus Juris*.

15 C.J. p 1267 note 38.

"The warrantor is estopped by the recovery in such case from denying that it was under a better title the recovery was had, than that which he passed to his warrantee."—*Ives v. Niles*, 5 Watts, Pa., 323, 325.

this is true notwithstanding the judgment was taken by default;²⁸ but a covenantor will not be concluded if the covenantee refuses to permit him to defend, although he will not thereby be discharged from his liability for a breach of the covenant.²⁹

Vouching in an immediate warrantor does not impair the covenantee's claim against the original warrantor on his covenant.³⁰

§ 93. Sufficiency of Performance in General

The sufficiency of performance of a covenant is determined by the parties' intent, as shown by the instrument and the circumstances of its execution. Substantial and reasonable performance is generally sufficient.

The sufficiency of the performance of a covenant is to be determined by the true intent of the parties as shown by the instrument itself, viewed in connection with the circumstances surrounding its execution.³¹ While it has been held that one who covenants to take proper means to secure the collection of a bond or mortgage is responsible that such means should be taken by every person whom he employs to execute his covenant,³² yet it may be said as a rule that a substantial and reasonable performance of the covenant is sufficient,³³ and that if either one of alternative covenants is

performed there is no breach.³⁴ If the covenant is once properly performed the covenantor is absolved from liability, notwithstanding the performance may be defeated or rendered unavailing by matter subsequent,³⁵ unless the covenant is a continuing one.³⁶

A subsequent grantee does not, by accepting a deed to the premises, acknowledge the sufficiency of the covenantor's performance of his covenant.³⁷

Time of performance. Where no time is limited for the performance of the act covenanted to be done it must be performed within a reasonable time.³⁸

§ 94. Breach in General

A covenant may be broken by the falsity of alleged facts covenanted, failure to perform an act covenanted or to refrain from one covenanted against, or conduct rendering performance impossible. Performance may be waived.

A covenant may be broken by the falsity of alleged facts covenanted to be true,³⁹ by the failure to perform an act covenanted to be performed,⁴⁰ by the failure to abstain from an act covenanted against,⁴¹ or by knowingly procuring a person to

Judgment in same action

(1) Where covenantors, given notice to defend, failed to appear, covenantee could obtain judgment against them in the same action, without giving them any additional notice.—*Harmon v. Nofre*, 267 P. 650, 131 Okl. 1.

(2) Grantee, notifying warrantors to defend, need not file cross-petition against them before entry of judgment against him to preserve right to recover in same action.—*Harmon v. Nofre*, *supra*.

(3) Question of liability of warrantors, notified to defend, but not appearing, may be heard after recovery against grantee during term.—*Harmon v. Nofre*, *supra*.

(4) Order postponing determination of liability of warrantors, notified to defend, to ousted grantee to subsequent date, is not necessary to retain jurisdiction.—*Harmon v. Nofre*, *supra*.

28. N.H.—*Eaton v. Clarke*, 120 A. 433, 80 N.H. 577.
N.Y.—*Jackson v. Marsh*, 5 Wend. 44.
Tex.—*Brader v. Zbranek*, Civ.App., 213 S.W. 331, dismissed for want of jurisdiction.

Duty to defend and appeal

"It was not the duty of . . . [the grantee] to defend and appeal from an adverse judgment. It was the duty of the . . . grantor, when duly notified, to defend such

suit."—*Bollenbacher v. Lee*, 121 N.E. 663, 665, 75 Ind.App. 330.

29. Mass.—*Boyle v. Edwards*, 114 Mass. 373.

30. Me.—*Crooker v. Jewell*, 29 Me. 527.

31. N.C.—*Brown v. Southerland*, 59 S.E. 114, 145 N.C. 331.

15 C.J. p 1263 note 75.

Place of performance

That for a time after a conveyance made in consideration of a contract to furnish home and care, no place being specified, the grantor was cared for at the grantee's home on the land conveyed, did not constitute an irrevocable election to ever afterward accept performance of the covenant at that place.—*Flinn v. Boss*, 92 S.E. 130, 79 W.Va. 493.

32. N.Y.—*Hoard v. Garner*, 10 N.Y. 261.

33. N.Y.—*Avery v. New York Cent., etc., R. Co.*, 24 N.E. 20, 24, 121 N.Y. 31, 649.

15 C.J. p 1263 note 78.

34. Pa.—*Stewart v. Bedell*, 79 Pa. 336.

15 C.J. p 1264 note 79.

35. U.S.—*Lucas v. New York, N. H. & H. R. Co.*, N.Y., 130 F. 436, 64 C.C.A. 638.

15 C.J. p 1264 note 81.

36. Or.—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 159 Or. 80.

37. Mich.—*Mueller v. Bankers' Trust Co. of Muskegon*, 247 N.W. 103, 262 Mich. 53.

38. N.Y.—*King v. Hudson River Realty Co.*, 104 N.E. 926, 210 N.Y. 467.

15 C.J. p 1264 note 83.

39. N.Y.—*Toch v. Hurowitz*, 37 N.Y. S. 455.

15 C.J. p 1264 note 84.

40. Neb.—*Hartley v. Gregory*, 2 N.W. 878, 9 Neb. 279.

15 C.J. p 1264 note 85.

A covenant to pay the heirs of the covenantee is not broken by reason of failure to pay the covenantee.—*Steele v. Steele*, 4 T.B.Mon., Ky., 110.

Sale to negroes is not a violation of a covenant that property should not be leased to or occupied by persons other than of the white race.—*Stratton v. Cornelius*, 277 P. 893, 99 Cal.App. 8.

Relocation of road

Where grantor covenanted that, if road running along south line of granted land should be moved south, grantor would dedicate as a common the land between the south line of granted land and the road as thus changed, and county relocated road to the south except that part of it along south side of granted land, grantee held not entitled to claimed dedication.—*Kelly v. Whitham*, 37 P. 2d 1091, 149 Or. 215.

41. N.Y.—*Harry, Angelo Co. v. Im-*

do acts which are a violation of the covenant.⁴² So too any voluntary act on the part of the covenantor which renders the performance of the covenant impossible will constitute a breach,⁴³ although the mere fact that a covenantor unwittingly put it out of his power to perform is not always sufficient to charge him with a breach of the covenant.⁴⁴ A previous agreement by the covenantor which if acted upon by the other party within the time limited by the agreement would operate as a breach of the covenant will not so operate when not acted upon within such time.⁴⁵

One breach of a covenant, as in the case of a covenant to maintain and repair, is not always sufficient to charge the covenantor with a total breach.⁴⁶

Failure to deliver possession is a breach of a general warranty.⁴⁷

In case of a mutual covenant the failure of either party to perform his part gives a right of action to the other.⁴⁸

Damages. The legal responsibility for the non-fulfillment of a covenant is that the party violating it must respond in damages.⁴⁹

Waiver. There may be a waiver of performance of a covenant or of a breach thereof, and no advantage can be taken of a breach which has been waived.⁵⁰ Waiver may result from circumstances as well as from express language to that effect.⁵¹

§ 95. Covenants of Title in General

An eviction is not a condition precedent to an action on a covenant of title in presenti. The usual covenants in a deed protect only against lawful claims; whether

they extend to equitable, as well as legal, claims is in question.

Covenants of title in presenti, including covenants of seizin, of good right to convey, and against encumbrances, in general are broken, if at all; as soon as made, as shown supra §§ 37, 40, 41, and 42, and they can be sued on at any time without alleging an eviction or an interruption in the title,⁵² at least where possession was not delivered to the grantee.⁵³

The usual covenants in a deed are a protection against paramount, lawful claims, and are not breached by the existence of unlawful encroachments upon the land;⁵⁴ and it has been held that the usual covenants in a deed conveying the legal title are not breached by the existence of an equitable title in another,⁵⁵ although there is authority to the effect that such covenants extend to equitable as well as to legal claims.⁵⁶ A covenant by one of two administrators that the property sold belonged to him as administrator is not breached by the fact that the title was in both of such administrators.⁵⁷ Covenants of title in a deed executed by a minor are not breached until he thereafter disaffirms the deed.⁵⁸ The rule that a grantor of land with covenants of title is not liable for a failure of title subsequently occurring does not apply where the failure of title is caused by the act of the covenantor himself.⁵⁹

One entitled to compensation in the event of a failure of title may recover for a partial, as well as a total, failure.⁶⁰

Breach of a covenant of title is not excused by the refusal of the covenantee to buy in the title or to compromise with the holder of the title.⁶¹

proved Property Holding Co., 122 N.Y.S. 199, 137 App.Div. 308. 15 C.J. p 1264 note 87.

Lease for ninety-nine years, with privilege of renewal for the same period, is a breach of a covenant not to convey the premises without giving the assignee of the vendor an opportunity of purchasing it on agreed terms.—H. J. Lewis Oyster Co. v. West, 107 A. 138, 93 Conn. 518.

42. Ind.—Polk v. Givens, 90 N.E. 19, 44 Ind.App. 667.

43. Ky.—Summers v. Saunders, Litt.Sel.Cas. 329.

W.Va.—Millan v. Bartlett, 71 S.E. 13, 69 W.Va. 155.

15 C.J. p 1264 note 90.

44. N.C.—Murrell v. Weathers, 48 N.C. 525.

15 C.J. p 1264 note 91.

45. Vt.—Fleet v. Wait, 66 A. 1031, 80 Vt. 177.

15 C.J. p 1264 note 92.

46. Va.—Hurxthal v. St. Lawrence Boom, etc., Co., 44 S.E. 520, 58 Va. 84, 97 Am.S.R. 954.

15 C.J. p 1264 note 94.

47. Mo.—Hickman v. Hickman, 55 Mo.App. 308, followed in Anthony v. Rockefeller, 76 S.W. 491, 102 Mo.App. 326.

15 C.J. p 1264 note 89.

48. Mo.—Lucas v. Clemens, 7 Mo. 367.

15 C.J. p 1264 note 93.

49. Ill.—Powell v. Powell, 167 N.E. 802, 335 Ill. 533.

50. Ga.—Burkhalter v. De Loach, 155 S.E. 513, 171 Ga. 384.

51. Ga.—Burkhalter v. De Loach, supra.

52. N.Y.—Green Point Sav. Bank v. Krokow, 256 N.Y.S. 428, 235 App. Div. 126.

15 C.J. p 1267 note 44.

53. Ky.—Eli v. Trent, 241 S.W. 324, 195 Ky. 26.

54. N.J.—Ratkewicz v. Kara, 103 A. 912, 89 N.J.Eq. 203, affirming 102 A. 634, 88 N.J.Eq. 201.

55. Iowa.—Wilson v. Irish, 6 N.W. 591, 10 N.W. 343, 57 Iowa 184.

56. Ill.—Dugger v. Oglesby, 99 Ill. 405.

57. N.C.—Cowles v. Rowland, 47 N.C. 239.

58. Neb.—Pritchett v. Redick, 86 N.W. 1091, 62 Neb. 296.

15 C.J. p 1268 note 52.

59. Ill.—Hamilton v. Doolittle, 37 Ill. 473.

15 C.J. p 1268 note 54.

60. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138.

61. Miss.—Sutton v. Cannon, 100 So. 24, 135 Miss. 368.

15 C.J. p 1296 note 34.

§ 96. Covenant of Seizin

- a. In general
- b. Encumbrances
- c. Appurtenances
- d. Eviction

a. In General

The covenant of seizin is breached when made if, at the time of the conveyance, the covenantor is not seized of the very estate which his deed purports to convey; but the covenantee cannot set up as a breach a title previously existing in him, and nothing occurring after the covenant is made can constitute a breach.

In accordance with the general rule, stated in § 40, supra, that a covenant of seizin is a covenant in presenti and that it is broken, if at all, the moment it is made, a breach occurs, and a right of action immediately accrues, if the covenantor is not, at the time of the conveyance, seiz-

ed of the very estate, in quantity and quality, which his deed purports to convey,⁶² as when there is outstanding an interest in the land.⁶³ Since the covenant of seizin extends only to a title existing in a third person which may defeat the estate granted,⁶⁴ the grantee of a deed with covenant of seizin cannot set up a title previously existing in him as a breach of the covenant of seizin.⁶⁵

A mere incorrect description of the land conveyed will not, as a rule, constitute a breach of the covenant of seizin if the premises can otherwise be sufficiently identified.⁶⁶

Adverse possession. It is generally held that a possession adverse to the grantor at the time of his conveyance is a breach of his covenant of seizin,⁶⁷ whether the adverse possession is rightful or wrongful;⁶⁸ but since, as discussed in Adverse

62. Ala.—Russell v. Belsher, 128 So. 452, 221 Ala. 360—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

Ill.—Meyers v. Veres, 245 Ill.App. 127.

Mo.—Rainey v. Davidson, 26 S.W.2d 841, 224 Mo.App. 679.

N.M.—Beecher v. Tinnin, 189 P. 44, 25 N.M. 59.

N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907—Green Point Sav. Bank v. Krokow, 256 N.Y.S. 428, 235 App.Div. 126—In re Boylan's Estate, 197 N.Y.S. 710, 119 Misc. 545.

N.C.—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 103—Wilson v. Vreeland, 97 S.E. 427, 176 N.C. 504.

N.D.—Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 46 N.D. 646.

Okl.—Riddle v. Hudson, 172 P. 921, 68 Okl. 172.

Tenn.—Pace v. Watson, App., 126 S.W.2d 404—Grant Bond & Mortgage Co. v. Ogle, 65 S.W.2d 1091, 17 Tenn.App. 112—Young v. Brannan, 5 Tenn.App. 1.

Tex.—Langford v. Newsom, Com. App., 220 S.W. 544, 545, affirming Newsom v. Langford, Civ.App., 174 S.W. 1036.

Wash.—Brown v. Carpenter, 169 P. 331, 332, 99 Wash. 237.

Wis.—Koepeke v. Winterfield, 92 N.W. 437, 116 Wis. 44.

15 C.J. p 1268 notes 53, 59.

Failure of seizin as to part of premises

"It is not necessary that the covenant of seizin fail as to the whole of the lands conveyed that the action may be maintained, but the vendee may recover, if there be a failure of seizin as to a part of the premises described in the deed."—Burton v. Price, 141 So. 728, 729, 105 Fla. 544.

Deficiency in acreage

Vendee's cause of action against

vendor for value of alleged deficiency in acreage was for breach of covenant of seizin, and accrued immediately upon delivery and acceptance of deed executed by vendor to him.—Pace v. Watson, Tenn.App., 126 S.W.2d 404.

Involuntary loss of possession

(1) "The covenant of seizin is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of paramount title."—Thomas v. Becker, 180 N.W. 235, 287, 190 Iowa 237.

(2) Necessity of eviction see infra § 96 d.

63. Outstanding estate in remainder Ala.—Mixon v. Burleson, 82 So. 98, 203 Ala. 84.

Outstanding estate for life

N.C.—Potter v. Miller, 133 S.E. 193, 191 N.C. 814.

Equity in land created by outstanding contract of sale

Pa.—Seitzinger v. Weaver, 1 Rawle 377.

If the grantor in fee simple has only an estate tail, the covenant is broken.—Potter v. Miller, 133 S.E. 193, 195, 191 N.C. 814.

Interest of life beneficiaries under trust held to constitute breach of covenant of seizin in warranty deed given by trustee and remaindermen.—Crickenberger v. Clay, 109 So. 363, 215 Ala. 67.

64. Ala.—Youngerman - Reynolds Hardwood Co. v. Hicks, 181 So. 111, 236 Ala. 138.

Ill.—Davenport v. Roberts, 171 Ill. App. 196.

Miss.—H. Weston Lumber Co. v. Lacey Lumber Co., 85 So. 193, 123 Miss. 208, 10 A.L.R. 436.

Tenn.—Young v. Brannan, 5 Tenn. App. 1.

15 C.J. p 1268 note 62.

Foreclosure by grantor under purchase-money mortgage and taking of possession under sheriff's deed did not constitute breach of covenant of seizin.—Stone v. Rozich, 297 A. 999, 88 Colo. 399.

65. Ala.—Youngerman - Reynolds Hardwood Co. v. Hicks, 181 So. 111, 236 Ala. 138.

Ill.—Davenport v. Roberts, 171 Ill. App. 196.

N.Y.—Fitch v. Baldwin, 17 Johns. 161.

N.C.—Eames v. Armstrong, 59 S.E. 165, 146 N.C. 1, 125 Am.S.R. 436.

Tenn.—Young v. Brannan, 5 Tenn. App. 1.

"A party cannot buy title to his own land, accept a warranty deed with covenants of seizin, and then turn upon his grantor and allege that the covenants are broken because of the very fact that the purchaser himself is seized of the premises."—H. Weston Lumber Co. v. Lacey Lumber Co., 85 So. 193, 123 Miss. 208, 10 A.L.R. 436.

66. N.C.—Plotkin v. Realty Bond Co., 168 S.E. 820, 204 N.C. 508. 15 C.J. p 1270 note 6.

67. Colo.—Thomas v. Dunnean, 225 P. 253, 75 Colo. 216.

15 C.J. p 1269 note 72.

"A covenant of seizin . . . is broken if the covenantor have not the possession, the right of possession, and the right of legal title."—Coleman v. Clark, 80 Mo. 339, 342.

Possession of the land by a third person at the date of the conveyance is prima facie evidence of title in him which could not be overcome by proof of the grantor that his title was paramount.—Prestwood v. McGowan, 41 So. 779, 148 Ala. 475.

68. Colo.—Thomas v. Dunnean, 225 P. 253, 75 Colo. 216.

Possession § 55, an essential ingredient of adverse possession is a claim of right hostile to the true owner, the covenant is not broken by the fact that the land is then occupied by a tenant of the covenantor with the knowledge of the covenantee,⁶⁹ or by the fact that the premises were in the possession of another who merely claimed under a mistaken idea as to boundaries.⁷⁰

Subsequent outstanding interest. Since the covenant, if breached at all, is breached when made, nothing that occurs thereafter to defeat the title can constitute a breach of the covenant.⁷¹ Thus neither the setting aside of a foreclosure sale under which the covenantor acquired title⁷² nor a subsequent conveyance of the land by the covenantor's grantor⁷³ will breach the covenant.

Where the covenantor perfects his title before the commencement of suit on the covenant,⁷⁴ as where the outstanding interest in the land is destroyed by adverse possession before such commencement,⁷⁵ there is no breach of the covenant of seizin, if the grantees have not been either actually or constructively evicted.⁷⁶

Conveyance by covenantee. It is a good defense to an action for breach of a covenant of seizin that

the covenantee had disabled himself from reconveying to his grantor by conveying the land to a third person,⁷⁷ although the covenantor has been held to derive no equity from a sale by the covenantee where the difference between the purchase price received by the covenantee and that received by the covenantor exceeded the amount sued for.⁷⁸ On the other hand, it has been held that a grantee's right to recover for a breach of the covenant of seizin is not defeated by the foreclosure of a mortgage given or assumed by him, and his consequent loss of the property.⁷⁹

b. Encumbrances

The covenant of seizin is not broken by the existence of an encumbrance or easement not affecting the technical seizin. Authorities conflict as to whether it is breached by the existence of an outstanding lease, a tax claim, or a street or highway on the land.

It is a general rule that the covenant of seizin is not broken by the existence of an encumbrance or easement which does not affect the technical seizin of the covenantee,⁸⁰ as, for example, an inchoate or contingent right of dower,⁸¹ an outstanding judgment against the covenantor,⁸² a mortgage,⁸³ a railroad right of way,⁸⁴ or a right to erect a wall on the granted premises.⁸⁵

69. Tex.—Baldwin v. Smith, Civ. App., 119 S.W. 111.

70. Colo.—Stearns v. Jewel, 149 P. 846, 27 Colo.App. 390.

71. N.Y.—Coit v. McReynolds, 25 N.Y.Super. 655.

Tax deed

(1) A tax deed executed after a conveyance containing a covenant of seizin did not constitute a breach of the covenant of seizin, even though the tax deed was based upon a tax certificate which existed at the time of the transfer; the tax certificate prior to its ripening into a deed was simply a lien on the property.—Zerfing v. Seelig, 85 N.W. 585, 14 S.D. 303, affirming 80 N.W. 140, 12 S.D. 25.

(2) However, it has been held that such a deed, when recorded, was an eviction of the grantee if the land was vacant and unoccupied, entitling the grantee to sue for breach of the covenant of seizin.—Daggett v. Reas, 48 N.W. 127, 79 Wis. 60.

Estate subject to divestment

Grantee whose predecessor's title was to be divested on certain contingency was held not entitled to relief under covenants of seizin, there being no outstanding title or claim then existing.—Millison v. Drake, 175 N.E. 34, 37 Ohio App. 559, affirmed 174 N.E. 776, 123 Ohio St. 249.

72. N.Y.—Coit v. McReynolds, 25 N.Y.Super. 655.

Possible attack by mortgagor's heirs

Where a purchaser accepts a deed from a vendor who acquired title through a mortgage foreclosure sale, the fact that the title may be subject to attack by heirs of the mortgagor is not sufficient to authorize judgment for breach of covenant of seizin when it appears that the existence of such heirs is uncertain.—Zarkowski v. Schroeder, 75 N.Y.S. 1021, 71 App.Div. 526.

73. U.S.—Vorhis v. Forsythe, C.C. Ill., 28 F.Cas.No.17,004, 4 Biss. 409.

74. N.Y.—Deschenes v. Tallman, 161 N.E. 321, 248 N.Y. 33, reversing 225 N.Y.S. 815, 222 App.Div. 761.

75. Kan.—Loomis v. Laughry, 199 P. 470, 109 Kan. 445.

76. Wis.—Sanborn v. Knight, 75 N.W. 1009, 100 Wis. 216.

77. N.C.—Eames v. Armstrong, 59 S.E. 165, 146 N.C. 1, 125 Am.S.R. 436.
15 C.J. p 1297 note 63.

78. N.C.—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 108.

79. N.Y.—Bingham v. Weiderwax, 1 N.Y. 509.

N.D.—Anderson v. Olson, 260 N.W. 407, 65 N.D. 550.

80. Mass.—Bumstead v. Cook, 48 N.E. 767, 169 Mass. 410, 61 Am.S.R. 293.

15 C.J. p 1269 note 78.

Threat of potential lien does not constitute breach of covenant of seizin.—Deschenes v. Tallman, 161 N.E. 321, 248 N.Y. 33, reversing 225 N.Y.S. 815, 222 App.Div. 761.

81. Va.—Building, Light & Water Co. v. Fray, 32 S.E. 58, 96 Va. 559.
15 C.J. p 1269 note 79—20 C.J. p 1250 note 62 b [2].

But it has been said, as dictum, that "an outstanding right of dower . . . according to most authorities is . . . covered by covenants of seizin."—Kreinbring v. Mathews, 159 P. 75, 77, 81 Or. 243.

82. N.Y.—Sedgwick v. Hollenback, 7 Johns. 376.
15 C.J. p 1269 note 80.

83. N.J.—Kuntzman v. Smith, 75 A. 1009, 77 N.J.Eq. 80.
15 C.J. p 1269 note 81.

84. Wis.—Smith v. Hughes, 7 N.W. 653, 50 Wis. 620.
15 C.J. p 1269 note 82.

Where title in fee has passed with the easement, however, the covenant is breached.—Messer v. Oestreich, 10 N.W. 6, 52 Wis. 684—15 C.J. p 1269 note 83.

85. Iowa.—Percival v. Colonial Inv. Co., 115 N.W. 941, 140 Iowa 275, 24 L.R.A., N.S., 293.
Mo.—Blondeau v. Sheridan, 81 Mo. 545.

Street or highway. Although there is authority to the contrary,⁸⁶ it is generally held that a covenant of seizin is not breached by the existence of a street or highway on the land,⁸⁷ especially if the covenantee is chargeable with notice of its existence.⁸⁸

Outstanding lease. It has been held that the covenant is not broken by the existence of a prior lease on the land,⁸⁹ but there is authority to the contrary.⁹⁰

Tax claims. An outstanding tax certificate has been held not to be a breach of the covenant of seizin even though it ripened into a deed after the covenant was given.⁹¹ On the other hand, it has been held that the covenant is breached by the existence of a tax claim which the grantee is compelled to pay.⁹²

c. Appurtenances

The covenant of seizin is breached by a failure of title to anything properly appurtenant to the land conveyed, including an appurtenant right.

There is a breach of the covenant of seizin where there is a failure of title to anything properly ap-

purtenant to the land conveyed, as, for example, plumbers' fixtures,⁹³ fences,⁹⁴ or standing timber;⁹⁵ and it has been held that the covenant was breached where a third person had title to a spring on the premises with the right to convey the water away by means of an aqueduct.⁹⁶ So too the covenant is breached by failure of title to any appurtenant right purported to be conveyed, such as the right to raise a milldam.⁹⁷

On the other hand, the unlawful removal by a tenant of buildings erected by him is not a breach of the landlord's covenant of seizin;⁹⁸ and the fact that a building on the premises encroaches on adjoining land is not a breach of the covenant of seizin.⁹⁹ Title deeds to land are not appurtenant thereto so as to render the grantor liable on his covenant of seizin for failing to deliver them to the grantee.¹

d. Eviction

An actual eviction is generally not essential to a breach of the covenant of seizin, except, under some authorities, where possession attended the deed.

Generally, an actual eviction is not essential to a breach of the covenant of seizin,² and the absence

86. Mo.—Elmore v. McNealey, App., 236 S.W. 381, modifying 235 S.W. 164.

Public or private way; urban or rural property

A public or a private right of way is a breach of the covenant of seizin as to urban property; a private, but not a public, right of way is a breach of a covenant of seizin as to rural property.—Bank of Alaska v. Ashland, 224 P. 7, 128 Wash. 572.

87. Ala.—Moore v. Johnston, 6 So. 50, 87 Ala. 220.
15 C.J. p 1269 note 84.

88. Wis.—Burbach v. Schweinler, 14 N.W. 449, 56 Wis. 386.
15 C.J. p 1269 note 85.

89. Ind.—Lindley v. Dakin, 13 Ind. 388.

Lease for ninety-nine years
N.Y.—Hebler v. Brown, 41 N.Y.S. 441, 13 Misc. 395.
15 C.J. p 1269 note 87 [a].

90. Mo.—Langenberg v. Chas. H. Heer Dry Goods Co., 74 Mo.App. 12.
15 C.J. p 1269 note 88.

91. S.D.—Zerfing v. Seelig, 85 N.W. 585, 14 S.D. 303, affirming 80 N.W. 140, 12 S.D. 25.

92. Tenn.—Grant Bond & Mortgage Co. v. Ogle, 65 S.W.2d 1091, 17 Tenn.App. 112.

93. N.Y.—Herzog v. Marx, 94 N.E. 1063, 202 N.Y. 1, 35 L.R.A., N.S., 976.
15 C.J. p 1270 note 96.

94. N.Y.—Mott v. Palmer, 1 N.Y. 564, 569, 571.

Reason for rule

"A grantor who executes a conveyance of land undertakes to convey everything described in his deed; and by a covenant of seizin he assumes to be the owner of all he undertakes to convey. . . . The word land, when used in a deed, includes not only the naked earth, but every thing within it, and the buildings, trees, fixtures, and fences upon it."—Mott v. Palmer, supra—15 C.J. p 1270 note 97 [a].

95. Wis.—McInnis v. Lyman, 22 N.W. 405, 62 Wis. 191.
15 C.J. p 1270 note 98.

96. Vt.—Clark v. Conroe, 33 Vt. 469.

97. Ind.—Traster v. Snelson, 29 Ind. 96.
Wis.—Walker v. Wilson, 13 Wis. 522.

98. N.Y.—Loughran v. Ross, 45 N.Y. 792, 6 Am.R. 173.
15 C.J. p 1269 note 94.

99. N.J.—Dorfman v. Lieb, 141 A. 581, 102 N.J.Eq. 492, affirmed 146 A. 326, 104 N.J.Eq. 497.
N.Y.—Burke v. Nichols, 1 Abb.Dec. 260, 2 Keyes 670, 31 How.Pr. 640—Fehlhaber v. Fehlhaber, 140 N.Y. S. 973, 80 Misc. 149.

1. N.Y.—Abbott v. Allen, 14 Johns. 248.

2. N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907—

Murphy v. United States Title Guaranty Co., 172 N.Y.S. 243, 104 Misc. 607.

N.C.—Wilson v. Vreeland, 97 S.E. 427, 176 N.C. 504.

Okl.—Rogers v. Amrey, 251 P. 1013, 123 Okl. 70—Riddle v. Hudson, 172 P. 921, 68 Okl. 172.

Tenn.—Face v. Watson, App., 126 S.W.2d 404—Grant Bond & Mortgage Co. v. Ogle, 65 S.W.2d 1091, 17 Tenn.App. 112—Young v. Brannan, 5 Tenn.App. 1.

Tex.—Langford v. Newsom, Com. App., 220 S.W. 544, affirming Newsom v. Langford, Civ.App., 174 S.W. 1036.

Va.—Otey v. Oakley, 160 S.E. 3, 10, 157 Va. 314, citing *Corpus Juris*.
15 C.J. p 1270 note 7.

"In an action upon . . . [a covenant of seizin], it is only necessary to negative the words of the covenant and to allege that the grantor had no seizin or title to the land."—Pridgen v. Long, 98 S.E. 451, 453, 177 N.C. 189.

Damage resulting from existence of outstanding title is sufficient without an eviction to constitute a breach of the covenant of seizin.—Jones v. Hazeltine, 102 S.W. 40, 124 Mo.App. 674.

Purchase of outstanding paramount title by the grantee is equivalent to an eviction.—Brooks v. Mohl, 116 N.W. 981, 104 Minn. 404, 124 Am.S.R. 629, 17 L.R.A., N.S., 1195—15 C.J. p 1270 note 9.

of an eviction does not limit recovery to nominal damages;³ however, there is authority that when possession attended the deed actual or constructive eviction is necessary.⁴

The covenant is not broken when the grantee voluntarily surrenders possession to one not having the paramount title,⁵ as to the purchaser at a tax sale while the right of redemption remains.⁶

§ 97. Covenant of Right to Convey

A covenant of good right to convey is broken where the covenantor does not have the title contemplated by the covenant, but not by the existence of encumbrances not affecting the seizin. An actual eviction is not necessary to consummate a breach.

Since, as stated supra § 40 the covenant of good right to convey is held to be equivalent to the covenant of seizin, the general rules stated in § 96 supra with reference to the covenant of seizin apply to the covenant of right to convey. In accordance with the usually recognized rule, stated in § 41, supra, that the covenant is a covenant in presenti, and, if broken, is broken, when made, in general there is a breach where, at that time, the covenantor does not have the title contemplated by the covenant,⁷ as, for example, where the covenantor has no title,⁸ or where there is outstanding an estate in remainder;⁹ and the covenant has been held to be

breached by the existence of a tax claim which the grantee was compelled to pay.¹⁰ It is not broken by a technical error in the description of the premises,¹¹ or by the existence of a public highway over the land conveyed,¹² or of an inchoate right of dower,¹³ or of an outstanding mortgage,¹⁴ or by the fact that the grantor had a voidable title.¹⁵

An actual eviction is unnecessary to consummate the breach,¹⁶ unless, as held in some cases, possession accompanied the deed.¹⁷

§ 98. Covenant against Encumbrances

A covenant against encumbrances is regarded as broken, generally without respect to actual eviction, if at the time the covenant is made there exists an outstanding adverse right, title, or interest which the law will recognize and protect, and if such encumbrance is within the scope of the covenant and its removal not expressly or impliedly assumed by the grantee.

As appears in § 42 supra, while the covenant against encumbrances has sometimes been regarded, in effect, as one of indemnity, it is ordinarily considered to be a covenant in presenti, which if not true is broken as soon as made. Accordingly, a breach of the covenant has occurred if there exists at the time of the conveyance an outstanding adverse title, charge, burden, or interest constituting an encumbrance¹⁸ within the meaning of the

3. N.Y.—Hilliker v. Rueger, 126 N. E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907.

4. Ohio.—Millison v. Drake, 175 N. E. 34, 37 Ohio App. 559, affirmed 174 N.E. 776, 123 Ohio St. 249. 15 C.J. p 1270 note 12.

Where covenantor is not in possession at time of conveyance, there is an immediate eviction.—Baughman v. Hower, 10 N.E.2d 176, 56 Ohio App. 162.

5. Mo.—Freyboth v. Nelson, 84 Mo. App. 293.

6. Wis.—Semple v. Whorton, 32 N. W. 690, 68 Wis. 626.

7. Tex.—Langford v. Newsom, Com. App., 220 S.W. 544, affirming Newsom v. Langford, Civ.App., 174 S. W. 1036.

Interest of life beneficiaries under trust held to constitute breach of covenant of right to convey in deed given by trustee and remaindermen.—Crickenberger v. Clay, 109 So. 363, 215 Ala. 67.

8. Ala.—Russell v. Belsher, 128 So. 452, 221 Ala. 360.

Ill.—Meyers v. Veres, 245 Ill.App. 127.

Tex.—Langford v. Newsom, Com. App., 220 S.W. 544, affirming Newsom v. Langford, Civ.App., 174 S. W. 1036.

9. Ala.—Mixon v. Burleson, 82 So. 98, 203 Ala. 84.

10. Tenn.—Kenyon v. Russell, 5 Tenn.App. 401.

11. Conn.—Belden v. Seymour, 8 Conn. 19.

15 C.J. p 1271 note 18.

12. N.Y.—Whitbeck v. Cook, 15 Johns. 483, 8 Am.D. 272.

15 C.J. p 1271 note 19.

13. Ind.—Whisler v. Hicks, 5 Blackf. 100, 33 Am.D. 454.

Ohio.—Tuite v. Meller, 10 Ohio 382.

14. Ind.—Reasoner v. Edmundson, 5 Ind. 393.

15. Mass.—Walt v. Maxwell, 5 Pick. 217, 16 Am.D. 391.

15 C.J. p 1271 note 22.

16. Ill.—Firebaugh v. Wittenberg, 141 N.E. 379, 309 Ill. 536, reversing 227 Ill.App. 77.

Okl.—Rogers v. Amrey, 251 P. 1013, 123 Okl. 70.

15 C.J. p 1271 note 16.

17. U.S.—Peters v. Bowman, Miss., 98 U.S. 56, 25 L.Ed. 91.

Mass.—Follett v. Grant, 5 Allen 174.

18. Ala.—Colson v. Harden, 141 So. 639, 224 Ala. 665—Blankenship v. Lanier, 101 So. 763, 212 Ala. 60—Alger-Sullivan Lumber Co. v. Union Trust Co., 96 So. 436, 209 Ala. 432.

Ark.—Kahn v. Cherry, 198 S.W. 266, 181 Ark. 49.

Ill.—Ibbetson v. Knodle, 201 Ill. App. 373.

Mass.—Gallison v. Downing, 138 N. E. 315, 214 Mass. 33.

Mich.—Lavey v. Graessle, 224 N.W. 438, 245 Mich. 681, 64 A.L.R. 1477.

N.J.—Goldsmith v. Meyer, 109 A. 293, 94 N.J.Law 40—Emery v. Hansen, 151 A. 731, 107 N.J.Eq. 117.

N.Y.—Doonan v. Killilea, 118 N.E. 851, 222 N.Y. 399.

N.C.—Lockhart v. Parker, 126 S.E. 813, 189 N.C. 133.

15 C.J. p 1235 notes 48 [a], 57 [a].

Encumbrances of "public record"

(1) Under statute permitting recovery against remote grantor for encumbrance appearing from a "public record," suit for breach of covenant can be maintained for encumbrance disclosed by records of probate court.—Dyer v. Scott, 149 N.E. 146, 253 Mass. 480.

(2) Under the former wording of the statute, requiring the encumbrance to appear "of record," it was held that a breach of covenant occurred only where the encumbrance appeared of record in the registry of deeds, and that a lien for unpaid taxes which appeared only in the records of a city or town was not sufficient to come within the statute.—Carter v. Peak, 138 Mass. 439.

term as discussed generally in § 42 supra, such as an outstanding estate in remainder in a third person,¹⁹ or the encroachment on adjoining land of a building on the land conveyed.²⁰

On the other hand, such a covenant is not breached if there does not exist at the time of the conveyance an outstanding right, title, or interest which the law will recognize and protect,²¹ and hence the covenant is not broken by the existence of an invalid claim or demand against the property,²² or by the existence in another of a mere possibility of establishing a right to or an interest in the land.²³ So the grantee cannot recover damages for removing an alleged encumbrance where the grantor had in any case gained full title to the property by prescription.²⁴ Also, such a covenant has no reference to obvious and physical burdens on the land, which

are permanent in character;²⁵ and a claim for breach of covenant cannot be predicated on the condition of the premises as to dilapidation or the existence of a nuisance or the necessity of repair or alteration to conform to building laws.²⁶

Generally, the covenant may be enforced only where the encumbrance derogates from the title which the covenantor agreed to convey, and it does not apply to liens created by intermediate parties,²⁷ or to encumbrances placed on the premises by the grantee himself.²⁸

Exceptions from covenant; assumption by grantee. The covenant against encumbrances does not extend to an encumbrance which the covenantee has either expressly or impliedly excepted therefrom and assumed to remove;²⁹ and it has been held that

Breach of contract

That grantee in subsequently selling land breached contract to furnish abstract showing title free from material defect does not necessarily show breach of covenant in deed to him that title was unencumbered.—*Smith v. McKelvey*, 162 N.E. 722, 28 Ohio App. 361.

Effect of existence of older encumbrance

The existence of an older unpaid encumbrance is no defense to an action on a covenant against encumbrances on account of a junior encumbrance paid off by the covenantee.—*Dehority v. Wright*, 101 Ind. 382.

Failure of grantee to perform collateral agreement

In an action for breach of an implied covenant against encumbrances, the fact that plaintiff failed to perform his agreement as to the satisfaction of a deficiency judgment against one defendant is immaterial, where no damage was suffered thereby.—*Holzheier v. Hayes*, 65 P. 968, 133 Cal. 458.

Custom contrary to terms of covenant

A custom that, where a person sold realty with a condition that a certificate of title would be furnished to the purchaser and, if the title was defective, the purchaser must bear the burden of the error is no defense to an action for breach of a covenant against encumbrances.—*Sondag v. Keefe*, 251 Ill.App. 378.

Resale of property by grantee

In action for breach of covenant against encumbrance, that plaintiff resold property at profit is no defense.—*Carney v. Morrison*, 228 N.Y. S. 308, 223 App.Div. 244, motion granted 164 N.E. 565, 249 N.Y. 511.

19. Ala.—*Mixon v. Burleson*, 82 So. 98, 203 Ala. 84.

20. N.Y.—*Gamorsil Realty Corpora-*

tion v. Graef, 220 N.Y.S. 221, 128 Misc. 596—*Fehlhaber v. Fehlhaber*, 140 N.Y.S. 973, 80 Misc. 149.

Or.—*Kennell v. Tandy*, 270 P. 473, 126 Or. 528, 60 A.L.R. 232.
Contra *Dorfman v. Lieb*, 141 A. 581, 102 N.J.Eq. 492, affirmed 146 A. 326, 104 N.J.Eq. 497.

21. Conn.—*Staite v. Smith*, 111 A. 799, 95 Conn. 470.
Ohio.—*Price v. Foster*, 173 N.E. 618, 36 Ohio App. 526—*Rabel v. Downs*, 155 N.E. 403, 28 Ohio App. 352.

22. Conn.—*Reed v. Stevens*, 107 A. 495, 93 Conn. 650, 5 A.L.R. 1081.
Mich.—*Balfour v. Whitman*, 50 N.W. 744, 89 Mich. 202.
Mo.—*Luther v. Brown*, 66 Mo.App. 227.

"The covenants in a deed are not that illegal or fictitious claims shall not be set up against the premises conveyed, but that no legal claims exist against them."—*Manley v. Pool*, 246 P. 386, 117 Okl. 249.

Possession without right

Covenant is not breached by a valid possession in a third person without right.—*Dinsmore v. Savage*, 68 Me. 191.

23. Iowa.—*Frankel v. Blank*, 213 N.W. 597, 205 Iowa 1.

Unexercised right of seizure

Covenant is not broken by existence of a right of seizure under the embargo laws, unexercised at the time of the conveyance.—*Ingersoll v. Jackson*, 13 Mass. 182, 14 Mass. 109.

24. Mass.—*Dyer v. Scott*, 149 N.E. 146, 253 Mass. 430.

25. Cal.—*Jaques v. Tomb*, 177 P. 280, 179 Cal. 444.

High embankment used as levee
Cal.—*Jaques v. Tomb*, supra.

26. Pa.—*Berger v. Weinstein*, 63 Pa. Super. 153.

27. Ark.—*Naylor v. McNair*, 122 S.W. 662, 92 Ark. 345.
15 C.J. p 1235 note 53.

Liens from building operations

A purchaser from one in possession under a contract of purchase, who takes a deed directly from the latter's vendor, must ascertain whether liens arising from building operations of his grantor are included within the covenant and cannot hold the original covenantor where the covenant did not include such liens.—*Capital City Lumber Co. v. Olson*, 208 N.W. 891, 190 Wis. 183.

28. Wis.—*Capital City Lumber Co. v. Olson*, supra.
15 C.J. p 1272 note 40, p 1273 note 45.

29. Colo.—*McClellan v. Morris*, 206 P. 575, 577, 71 Colo. 304, citing *Corpus Juris*.

Ohio.—*McKenzie v. Buchamann*, 5 Ohio App. 270.
Or.—*Hobson v. Beall*, 279 P. 645, 130 Or. 240.

Pa.—*Grange Trust Co. v. Shade*, 156 A. 620, 102 Pa.Super. 122.
15 C.J. p 1278 note 38.

Assumption of mortgage generally
Mass.—*Gerber v. Bernstein*, 3 N.E.2d 223.

Pa.—*Grange Trust Co. v. Shade*, 156 A. 620, 102 Pa.Super. 122.

Particular provisions construed and applied

(1) A provision which excepts from the covenant as to encumbrances a certain mortgage includes by implication the accrued interest thereon, and no breach can arise from nonpayment of such interest. Ill.—*King v. Sea*, 6 Ill.App. 189.

Iowa.—*Bankson v. Lagerlof*, 75 N.W. 661—*Johnson v. Nichols*, 74 N.W. 750, 105 Iowa 122.

(2) Where mortgage is excepted from covenant, no encumbrance results from proceedings to foreclose

the assumption of an encumbrance by a covenantee may be by parol,³⁰ although other authority holds that the legal effect of a covenant cannot be destroyed by a parol contemporaneous agreement.³¹

An assumption by the covenantee may be shown by an agreement to take the deed subject to the encumbrance as part of the consideration for the land,³² by an express exclusion of the encumbrance from the operation of the covenant,³³ by the receipt from the covenantor of money wherewith to discharge the encumbrance,³⁴ or by a reconveyance in trust or by mortgage with full covenants.³⁵ Where, however, the assumption is limited to an amount smaller than the encumbrance, the covenant against encumbrances is broken to the extent of the excess.³⁶

Eviction. While it has been broadly stated in some cases that the covenant against encumbrances is not broken until actual eviction,³⁷ at least where

the breach is claimed merely by reason of a restriction resting on the land,³⁸ or according to some authorities until the grantee has been evicted or has removed the encumbrance,³⁹ and while it appears from § 145 *infra* that, where there has been no eviction either actual or constructive, only nominal damages can be recovered, the general rule is that an actual eviction is not necessary to a right of action for a breach of this covenant,⁴⁰ especially where the land is wild and unimproved.⁴¹ The purchaser may on satisfying the outstanding encumbrance resort to his action against the covenantor;⁴² and, although it has been said that satisfaction of the encumbrance is a condition precedent to the right of recovery except in case of an absolute covenant by the grantor to satisfy the encumbrance, see *infra* § 117, it has also been held that he is not deprived of the right to recover on the covenant because he has not been able to redeem the land by paying off the encumbrances where he has exhausted his defenses in the courts.⁴³

and the filing of a *lis pendens*.—*Monell v. Douglass*, 17 N.Y.S. 178.

(3) In an action for breach of covenant against encumbrances, "except a mortgage of \$6,500," evidence that parties understood that the encumbrance was represented by two mortgages, one for six thousand five hundred dollars at six per cent interest and another for one thousand three hundred dollars representing two per cent interest for the term of the loan, sustained directed verdict for defendants.—*Bills v. Thayer*, Tex. Civ.App., 266 S.W. 822.

(4) Other provisions.—*Wilkinson v. Medbury*, 228 N.Y.S. 666, 132 Misc. 58.
15 C.J. p 1226 note 37 [d], [e], p 1235 note 64 [a].

Amount of encumbrance

So long as the amount due on the encumbrance does not exceed the amount excepted at the time of making of the covenant, no breach occurs notwithstanding the amount originally due was in excess thereof.—*Rhodes v. Culp*, Mo.App., 226 S.W. 294.

30. Conn.—*Mereness v. Delemos*, 101 A. 8, 91 Conn. 651.

Ohio.—*McKenzie v. Buchamann*, 5 Ohio App. 270.

Pa.—*Grange Trust Co. v. Shade*, 156 A. 620, 102 Pa.Super. 122.

15 C.J. p 1278 note 39.

31. Ala.—*Holley v. Younge*, 27 Ala. 203.

32. Pa.—*Grange Trust Co. v. Shade*, 156 A. 620, 102 Pa.Super. 122.
15 C.J. p 1278 note 41.

Indemnification

No breach results where the covenantee bought with knowledge of the

encumbrance and provided a mode for indemnifying himself against it as part of the contract of purchase. Mass.—*Foster v. Woodward*, 6 N.E. 853, 141 Mass. 160.

Pa.—*Johnston v. Markle Paper Co.*, 25 A. 560, 885, 153 Pa. 189.

15 C.J. p 1273 note 45.

33. Ohio.—*McKenzie v. Buchamann*, 5 Ohio App. 270.

15 C.J. p 1278 note 42.

34. Iowa.—*Blood v. Wilkins*, 43 Iowa 565.

Kan.—*Perley v. Taylor*, 21 Kan. 712.

35. Mo.—*Geer v. Redman*, 4 S.W. 745, 92 Mo. 375—*Cleveland Park Land, etc., Co. v. Campbell*, 65 Mo. App. 109.

Mont.—*Frank v. Cobban*, 50 P. 423.
20 Mont. 163.

36. Tex.—*Askew v. Bruner*, Civ. App., 205 S.W. 152.

15 C.J. p 1279 note 45.

37. Ohio.—*Stites v. Hobbs*, 2 Disn. 571.

Pa.—*Wazonek v. Saul*, 3 Pa.Dist. & Co. 293.

Encumbrance at time of conveyance

The covenant of freedom from encumbrances arising by virtue of statute from the words "grant, bargain and sell" is broken immediately without eviction if an encumbrance exists on the land at the time the conveyance is made.—*Williams v. O'Donnell*, 35 Pa.Co. 433.

38. Cal.—*Thurgood v. Spring*, 73 P. 456, 139 Cal. 596.

39. Ark.—*Johnson v. Polk*, 269 S. W. 571, 168 Ark. 201.

Miss.—*Simon v. Williams*, 105 So. 487, 140 Miss. 854, 44 A.L.R. 402.

N.Y.—*City of New York v. New York & South Brooklyn Ferry &*

Steam Transp. Co., 172 N.Y.S. 495, 104 M'sc. 438, affirmed 179 N.Y.S. 914, 190 App.Div. 938.

15 C.J. p 1278 note 30.

"A breach other than nominal, occurs only when there is eviction, actual or constructive, disturbance of possession, or where some special damage arises."—*Green Point Sav. Bank v. Krokow*, 256 N.Y.S. 428, 429, 235 App.Div. 126.

40. Ala.—*Alger-Sullivan Lumber Co. v. Union Trust Co.*, 96 So. 436, 209 Ala. 432—*Anniston Lumber & Mfg. Co. v. Griffin*, 78 So. 418, 193 Ala. 122.

Ark.—*Kahn v. Cherry*, 198 S.W. 266, 131 Ark. 49.

Ga.—*Cheatham v. Palmer*, 167 S.E. 522, 176 Ga. 227.

N.J.—*Smith v. Smith*, 101 A. 254, 90 N.J.Law 282.

N.Y.—*Stanton v. Conley*, 278 N.Y.S. 275, 244 App.Div. 84—*Sturmer v. Holden*, 213 N.Y.S. 339, 215 App. Div. 33.

Tenn.—*Brown v. Taylor*, 88 S.W. 933, 115 Tenn. 1, 112 Am.S.R. 811, 4 L. R.A., N.S., 309.

15 C.J. p 1278 note 32.

41. Ark.—*Seldon v. Dudley E. Jones Co.*, 85 S.W. 778, 74 Ark. 348.

42. Ga.—*Cheatham v. Palmer*, 167 S.E. 522, 176 Ga. 227.

Ill.—*Meyers v. Veres*, 245 Ill.App. 127.

Mo.—*Brand v. Hough*, App., 206 S.W. 425.

N.Y.—*Sturmer v. Holden*, 213 N.Y.S. 339, 215 App.Div. 33—*Lauer v. Maga*, 1 N.Y.S.2d 743.

15 C.J. p 1278 note 34.

43. Ill.—*Trumbull v. Gale*, 222 Ill. App. 113, 115, quoting *Corpus Juris*.

§ 99. — Attachments

Covenant against encumbrances is ordinarily broken by the existence of an attachment on the land.

An attachment resting on land prior to a deed is generally considered an encumbrance within the meaning of a covenant against encumbrances,⁴⁴ especially when followed by a levy of execution.⁴⁵

§ 100. — Dower

An inchoate right of dower in the land conveyed is generally held an encumbrance, although some authorities hold that no breach occurs until the amount thereof has been ascertained.

It has generally been held that the covenant against encumbrances is broken by the existence of an inchoate right of dower in the land conveyed,⁴⁶ although the rule does not seem to be of universal application,⁴⁷ it being held, for example, that no breach occurs where there are other lands of the grantor on which the dower interest could take effect.⁴⁸ According to some authorities a covenant against encumbrances is not considered as broken by the existence of a right of dower until it has been ascertained,⁴⁹ although it is conceded that a technical breach may have occurred at the

time of making the covenant.⁵⁰

§ 101. — Easements

- a. In general
- b. Water rights

a. In General

As a general rule, the covenant against encumbrances is considered broken by the existence of an outstanding easement diminishing the value of the property, such as a private right of way or a railroad right of way, but it is disputed whether a public highway over the land constitutes a breach.

Except when acquired through exercise of the power of eminent domain,⁵¹ or by act of congress or a state legislature,⁵² the covenant against encumbrances is generally held to be broken by the existence of any outstanding easement which diminishes the value of the land conveyed,⁵³ and it appears from § 39 supra that, with certain limitations as to open, notorious easements, the grantee's knowledge of the existence of the easement makes no difference.

On the other hand, where the right is merely an inconvenience, inseparable from the nature of the

Tex.—Seibert v. Bergman, Civ.App., 44 S.W. 872.

44. Conn.—Kelsey v. Remer, 43 Conn. 129, 21 Am.R. 638, 15 C.J. p 1273 note 52.

In the Philippines an attachment operates as an encumbrance only when it has been inscribed in the register of property.—U. S. v. Regalado, 1 Philippino 125.

45. Mass.—Barrett v. Porter, 14 Mass. 143.

46. W.Va.—Stone v. Kaufman, 107 S.E. 295, 88 W.Va. 588.

15 C.J. p 1271 note 30.—20 C.J. p 1250 note 62 b (1).

"Although an inchoate right of dower is not an estate, but only a right of action, still it is in the nature of a lien upon real estate, and it is treated as an incumbrance."—Brusco v. Pate, 153 A. 311, 51 R.I. 222.

47. Mass.—Fuller v. Wright, 18 Pick. 403.

15 C.J. p 1271 note 31.

Lien not created

A deed from heirs of a deceased owner of land, with covenants against encumbrances except the widow's right of dower, which the grantee agreed to procure without cost to the grantor, did not create a lien on the land in favor of the widow.—Cain v. Kentucky & Indiana Bridge & R. Co., 99 S.W. 297, 124 Ky. 449, 30 Ky.L. 593.

48. Ark.—Allen-West Commn. Co.

v. Patrick, 184 S.W. 436, 123 Ark. 55.

15 C.J. p 1271 note 31.

49. U.S.—Powell v. Monson & Brimfield Mfg. Co., C.C.Mass., 19 F.Cas. No.11,356, 3 Mason 347.

15 C.J. p 1272 note 32.

50. Mo.—Bartlett v. Ball, 43 S.W. 783, 142 Mo. 28.

15 C.J. p 1272 note 33.

51. Mass.—Weeks v. Grace, 80 N.E. 220, 194 Mass. 296, 9 L.R.A.N.S., 1092, 10 Ann.Cas. 1077.

15 C.J. p 1275 note 90.

52. Idaho.—Newmyer v. Roush, 120 P. 264, 21 Idaho 106, Ann.Cas.1913D 433.

53. Ark.—Kahn v. Cherry, 198 S.W. 266, 131 Ark. 49.

Mich.—Lavey v. Graessle, 224 N.W. 436, 245 Mich. 681, 64 A.L.R. 1477.

N.J.—Brownback v. Spangler, 139 A. 524, 101 N.J.Eq. 388—Garber v. Stern, 135 A. 550, 100 N.J.Eq. 470, affirmed 138 A. 920, 101 N.J.Eq. 742.

N.Y.—City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co., 131 N.E. 554, 231 N.Y. 18, 16 A.L.R. 1059, reversing 179 N.Y.S. 914, 190 App. Div. 939, and reargument denied 132 N.E. 903, 231 N.Y. 593.

15 C.J. p 1235 note 48 [a] (2), p 1275 note 92.

Party walls

(1) The existence of a party wall

wholly on one of two adjacent lots of land, yet subject to the right of enjoyment by the owner of the other, is a breach of the covenant against encumbrances.

N.Y.—Mohr v. Parmelee, 43 N.Y. Super. 320.

Pa.—Stern v. Saeger, 34 Leg.Int. 21.

(2) So, also, where a vacant lot supports the half of the wall of the building erected on an adjoining lot, and a purchaser of the vacant lot is bound by the terms of a party-wall agreement entered into between his grantor and the adjoining owner to pay half of the cost of such wall in order to use the same, it is held that the purchaser may sue for a breach of the covenant against encumbrances.

Minn.—Mackey v. Harmon, 24 N.W. 702, 34 Minn. 168.

Mo.—Blondeau v. Sheridan, 47 Mo. App. 460.

Neb.—Burr v. Lamaster, 46 N.W. 1015, 30 Neb. 688, 27 Am.S.R. 423, 9 L.R.A. 637.

(3) However, where statute gives the right to rest half of the wall on the contiguous lot and requires the owner of the vacant lot to pay his proportionate share of the expense of the wall before he enters on its enjoyment, the purchaser of the vacant lot cannot maintain an action for breach of a covenant against encumbrances.—Bertram v. Curtis, 31 Iowa 46.

estate,⁵⁴ or where it is part of a beneficial improvement on the land,⁵⁵ it is not within the meaning of the covenant. A parol license to enter on land for a specific purpose is not an encumbrance;⁵⁶ nor is the easement of an existing drainage ditch an encumbrance since its existence must have been within the contemplation of the parties.⁵⁷

Public highways. The question whether the existence of a public highway over land constitutes a breach of the covenant against encumbrances in a conveyance of the land is one on which there is conflict of judicial opinion. According to some authorities such a highway constitutes a breach,⁵⁸ while many others contend that, since its existence must have been in contemplation of the parties when the deed was made, a public highway over land does not constitute a breach of the covenant,⁵⁹ especially where the deed refers to a plat on which the highway is shown.⁶⁰ Still other authorities distinguish between urban and rural land and hold that the easement of a public highway constitutes an encumbrance in the case of city property but not in the case of rural property.⁶¹

Private ways. The existence in a private person of a right of way over granted premises at the time of the conveyance is ordinarily considered a breach of the covenant against encumbrances,⁶² and, as is stated in § 39 supra, the grantee's knowledge of the existence of such a way does not protect the grantor from his covenant. Under some circumstances, however, the existence of a right of way may not constitute a breach of covenant justifying recovery of damages.⁶³

So the grantor's covenant that he had not done anything to encumber the property is not broken by a right of way which came into existence prior to the time the grantor acquired title.⁶⁴

Railroad rights of way. The existence of a railroad right of way over the land conveyed is a breach of the covenant against encumbrances in the deed of conveyance;⁶⁵ it appears, however, from § 39 supra that there is a conflict of opinion as to whether this rule is changed by the grantee's knowledge of the existence of such right of way. It has also been held that a covenant against en-

54. Ohio.—Wilkins v. Irvine, 33 Ohio St. 138.
15 C.J. p 1275 note 95.

55. Minn.—Carver v. Lane, 190 N.W. 68, 153 Minn. 203.

Right to enter, and repair drain does not convert such beneficial improvement into an encumbrance.—Carver v. Lane, supra.

56. Mass.—Fitch v. Seymour, 9 Metc. 462.

Ohio.—Wilkins v. Irvine, 33 Ohio St. 138.

15 C.J. p 1275 note 96.

57. Iowa.—Stuhr v. Butterfield, 130 N.W. 897, 151 Iowa 736, 36 L.R.A., N.S., 321—Kleinmeyer v. Willenbrock, 210 N.W. 447, 202 Iowa 1048.

58. Ala.—Smith v. Birmingham Realty Co., 94 So. 117, 208 Ala. 114.

15 C.J. p 1275 note 97.

Dedicated street across land

N.J.—Brownback v. Spangler, 139 A. 524, 101 N.J.Eq. 388.

59. Iowa.—Dierksen v. Pahl, 190 N.W. 423, 194 Iowa 713.

Pa.—McDermott v. Reiter, 124 A. 187, 279 Pa. 545.

Va.—Deacons v. Doyle, 75 Va. 258—Jordan v. Eve, 31 Gratt. 1, 72 Va. 1.

W.Va.—Patton v. Quarrier, 18 W. Va. 447.

15 C.J. p 1276 note 99.

Text rule referred to with approval
N.J.—Beach v. Hudson River Land Co., 56 A. 157, 65 N.J.Eq. 426, af-

firmed on other grounds 60 A. 210, 68 N.J.Eq. 656.

The reason for the rule is "the fact that the road, although admittedly an incumbrance, and possibly an injury to the property, was there when the purchaser bought, and he is presumed to have had knowledge of it. In such and in similar cases there is the further presumption that if the incumbrance is really an injury, such injury was in the contemplation of the parties, and that the price was regulated accordingly."—Mummert v. McKeen, 4 A. 542, 112 Pa. 315, 320—15 C.J. p 1276 note 99 [a].

An exception to the text rule is recognized where by mistake of the parties property conveyed as abutting the road actually encroaches thereon, since in such case the parties cannot be said to have contemplated the existence of the easement on the property.

Va.—Trice v. Kayton, 4 S.E. 377, 84 Va. 217, 10 Am.S.R. 836.

W.Va.—Myers v. Graner, 158 S.E. 171, 110 W.Va. 349.

Viewing premises and staking out a road over them by the selectmen of a town has been held not to constitute an encumbrance thereon until a location is filed and accepted.—Shute v. Barnes, 2 Allen, Mass., 598.

60. Ohio.—Cincinnati v. Brachman, 85 Ohio St. 289.

61. Minn.—Sandum v. Johnson, 142 N.W. 878, 122 Minn. 368, 48 L.R.A., N.S., 619, Ann.Cas.1914D 1007.

Wash.—Bank of Alaska v. Ashland,

224 P. 7, 128 Wash. 572—Hoyt v. Rothe, 163 P. 925, 95 Wash. 360.

62. Mich.—Lavey v. Graessle, 224 N.W. 436, 245 Mich. 681, 64 A.L.R. 1477.

N.J.—Emery v. Hansen, 151 A. 731, 107 N.J.Eq. 117.

Ohio.—Fassnacht v. Bessinger, 172 N.E. 636, 35 Ohio App. 509—Kunkle v. Beck, 1 Ohio App. 70.

Wash.—Bank of Alaska v. Ashland, 224 P. 7, 128 Wash. 572.

15 C.J. p 1276 note 2.

Private alley

Pa.—McDermott v. Reiter, 124 A. 187, 279 Pa. 545.

63. **Depth of right of way**

Where right of way is at a depth in soil beyond the point to which the owner can conceivably make use of the property, no encumbrance exists.—Boehringer v. Montalto, 254 N.Y.S. 276, 142 Misc. 560.

Way of necessity

(1) It has been held that a covenant against encumbrances is not broken by a conveyance burdened with an implied reservation of a way of necessity to afford another reasonable access to his land, since the grantee takes subject thereto.—Reed v. Blum, 183 N.W. 766, 215 Mich. 247.

(2) Other authority has apparently taken a contrary position.—Fennock v. Goodrich, 157 A. 922, 104 Vt. 134.

64. Md.—Levine v. Hull, 109 A. 141, 135 Md. 444.

65. Pa.—Strong v. Brinton, 63 Pa. Super. 267.

15 C.J. p 1277 note 5.

cumbrances in a deed of land conveying no part of the adjacent streets is breached by a release previously executed by the grantor releasing a railway from liability for damages resulting to the land from its operation on an adjacent street;⁶⁶ but the mere use of a way by a railroad company does not show a right thereto, and raises no presumption of the existence of an encumbrance.⁶⁷

b. Water Rights

With some exceptions, the existence of outstanding water rights preventing the grantee's full enjoyment of the premises conveyed constitutes a breach of covenant against encumbrances.

The existence of outstanding water rights which prevent a grantee's full enjoyment of the premises conveyed is as a rule a breach of the covenant against encumbrances in the deed of conveyance,⁶⁸ although a parol license by a covenantor to flow lands by a dam is not a breach of his covenant against encumbrances.⁶⁹ In applying the general rule, however, it must be remembered that the precise measure of the covenantee's rights are governed by the grant and the covenants of the grantor,⁷⁰ and, while the law will make all necessary implications to prevent the grantor from derogating from his own grant, it will reciprocally and equally make like implications to prevent the grantor from being shorn of his just rights in reference to property which he retains.⁷¹

Also, since the right of a proprietor to the flow and fall of water on his own land is not an easement, but is inseparably connected with, and inherent in, the land, the flow of such stream over the land conveyed,⁷² or the exercise of the right to its flow below certain granted premises in accordance with a previous appropriation,⁷³ is not an encumbrance; nor is the exercise of the right to have a natural stream flow freely over the land of a lower proprietor an encumbrance on the land below.⁷⁴

§ 102. — Judgments

The covenant against encumbrances is generally breached by an outstanding judgment against the grantor at the time of the conveyance.

An outstanding judgment against the grantor at the time of the conveyance of land is a breach of the covenant against encumbrances,⁷⁵ and, where the encumbrance is a judgment for dower which has been assigned in the form of an annuity charged on the land, the covenantee can maintain an action on the covenant against encumbrances on the payment by him of each installment.⁷⁶ Of course, the covenant is not broken by a judgment not constituting a lien against the property conveyed.⁷⁷

§ 103. — Leases

Generally the covenant against encumbrances is breached by a valid outstanding lease on the property conveyed.

68. Ala.—Tuskegee Land & Security Co. v. Birmingham Realty Co., 49 So. 878, 161 Ala. 542, 28 L.R.A., N.S., 392.

67. Iowa.—Jerald v. Elly, 1 N.W. 639, 51 Iowa 321.

68. Wis.—Gadow v. Hunholz, 151 N.W. 810, 160 Wis. 293.
15 C.J. p 1277 note 11.

69. Mass.—Fitch v. Seymour, 9 Metc. 462.

70. N.Y.—Bliss v. Greeley, 45 N.Y. 671, 6 Am.R. 157.

71. Mass.—Johnson v. Knapp, 15 N.E. 134, 146 Mass. 70.
15 C.J. p 1277 note 15.

An artificial raceway built by the owner of the land is not an encumbrance within the meaning of a covenant against encumbrances in a deed to a part of the land, afterward executed.—Dunklee v. Wilton R. Co., 24 N.H. 489.

Water flow from dam

A covenant against encumbrances is not breached by the fact that the grantor prior to the conveyance caused water to flow on the land by means of a dam which he had a right to build.—Kidder v. George, 18 N.H. 511.

Reservation of privileges

Where a grant of land on or near a road or stream reserves the mill and water privileges, the easement of flowing the land so far as may be necessary is not an encumbrance on the premises granted.—Pettee v. Hawes, 13 Pick., Mass., 323.

72. N.J.—Stanfield v. Schneidewind, 115 A. 339, 96 N.J.Law 428.

Existence of structure covering stream does not change text rule.—Stanfield v. Schneidewind, supra.

73. Mass.—Cary v. Daniels, 8 Metc. 466, 41 Am.D. 532.

74. N.J.—Stanfield v. Schneidewind, 115 A. 339, 340, 96 N.J.Law 428, citing *Corpus Juris*.
15 C.J. p 1277 note 22.

75. N.C.—Thompson v. Avery County, 5 S.E.2d 146, 216 N.C. 405.
15 C.J. p 1273 note 55.

Necessity for execution by judgment creditor

Purchaser was held not precluded from recovering from vendor, who covenanted against encumbrances, amount of judgment paid by purchaser to judgment creditor's assignee on ground that assignee had not secured

issuance of execution, since in equity there is no distinction between actual issuance of execution and threat to cause execution to issue.—De Carli v. O'Brien, 41 P.2d 411, 150 Or. 35, 97 A.L.R. 693.

76. Mo.—Priest v. Deaver, 22 Mo. App. 276.

77. N.C.—Tucker v. Almond, 133 S.E. 407, 209 N.C. 333.

Alimony decree

Utah.—Beesley v. Badger, 240 P. 458, 66 Utah 194.

Lien against life estate only

Where owner of life estate in certain land, against which there were existing judgment liens, had executed a deed conveying fee in land with covenant against encumbrances and later joined owner of remainder in executing a like deed to same grantee, remainderman was not liable to grantee for breach of covenant against encumbrances for amount expended by grantee in discharging judgment liens against life estate, since life tenant's interest was conveyed to grantee by first deed and inclusion of her name in second deed was surplusage.—Thompson v. Avery County, 5 S.E.2d 146, 216 N.C. 405.

A valid outstanding lease is an encumbrance, within the meaning of the covenant against encumbrances in a deed of conveyance of the land,⁷⁸ unless the grantee at time of the conveyance takes an assignment of the lease,⁷⁹ or accepts the benefits thereof;⁸⁰ and it seems that a covenant for the future renewal of a lease is not such a present demise as will constitute an encumbrance on the land in the hands of a third person after the first term has been surrendered by agreement.⁸¹

§ 104. — Liens in General

A valid subsisting lien on the land conveyed is ordinarily a breach of the covenant against encumbrances.

If a lien on the land conveyed is a valid and subsisting one at the time the covenant is made,⁸² it constitutes a breach of the covenant against encumbrances,⁸³ unless the lien was one for which the grantee was primarily liable before he received a conveyance of the premises.⁸⁴

§ 105. — Mortgages

Generally the covenant against encumbrances is broken immediately where there is a valid outstanding mortgage on the premises conveyed.

As a rule the covenant against encumbrances is broken immediately, where there is an outstanding mortgage on the premises conveyed;⁸⁵ and the rule applies to the statutory covenant implied by use of the words "grant, bargain and sell."⁸⁶ Also, the covenant is broken by the existence of a statutory right of redemption.⁸⁷

It has been held, however, that no action lies for substantial damages by reason of the mortgage in advance of an eviction or until the owner of the land pays off the encumbrance, see *infra* § 117; and a covenant against encumbrances cannot be enforced where the outstanding mortgage is conclusively shown not to be a valid and subsisting lien,⁸⁸ or where the mortgage was created by the grantee himself,⁸⁹ or where he has obtained the mortgagor's

70. Iowa.—Pope v. Coe, 225 N.W. 939, 208 Iowa 759.

Kan.—Shunk v. Fuller, 236 P. 449, 118 Kan. 682.

Or.—Estep v. Bailey, 185 P. 227, 94 Or. 59.

Tex.—Morris v. Hesse, Civ.App., 210 S.W. 710, reversed on other grounds, Com.App., 231 S.W. 317.

Wash.—Frerich v. Abrams, 166 P. 702, 97 Wash. 460.

Wis.—Klippel v. Borngesser, 188 N.W. 654, 177 Wis. 423.

15 C.J. p 1272 note 34.

Holdover tenancy

The wrongful claim of a tenant who attempts to hold over without color of title is not an encumbrance. Kan.—Walker v. Steavens, 212 P. 665, 112 Kan. 710.

Okla.—Manley v. Pool, 246 P. 386, 117 Okl. 249.

Later attornment of tenant

Where vendor collected rent in advance shortly before conveying with covenant against encumbrance, the fact that at expiration of time for which that rent was collected the tenant attorned to the purchaser does not defeat the purchaser's right to recover damages for breach accruing prior thereto.—Winn v. Taylor, 194 P. 857, 98 Or. 556, affirming 190 P. 342, 98 Or. 556.

79. Cal.—Mann v. Montgomery, 92 P. 875, 6 Cal.App. 646.

15 C.J. p 1272 note 35.

80. Mich.—Haldane v. Sweet, 20 N.W. 902, 55 Mich. 196.

81. Mass.—Weld v. Traip, 14 Gray 330.

82. Ind.—Rife v. Diamond Flint

Glass Co., 35 N.E. 726, 42 Ind.App. 346.

15 C.J. p 1272 note 38.

Potential liens

Warranty against encumbrances does not include potential liens, but only liens existing at time of delivery of deed.—Hobson v. Beall, 279 P. 645, 130 Or. 240.

Unrecorded claim

A covenant against encumbrances is not broken even by the existence of an unpaid municipal claim for a public improvement unless it be recorded as a lien on the land which it affects.—Staite v. Smith, 111 A. 799, 95 Conn. 470.

83. Ala.—Alexander v. Bond Bros., 168 So. 561, 232 Ala. 533.

Iowa.—Pope v. Coe, 225 N.W. 939, 208 Iowa 759.

Tex.—Askew v. Bruner, Civ.App., 205 S.W. 152—Neeley v. Lane, Civ.App., 193 S.W. 390.

15 C.J. p 1272 note 39.

Materialman's lien

Utah.—Boothe v. Wyatt, 183 P. 323, 54 Utah 550.

Under covenant implied from statutory form of deed

Tex.—Woodward v. Harlin, Civ.App., 20 S.W.2d 158, reversed on other grounds 39 S.W.2d 8, 121 Tex. 46, rehearing denied 41 S.W.2d 204, 12 Tex. 46.

84. N.Y.—Gruzenskie v. Schreyer, 151 N.Y.S. 923.

15 C.J. p 1272 note 40.

85. Ark.—Manning v. Davis, 17 S.W.2d 313, 179 Ark. 609.

Ill.—Coffman v. Scoville, 86 Ill. 300.

Iowa.—Pope v. Coe, 225 N.W. 939, 208 Iowa 759.

15 C.J. p 1272 note 41.

Purchase of premises at foreclosure sale

(1) The fact that defendant has bid in the land at the foreclosure sale, and thus perfected his title, is no defense to an action against him on his covenant against encumbrances.—Stow v. Gilbert, 4 Ohio Dec., Reprint, 528, 2 Clev.L.Rep. 321.

(2) The fact that plaintiff caused the property to be bid in at a foreclosure sale, under a prior mortgage, at a very cheap rate, and had the deed made to himself, is no answer to an action for breach of the covenant against encumbrances.—Eckhardt v. Neracher, 4 Ohio Dec., Reprint, 324, 1 Clev.L.Rep. 313.

86. Pa.—Williams v. O'Donnell, 35 Pa.Co. 433.

87. Ala.—Roy v. F. M. Martin & Son, 81 So. 142, 16 Ala.App. 650.

88. Ohio.—Price v. Foster, 173 N.E. 618, 36 Ohio App. 526.

Unrecorded release

Where release had been executed on mortgage but not recorded, mortgage was not valid encumbrance within covenant against encumbrance.—Smith v. McKelvey, 162 N.E. 722, 28 Ohio App. 361.

Payment of notes

Covenant cannot be enforced where it appears that the notes on which the mortgage was founded have been paid, although the mortgage had not been satisfied of record.—Judevine v. Pennock, 15 Vt. 683.

89. N.Y.—Judd v. Seekins, 62 N.Y. 266.

right of redemption,⁹⁰ or a release of the mortgagor's right to redeem after such right is barred by limitation.⁹¹ Also, as appears supra § 98, such a covenant cannot be enforced where the mortgage encumbrance was excepted from the covenant and assumed by the covenantee. In case of the statutory covenant implied by the use of the words "grant, bargain and sell," the mortgage encumbrance must have been done or suffered by the grantor or some person claiming under him.⁹²

It has been held that an irregularity in proceedings to foreclose a mortgage cannot be shown in defense to an action for breach of a covenant against encumbrances by reason of such mortgage, the covenantee not being a party to the proceedings.⁹³

§ 106. — Taxes

As a general rule, unpaid taxes or special assessments which under the controlling statutory provisions constitute a valid and subsisting lien on land at the time of its conveyance, or valid outstanding tax titles, constitute a breach of covenant against encumbrances.

While a covenant against encumbrances is not broken by a claim on account of taxes which is improper or invalid,⁹⁴ or which does not become a lien on the land prior to the conveyance,⁹⁵ yet unpaid taxes constituting a valid and subsisting lien on land at the time of its conveyance constitute a breach of

the covenant,⁹⁶ which is not excused by the covenantor's agreement to pay the tax;⁹⁷ and notwithstanding a personal liability also rests on the covenantor,⁹⁸ although it has been held that taxes are not an encumbrance on land granted within the meaning of a covenant against encumbrances in the grant, where the grantor has other estate from which the tax could be collected.⁹⁹

It has also been held that taxes assessed after a contract of sale but before the execution of the deed are within the covenant against encumbrances contained in the deed,¹ unless otherwise controlled by an agreement between the parties;² but it has been held that taxes assessed after contract of sale which the purchaser permits to remain unpaid do not constitute an encumbrance done or suffered by the vendor under the covenant implied from the statutory form of deed.³ A former owner of land is not liable on his covenant against encumbrances to a remote grantee for the personal taxes of such grantee which were included with the realty tax of his grantor on which the land was sold at tax sale and redeemed by the last grantee.⁴ The covenant against encumbrances implied from the word "grant" is not breached by outstanding taxes which were a lien on the land at the time of its conveyance but not payable until afterward, unless the grantor was under personal obligation to discharge the lien.⁵

90. Me.—Trask v. Wilder, 50 Me. 450.

15 C.J. p 1273 note 47.

91. N.Y.—McMichael v. Russell, 74 N.Y.S. 212, 68 App.Div. 104.

15 C.J. p 1273 note 48.

92. Mo.—Clare v. Graham, 64 Mo. 249—Williamson v. Hall, 62 Mo. 405.

93. N.Y.—De Forest v. Leste, 16 Johns. 122.

94. Mich.—Balfour v. Whitman, 50 N.W. 744, 89 Mich. 202.

N.J.—Stec v. Weigang, 179 A. 378, 115 N.J.Law 292.

15 C.J. p 1273 note 59.

Tax encumbrance not of record see supra § 98.

If the lien has been lost by laches, the grantee is not justified in paying off back taxes and suing for breach of covenant where there has been no threat of eviction.—Robinson v. Pierce, 52 S.W. 992, 102 Tenn. 428, 47 L.R.A. 275.

No taxes due

Grantees are not entitled to recover from grantors expense of procuring waiver of inheritance tax under warranty against encumbrance, where there were no taxes due and there was absence of proof that property

was of such value as would subject it to statutory lien.—Stec v. Weigang, 179 A. 378, 115 N.J.Law 292.

Reassessment

Where grantor covenanted to pay reassessment thought to be in litigation "should the court adjudge the same as a lien," it devolved on grantee suing to set off amount of such taxes against the mortgage debt to obtain judicial determination that the reassessment was valid.—Pearson v. Richards, 211 P. 167, 106 Or. 78.

95. Cal.—Jaques v. Tomb, 177 P. 280, 179 Cal. 444.

15 C.J. p 1273 note 60.

96. Ala.—Ex parte Helm, 95 So. 546, 209 Ala. 1.

Idaho.—Carssow v. Brinton, 208 P. 1031, 35 Idaho 687—Brinton v. Johnson, 208 P. 1028, 35 Idaho 656.

N.Y.—Sturmer v. Holden, 213 N.Y. S. 339, 215 App.Div. 33.

Tenn.—Grant Bond & Mortgage Co. v. Ogle, 65 S.W.2d 1091, 17 Tenn. App. 112—Kenyon v. Russell, 5 Tenn.App. 401.

Utah.—Soderberg v. Holt, 46 P.2d 428, 86 Utah 485, 99 A.L.R. 1041.

15 C.J. p 1273 note 61.

Proof of payment

If vendor had paid taxes, but failed to get a receipt or failed to

make such a showing on trial as would defeat a suit for such taxes by county collector against purchaser, he has not fulfilled his covenant.—Brand v. Hough, Mo.App., 206 S.W. 425.

Parol agreement by grantee to pay taxes as part consideration for conveyance is good defense in action by grantee on covenant against encumbrances.—Mereness v. Delemos, 101 A. 8, 91 Conn. 651.

97. Wis.—Patterson v. Cappon, 102 N.W. 1083, 125 Wis. 198.

98. Mass.—Cochran v. Guild, 106 Mass. 29, 8 Am.R. 296.

99. Conn.—Briggs v. Morse, 42 Conn. 253.

1. Mich.—Eaton v. Chesebrough, 46 N.W. 365, 82 Mich. 214.

2. N.H.—Gill v. Ferrin, 52 A. 558, 71 N.H. 421.

15 C.J. p 1273 note 67.

3. Ala.—Hood v. Clark, 37 So. 550, 141 Ala. 397.

Pa.—Gheen v. Harris, 32 A. 1094, 170 Pa. 644.

4. Iowa.—Baldwin v. Mayne, 42 Iowa 131.

5. Idaho.—Polak v. Mattson, 128 P. 89, 22 Idaho 727.

Special assessments. Unless otherwise provided by statute,⁶ and subject to statutory regulations as to the time when the lien attaches, and subject also to the general rule that local assessments are not included in a covenant against taxes,⁷ valid special assessments which constitute a lien on land at the time of its conveyance are within the meaning of a covenant against encumbrances.⁸ In some jurisdictions this rule applies to reassessments when the original assessment has been declared invalid,⁹ but in others it is held that the reassessment does not relate back to the date of the original levy so as to constitute an encumbrance.¹⁰

On the other hand, while it has been indicated that an encumbrance may arise from a tax claim notwithstanding no lien for the claim has yet been established,¹¹ it is generally held that a special assessment not becoming a lien until after the date of the conveyance does not breach a covenant against encumbrances.¹² An assessment of benefit from a

street widening is held to be a breach of the covenant against encumbrances in a deed of the assessed premises afterward executed, although the grantor at the time of the conveyance had only constructive notice of the widening.¹³

A conveyance of a portion of a lot which is subject to the lien of a special assessment, containing a covenant that the property conveyed is free from encumbrances, discloses the intention on the part of the parties to the conveyance that the grantor is to assume the whole burden of such lien on the portion retained by him, while the grantee is to take and hold his portion entirely free from the burden of the lien.¹⁴

When lien attaches. The circumstances under which a tax or special assessment lien attaches, so as to render a grantor liable on his covenant against encumbrances, are to be determined in accordance with the controlling statutory provisions,¹⁵ and

6. La.—Ranney v. Burthe, 15 La. Ann. 343.
15 C.J. p 1274 note 75.

7. Ark.—Sanders v. Brown, 47 S.W. 461, 65 Ark. 498.

Mass.—Smith v. Abington Sav. Bank, 42 N.E. 1133, 165 Mass. 385.

N.Y.—Chamberlin v. Gleason, 57 N.E. 487, 163 N.Y. 214.

Okl.—Knight v. Clinkscales, 152 P. 133, 51 Okl. 508.

8. U.S.—City of Winston-Salem v. Powell Paving Co. of North Carolina, D.C.N.C., 7 F.Supp. 424.

Colo.—Wilson v. Barney, 9 P.2d 1058, 90 Colo. 461.

Mont.—Clark v. Demers, 254 P. 162, 78 Mont. 287.

Ohio.—Schick v. Ulland, 24 Ohio N.P., N.S., 401.

Tenn.—Hughes v. Herbert, 17 S.W.2d 16, 159 Tenn. 187—Brown v. Walker, 14 Tenn.App. 587.

Tex.—Walcott v. Kershner, Com.App., 291 S.W. 195, reversing Kershner v. Walcott, Civ.App., 285 S.W. 902.

Wash.—Wright v. Collins, 254 P. 846, 143 Wash. 162.

15 C.J. p 1274 note 79.

An invalid assessment does not constitute an encumbrance.—Bowers v. Narragansett Real Est. Co., 67 A. 324, 28 R.I. 329—15 C.J. p 1274 note 78.

Covenant implied from statutory form of grant

(1) Text rule generally applies.—Cheatham v. Palmer, 167 S.E. 522, 176 Ga. 227.

(2) Covenant implied by the words "grant, bargain, sell," having, under statute, the effect of a warranty against encumbrances done or suffered by the grantor, covers a local assessment against the property

while owned and in possession of the grantor; but such a covenant in mortgagee's foreclosure deed does not cover lien for taxes assessed against mortgagor in possession.—Dothan Nat. Bank v. Hollis, 103 So. 589, 212 Ala. 628.

Voluntary or involuntary payment

It is immaterial to grantee's right of recovery whether his payment of the taxes constituting the encumbrance was voluntary or involuntary.—Bean v. Munger Land Co., Mo.App., 265 S.W. 844.

9. N.J.—Cadmus v. Fagan, 4 A. 323, 47 N.J.Law 549.

Wash.—Green v. Tidball, 67 P. 84, 26 Wash. 338, 55 L.R.A. 879.

10. Mass.—Campbell v. Haven, 97 N.E. 611, 211 Mass. 121.

15 C.J. p 1274 note 81.

11. R.I.—Amore v. Falco, 169 A. 323, 54 R.I. 41.

12. Ark.—Blakemore v. Covey, 293 S.W. 39, 173 Ark. 722.

Iowa.—Thompson v. Hirt, 191 N.W. 365, 195 Iowa 582.

Mont.—Clark v. Demers, 254 P. 162, 78 Mont. 287.

N.Y.—Doonan v. Killilea, 118 N.E. 851, 222 N.Y. 399, reversing 155 N.Y.S. 1103, 170 App.Div. 954, and reargument denied and remittitur amended 120 N.E. 861, 223 N.Y. 559.

—Ryan v. Domestic Realty Co., 147 N.Y.S. 974, 35 Misc. 449.

N.C.—Oliver v. Hecht, 177 S.E. 399, 207 N.C. 481—Branch v. Saunders, 141 S.E. 583, 195 N.C. 176.

Ohio.—Bruns v. Opel, 27 Ohio N.P., N.S., 212.

Wis.—Wileman v. Ladd, 245 N.W. 838, 209 Wis. 594.

15 C.J. p 1247 note 16 [a].

Right to tax land for improvement
district's indebtedness is not "encumbrance" within covenant, and would not become encumbrance until district levied assessment to pay debt.—Van Hollebeke v. Wheeler, 41 P.2d 603, 55 Idaho 268.

Intention of parties

Notwithstanding that unmatured installments of a special drainage assessment was admitted to be a lien on the land, it was held that the covenant extended only to such installments as were due and payable at the time of the conveyance where it was not intended by the parties that the grantor be liable for installments not yet due.—Duke v. Maness, 2 Tenn.App. 267.

13. Mass.—Blackie v. Hudson, 117 Mass. 181.

Exoneration of conveyed portion

The rule stated in the text was laid down in holding that the grantee had a right as against a later mortgagee of the grantor, taking with knowledge of such conveyance, to have the grantee's portion exonerated from the tax lien encumbrance.—Dothan Grocery Co. v. Dowling, 85 So. 498, 204 Ala. 224.

15. Conn.—Tomes v. Thompson, 191 A. 531, 112 Conn. 190, 72 A.L.R. 297.

Mo.—Bean v. Munger Land Co., App., 265 S.W. 844.

Mont.—Clark v. Demers, 254 P. 162, 78 Mont. 287.

N.J.—Lyczak v. Margulies, 151 A. 64, 8 N.J.Misc. 549, affirmed 162 A. 590, 190 N.J.Law 352.

Tenn.—Vaughan v. Vaughan, 6 Tenn. App. 354.

15 C.J. p 1274 note 83.

while, as a general rule, the lien must have attached prior to the time of the conveyance, see *supra* and *infra* this section, it has been held that it need not be actionable at the time of the conveyance.¹⁸ Other authority holds that, in the absence of contrary statute, the lien attaches when the amount of taxes is definitely fixed, and liability for its payment commences.¹⁷

Tax titles. It has been held that the covenant against encumbrances is breached by an outstanding tax deed to the property conveyed, although the tax sale was invalid;¹⁸ but it has also been held that an illegal sale for taxes is not a breach of the covenant against encumbrances.¹⁹ At any rate, a valid certificate of the sale of land for taxes held by a third person at the time a warranty deed is given is a breach of the covenant against encumbrances,²⁰ although it has been held that this rule does not apply to a remote grantee of an equity of redemption with covenants against encumbrances, who acquires title through foreclosure of the original trust instrument.²¹

§ 107. — Restrictions as to Use of Property

Generally restrictions and obligations as to the use

Existence of improvement bonds at time of conveyance does not breach covenant against encumbrances since no lien is created until assessment is levied to pay amount due on bonds.—Hobson v. Beall, 279 P. 645, 130 Or. 240.

Unmatured charges

Some assessments are regarded as a public charge running solely against the land and do not become a lien until maturity of the prescribed amount falling due each year. Ark.—Blakemore v. Covey, 293 S.W. 39, 173 Ark. 722. N.C.—Branch v. Saunders, 141 S.E. 583, 195 N.C. 176—Paite v. Banks, 100 S.E. 251, 173 N.C. 139. Or.—Hobson v. Beall, 279 P. 645, 130 Or. 240.

Construction prior to assessment

(1) Ordinarily, lien attaches from date assessment is made and not from date construction of improvement is commenced and covenant entered into after latter date but before former date is not breached.—Tomes v. Thompson, 151 A. 531, 112 Conn. 190, 72 A.L.R. 297.

(2) Especially is this true where the statute authorizing the improvement fixes the lien as of such time.—Bailey v. Levy, 104 So. 415, 213 Ala. 80.

(3) According to other authority, however, where the improvement has

been made at the time of agreement to convey land benefited thereby, the fact that the assessment was not actually made until after the deed will not relieve the grantor of liability for the assessment.

Pa.—De Arment v. Kennedy, 14 Pa. Super. 539. R.I.—Amore v. Falco, 169 A. 323, 54 R.I. 41.

La.—Louisiana Impr. Co. v. Machece, 3 La.A., Orleans, 71.

Assessment payable in installments

Where special assessment had been levied against property, and was an encumbrance on land at time of transfer, grantor was obliged to pay such taxes, although they were payable in annual installments, some of which were not due and payable at time of transfer of property.—Bean v. Munger Land Co., Mo.App., 265 S.W. 844.

Amount not yet ascertained

Where it was shown that the improvements had been ordered made but the amount due was not declared at the time of the making of the deed, it is the general rule that such taxes are a lien regardless of the fact that the exact amount is not yet ascertained.—Vaughan v. Vaughan, 6 Tenn.App. 354.

Mo.—Bean v. Munger Land Co., App., 265 S.W. 844.

of the property conveyed constitute a breach of covenant against encumbrances.

A covenant against encumbrances is broken where the grantor was validly restricted in or had assumed obligations as to the use of the property conveyed,²² unless the right so restricted did not pass as an appurtenance to the land granted;²³ and it has been held that the rule does not apply where the restrictions are not confined to any particular trade or business, but only to such business as may prove a nuisance.²⁴

§ 108. Covenant for Quiet Enjoyment

- a. General considerations
- b. Sufficiency of eviction or disturbance of possession in general
- c. Particular adverse claims or encumbrances

a. General Considerations

In general there is no breach of a covenant for quiet enjoyment unless and until there has been an eviction, or at least some disturbance of the possession, of the person entitled to the benefit of the covenant, by virtue of a paramount and lawful title or right existing when the covenant was made.

As a general rule the covenant for quiet enjoyment operates prospectively or in futuro, but ap-

18. U.S.—Vorhis v. Forsythe, C.C. Ill., 28 F.Cas.No.17,004, 4 Biss. 409.

19. Mass.—Tibbetts v. Leeson, 18 N.E. 679, 148 Mass. 102.

Vt.—Cummings v. Holt, 56 Vt. 384.

15 C.J. p 1275 note 87.

20. Iowa.—Doyle v. Emerson, 124 N.W. 176, 145 Iowa 353.

Wis.—Daggett v. Reas, 48 N.W. 127, 79 Wis. 60.

21. Colo.—Fisk v. Cathcart, 33 P. 1004, 3 Colo.App. 374.

15 C.J. p 1275 note 89.

22. Conn.—Hickson v. Noroton Manor, 171 A. 31, 118 Conn. 180.

Mass.—Gallison v. Downing, 138 N.E. 315, 244 Mass. 33.

N.Y.—Dieterlen v. Miller, 99 N.Y.S. 699, 114 App.Div. 40—Fusilli v. Feld, 247 N.Y.S. 721, 139 Misc. 170.

N.J.—Mills v. Brunetto, 143 A. 832, 103 N.J.Eq. 526.

15 C.J. p 1277 note 23.

Restrictions in deeds generally see the C.J.S. title Deeds §§ 162–171, also 18 C.J. p 384 note 84–p 401 note 95.

23. Ohio.—Meek v. Breckenridge, 29 Ohio St. 642.

15 C.J. p 1278 note 25.

24. N.Y.—In re Covenant against Nuisance, 2 N.Y.CityCt. 396.

Pa.—Gowen v. O'Hara, 15 Pa.Dist. 753.

15 C.J. p 1278 note 26.

plies only to acts of persons claiming under a title existing when the covenant was made, as shown supra § 45. The covenant is broken only when quiet enjoyment is disturbed;²⁵ as more specifically stated, there is no breach unless and until there has been an eviction,²⁶ actual or constructive,²⁷ or at least some disturbance of possession,²⁸ by virtue of a paramount title or right.²⁹ The mere existence of an outstanding, paramount title does not in general constitute a breach,³⁰ some hostile assertion of the adverse title usually being necessary;³¹ accordingly as a general rule, if the covenantee, enters and remains in undisturbed possession, the covenant is not breached by the mere fact that the title is in a third person.³² The assertion

by the United States of its paramount title to the property, however, apparently may be sufficient to effect a breach.³³

It has frequently been held or recognized that failure or inability of the covenantee or grantee to obtain possession because of an outstanding, paramount title is within the meaning and effect of the covenant,³⁴ and that the covenantee is not required to bring suit to obtain possession;³⁵ in such case the breach occurs when the covenant is made,³⁶ the case being an exception to, or qualification of, the general rule that the covenant operates prospectively or in futuro.³⁷

To summarize the foregoing rules, in general

25. Ala.—Keel v. Ikard, 133 So. 906, 222 Ala. 617.

15 C.J. p 1279 note 49.

26. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448—Anderson v. Knox, 20 Ala. 156.

Ind.—Clark v. Lineberger, 44 Ind. 223.

N.Y.—In re Boylan's Estate, 197 N.Y. S. 710, 119 Misc. 545.

N.C.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 164 S.E. 323, 202 N.C. 803—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189.

Pa.—Berger v. Weinstein, 63 Pa. Super. 153.

15 C.J. p 1279 note 49.

27. Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341.

Neb.—Campbell v. Gallentine, 215 N. W. 111, 115 Neb. 789, 61 A.L.R. 1.

N.Y.—Scriven v. Smith, 3 N.E. 675, 100 N.Y. 471, 53 Am.R. 224—Stanton v. Conley, 278 N.Y.S. 275, 244 App.Div. 84—Sturmer v. Holden, 213 N.Y.S. 339, 215 App.Div. 33—McMullin v. Wooley, 2 Lans. 394.

Tenn.—Hayes v. Ferguson, 15 Lea 1, 54 Am.R. 398.

15 C.J. p 1279 note 49, p 1281 note 81.

28. Ala.—Anderson v. Knox, 20 Ala. 156.

Pa.—Berger v. Weinstein, 63 Pa. Super. 153.

15 C.J. p 1279 note 49, p 1281 note 81.

Possession in grantor

Grantor's predecessors having paid taxes on wild lands for seven years next preceding date of deed, possession rested in grantor when deed was delivered, so that his covenant for quiet enjoyment was not broken until grantee's possession was disturbed.—Smith v. Boynton Land & Lumber Co., 198 S.W. 107, 131 Ark. 22.

Chattel

A breach of the covenant in respect of a chattel is not caused by a mere demand of possession by one having title where loss or disturbance of

possession did not follow.—Cowan v. Silliman, 15 N.C. 46.

29. Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341.

Ind.—Clark v. Lineberger, 44 Ind. 223.

Neb.—Campbell v. Gallentine, 215 N. W. 111, 115 Neb. 789, 61 A.L.R. 1.

N.Y.—Scriven v. Smith, 3 N.E. 675, 100 N.Y. 471, 53 Am.R. 224.

N.C.—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189.

Pa.—Berger v. Weinstein, 63 Pa. Super. 153.

15 C.J. p 1279 note 49.

30. Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341.

Ind.—Clark v. Lineberger, 44 Ind. 223.

N.C.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 164 S.E. 323, 202 N.C. 803.

15 C.J. p 1282 note 86.

31. N.C.—Guy v. First Carolinas Joint Stock Land Bank of Columbia, 164 S.E. 323, 202 N.C. 803.

32. Cal.—Bryan v. Swain, 56 Cal. 616.

15 C.J. p 1282 note 86.

33. Cancellation of receiver's receipt

It has been held that there is a breach of the covenant, made by one who had only a final receiver's receipt for the premises conveyed, if the United States reasserts title and cancels the receiver's receipt.—Albright v. Schwabland, 152 N.W. 301, 98 Neb. 190.

Cancellation of entry

There was a breach where the government asserted its title to the land by lawfully canceling an entry theretofore made thereon by the person through whom the covenantor claimed title, notwithstanding the covenantee was given a preference right to file on the land, and subsequently did file thereon.—Efta v. Swanson, 132 N.W. 335, 115 Minn. 373.

34. Ala.—Musgrove v. Cordova Coal, etc., Co., 67 So. 582, 191 Ala. 419.

Cal.—Platner v. Vincent, 202 P. 655, 187 Cal. 443.

Tex.—Morris v. Hesse, Civ.App., 210 S.W. 710, reversed on other grounds, Com.App., 231 S.W. 317.

Wash.—Whatcom Timber Co. v. Wright, 173 P. 724, 102 Wash. 566.

15 C.J. p 1281 note 84, p 1282 note 85.

Inconsistent covenants

Where one conveyed an estate in fee with a covenant for quiet enjoyment and also covenanted to surrender part of the estate conveyed on the happening of a certain event, this latter clause did not authorize the grantor to hold until the event happened, but the grantee was entitled to immediate possession.—Grimsley v. White, 3 Mo. 257.

In New York

(1) The rule stated in the text has been recognized or applied.—Shattuck v. Lamb, 65 N.Y. 499, 22 Am.R. 656—15 C.J. p 1281 note 84.

(2) Some early cases apparently took the contrary view.—Rindskopf v. Farmers' L. & T. Co., 58 Barb. 36—15 C.J. p 1281 note 83.

35. Neb.—Heyn v. Ohman, 60 N.W. 952, 42 Neb. 693.

Va.—Jones v. Richmond, 13 S.E. 414, 88 Va. 231.

15 C.J. p 1282 note 85.

36. Ala.—Musgrove v. Cordova Coal, etc., Co., 67 So. 582, 191 Ala. 419.

Wash.—Whatcom Timber Co. v. Wright, 173 P. 724, 102 Wash. 566.

15 C.J. p 1281 note 84, p 1282 note 85.

Grantor not in possession

The view has been expressed that, if the grantor was not in possession when the deed was delivered, the covenant would have been broken at that time.—Smith v. Boynton Land & Lumber Co., 198 S.W. 107, 131 Ark. 22.

37. Ala.—Musgrove v. Cordova Coal, etc., Co., 67 So. 582, 191 Ala. 419.

an action for the breach of an absolute or unlimited covenant for quiet enjoyment can be sustained only where the person claiming its benefit has been prevented from taking possession, or has been evicted, by a person having a lawful and paramount title existing at the time the covenant was made;³⁸ and to constitute a breach of a full and absolute covenant for quiet enjoyment against all persons, there must in general be a union of acts of disturbance and lawful title.³⁹

Covenantee in possession when covenant made. One who accepts a deed with a covenant for quiet enjoyment cannot allege that the covenant is broken because he himself is in possession at the time.⁴⁰

Acts of trespassers. In view of the general rule hereinbefore stated that, to constitute a breach, there must be a union of acts of disturbance and lawful title, as a general rule a disturbance or entry by a mere intruder is not sufficient to constitute a breach;⁴¹ nor is the covenant broken by the fact that, in a suit by the covenantee against an intruder, the grantor did not furnish the covenantee with the title deeds to the premises.⁴² The general rule does not apply, however, where particular persons are named, against whose acts the grantor covenants, and such covenant applies to disturbance by such persons whether or not under paramount and lawful title.⁴³

Acts or omissions of covenantor. The covenant for quiet enjoyment extends to all acts of the covenantor, whether tortious or not, if committed under color of title.⁴⁴ While the scope of the covenant in respect of the acts of a covenantor which will constitute a breach has been stated in rather

broad terms,⁴⁵ in this connection a distinction has been made between a mere trespass by the covenantor and an entry to the exclusion of the grantee or covenantee.⁴⁶ It has been held that there is not a breach where the covenantor does not assert title or right of possession through or under anyone other than the covenantee.⁴⁷ A covenant for quiet enjoyment in a grant of a railroad right of way over, across, through, or upon any land owned by the grantor is not breached by the recovery of damages by the grantor from the grantee for the maintenance of a right of way which was not incident to the right of way granted.⁴⁸

b. Sufficiency of Eviction or Disturbance of Possession in General

While there have been holdings or expressions to the effect that actual eviction is an essential element of the breach of a covenant for quiet enjoyment, the rule now quite generally recognized is that any actual disturbance of the possession equivalent to an eviction by one having the necessary title is sufficient.

The cases are not entirely harmonious as to whether actual eviction, which occurs when the grantee is dispossessed by process of law,⁴⁹ is a necessary element of breach of the covenant for quiet enjoyment. According to some cases, especially earlier ones, actual eviction is necessary,⁵⁰ but, according to the rule now quite generally recognized, even in various jurisdictions in which formerly actual eviction was regarded as, or said to be, necessary,⁵¹ any actual disturbance of the possession equivalent to an eviction by one having the required lawful and paramount title is a breach of the covenant;⁵² and, according to many authorities, a covenantee may voluntarily surrender possession to

38. Okl.—Brown v. International Land Co., 116 P. 799, 29 Okl. 341. 15 C.J. p 1279 note 49.

39. Okl.—Brown v. International Land Co., supra. 15 C.J. p 1279 note 62.

40. Ill.—Beebe v. Swartwout, 8 Ill. 162.

41. Okl.—Brown v. International Land Co., 116 P. 799, 29 Okl. 341. 15 C.J. p 1279 note 62, p 1280 note 63.

42. N.C.—Wilder v. Ireland, 58 N. C. 85. 15 C.J. p 1280 note 64.

43. Ky.—Patton v. Kennedy, 1 A.K. Marsh. 389, 10 Am.D. 744. 15 C.J. p 1280 note 65.

44. N.Y.—Cassada v. Stabel, 90 N.Y. S. 533, 98 App.Div. 600. 15 C.J. p 1279 note 59.

45. Exception to general rule
"The principle which requires the

eviction or disturbance to be by one claiming under a superior title to constitute a breach of the covenant for quiet enjoyment is subject to certain well-settled exceptions, among which is that the covenant extends to all acts of the covenantor himself whether tortious or otherwise."—Atler v. Erskine, 111 S.W. 186, 50 Tex. Civ.App. 576.

Exclusion from possession

Refusal by covenantor to deliver possession to the covenantee, whether or not tortious rendered the covenantor liable for breach of the covenant.—Atler v. Erskine, supra.

43. N.Y.—Cassada v. Stabel, 90 N.Y. S. 533, 98 App.Div. 600. 15 C.J. p 1279 note 62, p 1280 note 63.

47. N.Y.—Entwisle v. Margolies, 117 N.Y.S. 192, 133 App.Div. 189.

48. Ark.—Hot Springs R. Co. v. Williamson, 77 S.W. 916, 72 Ark. 52.

49. Constructive eviction distinguished

In laying down the rule stated in the text, "constructive eviction" has been distinguished from "actual eviction" by pointing out that a "constructive eviction" occurs when the grantee yields possession to a title which is actually paramount.—Stanton v. Conley, 278 N.Y.S. 275, 244 App.Div. 84—Mead v. Stackpole, 40 Hun, N.Y., 473.

50. Me.—Boothby v. Hathaway, 20 Me. 251.

15 C.J. p 1280 note 80.

51. Cal.—McGary v. Hastings, 39 Cal. 360, 2 Am.R. 456.

N.Y.—Shattuck v. Lamb, 65 N.Y. 499, 22 Am.R. 656.

15 C.J. p 1280 note 80, p 1281 note 81.

52. Ala.—Mugrove v. Cordova Coal, etc., Co., 67 So. 582, 191 Ala. 419.

Kan.—Christy v. Bedell, 61 P. 1095, 10 Kan.App. 435.

15 C.J. p 1281 note 81.

one having paramount title and then maintain his action for breach of the covenant.⁵³ The rule frequently recognized, and stated in the preceding subdivision of this section, that failure or inability of the grantee or covenantee to obtain possession because of an outstanding, paramount title is within the meaning and effect of the covenant has sometimes been regarded as based on the theory that such failure or inability is a constructive eviction.⁵⁴

In general, if the covenantee enters and remains in undisturbed possession, the covenant is not breached by the mere fact that the title is in a third person, as shown in the preceding subdivision of this section; there is neither actual nor constructive eviction justifying a claim of covenant broken where the grantee continues in possession,⁵⁵ unless, it seems, while continuing in physical possession, he submits by attornment to a claim of title paramount.⁵⁶

Mere threats to take legal proceedings against the covenantee, in respect of his possession of the property, do not constitute duress operating as a breach of covenant.⁵⁷

c. Particular Adverse Claims or Encumbrances

A breach of the covenant for quiet enjoyment may result from the existence and maintenance of the adverse claim of a lessee, mortgagee, one to whom dower has been assigned, the holder of an easement, a cotenant, or a remainderman.

The view has been expressed that, because an unexpired lease prevents the grantee from obtaining possession, the existence of such a lease effects a breach of the covenant for quiet enjoyment.⁵⁸ It has been held that there is a breach of a covenant for delivery of possession to grantee on a certain date subsequent to the date of conveyance where the grantor after the date of conveyance leases the property to a third person for a period extending beyond the date for delivery of possession to the grantee.⁵⁹ The covenant is not breached where the claim is that of the grantor or covenantor under a lease to him of part of the premises, made by the grantee or covenantee after the conveyance was made.⁶⁰ Questions as to the effect of the knowledge of the covenantee of the existence of a lease on the operative effect of various covenants are considered in certain aspects supra § 39.

Mortgage. Eviction, or the equivalent, of the grantee or covenantee under a mortgage existing when the conveyance is made,⁶¹ including a mortgage executed by the grantor and covenantor,⁶² constitutes a breach of the covenant, and, according to some authorities, the grantee's right to recover for the breach is not defeated because he himself becomes the purchaser at the sale,⁶³ or surrenders possession to the purchaser upon demand.⁶⁴ The covenant is not breached, however, by the mere

53. Ala.—Musgrove v. Cordova Coal, etc., Co., 67 So. 582, 191 Ala. 419. 15 C.J. p 1281 note 82.

Necessity for judgment

The paramount title need not be established by judgment before the covenantee will be authorized to surrender possession.—Ogden v. Ball, 41 N.W. 453, 40 Minn. 94, 97—15 C.J. p 1281 note 82 [a].

54. Minn.—Fritz v. Pusey, 18 N.W. 94, 31 Minn. 368, 370.

Tex.—Atler v. Erskine, 111 S.W. 186, 50 Tex.Civ.App. 576.

15 C.J. p 1281 note 84, p 1282 note 85.

55. N.Y.—Stanton v. Conley, 278 N.Y.S. 275, 244 App.Div. 84—Mead v. Stackpole, 40 Hun 473.

56. N.Y.—Sturmer v. Holden, 213 N.Y.S. 339, 215 App.Div. 33.

57. N.Y.—Ferraro v. Marrillard Builders, 239 N.Y.S. 337, 136 Misc. 160, affirmed 243 N.Y.S. 871, 229 App.Div. 802.

58. Tex.—Morris v. Hesse, Civ. App., 210 S.W. 710, reversed on other grounds, Com.App., 231 S.W. 317.

Argument

The view stated in the text has been presented by way of argument

in demonstrating that the breach, if any, occurred when the deed was given and that the right of action therefor did not pass to a subsequent purchaser.—Simons v. Diamond Match Co., 123 N.W. 1132, 159 Mich. 241.

59. Ind.—Gibbs v. Ely, 41 N.E. 351, 13 Ind.App. 130.

60. N.Y.—Entwisle v. Margolies, 117 N.Y.S. 192, 133 App.Div. 189.

15 C.J. p 1279 note 59 [a] (2).

61. Mass.—Sprague v. Baker, 17 Mass. 586.

15 C.J. p 1280 note 72.

Uninclosed or unoccupied lands

(1) In respect of uninclosed and uncultivated lands, it was held that the mere facts that the mortgage was foreclosed and that the property was sold did not effect a breach where there was no change of possession and the purchaser on foreclosure made no attempt to disturb the covenantee, the presumption having been indulged that the covenantee was in possession.—Wood v. Forncrook, 8 Thomps. & C., N.Y., 303.

(2) In an earlier case in New York, the view was taken that a mortgage foreclosure sale is in itself an eviction,

where the premises are unoccupied.—St. John v. Palmer, 5 Hill, N.Y., 599.

Purchase-money mortgage

There may be a breach by the acts of the grantor who has taken a purchase-money mortgage for part of the purchase price.—Cassada v. Stabel, 90 N.Y.S. 533, 98 App.Div. 600.

62. Wash.—Jackson v. McAuley, 43 P. 41, 13 Wash. 293.

15 C.J. p 1280 note 72.

63. In New York

(1) The rule stated in the text has been recognized.—Cowdrey v. Coit, 44 N.Y. 382, 4 Am.R. 690, reversing 26 N.Y.Super. 201—15 C.J. p 1280 note 73.

(2) In an early case, it was held that the covenant was not broken merely because the covenantee was compelled to purchase the land at a foreclosure sale in order to prevent an eviction.—Waldron v. McCarty, 3 Johns., N.Y., 471.

64. Neb.—Cheney v. Straube, 53 N.W. 479, 35 Neb. 521.

N.Y.—Jenks v. Quinn, 33 N.E. 376, 137 N.Y. 223—Cornish v. Capron, 32 N.E. 773, 136 N.Y. 232.

existence of an outstanding mortgage, containing a power of sale.⁶⁵

Dower. A covenant for quiet enjoyment is broken by an assignment of dower in the land conveyed,⁶⁶ but the existence of an inchoate right of dower in the premises is not a breach of the covenant.⁶⁷

Easement. The existence and exercise of an easement in the premises conveyed may constitute a breach of the covenant.⁶⁸

Taxes and assessments. Actual or constructive eviction is essential in order to permit the recovery of taxes paid by the covenantee in an action on the covenant.⁶⁹ The redemption by the grantee of the premises when sold for taxes, before the time to redeem has expired, does not constitute in itself a breach of the covenant, in view of want of indefeasible and paramount title and of eviction or its equivalent.⁷⁰ So the mere fact that the covenantee when he resells the property deducts from the price on resale the amount of an outstanding local assessment to which the property was subject when it was conveyed to him does not constitute an eviction.⁷¹

Cotenancies. There is authority for the view that the adjudging of a person a tenant in common with the grantee or person entitled to the benefit of the covenant is such a breach of the unity conveyed as to amount to a disturbance of possession so as to warrant recovery for breach of the covenant, although there was no actual eviction,⁷² and that a breach may result from the recognition and purchase by such grantee or person of the right of the cotenant, even though there had been only con-

structive possession of the property involved.⁷³

It has been held, however, that the covenantee cannot recover as for an eviction from the whole of the land conveyed on proof that one claiming under a paramount title had recovered in ejectment an undivided half interest therein.⁷⁴

Claim of remainderman. Breach is not effected by the failure of the grantor's remainder during the life of a life tenant where the grantor has good title to the life estate,⁷⁵ but the rule is otherwise where the life estate of the covenantor has been terminated by his death and the covenantee has been duly evicted by the remainderman.⁷⁶

Violation of building regulation. The covenant is not breached notwithstanding the existence of a violation of a building regulation when the deed was given where the covenantee himself cures the violation while he continues in possession.⁷⁷

§ 109. Covenant for Further Assurance

While there is breach of the covenant for further assurance where the covenantor fails or neglects to make such other and further assurance as the terms of the covenant require, in general only such act may be required or demanded as is necessary, reasonable, and in accordance with the nature and purport of the original bargain.

In general the covenant for further assurance is broken by the failure or neglect of the covenantor to make such other and further assurance of the title conveyed as the terms of the covenant require.⁷⁸ It has been held, however, that a substantial breach of the covenant occurs only upon a disturbance or eviction, actual or constructive, of the covenantee;⁷⁹ but it has also been held that an action may be maintained for a breach of the cove-

65. Ind.—Clark v. Lineberger, 44 Ind. 223.

15 C.J. p 1282 note 87.

66. S.C.—Lewis v. Lewis, 39 S.C.L. 12.

15 C.J. p 1280 note 70.

67. S.C.—Massey v. Craine, 12 S.C.L. 489.

15 C.J. p 1280 note 71.

68. Me.—Harrington v. Beam, 36 A. 986, 89 Me. 470.

15 C.J. p 1280 note 79.

In New York

(1) The rule stated in the text has been recognized or applied.—Scriven v. Smith, 3 N.E. 675, 100 N.Y. 471, 53 Am.R. 224—15 C.J. p 1280 note 79.

(2) The recovery of a right of way across lands conveyed, and the enforcement thereof by a third person, is such an eviction as to constitute a breach of the covenant.—Bridger v. Pierson, 45 N.Y. 601.

(3) That private roadway across

adjoining farms was used by purchasers of one farm under deed which did not except right of way, did not prevent it from being right of way in favor of adjoining farm, and purchasers were entitled to damages from vendor.—Niesz v. Spencer, 211 N.Y.S. 3, 213 App.Div. 476.

(4) In an early case it was held that the covenant was not breached by the existence and use of an easement to take water from a spring by means of pipes laid under ground, on the theory that there was no ouster.—McMullin v. Wooley, 2 Lans., N.Y., 394.

69. N.Y.—Stanton v. Conley, 278 N.Y.S. 275, 244 App.Div. 84.

70. N.Y.—Mead v. Stackpole, 40 Hun 473.

71. N.Y.—Sturmer v. Holden, 213 N.Y.S. 339, 215 App.Div. 33.

72. Ala.—Musgrove v. Cordova Coal, etc., Co., 67 So. 582, 191 Ala. 419.

Wash.—Black v. Barto, 118 P. 623, 65 Wash. 502, Ann.Cas.1913B 846.

73. Ala.—Musgrove v. Cordova Coal, etc., Co., 67 So. 582, 191 Ala. 419.

74. Pa.—McGrew v. Harmon, 30 A. 265, 268, 164 Pa. 115.

75. N.C.—Wilder v. Ireland, 53 N.C. 85.

76. N.C.—Parker v. Richardson, 53 N.C. 452.

77. Pa.—Berger v. Weinstein, 63 Pa. Super. 153.

78. U.S.—Fields v. Squires, C.C.Or., 9 F.Cas.No.4776, Deady 366.

15 C.J. p 1282 note 89.

Lease

Covenant of further assurance, or right to immediate possession, contained in warranty deed, was breached by existence of lease.—Kite v. Pittman, Mo.App., 278 S.W. 830.

79. N.J.—Zabriskie v. Baudendistel, Ch., 20 A. 163.

nant where the grantee has paid a mortgage outstanding at the execution of the deed.⁸⁰ Where, under the covenant, the covenantor perfects the seizin before the injury is sustained, by supplying the missing link in his chain of title, the grantee cannot rescind the conveyance and recover the price as for breach of covenant of seizin.⁸¹

The act which may be required or demanded under the covenant in general must be necessary,⁸² must be reasonable,⁸³ and must not differ from the nature and purport of the original bargain.⁸⁴ Since in some jurisdictions the statutory covenant for further assurance, implied from the use of certain words, relates only to such defects as the grantor can supply, as shown *supra* § 46, under such a covenant the grantor cannot be required to procure conveyance from persons who hold encumbrances not created by him,⁸⁵ the covenant embracing only those encumbrances of which the covenantor has control.⁸⁶ There is apparently authority for the view, however, that a vendor who has sold a bad title may be required under a covenant for further assurance to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration.⁸⁷

The covenantee must give notice of the assurance, specifying its nature, where the deed does not specify any particular assurance and provides for giving further assurance on his request.⁸⁸ In some jurisdictions, by virtue of statute, the expenses incurred in performing the covenant must be borne by the covenantee.⁸⁹

Title acquired from United States. A covenant that, if the grantors obtain title from the United States, they will convey the same to the grantees by deed of general warranty entitles the grantees

to a conveyance of the legal title when the contingency happens.⁹⁰ It has been held, however, that such covenant does not cover the acquisition of the title of the United States from any intermediate party.⁹¹

§ 110. Covenant of Warranty

- a. In general
- b. Subsequent acts of covenantor
- c. Acts or omissions of covenantee
- d. Liens and encumbrances generally
- e. Mortgages and deeds of trust
- f. Taxes and assessments
- g. Dower
- h. Leases, tenancies, and acts of tenants
- i. Highways, rights of way, and other easements
- j. Exercise of right of eminent domain

a. In General

A breach of a covenant of warranty consists of an eviction under a lawful paramount title. It may exist in respect of an appurtenance on part of the land, but not by reason of an unlawful claim by a trespasser. The limited scope of a special warranty is, of course, to be considered in determining whether there has been a breach thereof.

A covenant of general warranty is broken by eviction actual or constructive, under a lawful paramount title.⁹² Subject to the rules, and the exceptions thereto, as to the necessity of an eviction, actual or constructive, see *infra* § 112, under a paramount title or right, see *infra* § 111, there may be a breach of warranty where: There is a failure of title;⁹³ the grantors do not constitute all the owners in common;⁹⁴ the top of an adjoining building leans over the land;⁹⁵ improve-

80. N.Y.—Colby v. Osgood, 29 Barb. 339.

81. Va.—Building, etc., Co. v. Fray, 32 S.E. 58, 96 Va. 559.

82. Md.—Gwynn v. Thomas, 2 Gill & J. 420.

83. N.Y.—Miller v. Parsons, 9 Johns. 336.

84. N.Y.—Miller v. Parsons, *supra*.

85. Mo.—Armstrong v. Darby, 26 Mo. 517—Luther v. Brown, 66 Mo. App. 227.

86. Mo.—Armstrong v. Darby, 26 Mo. 517.

87. Md.—Cochran v. Pascault, 54 Md. 1.

88. N.Y.—Miller v. Parsons, 9 Johns. 336.

89. N.Y.—Werner v. Wheeler, 127 N.Y.S. 158, 142 App.Div. 358, 15 C.J. p. 1237 note 4.

90. U.S.—Fields v. Squires, C.C.Or., 9 F.Cas.No.4,776, Deady 366—Lamb v. Burbank, C.C.Or., 14 F.Cas.No. 8,012, 1 Sawy. 227.

91. U.S.—Davenport v. Lamb, Or., 13 Wall. 418, 20 L.Ed. 655.

Contrary view

The contrary view was taken in a case in which the surrounding circumstances were considered in determining the intention of the parties. —Hope v. Stone, 10 Minn. 141.

92. Ill.—Biwer v. Martin, 128 N.E. 518, 294 Ill. 488.

Ky.—Coffey v. Baker's Adm'r, 79 S.W.2d 8, 257 Ky. 698.

Mass.—Gallison v. Downing, 138 N.E. 315, 244 Mass. 33.

Tex.—Cochran v. Hill, Civ.App., 255 S.W. 768.

15 C.J. p. 1282 note 97.

93. Tex.—Rahl v. Compton, Civ. App., 112 S.W.2d 509, error dismissed—Shannon v. Childers, Civ. App., 202 S.W. 1030, error refused.

Cancellation of receipt on which title rests

A covenant of warranty by one whose title rested on a final receiver's receipt is broken if the government cancels such receipt.—Albright v. Schwabland, 152 N.W. 301, 98 Neb. 190.

94. U.S.—Bird Arias v. Societe Anonyme Des Sucreries De Saint Jean, C.C.A.Puerto Rico, 62 F.2d 410.

95. N.C.—Shrago v. Gulley, 93 S.E. 458, 174 N.C. 135.

ments on the land conveyed encroach on the adjoining land of another person;⁹⁶ or, as shown in subsequent subdivisions of this section, where there is a lien or encumbrance on the land at the time of the conveyance. Although, generally speaking, a covenant of warranty is a covenant in futuro, see *supra* § 47, nevertheless it is broken as soon as made where the covenantor has no title⁹⁷ and is not in possession.⁹⁸

In other particular cases there may be no breach of warranty or right to recover damages therefor,⁹⁹ especially where the warranty is a special one, such as one warranting only against claims or demands by the covenantor and persons claiming through or under him or persons under whom he claims.¹ A covenant of warranty does not bind the covenantor to defend the title conveyed by him, or to protect the covenantee, against a mere trespasser who has no title² or against an unlawful claim of title, constituting, at the most, a mere cloud on the title.³ It is not breached by a title already vested in the covenantee;⁴ but the subsequent acquisition of title by the grantee or his heirs is no defense in a suit for breach of the warranty.⁵

It is no excuse, or defense to an action, for breach of a covenant of warranty that: A bond of

indemnity had been given by the covenantor to the covenantee;⁶ the covenantor was not the real grantor;⁷ the defect in title may be cured;⁸ or the covenantor has previously recovered judgment against the evictor.⁹ The warranty is not satisfied by a conveyance to the covenantee of other property in an effort to make the warranty good.¹⁰

Contingency. There is no breach of covenant because the title depends on a contingency where the contingency is too remote to be entitled to recognition¹¹ or there is merely a condition subsequent,¹² and no outstanding title or existing claim.¹³ However, it has been held that, where the validity of a conveyance was dependent upon the contingency of proof of the grantor's title subsequently to be made, there was a breach of covenant of warranty for which the grantee was entitled to damages, as if the failure of the title had been absolute.¹⁴

Part of land. While there may be a breach of warranty by failure of title to part of the land,¹⁵ an eviction caused by a mutual mistake in a mere matter of description of the land conveyed is not a breach of a covenant of warranty contained in the deed,¹⁶ unless such erroneous description is

96. La.—Schill v. Churchill, 123 So. 139, 11 La.App. 181.

97. Miss.—Cranford v. State, 131 So. 638, 159 Miss. 32.

Mo.—Rainey v. Davidson, 26 S.W.2d 841, 224 Mo.App. 679.

Okl.—Herron v. Harbour, 182 P. 243, 75 Okl. 127, 29 A.L.R. 905.

98. Mo.—Rainey v. Davidson, 26 S.W.2d 841, 224 Mo.App. 679.

99. Fla.—Tyler v. Rudisill, 155 So. 353, 114 Fla. 301.

Iowa.—Churchman v. Wilson, 216 N.W. 726, 204 Iowa 1017.

N.Y.—Goldstein v. Hirsh, 178 N.Y.S. 325, 108 Misc. 294, affirmed Goldstein v. Rosenberg, 181 N.Y.S. 559, 191 App.Div. 492.

N.D.—Peterson v. Reishus, 266 N.W. 417, 66 N.D. 436, 105 A.L.R. 724.

Okl.—Baker v. Ebahotubbi, 246 P. 230, 117 Okl. 224.

Partnership debts

Where the grantee in a deed by partners covenants to pay all partnership debts of the grantors, the fact that the grantors are held liable for debts other than those which they represented they owed does not constitute a breach of the warranty in their deed.—Forbes v. Thorpe, 95 N.E. 955, 209 Mass. 570.

1 Ark.—Doak v. Smith, 208 S.W. 795, 137 Ark. 509.

Tex.—Garrett v. Houston Land &

Trust Co., Civ.App., 33 S.W.2d 775, error refused.

W.Va.—Simmons v. Simmons, 119 S.E. 161, 94 W.Va. 424.

15 C.J. p 1282 note 7.

2. Tex.—Freeman v. Anderson, Civ.App., 119 S.W.2d 1081—Biggs v. Doak, Civ.App., 259 S.W. 665, second motion for rehearing overruled, 260 S.W. 882.

15 C.J. p 1283 note 21.

3. Conn.—Reed v. Stevens, 107 A. 495, 93 Conn. 659, 5 A.L.R. 1081.

D.C.—Richmond Fairfield Ry. Co. v. U. S. Housing Corporation, 72 F.2d 78, 63 App.D.C. 285.

N.H.—Eaton v. Clarke, 120 A. 433, 80 N.H. 577.

Tex.—Felts v. Whitaker, Civ.App., 129 S.W.2d 682, error granted—Freeman v. Anderson, Civ.App., 119 S.W.2d 1081—Biggs v. Doak, Civ.App., 259 S.W. 665, second motion for rehearing overruled, 260 S.W. 882.

4. Minn.—Horrigan v. Rice, 38 N.W. 765, 39 Minn. 49.

Corpus Juris is cited in a case dealing, however, with a covenant of seizin.—Youngerman-Reynolds Hardwood Co. v. Hicks, 181 So. 111, 112, 236 Ala. 138.

5. Okl.—Rogers v. Amrey, 251 P. 1013, 123 Okl. 70.

6. Ala.—Andrews v. McCoy, 8 Ala. 920, 42 Am.D. 669.

7. Kv.—Brady v. Pock, 34 S.W. 906, 35 S.W. 623, 99 Ky. 42, 17 Ky.L. 1356.

15 C.J. p 1296 note 48.

8. Kv.—Megerion v. Harrison, 1 Ky. L. 398.

9. Ky.—Louisville Public Warehouse Co. v. James, 56 S.W. 13, 21 Ky.L. 1726.

15 C.J. p 1296 note 35.

10. Tex.—Conn v. Peavy-Moore Lumber Co., Civ.App., 6 S.W.2d 372, error dismissed.

11. Pa.—Anshutz v. Miller, 81 Pa. 212.

15 C.J. p 1282 note 3.

12. R.I.—Bergin Realty Co. v. Schaller, 168 A. 909, 54 R.I. 15.

13. Ohio.—Millison v. Drake, 175 N.E. 34, 37 Ohio App. 559, affirmed 174 N.E. 776, 123 Ohio St. 249.

14. Iowa.—Shorthill v. Ferguson, 44 Iowa 249.

15. Ark.—Robertson v. Collier, 238 S.W. 44, 152 Ark. 351.

Tex.—First Nat. Bank v. Brown, Com.App., 15 S.W.2d 563, reforming, Civ.App., 4 S.W.2d 635.

15 C.J. p 1282 note 98.

16. Ala.—Youngerman - Reynolds Hardwood Co. v. Hicks, 181 So. 111, 236 Ala. 138.

15 C.J. p 1287 note 79.

Inclusion of lots not owned by grantor

Where lots not owned by grantor

of the essence of the contract.¹⁷ If the deed is, or can be, reformed, the right of action, if any, for breach of warranty is the same as if the description had been correct in the first instance.¹⁸ In some states a shortage or deficiency in the recited acreage or other quantity of land conveyed is deemed not to be a breach of a general warranty of title;¹⁹ and even where there is considered to be an express or implied warranty of approximate quantity a comparatively slight deficiency is not a breach,²⁰ although there is a breach where the deficiency is substantial or more than reasonable or the area of the tract actually conveyed is not a near approximation to the acreage covenanted for.²¹

Appurtenances being within the scope and meaning of the covenant of warranty, a failure of title thereto is a breach of the covenant.²² In order, however, that the loss of a right may constitute a breach of the covenant, it must be a legal appurtenant to the land within the meaning of the deed.²³

b. Subsequent Acts of Covenantor

Except when they are of such nature and effect as to operate as a discharge of the warranty, subsequent acts of the covenantor do not prevent or excuse a breach, nor defeat recovery therefor, but may instead, when followed by eviction, result in a breach, as where the covenantor confers paramount title on another person.

While a conveyance subsequently made by a grantor is not itself a breach of the covenant of warranty contained in his prior conveyance,²⁴ it has frequently been held that an eviction of the covenantee, by reason of a paramount title derived from the covenantor subsequently to his conveyance,

constitutes a breach of the covenant of warranty;²⁵ but, as appears supra in § 48, this doctrine must be regarded as an exception to the general rule that a covenant of general warranty relates only to the title as it existed at the time the conveyance was made, and is opposed by some authorities upon the ground that the breach creates liability as of the date of the deed and not of the eviction.²⁶

Perfection of title. If prior to the eviction of the grantee a grantor of land with covenant of warranty purchases an outstanding title it inures to the benefit of the grantee, and thus operates as a discharge of the warranty;²⁷ but such purchase by the grantor after eviction of his grantee does not defeat the right of the latter to recover for breach of the covenant.²⁸

Tender. It is not a defense that the covenantor has tendered back the purchase price.²⁹ In an action for breach of a covenant to convey land by a lawful title, the question whether a tender of title was made before or after the commencement of the action is immaterial where it appears that the title tendered was insufficient.³⁰

c. Acts or Omissions of Covenantee

Acts or omissions on the part of the covenantee may prevent recovery by him.

It is a good defense or excuse that the covenantee: Prevented the covenantor from perfecting his title;³¹ yielded to an invalid and inferior claim;³² yielded against the grantor's wishes to a claim which was being contested by the grantor, it not appearing that the proceedings must necessarily

were included in the deed by mutual mistake, there was no breach of covenant of warranty.—*Maxwell v. Wayne Nat. Bank*, 95 S.E. 147, 175 N.C. 180.

Failure to include all land pointed out

If the seller makes a deed which by its terms does not include some of the land pointed out, the purchaser cannot recover upon the warranty for it is only where there is failure of title to part of the land which the deed purports to convey that the covenant of warranty is broken.—*Compton v. Franks*, Tex. Civ.App., 222 S.W. 988, error refused.

17. Mass.—*Cecconi v. Rodden*, 16 N.E. 749, 147 Mass. 164.
15 C.J. p 1287 note 80.

18. Ala.—*Youngerman v. Reynolds Hardwood Co. v. Hicks*, 181 So. 111, 236 Ala. 138.

Ind.—*Black v. Smith*, 158 N.E. 916, 86 Ind.App. 621.

Ky.—*Harriss v. Music*, 245 S.W. 845, 197 Ky. 114.

19. Tex.—*Liberto v. Sanders*, Com. App., 259 S.W. 1080, reversing, Civ. App., 248 S.W. 120.—*Rahl v. Compton*, Civ.App., 112 S.W.2d 509, error dismissed.—*Mullinax v. Snorgrass*, Civ.App., 83 S.W.2d 1080, error refused.—*Briley v. Hay*, Civ. App., 13 S.W.2d 997.

20. La.—*Ebarbo v. Stacey*, 133 So. 793, 16 La.App. 248.
Or.—*Ogilvie v. Stackland*, 179 P. 669, 92 Or. 352.

21. Iowa.—*Mahrt v. Mann*, 210 N.W. 566, 203 Iowa 880.—*Gardner v. Kiburz*, 168 N.W. 814, 184 Iowa 1268.

22. Tex.—*Weaver v. Propst*, Civ. App., 28 S.W.2d 872, 876, error refused, quoting *Corpus Juris*.
15 C.J. p 1287 note 75.

23. Tex.—*Weaver v. Propst*, supra, quoting *Corpus Juris*.
15 C.J. p 1287 note 78.

24. Pa.—*Scott v. Scott*, 70 Pa. 244.
15 C.J. p 1283 note 10.

25. Me.—*Curtis v. Deering*, 12 Me. 499.
15 C.J. p 1283 note 11.

26. Tex.—*McLean v. Moore*, Civ. App., 145 S.W. 1074.
15 C.J. p 1283 note 13.

27. Ind.—*Burton v. Reeds*, 20 Ind. 87.
15 C.J. p 1297 note 68.

28. Miss.—*Southern Plantations Co. v. Kennedy Heading Co.*, 61 So. 166, 104 Miss. 131.
15 C.J. p 1297 note 69.

29. N.Y.—*Gordon v. Illensworth*, 107 N.Y.S. 650, 56 Misc. 366.
15 C.J. p 1296 note 51.

30. Ind.—*Clark v. Redman*, 1 Blackf. 379.

31. Wash.—*Menasha Wooden Ware Co. v. Nelson*, 88 P. 1018, 45 Wash. 543.

32. Miss.—*Allen v. Miller*, 54 So. 731, 99 Miss. 75.

have resulted adversely;³³ invited an eviction or brought it about through his fraud or collusion;³⁴ or brought about a redemption by inducing a person to complete it, and aiding him in doing so, after he had announced his intention to abandon it.³⁵ Also, as a general rule, a covenantee cannot recover any damages which could have been prevented or avoided by reasonable diligence on his part.³⁶

On the other hand, it has been held not to be a good defense or excuse that the covenantee: Could have discovered the defect in title by inspecting the records;³⁷ promised not to use the deed against the vendor;³⁸ did not have actual possession;³⁹ allowed the premises to deteriorate;⁴⁰ invited the assertion of hostile rights by bringing suit to quiet his title;⁴¹ did not urge, as an objection to the form of action brought to try the title, the fact that the land was vacant when an action of ejectment was brought;⁴² or failed to record his deed,⁴³ prevent a sale of the property for delinquent taxes due by the grantor,⁴⁴ defend an action against him involving title,⁴⁵ appeal from an adverse decision,⁴⁶ object until eviction,⁴⁷ or to take actual possession at the time of the conveyance to him, even though, if he had done so, he would have acquired title by adverse possession⁴⁸ or would have prevented a mortgagee of the land from becoming mortgagee in possession.⁴⁹ The fact that a covenant of a title based on a mortgage foreclosure sale, on the foreclosure proceedings being held invalid, took a quitclaim deed from the mortgagor did not relieve

the covenantor from liability for breach of covenant, although the quitclaim deed was without consideration, and was taken with intent to prejudice the rights of the covenantor.⁵⁰

d. Liens and Encumbrances Generally

With some exceptions, a covenant of warranty may be breached by liens and encumbrances outstanding as a charge against the land at the time of the conveyance and which the covenantee has not agreed to discharge, at least where there is an eviction by reason thereof, and, according to some, but not other, authorities, by the mere existence thereof at the date of the conveyance.

There may be a breach of a covenant of warranty by reason of a lien on the land which is prior and superior to the interest of the covenantee.⁵¹ The eviction of a grantee by reason of an encumbrance resting on the land at the time of its conveyance is a breach of the covenant of warranty in the deed,⁵² unless, knowing of its existence at the time of the execution of the deed, he has agreed to discharge it.⁵³ Indeed, according to some,⁵⁴ but not other,⁵⁵ authorities, a vendor's covenant of warranty is breached by the existence of an outstanding encumbrance at the time the deed is delivered. It has been held that the covenant of warranty in a conveyance is broken where the land conveyed is subject to the right of another to enter and enjoy the benefit of oil and asphalt rights for a certain number of years,⁵⁶ or where a third person has a right to payment of a royalty up to a specified amount from the first oil produced out of the land,

33. Ga.—Tuggle v. Hamilton, 27 S. E. 987, 100 Ga. 292.

15 C.J. p 1297 note 60.

34. Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341.

35. U.S.—Kinney v. Millsap, C.C.A. Ala., 71 F.2d 578.

36. Kan.—Clafin v. Case, 36 P. 1062, 53 Kan. 560.

15 C.J. p 1283 note 14.

37. Ky.—Downs v. Nally, 170 S.W. 1193, 161 Ky. 432.

38. Ala.—Holley v. Younge, 27 Ala. 203.

39. U.S.—New Orleans v. Whitney, La., 11 S.Ct. 428, 138 U.S. 595, 34 L.Ed. 1102.

N.J.—Miller v. Halsey, 14 N.J.Law 48.

15 C.J. p 1296 note 33.

40. N.J.—Miller v. Halsey, supra. Tex.—Seibert v. Bergman, Civ.App., 44 S.W. 872.

15 C.J. p 1296 note 47.

41. Ind.—Sarris v. Beckman, 104 N. E. 598, 55 Ind.App. 638, Tex.—Coleman v. Luetcke, Civ.App., 164 S.W. 1117.

15 C.J. p 1296 note 39.

42. Minn.—Allis v. Nininger, 25 Minn. 525.

43. Mo.—Crosby v. Evans, App., 195 S.W. 514, certified questions answered 219 S.W. 948, 281 Mo. 202.

15 C.J. p 1283 note 11 [a], p 1296 note 50.

44. W.Va.—Cain v. Fisher, 50 S.E. 753, 1015, 57 W.Va. 492.

15 C.J. p 1296 note 40.

45. Ala.—Smith v. Gaines, 97 So. 739, 210 Ala. 245.

46. La.—Butler v. Watts, 13 La. Ann. 390.

47. Ind.—Walterhouse v. Garrard, 70 Ind. 400.

15 C.J. p 1296 note 37.

48. Ky.—Graham v. Dyer, 29 S.W. 346, 16 Ky.L. 541.

49. N.Y.—Winslow v. McCall, 32 Barb. 241.

50. Miss.—Allen v. Miller, 54 So. 731, 99 Miss. 75.

51. Tenn.—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn.App. 128.

52. Ala.—Dothan Nat. Bank v. Hollis, 103 So. 539, 212 Ala. 628.

15 C.J. p 1284 note 27.

53. S.C.—Hardin v. Clark, 11 S.E. 304, 32 S.C. 480.

15 C.J. p 1284 note 28.

54. Tex.—McLendon v. Federal Mortg. Co., Civ.App., 60 S.W.2d 324, error refused.

Encumbrance consisting of timber deed

A covenant of warranty is broken when made if, at the time, there is an existing encumbrance consisting of a timber deed conveying the right to cut and remove timber from the land.—Jerome Hardwood Lumber Co. v. Munsell, 275 S.W. 709, 169 Ark. 201.

55. Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

15 C.J. p 1284 note 34.

Implied covenant

The covenant of warranty implied from the words "grant, bargain and sell" is broken immediately without eviction if an encumbrance exists on the land at the time the conveyance is made.—Williams v. O'Donnell, 35 Pa.Co. 433.

56. Fla.—Flood v. Graham, 54 So. 456, 61 Fla. 207, Ann.Cas.1912D 1137.

regardless of whether the right to the royalty is treated as an interest in land or as an encumbrance.⁵⁷

The covenant is not breached by: Outstanding encumbrances, other than liens created by operation of law, over which the covenantor has no control, such as one created by his grantor,⁵⁸ or one created or suffered by the covenantee;⁵⁹ liens not in existence at the time of the execution of the deed,⁶⁰ such as liens created by operation of law which had not attached at the date of the conveyance;⁶¹ or a judgment against a drainage district which is not a lien or encumbrance on the privately owned land in question, although such land is within the boundaries or geographical area, of the district.⁶²

Under a general warranty, at least where it is deemed to include a warranty against encumbrances,⁶³ it is the duty of the covenantor to pay off and discharge all liens and encumbrances outstanding as a charge against the land other than any, or a specific amount thereof, assumed to be paid by the covenantee.⁶⁴ Payment of the encumbrance by the vendor frees the title whether the release therefor is recorded or not.⁶⁵

Right of covenantee to remove encumbrance

without awaiting actual eviction see *infra* § 112 b (2).

e. Mortgages and Deeds of Trust

A breach of a covenant of warranty may consist of an eviction under a mortgage or deed of trust.

An eviction under a mortgage or deed of trust is a breach of the covenant of warranty,⁶⁶ unless the mortgage or deed of trust is specially excepted,⁶⁷ or the eviction is in consequence of the negligence of the covenantee;⁶⁸ but the existence of a mortgage is not a breach of warranty of title if the covenantee has not the right of possession, and has not been evicted or kept out of possession by parties in under a better title.⁶⁹

While there is a fulfillment of his duty, rather than a breach of covenant, where the covenantor pays and discharges a mortgage,⁷⁰ there is a breach where the covenantor purchases an outstanding mortgage given by his grantor and asserts it against the covenantee.⁷¹

f. Taxes and Assessments

Ordinarily the question of whether there is liability on a covenant of warranty for a tax or assessment unpaid at the time of the execution of the deed containing the covenant depends on whether the tax or assessment was a lien at that time.

Unless excepted in the deed,⁷² the enforcement

57. Tex.—Compton v. Trico Oil Co., Civ.App., 120 S.W.2d 534, error refused.

58. Mo.—Koenig v. Branson, 73 Mo. 634.

59. Wash.—Stein v. Waddell, 80 P. 184, 37 Wash. 634.

60. Tex.—Hoge v. Garcia, Civ.App., 296 S.W. 982.

61. Ind.—Kimberlin v. Templeton, 102 N.E. 160, 55 Ind.App. 155.

62. N.C.—Virginia-Carolina Joint Stock Land Bank v. Watt, 178 S.E. 228, 207 N.C. 577.

63. Miss.—Garner v. Garner, 78 So. 623, 117 Miss. 694.

64. Tex.—Fauli v. City of Dallas, Civ.App., 97 S.W.2d 1031, error dismissed—Kimmins v. McKelvey, Civ.App., 12 S.W.2d 1085, error dismissed—Johnson v. Sherrill, Civ. App., 271 S.W. 276.

Protection of purchaser

Vendor giving full warranty deed specifically warranting title has duty to protect purchaser against any and all encumbrances existing and operating at time of sale.—Lear v. John, 6 La.App. 197.

65. Tex.—Adams v. Cox, Civ.App., 150 S.W. 1195.

66. Ala.—Andrews v. McCoy, 3 Ala. 920, 42 Am.D. 669.
15 C.J. p 1285 note 50.

67. Conn.—King v. Kilbride, 19 A. 519, 58 Conn. 109.
Mass.—Bemis v. Smith, 10 Metc. 194.
Mortgages assumed by grantee
Mass.—Gerber v. Bernstein, 3 N.E.2d 223.

Exception in added covenant

In a case where to a general warranty, deemed in legal effect to be a covenant for quiet enjoyment, there was added conjunctively a covenant against encumbrances, from which a mortgage on the lands conveyed and other lands was excepted, the court mentioned, but did not decide, several questions, including one as to whether the mortgage was excepted from the covenant of quiet enjoyment. It did decide, however, that the grantor's duties were contractual and that any failure to protect grantee or assigns against mortgage, if actionable, under circumstances, grew out of covenants, not deceit. Also it held that the clause as to "other lands," if capable of being classed as a distinct warranty, was not breached, it appearing without dispute that the mortgage did include other lands at the time the deed was made, and indeed at the time of the foreclosure, although at

that time some of the other lands had been released from the mortgage.—Keel v. Ikard, 133 So. 906, 222 Ala. 617.

Effect of exception as to other encumbrances

Where the grantor warrants the title except for certain specified mortgages, he warrants that it is free from other encumbrances.

Ala.—Rich v. King Land & Improvement Co., 148 So. 817, 226 Ala. 623.
Ill.—Trumbull v. Gale, 222 Ill.App. 113.

68. Ind.—Sebrell v. Hughes, 72 Ind. 186.

69. Va.—Washington City Sav. Bank v. Thornton, 2 S.E. 193, 83 Va. 157—Marbury v. Thornton, 1 S.E. 909, 83 Va. 702.

70. Ark.—Johnson v. Polk, 269 S.W. 571, 168 Ark. 201.
N.D.—Sommers v. Wagner, 131 N.W. 797, 21 N.D. 531.
15 C.J. p 1285 note 55.

71. N.D.—Smith v. Gaub, 123 N.W. 827, 19 N.D. 337.

72. Ohio.—Wolfe v. Eckert, 9 Ohio N.P.N.S., 109.
15 C.J. p 1285 note 56.

"All taxes" as including special assessments

The term "all taxes" in an exception from a covenant of general

of a tax or assessment lien against a grantee, due and unpaid at the time of the conveyance of the land with covenant of warranty, is a breach of the covenant,⁷³ even though, at the time of the execution of the deed, the grantor did not have knowledge of the lien.⁷⁴ Indeed, except where it is otherwise by virtue of statute,⁷⁵ an assessment or tax may, even before the amount thereof is ascertained, be such a lien as to constitute a breach of warranty in a deed.⁷⁶ Also the lien of unmatured installments of assessments may give rise to a breach;⁷⁷ and even though a statute providing that unmatured installments of special assessments shall not be deemed to be within the terms of a general covenant of warranty ordinarily will be accorded effect,⁷⁸ yet, despite such a statute, the contract of sale and deed may be so worded and construed as to subject the covenantor to liability for unmatured installments.⁷⁹ Furthermore, a covenant of war-

ranty may cover taxes previously assessed, although they do not fall due until the following year.⁸⁰

On the other hand, the covenant is not breached by future taxes or assessments⁸¹ or by special taxes or assessments which have not become liens at the time of the conveyance;⁸² and under some circumstances there is no liability on the covenant for taxes which have become delinquent or assessments which have become liens prior to the delivery of the deed, but after the making of the contract of sale, delivery of bond of title, placing of the deed in escrow, or delivery of possession to the purchaser.⁸³ The redemption by the grantee of premises when sold for taxes before the time to redeem has expired is not of itself a breach of the covenant of warranty.⁸⁴

There is, of course, no breach on account of a

warranty includes special benefit assessments.—*Building & Loan Ass'n of Jackson v. Woodward*, 131 So. 874, 159 Miss. 343.

Where covenantee assumes payment, in the deed, of all special assessments, levy of additional assessment after the date of the deed does not operate as breach of covenant of warranty.—*Kleinmeyer v. Willenbrock*, 210 N.W. 447, 203 Iowa 1049.

Taxes levied after specified year—Taxes for the years 1909, 1910, and 1911 on property formerly exempt, but conveyed to a nonexempt party in 1908, and not entered in the record of the board of assessors until 1912, when they were entered as back taxes, were not levied on the lots in question until subsequent to the year 1911, and did not constitute a breach of a warranty in a deed against all lawful claims "except taxes . . . levied subsequent to the year 1911."—*Willis v. Clark*, 221 Ill.App. 614.

73. Ala.—*Dothan Nat. Bank v. Hollis*, 103 So. 589, 212 Ala. 628.

Ga.—*Pone v. Barbare*, 196 S.E. 287, 57 Ga.App. 684.

Ill.—*Hagen v. Lehmann*, 148 N.E. 57, 317 Ill. 227, affirming 284 Ill.App. 395.

La.—*Long v. Grisham*, 123 So. 492, 11 La.App. 436.

Mass.—*Cohen v. Price*, 173 N.E. 690, 273 Mass. 303.

Tex.—*Lyon v. Gray*, Civ.App., 288 S.W. 545.

W.Va.—*Shelton v. Johnston*, 95 S.E. 958, 82 W.Va. 319.

15 C.J. p 1285 note 57.

74. Ga.—*Pone v. Barbare*, 196 S.E. 287, 57 Ga.App. 684.

Reassessment tax imposed after the execution of the deed but, under the law of the state, relating back to

the time when the property first became subject to be taxed, was a lien against the property at the time of the grant, although unknown at that time to either party to the deed.—*Nelson v. Gunderson*, 207 N.W. 408, 189 Wis. 139.

75. N.Y.—*Dowdney v. New York*, 54 N.Y. 186.

76. Tenn.—*Vaughan v. Vaughan*, 6 Tenn.App. 354, 358, quoting *Corpus Juris*.

15 C.J. p 1285 note 60.

77. Ga.—*Cheatham v. Palmer*, 167 S.E. 522 176 Ga. 227.

N.C.—*Coble v. Dick*, 140 S.E. 745, 194 N.C. 732.

78. Mo.—*United Brick & Tile Co. v. Ault*, 123 S.W.2d 39.

Okl.—*Patchell v. Garvin*, 168 P. 423, 66 Okl. 184—*Knight v. Clinkscales*, 153 P. 133, 51 Okl. 508.

79. Mo.—*United Brick & Tile Co. v. Ault*, 123 S.W.2d 39.

80. Mo.—*Fears v. State Bank of Naylor*, 31 S.W.2d 94, 224 Mo.App. 632.

81. Iowa.—*Wood v. Schwartz*, 236 N.W. 491, 212 Iowa 462.

Miss.—*Robertson v. Singleton*, 125 So. 421, 156 Miss. 220.

82. Ind.—*Robison v. Cato*, 137 N.E. 569, 79 Ind.App. 530.

N.C.—*Virginia-Carolina Joint Stock Land Bank v. Watt*, 178 S.E. 228, 207 N.C. 577—*Oliver v. Hecht*, 177 S.E. 399, 207 N.C. 481—*Foil v. Board of Drainage Com'rs of Big Cold Water Drainage Dist. No. 1 of Cabarrus County*, 135 S.E. 781, 192 N.C. 652.

Tex.—*Hoge v. Garcia*, Civ.App., 296 S.W. 982.

83. Purchaser treated as owner

Where purchaser was given possession of premises on execution of

deed placed in escrow, and on delivery of deed and final settlement between the parties was charged with all repairs, insurance, and interest on purchase price, and with installment assessed against the property for paying pursuant to proceedings had during interval between execution of deed and delivery thereof, and which the vendor had paid, the purchaser could not recover from vendor the amount of paying installments which subsequently became due, on theory that the paving certificates were encumbrances covered by the general warranty, since purchaser became invested with all benefits and chargeable with all burdens or ownership on execution of deed, in view of delivery of possession, and the construction placed upon the contract by the parties themselves as evidenced by the final settlement.—*Leeson v. City of Houston, Tex. Com.App.*, 243 S.W. 485, affirming, *Civ.App.*, 226 S.W. 763.

Fault of purchaser

Where a bond for title, which is transferred to successive purchasers, provides that the purchaser is to pay all taxes, and an intermediate purchaser of part of the land fails to pay taxes assessed after the contract of sale, whereupon such part is sold under tax execution, the vendor is not liable on his covenant of warranty in the deed to the last purchaser for this defect in the title, which is not caused by the vendor but is attributable to the fault of the purchaser.—*Finn v. Lifsey*, 150 S.E. 908, 169 Ga. 599, reversing *Lifsey v. Finn*, 145 S.E. 519, 38 Ga.App. 671, vacated 151 S.E. 392, 40 Ga.App. 735.

84. N.Y.—*Mead v. Stackpole*, 40 Hun 473.

paving charge which, although invalid, has been paid prior to the conveyance, so that it constitutes no lien at that time;⁸⁵ but it is held that, an unpaid tax lien of record, however invalid, is a cloud on the title and therefore ground for enforcement of the warranty.⁸⁶

A person may be liable on an unrestricted express warranty for taxes which accrued prior to his ownership.⁸⁷ However, a vendor who conveys land with warranty against all lawful claims of those claiming by, through, or under, him is not liable on the covenant to his grantee for taxes assessed against the property while in the possession of a third person, to whom the grantor had conveyed an equity of redemption, but who had subsequently reconveyed to the grantor.⁸⁸

g. Dower

A covenant of warranty affords protection against dower rights and is breached by the successful assertion of a ripened dower right.

The eviction of a grantee under a paramount right of dower is a breach of the covenant of warranty in the deed to him.⁸⁹ While the covenant is protection against a contingent right of dower,⁹⁰ yet, until assertion, the mere existence of a right of dower is not a breach of the covenant,⁹¹ especially in a deed by an heir to a coheir conveying the grantor's interest in the lands owned by decedent at his death.⁹² The covenantor may prevent a breach of his covenant by purchasing the dower interest for the benefit of his grantee;⁹³ but a release of dower contained in the same instrument as the covenant of general warranty does not adversely affect the covenant nor prevent its breach by a failure of title from some other cause.⁹⁴

h. Leases, Tenancies, and Acts of Tenants

An eviction of the grantee by reason of an unexpired lease or tenancy may constitute a breach of a covenant of warranty, as may a removal by a tenant of the grantor of permanent fixtures under an agreement giving him the right of removal.

In the absence of a statute to the contrary,⁹⁵ as a general rule the eviction of a grantee with covenant of warranty by reason of an unexpired lease or tenancy of the premises is a breach of the covenant of warranty,⁹⁶ unless the covenant recites existence of the lease and possession thereunder by the lessee⁹⁷ or unless the grantee with knowledge of the lease accepts attornment from the lessee.⁹⁸ The very object of the conveyance by warranty deed may have been to compel the grantor to oust the tenant in order that the grantee might have the full possession and enjoyment of the premises.⁹⁹ At any rate, where the land was in the possession of a tenant of the grantor at the time of the conveyance, no duty rested on the grantee to dispossess the tenant, but rather it became and was the duty of the grantor to deliver possession in accordance with the deed.¹ There are, however, a few cases which hold that the covenants of warranty in a deed are not broken by the existence of an outstanding lease.²

Removal of fixtures by tenant. In the absence of an express exception or reservation in the deed, the removal by a tenant of the grantor of permanent fixtures upon the premises granted, under an agreement giving the tenant the right of removal, is a breach of the covenant of warranty contained in the deed of conveyance.³

i. Highways, Rights of Way, and Other Easements

There may be a breach by, or in respect of, eas-

85. Miss.—Robertson v. Singleton, 125 So. 421, 156 Miss. 220.

86. Colo.—Wellshire Land Co. v. City and County of Denver, 87 P.2d 1, 103 Colo. 416.

87. Ga.—McEntyre v. Merritt, 175 S.E. 661, 49 Ga.App. 416.

88. Mass.—West v. Spaulding, 11 Metc. 556.

89. S.C.—De Witt v. Dowling, 91 S.E. 1040, 107 S.C. 51.
15 C.J. p 1284 note 36.

90. Fla.—Flood v. Graham, 54 So. 456, 61 Fla. 207, Ann.Cas.1912D 1137.

91. S.C.—Jeter v. Glenn, 43 S.C.L. 374.
15 C.J. p 1284 note 37.

92. Mo.—Aple-Hemmelmann Real Est. Co. v. Speibrink, 111 S.W. 480, 211 Mo. 671, 14 Ann.Cas. 452.
15 C.J. p 1284 note 38.

92. Ky.—Combs v. Combs, 114 S.W. 334, 130 Ky. 827.

93. Ill.—La Framboise v. Grow, 56 Ill. 197.
15 C.J. p 1284 note 43.

94. Ky.—Bacon v. Dickinson, 250 S.W. 807, 199 Ky. 121.

95. Ind.—Kellum v. Berkshire L. Ins. Co., 101 Ind. 455.
15 C.J. p 1285 note 44.

96. Mont.—Adams v. Durfee, 215 P. 664, 67 Mont. 315.
15 C.J. p 1285 note 45.

97. Iowa.—Spaulding v. Thompson, 93 N.W. 498, 119 Iowa 484.

98. Mo.—Anthony v. Rockefeller, 76 S.W. 491, 102 Mo.App. 326.

Wash.—Richardson v. Brower, 127 P. 1098, 71 Wash. 192.

Collection of part of rents and expiration of lease

Purchaser is not entitled to damages for breach of warranty in contract for sale of land in that land was encumbered by a lease, where such lease had expired before vendor sued for purchase price and purchaser had collected a part of rentals due on such lease from lessee.—Pritchett v. Shearer, Tex.Civ.App., 279 S.W. 305.

98. Mont.—Adams v. Durfee, 215 P. 664, 67 Mont. 315.

1. Mont.—Adams v. Durfee, *supra*.

2. Ind.—Hammond v. Jones, 83 N.E. 257, 41 Ind.App. 82.

Mich.—Simons v. Diamond Match Co., 123 N.W. 1132, 159 Mich. 241.

3. Mo.—Anthony v. Rockefeller, 76 S.W. 491, 102 Mo.App. 326.

15 C.J. p 1284 note 24.

ments, at least where they are private; but there is a conflict of authority as to whether the covenant is breached by public highways or railroad rights of way over the land conveyed.

The existence and use of a private right of way over granted premises, to which they were subject at the time of the conveyance, is a breach of the covenant of warranty,⁴ even though, as shown *supra* in § 39, the covenantee had knowledge, at the date of his deed, of the existence of the right of way. So also the existence of building restrictions upon land conveyed with a covenant of warranty is, upon enforcement, a breach of the covenant,⁵ or, at least, the easement created by building restrictions is a paramount right which may be so exercised, as to work a breach of the covenant.⁶ However, as to streets, highways, and other public rights of way, it is variously held that: A public highway over land conveyed with covenants of warranty is such an easement as to constitute a breach of the covenant;⁷ the covenant is not breached by the existence of a public street or highway in actual use over the land at the time of the conveyance,⁸ although the rule does not apply to a right of way unknown to the purchaser and not discernible by observation;⁹ and that a public alleyway or other public right of way over city property is a breach of covenant,¹⁰ while a public highway or other public right of way over rural property is not.¹¹ There is a like conflict of authority as to whether the existence of a railroad right of way across land at the time of its conveyance constitutes a breach of the covenant of warranty, it being decided in some cases that it does,¹² and in others that it does not.¹³ At any rate, there can be no recovery under the warranty on this ground where the railroad has for-

feited the right of way by failure to perform a condition in the grant to it.¹⁴ While there may be a recovery on the covenant for a properly granted pipe line right of way,¹⁵ it is otherwise as to alleged pipe line, telephone, or electric light rights of way which, because of the absence of written grants thereof, do not constitute encumbrances.¹⁶

The existence of a private easement, created prior to, and excepted from, the conveyance containing the covenant of warranty, is not a defense where the eviction was under title of the public.¹⁷

If the description of the land conveyed is such as to import a warranty that the streets which bound the land exist, a failure to open them is a breach of the covenant;¹⁸ and an eviction by paramount title from an easement in an alleyway or community driveway, passing under the deed as appurtenant to the premises, is a breach of the grantor's covenant of warranty;¹⁹ but the temporary interruption of an easement, although it may have existed at the time of the purchase and have continued until an action to recover the purchase money is brought, cannot be regarded as a breach of the covenant of warranty.²⁰

J. Exercise of Right of Eminent Domain

Unless it precedes the making of the covenant, the exercise of the right of eminent domain is not a breach of a covenant of warranty.

A covenantee cannot maintain an action upon the covenant of warranty in his deed, against the covenantor, in consequence of the exercise of the right of eminent domain by the government,²¹ unless such exercise preceded the making of the covenant.²²

4. Wash.—*Bank of Alaska v. Ashland*, 224 P. 7, 128 Wash. 572.

15 C.J. p 1283 note 22, p 1286 note 63.

5. Mass.—*Kramer v. Carter*, 136 Mass. 504.

6. Mass.—*Gallison v. Downing*, 138 N.E. 315, 244 Mass. 33.

Exercise of easement as eviction see *infra* § 112 b.

7. Kan.—*Turner v. State Bank of Ottawa*, 167 P. 1052, 101 Kan. 493. Mo.—*Elmore v. McNealey*, App., 236 S.W. 381, modifying 235 S.W. 164. 15 C.J. p 1286 note 66.

8. Kan.—*Miller-Carey Drilling Co. v. Shafter*, 61 P.2d 1320, 1324, 144 Kan. 508, quoting *Corpus Juris*.

N.Y.—*Grown Realty Corporation v. Levy*, 266 N.Y.S. 729, 143 Misc. 797.

Okl.—*Missouri State Life Ins. Co. v. Whisman*, 73 P.2d 130, 181 Okl. 168. 15 C.J. p 1286 note 68.

Under statute, no covenant of warranty will be considered broken by

the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed.—*Schmisseur v. Penn.*, 47 Ill.App. 278.

9. N.Y.—*Hymes v. Esty*, 22 N.E. 1087, 116 N.Y. 501, 15 Am.S.R. 421, reversing 36 Hun 147.

15 C.J. p 1286 note 69.

10. Wash.—*Bank of Alaska v. Ashland*, 224 P. 7, 128 Wash. 572.

11. Wash.—*Barth v. Benson*, 291 P. 474, 158 Wash. 569.—*Bank of Alaska v. Ashland*, 224 P. 7, 128 Wash. 572.—*Walquist v. Johnson*, 173 P. 735, 103 Wash. 30.

12. Ind.—*Quick v. Taylor*, 16 N.E. 583, 113 Ind. 540.

15 C.J. p 1286 note 71.

13. Ky.—*Patterson v. Jones*, 32 S.W. 2d 408, 235 Ky. 338.

15 C.J. p 1286 note 70.

14. Ky.—*Hunter v. Keightley*, 213 S.W. 201, 184 Ky. 835.

15. Okl.—*Missouri State Life Ins. Co. v. Whisman*, 73 P.2d 130, 181 Okl. 168.

16. Okl.—*Missouri State Life Ins. Co. v. Whisman*, *supra*.

17. N.J.—*De Long v. Spring Lake Beach Impr. Co.*, 66 A. 591, 74 N.J. Law 250.

18. Pa.—*Trutt v. Spotts*, 87 Pa. 339.

19. Tex.—*Weaver v. Propst*, Civ. App., 28 S.W.2d 872, 876, quoting *Corpus Juris*, error refused.

15 C.J. p 1287 note 77.

20. Ohio.—*Gest v. Kenner*, 2 Handy 86, 12 Ohio Dec., Reprint, 343.

21. Ga.—*Rabun Mineral & Development Co. v. Heyward*, 155 S.E. 324, 171 Ga. 322.

15 C.J. p 1286 note 73.

22. Mo.—*Scott v. Tanner*, App., 208 S.W. 264.

N.Y.—*Matter of Hamilton St.*, 127 N.Y.S. 1045, 69 Misc. 369.

§ 111. — Paramount Title or Right

It is essential to, but not alone sufficient to constitute, a breach of a covenant of warranty that the title or right under which the covenantee is evicted or to which he yields be paramount.

In order to constitute a breach of the covenant of warranty the title or right under which the covenantee is evicted or to which he yields must be paramount²³ and have been in existence at the date the warranty was made.²⁴ A title or right is superior and paramount where it prevails in an action²⁵ or is successfully asserted.²⁶ Conversely, a covenantor ordinarily is not liable to the covenantee for damages sustained by the latter by reason of an unsuccessful attack upon his title by a third person,²⁷ although it has been held that if the hostile title asserted is a legal title in fact outstanding against the grantee, but for equitable reasons not enforceable against him, he is entitled to recover from the covenantor the expenses incur-

red in defending his title.²⁸ A covenantee who, voluntarily or without suit, yields to an alleged paramount title or claim assumes the risk of its turning out not to be so.²⁹

Ordinarily the mere existence of an outstanding paramount title does not alone constitute a breach of a covenant of warranty;³⁰ as shown *infra* § 112 a, there must also be some hostile assertion of the adverse title.

§ 112. — Eviction

- a. Necessity
- b. Sufficiency

a. Necessity

With some exceptions, there is no breach of a covenant of warranty until there is an eviction, actual or constructive, or something equivalent thereto.

Unless the case is within an exception to the rule,³¹ an eviction,³² whether such eviction is

23. Ark.—Quinn v. Lee Wilson & Co., 207 S.W. 211, 137 Ark. 69.
Iowa.—Pope v. Coe, 225 N.W. 939, 208 Iowa 759.

Ky.—Towels v. Campbell, 264 S.W. 1107, 1108, 204 Ky. 591, 50 A.L.R. 175, quoting *Corpus Juris*—Burchett v. Blackburne, 248 S.W. 853, 198 Ky. 304, 34 A.L.R. 1425.

Miss.—Staton v. Henry, 94 So. 237, 130 Miss. 372.

N.C.—Cover v. McAden, 112 S.E. 817, 183 N.C. 641—Wilson v. Vreeland, 97 S.E. 427, 176 N.C. 504.

Pa.—Mylin v. Hetrick, 82 Pa.Super. 475, 39 Lanc.Rev. 63.

Tenn.—Young v. Brannan, 5 Tenn. App. 1—Cobb v. Sanders, 1. Tenn. App. 326.

Tex.—Graebner v. Limburger's Ex'rs, Com.App., 293 S.W. 100, reversing Limburger v. Graebner, Civ.App., 287 S.W. 1101—Freeman v. Anderson, Civ.App., 119 S.W.2d 1081.

Wash.—Hoyt v. Rothe, 163 P. 925, 95 Wash. 369.

Wyo.—Hawkins v. Stoffers, 276 P. 452, 40 Wyo. 226, rehearing denied 278 P. 76, 40 Wyo. 226.

15 C.J. p 1287 note 82.

24. Ky.—Towels v. Campbell, 264 S.W. 1107, 1108, 204 Ky. 591, 50 A.L.R. 175, quoting *Corpus Juris*.

N.C.—Cover v. McAden, 112 S.E. 817, 183 N.C. 641.

Tenn.—Young v. Brannan, 5 Tenn. App. 1.

15 C.J. p 1287 note 83.

25. Ind.—Van Dyke v. Replogle, 3 N.E.2d 95, 103 Ind.App. 372.

Ky.—Isaacs v. Maupin, 231 S.W. 49, 191 Ky. 527.

26. Ky.—Ware v. Owens, 3 Ky.L. 308.

27. U.S.—Burke v. Mountain Tim-

ber Co., D.C.Wash., 224 F. 591, affirmed 238 F. 881, 152 C.C.A. 15.
15 C.J. p 1283 note 19.

28. Iowa.—Smith v. Keeley, 125 N.W. 669, 146 Iowa 660.

29. Mass.—Gallison v. Downing, 138 N.E. 315, 244 Mass. 33.

Tex.—Felts v. Whitaker, Civ.App., 129 S.W.2d 682, error granted.

Covenantee who purchases outstanding title assumes the risk of judging correctly as to its validity.
—Coopwood v. McCandless, 54 So. 1007, 99 Miss. 364—Dyer v. Britton, 53 Miss. 270.

30. Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341.

Iowa.—Pope v. Coe, 225 N.W. 939, 941, 208 Iowa 759, citing *Corpus Juris*—McNair v. Sockriter, 201 N.W. 102, 199 Iowa 1176.

N.C.—Cover v. McAden, 112 S.E. 817, 820, 183 N.C. 641, citing *Corpus Juris*.

Pa.—Strong v. Nesbitt, 110 A. 250, 251, 267 Pa. 294, citing *Corpus Juris*.

Tex.—Love v. Minerva Petroleum Corporation, Civ.App., 105 S.W.2d 893—Shannon v. Childers, Civ.App., 202 S.W. 1030, error refused.

15 C.J. p 1288 note 89.

However, it is said that if there is an outstanding superior title to realty, to the one attempted to be passed by conveyance, and instrument contains warranty of title, breach of warranty is complete and cause of action arises at time of conveyance.—Felts v. Whitaker, Tex.Civ. App., 129 S.W.2d 682, error granted.

31. Ky.—Burchett v. Blackburne, 248 S.W. 853, 198 Ky. 304, 34 A.L.R. 1425.

32. U.S.—Elgmont Coal Co. v. Asher, D.C.Ky., 298 F. 1000.

Ala.—Murphree v. Starrett, 163 So. 647, 231 Ala. 123.

Ark.—Quinn v. Lee Wilson & Co., 207 S.W. 211, 137 Ark. 69—Dennis v. Long, 194 S.W. 237, 128 Ark. 420.

Conn.—Perkins v. August, 146 A. 831, 109 Conn. 452.

Idaho.—Bliss Town-Site Co. v. Morris-Roberts Co., 190 P. 1028, 33 Idaho 110.

Ky.—Jones v. Avondale Heights Co., 7 S.W.2d 949, 243 Ky. 135—Towels v. Campbell, 264 S.W. 1107, 1108, 204 Ky. 591, 50 A.L.R. 175, quoting *Corpus Juris*—Burchett v. Blackburne, 248 S.W. 853, 198 Ky. 304, 34 A.L.R. 1425—Hunter v. Keightley, 213 S.W. 201, 184 Ky. 835.

N.C.—Wolf Mountain Lumber Co. v. Buchanan, 136 S.E. 129, 192 N.C. 771—Lockhart v. Parker, 126 S.E. 813, 189 N.C. 138—Wilson v. Vreeland, 97 S.E. 427, 176 N.C. 504.

Tex.—Graebner v. Limburger's Ex'rs, Com.App., 293 S.W. 1100, reversing Limburger v. Graebner, Civ.App., 287 S.W. 1101.

Va.—Addington v. Fulton, 154 S.E. 565, 155 Va. 31.

Wash.—Hoyt v. Rothe, 163 P. 925, 95 Wash. 369.

15 C.J. p 1287 note 84.

Eviction from land or part thereof

Tex.—Dark v. Sheldon, Civ.App., 129 S.W.2d 830, followed in Connell v. Sheldon, 129 S.W.2d 832, Ferry v. Sheldon, 129 S.W.2d 832 and City State Bank & Trust Co. of McAllen v. Sheldon, 129 S.W.2d 833, error dismissed, judgment correct—Freeman v. Anderson, Civ.App., 119 S.W.2d 1081.

shown by the facts to be actual or constructive,³³ or something which in contemplation of law is equivalent to an eviction,³⁴ such as disturbance of possession,³⁵ under paramount title or right, see supra § 111, is necessary to constitute a breach of a covenant of warranty. As stated supra in § 111, the mere existence of an outstanding paramount title to land will not authorize a recovery by the grantee in an action for breach of the covenant; to warrant recovery there must be some hostile assertion of the adverse title.³⁶

The rule as to the necessity of an eviction or its equivalent is subject to certain exceptions³⁷ or, at least, apparent exceptions;³⁸ but a matter which in some cases is declared to be an exception may

in other cases, as appears hereinafter in § 112 b, be considered a constructive eviction. Exceptions are said to exist where: There was an entire want of title in the grantor;³⁹ he had only an equitable title with a right to legal title;⁴⁰ he was without title to the minerals;⁴¹ he is insolvent or a nonresident⁴² or has been guilty of fraud in the transaction;⁴³ the superior title is in the state;⁴⁴ or the covenantee did not, and could not, without committing a trespass, take possession under his deed.⁴⁵

b. Sufficiency

(1) In general

(2) Purchase or extinguishment of outstanding title or encumbrance

Eviction or threatened suit

Tex.—Westervelt v. Meuly, Civ.App., 216 S.W. 680.

Eviction or adjudication of inferiority of covenantee's title

Ky.—Ward v. Johnson, 113 S.W.2d 1132, 272 Ky. 234.

Eviction or acquisition or extinguishment of outstanding title or encumbrance

Mo.—Crosby v. Evans, App., 195 S.W. 514, certified questions answered 219 S.W. 948, 281 Mo. 202.
15 C.J. p 1289 note 28.

After unsuccessful attempt to evict grantee, suit by him on covenant will not lie against grantor to recover attorney's and surveyor's fees.—Upchurch v. White, 139 S.E. 81, 37 Ga. App. 100.

33. Ala.—Dallas Compress Co. v. Liepold, 88 So. 681, 205 Ala. 562.
Ark.—Dupree v. Steed, 298 S.W. 434, 174 Ark. 1179.

Conn.—Zandri v. Tendler, 193 A. 598, 123 Conn. 117, 111 A.L.R. 1280.—Beach v. Pisarek, 128 A. 30, 102 Conn. 126.

Neb.—Campbell v. Gallentine, 215 N.W. 111, 115 Neb. 789, 61 A.L.R. 1.

N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

N.Y.—Stanton v. Conley, 278 N.Y.S. 275, 244 App.Div. 84.—Sturmer v. Holden, 213 N.Y.S. 339, 215 App. Div. 33.

N.C.—Cover v. McAden, 112 S.E. 817, 183 N.C. 641.

Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.—Lindner v. Leopold, 5 Pa.Dist. & Co. 498, citing *Corpus Juris*.

Tex.—Love v. Minerva Petroleum Corporation, Civ.App., 105 S.W.2d 893.

Actual or implied eviction

Tenn.—Cobb v. Sanders, 1 Tenn.App. 326.

Actual eviction or surrender to paramount title

Neb.—Funke v. Fraas, 199 N.W. 336, 112 Neb. 541.

34. Ark.—Belleville Land & Lumber Co. v. Griffith, 6 S.W.2d 36, 177 Ark. 170.

Tenn.—Young v. Brannan, 5 Tenn. App. 1.

Tex.—Shannon v. Childers, Civ.App., 202 S.W. 1030, error refused.

35. Ky.—Towels v. Campbell, 264 S.W. 1107, 1108, 204 Ky. 591, 50 A.L.R. 175, quoting *Corpus Juris*.

Mo.—National Cypress Pole & Piling Co. v. Hemphill Lumber Co., 31 S.W.2d 1059, 325 Mo. 807.

Mont.—Green v. Baker, 214 P. 88, 66 Mont. 568.

N.C.—Wilson v. Vreeland, 97 S.E. 427, 176 N.C. 504.

15 C.J. p 1287 note 84.

36. Iowa.—Pope v. Coe, 225 N.W. 939, 941, 208 Iowa 759, citing *Corpus Juris*.—McNair v. Sockriter, 201 N.W. 102, 199 Iowa 1176.

N.C.—Cover v. McAden, 112 S.E. 817, 820, 183 N.C. 641, citing *Corpus Juris*.

Tenn.—Cobb v. Sanders, 1 Tenn.App. 326.

15 C.J. p 1288 note 90.

Covenantee has no right to presume that a superior title will be asserted or that he will be dispossessed until he actually feels its pressure upon him.—Hilburn v. Matheney, Tex.Civ.App., 227 S.W. 746.—Lumpkin v. Blewitt, Tex.Civ.App., 111 S.W. 1072.

37. Ky.—Jones v. Avondale Heights Co., 47 S.W.2d 949, 243 Ky. 135.

38. Mo.—Mackenzie v. Clement, 129 S.W. 730, 144 Mo.App. 114.

39. Ky.—Towels v. Campbell, 264 S.W. 1107, 1108, 204 Ky. 591, 50 A.L.R. 175, quoting *Corpus Juris*.
15 C.J. p 1288 note 85.

40. Ky.—Towels v. Campbell, supra quoting *Corpus Juris*.

Mo.—Mackenzie v. Clement, 129 S.W. 730, 144 Mo.App. 114.

15 C.J. p 1288 note 86.

41. Ky.—Stratton v. McGuire, 80 S.

W.2d 380, 249 Ky. 101.—Bayes v. Blair, 251 S.W. 623, 199 Ky. 455.

42. Ky.—Harper v. Wilson, 3 S.W. 2d 769, 223 Ky. 392.—Towels v. Campbell, 264 S.W. 1107, 204 Ky. 591, 50 A.L.R. 175.

43. Ky.—Crawford v. Baker, 32 S.W. 2d 340, 235 Ky. 784.—Harper v. Wilson, 3 S.W.2d 769, 223 Ky. 392.

44. Mich.—Staub v. Tripp, 226 N.W. 667, 248 Mich. 45, reversed on other grounds 235 N.W. 844, 253 Mich. 633.

45. Ky.—Foxwell v. Justice, 231 S.W. 509, 191 Ky. 749.

Tex.—Freeman v. Anderson, Civ.App., 119 S.W.2d 1081.

Wash.—Whatcom Timber Co. v. Wright, 173 P. 724, 102 Wash. 566.

Early rule has been relaxed to the extent that when one who takes under a deed attempts to take possession of the property purchased and finds another claiming under a superior title to his, and the latter denies him the right of possession and threatens enforcement of his rights through the courts or by pursuing other legal methods, such purchaser may, if outstanding title is superior to his own, resort to his remedy of suit for breach of warranty.—Felts v. Whitaker, Tex.Civ. App., 129 S.W.2d 682, error granted.

Lack of showing of inability to take possession

Where lands described in the field notes of a deed were located in a certain survey and because of a mistake in applying the field notes to the ground the grantee went into possession of a tract in another survey he could not, on being dispossessed by the owner, claim reimbursement from his grantor on his covenant of warranty, there being nothing to show that the grantee could not take possession of all the land which his deed described.—Crump v. Wilson, Tex.Civ.App., 260 S.W. 296.

- (3) Adverse possession
- (4) Governmental acts
- (5) Exercise of easement or other right
- (6) Legal process or proceedings

(1) In General

For the purpose of a breach of a covenant of warranty, there is a sufficient eviction where there is an implied or constructive eviction or such a disturbance in possession as to be equivalent to an actual eviction or ouster.

Eviction, in the sense of a breach of warranty of title, is a deprivation of the enjoyment of the whole or, as shown *infra* this section, a part of granted premises by reason of a paramount title or right.⁴⁶ There may be an eviction, under paramount title or right, and a breach of warranty without any actual physical ouster, eviction, or dispossession,⁴⁷ as where there is an implied⁴⁸ or constructive⁴⁹ eviction, or such a disturbance in title and posses-

sion as to be equivalent to an actual eviction or ouster.⁵⁰ It is sufficient if the grantee is compelled to yield to a paramount title to prevent actual eviction,⁵¹ especially where the deed passed no title to the grantee,⁵² this being a constructive eviction.⁵³ Also constructive eviction may be caused by the inability of the purchaser to obtain possession,⁵⁴ and where a grantor, without either title or possession, assumes to convey property with a covenant of warranty, there is at once a constructive eviction.⁵⁵

In a particular case, there may be no constructive eviction⁵⁶ or eviction of any kind.⁵⁷ The doctrine of constructive eviction has limitations which the court will not ignore where, to do so, would be without justification and would confuse the offices of covenants of seisin, and covenants of warranty.⁵⁸ There is neither actual nor constructive eviction where the covenantee continues in possession,⁵⁹

46. Mass.—Gallison v. Downing, 138 N.E. 315, 244 Mass. 33.

47. Cal.—Platner v. Vincent, 202 P. 655, 187 Cal. 443.

Iowa.—McNair v. Sockriter, 201 N. W. 102, 199 Iowa 1176.

Miss.—Brunt v. McLaurin, 172 So. 369, 178 Miss. 86—Middleton v. Howell, 90 So. 725, 127 Miss. 880.

Tex.—Felts v. Whitaker, Civ.App., 129 S.W.2d 682, error granted.

Contra Blydenburgh v. Cotheal, 8 N. Y.Super. 176—Lansing v. Van Alstyne, 2 Wend., N.Y., 563—Greenby v. Wilcocks, 2 Johns., N.M., 1, 3 Am.D. 379.

15 C.J. p 1289 note 92.

48. Tenn.—Cobb v. Sanders, 1 Tenn. App. 326.

49. Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341.

Where land is wild and unoccupied, actual eviction is not necessary, as the paramount title carries with it possession amounting to constructive eviction.—Jerome Hardwood Lumber Co. v. Munsell, 275 S.W. 709, 169 Ark. 201.

50. Mass.—Gallison v. Downing, 138 N.E. 315, 244 Mass. 33.

Destruction of timber
Mo.—Scott v. Tanner, App., 208 S.W. 264.

51. Ga.—Mizell v. Schubert, 121 S.E. 852, 81 Ga.App. 651.

Mass.—Gallison v. Downing, 138 N. E. 315, 244 Mass. 33.

Miss.—Middleton v. Howell, 90 So. 725, 127 Miss. 880.

N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

15 C.J. p 1289 note 94.

Hopeless contest

A warrantee need not fight in court or otherwise a force he cannot resist or make a hopeless contest of

another's right to title before he can yield to the title, right, or claim and maintain action for breach of warranty.—Felts v. Whitaker, Tex.Civ. App., 129 S.W.2d 682, error granted.

Lack of meritorious defense

Where the holder of the superior title actively and affirmatively asserts his claim and demands a release from the covenantee, and the latter makes an unsuccessful effort to acquire the superior title, he is not required to assert a defense, wholly without merit, under the title conveyed to him, but instead may yield to the superior title and resort to the warranty.—Love v. Minerva Petroleum Corporation, Tex.Civ.App., 105 S.W.2d 892.

Constant fear of law suit

Where a house on the improved premises in question encroaches on adjacent property and, if it is not removed, the covenantee will live constantly in fear of a law suit, he may remove the house and recover the cost of removal from the covenantor, even though the adjoining owner probably could not require removal because the existence of the encroachment for more than ten years created a continuous apparent servitude.—Schill v. Churchill, 123 So. 139, 11 La.App. 181.

Surrender rightful under circumstances

Where land for which grantee had contracted to pay ten thousand dollars was advertised for sale with other lands under a deed of trust, securing notes for twenty-seven thousand dollars, and grantee made unsuccessful effort to induce grantors to discharge encumbrance or protect his title from the sale, his surrender of possession, which he had a right, under the circumstances,

to make, did not preclude him from recovering from grantors for breach of warranty of title.—Sutton v. Cannon, 100 So. 24, 135 Miss. 368.

52. Kan.—Boling v. Brake, 45 P. 950, 4 Kan.App. 180.

53. N.Y.—Stanton v. Conley, 278 N. Y.S. 275, 244 App.Div. 84.

54. Mont.—Green v. Baker, 214 P. 83, 66 Mont. 568.

Possession of rights and privileges

There is a constructive eviction where, at the time of the conveyance, there is an outstanding royalty right attaching to the initial production of oil which makes it impracticable for any one to drill for oil on the site and prevents the covenantee from ever possessing the rights and privileges warranted to him.—Compton v. Trico Oil Co., Tex. Civ.App., 120 S.W.2d 534, error refused.

55. N.D.—Bull v. Beiseker, 113 N.W. 870, 16 N.D. 290, 14 L.R.A., N.S., 514. 15 C.J. p 1288 note 85.

56. Ark.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341.

57. Matters held not to constitute eviction

(1) Outstanding paramount title.—Hamilton v. Farmer, 292 S.W. 683, 173 Ark. 341.

(2) Defect in covenantee's title.—Lindner v. Leipold, 5 Pa.Dist. & Co. 498.

(3) Deduction of amount of outstanding local assessment from price on resale.—Sturmer v. Holden, 218 N. Y.S. 339, 215 App.Div. 33.

58. N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

59. N.Y.—Stanton v. Conley, 278 N. Y.S. 275, 244 App.Div. 84.

or at least where he has actual, undisturbed, undisputed, and unchallenged possession.⁶⁰ Where the covenantee continues to occupy the premises, there is a constructive eviction only when he submits by valid attornment to a claim by title paramount, so that, although continuing in possession, he ceases to hold under the subordinate title and begins a new holding under the paramount title.⁶¹ There is no eviction where the covenantee has not yielded to a paramount title and is not in a situation requiring him to yield presently to such a title as a matter of legal duty.⁶² Also a purely voluntary surrender of possession, without threat, menace, or well-founded belief that the outstanding title or right will be presently asserted or enforced, is not a constructive eviction.⁶³

Part of premises. There may be an eviction operating as a breach of a covenant of warranty where the covenantee is ousted from, deprived of the enjoyment of, or forced to yield to, a paramount title to a part of the premises conveyed,⁶⁴ although it has been held that an eviction from the occupied portion of a tract is not an eviction from the constructive possession of the unoccupied portion.⁶⁵

(2) Purchase or Extinguishment of Outstanding Title or Encumbrance

A sufficient constructive eviction exists where, to prevent an actual eviction, the covenantee purchases an outstanding paramount title, or removes a lawful, existing encumbrance, asserted against him on the land under such circumstances as to induce a well founded belief that it will be enforced.

There is a sufficient eviction to amount to a breach of a covenant of warranty when, to prevent an eviction, the covenantee purchases an outstanding paramount title asserted against him.⁶⁶ In Mississippi, while an action technically for breach of warranty would not lie, for want of a suf-

ficient eviction, where the paramount title was so purchased, yet an equivalent remedy was afforded by an action in assumpsit, or by suit in equity, and since the abolition of forms of action by the code the general rule may be said to prevail in Mississippi.⁶⁷ However, the purchase of an outstanding title is a constructive eviction when, and only when, the covenantee may be said to suffer an involuntary loss, as where an entry is made, suit is brought, or the outstanding title is asserted in some way and under such circumstances as induce a well founded belief that it will be enforced and under the menace thereof the covenantee purchases the adverse title.⁶⁸ Under a statute, considered *infra* § 112 b (6), making the commencement of a suit menacing possession an element of a cause of action on a covenant of warranty, the purchase of a paramount title will not support a suit on the covenant.⁶⁹

Under a covenant of general warranty, the covenantee or his successor in right may, without awaiting actual eviction, pay and remove a lawful, existing mortgage or other encumbrance asserted against the land, and recover the amount so paid from the covenantor.⁷⁰

(3) Adverse Possession

Adverse possession by a third person under paramount title or color of title at the date of the conveyance, as distinguished from adverse possession subsequent to the conveyance or a mere intrusion on land or a tortious possession without title or color of title, is a sufficient eviction to constitute a breach of a covenant of warranty.

Adverse possession at the time of the conveyance of a third person by virtue of a paramount title is regarded as a sufficient eviction at that time to constitute a breach of the covenant of warranty;⁷¹ and it has been held that a grantor, by refusing to

60. Pa.—*Strong v. Nesbitt*, 110 A. 250, 267 Pa. 294.

Refusal of vendee of covenantee to accept title is not a constructive eviction, the covenantee not being disturbed in his possession.—*Lindner v. Leipold*, 5 Pa. Dist. & Co. 498.

61. N.Y.—*Sturmer v. Holden*, 213 N. Y.S. 339, 215 App. Div. 33.

62. Ga.—*McElmurray v. Marshall*, 141 S.E. 670, 37 Ga. App. 725.

Mass.—*Gallison v. Downing*, 138 N. E. 315, 244 Mass. 33.

63. N.J.—*Greenwood v. Robbins*, 154 A. 333, 108 N.J. Eq. 122.

64. Idaho.—*Bliss Town-Site Co. v. Morris-Roberts Co.*, 190 P. 1028, 33 Idaho 110.

Mass.—*Gallison v. Downing*, 138 N.E. 315, 244 Mass. 33.

15 C.J. p 1239 note 1.

65. Miss.—*Green v. Irving*, 54 Miss. 450, 28 Am.R. 360.

66. Okl.—*Bronaugh v. John*, 221 P. 32, 96 Okl. 164.

15 C.J. p 1239 note 99, p 1290 note 9.

67. Miss.—*Coopwood v. McCandless*, 54 So. 1007, 99 Miss. 364.

15 C.J. p 1290 notes 11-15.

68. N.J.—*Kellog v. Platt*, 33 N.J. Law 328—*Greenwood v. Robbins*, 154 A. 333, 108 N.J. Eq. 122.

69. Colo.—*Ernst v. St. Clair*, 206 P. 799, 71 Colo. 353.

70. Ala.—*Dothan Nat. Bank v. Hollis*, 103 So. 589, 212 Ala. 628.

Ga.—*Cheatham v. Palmer*, 167 S.E. 522, 176 Ga. 227.

S.C.—*Morris v. Lain*, 180 S.E. 206, 176 S.C. 310, 100 A.L.R. 1189.

Judgment

(1) The rule has been considered

applicable to the payment of an encumbrance consisting of a judgment lien.—*Pee Dee Naval Stores Co. v. Hamer*, 75 S.E. 695, 92 S.C. 423.

(2) In some early cases, however, a different conclusion was reached. Ind.—*Hannah v. Henderson*, 4 Ind. 174.

La.—*Murray v. Bacon*, 7 Mart. N.S. 271.

71. Iowa.—*Fisher v. Paup*, 180 N.W. 167, 191 Iowa 296.

Ky.—*Pioneer Coal Co. v. Asher*, 276 S.W. 487, 210 Ky. 498, motion overruled 278 S.W. 833, 212 Ky. 286.

Tenn.—*Kitchen-Miller Co. v. Kern*, 91 S.W.2d 291, 293, 170 Tenn. 10, citing *Corpus Juris*.

Wash.—*Whatcom Timber Co. v. Wright*, 173 P. 724, 102 Wash. 566.

15 C.J. p 1290 note 16.

allow his grantee to enter and enjoy the premises conveyed and by maintaining an adverse interest in himself, commits a breach of his covenant of warranty.⁷² If the covenantor had no title, possession of third persons under color of title is sufficient to constitute a breach.⁷³ Where, however, the paramount title is in the warrantor, a tortious adverse possession does not constitute a breach of the covenant;⁷⁴ nor is it breached by the acquisition of title by a third person by adverse possession subsequent to the date of the conveyance;⁷⁵ and a mere intrusion on vacant land by one exercising no hostile or adverse possession is not such an eviction as to constitute a breach of the covenant of warranty in a deed to such land.⁷⁶

Hostile possession by government see *infra* § 112 b (4).

(4) Governmental Acts

Some, although not other, acts of the United States, a state, or a municipal corporation may constitute, or be equivalent to, an eviction.

Where the title to land attempted to be conveyed is in the public, there is such a hostile possession as amounts to an eviction the instant the deed is made.⁷⁷ However, this doctrine has been rejected as to tidal lands in an eastern state, which present a situation differing radically from public lands in a western state held for settlement and preëmption, and the view is taken that a constructive eviction should not be found to exist by reason of the single circumstance that title to tidal land is in the state where the covenantee is in possession which is peaceable and undisturbed and in no way challenged or threatened.⁷⁸ An eviction or the equivalent thereof may consist of: The final decision of the land department upon questions of title;⁷⁹ a sale of land by the government;⁸⁰ the action of

the state, through its duly constituted authorities, in forfeiting a survey;⁸¹ or a grant of lands, presumptively belonging to the state, by the legislature to a village and the laying out of a street thereon by the latter.⁸² On the other hand, a refusal to confirm a claim under a Spanish grant does not amount to an eviction;⁸³ and a United States survey of the whole land along a stream on which the tract sold is situated, over which the surveyors must have passed, is not an eviction.⁸⁴

(5) Exercise of Easement or Other Right

The exercise of an easement or other paramount right in the premises conveyed prevents the covenantee from having the free use of the property and is a sufficient eviction.

The assertion and exercise of an easement or other paramount right in premises conveyed with a covenant of warranty effectually prevents the covenantee from having the free use of the property and is a sufficient eviction to constitute a breach of the covenant.⁸⁵ The flowing of lands, under a prior grant, constitutes an eviction within a covenant of warranty,⁸⁶ at least as to the land so overflowed;⁸⁷ but it has also been held that the diversion of water from a stream passing through land conveyed with warranty is not a breach of the covenant.⁸⁸

(6) Legal Process or Proceedings

Subject to some variation in particular states or in cases where there are no other matters sufficient to constitute an eviction, a judgment, or process or sale thereunder, or any deprivation or yielding of possession by virtue of a legal proceeding, may be sufficient, but not necessary, to constitute an eviction.

A deprivation or yielding of possession by virtue of a legal proceeding constitutes an eviction.⁸⁹ It has been held that the covenantee cannot recover on the warranty if he surrenders possession with-

72. Ohio.—Jones v. Timmons, 21 Ohio St. 596.

73. Ala.—Caldwell v. Kirkpatrick, 6 Ala. 60, 41 Am.D. 30.
15 C.J. p 1291 note 17.

74. U.S.—Peters v. Bowman, Miss., 98 U.S. 56, 25 L.Ed. 91.—Noonan v. Lee, Wis., 2 Black 499, 17 L.Ed. 278.

75. Tex.—Felts v. Whitaker, Civ. App., 129 S.W.2d 632, error granted.—Schwarz v. Jones, 122 S.W. 956, 57 Tex.Civ.App. 603.

76. Wis.—McLennan v. Prentice, 55 N.W. 764, 85 Wis. 427.
15 C.J. p 1291 note 21.

77. N.M.—Beecher v. Tinnin, 189 P. 44, 26 N.M. 59.

N.C.—Cover v. McAden, 112 S.E. 817, 183 N.C. 641.
15 C.J. p 1292 note 49.

Assertion of paramount title is not necessary to amount to a constructive eviction where the paramount title is in the state or the United States.—Seldon v. Dudley E. Jones Co., 85 S.W. 778, 74 Ark. 348.

Corpus Juris is cited in a case which holds, however, that, by reason of a statute requiring a suit, eviction alone is not enough.—Ernst v. St. Clair, 206 P. 799, 800, 71 Colo. 353.

78. N.J.—Greenwood v. Robbins, 154 A. 333, 108 N.J.Eq. 122.

79. La.—Butler v. Watts, 13 La. Ann. 390.

80. Miss.—Green v. Irving, 54 Miss. 450, 28 Am.R. 360.—Glenn v. Thistle, 23 Miss. 42.

81. Tex.—Shannon v. Childers, Civ. App., 202 S.W. 1030, error refused.

82. N.Y.—Baker v. Johnson, 165 N. Y.S. 225, 178 App.Div. 230.

83. La.—Rightor v. Kohn, 16 La. 501.—Bessy v. Pintado, 3 La. 483.

84. La.—Keene v. Clark, 8 La. 114.

85. Md.—Wempe v. Schoentag, 163 A. 868, 163 Md. 647.
15 C.J. p 1292 note 42.

86. Mass.—Smith v. Richards, 28 N. E. 1132, 155 Mass. 79.

87. Me.—Harrington v. Bean, 36 A. 986, 89 Me. 470.

88. Conn.—Mitchell v. Warner, 5 Conn. 497.
15 C.J. p 1292 note 46.

89. Ga.—Reese v. Manget, 186 S.E. 380, 53 Ga.App. 637.

out any action having been brought to obtain possession;⁹⁰ and, by virtue of statute, a covenantee actually in possession may have no right of action for breach of covenant of warranty until his possession is menaced by the commencement of legal proceedings to obtain possession.⁹¹ However, the mere bringing of suit against the covenantee, not being dispossession, is not an eviction,⁹² nor is a verdict in ejectment not followed by a judgment.⁹³

Judgments generally. According to the modern authorities and the weight of authority generally, a final judgment or decree adverse to the covenantee's title or right to possession is sufficient eviction, or a sufficient substitute for, or equivalent of, eviction, to entitle him to sue for breach of the covenant of warranty,⁹⁴ provided the judgment is not void as to him;⁹⁵ but there are some authorities which contend that an adverse judgment in ejectment is not of itself an eviction such as will support an action for breach of a covenant of warranty.⁹⁶ At any rate, there may be a judgment or decree which does not constitute or amount to an eviction, such as an alternative judgment or decree,⁹⁷ a decree determining the existence of a contingency but not establishing any outstanding paramount title in any one who can presently assert an adverse claim,⁹⁸ or a judgment, finding, or adjudication that a person other than the covenantee is the owner of a fractional interest, subject to a life estate and without right to possession until the death of the life tenant.⁹⁹ Since, as indicated in the C.J.S. title *Navigable Waters* § 109, also 45 C.J. p 559 note 64, the ownership of tidewater flats is subject to the public easement

of the right of general navigation, a judgment declaring certain buildings erected on such premises a nuisance is not such an eviction as will constitute a breach of the covenant of warranty.¹

A judgment perpetually enjoining a grantee from using an easement which his grantor assumed to convey to him may be treated as an eviction;² but it is otherwise as to a temporary injunction against violation of building restrictions.³

It has variously been held that: Rendition of a money judgment in favor of persons holding an outstanding title in a suit to quiet title brought by one to whom land had been conveyed with covenants of warranty amounts to such an eviction as constitutes a breach;⁴ a judgment for damages only, not establishing title and not constituting a bar to an action in ejectment, is not in effect, an eviction;⁵ and that a personal judgment or decree for a sum in lieu of dower does⁶ or does not⁷ amount to an eviction.

In some states nothing less than a judgment constitutes sufficient eviction;⁸ but the general rule seems to be otherwise,⁹ it being permissible for the covenantee to yield notwithstanding there has been no judgment in ejectment against him,¹⁰ and, as shown above in § 112 b (1), it not being necessary for him to wage a hopeless contest before yielding. Where he does not yield, nothing short of a final judgment or decree amounts to an eviction.¹¹

Execution or other process. While it is not essential to an eviction that it be under, or by force of, legal process issued on or under a judgment,¹² a dispossession by physical compulsion un-

90. La.—*Minor v. Alexander*, 6 Rob. 166.

91. Colo.—*Stone v. Rozich*, 297 P. 999, 88 Colo. 399.

Statute contemplates suit in court for possession of the land, and not merely proceedings by a state board to sell the land.—*Ernst v. St. Clair*, 206 P. 799, 71 Colo. 353.

92. Mass.—*Gallison v. Downing*, 138 N.E. 315, 244 Mass. 33.

93. N.Y.—*Miller v. Avery*, 2 Barb. Ch. 582.

94. U.S.—*Edgemont Coal Co. v. Asher*, D.C.Ky., 298 F. 1000.

Ind.—*Van Dyke v. Replogle*, 8 N.E.2d 95, 103 Ind.App. 372.

Ky.—*Isaacs v. Maupin*, 231 S.W. 49, 191 Ky. 527.

Mass.—*Gallison v. Downing*, 138 N.E. 315, 244 Mass. 33.

Okl.—*Bronaugh v. John*, 221 P. 32, 96 Okl. 164.

15 C.J. p 1291 note 24.

95. Ky.—*Pritchard v. Smith*, 54 S.W. 717, 107 Ky. 483, 21 Ky.L. 1197.

96. Del.—*Evans v. Lewis*, 5 Del. 162.

15 C.J. p 1291 note 32.

97. Ill.—*Kirkendall v. Keogh*, 2 Ill. App. 492.

Tex.—*Hall v. Pierson*, 1 Tex.A.Civ. Cas. § 1210.

15 C.J. p 1291 note 30.

98. Iowa.—*McNair v. Sockriter*, 201 N.W. 102, 199 Iowa 1176.

99. Ark.—*Hamilton v. Farmer*, 202 S.W. 683, 173 Ark. 341.

1. Me.—*Montgomery v. Reed*, 69 Me. 510.

2. Ind.—*Scheible v. Slagle*, 89 Ind. 323.

3. Mass.—*Gallison v. Downing*, 138 N.E. 315, 244 Mass. 33.

4. Ind.—*Sarlls v. Beckman*, 104 N.E. 598, 55 Ind.App. 638.

5. Ky.—*Eversole v. Louisville & N. R. Co.*, 290 S.W. 467, 217 Ky. 601.

6. N.C.—*Jackson v. Hanna*, 53 N.C. 188.

S.C.—*De Witt v. Dowling*, 91 S.E. 1040, 107 S.C. 51.

7. Ohio.—*Johnson v. Nyce*, 17 Ohio 66, 49 Am.D. 444—*Tuite v. Miller*, 10 Ohio 382.

It is doubted whether the rule announced in the above cases would now be followed by the supreme court.—*Weyer v. Sager*, 21 Ohio Cir. Ct. 710.

8. U.S.—*Edgemont Coal Co. v. Asher*, D.C.Ky., 298 F. 1000.

Ky.—*Green v. Hammons*, 22 S.W.2d 422, 232 Ky. 59.

15 C.J. p 1289 note 96.

9. U.S.—*Edgemont Coal Co. v. Asher*, D.C.Ky., 298 F. 1000.

10. Mo.—*Eaker v. Harvey*, 179 S.W. 985, 192 Mo.App. 697.

11. Mass.—*Gallison v. Downing*, 138 N.E. 315, 244 Mass. 33.

12. U.S.—*Edgemont Coal Co. v. Asher*, D.C.Ky., 298 F. 1000.

N.C.—*Cover v. McAden*, 112 S.E. 817, 183 N.C. 641.

der process of law is an actual¹³ eviction.¹⁴ The levy of an execution against the covenantor on lands conveyed with covenant of warranty has been held such an eviction of the covenantee as to entitle him to an action on the covenant;¹⁵ but it has also been held that, where, after a sale of land, it is seized under an execution against the vendor and bought in by the vendee, the sheriff's deed transferring only the vendor's title, there is no eviction which will entitle the vendee to any claim except to be reimbursed the price of adjudication.¹⁶

The foreclosure of a mortgage or other lien is a sufficient constructive eviction to entitle the covenantee to sue for breach of the covenant of warranty,¹⁷ unless the foreclosure sale is invalid as to him because he was not made a party to the proceedings.¹⁸ This rule applies although the purchaser at the sale is the covenantee himself¹⁹ or his tenant;²⁰ and it has been held that the covenantee is not deprived of his right of action by the subsequent reversal of the judgment under which the sale was made.²¹ There is an eviction where the mortgagee takes possession under the judgment of foreclosure,²² or the purchaser at the foreclosure sale takes possession under the title which

he receives,²³ or there is an ouster of the covenantee under a writ of possession obtained by the purchaser.²⁴ So too, where upon condition broken the mortgagee may enter, such entry by him will constitute a sufficient constructive eviction to enable the covenantee to sue for breach of the covenant.²⁵ However, it is held that a foreclosure judgment alone does not constitute a breach of a covenant of warranty and that no cause of action for breach of the covenant arises until the land is sold under the judgment.²⁶ Indeed, there is early authority for the view that even a sale is not a breach where no deed has been executed to the purchaser and no suit to obtain possession has been begun by him.²⁷ A foreclosure of, or a proceeding to foreclose, a purchase-money mortgage given by the covenantee to the covenantor does not give rise to a right of action on the covenant.²⁸

§ 113. Covenant as to Use of Property

Questions relating to the performance or breach of covenants concerning the use of property are discussed in the C.J.S. title Deeds §§ 163-166, 169, also 18 C.J. passim p 386 note 16-p 393 note 7; p 402 note 7-p 404 note 27.

IV. ACTIONS FOR BREACH

§ 114. Nature and Form of Remedy

The usual remedy for breach of covenant is an action at law for damages, although in a proper case equitable relief may be secured.

The usual remedy for a breach of a covenant is

an action at law for damages.²⁹ While under certain circumstances, account, assumpsit, or debt may lie, as shown in the title Actions § 36, the most usual form of remedy at common law is an action of covenant to recover damages.³⁰

13. N.Y.—Stanton v. Conley, 278 N. Y.S. 275, 244 App.Div. 84.

14. Mass.—Garrison v. Downing, 138 N.E. 315, 244 Mass. 33.

15. Mass.—Whitney v. Dinsmore, 6 Cush. 124.

15 C.J. p 1292 note 40.

16. La.—Landry v. Gamet, 1 Rob. 362.

17. Tex.—Sherman v. Piner, Civ. App., 91 S.W.2d 1185.

15 C.J. p 1291 note 34.

18. Ill.—Ohling v. Luitjens, 32 Ill. 23.

15 C.J. p 1291 note 35.

19. Ill.—Claycomb v. Munger, 51 Ill. 273.

N.Y.—Cowdrey v. Coit, 44 N.Y. 382, 4 Am.R. 690, reversing 26 N.Y. Super. 210.

20. N.J.—Stewart v. Drake, 9 N.J. Law 139.

21. Ohio.—Smith v. Dixon, 27 Ohio St. 471.

22. Conn.—Zandri v. Tendier, 193 A. 593, 123 Conn. 117, 111 A.L.R. 1280.

23. Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

24. Ky.—Bynum v. Bailey, 265 S.W. 1110, 205 Ky. 384.

25. Mass.—Furnas v. Durgin, 119 Mass. 500, 20 Am.R. 341—White v. Whitney, 3 Metc. 81—Tufts v. Adams, 8 Pick. 547.

26. Tex.—Davis v. Teal, Civ.App., 200 S.W. 1166.

27. Ind.—Reasoner v. Edmundson, 5 Ind. 393.

15 C.J. p 1291 note 33.

28. Colo.—Stone v. Rozich, 294 P. 999, 88 Colo. 399.

Tenn.—Cobb v. Sanders, 1 Tenn.App. 326.

29. Tex.—Faull v. City of Dallas, Civ.App., 97 S.W.2d 1081, error dismissed—Kershner v. Walcott, Civ. App., 285 S.W. 902, reversed on other grounds Walcott v. Kershner, Com.App., 291 S.W. 195—Wilbarger County v. Robinson, 23 S.W. 823, 5 Tex.Civ.App. 10.

Va.—Hurst v. Williams, 160 S.E. 24, 157 Va. 124.

No remedy in rem

Breach of a covenant running with the land imposes a personal liability for damages, and does not impose a lien on the land in the nature of a judgment in rem.—Guild v. Wallis, 40 P.2d 737, 150 Or. 69, supplemented in other respects 41 P.2d 1119, 150 Or. 69, rehearing denied 42 P.2d 916, 150 Or. 69.

"Right of action" substantive

The obligation of a warranty and the right of action for its breach are both matters of substantive law, and the "right of action" should not be distinguished and regarded as matter of remedy or of adjective law.—Carpenter v. Herndon, 136 So. 577, 173 La. 239.

30. Tex.—Tinkle v. Tinkle, Civ.App., 110 S.W.2d 239, 240, citing Corpus Juris.

15 C.J. p 1292 notes 55, 56.

Action of covenant see title Covenant, Action of.

Covenant not running with land

The remedy for a breach of covenant which does not run with the

While an action on the covenants of a deed lies only at law,³¹ nevertheless, for matters which are peculiarly within equity jurisdiction, relief may be had in equity,³² and such jurisdiction is not confined by the limitations, nor founded on the principles, of an action of covenant in courts of law.³³ Relief may be had in equity where an assignee of a claim for breach of warranty takes only a part of the claim,³⁴ or in proper cases when the grantor is insolvent,³⁵ although equitable relief will not be granted where no adequate ground therefor exists,³⁶ and where enforcement of covenants would be inequitable, equity may decline to act and leave the parties to their action at law.³⁷

Neither a court of law nor of equity has jurisdiction to make whole a party damaged by a broken covenant of title by taking from the party in default an equal quantity of his land and bestowing it on the party injured.³⁸ The remedy on a deed containing covenants inter partes must depend on its terms considered with reference to the interest of the several individuals who are parties in the deed.³⁹ Since a grantee cannot recover for breach of a covenant for eviction from land not embraced in the deed, although it was intended to be included in the description, as shown infra § 116, the grantee's remedy in such a case is by proceedings in

equity to correct the deed, and not by an action on the covenants.⁴⁰ The remedy for breach of a covenant to support, in consideration of a conveyance of land, is not an action for cancellation of the deed, but for damages or specific performance.⁴¹

*Where the deed stipulates the remedy, such stipulation may be controlling.*⁴²

Election of remedies. A defrauded vendee may have his election in a proper case to sue in tort for the fraud or in contract for breach of the covenants of warranty in his deed, but if he relies on the covenants, he must confine himself to such remedy.⁴³ Where a covenant is coupled with a condition subsequent, the grantor may have an election to proceed on the one or the other.⁴⁴ A railroad's breach of covenant in a deed to it to ditch and fence its right of way may afford the grantor an election to sue for specific performance, or for damages to land, or for injury to crops.⁴⁵

§ 115. What Law Governs

The remedies on real covenants are governed by the law of the state wherein the land is located and by the law in force at the time of the making of the covenant.

The remedies on a real covenant running with the land are governed by the laws of the state wherein the land is located.⁴⁶ In all cases, the

land is by an action at law when same is adequate.—*Lowery v. May*, 104 So. 5, 213 Ala. 66.

Responding in damages

The legal responsibility of non-fulfillment of a covenant is that the party violating the covenant must respond in damages.—*In re Gaffers' Estate*, 5 N.Y.S.2d 671, 254 App.Div. 448.

31. Ohio.—*Millison v. Drake*, 175 N.E. 34, 37 Ohio App. 559, affirmed 174 N.E. 776, 123 Ohio St. 249.

32. Ala.—*Lowery v. May*, 104 So. 5, 213 Ala. 66.

Pa.—*Molony v. Belzer*, 14 Pa. Dist. & Co., 781, 46 Montg. Co. 262.

Tenn.—*Kenyon v. Russell*, 5 Tenn. App. 401.

15 C.J. p 1292 notes 59, 60.

Enforcement of covenants by persons not parties

Action to enforce restrictive covenants by persons not parties thereto is equitable.—*Clem v. Valentine*, 141 A. 710, 115 Md. 19.

Where covenant is dependent, the failure to perform it entitles the other party to the contract to rescission.—*Southern Colonization Co. v. Derfler*, 75 So. 790, 73 Fla. 924, L.R.A. 1917F 744.

33. Md.—*Clem v. Valentine*, 141 A. 710, 115 Md. 19.

34. W.Va.—*McConaughy v. Bennett*, 40 S.E. 540, 50 W.Va. 172.

35. Mo.—*Heady v. Hollman*, 158 S. W. 19, 251 Mo. 632—*Dudley v. Waldrop*, App., 183 S.W. 1095, 15 C.J. p 1293 note 62.

36. Ky.—*Shepherd v. Laviers*, 209 S. W. 17, 183 Ky. 246.

Va.—*Hurst v. Williams*, 160 S.E. 24, 157 Va. 124.

Rescission

The remedy for breach of covenant which is not a condition on which title rests is action for damages, and suit for rescission will not lie except for fraud in the transaction.—*Johnson v. Johnson*, Tex.Civ.App., 272 S.W. 225.

37. Fla.—*Edgewater Beach Hotel Corporation v. Bishop*, 163 So. 214, 120 Fla. 623.

Tenn.—*Brown v. Walker*, 14 Tenn. App. 587.

38. Pa.—*Doyle v. Brundred*, 41 A. 1107, 189 Pa. 113.

39. Vt.—*Sharp v. Conkling*, 16 Vt. 355.

40. Conn.—*Broadway v. Buxton*, 43 Conn. 282.

41. Mo.—*Reynolds v. Reynolds*, 136 S.W. 411, 234 Mo. 144.

Tex.—*Elliott v. Elliott*, 109 S.W. 215, 1142, 50 Tex.Civ.App. 272.

15 C.J. p 1293 note 69.

42. Ohio.—*New York Cent. R. Co. v. City of Bucyrus*, 186 N.E. 450, 126 Ohio St. 558, followed in *Bush v. Hague*, 191 N.E. 5, 128 Ohio St. 342.

43. Ky.—*Sellers v. Adams*, 228 S.W. 424, 190 Ky. 723.

44. Va.—*Neal v. State-Planters Bank & Trust Co.*, 184 S.E. 203, 166 Va. 158.

45. Ky.—*Chicago, M. & G. R. Co. v. Dodds & Johnson*, 131 S.W. 666, 167 Ky. 624.

46. Ala.—*Murphree v. Starrett*, 163 So. 647, 231 Ala. 123.

Ky.—*Harris v. Music*, 245 S.W. 845, 197 Ky. 114.

15 C.J. p 1293 notes 71, 72.

Law governing construction and effect of:

Personal covenants see supra § 21.

Real covenants see supra § 55.

Expenses of litigation

Law of state in which land was located, where parties contracted, and where litigation out of which claim arose was commenced and concluded controlled right to recover expenses, including attorneys' fees, in action for breach of covenant of general warranty.—*Richmond Fairfield Ry. Co. v. U. S. Housing Corporation*, 72 F.2d 78, 63 App.D.C. 285.

law in force at the time of sale determines the vendor's obligation on his covenants.⁴⁷

§ 116. Grounds of Action in General

A breach of a valid covenant constitutes a cause of action, although in the absence of actual injury no more than nominal damages may be recovered.

A breach of covenant confers a right of action on the covenantee as in the case of a breach of any other kind of contract,⁴⁸ and whatever constitutes a breach of a covenant furnishes a ground of action thereon,⁴⁹ and it has been held that this is true notwithstanding no actual loss was sustained by reason of the breach,⁵⁰ although this doctrine is not adhered to in all cases;⁵¹ and with respect to covenants restricting the use of land, it has been said that an indispensable element of an action to enforce them is that its enforcement will benefit the party suing or its violation will injure him.⁵² As pointed out *infra* §§ 142-150, it is well settled that unless actual loss has been occasioned by breach of a covenant, only nominal damages can be recovered.

The execution of a purchase-money mortgage does not extinguish the mortgagor's right of action for subsequently broken covenants in the deed to him.⁵³ A void judgment of eviction is no ground

of action for breach of a covenant of warranty,⁵⁴ nor is an eviction from land not embraced in the deed;⁵⁵ notwithstanding the deed was intended to cover land not embraced in the description;⁵⁶ and it has been held that an action for breach of the warranty contained in the covenants of a deed does not arise out of the act of the vendor in fraudulently concealing from, or misrepresenting to, the purchaser the boundaries of the property conveyed.⁵⁷

A grantee under a void deed cannot recover on the warranty of his grantors, although if the deed was made by mistake as to the interests of the parties the grantee may recover back the purchase money.⁵⁸ A grantee with covenants of warranty who voluntarily purchases an outstanding title after he has conveyed the land cannot recover on his grantor's warranty.⁵⁹ An action for breach of a covenant of seisin is available only to grantee where the title continues in a third person when the action is brought.⁶⁰ Mutual mistake, later corrected, in including plaintiff's land in a conveyance to a third person does not deprive plaintiff of ownership so as to preclude his recovery on a warranty on such land.⁶¹

While each breach of a covenant is itself a sepa-

47. La.—Durnford's Succ., 8 Rob. 438, 11 Rob. 183—Elwards v. Martin, 19 La. 284—Fletcher v. Cave-Hier, 10 La. 116.

S.C.—Aiken v. McDonald, 20 S.E. 796, 43 S.C. 29, 49 Am.S.R. 817.

48. Okl.—Ball v. Coyle, 233 P. 750, 108 Okl. 30.

49. Ala.—Lewis v. Harris, 31 Ala. 689.

15 C.J. p 1293 note 75.

What constitutes breach of particular covenants see *supra* §§ 87-113.

Private contractual right in which public not concerned

A covenant in a deed that the premises should not be used as a "commercial establishment or for any offensive purpose or occupation," not being a right merely incident to the general public, but being contractual, plaintiff need not show the act he seeks to restrain constitutes a nuisance sufficient to give residents of the neighborhood affected thereby a right of action.—Hunter v. Wood, 120 A. 781, 277 Pa. 150.

Voluntary payment of a judgment constituting an encumbrance is sufficient to support recovery for the amount paid against a vendor covenanting against encumbrances.—De Carli v. O'Brien, 41 P.2d 411, 150 Or. 35, 97 A.L.R. 693.

50. Mich.—Jennings v. Sheldon, 6 N. W. 96, 44 Mich. 92.

15 C.J. p 1293 note 76.

Enforcement without awaiting substantial damages

Grantor had right to enforce deed covenant requiring grantee to maintain ditches, and compel grantee's successors to perform covenant, and was not compelled to wait until damages were a considerable amount.—Guild v. Wallis, 40 P.2d 737, 150 Or. 69, supplemented 41 P.2d 1119, 150 Or. 69, rehearing denied 42 P.2d 916, 150 Or. 69.

51. N.C.—Ross v. Davis, 29 S.E. 338, 122 N.C. 265.

15 C.J. p 1293 note 77.

Technical breach without damage

Where plaintiffs purchased from defendant lot sixteen, but, through mutual mistake, a misdescription of the property as lot fifteen, occurring in former deeds, was repeated in deed to plaintiffs and plaintiffs remained in possession of lot sixteen without molestation and defendant prayed for reformation of deed, and where there were no encumbrances against lot sixteen aside from delinquent taxes for which settlement was adjudged, and plaintiffs were never molested, plaintiffs were held to have no cause of action on covenant that realty was free from encumbrances and that grantors and successors should war-

rant and defend it to grantees against lawful claims and demands of all persons, and were not entitled to recover from grantor purchase price with interest, nor costs incurred in unsuccessful ejectment action against owner of lot fifteen.—Byerly v. Odd Fellows' Home of Oregon, 42 P.2d 905, 149 Or. 665.

52. N.Y.—St. Stephen's Protestant Episcopal Church v. Church of Transfiguration, 114 N.Y.S. 623, 130 App.Div. 166, reversing 112 N.Y.S. 403, 248 Misc. 560.

53. Or.—Wesco v. Kern, 59 P. 548, 60 P. 563, 36 Or. 433.

54. Ky.—Pritchard v. Smith, 54 S.W. 717, 107 Ky. 483, 21 Ky.L. 1197.

55. Ga.—Littleton v. Green, 61 S.E. 593, 130 Ga. 692.

N.C.—Dixon v. Jones, 51 S.E. 903, 139 N.C. 75.

56. Ga.—Littleton v. Green, 61 S.E. 593, 130 Ga. 692.

57. Ky.—Lainhart v. Gabbard, 89 S.W. 10, 28 Ky.L. 105.

58. Va.—Mundy v. Vawter, 3 Gratt. 518, 44 Va. 518.

59. Mo.—Munford v. Keet, 55 S.W. 271, 154 Mo. 36.

60. N.Y.—Havens v. Howell, 278 N.Y.S. 223, 243 App.Div. 806.

61. Ky.—Shearer v. Huff, 49 S.W.2d 589, 248 Ky. 653.

rate and distinct ground of action,⁶² yet, in order to avoid a multiplicity of suits, it is proper to unite in one action claims for breaches occurring at different times.⁶³ An interference with the contract rights of a covenantee, after the commencement of an action by him for breach of the covenant in question, cannot avail him in such action.⁶⁴ In case of covenants running with the land, the last grantee is on breach entitled to an action against the covenantor, and need not allege nor prove that the intermediate assignees have kept their covenants.⁶⁵

§ 117. Conditions Precedent

- a. In general
- b. Removal of encumbrance
- c. Mutual and concurrent covenants
- d. Action by intermediate grantee
- e. Waiver of conditions

a. In General

Performance of conditions precedent is prerequisite to maintenance of suit on a covenant, and the terms of the covenant and other circumstances are determinative of whether any particular matter such as demand, rescission, or reformation of a deed does or does not constitute a condition precedent.

Performance of conditions precedent is essential to action on a covenant,⁶⁶ as where the covenant is to do something on demand, and demand, therefore, becomes prerequisite to maintenance of an action for breach.⁶⁷ On the other hand, there need be no performance as to matters which are not conditions precedent;⁶⁸ this is so where the covenantor has notice that the contingency has arisen on which the covenant is to be performed and a de-

mand of performance is not generally required.⁶⁹ Where a grantor conveys real estate unconditionally, in consideration of a nominal sum and the grantee's assumption by a contemporaneous written contract to pay the grantor's debts, a breach of the grantee's agreement does not give the grantor a right of action unless the grantee has refused to pay such debts and the grantor has paid them or some of them.⁷⁰

Exhaustion of remedies by covenantee. A covenantee against whom a judgment has been rendered in an action of trespass is not bound, before suing on his covenant of warranty, to bring ejectment against plaintiffs in the trespass suit, unless his grantor pays the judgment or tenders security for the expenses of the ejectment suit;⁷¹ and if, after his purchase, he learns of the existence of an alleged superior title, the bringing of a suit by him to clear the title will not be considered as an invitation to assert the superior title, which in the absence of collusion will defeat his right to recover on the warranty.⁷²

Reformation of deed. An action for breach of covenant of title cannot be maintained until after reformation of the deed, where the description in a deed is so defective that it can convey no title,⁷³ or where the land sold cannot be identified by the description in the deed;⁷⁴ but where the description is merely insufficient, but not such as to render the deed void, recovery can be had without reformation of the deed.⁷⁵

Rescission, or an offer to rescind, is not a condition precedent to a purchaser's suit for damages for breach of warranty,⁷⁶ although it may be prerequisite to recovery of the purchase price.⁷⁷

62. Ky.—Breckenridge v. Lee, 3 A.K.Marsh. 446—Davis v. Harrison, 1 A.K.Marsh. 514.
15 C.J. p 1294 note 89.

63. Ala.—Mobile, etc., R. Co. v. Gilmer, 5 So. 138, 85 Ala. 422.

64. Me.—Safford v. Annis, 7 Me. 168.

65. Ill.—Brady v. Spurek, 27 Ill. 478.

Minn.—Allis v. Foley, 147 N.W. 670, 126 Minn. 14.

66. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138.

La.—Simpson v. Simpson, 141 So. 50, 174 La. 530.

Written notice to repair

Covenantee cannot recover for repairs voluntarily made, where required written notice was not given covenantor to make them.—Simpson v. Simpson, *supra*.

In Maine before the assignee of a grantee can recover on covenants in

the deed of the original grantor he must release his grantor from covenants contained in the later deed.—Prescott v. Hobbs, 30 Me. 345.

67. N.H.—Winnipiseogee Paper Co. v. Eaton, 18 A. 171, 65 N.H. 13.
W.Va.—Johnson v. Ohio River R. Co., 56 S.E. 200, 61 W.Va. 141.
15 C.J. p 1294 note 95.

68. Cal.—Chandler v. Bowman, 279 P. 1041, 100 Cal.App. 221.

Ky.—Pence v. Duvall, 9 B.Mon. 48.

Payment of purchase money

Payment of the purchase money is not a condition precedent to a right of action for breach of the covenant of warranty.—Pence v. Duvall, *supra*.

Notice of breach as not prerequisite

It is unnecessary for a warrantee to notify a warrantor of the breach of any of his covenants of warranty in a deed conveying real estate before bringing suit for his damages.—

Smith v. Gaines, 97 So. 739, 210 Ala. 245.

69. N.C.—Jones v. Balsley, 69 S.E. 327, 154 N.C. 61.
15 C.J. p 1294 note 94.

70. Tex.—Closner v. Chapin, Civ. App., 168 S.W. 370.

71. Pa.—McCune v. Scott, 18 Pa. Super. 263.

72. Tex.—Coleman v. Luetcke, Civ. App., 164 S.W. 1117.
15 C.J. p 1295 note 14.

73. Ind.—Gordon v. Goodman, 98 Ind. 269.

74. La.—Pacot v. Prevost, 42 So. 263, 117 La. 765.

75. Ind.—Calton v. Lewis, 21 N.E. 475, 119 Ind. 181.

76. Cal.—Chandler v. Bowman, 279 P. 1041, 100 Cal.App. 221.

77. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138.

b. Removal of Encumbrance

Broadly speaking, a covenantee may not sue at law for breach of a covenant against encumbrances until he has been evicted or removed the encumbrance, although this rule is relaxed in equity; and in the case of a covenant against liability, suit may be maintained when the liability accrues without prior payment by the covenantee.

While a grantee with covenants against encumbrances may, on satisfying the encumbrance, maintain a suit for breach of the covenant, as shown supra § 98, he cannot recover the amount thereof until he has removed or extinguished the encumbrance,⁷⁸ and he cannot avail himself of a breach of the covenant, either by action or by set-off, without proving that the sum paid by him to remove the encumbrance was either actually due, or else that he had notified the vendor requiring him to remove the encumbrance within a specified time.⁷⁹ Generally speaking, a covenantee cannot maintain an action at law for substantial damages for breach of a covenant against encumbrances, such as mortgages, unless he has been evicted or has paid and extinguished the encumbrance,⁸⁰ although this general rule governing actions at law does not necessarily control suits in equity, where the rule is sub-

ject to relaxation,⁸¹ and, accordingly, it is not an indispensable prerequisite to every suit that plaintiff first pay and extinguish the encumbrance.⁸² Thus, an action may be maintained on a covenant against liability the moment the liability accrues, and payment by the covenantee is not prerequisite to maintenance of the action,⁸³ and on breach of an absolute covenant by the grantor to pay and satisfy an outstanding lien, the covenantee may recover the amount of the lien, although he had neither paid, nor been called on to pay, anything on account thereof.⁸⁴ A grantor covenanting against encumbrances who seeks affirmative relief against his grantee, as on a foreclosure of a purchase-money mortgage, must credit outstanding encumbrances for which he is liable.⁸⁵ As has been indicated supra § 98, grantees are not deprived of the right to recover on the covenant against encumbrances because they were not able to redeem the land by paying off the encumbrance, where they exhausted their defenses against the claim in the courts. It has been held that, until a purchaser is evicted, he cannot sue for breach of covenants of warranty unless the vendor is insolvent, a non-resident, or guilty of fraud.⁸⁶

Offer to return land

Where a conveyance provides for a refund of the entire purchase money in the case of "each acre of land the title to which shall fail," meaning prima facie at least a total failure, purchaser was not entitled to recover the entire purchase price for partial failure without offering to return the land.—*Alger-Sullivan Lumber Co. v. Union Trust Co.*, supra.

Placing covenantor in statu quo

Recovery or abatement of entire purchase price, title having partially failed, can only be allowed grantee on rescission and returning of covenantor to statu quo.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 215 Ala. 212.

Rescission as result rather than condition precedent

In an action by a purchaser on a covenant as to the quality of soil with agreement to return contract price if the soil was not as warranted, resulting rescission of the contract is necessarily implied to prevent vendee from getting back his money and keeping the land, but such a rescission is not a condition precedent to the vendee's right to recover the purchase price, but is a result flowing therefrom, and failure of plaintiff to restore possession or to tender it prior to commencement of suit is not fatal to plaintiff's right of recovery on the warranty, since the court in its decree will impose such conditions for defendant's protection as may be just, in view of *Comp.St. § 6411*.—*Wilson v. Sunny-*

side Orchard Co., 196 P. 302, 33 Idaho 501.

78. Cal.—*Wright v. Boggess*, 141 P. 1082, 24 Cal.App. 533.

Iowa.—*Harwood v. Lee*, 52 N.W. 521, 85 Iowa 622.

Mass.—*Coburn v. Litchfield*, 132 Mass. 449.

79. Wash.—*Green v. Tidball*, 67 P. 84, 26 Wash. 333, 55 L.R.A. 379. 15 C.J. p 1294 note 6.

Statutory provisions

Gen.L. c 184 § 22, making the grantor in a deed with a covenant against encumbrances liable for all damages sustained by the grantee, his successors or assigns, in removing any actual or apparent encumbrances appearing from any public record, by its plain words, applies only where the encumbrances have been removed by the party seeking to recover.—*Gallison v. Downing*, 138 N.E. 315, 244 Mass. 33.

Taxes

By way of dictum, it has been said in a case involving different facts, that in an action founded on a covenant against encumbrances in a deed to recover the amount of taxes paid by a grantee or a remote grantee, the covenant would be considered one of indemnity, and payment would be prerequisite to recovery of more than nominal damages.—*Brinton v. Johnson*, 208 P. 1028, 35 Idaho 656.

80. Miss.—*Simon v. Williams*, 105 So. 487, 140 Miss. 854, 44 A.L.R. 402.

Mo.—*Crosby v. Evans*, App., 195 S.W.

514, certified questions answered 219 S.W. 948, 281 Mo. 202.

Or.—*Pearson v. Richards*, 211 P. 167, 172, 106 Or. 78, citing *Corpus Juris*.

15 C.J. p 1272 note 43, p 1274 note 73.

Claim not matured

"A purchaser of a defective title, while still holding the land, cannot refuse to pay therefor, nor can he maintain a suit on the covenants of warranty until actually evicted, or having actually acquired or extinguished the outstanding superior title or incumbrance. The reason is that he cannot base a suit or counterclaim on a demand not fully matured, and such demand is not matured till he has been evicted or has extinguished a valid superior title or lien."—*Crosby v. Evans*, App., 195 S.W. 514, 516, certified questions answered 219 S.W. 948, 281 Mo. 202.

81. Or.—*Pearson v. Richards*, 211 P. 167, 172, 106 Or. 78, citing *Corpus Juris*.

15 C.J. p 1327 note 80.

82. Or.—*Pearson v. Richards*, 211 P. 167, 106 Or. 78.

83. Or.—*Pearson v. Richards*, 211 P. 167, 106 Or. 78.

84. Or.—*Pearson v. Richards*, 211 P. 167, 172, 106 Or. 78, citing *Corpus Juris*.

15 C.J. p 1294 note 7.

85. Idaho.—*Brinton v. Johnson*, 208 P. 1028, 35 Idaho 656.

86. Ky.—*Harper v. Wilson*, 3 S.W. 2d 769, 223 Ky. 890.

c. Mutual and Concurrent Covenants

In the case of mutual and concurrent covenants, performance or tender thereof by one party is ordinarily a condition precedent to suit against the other.

In cases of mutual concurrent covenants, where the acts to be done are simultaneous, neither party can maintain an action for a failure on the part of the other without showing a performance or a tender of performance on his own part,⁸⁷ although it has been held that, where the covenant of each, and not the expected performance, is the consideration, each may recover without showing performance on his part.⁸⁸

d. Action by Intermediate Grantee

Ordinarily, an intermediate grantee cannot recover for breach of covenant unless he has first paid or otherwise sustained damages in connection therewith.

Although there is some early authority to the contrary,⁸⁹ the general rule is that an intermediate grantee cannot maintain an action against his immediate or remote grantor until he has been damaged, that is, has either been evicted or compelled to pay damages on his own covenant, or has paid off and satisfied his obligations,⁹⁰ unless the suit is brought in the name of the intermediate grantee for the benefit of the person evicted.⁹¹

e. Waiver of Conditions

Conditions precedent to maintenance of a suit for breach of covenant may be waived.

A person entitled to avail himself of a condition precedent who waives it by a denial of plaintiff's right of action for the breach,⁹² or by proceeding to fulfill on his part,⁹³ cannot plead it in bar of an action on the covenant for negligent performance on his part.

§ 118. Defenses

A valid defense to a suit for breach of covenant may lie in the lack of a good cause of action in plaintiff or in some matter precluding his maintenance of the suit, such as estoppel, fraud, or mistake.

Broadly speaking, one sued for breach of covenant may interpose as a valid defense anything militating against the existence of the cause of action or the right to maintain it,⁹⁴ and matters which do neither will not constitute proper defenses.⁹⁵ The covenantor's own wrongful acts or neglect,⁹⁶ or his ignorance of law,⁹⁷ afford no defense in an action for breach of covenant, nor does the fact that another was liable with the covenantor.⁹⁸ Where the alleged breach is as to shortage of acreage, it is no defense that the sale was not by the acre but in gross,⁹⁹ and where the purchase was by subdivisions and not by acreage, that there was an excess acreage in some subdivisions to balance complete loss of other subdivisions through failure of title affords no defense.¹ The covenantor may interpose any defense against the grantee that he may have against another who is the real party in interest,² and a defense valid against immediate

Necessity of eviction to constitute breach see *supra* § 112.

Proof of eviction

In action for breach of warranty of title, a suit against plaintiff to restrain him from interfering with a drain was not available to prove an eviction when instituted after the institution of the action for breach of warranty. Nothing short of a final decree in suits to enjoin an alleged violation of building restrictions and an interference with a drain would constitute an eviction and authorize an action for breach of warranty of title, and hence, where such final decrees were entered long after the action for breach of warranty was brought, there was no proof of eviction.—*Gallison v. Downing*, 138 N.E. 315, 244 Mass. 33.

87. Ky.—*Hawley v. Mason*, 9 Dana 32, 33 Am.D. 522.
N.Y.—*Magee v. Palmer*, 134 N.Y.S. 1040, 150 App.Div. 356—*Gould v. Banks*, 8 Wend. 562, 24 Am.D. 90—*Cunningham v. Morrell*, 10 Johns. 203, 6 Am.D. 332.

88. Ky.—*Clay v. Straugham*, 5 T.B. Mon. 386.

89. La.—*Simmins v. Parker*, 4 Mart. N.S. 200—*Goodwin v. Chesneau*, 3 Mart.N.S., 409.

90. Ohio.—*Lyons v. Chapman*, 178 N.E. 24, 40 Ohio App. 1.
Tenn.—*Morrow v. Baird*, 38 S.W. 1079, 114 Tenn. 552, 4 Ann.Cas. 974.

91. Tex.—*McPike v. Smith*, Civ.App., 209 S.W. 815.

15 C.J. p 1295 note 20.

92. Ky.—*Chicago, etc., R. Co. v. Wilson*, 76 S.W. 138, 25 Ky.L. 525.

93. N.Y.—*Betts v. Perine*, 14 Wend. 219.

94. U.S.—*Salatich v. Hellen*, D.C. Cal., 4 F.Supp. 474.

95. Pa.—*Mylin v. Hetrick*, 82 Pa.Super. 475, 39 Lanc.L.Rev. 63.

Absence of breach see *supra* §§ 87–113.

Set-off and counterclaim see the C.J. S. title Set-Off and Counterclaim § 17, also 15 C.J. p 1295 note 22.

96. Ala.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 215 Ala. 212.

97. Mich.—*Staub v. Tripp*, 226 N.W. 667, 248 Mich. 45, reversed on other

grounds 235 N.W. 844, 253 Mich. 633.

98. Mo.—*Alexander v. Schreiber & Hagen*, 13 Mo. 271.

99. Conn.—*Stillman v. Thompson*, 67 A. 528, 80 Conn. 192.

15 C.J. p 1296 note 38.

97. U.S.—*White v. Murray*, Pa., 218 F. 933.

Iowa.—*Gerald v. Elley*, 45 Iowa 322.

15 C.J. p 1296 note 30.

Counsel's failure to make proper title examination

If attorney for seller of property failed carefully to examine title, loss must be borne by seller, not by purchaser, to whom he gave warranty deed and affidavit of title.—*Delco Holding Co. v. Rosenthal*, 164 N.Y.S. 785.

98. Mo.—*Adkinson v. McKay*, 172 S.W. 33, 186 Mo.App. 391.

15 C.J. p 1296 note 46.

99. Tex.—*Larkin v. Trammel*, 105 S.W. 552, 47 Tex.Civ.App. 548.

15 C.J. p 1296 note 52.

1. U.S.—*McGinley v. Martin*, C.C.A. Mo., 275 F. 267.

2. Conn.—*Mereness v. Delemos*, 101 A. 8, 91 Conn. 651.

grantees may be equally effective against remote grantees,³ subject to rules governing equities between the original parties, considered *supra* § 87.

In an action on a covenant, defendant may plead an attachment execution against plaintiff, which has been served on himself as garnishee, although such plea is neither in abatement nor in bar of the action, for the purpose of qualifying the judgment according to the facts.⁴

Estoppel or waiver may furnish valid defenses to suits to enforce a covenant,⁵ although such a defense may not successfully be interposed where the facts do not support the claim of estoppel⁶ or of waiver.⁷

Fraud and mistake. Fraud or false representations,⁸ or a mistake of fact,⁹ may constitute a valid defense to a suit for breach of covenant, although it has been held that the grantor cannot set up fraud as a defense without returning the consideration,¹⁰ and that a mistake in the description of the premises does not constitute a defense,¹¹ since the deed may be reformed and the mistake corrected in equity;¹² but it has also been held that where by mistake land was included in a deed

which the grantor did not own, and which the grantee did not intend to buy, such fact was an equitable defense to an action for a breach of the covenant of warranty in the deed.¹³

§ 119. — Other Breaches

The covenantee's acquiescence in other breaches of covenant may, under some circumstances, serve as a valid defense where the other breaches related to the same covenant as that sued on, but not where the other breaches related to different and distinct covenants.

Long continued abandonment or acquiescence in violation of a restrictive covenant may forfeit the right of relief for defendant's breach thereof.¹⁴ Plaintiff's failure to object to violations of covenants by persons other than defendant will not necessarily preclude his obtaining relief for defendant's violation,¹⁵ although where a covenantee knowingly permits others so to violate restrictive covenants as, in effect, to abrogate the purpose of the restrictions and to alter the general scheme originally contemplated, he may thereby lose his right to relief against defendant.¹⁶ The breach of another distinct and independent covenant in the same agreement is no defense to an action for breach of covenant,¹⁷ and the right to enforce one

3. Ind.—*Evans v. Bolley*, 137 N.E. 619, 79 Ind.App. 196.

4. Pa.—*Kase v. Kase*, 34 Pa. 128.

5. Ill.—*Mayer v. Metropolis Theatre Co.*, 21 N.E.2d 815, 301 Ill.App. 50. Tex.—*Dellaughter v. Hargrove*, Civ. App., 40 S.W.2d 253.

6. Cal.—*Chandler v. Bowman*, 279 P. 1041, 100 Cal.App. 221.

Ill.—*Mayer v. Metropolis Theatre Co.*, 21 N.E.2d 815, 301 Ill.App. 50. Me.—*Caron v. Marholm*, 147 A. 419, 128 Me. 339.

Mich.—*Signalgo v. Begun*, 207 N.W. 799, 234 M.ch. 246—*Smith v. Byrne*, 175 N.W. 138, 208 Mich. 104.

N.Y.—*Callanan v. Keenan*, 121 N.E. 376, 224 N.Y. 503, reversing 166 N.Y.S. 71, 179 App.Div. 405, rehearing denied 122 N.E. 877, 225 N.Y. 662.

Tex.—*Abernathy v. Adoue*, Civ.App., 49 S.W.2d 476.

W.Va.—*Shelton v. Johnston*, 95 S.E. 958, 82 W.Va. 319.

Estoppel of predecessor as not running against grantee

A grantee under deed was not estopped from enforcing restrictive covenant incorporated by reference in deed by which defendant acquired title to his lot because grantee's predecessors in title were allegedly guilty of such conduct as to estop them from claiming restrictive covenant against defendant.—*Smith v. Pindar Real Estate Co.*, 200 S.E. 131, 187 Ga. 229.

7. Ariz.—*Continental Oil Co. v. Eenemore*, 299 P. 132, 38 Ariz. 132.

Mich.—*Burns v. Terzian*, 207 N.W. 913, 233 Mich. 627.

Mo.—*Pierce v. St. Louis Union Trust Co.*, 278 S.W. 338, 311 Mo. 262.

N.Y.—*Chesebro v. Moers*, 134 N.E. 842, 233 N.Y. 75, 21 A.L.R. 1270, reversing 183 N.Y.S. 914, 196 App. Div. 930.

Or.—*Western Grain Co. v. Beaver Land-Stock Co.*, 253 P. 539, 120 Or. 678.

Tex.—*Abernathy v. Adoue*, Civ.App., 49 S.W.2d 476—*Green v. Gerner*, Civ.App., 283 S.W. 615, affirmed. Com.App., 289 S.W. 999.

Wash.—*Johnson v. Mt. Baker Park Presbyterian Church*, 194 P. 536, 113 Wash. 458.

Covenant as to freedom of soil from alkali

The right of a vendee to recover on a covenant that the soil is free from alkali is not waived by going into possession with knowledge that the soil is impregnated with alkali to the extent mentioned in the warranty, or by cultivating the land, or by making a cropping contract in regard to it.—*Wilson v. Sunnyside Orchard Co.*, 196 P. 302, 33 Idaho 501.

8. Ky.—*Vonderhite v. Walton*, 7 Ky. L. 766.

Wis.—*Lyndon Lumber Co. v. Sawyer*, 116 N.W. 255, 135 Wis. 525. 15 C.J. p 1297 note 53.

9. Ala.—*Prestwood v. Carlton*, 50 So. 254, 162 Ala. 327.

Conn.—*Rich v. Atwater*, 16 Conn. 409. 15 C.J. p 1297 note 54.

Mistake as to assumption of encumbrances

In an action for breach of a covenant against encumbrances, defendant may not insist that it was intended that plaintiff was to take subject to an encumbrance not expressly excepted in the deed, where he noticed the oversight or mistake at the time he signed the deed.—*Neeley v. Lane*, Tex.Civ.App., 205 S.W. 154.

10. Ala.—*Blackmon v. Quennelle*, 66 So. 608, 189 Ala. 630.

11. Ind.—*Wright v. Nipple*, 92 Ind. 310.

Mo.—*Lambert v. Estes*, 13 S.W. 284, 99 Mo. 604.

Wis.—*Delap v. Taber*, 16 Wis. 654.

12. N.Y.—*Johnson v. Taber*, 10 N.Y. 319.

13. Mo.—*Stewart v. Hadley*, 55 Mo. 235.

15 C.J. p 1297 note 53.

14. Fla.—*Steph v. Moore*, 114 So. 455, 94 Fla. 313.

15. Mass.—*Jenney v. Hynes*, 184 N.E. 444, 282 Mass. 182.

N.Y.—*McCain Realty Co. v. Aylesworth*, 219 N.Y.S. 59, 128 Misc. 408.

16. Ind.—*Schwartz v. Holycross*, 149 N.E. 699, 33 Ind.App. 658.

17. Md.—*Keefer v. Zimmerman*, 22 Md. 274.

N.Y.—*Gallon v. Hussar*, 158 N.Y.S. 895, 172 App.Div. 393—*Thompson v. Diller*, 146 N.Y.S. 438, 161 App. Div. 98.

covenant is not affected by acquiescence in the violation of another and distinct covenant.¹⁸ The mere existence of a right to recover nominal damages on a covenant against encumbrances does not prevent a recovery of substantial damage on the covenant of warranty, where there is a subsequent eviction.¹⁹

§ 120. — Want or Failure of Consideration

Want of or failure of consideration for a conveyance or other instrument may or may not afford a defense to suit for relief for breach of a covenant therein, in accordance with the circumstances involved and the law of the jurisdiction wherein the action is brought.

Independently of statute, it has generally been held that want or failure of, or fraud in the consideration of, an instrument is no defense to an action on a covenant contained therein,²⁰ although there is some authority to the contrary,²¹ and it has been held that one merely holding the legal title to land who conveys it without consideration to the beneficial owner at the latter's direction is not liable on the covenant against encumbrances for failure to pay an encumbrance on the land assumed by the beneficial owner in the transaction by which he acquired the beneficial ownership.²² It has also been held that while natural love and affection between near relatives is a sufficient consideration to support a deed, it will not render obligatory a mere covenant or promise.²³ Where there has been collusion between the grantor and the grantee, as where land is conveyed without consideration, for the purpose of enabling the grantee to establish adverse possession under color of title, both parties knowing that the grantor had no title, there can be no recovery on the covenants in the deed.²⁴ Where the statute provides that the measure of damages in an action for breach of warranty shall be the

consideration received by the grantor, no recovery can be had for a breach of warranty in a voluntary conveyance.²⁵ It has been held that a mutual building restriction covenant between lot owners has sufficient consideration to support an action for its breach.²⁶

§ 121. Jurisdiction and Venue

At common law, an action brought by a remote grantee for breach of a covenant running with the land should be laid in the county where the land lies, although under statutes abolishing the distinction between local and transitory actions it may be brought in a different county or jurisdiction, as where the covenant was made.

At common law, as between the original parties to a conveyance, an action for breach of the covenants founded on privity of contract is transitory;²⁷ but where the action is brought by a remote grantee on a real covenant, it being then based on privity of estate, the action must be brought in the county where the land lies,²⁸ except where by statute the common-law distinctions between local and transitory actions no longer exist, and the law where the contract, or covenant, was made may be applied.²⁹

§ 122. Time to Sue and Limitations

A covenantee's suit on the covenant is premature if brought before breach, and such suit should be brought within such time after breach as may be limited by statute, or in any event without unreasonable delay.

A covenantee may not sue for damages until there has been a breach of the covenant,³⁰ as by eviction breaching a covenant of warranty or other particular breach of a particular covenant, as considered supra §§ 87-113, although his right of action arises immediately on breach of the covenant,³¹ as shown in connection with limitations

18. *Hawaii*.—Town & Country Hokes, Limited v. Spitz, 31 *Hawaii* 653.

Mich.—Polk Manor Co. v. Manton, 265 *N.W.* 457, 274 *Mich.* 539.

N.Y.—Lattimer v. Livermore, 72 *N.Y.* 174.

19. *N.J.*—Smith v. Wahl, 98 *A.* 261, 88 *N.J.Law* 623.

20. *Ind.*—Beasley v. Phillips, 50 *N.E.* 488, 20 *Ind.App.* 182.

Mass.—Comstock v. Son, 28 *N.E.* 296, 154 *Mass.* 389.

Minn.—Randall v. Macbeth, 84 *N.W.* 119, 81 *Minn.* 376, 83 *Am.S.R.* 387.

15 *C.J.* p 1297 notes 72, 73.

21. *Iowa*.—Rice v. Rice, 119 *N.W.* 714—Richards v. Iowa Homestead Co., 44 *Iowa* 304, 24 *Am.R.* 745—Knadler v. Sharp, 86 *Iowa* 232.

Tenn.—Calcote v. Elkin, 15 *S.W.* 85.

22. *N.C.*—Deaver v. Deaver, 49 *S.E.* 113, 137 *N.C.* 240.

23. *N.Y.*—Duvoll v. Wilson, 9 *Barb.* 487, disapproving dictum *Hayes v. Kershow*, 1 *Sandf.Ch.* 258.

Tenn.—Calcote v. Elkin, 15 *S.W.* 85.

15 *C.J.* p 1298 note 77.

Good, as distinguished from valuable, consideration, has been held insufficient to support the covenants in a deed.—Wilbur v. Warren, 10 *N.E.* 263, 104 *N.Y.* 192, 25 *Wkly.Dig.* 276.

24. *Tex.*—Glenn v. Mathews, 44 *Tex.* 400.

25. *S.C.*—Ex parte Hardin, 13 *S.E.* 615, 34 *S.C.* 377, 27 *Am.S.R.* 820.

13 *L.R.A.* 723.

26. *Mich.*—Erichsen v. Tapert, 138 *N.W.* 330, 172 *Mich.* 457.

27. *Pa.*—Rowe v. Thompson, 6 *Pa. Dist. & Co.* 606.

15 *C.J.* p 1295 note 23.

28. *Mass.*—Clark v. Scudder, 6 *Gray* 122.

15 *C.J.* p 1295 note 26.

Cause of action arising out of state

The text rule is not affected by the fact that the cause of action arose out of the state.—White v. Sanborn, 6 *N.H.* 240.

29. *Ind.*—Worley v. Hineman, 33 *N.E.* 260, 6 *Ind.App.* 240.

15 *C.J.* p 1295 note 25.

30. *Ala.*—Murphree v. Starrett, 163 *So.* 647, 231 *Ala.* 123.

N.J.—Welltoff v. Kohl, 143 *A.* 628, 103 *N.J.Eq.* 454, modified in other respects 147 *A.* 390, 105 *N.J.Eq.* 181, 66 *A.L.R.* 1317.

31. *Ill.*—Meyers v. Veres, 245 *Ill.* App. 127.

Rule as applicable to "any covenant"

"The courts are united in holding that upon breach of any covenant it

in the C.J.S. title Limitations of Actions § 139, also in 15 C.J. p 1299 notes 92-98. Even in the case of a covenant in *præsent*i breached, if at all, as soon as made, the covenantee may sue immediately on breach,³² although he may be limited to nominal damages, as more particularly discussed *infra* §§ 142-150. The covenantee's right to relief will be barred where he delays suit for an unreasonable time after breach amounting to laches,³³ or where he fails to sue within such period, if any, as may be limited by statute,³⁴ although the action will not be barred if brought within the time so limited.³⁵

What law governs. The limitation of actions for breach of covenant is governed by the *lex fori*,³⁶ just as is the limitation of actions for breach of contract generally, as shown in the C.J.S. title Limitations of Actions § 28, also 37 C.J. p 730 note 21.

§ 123. Parties

- a. Parties plaintiff
- b. Parties defendant

ends and a right of action arises as on an ordinary chose in action."—*Parker v. Beasley*, 54 P.2d 687, 689, 40 N.M. 68.

32. N.M.—*Parker v. Beasley*, *supra*. Ohio.—*Lyons v. Chapman*, 178 N.E. 24, 40 Ohio App. 1.

33. Ga.—*Hollenshead v. Partridge*, 104 S.E. 206, 150 Ga. 521.

Tenn.—*Pace v. Watson*, App., 126 S.W.2d 404.

Laches not shown

(1) Generally.

N.J.—*Polhemus v. De Lisle*, 130 A. 618, 98 N.J.Eq. 256—*Camp v. Krulewitch*, 127 A. 669, 97 N.J.Eq. 384.

N.Y.—*McCain Realty Co. v. Aylesworth*, 219 N.Y.S. 59, 128 Misc. 408.

(2) When a vendor expressly covenants that the soil is practically free from alkali and agrees to return the contract price should it prove to have alkali sufficient to harm its productiveness, provided it is properly drained and farmed, an action on such warranty, although brought in equitable form, is not barred by lapse of time short of period of statute of limitations, unless delay has been inexcusable, or special circumstances exist making recovery inequitable; and there is no inexcusable delay where action is brought within a few months of purchase.—*Wilson v. Sunnyside Orchard Co.*, 196 P. 302, 33 Idaho 501.

(3) Covenant against encumbrances, not running with land, creates no privity between grantor and remote grantee, who, suffering eviction under encumbrance and suing on

covenant for quiet enjoyment, is not chargeable with laches for failure to remove encumbrance.—*Knight v. Cox*, 245 P. 250, 31 N.M. 325, 45 A.L.R. 510.

34. Tenn.—*Pace v. Watson*, App., 126 S.W.2d 404.

Utah.—*East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co.*, 233 P. 280, 65 Utah 560.

15 C.J. p 1298 note 89.

In New Jersey there is no statute of limitations in an action for breach of a covenant against encumbrances.—*Smith v. Smith*, 101 A. 254, 90 N.J.Law 282.

35. Iowa.—*Yancey v. Tallock*, 61 N.W. 997, 93 Iowa 386.

15 C.J. p 1298 note 89.

36. U.S.—*Flowers v. Foreman*, Md., 23 How. 132, 16 L.Ed. 405.

N.Y.—*New York L. Ins. Co. v. Aitken*, 26 N.E. 732, 125 N.Y. 660, reversing 11 N.Y.S. 349, 58 N.Y.Super. 586.

15 C.J. p 1298 note 89.

37. U.S.—*Farni v. Tesson*, Ill., 1 Black 309, 17 L.Ed. 67.

Me.—*Mitchell v. Kendall*, 45 Me. 234.

Md.—*Boyd v. Kienzle*, 46 Md. 294.

38. Me.—*Mitchell v. Kendall*, 45 Me. 234.

Md.—*Boyd v. Kienzle*, 46 Md. 294.

15 C.J. p 1300 note 27.

39. U.S.—*Seymour v. Western R. Co.*, N.C., 1 S.Ct. 123, 106 U.S. 320, 27 L.Ed. 103—*Calvert v. Bradley*, D.C., 57 U.S. 580, 16 How. 580, 14 L.Ed. 1066—*Philadelphia, W. & B. R. Co. v. Howard*, Md., 54 U.S.

a. Parties Plaintiff

Whether persons entitled to maintain an action on a covenant may be joined as parties plaintiff depends on the nature of their interest; when such interest is several, they need not be joined, but when it is joint, the action must be joint. Failure to show legal excuse for nonjoinder is fatal.

The question as to who may or must sue for breach of a personal covenant is discussed in § 35 *supra*, and as to who may or must sue for breach of a real covenant, in §§ 80-85 *supra*.

Joinder of plaintiffs. The propriety of the joinder or the nonjoinder of parties plaintiff in an action for breach of covenant is to be ascertained from the nature of the interest of the persons entitled to maintain the action.³⁷ If the interest of the parties suing for breach of covenant is several, the action may be several;³⁸ if joint, it must be joint;³⁹ and the terms or language of the covenant do not control this principle.⁴⁰ The fact that one of several joint covenantees did not execute the instru-

307, 13 How. 307, 14 L.Ed. 157—*Himes v. Schmehl*, C.C.A.Pa., 257 F. 69.

Ky.—*Burks v. Pointer*, 1 B.Mon. 65.

Me.—*Mitchell v. Kendall*, 45 Me. 234.

Mass.—*Montague v. Smith*, 13 Mass. 396—*Capen v. Barrows*, 1 Gray 376.

W.Va.—*Cummings v. United Fuel Gas Co.*, 182 S.E. 789, 791, 116 W.Va. 599, citing *Corpus Juris*.

15 C.J. p 1301 note 28.

Heirs or devisees of grantee may maintain a joint action on a covenant of warranty.—*Crisfield v. Storr*, 36 Md. 129, 11 Am.R. 480—15 C.J. p 1301 note 28 [d].

Effect of nonjoinder

Purchaser, seeking to recover from vendor for breach of warranty against encumbrances amount which purchaser had paid to satisfy judgment which was encumbrance against premises, by admitting receipt of certain sum from title insurer and by failing to join insurer as coplaintiff, waived right to recover from vendor amount obtained from insurer.—*De Carl v. O'Brien*, 41 P.2d 411, 150 Or. 35, 97 A.L.R. 693.

40. Me.—*Mitchell v. Kendall*, 45 Me. 234.

15 C.J. p 1300 note 27, p 1301 note 28.

Distinct duties

If the covenant is, joint in its terms yet runs to each of the covenantees as a certain and distinct duty to each, the covenant is several and they have each a separate cause of action and they need not join in a suit for a breach thereof.—*Ford v. Bronaugh*, 11 B.Mon., Ky., 14.

ment is immaterial,⁴¹ and it is not necessary that all of the parties should be named in the instrument, it being sufficient that they are so described therein that they can be identified.⁴²

Excuse for failure to join. If there is any legal ground for omitting the name of one of the covenantees, it is necessary to show such excuse for his nonjoinder, otherwise the omission is fatal.⁴³

Failure of remote grantee to bring in immediate grantee does not prevent the parties from litigating a controversy not concerning such immediate grantee.⁴⁴

b. Parties Defendant

Unless statutes otherwise provide, persons jointly liable on the covenant must be made parties defendant; but persons severally liable may not be joined as parties defendant. Where the liability is joint and several, the action may be against one or all of the parties liable. On the death of a joint obligor the survivor only is a proper party defendant.

The persons who are liable on personal covenants are discussed in § 36 supra, and the persons who are liable on real covenants are discussed in § 86 supra while the liability of heirs on the covenants of an intestate relating to land is treated in the C.J.S. title Descent and Distribution § 126, also 15 C.J. p 1262 note 51—p 1263 note 58, and 18 C.J. p 950 note 41—p 951 note 60, and of devisees on covenants of the testator relating to land, in the C. J.S. title Wills § 1315, also 15 C.J. p 1263 notes 59—61, and 69 C.J. p 1219 note 77—p 1220 note 82.

Joint obligation but several interest

When the interest of the covenantees is several, each may sue separately, although the obligation is joint.

Ky.—Thomas v. Pyke, 4 B'bb 418.
Me.—Mitchell v. Kendall, 45 Me. 234, 235.

Vt.—Sharp v. Conkling, 16 Vt. 355.

Several obligation but joint interest

Where the legal interest in a covenant or cause of action is joint, and the covenant in terms is several, the action must be by joint plaintiffs.—Capen v. Barrows, 1 Gray, Mass., 376.

41. U.S.—Seymour v. Western R. Co., N.C., 1 S.Ct. 123, 106 U.S. 320, 27 L.Ed. 103—Philadelphia, W. & B. R. Co. v. Howard, Md., 13 How. 307, 14 L.Ed. 157.

Ark.—Hays v. Lasater, 3 Ark. 565.

Reason for rule

"It is settled that if one of two covenantees does not execute the instrument, he must join in the action, because whatever may be the beneficial interest of either, their legal interest is joint, and if each were to sue, the court could not

know for which to give judgment."—Philadelphia, W. & B. R. Co. v. Howard, Md., 54 U.S. 307, 13 How. 307, 337, 14 L.Ed. 157.

42. U.S.—Seymour v. Western R. Co., N.C., 1 S.Ct. 123, 106 U.S. 320, 27 L.Ed. 103.

43. Ark.—Hays v. Lasater, 3 Ark. 565—Porter v. Clements, 3 Ark. 364.

44. Iowa.—Harris v. Schrimper, 169 N.W. 750, 184 Iowa 1295.

45. Ky.—Cassity v. Robinson, 8 B. Mon. 279.

Me.—Carleton v. Tyler, 16 Me. 392, 33 Am.D. 673.

Mass.—Morse v. Aldrich, 1 Metc. 544.
N.C.—Grier v. Fletcher, 23 N.C. 417, 15 C.J. p 1301 note 39.

46. In North Carolina

Under Rev.St. c 31 § 89, providing that, in all cases of joint obligations or assumptions of copartners or others, suits may be brought against the whole or any one or more of the persons making such obligations, assumptions, or agreements, the term "agreements" includes covenants, so that an action for breach of cove-

Joinder of defendants. Independently of statute, the rule is that, where the liability on the covenant is joint, all the defendants must be joined,⁴⁵ but, by statute, plaintiff may be permitted to sue one only of the covenantors.⁴⁶ Where the liability is several, the action must be several;⁴⁷ and where joint and several, the action may be against one or all.⁴⁸

Where one of two joint obligors dies, the action should be brought against the survivor only, and not against both,⁴⁹ and if he dies the action must be brought against the legal representative of the survivor only.⁵⁰

Two persons covenanting with another by distinct and separate writings, the one for performance of several duties and the other to become the surety for the performance thereof, cannot be sued in the same action for a breach of the covenant,⁵¹ nor can indorsers of a warranty deed be sued in the same action with the maker,⁵² but in the case of successive warrants, the covenantee may join in one action for breach of warranty both his immediate and the remote warrantors.⁵³

An action for breach of covenants running with the land cannot be maintained against a part only of the subsequent grantees bound thereby.⁵⁴ In an action by the vendor on a covenant made by the purchaser of land in the deed, the assignees of the purchaser cannot be joined with him as parties defendant.⁵⁵ In some jurisdictions, a wife is not a proper party to an action for breach of a

nant may be brought against any one or more of joint obligors.—Grer v. Fletcher, supra.

47. Ga.—Union City Realty, etc., Co. v. Wright, 76 S.E. 25, 138 Ga. 703, 15 C.J. p 1301 note 40.

48. N.Y.—Westcott v. King, 14 Barb. 32.

15 C.J. p 1301 note 41.

49. Ky.—Rowan v. Woodward, 2 A. K.Marsh. 140.

N.Y.—Gere v. Clarke, 6 Hill 350.
S.C.—Ayer v. Wilson, 9 S.C.L. 319, 15 C.J. p 1301 note 43.

50. Conn.—Bundy v. Williams, 1 Root 543.

S.C.—Ayer v. Wilson, 2 Mill 319.

51. Ala.—Childress v. McCullough, 5 Port. 54, 62.

52. Ga.—McGuire v. Wagnon, 59 Ga. 591.

53. N.C.—Winders v. Sutherland, 93 S.E. 726, 174 N.C. 235.

54. N.H.—Fowler v. Kent, 52 A. 554, 71 N.H. 388.

15 C.J. p 1301 note 42.

55. Ga.—Brooks v. Columbus Water Lot Co., 7 Ga. 101.

covenant contained in a deed in which she joined conveying property belonging to the husband.⁵⁶

A cestui que trust is not a necessary party defendant to an action for the breach of a covenant running with the land, the legal estate being vested in the trustee.⁵⁷

§ 124. Process and Appearance

Examine Pocket Parts for later cases. Questions as to the doctrine of notice to the warrantor to maintain or defend the title are discussed in supra §§ 89-92.

§ 125. Declaration, Complaint, Petition, or Statement

- a. In general
- b. Averments as to parties
- c. Allegation as to performance of condition precedent
- d. Averment of seal
- e. Allegation of demand of performance
- f. Averment of breach

56. Mo.—Stone v. Fry, 178 S.W. 289, 191 Mo.App. 607.
15 C.J. p 1301 note 45.

57. N.Y.—Keteltas v. Penfold, 4 E. D.Smith 122.

58. Wis.—Lyndon Lumber Co. v. Sawyer, 116 N.W. 255, 135 Wis. 525.

15 C.J. p 1301 note 46.
Anticipating defenses see the C.J.S. title Pleading § 84, also 15 C.J. p 1303 note 82.

Form of action

(1) A complaint in vendees' action against vendors in possession after conveyance, for the value of a crop harvested during such period by vendor's tenant, if susceptible to interpretation as one for conversion, might also be considered as one for breach of covenants, the distinctions between forms of action having been abolished.—Miller v. Smith, 205 P. 386, 119 Wash. 163.

(2) A complaint alleging that plaintiff was the owner of realty conveyed to him in fee simple by defendants by warranty deed, that plaintiff was entitled to immediate possession which defendants failed to give, and that by reason thereof plaintiff was deprived of the use and enjoyment of the premises for nine and one-half months, that the value of the rents and profits were a certain amount claimed as damages sustained, was held one for wrongful occupation, not breach of covenant.—Adams v. Durfee, 215 P. 664, 67 Mont. 815.

Complaints held sufficient

Iowa.—Mahrt v. Mann, 210 N.W. 566, 203 Iowa 880.

Ky.—Stratton v. McGuire, 60 S.W.2d 380, 249 Ky. 101.

Okl.—Schanbacher v. Payne, 191 P. 173, 79 Okl. 101.

15 C.J. p 1301 note 46 [a].

Complaints held insufficient

N.C.—Lockhart v. Parker, 126 S.E. 313, 189 N.C. 138.

15 C.J. p 1301 note 46 [b].

59. Ky.—Kalfus v. Davie, 175 S.W. 652, 164 Ky. 390.

15 C.J. p 1302 note 47.

60. Wash.—West Coast Mfg., etc. Co. v. West Coast Impr. Co., 66 P. 97, 25 Wash. 627, 62 L.R.A. 763.

15 C.J. p 1302 note 48.

Particular matters

In action for breach of covenant against encumbrances in a deed, allegations as to a contract for an exchange of lands providing that defendant's lands should be free from encumbrances, was surplusage, it not appearing that the contract was ever performed.—Wright v. Boggess, 141 P. 1082, 24 Cal.App. 533.

61. N.Y.—Kidder v. Port Henry Iron Ore Co., 94 N.E. 1070, 201 N.Y. 445.

62. N.M.—Norment v. Turley, 246 P. 748, 81 N.M. 400.

63. Ga.—Gano v. Green, 42 S.E. 371, 116 Ga. 22.

N.H.—Cassidy v. Richardson, 66 A. 641, 74 N.H. 221.

g. Damages

h. Amendments

a. In General

The declaration, petition, or complaint must contain allegations of all the facts essential to the cause of action.

The declaration, petition, or complaint in an action for breach of covenant must in all cases state every fact necessary to constitute a cause of action;⁵⁸ and no other facts need be alleged.⁵⁹ Immaterial allegations will be regarded as surplusage.⁶⁰ Mere statement of conclusions is insufficient; the facts must be alleged.⁶¹

Where the covenant is contained in a deed of land situated in another state, a complaint stating a cause of action for breach of covenant under the laws of the forum is sufficient.⁶²

The covenant sued on must be alleged,⁶³ including the execution of it by sealing, as discussed in subdivision d of this section, as must delivery.⁶⁴ The deed need not be set out in haec verba, but only so much of the deed and covenant as is es-

Implied covenant

In an action of covenant based on a general warranty in a deed of lands situated in another state, and claiming a breach of an implied specific covenant, the declaration is fatally defective in not alleging a law of such other state prescribing that such specific covenant shall be so included in a general warranty.—Alcorn v. Epler, 206 Ill.App. 140.

Pleading according to form in instrument

Whatever may be the true doctrine as to the distinction between covenant to warrant and defend title and covenant for quiet enjoyment, it is far safer, to say the least, to plead the covenant according to the form of it in the deed.—Peck v. Houghtaling, 35 Mich. 127.

What covenants sued on

A suit wherein a petition recites a deed conveying land by the words "grant, bargain and sell," setting out that plaintiff was obliged to bring ejectment to gain possession of the land, and concluding with a prayer of damage, is a suit for breach of the covenants in the deed rather than for breach of the single covenant of seisin and plaintiff is, therefore, not limited to damages for breach of the covenants against encumbrances.—Lasswell Land & Lumber Co. v. Langdon, Mo.App., 204 S.W. 812.

64. Mo.—Perkins v. Reeds, 8 Mo. 33.

N.Y.—Gazley v. Price, 16 Johns. 267.

sential to the cause of action.⁶⁵ The covenant may be stated according to its legal effect.⁶⁶ The date of the covenant⁶⁷ and the person with whom it was made, as stated *infra* in subdivision b, of this section should be stated. Profert of the deed, or some excuse for the omission, should usually be made.⁶⁸ Under the rule that a seal imports a consideration, stated in the title Contracts § 72, where it is alleged that the instrument was executed under seal,⁶⁹ it is not necessary to state the consideration of defendant's covenant,⁷⁰ unless the performance of it constitutes a condition precedent, under the rules discussed in subdivision c of this section; but where the covenant is not alleged to be under seal, there is authority that the consideration must be averred.⁷¹ In an action for breach of covenant of seisin, the declaration or complaint should, it has been held, describe the land by metes and bounds.⁷²

b. Averments as to Parties

The declaration, petition, or complaint must with some exceptions contain an averment with whom the covenant was made, and privity of estate between plaintiff and the covenantor must be shown.

In an action for breach of covenant it must be averred with whom the covenant was made,⁷³ although the rule does not apply to deed polls.⁷⁴ Privity of estate or contract between plaintiff and the covenantor must be shown.⁷⁵ Where an action is by an assignee of the covenant, it is not necessary that he should be described as "assign-

nee."⁷⁶ A declaration, both as heirs and devisees, without showing in particular how they were heirs, and without setting out the will, is a sufficient averment of title.⁷⁷

c. Allegation as to Performance of Condition Precedent

Performance of conditions precedent at the place and within the required time must be alleged, or tender of performance, or excuse for nonperformance stated. However, performance by plaintiff of an independent covenant need not be alleged.

Plaintiff must allege the performance on his part or a tender of performance or excuse for nonperformance of a condition precedent, if any there be, at the place and within the time required,⁶⁸ and an averment merely of readiness and willingness to perform is not generally regarded as sufficient.⁷⁹ As indicated *supra* § 25, this rule applies to an action for breach of a mutual concurrent covenant. Where the covenants of the parties are independent of each other, in an action for breach of the covenant by either, plaintiff need not allege performance on his part.⁸⁰ Where the condition precedent involves a question of law the manner of performance must be pointed out, but where it is a mere question of fact, a general averment of performance is proper.⁸¹

d. Averment of Seal

Where the covenant must be under seal, in some jurisdictions there must be an averment that the covenant

65. U.S.—*Wilcox v. Cohn*, C.C.S.D., 29 F.Cas.No.17,640, 5 Blatchf. 346. 15 C.J. p 1302 note 56.

66. Mo.—*Stone v. Fry*, 178 S.W. 289, 191 Mo.App. 607. 15 C.J. p 1302 note 57.

67. Ky.—*Hanson v. Cowan*, 7 T.B. Mon. 574. 15 C.J. p 1302 note 58.

68. Mass.—*Powers v. Ware*, 2 Pick. 451. 15 C.J. p 1302 note 60.

69. N.Y.—*Holmes v. Northern Pac. R. Co.*, 72 N.Y.S. 476, 65 App.Div. 49.

70. Ill.—*Buckmaster v. Grundy*, 2 Ill. 310.

Va.—*Jones v. Thomas*, 21 Gratt. 96, 62 Va. 96.

71. N.Y.—*Holmes v. Northern Pac. R. Co.*, 72 N.Y.S. 476, 65 App. Div. 49.

72. R.I.—*Mortkirian v. Toner*, 120 A. 161.

73. Mo.—*Keatley v. McLaugherty*, 4 Mo. 221. 15 C.J. p 1302 note 65.

74. Va.—*Jones v. Thomas*, 21 Gratt. 96, 62 Va. 96.

15 C.J. p 1302 note 66.

75. Mo.—*McCoy v. Wabash Ry. Co.*, App., 203 S.W. 249.

Okl.—*Faller v. Davis*, 118 P. 382, 30 Okl. 56, Ann.Cas.1913B 1181. 15 C.J. p 1302 note 67.

Complaint held insufficient

A complaint, not alleging that any of defendants in action to enforce covenant for repair of dike in deed to their predecessors in title received any benefit from dike, stated no cause of action, as requirement for repair of dike succeeded to defendants only so long as they derived some benefit therefrom.—*Salvi v. John A. Manning Paper Co.*, 7 N.Y.S. 2d 36, 168 Misc. 661.

76. N.J.—*Carter v. Denman*, 23 N.J. Law 260.

77. U.S.—*Day v. Chism*, Tenn., 10 Wheat. 449, 6 L.Ed. 363.

78. Ky.—*Ward v. Johnson*, 113 S.W. 2d 1132, 272 Ky. 234. 15 C.J. p 1303 note 71.

Particular condition precedent

The petition of a purchaser alleging that title of land conveyed was at all times in persons other than vendor, but not alleging that title was defective, or that the alleged de-

fect was pointed out and vendor given opportunity to correct it, did not state cause of action for breach of warranty in deed.—*Ward v. Johnson*, *supra*.

79. W.Va.—*Kern v. Zeigler*, 13 W. Va. 707. 15 C.J. p 1303 note 72.

80. Or.—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 969, 159 Or. 80, quoting *Corpus Juris*. 15 C.J. p 1303 note 75.

Averment of performance of covenants in contracts see the title Contracts § 538.

Covenant held within rule

In grantors' action against drainage district for breach of covenants to keep ditch covered and to construct cement fill in ditch, grantors did not need to allege performance of their covenant to maintain a fence on land, since their covenant was not a "condition precedent" but an "independent covenant."—*Norby v. Section Line Drainage Dist.*, 76 P.2d 966, 159 Or. 80.

81. Ind.—*Clark v. Lineberger*, 44 Ind. 223.

15 C.J. p 1300 note 76.

was sealed by the defendant; in other jurisdictions this is not necessary.

According to the weight of authority, where as is considered in § 4 a covenant must be under seal, it must be averred specifically, in an action for breach of covenant, that it was sealed by defendant,⁸² and it has been held that an action for covenant broken cannot be maintained on a deed in which the seal has been obliterated;⁸³ but according to some authorities an allegation of sealing is unnecessary, the reason being that an allegation that defendant covenanted by a deed or an indenture includes an averment of sealing.⁸⁴

e. Allegation of Demand of Performance

When a demand for performance is essential to impose liability on defendant, it must be alleged.

Where a special request for performance is necessary to impose on defendant liability on his covenant, as stated in § 88 *supra*, such request must be averred,⁸⁵ but not otherwise.⁸⁶

f. Averment of Breach

- (1) In general
- (2) Averment of eviction
- (3) Negating language of covenant
- (4) Description of paramount claim
- (5) Averment of notice to defend

(1) In General

Breach of the covenant sued on must be alleged, but one assignment is sufficient except in the case of alternative covenants. Exceptions or provisos in the covenant must be excluded. The breach may be assigned according to its legal effect.

The declaration or complaint in an action for breach of covenant must definitely show that the covenant is broken,⁸⁷ and while several breaches may be assigned, the assignment of one good breach is sufficient to support the action.⁸⁸ In case of an alternative covenant, breach of both alternatives must be shown;⁸⁹ and where the covenant contains exceptions or provisos the breach assigned must be excluded from such exceptions or provisos.⁹⁰ It is sufficient as a rule to assign a breach of covenant according to its legal effect, or in words which contain its sense and substance;⁹¹ but the assignment must conform to the covenant as set out, and the breach must not be for more than is covenanted to be performed.⁹² To show breach of a covenant of title implied from the use of particular words, it has been held necessary to aver that the title has failed in consequence of some act of the grantor.⁹³ In an action for breach of a covenant of warranty as to the quantity of land conveyed, it is unnecessary to allege a mutual mistake as to the number of acres.⁹⁴

(2) Averment of Eviction

An eviction or its equivalent must be alleged where the action is for breach of a covenant of warranty or quiet enjoyment, unless the vendor is insolvent or non-resident; but, except under statute, eviction need not be averred when the action is for breach of covenants of seizin, of good right to convey, or against encumbrances. While the facts constituting the eviction need not be stated, it is permissible to state them.

The general rule is that in action for the breach of a covenant of warranty or for quiet enjoyment an eviction or something tantamount thereto must be alleged,⁹⁵ but an exception to the rule is said

82. Ark.—Hays v. Lasater, 3 Ark. 565.

15 C.J. p 1303 note 78.

83. Mass.—Powers v. Ware, 2 Pick. 451.

84. Wis.—Jones v. Davis, 22 Wis. 421.

15 C.J. p 1303 note 80.

85. R.I.—Bowers v. Narragansett Real Est. Co., 67 A. 324, 28 R.I. 329.

15 C.J. p 1303 note 84.

86. N.J.—De Jianne v. Citizen's Protective Assoc., 74 A. 443, 79 N.J. Law 107.

15 C.J. p 1303 note 85.

87. Ohio.—John Hauck Brewing Co. v. Taft, 19 Ohio N.P.N.S., 604.

Or.—Pearson v. Richards, 211 P. 167, 106 Or. 78.

15 C.J. p 1304 note 92.

Covenant against encumbrances

(1) In action for breach of a covenant against encumbrances, plaintiff must allege the existence of a lien or encumbrance.—Pearson v. Richards, 211 P. 167, 106 Or. 78.

(2) Court order of confirmation must be pleaded to show valid irrigation district bond issue constituting lien and encumbrance on lands conveyed.—Clark v. Demers, 254 P. 162, 78 Mont. 287.

Averments held not sufficient

(1) Complaint, in action for breach of warranties in deeds, was defective in not alleging that lands are within irrigation district issuing bonds and making assessments alleged to be lien and encumbrance on lands.—Clark v. Demers, *supra*.

(2) Complaint, not showing irrigation district levy or assessment effective before conveyance of lands, alleged no lien or encumbrance thereon.—Clark v. Demers, *supra*.

(3) Other instances.—John Hauck Brewing Co. v. Taft, 19 Ohio N.P., N.S., 604.

15 C.J. p 1304 note 92 [f].

88. Ark.—Gaster v. Ashley, 1 Ark. 325.

15 C.J. p 1304 note 93.

89. N.Y.—Harmony v. Bingham, 8

N.Y.Super. 209, affirmed 12 N.Y. 99, 62 Am.D. 142.

90. Colo.—Dunn v. Dunn, 3 Colo. 510.

91. Ala.—Garner v. Morris, 65 So. 1000, 187 Ala. 653.

15 C.J. p 1304 note 97.

92. Cal.—Vance v. Pena, 33 Cal. 631. 15 C.J. p 1304 note 98.

93. Ala.—Griffin v. Reynolds, 17 Ala. 198.

Covenants implied from the use of particular words see *supra* § 13.

94. Iowa.—Mahrt v. Mann, 210 N.W. 566, 203 Iowa 830.

95. Ark.—Lammers v. American Southern Trust Co., 291 S.W. 437, 172 Ark. 1013.

Ky.—Ward v. Johnson, 113 S.W.2d 1132, 272 Ky. 234—Jones v. Avondale Heights Co., 47 S.W.2d 949, 243 Ky. 135—Hope Syndicate v. Southland Petroleum Co., 269 S.W. 517, 207 Ky. 473—Hunter v. Keightley, 213 S.W. 201, 184 Ky. 835.

to exist if the vendor is insolvent or nonresident;⁹⁶ and, as is stated in § 125 g, nominal damages may be recovered without an allegation of eviction or its equivalent; but, since covenants of seizin, of good right to convey, or against encumbrances, are broken, if at all, as soon as made, as is pointed out supra §§ 40, 41, and 42 respectively, unless otherwise provided by statute,⁹⁷ in an action for breach of these covenants an eviction need not as a rule be alleged,⁹⁸ although some doubt has been expressed as to whether the rule applies in all cases.⁹⁹ No particular formality is required in averring an eviction;¹ nor is it necessary to set out the facts attending the eviction or particularly to describe the adverse title,² it being sufficient merely to allege in general terms an eviction under a title paramount to that of the covenantor, as stated in § 125 f (4), although a declaration setting out all of the facts constituting an eviction is good.³

-(3) Negating Language of Covenant

In actions for breach of covenants of seizin and good right to convey, generally it is sufficient to negative the words of the covenant, but in some jurisdictions the person seized must be alleged, and in any case, where a general assignment does not necessarily show a breach, special averments are necessary. In actions for breach of covenants against encumbrances, for quiet enjoyment, and of warranty, the breach must be specifically stated.

While it has been held that in an action on the covenants of seizin it is necessary not only to aver that the covenantor was not seized, but also who was seized,⁴ the general rule is that, in the ab-

sence of a statute to the contrary,⁵ in actions for breach of the covenants of seizin and good right to convey it is sufficient to negative the words of the covenant generally;⁶ but this rule is subject to the exception that, when such a general assignment does not necessarily show a breach, special averments are required.⁷

In actions for breach of covenants against encumbrances, for quiet enjoyment, or of warranty, as a rule the breaches must be specifically set forth,⁸ and it has been held that in an action for breach of covenants against encumbrances the extinguishment of the encumbrance by plaintiff must be alleged.⁹ However, in some cases a complaint has been held sufficient as against a general demurrer, notwithstanding it failed specifically to set forth the breach of a covenant against encumbrances,¹⁰ or of warranty.¹¹

(4) Description of Paramount Claim

Where the action is for breach of a covenant against encumbrances, the encumbrances relied on must be stated and the title of defendant connected thereto. Where the breach is of a covenant of warranty, or for quiet enjoyment, an allegation of eviction under a lawful and paramount title is sufficient without stating such title, except in a jurisdiction requiring eviction on judicial determination.

As is stated in § 125 f (2), it is unnecessary in an action for breach of the covenants of seizin and of good right to convey to do more than merely negative the words of the covenant, but a different rule prevails with regard to a covenant against en-

Mont.—Green v. Baker, 214 P. 88, 66 Mont. 568.

Ohio.—John Hauck Brewing Co. v. Taft, 19 Ohio N.P.,N.S., 604.

Tenn.—Young v. Brannan, 5 Tenn. App. 1.

Tex.—Campbell v. Jones, Civ.App., 230 S.W. 710.

15 C.J. p 1304 note 2.

Loss of part of tract

Purchaser predicated suit for breach of warranty of title on yielding of possession of part of land as consequence of legal proceeding of which warrantor had notice and opportunity to defend was held not entitled to recover damages for breach of warranty of title to portion of land of which possession was still in purchaser, but to which purchaser asserted lack of title because title to portion which had been yielded was not good.—Reese v. Manget, 186 S.E. 880, 53 Ga.App. 637.

96. Ky.—Walker v. Robinson, 174 S. W. 503, 163 Ky. 618.

15 C.J. p 1305 note 3.

97. Mo.—Mumford v. Keet, 65 Mo. App. 502.

Ohio.—Robinson v. Neil, 3 Ohio 525.

98. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 96 So. 436, 200 Ala. 432.—Patridge v. Bates, 78 So. 911, 201 Ala. 557.

Iowa.—Fisher v. Paup, 180 N.W. 167, 191 Iowa 296.

Va.—Otey v. Oakley, 160 S.E. 8, 157 Va. 314.

15 C.J. p 1305 note 7.

99. U.S.—Duvall v. Craig, Ky., 2 Wheat. 45, 51, 4 L.Ed. 180.

15 C.J. p 1305 note 8.

Even if averment of eviction be deemed necessary, a petition alleging that paramount title was in state at time of conveyance was not demurrable on ground that no cause of action was stated for failure to allege eviction, although there was no allegation whether defendant was or was not in possession at time of conveyance, since if defendant was not in possession there was immediate eviction.—Baughman v. Hower, 10 N.E.2d 176, 56 Ohio App. 162.

1. U.S.—Day v. Chism, Tenn., 10 Wheat. 449, 6 L.Ed. 363.

15 C.J. p 1305 note 9.

2. Neb.—Cheney v. Straube, 53 N.W. 479, 35 Neb. 521.

3. N.Y.—Rickert v. Snyder, 9 Wend. 416.

4. Conn.—Wilford v. Rose, 2 Root 14.

5. Ohio.—Robinson v. Neil, 3 Ohio 525.

6. Ala.—Patridge v. Bates, 78 So. 911, 201 Ala. 557.

Iowa.—Fisher v. Paup, 180 N.W. 167, 191 Iowa 296.

15 C.J. p 1305 note 15.

7. Me.—Glover v. O'Brien, 62 A. 656, 100 Me. 551.

Mass.—Marston v. Hobbs, 2 Mass. 433, 3 Am.D. 61.

8. Ohio.—John Hauck Brewing Co. v. Taft, 19 Ohio N.P.,N.S., 604.

15 C.J. p 1305 note 17.

9. Wis.—Pillsbury v. Mitchell, 5 Wis. 17.

10. Or.—Dillon v. Beacon, 134 P. 778, 135 P. 336, 67 Or. 118.

15 C.J. p 1306 note 19.

11. Ga.—State Bank v. O'Neal, 28 S.E. 973, 101 Ga. 673.

15 C.J. p 1306 note 20.

cumbrances, and an assignment of a breach of the covenant against encumbrances must not only set out the particular encumbrance relied on,¹² but must also connect the title of defendant therewith,¹³ although it is not necessary to set forth the encumbrance more than substantially.¹⁴

In an action for a breach of covenant of warranty while a mere allegation that plaintiff has been evicted and that the title conveyed to him has failed has been held insufficient,¹⁵ it has generally been held that, in an action for breach of covenant of warranty or for quiet enjoyment, it is sufficient if an eviction under a lawful and paramount title is clearly alleged, without entering into a particular description of such title,¹⁶ subject to the requirement, in jurisdictions in which it is held that nothing less than a judgment is sufficient eviction, stated in § 112 supra, that not only must eviction on judicial determination of the title be alleged,¹⁷ but the nature of the claim on which the judgment was rendered must also be alleged;¹⁸ and in another jurisdiction the court found it unnecessary to pass on the question whether the petition should contain allegations specifically stating wherein and how the alleged outstanding titles were paramount, in view of other rulings in the case.¹⁹ It has been held that, if the covenantor has been notified of the eviction suit, the

declaration need not allege that the recovery was by an older and better title.²⁰

(5) Averment of Notice to Defend

Notice to the covenantor to defend need not be averred.

Although, as stated in § 90 supra, a covenantor is not precluded by an adverse judgment against the title conveyed unless he has been vouched, it is not necessary in an action for breach of covenant to aver that the covenantor had notice of the suit by which the covenantee was evicted.²¹

g. Damages

The declaration, petition, or complaint in an action for breach of covenant must contain allegations serving as a foundation for the proper measure of damages. General damages are recoverable under a general ad damnum or prayer for general relief; special or consequential damages must be pleaded to be recoverable.

The declaration, petition, or complaint with respect of damages for breach of covenant is governed by the usual rules of pleading damages, discussed in the C.J.S. title Damages §§ 129-140, also 17 C.J. p 998 note 36-p 1020 note 15. Proper allegations as a foundation for the application of the proper measure of damages must be made.²²

General damages may be recovered under the general ad damnum²³ or prayer for general re-

12. Vt.—French v. Slack, 96 A. 6, 89 Vt. 514.

15 C.J. p 1306 note 25, p 1306 note 17.

13. Vt.—Kellogg v. Robinson, 6 Vt. 276, 27 Am.D. 550.

15 C.J. p 1306 note 26.

14. Vt.—French v. Slack, 96 A. 6, 89 Vt. 514.

15 C.J. p 1306 note 27.

15. Ky.—Jones v. Jones, 7 S.W. 886, 87 Ky. 282, 9 Ky.L. 942.

16. Ala.—Smith v. Gaines, 97 So. 739, 210 Ala. 245—Alger-Sullivan Lumber Co. v. Union Trust Co., 96 So. 436, 209 Ala. 432.

Cal.—Platner v. Vincent, 202 P. 655, 187 Cal. 443.

Idaho.—Turner Trust Co. v. Gillett, 210 P. 1001, 36 Idaho 344.

Ky.—Burchett v. Blackburne, 248 S.W. 853, 193 Ky. 304, 34 A.L.R. 1425—Wilson v. McGowand, 234 S.W. 17, 192 Ky. 565.

Neb.—Chesney v. Straube, 53 N.W. 479, 35 Neb. 521.

Utah.—East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 65 Utah 560.

15 C.J. p 1306 note 29.

Allegations of payment of a judgment tax lien to clear their title from a cloud, until some action was taken preparatory to enforcing payment of tax out of specific real prop-

erty, are insufficient.—Beach v. Pisarek, 128 A. 30, 102 Conn. 126.

Allegation that title was in United States was held sufficient allegation of constructive eviction to support action as against demurrer.—East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 65 Utah 560.

Construction

Where grantee suing for breach of warranty alleged that at time deed was executed and delivered and consideration paid a superior title to land was in others and that grantee had no knowledge or notice of such superior title at time of delivery of deed, statement was construed as an allegation that grantee was an innocent purchaser for value.—Felts v. Whitaker, Tex.Civ.App., 129 S.W.2d 682, error granted.

Petition held insufficient

Ga.—McElmurray v. Marshall, 141 S.E. 670, 37 Ga.App. 725.

Tex.—Briley v. Hay, Civ.App., 13 S.W.2d 997.

17. Ky.—Walker v. Robinson, 174 S.W. 503, 163 Ky. 618.

18. Ky.—Wilson v. McGowand, 234 S.W. 17, 192 Ky. 565—Bland v. Thomas, 3 S.W. 595, 8 Ky.L. 866.

19. Ga.—White v. Stewart, 62 S.

E. 590, 131 Ga. 460, 15 Ann.Cas. 1198.

20. Ky.—Burchett v. Blackburne, 248 S.W. 853, 193 Ky. 304, 34 A.L.R. 1425—Wilson v. McGowand, 234 S.W. 17, 192 Ky. 565.

15 C.J. p 1307 note 35.

Necessity of averring notice see infra § 125 f (5).

21. Mo.—Smith v. Nussbaum, App., 71 S.W.2d 82, 86, citing *Corpus Juris*.

15 C.J. p 1306 note 22.

Notice of eviction as affecting necessity of allegation of eviction by paramount claim see supra § 125 f (4).

22. Mo.—Donner v. Whitecotton, 212 S.W. 378, 201 Mo.App. 443.

Petitions held insufficient

Mo.—Donner v. Whitecotton, supra. Tex.—Tindle v. Elms, Civ.App., 108 S.W.2d 437—Briley v. Hay, Civ. App., 13 S.W.2d 997.

23. N.C.—Jones v. Balsley, 69 S.E. 827, 154 N.C. 61.

15 C.J. p 1334 note 4.

Petition held sufficient

Allegations of liability of grantor under his warranty of title to seven hundred-acre tract, resulting from failure of remote grantee of another tract to perform covenant to pay portion of mortgage indebtedness

lied.²⁴ The existence of an outstanding paramount title permits the grantee to institute an action for breach of covenants of seizin and right to convey without averring special damages.²⁵

Special or consequential damages must be pleaded to be recoverable.²⁶

Nominal damages may be recovered without an allegation of eviction or its equivalent.²⁷ Likewise, in the absence of an averment of special damages, a declaration alleging only a formal breach of covenant justifies recovery only of nominal damages.²⁸

h. Amendments

Amendments either by the addition of a count or by correction of an erroneous count are permissible.

A declaration counting on one or more covenants may be amended by adding a count on another covenant,²⁹ or by correcting an erroneous count.³⁰ A petition in an action for breach of warranty of title to land which claims as the measure of plaintiff's damages the value of the property to which title has failed is amendable so as to make the damages claimed the purchase price of the property.³¹

covering both tracts, and of grantor's loss of security under junior purchase price mortgage on seven hundred-acre tract because of his inability to give good title while senior mortgage remained unpaid, were held to make case for substantial damages against remote grantee.—*Calder v. Richardson*, D.C.Fla., 11 F.Supp. 948.

24. N.C.—*Price v. Deal*, 90 N.C. 290.

25. Va.—*Otey v. Oakey*, 160 S.E. 8, 157 Va. 314.

26. Iowa.—*Jones v. Shay*, 33 N.W. 650, 72 Iowa 237.

15 C.J. p 1334 note 6.

27. Ind.—*Mason v. Cooksey*, 51 Ind. 519.

28. U.S.—*Calder v. Richardson*, D.C.Fla., 11 F.Supp. 948.

29. Ala.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 215 Ala. 212.

15 C.J. p 1307 note 36.

30. Ala.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, supra.

Description of land

In action for breach of covenants of warranty, amendment correcting description of lands to which title failed is allowable.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, supra.

31. Ga.—*St. John v. Leyden*, 36 S.E. 610, 111 Ga. 152.

32. Conclusion

(1) Where defendants plead a denial of the alleged breach, such plea should conclude to the country.

N.J.—*Star B-ick Co. v. Bidsdale*, 34 N.J.Law 428.

S.C.—*Wolfe v. Norris*, 29 S.C.Law 322.

(2) Although in affirmative words, a plea which is a direct denial of the declaration should conclude to the country.—*Overton v. Crabb*, 4 Hayw., Tenn., 109.

(3) A defendant whose plea concludes with a verification instead of the proper conclusion will be granted leave to amend on a showing that the plea is probable.—*Overton v. Crabb*, supra.

The general issue in action in covenant is pleaded by the common-law plea "non est factum" or its statutory equivalent "that the alleged deed is not his deed," and plea that defendant "did not promise as alleged" is demurrable.—*Bond v. Hewitt*, 149 So. 606, 111 Fla. 180.

33. Ill.—*Dickhut v. Durrell*, 11 Ill. 72.

Ky.—*Trabue v. Kay*, 4 Bibb 226.

Plea of performance:

Action of covenant see *Covenant*,

Action of § 30.

Action on bond see *Bonds* § 112 a.

Action on contract see *Contracts* §§ 553, 554.

34. Vt.—*Ferris v. Mosher*, 27 Vt. 218, 65 Am.D. 192.

35. Ill.—*Reed v. Hobbs*, 3 Ill. 297.

36. N.Y.—*Hackett v. Richards*, 3 E.D.Smith 13, reversed on other grounds 13 N.Y. 138.

§ 126. Plea or Answer

The general rules of pleading control as to the form and sufficiency of defendant's pleadings.

The rules governing pleas and answers in actions for breach of covenants are those which regulate such pleadings in civil actions generally, as discussed in the C.J.S. title Pleading §§ 99-166, also 49 C.J. p 179 note 58-p 296 note 48.³² Performance of the covenants by defendant must be pleaded.³³ Payments made by the covenantor to the covenantee on account of the breach should be specially pleaded when relied on in bar,³⁴ and such a plea, if not sustained, admits nothing more than plaintiff's right to recover nominal damages.³⁵ The amount of the damages laid is not traversable matter, and defendant need not deny it.³⁶

Pleas by way of confession and avoidance must confess the truth of the allegations which they purport to answer, as stated in the C.J.S. title Pleading § 165, also 49 C.J. p 292 note 81-p 293 note 87, and must explicitly state all facts necessary to constitute a lawful avoidance coextensive with confession.³⁷ Such a plea must conclude with a veri-

37. La.—*Levenberg v. Shanks*, 115 So. 641, 165 La. 419.

15 C.J. p 1307 note 44.

Assumption of payment of taxes by person asserting breach of warranty, being a defense in avoidance, must be specially pleaded.—*Levenberg v. Shanks*, supra.

Dower rights of wife

(1) Action for breach of covenant against encumbrance, alleging that plaintiff paid dower claim with knowledge of defendant's "claim" that dower claimant was not defendant's wife, is insufficient.—*Carney v. Morrison*, 228 N.Y.S. 308, 223 App.Div. 214, motion granted 164 N.E. 565, 249 N.Y. 511.

(2) Likewise, a defense based on dower rights of defendant's wife is insufficient to show wife's release of dower.—*Carney v. Morrison*, supra.

Plea of grantee's knowledge of defects claimed covered by warranty is bad.—*Lost Creek Coal & Mineral Land Co. v. Hendon*, 110 So. 308, 215 Ala. 212.

Bona fide purchaser

In grantee's suit for breach of warranty on ground that prior to deed grantor had conveyed property to others who had not placed their deed of record, where grantee alleged facts showing that he was an innocent purchaser for value, there was no necessity for plea by grantor that grantee was an innocent purchaser for value to entitle grantor to defend on ground that grantee received title superior to unrecorded

fication.³⁸ Where a proviso or exception is in the body of the covenant, the party seeking to avoid it must plead it in his answer,³⁹ but, if the proviso or exception is contained in a separate clause of the contract, the party pleading it need only state enough to show prima facie a right of action, leaving the matter of exception to be pleaded by the adversary.⁴⁰ New matter in confession and avoidance must be specially pleaded.⁴¹ Where equitable relief is sought, a special plea alleging the matter relied on should set forth the facts constituting such matter with sufficient certainty to apprise plaintiff of the character of the defense relied on and to enable the court to determine whether equitable relief should be granted.⁴²

Affidavit. A statutory requirement that a defendant must attach an affidavit of merits with his plea when plaintiff has attached an affidavit to his declaration applies to an action for breach of covenant of warranty.⁴³

§ 127. Subsequent Pleadings

- a. Demurrer
- b. Replication

a. Demurrer

General principles governing demurrers generally control as to demurrers in actions for breach of covenants.

The rules of pleading governing demurrer in actions generally, discussed in the C.J.S. title Pleading §§ 211-274, also 49 C.J. p 362 note 50-p 465 note

81, are of course controlling in actions for breach of covenant.⁴⁴ Statutory requirements that matters of substance must be distinctly stated in the demurrer must be complied with.⁴⁵ If two counts of a declaration are for the same cause of action, on the same covenant, and one count is good, the declaration is good on general demurrer.⁴⁶ Where one breach is well assigned in the declaration, a general demurrer will not be sustained,⁴⁷ but, if the breach is not well assigned, defendant is entitled to judgment, although his plea is bad.⁴⁸ The fact that a declaration does not in direct terms allege matters of substance, but only includes them by inference from exhibits, is not ground on which general demurrer may be based.⁴⁹ In an action for breach of covenant of seizin, demurrer lies as to a declaration which fails to describe the land by metes and bounds,⁵⁰ but a declaration alleging breach of a general and unqualified covenant of seizin is not demurrable.⁵¹ In an action for breach of a covenant against encumbrances, a demurrer that the complaint states as a conclusion that an alleged agreement constituted an easement, right of way, or encumbrances through and on the property is not sustainable,⁵² but a complaint failing to show a valid encumbrance is demurrable.⁵³ In an action for breach of covenant of warranty, a complaint not complying with statutory requirements is demurrable,⁵⁴ and a petition which fails to contain allegations showing possession by plaintiff or his grantee is bad on demurrer.⁵⁵

- deed.—*Felts v. Whitaker*, Tex.Civ. App., 129 S.W.2d 682, error granted.
 38. N.J.—*Star Brick Co. v. Ridsdale*, 34 N.J.Law 428.
 S.C.—*Wolfe v. Norris*, 29 S.C.Law 322.
 39. Mo.—*Consolidated Coal Co. v. Mexico Fire-Brick Co.*, 66 Mo.App. 296.
 40. Mo.—*Consolidated Coal Co. v. Mexico Fire-Brick Co.*, supra.
 41. Tex.—*Cates v. Field*, Civ.App., 85 S.W. 52.
 15 C.J. p 1307 note 68.
 42. Va.—*Burners v. Keran*, 24 Gratt. 42, 65 Va. 42.
 Wash.—*Menasha Wooden Ware Co. v. Nelson*, 88 P. 1018, 45 Wash. 543.
 15 C.J. p 1307 note 47.

Amendment

In case of a mutual mistake of the parties as to the extent of the rights conveyed, defendants may seek to amend their plea by filing a bill in equity for reformation.—*McShane v. Main*, 62 N.H. 4.

43. Ill.—*Chicago Mill & Lumber Co. of Cairo v. Townsend*, 203 Ill.App. 457.

44. N.J.—*Dick v. McPherson*, 62 A. 383, 72 N.J.Law 332.
 15 C.J. p 1307 note 49.
 45. Ala.—*Colson v. Harden*, 141 So. 639, 224 Ala. 665.
 Demurrer held bad
 Ala.—*Colson v. Harden*, 141 So. 639, 224 Ala. 665.
 46. Me.—*Blanchard v. Hoxie*, 34 Me. 376.
 15 C.J. p 1307 note 50.
 47. Ala.—*Taylor v. Pope*, 3 Ala. 190.
 15 C.J. p 1307 note 51.
 48. Mass.—*Kellogg v. Ingersoll*, 2 Mass. 97.
 49. Cal.—*Pedro v. Humboldt County*, 19 P.2d 776, 217 Cal. 493.
 50. R.I.—*Mortkirian v. Toner*, 120 A. 161.
 51. Fla.—*Burton v. Price*, 141 So. 728, 105 Fla. 544.
 52. Ala.—*Colson v. Harden*, 141 So. 639, 224 Ala. 665.
 53. Or.—*Pearson v. Richards*, 211 P. 167, 106 Or. 78.

54. Ala.—*Bobo v. Tally*, 104 So. 22, 213 Ala. 83.

Complaint held demurrable
 Ala.—*Bobo v. Tally*, supra.

Complaint held sufficient

(1) In suit against warrantor of title, allegation that warrantor had notice of proceeding pursuant to which purchaser yielded possession and knew of such proceeding and that plaintiff therein was seeking to recover of purchaser land sold under outstanding paramount title was held sufficient as allegation of notice as against general demurrer.—*Reese v. Manget*, 186 S.E. 880, 53 Ga. App. 637.

(2) In suit for breach of warranty of title, allegation of petition that as result of suit filed against plaintiff on outstanding paramount title plaintiff was evicted from premises to her injury and damage in designated amount was held sufficient as allegation of damage resulting from alleged breach of warranty of title to property from which plaintiff was evicted.—*Reese v. Manget*, supra.

55. U.S.—*Edgemont Coal Co. v. Asher*, D.C.Ky., 298 F. 1000.

b. Replication

A replication in an action for breach of covenant must traverse the truth of new matter introduced by the plea or confess and avoid the plea. When relied on, conditions must be pleaded in the replication. The replication must conform to the declaration.

A replication which does not traverse the truth of new matter introduced by the plea,⁵⁶ or confess and avoid the plea,⁵⁷ is bad. If plaintiff relies on conditions, he must plead them by way of replication.⁵⁸ The replication must in all cases conform to the declaration,⁵⁹ but, if a replication is good as to either of the breaches assigned in the declaration and answered in the plea, it will be upheld on demurrer.⁶⁰ In an action for breach of the covenant of seizin, the replication to defendant's plea maintaining his seizin should aver who in fact was seized.⁶¹

§ 128. Issues, Proof, and Variance

In an action for breach of covenant the proof must conform to the allegations, and be confined to the issues made by the pleadings. Only material matters in issue need be proved. Matters which may be shown under the plea of general issue may be proved without being specially pleaded. A material variance between the pleadings and proof is fatal.

The proof in actions for breach of covenant must conform to the allegations, and be confined to the issues made by the pleadings.⁶² Material matters put in issue must be proved,⁶³ but it is sufficient to prove the substance of the issue.⁶⁴ Matters admitted by the pleadings, or not put in issue, need not be proved.⁶⁵ The default by defendant in an action of covenant admits all the traversable averments in the declaration, but not the amount of damages, and leaves nothing to be done but the ascertainment and assessment of the damages, so that proof may be made of the damages sustained.⁶⁶

Under the general issue, so called, that is, a general denial of the facts relied on to show a liability on the covenant, defendant may introduce in evidence special facts inconsistent with the case alleged by plaintiff,⁶⁷ and whatever may be shown under such issue may be shown without being pleaded specially;⁶⁸ however, proof of changed conditions cannot be made under such a plea.⁶⁹ Where the facts alleged in a declaration may constitute a breach of either of several covenants, plaintiff is not, on such a case being shown, required to elect on which covenant he will seek a

56. N.Y.—Gelston v. Burr, 11 Johns. 482.

57. N.Y.—Gelston v. Burr, supra. 15 C.J. p 1307 note 55.

58. N.Y.—Denton v. Bours, Anth.N. P. 241.

59. Pa.—Burk v. Bear, 3 Clark 355, 5 Pa.L.Jr. 304. 15 C.J. p 1308 note 57.

60. N.Y.—Beach v. Barons, 13 Barb. 305.

61. Mass.—Marston v. Hobbs, 2 Mass. 433, 3 Am.D. 61.

N.Y.—Sedgwick v. Hollenback, 7 Johns. 376.

62. Tex.—Northcutt v. Hume, Com. App., 212 S.W. 157, reversing, Civ. App., 174 S.W. 974.

15 C.J. p 1308 note 61.

Theory of cause of action

Plaintiffs cannot recover from their grantor on theory of tort, where action was treated as an action on warranty.—Campbell v. Rogers, 211 N.W. 768, 191 Wis. 570.

Proof held admissible under pleadings

(1) In suit for breach of warranty of title, allegations in the petition that the price paid for all the land purchased by plaintiff was eight thousand dollars, and that the price paid for the land to which the title failed was twenty-five dollars an acre, were held sufficient to admit evidence of the price paid for all the land, whether in money or property, and of the proportional part of such price represented by the land lost.—

Northcutt v. Hume, Tex.Com.App. 212 S.W. 157, reversing, Civ.App., 174 S.W. 974.

(2) Payments made by the covenantor to the covenantee on account of the breach may be given in evidence in mitigation of damages under the plea of covenants performed.—Ferris v. Mosher, 27 Vt. 218, 65 Am.D. 192.

Proof held inadmissible under pleadings

(1) Purchaser suing vendor for breach of warranty, who alleged that title was in government, could not introduce evidence to show title in third person.—National Cypress Pole & Piling Co. v. Hemphill Lumber Co., 31 S.W.2d 1059, 325 Mo. 807.

(2) That party asserting breach of warranty in land title was himself responsible, hence not entitled to damages, must be specially pleaded, and, unless pleaded, evidence thereon is inadmissible.—Levenberg v. Shanks, 115 So. 641, 165 La. 419.

63. Ky.—Jones v. Avondale Heights Co., 47 S.W.2d 949, 243 Ky. 135.

Particular matters

(1) One cannot recover for breach of covenant of general warranty unless proving eviction or exception to rule requiring eviction before general warranty is breached.—Jones v. Avondale Heights Co., supra.

(2) Evidence that covenantor had notice of adverse suit is admissible in suit on covenants of warranty where put in issue, notwithstanding

absence of allegation of notice.—Smith v. Nussbaum, Mo.App., 71 S.W. 2d 82.

(3) In order to enforce covenants running with land, privity of estate between parties to contract and parties to litigation wherein such enforcement is sought must be proved.—McCoy v. Wabash Ry. Co., Mo. App., 203 S.W. 249.

(4) A covenant of good right to convey being breached when made if the covenantor had no title, in an action for the breach of such covenant because the covenantor did not have title to the mineral, evidence of eviction, ouster, or surrender was unnecessary.—Partridge v. Bates, 78 So. 911, 201 Ala. 557.

(5) Other matters see 15 C.J. p 1308 note 62 [a].

64. Ala.—Prestwood v. McGowan, 41 So. 779, 148 Ala. 475.

15 C.J. p 1308 note 63.

65. Tex.—Coleman v. Lustcke, Civ. App., 164 S.W. 1117.

15 C.J. p 1308 note 64.

66. Ill.—Chicago Mill & Lumber Co. of Cairo v. Townsend, 203 Ill.App. 457.

15 C.J. p 1308 note 65.

67. Wis.—Cady v. Henes, 138 N.W. 1022, 151 Wis. 422.

15 C.J. p 1308 note 66.

68. U.S.—Patrick v. Leach, C.C.Neb., 2 F. 120, 1 McCrary 250.

69. N.Y.—Schaefer v. Magerle, 211 N.Y.S. 469, 125 Misc. 840.

recovery;⁷⁰ but on the other hand, where two counts of a declaration are contradictory, a recovery cannot be had under both, since the cause of action set out in one would constitute a complete defense to that set out in the other.⁷¹ In case of the assignment of two or more distinct breaches, for one of which plaintiff has no cause of action, it is error to assess entire damages.⁷²

Variance. A material variance between the allegations and the proof, in actions for breach of covenant, is fatal;⁷³ but it is otherwise if the variance is immaterial.⁷⁴

§ 129. Presumptions and Burden of Proof

- a. Presumptions
- b. Burden of proof

a. Presumptions

The rules as to presumptions in civil actions generally apply in actions for breach of contract.

Certain legal presumptions may arise in actions on covenants from long continued possession of the premises in controversy,⁷⁵ especially as to the possession of uncultivated lands,⁷⁶ from long continued, peaceable, notorious, adverse, and uninterrupted enjoyment of an easement⁷⁷ or from the purchase of a paramount title by plaintiff,⁷⁸ or of purchasing with reference to liens.⁷⁹ So also certain presumptions may arise as to the considera-

tion for a covenant,⁸⁰ as to notice of entry,⁸¹ and, according to some authorities, as to the surrender of the premises,⁸² although this seems opposed to the general rule, stated *infra* § 129 b, that a covenantee who surrenders without suit has the burden of showing that he yielded to a title paramount. Where the purchase price of land is paid in property, there is no presumption that either party obtained an advantage in the trade.⁸³ It has been held that there is no presumption that particular lands to which title failed were of the same proportionate value as other lands embraced in the conveyance,⁸⁴ but where the parties dealt on a "per acre price," without notice of any differences in quality, uniformity of quality was presumed.⁸⁵ The value of the whole estate, as compared to the value of the part lost by failure of title, is not to be conclusively presumed to be the price fixed by the parties at the time of the conveyance.⁸⁶ Tax proceedings are presumed to be valid⁸⁷ and the amount of a special assessment recited in an execution therefor is presumed to be correct.⁸⁸

b. Burden of Proof

The burden of proof rests upon the party holding the affirmative of the issue.

In actions for breach of covenant, as in other actions, the burden of proof rests upon the party holding the affirmative of the issue,⁸⁹ whether it

70. Minn.—Bruns v. Schreiber, 51 N.W. 120, 48 Minn. 366.

71. Mich.—Capen v. Stevens, 29 Mich. 496.

72. Ky.—Morrow v. Governor, Hard. 489.

73. Pa.—Strong v. Nesbitt, 110 A. 250, 267 Pa. 294.
15 C.J. p 1308 note 71.

Variance held to be shown

(1) In an action for breach of covenant of warranty, there is a fatal variance between averment of actual eviction and proof of prior constructive eviction.—Strong v. Nesbitt, *supra*.

(2) Other instances see 15 C.J. p 1308 note 71 [a].

Variance held not to be shown

(1) In purchaser's suit for breach of covenant of warranty in deed, proof that title to land was found to be in third person instituting ejectment suit in which the warrantors were vouched into court and that purchaser paid amount of decree in ejectment suit covering value of land and mesne profits to protect purchaser's improvements and avoid a sale was not at variance with allegation that purchaser was evicted by reason of judgment in ejectment suit.

—West v. Lee, 197 S.E. 75, 57 Ga. App. 873.

(2) Other instances see 15 C.J. p 1308 note 71 [b].

74. Ala.—Prestwood v. McGowan, 41 So. 779, 148 Ala. 475.
15 C.J. p 1309 note 72.

75. Vt.—Knapp v. Marlboro, 34 Vt. 235.
15 C.J. p 1309 note 73.

76. Pa.—Steiner v. Baughman, 12 Pa. 106.
15 C.J. p 1309 note 74.

77. W.Va.—Lucas v. Smithfield, etc., Turnp. Co., 15 S.E. 182, 36 W.Va. 427.
15 C.J. p 1309 note 75.

78. Ill.—Harding v. Larkin, 41 Ill. 413.
15 C.J. p 1309 note 76.

79. Pa.—Bonebrake v. Summers, 8 Pa.Super. 55, 43 Wkly.N.C. 568, affirmed 44 A. 330, 193 Pa. 22.
15 C.J. p 1309 note 77.

80. N.D.—Bowne v. Wolcott, 48 N. W. 336, 1 N.D. 415.
15 C.J. p 1309 note 78.

81. Mass.—Burrage v. Smith, 16 Pick. 56.
15 C.J. p 1309 note 79.

82. Ind.—Burton v. Reeds, 20 Ind. 87.

Vt.—Williams v. Wetherbee, 1 Aik. 233—Drury v. Shumway, 1 D. Chipm. 110, 1 Am.D. 729.
15 C.J. p 1309 note 80.

83. Tex.—Northcutt v. Hume, Com. App., 212 S.W. 157, reversing, Civ. App., 174 S.W. 974.

84. Ark.—Lane v. Stitt, 219 S.W. 340, 143 Ark. 27.

Tex.—Westervelt v. Meuly, Civ.App., 216 S.W. 680.

85. Tex.—First Nat. Ban'k v. Brown, Com.App., 15 S.W.2d 563, reforming, Civ.App., 4 S.W.2d 635.

86. N.M.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 538.

87. N.Y.—Lauer v. Maga, 1 N.Y.S.2d 743.

88. Ga.—Pone v. Barbre, 196 S.E. 287, 57 Ga.App. 684.

89. Ala.—Marsh v. Cheeseman, 128 So. 796, 221 Ala. 390.

Mo.—Litzelfelner v. Cotner, App., 119 S.W.2d 447, 448, citing *Corpus Juris*.

N.Y.—Lauer v. Maga, 1 N.Y.S.2d 743.
15 C.J. p 1309 note 83.

Person claiming benefit of restriction has burden of showing that it is appurtenant to his land.

be plaintiff⁹⁰ or defendant.⁹¹ Thus the burden is on plaintiff to prove the amount of his damages;⁹² and a defendant who pleads performance of his covenant assumes the burden of proving performance.⁹³ By pleading title in himself at the execution of a deed containing a covenant of seizin, or probably of good right to convey, defendant, under the common-law system of pleading, assumes the burden of proving such title,⁹⁴ although where the plea, instead of averring performance of the covenant of seizin, avers that defendant has not broken his covenants, while plaintiff by his joinder avers that he has, plaintiff assumes the burden of proving the breach;⁹⁵ and in some of the code states the reasons that gave rise to the common-law rule

are held to be inapplicable, and the burden is on plaintiff to show wherein defendant's title was defective.⁹⁶ The burden is on plaintiff to show that such outstanding title or claim was in fact paramount, where he fails to notify his covenantor of the assertion of an adverse action under title paramount,⁹⁷ or where he has voluntarily yielded without suit to an outstanding title or claim;⁹⁸ however, it has been held that the latter rule is apposite only to a complaint charging a breach of the covenant of quiet enjoyment and of warranty, and not to a complaint counting on breaches of the covenants of seisin and good right to convey only, the burden of proving paramount title in such case being on defendant grantor.⁹⁹ Since a covenant

Md.—Clem v. Valentine, 141 A. 710, 115 Md. 19.

Mass.—St. Botolph Club v. Brookline Trust Co., 198 N.E. 903, 292 Mass. 430.

90. Iowa.—Pope v. Coe, 225 N.W. 939, 208 Iowa 759—Frankel v. Blank, 213 N.W. 597, 205 Iowa 1. **Mo.**—Smith v. Nussbaum, App., 71 S.W.2d 82.

N.M.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

N.Y.—Alhany Garage Co. v. Munson, 218 N.Y.S. 78, 218 App.Div. 240, affirmed 157 N.E. 880, 245 N.Y. 613. **Tex.**—Hoge v. Garcia, Civ.App., 296 S.W. 932.

15 C.J. p 1310 note 84.

Burden held on plaintiff to show

(1) Actual discharge of prior encumbrance, as averred.—McShan v. Kilpatrick, 110 So. 281, 215 Ala. 185.

(2) Eviction.

La.—Selby v. Williams, 140 So. 144, 19 La.App. 845.

Tex.—Felts v. Whitaker, Civ.App., 129 S.W.2d 682, error granted.

(3) That deed under which he claimed was made in substantial compliance with the provisions of controlling statute.—Langford v. Newsom, Tex.Com.App., 220 S.W. 544, affirming Newsom v. Langford, Civ. App., 174 S.W. 1036.

(4) That taxes paid and sought to be recovered were lawfully assessed.—Winder v. Southwestern Co., 291 P. 290, 35 N.M. 172.

(5) That his version of the covenant is sustained by plain and natural interpretation of its language.—Private A. S. Realty Corporation v. Julian, 212 N.Y.S. 430, 214 App.Div. 628.

(6) Title in third person, where plaintiff alleged that the paramount title was in a third person, and that the title received from defendants had failed, while defendants denied the allegations, and placed plaintiff

on strict proof.—Thomas v. Becker, 180 N.W. 285, 190 Iowa 237.

91. Ill.—Sondag v. Keefe, 251 Ill. App. 378.

N.Y.—Delco Holding Co. v. Rosenthal, 164 N.Y.S. 785, 15 C.J. p 1310 note 85.

Burden held on defendant to prove

(1) Excessiveness of paving assessment, notwithstanding misdescription of the property in the execution therefor.—Pone v. Barbree, 196 S.E. 287, 57 Ga.App. 684.

(2) Right to retain rent in action by grantee, where defendant admitted execution of warranty deed and receipt of rental from a lessee for the ensuing year.—Winn v. Taylor, 190 P. 342, 98 Or. 556, affirmed 194 P. 857, 98 Or. 556.

(3) Other matters see 15 C.J. p 1310 note 85 [a].

92. Ala.—McShan v. Kilpatrick, 110 So. 281, 215 Ala. 185—Mixon v. Burleson, 82 So. 98, 203 Ala. 84.

Burden held on plaintiff to show

(1) Price paid for property.—Faull v. City of Dallas, Tex.Civ.App., 97 S.W.2d 1031, error dismissed.

(2) That amount paid for outstanding title was reasonable and necessary.

Ark.—Murphey v. Carter, 31 S.W.2d 412, 182 Ark. 316.

Ill.—Meyers v. Veres, 245 Ill.App. 127.

(3) Value of the portion of the tract conveyed, title to which had failed.

Ark.—Lane v. Stitt, 219 S.W. 340, 143 Ark. 27.

Pa.—Kreim v. Steigerwald, 193 A. 390, 128 Pa.Super. 51.

93. Vt.—Drouin v. Wilson, 67 A. 825, 80 Vt. 335, 13 Ann.Cas. 93.

15 C.J. p 1310 note 86.

94. Iowa.—Thomas v. Becker, 180 N.W. 285, 190 Iowa 237.

Mo.—Litzelfelner v. Cotner, App., 119 S.W.2d 447, 448, citing *Corpus Juris*.

15 C.J. p 1310 note 87.

95. Me.—Montgomery v. Reed, 69 Me. 510—Boothby v. Hathaway, 20 Me. 251.

96. Conn.—Perkins v. August, 146 A. 831, 109 Conn. 452.

Ga.—Rowan v. Newbern, 123 S.E. 148, 32 Ga.App. 363.

Idaho.—Turner Trust Co. v. Gillett, 210 P. 1001, 36 Idaho 844.

Miss.—Staton v. Henry, 94 So. 237, 130 Miss. 372.

Tex.—Felts v. Whitaker, Civ.App., 129 S.W.2d 682, error granted.

Vt.—McDonough v. Hanger, 111 A. 452, 94 Vt. 195.

15 C.J. p 1310 note 89.

Outstanding lease with option

Grantor is not liable for breach of warranty of title because of outstanding lease with option to purchase, in the absence of showing that lessee ever exercised option, or that it was valid and subsisting lien at time of conveyance, or that grantees yielded to paramount title or did not enjoy quiet possession; and where grantees purchased quitclaim deed from holder of outstanding lease they could not recover without showing that they acquired lease and that it was valid and subsisting lien at time of conveyance.—Smith v. Tomlin, 1 N.E.2d 297, 102 Ind.App. 103.

97. Ky.—Burchett v. Blackburne, 248 S.W. 832, 198 Ky. 304, 34 A.L.R. 1425—Isaacs v. Maupin, 231 S.W. 49, 191 Ky. 537.

Mo.—Smith v. Nussbaum, App., 71 S.W.2d 82.

15 C.J. p 1311 note 92.

98. Ala.—Perry v. Marbury Lumber Co., 103 So. 580, 212 Ala. 542—Short v. De Bardeleben Coal Co., 94 So. 285, 208 Ala. 356.

Mass.—Gallison v. Downing, 138 N.E. 315, 244 Mass. 33.

Mo.—Litzelfelner v. Cotner, App., 119 S.W.2d 447, 448, citing *Corpus Juris*.

15 C.J. p 1311 note 91.

99. Ala.—Russell v. Belsher, 128 So. 452, 221 Ala. 360.

not only implies, but generally expresses, a consideration, the burden is upon a party pleading no consideration in an action of covenant to sustain his plea;¹ and likewise the burden is on a party claiming that the consideration expressed was not the real consideration to show what the real consideration was.² On proof by plaintiff of a restriction in a former deed and its violation it is incumbent on defendant to show that the restriction was no longer in force.³ To maintain an action for the recovery of taxes paid by the grantee under a deed containing a covenant against encumbrances, plaintiff must prove the deed, the existence of the taxes as an encumbrance, and his payment thereof.⁴

§ 130. Admissibility of Evidence in General

Competent evidence tending to prove that the covenant was or was not broken, or which may be material on the question of damages is admissible.

Evidence which has a legitimate tendency to satisfy the jury that the covenant was or was not broken, or which may be material upon the question of damages, and which is not otherwise incompetent, should be admitted;⁵ but evidence that is immaterial or irrelevant as to either of these questions is, of course, inadmissible.⁶ It has been held that evidence of the value of real estate, in an action for breach of a covenant of warranty on the sale thereof, is confined to its value at the time of the

conveyance, and that evidence of its value at the time of trial is inadmissible;⁷ but it has also been held that, in an action for breach of covenants of warranty and of seizin, evidence of the value of the land at the time of the conveyance is improper.⁸ A defendant in default has a right to introduce evidence tending to reduce the amount of damages claimed but not to introduce evidence by way of set-off.⁹ Expert testimony as to the difference in value between a perfect record title and that acquired was not called for where grantor did not have, nor intend to warrant, such title.¹⁰

Res gestæ. All the circumstances surrounding and explanatory of the transaction between the parties may be given in evidence as part of the *res gestæ*.¹¹

Documentary evidence. Unless the pleas admit the execution of the covenant, or allege excuse for nonperformance,¹² generally speaking the instrument containing the covenant alleged to have been broken is always admissible in evidence,¹³ provided plaintiff's claim of title has been established,¹⁴ notwithstanding the deed may in its terms vary in some measure from the allegations of the declaration.¹⁵ It has also been held that, in actions for breach of covenant contained in a deed, an option agreement under which the deed was made may be admissible in evidence to show the consideration for the deed,¹⁶ that a bond for title is admissible to show that defendants were bound to

1. Ky.—Taylor v. Ashby, 2 J.J. Marsh. 415.

2. Tex.—Northcutt v. Hume, Com. App., 212 S.W. 157, reversing, Civ. App., 174 S.W. 974.

3. N.Y.—Schaefer v. Magerie, 211 N.Y.S. 469, 125 Misc. 840.

4. Mo.—Patterson v. Yancy, 81 Mo. 379.

5. Ark.—Smith v. Thomas, 278 S.W. 39, 169 Ark. 1110.

Cal.—Joyce v. Krupp, 257 P. 124, 83 Cal.App. 391.

Kan.—Williams v. Chase, 116 P. 617, 85 Kan. 301.

Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

15 C.J. p 1311 note 94.

Evidence as to damages for breach of covenants of title see *infra* § 142.

Parol or extrinsic evidence affecting writings see the C.J.S. title Evidence §§ 851-1015, also 22 C.J. p 1070 note 34-p 1295 note 98, and 15 C.J. p 1312 note 11-p 1312 note 34.

Value of land

Mo.—Hatton v. Henman, 10 S.W.2d 967, 222 Mo.App. 954.

Defense

Proof tending to establish defense pleaded, that party in possession was

holding over without color of title, was admissible.—Manley v. Pool, 246 P. 386, 117 Okl. 249.

Payments pending action

Evidence of payments to remove an encumbrance from the land is not rendered inadmissible by the fact that such payments were made while the action for breach of covenants was pending.—City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co., 131 N.E. 554, 231 N.Y. 18, 16 A.L.R. 1059, reversing 179 N.Y.S. 914, 190 App.Div. 939, reargument denied 132 N.E. 903, 231 N.Y. 598.

6. Ala.—Colson v. Harden, 141 So. 639, 224 Ala. 665—Wilder v. Tatum, 73 So. 833, 15 Ala.App. 474.

Minn.—Knapp v. Foley, 168 N.W. 183, 140 Minn. 423.

R.I.—Greenstein v. Rosenstein, 117 A. 528, 44 R.I. 407.

Tex.—Askew v. Bruner, Civ.App., 205 S.W. 152.

15 C.J. p 1311 note 95.

Proposition and acceptance

Evidence of plaintiffs' proposition to purchase and defendants' acceptance thereof are inadmissible.—Black v. Smith, 158 N.E. 916, 86 Ind.App. 621.

7. Ind.—Sherwood v. Johnson, 62 N. E. 645, 28 Ind.App. 277.

8. Ala.—Prestwood v. McGowin, 29 So. 386, 128 Ala. 267, 86 Am.S.R. 136.

9. Ill.—Chicago Mill & Lumber Co. of Cairo v. Townsend, 203 Ill.App. 457.

10. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

11. Pa.—Frederick v. Campbell, 13 Serg. & R. 136, 14 Serg. & R. 293.

15 C.J. p 1312 note 1.

12. Mo.—Curl v. Mann, 4 Mo. 272.

13. Miss.—White v. Presly, 54 Miss. 313.

Vt.—Smith v. Perry, 26 Vt. 279—Williams v. Wetherbee, 2 Alk. 329.

15 C.J. p 1312 note 3.

14. Neb.—Blodgett v. McMurtry, 74 N.W. 392, 54 Neb. 69.

15. Mich.—Hovey v. Smith, 22 Mich. 170.

15 C.J. p 1312 note 5.

Variance between pleading and proof see *supra* § 128.

16. Wis.—Mills v. Chicago, etc., R. Co., 79 N.W. 245, 103 Wis. 192.

15 C.J. p 1312 note 7.

make a good warranty title,¹⁷ and that the papers showing the creation of the encumbrance or adverse title alleged as a breach of the covenant are admissible.¹⁸ It has been held, however, that, in an action for breach of covenants of seizin and of warranty, a deed containing such covenants is not admissible in evidence when some of the plaintiffs in the case are not entitled to sue on the covenants.¹⁹ A deed which has been reformed in an action therefor, being without force, is inadmissible.²⁰

§ 131. — Judgment as Evidence of Eviction

A judgment adverse to the covenantor or his successor in favor of the owner of the paramount right is admissible in an action on the covenant to show eviction.

A judgment adverse to the covenantee or one claiming under him in favor of the owner of the paramount title or right is admissible in an action by him against the covenantor for breach of his covenant to show the fact of eviction,²¹ irrespective of whether or not the covenantor had notice of such suit.²² So also it has generally been held that the record of a judgment rendered against the covenantee in an action brought by him against the person in possession is evidence of what is equivalent to an eviction,²³ although the correctness of this rule has been questioned,²⁴ especially where

the judgment was rendered in an action by the grantee against one not claiming under his grantor.²⁵

§ 132. — Judgment as Evidence of Paramount Title or Right

A judgment of eviction in an action against the covenantee is prima facie evidence of paramount title in a subsequent action by the covenantee against the covenantor, and conclusive upon the latter if he has been notified to defend the title in the prior action.

While there are, as shown supra § 89, a few cases which contend that a vendor cannot be brought in to defend a title set up against his grantee in a suit brought by the latter, and which consequently hold that a judgment against the covenantee in such case would not relieve him of the onus of proving that he was evicted by title paramount,²⁶ a judgment against the covenantee or one claiming under him whether the suit is by or against him²⁷ has generally been held to be prima facie evidence in an action against the covenantor for breach of his covenant against a paramount title or right in another,²⁸ provided the covenantor was called on or given notice to defend the suit in which the judgment was rendered,²⁹ subject sometimes to certain limitations.³⁰ Again in some cases the judgment has been held prima facie

17. Ga.—Pierce v. Dennett, 136 S.E. 440, 163 Ga. 471.

18. Ala.—Brodie v. New England Mortg. Security Co., 51 So. 861, 166 Ala. 170.

19. C.J. p 1312 note 8.

Transfer of lien

Documents evidencing several stages of ineffectual effort in chancery to sell lots for delinquent taxes, are admissible as evidence of transfer of city's lien for taxes to purchaser who might enforce lien.—Ex parte Helm, 95 So. 546, 209 Ala. 1.

19. Ala.—Prestwood v. McGowin, 29 So. 386, 128 Ala. 267, 86 Am.S.R. 136.

20. Ind.—Black v. Smith, 158 N.E. 916, 86 Ind.App. 621.

21. Mass.—Garrison v. Downing, 138 N.E. 315, 244 Mass. 33.
15 C.J. p 1313 note 35.

22. Iowa.—Thomas v. Becker, 180 N.W. 285, 190 Iowa 237.
Ky.—Isaacs v. Maupin, 231 S.W. 49, 191 Ky. 527.

Mo.—Smith v. Nussbaum, App., 71 S.W.2d 82, 86, citing *Corpus Juris*.
Wash.—Bank of Alaska v. Ashland, 224 P. 7, 128 Wash. 572.
15 C.J. p 1313 note 25.

23. Ky.—Cummins v. Kennedy, 3 Litt. 118, 14 Am.D. 45.
15 C.J. p 1314 note 37.

24. Wash.—O'Connor v. Enos, 105 P. 1039, 56 Wash. 448.

15 C.J. p 1314 note 38.

25. Mass.—Twambley v. Henley, 4 Mass. 441.

26. Tenn.—Ferrell v. Alder, 8 Humphr. 44.

27. Ky.—Cummins v. Kennedy, 3 Litt. 118, 14 Am.D. 45.

Vt.—Brown v. Taylor, 13 Vt. 631, 37 Am.D. 618—Pitkin v. Leavitt, 13 Vt. 379—Park v. Bates, 12 Vt. 381, 36 Am.D. 347.

28. N.J.—Smith v. Smith, 101 A. 254, 90 N.J.Law 282.

Tex.—Garrett v. Butler, Civ.App., 260 S.W. 1069.

15 C.J. p 1314 note 43.

Suit by remote covenantee

Pleadings and judgment in suit by remote covenantee, compelled to discharge encumbrance, against intermediate covenantor, and notice to original covenantor, are admissible in intermediate covenantor's suit against original covenantor as best evidence of cause of action.—Smith v. Nussbaum, Mo.App., 71 S.W.2d 82.

29. Ind.—Teague v. Whaley, 50 N.E. 41, 20 Ind.App. 26.

Ky.—Isaacs v. Maupin, 231 S.W. 49, 191 Ky. 527.

Mo.—Smith v. Nussbaum, App., 71 S.W.2d 82, 86, citing *Corpus Juris*.

Tex.—Garrett v. Butler, Civ.App., 260 S.W. 1069.

15 C.J. p 1314 note 44.

Suit by remote covenantee

Where covenantor against encumbrances was notified by his covenantee to defend suit by third person against the covenantee for breach of covenantee's similar covenant in deed of the property to such third person, and the covenantor failed to do so, the judgment recovered by the third person against the covenantee settled, as against the covenantor, that there was an encumbrance.—Ballou v. Clark, 171 N.W. 682, 187 Iowa 498.

30. Ala.—Johnson v. Linton, 51 So. 32, 163 Ala. 547.

15 C.J. p 1314 note 45.

Allowance of claim against estate of decedent for the value of an undivided interest in a portion of the land of decedent conveyed by the heir to claimant, the money from which was paid by claimant to the adverse claimant, is not binding upon the heir so as to show that the claim was valid against the tract conveyed, especially where it would be a charge upon the rest of the land in any event, so that it was immaterial whether it was paid directly from the rest of the land, or indirectly through claimant.—Eaton v. Clarke, 120 A. 438, 80 N.H. 577.

evidence of eviction, but not of paramount title;³¹ and it has been held that a judgment in a prior action of which the grantor had notice, finding the title unmarketable, does not in a subsequent action establish breach of the covenant of title.³² In those jurisdictions, where ejectment is a mere possessory action and a judgment therein confers no title on the successful party, it is no defense to an action in the federal court of another state by the grantee of land in such state to recover damages for the breach of covenants of seizin that the covenantor has succeeded to the rights of the prevailing party in ejectment and has duly conveyed them to plaintiff, in the absence of other proof of title in such prevailing party.³³

Effect of notice. It is now the prevailing rule in the United States that, in the absence of fraud or collusion, where the covenantor has been given proper notice to defend the eviction suit, he is concluded by a judgment rendered therein against his grantee's title;³⁴ and this rule applies with particular force where the covenantor was a party to the eviction suit.³⁵ It has been held, however, that where a grantee has been evicted by a subordinate title which he precluded himself from contesting by his own declarations and acts, his grantor when sued on his covenant may show title paramount in

himself, although he had notice to defend;³⁶ and that the warrantor, in an action against him for breach of covenant of warranty upon the ground that a judgment had been rendered against the grantee for only a part of the land, will not preclude the grantor from showing that such part of the land was not included in the land covered by the warranty, although he had notice of the eviction suit;³⁷ and it has also been held that a covenantor is not bound by a judgment in ejectment against his grantee even when duly requested to defend the action, if not allowed after an adverse judgment to pay the cost and take a statutory new trial.³⁸ Unless notified, he is not concluded,³⁹ but this rule does not apply where the suit was instituted at the instigation of the covenantor,⁴⁰ and an exception to the rule prevails in Louisiana where the judgment of eviction was obtained in another state.⁴¹

§ 133. Weight and Sufficiency of Evidence

General rules as to weight and sufficiency of evidence apply.

The weight and sufficiency of the evidence in actions on covenants is governed by the rules applicable to the weight and sufficiency of evidence in civil actions generally, and is a question depend-

31. Ky.—Booker v. Bell, 3 Bibb 173, 6 Am.D. 641—Baltzel v. Samuel, 3 J.J.Marsh. 198.

32. N.Y.—Hilliker v. Rueger, 114 N.E. 391, 219 N.Y. 334.
15 C.J. p 1314 note 47.

33. U.S.—Schnelle & Querl Lumber Co. v. Barlow, C.C.N.Y., 34 F. 853.

34. U.S.—Wolfe v. Barataria Land Co., Iowa, 255 F. 503, 166 C.C.A. 579.

Ark.—Fels v. Ezell, 35 S.W.2d 359, 183 Ark. 229.

Ill.—Blwer v. Martin, 128 N.E. 518, 294 Ill. 488.

Ind.—Bollenbacher v. Lee, 121 N.E. 663, 75 Ind.App. 330.

Iowa.—Kellar v. Lindley, 212 N.W. 360, 203 Iowa 57—Thomas v. Becker, 180 N.W. 285, 190 Iowa 237.

Ky.—Lashley v. Lashley, 266 S.W. 247, 205 Ky. 601—Burchett v. Blackburne, 248 S.W. 853, 198 Ky. 304, 34 A.L.R. 1425—Isaacs v. Maupin, 231 S.W. 49, 191 Ky. 527.

Mo.—Smith v. Nussbaum, App., 71 S.W.2d 82, 86, citing *Corpus Juris*.

N.H.—Eaton v. Clarke, 120 A. 433, 80 N.H. 577.

N.C.—Cover v. McAden, 112 S.E. 817, 183 N.C. 641.

Or.—Estep v. Bailey, 185 P. 227, 94 Or. 59.

Tex.—Sherman v. Piner, Civ.App., 91 S.W.2d 1185—Conn. v. Peavy-Moore

Lumber Co., Civ.App., 6 S.W.2d 372, error dismissed—Garrett v. Butler, Civ.App., 260 S.W. 1069.

Utah.—Boothe v. Wyatt, 183 P. 323, 54 Utah 550.

15 C.J. p 1315 notes 52-54.

Decision to covenantor's advantage

In suit against defendant on warranty in his deed by plaintiffs who had defended title after notice to defendant, defendant could not complain of action of court in awarding improvements to defendants in such suits, decision being to defendant's advantage.—Talbert v. Grist, 201 S.W. 906, 198 Mo.App. 492.

Early decisions to contrary

N.C.—Martin v. Cowles, 19 N.C. 101.
S.C.—Buckels v. Mouzon, 32 S.C.L. 448.

15 C.J. p 1315 note 50.

Notice to maintain or defend title generally see supra §§ 89-92.

35. U.S.—Caldwell v. Blodgett, N.D., 256 F. 744, 168 C.C.A. 90.

Ala.—Smith v. Gaines, 27 So. 739, 210 Ala. 245.

La.—Northwestern Bottle Co. v. Rosen, 8 La.App. 284.

Tex.—Garrett v. Butler, Civ.App., 260 S.W. 1069.

Finality of judgment

Where land was conveyed by defendant to plaintiff by general warranty deed, and in an action against

them there was a judgment that title was never in defendant, and canceling the deed, defendant had same right to appeal from judgment as plaintiff, and when neither appealed, the judgment became final; and the record of such judgment is conclusive evidence of the paramount title of adverse claimant.—Rennie v. Gibson, 183 P. 483, 75 Okl. 282.

36. N.Y.—Kelly v. Schenectady Dutch Church, 2 Hill 105.

37. Ky.—Sullivan v. Hill, 122 S.W. 564, 33 Ky.L. 962.

38. Wis.—Eaton v. Lyman, 26 Wis. 61, 33 Wis. 34.

39. Ark.—Murphy v. Carter, 31 S.W.2d 412, 182 Ark. 316.

Iowa.—Thomas v. Becker, 180 N.W. 285, 190 Iowa 237.

Ky.—Isaacs v. Maupin, 231 S.W. 49, 191 Ky. 527.

Mo.—Smith v. Nussbaum, App., 71 S.W.2d 82, 86, citing *Corpus Juris*—Hemphill Lumber Co. v. Arcadia Timber Co., App., 52 S.W.2d 750.

Wash.—Bank of Alaska v. Ashland, 224 P. 7, 128 Wash. 572.

15 C.J. p 1315 note 58.

40. Mo.—Hemphill Lumber Co. v. Arcadia Timber Co., App., 52 S.W.2d 750.

41. La.—Klumpp v. Howcott, 71 So. 353, 139 La. 163.

15 C.J. p 1315 note 59.

ent on the facts and circumstances of the particular case.⁴² It is prima facie sufficient for plaintiff to prove the execution of the covenant by defend-

ant,⁴³ and he need not produce nor prove the counterpart.⁴⁴ Damages must be proved with reasonable certainty.⁴⁵

42. Ill.—O'Gallagher v. Lockhart 105 N.E. 295, 263 Ill. 489, 52 L.R.A.N.S., 1044.
15 C.J. p 1316 note 61.

Evidence held sufficient

(1) To demand verdict for plaintiff—Rowan v. Newbern, 123 S.E. 148 32 Ga.App. 363.

(2) To establish covenantor's being made party to suit wherein third party established title was not unauthorized or at least that covenantor acquiesced therein.—Hemphill Lumber Co. v. Arcadia Timber Co., Mo. App., 52 S.W.2d 750.

(3) To make prima facie showing of a valid and paramount encumbrance and title.—Sutton v. Cannon, 100 So. 24, 135 Miss. 368—15 C.J. p 1316 note 61 [a] (4), (5), (7), (9).

(4) To overcome presumption of absolute ownership by virtue of legal title.—Dothan Nat. Bank v. Hollis, 103 So. 589, 212 Ala. 628.

(5) To show payment of tax liens reasonably necessary to discharge them.—Schuster v. Johnson, 139 A. 502, 107 Conn. 133.

(6) To show prima facie the value put upon the property exchanged, and to show the price paid by warrantee for all the land conveyed to him, and the proportional part of the price paid by warrantee represented by part of the land to which title failed.—Northcutt v. Hume, Tex.Com. App., 212 S.W. 157, reversing, Civ. App., 174 S.W. 974.

(7) To show that granary on land at time of conveyance was personal property of vendor's tenant, and that this fact was known to purchaser at time of conveyance.—Padden v. Murgitroyd, 165 P. 913, 54 Mont. 1.

(8) To show that grantee knew, when he purchased property, that a part of it had either been actually appropriated by state for canal purposes or was about to be.—Callanan v. Keenan, 166 N.Y.S. 71, 179 App. Div. 405, reversed on other grounds 121 N.E. 376, 224 N.Y. 503, rehearing denied 122 N.E. 877, 225 N.Y. 662.

(9) To show that parties agreed on sale of unimproved lots only.—Burns v. Ames Realty Co., Mo.App., 11 S.W.2d 71.

(10) To show that property on which taxes were paid was same property described in deed.—Grant Bond & Mortgage Co. v. Ogle, 65 S.W.2d 1091, 17 Tenn.App. 112.

(11) To show value of lands.—La.—Crowell & Spencer Lumber Co.

v. Hawkins, 179 So. 21, 189 La. 18, annulling, 174 So. 151.
Miss.—Brunt v. McLaurin, 172 So. 309, 178 Miss. 86.

(12) To support constructive eviction.—Campbell v. Gallentine, 215 N.W. 111, 115 Neb. 789, 61 A.L.R. 1—15 C.J. p 1316 note 61 [a] (1).

(13) To support findings and verdict.

Ark.—Holthoff v. Joyce, 294 S.W. 1006, 174 Ark. 248—Texas Co. v. Snow, 291 S.W. 326, 172 Ark. 1123—Eversmeyer v. McCollum, 283 S.W. 379, 171 Ark. 117—Robertson v. Collier, 238 S.W. 44, 152 Ark. 351.
Cal.—Chandler v. Bowman, 279 P. 1041, 100 Cal.App. 221.

Conn.—Schuster v. Johnson, 139 A. 502, 107 Conn. 133.

Ind.—Noffsinger v. Tritt, 145 N.E. 783, 82 Ind.App. 682.

Ky.—Shearer v. Huff, 49 S.W.2d 539, 243 Kv. 653.

La.—Willis v. Hamilton, App., 168 So. 355.

Mass.—Rajewski v. McBean, 172 N.E. 882, 273 Mass. 1.

Minn.—Baker v. Rodgers, 271 N.W. 241, 199 Minn. 148.

Tex.—Felts v. Whitaker, Civ.App., 139 S.W.2d 682, error granted.

15 C.J. p 1316 note 61 [a] (3).

(14) To sustain judgment.

Ind.—Van Dyke v. Replogle, 8 N.E. 2d 95, 103 Ind.App. 372.

Kan.—De Graffenrich v. Elliott, 255 P. 971, 123 Kan. 477.

Mo.—La Prade Realty Co. v. Board of Education of City of St. Louis, App., 220 S.W. 1021.

Neb.—Funke v. Fraas, 199 N.W. 836, 112 Neb. 541.

Okl.—George v. Hodges, 247 P. 1107, 121 Okl. 117.

Evidence held insufficient

(1) To charge grantors in deed or their predecessors with knowledge of underground sewer for period sufficient to give city prescriptive right to use it.—Albany Garage Co. v. Munson, 218 N.Y.S. 78, 218 App.Div. 240, affirmed 157 N.E. 880, 245 N.Y. 613.

(2) To disturb finding.—Getts v. Olsen, 202 N.W. 160, 186 Wis. 70.

(3) To establish cause of action.—Wheeler v. Roley, Colo., 95 P.2d 2.

(4) To establish that land included in warranty deed was in adverse possession at time of delivery of deed.—Dortch's Ex'r v. Willoughby, 113 S.W.2d 832, 272 Ky. 231.

(5) To prove constructive eviction.—Stanton v. Conley, 278 N.Y.S. 275, 244 App.Div. 84.

(6) To show actual value of property.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

(7) To show breach of covenant. Iowa.—Pope v. Coe, 225 N.W. 939, 208 Iowa 759.

Minn.—Baker v. Rodgers, 271 N.W. 241, 199 Minn. 148.

Mo.—Litzelfelner v. Cotner, App., 119 S.W.2d 447.

Ohio.—Rabel v. Downs, 155 N.E. 403, 23 Ohio App. 352.

Tex.—Adams v. Carter, Civ.App., 204 S.W. 781, error refused.

Va.—Otey v. Oakey, 160 S.E. 8, 157 Va. 314.

15 C.J. p 1316 note 61 [b] (2).

(8) To show mutual mistake as to acreage in land conveyed, relied on as defense.—Lashley v. Lashley, 266 S.W. 247, 205 Ky. 601.

(9) To show paramount title in third person.—Perry v. Marbury Lumber Co., 103 So. 580, 212 Ala. 542—15 C.J. p 1316 note 61 [b] (9).

(10) To show privity of estate.—McCoy v. Wabash Ry. Co., Mo.App., 203 S.W. 249.

(11) To show that grantee knew of prior sale.—Woollums v. Hewitt, 77 So. 295, 142 La. 597.

(12) To show that property was improperly assessed.—Grant Bond & Mortgage Co. v. Ogle, 65 S.W.2d 1091, 17 Tenn.App. 112.

(13) To show that vendor conveyed to bona fide purchasers.—Miller v. Electric Service Co., 186 N.W. 37, 192 Iowa 1073.

(14) To support findings and verdict.

Ark.—Arkansas Trust Co. v. Bates, 59 S.W.2d 1025, 187 Ark. 331.

Iowa.—Miller v. McCutchan, 184 N.W. 387, 192 Iowa 1209.

Tex.—Felts v. Whitaker, Civ.App., 129 S.W.2d 682, error granted.

15 C.J. p 1316 note 61 [b] (7).

(15) To warrant recovery.

Okl.—Baker v. Ebahotubbi, 246 P. 230, 117 Okl. 224.

Tex.—Rahl v. Compton, Civ.App., 112 S.W.2d 509, error dismissed—Pochyla v. Cralle, Civ.App., 42 S.W. 2d 793—Westervell v. Meuly, Civ. App., 216 S.W. 680.

15 C.J. p 1316 note 61 [b] (1), (4), (10).

43. N.J.—Patten v. Heustis, 26 N.J. Law 293.

15 C.J. p 1317 note 62.

44. N.J.—Patten v. Heustis, supra.

45. Va.—Otey v. Oakey, 160 S.E. 8, 157 Va. 314.

§ 134. Trial

The party who holds the affirmative of the issue, whether plaintiff or defendant, has the right to open and close.

The party who holds the affirmative of the issue has the right to open and to close the argument to the jury.⁴⁶ Inasmuch as plaintiff must prove the damages occasioned by the breach of the covenant, the right to open and to close the argument lies with him.⁴⁷ Where, however, defendant pleads performance of covenant, he must begin the evidence and conclude to the jury.⁴⁸

§ 135. — Questions of Law and Fact

Questions of law are for the court, and disputed questions of fact for the jury.

It is the province of the court, and not of the jury, to determine questions of law,⁴⁹ such as questions of construction,⁵⁰ and what constitutes a reasonable time for a grantor to perform his covenant to cure defects in title.⁵¹ It is the province of the jury to determine questions of fact,⁵² such as the amount of damages recoverable,⁵³ whether defendant performed its obligations under the covenant,⁵⁴ whether the grantee knew, or should have known

of an existing encumbrance,⁵⁵ and whether any money of plaintiffs was used in removing an encumbrance.⁵⁶ It has been held that the facts, whether the covenantor was given notice to defend an action brought against his covenantee, and of what the notice consisted, are to be determined by the court in an action by the covenantee to recover damages for breach of the covenant,⁵⁷ where no request is made that they be submitted to the jury;⁵⁸ but according to other authorities these questions, like other questions of fact, are to be determined by the jury.⁵⁹ If there is no material question of fact for submission to the jury on which there is any substantial controversy, the court may direct a verdict.⁶⁰ The mere claim of an excessive amount of damages is no ground for dismissal of the action.⁶¹

§ 136. — Instructions

Correct instructions should be given on matters in issue.

In accordance with the general rules applicable in the trial of a civil case generally, in actions for breach of covenant the court should correctly instruct the jury as to the law applicable to the case.⁶²

46. U.S.—Beall v. Newton, C.C.D.C., 2 F.Cas.No.1,164, 1 Cranch C.C. 404.

47. U.S.—Moncure v. Dermott, C.C. D.C., 17 F.Cas.No.9,707, 5 Cranch C.C. 445, reversed on other grounds 13 Pet. 345, 10 L.Ed. 193.

48. Pa.—Norris v. Insurance Co. of North America, 3 Yeates 84, 2 Am. D. 360.

49. Liability for attorney's fees

Where action on covenant against encumbrances was brought by grantee to recover amount of judgment he had been compelled to pay in action by owner of outstanding lease, of which action defendant grantors had been notified, and also to recover fifty dollars attorney's fees in the former action, the reasonableness of such fees not having been questioned in the former action, there was no necessity of submitting that part of the case to the jury, defendants' contention being that they were not liable therefor.—Estep v. Bailey, 185 P. 227, 94 Or. 59.

50. Ill.—Hutchinson v. Ulrich, 34 N. E. 556, 145 Ill. 336, 21 L.R.A. 391, 15 C.J. p 1336 note 40.

51. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 96 So. 436, 209 Ala. 432.

52. Ala.—Partridge v. Bates, 78 So. 911, 201 Ala. 557.

Ohio.—Lyons v. Chapman, 178 N.E. 24, 40 Ohio App. 1.

W.Va.—Pauley v. Decker, 109 S.E. 607, 89 W.Va. 485, 15 C.J. p 1336 note 39.

53. Ohio.—Lyons v. Chapman, 178 N. E. 24, 40 Ohio App. 1.

54. N.Y.—Miller v. H. J. & M. I. Realty Corporation, 183 N.Y.S. 446.

55. Ark.—Kahn v. Cherry, 198 S.W. 286, 131 Ark. 49.

56. Ala.—McShan v. Kilpatrick, 110 So. 281, 215 Ala. 185.

57. Ind.—Teague v. Whaley, 50 N.E. 41, 20 Ind.App. 16.

58. Mich.—Cook v. Curtis, 36 N.W. 692, 68 Mich. 611.

59. Iowa.—Kellar v. Lindley, 212 N. W. 360, 203 Iowa 57, 15 C.J. p 1337 note 43.

60. R.I.—Greenstein v. Rosenstein, 117 A. 528, 44 R.I. 407.

Tex.—Graebner v. Limburger's Ex'rs, Com.App., 293 S.W. 1100, reversing, Limburger v. Graebner, Civ.App., 287 S.W. 1101.

Wis.—Johnson v. Blumer, 197 N.W. 340, 183 Wis. 369, rehearing denied 198 N.W. 277, 183 Wis. 369, 15 C.J. p 1336 note 38 [a].

Evidence held insufficient for jury Mo.—Litzelfelner v. Cotner, App., 119 S.W.2d 447.

61. La.—Pharr v. Gall, 29 So. 306, 104 La. 700.

62. Instructions held proper under facts

(1) That issue was whether encumbrance existed, and that grantor's prior suit determined only issue of rent claimed therein.—Finer v. Miller, 136 A. 606, 5 N.J.Misc. 384.

(2) That measure of damages was value of "use," "occupancy," and "enjoyment" from date of deed until expiration of outstanding lease, although no cause of action for breach of covenant of quiet enjoyment was pleaded.—Jackson v. Sewell, Mo.App., 284 S.W. 197.

(3) That plaintiffs had not parted with value in removal of prior encumbrance, and that only nominal damages may be awarded.—McShan v. Kilpatrick, 110 So. 281, 215 Ala. 185.

(4) Other illustration see 15 C.J. p 1337 note 44 [b].

Instructions erroneous under proof

(1) Authorizing recovery by grantee for ground occupied by rear wall, claimed to have been conveyed.—Bosieux v. Shapiro, 153 S.E. 667, 154 Va. 255.

(2) Permitting grantee to recover entire consideration stated in deed, although retaining property after knowledge of defective title.—Otey v. Oakey, 160 S.E. 8, 157 Va. 314.

(3) Other illustrations see 15 C.J. p 1337 note 44, [a].

§ 137. — Verdict and Findings

The verdict and findings should conform to the pleadings and proof.

In an action for breach of covenant, the verdict and findings, while coextensive with the issues,⁶³ must be confined to the evidence in the case,⁶⁴ and, where the action is against the heirs of a covenantor, should be in solido.⁶⁵ A general verdict cannot be sustained where any one of the breaches assigned in the declaration or complaint is substantially defective,⁶⁶ and is unsupported by proof of a partial breach.⁶⁷ Similarly a judgment for general damages must be supported by a finding of the amount of such damages.⁶⁸ A finding which necessarily includes another upon an essential issue is good.⁶⁹

§ 138. Judgment

The judgment should be in accordance with the issues and proof in the particular case.

Judgment may be rendered for any amount justly due, not exceeding the ad damnum.⁷⁰ Where an action is brought on the covenant of seizin, and also that of warranty, plaintiff will at his election be allowed to take judgment on either;⁷¹ and, where a defendant tenders nominal damages, plaintiff does not waive his right to a judgment by going to the jury on the defense of title in defendant by adverse possession, where he has demurred to defendant's case on the evidence;⁷² nor does defendant waive his right to appear and tender evidence at the assessment of damages by suffering a judgment by default.⁷³ Since the rule as to joint tortfeasors is not applicable to breach of covenant, in an action for damages against defendants for breach by each defendant of one or more restrictive covenants in uniform deeds a judgment for

damages against all of the defendants jointly and severally is erroneous.⁷⁴ In an action of covenant against two persons, if one of them pleads infancy, and it is found for him, plaintiff may enter a nolle prosequi against him and have judgment against the other.⁷⁵ In a suit founded upon an allegation that plaintiff was evicted from certain land, on a showing that he was evicted from only half the land, a judgment of nonsuit as to the half from which he was not evicted is proper.⁷⁶ On recovery for breach of a warranty which fixed the purchase price as the measure of damages, cancellation of outstanding notes for the remainder of the purchase price, and a lien on the property to secure the recovery of the purchase money already paid, may be decreed.⁷⁷ A party asserting a claim for equitable relief and also for damages for breach of warranty may, in the adjustment of equities, be denied judgment on the warranty where he has already been awarded, on his prayer for equitable relief, more than his warranty would entitle him to.⁷⁸

Where covenantor is sued jointly with, or impleaded by, covenantee. Where both the covenantor and the covenantee are joined in an action to try title to the land conveyed, and judgment is recovered against them, the covenantee is entitled to judgment in the same action against the covenantor.⁷⁹ So too it has been held that where, upon eviction under a paramount title, the grantee of a covenantee sues him for breach of his covenant of warranty and the latter causes his covenantor to be impleaded, he is entitled to judgment for the consideration paid by him, with interest, although no judgment is recovered against him.⁸⁰

In action against estate of deceased covenantor. In an action against the administrator, widow, and heirs of a covenantor, the judgment should be

63. Cal.—Holzheiser v. Hayes, 52 P. 838, 5 Cal.Unrep.Cas. 965.

Mich.—Capen v. Stevens, 29 Mich. 496.

Finding held on immaterial matter

In suit for breach of warranty of title, finding that purchasers believed they were purchasing land embraced in half of driveway.—Weaver v. Propst, Tex.Civ.App., 28 S.W.2d 872, error refused.

64. Ala.—Anderson v. Knox, 20 Ala. 156.

65. Md.—Crisfield v. Storr, 36 Md. 129, 11 Am.R. 480.

66. Ky.—Talbot v. Herndon, 4 J.J. Marsh. 553—Willson v. Bowens, 2 T.B.Mon. 86.

67. N.H.—Parker v. Brown, 15 N.H. 176.

68. Iowa.—National Horse-Import-

ing Co. v. Novak, 64 N.W. 616, 95 Iowa 596.

Tex.—Hynes v. Packard, 45 S.W. 562, 92 Tex. 44.

69. Tex.—Chisum v. Chesnutt, Civ. App., 36 S.W. 758. 15 C.J. p 1337 note 51.

70. Mass.—Lucas v. Wilcox, 135 Mass. 77. 15 C.J. p 1335 note 8.

71. Conn.—Sterling v. Peet, 14 Conn. 245.

72. Mo.—Eagan v. Martin, 81 Mo. App. 676.

73. Wis.—Bartelt v. Braunsdorf, 14 N.W. 869, 57 Wis. 1.

74. N.Y.—Gallon v. Hussar, 158 N.Y. S. 895, 172 App.Div. 393.

75. U.S.—Kurtz v. Becker, C.C.D.C., 14 F.Cas.No.7,951, 5 Cranch C.C. 671.

76. La.—Kirby Lumber Co. v. Hicks Co., 80 So. 663, 144 La. 473.

77. Idaho.—Wilson v. Sunnyside Orchard Co., 196 P. 302, 33 Idaho 501.

78. Tex.—Herbert v. Denman, Civ. App., 44 S.W.2d 441, error refused.

79. Tex.—Branch v. Weiss, 57 S.W. 901, 23 Tex.Civ.App. 84.

Order postponing determination

Order after recovery against grantee, who had notified warrantors to defend, finding cause had been postponed, was in effect nunc pro tunc postponement order, authorizing court to determine liability of warrantors.—Harmon v. Nofre, 267 P. 650, 131 Okl. 1.

80. Tex.—Johnson v. Blum, Civ.App., 66 S.W. 461.

15 C.J. p 1337 note 60.

against them in solido, with an order as to the administrator quando acciderint.⁸¹ Where it does not appear in what capacity defendant holds the decedent's estate, whether as executor or devisee, it is error to award judgment against him in both capacities.⁸²

§ 139. Execution

A successful plaintiff may in a proper case be denied execution until he releases other covenants or lodges a discharge from his grantee; and a *capias ad satisfaciendum* will not ordinarily issue where arrest has been abolished in contract actions.

In case of a recovery on a covenant of seizin in a deed in which there are other covenants which run with the land, plaintiff should be required to give a release of those covenants before he is allowed to take out execution;⁸³ and, where plaintiff has conveyed the land, the court will order a stay of execution until he shall have lodged a discharge or quitclaim deed from his grantee.⁸⁴ In the absence of fraud a *capias ad satisfaciendum* will not issue on a judgment for breach of covenant in those jurisdictions in which arrest has been abolished in actions *ex contractu*.⁸⁵

§ 140. Appeal and Error

General rules governing appeals and writs of error apply.

The law governing appeals and writs of error in civil cases generally obtains in actions for breach of covenant. Thus error must be shown affirmatively by the record;⁸⁶ an objection not interposed below will not be considered by the higher court;⁸⁷ harmless error is no ground for reversal;⁸⁸ and a verdict which does substantial justice between

the parties,⁸⁹ or a finding of fact which is sustained by the evidence,⁹⁰ will not be disturbed; but a judgment not sustained by the evidence will be reversed.⁹¹

§ 141. Effect of Recovery on Title to Property

Although there is authority to the contrary, it is held that recovery for total breach of covenant revests title in the covenantor and estops the covenantee thereafter to set up the deed as a conveyance.

While it has been said to be obvious that a covenantee should not be allowed to recover damages for total breach of the covenant and also hold the land by virtue of the conveyance,⁹² the effect upon the title of a judgment for breach of covenant has been found by the courts to be a subject of some difficulty. Thus it has been held that the title revests in the covenantor;⁹³ that the recovery operates as an estoppel of the covenantee afterward to set up the deed as a conveyance of land against the grantor;⁹⁴ that the covenantor is entitled to a reconveyance free from any encumbrances created by the covenantee or those claiming under him,⁹⁵ and if a reconveyance is refused a court of equity will compel it;⁹⁶ and that a recovery of the purchase money for breach of warranty works a rescission.⁹⁷ Similarly it has been held that, where permanent damages are awarded for breach of a covenant restricting the use of property, it is proper to require the delivery to defendant of a release from such covenant.⁹⁸ On the other hand, however, it has been held that a recovery on the covenant against encumbrances will not divest the covenantee of title;⁹⁹ and that a covenantee who recovers as for a total breach of the covenant is under no obligation to reconvey the

81. Ill.—Dugger v. Oglesby, 3 Ill. App. 94, reversed on other grounds 99 Ill. 405.

82. Tex.—Johns v. Hardin, 16 S.W. 623, 81 Tex. 37.

83. Vt.—Blake v. Burnham, 29 Vt. 437.

84. Vt.—Campbell v. Martin, 95 A. 494, 89 Vt. 214.
15 C.J. p 1337 note 65.

85. Pa.—Howard v. McKee, 82 Pa. 409.

86. Va.—Carthrae v. Brown, 3 Leigh 98, 30 Va. 98, 23 Am.D. 255.
15 C.J. p 1337 note 68.

87. Mich.—Cook v. Curtis, 38 N.W. 692, 68 Mich. 611.
15 C.J. p 1338 note 69.

88. Mich.—Webb v. Holt, 71 N.W. 637, 113 Mich. 338.
15 C.J. p 1338 note 70.

89. Ga.—Reagan v. Galloway, 49 Ga. 452.

15 C.J. p 1338 note 71.

90. Minn.—Long v. Howard, 53 N.W. 1014, 51 Minn. 571.

91. Tex.—White v. Holley, 24 S.W. 831, 3 Tex.Civ.App. 590.
15 C.J. p 1338 note 73.

92. Ala.—Mackintosh v. Stewart, 61 So. 956, 181 Ala. 328.
15 C.J. p 1338 note 74.

93. Wis.—Noonan v. Kelsey, 21 Wis. 138.

15 C.J. p 1338 note 75.

94. Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138.
15 C.J. p 1338 note 76.

95. Iowa.—Shorthill v. Ferguson, 47 Iowa 284.

Ky.—McKinny v. Watts, 3 A.K.Marsh. 268.

Tenn.—Park v. Cheek, 4 Coldw. 20—Kincaid v. Brittain, 5 Sneed 119.
Release of other covenants in case of recovery on the covenant of seizin see supra § 139.

Stay of execution pending execution of quitclaim see supra § 139.

96. Tenn.—Park v. Cheek, 4 Coldw. 20. Contra Lawrence v. Vick, 10 Humphr. 285.

97. Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138.

98. N.Y.—Amerman v. Deane, 30 N. E. 741, 132 N.Y. 355, 28 Am.S.R. 584.

99. Me.—Foss v. Stickney, 5 Me. 390.
15 C.J. p 1338 note 80.

land to his covenantor,¹ and equity will not compel him so to do.² Likewise, it has been held that, in the absence of an allegation that no interest passed by the deed, and where in fact an equitable title did pass, a recovery by the grantee will not estop him from afterward claiming the property.³ In case of a partial breach, if the covenantee sues without an offer to rescind, he can recover only to the extent of the breach, the sale and conveyance remaining in force as to the part to which there is no failure of title.⁴

§ 142. Damages

- a. Measure of damages for breach
- b. Assumption of indebtedness
- c. What law governs
- d. Covenants of title generally

a. Measure of Damages for Breach

Compensation for the actual loss suffered is the measure of damages for breach of covenant. At least nominal damages are recoverable for any breach.

The measure of damages for breach of cove-

nant is compensation for the actual loss suffered by reason of the breach.⁵ Where the breach is in fact absolute,⁶ or where the performance of the covenant has become impossible by reason of the total destruction of the subject matter of the contract,⁷ damages should be given as for a total breach. On the breach of a personal covenant, the damages recoverable are a sum sufficient to put plaintiff in the position in which he would have stood if the covenant had been kept.⁸ Where a mortgage made by the grantee is outstanding at the time of suit, its amount must be deducted from the sum otherwise recoverable on covenants running with the land, as it is pro tanto an assignment.⁹

Contingent and speculative damages cannot be recovered,¹⁰ nor will plaintiff be able to recover for losses or damage unconnected with the breach of the covenant sued on.¹¹

Nominal damages. Covenantee is entitled to at least nominal damages for any breach of a covenant.¹² Substantial damages, however, are re-

1. Pa.—Ives v. Niles, 5 Watts 323. 15 C.J. p 1338 note 81.

2. Pa.—Ives v. Niles, supra.

3. N.D.—Bowne v. Wolcott, 48 N.W. 336, 1 N.D. 415.

4. Tenn.—Recohs v. Younglove, 8 Baxt. 385.

5. U.S.—Hoffer Oil Corporation v. Carpenter, C.C.A.Okl., 34 F.2d 589, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651.

Ala.—Coston v. McClelland, 127 So. 176, 220 Ala. 598—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138—Wilder v. Tatum, 73 So. 833, 15 Ala.App. 474.

Iowa.—Pronosil v. Pelton, 173 N.W. 235, 186 Iowa 1235.

Mich.—Mueller v. Bankers' Trust Co. of Muskegon, 247 N.W. 103, 262 Mich. 53.

N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907—Miller v. H. J. & M. I. Realty Corporation, 188 N.Y.S. 446.

Or.—Norby v. Section Line Drainage Dist., 76 P.2d 966, 159 Or. 80.

R.I.—Brusco v. Pate, 153 A. 311, 312, 51 R.I. 222, citing *Corpus Juris*.

Va.—Bossieux v. Shapiro, 153 S.E. 667, 154 Va. 255.

15 C.J. p 1317 note 65.

Profit vendee would have made on resale but for vendor's breach of covenant in deed, to effect that he was unmarried, is properly allowed as measure of damages for breach.

—Brusco v. Pate, 153 A. 311, 51 R.I. 222.

Consideration not determinative

Damages are awarded as compensation for the injury suffered and not to restore the consideration paid; hence the measure of damages for a breach of covenant is the value of the benefit contracted for, be it greater or less than the consideration paid.—Hoffer Oil Corporation v. Carpenter, C.C.A.Okl., 34 F.2d 589, certiorari denied 50 S.Ct. 158, 280 U.S. 608, 74 L.Ed. 651.

Damages held to be excessive

(1) \$3,000 damages to owner of residence property for breach of covenant in a trust agreement against erection of apartment houses on described lots is excessive, and should be reduced to \$1,000.—Heitkemper v. Schmeer, 29 P.2d 540, 146 Or. 304, rehearing denied 30 P.2d 1119, 146 Or. 304.

(2) Damages of \$1,120 for breach of a covenant in a deed conveying property subject to a mortgage which provided that, in case payment was demanded by the mortgagor, the grantor would procure an extension or a new mortgage held to be excessive and reduced to \$975.—Miller v. H. J. & M. I. Realty Corporation, 188 N.Y.S. 446.

Taxes on unusable property

On vendor's breach of a covenant to construct an adequate bridge across a creek, leaving the lots inaccessible, taxes paid without any use of the property because of the absence of a bridge is recoverable as a proper element of damages.—Muel-

ler v. Bankers' Trust Co. of Muskegon, 247 N.W. 103, 262 Mich. 53.

6. N.D.—Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 46 N.D. 646. 15 C.J. p 1318 note 66.

7. U.S.—Estill v. Blakemore, C.C. Tenn., 8 F.Cas.No.4,538, Brunn.Coll. Cas. 100.

N.Y.—Fish v. Folley, 6 Hill 54—Crain v. Beach, 2 Barb. 120, affirmed 2 N.Y. 86, 49 Am.D. 369.

8. N.C.—Lemly v. Ellis, 55 S.E. 629, 143 N.C. 200.

15 C.J. p 1329 note 15.

9. Mass.—Tufts v. Adams, 8 Pick. 547.

10. N.Y.—Shepherd v. Ryers, 15 Johns. 497.

11. Mich.—Mueller v. Bankers' Trust Co. of Muskegon, 247 N.W. 103, 262 Mich. 53.

12. N.Y.—Callanan v. Keenan, 121 N.E. 376, 224 N.Y. 503.

Ohio.—Schick v. Uiland, 24 Ohio N.P., N.S., 401.

Or.—Norby v. Section Line Drainage Dist., 76 P.2d 966, 159 Or. 80.

15 C.J. p 1318 note 72.

Covenant to convey seller's interest

Where A covenanted to convey to B his right, title, and interest in a slave, but not to warrant the title, and A had only a naked legal title to the slave, which was tainted with fraud, the measure of damages was only the value of A's interest, and, that being merely nominal, B could recover only nominal damages.—Whitehead v. Ducker, 11 Sm. & M. Miss., 98.

coverable only on proof of actual loss.¹³

Successive actions. The measure of damages against successive covenantors, in actions for the same breach of the same covenant, is the same in all.¹⁴

b. Assumption of Indebtedness

Damages for breach of purchaser's covenant to assume vendor's indebtedness are generally held to be the full amount of the debt assumed.

Where a purchaser of property agrees to assume and save the vendor harmless from certain outstanding indebtedness against him, the measure of damages in an action by the vendor upon a breach of such covenant has been held to be the full amount of the debt which the covenantee assumed to pay,¹⁵ although a different rule has been applied where the land is sold by virtue of an encumbrance which the grantee assumed to pay for a price exceeding the encumbrance.¹⁶

c. What Law Governs

The law in force at the date of the contract controls the measure of damages. The law of the forum governs the measure for breaches of covenants of seizin or warranty.

In all cases the law in force at the date of the contract governs in the determination of the measure of damages.¹⁷ In an action for a breach of covenant of seizin, the rule of damages in the state in which the action is brought will govern, although the land lies in another state,¹⁸ and the

same rule applies with reference to covenants of warranty.¹⁹

d. Covenants of Title Generally

- (1) Total loss of estate
- (2) Partial or temporary loss of estate
- (3) Nominal damages
- (4) Fraudulent representations
- (5) Acquisition of outstanding title
- (6) Enhanced value and improvements
- (7) Rents and profits
- (8) Taxes
- (9) Evidence of damages

(1) Total Loss of Estate

The measure of damages for a breach of covenant of title resulting in a total loss of the estate is ordinarily the purchase money paid with interest. If grantee had possession the amount of the benefit he received is deductible.

As a general rule the measure of damages for a breach of the usual covenants of title resulting in a total loss of the estate conveyed is the purchase money paid, or the value of the consideration²⁰ with interest thereon, see *infra* § 149, from the date of the conveyance; or, as otherwise stated, in some cases the value of the land at the time of the conveyance estimated by the purchase price.²¹ It does not modify the rule that the actual consideration was paid in other commodities than money, or even in other real estate; this only requires that the value of such other property be as-

13. Ala.—Mixon v. Burleson, 82 So. 98, 203 Ala. 84.

Ohio.—Schick v. Ulland, 24 Ohio N.P., N.S., 401.

15 C.J. p 1318 note 73.

Unproved taxes are not a proper item of damages for breach of a covenant of warranty.—Satcher v. Radesich, 96 So. 35, 153 La. 468.

14. Ohio.—Wilson v. Taylor, 9 Ohio St. 595, 75 Am.D. 488.

15. Iowa.—Stout v. Folger, 34 Iowa 71, 11 Am.R. 138.

Mass.—Furnas v. Durgin, 119 Mass. 500, 20 Am.R. 341.

N.J.—Sparkman v. Gove, 44 N.J.Law 252.

16. Pa.—Young v. Stone, 4 Watts & S. 45.

Sale price and agreed price

If a purchaser of land covenants to pay an encumbrance upon it out of the amount of the purchase money, which he fails to do, by reason of which the land is sold for the payment of the encumbrance, and sells for a price exceeding it, he is liable to the vendor for damages, the

measure of which is the difference between the amount for which the land sold and the price which he agreed to pay for it.—Young v. Stone, *supra*.

17. S.C.—Aiken v. McDonald, 20 S.E. 796, 43 S.C. 29, 49 Am.S.R. 817.

Tex.—Garrett v. Gaines, 6 Tex. 435.

18. U.S.—Mather v. Stokely, Mass., 218 F. 764, 134 C.C.A. 442.

Mass.—Smith v. Strong, 14 Pick. 128.

—Nichols v. Walter, 8 Mass. 243.

The rate of interest allowed as damages is governed by the lex fori.

—Mather v. Stokely, Mass., 218 F. 764, 134 C.C.A. 442.

19. Kan.—Looney v. Reeves, 48 Kan. 606, 5 Kan.App. 279.

20. Ark.—Fox v. Pinson, 34 S.W.2d 459, 132 Ark. 936, 74 A.L.R. 583.

Fla.—Burton v. Price, 141 So. 728, 105 Fla. 544.

Ga.—Cook v. Pollard, 179 S.E. 264, 50 Ga.App. 752, 268 citing *Corpus Juris*.

Ky.—Bynum v. Bailey, 265 S.W. 1110, 205 Ky. 384—Triplett v. Gill, 7 J. J.Marsh. 438—Cox's Heirs v.

Strode, 2 Bibb 278, 5 Am.D. 603.

La.—Levenberg v. Shanks, 115 So. 641, 165 La. 419.

Miss.—Brunt v. McLaurin, 172 So. 309, 178 Miss. 86.

Neb.—Campbell v. Gallentine, 215 N. W. 111, 115 Neb. 789, 61 A.L.R. 1.

N.Y.—In re Boylan's Estate, 197 N.Y. S. 710, 119 Misc. 545—Murphy v.

United States Title Guaranty Co., 172 N.Y.S. 243, 104 Misc. 607.

N.C.—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 108—Pridgen v. Long,

98 S.E. 451, 177 N.C. 189.

N.D.—Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 46 N.D. 646.

S.C.—Morris v. Lain, 180 S.E. 206, 176 S.C. 310, 100 A.L.R. 1189.

Tenn.—Cobb v. Sanders, 1 Tenn.App. 326.

Tex.—Rahl v. Compton, Civ.App., 112 S.W.2d 509, error dismissed—Rob-

erts v. Bell, Civ.App., 240 S.W. 616.

Wash.—Brown v. Carpenter, 193 P. 331, 99 Wash. 227.

15 C.J. p 1318 note 78.

21. Iowa.—Rockafellow v. Gray, 191 N.W. 107, 194 Iowa 1280.

N.C.—Meyer v. Thompson, 112 S.E. 328, 183 N.C. 543.

15 C.J. p 1319 note 79.

certained.²² Not even the fact that grantee has been compelled to pay his own grantee a larger sum on a covenant of warranty will enlarge his claim for damages.²³

Where grantee has been in possession, the measure of damages is the consideration paid and interest, less any benefit, direct or indirect, taken under the deed;²⁴ and hence it has been held that, where the covenant embraced two tracts of land, only one of which was improved, interest can be recovered only on the consideration paid for the unimproved tract.²⁵ Where the benefits received by reason of the conveyance equal or exceed the consideration paid, with interest, there can be no recovery.²⁶ The measure of recovery by the person evicted is not necessarily determined by the amount paid by him to his immediate grantor, but is controlled by the amount received by the grantor in the chain of title, to whom he elects to look for compensation for the eviction.²⁷ Some authorities hold that the measure of damages is the amount paid by plaintiff for the land, with interest, not exceeding the amount paid defendant by his immediate grantee.²⁸ Other authorities hold that the measure of damages is the amount paid defendant by his immediate grantee with interest irrespective of what plaintiff may himself have paid.²⁹

Where a valuation of the land or of the consideration given and received therefor has been mutually agreed upon by the parties, such valuation is the proper measure of damages in an action for breach of the covenant of warranty or for quiet enjoyment;³⁰ but a covenant in case of eviction to pay double the purchase money and all damages entitled the covenantee to his purchase money and

interest only.³¹

While it is the general rule that the damages for the breach of a covenant of warranty must be limited to the consideration paid, or the value of the land as agreed upon by the fixing of the consideration, with interest,³² nevertheless in a few jurisdictions a distinction has been made between the damages recoverable for the breach of a covenant of warranty and the breach of other covenants of title, holding that in the former case the damages recoverable is the value of the land at the time of eviction.³³ Still other cases say that the value of the land at the time of conveyance, with interest, affords the measure of damages.³⁴

Where the consideration cannot be ascertained the value of the land at the time of the conveyance, with interest thereon, is the measure of liability.³⁵ So, where the action is by a stranger to the consideration, the value of the land is the measure of damages,³⁶ or, as held in some cases, the consideration received for it by defendant instead of that paid by plaintiff.³⁷

Undertaking to perfect title. The general rule of damages as stated has been held not to apply where a vendor has sold lands to which he has not a perfect title, he undertaking to complete and make perfect the title, the proper measure of damages in such case being the value of the land at the time of eviction, with interest.³⁸ Damages recoverable after perfection of title by grantor, see *infra* § 142 d (5) (a), or by acquisition of title by grantee see *infra* § 142 d (5) (b), are separately considered elsewhere in this Title.

Consequential, incidental, and nominal damages.

22. Wash.—Brown v. Carpenter, 169 P. 331, 99 Wash. 227.
15 C.J. p 1319 note 83.

23. Mass.—Nichols v. Walter, 8 Mass. 243.

24. Tenn.—Cobb v. Sanders, 1 Tenn. App. 326.
15 C.J. p 1320 note 87.

25. Conn.—Castle v. Peirce, 2 Root 294.

26. Kan.—Danforth v. Smith, 21 P. 168, 41 Kan. 146.

27. Ark.—Wade v. Texarkana Building & Loan Ass'n, 233 S.W. 937, 150 Ark. 99.

Miss.—Brunt v. McLaurin, 172 So. 309, 178 Miss. 86.

Utah.—East Canyon Canal & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 283, 65 Utah 560, quoting *Corpus Juris*.
15 C.J. p 1320 note 90.

28. Ga.—West v. Lee, 197 S.E. 75, 57 Ga.App. 873.
15 C.J. p 1320 note 91.

29. Miss.—Brunt v. McLaurin, 172 So. 309, 178 Miss. 86.
Utah.—East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 65 Utah 560.
15 C.J. p 1320 note 92.

30. Mo.—Quick v. Williams, 217 S.W. 834, 219 Mo.App. 336.
15 C.J. p 1320 note 93.

31. N.C.—Nesbit v. Brown, 16 N.C. 30.

32. Iowa.—Churchman v. Wilson, 216 N.W. 726, 204 Iowa 1017.

N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907.

S.C.—Reid v. Gambill, 118 S.E. 308, 125 S.C. 187.

Tex.—Wiggins v. Stephens, Com.App., 246 S.W. 84.

33. Conn.—Butler v. Barnes, 24 A. 328, 61 Conn. 399.
15 C.J. p 1320 note 95.

Civil Law

The rule as stated in the text is said to be the rule of the civil law.—Boyer v. Amet, 6 So. 734, 41 La. Ann. 721—15 C.J. p 1321 note 96.

34. Ky.—Davis v. Hall, 2 Bibb 590.
Tex.—Adams v. Cox, Civ.App., 150 S.W. 1195.

35. Mass.—Staples v. Dean, 114 Mass. 125.
15 C.J. p 1321 note 1.

36. Mass.—Staples v. Dean, 114 Mass. 125—Hodges v. Thayer, 110 Mass. 286—Byrnes v. Rich, 5 Gray 518.

37. Mich.—Cook v. Curtis, 36 N.W. 692, 68 Mich. 611.
15 C.J. p 1321 note 3.

38. N.Y.—Taylor v. Barnes, 69 N.Y. 430, 434.
15 C.J. p 1319 note 85.

Consequential damages are not recoverable;³⁹ thus, as discussed *infra* § 142 d (6) as a general rule no account is taken of intervening improvements or of an increase or diminution of the value of the land.

(2) Partial or Temporary Loss of Estate

For a partial failure of title the measure of damages is generally held to be a proportionate part of the consideration fixed by the value of the estate lost as compared to that of the entire estate conveyed. The measure of damages for temporary deprivation of possession is compensation for the time of deprivation.

The general rule for the measurement of the damages in case of failure of title to a portion of the land conveyed is that the vendee can recover only such part of the original purchase price as bears the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole premises,⁴⁰ such relative values to be ascertained as of the time of the conveyance instead of the time of the trial,⁴¹ together with interest, see *infra* § 149, and costs, see *infra* § 150. Thus the damages recoverable for a breach resulting in a partial loss of estate cannot exceed the amount of the consideration.⁴² While it is competent in applying this rule to consider peculiar advantages and disadvantages of the part lost,⁴³ the expense of erecting improvements on an

adjoining tract should not be considered.⁴⁴

Where land is sold by the acre or front foot, the purchase price per acre or front foot of the part lost is the measure of damages;⁴⁵ but where the acreage of two tracts is sold for a gross sum, uniformity of value or the value of the part lost must be shown.⁴⁶ Incorporeal rights pertaining to the land may be taken into consideration in assessing the damages upon an eviction.⁴⁷ The general rule is not affected by the fact that the land was bought for a particular purpose which was known to the vendor,⁴⁸ and that the failure of title to a portion of it renders it useless for such purpose.⁴⁹ In an action against a remote grantor, the damages are limited to a proportionate part of the consideration received by such grantor.⁵⁰ The rule is subject to the same qualifications and conditions as those applicable in cases of total eviction.⁵¹

Benefits received by the grantee by reason of possession under the grant go in diminution of damages.⁵² When a deed passes an estate of value, although not that covenanted for, it is to be considered in measuring damages.⁵³ Thus, where the covenant is for a fee, and a life estate only passes by the deed, the damages are the consideration money less the value of the life estate.⁵⁴ Upon a partial breach which does not result in failure of title to any part of the land, or does not seriously

39. Ala.—Copeland v. McAdory, 13 So. 545, 100 Ala. 553.
15 C.J. p 1319 note 80.

40. U.S.—McGinley v. Martin, C.C.A. Mo., 275 F. 267.

Ark.—Lane v. Stitt, 219 S.W. 340, 143 Ark. 27—Cannon v. Foster, 216 S. W. 698, 141 Ark. 363.

Fla.—Burton v. Price, 141 So. 728, 105 Fla. 544.

Ga.—Rowan v. Newbern, 123 S.E. 148, 32 Ga.App. 363.

Iowa.—Frenosil v. Pelton, 173 N.W. 235, 186 Iowa 1235.

Ky.—Wilson v. McGowand, 234 S.W. 17, 192 Ky. 565.

Mo.—Quick v. Williams, 271 S.W. 834, 219 Mo.App. 336.

N.M.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

N.Y.—Sweet v. Howell, 89 N.Y.S. 21, 96 App.Div. 45.

N.C.—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 108.

Okl.—Eysenbach v. Naharkey, 246 P. 603, 114 Okl. 217, certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L.Ed. 412.

Pa.—Hebert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

S.C.—Smith v. Tapp, 151 S.E. 221, 154 S.C. 25.

Tex.—Allen v. Draper, Com.App., 256 S.W. 255.

Utah.—Van Colt v. Jacklin, 266 P. 460, 63 Utah 412.

Va.—Otry v. Oakey, 160 S.E. 8, 157 Va. 314.

Wis.—Getts v. Olsen, 202 N.W. 160, 186 Wis. 70.

15 C.J. p 1321 note 4.

41. U.S.—McGinley v. Martin, C.C.A. Mo., 275 F. 267.

Fla.—Burton v. Price, 141 So. 728, 105 Fla. 544.

La.—Crowell & Spencer Lumber Co. v. Hawkins, 179 So. 21, 189 La. 18.

15 C.J. p 1322 note 5.

42. N.M.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

43. Pa.—Krein v. Steigerwald, 193 A. 390, 128 Pa.Super. 51.

15 C.J. p 1322 note 7.

44. Pa.—Beaupland v. McKeen, 28 Pa. 124, 70 Am.D. 115.

45. U.S.—McGinley v. Martin, C.C.A. Mo., 275 F. 267.

Iowa.—Mahrt v. Mann, 210 N.W. 566, 203 Iowa 880.

La.—Rhodes v. Broadway, 121 So. 310, 10 La.App. 582.

15 C.J. p 1322 note 9.

46. U.S.—McGinley v. Martin, C.C.A. Mo., 275 F. 267.

15 C.J. p 1322 note 10.

47. Ind.—Scheible v. Slagle, 89 Ind. 323.

15 C.J. p 1322 note 11.

48. Tenn.—North v. Brittain, 291 S. W. 1071, 154 Tenn. 661, 61 A.L.R. 6.

15 C.J. p 1322 note 12.

49. Ind.—Hoot v. Spade, 20 Ind. 326.

50. Ky.—Dougherty v. Duvall, 9 D. Mon. 57.

Tenn.—Whitzman v. Hirsh, 11 S.W. 421, 87 Tenn. 513.

51. Tex.—Webb v. Brown, 2 Tex. Unrep.Cas. 36.

52. Pa.—Chambers v. Reinhold, 33 Pa.Super. 266.

Tenn.—Cobb v. Sanders, 1 Tenn.App. 326.

15 C.J. p 1323 note 16.

53. Minn.—Huntsman v. Hendricks, 46 N.W. 910, 44 Minn. 423.

15 C.J. p 1323 note 17.

54. Ala.—Dallas Compress Co. v. Liepold, 88 So. 681, 205 Ala. 562—

Mixon v. Burleson, 82 So. 98, 99, 203 Ala. 84, citing *Corpus Juris*.

Neb.—Campbell v. Galentine, 215 N. W. 111, 115 Neb. 789, 61 A.L.R. 1.

Tenn.—Campbell v. Lewisburg & N. R. Co., 26 S.W.2d 141, 160 Tenn. 477.

15 C.J. p 1323 note 18.

interfere with the use for which the property was designed, the measure of damages has been held to be the diminished value of the tract,⁵⁵ or the value of the estate or interest lost.⁵⁶ Where plaintiff sells the land by the same description and succeeds in settling his own liability for the shortage by paying a certain sum to his grantees, this sum is the actual damage.⁵⁷

Where the breach consists of a mere encumbrance, as a mortgage, which may be removed by the payment of money, the measure of damages is the amount necessary to remove such encumbrance; and if such encumbrance is paid and removed by the grantor the damages are nominal.⁵⁸ If, however, the encumbrance exceeds the value of the estate granted, the damages are governed by the rule applicable to a total breach, see supra § 142 d (1). Where the breach consists of an easement which may not be removed by the payment of money, the measure of damages is the depreciation in value of the estate by reason of such encumbrance.⁵⁹

The measure of damages for a temporary deprivation of possession is compensation for the time lost, as in the case of an outstanding term.⁶⁰ Where the grantee was evicted by legal process, and by reason of a subsequent suit the premises have been restored to him, he can no longer recover the purchase money because he is holding under the grant; the recovery is limited to costs of the eviction suit and interest on the purchase money while deprived of possession.⁶¹

(3) Nominal Damages

Grantee in undisturbed possession and suffering no

loss may recover only nominal damages for a technical breach of his covenants of title.

A grantee who has not been disturbed in his possession, nor subjected to any inconvenience or expense by reason of a defect in the title conveyed, is entitled to recover only nominal damages for a technical breach of any of the ordinary covenants of title.⁶²

While want of consideration is not, as a rule, a defense to an action for breach of a covenant, see supra § 120, it has been held that, where nothing has been paid as the price of the land, only nominal damages can be recovered;⁶³ but there is authority to the contrary.⁶⁴ Where, however, nothing was paid for land included in the deed by mutual mistake, the damages for failure of title to such lands are nominal.⁶⁵ It has also been held that nominal damages only can be recovered for an eviction due solely to the covenantee's fault, as in failure to pay the purchase money as agreed.⁶⁶

(4) Fraudulent Representations

Vendee induced to purchase by his vendor's fraud as to his title may, on eviction by a better title, recover all of the damages naturally resulting from the fraud.

Where the vendee is induced to purchase by the fraudulent representations of the vendor as to his title, he may, upon eviction by a better title, recover of his vendor all the damages naturally resulting from the fraud, although the land was conveyed by deed with warranty, the action in such case being for fraud and not upon the covenants in the deed.⁶⁷ So, where the eviction of the covenantee has been caused by the fraud of the covenantor, he is entitled to recover the highest value

55. Ky.—Helton v. Asher, 123 S.W. 235, 135 Ky. 751.

15 C.J. p 1323 note 19.

56. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138.

15 C.J. p 1323 note 20.

On recovery of dower

The liability of the estate of a grantor upon a covenant of warranty in a deed, where a claim of dower has been established by the widow of the grantor against his grantee, is that proportion of one third of the amount paid which the value of the widow's life estate in the assignment made bears to the value of a fee simple.—In re Imblum's Estate, 26 Pa. Dist. 852, 65 Pittsb. Leg. J. 384—15 C.J. p 1323 note 20 [a].

57. Iowa.—Prenosil v. Pelton, 173 N.W. 235, 186 Iowa 1235.

58. Conn.—Gilbert v. Bulkley, 5 Conn. 262, 13 Am.D. 57.

59. Ala.—Copeland v. McAdory, 13 So. 545, 100 Ala. 553.

15 C.J. p 1323 note 24.

60. N.Y.—Rickert v. Snyder, 9 Wend. 416, approved in Winslow v. McCall, 32 Barb. 241.

W.Va.—Moreland v. Metz, 24 W.Va. 119, 49 Am.R. 246.

61. N.Y.—Baxter v. Ryerss, 13 Barb. 267.

62. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

Ind.—Rook v. Wright, 117 N.E. 864, 186 Ind. 654—Marsh v. Thompson, 1 N.E. 630, 102 Ind. 272—Grubbs v. Barber, 1 N.E. 636, 102 Ind. 131—Axtel v. Chase, 77 Ind. 74—Jones v. Noe, 71 Ind. 368—Mahoney v. Robbins, 49 Ind. 146—Hacker v. Blake, 17 Ind. 97.

Iowa.—Mundt v. Comstock, 201 N.W. 797, 199 Iowa 282—McNair v. Sockriter, 201 N.W. 102, 199 Iowa 1176

—Hammarstedt v. Berkeley, 166 N.W. 729, 182 Iowa 1356.

N.Y.—Deschenes v. Tallman, 161 N.E. 321, 248 N.Y. 33, reversing 225 N.Y.S. 815, 222 App.Div. 761.

N.D.—Anderson v. Olson, 260 N.W. 407, 65 N.D. 550—Beulah Coal Mining Co. v. Helhn, 180 N.W. 787, 46 N.D. 646.

15 C.J. p 1323 note 28—p 1324 note 30.

63. N.C.—West v. West, 76 N.C. 45. Tex.—Glenn v. Mathews, 44 Tex. 400.

64. Mass.—Comstock v. Son, 28 N.E. 296, 154 Mass. 389—Mather v. Corliss, 103 Mass. 568.

65. Mass.—Leland v. Stone, 10 Mass. 459.

N.H.—Nutting v. Herbert, 35 N.H. 120, 37 N.H. 346—Barns v. Learned, 5 N.H. 264.

66. Conn.—Beecher v. Baldwin, 12 A. 401, 55 Conn. 419, 3 Am.S.R. 57.

67. N.C.—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189.

15 C.J. p 1324 note 33.

of the land at any time between his purchase and the commencement of his suit, the action being not for breach of warranty, but for a fraud.⁶⁸

(5) Acquisition of Outstanding Title

(a) By grantor

(b) By grantee

(a) By Grantor

Grantor's subsequent acquisition of title will mitigate damages, or if vendee has not been disturbed, will limit vendee to nominal damages.

The subsequent acquirement of title by the grantor,⁶⁹ or a perfection of title by a decree of court,⁷⁰ may be shown in mitigation of damages in actions for breach of the covenant of seizin, or of warranty,⁷¹ and where grantee has not been disturbed in the enjoyment of the property he will be limited to nominal damages.⁷² Where the grantor acquires title before the damages are assessed, although after the grantee has commenced action for the breach of covenant, it can be shown not in bar of the action, but only in mitigation of damages.⁷³ Where land is sold on credit, and the grantee is ejected by one holding a paramount title which is subsequently purchased by the grantor for the benefit of such grantee, the grantee is entitled to recover for the time that he was deprived of the land.⁷⁴

(b) By Grantee

Ordinarily where covenantee buys in the outstanding title he may recover what he necessarily paid for it, not exceeding the original consideration. Some authorities follow a different rule where there has been an eviction.

Where the covenantee has purchased the out-

standing title, his damages for the breach of his vendor's covenant of warranty or for quiet enjoyment or of seizin will be limited to the amount necessarily paid by him for that purpose, including interest, incidental expenses, and reasonable compensation for his trouble, not exceeding in all the purchase price and interest.⁷⁵ The price paid, however, must be reasonable,⁷⁶ and the title purchased must be valid.⁷⁷ Where the grantee extinguishes the paramount title for a nominal consideration, he can recover on the covenant only the amount of such consideration, with reasonable compensation for expenses to which he may have been put in extinguishing it.⁷⁸ In some cases the general rule is apparently limited to cases where the vendor has been guilty of no fraud.⁷⁹

It is claimed by some authorities, however, that a vendee who repurchases the paramount title after eviction is in under a new title, and that therefore the price last paid is no criterion of the damages sustained by failure of the vendor's title.⁸⁰ This rule is inapplicable, however, where the good title is acquired by means of vendee's possession of the imperfect title conferred on him by his vendor.⁸¹

(6) Enhanced Value and Improvements

Ordinarily neither the enhanced value of the property nor the value of improvements thereon is a proper item of damages. However in some jurisdictions this rule does not apply to all covenants of title.

It is the general rule that the enhanced value of the property cannot be taken into consideration in assessing damages for a breach of covenant of title.⁸² In those jurisdictions, however, where for certain covenants of title the value of the land at

63. Iowa.—Burdick v. Scymour, 39 Iowa 452.

69. Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

N.Y.—Murray v. United States Title Guaranty Co., 172 N.Y.S. 243, 104 Misc. 607.

N.C.—Meyer v. Thompson, 112 S.E. 328, 183 N.C. 543.
15 C.J. p 1324 note 41.

70. N.C.—Meyer v. Thompson, supra.

S.C.—Westbrook v. McMillan, 19 S.C. L. 317, 26 Am.D. 187.

71. Kan.—Looney v. Reeves, 48 P. 606, 5 Kan.App. 279.

N.Y.—Murray v. United States Title Guaranty Co., 172 N.Y.S. 243, 104 Misc. 607.

72. Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

N.C.—Meyer v. Thompson, 112 S.E. 328, 183 N.C. 543.

15 C.J. p 1324 note 41.

73. Ill.—King v. Gilson, 32 Ill. 348, 83 Am.D. 269.

74. Tex.—Huff v. Riley, 64 S.W. 887, 26 Tex.Civ.App. 101.

75. Ark.—Mayo & Robinson v. Maxwell & Moore, 215 S.W. 678, 140 Ark. 84.

Ga.—McEntyre v. Merritt, 175 S.E. 661, 49 Ga.App. 416.

Mass.—Cohen v. Price, 173 N.E. 690, 273 Mass. 303.

Mich.—Hartman v. Stoll, 171 N.W. 369, 205 Mich. 378.

Miss.—Staton v. Henry, 94 So. 237, 238, 139 Miss. 372, citing *Corpus Juris*.

Mo.—Smith v. Nussbaum, App., 71 S. W.2d 82.

N.Y.—Havens v. Howell, 278 N.Y.S. 223, 243 App.Div. 806.

Or.—Hammond v. Oregon & C. R. Co., 243 P. 767, 772, 117 Or. 244, citing *Corpus Juris*.

Tex.—McLendon v. Federal Mortg. Co., Civ.App., 60 S.W.2d 324, error refused.

15 C.J. p 1324 note 46.

76. Mo.—Dickson v. Desire, 23 Mo. 151, 66 Am.D. 661.

77. Ill.—Nattinger v. Ware, 41 Ill. 245.

78. N.Y.—Havens v. Howell, 278 N.Y.S. 223, 243 App.Div. 806.
15 C.J. p 1325 note 51.

79. S.C.—Brown v. Thompson, 62 S.E. 440, 81 S.C. 380.
15 C.J. p 1325 note 52.

80. Ga.—West v. Lee, 197 S.E. 75, 57 Ga.App. 873.
15 C.J. p 1325 note 53.

81. La.—Coxe's Succ., 15 La. Ann. 514.
15 C.J. p 1325 note 54.

82. N.Y.—In re Boylan's Estate, 197 N.Y.S. 710, 119 Misc. 545.

Tenn.—North v. Brittain, 291 S.W. 1071, 154 Tenn. 661, 61 A.L.R. 6—Cobb v. Sanders, 1 Tenn.App. 326.
15 C.J. p 1332 note 58.

In Louisiana the rule was formerly otherwise.—Weber v. Coussey, 12 La. Ann. 534—Durnford's Succ., 11

the time of eviction is the measure of damages it would seem that an increase in value, within the contemplation of the parties, is a proper item of damages.⁸³

In most jurisdictions the value of improvements made by the grantee is not considered as an element of damage in an action for breach of covenant by eviction;⁸⁴ but in some jurisdictions the value of improvements made by the grantee may be recovered,⁸⁵ as far as they have enhanced the rental or usable value of the estate;⁸⁶ but it is otherwise if they were only necessary for the enjoyment of the premises,⁸⁷ or were made after the commencement of a suit to evict,⁸⁸ when it is not shown that the improvements increased the value of the land or benefited the warrantor. Upon a loss of a part of the land upon which there were improvements at the time of conveyance, the damages cannot be confined to the land lost alone, without reference to such improvements; the improvements may be considered in ascertaining the proportionate value of the land lost.⁸⁹ The covenantor is entitled to an allowance for his improvements from the successful claimant;⁹⁰ and, where the covenantee has recovered from the paramount owner the value of such improvements, the covenantor is entitled to credit to that extent in an action for breach of his covenant;⁹¹ but since a grantee may yield to a paramount title without waiting to be evicted, no deduction will be made from the damages to which he would otherwise be entitled by reason of any claim of betterments of which he might have availed himself.⁹² The covenantor can set off the damage sustained by him from the covenantee's appropriation or removal of

permanent improvements erected by the covenantor.⁹³

(7) Rents and Profits

Generally rents and profits are not considered in mitigation of damages in actions for breach of covenant.

Although it has been said that, where the covenantee has derived profits from the land conveyed, for which by lapse of time he is no longer responsible, it would seem equitable to deduct from his damages for breach of covenant the profits received by him from such land,⁹⁴ the general rule seems to be that in actions for breach of covenant rents and profits cannot be considered in mitigation of damages,⁹⁵ especially where plaintiff does not claim interest on the purchase money,⁹⁶ unless the covenantor has paid them to the rightful owner of the premises.⁹⁷ It has been held, however, that where grantee reconveys, or tenders a reconveyance, and sues for the purchase money and interest, he must account to the grantor for the rents and profits.⁹⁸ A covenantee may recover for the depreciation in the rental value of his land by reason of the failure of the covenantor to perform a collateral covenant;⁹⁹ and in at least one jurisdiction it has been held that he can recover the value of the fruits and revenues which he has been compelled to return to the true owner.¹

(8) Taxes

Taxes paid by a covenantee are not proper items of damages on an action on a covenant of title nor may a covenantor deduct the amount of taxes paid by him.

Taxes paid by a covenantee or by his grantee are not recoverable upon eviction in an action against the covenantor for breach of his covenant;² nor

Rob. 183—Bissell v. Erwin, 13 La. 143, 15 La. 94—Fletcher v. Cavellier, 10 La. 116—Morris v. Abat, 9 La. 552—Elliott v. Labarre, 3 La. 541.

82. Conn.—Sterling v. Peet, 14 Conn. 245.

Mass.—Cecconi v. Rodden, 16 N.E. 749, 147 Mass. 164.

Vt.—Park v. Bates, 12 Vt. 381, 36 Am.D. 347.

84. N.Y.—In re Boylan's Estate, 197 N.Y.S. 710, 119 Misc. 545.

Okl.—Rube v. Irick, 163 P. 514, 63 Okl. 137.

Tenn.—North v. Brittain, 291 S.W. 1071, 154 Tenn. 661, 61 A.L.R. 6—Cobb v. Sanders, 1 Tenn.App. 326, 15 C.J. p 1328 note 98, p 1331 note 44.

85. Mass.—Cecconi v. Rodden, 16 N.E. 749, 147 Mass. 164.

15 C.J. p 1331 note 45.

86. Tenn.—Curtis v. Brannon, 38 S. W. 1073, 98 Tenn. 153, 63 L.R.A. 760.

87. La.—Williams v. Booker, 12 Rob. 253.

15 C.J. p 1331 note 47.

88. La.—Coleman v. Ballard, 13 La. Ann. 512.

89. Okl.—Eysenbach v. Namarkey, 246 P. 603, 114 Okl. 217, certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L.Ed. 412.

15 C.J. p 1331 note 49.

90. Ky.—Bradshaw v. Craycraft, 3 J.J.Marsh. 77.

91. Ky.—Booker v. Bell, 3 Bibb 173, 6 Am.D. 641.

15 C.J. p 1331 note 51.

92. N.H.—Drew v. Towle, 30 N.H. 531, 64 Am.D. 309.

15 C.J. p 1331 note 53.

93. Tenn.—Park v. Cheek, 4 Coldw. 20.

94. Mass.—Whiting v. Dewey, 15 Pick. 428.

95. Minn.—Knapp v. Foley, 168 N. W. 183, 140 Minn. 423.

15 C.J. p 1331 note 38.

96. N.C.—Wyche v. Ross, 25 S.E. 878, 119 N.C. 174.

97. Ind.—Burton v. Reeds, 20 Ind. 87.

98. Tenn.—Park v. Cheek, 4 Coldw. 20.

99. Ind.—Lake Erie, etc., R. Co. v. Griffin, 53 N.E. 1042, 57 N.E. 722, 25 Ind.App. 138.

15 C.J. p 1331 note 42.

1. La.—Pecot v. Prevost, 42 So. 263, 117 La. 765.

15 C.J. p 1331 note 43.

2. Okl.—George v. Hodges, 247 P. 1107, 121 Okl. 117—Rube v. Irick, 163 P. 514, 63 Okl. 137.

15 C.J. p 1331 note 55.

Taxes already credited to covenantee against a sum due for timber, in an accounting before a master in another state, being no longer sub-

can a covenantor deduct the amount of taxes paid by him out of the sum recoverable by the covenantee or those claiming under him,³ unless the covenantee has upon eviction recovered such taxes from the paramount owner.⁴

Taxes due before sale. Where a statutory lien for taxes had attached before the date of sale and the sale contract contained no agreement for the payment of taxes for the preceding year, the vendor is liable for the amount of such taxes under his covenant of warranty.⁵ Furthermore, where a grantor warrants that premises are free of all encumbrances, including taxes, and the premises when conveyed are subject to a lien for taxes previously levied, and the grantee pays such taxes, he may recover the amount of money paid.⁶

(9) Evidence of Damages

General rules of evidence control the admissibility of particular evidence on the question of damages for breach of covenants of title.

Any competent evidence which is relevant and material upon the question of damages is admissible;⁷ but where the evidence offered does not directly tend to show the damages under the established rules as to their measure, or raises collateral and irrelevant questions, it should be rejected.⁸

Value of part of tract lost. In an action for breach of covenant by reason of the loss of part of the land conveyed, defendant may prove the proportionate value of the part lost,⁹ at the time of the execution of the deed,¹⁰ and also in mitigation of damages that nothing was in fact paid for such part, that it was included in the deed by mis-

take, and that it was understood at the time by both parties not to belong to the grantor.¹¹ On the other hand, it is competent for plaintiff to show that the part lost had a peculiar value for certain purposes.¹²

Cost of outstanding title or encumbrance. Upon the assessment of damages, in an action for breach of covenant, it is competent to prove the price paid by plaintiff for an outstanding title, or to remove an encumbrance,¹³ although it has been held that such evidence is inadmissible for the purpose of reducing plaintiff's recovery.¹⁴

§ 143. — Covenant of Seisin

- a. In general
- b. Improvements; enhanced value; profits
- c. Acquisition of outstanding title
- d. Nominal damages

a. In General

For total failure of seisin the value of the consideration paid with interest is the measure of damages; for a partial loss of title the measure is the proportionate part of the consideration represented thereby. In no case can damages exceed the consideration.

As the covenant of seisin is one of the covenants of title, those general rules as to the measure of damages for the breach of such covenants, discussed supra § 142 d, apply to the measurement of damages for its breach.

Total failure of estate. In accordance with the rules just referred to, the measure of damages for a breach of covenant of seisin where there is a total failure of title is the purchase money paid, or the value of the consideration paid,¹⁵ with in-

sisting claims against covenantor when damages were assessed, cannot be recovered by covenantee.—Chicago Mill & Lumber Co. of Cairo v. Townsend, 203 Ill.App. 457.

3. Iowa.—Pierce v. Early, 44 N.W. 890, 79 Iowa 199.
15 C.J. p 1331 note 56.

4. Kan.—Danforth v. Smith, 21 P. 168, 41 Kan. 146—Stebbins v. Wolf, 7 P. 542, 33 Kan. 765.

5. Ark.—Hatch v. Lowrance, 10 S. W.2d 358, 178 Ark. 274.

6. Fla.—Howard Cole & Co. v. Whidden, 82 So. 297, 77 Fla. 342.

7. Mass.—Leland v. Stone, 10 Mass. 459.

15 C.J. p 1335 note 13.

Admissibility of evidence generally see supra § 130.

8. Iowa.—Myers v. Munson, 21 N. W. 759, 65 Iowa 423.

15 C.J. p 1335 note 14.

9. Wis.—Bartelt v. Braunsdorf, 14 N.W. 869, 57 Wis. 1.

15 C.J. p 1335 note 18.

10. Ky.—Sullivan v. Hill, 112 S.W. 564, 33 Ky.L. 962.

11. Mass.—Leland v. Stone, 10 Mass. 459.

15 C.J. p 1335 note 20.

12. Ky.—Louisville Public Warehouse Co. v. James, 70 S.W. 1046, 24 Ky.L. 1266.

13. Ga.—Lampkin v. Garwood, 50 S.E. 171, 132 Ga. 407.

15 C.J. p 1335 note 22.

14. Ky.—Cosby v. West, 2 Bibb 563.

15. Fla.—Burton v. Price, 141 So. 728, 105 Fla. 544.

N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N. Y.S. 1086, 184 App.Div. 907—In re Boylan's Estate, 197 N.Y.S. 710, 119 Misc. 545—Murphy v. United States Title Guaranty Co., 172 N. Y.S. 243, 104 Misc. 607.

N.C.—Newbern v. Hinton, 129 S.E. 181, 190 N.C. 108—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189.

N.D.—Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 46 N.D. 646.
Tenn.—Cobb v. Sanders, 1 Tenn.App. 326.

Wash.—Brown v. Carpenter, 169 P. 331, 90 Wash. 227.
15 C.J. p 1318 note 78.

The theory supporting this measure of damages is that, since the grantor had no title, he conveyed none and the grantor may therefore recover the money paid without consideration.—Murphy v. United States Title Guaranty Co., 172 N.Y.S. 243, 104 Misc. 607.

Reconveyance unnecessary

In an action at law for breach of covenant of seisin, the grantee may recover the full consideration paid, without tendering a deed of the property reconveying the land to its gran-

terest, see *infra* § 149. Another statement of the rule is that the measure of damages is the value of the land as agreed on by the purchase price.¹⁶ It is immaterial that the consideration was property rather than money, except that the value of the property given as consideration must be ascertained.¹⁷ The measure of damages by a remote grantee against the original grantor for a breach of the covenant of seisin has been held to be the amount of the consideration in the original grantor's deed to his grantee, with interest.¹⁸

Partial failure of title. If there is a failure of seisin as to a part of the premises described in the conveyance, the measure of damages is such proportionate or fractional part of the whole consideration paid as the value of the property at the time of the purchase of the part to which the title failed bears to the whole block purchased,¹⁹ with interest thereon, see *infra* § 149. This rule is limited to conveyances wherein the price for the land sold is by the acre or foot or where the value of the entire tract is uniform; it does not apply where the land is sold for a gross sum and the value of the different tracts is not uniform, some parts being more valuable than others.²⁰ In the latter case the proper measure of damages is the value of the land to which the title failed, so as to compensate for the actual loss sustained by reason of the eviction, not, however, to exceed the amount of the consideration paid.²¹ Similarly the damages which a remote covenantee is entitled to recover for a breach of the covenant of seisin where there is a partial failure of title is the value of the

property to which the title failed, not exceeding the consideration paid for the whole.²²

Where a deed undertakes to convey the entire estate in fee, but in fact conveys only a life estate, in his action on the covenant of seisin the purchaser is entitled to recover the difference between the life estate and the fee.²³

Damages limited to consideration or value. Damages recoverable for a total²⁴ or partial²⁵ breach of covenant of seisin cannot exceed the consideration paid or the value of the land at the time of the sale as then agreed on by the parties, or as determined by the price paid with interest.

Fraud. Where the vendee is induced to purchase by the fraudulent representations of the vendor as to title he may, on eviction by a better title, recover of his vendor all damages naturally resulting from the fraud.²⁶

b. Improvements; Enhanced Value; Profits

The covenantee cannot recover for a loss due to general enhancement of value or for improvements. Anticipated profits from resale will not increase the liability of the covenantor nor will a profit on resale mitigate the damages.

The vendee cannot augment his recovery for a breach of a covenant of seisin by showing a rise in the value of the land, whether from a general increase in market price²⁷ or from improvements placed upon the lands by the vendee or his successors in title.²⁸

The fact that the land was bought for a particular purpose, as for resale, will not, in the absence

tor.—*Murphy v. United States Title Guaranty Co.*, *supra*.

16. Iowa.—*Rockafellow v. Gray*, 191 N.W. 107, 194 Iowa 1280.

N.C.—*Meyer v. Thompson*, 112 S.E. 328, 183 N.C. 543.

15 C.J. p 1319 note 79.

17. Wash.—*Brown v. Carpenter*, 169 P. 331, 99 Wash. 227.

18. Iowa.—*Rockafellow v. Gray*, 191 N.W. 107, 194 Iowa 1280.

19. U.S.—*McGinley v. Martin*, C.C. A.Mo., 275 F. 267.

Ark.—*Cannon v. Foster*, 216 S.W. 698, 141 Ark. 363.

Fla.—*Burton v. Price*, 141 So. 728, 105 Fla. 544.

N.C.—*Newbern v. Hinton*, 129 S.E. 181, 190 N.C. 108.

15 C.J. p 1321 note 4, p 1322 note 5.

20. U.S.—*McGinley v. Martin*, C.C.A. Mo., 275 F. 267.

15 C.J. p 1322 notes 9, 10.

21. U.S.—*McGinley v. Martin*, C.C. A.Mo., 275 F. 267.

22. Minn.—*Knapp v. Foley*, 168 N.W. 183, 140 Mich. 423.

Not required to accept less

Neither the grantee nor his successor in interest after a breach of a covenant of seisin can be compelled to accept a less quantity of land and incur a large expense for removing the building back upon the part of the land as to which the title had not failed.—*Knapp v. Foley*, *supra*.

23. Ala.—*Mixon v. Burleson*, 82 So. 98, 203 Ala. 84.

Tenn.—*Campbell v. Lewisburg & N. R. Co.*, 28 S.W.2d 141, 160 Tenn. 477.

15 C.J. p 1323 note 18.

24. NY.—*Hilliker v. Rueger*, 126 N. E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907.

Tenn.—*North v. Brittain*, 291 S.W. 1071, 154 Tenn. 661, 61 A.L.R. 6.

25. U.S.—*McGinley v. Martin*, C.C.A. Mo., 275 F. 267.

Ala.—*Mixon v. Burleson*, 82 So. 98, 203 Ala. 84.

26. N.C.—*Pridgen v. Long*, 98 S.E. 451, 177 N.C. 189.

15 C.J. p 1324 note 38.

Where the action is on the fraud and not on the covenants of the deed, the rule of damages for breach of the covenant does not apply.—*Pridgen v. Long*, *supra*.

27. N.Y.—*In re Boylan's Estate*, 197 N.Y.S. 710, 119 Misc. 545.

Tenn.—*North v. Brittain*, 291 S.W. 1071, 154 Tenn. 661, 61 A.L.R. 6—*Cobb v. Sanders*, 1 Tenn.App. 326.

28. N.Y.—*In re Boylan's Estate*, 197 N.Y.S. 710, 119 Misc. 545.

Tenn.—*North v. Brittain*, 291 S.W. 1071, 154 Tenn. 661, 61 A.L.R. 6—*Cobb v. Sanders*, 1 Tenn.App. 326. 15 C.J. p 1331 note 44.

Equity rule inapplicable

Obviously the equity rules requiring a vendor to account for taxes paid and improvements made by the vendee cannot support the latter's claim for profits lost because of a breach of covenant of seisin as such profits in no way inure to the benefit of defendants as vendors of complainants.—*North v. Brittain*, 291 S.W. 1071, 154 Tenn. 661, 61 A.L.R. 6.

of fraud, have the effect of increasing the liability.²⁹ The covenantor may not show in mitigation of damages for a failure of seizin to a part of a tract that plaintiff, a remote grantee, had realized a profit on the sale of that part to which title had not failed over the price which he had paid for the entire tract.³⁰

c. Acquisition of Outstanding Title

Only nominal damages are recoverable where the covenantor subsequently perfects title and covenantee suffers no actual loss. Where the covenantee buys in the outstanding title he may recover what he has necessarily paid for it.

Where the covenantor perfects title in himself which, under his covenant, will inure to the benefit of the grantee, damages for the breach of the covenant of seizin will be nominal, where the vendee has not been disturbed in the enjoyment of the property.³¹

Acquisition by grantee. Where covenantee buys in an outstanding paramount title the measure of damages in an action for breach of the covenant of seizin in his deed is the reasonable price which he has fairly and necessarily paid for such title, not to exceed the original consideration paid by him.³²

By subvendee. The vendee's recovery for breach of covenant of seizin is not limited to the amount his subvendee may have paid to perfect his title.³³

d. Nominal Damages

Only nominal damages are allowable for a breach without eviction or positive injury.

A grantee in undisturbed possession may recover only nominal damages for a mere technical breach of the covenant of seizin³⁴ until he has been evicted³⁵ or suffers some other positive injury.³⁶ It has been held to be no mere technical breach where grantor at the time of the execution of the deed is not in fact or in law seized of the premises to which the covenant relates and an action for substantial damages is held to accrue immediately on the delivery of the deed.³⁷

If covenantee's title is perfected by the statute of limitations he is entitled to recover only nominal damages.³⁸

§ 144. — Covenant of Right to Convey

The consideration paid with interest is ordinarily the measure of damages for a total breach of the covenant of right to convey, a proportional recovery being permitted for a partial breach. Nominal damages only can be recovered for a technical breach.

In accordance with the rules governing damages for breach of covenants of title generally, which are discussed supra § 142, the measure of damages upon a breach of the covenant of right to convey resulting in a total loss of the estate conveyed is ordinarily the consideration paid,³⁹ with

29. Tenn.—North v. Brittain, supra. 15 C.J. p 1322 note 12.

Lost profit

Vendee cannot recover a lost profit on resale as damages for a breach of covenant of seizin on the ground that the parties contemplated a sale at a profit.—North v. Brittain, supra.

30. Minn.—Knapp v. Foley, 168 N.W. 182, 140 Minn. 423.

31. N.Y.—Murphy v. United States Title Guaranty Co., 172 N.Y.S. 243, 104 Misc. 607.

N.C.—Meyer v. Thompson, 113 S.E. 328, 183 N.C. 543.

32. N.Y.—Havens v. Howell, 278 N.Y.S. 223, 243 App.Div. 806.

N.C.—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189.

15 C.J. p 1324 note 46.

33. Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

34. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

N.Y.—Deschenes v. Tallman, 161 N.E. 321, 248 N.Y. 33, reversing 225 N.Y.S. 815, 222 App.Div. 761.—Havens v. Howell, 278 N.Y.S. 223, 243 App.Div. 806.

N.D.—Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 46 N.D. 646. 15 C.J. p 1324 note 29.

Confirmatory deed

Only nominal damages were recoverable for breach of covenant of seizin, where confirmatory deed was accepted by purchasers.—Deschenes v. Tallman, 161 N.E. 321, 248 N.Y. 33, reversing 225 N.Y.S. 815, 222 App.Div. 761.

Mere cloud on title

Where damages were sought for a breach of covenant of the seizin on the ground that the mineral rights in land had been conveyed, and plaintiff failed to show that ore existed in commercial quantity on the land and the rights under deed which was forty years old had never been exercised, damages will be denied, since the deed was a mere cloud on title which could be removed at small expense compared with the amount sought to be recovered.—Black v. Smith, 84 S.W.2d 593, 19 Tenn.App. 195.

35. Iowa.—Hammarstedt v. Bakeley, 166 N.W. 729, 182 Iowa 1356. N.D.—Anderson v. Olson, 260 N.W. 407, 65 N.D. 550.

36. Conn.—Perkins v. August, 146 A. 831, 109 Conn. 452.

Iowa.—Duke v. Tyler, 230 N.W. 319, 209 Iowa 1345.—Mundt v. Comstock, 201 N.W. 797, 199 Iowa 282.—McNair v. Sockriter, 201 N.W. 102, 199

Iowa 1176.—Hammarstedt v. Bakeley, 166 N.W. 729, 182 Iowa 1356. N.D.—Anderson v. Olson, 260 N.W. 407, 65 N.D. 550.

Cure of breach

In a case where there was at most a mere technical breach of a covenant of seizin which was practically cured before suit was brought at plaintiff's request and without expense to him, he may recover only nominal damages.—Perkins v. August, 146 A. 831, 109 Conn. 452.

Proof of actual loss is required before substantial damages are allowed.—Mixon v. Burleson, 82 So. 98, 203 Ala. 84.

Eviction unnecessary

Grantee is not restricted to nominal damages simply because there has been no eviction.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907.

37. N.D.—Beulah Coal Mining Co. v. Heihn, 180 N.W. 787, 46 N.D. 646.

38. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

39. Ind.—Overhiser v. McCollister, 10 Ind. 41.

Mass.—Byrnes v. Rich, 5 Gray 518.

interest, as discussed *infra* § 149, and costs and expenses of litigation, as discussed *infra* § 150. Where, however, the consideration cannot be ascertained, the measure of damages, at least in some jurisdictions, is the value of the land at the time of the intended conveyance.⁴⁰ Where the covenant relates to a fee and the covenantor has a right to convey a life estate only, the covenantee is entitled to the difference between the value of a life estate and an estate in fee simple in the land, not, however, exceeding the amount of the purchase money paid for the land.⁴¹ Similarly, if a title is found defective as to a part of the land, the vendee is entitled to damages for that part lost according to its relative value to the whole tract at the time of the conveyance.⁴² If there has been a technical breach only, and the covenantee has lost nothing, he can recover no more than nominal damages.⁴³

§ 145. — Covenants against Encumbrances

- a. In general
- b. Nominal damages
- c. Unexpired lease as encumbrance
- d. Encumbrances permanent in nature

a. In General

The measure of damages for breach of a covenant

against encumbrances is generally the loss actually sustained by the covenantee with interest. Where the breach amounts to a failure of title, the consideration money or, as held in some cases, the value of the land at the time of eviction, is the measure, while a covenantee who extinguishes the encumbrance can recover the amount reasonably paid for such purpose, not exceeding, however, the amount paid the covenantor, or the value of the estate. Special damages are ordinarily not recoverable.

As a general rule the measure of damages for breach of a covenant against encumbrances is the loss actually sustained by the covenantee,⁴⁴ with interest, as shown *infra* § 149. Thus, where the breach resulting from an encumbrance amounts to a failure of title, the measure of damages is the consideration money,⁴⁵ or, as is held in some cases, the value of the land at the time of the eviction,⁴⁶ with interest and costs and expenses of litigation, in accordance with the rules discussed *infra* in §§ 149-150.

While a covenantee is not ordinarily bound to buy in an outstanding title or encumbrance to prevent eviction,⁴⁷ even where it is offered to him on moderate terms,⁴⁸ yet, in an action for breach of a covenant against encumbrance, where the encumbrance has been obtained or removed by purchase, plaintiff is entitled to recover the amount which he fairly and reasonably paid for that purpose,⁴⁹ with interest, as stated *infra* § 149, and, according to some authorities, with compensation

N.H.—Nutting v. Herbert, 35 N.H. 120, 37 N.H. 346.

N.C.—Pridgen v. Long, 98 S.E. 451, 177 N.C. 189.

Va.—Otey v. Oakey, 160 S.E. 8, 157 Va. 314.

15 C.J. p 1318 note 78, p 1319 note 79, p 1321 note 1.

40. Mass.—Byrnes v. Rich, 5 Gray 518.

15 C.J. p 1321 note 1.

41. Ala.—Crickenberger v. Clay, 109 So. 363, 215 Ala. 67—Mixon v. Burleson, 82 So. 98, 203 Ala. 84.

42. Va.—Otey v. Oakey, 160 S.E. 8, 157 Va. 314.

15 C.J. p 1321 note 4.

43. Ind.—Overhiser v. McCollister, 10 Ind. 41.

N.H.—Nutting v. Herbert, 35 N.H. 120, 37 N.H. 346.

44. Ill.—Meyers v. Veres, 245 Ill. App. 127.

R.I.—Zambrano v. Morvillo, 161 A. 106, 52 R.I. 438—Brusco v. Pate, 153 A. 311, 51 R.I. 222.

15 C.J. p 1325 note 53.

The maximum recovery has been said to be the amount necessary to remove the encumbrance, with interest thereon.

Ala.—Steverson v. Gassenheimer, 150 So. 705, 25 Ala.App. 554, certiorari denied 150 So. 707, 227 Ala. 521.

Ark.—Smith v. Thomas, 278 S.W. 39, 169 Ark. 1110.

Purely statutory

Measure of damages for breach of covenant against encumbrances in Oklahoma is purely statutory.—Perkins v. Good, 65 P.2d 1218, 179 Okl. 405.

45. Ark.—O'Bar v. Hight, 277 S.W. 533, 169 Ark. 1008.

Tex.—Tindle v. Elms, Civ.App., 108 S.W.2d 437, 439, quoting *Corpus Juris*.

15 C.J. p 1328 note 92.

Exchange of lands; accounting for use

Upon dispossession, the measure of damages to grantees in a deed of land given in exchange for other land is the value of the land, with interest at least from the date of the foreclosure sale, and the grantees cannot be required, in an action for breach of the covenant against encumbrances, to account for what they got out of the land where the covenantor does not offer to pay for the use of the land conveyed to them.—Seibert v. Bergman, Tex.Civ.App., 44 S.W. 872.

46. Me.—Elder v. True, 32 Me. 104.

Mass.—Barrett v. Porter, 14 Mass. 143.

Vt.—Farwell v. Bean, 72 A. 731, 82 Vt. 172.

47. S.C.—Morris v. Lain, 180 S.E. 206, 178 S.C. 310, 100 A.L.R. 1189. 15 C.J. p 1327 note 82.

48. N.J.—Miller v. Halsey, 14 N.J. Law 48.

49. Ark.—Smith v. Thomas, 278 S.W. 39, 169 Ark. 1110—O'Bar v. Hight, 277 S.W. 533, 169 Ark. 1008. Cal.—Woods v. Bennett, 180 P. 23, 40 Cal.App. 34.

Colo.—Wheeler v. Roley, 95 P.2d 2. Fla.—Howard Cole & Co. v. Whidden, 82 So. 297, 77 Fla. 842.

Ill.—Meyers v. Veres, 245 Ill.App. 127 —Palmer v. Baum, 238 Ill.App. 472.

Iowa.—Kellar v. Lindley, 212 N.W. 360, 203 Iowa 57.

N.Y.—Sturmer v. Holden, 213 N.Y.S. 339, 215 App.Div. 33—Lauer v. Maga, 1 N.Y.S.2d 743.

N.C.—Thompson v. Avery County, 5 S.E.2d 146.

Ohio.—Lyons v. Chapman, 178 N.E. 24, 40 Ohio App. 1.

Or.—De Carli v. O'Brien, 41 P.2d 411, 150 Or. 35, 97 A.L.R. 693.

15 C.J. p 1327 notes 84, 85, p 1328 note 1.

Partial assumption of encumbrance by grantee

Where the grantee has, as a part of the consideration, agreed to pay

for his trouble and expenses.⁵⁰ It must appear, however, that such payment was reasonably and fairly made,⁵¹ mere proof of payment being insufficient;⁵² and the amount paid must not exceed the amount paid by the covenantor to the covenantor,⁵³ with interest,⁵⁴ or the value of the estate,⁵⁵ although neither of these last mentioned limitations have been recognized as applicable to all cases.⁵⁶ While such purchase may be made after the commencement of the action,⁵⁷ the covenantor cannot enlarge the amount of his recovery by delay until after foreclosure.⁵⁸ A covenantor is not bound by an allowance of damages made in a third party's action against his covenantor.⁵⁹

Remote or special damage. Damages, costs, and expenses, when given as a penalty for breach of a covenant against encumbrances, mean the necessary, natural, and proximate damages resulting from such nonperformance, and not some remote, accidental, or special injury to the party to whom the right of action accrues;⁶⁰ hence speculative damages will not be given,⁶¹ and the diminished value

of an estate, in consequence of an encumbrance upon it, is not the measure of damages, unless the estate was purchased by the grantee for the purpose of making a resale, and that fact was communicated to or known by the grantor.⁶²

Evidence. In a suit for damages on a covenant against encumbrances, evidence of the enhanced value of the land by reason of the encumbrance,⁶³ or evidence of plaintiff's object in purchasing,⁶⁴ is inadmissible, unless it formed part of the consideration;⁶⁵ and, where nominal damages only are recoverable, evidence of the difference in the value of the land with and without the encumbrance is inadmissible.⁶⁶

b. Nominal Damages

While any breach of a covenant against encumbrances will as a rule entitle the covenantor to at least nominal damages, substantial damages can ordinarily be recovered only upon proof of actual loss.

While any breach of a covenant against encumbrances will generally entitle the covenantor to at least nominal damages,⁶⁷ substantial damages can

a certain sum toward the removal of an encumbrance not excepted from the covenant, and subsequently pays off the encumbrance before its maturity for a greater sum, he is entitled to recover the amount so paid less the amount assumed by him.—*Corbett v. Wrenn*, 35 P. 658, 25 Or. 305—15 C.J. p 1336 note 24.

Set-off

A grantee in a deed, with covenants against encumbrances, who permits a lien for money then due for taxes to mature into absolute title in the state is entitled in a suit by the vendor for the purchase price to set off the entire amount he had to pay the state in order to get title.—*William Farrell Lumber Co. v. Deshon*, 44 S.W. 1036, 65 Ark. 103.

50. Ark.—*O'Bar v. Hight*, 277 S.W. 533, 169 Ark. 1008.
15 C.J. p 1327 note 86.

Attorney's fees for clearing property of inheritance tax lien were foreseeable consequence of breach of covenant against encumbrances, justifying covenantor's recovery.—*Watkins Realty Co. v. Hyman*, 157 A. 675, 9 N.J.Misc. 1317.

51. Ala.—*Helm v. Griffith*, 95 So. 548, 19 Ala.App. 1.
15 C.J. p 1327 note 84 [a].

52. Ala.—*Helm v. Griffith*, supra.
15 C.J. p 1327 note 84 [a].

Stipulation of parties

A stipulation of the parties stating that plaintiffs had been required to pay a certain amount for the removal of an encumbrance and not specifically stating that such amount was reasonable, has, however, been held a

sufficient ascertainment of damages.

—*Meyers v. Veres*, 245 Ill.App. 127.
53. Ark.—*Smith v. Thomas*, 278 S.W. 39, 169 Ark. 1110.

Ill.—*Meyers v. Veres*, 245 Ill.App. 127.

N.Y.—*Lauer v. Maga*, 1 N.Y.S.2d 743.
N.C.—*Thompson v. Avery County*, 5 S.E.2d 146.

Ohio.—*Lyons v. Chapman*, 178 N.E. 24, 40 Ohio App. 1.

Tex.—*Faulk v. City of Dallas*, Civ. App., 97 S.W.2d 1031, 1033, quoting *Corpus Juris*.

15 C.J. p 1327 note 87.

54. Ill.—*Meyers v. Veres*, 245 Ill.App. 127.

Ohio.—*Lyons v. Chapman*, 178 N.E. 24, 40 Ohio App. 1.

55. Utah.—*George A. Lowe Co. v. Simons Warehouse Co.*, 117 P. 874, 39 Utah 395, Ann.Cas.1913E 246.
15 C.J. p 1327 note 88, p 1328 note 1.

56. Cal.—*Fraser v. Bentel*, 119 P. 509, 161 Cal. 390, Ann.Cas.1913B 1062.

N.Y.—*King v. Union Trust Co.*, 133 N.Y.S. 18, 148 App.Div. 110, affirmed 101 N.E. 1108, 203 N.Y. 566.
15 C.J. p 1327 note 89.

57. Mass.—*Johnson v. Collins*, 116 Mass. 392.

15 C.J. p 1328 note 90.

58. Ark.—*Smith v. Thomas*, 278 S.W. 39, 169 Ark. 1110.

59. Iowa.—*Ballou v. Clark*, 171 N.W. 682, 187 Iowa 496.

60. Iowa.—*Wragg v. Mead*, 94 N.W. 856, 120 Iowa 319.

W.Va.—*Smith v. White*, 87 S.E. 865, 77 W.Va. 377.

15 C.J. p 1326 notes 59, 63.

Loss of profits on resale

Damages for breach of warranty against encumbrances do not include loss of profits on resale of property.—*O'Bar v. Hight*, 277 S.W. 533, 169 Ark. 1008.

61. Tenn.—*Egan v. Yeaman, Ch.A.*, 46 S.W. 1012.

62. Cal.—*Fraser v. Bentel*, 119 P. 509, 161 Cal. 390, Ann.Cas.1913B 1062.

Mass.—*Batchelder v. Sturgis*, 3 Such. 201.

63. Mo.—*Kellog v. Malin*, 62 Mo. 429.

15 C.J. p 1335 note 15.

64. Mo.—*Kellog v. Malin*, 62 Mo. 429.

65. N.H.—*Foster v. Foster*, 62 N.H. 46.

66. Ala.—*Blankenship v. Lanier*, 101 So. 762, 212 Ala. 60.

67. Cal.—*Woods v. Bennett*, 180 P. 25, 40 Cal.App. 34.

Mo.—*Brand v. Hough*, App., 206 S.W. 425.

N.Y.—*Sturmer v. Holden*, 213 N.Y.S. 339, 215 App.Div. 33.

Or.—*Pearson v. Richards*, 211 P. 167, 106 Or. 78.

Misstating amount of encumbrance; action by assignee

Where, however, there was prima facie no liability growing out of a mortgage subject to which a conveyance was made to a covenantor, the assignee of such covenantor, who was seeking to recover for a misstatement of the amount due on the mortgage, could not even recover nominal damages without showing

be recovered only upon proof of actual loss.⁶⁸ Accordingly, it may be stated as a general rule, subject, however, to the limitations hereinafter stated, that a grantee under a deed, who has not been disturbed in his possession and who has not paid the encumbrance, can recover no more than nominal damages for the breach of a covenant against encumbrances resulting from the existence of a mortgage or other money lien.⁶⁹ Thus an inchoate right of dower in the premises,⁷⁰ or a consummate right of dower which has not been enforced,⁷¹ is ground for nominal damages only. Similarly, where the encumbrance is in the nature of an easement or right of way which is not only not injurious to the land, but rather a benefit no substantial damages can be recovered for the breach.⁷² So too, in the absence of a valid statute to the contrary, where the encumbrance is removed by the grantor without expense or trouble to the grantee the lat-

ter can recover only nominal damages.⁷³ It should be noted, however, that the general rule that grantee who has not been disturbed in his possession and who has not paid the encumbrance is entitled to nominal damages only, has been limited in its application to an encumbrance in the nature of a money charge, such as a mortgage, judgment assessment, or tax.⁷⁴ Further, the rule has been said not to be controlling in equity,⁷⁵ and will not be applied where the reason for its application no longer exists.⁷⁶

c. Unexpired Lease as Encumbrance

In the absence of special circumstances, the measure of damages for breach of a covenant against encumbrances by reason of an outstanding lease is the value of the use of the premises during the remainder of the unexpired term, or for the time the grantee is kept out of possession.

In the absence of special circumstances, the gen-

damage to the covenantee.—Cebula v. Levin, 114 A. 787, 96 N.J.Law 194.

68. Conn.—Cohen v. Griswold, 153 A. 654, 112 Conn. 689.

N.J.—Cebula v. Levin, 114 A. 787, 96 N.J.Law 194.

N.Y.—Gamorsil Realty Corporation v. Graef, 220 N.Y.S. 221, 128 Misc. 596.

15 C.J. p 1326 note 73.

Statutory covenant against encumbrances implied from words "grant or convey" is covenant looking to future and promising compensation for damages at such time as same might be actually sustained.—Woodward v. Harlin, 39 S.W.2d 8, 121 Tex. 46, reversing, Civ.App., 20 S.W.2d 158, and rehearing denied 41 S.W.2d 204, 121 Tex. 46.

69. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.—Blankenship v. Lanier, 101 So. 763, 212 Ala. 60. Ark.—Smith v. Thomas, 278 S.W. 39, 169 Ark. 1110.

Cal.—Woods v. Bennett, 180 P. 25, 40 Cal.App. 34.

Idaho.—Binton v. Johnson, 208 P. 1028, 35 Idaho 656.

Mich.—Barsky v. Katz, 216 N.W. 382, 241 Mich. 63.

Ohio.—Lyons v. Chapman, 178 N.E. 24, 40 Ohio App. 1.

Okl.—Perkins v. Good, 65 P.2d 1218, 179 Okl. 405.

Or.—Pearson v. Richards, 211 P. 167, 172, 106 Or. 78, citing *Corpus Juris*.

R.I.—Zambrano v. Morvillo, 161 A. 106, 52 R.I. 438.

Tenn.—Brown v. Walker, 14 Tenn. App. 587.

Tex.—Woodward v. Harlin, 39 S.W. 2d 8, 121 Tex. 46, reversing, Civ. App., 20 S.W.2d 158, and rehearing denied 41 S.W.2d 204, 121 Tex. 46.

Vt.—O'Connor v. Lape's Estate, 3 A. 2d 554.

Wis.—Willeman v. Ladd, 245 N.W. 838, 209 Wis. 594.

15 C.J. p 1326 note 73.

Reasons for rule

(1) "The principle of this rule is that a covenant against encumbrances is treated as a contract of indemnity, and although broken as soon as made, if broken at all, nevertheless a recovery, beyond nominal damages, is confined to the actual loss sustained by the grantee by reason of the payment or enforcement of the incumbrance against the property."—Lauer v. Maga, 1 N.Y.S.2d 743, 745.

(2) "The doctrine . . . is founded upon the possibility of the mortgagee recovering on the personal covenant of the mortgagor."—Johnson v. Blumer, 197 N.W. 340, 343, 183 Wis. 369, rehearing denied 198 N.W. 277, 187 Wis. 369.

Where there has been no eviction either actual or constructive, only nominal damages can be recovered.—Seldon v. Dudley E. Jones Co., 85 S.W. 778, 74 Ark. 348—15 C.J. p 1278 note 31.

70. Ind.—Whisler v. Hicks, 5 Blackf. 100, 33 Am.D. 454.

Mass.—Harrington v. Murphy, 109 Mass. 299.

71. Mo.—Walker v. Deaver, 79 Mo. 664.

15 C.J. p 1327 note 75.

72. Ill.—Birkett v. De Vares, 206 Ill.App. 187.

Tenn.—Schwartz v. Black, 174 S.W. 1146, 131 Tenn. 360, L.R.A.1915D 898, Ann.Cas.1916C 1195.

Damages resulting from breach of covenant against encumbrances by easements generally see subdivision d of this section infra.

The reason for the rule is that such easements, unless they do effect injury and damage, are not encumbrances at all; they do not carry a pecuniary obligation on the part of the covenantee, and are not liens against the property; they affect its physical condition, and presumably were considered by the purchaser in making the price.—Walcott v. Kershner, Tex.Com.App., 291 S.W. 195, reversing Kershner v. Walcott, Civ App., 285 S.W. 902.

Rule recognized but held inapplicable

Tex.—Walcott v. Kershner, supra.

73. Ark.—Blankenship v. Lanier, 101 So. 763, 764, 212 Ala. 60, citing *Corpus Juris*.

Me.—Herrick v. Moore, 19 Me. 313 Mo.—Brand v. Hough, App., 206 S.W. 425.

15 C.J. p 1327 notes 78, 79.

74. N.Y.—Hansen v. Pattberg, 201 N.Y.S. 866, 212 App.Div. 49.

An existing easement in the property under which the grantee is in actual possession is a breach of the covenant against encumbrances which entitles the purchaser of the property to recover more than merely nominal damages.—City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co., 131 N.E. 554, 231 N.Y. 18, 16 A.L.R. 1059, reversing 179 N.Y.S. 914, 190 App.Div. 939, reargument denied 132 N.E. 903 231 N.Y. 598.

75. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448.

Or.—Pearson v. Richards, 211 P. 167 172, 106 Or. 78, citing *Corpus Juris* 15 C.J. p 1327 note 80.

76. Wis.—Johnson v. Blumer, 197 N.W. 340, 183 Wis. 369, rehearing denied 198 N.W. 277, 183 Wis. 369

eral rule is that the measure of damages for breach of a covenant against encumbrances by reason of an outstanding lease is the value of the use of the premises,⁷⁷ which is ordinarily the rental value,⁷⁸ during the remainder of the unexpired term, or for the time the grantee is kept out of possession.⁷⁹ The rule is otherwise, however, where special circumstances exist,⁸⁰ in which case the damage should be estimated according to the real injury caused by the existence of the encumbrance.⁸¹ In no event, however, should the grantee be permitted to recover both the rental value of the premises which he is prevented from occupying, and the rental value of the premises he does occupy, during the time that he is deprived of possession.⁸² While rent received by the grantee under the lease may be a proper deduction from the damages found upon breach of the covenant,⁸³ the grantee is not responsible for rent not collected under the tenancy.⁸⁴

d. Encumbrances Permanent in Nature

Damages, where a covenant against encumbrances breached by the existence of an encumbrance of a permanent nature, not removable at the will of the covenantee, may be measured by the difference between the value of the land without the encumbrance and with it, not exceeding, however, the consideration paid, or the moneys reasonably expended in extinguishing the burden. Where an easement is beneficial to other portions of the land, such benefit may be considered in assessing the damages arising from the easement.

Where a covenant against encumbrances breached by the existence of an encumbrance of a permanent nature, not removable at the will of the covenantee, as, for instance, an outstanding servitude or easement in the land, the damages are that amount of money which is a just compensation to the covenantee for the real injury resulting from the encumbrance.⁸⁵ Such damages may be measured by the difference between the value of the land without the servitude and with it, not exceeding, however, the consideration paid for the property,⁸⁷ or by the moneys reasonably e

77. Ark.—Arkansas Trust Co. v. Bates, 59 S.W.2d 1025, 187 Ark. 331.

Mo.—Jackson v. Sewell, App., 284 S.W. 197.

Or.—Estep v. Bailey, 185 P. 227, 94 Or. 59.

15 C.J. p 1326 note 63.

78. Mo.—Jackson v. Sewell, App., 284 S.W. 197.

15 C.J. p 1326 note 63.

79. Mo.—Jackson v. Sewell, supra. Okl.—Manley v. Pool, 246 P. 386, 117 Okl. 249.

Or.—Western Grain Co. v. Beaver Land-Stock Co., 253 P. 539, 120 Or. 678—Winn v. Taylor, 194 P. 857, 93 Or. 556, affirming 190 P. 342, 98 Or. 556.

Wis.—Klippel v. Borngesser, 188 N.W. 654, 177 Wis. 423.

15 C.J. p 1326 note 64.

Moving expenses

Damages may not be recovered for moving expenses of plaintiff incurred by reason of his inability to obtain possession of the dwelling house on the premises.—Klippel v. Borngesser, supra.

In Illinois, however, the measure of damages is the difference between the purchase price of the premises and the amount of their depreciation in value, if any, because of the lease; and an instruction that a grantee is entitled to the fair cash rental value of the premises from the time possession was promised up to the time the grantee obtained possession is improper.—Sizemore v. McDaniel, 239 Ill.App. 280.

80. Okl.—Manley v. Pool, 246 P. 386, 117 Okl. 249.

Or.—Western Grain Co. v. Beaver Land-Stock Co., 253 P. 539, 120 Or.

678—Estep v. Bailey, 185 P. 227, 94 Or. 59.

81. Or.—Estep v. Bailey, supra.

82. Okl.—Manley v. Pool, 246 P. 386, 117 Okl. 249.

83. Mich.—Edwards v. Clark, 47 N.W. 112, 83 Mich. 246, 10 L.R.A. 659.

Tex.—Morris v. Hesse, Civ.App. 210 S.W. 710, judgment reversed on other grounds, Com.App., 231 S.W. 317.

In the sale of tenement house property where a covenant that the fee is subject to certain monthly tenancies is broken by the existence of leases other than monthly tenancies the measure of damages, if any are proved, is the rental value of the premises less the rent reserved in the leases.—Toch v. Horowitz, 87 N.Y.S. 455.

84. Mich.—Edwards v. Clark, 47 N.W. 112, 83 Mich. 246, 10 L.R.A. 659.

85. Mass.—Bailey v. Agawam Nat. Bank, 76 N.E. 449, 190 Mass. 20, 112 Am.S.R. 296, 3 L.R.A.N.S., 98 —Richmond v. Ames, 41 N.E. 671, 164 Mass. 467.

N.Y.—Fusilli v. Feld, 247 N.Y.S. 721, 139 Misc. 170.

15 C.J. p 1328 note 3, p 1329 note 6.

86. Ala.—Crickenberger v. Clay, 109 So. 363, 215 Ala. 67—Smith v. Birmingham Realty Co., 94 So. 117, 208 Ala. 114.

N.Y.—City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co., 131 N.E. 554, 231 N.Y. 18, 16 A.L.R. 1059, reversing 179 N.Y.S. 914, 190 App.Div. 939, reargument denied 132 N.E. 903, 231 N.Y. 598—Fusilli v. Feld, 247 N.Y.

S. 721, 139 Misc. 170—Feigin Russek, 226 N.Y.S. 258, 131 Misc. 30.

Tex.—Pochyla v. Cralle, Civ.App., S.W.2d 793, 794, citing Corpus Juris.

15 C.J. p 1328 note 3.

Encroachment of purchased building on public street, being in nature of public nuisance, is encumbrance of a permanent nature which cannot be removed by money payment, because municipal authorities would have no right to sell land encroached on, nor to continue its existence if money consideration, and grant was therefore entitled to decrease value of land because of encumbrance.—Hansen v. Pattberg, 208 Y.S. 866, 212 App.Div. 49.

87. Ala.—Colson v. Harden, 141 S. 639, 224 Ala. 665.

When there is no failure of title to any part of land, but encumbrance exists on part created by prior conveyance of right to enter and cut "saw timber," measure of damages against covenantor against encumbrances is diminished value of entire tract, not exceeding entire purchase money paid with interest.—Blankenship v. Lanier, 101 So. 76, 212 Ala. 60.

Outstanding estate in remainder

The covenantee of freedom from encumbrance, on breach through outstanding estate in remainder, was entitled to recover of the covenantor the difference in value of the life estate in the land validly conveyed as an estate in fee simple, not exceeding the amount of the purchase money paid.—Mixon v. Burleson, 82 S. 98, 203 Ala. 84.

pended by the owner in freeing the land and extinguishing the burden,⁸⁸ together with the injury sustained between the date of the deed and the removal of the encumbrance.⁸⁹ While the relative value of the land is to be ascertained as of the time of the conveyance, and not as of the time of the trial,⁹⁰ the fact that the encumbrance is perpetual may properly be taken into consideration in assessing the damages.⁹¹ On the other hand, where an easement is of benefit to other portions of the land, as in case of a railroad or drainage right of way, the benefits accruing to such other portions by reason of its existence should be considered in estimating the damages arising from the easement,⁹² but not such benefits as were common to other lands in the vicinity not occupied by the railroad,⁹³ nor the benefit accruing to adjoining land owned by the grantee,⁹⁴ and it has been held that, where the vendee admits that the general market value of his land is enhanced by reason of the dedication by his vendor of a part of the land as streets and alleys, he cannot recover damages therefor merely because one to whom he has subsequently sold the land for a particular purpose has recovered damages from him.⁹⁵ However, where the encumbrance consists of a party-wall agreement which, in addition to giving that and the adjoining lot mutual easements each in the other, constituted a lien on the lot conveyed for half of the cost of the wall, the value of the easement rights of the lot may not be offset in diminution of damages against the amount which the grantees had to pay in the removal of such lien encumbrance.⁹⁶

§ 146. — Covenant for Quiet Enjoyment

Generally the measure of damages for breach of a covenant for quiet enjoyment, where there has been a total eviction, is the purchase price paid or the value of the consideration, although the rule may be varied by the conditions of the particular case. Where the covenant has extinguished an adverse title he can recover the amount necessarily expended for that purpose, not exceeding in all the purchase price and interest.

In accordance with the rules governing damages for breach of covenants of title generally, which are discussed supra § 142, the measure of damages for breach of a covenant for quiet enjoyment, where there is an eviction from the whole of the land conveyed, is generally the purchase price paid, or the value of the consideration,⁹⁷ with interest and costs and expenses of litigation, as discussed infra §§ 149-150. Such amount may be varied, however, by conditions existing in the particular case;⁹⁸ and the rule in some jurisdictions is that the value of the estate at the time of the eviction is the measure of damages when the covenant is in the future.⁹⁹ Where the covenant has extinguished the adverse title, his recovery will be limited to the amount necessarily paid by him for that purpose, not exceeding in all the purchase price and interest.¹

§ 147. — Covenant for Further Assurance

In the absence of actual injury resulting from refusal to execute a covenant for further assurance, only nominal damages are recoverable therefor.

Unless actual injury is shown to have been sustained by reason of refusal to execute a covenant for further assurance, only nominal damages are recoverable therefor.²

88. Mass.—*Bailey v. Agawam Nat. Bank*, 76 N.E. 449, 190 Mass. 20, 112 Am.S.R. 296, 3 L.R.A.,N.S., 98 —*Harlow v. Thomas*, 15 Pick. 66.

N.Y.—*City of New York v. New York & South Brooklyn Ferry & Steam Transp. Co.*, 181 N.E. 554, 231 N.Y. 18, 16 A.L.R. 1059, reversing 179 N.Y.S. 914, 190 App.Div. 939, reargument denied 132 N.E. 903, 231 N.Y. 598.

89. Ill.—*Wilcox v. Danforth*, 5 Ill. App. 378.

Ky.—*Helton v. Asher*, 123 S.W. 285, 135 Ky. 751.

90. Ind.—*Sherwood v. Johnson*, 62 N.E. 645, 28 Ind.App. 277.

Mass.—*Bailey v. Agawam Nat. Bank*, 76 N.E. 449, 190 Mass. 20, 112 Am.S.R. 296, 3 L.R.A.,N.S., 98.

However, it has been said that a covenant is not limited to the diminution of value as of the time of the conveyance.—*Fusilli v. Feld*, 247 N.Y.S. 721, 722, 139 Misc. 170.

91. Mass.—*Bailey v. Agawam Nat. Bank*, 76 N.E. 449, 190 Mass. 20, 112 Am.S.R. 296, 3 L.R.A.,N.S., 98, 15 C.J. p 1329 note 7.

92. Conn.—*Hubbard v. Norton*, 10 Conn. 422.

Ill.—*Wadhams v. Swan*, 109 Ill. 46. Mo.—*Williamson v. Hall*, 62 Mo. 405.

Where land is conveyed as an entirety, the measure of damages resulting from a right of way released to a drainage district is to be determined by the effect of such easement on the land as an entirety.—*Birkett v. De Vares*, 206 Ill.App. 187.

93. Mo.—*Williamson v. Hall*, 62 Mo. 405.

94. Iowa.—*Koestenbader v. Peirce*, 41 Iowa 204.

95. Ky.—*Vonderhite v. Walton*, 7 Ky.L. 766.

96. Wash.—*Hoffman v. Dickson*, 118

P. 737, 65 Wash. 556, 39 L.R.A., N.S., 67, Ann.Cas.1913B 869, 15 C.J. p 1329 note 12.

97. N.Y.—*In re Boylan's Estate*, 197 N.Y.S. 710, 119 Misc. 545. N.C.—*Pridgen v. Long*, 98 S.E. 451, 177 N.C. 189.

15 C.J. p 1318 note 78, p 1319 note 79.

98. Minn.—*Efta v. Swanson*, 132 N. W. 335, 115 Minn. 373, 15 C.J. p 1320 note 93.

99. Mass.—*White v. Whitney*, 3 Metc. 89, 15 C.J. p 1320 note 95, p 1321 note 96.

1. Ark.—*Smith v. Boynton Land & Lumber Co.*, 198 S.W. 107, 131 Ark. 22.

N.C.—*Pridgen v. Long*, 98 S.E. 451, 177 N.C. 189, 15 C.J. p 1324 note 46.

2. N.J.—*Zabriskie v. Baudendistel*, Ch., 20 A. 163. Pa.—*Burr v. Todd*, 41 Pa. 206, 15 C.J. p 1329 notes 13, 14.

§ 148. — Covenant of Warranty

a. In general

b. Upon acquisition of outstanding title

a. In General

The measure of damages for a total breach of a covenant of warranty is, although there are some diverse views, generally the consideration paid, or the value of the land as measured by the purchase price; and, where the breach is partial, only a proportional recovery may be had. Special damages are not ordinarily recoverable; and only nominal damages may be recovered for a technical breach.

In accordance with the rules governing covenants of title generally, which are discussed supra § 142, the general rule is that where the breach of a covenant of warranty results in a total loss of the estate conveyed the measure of damages is the consideration paid, or the value of the land as measured by the purchase price,³ with interest, as stated infra § 149, and costs and expenses of litigation, in accordance with the rules discussed infra § 150. The general rule is not universal, however, compensation for the actual injury sustained

being awarded under some decisions;⁴ and in some jurisdictions the measure of damages is the value of the estate at the time of the eviction.⁵ Furthermore, where the eviction is by reason of an outstanding mortgage, which may be redeemed and removed, the measure of damages, at least in some jurisdictions, is the amount necessary to pay and remove such encumbrance, with interest, if that is less than the value of the estate,⁶ although this rule is inapplicable if the encumbrance exceeds the value of the estate,⁷ and it has no application where the measure of damages is governed by a statute providing a different rule.⁸

While it has been held, upon a partial breach of a covenant of warranty, that the covenantee is entitled to the reasonable value of the land as to which title has failed,⁹ the general rule is that the covenantee can recover only such part of the original purchase price or consideration as bears the same ratio to the whole consideration that the value of the land to which title has failed bears to the value of the whole premises.¹⁰ Thus, where a

3. U.S.—*Irwin v. Maple*, Ohio, 252 F. 10, 164 C.C.A. 122.

Ark.—*Fox v. Pinson*, 34 S.W.2d 459, 182 Ark. 936, 74 A.L.R. 583.

Ga.—*West v. Lee*, 197 S.E. 75, 57 Ga.App. 873.

Iowa.—*Thomas v. Becker*, 180 N.W. 285, 190 Iowa 237—*Sietsema v. Anderson*, 176 N.W. 611, 188 Iowa 651.

Ky.—*Bynum v. Bailey*, 265 S.W. 1110, 205 Ky. 384—*Wilson v. McGowand*, 234 S.W. 17, 192 Ky. 565—*Cox's Heirs v. Strode*, 2 Bibb 276.

La.—*Levenberg v. Shanks*, 115 So. 641, 165 La. 419—*Satcher v. Radesich*, 96 So. 35, 153 La. 468—*Riley v. Rogan*, 5 La.App. 164.

Miss.—*Brunt v. McLaurin*, 172 So. 309, 178 Miss. 86—*Sutton v. Cannon*, 100 So. 24, 135 Miss. 368—*Burroughs Land Co. v. Murphy*, 95 So. 515, 131 Miss. 526.

Mo.—*Scott v. Tanner*, App., 208 S.W. 264.

Neb.—*Campbell v. Gallentine*, 215 N.W. 111, 115 Neb. 789, 61 A.L.R. 1—*Pauley v. Knouse*, 192 N.W. 195, 109 Neb. 716.

S.C.—*Morris v. Lain*, 180 S.E. 206, 176 S.C. 310, 100 A.L.R. 1189.

Tex.—*Wiggins v. Stephens*, Com. App., 246 S.W. 84, affirming, Civ. App., 191 S.W. 777—*Northcutt v. Hume*, Com.App., 212 S.W. 157, reversing, Civ.App., 174 S.W. 974—*Rahl v. Compton*, Civ.App., 112 S.W.2d 509, error dismissed—*Tindle v. Elms*, Civ.App., 108 S.W.2d 437—*Herbert v. Denman*, Civ.App., 44 S.W.2d 441, error refused—*Pritchett v. Shearer*, Civ.App., 279 S.W. 305—*Liberto v. Sanders*, Civ.App., 248 S.W. 120, reversed on other

grounds, Com.App., 259 S.W. 1080—*Fidelity Lumber Co. v. Ewing*, Civ.App., 201 S.W. 1163, error refused—*Farmers' & Merchants' State & Trust Co. v. Cole*, Civ.App., 195 S.W. 949.

Utah.—*East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co.*, 238 P. 280, 65 Utah 560. 15 C.J. p 1318 note 78, p 1319 note 79.

So by statute

Okl.—*Rubey v. Irick*, 163 P. 514, 63 Okl. 137.

When grantee has not been in possession of the demised premises, the measure of damages in a suit on general warranty of title to land is the purchase money, with interest at the legal rate from the date of payment.—*Southwestern Settlement & Development Co. v. Village Mills Co.*, Tex.Civ.App., 245 S.W. 975.

Where consideration not pecuniary

(1) When land to which title has failed has been exchanged for personality or other land without a stipulated value, the recovery should be the value of the personality or other land rather than the value of the land to which title failed.—*Wiggins v. Stephens*, Tex.Com.App., 246 S.W. 84, affirming, Civ.App., 191 S.W. 777—15 C.J. p 1319 note 83.

(2) In such a case evidence as to the value of the property given by either party in exchange for property of the other is admissible to show the true consideration paid by the warrantee.—*Northcutt v. Hume*, Tex.Com.App., 212 S.W. 157, reversing, Civ.App., 174 S.W. 974.

(3) Where, however, the value is

agreed upon by the parties, the value thus fixed becomes the measure of damages.—*Quick v. Williams*, 271 S.W. 834, 219 Mo.App. 336—15 C.J. p 1320 note 93.

Damages not excessive

Ind.—*Van Dyke v. Replogle*, 8 N.E. 2d 95, 103 Ind.App. 372.

Ky.—*Jones v. Hodgkins*, 26 S.W.2d 19, 233 Ky. 491.

4. Ala.—*Coston v. McClelland*, 127 So. 176, 220 Ala. 598.

Fla.—*Eaton v. Hopkins*, 71 So. 922, 71 Fla. 615.

"The rule is well settled in this state that the measure of damage for breach of warranty of title to real estate is the loss sustained by the grantee, not to exceed the amount of consideration received by the grantor."—*Churchman v. Wilson*, 216 N.W. 726, 728, 204 Iowa 1017.

5. Conn.—*Butler v. Barnes*, 24 A. 328, 61 Conn. 399.

15 C.J. p 1320 note 95, p 1321 note 96.

Damages assessable as for total failure of title

Mass.—*Handy v. Aldrich*, 46 N.E. 429, 168 Mass. 34.

6. Mass.—*Furnas v. Durgin*, 119 Mass. 500, 20 Am.R. 341.

15 C.J. p 1320 note 86.

7. Mass.—*Furnas v. Durgin*, supra, 15 C.J. p 1320 note 86.

8. S.C.—*Morris v. Lain*, 180 S.E. 206, 176 S.C. 310, 100 A.L.R. 1189.

9. Mo.—*Martin v. Jones*, 228 S.W. 1051, 286 Mo. 574.

10. Ark.—*Lane v. Stitt*, 219 S.W. 340, 143 Ark. 27—*Cannon v. Foster*, 216 S.W. 698, 141 Ark. 363.

covenant of warranty is for fee and a life estate only passes by the deed, the damages are the consideration paid less the value of the life estate,¹¹ or, as sometimes stated, the difference between the value of the life estate and the fee.¹² Also, where the breach consists of an encumbrance not removable at the will of the covenantee, the measure of damages is the value of the rights which the vendor could not convey,¹³ or the depreciation in the value of the estate by reason of such encumbrance.¹⁴ Where a vendor has a duty to place his vendee in possession, his failure to do so renders him liable under his covenant of warranty for the fair rental value of the property during the period the vendee was kept out of posses-

sion,¹⁵ and also for costs and expenses of litigation, as discussed *infra* § 150.

Whether the breach is total or partial, however, the purchase price is generally the limit of recovery;¹⁶ and where a grantee elects to sue upon the covenant of a prior grantor rather than upon that of his immediate grantor, the amount of recovery is controlled by the purchase price received by the grantor against whom suit is brought,¹⁷ or by the amount paid on the faith of the covenant,¹⁸ provided, in some jurisdictions, such amount does not exceed the amount paid by the ultimate purchaser bringing the suit.¹⁹ While under some circumstances money paid to a third

Ga.—Rowan v. Newbern, 123 S.E. 148, 32 Ga.App. 363.

Ky.—Wilson v. McGowand, 234 S.W. 17, 192 Ky. 565.

Me.—Quick v. Williams, 271 S.W. 834, 219 Mo.App. 336—Scott v. Tanner, App., 208 S.W. 264.

N.M.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

Okl.—Eysenbach v. Naharkey, 246 P. 603, 114 Okl. 217, modifying 236 P. 619, 110 Okl. 207, certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L. Ed. 412.

Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

S.C.—Smith v. Tapp, 151 S.E. 221, 154 S.C. 25.

Tex.—Allen v. Draper, Com.App., 256 S.W. 255, modifying rehearing 254 S.W. 783—Wiggins v. Stephens, Com.App., 246 S.W. 84, affirming, Civ.App., 191 S.W. 777—Chaison v. Stark, Civ.App., 29 S.W.2d 500, reversed on other grounds Stark v. Chaison, Com.App., 50 S.W.2d 776 —Farmers' & Merchants' State Bank & Trust Co. v. Cole, Civ.App., 220 S.W. 354—Fidelity Lumber Co. v. Ewing, Civ.App., 201 S.W. 1163, error refused—Farmers' & Merchants' State Bank & Trust Co. v. Cole, Civ.App., 195 S.W. 949.

Utah.—Van Cott v. Jacklin, 226 P. 460, 63 Utah 412.

Wis.—Getts v. Olsen, 202 N.W. 160, 186 Wis. 70.

15 C.J. p 1321 note 4.

The word "value," in this connection, means actual value, and not that fixed by the parties.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

Time for, and manner of, determining value

(1) The amount of recovery must be based on the value of the land at the time of its sale.—Crowell & Spencer Lumber Co. v. Hawkins, 179 So. 21, 189 La. 18, annulling 174 So. 151—15 C.J. p 1322 note 5.

(2) However, it has been said that the measure of damages for breach

of warranty is the value of that which was lost at the time of its loss, and, if the warranty was breached in the making, the value at that time.—Wilder v. Tatum, 73 So. 833, 15 Ala.App. 474.

(3) Such value must, in absence of fraud, be determined with regard to price fixed by parties rather than to value of bargain, although parties may show peculiar circumstances making part as to which title failed of greater or less value than part actually conveyed.—Krein v. Steigerwald, 193 A. 390, 128 Pa.Super. 51.

As against an undisclosed principal, the measure of damages must be the extent to which defendant was enriched at the expense of the purchaser, who bought from him through his agent.—Donner v. Whitecotton, 212 S.W. 378, 201 Mo.App. 443.

Land sold by acre

Where land is sold by the acre the purchase price per acre of the part lost is the measure of damages.

Iowa.—Mahrt v. Mann, 210 N.W. 566, 203 Iowa 880.

La.—Rhodes v. Broadway, 121 So. 310, 10 La.App. 582.

15 C.J. p 1322 note 9.

Failure of title as to wall

Measure of damages for conveyance of wall of building theretofore conveyed to another was difference between value of property with and without wall, less value of easement reserved.—Bossieux v. Shapiro, 153 S.E. 667, 154 Va. 255.

Recovery held excessive

Mo.—Donner v. Whitecotton, 212 S.W. 378, 201 Mo.App. 443.

Ala.—Dallas Compress Co. v. Liepold, 88 So. 681, 205 Ala. 562.

Neb.—Campbell v. Gallentine, 215 N.W. 111, 115 Neb. 789, 61 A.L.R. 1. 15 C.J. p 1323 note 18.

Ark.—Murphay v. Carter, 31 S.W.2d 412, 182 Ark. 316.

Tenn.—Campbell v. Lewisburg & N.R. Co., 26 S.W.2d 141, 160 Tenn. 477.

13. Ark.—Belleville Land & Lumber Co. v. Griffith, 6 S.W.2d 36, 177 Ark. 170.

14. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 92 So. 254, 207 Ala. 138.

Tex.—Pochyla v. Cralle, Civ.App., 42 S.W.2d 793.

Wash.—Bank of Alaska v. Ashland, 224 P. 7, 128 Wash. 572.

15 C.J. p 1323 note 24.

15. Ky.—Jones v. Hodgkins, 26 S.W.2d 19, 233 Ky. 491—Beutel v. American Machinery Co., 137 S.W. 799, 144 Ky. 57, 35 L.R.A., N.S., 779.

16. Iowa.—Churchman v. Wilson, 216 N.W. 726, 204 Iowa 1017.

N.M.—Merchants' Nat. Bank of Clinton, Iowa, v. Otero, 175 P. 781, 24 N.M. 598.

Pa.—Herbert v. Northern Trust Co., 112 A. 471, 269 Pa. 306.

S.C.—Reid v. Gambill, 118 S.E. 308, 125 S.C. 187.

Tex.—Wiggins v. Stephens, Com.App., 246 S.W. 84, affirming, Civ.App., 191 S.W. 777.

In the absence of fraud, the consideration fixed by the parties limits the amount of recovery whether the contract be executed or executory.—Krein v. Steigerwald, 193 A. 390, 128 Pa.Super. 51.

17. Ark.—Wade v. Texarkana Building & Loan Ass'n, 233 S.W. 937, 150 Ark. 99.

Miss.—Brunt v. McLaurin, 172 So. 309, 178 Miss. 86.

Utah.—East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 65 Utah 560.

15 C.J. p 1320 notes 90, 92, p 1323 note 14.

18. N.Y.—Hunt v. Hay, 108 N.E. 851, 214 N.Y. 578, modifying 156 App.Div. 133, 140 N.Y.S. 1070.

15 C.J. p 1321 note 3 [a].

19. Ga.—West v. Lee, 197 S.E. 75, 57 Ga.App. 373.

15 C.J. p 1320 note 91.

person by a covenantee, under an agreement of compromise, may be recovered in an action against his covenantor,²⁰ a covenantee cannot, by such an agreement, enlarge his claim for damages against his covenantor,²¹ and if, in the compromise, he paid more than the law would have exacted, he cannot recover the excess, but only so much as he was legally bound to pay.²² In an action by one or more grantees in common for breach of the covenant of warranty plaintiffs may recover only so far as their own interests extend.²³

Special damages are not ordinarily recoverable in an action for a breach of warranty of title.²⁴

Nominal damages. While any breach of a covenant of warranty will ordinarily entitle a covenantee to at least nominal damages,²⁵ where the breach is a mere technical one, only nominal damages are recoverable;²⁶ and not even nominal damages will be allowed where plaintiff's petition is expressly limited to a prayer for special damages.²⁷ However, a covenantee is not limited to nominal damages merely because of the fact that, after a subsequent conveyance of the property, his sub-

vendee perfects his own title by purchasing the outstanding title.²⁸

b. Upon Acquisition of Outstanding Title

In the absence of fraud on the part of the vendor, the measure of damages for breach of a covenant of warranty, where the covenantee has extinguished the outstanding title is generally limited to the amount necessarily paid by him for that purpose, not exceeding in all the purchase price and interest. The subsequent perfection of title by the grantor for the grantee's benefit may be shown in mitigation of damages.

As a general rule, where a covenantee has extinguished the outstanding title, his damages for the breach of his vendor's covenant of warranty will, at least where the vendor has been guilty of no fraud,²⁹ be limited to the amount necessarily paid by him for that purpose,³⁰ with interest, as shown *infra* § 149, and costs and expenses of litigation, as discussed *infra* § 150, not exceeding in all the purchase price and interest.³¹ The price paid must, however, be reasonable,³² the title purchased must be valid,³³ and a warrantee cannot recover the expense of making the title good of record when it was already actually good by readily available and undisputed facts in pais.³⁴ Moreover,

20. Ky.—Isaacs v. Maupin, 231 S.W. 49, 191 Ky. 527.

21. Ky.—Isaacs v. Maupin, *supra*.

Securing possession by compromise

Where property, occupied by tenants under a parol agreement for a term of five years, which could be terminated upon thirty days' notice, was conveyed by a special warranty, the grantee could not, ignoring the legal procedure to oust the tenants, compromise with them to secure possession of the property, and recover on the special warranty the amount paid under the compromise agreement.—Standard Sav. Bank v. Stone, 280 F. 1016, 52 App.D.C. 42.

22. Ky.—Isaacs v. Maupin, 231 S.W. 49, 191 Ky. 527.

23. Fla.—Eaton v. Hopkins, 71 So. 922, 71 Fla. 615.

24. U.S.—Bird Arias v. Societe Anonyme Des Sucreries De Saint Jean, C.C.A. Puerto Rico, 62 F.2d 410.

Ga.—Neal v. Medlin, 138 S.E. 254, 36 Ga.App. 796.

Ky.—Beutell v. American Machinery Co., 137 S.W. 799, 144 Ky. 57, 35 L.R.A., N.S., 779.
15 C.J. p 1319 note 80.

25. N.Y.—Callanan v. Keenan, 121 N.E. 376, 224 N.Y. 503, reversing 166 N.Y.S. 71, 179 App.Div. 405, rehearing denied 122 N.E. 877, 225 N.Y. 662.
15 C.J. p 1318 note 72.

26. Ala.—Alger-Sullivan Lumber Co. v. Union Trust Co., 118 So. 760, 218 Ala. 448—Lost Creek Coal & Min-

eral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212—McShan v. Kilpatrick, 110 So. 281, 215 Ala. 185.

Mo.—National Cypress Pole & Piling Co. v. Hemphill Lumber Co., 31 S.W.2d 1059, 325 Mo. 807.
15 C.J. p 1323 note 28.

27. Ga.—Neal v. Medlin, 138 S.E. 254, 36 Ga.App. 796.

28. Ala.—Lost Creek Coal & Mineral Land Co. v. Hendon, 110 So. 308, 215 Ala. 212.

29. S.C.—Brown v. Thompson, 62 S.E. 440, 81 S.C. 380.
15 C.J. p 1325 note 52.

30. Ark.—Mayo & Robinson v. Maxwell & Moore, 215 S.W. 678, 140 Ark. 84.

Ga.—Martin v. Hamlet, 126 S.E. 371, 159 Ga. 465, answer to certified questions conformed to 126 S.E. 557, 33 Ga.App. 485—McEntyre v. Merritt, 175 S.E. 661, 49 Ga.App. 416.

Mass.—Cohen v. Price, 173 N.E. 690, 273 Mass. 303.

Mich.—Hartman v. Stoll, 171 N.W. 369, 205 Mich. 378.

Miss.—Staton v. Henry, 94 So. 237, 130 Miss. 372.

Mo.—Smith v. Nussbaum, App., 71 S.W.2d 82.

Tex.—McLendon v. Federal Mortg. Co., Civ.App., 60 S.W.2d 324, error refused—Johnson v. Sherrill, Civ. App., 271 S.W. 276.
15 C.J. p 1324 note 46.

Nominal consideration

Where the grantee extinguishes

the paramount title for a nominal consideration, he can recover on the warranty only the amount of such consideration, with reasonable compensation for expenses to which he may have been put in extinguishing it.—Leffingwell v. Elliott, Mass., 8 Pick. 455, 10 Am.D. 343—15 C.J. p 1325 note 51.

31. Ark.—Mayo & Robinson v. Maxwell & Moore, 215 S.W. 678, 140 Ark. 84.

Ga.—Martin v. Hamlet, 126 S.E. 371, 159 Ga. 465, answer to certified questions conformed to 126 S.E. 557, 33 Ga.App. 485.
15 C.J. p 1324 note 46.

Where a vendee is in possession under the title conveyed by the vendor, and the relation of vendor and vendee still exists, the measure of damages for a breach of warranty is the amount which the vendee has been or will be forced to expend to protect his possession, and perfect his title, not in excess of the amount of the purchase price and interest.—Burroughs Land Co. v. Murphy, 95 So. 515, 131 Miss. 526.

32. Mo.—Dickson v. Desire, 23 Mo. 151, 66 Am.D. 661.

33. Ill.—Nattinger v. Ware, 41 Ill. 245.

34. Miss.—Presley v. Haynes, 180 So. 71, 182 Miss. 44.

Perfect title presumed

Where bank executed warranty deed, grantee thereunder executed second warranty deed, grantee under second deed discovered that forfeit-

where the covenant is for a fee, and a life estate only passes by the deed, the value of the life estate should be deducted from the amount necessarily paid for purchasing the outstanding title.³⁵ While a covenantee may, under some circumstances, as, for instance, where he acquires a title entirely new and different from that of his original vendor, be entitled to recover the original purchase price paid such vendor,³⁶ the rule is otherwise where his title is acquired by means of the possession or imperfect title conferred upon him by his vendor.³⁷

The subsequent acquirement or perfection of title by the grantor for the benefit of the grantee may be shown in mitigation of damages in an action for breach of the covenant of warranty.³⁸

Acquisition of outstanding title as affecting damages for breach of covenants of title generally is discussed supra § 142.

ed tax land patents to a predecessor of bank were void under statute, and bank and its predecessors had open, peaceable, and continuous possession for over forty-five years, exercising ordinary acts of ownership and paying taxes, grantee under second deed could not recover from bank for expense of procuring patent by way of quitclaim from the state, since conclusive presumption obtained that bank had perfect title.—Presley v. Haynes, 180 So. 71, 182 Miss. 44.

35. Ark.—Murphey v. Carter, 31 S. W.2d 412, 182 Ark. 816.

36. Ga.—West v. Lee, 197 S.E. 75, 57 Ga.App. 873.

La.—Riley v. Rogan, 5 La.App. 164, 15 C.J. p 1325 note 53.

"When judgment of eviction has been rendered against the vendee, if he, without aid derived from his vendor, buys in the paramount title, he may recover as upon a breach of the covenant of warranty the whole purchase-money and interest."—Nolan v. Feltman, 12 Bush, Ky., 119, 123.

Vendee not in possession under vendor's warranty

Where the vendee is not in possession under the vendor's warranty of title, and the relation of vendor and vendee has been severed, the vendee is under no duty to diminish the damage that would accrue from the breach of the warranty by purchasing the outstanding title, and he may recover the sum paid to the vendor for such void title.—Burrroughs Land Co. v. Murphy, 95 So. 515, 131 Miss. 526.

37. Miss.—Holloway v. Miller, 36 So. 531, 84 Miss. 776, 15 C.J. p 1325 note 54.

"If, through equities derived from his vendor, he subjects the property to sale and then becomes the purchaser . . . [the vendee] will be treated as purchasing for his vendor's benefit, and will only be entitled to recover what it cost him to perfect the title."—Nolan v. Feltman, 12 Bush, Ky., 119, 123.

38. Kan.—Looney v. Reeves, 48 P. 606, 5 Kan.App. 279, 15 C.J. p 1324 notes 41, 42.

39. U.S.—Irwin v. Maple, Ohio, 252 F. 10, 164 C.C.A. 122.

Ark.—O'Bar v. Hight, 277 S.W. 533, 169 Ark. 1008.

Ga.—West v. Lee, 197 S.E. 75, 57 Ga. App. 873.

Mich.—Mueller v. Bankers' Trust Co. of Muskegon, 247 N.W. 103, 262 Mich. 53.

Miss.—Brunt v. McLaurin, 172 So. 309, 173 Miss. 86—Sutton v. Cannon, 100 So. 24, 135 Miss. 368.

Mo.—Scott v. Tanner, App., 208 S.W. 264.

Neb.—Campbell v. Gallentine, 215 N. W. 111, 116 Neb. 789, 61 A.L.R. 1—Pauley v. Knouse, 192 N.W. 195, 109 Neb. 716.

Tex.—Wiggins v. Stephens, Com. App., 246 S.W. 84, affirming, Civ. App., 191 S.W. 777—Tindle v. Elms, Civ.App., 108 S.W.2d 437—Herbert v. Denman, Civ.App., 44 S.W.2d 441, error refused—Liberto v. Sanders, Civ.App., 248 S.W. 120, reversed on other grounds, Com.App., 259 S.W. 1080—Farmers' & Merchants' State Bank & Trust Co. v. Cole, Civ.App., 195 S.W. 949.

Utah.—East Canyon Land & Stock

§ 149. — Interest

Interest is usually allowed in actions for breach of covenants upon a recovery by the covenantee. There is some difference in the decisions as to the time from which interest may run.

As a general rule, upon a recovery by a covenantee in an action for breach of a covenant, interest is allowed upon the consideration paid,³⁹ or upon the value of the property to which the title has failed;⁴⁰ and, where the covenantee has purchased or extinguished the outstanding title, interest is usually allowed on the amount reasonably and necessarily paid by him for that purpose.⁴¹ Payments of interest on deferred payments of the consideration are recoverable as part of the consideration,⁴² and interest upon reasonable costs incurred in defending title is also allowable under some circumstances,⁴³ although the contrary may be true as to interest on the costs in an eviction suit,⁴⁴ at least where it is not shown that such costs have been paid.⁴⁵

Co. v. Davis & Weber Counties Canal Co., 238 P. 280, 65 Utah 560, 15 C.J. p 1318 note 78, p 1328 note 92, p 1329 note 18.

40. La.—Crowell & Spencer Lumber Co. v. Hawkins, 179 So. 21, 189 La. 18, annulling 174 So. 151.

Wis.—Darlington v. J. L. Gates Land Co., 138 N.W. 72, 151 Wis. 461, affirmed Darlington v. Gates Land Co., 139 N.W. 447, 151 Wis. 461, 15 C.J. p 1329 note 19.

Interest on rent collected by grantor
Where grantor in warranty deed breached covenant against encumbrances, in that a lease existed, and collected the rental for the ensuing year, to which grantee was entitled, the grantee in an action to recover such rental was entitled to interest on the amount of the rent.—Winn v. Taylor, 190 P. 342, 98 Or. 556, affirmed 194 P. 857, 98 Or. 556.

41. Fla.—Howard Cole Co. v. Whidden, 82 So. 297, 77 Fla. 842, N.Y.—Lauer v. Maga, 1 N.Y.S.2d 743, Ohio.—Lyons v. Chapman, 178 N.E. 24, 40 Ohio App. 1, 15 C.J. p 1324 note 46, p 1325 note 58.

42. Iowa.—Bellows v. Litchfield, 48 N.W. 1082, 33 Iowa 36, Minn.—Devine v. Lewis, 35 N.W. 711, 38 Minn. 24.

43. Ill.—Chicago Mill & Lumber Co. of Cairo v. Townsend, 203 Ill.App. 457, 15 C.J. p 1330 note 34.

44. N.J.—Morris v. Rowan, 17 N.J. Law 804.

45. Neb.—Walton v. Campbell, 71 N. W. 737, 51 Neb. 788.

There is some difference in the decisions as to the time from which interest should run, interest from the time of the conveyance⁴⁶ or payment of the purchase price⁴⁷ being the rule under some decisions, while under others the interest is calculated from the time of eviction,⁴⁸ or from the date of judgment.⁴⁹ In many decisions a distinction is made based upon the benefit derived by the covenantor from the occupancy of the premises, it being held, where the covenantor has derived such a benefit, that he is entitled to interest on the purchase money only for such period before eviction as he is liable to pay or has paid the true owner for mesne profits,⁵⁰ although he is entitled in such case to interest from the time of eviction,⁵¹ irrespective of whether the rents and profits which he has enjoyed are more or less than the interest on the purchase money.⁵² On the other hand, if he

has received no benefit from the land,⁵³ as in the case of wild land incapable of producing rent,⁵⁴ or has not secured possession by reason of an outstanding paramount title at the date of his purchase,⁵⁵ the interest is to be computed from the date of the conveyance.

Where the failure of title is only partial, interest is calculated upon a proportional part.⁵⁶

Rate of interest. The interest allowed is to be computed at the legal rate.⁵⁷ Simple interest only may be recovered; rests are not allowed.⁵⁸

§ 150. — Costs and Expenses of Litigation

- a. In general
- b. Attorney's fees
- c. Notice to covenantor as affecting right

46. Ill.—Chicago Mill & Lumber Co. of Cairo v. Townsend, 203 Ill.App. 457.

Iowa.—Rockafellow v. Gray, 191 N.W. 167, 194 Iowa 1280—Thomas v. Becker, 180 N.W. 285, 190 Iowa 237.

Ky.—Wilson v. McGowand, 234 S.W. 17, 192 Ky. 565.

La.—Satcher v. Radesich, 96 So. 35, 153 La. 468.

Tex.—Southwestern Settlement & Development Co. v. Village Mills Co., Civ.App., 245 S.W. 975.

15 C.J. p 1318 note 78, p 1330 note 28.

Time of contract

Wis.—Darlington v. J. L. Gates Land Co., 138 N.W. 72, 151 Wis. 461, affirmed Darlington v. Gates Land Co., 139 N.W. 447, 151 Wis. 461.

Time of eviction as limiting application of rule

It has been said that the above rule as to the recovery of interest is usually applied only where the eviction has been had within five years after the purchase.—Gilliam v. Cornett, 49 S.W.2d 316, 317, 243 Ky. 572.

47. La.—Crowell & Spencer Lumber Co. v. Hawkins, 179 So. 21, 189 La. 18, annulling 174 So. 151—Levenberg v. Shanks, 115 So. 641, 165 La. 419.

Tex.—Fidelity Lumber Co. v. Ewing, Civ.App., 201 S.W. 1163, error refused.

Consideration paid by installments

(1) Where the consideration is paid by installments previous to the execution of the deed, under a contract of sale, interest is recoverable from the date of each payment.—Devine v. Lewis, 35 N.W. 711, 38 Minn. 24.

(2) But it has also been held that the interest should be computed from the date of the grantee's final payment.

Tenn.—Haynie v. American Trust Inv. Co., Ch.A., 39 S.W. 860.

Tex.—Johns v. Hardin, 16 S.W. 623, 81 Tex. 37.

48. Ark.—Fox v. Pinson, 34 S.W.2d 459, 182 Ark. 936, 74 A.L.R. 583.

Okl.—Eysenbach v. Naharkey, 246 P. 603, 114 Okl. 217, modifying 236 P. 619, 110 Okl. 207, certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L. Ed. 412.

S.C.—Morris v. Lain, 180 S.E. 206, 176 S.C. 310, 100 A.L.R. 1189—Smith v. Tapp, 151 S.E. 221, 154 S. C. 25.

15 C.J. p 1328 note 96.

49. In the absence of a jury finding awarding interest from the date of accrual of the cause of action to the date of judgment, interest will be allowed only from the date of judgment.—Morris v. Hesse, Tex.Com. App., 231 S.W. 317, reversing, Civ. App., 210 S.W. 710.

50. Mo.—Crosby v. Evans, 219 S.W. 948, 281 Mo. 202, answering questions certified, App., 195 S.W. 514.

Tenn.—Campbell v. Lewisburg & N. R. Co., 26 S.W.2d 141, 160 Tenn. 477.

Tex.—First Nat. Bank v. Brown, Com.App., 15 S.W.2d 563, reforming, Civ.App., 4 S.W.2d 635.

15 C.J. p 1329 note 21.

"In a case where interest is asked upon the consideration paid, as in a case of total or partial failure of title, the interest calculated upon the consideration held by the covenantor for the term prior to the covenantor's eviction is to be offset by the value of the use of the land by the latter prior to his eviction."—Smith v. Nussbaum, Mo.App., 71 S.W.2d 82, 87, citing *Corpus Juris*.

"The New York rule," as the above rule has been termed, has been said to have been applied in many cases where more than five years have

elapsed without the eviction of the purchaser.—Gilliam v. Cornett, 49 S.W.2d 316, 317, 243 Ky. 572, citing *Corpus Juris*.

51. Mo.—Crosby v. Evans, 219 S.W. 948, 281 Mo. 202, answering questions certified, App., 195 S.W. 514.

Tenn.—Campbell v. Lewisburg & N. R. Co., 26 S.W.2d 141, 160 Tenn. 477.

15 C.J. p 1330 note 22.

52. Me.—Spring v. Chase, 22 Me. 505, 39 Am.D. 505.

53. Ky.—Graham v. Dyer, 29 S.W. 346, 16 Ky.L. 541.

15 C.J. p 1330 note 24.

54. Miss.—Yazoo, etc., R. Co. v. Banister, 42 So. 345, 89 Miss. 808.

55. U.S.—Northern Pac. R. Co. v. Montgomery, Or., 86 F. 251, 30 C. C.A. 17.

15 C.J. p 1330 note 26.

56. Ark.—Lane v. Stitt, 219 S.W. 340, 143 Ark. 27.

Iowa.—Mahrt v. Mann, 210 N.W. 566, 203 Iowa 880.

Ky.—Wilson v. McGowand, 234 S.W. 17, 192 Ky. 565.

Mo.—Scott v. Tanner, App., 208 S.W. 264.

Okl.—Eysenbach v. Naharkey, 246 P. 603, 114 Okl. 217, modifying 236 P. 619, 110 Okl. 207, certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L.Ed. 412.

S.C.—Smith v. Tapp, 151 S.E. 221, 154 S.C. 25.

15 C.J. p 1321 note 4, p 1329 note 20.

Interest from judicial demand

La.—Rhodes v. Broadway, 121 So. 310, 10 La.App. 582.

57. Vt.—Blake v. Burnham, 29 Vt. 437.

15 C.J. p 1330 note 35.

58. N.H.—Drew v. Towle, 30 N.H. 531, 64 Am.D. 309.

a. In General

Subject to certain qualifications, costs and expenses of litigation reasonably and necessarily incurred by a covenantee in defending his title are generally recoverable by him in an action for breach of covenant.

As a general rule, costs and expenses of litigation reasonably and necessarily incurred by a covenantee in defending his title are recoverable by him in an action for breach of covenant,⁵⁹ especially, as stated in subdivision c of this section, infra, or at least, where the covenantor is notified of the pendency of the action and requested to defend. The general rule is not without exceptions, however, being applicable only where a direct attack is made on the title;⁶⁰ and a covenantee can recover no expenses incurred in maintaining or defending an action based on an unfounded claim.⁶¹ Furthermore, it has been held that the general rule does not apply where the covenantor had no seizin at the time of his conveyance;⁶² where the vendor and purchaser by express contract had fixed the amount of the vendor's liability for loss of the land;⁶³ or where the expenses were unreasonably incurred,⁶⁴ or were incurred in defending title to lands not a part of those conveyed by the covenantor,⁶⁵ as where they were incurred in unsuccessfully defending a suit for possession of a part of the land which was erroneously omitted from, or embraced in, the description of the premises,⁶⁶ or where, as considered infra subdivision c of this section, they were incurred in defending a suit by the holder of the paramount title without having notified or called on the covenantor to defend. In an action on a covenant to refund the purchase money, a covenantee cannot recover costs paid by him in unsuccessfully resisting an eviction;⁶⁷ nor can he, in an action for breach of a covenant of seizin, recover the expense of a suit against him by one with whom he had negotiated an exchange of the premises to compel a reconveyance of the property exchanged.⁶⁸ A distinction has also been drawn where the costs are incurred by a covenantee in defending his title and where he himself sues to clear his title, it being held that in the latter case he cannot recover from the covenantor the costs and expenses which he incurs,⁶⁹ as for instance costs and expenses incurred by him in a suit to remove an apparent cloud from his title,⁷⁰ although an exception to this rule has been recognized where the successful claimant by entering on the land

tor,⁶⁵ as where they were incurred in unsuccessfully defending a suit for possession of a part of the land which was erroneously omitted from, or embraced in, the description of the premises,⁶⁶ or where, as considered infra subdivision c of this section, they were incurred in defending a suit by the holder of the paramount title without having notified or called on the covenantor to defend. In an action on a covenant to refund the purchase money, a covenantee cannot recover costs paid by him in unsuccessfully resisting an eviction;⁶⁷ nor can he, in an action for breach of a covenant of seizin, recover the expense of a suit against him by one with whom he had negotiated an exchange of the premises to compel a reconveyance of the property exchanged.⁶⁸ A distinction has also been drawn where the costs are incurred by a covenantee in defending his title and where he himself sues to clear his title, it being held that in the latter case he cannot recover from the covenantor the costs and expenses which he incurs,⁶⁹ as for instance costs and expenses incurred by him in a suit to remove an apparent cloud from his title,⁷⁰ although an exception to this rule has been recognized where the successful claimant by entering on the land

59. Ark.—Arkansas Trust Co. v. Bates, 59 S.W.2d 1025, 187 Ark. 331.

Ill.—Chicago Mill & Lumber Co. of Cairo v. Townsend, 203 Ill.App. 457.

Mo.—Smith v. Nussbaum, App., 71 S.W.2d 82.

Neb.—Pauley v. Knouse, 192 N.W. 195, 109 Neb. 716.

Or.—Estep v. Bailey, 185 P. 227, 229, 94 Or. 59, citing *Corpus Juris*.

Wash.—Bank of Alaska v. Ashland, 224 P. 7, 128 Wash. 572.

Wis.—Getts v. Olsen, 202 N.W. 160, 186 Wis. 70.

15 C.J. p 1322 note 93, p 1332 note 60.

Express agreement unnecessary

In an action for breach of covenant of warranty in a deed, the grantee may recover costs and necessary expenses incurred in a bona fide defense or assertion of his title, although grantor did not expressly agree to pay such expenses.—Rennie v. Gibson, 183 P. 483, 75 Okl. 282.

Expenses incurred in getting possession

(1) Reasonable costs and expenses incurred by a covenantee in getting possession of the lands, as, for instance, costs of an ejectment suit against a third party in possession, are ordinarily recoverable by him in an action for breach of covenant of seizin or warranty.

Ky.—Jones v. Hodgkins, 26 S.W.2d 19, 233 Ky. 491—Beutel v. Ameri-

can Machinery Co., 137 S.W. 799, 144 Ky. 57, 35 L.R.A.N.S., 779.

Mo.—Coleman v. Clark, 80 Mo.App. 339.

Vt.—Pitkin v. Leavitt, 13 Vt. 379.

(2) The contrary may be true, however, where the third party in possession is a trespasser.—Fishel v. Browning, 58 S.E. 759, 145 N.C. 71.

Costs of resisting correction of record of a deed, such correction being a necessary step that a third person's remainder interest in the land might be quieted, is an expense incurred in defense of the title.—Scott v. Scott, 210 S.W. 175, 183 Ky. 604.

Proof of expenses held insufficient

Okl.—Rubey v. Irick, 163 P. 514, 63 Okl. 137.

60. N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N.Y.S. 1086, 184 App.Div. 907.

61. N.H.—Eaton v. Clarke, 120 A. 433, 80 N.H. 577.

N.C.—Fishel v. Browning, 58 S.E. 759, 145 N.C. 71.

"The covenantee is clearly not entitled to demand of the covenantor expenses in defending a suit which sustains the title as valid."

D.C.—Richmond Fairfield Ry. Co. v. U. S. Housing Corporation, 72 F.2d 78, 80, 63 App.D.C. 285.

W.Va.—Smith v. Parsons, 11 S.E. 68, 69, 33 W.Va. 644.

Action to quiet title

Grantee could not recover damages against warrantor on account of expense involved in action to quiet title, where there was no hostile claim of title and grantee's title was not defective.—Peterson v. Reishus, 266 N.W. 417, 66 N.D. 436, 105 A.L.R. 724.

62. Me.—Stubbs v. Page, 2 Me. 378—Cushman v. Blanchard, 2 Me. 266, 11 Am.D. 78.

63. Ky.—Bradshaw v. Craycraft, 3 J.J.Marsh. 77.

64. Mich.—Seitz v. People's Sav. Bank, 103 N.W. 545, 140 Mich. 106. N.H.—Anderson v. Merrill Lumber, etc., Co., 90 A. 789, 77 N.H. 275. 15 C.J. p 1332 note 63.

65. N.Y.—Baker v. Johnson, 165 N.Y.S. 225, 178 App.Div. 230.

66. Conn.—Butler v. Barnes, 24 A. 328, 61 Conn. 399.

Kan.—Doom v. Curran, 34 P. 1118, 52 Kan. 360. 15 C.J. p 1332 note 64.

67. Ky.—Barnett v. Montgomery, 6 T.B.Mon. 327.

68. Kan.—Dale v. Shively, 8 Kan. 276.

69. Ind.—Gibbs v. Ely, 41 N.E. 351, 13 Ind.App. 130.

N.Y.—Roake v. Sullivan, 125 N.Y.S. 835, 69 Misc. 429. 15 C.J. p 1333 note 68.

70. N.Y.—Luther v. Brown, 66 Mo. App. 227.

forces the purchaser to bring an action to test his title.⁷¹ Again it has been held that, if it is plain that the defense is useless, and the covenantee has been notified not to defend by his immediate grantor who acknowledges liability on his covenants, costs and expenses cannot be recovered by the covenantee in an action against a remote grantor;⁷² but the correctness of this rule has been questioned.⁷³ While it has been held that costs of an unsuccessful appeal are not recoverable where not taken at the vendor's request,⁷⁴ the contrary is true if the vendor has authorized the appeal,⁷⁵ and it has been held that such costs can be recovered notwithstanding an appeal had previously been taken by the covenantor.⁷⁶ A plaintiff cannot recover the costs paid by him in a suit brought against him by his grantee on his covenant.⁷⁷

b. Attorney's Fees

While reasonable attorney's fees expended by a covenantee in good faith in defending his title are recoverable by him in an action on the covenant in some jurisdictions, in others fees beyond those included in the taxed costs are not allowed.

There is some conflict in the decisions as to the right of a covenantee to recover attorney's fees from his covenantor.⁷⁸ In many jurisdictions reasonable attorney's fees expended by a covenantee in good faith in defending his title are recoverable by him in an action on the covenant,⁷⁹ especially, as

pointed out in subdivision c of this section *infra*, or at least, where the covenantor has been notified of the pendency of the action and requested to defend. In other jurisdictions, however, fees beyond those included in the taxed costs are not allowed;⁸⁰ and attorney's fees are, of course, not recoverable in those instances in which the general expenses and costs of litigation are not allowed.⁸¹

Where allowed, the attorney's fees must have been incurred in a proceeding directly and necessarily affecting the title of the covenantor,⁸² and concerning land included in the covenant.⁸³ A covenantee against whom a judgment has been rendered in favor of his grantee on his covenants cannot recover his attorney's fees in such suit in an action against his own covenantor for the same breach.⁸⁴ Counsel fees in the action against the covenantor,⁸⁵ or in an action wherein the respective rights of the covenantor and covenantee only are in issue,⁸⁶ are ordinarily not recoverable, at least in the absence of any bad faith, deceit, or fraud on the part of the covenantor.⁸⁷ Such fees may, however, be authorized by statute.⁸⁸

To entitle a covenantee to recover attorney's fees, he must show that the fees have in fact been paid,⁸⁹ or that he is under obligation to pay some specific amount,⁹⁰ although it has been held that the grantee is not necessarily entitled to recover the fee

71. Ky.—Louisville Public Warehouse Co. v. James, 56 S.W. 19, 21 Ky.L. 1726.

N.H.—Andrews v. Davison, 17 N.H. 413, 43 Am.D. 606.

15 C.J. p 1333 note 70.

72. Mo.—Matheny v. Stewart, 17 S. W. 1014, 108 Mo. 73.

73. N.J.—Morris v. Rowan, 17 N.J. Law 304.

15 C.J. p 1333 note 72.

74. Ky.—Louisville Public Warehouse Co. v. James, 56 S.W. 19, 21 Ky.L. 1726.

75. Wash.—Bank of Alaska v. Ashland, 224 P. 7, 128 Wash. 572.

76. La.—Barber Asphalt Pav. Co. v. Standard Brewing Co., 7 La.App., Orleans, 376.

77. Or.—Stark v. Olney, 3 Or. 88.

78. Utah.—Van Cott v. Jacklin, 226 P. 460, 63 Utah 412.

79. Ark.—Arkansas Trust Co. v. Bates, 59 S.W.2d 1025, 187 Ark. 331.

III.—Chicago Mill & Lumber Co. of Cairo v. Townsend, 203 Ill.App. 457.

Neb.—Pauley v. Knouse, 192 N.W. 195, 109 Neb. 716.

Okl.—Eysenbach v. Naharkey, 246 P. 603, 114 Okl. 217, modifying 236 P. 619, 110 Okl. 207, certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L.Ed.

412—Bilby v. Halsell, 232 P. 379, 105 Okl. 215—Rennie v. Gibson, 183 P. 483, 75 Okl. 282.

Wash.—Bank of Alaska v. Ashland, 224 P. 7, 128 Wash. 572.

15 C.J. p 1333 notes 79, 80.

Reasonable attorney's fees on appeal, if the appeal was authorized by the grantor, may be recovered by a grantee under a warranty deed.—Bank of Alaska v. Ashland, *supra*.

Fee held excessive

Ark.—Arkansas Trust Co. v. Bates, 59 S.W.2d 1025, 187 Ark. 331.

80. D.C.—Richmond Fairfield Ry. Co. v. U. S. Housing Corporation, 72 F.2d 78, 63 App.D.C. 285.

La.—Gremillion v. Roy, 51 So. 576, 125 La. 524.

15 C.J. p 1333 note 81.

81. Ga.—Gragg v. Richardson, 25 Ga. 566, 71 Am.D. 190.

Tex.—Turner v. Miller, 42 Tex. 418, 19 Am.R. 47—Adams v. Cox, Civ. App., 150 S.W. 1195—Shook v. Laufer, Civ.App., 100 S.W. 1042—Cates v. Field, Civ.App., 85 S.W. 52.

15 C.J. p 1334 note 85.

82. Ill.—Harding v. Larkin, 41 Ill. 413.

N.Y.—Hilliker v. Rueger, 126 N.E. 266, 228 N.Y. 11, modifying 170 N. Y.S. 1086, 184 App.Div. 907.

"There is no authority for the payment of attorney's fees in collateral litigation."—Arkansas Trust Co. v. Bates, 59 S.W.2d 1025, 187 Ark. 331.

83. Conn.—Butler v. Barnes, 24 A. 328, 61 Conn. 399.

84. Iowa.—Myers v. Munson, 21 N. W. 759, 65 Iowa 423.

Mo.—Smith v. Nussbaum, 71 S.W.2d 82, 87, quoting *Corpus Juris*.

85. Ark.—O'Bar v. Hight, 277 S.W. 533, 169 Ark. 1008.

Pa.—Haverstick v. Erie Gas Co., 29 Pa. 254.

86. Ark.—Mayo & Robinson v. Maxwell & Moore, 215 S.W. 678, 140 Ark. 84.

87. Ga.—Pone v. Barbre, 196 S.E. 287, 57 Ga.App. 684.

88. Ga.—Pone v. Barbre, *supra*.
Okl.—Bilby v. Halsell, 232 P. 379, 105 Okl. 215.

89. Mo.—Johnson v. Crowley, App., 207 S.W. 235.

Wash.—Cullity v. Dorf, 50 P. 932, 18 Wash. 122.

90. Iowa.—Swartz v. Ballou, 47 Iowa 188, 29 Am.R. 470.

Mo.—Johnson v. Crowley, App., 207 S.W. 235.

which he has paid, but only the reasonable worth of the services to be determined by the jury.⁹¹

c. Notice to Covenantor as Affecting Right

Under some decisions, the covenantor's liability for costs and expenses of litigation reasonably and necessarily incurred by the covenantee in defending his title depends on whether the covenantor has been notified of the pendency of the action and requested to defend.

The rule that costs and expenses of litigation,⁹² including reasonable attorney's fees,⁹³ necessarily incurred by a covenantee in defending his title are recoverable by him in an action for breach of covenant, is especially applicable where the covenantor has been notified of the pendency of the action and requested to defend. Furthermore, under some decisions the liability of the covenantor for such costs

and expenses is expressly made dependent on such notice, the rule being that if he has been notified he is liable,⁹⁴ otherwise he is not,⁹⁵ except perhaps on proof that the claim defended against was valid,⁹⁶ or in cases of the warrantor's fraud or absence from the state.⁹⁷ On the other hand, it has been held that a covenantor is not liable, although notice has been given;⁹⁸ and also that he is liable, although no notice has been given.⁹⁹ Counsel fees incurred by the covenantee, after notice to the covenantor and the assumption of the defense by him, are not recoverable in an action on the covenants;¹ and the same is true where the covenantor, although not notified, becomes aware of the adversary action, and at once employs competent counsel to defend it.²

COVENT. A contraction, in the old books, of the word "convent."¹

COVENTRY ACT. The name given to an English statute, 22 & 23 Charles II chapter 1, which provides for the punishment of assaults with intent to maim or disfigure a person.²

COVER.

As a Noun

Anything which is laid, set, or spread upon, about, or above another; that which is laid over something else; a covering, envelope, lid, or screen; also anything which veils or conceals, a cloak, or disguise.³

91. N.Y.—Charman v. Tatum, 66 N. Y.S. 275, 54 App.Div. 81, affirmed 59 N.E. 1120, 166 N.Y. 605.

92. Iowa.—Ballou v. Clark, 171 N. W. 682, 187 Iowa 496.

N.H.—Winnepiseogee Paper Co. v. Eaton, 18 A. 171, 65 N.H. 13—Andrews v. Davison, 17 N.H. 413, 43 Am.D. 320.

Okl.—Sartin v. Hughen, 7 P.2d 151, 154 Okl. 155.

Utah.—Van Cott v. Jacklin, 226 P. 460, 63 Utah 412.

93. Iowa.—Kellar v. Lindley, 212 N. W. 360, 203 Iowa 57—Ballou v. Clark, 171 N.W. 682, 187 Iowa 496.

N.Y.—Fusilli v. Feld, 247 N.Y.S. 721, 139 Misc. 170.

Okl.—Sartin v. Hughen, 7 P.2d 151, 154 Okl. 155.

Or.—Estep v. Bailey, 185 P. 227, 94 Or. 59.

Utah.—Van Cott v. Jacklin, 226 P. 460, 63 Utah 412.

15 C.J. p 1333 note 80.

Ejectment suit brought by cove-

nantee

(1) Necessary expenditures, including attorney's fees incurred by a purchaser in bringing ejectment suit against a squatter, may be recovered in action for breach of the covenant of seisin.—Lasswell Land & Lumber Co. v. Langdon, Mo.App., 204 S.W. 812—Jeffords v. Dreisbach, 153 S.W. 274, 168 Mo.App. 577.

(2) In Georgia, however, a covenantee suing for breach of warranty is not entitled to recover attorney's fees paid in an unsuccessful ejectment suit of which his warrantor had notice.—Gragg v. Richardson, 25 Ga. 566, 71 Am.D. 190.

94. Utah.—Van Cott v. Jacklin, 226 P. 460, 63 Utah 412.

15 C.J. p 1334 note 94.

95. Ark.—Smith v. Boynton Land & Lumber Co., 198 S.W. 107, 131 Ark. 22.

Ky.—Wilson v. McGowand, 234 S.W. 17, 192 Ky. 565.

15 C.J. p 1334 note 95.

96. N.H.—Eaton v. Clarke, 120 A. 433, 80 N.H. 577.

97. Pa.—Fulweiler v. Baugher, 15 Serg. & R. 45.

98. Pa.—Terry v. Drabenstadt, 68 Pa. 400.

15 C.J. p 1334 note 97.

Unsuccessful ejectment suit maintained by covenantee.—Gragg v. Richardson, 25 Ga. 566, 71 Am.D. 190.

Where grantee elects to defend

Where, after proper notice to his grantor, a grantee elects to conduct a defense himself and is successful in defeating the claim set up, he has no cause of complaint against his grantor.—Eaton v. Clarke, 120 A. 433, 80 N.H. 577.

99. Mass.—Richmond v. Ames, 41 N. E. 671, 164 Mass. 467.

Mo.—McCrillis v. Thomas, 85 S.W. 673, 110 Mo.App. 699.

N.J.—Morris v. Rowan, 17 N.J.Law 304.

15 C.J. p 1334 note 98.

1. N.H.—Kennison v. Taylor, 18 N. H. 220.

Va.—Conrad v. Effinger, 12 S.E. 2, 37 Va. 59, 24 Am.S.R. 646.

Under statute

Okl.—Eysenbach v. Naharkey, 236 P. 619, 110 Okl. 207, modified on other grounds 246 P. 603, 114 Okl. 217, and certiorari denied 46 S.Ct. 21, 269 U.S. 561, 70 L.Ed. 412.

Rule approved but held inapplicable on facts.—Sartin v. Hughen, 7 P.2d 151, 154 Okl. 155.

2. Mo.—Long v. Wheeler, 84 Mo. App. 101.

1. Rapalje & L.L.D.

2. Or.—State v. Cody, 23 P. 891, 894, 18 Or. 506. See State v. Vowels, 4 Or. 324, 325.

15 C.J. p 1338 note 4.

See also the C.J.S. title Mayhem § 3, and 40 C.J. p 3 note 28 [a], note 39—p 4 note 57.

Repealed by 9 Geo. IV c 31.—Stroud Jud.D.

3. U.S.—U. S. v. Burnell, D.C.Iowa, 75 F. 824, 829.

In its mechanical sense, the word implies an opening and closing, and imports a movable part.⁴

Metaphorically, according to one of its usually accepted meanings, a deposit made with a broker to secure him from being out of pocket in the event of the stocks falling against his client, and the client's not paying the difference.⁵

Phrases: "Cover note,"⁶ and "cover note, binding slip, certificate, or memorandum."⁷

As a Verb

—**In General.** In its primary sense, to enfold, envelop, enwrap, extend over, inclose, lay or set over, overlap, overlay, overspread, protect, or shelter;⁸ more specifically, to envelop the surface or whole body, to lay or place one thing on or over another so as to protect, screen, conceal or hide it,⁹ and, in a derived or secondary sense, to be coextensive with, equal or equivalent to, or of the same extent or amount, to compensate for, or counterbalance.¹⁰ In a particular connection, "cover" means to "insure."¹¹

Covered into the treasury. A phrase used in acts of congress and practice of the United States treasury department meaning that money has actually been paid into the treasury in the regular manner, as distinguished from merely depositing it with the

treasurer.¹²

Not covered. A phrase which, as applied to a check or draft, has been construed as equivalent to not paid or unpaid.¹³

Other phrases: "Cover one's loss,"¹⁴ and "receipts do not cover the expenses;"¹⁵ also "'covered by' a prior mortgage,"¹⁶ "covered by insurance,"¹⁷ "covered crib or heart,"¹⁸ "covered swimming bath,"¹⁹ "holding the risk covered,"²⁰ "land covered with water,"²¹ "properly covered,"²² and "where such flights [of steps] 'shall not be covered.'"²³

—**Covering.** As a verbal noun, anything which covers or conceals, as a roof, a screen, a wrapper, clothing, etc.²⁴

As used in Tariff Acts, see the C.J.S. title Customs Duties § 46, also 17 C.J. p 584 note 52—p 586 note 71.

Phrases: "Coverings of any kind;"²⁵ and also, adjectively, "covering deed."²⁶

COVERAGE. As an insurance term see the C.J.S. title Insurance § 49.

Phrases: "Within the coverage of the policy;"²⁷ and also "restricted to the coverages."²⁸

COVERT. Covered, protected, or sheltered;²⁹ also

4. U.S.—Mergenthaler Linotype Co. v. International Typesetting Mach. Co., N.Y., 229 F. 407, 411, 143 C.C. A. 527.

5. Eng.—In re Cronmire, [1898] 2 Q. B. 383, 395.

6. Cal.—Black v. Industrial Accident Commission, 12 P.2d 640, 215 Cal. 639.

7. Cal.—Black v. Industrial Accident Commission, *supra*.

8. U.S.—U. S. v. Burnell, D.C.Iowa, 75 F. 824, 829.

Ga.—Gibbs v. Tifton Cotton Mills, 82 S.E. 921, 923, 15 Ga.App. 213.

Iowa.—Kirchoff v. Hohnsbehn Creamery Supply Co., 123 N.W. 210, 212, 148 Iowa 508.

N.H.—A. Perley Fitch Co. v. Phoenix Ins. Co., 133 A. 340, 342, 82 N.H. 318.

9. U.S.—U. S. v. Burnell, D.C.Iowa, 75 F. 824, 829.

Ga.—Gibbs v. Tifton Cotton Mills, 82 S.E. 921, 923, 15 Ga.App. 213.

Iowa.—Kirchoff v. Hohnsbehn Creamery Supply Co., 123 N.W. 210, 212, 148 Iowa 508.

10. Ill.—Off v. J. B. Inderrieden Co., 74 Ill.App. 105, 109.

11. N.H.—Barrette v. Casualty Co. of America, 104 A. 126, 127, 79 N. H. 59.

"Covered"

"According to the custom prevailing in Boston, 'covered' meant that he is insured. He is insured from that minute."—Mowles v. Boston Ins. Co., 115 N.E. 666, 226 Mass. 426. See also the C.J.S. title Insurance § 230, and 32 C.J. p 1099 note 72—p 1101 note 35.

12. Black L.D. See U. S. v. Johnston, N.Y., 8 S.Ct. 446, 454, 124 U.S. 236, 31 L.Ed. 389.

13. Can.—Reg. v. Montreal Bank, 1 Can.Exch. 154, 171.

14. Ill.—Off v. J. B. Inderrieden Co., 74 Ill.App. 105, 109.

15. Ill.—Off v. J. B. Inderrieden Co., *supra*.

16. Ala.—Butts v. Broughton, 72 Ala. 294, 298.

17. U.S.—Broderick v. Anderson, D. C.N.Y., 23 F.Supp. 488, 492.

Mass.—Johnson v. Campbell, 120 Mass. 449, 453.

18. Mich.—State v. Shawl, 272 N.W. 875, 279 Mich. 475.

19. Stroud Jud.D.

20. N.D.—Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins. Co., 160 N.W. 130, 136, 35 N.D. 244.

21. Eng.—East London Waterworks Co. v. Leyton Sewer Authority, L. R. 6 Q.B. 669, 673.

15 C.J. p 1339 note 15 [a].

22. Ga.—Gibbs v. Tifton Cotton Mills, 82 S.E. 921, 923, 15 Ga.App. 213.

Iowa.—Kirchoff v. Hohnsbehn Creamery Supply Co., 123 N.W. 210, 212, 148 Iowa 508.

23. N.Y.—Schroeck v. Reiss, 61 N.Y. S. 1054, 1055, 46 App.Div. 502.

24. U.S.—U. S. v. Nicholls, N.Y., 22 S.Ct. 918, 919, 186 U.S. 298, 46 L. Ed. 1173.

25. U.S.—U. S. v. Nicholls, *supra*.

26. Eng.—Ross v. Army, etc., Hotel Co., 34 Ch.D. 43.

Phrase defined

"A trust deed executed by a trading company to secure an issue of debentures."—Black L.D.

General corporation mortgage compared

Eng.—Ross v. Army, etc., Hotel Co., 34 Ch.D. 43.

15 C.J. p 1340 note 42 [a].

27. Colo.—Federal Life Ins. Co. v. Wells, 56 P.2d 936, 938, 98 Colo. 455.

28. U.S.—Carpenter v. Continental Casualty Co., C.C.A.S.D., 95 F.2d 634, 638.

29. Black L.D.

"**Pound covert**" is one that is closed or covered over, as distinguished from "pound overt," which is open overhead.—Black L.D.

implied or inferred, as a covert condition.³⁰ In another sense, married, under the disability of marriage.³¹

COVERTURE. The condition or state of a woman while under the protection of her husband.³² Sometimes used elliptically to describe the legal disability arising from such state,³³ and in this sense defined as meaning a personal disability, springing from the conjugal relation;³⁴ the legal condition of a married woman.³⁵

During coverture. While the marriage lasts.³⁶ In a particular connection, it has been said that the term refers to coverture between a decedent spouse and surviving spouse and does not include the coverture of a prior marriage between the decedent and some other spouse.³⁷

COVIN. A contrivance between two to defraud or cheat a third;³⁸ a secret contrivance between two or more persons to defraud and prejudice another of his rights.³⁹

COVINOUS. Deceitful, or having the nature of, or tainted by, covin.⁴⁰

COW.

As a Noun

The female of bovine animals.⁴¹ While in its

general and ordinary sense the term means a mature female of bovine animals,⁴² it may be used in a broader sense as including a heifer,⁴³ unless the context or intent prevents such a liberal construction.⁴⁴ Further, in a very broad sense the term is sometimes used as including all bovine animals,⁴⁵ but although colloquially "cow" may be, and under particular circumstances has been, employed as a generic term denoting animals of the cattle or cow kind,⁴⁶ yet, strictly speaking, it is distinguished from the true generic term which is "bos," see Bos 11 C.J.S. p 529 note 11. In particular connections, "cow" has been construed as referring to, or as including, a bull, see 12 C.J.S. p 557 note 27, a cow's calf,⁴⁷ a heifer or cow fourteen months old which had been bred,⁴⁸ and a milch cow.⁴⁹ "Cow," has, itself, been held included within the meaning of various other terms.⁵⁰

Compared with, or distinguished from: "Bull" see 12 C.J.S. p 557 note 28, "ox,"⁵¹ and "steer."⁵²

Milch cow. A cow giving, or in, milk, or kept for her milk.⁵³ Moreover, in a particular connection, the term has been held to refer to cows suitable for, intended to be used for, and kept for, milch cows, regardless of whether at the time they are actually giving milk, and the term so used, may refer to a milch cow, temporarily dry, and to a heifer which

30. Anderson L.D.

31. Anderson L.D.

Covert baron or covert de baron—the status of a woman under the protection and influence of her husband, her baron, or lord.—1 Blackstone Comm. p 442.

Feme covert—Norman-French for a married woman, as being under the wing, protection, or cover of her husband.—Hoker v. Boggs, 63 Ill. 161, 162.

La feme que est covert de baron—the woman which [who] is covert of a husband.—Black L.D., sub verbo Covert baron.

32. Ill.—Osborn v. Horine, 19 Ill. 124, 125.

33. Black L.D.

34. Vt.—Roberts v. Lund, 45 Vt. 82, 87.

Disabilities and privileges of coverture generally see the C.J.S. title Husband and Wife § 165 et seq. also 30 C.J. p 716 note 80 et seq.

35. Me.—Perkins v. Blethen, 78 A. 574, 576, 107 Me. 443, 31 L.R.A., N.S., 1148.

36. Mo.—State v. Guinotte, 57 S.W. 281, 283, 156 Mo. 513, 50 L.R.A. 787.

19 C.J. p 838 note 97.

37. N.J.—In re Maul's Estate, 174 A. 216, 16 N.J.Eq. 479.

38. Conn.—Mix v. Muzzy, 28 Conn. 186, 191.

15 C.J. p 1340 note 54.

Synonymous with "fraud" see the C. J.S. title Fraud § 1, also 26 C.J. p 1060 note 9.

Compared with or distinguished from "collusion" see Collusion 15 C.J.S. p 233 note 12.

"Covin or collusion"

Mass.—Cole v. Appelbury, 136 Mass. 525, 529.

39. Ind.—Anderson v. Oscamp, App., 35 N.E. 707, 708.

15 C.J. p 1340 notes 58, 59.

40. Black L.D. ante.

"Covinous acts"

Ind.—Anderson v. Oscamp, App., 35 N.E. 707, 708.

41. Ala.—Flowers v. State, 56 So. 36, 37, 1 Ala.App. 262.

Ark.—State v. McMinn, 34 Ark. 160, 162.

15 C.J. p 1341 note 62.

42. Ala.—Marsh v. State, 57 So. 387, 3 Ala.App. 80.

15 C.J. p 1341 note 63.

43. Ala.—Parker v. State, 39 Ala. 365, 366.

15 C.J. p 1341 note 64.

Use as an inclusive term

"The necessary inference from this holding [Parker v. State, supra] is that the word 'cow,' when used in an

indictment, is definitive of sex, not condition; is an inclusive, not a restrictive term."—Brannon v. State, 160 So. 726, 727, 26 Ala.App. 291.

44. Conn.—Daggett v. State, 4 Conn. 60, 64, 10 Am.D. 100.

15 C.J. p 1341 note 65.

45. Okl.—Jones v. State, 136 P. 182, 183, 137 P. 121, 10 Okl.Cr. 216.

15 C.J. p 1341 note 66.

46. Ark.—State v. Haller, 177 S.W. 1138, 1139, 119 Ark. 503.

47. Ky.—Stirman v. Smith, 10 S.W. 131, 132, 10 Ky.L. 665.

48. Mich.—Parsons v. Kimmel, 173 N.W. 539, 540, 206 Mich. 676.

49. N.Y.—Brigham v. Bush, 33 Barb. 596, 598, 600.

50. Included with such terms as:

(1) "Beast" see 10 C.J.S. p 220 note 70.

(2) "Beef" or "beeve" see 10 C.J. S. p 226 note 19.

(3) "Bovine" see 11 C.J.S. p 761 note 20.

51. Ala.—Tombigbee Valley R. Co. v. Wilks, 60 So. 559, 6 Ala.App. 473, 474.

52. Fla.—Mobley v. State, 49 So. 941, 942, 57 Fla. 22, 17 Ann.Cas. 735.

53. Tex.—Patterson v. English, Civ. App., 142 S.W. 18, 19.

has never been milked but is being raised to give milk.⁵⁴

Other phrases: "Cow or animal of the cow kind,"⁵⁵ "one cow (bull),"⁵⁶ and "range cow, unmarked;"⁵⁷ also "to each householder . . . two cows,"⁵⁸ and "two cows and a calf" see Calf 12 C.J.S. p 882 note 75.

As an Adjective

Cow kind. A statutory phrase which in the obvious signification of the words has been construed to include a steer, and indeed may well embrace every animal which is the offspring of the female of the bovine genus of animals.⁵⁹

Other phrases: "Cow-doctor,"⁶⁰ "cow house,"⁶¹ "cow keeper,"⁶² "cow-man," "cow-pony," and "cow-puncher."⁶³

COWARDICE. Defined by the Century Dictionary as meaning want of courage to face danger, difficulty, opposition, etc.; dread of exposure to harm or pain of any kind; fear of consequences; dishonorable fear; pusillanimity.⁶⁴ In a particular connection, "cowardice" has been defined as misbehavior through fear with relation to some duty to be performed before an enemy.⁶⁵ Imputation of cowardice as subject of libel and slander see the C.J.S. title Libel and Slander § 31, also 36 C.J. p 1167 note 70.

COWDASH. As a Scotch name for a young beast or cow see Colpindach 15 C.J.S. p 239 note 27.

COWHIDE. The word is defined by the Century Dictionary as meaning the skin of a cow prepared

for tanning, or the thick, coarse leather made from it.

Phrase: "Good custom cowhide boots."⁶⁶

CR. See Cr. in Abbreviations 1 C.J.S. p 276 note 5.

C. R. See Abbreviations 1 C.J.S. p 276 note 5.

CRAB. See the C.J.S. title Fish § 1, also 26 C.J. p 594 note 4 [a].

CRACKED CORN. See Chop 14 C.J.S. p 1113 note 67.

CRACKER. A machine used in the manufacture of rubber soles and heels and well known to the boot and shoe manufacturing industry.⁶⁷

CRACKING. A chemical process for separating the lighter and heavier constituents of petroleum to produce gasoline, described as the conversion, by means of heat and usually pressure, of the complex hydrocarbon molecules of the heavier oils into the molecular structure of the desired lighter oils;⁶⁸ the decomposition of petroleum by heat and pressure, with the consequent breaking up of the molecules and the production of both lighter and heavier hydrocarbons, gasoline being a lighter hydrocarbon produced by this chemical action.⁶⁹

CRACKLINGS. The word is defined by the Century Dictionary as meaning the crisp residue of hogs' fat after the lard has been tried out. In the production of lard, "cracklings," it is said, including a large amount of ash and protein, are separated

54. Okl.—Nelson v. Fightmaster, 44 P. 213, 215, 4 Okl. 38.

55. "Cow" and "animal of the cow kind" compared

"If the word 'cow' as used in the above statute includes or was intended to include both the male and the female of the bovine species, the words 'or animal of the cow kind' appearing in the statute are of no import and have no field of operation. The truth is that a cow is a female of bovine animals."—Marsh v. State, 57 So. 387, 3 Ala.App. 80, 81.

56. Ark.—State v. Haller, 177 S.W. 1138, 1139, 119 Ark. 503.

57. Ark.—Jeffries v. State, 144 S.W. 514, 515, 102 Ark. 373.

58. Mich.—Parsons v. Kimmel, 173 N.W. 539, 540, 206 Mich. 676.

59. Ala.—Watson v. State, 55 Ala. 150.

60. Ark.—State v. Haller, 177 S.W. 1138, 1139, 119 Ark. 503.

61. Included in "mansion"

Conn.—State v. Brooks, 4 Conn. 446, 448.

62. Definition

"One whose business is to keep cows; a dairyman."—Century D.—15 C.J. p 1341 note 76.

63. Ark.—State v. Haller, 177 S.W. 1138, 1139, 119 Ark. 503.

64. See 15 C.J. p 1341 notes 68-71.

65. Black L. D., citing O'Brien Courts Martial p 142. Military offenses generally see Army and Navy § 54 d.

66. A term of no definite meaning in a context in which the boots are referred to as "one half of said boots to be horse-hide legs, and one half to be good kip-skin legs."—Wait v. Fairbanks, Brayt., Vt., 77.

67. U.S.—Grosjean v. Panther-Panco Rubber Co., D.C.Mass., 26 F.Supp. 344, 347.

68. U.S.—Universal Oil Products Co. v. Skelly Oil Co., D.C.Del., 20 F.2d 995.

69. U.S.—Universal Oil Products Co. v. Winkler-Koch Engineering Co., D.C.Del., 6 F.Supp. 763, 764, 765.

It is distinguished from the physical process of obtaining gasoline by distillation, the method followed in the earlier days before the use of combustion engines in motor vehicles had created the great demand for gasoline.—Universal Oil Products Co. v. Skelly Oil Co., D.C.Del., 20 F.2d 995—Universal Oil Products Co. v. Winkler-Koch Engineering Co., D.C.Del., 6 F.Supp. 763, 764.

"Cracking tubes"

"Tubes . . . in a furnace through which a mixture of fresh charging stock and reflux condensate is continuously flowing as a stream with enough liquid oil to wash the tubes and prevent the deposit of carbon."—Universal Oil Products Co. v. Winkler-Koch Engineering Co., supra.

from the liquid resulting from the cooking of the hogs' fat under pressure for a certain period.⁷⁰

CRACK-LOO or **CRACK-OR-LOO**. See the C.J.S. title Gaming § 1, also 27 C.J. p 971 text and note 53.

CRAFT.

As Cunning

In this sense, the term is not a legal one, although often used in connection with such terms as "fraud" and "artifice," and defined as meaning guile; artful cunning; trickiness.⁷¹

As Trade or Occupation

Manual occupation; some mechanic art in which the person practicing may acquire and exhibit dexterity and skill;⁷² the occupation or employment itself, a trade;⁷³ also the body of persons pursuing such a calling,⁷⁴ hence a guild.⁷⁵

As Nautical Term

A vessel; ordinarily applied to water transporting conveyances of small character, generally engaged in coastwise or domestic navigation,⁷⁶ although the term is sometimes used to embrace vessels of all sizes, especially all kinds of sailing vessels.⁷⁷ It has been held to include a small pleasure boat, without deck, propelled by a small steam engine.⁷⁸

Water craft. A term applicable to the means of transportation by water,⁷⁹ and defined by Webster International Dictionary as meaning any vessel or boat plying on water; vessels and boats collectively.⁸⁰ Ordinarily, the term is applied to small vessels engaged in coastwise or domestic navigation,⁸¹ but it may be applied to a houseboat drawn up on

the beach,⁸² and to a wharf boat,⁸³ although it has been said that the term does not include a dredge.⁸⁴

Other phrases: "Bay or river craft" see Bay 10 C.J.S. p 214 note 74, "boat, air or water craft" see Boat 11 C.J.S. p 373 note 89, "fishing boat, craft, or vessel" see Collision § 53, "other small craft of light character" see Collision § 2 b note 69, and "steam-boat and water craft . . . or any building."⁸⁵

CRAFTSMAN. One who practices a handicraft.⁸⁶

CRAMP. A common term well understood to relate to a painful affection of the muscles, and frequently associated with an acute disease of the stomach or bowels; a sudden, involuntary, and highly painful contraction of a muscle or muscles; a variety of tonic spasm; and it has been said that it is most frequently experienced in the lower extremities, and is a common symptom of certain affections, as of colica pictonum and cholera morbus. Several of these painful contractions generally occur successively, so that the word "cramps" is used to designate the disease.⁸⁷

Cramp of the stomach. A sudden, violent, and most painful affection of the stomach, with sense of constriction in the epigastrium.⁸⁸

Cramp cure. A term descriptive of the purpose and character of a medicine.⁸⁹

CRANE. Sometimes called a "traveler;"⁹⁰ and defined by the Standard Dictionary as meaning a hoisting machine having the added capacity of moving a load in a horizontal or lateral direction.⁹¹ Even when operated by hand, it has been held to be a "machine."⁹²

CRANAGE. A liberty to use a crane for drawing up goods and wares of burden from ships and ves-

70. Pa.—Commonwealth v. Fried & Reineman Packing Co., 198 A. 801, 802, 330 Pa. 124.

71. Black L.D.
See also Art 6 C.J.S. p 772 note 11.

72. Ga.—Ganahl v. Shore, 24 Ga. 17, 28.

Similarly expressed

"A trade or occupation of the kind requiring skill and training, particularly manual skill combined with a knowledge of the principles of the art."—Cole v. Commonwealth, 193 S.E. 517, 519, 169 Va. 868.

73. Bouvier L.D.

Distinguished from "profession"
Ill.—Babcock v. Nudelman, 12 N.E. 2d 635, 637, 367 Ill. 626.

74. Va.—Cole v. Commonwealth, 193 S.E. 517, 519, 169 Va. 868.

75. Black L.D.

76. U.S.—The Saxon, D.C.S.C., 269 F. 639, 641.

77. Va.—The Wenonah, 21 Gratt. 685, 693, 62 Va. 685, 693.

78. U.S.—U. S. v. The Mollie, C.C. Tex., 26 F.Cas.No.15,795, 2 Woods 318.

79. U.S.—The Saxon, D.C.S.C., 269 F. 639, 641.

80. See 67 C.J. p 641 note 70.

81. U.S.—The Saxon, supra.

82. Ill.—Nagel v. People, 82 N.E. 315, 318, 229 Ill. 598.

83. Ohio.—Gaff v. Flescher, 33 Ohio St. 107, 114.

84. Mich.—Bartlett v. Steam Dredge No. 14, 64 N.W. 951, 107 Mich. 74, 61 Am.S.R. 314.

85. Wash.—State v. Sufferin, 32 P. 1021, 6 Wash. 107.

86. Kan.—State v. Ottawa, 113 P. 391, 393, 84 Kan. 100.
Compared with "artificer," "artisan," "laborer," "mechanic," and "workman" see Artificer 6 C.J.S. p 778 note 73.

87. U.S.—L. H. Harris Drug Co. v. Stucky, C.C.Pa., 46 F. 624, 626.
15 C.J. p 1343 note 6.

88. U.S.—L. H. Harris Drug Co. v. Stucky, supra.

89. U.S.—L. H. Harris Drug Co. v. Stucky, supra.

90. Kan.—Seeds v. American Bridge Co., 75 P. 480, 481, 63 Kan. 522.

91. See 15 C.J. p 1343 note 14.

92. Ind.—Crawford & McCrimmon Co. v. Gose, Ind.App., 82 N.E. 334, 985.

sels, at any creek of the sea, or wharf, onto the land, and to make a profit of doing so. It also signifies the money paid and taken for the service.⁹³

CRANK. Defined by Webster New International Dictionary, in its primary mechanical sense, as a bent portion of an axle, or shaft, or an arm keyed at right angles to the end of a shaft, by which motion is imparted to or received from it.⁹⁴ In a derived or secondary sense, some strange action, caused by a twist of judgment; a caprice; a whim; a crotchet; a vagary; also violent of temper; subject to sudden cranks.⁹⁵

CRAPE. A material of silk, to which a certain resinous substance has been applied; but it is said that neither the merchant nor the ordinary buyer understands silk and crape to be identical.⁹⁶

CRAPS and CRAP TABLE. See the C.J.S. title, Gaming § 1, also 27 C.J. p 987 text and note 7, and p 971 notes 54-58.

CRASS NEGLIGENCE. A vulgar term, for which, however, there is classical authority, meaning negligence where there is a plain duty to do or to abstain from doing a particular thing, and abstention from action, or action such as the court would be justified in holding to be mischievous or reckless.⁹⁷

CRASSUS, CRASSA, CRASSUM. The Latin adjective, meaning large; gross; excessive; extreme.⁹⁸

CRASTINO. A Latin term meaning literally "to-morrow,"⁹⁹ on the morrow, or the day after.¹ A title formerly given to the return days of writs, days in bank, or appearance days in the courts at Westminster.²

CRATE. An incasement which is not usually of permanent value, such as is ordinarily used for the convenient transportation of its contents.³

CRATES. An iron gate before a prison.⁴

CRAVE. To ask or to demand, as to craveoyer.⁵

CRAVEN. In old English law, a word of disgrace and obloquy, pronounced on either champion, in the ancient trial by battle, proving recreant, that is yielding.⁶

CRAVENETTE CLOTH. A woolen or worsted cloth which has been subjected to a process intended to make it rain repellent.⁷

CRAWFISH or CRAYFISH. See the C.J.S. title Fish § 1, also 26 C.J. p 594 note 4 [b].

CRAZY. See the C.J.S. title Insane Persons §§ 1, 2, also 32 C.J. p 603 notes 19, 20.

CREAM. A specific article of commerce which is separated and manufactured from milk by a centrifugal process, or by a natural process.⁸ Figuratively it is also used to signify the best part of a thing, as the cream of a story.⁹

93. Black L.D.
15 C.J. p 1343 note 11.

94. Crank hanger

A term used to designate an appliance pertaining to a bicycle, composed of a sleeve, cones, cups, cranks, sprocket, etc.—Rogers v. Beckrich, 61 N.Y.S. 725, 46 App.Div. 429, 430.

95. U.S.—Walker v. Tribune Co., C. III., 29 F. 827, 828, 829.

Not necessarily defamatory

"It is not a word which, by its common meaning in the English language, imports that a person has been guilty of a crime, or exposes him to hatred, contempt, ridicule obloquy, or which would tend to injure him in his trade or profession."—Walker v. Tribune Co., supra.

96. U.S.—Arthur v. Morrison, N.Y., 96 U.S. 108, 110, 24 L.Ed. 764.

"Crape veil" see the C.J.S. title Customs Duties § 43, also 17 C.J. p 575 note 78 [a].

97. Eng.—In re Liverpool Household Stores Assoc., Ltd., 59 L.J.Ch. 616, 618.

98. Black L.D.

Crassa ignorantia

Gross ignorance.—Seare v. Prentice, 8 East 348, 352, 103 Reprint 376.

Crassa negligentia

Gross negligence; a phrase which has been defined to mean the absence of ordinary care and diligence adequate to the particular case.—Hun v. Cary, 82 N.Y. 65, 72, 37 Am.R. 546.

Lata culpa et crassa negligentia

A term which both by the civil and common-law approximates to and in many instances cannot be distinguished from "dolus malus," or misconduct.—In re Hall, 2 M. & G. 847, 852, 40 E.C.L. 886, 133 Reprint 987.

99. Bouvier L.D.

1. Black L.D.

2. Burrill L.D., citing 3 Blackstone Comm. p 227.

15 C.J. p 1344 note 37.

Reason for taking second day

"The return day of writs [was the second day of the term], because the first day of the term was always some saint's day, and writs were returnable on the day after."—Black L.D.

3. U.S.—U. S. v. Nicholls, N.Y., 22 S.Ct. 918, 919, 186 U.S. 298, 46 L.Ed. 1173.

4. Black L.D.

5. Black L.D.
15 C.J. p 1344 note 40.

6. Black L.D.

Effect

"Glanville calls it 'infestum et inverecundum verbum.' His condemnation was 'amittere liberam legem,' i. e., to become infamous, and not to be accounted 'liber et legalis homo,' being supposed by the event to have been proved forsworn, and not fit to be put upon a jury or admitted as a witness."—Black L.D.

7. Waterproof quality

"Cravenette is not absolutely waterproof. . . . Nevertheless for all ordinary uses it is waterproof and that term is properly used in describing it."—U. S. v. Brown, N.Y., 136 F. 550, 551, 69 C.C.A. 260.

8. Mass.—Commonwealth v. Elm Farm Milk Co., 108 N.E. 911, 221 Mass. 68, 69.

9. U.S.—Price Baking-Powder Co. v. Fyfe, C.C.Minn., 45 F. 799, 800.

*Compared with "milk."*¹⁰

Cream of codfish. Skinned and boned fish, which is subjected to a further process of cutting or shredding.¹¹

Cream of tartar. A commercial phrase applied to tartar when pure.¹²

Other phrases: "Cream Baking Powder,"¹³ "cream butter" see Butter 12 C.J.S. p 862 note 93, and "ice cream plant."¹⁴

CREAMALT BREAD. A bread containing milk and malt, the surface of which is steam glazed.¹⁵

CREAMER. A foreign merchant; but generally taken for one who has a stall in a fair or market.¹⁶

CREAMERY. Early definitions of the term are a factory where cream from milk with or without the addition of salt and coloring matter is churned into butter;¹⁷ a place where butter is made regardless of the size and capacity of the factory that makes it.¹⁸ Following the processing of milk into a variety of products other than butter, "creamery" has more recently been defined as meaning an establishment where butter and cheese are made or where milk and cream are sold or prepared for market; an establishment where milk or cream is processed whether butter is made therein or not; a place or apparatus in which milk is set for creaming; also, rarely, the work of such an establishment.¹⁹

Creamery operated by power. A plant where raw milk is received and pasteurized, separated, bottled, and otherwise processed for market by power-driven machinery;²⁰ a plant where milk and cream are received, processed, and prepared for market, either as such or in the form of butter or other dairy products, and where machinery and power are employed for such purpose.²¹

Creamery operations. Operations connected with the making of a creamery product at the place of its operation. The operation of the creamery is over when creamery products are produced and are separated from creamery operations by being sent to other places for sale.²²

Other phrases: "Creamery or cheese plant,"²³ and "operating a creamery;"²⁴ and also "operate creameries."²⁵

CREAMUS. Literally "We create." One of the words by which a corporation in England was formerly created by the king.²⁶

CREANCE. In French law, a claim or debt; also belief, credit, or faith.²⁷

CREANSOR. One who trusts or gives credit; a creditor.²⁸

CREATE.

Present Tense

To bring or call into being or existence something that did not exist before,²⁹ to make or pro-

10. "Generically, milk and cream are the same thing."—Commonwealth v. Elm Farm Milk Co., 108 N.E. 911, 221 Mass. 68.

Statutory use

"The word 'milk' . . . is shown by section 7 to include milk from which no part of the cream has been removed, and we are of opinion that it is used as a general name, and in a sense broad enough to include cream."—Commonwealth v. Gordon, 33 N.E. 709, 159 Mass. 8.

11. U.S.—Teed v. U. S., C.C.N.Y., 126 F. 447, 448.

12. U.S.—Price Baking-Powder Co. v. Fyfe, C.C.Minn., 45 F. 799, 800.

13. U.S.—Price Baking-Powder Co. v. Fyfe, supra.

14. As "a creamery operated by power"

"An ice cream plant [is] both a 'factory . . . where machinery is used' and 'a creamery operated by power.'"—Allen v. State Industrial Commission, 83 P.2d 808, 810, 183 Okl. 585.

As "a creamery or cheese plant"

A company whose "principal manu-

factured product is ice cream in its various forms" is a "creamery or cheese plant" within the meaning of that statutory phrase.

Ga.—Miller v. Pitts, 177 S.E. 587, 588, 179 Ga. 789.

Okl.—Beatrice Creamery Co. v. State Industrial Commission, 49 P.2d 1094, 1096, 174 Okl. 101—Pawnee Ice Cream Co. v. Price, 23 P.2d 168, 169, 164 Okl. 120.

15. Mass.—George G. Fox Co. v. Glynn, 78 N.E. 89, 90, 191 Mass. 344, 114 Am.S.R. 619, 9 L.R.A., N.S., 1096.

16. Black L.D.

17. Okl.—Allen v. State Industrial Commission, 83 P.2d 808, 810, 183 Okl. 585.

18. Ill.—Elgin Butter Co. v. Elgin Creamery Co., 40 N.E. 616, 617, 155 Ill. 127.

19. Okl.—Allen v. State Industrial Commission, 83 P.2d 808, 809, 183 Okl. 585.

20. Okl.—Beatrice Creamery Co. v. State Industrial Commission, 49 P.2d 1094, 174 Okl. 101.

21. Okl.—Allen v. State Industrial Commission, 83 P.2d 808, 810, 183 Okl. 585.

22. N.Y.—Neubeck v. Doscher, 199 N.Y.S. 203, 206, 204 App.Div. 617. Okl.—Allen v. State Industrial Commission, 83 P.2d 808, 809, 183 Okl. 585.

23. Ga.—Miller v. Pitts, 177 S.E. 587, 179 Ga. 789.

24. "Dealing in milk" distinguished N.Y.—Neubeck v. Doscher, 199 N.Y.S. 203, 206, 204 App.Div. 617.

25. Ill.—Elgin Butter Co. v. Elgin Creamery Co., 40 N.E. 616, 617, 155 Ill. 127.

26. Black L.D., citing 1 Blackstone Comm. p 473.

27. Black L.D.

28. Black L.D.

29. Cal.—Jameson v. Chanslor-Canfield Midway Oil Co., 187 P. 369, 370, 176 Cal. 1.

Md.—Town of Westernport v. Green, 124 A. 403, 404, 144 Md. 85.

Mont.—Mitchell v. Banking Corporation of Montana, 273 P. 1055, 1058, 83 Mont. 581.

duce.³⁰

Equivalents or synonyms: "Establish,"³¹ and "incur."³²

Compared with, or distinguished from: "Amend" see Amend 3 C.J.S. p 1039 note 37, "assume,"³³ "declare,"³⁴ "designate,"³⁵ "maintain,"³⁶ and "regulate."³⁷

Phrases: "Create a charter,"³⁸ "create an office,"³⁹ "create any debt or debts,"⁴⁰ "create any office,"⁴¹ "create any vested right or interest,"⁴² "create a subdivision,"⁴³ "create a trust,"⁴⁴ and "create or assume."⁴⁵ For other phrases see 15 C. J. p 1344 note 64—p 1345 note 74.

Created

The past tense has been compared with, or distinguished from, "declared."⁴⁶

Phrases: "After liability is 'created,'"⁴⁷ "after . . . the liability was created,"⁴⁸ "claim . . .

then 'created,'"⁴⁹ "created and manifested,"⁵⁰ "created by law,"⁵¹ "created by this act,"⁵² "created or continued,"⁵³ "created or declared,"⁵⁴ "created or declared by operation of law,"⁵⁵ "created, suffered, assumed, or agreed to,"⁵⁶ "first created,"⁵⁷ "liability . . . created,"⁵⁸ "lien 'created,'"⁵⁹ "lien created by the statute itself,"⁶⁰ "mortgage . . . created and recorded,"⁶¹ "newly created,"⁶² "office created,"⁶³ "right . . . 'created' by the contract,"⁶⁴ and "right created in favor of several persons."⁶⁵ For other phrases see 15 C.J. p 1345 notes 75-92.

Creating

Phrases: "Creating a liability,"⁶⁶ and "creating the office."⁶⁷

CREATION. Defined by the Standard Dictionary as meaning an act of construction, physical or mental.⁶⁸ It has been said that the act of creation is not and cannot be complete until the thing is

Pa.—Commonwealth v. Reese, 143 A. 127, 129, 293 Pa. 398—Reading v. Shepp, 2 Pa. Dist. 137, 141. 15 C.J. p 1344 notes 55-60.

30. Ind.—Indianapolis v. Navin, 47 N.E. 525, 528, 51 N.E. 80, 151 Ind. 139, 41 L.R.A. 337, 344. 15 C.J. p 1344 notes 62, 63.

31. Ill.—People ex rel. Gill v. Devine Realty Trust, 9 N.E.2d 251, 254, 266 Ill. 418.

32. Cal.—Vandegrift v. Riley, 16 P. 2d 734, 736.

33. Ohio.—Tiffin v. Griffith, 77 N.E. 1075, 1076, 74 Ohio St. 219.

34. Nev.—Sime v. Howard, 4 Nev. 473, 484.

35. Tex.—Ex parte Heyman, 78 S. W. 349, 352, 45 Tex. Cr. 532.

36. Ill.—People ex rel. Gill v. Devine Realty Trust, 9 N.E.2d 251, 254, 266 Ill. 418.

37. N.J.—Taylor v. Lambertville, 10 A. 809, 811, 48 N.J. Eq. 107. 15 C.J. p 1345 note 83 [a].

38. "Extend a charter" and "renew a charter" distinguished Pa.—Moers v. Reading, 21 Pa. 188, 201. 15 C.J. p 1345 note 90 [a].

39. Ohio.—State v. Powell, 142 N.E. 401, 403, 109 Ohio St. 383.

40. "Incur any indebtedness" synonymous Cal.—Vandegrift v. Riley, 16 P.2d 734, 736.

41. Cal.—Davis v. Los Angeles County, 84 P.2d 1034, 1040, 12 Cal. 2d 413. 15 C.J. p 1345 note 70.

42. Cal.—Davis v. Los Angeles County, supra.

43. "Designate a subdivision" distinguished Tex.—Ex parte Heyman, 78 S.W. 349, 352, 45 Tex. Cr. 532.

44. "Declare a trust" distinguished Nev.—Sime v. Howard, 4 Nev. 473, 484.

45. Ohio.—Tiffin v. Griffith, 77 N.E. 1075, 1076, 74 Ohio St. 219.

46. Me.—McClellan v. McClellan, 65 Me. 500, 505.

47. Cal.—Richardson v. Barnum, 77 P.2d 1081, 11 Cal.2d 775—Richardson v. Busby, 77 P.2d 1081, 11 Cal. 2d 774.

48. Mont.—Mitchell v. Banking Corporation of Montana, 273 P. 1055, 1058, 88 Mont. 581.

49. Mont.—Mitchell v. Banking Corporation of Montana, 22 P.2d 175, 178, 94 Mont. 165.

50. "Created or declared" distinguished Me.—McClellan v. McClellan, 65 Me. 500, 505.

51. N.Y.—Board of Education of Union Free School Dist. No. Six of Town of Greenburgh v. Town of Greenburgh, 13 N.E.2d 768, 770, 277 N.Y. 193.

Okl.—Green-Boots Const. Co. v. State Highway Commission, 281 P. 220, 139 Okl. 108.

15 C.J. p 1345 note 82.

52. Pa.—Commonwealth v. Reese, 143 A. 127, 129, 293 Pa. 398.

53. Fla.—State ex rel. Landis v. Bird, 163 So. 248, 264, 120 Fla. 780.

54. Me.—McClellan v. McClellan, 65 Me. 500, 505.

"Created and manifested" distinguished see supra note 50.

55. N.D.—Arntson v. First National Bank, 167 N.W. 760, 763, 39 N.D. 408, L.R.A.1918F 1038.

56. N.Y.—First Nat. Bank & Trust Co. of Port Chester v. New York Title Ins. Co., 12 N.Y.S.2d 703, 709.

57. "Newly created" synonymous Pa.—Commonwealth v. Reese, 143 A. 127, 129, 293 Pa. 398.

58. Cal.—Richardson v. Craig, 77 P. 2d 1077, 1080, 11 Cal.2d 131.

59. "Lien 'acquired'" distinguished U.S.—U. S. v. Humbert, D.C.Kan., 30 F.2d 413, 415.

"Lien 'assigned'" distinguished U.S.—U. S. v. Humbert, supra.

60. U.S.—McGonigle v. Foutch, C.C. A.Mo., 51 F.2d 455, 461.

61. U.S.—John Murtland, Inc. v. Empire Trust Co., C.C.A.N.J., 39 F.2d 341, 344.

62. Pa.—Commonwealth v. Reese, 143 A. 127, 129, 293 Pa. 398. "First created" synonymous see supra note 57.

63. Mass.—In re Opinion of the Justices, 21 N.E.2d 551, 557.

64. Cal.—Jameson v. Chanslor-Canfield Midway Oil Co., 167 P. 369, 370, 176 Cal. 1.

65. Cal.—Jameson v. Chanslor-Canfield Midway Oil Co., supra.

66. La.—State ex rel. Porterle v. Board of Liquidation of State Debt, 182 So. 661, 669, 190 La. 520.

67. Md.—Town of Westernport v. Green, 124 A. 403, 404, 144 Md. 85.

"Imposing new duty" distinguished Md.—Town of Westernport v. Green, supra.

68. See 15 C.J. p 1346 note 97.

brought into being and exists.⁶⁹ As to creation of particular entities, relations, or status see such C.J. S. titles as Agency §§ 20, 28; Counties § 5; Courts § 120; Officers § 8, also 46 C.J. p 933 note 56—p 934 note 66; Powers § 9, also 49 C.J. p 1253 notes 68—73; Schools and School Districts § 27, also 56 C.J. p 197 note 22—p 205 note 87; Towns §§ 6, 8, also 63 C.J. p 102 notes 46—60; and Trusts §§ 22—64, also 65 C.J. p 231 note 67—p 318 note 27.

Phrases: "Creation of a debt,"⁷⁰ "creation of a lien,"⁷¹ "creation of a new debt,"⁷² "creation of any obstruction,"⁷³ and "creation of the liability."⁷⁴

CREATIVE FRANCHISE. See Corporations § 69.

CREATURE. Defined by the Century Dictionary as meaning a living created being; an animal or animate being.⁷⁵

Phrases: "Creature aforesaid so impounded,"⁷⁶ "reasonable creature,"⁷⁷ and "reasonable creature in being."⁷⁸

CREDENTIALS. In international law, the instruments which authorize and establish a public minister in his character with the state or prince to whom they are addressed.⁷⁹

CREDIBILITY. An ordinary English word, meaning entitled to credit or belief;⁸⁰ worthiness of belief.⁸¹ As applied to witnesses see the C.J.S. title

Witnesses § 458, also 70 C.J. p 759 note 8—p 760 note 27.

Compared with, or distinguished from: "Competency" see Competency 15 C.J.S. p 659 note 64, and "credit."⁸²

CREDIBLE. Entitled to confidence, trustworthy, worthy of belief or of credit;⁸³ so natural, reasonable, and probable, in view of the transaction which it describes or to which it relates, as to make it easy to believe it.⁸⁴ As applied to a "story," it may signify worthy of belief, or probable, only, or barely not incredible.⁸⁵ As applied to a witness, the word "credible" has a legal and well-defined meaning, signifying deserving of confidence;⁸⁶ particularly as used in statutes concerning the attestation of wills see the C.J.S. title Wills § 185, also 68 C.J. p 674 note 44 and 15 C.J. p 1347 notes 17—20. It has been held synonymous with "competent" see Competent 15 C.J.S. p 660 note 88, but has been compared with, or distinguished from, "creditable,"⁸⁷ and "reputable."⁸⁸

Credible person. In the legal sense, a person whose known standing or reputation in the community for veracity and reliability entitles him to belief by a reasonably prudent person,⁸⁹ one worthy of belief or entitled to credit;⁹⁰ a person competent to give evidence and worthy of belief;⁹¹ a person who is not only truthful, in the ordinary acceptance of the term, but who, from motives, intent, feelings, or relationship to the party, and the

69. Cal.—People v. California Fish Co., 138 P. 79, 91, 166 Cal. 576.

70. Wash.—Twichell v. City of Seattle, 179 P. 127, 129, 106 Wash. 32.

71. U.S.—Central Hanover Bank & Trust Co. v. United Traction Co., C.C.A.N.Y., 95 F.2d 50, 56.

72. Ala.—In re Opinions of the Justices, 126 So. 161, 220 Ala. 539.

73. U.S.—U. S. v. Bridgeport Towing Line, D.C.Conn., 15 F.2d 240, 241.

N.Y.—Phoenix Constr. Co. v. Cornell Steamboat Co., 103 N.E. 891, 893, 210 N.Y. 113, 118.

74. Wash.—McClain v. Church, 289 P. 88, 90, 76 Wash. 170.

"Accrual of cause of action to enforce the liability" distinguished Cal.—Richardson v. Craig, 77 P.2d 1077, 1080, 11 Cal.2d 131.

75. See 15 C.J. p 1346 notes 3, 4.

Cattle included

Conn.—Whitlock v. West, 26 Conn. 406, 415.

76. Conn.—Whitlock v. West, supra.

77. Term defined and held to include "A human being," and, in a partic-

ular connection, held to include "a lunatic, an idiot, or even a child unborn . . . as much as . . . a philosopher." Also held to include "a slave."—State v. Jones, 1 Miss. 83, 85.

78. **Existence independent of mother** "In order to become 'a reasonable creature 'in being,' a child must be born alive. . . . Ordinarily, if the child has breathed, this would show independent life. But this test is not infallible."—Morgan v. State, 256 S.W. 433, 434, 148 Tenn. 417.

79. Black L.D.

Production and recognition of letters of credence as beginning of ambassadorial mission see Ambassadors and Consuls § 6 a.

80. Vt.—Smith v. Jones, 34 A. 424, 68 Vt. 132.

81. N.C.—State v. Green, 122 S.E. 178, 179, 137 N.C. 466.

Tex.—Barber v. State, 142 S.W. 577, 581, 64 Tex.Cr. 96, 103.

82. Tex.—Dopley v. State, 108 S.W. 676, 52 Tex.Cr. 491, 492.

83. Miss.—Loeb v. State, 98 So. 449, 451, 133 Miss. 833.

15 C.J. p 1346 notes 11—15.

84. R.I.—Taylor v. Taylor, 90 A. 746, 751.

15 C.J. p 1346 note 16.

85. N.C.—Noland v. McCracken, 18 N.C. 594, 596.

86. Miss.—Loeb v. State, 98 So. 449, 451, 133 Miss. 833.

N.C.—Noland v. McCracken, 18 N.C. 594, 596.

See also the C.J.S. title Witnesses § 458, and 15 C.J. p 1347 note 30—p 1348 note 55.

87. Me.—In re Marston, 8 A. 87, 94, 79 Me. 25.

88. Ark.—Dewain v. State, 179 S.W. 346, 347, 120 Ark. 302.

89. Miss.—McGowan v. State, 185 So. 826, 829.

90. W.Va.—Peck v. Chambers, 28 S. E. 706, 708, 44 W.Va. 270.

91. Ark.—Dewain v. State, 179 S.W. 346, 347, 120 Ark. 302.

Miss.—Loeb v. State, 98 So. 449, 451, 133 Miss. 833.

Tex.—Burleson v. State, 100 S.W.2d 1019, 1020, 123 Tex.Cr. 576—Halbader v. State, 220 S.W. 85, 86, 87 Tex. Cr. 129—Jones v. State, 125 S.W. 914, 58 Tex.Cr. 313, 314.

like, and his opportunities and means of knowledge, would be likely to testify to the truth;⁹² a competent witness, as well as one worthy of belief.⁹³ It has been said that one who lacks knowledge on the subject under investigation is not a credible person to be accepted as worthy of belief in that particular inquiry;⁹⁴ and where it appears that a person's means of knowledge are not sufficient to support the statements made in an affidavit, he is not a credible person within the statutory meaning of the term.⁹⁵

Credible witness. As equivalent to "competent witness" and as meaning one who, being competent to testify, is deemed worthy of belief, see the C.J.S. titles Wills § 185, also 68 C.J. p 674 note 42-p 675 note 55, and 15 C.J. p 1347 note 17-20, Witnesses § 458, also 15 C.J. p 1347 note 30-p 1348 note 55, and as used in perjury prosecutions see the C.J.S. title Perjury § 69, also 48 C.J. p 902 note 53.

Other phrases: "Credible attesting witnesses,"⁹⁶ "credible evidence,"⁹⁷ and "disinterested and credible."⁹⁸

CREDIBLY. The statement, as in a pleading or affidavit, that one is "credibly informed and verily believes" such and such facts, means that, having no direct personal knowledge of the matter in question, he has derived his information with regard to it from authentic sources or from the statements of persons who are not only credible in the sense of being trustworthy, but also informed as to the particular matter or conversant with it.⁹⁹

CREDIT.

As a Noun

—**In General.** The term is derived from the Latin "credere," to trust,¹ and its meaning is perfectly well understood in commercial circles.²

—**Belief or Trust.** In this sense, "credit" has been defined primarily as meaning belief, faith, reliance on the truth or reality of something, and trust;³ trust given or received from one to another, and the like;⁴ and, derivatively, as meaning the capacity of being trusted,⁵ trustworthiness, or that which procures or adds to reputation or esteem.⁶ In an enlarged sense, the term may be employed as referring to a person's standing as a citizen in a community in which he lives;⁷ that influence connected with certain social positions.⁸ More specifically, in its commercial application, "credit" is the antonym of "cash" see Cash 14 C.J.S. p 18 note 69, denoting, or referring to, the time allowed by the creditor for the payment of goods sold by him to the debtor;⁹ a basis on which one may trade as he desires without payment, to the extent limited;¹⁰ the means by which a person can secure money with which to pay his debts or to carry on his business;¹¹ or security for the meeting of his obligations by the holder of the credit.¹² The term implies not merely the sale of goods or the loaning of money, but faith in the trustworthiness of the one to whom patronage is given,¹³ and that one is able, or may be compelled, to pay;¹⁴ and has been defined as meaning a good reputation and the confidence of the business community, in the borrower;¹⁵ hence

92. Tex.—Dunn v. State, 7 Tex.App. 600, 605, 606.

"Truthful man" distinguished
Tex.—Dunn v. State, supra.

93. Tex.—Thomas v. State, 14 Tex. App. 70, 72.

94. Ark.—Adams v. State, 20 S.W. 2d 130, 133, 179 Ark. 1047—Brown v. State, 203 S.W. 1031, 134 Ark. 597—Van Camp v. State, 189 S.W. 173, 174, 125 Ark. 532—Dewein v. State, 179 S.W. 346, 347, 120 Ark. 302.

95. Okl.—Turner v. State, 111 P. 988, 992, 4 Okl.Cr. 164.

96. Me.—Clark et al., Appellants, 95 A. 517, 114 Me. 105, Ann.Cas.1917A 837.

97. Wis.—Hills Dry Goods Co. v. Industrial Commission, 258 N.W. 336, 339, 217 Wis. 76.

98. Me.—Warren v. Baxter, 48 Me. 193, 195.

99. Black L.D.

See also the C.J.S. titles Affidavits § 26 a, and Pleading § 183, also 49 C. J. p 309 notes 94-8.

1. U.S.—In re Ford, D.C.Wash., 14 F.2d 848, 849.

Ill.—Lucas v. People, 75 Ill.App. 662, 665.

2. N.Y.—Ainis v. Ayres, 16 N.Y.S. 905, 908, 62 Hun 376.

3. Mont.—Simons v. Northern Pac. Ry. Co., 22 P.2d 609, 615, 94 Mont. 355.

15 C.J. p 1351 note 99.

4. Ark.—Brandon v. Yeakle, 50 S.W. 1004, 1005, 66 Ark. 377.

5. N.Y.—Bank of United States v. Drapkin & Goldberg Const. Co., 11 N.Y.S.2d 334, 337—Richard v. American Union Bank, 204 N.Y.S. 719, 722, 123 Misc. 92.

R.I.—Creditors' Service Corporation v. Cummings, 190 A. 2, 12, 57 R.I. 291.

15 C.J. p 1351 note 98.

6. Mont.—Simons v. Northern Pac. Ry. Co., 22 P.2d 609, 615, 94 Mont. 355.

7. S.C.—Jennings v. Clearwater Mfg. Co., 172 S.E. 870, 874, 171 S.C. 498, quoting *Corpus Juris*.

Tex.—Curlee v. Rose, 65 S.W. 197, 198, 27 Tex.Civ.App. 259.

8. Black L.D.

9. U.S.—In re Ford, D.C.Wash., 14 F.2d 848, 849.

Or.—Fleshman v. Whiteside, 34 P.2d 648, 650, 148 Or. 73, 93 A.L.R. 1456.

10. N.Y.—Rindge v. Judson, 24 N.Y. 64, 71.

11. N.Y.—In re Boyce, 19 N.Y.Civ. Proc. 23, 25.

12. N.Y.—Ainis v. Ayres, 16 N.Y.S. 905, 908, 62 Hun 376, 381.

The French equivalent is "crédit," used in the English sense of the term, or more particularly, the security for a loan or advancement.—Black L.D.

13. Mont.—Simons v. Northern Pac. Ry. Co., 22 P.2d 609, 615, 94 Mont. 355.

14. Ala.—Owen v. Mobile Branch Bank, 3 Ala. 258, 267.

15. N.Y.—In re Boyce, 19 N.Y.Civ. Proc. 23, 25.

the ability to borrow money or to obtain goods in virtue of the opinion conceived by the lender, or seller, that the party will repay;¹⁶ the confidence reposed in the ability and intention of a purchaser or a borrower to make payment at some future time, either specified or indefinite.¹⁷

—**Chose in Action.** As ordinarily used in trade and business, "credit" suggests nothing more than a chose in action¹⁸—a thing incorporeal, consisting in the right of one person to demand and recover from another, a sum of money or other thing in possession.¹⁹ It is, in a certain sense, property,²⁰ having no value other than the value which it has acquired by reason of the probability that the property, having present actual value, will be applied to the satisfaction of the claim which it represents.²¹ The term is of universal application to obligations due and to become due,²² attaching to a creditor and designating property possessed by him,²³ in contradistinction to its correlative words "debt," "debit," or "indebtedness,"²⁴ which have reference

to the debtor and a personal obligation resting upon him.²⁵ When used in the sense of what is owing to a person, "credit" necessarily implies a debtor and creditor relation,²⁶ an absolute right on the part of the creditor,²⁷ a debt or obligation to pay,²⁸ which is now due or to become due,²⁹ and in an amount at least equal to that of the credit;³⁰ and it may also imply ability of the debtor by reason of property or estates to make the promised payment,³¹ or security for the meeting of his obligations by the holder of the credit, but is not intended ordinarily as a substitute for those obligations.³² In a particular connection, it has been held that the word imports the tangible evidence of indebtedness, something that may be taken, secreted, or destroyed.³³

Depending upon the circumstances, "credit," in this sense, has been variously defined as meaning a claim or cause of action for money;³⁴ the mere legal right with which one is clothed to demand the delivery of money or other property in the future;³⁵ something belonging to a person, but of an

16. U.S.—In re Ford, D.C.Wash., 14 F.2d 848, 849.

R.I.—Creditors' Service Corporation v. Cummings, 190 A. 2, 12, 57 R.I. 291.

15 C.J. p 1351 note 93.

Similarly expressed

"The ability to borrow on the opinion conceived by the lender that he will be repaid."—People v. Wasservogle, 19 P. 270, 77 Cal. 173, 174.

17. Ill.—Lucas v. People, 75 Ill.App. 662, 665.

Similarly expressed

(1) "Confidence or trust reposed in one's ability to pay what he may promise."—People v. Wasservogle, 19 P. 270, 77 Cal. 173, 174.

(2) "The trust reposed in one by those who deal with him that he is of ability to meet his engagements."—Owen v. Mobile Branch Bank, 3 Ala. 253, 267.

18. W.Va.—Mountain State Motor Car Co. v. Solof, 124 S.E. 824, 825, 97 W.Va. 196, quoting Corpus Juris.

15 C.J. p 1348 note 59.

19. Ohio.—Columbus Exch. Bank v. Hines, 3 Ohio St. 1, 24.

Tex.—Lang v. Collins, Civ.App., 190 S.W. 784, 785.

W.Va.—Mountain State Motor Car Co. v. Solof, 124 S.E. 824, 825, 97 W.Va. 196.

20. Or.—Redfield v. Fisher, 292 P. 813, 817, 135 Or. 180, 73 A.L.R. 721.

15 C.J. p 1350 note 84.

21. Cal.—People v. Hibernia Sav. & Loan Soc., 51 Cal. 243, 246, 21 Am. R. 704.

22. Okl.—Colbert v. Superior Connection Co., 6 P.2d 791, 792, 154 Okl. 28.

23. N.C.—North Carolina R. Co. v. Alamance, 91 N.C. 454, 456.

24. Mass.—Wilde v. Mahaney, 67 N. E. 337, 338, 183 Mass. 455, 62 L.R. A. 813—Wentworth v. Whittemore, 1 Mass. 471, 473.

W.Va.—Mountain State Motor Car Co. v. Solof, 124 S.E. 824, 825, 97 W. Va. 196.

15 C.J. p 1350 notes 73, 79.

"What is a debt on one side is a credit on the other."—Libby v. Hopkins, Ohio, 104 U.S. 303, 309, 20 L.Ed. 769—Prudential Ins. Co. of America v. Nelson, C.C.A.Tenn., 101 F.2d 441, 443.

Coextensive with "debt"

"The term 'credits' can have no broader meaning than the term 'debts.'"—

U.S.—Libby v. Hopkins, Ohio, 104 U. S. 303, 309, 20 L.Ed. 769.

La.—Kansas City Life Ins. Co. v. Hammett, 149 So. 525, 527, 177 La. 930.

25. N.C.—North Carolina R. Co. v. Alamance, 91 N.C. 454, 456.

26. U.S.—In re Ford, D.C.Wash., 14 F.2d 848, 849.

Mass.—Wilder v. Bailey, 3 Mass. 289, 292.

15 C.J. p 1350 note 83.

27. N.H.—Brahmey v. Rollins, 179 A. 186, 189, 193, 87 N.H. 290.

28. La.—Kansas City Life Ins. Co. v. Hammett, 149 So. 525, 527, 177 La. 930.

15 C.J. p 1349 note 70 [a], p 1350 notes 81, 82.

29. W.Va.—Humphreys v. County Court, 110 S.E. 701, 703, 90 W.Va. 315.

Present and future included

"The claim that 'credit' implies only futurity, and not a present fact, cannot be supported."—People v. Wasservogle, 19 P. 270, 271, 77 Cal. 173, 175.

30. La.—Kansas City Life Ins. Co. v. Hammett, 149 So. 525, 527, 177 La. 930.

31. U.S.—In re Ford, D.C.Wash., 14 F.2d 848, 849.

32. Security, more or less

"The greater or less certainty of the security cannot affect the question of its character; it is but a security still."—Ainis v. Ayres, 16 N.Y.S. 905, 908, 62 Hun 376.

33. Idaho.—State v. Lottridge, 162 P. 672, 673, 29 Idaho 822.

34. As distinguished from generic term "credit"

"The generic term 'credit' is defined . . . as the 'capacity of being trusted.' But 'a' credit for a specified sum of money is a very different and concrete thing, namely, a claim or cause of action for money."—Richard v. American Union Bank, 204 N. Y.S. 719, 722, 123 Misc. 92.

35. La.—Kansas City Life Ins. Co. v. Hammett, 149 So. 525, 527, 177 La. 930.

Wash.—State v. Parmenter, 96 P. 1047, 1049, 50 Wash. 164, 19 L.R.A., N.S., 707.

Similarly expressed

"The right to receive money of the debtor."—Redfield v. Fisher, 292 P. 813, 817, 135 Or. 180, 73 A.L.R. 721.

intangible nature;³⁶ something belonging to one, but in the possession and under the control of another;³⁷ that which is due to any person as contradistinguished from that which he owes;³⁸ what is owing to a person, over and above his legal, bona fide debts;³⁹ a debt due in consequence of a contract of hire or borrowing of money;⁴⁰ a solvent debt owing to a person, firm, corporation, or association;⁴¹ also assets⁴² or moneyed capital.⁴³ A credit may be given either with or without interest, as its terms may be various, and must receive an extended or limited construction depending upon the character of the instrument in which it is used.⁴⁴ It has been said that "credit" may include an implied understanding from past course of dealing and known financial responsibility, even though the term is defined by statute.⁴⁵ Under particular circumstances, "credit," in this sense, has been held to include every claim or demand for money, labor, interest, or other valuable thing, due or to become

due,⁴⁶ such as accounts receivable,⁴⁷ annuities,⁴⁸ bank deposits,⁴⁹ bank shares or other corporate stock,⁵⁰ bonds and promissory notes,⁵¹ checks, drafts, or orders which are honored by a bank, when the books of the bank show that the account of the depositor is thereby overdrawn, also any written record of such overdraft which amounts to primary evidence thereof,⁵² claims to compensation for selling land,⁵³ claims and demands "owing upon bond, note, certificate, book account, or otherwise,"⁵⁴ funds placed in the hands of banks to pay existing or contemplated claims and which may be used for such purpose by draft,⁵⁵ judgment debts,⁵⁶ legacies in hands of executor or administrator,⁵⁷ loans by a foreign bank to a domestic corporation,⁵⁸ loans of money,⁵⁹ notes and bills payable and other forms of direct promises to pay money,⁶⁰ overpayments to the United States of taxes which the commissioner has directed the collector to apply toward payment of other taxes due from the

36. Ark.—Brandon v. Yeakle, 50 S. W. 1004, 1005, 66 Ark. 377.

Mo.—State ex rel. American Cent. Ins. Co. v. Gehner, 9 S.W.2d 621, 622, 320 Mo. 901, 59 A.L.R. 1041.

37. Cal.—Gow v. Marshall, 27 P. 422, 423, 90 Cal. 565—Sunset Realty Co. v. Dadmun, Super., 88 P.2d 947, 951. Philippine.—Manila v. Gambe, 13 Philippine 677, 684.

38. W.Va.—Mountain State Motor Car Co. v. Solof, 124 S.E. 324, 325, 97 W.Va. 196, quoting *Corpus Juris*.

Wis.—Pelican School Directors v. Rock Falls School Directors, 51 N.W. 871, 52 N.W. 1049, 31 Wis. 428, 436.

39. Ohio.—Chapman v. Wellington First Nat. Bank, 47 N.E. 54, 57, 56 Ohio St. 310, 320.

Similar definitions

(1) What is due to a man after deducting his liabilities."—Fayette County v. People's, etc., Bank, 25 N.E. 697, 701, 47 Ohio St. 503, 10 L.R.A. 196—Columbus Exchange Bank v. Hines, 3 Ohio St. 1, 40.

(2) "A balance of the assets after deducting debts and liabilities."—Pelican School Directors v. Rock Falls School Directors, 51 N.W. 871, 874, 52 N.W. 1049, 31 Wis. 428.

(3) "The amount, after deducting bona fide debts owing by the party."—Sellers v. Barrett, 57 N.E. 423, 425, 185 Ill. 466, 473—Allwood v. Cowen, 111 Ill. 481, 485.

40. U.S.—In re Ford, D.C.Wash., 14 F.2d 848, 849.

Ohio.—Stockyards Bank v. Seal, 161 N.E. 35, 36, 27 Ohio App. 179.

41. Idaho.—Salisbury v. Lane, 63 P. 383, 386, 7 Idaho 370.

Similarly expressed

(1) "A solvent debt, secured or unsecured."—Read v. Lewis and Clark County, 178 P. 177, 179, 55 Mont. 412.

(2) "A sum of money due to any person."—Columbus Exch. Bank v. Hines, 3 Ohio St. 1, 59.

(3) "Solvent debts, secured or unsecured, owing to a person."—State v. Mady, 272 P. 691, 693, 83 Mont. 418.

(4) "Solvent debts, claims, or demands owing or coming to any person."—West Virginia Pulp & Paper Co. v. Karnes, 120 S.E. 321, 323, 137 Va. 714.

42. Ark.—Brandon v. Yeakle, 50 S. W. 1004, 1005, 66 Ark. 377.

43. Iowa.—Albia First National Bank v. Albia, 52 N.W. 334, 336, 86 Iowa 28.

Wis.—Ruggles v. Fond du Lac, 10 N.W. 565, 566, 53 Wis. 436. See also Capital 12 C.J.S. p 1125 note 12.

Where given a limited construction

"In a contract, its meaning would be limited so as not to include interest unless it were expressed . . . [and] the sale was not the less upon a credit because interest was agreed to be paid upon the purchase money."—Kiddier v. Trustees of Schools, 10 Ill. 191, 194.

45. Ala.—Elliott v. Cahen Bros., 153 So. 613, 615, 228 Ala. 432.

46. Mo.—State ex rel. Globe-Democrat Pub. Co. v. Gehner, 294 S.W. 1017, 1018, 316 Mo. 694.

Neb.—Davis v. State, 226 N.W. 449, 450, 118 Neb. 828.

N.C.—Alston v. Warren County, 149 S.E. 680, 681, 197 N.C. 470.

W.Va.—Mountain State Motor Car Co. v. Solof, 124 S.E. 324, 325, 97 W.Va. 196.

15 C.J. p 1348 note 61, p 1349 note 62.

47. Mo.—State ex rel. Globe-Democrat Pub. Co. v. Gehner, 294 S.W. 1017, 1018, 316 Mo. 694.

48. N.H.—Brahmey v. Rollins, 179 A. 186, 193, 87 N.H. 290.

49. Mo.—State ex rel. American Cent. Ins. Co. v. Gehner, 9 S.W.2d 621, 623, 320 Mo. 901, 59 A.L.R. 1041.

N.C.—Allston v. Warren County, 149 S.E. 680, 681, 197 N.C. 470.

50. Iowa.—Albia First Nat. Bank v. Albia, 52 N.W. 334, 336, 86 Iowa 28, 40.

15 C.J. p 1349 note 63 [b].

51. R.I.—Webster v. Wiggin, 34 A. 990, 19 R.I. 466.

15 C.J. p 1349 note 63 [a].

52. Idaho.—State v. Lottridge, 162 P. 672, 673, 29 Idaho 822.

53. Minn.—Thaden v. Bagan, 165 N.W. 864, 865, 139 Minn. 46.

54. W.Va.—Humphreys v. County Court, 110 S.E. 701, 703, 90 W.Va. 315.

55. Ill.—Bond v. Moore, 132 N.E. 777, 779, 300 Ill. 32.

56. N.H.—Isabelle v. Le Blanc, 39 A. 436, 437, 68 N.H. 409.

57. Me.—Cummings v. Garvin, 65 Me. 301, 302.

58. La.—New Orleans Securities Co. v. City of New Orleans, 139 So. 635, 637, 173 La. 1097.

59. Ill.—Lucas v. People, 75 Ill.App. 662, 665.

60. W.Va.—State v. Hudson, 117 S.E. 122, 126, 93 W.Va. 435.

taxpayer,⁶¹ papers intended to represent and which could perform and were intended to perform the function of credits, such as travelers' checks,⁶² sales of goods on credit,⁶³ and uncollected premiums.⁶⁴ Under other circumstances "credit" has been held not to include agreement executed to sell real estate on condition precedent, no payment being made, and no title transferred,⁶⁵ bank shares and other corporate stock,⁶⁶ cash paid by insurance company to policyholder constituting a withdrawal by the policyholder of a portion of the reserve on his policy for which the company is bound, and not constituting a loan by the company to him,⁶⁷ claim based on a conversion,⁶⁸ contract for a sale of real estate, in the nature of an option which created no enforceable indebtedness,⁶⁹ contract of membership in an associated press,⁷⁰ execution in hands of sheriff for service,⁷¹ legacy in hands of executor or administrator,⁷² stocks,⁷³ surety or indemnity bond,⁷⁴ uncollected premiums of life insurance policy,⁷⁵ or various unliquidated claims.⁷⁶

As relating to deduction of a taxpayer's indebtedness from gross credits for purposes of assessment see the C.J.S. title Taxation § 414, also 61 C.J. p 651 notes 84-96.

—**Offset or Payment.** "Credit" has another and more restricted meaning which would narrow it down to a signification nearly synonymous with payment;⁷⁷ and, in its narrow or bookkeeping sense, as opposed to "debits," may be said to be a payment on account as shown by the creditor's books.⁷⁸ In this use, the word has been defined as meaning a payment, an acknowledgment or entry of payment, or of indebtedness reduced;⁷⁹ and, as applied specifically to bookkeeping entries, a balance of book accounts in favor of the credit side;⁸⁰ anything valuable standing on the creditor side of an account;⁸¹ a sum credited on the books of a company to a person who appears to be entitled to it;⁸² that which is entered in an account as an offset to a debt, or for which the party in whose favor the entry is made becomes the creditor of another; the opposite of debit; the side of a personal account on which everything is entered that answers as an offset to a debt, or on which payment is entered.⁸³ It has been said that, in the sense of acknowledgment of indebtedness reduced, the term imports finality, having neither duration nor expiration,⁸⁴ and that an entry of payment on the books is a "credit" only when made in such circumstances that the payment cannot be recalled.⁸⁵

61. U.S.—*Burris v. U. S.*, D.C.Del., 7 F.Supp. 636, 638.

62. U.S.—*Theobald v. U. S.*, C.C.A. Okl., 3 F.2d 601, 602.

63. Ill.—*Lucas v. People*, 75 Ill.App. 662, 665.

64. La.—*Kansas City Life Ins. Co. v. Hammett*, 149 So. 525, 527, 177 La. 930.

65. Mo.—*State ex rel. American Cent. Ins. Co. v. Gehner*, 9 S.W.2d 621, 623, 320 Mo. 901, 59 A.L.R. 1041.

66. Kan.—*Brown v. Thomas*, 15 P. 211, 213, 37 Kan. 282.

67. Kan.—*Dutton v. Citizens' Nat. Bank*, 36 P. 719, 720, 53 Kan. 440. 15 C.J. p 1349 note 63 [c].

68. Ala.—*Penn Mut. Life Ins. Co. v. State*, 135 So. 346, 348, 223 Ala. 332.

69. Colo.—*Black v. Plumb*, 29 P.2d 708, 710, 91 A.L.R. 1334, 94 Colo. 313.

70. Mont.—*Read v. Lewis and Clark County*, 178 P. 177, 179, 55 Mont. 412.

71. Colo.—*Arapahoe County v. Rocky Mountain News Printing Co.*, 61 P. 494, 498, 15 Colo.App. 189.

72. Mass.—*Sharp v. Clark*, 2 Mass. 91, 93.

73. Mass.—*Barnes v. Treat*, 7 Mass. 271, 274.

74. Mont.—*State v. Mady*, 272 P. 691, 693, 83 Mont. 418.

75. U.S.—*In re Ford*, D.C.Wash., 14 F.2d 848, 849.

76. La.—*Kansas City Life Ins. Co. v. Hammett*, 149 So. 525, 527, 177 La. 930.

77. Particular claims not included (1) A claim for unliquidated damages.—*Black v. Plumb*, 29 P.2d 708, 710, 94 Colo. 318, 91 A.L.R. 1334.

(2) A claim to unliquidated damages growing out of a tort.—*Humphreys v. County Court*, 110 S.E. 701, 703, 90 W.Va. 315.

(3) The claim of a trust beneficiary against the trustee where such claim is subject to the trustee's discretion and is unliquidated.—*Brahmay v. Rollins*, 179 A. 186, 189, 87 N.H. 290.

78. Tex.—*Walters v. Prestidge*, 30 Tex. 65, 73—*Lang v. Collins*, Civ. App., 190 S.W. 784, 785.

Payment by credits see the C.J.S. title Payment § 32, also 48 C.J. p 626 note 15-p 627 note 21.

79. Tex.—*Lang v. Collins*, supra.

80. Or.—*Fleshman v. Whiteside*, 34 P.2d 648, 650, 148 Or. 73, 93 A.L.R. 1456.

81. Ark.—*Brandon v. Yeakle*, 50 S.W. 1004, 1005, 66 Ark. 377.

82. Ohio.—*Columbus Exch. Bank v. Hines*, 3 Ohio St. 1, 59.

83. Ill.—*Coons v. Home Life Ins. Co. of New York*, 9 N.E.2d 419, 421, 291 Ill.App. 318.

84. Wis.—*Pelican School Directors v. Rock Falls School Directors*, 51 N.W. 871, 873, 52 N.W. 1049, 81 Wis. 428.

15 C.J. p 1352 note 23.

Similarly expressed

"The side of an account on which are entered all items reckoned as values received from the party or the category named at the head of the account, also, any one, or the sum, of these items."—*U. S. v. Du Perow*, D.C.Ohio, 208 F. 895, 898.

Bookkeeping use exemplified

(1) "'A' has several credits on the books of 'B.'"—*U. S. v. Du Perow*, supra.

(2) "The credits exceed the debts."—*Pelican School Directors v. Rock Falls School Directors*, 51 N.W. 871, 52 N.W. 1049, 81 Wis. 428, 432.

(3) "This article is carried to one's credit and that to one's debit."—*Pelican School Directors v. Rock Falls School Directors*, supra.

(4) "This sum is carried to one's credit, and that to his debit."—*U. S. v. Du Perow*, supra.

(5) "To carry money, goods, or notes to the credit of a person."—*Pelican School Directors v. Rock Falls School Directors*, supra.

84. Or.—*Fleshman v. Whiteside*, 34 P.2d 648, 650, 148 Or. 73, 93 A.L.R. 1456.

85. U.S.—*Lynchburg Trust & Savings Bank v. Commissioner of In-*

—**Other Terms Compared.** Terms which may be employed as synonymous with "credit" are "assets" see 6 C.J.S. p 1033 note 21, "confidence,"⁸⁶ "debt,"⁸⁷ "moneys due,"⁸⁸ "payment,"⁸⁹ and "reputation."⁹⁰ Terms which have been compared with or distinguished from "credit" are "accounts,"⁹¹ "assets" see 6 C.J.S. p 1033 note 23, "bank deposits,"⁹² "cash" see 14 C.J.S. p 18 note 70, "cash on delivery" see the C.J.S. title Sales § 234, also 15 C.J. p 1350 note 83 [a], "cash on deposit in bank" or "cash on hand,"⁹³ "credibility" see ante p 1039 note 82, "debit,"⁹⁴ "debt,"⁹⁵ "execution,"⁹⁶ "financial standing,"⁹⁷ "funds,"⁹⁸ "mercantile character,"⁹⁹ "money" or "moneys,"¹ "money on hand,"² "offset,"³ "refund,"⁴ and "trust."⁵

—**In Phrases.**

Crédit foncier. A company or corporation formed for the purpose of carrying out improvements, by means of loans and advances on real estate security.⁶

Crédit mobilier. A company or association formed for carrying on a banking business or for the construction of public works, building of railroads, operation of mines, or other such enterprises, by means of loans or advances on the security of personal property.⁷

Credit of a government. A belief of its ability

to comply with its engagements, and a confidence in its honor, that it will do that voluntarily which it cannot be compelled to do.⁸

Credit with banker. A term which does not imply payment, but a means of payment, more or less secure according to the solidity of the depository. The greater or less certainty of the security cannot affect the question of its character.⁹

Doubtful credit. The term is very comprehensive, and, when used without words of limitation or qualification, is understood to mean reputation or standing in the community, as distinguished from the estimate of particular individuals.¹⁰

Fictitious credit. "Credit" in the sense used in cases where the cause of action relied on is the creating of a fictitious credit has been said to mean the apparent possession of property on the part of the debtor out of which the creditor can enforce payment of such debt by law, as distinguished from such security or payment the creditor may hope to gain by the debtor's inducing some one else to help him pay or secure it.¹¹

Line of credit. A term with a fixed and definite meaning in the mercantile world, signifying a margin of credit enabling one to continue buying so long as he keeps his account within the limits by payments.¹² In a particular context, "line of

ternal Revenue, C.C.A., 68 F.2d 356, 359—Commissioner of Internal Revenue v. Stearns, C.C.A., 65 F. 2d 371, 373.

86. N.Y.—Rindge v. Judson, 24 N.Y. 64, 71.

S.C.—Jennings v. Clearwater Mfg. Co., 172 S.E. 870, 874, 171 S.C. 498.

87. **Sometimes used synonymously**

"The debts of a person may be such as are due to him, although the more usual signification is those owing by him."—Pine v. Rikert, 21 Barb. (N. Y.) 469, 475.

88. Mont.—Clark v. Maher, 87 P. 272, 273, 34 Mont. 391, 400.

89. U.S.—Commissioner of Internal Revenue v. Stearns, C.C.A., 65 F.2d 371, 373.

See also the C.J.S. title Payment § 1, also 48 C.J. p 585 note 1—p 588 note 17.

90. Mo.—Harrison v. Lakenan, 88 S. W. 53, 58, 189 Mo. 581.

S.C.—Jennings v. Clearwater Mfg. Co., 172 S.E. 870, 874, 171 S.C. 498, quoting Corpus Juris.

15 C.J. p 1351 note 9.

91. Ky.—Commonwealth v. Alford's Ex'r, 218 S.W. 721, 723, 187 Ky. 106. See also Account 1 C.J.S. p 571 note 51—p 573 note 68.

92. Ky.—Commonwealth v. Alford's

Ex'r, 218 S.W. 721, 723, 187 Ky. 106.

See also Banks and Banking § 267 a.

93. Ky.—Commonwealth v. Alford's Ex'r, supra.

See also Banks and Banking § 267 a, and Cash 14 C.J.S. p 18 note 87.

94. Wis.—Pelican School Directors v. Rock Falls School Directors, 51 N.W. 871, 52 N.W. 1049, 81 Wis. 428, 436.

95. Cal.—Gow v. Marshall, 27 P. 422, 423, 90 Cal. 565, 568. 15 C.J. p 1350 note 78.

96. Mass.—Sharp v. Clark, 2 Mass. 91, 93.

See also the C.J.S. title Executions § 1, also 23 C.J. p 305 notes 2—6.

97. Wash.—Jones v. Jenkins, 27 P. 1022, 1027, 3 Wash. 17.

98. U.S.—Robinson v. U. S., C.C.A. Tenn., 30 F.2d 25, 28.

W.Va.—State v. Hudson, 117 S.E. 122, 126, 93 W.Va. 435.

99. Ala.—Donnell v. Jones, 13 Ala. 490, 512, 48 Am.D. 59.

Wash.—Seattle Crockery Co. v. Haley, 33 P. 650, 653, 6 Wash. 302, 36 Am.S.R. 156.

1. U.S.—Robinson v. U. S., C.C.A. Tenn., 30 F.2d 25, 28.

W.Va.—State v. Hudson, 117 S.E. 122, 126, 93 W.Va. 435—Humphreys v.

County Court, 110 S.E. 701, 703, 90 W.Va. 315.

15 C.J. p 1349 note 71 [a].

2. Ill.—Bond v. Moore, 132 N.E. 777, 779, 300 Ill. 82.

3. Tex.—Walters v. Prestidge, 80 Tex. 65, 73—Lang v. Collins, Civ. App., 190 S.W. 784, 785.

4. U.S.—Caraleigh Phosphate & Fertilizer Works v. U. S., Ct.Cl., 1 F. Supp. 854, 857.

5. U.S.—Libby v. Hopkins, Ohio, 104 U.S. 303, 309, 26 L.Ed. 769.

See also the C.J.S. title Trusts § 1, also 65 C.J. p 214 notes 28, 29.

6. Black L.D. —

7. Black L.D. —

8. Ala.—Owen v. Mobile Branch Bank, 3 Ala. 253, 267.

9. N.Y.—Aines v. Ayres, 16 N.Y.S. 905, 908, 62 Hun 376.

Pa.—Bell v. Moss, 5 Whart. 189, 203.

10. Md.—Merchants' Bank v. Bank of Commerce, 24 Md. 12, 54.

11. Mo.—Clinton County Trust Co. v. Metzger's Ex'rs, 271 S.W. 1008, 1010, 219 Mo.App. 365.

12. Tex.—Schneider-Davis Co. v. Hart, 57 S.W. 903, 904, 23 Tex.Civ. App. 529.

Similarly expressed

A margin or fixed limit of credit,

credit" has been held to apply equally to the customer and his surety,¹³ and the words "reasonable line of credit" to the quantity or amount of credit, rather than to the length of credit.¹⁴

Mutual credits. As a ground for equitable set-off and as distinguished from "mutual debts" see the C.J.S. title Set-Off and Counterclaim § 5, also 57 C.J. p 364 text and notes 90-94; and as used in Bankruptcy Act see Bankruptcy § 211 note 15.

Personal credit. Personal credit is that credit which a person possesses as an individual,¹⁵ the pledging of which to payment of an obligation is contradistinguished from limiting the liability to a particular or specific fund.¹⁶

Refacción credit. That credit which arises from the contract of "refacción" which, in the civil law is a loan for the improvement of, or making a crop on, land.¹⁷

granted by a bank or merchant to a customer, to the full extent of which the latter may avail himself in his dealings with the former, but which he must not exceed; usually intended to cover a series of transactions, in which case, when the customer's line of credit is nearly or quite exhausted, he is expected to reduce his indebtedness by payments before drawing upon it further.—Black L.D.

13. La.—Isador Bush Wine and Liquor Co. v. Wolff, 19 So. 765, 766, 48 La. Ann. 918.

14. Wis.—The American Button-Hole, Overseaming and Sewing Machine Co. v. Gurnee, 44 Wis. 49, 62.

15. Black L.D.

Character and business standing

Personal credit is that "which is founded on the opinion entertained of his character and business standing."—Black L.D.

16. N.Y.—Hibbs v. Brown, 98 N.Y.S. 353, 357, 112 App. Div. 214.

17. Porto Rico.—De Noble v. Galardo, 7 Porto Rico Fed. 140, 143.

18. Ala.—Alabama Gold L. Ins. Co. v. Lott, 54 Ala. 499, 505.

As property

"Solvent credits are property."—Alston v. Warren County, 149 S.E. 680, 681, 197 N.C. 470.

Includes note

"A note upon which the maker is personally liable for the payment of a sum of money to the holder, whether the note is due or to become due, or whether it is secured or unsecured, is a solvent credit."—Alston v. Warren County, supra.

19. Two uses of the term

"The phrase 'a credit' may be used either to designate a mere bookkeeping entry . . . or a right to call

upon some one for the subject matter of the credit; in other words a chose in action against the debtor in favor of the person who holds the credit."—Equitable Trust Co. of New York v. Keene, 183 N.Y.S. 699, 700, 701, 111 Misc. 544.

Possible construction

"The expression 'a credit,' standing alone, might be construed to mean an acknowledgment or entry of payment."—Fleshman v. Whiteside, 34 P. 2d 648, 650, 148 Or. 73, 93 A.L.R. 1456.

"Credit" distinguished

"The generic term 'credit' may, indeed, be the capacity of being trusted, but in the transaction alleged in this complaint the defendant did not engage to acquire from the plaintiff the capacity of being trusted. What he wanted, and what he got, was 20,000 English pounds; i. e., a credit for 20,000 English pounds."—Equitable Trust Co. of New York v. Keene, 183 N.Y.S. 699, 700, 701, 111 Misc. 544.

20. N.Y.—Richard v. American Union Bank, 204 N.Y.S. 719, 722, 123 Misc. 92.

21. Cal.—O'Connor v. West Sacramento Co., 207 P. 527, 529, 189 Cal. 7.

22. Or.—Fleshman v. Whiteside, 34 P. 2d 648, 649, 148 Or. 73, 93 A.L.R. 1456.

23. U.S.—Burris v. U. S., D.C. Del., 7 F. Supp. 636, 638.

24. Ill.—Coons v. Home Life Ins. Co. of New York, 9 N.E. 2d 419, 421, 291 Ill. App. 313.

25. Unliquidated damages not included

Colo.—Black v. Plumb, 29 P. 2d 708, 710, 94 Colo. 318, 91 A.L.R. 1324.

Solvent credits. The excess of credits over indebtedness.¹⁸

Other phrases: "A credit,"¹⁹ "a credit of the amount specified,"²⁰ "a credit on the rent,"²¹ "after the expiration of such credit,"²² "amount against which the credit is taken,"²³ "bill of credit" see Bill 10 C.J.S. p 382 note 47—p 383 note 50, "clean letter of credit" see Banks and Banking § 175 note 70, "conditional credit" see the C.J.S. title Sales § 437, also 55 C.J. p 946 notes 5-8, "credit appearing on the books,"²⁴ "credit, debt, or chose in action,"²⁵ "credit in and about the said trade,"²⁶ "credit in cash" see Cash 14 C.J.S. p 18 note 92, "credit of the building" see the C.J.S. title Mechanics' Liens § 46, also 40 C.J. p 89 note 22—p 90 note 27, "credit of the personal liability of the stockholders,"²⁷ "credit on a sale,"²⁸ "credit to be drawn against,"²⁹ "credit was given to the partnership,"³⁰ "credit with the bank,"³¹ "expiration' of credit,"³²

26. As including borrowing at the bank

"In these days it may be said, as to the great mass of business, that credit at the banks is one of the most important items of credit. . . . Certainly credit 'in and about the trade' would include all credit reasonably incidental to the business, and it is well settled that mercantile partnerships have the right to borrow money and may be expected to do it."—Hobbs v. Virginia Nat. Bank of Petersburg, 128 S.E. 46, 51, 147 Va. 892.

27. U.S.—Real Estate Title Insurance & Trust Co. v. Lederer, D.C. Pa., 229 F. 799, 802.

"Capital used or employed" distinguished see Capital 12 C.J.S. p 1127 note 90.

28. Ala.—Henry v. Thompson, Minor 209, 225.

"Borrowing" distinguished see Borrow 11 C.J.S. p 528 note 76.

29. Philippine.—International Banking Corporation v. Martinez, 8 Philippine 427.

"Advance" distinguished see Advance 2 C.J.S. p 498 note 79.

30. "Credit" in the generic sense

"Nor does the phrase 'credit' was given to the partnership' necessarily imply the sale of goods or the loaning of money alone. . . . When one, on the faith in the trustworthiness of a firm, gives to it his patronage, he is giving credit to the partnership."—Simons v. Northern Pac. Ry. Co., 22 P. 2d 609, 615, 94 Mont. 355.

31. Implying contract with the bank

"'Credit' has been defined to be a contract with the bank."—Johns v. State, 168 N.E. 579, 30 Ohio App. 440.

32. As referring to period of grace

"In speaking of the 'expiration' of

"feelings, credit, and reputation,"³³ "for cash or on credit" see Cash 14 C.J.S. p 19 note 11, "for collection and credit,"³⁴ "for credit,"³⁵ "full faith and credit" see the C.J.S. title Judgments § 892, also 34 C.J. p 1137 note 40, "funds in, or credit with, such bank,"³⁶ "funds or credit,"³⁷ "general credit,"³⁸ "if a credit be given,"³⁹ "injury to credit,"⁴⁰ "interest . . . on the amount of such credit,"⁴¹ "interest upon the credit,"⁴² "letter of credit" see Banks and Banking § 175 and Bills and Notes § 23 d, "loan or credit,"⁴³ "obtaining credit on false statement" see Bankruptcy § 521 b, "quasi credit,"⁴⁴ "reasonable line of credit,"⁴⁵ "rolling credit,"⁴⁶ "sales on credit" see the C.J.S. title Sales § 235, also 55 C.J. p 515 note 76-p 518 note 49, and "standing to the

credit of each member;"⁴⁷ also "all credits, including open accounts,"⁴⁸ "all moneys, credits, investments,"⁴⁹ "all other credits or money at interest,"⁵⁰ "any kind of property or credits,"⁵¹ "book accounts and other credits,"⁵² "credits and offsets,"⁵³ "credits, due or to become due,"⁵⁴ "credits intrusted,"⁵⁵ "'credits' of beneficiary in his possession,"⁵⁶ "credits or offsets,"⁵⁷ "deposits and credits,"⁵⁸ "effects and credits,"⁵⁹ "funds and credits,"⁶⁰ "goods, chattels real and personal, money credits, investments and the evidences thereof,"⁶¹ "gross credits,"⁶² "money, credits, bonds or stock,"⁶³ "money, property, checks, credits, or any representative of value,"⁶⁴ "money, rights, or credits,"⁶⁵ "moneys and credits,"⁶⁶ "moneys, funds, or credits,"⁶⁷ "mutual

credit given, the statute must refer not to the instance of any payment made on the indebtedness, but to the expiration of an additional period of grace, or credit extension, accorded to the debtor."—*Fleshman v. Whiteside*, 34 P.2d 648, 650, 148 Or. 73, 93 A.L.R. 1456.

33. S.C.—*Jennings v. Clearwater Mfg. Co.*, 172 S.E. 870, 874, 171 S.C. 498.

Tex.—*Curlee v. Rose*, 65 S.W. 197, 198, 27 Tex.Civ.App. 259.

34. N.Y.—*Bank of America v. Waydell*, 92 N.Y.S. 666, 668, 103 App. Div. 25.

35. Cal.—*Frutig v. Trafton*, 83 P. 70, 71, 2 Cal.App. 47.

36. Ala.—*Elliot v. Caheen Bros.*, 153 So. 613, 614, 228 Ala. 432.

As meaning "arrangement for paying"

"The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depository for the payment of such check or draft."—*White v. State*, 280 N.W. 433, 435, 135 Neb. 154.

37. Ohio.—*Johns v. State*, 163 N.E. 579, 30 Ohio App. 440.

38. N.Y.—*Hibbs v. Brown*, 98 N.Y. S. 353, 357, 112 App.Div. 214—*Bemis v. Kyle*, 1 Sheld. 134, 5 Abb.Pr., N.S., 232, 233.

39. Or.—*Fleshman v. Whiteside*, 34 P.2d 648, 649, 148 Or. 73, 93 A.L.R. 1456.

40. S.C.—*Jennings v. Clearwater Mfg. Co.*, 172 S.E. 870, 874, 171 S.C. 498.

41. U.S.—*Burris v. U. S.*, D.C.Del., 7 F.Supp. 636, 637.

42. U.S.—*Caraleigh Phosphate & Fertilizer Works v. U. S.*, Ct.Cl., 1 F.Supp. 854, 857.

43. Ala.—*Penn Mut. Life Ins. Co. v. State*, 135 So. 346, 348, 223 Ala. 332.

44. As referring to payment by check

"Quasi credit is involved [in a

sale for payment by check] to the extent of the time to present the check for payment."—*In re Rea Bros.*, D. C.Mont., 251 F. 431, 432.

45. Wis.—*American Button-Hole, Overseaming and Sewing Machine Company v. Gurnee*, 44 Wis. 49, 62.

46. Tex.—*Tobler v. Willis*, 59 Tex. 80, 85, 86.

47. Eng.—*Durham, etc., Working Men's Permanent Bldg. Soc. v. Davidson*, 61 L.J.Q.B. 473, 476.

48. La.—*New Orleans Securities Co. v. City of New Orleans*, 139 So. 635, 637, 173 La. 1097.

49. N.C.—*Alston v. Warren County*, 149 S.E. 680, 681, 197 N.C. 470.

50. Ky.—*Commonwealth v. Alford's Ex'r*, 218 S.W. 721, 723, 187 Ky. 106.

51. As including beneficial interest
"Within the intendment of the statute 'any kind of property or credits' embraces a beneficial interest in credits or specific sums of money."

. . . "While the language is very broad, . . . it has never been held that it would apply to cover a contingent or uncertain interest in a trust estate."—*Fairfax v. Savings Bank of Baltimore, Md.*, 199 A. 872, 874, 116 A.L.R. 1334.

52. R.I.—*Webster v. Wiggin*, 34 A. 990, 19 R.I. 466.

53. "Payments and offsets" equivalent

Cal.—*Preston v. Sonora Lodge No. 10 I. O. O. F.*, 39 Cal. 116, 119.

54. Ill.—*Bond v. Moore*, 132 N.E. 777, 778, 300 Ill. 32.

55. Vt.—*Barker v. Esty*, 19 Vt. 131, 135, 136.

56. N.H.—*Brahmey v. Rollins*, 179 A. 186, 87 N.H. 290.

57. Tex.—*Lang v. Collins*, Civ.App., 190 S.W. 784, 785.

58. Ohio.—*Stockyards Bank v. Seal*, 161 N.E. 35, 36, 27 Ohio App. 179.

59. Me.—*Cummings v. Garvin*, 65 Me. 301, 302.

60. "Moneys" compared

"Moneys would be funds and credits, but the converse would not be true—that funds and credits are necessarily moneys."—*Davis v. State*, 226 N.W. 449, 450, 118 Neb. 328.

61. As "money" and "credits"

"We do not think that the words 'money credits' were intended as a phrase descriptive of only one species of personal property, but should be treated as being separated by a comma, denoting two classes of personal property, to wit: (1) Money; and (2) credits. Otherwise . . . money, being excluded from the classification in the statute, is not 'personal estate' or 'personal property.'"—*Mountain State Motor Car Co. v. Solof*, 124 S.E. 824, 825, 97 W.Va. 196.

62. Neb.—*Nye-Schneider-Fowler Co. v. Boone County*, 169 N.W. 436, 437, 102 Neb. 742.

63. Minn.—*Holmes v. Borgen*, 273 N.W. 623, 626, 200 Minn. 97.

64. Okl.—*Colbert v. Superior Confection Co.*, 6 P.2d 791, 792, 154 Okl. 28.

65. As debts belonging to principal debtor

"By the statute to charge a person as a trustee, he must have in his hands or possession, 'money, goods, chattels, rights or credits,' of the principal debtor. By money, rights, or credits, is meant cash in the hands of the trustee, or debts due from him, belonging to the principal debtor."—*Sargeant v. Leland*, 2 Vt. 277, 280.

66. Mont.—*State v. Mady*, 272 P. 691, 693, 83 Mont. 418.

67. U.S.—*Theobald v. U. S.*, C.C.A. Okl., 3 F.2d 601, 602—*U. S. v. Smith*, D.C.Ky., 152 F. 542, 544. W.Va.—*State v. Hudson*, 117 S.E. 122, 125, 93 W.Va. 435.

Words distinguished when used together

"The word 'funds' is an inclusive one, and might include both money

debts or mutual credits,"⁶⁸ "net credits,"⁶⁹ "rights and credits,"⁷⁰ "transfer of credits,"⁷¹ and "transfer of credits between different points by cable."⁷²

As an Adjective

Credit company. Credit companies, are strictly analogous to land mortgage banks, except that they invest their funds in loans on the security of general industrial undertakings, to which business they have added the function of negotiators of direct loans between companies formed for the conduct of such undertakings and the capitalist public.⁷³

Credit limit. A credit with a limit as to amount which an expectant seller of goods extends to an expectant buyer, implicit in which (when operative) necessarily is the existence of a debt due by the buyer to the seller on an order of the former accepted and executed by the latter.⁷⁴

Credit man. An employee of a commercial house whose special business it is to inquire with reference to the merit of all persons applying to purchase on credit, and who determines to whom credit shall be given, and the amount.⁷⁵

Nonprofit sharing credit corporation or associa-

tion. A corporation or voluntary association without capital stock organized and carried on solely for the mutual benefit of its members and not for profit, which limits its memberships to persons who do business in whole or in part on a credit basis, and which has as its main purposes the establishment and maintenance of a credit-rating service that may be resorted to by its members to secure credit reports, and other information of a similar nature, respecting the credit safety of outstanding accounts or the financial responsibility of customers.⁷⁶

Other phrases: "Credit agreement,"⁷⁷ "credit instrument,"⁷⁸ "credit price,"⁷⁹ "credit union" see Building and Loan Associations § 1 note 5, and "new credit limit" be guaranteed."⁸⁰

As a Verb

—**Present Tense.** Defined generally by the Century Dictionary as meaning to give credit for,⁸¹ and judicially, as meaning to enter upon the credit side of an account.⁸²

Phrases: "Credit my account,"⁸³ and "credit the drawer."⁸⁴

and credits if they were not specified; but considered separately, the words have familiar meanings, and 'credits' refers to obligations or debts of others to the bank."—Robinson v. U. S., C.C.A.Tenn., 30 F.2d 25, 28.

68. U.S.—Prudential Ins. Co. of America v. Nelson, C.C.A.Tenn., 101 F.2d 441, 443.

Used correlatively

"The words 'debts' and 'credits' as there used are correlative. What is a debt on one side is a credit on the other."—McCullum v. Hamilton Nat. Bank of Chattanooga, Tenn., 58 S.Ct. 568, 570, 303 U.S. 245, 32 L.Ed. 819.

69. Computation

"Net credits should be ascertained by deducting the indebtedness incurred in conducting the business from the gross credits thereof."—Nye-Schneider-Fowler Co. v. Boone County, 169 N.W. 436, 437, 102 Neb. 742.

70. Neb.—Burnham v. Doolittle, 15 N.W. 606, 608, 14 Neb. 214.

See also the C.J.S. title Garnishment § 69, also 28 C.J. p 92 note 25-p 93 note 56.

71. Inexact use of term in foreign exchange

"The customer does not open 'a credit' with the banker here, but makes or agrees to make a payment of dollars to him. Whether, however, it was intended to indicate that the 'credit' which is 'transferred' is

the customer's credit for dollars with the banker, or the latter's credit for dollars with some other financial institution here, it is an inexact and incomplete statement to say that it is 'transferred' to London, for example. Even assuming that 'credits' as such are involved at all, it is not the mere transfer of a dollar credit which the customer wants or the banker makes, but a conversion or exchange of a dollar 'credit' here into a pound 'credit,' say, in England."—Richard v. American Union Bank, 204 N.Y.S. 719, 721, 123 Misc. 92.

72. N.Y.—Equitable Trust Co. of New York v. Keene, 183 N.Y.S. 699, 700, 701, 111 Misc. 544.

73. N.J.—Barrett v. Bloomfield Sav. Inst., 54 A. 543, 551, 64 N.J.Eq. 425.

74. U.S.—Schaffran v. Mt. Vernon-Woodberry Mills, C.C.A.N.J., 70 F. 2d 963, 966, 94 A.L.R. 543.

75. U.S.—Erber v. Dun, C.C.Ark., 12 F. 526, 534, 4 McCrary 160.

76. R.I.—Creditors' Service Corporation v. Cummings, 190 A. 2, 12, 57 R.I. 291.

77. N.Y.—Bank of United States v. Drapkin & Goldberg Const. Co., 11 N.Y.S.2d 334, 337.

78. Applied to checks

"The checks were mere credit instruments used for the purpose of transferring cash from the dealer to the seller."—Ford Motor Co. v. Na-

tional Bond & Investment Co., 14 N. E.2d 306, 309, 294 Ill.App. 585.

79. N.J.—Steward v. Scudder, 24 N. J.Law 96, 101.

"Cash price" distinguished see Cash 14 C.J.S. p 21 note 52.

80. U.S.—Schaffran v. Mt. Vernon-Woodberry Mills, C.C.A.N.J., 70 F. 2d 963, 966, 94 A.L.R. 543.

81. See 15 C.J. p 1352 note 28.

82. Ind.—Jaqua v. Shewalter, 36 N. E. 173, 37 N.E. 1072, 1073, 10 Ind. App. 234.

83. Payment implied

U.S.—Lee v. Chillicothe Branch of State Bank, C.C.Ohio, 15 F.Cas.No. 8,187, 1 Biss. 325, 330, 331.

84. Intention to certify, not indorse

"The words 'credit the drawer' above Raesly's signature [on the face of the note] clearly are appropriate words to indicate his intention to certify the character and ownership of the note and not to become an indorser."—Merchants' Nat. Bank of Bangor v. Raesly, 136 A. 238, 288 Pa. 374, 58 A.L.R. 230.

No promise or undertaking implied

In construing the term as written upon the face of a promissory note by the indorsee, the court said: "The words . . . imply no promise or undertaking on the part of him who uses them, but are a direction to all persons to whom the note may be presented, to treat with the drawer as the owner, notwithstanding the apparent title of the indorsee."—

—**Credited.** The use of "credited" instead of "actually paid" a sum contemplated, is of no significance, because it is the appropriate term with relation to a current business transaction where a credit in one connection may be absorbed by a debit in another.⁸⁵

Phrases: "Amount of such overpayment . . . shall . . . be credited,"⁸⁶ "credited to such individual policy holder,"⁸⁷ "income . . . properly paid or credited,"⁸⁸ and "paid or credited . . . to any legatee."⁸⁹

CREDITABLE. Worthy of belief.⁹⁰ The word has been distinguished from "credible" see ante p 1039 note 87.

Creditable witness. One competent to testify;⁹¹ one whose testimony is worthy of credit, credence, belief—that is, in more modern phrase, a credible witness.⁹²

CREDIT INSURANCE. See the C.J.S. title Insurance §§ 10, 659, 887, 977, 1090, also 15 C.J. pp 1354-1365.

CRÉDITO. In Spanish law, claim or credit; the complement of debt, since every debt implies a corresponding credit. "Créditos" are of two kinds, namely, "comunes," common or general credits, and "privilegiados" or "preferidos," privileged or preferred credits.⁹³ It is with the latter class that the codes of the civil law countries deal and, as stated in Corpus Juris p 1365, they are classified in the codes according to their priority or preference, this

being known in the French law as "privilege" or "privilegié" and in the Spanish as "privilegio," or "privilegiado." It has been said that the privilege of a "credito" is always created by law and never by contract, nor by confession of judgment, it being "stricti juris,"⁹⁴ and that it is entirely distinct from an "attachment,"⁹⁵ a "judgment,"⁹⁶ a "lien,"⁹⁷ or a "mortgage."⁹⁸

A discussion of the rights or relationships which give rise to such credits, the scope of their privilege, priority, or preference, their rank and order of payment, their extinction, and the right of the holders of such privileged credits to abstain from participating in bankruptcy proceedings of their debtors, may be found in 15 Corpus Juris p 1365 note 4-p 1370 note 61, with citations of the applicable articles of the codes and of other civil law authorities.

Crédito litigioso. In Spanish law, a claim in litigation, not one which is open to litigation, but one which is actually litigated; a claim which is disputed or contested. The term is applied only after an answer has been interposed in a suit.⁹⁹

CREDITOR.

In General

A term comprehensive in scope,¹ of very broad meaning,² and susceptible of latitudinous construction,³ having reference, in its ordinary acceptation, to financial or business transactions.⁴ It commonly signifies one who holds some contractual obligation against another,⁵ and is ordinarily used as the anto-

Temple v. Baker, 17 A. 516, 517, 125 Pa. 634, 643, 11 Am.S.R. 926, 3 L.R. A. 709. To similar effect Steckel v. Steckel, 28 Pa. 233, 235.

85. Md.—Welsh v. Canfield, 60 Md. 469, 475.

86. U.S.—Burris v. U. S., D.C.Del., 7 F.Supp. 636, 637.

87. Irrevocably credited

"We think the phrase . . . means finally and irrevocably so credited."—New York Life Ins. Co. v. Edwards, C.C.A.N.Y., 8 F.2d 851, 856.

88. "Income . . . accumulated" contrasted

U.S.—Lynchburg Trust & Savings Bank v. Commissioner of Internal Revenue, C.C.A., 68 F.2d 356, 359.

89. "Allocated to any legatees beyond recall" equivalent

U.S.—Commissioner of Internal Revenue v. Stearns, C.C.A., 65 F.2d 371, 373.

90. Use in obsolete sense

"The use of the word 'creditable' to signify 'worthy of belief' is said

by lexicographers to be obsolete; and antiquity cannot be invoked to justify its use here in that sense, for it was introduced by our act of 1888. Nevertheless, we think such is its significance in this statute."—State v. Kenilworth, 54 A. 244, 245, 69 N.J.Law 114.

91. Tex.—Kennedy v. Upshaw, 1 S. W. 303, 313, 66 Tex. 442.

92. N.J.—State v. Kenilworth, 54 A. 244, 245, 69 N.J.Law 114.

93. Eseriche Diccionario.

94. La.—Henry Lochte Co., Ltd. v. Lefebvre, 50 So. 26, 28, 124 La. 244—Lee v. His Creditors, 2 La. Ann. 599, 602.

15 C.J. p 1365 notes 4, 6.

95. Porto Rico.—Oronoz v. Alvarez, 23 Porto Rico 497, 500.

96. La.—Henry Lochte Co., Ltd. v. Lefebvre, 50 So. 26, 28, 124 La. 244.

15 C.J. p 1366 note 10.

97. Philippine.—Pena v. Mitchell, 9 Philippine 587, 593.

15 C.J. p 1365 note 9.

98. La.—Pedesciaux v. Legare, 32 La. Ann. 380, 385—Jacobs v. Preston, 31 La. Ann. 514, 518—Bacchus v. Moreau, 4 La. Ann. 313, 315.

99. Philippine.—Robinson v. Garry, 8 Philippine 275, 276.

1. Mo.—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 738, 313 Mo. 969.

2. Del.—Mackenzie Oil Co. v. Omar Oil & Gas Co., 120 A. 852, 854, 14 Del.Ch. 36, citing Corpus Juris.

3. Kan.—Conrad v. Johnson, 4 P. 2d 767, 769, 134 Kan. 120.

N.J.—Moore v. Splitdorf Electrical Co., 168 A. 741, 745, 114 N.J.Eq. 353, quoting Corpus Juris. Tex.—El Paso Nat. Bank v. Fuchs, 34 S.W. 206, 207, 89 Tex. 197.

4. Neb.—State v. Ord State Bank, 220 N.W. 265, 266, 117 Neb. 189.

5. Kan.—Conrad v. Johnson, 4 P.2d 767, 769, 134 Kan. 120, quoting Corpus Juris.

Mass.—Boston v. Turner, 87 N.E. 634, 635, 201 Mass. 190.

onym or correlative of "debtor," involving both a debt and a credit,⁶ for, unless there is a debtor, one whose duty it is to pay, and of whom the debt can be demanded, there cannot be a creditor to enforce and compel payment.⁷ The term has both a usual and an unusual signification;⁸ and, in a strict literal sense,⁹ which may also be said to be its well established, customary, commercial, and legal sense,¹⁰ "creditor" has been defined as meaning one to whom a debt is due from another person called the debtor;¹¹ one who voluntarily trusts or gives credit to another for money or other property;¹² one who holds a demand which is certain and liquidated,¹³ although it does not necessarily imply maturity of the debt due.¹⁴ In a larger sense it means more than a person to whom money may be owing,¹⁵ or one having a liquidated demand based on an agreement,¹⁶ or to whom a debt is due, although that is

its usual meaning,¹⁷ and it may apply to one holding any legal liability that may have been incurred upon a contract, express or implied, or in tort,¹⁸ embracing, not alone judgment or lien creditors, but as well general or simple contract creditors, or creditors at large.¹⁹ In other words, it means one who popularly, commercially, and legally is known as a general creditor—a creditor who has given credit, but has neither originally given, nor subsequently obtained, any lien or security for the payment of his debt;²⁰ a person to whom any obligation is due, or to whom is owed a debt or obligation to pay money for which an action or suit would lie;²¹ any one who has a right to require the fulfillment of an obligation or contract for the payment of money, or who has a debt or demand against another upon contract, express or implied, for the payment of money;²² a person to whom a sum of money or

N.J.—Moore v. Splittorf Electrical Co., 168 A. 741, 745, 114 N.J.Eq. 358, quoting *Corpus Juris*.

6. Mass.—Boston v. Turner, 87 N.E. 634, 635, 201 Mass. 190.

N.J.—Moore v. Splittorf Electrical Co., 168 A. 741, 745, 114 N.J.Eq. 358, quoting *Corpus Juris*.

Or.—Erickson v. Grande Ronde Lumber Co., 92 P.2d 170, 177, 15 C.J. p 1371 note 67.

Less comprehensive than "debtor"

"But the word 'debtor' is a comprehensive term, and includes liabilities other than those which arise from contract, though the word 'creditor,' its antonym, is possibly somewhat less comprehensive."—Baker v. Keet-Rountree Dry Goods Co., 2 S.W.2d 733, 738, 318 Mo. 969.

7. Minn.—Mohr v. Minnesota El. Co., 41 N.W. 1074, 1076, 40 Minn. 343.

8. N.J.—New Jersey Ins. Co. v. Meeker, 37 N.J.Law 282, 300.

9. Conn.—Stanly v. Ogden, 2 Root 259, 261.

Kan.—Conrad v. Johnson, 4 P.2d 767, 769, 134 Kan. 120.

10. S.C.—King v. Fraser, 23 S.C. 543, 548.

11. U.S.—Guaranty Trust Co. v. Galveston City R. Co., Tex., 107 F. 311, 317, 46 C.C.A. 305.

N.D.—Sonnesyn v. Akin, 97 N.W. 557, 560, 12 N.D. 227.

15 C.J. p 1371 notes 73-75.

Similar definitions

(1) "A person to whom a debt is owed by another person." Iowa.—Hines v. McKenzie, 250 N.W. 687, 688, 216 Iowa 1388.

Kan.—Rooney v. Inheritance Tax Commission of Kansas, 53 P.2d 500, 501, 143 Kan. 143.

(2) "One to whom a certain sum is due."—Grant Motors v. Federal Credit Co., Miss., 185 So. 196, 199.

(3) "One to whom a sum is due, and which is to be paid after allowing all just credits."—In re Wilson, 80 Ill.App. 217, 219.

(4) "The person to whom the debt is owed; [and] who has the absolute control of it."—Davis v. Snead, 33 Gratt. 705, 709, 74 Va. 705, 709.

(5) Other similar statements see 15 C.J. p 1371 note 73 [a].

12. Ark.—Keith v. Hiner, 38 S.W. 13, 14, 63 Ark. 244.

Kan.—Conrad v. Johnson, 4 P.2d 767, 769, 134 Kan. 120.

Similar definitions

(1) "He who voluntarily trusts or gives credit to another, for a sum of money or other property, upon bond, bill, note, book, or simple contract."—Stanly v. Ogden, 2 Root, Conn., 259, 261.

(2) "One who gives credit in business matters; hence, one to whom money is due."—State v. Ord State Bank, 220 N.W. 265, 266, 117 Neb. 189.

(3) Other similar statements see 15 C.J. p 1371 note 72 [a].

13. Ill.—Superior Plating Works v. Art Metal Crafts Co., 218 Ill.App. 148, 150.

14. N.J.—Morse v. Metropolitan S. S. Co., 102 A. 524, 526, 88 N.J.Eq. 325.

15. Minn.—Daniels v. Palmer, 42 N.W. 855, 857, 41 Minn. 116.

15 C.J. p 1372 note 81.

16. Kan.—Henley v. Myers, 93 P. 168, 178, 76 Kan. 723, 728, 17 L.R. A., N.S., 779.

17. N.J.—New Jersey Ins. Co. v. Meeker, 37 N.J.Law 282, 300.

18. Ill.—Superior Plating Works v. Art Metal Crafts Co., 218 Ill.App. 148, 150.

19. Del.—MacKenzie Oil Co. v. Omar

Oil & Gas Co., 120 A. 852, 854, 14 Del.Ch. 36, citing *Corpus Juris*.

See also 15 C.J. p 1373 note 98-p 1374 note 22.

As meaning "creditor at large"

"The simple word 'creditor' standing by itself, means creditor at large; so it is generally used and generally understood."—Woolvorton v. George H. Taylor Co., 43 Ill.App. 424, 426.

20. S.C.—King v. Fraser, 23 S.C. 543, 548.

21. Kan.—Dewey v. Commercial State Bank, 41 P.2d 1006, 1007, 141 Kan. 356, quoting *Corpus Juris*—Conrad v. Johnson, 4 P.2d 767, 769, 134 Kan. 120, quoting *Corpus Juris*. N.C.—Citizens' Bank v. White, 162 S.E. 736, 737, 202 N.C. 311.

15 C.J. p 1372 notes 86, 87.

Thus it may mean "one having any character of claim against another."—Henley v. Myers, 93 P. 168, 173, 76 Kan. 723, 728, 17 L.R.A., N.S., 779.

22. Minn.—Atwater v. Manchester Sav. Bank, 48 N.W. 187, 188, 45 Minn. 341, 12 L.R.A. 741.

Mo.—Commerce Trust Co. v. Farmers' Exchange Bank, 61 S.W.2d 928, 931, 332 Mo. 979, quoting *Corpus Juris*.

Similar definitions

(1) "One who has a right to require of another the fulfillment of a contract or obligation." U.S.—In re Putman, D.C.Cal., 193 F. 464, 473.

Ill.—Dunnigan v. Stevens, 13 N.E. 651, 123 Ill. 396, 404, 3 Am.S.R. 496.

15 C.J. p 1372 note 88 [a] (1).

(2) "One in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of money."—Pierson v. Hickey, 91 N.W. 339, 340, 16 S.D. 46—15 C.J. p 1372 note 88 [a] (2).

other thing is due by obligation, promise, or in law;²³ one who has a valid cause of action, or a legal right to damages capable of enforcement by judicial process;²⁴ one who has a just claim for money, or a legal claim against another, or who owns a claim or demand;²⁵ a claimant in respect of commercial demands due or accruing due, whether the liability therefor is contested or not;²⁶ also, in particular connections, a person whose claim, upon certain conditions, is charged by law upon particular property;²⁷ the holder of a security or securities;²⁸ or one who has a claim against a debtor as well as one who has a claim against property.²⁹

As Claimant Ex Delicto

The term "creditor" has been held sufficiently comprehensive to include those holding claims arising out of tort; persons entitled to damages for torts—being broadly construed in furtherance of the purposes of remedial statutes.³⁰ In this inclusive sense, "creditor" has been defined as meaning any person having a claim or demand upon which a judgment for a sum of money, or directing the payment of money, can be recovered in an action;³¹ every one having a right to damages capable of ju-

dicial enforcement, whether growing out of tort or contract;³² every party who has a demand, an account, an interest, or a cause of action for which he might recover any debt, damages, penalty, or forfeiture;³³ one having a right to require the performance of any legal obligation, contract, or guaranty, or a legal right to damages growing out of contract or tort;³⁴ and, in a liberal sense, one who has a legal demand upon another, for money or other property which has got into the hands of another, without his consent, by mistake or accident, which he is entitled to have, or to a compensation in damages for, upon the ground of an implied promise.³⁵

As Judgment or Lien Creditor

The term "creditor," under particular circumstances, has been held not to include creditors at large, but to be confined to judgment creditors and those who have in some manner effected a lien on the debtor's property.³⁶ It is in this sense that the word is used in certain statutes governing procedure and relief, and when so used has been defined as meaning one who has acquired a lien, either by a legal or equitable attachment, or by seizure and levy on execution;³⁷ one armed with legal process

(3) "One who has the right to require the fulfillment of an obligation."—*In re Wilhelm*, D.C.Md., 25 F. Supp. 440, 443.

23. Iowa.—*Hines v. McKenzie*, 250 N.W. 687, 688, 216 Iowa 1388. Mo.—*Commerce Trust Co. v. Farmers' Exchange Bank*, 61 S.W.2d 928, 931, 332 Mo. 979, quoting *Corpus Juris*.

15 C.J. p 1373 note 90.

24. Ind.—*Bishop v. Redmond*, 83 Ind. 157, 159.

Kan.—*Dewey v. Commercial State Bank*, 41 P.2d 1006, 1007, 141 Kan. 356, quoting *Corpus Juris*—*Conrad v. Johnson*, 4 P.2d 767, 769, 134 Kan. 120, quoting *Corpus Juris*.

Mass.—*Bianco v. Piscopo*, 161 N.E. 605, 606, 263 Mass. 549.

15 C.J. p 1373 note 91.

Similarly expressed

(1) "A person having a cause of action capable of adjustment and liquidation upon a trial."—*Merwine v. Mt. Pocono Light & Improvement Co.*, 156 A. 150, 151, 304 Pa. 517.

(2) "One who has a definite demand against the estate, or a cause of action capable of adjustment and liquidation upon a trial."—*Langford v. State Bank & Trust Co. of Harrodsburg*, 65 S.W.2d 730, 731, 251 Ky. 633—15 C.J. p 1375 note 29.

(3) "One who has a right by law to demand and recover of another a sum of money on any account whatever."—*Conrad v. Johnson*, 4 P.2d 767, 769, 134 Kan. 120.

(4) "The holder of and person entitled to enforce any contract, debt, or engagement of the bank."—*Smith v. Olson*, 208 N.W. 585, 588, 50 S. D. 81.

25. Kan.—*Dewey v. Commercial State Bank*, 41 P.2d 1006, 1007, 141 Kan. 356, quoting *Corpus Juris*.

Mo.—*Commerce Trust Co. v. Farmers' Exchange Bank*, Mo., 61 S.W. 2d 928, 931, 332 Mo. 979, quoting *Corpus Juris*.

N.Y.—*Lent v. Farnsworth*, 87 N.Y.S. 1112, 94 App.Div. 99, 101—*In re Littleton's Estate*, 223 N.Y.S. 470, 479, 129 Misc. 845.

Similar definitions

"The holder of a claim."—*Hebert v. Handy*, 72 A. 1102, 1104, 29 R.I. 548—15 C.J. p 1373 note 96 [a].

26. Cal.—*Gray v. Palmer*, 9 Cal. 616, 636.

15 C.J. p 1373 notes 96, 97.

27. Tex.—*Commercial Credit Co. v. Schlegel-Storseth Motor Co.*, Com. App., 23 S.W.2d 702, 703.

28. U.S.—*In re Merced Irr. Dist.*, D. Cal., 25 F.Supp. 981, 983.

29. U.S.—*In re Pressed Steel Car Co. of New Jersey*, C.C.A.Pa., 100 F.2d 147, 152.

30. Ga.—*McVeigh v. Harrison*, 194 S.E. 208, 213, 185 Ga. 121, quoting *Corpus Juris*.

Kan.—*Conrad v. Johnson*, 4 P.2d 767, 768, 134 Kan. 120.

Mich.—*Ford v. Maney's Estate*, 232

N.W. 393, 394, 251 Mich. 461, 70 A.L.R. 1815.

15 C.J. p 1374 note 28, p 1375 note 24.

31. Ga.—*McVeigh v. Harrison*, 194 S.E. 208, 213, 185 Ga. 121, quoting *Corpus Juris*.

N.Y.—*In re Wilcox*, 11 N.Y.Civ.Proc. 115, 125.

15 C.J. p 1375 note 28.

32. Ga.—*McVeigh v. Harrison*, 194 S.E. 208, 213, 185 Ga. 121, quoting *Corpus Juris*.

Ind.—*De Ruiter v. De Ruiter*, 62 N. E. 100, 103, 28 Ind.App. 9, 91 Am. S.R. 107.

Pa.—*Merwine v. Mt. Pocono Light & Improvement Co.*, 156 A. 150, 151, 304 Pa. 517, citing *Corpus Juris*.

15 C.J. p 1375 note 25.

33. N.D.—*Soly v. Aasen*, 86 N.W. 108, 109, 10 N.D. 108.

15 C.J. p 1375 note 27.

34. Ark.—*Hernton v. Short*, 181 S. W. 142, 144, 121 Ark. 383.

15 C.J. p 1375 note 26.

35. Ga.—*Banks v. McCandless*, 47 S.E. 332, 335, 119 Ga. 793.

15 C.J. p 1375 note 30.

36. U.S.—*Holt v. Crucible Steel Co. of America, Ky.*, 32 S.Ct. 414, 415, 224 U.S. 262, 56 L.Ed. 756.

15 C.J. p 1373 note 5.

37. Mass.—*Hill v. Hill*, 82 N.E. 690, 691, 196 Mass. 509.

15 C.J. p 1373 note 6.

Similar definitions

(1) "One having some sort of lien

which authorizes him to seize the property—such as an execution issued upon a judgment, or an attachment;³⁸ one who has a judgment or a lien;³⁹ a person having a claim that is recognized and admitted, or such as has been ascertained and established by the judgment of a competent court, and

not one that has been disputed or rejected.⁴⁰

Specific Applications

In the subjoined notes, examples are given of what the term has been held to include;⁴¹ and of

fixed by law or legal proceedings upon particular property."—Eason v. Garrison, 82 S.W. 800, 801, 36 Tex. Civ.App. 574.

(2) "One who has acquired some form of lien."—Jennings v. Schwartz, 149 P. 947, 949, 86 Wash. 202, 205.

(3) "One who has by legal process fastened a lien or charge upon the property for the satisfaction of the debt."—Folsom v. Peru Plow & Implement Co., 95 N.W. 635, 636, 69 Neb. 316, 111 Am.S.R. 537.

38. N.Y.—Button v. Rathbone, 27 N.E. 266, 126 N.Y. 187, 191.

Similarly expressed

"One who has seized the property by judicial process."—Dexter v. Citizens' Nat. Bank of Norfolk, 94 N.W. 530, 531, 4 Neb.Unoff. 380.

39. Miss.—Loughridge v. Bowland, 52 Miss. 546, 558.
15 C.J. p 1374 note 14.

Similar definition

"One who has recovered judgment."—Underwood v. Ogden, 6 B. Mon., Ky., 606.

40. N.Y.—Wilson v. Baptist Education Soc., 10 Barb. 308, 319.
15 C.J. p 1374 note 16.

Judgment as condition precedent

The acquisition of such judgment or lien is merely a condition precedent to the creditor's right to proceed in equity; it is a question of exhausting the remedy at law; a creditor is none the less such because he has not reduced his claim to judgment or secured himself by lien."—Southard v. Benner, 72 N.Y. 424, 426.

41. "Creditor" held to include

(1) All persons whose claims are, upon certain conditions, charged by law as specific liens upon certain property, such as holders of attachment, execution, judgment, landlord, and mechanic's liens.—Oak Cliff College v. Armstrong, Tex.Civ.App., 50 S.W. 610, 613—15 C.J. p 1374 note 18.

(2) Any person having a claim for expense of administration of a deceased's estate, as attorney for the executor.—In re Kaplan's Estate, 247 N.Y.S. 384, 385, 139 Misc. 414.

(3) Artificial person, such as a body politic or corporate.—State v. Crutcher, 2 Swan, Tenn., 504, 511.

(4) Assignee of claim against bankrupt.—In re Lewis F. Perry & Whitney Co., D.C.Mass., 172 F. 744, 745, 22 Am.Bankr. 770.

(5) Assignee of judgment.—Van

Rensselaer v. Onondaga County, 1 Cow., N.Y., 443, 457.

(6) Broker who has purchased stock on his customer's account.—Eastman v. Kendall, 239 N.W. 263, 256 Mich. 215.

(7) Claimant for damages.—Des Arc Oil Mill Co. v. McLeod, 216 S. W. 1040, 1041, 141 Ark. 332.

(8) Claimant under a bond.—Municipal Ct. v. Whaley, 57 A. 1061, 1062, 26 R.I. 25.

(9) Divorced wife with a decree giving her the custody of their minor child and an order for the child's maintenance.—Hill v. Hill, 82 N.E. 690, 691, 196 Mass. 509.

(10) Dummy stockholder with no interest as stockholder, who loans money to the corporation.—Phillips v. Pine Bluff S. & S. Ry. Co., 208 S.W. 313, 315, 137 Ark. 443.

(11) Every person, copartnership, or company to whom one is liable, whether primarily or secondarily, and whether as principal or surety.—Evans v. Ross, 80 U.C.C.P. 121, 126.

(12) Guarantor who has made payment under the guaranty.—Scott v. Norton Hardware Co., C.C.A.Va., 54 F.2d 1047, 1050.

(13) Holder of a bank's certificate of deposit, payable on a fixed date with interest.—Taylor v. Hutchinson, 40 So. 108, 110, 145 Ala. 202.

(14) Holder of a promissory note.—Cutler v. Huston, Mich., 15 S.Ct. 868, 370, 158 U.S. 423, 39 L.Ed. 1040.

(15) Holder of contract with corporation breached by its insolvency.—Spader v. Mural Decoration Mfg. Co., 20 A. 378, 47 N.J.Eq. 18.

(16) Holder of wheat ticket or receipt issued by warehouseman who has become insolvent.—Daniels v. Palmer, 42 N.W. 855, 857, 41 Minn. 116.

(17) Indorsee of a note.—Dunnigan v. Stevens, 13 N.E. 651, 654, 122 Ill. 396, 3 Am.S.R. 496—15 C.J. p 1371 note 78 [a].

(18) Indorser, guarantor, or surety.—Kahn v. Bledsoe, 98 P. 921, 922, 22 Okl. 666, 132 Am.S.R. 665—15 C.J. p 1371 note 78.

(19) Judgment creditor having a lien.—Chicago Sav. Bank & Trust Co. v. Coleman, 119 N.E. 587, 589, 283 Ill. 611—15 C.J. p 1374 notes 20, 21.

(20) Judgment, execution, or attachment creditor.—Farmers' & Merchants' Bank of New York v. An-

thony, 57 N.W. 1029, 1030, 39 Neb. 343.

(21) Mortgagee.—Calkins v. Howard, 83 P. 280, 281, 2 Cal.App. 233, 235.

(22) Oblige in an appeal bond.—Hanna v. Hurley, 127 N.W. 710, 711, 162 Mich. 601.

(23) One against whom slanderous words are uttered.—Banks v. McCandless, 47 S.E. 332, 335, 119 Ga. 793—15 C.J. p 1375 note 31.

(24) One asserting claim against estate for injuries due to deceased's negligence.—Ford v. Maney's Estate, 232 N.W. 393, 394, 251 Mich. 461, 70 A.L.R. 1315.

(25) One having a right to maintain a proceeding for the support of a bastard child.—Bishop v. Redmond, 83 Ind. 157, 159—15 C.J. p 1375 note 33.

(26) One who loans credit.—Swarts v. Siegel, Mo., 117 F. 13, 17, 54 C.C.A. 399.

(27) Owner of rented building for rents due.

Tex.—General Motors Acceptance Corporation v. Bettles, Civ.App., 57 S.W.2d 263, 265.

Wash.—Harrison v. National Cash Register Co., 82 P.2d 136, 139, 196 Wash. 83.

(28) Person to whom any obligation is due.—In re Wilhelm, D.C.Md., 25 F.Supp. 440, 443.

(29) Person to whom a promise of marriage is made after the breach.—Bishop v. Redmond, supra—15 C.J. p 1375 note 32.

(30) Pledgee of property as security for claim.—Jewell v. Cecil, 198 S.W. 199, 202, 177 Ky. 822.

(31) Policy holder who has paid his premium.—Hoyt v. Hampe, 214 N.W. 718, 720, 206 Iowa 206.

(32) Sheriff acting in official capacity in sale of personalty for taxes.—Andrews v. Hurst, 161 S.E. 331, 333, 163 S.C. 86.

(33) Stockholder of insolvent building and loan association with respect to his distributive share.—Irwin v. Granite State Provident Assoc., 38 A. 680, 682, 56 N.J.Eq. 244.

(34) Trustee in a conditional buyer's trust deed.—Handlan-Buck Mfg. Co. v. Waterloo Drop Forge Co., 155 N.W. 802, 807, 173 Iowa 452.

(35) Wife bringing action for maintenance and support.—Hagedorn v. Hagedorn, 189 S.E. 507, 509, 211 N.C. 175.

what it has been held not to include.⁴²

Who are creditors under particular circumstances or within the purview of particular statutes see, *inter alia*, such C.J.S. titles as Assignments for Benefit of Creditors § 308; Bankruptcy §§ 98-109, 385-389, 514, 1221; Banks and Banking §§ 88, 519-529; Building and Loan Associations § 36 notes 6-15; Chattel Mortgages §§ 136-141; Corporations §§ 1377-1382, 1394, 1395, 1400, 1424-1430, 1431-1433, 1450, 1468-1471, 1547-1551, 1587, 1588; Fraudulent Conveyances §§ 63-69, also 27 C.J. p 472 note 19-p 474 note 40, § 484, also 27 C.J. p 885 note 66-p 887 note 92; Liens § 9, also 37 C.J. p 327 notes 99-11; Mechanics' Liens § 86, also 40 C.J. p 128 note 74-p 129 note 1; Mortgages § 60, also 41 C.J. p 366 note 61-p 367 note 73, § 273, also 41 C.J. p 574 note 95-p 576 note 12; Partnership §§ 188, 189, also 47 C.J. p 912 note 69-p 920 note 84; Principal and Surety § 4, also 50 C.J. p 14 note

28; Receivers § 41, also 53 C.J. p 57 note 91-p 58 note 97; Sales § 582, also 55 C.J. p 1250 note 83-p 1253 note 27; Subrogation §§ 47-56, also 60 C.J. p 740 note 4-p 770 note 98; Trusts §§ 197-200, also 65 C.J. p 553 note 85-p 565 note 32; Vendor and Purchaser §§ 306-308, also 66 C.J. p 1063 note 59-p 1065 note 99; and Wills §§ 1137-1141, also 69 C.J. p 950 note 56-p 963 note 45.

Other Terms Compared

The terms "applicant for the writ" see Applicant 6 C.J.S. p 86 note 39, "claimant" see Claimant 14 C.J.S. p 1191 note 58, or "obligee"⁴³ may be employed as equivalent to "creditor." Also "creditor" has been compared with, and distinguished from, "assigns" see Assign 6 C.J.S. p 1036 note 21, "claimant" see Claimant 14 C.J.S. p 1191 note 59, "coadventurer,"⁴⁴ "dependent,"⁴⁵ "incumbrancer,"⁴⁶ "investor,"⁴⁷ "joint obligor,"⁴⁸ "laborer,"⁴⁹ "owner,"⁵⁰

(36) Wife holding annuity under antenuptial agreement.—*In re Coane's Estate*, 165 A. 2, 3, 310 Pa. 138.

42. "Creditor" held not to include

(1) Assignee of conditional seller who has seized the property sold on purchaser's default.—*John W. Snyder, Inc. v. Aker*, 236 N.Y.S. 28, 30, 134 Misc. 721.

(2) Beneficiary of trust.—*Musselman v. Joplin*, Mo.App., 180 S.W. 1058, 1060.

(3) Board of education with respect to funds deposited in bank without its authority.—*Myers v. Clay Center Bd. of Education*, 32 P. 658, 662, 51 Kan. 87, 37 Am.S.R. 263.

(4) Claimant under contract to make a will.—*Rooney v. Inheritance Tax Commission of Kansas*, 53 P.2d 500, 501, 143 Kan. 143.

(5) Commissioner to collect purchase money.—*Davis v. Snead*, 33 Gratt. 705, 711, 74 Va. 705, 711.

(6) Customer for whom a broker buys stock on margin.—*Richardson v. Shaw*, N.Y., 147 F. 659, 660, 663, 77 C.C.A. 643.

(7) Director of corporation with respect to his salary.—*McDowall v. Sheehan*, 29 N.E. 299, 301, 129 N.Y. 290.

(8) Divorced wife of insane veteran given award for support of child.—*In re Gardner*, 264 N.W. 643, 646, 220 Wis. 75.

(9) Government department, bureau, or commission to which money has been appropriated from a fund owned by the government.—*Eastern & Western Lumber Co. v. Patterson*, 264 P. 441, 124 Or. 112, 60 A.L.R. 528.

(10) Guardian of a ward.—*Hines*

v. McKenzie, 250 N.W. 687, 688, 216 Iowa 1388.

(11) Holder of bank check until and unless the bank accepted or certified it.—*Blanchard v. Bank of Morgan City & Trust Co.*, La.App., 185 So. 120, 121.

(12) Holder of preferred stock in domestic corporation.—*Gressinger v. Massey Hardware Co.*, 33 P.2d 128, 129, 139 Kan. 782.

(13) Holder of withdrawable stock in a building and loan association.—*Clardy v. Jefferson County Building & Loan Ass'n*, 176 So. 368, 369, 234 Ala. 658.

(14) Insurance company advancing money on insurance policy by way of "loan."—*Baker v. General American Life Ins. Co.*, 268 N.W. 556, 561, 222 Iowa 184.

(15) One claiming under decedent's oral contract to give him interest in his estate.—*In re Schinas's Estate*, 248 N.Y.S. 691, 705, 139 Misc. 459.

(16) One who claims as his own specific property claimed by estate.—*Newport v. Hatton*, 231 P. 987, 993, 195 Cal. 132.

(17) Person claiming damages for conversion of his property.—*Hutchinson v. Lamb, Brayt.*, Vt., 234, 235.

(18) Plaintiff in attachment.—*Melville v. Brown*, 16 N.J.Law 363, 365.

(19) Preferred stockholder.—*Me.—Spear v. Rockland-Rockport Lime Co.*, 93 A. 754, 756, 113 Me. 285.

Or.—*Hewitt v. Linnhaven Orchard Co.*, 174 P. 616, 618, 90 Or. 1.

(20) Promoter of corporation, taking stock for his services.—*Villere v. New Orleans Pure Milk Co.*, 48 So. 162, 175, 122 La. 717.

(21) Stockholder.—*Hegarty v. American Commonwealths Power Corporation*, 174 A. 273, 275, 20 Del. Ch. 231.

(22) Trustee of a company, authorized to collect assessment against estate of deceased stockholder.—*Glenn v. Reid*, 24 A. 155, 156, 74 Md. 238.

(23) Wife asking for temporary alimony in suit for divorce.—*Stirgus v. Stirgus*, 160 So. 285, 286, 172 Miss. 337.

(24) Wife claiming alimony and support.—*Commons v. Bragg*, 80 P. 2d 287, 291, 183 Okl. 122.

(25) Wife demanding alimony.—*Hollis v. Bryan*, 143 So. 687, 688, 166 Miss. 874.

(26) Wife to whom alimony has been awarded.—*Festervand v. Laster*, 130 So. 634, 638, 15 La.App. 159.

43. La.—*Duflho v. Bordelon*, 92 So. 744, 746, 152 La. 88.

44. N.J.—*Stein v. George B. Spearin, Inc.*, 184 A. 436, 440, 120 N.J.Eq. 169.

45. Mass.—*Skillings v. Massachusetts Ben. Assoc.*, 15 N.E. 566, 568, 146 Mass. 217.

46. Ill.—*Shaeffer v. Weed*, 8 Ill. 511, 517.

47. Ark.—*Phillips v. Pine Bluff S. & S. Ry. Co.*, 208 S.W. 313, 315, 137 Ark. 443.

48. Mo.—*Chandler v. Stevenson*, 68 Mo. 450, 451.

49. Iowa.—*Heessel v. Creston Nat. Bank*, 218 N.W. 298, 300, 205 Iowa 508.

50. S.D.—*Boyce v. Hawn*, 216 N.W. 589, 590, 52 S.D. 53.

See also the C.J.S. title Property § 13, also 50 C.J. p 776 note 51, p 777 note 15.

"preferred stockholder,"⁵¹ "purchaser under warranty of title,"⁵² "stockholder,"⁵³ and "subsequent purchaser in good faith for value."⁵⁴

In Phrases

Creditor at large. One who has not reduced his claim to judgment at law, or who has not acquired, or does not possess, a lien for the enforcement of such demand; or, in other words, one who has not established his debt by a judgment rendered, or has not an acknowledged debt with an interest in the money of the debtor, or a lien created by contract, or by some distinct legal proceeding, or by law,⁵⁵ as distinguished from a creditor who has obtained some process on which property may be seized lawfully, and by which it is made liable, either immediately or ultimately, to be appropriated in satisfaction of his debt.⁵⁶ The term is used indifferently with the terms "general creditor,"⁵⁷ and "simple contract creditor."⁵⁸

Debtor and creditor. Wherever one person, by contract or by law, is liable and bound to pay another an amount of money, certain or uncertain, the relation of debtor and creditor exists between them.⁵⁹ The relation of debtor and creditor has been distinguished from "pledge" see the C.J.S. title Pledges § 3, also 49 C.J. p 898 note 56, and "sale" see the C.J.S. title Sales § 2, also 55 C.J. p 42 note 82.

Double creditor. One having a lien on two funds.⁶⁰

Execution creditor. One who, having recovered a judgment against the debtor for his debt, has also caused an execution to be issued thereon.⁶¹

General creditor. An unsecured creditor,⁶² as distinguished from a creditor who has a lien on property and is lawfully in possession under such lien;⁶³ one who has not procured a lien on property by some legal process, as distinguished from a creditor who has obtained some process by which the property may be lawfully seized, and by which it is made liable either immediately or ultimately to be appropriated in satisfaction of his debt;⁶⁴ a person who has given credit and who has no lien or security for the payment of the debt so created.⁶⁵ A "general creditor" has been held not to be included within the term "junior encumbrancer,"⁶⁶ and has been held not to include the holder of a claim against a city, who is entitled to payment only from and out of the funds appropriated to the payment of such claims.⁶⁷ The term has been held equivalent to "creditor at large" see supra note 57, and distinguished from "judgment creditor."⁶⁸

Judgment creditor. A term with a special meaning, and defined as one whose claim has been merged into a judgment against his debtor, and under which, generally, execution may be had;⁶⁹ one who has obtained a judgment against his debtor,

51. U.S.—Elko Lamolile Power Co. v. Commissioner of Internal Revenue, C.C.A., 50 F.2d 595, 596—Vanden Bosch v. Michigan Trust Co., C.C.A.Mich., 35 F.2d 643, 645.
Mass.—Wilder v. Trefry, 125 N.E. 689, 690, 234 Mass. 470.
Pa.—Pardee v. Harwood Electric Co., 105 A. 48, 50, 262 Pa. 68.
See also Corporations § 483.

52. Tex.—Turner v. Cochran, 61 S. W. 923, 924, 94 Tex. 480.

53. U.S.—Helvering v. Richmond, F. & P. R. Co., C.C.A., 90 F.2d 971, 974—Curtis v. Dade County Sec. Co., C.C.A.Fla., 30 F.2d 325, 326.

Ala.—Clardy v. Jefferson County Building & Loan Ass'n, 176 So. 368, 369, 234 Ala. 658.

Mich.—Curtiss v. Wilmarth, 236 N. W. 773, 776, 254 Mich. 242—Leland v. Ford, 223 N.W. 218, 223, 245 Mich. 599.

See also Corporations § 483.

54. Okl.—Morgan v. Stanton Auto Co., 285 P. 962, 964, 142 Okl. 116.

55. U.S.—U. S. v. Ingate, C.C.Ala., 48 F. 251, 254.

56. N.M.—Wolcott v. Ashenfelter, 23

P. 780, 784, 5 N.M. 442, 8 L.R.A. 691.

15 C.J. p 1373 note 3.

57. N.M.—Wolcott v. Ashenfelter, 23 P. 780, 784, 5 N.M. 442, 8 L.R.A. 691.

58. U.S.—U. S. v. Ingate, C.C.Ala., 48 F. 251, 253.

59. Ga.—Banks v. McCandless, 47 S. E. 332, 335, 119 Ga. 793.

Broad scope of definition

(1) It has been said that this definition is much broader than is generally supposed and includes a liability for a wrongful conversion of property.—Banks v. McCandless, supra.

(2) It may arise by direct agreement, or breach of duty, between the parties.—Commercial National Bank v. Taylor, 19 N.Y.S. 533, 535, 64 Hun 493.

(3) Also it has been said that the phrase implies that the one has given credit to the other in a contract and that it would be absurd to say that a fine imposed as a punishment for a penal offence was a debt contracted.—Whiteacre v. Rector, 29

Gratt. 714, 716, 70 Va. 714, 716, 26 Am.R. 420.

60. Kan.—Newby v. Fox, 133 P. 890, 891, 90 Kan. 317, 47 L.R.A., N.S., 302.

61. Ind.—Chalmers & Williams v. Surprise, 123 N.E. 841, 844, 70 Ind. App. 646.

See also the C.J.S. title Executions § 14, also 23 C.J. p 310 note 2-p 311 note 8.

62. Minn.—Noyes v. Chapman-Drake Co., 61 N.W. 901, 60 Minn. 88.

63. Mich.—Dempsey v. Pforzheimer, 49 N.W. 465, 468, 86 Mich. 652, 13 L.R.A. 388.

64. N.M.—Wolcott v. Ashenfelter, 23 P. 780, 784, 5 N.M. 442, 8 L.R.A. 691.

65. S.C.—King v. Fraser, 23 S.C. 543, 545, 548.

66. Md.—McNiece v. Elhason, 27 A. 940, 941, 78 Md. 168.

67. La.—Johnson v. City of New Orleans, 15 So. 100, 101, 46 La. Ann. 714.

68. S.C.—King v. Fraser, 23 S.C. 543, 548.

69. Ind.—Chalmers v. Surprise, 123 N.E. 841, 844, 70 Ind. App. 646.

under which he can enforce execution.⁷⁰ The term has been distinguished from "general creditor" see *supra* note 68.

Refacción creditor. In the Spanish civil law, one who puts capital or material into the construction or repair of a building.⁷¹

Simple contract creditor. A creditor who has not reduced his demand to a judgment at law, or who has not acquired or does not possess a lien for the enforcement of such demand; one who has not established his debt by a judgment rendered, or has not an acknowledged debt with an interest in the property of the debtor, or a lien thereon created by contract, or by some distinct legal proceeding, or by law.⁷² The term has been held equivalent to "creditor at large" see *supra* note 58.

Single creditor. One having a lien only on a single fund.⁷³

Subsequent creditor. A creditor whose claim or demand accrued or came into existence after a given fact or transaction, such as the recording of a deed or mortgage or the execution of a voluntary

conveyance;⁷⁴ one who afterwards became a creditor.⁷⁵

Warrant creditor. A creditor of a municipal corporation to whom is given a municipal warrant for the amount of his claim, because there are no funds on hand to pay it.⁷⁶

Other phrases: "Attaching creditor" see 7 C.J.S. p 169 note 85, "bona fide" creditor" and "bona fide creditor without notice" see 11 C.J.S. p 390 notes 94, 95, "bona fide judgment creditor" see 11 C.J.S. p 388 note 56, "catholic creditor" see 14 C.J.S. p 36 note 74, "certificate creditor" see 14 C.J.S. p 112 note 77, "conditional creditor" see 15 C.J.S. p 813 note 96, "confidential creditor" see 15 C.J.S. p 823 note 2, "creditor acquiring lien,"⁷⁷ "creditor of . . . [a bankrupt] seeking a preference,"⁷⁸ "creditor of an estate,"⁷⁹ "creditor of corporation,"⁸⁰ "creditor of deceased,"⁸¹ "creditor of lessee,"⁸² "creditor of the estate of deceased,"⁸³ "creditor or creditors,"⁸⁴ "domestic creditor,"⁸⁵ "existing creditor,"⁸⁶ "foreign creditor,"⁸⁷ "junior creditor,"⁸⁸ "lien creditor,"⁸⁹ "loan creditor,"⁹⁰ "principal creditor,"⁹¹ "quasi creditor,"⁹² "secured creditor" see Bankruptcy §§ 101, 387, and "senior creditor" see

70. Black L.D.

Statutory definition

"The person who is entitled to collect, or otherwise enforce, in his own right, a judgment for a sum of money, or directing the payment of a sum of money."—Kemp v. Gartenburg, 156 N.Y.S. 883, 884, 93 Misc. 313.

Limited meaning

In a particular connection, the term is limited to "a judgment creditor who has first exhausted all legal remedy."—Baxter v. Moses, 1 A. 350, 352, 77 Me. 465, 52 Am.R. 783.

As "incumbrancer"

The phrase has been held to be included within the term "incumbrancer."—De Voe v. Rundle, 74 P. 836, 837, 33 Wash. 604.

Term held not to include the receiver or general creditors of an insolvent corporation.—Smith v. Hotel Ritz Company, 70 A. 137, 74 N.J.Eq. 616.

71. Porto Rico.—In re Sola e Miho, 7 Porto Rico Fed. 392, 397.

72. U.S.—U. S. v. Ingate, C.C.Ala., 48 F. 251, 254.

73. Kan.—Newby v. Fox, 133 P. 890, 90 Kan. 317, 47 L.R.A., N.S., 302.

74. Black L.D.

75. Ohio.—Friedel v. Wolfe, 180 N. E. 738, 739, 41 Ohio App. 564.

S.C.—McGhee v. Wells, 35 S.E. 529, 532, 57 S.C. 280, 76 Am.S.R. 567.

60 C.J. p 974 note 7.

See also the C.J.S. title Fraudulent

Conveyances § 69, also 27 C.J. p 474 notes 35-40.

76. La.—Johnson v. City of New Orleans, 15 So. 100, 101, 46 La. Ann. 714.

77. N.J.—General Motors Acceptance Corporation v. Hayes Motor Co., 172 A. 343, 345, 12 N.J. Misc. 384.

78. Colo.—Nisbet v. Siegel-Campton Live Stock Co., 123 P. 110, 120, 21 Colo. App. 494.

79. Holder of definite claim

"A creditor of an estate is one who has a definite demand against the estate, or cause of action capable of adjustment and liquidation upon a trial."—In re Wilhelm, D.C. Md., 25 F. Supp. 440, 443.

80. Idaho.—Mapleton Bank v. Standrod, 71 P. 119, 121, 8 Idaho 740, 67 L.R.A. 656.

81. Ky.—Moore's Adm'x v. Brookins, 92 S.W.2d 813, 814, 263 Ky. 519.

Mass.—First Nat. Bank v. Nichols, 200 N.E. 869, 872.

Tenn.—Gillespie v. Broadway Nat. Bank, 68 S.W.2d 479, 482, 167 Tenn. 245.

82. Idaho.—Continental Nat. Bank of Salt Lake City v. Naylor, 228 P. 266, 268, 39 Idaho 267.

83. Cal.—Platnauer v. Forni, 21 P. 2d 638, 641, 131 Cal. App. 393.

La.—Succession of Reed, App., 157 So. 765, 767.

N.Y.—In re Laughlin's Estate, 8 N. Y.S.2d 842, 843, 255 App. Div. 927.

84. Ohio.—Smith v. Cooper Marble,

Co., 192 N.E. 282, 283, 48 Ohio App. 65.

85. Defined

"One who resides in the same state or country in which the debtor has his domicile or his property."—Black L.D.

86. Iowa.—Blackman v. Baxter, Reed & Co., 100 N.W. 75, 78, 125 Iowa 118, 70 L.R.A. 250, 2 Ann. Cas. 707. 25 C.J. p 168 note 59.

87. Defined

"One who resides in a state or country foreign to that where the debtor has his domicile or his property."—Black L.D.

88. Defined

"One whose claim or demand accrued at a date later than that of a claim or demand held by another creditor, who is called correlatively the 'senior' creditor."—Black L.D.

89. Defined

"One whose debt or claim is secured by a lien on particular property, as distinguished from a 'general creditor' who has no such security."—Black L.D.

90. "Investor" distinguished

Ark.—Phillips v. Pine Bluff, S. & S. Ry. Co., 208 S.W. 313, 316, 137 Ark. 443.

91. Defined

"One whose claim or demand very greatly exceeds the claims of all other creditors in amount."—Black L.D.

92. Okl.—Commons v. Bragg, 80 P. 2d 287, 290, 183 Okl. 122.

supra note 88; also "bona fide purchasers or unsecured or lien creditors" see Bona Fide 11 C.J.S. p 390 note 89, "creditors" and persons interested in the estate,"⁹³ "creditors and subsequent purchasers,"⁹⁴ "creditors by a mortgage,"⁹⁵ "creditors of any person to whom an award was made,"⁹⁶ "creditors of bankrupt,"⁹⁷ "creditors of deceased,"⁹⁸ "creditors of deceased persons,"⁹⁹ "creditors of same class,"¹ "creditors of the bank,"² "creditors of the buyer,"³ "creditors of the mortgagor,"⁴ "creditors or claimants,"⁵ "creditors or third persons,"⁶ "creditors residing within the state,"⁷ "de-

positors and other creditors,"⁸ "intent to defraud creditors,"⁹ "joint creditors,"¹⁰ "moneys disbursed to creditors by trustee,"¹¹ "notice . . . to all known creditors,"¹² "petitioning creditors" see Bankruptcy §§ 98-103, "preference as one of the creditors,"¹³ and also, adjectively, "creditor beneficiary."¹⁴

CREDITOR QUI PERMITTIT REM VENIRE PIGNUS DIMITTIT.¹⁵

CREDITORS' BILL. See Creditors' Suits § 1.

93. N.Y.—Matter of Thompson, 83 N.Y.S. 983, 984, 41 Misc. 223.

94. La.—Gulf Refining Co. of Louisiana v. Glassell, 171 So. 846, 853, 186 La. 190.

Miss.—Lampton-Reid Co. v. Allen, 171 So. 780, 782, 177 Miss. 698.

95. N.Y.—In re Ries, 169 N.Y.S. 426, 427, 182 App.Div. 296.

96. Ga.—Gainey v. Bank of Thom- asville, 168 S.E. 877, 878, 176 Ga. 736.

97. "Holders of participating operation certificates issued by bankrupt oil company under contract requiring company to set aside certain fund for payment thereof, held not "creditors of bankrupt," in that they were coadventurers with stockholders, haz- arding their investment on continued operation and success of company.— In re Hawkeye Oil Co., D.C.Del., 19 F.2d 151, 152.
See also Bankruptcy §§ 385-389.

98. Okl.—United States Fidelity & Guaranty Co. v. Krow, 87 P.2d 950, 954, 184 Okl. 444.

99. "All persons having demands originating from contracts or agree- ments with the deceased are credi- tors of his estate in the sense of the statute."—Coffey v. Fisher, C.C.A. Tenn., 100 F.2d 51, 53.

1. U.S.—Jentzer v. Viscose Co., D. C.N.Y., 13 F.Supp. 540, 544.

2. N.C.—Davis v. Industrial Mfg. Co., 19 S.E. 371, 372, 114 N.C. 321, 329, 23 L.R.A. 322.

3. U.S.—Nauman Co. v. Bradshaw, Iowa, 193 F. 350, 353, 113 C.C.A. 274.

4. U.S.—Queenan v. Wiker, D.C.Okla., 21 F.Supp. 943, 945, 946.

Ill.—Collateral Finance Co. v. Braud, 18 N.E.2d 392, 395, 298 Ill.App. 130.
Kan.—Schwartz v. Duncan, 284 P. 606, 611, 129 Kan. 749—Campbell v. Killion, 257 P. 752, 753, 124 Kan. 124.

5. Miss.—Drainage Dist. No. 1 of Noxubee County v. Evans, 99 So. 819, 821, 126 Miss. 178.

6. Colo.—Glass & Bryant Mercantile Co. v. Farmers' State Bank of Ft. Morgan, 265 P. 682, 684, 83 Colo. 193.

7. N.J.—Baker v. City of East Orange, 111 A. 681, 682, 95 N.J. Law 365.

8. "Other creditors" held to mean "any persons having claims of any kind . . . which lawfully can or should be paid out of . . . as- sets which come into the hands of the receiver."—Conrad v. Johnson, 4 P.2d 767, 769, 134 Kan. 120.

9. Ky.—Hord v. Green, 44 S.W.2d 549, 551, 241 Ky. 641.

See also the C.J.S. title Fraudulent

Conveyances §§ 110-114, also 27 C. J. p 503 note 63-p 506 note 93.

10. Defined

"Persons jointly entitled to re- quire satisfaction of the same debt or demand."—Black L.D.

11. U.S.—Oldham v. Parker, D.C. Tex., 5 F.2d 682, 684.

12. Conn.—Davis' Appeal, 39 Conn. 395, 399.

13. Wash.—State v. Erickson, 223 P. 1046, 1047, 128 Wash. 561.

14. U.S.—Aetna Life Ins. Co. of Hartford, Conn., v. Maxwell, C.C.A. W.Va., 89 F.2d 983, 993.

Cal.—Hartman Ranch Co. v. Asso- ciated Oil Co., 73 P.2d 1163, 1169, 10 Cal.2d 232.

Ky.—Fidelity & Deposit Co. of Mary- land v. Lyon, 124 S.W.2d 74, 77, 276 Ky. 411—J. T. Jackson Lumber Co. v. Union Transfer & Storage Co., 55 S.W.2d 670, 672, 246 Ky. 653.

Ohio.—Vail v. Reuben H. Donnelly Corporation, 10 N.E.2d 239, 241, 56 Ohio App. 219.

Tex.—Breaux v. Banker, Civ.App., 107 S.W.2d 382, 389.

Utah.—Kelly v. Richards, 83 P.2d 731, 735, 95 Utah 560.

15. A maxim meaning "The credi- tor who allows property to be sold gives up the pledge."—Morgan Leg. Max.

CREDITORS' SUITS

This Title includes actions to enforce judgments and other general liens against property of debtors liable for payment of their debts but not subject to levy and sale under execution; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom, and on what judgments or other liens, and as to what property, they may be maintained; jurisdiction of such actions and proceedings therein; incidental relief; judgments or decrees and enforcement thereof; review of proceedings; and costs in such actions.

Matters not in this Title, treated elsewhere in this work, see *Descriptive-Word Index*

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§ 1. Definition, Classes and Nature

- a. Definition and classes
- b. Nature, scope, and purpose

a. Definition and Classes

Creditors' bills are bills in equity filed by creditors to reach and subject to the payment of their debts so-called equitable property or assets which cannot be reached by a levy and sale on execution at law. There is a distinction between general creditors' bills and judgment creditors' bills.

Generally defined, creditors' suits or bills are bills in equity filed by creditors to enforce the payment of debts out of property of debtors under circumstances which impede or render impossible the collection of the debts by the ordinary process of execution.¹ In the sense in which the term is used in this title creditors' suits are proceedings in equity to compel the discovery and application to the payment of debts of so-called equitable assets or property which cannot be reached by levy and sale on execution at law.² In accordance with this definition, certain bills in equity have been held to be, or not to be, creditors' bills.³ In some of the states statutes have been enacted which materially enlarge the kinds of property of debtors

that may be reached without resort to equitable proceedings, or which materially enlarge the chancery jurisdiction and provide for proceedings more or less closely resembling creditors' bills.⁴ It is not essential that a creditors' suit should be such in its inception; a bill by a single creditor, although filed on behalf of himself only, may be converted into a creditors' suit, as shown *infra* § 55. There are two classes of creditors' bills, one to reach the equitable assets or property of the debtor on which execution at law cannot be levied; the other where property legally liable to execution has been fraudulently conveyed and the creditor seeks to have the conveyance set aside.⁵ A creditors' bill of the first-mentioned class has been defined *supra* this section, while the latter class is discussed in the C.J.S. title *Fraudulent Conveyances* §§ 319, 321, also 27 C.J. p 716 note 55—p 717 note 60, p 719 note 81. Other classes of proceedings commonly designated as creditors' bills, but which are not within the scope of this article, are bills by creditors of deceased persons against the personal representatives to compel an accounting and settlement of the estate, as discussed in the C.J.S. title *Executors and Administrators* § 849, also 24 C.J. p 954 notes 68, 69; bills by creditors to set aside fraudulent con-

1. Cal.—*San Bernardino County Sav. Bank v. Denman*, 200 P. 606, 186 Cal. 710.

Ill.—*W. G. Press & Co. v. Fahy*, 145 N.E. 103, 313 Ill. 262.

Miss.—*Yates v. Council*, 102 So. 176, 137 Miss. 381.

Ohio.—*Shor v. Hutton*, 198 N.E. 192, 50 Ohio App. 349.

S.C.—*Ex parte Roddey*, 172 S.E. 866, 868, 171 S.C. 439, quoting *Corpus Juris*.

Tenn.—*State v. Caldwell*, 40 S.W.2d 1036, 1037, 163 Tenn. 77, citing *Corpus Juris*.

15 C.J. p 1380 note 1.

2. Minn.—*Lind v. O. N. Johnson Co.*, 282 N.W. 661, 204 Minn. 30, 119 A.L.R. 940.

Neb.—*Eremont v. Farmers Union Co-op. Ass'n v. Markussen*, 286 N.W. 784, 136 Neb. 567, 136 A.L.R. 1287.—*Thies v. Thies*, 198 N.W. 151, 111 Neb. 805.

N.Y.—*Duncan v. Laury*, 292 N.Y.S. 138, 249 App.Div. 314.

Okl.—*Interurban Const. Co. v. Central State Bank of Kiefer*, 184 P. 905, 76 Okl. 281.

S.D.—*Shoen v. Sioux Falls Gas Co.*, 261 N.W. 393, 63 S.D. 527.

Tenn.—*Sweetwater Bank & Trust Co. v. Howard*, 13 Tenn.App. 592, 15 C.J. p 1380 note 2.

As otherwise defined, a "creditor's bill" is suit in equity by judgment creditor to reach property to which defendant in execution has mere

equitable title, where creditor has in vain attempted to obtain satisfaction.

Fla.—*Bay View Estates Corporation v. Southerland*, 154 So. 894, 114 Fla. 635, costs retaxed 170 So. 732, 126 Fla. 239.—*George E. Sebring Co. v. O'Rourke*, 134 So. 556, 101 Fla. 885.—*B. L. E. Realty Corporation v. Mary Williams Co.*, 134 So. 47, 101 Fla. 254.—*Armour Fertilizer Works v. First Nat. Bank*, 100 So. 362, 87 Fla. 436.

Ill.—*W. G. Press & Co. v. Fahy*, 145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.

3. U.S.—*In re American Fidelity Corporation*, D.C.Cal., 28 F.Supp. 462.

N.Y.—*Hart v. Albright*, 18 N.Y.S. 718, 28 Abb.N.Cas. 74.

15 C.J. p 1380 note 2 [a]—[f].

Petition to enforce landlord's lien

Petition of judgment creditor asking that landlord's lien existing in favor of debtor be enforced in his behalf, by virtue of garnishment, was not creditor's bill.—*Kinart v. Churchill*, 230 N.W. 349, 210 Iowa 72.

4. Mass.—*McCarthy v. Rogers*, 3 N.E.2d 787.—*Todd v. Pearce*, 197 N.E. 156, 291 Mass. 455.—*Orange Hardware Co. v. Ryan*, 172 N.E. 654, 272 Mass. 413.

15 C.J. p 1381 note 3.

It has always been the policy of the commonwealth that the assets

of a debtor should be subject to payment of his debts, and the purpose of the statute was to give the broadest scope to such proceedings and thereby provide in equity in aid of the law a remedy analogous to creditors' suits.—*Orange Hardware Co. v. Ryan*, *supra*.

Effect of statute

A statute providing that creditors' bill might be filed after action at law was begun and before rendition of final judgment therein did not define a creditors' bill or change existing rule as to what constitutes essential elements of a creditors' bill.—*Stewart v. Manget*, 181 So. 370, 132 Fla. 498.

"Debt"

Liability of building contractor to creditor which furnished materials and performed labor under contract in connection with erection of building, evidenced by final bill, approved by authorized representative of building contractor, showing amount due, is a "debt" within statute authorizing suit by creditor to reach and apply property of debtor in payment of debt.—*Bethlehem Fabricators v. H. D. Watts Co.*, 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124.

5. Minn.—*Lind v. O. N. Johnson Co.*, 282 N.W. 661, 204 Minn. 30, 119 A.L.R. 940.

Neb.—*Thies v. Thies*, 198 N.W. 151, 111 Neb. 805.

veyances made by deceased debtors in their lifetime, as discussed in the C.J.S. title *Fraudulent Conveyances* § 323, also 27 C.J. p 720 note 96; and bills by creditors of insolvent corporations to compel distribution of assets, to reach property misappropriated or misapplied, or to compel payment for the benefit of creditors of unpaid stock subscriptions, discussed in *Corporations* §§ 679 e, 1431-1444.

General and judgment creditors' bills. General creditors' bills are such as are brought in behalf of all creditors.⁶ Judgment creditors' bills are those instituted by one or more judgment creditors for the purpose of subjecting equitable and other interests of a living debtor, or of removing obstructions in the way of the process of execution.⁷

b. Nature, Scope, and Purpose

Creditors' bills are in the nature of proceedings in

rem, ordinarily ancillary. Their purpose is to bring into exercise the equitable powers of the court to enforce a judgment by means of an equitable execution when an execution at law cannot be had.

Creditors' bills are in the nature of proceedings in rem rather than in personam,⁸ and are ancillary and not original proceedings,⁹ being a continuation in effect of the judgments upon which they are founded to work out satisfaction thereof.¹⁰ It has been held, however, that a judgment creditor's proceeding to subject to the satisfaction of his judgment intangible property which could not be reached by an execution at law is not purely an ancillary proceeding, although the judgment was rendered in an action at law, but is an independent proceeding in equity to be governed by equity practice and procedure.¹¹ The scope and purpose of a creditors' bill is to bring into exercise the equitable powers of the court¹² to enforce a judgment by means of an equitable execution,¹³ where

6. Va.—Piedmont, etc., L. Ins. Co. v. Maury, 75 Va. 508.
Parties plaintiff see *infra* § 56.

Primary purpose of general creditors' bill is to make equitable distribution of common fund.—Hutsell v. Harrington, 12 S.W.2d 370, 157 Tenn. 553.

General creditors' suits are directed at particular property to subject it and distribute proceeds according to priorities of creditors.—State v. Caldwell, 40 S.W.2d 1036, 163 Tenn. 77.

Bill by single creditor

A bill by one creditor of an insolvent corporation, praying that all creditors be convened, that the amount and priority of their claims be ascertained, and that all necessary accounts and inquiries be taken and made, is a general creditors' bill.—Piedmont, etc., L. Ins. Co. v. Maury, 75 Va. 508.

"A creditors' bill, sometimes called an omnibus bill, being a bill for all. It is not directed at property alone, or property fraudulently appropriated within the purview of the statute of Elizabeth; but it is directed at all the assets of the defendants, as well that existing in the form of tangible property as that in the form of open accounts, notes due, and choses in action generally, for the ingathering of which a receiver is necessary."—Fink v. Patterson, C.C. Va., 21 F. 602, 608.

7. N.C.—Hancock v. Wooten, 12 S. E. 199, 107 N.C. 9, 11 L.R.A. 466.

8. U.S.—Spellman v. Sullivan, D.C. N.Y., 43 F.2d 762, affirmed, C.C.A., 61 F.2d 787.

Cal.—Canfield v. Security-First Nat. Bank, 87 P.2d 830, 13 Cal.2d 1.

Del.—Provident Trust Co. v. Banks, 9 A.2d 260, 262.

Ohio.—Harris v. Cincinnati H. & D. Ry. Co., 5 Ohio N.P., N.S., 173.

S.D.—Shoen v. Sioux Falls Gas Co., 261 N.W. 393, 63 S.D. 527.

Tenn.—State v. Caldwell, 40 S.W.2d 1036, 1037, 163 Tenn. 77, citing *Corpus Juris*.

15 C.J. p 1382 note 11.

Seeking sale of realty

Creditor's suit seeking only sale of realty to satisfy debt is in nature of proceeding in rem.—Naff v. Fairfield-American Nat. Bank, 165 So. 224, 231 Ala. 388.

9. Ohio.—Harris v. Cincinnati H. & D. Ry. Co., 5 Ohio N.P., N.S., 173.
15 C.J. p 1382 note 12.

10. U.S.—Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co., C.C.Mo., 46 F. 584.

Tenn.—State v. Caldwell, 40 S.W.2d 1036, 1037, 163 Tenn. 77, citing *Corpus Juris*.

11. Ala.—International Moving Picture & Film Co. v. Smith, 99 So. 303, 211 Ala. 3.

12. Neb.—Fremont v. Farmers Union Co-op. Ass'n v. Markussen, 286 N.W. 784, 136 Neb. 567, 136 A.L.R. 1287.

Tex.—Thurber Const. Co. v. Kemplin, Civ.App., 81 S.W.2d 103.

Courts of equity have jurisdiction to entertain suits in the nature of creditors' bills for the purpose of administering estates, marshaling assets, and adjusting equities.—U. S. v. Minor, N.C., 254 F. 57, 165 C.C.A. 467, reversing, D.C., 243 F. 953.

Creditors' right to seize property is not a constituent part of title nor a quality of property, nor an element of ownership, but is an exposure to loss of ownership, or a bur-

den on incidence or consequence of ownership, and is a public regulation of property beyond private control.—Brahmey v. Rollins, 179 A. 186, 87 N.H. 290.

Creditors' bill or suit to quiet title

Where money held on deposit by indemnity company which had furnished bail for individual convicted in criminal prosecution was levied on by state for fines assessed against the convicted individual and was claimed by the trustee in bankruptcy of corporation of which the convicted individual had been an officer and director, by creditors of the corporate bankrupt's estate, and by others, state could maintain suit in state court to ascertain ownership of the money and to enforce its execution liens, on the theory either of a creditors' bill or of a suit to quiet title to personal property.—In re American Fidelity Corporation, D.C. Cal., 28 F.Supp. 462.

13. Del.—Provident Trust Co. v. Banks, 9 A.2d 260, 262.

Fla.—Stewart v. Manget, 181 So. 370, 132 Fla. 498—Hillsborough County v. Dickenson, 189 So. 734, 125 Fla. 181—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254—Armour Fertilizer Works v. First Nat. Bank, 100 So. 362, 87 Fla. 436.

Comparable to supplementary proceedings

A judgment creditor's bill is in essence an equitable execution, comparable to proceedings supplementary to execution.—Pierce v. U. S., Mo., 41 S.Ct. 365, 255 U.S. 398, 65 L.Ed. 697, modifying 257 F. 514, 171 C.C.A. 1, rehearing of which was denied 260 F. 158, 171 C.C.A. 194, certiorari denied 40 S.Ct. 15, 250 U.S. 670, 63 L.Ed. 1199.

an execution at law cannot be had and no adequate legal remedy exists. Where the purpose of the bill is to reach a debt or fund in the hands of a third person, it is said to be in the nature of an equitable attachment or garnishment.¹⁴ So a suit by a judgment creditor to subject property which cannot be reached by execution has been termed "an equitable levy."¹⁵ A creditors' bill filed after return of an execution unsatisfied is not an action on a judgment within the meaning of a statute relating to such actions.¹⁶ It is often said that a court of equity has no jurisdiction of a creditors' bill if there is no judgment at law, or if any indispensable party is not on the record; but this is not an accurate use of the term. If the relief sought is of an equitable character, and the parties against whom it is sought are in court, a court of equity has jurisdiction.¹⁷

§ 2. Statutory Provisions

Statutes authorizing creditors' suits do not confer jurisdiction to entertain a suit instituted before their enactment.

Statutes regulating the rights of creditors, to resort to proceedings of an equitable nature to reach property of their debtors, or to maintain proceedings more or less analogous to creditors' bills, are

referred to supra § 1 a and infra § 7 b. Such a statute does not confer jurisdiction to entertain a suit instituted before its enactment.¹⁸

§ 3. Adequate Remedy at Law

- a. In general
- b. Effect of abolition of distinction between law and equity

a. In General

A creditors' bill will not lie where there is an adequate remedy at law.

The rule that a court of equity will not aid a complainant where there is an adequate remedy at law is especially applicable to creditors' suits.¹⁹ Where the property sought to be subjected can be reached by the process of courts of law, a creditors' bill will not be entertained.²⁰ To sustain the jurisdiction of equity, it must appear that a court of law is incompetent to reach the property of defendant on execution, either by reason of the peculiar character of the property or from inability to discover it,²¹ or because the enforcement of the legal remedy is obstructed by some encumbrance or by a transfer which has been made to defeat the creditors' rights.²² Where, however, the creditor has no remedy at law,²³ or where, although the

Other statements of purpose

(1) Nature and purpose of a creditor's bill is to enable creditor to apply to payment of his debt property of judgment debtor, which by its nature cannot be taken in an execution at law, or to convert holder of a legal estate into a trustee, and call for a conveyance, or to have it sold in satisfaction of his claim, or to aid creditor in reaching property of debtor by removing fraudulent judgments or conveyances which defeat his remedy at law.—*Gilbank v. Benton*, 50 P.2d 815, 9 Cal.App.2d 517.

(2) Purpose of creditor's bill is to exercise court's equitable powers to set aside fraudulent encumbrance or conveyance preventing an execution at law or to compel discovery and application of equitable assets to payment of debts.—*Shoen v. Sioux Falls Gas Co.*, 261 N.W. 393, 63 S.D. 527.

14. Mo.—*State ex rel. Busby v. Cowan*, App., 107 S.W.2d 805—*De Field v. Harding Dredge Co.*, 167 S.W. 593, 180 Mo.App. 563.
15 C.J. p 1382 note 14.

15. U.S.—*Miller v. Sherry*, 111, 2 Wall. 237, 249, 17 L.Ed. 827.
15 C.J. p 1382 note 15—20 C.J. p 1303 notes 81, 82.

16. N.Y.—*Dunham v. Nicholson*, 4 N.Y.Super. 636, 3 Code Rep. 199—*Catlin v. Doughty*, 12 How.Pr. 457.

17. U.S.—*Dyer v. Stauffer*, C.C.A. Ohio, 19 F.2d 922, certiorari denied 48 S.Ct. 114, 275 U.S. 551, 72 L.Ed. 421.

18. Ky.—*McFerran v. Jones*, 2 Litt. 219.

Tenn.—*Erwin v. Oldham*, 6 Yerg. 185, 27 Am.D. 458.

19. U.S.—*Home Acc. Ins. Co. v. Berges*, C.C.A.Cal., 30 F.2d 759.

Ill.—*Hart v. Oliver*, 129 N.E. 833, 206 Ill. 209—*Wojtas v. Rachel*, 267 Ill.App. 148.

Mo.—*Buckley v. Maupin*, 125 S.W.2d 820.

Neb.—*Mills v. Heckendorn*, 281 N.W. 49, 135 Neb. 294.

N.Y.—*Gaunt v. Nemours Trading Corporation*, 186 N.Y.S. 92, 194 App. Div. 688.

Ohio.—*Harris v. Cincinnati, H. & D. Ry. Co.*, 5 Ohio N.P., N.S., 173, 15 C.J. p 1385 note 23.

Lex fori

Where an assignment made in one state of a debt due from a resident of another state is, under the law of either state, voidable by the creditors in some form of judicial process, the question whether it should be relieved against on the common-law or the equity side of the court is a question of remedy only, and governed by the *lex fori*.—*Drake v. Rice*, 180 Mass. 410.

20. Ala.—*Most Worshipful Grand Lodge of Alabama A. F. & A. M. v. All-n*, 94 So. 343, 208 Ala. 292, 28 A.L.R. 1043.

Fla.—*Stewart v. Manget*, 181 So. 370, 373, 132 Fla. 498, citing *Corpus Juris*.

15 C.J. p 1385 note 24.

Execution at law

The jurisdiction of equity could not be invoked by creditors' bill to subject property to payment of judgment where property was subject to execution at law.

Ark.—*Newman v. Neel*, 227 S.W. 977, 147 Ark. 439.

Fla.—*Stewart v. Manget*, 181 So. 370, 132 Fla. 498—*George E. Sebring Co. v. O'Rourke*, 134 So. 556, 101 Fla. 885.

Ky.—*Brownsville Auto Co. v. Peaslee Gaulbert Co.*, 46 S.W.2d 1088, 242 Ky. 519.

Tenn.—*Sweetwater Bank & Trust Co. v. Howard*, 13 Tenn.App. 592.

21. Ill.—*Durand v. Gray*, 21 N.E. 610, 129 Ill. 9.

15 C.J. p 1385 note 25.

22. Tenn.—*Hutchins v. Wilson*, 210 S.W. 155, 141 Tenn. 297—*Sweetwater Bank & Trust Co. v. Howard*, 13 Tenn.App. 592.

15 C.J. p 1385 note 26.

23. Mass.—*Orange Hardware Co. v. Ryan*, 172 N.E. 654, 272 Mass. 413.

creditor has a remedy at law, it is incomplete or inadequate,²⁴ he may resort to a court of equity.

Sale of equitable interests on execution. Statutes authorizing the sale of equitable interests on execution, unless they contain a prohibitory or restrictive clause, afford a cumulative remedy merely, and do not deprive the creditor of his right given by a prior statute to go into equity to reach such interests.²⁵

b. Effect of Abolition of Distinction between Law and Equity

Creditors' bills ordinarily are maintainable in those states where the distinction between law and equity has been abolished.

As a rule, in those states where the distinction between law and equity has been abolished and the two systems are merged, creditors' bills nevertheless exist and are entertained by the courts unless they are by statute expressly abolished or supplanted by some other remedy;²⁶ but the rule does not prevail in some states.²⁷

§ 4. — Attachment or Garnishment

In some states the statutory remedies of attachment and garnishment are cumulative with the remedy by creditors' bill, while in others they are exclusive, if adequate. Creditors' bills are not barred by garnishment proceedings which do not come to a trial on the merits.

In some jurisdictions the statutory remedies of attachment and garnishment are held to be cumulative only, and not to take away the remedy by creditors' bill;²⁸ but in several other states the stat-

utory proceedings are held to be exclusive,²⁹ provided the remedy at law in the particular case is adequate.³⁰ Whether or not the remedy by attachment or garnishment is cumulative only, it has been held that a creditor is not entitled to both remedies at the same time, and that, where he has proceeded by attachment or garnishment and that process is still pending, chancery will not entertain jurisdiction;³¹ but it has also been held that garnishment proceedings which do not come to trial on the merits,³² or which are pursued no further than to give warning,³³ do not bar a creditors' bill.

Where the ground of jurisdiction under the statute is the creditor's lack of a remedy at law, the fact that an equitable attachment might have been obtained by a judgment creditor does not bar his remedy by creditors' bill.³⁴

§ 5. — Supplementary Proceedings to Execution

Proceedings supplementary to execution supplant creditors' bills in some states, but not in others. If supplementary proceedings do not afford an adequate remedy, a creditor may in some states maintain a creditors' bill.

The decisions are in conflict as to whether statutory proceedings supplementary to execution oust the jurisdiction of equity to entertain bills to discover and subject choses in action and equitable assets. In some states it is held that the statutory proceedings are exclusive;³⁵ in others it is held that the remedy in equity is not superseded;³⁶ and in yet others it is held that, if for any

24. U.S.—Huff v. Bidwell, Ga., 151 F. 563, 81 C.C.A. 43, appeal dismissed 29 S.Ct. 694, 214 U.S. 528, 53 L.Ed. 1069.

15 C.J. p 1385 note 27.

25. Ill.—McNab v. Heald, 41 Ill. 326.

26. Mich.—Kraft v. Stott, 270 N.W. 253, 278 Mich. 162.

15 C.J. p 1385 note 29.

27. Conn.—Vail v. Hammond, 22 A. 954, 60 Conn. 374, 25 Am.S.R. 330.

28. Hawaii.—Henry Waterhouse Trust Co. v. King, 33 Hawaii 1. 15 C.J. p 1385 note 31.

Interest in royalties on patent

If debtor had a contract with patentee under which patentee was obligated to pay debtor two per cent of royalties received on product covered by patent, debtor had an equitable interest which could be subjected to demand of creditor notwithstanding interest of debtor would be a legal claim which could be reached by garnishment.—Anderton v. Hiter, Ala., 188 So. 904.

29. Mass.—Hooker v. McLennan, 127 N.E. 626, 236 Mass. 117—Stone Leather Co. v. Henry Boston & Sons, 126 N.E. 46, 234 Mass. 477. 15 C.J. p 1386 note 32.

30. Mo.—Cooksey v. Cooksey, App. 200 S.W. 103.

15 C.J. p 1386 note 33.

31. N.Y.—Crosby v. Lumberman's Bank, Clarke Ch. 234.

15 C.J. p 1386 note 34.

32. Or.—Sabin v. Anderson, 49 P. 870, 31 Or. 487.

33. Iowa.—W. A. Jordan Co. v. Sperry, 119 N.W. 692, 141 Iowa 225.

34. Tenn.—Hull v. Vaughn, 107 S.W. 2d 219, 171 Tenn. 642.

35. Colo.—Hexter v. Clifford, 5 Colo. 168.

15 C.J. p 1386 note 37.

In Wisconsin

(1) Under the former practice, supplementary proceedings constituted the only manner of obtaining the relief previously had under a creditors' bill.—Seymour v. Briggs, 11 Wis. 197—Graham v. Lacrosse & M.

R. Co., 10 Wis. 459—In re Remington, 7 Wis. 643.

(2) The remedy by creditors' bill was restored, however, by a subsequent statute.—Clark v. Bergenthal, 8 N.W. 865, 52 Wis. 103—Williams v. Sexton, 19 Wis. 4?—Winslow v. Dousman, 18 Wis. 456—Gates v. Boomer, 17 Wis. 455.

36. Dak.—Feldenheimer v. Tressel, 43 N.W. 94, 6 Dak. 265.

Kan.—Ludes v. Hood, Bonbright & Co., 29 Kan. 49.

Neb.—Monroe v. Reid, 64 N.W. 983, 46 Neb. 316.

N.Y.—Pope v. Cole, 64 Barb. 406, affirmed 55 N.Y. 124, 14 Am.R. 198—Barnes v. Levy, 29 N.Y.S. 1076, 23 N.Y.Civ.Proc. 253.

Utah.—Enright v. Grant, 15 P. 268, 5 Utah 334, affirmed 16 P. 595, 5 Utah 400.

Pendency of proceedings supplementary to execution

(1) Pendency of proceedings supplementary to execution will not preclude the maintenance of a judgment

reason the supplementary proceedings do not afford an adequate remedy, a creditors' bill may be maintained.³⁷

§ 6. Grounds in General

Equity will in a proper case aid a creditor who is unable to collect his debt at law.

Equity will, in a proper case, assume jurisdiction

to aid a creditor who is unable to collect his debt at law.³⁸ To enforce a lien against real estate incumbered by trusts, a judgment creditor must, under some statutes, proceed by bill in equity.³⁹ Where the main object of a creditors' bill is to hold the affairs of several defendants in statu quo until plaintiff can try a suit at law against one of the defendants for damages, the bill is without equity,⁴⁰ but equity may be resorted to when neces-

creditor's suit.—Taylor v. Persse, 15 How.Pr., N.Y., 417.

(2) The creditor may abandon the proceedings if no receiver has been appointed, and commence a creditor's suit.—Bennett v. McGuire, 58 Barb., N.Y., 625, 5 Lans. 183.

In North Carolina it has been held that Code §§ 264-274, relative to proceedings supplementary to execution, is intended to perfect the creditor's remedy in the same action, and that a judgment creditor may, notwithstanding such provisions, prosecute a new and independent suit, instituted and conducted for the benefit of all the creditors against additional defendants whose indebtedness he proposes to call in and subject to the payment of creditors.—Bronson v. Wilmington North Carolina Ins. Co., 85 N.C. 411.

37. Idaho.—Gordon v. Lemp, 65 P. 444, 7 Idaho 677.

In California

(1) Where statutory proceedings supplementary to execution are adequate, a creditors' bill cannot be maintained; but, where statutory proceedings supplemental to execution afford no adequate remedy, relief by creditor's bill is available.—Phillips v. Price, 94 P. 617, 153 Cal. 146.—McCutcheon v. Superior Court in and for Los Angeles County, 24 P.2d 911, 134 Cal.App. 5.—Henderson v. D. S. Denchy Mercantile Co., 191 P. 558, 48 Cal.App. 41.—Smith v. Lehfeltdt, 179 P. 724, 39 Cal.App. 791.—Bonner v. Lehfeltdt, 179 P. 722, 39 Cal.App. 649.

(2) Proceedings supplemental to execution are not adequate remedy when they cannot, in themselves, result in subjecting property to payment of plaintiff's claim.—Bond v. Bulgheroni, 8 P.2d 130, 215 Cal. 7.

(3) They are wholly inadequate when the grantee of a judgment debtor asserts title in himself, since to order the application of property claimed by a person in his own right would be to deprive him of his property on a summary proceeding and without due process.—Bond v. Bulgheroni, supra.

(4) Where judgment creditor claims that title of debtor's transferee is invalid, issue respecting title should be tried in appropriate ac-

tion wherein judgment may be had and parties conclusively bound.—Bond v. Bulgheroni, supra.

38. U.S.—First Nat. Bank v. Blackwell, D.C.Tex., 51 F.2d 282.

Ill.—Kenwood Trust & Savings Bank v. Palmer, 209 Ill.App. 370, affirmed 121 N.E. 186, 285 Ill. 552.

Tenn.—Hull v. Vaughn, 107 S.W.2d 219, 171 Tenn. 642.—Forrest v. Hawkins, 39 S.W.2d 738, 162 Tenn. 658.

Wash.—Bowyer v. Boss Tweed-Clipper Gold Mines, 79 P.2d 713, 195 Wash. 25.

15 C.J. p 1383 note 17.

While court of equity should not obstruct court of law from helping judgment creditor collect his honest obligation, court of equity may assist judgment creditor in collection of his obligation.—Montgomery & Crawford v. Arcadia Mills, 176 S.E. 589, 173 S.C. 464.

Realty subject to constructive trust in favor of purchaser who paid consideration but took title in third person's name constituted purchaser's "assets" within statute relating to property liable for debts, and, in view of fraudulent transfer of other property, court of equity had power to grant relief to person subsequently obtaining personal injury judgment against purchaser.—Duncan v. Laury, 292 N.Y.S. 138, 249 App.Div. 314.

Judgment imposing fine

Under Rev.St. § 1041, providing that a judgment imposing a fine for an offense against the United States "may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced," such a judgment may support a creditors' bill in aid of an execution which has proved fruitless.—Pierce v. U. S., Mo., 257 F. 514, 171 C.C.A. 1, rehearing denied 260 F. 158, 171 C.C.A. 194, certiorari denied 40 S.Ct. 15, 250 U.S. 670, 63 L.Ed. 1199, and modified on other grounds 41 S.Ct. 365, 255 U.S. 398, 65 L.Ed. 697.

Removal of cloud on title

Conveyances for and in the name of a corporation, not void on their face, constituted clouds on title and hindrances to judgment creditors which on their suit in equity the

court would remove.—Dothan Lumber Co. v. Bell Lumber Co., 69 So. 419, 193 Ala. 399.

Bill of discovery

(1) In Texas, under Acts 38th Leg. 1923 c 19, reviving bills of discovery, a bill of discovery will lie in favor of a judgment creditor after return of execution unsatisfied to compel judgment debtor to disclose facts with reference to alleged fraudulent sale, after filing of suit by judgment creditor, and to answer generally as to any property, or interest in any property, then owned by him, out of which plaintiff might satisfy his judgment.—National Compress Co. v. Hamlin, Tex., 269 S.W. 1024, dismissing writs of error Texas & N. O. Ry. Co. v. Wagner, Civ.App., 262 S.W. 902, Mims v. Hunken, Civ.App., 262 S.W. 930, L. B. Price Mercantile Co. v. Moore, Civ. App., 263 S.W. 657, Chapman v. Leaverton, Civ.App., 263 S.W. 1038, International Travelers' Ass'n v. Griffing, Civ.App., 264 S.W. 263, National Compress Co. v. Hamlin, Civ. App., 264 S.W. 488, and Alexander v. Alexander, Civ.App., 265 S.W. 1072.

(2) Bill of discovery to force disclosure of facts that would enable judgment creditor to satisfy a judgment already procured is recognized and permitted where judgment creditor has been unable to find sufficient property of judgment debtor to satisfy judgment.—B. F. Avery & Sons Plow Co. v. Mayfield, Tex.Civ.App., 111 S.W.2d 1134, error dismissed.

39. D.C.—Carroll v. Elkins, 29 F.2d 638, 58 App.D.C. 265.

In Massachusetts a creditor having attached on mesne process in law action all right of heirs in decedent's realty within thirty days, and having brought bill in equity to enforce rights, lien of attachment on share of proceeds belonging to one heir, the debtor more than enough to satisfy the judgment, although changed in form by administrator's sale, never had been dissolved and was enforceable under Rev.L. c 187 §§ 38, 55.—Bartlett v. Moore, 124 N.E. 275, 233 Mass. 481.

40. Fla.—Stewart v. Manget, 181 So. 370, 132 Fla. 498.—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.

sary to enforce collection of an execution issued in an action at law.⁴¹ Whether a general creditors' bill will lie is determined, not so much by the character of the debtor, as by the nature of the relief sought.⁴²

§ 7. Property Not Reachable by Execution

- a. In general
- b. Statutes conferring jurisdiction

a. In General

In some states creditors' bills are maintainable to reach property that cannot be reached by execution at law, while in others such bill will not lie in the absence of a statute authorizing it.

The same conflict that formerly existed in the decisions of English courts as to whether bills in chancery were maintainable to reach choses in action, equitable interests, and other property that cannot be reached by execution at law⁴³ exists in the decisions of the courts in the United States. In a majority of jurisdictions such bills are generally entertained;⁴⁴ but in some states, in the absence of statute, jurisdiction to entertain such bills has been either altogether denied or confined strictly to cases of fraud and trust.⁴⁵

b. Statutes Conferring Jurisdiction

Under many state statutes judgment creditors may maintain proceedings to reach choses in action and other property of their debtors which cannot be reached by execution at law.

In nearly all the states statutes have been enacted, providing that, when an execution has been returned wholly or partly unsatisfied, the judgment creditor may maintain a proceeding against the judgment debtor and any other person to compel the discovery of anything in action, or other property belonging to the debtor, and of any money, thing in action, or other property due to him, or held in trust for him, and to procure satisfaction of the judgment out of such property, or providing for a creditors' bill to reach and apply any such property or right that cannot be attached or taken on an execution at law.⁴⁶ It has been held, however, that, under a statute permitting a creditor to reach any property, etc., of the debtor "which cannot be reached to be attached or taken in execution in an action at law", the inability to reach property means legal inability resulting from the fact that the property is of a nature not attachable or subject to execution, and does not include property which cannot be found, or which, because of its situation, cannot be attached.⁴⁷

41. Mass.—Service Mortg. Corporation v. Welson, 200 N.E. 278.

42. Tenn.—State v. Caldwell, 40 S. W.2d 1036, 163 Tenn. 77.

43. American reviews of English Cases
N.Y.—Hadden v. Spader, 20 John. 554.

15 C.J. p 1383 note 18 [b] (3).

Rule finally adopted by English Courts after some vacillation is that, in the absence of statutory authorization, equity will not take jurisdiction of a bill to reach such property.—Fremont Farmers Union Co-op. Ass'n v. Markussen, 286 N.W. 784, 785, 136 Neb. 567, 123 A.L.R. 1287, citing *Corpus Juris*.

44. N.J.—Baader v. Mascellino, 172 A. 549, 116 N.J.Eq. 126, reversing 166 A. 466, 113 N.J.Eq. 189.
N.C.—Powell v. Howell, 63 N.C. 283—Hook, Skinner & Co. v. Pentress, 62 N.C. 229.

15 C.J. p 1383 note 19.

45. Ill.—W. G. Press & Co. v. Fahy, 145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.

R.I.—Berard v. Blais, 186 A. 475, 478, 56 R.I. 431, citing *Corpus Juris*.

15 C.J. p 1384 note 20.
Property expressly exempt at law see *infra* § 34.

46. Ill.—McCarthy v. Chicago Title & Trust Co., 264 Ill.App. 423.

Ky.—Pioneer Coal Co. v. Asher, 276 S.W. 487, 210 Ky. 498, motion overruled 278 S.W. 833, 212 Ky. 286.

Mass.—Boston Five Cents Sav. Bank v. Trustees of Methodist Religious Soc. in Boston, 4 N.E.2d 315—New England Oil Refining Co. v. Canada Mexico Oil Co., 174 N.E. 330, 274 Mass. 191.

Mich.—Kraft v. Stott, 270 N.W. 253, 278 Mich. 162.

Neb.—Fremont Farmers Union Co-op. Ass'n v. Markussen, 286 N.W. 784, 136 Neb. 567, 123 A.L.R. 1287.

15 C.J. p 1384 note 21.

Independent ground of chancery jurisdiction unnecessary

Under the Nebraska statute it is not necessary to the maintenance of a creditors' suit that some independent ground of chancery jurisdiction, such as fraud or trust, shall exist, but such a suit may be maintained by a judgment creditor to reach any assets of the debtor not immediately subject to execution or garnishment, and which are not exempt by statute or immune on the ground of public policy.—Fremont Farmers Union Co-op. Ass'n v. Markussen, *supra*.

Operation and effect of statutes

(1) Michigan statute authorizing bill in chancery after return of unsatisfied execution on judgment was not intended to restrict inherent jurisdiction of chancery courts, as regards right to maintain creditors'

suit after return of unsatisfied execution on money decree in chancery.—Kraft v. Stott, 270 N.W. 253, 278 Mich. 162.

(2) Equitable jurisdiction of statutory proceeding under Massachusetts statute to reach and apply equitable assets depends not on the nature of plaintiff's debt or cause of action, but on existence of some property which cannot be attached or taken on execution.—Todd v. Pearce, 197 N. E. 156, 291 Mass. 455.

(3) A creditor's bill under Cahill Rev.St.1931 c 22 par 49 is in the nature of an inquisition, the purpose of which is to discover property of the debtor which may be applied to the satisfaction of his debts, and qualitatively and usually quantitatively differs from other proceedings in chancery.—McCarthy v. Chicago Title & Trust Co., 264 Ill. App. 423.

Provisions not in conflict

Statute entitling execution creditor to court order requiring debtor to make discovery concerning his property was held not in conflict with statute authorizing bill in chancery after return of execution unsatisfied, nor does the former statute repeal the latter.—Kraft v. Stott, 270 N.W. 253, 278 Mich. 162.

47. Mass.—H. E. Shaw Co. v. Kar-casinas, 180 N.E. 140, 278 Mass. 397.

§ 8. Property and Rights Subject

Personal property may be reached by creditors' bill. Generally, the rights of a creditor in the debtor's property are no better than the rights of the debtor himself.

Personal property as well as real property may be reached by creditors' bill.⁴⁸ The rights of a creditor as to the property of his debtor are derivative, and generally are no better than the rights of the debtor himself.⁴⁹ With some exceptions, the particular rights or interests which may be subjected to the payment of debts are discussed *infra* §§ 9-34. As to the right to maintain a creditors' bill to enforce liabilities against the separate estates of married women, see the title Husband and Wife § 361, also 30 C.J. p 923 note 33.

§ 9. — After-Acquired Property in General

Property acquired by the debtor after the debt was incurred may be subjected to payment of the debt.

Creditors may look not only to property belonging to the debtor at the time credit was given, but also to property which the debtor subsequently acquired;⁵⁰ but complainant cannot reach property acquired by the debtor after the filing of the bill, without a supplemental bill, as stated *infra* § 67.

§ 10. — Annuities

An annuity ordinarily may be reached by a creditors' bill for the payment of the annuitant's debts.

Ordinarily, an annuity may be reached by a creditors' bill for the payment of the annuitant's debts.⁵¹ Thus, an annuity in lieu of dower, made a charge on real and personal property by will, is subject to a creditors' bill,⁵² as is an annuity to be paid to their mother by the grantees in a deed,⁵³ and an annuity reserved to the assignor in an assignment in trust for the benefit of creditors.⁵⁴ However, it has been held that an annuity created for a debtor by a third person, the debtor having no control over the fund, is not subject to a creditors' bill, although alienable, when such annuity is not more than sufficient for the debtor's support.⁵⁵

§ 11. — Choses in Action in General

In some states, in the absence of statute or of fraud or other ground of equity jurisdiction, choses in action are not subject in equity to the payment of debts, while in others they may be so subjected. In many states, the statutes give such equitable remedy to creditors.

In some jurisdictions it is held that, in the absence of express statutory authorization, choses in action of a debtor cannot be subjected in equity to the payment of his debts,⁵⁶ where there is no fraud, mistake, trust, or other recognized ground of equitable jurisdiction.⁵⁷ In other states, the jurisdiction is sustained.⁵⁸ In many states, by force of statutes, choses in action are reachable in equity for the payment of debts;⁵⁹ but a cause of action which is not assignable cannot be reach-

48. Ark.—Wm. R. Moore Dry Goods Co. v. Ford, 226 S.W. 139, 146 Ark. 227—Wm. R. Moore Dry Goods Co. v. Ford, 225 S.W. 320, 146 Ark. 227.

Ky.—Florence v. Dunagan, 134 S.W. 2d 970, 972, citing *Corpus Juris*.

49. Cal.—Depner v. Joseph Zukin Blouses, 56 P.2d 574, 13 Cal.App. 2d 124.

S.D.—Smith v. First Nat. Bank, 239 N.W. 842, 59 S.D. 320.

50. N.H.—Brahmey v. Rollins, 179 A. 186, 87 N.H. 290.

51. N.Y.—DeGraw v. Clason, 11 Paige 136.
15 C.J. p 1402 note 24.

Annuity derivable from property outside jurisdiction see *infra* § 24.

52. N.Y.—DeGraw v. Clason, *supra*.

53. Ky.—Ellis v. Ellis, 46 S.W. 521, 104 Ky. 121, 20 Ky.L. 438.

54. U.S.—De Hierapolis v. Lawrence, C.C.N.Y., 99 F. 321.

55. N.Y.—Stewart v. McMartin, 5 Barb. 438.

56. Md.—Harford Bank of Bel Air v. Havre de Grace Banking & Trust Co., 169 A. 315, 165 Md. 454.
15 C.J. p 1402 note 28.

Money due debtor by contract

If one renders services for a corporation with understanding between it, him, and his wife that the value thereof shall be paid in additional dividends to his wife, a stockholder, and that he shall receive from her a fair compensation, a creditor of his has no lien on moneys to come to him, either in the hands of the corporation or the wife, but the creditor's remedy is by garnishment, operating only on compensation due and unpaid.—*Most Worshipful Grand Lodge of Alabama A. F. & A. M. v. Allen*, 94 So. 343, 208 Ala. 292, 28 A.L.R. 1043.

57. R.I.—Berard v. Blais, 186 A. 475, 56 R.I. 431.
15 C.J. p 1402 note 29.

58. Ill.—Kinnan v. Charles B. Hurst Co., 148 N.E. 12, 317 Ill. 251.
Ohio.—O'Hara v. Bell, 8 Ohio N.P., N.S., 352.
15 C.J. p 1402 note 30.

Indebtedness of insurer to debtor

Where execution against employer on judgment for injuries was returned unsatisfied, employee was entitled to have indebtedness of liability insurer to employer, arising from its failure to defend suit, applied to payment of his judgment, not on

basis of relation of employer's insurer and employee, but because of rights as judgment creditor.—*Kinnan v. Charles B. Hurst Co.*, 148 N.E. 12, 317 Ill. 251.

59. Mass.—Westminster Nat. Bank v. Graustein, 170 N.E. 621, 270 Mass. 565, certiorari denied *Graustein v. Westminster Nat. Bank*, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 773.

15 C.J. p 1402 note 31.

"Thing in action" defined

Within Chancery Act § 40, authorizing judgment creditor by bill to compel discovery of anything in action due judgment debtor, a "thing in action" is property distinguished from thing of which owner has actual or constructive possession, but for which he may bring action to reduce to possession, and to authorize judgment creditor to bring bill to discover anything in action, due judgment debtor, there must be fixed present right of debtor, and under such section judgment creditor of piano salesman could reach commission on sales of pianos accrued and in hands of debtor's employer from so-called "repeat orders."—*Tumy v. Mayer*, 124 N.E. 661, 289 Ill. 458, af-

ed by a creditor, under a statute authorizing a suit by a creditor to reach and apply to his debt "property, right, title, or interest, legal or equitable."⁶⁰

Proceeds of suit to recover back usurious interest. The proceeds of a suit brought by a judgment debtor to avoid usurious contracts are reachable by a creditors' bill;⁶¹ but the debtor may dismiss or compromise the suit, at his pleasure, regardless of the rights of his creditors.⁶²

Debts in judgment. Demands reduced to judgment may be reached by a creditors' bill.⁶³

§ 12. — Contingent Interest in Estate

Vested interests, even in a contingent right, may be reached by a creditors' bill. There is authority both for and against the right of creditors to subject contingent remainders to the debts of the remainderman.

A vested interest in the proceeds of an estate is subject to the payment of the beneficiary's debts,⁶⁴ but the rule is otherwise if the beneficiary's rights are contingent, and the fund may never be enjoyed by him.⁶⁵ A vested remainder subject to a life estate may be reached by a creditors' bill,⁶⁶ as may a vested interest in a contingent right;⁶⁷ and an interest vesting on the death of the debtor may be reached by bill against his executor.⁶⁸

affirming Tuny v. Mayer, 218 Ill.App. 385.

Breach of agreement to lend money

Right of recovery against trust company for breach of agreement to lend money is a right which cannot be reached, attached, or taken in execution in action at law, and is included within phrase "any property, right, title or interest" in Rev. L. c. 159 § 3 cl. 7.—*Digney v. Blanchard*, 118 N.E. 250, 229 Mass. 235.

Liability for breach of covenant of warranty is "chose in action," and may be enforced by remote grantee as creditor of original grantee under Code Civ. Pract. § 439, after return of execution unsatisfied.—*Pioneer Coal Co. v. Asher*, 276 S.W. 487, 210 Ky. 498, motion overruled 278 S.W. 333, 212 Ky. 286.

60. Mass.—*Bethlehem Fabricators v. H. D. Watts Co.*, 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124.

61. N.Y.—*Boughton v. Smith*, 26 Barb. 635.

62. N.Y.—*Boughton v. Smith*, *supra*.

63. Mass.—*New England Oil Refining Co. v. Canada Mexico Oil Co.*, 174 N.E. 330, 274 Mass. 191—*Orange Hardware Co. v. Ryan*, 172 N.E. 654, 272 Mass. 413. 15 C.J. p 1402 note 39.

Before and after execution

(1) Bill in equity to reach defendant's interest in judgment lies both before and after issuance of execu-

tion on judgment debt with injunction to stay satisfaction of execution.—*Orange Hardware Co. v. Ryan*, *supra*.

(2) Judgment debt is assignable and can be reached by equitable trustee process before issuance of execution.—*Orange Hardware Co. v. Ryan*, *supra*.

Proceeds of judgment

Where creditor brought suit in equity to reach and apply cause of action in favor of debtor in satisfaction of debt, and debtor subsequently obtained judgment on cause of action and proceeds of judgment were paid to attorneys for debtor, proceeds of judgment on cause of action retained by attorneys for debtor under decree of court were available for satisfaction of debt.—*Bethlehem Fabricators v. H. D. Watts Co.*, 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124.

64. N.J.—*Muller v. Cox*, 130 A. 811, 98 N.J.Eq. 188.

65. N.J.—*Muller v. Cox*, *supra*. Contingent interest in insurance policy see *infra* § 21.

66. Wis.—*Arzbacher v. Mayer*, 10 N. W. 440, 53 Wis. 380.

Vested remainder in trust property

Where discovery disclosed that judgment debtor was owner or vested remainder interest in trust property, creditor was entitled to establishment of lien on such remainder

It has been held that a contingent remainder cannot be sold for the benefit of the creditors of the possible remainderman,⁶⁹ but there is authority to the contrary.⁷⁰

§ 13. — Copyright

A creditors' bill will lie to subject a copyright or royalties due or to become due, to the owner's debts.

A copyright may be reached and subjected to its owner's debts by means of a creditors' bill,⁷¹ but the court would be compelled to decree and enforce a transfer in the mode provided by statute.⁷² It has been held that even though an author who has obtained a copyright cannot be deprived by creditors of any of the rights secured by the copyright law, such protection does not extend to the proceeds of the sale of the copyright.⁷³ Royalties due to an author, or to become due on a future accounting, under a publishing contract may be reached by a creditors' bill.⁷⁴

§ 14. — Corporate Stock

Corporate stock owned by a debtor is subject to a creditors' bill.

Stock owned by the debtor in a corporation may be reached by a creditors' bill,⁷⁵ even though the

interest, notwithstanding that discovery involved construction of will.—*Bankers Trust Co. v. Garver*, 268 N.W. 568, 222 Iowa 196.

67. Ill.—*Lay v. Myers*, 181 Ill.App. 614.

Mass.—*Clarke v. Fay*, 91 N.E. 328, 205 Mass. 228, 27 L.R.A., N.S., 454. 15 C.J. p 1405 note 69.

68. N.Y.—*Bergmann v. Leavitt*, 90 N.Y.S. 748, 113 App.Div. 899.

69. Ill.—*Kenwood Trust & Savings Bank v. Palmer*, 121 N.E. 186, 285 Ill. 552, affirming 209 Ill.App. 370. 15 C.J. p 1405 note 71.

70. D.C.—*Bryan v. May*, 9 App.D.C. 383.

Contingency of survival

Contingent remainder to person in existence, contingency being that he survive to named date, may on creditors' bill be reached in satisfaction of debts.—*Crescent City Motors v. Nalaelelua*, 31 Hawaii 418.

71. U.S.—*Stevens v. Gladding, R.I.*, 17 How. 447, 15 L.Ed. 155—*Stephens v. Cady, R.I.*, 14 How. 528, 14 L.Ed. 528.

72. U.S.—*Stephens v. Cady*, *supra*.

73. Ky.—*Cooper v. Gunn*, 4 B.Mon. 594.

74. Ky.—*Cooper v. Gunn*, *supra*. Mass.—*Lord v. Harte*, 118 Mass. 271.

75. Mass.—*Central Mortg. Co. v. Buff*, 179 N.E. 628, 278 Mass. 233—

stockholder is indebted to the corporation.⁷⁶ So, an equitable interest in corporate stock may be subjected to the demands of creditors.⁷⁷ However, a creditor cannot subject to his claim stock purchased with wages of the debtor's emancipated minor son,⁷⁸ nor stock assigned without fraud, even though it has not been transferred formally on the corporate books.⁷⁹ The right of a creditor to subject prospective dividends on stock owned by the debtor is discussed *infra* § 23; Creditors' bills against insolvent corporations are discussed in the title Corporations §§ 679 e, 1431-1444.

§ 15. — Crops

A creditors' bill will lie to subject a debtor's interest in crops.

A debtor's crops raised on a farm carried on in the name of another,⁸⁰ or rented by the debtor,⁸¹ are subject to a creditors' bill.

§ 16. — Debt Due to a Debtor of the Debtor

A debt due to a debtor of the debtor is not subject to a creditors' bill.

A debt due to a debtor of the debtor cannot be reached by a creditors' bill.⁸² However, an insurance agent's interest in an uncollected renewal premium is not a debt due to the insurance company but a debt of the company due to him, and it may be reached.⁸³

§ 17. — Debts Due from United States, State or Municipal or Public Corporations

- a. Debts due from United States
- b. Debts due from state
- c. Debts due from municipal or public corporations

a. Debts Due from United States

Debts due to a debtor from the United States government are subject to a creditors' suit in some cases, but not in others.

It has been held that, where the United States government directs a debt due to a deceased debtor to be paid to his children and heirs, the fund may be subjected to the payment of a judgment against the administrators;⁸⁴ but money in court awaiting distribution to those in whose favor awards have been made in condemnation proceedings instituted by the government cannot be intercepted by means of a creditors' bill, or by an intervening petition in the nature thereof,⁸⁵ and an order directing a judgment debtor to pay to a receiver, to be applied on the debt, all salary received from the government in excess of one hundred dollars a month has been held erroneous as accomplishing indirectly what is forbidden to be done directly by attachment or garnishment.⁸⁶ Money due to a railroad company from the government under the federal statutes, where the obligation of the government is largely undetermined, is not in the hands, possession, or control of the debtor, within the meaning of a statute authorizing creditors' suits to reach and apply money so possessed or controlled.⁸⁷

b. Debts Due from State

A bill in equity will not lie to subject a debtor's salary as a state official, or money due him for materials and services furnished to the state.

A creditor cannot, by a bill in equity, subject the salary of his debtor as a state official⁸⁸ or money due him for materials and services furnished to the state.⁸⁹

c. Debts Due from Municipal or Public Corporations

Some authorities hold that money due to a debtor by a municipal or public corporation may be subjected to

Tremont Trust Co. v. Brand, 138 N.E. 564, 244 Mass. 421. 15 C.J. p 1403 note 41.

What constitutes present ownership

Possibility that court, on creditor's bill to compel transfer of stock in plaintiff corporation, may order specific performance of defendant's agreement to transfer to another defendant, is not present ownership of shares on part of other defendant, or of interest in corporation, within Rev.L. c 159 § 3 cl 7, as amended by St.1902 c 544 § 23, and St.1910 c 531 § 2.—Stone, Timlow & Co. v. Stryker, 119 N.E. 655, 230 Mass. 67.

76. Tenn.—Brightwell v. Mallory, 10 Yerg. 196.

77. Ala.—Anderton v. Hiter, 188 So. 904.

Okl.—Carey v. Winslow, 122 P. 174, 30 Okl. 780.

78. N.J.—Wisner v. Osborne, 55 A. 51, 64 N.J.Eq. 614.

79. N.Y.—Vail v. Craig, 13 N.Y.St. 448.

80. Ala.—Micou v. Moses, 72 Ala. 439.

Ky.—Farmers' Bank v. Morris, 79 Ky. 157.

81. Tenn.—Bourne v. Darden, Ch., 61 S.W. 1078.

82. Ill.—Bullard v. Mason, 217 Ill. App. 401.

Mo.—Jones v. Huntington, 9 Mo. 249.

83. Ill.—Lay v. Myers, 181 Ill.App. 614.

84. N.Y.—Austin v. Tompkins, 3 Sandf. 22.

85. U.S.—U. S. v. Eisenbeis, D.C. Wash., 88 F. 4, affirmed 112 F. 190, 50 C.C.A. 179.

86. D.C.—McGrew v. McGrew, 38 F. 2d 541, 59 App.D.C. 230, certiorari denied 50 S.Ct. 349, 281 U.S. 739, 74 L.Ed. 1153.

87. Mass.—Wilson v. Central Vermont Ry. Co., 131 N.E. 169, 239 Mass. 80.

88. Tenn.—Tennessee Bank v. Di-brell, 3 Sneed 379.

89. Ky.—Divine v. Harvie, 7 T.B. Mon. 439, 18 Am.D. 194.

Mass.—McCarthy Co. v. Rendle, 111 N.E. 39, 222 Mass. 405.

his debts by a creditors' bill, while other authorities hold to the contrary.

The authorities are in conflict on the question whether money owing to a debtor by a municipal or public corporation for work done or materials furnished under a contract or for salary can be subjected by a creditors' bill to the payment of his debts. In some states, a creditor may obtain discovery and relief by a bill with respect to sums due his debtor as an officer of, or a contractor with, a county, city, or town,⁹⁰ or by a bill to subject county warrants payable to the debtor through the hands of the county clerk for work done.⁹¹ In other jurisdictions, such a bill will not lie.⁹² Thus, compensation due to a public officer or employee cannot be subjected to a creditors' bill,⁹³ even though the officer's term of office has expired.⁹⁴ Fees earned by a public officer by the piece or by the job as the work is done may be reached by a judgment creditor, even though the day of payment had not arrived when the bill was filed;⁹⁵ but salary to be earned cannot be reached,⁹⁶ although the contrary has been held as to salary of a city officer not wholly earned or due, where the city council has actually set it apart and ordered it to be paid.⁹⁷ It has been held that, where a bill seeks to reach an amount alleged to be due by a city to a school

board, which can be ascertained only by an accounting, equity has jurisdiction.⁹⁸ A suit does not lie by a judgment creditor to require the debtor to assign to him a claim against a county for bonds and to require the county to deliver the bonds, the only remedy of the debtor against the county being by mandamus.⁹⁹ On the other hand, it has been held that a debtor may be compelled to assign a demand against a city to a receiver, to be collected and applied to the satisfaction of the debt.¹

§ 18. — Dower Interests

An unassigned right of dower is subject to a creditors' bill under some statutes, but such right has been held not subject to payment of debts, in the absence of statute, fraud, or other equitable ground.

In many jurisdictions, it is held that an unassigned right of dower may be reached by a judgment creditor in equity by means of a creditors' bill or other suitable remedy;² but, in those jurisdictions, it is usually provided by statute that courts of equity may decree satisfaction of a judgment out of a thing in action whenever execution has been issued against other property and returned unsatisfied.³ On the other hand, it has been held that unassigned dower rights are not subject to a credi-

90. U.S.—Hinsdale-Doyle Granite Co. v. Tilley, C.C.Ill., 10 F. 799, 10 Biss. 572.

15 C.J. p 1403 note 46.

In Ohio

(1) Money so due may, under special statutory authority, be reached and applied by creditors.—Newark v. Funk, 15 Ohio St. 462.

(2) The contrary rule prevailed before the enactment of the statute.—Boalt v. Williams County Comrs., 18 Ohio 13.

Bill to compel assignment

Creditor's bill in equity to compel the assignment of a debt owed by a county will be allowed, where bill does not interfere with public interest.—Graves Bros. v. Lasley, 78 S.W. 2d 810, 190 Ark. 251.

91. Kan.—Clark v. Bert, 42 P. 733, 2 Kan.App. 407.

92. Ill.—Addyston Pipe & Steel Co. v. City of Chicago, 48 N.E. 967, 170 Ill. 580, 44 L.R.A. 405, affirming 58 Ill.App. 273.

15 C.J. p 1403 note 48.

93. Ala.—Jaffe v. McAdory, 79 So. 391, 202 Ala. 53.

Ill.—Goodwine State Bank v. Wise, 263 Ill.App. 291.

In Missouri

(1) It has been held that, under statute exempting municipal corpo-

rations from garnishment, a wife could not maintain creditors' bill to collect alimony judgment from city employee by appointment of receiver to receive and pay over employee's salary.—State ex rel. Busby v. Cowan, App., 107 S.W.2d 805.

(2) On the other hand, it has been held that, "where a debtor has absconded so that judgment cannot be obtained against him, and has no property in the State subject to attachment, but has money in a city treasury belonging to him, it may be reached by bill in equity, in the first instance, without a previous judgment at law, and without showing fraud or any other recognized ground of equitable jurisdiction. And the fact that cities are not liable under the statutory garnishment will not protect them from such proceeding in equity."—Pendleton v. Perkins, 49 Mo. 565.

(3) So, the statute exempting a municipal corporation from garnishment does not prevent maintenance of a suit in the nature of an equitable attachment to reach funds owing for completed work by a municipal corporation to a foreign corporation which has ceased to do business in the state and has no other property there.—Wilkinson v. Harding Dredge Co., 167 S.W. 595, 180 Mo.App. 571—De Field v. Harding Dredge Co., 167 S.W. 593, 180 Mo.App. 563.

(4) It has been held that a debt due by a municipal corporation for work done under contract may by a creditors' bill be subjected to the satisfaction of judgment against the latter.—Furlong v. Thomssen, 19 Mo. App. 364.

(5) But this latter case is of doubtful authority in view of the decision in Geist v. St. Louis, 57 S.W. 766, 156 Mo. 643, 79 Am.S.R. 545.

94. Ala.—Jaffe v. McAdory, 79 So. 391, 202 Ala. 53.

95. N.Y.—Thompson v. Nixon, 3 Edw. 457.

96. N.Y.—Browning v. Bettis, 3 Paige 568—Thompson v. Nixon, 3 Edw. 457.

97. Ky.—Speed v. Brown, 10 B.Mon. 108.

98. U.S.—New Orleans v. Fisher. La., 91 F. 574, 34 C.C.A. 15, modified on other grounds 21 S.Ct. 347, 180 U.S. 185, 45 L.Ed. 485.

99. U.S.—Smith v. Bourbon County, Kan., 8 S.Ct. 1043, 127 U.S. 105, 32 L.Ed. 73.

1. Minn.—Knight v. Nash, 22 Minn. 452.

2. U.S.—Muir v. Hodges, C.C.Vt., 116 F. 912.

19 C.J. p 537 note 38.

3. Ohio.—Boltz v. Stolz, 41 Ohio St. 540.

19 C.J. p 537 note 40.

tors' bill in the absence of statute, fraud, or other equitable ground.⁴

§ 19. — Equitable Assets or Interests in General

An equitable interest of a debtor may be reached by a creditors' bill; but the bill will not lie to reach assets for which the debtor himself has not an actionable demand enforceable in an action in his own name.

Any beneficial interest of a debtor in real or personal property which cannot be reached by regular process of law and is not expressly exempted by statute may be reached by a creditors' bill and subjected to the payment or satisfaction of the debt;⁵ and only such property may be so reached.⁶ A creditors' bill will not lie to reach assets for

which the debtor himself has not an actionable demand,⁷ and which he cannot recover in an action in his own name.⁸

§ 20. — Good Will

The good will of a business is not subject to a creditors' bill.

A creditors' bill does not lie to reach the good will of a business.⁹ So, where an insurance agency is transferable at the pleasure of the company, it and its good will are not equitable assets which can be reached by bill.¹⁰

§ 21. — Interests in Insurance Policies

The interest of a debtor in a policy on his own life,

4. Md.—Harford Bank of Bel Air v. Havre de Grace Banking & Trust Co., 169 A. 315, 165 Md. 454. 19 C.J. p 537 note 32.

5. Ala.—Anderton v. Hiter, 188 So. 904.

Colo.—Walker v. Staley, 1 P.2d 924. 89 Colo. 292.

Fla.—Hillsborough County v. Dickenson, 169 So. 734, 125 Fla. 181.

Ga.—Citizens' Bank of Moultrie v. Taylor, 117 S.E. 247, 155 Ga. 416.

Hawaii.—Crescent City Motors v. Nalaelua, 31 Hawaii, 418, 424, quoting *Corpus Juris*.

Ky.—Florence v. Dunagan, 134 S.W. 2d 970, 973, citing *Corpus Juris*.

N.Y.—Duncan v. Laury, 292 N.Y.S. 138, 249 App.Div. 314.

N.C.—Dillard v. Walker, 167 S.E. 632, 204 N.C. 67.

Or.—Ruth v. Cox, 291 P. 371, 373, 134 Or. 200, quoting *Corpus Juris*.

Tex.—Binkman v. Tinkler, C.v.App., 117 S.W.2d 139, error refused.

15 C.J. p 1401 note 14.

Right to contribution

An equitable interest of an execution debtor, as a right of contribution, by reason of his payment of more than his share of a judgment against him and others, may be reached by creditors' bill, and subjected to the debt.—Sussex Trust Co. v. Bacon, 102 A. 785, 11 Del.Ch. 380.

Where creditor holds absolute deed as security for debt with bond to reconvey outstanding, and, on debtor's insolvency, takes property in payment of debt, in value exceeding amount of debt, creditors may have such property administered in equity as assets of insolvent, and proceeds applied first to secured debt, and surplus to other claims, which may be done without first tendering to secured creditor payment of his claim.—Kidd v. Kidd, 124 S.E. 45, 158 Ga. 546, 36 A.L.R. 798.

Trust funds

(1) Creditors' bill will lie to reach

funds held in trust by sole legatee for missing judgment debtor.—Muller v. Cox, 130 A. 811, 98 N.J.Eq. 188.

(2) Debtor's interest in trust fund created either by himself or another or in resulting or constructive trust may be reached to satisfy judgment against him by a creditor's bill.—Hillsborough County v. Dickenson, 169 So. 734, 125 Fla. 181.

(3) The interest of one who takes under a will after expiration of a trust and without action on part of the trustee is not within the exception contained in Hurd Rev S. 1915-1916 c 22 § 49, authorizing creditor to reach any money or thing in action due to debtor or held in trust for him, except when such trust has in good faith been created by, or the fund so held in trust has proceeded from, some person other than defendant himself, and, as far as that provision is concerned, may be reached by a creditor's bill.—Kenwood Trust & Savings Bank v. Palmer, 209 Ill. App. 370, affirmed 121 N.E. 186, 285 Ill. 552.

(4) But such statutory exception will prevent the maintenance of a creditors' bill to reach the debtor's vested remainder interest in a trust estate created by a will providing that distribution of the trust's income and corpus to named children of the testator, including defendant, should be made as of a certain subsequent date not yet arrived and in a manner dependent on whether the testator's widow, still living, was alive on such date or whether her death occurred prior or subsequent thereto, especially in view of the spendthrift clause contained in the same will.—Von Kessler v. Scully, 267 Ill.App. 495.

Promise to pay mortgage

Grantee's promise to mortgagor to pay mortgage debt cannot be considered property held in trust for mortgagee so that latter can reach

and apply same in payment of mortgage debt.—Bloch v. Budish, 180 N. E. 729, 279 Mass. 102.

Debtor held to have no equitable interest

Where defendant agreed in writing to buy lands from a third party, the purchase price to be paid in cash and in yearly installments, and entered into possession, but was unable to complete payments, whereupon his wife with her own money took over the contract and paid the amount due, which, with principal and interest, amounted to original purchase price, defendant had no equitable interest in the land subject to sale under a creditor's bill.—Holly v. Grinesville Nat. Bank, 86 So. 444, 80 Fla. 523.

6. Fla.—George E. Sebring Co. v. O'Rourke, 134 So. 556, 559, 101 Fla. 426, citing *Corpus Juris*.

Hawaii.—Crescent City Motors v. Nalaelua, 31 Hawaii 418, 424, quoting *Corpus Juris*.

Or.—Ruth v. Cox, 291 P. 371, 373, 134 Or. 200, quoting *Corpus Juris*. 15 C.J. p 1401 note 15.

7. Ariz.—Ellery v. Cumming, 14 P. 2d 709, 711, 40 Ariz. 512, citing *Corpus Juris*.

Cal.—Depner v. Joseph Zukin Blouses, 56 P.2d 574, 13 Cal.App.2d 124.

Ill.—Tumy v. Mayer, 124 N.E. 661, 289 Ill. 458, affirming Tumy v. Mayer, 213 Ill.App. 385.—Alexander v. Tams, 13 Ill. 221.

Okl.—Roxoline Petroleum Co. v. Wilson, 253 P. 59, 123 Okl. 241.

15 C.J. p 1401 note 16.

8. Cal.—Depner v. Joseph Zukin Blouses, 56 P.2d 574, 13 Cal.App. 2d 124.

Colo.—Noonon v. Stein, 136 P. 1181, 56 Colo. 64.

9. U.S.—Lilienthal v. Drucklieb, C. C.N.Y., 84 F. 918, modified on other grounds 92 F. 753, 34 C.C.A. 657.

10. Miss.—Tierney v. Klein, 6 So. 739, 8 So. 424, 67 Miss. 173.

as well as his interest under a fire policy, may ordinarily be reached by a creditors' bill.

In general, the interest of a debtor in a policy of insurance on his own life may be reached by a creditors' bill,¹¹ whether such interest arises by the terms of the policy or by reason of premiums paid by the debtor in fraud of creditors;¹² and the right of a member of a mutual benefit association to change the beneficiary makes his interest one which can be reached by a creditors' bill.¹³ However, the contingent interest of the insured, dependent on whether he outlives the beneficiary and the policy becomes payable to his estate, is not subject to a creditors' bill by his creditors during the life of the beneficiary, or before the latter's rights have lawfully been terminated.¹⁴ The interest of insured under a fire policy may be reached by a creditors' suit in a court of equity, although the insurer has the right either to pay the loss or to rebuild, and has not elected.¹⁵

§ 22. — Liquor Licenses

A liquor license not transferable without written permission of the excise board is not subject to a creditors' suit.

If, under statutes, a liquor license is not trans-

ferable without written permission of an excise board, it is a mere personal privilege and is not property which can be reached by a creditors' suit.¹⁶

§ 23. — Mere Possibilities

Mere possibilities cannot be reached by a creditors' bill.

A creditors' suit cannot reach mere possibilities,¹⁷ such as the chance that the debtor may be entitled to a share as next of kin in the estate of another should he outlive him;¹⁸ the possibility of earning salary or wages, as stated *infra* § 32; an interest in the profits upon a resale of land purchased by another at the debtor's request, although all the land has been resold except a certain part which represents the profits;¹⁹ or prospective dividends on stock owned by the debtor.²⁰ However, it has been held that, where a debtor was employed as a salesman, his compensation to be a percentage on all accepted orders received by him, he acquired a vested interest, as of the date of the contract, in all orders thereafter received which were subject to his commissions, and that such interest could be reached by a creditors' bill, even though the commissions

11. Mass.—*Anthracite Ins. Co. v. Sears*, 109 Mass. 383.
15 C.J. p 1404 note 64.

Construction and operation of statutes

(1) Where, after insured died, his widow brought several actions in New York on policies insuring his life, such actions were superseded by creditors' suit for the benefit of all insured's creditors to recover the insurance purchased with premiums in excess of five hundred dollars per annum.—*Guardian Trust Co. v. Straus*, 123 N.Y.S. 852, 139 App.Div. 884, affirmed 95 N.E. 1129, 201 N.Y. 546.

(2) A creditor's suit to recover insurance on a debtor's life, purchased with premiums in excess of five hundred dollars per annum, as authorized by Dom.Rel.L. § 22, L.1896 c 272, although brought before the conclusion of the administration of the debtor's estate, was not premature.—*Guardian Trust Co. v. Straus*, *supra*.

(3) Where a creditors' suit to recover insurance purchased on a debtor's life with premiums in excess of five hundred dollars per annum, as authorized by Dom.Rel.L. § 22, L. 1896, c. 272, is brought before conclusion of the administration of the debtor's estate, it must be proved and found that insured died insolvent.—*Guardian Trust Co. v. Straus*, *supra*.

(4) Where a creditor's suit was in-

stituted to recover insurance purchased with premiums in excess of five hundred dollars per annum, prior to the conclusion of the administration of insured's estate, the fund resulting from the payment of the excess premiums should be impounded to await the conclusion of the administration when it should be distributed to the payment of creditors' claims and the balance, if any, then paid to the beneficiary.—*Guardian Trust Co. v. Straus*, *supra*.

Determination of liability

(1) In determining whether deceased's life policies above exemption are subject to debts, each policy is judged on own merits.—*Brasher v. Breen & Gardien Ins. Agency*, 133 So. 698, 223 Ala. 585.

(2) Disposition of proceeds of deceased's policies above exemption must be determined according to rules governing conveyances generally.—*Brasher v. Breen & Gardien Ins. Agency*, *supra*.

Foreign insurer

Under the Massachusetts statute, creditors may maintain a bill to reach and apply a policy on the life of a debtor, assignable by its terms and owned by him, even though the insurer is a foreign corporation.—*Anthracite Ins. Co. v. Sears*, 109 Mass. 383.

Policy assigned by beneficiary

The interest of a wife in a policy of insurance on the life of her hus-

band payable to her in case she survives him, if not, then to his children, the premiums being paid by her husband, is not such a property right as may be reached by a creditors' bill against the wife upon the death of the husband, the wife surviving but having assigned the policy in his lifetime.—*Leonard v. Clinton*, 26 Hun, N.Y., 288—*Smillie v. Quinn*, 25 Hun, N.Y., 332, affirmed 90 N.Y. 492.

12. Ala.—*Fearn v. Ward*, 2 So. 114, 80 Ala. 556. 65 Ala. 33.
15 C.J. p 1404 note 65.

13. N.J.—*Schuhardt v. Wittcke*, 78 A. 570, 76 N.J.Eq. 119, affirmed 78 A. 1135, 78 N.J.Eq. 292.
N.Y.—*Cavagnaro v. Thompson*, 138 N.Y.S. 819, 78 Misc. 687.

14. Minn.—*Murphy v. Casey*, 184 N.W. 783, 150 Minn. 107.

15. Mass.—*Lewenstein v. Forman*, 111 N.E. 962, 223 Mass. 325.

16. N.Y.—*Koehler v. Olsen*, 22 N.Y. S. 677, 68 Hun 63.

17. Ill.—*Lay v. Myers*, 181 Ill.App. 614, 618.
15 C.J. p 1405 note 74.

18. N.Y.—*Smith v. Kearney*, 2 Barb. Ch. 533.

19. Iowa.—*Gray v. Boardman*, 14 N. W. 252, 60 Iowa 205.

20. Ky.—*Bowman v. Breyfogle*, 140 S.W. 694, 145 Ky. 443, Ann.Cas. 1914B 938.

then existed only in possibility, and the amount was uncertain.²¹

§ 24. — Property in Another State in General

Generally a creditors' bill will not lie to reach property in another state.

Unless the statute expressly authorizes it,²² a creditors' suit will not ordinarily lie to reach real property,²³ or property in general,²⁴ in another state, although there is jurisdiction of the person.

§ 25. — Property in Custody of Law in General

It is a general rule, subject to exceptions, that property in custodia legis cannot be reached by a creditors' bill.

Money paid into court cannot generally be reached by a creditors' bill, although the debtor has an interest therein and it is paid into court for his benefit.²⁵ However, the rule that property in custodia legis cannot be reached by a creditor is not a rule strictissimi juris, but is founded on convenience and is subject to exceptions.²⁶ Where a debtor has absconded, money in possession of an administrator as the debtor's distributive share

of decedent's estate may be reached by an action in the nature of a creditor's bill,²⁷ and the fact that the administrator was not subject to garnishment at the time the action was commenced will not protect him from such action.²⁸

§ 26. — Redemption Rights

Redemption rights of a debtor may ordinarily be reached by a creditors' bill.

Both the right of a mortgagor or pledgor of real or personal property to redeem the same on payment of the debt, and the surplus of the property above the amount of the debt, can be reached by a creditors' bill,²⁹ as can also the right of a debtor to redeem property, the legal title to which is in another, upon complying with certain conditions,³⁰ or the proceeds of such property where the holder of the legal title has disposed of it and applied the proceeds to his own use.³¹ It has been held, however, that, in the absence of equitable ground, the mere fact that the lien of a judgment creditor obtained against the grantor subsequently to the making of the security deed cannot be enforced by levy and sale until the grantor's title has become revested by redemption, is insufficient to subject the grantor's interest in the land as an equitable

21. Ill.—Tuny v. Mayer, 213 Ill.App. 385, affirmed Tuny v. Mayer, 124 N.E. 661, 289 Ill. 458.

22. Ala.—Elliot v. Kyle, 57 So. 752, 176 Ala. 187.

15 C.J. p 1401 note 21.

23. Ala.—Lide v. Parker, 60 Ala. 165. 15 C.J. p 1401 note 19.

24. Mass.—Carver v. Peck, 131 Mass. 291.

15 C.J. p 1401 note 20.

However, where a foreign corporation is a debtor to a creditor residing in the commonwealth and has no property there which can be attached, but has in the hands of its agent in the commonwealth promissory notes payable to the corporation, its property in the notes may be reached by a proceeding in equity under the statute, making the agent a party and compelling him to retain the notes to be applied to the discharge of the debt.—Silloway, v. Columbia Ins. Co., 8 Gray, Mass., 199.

Promissory note

In suit seeking to reach and apply promissory note made to defendant's order, where note was in possession of defendant in foreign state but payable in Massachusetts, makers could not be held as trustees under equitable process.—Pond v. Simpson, 146 N.E. 684, 251 Mass. 325.

Annuity payable from property outside of jurisdiction

An annuity, if reachable at all, is

none the less so because it is due from persons, and derivable from property, outside of the jurisdiction of the court, since an assignment made by a person to whom a chose in action belongs is good everywhere.—Frazier v. Barnum, 19 N.J.Eq. 316, 97 Am.D. 666.

In Wisconsin it has been held that a judgment creditor may bring suit to subject to payment of his judgment a note held by a nonresident debtor, made by a resident.—Bragg v. Gaynor, 55 N.W. 919, 85 Wis. 468, 21 L.R.A. 161.

25. U.S.—Buchner v. Vance, C.C.A. Ill., 36 F.2d 774.

Mass.—Moseley v. Moseley, 132 N.E. 417, 240 Mass. 1.

Tex.—Thurber Const. Co. v. Kemplin, Civ.App., 81 S.W.2d 103, 109, citing Corpus Juris.

15 C.J. p 1404 note 60.

Liens and priorities where fund is in court see infra § 84.

Distribution

Where court ordered clerk to pay sum deposited in court to party, but such party returned check to clerk, there was no "distribution" which would defeat a creditors' bill.—Buchner v. Vance, C.C.A.Ill., 36 F.2d 774.

26. Mass.—Adamian v. Hassanoff, 75 N.E. 126, 189 Mass. 194.

15 C.J. p 1404 note 61.

When creditors' bill will lie

Under the inherent jurisdiction of

the chancellor, as well as by virtue of the statute giving chancery court exclusive jurisdiction to aid creditor to subject property of a defendant which cannot be reached by execution, to satisfaction of the judgment or decree, a creditor can bring a bill in equity to subject to the payment of his judgment the judgment debtor's interest in a fund which has been paid into court.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356.

27. Okl.—Johnston v. Byars State Bank, 284 P. 862, 141 Okl. 277.

28. Okl.—Johnston v. Byars State Bank, supra.

29. Mo.—Ball v. Peper Cotton Press Co., 121 S.W. 798, 141 Mo.App. 20. 15 C.J. p 1406 note 90.

Grantor under deed operating as mortgage retains right of possession and right of redemption by payment of debt, and consequently has equitable estate which may be subjected to payment of his debts.

Ga.—Citizens' Bank of Moultrie v. Taylor, 117 S.E. 247, 155 Ga. 416. W.Va.—Harvey v. Shipe, 88 S.E. 830, 78 W.Va. 246.

30. Iowa.—Rankin v. Wilsey, 17 Iowa 463.

31. N.Y.—Bowery Nat. Bank v. Duncan, 12 Hun 405.

asset,³² and that a creditors' bill is not the proper process for a pledgee suing as a judgment creditor to enforce his claim against the pledgor and the property pledged.³³ The right of a debtor to redeem land sold on execution against him within a certain time, and to use it meanwhile, is also proper subject matter for a creditors' bill,³⁴ provided there is no adequate remedy at law.³⁵

§ 27. — Rents

Rents of land may be reached by a creditors' bill under proper circumstances, provided there is no adequate legal remedy.

Under proper circumstances, the court may apply rents of land to the satisfaction of a judgment,³⁶ provided no adequate legal remedy exists by which they may be attached.³⁷

§ 28. — Resulting Trusts

A debtor's interest in property of a resulting trust is usually subject to a creditors' bill for the payment of his debts.

It is a well settled rule of equity that where property is paid for, either with the money or the assets of one person and title thereto is taken in the name of another, in the absence of circumstances showing a different intention or understanding, a resulting trust in the property arises in favor of the person whose money or assets are so used, as stated in the C.J.S. title Trusts § 116, also 65 C.J. p 382 notes 11-14, and his equitable interest in the property may be reached by creditors' bill.³⁸ This rule applies to an interest in a bond conditioned for

the conveyance of land, where the purchase money is paid by the debtor and the bond is taken in the name of another.³⁹ The rule is not altered by the absence of fraud,⁴⁰ nor by the fact that the debtor was not insolvent or indebted to the creditor when the trust arose.⁴¹ Under the statutes in some jurisdictions, however, where a conveyance of land is made to one person and the consideration therefor is paid by another, the title vests in the person named as grantee, and no trust results in favor of the person paying the consideration save under prescribed circumstances, as stated in the C.J.S. title Trusts § 116, also 65 C.J. p 388 note 48 p 390 note 52. It has been held that such statutes preclude a creditor of the person paying the consideration from subjecting the property by a creditors' bill to the payment of the latter's debts, in the absence of fraud, actual or presumed, against creditors.⁴² Where property is conveyed on a trust to pay certain debts of the grantor, satisfaction of a judgment against him on another debt may be decreed out of the surplus remaining in the hands of the grantee.⁴³

§ 29. — Right of Action for Tort

A right of action for a personal tort is not property subject to a creditors' suit; but it is otherwise as to a right of action for conversion of or injury to property.

A mere right of action for a personal tort, such as assault and battery, slander, or malicious prosecution, is not property which can be reached by a creditors' suit.⁴⁴ This rule applies to a claim for personal injuries⁴⁵ or even to a verdict for person-

32. Ga.—First Nat. Bank of Commerce v. McFarlin, 92 S.E. 69, 146 Ga. 717—Virginia-Carolina Chemical Co. v. Rylee, 78 S.E. 27, 139 Ga. 699.

33. Me.—Shaw v. Monson Maine Slate Co., 51 A. 285, 96 Me. 41.

34. Mass.—Judge v. Herbert, 124 Mass. 330.

N.Y.—Farnham v. Campbell, 10 Paige 598.

35. Tenn.—Weakley v. Cockrill, 6 Lea 270, 272, reversing 2 Tenn.Ch. 316.

36. N.Y.—Taylor v. Ellsworth Bldg. Corporation, 183 N.Y.S. 394, affirmed 190 N.Y.S. 954. 15 C.J. p 1406 note 97.

37. Ill.—Fifield v. Gorton, 15 Ill. App. 458.

Mass.—Schlesinger v. Sherman, 127 Mass. 206.

38. Ky.—Florence v. Dunagan, 134 S.W.2d 970, 972, citing Corpus Juris.

N.J.—Husilton v. Dunrie, 77 A. 1042, 77 N.J.Eq. 437. 15 C.J. p 1406 note 2.

Realty subject to constructive trust in favor of purchaser who paid consideration but took title in third person's name constitutes purchaser's "assets" within statute relating to property liable for debts, and, court of equity had power to grant relief to person subsequently obtaining personal injury judgment against purchaser.—Duncan v. Laury, 292 N.Y.S. 138, 249 App.Div. 314.

Specific lien necessary

It has been held that a creditor must have acquired a specific lien by levy or the filing of a transcript on a judgment debtor's interest in land under a resulting trust in order to support a creditors' suit.—Robison v. Gumaer, 95 P. 935, 43 Colo. 310.

In Georgia, it has been held that a creditors' bill does not lie, since the remedy by execution is adequate.—Field v. Jones, 10 Ga. 229.

39. Vt.—Woods v. Scott, 14 Vt. 518.

Where bond is delivered up

Where the debtor made a contract to buy land, and on payment of nearly all the price took a bond for title

in his daughter's name, and thereafter procured such bond to be delivered up to the vendor, it was held that he had such an interest in the land as a court of equity would subject to the claims of creditors.—Gentry v. Harper, 55 N.C. 177.

40. Neb.—Cochran v. Cochran, 87 N.W. 152, 62 Neb. 450.

41. Neb.—Burke v. Tewksbury, 92 N.W. 726, 3 Neb., Unoff., 739. N.J.—Hageman v. Brown, Ch., 72 A. 438, 77 N.J.Law 233.

42. N.Y.—Irving Nat. Bank v. Gray, 160 N.Y.S. 341, 174 App.Div. 29. Remedy of creditors where fraud exists see the C.J.S. title Fraudulent Conveyances §§ 319, 321, also 27 C.J. p 716 note 55—p 717 note 60, p 719 note 81.

43. Vt.—Waterman v. Cochran, 12 Vt. 699.

44. N.Y.—Hudson v. Plets, 11 Paige 180, 3 Leg.Obs. 120.

45. Mass.—White Sewing Mach. Co. v. Morrison, 122 N.E. 291, 232 Mass. 387.

al injuries before judgment has been entered thereon.⁴⁶ However, an assignable⁴⁷ right of action for a tort occasioning injury to property,⁴⁸ or for conversion of property,⁴⁹ even though the converted property has been used to pay a creditor of the debtor,⁵⁰ may be reached by bill in equity, or under statutory provisions analogous thereto.

§ 30. — Rights and Interests of Vendor and Purchaser

The respective rights and interests of a vendor and purchaser under a contract for the sale of land may be reached by a creditors' bill.

A vendor's lien for the unpaid purchase price of real estate is subject to a creditors' bill,⁵¹ and so of purchase money due the vendor,⁵² even though it is payable on a future contingency.⁵³ The equitable interest of a debtor in land under an executory contract of purchase is subject to a creditors' bill.⁵⁴ Where, however, a deed was made by a father to his son, but never acknowledged or delivered, and the son took timber to the full value of the amount which was paid as part of the consideration, upon subsequent rescission of the contract the son has

no interest which can be reached by a creditors' bill.⁵⁵ In some states an option to purchase real estate confers no interest in the land which can be reached by a creditors' bill,⁵⁶ while in others creditors may reach and subject to their claims a debtor's interest in a lease containing an option to purchase at a price fixed by the lease.⁵⁷ An interest in land obtained by a contract resting in parol may be reached in equity where the contract has been fully performed;⁵⁸ but where a part of the consideration for the conveyance of land by a judgment debtor was a parol reservation of the right to occupy the premises for a specified time without payment of rent, it was held that the agreement was void and conferred no interest in the premises on the judgment debtor which could be reached by creditors.⁵⁹ Where a right to a conveyance has been forfeited by the laches of the purchaser in paying the installments due on the purchase price, a bill will not lie in behalf of his creditor to compel the sale of the land and the application of the proceeds to his debts.⁶⁰ A purchaser of land with his own funds, although for the benefit of another person, will be protected against the latter's creditors to the extent of the payment made.⁶¹

Action pending

Claim for personal injuries is not property which can be reached by creditors' bill, and where street railway company's offer to pay certain sum in satisfaction of injured person's claim was not accepted, and his action was pending when bill to reach and apply his damages was filed, his cause of action could not be subjected.—*White Sewing Mach. Co. v. Morrison*, *supra*.

46. Mass.—*Bennett v. Sweet*, 51 N. E. 183, 171 Mass. 600.

47. Mass.—*Bethlehem Fabricators v. H. D. Watts Co.*, 190 N.E. 828, 283 Mass. 556, 93 A.L.R. 1124—*Delval v. Gagnon*, 99 N.E. 1095, 213 Mass. 203.

48. Cal.—*Travis Glass Co. v. Ibbetson*, 290 P. 595, 186 Cal. 724. 15 C.J. p 1402 note 35.

Injury to building contract

(1) Cause of action in tort in favor of building contractor against third persons for damages for unlawful interference with building contract is for damage to specific property, that is, the contractor's building contract, and constitutes "property, right, title or interest, legal or equitable," which could be reached by suit in equity by creditor of building contractor under statute, notwithstanding action was pending and cause of action had not been reduced to judgment.—*Bethlehem Fabricators v. H.*

D. Watts Co., 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124.

(2) Value of such cause of action was ascertainable by sale, appraisal, or by means within ordinary procedure of court within statute authorizing creditors' suit to reach and apply property.—*Bethlehem Fabricators v. H. D. Watts Co.*, *supra*.

49. Cal.—*Travis Glass Co. v. Ibbetson*, 290 P. 595, 186 Cal. 724.

50. Neb.—*German Nat. Bank v. Hastings First Nat. Bank*, 75 N.W. 531, 55 Neb. 86.

51. Ohio.—*Edwards v. Edwards*, 24 Ohio St. 402, 412.

Va.—*Withers v. Carter*, 4 Gratt. 407, 45 Va. 407, 50 Am.D. 78.

52. Ky.—*Kaiser v. Shaw*, 46 S.W. 524, 104 Ky. 119, 20 Ky.L. 568, 81 Am.S.R. 450.

53. Minn.—*Fryberger v. Breven*, 92 N.W. 1125, 88 Minn. 311.

54. Ala.—*Opelika Bank v. Kiser*, 24 So. 11, 119 Ala. 194. 15 C.J. p 1407 note 11.

Interest subject to execution

(1) In Illinois, under a statute authorizing the creditor to file a bill to reach any property or thing in action due to, or held in trust for, the debtor, a bill may be filed to reach the interest of the debtor in land under an unfulfilled contract of purchase, notwithstanding a statute providing that such interest may

be sold as real estate on an execution.—*McNab v. Heald*, 41 Ill. 326.

(2) In Nebraska, an interest in land derived through an agreement for sale, although of an equitable nature, may be sold under an ordinary execution, and the creditor will not be permitted to resort to equity to reach it, unless the interest is shown "to be indefinite in its character or extent, or so clouded by apparent but really fraudulent or unreal adverse claims as would render the title of a purchaser at execution sale uncertain."—*Rosenfeld v. Chada*, 10 N.W. 465, 12 Neb. 25, 27.

55. Tenn.—*Miller v. Winton*, Ch. App., 56 S.W. 1049.

56. Iowa.—*Sweezy v. Jones*, 21 N. W. 603, 65 Iowa 272.

57. Mass.—*Eastern Bridge, etc., Co. v. Worcester Auditorium Co.*, 103 N.E. 913, 216 Mass. 426.

58. Ohio.—*Waggoner v. Speck*, 3 Ohio 292.

59. N.Y.—*Crouse v. Frothingham*, 97 N.Y. 105, reversing 27 Hun 123.

60. Mass.—*Fuller v. Hovey*, 2 Allen 324, 79 Am.D. 732.

61. Ala.—*McCarty v. Robinson*, 130 So. 680, 232 Ala. 55.

Creditors of person using land

Purchaser paying with own funds is entitled to let any one use land, and user's creditor is not thereby prejudiced.—*McCarty v. Robinson*, *supra*.

§ 31. — Rights Arising from Improving Land of Another or Paying Encumbrances Thereon

A creditors' bill may lie to reach interests arising from improving, or paying encumbrances on, the land of another.

A creditors' bill will lie to reach improvements made by the debtor on the real estate of another.⁶² The interest of an insolvent husband in improvements made by him upon real estate of his wife⁶³ or of an insolvent, father in improvements made on the land of his infant son of whom he is guardian,⁶⁴ or of an insolvent son on improvements made on the land of his father,⁶⁵ is subject to a creditors' bill for payment of the prior indebtedness of the husband or father, provided the improvements were made with fraudulent intent and the landowner participated therein.⁶⁶ This is also true of sums expended by an insolvent husband in paying encumbrances on property conveyed to his wife.⁶⁷

The rights of creditors generally in improvements made by a debtor on lands of another in fraud of creditors are discussed in the C.J.S. title *Fraudulent Conveyances* § 23, also 27 C.J. p 431 note 48-p 432 note 50. As stated *infra* § 33, the right of a cotenant to reimbursement from his cotenants for improvements cannot be reached by creditors, at least before partition. The right of creditors to reach the purchaser's equitable interest in land conveyed to another is discussed *supra* § 28.

§ 32. — Salary

Salaries earned before filing a creditors' bill may be reached thereby; but unearned salaries, or salaries assigned before the filing of the bill, cannot be reached.

Salary completely earned before the filing of

the bill by performance of all services required to entitle the debtor thereto may be subjected to the payment of his debts,⁶⁸ although not payable when the bill is filed;⁶⁹ but unearned salary is not reachable, since neither the creditor nor the court could compel the debtor to work out his part of the contract and earn the salary for the use of the creditor;⁷⁰ and salary assigned before the filing of the bill cannot be reached.⁷¹

The right of creditors to reach the salary due a public officer has been discussed *supra* § 17.

§ 33. — Undivided Interests in General

An undivided interest in notes and a mortgage is subject to a creditors' bill; but such bill does not lie to subject real estate owned jointly. The right of a cotenant to reimbursement for improvements on the land cannot be reached by a creditors' bill, at least before partition.

It has been held that an undivided interest in notes and a mortgage is subject to a creditors' bill,⁷² but that a bill does not lie to subject real estate owned jointly, since the remedy at law is adequate.⁷³ The right of a cotenant to reimbursement from his cotenants for improvements made on the land cannot be reached by creditors' bill, at least not in advance of partition.⁷⁴

§ 34. — Other Interests or Rights

Various other property rights or interests have been held subject or not subject to a creditors' bill, according to their character and the particular circumstances of the case.

A creditors' bill will not lie to reach and compel a debtor to appropriate money that he has obtained by mortgage and which he has in his possession to the payment of his debt;⁷⁵ but an equitable interest in money in possession of another may in a proper case be subjected.⁷⁶ A note se-

62. Pa.—Curtis v. Olds, 95 A. 526, 250 Pa. 320.

Va.—National Valley Bank v. Hancock, 40 S.E. 611, 100 Va. 101, 93 Am.S.R. 933, 57 L.R.A. 728.

63. Me.—Trefethen v. Lynam, 38 A. 335, 90 Me. 376, 60 Am.S.R. 271, 38 L.R.A. 190.

15 C.J. p 1407 note 13.

64. Ky.—Athey v. Knotts, 6 B.Mon. 24.

65. Ky.—Roach v. Royal, 8 Ky.L. 609.

66. Tex.—Maddox v. Summerlin, 49 S.W. 1033, 50 S.W. 567, 92 Tex. 483.

15 C.J. p 1407 note 16.

67. N.J.—Farr v. Hauenstein, 61 A. 147, 69 N.J.Eq. 740.

68. Mo.—State ex rel. Busby v. Cowan, App. 107 S.W.2d 805, 807, 15 C.J. p 1407 note 19.

69. Mo.—State ex rel. Cowan v. Busby, supra, quoting *Corpus Juris*.

15 C.J. p 1407 note 19.

70. Mo.—State ex rel. Busby v. Cowan, supra, quoting *Corpus Juris*.

15 C.J. p 1407 note 20.

71. N.Y.—Ireland v. Smith, 1 Barb. 419, 3 How.Pr. 244.

72. Ala.—Martin v. Carter, 7 So. 510, 90 Ala. 96.

73. Iowa.—Kalona Sav. Bank v. Bash, 109 N.W. 887, 133 Iowa 190.

74. Ill.—Beam v. Scroggin, 12 Ill. App. 321.

75. Tenn.—Webb v. Jones, 13 Lea 200.

76. Okl.—Indian Land, etc., Co. v. Owen, 162 P. 818, 63 Okl. 127.

Money not subject

(1) Where, at time of execution of contract for sale of standing timber by several owners, one of owners was indebted to another and payments on debtor-owner's share of purchase price of timber were made to creditor-owner pursuant to written contract, prior judgment creditor of debtor-owner was not entitled to recover amount of payments from executor of creditor-owner, where total amount of payments was less than amount due creditor-owner.—Yates v. Cockerham, 87 P.2d 269, 156 Or. 245.

(2) Where one of several vendors of standing timber foreclosed mort-

cured by deed of trust belonging to a judgment debtor may be subjected in equity to the satisfaction of the judgment, and a sale under the trust deed ordered to pay it;⁷⁷ but a creditor cannot reach a note or mortgage made to the debtor who held the record title to the mortgage and had assigned the note and mortgage to the real owner without recording the assignment.⁷⁸

Exempt property. Property expressly exempted at law from execution cannot be reached by a creditors' bill.⁷⁹

Patents and royalties. The interest of a debtor in letters patent may be reached by proper proceedings in equity and subjected to the payment of his debts;⁸⁰ this is not so, however, in the case of an unpatented invention.⁸¹ Royalties under a license contract may be reached by a creditors' bill,⁸² and a license to use a patented invention may be subjected to the payment of a judgment against the licensee for nonpayment of royalties;⁸³ but a contract with the nonresident owner of a patent for payment of royalties in the future cannot be reached by a creditors' bill against the owner of the patent who is not personally served in the state.⁸⁴ Where a patentee transfers his patent in fraud of creditors and the assignee receives shares of stock in a corporation organized on the basis of the patent, the shares are subject to the claims

of creditors.⁸⁵

Pension money. Pension money, after it reaches the debtor, is not exempt, and land purchased therewith, the title to which is fraudulently taken in the name of the pensioner's wife, may be reached by a creditors' bill.⁸⁶

Property of Indians. Personal property owned by Indians by blood can be reached by a creditors' suit and put in the hands of a receiver.⁸²

Right of turnpike company to levy assessment. Where a turnpike company has power to assess property to pay for construction and to return the assessment for collection by the sheriff, a creditor whose claim is incurred in the construction may invoke the aid of equity, after a return of "no property," for collection and appropriation of the tax to payment of his claim.⁸⁸

Membership in exchange or club. In some cases it is held that a membership or seat in a stock exchange or a merchants' exchange, which has a money value and is transferable subject to the election of the purchaser as a member and to the rules of the exchange, is property subject to a creditors' bill.⁸⁹ Other authorities maintain that such a seat is not property but a mere license or privilege to participate in the transactions of the exchange, and therefore cannot be subjected to claims of creditors,⁹⁰ especially where the rules

gage on lands belonging to another vendor and bid such lands in at foreclosure sale, prior judgment creditor of vendor whose land was mortgaged would not be entitled to money received by vendor who foreclosed mortgage and his executor under contract for sale of timber to be applied on judgment, where, after foreclosure and sale, timber on foreclosed lands was cut, removed, and paid for by buyer, and moneys distributed as if no foreclosure had been had, and foreclosed lands without timber were of but little value, and transaction with all sums paid was insufficient to satisfy indebtedness owed to vendor holding mortgage.—*Yates v. Cockerham*, supra.

Condemnation award

If debtor had conveyed land before condemnation thereof, debtor's creditor could not have part of condemnation judgment applied to satisfaction of creditor's judgment, as against contention that mortgagee of debtor's transferee had no right to collect the condemnation judgment because its trust deed was not executed until after condemnation judgment was rendered.—*Faxton v. Gubbins*, 21 N.E.2d 300, 371 Ill. 435.

77. Miss.—*Cohen v. Carroll*, 13 Miss. 545, 45 Am.D. 267.

78. Mass.—*O'Gasapian v. Danielson*, 187 N.E. 107, 284 Mass. 27, 89 A.L.R. 1159.

79. Neb.—*Pawnee City First Nat. Bank v. Hazels*, 89 N.W. 378, 63 Neb. 844, 56 L.R.A. 765.
15 C.J. p 1404 note 53.

Money due on promissory note

Under Rhode Island statute, judgment creditor could not by creditor's bill reach money due debtor upon third persons' promissory note without alleging fraud or trust, since statute exempting from attachment debts secured by notes specifically exempts such debts from reach of creditor's bill, as against creditor's construction of statute that reason for exemptions was to protect debtor in necessities of life and not from payment of just debts.—*Berard v. Blais*, 186 A. 475, 56 R.I. 431.

80. Mass.—*Wilson v. Central Vermont Ry. Co.*, 131 N.E. 169, 239 Mass. 80.
15 C.J. p 1405 note 81.

Equitable interest

Bill alleging that patent had been issued to another and that, although it stood in the name of the other, debtor owned a two per cent in the patent alleged an equitable interest of the debtor in the patent which

could be subjected to demand of creditor.—*Anderton v. Hiter*, Ala., 188 So. 904.

81. U.S.—*In re Dann*, D.C.Ill., 129 F. 495.

N.Y.—*Gillett v. Bate*, 86 N.Y. 87, 10 Abb.N.Cas. 88.

82. Mass.—*Lord v. Harte*, 118 Mass. 271.

83. U.S.—*Matthews v. Green*, C.C. Pa., 19 F. 649.

84. Minn.—*P. H. & F. M. Roots Co. v. Decker*, 127 N.W. 417, 111 Minn. 458.

85. Ill.—*Beidler v. Crane*, 25 N.E. 655, 135 Ill. 92, 25 Am.S.R. 349.

N.Y.—*Gillett v. Bate*, 86 N.Y. 87, 10 Abb.N.Cas. 88.

86. Ky.—*Johnson v. Elkins*, 13 S.W. 448, 90 Ky. 163, 11 Ky.L. 967, 8 L.R.A. 552.

87. Ind.T.—*Daugherty v. Bogy*, 53 S.W. 542, 3 Ind.T. 197.

88. Ky.—*Halbert v. Vanceburg, etc., Turnp. Road Co.*, 11 Ky.L. 721.

89. Mo.—*Eliot v. Merchants' Exch.*, 14 Mo.App. 234.

N.Y.—*Ritterband v. Baggett*, 42 N.Y. Super. 556, 4 Abb.N.Cas. 67.

90. Ill.—*W. G. Press & Co. v. Fahy*,

of the exchange provide that, in case a member becomes insolvent, his seat shall be sold and the proceeds applied to the payment of his debts to other members.⁹¹ So it has been held that membership in an exchange may be reached by a creditors' bill only where the court can compel an involuntary transfer.⁹² Club membership is not property in the broad sense and cannot be reached by creditors' bill.⁹³

§ 35. Creditors Entitled to Relief

- a. In general
- b. Assignor and assignee
- c. Persons entitled by subrogation

a. In General

Various creditors have been held to be competent to maintain a creditors' suit.

Various creditors have been held to be competent to maintain a creditors' suit,⁹⁴ although, as is shown in § 43 *infra*, ordinarily the suit may not be brought by a general creditor.

Under a statute authorizing general or judgment creditors to file a bill for discovery of assets, and permitting any number of creditors to join as complainants, relief may be granted, although the claims of some of the complainants contain waivers of exemption.⁹⁵ A judgment creditor will not be denied the right to bring a creditors' bill because he is not beneficially interested where the interested person does not controvert his right to maintain the bill.⁹⁶

A judgment creditor is not precluded from maintaining a bill to reach a fund belonging to the debtor because there are other creditors having a superior right to the fund, where they are taking no steps to assert that right;⁹⁷ nor by the fact that a receiver has been appointed for the debtor

who might assert a right to the fund for the benefit of all creditors where the receiver is not doing so.⁹⁸

The rule that a cestui que trust suing in his own name must explain why the suit is not brought by the trustee does not apply to a creditor who seeks by subrogation to take advantage of the existence of a deed given to trustees to secure indorsers on the debtor's notes, including plaintiff's, where the sole duty of the trustees is to hold the property until defeasance, and they have no power over it or authority to foreclose.⁹⁹

Creditor of deceased debtor. As is explained in the C.J.S. title Executors and Administrators § 473, also 24 C.J. p 455 note 81, the creditor of a deceased debtor may file a creditors' bill.

Parties plaintiff in creditors suits are considered in § 55 *infra*.

b. Assignor and Assignee

The assignor of a judgment ordinarily may not maintain a creditors' bill, but such a bill may be maintained by an assignee.

Ordinarily a creditor who has assigned his judgment may not maintain a creditor's suit thereon,¹ except by agreement with the assignee.² This rule applies to a creditor who assigns his judgment as collateral security where it does not appear by the bill that the assignee has neglected or refused to sue under circumstances calculated to prejudice the rights of the assignor.³

Where complainant assigns his claim pending the action, the suit may not be continued in his name on behalf of the other creditors if the assignee demands its discontinuance.⁴

Where the bill alleges ownership in the assignor, the fact that one defendant has become the assignee will not enable the assignor to maintain

145 N.E. 103, 313 Ill. 262, affirming 231 Ill.App. 193.

15 C.J. p 1408 note 24.

91. Pa.—Pancoast v. Gowen, 93 Pa. 66—Evans v. Adams, 81½ Pa. 443.

92. N.Y.—Ulmann v. Thomas, 175 N.E. 192, 255 N.Y. 506, affirming 243 N.Y.S. 771, 229 App.Div. 855, and reargument denied 177 N.E. 156, 256 N.Y. 598.

93. Ill.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426, reversing 252 Ill. App. 298, transferred, see 163 N.E. 707, 332 Ill. 316.

94. Insolvent creditor

The insolvency of a creditor is no objection to a bill filed by him in

behalf of himself and other creditors.—White v. Russell, 79 Ill. 155.

Motive of creditor

A creditor's right to maintain a bill to reach equitable interests of the debtor in corporate stock is not affected by the fact that he is prompted to bring the suit by other stockholders who, with him, desire to gain control of the corporation.—McMullen v. Ritchie, C.C.Ohio, 64 F. 253, modified on other grounds 79 F. 522, 25 C.C.A. 50.

95. Ala.—Etheridge v. Swann—Abrams Hat Co., 41 So. 465, 147 Ala. 535.

96. Va.—Hale v. Horne, 21 Gratt. 112, 62 Va. 112.

15 C.J. p 1408 note 34.

97. Ill.—McMannomy v. Chicago, D. & V. R. Co., 47 N.E. 712, 167 Ill. 497, reversing 63 Ill.App. 259.

98. Ill.—McMannomy v. Chicago, D. & V. R. Co., *supra*.

99. U.S.—D. A. Tompkins Co. v. Catawba Mills, C.C.S.C., 82 F. 780.

1. N.Y.—Gitler v. Russian Co., 106 N.Y.S. 886, 55 Misc. 553, reversed on other grounds 108 N.Y.S. 793, 124 App.Div. 273.

2. N.Y.—Hathaway v. Scott, 11 Paige 178.

3. Mich.—Andrews v. Kibbee, 12 Mich. 94, 83 Am.D. 766.

4. N.Y.—Hirshfeld v. Fitzgerald, 51 N.E. 997, 157 N.Y. 166, 46 L.R.A. 839, reversing 50 N.Y.S. 676, 27 App.Div. 180.

the bill, as the evidence showing the assignment would also show that he had no right of action.⁵

Where a creditor assigns all interest in a judgment to a third person prior to the filing of the bill, the defense must be made by plea or answer, and defendant cannot afterward have the bill dismissed if complainant within a time limited by the court files a supplemental bill to bring the assignee before the court;⁶ but where the suit is properly commenced, and thereafter complainant assigns his judgment either in whole or in part, defendant may apply to the court to have the bill dismissed unless the assignee, within a prescribed time, be brought in by supplemental bill.⁷

Assignee. An assignee may maintain a creditors' bill,⁸ and, as is observed in § 55 *infra*, in some jurisdictions the bill may be maintained by the assignee in his own name without joining the assignor.

Consideration for assignment. Where the bill is filed by the assignee of the judgment, the consideration for the assignment may not be questioned by defendant;⁹ nor can defendant set up that the assignment was made in fraud of the creditors of the assignor.¹⁰ So the assignee of a note on which judgment has been recovered may maintain a bill in his own name, although the assignment was merely for the purpose of vesting the legal title in him without conferring any beneficial interest.¹¹

c. Persons Entitled by Subrogation

The authorities are in conflict on the questions whether a creditors' suit may be maintained by a surety or indorser who has paid a judgment or by a purchaser whose money has been used to pay lien creditors.

Where a surety or an indorser pays a judgment

against himself and the principal, he becomes subrogated to the rights of plaintiff in the judgment, see the C.J.S. title Subrogation § 47, also 60 C.J. p 740 note 6 *et seq.*, and it has been held that the surety or indorser is entitled to go into equity to enforce the judgment without obtaining any other judgment.¹² However, this rule does not prevail in all states.¹³

Furthermore, it has been held that where a purchaser under a void decree, on disaffirmance of the sale, has been substituted to the rights of creditors whose liens his money has paid, he may maintain a bill to enforce such rights, and, as incident to the relief sought, may make his bill a creditors' bill;¹⁴ but there is authority to the contrary.¹⁵

Since a creditor is entitled to the benefit of any security given by the principal to a surety for the payment of the debt, he is entitled to maintain a creditors' bill to reach such security.¹⁶

§ 36. Persons against Whom Relief Obtainable

Unless authorized by statute, a creditors' bill may not be filed against a nonresident or against a county.

A creditors' suit may be filed only against proper persons.¹⁷

Although the property sought to be subjected is within the jurisdiction of the court, a court of equity may not proceed as against a nonresident, unless it is empowered to act in rem under enabling statutes.¹⁸

A court of equity may assume jurisdiction of a bill filed by a nonresident plaintiff against a nonresident debtor if there be also a resident debtor.¹⁹

5. Mich.—Andrews v. Kibbee, 12 Mich. 94, 83 Am.D. 766.

6. N.Y.—Hathaway v. Scott, 11 Paige 173.

7. N.Y.—Hathaway v. Scott, *supra*.

8. Mass.—Westminster Nat. Bank v. Graustein, 170 N.E. 621, 270 Mass. 565, certiorari denied Graustein v. Westminster Nat. Bank, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 773.

15 C.J. p 1408 note 39. Necessity of issuing new execution after assignment of judgment see *infra* § 47 a.

9. U.S.—Jahn v. Champagne Lumber Co., C.C.Wis., 157 F. 407, 147 F. 631, affirmed 168 F. 510, 93 C.C. A. 532.

10. Mich.—Morey v. Forsyth, Walk. 465.

11. Ill.—Atkinson v. Foster, 25 N.E. 528, 134 Ill. 472.

12. N.Y.—Cuyler v. Ensworth, 6 Paige 32.

15 C.J. p 1409 note 50.

13. Ohio.—Horst v. Dague, 34 Ohio St. 371.

14. W.Va.—Hull v. Hull, 13 S.E. 49, 35 W.Va. 155, 29 Am.S.R. 800.

15. N.C.—Frost v. Reynolds, 39 N. C. 494.

16. U.S.—D. A. Tompkins Co. v. Catawba Mills, C.C.S.C., 82 F. 780.

17. **One having set-off against debtor**

A creditors' bill does not lie against one having funds of the debtor in his hands when he has a set-off on a claim against the debtor to the full amount.—Bonte v. Cooper, 90 Ill. 440.

Successor in interest

A grain elevator company holding the property of a ventilating com-

pany, such ventilating company having installed a grain drying apparatus for the elevator company's predecessor, will not be heard in equity to insist that the ventilating company should not be permitted to prosecute its action based on a valid judgment against the predecessor of the elevator company to cancel conveyances by the elevator company's predecessor as a cloud on title to the realty, or to declare the judgment thereon.—Hess Warming & Ventilating Co. v. Burlington Grain Elevator Co., 217 S.W. 493, 280 Mo. 163.

18. Mass.—Moody v. Gay, 15 Gray 457.

Miss.—Zecharie v. Bowers, 9 Miss. 584, 40 Am.D. 111.

19. Miss.—Comstock v. Rayford, 9 Miss. 423, 40 Am.D. 102.

The fact that the principal debtor is a nonresident and cannot be served does not oust the jurisdiction to decree against resident defendants such relief as may be proper against them alone.²⁰

Counties. Where suits against counties are placed on the same footing as those against individuals, see Counties § 319, a creditors' bill may be filed against them or their designated representatives;²¹ but in the absence of statutory authority a county may not be thus sued.²²

Parties defendant in a creditors' suit are considered in § 57 infra.

§ 37. Form of Remedy

As is explained in § 53 infra, a court of equity ordinarily has jurisdiction of a creditors' suit. Examine Pocket Parts for later cases.

§ 38. Conditions Precedent in General

To maintain a creditors' suit there must be a compliance with the prescribed conditions precedent.

To maintain a creditors' suit the various conditions precedent, discussed in §§ 40-49 infra, must be complied with.²³

In Corporations § 1438 are considered the conditions precedent in a creditors' suit against a corporation, and the conditions precedent to an action to set aside a fraudulent conveyance are discussed in the C.J.S. title Fraudulent Conveyances §§ 326-336, also 27 C.J. p 723 note 19-p 747 note 69.

§ 39. Exhausting Remedies at Law

As is explained in § 41 infra, a creditor ordinarily must exhaust his remedies at law in order to maintain a creditors' bill. Examine Pocket Parts for later cases.

§ 40. Acknowledgment or Establishment of Debt in General

For purposes of a creditors' bill the acknowledgment of the debt is equivalent to its establishment by judgment.

As is explained in § 43 infra, ordinarily a judgment at law is a prerequisite to the maintenance of a creditors' suit. However, in some cases it has been held that the admission or acknowledgment of the debt is equivalent to its establishment by a judgment.²⁴ In other words, the objection that complainant's claim has not been reduced to judgment is one which can be raised only by defendant, and may be waived by failure to set it up.²⁵

§ 41. Exhausting Ordinary Legal Remedies in General

As a condition precedent to the maintenance of a creditors' bill, a creditor ordinarily must exhaust his remedies at law.

Ordinarily, before a creditor seeking to subject property of the debtor not seizable on execution to the payment of his debt will be assisted in equity, he must have exhausted the remedies afforded him by courts of law.²⁶ However, it has been held that a lien creditor may bring a creditors' bill without having first exhausted his remedies at law.²⁷ Statutes requiring the exhaustion of legal

20. U.S.—Plume & Atwood Mfg. Co. v. Baldwin, C.C.N.Y., 87 F. 785.

21. U.S.—Lyle v. St. Clair County, C.C.Mich., 15 F.Cas.No.8,621, 3 McLean 580.

22. Ohio.—Boalt v. Williams County Comrs., 18 Ohio 13.
15 C.J. p 1417 note 76.

23. Utah.—Enright v. Grant, 15 P. 268, 5 Utah 334.

24. U.S.—Hatch v. Morosco Holding Co., C.C.A.N.Y., 50 F.2d 133, affirming, D.C., 34 F.2d 579, and certiorari denied Irving Trust Co. v. U. S., 52 S.Ct. 42, 284 U.S. 668, 76 L.Ed. 565.

Okl.—Owen v. General American Oil Co., 3 F.2d 184, 151 Okl. 216.
15 C.J. p 1390 note 71.

25. U.S.—Union Trust Co. of Pittsburgh, Pa., v. Jones, C.C.A.W.Va., 16 F.2d 236.
15 C.J. p 1390 note 72.

Waiver of objection based on adequacy of remedy at law see infra § 41.

26. U.S.—Pusey & Jones Co. v. Hanssen, Del., 43 S.Ct. 454, 261 U.S. 491, 67 L.Ed. 763, reversing, C.C.A., 279 F. 488, affirming, D.C., Hanssen v. Pusey & Jones Co., 276 F. 296—People's-Pittsburgh Trust Co. v. Hirsch, C.C.A.Pa., 65 F. 2d 972—First Nat. Bank v. Blackwell, D.C.Tex., 51 F.2d 282.

Cal.—Delaney Producing & Refining Co. v. Crystal Petroleum Products Corporation, 264 P. 521, 88 Cal.App. 784.

D.C.—Jordan v. Latrobe, 67 F.2d 255, 62 App.D.C. 295.

Fla.—Holly v. Gainesville Nat. Bank, 86 So. 444, 80 Fla. 523.

Kan.—Union Nat. Bank of Wichita v. Ternes, 204 P. 699, 110 Kan. 475.

Md.—Kinsey v. Drury, 119 A. 646, 141 Md. 684.

Mo.—Buckley v. Maupin, 125 S.W.2d 820—Dalton v. Barron, 239 S.W. 97, 293 Mo. 36, 22 A.L.R. 187.

Neb.—Riggs v. Hoch, 274 N.W. 598, 133 Neb. 270—Thies v. Thies, 198 N.W. 151, 111 Neb. 805.

N.Y.—Farjeon v. Fulton Securities Co., 233 N.Y.S. 577, 235 App.Div. 541—Taylor v. Ellsworth Bldg. Corporation, 183 N.Y.S. 394, affirmed 190 N.Y.S. 954.
15 C.J. p 1387 note 47.

Joint debtors

In order to proceed against the property of one joint debtor the creditor must exhaust his legal remedy against all of the others.—Brown v. Benson, 224 Ill.App. 283.

27. U.S.—Tennessee Pub. Co. v. Carpenter, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.

"A creditor's bill must be predicated upon a specific attachment lien or upon a judgment, with the possible exception of certain special cases where it is sought to reach property transferred under threat of transfer in fraud of creditors."—Dupont v. Moore, 116 A. 417, 418, 86 N.H. 254.

remedies before resorting to equity must be strictly complied with, and every fact must exist as required thereby before the aid intended to be afforded may be invoked.²⁸

Bill to reach land outside of jurisdiction. Without showing special grounds for the intervention of equity a creditors' suit may not be maintained merely because the only property of the debtor is land in another jurisdiction, but rather the creditor must pursue the legal remedy afforded by the laws of the other jurisdiction.²⁹

Waiver of objection. The objection that complainant has an adequate remedy at law may, it has been held, be waived by defendant.³⁰ The objection is waived by an admission in the answer of the allegations of the bill.³¹

On the other hand, it has been held that the objection is not waived by failure to raise it by demurrer.³² The failure of defendant to plead in his answer that there exists an adequate remedy at law has been held not to constitute a waiver,³³ although there is contrary authority.³⁴

Abolition of distinction between law and equity. Where statutes abolish the distinction between law and equity and give to the same court power to administer each kind of relief, see Actions §§ 55, 56, it has been held, in some jurisdictions, that the rule requiring a creditor to exhaust his remedies at law before resorting to a creditors' bill no longer exists.³⁵ In such jurisdictions a creditor may sue to recover a judgment for an indebtedness

and in the same action avail himself of the equitable powers of the court to reach property of the debtor which should be subjected to the payment of his indebtedness.³⁶

In other states, however, the rule has been enforced in spite of the blending of the jurisdictions at law and in equity.³⁷

§ 42. Recovery of Judgment

The necessity for the acquisition of a judgment as a condition precedent to a creditors' suit is discussed in §§ 43-45 infra, and in § 46 thereafter the character of the judgment required is considered. Examine Pocket Parts for later cases.

§ 43. — Necessity

- a. In general
- b. Exceptions and limitations

a. In General

As a general rule a judgment at law is a prerequisite to the maintenance of a creditors' suit.

As a general rule, sometimes by reason of statutory regulation, it is a prerequisite to the maintenance of a creditors' bill seeking satisfaction out of equitable assets or choses in action not reachable by execution at law that the creditor establish his claim or debt by a judgment at law; a general creditor with a mere legal demand may not, in the absence of statutory authorization, come into equity to collect his claim.³⁸

To prevent waste

U.S.—Tennessee Pub. Co. v. Carpenter, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.

22. Ky.—Proctor v. Bell, 30 S.W. 15, 97 Ky. 98, 16 Ky.L. 823.

N.Y.—McCartney v. Bostwick, 32 N.Y. 53, reversing 31 Barb. 390.

29. Me.—Lakin v. Lower California Chartered Co., 90 A. 427, 111 Me. 556.

N.Y.—Heyl v. Taylor, 122 N.Y.S. 279, 137 App.Div. 641.

30. U.S.—Yaryan Naval Stores Co. v. B. Borchardt Co., Ga., 217 F. 758, 133 C.C.A. 488.

Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

Dismissal on ground of adequate remedy at law see infra § 72.

Waiver by failure to object in trial court see infra § 82.

31. U.S.—Union Trust Co. of Pittsburgh, Pa., v. Jones, C.C.A.W.Va., 16 F.2d 236.

Acknowledgment of debt see supra § 40.

Waiver of objection to equity jurisdiction see the C.J.S. title Equity § 88, also 21 C.J. p 168 note 81 et seq.

32. Ind.—Bryan v. Blythe, 4 Blackf. 249.

Demurrer *ore tenus* does not raise the issue whether plaintiff has an adequate remedy at law.—Pierstoff v. Jorge, 56 N.W. 735, 86 Wis. 128, 39 Am.S.R. 881.

33. Mo.—Humphreys v. Atlantic Milling Co., 10 S.W. 140, 98 Mo. 542.

34. Ill.—Hart v. Oliver, 129 N.E. 833, 296 Ill. 209—Wojtas v. Rachel, 267 Ill.App. 148.

35. N.C.—Armstrong Grocery Co. v. Banks, 116 S.E. 173, 185 N.C. 149, 15 C.J. p 1388 note 54.

Effect of abolition of distinction on jurisdiction to entertain bill see supra § 3.

36. N.C.—Dillard v. Walker, 167 S.E. 632, 204 N.C. 67—Armstrong Grocery Co. v. Banks, 116 S.E. 173, 185 N.C. 149.

S.D.—Shoen v. Sioux Falls Gas Co., 261 N.W. 393, 63 S.D. 527.

15 C.J. p 1389 note 64.

37. N.Y.—Crippen v. Hudson, 13 N.Y. 161.

Wash.—Thompson v. Caton, 13 P. 185, 8 Wash.T. 31.

38. U.S.—Tennessee Pub. Co. v. Carpenter, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056—Motlow v. Southern Holding & Securities Corporation, C.C.A.Mich., 95 F.2d 721, 723, citing *Corpus Juris*—Hatch v. Morosco Holding Co., C.C.A.N.Y., 50 F.2d 133, affirming, D.C., 34 F.2d 579, and certiorari denied Irving Trust Co. v. U.S., 52 S.Ct. 42, 284 U.S. 688, 76 L.Ed. 565—In re Bartlett Oil & Gas Corporation, D.C.Okl., 44 F.2d 616—American Mine Equipment Co. v. Illinois Coal Corporation, C.C.A.Ill., 31 F.2d 507, certiorari denied Illinois Coal Corporation v. American Mine Equipment Co., 50 S.Ct. 29, 280 U.S. 572, 74 L.Ed. 624—White v. Croker, C.C.A.Fla., 13 F.2d 321, certiorari denied 47 S.Ct.

Where a creditor has several claims, it has been held that the reduction of some of them to judgment does not entitle him, in equity, to enforce the payment of such claims and others for which he has obtained no judgment;³⁹ but there is authority to the contrary.⁴⁰

Suits against joint debtors. Where judgment is recovered against joint debtors on service of process on less than all, a creditors' bill may not be maintained to interfere with any disposition of the separate property of those not served,⁴¹ but the joint property may nevertheless be reached.⁴² Where a creditor obtains judgment against one of two persons sued as joint debtors, he may issue execution on the judgment, and if it returned unsatisfied he may commence a creditors' action without proceeding to judgment against the other joint debtor.⁴³

Creditors of decedent. The necessity for a judg-

ment to support a creditors' suit against the estate of a decedent is discussed in the C.J.S. title Executors and Administrators § 473, also 24 C.J. p 455 notes 83, 84.

b. Exceptions and Limitations

- (1) In general
- (2) Statutory exceptions

(1) In General

There are several exceptions to the general rule requiring a judgment at law as a condition precedent to the filing of a creditors' bill.

To the general rule that a creditors' bill may not be maintained without a judgment at law first obtained there are exceptions.⁴⁴ The general rule affects the remedy only and not the right, and the recovery of a judgment is not an indispensable requisite where it is impossible or impracticable.⁴⁵ Furthermore, if complainant's demand is of a pure-

108, 273 U.S. 715, 71 L.Ed. 855—*Deckert v. Independence Shares Corporation*, D.C.Pa., 27 F.Supp. 763, reversed on other grounds, C.C.A., *Independence Shares Corporation v. Deckert*, 108 F.2d 51—*Commercial Trust Co. v. Chattanooga Ry. & Light Co.*, D.C.Tenn., 281 F. 856.

Cal.—*Delaney Producing & Refining Co. v. Crystal Petroleum Products Corporation*, 264 P. 521, 88 Cal.App. 784.

Colo.—*J. I. Case Threshing Mach. Co. v. Packer*, 254 P. 779, 81 Colo. 195.

D.C.—*Blundon v. Guy*, 53 F.2d 930, 60 App.D.C. 318.

Hawaii.—*Henry Waterhouse Trust Co. v. King*, 33 Hawaii 1, 9, citing *Corpus Juris*.

Ill.—*Birney v. Solomon*, 181 N.E. 318, 348 Ill. 410.

Kan.—*Federal Land Bank of Wichita, Ktn., v. Tawzer*, 281 P. 904, 905, 129 Kan. 93, citing *Corpus Juris*—*Union Nat. Bank of Wichita v. Ternes*, 204 P. 699, 110 Kan. 475—*Farmers' & Merchants' State Bank v. Lemley*, 180 P. 233, 105 Kan. 15, rehearing denied 181 P. 606, 105 Kan. 15.

Md.—*Kinsey v. Drury*, 119 A. 646, 141 Md. 684.

Mo.—*O'Connell v. Smith*, App., 131 S.W.2d 730—*Curlee Clothing Co. v. Boxer*, App., 51 S.W.2d 894—*Hunter v. Mathewson*, 129 S.W. 749, 149 Mo.App. 601.

Neb.—*Mills v. Heckendorn*, 281 N.W. 49, 135 Neb. 294—*First State Bank of North Bend v. Kastle*, 225 N.W. 776, 118 Neb. 630.

N.H.—*Dupont v. Moore*, 166 A. 417, 86 N.H. 254.

N.Y.—*Farjeon v. Fulton Securities Co.*, 233 N.Y.S. 577, 225 App.Div.

541—*Dorland v. Fidelity Development Co.*, 171 N.Y.S. 1000, 104 Misc. 97.

Ohio.—*Harris v. Cincinnati, H. & D. Ry. Co.*, 5 Ohio N.P.N.S., 173.

Okl.—*Johnston v. Byars State Bank*, 284 P. 862, 141 Okl. 277—*Treese v. Horany*, 248 P. 557, 119 Okl. 64—*Porter v. Rott*, 243 P. 160, 164, 116 Okl. 8, quoting *Corpus Juris*.

Or.—*Security Savings & Trust Co. v. Portland Flour Mills Co.*, 261 P. 432, 441, 124 Or. 276, citing *Corpus Juris*.

Tenn.—*State v. Caldwell*, 40 S.W.2d 1036, 183 Tenn. 77—*Prichard Bros. v. Causey*, 12 S.W.2d 711, 158 Tenn. 53.

Va.—*Chaney v. Kibler*, 198 S.E. 877, 879, 171 Va. 194, citing *Corpus Juris*.

15 C.J. p 1388 note 58—25 C.J. p 804 note 78 [a].

Reasons for rule

(1) "The reasons usually given for such holding are that a judgment with execution returned unsatisfied is the best evidence of the debt claimed and that law tribunals should adjudicate legal claims."—*Shoen v. Sioux Falls Gas Co.*, 261 N.W. 393, 396—15 C.J. p 1387 note 47 [a].

(2) The debtor has a right to trial by jury.—*McBride v. Wayne Circuit Judge*, 229 N.W. 493, 250 Mich. 1—15 C.J. p 1388 note 58 [b].

(3) Other statements of reasons. D.C.—*Blundon v. Guy*, 53 F.2d 930, 931, 60 App.D.C. 318. Or.—*Security Savings & Trust Co. v. Portland Flour Mills Co.*, 261 P. 432, 441, 124 Or. 276.

15 C.J. p 1388 note 58 [a], p 1390 note 76 [a].

In Florida, until the enactment of Acts 1908 c 5137 § 1, see subdivision

b (2) of this section, the rule of the text prevailed.—*Stewart v. Manget*, 181 So. 370, 132 Fla. 498—*George E. Sebring Co. v. O'Rourke*, 134 So. 556, 101 Fla. 885—*B. L. E. Realty Corporation v. Mary Williams Co.*, 134 So. 47, 101 Fla. 254—*Armour Fertilizer Works v. First Nat. Bank*, 100 So. 362, 87 Fla. 436—15 C.J. p 1388 note 58.

39. Ky.—*McKinley v. Combs*, 1 T.B. Mon. 105.

N.J.—*Claffin v. French*, 28 N.J.Eq. 383, affirmed 29 N.J.Eq. 376.

40. Mo.—*A. G. Edwards, etc., Brokerage Co. v. Rosenheim*, 74 Mo. App. 621.

41. N.Y.—*Field v. Chapman*, 15 Abb. Pr. 434, 24 How.Pr. 463, affirming 22 How.Pr. 329, 13 Abb.Pr. 320—*Billhofer v. Heubach*, 15 Abb.Pr. 143.

Absconding or nonresident joint debtors see *infra* § 45.

42. N.Y.—*Paton v. Wright*, 15 How. Pr. 481.

15 C.J. p 1391 note 82.

43. N.Y.—*Hiler v. Hetterick*, 5 Daly 33.

44. Hawaii.—*Henry Waterhouse Trust Co. v. King*, 33 Hawaii 1.

45. U.S.—*Hatch v. Morosco Holding Co.*, C.C.A.N.Y., 50 F.2d 138, affirming, D.C., 34 F.2d 579, and certiorari denied *Irving Trust Co. v. U. S.*, 52 S.Ct. 42, 284 U.S. 668, 76 L. Ed. 565.

Colo.—*Shuck v. Quackenbush*, 227 P. 1041, 1044, 75 Colo. 592, 33 A.L.R. 259, citing *Corpus Juris*.

Mo.—*Buckley v. Maupin*, 125 S.W.2d 820.

N.Y.—*Dorland v. Fidelity Development Co.*, 171 N.Y.S. 1000, 104 Misc. 97.

15 C.J. p 1390 note 73.

ly equitable nature, recognizable only by a court of equity, he need not first establish it in an independent suit, but may do so in the creditors' suit to reach the equitable assets of the debtor.⁴⁶ In addition, where the purpose of the bill is to reach the interest of the debtor in property or funds held in trust for him or for his creditors, the claim need not first be established by a judgment at law.⁴⁷

Restraining action at law. It is no excuse for failure to procure judgment that the prosecution of the action at law was restrained by an order of court, where it does not appear that the order was made without complainant's consent or that any attempt was made to vacate it.⁴⁸

Awards. Parties holding an equitable lien for services in securing an appropriation from congress, in whose favor a specific award has been made under an agreement to arbitrate, may maintain a creditors' bill on the award without reducing their demand to judgment;⁴⁹ but an award of arbitrators appointed under agreement of the parties is not in itself sufficient to support a bill.⁵⁰

(2) Statutory Exceptions

Where dispensed with by statute, a judgment at law is not a condition precedent to the maintenance of a creditors' suit.

Where statutes so provide, the reduction of a claim to a judgment at law is not a prerequisite to the maintenance of a creditors' suit.⁵¹ Such statutes have been held to be valid,⁵² although, as appears in the C.J.S. title Equity § 19, also 21 C.J. p 44 note 71, state statutes authorizing general creditors to maintain a creditors' bill are not binding on the federal courts.

Pursuant to statutory regulation in some states, a creditors' bill may be filed before a judgment at law is obtained, provided an action at law is pending for the collection of the claim, although no final decree may be entered on such creditors' bill until the claim has been reduced to a judgment at law.⁵³ The statute alters the general rule only in so far as to permit the filing of a creditors' bill prior to the rendition of a judgment at law; a judgment at law is essential before a final decree in equity may be entered.⁵⁴ Where the creditor has not reduced his claim to judgment, under such statute no creditors' bill may be filed until an action at law is pending for the collection of the claim.⁵⁵ The institution of a suit at law for damages not involving a claim of indebtedness does not warrant a creditors' suit under such statute.⁵⁶

46. U.S.—Cobb v. Interstate Mortg. Corporation, C.C.A.Md., 20 F.2d 786—Dyer v. Stauffer, C.C.A.Ohio, 19 F.2d 922, certiorari denied 48 S.Ct. 114, 275 U.S. 551, 72 L.Ed. 421.

Del.—Borwick v. Associated Gas & Electric Co., 174 A. 122, 20 Del. Ch. 265.

Hawaii.—Henry Waterhouse Trust Co. v. King, 33 Hawaii 1, 10, quoting *Corpus Juris*.
15 C.J. p 1330 note 75.

47. U.S.—Hamilton Michelson Groves Co. v. Penney, C.C.A.Fla., 53 F.2d 761.

Mo.—Cape County Sav. Bank v. Wilson, 34 S.W.2d 981, 986, 225 Mo.App. 14, citing *Corpus Juris*.

Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.

15 C.J. p 1391 note 79.

48. N.Y.—Brown v. Barker, 74 N.Y. S. 43, 68 App.Div. 592.

49. D.C.—Sanborn v. Maxwell, 18 App.D.C. 245.

50. N.J.—Williams v. Winans, 22 N. J.Eq. 573.

51. W.Va.—Johnson v. Todd, 102 S. E. 697, 86 W.Va. 24.

Setting aside fraudulent conveyances
A statute authorizing creditors who have not obtained judgment to file bills to set aside fraudulent conveyances does not authorize them

to file bills to reach equitable assets in cases where there are no allegations of fraud.—K'ney v. Drury, 119 A. 646, 141 Md. 634—15 C.J. p 1389 note 62.

In Louisiana.

(1) Since the adoption of the code of practice, a judgment against the original debtor is no longer necessary to support an action of mortgage, even when the *via executiva* is resorted to.—Gomez v. Courcelle, 8 La. Ann. 304—Robatham v. Tete, 8 La. Ann. 73—15 C.J. p 1389 note 65.

(2) Where judgment creditor, through execution and garnishment proceedings, had previously attempted to collect judgment from judgment debtors primarily liable, hypothecary action to enforce judicial mortgage on land purchased by strangers from judgment debtor secondarily liable, commenced after statutory notice, held not premature as brought without exhaustion of remedies against debtors primarily liable, though a revocatory action to annul a sale by one of debtors primarily liable was still pending.—Robin v. Harris Realty Co., 152 So. 573, 178 La. 946.

52. Miss.—McBride v. State Revenue Agent, 12 So. 699, 70 Miss. 716. 15 C.J. p 1388 note 58 [b] (2).
Right to trial by jury see the C.J.S. title Juries § 121, also 35 C.J. p 231 note 9 et seq.

53. Fla.—George H. Sebring Co. v. O'Rourke, 134 So. 556, 101 Fla. 885—Armour Fertilizer Works v. First Nat. Bank, 100 So. 362, 87 Fla. 436.

54. Fla.—Hollywood Beach Hotel & Golf Club v. Gilliland, 191 So. 30—Stewart v. Manget, 181 So. 370, 132 Fla. 498.

55. Fla.—E. H. L. Page Properties v. Pinellas Groves, 164 So. 543, 544, 121 Fla. 699—Davis v. Turner, 147 So. 224—Nichols v. Bodenwein, 146 So. 86, 107 Fla. 25, rehearing denied 146 So. 659, 107 Fla. 25—Willis v. Fowler, 136 So. 358, 102 Fla. 35—B. L. E. Realty Corporation v. Mary Williams Co., 134 So. 47, 101 Fla. 254.

When action is pending

No suit at law is pending if it appears that no service of process has been had and it also appears that no service of process can be had.—Adam Brewing Co. v. Bowman, 109 So. 583, 92 Fla. 509.

Pendency of attachment

Plaintiff who recovered in attachment suit against nonresident defendant pending suit instituted by creditors' bill held entitled to maintain creditor's suit.—Bean v. First Nat. Bank, 135 So. 803, 102 Fla. 367. Pendency of actions see Actions § 142.

56. Fla.—B. L. E. Realty Corpora-

As is disclosed in § 41 supra, in some jurisdictions where the distinction between law and equity has been abolished, a creditor in one action may reduce his debt to judgment and invoke the equitable powers of the court to reach the property of the debtor.

In *Massachusetts*, under the statutes, a debt need not be reduced to judgment in order to entitle the creditor to maintain a bill in equity to reach and apply to the payment of the debt property of defendant which cannot be attached or taken on execution at law.⁵⁷ This remedy was not taken away or limited by the subsequent legislative grant to the court of general equity powers;⁵⁸ and the statutes have been held to apply even though the debt is secured by mortgage.⁵⁹ Nevertheless, to authorize the maintenance of such a bill the debt must have matured,⁶⁰ and where it appears that the property sought to be reached can be attached at law the bill may not be maintained.⁶¹

§ 44. — Insolvent Debtor

Where the debtor is insolvent, the authorities are in conflict as to whether a judgment is a prerequisite to the maintenance of a creditors' suit.

As an exception to the general rule discussed in § 43 a supra, it has been held that the procuring of a judgment and the issuance of execution thereon and its return unsatisfied is but one form of proof of the creditors' want of remedy at law; that insolvency of the debtor may be otherwise established; and that where it is shown that judgment and execution would be fruitless and involve useless expense, a creditor may maintain a bill to

reach equitable interests of his debtor without first obtaining a judgment at law.⁶² According to other decisions, however, a creditor must reduce his claim to judgment, notwithstanding the debtor is insolvent.⁶³ Insolvency of the debtor is no excuse where, under the statute, see § 43 b (2) supra, a creditors' bill may be filed only by a creditor who either has reduced his claim to judgment, or has instituted an action at law for its collection.⁶⁴

At any rate, where the statute so provides, no judgment is necessary where the debtor is insolvent.⁶⁵ Furthermore, where the fund sought to be reached is beyond legal process, the debtor is insolvent, and the claim of complainant is undisputed, it has been held that a creditors' bill may be maintained although no judgment is first had establishing the debt.⁶⁶

§ 45. — Nonresident or Absconding Debtor

Where a debtor has absconded, or is a nonresident, and legal remedies are unavailable, a judgment at law ordinarily is not a prerequisite to the maintenance of a creditors' suit.

As an exception to the general rule stated in § 43 a supra, where a debtor has absconded or absented himself from the state so that personal service cannot be had and judgment may not be rendered, and he has no property in the state subject to seizure at law, a creditors' bill to subject the equitable interests of the debtor within the state may be maintained without a judgment at law establishing the debt first having been obtained;⁶⁷ and the same rule applies where the debtor,

tion v. Mary Williams Co., 134 So. 47, 101 Fla. 254.

57. Mass.—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124. 15 C.J. p 1390 note 66.

What constitutes "debt" within statute

(1) A claim of unliquidated damages for breach of executory contract is not a "debt" within the statute.—Stone, Timlow & Co. v. Stryker, 119 N.E. 655, 230 Mass. 67—H. G. Kilbourne Co. v. Standard Stamp Affixer Co., 103 N.E. 469, 216 Mass. 118.

(2) Liability of trustee to others for breach of trust, established in suit in equity, is a "debt" within Rev.L. c 159 § 3 cl 7.—Digney v. Blanchard, 118 N.E. 250, 229 Mass. 235.

Discharge in bankruptcy

Suits under statute to apply debtor's interests in payment of debt cannot be maintained where liability for debt cannot be established be-

cause of debtor's discharge in bankruptcy.—Bloch v. Budish, 180 N.E. 729, 279 Mass. 102.

Determination of value of judgment debt

Whether to require determination of precise value of judgment debt from third persons to debtor, before attempting to turn judgment into cash in creditors' suit, was within judge's discretion.—New England Oil Refining Co. v. Canada Mexico Oil Co., 174 N.E. 330, 274 Mass. 191.

58. Mass.—Barry v. Abbot, 100 Mass. 396.

15 C.J. p 1390 note 67.

59. Mass.—Tucker v. McDonald, 105 Mass. 423.

Resort to collateral security see infra § 49.

60. Mass.—Willard v. Briggs, 36 N. E. 687, 161 Mass. 48.

61. Mass.—Phoenix Ins. Co. v. Abbott, 127 Mass. 558.

62. U.S.—See Motlow v. Southern Holding & Securities Corporation, C.C.A.Mich., 95 F.2d 721.

Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.

15 C.J. p 1390 note 77.

63. Kan.—Union Nat. Bank of Wichita v. Ternes, 234 P. 699, 110 Kan. 475—Farmers' & Merchants' State Bank v. Lemley, 180 P. 238, 105 Kan. 15, rehearing denied 181 P. 606, 105 Kan. 15.

15 C.J. p 1390 note 76.

64. Fla.—Willis v. Fowler, 136 So. 358, 102 Fla. 35.

65. Ark.—Riggin v. Hillard, 20 S. W. 402, 56 Ark. 476, 35 Am.S.R. 113, followed in McFadden v. Hillard, 20 S.W. 404.

66. U.S.—American Brake Shoe, etc., Co. v. Pere Marquette R. Co., Mich., 205 F. 14, 123 C.C.A. 322.

15 C.J. p 1391 note 78.

Acknowledgment of debt see supra § 40.

67. U.S.—In re Bartlett Oil & Gas Corporation, D.C.Okl., 44 F.2d 616. Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

although he has not absconded, has removed to another state wherein he has no property.⁶⁸

Where the debtor is a nonresident, it has been held that a judgment at law is not a prerequisite,⁶⁹ but this has been denied,⁷⁰ especially where judgment might have been obtained in the state of the debtor's residence.⁷¹ In any event, where the debtor has visible property in the jurisdiction that may be reached by attachment at law nonresidence alone will not authorize the filing of a creditors' bill in the first instance to enforce a purely legal demand.⁷²

If a creditor in another state where the debtor resides has obtained judgment and issued execution in that state, thus exhausting the legal remedy, it has been held that he has sufficiently complied with the rule requiring that the legal remedy be exhausted before a creditor's suit may be brought.⁷³

If there is an action pending at law in which no process has been served on the debtor and the debtor will enter an appearance therein, proceedings in equity may be stayed to await the result of the action at law.⁷⁴

Suits against joint debtors. Where one joint debtor has absconded and the other is dead, a bill will lie to reach joint equitable funds without first obtaining a judgment at law.⁷⁵ Where one joint debtor has removed from the jurisdiction so that process cannot be served on him in an action at law, and the other is insolvent, so that a judgment against him cannot be satisfied, and the only asset of the nonresident debtor within the jurisdiction or elsewhere is an equitable interest in real estate in the jurisdiction, a bill is main-

tainable to subject such interest to payment of the debt without the debt being first reduced to judgment.⁷⁶

Furthermore, if one of two joint obligors is out of the state, it has been held that the obligee may proceed in chancery to subject the absentee's choses in action to the payment of the debt without first prosecuting the resident obligor to insolvency;⁷⁷ but, on the other hand, it has been held that where the creditor has an adequate remedy at law against a resident joint debtor, he may not maintain a bill to subject the assets of the nonresident debtor without first obtaining a judgment at law against him.⁷⁸

§ 46. — Character and Sufficiency of Judgment

- a. In general
- b. Decree in equity
- c. Jurisdiction of court
- d. Judgment of other courts

a. In General

To support a creditors' suit the judgment required must be a valid, subsisting judgment, a judgment which is not dormant, and which has not been set aside, appealed from, or satisfied.

The judgment required as a condition precedent to the maintenance of a creditors' suit, see § 43 *supra*, must be a valid and subsisting judgment.⁷⁹ A void judgment is not sufficient.⁸⁰

The judgment must have been duly entered and perfected,⁸¹ and, except as the rule has been changed by statute, see § 43 b (2) *supra*, it is not sufficient that an action at law is pending which may result in judgment,⁸² or that a verdict has been

Mo.—Curlee Clothing Co. v. Boxer, App., 51 S.W.2d 894.

Okl.—Johnston v. Byars State Bank, 284 P. 862, 141 Okl. 277. 15 C.J. p 1391 note 85.

68. D.C.—Supplee Hardware Co. v. Driggs, 13 App.D.C. 272.

Mich.—Earle v. Grove, 52 N.W. 615, 92 Mich. 285.

69. D.C.—Blundon v. Guy, 53 F.2d 930, 60 App.D.C. 318. 15 C.J. p 1391 note 87.

70. U.S. — Hamilton Michelsen Groves Co. v. Penney, C.C.A.Fla., 58 F.2d 761.

Ga.—Grimmett v. Barnwell, 192 S.E. 191, 195, 184 Ga. 461, citing *Corpus Juris*.

Ill.—Ladd v. Judson, 51 N.E. 338, 174 Ill. 344, 66 Am.S.R. 267.

71. Neb.—Brumbaugh v. Jones, 98 N.W. 54, 70 Neb. 786.

72. Neb.—Weaver v. Cressman, 33 N.W. 478, 21 Neb. 675.

15 C.J. p 1391 note 90.

73. N.Y.—McCartney v. Bostwick, 32 N.Y. 53, reversing 31 Barb. 390. Foreign judgment as supporting creditor's bill see *infra* § 46 d.

74. D.C.—Droop v. Ridenour, 9 App. D.C. 95.

Pendency of law action as stay in equity see Actions § 133 c (3).

75. Ala.—Lucas v. Atwood, 2 Stew. 378.

76. D.C.—Supplee Hardware Co. v. Driggs, 13 App.D.C. 272.

77. Ky.—Curd v. Letcher, 3 J.J. Marsh. 443.

78. Cal.—Lupton v. Lupton, 3 Cal. 120.

79. Va.—Chaney v. Kibler, 198 S.E. 877, 171 Va. 194.

15 C.J. p 1392 note 5.

Variations in spelling and designating names of parties to common-law action predicated on Ohio judgment permitted to go unchallenged until they became a part of the final judgment rendered the judgment void, so that creditor's bill seeking means to satisfy the judgment was properly dismissed.—Romaine v. Horobin, Fla., 190 So. 508.

80. Ill.—Anderson v. Hawhe, 3 N.E. 566, 115 Ill. 33.

Va.—Chaney v. Kibler, 198 S.E. 877, 879, 171 Va. 194, citing *Corpus Juris*.

Confession of judgment

A confessed judgment entered by a clerk without authority is void and will not support a creditors' bill.—Wilhelm v. Locklar, 35 So. 6, 46 Fla. 575, 110 Am.S.R. 111.

81. Fla.—Post v. Roach, 7 So. 854, 26 Fla. 442.

82. Fla.—Post v. Roach, *supra*.

recovered.⁸³

Docketing and filing of transcript. Where the object of the bill is to reach land of the debtor, a statute making it necessary to docket the judgment in a particular county or in a particular court in order that it shall constitute a lien on the land must be complied with.⁸⁴

Dormant judgments. To justify a creditors' suit, the judgment at law must be one still in force; a dormant judgment is not a sufficient basis for the suit.⁸⁵ However, the dormancy of the judgment does not defeat the bill where the debtor had previously been taken in execution and had obtained his discharge as an insolvent and where he admits that he has no tangible property.⁸⁶

While there is authority to the contrary,⁸⁷ the fact that, after bill filed and before decree, complainant's judgment at law becomes dormant will not preclude his maintaining his bill, nor need he have his judgment revived and execution again issued thereon in order to entitle him to a decree.⁸⁸ Furthermore, where the bill is filed within the statutory period during which a judgment continues to be a lien, and within the time allowed by statute in which an action may be brought thereon, it has been held that it is immaterial that complainant would not be entitled to issue an execution until he revived the judgment by scire facias;⁸⁹ but there is authority to the contrary.⁹⁰

Where the judgment is valid and enforceable by execution, it has been held that a creditor may maintain a bill although the lien of the judgment

on real estate has expired.⁹¹

Opening or vacating judgment. Where, pending a creditors' suit, the judgment at law on which it is based is set aside by the court which rendered it, the bill will be dismissed.⁹² However, a creditors' bill may be maintained against one of two defendants against whom judgment has been recovered, notwithstanding that for cause shown the court has set aside the judgment as against the other defendant, where the court has allowed the judgment to stand as a several judgment.⁹³

Where a creditors' bill has been properly filed on an execution returned unsatisfied, and where defendant is afterward let in to make defense in the action at law, leaving the judgment to stand as a security to the adverse party, the regular course is to stay proceedings in chancery until final decision of the court of law.⁹⁴

Pendency of appeal or writ of error. A creditors' bill may not be based on a judgment in favor of complainant where an appeal, or a proceeding in error to reverse the same, is pending,⁹⁵ provided that the appeal has been so perfected as to operate as a stay of execution.⁹⁶ However, a writ of error brought after the filing of a creditors' bill does not necessarily stay the proceedings in equity, even where the security on the writ of error is given in such form as to make the sureties liable for the debt and costs in the court below as well as for the costs on the writ of error.⁹⁷

Satisfaction of judgment. A judgment that has been satisfied will not support a creditors' bill.⁹⁸

83. Mass.—Bennett v. Sweet, 51 N. E. 183, 171 Mass. 600.

N.Y.—Moran v. Dawes, Hopk. 365, 14 Am.D. 550.

More finding that contract was broken by defendant does not, prior to assessment of damages, render plaintiff a "judgment creditor," or create a "debt" within Rev.L. c 159 § 3 cl 7, as amended by St.1902 c 544 § 23, and St.1910 c 531 § 2, relating to creditors' bills.—Stone, Timlow & Co. v. Stryker, 119 N.E. 655, 230 Mass. 67.

84. Colo.—Barnes v. Beighly, 12 P. 906, 9 Colo. 475.

15 C.J. p 1392 note 3.

85. Va.—Chaney v. Kibler, 193 S.E. 877, 171 Va. 194.

15 C.J. p 1392 note 5.

Dormant judgments and revival thereof see the C.J.S. title Judgments § 532 et seq, also 34 C.J. p 655 note 58 et seq.

86. N.C.—Brown v. Long, 36 N.C. 190, 36 Am.D. 43.

87. Okl.—Miller v. Melone, 67 P. 479, 11 Okl. 241, 56 L.R.A. 620.

88. Neb.—Flint v. Chaloupka, 99 N. W. 825, 72 Neb. 34, 117 Am.S.R. 771.

Ohio.—Cincinnati v. Hafer, 30 N.E. 197, 49 Ohio St. 60.

15 C.J. p 1392 note 8.

89. Iowa.—Postlewait v. Howes, 3 Iowa 365.

90. Mich.—Gould v. Tryon, Walk. 358.

15 C.J. p 1392 note 10.

91. Iowa.—Dunton v. McCook, 61 N. W. 977, 93 Iowa 258.

92. N.Y.—Butchers, etc., Bank v. Willis, 1 Edw. 645.

93. N.Y.—Hiler v. Hetterick, 5 Daly 33—Lake Erie Commercial Bank v. Meach, 7 Paige 448.

94. N.Y.—Drew v. Dwyer, 1 Barb. Ch. 101.

Pendency of law action as stay in equity see Actions § 133 c (3).

95. N.Y.—Smith v. Crocheron, 2 Edw. 501.

Delay in perfecting appeal

When a judgment rendered by a justice of the peace is appealed from,

and no effort is made by appellant for a period of more than four years to perfect such appeal, he cannot set up as a defense, in a collateral proceeding in equity to subject his property to the payment of the judgment, that an appeal therefrom was pending.—Warder v. Rivers, 20 N.W. 739, 64 Iowa 412.

Appealed judgment as basis of intervention see infra § 58.

Effect of appeal generally see the title Appeal and Error §§ 605-624.

96. Cal.—Sewell v. Johnson, 134 P. 704, 165 Cal. 762, Ann.Cas.1915B 645—Jenner v. Murphy, 92 P. 405, 6 Cal.App. 484.

97. N.Y.—Bradt v. Kirkpatrick, 7 Paige 62.

98. Me.—Davis v. Walton, 15 A. 43, 80 Me. 461.

15 C.J. p 1393 note 18.

Satisfaction of judgment pendente lite as ground for dismissal see infra § 72.

Subrogation of person paying judgment to rights of creditor see supra § 35 c.

Where a judgment debtor is taken in custody under a *capias ad satisfaciendum*, it is presumed to be a satisfaction of the judgment, see the C.J.S. title Judgments § 573, also 34 C.J. p 721 note 16, and as long as the debtor remains in custody, no creditors' bill may be brought against him by plaintiff in the execution.⁹⁹ However, the discharge of a debtor under the Honest Debtor's Act, whose body had been taken on a *capias*, has no effect other than to exempt the person of the debtor from future arrest, and does not relieve his property from liability for his debt, and hence a creditors' bill may be maintained notwithstanding such discharge.¹

Merger by action on judgment. Where the judgment is sued on and another judgment is recovered without effecting a merger of the first judgment, see the C.J.S. title Judgments § 561, also 34 C.J. p 697 note 93 et seq, the first judgment possesses sufficient vitality on which to base a creditors' bill.² For example, where the second judgment is recovered in another state, the first judgment is sufficient to support the bill.³

b. Decree in Equity

Decrees in equity for specific sums of money, enforceable by execution, are sufficient on which to base a creditors' suit.

Decrees in equity for specific sums of money, enforceable by execution in the same manner as judgments at law, constitute liens on the property of the debtor to the same extent as ordinary judgments, and may be made the basis of creditors' bills.⁴

It has been held that a decree in a foreclosure suit that defendant is personally liable for the debt and requiring him to pay any deficiency after con-

firmation of the sale does not render complainant a decree creditor, so as to enable him to maintain a creditors' bill against defendant;⁵ but there is authority to the contrary;⁶ and it has been held that an order requiring the purchaser at a foreclosure sale to pay the expenses and deficiencies occasioned by his omission to complete the purchase is a sufficient foundation on which to base a creditors' bill.⁷

c. Jurisdiction of Court

To justify a creditors' suit the judgment required must have been rendered by a court having jurisdiction.

The judgment required as a condition precedent to the maintenance of a creditors' suit must have been rendered by a court having jurisdiction,⁸ and, if the court had jurisdiction, the judgment may not, as is shown in § 51 *infra*, be attacked collaterally in the creditors' suit. The judgment is sufficient if it has been recovered in a court of general jurisdiction.⁹

Jurisdiction of person. The court must have had jurisdiction of the person of defendant in the action in which the judgment was rendered.¹⁰ Ordinarily, the judgment at law must be a personal one.¹¹ However, a judgment is none the less personal because the word "trustee" is added after the name of defendant, this being merely descriptive.¹²

d. Judgment of Other Courts

The judgment required as a prerequisite to a creditors' suit ordinarily must have been rendered in the particular jurisdiction in which the creditors' bill is filed.

Ordinarily, the judgment required must be one rendered in the particular jurisdiction where the creditors' bill is filed,¹³ unless it is impossible to obtain a judgment in that jurisdiction.¹⁴ It has been

99. N.Y.—*Stillwell v. Van Epps*, 1 Paige 615.
15 C.J. p 1393 note 19.

1. Ga.—*Phillips v. Wesson*, 16 Ga. 137.

2. N.Y.—*Bates v. Lyons*, 7 Paige 85.

3. Colo.—*Wells v. Schuster-Hax Nat. Bank*, 48 P. 809, 23 Colo. 534.
N.Y.—*Bates v. Lyons*, 7 Paige 85.

4. Hawaii.—*Henry Waterhouse Trust Co. v. King*, 33 Hawaii 1, 11, quoting *Corpus Juris*.
15 C.J. p 1393 note 24.

Decree for alimony see the C.J.S. title Divorce § 273, also 19 C.J. p 318 note 99.

Decree in equity as creating lien see the C.J.S. title Judgments § 459, also 34 C.J. p 572 notes 21-27.

Enforcement of equity decrees by execution see the C.J.S. title Equity § 617, also 21 C.J. p 694 note 29.

5. Ill.—*Cotes v. Bennett*, 55 N.E. 661, 183 Ill. 82, affirming 84 Ill.App. 33.

6. Mich.—*Clement v. Oceana Cir. Judge*, 78 N.W. 666, 119 Mich. 605.

7. N.Y.—*Lydecker v. Smith*, 44 Hun 454.

8. Ill.—*Anderson v. Hawhe*, 3 N.E. 566, 115 Ill. 33.

9. Neb.—*Becker v. Linton*, 114 N.W. 928, 80 Neb. 655, 127 Am.S.R. 795.
Wis.—*Faber v. Matz*, 57 N.W. 39, 86 Wis. 370.

Judgment of justice of peace may be sufficient to sustain a creditor's bill.—See *Arthur Lehman & Co. v. Slat*, 208 Ill.App. 39.

10. Ill.—*Anderson v. Hawhe*, 3 N.E. 566, 115 Ill. 33.

Unauthorized appearance

Ill.—*Anderson v. Hawhe*, *supra*.
15 C.J. p 1410 note 71 [a].

11. Mich.—*Bliss v. Tyler*, 124 N.W. 560, 159 Mich. 502.

15 C.J. p 1393 note 21.
Necessity of judgment where debtor is nonresident or absconding see *supra* § 45.

12. Fla.—*Robinson v. Springfield Co.*, 21 Fla. 203.

13. U.S.—*First Nat. Bank v. Blackwell*, D.C.Tex., 51 F.2d 282—*Gaskins v. Bonfils*, D.C.Colo., 8 F.Supp. 832, modified on other grounds, C.C.A., 79 F.2d 352, mandate construed 85 F.2d 672.
15 C.J. p 1393 note 29.

14. U.S.—*Gaskins v. Bonfils*, D.C.Colo., 8 F.Supp. 832, modified on other grounds, C.C.A., 79 F.2d 352, mandate construed 85 F.2d 672.
15 C.J. p 1393 note 30.

held that a judgment of a federal court of one district will not support a creditors' bill filed in the federal court of another district.¹⁵

Judgment of sister state court. As a general rule, a creditors' bill may not be based on a judgment rendered in another state.¹⁶ However, in some cases judgments recovered in sister states have been held sufficient, but these cases usually contain special elements.¹⁷

Judgment of state court where suit in federal court. A federal court will take jurisdiction of a creditors' bill founded on a judgment rendered in a state court within the district over which the jurisdiction of the federal court extends.¹⁸ On the other hand, as a general rule a judgment at law in a state court may not be used as the basis of a creditors' bill in a federal court in another state,¹⁹ although there is some contrary authority.²⁰

Judgment of federal court where suit in state court. As a general rule, where the bill is filed in a state court, a judgment recovered in a United States court sitting in such state is sufficient.²¹ In some jurisdictions however, it has been held that the judgment of a federal court may not be made the basis of a decree in a state court,²² although such federal court is of the district in which the creditors' bill is filed, since such court is deemed to be a court of another jurisdiction.²³

§ 47. Execution and Return

- a. Necessity for execution
- b. Character and sufficiency of execution
- c. Return

a. Necessity for Execution

- (1) In general
- (2) Where several plaintiffs or defendants
- (3) Insolvent debtor

(1) In General

The issuance of an execution on the judgment obtained, including a decree in equity, ordinarily is a condition precedent to the maintenance of a creditors' suit. After return of an execution unsatisfied an assignee need not take out an execution.

In addition to the necessity for obtaining a judgment, see § 43 a supra, a creditor is generally required to have execution issued and returned unsatisfied, in whole or in part, before a court of equity will entertain a creditors' bill.²⁴ However, this rule does not deny to a creditor the aid of equity where it is impossible or impracticable for him to take this preliminary step,²⁵ or where the legal remedy is inadequate;²⁶ nor where the debtor is a non-resident so that no personal judgment can be obtained against him.²⁷ Furthermore, the issuance of an execution is unnecessary where it is dispensed with by statutory regulation.²⁸

15. U.S.—Union Trust Co. v. Broker, C.C.N.Y., 89 F. 6.

16. U.S.—Gaskins v. Borfils, D.C. Colo., 4 F.Supp. 547, 549, citing *Corpus Juris*.

S.C.—Penning v. Reid, 166 S.E. 139, 142, 167 S.C. 263, citing *Corpus Juris*.

15 C.J. p 1394 note 32.

17. S.C.—Penning v. Reid, supra.

15 C.J. p 1394 note 33.

18. U.S.—Feidler v. Bartleson, Wash., 161 F. 30, 80 C.C.A. 164, affirming, C.C., 149 F. 299.

15 C.J. p 1394 note 34.

Judgment of state court as basis of intervention see infra § 58.

Jurisdiction of federal court see infra § 53.

19. U.S.—Gaskins v. Bonfils, D.C. Colo., 4 F.Supp. 547, 549, citing *Corpus Juris*.

15 C.J. p 1394 note 36.

20. U.S.—Merchants' Nat. Bank v. Chattanooga Constr. Co., C.C.Tenn., 53 F. 314.

15 C.J. p 1394 note 35.

21. Kan.—Benson v. Altenburg, 259 P. 791, 124 Kan. 296, motion granted 261 P. 589, 124 Kan. 571.

Mo.—Bush v. Arnold, 50 Mo.App. 8, 15 C.J. p 1394 note 37.

22. Ill.—Dilworth v. Curtis, 29 N.E. 861, 139 Ill. 508, affirming 38 Ill. App. 93.

15 C.J. p 1394 note 38.

23. N.Y.—Davis v. Bruns, 23 Hun 648—Tarbell v. Griggs, 3 Paige 207 23 Am.D. 790.

24. Ill.—Hart v. Oliver, 129 N.E. 833, 296 Ill. 209.

Kan.—Federal Land Bank of Wichita, Kan., v. Tawzer, 281 P. 904, 905, 129 Kan. 93, citing *Corpus Juris*—Union Nat. Bank of Wichita v. Ternes, 204 P. 699, 110 Kan. 475.

Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.

Mo.—O'Connell v. Smith, App., 181 S.W.2d 730.

Neb.—Mills v. Heckendorn, 281 N.W. 49, 135 Neb. 294.

Ohio.—Harris v. Cincinnati, H. & D. Ry. Co., 5 Ohio N.P., N.S., 173.

15 C.J. p 1394 note 40.

25. Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

Mich.—McBride v. Wayne Circuit Judge, 229 N.W. 493, 250 Mich. 1.

Mo.—Steele v. Reid, 223 S.W. 881, 284 Mo. 269.

15 C.J. p 1395 note 41.

26. Ohio.—Piatt v. St. Clair, 6 Ohio 227.

15 C.J. p 1395 note 42 [a].

27. Mo.—O'Connell v. Smith, App., 181 S.W.2d 730.

Necessity for resort to other evidence

By the nonresidence of a debtor, a creditor, through no fault of his own, is deprived of evidence of nonexistence of property of debtor subject to execution afforded by a nulla bona return on an execution, for in such case creditor cannot obtain a personal judgment on which to issue an execution, so that a creditor must resort to other evidence to show that he has exhausted his legal remedies before seeking relief in equity.—O'Connell v. Smith, supra.

28. W.Va.—U. S. Fidelity & Guaranty Co. v. Eary, 181 S.E. 817, 116 W.Va. 477.

15 C.J. p 1395 note 43.

Nature of statutory action

Statutory action allowing a bill to be filed after judgment, without or before execution, on the ground of

It is no excuse for failure to have execution issued and returned nulla bona that the prosecution of a suit brought by complainant was restrained by order of court, where it does not appear that the order was made without the consent of the complainant, or that any attempt has been made to vacate it;²⁹ nor is it any excuse that the enforcement of an execution was restrained by a military order.³⁰

Execution on decree in equity. A decree in equity for the payment of money stands on the same footing as a judgment at law, and execution must be issued thereon and returned nulla bona in order that it may be a proper foundation for a creditors' bill.³¹ However, where the creditor's only remedy is in equity, it has been held that the issuance of an execution on the decree obtained is not necessary in order to reach the equitable assets of the debtor.³²

Acquisition of lien by creditor. Where a judgment creates a lien on the debtor's interest in land, see the C.J.S. title Judgments § 454, also 34 C.J. p 569 note 83, in some jurisdictions, in order to reach a debtor's interest in land, no execution is necessary.³³ Furthermore, it has been held that a creditor's bill to subject equitable interests of a debtor to the payment of a judgment may be maintained without showing a levy on the property sought to be reached or a sale thereof in execution.³⁴

Body execution. A creditor need not have the body of the debtor taken into custody, even where the law permits it, where execution has issued against the property of the debtor and been returned nulla bona.³⁵

Alias execution. After the lapse of a certain period of time since the return of the original execution unsatisfied, as a condition precedent to the maintenance of a creditors' bill the issuance of a new execution has been held necessary³⁶ and unnecessary.³⁷

Where a judgment is revived, a new execution has been held to be necessary before the bill may be filed.³⁸ However, where the judgment is revived by scire facias in favor of personal representatives, it has been held to be unnecessary to sue out a new execution.³⁹

Where a supplemental bill shows that defendant has acquired property since the original execution was returned unsatisfied and prays for discovery, the bill may be sustained, although no second execution has been issued.⁴⁰

Assignee of judgment. An assignee of a judgment need not take out a new execution before filing a creditors' bill where his assignor had caused an execution to be issued which was returned nulla bona.⁴¹

(2) Where Several Plaintiffs or Defendants

Execution must issue and be returned unsatisfied against all of the defendants. If there are several plaintiffs, the failure of one to issue execution may be excused.

If two judgment creditors unite in the bill, and one has issued an execution which has been returned unsatisfied, the failure of the other so to do is excused where the averments of the bill are in proper form.⁴²

Where there are several defendants in the judgment, complainant must show the issuance and re-

no property on which to levy, is in the nature of an equitable attachment or execution and not the pursuit of a trust fund.—*Harris v. Cincinnati, H. & D. Ry. Co.*, 5 Ohio N.P., N.S., 173.

In Florida

The rule that a creditor can resort to his remedy by means of a creditors' bill only after he has secured a judgment at law and has exhausted all means afforded by law to recover on such judgment and has had a return of the execution that no goods of the debtor are to be found was not altered by statute, see § 43 b (2) supra, providing that creditors' bill might be filed after action at law was begun and before rendition of final judgment therein.—*Stewart v. Manget*, 181 So. 370, 132 Fla. 498.

29. N.Y.—*Brown v. Barker*, 74 N.Y. S. 43, 68 App.Div. 592.

30. Ala.—*Mixon v. Dunklin*, 48 Ala. 455.

31. Ill.—*Winslow v. Leland*, 21 N. E. 588, 128 Ill. 304.
15 C.J. p 1395 note 55.

32. Hawaii.—*Henry Waterhouse Trust Co. v. King*, 33 Hawaii 1.

33. D.C.—*Biggs v. Campbell*, 46 App. D.C. 288.

15 C.J. p 1396 note 64.

34. Ky.—*Mason v. Southern Deposit Bank*, 17 S.W.2d 1022, 229 Ky. 728.
—*Garrison v. Clark*, 152 S.W. 581, 151 Ky. 565.

15 C.J. p 1396 note 65.

35. N.C.—*Hough v. Cress*, 57 N.C. 295.

36. After nine years

Mich.—*Gould v. Tryon*, Walk. 353.
Dormant judgment as sufficient to support suit see supra § 46 a.
Limitations and laches see infra § 52.

37. After six years

N.Y.—*Corning v. Stebbins*, 1 Barb. Ch. 589.

38. Judgment ten years old
Ill.—*Crawford v. Cook*, 55 Ill.App. 351.

39. N.Y.—*Colt v. Fulton*, Ch.Sent. 45.

40. Mich.—*Newlove v. Pennock*, 82 N.W. 54, 123 Mich. 260.

41. Mich.—*Cook v. Casualty Ass'n of America*, 224 N.W. 341, 246 Mich. 278.

15 C.J. p 1395 note 54.

Dissolution of assignor before execution

Judgment in name of original plaintiff after assignment of claim and execution in name of original plaintiff returned unsatisfied supported creditor's bill by assignee, although original corporate plaintiff was dissolved before execution.—*Cook v. Casualty Ass'n of America* supra.

42. Utah.—*Enright v. Grant*, 15 P. 268, 5 Utah 334.

turn unsatisfied of execution against all of the defendants,⁴³ unless one defendant is in the position of a surety toward the others,⁴⁴ and the bill is brought with his consent and for his benefit.⁴⁵

The exhaustion of the remedy at law against a person who was an indorser on an instrument merged into judgment, and who was not a party to the judgment proceedings, is not essential to the maintenance of an equitable action against the judgment debtors.⁴⁶

(3) Insolvent Debtor

Where the debtor is insolvent, as a general rule the issuance and return of an execution unsatisfied are not conditions precedent to the maintenance of a creditors' suit.

As a general rule, when it appears that the debtor is insolvent, the issuance of execution and a return of nulla bona are not necessary, since their purpose is to establish insolvency of the debtor and want of remedy at law, and where the debtor is shown to be insolvent by other evidence and the issuance of execution would be of no practical utility, it may be dispensed with.⁴⁷ However, there are decisions to the contrary.⁴⁸

At any rate, whether or not execution and return of nulla bona are essential, it has been said that

they are the most satisfactory evidence of insolvency, and such proof should be produced when convenient.⁴⁹

b. Character and Sufficiency of Execution

To support a creditors' suit, the required execution must be valid and must comply with statutory requirements; it must be issued within the proper time, to the proper county, and must be directed to the realty of the debtor as well as to his personality.

The execution required as a condition precedent to the maintenance of a creditors' suit must be a valid one,⁵⁰ and must have been issued in compliance with statutory requirements.⁵¹

Time of issuance. Where the premature issuance of an execution renders it voidable only, see the C. J. S. title Executions § 66, also 23 C. J. p 379 note 8, such execution is sufficient for the purpose of a creditors' suit.⁵² Where no execution was issued to the proper county for a long period of time, the defense of laches applies, at least as to personal property.⁵³

To what county issued. Ordinarily, the execution should be issued to the county of the debtor's residence,⁵⁴ or to the county in which the judgment was rendered.⁵⁵ Where a debtor has no real

43. Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606. 15 C.J. p 1395 note 57.

44. N.Y.—Speiglemeyer v. Crawford, 6 Paige 254.

15 C.J. p 1395 note 58.

45. N.Y.—Child v. Brace, 4 Paige 309.

46. Neb.—Thompson v. La-Rue, 81 N.W. 612, 59 Neb. 614.

47. Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

Kan.—Achor v. Parker, 67 P.2d 561, 563, 145 Kan. 854, citing *Corpus Juris*—Federal Land Bank of Wichita, Kan., v. Tawzer, 281 P. 904, 129 Kan. 93.

Mo.—Jackman v. St. Louis & H. R. Co., 263 S.W. 230, 304 Mo. 319, error dismissed St. Louis & H. R. Co. v. Jackman, 45 S.Ct. 641, 268 U.S. 682, 69 L.Ed. 1155.

Neb.—Application of Laffin, 239 N.W. 836, 837, 122 Neb. 210, citing *Corpus Juris*.

Or.—Security Savings & Trust Co. v. Portland Flour Mills Co., 261 P. 432, 124 Or. 276.

S.C.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 1 S.E.2d 797.

Tenn.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356.

15 C.J. p 1396 note 61.

In Illinois

(1) Where the debtor admits his insolvency, the issuance and return of an execution unsatisfied is not necessary.—*Wojtas v. Rachel*, 267 Ill. App. 148.

(2) A bill may not be sustained as a creditors' bill where it does not appear that execution was issued and returned unsatisfied and an allegation that defendant had no property subject to execution is insufficient, at least where there is not sufficient proof of the fact.—*Albright v. Herzog*, 12 Ill.App. 557.

48. N.J.—Huselson v. Durie, 77 A. 1042, 77 N.J.Eq. 437. 15 C.J. p 1396 note 62.

49. Iowa.—Postlewait v. Howes, 3 Iowa 365.

Effect of return of execution see *infra* § 47 c (3).

50. Ky.—Farmers' Nat. Bank v. Lancaster Nat. Bank, 4 Ky.L. 451.

Mich.—De Guzman v. Shepherd, 196 N.W. 523, 225 Mich. 606.

Irregularity or invalidity as a defense see *infra* § 51.

Direction as to levy on land

It is not a valid objection to the execution that it directed the sheriff to levy on defendant's lands whereof he was seized on February 1, when direction might have been given from January 26.—*Green v. Burnham*, 3 Sandf.Ch. N.Y., 110.

Execution against county

A fieri facias issued against a county and returned nulla bona lays ground for a creditors' bill. The remedy by compelling the supervisors to levy a tax on the county is cumulative and does not necessarily prohibit the ordinary course of issuing execution.—*Lyell v. St. Clair County*, C.C.Mich., 15 F.Cas.No. 8,621, 3 McLean 580.

51. N.Y.—Manning v. Merritt, Clarke 98.

52. N.Y.—Green v. Burnham, 3 Sandf.Ch. 110.

53. Lapse of nearly seven years

Ill.—Aultman v. Jackson, 122 Ill.App. 639.

Delay in delivery to sheriff

Where executions on judgments were not placed in the hands of the sheriff until the return day thereof, such delay rendered them a nullity, and unsatisfied returns thereon were insufficient basis for proceedings in the nature of a creditor's bill against the judgment debtor.—*De Guzman v. Shepherd*, 196 N.W. 523, 225 Mich. 606.

54. W.Va.—U. S. Fidelity & Guaranty Co. v. Eary, 181 S.E. 817, 116 W. Va. 477.—*Lewis v. Fisher*, 171 S.E. 106, 114 W.Va. 151.

15 C.J. p 1397 note 71.

55. Ky.—Nashville, etc., R. Co. v.

or personal property in the county where he resides liable to levy and sale on execution, the issuance of an execution in the county where the judgment is recovered, and its return unsatisfied, is sufficient.⁵⁶ If, however, plaintiff knows that defendant in the execution has property in a particular county execution should be sent there.⁵⁷

Directions as to property to be taken. An execution directed merely against the personality of the debtor is not sufficient; it must be one that might be levied also on his real estate.⁵⁸

In the absence of statute, the exhaustion of personal property is not required before a creditor may have recourse to equitable interests in real estate.⁵⁹ However, as is shown in the C.J.S. title Executions § 100, also 23 C.J. p 445 note 72, in some jurisdictions, by statute or otherwise, the rule is that the debtor has the right to have his personal goods exhausted before any of his realty may be taken on execution. Furthermore, in the ad-

ministration of decedents' estates, see the C.J.S. titles Descent and Distribution § 121, also 18 C.J. p 944 note 50, and Executors and Administrators § 479, also 24 C.J. p 461 note 38, the personality is the primary fund for the payment of debts.

c. Return

- (1) Necessity for return
- (2) Sufficiency of return
- (3) Operation and effect

(1) Necessity for Return

To support a creditors' suit the execution must be returned unsatisfied, although an outstanding alias execution ordinarily does not bar the suit.

The mere issuance of execution on the creditor's judgment is not sufficient; it must be returned unsatisfied, since the creditor must ordinarily show that he is remediless at law, and of this the issuance of an execution and its return unsatisfied are the most acceptable proof.⁶⁰

Mattingly, 40 S.W. 673, 101 Ky. 219.
19 Ky.L. 373.
15 C.J. p 1397 note 72.

Where several defendants reside in several counties different from that in which the judgment was rendered, the issuing of an execution against all of them to the county where one of them resides, and its return nulla bona does not authorize the maintenance of an equitable action on such return against those who do not reside in the county to which the execution was issued.—Proctor v. Bell, 30 S.W. 15, 97 Ky. 98, 16 Ky.L. 823.

58. Neb.—Sayre v. Thompson, 24 N. W. 383, 18 Neb. 33.

57. Ill.—Corn v. Greenberg, 181 Ill. App. 669.
15 C.J. p 1397 notes 68, 74.

Land in other county insufficient

If it appears that land situated in a county other than that in which execution issued is entirely inadequate to satisfy the judgment, execution need not issue to the county where the land lies.—Thompson v. La Rue, 81 N.W. 612, 59 Neb. 614.

Parcels of land in many counties

Where defendant has land in many different counties, the whole of which would not be more than sufficient to pay the debt, the court will not require plaintiff, before filing his bill, to take out numerous successive executions which would necessitate great delay in collecting the judgment, allowing a term for each execution.—Albany City Bank v. Dorr, Walk, Mich., 317.

In Tennessee

(1) It is sufficient if the creditor shows an exhaustion of his legal remedy by the return unsatisfied of

an execution issued in the county in which the judgment was recovered without also issuing an execution to the county in which the assets sought to be reached are situated, or. It seems, the county of the debtor's residence.—Riddle v. Motley, 1 Lea 468.

(2) Where the object of the bill is to reach equitable, personal assets, the return unsatisfied of an execution issued to the sheriff of the county in which the judgment was rendered shows that the judgment creditor has exhausted his legal remedies, and entitles him to proceed in equity without issuing an execution to the county wherein such assets are situated.—Embree v. Reeve, 6 Humphr. 37.

58. N.Y.—Coe v. Whitbeck, 11 Paige 42.
15 C.J. p 1397 note 75.

59. D.C.—Clark v. Walter T. Bradley Coal, etc., Co., 6 App.D.C. 437.
Mich.—Wilson v. Addison, 37 N.W. 109, 127 Mich. 680.

60. U.S.—Harkin v. Brundage, Ill., 48 S.Ct. 268, 276 U.S. 36, 72 L.Ed. 457, reversing, C.C.A., 13 F.2d 617, certiorari granted 47 S.Ct. 237, 273 U.S. 682, 71 L.Ed. 838.—Motlow v. Southern Holding & Securities Corporation, C.C.A.Mo., 95 F.2d 721, 119 A.L.R. 1331, certiorari denied 59 S.Ct. 68, 305 U.S. 609, 33 L.Ed. 388.—Commercial Trust Co. v. Chattanooga Ry. & Light Co., D.C.Tenn., 281 F. 856.

Cal.—Israel v. Bryan, 197 P. 121, 52 Cal.App. 66.

Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

Fla.—Holly v. Gainesville Nat. Bank, 86 So. 444, 80 Fla. 523.

Ill.—Birney v. Solomon, 181 N.E. 318, 348 Ill. 410.—Chicago Title & Trust Co. v. Provol, 282 Ill.App. 173.—Wojtas v. Rachel, 267 Ill.App. 148.—Clark v. G. A. Ball-Bearing Mfg. Co., 245 Ill.App. 579.—National Plumbing & Heating Supply Co. v. Illinois Wood Preserving Co., 229 Ill. App. 69.—Meusel v. Bock, 234 Ill. App. 455.

Mass.—First Nat. Bank v. Nichols, 200 N.E. 869.

Mich.—Van Buren v. Armstrong-Jewell Const. Co., 226 N.W. 213, 214, 247 Mich. 522, quoting *Corpus Juris*—Comstock v. Horton, 209 N.W. 179, 235 Mich. 232.

Mo.—O'Connell v. Smith, App., 131 S. W.2d 730.

N.Y.—Farjeon v. Fulton Securities Co., 233 N.Y.S. 577, 235 App.Div. 541.

Or.—Ruth v. Cox, 291 P. 371, 134 Or. 200.

W.Va.—Lewis v. Fisher, 171 S.E. 106, 114 W.Va. 151.

15 C.J. p 1397 note 78, p. 1400 note 11 [b].

Presumption as to return before suit see *infra* § 69.

Return of execution generally see the C.J.S. title Executions §§ 314–330, also 23 C.J. p 791 note 47 et seq.

Suit after return but before filing thereof

An indorsement by a deputy sheriff on an execution, after more than sixty days from its issue, of a return of no property, and a delivery of the same by him to the officer in charge of the sheriff's office to be filed, is a sufficient return to sustain a creditors' suit commenced on that day, although the return is not filed with the county clerk until the next day.—Iselin v. Henlein, 7 N.Y.Civ.Proc.

Return on alias execution. After an execution has been issued and returned unsatisfied, the issuance of an alias execution does not operate against the right of complainant to file a creditors' bill,⁶¹ unless it appears that the sheriff has levied or can levy the alias execution on property sufficient to satisfy the judgment, it being immaterial that the alias execution has been levied on property insufficient in value.⁶²

Where an execution is issued to the proper county and returned nulla bona, it is no defense to a creditors' bill founded thereon that an execution has been issued to another county and not returned.⁶³ However, where a fieri facias is levied on property of the debtor, and thereafter successive venditioni exponas with fieri facias clauses are issued and returned "stayed by the complainant," the return unsatisfied of an execution issued to another county is not sufficient to confer jurisdiction.⁶⁴

(2) Sufficiency of Return

To support a creditors' suit, the return of the execution must be properly made; it must be made in good faith, by the proper officer, to the proper court and within the proper time.

As a condition precedent to the maintenance of a creditors' suit, a proper return of the execution must be made.⁶⁵ The return must show prima facie that the creditor has exhausted his legal remedies.⁶⁶ The return must be broad enough to disclose or show that defendant has no property of any kind,

real or personal, out of which the execution can be satisfied,⁶⁷ and must be such as, if untrue, would render the officer liable for a false return.⁶⁸

A personal demand on defendant in the execution for payment thereof, or of property out of which to make it, is not essential to the validity of the return.⁶⁹ A return of an execution against several defendants stating generally that they had no property out of which the execution could be collected, without particularly stating that neither of them had such property, is sufficient to show that the execution could not be made out of joint or separate property of defendants.⁷⁰

Good faith. The object of requiring the issuance and return unsatisfied of an execution being to show that complainant has no remedy at law, the return of the execution unsatisfied must be made in good faith and because defendant has no property out of which to make it, and a return for any other reason is not sufficient.⁷¹ The return of an execution unsatisfied is insufficient where made pursuant to the direction of plaintiff in the execution,⁷² without any effort made by the officer to collect the execution or find property on which to levy it.⁷³ On the other hand, the creditors' right to maintain the bill is not affected by the fact that there was property which might have been seized, unless plaintiff knew of its existence and omitted to act on such knowledge.⁷⁴ Furthermore, it has been held that the fact that plaintiff in the execution did not direct the sheriff to levy on certain property belonging to defendant, of

481, 16 Abb.N.Cas. 73, 2 How.Pr.N.S. 211.

61. N.Y.—Thomas v. McEwen, 11 Paige 131.

15 C. J. p 1398 note 80.

62. N.Y.—Storm v. Badger, 8 Paige 130.

15 C.J. p 1398 note 81.

63. N.Y.—Cuyler v. Moreland, 6 Paige 273.

However, where there were two executions issued, one to the county of defendant's residence and the other to another county, it was held that a creditors' bill could not be maintained except on an allegation of the return of both executions unsatisfied, unless it was also alleged that some fraudulent obstruction to the collection of the second execution was interposed, or that the property of defendant in such county would in any event be insufficient to pay the judgment.—Willis v. Moore, Clarke, N.Y., 150.

64. N.C.—Canaday v. Nuttall, 37 N. C. 265.

21 C.J.S.—69

65. Ill.—Hart v. Oliver, 129 N.E. 833, 296 Ill. 209.

Irregularity or invalidity as a defense see infra § 51.

66. Ill.—Hart v. Oliver, supra.

67. Ill.—Hart v. Oliver, supra.

15 C.J. p 1398 note 85.

Return of levy on equity

A return of no personal property, and a levy on an equitable interest in land, or on land in which defendant has only an equity, is a return of the execution unsatisfied, the levy on the equity being a nullity.—House v. Swanson, 7 Heisk., Tenn., 32.

68. Ill.—Hart v. Oliver, 129 N.E. 833, 296 Ill. 209.

Mich.—Williams v. Hubbard, Walk. 28.

69. Ill.—Reinhardt v. Kennedy, 106 Ill.App. 96—Thompson v. Marsh, 61 Ill.App. 289.

70. N.Y.—Austin v. Figueira, 7 Paige 56.

15 C.J. p 1399 note 88.

71. U.S.—Bassett v. Orr, C.C.Wis., 2 F.Cas.No.1,095, 7 Biss. 296.

15 C.J. p 1399 note 90, p 1400 note 3 [d].

72. Mich.—Wharton v. Fitch, Walk. 143—Williams v. Hubbard, Walk. 28.

73. Ill.—Scheubert v. Honel, 38 N.E. 913, 152 Ill. 313, affirming 50 Ill. App. 597.

15 C.J. p 1399 note 92.

74. N.Y.—Meyer v. Mohr, 24 N.Y. Super. 333, 19 Abb.Pr. 299.

15 C.J. p 1399 note 93.

In Ohio, under Code § 458, providing that any equitable interest of a judgment debtor shall be subject to the payment of the judgment "when a judgment debtor has not personal or real property subject to levy on execution," the court must dismiss the bill whenever it is shown or admitted by plaintiff that the debtor has sufficient property liable to execution to satisfy the judgment.—Lee v. Harback, 2 Ohio Dec. (Reprint) 361, 2 West.L.Month. 527.

which plaintiff knew, is no defense to a bill;⁷⁵ but there is authority to the contrary.⁷⁶

By whom made. A return of nulla bona made by a deputy sheriff is sufficient, where it does not appear that his authority is not coextensive with the territorial boundaries of the county.⁷⁷

To what court. Where a judgment is docketed in another county, a creditors' bill may not be sustained on return of the execution to the clerk's office of that county, where the statute requires that it be duly returned to the court from which it issued.⁷⁸

Time for return. As may be seen in subdivision c (1) of this section, the execution must be returned unsatisfied in whole or in part prior to the filing of the bill. A return of the execution on the return day named therein is a good one;⁷⁹ but a return may not be made after one of several joint judgment defendants has paid the judgment and it has been assigned to him.⁸⁰

As a general rule, a creditor may base his suit on a return made before the return day, or before the lapse of the entire time within which by statute the sheriff may hold the execution in his hands, where the bill is not filed until after that time, and where the sheriff takes on himself the responsibility of returning the execution within such time, having satisfied himself that defendant has no property out of which to make the money.⁸¹ This rule does not prevail in all states, however;⁸² and it has been held that the creditor may not

file his bill before the return day named in the execution, even where the execution has been actually returned before that day,⁸³ although there is authority to the contrary.⁸⁴

(3) Operation and Effect

In a creditors' suit the return of an execution unsatisfied is *prima facie*, sufficient and ordinarily conclusive evidence that defendant is without property subject to execution.

The return by the officer of an execution nulla bona is *prima facie* and sufficient evidence that defendant has no property subject to levy at that time, so as to authorize a creditors' bill based on the judgment on which the execution issued,⁸⁵ especially where the answer admits that such is the effect of the return,⁸⁶ and dispenses with proof that the debtor is without property other than that which the creditor seeks to reach by his bill.⁸⁷

Ordinarily, such a return is conclusive evidence of the exhaustion of legal remedies and the necessity for resort to a court of equity, when it is good on its face and is not made collusively,⁸⁸ and, as is shown in § 51 *infra*, such a return ordinarily may not be attacked collaterally.

§ 48. Supplementary Proceedings

A creditor need not first resort to supplementary proceedings in order to file a creditors' bill where such proceedings merely provide a cumulative remedy.

Where statutory proceedings supplementary to execution are regarded as cumulative only, see §

75. Mich.—Albany City Bank v. Dorr, Walk. 317.
15 C.J. p 1399 note 94.

76. U.S.—Merchants' Nat. Bank v. Sabin, C.C.Minn., 34 F. 492.
15 C.J. p 1399 note 95.

77. Ky.—Dana v. Banks, 6 J.J. Marsh. 219.

78. N.Y.—Winslow v. Pitkin, 1 Barb.Ch. 402.

In Kentucky, to give a circuit court jurisdiction of a suit to subject real property to a judgment of an inferior court, there must be a return of "no property," not only on an execution from the inferior court, but also on an execution from the circuit court.—Alexander v. Mullins, 16 Ky.L. 31.

79. Mich.—Williams v. Hubbard, 1 Mich. 446.

N.Y.—Williams v. Hogeboom, 3 Paige 469.

80. N.Y.—Bostwick v. Scott, 40 Hun 212.

81. U.S.—Bassett v. Orr, C.C.Wis., 2 F.Cas.No.1,095, 7 Biss. 296.
15 C.J. p 1400 note 2.

82. Mich.—Mauch Chunk Second Nat. Bank v. Dwight, 47 N.W. 111, 83 Mich. 192.

15 C.J. p 1400 note 4.

83. Mich.—Mauch Chunk Second Nat. Bank v. Dwight, *supra*.

15 C.J. p 1400 note 5.

84. U.S.—Bassett v. Orr, C.C.Wis., 2 F.Cas.No.1,095, 7 Biss. 296.

15 C.J. p 1400 note 6.

85. Ky.—Sipple v. Catron, 265 S.W. 491, 205 Ky. 81.

Or.—American Bank v. Port Orford Cedar Products Co., 12 P.2d 1014, 1916, 140 Or. 138, citing *Corpus Juris*.

N.Y.—Taylor v. Ellsworth Bldg. Corporation, 183 N.Y.S. 394, affirmed 190 N.Y.S. 954.

15 C.J. p 1400 notes 8, 11 [a], p 1411 note 76 [a].

86. Tenn.—Turley v. Taylor, 3 Lea 171.

87. Colo.—Goddard v. Fishel-Schlichten Importing Co., 48 P. 279, 9 Colo.App. 306.

88. Mich.—Van Buren v. Armstrong-Jewell Const. Co., 226 N.W. 213, 214, 247 Mich. 522, citing *Corpus Juris*.

Mo.—O'Connell v. Smith, App., 131 S.W.2d 730.

15 C.J. p 1400 note 11.

Conclusiveness of return generally see the C.J.S. title Executions § 329, also 23 C.J. p' 805 note 5 et seq.

Return based on debtor's statement

Where an officer returns an execution nulla bona on the statement of defendant that he has no property or money, defendant cannot afterward contradict the return by showing that he had property.

Ill.—Lewis v. Lamphere, 79 Ill. 187.

N.Y.—Gillett v. Staples, 16 Hun 587.

Sheriff's return establishes what it certifies, unless it was procured by a collusion between the creditor and sheriff, or there was an intentional omission to enforce the execution.—Taylor v. Ellsworth Bldg. Corporation, 183 N.Y.S. 394, affirmed 190 N.Y.S. 954.

5 supra, a creditors' bill may be maintained without first resorting to the statutory proceeding.⁸⁹

In some jurisdictions, the creditor must first resort to supplementary proceedings,⁹⁰ unless such proceedings will not afford an adequate remedy.⁹¹

§ 49. Resort to Collateral Security

The authorities are in conflict on the question as to whether a creditor must resort to collateral security as a condition precedent to filing a creditors' bill.

In some jurisdictions, it has been held that a creditor may maintain a bill in equity without first pursuing his remedies under a mortgage by which his debt is secured;⁹² but it has been also held that where a creditor has security for his debt, he must first exhaust such security in order to obtain relief in equity.⁹³

§ 50. Exhausting Legal Remedies after Suit Brought

As is shown in § 67 infra, where jurisdiction does not exist at the time of the filing of a creditors' bill because of the want of judgment or execution, the defect cannot be cured by the subsequent recovery of a judgment or the issuance and return unsatisfied of execution thereon and the setting up of such facts in a supplemental bill.

It may be observed in § 43 b (2) supra, however, that by reason of statute in some jurisdictions a

pending action at law is sufficient to maintain a creditors' bill, although no final decree in equity may be rendered until judgment at law has been entered.

§ 51. Defenses

Ordinarily, in the absence of waiver, anything tending to defeat the suit may be shown in defense to creditors' suits, but the judgment or return of execution is not open to contradiction or impeachment.

Ordinarily, anything tending to defeat the suit may be shown in defense to creditors' suits.⁹⁴ However, in an action against a person alleged to have property of the judgment debtor or to be indebted to him, alleged facts will not constitute a defense where they would not have been a defense in an action by the judgment debtor.⁹⁵

A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some direct proceeding, is not open to contradiction or impeachment in respect of its validity, verity, or binding effect in a creditors' suit based thereon.⁹⁶ Ordinarily, the fact that the execution was not issued and returned in conformity with statutory requirements cannot be taken advantage of in proceedings on a creditors' bill founded on such execution,⁹⁷ and the return of execution, as regards its conclusiveness, is governed by the same rule as the execution, and is presumed to be regu-

89. Neb.—Chamberlain Banking House v. Turner-Frazier Mercantile Co., 92 N.W. 172, 66 Neb. 48. S.D.—Meyer Boot, etc., Co. v. Shenkberg Co., 80 N.W. 126, 11 S.D. 620. Supplementary proceedings as substitute for creditors' bill see the C.J.S. title Executions § 345, also 28 C.J. p 827 notes 55-57.

90. Cal.—Henderson v. D. S. Den-ehy Mercantile Co., 191 P. 558, 48 Cal.App. 41.

91. Cal.—Bond v. Buigheroni, 8 P. 2d 130, 215 Cal. 7—Phillips v. Price, 94 P. 617, 153 Cal. 146—Rapp v. Whittier, 45 P. 703, 113 Cal. 429—Henderson v. D. S. Den-ehy Mercantile Co., 191 P. 558, 48 Cal.App. 41—Smith v. Lehfeldt, 179 P. 724, 39 Cal.App. 791—Bonner v. Lehfeldt, 179 P. 722, 39 Cal.App. 649.

92. N.Y.—Palmer v. Foote, 7 Paige 437. 15 C.J. p 1388 note 56.

93. Ill.—Preston v. Colby, 4 N.E. 375, 117 Ill. 477, 15 C.J. p 1388 note 57.

94. Facts constituting defense

(1) Mortgagee cannot under statute reach and apply, to satisfy bal-

ance due on mortgage debt, mortgagor's right to require grantee, assuming mortgage, to pay mortgage debt, where mortgagor's indebtedness to mortgagee could not be established because of former's discharge in bankruptcy.—Bloch v. Budish, 180 N.E. 729, 279 Mass. 102.

(2) Grantee, sued by judgment creditors of his grantor's covenantee for half interest in land conveyed, could show that debtor never ratified purchase, and disavowed or repudiated it within reasonable time.—Opelousas-St. Landry Bank & Trust Co. v. Bruner, 125 So. 507, 13 La.App. 337.

Facts not constituting defense

(1) In general.

Ky.—Robertson v. Stewart & Spring, 2 B.Mon. 321.

Ohio.—Gibbon v. Dougherty, 10 Ohio St. 365.

(2) National bank's violation of statute prohibiting it from taking mortgage to secure new loan was held no defense to its assignee's suit to apply borrower's interest in certain fund to payment of note assigned to bank with mortgage as security for nominal payee's note.—

Westminster Nat. Bank v. Graustein, 170 N.E. 621, 270 Mass. 565, certiorari denied Graustein v. Westminster Nat. Bank, 51 S.Ct. 80, 282 U.S. 376, 75 L.Ed. 773.

(3) That a depository does not claim title to a fund does not preclude the maintenance of a judgment creditors' action where others claim the fund adversely.—Bond v. Bulgheroni, 8 P.2d 130, 215 Cal. 7.

(4) It is no defense that one of the creditors has taken out a capias ad satisfaciendum and has caused the arrest of the debtor thereon where the debtor has applied for the benefit of the Insolvent Debtor's Act.—Brandon v. Gowing, 6 Rich.Eq. 5.

95. Cal.—Travis Glass Co. v. Ibbetson, 200 P. 595, 186 Cal. 724.

96. Ky.—Havens v. Ahlering, 97 S. W. 344, 29 Ky.L. 1265. 15 C.J. p 1410 note 69.

Collateral attack generally see the C.J.S. title Judgments §§ 401-435, also 34 C.J. p 511 note 46-p 567 note 71.

97. D.C.—Branham v. Johnson, 85 F.2d 807, 66 App.D.C. 230. 15 C.J. p 1410 note 73.

lar; objections thereto should be made to the court in which the judgment was recovered.⁹⁸ However, the fact that the judgment, on which the creditors' suit is based, is void is a good defense to such suit.⁹⁹

Where a bank which is a party to a creditors' bill against a depositor pays the deposit to him, it is subrogated to his rights and may avail itself of any defense existing in his behalf.¹

Waiver. A defense to creditors' suits may be waived, as by not setting it up in the answer.²

§ 52. Limitations and Laches

A creditors' suit may be barred by limitations or laches, the time beginning to run ordinarily from the return of execution nulla bona.

A creditors' suit must be brought within the time allowed by the statute of limitations.³ Ordinarily, until judgment has been obtained at law and execution has been returned nulla bona, the right to file a creditors' bill does not accrue, and hence the statute of limitations begins to run only from that time.⁴ Although there is authority to the contrary,⁵ the general rule is that where the suit is in reality for the benefit of all persons interested provided they come in and make themselves parties, the statute of limitations applies to the time of the institution of the suit and not to the time of intervention.⁶ However, where a bill filed on behalf of an individual creditor is afterward amended to state that it is filed on behalf of all creditors who may come in, a creditor whose claim is barred at the time of the amendment cannot come

in under the bill.⁷

The defense of the statute of limitations may be set up by any party to the proceeding;⁸ and it has been held that the statute may be set up at any time before the master makes his report, and even thereafter on exceptions, unless the party has done some act or stands by and permits some act to be done which necessarily implies a waiver of that defense on his part.⁹

Laches. Where plaintiff is guilty of laches he will be precluded from maintaining a creditors' suit.¹⁰

§ 53. Jurisdiction and Venue

- a. Jurisdiction
- b. Venue

a. Jurisdiction

Creditors' suits should ordinarily be brought in equity and the amount involved must be within the jurisdictional amounts that may be fixed by statutory or constitutional provisions.

A creditors' suit being one of equitable cognizance, as shown supra § 1, it follows that, in the absence of any statute to the contrary, the bill should be filed in a court of equity jurisdiction.¹¹ A court is not deprived of jurisdiction because the creditor originally filing the bill was not entitled to relief where it had acquired jurisdiction of valid claims by intervention of other creditors.¹²

Where a judgment is obtained in a federal court, such court will entertain a creditors' bill brought by the judgment debtor.¹³

98. N.Y.—Taylor v. Ellsworth Bldg. Corporation, 183 N.Y.S. 894, affirmed 190 N.Y.S. 954.
15 C.J. p 1410 note 74.

99. Ill.—Anderson v. Hawhe, 3 N.E. 566, 115 Ill. 33.

1. N.Y.—A. T. Albro Co. v. Fountain, 57 N.E. 72, 162 N.Y. 498, reversing 44 N.Y.S. 150, 15 App.Div. 351.

2. Mass.—Coral Gables v. Beerman, 5 N.E.2d 554.

3. Iowa.—Bankers Trust Co. v. Garver, 268 N.W. 568, 222 Iowa 196.

4. N.Y.—Bergmann v. Lord, 86 N.E. 828, 194 N.Y. 70.
15 C.J. p 1409 note 61.

5. Md.—Hall v. Ridgely, 33 Md. 308.
15 C.J. p 1409 note 62.

6. U.S.—Richmond v. Irons, Ill., 7 S.Ct. 788, 121 U.S. 27, 30 L.Ed. 864—Marsh v. United States, C.C.A.Va., 97 F.2d 327, 330, citing *Corpus Juris*—Newgass v. Atlantic & D. R. Co., C.C.Va., 72 F. 712.

Mont.—State v. District Court of First Judicial Dist., 300 P. 544, 546, 90 Mont. 213, quoting *Corpus Juris*.

15 C.J. p 1409 note 63.

7. N.Y.—Cunningham v. Pell, 6 Paige 655.

8. Md.—Hall v. Ridgely, 33 Md. 308.

15 C.J. p 1409 note 65.

9. Md.—Hall v. Ridgely, 33 Md. 308.

10. U.S.—Burton v. Roos, D.C.Tex., 20 F.Supp. 75, affirmed, C.C.A., Texas Co. v. Roos, 93 F.2d 380.
Ill.—See *In re Dyer's Estate*, 201 Ill. App. 183.

15 C.J. p 1409 note 68.

Laches held not to exist

(1) In general.—Scholtz v. Hazard, 191 P. 123, 68 Colo. 343—15 C.J. p 1409 note 68 [d].

(2) Creditors of owner of estate in remainder, who for more than seven years failed to institute any proceedings to subject property thereof to

the satisfaction of their claims were held not barred by laches, the existence of the life estate being a sufficient excuse for delay.—Field v. Tyner, 261 S.W. 35, 163 Ark. 373.

11. Mo.—Kinsella v. Marquette-Easton Finance Corporation, App., 28 S.W.2d 427.

15 C.J. p 1411 note 83 [a].

Probate court

Ordinarily, creditors' suits cannot be maintained in probate courts.—Moseley v. Moseley, 132 N.E. 417, 240 Mass. 1—24 C.J. p 455 note 81 [e].

Estoppel

In suit to apply stock for liability on notes, defendant who admitted owning two shares of stock in corporation named in bill could not deny jurisdiction of equity court to hear suit.—Coral Gables v. Beerman, Mass., 5 N.E.2d 554.

12. Va.—Chaney v. Kibler, 198 S.E. 877, 171 Va. 194.

13. U.S.—Hudson v. Wood, C.C.Ky., 119 F. 764—Burt v. Keyes, C.C. Ohio, 4 F.Cas.No.2,212, 1 Flipp. 61.

Jurisdictional amount. By constitutional or statutory provisions, the jurisdiction of the lower federal courts and of particular lower courts of some of the states is dependent on the amount in controversy, and where a minimum amount is thus fixed, the court cannot entertain a creditors' bill involving a less amount;¹⁴ and where a maximum amount is fixed, the court has no jurisdiction of a bill involving a greater amount.¹⁵ It has been held that, if either the amount of complainant's judgment or the amount of defendant's property is insufficient, the bill will not be sustained.¹⁶ Two or more creditors who have obtained judgments on which executions have been returned nulla bona may join in a creditors' suit for the purpose of giving the court jurisdiction, where the aggregate of their debts exceeds the minimum jurisdictional amount, although their individual claims are less than such amount,¹⁷ and in a federal court it has been held sufficient if the judgment of one of the plaintiffs exceeds the jurisdictional minimum, and other creditors having claims of the same general character, although insufficient in amount, may unite or intervene.¹⁸

In some states, however, the courts have jurisdiction regardless of the amount of complainant's demand,¹⁹ although it has been held that the court will not entertain jurisdiction where the amount of complainant's claim is trifling;²⁰ or where the

value of the property sought to be reached does not exceed the amount of lien debts, and an injunction would be fruitless.²¹

b. Venue

A creditors' suit must be brought within the forum prescribed by applicable constitutional or statutory provisions.

A creditors' suit must be brought within the forum prescribed by applicable constitutional or statutory provisions.²² While, under some statutes, the assignee of a judgment may file a bill in the county in which he resides,²³ under other statutes a creditors' suit may be maintained either in the county in which the judgment was rendered or in the county in which defendant resides or is summoned.²⁴

It has been held that, in the absence of statute prescribing the county in which equitable proceedings shall be commenced, a creditors' suit should be filed in the county where one of the creditors resides, if both reside within the state; but that if plaintiff does not reside within the state, the bill may be brought in any county.²⁵ It has been held also that the courts of a particular county have jurisdiction where one of the defendants resides therein,²⁶ or where the property sought to be subjected is situated there.²⁷ It has been held in the federal courts that a creditors' bill may be filed by an alien plaintiff in the district of the situs of the property, al-

Character and sufficiency of judgment see supra § 46.

Diversity of citizenship:

Intervention as affecting jurisdiction see Federal Courts § 69, also 25 C.J. p 764 note 11—p 765 note 19.

Time as of which jurisdiction determined see Federal Courts § 57, also 25 C.J. p 748 note 59—p 749 note 69.

14. Tenn.—Pierce v. Bowers, 8 Baxt. 353.

15 C.J. p 1411 note 91.

15. Ohio.—Devou v. Simpson, 1 Handy 557, 12 Ohio Dec. (Reprint) 287.

Tex.—Cleveland v. Peoples' Nat. Bank, Civ.App., 49 S.W. 523.

16. N.Y.—Shepard v. Walker, 7 How.Pr. 46—Smets v. Williams, 4 Paige 364.

17. N.Y.—Dix v. Briggs, 9 Paige 595.

15 C.J. p 1411 note 94.

18. U.S.—Huff v. Bidwell, Ga., 151 F. 563, 81 C.C.A. 43, affirmed 103 F. 362, and appeal dismissed 29 S.Ct. 694, 214 U.S. 528, 53 L.Ed. 1069.

Patent interest

If the amount in controversy is too

small to bring the case within the jurisdiction of a federal court, it cannot assume jurisdiction merely because the object of the bill is to reach an interest of the debtor in a patent.—Ryan v. Lee, C.C.Mo., 10 F. 817.

19. Ky.—Bryant v. Bryant, 20 S.W. 270, 14 Ky.L. 358.

15 C.J. p 1412 note 97.

20. Or.—Hamburger v. Grant, 8 Or. 181.

15 C.J. p 1412 note 98.

21. Ga.—Barnwell v. Wofford, 67 Ga. 50.

22. Realty outside county

Under statutes permitting actions relating to a parcel of land situated in two counties to be brought in either county, etc., a court has no jurisdiction, in a judgment creditor's suit, over land located wholly in another county.—French v. Buffatt, 33 S.W.2d 92, 161 Tenn. 500.

To collect from testamentary trust

A creditors' suit to collect a judgment from income payable under testamentary trust was not to establish "a money demand against the estate" within a statute requiring suit to be brought in the county in which the estate is being administered; nor

one "to annul or suspend provisions of a will," within a statute providing that proceeding to annul provisions of a will shall be before the court probating same.—Nunn v. Titcher-Goettinger Co., Tex.Com.App., 196 S.W. 890, affirmed, Civ.App., 245 S.W. 421.

23. Mich.—Rankin v. Rothschild, 43 N.W. 1077, 78 Mich. 10.

24. Ky.—Bramblett v. Couch, 105 S.W. 460, 32 Ky.L. 311.

15 C.J. p 1412 note 7.

Several defendants

Under a code provision that equity cases shall be tried in the county of the residence of the defendant against whom substantial relief is prayed, if this requirement is satisfied as to one defendant, it is immaterial that another defendant resides in another county.—Bryant v. Thomas, 84 S.E. 739, 143 Ga. 217—Kruger v. Walker, 36 S.E. 794, 111 Ga. 383.

25. N.H.—Bay State Iron Co. v. Goodall, 39 N.H. 223, 75 Am.D. 219.

26. Va.—Clayton v. Henley, 32 Gratt. 65, 73 Va. 65.

27. Va.—Clayton v. Henley, supra.

though defendants may be residents of another district.²⁸

§ 54. Parties in General

All persons whose rights may be affected by the decree to be made in a creditors' suit should be made parties.

Although all persons whose rights may be affected by the decree to be made in a creditors' suit are necessary parties,²⁹ the action of the court in proceeding without such parties is erroneous, but not void.³⁰ The court may, if necessary to a proper decision, require lienholders to be made formal parties, although their debts have been reported as liens by the commissioner.³¹ Although a judgment at law is recovered in the name of one to the use of another, yet a creditors' bill cannot be brought by the use plaintiff in the same way, but the person to whose use the bill is filed must be made a party to the suit.³²

Parties to creditors' suits by creditors of a corporation see the title Corporations § 1439.

§ 55. Plaintiffs in General

A creditor of a living debtor may file a bill in behalf of himself alone where he does not seek enforcement of any trust for the benefit of creditors; and several creditors having distinct claims may join in a creditors' bill.

In general, where the creditor of a living debtor resorts to equity because of the inadequacy of his remedy at law, as in suits to subject property not reachable by execution, and not for the enforcement of any trust for the benefit of creditors, he may file the bill in behalf of himself alone.³³

although the usual and the better practice in such cases is for plaintiff to sue on behalf of himself and other creditors of the same class, as shown infra § 56. A bill by a single creditor, although filed on behalf of himself only, may, by an order convening all the creditors and directing the statement of proper accounts, be converted into a creditors' suit, and it will be regarded as such from the time such order of reference is made,³⁴ provided the court had jurisdiction of the single creditor's suit.³⁵

Joinder of plaintiffs. It is well settled that creditors of the same debtor, each of whom is entitled to resort to equity, although their claims are several and distinct, may join in a creditors' bill,³⁶ provided all creditors so joining stand on the same footing and have judgment and execution returned unsatisfied, where that is a prerequisite.³⁷

It has been held that both assignor and assignee of a claim or judgment are proper³⁸ and necessary³⁹ parties to a creditors' bill; but in some states the assignor need not ordinarily be made a party.⁴⁰

§ 56. — Suing in Behalf of All

One or more creditors may file a bill in behalf of all creditors who may choose to come in, and it has been held that a creditor cannot, for his sole benefit, exercise rights which exist for the equal benefit of all creditors as a class.

One creditor may file a bill in behalf of himself and all other creditors in the same situation who may choose to come in and contribute to the expense of the suit,⁴¹ where the beneficiaries are so

28. U.S.—*De Hierapolis v. Lawrence*, C.C.N.Y., 99 F. 321.

29. U.S.—*Cleveland Worsted Mills Co. v. Consolidated Textile Corporation*, C.C.A.Del., 292 F. 129.
Ga.—*Polhill v. Neal*, 50 Ga. 146.
15 C.J. p 1412 note 10.

Trustees

Where lien creditor brought a general creditor's bill and prayed for sale of debtor's assets and all holders of bonds secured by lien on debtor's assets intervened individually and proved their claims, trustees holding title for purpose of satisfying bonded indebtedness were "proper" but not "indispensable parties."—*Tennessee Pub. Co. v. Carpenter*, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.

30. U.S.—*Dyer v. Stauffer*, C.C.A. Ohio, 19 F.2d 922, certiorari denied 48 S.Ct. 114, 275 U.S. 551, 72 L.Ed. 421.

31. W.Va.—*Smith v. Parsons*, 11 S. E. 63, 33 W.Va. 644.

32. W.Va.—*Kellam v. Sayre*, 3 S.E. 589, 30 W.Va. 198.

33. U.S.—*Jenkins Petroleum Process Co. v. Credit Alliance Corporation*, C.C.A.Okla., 83 F.2d 532, 537, citing *Corpus Juris*.

Del.—*Keller v. Wilson & Co., Ch.*, 194 A. 45.

Hawaii.—*Henry Waterhouse Trust Co. v. King*, 33 Hawaii 1.

Ind.—*La Follett v. Akin*, 36 Ind. 1.

Tex.—*Trinity Portland Cement Co. v. Naylor*, Civ.App., 33 S.W.2d 853, error refused.

15 C.J. p 1413 note 14.

34. Va.—*Sutherland v. Rasnake*, 192 S.E. 695.

15 C.J. p 1413 note 15.

35. Va.—*Sutherland v. Rasnake*, supra.

36. Ark.—*Wm. R. Moore Dry Goods Co. v. Ford*, 225 S.W. 320, 146 Ark. 227, dissenting opinion 226 S.W. 139, 146 Ark. 227.

Fla.—*Ratliff v. Nowery*, 136 So. 895, 897, 102 Fla. 1072, citing *Corpus Juris*.

15 C.J. p 1413 note 25.

37. Fla.—*Ratliff v. Nowery*, supra.
Mich.—*McBride v. Wayne Circuit Judge*, 229 N.W. 493, 250 Mich. 1.
15 C.J. p 1414 note 26.

38. Mass.—*Westminster Nat. Bank v. Graustein*, 170 N.E. 621, 270 Mass. 565, certiorari denied *Graustein v. Westminster Nat. Bank*, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 773.
15 C.J. p 1414 note 28.

39. Ky.—*Cooper v. Gunn*, 4 B.Mon. 594.

40. Mass.—*Westminster Nat. Bank v. Graustein*, 170 N.E. 621, 270 Mass. 565, certiorari denied *Graustein v. Westminster Nat. Bank*, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 773.

15 C.J. p 1408 note 39, p 1414 note 30.

41. U.S.—*Richmond v. Irons, Ill.*, 7 S.Ct. 788, 121 U.S. 27, 30 L.Ed. 864.

numerous that it would be impracticable to bring them all before the court,⁴² provided the suit is in its nature one for the benefit of all the creditors,⁴³ for otherwise the other creditors are not entitled to share.⁴⁴ So, two or more creditors may unite in suing for the benefit of themselves and all other creditors.⁴⁵

It has been held that a suit to subject lands to payment of a judgment should be brought on behalf of complainant and all other judgment creditors, except those made defendants,⁴⁶ and that one creditor cannot, for his sole benefit, exercise rights which exist for the equal benefit of all creditors as a class.⁴⁷

Under some statutes, one or more creditors representing one third in amount of the unsecured debts of an insolvent are necessary parties to a suit instituted under the statute; and where an ordinary bill is filed by parties representing less than one third of the debts in amount, the defect cannot be cured by admitting new parties.⁴⁸

§ 57. Defendants

- a. In general
- b. Judgment debtors
- c. Debtor of judgment debtor
- d. Judgment creditors and other lienors
- e. Trustees and cestuis que trust

a. In General

All persons interested in the subject matter of the suit who are not plaintiffs are proper and necessary parties defendant.

As in other suits, the rule is that all persons interested in the subject matter of the suit who are not plaintiffs are proper and necessary parties defendant.⁴⁹ Conversely, persons not interested need

not be made parties.⁵⁰

Naming a person in the caption of the bill as a defendant and serving him with process are not alone sufficient to constitute such person a party to the suit so as to authorize the granting of relief against him. An averment showing his interest in, and relation to, the subject matter of the suit and a prayer for relief against him are indispensable, and the fact that such person files a so-called answer to the bill, claiming title to some of the property in suit, does not supply the lack of such averment or make such person a party.⁵¹ So, where the debtor is made sole defendant, and he files an answer showing that a third person holds a prior deed of trust of the premises, and the court orders such person to be made a party defendant, and that process be issued and served on him, which is done, such person is not thereby made a party defendant so as to authorize a decree against him, there being no allegations with reference to him in the bill, and no relief being prayed against him;⁵² nor is such person made a party defendant by the fact that the court, for the purpose of ascertaining all liens and their priorities, orders a reference of which such person is notified, since a decree directing all liens to be audited cannot make a trustee who holds the legal title a quasi party, nor the cestui que trust in a deed of trust, but only the undefined class of judgment creditors holding liens similar to complainant's.⁵³

Persons in possession of debtor's property. Ordinarily, all persons in possession of the property of the debtor sought to be reached are necessary parties to the suit.⁵⁴ However, a clerk of the court in possession of a fund is neither a necessary nor proper party.⁵⁵

Cooowners and persons having interests in prop-

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| <p>Ark.—Wm. R. Moore Dry Goods Co. v. Ford, 225 S.W. 320, 146 Ark. 227, dissenting opinion 226 S.W. 139, 146 Ark. 227.</p> <p>Del.—Keller v. Wilson & Co., Ch., 194 A. 45.</p> <p>Tex.—Staley-Wynne Oil Corporation v. International Shoe Co., Civ.App., 91 S.W.2d 877, error dismissed—Trinity Portland Cement Co. v. Naylor, Civ.App., 33 S.W.2d 853, error refused.</p> <p>15 C.J. p 1413 notes 16, 17.</p> <p>42. Pa.—In re Thompson's Receivership, 25 Pa.Dist. 757, 44 Pa.Co. 518. 15 C.J. p 1413 note 18.</p> <p>43. N.J.—Iauch v. De Socarras, 39 A. 381, 56 N.J.Eq. 524.</p> <p>44. N.J.—Whitney v. Robbins, 17 N. J.Eq. 360.</p> | <p>45. Md.—Birely v. Staley, 5 Gill & J. 432, 25 Am.D. 303.</p> <p>N.Y.—Lentilhon v. Moffat, 1 Edw. 451.</p> <p>46. W.Va.—Blumberg Bros. Co. v. King, 127 S.E. 47, 98 W.Va. 275. 15 C.J. p 1413 note 21.</p> <p>47. N.J.—Central-Penn Nat. Bank v. New Jersey Fidelity & Plate Glass Ins. Co., 182 A. 262, 119 N.J.Eq. 265.</p> <p>48. Ga.—Maddox v. Lanier, 33 S.E. 58, 107 Ga. 291.</p> <p>49. Colo.—Ross v. Nichols, 138 P. 1013, 25 Colo.App. 409. 15 C.J. p 1414 note 32.</p> <p>50. Lessee of land
As a general rule, where proceedings are had to sell the fee in land, it is not necessary to make the les-</p> | <p>see of the land a party.—Chapman v. Pittsburgh & S. R. Co., 18 W.Va. 184.</p> <p>51. W.Va.—R. D. Johnson Milling Co. v. Read, 85 S.E. 726, 76 W.Va. 557.</p> <p>52. W.Va.—McCoy v. Allen, 16 W.Va. 724.</p> <p>53. W.Va.—McCoy v. Allen, supra.</p> <p>54. Ala.—Spear v. Virginia-Carolina Chemical Corporation, 142 So. 33, 34, 225 Ala. 17, citing <i>Corpus Juris</i>.</p> <p>Ky.—Cassada v. First Nat. Bank, 105 S.W.2d 149, 268 Ky. 373.</p> <p>Ohio.—Cleveland Nat. Bank v. Burroughs Land Co., 10 Ohio App. 61. 15 C.J. p 1415 note 50.</p> <p>55. Tenn.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356.</p> |
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erty. Persons jointly interested with the debtor in property sought to be reached by a creditors' bill are not necessary parties, if the bill does not seek to affect their interests.⁵⁶ So, the persons entitled to the reversion after the determination of an estate by the curtesy are not proper parties defendant in a suit to subject such estate to a judgment against the tenant.⁵⁷ Where, however, the answer shows that persons not before the court claim property in the debtor's possession which the creditor attempts to reach, such persons or their representatives must be made parties before a decree can be had.⁵⁸

Grantors; assignees and grantees. Persons who have parted with their title to the property involved in a creditors' bill are not necessary parties therein.⁵⁹

Save in exceptional cases,⁶⁰ assignees, transferees, or grantees of the property sought to be reached are proper and necessary parties to the bill.⁶¹ However, where there have been successive assignments, the intermediate assignees are not necessary parties, if no attack is made on the first assignment and no relief is sought against the intermediate assignees.⁶²

Receiver or assignee. The court may grant leave to make a receiver a party defendant on a proper

showing,⁶³ and where, pending a creditors' bill, bankruptcy proceedings are instituted against the debtor, and he makes a transfer of his property to an assignee, the assignee should be brought in.⁶⁴

Minors and guardians. On a creditors' bill to reach a trust fund in which minors are interested, guardians ad litem may be appointed and are proper parties defendant.⁶⁵ Minor heirs have been held necessary parties to a suit to sell property to satisfy the judgment,⁶⁶ and it has been held that a suit to subject to the payment of debts of the insured the proceeds of life policies assigned by him to his wife and children cannot be brought against the curator of the minors, but must be brought against them directly, the title to an infant's estate being in the infant and not in the curator.⁶⁷

b. Judgment Debtors

Ordinarily, the judgment debtor is a necessary party defendant in an action to subject his equitable interests to the payment of a judgment.

Subject to some exceptions and qualifications,⁶⁸ it is a general rule that the judgment debtor is a necessary party defendant in an action to subject his equitable interests to the payment of a judgment,⁶⁹ even though he is a nonresident.⁷⁰ So, where there are several judgment debtors, all of them are necessary parties defendant,⁷¹ unless it

56. Iowa.—Cassady v. Grimmelman, 77 N.W. 1067, 108 Iowa 695. 15 C.J. p 1415 note 51.

Waiver of right to sue one of several

Although a creditor having remedies against several persons, each equally responsible to him, may proceed to enforce payment of his debt from either, and is not bound to proceed against all, yet he waives this right by convening all before the court and asking that the persons and subject of right chargeable with the debt shall be compelled to pay it.—Bentley v. Harris' Adm'r, 2 Gratt. 357, 43 Va. 357.

57. D.C.—Uhler v. Adams, 1 App.D. C. 392.

58. N.Y.—Taylor v. Mills, 2 Edw. 318.

59. Ala.—Southern R. Co. v. Hartshorn, 43 So. 583, 150 Ala. 217, 124 Am.S.R. 68.

Ill.—Andrews v. Scott, 113 Ill.App. 581, affirmed 71 N.E. 1112, 211 Ill. 612, 103 Am.S.R. 215.

60. W.Va.—Shumate v. Crockett, 27 S.E. 240, 43 W.Va. 491. 15 C.J. p 1416 note 59.

61. Ala.—Toone v. Roberts, 93 So. 616, 207 Ala. 671.

Ky.—Cassada v. First Nat. Bank, 105 S.W.2d 149, 268 Ky. 373. 15 C.J. p 1416 note 58.

62. N.Y.—McNeal v. Hayes Mach. Co., 103 N.Y.S. 312, 118 App.Div. 130.

15 C.J. p 1416 note 60.

63. Ill.—Burden v. Burden, 193 Ill. App. 102.

15 C.J. p 1417 note 68.

64. N.Y.—Lowry v. Morrison, 11 Paige 327.

65. Ill.—Binns v. La Forge, 61 N.E. 382, 191 Ill. 598.

Appointment

Where minor devisees are interested, it must appear that there was a decree appointing a guardian ad litem, and an answer purporting to be in virtue of such appointment is not sufficient.—Darrington v. Borland, 3 Port., Ala., 9.

66. Ill.—Meusel v. Bock, 234 Ill.App. 455.

67. Mo.—Judson v. Walker, 55 S.W. 1083, 155 Mo. 166.

68. Mass.—Warecki v. U. S. Fidelity & Guaranty Co., 170 N.E. 49, 270 Mass. 233.

15 C.J. p 1415 note 45.

No claim to fund

Where the judgment debtor made no claim to the fund sought to be reached, it was held that he was not a necessary party.—Rogers v. Brix Bros. Logging Co., C.C.A.Or., 287 F. 867.

Contribution from distributees

Where a judgment creditor of an insolvent, who was not a party to the insolvency proceedings, files a bill for contribution against a distributee who has received more than his equitable share of the assets, he need not make the insolvent, nor other creditors parties.—Bickford v. McComb, C.C.Tenn., 88 F. 428.

69. U.S.—Cleveland Worsted Mills Co. v. Consolidated Textile Corporation, C.C.A.Del., 292 F. 129—Ozan Lumber Co. v. Davis Sewing Mach. Co., D.C.Del., 283 F. 436.

Cal.—Burgoyne v. Perry, 3 Cal. 50. W.Va.—Blumberg Bros. Co. v. King, 127 S.E. 47, 98 W.Va. 275.

15 C.J. p 1415 note 38.

70. N.C.—Yarbrough v. Arrington, 40 N.C. 291.

71. Fla.—Ratliff v. Nowery, 136 So. 895, 897, 102 Fla. 1072, citing *Corpus Juris*.

W.Va.—White v. Kennedy's Adm'r, 28 W.Va. 221.

15 C.J. p 1415 note 40.

Joint judgments

Where in judgment creditors' suits, consolidated or ordered to be heard together, there are joint judgments against judgment debtor and third persons, such third persons should be made parties defendant and served with process, and until that is done,

is shown by the bill that the persons not made parties are mere sureties,⁷² or are not legally or morally liable to contribute toward the satisfaction of the debt;⁷³ or are insolvent⁷⁴ or are out of the jurisdiction of the court.⁷⁵

c. Debtor of Judgment Debtor

Where a creditor seeks payment out of a chose in action, the person against whom the debtor has a cause of action is a proper, and sometimes a necessary, party.

Where the creditor seeks payment out of a chose in action, the person against whom the debtor has a cause of action is a proper party defendant,⁷⁶ and two or more distinct debtors of the judgment debtor may be joined.⁷⁷ In some cases, it is held that such person is a necessary party defendant,⁷⁸ but this has been disputed.⁷⁹

The state; municipal corporations. Where the state is a subscriber to stock of a debtor corporation, it should not be made a party to a creditors' bill, it being sufficient to allege inability to make it a party.⁸⁰ It has been held that a municipal corporation which is indebted to a judgment debtor may be made a party defendant.⁸¹ In any event where a bill seeks discovery of salary due a county officer and what disposition, if any, he has made of it, and an injunction against his transferring the same, etc., and does not ask any relief against the county, neither the county nor any of

its officers is a necessary party.⁸²

d. Judgment Creditors and Other Lienors

Ordinarily, all persons having liens on the land sought to be subjected should be made parties.

All creditors whose judgments are liens on the land sought to be subjected should, according to some of the authorities, be made parties defendant;⁸³ but this rule does not prevail in all jurisdictions.⁸⁴ According to some cases, all persons having specific liens must be joined;⁸⁵ but it has been held that a mortgagee is not a necessary party to a suit to subject the equity of redemption to a judgment against the mortgagor,⁸⁶ although the better practice is to make him a party.⁸⁷

e. Trustees and Cestuis Que Trust

Generally, where the legal title to the property is held by trustees, such trustees and the cestuis que trust are necessary parties in creditors' suits relating to the property.

In creditors' bills brought to subject equitable interests of debtors to the satisfaction of their debts, where the legal title to the property is held by trustees, such trustees are, as a rule, necessary parties defendant;⁸⁸ but the rule is otherwise under some statutes.⁸⁹ So, all cestuis que trust whose interests are sought to be affected are necessary parties defendant,⁹⁰ particularly if they are limited in number.⁹¹

to direct order of reference, or to take any other steps affecting their interests, is error.—*Blumberg Bros. Co. v. King*, 127 S.E. 47, 98 W.Va. 275.

72. N.Y.—*Commercial Bank v. Meach*, 7 Paige 448.

73. N.Y.—*Commercial Bank v. Meach*, supra.

74. Mich.—*Rankin v. Rothschild*, 43 N.W. 1077, 78 Mich. 10.
15 C.J. p 1415 note 43.

75. N.Y.—*Commercial Bank v. Meach*, 7 Paige 448.

76. Fla.—*Ratliff v. Nowery*, 136 So. 895, 897, 102 Fla. 1072, citing *Corpus Juris*.

15 C.J. p 1415 note 46.

77. N.Y.—*Boyd v. Hoyt*, 5 Paige 65.
15 C.J. p 1415 note 47.

78. Mo.—*Cooksey v. Cooksey*, App., 200 S.W. 103.

15 C.J. p 1415 note 48.

Government as party

A suit cannot be maintained by a creditor of a railroad to reach moneys due it from the government, where the government is not made a party, as the fact that it cannot be sued except by its consent does not give the court jurisdiction to adjudicate its rights when it is not a party.

—*Wilson v. Central Vermont Ry. Co.*, 131 N.E. 169, 239 Mass. 80.

79. Tenn.—*Brightwell v. Mallory*, 10 Yerg. 196.

15 C.J. p 1415 note 49.

80. Ohio.—*Miers v. Zanesville, etc.*, Turnp. Co. 11 Ohio 273.

81. U.S.—*Hinsdale-Doyle Granite Co. v. Tilley*, C.C. Ill., 10 F. 799, 10 Biss. 572.

Mo.—*Pendleton v. Perkins*, 49 Mo. 565.

82. Ill.—*Singer, etc., Stone Co. v. Wheeler*, 6 Ill.App. 225.

Suing individual as officer

Where it appears from the averments of a creditor's bill that the money claimed to be due to defendant is payable to defendant as treasurer of the town and not as an individual, and that all matters which will be legally required to be done or which he will be restrained from doing by the direction of the court in order to carry out the purposes of the bill are matters which defendant would have to do or refrain from doing as treasurer of the fund, it is essential, to give the court jurisdiction to adjudicate the right claimed under the bill, to make the treasurer a party to the proceeding, and this legal requisite is not supplied by

making defendant a party to the suit as an individual.—*Goodwine State Bank v. Wise*, 263 Ill.App. 291.

83. W.Va.—*Arnold v. Casner*, 22 W. Va. 444.

15 C.J. p 1416 note 54.

84. Cal.—*Seymour v. McAvoy*, 53 P. 946, 121 Cal. 438, 41 L.R.A. 544.

15 C.J. p 1416 note 55.

85. N.C.—*Rountree v. McKay*, 59 N. C. 87.

15 C.J. p 1416 note 56.

86. Ga.—*Shepherd v. Armour Fertilizer Works*, 75 S.E. 585, 138 Ga. 555.

15 C.J. p 1416 note 57.

87. Tenn.—*Wessel v. Brown*, 10 Lea 685.

88. Ill.—*Meusel v. Bock*, 234 Ill.App. 455.

W.Va.—*Jackson County Bank v. First Nat. Bank*, 109 S.E. 719, 89 W.Va. 165.

15 C.J. p 1416 note 62.

89. Mass.—*Russell v. Burke*, 62 N. E. 963, 180 Mass. 543.

15 C.J. p 1416 note 63.

90. Ill.—*Meusel v. Bock*, 234 Ill.App. 455.

15 C.J. p 1416 note 64.

91. W.Va.—*Norris v. Bean*, 17 W.Va. 655.

§ 58. Intervention and Change of Parties

Generally, all persons possessing the necessary interest may intervene in creditors' suits. The petition in intervention need not conform to technical rules applicable to pleadings between the principal parties.

As a general rule, all persons possessing the necessary interest may intervene in creditors' suits.⁹² Thus, unless intervention is not necessary to protect their rights,⁹³ other creditors may, by leave of court, intervene as parties plaintiff whether the bill is filed on behalf of plaintiff and of all other creditors who may join as parties or on behalf of plaintiff alone,⁹⁴ although their judgments were obtained after the creditors' bill was filed;⁹⁵ but where there are several creditors' bills which have not been consolidated, complainants in one cannot, on motion, be permitted to intervene in the others to assail the decree.⁹⁶ Where funds of a debtor are in the hands of a court of equity, a judgment creditor may file an intervening petition to have such funds applied to his judgment,⁹⁷ and is not bound to resort to independent proceedings in equity unless he so chooses.⁹⁸ It has been held that where it has been established

by one of the parties to a creditors' bill by a judgment and return nulla bona of execution that the debtor is insolvent, and that hence there is no adequate remedy at law, then all creditors, whether having judgments or not, should be allowed to come in by intervening petition;⁹⁹ but in other cases it is held that creditors who have not exhausted their legal remedies cannot intervene,¹ even though the bill is filed on behalf of all creditors.² A creditor who has no lien and does not offer to share costs and expenses may not be entitled to intervene.³ It has been held that if the suit is not a creditors' bill nor maintainable as such, intervention will not be allowed;⁴ but it has also been held that where a bill is filed by a creditor whose claim has not been reduced to judgment, a judgment creditor who has had an execution returned nulla bona may intervene as plaintiff.⁵

A judgment in a state court is a sufficient basis for an intervention in a general creditors' suit in a federal court, although an appeal is pending from it.⁶

Time for coming in. It is usual to permit creditors to come in as parties at any time before dis-

92. Debtor's attorneys in another suit

In suit to reach and apply moneys due defendant, amount of which was in litigation in suit by defendant against others, defendant's attorneys in such other suit were properly permitted to intervene.—Baskin v. Pass, Mass., 19 N.E.2d 30.

Purchaser pendente lite

A purchaser from defendant pending a suit to subject the property to the payment of the vendor's debts is not entitled to be made a party to the suit.—Child, Pratt & Co. v. Burton, 69 Ky. 617, 6 Bush, 617.

Discretion of court

An application by a stranger to a suit to be allowed to intervene and be made defendant, in order that he may litigate plaintiff's claim, and set up a claim against the original defendants adverse to, and exclusive of, that of plaintiff, is not a matter of strict right, but rests in the discretion of the court.—Scheidt v. Sturgis, 23 N.Y.Super. 606.

93. Presenting claims to master

In a creditors' suit in which a receiver has been appointed, notice given to all creditors to present their claims to a special master with authority to take testimony and to determine all claims to priority, subject to action of the court, leave to intervene as a party will not be granted to a creditor, whose rights, as alleged in his petition, are fully provided for and protected by such gen-

eral orders.—Acme White Lead & Color Works v. Republic Motor Truck Co., D.C.Mich., 285 F. 88.

94. Mich.—Campau v. Detroit Driving Club, 90 N.W. 49, 130 Mich. 417.

15 C.J. p 1417 note 79.

Demurrers erroneously sustained

In creditor's suit to set aside deeds and for an accounting as to proceeds of realty deeded, sustaining demurrers of security-deed interveners to answers of plaintiff judgment creditor attacking priority of interventions, on ground that sales under which interveners claimed were invalid because of lack of reconveyance to grantor debtor, was error where interventions recited the obtaining of judgments and executions and the crediting on such judgments of the proceeds of sale of real estate covered by security deeds, but did not aver as to manner of sale.—Williams Realty & Loan Co. v. Simmons, 3 S.E.2d 580, 188 Ga. 184.

95. Va.—Rush v. Dickenson County Bank, 104 S.E. 700, 702, 128 Va. 114, citing *Corpus Juris*.

15 C.J. p 1417 note 80.

96. N.J.—Jones v. Fayerweather, 19 A. 22, 46 N.J.Eq. 237.

97. Ill.—Phillips v. Blatchford, 26 Ill.App. 606.

Mich.—In re Abbott, 153 N.W. 795, 187 Mich. 229.

98. Ala.—Talladega Mercantile Co. v. Jenifer Iron Co., 14 So. 743, 102 Ala. 259.

99. Ill.—Comstock-Castle Stove Co. v. Baldwin, 48 N.E. 723, 189 Ill. 636.

15 C.J. p 1417 note 84.

1. Mich.—McBride v. Wayne Circuit Judge, 229 N.W. 493, 250 Mich. 1.

15 C.J. p 1417 note 85.

2. N.Y.—Mattison v. Demarest, 24 N.Y.Super. 717, 19 Abb.Pr. 356.

15 C.J. p 1417 note 85.

3. U.S.—Jenkins Petroleum Process Co. v. Credit Alliance Corporation, C.C.A.Okl., 88 F.2d 532.

Employment of own counsel

One creditor, who came into a creditors' suit to subject lands to various judgments, but refused to contribute to the compensation of counsel employed by the other creditors, could nevertheless prove its judgment, where it appeared by its own counsel, and was liable for costs.—McClanahan's Adm'r v. Norfolk & W. Ry. Co., 96 S.E. 453, 122 Va. 705.

4. U.S.—Jenkins Petroleum Process Co. v. Credit Alliance Corporation, C.C.A.Okl., 88 F.2d 532.

Ga.—Branan v. Baxter, 50 S.E. 45, 122 Ga. 222.

5. Neb.—Merchants' Nat. Bank v. McDonald, 88 N.W. 492, 89 N.W. 770, 63 Neb. 363.

6. Tenn.—Barnett v. East Tennessee, etc., R. Co., Ch., 48 S.W. 817. Character and sufficiency of judgment to support creditors' suits see supra § 46.

tribution of the fund,⁷ or before final decree.⁸ Under some special circumstances, new parties may come in after decree if they can show an interest in the fund;⁹ but the filing of petitions to intervene will not be allowed from time to time without limit so as unnecessarily to delay plaintiff's cause.¹⁰ A creditor cannot ordinarily come in at a subsequent term, after decree settling all controverted questions, for the purpose of reopening the case and having the questions reheard.¹¹ After the original suit has been dismissed, although the formal order of dismissal has not been entered, other creditors have no right to intervene, although they contend that the dismissal was fraudulent as to them.¹²

Pleading and practice. Although a person not named in the bill as a party may become such in a general sense when a decree for a general account is entered under which he may prove his demand, as shown *infra* §§ 77, 78, when a creditor desires to be admitted as a cocomplainant of record, the course is to present a petition to the court, setting forth his claim,¹³ and to serve process or notice on the other parties,¹⁴ but the petition for intervention must not state a distinct cause of action.¹⁵ It has been held, however, that intervening petitions are not required to conform to the technical rules applicable to pleadings between the principal parties, and need not name other parties nor contain prayer for process.¹⁶ A petition to intervene may be filed without previous order of the court, and when so filed becomes a part of the pleadings and record;¹⁷ but the mere filing of a petition by another creditor to be made a party does not make petitioner a party, to effect such result

an order of the court is necessary;¹⁸ and no defense which may exist against the claim of a creditor who is permitted to come in as a party to the record is concluded by the order admitting him.¹⁹ Where a creditor is already a party plaintiff at his election to come in and comply with prescribed conditions, the fact that the order recognizing him as such is made before the personal representatives of certain deceased defendants have been brought in by service of process constitutes no irregularity.²⁰

In a suit by a simple creditor to subject funds in the hands of a third person, a bill of interpleader may be sustained as a general creditors' bill in order to remove any question of the court's jurisdiction over the entire amount of the funds in controversy.²¹ After judgment appointing a receiver, it has been held error to permit a person to be made a party defendant with leave to answer, where he does not allege that he has any defense, nor submit a proposed answer or affidavit of merits, but merely alleges that he is a creditor of defendant, holding a note.²² Where interveners have presented a petition for the discharge of the receiver and for an accounting by him, a denial of it is not a bar to a second petition in intervention to declare execution sales illegal and void because made when the property was in the receiver's possession and control.²³

Status of interveners. Where the receiver of the defendant debtor intervenes, claiming the fund in suit, he stands in the position of plaintiff in an ordinary action and must be dealt with as such,²⁴ and if a bill is filed by a creditor whose claim has

7. N.Y.—Kerr v. Blodgett, 48 N.Y. 62.
15 C.J. p 1418 note 91.

8. Md.—Watkins v. Worthington, 2 Bland 509.
15 C.J. p 1418 note 92.
Claims under decree see *infra* § 77.

Unreasonable time limit

Limit of two months, in which creditors not parties to original creditors' bill might intervene, was unreasonable as to nonresident interveners.—Columbus Iron Works v. Sibley, 137 S.E. 757, 164 Ga. 121.

9. U.S.—Seaver v. Bigelows, Ill., 5 Wall. 208, 18 L.Ed. 595.

Before confirmation of sale

Where debtor did not until on day of sale raise question of defect of parties arising from fact that trustees holding legal title to secure bonds were not made parties, court properly exercised its discretion in permitting trustees to appear after sale and before confirmation.—Tenn.

nessee Pub. Co. v. Carpenter, C.C.A. Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.

10. W.Va.—Marling v. Robrecht, 13 W.Va. 440.

11. Tenn.—U. S. Fidelity, etc., Co. v. Rainey, 113 S.W. 397, 120 Tenn. 357.

12. Iowa.—Keehn v. Keehn, 88 N.W. 957, 115 Iowa 467.

13. Tenn.—Thompson v. American Lumber & Mfg. Co., 256 S.W. 447, 148 Tenn. 470.

15 C.J. p 1418 note 96.

Petition held sufficient

Va.—Rau v. Shaver, 45 S.E. 873, 102 Va. 68.

14. S.C.—Ex parte Columbia Sav. Bank & Trust Co., 120 S.E. 371, 126 S.C. 378.

15 C.J. p 1418 note 97.

15. Ala.—Cortner v. Galyon, 137 So. 30, 223 Ala. 405.

Ga.—Dwight v. First Nat. Bank, 125 S.E. 62, 159 Ga. 188.

16. Ala.—American Pig Iron Storage Warrant Co. v. Gorman, 28 So. 603, 126 Ala. 194, 85 Am.S.R. 21.
15 C.J. p 1418 note 98.

17. Ga.—Brannan v. A. B. Baxter & Co., 50 S.E. 45, 122 Ga. 222.

18. Va.—Piedmont, etc., L. Ins. Co. v. Maury, 75 Va. 508.

19. N.C.—Long v. Yanceyville Bank, 85 N.C. 354.

20. N.C.—Long v. Yanceyville Bank, *supra*.

21. Tenn.—Willis v. Mann Const. Co., 236 S.W. 282, 145 Tenn. 318.

22. N.Y.—Trowbridge v. Troy, etc., R. Co., 99 N.Y.S. 435, 113 App.Div. 325.

23. Mich.—Campau v. Detroit Driving Club, 90 N.W. 49, 180 Mich. 417.

24. Mo.—Wilkinson v. Harding Dredge Co., App., 186 S.W. 743, followed in Alsop v. Wilkinson, App., 186 S.W. 745.

it been reduced to judgment, and a judgment creditor who has had an execution returned nulla bona intervenes, the intervener becomes plaintiff and all other parties defendants.²⁵ While an intervening creditor cannot defeat the judgment claim in which the bill is founded and the court obtains jurisdiction, he is not concluded by collateral averments in the bill which concede the validity of certain bonds and mortgages affecting the property, and he is, therefore, free to attack the validity thereof.²⁶

If persons who, although not necessary, are proper parties, are permitted to file answers without objection, plaintiffs cannot afterward object to their being parties,²⁷ and where a creditor who has been made a defendant to a general bill intervenes as a complainant, and the original complainants not only do not object but accept his assistance in the prosecution of the suit, they cannot thereafter attack his status as a complainant.²⁸

§ 59. — Rights of Plaintiffs and of Interveners to Control Suit

Prior to an order of reference or decree, the complainant may ordinarily discontinue a creditors' suit where other creditors have not become parties.

Although unsecured creditors intervening in the suit, being neither necessary nor proper parties, cannot contest the right of litigants to proceed,²⁹ where the original complainant unduly delays the prosecution, the conduct of the cause may be committed by the court to some other creditor.³⁰

In the absence of statute to the contrary,³¹ a creditor who commences suit for himself and all other creditors who may join may discontinue the same without the consent of the other creditors before any decree is made, where they have not become parties,³² even though they have filed peti-

tions to intervene.³³ However, one complainant can dismiss only as to himself, where there are other complainants, or where intervening creditors have been admitted as parties to the record,³⁴ and after an order of reference³⁵ or a decree,³⁶ complainant cannot deprive the other creditors of the same class of the right to prosecute the suit. So, where a judgment creditor, after return of "No property found," brings action to subject land in the county where the judgment was rendered, as authorized by statute, and another creditor files an answer and cross petition, plaintiff's action having been properly brought in such county, his act in dismissing it cannot deprive cross complainant of his right to prosecute the action in that form, although he might not have been entitled to sue there.³⁷

In regard to discontinuance or dismissal after complainant's judgment has been satisfied by defendant, the cases are not in accord. It has been held, on the one hand, that such satisfaction leaves nothing in court on which there can be any litigation, and that defendant is entitled to a dismissal,³⁸ although after notice by him of an application for dismissal other creditors who have acquired judgments since the filing of the bill have, on their ex parte petitions, been admitted as parties complainant.³⁹ On the other hand, it has been held that satisfaction of complainant's judgment after an order of reference does not suspend the suit,⁴⁰ but that it may proceed in the name of complainant unless another creditor is substituted in his place;⁴¹ that in such case complainant may have the cause dismissed as to himself, but not as to other creditors who are parties, formal or informal, to the suit;⁴² and that satisfaction of his claim does not entitle complainant to discontinue the suit where intervening creditors have acquired rights which would be thereby jeopardized or deferred.⁴³

25. Neb.—*Merchants' Nat. Bank v. McDonald*, 88 N.W. 492, 89 N.W. 770, 63 Neb. 363.

26. U.S.—*Continental Trust Co. v. Toledo, etc., R. Co.*, C.C.Ohio, 82 F. 642, modified on other grounds 95 F. 497, 36 C.C.A. 155.

27. Va.—*Sayers v. Wall*, 26 Gratt. 354, 67 Va. 354, 21 Am.R. 303.

28. N.C.—*Goldberg v. Cohen*, 25 S. E. 714, 119 N.C. 68.

29. U.S.—*Union Trust Co. of Pittsburgh, Pa., v. Jones*, C.C.A.W.Va., 16 F.2d 236.

30. N.J.—*Thompson v. Fisler*, 33 N. J.Eq. 480.

31. W.Va.—*Honesdale Shoe Co. v.*

Montgomery, 49 S.E. 434, 56 W.Va. 397.

15 C.J. p 1430 note 90.

32. Del.—*Keller v. Wilson & Co.*, Ch., 194 A. 45.

15 C.J. p 1430 note 91.

33. Va.—*Piedmont, etc., L. Ins. Co. v. Maury*, 75 Va. 508.

34. Mass.—*Atlas Bank v. Nahant Bank*, 23 Pick. 480.

15 C.J. p 1430 note 93.

35. W.Va.—*Bilmyer v. Sherman*, 23 W.Va. 656.

15 C.J. p 1430 note 95.

36. Va.—*Catron v. Bostic*, 96 S.E. 845, 123 Va. 355.

15 C.J. p 1430 note 96.

37. Ky.—*Chinn v. Curtis*, 71 S.W. 923, 24 Ky.L. 1563.

38. N.J.—*Schlagenhauf v. Craven*, 47 A. 804, 61 N.J.Eq. 232.

39. N.J.—*Schlagenhauf v. Craven*, supra.

40. W.Va.—*Shumate v. Crockett*, 27 S.E. 240, 43 W.Va. 491.

41. W.Va.—*Shumate v. Crockett*, supra.

42. W.Va.—*Lewis v. Laidley*, 19 S. E. 378, 39 W.Va. 422—*Lindsey v. McGannon*, 9 W.Va. 154.

43. D.C.—*La Tourette v. Fletcher*, 3 App.D.C. 324.

§ 60. Process and Appearance

Process and appearance in equity proceedings generally see the C.J.S. title Equity §§ 171-178, also 21 C.J. p 351 note 48-p 366 note 81.

Examine Pocket Parts for later cases.

§ 61. Discovery

- a. In general
- b. Bill
- c. Demurrer or answer
- d. Decree and enforcement

a. In General

Ordinarily, discovery may be had in aid of a creditors' bill and every one from whom discovery is sought should be made a party.

While the rule does not prevail in all jurisdictions,⁴⁴ yet in most states, by statute or otherwise, in addition to equitable relief by application of property not otherwise available to the payment of claims of creditors, the bill may be filed for discovery of the debtor's property by compelling him and others to disclose, by answers under oath to interrogatories, any and all property or effects of the debtor, together with his evidence of title, the situation of the property, and the disposition, if any, which he has made of it;⁴⁵ and discovery may be had as well of property without the jurisdiction of the court as of that within the jurisdiction.⁴⁶ However, complainants can have discovery only of what is necessary for their own use, and they will not be allowed to pry into the business of defendant.⁴⁷

Statutes removing the disability of parties to testify, whatever may be their effect on the right to maintain bills for discovery generally, do not take away the right of discovery incidental to a creditors' bill, where such right is expressly conferred by statute.⁴⁸

Parties. Persons named in the bill as having possession of the debtor's property, kept concealed and unknown to complainant, are proper parties defendant,⁴⁹ and every one from whom discovery is sought should be made a party;⁵⁰ and any one from whom information is sought may be made a party for the purpose of discovery only.⁵¹ Under statutes authorizing the creditor to file a bill against the debtor and any other person, it has been held that the bill may be filed against the debtor alone;⁵² but the cases are not in accord as to whether this may be done in the absence of statute.⁵³

Under one statute defendant was held not entitled to have the bill dismissed because not brought in the name of the parties who it alleges are the owners of the judgments.⁵⁴

b. Bill

It is ordinarily sufficient for a bill to allege the supposed interest of defendant in the property in general terms.

It has been held that in the absence of statutory provisions to the contrary, the allegations of the bill must be specific and precise with respect to the estate or interest sought to be subjected, and must not be speculative or vague;⁵⁵ but the bill is not always construed so strictly,⁵⁶ as where discovery is sought in aid of another and primary equity.⁵⁷ However, under statutes authorizing the discovery of any property, money, or thing in action belonging to defendant, and of any property, money, or thing in action due to him, or held in trust for him, it is enough to allege the supposed interest of defendant in the property, etc., in the general terms of the statute;⁵⁸ and it is not necessary to allege fraud on the part of the debtor, or concealment by him of his property or effects with the intention to delay, hinder, or defraud creditors.⁵⁹ A bill for discovery filed by a creditor at

44. Tex.—Cronin v. Gay, 20 Tex. 460.

45. Ala.—Anderton v. Hiter, 188 So. 904.

15 C.J. p 1444 note 64.

46. N.Y.—Le Roy v. Rogers, 3 Paige 234.

47. Miss.—Ringold v. Goyer Co., 144 So. 706, 164 Miss. 261.

48. U.S.—Frazer v. Colorado Dressing, etc., Co., C.C.Colo., 5 F. 163, 2 McCrary 11.

15 C.J. p 1444 note 68.

49. Ala.—Hackney v. Yarbrough, 172 So. 107, 233 Ala. 365.

50. N.Y.—Copous v. Kauffman, 3 Paige 583.

51. Tenn.—Buckner v. Abrahams, 3 Tenn.Ch. 346.

15 C.J. p 1444 note 70.

52. N.H.—Bay State Iron Co. v. Goodall, 39 N.H. 223, 75 Am.D. 219.

Tenn.—Cresswell v. Smith, 8 Lea 688, reversing 2 Tenn.Ch. 416.

53. N.H.—Bay State Iron Co. v. Goodall, 39 N.H. 223, 75 Am.D. 219.

Tex.—Cargill v. Kountze, 22 S.W. 1015, 25 S.W. 13, 86 Tex. 386, 40 Am.S.R. 853, 24 L.R.A. 183.

54. Ill.—Merchants' Bldg. Impr. Co. v. Chicago Exch. Bldg. Co., 108 Ill. App. 54.

55. Ala.—Martin v. Carter, 7 So. 510,

90 Ala. 96—Brown v. Bates, 10 Ala. 432.

S.C.—Verdier v. Foster, 25 S.C.Eq. 227.

56. Ohio.—Cadwallader v. Granville Alexandrian Soc., 11 Ohio 292—Miers v. Zanesville, etc., Turnp. Co., 11 Ohio 273.

57. Ala.—Carns v. Filler, 117 So. 672, 218 Ala. 100.

58. Ala.—Anderton v. Hiter, 188 So. 904—Hackney v. Yarbrough, 172 So. 107, 233 Ala. 365.

15 C.J. p 1445 note 76.

59. Ala.—Anderton v. Hiter, 188 So. 904.

15 C.J. p 1445 note 77.

large should allege that the debtor has no property reachable by the ordinary process of execution sufficient to satisfy complainant's demand.⁶⁰ In a bill for discovery of assets, a waiver of answer under oath as to all except interrogatories directed to the character and location of the assets alleged to be concealed does not prevent the bill from being a bill of discovery.⁶¹ An interrogatory in a bill for discovery as to the amount of income received by an execution proof debtor as a public official, and as to the disposition thereof, is not impertinent nor improper if designed to disclose possible investments.⁶² Objection to entertaining a bill filed for discovery as a creditors' bill is not too late, although made after the report of the master, if the intention to treat it as a creditors' bill was not disclosed till after the answer and the taking of the testimony.⁶³

A bill seeking to discover legal assets belonging to defendant must be verified;⁶⁴ but when discovery is sought as merely incident to relief in matters of ordinary equitable cognizance, the bill need not be sworn to.⁶⁵

The necessity of a supplemental bill to reach after-acquired property is discussed *infra* § 67.

c. Demurrer or Answer

A general demurrer to a bill for discovery will not be sustained where the creditor is entitled to any of the discovery claimed. The answer to the bill must be a full and true statement, responsive to the interrogatories, of all the estate of the debtor.

On a bill for discovery and relief defendant may

answer and make the discoveries sought, and demur to the relief only.⁶⁶

Demurrer. Where the creditor is entitled to any of the discovery prayed for, a general demurrer to the bill should not be sustained.⁶⁷ While interrogatories appended to the bill are incorporated in and become a part thereof, yet they do not constitute, separate from the stating part of the bill, the subject of demurrer.⁶⁸ A bill for discovery is not demurrable as requiring defendant to disclose matters which may subject him to a criminal prosecution or pains and penalties where such facts are not alleged or suggested in the bill;⁶⁹ and a demurrer for want of parties will not be sustained when the bill seeks discovery of persons interested.⁷⁰

Answer. A general denial is not sufficient, but there must be a full and true statement, responsive to the interrogatories, of all the estate of the debtor, real and personal, of every description, including goods, chattels, choses in action, etc., as of the time of filing the bill,⁷¹ and when the answers are not sufficient, complainants may except and compel full answers,⁷² although, under some statutes, complainant must look for discovery before a master and is not entitled to discovery by answer.⁷³ It is not proper to except to defendant's answer because of his failure to produce books and papers, but the application to have any such documents as defendant admits to be in his possession or under his control brought in must be made by petition.⁷⁴ Where discovery is prayed in respect

60. Ala.—Lawson v. Warren, 8 So. 141, 89 Ala. 584.

61. Ala.—Pollak v. Billing, 32 So. 639, 131 Ala. 519.

62. Ala.—Moore v. Alabama Nat. Bank, 23 So. 831, 120 Ala. 89.

63. Va.—Hutchinson v. Maxwell, 43 S.E. 655, 100 Va. 169, 93 Am.S.R. 944.

64. Ala.—Burke v. Morris, 25 So. 759, 121 Ala. 126.

65. Ala.—Carns v. Filler, 117 So. 672, 218 Ala. 100.
15 C.J. p 1445 note 83.

66. N.Y.—Brownell v. Curtis, 10 Paige 210.

67. Mich.—Clark v. Davis, Harr. 227.
N.H.—Treadwell v. Brown, 44 N.H. 551.

Particular ground

The objection that a creditors' bill, seeking to subject to the judgment land in which the judgment debtor is alleged to have an interest, and seeking a discovery as to the persons claiming to own the land, is defective in that it fails to allege that defendant can make such discovery,

is not raised by a general demurrer on the ground that such persons were not made parties.—Burke v. Morris, 25 So. 759, 121 Ala. 126.

68. Ala.—Chardavoyne v. Galbraith, 1 So. 771, 81 Ala. 521.

69. N.H.—Bay State Iron Co. v. Goodall, 39 N.H. 223, 75 Am.D. 219.
15 C.J. p 1446 note 88.

70. Ala.—Burke v. Morris, 25 So. 759, 121 Ala. 126.

71. N.Y.—Trotter v. Bunce, 1 Edw. 573.
15 C.J. p 1446 note 90.

Claim property exempt
Where defendant denies that he has property, except such as he claims is exempt from seizure for the payment of his debts, the answer must show the amount and value of such property.—Gregory v. Valentine, 4 Edw. N.Y., 282.—Brown v. Morgan, 3 Edw. N.Y., 278.

Subjecting to forfeitures and penalties
Defendant need not make an answer which would incriminate him or

subject him to forfeitures or penalties.—Bay State Iron Co. v. Goodall, 39 N.H. 223, 75 Am.D. 219.

Surplus in trustee's hands

Where the bill distinctly alleges that a surplus exists in the hands of a trustee over what is necessary for defendant's support, a denial should set forth facts and figures as to the amount necessary for support.—Miller v. Miller, 1 Abb.N.Cas. N.Y., 80.

More formal averments, such as an averment required by rule of court that plaintiff believes that defendant has equitable interests, etc., of the value of one hundred dollars, need not be answered at all, and a mere formal denial is sufficient.—Batterson v. Ferguson, 1 Barb. N.Y., 490.

72. Iowa.—W. A. Jordan Co. v. Sperry, 119 N.W. 692, 141 Iowa 225.
N.J.—Whitney v. Robbins, 17 N.J.Eq. 360.

73. N.J.—Kemeny v. Wentz, 147 A. 587, 105 N.J.Eq. 296.

74. Md.—State Bank v. Dugan, 3 Bland 254.

of the indebtedness of defendant to the judgment debtor, he cannot object to making such discovery because answer under oath is waived.⁷⁵

Where the answers are responsive to the charges contained in the bill, they must be taken to be true,⁷⁶ unless they are proved to be false;⁷⁷ but averments in the answer which are not responsive to any charge in the bill, and which set up matters as to which no discovery is sought, are not to be taken as true.⁷⁸ By setting down the cause for hearing on the bill and answer, complainant is taken to admit the truth of the whole of defendant's answer, not only of the facts stated in direct response to the bill, but also those set up by way of affirmative defense.⁷⁹ However, under some statutes, answers are not usually sustained by the respondent's affidavit, and are not regarded as evidence, whether they are sworn to or not.⁸⁰

The refusal of defendant to answer interrogatories contained in the bill is not to be taken as an admission of the allegations of the bill which have not been answered, however much it may arouse suspicion against him.⁸¹

d. Decree and Enforcement

Full satisfaction of their claims is all the relief complaining creditors are entitled to under a bill of discovery.

Full satisfaction of their claims is all the relief complaining creditors are entitled to under a bill of discovery, and, therefore, a decree is improper

which directs the debtor to pay over to a receiver a sum in excess of the aggregate sum asked for by complainants.⁸² In some jurisdictions, in an action to subject property of a defendant to the satisfaction of a judgment against him, in which action persons holding property in which the debtor has any interest may be made defendants, the remedy to compel such answers as the court may direct is to require full discoveries by process of contempt.⁸³ The right to compel disclosure on special motion in case of a failure by defendant to answer all interrogatories is addressed to the discretionary power of the court.⁸⁴ In proceedings in chancery in aid of an unsatisfied judgment and execution, an interlocutory order for discovery should specify the place for defendant's appearance.⁸⁵

§ 62. Injunction

- a. In general
- b. Notice; operation and effect of injunction
- c. Violation of injunction
- d. Dissolution of injunction

a. In General

Injunction is frequently issued as a matter of course in aid of creditors' suits.

An injunction may properly be granted in aid of a creditors' bill,⁸⁶ provided complainant has exhausted his remedies at law,⁸⁷ and the particular facts of the case warrant its issuance.⁸⁸ Thus,

75. U.S.—Hudson v. Wood, C.C.Ky., 119 F. 764.

76. Me.—Hartshorn v. Eames, 31 Me. 93.

Miss.—Berryman v. Sullivan, 21 Miss. 65.

77. Ill.—Harbert v. Mershon, 48 N. E. 450, 169 Ill. 52.
15 C.J. p 1446 note 3.

78. Iowa.—Doolittle v. Bridgeman, 1 Greene 265.

15 C.J. p 1446 note 4.

79. D.C.—Birdsall v. Welch, 6 D.C. 316.

80. W.Va.—Rogers v. Verlander, 5 S.E. 847, 30 W.Va. 619.

81. Md.—McDowell v. Goldsmith, 2 Md.Ch. 370.

82. Ala.—McKissack v. Voorhees, 24 So. 523, 119 Ala. 101.

83. Iowa.—W. A. Jordan v. Sperry, 119 N.W. 692, 141 Iowa 225.

84. Mich.—Crawford v. Wayne Cir. Judge, 138 N.W. 705, 173 Mich. 109.

85. N.J.—Barr v. Voorhees, 37 A. 134, 55 N.J.Eq. 561.

86. Mass.—Motoreze Oil Co. v. Brennan, 181 N.E. 197, 279 Mass. 375.

Tenn.—Hutsell v. Harrington, 12 S. W.2d 370, 157 Tenn. 553.
15 C.J. p 1447 note 12.

Raising amount of bond

In creditors' suit wherein court restrained further proceedings as to foreclosure of other mortgages executed by debtor, and fixed amount of injunction bond at a set sum, with permission to any party to apply for modification of amount, court subsequently had right to increase amount of bond as against contention that remedy should have been by appeal.—First Carolinas Joint Stock Land Bank of Columbia v. Knotts, S.C., 1 S.E.2d 797.

87. Ga.—Authur v. Ball Ground Bank, 92 S.E. 205, 146 Ga. 719.
Neb.—Brumbaugh v. Jones, 98 N.W. 54, 70 Neb. 786.

88. U.S.—Dey v. Brenack Stevedoring Co., D.C.N.Y., 272 F. 127—Gillespie v. Riggs, C.C.A.W.Va., 253 F. 943, 165 C.C.A. 385, affirming, D. C., 248 F. 843.

Creditor without lien

A suit on petition, alleging plaintiff's rental of land for one third of

products, claiming an equitable lien on corn raised, with damages from defendant's breach of rent contract, and seeking to enjoin his disposal of corn, is within general rule under a statute, that creditors without a lien cannot enjoin their debtors from disposing of their property, and an interlocutory injunction and the appointment of a receiver was error.—Ayers v. Claridy, 101 S.E. 292, 149 Ga. 498.

Damages unliquidated

Mere finding of breach of contract without computation and assessment of damages does not give jurisdiction under some statutes to restrain defendant from collecting judgment for tort against plaintiff and another defendant pending plaintiff's creditors' suit.—Stone Timlow & Co. v. Stryker, 119 N.E. 655, 280 Mass. 67.

Special cause to prevent insolvent discharge

If it is sought to enjoin defendant from proceeding to obtain a discharge under the insolvent laws, special cause must be shown for the injunction.—Schanck v. Sniffen, 1 Barb., N. Y., 32.

of the indebtedness of defendant to the judgment debtor, he cannot object to making such discovery because answer under oath is waived.⁷⁵

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§ 62. Injunction

- a. In general
- b. Notice; operation and effect of injunction
- c. Violation of injunction
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Special cause to prevent insolvent discharge

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where the object of the bill is to subject choses in action, equitable assets, etc., an injunction is granted to prevent the assignment by the debtor of his interest in such property, or the payment to him of any moneys which he might otherwise collect, or the disposal of the property by a codefendant in possession thereof.⁸⁹ Such an injunction is usually granted as a matter of course.⁹⁰ A decree may be granted enjoining a debtor from disposing of his property where the creditors' bill is taken pro confesso, even though no fraud is alleged;⁹¹ and the fact that another action, whether prior or subsequent to the creditors' bill, is pending on behalf of all creditors who may come in constitutes no objection to the granting of an injunction.⁹² The court having appointed a receiver for property in a creditors' suit and directed its sale by him, it should enjoin the holder of a mortgage fieri facias from selling a part of the property.⁹³ The injunction should not be general, but should be directed to a specific debt or trust pointed out in the bill and proved by oath to exist;⁹⁴ and in order to stay proceedings at law, should go against the party, and not against the sheriff or other officer who is acting under the mandate of the court, and who would be put in peril of disobedience by discordant orders of conflicting jurisdictions.⁹⁵

The bill must set forth sufficient facts to warrant the issuance of an injunction.⁹⁶ Thus, a creditors' bill alleging merely that complainant has unsatisfied judgments against defendant, and that defendant has demands due from a codefendant for money due and for personalty held in trust, and praying for an injunction to enjoin defendant from disposing of his claims or property, does not justify an injunction restraining the codefendant from en-

cumbering his property.⁹⁷ Where a creditors' bill is insufficient to authorize the issuance of an injunction, an injunction should not be issued, although the bill may be capable of such amendment as would justify the issuance of the writ.⁹⁸

While the court will not grant an injunction on an ex parte application against defendant trustees in possession of personal property, where it is not alleged that they are insolvent, transient, or irresponsible,⁹⁹ the bill need not be supported by affidavits aliunde the affidavit of complainant to the bill, in order to entitle complainant to an injunction.¹

b. Notice; Operation and Effect of Injunction

Ordinarily, an injunction will not be granted without giving the opposite party an opportunity to be heard; such injunctions generally operate only on the debtor.

An injunction should rarely be awarded without giving the opposite party a chance to be heard and to file affidavits in answer to the bill;² but the granting of an injunction restraining the transfer of property by defendants will be sustained, although it was without notice to one defendant, where it appeared that the rights of complainant would have been unduly prejudiced had an attempt been made to serve such defendant with notice;³ and after the bill has been taken for confessed, an application for injunction may be made without any notice.⁴

The injunction should not issue until the court has made an order so directing.⁵

Operation and effect. An injunction issued to persons not parties to the suit is inoperative as to them, except as notice.⁶ An ordinary injunction on

Nothing to operate on

Where there are liens more than sufficient to absorb the debtor's interest in the property sought to be reached, and there would be nothing left which could be reached and subjected to the payment of complainant's claim, there is nothing for an injunction to operate on, and there is no necessity therefor.—*McCullough v. Jones*, 8 So. 696, 91 Ala. 186.

^{89.} Mass.—*Orange Hardware Co. v. Ryan*, 172 N.E. 654, 272 Mass. 413. N.Y.—*Application of Standard Tile Co.*, 12 N.Y.S.2d 188, granting reargument 11 N.Y.S.2d 603. 15 C.J. p 1447 note 14.

^{90.} Colo.—*Livingston v. Swofford Bros. Dry Goods Co.*, 56 P. 351, 12 Colo.App. 320.

^{91.} Ill.—*Runals v. Harding*, 83 Ill. 75.

^{92.} N.Y.—*La. Chaise v. Lord*, 1 Abb. Fr. 213, 10 How.Pr. 461.

^{93.} Ga.—*Bryant v. Thomas*, 84 S.E. 739, 143 Ga. 217.

^{94.} N.J.—*Barr v. Voorhees*, 37 A. 134, 55 N.J.Eq. 561.

^{95.} Pa.—*Artman v. Giles*, 26 A. 668, 155 Pa. 409.

96. Setting forth property

A restraining order is not authorized where a bill to discover and reach assets of the debtor contains no clear and distinct charge that he has any particular property or things in action in his possession.—*Sioux City First Nat. Bank v. Gage*, 79 Ill. 207.

^{97.} Mich.—*Krzyszke v. Kamin*, 128 N.W. 190, 163 Mich. 290.

^{98.} Ala.—*Lehman-Durr Co. v. Griel Bros. Co.*, 24 So. 49, 119 Ala. 262.

^{99.} Mich.—*Thayer v. Swift, Harr.* 430.

^{1.} Md.—*Myers v. Amey*, 21 Md. 302.

^{2.} Ill.—*Phelps v. Foster*, 18 Ill. 309.

^{3.} Ill.—*Anderson v. Hultberg*, 117 Ill.App. 231.

^{4.} Ill.—*Runals v. Harding*, 83 Ill. 75.

N.Y.—*Austin v. Figueira*, 7 Paige 56.

^{5.} Ill.—*Phelps v. Foster*, 18 Ill. 309.

^{6.} N.Y.—*Sage v. Quay, Clarke* 347.

Injunction held binding

Injunction enjoining all creditors from proceeding otherwise than in suit was held binding on judgment lienholder who had actual notice of injunction, although he was not served with process in creditors' proceeding, the advertisement ordered for the notification of creditors serving as process.—*Sweetwater Bank & Trust Co. v. Howard*, 66 S.W.2d 225, 16 Tenn.App. 91.

a creditors' bill operates only on the debtor;⁷ it does not prevent a particular creditor from establishing his claim by judgment, such judgment not to entitle him to preference over other creditors;⁸ nor does it prevent a judgment creditor, not a party to the suit, from levying on the property of the debtor that is subject to sale, under execution, before defendant's title is equitably divested by an order of sequestration or the appointment of a receiver.⁹ An order restraining creditors from bringing suit and requiring them to prove their claims does not invalidate a decree of the same court in another cause establishing a claim which could have been proved under such order.¹⁰ An injunction obtained on the filing of the original bill does not affect the right of the debtor to dispose of property subsequently acquired;¹¹ and an injunction restraining a defendant in a creditors' suit from in any way disposing of, or intermeddling with, the debtor's property, whether in his possession or not, does not prevent him from taking care of and protecting property in his possession from tortfeasors.¹² Complainant cannot, after obtaining an injunction restraining the debtor from collecting his choses in action, levy a new execution on money paid to an agent of the debtor pendente lite on account of one of the choses in action involved in the suit.¹³

c. Violation of Injunction

After service of an injunction, the debtor commits a contempt by applying money in his possession to the payment of other debts.

An injunction against a judgment debtor is violated by his applying money previously earned or in his possession at the time of the service of the injunction to the payment of other debts.¹⁴ So,

where the injunction prohibits any transfer of the debtor's property, it is a violation thereof for the debtor to inform a creditor, not a party to the suit, that he has property applicable to the payment of his claims, and to procure an agent to obtain execution and deliver property to a sheriff holding execution;¹⁵ but such injunction does not prevent defendant from confessing judgment in favor of other creditors, although he is aware of their intention to obtain a preference by levying on the property.¹⁶ So, after service of the ordinary injunction in a creditors' suit, defendant is not guilty of contempt by proceeding to judgment in a suit previously commenced,¹⁷ nor is the mere bringing of an action for an injury to property belonging to the debtor, without the recovery of a judgment, a breach of the injunction.¹⁸

By violating the injunction, defendant commits a contempt, and will be punished summarily therefor by the imposition of costs or otherwise.¹⁹

d. Dissolution of Injunction

While an injunction improvidently granted will be dissolved, it is not uncommon to retain the injunction until complainant has a fair opportunity to offer testimony, especially where the ends of justice will be better subserved thereby.

While the injunction will be dissolved whenever it has been allowed improvidently,²⁰ a motion to dissolve the injunction resting only on the answer before the proofs are in is addressed to the sound discretion of the court,²¹ and it is not uncommon to retain the injunction until complainant has had a fair opportunity to take testimony, especially where the ends of justice will be better subserved thereby.²² Thus, an injunction will not be dissolved on the denial of defendant in his answer that he has

7. S.C.—Van Wyck v. Norris, 6 S.C. 305.

Prior conveyance

Injunction restraining judgment debtor from disposing of property, issued but not served before debtor conveyed property, did not create enforceable lien where receiver had not yet been appointed.—Bankers' Trust Co. of Detroit v. Humber, 248 N.W. 858, 263 Mich. 426.

8. N.Y.—Davenport v. Kelly, 42 N.Y. 193.

9. N.Y.—Davenport v. Kelly, supra—Lansing v. Easton, 7 Paige 364.

10. S.C.—Reynolds v. Timmons, 7 S.C. 486.

11. N.Y.—Eager v. Price, 2 Paige 333.

12. N.Y.—McQueen v. Babcock, 3 Abb.Dec. 129, 3 Keyes 428.

13. N.Y.—Price v. Church, Clarke 358.

14. N.Y.—Taggard v. Talcott, 2 Edw. 628.

Prior action valid

Where, before proceedings are instituted by a creditors' bill and injunction to reach a month's salary, defendant has procured a third person to advance the amount thereof to him and has given a draft on his employer to pay it when due, the fact that he makes a necessary indorsement on the check for the amount of the salary after the issuance of the injunction is no violation thereof.—Ireland v. Smith, 1 Barb., N.Y., 419, 3 How.Pr. 244.

15. N.Y.—Lansing v. Easton, 7 Paige 364.

16. N.Y.—Lansing v. Easton, supra.

17. N.Y.—Parker v. Wakeman, 10 Paige 485.

18. N.Y.—Hudson v. Plets, 11 Paige 180, 3 N.Y.Leg.Obs. 120.

Exempt property

Where trespass has been committed on the debtor's exempt property, he may recover a judgment therefor, and even collect the amount of such judgment without being guilty of contempt.—Hudson v. Plets, supra—15 C.J. p 1448 note 46.

19. Mich.—Saginaw County Nat. Bank v. Duffield, 122 N.W. 186, 157 Mich. 522, 133 Am.S.R. 354.

15 C.J. p 1448 note 48.

20. Mich.—Clark v. Davis, Harr. 227, 15 C.J. p 1448 note 52.

21. Miss.—Bowen v. Hoskins, 45 Miss. 183, 7 Am.R. 728.

22. Miss.—Bowen v. Hoskins, supra.

Simple affidavit

An injunction will not be dissolved on a simple affidavit contradicting a material fact to which complainant has positively sworn in his bill;

any property or choses in action or any interest in property,²³ to the amount sought to be recovered.²⁴ However, where it appears from the answer and affidavits that complainant's bill is without equity, the injunction will be dissolved;²⁵ but a mere formal traverse of the charges of the bill in the precise phraseology in which the charges are made, without a full and explicit denial of the equity of the bill, is not sufficient;²⁶ and an injunction should not be dissolved on a denial of the full equity of the bill, if there is good reason for retaining the property in the receiver's hands.²⁷

Failure of a creditor who has obtained an order enjoining the debtor from collecting his debts and disposing of perishable property to apply for the appointment of a receiver is ground for dissolving an injunction,²⁸ as is also the failure of complainant to use due diligence in the prosecution of the suit.²⁹

Where, after the filing of a creditors' bill, defendant is let in to defend in the action at law, and the judgment is allowed to stand as a security, an injunction granted in the creditors' suit should be retained until the final result of the new trial is ascertained, unless defendant gives security to pay whatever may be recovered against him in the action at law.³⁰

§ 63. Receiver

- a. In general
- b. Application, notice, and hearing
- c. Title of receiver; assignment of property
- d. Possession and control of receiver
- e. Accounting, compensation, expenses, and discharge
- f. Actions

a. In General

Under proper circumstances, it is a well established practice to appoint a receiver of the defendant's property in aid of a creditors' bill, and such appointment cannot generally be collaterally attacked.

It is a well established practice to appoint a receiver of defendant's property in aid of a creditors' bill whenever it appears that the property is in peril or in danger of waste, especially where the equity of the bill is not denied.³¹ Such appointment is discretionary with the court, however, and may be refused unless there are special and peculiar circumstances requiring summary relief,³² and an application for the appointment of a receiver will be denied where the bill is without equity.³³ A judgment creditors' bill praying for the appointment of a receiver must comply strictly with the statute prescribing the conditions warranting the institution of a judgment creditors' suit.³⁴ Where the complaint fails to state a 'cause of action, the order appointing a receiver is void,³⁵ and a sub-

defendant must put in his answer and then move to dissolve on the bill and answer.—*Strange v. Longley*, 3 Barb.Ch., N.Y., 650.

23. N.Y.—*New v. Bame*, 10 Paige 502.

24. N.Y.—*Sage v. Quay, Clarke* 347.

25. N.Y.—*Congden v. Lee*, 3 Edw. 304.

15 C.J. p 1449 note 58.

26. N.J.—*Brown v. Fuller*, 13 N.J. Eq. 271.

27. N.Y.—*Monroe Bank v. Schermerhorn, Clarke* 303.

28. N.Y.—*Osborne v. Heyer*, 2 Paige 342.

29. N.J.—*Brown v. Fuller*, 13 N.J. Eq. 271.

30. N.Y.—*Drew v. Dwyer*, 1 Barb. Ch. 101.

31. Fla.—*Armour Fertilizer Works v. First Nat. Bank*, 100 So. 362, 87 Fla. 436.

Ga.—*Cook v. Securities Inv. Co.*, 192 S.E. 179, 184 Ga. 544.

Ill.—*Nelson v. Brodfuehrer*, 211 Ill. App. 395.

N.Y.—*In re Standard Tile Co.*, 12 N.

Y.S.2d 188, granting reargument 11 N.Y.S.2d 603.

15 C.J. p 1449 note 63.

Master deemed receiver

Officer appointed in creditors' suit to hold proceeds of judgment debt, although designated as special master, must be deemed to be receiver.—*New England Oil Refining Co. v. Canada Mexico Oil Co.*, 174 N.E. 330, 274 Mass. 191.

One is "insolvent" for purposes of creditors' bill to appoint receiver for his properties, when he is unable to pay his obligations as they mature.—*Commerce Trust Co. v. Woodbury, C.C.A.Mo.*, 77 F.2d 478, modifying, D.C., *Woodbury v. Pickering Lumber Co.*, 10 F.Supp. 761, and certiorari denied *Woodbury v. Commerce Trust Co.*, 56 S.Ct. 134, 296 U.S. 614, 80 L.Ed. 435.

Bond

An order appointing a receiver without requiring a bond must be reversed where the record fails to show a determination to dispense with the bond.—*National Plumbing & Heating Supply Co. v. Illinois Wood Preserving Co.*, 239 Ill.App. 69.

32. Va.—*McClanahan's*, Adm'r v.

Norfolk & W. Ry. Co., 96 S.E. 453, 122 Va. 705.

15 C.J. p 1449 note 64.

Appointment proper

Where judgment debtor owned no property except equity in land and conveyed land to Home Owners Loan Corporation to secure amortized debt which was not yet due, judgment creditor was entitled to appointment of receiver to sell land subject to security deed, in absence of showing of exceptional stipulation in security deed rendering such relief improper.—*Cook v. Securities Inv. Co.*, 192 S.E. 179, 184 Ga. 544.

33. W.Va.—*Davidson v. Davidson*, 73 S.E. 715, 70 W.Va. 203.

15 C.J. p 1449 note 65.

34. Mich.—*Campau v. Detroit Driving Club*, 107 N.W. 1063, 144 Mich. 80.

35. Consent immaterial

That debtor corporation consented to appointment of receiver of its assets in creditor's suit was immaterial on question of whether court acquired jurisdiction.—*McCutcheon v. Superior Court in and for Los Angeles County*, 24 P.2d 911, 134 Cal. App. 5.

sequent order based on the assumed validity of the former order is likewise void.³⁶ In considering the propriety of appointing a receiver on a creditors' bill, the bill must be looked to as it is; it is immaterial that it may be capable of such amendment as will justify the appointment of a receiver.³⁷ Unless the requirement is waived, a creditor seeking receivership must first obtain a judgment at law;³⁸ but a receiver may be appointed pendente lite notwithstanding a cross bill alleging the judgments were void for lack of service.³⁹

A lien creditor may apply for the appointment of a receiver to prevent waste prior to actual default,⁴⁰ and it has been held that a receiver may be appointed even before it appears that there is any property of the debtor to be administered by him;⁴¹ but where it is shown by the answer that there are on the property described in the bill liens which are more than sufficient to absorb defendant's interest therein, there is nothing for the receiver to take charge of, and no necessity for the appointment of a receiver;⁴² and, conversely, a receiver should not be appointed to take possession of property greatly in excess of enough to secure the claims against the judgment debtors.⁴³ A deposit in court sufficient to meet the creditor's claim will prevent the appointment of a receiver,⁴⁴ but where other creditors have asserted claims in the action, defendant cannot defeat the appointment of a receiver by paying the judgment of plaintiff.⁴⁵ Also, an offer by defendant to turn out to the sheriff sufficient property to satisfy the execution is no defense to the appointment of a receiver, as defendant has his remedy against the sheriff if he makes a false return.⁴⁶

Where the property sought to be reached is in the hands of a mortgagee or trustee, it is not proper to appoint a receiver to take the property out of his hands, unless he is insolvent, or unless there are special circumstances showing that the property is in danger,⁴⁷ but in order to reach a debt from trustees to the principal debtor, it is proper to appoint receiver to hold moneys paid by the trustees.⁴⁸ So, where the property is under the control of a receiver previously appointed in supplementary proceedings, the court will not appoint another receiver on the application of a creditor filing a creditors' bill;⁴⁹ and where two or more suits are brought by creditors of the same debtor, each bill being filed in behalf of the complaining creditor alone, and the appointment of a receiver is proper, the court, instead of appointing several receivers, usually appoints the same person receiver in each suit, or, where a receiver has already been appointed, extends the receivership to the other suits,⁵⁰ in which latter case it is the duty of the receiver appointed in the first suit to consent to the extension of the receivership.⁵¹ In a suit to subject lands to the payment of liens thereon, the court may, in a proper case, appoint a receiver to take charge of the lands and rent the same until a sale can be made;⁵² but it is error to appoint a receiver to rent out land, pending the rendition of a decree in a separate suit to determine the interest of the judgment debtor in the land, where it does not appear that the debtor is insolvent and it does appear that the land is worth more than the amount of the lien proved against it.⁵³

Collateral attack. Where the court had jurisdiction of the proceeding, the appointment of a receiver cannot be collaterally attacked.⁵⁴

36. Cal.—McCutcheon v. Superior Court in and for Los Angeles County, *supra*.

37. Ala.—Lehman-Durr Co. v. Griel Bros. Co., 24 So. 49, 119 Ala. 262.

38. U.S.—Nolte v. Hudson Nav. Co., C.C.A.N.Y., 31 F.2d 527.

39. Mich.—McBride v. Wayne Circuit Judge, 229 N.W. 493, 250 Mich. 1.

40. U.S.—Tennessee Pub. Co. v. Carpenter, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.

41. Mich.—Dutton v. Thomas, 56 N.W. 229, 97 Mich. 93.
15 C.J. p 1449 note 67.

42. Ala.—McCullough v. Jones, 8 So. 696, 91 Ala. 186.

43. Cal.—Ryan v. Murphy, 179 P. 517, 39 Cal.App. 640.

44. N.Y.—St. John Woodworking Co.

v. Smith, 82 N.Y.S. 1025, 82 App. Div. 348, affirmed 71 N.E. 1139, 178 N.Y. 629.

45. Minn.—Parten v. Southern Colonization Co., 178 N.W. 744, 146 Minn. 287.

46. N.Y.—Balde v. Smith, 5 Ch.Sent. 11.

Failure to levy

An order appointing a receiver will not be set aside on the ground that defendant had sufficient property to pay the judgment, and that the sheriff returned the execution nulla bona without attempting to levy on such property, where there is no pretense of collusion between the sheriff and plaintiff, the remedy being to pay the judgment, and sue the sheriff for the extra cost and expense to which defendant has been put.—Rawdon v. Benedict, 1 Ch.Sent., N.Y., 48.

47. Ill.—Van Ness v. Arado, 257 Ill. App. 56.

15 C.J. p 1450 note 72.

48. Mass.—New England Oil Refining Co. v. Canada Mexico Oil Co., 174 N.E. 380, 274 Mass. 191.

49. N.Y.—Myrick v. Selden, 36 Barb. 15.

50. N.Y.—McDonald v. McDonald, 17 N.Y.S. 230.

15 C.J. p 1450 note 74.

51. N.Y.—Cagger v. Howard, 1 Barb. Ch. 368.

15 C.J. p 1450 note 75.

52. W.Va.—Ogden v. Chalfant, 9 S.E. 879, 32 W.Va. 559.

53. Va.—Banner v. Dingus, 33 S.E. 530.

54. N.Y.—Jones v. Blun, 39 N.E. 954, 145 N.Y. 333.

Appointment cannot be attacked on the ground that the creditor at

b. Application, Notice, and Hearing

In the absence of exceptional circumstances, a receiver should not be appointed without notice to the defendant.

Ordinarily, a receiver should not be appointed until after answer;⁵⁵ but a receiver may be appointed on the filing of the bill and before answer, where there are unusual circumstances requiring immediate action.⁵⁶ However, except in strong cases of emergency and peril,⁵⁷ a receiver should not be appointed without notice to defendant, at least until after the time for his appearance has expired,⁵⁸ and a copy of the bill should be served before moving for a receiver.⁵⁹ Some cases hold that the appointment of a receiver may be made without notice of the application, where the equity of the bill is not denied;⁶⁰ and after the bill has been taken for confessed against defendant because of his failure to appear, application may be made for the appointment of a receiver ex parte and without notice.⁶¹ Where the application for a receiver is made before defendant has filed his answer, defendant may be heard on his affidavit, by way of defense to the application;⁶² and it is proper to permit affidavits to be read by complainant on the hearing of a motion for a receiver to meet matters set up in avoidance in defendant's answer.⁶³ It is no objection to a motion for a receiver that the bill waives answer on oath,⁶⁴ or that a motion for leave to amend a creditors' bill is pending, provided the defect in the bill is not fatal or does not render the bill demurrable.⁶⁵ In an action by judgment creditors of a grantor against the grantee to subject the lands to payment of the judgments, the appointment of a receiver for the

grantee may be opposed by showing that the judgments were obtained by fraud, he not having been a party to the actions in which the judgments were rendered,⁶⁶ but the debtor himself, however, cannot oppose an application for a receiver on the ground that the judgment against him is invalid,⁶⁷ and the return of the execution unsatisfied is conclusive on him on the hearing of a motion for a receiver.⁶⁸

c. Title of Receiver; Assignment of Property

The court may order the defendant to make an assignment of his property to the receiver when necessary to vest title in him.

As respects the debtor's personal estate, it has been held that the appointment and qualification of a receiver vests title in him as of the date of the order of appointment without the execution of any transfer or assignments by the debtor;⁶⁹ but there is authority to the contrary.⁷⁰ As respects the debtor's real property, the rule is different; a conveyance by the debtor to the receiver is necessary to vest title in him.⁷¹ So, the appointment of a receiver will not per se vest a title in the receiver to the trust income of the debtor, although the income may have already accrued and be in the hands of the trustee.⁷²

The court appointing a receiver has power to order an assignment or conveyance to him by the debtor,⁷³ and may order property in hands of one other than the debtor delivered to the receiver pendente lite.⁷⁴ A debtor's affidavit that he has no property will not excuse him from executing a formal assignment of all his property to a receiver.

whose instance the appointment was made had not first obtained judgment at law.—*Whitney v. Hanover Nat. Bank*, 15 So. 33, 71 Miss. 1009, 23 L.R.A. 531.

55. Ala.—*Briarfield Iron Works Co. v. Foster*, 54 Ala. 622.

56. U.S.—*Tennessee Pub. Co. v. Carpenter*, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056, 15 C.J. p 1450 note 82.

57. Ala.—*Moritz v. Miller*, 6 So. 269, 87 Ala. 331, 15 C.J. p 1450 note 83.

58. Ala.—*Smith-Dimmick Lumber Co. v. Teague*, 24 So. 4, 119 Ala. 385, 15 C.J. p 1450 note 84.

59. N.Y.—*Hart v. Tims*, 3 Edw. 226.

60. Ala.—*Maxwell v. Peters Shoe Co.*, 19 So. 412, 109 Ala. 371, 15 C.J. p 1450 note 86.

61. N.Y.—*Austin v. Figueira*, 7 Paige 56, 15 C.J. p 1450 note 87.

62. Wash.—*Whitehouse v. Point Defence, etc.*, R. Co., 38 P. 152, 9 Wash. 558.

63. Mich.—*Rankin v. Rothschild*, 43 N.W. 1077, 78 Mich. 10.

64. N.Y.—*Root v. Safford*, 2 Barb. Ch. 33.

65. N.Y.—*Barnard v. Darling*, 1 Barb.Ch. 76.

66. Wash.—*Whitehouse v. Point Defence, etc.*, R. Co., 38 P. 152, 9 Wash. 558.

67. N.Y.—*Lent v. McQueen*, 15 How. Pr. 313, 15 C.J. p 1451 note 93.

68. Mich.—*Rankin v. Rothschild*, 43 N.W. 1077, 78 Mich. 10, 15 C.J. p 1451 note 94.

69. N.Y.—*Chautauque County Bank v. Risley*, 19 N.Y. 369, 75 Am.D. 347, 15 C.J. p 1451 note 95.

70. Ill.—*Thomas v. Van Meter*, 45 N. E. 405, 164 Ill. 304, reversing 62 Ill.App. 309.

71. N.Y.—*Chautauque County Bank v. Risley*, 19 N.Y. 369, 75 Am.D. 347.

72. N.Y.—*Genet v. Foster*, 18 How. Pr. 50.

73. N.J.—*Kemeny v. Wentz*, 147 A. 587, 105 N.J.Eq. 296, 15 C.J. p 1451 note 99.

Neglect to execute

The fact that defendant neglects to execute an assignment as directed by the court furnishes the master no grounds for refusing to direct defendant to deliver over his property to the receiver, and to decide what property defendant has in his possession, or under his control, which ought to be delivered over pursuant to the order.—*Eldred v. Hall*, 9 Paige, N.Y., 640.

74. N.J.—*Kemeny v. Wentz*, 147 A. 587, 105 N.J.Eq. 296.

er;⁷⁵ nor will the filing of a petition in bankruptcy between the filing of the creditors' suit and the order to transfer property.⁷⁶ Where defendant admits that he has certain property but denies that he has any other, the order for delivery of his property to the receiver must be general.⁷⁷ Creditors prosecuting a bill for the discovery of assets are not entitled to an order requiring their debtor to pay to a receiver more than the amount of their claims, although the bill was brought in behalf of all creditors who might come in.⁷⁸

An assignment to a receiver does not pass a right of action in the debtor for an injury to property exempt from execution,⁷⁹ nor for a mere personal tort.⁸⁰ It is otherwise, however, as to a right of action for an injury to property to which complainant has a right to resort to satisfy his claim.⁸¹ The assignment executed by the debtor should contain an exception of property exempt by law from sale on execution, notwithstanding the general order of reference,⁸² and notwithstanding the fact that a fraudulent assignment of all the debtor's property has been set aside.⁸³ It need not, however, contain a reservation of property which the debtor holds merely in the character of trustee for others, and in which he has no beneficial interest;⁸⁴ and it is neither necessary nor proper for the master, in settling the form of the assignment, to insert an exception therein of property held in trust for defendant under a trust which proceeded from some other person.⁸⁵

The function of the receiver is to hold the property as an officer of the court, so that when all conflicting interests have been determined, the residue in his hands may be paid over to the party en-

titled thereto.⁸⁶ Under some circumstances and for some purposes, a receiver represents the creditors for whose benefit the suit is brought as well as the person or estate in receivership,⁸⁷ but the receiver is not an innocent purchaser of an insolvent estate's assets.⁸⁸ As to a creditor who is not a party to the suit, the title of the receiver to the property of the debtor does not relate to the time of the filing of the bill, but only to the time when the assignment to the receiver is made.⁸⁹

d. Possession and Control of Receiver

Ordinarily, third persons may not interfere with property in the possession of a receiver.

The court will restrain any persons within its jurisdiction from taking steps which will prevent the receiver from getting the property of the debtor into his hands,⁹⁰ although not by summary process as against those not parties to the suit.⁹¹ A creditor cannot sue out execution and cause it to be levied on property to which the receiver is entitled;⁹² but a sale by a sheriff under execution of land in the possession of the receiver and subject to the lien of a judgment does not disturb the receiver's possession.⁹³ A receiver appointed by a domestic court on a bill to enforce a domestic judgment may hold the debtor's assets against a domestic attaching creditor, although the bill was filed by a citizen of another state.⁹⁴

The receiver holds the debtor's choses in action in preference to one who purchased the same of the debtor after notice of the filing of the bill;⁹⁵ but he is not entitled to an adjudication or preliminary examination awarding him the possession of property and book accounts transferred by the

75. N.Y.—Chipman v. Sabbaton, 7 Paige 47.

76. N.Y.—Watkins v. Pinkney, 3 Edw. 533.

77. N.Y.—Browning v. Bettis, 8 Paige 568.

78. Ala.—McKissack v. Voorhees, 24 So. 523, 119 Ala. 101.

79. N.Y.—Hudson v. Plets, 11 Paige 180, 3 N.Y.Leg.Obs. 120.

80. N.Y.—Hudson v. Plets, supra.

81. N.Y.—Hudson v. Plets, supra.

82. N.Y.—Cagger v. Howard, 1 Barb. Ch. 368.

83. N.Y.—Sheldon v. Weeks, 7 N.Y. Leg.Obs. 57.

84. N.Y.—Cagger v. Howard, 1 Barb. Ch. 368.

85. N.Y.—Degraw v. Clason, 11 Paige 136.

86. Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.

Title in trust

The legal title which vests in the receiver is in trust, not for the court but for those having the equitable title—the creditors.—Harrigan v. Gilchrist, 99 N.W. 909, 121 Wis. 127.

87. U.S.—Cornellius v. C. C. Pictures, Inc., C.C.A.N.Y., 297 F. 444—American & British Securities Co. v. American & British Mfg. Corporation, D.C.N.Y., 275 F. 121.

Mo.—Matz v. Miami Club Restaurant, App., 127 S.W.2d 738.

Judgment creditor's rights

A special master, appointed in creditor's suit to hold proceeds of judgment debt from trustees to debtor, was entitled, under decrees, to the judgment creditor's rights against the trustees.—New England Oil Refining Co. v. Canada Mexico Oil Co., 174 N.E. 330, 274 Mass. 191.

88. Tenn.—Pope v. Knoxville Indus-

trial Bank, 121 S.W.2d 530, 173 Tenn. 461.

89. N.Y.—Watson v. New York Cent. R. Co., Sheld. 159, 6 Abb.Pr., N.S., 91, affirmed 47 N.Y. 157.

90. Ill.—Sercomb v. Catlin, 21 N.E. 606, 128 Ill. 556, 15 Am.S.R. 147, affirming 30 Ill.App. 258.

91. N.Y.—Albany City Bank v. Schermerhorn, 9 Paige 372, 38 Am. D. 551.

92. N.Y.—Gouverneur v. Warner, 4 N.Y.Super. 624.

93. N.Y.—Albany City Bank v. Schermerhorn, 9 Paige 372, 38 Am. D. 551.

94. Ill.—Holbrook v. Ford, 39 N.E. 1091, 153 Ill. 632, 46 Am.S.R. 917, 27 L.R.A. 324, affirming 50 Ill.App. 547.

95. N.Y.—Weed v. Smull, 3 Sandf. Ch. 273.

debtor to another who is made a party defendant.⁹⁶ The rents and profits of real estate of a debtor during the time allowed for redemption from sale go to the receiver immediately.⁹⁷ Where a debtor's tenants have attorned to the receiver, they will not be permitted to question his rights by disturbing his possession.⁹⁸ Where a demurrer to a bill to reach property in the hands of a third person is sustained, the functions of a receiver appointed to collect and hold rents and profits cease *inter partes*, but his amenability to the court as an officer thereof continues, and the fund itself is subject to the court's order.⁹⁹ If the receiver takes possession of goods, apparently in the debtor's possession but which are claimed by a third person, he will be ordered to restore them on claimant's undertaking to hold them subject to the order of the court to be made after title is settled.¹ The sale and conveyance of property under order of court is discussed *infra* § 80.

e. Accounting, Compensation, Expenses, and Discharge

A receiver should be required to account, and is ordinarily entitled to compensation and expenses lawfully incurred.

It is error to dismiss a creditors' bill without requiring a receiver appointed in the suit to account.² A receiver is generally entitled to recover compensation and expenses lawfully incurred.³ The expenses of a receiver in caring for property are a charge on it, although it belongs to a person other than the judgment debtor.⁴

A party may be estopped to have a receiver discharged.⁵

f. Actions

A receiver may sue to recover or protect the debtor's property.

Where a receiver of a debtor's property is appointed in a creditors' suit, he may sue at law for the recovery of the debtor's property.⁶ He may file a bill in chancery to collect money which he claims is held in trust for the debtor, although he may have a concurrent remedy at law, and in such case he need not first obtain a judgment at law and issue execution, judgment and execution having been previously obtained by complainant in the creditors' suit.⁷ The receiver may pursue by suit in his own name funds of the debtor which have been fraudulently transferred,⁸ even though the creditor by amending his bill might impeach the same fraudulent transaction,⁹ but a receiver appointed in a creditors' suit in one state cannot maintain suit in another state to set aside a fraudulent conveyance of the debtor.¹⁰ A receiver appointed to collect rents may maintain a bill to protect his rights against others who have taken possession of the premises, where the debtor neglects to make an assignment giving the receiver the legal title;¹¹ and a receiver of the property of a *cestui que trust* may avoid the trustee's purchase of the trust property.¹²

A receiver is not to be restricted to the vulnerable title of the parties in receivership; but

96. N.J.—New Jersey Lumber Co. v. Ryan, 41 A. 839, 57 N.J.Eq. 330.

97. N.Y.—Farnham v. Campbell, 10 Paige 598.

15 C.J. p 1452 note 22.

98. N.Y.—Albany City Bank v. Schermerhorn, 9 Paige 372, 38 Am. D. 551.

99. Ga.—Field v. Jones, 11 Ga. 413.

1. N.Y.—Dickerson v. Van Tine, 3 N.Y.Super. 724.

2. Ala.—Simmons v. Shelton, 21 So. 309, 112 Ala. 284, 57 Am.S.R. 39.

3. Ohio.—Kittinger Witt Co. v. Brooks, 172 N.E. 297, 35 Ohio App. 266.

No benefit to creditors

Where receiver discovered no property and reached no assets properly reachable in a creditors' suit, he is not entitled to compensation for continuing the debtor's business and realizing a fund, where he did so solely for the purposes of maintaining the reputation of the property of the debtor as a place for race meetings, postponing the foreclosure of a senior mortgage on the property

as long as possible, and producing, when the enforcement of that security occurred, the largest possible sum; nor should he be allowed for disbursements made to his attorneys; and where he paid interest on a first mortgage on the property and taxes thereon, but no benefit to the fund derived from the continuance of the business resulted from such payments, he is not entitled to credit for such payments as against the fund realized; but he should be allowed all disbursements necessary to conducting the business.—Campau v. Detroit Driving Club, 107 N.W. 1063, 144 Mich. 80.

4. Ill.—Heise v. Starr, 44 Ill.App. 406.

5. Ill.—Erickson v. Ehresman, 269 Ill.App. 343.

6. N.J.—Miller v. MacKenzie, 29 N. J.Eq. 291.

N.Y.—Wilson v. Allen, 6 Barb. 542.

Time to sue

Application by temporary receiver in judgment creditor's action, for moneys owing deceased debtor by

testamentary trustee was premature, where judgment creditor's action remained undetermined.—In re Leverich's Estate, 239 N.Y.S. 741, 136 Misc. 22.

Suing trustees individually

In creditors' suit against debtor and trustees to reach judgment debt owed by trustees to debtor, decree authorizing master to sue trustees individually was within court's jurisdiction.—New England Oil Refining Co. v. Canada Mexico Oil Co., 174 N. E. 330, 274 Mass. 191.

7. N.J.—Terhune v. Bell, Ch., 9 A. 111.

8. N.J.—Miller v. Mackenzie, 29 N.J. Eq. 291.

9. N.Y.—Green v. Bostwick, 1 Sandf. Ch. 185.

10. Wis.—Filkins v. Nunnemacher, 51 N.W. 79, 81 Wis. 91.

11. N.Y.—Albany City Bank v. Schermerhorn, 9 Paige 372, 38 Am. D. 551, reversed on other grounds 10 Paige 263.

12. N.Y.—Iddings v. Bruen, 4 Sandf. Ch. 223.

may defend against mortgages or liens which are void as to creditors, even though as between the parties no such defense could be asserted.¹³

Suit on creditor's bond. A person, suing on a creditor's bond for the appointment of a receiver, is limited to a recovery for the breach alleged in his complaint;¹⁴ and a bond indemnifying against damages in case the appointment of the receiver was revoked was held not breached where receiver continued in office after creditors' bill against person whose property was seized was dismissed for want of equity.¹⁵

§ 64. Pleading

In the following sections are discussed the form, requisites, and sufficiency of the bill, complaint, or petition in creditors' suits, see *infra* § 65, and of the plea or answer and subsequent pleadings, see *infra* § 66; amended and supplemental pleadings, see *infra* § 67; and matters relating to issues, proof, and variance, see *infra* § 68.

§ 65. — Bill, Complaint or Petition

- a. In general
- b. Allegations as to parties
- c. Description of indebtedness
- d. Allegations as to judgment

- e. Allegations as to exhaustion of legal remedies
- f. Allegations as to insolvency of debtor
- g. Description of property and debtor's interest
- h. Allegations as to collusion and value of property not subject to execution
- i. Multifariousness
- j. Framing bill with double aspect
- k. Prayers
- l. Verification

a. In General

A creditors' bill must state facts showing the complainant's right to relief.

Ordinarily no particular form of bill or complaint and no formal specific allegations are necessary. It is sufficient to state facts from which the inference may be drawn that the aid of a court of equity is required to give the creditor relief.¹⁶ The rules of equity pleading apply to creditors' bills.¹⁷ The bill must allege, clearly and definitely, every fact necessary to entitle complainant to relief;¹⁸ and a bill is defective which fails to show that the court in which it is filed has jurisdiction of the parties and of the property,¹⁹ and that the case is one for equitable intervention and there is no adequate remedy at law.²⁰ A bill or

13. U.S.—*Cornelius v. C. C. Pictures, Inc.*, C.C.A.N.Y., 297 F. 444—*American & British Securities Co. v. American & British Mfg. Corporation*, D.C.N.Y., 275 F. 121.

Mo.—*Matz v. Miami Club Restaurant*, App., 127 S.W.2d 738.

14. Evidence relating to another breach is inadmissible.—*Robinson v. American Surety Co. of New York*, 11 N.E.2d 24, 292 Ill.App. 252.

15. Ill.—*Robinson v. American Surety Co. of New York*, *supra*.

16. U.S.—*Darragh v. H. Wetter Mfg. Co.*, Ark., 78 F. 7, 23 C.C.A. 609, removed on appeal 84 F. 1016, 28 C.C.A. 680.

15 C.J. p 1419 note 16.

17. Fla.—*Stewart v. Manget*, 181 So. 370, 132 Fla. 498.

18. Ala.—*Brasher v. Breen & Gardien Ins. Agency*, 133 So. 698, 222 Ala. 585.

Fla.—*Stewart v. Manget*, 181 So. 370, 132 Fla. 498—*B. L. E. Realty Corporation v. Mary Williams Co.*, 134 So. 47, 101 Fla. 254.

Ill.—*Jeffries v. White*, 267 Ill.App. 831.

He must stand or fall by case made by bill, and to recover he must aver facts from which recovery can be had.—*Crowder v. Nuttall*, 1 N.E.2d 912, 285 Ill.App. 254.

Allegations held insufficient

Averment in creditors' bill that subcontractor of state highway contractor was to receive state contract price less ten per cent which was to be retained by contractor did not show that subcontractor had a lien on funds paid to contractor.—*Wade v. Brantley & Crawley Const. Co.*, 161 So. 101, 230 Ala. 345.

19. N.Y.—*Sherman v. Tucker*, 69 N.Y.S. 850, 60 App.Div. 127.

15 C.J. p 1419 note 17.

20. Ala.—*Brasher v. Breen & Gardien Ins. Agency*, 133 So. 698, 222 Ala. 585—*Murphy v. City Nat. Bank*, 98 So. 288, 210 Ala. 375. Cal.—*Matteson & Williamson Mfg. Co. v. Conley*, 77 P. 1042, 144 Cal. 483—*McCutcheon v. Superior Court* in and for Los Angeles County, 24 P.2d 911, 134 Cal.App. 5.

N.Y.—*Abbott v. National Gravure Circuit*, 192 N.Y.S. 440, 200 App. Div. 47.

Ohio.—*Harris v. Cincinnati, H. & D. Ry. Co.*, 5 Ohio.N.P.N.S., 173.

15 C.J. p 1419 note 18.

General averments insufficient

The allegations in a creditors' bill relating to the matter of jurisdiction cannot be shown by general averments that plaintiff has no remedy or no adequate remedy without assistance of a court of equity, but facts must be alleged showing that only in equity will the remedy be full, adequate, and complete, and the facts must speak for themselves.—*Stewart v. Manget*, 181 So. 370, 132 Fla. 498.

Construction of bill

Judgment creditor's bill against judgment debtor corporation alleging that execution issued on her judgment was returned "No property found," and that defendant owned no property other than certain patents, and asking for the conveyance of the patents to a receiver to be appointed by the court, and for the sale thereof by the receiver and the application of the proceeds to the payment of her judgment, and for an injunction restraining the defendant from disposing of patents, is a bill by a judgment creditor to subject intangible property, which cannot be reached by an execution at law, to the satisfaction of complainant's judgment.—*International Moving Picture & Film Co. v. Smith*, 99 So. 303, 211 Ala. 3.

complaint filed under a statute must comply strictly with the conditions prescribed by the statute,²¹ and, if the necessary allegations are lacking, the defect cannot be cured by consent of the parties.²²

b. Allegations as to Parties

The bill must contain proper allegations as to the parties.

The bill must allege that plaintiff is a creditor of defendant debtor,²³ and inform defendant when and how the indebtedness claimed arose, as stated *infra* § 65 c. However, a bill to enforce a judgment against land, the legal title to which

is in the debtor's daughter, alleging that the debtor purchased the land with his own money and caused the conveyance to be made to his daughter, pleading facts negating the idea that the conveyance was a gift, and alleging that the daughter has no beneficial interest in the land, but holds it in trust for her father, is sufficient as a bill to enforce the judgment against the debtor's equitable estate without an averment that complainant was a creditor when the land was purchased and the title placed in the daughter.²⁴ If the debt is in judgment, the ownership of the judgment by plaintiff at the time the bill is filed must be alleged,²⁵ and it is not sufficient to allege ownership of the execution

Allegations held insufficient

(1) A bill by a simple contract creditor of a corporation against another corporation, to which the first had transferred its assets in exchange for stock, which did not show that the debtor was insolvent at the time of the transfer, that the transferee assumed its debts or held the assets under an express trust, or that complainant had obtained judgment against the transferor, or that it was impossible to obtain such judgment, or that, if obtained, it could not be collected, did not state a cause of action for equitable relief.—*Ozan Lumber Co. v. Davis Sewing Mach. Co.*, C.C.A.Del., 292 F. 135, affirming, D.C., 284 F. 161, and 285 F. 395.

(2) A bill against wife of decedent against whom judgments had been obtained, to subject property which was formerly community property to satisfaction of such judgments, was insufficient where it did not allege death or negative the fact or possibility of administration, nor allege that, although administration was then pending, relief had been denied or was unattainable.—*First Nat. Bank v. Blackwell*, D.C.Tex., 51 F.2d 282.

(3) A creditors' bill to subject ninety-acre tract, legal title to seventy acres of which was in name of owner's wife, to payment of judgment for two thousand dollars commission which broker might procure in action at law, was insufficient to allege a cause for equity jurisdiction, where it appeared from the face

Allegations held sufficient

(1) Generally.

Cal.—*Bond v. Bulgheroni*, 8 P.2d 130, 215 Cal. 7.

Ill.—*Kadyk v. Abbott*, 266 Ill.App. 537—*McCarthy v. Chicago Title & Trust Co.*, 264 Ill.App. 423.

(2) In a creditor's action to have his claim against a decedent's estate declared a lien on the property after sale by the administratrix to defendant, a plea of a contract between the brother of the testatrix and defendant, whereby defendant was to purchase the property, setting forth the relation of the administratrix thereto, and the fulfillment of the terms of such contract, was a sufficient allegation of equities in plaintiff.—*Scholtz v. Hazard*, 191 P. 123, 68 Colo. 343.

21. Mass.—*H. E. Shaw Co. v. Karcasinas*, 180 N.E. 140, 278 Mass. 397.

Mich.—*Campau v. Detroit Driving Club*, 107 N.W. 1063, 144 Mich. 80. N.Y.—*Quick v. Keeler*, 4 N.Y.Super. 231.

Necessary allegations

A creditor who brings a statutory creditor's bill to reach and apply property of debtor which cannot be attached on writ or taken on execution must allege that he is a creditor, that principal defendant is a debtor having some valuable legal or equitable interest not exempted by law from attachment, of such a nature that it cannot be reached by common-law process against debtor, and that property is held by a third party who may be considered equita-

inventory, that the other failed to organize corporation but operated business under corporate name that plaintiff corporation at president's direction furnished the other merchandise which it charged to the supposed corporation, that the other promised to pay president, and that the president had not paid plaintiff, were not sufficient to constitute it a bill, under Massachusetts statute, to reach and apply in payment of a debt any property, right, title or interest, legal or equitable, of debtor which could not be reached to be attached or taken on execution in an action at law.—*George Lawrence, Inc. v. Brodie*, Mass., 20 N.E.2d 413.

(2) Creditor's bill to reach proceeds of check is insufficient for failure to allege that proceeds were not attachable in law action.—*H. E. Shaw Co. v. Karcasinas*, 180 N.E. 140, 278 Mass. 397.

(3) Plaintiff does not show a cause of action under the statute by allegation that he did not know form of proceeds or where they were.—*H. E. Shaw Co. v. Karcasinas*, *supra*.

(4) A creditor's bill, which was brought under statute providing for creditors' bills to reach and apply property of debtor which cannot be attached on writ or taken on execution in legal action, and which alleged that "plaintiff is informed" that defendant held property of debtor which could not be reached by legal process, was defective, since such allegation in equity raised no issue.—*Darling Automobile Co. v. Hall*, 197 A. 558, 135 Me. 382.

22. *See* *McCarthy v. Chicago Title & Trust Co.*

issued on the judgment²⁶ or of the obligations on which the judgment was recovered.²⁷ Where a creditor is permitted to sue in his own behalf alone, the bill need not state that it is in behalf of all creditors nor need it contain any invitation to other creditors to come in,²⁸ although it shows that there are other creditors beside plaintiff.²⁹ Where plaintiff sues in behalf of other creditors, the bill should allege the existence of other creditors.³⁰ A bill which states that it is in behalf of all creditors "who may be entitled to become parties" is not objectionable in not being limited to lien creditors, where only lien creditors may become parties.³¹

Parties defendant. In order to excuse the non-joinder of a joint debtor on the ground that he is wholly irresponsible and destitute of property, that ground should be distinctly averred, either positively or on information and belief, so that the adverse party may take issue thereon.³² A general averment that defendant is primarily liable for the payment of the obligations on which the judgment was recovered is too indefinite to excuse plaintiff from making the other judgment debtors parties.³³

c. Description of Indebtedness

The necessity for, and the sufficiency of, a description of the indebtedness of the defendant depends on the nature of the particular suit.

When the suit is brought by a creditor at large, the indebtedness of defendant must be accurately described as in ordinary actions of debt or assumpsit, and care must be taken to show that complainant's claim was due and payable when the bill was filed;³⁴ but, when the claim has been reduced to judgment, the indebtedness on which the

judgment was recovered need not be set forth.³⁵ A bill brought under a statute authorizing suits by creditors to reach and apply, in payment of a debt, any property which cannot be reached to be attached or taken on execution at law, is not insufficient because it does not set forth the nature of plaintiff's debt or cause of action.³⁶

d. Allegations as to Judgment

The bill must allege the recovery of a valid subsisting judgment, and show, either that the judgment was obtained in the jurisdiction where suit is brought, or that it was impossible to obtain such judgment.

In the absence of statutory provisions of circumstances dispensing with the necessity of obtaining a judgment,³⁷ a creditors' bill must sufficiently allege the recovery and present existence of a valid judgment as a basis for the bill.³⁸ So the bill must set forth a judgment obtained in the jurisdiction where the suit is brought³⁹ or must show that it was impossible to obtain such judgment.⁴⁰

e. Allegations as to Exhaustion of Legal Remedies

- (1) In general
- (2) Issuance and return day of execution
- (3) To what county execution issued
- (4) Return of execution

(1) In General

When exhaustion of legal remedies is essential, it must be alleged or facts stated excusing failure to exhaust such remedies.

Where exhaustion of legal remedies is essential before resorting to equity, it must of course be averred in the bill, or facts must be set forth excusing failure to exhaust the legal remedies.⁴¹

26. Fla.—Richardson v. Gilbert, supra.

27. N.Y.—Strange v. Longley, 3 Barb.Ch. 650.

28. N.Y.—Green v. Griswold, 4 N.Y. S. 8, 15 N.Y.Civ.Proc. 220. 15 C.J. p 1420 note 26.

29. Wash.—Morrison v. Blue Star Nav. Co., 67 P. 244, 26 Wash. 541.

30. N.Y.—Elwell v. Johnson, 3 Hun 558, appeal dismissed 74 N.Y. 80. 15 C.J. p 1420 note 28.

31. Va.—Hutchinson v. Maxwell, 40 S.E. 655, 100 Va. 169, 93 Am.S.R. 944, 57 L.R.A. 384.

32. N.Y.—Van Cleef v. Sickles, 5 Paige 505, reversing 2 Edw. 392.

33. Ill.—See Petroyeanis v. Pirola, 205 Ill.App. 310.

N.Y.—Strange v. Longley, 3 Barb. Ch. 650.

34. N.Y.—Louis v. Belgard, 17 N.Y. S. 832.

15 C.J. p 1420 note 32.

Bill should show where, when, and how indebtedness arose.

N.Y.—Gray v. Kendall, 18 N.Y.Super. 666, 10 Abb.Pr. 66.

Ohio.—Harris v. Cincinnati, H. & D. Ry. Co., 5 Ohio N.P.N.S., 173.

15 C.J. p 1419 note 21.

35. Cal.—Tatum v. Rosenthal, 30 P. 136, 95 Cal. 129, 29 Am.S.R. 97.

36. Mass.—Ginn v. Almy, 99 N.E. 276, 212 Mass. 486.

37. In Alabama creditors bringing a bill against their debtor to discover assets under Code 1896, § 819, authorizing such a bill by judgment creditors, or by creditors not having a lien or judgment need not allege whether their claims have been re-

duced to judgment.—McKissack v. Voorhees, 24 So. 523, 119 Ala. 101.

38. Neb.—Mills v. Heckendorn, 281 N.W. 49, 135 Neb. 294.

N.Y.—Abbott v. National Gravure Circuit, 192 N.Y.S. 440, 200 App. Div. 47.

Ohio.—Harris v. Cincinnati, H. & D. Ry. Co., 5 Ohio N.P., N.S., 173.

15 C.J. p 1420 note 34.

39. N.M.—Albright v. Texas, S. F. & N. R. Co., 46 P. 448, 8 N.M. 422.

40. U.S.—National Tube Works Co. v. Ballou, N.Y., 13 S.Ct. 165, 146 U.S. 517, 36 L.Ed. 1070, affirming, C.C., 42 F. 749.

N.M.—Albright v. Texas, S. F. & N. R. Co., 46 P. 448, 8 N.M. 422.

41. Cal.—Shafer v. Fisher, 258 P. 651, 35 Cal.App. 43.

Ill.—Betten v. Williams, 277 Ill.App. 353.

Neb.—Riggs v. Hroch, 274 N.W. 598,

(2) Issuance and Return Day of Execution

The bill should allege the issuance of the execution, describing it, and the time of its issuance and return.

The bill should allege that the execution actually issued, and should describe it, stating the respective dates at which it issued and was returned.⁴²

(3) To What County Execution Issued

The bill must contain proper averments as to the county to which execution was issued.

Where the judgment is one on which an execution might have been issued to any county of the state, it is not sufficient to allege that an execution was issued to a named county, without alleging that the debtor resided in such county at the date of the issuance of the execution,⁴³ or without alleging some sufficient excuse for not issuing an execution to the county of the debtor's residence.⁴⁴ In Alabama the bill need not contain a specific allegation that the execution was issued to the county in which defendant had a fixed and known residence, but it devolves on defendant to show that the execution was issued to an improper county.⁴⁵ In Illinois allegations showing that the execution was issued to the sheriff of the county in which the judgment was recovered are sufficient, without an allegation that the judgment debtor, at the time of the issuance and delivery of the execution, resided in that county, the presumption being that defendant resided in the county

where the suit was brought.⁴⁶ In Kentucky the petition must allege that the execution was directed to the county in which the judgment was rendered⁴⁷ or in which defendant resides.⁴⁸

(4) Return of Execution

The bill should allege the return of execution before the filing of the bill, and state the time the return was made. Subject to some exceptions, the bill must show that the execution was returned nulla bona; but the return need not be set forth in haec verba.

The bill should allege the actual return of the execution before the filing of the bill, and should state the time when it was made,⁴⁹ to enable the court to ascertain that the execution was actually returned before the filing of the bill.⁵⁰ As a rule the bill must show that the execution was returned nulla bona or unsatisfied;⁵¹ but this rule is subject to some exceptions.⁵² The return need not be set forth in haec verba;⁵³ it is sufficient to allege that the execution was returned nulla bona or "wholly unsatisfied."⁵⁴

f. Allegations as to Insolvency of Debtor

Where it is alleged that execution has been returned unsatisfied, the bill need not expressly allege the insolvency of debtor. Where the debtor's insolvency dispenses with the necessity for a return of execution, such excuse must be pleaded.

Where it is alleged that an execution has been issued and returned unsatisfied, it need not be averred expressly that the debtor is insolvent or has no other property than that out of which the creditor

133 Neb. 260—Thies v. Thies, 198 N.W. 151, 111 Neb. 805.

15 C.J. p 1421 note 38.

Bill held sufficient

On return nulla bona, bill for discovery, not alleging that judgment debtor has no property in county outside jurisdiction, is not defective.—National Plumbing & Heating Supply Co. v. Illinois Wood Preserving Co., 239 Ill.App. 69.

42. Mich.—German-American Seminary v. Saenger, 33 N.W. 301, 66 Mich. 249.

15 C.J. p 1421 note 39.

43. Ind.—Kelly v. Bell, App., 83 N.E. 773, affirmed 88 N.E. 59, 172 Ind. 590.

15 C.J. p 1422 note 40.

44. N.Y.—Merchants' & Mechanics' Bank v. Griffith, 10 Paige 519—Reed v. Wheaton, 7 Paige 663, 34 Am.D. 366.

45. Ala.—Nix v. Winter, 35 Ala. 309—Brown v. Bates, 10 Ala. 432.

46. Ill.—Deimel v. Brown, 27 N.E. 44, 136 Ill. 586.

47. Ky.—Tanner v. Howard, 1 Ky.L. 343, 10 Ky.Op. 793—Adkins v. Meadows, 9 Ky.Op. 124.

48. Ky.—Adkins v. Meadows, supra. Sufficiency of petition.

Under Civ.Code tit 10 c 4 § 439, which provides that after an execution, "directed to the county in which the judgment was rendered, or to the county of defendant's residence," is returned unsatisfied, plaintiff may institute an equitable action to subject choses in action, etc., it is insufficient to allege the issuance of an execution to a named county other than that in which the judgment was rendered, without averring that defendant resided in such county.—Crabb v. Hill, 30 S.W. 415, 17 Ky.L. 44.

49. N.Y.—Pardee v. De Cala, 7 Paige 132.

15 C.J. p 1422 note 46.

50. N.Y.—Pardee v. De Cala, supra.

51. N.Y.—Abbott v. National Gravure Circuit, 192 N.Y.S. 440, 220 App.Div. 47.

15 C.J. p 1422 note 48.

In West Virginia, under statute providing for enforcement of judgment liens in equity, a bill by a judgment creditor against the husband to sell the estate he holds by

the curtesy in the real property owned by his deceased wife at the time of her death, for the payment of liens thereon, which charges that the judgment was regularly obtained, that an execution thereon was issued and returned "No property found," and that the rents and profits of the property will not pay the liens against it in five years, is not demurrable because of its failure to allege that the property sought to be subjected is all the property owned by the husband.—First Nat. Bank v. Godfrey, 117 S.E. 680, 94 W. Va. 1, 30 A.L.R. 1054.

52. Colo.—Stephens v. Parvin, 78 P. 688, 33 Colo. 60.

Okl.—Ziska v. Ziska, 95 P. 254, 20 Okl. 634, 23 L.R.A., N.S., 1.

Va.—Hutchinson v. Maxwell, 40 S.E. 655, 100 Va. 169, 93 Am.S.R. 944, 57 L.R.A. 384.

15 C.J. p 1422 note 49.

53. Wis.—Daskam v. Neff, 47 N.W. 1132, 79 Wis. 161.

54. Ill.—Alexander v. Tams, 13 Ill. 221.

15 C.J. p 1422 note 51.

seeks payment.⁵⁵ Where the insolvency of the judgment debtor dispenses with the necessity for a return of an execution, such excuse, to be available, must be alleged in the bill.⁵⁶ In such cases an averment that the judgment debtor is insolvent,⁵⁷ or that he has no property left subject to execution,⁵⁸ or any allegation equivalent thereto,⁵⁹ is sufficient. A bill against several defendants, alleging the insolvency of only one, is insufficient.⁶⁰

g. Description of Property and Debtor's Interest

The property and interest of the debtor sought to be reached should be set out in the bill.

The property sought to be reached by a creditors' bill should be described with certainty,⁶¹ unless it is unknown to complainant, in which case he is not required to point out the property sought to be reached.⁶² The bill should allege the specific interest of the debtor sought to be reached.⁶³ It has been held, however, that a bill which fails to state specifically what the property is, is not for that reason demurrable, the remedy being by motion to make definite and certain.⁶⁴ The sufficiency of the description to create a lien is discussed *infra* § 84.

h. Allegations as to Collusion and Value of Property Not Subject to Execution

Unless the statute or a rule of court so requires, the

bill need not allege that it is not prosecuted by collusion, or to protect the property against the claims of other creditors, or that the defendant has property not subject to execution to the value of a certain number of dollars.

Complainant need not allege that the bill is not proffered and prosecuted by collusion, or for the purpose of protecting the property and effects of the debtor against the claims of other creditors,⁶⁵ or that defendant has property not subject to execution to the value of a certain number of dollars,⁶⁶ in the absence of any statute or rule of court requiring it.⁶⁷ Even when an allegation negating collusion is required by a rule of court, it may be dispensed with when facts are stated from which it is apparent that there was no collusion.⁶⁸

i. Multifariousness

While a creditors' bill which seeks to litigate entirely distinct controversies is multifarious, a bill is not multifarious merely because it unites different matters arising out of the same transaction, or seeks relief on different or alternative theories.

A creditors' bill which joins several distinct and entirely unconnected matters or transactions is multifarious.⁶⁹ If the object of the bill is single and for the subjection of the debtor's property to the satisfaction of complainant's judgment, and the relief, if granted, must be the same as to any portion of such property, whether held by the debtor or in trust for him by another or by several, the

55. Minn.—Williams v. Kemper, 109 N.W. 242, 99 Minn. 301.

15 C.J. p 1423 note 52.

56. Kan.—Moyer v. Riggs, 55 P. 494, 8 Kan.App. 234.

15 C.J. p 1423 note 53.

57. Ind.—Armstrong v. Keifer, 39 Ind. 225.

58. Ind.—Vansickle v. Shenk, 50 N. E. 381, 150 Ind. 413—Alford v. Baker, 53 Ind. 279.

59. Kan.—Moyer v. Riggs, 55 P. 494, 8 Kan.App. 234.

15 C.J. p 1423 note 56.

60. U.S.—Anastasopoulos v. Steger & Sons Piano Mfg. Co., C.C.A. Ill., 16 F.2d 32, certiorari denied 47 S. Ct. 572, 273 U.S. 769, 71 L.Ed. 882.

61. Md.—Roland v. People's Bank of Somerset, 106 A. 570, 134 Md. 218.

15 C.J. p 1423 note 57.

62. Ala.—Sweetzer v. Buchanan, 10 So. 552, 94 Ala. 574.

15 C.J. p 1423 note 58.

63. Fla.—Hewitt v. Punta Gorda State Bank, 145 So. 883, 108 Fla. 39.

15 C.J. p 1424 note 59.

Bill held sufficient

Judgment creditor's bill seeking to

set up interest in realty to which judgment of 1926 might attach, alleging that defendant's father by will probated in 1921 provided for division of realty and personalty into four equal shares one of which was devised to defendant and that in 1931 executors conveyed realty as part of share devised to them for distribution, was sufficient to show a vesting of one-fourth interest in realty in defendant, and time of vesting was not required to be pleaded.—Guaranty Co. of Maryland v. Hubbard, 187 S.E. 313, 117 W.Va. 563.

Bill held insufficient

In creditor's suit to reach and apply in payment of debt the interests of debtor under an agreement and in certain land allegedly conveyed in trust, allegation that land was conveyed in trust and that agreement was entered into in July or August, 1935, was demurrable since it was not an allegation that the same facts existed in September, 1937, when the bill was filed.—Malden Trust Co. v. George, Mass., 22 N.E. 2d 74.

64. Ark.—Wm. R. Moore Dry Goods Co. v. Ford, 225 S.W. 320, 226 S. W. 139, 146 Ark. 227.

Grounds for demurrer generally see *infra* § 66 d.

65. N.Y.—Quick v. Keeler, 4 N.Y. Super. 231.

66. N.Y.—Quick v. Keeler, *supra*.

67. Mich.—Clark v. Davis, Harr. 227.

15 C.J. p 1424 note 62.

68. Wis.—Faber v. Matz, 57 N.W. 39, 86 Wis. 370.

69. Ala.—O'Bear Jewelry Co. v. Volfer, 17 So. 525, 106 Ala. 205, 54 Am.S.R. 31, 28 L.R.A. 707.

N.Y.—Jackson v. Forrest, 2 Barb.Ch. 576.

Tenn.—Ohio Life Ins. & Trust Co. v. Merchants Ins. & Trust Co., 11 Humphr. 1, 53 Am.D. 742.

Bills held multifarious

(1) Creditors were not permitted to set aside a fraudulent conveyance and at the same time to compel a settlement of an assignment for the benefit of creditors to remove the trustee and have a receiver appointed.—Seals v. Pfeiffer, 77 Ala. 278.

(2) It is multifarious to seek satisfaction out of property assigned by the debtor without consideration, and also damages for waste committed on land purchased by plaintiff under an execution on his judgment.—Boyd & Suydam v. Hoyt & Parsel, 5 Paige, N.Y., 65.

bill is not multifarious, although the property is held by different persons under separate conveyances, or the relief is sought on different or alternative theories,⁷⁰ and although different defendants acquired different portions of the debtor's property, real and personal, at different times.⁷¹ A bill is not multifarious, although it is brought as well to reach equitable interests as to set aside an obstruction to the levy of an execution at law,⁷² or although it prays discovery as well as relief.⁷³ Multifariousness in bills in equity generally is discussed in the title Equity §§ 233-257, also 21 C.J. p 408 note 18-p 427 note 86.

j. Framing Bill with Double Aspect

A creditors' bill may be framed with a double aspect.

The bill may be framed with a double aspect, as in aid of execution and to reach property not subject to execution,⁷⁴ or to seek payment out of property which the debtor has fraudulently conveyed, and also out of choses in action, equitable interests, and other property not reachable by execution.⁷⁵

k. Prayers

The bill or petition should contain a proper prayer for relief.

A creditors' bill which purports to be filed in be-

half of all creditors should contain a prayer not only for the payment of complainant's debt, but also for the payment of the debts of all other creditors who might come in and prove their claims.⁷⁶ A prayer for judgment that defendants be compelled to pay plaintiff the amount of his judgment is correct, and does not stamp the action as a legal rather than an equitable one.⁷⁷ A bill to subject the equitable estate of a debtor to the payment of complainant's claim is not demurrable because some additional relief is sought that may be obtained in connection with the discovery which is the main equity on which the bill rests.⁷⁸ Where the petition contains a prayer for general relief, it is not wholly bad because petitioner is not entitled to a part of the specific relief prayed for;⁷⁹ and, although the specific prayers for relief are defective, complainant will, under the prayer for general relief, be awarded such relief as is consistent with the case made out by the bill and within the issues, as stated *infra* § 75.

l. Verification

The bill must be properly verified when verification is required.

In some jurisdictions a bill which seeks discovery of legal assets belonging to defendant is insufficient unless verified by oath,⁸⁰ but, when discovery is

70. U.S.—*De Hierapolis v. Lawrence*, C.C.N.Y., 115 F. 761.

Ala.—*Montgomery Iron Works v. Capital City Ins. Co.*, 34 So. 210, 137 Ala. 134—*Handley v. Heflin*, 4 So. 725, 84 Ala. 600—*Wedgeworth v. Wedgeworth*, 4 So. 149, 84 Ala. 274—*Allen v. Montgomery R. Co.*, 11 Ala. 437.

Fla.—*Ratliff v. Nowery*, 136 So. 895, 897, 102 Fla. 1072, citing *Corpus Juris*.

S.C.—*Ragsdale v. Holmes*, 1 S.C. 91. Tenn.—*Swepson v. Exchange & Deposit Bank*, 9 Lea 713.

Utah.—*Hoggan v. Price River Irr. Co.*, 184 P. 536, 538, 55 Utah 170, citing *Corpus Juris*.

Va.—*Hutchinson v. Maxwell*, 40 S. E. 655, 100 Va. 169, 57 L.R.A. 384, 93 Am.S.R. 944—*Jordan v. Liggan*, 29 S.E. 330, 95 Va. 616—*Nulton v. Isaacs*, 30 Gratt. 726, 71 Va. 726. 15 C.J. p 1424 note 64.

Purpose of bill is to avoid multiplicity of suits by permitting several creditors, although holding unrelated claims, to join in single suit, where questions are substantially same.—*Ratliff v. Nowery*, 136 So. 895, 102 Fla. 1072.

Particular bills held not multifarious

(1) A bill, the general purpose of which is to subject assets of the principal defendants to the valid liens of their creditors, is not multi-

furious because, as incidental to such relief, it also seeks the cancellation of tax deeds on portions of the property, the equitable apportionment of the taxes for which such sales were made, as between the portions of the property covered by different liens, and to set aside special assessments made by a city for street improvements, alleged to be unconstitutional and void, and to that end joins as defendants the officers of the city and others interested in such tax deeds.—*Bidwell v. Huff*, C.C.Ga., 103 F. 352.

(2) A bill is not multifarious which seeks to set aside fraudulent conveyances and also to reach equitable interests.—*Randolph v. Daly*, 16 N.J.Eq. 313—*Way v. Bragaw*, 16 N.J.Eq. 213, 84 Am.D. 147.

(3) A bill is not multifarious because it seeks to subject land attached and remove the lien of a judgment fraudulent against the attachment.—*Stewart v. Stewart*, 27 W.Va. 167.

71. Ala.—*Henderson v. Farley Nat. Bank*, 26 So. 226, 123 Ala. 547, 82 Am.S.R. 140.

N.J.—*Burne v. O'Shaughnessy*, Ch., 38 A. 963.

72. Mich.—*Vanderpool v. Notley*, 39 N.W. 574, 71 Mich. 422. 15 C.J. p 1424 note 66.

73. N.J.—*New Jersey Lumber Co. v. Ryan*, 41 A. 839, 57 N.J.Eq. 330.

15 C.J. p 1424 note 67.

74. Mich.—*Newcomb v. Montague*, 160 N.W. 405, 194 Mich. 74—*Wilson v. Addison*, 87 N.W. 109, 127 Mich. 680.

75. Mich.—*Vanderpool v. Notley*, 39 N.W. 574, 71 Mich. 422.

15 C.J. p 1424 note 70.

76. Del.—*Keller v. Wilson & Co., Ch.*, 194 A. 45.

77. N.Y.—*Murtha v. Curley*, 90 N. Y. 372, 3 N.Y.Civ.Proc. 1, 12 Abb.N. Cas. 12, reversing 47 N.Y.Super. 393, 12 N.Y.Wkly.Dig. 52.

78. Ala.—*Anderton v. Hiter*, 188 So. 904.

79. Ga.—*Cook v. Securities Inv. Co.*, 192 S.E. 179, 184 Ga. 544.

Sale of property

A petition asking receiver's sale of premises which had been conveyed to secure debt was not bad because it improperly sought to require purchaser at such sale to assume security deed, where petition contained prayer for general relief, sufficient to cover sale of property subject to security deed.—*Cook v. Securities Inv. Co.*, *supra*.

80. Ala.—*Burke v. Morris*, 25 So. 759, 121 Ala. 126. 15 C.J. p 1425 note 73.

merely incidental to the relief sought in matters of ordinary equitable cognizance, the bill need not be verified by oath.⁸¹ The allegation negating collusion, required by rule of court, must be sworn to.⁸² When verification is required, if the averments of the bill are positive, the verification must be so;⁸³ but, when they are on information and belief, the verification must embrace both the facts that affiant has been informed and that he believes them to be true, either in terms, or by affirming positively that the facts alleged in the bill are true as therein stated.⁸⁴ Verification according to affiant's best belief and recollection is insufficient.⁸⁵ It is sufficient for complainant to swear to the obtaining of the judgment and return of the execution nulla bona on information of his attorney.⁸⁶ The verification may be by the attorney or his clerk who had charge of the collection of the debt, conducted the proceedings at law, and had personal knowledge of the facts stated in the bill.⁸⁷ Where a bill is verified by complainant's agent who is not also his solicitor, the jurat should state the person verifying to be the agent of complainant;⁸⁸ but, where it is verified by the oath of complainant's solicitor, the court will take notice of that fact from the records and proceedings in the cause.⁸⁹

§ 66. — Plea or Answer and Subsequent Pleadings

- a. Plea or answer
- b. Cross bill

- c. Replication
- d. Demurrer

a. Plea or Answer

The ordinary rules of equity pleading apply to the plea or answer in creditors' suits. The defendant is bound by admissions of fact in the answer, and allegations of the bill are admitted by failure of the answer to deny them.

The ordinary rules of equity pleading apply to the plea or answer in creditors' suits.⁹⁰ An answer alleging that plaintiff has an adequate remedy at law states a conclusion merely and is insufficient.⁹¹ An answer is insufficient which avers merely that defendant has no recollection and does not believe that any declaration or process was served on him in the suit in which the judgment was entered.⁹² A general assertion in an answer to a judgment creditors' bill that defendant has property liable to execution, and which might have been levied on, is insufficient; he must state what and where the property was that the sheriff ought to have seized but did not seize.⁹³ So, an answer is insufficient which avers merely that defendant does not admit that he has no property on which to levy;⁹⁴ but in an action in the nature of a creditors' bill brought to subject to the lien of a judgment lands owned by one not a judgment debtor, an answer alleging that the judgment debtor has property which is or can be made available to the payment of the judgment states a defense and is not demurrable.⁹⁵

Admissions. Defendant is bound by an admission of fact in the answer,⁹⁶ and he cannot object

81. Ala.—Plaster v. Throne-Franklin Shoe Co., 26 So. 225, 123 Ala. 360.

15 C.J. p 1425 note 74.

82. Mich.—Clark v. Davis, Harr. 227.

83. Ala.—Burgess v. Martin, 20 So. 506, 111 Ala. 656.

84. Ala.—Burgess v. Martin, 20 So. 506, 111 Ala. 656.

15 C.J. p 1425 note 77.

Sufficiency of verification

(1) Statement of affiant that he had read bill and knew the contents and that they were true of his own knowledge, "except as to the matters stated on information and belief, and as to those he believes it to be true," was sufficient.—National Plumbing & Heating Supply Co. v. Illinois Wood Preserving Co., 239 Ill.App. 69.

(2) Where complaint stated some matters positively and others on information and belief, affidavit by complainant's attorney that affiant of his own knowledge knows that the

facts are true as stated in the complaint was sufficient.—Guyton v. Terrell, 31 So. 83, 132 Ala. 66.

(3) But an affidavit that the allegations of the bill are true to the best of affiant's knowledge, information, and belief was insufficient.—Burgess v. Martin, 20 So. 506, 111 Ala. 656.

85. Ala.—McKissack v. Voorhees, 24 So. 523, 119 Ala. 101.

86. N.Y.—Hamersley v. Wyckoff, 8 Paige 72.

87. N.Y.—Sizer v. Miller, 9 Paige 605—Wooster Bank v. Spencer, Clarke 386.

88. Mich.—Bergh v. Poupard, Walk 5.

89. Mich.—Bergh v. Poupard, supra.

90. Multifarious plea

A plea that the execution was improperly returned unsatisfied, and that, as defendant was the owner of land in another county and had so informed plaintiff, he should have taken out an alias execution, is

multifarious and bad.—Albany City Bank v. Dorr, Walk, Mich. 317.

Plea to jurisdiction

In Tennessee, the defense that there is no proper return or nulla bona is to the jurisdiction, and under the code must be made by a motion to dismiss, by demurrer, or by plea in abatement, and cannot be made by answer.—Turley v. Taylor, 3 Lea, Tenn. 171.

91. N.Y.—Holland v. Grote, 107 N.Y.S. 667, 56 Misc. 370, affirmed 109 N.Y.S. 787, 125 App.Div. 413.

92. N.Y.—Corey v. Cornelius, 1 Barb.Ch. 571.

93. Mich.—Rankin v. Rothschild, 43 N.W. 1077, 78 Mich. 10.

94. Ohio.—Bomberger v. Turner, 13 Ohio St. 263, 82 Am.D. 438.

95. Minn.—Keith v. Keith, 127 N.W. 567, 112 Minn. 183.

96. Ala.—Nix v. Winter, 35 Ala. 309. Wis.—Wanzer v. Howland, 10 Wis. 8.

15 C.J. p 1426 note 3.

to the failure of the bill to allege facts which are thus admitted;⁹⁷ nor can he, by his answer to a supplemental complaint, withdraw or nullify the admissions made in the answer to the original complaint.⁹⁸ An allegation in a supplemental petition that plaintiff had obtained a judgment at law is admitted by an answer failing to deny such allegation.⁹⁹ Under a statute providing that every material allegation of a bill not controverted by an answer shall be taken as true, the only proper mode of controverting any allegation in a bill is for the answer to deny or controvert such allegation specifically, and a general denial is not proper pleading.¹ A bill under the statute by a judgment creditor against executors to subject the equitable interest of the debtor as devisee on the ground that such interest was not leviable on by execution, is not in the nature of a garnishment, and complainant is not bound by the sworn answer of the executors denying that the estate was indebted to the judgment debtor.²

b. Cross Bill

A cross bill germane to the original suit may be filed in a proper case.

Cross bills germane to the subject matter of the original suit may be filed.³ Where a lien creditor files a bill to ascertain the property of the debtor and the liens and priorities, a creditor defendant may file an answer in the nature of a cross bill attacking any of the liens involved as a fraudulent preference;⁴ but where plaintiff in an action in the nature of a creditors' bill brings in another party claiming to have an interest in the property, the latter cannot by answer assert against the debtor a claim for a money judgment.⁵ A

defendant cannot file a cross bill in the nature of a creditors' bill based on a general claim.⁶

c. Replication

The complainant must file a replication where he desires to deny the truth of the answer. A general denial requires no replication; and a replication may be waived.

Where complainant desires to deny the truth of defendant's answer, he must do so by filing a replication.⁷ A general denial, however, requires no replication.⁸

Where defendants, as well as complainant, have taken depositions relative to the merits of the controversy, and have submitted the cause for final decree on bill, answer, exhibits, and deposition, defendants thereby waive the formality of a replication.⁹

d. Demurrer

The general rules of pleading are applicable in creditors' suits in determining the grounds of demurrer to the pleadings; whether a general or a special demurrer is required to reach certain defects; and as to the scope, sufficiency, and effect of a demurrer.

The failure to set forth matters which are not essential to the equity of the bill is not ground of demurrer; the nonexistence of such facts must be set up by answer or plea.¹⁰ Matters unnecessarily set forth in the bill are not ground for a demurrer,¹¹ the proper method of objecting to irrelevant averments being by motion to strike out.¹² Affirmative matters of defense can be presented only by answer and not by demurrer.¹³ A complaint which states a sufficient cause of action for equitable relief is not open to demurrer under the code.¹⁴ The objection to misjoinder of causes of action or multifariousness should be taken by demurrer,¹⁵ and

97. Md.—Birely v. Staley, 5 Gill & J. 432, 25 Am.D. 303.

98. N.Y.—Forbes v. Waller, 25 N. Y. 430.

99. Or.—First Nat. Bank v. Manassas, 150 P. 258, 30 Or. 53.

1. W.Va.—Rogers v. Verlander, 5 S. E. 847, 30 W.Va. 619.

2. Tenn.—Hull v. Vaughn, 107 S.W. 2d 219, 171 Tenn. 642.

3. Fla.—Switow v. Sher, 186 So. 519.

Intervenor

Where trustee in bankruptcy not a party to creditor's bill intervened and asserted claim to note which was cause of action in law action which was basis of creditor's bill, trustee was properly allowed to file a cross bill, since cross bill was germane to subject matter of original suit—Switow v. Sher, supra.

4. Tex.—Briggs v. Ladd, Civ.App., 64 S.W.2d 389, 390, citing Corpus Juris.

15 C.J. p 1426 note 7.

5. Ohio.—Davis Carriage Co. v. Weber, 32 Ohio Cir.Ct. 621.

6. U.S.—Goff v. Kelly, C.C.Mont., 74 F. 327.

7. D.C.—Birdsall v. Welch, 6 D.C. 316.

8. Mo.—Jordan v. Buschmeyer, 10 S.W. 616, 97 Mo. 97.

9. Ind.—Demaree v. Driskill, 3 Blackf. 115.

10. N.Y.—Thomas v. McEwen, 11 Paige 131.

15 C.J. p 1427 note 15.

11. N.H.—Treadwell v. Brown, 44 N. H. 551.

12. N.Y.—Hammond v. Hudson River Iron & Machine Co., 20 Barb.

378—Bank of British North America v. Suydam, 6 How.Pr. 379, 1 Code Rep., N.S., 325.

13. Ark.—Hall v. Brewer, 40 Ark. 433.

N.Y.—Rochester Bank v. Emerson, 10 Paige 115.

14. N.Y.—Hart v. Albright, 18 N.Y. S. 718, 28 Abb.N.Cas. 74.

15. N.Y.—Redmond v. Dana, 16 N. Y.Super. 615.

Nature of demurrer

A demurrer for multifariousness is substantially the same as a demurrer to a declaration at law for a misjoinder of causes of action or of different causes of action which cannot be properly litigated in the same suit, and such a demurrer goes to the whole bill, and either or both defendants may demur.—Boyd v. Hoyt, 5 Paige, N.Y., 65.

the demurrer should be special and not general.¹⁶ Where an answer alleges that plaintiff has an adequate remedy at law, an objection thereto on the ground that it states a conclusion merely may be raised by demurrer.¹⁷ A ground of demurrer should be so stated as to apprise the court of the real objection.¹⁸ A general demurrer by all defendants should be overruled where the bill discloses a ground for relief against one of them,¹⁹ and a demurrer to the whole bill cannot be sustained where complainant is entitled to a part of the relief demanded.²⁰ A complaint is good on general demurrer, although unnecessary parties are joined.²¹ It has been held that a general demurrer is sufficient to raise the objection that complainant has an adequate remedy at law,²² although under a statute requiring a demurrer to specify the grounds of objection, it has been held questionable whether a general demurrer is sufficient to raise the objection that the creditor has not recovered a judgment and exhausted his remedy at law.²³ A speaking demurrer based on the contents of a writing entirely variant from the allegations of the bill will not be sustained.²⁴ A demurrer admits the truth of the allegations of the bill.²⁵ A motion to dismiss a complaint as not stating facts sufficient to constitute a cause of action may be treated as a demurrer.²⁶ Where a bill alleges facts in the alternative, and any of the alternative allegations are insufficient, a demurrer addressed to such insufficiency should be sustained.²⁷

§ 67. — Amended and Supplemental Pleadings

a. Amendments

b. Supplemental pleadings

a. Amendments

The bill or answer may be amended if sought at the proper time and the amendment does not materially change the cause of action or defense.

The court may permit an amendment of the bill in its discretion, for the purpose of making it more definite and certain, and curing informalities therein;²⁸ but where an amendment to a petition presents no issue on which a court or jury could pass, it will be refused.²⁹ It being the common practice, where judgment creditors, suing in behalf of themselves and all other lien creditors, specifically refer to only a portion of the debtor's real estate, to search out other property on which the judgments constitute liens and bring it before the court for administration, it is not necessary to amend the pleadings in order to do so, where third persons do not claim any interest in such other property;³⁰ but where it is claimed that the interests of others have attached, the proper mode is to file an amended bill or to bring the facts to the attention of the court by petition.³¹ A judgment creditor who feels that his rights have been injuriously affected by a voluntary partition of the property held in cotenancy and the taking possession by the debtor of his portion, should bring the matter to the attention of the court by an amendment of the bill.³² It has been held that an amendment may be allowed even though the bill as originally filed shows on its face that the remedy at law has not been exhausted,³³ but there is authority to the contrary.³⁴ Where the bill shows on its face, in connection with the summons, that the debt had been paid when the bill was filed, it is not susceptible of amendment.³⁵ As in other suits, it is not permissible to amend the bill so as to change its purpose and ask altogether different relief;³⁶

16. Ala.—Bromberg v. Heyer, 69 Ala. 22.
- Tenn.—Fay v. Jones, 1 Head. 442.
17. N.Y.—Holland v. Grote, 107 N.Y.S. 667, 56 Misc. 370, affirmed 109 N.Y.S. 787, 125 App.Div. 413.
18. Mich.—Kellogg v. Hamilton, 5 N.W. 315, 48 Mich. 269.
19. Ill.—Fusze v. Stern, 17 Ill.App. 429.
20. Ala.—Burke v. Morris, 25 So. 759, 121 Ala. 126.
- 15 C.J. p 1427 note 25.
21. Wis.—Lehr v. Murphy, 116 N.W. 893, 136 Wis. 92.
22. Wis.—Gullickson v. Madsen, 57 N.W. 965, 87 Wis. 19.
23. N.Y.—Loomis v. Tift, 16 Barb. 541.
24. Ala.—Bromberg v. Heyer, 69 Ala. 22.

- N.J.—McDevitt v. Connell, 63 A. 504, 71 N.J.Eq. 119.
25. Ill.—Miller v. Davidson, 8 Ill. 518, 44 Am.D. 715.
- Miss.—Vasser v. Henderson, 40 Miss. 519, 90 Am.D. 351.
26. N.Y.—Sloan v. Waring, 55 How. Pr. 62, affirmed 9 N.Y.Wkly.Dig. 170.
27. Ala.—Crisp v. First Nat. Bank, 139 So. 213, 224 Ala. 72.
28. Neb.—Monroe v. Reid, 64 N.W. 983, 46 Neb. 316.
- 15 C.J. p 1427 note 32.
29. Ga.—Lydia Pinkham Medicine Co. v. Gibbs, 33 S.E. 945, 108 Ga. 133.
30. Va.—McClanahan v. Norfolk & W. R. Co., 87 S.E. 781, 118 Va. 388.
31. Va.—McClanahan v. Norfolk & W. R. Co., supra.

32. Ala.—Griffith v. First Nat. Bank, 140 So. 359, 224 Ala. 296.
33. N.Y.—Baggott v. Eagleson, Hoffm. 377.
34. Miss.—Scott v. McFarland, 34 Miss. 383.
- Where opportunity to put in new answer is given
- Where the bill states that the execution was returnable, and was in fact returned after the commencement of the suit, it is bad in matter of substance, and is not amendable under 2 Rev.St. 424 §§ 1, 2, without giving defendants an opportunity to put in a new answer.—Pardee v. DeCala, 7 Paige, N.Y., 132.
35. W.Va.—Wildasin v. Long, 82 S. E. 205, 74 W.Va. 583.
36. Ala.—Scott v. Ware, 64 Ala. 174.
- Ga.—Owen v. S. P. Richards Paper Co., 3 S.E.2d 660, 138 Ga. 258.
- 15 C.J. p 1428 note 39.

but an amendment is not a departure because it adds as parties to the bill some who were not made parties in the original bill.³⁷ The court may, in its discretion, after a demurrer has been sustained, permit an amendment by striking out the names of some of the complainants,³⁸ or by striking out an invitation to other creditors to join in the suit.³⁹ An alternative ground of relief may be set up by amendment when the matter of amendment might have been stated in the alternative in the bill as originally filed.⁴⁰ A creditor may not set up by amendment new matters or events which have arisen since the filing of the original bill,⁴¹ the proper course being to file a supplemental bill, as stated *infra* § 67 b. While the court has full discretionary power to allow amendments to equity pleadings at any time, and will exercise that power at any stage of the case on reasonable terms, or even without terms, if necessary for the preservation of some substantial right, it will not ordinarily allow amendments to the bill after the case has been reported to the law court. If the bill cannot then be sustained without further amendment, it will ordinarily be dismissed, with costs, and plaintiff will be left to bring a new bill.⁴² An amendment in matters of form merely may be made at any stage of the suit;⁴³ but it is within the discretion of the chancellor to refuse to permit an amendment of a bill after the cause has been heard and a decree entered.⁴⁴ The bill may in a proper case be amended to conform to the proof.⁴⁵ The refusal of the chancellor to strike out an amended

bill because it was filed without leave of court is tantamount to leave to file it.⁴⁶ A new summons is not necessary on an amended petition which seeks no other or different relief than the original petition.⁴⁷

An amendment of an answer in order to show a homestead right in the land sought to be reached may be allowed.⁴⁸ The rule permitting the rejection of an amended answer does not apply to an amended answer setting up facts presenting equitable defenses, the disposal of which is necessary to any final adjudication of the rights and priorities of the several creditors.⁴⁹ When a bill was amended by joining other persons as parties defendant, but did not change any other material allegations of the bill, an amended answer, containing much immaterial matter, and filed without leave of court, after the property had been sold, was properly stricken out.⁵⁰

b. Supplemental Pleadings

A supplemental bill may be filed to introduce matters occurring after the filing of the original bill which relate to and support the rights set up in the original bill; and in some cases new parties may be brought in by supplemental bill.

New events or new matters which do not change the parties before the court, or the rights and interests of the parties, but merely refer to and support the right and interests already urged in the bill, may be brought before the court by a supplemental bill;⁵¹ and if the original bill is suffi-

Suit to cancel debtor's conveyance to defendant

In creditors' suit to cancel debtor's conveyance to defendant where original petition alleged fraud on creditors, permitting an amendment over defendant's objection on ground that amendment was inconsistent with, and contradictory to, original petition, alleging that deed in question was a forgery, was error where amendment was allowed without striking original allegations concerning conveyance to defendant and petition contained only one count.—Owen v. S. P. Richards Paper Co., *supra*.

37. Ga.—McDougald v. Dougherty, 11 Ga. 570.
15 C.J. p 1428 note 40.

38. Ill.—Heacock v. Durand, 42 Ill. 230.

39. U.S.—Yates v. Arden, D.C., 30 F.Cas.No.18,126, 5 Cranch C.C. 526.

40. Ala.—Wimberly v. Montgomery Fertilizer Co., 31 So. 524, 132 Ala. 107.

41. N.Y.—Hope v. Brinckerhoff, 4 Edw. 348, 660.

42. Me.—Shaw v. Monson Maine Slate Co., 51 A. 285, 96 Me. 41.

43. N.Y.—Pardee v. DeCala, 7 Paige 132—Candler v. Pettit, 1 Paige 168, 19 Am.D. 399.

44. Tenn.—Montgomery v. Clark, Ch., 46 S.W. 466.

45. Tenn.—Bryan v. Zarecor, 81 S. W. 1252, 112 Tenn. 503.
15 C.J. p 1428 note 49.

46. Miss.—Ward v. Whitfield, 2 So. 493, 64 Miss. 754.

47. Ky.—Moore v. Robinson, 91 S. W. 659, 29 Ky.L. 43.

48. Ky.—Cincinnati Tobacco Warehouse Co. v. Matthews, 74 S.W. 242, 24 Ky.L. 2445.

49. W.Va.—Blumberg Bros. Co. v. King, 127 S.E. 47, 98 W.Va. 275.

Rejection of amendment held error
Where, in judgment creditors' suit, on showing by amended answer that other suits are pending in same court involving rights and interests of parties, necessary to be adjudicated before final disposition of cause, and that other rights have intervened since execution of order of

reference, which should be inquired into, and constituting ground for affirmative relief, answer should be allowed to be filed and parties brought to issue thereon before final disposition of cause.—Blumberg Bros. Co. v. King, *supra*.

50. U.S.—Tennessee Pub. Co. v. Carpenter, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1066.

51. Mass.—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124.
15 C.J. p 1425 note 84.

Judgment on debtor's cause of action after original bill filed

(1) In creditors' suit to reach and apply cause of action in favor of building contractor for damages for unlawful interference with building contract in satisfaction of debt, brought before judgment was obtained thereon in pending action, supplemental bill, in nature of amendment to original bill, showing cause of action had been reduced to judgment and bringing in additional defendants so as to control proceeds of judgment, was properly allowed.

cient to entitle complainant to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out the new matter by supplemental bill;⁵² but where the original bill is wholly defective, so that no valid decree can be made thereon, a supplemental bill cannot be maintained on matters subsequently taking place; a new bill must be filed.⁵³ Accordingly, where jurisdiction does not exist at the time of the filing of the bill because of the want of judgment or execution, the defect will not be cured by the subsequent recovery of judgment and the issuance and return unsatisfied of execution thereon and the setting up of such facts in a supplemental bill;⁵⁴ and where the original bill is based on a judgment which is afterward set aside at law, complainant is not entitled to file a supplemental bill founded on a second judgment obtained pendente lite.⁵⁵ A supplemental bill is allowed and is necessary to discover and reach property acquired by defendant subsequently to the filing of the original bill;⁵⁶ and a supplemental bill may be filed to subject to the payment of a judgment obtained subsequently to the institution of the original bill, and on which execution has been issued and been returned nulla bona, property acquired subsequently to the filing of the original bill as well as property sought to be reached by the original bill.⁵⁷ In some cases, where proper parties are not before the court, they may be brought in by a supplemental bill.⁵⁸ Where

rules of court require an averment as to the amount in controversy, if it appears in the original bill it need not be repeated in the supplemental bill.⁵⁹

§ 68. — Issues, Proof and Variance

Evidence of matters not pleaded is inadmissible. The proof must conform to the pleadings; but an immaterial variance will not prevent recovery.

In accordance with the general rule, the issues in a creditors' suit are those⁶⁰ and only those⁶¹ raised by the pleadings. The claim that creditors realized from securities and did not give the debtor credit therefor on their judgments against him on which their bill is founded cannot be considered, unless raised by defendants' pleadings.⁶² It has been held that the debtor cannot claim a fund sought to be reached by a creditors' bill as an exemption, unless he pleads it by way of answer;⁶³ but it has also been held that evidence showing a right to claim property as exempt is admissible under the general denial.⁶⁴ Where plaintiff's right to equitable relief depends entirely on the fact that the bill is filed to reach and apply property not subject to attachment or execution, the averments as to the existence of such property are jurisdictional, and must be proved as laid.⁶⁵ However, where the petition sets up matters entitling plaintiff to equitable relief, it is sufficient to prove them without proof of other matters alleged;⁶⁶ and the averments that defendant has property to the amount of one hundred dollars, and that the bill is not filed by collu-

—Bethlehem Fabricators v. H. D. Watts Co., *supra*.

(2) Where original bill by creditor sought to reach and apply cause of action in favor of debtor in satisfaction of debt, and supplemental bill, in nature of amendment to original bill, was filed alleging that debtor obtained judgment on cause of action and that execution was issued on judgment, judgment was held to stand in place of cause of action sought to be reached and applied by original bill to satisfaction of debt and was itself property which could be reached and applied by creditor. —Bethlehem Fabricators v. H. D. Watts Co., *supra*.

Notice of filing

Where evidence showed that defendant in creditors' suit had actual notice of filing of supplemental bill, and defendant was represented by counsel appearing specially for protection of interest in property within jurisdiction of court referred to in supplemental bill, further notice to defendant of filing of supplemental bill or issuance and service of process thereon was not necessary. —Bethlehem Fabricators v. H. D. Watts Co., *supra*.

52. N.Y.—Thomas v. McEwen, 11 Paige 131.

15 C.J. p 1425 note 85.

53. U.S.—Putney v. Whitmire, C.C. S.C., 66 F. 385.

15 C.J. p 1425 note 86.

54. W.Va.—Lewis v. Fisher, 171 S. E. 106, 114 W.Va. 151.

15 C.J. p 1425 note 87.

55. N.Y.—Butchers & Drovers Bank v. Willis, 1 Edw. 645.

56. Mich.—Newlove v. Pennock, 82 N.W. 54, 123 Mich. 260.

15 C.J. p 1426 note 89.

57. N.Y.—Thomas v. McEwen, 11 Paige 131.

58. Mass.—Bethlehem Fabricators v. H. D. Watts Co., 190 N.E. 828, 286 Mass. 556, 93 A.L.R. 1124. 15 C.J. p 1426 note 91.

59. N.Y.—Thomas v. McEwen, 11 Paige 131.

60. Ala.—Boasberg v. Cooke, 136 So. 797, 223 Ala. 389.

Existence of judgment as alleged by plaintiff was held put in issue by answer.—Boasberg v. Cooke, *supra*.

Evidence admissible under pleadings. Reference in amended bill to

amounts "agreed" to be paid on notes in certain letter was held not to preclude plaintiff from proving that contract was made by acceptance in modified form of offer or application for loan in such letter.—Westminster Nat. Bank v. Graustein, 170 N.E. 621, 270 Mass. 565, certiorari denied Graustein v. Westminster Nat. Bank, 51 S.Ct. 80, 232 U.S. 376, 75 L.Ed. 773.

61. Me.—Darling Automobile Co. v. Hall, 197 A. 558, 559, 135 Me. 382. "Evidence without allegation is as futile as allegation without evidence."—Darling Automobile Co. v. Hall, *supra*.

62. Iowa.—O'Brien v. Stambach, 69 N.W. 1133, 101 Iowa 40, 63 Am. S.R. 363.

63. Mo.—Furlong v. Thomssen, 19 Mo.App. 364.

64. Ind.—Starke v. Lamb, 78 N.E. 668, 79 N.E. 895, 167 Ind. 642.

65. Mass.—Hoshor-Platt Co. v. Miller, 76 N.E. 650, 190 Mass. 235.

66. Iowa.—Nichols Shepard Co. v. Ringler, 112 N.W. 543, 135 Iowa 131.

sion, being required only by rule of court, constitutes no part of plaintiff's case, and need not be proved.⁶⁷

Variance. To authorize a recovery on a creditors' bill, the pleadings and proof must correspond;⁶⁸ but this doctrine will not be extended to prevent a recovery in case of an immaterial variance.⁶⁹

§ 69. Presumptions and Burden of Proof

Ordinarily, the burden is on the creditor to prove the facts essential to a recovery, and on the debtor to prove facts set up as a defense; but a party need not prove facts that reasonably may be presumed from other facts proved.

The burden is on complainant to prove his jurisdictional averments.⁷⁰ Thus, the allegations of the bill of recovery of a judgment, issuance of execution, and return thereof nulla bona must be proved.⁷¹ However, a return nulla bona makes a prima facie case that defendant has no sufficient property on which execution can be levied, casting on defendant the burden of adducing evidence to the contrary, as stated supra § 47; and a defendant claiming that complainant has not exhausted his remedies at law, and that attachment proceedings taken on the judgment have not been determined,

must show these facts affirmatively, where the evidence of complainant makes a prima facie case of exhaustion of legal remedies.⁷² Where the failure to issue execution to the county of defendant's residence is set up as a defense to the bill, defendant must show that he not only resided or had a place of business in some county other than that to which the execution issued, but also that he had visible property there out of which the execution might have been satisfied if plaintiff had exercised due diligence.⁷³ Where an execution was returned on the day the complaint was sworn to and the summons dated, the presumption is that it was returned before the commencement of the action.⁷⁴ If the bill seeks to charge an equitable asset on the ground of the debtor's insolvency, such insolvency must be proved.⁷⁵ It has been held that in the absence of proof of the value of the assets of the debtor that could be reached by process at law, it appearing that they were such assets, it will be presumed that they were of sufficient value to satisfy complainant's debt;⁷⁶ but there is authority to the contrary where execution has been returned nulla bona.⁷⁷ The burden is on the creditor to show that assets which he seeks to subject to the payment of his claim are the property of the judgment debtor,⁷⁸ and where he seeks to subject a debt alleged to be due the debtor, he must establish that

67. N.Y.—Batterson v. Ferguson, 1 Barb. 490.

68. Ill.—Detroit Stove Works v. Koch, 30 Ill.App. 328.

N.Y.—Merchants' & Mechanics' Bank v. Griffith, 10 Paige 519.

69. Mich.—Marshall First Nat. Bank v. Hosmer, 12 N.W. 212, 48 Mich. 200.

15 C.J. p 1428 note 61.

70. Ill.—Crowder v. Nuttall, 1 N.E.2d 912, 285 Ill.App. 254.

Mass.—Hosbor-Platt Co. v. Miller, 76 N.E. 650, 190 Mass. 285.

15 C.J. p 1429 note 62.

In West Virginia under statute, in suit to foreclose liens in equity, where it is necessary before decreeing sale of property to ascertain whether rents and profits thereof will suffice to discharge liens within five years, the burden of establishing the insufficiency of such rents, etc., rests on creditor.—Abney-Barnes Co. v. Davy-Pocahontas Coal Co., 98 S.E. 298, 83 W.Va. 292.

Waiver by defendant

(1) A denial by the debtor that he has assets or securities in the hands of the other defendants which could not be reached at law, and the giving of evidence in support thereof, do not waive his objection to the jurisdiction of a court of equity, or re-

lieve plaintiff of the burden of proving his jurisdictional averments.—Hosbor-Platt Co. v. Miller, 76 N.E. 650, 190 Mass. 285.

(2) A showing that the creditor has pursued his remedies at law to every available extent when necessary is of the substance of the creditor's right to relief and is not waived by the general answer.—Wright v. Petrie, 1 Sm. & M.Ch., Miss., 326.—Parish v. Lewis, Freeman, Miss., 299.

(3) In Tennessee, however, the defense that there has been no return of execution nulla bona must be made by motion to dismiss by demurrer, or by plea in abatement, and is waived by answer.—Turley v. Taylor, 3 Lea, Tenn., 171.

71. Ill.—Russell v. Chicago Trust & Savings Bank, 29 N.E. 37, 139 Ill. 538, 17 L.R.A. 845.

15 C.J. p 1429 note 63.

Essential elements to be proved

A judgment creditor who attempts to reach realty in satisfaction of judgment through action in equity must show existence of judgment recorded in county wherein realty is located, issuance to sheriff of county of debtor's residence, of execution which has been returned unsatisfied, and an obstruction to enforcement of execution against debtor's realty,

such as a conveyance of the realty rendering the debtor insolvent.—Kwandrans v. Dobosz, 10 N.Y.S.2d 34.

72. D.C.—Weightman v. Washington Critic Co., 4 App.D.C. 136.

73. Ala.—Nix v. Winter, 35 Ala. 309.

15 C.J. p 1429 note 66.

74. N.Y.—Murtha v. Curley, 92 N.Y. 359, 3 N.Y.Civ.Proc. 266, 65 How. Pr. 86, reversing 49 N.Y.Super. 482, 3 N.Y.Civ.Proc. 86, 64 How.Pr. 465, reversing 64 How.Pr. 222.

15 C.J. p 1429 note 67.

75. Ill.—Greenman v. Greenman, 107 Ill. 404.

76. Ill.—Ward v. Wood, 32 Ill.App. 289.

77. Wis.—Oppenheimer v. Collins, 91 N.W. 690, 115 Wis. 283, 60 L.R.A. 406.

78. Ark.—Phillips v. Ettenburn, 238 S.W. 28, 158 Ark. 643.

15 C.J. p 1429 note 71.

Equitable ownership

Where judgment creditor seeks to subject to the judgment land standing in the name of children of the debtor on the theory of a trust, the burden rests on the judgment creditor to establish equitable ownership in the debtor.—Phillips v. Ettenburn, supra.

debt.⁷⁹ It has been held, however, that where a third person intervenes, claiming the fund in suit, the burden is not on the creditor to show that the money did not belong to intervener;⁸⁰ and where a party to a creditors' bill claims to have acquired an interest for value and in good faith in a certificate of ownership of land in suit before the commencement of the litigation, the burden is on him to show that fact.⁸¹ A judgment creditors' bill is not sustained by proof merely of the judgment, execution, and return unsatisfied; it must be shown that defendant has property, either legal or equitable, either in hand or due from some one else, or that he has legal title to real estate which he withholds from the record, where that is alleged in the bill.⁸² In a statutory action to reach the debtor's corporate stock, plaintiff need not prove that the stock certificates are in possession of the debtor, where such proof is not required by the statute.⁸³ Complainant must establish the debt on which the bill is based;⁸⁴ but where the regularity

of judgments on which the bill is founded is admitted, they are prima facie evidence of indebtedness, and the burden is on defendants to prove payment,⁸⁵ unless such time has elapsed as to give rise to a presumption of payment.⁸⁶ If it is sought to subject the land of nonresidents to payment of a debt, complainant must prove nonresidence.⁸⁷

§ 70. Admissibility of Evidence

The general rules as to the admissibility of evidence are applicable in creditors' suits.

Any competent evidence which is relevant and material to the issues is admissible in a creditors' suit.⁸⁸

§ 71. Weight and Sufficiency of Evidence

The general rules as to the weight and sufficiency of the evidence are applicable in creditors' suits.

The rules relating to the weight and sufficiency of evidence in civil suits generally apply in creditors' suits.⁸⁹ The mere filing of the bill furnishes

79. Ill.—Crowder v. Nuttall, 1 N.E. 2d 912, 235 Ill.App. 254.

Mo.—Wilkinson v. Harding Dredge Co., App., 186 S.W. 743.

80. Ark.—Parker v. Wells, 105 S.W. 75, 84 Ark. 172.

81. D.C.—Merrillat v. Hensey, 84 App.D.C. 398.

82. Mich.—Wilson v. Henry, 100 N.W. 890, 108 N.W. 964, 137 Mich. 675.

83. Mass.—Central Mortg. Co. v. Buff, 179 N.E. 628, 278 Mass. 233.

84. Ky.—Strong v. Sewell, 12 Ky.L. 94.

85. Iowa.—O'Brien v. Stambach, 69 N.W. 1133, 101 Iowa 40, 68 Am.S.R. 368.

86. Ky.—Calk v. Chiles, 9 Dana 265.

87. Ky.—Calk v. Chiles, *supra*.

88. Mass.—Westminster Nat. Bank v. Graustein, 170 N.E. 631, 270 Mass. 565, certiorari denied Graustein v. Westminster Nat. Bank, 51 S.Ct. 80, 232 U.S. 876, 75 L.Ed. 773.

Evidence held admissible

(1) Indorser's letter, stating his wife's proposition to pay monthly installments on notes in consideration of loan to her, was admissible in suit to apply her interest in certain fund to payment of such installments.—Westminster Nat. Bank v. Graustein, *supra*.

(2) Borrower's notes and agreement to application of payments on original note to other purposes were admissible in suit to apply her interest in certain fund to payment of original note.—Westminster Nat. Bank v. Graustein, *supra*.

(3) In creditor's suit to reach debtor's alleged equitable interest in stock purchased with borrowed money, evidence showing lender's mental attitude respecting debtor was improperly excluded.—First Nat. Bank v. Harrison, 171 N.E. 724, 271 Mass. 258.

(4) In creditor's bill by injured party against liability insurer and insured whose automobile caused injuries, evidence tending to show circumstances surrounding withdrawal of insurer's attorneys, from injury suit was properly admitted to show good faith of insurer in withdrawing from case.—Patton v. Washington Ins. Exchange, 6 N.E.2d 472, 288 Ill. App. 594.

89. Ark.—Phillips v. Ettenburn, 233 S.W. 28, 158 Ark. 643.

15 C.J. p 1429 note 82.

Grounds of proceeding must be clearly and fully proved.—Harris v. Cincinnati, H. & D. Ry. Co., 5 Ohio N.P.N.S., 173.

Clear right to relief sought must be shown.—Jeffries v. White, 267 Ill.App. 331.

Weight or preponderance of evidence is necessary to establish equitable ownership of property sought to be reached.—Phillips v. Ettenburn, 233 S.W. 28, 158 Ark. 643.

Evidence held sufficient

(1) To show plaintiff entitled to relief.—Union Nat. Bank of Wichita v. Ternes, 204 P. 699, 110 Kan. 475.

(2) To sustain finding against both defendants, who were the debtor's widow and a corporation, as to their liability for amounts found against them.—Williams Realty & Loan Co.

v. Simmons, 3 S.E.2d 580, 188 Ga. 184.

(3) To sustain findings for defendants.—Commerce Trust Co. v. Dern, 242 P. 131, 120 Kan. 135.

(4) To establish debt due from defendant to plaintiff.—New England Oil Refining Co. v. Canada M^cco Oil Co., 174 N.E. 330, 274 Mass. 191.—Star Brewing Co. v. Flynn, 129 N.E. 438, 237 Mass. 213.

(5) To show that proceeds of sale of corn belonged to judgment debtor.—Lawton Sav. Bank v. Bremer, 218 N.W. 49, 205 Iowa 334.

(6) To sustain finding that bonds which debtor's brother delivered for deposit as bail on appeal in criminal proceedings against debtor, were property of debtor.—Dickerman v. Ahern, 269 P. 180, 93 Cal.App. 166.

(7) To show that debtors were real owners of land standing in name of another.—Klein v. Reske, 198 N.W. 934, 227 Mich. 348.

(8) To authorize finding that land was subject to judgment, although standing in name of judgment debtor's wife.—Cassada v. First Nat. Bank, 105 S.W.2d 149, 268 Ky. 373.

(9) To sustain finding that debtor, not legal title holder, paid for property.—Moore v. McDonald, 9 P.2d 556, 122 Cal.App. 61.

(10) To show that deed originally named debtor grantee, and debtor substituted legal title holder's name before recording deed.—Moore v. McDonald, *supra*.

(11) In suit to recover balance of debt secured by bill of sale to cotton, evidence authorized finding that

no proof of the truth of its contents.⁹⁰ However, the exhaustion of legal remedies may be proved by inference,⁹¹ and deficiencies in complainant's evidence in this respect may be supplied by evidence introduced by defendant.⁹² In order to prove the judgment, it is not necessary to introduce the entire record of the case.⁹³ The previous issue and return of the execution is sufficiently proved by producing the execution with the sheriff's return and date of filing indorsed thereon, and testimony of a witness that he had seen it on file in the clerk's office.⁹⁴ It is sufficient proof of insolvency to show that the debtor is a nonresident of the state and that persons who reside in his home town knew him for many years and knew that he had some exempt property but no other property or equitable assets reachable by the bill.⁹⁵

§ 72. Dismissal before Hearing

Involuntary dismissal of a creditors' bill, before hearing, may be adjudged on sufficient grounds. The dismissal of the bill carries with it an answer attempted to be set up as a cross bill.

The right of complainant or intervener to control the suit, and hence to voluntarily dismiss or discontinue it, has been discussed supra § 59. In-

voluntary dismissal before the hearing, and the grounds therefor, are discussed infra this section. A creditors' bill may be dismissed before hearing for want of equity;⁹⁶ but a bill should not be dismissed on the ground of want of equity on its face unless it is manifest that no amendment can help it.⁹⁷ The fact that defendant in a bill of discovery on a return of no property has been adjudged not to be the owner of attached property does not entitle him to a dismissal of the bill, as plaintiff may continue the case on the docket until there has been a full answer disclosing the fact that there is no property subject to attachment.⁹⁸ It has been held that whenever it appears on trial of a creditors' suit that plaintiff has a remedy at law, the equitable proceeding should be dismissed;⁹⁹ but that a motion to dismiss a creditors' suit on the ground of an adequate remedy at law, made after an answer admitting the debt and the equities of the bill, and the appointment of a receiver who has incurred obligations and expenditures, comes too late.¹ Where on the trial no assets either legal or equitable are discovered, the bill should be dismissed.² A decree dismissing a creditors' bill, because complainant is a simple contract creditor and therefore not entitled to maintain the same,

creditor's agent was acting for creditor in transactions relating to cotton, that creditor's agent informed debtor that creditor had mortgage on cotton and that it would have to be shipped to third person, and that cotton was turned over to third person in accordance with creditor's request.—*Goldin v. Federal Intermediate Credit Bank*, 179 S.E. 291, 50 Ga. App. 790.

(12) In creditors' suit to reach funds in hands of sole legatee, testimony of complainant's witnesses was held to establish promise by legatee to testatrix to turn over proceeds of estate to missing judgment debtor if or when he returned, in view of defendant's admissions, demeanor, reluctance to appear, documentary contradiction of her testimony, etc.—*Muller v. Cox*, 130 A. 811, 98 N.J.Eq. 188.

(13) Other instances of evidence held sufficient.

U.S.—*Tennessee Pub. Co. v. Carpenter*, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056—*Rogers v. Brix Bros. Logging Co.*, C.C.A.Or., 287 F. 867.

Cal.—*Travis Glass Co. v. Ibbetson*, 200 P. 595, 186 Cal. 724.

Evidence held insufficient

(1) To sustain bill seeking to appropriate certain property to satisfaction of judgment.—*Little v. Saffer*, 148 So. 578, 110 Fla. 230.

(2) To support verdict for defendants.—*Riddle v. Garner*, 52 P.2d 837, 175 Okl. 325.

(3) To show that debtor had an interest in the land sought to be reached and that his children were holding it in trust for him.—*Phillips v. Ettenburn*, 288 S.W. 28, 158 Ark. 643.

(4) To show that half interest in land sold by judgment debtor's co-vendee was in debtor.—*Opelousas-St. Landry Bank & Trust Co. v. Bruner*, 125 So. 507, 13 La.App. 337.

(5) In creditor's bill seeking to discover hidden assets, when there is no testimony indicating that there are any hidden assets, other property may not be subjected to creditor's claim merely on suspicion.—*Graves v. Rickershauser*, 241 P. 272, 74 Cal.App. 500.

(6) Where bill sought to reach and apply interest of defendant in note assigned to bank, master's finding that, at time of bank's loan to defendant's son, defendant was not indebted to bank, was held not clearly wrong.—*Rudnick v. Greenfield*, 179 N.E. 591, 278 Mass. 138.

(7) That insured was insolvent at death is insufficient proof of fraud to subject life policies above exemption to debts.—*Brasher v. Breen & Gardien Ins. Agency*, 183 So. 698, 222 Ala. 585.

90. Ill.—*Davis v. Hincke*, 183 Ill.

App. 475, affirmed 105 N.E. 708, 284 Ill. 46.

Mich.—*Bodine v. Simmons*, 38 Mich. 682.

91. Utah.—*Rolapp v. Ogden & N. W. R. Co.*, 110 P. 364, 37 Utah 540.

92. N.J.—*Thorp v. Leibrecht*, 39 A. 361, 56 N.J.Eq. 499.

93. W.Va.—*Dickinson v. Chesapeake & Ohio R. Co.*, 7 W.Va. 390.

Short copy of judgment in favor of the creditor against the grantor is sufficient prima facie proof of indebtedness to give the creditor standing in court.—*Mayfield v. Kilgour*, 31 Md. 240.

94. N.Y.—*Meyer v. Mohr*, 24 N.Y. Super. 333, 19 Abb.Pr. 299.

95. Mo.—*Tiftman v. Thornton*, 17 S.W. 979, 107 Mo. 500, 16 L.R.A. 410.

96. Ill.—*Betten v. Williams*, 277 Ill. App. 353.

97. Ala.—*Lehman-Durr Co. v. Griel Bros. Co.*, 24 So. 49, 119 Ala. 262.

Ill.—*Stamatakis v. McCaffrey*, 177 Ill.App. 370.

98. Ky.—*Smith v. Meisenheimer*, 49 S.W. 968, 20 Ky.L. 1718.

99. Ky.—*Smith v. Ratcliff*, 1 Ky.L. 316, 10 Ky.Op. 737.

1. U.S.—*Yaryan Naval Stores Co. v. B. Borchardt Co.*, Ga., 217 F. 758, 133 C.C.A. 488.

2. N.Y.—*Pond v. Harwood*, 34 N.E. 468, 139 N.Y. 111.

should be without prejudice.³ So, where land is settled on a wife for life to use for support of herself and her children, remainder to her children surviving her, and in a suit by general creditors it is not alleged nor apparent that any residue exists after deducting the support of herself and her children, the bill will be dismissed, but without prejudice as to such creditors as appear to hold specific liens on the trust property, yet who have not set them up in the suit, although reported without sufficient proof by the commissioner.⁴ The court may, likewise, dismiss without prejudice on refusing an amendment to a creditors' bill that cannot be sustained as such,⁵ or where there is nothing on which the decree could operate if granted.⁶ Where a statute provides that if complainant requires discovery the disclosure shall not be deemed conclusive if a replication is filed, it is error to dismiss a creditors' bill merely because the answer, properly replied to, fails to disclose assets in the hands of defendants alleged to hold property in trust for the debtor.⁷ Where there is evidence that one defendant purchased property of considerable value from the debtor, and he defaults and refuses to answer, it is error to dismiss as to him.⁸

Effect of dismissal. The dismissal of a bill in the nature of a creditors' bill necessarily carries with it an answer attempted to be set up as a cross bill.⁹

§ 73. Trial or Hearing

The trial or hearing must be in accordance with equity procedure. The court may determine the question

of priority. Sufficient findings must be made and they will be so construed as to uphold the judgment or decree. In a proper case a stay of proceedings may be had.

Creditors' suits, being of a purely equitable character, must be tried according to the modes of procedure known to courts of equity; it is erroneous to try them as common-law cases.¹⁰ In a suit in a federal court by a judgment creditor against a judgment defendant and another who is alleged to be indebted to him on a money demand, complainant has a right to obtain a discovery from such defendant as to his indebtedness, and the right to an equitable lien thereon, to become effective and to be enforced when such indebtedness shall have been established in an action at law, and also the right to the appointment of a receiver with authority to bring such an action.¹¹ In accordance with the doctrine that complainant will be required to abide by the case made by his bill, he will not be permitted on the hearing to insist that a judgment treated by the bill as only prima facie evidence is conclusive on defendants.¹² In a creditor's suit against a decedent's estate, the court may determine the question of the priority of the assignment of notes secured by a vendor's lien.¹³ On a bill for statutory discovery, the ownership of property claimed to belong to the debtor, but in the hands of another person who lays claim to it in his own right, must be tried on final hearing before delivery to a receiver may be ordered.¹⁴

Findings. The findings of fact made by the trial court should be so construed as to uphold rather

3. U.S.—Harrison v. New York Farmers' L. & T. Co., Tex., 94 F. 728, 36 C.C.A. 443.

4. Va.—French v. Waterman, 79 Va. 617.

5. Me.—Shaw v. Monson Maine Slate Co., 51 A. 285, 96 Me. 41.

6. Ky.—Paul v. Rogers, 5 T.B. Mon. 164.

7. Ill.—Harbert v. Mershon, 48 N.E. 450, 169 Ill. 52, reversing 64 Ill. App. 297.

8. Neb.—Benedict v. T. L. V. Land & Cattle Co., 92 N.W. 210, 66 Neb. 236.

9. Va.—Piedmont & Arlington L. Ins. Co. v. Maury, 75 Va. 503.

10. U.S.—Dunphy v. Kleinsmith, Mont., 11 Wall. 610, 30 L.Ed. 233.

Submission of issues; questions of fact

(1) In an action in the nature of a creditors' bill to subject certain lands to the payment of plaintiff's claim, it is not error to refuse to submit to a jury the question of the title

to the property, in view of Gen.St. 1915 § 7179, specifying what issues of fact shall be tried by the court.—Postlethwaite v. Edson, 187 P. 688, 106 Kan. 354.

(2) Whether there was consideration for note assigned to plaintiff was essentially fact question.—Westminster Nat. Bank v. Graustein, 170 N.E. 621, 270 Mass. 565, certiorari denied Graustein v. Westminster Nat. Bank, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 773.

(3) Under the facts shown, it was held error to sustain a demurrer to the evidence.—Kinkel v. Chase, 169 P. 1134, 102 Kan. 275.

Limiting issues

In creditor's suit to set aside deeds wherein creditor properly filed an ancillary bill for accounting as to proceeds of realty deeded, limiting the issues raised by the pleadings to the sole question as to what sum should be recovered according to the amount of proceeds received by defendants from a sale of property in question was proper.—Williams Real-

ty & Loan Co. v. Simmons, 3 S.E.2d 580, 188 Ga. 184.

Instructions held not erroneous

(1) On trial of equitable petition to impound purchase money, a charge that, for creditor to recover, debtor must have sold materials to purchaser, was not objectionable as authorizing recovery if debtor was seller's agent.—Knapp Bros. Mfg. Co. v. Cook, 155 S.E. 321, 171 Ga. 330.

(2) Neither was a charge that seller could recover purchase money impounded if directly selling to purchaser objectionable as precluding recovery, if sale was through agency of debtor.—Knapp Bros. Mfg. Co. v. Cook, supra.

11. U.S.—Hudson v. Wood, C.C.Ky., 119 F. 764.

12. Ill.—Helm v. Cantrell, 59 Ill. 524.

13. Va.—First-State Bank of Boones Path v. Kincaid, 144 S.E. 453, 151 Va. 101.

14. N.J.—Kemeny v. Wentz, 147 A. 587, 105 N.J.Eq. 296.

than defeat the judgment;¹⁵ and in the absence of any evidence as to how a levy under execution was made, a finding that execution was served on the person having money of the debtor in his possession, implies that it was duly served in compliance with the statute.¹⁶ A special finding that defendants executed a note to plaintiff, which was afterward "renewed," and that plaintiff obtained judgment on the renewal note, is a sufficient finding that the judgment was against defendants;¹⁷ and a finding that execution was duly issued out of the proper court, directed to the sheriff and against the proper defendant in execution, and that the execution was returned unsatisfied, is a sufficient finding that defendant had no property subject to execution.¹⁸ A finding not supported by the pleadings,¹⁹ or which is contrary to law,²⁰ is insufficient. A finding that a joint judgment against two debtors was fraudulently entered as to one of them requires a dismissal of a bill to discover assets of the judgment debtors, since the judgment was a unit, and could not be valid as to one of the debtors and invalid as to the other.²¹

Stay of proceedings. In a proper case the proceedings on a creditors' bill will be stayed a sufficient length of time to enable defendant to apply to a court of law for an order to set aside the judgment or execution for irregularity.²²

§ 74. — Reference

- a. In general
- b. Examination of defendant

a. In General

Pursuant to general equity practice, matters proper

for reference may be referred to a master or commissioner, to determine matters submitted and make his report thereon to the court.

A reference should not be made to a commissioner or master who is a creditor and a party to the suit.²³ A decree or order of reference suspends all other pending suits for the administration of the debtor's assets;²⁴ and if, after a decree or sale is entered, other liens are directed to be audited and reference made for that purpose, such order or audit and reference suspends a decree of sale.²⁵ As heretofore shown, *supra* § 55, although a suit is brought by one judgment creditor in his own behalf only, yet where the court refers the matter to a commissioner to convene lienors and ascertain the amount and priority of their liens, the suit becomes one for the benefit of all creditors presenting liens. The necessity of a reference before a decree of sale is discussed *infra* § 76.

Report. To warrant a commissioner to report liens on the debtor's property, he must have legal proof thereof, and of the amount remaining due thereon at the time of the report.²⁶ Where a cause is referred to a commissioner to audit judgment liens against a debtor, and after the original report is filed, and at the request of plaintiff's attorney, the commissioner files a supplemental report auditing other judgments since recovered, and all the necessary parties are brought before the court before the hearing of such reports, and opportunity being had, no exceptions are filed to either the original or the supplemental report, it is proper to hear the cause on such supplemental as well as the original report.²⁷ Where a lien allowed is not claimed by any pleading, the commissioner's report should show that claimant or hold-

15. Cal.—Israel v. Bryan, 197 P. 121, 52 Cal.App. 66.

16. Cal.—Israel v. Bryan, *supra*.

17. Ind.—Kedey v. Petty, 54 N.E. 798, 153 Ind. 179.

18. Neb.—Cochran v. Cochran, 87 N.W. 152, 62 Neb. 450.

19. Ga.—Owen v. S. P. Richards Paper Co., 3 S.E.2d 860, 188 Ga. 258.

Particular facts not pleaded

In creditors' suit to cancel deed executed by debtor to defendant where neither a security deed from the debtor to a third person nor the transfer thereof to defendant was mentioned in pleadings, an exception to so much of the auditor's findings as dealt with the security deed and its transfer to defendant should have been sustained.—Owen v. S. P. Richards Paper Co., *supra*.

20. Ga.—Owen v. S. P. Richards Paper Co., *supra*.

Liability to account

In creditors' suit to cancel deed executed by debtor to defendant, auditor's finding that plaintiffs and interveners were entitled to an accounting by defendant for money coming into his hands by the operation of certain property was subject to exceptions as contrary to law.—Owen v. S. P. Richards Paper Co., *supra*.

21. Ill.—Downer v. Warren, 200 Ill. App. 451.

22. Ill.—Newman v. Willitts, 60 Ill. 519.

15 C.J. p 1411 note 78.

23. Va.—Dillard v. Krise, 10 S.E. 430, 86 Va. 410.

24. W.Va.—Dixon v. Hesper Coal & Coke Co., 130 S.E. 663, 100 W. Va. 422—Bilmyer v. Sherman, 23 W.Va. 656.

Priorities

In general creditors' suit, no priori-

ty will be given lien acquired after entry of order referring cause to commissioner to convene creditors and report debts of insolvent debtor, since the order of reference suspended all other pending suits.—Dixon v. Hesper Coal & Coke Co., 130 S.E. 663, 100 W.Va. 422.

25. Va.—Harris v. Jones, 32 S.E. 455, 98 Va. 653.

26. W.Va.—Blumberg Bros. Co. v. King, 127 S.E. 47, 98 W.Va. 275.

Insufficient proof

Transcripts of judgments lodged with commissioner to whom creditors' suit has been referred, without further evidence, will not constitute sufficient proof of amounts remaining due thereon to warrant reporting liens on debtor's property.—Blumberg Bros. Co. v. King, *supra*.

27. W.Va.—Scott v. Ludington, 14 W.Va. 337.

er thereof appeared and proved it.²⁸ A special master appointed for the purpose of enlightening the court, so that proper judicial action may be taken, may make a report recommending future proceedings against defendant trustees;²⁹ and while such report is in no sense a pleading, it is a matter of public record on the files of the court, and all parties to the suit are chargeable with knowledge of its contents, certainly after an order of notice has been made.³⁰ On the filing of a report and after the usual time for excepting,³¹ it may be submitted for ratification, and when ratified all parties are concluded thereby and the litigation is at an end.³² A master's duty in a creditors' suit is discharged when, having acted in so far as possible in conformity with the court's decree, he reports to the court and asks further instructions.³³

b. Examination of Defendant

The defendant may be required to appear for examination before a master or commissioner.

Where the order appointing a receiver in a creditors' suit based on an unsatisfied execution directs a circuit court commissioner to issue, on request, a summons requiring defendant to appear for examination, a copy of which order is before the commissioner, it is sufficient to authorize him to issue the summons, and he need not have before him proof of service of the order on defendant.³⁴ Irregularity in the appointment of a receiver under a judgment creditor's bill is no ground for defendant's objecting to submit to an examination concerning his property and effects.³⁵ The fact that defendant's answer on oath is waived is no objection to an order for his examination on oath before a master.³⁶ Although defendant has filed a full answer, he must reply to interrogatories in regard to his property.³⁷ The order of reference should direct that complainant have leave to

examine defendant or any other person on oath before the master for any of the purposes of the reference, and to compel the production of such books and papers as the master may deem necessary.³⁸ It is erroneous to direct defendant to be examined in relation to any matters other than those charged in the bill, except where an examination is intended as a substitute for an answer in cases where defendant has given a stipulation to that effect.³⁹ The examination is not confined to defendant's property or effects, but extends to any matter which he would be required to disclose by answer, and authorizes the examination of witnesses on any matter charged in the bill and not admitted by defendant on his examination before the master.⁴⁰ A defendant's evidence may properly be received by the master in reference to the true value, quantity, and condition of the property,⁴¹ and he should be given an opportunity to show payment or set-offs to which he may be entitled.⁴² The debtor cannot be examined as to the title of property assigned and delivered to the receiver and sold by him.⁴³ A refusal to allow the judgment debtor to examine the witnesses produced renders their evidence inadmissible against him.⁴⁴ Where a debtor has once gone through an examination, he cannot be compelled to submit to another;⁴⁵ in such case, the master has no power to issue a new summons to compel him to attend for a further examination without a new order of court.⁴⁶ Where defendant has once been sworn before the master to answer as to his property, which is to be delivered to the receiver, it is not necessary or proper to swear him a second time on an adjourned examination, but complainant should proceed to examine him further on the oath already taken.⁴⁷ The examination should proceed with reasonable diligence, and the master cannot adjourn it indefinitely without defendant's consent.⁴⁸

28. W.Va.—*Armstrong v. Painter*, 83 S.E. 1027, 75 W.Va. 393.

29. Mass.—*New England Oil Refining Co. v. Canada Mexico Oil Co.*, 174 N.E. 330, 274 Mass. 191.

30. Mass.—*New England Oil Refining Co. v. Canada Mexico Oil Co.*, supra.

31. Va.—*Hutton v. Lockridge*, 22 W. Va. 159.

32. Md.—*Dixon v. Dixon*, 1 Md.Ch. 271.

33. Mass.—*Eastern Bridge, etc., Co. v. Worcester Auditorium Co.*, 103 N.E. 913, 216 Mass. 426.

34. Mich.—*Central Nat. Bank v.*

Graham, 76 N.W. 1042, 118 Mich. 488.

35. Mich.—*Thomas v. Wayne County Cir. Judge*, 57 N.W. 188, 97 Mich. 608—*Howard v. Palmer*, Walk. 391.

36. N.Y.—*Root v. Safford*, 2 Barb. Ch. 33.

37. N.Y.—*Austin v. Dicky*, 3 Edw. 378.

38. N.Y.—*Green v. Hicks*, 1 Barb. Ch. 309, 4 N.Y.Leg.Obs. 133.

39. N.Y.—*Copous v. Kauffman*, 3 Paige 583.

40. Mich.—*Howard v. Palmer*, Walk. 391.

41. Vt.—*Morse v. Slason*, 16 Vt. 319.

42. Va.—*Kendrick v. Whitney*, 28 Gratt. 646, 69 Va. 646.

W.Va.—*Marling v. Robrecht*, 13 W. Va. 440.

43. N.Y.—*Hudson v. Plets*, 11 Paige 180, 3 N.Y.Leg.Obs. 120.

44. N.Y.—*Lee v. Huntoon*, Hoffm. 447.

45. N.Y.—*Hudson v. Plets*, 11 Paige 180, 3 N.Y.Leg.Obs. 120—*Starr v. Morange*, 3 Edw. 345.

46. N.Y.—*Hudson v. Plets*, 11 Paige 180, 3 N.Y.Leg.Obs. 120. 15 C.J. p 1432 note 41.

47. N.Y.—*Hudson v. Plets*, 11 Paige 180, 3 N.Y.Leg.Obs. 120.

48. N.Y.—*Hudson v. Plets*, supra.

§ 75. Relief Awarded

- a. In general
- b. Conformity to pleadings and proof
- c. Decree for accounting
- d. Personal decree or judgment

a. In General

On a creditors' bill, the court should award such relief as the parties are equitably entitled to, and may retain jurisdiction in order to give complete relief.

A court of equity, having acquired jurisdiction of a creditors' suit, may, under proper circumstances, retain such jurisdiction in order to administer complete relief.⁴⁹ The decree should settle all questions involved,⁵⁰ even to the adjustment of merely legal rights;⁵¹ but it should not seek to adjust the rights of the debtor and third persons further than is necessary to the preservation of the rights of creditors interested in the litigation.⁵²

In a statutory proceeding to reach property or assets which cannot be attached or taken on execution, any relief appropriate under general equitable principles may be granted;⁵³ and in such proceeding the court may order the debtor to assign his interest in a judgment and execution against a third person.⁵⁴

It is not error to enter judgment for the full amount or value of the judgment debtors' property found to be in defendant's hands;⁵⁵ and the rights of a complainant are not affected by an

agreement, on the conveyance of homestead property, whereby money was to be held in escrow for defendant subject to the judgment lien; and hence a clause of the decree is correct which orders the holders of such money who tendered it into court to pay it to complainant.⁵⁶ The owner of a judgment against the grantor in a deed absolute on its face, but in reality a mortgage, may in an action in aid of his execution have the deed declared a mortgage.⁵⁷ On bill for the satisfaction of a judgment at law, obtained against a husband for fraudulent representations in the sale of land, a decree for plaintiff against the defendant wife having title thereto, enjoining her from foreclosing or assigning the mortgage and notes held by her until the decree should be paid, provides adequate security for payment, where the amount of the notes exceeds the amount of the decree.⁵⁸ An order directing the substitution of a receiver, appointed for insured in a judgment creditors' suit against him, for the beneficiary named in the policies, without notice to such beneficiary or to the insurance companies, was erroneous, where neither the creditors' bill nor the petition of the receiver for such order showed that the insured debtor had any interest in the policies;⁵⁹ and his severe illness did not present an emergency requiring the substitution of beneficiary before insured's death.⁶⁰

Other cases in which the right to a decree for particular relief has been determined will be found in the notes.⁶¹

49. W.Va.—Shipley v. Browning, 172 S.E. 149, 114 W.Va. 409, 91 A.L.R. 643.

Relief awarded

Where, after suit under statute to subject judgment debtor's equity of redemption in land, sold to state for taxes, to payment of judgment lien, was matured for hearing, plaintiff, who also attacked judgment debtor's release of future rentals due under long-term lease, had execution issued which was returned with indorsement of no property found, matter raised by attack on release was properly considered in suit, since necessary parties were before court and issues involved were same, and plaintiff would not be required to institute a new suit under another statute governing enforcement of execution liens.—Shipley v. Browning, *supra*.

50. Md.—Wernitz v. Wells, 99 A. 956. S.C.—Sherwood v. McLaurin, 88 S.E. 863, 103 S.C. 370.

Under New York code, the form and details of a decree in an action for the satisfaction of a creditor's claim is in the discretion of the trial

court.—Bergmann v. Lord, 86 N.E. 828, 194 N.Y. 70, affirming 107 N.Y. S. 1121.

51. Va.—Kane v. Mann, 24 S.E. 938, 93 Va. 239.

15 C.J. p 1432 note 52.

52. Ala.—McKissack v. Voorhees, 24 So. 523, 119 Ala. 101. 75 C.J. p 1432 note 53.

53. Mass.—New England Oil Refining Co. v. Canada Mexico Oil Co., 174 N.E. 330, 274 Mass. 191.

54. Mass.—Motoreze Oil Co. v. Brennan, 181 N.E. 197, 279 Mass. 375.

Enforcement of rights may be by order in personam as, for instance, by injunction or an order to make an assignment.—Motoreze Oil Co. v. Brennan, *supra*.

55. Idaho.—Gordon v. Lemp, 65 P. 444, 7 Idaho 677.

Where bill is filed by creditor not secured in trust deed to subject the surplus of the property so conveyed to the payment of his debts, and the clerk reports that such property was sufficient to pay all debts, including plaintiff's, a decree that the trustee

should pay plaintiff his debt is erroneous. It should direct that the trustee sell enough of the property to satisfy the judgment.—Bobbitt v. Brownlow, 62 N.C. 252.

56. Ill.—Kline v. Marty, 171 Ill. App. 495.

57. N.Y.—Macauley v. Smith, 30 N. E. 997, 132 N.Y. 524, reversing 10 N.Y.S. 578.

W.Va.—Morris v. Baird, 78 S.E. 371, 72 W.Va. 1, Ann.Cas.1915A 1278.

58. Vt.—Rowley v. Shepardson, 99 A. 228.

59. U.S.—Red Star Laboratories Co. v. Pabst, C.C.A.Ill., 100 F.2d 1.

60. U.S.—Red Star Laboratories Co. v. Pabst, *supra*.

61. Relief held warranted

(1) Where a trust company held money sought to be reached and applied in payment of the owner's debts, under the statute, subject to the payment of all charges, compensation and expenses, and a lien therefor on the owner's interest, the trust company was entitled to award for charges, etc., until date of decree.—

The question of liens and priorities is discussed infra §§ 84-87.

b. Conformity to Pleadings and Proof

The relief given must be warranted by the pleadings and proof.

The relief awarded must be warranted by the pleadings of the party in whose favor the decree is rendered, and the evidence produced, and relief should not be allowed complainant on a theory different from that on which the bill proceeds.⁶² Although the specific prayers for relief are defective, complainant will, under the prayer for general relief, be awarded such relief as is consistent with the case made out by his bill and within the issues,⁶³ even though such relief is inconsistent with the specific relief prayed for, if consistent with the case made by the bill.⁶⁴ However, a prayer for general relief will not warrant the court

to grant relief against a party as to whom no averment is made and no special relief is asked; general relief can be given against those only as to whom special relief is sought.⁶⁵

c. Decree for Accounting

A decree for an accounting may be made in a proper case.

A judgment creditor of a mortgagor in a proper case for equitable relief has the same right to an account for rents and profits as the mortgagor, where the mortgagee has used and occupied the premises.⁶⁶ Where judgment creditors of a bankrupt debtor file a bill against the administrator and heirs of the debtor's surety to subject the surety's land to the payment of the debts, and other creditors are admitted by petition, plaintiffs are entitled to a decree for an account of debts.⁶⁷ In a suit by a judgment creditor of a

Westminster Nat. Bank v. Graustein, 170 N.E. 621, 270 Mass. 565, certiorari denied *Graustein v. Westminster Nat. Bank*, 51 S.Ct. 80, 282 U.S. 876, 75 L.Ed. 773.

(2) Since realty subject to constructive trust in favor of purchaser who paid consideration but took title in third person's name constitutes purchaser's "assets" within statute relating to property liable for debts, court of equity had power to grant relief to person subsequently obtaining personal injury judgment against purchaser either by appointing receiver to collect rents of such realty or by impressing lien thereon.—*Duncan v. Laury*, 292 N.Y.S. 138, 249 App.Div. 314.

(3) In a suit in equity to enforce a personal decree in a former suit by establishing a beneficial ownership of the debtors in certain land claimed by them to have been held in trust under a deed in which no beneficiaries were named, and which they conveyed to their alleged cestuis que trust immediately prior to the rendition of the decree, the conveyance should be allowed to stand as to the cestuis que trust, irrespective of the question whether the deed in trust authorized it to be made, where their interests were acquired in good faith and prior to the commencement of the former suit against the trustee.—*Merrillat v. Hensey*, 84 App.D.C. 398.

Relief held unwarranted

(1) Where plaintiff, suing for breach of warranty, recovered attorney's fees and expenses, but brought no suit against defendant's grantor for his breach of warranty, he was not entitled in an action against such grantor to enforce his judgment obtained in the other suit, to recover such attorney's fees and

expenses.—*Asher v. Pioneer Coal Co.*, 283 S.W. 954, 214 Ky. 505.

(2) In creditors' suit under Rev.L. c 159 § 3 cl 7, as amended by St. 1902 c 544 § 23, and St.1910 c 531 § 2, to restrain A, defendant, from collecting judgment for tort against plaintiff and B, another defendant, pending termination of plaintiff's suit against defendant for breach of contract, court has no jurisdiction to determine plaintiff was secondarily liable on A's judgment, or entitled to subrogation.—*Stone, Timlow & Co. v. Stryker*, 119 N.E. 655, 230 Mass. 67.

(3) Where a son cultivated the lands of his mother under an agreement with her that he was to receive a certain portion of the crops as between the son and the estate of the mother, it was error in a creditors' suit by him against his mother's estate to charge him for the rental value of the lands after the mother's death without giving him an opportunity to show what taxes and other proper charges he was entitled to have set off against the use of the land.—*Burwell v. Burwell*, 49 S.E. 68, 103 Va. 314.

Where creditor has taken possession of and sold security for debt

(1) In creditor's suit for balance of debt secured by bill of sale, where creditor has exercised right given by bill to take possession of security and sell security at private sale as debtor's agent, creditor cannot recover in any amount until he has met burden of showing disposition of security as debtor's agent under terms of contract and amount realized thereby, and can then recover only difference between debt and amount realized, provided debt exceeds amount realized.—*Goldin v. Federal*

Intermediate Credit Bank, 179 S.E. 291, 50 Ga.App. 790.

(2) Creditor, who had refused to permit debtor to dispose of cotton and pay off debt, but required debtor, under authority of bill of sale to cotton to secure debt, to turn cotton over to third person to be sold at best price obtainable, could not recover any of claimed balance due without showing when cotton was sold by third person, whether best price obtainable was realized, amount of cotton sold and amount realized, disposition of proceeds, and exercise of ordinary diligence in disposition of cotton.—*Goldin v. Federal Intermediate Credit Bank*, *supra*.

62. *Tenn.—Forrest v. Hawkins*, 39 S.W.2d 738, 162 Tenn. 658.

15 C.J. p 1433 note 64.

Decree unwarranted

In creditor's bill in aid of execution, where relief sought was that creditor be authorized to proceed on writ of execution theretofore issued, and that sheriff be directed to sell premises for payment of judgment, decree vesting title to the premises in creditor was not authorized.—*Crowder v. Nuttall*, 1 N.E.2d 912, 285 Ill.App. 254.

63. *Neb.—Columbia Nat. Bank v. Baldwin*, 90 N.W. 890, 64 Neb. 732. 15 C.J. p 1433 note 67.

64. *N.Y.—Bailey v. Burton, & Wend.* 339.

65. *W.Va.—R. D. Johnson Milling Co. v. Read*, 85 S.E. 726, 76 W.Va. 557.

66. *Ohio.—Anderson v. Lanterman*, 27 Ohio St. 104.

67. *Va.—Elwing v. Ferguson*, 33 Gratt. 548, 74 Va. 548.

contractor to enforce his judgment against the fund received under the contract, where the contractor and two other claimants to a share in the profits appear and consent to the appointment of a receiver to distribute the fund, the rights of all the claimants should be settled in that proceeding by an accounting.⁶⁸ Where receivers were appointed to take charge of the rents and profits of the land involved, defendant, on denial of plaintiff's claim, is entitled to an accounting of rents and profits taken by the receivers.⁶⁹

d. Personal Decree or Judgment

A personal decree or judgment may, under some circumstances, be rendered against defendant; but not under others.

A court of equity may adapt its relief to the exigencies of the case, and may, when that is all the relief needed, order a sum of money to be paid plaintiff, and give him a personal judgment therefor.⁷⁰ However, in an equity proceeding based on a judgment at law and return of "No property," it is error to render another personal judgment;⁷¹ and where on a creditors' bill against two defendants, one of whom is an absentee, it appears that the one within the jurisdiction is not indebted to the absentee but has received property from him subject to his debts, a personal decree should not be rendered against defendant within the jurisdiction, except for so much of the property as he may have consumed or appropriated to his own use, so that it cannot be forthcoming, or for the profits which he may have received.⁷² Where the judgment on which a creditor's suit is based is void, and hence not a lien on the debtor's land, the court is without jurisdiction to enter a personal judgment against the debtor, even though the debt is admitted to be due.⁷³

§ 76. Decree or Judgment

- a. In general
- b. Decree for sale of property
- c. Effect of decree

a. In General

The decree must conform to the pleadings and proof. It may be rendered in favor of a receiver instead of the complainant, and may be set aside on sufficient grounds.

The judgment or decree must conform to the pleadings and proof.⁷⁴ However, a creditors' bill, charging that defendants hold property in trust for the debtor, or in which he has some equity of redemption or other valuable interest, is sufficient to sustain a finding in the decree that he is the equitable owner of the property;⁷⁵ and the fact that plaintiff sets forth in the complaint that the action is brought on behalf of himself and of all judgment creditors who shall in due time come in and seek relief by, and contribute to, the expenses of the suit does not prevent a judgment in favor of plaintiff alone, where no creditors come in.⁷⁶ The rule that unless all the complainants can recover none can has no application to a creditors' bill filed by a number of creditors of a common debtor.⁷⁷ A decree may be rendered in favor of a receiver rather than complainant, as it vests no title in him, but keeps the property in the custody of the law.⁷⁸ A specific application for a decree establishing as legal and subject to the creditor's claim the title to land awarded to the debtor by a partition agreement, was unnecessary, where the cotenants were all parties to the creditor's bill, and by their verified answers admitted the partition agreement.⁷⁹ Where a finding in a creditors' suit is such as to destroy any equitable features in the case, a decree dismissing the bill is required.⁸⁰ Under a stat-

68. Md.—*Werntz v. Wells*, 99 A. 956.

69. U.S.—*Anderson v. Hultberg*, Kan., 247 F. 273, 159 C.C.A. 367, certiorari denied *Hultberg v. Anderson*, 39 S.Ct. 133, 248 U.S. 581, 63 L.Ed. 431.

70. D.C.—*May v. Bryan*, 17 App.D. C. 392.

Ky.—*Brown v. Story*, 4 Metc. 316.
N.Y.—*Murtha v. Curley*, 90 N.Y. 372.

71. Ky.—*Darling v. Hanks*, 42 S.W. 1130, 51 S.W. 792, 21 Ky.L. 145—*Farmer v. Porch*, 5 Ky.L. 933.

72. Va.—*Gibson v. White*, 3 Munf. 94, 17 Va. 94.

73. Va.—*Chaney v. Kibler*, 193 S.E. 877, 171 Va. 194.

74. Ill.—*Crowder v. Nuttall*, 1 N.E.2d 913, 285 Ill.App. 254.

Tenn.—*Forrest v. Hawkins*, 39 S.W. 2d 738, 162 Tenn. 658.

15 C.J. p 1433 note 64.

Issue as to invalidity of deed

In creditors' suit to cancel deed executed by debtor to defendant, sustaining defendant's exception that the deed in question was void because of its procurement by an attorney acting in dual capacity of agent for both purchaser and seller was proper, where issue of dual agency was not raised by pleading and deed was not attacked on such ground.—*Owen v. S. P. Richards Paper Co.*, 3 S.E.2d 660, 188 Ga. 253.

75. Ill.—*Kennard v. Curran*, 87 N.E. 913, 239 Ill. 122, affirming 141 Ill. App. 621.

76. N.Y.—*Green v. Griswold*, 4 N.Y. S. 220, 15 N.Y.Civ.Proc. 220.

77. Ala.—*Henderson v. J. B. Brown*

Co., 28 So. 79, 125 Ala. 566—*Colgin v. Redman*, 20 Ala. 650.

78. Va.—*Harman v. McMullin*, 7 S. E. 349, 85 Va. 187.

79. Ala.—*Griffith v. First Nat. Bank*, 140 So. 359, 224 Ala. 296.

For the reason that the court's action on faith of the admissions would fix the status of the legal title, so that a decree condemning a portion of the land to be sold to satisfy the creditor's claim would operate to vest in the purchaser the legal, as well as the equitable, title as effectually as though the partition had been evidenced by a conveyance of the land in due form to him, or affirmatively declared by the court.—*Griffith v. First Nat. Bank*, supra.

80. Mass.—*Westfield Sav. Bank v. Leahey*, 197 N.E. 160.

ute authorizing a suit in equity to subject property to the payment of plaintiff's judgment after a return of execution "no property found," it is error to give plaintiff a judgment for his debt, he having one judgment which he is seeking to collect.⁸¹

Setting aside decree. When the absence of necessary parties is brought to the court's attention after decree, it should set aside the decree and require amendment of the bill bringing in absent trustees under deeds of trust, giving them an opportunity to prove and have decreed their deeds and liens in order of priority.⁸²

Default. Although a bill to reach and apply property to payment of a debt is sometimes said to be in the nature of an equitable trustee process, the normal effect of a default is not the same as in trustee process, where the trustee by common practice is permitted to make his defense on scire facias,⁸³ but a decree, taking the bill as confessed, on failure of defendant to appear or answer, may be vacated and defendant allowed to make his defense on the merits.⁸⁴

b. Decree for Sale of Property

- (1) Necessity and propriety in general
- (2) Sufficiency of rents to pay debts
- (3) Requisites of decree

(1) Necessity and Propriety in General

The court may direct a sale of the debtor's property to satisfy the judgment or decree. The entry of a decree of sale before material issues have been disposed of, is premature. In some states, a sale may be ordered pending a motion for a new trial.

The usual methods by which choses in action and equitable rights of the judgment debtor are subjected to the payment of complainant's judgment are by directing the sale of such property it-

self and the application of the proceeds to the payment of the judgment,⁸⁵ or by compelling an assignment to a receiver with power on his part to take such proceedings in the appropriate tribunal as may be necessary to reduce the same to his possession, as stated supra § 63. No sale should be ordered, however, where there is an adequate legal remedy.⁸⁶ A sale may be ordered by the court in a general creditors' suit, although the creditor instituting the same has *parte'* with his interest.⁸⁷ A decree for the sale of land to satisfy a judgment is properly refused where the judgment debtor had no equity in the land which could be subjected.⁸⁸ A decree subjecting the debtor's property to the creditor's judgment is not erroneous for failure to direct a sale, where the decree reserved leave to plaintiff to apply for such further orders as would carry the decree into effect.⁸⁹ A decree directing satisfaction of a judgment out of a sale of property to be discovered is not prejudicial to defendant, as there can be no satisfaction of the judgment until something is discovered.⁹⁰

Time of rendition or entry. The entry of a decree of sale before material issues raised by the pleadings have been decided, is premature.⁹¹ In some states, a sale may be ordered pending a motion for a new trial.⁹²

(2) Sufficiency of Rents to Pay Debts

Under some statutes, a sale of land can be ordered when and only when it is made to appear that the rents and profits for a period of five years will be insufficient to satisfy the claims.

Under the statutes of some states, the court has no power to order a sale of real estate, unless it be made to appear that the rents and profits therefrom for a period of five years will be insufficient to satisfy the claims.⁹³ It is ordinarily the duty of the court to ascertain this fact by reference

Nature of finding requiring dismissal

In bank's suit to apply guarantors' alleged deposits on debt created by guaranty, finding that deposits belonged to parties whose names had been subsequently added to accounts as joint depositors destroyed equitable features in case and required decree dismissing bill, leaving plaintiff to pursue at law any remaining rights, unless there had been waiver of want of equity jurisdiction, permitting decrees against principal debtors.—*Westfield Sav. Bank v. Leahy*, supra.

81. Ky.—*Supple v. Catron*, 265 S.W. 491, 205 Ky. 81.

82. It is immaterial that one of the trust creditors was made a party and appeared before the commission-

er and had audited debt secured to him by a trust deed on one of the tracts of land properly proceeded against.—*Jackson County Bank v. First Nat. Bank*, 109 S.E. 719, 89 W. Va. 165.

83. Mass.—*Hyde Park Sav. Bank v. Davankoskas*, 11 N.E.2d 3.

84. Mass.—*Hyde Park Sav. Bank v. Davankoskas*, supra.

85. Ill.—*Binz v. Michels*, 220 Ill. App. 88.

Va.—*Peterson v. Haynes*, 134 S.E. 675, 145 Va. 653.

W.Va.—*Abney-Barnes Co. v. Davy-Pocahontas Coal Co.*, 93 S.E. 208, 83 W.Va. 292.

15 C.J. p 1434 note 74.

86. Ky.—*Weatherford v. Myers*, 2 Duv. 91.

N.Y.—*Hendrickson v. Winne*, 3 How. Pr. 127.

87. Va.—*Karn v. Rorer Iron Co.*, 11 S.E. 431, 86 Va. 754.

88. Tenn.—*Forrest v. Hawkins*, 39 S.W.2d 738, 162 Tenn. 658.

89. S.C.—*First Nat. Bank v. Hinkle*, 115 S.E. 297, 122 S.C. 238.

90. Ill.—*Gage v. Smith*, 79 Ill. 219.

91. Va.—*Johnston v. Kelley*, 198 S. E. 485, 171 Va. 239.

92. Neb.—*Cochran v. Cochran*, 95 N.W. 778, 1 Neb., Unoff., 508.

93. Va.—*Etter v. Scott*, 19 S.E. 776, 90 Va. 762—*Dillard v. Krise*, 10 S. E. 430, 86 Va. 410.

W.Va.—*Merchants' Nat. Bank of Point Pleasant v. Ralphsnyder*, 169 S.E. 89, 113 W.Va. 480—*Abney-*

to a commissioner, or by an express finding of its own based on the pleadings and evidence,⁹⁴ and if such fact is shown the court will decree a sale.⁹⁵ This statute may be waived by the debtor.⁹⁶ It has been held that a decree to rent land made in a creditors' proceeding is no objection to a subsequent decree of sale in a suit to enforce a prior lien, the creditors to the former suit being parties;⁹⁷ and that where none of the decrees for renting has been executed, and the real estate would not in five years rent for enough to discharge the liens, a decree annulling them, and directing the sale of so much of the property as may be necessary, is proper.⁹⁸

(3) Requisites of Decree

- (a) In general
- (b) Ascertainment of amount of liens and priorities
- (c) Ascertainment of amounts, parcels, or interest to be sold

(a) In General

In decreeing a sale, the court should ascertain and protect the rights of all parties. A decree of sale from which no appeal is taken is conclusive until vacated.

In decreeing a sale, the court should ascertain and protect the rights of all the parties,⁹⁹ and also the rights of a tenant in possession under a lease executed before the judgment.¹ A decree of sale is not invalid because it does not set forth with accuracy and definiteness the indebtedness for which the land is to be sold.² Where defendants do not answer, the court may, although no decree pro

confesso is entered, define the rights of plaintiff, and under the master's report direct him to sell the property at a price named, and, on his further report that such price cannot be obtained order him to sell at public auction, with full directions for the protection and settlement of the rights of the parties.³ Where the court has jurisdiction both of a creditors' suit to reach and to apply property of the debtor and of the parties, a decree of sale from which no appeal is taken is conclusive until vacated by the trial court, even if erroneous or inadvertently entered; and defendants cannot attack it in subsequent proceedings in the cause.⁴

(b) Ascertainment of Amount of Liens and Priorities

The decree should ascertain and state the amount of liens and their priority; and for this purpose a reference to the commissioners is generally required. A decree based on the report of a commissioner will be set aside where such report did not show the value of the property or the liens or indebtedness.

A decree subjecting property to the satisfaction of a judgment and ordering a sale thereof must ascertain and state the precise amount for which it is liable,⁵ should ascertain with certainty the name of each lienor and the character of the lien,⁶ and should also determine the priority of the liens.⁷ Error in this respect may, however, be waived by the debtor by failure to object until after the decree has been executed and the report of sale made and confirmed and the proceeds of sale directed to be distributed.⁸

To ascertain the amount of liens and priorities,

Barnes Co. v. Davy-Pocahontas Coal Co., 98 S.E. 298, 83 W.Va. 292
—*Westinghouse Lamp Co. v. Ingram*, 90 S.E. 837, 79 W.Va. 220.
15 C.J. p 1434 note 80.

Applicability of statute

(1) The statute applies only to the enforcement of judgment liens.
Va.—Kyger v. Sipe, 16 S.E. 627, 89 Va. 507.

W.Va.—Phipps v. Lopinsky, 125 S.E. 250, 97 W.Va. 457—*Lewis, Hubbard & Co. v. Toney*, 85 S.E. 30, 76 W.Va. 80.

(2) It has no application to foreclosure of deeds of trust.
Va.—Kyger v. Sipe, supra.
W.Va.—Lewis, Hubbard & Co. v. Toney, supra.

94. *Va.—Dillard v. Krise*, 10 S.E. 430, 86 Va. 410.
W.Va.—Abney-Barnes Co. v. Davy-Pocahontas Coal Co., 98 S.E. 298, 83 W.Va. 292.

Burden of proof

Where ascertainment is necessary, the burden is on the creditor to es-

tablish the insufficiency of the rents and profits.—*Abney-Barnes Co. v. Davy-Pocahontas Coal Co.*, supra.

95. *Va.—Preston v. Aston*, 7 S.E. 344, 85 Va. 104.
15 C.J. p 1434 note 81.

96. *Va.—Brenge v. Richardson*, 78 Va. 406.

97. *Va.—Kane v. Mann*, 24 S.E. 938, 93 Va. 239.

98. *Va.—Preston v. Aston*, 7 S.E. 344, 85 Va. 104.

99. *W.Va.—Murdock v. Welles*, 9 W.Va. 552.

1. *Va.—Moore v. Bruce*, 7 S.E. 195, 85 Va. 139.

2. *Va.—Peterson v. Haynes*, 134 S.E. 675, 145 Va. 653.

3. *Mass.—Eastern Bridge & Structural Co. v. Worcester Auditorium Co.*, 103 N.E. 913, 216 Mass. 426.

4. *Mass.—Eastern Bridge & Structural Co. v. Worcester Auditorium Co.*, supra.

5. *Va.—Carnahan v. Ashworth*, 31 S.E. 65.

W.Va.—Blumberg Bros. Co. v. King, 127 S.E. 47, 98 W.Va. 275—*Mishawaka Woolen Mfg. Co. v. Nelson*, 123 S.E. 568, 96 W.Va. 617.

15 C.J. p 1435 note 90.

6. *W.Va.—Mishawaka Woolen Mfg. Co. v. Nelson*, supra.

7. *Va.—Carnahan v. Ashworth*, 31 S.E. 65.

W.Va.—Blumberg Bros. Co. v. King, 127 S.E. 47, 98 W.Va. 275—*Mishawaka Woolen Mfg. Co.*, 123 S.E. 568, 96 W.Va. 617.

15 C.J. p 1435 note 91.

Reason for this is that a decree of sale before ascertaining the amount of the liens and their respective priorities has a tendency to sacrifice the property by discouraging the creditors from bidding as they probably would if their right to satisfaction of their debts and the order in which they were to be paid out of the property had been previously ascertained.—*Marling v. Robrecht*, 13 W.Va. 440.

8. *W.Va.—White v. Drew*, 9 W.Va. 695.

the cause should be referred to commissioners, and if their report fails to show the debts, their priority, and their amount, the cause should be recommitted so that this may be done;⁹ but the cause will not be referred unless it appears that there are other liens in addition to those appearing in the bill,¹⁰ and where there are only two judgment liens and the pleadings and proof show clearly what they are, a reference is not necessary;¹¹ nor is it necessary, before decreeing that lands be leased to discharge a lien thereon, to refer the cause to have the amounts and priorities of all the liens ascertained and fixed.¹² Where, under a general creditors' suit, a decree is entered for the sale of defendant's lands, and it is subsequently suggested that there are other liens than those audited, a decree referring the cause to a master commissioner for a further accounting should in terms suspend the decree of sale.¹³ Payment of some of the debts included in a decree made on a commissioner's report convening liens in a suit by a judgment creditor for himself and other lienors does not call for a restatement of liens.¹⁴

Setting aside decree made on incomplete report. A decree for the sale of realty, made on the report of a commissioner which did not show the value of the personal property or the liens or indebtedness against the estate, or the date or priorities thereof, so that the court could not determine to what extent it would be necessary to resort to the realty, will be set aside.¹⁵

(c) Ascertainment of Amounts, Parcels, or Interest to Be Sold

The determination of the amount, parcels, or interest to be sold and the order of sale, is ordinarily governed by the rules as to marshaling assets and securities. Where an equity of redemption is sought to be reached, it has been held that the court may decree a sale of the entire property, and that the surplus, after payment of the debt due the mortgagee or pledgee, be applied to the satisfaction of complainant's claim; but there is contrary authority.

The general rules as to the marshaling of assets and securities, as laid down in the title Marshal-

ing Assets and Securities, are applicable in determining the parcels to be sold and the order of sale in creditors' suits.¹⁶ If it does not appear with reasonable certainty that the land first liable will be sufficient to discharge the lien, the decree may direct a sale of all the land in the order in which it is liable until enough is realized to pay off the judgment and costs.¹⁷ On a bill by a judgment creditor to subject the lands of his debtors to satisfy a judgment obtained against them as maker and indorsers of a note, whose liabilities inter sese are successive, it is error to decree a sale of the lands of the last indorser before resorting to the lands of the maker and prior indorsers, unless to require plaintiff to exhaust the estates of those debtors whose liability is prior to the last indorser, will, in the opinion of the court, unduly delay plaintiff in the collection of his debt.¹⁸ In a proceeding to reach an equity of redemption, it has been held, the entire property may be sold and the surplus after payment of the debt due to the mortgagee or pledgee applied to the satisfaction of complainant's claim;¹⁹ but there is authority to the contrary.²⁰ Where property in the hands of a receiver is more than sufficient to pay all debts, he will be restrained from selling the whole.²¹ So, on a bill to subject a contingent interest of a debtor in land to the claims of judgment creditors, if the debts are small, the debtor's interest should be protected by directing the commissioner first to offer for sale a fraction of the debtor's contingent interest in each lot.²² It has also been held that on a bill against a debtor who has escaped after civil arrest and the debtor's alienee, to subject lands devised to the debtor after his escape and conveyed by him while at large, equity will decree a sale of so much of the land as is liable to an elegit lien, if it appears that the profits are insufficient to keep down the interest of the debt, but will not decree a sale of the whole of the lands.²³ Where, in a suit by a general creditor to subject to payment of his debt the debtor's interest in land held in secret trust by his joint owner, it appears that the joint owner, holding the legal title, has created

9. Va.—Shultz v. Hansbrough, 74 Va. 567.

15 C.J. p 1435 note 94.

10. W.Va.—Bock v. Bock, 24 W.Va. 586.

11. W.Va.—Anderson v. Nagle, 12 W.Va. 98.

12. W.Va.—Douglass v. McCoy, 24 W.Va. 722.

13. Va.—Harris v. Jones, 32 S.E. 455, 96 Va. 653.

Reference as suspending decree ipso facto see supra § 74.

14. W.Va.—Shumate v. Crockett, 27 S.E. 240, 43 W.Va. 491.

15. Va.—Kirby v. Booker, 94 S.E. 775, 122 Va. 291.

16. Va.—Shultz v. Hansbrough, 76 Va. 817—Buchanan v. Clark, 10 Gratt. 164, 51 Va. 164.

17. W.Va.—Handly v. Sydenstricker, 4 W.Va. 605.

18. W.Va.—Shenandoah Valley Nat. Bank v. Bates, 20 W.Va. 210.

19. Miss.—Uhler v. Adams, 18 So. 654, 73 Miss. 332.

15 C.J. p 1436 note 4.

20. Ala.—Turrentine v. Koopman, 27 So. 522, 124 Ala. 211.

15 C.J. p 1436 note 5.

21. N.Y.—Wardell v. Leavenworth, 3 Edw. 244.

22. Ky.—Jacob v. Howard, 22 S.W. 332, 15 Ky.L. 133.

23. Va.—Stuart v. Hamilton, 1 Leigh 503, 35 Va. 503.

a lien on the land superior to plaintiff's claim, only the debtor's equity of redemption in his moiety can be sold, it being error to direct a sale of the entire interest in the land;²⁴ and this is so even though the joint owner may be a coobligor, jointly and equally liable for the discharge of the superior lien, unless the debt constituting the superior lien covering such interest is due, and payment thereof is demanded by the creditor.²⁵ The debtor's land on which an unmatured mortgage debt constitutes a first lien should ordinarily be directed to be sold subject to the mortgage.²⁶ The court may in a proper case decree the sale of certain parcels of the real estate involved or so much thereof as may be necessary to satisfy the judgment, and reserve jurisdiction of the cause and the parties for such further proceedings as to the balance of the property as justice may require.²⁷

The decree of sale should show what property or interest is to be sold;²⁸ but a decree directing the sale of a judgment debtor's equitable interest in realty encumbered by trust deeds is not invalid for failure to specify what is to be sold, since the debtor's interest ordinarily is that left over after satisfaction of the trust deeds.²⁹ In a suit to subject a decedent's realty to the payment of a judgment, the court properly sustained the report of a commissioner of sale which was sufficiently clear to show that the judgment was a lien on the realty, and that there was no personalty to pay the debt.³⁰ Where the bill and proceedings specify the land, a decree for the sale of the land in the bill and proceedings mentioned, or so much as may satisfy the purposes of the decree, is sufficiently certain.³¹ Before making the decree of sale, it is not necessary to ascertain the value of the land.³² It is error for the commissioner appointed in a creditors' suit to return the debtor's property at his own valuation;³³ but where such valuation is not disputed, and other

evidence tends to show that it is correct, exceptions to the report are properly overruled.³⁴

c. Effect of Decree

The decree binds all creditors coming in after the institution of the suit. A decree of sale establishes the validity of complainant's as against such creditors as well as against the debtor. A decree for an account suspends all other pending suits of creditors who come in under the decree. Purchasers pendente lite are bound.

All creditors coming in after the institution of a creditors' suit are bound by the decree.³⁵ A decree of sale establishes complainant's claim as legal and valid,³⁶ unless it is otherwise declared in the decree;³⁷ and prevents the running of the statute of limitations against a claim as a simple contract debt.³⁸ The claim is established as valid, not only as against the debtor, but as against all creditors coming in to claim distribution.³⁹ A decree for an account operates to suspend all other pending suits of creditors who come in under the decree.⁴⁰

Purchasers from the debtor pendente lite, although not parties to the suit, are in privity with the debtor, and are bound by the judgment.⁴¹

§ 77. Claims of Creditors under Decree or Judgment

The formal intervention by creditors as parties of record is discussed supra § 58. The right of creditors to come in under the decree or judgment for the purpose of presenting and proving their claims is discussed infra § 78.

§ 78. — Presentation, Proof and Allowance of Claims

- a. In general
- b. Time for presentation
- c. Proof and allowance
- d. Effect of failure to present or prove

24. W.Va.—Johnson v. Todd, 102 S. E. 697, 86 W.Va. 24.

25. W.Va.—Johnson v. Todd, supra.

26. W.Va.—Simmons Auto Co. v. Pursley, 171 S.E. 255, 114 W.Va. 168.

27. Ill.—Prindeville v. Curran, 156 Ill.App. 278.

28. Ill.—Mason v. Patterson, 74 Ill. 191.

Construction of decree

D.C.—Camp v. Boyd, 35 App.D.C. 159.

Ill.—Mason v. Patterson, 74 Ill. 191.

29. D.C.—Carroll v. Wilkins, 29 F.2d 638, 58 App.D.C. 265.

30. Va.—Wood v. Kane, 129 S.E. 327, 143 Va. 281.

31. Va.—Barger v. Buckland, 28 Gratt. 850, 69 Va. 850.

32. Va.—Sively v. Campbell, 23 Gratt. 893, 64 Va. 893.

W.Va.—Grantham v. Lucas, 24 W.Va. 231.

33. Va.—Moore v. Bruce, 7 S.E. 195, 85 Va. 139.

34. Va.—Moore v. Bruce, supra.

35. W.Va.—Bilmyer v. Sherman, 23 W.Va. 656.

15 C.J. p 1436 note 22.

36. Md.—Simmons v. Tongue, 2 Bland 341.

15 C.J. p 1436 note 17.

37. Md.—Rhodes v. Amsinck, 38 Md. 345—Welch v. Stewart, 2 Bland 37.

38. Md.—Griffith v. Reigart, 6 Gill 445.

39. Md.—Rhodes v. Amsinck, 38 Md. 345.

For whose benefit presumed

A decree for the sale of property in a general creditors' suit, in which all claims have been audited, is presumed to be for the benefit of all creditors, and not for complainant's benefit alone.—Haskin Wood Vulcanizing Co. v. Cleveland Ship-Building Co., 26 S.E. 878, 94 Va. 439.

40. Va.—Stephenson v. Taverners, 9 Gratt. 398, 50 Va. 398.

41. Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

a. In General

The complainant cannot, after decree, bring in any new or additional claim. A defendant may, after decree, come in as a creditor. Creditors other than the complainant are entitled to come in and prove their claims under a general decree, and may resist the allowance of other claims. Before distribution, all creditors should be called in by appropriate notice.

The rights of complainant under the decree are limited to the claim set forth in the bill; he cannot after decree bring in any new or additional claim,⁴² and where he recovers another judgment after filing his bill, he cannot come in and receive the benefit of the decree with respect to the second judgment, against defendant's objection.⁴³ A defendant to a creditors' bill, although he does not in his answer distinctly allege himself to be a creditor, and although he asks in his answer to be dismissed with costs, may still after decree come in on the fund as a creditor.⁴⁴ Creditors other than complainant, even though they are not mentioned in the bill, are entitled to come in and prove their claims under a general decree,⁴⁵ although where a fund can be divided satisfactorily only by dividing it among a certain class of persons, it is necessary so to frame the decree that all those persons may be brought in for their distributive shares.⁴⁶ Creditors who file a petition electing to come in under the decree that may be made on a pending creditors' bill have a full standing as creditors, entitled to prove under the decree when made.⁴⁷ Where several bills are instituted by different creditors, and all are stayed but one, all the creditors should be allowed to come in under the decree in that suit.⁴⁸ Where a bill is referred to a commissioner or master to ascertain the liens and their priorities, any creditor may present his claim, and if it is allowed, he has the right to have it passed on by the court without formal pleadings;⁴⁹ and a creditors' bill inures to the benefit of all creditors who present and prove

their claims, although they are not made formal parties to the bill.⁵⁰

The creditors whose claims have been recognized or established in any of the modes pointed out by the decree become quasi parties to the litigation,⁵¹ and are entitled to notice of application made in the cause,⁵² and may resist the allowance of any claim of equal or greater dignity than their own,⁵³ as by interposing the statute of limitations as a bar to the claims of other creditors.⁵⁴ They cannot, however, question the rights of any other creditors after settlement on an issue between the proper parties; the rights of such other creditors remain undisturbed except in so far as a proportionate abatement is concerned by reason of the additional claims.⁵⁵ Before distribution under a creditors' bill, all creditors should be called in by publication or some appropriate notice, so as to afford them an opportunity to present their claims;⁵⁶ and this is so in some states even where the suit is instituted by complainant in his own behalf alone.⁵⁷

b. Time for Presentation

The court may limit the time for presentation of claims, but such limitation will not be enforced strictly, unless injustice would otherwise result.

The court may direct an interlocutory judgment requiring other judgment creditors to prove their claims within the time limited, and may allow a reasonable time to reduce other claims to judgment, rendering final judgment for the division of the fund among judgment creditors entitled thereto where the allotted time shall have elapsed.⁵⁸ Although an order requiring creditors to file their claims within a reasonable time fixed, or be forever barred, has been held valid and effective,⁵⁹ it has also been held that creditors are not held strictly to the time unless injustice would otherwise be done thereby to the parties;⁶⁰ that such an

42. Md.—Welch v. Stewart, 2 Bland 37—Strike's Case, 1 Bland 57.

43. N.J.—Elizabeth Nat. State Bank v. McCormick, Ch., 44 A. 706.

44. Md.—Gibbs v. Cunningham, 4 Md.Ch. 322.

45. Va.—First State Bank of Boones Path v. Kincaid, 144 S.E. 453, 151 Va. 101—Hudgins v. Lanier, 23 Gratt. 494, 64 Va. 494.

46. U.S.—Marsh v. Burroughs, C.C. Ga., 16 F.Cas.No.9,112, 1 Woods 463.

47. Ala.—Taber v. Royal Ins. Co., 26 So. 252, 124 Ala. 681.

48. N.Y.—Hallett v. Hallett, 2 Paige 15.

49. S.C.—Floyd v. Neel, 10 Rich.Eq. 338, 73 Am.D. 94.

49. U.S.—American Hay Co. v. Dry Dock, E. B. & B. R. Co., C.C.N.Y., 165 F. 486.

W.Va.—Wilson v. Carrico, 40 S.E. 439, 50 W.Va. 336.

50. Ill.—Pennell v. Lamar Ins. Co., 73 Ill. 303.

15 C.J. p 1437 note 31.

51. Tex.—Fagan & Osgood v. Boyle Ice Mach. Co., 65 Tex. 324.

15 C.J. p 1437 note 32.

52. N.Y.—Anonymous, 18 Abb.Pr. 87.

53. N.C.—Wordsworth v. Davis, 75 N.C. 159.

15 C.J. p 1437 note 34.

54. N.C.—Wordsworth v. Davis, supra.

15 C.J. p 1437 note 34 [a].

55. Md.—Trayhern v. National Mechanics' Bank, 57 Md. 590—In re Cape Sable Co.'s Case, 3 Bland 606.

56. U.S.—Chicago, R. I. & P. Ry. Co. v. Lincoln Horse & Mule Commission Co., C.C.A.Neb., 284 F. 955. 15 C.J. p 1437 note 36.

57. W.Va.—Neely v. Jones, 16 W.Va. 625, 37 Am.R. 794. 15 C.J. p 1437 note 37.

58. N.Y.—Bleimeyer v. Public Service Mut. Casualty Ins. Corporation, 165 N.E. 286, 250 N.Y. 264, affirming in part and reversing in part 221 N.Y.S. 794, 220 App.Div. 741.

59. U.S.—Chicago, R. I. & P. Ry. Co. v. Lincoln Horse & Mule Commission Co., C.C.A.Neb., 284 F. 955.

60. U.S.—In re Studebaker-Wulff

order is primarily intended for safety in distribution, and not as a forfeiture of the rights of dilatory creditors;⁶¹ and that a refusal to permit the filing of a claim after the time fixed in the order must be based on some prejudice arising, not from the claim itself, but from delay in prosecuting it.⁶²

c. Proof and Allowance

A creditor coming in under the decree must prove his claim if its validity is denied. Where an audit is confirmed by the court, it may order the payment of the claims allowed. An order fixing the amount of a claim may be set aside for cause. Interest on a claim may be allowed.

In a general creditors' proceeding, creditors may informally present their claims, and, after a more or less formal hearing, the chancellor determines, on the entire record and all the facts before him, the rights of the various creditors as against the fund for distribution and as between themselves.⁶³ A person coming in under the decree and presenting a claim must establish the same by full proof before the master or commissioner,⁶⁴ and if any party interested denies its validity,⁶⁵ and if he fails to prove a valid claim, it will be disallowed.⁶⁶ If defendant is insolvent, the insolvent schedule or his voluntary admission is sufficient proof of the claim of a creditor who afterward comes in to participate in the fund;⁶⁷ but where

other creditors come in after decree and the insolvent denies the debt, or there is a discrepancy between the claim and his admissions, full proof is required.⁶⁸ Where an audit is confirmed by a court of equity, the approved practice is also to pass an order to pay the claims which were thereby allowed; but the judgment of the court is effectually pronounced on a claim by confirming the auditor's report, if no steps are taken to revoke or overrule it.⁶⁹ An order fixing the amount of a claim is interlocutory and may be set aside for good cause shown at any time before the close of the term in which final decree is entered.⁷⁰

Interest on claim. Where a special master fails to fix a date for the application of certain funds to the payment of bonds, as required by the decree, interest is allowable on the amount to the date of actual payment.⁷¹

d. Effect of Failure to Present or Prove

A creditor who is given an opportunity to come in and prove his claim, but who fails to do so, cannot share in the distribution.

Where an order or decree is made under which all creditors are authorized to come in and prove their claims, a creditor who fails to come in and prove his claim will not be permitted to share in the distribution,⁷² and the court cannot enter a de-

Rubber Co., D.C.Ohio, 33 F.2d 1004, 1005, quoting *Corpus Juris*.

Ga.—*Gainesville Nat. Bank v. Martin*, 1 S.E.2d 636, 640, quoting *Corpus Juris*.

15 C.J. p 1437 note 38.

Order not enforced before full distribution unless injustice would otherwise be done.—In re *Studebaker-Wulff Rubber Co.*, D.C.Ohio, 33 F.2d 1004.

Statute permitting tardy creditor to come in before final decree and have claim allowed from any surplus fund, was intended to make provision for those belated creditors who, for some fortuitous reason, did not file their claims with due promptness.—*Snodgrass v. Snodgrass*, 189 S.E. 137, 118 W.Va. 150.

61. U.S.—*Employers' Liability Assur. Corporation v. Astoria Mahogany Co.*, C.C.A.N.Y., 6 F.2d 945, reversing, D.C., 295 F. 767.

62. U.S.—*Employers' Liability Assur. Corporation v. Astoria Mahogany Co.*, supra.

Erroneous refusal to permit filing after time fixed

Refusal to permit creditor to file claim against receivers appointed in creditors' suit for sequestration, nearly a year and half after expira-

tion of time fixed by decree for filing of such claims, was error, where only objections made were that allowance of claim would swell the total amount of the claims and might prevent reorganization in near future.—*Employers' Liability Assur. Corporation v. Astoria Mahogany Co.*, supra.

Duty of dilatory creditor

Creditor, having failed to file claim within time fixed therefor by order of foreclosure, is under no obligation to give notice that it is conducting investigation which may lead to subsequent presentation of claim.—*Employers' Liability Assur. Corporation v. Astoria Mahogany Co.*, supra.

63. Tenn.—*Thompson v. American Lumber & Mfg. Co.*, 256 S.W. 447, 148 Tenn. 470.

64. N.Y.—*Morris v. Mowatt*, 4 Paige 142.

15 C.J. p 1437 note 39.

65. Md.—*Dorsey v. Hammond*, 1 Bland 463.

66. U.S.—*McCormick v. Puritan Coal Mining Co.*, C.C.A.Pa., 28 F.2d 331, certiorari denied *Puritan Coal Mining Co. v. McCormick*, 49 S.Ct. 176, 278 U.S. 651, 73 L.Ed. 562.

Disallowance held proper

(1) Where the owner conveyed

personal property to the debtor after a local tax assessment thereon, a claim for taxes so assessed was properly disallowed as a preferred claim against the proceeds of the debtor's property on insolvency, the tax not being an obligation of the debtor.—*McCormick v. Puritan Coal Mining Co.*, supra.

(2) A decree disallowing a claim presented by an administrator of a deceased creditor of defendant is proper, where the demand is stale and was never asserted by decedent in his lifetime, and by reason of lapse of time, death of parties, loss of evidence, and loose business methods of the parties, an accurate and fair settlement of their accounts is impossible.—*Kavanaugh v. Kavanaugh*, 37 S.E. 275, 98 Va. 649.

67. Md.—*Strike v. McDonald*, 2 Harr. & G. 191.

68. Md.—*Strike v. McDonald*, supra.

69. D.C.—*May v. Bryan*, 17 App.D.C. 392.

Md.—*Lee v. Boteler*, 12 Gill & J. 323.

70. U.S.—*Standard Sav., etc., Assoc. v. Aldrich*, Mich., 163 F. 216, 89 C.C.A. 646, 20 L.R.A.N.S., 393.

71. U.S.—*Nolte v. Hudson Nav. Co.*, C.C.A.N.Y., 47 F.2d 166.

72. N.Y.—*Hirshfeld v. Fitzgerald*, 51

decree recognizing him as a creditor.⁷³ However, where a creditor's judgment is a lien on two separate tracts of land, his failure to present his claim in a suit to subject one of those tracts does not preclude him from proving it in a subsequent suit to subject the other.⁷⁴

Want of notice. Where lienholders, not made parties to the bill, were not given the notice required by statute to present their claims for adjudication, they were not precluded by the decree confirming the commissioner's report, fixing the amounts and priorities of liens, and directing a sale of the property.⁷⁵

§ 79. Execution and Enforcement of Decree or Judgment in General

In a general creditors' suit plaintiff cannot, after judgment and the appointment of a receiver to collect and apply the debtor's assets, issue execution on the judgment. Where, in a suit against a trustee to reach the trust estate or the income thereof, the judgment fixes the amount of the surplus income and directs the plaintiff's debt to be paid therefrom, execution may issue against the trustee's property on his failure to comply with such order.

In a creditors' suit brought by plaintiff in behalf of himself and others who may come in, plaintiff cannot, after judgment and the appointment of a receiver to collect the debtor's assets and apply them to the payment of the debts, issue execution on the judgment; the receiver alone can enforce the judgment.⁷⁶ When a judgment in a creditors' suit brought against a trustee to reach the trust estate or the income thereof, fixed the amount of the surplus income and directed plaintiff's debt to be paid therefrom, it was proper to order the issuance of an execution against the property of the trustee on his failure to comply with the judgment, a copy of which had been served on him and his attorneys.⁷⁷

§ 80. Sales and Conveyances under Order of Court

The rules governing judicial sales generally are applicable to sales under decrees in creditors' suits, with respect to the conduct of the sale, the rights and liabilities of bidders and purchasers, ground for objecting to or setting aside a confirmation of the sale, etc.

The general principles relating to execution sales, judicial sales, and sales by receivers are discussed in the C.J.S. title Executions § 196 et seq, also 28 C.J. p 615 note 43 et seq.; the C.J.S. title Judicial Sales § 1 et seq, also 35 C.J. p 7 note 1 et seq; and the C.J.S. title Receivers § 220 et seq, also 53 C.J. p 203 note 36 et seq.

On a decree for complainant the sale may or should be conducted, according to the practice in the various jurisdictions, by the master or commissioner,⁷⁸ by a receiver appointed in the suit,⁷⁹ or by the sheriff.⁸⁰ Although the appointment of a commissioner to make the sale is within the sound discretion of the court,⁸¹ it is the practice to heed the requests of the creditors in making the appointment.⁸² Plaintiff's attorney may properly be made a co-commissioner or special commissioner where it appears that the sale will produce a surplus over the indebtedness,⁸³ but it is the general practice not to appoint the debtor's attorney as sole commissioner;⁸⁴ nor, it has been held, is defendant entitled to have his own attorney appointed as co-special commissioner to protect his interests at the sale.⁸⁵

Rights and liabilities of purchaser in general. A purchaser at the sale under a decree in a general creditor's suit becomes a party to the suit;⁸⁶ and if the decree and commissioner's deed embrace all the property which the purchaser claims to have purchased, he may apply to the court in such proceeding for correction or relief, but cannot

N.E. 997, 157 N.Y. 180, 46 L.R.A. 839.

15 C.J. p 1438 note 44.

73. S.C.—Mann v. Poole, 26 S.E. 229, 48 S.C. 154.

15 C.J. p 1438 note 45.

74. W.Va.—Gilbert v. Lawrence, 49 S.E. 155, 56 W.Va. 281.

75. W.Va.—Dickerson v. Flanagan, 136 S.E. 854, 103 W.Va. 233.

Insufficient notice

Commissioner's report, claiming to have given notice to lienholders required by decree directing publication, but not requiring posting of notice, did not show compliance with statute requiring notice to be "posted and published."—Dickerson v. Flanagan, *supra*.

76. N.Y.—Rigney v. Tallmadge, 19 Abb.Pr. 16.

77. N.Y.—Williams v. Thorn, 81 N.Y. 381.

78. Mass.—Russell v. Burke, 62 N.E. 963, 180 Mass. 543.

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Prayer for sale by sheriff

A sale by a master in a creditors' suit, notwithstanding the prayer is that the sheriff be directed to sell, is justified under the prayer for general relief.—Mason v. Wedekind, 150 Ill. App. 33.

79. U.S.—Tennessee Pub. Co. v. Carpenter, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.

15 C.J. p 1438 note 50 [a].

80. Neb.—Cochran v. Cochran, 95 N.W. 778, 1 Neb., Unoff., 508.

N.Y.—Kennedy v. Brandon, 4 Hun 642, 67 Barb. 209.

81. W.Va.—Hyre v. Johnson, 149 S.E. 385, 107 W.Va. 524, 64 A.L.R. 1536.

82. W.Va.—Hyre v. Johnson, *supra*.

83. W.Va.—Mishawaka Woolen Mfg. Co. v. Nelson, 123 S.E. 568, 96 W.Va. 617.

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Prayer for sale by sheriff

A sale by a master in a creditors' suit, notwithstanding the prayer is that the sheriff be directed to sell, is justified under the prayer for general relief.—Mason v. Wedekind, 150 Ill. App. 32.

79. U.S.—Tennessee Pub. Co. v. Carpenter, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.

15 C.J. p 1438 note 50 [a].

80. Neb.—Cochran v. Cochran, 95 N.W. 778, 1 Neb. Unoff., 508.

N.Y.—Kennedy v. Brandon, 4 Hun 642, 67 Barb. 209.

81. W.Va.—Hyre v. Johnson, 149 S.E. 385, 107 W.Va. 524, 64 A.L.R. 1536.

82. W.Va.—Hyre v. Johnson, *supra*.

83. W.Va.—Mishawaka Woolen Mfg. Co. v. Nelson, 123 S.E. 568, 96 W.Va. 617.

84. W.Va.—Hyre v. Johnson, 149 S.E. 385, 107 W.Va. 524, 64 A.L.R. 1536.

85. W.Va.—Mishawaka Woolen Mfg. Co. v. Nelson, 123 S.E. 568, 96 W.Va. 617.

86. W.Va.—Bush v. Ralphsnyder, 130 S.E. 897, 100 W.Va. 464.

not obtain the same in a separate suit.⁸⁷ Where the interest of a purchaser began with his bid, he cannot rightly complain of orders made before his rights accrued.⁸⁸ Where a debtor in a creditors' bill, filed to reach his interest under a title bond, alleged a transfer of the bond as security, prior to the suit, to one who was not made a party, the transferee was not bound by a decree declaring the interest in the bond to be in the debtor, and ordering a sale, and could not maintain a bill to be relieved from such decree.⁸⁹ Where a decree directed the renting of the land and the application of the rent to discharge the indebtedness, the liability of sureties on the rental bond with knowledge that, on the tenant's default and the sale of the land, they would be liable for the difference between the sale price and the amount of lien indebtedness, arises and becomes enforceable in case of a deficiency.⁹⁰

Manner of making sale; bids. The order in which separate parcels or interests should be sold is considered supra § 76 b (3) (c). Where the master reports that he cannot obtain the price at which he was directed to sell, the court may order him to sell at public auction.⁹¹ It is not error to decree a sale of land for cash where a trust deed given thereon to secure a debt then past due, and which is prior to the judgments, authorizes the trustee to sell for cash.⁹² The proper rule for the court, in directing a sale of real estate in a creditors' suit, is to direct, in the decree ordering the sale, that the cash payment shall be retained by the commissioner making the sale, or be paid into bank to the credit of the suit, subject to the future order of the court; the money, being thus under the control of the court, will, on the confirmation of the report or on the setting aside of the sale, be disposed of in the way that shall then seem proper.⁹³ Where the successful bidder at the sale, makes a deposit and then refuses to pay the purchase price, the court may accept the bid, confirm the sale to such purchaser, and take steps to

hold him to his contract of purchase,⁹⁴ or the court may reject the bid and refuse to confirm the sale, in which case the purchaser is released from any obligation to comply with his bid, and cannot thereafter be proceeded against;⁹⁵ and, on refusal to confirm the sale, the court cannot properly accept a private bid which was substantially less than the highest bid, but should readvertise the property for sale at public auction in order to bring the highest price possible.⁹⁶ Where, after a junior judgment creditor had made a bid on property sold in his creditors' suit against the debtor, senior judgment creditors, with liens properly recorded, intervened and demanded participation in the proceeds, the fact that their claims were unknown to the junior creditor was not such a mistake as entitled the latter to be relieved of his bid.⁹⁷ The debtor cannot complain that the bidding at the sale was chilled by failure of the court to join trustees, who held the legal title to the property as security for bonds, as parties before the sale, where the purchaser paid twice the upset price for the property covered by the indenture under which the trustees acted, and more than the upset price for the balance of the property, and almost three times the appraisal figure.⁹⁸

Confirmation, setting aside, or stay of sale. A party who is jointly bound for the debts for which land of his codefendant has been sold to satisfy judgment liens may object to the confirmation of the sale, the proceeds of which are sufficient to pay all debts.⁹⁹ Errors of law in a decree and in proceedings leading up to it are not reviewable on objections to the confirmation of a sale thereunder.¹ An order confirming a commissioner's sale in a creditors' suit will be reversed where there is great inadequacy in the price received;² but one who objects to confirmation of a sale to the highest bidder on the ground of gross inadequacy of price, has the burden of proving such inadequacy and unless this is shown, it is error to refuse confirmation.³ Where one who bids at a sale is un-

87. W.Va.—Bush v. Ralphsnyder, supra.

88. U.S.—Luhrig Collieries Co. v. Interstate Coal & Dock Co., C.C.A.N.Y., 287 F. 711, certiorari denied Thosmil Holding Corporation v. Interstate Coal & Dock Co., 43 S.Ct. 700, 262 U.S. 751, 67 L.Ed. 1215.

89. Tenn.—Rodgers v. Dibrell, 74 Tenn. 69, 6 Lea 69.

90. Va.—Dulaney v. Smith, 149 S.E. 441, 153 Va. 118.

Defense

The contention that tenant was not liable for rent because he was evicted

and premises sold on his default in paying rental notes was held to be without merit.—Dulaney v. Smith, supra.

91. Mass.—Eastern Bridge, etc., Co. v. Worcester Auditorium Co., 103 N.E. 913, 216 Mass. 426.

92. W.Va.—Stafford v. Jones, 80 S.E. 825, 73 W.Va. 299.

93. W.Va.—Arnold v. Casner, 22 W.Va. 444.

94. Va.—Chaney v. Kibler, 198 S.E. 877, 171 Va. 194.

95. Va.—Chaney v. Kibler, supra.

96. Va.—Chaney v. Kibler, supra.

97. S.C.—Turner v. Washington Realty Co., 122 S.E. 768, 128 S.C. 271.

98. U.S.—Tennessee Pub. Co. v. Carpenter, C.C.A.Tenn., 100 F.2d 728, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 33 L.Ed. 1056.

99. Va.—Thomas v. Farmers' Nat. Bank, 9 S.E. 1122, 86 Va. 291.

1. Neb.—Cochran v. Cochran, 95 N.W. 778, 1 Neb., Unoff., 508.

2. W.Va.—Beaty v. Veon, 18 W.Va. 291.

3. Va.—Hamilton v. Bowman, 122 S.E. 342, 138 Va. 442.

able to comply with the terms of sale, and by parol it is agreed that another shall stand in his stead and the sale is confirmed, the confirmation may properly be set aside, as it is not enforceable in a court of equity.⁴ As against a bona fide purchaser, a sale which has been confirmed will not be set aside because of error in decreeing a sale without an account of the amount or priority of debts, if it appears that a sale was necessary;⁵ and where a decree directs the commissioner to sell the land in suit or so much thereof as may be necessary to satisfy the judgment, and a sale is made to a bona fide purchaser and confirmed, if the debtor or his assignee in bankruptcy seeks to set aside the sale on the ground that the price was inadequate or that only a part of the land should have been sold, the burden is on him to show that fact.⁶ A sale by a receiver may be stayed in a proper case;⁷ but where judgment creditors sue for themselves and all other lienholders, payment of some of the debts included in the decree made on the commissioner's report does not suspend execution of the decree of sale.⁸

Conveyance. Where a wife, who was named as grantee in a referee's deed to land purchased by her husband at a foreclosure sale, was made a party to a creditors' suit by a judgment creditor of the husband, and refused to convey the title, as directed by the court, the court properly directed the sheriff to make the conveyance,⁹ but the order was erroneous in directing a conveyance by a full covenant warranty deed, instead of a bargain and sale deed.¹⁰ A decree should not authorize the master to convey title to the purchaser in case defendant elects not to convey his equitable interest to complainant, and a sale is thereby rendered necessary; but where the debtor has appeared and is a resident of the commonwealth, the decree should direct him to make a conveyance to

the purchaser in case of sale.¹¹ So, where, in a suit to reach the debtor's interest in a lease containing an option to purchase at a fixed price, a sale of the land is had at a price which satisfies the agreement in the lease, the purchaser is entitled to a conveyance, and where the lessee executes a deed to him but the lessor refuses to do so, the court should enter a final decree, which, on being recorded would vest title in the purchaser.¹² Where the court orders a sale subject to the payment of a lien in a certain sum, and the payment of a further sum to the debtor by way of exemption, a tender by the purchaser of the amount of the lien only does not entitle him to a conveyance.¹³

Redemption. On decreeing a sale of land, the debtor should be given a reasonable time before the sale, in which to redeem the land by paying the debt due on it.¹⁴

§ 81. Distribution among Creditors

The expenses of the sale and taxes due from the debtor must be first paid from the proceeds of the sale; and where there are several creditors, each having claims of the same class, a ratable distribution will be made. Loss of funds arising from the sale will be deducted from the shares of those responsible for the loss.

Where land is sold in a creditors' suit, taxes due from the debtor must be first satisfied from the proceeds.¹⁵ So, all expenses of the sale are to be first paid from the proceeds thereof, and the balance only ratably distributed among the creditors, who are in that way made to contribute in due proportion to defraying the expenses of the suit;¹⁶ where more than one creditor is entitled to payment, each claim is paid according to its dignity, and where there are several creditors, each having claims in the same class, a ratable distribution is made among them;¹⁷ and the rights of creditors having liens by judgment, mortgage, or otherwise, are not dis-

4. W.Va.—Kingwood Nat. Bank v. Jarvis, 28 W.Va. 805.

5. Va.—Crawford v. Weller, 23 Gratt. 835, 64 Va. 835.

6. Va.—Barr v. White, 30 Gratt. 531, 71 Va. 531.

7. N.Y.—Wardell v. Leavenworth, 3 Edw.Ch. 244.

Grounds for stay

Where the affidavits showed that the aggregate amount of the judgments was one thousand dollars and the value of the property sixty thousand dollars, and the receiver, on the rule to show cause why the sale of the entire property should not be stayed, showed that the greater part of the property consisted of mining

stocks and that he had no knowledge of its value, he was directed to stay such sale until further order of court.—Wardell v. Leavenworth, *supra*.

8. W.Va.—Shumate v. Crockett, 27 S.E. 240, 43 W.Va. 491.

9. N.Y.—England v. Nuzzo, 299 N.Y. S. 994, 252 App.Div. 869.

10. N.Y.—England v. Nuzzo, *supra*.

11. Mass.—Russell v. Burke, 62 N. E. 963, 180 Mass. 543.

12. Mass.—Eastern Bridge, etc., Co. v. Worcester Auditorium Co., 103 N.E. 913, 216 Mass. 426.

13. Ind.—Smith v. Vanscoten, 20 Ind. 221.

14. W.Va.—Abney-Barnes Co. v. Da-

vy-Pocahontas Coal Co., 98 S.E. 298, 83 W.Va. 292.

15 C.J. p 1438 note 52.

16. Md.—Tuck v. Calvert, 33 Md. 209—Dorsey v. Hammond, 1 Bland 463.

17. Md.—Dorsey v. Hammond, *supra*.

18. Va.—Robinson v. Allen, 8 S.E. 835, 85 Va. 721.

Wash.—Manhattan Trust Co. v. Seattle Coal, etc., Co., 53 P. 951, 19 Wash. 493.

Where property is reconveyed to debtor, all existing judgment liens attach at the same time, and the fund must be distributed among them all *pari passu*.—Ware v. Delahaye, 64 N.W. 640, 95 Iowa 667.

turbed.¹⁸ A wife who gave her personal property to her husband to invest for her may, on his insolvency, if she declines to assert any lien rights to the detriment of other creditors, claim as a general creditor in the distribution of the proceeds of the sale of the insolvent's real and personal property after satisfaction of specific and general liens.¹⁹ Where parties to a creditors' bill unwarrantably occasion a loss to the funds arising from the sale of property by pretended bids, the amounts otherwise due them on the general distribution will be mulcted by the court to protect other creditors from loss on account of their conduct.²⁰ Where a trustee appointed under an agreement with lien creditors pendente lite wrongfully distributes funds collected by him, the ensuing loss should be charged to the creditors and not to the debtor.²¹

The acquisition of a lien by the filing of a creditors' bill, the priorities between lien claimants, the commencement and duration of the lien and the property to which it attaches, are discussed infra §§ 84-87.

§ 82. Appeal and Error

The rules governing appeal and review in civil actions generally apply to creditors' suits.

A decree ascertaining the amounts and priorities of all the debts sought to be established as liens, and ordering the sale of the property for payment of the debts is a final decree from which an appeal will lie;²² and the same is true of an order distributing the proceeds of the sale;²³ but a decree which does not order a sale or payment of complainant's demand has been held to be merely interlocutory.²⁴ In a suit by a creditor to convene the creditors of an insolvent corporation, a creditor whose debt or lien is disallowed may appeal without waiting further action as to debts of the

others.²⁵ A judgment creditor who is not made a party to a suit may appeal from an order denying his petition for intervention,²⁶ but an order that, after exhausting their remedy against the principal debtor, creditors may apply for and obtain a judgment against a guarantor of collection is not final, and is therefor not appealable;²⁷ nor is an order denying an application for a bond from plaintiff.²⁸ For the purpose of determining the question of appellate jurisdiction, the amount in dispute is the amount of the judgment plaintiff seeks to enforce, although the fund sought to be reached is greater in amount;²⁹ and where the demands of several creditors joining in the bill exceed the amount necessary to confer jurisdiction, but no individual creditor has a claim sufficient in amount for that purpose, none of the creditors can appeal from a decree dismissing the bill.³⁰ Where the interests of the parties are severable, each party representing a separate interest must take a separate appeal; an appeal by one party defendant does not bring up the case for review as to the other parties not affected by the issues on such appeal.³¹

Presentation and reservation in lower court of grounds for review. The rule that questions not raised and properly preserved for review in the lower court will not be noticed on appeal, stated in Appeal and Error § 228, ordinarily applies in appeals in creditors' suits.³² Thus an objection that complainant had an adequate remedy at law cannot be raised for the first time on appeal.³³ On the other hand, it has been held that such objection is not waived by failure to make it in the trial court,³⁴ and that the failure of the commissioner's report to set out the order of liens on the property sought to be subjected may be taken advantage of for the first time on appeal, where the defect is apparent on the face of the report.³⁵ It has also been held that

18. N.Y.—Thompson v. Brown, 4 Johns.Ch. 618.

15 C.J. p 1439 note 73.

19. W.Va.—Keller v. Washington, 98 S.E. 880, 83 W.Va. 659.

20. U.S.—Jaffrey v. Brown, C.C.Ga., 29 F. 476.

21. W.Va.—Golden v. O'Connell, 85 S.E. 533, 76 W.Va. 282.

22. U.S.—Andrews v. National Foundry & Pipe Works, Wis., 73 F. 516, 19 C.C.A. 548.

W.Va.—Core v. Strickler, 24 W.Va. 689.

23. Ky.—McLaughlin v. List, 5 Ky. L. 291.

24. W.Va.—Pickens v. Daniels, 52 S. E. 215, 58 W.Va. 327.

3 C.J. p 557 note 90.

25. W.Va.—Kahle v. Long Reach Oil Co., 41 S.E. 233, 51 W.Va. 313.

26. W.Va.—Pappenheimer v. Roberts, 24 W.Va. 702.

27. Neb.—Millard v. Parsell, 77 N. W. 390, 57 Neb. 178.

28. U.S.—First Union Trust & Savings Bank v. Consumers' Co., C.C. A.111, 63 F.2d 273, certiorari granted on other grounds First Union Trust & Savings Bank v. Consumers Co., 54 S.Ct. 61, 290 U.S. 585, 78 L.Ed. 517.

29. U.S.—Seaver v. Bigelows, 111, 5 Wall. 208, 18 L.Ed. 595.

N.Y.—Payne v. Becker, 87 N.Y. 153.

30. U.S.—Schwed v. Smith, Mo., 1 S. Ct. 221, 106 U.S. 183, 27 L.Ed. 156. 15 C.J. p 1439 note 78.

31. D.C.—May v. Bryan, 16 App.D.C. 556.

Tenn.—Shapira v. Paletz, Ch.A., 59 S.W. 774.

W.Va.—White v. Drew, 9 W.Va. 695.

32. Ill.—Kennard v. Curran, 87 N.E. 913, 239 Ill. 122, affirming 141 Ill. App. 621.

15 C.J. p 1439 note 82 [a]—[c].

33. Iowa.—O'Brien v. Stambach, 69 N.W. 1133, 101 Iowa 40, 63 Am.S. R. 368.

Neb.—Raymond v. Leinberger, 70 N. W. 400, 50 Neb. 815.

34. Va.—Armstrong v. Pitts, 13 Gratt. 235, 54 Va. 235.

35. Va.—Carnahan v. Ashworth, 31 S.E. 65.

a judgment creditor is not estopped by failure to except to the ratification of the auditor's allowance to another creditor within the time allowed by an order nisi.³⁶

Effect on jurisdiction of trial court. A chancellor, by granting an appeal, loses all jurisdiction of the cause.³⁷

Record. A decree dismissing a creditors' bill will be affirmed, notwithstanding it is claimed that facts were admitted at the hearing authorizing a recovery, where the record shows no such admissions.³⁸

Review and disposition of cause. Matters not necessary to a decision will not be reviewed.³⁹ The rule stated in Appeal and Error § 1676, that non-prejudicial error is not ground for reversal, applies in creditors' suits.⁴⁰ Where a decree of sale in a creditors' suit, which is erroneous for denial of the preference right of certain of the creditors and for failure to adjust liens, is confirmed without objection before appeal, so much of it as directs the sale will be affirmed, and the decree will be reversed only in so far as it denies the preference right to the prejudice of the complaining creditor.⁴¹ So, where one creditor in an action to recover a preference appeals, but other creditors have not been given an opportunity to establish their status, the cause should be remanded to enable them to do so.⁴² The reviewing court may, in order to obviate an objection made for the first time on appeal that necessary parties were omitted, refuse to dismiss the bill and remand it so that it may be amended as to parties.⁴³ If the property sought to be subjected to a creditors' bill is adjudged not liable to attachment, and complainants' appeal without establishing their debt or attempting to do so, the court, on reversing the decree, will remand the cause in order that the debt may be es-

tablished,⁴⁴ but where the trial court, after refusing to permit plaintiff to amend the bill so as to show that the judgment on which the suit was based was a judgment of the circuit court, called on both parties for further testimony, and plaintiff thereupon rested, without introducing any proof that defendant had property in hand or due from third persons, or that he had legal title to real estate which he withheld from record, as stated in the bill, whereupon the bill was dismissed, plaintiff is not entitled to a reversal on appeal, although the court erred in refusing leave to amend.⁴⁵ Where, in a suit to enforce judgment liens, appellant, since the appeal, finds proof that one of the judgments had been paid, the propriety of the affirmation of the decree by the appellate court is not thereby affected, but appellant can have relief in the court below.⁴⁶ Where error in the amount of the decree is released the appellate court will not reverse on that account.⁴⁷

§ 83. Costs

- a. Persons entitled to, and liable for, costs
- b. Amount and items taxable

a. Persons Entitled to, and Liable for, Costs

The general principles relating to costs in civil actions are ordinarily applicable to creditors' suits.

Under a statute declaring under what circumstances the costs in the trial court and on appeal shall be within the discretion of the court, the imposition of costs in an action in the nature of a judgment creditors' suit is discretionary.⁴⁸

Complainants. It is a general rule that one jointly interested in a common fund, who brings and prosecutes a suit for its preservation and administration, as in a general creditors' suit, is equitably entitled to reimbursement of his costs.⁴⁹ If com-

36. Md.—Harford Bank of Bel Air v. Havre de Grace Banking & Trust Co., 169 A. 315, 165 Md. 454.

37. Tenn.—Sweetwater Bank & Trust Co. v. Howard, 66 S.W.2d 225, 16 Tenn.App. 91.

Intervention pending appeal

Where chancellor granted discretionary appeal to court of appeals in creditors' suit, and, while appeal was pending, judgment creditor of defendants intervened and prayed for construction of injunction issued in creditors' suit, chancellor, by granting appeal, lost all jurisdiction in cause.—Sweetwater Bank & Trust Co. v. Howard, *supra*.

38. Ill.—Beldier v. Douglas, 35 Ill. App. 124.

39. Ala.—Taylor v. Morton, 151 So. 853, 227 Ala. 690.

Question not reviewable

Where motion to require security for costs was made on ground federal reserve bank bringing creditor's bill was nonresident, reviewing court need not consider whether bank was nonresident, where it was in same federal reserve district as state of suit, was organized under federal reserve law and transacted its business throughout district.—Taylor v. Morton, *supra*.

40. Neb.—Parsons v. Cathers, 138 N.W. 747, 92 Neb. 525.
15 C.J. p 1440 note 87 [a].

41. W.Va.—Lowther v. Lowther-Kaufmann Oil, etc., Co., 83 S.E. 49, 75 W.Va. 171.

42. Tenn.—Goodman v. Wann, 11 Tenn.App. 560.

43. N.C.—Rountree v. Macay, 59 N.C. 87.

44. Miss.—Comstock v. Rayford, 20 Miss. 369.

45. Mich.—Wilson v. Henry, 100 N.W. 890, 108 N.W. 964, 137 Mich. 675.

46. Va.—McAllister v. Bodkin, 76 Va. 809.

47. Va.—Dickinson v. Clement, 12 S.E. 105, 87 Va. 41.

48. N.Y.—Thorndike & Hix Lobster Co. v. Hall, 230 N.Y.S. 554, 132 Misc. 723.

49. U.S.—Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., D.C.Tenn., 274 F. 836.

plainant fails to find property on his bill he is liable for costs.⁵⁰ So also is a creditor who with knowledge that a decree has been entered in one creditors' suit brings a separate suit.⁵¹ Where the appellate court finds that complainant was not entitled to maintain his creditors' bill, but that the trial court properly rendered judgment in his favor on the indebtedness, all costs beyond those necessarily incurred in obtaining the judgment for the debt should be taxed against complainant.⁵²

Interveners. Parties voluntarily coming into a creditors' suit before any costs have accrued except such as were necessary to the institution and preparation of the suit are liable for all costs,⁵³ and creditors who intervene and have their claims properly proved are entitled to have their necessary costs taxed against the fund sought to be subjected.⁵⁴ However, the retainer of counsel in a creditors' suit, without notice to subsequent intervening creditors, does not give the court jurisdiction to order judgment against the interveners for such attorney's fee without notice or hearing.⁵⁵

Defendants. A defendant debtor of the debtor who admits his liability and is willing to pay the debt is entitled to his costs out of the fund.⁵⁶ If a defendant charged as trustee denies the trust, and the court finds that it exists, he is not entitled to costs out of the fund, but is liable personally therefor;⁵⁷ and the same is true where the court finds that defendant intended to evade a statute relating to transfers of personal property.⁵⁸ A defendant receiver who is successful on his appeal is entitled to the cost thereof.⁵⁹

b. Amount and Items Taxable

Necessary costs, including reasonable attorney's fees, are recoverable in creditors' suits.

The rules which govern items taxable as costs, discussed in Costs § 184 et seq, apply in creditors' suits.⁶⁰ Costs necessarily incurred to bring the case to final decree, such as procuring certified copies of deeds and other papers, may be ordered to be paid out of funds in the hands of a special receiver appointed on the application of the judgment debtor, as against the objection of such debtor.⁶¹

Costs of reference. Upon a reference to determine the priorities of the creditors, costs of the parties in attending the reference will not be allowed out of the fund.⁶² The fees of the referee are taxable as costs and payable out of the funds derived from the litigation before distribution.⁶³

Attorney's fees. A plaintiff in a general creditors' bill is entitled to have his attorney's fees taxed,⁶⁴ to be paid either out of the fund itself or by proportionate contribution from those receiving the benefit of the litigation;⁶⁵ and, while such fees should in strictness be allowed only to creditors incurring expenses for the benefit of an entire class,⁶⁶ they may be awarded directly to the attorney, without any application by the client.⁶⁷ The fees allowable to plaintiff's counsel include reasonable compensation for services rendered after the appointment of a receiver in discharge of his duty, acting in behalf of all creditors standing in a position similar to plaintiff to prosecute the suit to final distribution and to defend and otherwise protect

50. N.Y.—Raymond v. Redfield, 2 Edw. 196.

51. Va.—Stephenson v. Taverners, 9 Gratt. 398, 30 Va. 398.

52. Tenn.—Sweetwater Bank & Trust Co. v. Howard, 13 Tenn.App. 592.

53. Ky.—Davis v. Sharron, 15 B. Mon. 64.

54. Ga.—Lowry Banking Co. v. Abbott, 13 S.E. 204, 87 Ga. 134.

N.Y.—Mason v. Codwise, 6 Johns. Ch. 297.

55. Mo.—Gilliam v. St. Louis Transit Co., 164 S.W. 199, 255 Mo. 147.

56. N.Y.—Stafford v. Mott, 3 Paige 100.

57. Vt.—Waterman v. Cochran, 12 Vt. 699.

58. N.Y.—Thorndike & Hix Lobster Co. v. Hall, 230 N.Y.S. 554, 132 Misc. 723.

59. Wash.—Rugger v. Hammond, 163 P. 408, 95 Wash. 85.

60. In Massachusetts the allowance of disbursements to a trustee in a

creditors' bill analogous to the process of foreign attachment is discretionary with the single justice who tried the case.—Cashman v. Bangs, 86 N.E. 932, 200 Mass. 498.

In South Carolina traveling expenses incurred by plaintiffs in attending court cannot be taxed as costs or as "necessary disbursements;" and a decree providing for payment of the expenses of the action does not include traveling expenses incurred in attending court.—Putney v. McDow, 32 S.E. 67, 54 S. C. 172.

61. W.Va.—Mishawaka Woolen Mfg. Co. v. Nelson, 123 S.E. 568, 96 W. Va. 617.

62. N.Y.—Burrell v. Leslie, 6 Paige 445.

63. N.Y.—Mason v. Codwise, 6 Johns. Ch. 297.

Ohio.—Timmonds v. Wheeler, 12 Ohio Cir.Ct. 19, 5 Ohio Cir.Dec. 625.

64. U.S.—Muskegon Boiler Works v.

Tennessee Valley Iron & R. Co., D. C.Tenn., 274 F. 836.

15 C.J. p 1440 note 7.

65. U.S.—Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., supra.

66. U.S.—Nolte v. Hudson Nav. Co., C.C.A.N.Y., 47 F.2d 166.

67. U.S.—Central Railroad & Banking Co. of Georgia v. Pettus, Ala., 5 S.Ct. 387, 113 U.S. 116, 28 L.Ed. 915.—Nolte v. Hudson Nav. Co., C.C.A.N.Y., 47 F.2d 166.—Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., D.C.Tenn., 274 F. 836.

Determination of right

Court should have determined as matter of discretion whether unsecured creditors' attorneys, whose efforts increased assets distributable to general creditors, although not total assets, were entitled to counsel fees.—Nolte v. Hudson Nav. Co., C.C.A.N.Y., 47 F.2d 166.

the fund;⁶⁸ but such fees are to be based only on the fund applicable to claims of creditors of the same class as plaintiff, and the fund on which others have superior liens cannot be subjected to such payment.⁶⁹ It has been held erroneous to decree compensation to an attorney for the preparation of the final decree, payable out of the fund, but counsel fees allowable on other grounds may be so apportioned as to compensate him for such services.⁷⁰ Bondholders who receive no benefit from the services of attorneys for the general creditors should not be required to pay for any part of such services.⁷¹ So creditors represented by their own counsel cannot be compelled to share in expenses incurred in the employment of other counsel by other creditors;⁷² but creditors, although nominally represented by their own counsel, expressly or impliedly consenting to be represented by attorneys for other creditors who alone are active and achieve beneficial results, should contribute proportionately to counsel fee expense.⁷³ Where plaintiff's counsel are also employed by interveners under contracts for special fees, while the general allowance to them, from the fund recovered, of fees for their services in recovering the same is not to be diminished by the total of the special fees, the amount of the claims of the separate clients from whom counsel receive special compensation is to be taken into consideration by way of a general deduction in determining the total fund on the basis of which their fees should be fixed.⁷⁴ A creditor who collects funds of a debtor for the joint benefit of himself and other creditors should be allowed reasonable compensation for the services of his attorney,⁷⁵ at least to the extent that they are beneficial.⁷⁶ However, counsel are entitled only

to their reasonable and necessary disbursements;⁷⁷ and such allowance is not chargeable to any surplus otherwise payable to the debtor.⁷⁸ If an allowance beyond the usual fee for counsel is proper, and it is paid out of the proceeds, it should be credited ratably on the liens, so as not to tax the debtor with it.⁷⁹

§ 84. Liens and Priorities

- a. In general
- b. Where fund is in court or is trust fund for all creditors
- c. Where bill is brought in behalf of all creditors

a. In General

As a general rule a creditor who brings a creditors' bill to reach equitable assets of the debtor acquires a lien, and is entitled to the satisfaction of his claim out of such assets in preference to other creditors. The bill must point out the specific property sought to be reached.

Judgments are not in equity liens on equitable assets of the debtor prior to the filing of a bill to subject them.⁸⁰ A judgment creditor, having no lien on the debtor's unassigned dower interest in land at the time of filing his petition for payment to petitioner of the sum awarded the debtor in lieu of dower from the proceeds of a consent sale of the land, could not obtain a lien on such sum by intervening in a creditors' suit.⁸¹

The principle is well established that, where a creditor by his superior diligence discovers and uncovers property which could not be seized on execution at law, and properly proceeds by a creditors' bill in his own right to subject such property to the satisfaction of his judgment, he acquires a lien on such property,⁸² whether the debt is evi-

68. U.S.—Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., D. C.Tenn., 274 F. 836.

69. U.S.—Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., *supra*.

70. W.Va.—Hartley v. Ault Wood-ware Co., 97 S.E. 137, 82 W.Va. 780.

71. U.S.—Nolte v. Hudson Nav. Co., C.C.A.N.Y., 47 F.2d 166.

72. U.S.—Nolte v. Hudson Nav. Co., *supra*.

73. U.S.—Nolte v. Hudson Nav. Co., *supra*.

74. U.S.—Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., D.C.Tenn., 274 F. 836.

75. U.S.—Central Railroad & Bank-ing Co. of Georgia v. Pettus, Ala.,

5 S.Ct. 387, 113 U.S. 116, 28 L.Ed. 915.
15 C.J. p 1441 note 8.

76. U.S.—Central Trust Co. of New York v. U. S. Light & Heating Co., N.Y., 233 F. 420, 147 C.C.A. 356.

Ga.—Price v. Cults, 29 Ga. 142, 74 Am.D. 52.

77. U.S.—Central Trust Co. of New York v. U. S. Light & Heating Co., N.Y., 233 F. 420, 147 C.C.A. 356.

78. U.S.—Huff v. Bidwell, Ga., 195 F. 430, 115 C.C.A. 332.

Ga.—Peppers v. Cauthen, 84 S.E. 477, 143 Ga. 229.

79. Va.—Citizens' Nat. Bank v. Ma-noni, 76 Va. 802.

80. Neb.—Flint v. Chaloupka, 99 N. W. 825, 72 Neb. 34, 117 Am.S.R. 771.

15 C.J. p 1441 note 12.

81. Md.—Harford Bank of Bel Air v. Havre de Grace Banking & Trust Co., 169 A. 315, 165 Md. 454.

82. U.S.—Freedman's Savings & Trust Co. v. Earle, D.C., 4 S.Ct. 226, 110 U.S. 710, 28 L.Ed. 801—Spell-man v. Sullivan, D.C.N.Y., 43 F.2d 762, affirmed, C.C.A., 61 F.2d 787 —In re Porter, D.C.Fla., 3 F.Supp. 582.

Cal.—Canfield v. Security-First Nat. Bank of Los Angeles, 87 P.2d 830, 846, citing *Corpus Juris*.

Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

N.J.—Zane v. Brown, 8 A.2d 367, 126 N.J.Eq. 200—Central-Penn Nat. Bank v. New Jersey Fidelity & Plate Glass Ins. Co., 182 A. 262, 119 N.J.Eq. 265—Sitley & Son v. Morris, 67 A. 789, 73 N.J.Eq. 197—Taylor v. Taylor, 45 A. 440, 59 N. J.Eq. 86.

denced by simple contract or by judgment,⁸³ and becomes entitled to the satisfaction of his judgment out of such property in preference to other creditors whose liens are subsequently acquired,⁸⁴ even though other creditors have judgments which were obtained prior to the time when the complaining creditor obtained his;⁸⁵ and to the fastening or preservation of such a lien on injunction⁸⁶ or attachment or levy on the property⁸⁷ is ordinarily necessary, although under some statutes it is held that the filing of a bill to reach property of a debtor to pay a claim not reduced to judgment creates

no lien unless accompanied by the issuance of an injunction.⁸⁸ A creditors' bill to reach book accounts of a debtor is effective as a lien without notice to each individual debtor.⁸⁹

The general principle above stated is not to be extended, however, beyond the reason of its existence;⁹⁰ it applies only to a technical creditors' bill,⁹¹ and only where it is sought to reach equitable assets;⁹² and in some jurisdictions no lien attaches upon the mere filing of the bill,⁹³ but it attaches on the appointment of a receiver;⁹⁴ and the lien is contingent on the recovery of a valid

N.Y.—Keating v. Hammerstein, 209 N.Y.S. 769, 125 Misc. 334.

Or.—Ruth v. Cox, 291 P. 371, 134 Or. 200.

Tenn.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356—Harris v. Beasley, 133 S.W. 1110, 123 Tenn. 605—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn. App. 128.

15 C.J. p 1441 note 13.

Seizure under creditors' bill fixes equitable lien.—Central Union Trust Co. v. Appalachian Corporation, D.C. Ga., 300 F. 397, affirmed, C.C.A., West v. Central Union Trust Co., 2 F.2d 585.

83. Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

84. U.S.—Freedman's Savings & Trust Co. v. Earle, D.C., 4 S.Ct. 226, 110 U.S. 710, 28 L.Ed. 301—Jenkins Petroleum Process Co. v. Credit Alliance Corporation, C.C.A. Okl., 83 F.2d 532.

Cal.—Canfield v. Security-First Nat. Bank of Los Angeles, 87 P.2d 830, 846, citing *Corpus Juris*.

Ill.—Todd v. Todd, 214 Ill.App. 282.

Miss.—Cahn v. Person, 56 Miss. 360—Fleming v. Grafton, 54 Miss. 79.

N.J.—Central-Penn Nat. Bank v. New Jersey Fidelity & Plate Glass Ins. Co., 182 A. 262, 119 N.J.Eq. 265—Stiley & Son v. Morris, 67 A. 789, 73 N.J.Eq. 197, 198.

Tenn.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn.App. 128.

15 C.J. p 1441 note 14.

Priority over execution lien

The fiction of the relation back of the lien of an execution to its tests will not be extended in favor of a judgment creditor who has failed to take out execution as soon as he legally might, so as to give his lien priority over that of a subsequent judgment creditor, who, in the meantime, and before registration of the judgment of the other, or issuance of execution thereon, has fixed his lien on a chose in action by filing a cred-

itors' bill under statute.—Stahlman v. Watson, Tenn.Ch.App., 39 S.W. 1055.

Priority over deed

Filing of bill by judgment creditor which described the property, alleged rendition of judgment, issuance of execution, nulla bona return, and existence of six hundred dollar note and deed of trust against property, foreclosure of which was threatened, fixed lien on property which was superior to interest created by deed filed two minutes after filing of bill.—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn.App. 128.

85. Tenn.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356.

15 C.J. p 1441 note 15.

86. Ky.—Scott v. McMillen, 1 Litt. 302, 311, 13 Am.D. 239.

Tenn.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356.

87. Tenn.—Hull v. Vaughn, 107 S.W. 2d 219, 171 Tenn. 642—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356.

15 C.J. p 1441 note 17.

Where plaintiff sought to reach resulting trust in favor of debtor or in land, legal title to which was in name of wife, and they were nonresidents and absconders, having no agent in state on whom service could be made, it was held that, in view of Code Civ.Proc. § 115 subd 2, failure of plaintiff to sue out writ of attachment did not defeat specific lien on debtor's interest acquired by filing complaint and notice of lis pendens.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259.

88. Mass.—Rioux v. Cronin, 109 N. E. 898, 222 Mass. 131.

Temporary injunction

(1) Plaintiff who, in suit under the statute to establish debt and to reach and apply in payment thereof shares of stock, obtained temporary injunction preventing assignment of stock by debtor, acquired equitable lien upon stock good as against other creditors, and entitled to recognition in

bankruptcy proceedings.—McCarthy v. Rogers, Mass., 3 N.E.2d 787.

(2) Where temporary order restraining debtor from transferring shares of stock was granted in creditor's suit to reach and apply shares to payment of debt, and debtor died before master's report was filed, creditor was not entitled to retain priority acquired over other creditors of debtor's insolvent estate, since priority would have been dissolved had claim been prosecuted by writ of summons and attachment or trustee writ at law.—McCarthy v. Rogers, supra.

89. Tenn.—Boorum, etc., Co. v. Armstrong, Ch.A., 37 S.W. 1095.

90. Neb.—Nebraska Nat. Bank v. Hallowell, 88 N.W. 556, 63 Neb. 309.

91. U.S.—Equitable Trust Co. of New York v. Connecticut Brass & Mfg. Corporation, C.C.A.Conn., 290 F. 712.

Petition by creditor for appointment of receiver of the debtor corporation, which did not allege that plaintiff was a judgment creditor, was not a technical creditors' bill, and therefore created no lien which would be superior to claims accruing against the corporation after the filing of the suit.—Equitable Trust Co. of New York v. Connecticut Brass & Mfg. Corporation, supra.

92. N.J.—Kinmonth v. White, 48 A. 952, 953, 61 N.J.Eq. 358.

"It is argued that the party who first files his bill is entitled to be first paid; that he thereby shows his diligence, and acquires the first lien on the assets sought to be reached by the aid of the court. I am unable to adopt that view. The rule invoked applies only to bills filed to reach equitable assets, by which is meant assets not subject to levy."—Kinmonth v. White, supra.

93. Mich.—Beith v. Porter, 78 N.W. 336, 119 Mich. 365, 75 Am.S.R. 402. 15 C.J. p 1442 note 20.

94. Mich.—Saginaw County Sav. Bank v. Duffield, 122 N.W. 186, 157 Mich. 522, 133 Am.S.R. 354.

judgment, and is liable to be defeated by anything that defeats the judgment or the right of complainant to appropriate the fund.⁹⁵ Such lien is in all cases subject to prior legal or equitable liens or equities of others on the property.⁹⁶ The filing of a general creditors' bill after execution has been returned *nulla bona* does not entitle plaintiff to priority over previous executions where plaintiff's bill does not discover assets or aver facts which have not been sought to be taken advantage of by other parties previous to the filing of the bill.⁹⁷

In case several bills are filed against the same debtor, the respective complainants take priorities according to the seniority of their bills;⁹⁸ but where an attorney obtains a judgment in the capacity of executor, and is at the same time attorney for other parties in a suit against the same defendant, and a few days later obtains a judgment for them, the court, in applying the proceeds of an equity of redemption, will recognize no priority but will make distribution *pari passu*.⁹⁹ It has also been held that, where a later creditor files a bill and gets the first execution set aside, the next execution thereto, if levied before equity acquired jurisdiction, will be paid in its proper order.¹ However, a creditor is not debarred from participation in property because he has taken a preferential lien which is declared void.² Where a judgment creditor resorts to equity to reach a supposed equitable interest of the judgment debtor in the proceeds of the sale of real estate, and seeks to reach an interest not of record, he is subject to prior assignments of such interest, although not disclosed by record.³ So, where one of two joint purchasers pays the purchase price and takes title in his own name, he is entitled to be satisfied for the money advanced out of the land as against a creditor of the other purchaser, bringing a suit to reach the latter's equitable interest.⁴

In a suit to enforce a judgment against lands held by the debtor subject to a purchase-money lien, it is error to decree payment of the purchase money before the time fixed in the contract of purchase and sale;⁵ and since a judgment creditor of the grantor, in a trust deed securing a loan payable in installments, proceeding to enforce his judgment lien in a court of equity, can subject only the equity of redemption, the court has no power to change the terms and conditions of the deed of trust as to the maturity of the loan.⁶ As against a person holding equitable mortgages and assignments of funds due a contractor, made and recorded previous to the making of the subcontract, and who prior to the subcontractor's suit in equity had filed the contractor's written assignment of the balance due, the subcontractor has no superior right to subject such funds to the payment on his own contract,⁷ unless the equitable mortgagee has become estopped by his course of dealing from claiming as against the subcontractor.⁸

What law governs. The distribution of assets seized by a receiver in a creditors' suit is controlled by the court appointing the receiver, and is governed as to preferences between creditors by the law of the place where the seizure takes place, which will prevail over the law of the debtor's domicile.⁹

Requisites of bill to create lien. In order that a lien may be acquired by the filing of a creditors' bill, the bill must point out specific property of the debtor sought to be reached.¹⁰

b. Where Fund Is in Court or Is Trust Fund for All Creditors

As a general rule, where the fund is in court or is recognized in equity as a trust fund for all creditors, no one judgment creditor can obtain a preference by first filing a creditors' bill.

95. U.S.—*In re Lesser*, D.C.N.Y., 100 F. 433.

96. S.C.—*McCormack v. Sherwood Lumber & Mfg. Co.*, 122 S.E. 493, 494, 128 S.C. 407.

15 C.J. p 1442 note 23.

"We know of . . . [no authority] that enables junior creditors to impair the security of a senior lien creditor by any proceedings in court or out of it."—*McCormack v. Sherwood Lumber & Mfg. Co.*, *supra*.

Assignment

Assignment to another of fixtures purchased, made before creditor's suit against assignor, gave assignee prior lien on fixtures.—*Kittinger Witt Co. v. Brookins*, 172 N.E. 297, 35 Ohio App. 266.

97. Ill.—*Royston v. John Spry Lumber Co.*, 85 Ill.App. 223, affirmed 56 N.E. 794, 184 Ill. 539.

Neb.—*Nebraska Nat. Bank v. Hallowell*, 83 N.W. 556, 63 Neb. 309. 15 C.J. p 1442 note 24.

98. Cal.—*Canfield v. Security-First Nat. Bank*, 87 P.2d 830.

Ill.—*Todd v. Todd*, 214 Ill.App. 282. 15 C.J. p 1442 note 25.

99. D.C.—*Poole v. Daly*, 12 D.C. 460.

1. Ill.—*Royston v. John Spry Lumber Co.*, 85 Ill.App. 223, affirmed 53 N.E. 794, 184 Ill. 539.

2. W.Va.—*Lawyer v. Barker*, 31 S. E. 964, 45 W.Va. 468—*Casto v. Greer*, 30 S.E. 100, 44 W.Va. 332.

3. Ill.—*Gilliam v. Waterhouse*, 93 Ill.App. 595.

4. Tenn.—*Sweat v. Henson*, 5 Humphr. 49.

5. W.Va.—*Dunfee v. Childs*, 30 S.E. 102, 45 W.Va. 155.

6. W.Va.—*Wise v. Taylor*, 29 S.E. 1003, 44 W.Va. 492.

7. Ark.—*Goyer Co. v. Williamson*, 154 S.W. 525, 107 Ark. 189.

8. Ark.—*Goyer Co. v. Williamson*, *supra*.

9. U.S.—*Nolte v. Hudson Nav. Co.*, C.C.A.N.Y., 31 F.2d 527.

10. Tenn.—*Boorum & Peas Co. v. Armstrong, Ch.A.*, 37 S.W. 1095. 15 C.J. p 1443 note 40.

The rule that a creditor who first files a creditors' bill to reach property which cannot be seized on execution, acquires a prior lien, see *supra* § 84 a, has been held applicable where the fund uncovered is a fund which has been paid into court.¹¹ On the other hand it, has been held that where the fund is in court, no one judgment creditor can obtain any preference over others by first filing a bill.¹² Where an insolvent debtor's property has come into the custody of the court under a creditors' bill, to be distributed according to equitable principles, the rights of all parties are fixed as of that time;¹³ and where, after the appointment of a receiver on a creditors' bill, to conserve the property of an alleged solvent debtor, it develops that the debtor was insolvent at the time of the appointment, the rights of creditors are fixed as of that date, and a creditor having a claim in suit, but not adjudicated, cannot obtain a preference by proceeding to judgment and asserting a lien.¹⁴ It has been held, however, that the filing of a creditors' bill gives the creditor a lien on assets of the debtor in the hands of a receiver appointed in a prior suit brought by another creditor, superior to that of all judgment creditors except the one who brought the prior suit.¹⁵ Where the property or fund is recognized in equity as a trust fund for all creditors, no one creditor can, by filing a bill to obtain satisfaction of his debt out of it, obtain a preference of payment out of such fund over other creditors, but the fund is to be distributed

pari passu among all creditors.¹⁶

c. Where Bill Is Brought in Behalf of All Creditors

Ordinarily, where a bill is brought by a creditor in behalf of all creditors who may come in, complainant obtains no preference in the distribution of the property or fund.

Where a bill is brought by a creditor on behalf of all other creditors who may come in, complainant obtains no preference over others who come in in due time, and the property will be administered so as to be distributed proportionately among all¹⁷ without, however, displacing the legal lien of any creditor.¹⁸ It has been held, however, that, where a bill is filed by a creditor for the benefit of all creditors who come in, those who come in only after decree do not stand on a parity with those who file the bill or come in before trial, but the latter have priority.¹⁹

§ 85. — Time of Attachment of Lien

The creditors' lien attaches on the service of process, or on the filing of the bill, or on the commencement of the suit and the issuance of process. An Intervener acquires a lien from the date of intervention.

The lien obtained on the equitable assets of a debtor by a creditors' suit attaches thereto from the time of service of process;²⁰ or, as stated in some of the cases, on the filing of the bill²¹ or the institution or commencement of suit²² and issuance

11. Tenn.—Scott County Nat. Bank v. Robinson, 226 S.W. 218, 143 Tenn. 356.

12. Ill.—Binns v. La Forge, 61 N.E. 382, 191 Ill. 598.

15 C.J. p 1442 note 34.

13. U.S.—McCormick v. Puritan Coal Mining Co., C.C.A.Pa., 28 F.2d 331. certiorari denied Puritan Coal Mining Co. v. McCormick, 49 S.Ct. 176, 278 U.S. 651, 73 L.Ed. 562.

14. U.S.—E. C. Horn Sons v. Hoffman, C.C.A.Pa., 24 F.2d 162.

15. Ill.—Russell v. Chicago Trust, etc., Bank, 29 N.E. 37, 139 Ill. 538, 17 L.R.A. 345.

16. Ark.—Senter v. Williams, 32 S.W. 490, 61 Ark. 189, 54 Am.S.R. 200. 15 C.J. p 1442 note 36.

17. Neb.—Nebraska Nat. Bank of Omaha v. Hollowell, 88 N.W. 556, 63 Neb. 309.

15 C.J. p 1443 note 37.

In District of Columbia

(1) The rule stated in the text has been affirmed.—Arlington Brewing Co. v. Wyvill, 35 App.D.C. 589.

(2) But it has also been held that where, on a bill filed by a judgment

creditor in behalf of himself and others who may afterward come in, an equity of redemption is decreed to be sold, the court will apply the proceeds, after the satisfaction of the trust, to the payment of the judgments according to their priority in point of time.—Yates v. Seitz, 7 D.C. 11.

18. Md.—Tuck v. Calvert, 33 Md. 209.

N.Y.—Purdy v. Doyle, 1 Paige 588.

19. Ark.—Senter v. Williams, 32 S.W. 490, 61 Ark. 189, 54 Am.S.R. 200.

Ky.—Gibbons v. Germantown, etc., Crossroads Turnp. Road Co., 14 Bush 389.

20. Ark.—Plummer v. Marianna School Dist. No. 1, 118 S.W. 1011, 90 Ark. 236, 134 Am.S.R. 28, 17 Ann.Cas. 508.

15 C.J. p 1443 note 41.

On filing of bill and service of process, plaintiff's lien attaches.

U.S.—Metcalf Bros. & Co. v. Barker, N.Y., 28 S.Ct. 67, 187 U.S. 165, 47 L.Ed. 122.—In re Porter, D.C.Fla., 3 F.Supp. 582.

Colo.—Shuck v. Quackenbush, 227 P. 1041, 75 Colo. 592, 38 A.L.R. 259. N.J.—Central-Penn Nat. Bank v. New Jersey Fidelity & Plate Glass Ins. Co., 182 A. 262, 119 N.J.Eq. 265. Or.—Ruth v. Cox, 291 P. 371, 134 Or. 200.

Institution of two suits on same day

(1) Where two or more bills are filed and the subpoenas are served on the same day, the creditor who has a subpoena served first is entitled to priority, and the court will look to the hour and minute.—Safford v. Douglas, 4 Edw., N.Y., 537.

(2) The rule is otherwise in Missouri.—Judson v. Walker, 55 S.W. 1083, 155 Mo. 166.

21. U.S.—Freedman's Savings & Trust Co. v. Earle, D.C., 4 S.Ct. 226, 110 U.S. 710, 28 L.Ed. 301.—Jenkins Petroleum Process Co. v. Credit Alliance Corporation, C.C.A. Okl., 83 F.2d 532. Tenn.—Clevenger v. Rains, 73 S.W.2d 1114, 18 Tenn.App. 128.

15 C.J. p 1443 note 42.

22. N.Y.—Roberts v. Albany, etc., R. Co., 25 Barb. 662.—Storm v. Waddell, 2 Sandf.Ch. 494, 3 N.Y.Leg. Obs. 367.

of process.²³ The lien does not relate back to the date of the judgment sought to be enforced, so as to affect assignments between the date of the judgment and the time of the filing of the bill;²⁴ nor does it relate back to proceedings supplemental to execution, where no receiver was appointed therein.²⁵ Where an original creditors' bill is insufficient to fix a lien on the debtor's property, an amendment supplying the defect establishes the lien only from the date thereof, and does not relate back to the date of the original bill.²⁶ An intervener is entitled to a lien on the fund sought to be reached from the date of the intervention.²⁷

§ 86. — Property to Which Lien Attaches

The lien attaches only to the property owned by the debtor at the time the suit was commenced. It does not attach to property which is subject to execution, until the appointment of a receiver, or until an order restraining creditors from pursuing their remedy at law.

The lien of a creditor obtained by the filing of the bill attaches only to property of the debtor owned at the time of the commencement of the suit.²⁸ A supplemental bill is necessary to obtain a lien on after-acquired property, as stated *supra* § 67. The lien does not attach to property of the debtor which is subject to execution,²⁹ until the entry of an order appointing a receiver,³⁰ or until an order enjoining creditors from pursuing their remedy at law.³¹ However, the lien on the mortgagor's equity acquired by the filing of a bill by a creditor to foreclose the mortgage and reach the surplus, if any, expands with the enlargement of the mortgagor's interest by subsequent payments,

and attaches to the entire land on satisfaction of the mortgage.³²

§ 87. — Duration of Lien

The lien acquired by bringing a creditors' suit ordinarily is not lost by the expiration of the lien of the judgment on which the suit is based, by laches in the prosecution of the suit, by a subsequent transfer by the debtor, nor by his death.

The lien acquired by the commencement of a creditors' suit is not lost by the expiration of the lien of the judgment on which the bill is based,³³ although some decisions hold that if complainant's judgment expires pending suit there is no *lis pendens*.³⁴ Neither is such lien lost by laches in the prosecution of the bill,³⁵ although where a creditors' bill which has been dismissed for want of prosecution is afterward reinstated, it cannot, by a *nunc pro tunc* order, be given effect during the period which has elapsed since the dismissal.³⁶ The lien is not affected by any subsequent transfer or assignment made by the debtor,³⁷ nor by his death,³⁸ even before the appointment of a receiver.³⁹ Whether the death of the debtor abates a creditors' suit is discussed in Abatement and Revival § 151. The effect of an adjudication of the debtor's bankruptcy on the lien acquired by the filing of a creditor's bill is discussed in Bankruptcy § 244 a; and the effect of the debtor's discharge in bankruptcy or liens acquired through legal proceedings generally is discussed in Bankruptcy § 582 b (6), and applied to a creditor's suit in note 45 of that section.

CREDITRIX. A female creditor.¹

CREDO. Latin, literally, "I believe"; hence a

creed, or set of opinions professed or adhered to.²

CREED. The word "creed" has a definite meaning

23. Ark.—Plummer v. Marianna School Dist. No. 1, 118 S.W. 1011, 90 Ark. 236, 134 Am.S.R. 28, 17 Ann.Cas. 508.

15 C.J. p 1443 note 44.

24. N.Y.—Grosvenor v. Allen, 9 Paige 74.

25. N.Y.—Edmonston v. McLoud, 16 N.Y. 543—Ballou v. Boland, 14 Hun 355.

26. Tenn.—Boorum, etc., Co. v. Armstrong, Ch.A., 37 S.W. 1095.

27. Neb.—Omaha Merchants' Nat. Bank v. McDonald, 88 N.W. 492, 89 N.W. 770, 63 Neb. 363.

28. Ill.—Sioux City First Nat. Bank v. Gage, 93 Ill. 172.

N.Y.—Eagar v. Price, 2 Paige 333.

29. U.S.—Cinchfield Fuel Co. v. Titus, S.C., 226 F. 574, 141 C.C.A. 330. 15 C.J. p 1443 note 51.

30. U.S.—Cinchfield Fuel Co. v. Titus, *supra*.
N.Y.—In re Gies Lithographic Co., 40 N.Y.S. 146, 7 App.Div. 550. 15 C.J. p 1443 note 52.

31. U.S.—Cinchfield Fuel Co. v. Titus, S.C., 226 F. 574, 141 C.C.A. 330.

32. Tenn.—Bridges v. Cooper, 39 S. W. 720, 98 Tenn. 381.

33. Ill.—Davidson v. Burke, 32 N.E. 514, 143 Ill. 139, 36 Am.S.R. 367.
Or.—Alexander v. Munro, 101 P. 903, 54 Or. 500, 135 Am.S.R. 840, modified on another ground 103 P. 514, 54 Or. 500, 135 Am.S.R. 840.

15 C.J. p 1444 note 56.

34. Miss.—McCutchen v. Miller, 31 Miss. 65.

35. D.C.—Young v. Kelly, 3 App.D.C. 296.

36. Ill.—Thomas v. Van Meter, 45 N. E. 405, 164 Ill. 304, reversing 62 Ill.App. 309.

37. Ohio.—Citizens Savings & Trust Co. v. Burkhardt, 17 Ohio N.P., N.S., 401. 15 C.J. p 1444 note 59.

38. Ill.—Sioux City First Nat. Bank v. Gage, 93 Ill. 172. 15 C.J. p 1444 note 60.

39. Mich.—Saginaw County Sav. Bank v. Duffield, 122 N.W. 136, 157 Mich. 522, 133 Am.S.R. 354. 15 C.J. p 1444 note 61.

1. Black L.D.

2. Webster New Ind.D. See also Creed post.

as confession or articles of faith, a covenant, what a man believes, or the common belief of a sect;³ formal declaration of religious belief.⁴ As a condition to membership in a religious society see the C.J.S. title Religious Societies § 11, also 54 C.J. p 16 notes 46, 47.

CREEK.

Body of Water

A small bay, inlet, or cove; but more generally a small river;⁵ a small stream, less than a river.⁶ As a mining term see the C.J.S. title Mines and Minerals § 3, also 15 C.J. p 1453 note 11 [b].

Phrases: "River, creek, bayou, or water course;"⁷ also "Creeks of Ports" and "Creeks of the Sea;"⁸ and also, adjectively, "creek claim" see the C.J.S. title Mines and Minerals § 3, also 15 C.J. p 1453 notes 12, 13.

Indian Name

As an Indian name see the C.J.S. title Indians § 9, also 31 C.J. p 485 note 6.

Creek nation. As one of the five so called civilized tribes of Indians, also referred to as the Muscogee nation, see the C.J.S. title Indians § 9, also 31 C.J. p 485 note 6 [L], and 44 C.J. p 1498 note 32.

Other phrases: "Creek agreement" see the C.J.S. title Indians § 24, also 31 C.J. p 495 note 64, "Creek descendant of a Creek citizen,"⁹ and "Creek descendants;"¹⁰ also "treaty with the Creeks" see the C.J.S. title Indians § 24, also 31 C.J. p 494 note 62 [a] (8).

CREEPING. As a technical term describing an unexpected and untoward movement of a steam locomotive see the C.J.S. title Railroads § 1.

CREMATION. The act or practice of reducing a corpse to ashes by means of fire.¹¹

CREMATORY. Defined by Webster International Dictionary as meaning a furnace for cremating, as corpses or refuse; also a building containing such a furnace.¹²

CREME DE MENTHE. The equivalent of peppermint cordial and the commonly known name of that liqueur, see Cordial 18 C.J.S. p 282 note 32.

CREMENTUM COMITATUS. The increase of a county.¹³

CREOLE. Defined generally by Webster International Dictionary as a white person descended from the French or Spanish settlers of Louisiana or the Gulf states, and preserving their characteristic speech and culture; and judicially, in a particular connection, as meaning a person of mixed African and European blood, and, as applied to a female, a negress or mulatto.¹⁴

CREOLIN. A preparation of creosol and resin soap used as a deodorant and disinfectant.¹⁵

CREOSOTE. A coal-tar derivative containing certain harmful acids with an affinity for chlorine;¹⁶ a product of coal tar by fractional distillation. While creosote may be termed an oil, still it is not, strictly speaking, a distilled oil, but a dead oil.¹⁷

3. N.H.—Hale v. Everett, 53 N.H. 9, 92, 16 Am.R. 82.
15 C.J. p 1452 note 4.

4. Ind.—Hammer v. State, 89 N.E. 850, 852, 173 Ind. 199, 140 Am.S.R. 248, 24 L.R.A.,N.S., 795, 21 Ann. Cas. 1034.

5. N.Y.—French v. Carhart, 1 N.Y. 96, 107.
15 C.J. 1452 note 9.

6. Black L.D.

7. "Navigable water-course" equivalent
U.S.—Surgett v. Laprice, La., 8 How. 48, 69, 12 L.Ed. 982.
See also the C.J.S. title Navigable Waters § 1, and 45 C.J. p 404 notes 1-9.

8. "A Creek is of two kinds, viz: Creeks of the Sea and Creeks of Ports. The former sort are such little inlets of the Sea, whether within the precinct or extent of a Port or without, which are narrow little passages, and have Shore of either side of them. Creeks of Ports,

are by a kind of civil denomination such. They are such that, though possibly for their extent and situation they might be Ports yet, they are either members of, or dependent upon, other Ports."—Stroud Jud.D., quoting Hale de Portibus Maris ch. 2.

9. Okl.—Grease v. McNac, 225 P. 524, 525, 102 Okl. 44.

10. U.S.—Carter Oil Co. v. Scott, D. C.Okl., 12 F.2d 780, 781.

11. Black L.D.
15 C.J. p 1453 note 15.

12. See 15 C.J. p 1453 notes 16, 17. See also Cemeteries § 2 note 23, § 19 note 12.

In garbage plant

In a crematory, "the ordinary garbage of a city, including half-decayed meat, dead animals, and the like, are subjected to a burning process, and the residue, as ashes, is used, in connection with the night soil collections and ordinary stable waste, to make a fertilizer."—Laird

v. Atlantic Coast Sanitary Co., 67 A. 387, 388, 73 N.J.Eq. 49.

13. Black L.D.

"The sheriffs of counties anciently answered in their accounts for the improvement of the king's rents, above the 'viscontiel' rents, under this title."—Black L.D.

14. Ala.—Parker v. State, 23 So. 664, 665, 118 Ala. 655.

15. Miss.—Breland v. State, 178 So. 817, 818, 180 Miss. 830.

Creolin-Pearson

A preparation produced from coal tar, and within the tariff classification "preparations of coal tar, not medicinal."—Merck v. U. S., C.C.N. Y., 147 F. 896.

16. Presence of creosote in water renders "the water poisonous for human use."—Rogers v. Bond Bros., 130 S.W.2d 22, 23, 279 Ky. 239.

17. U.S.—In re Southern Pac. Co., C. Cal., 82 F. 311, 312, 313.

In a particular connection, it has been referred to as "wood tar oil."¹⁸

Creosote oil or Dead oil. A product of coal tar, known commercially as "carbolineum" or "carbolineum Avenarius," the last being the name of its proprietor; also described as not being a distilled oil.¹⁹

Other phrases: "Liquid creosote,"²⁰ and "soluble creosote."²¹

CREPARE OCULUM. In Saxon law, to put out an eye; the act formerly had a pecuniary punishment of fifty shillings annexed to it.²²

CREPE PAPER. Paper which has been passed through a creping machine and bearing a resemblance to the silk fabric from which it derives its name.²³

CREPITUS. A surgical term used to describe the grating of the ends of the bones of a fracture.²⁴

CREPUSCULUM. Twilight; such light as exists immediately before the rising of the sun or directly after its setting. In the law of burglary, this term means the presence of sufficient light to discern the face of a man.²⁵

CRESCENDO RENTAL. A term used in the leasing of property, meaning a rental which, owing to certain well-known and universal laws, applicable to growing localities, provides for a gradual increase of the amount of rent at fixed periods during the term of the lease.²⁶

CRESCENTE MALITIA, CRESCERE DEBET ET PCENA.²⁷

CREST. A term used in heraldry, signifying the devices set over a coat of arms.²⁸

CRESYLIC. A word descriptive of the nature and quality of a compound made of soap and cresylic acid.²⁹

Cresylic acid. A product of coal tar, well known in commerce and in manufacture.³⁰

CRETINISM. See the C.J.S. title Insane Persons § 1, also 32 C.J. p 603 note 21.

CRETINUS. In old records, a sudden stream or torrent; a rising or inundation.³¹

CRETIO. In the civil law, a certain number of days allowed an heir to deliberate whether he would take an inheritance or not.³²

CREVICE. As a mining term see the C.J.S. title Mines and Minerals § 3, also 15 C.J. p 1453 notes 36, 37.

CREW.

In General

A collective noun,³³ having several well known significations.³⁴ In its general and popular sense, it is equivalent to company; a company of people associated for any purpose.³⁵

As used in "full-crew" statutes see the C.J.S. title Railroads § 401, also 51 C.J. p 982 note 31—p 985 note 85.

In Navigation

In maritime law, and in a general sense, the ship's company, embracing all the officers, as well as the common seamen.³⁶ The term, however, sometimes:

18. Tex.—Halbert v. Texas Tie & Lumber Preserving Co., Civ.App., 107 S.W. 592.

19. U.S.—Downing v. U. S., C.C.N.Y., 123 F. 1000, 1001—In re Southern Pac. Co., C.C.Cal., 82 F. 311, 313.

20. U.S.—In re Southern Pac. Co., supra.

21. Product described

A substance produced by various additional processes and ingredients from coal-tar dead oil, which by such additions it has ceased to be.—Schoellkopf v. U. S., C.C.N.Y., 124 F. 83.

22. Black L.D.

See also the C.J.S. title Mayhem § 3, and 40 C.J. p 5 note 83 [f] (1).

23. U.S.—Fiegel v. U. S., N.Y., 167 F. 537, 538, 93 C.C.A. 215.

24. U.S.—The Kenilworth, D.C.Pa., 137 F. 1008, 1005.

25. Black L.D., citing 4 Blackstone Comm. p 224.

See also Burglary § 14.

26. N.Y.—Sohmer Co. v. C. H. Wellington Inv. Co., 118 N.Y.S. 450, 452, 63 Misc. 439.

27. A maxim meaning "Vice increasing, punishment ought also to increase."—Black L.D., citing 2 Coke Inst p 479.

28. Black L.D.

29. U.S.—Carbolic Soap Co. v. Thompson, C.C.Tex., 25 F. 625, 626.

30. Other designations

"Whether among chemists and scientific people this distinctive cresylic acid is regarded as only impure carbolic acid, or crude carbolic acid, or whether it should be called 'cresol,' 'cresylic alcohol,' 'hydrate of cresyl,' 'hydrate of oxide of cresyl,' 'cresylic acid,' or 'cresylol,' is immaterial."—Carbolic Soap Co. v. Thompson, supra.

31. Black L.D.

32. Black L.D.

33. U.S.—De Wald v. Baltimore & O. R. Co., C.C.A.Md., 71 F.2d 810, 813—Diomedes v. Lowe, D.C.N.Y., 14 F.Supp. 380, 382.

34. U.S.—U. S. v. Winn, C.C.Mass., 28 F.Cas.No.16,740, 3 Sumn. 209, 213.

35. U.S.—U. S. v. Winn, supra.

36. U.S.—Taylor v. McManigal, C.C.A.Mich., 89 F.2d 583, 585—De Wald v. Baltimore & O. R. Co., C.C.A.Md., 71 F.2d 810, 813—Seneca Washed Gravel Corporation v. McManigal, C.C.A.N.Y., 65 F.2d 779, 780—The Herdis, D.C.Md., 22 F.2d 304, 305—Hunt v. U. S., D.C.N.Y., 17 F.Supp. 578, 583—Baltimore & O. R. Co. v. Parker, D.C.Md., 4 F.Supp. 815, 817.

15 C.J. p 1454 notes 42, 43.

includes the officers and the common seamen, excluding the master; and sometimes includes the common seamen only, excluding the master and the officers.³⁷ When the crew of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board,³⁸ and, in a particular connection, the term has been defined as meaning that body of men who in the common parlance make up the ship's complement, those who regularly or ordinarily are engaged in seafaring and navigation, as distinguished from those whose tasks are of such a nature that they are independent of navigation in their scope, such as tasks which might as well have their background on shore, or at the dock, such as watchmen, etc.³⁹ The word implies a definite and permanent connection with the vessel, an obligation to forward her enterprise and to protect her in emergency, and a right to look to her and her earnings for wages; also the word implies subjection to the commands of the master, if the vessel has a

master.⁴⁰ Under particular circumstances, "crew" has been held to include various classes of persons;⁴¹ but not to include others.⁴²

As used specifically in various branches of the law, see *inter alia*, such particular C.J.S. titles as Collision § 161 b; Salvage § 12, also 56 C.J. p 13 note 12, §§ 42, 43, also 56 C.J. p 36 note 74-p 41 note 77, §§ 136, 137, also 56 C.J. p 99 note 25-p 104 note 19; Seamen § 1, also 56 C.J. p 922 note 2-p 924 note 82, § 55, also 56 C.J. p 956 note 13-p 957 note 24, §§ 222, 223, also 56 C.J. p 1117 note 44-p 1119 note 80, § 260, also 56 C.J. p 1143 note 5-p 1144 note 40, § 261, also 56 C.J. p 1144 note 42-p 1146 note 90; and Shipping § 243, also 58 C.J. p 650 note 20-p 651 note 33.

Phrases: "Any one of the crew of an American vessel,"⁴³ "crew of a ship,"⁴⁴ "crew of a vessel,"⁴⁵ "crew of the engineer's department,"⁴⁶ "crew of transport,"⁴⁷ "member of a crew,"⁴⁸ "member of a crew of any vessel,"⁴⁹ and "the crew, if required, to be transferred to any other ship in the same

As referring to one person only

"It may be assumed, arguendo, that one may be the crew 'the ship's company,' albeit he was its solitary member."—*Diomedes v. Lowe*, D.C.N.Y., 14 F.Supp. 380, 383.

"Ship's company" may constitute the crew.—*U. S. v. Winn*, C.C.Mass., 28 F.Cas.No.16,740, 3 Sumn. 209, 215.

37. U.S.—*Warner v. Goltra*, Mo., 55 S.Ct. 46, 47, 293 U.S. 155, 79 L.Ed. 254.

15 C.J. p 1454 notes 44, 45.

38. U.S.—*Diomedes v. Lowe*, C.C.A.N.Y., 87 F.2d 296, 298—*Taylor v. McManigal*, D.C.Mich., 14 F.Supp. 419, 421—*The Buena Ventura*, D.C.Mass., 243 F. 797, 799.

15 C.J. p 1454 note 46.

39. U.S.—*South Chicago Coal & Dock Co. v. Bassett*, C.C.A.Ill., 104 F.2d 522, 528.

40. U.S.—*Maryland Casualty Co. v. Lawson*, C.C.A.Fla., 94 F.2d 190, 192.

41. Held included

(1) Cooks and engineers, as well as sailors.—*Maryland Casualty Co. v. Lawson*, supra—*The D. C. Fogel*, C.C.La., 41 F. 154, 155—15 C.J. p 1454 note 46 [b].

(2) Firemen.—*In re Meyer*, D.C.Cal., 74 F.2d 881, 892.

(3) Mates, generally.—*U. S. v. Winn*, C.C.Mass., 28 F.Cas.No.16,740, 3 Sumn. 209.

(4) The mate even though temporarily put at work ordinarily performed by others not members of the

crew.—*Maryland Casualty Co. v. Lawson*, supra.

42. Held not included

(1) A bookkeeper of a steamboat who performs such service wholly on shore and renders no service on board the boat.—*Dalzell v. The Daniel Kaine*, D.C.Pa., 81 F. 746, 747.

(2) A laborer whose job was to prod coal down a runway from one ship to another.—*South Chicago Coal & Dock Co. v. Bassett*, C.C.A.Ill., 104 F.2d 522, 528.

(3) Longshoremen who load and unload a vessel under temporary local employment.—*Maryland Casualty Co. v. Lawson*, C.C.A.Fla., 94 F.2d 190, 192.

(4) Mechanics who come aboard the vessel to repair or clean or paint her.—*Maryland Casualty Co. v. Lawson*, supra.

(5) One loading a vessel which was being used for storage only, and not for navigation.—*Hawn v. American S. S. Co.*, D.C.N.Y., 27 F.Supp. 410, 411.

(6) Passengers.—*U. S. v. Libby*, D.C.Me., 26 F.Cas.No.15,596, 1 Hask. 271.

(7) Repairmen on a vessel to put her in condition for navigation at a later date.—*Taylor v. McManigal*, D.C.Mich., 14 F.Supp. 419, 420.

(8) The master, who is generally held to be rather in the nature of an agent of the owner than a seaman.—*The Marie*, D.C.Or., 49 F. 286, 287—*U. S. v. Winn*, C.C.Mass., 28 F.Cas.No.16,740, 3 Sumn. 209.

43. U.S.—*U. S. v. Huff*, C.C.Tenn., 18 F. 630, 632.

44. In the French service the crew of a ship ("Equipage," French) comprehends the officers, sailors, seamen, marines, ordinary men, servants, and boys, but is exclusive of the captains and Lieutenants.—*U. S. v. Winn*, C.C.Mass., 28 F.Cas.No.16,740, 3 Sumn. 209, 215.

45. U.S.—*Maryland Casualty Co. v. Lawson*, C.C.A.Fla., 94 F.2d 190, 192.

46. U.S.—*Taylor v. McManigal*, D.C.Mich., 14 F.Supp. 419, 420.

47. Crew of transport are civilian employees.—*Civilian Employees Dig. Op. Judge Adv.-Gen.* p 230.

48. U.S.—*The Falco*, C.C.A.N.Y., 20 F.2d 362, 363.

Implies a complete personnel

"While it might be held in some cases that one is a member of a crew before the personnel of the crew is entirely complete . . . the most that can be stated with accuracy is that deceased expected and intended to become a member of the crew when formed."—*Taylor v. McManigal*, D.C.Mich., 14 F.Supp. 419, 420.

Only one on board

"One who is the sole person employed upon a scow cannot properly be considered a 'member of a crew' of a vessel."—*Diomedes v. Lowe*, D.C.N.Y., 14 F.Supp. 380, 382. "Stowaway" not included see the C.J.S. title Seamen § 260, also 56 C.J. p 1143 note 9.

49. U.S.—*Baltimore & O. R. Co. v. Parker*, D.C.Md., 4 F.Supp. 815, 817.

employ;"⁵⁰ also, adjectively, "crew list,"⁵¹ and "crew space" see the C.J.S. title Seamen § 10, also 56 C.J. p 929 note 71—p 930 note 73.

CRIADO. In Spanish law, servant.⁵²

CRIB. The word has various definitions, as a frame for a child's bed; a small habitation; the manger of a stable; a bin;⁵³ a box or bin, or similar wooden structure, for storing grain, salt, etc., as a crib for corn or oats.⁵⁴ As a structure for storing grain or corn, it is not to be included in the term "barn" see Barn 9 C.J.S. p 1544 note 16, but is distinguished therefrom.⁵⁵

As a term used in logging see the C.J.S. title Logs and Logging § 1, also 15 C.J. p 1454 notes 55, 56.

Phrases: "Corn crib" see Corn 18 C.J.S. p 283 notes 65-67, and "crib of corn."⁵⁶

CRIBS. A term used in the meat trade, meaning clear ribs.⁵⁷

CRICKET. A saltatorial gryllid orthopterous insect of which there are several species, the most common being the house cricket, *gryllus domesticus*.⁵⁸

Phrases: "Ground cricket," "snowy tree cricket," and "striped tree cricket."⁵⁹

CRIER. An officer of a court, who makes proclamations.⁶⁰ Also an auctioneer.⁶¹

CRIEZ LA PEEZ. Rehearse the concord, or peace.⁶²

CRIM. CON. See Abbreviations 1 C.J.S. p 276 note 5.

CRIME. See the C.J.S. title Criminal Law § 2.

Phrases: "Capital crime" see Capital 12 C.J.S. p 1129 notes 38-48, "continuous crime" see Continuous 17 C.J.S. p 285 note 90, "conviction of a capital crime" see Capital 12 C.J.S. p 1129 note 49, "crime against nature" see the C.J.S. title Sodomy § 1, also 58 C.J. p 788 note 4, "crime against the law of nations" see the C.J.S. title Criminal Law § 1, "crime against the United States,"⁶³ "crime arising under the revenue law" see the C.J.S. title Criminal Law § 1, and generally the C.J.S. title Customs Duties § 245, also 17 C.J. p 665 notes 87-91, "crime by one spouse against the other,"⁶⁴ "crime committed by one against the other,"⁶⁵ "crime involving moral turpitude,"⁶⁶ "crime of drunkenness,"⁶⁷ "crime of

50. Eng.—*Frazer v. Hatton*, 2 C.B. N.S. 512, 526, 89 E.C.L. 512, 140 Reprint 516.

51. **Defined**

In maritime law, a list of the crew of a vessel; one of a ship's papers. —Black L.D.

52. *Escriche Diccionario*.

53. Fla.—*Wood v. State*, 18 Fla. 967, 969.

54. Ala.—*Jackson v. State*, 40 So. 979, 980, 145 Ala. 54. 15 C.J. p 1454 note 54 [a].

55. Ala.—*Jackson v. State*, 40 So. 979, 980, 145 Ala. 54.

N.C.—*State v. Laughlin*, 53 N.C. 455, 458.

56. **Indicates quantity**

An expression used to indicate an indefinite quantity of corn, but not necessarily a crib full.—*Masterson v. Goodlett*, 46 Tex. 402, 406.

57. Tenn.—*Pepper v. Western Union Tel. Co.*, 11 S.W. 783. 87 Tenn. 554, 556, 10 Am.S.R. 699, 4 L.R.A. 660.

58. **Leaping characteristic**

"Whatever the variety, the cricket's most conspicuous means of locomotion is an habitual leaping, which at times is so frequent as to suggest dancing. Hence, the term 'saltatorial.'"—*Ben Har Holding Corporation v. Fox*, 263 N.Y.S. 695, 699, 700, 702, 703, 147 Misc. 300.

Not vermin or pest

It has been held that the cricket is

not to be legally classified among the various types of creatures known to be noxious or mischievous, and commonly referred to as vermin or pests. —*Ben Har Holding Corporation v. Fox*, supra.

59. N.Y.—*Ben Har Holding Corporation v. Fox*, supra.

60. Black L.D.

"Bailliff" distinguished see *Bailliff* 8 C.J.S. p 219 note 12.

Duties of crier

"His principal duties are to announce the opening of the court and its adjournment and the fact that certain special matters are about to be transacted, to announce the admission of persons to the bar, to call the names of jurors, witnesses, and parties, to announce that a witness has been sworn, to proclaim silence when so directed, and generally to make such proclamations of a public nature as the judges order."—Black L.D.

61. *Burrill L.D.*

62. Black L.D.

In levying fines

"A phrase used in the ancient proceedings for levying fines. It was the form of words by which the justice before whom the parties appeared directed the serjeant or countor in attendance to recite or read aloud the concord or agreement between the parties, as to the lands intended to be conveyed."—Black L.D.

63. U.S.—*In re Parker*, D.C.Cal., 299 F. 1006, 1010.

D.C.—*Story v. Rives*, 97 F.2d 182, 185, 68 App.D.C. 325—*Arnstein v. U. S.*, 54 App.D.C. 199, 296 F. 946, 948.

64. Colo.—*O'Loughlin v. People*, 10 P.2d 543, 546, 90 Colo. 368.

Okl.—*Lacey v. State*, 224 P. 994, 995, 27 Okl.Cr. 42.

65. S.D.—*State v. Goff*, 264 N.W. 665, 666, 64 S.D. 80.

66. U.S.—*U. S. ex rel. Volpe v. Smith*, Ill., 53 S.Ct. 665, 666, 289 U.S. 422, 77 L.Ed. 1298—*Bufalino v. Irvine*, C.C.A.Kan., 103 F.2d 830, 832—*Whitty v. Weedon*, C.C.A. Wash., 68 F.2d 127, 130—*U. S. ex rel. Robinson v. Day*, C.C.A.N.Y., 51 F.2d 1022—*U. S. ex rel. Rizzio v. Kenney*, D.C.Conn., 50 F.2d 418, 419—*Ng 'Sui Wing v. U. S.*, C.C.A. Ill., 46 F.2d 755, 756—*Ex parte Wilson*, D.C.Cal., 35 F.2d 537, 538—*U. S. ex rel. Squillari v. Day*, C.C.A.N.J., 35 F.2d 284, 286—*U. S. ex rel. Guarino v. Uhl*, D.C.N.Y., 27 F.Supp. 135, 136—*In re Schiano Di Cola*, D.C.R.I., 7 F.Supp. 194, 195.

67. **Defined**

Drunkenness by the voluntary use of intoxicating liquor.—*Commonwealth v. Coughlin*, 123 Mass. 436, 437.

public nature,"⁶⁸ "crime within this state,"⁶⁹ "infamous crime" see the C.J.S. title Criminal Law § 3, and "quasi crime" see the C.J.S. title Criminal Law § 1, and also "common-law crimes" see the C.J.S. title Criminal Law §§ 18-22, "crimes mala in se" and "crimes mala prohibita" see the C.J.S. title Criminal Law § 8, "crimes or offenses,"⁷⁰ "except for capital crimes" see Capital 12 C.J.S. p 1130 note 51, "high crimes and misdemeanors" see the C.J.S. title Criminal Law § 1, and "statutory crimes" see the C.J.S. title Criminal Law §§ 23-28.

CRIMEN. The Latin noun "crimen, criminis" means crime; also an accusation or charge of crime.⁷¹

The Spanish word "crimen" also means, in Spanish law, crime, although a more common term is "delito." A distinction, however, is drawn between the two in this, that "delito" is general and includes all infractions of the penal laws, while "crimen" refers particularly to the most serious ones and

those which are punished by afflictive or infamous penalties.⁷²

CRIMEN EX POST FACTO NON DILUITUR.⁷³

CRIMEN LÆSÆ MAJESTATIS OMNIA ALIA CRIMINA EXCEDIT QUOAD PÆNAM.⁷⁴

CRIMEN OMNIA EX SE NATA VITIAT.⁷⁵

CRIMEN TRAHIT PERSONAM.⁷⁶

CRIMEN VEL PÆNA PATERNA NULLAM MACULAM FILIO INFLIGERE POTEST.⁷⁷

CRIMINAL.

As a Noun

A person who has committed a crime; one who is guilty of a felony or misdemeanor.⁷⁸ The word is of broad significance and includes those who may have committed the most trifling infractions of a

68. Fla.—Osceola County v. State ex rel. Newton, 155 So. 119, 120, 115 Fla. 5.

69. Idaho.—State v. Sheehan, 196 P. 532, 534, 33 Idaho 553.

70. U.S.—McCourtney v. U. S., C.C.A. Mo., 291 F. 497, 498.

71. Black L.D.

Crimen falsi

(1) "In the civil law, the crime of falsifying; which might be committed either by writing as by the forgery of a will or other instrument; by words, as by bearing false witness, or perjury; and by acts, as by counterfeiting or adulterating the public money, dealing with false weights and measures, counterfeiting seals, and other fraudulent and deceitful practices."—Black L.D.

(2) "In Scotch law . . . 'A fraudulent imitation or suppression of truth, to the prejudice of another.'"—Black L.D.

(3) As used at common law and in modern law of crimes see the C.J.S. title Criminal Law § 2, also 16 C.J. p 60 notes 8, 9.

Crimen felonie imposit

Made a charge of felony.—Davis v. Noak, 1 Stark, 377, 382, 2 E.C.L. 146 —15 C.J. p 1455 note 72.

Crimen flagrans or Flagrans crimen

(1) "In Roman law, a fresh or recent crime. This term designated a crime in the very act of its commission, or while it was of recent occurrence."—Black L.D.

(2) A crime in its very heat, or during the commission of a crime.—English L.D.

Crimen furti

"The crime or offense of theft."—Black L.D.

Crimen incendii

"The crime of burning, which included not only the modern crime of arson, but also the burning of a man, [or of] a beast, or other chattel."—Black L.D.

Crimen innominatum

"The nameless crime; the crime against nature; sodomy or buggery."—Black L.D.

Crimen læsæ majestatis

"The crime of 'lese-majesty,' or injuring majesty or royalty; high treason. The term was used by the older English law writers to denote any crime affecting the king's person or dignity. It is borrowed from the civil law, in which it signified the undertaking of any enterprise against the emperor, or the republic."—Black L.D.

Crimen paris gradus

"A crime of equal grade."—Adams Gloss., citing Bacon Max.Reg. 15.

Crimen raptus

"The offense of rape."—Black L.D.

Crimen repetundarum

"The crime of taking money unjustly for an unjust purpose when in office."—Trayner Leg.Max.

Crimen roberis

"The offense of robbery."—Black L.D.

Crimen stellionatus

The crime of imposition, cozenage, or trickery.—Adams Gloss.

Crimina extraordinaria

Extraordinary crimes.—Adams Gloss.

Locus criminis

"The locality of a crime; the place where a crime was committed."—Black L.D.

Particeps criminis

(1) An accomplice.—Blakely v. State, 7 S.W. 233, 24 Tex.App. 616, 625, 5 Am.S.R. 912.

(2) "A participant in a crime . . . one who shares or co-operates in a criminal offense, tort, or fraud."—Black L.D., citing State v. Fox, 57 A. 270, 70 N.J.Law 353, 355.

(3) One who assists another in any manner in carrying out a fraudulent purpose.—Alberger v. White, 23 S.W. 92, 117 Mo. 347, 364. See also the C.J.S. title Criminal Law § 85 et seq. 72. Escriche Diccionario.

Crimen de lesa majestad

The crime of lese majeste.—Escriche Diccionario.

73. A maxim meaning "A crime cannot be expiated by after acts."—Adams Gloss., citing Halkerston p 32.

74. A maxim meaning "The crime of treason exceeds all other crimes in its punishment."—Black L.D.

75. A maxim meaning "Crime vitiates everything which springs from it."—Black L.D.

Applied in Henry v. Salina Bank, 5 Hill, N.Y., 523, 531.

76. A maxim meaning "The crime carries the person."—Black L.D.

Applied in People v. Adams, 3 Den., N.Y., 190, 210, 45 Am.D. 468.

77. A maxim meaning "The crime or punishment of a father inflicts no stain upon his son."—Adams Gloss., citing Bracton iii c 6 fol 105.

78. Black L.D.

penal statute, as well as those guilty of the most heinous offenses.⁷⁹

Phrase: "Apprehending criminals."⁸⁰

As an Adjective

Punishable by law, human or divine;⁸¹ also that which pertains to or is connected with the law of crimes, or the administration of penal justice, or which relates to or has the character of a crime.⁸² When used with reference to judicial proceedings, the term "criminal" is opposed to "civil" see Civil 14 C.J.S. p 1154 note 61, and, in its most comprehensive meaning, may be regarded as including all cases for the violation of the penal law.⁸³

Compared with, or distinguished from: "Penal,"⁸⁴ and "unlawful."⁸⁵

Criminal code. A shorter term for "The Code of Criminal Procedure," and synonymous with "criminal jurisprudence."⁸⁶

Criminal operation. A term which has been held to be synonymous with abortion.⁸⁷

Criminal organisation. The term includes all orders, organizations, associations, or by whatever name called, which teach, advise, counsel, encourage, or practice a commission of crimes forbidden by law.⁸⁸

Criminal term. The term is applied to a term of

court at which indictments are found and returned, and at which persons are tried for crimes and other penal offenses.⁸⁹

Other phrases: "Criminal abortion" see Abortion §§ 1, 2, "criminal abuse" see the C.J.S. title Rape § 5, also 52 C.J. p 1009 notes 93-5, "criminal act,"⁹⁰ "criminal assault" see Assault and Battery § 57, "criminal attempt" see the C.J.S. title Criminal Law §§ 73-78, "criminal capacity" see the C.J.S. title Criminal Law §§ 55, 583, "criminal case less than capital,"⁹¹ "criminal cause" as distinguished from "civil action" see Actions § 1 a (8) note 35, "criminal conspiracy" see Conspiracy § 34, "criminal contempt" see Contempt § 5, "criminal contempt final judgment,"⁹² "criminal conversation" see the C.J.S. title Husband and Wife § 697, also 30 C.J. p 1153 notes 84-91, "criminal docket,"⁹³ "criminal gross negligence,"⁹⁴ "criminal information" see the C.J.S. titles Criminal Law § 300, also 16 C.J. p 286 notes 74, 75, and Indictments and Informations §§ 10-13, also 31 C.J. p 569 note 67-p 572 note 12, "criminal insanity" see the C.J.S. title Criminal Law § 58, "criminal judgment" see the C.J.S. title Criminal Law §§ 1593-1597, "criminal jurisdiction" see the C.J.S. title Criminal Law § 107, "Criminal Law Amendment Act,"⁹⁵ "Criminal Law Consolidation Acts,"⁹⁶ "criminal laws of this state,"⁹⁷ "criminal lawyer,"⁹⁸ "criminal letters,"⁹⁹ "criminal libel" see the C.J.S. title Libel and Slander § 1, also 36 C.J. p 1145 notes 49-53, and § 281, also 37 C.J. p 138

79. Mass.—Creeden v. Boston & Maine R. Co., 79 N.E. 344, 346, 193 Mass. 280, 9 Ann.Cas. 1121.

A prisoner under sentence of death is a "criminal" in the eye of the law as long as the sentence remains in force, because he has been adjudged guilty of crime.—Molineux v. Collins, 69 N.E. 727, 728, 177 N.Y. 395, 398, 18 N.Y.Cr. 201, 65 L.R.A. 104.

A juvenile delinquent held not a "criminal" within the purview of a particular statute.—State v. Zenzen, 227 N.W. 356, 178 Minn. 394.

"Crook" as synonym
N.Y.—Weiner v. Leviton, 244 N.Y.S. 176, 178, 230 App.Div. 312.

80. Mass.—Creeden v. Boston & Maine R. Co., 79 N.E. 344, 346, 193 Mass. 280, 9 Ann.Cas. 1121.

81. N.C.—State v. Burton, 18 S.E. 657, 660, 113 N.C. 655, 662.

82. Black L.D.

"Culpable" as synonymous

N.Y.—People v. Grogan, 183 N.E. 273, 275, 260 N.Y. 138, 86 A.L.R. 1266.

83. Ky.—Stone v. Paducah, 86 S.W. 511, 534, 120 Ky. 322, 27 Ky.L. 717, 15 C.J. p 1455 note 95.

84. N.J.—Marter v. Repp, 77 A. 1030, 1031, 80 N.J.Law 530—Silberman v. Skouras Theatres Corporation, 169 A. 170, 171, 11 N.J.Misc. 907.

85. "Unlawful" not synonymous
Cal.—People v. Ranney, 1 P.2d 423, 426, 213 Cal. 70.
66 C.J. p 34 note 6.

86. Ill.—People v. Van Bever, 93 N.E. 725, 728, 248 Ill. 136.
See also Code 14 C.J.S. p 1306 note 28.

87. Wis.—Miller v. Bayer, 68 N.W. 869, 94 Wis. 123, 126.

88. Idaho.—Wooley v. Watkins, 22 P. 102, 2 Idaho, Hasb., 590, 601.

89. Ky.—Smedley v. Commonwealth, 127 S.W. 485, 488, 129 S.W. 547, 138 Ky. 1.

90. N.C.—State v. Agnew, 164 S.E. 578, 579, 202 N.C. 755.

Pa.—United States Bank & Trust Co. v. Switchmen's Union of North America, 100 A. 808, 256 Pa. 228, L.R.A.1917E 311.

91. Fla.—Cotton v. State, 95 So. 668, 669, 85 Fla. 197.

92. Wash.—Boudwin v. Boudwin, 298 P. 337, 339, 162 Wash. 142.

93. Pa.—Commonwealth v. Kelly, 12 Pa.Dist. 32, 33, 27 Pa.Co. 249.

94. Va.—Bell v. Commonwealth, Va., 195 S.E. 675, 681, 170 Va. 597.
See also the C.J.S. title Negligence § 306, and 45 C.J. p 1372 notes 21, 22.

95. English statute

An act, 34 & 35 Vict. c 32, passed in 1871 to prevent and punish any violence, threats, or molestation, on the part either of master or workmen, in the various relations arising between them.—Black L.D., citing 4 Stephen Comm. p 241.

96. English statutes

The statutes, 24 & 25 Vict. cc 94-100, passed in 1861, for the consolidation of the criminal law of England and Ireland.—Black L.D., citing 4 Stephen Comm. p 297.

97. Kan.—In re Hurston, 210 P. 495, 112 Kan. 238.

98. Phrase defined

"One skilled in the practice of criminal law."—English L.D.

99. In Scotch law, a process used as the commencement of a criminal proceeding, in the nature of a summons issued by the lord advocate or his deputy, and said to resemble a criminal information at common law.—Black L.D.

note 40—p 139 note 53, "criminal matters,"¹ "criminal motive,"² "criminal negligence" see the C.J.S. title Negligence § 306, also 45 C.J. p 1371 note 15—p 1373 note 39, "criminal news,"³ "criminal prisoner,"⁴ "criminal prosecution in behalf of state,"⁵ "criminal responsibility,"⁶ "criminal sale" of adulterated article see Adulteration § 8, of intoxicating liquor see the C.J.S. title Intoxicating Liquors § 237, also 33 C.J. p 591 notes 99–10, of property in fraud of creditors see the C.J.S. title Fraudulent Conveyances § 469, also 27 C.J. p 871 note 77—p 872 note 82, "criminal side,"⁷ "criminal statute" see the C.J.S. title Statutes § 222, also 59 C.J. p 821 note 99—p 824 note 7, "criminal syndicalism," see the C.J.S. title Insurrection and Sedition §§ 1, 2, also 33 C.J. p 161 notes 82, 83 and p 162 note 18—p 164 note 62, "criminal trespass" see the C.J.S. title Trespass § 140, also 63 C.J. p 1075 note 94—p

1095–1149 note 11, "criminal trial,"⁸ and "criminal violence."⁹ In the C.J.S. title Criminal Law § 1, also 16 C.J. p 49 note 2—p 50 note 32, still other phrases, referring specifically to the criminal branch of the law, are defined, such as: "Criminal action," "criminal business," "criminal case," "criminal charge," "criminal court," "criminal intent," "criminal offense," "criminal proceeding," "criminal procedure," "criminal process," "criminal prosecution," and "criminal transaction."

CRIMINALITER. Literally "Criminally." This term is used, in distinction or opposition to the word "civiliter," civilly, to distinguish a criminal liability or prosecution from a civil one.¹⁰

CRIMINALITY. See the C.J.S. title Criminal Law § 1.

1. Constitutional phrase

The term as used in a state constitution, providing that sheriffs shall receive a certain compensation from the parish for their services in criminal matters, etc., is not used in its strict legal significance as synonymous with "criminal cases" and "criminal proceedings," but conveys the meaning of whatever pertains to sheriffs' services in criminal matters of every kind, and means some not strictly included in that designation.—*Lake v. Caddo*, 37 La. Ann. 788, 791.

2. Wash.—*State v. Richardson*, 84 P.2d 699, 703, 197 Wash. 157.

3. A statutory phrase which has been construed in its wide significance, as meaning information of wicked and immoral acts of recent occur-

rence or discovery.—*State v. McKee*, 46 A. 409, 414, 73 Conn. 18, 84 Am. S.R. 124, 49 L.R.A. 542, citing Conn. Pub. Acts, 1885, p 433 § 2.

4. A statutory phrase which has been interpreted to mean any prisoner charged with or convicted of a crime.—*Osborne v. Milman*, 17 Q.B. D. 514, 519, citing St. 28 & 29 Vict. c 126, § 4.

5. Tenn.—*Seals v. State*, 11 S.W.2d 879, 880, 157 Tenn. 538.

6. Test

"The test of criminal responsibility for committing an act which is declared to be a crime is fixed at the point where accused has mental capacity to distinguish between right and wrong as applied to the particular act, and to understand the na-

ture and consequences of such act."—*Tittle v. State*, 280 P. 865, 867, 44 Okl. Cr. 287—*Turner v. State*, 279 P. 525, 527, 43 Okl. Cr. 380.

See also Criminal Law § 55 et seq. "Civil responsibility" contrasted see Civil 14 C.J.S. p 1156 note 90.

7. Defined

"The criminal jurisdiction of a court having both civil and criminal jurisdiction."—English L.D.

8. U.S.—*Irvin v. Zerbst*, C.C.A. Ga., 97 F.2d 257, 258.

N.J.—In re United Hatters of North America, 158 A. 435, 436, 110 N.J. Eq. 42.

9. Cal.—*People v. James*, 48 P.2d 1011, 1012, 9 Cal. App.2d 162.

10. Black L.D.

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